OPEN JUSTICE — THE CONSTITUTIONAL RIGHT TO ATTEND AND SPEAK ABOUT CRIMINAL PROCEEDINGS

By M. David Lepofsky

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In its promotional material, Butterworths, the publisher of *Open Justice*, says that the book critically examines the extent to which Canadians are free to attend criminal proceedings, report cases in progress and freely debate criminal court decisions. For those who are in the media and for lawyers who advise the media, the book does that and more. The author, M. David Lepofsky, has expanded on his thesis work leading to his Masters of Law (Harvard) to produce this very informative treatise on a field which is becoming more and more relevant as the public's interest in the administration of justice and the operation of the courts becomes more acute.

Lepofsky states in the Preface to his work his hope that the book can serve as a useful resource in three ways: (1) to assist persons interested in understanding the law in Canada concerning the subject of publicity of courts, the open administration of justice and due process for persons accused of committing crimes; (2) as an exposition on one aspect of free speech — the scope of the right to attend and speak about criminal proceedings; and (3) as an exposition of one important *Charter* issue which furnishes a methodology for exploring other *Charter* topics. The methodology he describes relates not to competition or conflict between *Charter* rights — free speech/fair trial — but rather to how the rights can co-exist without 'trading off' one against the other. This approach, as he describes, has not often been applied by the Canadian courts.

To fulfill these purposes, the author has conveniently set out the book in four broad areas: (1) the issue in practice and principle; (2) pre-*Charter* Canadian law; (3) contrasting positions under the U.S. Constitution; and (4) the Canadian legal position under the *Charter*.

Each of these broad areas is, of itself, complex. But the presentation by the author does, at least in this writer's view, serve as a very useful resource on each topic. And he has been able to consider not only the American position (where the courts have been grappling with the issues for many more years than in Canada) but also the English common law position, and in so doing, he illustrates the differences in approach, in principle, and seemingly in result, from the experience of the courts in England. This contrast alone makes the book useful as a resource since Canadian courts often tend to rely, without distinction, on English decisions. For example, the Canadian position, as set out in part by the Supreme Court of Canada in *A.G. N.S.* v. *MacIntyre*,[1] applies a broader interpretation to

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1. (1982), 65 C.C.C. (2d) 129, 26 C.R. (3d) 193, [1982] 1 S.C.R. 175, 49 N.S.R. (2d) 609, 132 D.L.R. (3d) 385, 40 N.R. 181.

the openness requirement than does the English position. In England, the common law "draws a peculiar line circumscribing the 'trial' for purposes of applying the open court rule. . . . The Canadian law regarding openness, primarily being statutory, is not bound strictly by current English common law jurisprudence."

The book contains references to Canadian *Charter* cases which were available at the time of writing (Spring 1984). By that time, the *Charter* had only been in effect for approximately two years. But the number of *Charter* cases on the subject of 'open justice' even within that short time in the development of the law in Canada serves to illustrate how important the subject is and will become. It is hoped that Lepofsky will continue to monitor the new cases which are reported from time to time, and publish supplements to the book.