Open Justice: Professional Challenges, Institutional Balances, and Ongoing Debates

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In opening this conference, Michele Rivet, President of the CIAJ, spoke of a fragile balance between open justice and judicial process, between privacy and procedural fairness. The conference has succeeded in elucidating a rich array of challenges to this fragile balance. In particular, the conference has raised questions of professional roles and responsibilities, and of institutional capacities and balances.

As rapporteur, it strikes me that the conference can be assessed in terms of how successfully it has dealt with the reporter's standard questions: notably the "who", the "what", and the "how". Perhaps most importantly, many presenters and interveners have focused on the "why" (that is, the purpose in treating information in a particular fashion) in order to develop satisfactory responses to the "who", "what" and "how".

As for the "who", the conference organizers have, in determining the cast of presenters and interveners, identified a diversity of players responsible for developing effective practices of open justice. We have heard from privacy commissioners, from media representatives, from academics, from defence counsel and prosecutors, from judges, from administrative decision-makers, and from commercial lawyers and civil litigators.

The "what", for the purposes of this conference, is in effect the question of what constitutes information. We are sometimes given to thinking of information as an artifact, and to overlooking the active role that many of the participants in this conference play in creating information. Whether in media reporting, in government data banks, in judicial decisions, or through a multitude of other means, we are constantly creating information. And, surrounding the creation of this information is a host of professional obligations. Not only do lawyers, judges, media players, privacy commissioners and academics create information, we also determine when information is considered to be sensitive. Whether we talk about commercially sensitive information, or the identity of a complainant in a criminal matter, or information with respect to judicial discipline, any such information becomes sensitive only through the initiative of someone who is trying to restrict its free circulation.

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There has been much attention during the conference to evolving institutional roles. In his keynote address on "The Role of the Judge in the 20th Century", Chief Justice Lamer spoke of the days of the judge as umpire as "long gone". In particular, the Chief Justice addressed the role of courts in their relations with a broader public, and noted that there are "serious cultural differences" between judging and news gathering.

Media representative Stephen Bindman conceded that he is more comfortable with courts making decisions about what information or whose identities should be protected than he is with leaving those decisions to the editors of most large newspapers. At the same time, Mr. Bindman offered some practical advice to judges about issuing publication bans. Freelance journalist Laurent Laplante expressed concerns about lack of diversity in the media and about the tendency to monopoly control. These interventions underscored the variety of players who influence the balance of open justice, and the need for collaborative responses. And they effectively make the point that concerns about information will evolve in response to institutional change.

The key themes in this conference are professional responsibility and institutional vigilance. The lawyer who claims confidentiality for commercial information plays a unique role, particularly given what Neil Campbell identifies as the incentive for firms to "over-protect". At the same time, the lawyer's duty to the client remains primary, and Campbell suggests that it is for tribunals and their counsel to police against overbroad claims. The challenge is to be clear about the public interest, and to work out practices that effectively strike the right balance.

Campbell offered a number of examples of how commercial (and public) interest in nondisclosure can be balanced with a presumption of openness. These include sunset periods and summaries of confidential material. Michelle Fuerst and Elizabeth Bennett shared their considerable experience with protecting vulnerable witnesses in the criminal context through practices such as video screens, videotaping and closed-circuit television. It was at first striking that there was such a large measure of agreement between Crown and defence counsel on these points. On reflection, the presentations of Campbell, Fuerst and Bennett were a reminder that legal practitioners have a critical contribution to make to the development of open justice through sensitivity to overall public interest, and through readiness to adapt to new technologies and professional relationships. Judge Sidney Linden and Professor Martin Friedland raised a number of innovative responses in the context of judicial discipline, as did David Lepofsky in proposing methods of preventing adverse effects of televised court proceedings.

At many points in the conference, there was striking evidence that the problems of open justice do not lend themselves to all-or-nothing solutions. These are above all issues requiring reflection and a serious-minded search for practical solutions. Those who took dogmatic positions, or who denied professional or institutional responsibility, are patently part of the problem.

This conference lived up to its objectives in a number of important regards. It has brought together a rare cast of players to develop the "who". It raised issues of the "what", the "how" and the "why" in contexts as diverse as judicial discipline, commercial and criminal litigation, administrative proceedings, information and privacy administration, even psychiatry. Most of all, it has left participants with a sense that there are practical and

professional responses, and that there are important and ongoing debates about further "solutions" in striking the balances required by open justice.