

Hardly a "Natural Born" Charter Right: Why Section 2(b) of the Charter Should Not Include a Right to Attend Hearings

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It was with ambivalence that I accepted the invitation earlier this year from conference organizers to debate Professor Cameron on the question whether section 2(b) of the *Canadian Charter of Rights and Freedoms* includes a "right to attend hearings". While I was delighted to agree to share the podium with an academic I greatly respect, and to speak, albeit briefly,¹ to such an esteemed audience, I was led at once to recall a passage in a paper I had just read by Professor P. Russell:

*The Charter has done little good for anything I care about except to enrich the intellectual life of the chattering classes. For that, I know, I should be exceedingly grateful.*²

My first impression was that Professor Russell's words were particularly apt in this context because of what this debate is 'not' about — namely, whether courtrooms should presumptively be open to the public. Of course they should. The common law presumption in favour of open civil and criminal courtrooms is an integral, ingrained and vital aspect of the administration of justice in Canada. Access by the public to courts of law may properly be regarded as a fundamental principle in the administration of justice. As our English heritage demonstrates, the jealous protection of this principle does not require an entrenched Bill of Rights: *Scott v. Scott*.³

Professor Russell's words seemed even more apt in view of my position that, while the inclusion of a "right of access" in section 2(b) is problematic, the open court principle is manifestly a constitutional principle. Section 11(d) of course explicitly protects the right of a person charged with an offence to an open trial. I would moreover go further and assert that a mandatory closure provision enacted by a legislature in respect of superior court civil proceedings runs the risk of being struck down as impairing the independence of the judiciary so jealously guarded by the courts under section 96 of the *Constitution Act, 1867*.⁴ I also argue that, in respect of inferior tribunals that make orders affecting a person's right to life, liberty and security of the person, the right to public hearing may enjoy some residual protection under section 7 of the Charter.

If Professor Cameron and I are in agreement, albeit for different reasons, that open courtrooms are a matter of constitutional moment, why does it matter where one finds such a right? In the end, does the debate over where such a right falls amount to anything more than "constitutional chatter"?

One of my purposes in presenting this paper is to argue that the question whether section 2(b) of the Charter embraces a right of "access to hearings" does indeed involve more than just chatter. The proposition that "open courtrooms" are an aspect of "freedom of expression" is arguably ill-fitted to the history and meaning of that freedom and portends doctrinal developments with consequences far beyond the laudable and self-evident proposition that courtrooms should, as a rule, be open to the public.

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1. It seems that whenever I come to Ottawa, I never get more than 15 minutes to make my pitch....
 2. P. H. Russell, "The Political Purposes of the Charter: Have They Been Fulfilled? An Agnostic's Report Card" in P. Bryden, S. Davis & J. Russell, eds., *Protecting Rights and Freedoms: Essays on the Charter's Place in Canada's Political, Legal and Intellectual Life* (Toronto: University of Toronto Press, 1994) at 42.
 3. *Scott v. Scott*, [1913] A.C. 417 (H.L.).
 4. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

In virtually all academic discussions of the issue, the proposition that a "right of access" to courtrooms is an implicit part of the guarantee of freedom of expression is taken as being obvious.⁵ In my view, it is far from obvious. My purpose here however is not to advance the definitive argument on the point. Instead, I hope to achieve the more modest aim of inviting readers firstly to recall the origins and underpinnings of the open court principle, and secondly to engage in a critical assessment of the cases, the rhetoric and the implications of finding a "right of access to courts" constitutionalized in section 2(b) of the Charter.

I. OPEN JUSTICE AT COMMON LAW

In *Richmond Newspapers Inc. v. Virginia*,⁶ Chief Justice Burger traced the history of open courts in England, at least for criminal trials, as far back as the Norman Conquest. In *Gannett Company Inc. v. DePasquale*,⁷ Blackmun J. (dissenting) pointed out that open hearings characterized even the early Anglo-Saxon criminal proceedings such as trial by ordeal and compurgation, which "proceedings" bore greater resemblance to "an ill-managed public meeting" than to a trial as we know it today.⁸ The majority of the Law Lords in *Scott v. Scott*,⁹ did not find it necessary to carry their researches quite so far. For them, the principle that judicial proceedings are open to the public was manifestly an "inveterate" principle and a "priceless inheritance".¹⁰ Lord Shaw repeatedly emphasized the "constitutional" nature of the principle.¹¹ Openness of judicial proceedings is also a centrepiece of the administration of justice in Canada: *MacIntyre v. Nova Scotia (Attorney General)*,¹² *John Doe v. Canadian Broadcasting Corporation*.¹³

Two aspects of the common law open court principle discussed in the speeches of the Law Lords in *Scott* are central to virtually every discussion of the subject of open courts. They accordingly deserve emphasis at the outset of this discussion.

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5. See for example, A. Linden, "Limitations on Media Coverage of Legal Proceedings: A Critique and Some Proposals for Reform" in P. Anisman & A. Linden, eds., *The Media, The Courts and The Charter* (Toronto: Carswell, 1986).
 6. *Richmond Newspapers Inc. v. Virginia*, 65 L. Ed. 2d 973 (U.S.S.C. 1980) at 982-983.
 7. *Gannett Company Inc. v. DePasquale*, 61 L. Ed. 2d 608 (U.S.S.C. 1979) at 646-649.
 8. *Ibid.* at 646, quoting Pollock, *The Expansion of the Common Law* (1904).
 9. *Supra* note 3.
 10. *Ibid.* Loreburn J. at 445, 447. It is not without significance that even the proceedings of the infamous *Star Chamber* were conducted publicly: see M. Radin, "The Right to a Public Trial" (1931-32) 6 Temple L.Q. 381 at 386-387 and Law Reform Commission of Canada, *Public and Media Access to the Criminal Process*, Working Paper 56 (1987) at 15.
 11. *Supra* note 4 at 475, 477, 482.
 12. *MacIntyre v. Nova Scotia (Attorney General)*, [1982] 1 S.C.R. 175.
 13. *John Doe v. Canadian Broadcasting Corporation* (1994), 86 B.C.L.R. (2d) 202 (S.C.); stay ref'd (1994), 86 B.C.L.R. (2d) 216 (C.A.).

First, public access to courts of law, while properly a matter within the control of the judiciary, does not depend "merely on the discretion of the judge". Viscount Haldane thus stated that:

*Whatever may have been the power of the Ecclesiastical Courts, the power of an ordinary Court of justice to hear in private cannot rest merely on the discretion of the judge or on his individual view that it is desirable for the sake of public decency or morality that the hearing should take place in private. If there is any exception to the broad principle which requires the administration of justice to take place in open Court, that exception must be based on the application of some other and overriding principle which defines the field of exception and does not leave its limits to the individual discretion of the judge.*¹⁴

To rebut the presumption of openness, the threshold is high. The onus is on those seeking to close the courtroom to demonstrate that closure is "strictly necessary" for the attainment of justice.

Second, the open court principle is not absolute. While extremists might assert the unqualified proposition that publicity is the *sine qua non* of justice, almost all thoughtful commentators have accepted that open courtrooms must, in some circumstances, bow before the paramount duty of the court to ensure that justice is done. The necessity for ultimate judicial control flows from the reality that "open justice" can, in some circumstances, amount to an oxymoron. Viscount Haldane thus emphasized that:

*While the broad principle is that the Courts of this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions, such as those to which I have referred. But the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of Courts of justice must be to secure that justice is done.*¹⁵

II. THE NEED FOR CONTEXT

Consistent with the historical record explored in *Gannett* and *Richmond Newspapers*, the Law Reform Commission of Canada has observed that justifications for open courtrooms arose much later than the tradition itself. "The concept of openness in the administration of justice, then, has more tradition in it than ideology..."¹⁶ While this observation does not of course preclude a modern assessment of the interests served by open courtrooms, it does commend that we be cautious, in this context, of embracing any grand "unitary theory" of "openness" which diverts attention away from the premise that, in this context, it is the proper administration of justice we are ultimately concerned with,

14. *Supra* note 3 at 435.

15. *Supra* note 3 at 437.

16. *Public and Media Access to Criminal Proceedings*, *supra* note 9 at 14-15.

and not open courtrooms *per se*. I return again the words of Viscount Haldane that "the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of courts of justice must be to secure that justice is done".

Openness is the servant; justice the master. To elevate, in a vacuum, any or all of the interests served by open courts to constitutional status without regard to an overall assessment of the various and complex pressures and interests at work in the justice system is truly to rip openness from its justice context and risk underplaying other factors critical to the administration of justice. In my respectful view, this is the error committed by those who make shopping lists of the "departures" from the "open court rule" in Canadian law rather than critically analyzing each instance in its context and determining whether and how they serve the overall interests of justice.¹⁷

Given the palpable dangers of abstracting only the "advantages" of the open court without regard to the overall justice context within which it exists, it is not surprising that Madam Justice Wilson chose the case of *Edmonton Journal v. Alberta (Attorney General)*¹⁸ to introduce the importance of a "contextual approach" to the Charter, an approach which the Supreme Court of Canada has subsequently recognized applies as much to the initial definition of rights and freedoms as it does to the justification process under section 1: *Pearlman v. Manitoba Law Society*,¹⁹ *Kindler v. Canada (Minister of Justice)*,²⁰ *R. v. Wholesale Travel Group Inc.*²¹

A proper "contextual approach" to open courtrooms is well illustrated in the judgment of Mr. Justice Goldie in *Needham v. British Columbia*.²² In that case, a petitioner (newspaper reporter) challenged a number of limited court closure orders made by a trial judge in a murder case. The purpose of the court closures was to conceal the identity of a witness for whose safety the trial judge was concerned.²³ The petitioner made a "preliminary application" to the trial judge for access to transcripts of the closed proceedings in order to determine whether "substantive relief" might later be sought under section 2(b) of the Charter. The trial judge dismissed the application "as having squarely put the cart before the horse". The court was clearly not prepared to address a "preliminary" application for transcripts on the assumption that there was, *inter alia*, a

17. A. Linden, "Limitations on Media Coverage of Legal Proceedings: A Critique and Some Proposals for Reform", *supra* note 5 at 326-330.

18. *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326.

19. *Pearlman v. Manitoba Law Society*, [1991] 2 S.C.R. 869.

20. *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779 at 848-849.

21. *R. v. Wholesale Travel Group Inc.* (1992), 130 N.R. 1 (S.C.C.), Cory J. at 23-27, adopted by the full Court in *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711.

22. *Needham v. British Columbia* (1993), 76 C.C.C. (3d) 146 (B.C.C.A.).

23. Even the Supreme Court of Canada has closed its courtroom for the purpose of protecting witness safety: see *R. v. A.*, [1990] 1 S.C.R. 992. Consistent with the common law approach of allowing closure and the effects of closure to continue only so long as it is necessary to achieve other justice interests, the Court withdrew its order and released the file three months later, on the basis that it appeared to the Court, "that the circumstances which warranted conducting this proceeding in confidence are no longer present". [at 994; see also [1990] 1 S.C.R. 995].

section 2(b) "right" to assert. The Court of Appeal dismissed the appeal on the basis that the nature of the proceeding (an attempt to review a trial judge's decision to close the court to protect a witness) was a "wholly criminal" matter for which the Criminal Code provides no right of appeal.

What is relevant for our purposes, however, is the "broader constitutional perspective" within which Goldie, J.A. considered the issues. Justice Goldie properly commenced his discussion by recognizing the constitutional reality that judges of the Supreme Court "occupy a position of prime importance in the constitutional pattern of this country",²⁴ and made reference to the preamble to the *Constitution Act, 1867*²⁵ which grounds the Canadian Constitution "upon the rule of law administered in open courts by judges whose independence from the King and his Ministers had been formally secured as a consequence of the Revolution of 1688, and the subsequent *Act of Settlement, 1700*."²⁶ It was in this overall justice context that His Lordship considered the openness of criminal courts.

Justice Goldie identified the important interests served by open courts. He emphasized that open court not only fosters the public's confidence in and understanding of the judicial system, but secures justice by improving the quality of evidence brought into the courtroom. Citing *Scott*, however, Justice Goldie also recognized that the overarching value at play is the attainment of justice in individual cases. The interests of the public, including the press, to access cannot be overdrawn. As His Lordship stated:

In my view, the interests of the press under s. 2(b) are largely subsumed in the larger public interest in the efficacy and integrity of the justice system. There may be particular cases in which the press can demonstrate a unique interest. Re F.P. Publications (Western) Limited and The Queen²⁷ is an example of a particular newspaper being singled out. But in the case at bar the primary interest is that of the public in the administration of justice.²⁸
[emphasis added]

In a similar vein, Anderson has observed that "[I]t is only in an indirect and general sense that the open court can be said to exist *for the benefit of the public*".²⁹
[emphasis added]

I hasten to remind the reader that I do not take issue for a moment with the need for a strong and vibrant presumption that courts be open. Justice Goldie's broad statement

24. *Supra* note 22 at 151.

25. *Constitution Act, 1867* (U.K.), *supra* note 4.

26. *Act of Settlement, 1700*, 12 & 13 Will. III, c. 2.

27. *Re F.P. Publications (Western) Limited and The Queen* (1980), 51 C.C.C. (2d) 110.

28. *Supra* note 22 at 153-154.

29. W.J. Anderson, "The Open Court and a Free Press: A View from the Bench" (March 1994) Vol. XXVIII, No. 1, *The Law Society of Upper Canada Gazette* at 64.

of the interests served by open justice can, as noted by Lepofsky,³⁰ be described more specifically as preventing abuse of the individual by judges, prosecutors or police, ensuring public scrutiny and comment on the courts (including the ability of the press "to report, to comment, to criticize or to praise"), fostering the giving of honest testimony and enhancing litigants' and the public's confidence in the justice system.

My argument is simply that these interests should not be isolated and elevated to constitutional status as "expression" when they are more properly viewed as only part of a much more rich and complex set of sometimes competing rationales and interests which inform the justice system. In deciding whether and to what extent to constitutionalize "open courts", decision-makers should be acutely aware of those competing interests and the reality that openness is sometimes anathema to justice. The need to consider competing values of superordinate importance alongside the openness principle is emphasized in the Supreme Court of Canada's oft-cited decision in *Attorney General of Nova Scotia v. MacIntyre*.³¹

In the end, I argue here simply for an acknowledgement that "open court" and its exceptions flow from the same wellspring — the need for justice to be done. From the perspective of justice, the so-called "exceptions" are just as important as the rule. The complex rationales and sensitive balancing of the interests at play in this equation are at risk of being upset by the rather linear assertion that "public access to court" is a constitutionally entrenched guarantee under section 2(b) and that any competing considerations are "limitations" that must be "justified" under section 1.

Thus, my limited plea at this point in the argument is that if one is prepared to construct, within section 2(b), a "right of access to court", it should be thought of and constructed not as an absolute, but in a contextual manner. To the extent that access is inconsistent with justice (for example, where it would offend an accused's right to a fair trial, or threaten the security of the person of a witness) the Constitution should not recognize it. The alternative approach would potentially trivialize section 2(b) and, by relegating other justice factors (some of which are expressly constitutionally entrenched) to section 1, potentially diminish the importance of those factors. In my submission, all this is consistent with Chief Justice Lamer's acknowledgement in *Committee for the Commonwealth* that there are situations where "definitional balancing" within section 2(b) is appropriate. As the Chief Justice recognized in that case, section 2(b) of the Charter guarantees not expression by itself, but freedom of expression.

III. THE COURTS' COMMITMENT TO OPEN COURTROOMS AND THE COMMON LAW SOLUTION TO RICHMOND NEWSPAPERS

30. M.D. Lepofsky, "Open Justice 1990: The Constitutional Right to Attend and Report on Court Proceedings in Canada" in D. Schneiderman, *Freedom of Expression and the Charter* (Calgary: Thomson Professional Publishing Company, 1991) at 10-11.

31. *Attorney General of Nova Scotia v. MacIntyre* (1982), 132 D.L.R. (3d) 385 (S.C.C.) at 403; See also supra note 29 at 64-67 and *Southam Inc. v. Coulter* (1990), 75 O.R. (2d) 1 (C.A.).

Despite the absence of an entrenched Bill of Rights, the open court principle has in England enjoyed a vibrant and vigorous history. It cannot be overcome by the consent of the litigants, that is, it cannot be "waived". Concerns about "public decency", or the "unsavoury" nature of evidence, the "delicacy" of the parties, of witnesses, or the privacy interests of magistrates have all been held as being insufficient to displace the open court principle.³² The House of Lords in *Scott* carefully circumscribed the exceptions as being limited to protection of trade secrets, *parens patriae* hearings involving children and the mentally disabled, and cases where justice could simply not be done in open court.

An analysis of *Scott* and its progeny demonstrates just how easy it is in Canada (or in England) to solve cases like *Richmond Newspapers* without creating the risks inherent in an extravagant interpretation of freedom of expression as including a "right to attend" court.

To emphasize how simple a case *Richmond Newspapers* would have been if it had arisen in Canada, it is worth briefly recalling the facts. In the State of Virginia, the following provision governed judges conducting criminal trials:

In the trial of all criminal cases, whether the same be felony or misdemeanor cases, the court may, in its discretion, exclude from the trial any persons whose presence in the courtroom would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated.

On the strength of this provision, a Virginia trial judge, on the bench for barely a year, granted defence counsel's request that his client's fourth trial for the stabbing murder of a hotel manager be closed to the public. It was the validity of that order, rather than the provision under which it was made, which was under review by the United States Supreme Court.

The closure order arose in circumstances where, although the accused was initially convicted of the murder, a second trial was ordered after an appeal which excluded a key piece of evidence. The second trial ended in a mistrial when a juror asked to be excused and no alternate was available. The third trial suffered the same fate apparently because a prospective juror who read about the case in the newspaper decided that other jurors should also enjoy the "right to know". At the fourth trial, the prosecution did not object to the defence's request for a secret trial. Astonishingly, the trial judge granted the order based in part on the concern that, given the layout of the courtroom, jurors might be distracted by the presence of the public. The court articulated its other reasons in this way:

I'm inclined to agree with [defence counsel] that if I feel that the rights of the defendant are infringed in any way, [when] he makes a motion to do

32. See for example, *Attorney General v. Leveller Magazine*, [1979] A.C. 440; *R. v. Chief Registrar of Friendly Societies*, [1984] 2 All E.R. 27 (C.A.); *R. v. Felixstowe Justices*, [1987] 1 All E.R. 687 (Q.B.D.); *R. v. Malvern Justices*, [1988] 1 All E.R. 371 (Q.B.D.); *Re Crook*, [1992] 2 All E.R. 687 (C.A.).

something and it doesn't completely override the rights of everyone else, then I'm inclined to go along with the defendant's motion.

The trial judge made no findings to support the closure order. No findings were made as to exactly how the right to a fair trial would be compromised. No inquiry was made as to less restrictive orders which might address the court's concerns.

The closure order issued in *Richmond Newspapers* reflects precisely the kind of idiosyncratic, unprincipled reasoning that *Scott* rejected 80 years ago. If *Richmond Newspapers* were to arise in England, or in Canada, the solution would be simple. The order would be set aside as having been made in a manner inconsistent with the principles that inform the exercise of discretion under the enabling statute. The task of reconstructing "freedom of expression" so as to include a "right of access" to courtrooms would be wholly unnecessary.³³

It has been suggested elsewhere that notwithstanding the attraction of Canadian courts to "open justice" rhetoric, our judiciary sacrifices openness to perceived competing concerns with "surprising ease".³⁴ I do not share this view. That some (usually well publicized) exceptions exist, and that courts give the most anxious consideration to court closure applications, suggests that the vigor with which the rule was expressed and applied in *Scott* has not diminished in the hands of Canadian judges. At least one former Justice of the Ontario High Court has also made this point in a recent article.³⁵ This does not mean that, in a system run by human beings, there have not been and will not continue to be mistakes. Even rules of constitutional law cannot foreclose the possibility of judicial mistake.

Two recent cases from my home province nicely illustrate the depth of the courts' commitment to the open court principle: *John Doe v. Canadian Broadcasting Corporation*³⁶ and *Blackman v. B.C. (Review Board)*.³⁷

33. While the writer does not profess great expertise in American constitutional criminal procedure, his understanding is that the United States Supreme Court in *Richmond Newspapers v. Virginia*, 281 S.E. 2d 915 (1981), was foreclosed the less intrusive "interpretation" solution proposed here. Because that Court is not permitted to interfere with State court rulings on the interpretation of statutes, the Supreme Court must, to overturn a particular decision of a state court, find that a Constitutional right has been violated, and then find that right applicable to the States via the "Due Process Clause" to the 14th Amendment to the U.S. Constitution: see L.H. Tribe, *American Constitutional Law*, 2d ed. (New York: Foundation Press, 1988) at 772-773. The appropriateness of that process of "reading rights into" the 14th Amendment has been a source of great controversy concerning the legitimacy of judicial review in American constitutional jurisprudence: Tribe, *ibid.*

34. See J. Cameron, "Comment: The Constitutional Domestication of our Courts — Openness and Publicity in Judicial Proceedings under the Charter" in P. Anisman & A. Linden, eds., *The Media, the Courts and the Charter*, *supra* note 5 at 331-346.

35. *Supra* note 29.

36. *John Doe v. Canadian Broadcasting Corporation* (1993), 86 B.C.L.R. (2d) 202 (S.C.); stay ref'd (1993), 86 B.C.L.R. (2d) 216 (C.A.).

37. *Blackman v. British Columbia (Review Board)* (1993), 82 C.C.C. (3d) 5 (B.C.S.C.) [appeal to B.C.C.A. presently under reserve].

The plaintiff in *John Doe*, a British Columbia resident, had been involved in an American mining venture which was later the subject in that country to regulatory and criminal investigation. A television reporter sought an on-camera interview with the Plaintiff concerning his involvement with the mine, but when the interview was refused and a written exchange suggested, the reporter decided to engage in "jump interviews" — those unexpected, "in your face" interviews which receive such high ratings in American "current affairs" shows.³⁸

The plaintiff alleged that the first "jump interview" took place as the plaintiff emerged from a hotel in New York City and that the reporter, while chasing him to a hotel elevator, asked "loud, provocative and insulting" questions and made false statements concerning the plaintiff's personally being subject to the criminal or regulatory investigations. The plaintiff alleged that the second incident took place in Vancouver as he emerged from a parking lot. He was again chased into an elevator, and then back out onto the street and eventually to the offices of his counsel. During the chase, the reporter bellowed the following statements:

Isn't it true that you were in a federal prison and convicted of a drug offence in the United States? How did you manage to get into Canada? Did you tell the immigration authorities about these matters?

The plaintiff considered the reporter's conduct and statements to be defamatory and a breach of his privacy. He commenced an action against the reporter and his employer using the pseudonym "John Doe" as plaintiff. He applied *ex parte*, "in camera", before a Justice of the Supreme Court seeking orders, *inter alia*, that the court file be sealed and that all proceedings be held "in camera". On August 31, 1993, the Court granted the Order and it was served on the defendants, with liberty to set the order aside. In September 1993, the defendants applied before Boyd J. to have the Order set aside and the plaintiff resisted, arguing in the alternative for a fresh order in the same terms.

The plaintiff argued that this case was a proper exception to the open court rule because, like the trade secrets exception, to allow this matter to be litigated in open court would allow for the dissemination of the very information over which the plaintiff claims the right to privacy, thus negating the very root of the relief sought in the action.

Consistent with the spirit of *Scott*, Madam Justice Boyd not only rejected the submission, but found that the plaintiff had "not even come close" to overcoming the open court presumption. While Her Ladyship made brief reference to section 2(b) of the Charter, her judgment on the request for an "in camera" trial was informed primarily by the common law open justice principle which she accurately summarized as follows:

Since [Scott] it has been held that proceedings ought to be held in open court, except in the following circumstances: to protect the safety of a witness, to protect a child, to protect a secret process (a trade secrets case), to protect the public against moral depravity and, finally, in those cases in which the

38. Jump interviews, and other tabloid media techniques, are displayed at their unpleasant best in the recent Oliver Stone film "Natural Born Killers".

*administration of justice would be rendered impracticable by the presence of the public. In modern times, the protection of the public from moral depravity has not been relied upon as a basis for closing the courts.*³⁹

In dismissing an application for a stay of Boyd J.'s order pending appeal, McEachern C.J.B.C. recognized the competing interests at stake but made it clear that if both interests were to be protected, "I doubt if it will be by *ex parte* or other proceedings "in camera".

John Doe illustrates that where the matter lies within the discretion of Canadian courts, their commitment to open justice is alive and well. For this purpose, one does not have to create within section 2(b) of the Charter a constitutional "right of access".

Blackman further emphasizes the commitment of the courts to open proceedings. Unique among charter cases concerned with openness, and contrary to the assertion that openness is protected under section 2(b), *Blackman* raised the argument that openness is precisely what violates the Charter.

The circumstances involved a petitioner who had previously been found not guilty by reason of insanity on several counts of murder. He challenged section 672.5(6) of the Criminal Code which authorizes Review Boards and courts to exclude the public from disposition hearings concerning his future detention. Section 672.5(6) allows the public to be excluded from those hearings where it is considered "to be in the best interests of the accused and not contrary to the public interest". [emphasis added]

Blackman argued that the provision's reference to "the public interest" violated his section 7 rights because it authorizes publicity that necessarily perpetuates the stigma and prejudice caused by his crime and his illness, and adversely affects his physical and mental health. He argued further that the section violated his section 15 rights by providing him with less "privacy protection" than is given in other legislation to other vulnerable groups such as parolees and young offenders.

Brenner J. dismissed these arguments on the basis that, notwithstanding the stigma and possible prejudice to his reintegration, the section at issue gave appropriate primacy to the "presumption of openness of judicial proceedings".⁴⁰ The Court emphasized that "if public confidence in the regime under Part XX.1 is to be maintained it is essential that the hearings be open in all but the most compelling of cases".⁴¹ In response to the argument, relying on *R. v. Mills* and *R. v. Morgentaler*, that excessive exposure to the vicissitudes of the criminal process can amount to a breach of security of the person, Brenner J. stated:

Assuming that security of the person does encompass the right to be free from serious state-imposed psychological stress at least in the criminal justice

39. *Supra* note 36 at 211.

40. *Supra* note 37 at 19-20.

41. *Ibid.* at 20.

*context, the standard is a high one. Contact with the criminal justice system is psychologically stressful — it is only where there is government action which results in a demonstrably profound impact on the individual that the principle stated by Dickson C.J.C. [in Morgentaler] should be invoked.*⁴²

In my respectful view, this high standard sets out an entirely appropriate resolution of the need to balance openness and personal security and privacy. Along with *John Doe, Blackman* illustrates the commitment of British Columbia courts to openness of their proceedings.

IV. THE CHARTER OFTEN ADDS NOTHING TO THE ANALYSIS

It has been my thesis to this point that in circumstances where the matter is left to the discretion of the courts, it is simply not necessary to address the question whether section 2(b) of the Charter encompasses the right to attend court. Where the matter lies in the court's hands, the common law goes along just fine.

I would however go further and assert that even where courts are willing to imply a "right to attend" in section 2(b) — and notwithstanding my concerns expressed earlier about the risks of overemphasizing "access" by entrenching it in absolute terms in section 2(b) — there are cases where the addition of the Charter seems to add very little to the substantive outcome of the question. A nice illustration of this observation is the decision of the Ontario Court of Appeal in *Southam Inc. v. Coulter*.⁴³

At issue in *Coulter* was, *inter alia*, the correct statutory construction of section 507(1) of the *Criminal Code*. That section deals with "private informations". It allows a justice of the peace to hold a "pre-inquiry" to determine whether a case has been made to compel persons named in the private information to answer the offences charged. The issue was whether, either as a matter of statutory construction or under the Charter, these "pre-inquiries" were required to be open to the public.

In considering the statutory construction issue, the Court quite properly had regard to the balancing test which underscores the common law principles expressed in *Attorney General of Nova Scotia v. MacIntyre*. As noted by Krever, J.A.:

It is the concern for both the protection of the innocent and the effective administration of justice that justifies an exception to the principle of public access to judicial proceedings.

[...]

42. *Ibid.* at 28.

43. *Southam Inc.*, *supra* note 31.

Although the public nature of judicial proceedings is strongly endorsed in the decision, the MacIntyre case is authority for the existence of a departure from the general rule when it is necessary to do so to protect social values of superordinate importance. Two of these values, the court held, are the protection of the innocent and the prevention of frustration of the effective administration of justice.⁴⁴

In applying this test, the Court found compelling reasons for construing the section so as to apply "in camera". To allow the "pre-inquiry" to be conducted in public would cause harm to innocent persons where a court found the information was specious. It would also adversely affect the administration of justice by thwarting the apprehension of those charged where the case for a warrant has been made out. These overriding policy considerations justify an "in camera" construction to section 507(1).

Justice Krever's judgment masterfully demonstrates that the statutory construction question is not an arid, technical exercise. It is necessarily informed by a process of considering and balancing common law policy considerations in a contextual fashion. In many respects, the process bears striking similarity to the question whether to imply a duty of fairness at common law.

What would the introduction of section 2(b) of the Charter add to any of this? The answer, as the judgment shows, is "nothing".

The obligatory Charter argument was that if the section, properly construed, did not allow public access, then the section should be struck down as an unconstitutional encroachment on "freedom of expression". It will not surprise readers to discover that there was a certain redundancy about this argument, and the Court's treatment of it. After citing *Edmonton Journal v. Alberta (Attorney General)*, and acknowledging the Attorney General of Ontario's concession that section 2(b) of the Charter embraces a right of access to a pre-inquiry, the Court went on to consider section 1. The Court's section 1 analysis greatly resembled its common law balancing analysis and the Court sustained the section as a reasonable limit on section 2(b).

44. *Attorney-General of Nova Scotia*, *supra* note 31 at 10.

V. WHAT ABOUT MANDATORY CLOSURE PROVISIONS WHICH MANIFESTLY OFFEND THE OPEN COURT PRINCIPLE?

In response to the foregoing, proponents of constitutionalizing a right of "access to the courts" in section 2(b) of the Charter will no doubt eagerly argue that such a right is, far from being redundant, manifestly necessary to ensure that we do not fall victim to regressive legislative provisions purporting to bar access to the courts altogether.

It is my thesis that this risk is overstated, that it can be addressed, if necessary, by arguments outside section 2(b) of the Charter, and that the risks attendant on including a "public right of access" within section 2(b) are significantly greater.

A. The argument against a section 2(b) "right of access"

The 1989 decision of the Supreme Court of Canada in *Irwin Toy* is without doubt the leading Canadian decision on freedom of expression. Its impact has been as profound for section 2(b) as *Oakes* was for section 1. Its influence is so pervasive that counsel and courts as often pose the question whether government action violates "*Irwin Toy*" as they do whether that action violates freedom of expression. The *obiter dicta* which constitute its formula for deciding section 2(b) questions have attained almost talismanic status.

In an important article, D. Lepofsky recently levelled a powerful critique of *Irwin Toy*.⁴⁵ Part of Lepofsky's thesis is that no single "magic formula" can or should, particularly at this stage in our constitutional development, dictate the results of free expression cases in contexts which can differ so radically from one another. Lepofsky's thoughtful article should be required reading for anyone undertaking serious consideration of the future of Canadian constitutional adjudication under section 2(b) of the Charter.

For all the areas of the *Irwin Toy* test which Lepofsky argues require critical re-assessment, he does not (and could not) take issue with the proposition that lies at the root of the *Irwin Toy* test — namely, that expression is something unique, "something less than the totality of human conduct".⁴⁶ It is precisely because expression is something less than the totality of human conduct that there must, of necessity, be some initial test for identifying "expression" and for distinguishing expression from activity which is not expression. Failure to do so would overshoot the purpose of this Charter freedom, a

45. D. Lepofsky, "The Supreme Court's Approach to Freedom of Expression — *Irwin Toy v. Quebec (Attorney General)* — And the Illusion of Section 2(b) Liberalism" (1993) 3 N.J.C.L. 37.

46. F. Schauer, *Free Speech: A Philosophic Enquiry* (Cambridge: Cambridge University Press, 1982) at 91, cited with approval in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 968 and in *Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 at 1180.

freedom concerned with the dissemination of information, ideas and opinions — with "all expressions of the heart and mind".⁴⁷

This basic proposition — that not all human activity can be equated with "expression" — must lead us to think critically about the arguments of those who, in the name of a "purposive" approach to the Charter, argue that section 2(b) embraces the right to attend court. Proponents may argue, for example, that because the open court advances some of the same purposes as expression, and because Charter rights are understood in relation to their purposes, the right to attend court must, applying the "purposive approach" to Charter interpretation, be regarded as part of protected expression.⁴⁸

This argument seems to take the purposive approach much too far. While the purposes of a right or freedom help to define its scope, those purposes are not a substitute for the definitional limits inherent in the articulation of the words carefully chosen to describe the rights and freedoms themselves. The term "expression" is not so uncertain, and the courts' approach to language is not so nihilistic, that the language used to express the concept must be discarded and replaced with a test which defines rights only with regard to certain judicially articulated purposes. Using a provision as a mere textual peg is potentially limitless. It should be self-evident for example that while "self-fulfillment" is one of the core purposes of free expression, not every activity that is self-fulfilling constitutes expression. If this were not so, "expression" would envelope virtually every other Charter right,⁴⁹ and virtually obliterate any meaningful attempt to distinguish between expressive and non-expressive action. Moreover, it does not seem reasonable to suppose that section 2(b) would speak specifically to government interference with expression if its drafters had intended to create a right to know and a concomitant duty on government to provide access to information.⁵⁰

The necessity for distinguishing activity which is expression from that which is not expression was thus properly recognized in *Irwin Toy Ltd.*:

*Clearly, not all activity is protected by freedom of expression [...].*⁵¹

47. *Irwin Toy Ltd.*, *ibid.* at 968.

48. D. Lepofsky, *Open Justice: The Constitutional Right to Attend and Speak about Criminal Proceedings* (Toronto: Butterworths, 1985) at 219-220. While some readers may find it rather ironic that I am citing Mr. Lepofsky with approval in some contexts and disapproval in others, I want to assure my readers that, since writing his book in 1985, Mr. Lepofsky has repented and undergone a conversion on the question of how far section 2(b) extends.

49. It was precisely this type of argument that persuaded Lamer J. (as he then was) in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code* (1990), 56 C.C.C. (3d) 65 at 100 (S.C.C.) that the term "liberty" in section 7 must be regarded as a term of art: "If liberty or security of the person under section 7 of the Charter were defined in terms of attributes such as dignity, self-worth and emotional well being, it seems that liberty under section 7 would be all inclusive. In such a state of affairs there would be serious reason to question the independent existence in the Charter of other rights and freedoms [...]."

50. See generally, *Capital Cities Media Inc. v. Chester*, 797 F. 2d. 1164 (3d. Cir. 1986) at 1168.

51. *Supra* note 46 at 967.

*If the activity is not within s. 2(b), the government action obviously cannot be challenged under that section.*⁵²

Some activity is expression, some is not. *Irwin Toy Ltd.* teaches that the distinction between the two lies in the attempt to convey meaning:

*"Expression" has both a content and a form [...]. Activity is expressive if it attempts to convey meaning.*⁵³

*Of course, while most human activity combines expressive and physical elements, some human activity is purely physical and does not convey or attempt to convey meaning. It might be difficult to characterize certain day-to-day tasks, like parking a car, as having expressive content. To bring such activity within the protected sphere, the plaintiff would have to show that it was performed to convey a meaning.*⁵⁴ [emphasis added]

The onus is on the person performing the activity to demonstrate that the activity, for instance parking a car, *attempts* to convey meaning to others.⁵⁵ It is a test which recognizes that in the context of a freedom whose purpose is to protect information, ideas and opinions, what is really being protected is speech or activity akin to speech.

Does the act of walking into a courtroom, sitting down and observing the proceedings constitute an attempt to convey meaning to others? It is my view that in the vast majority of cases, the answer to this question is "no". While it is possible to construct examples where attending court is an attempt to convey meaning to others, these marginal examples are not a basis to fashion a constitutional right "at large". This is not to say that the ability to attend court is unimportant. On the contrary, it is properly recognized in a fundamental precept of the common law. It is an important political ideal.⁵⁶ But that does not — except if we are willing to give the term such a minimalist definition that it is indeed synonymous with "all activity" — make it "expression". One can read John Stuart Mill's *On Liberty*⁵⁷ in vain for any reference to "the right to attend court".⁵⁸

52. *Ibid.* at 968.

53. *Ibid.*

54. *Ibid.* at 969.

55. See *Lavigne v. Ontario Public Service Employees Union* (1991), 81 D.L.R. (4th) 545 at 640 (S.C.C.), La Forest J. (Sopinka and Gonthier JJ., concurring).

56. See D. O'Brien, "Reassessing the First Amendment and the Public's Right to Know in Constitutional Adjudication" (1980) 26 Vill. L. Rev. 1 at 8.

57. J.S. Mill, *On Liberty* (London: John W. Parker and Son, 1859).

58. In its Working Paper, at 7-8, the Law Reform Commission of Canada in fact cites a passage from *On Liberty* in support of the suggestion that "openness" (in the sense of access) was part of Mill's thesis on the unlimited right to express oneself. Suffice to say that I do not take Mill to be saying anything more than there should be an unlimited right to express oneself openly. It is doubtful whether Mill would have supported openness at the expense of an accused's right to a fair trial.

Critics will, however, reply that if court attendance is not itself expression, it is "necessarily incidental" to the right to report and comment on court proceedings — the latter activity clearly falling within the heart of freedom of expression.⁵⁹ Reference will be made as well to the proposition that "newsgathering" is (or ought to be) protected under section 2(b) and that freedom of expression serves the interests of "listeners" as well as those of speakers. It was these kinds of arguments that moved the United States Supreme Court in *Richmond Newspapers*⁶⁰ to acknowledge a "free speech" right to attend judicial proceedings. Such reasoning also appears to have held sway among some members of the Supreme Court of Canada.⁶¹

It is worth spending a few moments of critical reflection on these assertions.

It must be remembered that the freedom protected by section 2(b) is freedom of expression, and that while it is true that both the speaker and the listener have "an *interest* in freedom of expression",⁶² this is not the same thing as saying that section 2(b) protects a whole category of undefined rights called "listener's rights" existing and enforceable quite apart from the receipt by a willing listener of a message conveyed by a willing speaker. It must be recalled that section 2(b) of the Charter, consistent with the Charter generally, operates as a restraint on government action. It does not give "listeners" any affirmative right other than to have the government not interfere with a willing speaker's expression. Nor does it afford "the media" special rights to information over and above those enjoyed by the public.⁶³

59. As articulated by D. Lepofsky, *supra* note 48 at 219: "Section 2(b) prohibits official action whose purpose and proximate effect is the imposition of a burden on the exercise of free expression".

60. *Supra* note 33 at 988-989.

61. See for example the *obiter dicta* comments of La Forest J. in *Canadian Broadcasting Corp. v. Lessard* (1992), 67 C.C.C. (3d) 517 (S.C.C.) and the reasons of Cory J. in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker, House of Assembly)* (1993), 100 D.L.R. (4th) 212 at 252-258 (S.C.C.) ("*Donahoe*"). Compare the concurring reasons of Sopinka J. in *Donahoe* at 246 where His Lordship is not prepared to pronounce on the question whether section 2(b) protects the "means by which" news is "gathered". As is appropriate, I should disclose that I acted as counsel for the Attorney General of British Columbia in the *Donahoe* case. As to the *Lessard* case, it should be noted that no constitutional question was set in that case. Attorneys General were accordingly not given notice of the case and thus had no opportunity to advance arguments concerning the broad implications of the broad right to "gather news".

62. *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712 at 760.

63. I do not intend to devote a great deal of time to the assertion that the Charter confers "special rights" on the media. On this point, I would simply observe that even on the expansive American approach to free speech, the media in that country do not enjoy greater rights of expression and access to information than the public: see *Houchins v. KQED Inc.*, 98 S. Ct. 2588 (1978). See also the concurring opinion of L'Heureux-Dube J. in *Canadian Broadcasting Corporation v. Lessard* (1992), 67 C.C.C. (3d) 517 (S.C.C.), adopted by Maczko J. in *Bank of British Columbia v. Canadian Broadcasting Corporation* (1994), 108 D.L.R. (4th) 178 at 185 (B.C.S.C.); see also *National Bank of Canada v. Melitzer* (1992), 84 D.L.R. (4th) 315 at 320-321, 324 (Ont. S.C.), and see generally D. Lepofsky's excellent discussion of the question in *Open Justice 1990*, *supra* note 30 at 79-84. Lepofsky exposes the legal errors attendant on viewing uncritically media rhetoric such as the media being the "agent of the public" and the assertion of the "public's right to know". Lepofsky also challenges the validity of an asserted media "duty" to inform the public about the justice system in circumstances where "most court cases are not perceived as being the least bit newsworthy by

The argument that an activity that is manifestly not expression should be defined as expression simply because, in functional terms, it assists expression, admits of no principled limits, even with a form of "necessarily incidental" limitation. If access to court is guaranteed because it is "necessarily incidental" to the expressive activity of reporting about court, why is access to the judge's chambers not *prima facie* guaranteed on the basis that it is "necessarily incidental" to the expressive activity of reporting about the internal workings of the judiciary? Indeed, on what principled basis would it be possible to limit our application of the necessarily incidental test to requests for "access"? Wealth, a good education, a lap top computer and an exemption from breaking and entering laws might all be absolutely essential for persons to express themselves meaningfully in ways that are now impossible and in ways that might ultimately fulfill all of the core purposes of free expression. Is it to be the law of the Canadian Constitution that government limits on all these things will constitute a violation of freedom of expression, subject only to uncertainties of section 1, the benefit of which governments will moreover only be able to obtain where the government imposed impediments are "prescribed by law"?⁶⁴

It is precisely because of these concerns that American courts have, despite the narrow exception carved out in *Richmond Newspapers* and subsequent cases,⁶⁵ refused to

reporters". To those who would assert "special media rights", Lepofsky articulates the following contextual reality, at 83:

[...] It is not appropriate to fashion open justice rules or principles on the premise that the media effectively informs the public about the overall court system or that it effectively and comprehensively ensures judicial accountability. This is not to denigrate the media's important role in covering courts. The media serves in practice as the lifeline of an open justice system, since it is largely from the media that the public have any hope of knowing what goes on in courts, once their doors are open to public attendance. However, this lifeline must be understood as a limited one, an imperfect one, and one whose effectiveness and objectives should not be exaggerated.

Arguments against special press rights have also been advanced on the footing that "to the degree to which the press is alone in its enjoyment of freedom, to that degree is its [own] freedom imperilled". The argument is that the press is so unpopular that the conferral of special rights on the press could be used to justify the imposition of special duties. Others have expressed a similar view: "A press that continually applies to the courts for the vindication of the right to gather information cannot credibly be the same press that tells the same courts that what the press prints and why it prints it are not matters of that courts may even consider". See A. Lewis, "A Preferred Position for Journalism?" (1979) 7 *Hofstra L. Rev.* 595 and F. Abrams, "The Press is Different" (1979) 7 *Hofstra L. Rev.* 563.

64. Of course, it should be noted that in many circumstances the government would be unable to rely on section 1 because government limitations to places or information are not "prescribed by law" but are rather a matter of policy, convention, or discretion.
65. In cases involving the justice context, the U.S. Supreme Court appears to have adopted a limited First Amendment "right of access" — if there is a "tradition of access" to the proceeding, and access would play "a significant positive role in the functioning of the process in question", a "qualified" first amendment right of access attaches, a right which may be restricted by an overriding and narrowly tailored government interest: see *Press Enterprise Co. v. Superior Court*, 106 S. Ct. 2735 (1986); and see generally, M.J. Hayes, "What Ever Happened to 'The Right to Know'? Access to Government-Controlled Information Since *Richmond Newspapers*" (1987) 73 *Va. L. Rev.* 1111 at 1118-1121. As Tribe pointed out in 1988, however, "the contours and the growth potential of the principles established [in *Richmond Newspapers*] are far from definite": L.H. Tribe, *American Constitutional Law* (2d ed., 1988) at 961-962.

recognize a general first amendment right of access to government information. As noted by the Court in *Zemel v. Rusk*, "[t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow".⁶⁶

In many ways, it is surprising that the "necessarily incidental" approach would have much sway given the court's proper recognition in the context of other rights and fundamental freedoms of the need for definitional limits to avoid "trivializing" and overextending other rights and freedoms. A good example is freedom of association guaranteed by section 2(d) of the Charter. The Supreme Court of Canada has quite properly recognized that freedom of association includes the right to associate and form a trade union. However, it has rejected the argument that constitutional status should also attend the "right to strike" as something "necessarily incidental" to the formation of a trade union.⁶⁷ The court recognized the breathtaking sweep of a constitutional right to carry out any "essential object" an association may wish to pursue. The court has been equally vigilant in ensuring proper definitional and conceptual limits on freedom of religion⁶⁸ and equality rights.⁶⁹

In the open court context, the "necessarily incidental" argument really amounts to an attempt to assert a constitutional right of access to information, a right which is not and cannot be limited to what goes on inside courtrooms.⁷⁰ As noted by Professor Be Veir, despite Chief Justice Burger's attempt to limit his decision in *Richmond Newspapers* by referring to the historical precedent for open courtrooms, "much of the opinion's first amendment discussion is as plainly pertinent to governmental activities that do not have a history of openness as those that do". The policy arguments concerning the need for information to ensure the integrity of the administration of justice can be (and are) made in just as passionate a fashion about information concerning and in possession of other

66. *Zemel v. Rusk*, 381 S. Ct. 1271 (1965) at 1281. In *Zemel*, the plaintiff argued that the American government's ban on travel to Cuba violated the First Amendment right of citizens to gather information on the effect of government policies.

67. See *Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313.

68. See *Young v. Young* (1993), 108 D.L.R. (4th) 193 (S.C.C.) wherein the judgments of both L'Heureux-Dube J. and McLachlin J. recognized inherent limitations on both freedom of religion and freedom of expression.

69. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. See also P. Hogg, *Constitutional Law of Canada*, 3d ed. (Ontario: Carswell, 1992) at 813, where the author advocates a "definitional balancing" approach to the rights and freedoms so as to minimize the prospect that section 1 analysis will become so amorphous that it will be "even more unpredictable than it is now". Indeed, recent cases of the Court reflect a greater willingness to engage in definitional balancing even within section 2(b): see for example *Shell Products Ltd. v. Vancouver (City)* (1994), 110 D.L.R. (4th) 1 (S.C.C.) at 38, where McLachlin J., for the 4 members of the Court who addressed this point, dismissed as "trivial" Shell's assertion that the limitation on its ability to contract with the City was a violation of its freedom of opinion on the matter of continuing to do business with South Africa. Also see *Young v. Young* *ibid.* at 257, wherein L'Heureux-Dube J. qualified freedom of expression so as to prevent it from reaching speech detrimental to a child's best interests and McLachlin J. at 275-276 reached the same result by emphasizing the need to reconcile the *prima facie* broad expression freedom with the narrower freedom of religion.

70. L. BeVier, "Like Mackerel in the Moonlight: Some Reflections on *Richmond Newspapers*" (1982) 10 Hofstra L. Rev. 311 at 326.

organs of the State. If the asserted "right of access" is predicated on the public's need for information concerning the operations of government, then a stronger case for access might be made for places where public access is customarily limited. Tradition is neither a logical nor principled limiting factor for those who would assert a justification for a constitutional right of access in a free expression context. One should also be alive to the reality that for Canadian courts, tradition is rarely accepted as a basis for limitations on constitutional rights. A constitutional right of access to information under section 2(b) would be very difficult to confine to the justice context.

Thus, the logical extension of the apparently laudatory notion that "access to courts" is protected under section 2(b) is the proposition that section 2(b) implies a form of "constitutional Freedom of Information Act" under which the judiciary becomes the ultimate arbiter at large, of what the public does and does not have the right to know. Catch phrases like "the right to gather news", "listeners' rights" and "the right to know" are all part of this movement. They lead inevitably to very sweeping assertions such as the one accepted by the Federal Court of Appeal in *International Fund for the Protection of Animal Welfare Inc. v. Canada*⁷¹ that, on an "expansive and purposive" interpretation of section 2(b), "freedom of expression must include freedom of access to all information pertinent to the ideas or beliefs sought to be expressed".

In *Travers v. Chief of Defence Staff* (1994),⁷² the Federal Court of Appeal's language in *I.F.P.W. v. Canada* was used as the basis for an argument before that Court that the media have the right under section 2(b) to attend an inquiry conducted under the *National Defence Act*.

Not surprisingly, the Federal Court of Appeal recognized the implications of the potentially limitless right of "access to all information pertinent to ideas sought to be expressed" and narrowed the scope of its previous judgment. The Court summarily rejected an argument that the media have a right enforceable under section 2(b) of the Charter to attend an inquiry conducted under the *National Defence Act*. As noted by Hugesson J.A., for the Court:

*The appellants seek to take some comfort from this Court's decision in FAW v. Canada. That case had to do with a regulation whose effect was to deny the media and others access to an open, public, commercial seal hunt carried out on the ice of the Gulf of St. Lawrence. To attempt to read it as creating a general journalistic right of access to anything which may be of interest to the media is to rip it from its context and to confound journalistic interest with public interest. By the same token we can see nothing in any of the differing opinions given in Committee for the Commonwealth of Canada v. Canada which would turn section 2(b) of the Charter into a key to open every closed door in every government building and requiring section 1 justification to keep it closed.*⁷³

71. *International Fund for Animal Welfare Inc. v. Canada* (1989), 45 C.C.C. (3d) 457 at 467 (F.C.A.).

72. *Travers v. Chief of Defence Staff* (15 June 1994) (F.C.A.) [unreported].

73. *Ibid.* at 2.

Justice Killeen made similar observations in *National Bank of Canada v. Melnitzer*.⁷⁴ In that case, a media organization attacked as unlawful a court order under section 147(2) of the *Ontario Courts of Justice Act, 1984*⁷⁵ which sealed the minutes of a meeting between a prominent lawyer and a receiver, which minutes pertained to ongoing civil and criminal proceedings in relation to the lawyer. In rejecting the argument that the Court's discretion to seal the file had anything to do with section 2(b) of the Charter, Killeen held as follows:

*It is to be noted that freedom of the press is set out in s.2(b) as an included fundamental freedom under the broader rubric of "freedom of thought, belief, opinion and expression...". This included position of the free-press principle must have been deliberate on the part of Parliament and can hardly mean that freedom of the press was meant to be broader in sweep than the freedom or freedoms of which it is expressly stated to be a part. I say this not to denigrate the vital principle of a free press but simply to state that it is not a limitless freedom which gives the press, or other media, a preferred position in our constitutional scheme of things. 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 circumstance to any and all information and documentation which might be extant in civil or criminal litigation.*⁷⁶

To manufacture a constitutional "right to know" in section 2(b) would not only be conceptually problematic and difficult to contain, but would have the side effect of entangling the judiciary in the unprecedented exercise of deciding, at large, what the public does and does not have the right to know. It would impair the flexibility of Parliament and provincial legislatures to devise and experiment with their own schemes for freedom of information. It would also, in the end, require judges to answer questions about access which in many areas stray beyond their legitimate function and expertise. It should be apparent that the task of the court in defining, at large, the nature and scope of a constitutional right of access is quite a different proposition from the courts' exercise of their inherent judicial review function in circumstances where an elected legislature has itself defined the circumstances under which such information might be available.⁷⁷ Considered "at large", there is no principled constitutional basis for deciding which government information must be made available and which need not.⁷⁸ Moreover, I would

74. *National Bank of Canada v. Melnitzer* (1991), 84 D.L.R. (4th) 315 (Ont. Ct. Gen. Div.).

75. *Courts of Justice Act*, S.O. 1984, c. 11.

76. *Ibid.* at 320-321.

77. See for example, British Columbia's new *Freedom of Information and Protection of Privacy Act*, S.B.C. 1992, c. 61.

78. See *Capital Cities Media Inc. v. Chester*, 797 F.2d 1164 (3d Cir. 1986) at 1172: "Initially, at least, the values assigned to competing secrecy interests necessarily would involve standardless decisionmaking"; and see *Houchins v. KQED Inc.* 57 L.Ed. 2d. 553 at 563 (1978): "The respondents' argument is flawed, not only because it lacks precedential support [...], but also because it invites the Court to involve itself in what is clearly a legislative task which the Constitution has left to political processes.

suggest that an "at large" judicial discretion to determine what government may or may not disclose potentially intrudes on the constitutional prerogatives of the other branches of government.

A broad and general right to receive information, without regard to whether there exists a willing speaker, calls into question under section 2(b) laws relating to trespass, theft, copyright, privacy, eavesdropping, all of which would be unconstitutional unless saved by section 1. The Charter's framers cannot have intended section 2(b) to have had the sweeping effect of affording "listeners" the right to know whatever they wish, subject only to section 1 of the Charter and unrelated to a person's exercise of free expression.

If section 2(b) conferred on listeners the right to any information they please whether or not a person wished to impart the information, this would directly conflict with the speaker's liberty and expression and might improperly require government to impart different information and opinions to the interested listener. As noted by Baldasty and Simpson, "[i]n [American] cases involving the 'right to know', it is significant that the rights of the speaker have been consistently subordinated to listener rights, and thus often curtailed".⁷⁹ Finally, I would address the argument that the claimed "right of access" to court under section 2(b) is nothing more than an extension of the "public forum doctrine" which governs the rights of the public to assemble and express themselves in public places. As has been suggested elsewhere,⁸⁰ a public forum, unlike a courtroom, is a place where individuals go "to disseminate their message to other members of the public who have gathered there". To call the mere act of "attending" expression simply because it is linked to subsequent expression is simply a restatement of the "necessarily incidental" argument addressed above. That the picketing of a courthouse is so offensive⁸¹ shows just how different a courthouse is from public fora like streets and parks which enjoy a legitimate tradition of public assembly and debate.

In summary, I would argue that attendance at court is not, in and of itself, expression. To attempt to protect it as expression because of its relationship to subsequent reporting is not consistent with the accepted approach to the other fundamental freedoms, and is difficult to limit in any principled fashion. It all leads to the unpleasant prospect of having courts arbitrate what the public does and does not have the right to know by way of the creation of a constitutional Freedom of Information Act.

The constitutional content of the phrase "the right to listen" ought not to be defined without a critical analysis of both its content and consequences. While the phrase has an emotive appeal, it should, in law, be properly understood as a component or aspect of the freedom of expression — namely, the freedom to receive a message that a speaker

[...]. Because the Constitution affords no guidelines, absent statutory standards, hundreds of judges would...be at large to fashion ad hoc standards, in individual cases, according to their own ideas of what seem "desirable" or "expedient" (Burger J., plurality opinion).

79. G.J. Baldasty and R.A. Simpson, "The Deceptive 'Right to Know': How Pessimism Rewrote the First Amendment" (1981) 56 Wash. L. Rev. 365 at 395.

80. See the Factum of the Attorney General for Ontario in *Donahoe*.

81. *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214.

wishes to send to you. Similarly, there is nothing offensive about a "right to gather news" provided the concept is limited to a right, within the means permitted by law, to gather information. It should not be interpreted as a constitutional right of access to news sources.⁸²

B. If section 2(b) of the Charter does not include a right of access to courts, how do we protect ourselves against patently regressive mandatory closure provisions?

In answering this question, I begin with the proposition that the risk of Parliament or legislatures launching an assault on the open court principle is overdrawn. Open courts represent a strong "political ideal" and this common law ideal is manifest in numerous statutory provisions recognizing this presumption. As evidenced by the adoption of access to information legislation across Canada, governments are embracing rather than rejecting openness. The task of constructing constitutional rights to fend off hypothetical government violations with little foundation in reality is a perilous one at best.

However, the question must be directly confronted in relation to provisions like section 12(1) of the old *Juvenile Delinquents Act*.⁸³

12(1) The trials of children shall take place without publicity and separately and apart from the trials of other accused persons, and at suitable times to be designated and appointed for that purpose.

In 1981, the Supreme Court of Canada held that "without publicity" meant "in camera".⁸⁴ The issue was thus joined. Was the right of the public to attend court constitutionally protected, and if so, was it protected under section 2(b)?

Less than one year after the Charter had come into force, the Ontario Court of Appeal answered both questions in the affirmative in *Re Southam Inc. and The Queen*.⁸⁵ Understandably, very little attention was given to the proper conception of "expression" and the implications of the Court's decision for future cases. Looking to the *Richmond Newspapers* decision, and emphasizing the virtues of the open court principle, the Court was prepared to read into section 2(b) a constitutional right, at large, to attend court, which right could be limited only by section 1.

Quite apart from the questions whether this decision is consistent with the Court's subsequent decision in *Irwin Toy* and whether, given its implications, it should be

82. See *Houchins v. KQED Inc.*, *supra* note 63 at 562-563, Burger J., for plurality.

83. *Juvenile Delinquents Act*, R.S.C. 1970, c. J-3.

84. *C.B. v. The Queen* (1982, 62 C.C.C. (2d) 107 (S.C.C.)).

85. *Re Southam Inc. and The Queen (No. 1)* (1983), 41 O.R. (2d) 113 (C.A.).

the law of the Constitution, questions also arise whether the Court, in citing *Richmond Newspapers*, extended the scope of *Richmond Newspapers* beyond what its American authors ever intended. It will be recalled that in both the plurality decision of Chief Justice Burger, and the concurring opinion of Mr. Justice Brennan, the justification for access to criminal trials lay in the longstanding tradition of open criminal courtrooms — in Justice Brennan's words "an enduring and vital tradition of public entree". By implication, where no such tradition existed, the recognition of such a right would be much more problematic.⁸⁶

For crimes committed by juveniles, a history of access is much more difficult to establish. On the *Richmond Newspapers* test, the fact that "the section has been on Canadian statute books since 1908" would have been extremely significant. To its credit, the Court in *Southam (No. 1)* seriously considered the question (albeit in the context of section 1) and determined that it was very difficult to determine any clear common thread to the treatment of juvenile crime cases, although a judicial discretion to impose closure seemed to be the majority view. This is, however, far from the "enduring and vital tradition of public entree" which justified the "penumbral" right created in *Richmond Newspapers*.⁸⁷

If the Ontario Court of Appeal's decision in *Southam (No. 1)* is not followed, does this mean that there is no effective check on the ability of governments to legislate secret trials?

To this question, I would offer a number of answers.

First, I believe it to be a satisfactory answer to suggest that the presumption of openness is such an important political ideal for Canadians, that those who would parade horrors about secret trials do not have a proper perception of political reality or judicial attitudes.⁸⁸ Indeed, it is not without significance that by the time section 12(1) of the *Juvenile Delinquents Act*⁸⁹ came before the Ontario Court of Appeal in *Southam (No. 1)*,

86. I concede that in a later decision, a majority of the United States Supreme Court was willing to look beyond the particular *type* of proceeding in deciding whether history supported a right of access. In *Globe Newspaper Inc. v. Superior Court* 73 L.Ed. 2d. 248 (1982) the Court held that a state statute closing all trials involving minor victims of sexual offences violated the *Richmond Newspapers* principle because of the history of openness of criminal trials generally. I am not certain however that juvenile delinquent proceedings would fall to be decided on the same basis. See next footnote.

87. It has in fact expressly been held that juvenile proceedings do not meet the *Richmond Newspapers* test: see *In re J.S.* 438 A.2d. 1125 (1981).

88. As John Hart Ely has noted in his important book, *Democracy and Distrust, A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980) at 183: "It is an entirely legitimate response to [a law that would never be enacted] to note that it couldn't pass and refuse to play any further. In fact, it can only deform our constitutional jurisprudence to tailor it to laws that couldn't be enacted, since constitutional law appropriately exists for those situations where representative government cannot be trusted, not those where we know it can".

89. *Supra* note 83.

Parliament had already enacted (but not yet proclaimed) the *Young Offenders Act*,⁹⁰ which legislated an open court discretion.⁹¹

Second, in cases like section 12 of the *Juvenile Delinquents Act*, where legislation does mandate closed trials, Parliament is almost always pursuing objectives of superordinate importance. Whether the "means used" to achieve the objective impair are a reasonable limitation on open court is a policy decision admitting of no self-evidently correct answer. The evidence adduced at Southam's subsequent challenge to section 39(1)(a) of the *Young Offenders Act*,⁹² illustrated that the mandatory ban imposed by the previous legislation was, while controversial, hardly irrational given the special position of children and the unique objectives of legislation concerned with crimes committed by children.⁹³

Third, if a case were to arise in which a legislature were to enact an arbitrary and manifestly offensive closure provision, it is my view that other constitutional arguments would be much more appropriate.

In the context of penal proceedings, section 11(d) explicitly provides accused persons with the right, *inter alia*, to a "public hearing":

11. *Any person charged with an offence has the right*

[...]

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

Given that the Charter addresses the question of open trials directly in section 11(d), why all the "sound and fury" around creating such a right within section 2(b)? Those who assert that reliance on section 11(d) is "problematic" argue that it provides insufficient protection to the open court principle partly because of its definitional limits

90. *Young Offenders Act*, R.S.C. 1985. c. Y-1.

91. On this point, the history of the *Punishment of Incest Act* (U.K.), 1908, c. 45 in England, is also noteworthy. The statute, in its original form, required all proceedings to be conducted "in camera". By 1934, Parliament repealed the provision because, according to one observer, "it was found that such acts were often committed in ignorance that they were criminal": see Law Reform Commission of Canada, Working Paper 56, *supra* note 58 at 17.

92. See *Re Southam Inc. and the Queen* 1985, 48 O.R. (2d) 678 (H.C.J.); app. dismissed (1986), 53 O.R. (2d) 663 (C.A.).

93. See P.J. Monahan and A. Petter, "Developments in Constitutional Law: The 1985-86 Term" (1987) 9 Sup. Ct. L. Rev. 69 at 109-110: "Laws may be enacted for reasons we happen to disagree with, but it seems implausible to suppose that laws are enacted for no reasons at all [...]. The only real function of the rational basis test is to make the judicial balancing of interests less apparent and thus seemingly more legitimate". See also F.S. Cohen, "Transcendental Nonsense and the Functional Approach" (1930) 33 Col. L. Rev. 808 at 819: "Taken seriously, this conception [of a rationality standard] makes of our courts lunacy commissions sitting in judgment upon the mental capacity of legislators and, occasionally, of judicial brethren".

(that is, it applies only to persons charged with an offence) and partly because, being the right of an accused (rather than the public), its exercise is exclusive to the accused, who can choose to waive it. It is said that in cases where an accused might wish to apply under a statutory closure provision, section 11(d) would not allow the public or press to step in and assert any form of a "public right to know" in relation to judicial proceedings.

The latter argument — that section 11(d) provides insufficient protection because the accused can waive it — is not persuasive. As unanimously agreed by the United States Supreme Court in *Gannett v. DePasquale*,⁹⁴ the constitutional right of an accused to a public hearing does not guarantee the right to a private trial. Section 11(d) acts as a shield against secrecy, not a sword to compel it. Thus, even if an accused were to state a desire to have a secret trial, this would not affect the responsibility of the court to decide, according to common law principles — which include consideration of the societal interest in open courtrooms — whether closure is necessary. Thus, where the court is operating in the context of discretionary closure provisions, the balancing of the common law, discussed above, addresses the issue.

In the case of mandatory secret trial provisions like section 12(1) of the *Juvenile Delinquents Act*, section 11(d) would allow any accused — or, if the court were satisfied that, in practical terms, the section would not otherwise be challenged — an individual under public interest, standing to challenge the mandatory nature of the section and to have it declared unconstitutional under section 52 of the *Constitution Act, 1982*.⁹⁵ This, indeed, is precisely what occurred in *Re Edmonton Journal and Attorney General for Alberta*.⁹⁶ Moreover, as the dissenting judgment in *Gannett* points out, the accused's right to a public hearing may indeed embrace an independent right inhering in members of the public to assert a right of access over the opposition of the accused.⁹⁷ Whether this latter right is properly part of section 11(d) is a question beyond the scope of this paper. The point is that residing as it does within section 11(d), the debate is properly confined to the justice context and does not possess the much more far reaching implications of a section 2(b) right of access.

This brings me to a serious practical objection to my argument, namely, that it fails to address oppressive mandatory closure provisions in civil and administrative proceedings. Is not a section 2(b) "right of access" necessary to guarantee that legislatures do not begin to arbitrarily impose mandatory closure provisions in civil proceedings and administrative contexts?

Insofar as civil proceedings before superior courts are concerned, I suppose it is possible to conceive of a statute which would remove all discretion from trial judges and

94. *Supra* note 7.

95. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

96. *Re Edmonton Journal and Attorney General for Alberta* (1983), 4 C.C.C. (3d) 59 (Alta.Q.B.).

97. As articulated by the dissent in *Gannett*, *supra* note 7 at 652, "[...] there is a societal interest in the public trial that exists separately from, and at times in opposition to, the interests of the accused [...] a court may give effect to an accused's attempt to waive his public-trial right only in certain circumstances".

dictate that civil proceedings in superior court shall be conducted "in camera". In this unlikely event, I suggest that it would be much more doctrinally sound for courts to strike down such legislation as offending a critical aspect of the independence of the judiciary protected by section 96 of the *Constitution Act, 1867*.⁹⁸ As noted by Goldie J.A. in *Needham*⁹⁹ "the rule of law administered in open courts by judges whose independence of the King and his Ministers had been formally secured" is an integral aspect of the exercise of jurisdiction by superior courts, "the descendants of the Royal Courts of Justice as courts of general jurisdiction". To eliminate the superior courts' right to exercise any discretion in relation to openness when openness is so central to their ability to dispense justice would in my view arguably offend the judicature provisions of the *Constitution Act, 1867*.¹⁰⁰ In my opinion, a section 96 argument in these circumstances is much less of a stretch (and has fewer negative repercussions) than a finding that "expression includes access".

But what about proceedings not covered either by section 11(d) or section 96, such as access to provincial court child protection proceedings or proceedings before administrative tribunals? Surely here we require a section 2(b) right of access in order to protect against mandatory closure provisions that are oppressive.

For those who view the Charter as supplying the solution to every situation that does not comport with their vision of openness, I am sure that the following answers will not be satisfactory. I do nonetheless offer the following observations.

First, if, as the *Richmond Newspapers* court held, the constitutional right of access *qua* expression is justified only where access has been "traditionally" given to the public — where there is "an enduring and vital tradition of public entree" — the right would not in any event extend to the kinds of proceedings I have just described.

Second, insofar as inferior courts and tribunals make decisions that affect a person's life, liberty or security of the person, it seems legitimate to argue that some residual right of access may inhere in section 7 of the Charter as a principle of fundamental justice, a basic tenet of our legal system. Again, containing the discussion in section 7 ensures that the right is asserted only in cases where the most serious interests are affected and ensures that they are considered in a contextual manner, limited to the justice context. While, in preparing this paper, I have not had the opportunity to present a full exposition of this argument, I suggest that it is plausible to assert, as a basic tenet of our legal system, a *prima facie* right to an open hearing, which must be contextually examined and balanced against other factors, whenever an agent of the state makes an order that could violate a person's life, liberty or security of the person.

Third, insofar as the argument is made that the right of access should extend to proceedings of inferior tribunals that do not affect section 7 interests, I suggest that there is

98. *Supra* note 4.

99. *Supra* note 22 at 151.

100. As noted by Blackmun J. dissenting, in *Gannett*, *supra* note 7 at 647: "Publicity thus became intrinsically associated with the sittings of the royal courts".

value in allowing legislatures and tribunals to be able to experiment with administrative schemes for administering regulatory statutes outside the traditional judicial model.¹⁰¹

Finally, for the very rare cases where legislators dictate that proceedings before inferior tribunals shall be closed, and where there is no Charter right on which to base an attack in court, I would answer that there is still the avenue of democratic action and the assertion of the "political ideal" of openness. While some will bristle at the suggestion that some good ideas are simply not elevated to the status of constitutional rights, I would respectfully suggest that leaving a little elbow room for democratic debate, and taking some decisions out of the hands of lawyers and judges, might just have the ironic result of leading to a more informed citizenry.¹⁰²

101. See the discussion on this point in Jones and de Villars, *Principles of Administrative Law*, 2d ed. (1994) at 272-276. And see D. Lepofsky's discussion of this question in "Open Justice, 1990...", *supra* note 30 at 29-33. Lepofsky points out that while there is at present no common law natural justice obligation on tribunals to conduct their proceedings in public, judicial and quasi-judicial tribunals do possess a discretion to hold public hearings. Moreover, legislative reforms have mandated open hearings in certain circumstances. As to whether it is appropriate to constitutionalize a right to attend tribunal hearings, Lepofsky properly observes that there is absent that "powerful, longstanding tradition" of openness which justifies such a right. He also properly points out that:

[...] The core focus of modern administrative law has been to avoid an excessive judicialization of the regulatory state, in order to leave the legislature free to fashion new, alternative modes for promoting public policy, outside the framework of the traditional judicial paradigm.

102. See P. Monahan, *The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987) at 138:

Judicial fiat is no substitute for civic deliberation. Rule by judiciary supposes that the only way to deter oppression is to impose external restraints on the political process. But because such external restraints deny the competence of citizens to arrive at informed ethical judgments, they undermine the very process of reflection and self-criticism which might lead to a more mature collective morality. Elitist politics breeds only a mob; to produce citizens, one needs democracy.