Open Justice in the Common Law  
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This paper was written on behalf of Environment Probe by University of Toronto Faculty of Law student Amy Rose, in partnership with Pro Bono Students Canada. Ms. Rose drew on research conducted in 2008-9 by law students Benjamin Myers and Nuha Abunada.

I. Introduction

For many Canadians, transparency in the administration of justice is simply presumed. That justice be administered in the open, that access to information be unfettered, that the procedural mechanisms and exercises of power that constitute our legal system be exposed and open to criticism – these notions are at the core of our communal faith in the rule of law and democratic principles. Yet there is a deep and complex history underlying open justice in the common law, one that not only justifies its central role in our society but may also provide guidance as we face new obstacles to transparent justice in the coming decades.

“There is no common law right to open justice,” explained legal scholar Patrick Keyzer. “There is a common law right to justice, and there is a common law principle that the pursuit of justice is ordinarily done in open court.” Yet the imperative of open justice has evolved in common law legal systems far beyond the open court principle, into a multifaceted concept widely acknowledged as critical to the equitable administration of justice. Indeed, the scope of the principle extends to a range of rights, freedoms, and procedural guarantees that have acquired constitutional or near-constitutional status in common law societies all over the world. To fully understand the evolution of this principle, it is helpful to canvas its various meanings. Section II of this paper examines the values and functions of open justice, and in the process sets forth the political, legal, social and psychological rationales for its predominance in the common law. Section III presents the various procedural manifestations of the principle, with a historical overview of its development in the British and later Canadian case law. Section IV briefly surveys the tensions at stake in the evolution of the principle and looks ahead to the challenges presented to open justice by the changing role of technology and the state in the lives of individuals in society.

II. Functions and Rationales

One way of thinking about open justice is as “the public’s right to know.” This right has over time become paradigmatic of a democratic state and a free society. As Lord Bridge stated more than a century ago in Attorney General v. Guardian Newspapers, freedom of information and expression “is always the first casualty under a totalitarian regime. Such a regime cannot afford to allow the free circulation of information and ideas among its citizens. Censorship is the indispensable tool to regulate what the public may and what they may not know.” As noted above, the constitutions of many common law nations and more recently drafted international agreements reflect the fundamental position that open justice holds in our understanding of the innate rights of a political citizen. Some or all of the specific freedoms promoting open justice – freedom of speech, freedom of expression,
freedom of the press, right to a public trial – are enshrined in the American Bill of Rights, the Canadian Charter of Rights and Freedoms, the Constitution of the Republic of South Africa, the European Convention for the Protection of Human Rights, and the International Covenant on Civil and Political Rights. As the Honourable Justice Spigelman of New South Wales recently pointed out, the principle of open justice is of such power in free states that even where it is unwritten, as in England, Australia, and pre-Charter Canada, it is treated as having constitutional authority.³

Open justice has come to have this enormous importance in nations across the world because of the underlying values and objectives it serves. Beverly McLachlin, the Chief Justice of the Canadian Supreme Court, suggested in a 2003 lecture that one crucial object of open justice is the so-called “search for truth” underlying our legal structure.⁴ If we conceive of truth as a multidimensional concept informed by communal ideas of equality, impartiality, integrity, and a shared experience of justice being done, the components of open justice – such as freedom of expression and freedom of the press – take on special significance. The ability to discuss and critique judicial proceedings, for instance, facilitated in modern society by the access of the press to the courts, is a crucial exercise in revealing and challenging our common values and learning about our rights and obligations as members of a given society. Publicity in the justice system is thus critical in exposing “truth,” both in terms of factual and legal narratives about events in our communities, and also in terms of our social, political, and philosophical assumptions.

A related function of open justice is that of judicial review and accountability. In the words of 18th century English philosopher and jurist Jeremy Bentham, an open court “keeps the judge himself while trying under trial.”⁵ Put another way, “when judges sit at trial, [they also] stand on trial.”⁶ In liberal democratic societies, the judiciary is afforded an enormous degree of discretion and independence from the rest of the state. With that power comes tremendous responsibility, and the requirement of openness in the administration of justice is an essential mechanism of the separation of powers characterizing democratic states. Although most judges cannot be dismissed in an election or vetoed in the legislature, they can certainly be censured by the public vis-à-vis a courtroom open to the criticism of an engaged public and press. The public exposure of judicial proceedings also trickles down from the justices themselves to all other officers and participants in the court – lawyers, witnesses, parties, government officials, and juries are all monitored and thereby deterred from transgressing broadly accepted norms of legality. As Justice Spigelman explained: “The principle of open justice, in its various manifestations, is the basic mechanism of ensuring judicial accountability. The cumulative effect of the requirements to sit in open court, to publish reasons, to accord procedural fairness, to avoid perceived bias and to ensure fairness of a trial, is the way the judiciary is held accountable to the public.”⁷

An open court certifies to the public that procedural fairness was exercised. It also ensures, to quote an oft-repeated phrase in the common law, that justice not only be done but be seen to be done. Access to judicial records allows the public to experience the law in action, and to understand the limitations on individual freedoms operating in their society. This serves both an educational and disciplinary function by breathing life into the formal legal structure and by publicly denouncing those who transgress the rules upon which we have all theoretically agreed. As Chief Justice Berger explained in 1980, in the foundational American case for open justice, Richmond Newspapers, a trial has a “prophylactic purpose
of providing an outlet for community concern, hostility, and emotion.”

If members of the community do not witness the sanctioning of criminal or harmful behavior, they may be more inclined to take justice into their own hands, or even to participate in this type of conduct themselves.

There is a related palliative dimension of an open court for the parties to the disputes themselves. In the words of Justice McLachlin, “open justice is therapeutic justice.” Not only should a party to a litigation feel that a wrong has been righted, or at the very least that he understands why a decision was made; he is also often seeking vindication, repudiation, or exoneration – all of which require publicity to be effective. If we accept that a primary objective of the justice system is dispute resolution, we must also acknowledge that private reparation alone may not adequately resolve most disputes or deter individuals from other means of closure. Justice McLachlin wrote that a public judgment "proclaims to the community the rightness – or perhaps the error – of the claimant’s pretension. Disputes must be resolved and people must move on. All of this is best done if the system of justice operates openly and transparently.”

Even where two individuals to a private dispute both waive the right to an open court, there may still be a public interest in the records of the litigation being accessible to the public. As Justice Spigelman noted, both procedural and substantial justice is assessed on a reasonable person standard in the Anglo-legal tradition: “It is a question of what fair minded people, not just the parties but the public at large, might reasonably apprehend or suspect.” Moreover, he pointed out that these standards of justice will vary over time and context, and thus the argument could be made that the one applied should be sanctioned by a discernable majority of people in the relevant space, time, and community. The demos can only accept and internalize these applications of justice if they are granted access to them.

Charles E. Ares made a similar point regarding the relationship between a criminal trial and the society in which it occurs: A trial “is an act of government of considerable social and political importance to people who have no direct concern with the specific events that led to prosecution.” As judges apply broad legal principles to specific cases, they are developing a body of law which will operate as against the entire public, not just the parties to the dispute. As Justice Brennan similarly explained in Richmond Newspapers, “While individual cases turn upon the controversies between parties or involve particular prosecutions, court rulings impose official and practical consequences upon members of society as a whole.” Wherever lawmaking binds all citizens in a given state, democratic norms of fairness demand that it be done in public.

For Justice McLachlin, the “single unifying purpose [that] animates all these benefits...[is] the preservation of public confidence in the administration of justice.” The public must have faith in the justice system, and a knowledge of its inner-workings is crucial to the development of that trust. As stated in 1913 in Scott v. Scott, “in the public trial is to be found, on the whole, the best security for the pure impartial administration of justice, the best means for winning for it public confidence and respect.” Indeed, it is not abstract truth for which the legal system is aiming, but a publicly acknowledged legitimacy to sustain and substantiate legal decisions.

Not only does transparency allow the members of a given society to learn about and gain faith in their own rules, procedures and conceptions of justice, it also provides grounds upon which these notions may be challenged in a meaningful and reasoned way. If the members of society are expected to accept and abide by legal constraints on their
freedom, they must also be endowed with the power to know and affect them.\textsuperscript{17} In 1999, in \textit{R v. Secretary of State for the Home Department ex p Simms}, Lord Steyn described the free flow of information as a “safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them.”\textsuperscript{18} The facility of the appeals process, along with the potency of public debate around the requirements and limitations of justice, are thus both at stake when proceedings are cloistered away from the public.

The nature of common law jurisdictions, where “courts not only resolve disputes but announce rules to govern future cases,” is especially relevant to the requirement of open justice.\textsuperscript{19} Where the law is developed incrementally based on precedential decisions, it is imperative that the facts in a given litigation as well as the reasoned opinions of the decision-maker are made available to future litigants, justices, legal scholars, and general members of the public. In common law jurisdictions, where the courts play a law-making as opposed to a mere law-implementing role, it is crucial that they are subject to the oversight of both legal experts and citizens alike.

Open justice has taken on an even more extraordinary importance in the face of the rise of the administrative state over the last century. The critical role of transparency in criminal trials, where the accused faces the full retributive power of the justice system, has long been acknowledged. Now individuals in modern societies increasingly find themselves confronted by the full \textit{administrative} power of the state nearly every day. The sheer breadth of activity by state officials in this context mandates an enormous degree of discretion in adjudicative settings and opportunities for appeal are limited by constraints on resources. The accessibility of these processes to the public not only exposes to the electorate the potential injustices of the system but also promotes coherent, consistent, and effective decision-making. It is thus not surprising that natural justice, of which open justice is a crucial component, has been a focal point of administrative law trials over the last seventy years.

\section*{III. Historical Development of Open Justice Processes}

What types of processes ensure that open justice serves the functions and values enumerated above? The fundamental procedural guarantee provided by open justice in the common law context is \textit{access} – to proceedings and to records, and as a corollary, to reasons and to appeal. The best way of understanding the development of these procedural protections in Canada is to examine the history of the principle in the common law.

According to Justice Spigelman, the “pragmatic origins” of open justice were in the political realm.\textsuperscript{20} “Court” in medieval England referred to the royal court, in which disputes were attended by large numbers of the public and aristocracy. In medieval England, jurists were assigned as representative of the community from which they were drawn, and sat as public witnesses to proceedings.\textsuperscript{21} The British and Canadian case law since that time has developed the principle of open justice in a number of ways.

\textit{Scott v. Scott} is the foundational case on the principle of open justice in the common law.\textsuperscript{22} Mrs. Scott, in the process of filing for divorce from her husband, made copies of and distributed transcripts from a portion of the trial heard in private. Held in contempt, she appealed. While the bench considered a number of open justice concerns in the course of their judgment, the \textit{ratio decidendi} came down to a limitation on the common law power to
direct a trial to be conducted in private in the course of a marriage annulment, and a curtailment of the effect of that order on post-trial publication of proceedings.23

The enduring significance of Scott v. Scott lies in its codification of the most fundamental aspect of open justice in the common law: the open court principle, which requires that judicial proceedings be part of the public record. The court famously quoted Bentham in explaining the critical role played by transparency: “In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice…”24

Twenty years later, the Privy Council again addressed the open court issue in a Canadian context when an appellant from the Supreme Court of Alberta sought to have divorce orders reinstated after the Court of Appeal had dissolved them on the basis that the trial had not been held in open court. The Council at that time warned: “Publicity is the hallmark of judicial as distinct from administrative procedure...The Court must be open to any who may present themselves for admission.”25 That judicial proceedings occur in open court, and that the general public and press be permitted into the court has become a cornerstone of our justice system and, in Justice Spigelman’s words, represent the “essential qualities of a judicial trial.”26

More than a mere opportunity to attend, the open court principle ensures the public’s ability to freely discuss and critique the processes and decisions of the court as well as the arguments made therein. In 1936, the majority in Ambard v. Attorney General for Trinidad and Tobago made the following statement in a decision involving freedom of the press: “Justice is not a cloistered value: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.”27 This case represents an early statement regarding the necessity of the freedom of the press to the proper functioning of open justice principle: “Liberty of the Press...is no more than the liberty of any member of the public to criticize temperately and fairly, but freely, any episode in the administration of justice.”28 It is now widely accepted that freedom of the press is absolutely critical to protect the individual’s right to criticize or discuss the justice system in a public way while ensuring access to the information necessary to do so: “The press effectively acts as the public’s proxy by reporting on court proceedings and disseminating the information essential to public discussion of issues relating to the administration of justice.”29

Yet recent cases dealing with the access of media to court rooms, especially in the course of criminal proceedings, have betrayed a struggle by judges to distinguish the rights of the accused to a fair and public trial, the right of the public to see justice done, and the exploitative and distortive potential inherent in the commercial pressures on news services today. In 1996, in Canadian Broadcasting Corp. v. New Brunswick, the Supreme Court of Canada acknowledged the concept of an open court as one of the “hallmarks of a democratic society” but upheld the trial judge’s decision to exclude the media from the courtroom for twenty minutes while unheard evidence of a sexual assault against a young woman was presented. Quoting Justice Angers from the Court of Appeal, they endorsed his caution that “[w]hile the public...is involved in the administration of criminal justice, the media per se is not. Its interests are different. Its duty is to inform, its temptation to entertain.”30 In 2007, the majority in Named Person v. Vancouver Sun, a case regarding access of the media to sensitive information provided by a confidential police informant,
made a similar point: “While open courts are undoubtedly a vital part of our legal system and of our society, their openness cannot be allowed to fundamentally compromise the criminal justice system.”

Other recent cases dealing with publication bans – judge-imposed prohibitions on access of the media to court records prior to, during, or following a trial – reflect the same attempt at balancing the privacy rights of individuals, the potential of media distortion of proceedings, and the requirements of open justice. The courts are increasingly confronting new technologies that facilitate in an unprecedented way the immediate and far-reaching dissemination of court records by the media. This in turn prompts judges in the lower courts, scrambling to mitigate the threat to a fair trial inherent in this type of publicity, to issue sweeping and borderline unconstitutional bans instead of risking mistrials. The Supreme Court of Canada, in *Dagenais v. Canadian Broadcasting Corp.* (1994), attempted to address the limitation on the *Charter* protected freedom of expression these types of publication bans represent by creating a stricter test for the imposition of bans. “A publication ban,” the majority determined, “should only be ordered when (a) such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and (b) the salutary effects of the publican ban outweigh the deleterious effects to the free expression of those affected by the ban.” These types of judicial innovations will undoubtedly continue as the courts confront even more invasive media technologies.

It is clear why the lower courts have been hesitant to uphold the open justice principle in these scenarios. If the underlying objective of openness in proceedings is to ensure that justice is done to the person on trial and seen by the wider public to be done, forms of publicity that undermine the fairness of the process itself cannot be justified in the name of the principle. This reflects the logic of the court in *Scott v. Scott*, which set forth the only enduring exception to the open court principle as it effectively institutionalized it: “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 exception...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.”

The lower courts in Canada have indeed been reluctant to follow the Supreme Court’s lead in emphasizing the critical role of “truly open court proceedings” over the last quarter century based on concerns about distortions of due process. Despite “the Supreme Court’s repeated direction that there is a presumption of timely access to public records, unless there are exceptional circumstances,” Ontario in particular has shown a particular reluctance to make available these documents. This is in sharp contrast to other common law jurisdictions, including the United States, where publication bans are exceedingly rare and records of both criminal and civil trials are available online in many states. Despite the increasing emphasis on the common law principle of open justice in the higher courts in Canada over the last 25 years, the justice system itself and the administration thereof have been slower to move.

A dimension of open justice related to access to records that has seen considerable development in Canadian case law in the administrative context is the right to reasons. A record of the reasons a judge made a decision or applied a principle in a certain way is critical to the coherent development of the common law and the right to an effective appeal of that decision: “[A] person prejudicially affected by a decision must be adequately
notified of the case he has to meet in order to exercise any right he may have to make further representations or effectively exercise a right of appeal." The right to reasons has been a focal point of a long line of cases developing rules of natural justice to be observed in administrative trials. The landmark 1999 Supreme Court of Canada decision in Baker v. Canada (Ministry of Citizenship and Immigration) marked a turning point in transparent justice by institutionalizing a common law duty for administrative decision-makers to give reasons in a broad range of circumstances.

The relative paucity of debate about reasons in the civil case law is presumably based on the fact that “the reasoned decision is at the very heart of the common law system, based, as it is, on the doctrine of precedent.” Moreover, the absence of reasons or an omission of certain considerations in reasons has been recognized for a long time as grounds for appeal. Nonetheless, there is no statutory duty of trial judges to give reasons in Canada as there are in many other jurisdictions, and until recently there was no explicit common law requirement to do so either (despite a somewhat contradictory mix of case law addressing the question). In 1994, the Supreme Court did establish a common law duty to give reasons in criminal trials under certain circumstances, such as in the face of confused or contradictory evidence (confirmed in R. v. R.E.M in 2008). While there remains no absolute rule in regards to civil cases, the language of these cases may be interpreted as applying beyond the criminal context.

IV. Values at Stake and Looking Ahead

These procedural components of open justice and their common law history illuminate the various tensions underlying this foundational concept. It has been widely acknowledged in both the case law and statute that there are many competing and valid interests at stake when we talk about open justice – and in rare instances, our collective values may demand deviation from these norms. Like all fundamental principles of justice in post-Charter Canadian society, the right to open justice has always and continues to be a qualified one.

The history of the case law reveals how difficult the task of balancing competing interests has proven to be. To this point, Justice McLachlin presented a series of individual and social “costs” associated with open justice which have repeatedly arisen in the jurisprudence over the last century. The first is privacy, “a protected sphere of individual autonomy” which “is an important aspect of human dignity” and has come to have “constitutional dimensions” in this country. It is clear that this cost is not merely one of inconvenience but goes to the very heart of the individualism our legal system is intended to protect. When court records were kept on paper in court houses or reproduced in libraries, personal information, although ostensibly available to the public, was protected by “practical obscurity.” Such information was difficult and costly to obtain. Putting court records in electronic form and making them available on the internet has removed those protections. Vast quantities of personal information are readily accessible at the click of a button. In this context, both the courts and the legislature have become more and more sensitive to specific circumstances where exposure in open court would undermine “the very purpose of seeking recourse to justice,” in cases involving trade secrets or victims of sexual abuse for example. In these scenarios, there is a recognition that privacy risks may justify masking some personal information in otherwise public records, for instance by replacing full names with initials. As Justice McLachlin pointed out, the challenge of
balancing these two competing concerns will only grow as technological advances enhance access at every turn.

The second cost she put forward, one with special relevance in the criminal context, is the fairness of the trial, a constitutionally protected right in Canada. Not surprisingly, open justice operates as a double-edged sword in this context, simultaneously ensuring some rights (judicial impartiality, procedural fairness) and jeopardizing others (biased jurors, distortion of evidence). The primary concern, according to Justice McLachlin, is the threat to juror impartiality presented by pre-trial publicity, and the impossibility of strictly enforcing publication bans where the court is required to implement them. Again, modern media and communications networks prevent traditional imperatives of open justice from prevailing. A related third cost is the risk of sensationalism and distortion by the news media, a competitive industry in which growing commercial pressures may create incentives to choose audience ratings over journalistic integrity. This is compounded for Justice McLachlin by the unregulated nature of the internet, whereby the validity of information may be measured by popularity and newsworthiness rather than balanced reporting: “Such sensationalism and distortion does little to help people understand the issue or the justice system, and imposes serious costs in terms of the security of judges, the independence of the judiciary, and the repute of the judicial system.” On the other hand, these same technological advances may also expand the potential of open justice by facilitating true accessibility. The effort or cost required to attain copies of paper records is no longer a prohibitive factor for those people who can access the same materials in a matter of seconds from their homes. In this way, the internet may also be a vehicle for a democratization of the law.

Finally, the slow appropriation of the judiciary’s traditional roles by the administrative state has raised a new set of open justice challenges in many common law societies. Transparency in the administrative context has a dual function in that it enhances the same protections as in the judicial context while also ensuring the democratic accountability of our elected officials. Administrative law has indeed become a focal point for open justice considerations in the case law of the last century, though the landmark cases have generally indicated a judicial hesitance to formalize any type of procedural or substantive requirements in terms of transparency. This is undoubtedly a manifestation of the courts struggling to respect the separation of powers and give due deference to Parliament where constitutional issues are not at stake. However, the growing body of jurisprudence – and revised statutes in several provinces – addressing these questions seem to indicate that the rationales for the common law principle of open justice are alive and growing in the administrative context. As administrative tribunals assume responsibility for issues that were formerly in the domain of common law courts, it is important for them to move towards the standards of transparency that have for centuries governed the resolution of disputes.

V. Conclusion

The principle of open justice is among the foundational legal values in common law jurisdictions across the world. That courts and tribunals actively participating in both the development and the implementation of law be accessible to the public is in keeping with what are now recognized as fundamental principles of justice in free and democratic
societies. While the scope of transparency required for the proper administration of justice will invariably differ from context to context and over time, its status as an essential element of equitable adjudication should, and must, endure.

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Notes

7 Spigelman, “Open Justice”, supra note 3.
10 Ibid.
13 Richmond Newspapers, supra note 8 at 187.
15 Scott v Scott [1913] AC 417, 463 (Lord Atkinson) qtd. in ibid.
17 Qtd. in Jacob, Joseph M. Civil Justice in the Age of Human Rights, (Burlington: Ashgate Publishing Company, 2007) at 49.
18 Qtd. in Jacob, Joseph M. Civil Justice in the Age of Human Rights, (Burlington: Ashgate Publishing Company, 2007) at 49.
19 Taggart, Michael. “Should Canadian Judges be Legally Required to Give Reasoned Decisions in Civil Cases?” (1983) 33 University of Toronto L.J. 1 at 3 [Taggart, “Reasoned Decisions”].
21 Ibid.
22 Scott v Scott [1913] AC 417, 433 [Scott].
24 Scott, supra note 21 at 477.
26 Spigelman, “Open Justice”, supra note 3.
27 Ambard v Attorney General for Trinidad & Tobago [1936] AC 322 at 335.
28 Ibid. at 337.
34 Scott v Scott [1913] AC 417, 433 at 437
39 Taggart, “Reasoned Decisions”, supra note 18 at 8.
43 Ibid.
44 Ibid.
45 Ibid.