Judicial Transparency and the Rule of Law

2015 FORUM FOR STATE APPELLATE COURT JUDGES

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Fellow appellate judges, members of the Bar, professors, members of the Pound Civil Justice Institute and distinguished guests,

Je vous souhaite la plus cordiale bienvenue à Montréal.

Allow me to welcome you to Canada and the province of Quebec. I hope you are enjoying your stay in Montreal. This city is as unique as the legal landscape of our province which, as you may already know, is the functional equivalent of an American state. With its mix of civil and common law traditions, the province of Quebec provides a unique backdrop for this year's Forum. This morning I would like to begin with an overview of what makes our province such an interesting legal environment. I will then touch on the topic of judicial transparency, as a prelude to the thought-provoking plenaries on today's schedule.

As a result of both French and English colonial rule, Quebec's legal tradition sits at the confluence of the civil law and common law traditions. The civil law tradition of continental Europe governs local matters such as procedural law and civil disputes, while British common law applies to federal and constitutional matters. To name a few, bankruptcy, criminal and divorce proceedings are anchored in the common law tradition across Canada. So is the field of public law generally.

The Court of Appeal, which I have the privilege to lead, is composed of federally-appointed judges. I will spare you the jurisdictional details, but suffice it to say that as the highest court in the province, the Court of Appeal's jurisdiction extends from criminal to family law, embracing a wide variety of areas including commercial and administrative disputes. It hears over 1000 appeals on the merits

yearly. In the spirit of transparency, the Court's website[1] features data on our caseload and handling time, should you be interested in this information.

This brings me to my second topic: judicial transparency. Those who visited the Court of Appeal yesterday might have noticed the abundance of natural light flowing through the building's twenty-three skylights, symbolizing transparency in action. Indeed, transparency is part of the Court's DNA, just as it is core to our legal tradition. In the words of Jeremy Bentham[2] :

> 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.

Professor Resnik provides a thoughtful reflection on Bentham's legacy in her paper introducing this morning's plenary. I will not steal her thunder, but I do hope Bentham's remarks about the importance of public trials inform your thought process today.

That said, transparency, however crucial, is not unfettered. It must be balanced against a plurality of other interests and rights. Be it to protect the accused's right to a fair trial, or to maintain the cover of field agents in active police operations, many legitimate concerns limit public access to legal processes. In a nutshell, the Canadian approach to resolving the conflict between such concerns and our dedication to open courts is a two-step process.[3] First, the court considers whether a serious risk to the proper administration of justice requires restricting the open court principle. Second, the court evaluates whether the salutary effects

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[1] http://courdappelduquebec.ca/en/about-the-court/statistics-et-publications/ [http://perma.cc/LL9Y-BKAL].

[2] John Bowring, ed., *The Works of Jeremy Bentham*, (Edinburgh: William Tait, 1843), Constitutional Code, Book II, ch. XII, sect. XIV, vol. X, p. 493. See also *Vancouver Sun (Re)*, 2004 SCC 43, par. 24-25 [*Vancouver Sun*]; *Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, p. 186; Matthew Hale & Charles Runnington, *The History of the Law of England and an Analysis of the Civil Part of Law*, 6th ed., London, Butterworth, 1820, p. 345. *Contra*: Max Radin, "The Right to a Public Trial", (1932) 6 Temp. L. Rev. 381.

[3] *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76; *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41. The party seeking the restriction bears the burden of reversing the presumption of open courts. See also *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, *Vancouver Sun*, *supra*, note 2, par. 31.

of the restriction outweigh its deleterious effects on the rights and interests of the parties and the public. This second inquiry includes assessing the effect of a restriction on the right to free expression, on the right of the accused to a fair and public trial, and on the efficacy of the administration of justice. This contextual approach applies to all discretionary court orders limiting freedom of expression and freedom of the press in relation to legal proceedings, including orders to seal search warrant materials.

The point of this cursory overview of Canadian case law is to underline the common challenges we face as appellate judges. Balancing open courts with a plethora of other rights is fraught with uncertainties. Regardless of how a particular jurisdiction articulates this balancing act, it is worth pausing for a moment to contemplate common challenges, both longstanding and emerging.

I will leave you by raising two emerging challenges which strike me as particularly pressing. The first is the trend towards alternative dispute resolution. Arbitration clauses in consumer contracts provide an example of this trend. How might emerging arbitration processes affect transparency and meaningful access to justice? The second game changer is technology. While technology can lead to greater transparency, as it has in our Canadian courts, it also presents new challenges. How effective are publication bans in an age of decentralized, instant communication? These are but two areas that we, as judges, scholars and lawyers, must grapple with as we ponder how transparency and the rule of law interact in our current context. Today's distinguished presenters, panellists and speakers will undoubtedly provide insights for the courtroom and beyond.

On that note, I hope this event will spur meaningful exchanges with your colleagues and provide the impetus for a renewed reflection on judicial transparency. I wish you an excellent Forum and a great time in the beautiful city of Montreal.