MacIntyre v. A.-G. of Nova Scotia: access to search warrants

C. M. V. Plunket*

In MacIntyre's *case the Supreme Court of Canada held that search warrants were to be available as of right for public inspection. In the absence of direct legal authority, the court reached its decision on the basis of policy extensions from accepted principles. Plunket analyses the reasoning of the judges from the three sources of rules, principles and policy. His emphatic conclusion is that this is not an area where the law ought to have been extended by judicial innovation.*

I. INTRODUCTION

MacIntyre[1] is a case about public access to documents in the court system. The wider issue of freedom of information has been a contentious one in recent decades. Freedom of Information Acts have been passed in states around the world. The Canadian Freedom of Information Act was passed in 1982, that of Nova Scotia in 1977. New Zealand's contribution to the legislative scene, the Official Information Act, was enacted in 1983. These acts concern administrative and executive bodies[2] and have been drafted in the light of modern conditions and considerations. As a rule, the legislation has heralded a shift in the presumptions on access. The traditional position has been that documents are withheld unless there is a good reason to produce them. The new position is that access should be granted unless there is a good reason to refuse it.

The court system has been subjected to an access regime for a much longer period. In *Scott* v. *Scott*[3] the Earl of Halsbury was of the opinion "that every court of justice is open to every subject of the King."[4] This he believed to have been the rule "at all events, for some centuries, but . . . it has been the unquestioned rule since 1857."[5]

* This paper was presented as part of the LL.B. (Honours) programme. Casey Plunket was awarded the 1983 Robert Orr McGechan Memorial Prize for this piece of legal writing.

1 Both lower court judgments reported in (1980) 110 D.L.R. (3d) 289. Supreme Court judgment [1982] 1 S.C.R. 175.

2 Section 2(1) of the Canadian Act states: "The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution." Section 2(1) of the New Zealand Official Information Act does not include the court system within its purview either.

3 [1913] A.C. 417.

4 Ibid. 440.

5 Idem.

In *MacIntyre* the Supreme Court of Canada extended this regime, in a fashion more typical of a law reform committee than a court. That extension is the subject of this note. For the purpose of analysis, the arguments in its favour are divided into three types. This may be objected to on the basis that it imposes upon the various judgments a uniform structure which was never explicitly adopted. It is to some extent an artifice. However, the division is based upon a distinction that may sensibly be discerned when considering the judge as a decision-maker, drawing upon various sources so as to 'find' the law and apply it to the facts before him. The three types of argument with which the courts were faced were:

1. Arguments based on legislation and precedent;
2. Arguments based on the strict application of the principle of the open court;
3. Arguments based on policy.

This note will examine the validity of each argument with the intention of making an evaluation of the substance of the judgments and the final declaration made.

II. FACTS AND PROCEEDINGS

Mr MacIntyre, the plaintiff at the trial, was a journalist employed by the Canadian Broadcasting Corporation. He was engaged in researching a story on political patronage and fundraising. He wished to see what search warrants had been issued in connection with that subject. To that end he approached Mr Grainger, Chief Clerk of a Provincial Magistrate's Court. Mr Grainger refused the request. He believed that such material was not available for inspection by the general public. Mr MacIntyre then took legal action. He applied to the Trial Division of the Nova Scotia Supreme Court for a writ of mandamus to order Mr Grainger to make available the search warrants in his possession. In the alternative, Mr MacIntyre sought a declaration to the effect that, as a member of the general public, he had a legal right of access to the search warrants.

The trial judge, Richard J., opined that as Mr MacIntyre had never claimed any special standing or interest, declaratory relief was more appropriate than mandamus.[6] This was granted, Richard J. declaring that search warrants which have been executed, and which are in the custody or control of a justice of the peace or a court official are court records and available for examination by members of the general public.[7] Mr Grainger and the Attorney-General for Nova Scotia appealed to the Appeal Division of the Nova Scotia Supreme Court on the ground that the trial judge's decision was wrong in law. The Appeal Division, in a unanimous decision delivered by Hart J.A.[8] came down more firmly still on the plaintiff's side. Hart J.A. widened the trial judge's declaration to apply also to any information[9] presented to the court, and before as well as after the execution of the warrant.

6 (1980) 110 D.L.R. (3d) 289, 294.
7 Ibid. 295.
8 Jones and MacDonald JJ. concurring.
9 See infra at n.12.

The two appellants again appealed, this time to the Supreme Court of Canada. They were supported by the Attorneys-General of Canada, Ontario, Quebec, New Brunswick, British Columbia, Saskatchewan, and Alberta. Mr MacIntyre was assisted by the Canadian Civil Liberties Association. The Supreme Court dismissed the appeal by a vote of five to four. Dickson J. delivered the majority judgment in which Laskin C.J.C., McIntyre, Chouinard and Lamer JJ. concurred. He cut down the Appeal Division's declaration, restricting inspection by members of the public to warrants and informations which had been executed and under which objects had been found and brought before a justice of the peace.[10] Martland J. delivered the dissenting judgment for himself, Ritchie, Beetz and Estey JJ. He agreed with the appellants that access to the documents in question should be limited to those who could show an interest in them that was direct and tangible.[11]

There were two types of document discussed in the case: the information and the search warrant. The information is the document which, if in compliance with the statutory requirements, confers jurisdiction on the justice of the peace to issue the warrant. The principal search warrant provision in Canada is section 443 of the Criminal Code; it is also the warrant provision with which this case is concerned. Section 443 requires the information to be made on oath in Form 1 (found in part xxv of the code). Form 1 requires:

(i) the informant's[12] name;

(ii) his occupation;

(iii) a description of the thing(s) to be searched for and the offence in respect of which the search is to be made;

(iv) the informant to have reasonable grounds to believe the thing(s) to be in a particular place (which must be specifically identified);

(v) the informant to set out the grounds for his belief.

This document is kept in the custody of the issuing justice of the peace.[13]

The warrant is addressed to the peace officers in a particular province and contains (i), (iii), and (iv) above.[14] Having been made out, the warrant and a copy are given to the informant, who arranges for a search to be made. The

10 There is an express statutory restriction on inspection of the goods seized under the warrant. Access to them is governed by s.446(5) of the Criminal Code, which provides—

> Where anything is detained under subs. (1), a judge of a superior court of criminal jurisdiction, or of a court of criminal jurisdiction, may on summary application on behalf of a person who has an interest in what is detained, after three clear days notice to the Attorney-General, order that the person by or on whose behalf the application is made, be permitted to examine anything so detained.

11 [1982] 1 S.C.R. 175, 201.

12 The "informant", in the context of this paper, is not quite the same as his New Zealand counterpart. Rather than being the person who swears the information which initiates a prosecution, he merely presents the information in Form 1 and swears his belief that it is true. Thus his acts initiate not a prosecution but the issuance of a warrant.

13 For a discussion of the standards of particularity required in both information and warrant, see Paikin *The Issuance of Search Warrants* Law Reform Commission of Canada.

14 Ibid. 58.

fate of the warrant once it leaves the justice of the peace is outlined by Hart J.A.[15]

> A copy of the warrant is normally left with the person against whom the search is directed and the original warrant kept by the informant to justify his entry and search Only if documents or goods are in fact seized under the warrant are they[16] returned to the justice.

Thus if goods are not seized, the justice of the peace will never regain a copy of the warrant. However, the information can be presumed to remain in the court system, and from an access standpoint, it is the more informative document.

It is immediately apparent that the right to see the documents is susceptible of considerable variation. It may be restricted till after the warrant is executed, or it may be available from the moment of the warrant's creation. The right may be restricted to those occasions on which the warrant is successful, or it may be available regardless. Only the warrant might be made available, or the supporting information might also be included. The degree of interest required of an applicant before access is granted is a fourth variable. The very real significance of these variations is reflected in the divergence of approach amongst the four judgments.

III. THE FIRST ARGUMENT: LEGISLATION AND PRECEDENT

The first argument in favour of Mr MacIntyre's claim is the most traditional. Relying on decided cases and legislation, Mr MacIntyre hoped to demonstrate that the right he asserted was already established and should therefore be recognised by the court. The courts are supremely well equipped to deal with such arguments: it is what they are designed to do. Each side presents its own view of the particular decided cases and legislation. The court decides which it prefers. Such a process is the least controversial possible.

The earliest authority relied on by Mr MacIntyre was the Statute of Edward III, 1372 (Imp.) 46 Edw.[17] which in translation states:[18]

> . . . whereas records, and whatsoever is in the King's Court, ought of reason to remain there for perpetual evidence and aid of all parties thereto and of all those whom in any manner they reach, when they have need, and yet of late they refuse, in the court of our said Lord, to make search and exemplification of anything which can fall against the King or in his disadvantage. May it please (you) to ordain by statute, that search and exemplification be made for all persons of whatever record touches them in any manner, as well as that which falls against the King as other persons.

The extent of the right thus conferred is not altogether clear. The 'preamble' states that records ought to be accessible for "perpetual evidence and aid of all parties thereto, and of all those whom in any manner they reach." However, the

15 Supra n 6, 300.

16 The significance of "they" is unclear. However, it would appear that it does include the original of the warrant.

17 In its original Law French, this statute may be found at p. 196, vol. II of Pickering's Statutes. However, its validity is not beyond question, as is explained in the note on p. 191 of the same volume. It is accepted as an Act of Parliament by Sir Edward Coke, in his preface to 3 Co. Rep., cited in *Caddy* v. *Barlow*, 1 Man. & Ry. (1827) 275, reprinted in the Revised Reports, (1927-1830), vol. 31 325, 328.

18 *Caddy* v. *Barlow* supra.

'command' states that search and exemplification should be made to all persons "of whatever record touches them in any manner." Taking this as the effective limitation, what is its significance? Views adduced from authorities are somewhat conflicting. Sir Edward Coke used the statute as authority for the proposition that records should be accessible "for the necessary use and benefit"[19] of subjects. The records to which he was referring were the "judicial records of the King's Courts, wherein cases of importance and difficulty are upon great consultation and advisement adjudged and determined, in which records the reasons or causes of the judgments are not expressed."[20] The adjudicative procedure described does not altogether fit an application for a search warrant. Furthermore, Sir Edward Coke seems to be laying down a broad principle which it is desirable to follow, rather than attempting to lay down a specific right of access in the general public. The use to which he puts the statute is not the same as that for which Mr MacIntyre contended. Sir Edward Coke's statement does not necessarily suggest that a search warrant is accessible for the necessary use and benefit of subjects. Foster's[21] limitation on access goes to the interest required. He states that ". . . the Statute plainly relateth to such Records in which the subject may be Interested as Matters of Evidence upon Questions of Private Right."[22] This would appear to exclude Mr MacIntyre.

The suggestion of Sir Edward Coke (with the caveat that it was not necessarily meant to apply to records of applications for search warrants) that records be available for the necessary use of the subject is an interesting one. A situation could be envisaged where the public in general would be directly interested in records. It could be suggested that it is necessary for the public to be aware of the contents of search warrants so as to check the exercise of judicial discretion they involve. Such a broad public interest has been accepted by the courts in the area of locus standi. In practice the statute has not been stretched so far. Nor do any of the judges in *MacIntyre* seem to consider it so flexible. Richard J. in the trial division[23] believed it established a right of access only for a party to the action. Neither Dickson J. nor Hart J.A. gave it prominence. They do not appear to have believed it would assist them in granting such a broad right as was required to find in Mr MacIntyre's favour. Martland J. is the exception: he took the statute to mean that the document had in some way to affect the applicant's interest[24] which requirement Mr MacIntyre did not satisfy. However, Martland J. does raise the possibility that the statute might, in an appropriate case, grant general public access.

Nor do the cases Mr MacIntyre cites appear to establish the right he claims.[25] In all of them the applicant was the person whose premises were searched under

19 3 Cookes Reports, preface p. 3.
20 Idem.
21 *Fosters Crown Pleas* (Reprint, Professional Books Ltd., 1982).
22 Ibid. 229.
23 Supra n.6, 291.
24 Supra n.11, 194.
25 *Attorney-General* v. *Scully* (1902) 6 C.C C. 167; *R.* v. *Brangan* (1742) 1 Leach 27, 168 E.R. 116 and *Realty Renovations Ltd.* v. *Attorney-General Alta.* (1978) 44 C.C.C. (2d) 249.

the warrant. Only one of the authorities cited proposed a wider right of access, a decision of the trial division of the Supreme Court of Alberta[26] which contained the statement ". . . that upon execution of a search warrant, the information in support and the warrant are matters of Court Record and are available for inspection on demand."[27] However, that went substantially beyond the facts of the case, and little weight is placed on it by either Hart J.A. or Dickson J.

In summary, legislation and precedent on access to court documents do not extend so far as the right claimed by the plaintiff.

IV. THE SECOND ARGUMENT: THE PRINCIPLE OF THE OPEN COURT

Mr MacIntyre was faced, therefore, with a problem. How could he establish a public right of access based on authorities which suggested a special interest had to be shown? To reinforce his attack, he provided the court with a second source of material upon which a decision in his favour might be made: principle. When the straight application of precedent is not conclusive, or its results are manifestly undesirable, the judge will often consider the spirit of the law: its direction and its underlying bases as developed by previous cases. The judge is acting in a somewhat more free fashion here, but arguments of legal principle are eminently suitable for determination by the judge.

The principle Mr MacIntyre suggested was the "open court", and as principle it was taken up most enthusiastically by the appeal division. The principle and the reasons for it are most clearly expounded in *Scott* v. *Scott*,[28] where Lord Shaw of Dumferline quoted Bentham as follows:

> In the darkness of secrecy, sinister interest and evil of every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity, there is no justice. It is the keenest spur to exertion and the surest of all guards against improbity.

The principle will be examined first for its prima facie application. Then the exceptions will be canvassed generally, and finally the issue as to whether the principle is applicable to records will be discussed.

A. *The Arguments For and Against the Prima Facie Application of the Principle to these Proceedings*

Hart J.A. attempts a strict application of the principle to the facts. He begins by quoting the rule as stated in *Scott* v. *Scott* and comments: "The fundamental rule is that all judicial proceedings will be held in open court, and this means that the public have the right to attend and observe the process."[29] He continues: "The next point to consider is the extent to which the records of the court proceedings are open to the public."[30] After dismissing the limitation imposed by the "special interest" requirement, he concludes that since ". . . the issue of a search warrant is a judicial act performed in open court by a justice of the peace, . . . the information has become part of the record of the court as revealed at a public hearing and must be available for inspection by a member of the

26 *Realty Renovations* supra.
27 Ibid. 255.
28 Supra n.3.
29 Supra n.6, 298.
30 Ibid. 299.

public."[31] The appeal division seems to consider self-evident the applicability of the open court rule to these facts, on the basis that the justice was performing a judicial function.[32]

The majority in the Supreme Court adopted the open court as a policy aim. As such its application will be considered under the third heading: arguments of policy. The minority in the Supreme Court believed that the open court principle was not appropriate.[33]

> The function of the justice may be considered to be a judicial function, but might more properly be described as a function performed by a judicial officer, since no notice is required to anyone, there is no opposite party before him, and in fact, in the case of a search before proceedings are instituted, no opposite party exists. There is no requirement that the justice should perform his function in open court. . . . As the function of the justice is not adjudicative and is not performed in open court, cases dealing with the requirement of court proceedings being carried on in public . . . are not, in my opinion, relevant to the issue before the court.

Martland J.'s approach distinguishes the incidences of a search warrant from those of more traditional judicial proceedings. We do not have two parties in an application for a search warrant, and this makes the proceedings look very different from those to which our adversarial system typically gives rise.

The term "judicial" can import various requirements when applied to proceedings. It can import the requirement to give each of two parties a fair hearing, the obligation to give each party notice, the requirement of a public hearing, protection from suit for the person presiding, and the availability of the remedy of certiorari. These elements, with others, may be present in varying combinations where a proceeding is "judicial". However, the variability of the label makes it of dubious value. The shifts in its meaning, the changes in its ingredients when applied to different situations, make any attempt to deduce from it, as a necessary requirement, the need for a public hearing, quite spurious. One must look directly at the proceedings themselves in order to establish whether an open hearing is appropriate. In the case of an application for a search warrant, there are strong arguments against it.[34]

Hart J.A. is thus guilty of a considerable over-simplification when he says: "The fundamental rule is that all judicial proceedings will be held in open court."[35] He comes much closer to a correct formulation on the following page when he says: "The rule is clear that *court proceedings* generally must be open to the public."[36] The shift in emphasis is revealing. It points to the central problem in the prima facie application of the principle, there is no requirement that these proceedings be held in court.

B. *Is There a Recognised Exception to the Principle Which Is Applicable?*

Assuming for the sake of argument that the open court principle is applicable, certain exceptions must be admitted. It is submitted that the failure to give due weight to these exceptions further flaws the appeal division's judgment in Mr MacIntyre's favour.

31 Ibid. 310.
32 Ibid. 299-300.
33 Supra n.11, 197.
34 Infra.
35 Supra n.6, 298.
36 Ibid. 299.

One of these exceptions is where an open court would defeat the ends of justice. It finds application in areas such as secret process and patents. It was approved by Viscount Haldane in *Scott* v. *Scott*[37] with the proviso that ". . . the principle is not stretched to cases where there is not a strict necessity for invoking it."[38] In the Supreme Court, both judgments agreed that there was such a strict necessity in this area. Dickson J. said:[39]

> The Attorneys-General have established, at least to my satisfaction, that if the application for the warrant were made in open court, the search for the instrumentalities of crime would, at best, be severely hampered and at worst rendered entirely fruitless. . . . I agree . . . that the presence in open court of members of the public, media personnel and, potentially, contacts of the suspected accused in respect of whom the search is to be made, would render the mechanism of a search warrant utterly useless.

Surely the line of reasoning adopted by the appeal division breaks down at this point. If these judicial proceedings are not conducted in open court, due to a recognised exception in the rule, then access to the proceedings by the public is not available as a foundation for a right of post-execution, or any other, access.

C. *Should the Open Court Principle Apply to Records?*

A further flaw in the application of the open court principle is that, as recognised by previous courts, it does not apply to the records of judicial proceedings. The necessity for showing some sort of special interest is not a limitation on a right inherent in the principle of the open court. It is the essential ingredient in the applicant's quite separate claim; a claim which is unsupported by the open court principle. The right of access to records has never been founded upon the public's right to attendance at the court, and there has never been established any broad right of access to records which could be limited by a special interest requirement.

This is pointed out in Dickson J.'s judgment, when he says: "These authorities indicate that under English practice there is no general right to inspect and copy judicial records and documents. The right is only exercisable when some direct and tangible interest or proprietary right in the documents can be demonstrated."[40] It seems clear that the right of the public to attend a hearing does not impose a duty on the custodians of its records to make those records available.

Several problems might also arise if a right of access to records were founded directly on a right of access to proceedings. The first involves an inconsistency. The suggestion is that openness is an over-riding necessity. But we must also remember that in some cases, due to the requirements of justice, the proceedings must be held in camera. The judge has an inherent power to close the court, and there are also statutory provisions to the same effect.[41] Some cases will require only interim suppression. In such cases it would surely be especially important that the records be open to the public once the need for secrecy had passed. An example of such a civil proceeding is *Skope Enterprises* v. *Consumer*

37 Supra n.3.
38 Ibid. 436.
39 Supra n.11, 187-188.
40 Ibid. 181.
41 E.g. s.54 of the Official Information Act 1983 and s.83 of the Matrimonial Proceedings Act 1976.

Council.[42] It involved an injunction which sought to restrain the publication of certain material claimed to be prejudicial to the fair trial of another action in which the applicant was a defendant. The claim in the other action was likely to be heard by a jury. The applicant applied for an order that the injunction proceedings should take place in camera. Cooke J. granted the order, which was to apply ". . . until the further order of the court, as the outcome of the application for an injunction will be relevant in considering whether today's proceedings or the result of them can properly be published."[43] The judge was clearly contemplating that if the injunction failed, the record of the proceedings would be open to the public. Such would clearly be the correct course. Yet the public would never have had access to the proceedings themselves, and if the right of access to records were based on access to the proceedings, the public would never get to see the records in any case. On the criminal side, a situation might be imagined where an accused was to appear at a number of trials as a conspirator with others. In such a case, publication of the results of the earlier trials might well prejudice the minds of the members of the jury in later trials. The public might therefore be barred from the trials until they were over, at which stage there would be good reason to publish all the proceedings. To base an argument for disclosure of records on whether there was public access to proceedings may not yield the desirable result.

A second problem in applying the open court principle to records is with the nature of the records that would be revealed under such a principle. *Home Office* v. *Harman*[44] indicates the difficulties involved. The defendants had published documents which they had received by discovery. They defended that publication on the basis that, as the documents had been read out in open court, their confidentiality was destroyed. Lord Diplock spoke of the public's rights under the open court principle as follows: ". . . justice in the courts of England is administered in open court to which the public have free access and can listen to and communicate to others all that was said there by counsel or witnesses."[45] The reason for this right is ". . . to keep the judges themselves up to the mark,"[46] and the later publishing by onlookers of what was said is ". . . purely a side-effect that may not be conducive to the attainment of justice in the particular case."[47] The extent of what is revealed is purely a procedural matter, quite untainted by considerations of what the public should know. The court puts on no special display. That is made clear when Lord Diplock speaks of the extent to which counsel are allowed to read documents aloud in the court (and thus bring them into public knowledge). This ". . . depended on the extent to which the 'keenest spur to exertion' had led the judge either to read the documents in advance or to read them silently. . . . This used to vary considerably from judge to judge."[48]

The appeal division's formulation of the extent of the public right of access varies. A right to ". . . documents upon which the judicial act is exercised in

42 [1973] 2 N.Z.L.R. 399.
43 Ibid. 400.
44 [1982] 2 W.L.R. 338.
45 Ibid. 344.
46 Idem.
47 Ibid. 345.
48 Idem.

open court"[49] is first approved. Then it is suggested that the right is ". . . to those records which would normally be revealed during the conduct of the proceeding in open court."[50] Lastly it is suggested that the public have a right to ". . . any information they may glean from attendance at a public hearing of the process in open court and to those parts of the record that are part of the public presentation of the judicial proceeding in open court."[51] The nature of the distinction between the two categories in the last formulation is not altogether clear.[52] However, it would seem that the extent of public access will depend largely on the manner in which the trial is conducted. As *Home Office* v. *Harman*[53] shows there is no clear policy direction at work here. To have a right of access to records depend upon a mere accident of procedure seems an ill-advised step. Lord Keith of Kinkel in the *Harman*[54] case, envisaging a right to publish based purely on the ability of the public to be present in the courtroom, said:[55]

> There is also reason to apprehend the introduction into proceedings of tactical manoeuverings on either side designed to secure that discovered documents were not read out in full.

That might apply to information as well as documents. If the informant could avoid reading the information out, it would not be part of the record of the court as revealed at a public hearing, and therefore would not be available for inspection. Such a possibility illustrates the lack of principle and policy in granting a public right of access to records based on the open court principle.

V. THE THIRD ARGUMENT: POLICY

Under this heading the broader arguments in favour of Mr MacIntyre's right will be considered. These were canvassed most fully in the Supreme Court. They are examples of a third source of judge-made law: policy. In this area the judge's role is a controversial one. It is not always clear that the judge should be actively using policy to formulate the law. This part will consider the wisdom of that course in this particular case, and the results of its undertaking by both majority and minority judges.

A. *Should the Supreme Court be Considering Policy?*

Mr MacIntyre's claim is not supported by the straightforward application of the principle of the open court, nor by precedent and legislation. However, the fact that no previous authority can be found is not conclusive proof that he has no cause of action. Sir Robert Megarry, in *Malone* v. *Metropolitan Police Commissioner*,[56] saw it thus:

> The absence of any authority on the point is something that has to be borne in mind, but it certainly does not establish that no such right exists. . . . It is perhaps surprising that the question now raised here has taken a hundred years to come before the courts, but there may be explanations of that. . . .

The right with which Sir Robert Megarry V-C. was dealing was in many ways

49 Supra n.6, 305.
50 Ibid. 307.
51 Ibid. 310.
52 See Barton (1982) 12 Manitoba L.J. 130.
53 Supra n.44.
54 Idem.
55 Ibid. 349.
56 [1979] 1 Ch. 344, 356-357.

analogous to Mr MacIntyre's. The plaintiff's telephone had been "tapped". He sought a declaration that such non-consensual interference was unlawful due to his right of property, privacy and confidentiality in respect of telephone conversations on his telephone lines. As with Mr MacIntyre, no such right could be established by precedent. Sir Robert Megarry V-C. was therefore faced directly with the question whether the applicant could establish a right on some other basis. To do so, the applicant would have to meet certain criteria.[57]

> As I have indicated, I am not unduly troubled by the absence of English authority, there has to be a first time for everything, and if the principles of English law, and not least analogies from the existing rules, together with the requirements of justice and common sense, pointed firmly to such a right existing, then I think the court should not be deterred from recognising the right. On the other hand, it is no function of the courts to legislate in a new field. The extension of the existing laws and principles is one thing, the creation of an altogether new right is another. At times the judges must and do legislate, but as Holmes J. once said, they do so only interstitially and with molecular rather than molar motions. . . . Anything beyond that must be left for legislation. No new right in the law, fully fledged with all the appropriate safeguards, can spring from the head of a judge deciding a particular case: only Parliament can create such a right.

This deliberative quote is in stark contrast to Dickson J.'s freewheeling approach. Having dismissed the precedents as useless, he declares that "the response to that question, it seems to me, should be guided by several broad policy considerations."[58] The appropriateness of such a course is nowhere discussed.

Malone[59] seems to indicate two broad tests which identify a right as appropriate or not for judicial declaration on grounds other than precedent:

(a) Do the principles of the Common Law, and not least analogies from existing cases, point clearly to such a right existing?

(b) Is the suggested right of a simple and straightforward nature such that it can simply be said that it exists or it does not, without the need for further qualification? In addition one might add a test suggested by Lord Reid, in a speech to the Society of Public Teachers of Law:[60]

> . . . when public opinion is sharply divided on any question, . . . no judge ought in my opinion to lean to one side or the other if that can possibly be avoided. . . . Parliament is the right place to settle questions which the ordinary man regards as controversial.[61]

(1) *Do the principles of the Common Law, and not least analogies from existing cases, point clearly to such a right existing?*

Applying this test, it would be possible to discern some sense of direction from a survey of principle. There are two large principles already mentioned; the right of an interested party to have access to the warrant, and the right of the public to be present at court proceedings. These could be extended to establish the right claimed by Mr MacIntyre. The right of an interested party to access could be extended to the general public, without any necessity to show special interest. Or Mr MacIntyre could claim, as a member of the public, an interest

57 Ibid. 372.
58 Supra n.11, 183.
59 Supra n.56.
60 (1972/3) J. Soc. Pub. T. Law.
61 Ibid. 22-23.

in ensuring that search warrants are issued in accordance with the law.[62] Such an extension could be seen as a fine example of the flexibility of the Common Law, reflecting changing attitudes to freedom of information and the value of an informed public. A right such as Mr MacIntyre's could be declared by such an extension from the existing principles. Whether a court should do so will depend on whether the further tests are satisfied.

(2) *Is the suggested right of a simple and straightforward nature?*

The possible ambit of the suggested right is by no means simple and straightforward. The judgments reveal differences of approach to each of four issues:

(i) Should access be restricted to those with a direct and tangible interest? Martland J. believed it should, against him were Dickson and Richard JJ. and Hart J.A.

(ii) Should access be restricted until after execution? Dickson and Richard JJ. said yes, Hart J.A. said no.

(iii) Should the informations be available? Dickson J. and Hart J.A. believed they should, Richard J. did not.

(iv) Should access be restricted to those occasions where the warrant is successful? Dickson J. said it should.[64] Hart J.A. and Richard J. imposed no such restriction. Thus all of the judgments gave differing interpretations of the right of access to search warrants. This suggests that the principles are being obscured. Considerations of commonsense and policy are so contradictory and difficult for the judges to assess that a mockery is made of the attempt to apply principles. When a judge is faced with a decision as to whether to extend principles to establish a new right, in the interests of certainty he should consider the possible arbitrary character of the right he might declare. A dictum of Lord Reid's from *Myers* v. *D.P.P.*[65] is most apt:[66]

> And if we do in effect change the law, we ought in my opinion only to do that in cases where our decision will produce some finality or certainty. If we disregard technicalities in this case and seek to apply principle and commonsense, there are a number of other parts of the existing law of hearsay susceptible of similar treatment. . . . If we are to give a wide interpretation to our judicial functions questions of policy cannot be wholly excluded, and it seems to me to be against public policy to produce uncertainty.

Myers v. *D.P.P.* was a case on the admissibility of certain hearsay evidence. The House of Lords found it inadmissible, holding that authority had to be found to justify its reception within some established and existing exception to the rule: the countenancing of new exceptions would amount to judicial legislation. As in *MacIntyre* the House was faced with a choice of changing the law, recognising a new right based on some policy considerations, or leaving the law as they found it, unaltered for better or worse.

62 As earlier indicated such a definition of "interest" is a possible (though unlikely) interpretation of the words of Sir Edward Coke and the 1372 Statute.
64 [1982] 1 S.C.R. 175, 187.
65 [1965] A.C. 1001.
66 Ibid. 1019.

It is submitted that in the area of access to search warrants also, a decision extending the principles, changing the law, would not produce finality or certainty. That is borne out by the conflicts between the various judgments. It is also possible that such a decision might have an unsettling effect on other parts of the law of access, such as is envisaged by Lord Reid in relation to the law of hearsay evidence.

(3) *Is the matter a controversial one?*

On this third test, the issue clearly is a controversial one. Given the legislative activity in this area,[67] and the popular concern surrounding it, Parliament is clearly the body most appropriate to resolve such disputes. Dickson J.'s approach then seems suspect. The arbitrary nature of the exceptions and limits on the right and its controversial nature, suggest that here is a matter on which the judge should lean neither one way nor the other. In the absence of clear authority, he should not declare Mr MacIntyre's right.

B. *Criticism of the Application of Policy in the Supreme Court*

Nevertheless, Dickson J. does draw on policy so as to establish the plaintiff's claim. Furthermore, the main thrust of the dissenting judgment is an attempt to refute the majority on policy grounds. A criticism of the policy arguments used and the conclusions thus reached might serve a dual function. First it will illustrate some of the deficiencies to which judgments based on policy are susceptible. Second, it may be of some use in arriving at a better view of what the law should be in this area.

Dickson J. would delay access until the warrant has been executed. Until then, the effective administration of justice and the implementation of the will of Parliament require that no access be given.[68] As already noted, the effective administration of justice argument was accepted as valid in *Scott* v. *Scott*.[69] Problems of a practical nature might also be envisaged in allowing access pre-execution, particularly in allowing access to the hearing itself. There is no requirement that the justice of the peace or magistrate in Canada should issue the warrant in court; as in New Zealand they are often issued at his home.[70] The difficulties involved in granting access to such proceedings might safely be assumed to be considerable. Dickson J.'s conclusion at this stage is difficult to criticise.

Post-execution, Dickson J. believes the force of the "administration of justice" argument abates. The warrant's existence has been revealed to those from whom it was vital to conceal it prior to execution. There is no longer any reason for saying that public access would defeat the purpose of the warrant. That purpose has been achieved. The person searched must have access to both warrant and information, on the basis of authority, principle and accepted practice. As to the

67 In the New Zealand context, a good example is the Criminal Proceedings (Search of Court Records) Rules, Regulation 58 of 1974.
68 [1982] 1 S.C.R. 175, 188.
69 Supra n.3.
70 Supra n.11, 188.

general public, Dickson J. would give them access to the records on the strength of the open court policy. The traditional rationale for the open court has already been stated. Briefly, it is suggested that it will encourage judicial probity. In the search warrant situation, this argument is somewhat undercut. If any official improbity has occurred, the person searched will usually have the most compelling reasons to challenge the warrant. Dickson J.'s argument, that if those directly interested can see the warrant, a third party is no threat to the administration of justice,[71] is somewhat two-edged. There may be no reason for denying access, but its grant will not promote the effective administration of justice to any great extent either. Public accessibility is unlikely to be important in ensuring there is no abuse in the issue of search warrants, given that an interested party has access.

A more democratically oriented rationale for public access is that "Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered."[72] If the public have not been given access to the process, there is increased scope for suspicion. Thus public access to records post-execution might be supported by the benefits from increased public confidence in the process.

However, the application of the open court policy to these facts is no simple matter. In truth, Dickson J. has ventured onto a policy minefield. This becomes apparent on reading Martland J.'s dissenting judgment, which deals more fully with the competing considerations. Martland J. believes that the "effective administration of justice" argument still retains sufficient force to make public access post-execution an unwarranted danger. He gives three reasons for this.

(a) The information discloses the informant's ground for belief that the thing in respect of which the search is to be made is in a particular place, and the offence with which it is connected.[73] The disclosure of such information could be prejudicial to the fair trial of the person suspected of having committed such a crime. Here there is a quite delicate balancing exercise. Martland J.'s argument does seem plausible as it relates to public access to the informant's ground for belief. The accused may be seeking to attack these grounds: to argue that the reason for the goods being on his premises was not that given by the informant. Or he may be seeking to argue that he was "framed". The informant's ground for belief, which could become an issue at the trial, would be available to the public through the warrant without the balancing influence of an opposing view, which it would receive at the hearing. The grounds for belief might in some circumstances be inadmissible at the trial, in which case publicity would be more undesirable still. How may the value of openness be balanced against the need for a fair trial? Arguably, the best way would be a case-by-case approach rather than the laying down of an immutable access/no access rule (as is done in this case). There could be a discretion in the justice or court clerk not to release a warrant on these grounds, reviewable by a higher court. Or the person seeking

71 Ibid. 189.
72 Ibid. 185.
73 Ibid. 198.

to block access could bring an action in the courts.[74] A more typical Common Law remedy would be to allow access but to apply the rules of contempt of court to any publication which might be prejudicial to a fair trial. But it is not for the courts to bring about such sweeping reforms, to instigate such safeguards in the pursuit of the proper restriction of a novel right.

(b) The second of Martland J.'s arguments against post-execution disclosure is that ". . . inspection of the information and the search warrant would enable the person inspecting the documents to discover the identity of the informant. In certain types of cases this might well place the informant in jeopardy."[75] This would be a persuasive argument were it not for the fact that the person searched is actually given a copy of the warrant by the police to justify the search. Secondly, the informant will usually be a police officer. Such risks are a part of his job, and they are unlikely to be significantly increased by giving disinterested persons access to search warrants. It might also be noted here that sources need not be mentioned by name when the informant furnishes his grounds for belief.

(c) Martland J. argues thirdly that "It is undesirable, in the public interest, that those engaged in criminal activities should have available to them information which discloses the pattern of police activities."[76] This is again an argument which loses its appeal when one considers that the interested party has a right to see the warrant. There is a further difficult question here: whether this consideration should be allowed to obscure the benefit of an informed public. Often the legislature has considered that it should, giving prominence to law and order enforcement considerations in freedom of information legislation.

The arbitrary nature of the conclusions reached by the judges, supposedly on the basis of policy, should now be evident. The two Supreme Court judgments, on the basis of the same considerations, reach quite different conclusions. Lord Reid in *Myers* v. *D.P.P.* is again pertinent:[77]

> The only satisfactory solution is by legislation following a wide survey of the whole field, and I think that such a survey is overdue. A policy of make do and mend is no longer adequate. The most powerful argument of those who support the strict doctrine of precedent is that if it is relaxed judges will be tempted to encroach on the proper field of the legislature, and this case to my mind offers a strong temptation to do that which ought to be resisted.

Lord Reid's statement is worthy of particular note in that it relates to a field of law which is largely judge-made.

The difficulties posed for Dickson J. in declaring Mr MacIntyre's right become more apparent when he attempts to control it. Dickson J.'s restriction as regards

74 This procedure has been adopted in some of the United States of America, see *Thomson* v. *Cash* 377 A 2d. The plaintiff has to establish (a) that the publication resulting from access would be sufficiently widespread to make the selection of an impartial jury a real difficulty; (b) the nature of the details in the warrant would be of sufficient prejudicial value to make the selection of an impartial jury a real difficulty. These criteria would probably apply regardless of the mechanism.

75 Supra n.11, 199.

76 Ibid.

77 Supra n.65, 1020.

post-execution access relates to the protection of the innocent from unnecessary harm. "In my view that consideration over-rides the public interest in those cases where a search is made and nothing is found. The public right to know must yield to the protection of the innocent."[78] The unnecessary harm Dickson J. foresees is stigmatization to name and reputation. His position is a reversal of that usually adopted by the judiciary, who tend to decide the requirement that justice be done in public is rather more pressing than that individuals not be caused public embarrassment.[79] It is a reversal that is not entirely immune from criticism. When a search warrant is executed but nothing found, there is no resultant lessening in the force of the arguments for openness — quite the opposite. The possibility that the warrant was issued on inadequate grounds, was the result of lax judicial supervision, or was obtained purely to harrass the person searched, must have increased. When something is found there would seem more of a prima facie inference that the wheels of justice are turning smoothly.

For Dickson J.'s reversal to be valid therefore, the possibility of harm to innocent individuals, or the extent of that harm, must be considerably greater when nothing is found. That may not be the case. Even when the search warrant is productive, the owner of the premises in respect of which the warrant was issued may be altogether innocent of any crime. If he is charged, his guilt still must be established. However, once something is found, Dickson J. would immediately allow access to the warrant. The distinction made between productive and unproductive warrants may be a misleading one in terms of an attempt to protect innocent persons.[80]

The extent of the harm done to an innocent party by the publication of search warrants is also unclear. To some extent it could be remedied by the law of defamation, especially if the publication went beyond a strict reporting of the warrant's details. Furthermore, if publication of warrants were of an everyday nature, no more attention would be given to it than is given to more standard criminal court proceedings. Once more, the arguments would perhaps be better resolved by the detailed scrutiny which could be carried out by a body such as a select committee.

The last part of this paper has shown that both the realities and the correct policies to be applied to them are most uncertain. *MacIntyre* is not a case where the courts should be attempting to ascertain them. The lack of wisdom in attempting such a course is evidenced in part by the result. Bereft of any clear indications

78 Supra n.11, 187.

79 For instance, Dickson J. states at p. 185 that: "Many times it has been urged that the 'privacy' of litigants requires that the public be excluded from court proceedings. It is now well established, however, that covertness is the exception and openness the rule."

80 The inadequate factual resources of the courts are exposed here. If the person whose premises are searched is almost invariably the person charged, then Dickson J.'s link between productive warrants and guilt (at least sufficient for the police to consider bringing a case) is tenable. The link is weakened if a significant minority (say 10 percent or more) of the owners of premises searched are not charged with any crime. A survey to ascertain such facts is impractical in the context of a court proceeding, but perfectly feasible for a law reform committee.

from precedent and principle, faced with a tangle of conflicting policy considerations which must be applied to a reality he has not the equipment to discern, Dickson J.'s declaration, while heroic, is less than judicial. It cannot be the function of the judiciary to act in this area. The legislature, on the other hand, does have the necessary resources and range of views and experience. It has shown an inclination to act. The court should not be usurping its function.

VI. CONCLUSION

The law discussed in this note is applicable in its entirety (excepting the exact wording of the warrant provisions) in the New Zealand context also. There is no statutory guarantee of public access to search warrants. In the absence of such legislation, no right should be declared by the courts. The principles and precedents do not establish it. To extend them in the face of the practical and policy problems that exist would be unwise. Any clarification in this area must come from the legislature.