OPENNESS AND THE RULE OF LAW

Remarks of the Right Honourable Beverley McLachlin, P.C.

Chief Justice of Canada

at the Annual International Rule of Law Lecture

London, United Kingdom

January 8, 2014

OPENNESS AND THE RULE OF LAW

Remarks of the Right Honourable Beverley McLachlin, P.C.
Chief Justice of Canada

At the Annual International Rule of Law Lecture
January 8, 2014

I. Introduction

It is a great honour to have been asked to present the Annual International Rule of Law Lecture. The honour is only deepened by the association between this lecture and the late Lord Bingham, whose memory we revere. No one did more to promote the rule of law throughout the world than Tom Bingham, whose book is rightly seen as the bible on the subject.

Today, I take as my theme one of the elements of the rule of law Lord Bingham set out in his book – the principle of open justice. Lord Bingham held that the core of the rule of law is the principle "that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts."[1]

The open court principle is a venerable principle, deeply rooted in western consciousness. And for good reason. As Jeremy Bentham famously put it:

> Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.[2]

[1] Tom Bingham, *The Rule of Law* (London: Penguin Group Ltd., 2010) at 8.
[2] Quoted in *A.G. (Nova Scotia) v. MacIntrye*, [1982] 1 S.C.R. 175 at 183, *per* Dickson J. (as he then was).

Or as Justice Brandeis succinctly expressed it, "Sunshine is said to be one of the best disinfectants."[3]

We insist on open justice so that citizens may know how justice is being rendered. Courts must be open and reasons for judgment public so that the litigants, the media, legal scholars and ultimately the general public may follow, scrutinize and criticize what is done in the name of justice. It is a point of pride that long before transparency became the buzzword of governance, the courts insisted that their proceedings be open to all.

Yet open justice, important as it is, comes at a cost. It exists in tension with two other things that we value – privacy and security. In Bentham's time, the tension between open courts on one hand, and privacy and security on the other, was minimal and hence seldom discussed. In our time, the tension has increased exponentially as a consequence of an increased emphasis on privacy, technology, and national security. The result is that the open court principle – and with it the rule of law – stands in peril as never before. This begs the question: is the open court principle sustainable in the 21st century?

To answer this question, I wish to explore with you what has changed and what we can do about it. I will suggest that much as we might wish to, we can no longer think of open justice as an absolute principle, before which all other considerations must fall. Instead, the courts must

[3] "What Publicity Can Do", *Harpers Weekly* (December 20, 1913).

balance the open justice principle against countervailing interests of privacy and security. The question in each case is where and how to draw the line.

This is not an easy task. Judges, guided by counsel, must identify the values at stake in a particular case and consider how they are likely to play out. The goal is to draw the line at the point where privacy and security are appropriately protected, yet the essentials of the open justice principle are maintained. The science is not exact, to be sure. Yet the task can be accomplished if the judge identifies and carefully evaluates what is at stake on both sides of the issue. It is all too easy in this arena to allow emotion and fear to cloud judgment, skewing the balance in favour of privacy or security. The antidote is reasoned identification and examination of what is really at stake in the case at hand. In this way, we can sustain the fundamental principle of open justice, while also responding to changing circumstances and priorities.

II. The Traditional Open Court Principle

We must first ask ourselves: what is the open court principle?

The open court principle can be reduced to two fundamental propositions. First, court proceedings, including the evidence and documents tendered, are open to the public. Second, juries give their verdicts and judges deliver their judgments in public or in published form.

It is also important to note what the common law open court principle *is not*. It does not require all aspects of the judicial process be open to the public. For example, a judge's private deliberations remain private and evidence may be protected by privileges, such as informer's privilege, that allow some facts to remain private.

The next question is: why is open justice so important?

Open justice serves three important functions: (1) it assists in the search for truth and plays an important role in educating the public by permitting access to and dissemination of accurate information;[4] (2) it ensures and enhances judicial accountability, deterring misconduct by judges, police officers and prosecutors; and (3) it performs a therapeutic function by permitting the community to see that justice is done.[5] In these ways, the open courts principle works to preserve public confidence in the administration of justice, which is essential to the rule of law.

The principle of open justice is not new. The idea that judicial proceedings should be public is as old as the trial itself. Before the Norman Conquest, trials were being held in the mandatory presence of the freemen of the local community, who were called upon to render judgment.[6]

[4] See S.E. Harding, "Cameras and the Need for Unrestricted Electronic Media Access to Federal Courtrooms", (1995-1996) 69 S. Cal. L. Rev. 827, at 845.
[5] See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).
[6] Jack B. Harrison, "How Open is Open – the Development of the Public Access Doctrine under State Open Court Provisions" (1991-1992) 60 U. Cin. L. Rev. 1307 at 1308-1309; see also: *Richmond Newspapers*, *supra*, at 565.

Over time, this system evolved so that only a representative body of freemen was required to attend hearings and pass judgment on behalf of the community. The modern jury system was born. Although the public's attendance at trials was no longer required, trials remained open and the importance of public attendance was recognized.[7] Gradually, the tradition of open justice became enshrined as a central tenet of the English justice system[8], and spread throughout the western world and beyond.

Thus in 1892, Canada's first *Criminal Code* endorsed the common law principle that every court "shall be deemed an open and public court, to which the public may generally have access so far as the same [room] can conveniently contain them".[9]

Until recently, this fundamental principle was viewed as virtually absolute, subject only to certain exceptions. In a few narrowly circumscribed situations, the privacy interests of litigants and witnesses were allowed to trump the open court principle – where this was essential to a fair criminal trial, in litigation involving wards, in lunacy proceedings, and in disputes over trade secrets.[10] In all other cases, the open court principle was held to be paramount.

In 1913, the House of Lords in *Scott v. Scott* opined that while public hearings may be trying for parties and witnesses, this is tolerated and endured because openness is the best means for

[7] *Ibid.*
[8] *Ibid.*
[9] Jamie Cameron, "Victim Privacy and the Open Court Principle" (2003) Department of Justice Canada at 7.
[10] *Scott v. Scott*, [1913] A.C. 417 at 482 (House of Lords).

establishing public confidence and respect in the administration of justice.[11] Lord Atkinson acknowledged that the hearing of a case in public may be "painful, humiliating, or deterrent both to parties and witnesses" and in some cases, "the details may be so indecent as to tend to injure public morals".[12] Nonetheless, the open courts principle prevails. Lord Shaw acknowledged that the fear of giving evidence in public may deter witnesses from giving testimony, but concluded that "the concession to these feelings would … tend to bring about those very dangers to liberty in general, and to society at large, against which publicity tends to keep us secure…"[13]

Across the Atlantic, the Supreme Court of Canada, affirmed the importance of the open court principle in 1982, stating:

> It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings.[14]

With the advent of the *Canadian Charter of Rights and Freedoms*, the open court principle was recognized as a component of freedom of expression, protected by s. 2(b) of our *Charter*.[15] This meant that the government was foreclosed from legislating closed hearings or publication bans unless the limit on freedom of expression was "demonstrably justified in a free and democratic society" under s. 1 of our *Charter*.

---

[11] *Ibid* at 463.
[12] *Ibid*.
[13] *Ibid* at 485.
[14] *Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 S.C.R. 175 at 185, *per* Dickson J. for the majority.
[15] *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326

In short, court proceedings have historically been open, unless the case fell within a few recognized exceptional categories. Open justice was generally presumed to trump other interests. As we shall presently see, that presumption has been challenged in recent years as the growing importance of other interests has been recognized.

III. The Privacy Principle

The first challenge to the open court principle in the 21st century has been an increasing emphasis on privacy rights.

The right to privacy is the handmaid to several interests worth protecting. It is, in the words of Professor Daniel Solove, a "pluralistic value". It protects:

> intimacy, friendship, dignity, individuality, human relationships, autonomy, freedom, self-development, creativity, independence, imagination, counterculture, eccentricity, freedom of thought, democracy, reputation, and psychological well-being.[16]

As George Orwell saw so clearly in his dystopian novel *1984*, the modern panoptic state has the potential to undermine these values are so essential to human flourishing. In 2013, however, the dangers are posed not only by the state, but insidiously by private enterprise's efforts to amass our personal details so that they can more effectively target us as consumers of their products. By some estimates, there is more personal information – about our tastes, religious and political beliefs, sexual proclivities, and reading and viewing habits – in the hands of corporations than in

[16] Daniel J. Solove, *Understanding Privacy* (Cambridge: Harvard University Press, 2008) at 98.

the hands of any one state.

Traditionally, as *Scott v. Scott* attests, privacy did not count for much in court. Apart from a few exceptions, the public could attend any court hearing, consult any court document, and examine any judgment – regardless of what intimate or embarrassing details of litigants' and witnesses' lives may be revealed. Indeed, one searches the old common law cases in vain for an articulated principle of privacy. Perhaps one of the earliest statements of a privacy right is found in the celebrated *Seyman's Case*,[17] which provides that a man is secure from unreasonable search and seizure within his own home. Summing up the principle, Sir Edward Coke famously proclaimed that "[t]hat the house of every one is to him as his Castle and Fortress as well for defence against injury and violence, as for his repose".[18] The privacy interest in this statement is implicit. It is cloaked in the language of property rights and the notion of sanctuary – in the principle that "everyone's house is his safest refuge"[19] – rather than an articulated principle of privacy.

Two seemingly contradictory developments have challenged this anemic conception of privacy in more modern times.

The first was the articulation of privacy as a right or legal entitlement.

In their seminal article, *The Right to Privacy*, Samuel Warren and Louis Brandeis discussed the

[17] (1604) Michaelmas Term, 2 James 1 In the Court of King's Bench.
[18] The *Reports*, volume 5, page 91a.
[19] *Domus sua cuique est tutissimum refugium.*

importance of protecting one's private life in the age of modern media and advocated for a right to privacy under the law.[20] They wrote:

> Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops." For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons…

In 1965, the United States Supreme Court recognized a constitutional right to privacy in affirming the right to use contraception. It stated that the various constitutional provisions created "zones of privacy" into which the state could not intrude.[21] Eight years later, the U.S. Supreme Court affirmed the constitutional right to privacy in *Roe v. Wade.*[22] The right to privacy entered the jurisprudential lexicon.

The idea spread. In 1982, Canada adopted a constitutionally entrenched *Charter of Rights and Freedoms.* Section 7 guaranteed the right to "life, liberty and security of person", which the courts construed as including privacy rights. Section 8 protects individuals from unreasonable search or seizure, and implicitly creates a zone of privacy into which the state cannot unreasonably intrude.[23] The right to privacy is also explicitly protected by articles 3 and 35-7 of the *Civil Code* of Quebec.[24]

---

[20] Samuel Warren and Louis Bradeis, "The Right to Privacy" (1890) 4 Harv. L. Rev. 193.
[21] *Griswold et al. v. Connecticut*, 381 U.S. 479 (1965).
[22] 410 U.S. 113 (1973).
[23] *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Dyment*, [1988] 2 S.C.R. 417; *R. v. Mills*, [1999] 3 S.C.R. 662.
[24] S.Q. 1991, c. 64.

The Ontario Court of Appeal recently concluded that invasion of privacy constitutes an actionable tort, provided : 1) the defendant's conduct was intentional; 2) the defendant invaded, without lawful justification, the plaintiff's private affairs or concerns; and 3) a reasonable person would regard the invasion as highly offensive causing distress, humiliation, or anguish.[25] The rationales for affirming a tort of privacy included the importance of the value of privacy, the constitutional dimension of privacy, and technological changes that pose novel threats to the right of privacy.[26]

Most U.S. states have also recognized a tort of invasion of privacy.[27] Four Canadian provinces have statutorily created that tort.[28]

The criminal law has also moved to increase privacy protection for victims, complainants and children. For example, in Canada, we have come to recognize the importance of protecting the privacy of victims of sexual abuse.[29] The concern is that complainants may be further victimized by the violation of their privacy and, more broadly, that the administration of justice may be harmed if complainants refuse to pursue complaints because of privacy concerns.[30]

---

[25] *Jones v. Tsige*, 2012 ONCA 32, 108 O.R. (3d) 241 at para. 71.
[26] *Ibid* at paras. 66 – 69.
[27] *Ibid* at para. 55.
[28] *Privacy Act*, R.S.B.C. 1996, c. 373 (British Columbia); *Privacy Act*, R.S.M 1987, c. P125 (Manitoba); *Privacy Act*, R.S.S. 1978, c. P-24 (Saskatchewan); *Privacy Act*, R.S.N.L., 1990, c. P-22.
[29] *Criminal Code*, s. 486.4.
[30] *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122.

Many jurisdictions, including Canada, have enacted limits on the open court principle to protect the privacy rights of children. Section 110 of the *Youth Criminal Justice Act,*[31] prohibits publication of information that may identify the young accused, and s. 111 prohibits the publication of any information that may identify a young victim or witness in connection with an offence committed by a youth.

Provincial child protection legislation often provides for closed hearings and publication bans. For example, under the Ontario *Child and Family Services Act,*[32] child protection hearings are heard in private, unless the court orders otherwise. Certain media representatives may be present, but the court has the discretion to exclude the media or prohibit publication if it would cause emotional harm to the child.

Finally, in direct conflict with the open court principle, s. 486 of the Canadian *Criminal Code* provides that a judge may exclude all or any members of the public from the court room if it is in the "interests of public morals, the maintenance of order or the proper administration of justice…" In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General),*[33] the Supreme Court of Canada considered the constitutional validity of this limitation on the open court principle and concluded that while it violates freedom of expression, it is justified. It preserves the general principle of openness in most situations, but also gives the court a way to protect the privacy interests of innocent victims in appropriate cases. The Court held that s. 486

[31] S.C. 2002, c. 1.
[32] R.S.O. 1990, c. 11.
[33] [1996] 3 S.C.R. 480.

"arms the judiciary with a useful and flexible interpretive tool to accomplish its goal of preserving the openness principle, subject to what is required by the administration of justice…"[34]

In England, privacy has entered legal doctrine via Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950,[35] incorporated by the *Human Rights Act* 1998 (U.K.).[36] The House of Lords has declined to recognize a common law tort of invasion of privacy.[37] However, the tort of breach of confidence captures the misuse of private information.[38] As in Canada, various criminal and civil statutes impose restrictions on the open court principle in the name of privacy. And as in Canada, the U.K. has passed laws protecting the identity of victims of sexual offences and children involved in the criminal justice system.[39]

The tension between the open court principle and the competing principle of privacy is evident in the recent debates about the U.K. Family Courts. Public access to hearings on family matters is highly restricted. Most family proceedings are heard in private, and while duly accredited members of the media are entitled to attend private hearings, the court retains the power to exclude them and reporting is limited. In most cases, the media representatives are not entitled to

[34] *Ibid* at para. 60.
[35] 213 U.N.T.S. 221
[36] 1998 c. 42.
[37] *Wainwright v. Home Office*, [2003] UKHL 53, [2003] 4 All E.R. 969.
[38] *Campbell v. MGN Ltd.*, [2004] UKHL 22, [2004] 2 A.C. 457.
[39] Cameron, *supra*, at 43-44.

receive or examine court documents.[40] And few judgments are made available to the public.[41]

Many have called for increases in the openness and transparency of the Family Courts. Recently, Sir James Munby, the president of the Family Division, issued a draft practice guidance calling for greater transparency to improve public understanding of court processes and confidence in the court system. In particular, he suggests presumptions in favour of publishing judgments.[42]

Overall, the trend appears clear. The open court principle continues to be a fundamental part of our society, but more and more privacy concerns are limiting it. The increasing protection of privacy interests in manifest forms and guises is increasingly circumscribing the open court principle.

Yet this is not the whole story. A second and countervailing development has been simultaneously undermining of the right to privacy. I speak of technological advances in communications. Paradoxically, while courts and legislators have been advancing privacy interests, technology has been working to destroy them. The digital revolution put smart phones and Facebook into the hands of millions. People voluntarily revealed -- and continue to reveal -- immense quantities of private information pertaining not only to themselves but to others within their particular cyberspace. What they choose not to reveal can be obtained by the state, as

[40] Adam Wolanski and Kate Wilson, "The Family Courts: Media Access and Reporting"(2011), a joint publication of the President of the Family Division, the Judicial College, and the Society of Editors.
[41] *Ibid*.
[42] Draft Practice Guidance issued by Sir James Munby, "Transparency in the Family Courts and the Court of Protection" (12 July 2013).

Edward Snowden's leaks have revealed. And overarching all this is the information that Google has placed in the ubiquitous "Cloud". As one Silicon Valley boss reportedly remarked, "Privacy is dead. Get over it."[43] Or as Mark Zukerberg, the founder of Facebook, put it, privacy is no longer a "social norm".[44]

This second trend – the negative impact of technology on privacy – also conflicts with the open court principle. In Bentham's day, technical barriers to the mass collection and distribution of information offered some protection to the privacy of participants in the justice system. Only those who were able to attend the court or read newspapers followed court proceedings. Today, television, the internet, and social media provide for the immediate dissemination of information to a vast audience. In the era of 21st century technology, the open court principle can mean an enormous loss of privacy.[45] In short, the paradigm shift in communication that we are living through has necessitated a change in how we apply the open court principle.

Consider the following. In the United States, Canada and other jurisdictions, electronic filing of court documents, including affidavits, is routine. Following the open court principle, a number of jurisdictions in the United States moved to allow public access to these documents. At the touch of a key, personal details of the parties' conduct, alleged conduct and finances were immediately accessible to anyone who cared to log on. When people had to go to the courthouse

[43] Timothy Garton Ash, *Globe and Mail*, "Government Spying? Worry About Yourself", November 1, 2013, p. A15.
[44] *The Economist*, "The people's panopticon", November 16, 2013, p. 29.
[45] Chief Justice Beverly McLachlin, "Courts, Transparency, and Public Confidence – To the Better Administration of Justice" (2003) 8 Deakin L. Rev. 1 at 3.

and ask for a file, few accessed such information. When it was simply a matter of striking a few keys in the privacy of one's home, thousands did.[46]

The same paradigm shift may give rise to claims for the protection of the anonymity of litigants to counter the reality of mass distribution. A recent case in the Supreme Court of Canada, *A.B. v. Bragg Communications Inc.*,[47] concerned a 15 year old girl victimized by a fake, highly sexualized Facebook page. Her father sued the internet provider to obtain information identifying the offender, with a view to suing him for defamation. Normally, parties to litigation must declare who they are. However, in this case, the father asked for an order banning the publication of the girl's identity and the details of the Facebook page, on the ground that publication of these would further injure his daughter. The lower courts denied the publication bans. Reversing those decisions, the Supreme Court emphasized the inherent vulnerability of children, the harms to children as a result of cyber-bullying, and the harms to the administration of justice if children decline to take steps to protect themselves because of the risk of further harm from public disclosure. These harms outweighed the open court principle, warranting a publication ban. This said, the Court confined the publication ban to information that would identify the complainant; the public's right to open courts and press freedom prevailed with respect to the non-identifying Facebook content. The order was justified, the Court said, because the internet allows cyber-bullies to follow children wherever they go and to spread information widely, quickly, and

[46] Karen Eltis, "The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context" (2011) 56:2 McGill L.J. 289.
[47] 2012 SCC 46, [2012] 2 S.C.R. 567.

anonymously.[48]

One thing seems clear. In an age of immediate access to vast amounts of information, it is becoming ever more difficult to reconcile concerns for the privacy, reputation and well-being of individuals engaged in the justice system with the principle of the open and public administration of justice.[49] We all agree that the open court principle is critical to maintaining public confidence in the judiciary, and in turn, fostering the rule of law. However, we must face the question: given the tugs of increasing insistence on privacy on the one hand, and the impact of technology on the dissemination of private data on the other, how will we sustain the open court principle in today's society?

The regulation of the media's access to and publication of litigants' personal information can take different forms. Courts can and ought to continue their case-by-case supervision through confidentiality orders and publication bans. Ultimately, it is the responsibility of the courts to balance the open court principle against the right to privacy. But other forms of regulation of the dissemination of litigants' data can be a useful auxiliary to the courts' direct supervision. At one end of the spectrum, the press can self-regulate through codes of conduct and industry complaint bodies. Information and privacy commissioners can play a role by issuing guidance in relation to the obtaining and use by the press of litigants' personal data. This kind of "soft" law can have a salutary effect, even if it does not have binding force. And at the other end of the spectrum, the

[48] *Ibid* at para. 22.
[49] Chief Justice McLachlin, *supra*, at 4.

law could regulate the media's activities through data-protection legislation.

2. National Security

The second concern increasingly impinging on the open court principle is national security. "Our fidelity to the open court principle was nurtured in a stable democracy, in peaceful times."[50] Now the open court principle must adapt to unstable times and the global threat of terrorism. Since the September 11, 2001, attacks on the World Trade Center Towers, national security has become a priority for many governments, and there is a heightened need to keep sources and intelligence secret.[51] The state's highest duty is to protect its citizens, it is argued. In a world where the disclosure of information can endanger populations and jeopardize national security efforts, the transnational threat of terrorism makes sharing intelligence between states essential. Cooperation and coordination are in turn premised on mutual commitments that the shared information will be kept confidential.[52] The result has been ever-greater limits on the openness of judicial proceedings that involve national security issues. The person charged or threatened with deportation may be denied access to the information used against him. And the public and the press are left unable to judge whether the court proceedings are fair and the result just.

Countries across the globe have passed laws limiting access to national security evidence and

[50] D.M. Paciocco, "When Open Courts Meet Closed Government" (2005) 29 S.C.L.R.(2d) 385 at 386-7.
[51] *Ibid* at 387.
[52] David Cole, Federico Fabbrini and Arianna Vedaschi, *Secrecy, National Security, and the Vindication of Constitutional Law*, (United Kingdom: Edward Elgar Publishing Ltd., 2013) at 2.

information in court proceedings. In Canada, anti-terrorism legislation enacted after 9/11 provided for increased discretionary and mandatory publication bans and secret hearings to prevent injury to international relations or national security.[53] This has limited public and press access to judicial proceedings.

Not surprisingly, many of these legislative provisions have been challenged as an unreasonable limit on freedom of expression. Canadian courts were asked to strike a balance between the principle of openness, enshrined in our *Charter*, and national security concerns in a post 9/11 world.

In *Ruby v. Canada (Solicitor General),*[54] the Supreme Court of Canada heard a constitutional challenge to a provision in the *Privacy Act*[55] that provided for mandatory *in camera* and *ex parte* judicial review proceedings where a request for personal information was denied on national security grounds. The Court reiterated the importance of the open court principle, but also recognized that national security is a pressing and substantial concern and closed hearings reduce the risk of an inadvertent disclosure of sensitive information. Balancing these competing imperatives, the Court concluded that the requirement that the entire judicial review proceeding be heard *in camera* was an unreasonable limit on freedom of expression.

The Court was again asked to determine the appropriate balance between openness and national

[53] *Anti-Terrorism Act*, S.C. 2001, c. 41. See also: Pacciocco, *supra*.
[54] 2002 SCC 75, [2002] 4 S.C.R. 3.
[55] R.S.C. 1985, c. P-21.

security interests in *Re Vancouver Sun.*[56] Canadian anti-terrorism legislation created a new procedure for investigative hearings, allowing investigators to compel potential witnesses to provide information during terrorism investigations. In this case, the government obtained an order that the hearing was to be held *in camera* and no notice was to be given to the accused, the press, or the public. Subsequently, the witness challenged the constitutional validity of the investigative hearing procedure. The hearing on the constitutional issue was held *in camera* and the reasons for judgment were sealed. The Court criticized the level of secrecy in this case, noting that the facts of this case illustrate "how antithetical to the judicial process secret court hearings are."[57] The Court concluded that the constitutional hearing should have been held in open court and the judicial investigative hearing was to be held in public. This case represents a strong affirmation of the open court principle, even in the context of national security. Indeed, the Supreme Court of Canada heard the appeal from the constitutional challenge entirely in open court, subject to some restrictions.[58]

More recently, the Supreme Court of Canada held that the security certificate regime in Canadian immigration law was unconstitutional.[59] This regime permitted the government to issue security certificates, leading to the detention and ultimate deportation of a non-citizen deemed to be a threat to national security. The certificate and detention were subject to review by a judge, but upon the government's request, the review was conducted *in camera* and *ex parte*. The named

[56] 2004 SCC 43, [2004] 2 S.C.R. 332.
[57] *Ibid* at para. 52.
[58] *Ibid* at para. 20.
[59] *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350.

person had no right to see the material upon which the case against him was based.[60] The Court found this procedure unconstitutional because it resulted in the detainee being denied full information about the case against him.

Last autumn, the Supreme Court of Canada heard yet another constitutional challenge to the revised security certificate regime.[61] Under the legislation, we were obliged to hold part of our hearing *in camera* at a secret location. Much of the evidence and part of the judgments on review were secret.

The challenge of balancing openness against national security concerns is increasingly confronting Canadian judges. For example, the Federal Court has considered provisions requiring closed hearings when determining whether national security information should be disclosed.[62] The Court held that these provisions were an unjustified limit on the open court principle – but only to the extent that they apply when there is no secret information being reviewed by the court and the court sessions and court records are available to all parties. The provisions remain valid when secret information is in play.[63]

In the United States, shortly after the terrorist attacks of 9/11, the Chief Immigration Judge issued a directive to all United States Immigration Judges requiring a closure of "special interest cases", including certain deportation cases. The issue before the U.S. Court of Appeals for the

[60] *Ibid* at paras. 4-9.
[61] *Ministry of Citizenship and Immigration, et al. v. Mohamed Harkat, et al.* (34884).
[62] *Toronto Star v. Canada*, 2007 F.C. 128.
[63] *Ibid* at para. 2.

Sixth Circuit was whether this violated the First Amendment.[64] Strongly affirming the open court principle, the court stated:

> Democracies die behind closed doors. The First Amendment, through a free press, protects the people's right to know that their government acts fairly, lawfully, and accurately in deportation proceedings. When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation. The Framers of the First Amendment "did not trust any government to separate the true from the false for us"… They protected the people against secret government.[65]

The court added that "open proceedings, with a vigorous and scrutinizing press, serve to ensure the durability of our democracy"[66] concluding that the press and public have a First Amendment right of access to deportation hearings. Yet we are told that electronic eavesdropping by the federal government is monitored by the Foreign Intelligence Surveillance Court, a court consisting of a panel of selected judges, sitting in secret.[67]

The competing principles of openness and national security are also at play in the recent debates and discussion surrounding closed material proceedings in the U.K. CMP's were first introduced in the late 1990's to facilitate the hearing of deportation cases that raised national security issues. At that time, they were exceptional.[68] Under a CMP, the court sits in private and sensitive information is only disclosed to the court and Special Advocates appointed by the government to

[64] *Detroit Free Press, et al. v. John Ashcroft, et al.*, 303 F.3d 681 (3d Cir. 2002).
[65] *Ibid* at 683.
[66] *Ibid* at 711.
[67] "In Secret, Court Vastly Broadens Powers of N.S.A.", New York Times, July 6, 2013.
[68] Lord Justice Stephen Sedley, "Terrorism and Security: Back to the Future?" in David Cole, Federico Fabbrini and Arianna Vedaschi, eds., *Secrecy, National Security, and the Vindication of Constitutional Law* (United Kingdom: Edward Elgar Publishing Ltd., 2013) 13 at 21.

represent the other party's interests. The other party does not see the sensitive evidence.[69] In the past decade, the U.K. Parliament introduced legislation allowing for CMP's in certain terrorism cases.[70]

In *Al Rawi v. Security Service*,[71] the claimants brought proceedings against the Security Services for damages arising from the government's complicity in their detention and ill treatment by foreign authorities. The government claimed that the material for its defence was sensitive and requested that part of the hearing proceed by way of a CMP. The issue before the Court was whether it had the power to order a CMP for the whole or part of a civil trial for damages. The Court affirmed the important principle of open justice, but also recognized the growing need to balance that principle against national security interests. Ultimately, the Court concluded that CMP's are such a significant departure from the common law principles of openness and natural justice, that only Parliament can bring about such a fundamental change.

In *Bank Mellat v. HM Treasury*,[72] the Supreme Court considered whether it could conduct a closed hearing when the statute in question provided for CMP's in the lower courts. In concluding that it could adopt a CMP under the *Counter-Terrorism Act 2008*, the Court reiterated the open court principle[73], but held that CMP's may be necessary to promote the *Act*'s

[69] *Al Rawi v. Security Service*, [2011] UKSC 34 at para. 2.
[70] *Ibid* at para. 27.
[71] *Al Rawi*, *supra*.
[72] [2013] UKSC 38.
[73] *Ibid* at para. 2

aim of protecting the country from threats of terrorism.[74]

The use of CMP's in the U.K. has expanded with the enactment of the *Justice and Security Act*.[75] Enacted this past year, the *Act* expands the use of "closed material proceedings" in civil cases.

When the *Justice and Security Bill* was first introduced, there was much debate about whether it struck the appropriate balance between transparency in court proceedings and the secrecy that national security sometimes demands. The House of Lords expressed concerns that CMP's offend the principle of open justice, saying:

> A CMP is inherently damaging to the integrity of the judicial process. Judicial decisions are respected precisely because all the evidence is heard in open court and can be reported, subject to exceptions, and judges give a reasoned judgment that explains their decision.[76]

The House of Lords suggested amendments to the bill that would allow for judicial discretion in deciding whether to use a CMP, rather than mandating closed procedures.[77] This allows the judge to balance the competing interests of national security and open justice in the particular circumstances of the case. The government accepted this change, and s. 6(5) of the *Act* provides that the court may allow a closed material application in cases involving sensitive information if "it is in the interests of the fair and effective administration of justice".

---

[74] *Ibid* at paras. 51-54.
[75] 2013, c. 18.
[76] Hansard, Report of the 2nd sitting of the House of Lords, November 21, 2012.
[77] *Ibid*.

The increased use of CMP's and the *Justice and Security Act* are just two more examples of how modern national security concerns test the open court principle. In a time where secrecy is seen as an essential component of national security, is the open court principle sustainable? How can governments and courts reconcile these two competing principles?

III. Is the Open Courts Principle Sustainable?

Lord Bingham was right to state that the open court principle lies at the heart of the rule of law. As such, we must ensure that our courts conduct their business and render their judgments in public. We do not have to reach back far into history to understand the evil of secret trials and Kafkaesque decrees.

At the same time, we would be foolish not to recognize the pressures that modern society and the communications revolution has placed on the open court principle. We cannot be blind to claims for privacy in the face of ever-more invasive publication practices. Nor can we, since 9/11, ignore the reality that some information must be kept secret for the security of everyone.

We must recognize that the open court principle may conflict with other important values, such as privacy or national security. These interests are important to the administration of justice, and only the rash would say that such interests must always yield to the fundamental principle of

openness.

The result, as I suggested at the outset, is that as a society – and as a profession – we find ourselves engaged in a new and complicated exercise of line-drawing. No longer can we say that the open court principle prevails, unless the case falls within a handful of circumscribed exceptions. Instead, we must weigh and evaluate the competing interests in context, with the goal of finding a solution that offers adequate protection to privacy and national security, while preserving open justice and the rule of law. Without denying the importance of protecting privacy and security, we must preserve the essential core of the open court principle, and the broader principle of freedom of expression.

How do we do this? In Canada, we have established a common law test for balancing the open court principle against other interests. Judges may limit the open court principle if: 1) such an order is necessary to prevent a serious risk to the proper administration of justice because other reasonably alternative measures will not prevent the risk; and 2) the salutary effects of the limit on openness outweigh the deleterious effects on the rights and interests of the parties and the public.[78]

Drawing the line between conflicting values in the right place is neither an obvious nor easy task. The recent revelations emerging from the Snowden affair have led some to suggest that

[78] *Dagenais v. Canadian Broadcasting Corp*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522; *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188.

governments have not always drawn the line between security and privacy in the right place.[79] It is our job as lawyers and judges to ensure that when we are confronted with the task of drawing such lines, we carefully weigh the conflicting concerns in the context at hand. If we do this, I am confident that the open court principle that has sustained the rule of law for the past five hundred years will survive.

[79] Ash, *supra.*