Media Access to Public Inquiry Commissions

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by

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1. Introduction

A recent decision of the Quebec Court of Appeal holds that the freedom of expression provisions of the *Canadian Charter of Rights and Freedoms*[1] are not breached when a public inquiry commissioner imposes a temporary publication ban on testimony heard by the inquiry[2]. In reasons that were endorsed by Chief Justice Bisson and Justice Mailhot, Justice Richard *ad hoc* wrote that such a ban, imposed with respect to the testimony of an adolescent witness during an inquiry into allegations of sexual abuse committed by adult staff of a youth home against their residents, did not infringe section 2(b) of the *Charter*, and that even if it did, the limitation was reasonable and was accordingly saved by section 1.

Cited in support of the Quebec Court of Appeal's reasoning was a decision of the Alberta Court of Queen's Bench which held that freedom of the press did not encompass

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1 R.S.C. 1985, Appendix II, No. 44, s. 2(b) (hereinafter *Canadian Charter* or *Charter*).

2 *Gagnon* v. *Southam*, [1989] R.J.Q. 1145 (C.A.), leave to appeal refused [1989] 2 S.C.R. xii; followed in *Southam Inc.* v. *Lafrance*, [1990] R.J.Q. 219 (S.C.), *Southam Inc.* v. *Lafrance*, [1990] R.J.Q. 937 (C.A.), leave to appeal to the Supreme Court of Canada refused [1990] R.J.Q. 937n. The decision is criticized in MARC-ANDRÉ BLANCHARD, "L'article 2b) de la Charte canadienne: Une perspective québécoise de la liberté de presse", (1989) 49 *R. du B.* 463.

a right of access to a coroner's inquest or a fatality inquiry. In that decision, Justice D.C. McDonald wrote:

> In my view, a coroner's inquest or a fatality inquiry, as we know it in Canada, is not a court proceeding. That being so, if the Legislature chooses to assign certain investigative duties to a coroner's inquest or a fatality inquiry, there is no constitutional compulsion that such duties be carried out in public...Consequently, if, as here, the Legislature decides that the "public" nature of the inquiry shall be not a universal rule, but a general rule subject to some specific exception or exceptions, that decision is not subject to judicial review on the ground provided for in s. 52(1) of the *Constitution Act, 1982*...As I have said, s. 2(b) is not a fundamental freedom applicable to a fatality inquiry constituted under the Fatality Inquiries Act[3].

Apart from these two decisions, the issue of a right of access to hearings of a commission of inquiry does not appear to have been explored further by the courts, something which surprises given the abundant litigation surrounding public inquiries, the inevitable press interest in their proceedings, the predilection of commissioners to hold at least part of their sessions *in camera*, and the enthusiasm of

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3 *Edmonton Journal and A.-G. of Alberta*, (1984) 5 D.L.R. 240, [1984] 1 W.W.R. 599 (Alta Q.B.), confirmed (1985) 13 D.L.R. 479, [1985] 1 W.W.R. 575 (Alta C.A.), leave to appeal to the Supreme Court of Canada refused [1985] 1 W.W.R. viii, at pp. 249-250. In a critique of Justice McDonald's reasons, Brian MacLeod Rodgers has written: "The issue really centred on the degree of privacy to be preserved for personal psychiatric records - an issue for which there has been considerable public concern. In any event, there is no reasoning that deals with why a coroner's inquest should be treated differently from a court - apart from the historical fact that it has been in the past. In fairness, the decision was made before any pronouncements on the Charter had come from the Supreme Court of Canada, including development of the purposive approach." (in Brian MacLeod Rogers, "Access to Administrative Tribunals", in *Développements récents en droit administratif*, Cowansville: Editions Yvon Blais, pp. 181-201, at p. 200).

media lawyers for contesting any impediments to the activities of their clients[4].

2. The Practice of Commissions of Inquiry With Respect to Press and Public Access

Neither the federal *Inquiries Act* nor that of any of the provinces, with the exception of Ontario, give any legislative guidance with respect to the public or private nature of commission hearings[5]. The consensus seems to be that in principle commissions sit in public, but that they also have a more or less unfettered discretion to exclude the public, or to impose conditions on the presence of the media such as the exclusion of television cameras, and to issue publication bans on proceedings before the inquiry. This consensus can be readily deduced from the reported cases on

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4 The author has been told that an application is currently pending before the Federal Court of Canada by lawyers for Southam Inc which challenges a decision by the R.C.M.P. Commissioner dictating that an inquiry be held *in camera* (something that is explicitly provided for in the statute) and the refusal of Commissioner Morin to reverse that decision (Personal communication from Mr Neil Wilson of Gowling and Henderson, July 26, 1990).

5 Section 4 of the *Public Inquiries Act*, R.S.O. 1980, c. 44, states:

> 4. All hearings on an inquiry are open to the public except where the commission conducting the inquiry is of the opinion that,
> (a) matters involving public security may be disclosed at the hearing; or
> (b) intimate financial or personal matters or other matters may be disclosed at the hearing that are of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public
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> in which case the commission may hold the hearing concerning any such matters *in camera*.

the matter[6], the comments of legal scholars[7], and the behaviour of the commissions themselves, which are as a general rule presided over by senior judges.

For example, the report of the Sinclair Stevens inquiry indicates that 796 pages of transcript and 1,170 pages of exhibits were *in camera*[8]. Not that the inquiry was particularly secretive, held as it was under the glare of kleig lights and the curious eyes of millions of television viewers. In a ruling on the presence of television cameras, Justice Parker declared:

> ...it is in the public interest that the hearing be open to the public as much as possible. We are dealing with a public matter that took place in a televised forum. Under the circumstances, I think it is in the public

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6 *C.B.C. and Knapp* v. *Cordeau, Brunet, Courtemanche and the Quebec Police Commission*, [1979] 2 S.C.R. 618; *Re Ontario Crime Commission*, [1963] 1 C.C.C. 117 (Ont. C.A.).

7 STUART M. ROBERTSON, *Court and the Media*, Toronto: Butterworth, 1981, at pp. 162-3: "Therefore, a common law notion is evolving whereby an inquiry may be expected to carry on in public, even though it is obliged to do so neither by statute nor by its own terms of reference". See also PATRICK ROBARDET, "Should We Abandon the Adversarial Model in Favour of the Inquisitorial Model in Commisisons of Inquiry?", in A. PAUL PROSS et al. (eds), *Commissions of Inquiry*, Toronto: Carswell, 1990, pp. 111-131, at p. 130; DAVID W. SCOTT, "The Rights and Obligations of Those Subject to Inquiry and of Witnesses", in A. PAUL PROSS et al. (eds), *Commissions of Inquiry*, Toronto: Carswell, 1990, pp. 133-149, at pp 145-6.; WILLARD ESTEY, "The Use and Abuse of Inquiries", in A. PAUL PROSS et al. (eds), *Commissions of Inquiry*, Toronto: Carswell, 1990, pp. 209-216, at pp. 211-212: "I see in judicial review cases some reference to the fact that *in camera* hearings are authorized, indeed, encouraged. I do not really believe that. I think the rule is the opposite. You should hold the hearing in public so long as it is not going to cause difficulties: (a) for the pbulic; and (b) for the efficient discharge of the mandate".

8 Canada, *Commission of Inquiry into the Facts of Allegations of Conflict of Interest Concerning the Honourable Sinclair M. Stevens*, Ottawa: Supply and Services Canada, 1987, Vol. 1, at pp. 374-5.

> interest that television be allowed in the hearing room under controlled conditions[9].

The fact that a portion of the record remains shielded from public scrutiny does not appear to have been challenged by the press or by parties with standing at the inquiry. In his report, Justice W.D. Parker, who presided the inquiry, gave no evidence of any soul-searching as to whether such a power to proceed *in camera* actually exists. It seems simply to have been taken for granted by all concerned. David W. Scott has suggested that these *in camera* proceedings were held mainly at the request of the witnesses themselves, and only with a view to delaying, and not prohibiting, publicity:

> One of the difficulties is that if you adopt the protocol that a person whose conduct is being inquired into should be entitled to leave the evidence until he or she has heard all the evidence that is tendered by the commission, then it means that it may be months before a person can have his or her opportunity to respond on television to the evidence given earlier. And of course television and the print media play up with headlines what is going on and the poor "victim" has to wait months for the opportunity to respond. This buttresses the development of the idea of holding *in camera* hearings where very sensitive information is given which could damage a person or be prejudicial to a person, and leaving its release to the public until closer to the moment that that person will be entitled himself to give evidence. That arose from time to time in the Stevens' Inquiry and, in accordance with the extraordinary fairness of commission counsel, such requests were on every occasion accomodated[10].

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9 Ruling of July 14, 1986, Transcript, Vol. 2, p. 137, quoted in *ibid.*, at p. 451.

10 DAVID W. SCOTT, *loc. cit. n.* 7, at pp 145-6.

Yet Justice Parker's terms of reference were spelled out in only the most general of terms, empowering him to "adopt such procedures and methods as he may consider expedient"[11]. As we have already mentioned, no express support can be found in the federal *Inquiries Act*[12] for any authority to hear *in camera* testimony. Nor, at least according to the published report of the Commission, was there a sense of any obligation to give reasons for a departure from the principle of open hearings.

In the Douglas Marshall inquiry, which was also widely televised, occasional restrictions were placed on media coverage at the request of witnesses, though according to its report the Commission did not sit *in camera* at any time. Thus, witness John Pratico sought the exclusion of television cameras during his testimony because he felt it would be inhibiting, and his application was granted by the Commissioners, who ruled:

> The right of the press to report is secondary only to the Commission's duty to see that all relevant evidence is given freely and [without inhibition][13].

The public and representatives of the print media remained present during Pratico's testimony, and television addicts prepared to endure a few hundred words worth of mental effort

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11 P.C. 1986-1139.

12 R.S.C. c. I-11, ss. 4 and 5.

13 Ruling on exclusion of TV cameras, Testimony of John Pratico, September 18, 1987, Transcript, p. 1323, quoted in Nova Scotia, *Royal Commission on the Donald Marshall, Jr., Prosecution*, Halifax, Vol. 1, at p. 340.

above and beyond the line of duty were not totally deprived of knowledge of his evidence.

Donald Marshall himself also sought a ban on all cameras during his own testimony. The Commissioners agreed that television cameras would be excluded, but refused to extend the prohibition to still cameras[14]. Once again, the terms of reference setting up the Marshall Inquiry, which drew on the words of the statute[15], defined the powers of the Commissioners in only the most general of terms ("...may adopt such rules..."). No specific authority to restrict media access was set out in the terms of reference, nor does it appear in the Nova Scotia *Inquiries Act*. The rules of practice and procedure adopted by the Marshall Commission stated:

> 5 (4). The Commission may in its discretion hold hearings *in camera*[16].

Much of the proceedings of the federally appointed Commission of Inquiry on War Criminals, presided over by Justice Jules Deschênes, was held behind closed doors. Indeed the report of the Commission consists of two volumes, one available to the public, the other "destined to remain confidential"[17]. Yet nothing in the order in council

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14 Ruling on exclusion of TV cameras, Testimony of Donald Marshall, June 27, 1988, Transcript, p. 14,350, quoted in Nova Scotia, *Royal Commission on the Donald Marshall, Jr., Prosecution*, Halifax, Vol. 1, at p. 341.

15 *Public Inquiries Act*, R.S.N.S. 1967, c. 250.

16 *Ibid*, at p. 302.

17 Canada, *Commission of Inquiry on War Criminals*, Ottawa: Supply and Services Canada, 1986.

establishing the Commission ever authorized it to proceed *in camera*, nor did anything suggest that part of its report was to be sealed. Even in the public volume of the report, names of witnesses and of their attorneys are frequently blanked out. Justice Deschênes adopted rules of practice that stated:

> The Commission shall sit in public or *in camera*, at its sole discretion[18].

The *raison d'être* for proceeding *in camera*, according to Justice Deschênes, was to protect the right to a fair trial of those who testified before him. As an example, he points to Mr Imre Finta, who had been a witness before the inquiry, and who was subsequently acquitted by a judge and jury of charges laid under the new provisions of the *Criminal Code*. Mr Finta's name does not appear in the public report of the Commission[19]. In other words, Justice Deschênes' overriding concern was the protection of the rights of the individuals being heard, rights which are set out in section 11(d) of the *Charter*. And yet had he not made such a ruling, and had witnesses sought this same protection through intervention of a superior court, the case law holds that no relief would be available. The individuals had not yet been "charged with an offence"[20].

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18 *Ibid*, p. 847.

19 Personal communication from the Hon. Jules Deschênes, July 26, 1990.

20 *Robinson* v. *B.C.*, (1986) 28 C.C.C. (3d) 489, [1986] 3 W.W.R. 729, (1986) 3 B.C.L.R. (2d) 77 (S.C.), affirmed (1986) 36 D.L.R. (4th) 308, 33 C.C.C. (3d) 90, [1987] 3 W.W.R. 362, (1987) 28 B.C.L.R. (2d) 343 (C.A.).

Justice Deschênes was never challenged by any of the parties with standing before the Commission or by the media on his decision to proceed *in camera*[21], though an adroit advocate might have found some comfort in an earlier decision of the Quebec Superior Court, rendered by Justice Deschênes himself[22]. Towards the close of the Commission hearings, Justice Deschênes denied certain parties access to expert opinions that had been prepared for him and that had already been filed with the Commission. This ruling was successfully challenged in the Federal Court of Appeal, but on the grounds that standards of procedural fairness had been violated. The principle of public access was never an issue before the Federal Court[23].

In the Western Banks Inquiry that was presided by Supreme Court Justice Willard Estey, the evidence was initially reviewed *in camera* and vigorously edited before being unveiled at public hearings. According to Justice Estey:

> ...we expurgated thousands and thousands of documents. We had 4,900 exhibits and some of

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21 Personal communication from the Hon. Jules Deschênes, July 26, 1990.

22 In *Bélanger* v. *Commission de Révision du Comté de Sauvé*, [1973] Que. S.C. 814, Justice Deschênes said that if a commission's mandate required it to carry on in a judicial manner, the proceedings should be open to the public, subject to the common law exceptions.

23 *League for Human Rights of B'nai Brith Canada* v. *Commission of Inquiry into War Criminals*, May 9, 1986, Federal Court of Canada Appeal Division no. A-87-86 (Mahoney J.A.), reversing *League for Human Rights of B'nai Brith Canada* v. *Commission of Inuqiry into War Criminals*, February 10, 1986, Federal Court of Canada Trial Division no. T-2488-85 (Cullen J.).

> them had pages and pages. You can imagine the amount of paper in a bank office. We took out the names of all the borrowers and guarantors. We took out identifying circumstances, age, place of work and so on. And all that because the press would seize upon it in the locale of the bank branch and out would come damaging private information. So the first stage is to clean up the evidence before it goes out; not to censor it, but to protect the public, protect individual members of the public[24].

Further back in Canadian history, we find a stunning example of a secretive inquiry in the 1946 Kellock-Taschereau Commission into Canada's "communist fifth column"[25]. Though the *War Measures Act* was still in force at the time, the Commission's authority derived solely from the *Inquiries Act*[26], with terms of reference that were as general and vague as that of Justice Deschênes or Justice Parker. Commissioners Kellock and Taschereau, both then members of the Supreme Court of Canada, proceeded to examine witnesses *in camera* who had then been held in detention without charge for several months pursuant to an Order in Council made under the *War Measures Act*. The evidence obtained by Justices Kellock and Taschereau led to criminal prosecutions of these individuals, several of whom later served prison terms. The entire proceedings of the Kellock-Taschereau Commission were held *in camera*, with those in attendance, including counsel,

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24 WILLARD ESTEY, *loc. cit* n. 7, at p. 211.

25 Canada, *Report of the Royal Commission Appointed under Order in Council PC 411 of February 5, 1946, To Investigate the Facts Relating to and the Circumstances Surrounding the Communication, by Public Officials and Other Persons in Positions of Trust, of Secret and Confidential Information to Agents of a Foreign Power*, Ottawa: The King's Printer, 1946.

26 R.S.C. 1927, c. 97.

being required to take an oath of secrecy. According to the Report:

> For reasons which appear in this Report we determined that the Inquiry should be held *in camera* and in order to effectuate the purpose which dictate that decision, at the beginning of the inquiry we required all persons concerned in the inquiry, including witnesses, to take an Oath of Secrecy as to their evidence. All counsel also were in accordance with the custom in such cases required to give their undertaking. This course was followed until in our opinion it was no longer necessary by reason of publication and it was then discontinued[27].

In all of these inquiries, then, press and public access was restrained to a greater or lesser extent, by Commissioners (who were also Superior or Supreme Court justices) acting in virtue of general terms of reference to proceed "as they may deem expedient" and in the absence of any express statutory authority to exclude or restrict the media.

3. A Right of Public or Press Access to Commissions of Inquiry

Few would question the general principle of media access to commissions of inquiry. Often commissions are actually set up as a direct result of media pressure inspired by editorialists or investigative journalists. Some commissions brazenly seek out publicity, hiring media relations personnel and providing full press services including press conferences

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27 *Supra* n. 23, at p. 676.

and briefings[28]. Nor are witnesses, counsel and even the commissioners themselves totally immune to the lure of celebrity.

A societal interest in commission proceedings is easy to understand. Television coverage of commissions, surely more than that of any other media, has ensured an exceptional degree of public awareness on such important issues as drug use by athletes, inequities in the justice system's treatment of natives, and conflicts of interest of elected officials. Such publicity is surely a salutary influence on the health of a democracy.

The glare of publicity may also appeal to the individuals concerned, who seek out, sometimes naively, a podium that they believe will improve their public image. In the case of Susan Nelles, televised testimony before the Grange Commission largely helped put to rest public suspicions in a way that was infinitely more effective than a

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28 DAVID M. GRENVILLE, "The Role of the Commission Secretary", in A. PAUL PROSS et al. (eds), *Commissions of Inquiry*, Toronto: Carswell, 1990, pp.51-73, at pp. 59-60; RUSSELL J. ANTHONY, ALASTAIR R. LUCAS, *A Handbook on the Conduct of Public Inquiries in Canada*, Toronto: Butterworths, 1985, at pp. 48-49:

> Generally, an inquiry is created in response to public pressure or public concern over major issues. It is important, therefore, that representatives of the public be kept informed of the inquiry's activities and how they can participate in the process.
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> This need for communication can be met by regular press briefings or press releases by the commissioner even before the inquiry starts...
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> Before any public hearings can held, even hearings of a preliminary nature, there must be some public education undertaken to ensure that people ar aware of reasons why they should participate in the inquiry process, what information they should bring, and how it should be presented.

dozen newspaper headlines reporting her discharge at a preliminary hearing.

But there may also be compelling reasons to limit media access. Television coverage may be restricted because it intimidates witnesses, or distracts counsel, or simply because it disturbs the decorum of the proceedings. Publication bans may appear appropriate in order to protect the right to a fair trial of witnesses who may subsequently be charged, as in the Deschênes inquiry, or simply to ensure that witnesses are not informed of prior testimony, as in the Gagnon inquiry.

Individuals may seek to muzzle press coverage of an inquiry, so as to prevent being tried in the press by what Justice Samuel Grange has called "the electronic jury"[29] before being tried by a court of law. The analogy with the right of an accused to seek publication bans on evidence at a bail hearing or preliminary inquiry is obvious. But in her dissenting reasons in *Starr* v. *Houlden*, Justice l'Heureux-Dubé considered this aspect of press coverage of an inquiry:

> Concern was expressed as to whether Ms. Starr could every hope to undergo a fair trial should criminal charges ever be brought, particularly as a result of her media exposure. Yet Ms. Starr was being discussed, if not accused, by the media well before the legislature contemplated setting up an inquiry or pursuing any investigation whatsoever. If anything, the flexibility of the inquiry would enable her to clear any alleged blemishes to

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29 SAMUEL G.N. GRANGE, "How Should Lawyers and Legal Profession Adapt?", in A. PAUL PROSS et al. (eds), *Commissions of Inquiry*, Toronto: Carswell, 1990, pp. 151-160.

> her reputation as a result of media exposure. The commission will have to hear her. The media owe her no such duty.
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> Section 4 of the *Public Inquiries Act* stipulates that all hearings in an inquiry are open to the public except where the commission, in its discretion, feels that the balance of interests weighs in favour of *in camera* proceedings. Hence, the argument that permitting access to inquiry proceedings is effectively adjudication by "an electronic jury in the courtroom of public opinion" is ill-fated. It confuses the commissioner's role in relation to the media; granted, the media cannot be used as a sword to impose greater liability on the witnesses appearing at of the inquiry - but any such effects are mitigated by the stringent rules of evidence that would govern in any subsequent criminal proceeding. Moreover, the commission's scope should not be restricted as as result of this media "threat". In this sense, it cannot be used as a shield by witnesses at the inquiry. Counsel for the appellant remarked that respondents "cannot eat their cake and have it too", yet by the same token appellants can neither deny public access to the cake, nor prevent an examination of its ingredients to see if their inclusion was suspect.
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> Furthermore, ss. 11 and 13 of the *Canadian Charter of Rights and Freedoms*, s. 5(2) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, and s. 9 of the *Public Inquiries Act* guarantee that regardless of what evidence was tendered during the inquiry, or how the media chose to portray those events, Ms. Starr or anyone else implicated will be protected against the subsequent use of testimony given at the inquiry should the matter ever be prosecuted in a court of law[30].

The question of whether or not the media have a right of access to commissions of inquiry may be approached from both the administrative law and the constitutional law standpoint. In administrative law, a view may be evolving that proceedings before a tribunal are deemed to be public, as if

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30 *Starr* v. *Houlden*, (1990) 55 C.C.C. (3d) 472, at pp. 527-8.

they were proceedings before a court of law[31]. Is a decision to proceed *in camera*, in the absence of statutory authorization, a loss of jurisdiction? Assuming a commissioner has some implicit discretion to exclude the media or control its presence, is this subject to judicial review? Do general terms of reference and a broad but vague authority from the enabling statute authorize a commission to sit *in camera*, to exclude some or all of the media, and to issue temporary or permanent publication bans? From a constitutional standpoint, even assuming such discretion exists, either implicitly or, as in the case of the Ontario statute, expressly, is this compatible with section 2(b) of the *Canadian Charter*? Do the media have an absolute *right* of access to proceedings before a commission of inquiry?

3.1 Media Access in Administrative Law

As both judges and commissioners are fond of reminding us, a commission of inquiry is not a court[32], even though witnesses can be excused if on occasion they suffer from the unpleasant misconception that a trial is indeed underway. The commission must act judicially when the rights of individuals concerned by the proceedings are concerned, for example when the power to cite for contempt is invoked to

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31 BRIAN MACLEOD ROGERS, *loc. cit.* n. 3, at pp. 181-201.

32 *Di Iorio v. Warden of Common Jail of Montreal*, [1976] 1 S.C.R. 152, (1976) 73 D.L.R. (3d) 491, 33 C.C.C. (2d) 289, at pp. 524-5 (D.L.R.), 323 (C.C.C.).

loosen the tongues of uncooperative witnesses[33]. Nevertheless, a commission remains an organ of the executive branch, appointed by order in council, and its only mission is eventually to report back to the executive with the results of its investigation and some appropriate recommendations[34].

Supposing a commissioner were to base his or her recommendations not only on testimony produced during public hearings but also on material collected privately, even "gossip" garnered at a dinner party, a cocktail reception or a casual telephone conversation, how could this be controlled or verified, and what would be the point? There is no appeal of a commissioner's recommendations. No lawyer is going to spend evenings analysing the commission transcript so as to draft a factum demonstrating that the recommendations are unsupported by the evidence, or that "judicial knowledge" was improperly taken.

Commissions have been grouped into two broad categories, those that advise and those that investigate[35]. Justice Lamer, as he then was, wrote in *Starr* v. *Houlden*:

> Most authors seems to agree that public inquiries serve a number of functions enabling government to secure information as a basis for developing or implementing policy,

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33 *A.G. Quebec and Keable* v. *A.G. Canada*, [1979] 1 S.C.R. 218, (1979) 90 D.L.R. 161, 43 C.C.C. (2d) 49, 6 C.R. (3d) 145, 24 N.R. 1.

34 *Re Commission of Inquiry Concerning Certain Activities of the R.C.M.P.*, (1978) 94 D.L.R. (3d) 365; *Re Copeland and McDonald*, [1978] 2 F.C. 815, (1978) 88 D.L.R. (3d) 724 (T.D.).

35 Law Reform Commission of Canada, *Commissions of Inquiry, Working Paper 17*, Ottawa: Supply and Services Canada, 1977, at p. 13.

> educating the public or legislative branch, investigating the administration of government and permitting the public voicing of grievances. Investigatory commissions in particular serve to supplement the activities of the mainstream institutions of government[36].

Certainly a minister is empowered to examine matters within his purview, without being troubled by the formalities of a commission, and to direct investigations by his own staff, to order outside research studies which may or may not be published, even to hire private detectives, as long as no laws are broken in the process. Whatever documentation results may be kept confidential, subject however to access to information legislation. Usually the media will not seek access to such reports of in-house inquiries, because without a "leak" from a disgruntled civil servant, it is unlikely the media will even be aware such reports exist.

When the government requires the prestige and credibility of a neutral arbiter, or the power to compel testimony, it may choose to proceed by commission of inquiry. Sometimes, the executive will opt for a commission of inquiry precisely to obtain publicity. Airing one's dirty linen in public is often politically shrewd. It may minimize the harm done by government misconduct and begin to re-establish confidence in a regime feeling the sting of opposition orators and glib editorialists.

As we have already noted, nowhere in the federal *Inquiries Act*, nor in the various orders in council setting

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36 *Starr* v. *Houlden*, *supra* n. 27.

up commissions, is a power to proceed *in camera* or otherwise to control media coverage spelled out. This power seems to have been taken for granted and, with a few recent exceptions[37], left unchallenged. But because administrative tribunals are creatures of statute, without inherent powers, are commissions of inquiry deemed to proceed in public unless the statute otherwise provides? The same question may be asked generally with respect to administrative tribunals, which often adopt rules of practice providing for the possibility of *in camera* proceedings, despite silence in the enabling statute.

The matter was examined by Justice Pratte of the Federal Court of Appeal, in *Rémi St-Louis* v. *Conseil du Trésor*, where a labour arbitrator had proceeded *in camera* in order to ensure confidentiality for government accounting documents:

> Les arbitres agissant en vertu de la *Loi sur les relations de travail dans la Fonction publique* sont dans la même situation que les tribunaux autres que les cours de justice à qui la Loi n'impose pas expressément l'obligation de siéger en public: ils ne sont pas régis par les règles applicables aux cours de justice, encore qu'il soit souhaitable qu'ils s'inspirent de principes identiques[38].

In *Hearts of Oak Assurance Company Limited* v. *Attorney General*[39], the House of Lords ruled that no legal obligation to proceed in public was imposed on a "purely preliminary proceeding" of an administrative nature. But the *ratio*

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37 *Gagnon* v. *Southam*, *supra* n. 2, although strictly speaking, administrative law grounds were not argued.

38 [1983] R.D.J. 185, at p. 187.

39 [1932] A.C. 392 (H.L.).

decidendi of this decision was given a very narrow construction by Justice Cattenach of the Federal Court of Canada, whose reasons support the notion that an administrative tribunal has no common law power to proceed *in camera*[40], unless of course the enabling statute states otherwise. And Justice Laskin sitting on the Ontario Court of Appeal declared:

> If there is any general rule applicable where the statute is silent, it is that the proceedings of a statutory tribunal should be conducted in public unless there be good reason to hold them *in camera*[41].

But given the narrow scope of judicial review on procedural decisions by administrative tribunals, such declarations may do little to reassure media lawyers.

A distinction should also be made between administrative tribunals generally, and commissions of inquiry, for in the latter there is no *lis inter partes*. The scope of judicial review where commissioners elect to exclude the press, to issue publication bans, or to proceed *in camera*, will be even narrower than it is with administrative tribunals, because no adjudication is being made affecting the rights of parties.

The absence of any mention of the issue in the enabling statute of a commission of inquiry has been held to provide an implicit authorization to proceed either in public or *in camera*, at the discretion of the commissioner. In *Gagnon* v.

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40 *Re Millward and Public Service Commission,* (1975) 49 D.L.R. (3d) 295, 308.

41 *R.* v. *Tarnopolsky, ex parte Bell,* [1970] 2 O.R. 672 (C.A.), at p. 630.

Southam, Justice Mailhot of the Quebec Court of Appeal wrote of the *Loi des commissions d'enquête*, L.R.Q. c. C-37:

> Telle que rédigée, cette loi laisse au commissaire la discrétion de décider si les audiences seront tenues publiquement ou à huis clos. Il faut alors se référer au décret qui crée une commission d'enquête pour déterminer s'il y a obligation pour cette commission de tenir des audiences publiques on non[42].

The learned justice construed the silence of the order in council as an implicit authorization for the commissioner to proceed *in camera* or to impose publication bans. She dismissed an argument, which had been accepted by the trial judge, that because the English title of the statute was the *Public Inquiries Act*, this meant the inquiry should be conducted in public[43].

In the same case, Justice Richard *ad hoc* wrote as follows:

> Si le décret énonce qu'il est dans l'intérêt public que l'enquête ait lieu, il n'y apparaît nulle part toutefois qu'elle doive être publique ni que le rapport qui doit en résulter soit rendu public. La Loi oblige le commissaire à faire rapport au gouvernement et a personne d'autre. Seul le gouvernement peut décider de rendre public le rapport reçu...Je conclus de la loi et du décret que le commissaire avait les pouvoirs et la

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42 *Gagnon* v. *Southam*, *supra* n. 2, at p. 1147

43 A view that does not appear to be shared by Patrick Robardet, who writes: "...whether the inquiry is public and comes within the terms of the federal *Inquiries Act*, as opposed to an investigative inquiry held in private, can influence perceptions as to what sort of process of inquiry will be employed", PATRICK ROBARDET, "Should We Abandon the Adversarial Model in Favour of the Inquisitorial Model in Commisisons of Inquiry?", in A. PAUL PROSS et al. (eds), *Commissions of Inquiry*, Toronto: Carswell, 1990, pp. 111-131, at p. 115.

> discrétion nécessaires pour tenir des audiences publiques ou privées...[44]

The Law Reform Commission, in its working paper on commissions of inquiry, approached the issue of restrictions on media coverage within the context of protection of individuals concerned by the inquiry:

> An investigatory commission should have discretion to hold *in camera* hearings, and to order restrictions on the reporting of public hearings, and witnesses should have the right to request a commission to exercise this discretion. It should, however, always be remembered that since one function of a public inquiry is often to allay public concern of some sort, and since it is desirable that a commission be seen to be operating fairly, wherever possible a commission to investigate should operate publicly. Schroeder J.A. observed of organized crime in *Re Ontario Crime Commission, Ex parte Feeley and McDermott* [1962] O.R. 872 (C.A.), that "inquiry and publicity are both powerful weapons in coping with this and other characteristic modern social evils". But sometimes closed doors and restrictions on publicity are desirable. Section 4 of the *Ontario Public Inquiries Act* deals well with the question of *in camera* hearings...
>
> The problem of publicity in any particular situation can be solved by a commission at its discretion issuing an appropriate order to the media. In exercising its discretion, a commission should weigh the value of publicity with the harm that might be suffered by the witness and others if particular testimony is made public[45].

> Publicity is a related problem. Publicity surrounding a commission of inquiry may jeopardize the right to a fair trial of a commission witness who is an accused at the time of the inquiry, or subsequently becomes one. The *Criminal Code* already places restrictions on publicity of preliminary inquiries. Difficulties facing inquiries

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44 *Gagnon* v. *Southam, supra* n. 2, at p. 1152-3.

45 Law Reform Commission of Canada, *loc. cit.* n. 32, at p. 35.

> regarding publicity can be overcome by a commission issuing, when necessary, orders limiting or forbidding publicity[46].

In conclusion, from the administrative law standpoint, an argument might succeed, though none has to our knowledge, on the premise that a commission cannot sit *in camera* or otherwise restrict public or media access or coverage without express statutory authority. Where the only issue is the manner of exercise of a discretion to open or close the doors of the hearing room, the commission would appear to be virtually immune to challenge except in the hypothetical case of a blatant infringement on the rights of an individual concerned by the inquiry.

3.2 Media Access in Constitutional Law

Since the proclamation of the *Canadian Charter* on April 17, 1982, the debate about media access has been renewed. The backdrop is a number of successful challenges under section 2(b) of the *Charter* where media access to courts of law has been impeded[47]. The "open court" principle explicitly appears in the *Charter* only in section 11(d), where its scope is confined to the right of a person charged with an offence in a criminal or penal proceeding[48]. But media have obtained standing to challenge restrictions on their access to the

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46 Law Reform Commission of Canada, *loc. cit.* n. 32, at p. 37.

47 *Re Southam Inc. and the Queen (No. 1)*, (1983) 146 D.L.R. (3d) 408, 3 C.C.C. (3d) 515, 41 O.R. (2d) 113, 33 R.F.L. (2d) 279, 34 C.R. (3d) 27 (C.A.); *Edmonton Journal* v. *Alta (A.-G.)*, [1989] 2 S.C.R. 1326, (1990) 64 D.L.R. (4th) 577, [1990] 1 W.W.R. 557.

48 *Law Society of Manitoba* v. *Savino*, [1983] 6 W.W.R. 538, (1984) 6 C.R.R. 336 ( ).

courts and their right to report on proceedings. The right, in this case, is not rooted in section 11(d), but rather in section 2(b) of the *Charter*, where it is the liberty of the press and of other means of communication that is at stake. In *Gagnon* v. *Southam*, Justice Richard called freedom of the press the corollary of the "open trial" principle[49].

The Supreme Court of Canada has stressed the purposive or teleological approach to interpretation of the *Charter*[50], The two sections, 11(d) and 2(b), most certainly exist for different purposes. Section 11(d) aims at protection of the integrity and fairness of the trial process itself. Only where trials are public, the classic reasoning goes, will arbitrary and abusive exercise of judicial power be curtailed. The principle of the "open trial" found expression in Canadian law long before the proclamation of the *Charter*, as a common law rule subject to narrow and clearly circumscribed exceptions[51]. Being a common law rule, it is always vulnerable to statute. At common law, the rule applies without distinction to both civil and criminal matters. As Viscount Haldane wrote, in *Scott* v. *Scott*:

> ...the power of an ordinary Court of justice to hear in private cannot rest merely on the view that it is desirable for the sake of public decency or morality that the hearing should take place in private. If there is an

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49 *Southam* v. *Gagnon*, *supra* n. 2, pp. 1154-1155.

50 *R.* v. *Big M Drug Mart*, [1985] 1 S.C.R. 295, (1985) 18 D.L.R. (4th) 321, 18 C.C.C. (3d) 385, [1985] 3 W.W.R. 481, 37 Alta L.R. (2d) 97, 58 N.R. 81, 60 A.R. 161, 13 C.R.R. 64, 85 C.L.L.C. ¶14,023.

51 *Scott* v. *Scott* [1913] A.C. 417 (H.L.); *McPherson* v. *McPherson* [1936] A.C. 177, [1936] 1 D.L.R. 321 (J.C.P.C.).

> 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[52].

According to Lord Atkinson, in the same case:

> The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to [be] found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect[53].

However, added Viscount Haldane, "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"[54]. And further on: "I think that to justify an order for hearing *in camera* it must be shewn that the paramount object of securing that justice is done would be rendered doubtful of attainment if the order were not made"[55].

A number of statutory limitations to the "open court" principle in criminal matters have been imposed and these have usually stood the test of section 1. By and large, the purpose of these limitations is to protect the individual accused and his or her right to a fair trial. The *raison*

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52 *Scott* v. *Scott* [1913] A.C. 417, at p.435.
53 *Ibid.*, at p. 463.
54 *Ibid.*, at p. 437 (Per Viscount Haldane).
55 *Ibid.*, at p. 439 (Per Viscount Haldane).

d'être of the limitations is thus completely compatible with the overall purpose of section 11(d), which deals not only with courtroom publicity but also with the presumption of innocence and more generally with the fairness of the proceedings. An example of such limitations would be the publication ban on bail hearings[56] or preliminary inquiries[57], measures which are aimed at restricting public knowledge of the evidence so that an eventual jury would not already have been inundated with media summaries of the Crown's case.

In confining section 11(d) to criminal and penal proceedings[58], the drafters of the *Canadian Charter* made a clear distinction with the international instruments which otherwise provided such an important source of their inspiration, and which have furthermore generated a rich background of "relevant and persuasive" authority for the construction of the *Charter*[59]. Article 14§1 of the

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56 *Criminal Code*, R.S.C., 1985, c. C-46, s. 517; conformity with section 1 of the *Canadian Charter* upheld by the Ontario Court of Appeal: *Re Global Communications Ltd. and A.G. Canada*, (1984) 10 C.C.C. (3d) 97, 38 C.R. (3d) 209, 44 O.R. (2d) 609 (C.A.).

57 *Criminal Code*, R.S.C., 1985, c. C-46, s. 539; conformity with section 1 of the *Canadian Charter* upheld by the New Brunswick Court of Queen's Bench: *R.* v. *Banville*, (1983) 3 C.C.C. (3d) 312, 34 C.R. (3d) 20 (N.B.Q.B.)

58 Nor can section 11(d) be invoked before an inquiry: *Robinson* v. *B.C.*, *supra* n. 20.

59 *Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313, (1987) 38 D.L.R. (4th) 161, 51 Alta L.R. (2d) 97, [1987] 3 W.W.R. 577, (1987) 28 C.R.R. 305, 74 N.R. 99, 78 A.R. 1, [1987] D.L.Q. 225, (1987) 87 C.L.L.C. ¶14,021, at pp. 348-50 (S.C.R.), per Chief Justice Dickson:

> ...the similarity between the policies and provisions of the *Charter* and those of international human rights documents attaches considerable relevance to interpretations of those documents by adjudicative bodies, in much the same way that decisions of the United States courts under the Bill of Rights, or

International Covenant on Civil and Political Rights, to which Canada acceded with the support of all ten provinces in 1976, provides:

> ...In the determination of any criminal charge against him, or of his rights and obligations in a suite of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established

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decisions of the courts of other jurisdictions are relevant and may be persuasive. The relevance of these documents in *Charter* interpretation extends beyond the standards developed by adjudicative bodies under the documents to the documents themselves. As the Canadian judiciary approaches the often general and open textured language of the *Charter*, "the more detailed textual provisions of the treaties may aid in supplying content to such imprecise concepts as the right to life, freedom of association, and even the right to counsel." J. Claydon, "International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms" (1982), 4 *Supreme Court L.R.* 287, at p. 293.

Furthermore, Canada is a party to a number of international human rights Conventions which contain provisions similar to identical to those in the *Charter*. Canada has thus obliged itself internationally to ensure within its borders the protection of certain fundamental rights and freedoms which are also contained in the *Charter*. the general principles of constitutional interpretation require that these international obligations be ea relevant and persuasive factor in *Charter* interpretation. As this Court stated in *R.* v. *Big M Drug Mart Ltd.*, [19845] 1 S.C.R. 295, at p. 344, interpretation of the *Charter* must be "aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection". The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of the "full benefit of the *Charter*'s protection". I believe that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.

In short, though I do not believe the judiciary is bound by the norms of international law in interpreting the *Charter*, these norms provide a relevant and persuasive source for interpretation of the provisions of the *Charter*, especially when they arise out of Canada's international obligations under human rights conventions.

> by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of judgment; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children[60].

Similar provisions can be found in the *European Convention on Human Rights* and the *American Convention on Human Rights*. It should be noted, then, that the "open trial" principle is approached in the international instruments as a right of litigants which is aimed at the integrity and fairness of the trial, and that civil proceedings fall within its scope. In fact, the European Court of Human Rights has broadly construed the phrase "in a suit at law" so as to extend it to administrative matters[61], a liberal approach that the Human Rights Committee of the United Nations has thus far hesitated to follow[62]. The litigation before the European Court on the

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60 *International Covenant on Civil and Political Rights*, (1976) 999 U.N.T.S. 171, [1976] C.T.S. 47.

61 *H.* v. *Belgium*, November 30, 1987, Series A, No. 127, (1988) 10 E.H.R.R. 339; see also *Le Compte, van Leuven and de Meyere* v. *Belgium*, June 23, 1981, Series A, No. 43, (1982) 4 E.H.R.R. 1; *Albert and Le Compte* v. *Belgium*, February 10, 1983, Series A, No. 58; *Buchholz* v. *Federal Republic of Germany*, May 6, 1981, Series A, No. 42, (1981) 3 E.H.R.R. 597, 62 I.L.R. 297; *Deumeland* v. *Federal Republic of Germany*, May 29, 1986, Series A, No. 100; *Neves e Silva* v. *Portugal*, April 27, 1989, Series A, No. 153; *Baraona* v. *Portugal*, July 8, 1987, Series A, No. 122; *Erkner and Hofauer* v. *Austria*, April 23, 1987, Series A, No. 117; *H.* v. *France*, October 24, 1989, Series A, No. 162.

62 *Y.L.* v. *Canada* (No. 112/1981), (1990) 2 *Selected Decisions* 28; *C.A.* v. *Italy* (No. 127/1982), (1990) 2 *Selected Decisions* 39.

issue of public hearings has been situated within the context of the right to a fair trial, and not within the context of freedom of the press.

To find support for an "open trial" principle in non-criminal matters, our courts have therefore turned to section 2(b) of the *Canadian Charter*. Freedom of the press does not, of course, imply an unfettered right for members of the media to go where they please and to do what they please. It is hard to imagine, for example, a journalist insisting on a right to search a private home in the interests of freedom of the press. On the other hand, it would be an overly narrow construction of section 2(b) to confine freedom of the press to such matters as censorship or patently oppressive regulation[63]. If the purpose of the drafters of the *Charter* was to protect and promote an indispensable component of the democratic system, and to ensure that the public's "eyes and ears" remain open and attentive, then freedom of the press must include an assurance of media access to matters of public concern. In other words, freedom of the press includes a right to information. From this standpoint, the media would have an even stronger claim to access to a commission of inquiry than they would to, say, a divorce hearing, a juvenile court proceeding or an immigration

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63 The way it was approached as a pre-*Charter* fundamental right: *Reference Re Alberta Statutes*, [1938] S.C.R. 100, [1938] 2 D.L.R. 81. Chief Justice Duff considered that freedom of the press was an adjunct of the "right of free public discussion of public affairs", at p. 133.

inquiry, because the commission of inquiry is by its very nature addressed to a matter of major public interest and of the functioning of the political system.

Recently, the Supreme Court of Canada relied on section 2(b) in ruling that a statutory prohibition on media of family cases in the Province of Alberta was unconstitutional[64]. Only the minority was convinced by arguments that the essentially private nature of matrimonial matters, something which had found expression in the comparable international instruments[65], justified a limitation on media access in accordance with section 1. Yet it is far from obvious that *Edmonton Journal* stands for the proposition that section 2(b) gives media access to judicial proceedings a constitutional protection. The impugned section 30 of the Alberta *Judicature Act*[66] did not prevent access to proceedings, but only restricted media coverage of them. It

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64 *Edmonton Journal* v. *Alta (A.-G.)*, *supra* n. 44.

65 Justice La Forest cited the international instruments in his dissenting reasons. Article 19 of the *International Covenant on Civil and Political Rights* reads as follows:

> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or though any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

66 R.S.A. 1980, c. J-1.

did not deny reporters the right to attend divorce hearings.

Because the Alberta statute singled out the press, telling it what it could and could not report, the court considered that there was a *prima facie* violation of section 2(b). In other words, the breach of the *Charter* was the ban on publication, not the issue of the "open court". Where the court split was on the section 1 analysis. Justice Cory discussed the "open court" principle as fundamental to a democracy without necessarily attaching it to a specific section of the *Charter*[67]. Rather, the issue arose only with respect to the reasonableness of limitations on press coverage. Justice Wilson's approach is similar, treating the "open court" principle more as a "value in conflict"[68] within a section 1 analysis than as a full-blown constitutional right. *Edmonton Journal* is certainly very persuasive on the subject of the "open court" principle, but nowhere in the reasons of Justices Cory, Wilson and La Forest do we find it put unequivocally that "freedom of the press" equals "open court".

As we have already mentioned, in the two *Charter* cases where section 2(b) has been pleaded with respect to commissions, the courts have decided that there is no breach of freedom of the press and of section 2(b) of the *Charter* by a temporary public ban[69] or an *in camera* order[70]. Like the

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67 *Edmonton Journal and A.-G. of Alberta, supra* n. 44, at p. 1337 (S.C.R.)

68 *Ibid.*, at p. 1367 (S.C.R.).

69 *Gagnon* v. *Southam, supra* n. 2.

man who wears both suspenders and a belt, in both cases the courts took the precaution of also addressing the section 1 issues, and declaring that even if a breach of section 2(b) could be found, the limitation was reasonable.

From the standpoint of section 1 of the *Canadian Charter*, which permits limitations on guaranteed rights and freedoms providing such limitations are reasonable within the context of a free and democratic society, it is useful to distinguish the types of infringement on the rights of the media that may be imposed by commissions.

There are two main categories: publication bans, which are directed solely at the media and which do not in any way inhibit either public or media presence at the hearing; and *in camera* orders, which shroud the proceedings from the eyes of both public and the press, in some cases permanently. Restrictions on television coverage are a form of publication ban directed at one particular form of media.

Publication bans usually aim at the integrity, decorum and fairness of the proceedings. They are almost invariably defended with reference to some other overriding concern, and often one touching on the rights and freedoms of individuals affected by the inquiry, such as the right to a fair trial, or the presumption of innocence. They are also, as a general rule, temporary in nature. Can we speak of a denial of freedom of information where the hearings remain open to

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70 *Edmonton Journal and A.-G. of Alberta, supra* n. 44.

curious or inquisitive members of the public, and where a ban on publication is only short-lived? Public discussion and debate of matters at issue is only delayed.

As for the presence of television cameras at commissions, although such coverage is rarely challenged, when difficulties arise the issue is generally the serenity of the proceedings. The problem is a technological one, and disgruntled television directors may have to resign themselves to living with what they call "available light" and with clips that are perhaps less dynamic than the replay of a game-winning goal or a home run. As the French lawyer Raymond Lindon has written:

> La présence de la télévision ne doit pas être plus gênante que celle du public de la salle d'audience, nécessairement impassible, silencieux et contraint de s'interdire toute gesticulation ou toute manifestation troublant l'audience.
>
> Tant que les techniques seront aussi indiscrètes qu'elles le sont aujourd'hui, elles devront se soumettre à une sévère discipline, qui nuira forcément à leur qualité de reproduction de la réalité[71].

Thus, bans are usually carefully tailored to a specific objective, minimal in their limitation on freedom of the press, and proportional to their purpose. It is submitted that as a general rule the section 1 argument will not be difficult to make in their defense, especially where they are temporary in scope or confined to specific media, such as television.

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71 RAYMOND LINDON, "La Télévision à l'audience?", *Receuil Dalloz Sirey 1985, 14e cahier - chronique*, p. 81, at p. 82.

Whether or not *in camera* orders can withstand the section 1 test seems less obvious. It may be, as Justice Deschênes maintained with respect to his inquiry into war criminals, that the rights of the individuals concerned, as protected by section 11(d), supersede any rights of the media or of the public under section 2(b). And yet our judicial system has always taught that the rights of individuals are best protected by open courts. As Jeremy Bentham said, "Where there is no publicity there is no justice". In *Edmonton Journal*, Justice Wilson reminds us that an open trial is more likely to be a fair trial[72]. When the *Criminal Code* seeks to protect an accused from potentially harmful publicity at the pre-trial stage, this is done by a publication ban, and not by an *in camera* order. The classic common law exceptions permitting *in camera* hearings - matters involving children, the insane, and intellectual property - are unlikely to arise at commissions of inquiry. As for the most common of the statutory exceptions, national security, it would be reassuring to know that commissions are not immune from judicial scrutiny.

4. Conclusion

Lord Justice Salmon, in his report as chairman of a 1966 study of commissions of inquiry, was extremely negative about suggestions that proceedings be allowed to go on *in camera*:

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72 *Edmonton Journal and A.-G. of Alberta, supra* n. 44, at p. 1360 (S.C.R.)

> 115. ...it is...of the greatest importance that hearings before a Tribunal of Inquiry should be held in public. It is only when the public is present that the public will have complete confidence that everything possible has been done for the purpose of arriving at the truth.
>
> 116. When there is a crisis of public confidence about the alleged misconduct of persons in high places, the public naturally distrusts any investigation carried out behind closed doors. Investigations so conducted will always tend to promote the suspicion, however unjustified, that they are not being conducted sufficiently vigorously and thoroughly or that something is being hushed up. Publicity enables the public to see for itself how the investigation is being carried out and accordingly dispels suspicion. Unless these inquiries are held in public they are unlikely to achieve their main purpose, namely, that of restoring the confidence of the public in the integrity of our public life. And without this confidence no democracy can long survive.
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> 117. It has been said that if the inquiry were held in private some witnesses would come forward with evidence which they would not be prepared to give in public. This may well be so. We consider, however...that although secret hearings may increase the quantity of the evidence they tend to debase its quality. The loss of the kind of evidence which might be withheld because the hearing is not in secret would, in our view, be a small price to pay for the great advantages of a public hearing[73].

Some may consider that where newspaper headlines and television news are often virtually monopolized by reports on commissions of inquiry, press and public access is simply not much of an issue. Should protection and reassurance be required, it may be better to leave the matter with

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73 Royal Commission on Tribunals of Inquiry (1966), Cmnd. 3121, December 6, 1977.

Parliament, and not to rely on the uncertainties of judicial review on either administrative or constitutional grounds.

The Law Reform Commission of Canada recommended:

> A commission should have the discretionary power to hold *in camera* hearings, and order restrictions on publicity; it would be desirable to grant those powers in the context of a statement of principle that, save in exceptional circumstances, hearings are public and open. Witnesses should have the right formally to request a commission to exercise these discretionary powers.[74]

In its draft *Inquiries Act*, the Law Reform Commission urged the addition of section 19, as follows:

> **19.** (1) All hearings of a commission shall be open to the public, except that the commission may on its own motion or at the request of any person, hold a hearing *in camera* if it is of the opinion that the public interest in adhering to the principle that hearings be open to the public is outweighed for any reason, such as possible danger to public security, the interest in privacy regarding intimate personal or financial matters, or the danger of jeopardizing the right of anyone to a fair trial.
>
> (2) All public hearings of a commission may be freely reported, except that a commission may, on its own motion or at the request of any person, issue an order restricting or forbidding the reporting of any matter where it is of the opinion that the public interest in adhering to the principle that hearings may be freely reported is outweighed for any reason, such as possible danger to public security, or the interest in privacy respecting intimate, financial or personal matters, or the danger of jeopardizing the right of anyone to a fair trial.
>
> [Section 19 is new. It is intended to ensure as much as possible the principle that commission

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74 Law Reform Commission of Canada, *loc. cit.* n. 32, at p. 50.

> hearings be open to the public and freely reported in the media.][75]

This proposal is patterned largely on section 4 of the Ontario statute, with the advantage that it is somewhat more precise. Presumably the *ejusdem generis* rule will be applied with respect to the enumeration of grounds justifying imposition of a publication ban or complete exclusion of the public. The inclusion of such a provision in the federal and the provincial statutes would clarify some of the ambiguity which now exists. Such an enactment would be likely to meet the test of section 1 of the *Canadian Charter*, should the courts ever conclude that media access to proceedings before commissions of inquiry is guaranteed by section 2(b). Where a particular commission of inquiry dictates the need for special or extraordinary rules in order to limit the actions of one of the fundamental components of a modern democracy, the press, then such rules should be set out expressly by one of democracy's other fundamental components, Parliament.

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75 Law Reform Commission of Canada, *loc. cit.* n. 32, at p. 59.