

# Toward a Theory of Responsible Justice

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Time-honoured principles of justice predate the Charter. One such principle, public access to the courts, has for centuries been a cornerstone of common law tradition.<sup>1</sup> Another respected the role a free press plays in democratic governance, despite the lack of a constitutional guarantee.<sup>2</sup> Values of access and publicity were linked in a jurisprudence that expressed its reluctance to close courtroom hearings,<sup>3</sup> impose publication bans on the press<sup>4</sup> or invoke contempt of court to protect its process.<sup>5</sup>

Against that backdrop, prying the justice system open under the Charter hardly seemed necessary.<sup>6</sup> Some constitutional guarantees challenged parliamentary supremacy and created a potential for strain on relations between the judiciary and legislatures. Others, like the right to a public hearing and the guarantee of a free press, appeared to restate the status quo.<sup>7</sup> Under the Charter, refinements and adjustments at the margins of "open justice" were more predictable than an overhaul of the concept.

This paper assesses the transition from a common law tradition of openness to a regime of constitutional rights. In doing so, it considers whether the Charter simply codified venerated principle, or has instead altered its meaning. If it is doubtful that open justice can remain the same under the Charter, the degree to which it must be transformed is also uncertain. Following an initial section that reviews the tradition of openness at common law, the discussion turns to the Charter, and the themes that have emerged in the jurisprudence thus far. The paper concludes with reflections, and an introduction to the concept of "responsible justice".<sup>8</sup>

## I. THE "SOUL OF JUSTICE"

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1. *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175 (explaining the importance of openness in Canada's legal tradition).
2. See for example, *The Alberta Press Case*, [1938] S.C.R. 100 (acknowledging, in a division of powers context, the role a free press plays in parliamentary government).
3. *Scott v. Scott*, [1913] A.C. 417 (confirming the common law principle that a "paramount object" is required to justify an *in camera* hearing).
4. See *Re Depoe and Lamport* (1968), 66 D.L.R. (2d) 46 at 49 (declaring that "[o]urs is a democratic system." "[w]ithin well-defined limits, there is no gag on freedom of opinion.")
5. Though prosecutions were infrequent, the courts have in the past taken a dim view of commentary that was perceived as an interference with the administration of justice; but see *Bellitti v. C.B.C.* (1973), 15 C.C.C. (2d) 300 (Ont. H.C.) (stating that a publication constitutes a contempt only when it departs from factual reporting and expresses comments or opinions that interfere with the administration of justice or prejudice a fair trial).
6. See D. Lepofsky, *Open Justice: The Constitutional Right to Attend and Speak About Criminal Proceedings*, (Toronto: Butterworths, 1985) (arguing that Canadian law inadequately protected open justice prior to the Charter).
7. Sections 2(b) [guaranteeing freedom of the press and other media of communication] and 11(d)[guaranteeing every person charged with an offence the right to a "fair and public" hearing]; *Canadian Charter of Rights and Freedom*, Part I of the *Constitution Act 1982*, being Schedule B of the *Canada Act 1982* (U.K.) 1982, c. 11.
8. The text of this paper was modified following the Supreme Court of Canada decisions in *Re Dagenais v. C.B.C.* (1995), 94 C.C.C. (3d) 289, and *R. v. S.(T.)* (1995), 94 C.C.C. (3d) 372 (considering whether third parties have status to challenge and appeal publication bans issued in the criminal justice process).

*In the darkness of secrecy, sinister interest, and evil in every shape have full swing.*<sup>9</sup>

Bentham's declaration that publicity is "the very soul of justice" created an idiom that has resonated in the jurisprudence of Canada, the United States and Britain. From earliest times, common law tradition was founded on an elemental faith in trial by jury, the presumption of innocence and public access to the courts. Over the years, access and publicity have been so closely associated with the fairness of the adversarial system, and the public's confidence in the law, that openness is often equated with justice itself.

The common law was, and still is today, grounded in the assumption that an adversarial hearing between the parties in dispute, whether in civil or criminal proceedings, will lead the trier of fact to the truth. Public access to the courts re-enforced the integrity of that system by providing a check against excessive zeal and inappropriate behaviour by participants in the process. Thus, a public presence diminished the risk that the quest for truth might be subverted by over-reaching or misconduct by the advocates, their witnesses, or the trier of fact. As Bentham observed, perjury is less likely in open court: "[E]nvironed as [the witness] sees himself, by a thousand eyes, contradiction, should he hazard a false tale, will seem ready to rise up in opposition from a thousand tongues [...]"<sup>10</sup> A public process also discouraged "mis-decision" by the judge, "restraining him from active impartiality and improbity in every shape".<sup>11</sup> As classically stated, the "open examination of witnesses, *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of the truth, than the private and secret examination..."<sup>12</sup>

Access to the courts also validated the community's stake in the administration of justice. To be legitimate in the community's eyes, common law justice had to be perceived as fair; to be perceived as fair to litigants and the larger community alike, common law justice had to be visible. Access and publicity ensured, not only that justice was done, but that it was also "seen" by members of the public to have been done. Linked as it is, to the fairness of an adversary system and to the integrity of justice, openness is one of the common law's great hallmarks. Shortly before the Charter's arrival, Dickson J. declared that "covertness is the exception and openness the rule",<sup>13</sup> because "maximum accountability and accessibility" promote "[p]ublic confidence in the integrity of the court system" and "understanding of the administration of justice".<sup>14</sup>

At the same time, a principle that has been endorsed through the ages, in vibrant and often uncompromising terms, was subject to exceptions. Despite the presumption in

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9. J. Bentham, quoted in *MacIntyre*, *supra* note 1 at 183.

10. J. Bentham, *Rationale of Judicial Evidence*, (New York: Garland, 1827) at 522.

11. *Ibid.* at 523.

12. W. Blackstone, *Commentaries on the Laws of England*, vol. 3 (New York: Garland, 1978) at 373.

13. *Supra* note 1 at 185 (upholding an *in camera* proceeding to issue a search warrant but permitting access after its execution).

14. *Ibid.*

favour of openness, the courts exercised a discretion to close proceedings where publicity might jeopardize its fairness or compromise the "public interest" more generally.<sup>15</sup> Derogations from openness also served the interests of justice, thereby enabling the common law to harmonize the rule and its exceptions.

Common law justice comprises a body of judge-made principles that are subject to modification by the legislatures. Over the years, the presumption of openness was eroded by statutory provisions which, by 1982, had grown significant in scope and number.<sup>16</sup> Instead of enriching a tradition of openness, the legislatures invariably introduced limitations on access and publicity. Imperative rules replaced the discretion that would have been exercised at common law, to balance competing interests on a case-by-case basis.<sup>17</sup>

Virtually without complaint, these legislative restrictions were incorporated into the law. The Charter's arrival created a breach with the status quo, which placed the validity of statutory limitations in doubt and challenged the courts to adapt common law doctrine to the demands of constitutional analysis. While few questioned the status quo, at least some of its solutions were vulnerable under the Charter. Adjudicating such cases has required the courts to consider what difference the Charter should make, if any, and to articulate how reasonable limitations will be judged under section 1. As the courts have discovered, ready-made answers to those questions did not exist.

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15. *Supra* note 6 at 32-44 (discussing the exceptions to the principle of open courts that governed prior to the Charter).

16. See, for example, section 486(1) of the *Criminal Code*, R.S.C. 1985, c. C-46 (empowering judges to exclude all or any members of the public from the courtroom, for all or part of the proceedings, in the interest of public morals, the maintenance of order or the proper administration of justice); other provisions in the Code and other statutory instruments, *infra* notes 17 and 20, permit the courts to close the court or impose publication bans in specific circumstances.

17. See, for example, section 12 of the *Juvenile Delinquents Act*, *infra* note 19 (compelling the closure of juvenile proceedings); and section 442(3) of the *Criminal Code* (compelling a ban on the publication of information that might identify the complainant in a sexual assault proceeding, and upheld under the Charter in *Canadian Newspapers Co. v. Attorney General of Canada*, [1988] 2 S.C.R. 122).

## II. OPENNESS AND THE CHARTER

### A. Continuity and Change

*[R]easonable limitations upon the principle that justice must be done in the open have been recognized for many years in free and democratic societies.<sup>18</sup>*

For the most part, the early Charter jurisprudence has followed the pattern of the common law. From one perspective, the similarity of analysis has provided a welcome assurance that continuity with tradition will be preserved. At the same time, counter-indications suggest important differences in the way openness issues will arise and be resolved under the Charter.

At first glance, it might appear that little has changed. Like the common law, the Charter jurisprudence has confirmed the virtues of openness. Legislation mandating the closure of proceedings or requiring a publication ban, without reference to the circumstances, has been difficult to justify. The courts have responded, in a handful of important decisions, by invalidating restrictions which were blunt and unconditional. The legislative framework that governs young offenders provides one example. Though the presumption of openness would ordinarily apply, Parliament directed that juvenile hearings be held *in camera*. That requirement was struck under the Charter,<sup>19</sup> and then eclipsed by a successor, which permits closure, as a matter of judicial discretion, rather than as a statutory imperative.<sup>20</sup> Provincial legislation which placed an extensive ban on the publication of information about private litigation was also invalidated.<sup>21</sup> To some extent then, the Charter may have rescued common law principle from erosion by the legislatures.

At the same time, the courts have also invoked the common law to justify limitations on access and publicity.<sup>22</sup> As abstract principle, openness has a strong currency, which dissipates nonetheless when pitted against the right to a fair trial, the privacy of witnesses or complainants and the administration of justice. Although no study has as yet been undertaken to determine whether the courts have been more, or less, open

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18. *Re Hirt and College of Physicians and Surgeons of British Columbia* (1985), 17 D.L.R. (4th) 472 at 486 (B.C.C.A.) (protecting the identity of parties in a case of alleged sexual misconduct by a physician).

19. *Re Southam Inc. v. R.* (No. 1) (1983), 146 D.L.R. (3d) 408 (Ont.C.A.) (invalidating section 12 of the *Juvenile Delinquents Act* R.S.C. 1970, c. J-3).

20. *Re Southam Inc. v. R.* (1986), 53 O.R. (2d) 663 (Ont.C.A.) (upholding section 39 of the *Young Offenders Act*, which permits judges, in prescribed circumstances, to close all or part of young offender proceedings).

21. *Edmonton Journal v. Attorney General for Alberta*, [1989] 2 S.C.R. 1326.

22. See, for example, *C.B.C. v. Dagenais* (1992), 12 O.R. (3d) 239 (Ont.C.A.) (explaining that, both at common law and under the Charter, a fair trial is paramount to freedom of the press and reversed on appeal, *supra* note 8.)

since 1982, at the least, bans and closures have become more controversial. Whatever a tabulation of cases might reveal, there can be little doubt that the judiciary has been reluctant to enhance access and publicity at the expense of other values.

In many cases, openness is presented as a threat, rather than as a safeguard, of the justice system. Not only have the courts rejected a majority of claims under section 2(b), in doing so, some have candidly stated their hostility to freedom of the press.<sup>23</sup> Access has been undercut by applications to close proceedings and seal files, either wholly or in part.<sup>24</sup> Publication bans have been sought and granted in a variety of instances; whether more frequent or not, the scope of these bans has at times been startling.<sup>25</sup> Contrary to section 1's requirements, limitations have been imposed in such cases to prevent a risk of harm, whether the harm was real or not.<sup>26</sup> In rationalizing these decisions, the courts have minimized the public's interest in access to information, and diminished the importance of time as an element of access. Restrictions on access and publicity have been characterized as slight or trivial,<sup>27</sup> and the media's attempts to invoke section 2(b) are interpreted as demands for special privileges.<sup>28</sup>

In many ways, open justice has regressed since 1982. It is debatable, of course, whether the courts and other public proceedings should be more open. The Charter has

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23. See *Re Southam Inc. v. The Queen (No. 2)* (1982), 70 C.C.C. (2d) 264 at 269 (Ont. H.C.) (stating that , "It could not have been in the contemplation of the new Fathers of Confederation that the rights of an accused person should be whittled down in the name of a general concept of the freedom of expression or freedom of the press..."); and *National Bank of Canada v. Melnitzer* (1991), 84 D.L.R. (4th) 315, *infra* note 28.
  24. See for example, *A.B. & C. v. R.*, [1990] 1 S.C.R. 992 (explaining the Court's decision, on security grounds, to conduct leave to appeal and appeal hearings *in camera* and to seal the file); *Needham v. R.* (1992), 72 B.C.L.R. 331 (B.C.C.A.) (upholding closure and publication ban orders on grounds of witness safety); and *R. v. Homolka* [1993] O.J. No. 2044 (Ont. Gen. Div.) (excluding the general public and foreign press from access to the courtroom). See also *supra* note 17 (protecting the identity of parties in a case of alleged sexual misconduct); *A. v. C.* (1994), 89 B.C.L.R. (2d) 92 (upholding a sealing order to protect the identities of parties to civil litigation); and *Melnitzer, ibid.* (denying access to sealed minutes of a meeting between a receiver and a lawyer accused of civil and criminal fraud).
  25. See for example, *Dagenais supra* note 22 (varying an order that banned the airing of *The Boys of St. Vincent* throughout Canada, to protect the fairness of proceedings in progress and pending in Ontario); and *John Doe v. C.B.C.* (1993), 86 B.C.L.R. (2d) 216 (B.C.C.A. in Chambers) (dismissing an application to stay an order which set aside an *ex parte* and *in camera* order banning the publication of all information and sealing the court file in civil proceedings).
  26. As explained in *Southam Inc. v. Brassard* (1987), 38 C.C.C. (3d) 74 at 87 (Que. S.C.): "As soon as this balance [between a fair trial and a free press] is upset, *or risks being upset*, the right to a fair trial must take precedence over the freedom of the press". [my emphasis].
  27. See for example, *Hirt, supra* note 18 at 483 (declaring that anonymous proceedings constitute a minor infringement of the Charter and that disclosure of the parties' identities would serve no useful purpose).
  28. See for example, *Melnitzer, supra* note 23 at 321 (declaring that section 2(b) is not a "limitless freedom" which gives the press, or other media, a "preferred position"); and *MacLeod v. Canada*, [1991] 1 F.C. 114 (declaring that freedom of the press does not confer special status on media people); see also *Attorney General of Quebec v. C.B.C.*, [1991] 3 S.C.R. 421 at 436 (per L'Heureux-Dubé J., concurring, that freedom of the press does not guarantee the press special privileges which ordinary citizens would not enjoy, and that the press "itself does not generally request special privileges").

provoked a reaction just the same. This paper identifies and discusses three factors which have influenced the jurisprudence on openness. First, the Charter has expanded the frontiers of access well beyond those recognized at common law. Not surprisingly, the courts have been ambivalent, when faced with requests for access to all phases of the trial process, as well as to a diverse assortment of "public" proceedings, about the scope of the concept. Second, the common law's familiar method of analysis has been transported into new and foreign territory: the language, rhetoric and analysis of rights discourse. The courts continue to place heavy reliance on common law assumptions which, under a regime of constitutional rights, must be balanced against other values explicitly protected by the Charter. How that exercise should be conducted is far from obvious. Third, public scrutiny of the courts has intensified in recent years. When the judiciary shields the accused and other witnesses from the public eye, it necessarily deflects attention away from itself. Yet the Charter has altered the justice system and, in doing so, transformed the public's perception of its accountability. Such dynamics would seemingly be better served by fewer, rather than greater, restrictions on openness.

## B. Reconceptualizing Access

*Freedom of the press is not the equivalent of a freedom of information act, nor does it have the effect of appointing the press as a sort of permanent and roving royal Commission entitled at its own demand and in every circumstances to any and all information [...].*<sup>29</sup>

Access to the courts at common law was a relatively simple concept of modest scope. Attending the trial was of paramount interest, and in most cases the trial was a discrete event. Today, access is implicated at every step in a spectrum of events which includes pre-trial and appellate processes, as well as the pleadings, evidence and other parts of the record. In default of certain answers at common law, the status of access at various stages in the process has arisen as a matter of first impression under the Charter.<sup>30</sup>

Not only has access been sought to various elements of the litigation process, section 2(b) has been invoked to support a right to attend all proceedings in which the public claims an interest. Such a right, it bears noting, is unprecedented at common law. There, the courts held hearings in public to protect the legitimacy of their own proceedings: unless empowered by statute, they lacked the jurisdiction to impose that requirement on non-judicial hearings. The Charter is not bound by the constraints of the common law; under section 2(b) courts have the authority and, some would argue, the responsibility, to compel public admission to a variety of "public proceedings".

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29. *Melnitzer, ibid.*

30. In *MacIntyre, supra* note 1, Dickson J. announced that openness should apply, as a matter of principle, to trial and pre-trial proceedings but then upheld an *in camera* search warrant proceeding.

Acknowledging such a right, however, has awkward consequences for institutional relations between the judiciary and the other branches of government.<sup>31</sup>

The common law principle of access has been complicated, in the first instance then, by the increased complexity of adjudication. A principle that was based on the public's right to attend "the trial" must now accommodate a continuum of proceedings bounded, at one end, by the originating process and, at the other, by a final order in the last court of appeal. In criminal prosecutions, for example, arraignment, bail and preliminary hearings are usually held before any issue of responsibility is decided. Following the completion of those processes, appeals may be taken and a second trial is on occasion ordered. With its own battery of discovery, pre-trial applications and appeal proceedings, civil litigation is hardly less complicated.

In 1982, the status of access to proceedings at various points along that continuum was unsettled. The Charter also created doubts about legislative restrictions that authorized the closure of certain types of proceedings, and parts of a hearing. The difficulty in responding to these issues under the Charter is this: historically, public access ensured the fairness of the trial and demonstrated to the community that justice had been served. In principle, those rationales should apply to the entire continuum of proceedings, resulting in access to all parts of the process, on the same footing as to the trial itself.<sup>32</sup> Yet instinct has resisted that result: courts have expressed the fear that exposing the entire workings of the justice system will "overshoot" the Charter's purposes.<sup>33</sup> The common law expresses a contradiction between its commitment to openness and the low threshold doctrine has established for derogations from that commitment. Meanwhile, the *Oakes* test is in conflict with an instinct to preserve some vestiges of tradition and thereby not overshoot the Charter's purposes. In such circumstances, the courts have found it difficult to separate those aspects of the process which should be open, from others which can justifiably be closed.

In addition, access has attained whole new dimensions under the Charter. At common law the courts recognized the public's right to attend hearings that fell within their inherent jurisdiction. Although that right has been constitutionalized by section 11(d) and section 2(b), the latter has additionally enabled citizens and members of the press to

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31. See for example, *New Brunswick Broadcasting Co. v. Nova Scotia*, [1993] 1 S.C.R. 319 (dismissing an application for camera access to a provincial legislature under section 32 of the Charter); *Southam Inc. v. Canada*, [1989] 3 F.C. 147 [F.C.A.] (dismissing an application for access to Senate committee hearings on jurisdictional grounds); and *Native Women's Association of Canada v. Canada*, [1994] 3 S.C.R. 627 (reversing a Federal Court of Appeal decision granting a right of equal access, under section 2(b), to the process of constitutional reform that culminated in the Charlottetown Accord).

32. *Supra* note 1 at 186.

33. *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 (cautioning against such interpretations of the Charter).



claim access to administrative tribunals,<sup>34</sup> coroner's inquiries,<sup>35</sup> discipline hearings<sup>36</sup> and government proceedings,<sup>37</sup> as well as to commissions of inquiry and a variety of hearings on issues of public interest.<sup>38</sup>

Following the pattern of the common law, some courts have concluded that the right to attend applies only to judicial proceedings.<sup>39</sup> On that point, an analogy to administrative law and the principles of natural justice can be drawn. In the past, those principles applied only to proceedings which could be characterized as "judicial". Even before the Charter, however, the courts had largely rejected the distinction between judicial and quasi-judicial proceedings in favour of a duty of fairness which now applies to a wide variety of administrative hearings. It is puzzling that a distinction that was rejected in that context should now be invoked to limit access to hearings which are not "judicial" in character. In *Attorney General of Nova Scotia v. MacIntyre*, Dickson J. rejected a sharp distinction between trial and pre-trial proceedings.<sup>40</sup> A few years later, MacGuigan J. likewise rejected the distinction between judicial and non-judicial proceedings to support a right of access, under the Charter, to immigration hearings.<sup>41</sup>

Whether access should be contingent on the status of a hearing depends on the rationales for openness — not at common law, but under the Charter. Historically, openness served the quest for truth in a fact finding process based on the principles of the adversary system. Should it retain that function under the Charter, access to proceedings that do not adjudicate questions of fact between adversaries, which is of the essence of the

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34. See for example, *Pacific Press Ltd. v. Canada*, [1991] 2 F.C. 327 [C.A.]; *McVey* No. 1, [1990] 1 F.C. 319; and *Toronto Star Newspapers v. Kenney*, [1990] 1 F.C. 425 [T.D.] (discussing access to immigration and refugee hearings under the Charter).

35. See for example, *Re Edmonton Journal v. Attorney General for Alberta* (1983), 5 D.L.R. (4th) 240 (Alta. Q.B.) (denying a request for access to proceedings under the *Fatality Inquiries Act*); and *Canadian Newspapers Co. Ltd. v. Isaac* (1988), 63 O.R. (2d) 698 (Div. Ct.) (rejecting an application to compel disclosure of an anonymous witness who had received a promise of confidentiality).

36. See for example, *Re Yuz and Laski* (1986), 32 D.L.R. (4th) 452 (O.C.A.) (upholding a professional tribunal's decision to hold a misconduct hearing in public); and *Southam Inc. v. LaFrance* (1990), 71 D.L.R. (4th) 282 (Que. C.A.) (upholding an *in camera* discipline committee hearing, in circumstances of concurrent criminal charges).

37. *Supra* note 31.

38. Examples of public inquiries or hearings held in the open and televised include the Grange Inquiry [into the suspicious deaths of sick children at children's hospital]; the Dubin Inquiry [into the use of drugs in sports]; and, a hearing into the professional conduct of Judge Hryciuk [of the Provincial Court of Ontario].

39. See *McPherson v. McPherson*, [1936] A.C. 177 at 200 (describing publicity as the "authentic hallmark of judicial as distinct from administrative procedure"); the distinction has been followed, under the Charter, in *Re Edmonton Journal*, *supra* note 35, and *Travers*, *infra* note 42.

40. *Supra* note 1 at 186 (upholding an *in camera* proceeding to issue a search warrant but permitting access after its execution).

41. *Pacific Press*, *supra* note 34 at 344.

"judicial" role, can presumably be denied.<sup>42</sup> However, by enhancing the role of the courts, the Charter has altered the public's perception of their accountability and created an expectation that citizens have a "right to know". Although accountability is discussed later in this paper, here it should be noted that a generous conception under section 2(b) would make it difficult for the courts to deny access to any proceeding in which the public claims an interest.

There can be little doubt that already, the Charter has pressed principle beyond the comfortable boundaries of the common law. The trial process, both civil and criminal, has been complicated in recent years by the introduction of additional procedural steps before, during and after the hearing. The courts have had to grapple with requests, not just to the trial *per se*, but, as well, to all its ancillary processes, and all the documents and exhibits it generates.<sup>43</sup> Moreover, access and publicity can no longer be as closely or as exclusively tied to the integrity of adversarial proceedings. Recognition of a right to know under section 2(b) could result in orders compelling all manner of public proceedings open. Thus, access has vast potential under the Charter; and, despite its pedigree, common law principle has provided little guidance to the courts in deciding whether to harness or unleash that potential.

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42. See for example, *Travers v. Canada* (1995), 171 N.R. 158 at 159 (denying access to a Board of Inquiry on military activities in Somalia, because "the Board manifestly has no dispositive or decision-making role").

43. See for example, *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, [1991] 1 S.C.R. 671 (denying press access to a videotape confession, after completion of the trial and appeal process, and a final verdict of acquittal).

### C. The Juxtaposition of Values

*As soon as this balance is upset or risks being upset, the right to a fair trial must take precedence over the freedom of the press.*<sup>44</sup>

Until recently, the Charter jurisprudence replicated the common law's hierarchy of values, which readily preserved a fair trial at the expense of openness and a free press.<sup>45</sup> Competing values were balanced, in most cases, with predictable results: fair trial prevailed without proof that openness would pose a tangible risk of prejudice to a fair trial. Common law analysis likewise failed to consider alternatives which might have preserved openness while also protecting the fairness of the trial. This balancing of interests was intuitive rather than analytical. Under the Charter, however, where the section 1 analysis requires a substantial and pressing objective, as well as proportional means, such an approach is inappropriate. As a result, section 1's analytical requirements have placed the Charter in conflict with the ingrained belief that a fair trial should receive near absolute protection.

The rhetoric of balancing has also changed under the Charter. Though competing interests must be resolved on a case-by-case basis both at common law and under the Charter, the demands of constitutional interpretation are somewhat different. Adjudication under the Charter invites a principled rationalization of the courts' choices: a vision, ideology, or set of principles that will lend legitimacy to the judiciary's interpretation of its guarantees. Prior to *Dagenais*<sup>46</sup> the dominant vision preferred the rights of the accused and expressed ambivalence toward the press.

Canada's criminal justice system has been revolutionized by the Charter. Except under the division of powers, a constitutional defense to criminal charges previously did not exist, and little improved under the statutory *Bill of Rights*. Yet much like the principle of openness, the presumption of innocence had been eroded by legislation that relaxed the state's burden to prove guilt beyond a reasonable doubt. Meanwhile, the common law displayed a distinct lack of sympathy for the accused.<sup>47</sup> In short years since the Charter's arrival, that pattern has been reversed. Principles which received scant mention in the past have virtually negated the prior jurisprudence: in case after case, the Supreme Court of Canada has extended protections to those accused of crimes which, only a few years ago, were beyond the wildest imagination. In doing so, the Court has erased

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44. *Supra* note 26.

45. *R. v. Bryan* (1954), 108 C.C.C. 209 at 217 (Ont. H.C.) (stating that "[O]ne of the most sacred things we have is the right to have a fair trial [...] [and] [i]f we surrender that principle [...] we defile our whole administration of justice").

46. *Supra* note 8.

47. See for example, *R. v. Wray*, [1971] S.C.R. 272 (denying the existence of a discretion to exclude evidence whose admission would bring the administration of justice into disrepute).

the disappointing record of the *Bill of Rights*, and produced a jurisprudence on criminal justice issues that is more "liberal" than its American counterpart.<sup>48</sup>

The Charter's strictest scrutiny is reserved for interference with the rights of the accused. That prioritization of values began in the aftermath of *Oakes*, and the section 1 test promulgated in that decision. There, the Court invalidated legislation that violated the common law presumption of innocence.<sup>49</sup> In doing so, it introduced a standard of justification which, by all appearances, was both strict and universal. Retreat was inevitable, however, because *Oakes* failed to incorporate criteria of deference. After suggesting that *Oakes* could be varied, on *ad hoc* grounds,<sup>50</sup> the Court proposed a more categorical approach which established a double standard of justification under section 1. *Irwin Toy* declared that the full rigour of *Oakes* would be reserved for those cases in which the state acts as the singular antagonist of the individual. The state is most patently the singular antagonist of individuals, it bears noting, when it prosecutes them for the commission of crimes.<sup>51</sup> The Court suggested a more deferential attitude when government infringes the Charter in the course of allocating scarce resources or protecting the vulnerable.

*Irwin Toy's* gloss on *Oakes* is based on certain assumptions about judicial power, and the Charter's transformation of institutional relations. In the Court's view, deference is required on issues that invite the judiciary to second guess Parliament's judgment and thereby assume a political function. By contrast, it is appropriate for the courts to intervene in matters pertaining to the administration of justice; there, the judiciary is simply exercising its traditional mandate. On that view, enforcing the rights of the accused is an aspect of the administration of justice that falls squarely within the judicial domain. Unlike the socio-economic entitlements implicated, for example, by a guarantee of equality, the Charter's procedural guarantees could be integrated into a traditional conception of judicial role. Despite, or perhaps because of, the *Bill of Rights* experience, the Supreme Court of Canada has been particularly vigilant in enforcing the Charter's criminal justice guarantees.

Meanwhile, the jurisprudence under section 2(b) is uneven. Though *Edmonton Journal* acknowledged the connection between openness, a free press and democratic governance, claims in other decisions have been easily dismissed.<sup>52</sup> The cases on access

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48. See generally R. Harvie & H. Foster, "Ties That Bind? The Supreme Court of Canada, American Jurisprudence, and the Revision of Canadian Criminal Law Under the *Charter*" (1990) 28 O.H.L.J. 719; and R. Harvie & H. Foster, "Different Drummers: The Supreme Court of Canada, American Jurisprudence and the Continuing Revision of Criminal Law Under the Charter" (1992) 24 Ottawa L. Rev. 39.

49. *R. v. Oakes*, [1986] 1 S.C.R. 103.

50. *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at 781-82.

51. *Irwin Toy Ltd. v. Quebec*, [1989] 1 S.C.R. 927 at 993-94 (specifically referring, in the context of the state as singular antagonist, to the Charter's legal rights in sections 7-14).

52. See *supra* note 43; *C.B.C. v. Lessard*, [1991] 3 S.C.R. 421 and *C.B.C. v. New Brunswick*, [1991] 3 S.C.R. 459 (upholding search warrants issued against the press); and *New Brunswick Broadcasting Co.*, *supra* note 31.

are indicative of the judiciary's uncertainty: it remains unclear which of the three approaches introduced in *Commonwealth* represents governing doctrine.<sup>53</sup> Few principles have emerged and there is even less to suggest an evolving theory of the press. Because they undermine Dickson J.'s pronouncement that "covertness is the exception and openness the rule", the cases on open justice are particularly worrying. *Dagenais* is a welcome respite from the vein of hostility that runs through this jurisprudence.

Prior to *Dagenais*, the malleability of contextualization under section 1's and the common law's preference for fair trial values, had converged to create a presumption against open justice. To some extent, the imbalance created by that jurisprudence has been corrected by a pendulum swing back in favour of openness. In establishing strict standards for publication bans, *Dagenais* articulated a number of important principles. First, the Court held that the common law balance, which favours a fair trial over expressive freedom, is inconsistent with the equal status of sections 2(b) and 11(d) of the Charter.<sup>54</sup> Second, though section 11(d) prevents a real and substantial risk to a fair trial, the guarantee does not require all conceivable steps to be taken to remove speculative risks.<sup>55</sup> Third, where the negative impact of a ban outweighs its useful effects, section 1's standard of justification will not be met.<sup>56</sup>

Access and publicity are distinctive, but closely related, elements of open justice. Thus it is significant, in *Dagenais'* context of publication bans, that the Court explicitly endorsed openness values and heightened their protection under the Charter. The Supreme Court of Canada has signalled the lower courts that common law assumptions about the relative value of openness and competing interests, like privacy and a fair trial, have been modified by section 2(b)'s guarantee of expressive freedom.

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53. In *Ramsden v. Peterborough*, [1993] 2 S.C.R. 1084, the Supreme Court of Canada refused to choose between the three approaches articulated in *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139.

54. *Supra* note 8 at 316, Lamer C.J.

55. *Ibid.* at 318.

56. *Ibid.* at 321-26.

## D. Accountability and the Charter

*One of the demands of a democratic society is that the public should know what goes on in courts [...] to the end that the public may judge whether [the] system of criminal justice is fair and right.<sup>57</sup>*

Still, the relationship between openness at common law and the demands of the Charter is unclear. In addressing that relationship, it is important to consider whether the principle of accountability, which is the source of common law openness, has been altered by the Charter. From the beginning, English common law included the public in the administration of justice. The evolution of the jury merged the community's values with the concept of justice, and access gave the general public a presence in the process. Though a jury might be representative, that did not foreclose others from attending in court as members of the community. The common law attained legitimacy in large part because it was open: access to hearings promoted the public's confidence, not only in the ends of justice, but, as well, in the fairness of the process by which those ends were attained.

At the level of principle, the presumption of openness has never seriously been challenged. To the contrary, the rhetoric consistently identifies access and publicity as bedrocks of common law tradition, this, despite restrictions which have grown more numerous, or at least more visible, in recent years. The resulting contradiction is confronted and then resolved by assertions that justice favours a fair trial, rather than analysis of the competing values at stake. What justice requires is a matter of perception, however, and perceptions change over time. By altering the public's expectations about the justice system, the Charter has also undermined traditional assumptions about the permissibility of restrictions on openness.

The judiciary was less visible prior to the Charter, and few would have defined the courts as one of Canada's branches of government. Common law justice presented the judiciary as "neutral arbiters", whose task it was to find the facts and discover the truth quietly, objectively and impartially.<sup>58</sup> Though a sniff of politics occasionally hung in the air, especially on decisions about the division of powers, a separation of law and politics was more compatible with cultural assumptions about parliamentary democracy. There can be little doubt that the Charter has transformed the courts and judiciary. No matter what interpretation it is given, the Charter affects public policy, and, willingly or not, the courts have entered the political thicket. As a result, the judiciary can no longer claim the mantle of neutral arbiters. Their increased power over the lives of Canadians has in turn sparked demands that the judges, their decisions and the system of justice be held accountable.

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57. Frankfurter J., dissenting from the denial of *certiorari* in *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912 at 920 (1950).

58. *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at 600.

Paradoxically, while empowering the courts, the Charter has also diminished the judiciary's control over its own processes. At common law, courts exercised their discretion to grant the public a privilege of attending hearings. From time to time Parliament intervened, but not to impose onerous standards of access on an unwilling judiciary; the purpose of legislated responses was instead to introduce further restrictions on openness. Under the Charter, however, access and publicity claim a source of authority in the supreme law of Canada that is independent both of legislation and the common law. The status of openness no longer rests on common law instincts or parliamentary judgments; rather, it depends on a threshold of justification being met under section 1 of the Charter. The prominence of closure orders and publication bans in recent years suggests resistance to the changes wrought by the Charter and an attempt, by the judiciary, to reclaim the common law prerogative to control the administration of justice. Yet as the Homolka-Bernardo proceedings demonstrate, the public may not be as willing to acquiesce in such solutions today, as it was prior to the Charter.

An additional difficulty for the courts is that constitutional interpretation has established analytical standards which pre-empt common law doctrine. Claims brought under the Charter also carry a different message. Access was a privilege at common law, which was granted by the courts to validate the administration of justice; in such circumstances, there was a tendency to equate the judiciary's interpretation of openness with the integrity of justice. Under the Charter, however, the courts must explain any limitations which deny the access to a system of justice which the public now perceives as directly accountable.

That perception reveals a further dynamic. The Charter shields the accused from the power of the state, but serves as a sword for those who invoke it to expose the accused, their witnesses and the judicial process to public scrutiny. Instinctively, the courts have acted to protect the common law's conception of adjudication as a contest between the parties in dispute, and of the judge as neutral arbiter. On that view, unrestricted access by external constituencies, which may include the media, the public and particular interests, can only disturb the equilibrium of a model of justice based on the assumptions of the adversarial system. Thus, demands for information and access have been met with the declaration that the balance of the system "must not be upset by a third or fourth trial taking place in a public forum".<sup>59</sup> Limitations ensure that third parties, who are not formally part of the dispute, cannot upset the equilibrium of a process whose fairness has been calibrated, over the centuries, by the evolution of common law justice.

These instincts combine, with the selective protection of some participants and privacy interests, in a jurisprudence that is more restrictive than expansive of openness values. Over time, such an approach may prove short-sighted: whatever the relationship between openness and accountability may have been at common law, the Charter has set new dynamics in motion. In place of an acquiescent faith in the judges as neutral arbiters is a public mood that is restive, and which demands answers about the justice system. This mood is expressed in calls for an open system of judicial nominations, in critical review of judges themselves and in angry responses to decisions, both Charter and non-Charter. It is

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59. *R. v. Lortie* (1985), 21 C.C.C. (3d) 436 at 475 (Que.C.A.).

doubtful that the integrity of justice can be served, in the long run, by limitations on openness that deny the transformation public expectations have undergone since 1982.

Not only has the Charter shaken the foundations of common law principle, it has juggled relations between the courts and other branches of government: section 2(b) has armed the judiciary with a new-found power to compel public access to other public proceedings. Though access would unquestionably promote goals of democratic governance and accountability, it raises the difficult question of limits: if a "public interest" is the threshold in these cases, when, if ever, could access be legitimately denied? Aware that such limits may be elusive, and ever-conscious of the delicacy of institutional relations, the courts have thus far declined to impose obligations of access and accountability on non-judicial proceedings.<sup>60</sup>

The political and institutional dynamics of the Charter require a reconceptualization of the common law principle of openness. To preserve continuity with tradition while responding to change, the judiciary must adapt the spirit of Bentham to the demands of constitutional analysis. At the same time, the Charter has created tension between the judicial and parliamentary branches of government. There, as well, a theory of access is needed to determine when non-judicial "public" proceedings should be pried open under the Charter.

### III. TOWARD A THEORY OF RESPONSIBLE JUSTICE

*Of the three levels of government, it is the courts above all which must operate openly.*<sup>61</sup>

The justice system must respond to the Charter and the rapidly evolving technology of information. As experience has shown, closure orders and publication bans do not provide the answer; nor does a rhetoric that is unsympathetic and at times hostile to legitimate requests for information about the law. Instead of resisting, the courts should view these dynamics as a further step in the evolution of a fundamental concept in our tradition of justice. The vitality of that tradition, and its underlying concepts, it should not be forgotten, depends on its capacity to adapt. "Responsible justice" is an expression that incorporates the principled assumptions of common law justice into a scheme for constitutional rights which, paradoxically, makes demands of the law that are both old and new. To preserve its legitimacy in the era of the Charter, the justice system must be perceived by the public as "responsible" and responsive; it will not be perceived as either if it is not accountable; and, it cannot be accountable unless it is open.

*Dagenais* may be a decision of transcending importance. By readjusting the balance between publicity and a fair trial, the Supreme Court of Canada may also have made restrictions on access more difficult to justify. Moreover, the Court acknowledged

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60. *Supra* note 31.

61. *Supra* note 43 at 704 (dissenting opinion).



the legitimacy of third party claims in the criminal justice process. In devising procedural mechanisms to facilitate appeals, not only by the media but as well, by other third party interests, *Dagenais* accommodated new demands for access and rights of participation. With this decision, the Supreme Court of Canada embarked on the important task of adapting the common law concept of openness, "the very soul of justice", to the Charter.