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When Open Courts Meet Closed Government

David M. Paciocco*

I have long been aware at an intellectual level of the importance of the “open court” principle. I did not fully appreciate that importance, though, until I witnessed the President of the Appeals Chamber of the International Criminal Tribunal for Rwanda order that a hearing I was counsel at would go into “closed session.”¹ I was about to cross-examine an expert witness who had testified for the Prosecution at the trial about a missive he had sent to the Prosecutor after the trial was over claiming that our client was not at the location of a massacre for which he was convicted. When the President made his order the microphones in the sound-proof, glass-walled visitor’s gallery were turned off. Then automatic blinds were inched closed to the sound of a grating motor, blocking the view into the courtroom from the gallery, presumably so that no one could read the expert’s lips while looking at the back of his head (which is all their vantage point allowed). What then transpired was to be “closed” from the world forever.

What amazed me about this development was that the Prosecutor had not even asked for the hearing to move into closed session. The witness requested it. All he had to say in order for the President to shut the public out and forever seal what was about to transpire was that he was concerned for the safety of some of the witnesses he had spoken to, should their names become public. No evidential foundation for his fear was presented or asked for, and no canvass was undertaken for less intrusive ways to protect those witnesses, if they indeed needed protection.² The President did not even invite submissions before making the

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¹ The case is *Prosecutor v. Georges Rutaganda*. The final appeal decision (*The Prosecutor v. Georges Rutaganda*, Case No. ICTR-96-3-A, 26 May 2003), and the decision on this fresh evidence motion (*Decision on Consolidated Defence Motion*, 3 January 2003) can be found online at <www.ictt.org> (last accessed 27 June 2005).

² Such as leaving the hearing open but assigning the witnesses pseudonyms, or having the expert write out their names and hand them up to the Tribunal when their identifications were being canvassed.

order. We simply continued in a closed proceeding in which issues central to the liberty of my client would be determined away from the eyes of the world.

The irony that a Tribunal, created to enable the eyes of the world to witness justice, would so reflexively go into “closed session” was not lost on me. Nor did I fail to see the long-term risks of such practices to the integrity of the justice the Tribunal was dispensing. As a Canadian lawyer I dismissed this attitude about the open court principle as yet one more product of the cultural gap between Canadian conceptions of justice and those that apply internationally. Canadian justice system participants³ would never be so cavalier about the open court principle, I thought. I am beginning to fear that maybe I was wrong.

I. INTRODUCTION

The law, of course, largely controls the degree to which the open court principle is respected. “Legal culture,”⁴ however, has as much to do with the fortunes of the “open court principle” as does the law. The law often provides only standards — not clear answers. The extent to which the open court principle is respected therefore comes down to attitude or the commitment to it among justice system participants. The point is worth making, indeed stressing, now that our legal culture is experiencing the stress of national insecurity brought on by the terrorist attacks of 2001.

We are fortunate that this is a country with a long and demonstrated commitment to the open court principle.⁵ But attitudes have changed since that commitment rooted. With the notable exception of a decade of war in the first half of the 20th century and the October crises of 1970, our fidelity to the open court principle was nurtured in a stable democracy, in

³ The term “justice system participants” is a term of art in the *Criminal Code of Canada*, R.S.C. 1985, c. C-46, defined in s. 2, and includes Parliamentarians, members of the executive, prosecutors, lawyers and peace officers.

⁴ I cannot rely as heavily as I do on the term, “legal culture,” without explaining what I mean by it. I use the term to define a community’s attitudes about the imposition and application of law, both as reflected in the legal system’s own rules, principles and policies, and by the views and priorities of those who administer the law.

⁵ See P.B. Shabas, “Media Freedom under the Charter,” Law Society of Canada Special Lectures 2001, Constitutional and Administrative Law (Toronto: Law Society of Upper Canada, 2002), at 441 for a description of the common law tradition of respect for the principle, and its transition to a constitutionally protected ideal.

peaceful times. The terrorist attacks of 2001 have ushered in a heightened sense of purpose and secrecy on the part of government, and the intelligence and law enforcement communities, all in the interests of that profoundly powerful goal of “national security.” National security can indeed be compromised by the flow of information, and no responsible Canadian would expect legal doctrine to require the disclosure of information that would endanger Canada or impair the ability of the government to protect its citizens. National security is being invoked, however, with increasing frequency. It is being used to shut down public access to information that is being relied upon to make serious decisions about the liberty of individuals — about whether to execute warrants, including warrants against journalists;⁶ about whether “public inquiries” into important issues relating to the activities of our national security apparatus should really be public inquiries;⁷ about whether to detain people in immigration lock-ups and deport them;⁸ about whether to list people or groups as terrorist entities;⁹ about whether to seal search warrants;¹⁰ about whether to resist disclosure; about whether to permit defendants to use evidence they have acquired;¹¹ and about charging individuals with terrorist offences.

The attitude that gives priority to national security concerns challenges the open court principle in criminal cases. While it is to be expected, it is worrisome because it is precisely in times of national insecurity that the open court principle takes on special urgency. After all, one of the roles of the open court principle is to ensure that individuals brought before the courts for prosecution are being treated fairly; the

⁶ The R.C.M.P. executed warrants in January of 2004 at the offices of the Ottawa Citizen Group Inc., and at the residence of journalist Juliett O’Neill. The warrant documents were sealed, in the interests of national security, leading to protracted litigation to unseal them. See *Canada (Attorney General) v. O’Neill*, [2004] O.J. No. 4649, 192 C.C.C. (3d) 255 (S.C.J.).

⁷ *Commission of Inquiry Into the Actions of Canadian Officials in Relation to Maher Arar*, The Hon. Dennis R. O’Connor, Commissioner [hereinafter “Arar Inquiry”].

⁸ See, e.g., proceedings against Mohammed Harkat, chronicled in “Mohamed Harket — A Security Certificate Case, 25 For the Defence: Criminal Lawyer’s Association Newsletter, No. 6, 44.

⁹ Liban Hussein, an Ottawa member of the Somali community, was placed on a terrorist list established under the authority of the *United Nations Act*, but was subsequently de-listed.

¹⁰ A considerable but unknown number of search warrants have been executed and sealed, including one against Ottawa resident, Abdullah Amalki, “Judge Won’t Reverse Ruling on Unsealing Amalki Files,” *The Ottawa Citizen* (11 January 2005) A14.

¹¹ See *Canada (Attorney General) v. Ribic*, [2003] F.C.J. No. 1964, 185 C.C.C. (3d) 129 (C.A.), leave to appeal refused (22 October 2003) (S.C.C.).

American experience with its overlay of abuse sheltering in a regimen of military trials and secret processes shows the heightened need for transparency if individual rights are to be respected when a government feels most threatened. The situation is decidedly less intense in Canada, but the point is made; “History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure.”¹²

The other role of the open court principle is to secure democracy, yet, as has also been observed, “the powers necessary to defeat terrorism and suppress insurrection [including state control on the flow of information] are the very ones needed to enforce a tyranny.”¹³ I do not want to be histrionic about this. Canada is one of the world’s most stable liberal democracies. Our democracy and commitment to individual rights and civil treatment runs deep and will survive the current impulse to put security concerns first. Still, there are various grades of democracy and various degrees of freedom, and unless those responsible for the administration of the open court principle — the executive, government officials, line peace officers and, of course, courts — turn their minds to the issue and reaffirm their commitment to leave our courts as open as they can be in this age of insecurity, our freedom and democracy will be diminished more than it need be. Society will suffer for it, and so too will some individuals.

II. THE MEANING OF THE “OPEN COURT PRINCIPLE”

1. The Open Court Principle is about Access to Information, not Access to Wood-paneled Rooms

The term “open court principle” is potentially misleading. It sounds like it is concerned with open doors, including the common law implication that open doors are an invitation to enter. These rudimentary notions,

¹² Per Thurgood Marshall, as quoted in Michael Linfield, *Freedom under Fire: U.S. Civil Liberties in Times of War* (Boston: South End Press, 1990) at 1, and see Michael Freeman, *Freedom or Security: The Consequences for Democracies Using Emergency Powers to Fight Terror* (Westport, Connecticut: Praeger, 2003), at 2.

¹³ R. Eveleigh, *Peace-Keeping in a Democratic Society: The Lessons of Northern Ireland* (Montreal: McGill-Queen’s University Press, 1978), at 60, quoted at M. Freeman, *Freedom or Security: The Consequences for Democracies Using Emergency Powers to Fight Terror* (Westport, Connecticut: Praeger, 2003), at 4.

open doors and the right of public entry, are indeed encompassed by the open court principle but they are not its heart and soul. They are a means to an end. The “open court principle” is in fact about access to, and the dissemination of, information about what courts do.

2. Open Doors

As indicated, the “open court principle” does indeed open courtroom doors. In *Vickery v. Supreme Court Nova Scotia (Prothonotary)* Cory J. described the “first facet” of the open court principle as including “the right of the public and of the media, as agents of the public to attend trials and court proceedings.”¹⁴ That is why the order made by a judge under section 486 (1) of the *Criminal Code of Canada* to exclude the public from a sentencing hearing in order to shield a sexual offence complainant from being embarrassed by the recitation in front of strangers of the horrid things that had happened to her was quashed by the Supreme Court of Canada in *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*.¹⁵ This is also why, in *Vancouver Sun (Re)*,¹⁶ the Supreme Court of Canada arrived at the stunning conclusion that investigative hearings being conducted under the *Anti-terrorism Act* should be open, even though judges are not adjudicating contested legal claims at those hearings.

While the open court principle grants public entrance to courtrooms, it would be a mistake to think of it as some kind of legal door stop. Opening doors is merely a means to an end, and not an end in itself.

3. Open Court Records

What the open court principle is really about is access to information. It advances the notion that any non-privileged information that a court receives in going about its business should be available to the public. In *Sierra Club of Canada v. Canada (Minister of Finance)* Iacobucci J. referred to the underlying principle of “public openness, both in the proceedings in dispute, and in the material that is relevant to

¹⁴ [1991] S.C.J. No. 23, [1991] 1 S.C.R. 671, at 688, 64 C.C.C. (3d) 65, at 70, dissenting in the result.

¹⁵ [1996] S.C.J. No. 38, [1996] 3 S.C.R. 480, 110 C.C.C. (3d) 193.

¹⁶ [2004] S.C.J. No. 41, [2004] S.C.R. 332.

its resolution.”¹⁷ That is why in the pre-Charter decision of *Nova Scotia (Attorney General) v. MacIntyre*¹⁸ the Supreme Court of Canada used the open court principle to entitle an investigative reporter to view the documents that had been used to secure a search warrant. Search warrant hearings, if they can be called hearings at all,¹⁹ are not open, but once the warrant is executed, the information presented to the justice or judge is caught by the principle and is generally available to the public for inspection and dissemination. The principle, which applies at all stages of a legal process including appeals,²⁰ has also been called into aid to set aside judicial orders sealing court documents.²¹ Any rule or ruling that seals information presented to a court or otherwise keeps that information from the public is contrary to the open court principle.²²

4. Publication

The open court principle also includes the idea that the information that is accessed can be disseminated or published. In *Vickery v. Nova Scotia Supreme Court (Prothonotary)* Cory J. included, in his description of the essential facets of the principle, the right of the media to report what transpires in court proceedings.²³ In *Sierra Club of Canada v. Canada (Minister of Finance)* Iacobucci J. said in the context of the principle that the importance of media access to the courts cannot be

¹⁷ [2002] S.C.J. No. 42, [2002] 2 S.C.R. 522, at 526, 211 D.L.R. (4th) 193, at 197 (emphasis added).

¹⁸ [1982] 1 S.C.R. 175.

¹⁹ An informant swears an affidavit, meets alone with a justice of the peace or a judge and the justice of the peace or judge signs the order. There is hardly any more “hearing” happening than there is where a civil judge signs consent orders on written motions in the sanctity of chambers.

²⁰ *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, *supra*, note 14.

²¹ See *R. v. Toronto Star Newspapers Ltd.*, [2005] S.C.J. No. 41; *R. v. Eurocopter Canada Ltd.*, [2003] O.J. No. 4238 (C.J.); *Canada (Attorney General) v. O’Neill*, *supra*, note 6; *R. v. Angel Acres Recreation and Festival Property Ltd.*, [2004] B.C.J. No. 1523 (Prov. Ct.), upheld on judicial review [2004] B.C.J. No. 1428; *Canada (Commissioner of Competition) v. Cascades Fine Papers Group Inc.*, 2004 FC 95.

²² There are related considerations that do not fall directly within the open court principle — namely the notions that the subject of a proceeding should have disclosure from the state of relevant information in its possession (the right of discovery), and the even more powerful ideal that persons affected by information presented during a judicial proceeding should have access to it. The open court principle does not address these ideals directly, as it is concerned with public access to information. The aforementioned ideals are protected by other principles, like the fair hearing principle in administrative law and the powerful right of full answer and defence in criminal cases.

²³ *Supra*, note 14, at 688, dissenting in the result.

understated, “as [along with public access it] is the method by which the judicial process is scrutinized and criticized ... and justice ... is seen to be done.”²⁴ “It is only through the press that most individuals can really learn of what is transpiring in the courts.”²⁵ The open court principle, like the constitutional right of freedom of expression, therefore protects both listeners and readers.²⁶

It is therefore helpful to think of the open court principle, not as a doctrine that permits access to courtrooms — that is a mere means to an end. It exists to protect public access to information. I wish it was called the “open information” principle.

III. WHY THE OPEN COURT PRINCIPLE IS SO IMPORTANT: THE PURPOSES IT SERVES

There are two primary reasons why the open court principle developed. It exists mainly to (1) protect the interests of those who are subject to the authority of courts, and (2) to permit democracy to work. Like so many other sacred ideas in our legal system, it is built to some degree on mistrust. It is about checks and balance on power — the power of courts and the power of the state.

1. Protecting the Interests of Those Subject to the Authority of Courts

The role of the open court principle in protecting the interests of those who are subject to the authority of courts is captured in the timeless prose of Bentham, “Where there is no publicity, there is no justice,”²⁷ and, “publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity.”²⁸ In essence, publicity “guarantees the integrity of judicial processes by demonstrating ‘that justice is administered in a non-arbitrary manner, according to

²⁴ *Supra*, note 17, at para. 52.

²⁵ *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, note 15, at para. 23.

²⁶ *Ruby v. Canada (Solicitor General)*, [2002] S.C.J. No. 73, [2002] 4 S.C.R. 3, at para. 52.

²⁷ As quoted in *Nova Scotia (Attorney General) v. MacIntyre*, *supra*, note 18, at 183.

²⁸ *Id.*, at para. 24, citing J.H. Burton, ed., *Benthamiana or Selected Extracts from the Works of Jeremy Bentham* (1843), at 115.

the rule of law’.”²⁹ It also increases the prospect that truthful verdicts will be rendered, as the world, including those with knowledge, watch as facts unfold.³⁰ The principle is therefore meant to ensure that judges do not use their power inappropriately or oppressively. It is part of a shared legacy with England, the font of the common law, which includes the Courts of Star Chamber and High Commission where subjects, suspected of being enemies of the state, were spirited away and “tried” in closed session.³¹ The open court principle is dedicated to preventing such abuses. It exists out of recognition that the power of judges derives from the law; they are beholden to it and must show that they honour it, and this requires that what they do must be seen, and why they do it, understood.³² The Supreme Court of Canada made these observations in *Vancouver Sun (Re)*:

Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public’s understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts.³³

This face of the open court principle is therefore linked closely to fair hearing and fair trial rights, and where a subject is charged with an offence, it is protected, in part, by section 11(d) of the Charter.

²⁹ *Vancouver Sun (Re)*, *supra*, note 16, at para. 25, quoting in part *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, note 15, at para. 22.

³⁰ In *Sierra Club of Canada v. Canada (Minister of Finance)*, *supra*, note 17, at 217, the Court speaks of the important role that the principle has in “seeking the truth and the common good.” In *Dagenais v. Canadian Broadcasting Corp.*, [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835, at 883 Lamer C.J. noted how publicity maximizes the chance that individuals with relevant information will come forward, and helps to prevent perjury by placing witnesses under public scrutiny.

³¹ See The Hon. Roger Salhany, *The Origin of Rights* (1986), at 90-96.

³² Related notions include the time-honoured maxim that “Justice must not only be done, it must manifestly be seen to be done,” and the Supreme Court of Canada’s recent, crucial innovation in criminal cases in *R. v. Sheppard*, [2002] S.C.J. No. 30, [2002] 1 S.C.R. 869, making it an error of law for judges to fail to give reasons for their decisions where the failure to do so prejudices the ability of the accused to be sure that the law has been applied properly.

³³ *Supra*, note 16, at para. 25.

2. Facilitating Democracy

The second primary function of the open court principle, the protection of democracy itself, is even more ambitious. “The freedom of individuals to discuss information about the institutions of government, their policies and practices, is crucial to any notion of democratic rule.”³⁴ Since courts and particularly criminal courts play a central role in a democracy, their policies and practices must be open, not just for the sake of enabling criticism of courts as institutions, but to ensure that state power is not being abused. As La Forest J. explained in *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*:

It is in this forum [namely, courts] that the rights of the powerful state are tested against those of the individual. As noted by Cory J. in *Edmonton Journal*, courts represent the forum for the resolution of disputes between the citizens and the state, and so must be open to public scrutiny and to public criticism of their operations.³⁵

Of course, neither open doors at hearings nor obliging court clerks to produce documents that judges have used when not engaged in formal hearings can realistically advance democracy without dissemination of the information that is made known. This, of course, is where freedom of the press comes in. The press is the agent for the dissemination of information that a democracy requires. Again, only a time-worn quote in more classic English than writers today can muster will convey the message in sufficiently reverential tones; appropriately the Supreme Court of Canada called the words of James Mill into aid when making this point:

So true, it is, however, that the discontent of the people is the only means of removing the defects of vicious governments, that the freedom of the press, the main instrument of creating discontent, is, in all civilized countries, among all but the advocates of misgovernment, regarded as an indispensable security, and the greatest safeguard of the interests of mankind.³⁶

³⁴ *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, note 25, at para. 18.

³⁵ *Id.*, at para. 20.

³⁶ “Liberty of the Press,” in *Essays on Government, Jurisprudence, Liberty of the Press, and Law of Nations* (1825) (reprint ed. 1967), at 18, as quoted in *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *id.*, at para. 18.

3. Added Intensity in Criminal Cases

The open court principle applies to all court business in all kinds of cases. It even applies in a non-constitutionalized form in civil cases,³⁷ to administrative reviews,³⁸ and in a qualified fashion in immigration cases as well.³⁹ Because of its function of protecting litigants and democracy, the intensity of the open court principle increases, however, where the stakes for the litigant are particularly high or where the political process is engaged in a proceeding.⁴⁰ In a criminal trial the principle is therefore at its most compelling. The stakes for the accused, who the state is attempting to stigmatize and deprive of liberty, are invariably high. Criminal prosecutions are also endemically political. Each one engages the nature and extent of state power over the individual.

The open court principle is particularly compelling in this context for another reason — the principle is tied intimately to the basic function of a criminal trial. As Cory J. has explained, “There can be a cathartic effect to a criminal trial . . . An open trial process demonstrates to all, whether the family of the victim, the family of the accused, or the members of the community in general, that the entire criminal process has been conducted fairly and that those accused of crimes have been dealt with justly.”⁴¹ Chief Justice Lamer made the same basic point in *Dagenais v. Canadian Broadcasting Corp.* when he noted that an open criminal trial can help reduce crime through the public expression of disapproval of crime.⁴² The open court principle is an essential feature of a just and effective criminal system.

³⁷ In *Sierra Club of Canada v. Canada (Minister of Finance)*, *supra*, note 17, the Supreme Court of Canada recognized the central importance of the open court principle whenever public courts are used to litigate civil disputes. The Court used that principle in evaluating whether a “confidentiality order” was valid. A confidentiality order is like a publication ban on steroids. It not only prohibits the publication of information, but denies access to the documents to everyone but the parties and the court. The order does not, however, exclude the public from court. See also *Edmonton Journal v. Alberta (Attorney General)*, [1989] S.C.J. No. 124, [1989] 2 S.C.R. 1326.

³⁸ *Ruby v. Canada (Solicitor General)*, *supra*, note 26; *Toronto Star Newspapers Ltd. v. Kelly*, [2000] O.J. No. 1259 (S.C.J.), cited in P.B. Shabas, “Media Freedom under the Charter” Law Society of Canada Special Lectures 2001, Constitutional and Administrative Law (Toronto: Law Society of Upper Canada, 2002) 441, at 457.

³⁹ *Majoub v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1335.

⁴⁰ *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] S.C.J. No. 42, [2002] 2 S.C.R. 522, 211 D.L.R. (4th) 193, at 219.

⁴¹ *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, [1991] S.C.J. No. 23, [1991] 1 S.C.R. 671, at para. 78, 64 C.C.C. (3d) 65, at 79, dissenting in the result.

⁴² *Supra*, note 30, at 883.

So, at bottom, the open court principle, this “very soul of justice,”⁴³ is in large measure about prudent suspicion of government and government institutions, and about the importance of sending appropriate messages to the public in the interests of law and the repute of the administration of justice. As Lord Atkin observed, it is the right of any citizen to know that coercive action by the state is justified in law. He cautioned that the phrase, “justified in law” is emptied of its meaning if we are required to take executive officials at their word.⁴⁴ The open court principle is an integral part of our system of checks and balances and it is therefore constitutionally protected not only by the freedom of the press and freedom of expression housed in section 2(b) of the Charter but in the constitutional right to a fair and public hearing found in section 11(d).

IV. THE IMPACT OF 9/11: A CHANGE IN LEGAL CULTURE

It has become trite to observe that the attack on the United States of America (and on American allies and even Western values) caused an adjustment in the balance between liberty and security. This was to be expected. “Extravagant terrorist attacks tend to bring about ... the prevailing belief that if only we extend the arsenal of law enforcement agencies by putting at their power more sweeping powers ... the country will be more secure.”⁴⁵ This phenomenon has been dubbed the “totalitarianism of hazard protection.”⁴⁶ So it was not surprising when the Minister of Justice, in announcing new anti-terrorism measures asserted that “the balance between individual rights and collective security shifted after the attacks.”⁴⁷

⁴³ *Sierra Club of Canada v. Canada (Minister of Finance)*, *supra*, note 40, at para. 52.

⁴⁴ D. Dyzenhaus, “The Permanence of the Temporary: Can Emergency Powers be Normalized,” in *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill*, R.J. Daniels, P. Macklem and K. Roach, eds. (Toronto: University of Toronto Press, 2001), at 28.

⁴⁵ O. Gross, “Cutting Down Trees: Law-Making Under the Shadow of Great Calamities” in *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* R.J. Daniels, P. Macklem and K. Roach, eds. (Toronto: Carswell, 2002) 39, at 42.

⁴⁶ U. Beck, *Risk Society: Towards a New Modernity* (1992), at 80, quoted in D. Schneiderman, “Terrorism and the Risk Society” in *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* R.J. Daniels, P. Macklem and K. Roach, eds. (Toronto: Carswell, 2002) 63, at 69.

⁴⁷ *The Globe and Mail* (6 October 2001) A1 and (22 October 2001) A7.

Unfortunately, while crises, real or perceived, are often the inspiration for law reform, crisis is a dangerous milieu in which to attempt to redefine basic political priorities in a liberal democracy. Insecurity reduces the resistance to the exercise of government power. “[T]he general public and the legal profession (and more importantly the judiciary) [tend to] give their seal of approval to such police activity and claims of authority.”⁴⁸ In effect, a legislative honeymoon is created. It enables governments, who trust themselves and are less apt to worry about checks and balances than about security, to say “trust us.” “Trust us” is not fertile soil for the open court principle. As explained, the open court principle is not borne of a culture of trust — it is a product of a “culture of justification,”⁴⁹ one in which the state is required to demonstrate at every turn that it is respecting the rule of law and comporting itself in a way that is acceptable to the public. This is not to say that a rule of law culture is one of deep mistrust; it is simply one that has sage institutionalized mechanisms to limit power abuses, mechanisms that depend on openness, transparency and information.

Ironically, while national security typically presents itself as the justification for secrecy, there is an increased need for openness when a government is attempting to deal with a security threat. As has been observed, “in the war on terrorism, publics will need to be told more, rather than less, about the actions and capabilities of Canadian security and intelligence institutions.”⁵⁰ Where the potential targets in the war on terrorism are members of an identifiable group, such as Muslims, the need for the public to be kept apprised of what is happening takes on

⁴⁸ O. Gross, “Cutting Down Trees: Law-Making Under the Shadow of Great Calamities” *supra*, note 45, at 51. In truth, much of the academy, the criminal defence bar, civil libertarians, feminist groups and equality-seeking groups aligned to challenge successfully some of the initiatives that had been undertaken. See K. Roach, *September 11: Consequences for Canada* (2003), c. 3. There was only so much that could be done, however, given how sweeping the anti-terrorism legislation was. Priorities had to be identified. The open court principle therefore commanded little attention.

⁴⁹ D. Dyzenhaus, “The Permanence of the Temporary: Can Emergency Powers be Normalized,” in *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* R.J. Daniels, P. Macklem and K. Roach, eds. (Toronto: Carswell, 2002) 21, at 34, quoting Etienne Mureinik, a South African lawyer who used the phrase to describe the post-Apartheid era. See “Law as Justification: Etienne Mureinik’s Conception of Legal Culture” (1998) 14 *South African Journal of Human Rights* 11.

⁵⁰ W. Wark, “Intelligence Requirements and Anti-Terrorism Legislation” in *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* R.J. Daniels, P. Macklem and K. Roach, eds., (Toronto: Carswell, 2002) 287, at 292.

increased importance. This is not just to salve public or community insecurities. It is because responding to security threats increases the risk of abuse. It was broadly agreed during the leading international law colloquium on access to information that “most serious violations of human rights and fundamental freedoms are justified by governments as necessary to protect national security.”⁵¹ As states claim exceptional powers such as the ability to conduct investigative hearings, or to move before the Federal Court to suppress evidence in any other proceeding, or to “list” and socially and legally blackball individuals and groups as terrorist entities, there is an increased need for vigilance. This is particularly so where states choose to use the criminal law to achieve security. The power of the state is being used against individuals, and courts are called upon to make profoundly political decisions about the reaches of government power.

In a study of abuse of emergency powers Michael Freeman, an American “political risk consultant” concluded what the common law has long accepted — that among the essential safeguards in protecting against abuse of emergency powers by international governments is the ability to monitor the use that is being made of those powers, including through the use of free press and free speech.⁵² There is no point in having free press and free speech if the facts cannot be known. Those checks and balances depend on both open government and open courts. The paradox is therefore engaged. Insecurity breeds both a need for secrecy and a need to know.

As always where there is a clash of competing interests, there has to be a balance. Achieving that balance depends on the prevailing legal culture — on the attitudes of those responsible for defining and administering the law. It requires a sensible appreciation, but without exaggeration, of the reality that some information cannot be released without endangering the public or undermining the ability of the state to protect its citizens, but it depends equally on appropriate commitments to democratic principles and the need for checks and balances, including the “open court principle.” In his study, Freeman highlighted the importance of an appropriate culture on the part of those exercising emergency power

⁵¹ *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, U.N. Doc. E/CN.4/1996/39 (1996), Preamble.

⁵² M. Freeman, *Freedom or Security: The Consequences for Democracies Using Emergency Powers to Fight Terror* (Westport, Connecticut: Praeger, 2003), at 9.

as a palliative for abuse. He used Canada and the October Crisis⁵³ as one of his exemplars, noting that there was no long term abuse of democratic rights in Canada following the crisis because the commitment to democracy was strong; “there was neither the desire nor the opportunity [because of a free press and an existing system of checks and balances] for individuals or [state] organizations to abuse their ... powers.”⁵⁴

Of these factors (namely an existing system of checks and balances, a free press, and democratic ideals or norms) having commitment to appropriate norms is the most important variable in avoiding abuse of power.⁵⁵ Lawmakers who do not have appropriate legal culture can create laws that do not give appropriate regard to principle. Judges and justices of the peace who fail to consider the full importance of the open court principle can undermine it in constitutional adjudication, and in application. Those who work with the laws, such as prosecutors who stand in court and evoke national security justifications at the behest of government officials or investigators, or who ferry cases to Federal Court to suppress information, or police officers who decide to seek sealing orders, can all influence the fortunes of the open court principle. If they do not have the appropriate culture of respect for the open court principle, it will wither. Of course the law allows constitutional challenges, but who can afford them? The law may allow applications to unseal sealing orders, but what private litigant can pay for days in court to fight over redactions in search warrant documents? The fate of the open court principle will depend, in many cases, not on courts vindicating the principle, but on the goodwill and understanding of the non-judicial justice system participants. An example of an attitude of respect for the open court principle was the practice of the Solicitor General and the Department of Justice of agreeing to open hearings in *Privacy Act*⁵⁶

⁵³ The “October Crisis” refers to the invocation by the Prime Minister of Canada of emergency powers suspending certain civil liberties in the wake of political kidnappings by the FLQ, a group dedicated to using violent means to securing independence for the province of Quebec.

⁵⁴ M. Freeman, *Freedom or Security: The Consequences for Democracies Using Emergency Powers to Fight Terror* (Westport, Connecticut: Praeger, 2003), at 130.

⁵⁵ M. Freeman, *id.*, at 187.

⁵⁶ *Ruby v. Canada (Solicitor General)*, [2002] S.C.J. No. 73, [2002] 4 S.C.R. 3 regarding the *Privacy Act*, R.S.C. 1985, c. P-21.

reviews, even in the face of legislation that contemplated that those hearings be closed.⁵⁷

That the attitudes of bureaucrats or line personnel can determine the fortunes of the open court principle is a daunting thought. While Freeman, with good reason applauded the Canadian commitment to democratic principles, he was contrasting our experiences during the October Crisis with those in Uruguay, where emergency powers were employed to stage a coup, and in Peru where they enabled political killings and torture. Before we rely too eagerly on Canadian democratic traditions to replace our system of checks and balances with a culture of trust it bears note that “Canada’s political history offers too many examples of abuse and prolongation of emergency powers to assume that the government’s assurances of high purposes and careful execution merit automatic deference.”⁵⁸ There have been too many interned, too many detained, and enough illegal acts by peace officers in the name of national security to enable us to discount the need for the public to be apprised of government activity.

In spite of periodic episodes where civil liberties were abused, I for one am confident that the government of Canada has the best of intentions. Still, there is an unsettling indeterminacy about when an actor can be satisfied that an appropriate balance has been achieved. There can be different sensibilities about national security and rights. One person’s terrorist is another’s freedom fighter, one person’s freedom of expression can be another’s crime against humanity, and “one state’s reasonable limit on rights of expression and association may be another’s undermining of the international humanitarian order.”⁵⁹ Then there are questions about judgment, even where intentions are good. As the Federal Court of Appeal noted in *Gougeon v. Gibson*, national security

⁵⁷ The practice, reported in *Ruby v. Canada (Solicitor General)*, *id.*, at para. 57, related to Federal Court hearings where the government of Canada was relying on national security exceptions to deny access to information. The statute purported to require the entire hearing be closed, but the practice was to agree to opening it, save when the sensitive information was actually being revealed, *ex parte*, to the judge. The *Ruby* Court “read down” the statute as unconstitutional, removing the mandatory closure of the hearings, leaving the judge with the discretion whether to do so.

⁵⁸ L.E. Weinrib, “Terrorism’s Challenge to the Constitutional Order” in *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill*, R.J. Daniels, P. Macklem and K. Roach, eds., (2002) 93, at 104.

⁵⁹ E. Morgan, “A Thousand and one Rights” in *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill*, R.J. Daniels, P. Macklem and K. Roach, eds. (2002) 405, at 411.

claims “may be feared and evoked somewhat too quickly, albeit in perfect good faith,”⁶⁰ particularly by those who are on the front line and who see their function as protecting national security. As Hamish Stewart has pointed out, Nixon’s staff suggested that an attempt to steal information to discredit Daniel Ellsberg who had leaked the Pentagon papers was justifiable in the interests of national security.⁶¹ Then there is the risk that national security can be used opportunistically as a political shield. Those who are in self-protection mode may not be ardent fans of the open court principle. Then there is the reality that issues that play out in courts are adversarial by nature. It is far too easy for secrecy to become a litigation tool. There can be little solace taken then when a justice system participant says, even in good faith, “trust me. I have achieved an appropriate balance.”

It is in this light, then, that Canadian legal culture and its commitment to the open court principle needs to be understood. Is that commitment deep enough?

V. A LEGACY OF RESPECT PRIOR TO 9/11

In keeping with its central role, Canada has a long history of protecting the open court principle in criminal matters. Like all principles, there are, of course, exceptions. There are provisions that close court rooms, deny access to information, and impose publication bans for reasons unrelated to national security. (They are listed in a Schedule at the end of this article). Even though the number of these exceptions becomes long in the listing, the exceptions are tightly constrained. Three observations apply:

- (1) The suppression of information is typically temporary, and undertaken to enable court processes to operate;
- (2) In those rare cases where the permanent suppression of information occurs, this is not done for some broader state interest but to prevent

⁶⁰ [1984] F.C.J. No. 13, 10 C.C.C. (3d) 492, at 504 (C.A.), cited in H. Stewart, “Rule of Law or Executive Fiat? Bill C-36 and Public Interest Immunity” in *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill*, R.J. Daniels, P. Macklem and K. Roach, eds. (Toronto: Carswell, 2002) 217, at 220.

⁶¹ H. Stewart, “Rule of Law or Executive Fiat? Bill C-36 and Public Interest Immunity” *id.*, at 233.

unnecessary harm to the personal interests of a particular individual affected by the legal process, relating to information that is too unimportant to affect the outcome of a case; and

- (3) In those rare cases where criminal courts rely in coming to their decisions on information that has been suppressed permanently, the suppressed information will be used to grant the state access to investigative techniques like search warrants or wiretaps but not in the final adjudication of whether the accused is guilty.

An examination of the network of court closing provisions does not contradict the existence of a legal culture that embraces the open court principle. It reaffirms that culture.

The most powerful indicia of a culture of respect for the open court principle is found in the constitutional jurisprudence. In *R. v. Toronto Newspapers Ltd.*, a decision affirmed by the Supreme Court of Canada, Doherty J. described the need for “close scrutiny” according to the “rigorous standards” of any attempt to restrict the open court principle.⁶² Those standards matured in *R. v. Mentuck*.⁶³ They are animated by two governing principles which are to be applied in a flexible and contextual way depending on factors such as the nature of the hearing in question and the proposed duration of the suppression of the information.⁶⁴ They are animated by two governing principles. The first, the “necessity principle,” requires that compromises on the open court principle can be tolerated only where there is a demonstrated reason⁶⁵ of superordinate⁶⁶ importance for doing so. The necessity principle includes within it the notion of minimal impairment, that the open court principle can be

⁶² [2003] O.J. No. 4006, 67 O.R. (3d) 577, at para. 19 (C.A.), affd [2005] S.C.J. No. 41, *supra*, note 21.

⁶³ [2001] S.C.J. No. 73, [2001] 3 S.C.R. 442, 158 C.C.C. (3d) 449. *Mentuck* is a publication ban case but the *Mentuck* test applies to all open court principle situations, including, whether courts remain open: *Vancouver Sun (Re)*, [2004] S.C.J. No. 41, [2004] 2 S.C.R. 332; controlling confidentiality orders: *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] S.C.J. No. 42, [2002] 2 S.C.R. 522, 211 D.L.R. (4th) 193; and controlling the issuance of sealing orders relating to warrant informations; *Toronto Star Newspapers Ltd. v. Ontario*, *id.*

⁶⁴ *R. v. Toronto Star Newspapers Ltd.*, [2005] S.C.J. No. 41, at para. 31, *supra*, note 21.

⁶⁵ *Sierra Club of Canada v. Canada (Minister of Finance)*, *id.*, at 208; *R. v. Toronto Star Newspapers Ltd.*, *supra*, note 21.

⁶⁶ *R. v. MacIntyre*, [1982] 1 S.C.R. 175, at 186-87.

sacrificed no farther than it has to be in order to fulfill the pressing need.⁶⁷

The second governing principle is “proportionality.” The benefits of suppressing the open court principle have to outweigh the damage that is done to the individuals affected, the legal system, and to Canadian society as a whole by inhibiting access to the information.⁶⁸ Those who advocate compromises on the open court principle, including Parliament when it passes laws limiting the principle,⁶⁹ bear a heavy burden of justification.

VI. THE OPEN COURT PRINCIPLE AFTER 9/11: DIMINISHED RESPECT

This same degree of commitment to the open court principle has not survived 9/11. To be sure, no one could reasonably have expected it would. National security concerns are more pressing now, and they will require the suppression of some information. The question, however, is whether a respectful balance has been attained. The Supreme Court of Canada noted in advance of anti-terrorism legislation that “Parliament’s challenge is to draft laws that effectively combat terrorism and conform to the requirements of our Constitution and our international commitments.”⁷⁰ While things could have been worse, I do not think that this balance has been achieved. Some of the laws that have been adopted since September 11, and which limit the open court principle, go farther than they need to, leaving too little flexibility. I do not say this solely as a matter of personal taste; I have already acknowledged the subjectivity of values. I say it in light of the *Mentuck* principles and the jurisprudence of the Supreme Court of Canada.

It is not just the legislation that is worrisome. Being mindful of the dangers of over-generalizing, there is reason to fear that non-judicial justice system participants may be focused too intently on national secu-

⁶⁷ *Sierra Club of Canada v. Canada (Minister of Finance)*, *supra*, note 63, at para. 46.

⁶⁸ *R. v. Mentuck*, *supra*, note 63, at para. 32.

⁶⁹ Subsection 487.2(1) of the *Criminal Code of Canada* purported to prohibit the publication of information relating to the execution of search warrants, but it has been struck down as unconstitutional, using a more primitive version of the *Mentuck* test: *Girard (Informant) v. Oullet*, [2001] Q.J. No. 868, 153 C.C.C. (3d) 217 (C.A.); leave to appeal denied, [2001] S.C.R. 238n.

⁷⁰ *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 3, [2002] 1 S.C.R. 3, at para 4.

urity, to the point where its demands are exaggerated and the open court principle is being needlessly compromised.

1. Statutory Changes: The Legislative Culture Post 9/11

(a) Subsection 486: Closing Courts

Subsection 486(1) of the *Criminal Code of Canada* was amended to expand the grounds for excluding the public from court, to include those cases where doing so “is necessary to prevent injury to international relations or national defence or national security.” This amendment was more symbolic than technically significant. Prior to the amendment subsection 486(1) already allowed for courts to be closed “in the interests of public order or for the proper administration of justice,” which no doubt would have included national security concerns.⁷¹ The amendment to subsection 486(1) then, did less to change the law, than to give comfort to courts by showing that Parliament considers international relations, national defence and national security as appropriate bases for closing courts. Parliament has provided overtly for the possibility of trials, secret in whole or in part, for the prosecution of terrorism offences.

As daunting as this power may seem to ardent fans of open courts, things could have been worse. First, the provision is discretionary. Prosecutors will need to present a compelling case for closing courts. Second, the provision does not, as in the case of immigration proceedings, empower courts to flout full answer and defence considerations by receiving and relying on information that is kept from the accused.⁷² Parliament cannot be faulted for the existence and design of this particular provision.

⁷¹ By way of analogy, sealing orders can be granted under s. 487.3(1) under the rubric of “the ends of justice” for national security purposes, without any express recitation of this authority: *Canada (Attorney General) v. O’Neill*, [2004] O.J. No. 4649, 192 C.C.C. (3d) 255 (S.C.J.).

⁷² To a degree, the reality that the accused and its counsel will learn of the information may undermine the intensity of the case for closing the court.

(b) The Infamous Section 38

The open court principle is concerned, of course, with matters of secrecy. The *Anti-terrorism Act* provision relating to secrecy that has attracted the greatest attention has been the amendment to subsection 38 of the *Canada Evidence Act*. This provision has been criticized, and with good reason.⁷³ Subsection 38 does not, however, lead to rulings that contravene the open court principle directly, as it does not purport to deny public access to information that has been presented during the prosecution of the accused. In other words, it is not a provision allowing prosecutors to advance their case against the accused by presenting information *ex parte* or even in closed courts.⁷⁴ Instead, it deals with whether information should be disclosed — in particular, information that would be injurious to international relations, national defence, or national security. In substance, it creates a privilege. It *prohibits* presentation of such information to a court,⁷⁵ or the disclosure of such information by a court, unless the Federal Court has decided that the public interest in disclosure outweighs the public interest in non-disclosure.⁷⁶

The section 38 regime does, however, compromise the open court principle indirectly in two important respects. First, any section 38 hear-

⁷³ See, e.g., H. Stewart, "Rule of Law or Executive Fiat? Bill C-36 and Public Interest Immunity," *supra*, note 60, at 217.

⁷⁴ Information is presented *ex parte* where this is done without notice to or argument by an adverse party: *Ruby v. Canada (Solicitor General)*, *supra*, note 56, at para 23. In *Canada (Attorney General) v. O'Neill*, *supra*, note 70, the presiding judge did, however, use s. 38 to sustain objections to the disclosure of particular information that was relied upon by a Justice of the Peace in a sealed search warrant application. In this sense, s. 38 was used to permit the Crown to rely on information to obtain a judicial order, without disclosing that information to the defence.

⁷⁵ See *Canada (Attorney General) v. Ribic*, [2003] F.C.J. No. 1964, 185 C.C.C. (3d) 129 (C.A.); leave to appeal refused 22 October 2003.

⁷⁶ The Attorney General of Canada can override a decision by a court to receive or disclose the information by filing a "certificate" under s. 38.13. The relevant provisions are all prohibitions on disclosure. It would be a mistake to interpret s. 38 as authorizing a court to receive as evidence, and then not disclose to the public or a party, any information or evidence. The first step in the regime is to stop information from being disclosed before the government has a chance to object. Subsections 38.01(1)-(4) impose obligations on the various participants in a case to notify the Attorney General of Canada before this happens. In particular, s. 38.01(1) speaks of the "possibility of disclosure," and ss. 38.01(2)-(4) address the prospect that protected information is "about to be disclosed." The operative provision, s. 38.02(1)(a), proscribes disclosure of the information. The second step in the regime is to enable the Attorney General to apply to the Federal Court if information is about to be disclosed or ordered disclosed. Subsection 38.04 permits applications for an order "with respect to the disclosure of [such] information," and s. 38.06 describes when disclosure can be made. The last stage, s. 38.13 empowers the Attorney General of Canada to issue a certificate that "prohibits disclosure."

ing before the Federal Court to determine whether to guard information from disclosure, or any appeal from that hearing, is to be conducted *in camera* — in other words, with the public excluded. Second, subsection 38.02 makes not only the contents of the hearing confidential, but also the very fact that a hearing is being held.

It has been suggested that closing the hearing is “a sensible precaution” since the point of the proceeding is to determine whether the information in question is to be disclosed.⁷⁷ This opinion was expressed prior to the Supreme Court of Canada decision in *Ruby v. Canada (Solicitor General)*.⁷⁸ There the Supreme Court of Canada held that a provision requiring an administrative review court to be closed in its entirety when considering whether a national security exemption applied was not minimally impairing of the open court principle. It held that the provision had to be read down so that judges would have the discretion of whether to close the proceeding when *ex parte* material was not being presented. If a proceeding is to be closed, the state must demonstrate the need on a case-by-case basis. Mandatory closure of courts, and confidentiality orders on all information, are overbroad according to *Mentuck* standards.

It should only rarely be necessary to close a courtroom entirely in order to control litigation relating to whether information should be disclosed. Courts are not closed when parties fight over whether information, such as a solicitor-client confidence, is privileged. In *Canada (Attorney General) v. O’Neill*, the Court dealt with objections based on section 38 considerations in open court, while preserving the confidentiality of the information from both the public and counsel. The Court did so by working from a redacted document and enabling objections to be made by the Crown to inappropriate questions asked during cross-examination of an affiant for a sealing order. The same was managed in *A.G. (Canada) v. Amalki*; the challenge to a national security based sealing order before a Provincial Court Judge was undertaken in open court.⁷⁹

⁷⁷ H. Stewart, “Rule of Law or Executive Fiat? Bill C-36 and Public Interest Immunity,” *supra*, note 60, at 224.

⁷⁸ [2002] S.C.J. No. 73, [2002] 4 S.C.R. 3.

⁷⁹ *Ottawa Citizen Group v. Canada (Attorney General)*, (17 December 2004), (Ont. C.J.); corrigendum (4 January 2005), (Ont. C.J.), *per* Dorval J. The decision was initially affirmed 9 February 2004 (S.C.J.) but the Ontario Court of Appeal ultimately ruled that the sealing order that

The second ban, the automatic confidentiality order relating to the very fact that a hearing is being held, “goes well beyond what is necessary to protect the information in question.”⁸⁰ There may be cases where there is a public interest in trying to limit knowledge of the existence of an investigation in which a section 38 hearing arises, but where this is so, *Mentuck* standards require the government to establish this. This absolute confidentiality provision is overbroad and unconstitutional. It reveals an inadequate commitment to the open court principle.

(c) *Subsections 83.05(6) and 83.06(1)*

A number of new anti-terrorism offences in the *Criminal Code of Canada* turn on whether an entity (which can include an individual) is a “terrorist group.” Parliament established a procedure in subsections 83.05 and 83.06 of the *Criminal Code* for administratively listing entities, thereby deeming an entity to be a terrorist group. There is a judicial review procedure established by the legislation. This process, which can have tremendous impact on the outcome of criminal charges,⁸¹ mimics immigration procedures where little regard is given to open court and full answer and defence considerations.⁸² During a judicial review proceeding under subsection 83.05, the Solicitor General can require the judge to examine the matter “in private.”⁸³ The judge *shall* receive at that hearing, in private and in the absence of counsel for the listed entity, any information that has been obtained in confidence from a foreign state or international organization, and if the judge finds it relevant, the judge can consider it.⁸⁴ With respect to other material, if the judge is of

was issued was broader than required: 3 June 2005, C42288, addendum released 9 June 2005, C42288 (Ont. C.A.).

⁸⁰ H. Stewart, “Rule of Law or Executive Fiat? Bill C-36 and Public Interest Immunity,” *supra*, note 60, at 224.

⁸¹ For my general criticisms of this regime, see “Constitutional Casualties of September 11: Limiting the Legacy of the Anti-Terrorism Act” (2002) 16 S.C.L.R. (2d) 185.

⁸² See L. Waldman, *Canadian Immigration & Refugee Law Practice, 2005* (2005) at 237-46 for a description of the regime. Immigration cases, including deportation hearings, do not receive the same open court protection as criminal cases because they are considered in no way to be akin to criminal cases, since detention and deportation are not considered punishments and they deal with a person who has a qualified right to stay in the country: *Ahani v. R.* (1966), 201 N.R. 233 (Fed. C.A.); leave to appeal refused, [1997] 2 S.C.R. v.

⁸³ *Criminal Code*, s. 83.05(6)(a).

⁸⁴ *Criminal Code*, s. 83.06.

the opinion that disclosure would injure national security or endanger the safety of a person, the judge may hear all or part of the evidence in the absence of counsel.⁸⁵

The process of using administratively established lists as the basis for establishing an essential element in criminal prosecutions in lieu of proof beyond a reasonable doubt is deeply disturbing in its own right.⁸⁶ So, too, is the use by a court of evidence that has been received *ex parte* and which the opposing party will thereby be unable to answer. Given the focus of this paper I will leave these considerations aside. The current point is that aspects of the regime denigrate the open-court principle unduly.

First, subsection 83.05(6)(a) empowers the Solicitor General to effectively close the court. The judge has no discretion in the matter. This provision is contrary to *Ruby v. Canada (Solicitor General)*,⁸⁷ and should not be defensible in the face of Charter challenge.

Second, the right of the Crown under subsection 83.06 to require a private hearing where a judge will decide whether to consider information obtained in confidence from a foreign state also compromises the open court principle, but it is not so easy to challenge as unconstitutional. In *Ruby v. Canada (Solicitor General)* the Supreme Court of Canada accepted the need for a provision that gives the government an absolute right to furnish *ex parte* in a *Privacy Act*⁸⁸ hearing information obtained in confidence from a foreign state, and held that the presentation of the information would have to be done in private, notwithstanding the judge's discretion at other points in a hearing to leave the hearing open or closed. *Ruby*, though, was not a criminal case. It was an administrative one. While subsection 83.06 appears on its face to be an administrative procedure dealing with the compilation of government lists, it is situated in the *Criminal Code of Canada*. More importantly, the terrorist list is intended to be used as surrogate proof, in criminal proceedings, for the terrorist character of a listed entity. This is a criminal law initiative, albeit disguised as an administrative one. Given the increased importance of the open court principle in the criminal context,

⁸⁵ *Criminal Code*, s. 83.05(6)(a).

⁸⁶ I address this concern in "Constitutional Casualties of September 11: Limiting the Legacy of the Anti-Terrorism Act" (2002) 16 S.C.L.R. (2d) 185.

⁸⁷ *Supra*, note 78.

⁸⁸ *Id.*; see *Privacy Act*, R.S.C. 1985, c. P-21.

requiring but not authorizing a judge to hold a private hearing may contravene the Charter. Still, the heart of the *Ruby* reasoning had to do with the need to enable the Canadian government to give absolute assurances to foreign governments that shared information would not be disclosed, and the Court accepted that without the information being presented in a fully secret hearing, assurances may not satisfy foreign states.⁸⁹

Notwithstanding this, subsection 83.06 appears to go farther than it has to. It requires the entire application for admission to be held in private. According to *Mentuck*, the Crown has to provide an evidentiary foundation to support its claim that the information was received in confidence from a foreign government. In most cases one would expect that this could be done without revealing the confidential information.

(d) Opportunistic Amendments

Parliament took the opportunity when revising its public interest immunity provisions under the *Canada Evidence Act* to impose *in camera* hearings on section 37 applications. Section 37 applications do not deal invariably with national security-type information, but rather with any information the government wishes to keep secret on the basis of any “specified public interest.” Under the amendment made in section 37.21, both these hearings and appeals from them were to be held *in camera*.⁹⁰ The *requirement* that the courts be closed was again overbroad; while it may be justifiable in particular cases, there was no rea-

⁸⁹ *Ruby v. Canada (Solicitor General)*, *supra*, note 78, at paras. 43-46. Frankly, I worry about this “promise of confidentiality” basis for suppressing information. Unless it is circumscribed as s. 83.06 is (it authorizes the judge after inspection to suppress only information received from a foreign entity that would in fact endanger national security), the “promise of confidentiality” justification enables governments to create the self-serving obligation to keep potentially important but innocuous information confidential by merely promising a foreign government or agency to keep it confidential. The reality is that if the government, having promised confidentiality to another nation, needed that information for a prosecution it would seek consent to use it, but it would be unlikely to do so if an opposing party litigant sought access to it. There is room, in my view, for a healthy degree of skepticism about the chilling effect claim; if it is truly necessary in order to achieve international security to share information, is it really likely that a foreign government would sooner jeopardize international security by not sharing the information, than run the risk that the government of Canada may some day be unable to support a national security claim on its merits to the satisfaction of a court? I do not believe so. Unfortunately, the “foreign relations” national security claim has received significant (and in my view) undue deference, including that received by the “*Arar Inquiry*.” See “Ruling on National Security Confidentiality,” (3 December 2004), at paras. 24 and especially 43.

⁹⁰ *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 37.21.

son for a blanket protection. In April of 2004 this provision was repealed,⁹¹ no doubt as a result of the realization that it would not have passed constitutional muster in light of *Ruby v. Canada (Solicitor General)*.⁹²

The government also took the opportunity presented by 9/11 to amend section 486 of the *Criminal Code of Canada* to increase the range of publication bans on the names of victims and witnesses. Whereas the protection was once confined to sexual offences, subsection 486(4.1) now permits judges to order publication bans to secure the identity of complainants and witnesses for any offence, in order to protect them or their privacy.⁹³ There is another innovation in the new provision. The names of “justice system participant[s],” defined broadly enough to include members of Parliament, executive members of government, lawyers, judges, jurors, and court and parole officials,⁹⁴ can be subject to a publication ban.

The fact that the government embedded open court compromises that will typically have nothing to do with national security matters in a statute that deals with anti-terrorism initiatives is dispiriting. The disappointment is mollified to some degree as a result of the repeal of subsection 37.21, but is not alleviated. The initiative was symptomatic of a diminished commitment to the open court principle. It would have been better and more in keeping with Canadian traditions of liberal democracy if the government had undertaken its task of creating dangerous and exceptional powers with a demonstrated reluctance and a commitment to minimizing their intrusion on basic principles. Instead, it used the legislative honeymoon that Canadians had granted it to deal with the terrorism threat, to water down the open court principle in other contexts.

(e) *The Absence of a Definition*

The legislation is not crafted in a fashion that is likely to acculturate justice system participants with a cautious attitude about using national security to close down access to information. Section 38, perhaps the

⁹¹ S.C. 2004, c. 12, s. 18.

⁹² *Supra*, note 78.

⁹³ Amended by the *Anti-Terrorism Act*, S.C. 2001, c. 41, s. 13(2).

⁹⁴ *Criminal Code of Canada*, s. 2.

benchmark for identifying what the standards of protection for information are, does not define the term, “national security.” Nowhere does it reflect the international standard that to be protected for national security reasons information must have the demonstrable effect, if released, of threatening a nation’s existence or territorial integrity or of imperiling the nation’s capacity to respond to force or the threat of force.⁹⁵ Section 38 leaves the criteria unbridled. Had national security been defined in an appropriately cautious fashion, it would have decreased the risk of unnecessary sacrifice of the open court principle.

Hence, some of the legislative compromises on the open court principle contained in the legislation are defensible and sufficiently flexible to enable the principle to be secured on a case-by-case basis. On balance, though, it appears that Parliament over-reached, under the influence of post 9/11 angst. Section 38 hearings should not be closed automatically and in their entirety, and the fact that such hearings are being held should not automatically be confidential. Nor should subsection 83.05 review hearings be automatically closed. There is also reason to believe that the private, *ex parte* procedures for resolving applications to protect foreign intelligence could be more open than they are. Finally, the fact that the section 37 amendment and the expansion of publication bans in subsection 486(4.1) were housed opportunistically in what the public believed to be emergency legislation, is not a positive omen for the open court principle, even bearing in mind the ultimate re-opening of section 37 hearings in the face of certain constitutional defeat.

VII. OPEN COURT CULTURE AND JUSTICE SYSTEM PARTICIPANTS

It is difficult to generalize about whether non-judicial officers who administer the law have maintained an appropriate commitment to the open court principle. The irony is that this inability to know is largely because of secrecy. The public does not know how many closed section 38 applications have been held, since the disclosure of an application is prohibited. Similarly, where court presented information is kept under wraps because of national security concerns, there is no way to test whether the claim is warranted, short of trusting officers, governments,

⁹⁵ The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, U.N. Doc. E/CN.4/1996/39 (1996), principle 2(a).

and in some cases closed courts — courts who may have to decide the national security matter without the benefit of arguments or meaningful advocacy by opposing counsel who are kept in the dark. It is simply impossible to know whether those officials who undertake in the name of national security initiatives that close information to the public are adequately respecting the open-court principle. Yet, there are reasons to be concerned.

These reasons include the staggering amount of material that the government is trying to suppress in the *Arar* inquiry, to the degree that a supposedly public inquiry has been held in private for months while the Commissioner forges through it. In a press release, the Commission observed that “some of the information blacked out by the government could not conceivably relate to National Security Confidentiality.”⁹⁶

This includes information over which the government did not claim National Security Confidentiality in the hearing before the Commissioner on October 29. It also includes some conclusions drawn by the Commissioner that do not disclose any substantive information, and information that was subject of the public testimony at the Commission’s public hearings in July.⁹⁷

The position taken by CSIS before the *Arar* Commission about what must be secured is simply staggering. Emboldened by the decision in *Henrie v. Canada (Security Intelligence Review Committee)*⁹⁸ and its acceptance of the “mosaic effect” in which cunning readers are assumed to be able to take apparently innocuous information into the general picture to make damaging deductions, it argued that a forward looking approach should be taken which accepts that one cannot know what risks today’s information might present tomorrow.

For this reason CSIS routinely refuses to publicly disclose information about past or ongoing investigations or information acquired about individuals. Indeed, CSIS does not confirm or deny any such matters.

⁹⁶ “Commission of Inquiry Blocked from Full Release of Documents; Government Raises New National Security Objections” (20 December 2004), “Press Release,” The *Arar* Commission, online at: <<http://www.ararcommission.ca>> (last accessed 28 June 2005).

⁹⁷ *Id.*

⁹⁸ [1988] F.C.J. No. 965, 53 D.L.R. (4th) 568 (T.D.), affd [1992] F.C.J. No. 100, 88 D.L.R. (4th) 575, at 578-79 (C.A.).

The government submitted that even when that information is in the public domain, there could be injury if CSIS confirms its accuracy.⁹⁹

Reasons for concern include the overbroad orders that were sought and granted in the *O'Neill* and *Amalki* cases,¹⁰⁰ where everything used to secure search warrants was sealed, much of which proved after expensive unsealing litigation to have had nothing to do with national security.

Reasons for concern include the inconsistency between government officials from case to case in terms of what needs to be kept confidential; in *O'Neill* the name of the project, "A-OCanada," was suppressed, ostensibly for fear that revealing the moniker could imperil the anti-terrorism investigation, while at the same time the name was made public uneventfully at the *Arar* Inquiry.

Reasons to be concerned about a culture of inadequate respect for the open-court principle include the exaggerated claims of national security made in *O'Neill*. By way of example, national security was used to justify non-disclosure of the address of the office where the R.C.M.P. task force was working. On cross-examination it was discovered that the building had an R.C.M.P. sign in front of it. National security was also used to suppress the names of co-operating police forces from the search warrant information, even though the Ottawa Police Force had announced publicly to the Muslim community in advance of the *Arar* Inquiry that it had participated in the investigation, and even though the O.P.P. relied on its own participation in the investigation to try to get standing before the *Arar* Inquiry.

It would be unfair to generalize from these isolated examples and say that there is a legal cultural problem among those who administer the law, but these anecdotes give reason for concern. These experiences, coupled with the natural litigation based incentives to exploit secrecy in an adversarial system, the ability to use national security to prevent embarrassment, or the distorting impact of national security tunnel vision should prevent us from assuming goodwill and good judgment across the board.

⁹⁹ The *Arar* Commission, "Ruling on National Security Confidentiality" (3 December 2004), at para. 20.

¹⁰⁰ In each case, originally sealed information was subsequently released. See *Canada (Attorney General) v. O'Neill*, [2004] O.J. No. 4649, 192 C.C.C. (3d) 255 (S.C.J.) and "Judge Won't Reverse Ruling on Unsealing Amalki Files" *The Ottawa Citizen* (11 January 2005), A14.

These kinds of experiences and realities should also chasten the apparent enthusiasm of some courts to defer in open court matters to government claims of national security, as was done in *Canada (Attorney General) v. Ribic* where a “reasonableness standard” was employed.¹⁰¹ With respect, upholding national security claims unless no person advising the Crown could reasonably have believed it to be necessary is not in keeping with the presumption of openness in *Mentuck*, nor does it reflect the heavy burden of justification that the law imposes on closed court initiatives. Much to be preferred is the approach that O’Connor J. is taking in the *Arar* Inquiry; while it must be accepted that the government and its witnesses can have access to special information and expertise, there is a need to be “vigilant about the possibility that the government could attempt to use the opportunity to claim [National Security] in order to delay or avoid the release of embarrassing information, the disclosure of which would not be injurious to any of the elements of [National Security].”¹⁰²

VIII. OPEN COURT CULTURE AND THE SUPREME COURT OF CANADA

The most optimistic note about Canadian legal culture and the open court principle in this national security era is *Vancouver Sun (Re)*,¹⁰³ a decision of the Supreme Court of Canada. *Vancouver Sun (Re)* is a remarkable case. It involved a challenge to the constitutional validity of one of the most startling innovations in *The Anti-terrorism Act*, the investigative hearing provisions.¹⁰⁴ Those provisions create a procedure that enables investigators to compel witnesses to provide information during terrorism investigations. Even though this kind of compulsion, let alone the use of a court’s power to assist in that compulsion, is a radical departure from existing practice and tradition, the challenge failed. What is most striking about the decision, though, is the reaffirmation the Court gave to the open court principle. The Court criticized the

¹⁰¹ [2003] F.C.J. No. 1964, 185 C.C.C. (3d) 129, at para. 19 (C.A.); leave to appeal refused 22 October 2003 (S.C.C.).

¹⁰² The *Arar* Commission, “Ruling on National Security Confidentiality” (3 December 2004), at para. 60; *R. v. Mentuck*, [2001] S.C.J. No. 73, [2001] 3 S.C.R. 442, 158 C.C.C. (3d) 449.

¹⁰³ [2004] S.C.J. No. 41, [2004] 2 S.C.R. 332.

¹⁰⁴ Provided for in s. 83.38 of the *Criminal Code of Canada*.

level of secrecy that had been applied when the procedure was used to extract information from an Air India witness, reciting the need to protect democracy and the repute of the administration of justice by conducting investigative hearings in public. While the Court accepted that parts, even large parts, of those hearings may have to be held *in camera* in a given case to protect sensitive information, it affirmed the open-court principle in powerful terms. The Court made it clear that closing a court, even during an investigative hearing, should be “undertaken with the greatest reluctance.”¹⁰⁵ In doing so it reified the open court principle. It reinforced it not with respect to a hearing where a court or tribunal would be adjudicating a dispute between parties. It affirmed it in a most unexpected context. Investigative procedures are rarely carried out in public, and investigators are quick to argue against the release of investigative material for fear it will scuttle further efforts. So the government argued for a presumption that investigative hearings be closed. This “close down the show” position by the government speaks poorly of its commitment to the open court principle, but the voice of the Supreme Court of Canada has spoken more loudly.

Another strong endorsement by the Supreme Court of Canada of the open court principle is found in its latest decision, *R. v. Toronto Star Newspapers Ltd.*¹⁰⁶ The Crown argued that the *Mentuck* test should not be applied when police officers seeks to seal search warrant material, because the court order is being made during the course of an investigation. The Supreme Court of Canada remarked that “This argument is doomed to failure by more than two decades of unwavering decisions in this Court.”¹⁰⁷ The Court concluded that “Public access will be barred only when the appropriate court, in the exercise of its discretion [on the basis of demonstrated and particularized grounds] concludes that disclosure would *subvert the ends of justice* or *unduly impair its proper administration*”¹⁰⁸

The Supreme Court of Canada has continuously affirmed that the open court principle is the starting point. The message is clear. Closure is an exception that should be adopted only with reluctance.

¹⁰⁵ *Supra*, note 103, at para. 39.

¹⁰⁶ [2005] S.C.J. No. 41, *supra*, note 21.

¹⁰⁷ *Id.*, at para. 30.

¹⁰⁸ *Id.*, at para. 4, emphasis in the original.

IX. CONCLUSION

The paradox is that a national security crisis, whether perceived or real, increases both the need for secrecy and the need for public information. As always, it is about balance. Any responsible Canadian knows that governments have to protect information, but in the meantime, responsible officials should know that the open court principle is to be respected to the greatest extent possible. Information, especially about what courts are doing, is the key to preventing abuse in a system that uses a criminal law approach to combating terrorism. Information is also the grist for the democratic mill. While the law recognizes this, unfortunately the law can go only so far in protecting the open court principle. Its fortunes depend largely, if not mainly, on the prevailing legal culture. At the end of the day, as fundamentally inconsistent as it is with our “culture of justification,” we are left to rely on the goodwill and good judgment of justice system participants.

I have suggested that there is reason to be concerned about whether the prevailing legal culture is sufficiently committed to open courts. Parliament went deeper into the open court principle than it needed to when it legislated, and there are troubling signs that some justice system participants are so closely focused on national security that their vision of what it involves may be blurred, and their view of the broader needs of democracy obscured. This paper is an attempt to encourage those who administer the law to adopt the kind of deep respect for the open court principle that the interests of justice and democracy require. Just like the responsibility to protect the nation, the power to respect fundamental principles — and the open court principle is decidedly one — is held in the public trust. Those who fail to appreciate this are not Canada’s protectors. They are its problem.

X. SCHEDULE

NON-NATIONAL SECURITY-BASED COMPROMISES ON OPEN COURTS

As indicated, while there are many exceptions to the open court principle provided for in criminal law rules unrelated to national security, those cases tend to be defined narrowly.

1. Closing Courts

Courts are sometimes closed. Section 486(1) of the *Criminal Code of Canada* empowers criminal courts to exclude the public, but the provision is used extremely sparingly, primarily to encourage testimony from witnesses who would be disabled from testifying were the public to attend. Of crucial importance, the transcripts of their testimony are not sealed — they are subsequently made available, leaving the information available to the public.¹⁰⁹ The public is not permitted to attend search warrant applications either, so that the issuance of a warrant can be kept secret until it has been executed. After execution, however, the information can be accessed,¹¹⁰ absent a special sealing order.

The public is also excluded in sexual offence cases from hearings into whether private records must be disclosed to the defence,¹¹¹ or whether evidence about the sexual experiences of complainants can be led.¹¹² This is not done primarily to aid the state¹¹³ but to protect the

¹⁰⁹ See, e.g., *R. v. Lefebvre* (1984), 17 C.C.C. (3d) 277 (Que. C.A.), and *R. v. Vandeveld*, [1994] S.J. No. 156, 89 C.C.C. (3d) 161 (C.A.). The section was also used at an impartiality hearing relating to jurors: *R. v. Musitano* (1985), 53 O.R. (2d) 321, 24 C.C.C. (3d) 65 (C.A.). The section will not be used to preserve persons from mere embarrassment: *Re F.P. Publications (Western) Ltd.*, [1979] M.J. No. 99, 51 C.C.C. (2d) 110 (C.A.); *R. v. Quesnel* (1979), 51 C.C.C. (2d) 270 (Ont. C.A.).

¹¹⁰ *Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 S.C.R. 175, and see *National Post Co. v. Canada (Attorney General)*, [2003] O.J. No. 2238 (S.C.J.), leave to appeal denied, [2003] S.C.C.A. 422.

¹¹¹ *Criminal Code of Canada*, s. 278.4(1).

¹¹² *Criminal Code of Canada*, s. 276.3.

¹¹³ It can have that effect by encouraging the reporting of offences. This is a factor listed for consideration for both sexual experience evidence hearings (s. 276(3)(b)), and private third party record hearings (s. 278.5(2)(f)). The Supreme Court of Canada has cautioned courts not to give this undue weight however: *R. v. O'Connor*, [1995] S.C.J. No. 98, [1995] 4 S.C.R. 411, 103 C.C.C. (3d) 1, at paras. 20 and 32; *R. v. Mills*, [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668, 139 C.C.C. (3d) 321.

privacy of complainants from having their personal information, unimportant in the case at hand, needlessly publicized. If the information is immaterial, it will be excluded from consideration and will not affect the outcome of the case. The public will therefore not lose access to juristic information because of the ban. If the information is material, it will become public after the hearing, during the trial.

2. Closing Information to the Public

Documents used to obtain wiretap orders are automatically sealed from the public,¹¹⁴ and courts have the power to seal search warrant materials, including DNA warrant materials, so that they remain confidential after a warrant has been executed.¹¹⁵ These cases provide the sole exceptions in criminal cases where a trier can rely on information that may not be made public. This is not done for the purpose of deciding issues related to the merits of a case, but for the limited purpose of enabling an investigative technique to be employed. In each case, there are procedures for setting aside the orders when the need for them expires. Those applications will tend to succeed once the relevant investigation has ended, unless disclosure would reveal the identities of confidential informants.

Judges will also, on occasion, inspect documents *in camera* in order to determine whether they are privileged and therefore inadmissible in the proceedings.¹¹⁶ Of importance, the hearings about privilege are not themselves closed. They are open, with the understanding that the privileged information will not be revealed by those lawyers who are aware of it. Confidentiality is preserved in this way to keep from undermining the utility in granting the privilege. The information that is inspected by

The key considerations in deciding to suppress information relate to the particular case and the particular complainant.

¹¹⁴ *Criminal Code of Canada*, s. 187.

¹¹⁵ *Criminal Code of Canada*, s. 487.3, on the grounds the disclosure would subvert the ends of justice (including compromising the identity of confidential informants; compromising an ongoing investigation; endangering a person engaged in an intelligence-gathering technique thereby prejudicing future investigations; prejudice to the interests of the innocent; or for any other sufficient reason), or the information would be used for an “improper purpose.”

¹¹⁶ This is done under common law authority where a judge must inspect a document to identify its privileged status.

a judge is kept from the public, unless the documents prove to be admissible, in which case it becomes part of the court record.

3. Publication Bans

Some information is subject to temporary publication bans, but this is often done to secure fair trials for accused persons. Evidence or information presented during bail hearings,¹¹⁷ preliminary inquiries,¹¹⁸ and *voir dire*s¹¹⁹ is temporarily suppressed to keep trial judges and juries from being tainted by it. Other information is subject to permanent publication ban in order to protect the privacy of individuals who come before the courts by preventing the public exposure of immaterial private information; again, *voir dire* proceedings into disclosure of third party records¹²⁰ and sexual experience evidence¹²¹ conducted in sexual offence cases is subject to publication ban, as is information that would disclose the identity of sexual offence complainants.¹²² In keeping with the philosophy of the *Youth Criminal Justice Act* of giving young offenders a fresh start when they mature, the identity of youthful offenders is suppressed,¹²³ and in rare cases, the identity of jurors is suppressed.¹²⁴ Judges also have inherent power to order publication bans, but this authority is rarely used.

¹¹⁷ *Criminal Code of Canada*, s. 571. The accused must request the publication ban.

¹¹⁸ *Criminal Code of Canada*, s. 542. The ban is automatic.

¹¹⁹ *Criminal Code of Canada*, s. 648. A *voir dire* is a hearing undertaken on a point of law in the absence of the jury. Sometimes information inadmissible at the trial itself is presented at a *voir dire*, hence the need for the publication ban to keep the jury from learning of it.

¹²⁰ *Criminal Code of Canada*, s. 278.9(1).

¹²¹ *Criminal Code of Canada*, s. 276.3.

¹²² *Criminal Code of Canada*, s. 486(4). The ban is automatic upon request by the complainant and can be secured by motion of the prosecutor or judge.

¹²³ S.C. 2002, c. 1, ss. 111, 112.

¹²⁴ *Criminal Code of Canada*, s. 631(6).