

Electronic Public Access — An Idea Whose Time Has Come

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I. ELECTRONIC PUBLIC ACCESS: A RECAP

A decade ago, at "The Media, the Courts, and the Charter", a conference held at Osgoode Hall Law School in March 1985, I presented my argument for television camera access to courts in a paper entitled "Electronic Public Access to Court: A Proposal for its Implementation Today".¹ Much has happened in the interim. The argument, considerably bolstered by new evidence and recent Charter interpretations, remains the same.

Simply put, the public has a right to have access to public court proceedings.

This principle has long been enshrined in our law. Since the advent of the Charter, it has gained constitutional status. It is important, therefore, to understand the basis for it as we consider its application to the camera in court debate. The "public" in this principle is not simply a useful prop, whose mere "right of access" converts secret proceedings into open ones. It is not just window dressing for the justice system as a whole. The public's right of access is meaningless if it doesn't carry with it real public presence, participation, and scrutiny of the process.

If a witness lies while testifying at trial, it matters little that the court doors were open to the public if the particular members of the public who could recognize the lie and come forward to correct the record remain unaware that the witness lied in the first place. The right of public access achieves little in this context if the public is hampered from exercising it.

Similarly, if testimony is incomplete, potential witnesses who have useful information to add but who are unknown to the parties may not know of the need to present themselves, or, if the law is ignored or misapplied, appeals may be warranted but not sought. Members of the public who care about the parties or the process can come forward to assist if they know the details of the case. Again, it matters little that the court doors are open if the details are not actually accessible to them.

Public access also has a positive effect on the participants in the court process. On balance, cases tell us, they will be more careful and try harder if they know that others who know them are observing what they say and do. It is the observation, not the remote chance of it, that improves the judicial process.

While the justice system cannot force people to attend court proceedings as observers, or require the media to report on all court proceedings taking place, it clearly benefits from the public's attention. Publication restrictions limit that attention. Today there can be no doubt that a denial of camera and microphone access to court clearly limits the scope of publication from, and public attention to, court proceedings. Indeed, on this account, opponents of electronic public access seek to have it both ways. On the one hand, they suggest that there is no restriction on information flow inherent in the camera ban because reporters who are present can still report all that they see and hear. On the other, they denounce proponents of electronic access for seeking to use court proceedings to obtain larger audiences, which would represent increased information flow.

1. P. Anisman & A.M. Linden, eds., *The Media, The Courts, and The Charter* (Toronto: Carswell, 1986).

Information is useless unless it is communicated. Just as the existence of a community library does not translate into widespread public knowledge of whatever is in the collection, open court doors and files do not translate into public knowledge of court proceedings. Legitimate daily priorities inhibit access to information. It is the media's role to connect people to the information they need at a time and in a form convenient to them. Television has the ability to find an audience for information, and deliver vast amounts of information to it. Today, in the face of the information deluge in the O.J. Simpson case, the most asked question in this regard is not whether television delivers more information to more people, but whether, in the case of particular information, it should. That is as it should be. As a society, we should be debating what cases we need to know about and in what detail, not whether we should have access to the best available information about them in the first place. Electronic public access is not a departure at all, let alone a substantial departure, from the existing public access principle. Indeed, for some, that is what makes it unsettling. We have become so accustomed to so little public participation in court cases that we've come to think that that is the way it should be. Electronic access means real public access. The extent to which we implement it is the extent to which we demonstrate our belief in the principle itself.

My earlier paper covered considerable ground which I will not repeat here. It reviewed Anglo-Canadian judicial development of the principle of public access to court, and considered its application to electronic access. It canvassed American judicial history, practice, and research on this issue, with a summary of, and thorough response to, the essential arguments against it. The Ontario experience was then set out, followed by a comprehensive list of existing provisions in Canadian law protecting certain court participants from publicity. The conclusion was that, aside from technical safeguards, no further measures are needed in Canadian law to protect individuals from the different form of publicity associated with the camera. If any catch-all provision is necessary, the logical questions were asked and answered by a test adopted by the Florida courts in this regard. Model guidelines were proposed that would permit immediate electronic public access to court.

Aside from the Charter, Canadian law on this subject remains essentially the same. Ontario is the only province in Canada that attempts by statute to prohibit camera access to court.² While the other provinces do not have statutory provisions, a few courts

2. *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 136:

Prohibition Against Photography, etc., at Court Hearing

1. Subject to subsections (2) and (3), no person shall,

(a) take or attempt to take a photograph, motion picture, audio recording or other record capable of producing visual or aural representations by electronic means or otherwise,

(i) at a court hearing,

(ii) of any person entering or leaving the room in which a court hearing is to be or has been convened, or

(iii) of any person in the building in which a court hearing is to be or has been convened where

have established a rule of practice.³ Most rely on the Chief Justice and the provincial Attorney-General to enforce an unwritten but absolute ban.⁴

In the decade since my earlier paper was written, landmark rulings on the Charter have been handed down supporting greater media freedom in this regard. Additional

there is reasonable ground for believing that the person is there for the purpose of attending or leaving the hearing;

(b) publish, broadcast, reproduce or otherwise disseminate a photograph, motion picture, audio recording or record taken in contravention of clause (a); or

(c) broadcast or reproduce an audio recording made as described in clause (2)(b). 1984, c.11, s.146(1); 1988, c.69, s.1(1).

Exceptions

2. Nothing in subsection (1),

(a) prohibits a person from unobtrusively making handwritten notes or sketches at a court hearing; or

(b) prohibits a solicitor, a party acting in person or a journalist from unobtrusively making an audio recording at a court hearing, in the manner that has been approved by the judge, for the sole purpose of supplementing or replacing handwritten notes. 1984, c.11, s.146 (2); 1988, c.69, s. 1(2).

Exceptions

3. Subsection (1) does not apply to a photograph, motion picture, audio recording or record made with 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 court hearing;

(b) in connection with any investitive, naturalization, ceremonial or other similar proceeding; or

(c) with the consent of the parties and witnesses, for such educational or instructional purposes as the judge approves. 1984, c.11, s.146(3).

Offence

4. Every person who contravenes this section is guilty of an offence and on conviction is liable to a fine of not more than \$25,000 or to imprisonment for a term of not more than six months, or to both. 1984, c.11, s.146(4); 1989, c.72, s.18.

3. See for example *Quebec Superior Court Rules of Practice*:

36. Anything that interferes with the decorum and good order of the court is forbidden.

The reading of newspapers, the practice of photography, cinematography, broadcasting or television are equally prohibited during the sittings of the Court.

Sound recording of the proceedings and of the decision, as the case may be, by the media, shall be permitted unless the judge decides otherwise. Such recordings shall not be broadcast.

4. See *R. v. Vander Zalm*, *infra* note 32 at 20.

protection has been added to the *Criminal Code* to protect witnesses and victims in certain cases from any publicity which would identify them. Considerable experience has been amassed here and elsewhere demonstrating the merits of electronic public access to court. I will discuss each of these areas in turn.

II. CHARTER SECTION 2(B): FREEDOM OF EXPRESSION, INCLUDING FREEDOM OF THE PRESS AND OTHER MEDIA OF COMMUNICATION

In the last decade there have been a number of decisions that have set the groundwork for future consideration of this issue. The Supreme Court of Canada has defined the scope of the fundamental freedoms and permissible limits on them, and determined the relationship between freedom of expression and fair trial. Only a few trial court decisions have dealt directly with electronic public access to court.

As of December 8, 1994, all the law in this area must now be read in light of the watershed ruling by the Supreme Court in *Canadian Broadcasting Corporation and the National Film Board of Canada v. Lucien Dagenais et al.*,⁵ popularly known as the "Boys of St. Vincent" case. A fictional television drama about child abuse in a Catholic institution in Newfoundland was enjoined from broadcast when a number of Christian Brothers on trial or about to go on trial in Ontario claimed that they would be deprived of their right to a fair trial if the broadcast proceeded on schedule. Their concern was that basic similarities between the plot line and their own cases would prejudice existing and potential jurors against them. The Ontario Court of Appeal narrowed the scope of the publication ban but affirmed it in Ontario and the part of Quebec from which the broadcast signal could be beamed into the area where one of the trials was to take place. The Supreme Court of Canada held that the ban should never have been made in the first place.

The majority judgment, written by Chief Justice Lamer, treated freedom of expression with the respect many have argued for some time it deserves in this context. No longer would freedom of expression automatically lose out to fair trial rights anytime there seemed to be a conflict. Both rights are to be treated equally. As a result, he reformulated the common law rule on publication bans:

Given that publication bans, by their very definition, curtail the freedom of expression of third parties, I believe that the common law rule must be adapted so as to require a consideration both of the objectives of a publication ban, and the proportionality of the ban to its effect on protected Charter rights. The modified rule may be stated as follows:

A publication ban should only be ordered when:

5. *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, also 34 C.R. (4th) 269.

- (a) *Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and*
- (b) *The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.*

If the ban fails to meet this standard (which clearly reflects the substance of the Oakes test⁶ applicable when assessing legislation under s.1 of the Charter), then in making the order, the judge committed an error of law and the challenge to the order on this basis should be successful.⁷

Later, the Chief Justice noted that all conceivable steps need not be taken "to remove even the most speculative risks". Quoting an earlier judgment of his, he noted "the Constitution does not always guarantee the 'ideal'". He continued:

As the rule itself states, the objective of a publication ban authorized under the rule is to prevent real and substantial risks of trial unfairness — publication bans are not available as protection against remote and speculative dangers.⁸

In applying the rule, the Chief Justice demonstrated how section 1 proportionality entered the equation. In the case at bar, he said, the publication ban would have passed the first stage of analysis under the common law rule if:

- (1) *the ban was as narrowly circumscribed as possible (while still serving the objectives); and*
- (2) *there were no other effective means available to achieve the objectives.⁹*

The Chief Justice went on to comment on publication bans generally. To begin with, he rejected the American clash model for analysis of free expression and fair trial rights, and noted that:

Sometimes publicity serves important interests in the fair trial process. For example, in the context of publication bans connected to criminal proceedings, these interests include the accused's interest in public scrutiny of the court process, and all of the participants in the court process.¹⁰

6. *R. v. Oakes*, [1986] 1 S.C.R. 103.

7. *Supra* note 5 at 298.

8. *Ibid.* at 299.

9. *Ibid.* at 300.

10. *Ibid.* at 301.

He then added that the analysis of publication bans should be much richer than the clash model suggests, and listed a number of factors militating for and against bans, most of which have relevance to the electronic access debate. Indeed, it is impossible to read the *Dagenais* analysis without concluding that it is directly applicable to this issue.

There can be no doubt that a denial of electronic access to court is an infringement of section 2(b) and operates as a publication ban. The only question remaining is how the test will be applied. It seems clear, however, that there is no room in the analysis for reliance on speculative risks or the use of absolute electronic bans.

As mentioned, the Supreme Court has rendered other important decisions on freedom of expression that have a bearing on this issue. It has held that section 2(b) protects:

- all but violent expression;¹¹
- filming;¹²
- expression in public places;¹³
- public access to information about court pleadings and proceedings;¹⁴ and
- the right to gather news and other information without undue governmental interference.¹⁵

In my earlier paper I argued that the phrase "other media of expression" must mean something additional to "freedom of the press". In eloquent language, the Supreme Court has given flesh to that phrase. It would be instructive to set out certain of its comments along the way.

In *R. v. Butler*,¹⁶ Sopinka J. responded to the contention by the Attorney General of B.C. that a distinction should be made between films and written works. The argument was that while the written word is by its very nature an attempt to convey meaning, the medium of film can be used for a purpose "not significantly communicative". If hard core pornographic acts are not themselves protected expression, then reproduction of such acts "by the technology of a camera does not magically transform them" into such "expression". Sopinka J. disagreed:

11. *R. v. Keegstra*, [1990] 3 S.C.R. 697.

12. *R. v. Butler*, [1992] 1 S.C.R. 452; (1992), 89 D.L.R. (4th) 449.

13. *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139.

14. *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326.

15. *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)* (1992), 67 C.C.C. (3d) 544 (S.C.C.).

16. *Supra* note 12, D.L.R..

First, I cannot agree with the premise that purely physical activity, such as sexual activity, cannot be expression. Secondly, in creating a film, regardless of its content, the maker of the film is consciously choosing the particular images which together constitute the film. In choosing his or her images, the creator of the film is attempting to convey some meaning. The meaning to be ascribed to the work cannot be measured by the reaction of the audience, which, in some cases, may amount to no more than physical arousal or shock. Rather, the meaning of the work derives from the fact that it has been intentionally created by its author. To use an example, it may very well be said that a blank wall in itself conveys no meaning. However, if one deliberately chooses to capture that image by the medium of film, the work necessarily has some meaning for its author and thereby constitutes expression. The same would apply to the depiction of persons engaged in purely sexual activity.¹⁷

In *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*,¹⁸ the Supreme Court was asked to consider whether the Charter required the legislature of Nova Scotia to permit members of the media sitting in the public gallery to use their cameras to record the public proceedings for broadcast. The majority reversed rulings in the Trial Court and the Court of Appeal in favour of the media on the basis that the Charter did not apply to override the privileges of members of the legislature to determine their own procedures. In his reasons in dissent, Cory J. decided that the Charter did apply. His analysis bears repeating. In deciding that the media's section 2(b) rights were violated by the camera ban, he stated:

In my view, the protection of news gathering does not constitute a preferential treatment of an elite or entrenched group, the media, rather it constitutes an ancillary right essential for the meaningful exercise of the Charter. Although the language of the section may not specifically grant special rights to a defined group it does include freedom of the press within the ambit of protected expression. It is obvious that a prohibition on television cameras is by definition a restriction on freedom of the press. [...] Certainly, if the legislative assembly prohibits any media access to the public debates or excludes one form of the media (television) from the public debates, there has been an infringement of the Charter right to freedom of expression.¹⁹

On the issue of section 1, he reviewed some of his earlier comments in *Edmonton Journal v. Alberta (Attorney General)*:

It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without

17. *Ibid.* at 474.

18. *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319.

19. *Ibid.* at 406.

that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized.

[...]

[F]reedom of expression "protects listeners as well as speakers". That is to say as listeners and readers, members of the public have a right to information pertaining to public institutions and particularly the courts. Here the press plays a fundamentally important role. It is exceedingly difficult for many, if not most, people to attend a court trial. Neither working couples nor mothers or fathers house-bound with young children, would find it possible to attend court. Those who cannot attend rely in large measure upon the press to inform them about court proceedings — the nature of the evidence that was called, the arguments presented, the comments made by the trial judge — in order to know not only what rights they may have, but how their problems might be dealt with in court. It is only through the press that most individuals can really learn of what is transpiring in the courts. They as "listeners" or readers have a right to receive this information. Only then can they make an assessment of the institution. Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court. Practically speaking, this information can only be obtained from the newspapers or other media.²⁰

The special importance of the operation of a free press, capable of gathering and transmitting information to the public was also emphasized in *Canadian Broadcasting Corporation Corp. v. Lessard*.²¹ In that case, LaForest J., concurring in the majority reasons, wrote:

[T]he 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.²²

The need to protect the ability of the media to gather and communicate information was set out in *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*:

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. The special significance of the work of the media was recognized by this Court in Edmonton Journal [...]. The importance

20. *Ibid.* at 407.

21. *Canadian Broadcasting Corporation Corporation v. Lessard*, [1991] 3 S.C.R. 421.

22. *Ibid.* at 429-430.

*of that role and the manner in which it must be fulfilled give rise to special concerns when a warrant is sought to search media premises.*²³

The television media constitute an integral part of the press. Reporting in all forms has evolved over the ages. Engraved stone tablets gave way to the baked clay tablets impressed with the cuneiform writing of the Assyrians and the papyrus records of the Egyptians. It is not long ago that the quill pen was the sole means of transcribing the written word. Surely today neither the taking of notes in shorthand or the use of unobtrusive tape recording devices to ensure accuracy would be banned from the press gallery. Nor should the unobtrusive use of a video camera. The video camera provides the ultimate means of accurately and completely recording all that transpires. Not only the words spoken but the tone of voice, the nuances of verbal emphasis together with the gestures and facial expressions are recorded. It provides the nearest and closest substitute to the physical presence of an interested observer.

So long as the camera is neither too pervasive nor too obtrusive, there can be no good reason for excluding it. How can it be said that greater accuracy and completeness of reporting are to be discouraged? Perhaps more Canadians receive their news by way of television than by any other means. If there is to be an informed opinion in today's society, it will be informed in large part by television reporting. Nor should we jump to the conclusion that if the media is granted broader rights that they will be abused. Hand in hand with increased rights go increased responsibilities. The responsibility of the press is to report accurately, fairly, and completely that which is relevant and pertinent to public issues. It may be argued that the television media will only broadcast that which is sensational. That same argument could be advanced with regard to all forms of media. Yet no one would consider barring the print media from a public session of the Assembly on the grounds that they tended to be sensationalist. The public today is too intelligent, too discerning and too well informed to accept unfairly slanted or sensational reporting.

*Clearly, the legislative assembly has a right in appropriate circumstances to exclude or remove visitors including the members of the press. For example, the regulations can require all visitors to act properly, with reasonable dignity and decorum so that the legislative assembly can itself operate reasonably efficiently and with dignity and decorum. With regard to the attendance of television media the number of cameras could be limited and their location and their manner of operation regulated. What the Assembly cannot do is to exclude television entirely by means of regulation without infringing s. 2(b) of the Charter.*²⁴

23. *Canadian Broadcasting Corporation v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459 at 475.

24. *Supra* note 18 at 408.

The issue of the Charter's treatment of camera access to court was first addressed in *R. v. Squires*.²⁵ That case involved a prosecution against Cathy Squires, a CBC reporter in Ottawa, for a violation of section 67 of the *Judicature Act*,²⁶ which prohibited filming in a courthouse without the permission of the parties, the witnesses, and the judge, for such educational or instructional purposes as the judge may approve. She directed filming of someone emerging from the doorway of a courtroom and was ultimately convicted for doing so. She was fined the maximum \$500. In the process, she challenged the constitutional validity of the entire provision prohibiting filming in and out of the courtroom.

In Provincial Court, five weeks of evidence were led by the defence and the Crown on this motion. The Court held that no Charter right was violated by the statutory provision, and if it were, then it was saved by section 1.

In District Court the judge held that section 2(b) was violated by the provision, and that part of it was saved by section 1. The requirement for an educational or instructional purpose was declared invalid but the consent provision was not. In the final analysis, he upheld the conviction.

The Ontario Court of Appeal was the last court to rule on the case, as leave to appeal to the Supreme Court of Canada was denied. It restricted argument to the facts giving rise to the case, and excluded consideration of all the evidence tendered and argument raised on the issue of camera use inside the courtroom. Nonetheless, the decisions rendered were very instructive in the context of the overall debate.

The decision was 3-2, with three separate judgments in the majority, and Tarnopolsky J.A. writing for both himself and Krever J.A. in the minority. Four of the five judges agreed that section 2(b) was infringed by the provision, and the fifth did not make much of an issue of that conclusion. Two of the majority judges were careful to restrict their support for the saving of the provision through section 1 to the specific mischief associated with filming in the doorway area of the courtroom. They went out of their way to indicate that different considerations applied to cameras in the court and even in the hallway areas of courthouses. They noted that inside the court, unlike in the courtroom entrance and exit areas where disruption can occur, the judge is in complete control. Inside the court as well, there is no right of privacy, apart from that afforded to sexual assault victims or jurors. Read in conjunction with the minority decision, the rulings appear to be supportive overall of electronic access to court proceedings.

The minority decision is well written, compelling, and clearly applicable to the issue of electronic access to court. A number of extracts are worthy of repetition:

25. *R. v. Squires* (1986), 50 C.R. (3d) 320 (Ont. Prov. Offences Ct.), Vanek J.; aff'd (1989), 69 C.R. (3d) 337 (Ont. Dist. Ct.), Mercier J.; aff'd (1993), 78 C.C.C. (3d) 97 (Ont. C.A.); leave to appeal to Supreme Court of Canada refused (1994), 25 C.R. (4th) 103.

26. *Judicature Act*, R.S.O. 1980, c. 223, now, with some modifications, s.136 of the *Courts of Justice Act*, R.S.O. 1990, c. 43.

The appellant argues that the effect of the statutory restriction is to “dictate the form of communication, which affects the content [thereby infringing upon] the meaningful exercise of the freedoms guaranteed the electronic media by s.2(b)”. In essence, the appellant contends that images and sounds are vital to the unique medium of modern television: without them “much of the communicative value of the medium is lost”. The prohibition imposed by s.67(2)(a)(ii) is, therefore, a dictating of how television journalists can express themselves, which is essentially censorship.²⁷

After reviewing the ruling in *Southam No. 1* that held that free access to the courts is “an integral and implicit part of the guarantee given to everyone of freedom of opinion and expression which, in terms includes freedom of the press”, Tarnopolsky J.A. repeated the summary by Wilson J. in *Edmonton Journal* of the purpose of openness of court proceedings to the news media:

In summary, the public interest in open trials and in the ability of the press to provide complete reports of what takes place in the courtroom is rooted in the need (1) to maintain an effective evidentiary process; (2) to ensure a judiciary and juries that behave fairly and that are sensitive to the values espoused by the society; (3) to promote a shared sense that our courts operate with integrity and dispense justice; and (4) to provide an ongoing opportunity for the community to learn how the justice system operates and how the law being applied daily in the courts affects them.²⁸

He then continued:

*Without commenting upon the desirability of televising trials, since that issue is not before us, I would agree that a certain amount is lost to journalists and the public because of the limits imposed by s.67(2) of the Judicature Act. An artist's rendering can never capture the vital and spontaneous depiction offered by televised images. The United States Third Circuit Court of Appeals has considered this loss in *U.S. v. Criden*, 648 F.2d 814 (1981) at p. 824 noting, “[t]here can be no question that actual observation of testimony or exhibits contributes a dimension which cannot be fully provided by secondhand reports”.*

It follows that I do not consider the visual deprivation mandated by s.67(2)(a)(ii) to be trivial or insignificant, as the respondent contends. Rather, I believe that the images taken in a court-house corridor can make an important contribution to the public's understanding of complex and abstract court proceedings in our visually sensitive age. The range of time at which news coverage is available offers the added promise of disseminating images and ideas that originate in court proceedings to the public in periods

27. *Supra* note 25 at 116, C.C.C.

28. *Ibid.* at 117.

when the public is able to receive them, rather than restricting observation to a small and select group of people who can attend the court-house in person.

The prohibition embodied in s.67(2)(a)(ii) precludes a better appreciation of the democratic system, to which the courts undoubtedly belong. There is ample evidence in this case to suggest that television journalism, perhaps the most widely resorted to medium of journalism today, is handicapped as to the coverage it can convey of judicial proceedings, thereby precluding any meaningful realization of its potential in informing the public and of its s.2(b) right.²⁹

A careful analysis of the impact of the Supreme Court decision in the *Commonwealth* case ensues. He concluded that the section 2(b) and section 1 determination should be made as follows:

- (1) *Is the particular action expressive and not violent? Obviously it is. It constitutes preparation of images for the purpose of making a visual impact constituting, along with verbal commentary, communication for two of the three purposes referred to by McLachlin J. in Committee for the Commonwealth, namely, seeking and obtaining truth, and participation in social and political decision-making.*
- (2) *Is the purpose or is the effect of the statutory provision to limit expression? It is clearly intended to limit expression by way of visual representation on video or film. Whether its purpose or object is, as Vanek Prov. Ct. J. held, to be one of safeguarding a fair trial or dignity and decorum in the court-room and court-house, or the dignity and privacy of trial participants, cannot matter in this case for purposes of determining whether s.2(b) of the Charter has been violated. The reason is that, although its purpose is content-neutral, its effect is to limit the kind of expression that is an inherent part of television reporting.*
- (3) *Since the limitation here is on government property, is the form of expression incompatible with the principal function of the place where it occurs? The answer here must be given in the light of what was said by MacKinnon A.C.J.O. for this court in Re Southam, supra, at p.525, C.C.C., p. 148 D.L.R., i.e., that free access to the courts "is an integral and implicit part of the guarantee given to everyone of freedom of opinion and expression which, in terms, includes freedom of the press". Also see the words of Cory J. in Edmonton Journal,³⁰ [...] emphasizing the "fundamentally important role" of the press and other media in informing the public about what happens in such public institutions as the courts. Newspaper coverage is permitted both of court proceedings*

29. *Ibid.*

30. *Supra* note 14 at 1339.

and activities in court-house corridors, including who enters or leaves court-rooms. Thus, reporting as such is not considered to be incompatible with the function of a court-house. Even visual representations of court-room scenes, by way of hand drawings, are permitted. As all judges know, these are never flattering and seldom accurate. Could that be why they are permitted instead of the more accurate image of a television camera? In any case, recognition of who goes in and out of court-rooms is possible, even intended, in newspaper coverage. Can one say that the more evident image on television is somehow less compatible with the function of a court-house? It is said that with television reporting there can be a "scramble" which could be disturbing. But, if so, these are matters of disturbance, or even violence, which are not compatible with the use of court-houses. If there is violence, it is not expression for s.2(b) purposes. If there is a disturbance, there can be controls of time and place, which are aspects of s.1, not s.2(b).

- (4) *As an alternative to the previous question, which one would ask if following the "compatibility of function" approach of Lamer C.J.C. in Committee for Commonwealth, one could pose the question à la "definitional" approach of McLachlin J., i.e., is the expression related to one of the three purposes of the free expression guarantee noted in Irwin Toy? I have already asserted that it is. In any balance with the important function of the press and other media urged by Cory J. and MacKinnon A.C.J.O., and noted above, one would have to conclude, as McLachlin J. did in Committee for Commonwealth, that there has been a violation of s.2(b) of the Charter and so it is necessary to consider s.1 of the Charter.³¹*

In the section 1 analysis, he noted:

In surveying the entirety of the evidence, I find it difficult to find a rational link between banning the televising of participants entering and leaving judicial proceedings and the fairness of the trial process. One telling point is that in the United States, where television in courts has been permitted for some time, there has not been a single trial, where television occurs, that the verdict has been overturned on appeal because of the coverage [...]. Surely, if televising has caused no reported problem, then it would appear that permitting television outside the court-room, that is, in the corridors and rotundas of the province's court-houses, where any threat to the judicial process is obviously more remote, would not compromise the justice rendered.

31. *Supra* note 25 at 123, C.C.C.

*Taking this requirement into consideration, I fail to see any actual demonstration of harm and only a remote, and as yet unproven, possibility of harm should filming be allowed in the vicinity of court-rooms.*³²

He then found that the provision did not meet the minimal impairment test either.

What could be a better illustration of an overbroad restriction than a total ban? That is what s. 67(2)(a) amounts to [...]. *In other words, no still or television camera anywhere on court-house premises — disturbance or no disturbance, lack of dignity and decorum, or propriety of behaviour. It is true that trial participants may have their dignity and privacy protected from television broadcasting, but there is no protection from newspaper or radio intrusion into such dignity and privacy. Is the difference between the one intrusion and the other discernible or obvious? Is it sufficiently important to permit the one and totally prohibit the other? The answer has to be in the negative.*³³

In the final analysis he noted:

*An open and public hearing, which is such an essential feature of our system of administration of justice, does not countenance distinctions being made between different forms of media on the ground of form, unless it interferes with a fair trial or obstructs dignity and decorum in the court and court-house.*³⁴

While the Charter analysis of Tarnopolsky J.A. did not address electronic access to court proceedings themselves, it foreshadowed future consideration of the issues involved. There is a right to use a camera in court. A limitation on that right is an infringement under section 2(b) and must be justified under section 1. The onus of proving that justification clearly lies with those supporting the restriction. Speculation about potential effects cannot justify a limitation on a Charter right. There must be a demonstration of harm sufficient to justify the limitation of a fundamental freedom.

In recent years there have been a few other attempts in Canadian courts to address the issue but it has either been sidestepped or quickly dismissed. These cases must be read with caution in light of the new analysis required by *Dagenais*.

In May 1992, British Columbia's electronic media attempted to televise the criminal case against former Premier Vander Zalm.³⁵ The central figures in the case were used to television cameras on this topic as the story had a political dimension prior to its legal one. The case alleged breach of trust while in office, and clearly was of legitimate public interest in the province and, indeed, in the country.

32. *Ibid.* at 126.

33. *Ibid.* at 127.

34. *Ibid.* at 128.

35. *R. v. Vander Zalm*, (14 May 1992), (B.C.S.C.) [unreported].

The applications to televise the proceedings were brought before Chief Justice Esson of the B.C. Supreme Court. The result denied the applicants a hearing on the merits of their applications, principally because of time. The applications were heard the week before the trial was to begin. Time, though, was not the only factor.

I should say at the outset that I do not think it would have made much difference had this application been made weeks or months ago. If these issues are to be explored in a litigious way, that should be in a proceeding quite different from a simple chambers application brought on short notice and it should be one which would give rise to clear rights of appeal.

With all respect to counsel and the applicants, I conclude that these applications are, essentially, misconceived and are an almost whimsical way of raising an issue of such importance.³⁶

The ban on electronic access in B.C. is unwritten. Counsel for one of the applicants pointed out that any limit on a Charter right had to be "prescribed by law" before it could be justified under section 1. The Chief Justice responded to that contention.

The applications have been brought because of the longstanding and well-known rule 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. Its origins may be said to be lost in the mists of time; but its existence, rather than its origins, is what is significant.

*I am inclined to the view that it has the force of law, but as I have not had full submissions on that, I leave that question open. But I do not think that, as the applicants submit, it can be equated to the internal direction of an airport manager, which is what was under consideration in *The Queen in Right of Canada*. Committee for the Commonwealth of Canada.³⁷*

Given that the origin and scope of the camera bans in the courts of most provinces are also "lost in the mists of time", this question will, no doubt, be the subject of further argument and judicial interpretation.

In October 1994, an application by Triad Film Productions Limited³⁸ to film a murder trial in Nova Scotia for a documentary was denied, in part, on the basis that "the only way there could be complete and accurate reporting would be for the broadcast of the entire trial, not selected portions with selected comments by others not being involved in

36. *Ibid.* at 6.

37. *The Queen in Right of Canada v. Committee for the Commonwealth of Canada* (1991), 77 D.L.R.(4th) 385 at 401, Lamer C.J.; also *ibid.* at 2.

38. *R. v. Fleet* (2 November 1994), (N.S.S.C.) [unreported].

the court process".³⁹ The case to be filmed was *R. v. Fleet*, presided over by Associate Chief Justice Palmetier. The court was not convinced that "there is a right to have cameras in the courtroom and, accordingly, that there would be a breach of section 2(b) of the Charter if the practice ban on cameras was continued".⁴⁰

The judge felt that the camera's presence "would be disruptive and not in the best interest of justice".⁴¹ He pointed out that the matter of getting consent of all concerned, the question of identification or non-identification of witnesses or jurors, the question of editing the film "which would still have to be under the control of the Court to some degree"⁴² would add a burden to the trial process. He even went on to say that "the presence of individuals in the courtroom who are not court staff, no matter how much they might attempt to be unobtrusive would cause some disruption".⁴³

There is room to question the cogency of these concerns. No court should be involved in any way in controlling the editing of a journalist's work, unless that work offends an applicable law. Control of the kind contemplated is censorship. The judge himself expressed contradictory sentiments in this regard:

*In addition there is really no way that the Court could control the "accurate reporting" of the trial, which I think goes to the very essence of the application. Only parts of the court process would be used in the documentary and the Court, of course, would have no control over editorial comment, nor should it.*⁴⁴

His concern as to identification of witnesses and jurors is easily answered routinely in numerous criminal proceedings already without cameras. As to the issue of consent, it is also relatively straightforward, but I will deal with the lack of necessity for it below.

In April 1995, post-*Dagenais*, Associate Chief Justice LeSage of the Ontario Court of Justice (General Division) was called upon to rule in response to an application by CBC to televise the case against Paul Bernardo⁴⁵ for sexual assault, forcible confinement, and first degree murder. As happened in the *Vander Zalm* case, the judge disposed of the application without dealing with it on the merits. He held that the motion could not be dealt with in the time period remaining before trial, given other pretrial motions. While CBC brought its motion three months prior to the commencement of the

39. *Ibid.* at 3.

40. *Ibid.* at 6.

41. *Ibid.*

42. *Ibid.* at 7.

43. *Ibid.*

44. *Ibid.* at 7-8.

45. *R. v. Bernardo* (8 March 1995), (Ont. Ct. Gen. Div.) [unreported].

trial in front of the jury, it was not prepared to appeal his decision because it did not want to delay this important trial any more than it had been already.

The trial had actually started a year earlier, in May 1994, but ran into a number of delays before a jury could be selected beginning May 1, 1995. During oral argument on March 3, 1995 on the issue of whether he would hear the electronic access application, the judge noted that if CBC had made its application when the trial first started (at that time all parties expected the trial to begin right away) it would have been met with the same objection by the Crown — that to argue the issue would delay the trial. In other words, he said, the effect of this might be that CBC would never be able to have the issue heard. Nevertheless, in his ruling on March 8, 1995 he expressed concern that:

[T]his application, whether it had been brought in May of 1994, or at the present time, will probably require weeks of preparation before the matter properly can be heard, and perhaps weeks of hearing, including what I expect would be vast amounts of documentary evidence, before a determination of the issue can occur. Even if there is no cross-examination on the affidavits that most certainly would be filed, I am absolutely satisfied that a proper hearing of the CBC's application would, of necessity, delay this trial at least for weeks and probably months.

Notwithstanding the potential merits of the CBC's position, and their intention and desire to have the issue determined in a succinct and relatively summary fashion, I am convinced that it could not be properly heard in that manner. Although the issue may ultimately be determined in the straightforward and uncomplicated manner suggested by Mr. Hunt, for the CBC, I believe that it would necessitate a full hearing on all of the issues, including the constitutional issues, to determine this long-standing and much debated issue of the right of access of cameras to the trial process.

For the reasons above, I exercise my discretion to refuse the applicant, CBC, leave to intervene in this trial for the purpose of bringing an application to permit camera and other audio recording access to this already much delayed trial.⁴⁶

No doubt there will be more litigation on the issue. The media will inevitably put the question to the courts in a way that will elicit decisions on the merits. The courts, having resisted a comprehensive approach to this topic based on consultation with the media, have left the media little choice.

III. ADDITIONAL PROTECTION ADDED TO THE CRIMINAL CODE

46. *Ibid.* 5.

In my earlier paper I noted that there was no need for additional safeguards to protect vulnerable individuals involved in the criminal process from electronic publication of court proceedings, because there were already numerous existing publication bans which protected them from publicity of any kind. I then catalogued them. In the intervening time, additional statutory protection has been added.

The current section 486 of the Criminal Code was substantially modified in 1987. Its predecessor protected the identity of complainants from publication in cases of incest, gross indecency, sexual assault, sexual assault with a weapon, threats to a third party, threats to cause bodily harm, or aggravated sexual assault.

The current provision allows for protection of the identities of both complainants and witnesses, and in a much wider range of cases. The list now includes sexual interference, invitation to sexual touching, sexual exploitation, anal intercourse, compelling the commission of bestiality, bestiality in presence of or by a child, parent or guardian procuring sexual activity, householder permitting sexual activity, corrupting children, indecent acts, extortion and criminal interest rate, as well as sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, or aggravated sexual assault. Further, the presiding judge must inform witnesses under eighteen as well as complainants of the right to obtain the order, and if the complainant, prosecutor, or any such witness asks, the judge has no discretion but to grant it.

Sections 276.1, 276.2, and 276.3 were amended or added in 1992. They provide that in hearings dealing with admissibility into evidence of the prior sexual history of a complainant in a variety of cases set out in section 276 the public is automatically excluded from the courtroom. Further, there is a ban on publication of the contents of an application, any evidence taken, information given, or representations made at the hearings. There is also a ban on the determinations made, unless taking into account the complainant's right of privacy and the interests of justice, the presiding judge orders that the decision or reasons dealing with admissibility may be published.

In the meantime, to conform to the Supreme Court ruling in the *Edmonton Journal* case, section 166 of the *Criminal Code*, banning publication of certain "indecent details" of court proceedings, was repealed in late 1994.

IV. EXPERIENCE, STUDIES, AND RECOMMENDATIONS

A. Outside Canada

Electronic access has been permitted in a number of countries around the world on a selective or more general basis. An excellent overview of the international situation was included in "Televising the Courts", the May 1989 report of the The Public Affairs Committee of The General Council of the Bar in England. It concluded that to that point Australia, Canada, France, Israel, Italy, Netherlands, Norway, Spain, United States, and

the European Court of Human Rights had some actual experience of televising or filming court proceedings.

I have not done a comprehensive international survey. I am aware, however, of the televising of some proceedings in other countries, such as China and Russia, and I have tried to keep abreast of developments abroad. I have the following to add:

1. In Australia

On May 23, 1994, the "Sackville Report" of the Access to Justice Advisory Committee reviewed the history of camera access to Australian courts and elsewhere, as well as the law and the arguments, and recommended that the Federal Court of Australia consider an experimental program to allow the broadcasting of proceedings. The Chief Justice indicated support for the idea and the Federal Court judges were to discuss it further. In May 1995, the sentencing of an axe murderer was televised, and the Attorney General indicated his support for an experiment.

2. In France

In 1983, a commission was created inside the Ministry of Justice to propose reform. In 1984, Commission Braunschweig recommended a two to three year experiment under strict controls. Only a portion of its proposal met with approval, the creation of historical archives for justice. Now, there are two exceptions to the general rule against broadcasting trials: first, according to legislation adopted July 25, 1985, and second, through the authorization of the Minister of Justice.

By legislation, trials of historical interest can be recorded, on approval and consultation, but only released to the public 20 years later, after consultation with the affected parties, or after 50 years regardless. Crimes against humanity can be broadcast sooner. Klaus Barbie's trial was broadcast in the fall of 1993, and Jean Touvier's trial in April 1994 has been recorded but not yet broadcast. Only one trial has been broadcast pursuant to the authorization of the Minister of Justice. In 1991, a criminal trial was recorded for broadcast in a 1993-1994 program called "Justice in France". The trial apparently had no historical element to it.

3. In Germany

Cameras are normally prohibited from all but the halls and lobbies of the courthouse. This principle was challenged in the prosecution against Erich Honecker, the former head of East Germany. The result was the filming of the parties alone at the commencement of the hearing. In the Federal Constitutional Court, judgments and their reasons can also be televised.

4. In Great Britain

As noted above, in May 1989 a working party of The Public Affairs Committee of The General Council of the Bar in England delivered its report, entitled "Televising the Courts". It concluded that for England camera access should be permitted in court, without a requirement for consent of the accused in a criminal case. Legislation is required to effect a change, given an existing 1925 statutory prohibition on courtroom photography, and such legislation has not yet been enacted.

An experiment in Scotland has resulted in the filming of six trials by the BBC. The experiment requires consent of all court participants, with jurors out of camera range, and sensitive witnesses filmed in a manner that renders them unidentifiable.

5. In Ireland

In September 1994, the Law Reform Commission, in its report on "Contempt of Court", pronounced itself in favour, in principle, of the televising of court proceedings. It suggested following the approach set out in the English Bar report, and recommended the establishment of an Advisory Committee to devise and monitor pilot projects involving civil and criminal trials, appellate proceedings, and tribunals of inquiry.

6. In New Zealand

A three year pilot program involving news coverage is underway. The first criminal jury trial taped was a murder trial. The defence barrister was generally happy with the coverage given the case by the country's two channels, indicating that the coverage did not affect the fairness of the trial.

7. In Singapore

In February 1995, Singapore's Chief Justice introduced television coverage of the sentencing of "outrage of modesty" offenders pleading guilty. The purpose is to shame them and deter others. The reason for choosing this type of offence is that, unlike others, large custodial sentences and caning have not reduced its incidence. As well, the large proportion of such offences were committed against young people in public housing estates where most of the population reside, and presumably, where most rely on television for their information. In making his announcement, he noted that social disapproval has a deterrent effect, and quoted Joseph Pulitzer to make the point:

*There is not a crime, there is not a dodge, there is not a trick, there is not a swindle, there is not a vice which does not live by secrecy. Get these things out in the open, describe them, attack them, ridicule them in the press, and sooner or later public opinion will sweep them away.*⁴⁷

Consideration is also being given to televising excerpts of rape, robbery, and murder cases to educate the public about the consequences of crime.

8. In the United States

Cameras are allowed in the courts of forty-seven states. Forty-five of these states have permanent rules extending media coverage and six have experimental ones (four states have a mix of rules). Forty states have rules permitting such coverage in trial and appellate courts, and in civil and criminal proceedings.

Thirty-four of the forty states permitting criminal trial coverage do not require the consent of the accused for coverage of the trial; thirty-six do not require the consent of the prosecution. Forty states do not require the consent of parties to civil cases and criminal appeals. Forty-three states do not require the consent of counsel for civil trials and all appeals. In none of the states is witness consent a precondition to electronic coverage of the trial, and in twenty-seven states such consent is not required at all. In the remaining states requiring some witness consent, the consent is for coverage of that witness's testimony itself, and is often only for certain types of witnesses in certain types of cases (such as victims).

In the U.S. Federal Court, a three year experiment with electronic coverage of civil proceedings in six selected districts ended at the end of 1994 as planned. A study done by that court's research project staff recommended extending camera access to all federal civil proceedings nationwide based on the experiment's success.⁴⁸ Overall, judges' attitudes were initially neutral and "became more favourable after experience with electronic media coverage".⁴⁹ Also "judges and attorneys who had experience with electronic media coverage under the program generally reported observing little or no effect of camera presence on participants in the proceedings, courtroom decorum, or the administration of justice".⁵⁰ During the experimental period, while civil appeals were televised, the most common type of coverage was of trials.

On September 20, 1994, the Judicial Conference itself, after a brief discussion, decided against continuing the experiment. Because of the limited geographic scope of the

47. Keynote address of Chief Justice Yong Pung How, on the introduction of the 1995/96 Workplan, Subordinate Courts, Singapore, Feb. 25, 1995 at 9.

48. Electronic Media Coverage of Federal Civil Proceedings, An Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeals, Federal Judicial Center, 1994 at 43.

49. *Ibid.* at 7.

50. *Ibid.*

experiment, few of those voting had participated in the experiment themselves. Since then, however, the Judicial Conference has opened the door to further experimentation. In a report on its recent activities issued in March 1995, it noted that it approved a recommendation of its Executive Committee, stating that:

The Judicial Conference clarifies that the Court Administration and Case Management Committee is not prohibited from proposing pilot programs or conducting other studies necessary to the making of further recommendations on cameras in the courtroom in civil cases which differ from those disapproved by the Judicial Conference at its September 1994 session.

Further action on a different proposal for experimentation will shortly be considered.

A complete summary of the U.S. situation has been prepared by the Radio Television News Directors Association (RTNDA) under the title "News Media Coverage of Judicial Proceedings with Cameras and Microphones: A Survey of the States". A summary chapter of the January 1, 1995 version of that report is attached.

A significant development in the last decade was the sign-on in July 1991 of a new 24 hour a day channel devoted exclusively to court cases, CourtTV. Trial coverage is extensive, and professors of law and noted lawyers explain the process to viewers. There are now over 15.6 million subscribing households. CourtTV's success has led to more extensive coverage of the courts by all U.S. electronic media.

The lack of access to Federal Court proceedings has had a serious impact on the image Americans get of their own justice system. Important cases that are tried there, like the Noriega trial involving U.S. drug policy, or the Westmoreland case against CBS focusing on the U.S. role in Vietnam, cannot be conveniently brought to the television audience. CourtTV, for one, has indicated its preference for extensive coverage of those cases from time to time, instead of being confined to the steady stream of state court trials they are able to broadcast.

In the decade since my earlier paper, television coverage of court cases has been massive, and while public debate focuses on individual cases, like the O.J. Simpson case, the Menendez case, the Bobbit case and the W. Kennedy-Smith case, thousands of cases are televised each year locally, regionally, and even nationally with much less fanfare. Electronic coverage is now routine wherever it is permitted. It is itself rarely an issue.

Numerous articles have been written about this subject, mostly summarizing developments anew. The significant studies and surveys were done in the early 1980's, and were summarized in my earlier paper. One recent important addition to the literature is a paper entitled "Cameras in the Courtroom: The Effects of Media coverage on Witness Testimony and Juror Perceptions",⁵¹ by E. Borgida, K. DeBono and L. Buckman. Dr. Borgida is a noted psychologist who testified for the Crown to support the Ontario statute

51. E. Borgida, K.G. DeBono & L.A. Buckman, "Cameras in the Courtroom, The Effects of Media Coverage on Witness Testimony and Juror Perceptions" (1990) 14 Law and Human Behaviour 489.

prohibiting camera access to court against the Charter challenge by Cathy Squires referred to earlier. He took the position then that despite all the studies that were done, none were sufficiently scientifically rigorous to set aside his concerns. His recent study, published in 1990, did, however, meet his own criteria. The report's introductory summary described its methodology:

The present experiment examined some of the key psychological issues associated with electronic media coverage (EMC) of courtroom trials. Undergraduate student subjects served as either witnesses or jurors in one of three types of trials: EMC, in which a video camera was present; conventional media coverage (CMC), in which a journalist was present; or, a no-media control, in which no media representative or equipment was present. Students who served as witnesses first viewed a five minute videotape of a re-enacted armed robbery. Days later, these students testified as witnesses to the crime in front of a jury of peers.

The results showed that electronic media coverage witnesses and jurors had significantly more favourable attitudes toward it than participants in the other two conditions. And, although (contrary to state studies) they perceived greater witness nervousness, distraction, and awareness than those in the conventional media coverage condition, the EMC experience did not impair the witnesses' ability to recall accurately details of the crime or to communicate effectively, and did not adversely affect juror perceptions of the quality of witness testimony.

B. In Canada

1. A Brief Review of Electronic Public Access to Canadian Courts To-Date

Since my earlier paper was published, Canadians have seen their own court proceedings on a few more occasions. The Supreme Court of Canada has become the pioneer with electronic coverage. It first allowed a camera in its court in 1981 to broadcast its decision in the *Patriation Reference* case. There was a technical glitch with the sound pick-up and until recently the court did not permit further camera access. In 1983, the Supreme Court implemented a satellite-delivered televised live to appeal hearing process, which, at least on one occasion, was featured on CBC's National News. Since March 2, 1993, the Supreme Court has permitted the televising of three cases, involving the tax deductibility of nanny expenses to a professional (*Symes*), the right to assisted suicide (*Rodriguez*), and the tax deductibility of spousal support payments (*Thibaudeau*). These were shown live in large part on CBC Newsworld, as well as on a tape delay basis on other stations in Canada for news and current affairs purposes.

For the past couple years the Supreme Court has videotaped all its cases and has indicated its willingness to make them available on request, for example, to law schools. On occasion, with the permission of counsel, certain judges who were absent from the

hearing room during argument have even been able to view the tapes afterwards and participate in the decisions ultimately rendered in the case. I am advised that certain judges have also found the tapes useful in simplifying and improving their notetaking during the hearings themselves.

My earlier paper outlined the experiment conducted in 1982 in Ontario courts by the Radio Television News Directors Association of Canada under the supervision of the Chief Justice's Bench and Bar Committee. The experiment was pronounced successful by all concerned but it did not lead to changes in the law. The paper also noted the filming by CBC of the trial of *R. v. Clow* in Kingston in 1985 as part of the "Lawyers" series hosted by Patrick Watson. The same series also involved filming approximately six trials in their entirety conducted in the Northwest Territories by a judge on circuit.

In 1989, a camera was allowed in the Supreme Court of Ontario to record the dissolution by Mr. Justice Gray of an injunction granted earlier against *Barbara Dodds* which would have stopped her from having an abortion.

That same year, CBC Newfoundland broadcast portions of a number of trials in the course of doing a documentary on Judge Igloliorti, the province's first native judge. In 1990, CBC Newfoundland broadcast a report on impaired driving, and included portions of a trial in that regard.

In 1990, judges of the Court of Queens Bench of Manitoba conducted an experiment with cameras in a criminal proceeding. The trial was taped, though not broadcast.

In early 1991, CTV National News broadcast a report on youth court in northern Alberta. In late 1991, CBC recorded a number of proceedings in youth court in Edmonton over a three day period, and broadcast a 20 minute report on the news locally and on CBC Newsworld. The identities of the young people were protected in the course of the broadcast. All these proceedings were recorded with judicial approval alone.

In 1993, CBC's "Life the Program" broadcast the sentencing of a person who had committed an environmental offence. The oral decision was rendered by Justice of the Peace Woodworth of the Ontario Court (Provincial Division).

In early 1994, CBC's "Prime Time News" attempted to broadcast a report on a day in the life of a judge. A few interviews were conducted with judges in Saskatchewan, Manitoba, and Ontario, but little courtroom footage could be obtained. While some taping was done in assignment court in Ontario Court (Provincial Division), the program management ultimately decided that there was not enough material overall to get to air. It was like trying to do a story on a garage mechanic without being able to show him work on a car. One can describe the experience fully and completely but in television nothing can replace an illustration.

On January 1, 1995 the Federal Court of Appeal began its two year experiment with electronic access. The experiment grew out of an incident in 1994 that speaks volumes about the sensitivity of the courts on this issue. CBC Toronto was preparing a documentary report on hate groups in the community. The Canadian Human Rights

Commission had ordered Wolfgang Droege, an organizer of a hate message telephone line, to cease his activity in that regard. He was then accused of opening up a similar service under another name. The CHRC decided to go to Federal Court to have him cited for contempt.

On the appointed day, a CBC lawyer arrived to argue for camera access. With the consent of the parties and the judge, he succeeded. The camera was placed in court and recorded proceedings for about an hour and a half without incident. There was one slight problem. The Federal Court hearing was not taking place in a Federal Court building. It was in the main Toronto court house, and court administrators, unused to camera access to court, reported what was taking place to then Chief Justice Callaghan of the Ontario Court (General Division). His response was swift. At a break in the proceedings, he contacted the presiding judge and insisted that the camera be removed. When the case resumed, CBC was ordered to stop taping, to place the recorded tape in the custody of the CBC lawyer (where it remains), and not to broadcast it.

This incident was the catalyst for a dialogue that led to the experiment in the Federal Court of Appeal. For the moment, proceedings can be televised during the experiment only from locations under the Federal Court's exclusive control.

2. To Quasi-Judicial Proceedings

Over 20 commissions of inquiry and other proceedings have been televised in whole or in part since the early 1980's.⁵² Parties have generally been consulted about the

52. Royal Commissions and other inquiries televised live on a community cable television channel or CBC Newsworld, as well as in news and current affairs programming: *Inquiry into Certain Deaths at the Hospital for Sick Children and Related Matters* — Mr. Justice Grange (1983-1984), *Inquiry into the Facts of Allegations of Conflict of Interest Concerning the Honourable Sinclair Stevens* — Associate Chief Justice Parker (1986-1987), *Inquiry under the Business Corporations Act into the Principal Group of Companies* — Mr. Code Q.C. (1987-1989), *Royal Commission on the Donald Marshall, Jr., Prosecution* — Chief Justice Hickman, Associate Chief Justice Poitras, Mr. Justice Evans (1987-1988), *Inquiry into the Use of Drugs and Banned Practices Intended to Increase Athletic Performance* — Mr. Justice Dubin (1988-1989), *Inquiry into the Administration of Justice and Aboriginal People* — Associate Chief Judge Sinclair, and Associate Chief Justice Hamilton (1988-1989), *Inquiry into the Relationship between Certain Individuals and Corporations and Elected and Un-Elected Public Officials* — Mr. Justice Houlden (1989-1990), *Inquiry into Sexual Abuse at Mount Cashel Orphanage* — Mr. Justice Hughes (1989-1990), *Inquiry on the Blood System in Canada* — Mr. Justice Krever (1994).

Royal Commissions televised as part of news and current affairs programming: *Inquiry on Aviation Safety* — Mr. Justice Dubin (1979-1982), *Inquiry into Railway Safety in Canada* — Mr. Justice Grange (1979-1980), *Royal Commission on the Ocean Ranger Marine Disaster* — Chief Justice Hickman, Chairman (1982-1984), *Inquiry into the Collapse of the CCB and Northland Bank* — Mr. Justice Estey (1985-1986), *Inquiry into the Hinton Train Collision* — Mr. Justice Foisey (1986), *Inquiry into the Mall Coaster Accident in Edmonton* — Mr. McKenzie, Dr. Kulak (1986-1987), *Inquiry into the Air Ontario Crash at Dryden, Ontario* — Mr. Justice Moshansky (1989-1991), *Inquiry into Procedures Followed by the Vancouver Police Department (including William Marshall, now Chief of Police) in 1983 Regarding Prisoners in Custody* — Mr. Justice McKenzie

camera at the outset, but their consent, and the consent of all other inquiry participants, has only occasionally been required. Those participating in these proceedings include over a dozen judges, and hundreds of lawyers and witnesses. Literally years of daily testimony has been televised.

In all this experience, there have been only isolated instances when, after submissions, the camera was turned off for the testimony of a few witnesses who were reluctant to testify in public on camera. In each such case, a determination was made that the only way to secure the evidence was to shut off the camera. In the Marshall inquiry the camera was shut off for the testimony of John Pratico and Donald Marshall, and in the Mount Cashel inquiry, for the testimony of two of the victims of sexual assault.

C. Recommendations

In the meantime, there have been a number of noteworthy recommendations, mostly in favour of experimentation with electronic access to court.

1. Law Reform Commission of Canada

In 1987, the Law Reform Commission of Canada released Working Paper 56 on Public and Media Access to the Criminal Process. Recommendation 23 reads as follows:

- (1) Electronic media coverage should be permitted in relation to appeals in criminal cases;
- (2) Use of audio recorders should be permitted in criminal proceedings as a substitute for, or in addition to, handwritten notes; and
- (3) A national experiment with electronic media coverage of criminal trials should be conducted with a view to studying comprehensively the impact of

(1994), *Inquiry into Ferry Safety* — former Chief Justice Nemetz (1992).

Examples of other Canadian quasi-judicial proceedings televised as part of news and current affairs programming: *Immigration Inquiries* into Ms. Lawrenca Bembenek (1990), Mr. Arthur Rudolph (1990), Mr. Sulinder Singh (1989), *Securities Hearings* involving the Ontario Securities Commission (in the matter of Messrs. Orsini, Tulk, Banks, Gordon (1990)), and the B.C. Securities Commission (in the matter of Calpine Resources Inc., Prime Resources Group Inc., Messrs. Pezim, Page and Ivany (1990)), *Ontario Civilian Commission on Police Services Inquiry* into the policies, practices and procedures employed by the Metropolitan Toronto Police Internal Affairs Unit (1991), *Coroners Hearings* in B.C., Stewart McLeod (suicide at the remand centre in Vancouver (1990-1991)), Cindy James (nurse who disappeared and was then found, (1990)), *Judicial Council Inquiries*, Inquiry into the conduct of Judge Frank D. Allen (1993), Commission of Inquiry into conduct of Judge Walter P. Hryciuk — 1993, *Human Rights Commission Hearings*, New Brunswick Inquiry into Malcolm Ross (1991), Saskatchewan inquiry into Dairy Producers Co-Operative Ltd. (1994).

the presence of video and still cameras and audio recorders on witnesses, counsel, judges, and jurors.⁵³

53. "Public and Media Access to the Criminal Process", Working Paper 56, Law Reform Commission of Canada, 1987 at 87-91.

2. Canadian Bar Association

In 1987 the Canadian Bar Association received a report from its President's Special Committee on Cameras in Court.⁵⁴ After a one and a half year study, including interviews with a sampling of judges, lawyers, and witnesses with experience in televised proceedings in Toronto, Calgary, and Boston, all but one member of the committee recommended a two year experiment with cameras in court. The proposed experiment was to cover both appellate and trial courts, in both civil and criminal cases. It was to be subject to the following rules:

- (1) The placement and operation of the camera(s) and all control over the sharing of the signal, etc. shall be subject to guidelines established by the court;
- (2) The presiding judge may limit, suspend or delay electronic coverage of all or any part of any proceeding if that is required in the interest of justice; and
- (3) In addition to existing bans on publication of information, other participants, not covered by such bans, may request that their participation not be televised, which request may be granted if the presiding judge is satisfied that it is necessary in the interest of justice.⁵⁵

At its annual meeting in 1987, two resolutions were passed by the Association. One in favour of "electronic and photographic media access to cover proceedings in Canadian appellate courts" and the other supporting, "in principle, the establishment of a two year trial program to give access to the electronic and photographic media to cover proceedings in Canadian trial courts...".

3. Ontario Courts Inquiry

In July 1987, in his report on Ontario court reform for the Attorney General of Ontario, Mr. Justice Zuber recommended that the prohibition on televising court proceedings contained in section 146 of the *Courts of Justice Act* be amended to permit a two year experiment.

4. Canadian Judicial Council

54. The Committee Chair was John Merrick, Q.C. Other members were Morris Bodnar, Q.C., Mary Jane Dodge, Nicole Duval-Hesler (now Duval-Hesler J.), Thompson MacDonald, Prof. A. Wayne MacKay, James J. Ogle, and myself. Recommendations of the report were endorsed by the CBA Standing Committee on Legislation and Law Reform.

55. Report of the Canadian Bar Association's Special Committee on Cameras in Court, July 22, 1987 at 9.

While judges have written clearly and convincingly over the centuries in favour of public access to court, and indeed, have been responsible for the entrenchment of such access, it is ironic that in Canada, one of the principal opponents to *electronic* public access to court has been the Canadian Judicial Council, a body composed of Canada's Chief Justices.

On September 30, 1994 the Council announced that at its recently concluded annual meeting in Regina it had reaffirmed its position that "televising court proceedings would not be in the best interests of the administration of justice". This position was first adopted by the Council at its meeting in the same city a decade earlier in 1983. A motion in 1988 to have the Council withdraw this position was narrowly defeated.

Despite appearances to the contrary, there is a silver lining in all this for proponents of electronic access. The Council seems now to have removed itself as an obstacle to further developments in this area. Its current position is expressed as a "recommendation" only. There had been some concern earlier that, because the Council doubles as the disciplinary authority for federally appointed judges, its "policy" on this topic might have disciplinary consequences. That concern is no longer valid. Judicial independence has, in effect, been reaffirmed.

It should be noted that the Council's position on this topic has been selectively ignored by Canadian judges and others since its adoption. As a blanket statement, it runs contrary to Charter principles. In light of its broad application, it also makes little objective sense.

The current version, which exempts the Supreme Court of Canada, begs obvious questions: Why was that one court exempted, but not the Federal Court of Appeal which announced a two year experiment days before the vote? What differentiates the Supreme Court of Canada in this context from courts of appeal generally across the country? What is the objection in broadcasting motions and portions of trials that are similar in nature to appellate proceedings, or judgments at trial delivered from the bench? Why are courts the only public places in Canada to which a camera and microphone are absolutely denied access?

The Council has never provided reasons for its position and did not do so now. In its release we were told only that the O.J. Simpson case and the recent decision of the federal Judicial Conference of the United States were no doubt significant factors in the Council's decision. The absence of any further explanation makes it difficult to appreciate the Council's concerns, especially given the circumstances surrounding those events at that time.

As of the date of the Canadian Judicial Council vote, there had been no televising of the Simpson trial itself, merely pretrial proceedings whose equivalent in Canadian court proceedings would be banned from publication of any kind until the end of the trial. While there are many questions about justice raised by the Simpson case, including questions about the role of counsel, press conferences, leaks of material evidence, the sale of book rights in advance of trial by witnesses and jurors, and the conduct of the trial itself, the camera in court is not the issue. There is no reason to believe that the prosecution and

defence teams, the witnesses, or the judge would have behaved any differently without the camera being present, in the face of otherwise inevitable wide public interest and publicity.

As for the Judicial Conference position, it seems, as noted above, that it may be changing. Indications of this change, however, came *after* the vote by the Canadian Judicial Council which was responding to its earlier position.

It is hard to have confidence in, or even to accept, decisions made behind closed doors. It is even harder on this topic in Canada, when the media are left in the invidious position of having to assert obvious Charter rights in a context in which the combined Chief Justices of Canada appear to have already decided the issue against them. This concern was drawn to their attention prior to the recent vote, but appears not to have been persuasive. It remains to be seen whether the Supreme Court's decision in *Dagenais*, delivered just over two months later, will have any effect.

It should be noted in passing that the Council's recent recommendation is not easy to reconcile with sentiments expressed in its own April 1990 release entitled "Principles Governing Relations Between the Judiciary and the News Media":

The quality of justice in Canada is enhanced when citizens have accurate information and a reasonable understanding of the workings of their system of justice. Education about the legal process and an understanding of the manner of arriving at legal decisions engenders respect for the operation of the system and for those who practice and interpret the law.

Reports prepared by journalists and disseminated through the media constitute the main and most influential source of news and comment on the justice system. For most people, the only contact that they have with the daily workings of the law is through media reports.

The Canadian Judicial Council acknowledges that the justice system and the public interest are served when coverage of the justice system and the manner in which it functions contains an accurate, balanced and complete report of the hearing and disposition of specific cases.

In the end, we should be careful in reading too much into the Council's recommendation. It is perhaps best treated as a snapshot of judicial opinion, taken at a moment in time. Just as the American Bar Association's opposition was reversed only years after successful experimentation with television cameras in American courts, I expect that the Council's position will change as well, as time and experience prove it in need of revision.

V. WHY JUDGES SHOULD FAVOUR ELECTRONIC PUBLIC ACCESS TO COURT

Some have suggested that the reason electronic access has been permitted in the U.S. is because judges there are elected and crave the exposure. While that has no doubt been a factor in some courts, its significance is overstated. A number of states with electronic access appoint their judges. Further, if electronic access does have independent merit, any selfish motivation for its adoption elsewhere is irrelevant.

There is no doubt that electronic access tends to make those seen and heard on camera more accountable. It is human nature not to seek out greater accountability than one already enjoys. Historically, though, greater accountability of those involved in the judicial process has been considered one of the prime justifications for public access to court. As Bentham said of publicity: "It keeps the judge while trying under trial".⁵⁶

While greater accountability makes electronic access both easier for courts to justify and more difficult for judges to embrace, electronic access does offer judges a number of clear benefits.

A. Justice is Done.

In my earlier paper, I canvassed and carefully answered a number of concerns. While opponents continue to raise them, the evidence continues to mount that they are unwarranted. Without reviewing the arguments in the detail previously given, here are the headings and some of the responses.

1. There is no Physical Disruption

The placement of a single camera and microphone in court at the side of the public gallery, without any additional light, does not affect the proceedings.⁵⁷ The camera blends into the background. No one who has any experience with this complains of any physical disruption. In fact, with many of the reporters out of the courtroom watching the proceedings on television, there is even less disruption than otherwise would be the case.

56. *MacIntyre v. Nova Scotia (Attorney General)*, [1982] 1 S.C.R. 175 at 183.

57. See for example S.L. Alexander, "Cameras in the Courtroom: a Case Study" (1991) 74 *Judicature* 307.

2. Dignity and Decorum are Preserved

Dignity and decorum are preserved unaffected. On this there is also little doubt. Counsel, parties, and witnesses have a function to perform. That continues to motivate them, regardless of the presence of a camera. If anything, the camera induces better behaviour of all concerned.

3. Effect on the Participants

Participants either ignore the camera completely, forget about it after a brief time, or react to it simply as a reminder that the process is indeed public. As noted earlier, a participant's knowledge that justice is public has always been considered to be positive for the system on balance. The presence of the camera does not change the analysis.

The suggestion that people are affected by the camera as a matter of human nature (and pose for it from birth) ignores the fact that in court the proceedings are already on the record, without the camera. People may well react differently on and off the record, but that is beside the point. In court the camera is simply one more method of making a public record of the proceedings.

i) *Witnesses*

Witnesses are more likely to tell the truth, knowing that viewers are monitoring their testimony. The argument that a single adverse effect of a camera on a single witness could be the difference that puts an innocent man behind bars is speculative. In the first place, no study supports such a possibility. Indeed, as noted above, the most recent study by the leading psychologist working in this field discounts any effects of a camera on the fact finding process.⁵⁸ Second, the argument itself can easily be turned around. A single positive effect could be the difference that sets the innocent man free. Once the benefit of wide public access through television is lost in a case, it cannot be restored.

ii) *Counsel*

Lawyers are more likely to prepare and present their cases well, knowing that their reputations will be affected by their professional performance. They do not grandstand for the camera any more than they do now for the public gallery in court. As long as any reporter is there, the incentives are the same. The camera is as likely to inhibit grandstanding as to generate it.

58. *Supra* note 48 at 31.

iii) *Judges*

Judges are equally unaffected. Opponents raise the concern that a judge would have an added burden, in administering the rules relating to the camera. There are two answers to this. The first is that the rules can be developed to minimize this burden. In Florida, for example, electronic access has been routine for about 15 years. Disputes about the camera's presence or conduct now rarely occur. The last reported case there considering the issue is over ten years old. The second answer is that if electronic access ought to be permitted, the added administrative burden is not a sufficient reason to obstruct it.⁵⁹

iv) *Jurors*

Juries are more likely to understand that they represent the community and that the community is looking to them to do their job well. If there is a concern about juror anonymity, rules can be developed to ensure that jurors are not the focus of television coverage, if that is considered necessary or desirable. It should be noted that on occasion televising jurors can have significant educational or informative value.

A camera at trial does not inevitably lead to juror sequestration or more rigorous juror selection, as some contend. The suggestion that second trials are more difficult in the television age is not borne out. In Canada, the *Kenny*⁶⁰ case stands for the proposition that no matter how pervasive television coverage of an earlier related event may be (in that case the live television coverage of the Mount Cashel inquiry preceding the trial of the accused), a fair minded jury can be found. Second trials more often result in acquittals than convictions, even when there has been television access to the first trial. Cases such as *Von Bulow* illustrate the point.

4. Privacy Rights

Traditionally, there is no privacy right in court. It is difficult for it to exist there. Public information important to an understanding of a case cannot be subdivided into semi-private and public categories without seriously undermining public access to court proceedings.

Opponents often presume that electronic coverage has a more powerful and prejudicial effect, but they offer no proof for that assertion. There is none. Television

59. See *Singh v. Ministry of Employment and Immigration* (1985), 17 D.L.R. (4th) 422 at 469, Wilson J., [1985] 1 S.C.R. 177.

60. *R. v. Kenny* (1991), 287 A.P.R. 318 (Nfld.S.C.).

images are fleeting,⁶¹ and we are literally bombarded with them in our daily lives. Try, for example, to recall the images of those who testified or represented clients in the Dubin inquiry into drug use in sport, or even the current Krever inquiry into the safety of the blood supply. Try to recall those who appeared in the trial of Claus Von Bulow or William Kennedy-Smith. Try to recall any of the faces you watched last night or the night before on the evening news. While a few images may stand out, most are quickly forgotten. Any images retained are as likely to be beneficial as prejudicial.

5. Fair Trial and the Administration of Justice

Practice and research make clear that justice is not so fragile that the addition of a camera to a packed room of reporters and spectators can affect its natural course. It is, frankly, hard to believe that any effect from it could steer the process away from conclusions reached through the confluence of a case's history, facts, merits, and the applicable law. Further, virtually all of the "effects" ascribed by opponents to the camera can be ascribed to publicity and wide public knowledge, traditionally considered desirable influences in this context.

6. Victims and the Reporting of Crime

Opponents suggest that electronic public access would deter the reporting of crime, but again offer no proof. The evidence is at least as consistent with the opposite conclusion. While immediately after the Big Dan rape trial in Massachusetts (the one in which a woman was raped on a pool table by a number of men in a bar) the number of reported rapes in the area dropped, soon after the number rose again.⁶² Victims may be initially concerned that their case may get on television, but when they realize that only the exceptional case is televised they feel free to report. Further, once they have seen the process on television, they understand it better and are better prepared for what they may experience in their own case.

If a case is televised in Canada, it should not be assumed that victims involved in it will be further victimized, and, as a result, be deterred from coming forward. The *Criminal Code* ban on identification of many victims and witnesses, upheld by the Supreme Court in the *Canadian Newspapers* case, precludes showing pictures of them.

61. In the Ontario Courts Inquiry report, Mr. Justice Zuber commented on the experience with cameras in Royal Commissions in Ontario:

A great many witnesses have testified at all of these commission hearings and whatever notoriety may have been visited upon any of the witnesses has been very fleeting and bears out at least part of the prophecy of Andy Warhol, that in the future everyone will be famous for 15 minutes.

62. This was suggested by Karen McLaughlin, Executive Director of the Massachusetts Program for Victim Assistance, in an interview with the Canadian Bar Association's Special Committee on Cameras in Court.

Moreover, not all victims want protection, a fact demonstrated clearly during the televising of the Mount Cashel inquiry into sexual abuse of children at an orphanage in Newfoundland. Some, in fact, insist on publication as a means of therapy or retribution.

B. Justice is Seen to be Done

Electronic reports are more accurate. Unlike traditional reports they are not completely second hand. They contain added and vastly improved context. They permit greater clarity to be achieved in public debate by increasing the number of people with access to first hand information.

Electronic access also improves reporting by increasing the incentive for the electronic media to divert scarce editorial resources to the coverage of courts. Greater editorial attention results in a greater reporter understanding of both courts in general and particular court cases, and allows for the development of greater repertorial expertise.

Opponents to camera access focus on the use of "misleading" and "sensationalist" clips. Clips are used in almost all electronic reports for the obvious reason that they represent the best method of communicating a story accurately, clearly, directly, effectively, and succinctly. Electronic journalists choose them carefully. When dramatic moments are recorded, they are inserted in electronic reports only when they advance the story being told.

To focus on the use of misleading clips in electronic reports is itself misleading. Without electronic access at all, there is no routine use of clips in fair and accurate reports of court proceedings, and no extended coverage of those proceedings either. In over a decade of experience with cameras in quasi-judicial proceedings in Canada, only one or two examples of the misuse of such clips are pointed at in the face of a sea of daily coverage spanning that time.

What is often presented as misleading or a misinterpretation is often simply a different perception of the case than that seen by lawyers. A recent study demonstrated that broadcast journalists using electronic clips in their reports accurately present coverage from a layman's point of view. Fact errors were not the problem. More education of both lawyers and journalists about each others' professions was recommended as a solution.⁶³

Televised coverage of a case from beginning to end on "all news" channels is only possible with electronic access to the hearing room. It is difficult to argue with the educational potential of extended coverage of even one such case. Electronic coverage of many cases can reduce the risk of misimpressions of the system. Editorial freedom in the selection of court cases for coverage, tempered by continuous public reaction to those cases, will ultimately ensure the public gets what it wants, needs, and deserves to know.

63. S.L. Alexander, *supra* note 57 at 312.

In Canada there is a crucial additional benefit. For a variety of legitimate practical reasons, few Canadians now get to court. The result is that most form their opinions of justice on the basis of U.S. cases that they see on television and that they assume correspond to what happens in Canadian courtrooms. They do not understand or appreciate our own unique judicial system.

Televising Canadian court proceedings is the only real answer to this important cultural dilemma. Access to pictures and sounds of Canadian court proceedings would significantly expand public knowledge of how justice is administered here. The more video and audio information that is made available, the more complete can be the understanding.

C. Judges are Generally Shown Doing Their Job, in a Normal Fashion and in a Positive Light

Some judges express concern at the prospect of being at the centre of public scrutiny. The reality is that the judge is generally seen as a bystander in a court story focused on the important testimony of the day. The media's reasons for attending the trial, and doing the story, often have little to do with the judge. As a result, viewers generally see the judge doing his or her job, the way he or she would normally do it. The image is of someone respected and reassuring. The impression is formed in context and is favourable.

In Canada, respect for judges and deference for their authority would tend to inhibit any media use of actuality improperly or out of context. In fact, concerns about adversely affecting fair trial rights tend to keep all reporting of trials here in line. The risks opponents associate with the 30 second clip in this context are vastly overstated.

D. Judges Have an Improved Ability to Inform the Public About the Judicial System

The electronic media offer the public the opportunity to see the court system as the judge sees it. One of the roles of the judge, for example, is to make clear to society the consequences of crime. If a deterrent sentence is to be imposed, there is no more effective way to get the message to the public at large. If a law is unworkable and deserves to be rewritten, television is the best way to inform legislators and the public of the judge's perspective.

Television provides an unequalled opportunity to educate the public about judicial issues. This is not limited to sentencing. It is one thing for the media to advise the public that there are delays and crowded dockets. It is quite another to show it to them in full colour. There is truth to the maxim "seeing is believing".

Once people believe a problem exists they have the capacity to learn from it. While many people knew of military hazing rituals, it was not until a videotape of it was

shown on national television that the federal cabinet was galvanized to act. Electronic access to court can't help but have a positive effect on legislators and the way they respond to the needs of the justice system.

E. Judges Who Have Experienced Electronic Access Favour It

Since the introduction of cameras into U.S. courts, numerous surveys have been done of the attitudes that participants in court proceedings have to them. All such surveys show that the vast majority of court participants who have had experience with electronic access either are neutral toward it or favour it, and this includes judges.

The most recent such survey was part of the experiment in the U.S. Federal Court that ended in 1994. Overall, judges' attitudes to coverage were initially neutral and became more favourable after experience with electronic coverage.

F. There is a Greater Likelihood of Public Confidence in the Result

Too often, judges do not receive as much public support as they deserve for the difficult decisions they make. Studies show that a significant factor in this is that the public receives insufficient information about the cases they decide.⁶⁴ People may believe on reading newspaper reports, for example, that a particular offender has received too lenient a sentence, but if they are given the same information as the judge had at the time the decision was made they tend to be more likely to agree with the outcome.

Electronic public access, to the extent it increases and improves the information flow to the public about a case, increases the likelihood that the public will appreciate the result obtained there.⁶⁵ Public understanding fosters public confidence if, of course, that confidence is deserved. If it is, sceptics who would otherwise hold sway in the absence of electronic access, would be drowned out by a knowledgeable public response. If it isn't, public understanding would foster knowledgeable public debate about the law and its application in the case. That debate can lead to the enactment of better laws, or the better application of existing ones.

64. A.N. Doob & J.V. Roberts "Public Punitiveness and Public Knowledge of the Facts: some Canadian Surveys in N. Walker and J.M. Hough, eds., *Public Attitudes to Sentencing* (Aldershot: Gower, 1988). See also P. Raymond, *The Impact of a Televised Trial on Individuals' Information and Attitudes*, (1992) 75 *Judicature* 204. The summary states:

Viewers of a televised trial became more knowledgeable about the judicial process. And, despite the fact that they viewed a trial in which a poor person lost to a large corporation, they did not become less confident in the courts nor less willing to utilize the judicial system in the future.

65. S.L. Alexander, *supra* note 57 at 313. In the fall of 1989, William Lozano, a Hispanic police officer, was on trial in Florida in the shooting deaths of an unarmed black motorcyclist and his passenger. Community leaders specifically requested public television to do gavel-to-gavel coverage of the case to diffuse tensions and avoid riots following two earlier similar cases.

I am confident that routine electronic public access to Canadian courts would enhance public confidence in the system overall.

VI. INDIVIDUAL POSITIONS AND THE PUBLIC INTEREST

It is clear now that absolute bans on electronic public access do not have a legal future. It remains to be seen just what restrictions on electronic access, if any, do. Perhaps sensing this, opponents now focus on an alternate restriction based on consent. No one, they say, should be forced to be filmed without their informed consent. In fact, they go on, no one else can be filmed in a proceeding if any one person withholds that consent.

"Informed consent" is a concept suited to surgery, not justice. Surgery is an individual matter. Justice is a community event.

Of course, anyone participating in any activity should be informed about its ramifications for them. This paper is an argument for informing people. It is premised on keeping everyone well informed about the judicial process generally as well as the case at hand. The real issue is the deference one ought to pay to individual perspectives in the case. Should an individual involved in a case, in whatever peripheral or substantial way, have a right of "veto" over public access to electronic information about that case? Logic and law suggest not. A person should have an ability to have their views on any form of publicity considered by the court, in context, on the basis of an acceptable constitutional standard. It is for the court, not any one individual, to decide the issue in the public interest.

Consent is superficially attractive, but is ultimately misleading. The individual's preference on electronic public access to court should not only not be determinative, it should be recognized as a side issue. The threshold issue for the court to resolve is based on public interest and the test is set out in *Dagenais*, to wit, whether a denial of electronic access to its proceedings is necessary to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk.⁶⁶ Consent is irrelevant to that test. It cannot cure justice that is flawed by electronic access, and, it should not be used to deny electronic access if fair and equitable justice is not at risk.

If consent is indeed irrelevant to the issue of whether justice can be obtained, it should not be used to solve extraneous public relations questions. Judges cannot permit court participants to use the provision or denial of consent to electronic coverage as a means of manipulating the dissemination of details of any case in which they are involved. The public is entitled to see and hear the truth, not merely the image that any particular individual involved in the case would prefer them to have. Indeed, one party may wish the others' roles in a case to be widely known. The public interest may well support that view.

66. The concept of necessity is also contained in the test proposed by the Canadian Bar Association's Special Committee on Cameras in Court for consideration of a denial of electronic access. *Supra* note 55.

Why should any one of the others have a personal veto over the effective dissemination of that information?

As noted above, members of the public have a right to go down to court and see and hear the whole proceeding, and all the participants, for themselves. Time and distance strip them of that right. The media restore it to them. The media's role is to inform the public fully. Conventional media coverage may now include a complete description of the atmosphere in the room, as well as the pauses, inflections, emphasis, gestures, tone, manner of dress, appearance, and physical condition of those involved. It may also include pictures and sounds of them. Electronic access facilitates the dissemination of this very same information. Inhibiting the dissemination of visual and aural information that can otherwise be freely described from court comes at a cost. Fewer people get information, and fewer get accurate information. An electronic access veto must be understood in that light. Any or all of the detail of court proceedings may be highly relevant to public understanding of the case. People, not "descriptions" of them, commit crimes or are wrongly accused. Viewers should be able to see these people, and not be confined to descriptions of them.

As documented in my earlier paper, consent is also, in reality, an absolute bar to electronic access. The isolated instances of televising Ontario court proceedings, where a consent rule has been in effect since 1974, are testament to that. If we are serious about electronic access, we should not fool ourselves into thinking that electronic access with a consent rule constitutes real electronic public access. Opponents of electronic access point to the difficulty in obtaining consent, and conclude that electronic coverage should not be allowed because it is not widely supported. While consent can be difficult to obtain, that is merely evidence of the inevitable result of offering those involved in a case the ability to control an aspect of their public image. A denial of consent does not mean that the public interest is served in the process.

A noteworthy example is contained within the *Squires* case itself. The issue on the constitutional motion was television camera access to court, and the Crown refused to consent to the motion being televised. A television camera could not attend its own trial! One can only speculate about the effects that wide public access to that proceeding would have had. The educational impact would have been significant.

A consent requirement also permits consent to be withheld by the Crown where the conduct of the police or the Crown itself is at issue. Surely someone who, by virtue of their public office should be publicly accountable, should not have a veto capable of being exercised without any justification at all over electronic access, the most effective means of facilitating scrutiny of their actions. Clearly not all litigants are alike, and an inflexible rule implying they are is not justifiable.

Consent is arbitrary, simplistic, misleading, unworkable, and contrary to the public interest. It is also contrary to the discretionary test mandated by *Dagenais* for the consideration of publication bans. Given the lack of evidence demonstrating that electronic public access puts justice at risk, let alone at "real and substantial" risk, it seems clear that the arrival of electronic access to court cannot be far away.

VII. IT'S TIME TO UNDERSTAND AND ADAPT TO THE NEW COMMUNICATIONS MEDIA

Unlike Joshua, we cannot stop the sun. We cannot stop world progress because of a nostalgic vision of how the public ought to get its information, based on the fact that the work of the courts was once disseminated to all in print.⁶⁷ The public abandoned an exclusive reliance on print years ago in favour of an increased reliance on the electronic media. Now two-thirds to three-quarters of the public describe television as their main source of news, and about a third rely on television exclusively for it. The justice system either provides those citizens with access to information or it does not.

Public access implies public choice. It is for members of the public to decide what information they need and how to get it. It is for the media to assist the public in satisfying its various needs to know. Suggesting television accommodate itself to the existing ban on electronic access and disseminate information in different ways than it does routinely vis-à-vis other stories and venues is not the answer. Patrick Watson, an accomplished and respected broadcaster, testified eloquently in the *Squires* case about free and effective expression in television from the point of view of someone working in this medium:

I would use courtroom footage if I had an entirely free choice [...]. [M]y ability to express my craft through the camera is found first in the decisions I make about the subject matter that is to be dealt with, second in the techniques that are to be used. I would feel that in any reportage or documentary presentation that I was trying to make about any activity whatsoever, if I am constrained from using the camera to present the reality, then a large part of my expressive capacity has been amputated.

As to greater use of conventional methods to convey information about court proceedings, he had this to say:

It is my contention that for the most part the present duration of stories which are read and illustrated without access to actuality footage has about reached the limit that can hold an audience's attention. We noticed in this court yesterday afternoon as I sat and watched the body language of those watching the film, that the point at which the actuality ceased and I came on and gave the final minute and a half of explanation of what happened later, attention went way down. People sat back and relaxed, started to look around, fidget, whereas up to the point where it was all actuality, people

67. Interestingly, at the turn of the century it was the practice of daily newspapers to print for the public entire transcripts of court proceedings important to them. An example is the trial of Reginald Birchall, which began on September 22, 1890 in Woodstock. He was an English con man who lured young men from England on the pretence of teaching them farming. He shot Fred Benwell in a swamp and was tracked down by John Wilson Murray (The Great Detective). It was the most famous Canadian murder case of the nineteenth century. A cable connection led direct from the court house to London, England where newspapers printed full testimony, the lawyers pleas, and the judge's charge.

were leaning forward. They were totally engaged in what went on. A news director who ran a four or five minute coverage of the newscast — of a trial in a courtroom without actuality material available to him would, in my judgment and judgment based on a great deal of experience examining exactly this issue, will lose the audience and therefore decrease the flow of information.

Finally, in response to the repeated suggestion by opposing counsel that longer reports contain more information than shorter ones and that, as a result, the media, if it was really interested in educating the public, could increase the content of information communicated to the public by simply lengthening the duration of news items produced by conventional means, he surprised that counsel by making the following point:

There's no such thing as contain information [...]. There is only information that is communicated or suppressed. A story that reaches a zero audience has no information in it [...]. [W]e're in the business of communication, not in the business of some archive [...]. [I]t's like the tree that falls in the forest with no one to hear it. There is, as far as a human being is concerned no sound. You're talking about potential for communicating experience to an audience. You are trying to make me agree with you that a five minute story will communicate more than a one minute story and I'm telling you the opposite is true [...]. I am telling you that the notion of containment as you put it does not apply in communications theory. I will reject it entirely and I don't know any serious student of communication who would accept it.

If courts believe the public access principle, and want to connect once again to the public they serve, they must make it possible for the public to get information about courts in accordance with today's technologies and public choices. Electronic media of expression are omnipresent, and are accepted in virtually all other spheres of our daily lives. Holding back the clock simply denies the public information and will not work.

In light of the Charter developments, experiences in Canada and elsewhere with respect to cameras at judicial and quasi-judicial proceedings, and the lack of reliable scientific evidence establishing that electronic access poses any risks to the fairness of the proceedings, electronic public access to court is the only way to go. It's an idea whose time has come.