SUPREME COURT OF BRITISH COLUMBIA

POLICY ON

TELEVISION IN THE COURTROOM

(Adopted March 9, 2001)

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PART I Summary of Considerations and Conclusions

A: Is the question of allowing television coverage in our court a matter of policy to be decided by the court as a whole, or is it a matter to be decided by the individual judges in each case?

It should be noted that the Canadian Judicial Council considers this subject to be a matter of policy. Their present position is set out in resolutions passed at their meetings in September 1983 and September 1994, as follows:

September 1983

> That the Standing Committee on the Administration of Justice reaffirms its earlier position that the television of Court proceedings not be permitted. The Committee is of the view that it would not be in the best interests of the administration of justice to allow the televising of such proceedings.

September 1994

> Recognizing that the Council has a mandate to promote uniformity in the courts, the Council affirms its 1983 resolution, it confirms that the resolution is a recommendation, but that it does not apply to the Supreme Court of Canada.

The jurisdiction of the Canadian Judicial Council may flow from s-s. 60(1) of the ***Judges Act***:

> (1) The objects of the Council are to promote efficiency and uniformity, and to improve the quality of judicial service, in superior courts and in the Tax Court of Canada.

Moreover, the question has been treated as one of court policy in many other jurisdictions, as will be seen from the references in this paper.

Individual applications to televise trials will of necessity have to be decided by the trial judges to whom they are made, applying the law. **However, because the televising of trials engages issues touching on the proper administration of justice generally, and because the proper administration of justice is within our inherent jurisdiction, it is a subject on which the court may legitimately have a policy.**

B: If the court is to have a policy, what should that policy be?

POLICY OPTIONS:

There are the following general policy options and consequences for the court:

1. Do nothing.
2. Adopt a policy of no cameras in the court.
3. Adopt a policy of no cameras in the courts except under specified guidelines. (To be settled after consultation with bar and media and other interested parties.)
4. Adopt a permissive policy with specified guidelines. (To be settled after consultation as above.)

Consequences:

To do nothing is to miss an opportunity to provide assistance to individual judges who, it seems, will increasingly be faced with media applications that are a serious distraction from the main task at hand, yet are a matter of significance to society as a whole, so that a uniform or collective approach is not only justified but is preferable.

To adopt a policy of an absolute ban is really to do nothing. Now that **R. v. Cho** has become part of the common law, a policy statement banning cameras in the courts would be both ineffective and inappropriate. (See Part III for a review of this case.)

Policy will not have the force of law (unless it should be legislatively enacted) and will not bind individual judges in particular cases, but it may serve to inform and guide the media and the court on applications for television coverage. It could be argued that options 3 and 4 are not really much different, and their real effect upon applications will depend entirely upon the nature of the guidelines. Nevertheless, Option 3 signals a conservative approach that reflects the view of the court that the public educational and informational value of media-driven camera access is dubious at best.

Balanced against the very limited value of commercial visual media coverage is the potential deleterious effect on access to justice for some litigants and interference with a fair trial. Requiring the consent of the parties should mitigate concerns about the potential deleterious effects of cameras upon the right to access to justice, the right to a fair trial, the privacy rights of court participants, and the dignity and decorum of our courtrooms. A consent requirement for capturing visual images is a minimal restriction on the media's freedom of expression rights, and is justified in order to preserve the key values that are fundamental to the proper administration of justice.

While it is anticipated that guidelines would provide for objections to filming of individual witnesses, it is felt that applicants need only obtain the consent of the parties to a proceeding (the Crown and the accused in a criminal trial), in order to engage the consideration of the Court.

A restrictive policy then, with cogent guidelines adopted after appropriate consultation and consideration, is desirable, would serve a useful purpose, and would be effective. The effectiveness would be greatly enhanced if the policy were to eventually become the substance of a Rule of Court, or of legislation.

POLICY ADOPTED

> **There shall be no broadcasting, televising, recording, or taking of photographs in the courtroom, or areas immediately adjacent thereto, during sessions of court or recesses between sessions, unless the parties to the proceeding consent, and unless prior permission**

has been expressly granted by the presiding judge following application upon timely notice to the parties, and subject to such conditions as the presiding judge may prescribe to protect the interests of justice and to maintain the dignity of the proceedings.

C: Should guidelines be adopted to give effect to the policy and to give guidance to individual trial judges and, if so, what should those guidelines be?

The benefit of guidelines is that they will eliminate the necessity for judges to "reinvent the wheel" each time that an application is brought, and they will serve to organize the media applicants and the other participants. They will have the incidental benefit of reducing the time spent on applications, which, after all, are collateral to the main purpose of the proceedings.

Guidelines will deal with such things as:

- Application procedures;
- Restrictions with respect to types of proceedings;
- Ownership and use of the film;
- Equipment and personnel to operate it;
- Sound and lighting criteria; and
- Factors to consider in exercising judicial discretion.

Guidelines could be promulgated and implemented as law by way of legislation or rules of court, but action by the Legislature is beyond our control. As we think that guidelines are desirable, it is our view that they should be prepared by the judges, after appropriate consultation with other interested parties, and published by the Chief Justice. The publication could take the form of a practice direction. However, some jurisdictions use a manual that is revised and updated over time.

The preparation of specific guidelines is a daunting task. The rules that have been devised in several of the United States, in other Commonwealth countries, and in Nova Scotia are a rich source upon which we could draw. **A draft set of guidelines to implement the adopted policy will be prepared by judges, with the assistance of judicial staff. Thereafter, we propose that they will be vetted by a committee comprised of judges, members of the bar, members of the media, and others with a demonstrable interest, with a view to arriving at a set of guidelines with broad general acceptance.**

PART II Summary of Common Arguments For and Against Television

Any useful discussion of a policy requires a familiarity with some of the key arguments for and against the televising of trials. A committee of the court has reviewed a wealth of materials from various sources. The following is a summary of some of the common arguments on each side of the question.

FOR TELEVISION

Television opens trials to public scrutiny

- enhances fairness of the trial and the appearance of fairness that is essential to public confidence in the system by exposing the participants to public view and criticism
- does not distort – merely "watches" and shows accurately
- knowledge that trial will be televised will cause lawyers to prepare more thoroughly to avoid looking foolish, and will thus produce more effective advocacy and an improvement in the administration of justice
- the courts are public institutions, not the private preserve of judges, and the public has a right to have public proceedings televised

Television educates the public

- increased public understanding of the system enhances the quality of justice and engenders respect and confidence – will allay the current widespread cynicism
- most people have no direct access to courtrooms and receive their information through television
- an informed public can work to ensure that laws and procedures are fairly and lawfully implemented
- television provides more accurate, balanced, and complete reports of court proceedings than conventional media reports
- tapes of televised trials will be valuable educational tools, particularly for law students

AGAINST TELEVISION

Television affects the trial participants

- witnesses may be reluctant to testify when faced with the glare of publicity
- witnesses may look and act differently than they would if they did not know they were being televised, thus affecting an assessment of their credibility (The U.S. Federal Judicial Conference evaluation noted that 64% of participating judges reported that, at least to some extent, cameras make witnesses more nervous and 41% found that, at least to some extent, cameras distract witnesses)
- a witness's testimony may be affected by what he or she sees during televised proceedings before testifying
- witnesses may embellish their testimony to attract media attention to themselves – their "15 minutes of fame"
- television puts unnecessary pressure on jurors and could affect their judgment
- lawyers will be tempted to "grandstand" (e.g., O.J. Simpson)
- television may affect counsel's conduct of the case (e.g., defence lawyer in William Kennedy Smith case claims he was inhibited by national television, with complainant's mother watching, in his cross-examination of the complainant; evidence in ***Squires*** of how counsel use camera angles to intimidate

witnesses in cross-examination)

Television will not show entire trial, but only "highlights"

- television will show only vivid highlights of controversial trials – will show what is most interesting to the audience, with a reporter's voice-over storyline, and not necessarily what is important to the trial - reality is distorted when public opinion is formed on the basis of incomplete or inaccurate information (U.S. Federal Judicial report showed that average of only 56 seconds of courtroom footage was shown per story, most of which was "voiced over" by reporter's narration)
- object of television is entertainment – will not show typical trials, but only sensational ones
- re-broadcast and nightly analysis of trials provides a "feedback loop" which permits the judge, lawyers, jurors, and witnesses to become aware of public reaction to what is going on during the trial – this can have a prejudicial effect
- by focussing on sensational cases, television diminishes the dignity of the courts and fosters disrespect for the process

Television will inhibit access to the courts

- Victims of crimes will be reluctant to report crimes and to testify if they know that the gory details will be televised
- Parties to civil disputes may refrain from bringing actions or may settle actions disadvantageously rather than face widespread adverse publicity – strong temptation for lawyers to try their cases "in the court of public opinion" before the actual trial

Television will create significant costs

- Courtrooms will have to be adapted for cameras and microphones
- Potential jury contamination will result in longer and more costly jury sequestration

Television will jeopardize the safety and privacy of trial participants

- Widespread recognition of witnesses, including police witnesses, may lead to acts of revenge and of intimidation of them and their families (e.g., will be problematic for witness protection program, undercover police officers) – will be facilitated by general knowledge that witness will be at courthouse at particular time
- Widespread recognition of jurors leaves them open to similar concerns and to post-trial demands by strangers to explain or justify their verdict

- Safety of lawyers and judges will be compromised by dissemination of their pictures on television (e.g., Sharpe case, Hells Angels case, Federal Justice Department 1999 consultation paper: "Fear Affects the Decisions You Make")
- Clerks and Sheriff's officers will have similar concerns
- Cameras will attract publicity-seekers, such as activists and terrorists, to the courtroom and will elevate security concerns in the building

These arguments are fully developed in two particularly useful papers. First, arguments in favour of televised trials are developed in a paper by Daniel J. Henry, house counsel for the C.B.C., entitled "Electronic Public Access to Court – An Idea Whose Time Has Come", which can be found at: ***http://adidem.org/articles/DH1.html***. Second, arguments against television of trials are set out in an article by M. David Lepofsky, counsel in the Ontario Ministry of the Attorney General, who was Crown counsel in R. v. Squires in both the District Court and the Court of Appeal. His paper is entitled "Cameras in the Courtroom – Not Without My Consent", and is published at 6 National Journal of Constitutional Law 161.

PART III Summary of Some Pertinent Case Law and the *Charter*

A brief review of relevant case law is necessary to the discussion of available policy options.

There are two Canadian jurisdictions that have dealt with the issue directly: in Ontario, ***R. v. Squires***, [1989] O.J. No. 1256 (QL) (Ont. Dist. Ct.); (1992) 11 O.R. (3d) 385 (C.A.) and in British Columbia, ***R. v. Cho, Choi, Im et al*** (2000118) Victoria Registry, Docket No. 104865 C2. In addition, two Australian cases have also dealt with this matter.

Squires, which reached the Ontario Court of Appeal, dealt with a statutory prohibition on photos and recording in Ontario courthouses. ***Cho,*** a decision of the British Columbia Supreme Court, was concerned with a common law prohibition similar in effect to the Ontario statute.

Sections 1 and 2(b) of the ***Canadian Charter of Rights and Freedoms*** frame the legal question in Canada and distinguish the legal analysis from other jurisdictions in the Commonwealth.

> *1. The **Canadian Charter of Rights and Freedoms** guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*
>
> *2. Everyone has the following fundamental freedoms:*
>
> ...
>
> > *(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication ...*

The common law was expressed by Esson C.J.B.C. (as he then was) in ***R. v. Vander Zalm*** [1992] B.C.J. No. 3065 (QL) (B.C.S.C.):

> *… the longstanding and well-known rules of this court that no cameras may be used in the courtroom during a trial or other proceeding. That rule is not statutory and is nowhere written down. But that it exists has never, to my knowledge, been questioned, nor has it ever been questioned that it has been applied in this province without exceptions.*

ONTARIO

Squires was concerned with the conviction of a reporter for taking photographs of persons coming in or going out of a courtroom in Ontario. The reporter's activity was an offence under s. 67 of the ***Ontario Judicature Act,*** *R.S.O. 1980, c. 223,* which provided as follows:

> *67 (2) Subject to subsection (3), no person shall,*
>
> *(a) take or attempt to take any photograph, motion picture or other record capable of producing visual representations by electronic means or otherwise,*
>
> *(i) at a judicial proceeding, or*
>
> *(ii) of any person entering or leaving the room in which the judicial proceeding is to be or has been convened, or*
>
> *(iii) of any person in the precincts of the building in which the judicial proceeding is to be or has been convened where there is reasonable ground for believing that such person is there for the purpose of attending or leaving the proceeding; or*
>
> *(b) publish, broadcast, reproduce or otherwise disseminate any photograph, motion picture or record taken or made in contravention of clause (a).*
>
> *(3) Subsection (2) does not apply to any photograph, motion picture or record taken or made upon authorization of the judge,*
>
> *(a) where required for the presentation of evidence or the making of a record or for any other purpose of the judicial proceeding;*

> *(b) in connection with any investive, ceremonial, naturalization or similar proceedings; or*
>
> *(c) with the consent of the parties and witnesses, for such educational or instructional purposes as may be approved by the judge.*

In reviewing the decision of a lower court judge, Mercier D.C.J. found that the statutory prohibition in s.67 of the ***Judicature Act*** against the taking of photographs in the courtroom and within the confines of the courthouse, is an infringement of the media's constitutionally protected right under s. 2(b) of the ***Charter***.

Mercier D.C.J. then went on to consider whether such an infringement could be justified under s.1. The analysis began by stating the objectives of the statutory prohibition:

> *Are the infringements on media rights imposed by s. 67 of* ***The Judicature Act*** *justifiable pursuant to s. 1 of the* ***Charter****?*
>
> *To determine this we must first look at the objects of the section. I agree with the learned trial judge that s. 67 aims at:*
>
> *1) protecting the interests of the parties and the public in ensuring fair trials,*
>
> *2) protecting the rights, dignity and privacy of trial participants, and*
>
> *3) ensuring order and decorum in the courtrooms and within the precincts of the courthouse.*
>
> *We must then determine if the legislation serves societal interests of superordinate importance and in doing so we must assess if a valid governmental objective is served by the limitation of the right to film and if the limitation imposed by s. 67 is restricted to that which is necessary for the attainment of that objective.*
>
> *...*
>
> *Does s. 67 serve societal interests of superordinate importance?*
>
> *The right to a fair trial is a societal interest of superordinate importance. The "raison d'être" of courthouses is to provide facilities: where members of the public may have differences between them tried; where society may have persons alleged to have committed crimes tried; and where persons who have been charged with the commission of criminal offences call* [sic] *expect due process.*
>
> *The learned trial judge held that the right to a fair trial is a constitutional right which is to be given priority over any competing interest under s. 2(b). The appellant alleges that he erred. I*

cannot agree. Within the confines of the courthouse, there can be no more important right than that to a fair trial. Any other freedom or right which competes with the right to a fair trial within the confines of a building erected for the purpose of ensuring that right must be subordinate. (emphasis added)

Contrary to the submissions of counsel for the appellant, I am of the view that the guaranteed right to a fair trial is paramount to the fundamental freedom of the press and other media of communication, certainly within the confines of a courthouse and probably anywhere.

This paramount right, therefore, justifies some limitation of any other freedom which might affect it negatively. The government objective to ensure fair trials is of sufficient importance to warrant overriding the constitutionally protected freedom of the press and other media communication if it is established that it can interfere with that objective.

...

The evidence does establish that televising judicial proceedings can and does interfere with fair trials.

It is not necessary for me to go over the evidence in detail as it has been thoroughly canvassed by the learned trial judge and I agree with his conclusions.

One might quibble on the emphasis placed on the evidence of certain witnesses, as opposed to others. The totality of the evidence, nonetheless, makes one thing clear. The television media have testified that operating without a camera is for them like operating without a pencil would be for the print media. I accept this. The fact remains, apt analogies apart, that cameras in the courtroom and in the courthouse can sometimes be so disruptive as to seriously affect the right to a fair trial.

The evidence has established that cameras in the courtroom can have a negative effect on witnesses and jurors which could lead to an unfair trial. It is true that "the general advantage to the country in having these proceedings made public more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings", as stated by Laurence J. in ***R. v. Wright*** *(supra). The right of a person to a fair trial is, however, more than an inconvenience.*

Moreover, one must consider that many witnesses and all jurors are in court because they are obliged to be there and consequently they ought to be entitled to reasonable privacy and/or protection. If they are to have no say in whether they are to be filmed, witnesses may not be so willing to step forward and this would obviously have a deleterious effect on trials. Jurors might well be reluctant to serve and look for excuses not to, or be less attentive to the evidence than to the cameras. The evidence does establish that the presence of cameras in courtrooms can have an effect on witnesses and on jurors, and I accept the learned trial judge's view on these." (emphasis added)

The trial judge considered the matter of televising courtroom proceedings and commented on the provision in the ***Ontario Judicature Act*** which provided for photographing or filming in the courthouse with the consent of the parties and witnesses but only for such "educational or instructional purposes as may be approved by the judge". This provision was not saved by s. 1 as a reasonable limitation. In the opinion of Mercier D.C.J., if the parties and witnesses agreed to filming there would likely be no disruption of the trial nor would the trial be adversely affected.

The Ontario Court of Appeal substantially agreed in the result achieved by Mercier D.C.J., but for a variety of different reasons – see (1992) 11 O.R. (3d) 385. In a 3-2 decision, as part of the majority, Osborne J.A. agreed that the ***Judicature Act*** prohibition on televising or photographing persons entering or leaving the courtroom was an infringement of s. 2(b) of the ***Charter***. He, with the majority, declined to consider the part of the ***Act*** which prohibits such activity in the courtroom because it was not directly raised by the facts.

Osborne J.A. analyzed the prohibition as follows:

> *I agree with both Houlden and Tarnopolsky JJ.A. that the activity in issue is a form of expression and its prohibition by law is best considered in the balancing of competing interests required by s. 1. I propose to add a few brief comments with respect to the rights analysis required to determine if the prohibition contained in s. 67(2)(a)(ii) breaches s. 2(b) of the* ***Charter****.*
>
> *It seems to me to be clear that quite apart from expressive activity which is violent, not all expressive activity in a government building will attract the constitutional protection of s. 2(b) of the* ***Charter****. This was made clear in* ***Committee for Commonwealth of Canada v. Canada****, [1991] 1 S.C.R. 139, 4 C.R.R. (2d) 60. In the* ***Commonwealth*** *case the specific issue was the constitutional validity of a federal regulation which prohibited the distribution of political pamphlets in an airport owned by the federal government. Lamer C.J.C. quickly rejected the submission that the government's ownership of the airport carried with it the right to prohibit all expressive activity on the property. Lamer C.J.C.'s s. 2(b) analysis gave primary consideration to two factors -- the form of expression in issue and the purpose or function of the building. He concluded that if the form of expression was incompatible with the building's function, the expressive activity will not attract the protection of s. 2(b).*
>
> ...
>
> *In my opinion, the activity sought to be protected, although of limited benefit, is nonetheless an expressive activity which works to further the values underlying s. 2(b) of the* ***Charter****. Thus, the expressive activity is constitutionally protected. I prefer to consider under s. 1: the function of a courthouse; the benefits to be derived from permitting the filming of persons entering and leaving a courtroom; and the practical implications of workable plans to regulate this expressive activity.*

...

> *I now turn to consider whether the total ban on expression in the general area of courtroom entrances and exits is a reasonable limitation on expression. Section 1 provides:*

*1. The **Canadian Charter of Rights and Freedoms** guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*

*Section 1 presents a constitutional statement that the rights contained in the **Charter** are not absolute and that allowance must be made for some limitation on those rights.*

*I agree with Tarnopolsky J.A. as to the general purpose of s. 1, and with his view that the analysis required by s. 1 should be undertaken in accordance with the Supreme Court of Canada's decision in **R. v. Oakes,** [1986] 1 S.C.R. 103, 19 C.R.R. 308. The government's purpose or objective and the means chosen to accomplish that purpose or objective must be taken into account and balanced in the assessment of the reasonableness of the limitation.*

*The required balancing must, in my view, be flexible, consistent with the purpose of s. 1: see **Commonwealth of Canada v. Canada**, supra. The balancing required by s. 1 must be undertaken in an appropriate context. It is not an abstract exercise. A contextual approach to the application of s. 1 was approved in **Edmonton Journal v. Alberta (Attorney General)**, [1989] 2 S.C.R. 1326.*

...

Thus the contextual approach to the application of s. 1 imports within it a degree of flexibility which is consistent with the purpose of the section itself. A limitation which is relatively insignificant will be easier to justify under s. 1 because, in all of the circumstances, the limitation in issue will more readily be found to be reasonable when competing values are considered. The exercise is relational.

If a contextual approach is taken in the application of s. 1 in the circumstances of this case, it becomes necessary to take into account what is really at stake -- that is, to answer the following question: What is lost as a result of the statutory prohibition against filming persons entering and leaving a courtroom? The resolution of that general issue requires the consideration of the extent to which expression (essentially through television) would be enhanced were the prohibition contained in s. 67(2)(a)(ii) not to exist.

...

I cannot agree with the appellant's submission that the s. 67(2)(a)(ii) prohibition results in a loss of images and sounds which strip television in particular of vital images and sounds with the result that "much of the communicative value of the medium is lost". What is lost, in my opinion, falls far below that standard of significance.

...

Tarnopolsky J.A. is correct in stating that the evidence (most of which was directed to the impact of cameras in the courtroom) does not support the conclusion that the electronic media's presence in courthouses, in jurisdictions where it is permitted, has led to appellate orders for new trials, on

> *the basis that the accused's or the Crown's right to a fair trial was somehow compromised. However, merely because cameras in the courtroom have caused no reported problems cannot, in my view, be taken to support the conclusion that no harm will result from exposing persons entering and leaving a courtroom to electronic media scrutiny. The potential problems attendant upon the electronic media's presence in the courtroom and in the courtroom doorway areas are different. I agree with Houlden J.A.'s conclusion that the critical issue in relation to television in courtroom entrance/exit areas is directly related to the need to avoid disruption and to protect the reasonable expectation of privacy of at least some of the participants in courtroom proceedings. For example, as the respondent has noted, jurors may well fear a loss of anonymity from the visual disclosure of their identities entering or leaving a courtroom. This is an example of a problem which arises only from the reproduction of visual images. Participants facing radio or print media have an option -- they need not engage in any exchange. This option is unavailable to a person confronted by a television camera.*
>
> ...
>
> *In my opinion, electronic media access to those entering and leaving a courtroom cannot, in practice, be regulated in such a way as to achieve a degree of control which would be viewed as reasonable and workable. It is imperative that a reasonable degree of dignity and decorum be preserved. That goes to the heart of the public's confidence in the administration of justice and to the public's willingness to participate in it. The trial judge will not be able to control, in any effective way, what occurs once a witness, a victim or a juror leaves or enters a courtroom. I agree with Houlden J.A. that abuses will inevitably occur if television is allowed to operate in that part of the courthouse. Any system of regulation would have to be workable in all courthouses, in most circumstances. Thus, it seems to me that in the face of benefits (emerging from the form of expression prohibited by s. 67(2)(a)(ii)) which I believe to be of distinctly limited value, the prohibition contained in s. 67(2)(a)(ii) passes the test required to be imposed by s. 1 itself, and by* ***Oakes****. In my opinion, the statutory prohibition contained in s. 67(2)(a)(ii) is a reasonable limit imposed by law.*

Dubin, C.J.O. considered the matter differently. He stated:

> *I agree with the conclusion of my colleagues, Houlden and Osborne JJ.A., that s.67(2)(a)(ii) of the Judicature Act is constitutional. However, in light of the comments, principally of Lamer C.J.C., in Committee for Commonwealth of Canada v. Canada, [1991] 1 S.C.R. 139, 77 D.L.R. (4th) 385, I have a reservation as to whether the activity prohibited by s.67(2)(a)(ii) is compatible with the principal function or intended purpose of a courthouse and thus within the ambit of s.2(b) of the Canadian Charter of Rights and Freedoms. Since all my colleagues are of the contrary view on this issue, nothing is to be gained, in my opinion, by my exploring that issue further here.*

The Court of Appeal in ***Squires*** restricted its consideration of the issue to filming in courthouse corridors. Whether that analysis can be extended to courtroom filming without consent of all parties is something which has not been the subject of direct pronouncement by a Court of Appeal in Canada. The Supreme Court of Canada refused leave in ***Squires*** and has not considered the question.

It is certainly arguable that a principled construction of ***Charter*** section 2(b) does not confer a constitutional right on media to film unwilling court participants. Until the issue is squarely considered by either a Court of Appeal or the Supreme Court of Canada, including a consideration of the impact of such a right in relation to the function of a courthouse, i.e. to provide a place for the conduct of a fair trial – the matter appears open to legal determination.

It is interesting that each of Dubin C.J.O. and Osborne J.A. invoked Lamer C.J.C.'s remarks in ***Committee for Commonwealth of Canada vs. Canada***. Lamer C.J.C.'s decision determined that consideration of the form of expression in issue and the purpose or function of the building is an analysis to be undertaken in considering whether the expressive activity attracts the protection of 2(b). Dubin C.J.O. preferred that analysis. Osborne J.A. acknowledged that analysis, but without comment, stated he preferred to consider the function of the courthouse as part of the section 1 analysis.

This issue is well-analyzed in a paper presented by Frank A.V. Falzon in *1994 C.I.A.J. Conference Papers, Open Justice*: **Hardly a "Natural Born" Charter Right: Why Section 2(b) of the Charter Should not Include a Right to Attend Hearings**

Thus, ***Squires*** finds televising in courthouses -and perhaps in courtrooms – protected expression by s. 2(b) of the ***Charter***. At the trial level it was found that the right of the press or media in relation to access to court proceedings is greater (in some unspecified way) than that of the general public. (Falzon (supra) takes on this concept as well and asks some provocative questions in relation to findings of both **Squires** and other courts that in his view have swallowed media rhetoric too readily without close analysis.)

The statutory prohibition in Ontario, however, is saved by s. 1. The interest said to trump the protected right of access by the media is the litigant's or accused's right to a fair trial. Evidence presented before the court was found to establish that cameras in the courthouse or courtroom can and do interfere with fair trials.

It is fair to say that the right to privacy is also a consideration. It was found to be properly considered in relation to both jurors and participants in trials by the trial court and at least in relation to jurors and some participants by the Court of Appeal.

The negative effect of televising trial proceedings on access to justice, that is, that some litigants might not come to the courts to test their legal issues because they would not want to be exposed to television coverage, was considered and accepted by the trial court but not considered by the Court of Appeal.

This issue of the impact of television coverage of court proceeding was eloquently commented upon by Chief Judge Becker of the Court of Appeal for the Third Circuit in remarks to a congressional committee considering legislation to compel U.S. Federal courts to allow televising the Federal Court trials. Chief Judge Becker was representing the Executive Committee of the Judicial Conference of the U.S. in his remarks. He said:

> *This is not a debate about whether judges would be discomfited with camera coverage. Nor is it a debate about whether the federal courts are afraid of public scrutiny. They are not. Open hearings*

> *are a hallmark of the federal judiciary. It is also not about increasing the educational opportunities for the public to learn about the federal courts or the litigation process. The judiciary strongly endorses educational outreach, which could better be achieved through increased and targeted community outreach programs.*
>
> *Rather, this is a decision about how individual Americans – whether they are plaintiffs, defendants, witnesses, or jurors – are treated by the federal judicial process. It is the fundamental duty of the federal judiciary to ensure that every citizen receives his or her constitutionally guaranteed right to a fair trial. For the reasons discussed in this statement, the Judicial Conference believes that the use of cameras in the courtroom could seriously jeopardize that right. It is this concern that causes the Judicial Conference of the United States to oppose enactment of S. 721. As the Supreme Court stated in* ***Estes****, "[w]e have always held that the atmosphere essential to the preservation of a fair trial-the most fundamental of all freedoms-must be maintained at all costs." 381 U.S. at 540.*

The issues are also discussed at length in "**Cameras in the Courtroom – Not Without My Consent**", M. David Lepofsky, (supra) and in " **Framing the Issues for Cameras in the Courtrooms: Redefining Judicial Dignity and Decorum"**, A. Wayne MacKay, 19 Dalhousie Law Journal 139.

The Supreme Court of Canada, in ***Canadian Broadcasting Corp v. New Brunswick (Attorney General)*** (1996), 110 C.C.C. (3d) 193, dealt with a challenge to the validity of s.486(1) of the **Criminal Code**. The court found that it infringed section 2(b) of the **Charter,** but was saved by section 1. At pp 204-205, supra, the court, in a unanimous decision of nine, written by La Forest, J. had the following to say about freedom of the press:

> *24. Essential to the freedom of the press to provide information to the public is the ability of the press to have access to this information. In Canadian Broadcasting Corp. v. Lessard, [1991] 3 S.C.R. 421, 67 C.C.C. (3d) 517 (S.C.C.), I noted that freedom of the press not only encompassed the right to transmit news and other information but also the right to gather this information. At pp. 429-30, I stated:*
>
> > *There can be no doubt, of course, that it comprises the right to disseminate news, information and beliefs. This was the manner in which the right was originally expressed, in the first draft of s. 2(b) of the Canadian Charter of Rights and Freedoms before its expansion to its present form. <u>However, the freedom to disseminate information would be of little value if the freedom under s. 2(b) did not also encompass the right to gather news and other information without undue governmental interference.</u> [Emphasis added.]*
>
> *25. It is by ensuring the press access to the courts that it is enabled to comment on court proceedings and thus inform the public of what is transpiring in the courts. To this end, Cory J. stated in Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1991] 3 S.C.R. 459, at p. 475, 67 C.C.C. (3d) 544 (S.C.C.):*
>
> > *The media have a vitally important role to play in a democratic society. It is the*

> *media that, by gathering and disseminating news, enable members of our society to make an informed assessment of the issues which may significantly affect their lives and well-being.*
>
> *26. From the foregoing, it is evident that s. 2(b) protects the freedom of the press to comment on the courts as an essential aspect of our democratic society. It thereby guarantees the further freedom of members of the public to develop and to put forward informed opinions about the courts. As a vehicle through which information pertaining to these courts is transmitted, the press must be guaranteed access to the courts in order to gather information. As noted by Lamer J., as he then was, in Canadian Newspapers Co. v. Canada (Attorney General), [1988] 2 S.C.R. 122, at p. 129, 43 C.C.C. (3d) 24 (S.C.C.): "Freedom of the press is indeed an important and essential attribute of a free and democratic society, and measures which prohibit the media from publishing information deemed of interest obviously restrict that freedom." Similarly, it may be said that measures that prevent the media from gathering that information, and from disseminating it to the public, restrict the freedom of the press. To the extent that such measures prohibit public access to the courts and to information about the courts, they may also be said to restrict freedom of expression in so far as it encompasses the freedom of listeners to obtain information that fosters public criticism of the courts.*

Although this case considered only previous Supreme Court of Canada decisions, and did not refer to the narrower issue of the use of television cameras to gather information, or the **Squires** decision in the Ontario Court of Appeal, it certainly reinforces the significance of s.2 (b) rights in connection with any measure that would "prevent the media from gathering" and "disseminating" information "deemed of interest".

BRITISH COLUMBIA

In ***R. v. Cho, Choi, Im et al*** (20000118) Victoria Registry, Docket No. 104865 C2, Mr. Justice McKinnon allowed the media to make visual and audio recordings of counsels' arguments and his instructions to the jury; however, he acceded to defence and Crown arguments against filming the accused, the jury or any defence witnesses.

McKinnon J. in ***Cho*** set out the comments of Lamer C.J.C. in ***Dagenais v. CBC***, [1994] 3 S.C.R. 835. ***Dagenais*** was concerned with a purported common law ban on publication. Essentially Lamer C.J.C. applied the same test to the common law ban as was applied in relation to the prohibition against taking photographs in the courthouse in ***Squires*** by all levels of the courts which dealt with it.

The application in ***Cho*** was made after the close of the Crown's case, by the Canadian Broadcasting Corporation, for Court approval for audio and visual recording of the remainder of the trial.

Defence and Crown counsel opposed the application on the basis that it would be unfair to permit such an application at this stage in the proceedings. The principle of providing the public with an accurate rendition of the

trial, it was argued, was compromised, because no member of the public would see anything but defence witnesses.

The thrust of the arguments made on behalf of the media applicants was (page 5) "that given these rights and given the advances in technology, there is simply no good reason to exclude the use of modern equipment capable of accurately recording a public trial."

After a review of Canadian case law, McKinnon J. concluded as follows (page 14):

> *The sum of the many cases referred to suggests to me that insofar as British Columbia is concerned, there is no common law basis for excluding modern technology from the court room …Given the provisions of s.2 of the Charter, against the obiter referred to, it could be argued that, subject to the overriding duty and right of the individual trial judge to control his or her process, the time has now arrived to permit the introduction of equipment designed to more accurately depict public events.*

McKinnon J. dismissed a suggestion that this issue is one of policy that ought to be referred to the Chief Justice on the basis that the prohibition in British Columbia was based in the common law and it was the right and obligation of a trial judge to control proceedings in his or her courtroom.

The tenor of his reasons was that the issue should be addressed on a case by case basis. In many cases, the issue is resolved by reference to blanket statutory protections offered to certain witnesses. In other cases, consent of the parties may be required and in all cases, it is open to the trial judge to consider any request for exclusion based upon real or potential issues of safety or fairness.

Though he was not required to resolve the issues of privacy or consent, because neither issue was argued by the parties, McKinnon J. did make some comments in obiter (page 16):

> *Consent is a factor in the Ontario legislation which, though it found the impugned section to be constitutional, nevertheless did so on narrow grounds. No person is asked to consent to having his or her sketch taken, nor whether any testimony offered could be reproduced in a news item either on television or in print. So far as I am aware there is no privacy right afforded in court to any person save for those statutory rights protecting certain witnesses and events.*
>
> In conclusion, McKinnon J. holds (page 18) that:
>
> *… given my view of the state of the law and particularly the absence of any cogent reasons to support the existing common law ban, I am prepared to permit the introduction of the video and still cameras to record counsels' submissions to the jury and my instructions.*

The portion of the trial that McKinnon J. was prepared to permit to be recorded precluded an in-depth analysis

of the issues of disruption, privacy and consent, or the value of broadcasting as expression versus the potential downsides. McKinnon J. was alive to the issue of fairness and as mentioned, accepted that it would be unfair to videotape or photograph the defence witnesses or the accused. The larger issue of television in the courtroom is still very much a live issue in British Columbia.

AUSTRALIA

The issue of visually recording court proceedings has also been subjected to judicial consideration in Australia, where there is no Charter entrenched freedom at issue.

In **Roberts v. Nine Network Australia Pty Ltd** (18 December 1995) Supreme Court of Victoria Practice Court**,** Cummins J. noted that he had to balance the protective exercise of the court's jurisdiction with the need for the court to be open. He declined in the specific circumstances to allow broadcasting. However, were it not for the exceptional circumstances of the application before him, Cummins J. appears to be convinced that the authorities allowed the broadcast of court proceedings.

After examining the fundamental principle of public access to court proceedings, Cummins J. embarked on a discussion of the competing interests in opening the courts to electronic media:

> *The court has the inherent power to control its own process and always will do so. The court requires accurate, balanced and fair reporting and always will do so. The court will not permit oppression of witnesses. However, the fact that a matter is embarrassing to be published is of itself no reason for it not to be published. The fact that a matter may receive higher profile than otherwise by reason of electronic dissemination is no reason of itself for it not so to be disseminated. Were it otherwise, the court would have been also constantly engaged in an assessment of the degree of print publicity, and the court has not so been constantly engaged; nor do I see any reason why it should be so engaged in assessment of dissemination by electronic media. It may be that the perceived problems of undue publicity are transitional and will recede if such dissemination becomes, as print dissemination is, routine. It is said that the very public presentation of parties or witnesses militates by undue publicity against visual electronic dissemination but it seems to me that no difference in principle arises between that dissemination and by print. The difference is of degree, not of kind, in relation to the fundamental of Benthamite publicity. As to the right to privacy, the courts are public, not private. As to suggested disruption to court process by electronic media, if the eye of television can see through a cricket stump, no doubt it can see in a court without disruption to the court.*

In ***The Queen v. Avent*** (17 May 1995), Supreme Court of Victoria, No. 1436 of 1995, an application was made to videotape the sentencing of the offender. After hearing submissions by the parties, Teague J. allowed the application subject to the following conditions (page 1-2):

> 1. *The sentence may be recorded by one camera operated by a camera operator determined by the Courts Information Officer, such camera to be located in the public gallery, and such camera to cover only the Bench, and with the use of one microphone on the bench.*

> *2. The videotape will be subject to editing by me before being made available to the Courts Information Officer for the media.*
>
> *3. Material so recorded, which is broadcast, shall be presented in a way which gives an accurate impartial and balanced coverage of the proceedings and of the parties involved. Any such broadcast is to be without editorial comment and to be of at least two minutes duration per news item.*
>
> *4. There shall be no use of such material otherwise than for normal news programmes unless prior approval of that use has been given by me.*

In addressing the objections of defence counsel, including the absence of consent by the offender, Teague J. noted that what had been applied for would go little further than the current practice in Victoria, whereby judges were videotaped or photographed sitting on the bench (when the court was not in session), and such clips were used to provide visual aids in news reports of court proceedings.

Teague J. acknowledged that rules of procedure would assist a judge in exercising his or her discretion in applications of this kind, but he was prepared to exercise his discretion in this case, with the assistance of rules from other jurisdictions, because the proposed form of recording did not differ from existing practice and because the limited subject matter was that of a sentencing, not a trial.

Privacy therefore was not an issue and any concerns about prejudice to the offender Teague J. felt, could be appropriately dealt with in the aforementioned conditions. In response to an argument that any conditions on broadcast imposed by the court would be an exercise by the court of "undue interference with editorial freedom", Teague J. commented as follows (page 28-29):

> *If the conditions are so perceived, the remedy is simple. The news editor can choose not to exercise the option of publishing in the extended form [television broadcast]. Instead, a news report can be published in whatever variant of the current established form the news editor chooses, given that the conditions have no effect on that form.*
>
> *It should go without saying that the conditions imposed on this occasion were those assessed by me as appropriate to the particular circumstances.*

SUMMARY OF CASE LAW

To summarize, the factors currently at play in a legal analysis following the case law in Canada are as follows:

> 1. Media access and its corollary right to gather information by recording, photographing or televising court proceedings is a constitutionally protected right. (s.2 (b) of the ***Charter of Rights and Freedoms***). Whether televised expression in a courtroom should be a protected form of

expression has not been considered in any court of appeal in Canada.

2. Any prohibition or restriction on that right must be put to a s. 1 analysis.

3. The factors so far considered in the case law in a s.1 analysis seek to balance competing protected rights: defined as the specific form of expression (and its benefits or value) and the function or purpose of a courthouse.

PART IV Overview of Guidelines in Canada and the Commonwealth

A few courts and other non-judicial bodies in Commonwealth jurisdictions have adopted, or are considering adopting, guidelines with respect to televising proceedings.

CANADA

Supreme Court of Canada

- The Supreme Court of Canada has installed video cameras in the courtroom for its own purposes. The cameras are mounted to the wall, and manoeuvre up, down, left, and right. When a lawyer steps to the podium and speaks, the camera automatically focuses and zooms in on the lawyer. The same applies when a judge speaks.
- The Supreme Court of ***Canada*** keeps and owns the master videotape.
- Any lawyer who has appeared before the Supreme Court of Canada may request a copy.
- Others may request a copy, stating a specific purpose for the request. All requests must be approved and, if so, the tape is given subject to an express condition that it not be published.
- A copy is also given to Cable Public Affairs Channel (CPAC) pursuant to a letter agreement, which sets out numerous terms and conditions.
- CPAC, following a review of the cases to be heard by the S.C.C., must indicate which cases it wishes to broadcast. The S.C.C. will seek the views of the parties and advise CPAC as quickly as possible of its decision.
- CPAC is required to broadcast cases in their entirety and in both official languages. CPAC must use its best efforts to ensure that any clips, sound bites, or commentary are balanced and fair.
- On request, CPAC will provide information as to how frequently the tapes are played, the potential audience, and any other uses to which the tapes have been put.
- No cameras other than the ones installed in the courtroom are permitted. Existing courtroom sound and light must be used without modification.
- The costs associated with feeding the S.C.C. broadcast to CPAC will be borne by CPAC and may be shared in a pool arrangement with other broadcast members of the parliamentary press gallery.
- CPAC will act as a pooling agent to other broadcast members. CPAC is required to keep the other broadcast members of the parliamentary press gallery apprised of the terms and conditions of the agreement and will relay the S.C.C. request that those using clips, sound bites, or commentary must use their best efforts to ensure they are balanced and fair.
- No tape of a proceeding will otherwise be made available to anyone, except with the express permission

of the S.C.C.
- The S.C.C. retains copyright in the broadcast material.

Nova Scotia

- Media guidelines were approved by judges of the Appeal, Supreme, and Provincial Courts in Nova Scotia in September of 1999. The guidelines set out the standards for public access to the courts, except in those cases or locations where an individual judge exercises his/her discretion otherwise.
- The guidelines deal with numerous issues including decorum in the courtroom, movement beyond the bar, and access to court documents.
- Copies of audiotapes are available at reasonable cost. Tapes that are purchased by the media may be used for verification purposes only, not for rebroadcast.
- Specifically with respect to cameras, filming or photographing a courtroom is not permitted from inside or outside the courtroom without the permission of the Court. Cameras, including television cameras, are not allowed in any courtroom during the conduct of a case without the express permission of the Court.
- The Nova Scotia Court of Appeal has embarked on a pilot project with respect to cameras in its courtrooms.
- A media outlet requesting permission to film or photograph must make a formal application, which must be filed and served on the parties at least 14 days prior to the hearing. If any party objects to coverage, the objecting party must file a Notice of Objection and notify the media intervenor within two clear days of the filing of the media application. If none of the parties object to coverage, the order may be granted by the Court without a hearing. If a Notice of Objection is filed, there must be a hearing before an appeal court judge. The media intervenor must attend the hearing, and all parties will have an opportunity to be heard.
- No appeal or application schedule for hearing shall be rescheduled to permit media coverage.
- Expressly included in the guidelines is a provision that "television and other media coverage of proceedings of the Court of Appeal shall be deemed to be in the public interest. It shall be grounds for refusal of an order permitting if the prejudice, disadvantage, hardship or other valid reason apprehended by a party resulting from coverage of the appeal or application outweighs the interest of the public in the granting of the order, or if media coverage of the proceedings to which the application applies is shown not to be in the public interest."
- The guidelines provide that documents on counsel table, the clerk’s desk or the bench shall not be photographed.
- A notice informing the public that proceedings are subject to media coverage shall be affixed to the courtroom door.
- Broadcasting of proceedings in the Court of Appeal shall be delayed, unless the panel hearing the appeal grants permission for a live broadcasting.
- Unless permitted by the panel, no more than one television camera with one operator shall be used. The television camera must be in a fixed position, and neither the operator nor other media personnel shall move about the courtroom when court is in session. No logos, call letters or identifying words or symbols are permitted on the television equipment or on the person of the operator. Any signal light showing when the equipment is operating shall not be visible. No lighting additional to the regular lighting in the courtroom is permitted.
- Media outlets are required to keep copies of transcripts, video and audiotapes of all broadcasts for a minimum of six months, and shall make copies available without cost to the Court if requested.
- During hearings for which permission for coverage has been granted, media intervenors may address the

Court only at the beginning or the end of the hearing, or at the beginning or end of a recess.
- Only one order permitting coverage shall be made with respect to any appeal or application.
- One courtroom is designated as a media courtroom and is permanently wired to a room designated as the media room. There is to be at least one camera receptacle in the media courtroom and at least six outlets in the media room to provide for pooled coverage. One outlet is reserved for the print media and one for television stations from outside Halifax, where the Court of Appeal sits.
- The costs shall be the responsibility of the media and may be shared by media representatives by agreement, but no fee or charge shall be payable for receipt of the television signal from the media room's outlets.
- The media representative named in a coverage order is responsible for the operation of the television camera in the courtroom and is entitled to the exclusive use of one of the media room outlets.
- If the media do have a pooling agreement with respect to the use of other outlets, the agreement may be filed with the Court. In the absence of such agreement, each outlet not otherwise reserved is available to the first person to use it.

New Brunswick

- The Court of Queen's Bench of New Brunswick has adopted a "bench rule" in respect of making video and audio recordings in courtrooms. The rule is a prohibition against making video or audio recordings in the courtroom subject to limited exceptions.
- A media representative may make an audio recording of court proceedings, but only to verify or supplement notes and not for broadcast or publication.
- Video recording may be made of marriage ceremonies and other ceremonial proceedings in a courtroom, and by prior arrangement, video recording may be made in any courtroom when it is not in use for court purposes, for the purpose of providing background photographs for use in a news medium.
- By policy, control of media and policy toward the media within the courtroom is in the discretion and in control of the presiding judge.

Saskatchewan

- Cameras and sound recording devices are not permitted to be used within the perimeter of a courthouse. With the permission of a presiding judge, photography and sound recording equipment will be permitted for the purpose of recording ceremonial occasions and "the presiding judge in the courtroom may also allow [photography and sound recording] equipment in other situations."

NEW ZEALAND

- In May 2000, New Zealand adopted "guidelines for expanded media coverage of court proceedings." There are separate guidelines for television media, still photography and radio.
- No live transmission of evidence is permitted. A minimum of one hour of broadcast delay is required unless specific approval is sought and obtained from the presiding judge.
- Any material obtained from expanded media coverage must be presented in a way in which gives an accurate, impartial and balanced coverage of the proceedings and of the parties involved. Any such broadcast is to be without editorial comment and of at least two minutes duration per news item.

- Material obtained from television coverage shall not be used for purposes other than normal news programs unless prior approval for that use is given by the trial judge.
- Any such coverage shall be subject at all times to the authority of the judge to regulate proceedings of the Court in a manner he/she considers consistent with the fair administration of justice.
- No television coverage is permitted in family court or youth court or in cases where members of the public have been excluded by statutory prescription or order of the Court.
- No television coverage is permitted with respect to any offence of a sexual nature.
- A request for television coverage from the media must be made in writing to the relevant court at least four working days prior to the scheduled start of the case.
- Counsel for the parties are to be notified of any media request by the Registrar the same day it is received by the Court, and an opportunity is given to counsel to make submissions with respect to the request.
- Notification of any television coverage must be given through counsel to all witnesses prior to the hearing, or where this has not been possible, prior to their appearance in court, and an opportunity given to the witnesses to object to coverage of their testimony and/or to seek protection of their identity.
- In criminal proceedings, any witness who conveys a prior objection to being identified shall have their identification protected. This also applies to an accused when giving evidence.
- An accused will not have an absolute right to object to being photographed while in the dock.
- An accused who objects to being photographed when in the dock may have the objection determined by the judge on discretionary grounds.
- Any witness or party in civil proceedings who objects to being identified, whether pictorially or by voice, shall have the matter determined by the judge on a discretionary basis.
- Such an objection shall be decided on the basis of a presumption in favour of open justice, subject however to the circumstances of the particular case.
- There should be no visual coverage of members of the jury at any time, and there should be no visual coverage of members of the public who are in attendance.
- Any television coverage must not infringe the confidentiality of counsels' papers and of their discussions with each other and with parties and witnesses.
- There should be no more than one video camera in the courtroom at any one time at shall operate from a fixed point determined by the Court. It shall be attended by no more than one media representative and the equipment and media person shall be in place for the full duration of any session. No additional lighting devices are permitted. The media is responsible for designating media representatives to conduct television coverage and for arranging an open and impartial distribution scheme. Each television organization is responsible to maintain a separate and secure archive of all television coverage from the Court, which is to be accessible to judges.
- A judge may impose any further conditions considered appropriate upon granting leave for media coverage of any case.
- A judge may terminate television coverage at any time upon finding that the guidelines or additional conditions imposed by the judge have been breached, the rights of individual participants or the accused's rights to a fair trial will be prejudiced by such coverage if it is allowed to continue, or there has been a breach of the code.
- The rules with respect to still photography and radio coverage are similar.

ENGLAND AND WALES

At present, electronic media coverage of court proceedings in England and Wales is prohibited by statute. However, since at least 1988, studies have been taken, reports have been written, and recommendations made with respect to this issue.

The Lord Chief Justice, Lord Woolf, is reported in the January 16, 2001, edition of The Times, to have signalled support for debating the possibility of limited television reporting of court proceedings. The same article indicates the Law Society of England and Wales also appears to support the move.

IRELAND

It appears that television cameras are banned from courtrooms in Ireland. A recent newspaper article suggests that Chief Justice Ronan Keane views the matter as very contentious. The article quotes him as saying, "Obviously, in some courts like the Supreme Court it would probably do no harm. It might also be rather dull viewing at times. I think civil trials and criminal trials all present very different problems. I think the case is far from being made out for television and cameras in courts. The dangers, in my view, certainly at the trial level, would outweigh the public benefit."

SCOTLAND

Until 1992, Scotland had a strict rule of practice prohibiting all electronic media coverage. In December of 1992, the Lord President of Scotland agreed to permit a controlled experiment whereby television cameras would be allowed into Scottish courts.

A number of basic guidelines were established. The general criterion was "whether the presence of television cameras in the court would be without risk to the administration of justice."

- Televising of current proceedings in civil and criminal cases are not permitted at trial, but televising of current proceedings in civil and criminal cases at the appellate level are permitted with the permission of the presiding judge.
- The videotaping of proceedings for later broadcast can only be undertaken with the consent of all parties involved, and must be approved by the presiding judge before it can be televised.
- Specific guidelines became the subject of negotiation between the Court and the media. The requirements ultimately imposed were very stringent and complex, which according to some commentators, resulted in many media networks losing interest in televising proceedings.

AUSTRALIA

Australia has not formally adopted guidelines with respect to television cameras in the courtroom. The Federal Court of Australia has permitted sound and visual recording of an entire case for potential broadcast; a sound and

visual recording in broadcast of a judgment; and a live broadcast of a judgment.

- In most cases, television cameras have been permitted into the Federal Court on condition that the proceedings are not disturbed, no artificial lighting is used, that cameras remain in fixed positions, and that the Court retains the right to veto the use of any part or of all footage recorded.
- The Federal Court of Australia is considering the adoption of a general policy, indicating its willingness to consider applications for electronic media coverage, and general guidelines regulating and governing electronic media access to the Court, which will broadly set out the basis for the exercise of a judge's discretion in implementing such a policy and guidelines.
- In the long term, the Court is giving consideration to the installation of its own recording equipment.
- A committee of the Federal Court of Australia has recommended a pilot project, during which it is proposed that guidelines be developed with respect to television cameras in the courtroom. The following are some of the recommendations with respect to the possible contents of guidelines:

a. The guidelines would be expressly subject to the discretionary power invested in the presiding judge, possibly spelling out a list of factors relevant to its exercise;
b. Media applications would be required to state the nature of the recording proposed and the intended use of the materials, with applications being made with sufficient notice to permit the views of all participants to be ascertained;
c. All recording would be undertaken on a pooled basis, with the media being solely responsible for arranging and distributing pooled footage or other materials and for all associated costs; prohibited would be any equipment, recording technique or actions by media personnel which may disturb or distract the proceedings;
d. Witnesses would be required to consent to *their* evidence being recorded by the electronic media;
e. Objections to being recorded, by participants other than witnesses, would be heard and determined by the presiding judge;
f. Visual coverage would be restricted to the bench, bar and witness box; no close-up shots beyond "head and shoulders" would be permitted and reaction shots be restricted to those being addressed;
g. Recording of in-court conversations between lawyers and between lawyers and parties or witnesses would be prohibited;
h. Visual coverage of documents or other exhibits not tendered in evidence would be prohibited;
i. Televising of jurors would be prohibited;
j. The Court would not seek editorial control, but guidelines would be used to reinforce the requirement that media reports of proceedings be fair, balanced and accurate;
k. Any recordings or photographs obtained under the evaluation project would be inadmissible as evidence in subsequent proceedings;
l. Unless otherwise authorized by the Court, the use of recordings or photographs made in the course of electronic media coverage would be limited to purposes specified in any approved application;
m. The Court may specifically prohibit any such materials in any light entertainment or advertising context;
n. The Court may consider restricting the subsequent use of recordings and photographs to contexts directly related to the proceedings in which they were created;
o. Restrictions on the use of recordings or photographs of proceedings would be binding on all media organizations wishing to broadcast or publish the material and not merely on those recording the material;
p. The Court should not seek to impose time limits on the broadcast of such materials nor prohibit editing or commentary, but should instead stress the media's obligation to present balanced and accurate reports.

Canadian Non-Judicial Proceedings

Parliament

- Parliament has adopted guidelines for televised chamber and committee proceedings in the House of Commons.
- The guidelines focus on how camera shots are to be taken, such as not focusing on the reaction of members during debate, no close-ups of papers or computing devices, head and shoulder shots of the members, etc.
- Coverage of the galleries is generally not permitted.
- In the event of unparliamentary behaviour or disturbance by strangers on the floor of House, the camera is to focus on the Chair to ensure the offending incident is not shown.

B.C. Securities Commission Hearings

- Guidelines have been established with respect to the media attending B.C. Securities Commission Hearings.
- The guidelines require, in most instances, written request for permission to televise.
- Television personnel are subject to the direction of the Chair of the panel presiding at the hearing. The guidelines address positioning of the cameras and personnel, and define a number of activities as "disruptive activities, including movement of reporters, camera operators, etc.; electronic flash; lighting cables or equipment which could distract the parties; interviews of the parties in the hearing room; etc.
- The guidelines also provide that in the event that more than one camera crew wishes to film a commission hearing, special arrangements such as pooling or time-sharing will be necessary.

PART V Overview of Guidelines in the United States

FEDERAL COURTS

There are 94 U.S. federal district courts in total, of which 89 are in the 50 states. Above the district courts are the courts of appeal of the 13 judicial circuits, and the U.S. Supreme Court. At the present time, cameras are not permitted in any of these courts, with the exception of two of the appellate courts, where the judges of those courts decided to permit coverage in appellate proceedings, following their participation in a pilot program which we will be referring to.

As the Federal Judicial Conference spokesman, Chief Judge Edward Becker of the US Court of Appeals for the Third Circuit, addressing a subcommittee on the subject in October 2000, indicated in very strong terms the continued opposition of the Conference to a proposed bill S721, which would allow, but not force federal judges

to permit the use of cameras in their courtrooms. A portion of his statement was quoted earlier in this paper. Bill S721 has not yet been passed, as far as we know.

According to Judge Becker's paper, electronic media coverage of criminal trials had been expressly prohibited in federal courts since 1946 under Federal Rules of Criminal Procedure, Rule 53, which stated that: *"the taking of photographs in the courtroom during the progress of judicial proceeding or radio broadcasting of judicial proceedings from the courtroom shall not be permitted by the court."* In 1972 the Judicial Conference adopted a prohibition against " *broadcasting, televising, recording or taking photographs in the courtroom or areas immediately adjacent thereto*", which was applicable to both criminal and civil cases.

In 1988, Chief Justice Rehnquist appointed an Ad Hoc Committee on Cameras in the Courtroom, which recommended a three-year experiment in certain proceedings in selected federal courts. That recommendation led to a July 1991-June 1994 Pilot Program in 6 district courts and 2 appellate courts. The Federal Judicial Center conducted an evaluation of the project, [copies of this are available], and although project staff recommended that the Conference authorize all federal courts nation-wide to provide camera access to all civil proceedings, this was not accepted by the Conference, which concluded that it was not in the interests of justice to permit cameras in federal courtrooms.

In 1996, the Conference voted to strongly urge each circuit judicial council to adopt, pursuant to its rulemaking authority, an order reflecting the Conference's decision not to permit photographs, radio or television coverage in U.S. district courts. A distinction was drawn with appellate courts because they do not involve witnesses or juries, and the Conference adopted a resolution stating that each court of appeals may decide for itself whether to permit coverage of appellate arguments subject to restrictions in statutes, local rules and such guidelines as the conference may adopt.

The two courts of appeal that participated in the pilot program have decided to continue to permit television coverage.

The guidelines that were in effect for the 1991 - 1994 pilot program can be summarized as follows:

General Provisions

- "reasonable" advance notice required, or coverage refused;
- discretion to refuse, limit or terminate a whole or a portion of coverage of the case "in the interests of justice to protect the rights of parties, witnesses, and the dignity of the court; to assure the orderly conduct of the proceedings; or for any other reason considered necessary or appropriate by the presiding judicial officer.";
- statement that nothing in the guidelines was intended to restrict a court from placing restrictions on other designated areas of the courthouse.

Limitations

- no coverage of criminal proceedings;
- no audio pickup of conferences in the facility involving counsel, whether with client, counsel or the court;

- no coverage of the jury, anywhere in the courthouse.

Equipment and Personnel

- 1 television camera and operator and 1 stationary sound operator in a trial proceeding, 2 in appellate; 1 still photographer;
- if 2 or more apply for coverage, none can begin until they have agreed on a pooling arrangement, without calling upon the court to resolve disputes;
- personnel must wear appropriate business attire w/o insignia.

Sound and light criteria

- no distracting sound or light, and no visible signals to show when equipment is operating;
- existing sound and light systems to be used without modification, except that if no suitable audio system exists, wires and microphones may be located where designated in advance and must be unobtrusive.

Location of Equipment and Personnel

- court shall designate location;
- during the proceedings there shall not be placement, movement or removal of equipment, movement of personnel, or changing of film, film magazines or lenses, (changing of video cassettes allowed by addendum).

Judge Becker informed the US Senate subcommittee that: *"as for cameras in the district courts, most circuit councils have either adopted resolutions prohibiting cameras in the district courts or acknowledged that the district courts in that circuit already have such a prohibition."*

His reference to "most" leaves open the possibility that some district courts may not prohibit cameras, but our research did not find any reports of federal district courts breaking the ranks outside the pilot program. The US District Court for the Southern district of Texas has a Rule 13, clause A of which simply provides that: *"The Free Press Fair Trial Guidelines of the Judicial Conference of the United States apply to all criminal proceedings in this district."* Clause C thereof goes on to state*: "Electro-Mechanical Devices. Except by leave of the presiding judge, no photo- or electro-mechanical means of recordation or transmission of court proceedings is permitted in the courthouse".*

STATE COURTS

The RTNDA (Radio-Television News Director's Association & Foundation) website <www.rtnda.org> contains a useful summary from their perspective of the camera coverage rules in state courts.

There are 25 states listed in the category which "allow most coverage", 8 states in a category which have restrictions "that prohibit coverage of important types of cases, or of all or large categories of witnesses who

object to coverage of their testimony", 15 states which allow only appellate coverage or "which have such restrictive trial coverage rules as to essentially prevent coverage", and 2 states and the District of Columbia which prohibit all trial and appellate coverage.

We have examined the rules in 16 states, some in each of the above categories, with a view to identifying the subject areas that are addressed, and observing the ways that different jurisdictions handle them. We will not summarize each set of rules, but copies are available upon request.

Generally, the rules in those states allowing some form of coverage deal with the same broad topics that were covered in the guidelines adopted during the federal pilot project, which are summarized above. The pilot program guidelines were undoubtedly drafted with the benefit of the many pre-existing state rules as models.

The matters typically addressed in the state rules can be grouped under the following headings:

1. Application procedure and notice requirements;
2. Types of proceedings excluded;
3. Consents or objections of parties or witnesses;
4. Technical matters concerning equipment, personnel, and camera location.

1. *Application procedure and notice requirements*

   Several of the state rules reviewed provide that written applications for coverage are to be made to appointed media co-ordinators, but the majority provide for notice to the court clerk or administrator. Notice periods vary. Some states provide simply for "timely" notice of an application, or "reasonable" enough to notify the parties, others (a majority) specify notice periods prior to the commencement of the proceedings of 1 week, or 5 days, or 3 days, or 24 hours. Usually the media applicant makes the application to the co-ordinator or the court and the latter notifies the parties.

2. *Types of proceedings excluded*

   Although 6 of the 8 states examined in the most permissive group do not expressly exclude any categories of proceedings normally open to the public, there is generally a broad discretion in the presiding judge. The proceedings that are excluded in the others are juvenile cases and jury selection. Looking at Appendix C, which lists a total of 25 states in the permissive group, it appears 20 of 25 do not exclude any categories of proceedings.

   In the tier II group (a total of 8 states, of which we looked at the rules of 4), the common categories excluded were family, juvenile, and cases involving trade secrets.

   Eleven states do not allow coverage of criminal trials, and 8 allow only appellate coverage.

   Some jurisdictions provide that there shall be no coverage in criminal proceedings prior to an accused being represented by counsel or electing to proceed unrepresented.

3. *Consents or objections of parties or witnesses*

A majority of states accord some degree of deference to the parties and/or witnesses. The rules on this topic usually provide for one of the following alternatives:

- Consent of all parties and counsel required;
- Certain types of participants are excluded automatically- these are typically jurors, minors, sex assault victims, undercover police agents, police informants, relocated witnesses, or witnesses whose safety may be jeopardized;
- Parties or participants have the right to object to applications for coverage and the judge will decide, but good cause is presumed if a participant is in one of the categories listed in the previous paragraph;

1. *Technical criteria concerning equipment, personnel, and camera location*

The following standards are virtually uniform in most states, with minor variations:

a. No more than 1 television camera and 1 still camera allowed (some allow two);
b. If there is more than one media application, they must agree amongst themselves on a pooling arrangement, or none will get coverage;
c. All non-camera equipment and personnel must be outside the courtroom and not compromise public access or traffic;
d. Media personnel and equipment must be in place at least 15 minutes prior to proceedings commencing;
e. Cameras and audio recording equipment must be unobtrusive and not distracting. There shall be minimal sound, no visible lights, and equipment shall be modified to prevent participants from knowing whether it is recording;
f. Equipment and personnel are to be placed in area designated by the court and shall not be moved or removed while the court is in session. (One set of rules required that the camera be stationary outside the bar of the courtroom.);
g. There shall be no changing of tapes, cassettes or film while the court is in session, except for video cassettes;
h. Media personnel shall be suitably attired in business dress, and conduct themselves in keeping with judicial proceedings;
i. There is to be no taping of people or events in the courtroom during any recess;
j. There is to be no focussing of cameras on any materials on counsel tables or recording of conferences between counsel or counsel and clients.

The issue of camera numbers and location is a consideration that goes directly to the issue of the efficacy of television coverage as a benign and accurate recorder of court proceedings. As noted in one commentary: *"…a gap between the TV viewer's perception and that of the jury can be problematic if viewers who reach their own conclusions based on the coverage become dismayed or angered by contrary real-world results."* The same commentator pointed out an aspect of the coverage of the O.J. Simpson trial:

> *… the prosecutors always were seen in a high-angle wide shot showing a paper-strewn desk in*

> *front of them, while the faces of the defendant and his team of lawyers always filled the screen in a long shot, the focal length of the lens compressing their faces together. Simply put, the shots did not match. At times, from the nature of the shots, the prosecutors looked disorganized and harried, while the defense looked focussed and concerned.* [Jeffrey Alan Goldenberg of the Society of Operating Cameramen in an on-line commentary at <www.soc.org/opcam/07_fw9596/mg07_courtcam>]

This issue of course turns to some degree on whether television coverage is intended to be the view from the gallery as alternative access for the public who do not or cannot attend, or should be an attempt to portray the proceedings as seen by a juror. The former view is usually of the back of counsel's head, and the witnesses in profile, whereas the latter is more face-on.

Factors to be considered in exercising judicial discretion

The Rules of Court of two of the state jurisdictions reviewed prescribe the factors that are to be taken into account. Both of these states are in the permissive group.

Arizona's rules provide as follows:

> *Electronic and still photographic coverage of public judicial proceedings other than the proceedings specified in paragraph (a) above may be permitted in the sole discretion of the judge of the particular proceeding giving due consideration to the following factors:*
>
> *(i) The impact of coverage upon the right of any party to a fair trial;*
>
> *(ii) The impact of coverage upon the right of privacy of any party or witness;*
>
> *(iii) The impact of coverage upon the safety and well-being of any party, witness or juror;*
>
> *(iv) The likelihood that coverage would distract participants or would detract from the dignity of the proceedings;*
>
> *(v) The adequacy of the physical facilities of the court for coverage; and*
>
> *(vi) Any other factor affecting the fair administration of justice.*
>
> California Rule 980 mandates a more detailed list of 19 relevant factors:
>
> *3) (Factors to be considered by the judge) In ruling on the request, the judge shall consider the following factors:*
>
> > *(i) Importance of maintaining public trust and confidence in the judicial system;*
> >
> > *(ii) Importance of promoting public access to the judicial system;*

(iii) Parties' support of or opposition to the request;

(iv) Nature of the case;

(v) Privacy rights of all participants in the proceeding, including witnesses, jurors, and victims;

(vi) Effect on any minor who is a party, prospective witness, victim, or other participant in the proceeding;

(vii) Effect on the parties' ability to select a fair and unbiased jury;

(viii) Effect on any ongoing law enforcement activity in the case;

(ix) Effect on any unresolved identification issues;

(x) Effect on any subsequent proceedings in the case;

(xi) Effect of coverage on the willingness of witnesses to cooperate, including the risk that coverage will engender threats to the health or safety of any witness;

(xii) Effect on excluded witnesses who would have access to the televised testimony of prior witnesses;

(xiii) Scope of the coverage and whether partial coverage might unfairly influence or distract the jury;

(xiv) Difficulty of jury selection if a mistrial is declared;

(xv) Security and dignity of the court;

(xvi) Undue administrative or financial burden to the court or participants;

(xvii) Interference with neighboring courtrooms;

(xviii) Maintaining orderly conduct of the proceeding;

(xix) Any other factor the judge deems relevant.