Cameras in the Courtroom — Not Without My Consent

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I. GENERAL

A. Introduction

It is commonly believed that the invention of new technologies automatically brings with it the unimaginable and unprecedented benefits of progress. One who warns against the proliferation of a particular kind of technology can, at first blush, be branded as an inflexible opponent to progress. On more careful reflection, it becomes evident that any new piece of technology can have the potential either to work for good or for bad.

In the context of the administration of justice, the introduction of the relatively new technology of television cameras into Canadian courtrooms to enable the media to film and broadcast judicial proceedings does not constitute a form of progress. Rather, it poses a serious threat to the proper administration of justice and offers little if anything in the way of benefits. The introduction of television cameras into Canada's courts, especially where the witnesses or parties do not consent to being filmed, would be a substantial step backwards in Canada's ongoing effort at improving its justice system. One can be a strong and passionate supporter of the long-standing principle of open justice, honouring the public's traditional right to attend and report on court proceedings in Canada, without at the same time having to approve of cameras in the courtroom. This article presents such a position.

The purpose of this article is to discuss whether and when we should permit television cameras in Canadian courtrooms. The position presented here is that cameras should not be admitted into courtrooms to film judicial proceedings for broadcast in whole or in part, except where such filming is consented to by all of the court participants who will be filmed, including the judge, the parties, the witnesses if any, and the jurors if any. By "consent" is meant the following: first, if a person does not agree to be filmed, but does not object to the rest of the proceeding being filmed, then filming can proceed except for the involvement of the objecting party. If a person objects to the filming of the whole proceeding, then the entire proceeding may not be filmed. It would be insufficient simply to allow a court participant to consent or withhold consent to filming of themselves alone. If an entire trial is to be filmed, and one witness is reluctant, they may feel compelled to consent to themselves being filmed, despite their true wishes, for fear of appearing to have something to hide. For the consent power to be meaningful and effective, the individual must have the full range of choices listed above.

The discussion begins with a brief review of the state of the art both in legislation in Canada and in practice. Next, the specific pro-camera arguments are each set out and responses to them are explored. The key arguments that media advocates typically advance in favour of the pervasive introduction of cameras into Canada's courts are identified. Responses are provided to each argument. The various pro-camera arguments considered here can be found in the veritable barrage of articles and commentaries which appear from time to time in the press and elsewhere authored by reporters, editorialists and lawyers who represent their interests.[1]

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1. See D.J. Henry, "Electronic Access to Court: A Proposal for its Implementation Today" in P. Anisman & A.M. Linden, eds., *The Media, The Courts and The Charter* (Toronto: Carswell, 1986) at 441-490; M.T. Crosson, "Cameras in Courts Do Not Adversely Affect Conduct of Court Proceedings" (1991) 205

Next, this article will set out the reasons why the *Canadian Charter of Rights and Freedoms* does not constitutionally require courts to admit cameras into their proceedings. Attention then turns to the suggestion, periodically put forward by media advocates, that we should try an experiment with cameras in the courtroom. Finally, some reflections on the overall debate over cameras in the courtroom are provided in the conclusion.

In this article, "cameras in the courtroom" or "courtroom filming" refers to the proposed practice of news media bringing cameras into the courtroom to take still or video recordings of a judicial proceeding, in whole or in part. It is contrasted with "conventional media coverage" of court proceedings. Conventional media coverage refers to the common current practice in Canada whereby news reporters from television, radio and newspaper outlets personally attend court proceedings, take notes, and then file reports on the day's proceeding, but without having the use of actual footage shot in the courtroom during the proceeding.

B. Disclaimer

At the outset, I should indicate my previous involvement with this issue. From late 1984 until late 1993, I acted as co-counsel for the provincial Crown in Ontario in the case of *R.* v. *Squires*.[2] There, relying on the guarantee of freedom of expression, including freedom of the press and other media of communication in section 2(b) of the *Canadian Charter of Rights and Freedom*s, CBC television reporter Catherine Squires attacked the constitutionality of Ontario legislative restrictions on filming in courtrooms and courthouse corridors. As is discussed further below, she was ultimately unsuccessful in her constitutional attack.

I have been intimately involved for many years in representing the Crown in this hotly contested Charter case. My perspectives on the cameras in the courtroom issue may well have been influenced by the partisan role which I was assigned to play, or may be perceived as having been so influenced. I can only invite the reader to critically assess my arguments and analysis on their merits.

New York Law 83; "Keep the Cameras" (Cameras in the Courtroom) (Editorial) *The National Law Journal*, (5 June 1989 12; J.A. Krsul Jr., "Cameras in the Courtroom: Time to Experiment" (1983) 62 Michigan Bar J. at 384-385; S.E. Nevas "The Case for Cameras in the Courtroom" (1981) 20 Judges J. at 22(5); T. D'Alemberte "Cameras in the Courtroom? Yes." (1980) 7 Barrister at 6(4); N. Davis, "Television in Our Courts: The Proven Advantages — The Unproven Dangers" (1980) 64 Judicature 85; W.J. Arendt, "Televised Trials in Illinois: Should it be Viewed as a Privacy Question?" (1985) 18 John Marshall L.Rev. 793; L. Ares, "Chandler v. Florida: Television, Criminal Trials, and Due Process" (1981) Supreme Court Review 157; See also the argument successfully advanced in favour of cameras in the courtroom by the media in *Re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So. 2d 764 (1979).

2. *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.

C. Terms of Reference for the Policy Debate

It is important at the outset to clarify key parameters of the cameras in the courtroom debate. First, this article's major focus is on the question of whether cameras should be admitted into Canadian courtrooms as a matter of policy, and if so, on what terms. This article approaches this debate primarily from the policy perspective. A consideration of the constitutional claim of a Charter right to televise court proceedings is provided after this policy discussion. Of course, many of this article's policy observations would bear upon a consideration of the constitutional question.

Second, the core policy question at stake here is not simply whether television cameras should ever be permitted in Canada's court rooms. The real issue is whether cameras should be permitted to film judicial proceedings in cases where some or all of the court participants (lawyers, witnesses, jurors, judge and/or parties) do not wish to be filmed. Where all court participants consent to being filmed, and where this consent is freely given without duress or pressure, there may be a reduction in the risks associated with filming court proceedings. Hence, the relevant question at the core of this debate is whether it is appropriate for court participants to be forced to be filmed by television cameras when they do not consent to being filmed.

Because Canada's courts now rarely admit television cameras, and certainly not without the consent of the presiding judge and court participants, any transition to a regime where reporters can bring cameras into courtrooms without the consent of court participants would be a dramatic change. From a justice policy perspective, such a substantial change should not occur unless it is first established that this new innovation will bring significant benefits and that it will not have any adverse effects on the administration of justice.

Hence, there are two questions that must be considered. On both, the burden of proof lies on those who seek to persuade us that cameras should more readily be admitted to Canada's courtrooms. First, will cameras in the courtroom provide any significant benefits? Second, even if they would, will they pose any material threats of harm to the administration of justice?

This does not involve a facile balancing of costs versus benefits — one that contemplates that if the benefits of courtroom filming are great, then any associated harms, even if significant, should be endured. Camera advocates cannot make out their case in the policy arena by simply showing that the benefits of cameras in the courtroom outweigh any possible harmful effects. They must instead begin by showing that cameras in the courtroom, if permitted over the objection of court participants, will be problem free. This must precede any discussion of cameras' alleged benefits.

The debate is framed in this way because we here contemplate significant alterations to the justice system. The administration of justice is a critical yet fragile component of our democratic self-governing process. Many people have their liberty and property at stake in courts everyday.

Even minimal or marginal adverse effects on any particular case can have dramatic consequences for individuals who come to court seeking justice, or whom government compels to appear in court. If cameras distract even one juror or intimidate one witness in a case, the conviction of an innocent person or the acquittal of a criminal offender may result. Either consequence is too serious to accept as a "trade-off" for allegedly better quality media coverage of courts. This assessment is analogous to the long-standing legal maxim that it is better that nine guilty persons go free rather than one innocent person be convicted.

A review of at least some U.S. state court decisions, affirming the use of cameras in the courtroom, suggests that cameras in the courtroom could pose some problems. At least some state courts appear to have concluded that the benefits outweigh the disadvantages in their view.[3] Such a willingness to tolerate and indeed to accept interference with the administration of justice reflects a value judgment that we in Canada ought not follow. With respect, it demonstrates a cavalier disregard of the importance of the right to a fair trial and the requirements of the proper administration of justice.

D. The Legislative Context

In most democratic countries around the world, television cameras are rarely if ever permitted into courtrooms. Canada is no exception. The principal departure from this trend is the United States. Within its two-tiered court system, most state courts now permit television cameras into courtrooms under some conditions. Although the federal courts recently conducted a limited experiment in this regard, they have concluded that they ought to continue their long-standing camera ban.[4] The U.S. Supreme Court does not permit cameras at all.

Of those American states that do permit television cameras in the courtroom, there exists a wide diversity of rules stipulating when cameras will be allowed. There is no general pattern. For example, some states allow television cameras into appeal courts, but not trial courts. Some permit television cameras into courts only with the permission of some or all court participants. Others will permit cameras in the courtroom over the objection of court participants, with limited exceptions.

A small number of States undertook what they called "experiments" with television cameras in the courtroom for limited periods, before making their camera rules permanent. Others simply adopted rules permitting television cameras without any prior

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3. See for example *Re Petition of Post-Newsweek Stations, Florida, Inc.,* for Change in Code of Judicial Conduct, *supra* note 1 at 787-789. See also the various other court studies such as those cited *infra* note 23.

4. See Jackson. "Let Cameras Roll" (Judicial Conference of U.S. decides to bar cameras for Federal courts) (Editorial) *Los Angeles Daily Journal* (3 October 1994) 2 and T. Lastes, "Experiment to End on T.V. in U.S. Courts: Conference Action" (N.S. Judicial Conference) *Los Angeles Daily Journal* (22 September 1994) 1.

on-site experimentation. Most if not all U.S. state rules admitting cameras to courtrooms were promulgated by the courts themselves, and not by the state legislatures.

Despite the broad diversity of local rules and practices, there is one point on which U.S. courts have been categorical and consistent. The admission of television cameras to U.S. courtrooms is not required under the free speech and press clauses of the First Amendment to the U.S. Constitution.[5] The U.S. Supreme Court has held that state courts are free to experiment with television cameras in the courtroom if they wish, so long as the accused's right to a fair trial is respected.[6] However, they are not constitutionally required to do so.

In Canada, television cameras have rarely been admitted to courtrooms to film judicial proceedings. There have been sporadic incidents of courtroom filming during judicial proceedings across the country. In most provinces, there is no legislation governing this question. Instead, it is left to the inherent jurisdiction of the presiding trial judge to determine whether television cameras may be admitted and if so, under what circumstances and conditions.

The most comprehensive legislative regime in Canada addressing cameras in the courtroom is found in *Ontario's Courts of Justice Act*.[7] It permits the filming of judicial

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5. *Chandler* v. *Florida*, 101 S.Ct. 802 (1981); *Estes* v. *Texas*, 85 S.Ct. 1628 (1965); *Nixon* v. *Warner Communications Inc.*, 98 S.Ct. 1306 (1978); *U.S.* v. *Edwards*, 785 F.2d 1293 (5th Cir. 1986); *Westmoreland* v. *CBS Inc.*, 596 F. Supp. 1166 (1984); 752 F.2d 16 (1985) cert. den. *sub nom. Cable News Network Inc.* v. *District Court et al.* 105 S. Ct. 3478 (1985); *U.S.* v. *Torres*, 602 F. Supp. 1458 (U.S. Dist.Ct. 1985); *U.S.* v. *Hastings* 695 F.2d 1278 (U.S.Ct.App. 1983); In *Re National Broadcasting Co., Inc.* 653 F.2d 609 (U.S.Ct.App. 1981); *Belo Broadcasting Corp.* v. *Clark*, 654 F.2d 423 (U.S.Ct.App. 1981); *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 529 F. Supp. 866 (E.D. Pa. 1981); *Dorfman* v. *Meisner*, 430 F.2d 558 (U.S.Ct.App. 1970); *Seymour* v. *United States*, 373 F.2d 629 (U.S.Ct.App. 1967); *Tribune Review Publishing Co.* v. *Thomas*, 254 F.2d 883 (U.S.Ct.App. 1958); In *Re Petition of Post-Newsweek Stations, Florida, Inc.*, for Change in Code of Judicial Conduct, *supra* note 1; In *Re Mack*, 126 A. 2d 679 (Pa. Sup.Ct. 1956); *State* v. *Clifford*, 123 N.E. 2d 8 (Ohio Sup.Ct. 1954).

6. *Supra* note 5.

7. See *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 136 building upon its predecessor, section 67 of the *Judicature Act*, R.S.O. 1980, c. 223, which was considered in the *Squires* case, *supra* note 2. Section 136 provides as follows:

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

proceedings for broadcast where the trial judge approves the filming for educational or instructional purposes, and where all witnesses and parties consent to being filmed. The *Squires* District Court ruling purported to sever and declare unconstitutional the "educational or instructional purposes" requirement in a predecessor provision. Whether or not this ruling was *obiter*, and whether it would stand if reviewed in a higher court are likely beside the point. This is because the trial judge in *Squires* had construed this "educational or instructional purposes" clause as potentially permitting filming in at least some news-gathering circumstances.[8] Hence, the clause does not appear to prevent media filming in courtrooms, except for perhaps commercial advertising or non-informational aims.[9]

(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.

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.

8. *Supra* note 2.

9. For a more thorough discussion of the history of the introduction of television cameras into courtrooms in Canada and the United States, see the *Squires* trial decision, *supra* note 2.

II. THE HARMS POSED BY CAMERAS IN THE COURTROOM

A. The Foundation for the Harms Posed by Cameras

To discuss the harms posed by cameras in the courtroom, it is helpful to first outline some distinctive properties of the television camera and of human nature. When a video camera records all or part of a court proceeding for broadcast to the public, either edited or unedited, it has several unique properties. These dramatically distinguish the video camera's eye from the eyes of a spectator in the courtroom, be that spectator a member of the general public or a journalist. These distinctive properties take on powerful significance when regard is had to the human experience of appearing in court as a witness or party to a legal proceeding.

The camera instantaneously captures on film or videotape the image of the witness, lawyer, juror, or party. It can immediately transmit that image in living colour to thousands or millions of television screens across the land. Excerpts can be replayed over and over again on the nightly news, on documentaries, and on television commercials for the television station for days, months, or even years into the future.

Paragraphs, sentences, phrases and even single words can be edited out of the videotape. The viewer may not be able to detect that this has occurred. Lawyers' questions and witnesses' answers can be juxtaposed out of sequence. This can create a different impression in the viewer's mind than would have occurred in the courtroom had the viewer been present; this can happen even where the editor does not seek to distort or manipulate the message.[10]

The camera can zoom in from a distance to provide an extreme close-up image of the witness's face. This provides a visual perspective that a court spectator could not secure. To obtain such a view in the courtroom, a spectator would have to walk up to the witness stand and place themselves inches from the witness's nose — something which no presiding judge would ever permit. Hence, the camera can electronically invade and violate the court participant's personal space in a fashion that no spectator can.

Even without any editing of images and shots, the camera can subtly distort visual images. Depending on the kind of lens being used, the shot's angle, the duration of a shot, and various settings on the camera, the image on the screen, while quite realistic and life-like, can nevertheless be dissimilar to the real thing. To some these differences may appear trivial at first. However, their cumulative impact can be quite significant. People may look bigger and heavier on television than in real life. Camera-induced spacial distortions may make court participants look like they are standing closer together or further apart than in real life. Depending on available lighting and camera settings, a person's face may look more or less pale on television than in real life.

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10. For a case study in how courtroom footage was used in a Canadian documentary produced by the CBC arising out of a murder trial which was filmed in Ontario with the legislatively required participant consents, see J.M. Linton & M. Gerace, "The `Reel World' of the Courtroom: An Analysis of A Television Documentary About a Murder Trial" (1990) 10 Windsor Yearbook of Access to Justice 127.

Turning from the properties of the camera to the properties of the persons being placed before the camera, there are several natural tendencies of people who are involved in court proceedings, such as jurors, witnesses, or parties to a criminal or civil proceeding. Most have never been in a courtroom before. Of those who have, it is rare that they will have had any experience giving testimony, much less subjection to an incisive and probing cross-examination. Many will be unfamiliar and uncomfortable with public speaking before an audience of strangers.

Witnesses and parties can personally have a great deal at stake in the proceedings. For the accused, their very liberty can be on the line. For plaintiffs and victims, much needed personal vindication can be at stake. For many parties, their livelihood and reputation can hang in the balance. For all parties and witnesses, their personal credibility is put in question as soon as they enter the witness box. In cross-examination, their honesty, their morality and their integrity can be savagely challenged by skilled professional counsel who are paid and trained to tear them apart through the ordinary adversary system.

When called to the stand, parties and other witnesses often must testify about personal and private matters, including events in which they may have been reluctantly caught up. It is not unusual, particularly in a criminal or matrimonial case, for witnesses to be called upon to give evidence about unseemly personal situations where they were in the wrong place at the wrong time. Many litigants, and especially victims and criminal accused persons, have very little confidence in the justice system because of its seeming lack of sensitivity, fairness and respect for their personal autonomy. Thus, most parties and witnesses enter the courtroom in a state of acute stress, fear and at times sleeplessness even without the prospect of television cameras. The courtroom's solemn ritual, formality and arcane language can be quite foreign and alienating. This exacerbates the powerful sense of fear and stress.

Most witnesses may only testify for a brief period of time, being a matter of minutes or hours within a single day. They will routinely be excluded from the courtroom before they give their own testimony, pursuant to a judicial order requiring witnesses to wait outside before they are called to give evidence. Thus, they have little time to acclimatize themselves to the process before the experience of testifying is upon them.

A professional witness such as a police officer may approach the giving of testimony in a more calm, controlled and experienced way. Yet beneath this veneer is still a human being with feelings, doubts and fears. If their professionalism, competence, honesty or motives are attacked in cross-examination, the courtroom experience can be quite stressful even if it is not particularly foreign.

Augmenting these personal attributes is the fact that very few persons in Canada, apart from full-time journalists, actors, and politicians, have ever been on television. For most, therefore, the experience of being on television for the first time is a foreign and daunting event, even at the best of times. From the earliest age, we are all trained at an instinctive or subconscious level to pose for the camera. Hence, experienced television journalists know that when a television camera appears at a demonstration or other news event, the conduct of persons at the scene can rapidly change. Similarly, they are well

aware that when politicians are off camera they may speak very differently than when the cameras are turned on.

Bearing in mind these well-known and time-tested attributes of the camera, and of people caught up in the judicial process, we can consider what consequences would ensue if court participants could be forced over their objection to be filmed by media cameras when they are involved in a court proceeding.

B. Threat to a Fair Trial Through Prejudicial Publicity

Media advocates argue that cameras in the courtroom would not generate any prejudicial publicity that could undermine the fairness of a trial. They assert that if there is any risk of potential prejudicial pretrial publicity, the *Criminal Code* now adequately addresses this. The Code mandates a series of publication bans which can be implemented if needed.

It is a core requirement of our justice system that every case be decided solely on the evidence presented to the judge and/or jury without any external influence or pressure. Justice is not done if media coverage of a court proceeding creates a real risk of prejudice to the fairness of a trial, by contaminating the trier of fact with material which may be inadmissible as evidence. Where there is a public perception of such contamination, then justice will not be seen to be done, even if there was no prejudice in fact.[11]

Both advocates for and opponents to cameras in the courtroom agree that courtroom filming should never be allowed to pose a risk of prejudicial publicity which could contaminate fairness of a trial. Where they disagree is on the questions of whether courtroom filming will create a risk of this prejudice, and whether the media will act on its own to prevent such prejudice, if given broader permission to film.

U.S. experience reveals that where courtroom filming is permitted, the media will be quite willing to film and broadcast a proceeding live, at least in part. This can include pretrial proceedings, if the media outlet believes that they have a sufficient market. They will do so regardless of the risk to the fairness of a trial.

No example better illustrates this than the O.J. Simpson prosecution. There U.S. television and radio networks nationally broadcasted gavel-to-gavel the entirety of the preliminary hearing, including a "suppression hearing" on the admissibility of certain incriminating evidence. The media could not have known in advance whether prosecution evidence challenged in the suppression hearing or other evidence adduced at the preliminary hearing would ultimately be ruled admissible at trial. Yet, the pretrial proceedings were televised non-stop, replete with colour commentary on how the various items of evidence might serve to incriminate or exculpate the accused.

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11. See generally, M.D. Lepofsky, *Open Justice: the Constitutional Right to Attend and Speak about Criminal Proceedings* (Toronto: Butterworths, 1985) at 17-22.

These broadcasts were not the sole effort of the marginal "tabloid media", engaging in their predictable excesses. Rather, they were provided by all the major U.S. networks. As such, there can be no practical expectation that the media will police its own reportage to insure that there is no prejudice to a fair trial, where cameras in the courtroom are permitted.

Publication bans provided for in the *Criminal Code* and pursuant to the court's inherent power may prevent some of these problems. For example, if there is a publication ban on the evidence tendered at a preliminary hearing or bail hearing, then these proceedings cannot be televised. However, with the media's increasing tendency to attack the constitutionality of these publication bans, one cannot assume that news outlets will be content that all existing publication ban powers remain in force in their present form, especially as they pertain to pretrial publicity.[12] One must approach the cameras in the courtroom debate on the basis that the media may well attack the constitutionality of these publication bans, as violating the Charter's free press clause.

Even if one assumes the continued availability of all existing publication bans, courtroom filming could nevertheless generate unchecked prejudicial publicity contrary to the requirement of a fair trial both for the prosecution or plaintiff and the accused or defendant. This is so for the following reasons.

First, during the trial itself, there is usually no publication ban precluding the media from reporting on the trial proceedings, with the exception of proceedings occurring in the absence of the jury. If courtroom filming occurs at trial, then the media could broadcast all or part of the trial while it is ongoing. Jurors, if not sequestered and/or members of their families, could be exposed to this coverage while the trial is in progress. The media's repeated emphasis on one piece of evidence on the nightly news could well influence jurors either directly, or through feedback from their family and friends.

It may not be sufficient for the trial judge to instruct the jury not to watch television at night while the trial is ongoing. Where courtroom filming is permitted, a community-wide if not nation-wide sensation can be created, such as in the O.J. Simpson murder case and the William Kennedy-Smith sex assault prosecution. This can make it virtually impossible for the jurors to escape potential media influence. The only alternative would be to sequester the jury. In the U.S., cameras in the courtroom have increased the need for more rigorous jury selection procedures and for sequestration during the trial. This is a dramatic incursion on juror's liberty. Sequestration is a last resort which should be avoided if at all possible, especially in a long trial.

Second, if a trial is televised in whole or in part and a successful appeal results in the direction of a new trial, the televising of the first trial can create a real and substantial risk of prejudicial publicity which would undermine the second trial. This is exacerbated

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12. See for example, *Global Communications and Attorney General for Canada* (1984), 10 C.C.C. (3d) 97 (Ont. C.A.); *R.* v. *Bernardo* (5 July 1993), (Ont. Ct. Gen. Div.) [unreported] Kovacs J.; *Monaghan et al.* v. *Canadian Broadcasting Corp. et al.* (1994), 110 D.L.R. (4th) 39 (Ont. Ct. Gen. Div.), Chapnick J.

by the fact that the media have a long standing practice of re-publicizing the first trial on the eve of the second trial, where the case is one of some notoriety.

For example, when New England millionaire, Claus VonBeulow was tried in the early 1980's for attempting to murder his wife in Rhode Island, his trial was televised. When his conviction was reversed on appeal, and a new trial ordered, the American media flocked to re-broadcast salient excerpts from the original trial on the eve of the new trial. This could only serve to make it harder to provide a prejudice-free second trial.

Finally, the *Criminal Code*'s publication bans do not apply in civil proceedings. While the vast majority of cases which the media wish to televise are criminal, there would be occasions where the media would seek to film civil cases. In such cases, camera advocates cannot plausibly argue that the existing criminal law governing publication bans will be certain to avert any risk of prejudicial publicity.

In response to these concerns, camera advocates would argue that these risks of prejudice are already present, even if there are no cameras in the courtroom. The media is free to report on Claus VonBeulow's first trial. There can be no problem if cameras are added.

This line of argument disregards the qualitative difference between television broadcasting of court proceedings on the one hand and conventional media reporting on television, radio, or in newspapers on the other. The public understands that a report by a television, radio or print journalist is just that — a report. The public knows that quotes can include misquotes and that reporting involves summarization. In the absence of cameras in the courtroom, there is no media created sense that one is "watching" the proceedings.

In contrast, when the public observes courtroom footage, no matter how edited and selective it may be, the viewer has a keen sense that they are seeing what "really happened". This can be an entirely inaccurate but strong perception. The photographic image tends to imprint itself in a more long lasting and emotive way on the viewer's mind than does conventional media coverage. As such, the prejudicial impact from filming in court can be more deeply rooted, insidious, and long lasting.

C. Impact on the Testimony of Witnesses

Camera advocates contend that cameras in the courtroom will have no effect on the testimony of witnesses. They argue that the courtroom is a public place. Evidence must now be given in public, even if cameras are not present. Witnesses now know that news reporters can be present. Every word a witness says can be transcribed and reported to the public. Media advocates thereupon ask: "What difference would a camera make?"

This line of argument ignores the core aspects of human nature and of the camera. As is described earlier, most television journalists and other public celebrities are quite used to performing in front of a camera. Most witnesses in court are neither public celebrities nor journalists. They have no experience in front of a television camera. Yet

they would have a great deal of experience with watching television and knowing of its dramatic impact on mass audiences. It is normal for a layperson who is shown on television in other contexts to receive comments from friends and acquaintances that they have now become "famous", a "star". It is unrealistic to expect that people can readily disabuse themselves of their natural tendencies to pose for the camera.

How is it that witnesses in a courtroom could be assumed to be immune to the dramatic impact of a camera, especially if they object to being filmed? As indicated above, participation in the court process, even without cameras, engenders stress and anxiety on all but the most fearless. Superimpose on this delicate, stressful and vulnerable situation the glaring eye of the television camera, the prospect that one's split second responses may be depicted on millions of television screens, and the possibility of subjection to instant replays if there is a dramatic error, admission or mistake. It is hard to imagine how cameras could *not* have some impact on the witness, especially if the witness does not consent to being filmed. Before one can accept the suggestion that cameras in the courtroom will not have an impact on a witness's demeanour on the stand, one must ignore the natural reaction people have to cameras and must disregard the overwhelming pressures and anxieties which a witness generally experiences when performing in court.

What are the implications for the administration of justice if we permit witnesses to be forced to be filmed while on the stand over their objection? Experienced trial lawyers know beyond any doubt that the courtroom is a very volatile place. The outcome of a case is dramatically affected both by the particular wording of a witness's response to a lawyer's probing, and by that witness's demeanour during questioning. The slightest pauses between questions and answers, the momentary changes in facial expressions, and the like can influence the judge's or jury's assessment of a witness's credibility. The witness's overall performance while testifying results from the confluence of the matrix of pressures and anxieties associated with the testimonial process. The experienced trial lawyer knows that no matter how many times a witness reviews their testimony with counsel in advance of a court proceeding, their performance in the witness box can include significant surprises.

Any new pressure introduced into the courtroom's subtly pressured environment can well affect what the witness says in the stand, how he or she says it, and how he or she looks while testifying. This in turn can influence how the judge or jury perceives the witness as they give evidence. Every jury is instructed by the presiding judge that to assess a witness's credibility they should take into account the witness's testimonial demeanour. Juries and judges routinely interpret a witness's nervousness or reluctance as a possible sign of dishonesty, or dubious credibility. If these perceptions are induced by the camera rather than by actual dishonesty, the camera serves to distort the fact finding process. This undermines the proper administration of justice and the right to a fair trial.

The camera's impact on witnesses can vary. Some who testify in front of a camera may become more outgoing or obnoxious, playing to the camera. Others can become more nervous, distracted, reluctant to testify, and more hesitant while answering counsel's questions. Still others may not be willing to testify at all in front of cameras.

If forced to testify under subpoena, and to be cross-examined as an adverse witness, the quality of a reluctant witness's evidence can suffer significantly, as compared to a willing and cooperative witness. As a legal formality, the subpoena and the adverse witness process are important tools. As a practical matter however the reluctant adverse witness who is forced under subpoena to testify and who must be cross-examined by the counsel calling him or her is a very shaky foundation on which to build a prosecution or defence.

Perhaps the ultimate proof that cameras in the courtroom can have an impact on witnesses came from three witnesses who testified for the Crown in the *Squires* case. Two leading U.S. criminal defence lawyers and one district attorney each testified that they had developed techniques to exploit television cameras in the courtroom as a tactical device to manipulate witnesses. While cross-examining an opposing witness, counsel would begin by standing in a position out of line with the camera. The witness would thus look at the questioning lawyer, and away from the camera, while testifying.

While conducting the cross-examination, the counsel would gradually move. They would eventually situate themselves in a position which is directly in line with the camera. This is achieved by slowly walking over to the jury box while questioning the witness, as the camera was placed in the back of the court, beyond the jury box. When counsel confronts the witness with the culminating question in cross-examination which presents the witness with a lie or inconsistency in their earlier testimony, the witness, while looking at counsel, must also look right into the camera's glaring eye. The witness wilts.

To the cross-examining counsel, it does not much matter whether the witness wilted because of the camera's eye, or because of the confrontation in cross-examination. Either way, the witness looked nervous at a critical point in the cross. The impact on the jury would favour a finding that the witness was not credible.

Trial lawyers are ultimately a result-oriented lot. They use what works. If U.S. trial lawyers have found that cameras in the courtroom can be subtly and carefully used to put increased pressure on an opposing witness, this is so because of the technique's effectiveness.

In response to these serious concerns, camera advocates contend that even if it were surmised that cameras in the courtroom have an impact on some witnesses, they will not affect every witness. However, it is not necessary for cameras to adversely affect every witness before the right to a fair trial is threatened. As long as any witness is affected, a material risk is posed to the right to a fair trial. This risk may not be quantifiable in advance, because the outcome of a trial is often unpredictable and fluid up until the last moment. However, once the damage is done, it cannot easily, if ever, be undone.

As well, camera advocates will answer that witnesses will get used to the cameras after a while. Their impact, if any, will thus dissipate. Even if it were assumed that some witnesses might get used to the cameras after a time, the camera-induced harm may already have been caused in the interim. As mentioned above, most witnesses testify for relatively brief periods of time. They may have gotten used to the camera, if at all, only after they have given their critical testimony.

D. Impact on Lawyers

Camera proponents assert that cameras in the courtroom will not have any impact on the behaviour of counsel. They reject suggestions that at least some lawyers will play to the cameras. As a fallback position, they suggest in the alternative that counsel who will play to the media would do so whether or not there are cameras.

Some lawyers will deny that counsel would play to the cameras, invoking platitudes of professionalism. However, the legal profession includes a heterogeneous population. Within this group are some for whom cameras would provide a welcome new audience, either to feed a public perception that they champion important causes, or as a means for developing clientele. As well, the legal marketplace is quite competitive. A lawyer's exposure to the public through televised court proceedings can give them far greater notoriety than does conventional media coverage.

Media advocates also contend that cameras in the courtroom will make lawyers prepare more thoroughly for court. If a lawyer knows that his or her case is going to be televised, they will not wish to look like a fool. This, it is argued, will contribute to more effective lawyering, and thus to the improvement of the administration of justice.

If this claim were true, then it contradicts the earlier media contention described above. Either cameras affect lawyers or they do not. If they do not affect lawyers at all, as some media advocates argue, then they cannot be expected to have a salutary impact on counsel's preparation. If, on the other hand, they do have the salutary impact on lawyer preparation, then it must be accepted that the cameras can influence lawyers' conduct. If it is conceded that cameras can influence lawyers' behaviour, then they can equally have an adverse impact on at least some counsel, inducing them to grandstand for the cameras.

Even if one does not wish to delve into the bog of lawyers' egos or economics, it is beyond debate that the introduction of cameras in the courtroom, particularly over the objection of witnesses and parties, will place significant new burdens on counsel. It will be the lawyer's responsibility to be ever-vigilant to detect any prejudicial camera-induced impact on witnesses. It will also be counsel's responsibility to place on the record at trial arguments about the camera's prejudicial impact, if the lawyer happens to notice its transitory effects when they occur. When media parties intervene in a proceeding to demand that cameras be permitted to film the case, it will be the responsibility of the lawyer, opposing cameras, to divert scarce time and resources to argue in opposition to the media requests.

Media advocates also suggest that the lawyer will quickly forget that the cameras are present in the courtroom. They will become absorbed in the regular pressures of advocacy. However, this would be irresponsible on the part of the lawyer. Because cameras in the courtroom, over the objection of the parties and witnesses, can generate the kind of prejudicial impacts described in this article, the lawyer is duty-bound in his or her client's interest to be ever alert to the camera's presence and impact. The lawyer cannot afford to forget the camera.

E. Impact on Jurors

Media advocates similarly urge that cameras in the courtroom would not have any adverse impact on jurors. Jurors are sworn to do their job of fairly trying the case on its merits. They will do the same job whether the cameras are present or not, it is contended. They urge that we should have faith in the integrity of Canadian juries.

Patriotic invocations of faith in the jury system provide no answer to the problems which cameras in court pose for the jury. To the contrary, cameras in the courtroom can have varied kinds of impact on jurors. Jurors may fear being depicted on television, and being identified in association with the proceeding, particularly in a criminal case. They could consciously or unconsciously fear that the accused's friends or associates might seek to secure retaliation against them, especially if they return a guilty verdict.

Media advocates respond that this concern can be solved by a guarantee that they will not film and broadcast the images of jurors. There are two problems with this solution. First, jurors will not necessarily have any confidence that the media will comply with this requirement. They would not know for certain that the media have complied with any such undertaking until the case is completed. Jurors are instructed not to watch television coverage of the case while the trial is ongoing. They would be left in doubt on this important matter when they most critically require real certainty. They would not know whether they had been depicted on television until it is too late.

Second, past experience reveals that the media cannot necessarily be trusted to always honour a requirement that they not visually identify jurors. In 1984, the CBC filmed a murder trial in Kingston, Ontario pursuant to section 67 of Ontario's *Judicature Act*. CBC secured the consent of the parties and witnesses and the trial judge's approval. As a precondition, CBC had undertaken that jurors would not be identifiably depicted in the ensuing documentary. CBC violated this commitment. The nationally broadcasted documentary clearly included the recognizable images of some jurors.[13]

If the cameras influence the testimony of any witnesses, as described above, this can in turn seep into the jury's assessment of the case. As well, the cameras can distract the jurors themselves, when they should be looking at the witness who is testifying. Being on camera is undoubtedly a novelty. Being a juror is undoubtedly a novelty. If the two are mixed together, justice may not result.

Cameras in the courtroom can have an additional impact on the jury, beyond the foregoing concerns. The fact that the media have decided to televise a particular case, in whole or in part, can signal to jurors that there is something special or extraordinary about the case. Jurors, like the rest of the public, know that most cases are not televised. They know as well that most cases would not be televised even if cameras in the courtroom were permitted more widely than at present.

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13. The use of courtroom footage in the documentary on this case is analyzed in J.M. Linton & M. Gerace, *supra* note 10.

Where cameras are liberally permitted in U.S. courtrooms, it is rare that cameras are present for the whole proceeding. More frequently, cameras will appear for only part of the case, if the news outlet is getting close to deadline, and has competing demands on its scarce camera crews. They may simply show up long enough to get some good footage and then leave. The cameras could be present for a witness during examination-in-chief, but not for the cross-examination.

When cameras are present for only part of the testimony, this could readily signal to one or more jurors that only part of the testimony was really important. Similarly, if the cameras are directed not to film the face of a particular witness (such as a sexual assault complainant), in order to preserve her anonymity, this could signal to the jury that this witness is somehow special or different, and merits special treatment. It would defy human nature to expect that a judge's correcting jury instruction could totally rectify these perceptions.

Discussions about jury deliberations are somewhat difficult by virtue of the fact that jurors in Canada cannot publicly discuss their deliberative processes.[14] Even where cameras have a prejudicial impact on some or all jurors, we will not be able to detect this through any disclosure by the jurors themselves.

F. Impact on the Judge

Proponents of cameras in the courtroom also contend that cameras will not have any impact on the presiding judge. Camera advocates play upon our confidence in judges' professionalism, and thus position camera opponents in the unsavoury role of doubting the abilities of judges.

Yet, there is a sound basis for being concerned about the potential impact of cameras in the courtroom on judges. At the very least, cameras in the courtroom will place significant added burdens on the judge. The judge will have to police the cameras, to ensure compliance with all rules, and to try to prevent any prejudicial camera-induced impact.

Unfortunately, the judge is not necessarily in a good position to effectively discharge these duties. The judge may not notice that the camera is distracting a juror, if the judge's eyes are fixed on a witness during important testimony. Similarly, the trial judge may not notice one counsel seeking to take advantage of the presence of the camera, if the judge's eyes are on the jury. If his or her eyes are cast downward while writing notes during testimony, the judge will not be in a position to police anything.

Judges are experienced with administering justice in public. However, they are no more experienced than the average lay witness in being broadcast to the television screens of untold thousands or millions of viewers. Serving as a trial judge is far from

14. It is of interest that it was held in *Ladone* v. *Lerner*, 521 N.Y.S. 2d 760 (1987), that filming oral argument can have a negative psychological impact on the jury.

simple and stress-free, especially in a difficult and controversial case, such as those attracting intense media attention. Unless trial judges are believed to be devoid of the normal human reactions to television cameras, then it is only reasonable to conclude that cameras can affect at least some judges' conduct to some extent.

G. Impact on Crime Victims

Camera advocates also reject any suggestion that cameras in the courtroom will have an adverse effect on crime victims. They argue that any problems experienced by crime victims in the criminal justice system already exist and that cameras will not make things any worse.

We must look closely at the circumstances now confronting crime victims. Our criminal justice system depends heavily on crime victims' willingness to come forward to report offences and to testify in court. Absent this, the police will experience greater difficulty acquiring criminal evidence. Without the victims' cooperation and effective testimony, the Crown's capacity to meet the very high burden of proof in a criminal case is significantly impaired.

Without television cameras in the courtroom, crime victims are now very reluctant to report their victimization, and to testify in court. Thus, much crime goes unreported and/or unprosecuted. Many criminal offenders go unconvicted and unpunished. As a result, both the public and individual victims suffer.

Those victims who do opt to report their victimization and testify, often now find their involvement in the justice system to be highly stressful and psychologically traumatic. Their participation in the criminal justice system is frequently described as a "second victimization". It reactivates the trauma associated with their original victimization at the hands of the offender. At the core of this second victimization is the victim's sense of loss of control over their circumstances, akin to the loss of control that they first experience when the crime was perpetrated against them.

If cameras are admitted into Canadian courtrooms over the objection of court participants such as victims, this can only worsen the troubling situation now confronting crime victims in our justice system. It will make victims more reluctant to report their victimization. Why would they want to subject themselves to the brutality of cross-examination on television? Why would they want to have their image splashed all over the television, so that they can be immediately recognized on the streets as a crime victim? The status of "victim" already carries with it a great deal of stigma and pejorative stereotype. Why would they want to make it easier for the accused's associates to record their picture on a VCR? This would enable them to recognize the victim and to take retaliatory action against them, even if those associates are not present in the courtroom during the victim's testimony.

Even if the victim is willing to report their victimization and to testify despite the foregoing concerns, their experience in the courtroom can only be made more stressful by

the presence of cameras. Subjection to harsh cross-examination is an unfortunate but necessary feature of our criminal justice system. The instantaneous transmission of this ordeal to a television audience at home need not be.

The "second victimization" trauma of participating in the court process will tend to be exacerbated by the repeated instant replays on nightly newscasts of dramatic courtroom scenes, such as a victim breaking down in tears in the face of harsh cross-examination. It is reasonable to expect that this will occur. The media tend to select the most dramatic courtroom scenes and to replay them again and again. We have all seen television replays of the testimony of the Mount Cashel orphanage victims, describing in detail their sexual violation at the hands of those who were charged with their care. These were aired across Canada, not only during the actual hearing itself, but as well for years afterwards during documentaries on child sexual abuse. For a victim who has had months or years after the trial to put the twin traumas of initial victimization and second victimization behind him or her, recurring instant replays on television can revive and reopen old wounds, in a fashion that the testimony at trial could not.

H. Public Perception of Justice

To sum up the preceding arguments, media advocates contend that cameras in the courtroom absent parties' or witnesses' consent will not cause any actual prejudice to the right to a fair trial or the proper administration of justice. As such, they submit that the discussion need go no further. Cameras should simply be permitted.

This approach disregards the second of the twin core requirements of the proper administration of justice. It is critical for justice not only to be done in fact, but as well, for justice to be seen to be done. It is thus critical to ask not only whether cameras in the courtroom will actually cause injustices, though, in this author's opinion, they will. It is necessary to inquire further. We must ask whether cameras in the courtroom, particularly over the objection of court participants, will create a public perception that justice is not being done. It is trite that public confidence in the administration of justice is critical to the effective operation of the justice system.

Cameras in the courtroom can create a public perception of injustice, especially if they are there over the objection of court participants. The public's confidence in the administration of justice can erode if there is a public perception that witnesses in a televised case were made more reluctant to testify because of cameras, or that lawyers played to the cameras to their client's detriment. Similarly, public confidence in the judicial process can be undermined if there is the perception that the trial judge was responding to the presence of cameras in his or her rulings, or that the jury was distracted, intimidated or otherwise influenced by cameras.

I. Impact on the Administration of Justice and Effective Law Enforcement

Camera advocates traditionally focus on the impact of courtroom filming on the accused's right to a fair trial, arguing that there is no adverse effect. However, in addition to the accused's fair trial interests, the public has fair trial entitlements at stake as well. This is usually articulated from the prosecution's perspective. It is characterized as the public's interest in the proper administration of justice and in effective law enforcement.

If cameras in the courtroom present the problems described above, they threaten not only the accused's fair trial rights but the public's fair trial rights as well. To the extent that Crown witnesses are not able to give effective testimony, or that victims and/or witnesses are reluctant to report crime and testify, or that jurors are made more reluctant to convict the guilty for fear of reprisals, the proper administration of justice is thwarted and offenders may go free. This undermines effective law enforcement.

J. Invasion of Privacy

Camera proponents argue that the introduction of cameras in the courtroom over the objection of court participants, will not cause any invasion of privacy for court participants. They argue that in a public courtroom, there is no such thing as "privacy". The courtroom is a public place, pure and simple. Once an individual enters this public place, they are susceptible to being photographed for broadcast, whether they like it or not.

Such a view fails to acknowledge the actual experience of individuals caught up in court proceedings, and the expanding recognition of the importance of privacy in Canadian law and society generally.[15]

As a practical matter, privacy is not an all or nothing phenomenon. A person is not automatically stripped of all privacy when he or she walks in public generally, or enters a courtroom in particular. Privacy is an important incident of personal dignity. It can exist in varying degrees, whether or not one is in public.

When a person enters a public courtroom, they know that they can be recognized by anyone in the courtroom, and that every word that is spoken during testimony is transcribed for the official record. They do not thereby automatically submit to becoming rendered instantly visually recognizable by any member of the public in their community, across Canada, or internationally. Yet, a television camera can suddenly create this mass recognizability. The camera thereby invades ones privacy in a fashion which conventional media coverage does not, even though conventional coverage can include exhaustive reports on the proceedings.

A television camera can intrude upon a witness while in the witness box in a way that a spectator in the courtroom cannot. When a spectator sits in the body of the court, they can only observe the witness from a discrete distance. A witness would certainly

15. For some indications of the Supreme Court's increasing acknowledgment of privacy in general, see for example, *Hunter* v. *Southam Inc.*, [1984] 2 S.C.R. 145; *R.* v. *Duarte*, [1990] 1 S.C.R. 30; *R.* v. *Wong*, [1990] 3 S.C.R. 36.

experience a substantial invasion of their personal space, if the spectator walked up to the box while they were giving evidence, and planted themselves two feet away from the witness. As is mentioned above, a television camera can zoom in on the witness as closely as this. This constitutes a unique kind of privacy invasion.

U.S. courts and Canadian media take the absolute, unwavering position that once a person enters a public venue such as a courtroom, their privacy is wrenched from them in its totality. The Supreme Court of Canada has enunciated a different perspective on privacy. Reflecting Canada's more sophisticated, delicately balanced conception of open justice, the Supreme Court of Canada has acknowledged that in a proceeding held in a public courtroom, court participants can still retain a measure of their personal privacy. It has recognized that privacy is a value of superordinate importance that can override the freedom of expression in relation to court reporting, at least in some circumstances.[16] This derives from the court's acknowledgment that open justice principles can be superseded by social interests of superordinate importance such as protection of the innocent.[17] It is constitutionally permissible for the court to ban the media from reporting on the name of a sexual assault complainant, even though the entire sex assault trial is carried on in public, and even though every other aspect of the case can be reported.[18] Consistent with Canada's recognition that participants in a public court proceeding can retain a residual privacy interest, cameras in the courtroom can invade this residue of privacy.

K. Access to Justice

In support of courtroom filming, it is also argued that cameras in the courtroom, even over the objection of court participants, would not undermine the public's important right of access to justice. The justice system is accessible to all, whether or not cameras are present, they argue.

This contention suffers from the same flaws as the preceding ones supporting non-consensual courtroom filming. Cameras in the courtroom, if permitted over the objection of court participants, do pose a serious and substantial threat to the right of every member of the public to access to justice. By "access to justice" is meant the right of every individual to avail themselves of the justice system, to seek redress of their grievances, whether criminal, civil, matrimonial, or otherwise. We have a justice system so that people can have open to them a civilized and orderly method under law to resolve disputes. To use this process, individuals must have a practical means of access to the justice system. If there are physical barriers to such access, such as a picket line,[19] or economic impediments to access, such as prohibitive costs, then the right of access to justice is illusory.

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16. See *Edmonton Journal* v. *Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; The court there, did not find the impugned legislation to be valid, however it acknowledged that more narrowly tailored legislation, targeted at promoting individual privacy, could be justified under Charter section 1.

17. *Attorney General of Nova Scotia* v. *MacIntyre*, [1982] 1 S.C.R. 175 at 186-187, Dickson J.

18. See *Canadian Newspapers Co.* v. *Canada (Attorney General)*, [1988] 2 S.C.R. 122.

19. For example see *B.C.G.E.U.* v. *British Columbia (Attorney General)*, [1988] 2 S.C.R. 214.

How could cameras in the courtroom undermine the right of access to justice? As was the specific case of crime victims discussed above, individuals who require access to justice for a redress of their civil grievances may similarly find that the possibility of being televised in court over their objection deters them from using the justice system. Our justice system is already severely criticized as being practically inaccessible to many. It would become even more inaccessible as a result of cameras in the courtroom over the objection of court participants. This is especially the case for vulnerable groups such as battered wives who are in special need of the courts as a means for protecting themselves from their violent husbands.

L. Improved Technology — New Miniaturized Television Cameras

Camera advocates will concede that in the years before the 1970's, television cameras may have posed problems for the administration of justice when they were admitted to court proceedings. They contend that the original objections to courtroom filming were due to the fact that before the mid 1970's, television cameras used to be large, loud, and supported by bright lighting. Camera advocates admit that those older cameras were disruptive and distracting in court proceedings. They urge that newer video cameras are now much smaller and silent. They can function in normal illumination without requiring additional bright lights. Thus, they argue that cameras will no longer be disruptive to court proceedings.

This argument begs the critical question. The position presented in this article is not premised on any assumption that cameras are noisy, physically disruptive, or demanding of special lighting. It is assumed throughout that silent, discreetly-placed cameras could be used to film in a courtroom without special lighting. This is subject to two factors. First, the camera is not invisible, unless it is hidden behind courtroom walls — something which most Canadian courtrooms cannot now accommodate. Second, microphones must be placed in front of the lawyers, the witness box, and the judge. This may not pose a difficulty in some courthouses. Some Canadian courtrooms are already equipped with microphones to aid in the production of the official record of the proceeding for appellate purposes.

The adverse impacts of courtroom filming, delineated in this article, arise solely from the fact that the proceeding is being filmed in whole or in part without the consent of all court participants. The judge, jury, witnesses, parties and lawyers, as well as prospective witnesses who might come forward to testify, will all be aware that the proceeding is being filmed, even if the camera is silent and unobtrusively located and indeed even if the camera is secreted in the courtroom wall out of sight. It is this fact, and not fears associated with large glaring lights or noisy videotape reels, which trigger the adverse effects on court participants.

M. Learning From the American Experience

Proponents of cameras in the courtroom argue that the American experience with courtroom filming has proven this practice to be beneficial and problem-free. The Americans, it is argued, have already examined all the key issues in this debate. They have undertaken rigorous experimentation with cameras in the courtroom, and have proven courtroom filming to be effective and desirable. The American experience is said to show that the more one has experienced with cameras in the courtroom, the more quickly the old, undocumented fears evaporate.

Each element of this contention is erroneous. It is true that some U.S. states undertook trial periods with cameras in the courtroom. However, this was only done in a minority of the States that now permit cameras.

Moreover, of the so-called "experiments" conducted in the late 1970's and early 1980's, none were conducted in a scientifically-valid way.[20] Florida, one of the first to convene such an experiment, openly admitted that it had declined to use a scientific method of evaluation.[21] The results of these "experiments" do not provide a proper basis for making policy or legal decisions.

It would be erroneous to suggest that the few States which undertook trial periods with television cameras in the 1970's and early 1980's, proved courtroom filming to be problem free. These inquiries tended to yield evidence showing that cameras in the courtroom could pose problems for the administration of justice, at least to some extent. Some witnesses, jurors and lawyers reported difficulties caused by television filming in the courtroom. It was decided by the States in question to go ahead with permanent permission for courtroom filming despite these adverse effects.[22] A most cursory examination of current U.S. experience with cameras in court triggers serious concerns about this practice's propriety. Women who have been victimized by sexual assault would likely be more reluctant to report their victimization to the police after the nation-wide televising of William Kennedy-Smith's sex assault trial. Even if O.J. Simpson were to

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20. G. Gerbner, "Trial by Television: Are We at the Point of No Return?" (1980) 63 Judicature 416; G. Gerbner, "The Risk of Playing to the T.V. Cameras", (1994) 137 New Jersey Law Journal 22; D. Slater & V.P. Hans, "Methodological Issues in the Evaluation of Experiments with Cameras in the Courts" (1982) 30 Communication Quarterly 376; M.C. Gerace, "Televised Trials: The Case Against Implementation" (1984) 3 Advocates' Society Journal 7; *R.* v. *Squires*, *supra* note 2 at 334-341.

21. See *Re Petition of Post-Newsweek, Stations, Florida, Inc.* for Change in Code of Judicial Conduct, *supra* note 1.

22. *Re Petition of Post-Newsweek Stations, Florida, Inc., ibid.* at 767-769; *Report of the Minnesota Advisory Committee on Cameras in the Courtroom to the Supreme Court*, vol. II (1982); *The Chief Justices' Special Committee on the Courts and the Media*. The State of California, Sacramento (1981); *The Advisory Committee to Oversee the Experimental Use of Cameras and Recording Equipment in the Courtroom*: Report to the Supreme Judicial Court Commonwealth of Mass. (1982); Report to the Supreme Court Committee to Monitor and Evaluate the Use of Audio and Visual Equipment in the Courtroom. The State of Wisconsin (1979); In Rre Society of Professional Journalists, (1986) 43 Utah Adv. Rep. 26 (Supreme Court of Utah); *In Re Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct*, 441 N.W. 2d 452 (Minn. Sup.Ct. 1989). See also D.J. Henry, "Electronic Public Access to Court: A Proposal for its Implementation Today" in P. Anisman & A.M. Linden, eds., The Media, The Courts and The Charter, (Toronto: Carswell, 1986) at 452-457.

secure a fair trial after the televised obsession with his case, any verdict would forever abide under a cloud of suspicion of potential camera-induced prejudice.

Before deciding to admit cameras into Canadian courtrooms even over court participants' objection based on the American experience, regard should be had to the fact that a number of U.S. states would themselves not permit courtroom filming without participant or party consents. It is also important to consider critical legal differences between the American judicial system and Canada's. Many if not most state American judges, district attorneys and in some cases public defenders are elected to office. State rules governing court filming are not made by state legislatures. Usually they are promulgated by the courts themselves.

Elected state judges, who must seek re-election, could reasonably be seen to have a very strong personal interest in admitting television cameras into their courtrooms, just as Canadian parliamentarians had an interest in allowing television cameras in the House of Commons and in provincial legislatures. Our judges are not elected. They administer justice in a somewhat different milieu than their American state counterparts.

The American examination of issues surrounding cameras in the courtroom, before their permanent introduction, was limited in scope. It failed to address critical issues which are fundamental to Canada's consideration of this issue. In the United States, the core question which was examined was the admittedly crucial issue of whether cameras in the courtroom would threaten the fairness of trials by, for example, affecting the quality of testimony of witnesses, the behaviour of lawyers, or the deliberations of jurors.

Yet, little if any attention was directed in the U.S. debate to the question whether cameras in the courtroom would deter witnesses and victims from coming forward to testify, or from reporting crimes to the police. The prospect that courtroom filming might make the victim's experience with the justice system even more psychologically traumatic was not weighed in the balance. At most only minimal consideration was paid to the question whether cameras in the courtroom over the participants' objection would deter potential plaintiffs from using the justice system for civil redress, undermining the right of access to justice. The question of whether cameras in the courtroom threatened the inherent right to privacy of court participants was similarly disregarded or downplayed.

These are all critical policy considerations. By failing to consider them, the balancing process undertaken by U.S. states in favour of admitting cameras was a lop-sided one, which biased in favour of the media. It was a process which Canada should not replicate.

N. Alternative Methods to Prevent Adverse Affects

If media advocates are confronted with the litany of adverse affects that courtroom filming can have on court participants, particularly where they are forced to be filmed over their objection, they fall back on a second line of defence. They may concede

that courtroom filming may on occasion cause some of the problems described above. However, they urge that these problems can be controlled by appropriate court rules, short of a requirement that all participants consent before the camera can be brought in.

Yet, no alternatives will work as effectively. The only measure which can truly prevent these problems is a rule requiring that courtroom filming will not be allowed except with the consent of court participants. This is demonstrated by the following review of the most commonly proposed alternative ways for controlling courtroom filming's adverse effects, short of a strong consent requirement:

1. Rules Restricting Numbers and Locations of Cameras

Media advocates point out that in most if not all American states that allow cameras in the courtroom, detailed rules have been devised to regulate the process. They limit the number and location of cameras that can be permitted in the courtroom at any one time. They require media outlets to share the feed from the limited number of cameras that are permitted in the courtroom. They preclude the cameras from being moved while proceedings are in progress.

These rules can undoubtedly help ensure orderliness in the courtroom. However, they do not address the major problems with courtroom filming discussed above. Moreover, while these rules may look good on paper, there can be no assurance that the media will consistently obey them.

Where a breach of these rules occurs, such as a camera person moving a camera around the courtroom during testimony, the trial judge confronts a catch-22. He or she can stop the proceedings and order the camera person to stop disrupting the proceedings, thereby causing a further disruption through the interruption of testimony. Alternatively, the judge can let the camera person continue to breach the rules. While this avoids an interruption of the proceeding's flow, a camera-induced distraction in the courtroom is tolerated.

2. Availability of Rights to Appeal

Media advocates have argued that we should not be concerned about the hypothetical possibility that cameras in the courtroom, over the objection of court participants, might cause prejudice in some cases. If there is any prejudice to a party, it is emphasized that they always have a right of appeal from an adverse finding on the merits of their case.

This is unacceptable as a solution to the problems posed by courtroom filming. It unfairly leaves the onus on an objecting party to finance and fight an appeal when the media has caused prejudice. At its core, the argument provides that we, the media, may cause the prejudice, but you, the victim of this prejudice, must thereafter take the steps to rectify it.

As well, rights of appeal may not always be sufficient to redress camera-induced problems. The adverse effects that cameras can have on a witness, juror, lawyer, or judge may be transitory, and may not be documented in the court record. There may be no foundation in the transcript upon which an appeal can be launched.

3. Bleep Out Names and Blot Out Images of Sensitive Witnesses Deserving Anonymity

Media advocates also propose that if the witness can persuade the court that they should not be filmed, there are electronic means for ensuring that they will not be visually identified. Their names can be bleeped out from the audio broadcast. The camera can be pointed away from the witness's face when they testify. Alternatively, a blue dot can be placed over their face while testifying to preclude anyone from recognizing them, as was done in the case of the sexual assault complainant in the William Kennedy Smith trial.

There are two problems with this approach. First, despite the media's best efforts, these methods may not prevent the name from getting out. For example, when such an arrangement was attempted in one nationally-televised sex assault case near Boston, there was a failure to bleep out the name of a sexual assault complainant. As a result, the name got out onto the airwaves. In that highly-publicized case, the sex assault victim had to eventually be relocated to another state. Similarly, even without such an error, friends and associates may nevertheless recognize the protected witness's voice, or otherwise piece together their identity from the onslaught of details that will become available through the broadcast of the proceedings.

Second, even if these difficulties do not occur, sexual assault complainants and others who might be entitled to have their identities bleeped out may nevertheless feel incredible pressure to consent to being identified, even though they don't want to be. This is what eventually happened to the complainant in the William Kennedy-Smith sexual assault prosecution. During the trial, her face was covered by a blue dot. However, after the accused was acquitted in a case which was largely a credibility contest, she eventually succumbed to enormous pressure to identify herself publicly. This was because the "blue-dot" made it look like she had something to hide, and that she was deserving of less credibility in the eyes of the public. It does not promote the proper administration of justice, or motivate already reluctant sexual assault victims to lay charges and testify, if our justice system were to confront vulnerable persons with the cruel choice of either surrendering their anonymity on the one hand, or appearing to have something to hide from the cameras, on the other.

4. Give Court Discretion to Disallow Cameras where Circumstances Proved to Warrant it

Camera advocates also suggest that the court should not automatically preclude courtroom filming when there is an absence of consent from the parties or witnesses. They fear that people will rarely if ever consent, and that in the result, it will be very difficult to ever get cameras into courtrooms. They would prefer it if the media had the right to film proceedings, unless an objecting party or witness could affirmatively persuade the court in the case's specific circumstances that it was justifiable to preclude filming of them.

This "judicial discretion" alternative to a consent requirement does not sufficiently address the problems posed by courtroom filming. The fact that witnesses and/or parties will often not consent to filming is indicative of the fact that cameras in the courtroom can pose a serious problem for the justice system. As well, it is entirely unfair to place upon a party or witness the burden to prove why they should not be filmed. The witness or party may not wish to publicly disclose their potential vulnerabilities. A judicial discretion rule unfairly forces a party to disclose to the opposing party potential weaknesses in their case. If it is the accused who does not wish to be filmed while testifying, this approach would require the defence to disclose to the prosecution at an early stage that the accused intends to testify, as part of a motion to exclude the cameras for cause. Ordinarily, the defence does not have to reveal in advance to the Crown that they intend to call the accused as a witness, much less that the accused has some fears regarding the giving of evidence. The defence may well feel that such early disclosure could compromise their defence strategy. The accused may be placed in the unacceptable position of either enduring the cameras, not testifying at all, or making early disclosure of the defence's intention to call the accused. Neither may be an acceptable option.

Such a judicial discretion rule also places the trial judge in an untenable position. How is the trial judge to know in advance whether the witness's objection to being filmed is valid? Would the parties be expected to call expert psychiatric testimony documenting the witness's sense of vulnerability to the cameras? Would media counsel be permitted to cross-examine the objecting party to test the strength of their reasons for not wanting to be filmed before the trial on the merits can begin?

If the trial judge is to rule on the claim for exclusion of the cameras on more than mere speculation or surmise, he or she would have to conduct a voir dire or mini-trial on the claim of an exemption from filming. The claim's outcome would likely depend primarily on the trial judge's appraisal of the witness's or party's credibility, perhaps bolstered by expert evidence. It would be inappropriate to call upon the judge to prejudge a witness's credibility before they reach the point in the case where they testify on the case's merits.

Under a judicial discretion rule, media interventions in the trial on collateral camera issues could disrupt and delay the proceedings on the merits. Depending on the applicable procedural law, media interventions under a judicial discretion rule could also generate interim appeal proceedings. These could further divert and detract from the resolution of the dispute between the parties which brought the case to court in the first place.

5. Allow Courtroom Filming on Appeals

Finally, media advocates argue that if there are problems with filming in trials without the consent of witnesses and parties, then cameras should at least be allowed to film appellate proceedings without requiring consent. Yet there is still room for a consent rule when dealing with media requests to film during an appeal. Consent will be easier to get in the Court of Appeal than at trial. There are no witnesses whose consent would be needed. Some lawyers may not be reluctant to being filmed in the appellate arena. Thus, a consent requirement will not be as burdensome on the media in the appellate context.

In the face of this more limited request for courtroom filming, it is still necessary to consider whether lawyers and clients should be forced to submit themselves to courtroom filming in appellate proceedings where they or their clients object to cameras. Especially for inexperienced counsel, this could pose a real difficulty. If they fear that cameras will adversely affect their performance in the appellate courtroom, they are professionally obliged to either object to the cameras' presence, or withdraw from the case. This in turn could interfere with the clients' right to have the services of the counsel of their choice. A debate over the wisdom of filming in appellate proceedings in the absence of consent is a largely irrelevant academic exercise. The media will rarely be interested in filming appellate proceedings. What they want to film are trials, especially dramatic criminal trials which involve public celebrities, violence, sex, or some combination of these. Appellate court proceedings are dry, boring, and unlikely to hold the attention of most television audiences for any amount of time.

III. THE ASSERTED BENEFITS OF CAMERAS IN THE COURTROOM

A. Preliminary Considerations — How Courtroom Footage Would be Used

Even if cameras in the courtroom presented none of the preceding problems, the question would arise whether courtroom filming offers any significant benefits to the public. The various benefits which media advocates attribute to cameras in the courtroom are considered here. However, before examining each claimed benefit individually, it is important as a basis for the discussion to delineate exactly how the media would use film shot in the courtroom. We are in a good position to evaluate this, because we can see how the U.S. media has made use of courtroom footage over the past 15 years.

Often, media advocates suggest that the public would better learn about a case if it were filmed and broadcast gavel-to-gavel. This, they argue, would be far superior to the audience merely receiving brief conventional media reports on the nightly broadcast or print news.

However, it would be erroneous to assess the potential benefits of cameras in the courtroom by focusing primarily on the advantages which might flow from a televising of cases wall-to-wall. This is because gavel-to-gavel coverage of a court proceeding is highly exceptional. It rarely happens in the United States where courtroom filming is more liberally permitted, and would rarely happen in Canada.

This is so for several reasons. First, courtroom filming is costly. Second, it disrupts or bumps regularly-scheduled programming. Third, most cases would not draw a sufficiently massive audience to justify the expenditure of media resources and the allocation of scarce air time. Only the most visible and sensational cases would secure enough ongoing audience attention to merit displacing the soaps.

At present the Canadian media does not report to the public on the vast majority of court proceedings. This is so even though almost all cases are tried in open court and are subject to no publication bans. The small percentage of cases on which the media now reports is not representative of the overall judicial business which Canadian courts routinely transact.

The media covers those cases that reporters and editors deem to be "newsworthy". Those are the proceedings which are the most immediate, important and interesting from the audience's perspective. These involve a combination of violent crime, sex, controversy and/or the alleged conduct of public figures.

When the media now opts to report on a case by conventional media coverage, reporters do not endeavour to fully cover the proceeding's entirety. Instead, they may only attend court for part of the case. They select for coverage those portions of the case which they judge to meet the foregoing newsworthiness criteria. News reporting focuses on a case's most conflictual or controversial events.

If the media could film in Canadian courts more readily than at present, they would still choose the same selective sample of cases for coverage as they now do. They would only report on the same aspects of a case as they now do. The only difference would be that coverage would include some courtroom footage to augment the reporter's narrative reportage.

Usually, brief 10 to 20 second clips from a day's proceedings would be inserted, with a reporter's voice-over explaining the context. These sound-bites will tend to portray a case's most visually dramatic moments. They can be heavily edited. The answer to a question in chief can be depicted without the question to which it responds, or any of the cross-examination on point that might elucidate the answer. In some instances, the voice-over might block out the witness's words.

Thus, the proper question to consider is whether this use of selective footage will provide any significant benefits to the public, as contrasted with current conventional media coverage of courts. Each of the media's assertions of benefits flowing from cameras in the courtroom must be appraised in light of the fact that courtroom footage will tend to be used in this way, and not generally through gavel-to-gavel simulcasting.

B. The Public's Right to Know

At the core of the traditional argument favouring cameras in the courtroom is the media's contention that to televise court proceedings would fulfill the public's "right to know". This argument suffers from four major flaws.

First, there is in law no such thing as a public's "right to know". While the Supreme Court has once adverted to such a "right to know",[23] it is doubtful that this "right" has any serious juridical status. Journalists typically use the rhetoric of a "public right to know" as a way of justifying their demands to compel access to information which they consider newsworthy. However, when a reporter on the trail of a story tells a potential news source that the "public has a right to know" about a desired piece of information, it is likely more accurate to state that in the reporter's judgment the public has a *desire* to know, or perhaps that the reporter has a desire to find out and tell.

The public does not have a general legal right to force a potential news source to pass on newsworthy information. It has been judicially recognized that section 2(b) guarantees both the right to disseminate information and the right to receive it. Section 2(b) gives rights to both speakers and listeners.[24] However, properly understood, this only pertains to the right of willing speakers to transmit information to willing listeners, and in turn, for willing listeners to receive information from a willing speaker. It should not be inflated or over-extended, so as to give a listening audience, such as the public, a right to compel access to information from a person or organization that does not wish the information released. Charter section 2(b) is not a constitutional freedom of information act.

Second, even if the public had a "right to know" of some kind, it is doubtful that a reporter can unilaterally enforce this right on the public's behalf. The media are not appointed by the public as their representative and have no legal authority to purport to exercise the public's rights. The danger of using this "right to know" rhetoric is that it can lead one to transform a claim of public interest into an assertedly higher claim of public right or, indeed, of supreme constitutional right.[25]

Third, had the law provided for a public "right to know", it would be fully satisfied by the traditional requirement of open justice, without needing the addition of cameras in the courtroom. When a courtroom is open to public attendants, including attendants by representatives of the media, and when those attending court proceedings are at liberty to fully report on the proceedings to others, then the public has ample opportunity to learn, and the media to inform about the case.

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23. *Supra* note 16.

24. See *Ford* v. *Quebec (Attorney General)*, [1988] 2 S.C.R. 712.

25. See M.D. Lepofsky, "The Role of `The Press' in Freedom of the Press", (1992-93) 3 Media & Communications Law Review 89.

Fourth, even if courtroom filming were more liberally permitted in Canada, this would not lead to any greater fulfillment of a public supposed right to know because of the limited and selective sampling of courtroom footage that would be shown to the public. The public has no way to force the media to televise portions of proceedings which editors and news producers opt not to put on the air, due to limited resources, competitiveness, or other editorial or commercial considerations.

C. Open Justice and Access to Court

Camera advocates rely heavily on the traditional principle of open justice. It is argued that for our justice system truly to be open, it is necessary that there be cameras in the court room. This article accepts as axiomatic that open justice is a core value of the Canadian justice system.[26] It does not follow from this that there must be cameras in court.

Traditionally, "open justice" includes two requirements. First, Canadian judicial proceedings should not be conducted in secret closed sessions. Courtroom doors must be open for the public to attend. Second, those who attend court proceedings should be free to report to others on what they have observed, without any judicial or other government censorship of their message.[27] These time-tested principles are founded on the need for public confidence in the judicial process, the need for judicial accountability, and the justified fear that where court proceedings are conducted in secret there is a serious risk of abuse of power by judges and other public officials akin to those experienced in the old Court of Star Chamber. They derive from the long-standing maxim that justice must not only be done, but must also be seen to be done.

According to camera advocates, it is logically inevitable that if courtrooms are to be open, they should be televised. After all, televising court proceedings advances the goals of openness. However, this conclusion does not so easily follow. To understand this, it is necessary to conceptualize the notion of openness of our justice system on a spectrum.

At one extreme of this spectrum is the closed court proceeding, with a broad publication ban that prevents anyone outside the courtroom from learning about events transpiring inside. This is the "Star Chamber" extreme. Moving along the spectrum to the middle, one finds a courtroom which is open to public attendants, and which is available for conventional media coverage. This middle ground embodies the traditional requirement of open justice. Moving to the opposite extreme we find a court proceeding which is not only open to public attendance with unfettered coverage by conventional media, but which is also broadcast to the world by television cameras, in whole or in part.

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26. See M.D. Lepofsky, *Open Justice, the Constitutional Right to Attend and Speak about Criminal Proceedings,supra* note 11, and M.D. Lepofsky, *Open Justice 1990.* "The Constitutional Right to Attend and Report on Court Proceedings in Canada", in D. Schneiderman, ed., Freedom of Expression and the Charter, (Toronto: Carswell, 1991) at 3-84.

27. *Ibid.* at 64.

Closed, secret proceedings do not secure public confidence. They do not promote judicial accountability. They run the real risk of abuse of power by judges and other public officials. To remedy this, we open the courtroom doors and free up the journalist's reportage. Once we have achieved the traditional middle ground of open justice, the risks associated with Star Chamber justice have been redressed.

It is thus erroneous to suggest that one need go further along the spectrum, to the extreme of televised court proceedings, before the concerns associated with closed and secret justice can be addressed. They already have been dealt with through traditional open justice practices, without needing to televise cases.

The argument of camera advocates is based on an unarticulated premise that unless court proceedings are televised, they are not in fact open. If so, then this would lead to the necessary conclusion that Canada's justice system is now not in truth open, despite its long standing commitment to open and public justice. This commitment is forcefully reflected in statutory and constitutional provisions as well as in innumerable oft-cited and lofty judicial pronouncements.

If we adopt the analysis propounded by camera proponents, we would not end up with a substantially more open justice system than at present in any event. As stated above, they would have it that a courtroom is not truly open unless it is televised. Yet, as detailed earlier in this article, if cameras were permitted in Canada's courtrooms on liberal terms, the media would not seek to film most judicial proceedings. Of those that they film, very little of the proceedings would be seen on the air. Hence, by their own analysis, even with broad permission to film, our courts would remain largely closed and secret, since they would remain largely untelevised.

It is highly doubtful that the 19th century proponents of open justice on whom camera advocates rely, such as Jeremy Bentham,[28] ever had in mind the mass broadcasting of court proceedings to audiences of millions, when they spoke so eloquently of the importance of public court proceedings and the evils of secret justice. Surely, proponents such as Bentham would not have endorsed as the ultimate achievement of open justice the trial of an accused person in a roman style coliseum before a live audience of tens of thousands of spectators. To them, a trial in Toronto's Skydome, packed to capacity, would have been out of the question. It would amount to a public spectacle, discordant with principles of fundamental justice.

Yet, camera advocates seek in effect to achieve what they would presumably characterize as the electronic equivalent. They argue that cameras in the courtroom enable the home viewer to have the same experience as if they were observing the trial in the courtroom itself. If a trial in the Skydome would thwart the fundamental principles of justice of which open justice is a core value, then its asserted electronic equivalent could bear no closer link to open justice.

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28. See J. Bentham, *Rationale of Judicial Evidence*, vol. 1. (London: Hunt & Clarke, 1827) cited in *Edmonton Journal*, *supra* note 16.

By another spin on their open justice argument, camera advocates contend that the public has a constitutional right of access to the courtroom. Most members of the public never physically attend a court proceeding. They are too busy, or the court is too far away. As such, television cameras provide them with electronic access to the courtroom.

This argument has two fatal defects. First it assumes that when cameras are in the courtroom, the trial will be televised in its entirety, gavel-to-gavel. As indicated above, this will be a rarity. Television cameras do not provide "access to the courtroom" for a person when they show a snippet anymore than does a newspaper columnist's reportage of a quotation from a court proceeding.

Second, this spin on the open justice argument presumes that the public can effectively use the media as its instrumentality to "attend" court proceedings by means of the television camera. A key component of the right to attend court is the right to choose which proceedings to attend. Yet, as indicated above, the public has no say in the choice of which cases the media will cover either through conventional coverage or by means of cameras in the courtroom.

D. Public Education on the Judicial Process

According to camera advocates, cameras in the courtroom would enable the media to more effectively and more accurately report on court proceedings. This will lead the public to be better informed and educated on the operations of the courts. This is said to be an important aim, since the Canadian public now knows little about our court process. It learns most of what it now knows from U.S. television.

While the aim of educating the public on the justice system is a laudable one, it is hardly one which should be pursued at the expense of undermining the proper administration of justice through the various camera-induced adverse effects described earlier in this article. In any event, cameras in the courtroom would not substantially contribute to better public education on the judicial system.[29]

Even if it were assumed that gavel-to-gavel coverage might serve an educational objective, this will rarely occur. Brief clips of dramatic scenes taken from the day's proceeding at a sensational or newsworthy case will not better educate or inform the public, or demystify the judicial process, when compared to conventional media coverage. After over a decade of cameras in many U.S. state courts, there is no solid evidence suggesting that this has led to a better informed and educated American public with respect to the judicial system.

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29. This is confirmed, for example, by the ruling of the Rhode Island Supreme Court in In *Re Extension of Media Coverage for a Further Experimental Period*, 472 A. 2d 1232 (1984). While the court decided there to extend the experimental period with cameras in the courtroom, it described the efforts of the media at educating the public to date as "feeble".

Moreover, it can appear somewhat disingenuous for media advocates to claim that the aim of cameras in the courtroom is better public education. The media did not extensively televise the Lorraina Bobbitt case because it raised any important legal issues. They televised it because of the sensational aspects of the case's bizarre facts.

When the Canadian and U.S. media broadcasted large portions of the prosecution of William Kennedy-Smith on sexual assault charges, they claimed that they were doing so to bring to the public's attention the important new issue surrounding date-rape. However, date-rape had been around for a long time, without receiving anywhere near the media attention that Kennedy-Smith secured. The truth is that they so intensively covered this case because a member of one of the most famous American families was on trial for alleged sexual misconduct. As well, his famous Senator/Uncle had to testify in his defence. The Kennedys always make good copy.

When the O.J. Simpson case received unprecedented coverage, it had nothing to do with public education on the workings of the criminal justice system. Rather, the prosecution of a sports and movie celebrity for an alleged rather typical spousal homicide provided an unprecedented opportunity for soap opera coverage, and tabloid excesses. From the outset when television cameras covered Simpson's flight from arrest, a veritable sensation was created for the public, which was fueled by national television coverage of every moment of the court proceedings, down to consent adjournments. As can happen when there are cameras in the courtroom, the media frenzy took on a life of its own, far out of proportion to the reality of the case. It was not unusual to hear members of the public and even some journalists complaining that the media coverage of this case was altogether out of hand.

If the media wished to film court proceedings for the purpose of educating the public about the operations of the justice system, they would not by mere coincidence have picked the most sensational cases to film. Should the media wish to take maximum advantage of the open justice principle to inform the public on the courts, there are thousands of court proceedings going on in Canada everyday in open courtrooms which are fully susceptible to media coverage, and which now receive no media coverage at all, cameras or no cameras. As well, if the media would like to better educate the Canadian public on the justice system, it has ample other opportunities so to do. Docu-dramas, in-depth reports and documentaries on cases and on justice issues can be equally informative and educational.

When confronted with the foregoing points, media advocates usually respond that the media should not be criticized for how they choose which cases to report and how they would use film footage. Bestowed the constitutional right to freedom of the press by our Charter, these matters should not be the subject of debate, they urge. They note that newspapers already provide selective reporting on court proceedings. Cameras in the courtroom should not be criticized for leading to the same selective process.

Such rejoinders miss the point. Camera advocates must show that cameras in the courtroom will have the additional educational benefits that they postulate, beyond those potentially available through conventional media coverage. If media advocates claim that courtroom filming will produce greater informational or educational benefits, it is entirely appropriate for these claims to be scrutinized critically.

If it turns out that the way in which news reporters would make use of this film footage will not lead to any additional informational or educational benefits, it is perfectly appropriate to point this out in response to the media claims. This does not involve any contravention or subversion of the freedom of the press. It is beyond debate that the media are free to disseminate whatever message they wish. However, the freedom of the press does not include a guarantee that the media will not be criticized or harshly judged when their reportage is found to be wanting, nor does it require us to accept on faith any contention that they advance during a policy debate.

Clearly the print media, like the television media, will be selective in the information that they choose to present to their audiences. This demonstrates that the use of film footage from courtrooms will not have any more educational benefit or informational gains than now derive from conventional media coverage of courts since the television media will employ the same selective news reporting techniques. The fact that print journalists are also selective does not make television journalism any more informative when it is selective.

At the core of the media's claim that cameras in the courtroom will lead to greater educational or informational benefit is the conventional wisdom among many television journalists that a news story must include pictures from the scene of the news event in order to be effective. Camera advocates emphasize that television news *is* pictures. Without courtroom footage, it is difficult if not impossible to effectively inform the public about the goings on in a courtroom. The audience will not watch, or if it watches, it will not understand the story in the absence of actual court footage.

While this may constitute a conventional wisdom among some, if not many television journalists, journalistic convention does not necessarily constitute objective truth. Inherent in this argument is the journalistic assumption that the Canadian viewing audience does not have the intelligence to effectively understand a report about what a witness is saying unless it is seen being said live and in colour. Yet, the vast majority of television, radio and print journalism relies heavily on narrative reports. The public keeps buying newspapers, televisions and radios, and continually tunes into its daily diet of news and current affairs programming. This media claim is also contradicted by the fact that the three most acclaimed and effective examples of television journalism over the 1980's primarily used "talking heads". "Talking heads" refers to people on the television screen talking to each other or to the viewing audience about current events or news, rather than a preponderance of action footage shot at the scene of newsworthy events. These programs include ABC's "Night Line", PBS's "McNeil, Leher Newshour", and CBC's "The Journal". The enormous audiences that these programs have attracted seem to be able to absorb complex current news and public affairs coverage, despite the absence of good visual action to reinforce the discussion in many if not most instances.

E. Public Confidence in the Judicial System

Camera advocates additionally contend that cameras in the courtroom promote public confidence in the administration of justice. They argue that much of the public

cynicism about the administration of justice is based on ignorance about the court process. Cameras will help lift the veil of ignorance, and dispel the cynicism.

This is a mere reiteration of the claim that cameras in court will educate and inform the public about the judicial process in a manner which conventional reporting cannot achieve. The arguments dispelling that claim are equally applicable here.

Recent American experience generates further doubt about the claim that cameras in the courtroom will promote confidence in the judicial system. With the intense television coverage of the O.J. Simpson case, including the televising of the preliminary hearing and suppression hearings, much of the debate surrounding that litigation has been about whether a fair trial could be achieved. Even before the O.J. Simpson trial began, public confidence in the capacity of the justice system to extend to the accused and to the public the basic entitlement to a fair trial, was at best, quite shaky.

Similarly, unbeknownst to many Canadians, the first trial in California state court of the police officers charged with beating motorist Rodney King was televised in southern California gavel-to-gavel for weeks on end. If the camera advocates are to be believed, this should have led to unprecedented public confidence in the fairness of that proceeding, and hence, substantial public acceptance of the eventual verdict. Yet, the massive riots which ensued after the delivery of the not guilty verdicts stands as perhaps the strongest evidence that cameras in the courtroom do not necessarily have the asserted public confidence-building capacity.

F. More Accurate Reporting on Court Proceedings

It is urged that courtroom filming will result in more accurate news reporting about court proceedings. Conventional media reporting by television, radio and newspapers runs the risk of subjectivity, due to the biases or personal perspectives of the individual reporter. Without video recording, there is more of a risk of inaccuracy in the rendering of information. In contrast, it is contended that the camera will provide an accurate, neutral and unmanipulatable rendering of the actuality or reality of the courtroom.

This argument flies in the face of modern teaching in the areas of film production and communication studies. The argument is rebutted by the simple fact, emphasised above, that courtroom proceedings will usually not be shown on television in their entirety. In a selective television news report that includes a brief courtroom clip, it is open to television news reporters to heavily contextualize a 10 second excerpt with voice over commentary as well as summary and analysis afterwards. Moreover, the excerpt can be edited and shown out of context. There is at least as much room for subjectivity or bias with film footage as there is without it.

The issue of news reporting accuracy is a red herring. Those who criticize existing news coverage of court proceedings rarely do so on the basis of factual error. It is not that the reporter frequently gets important facts wrong, though this of course can happen from time to time. Because court proceedings are usually transcribed by a court

reporter, a journalist can check a quotation's accuracy. Rather, it is the selectivity in which information is chosen for reporting, and the lack of adequate contextual information that gives rise to most criticism of media reporting on court proceedings. Cameras in the courtroom do nothing to address these problems.

G. Discrimination Against Television Media

Television industry advocates protest against restrictions on the use of cameras in court because there are said to be no comparable restrictions on radio or print reporters. They assert that camera restrictions discriminate against the television media. Other reporters are allowed to use the tools of their trade, whereas television journalists are not. This discrimination is said to be particularly odious since a majority of Canadians rely on television as their first source of news. The television media, they argue, should not be excluded from the courtroom if other media are not.

This discrimination rhetoric is wholly out of place in the cameras in the courtroom debate. It is erroneous to suggest that the television media is kicked out of the courtroom, while the other media are allowed in. Reporters from all three branches of the media are equally welcomed to attend public court proceedings, and thereafter to report to the public through their own chosen medium of communication.

Additionally, television reporters are not the only ones who might benefit from film and electronic recording technology, if it were permitted in courts. Print and television reporters would both wish to use pictures. Radio reporters wish to use audio clips from court proceedings and newspapers want to use still photographs. Hence, the restriction on electronic recording in the courtroom has an impact on each branch of the media, and not solely on television.

The very invocation of the term "discrimination" in this context is unwarranted. Under our Charter in particular and in Canadian law generally, the concept of discrimination pertains to adverse exclusion of minorities and groups from the mainstream of Canadian life, such as women, racial minorities, people with disabilities, and the like, who have historically suffered from social, political and economic disadvantage.[30] The television industry is far from a weak, powerless and disadvantaged group in our society. The simple fact that the law may not afford to the television industry every opportunity it wishes does not mean that this industry is the victim of discrimination.[31]

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30. See generally *Andrews* v. *Law Society of British Columbia,* [1989] 1 S.C.R. 143.

31. See the opinion of La Forest, J., dissenting on other grounds, in *Edmonton Journal*,*supra* note 16, where he rejects a suggestion that laws which differentially affect the various branches of the media may violate Charter section 15's equality guarantees. There, the print media protested under Charter section 15 against alleged legislative disadvantages imposed on it but not on the broadcast media. Section 15 prohibits legal discrimination against those disadvantaged groups enumerated in it, such as women, persons with disabilities, and racial minorities, and other similarly disadvantaged groups which are analogous to those who are explicitly named in section 15. The various branches of the mass media do not constitute an "analogous" group applying the section 15 test established in *Andrews* v. *Law*

H. Cameras in Canadian Royal Commissions

Proponents of cameras in the courtroom urge that television cameras have been present in a number of Royal Commissions across Canada over the past decade, without any problems. This, they argue, demonstrates that we need not entertain any fears about cameras in court proceedings.

This argument has several serious flaws. To begin, it is not accurate to assert as a fact that cameras have not posed problems during Royal Commission proceedings. There has been no systematic study of the impact of television cameras on the participants in these proceedings.

Sporadic anecdotal observations by a few commissioners that they did not observe any difficulties provide no basis for concluding that cameras in Royal Commissions have been problem free. A commissioner presiding at a Royal Commission, like a judge presiding at a trial, is not in a good position to know whether the cameras had an impact on the willingness of witnesses to come forward to testify, or on the conduct of witnesses, parties or counsel during the hearing, for the reasons described earlier in this article in relation to judges.

Even in the absence of formal studies, we know that there have been significant problems with cameras in Royal Commissions. For example, the Royal Commission into the sexual abuse of young boys at the Mount Cashel orphanage in Newfoundland was televised, including extended coverage of the testimony of the now-adult survivors of this child sex abuse. In a criminal proceeding concerning this sex abuse, the victims would be entitled to a legal guarantee of anonymity, through a publication ban on their identities. In contrast, the Mount Cashel victims were subjected to being televised while describing the horrendous personal violations which they had suffered as boys. The clips of the most emotional points in their testimony were replayed on television across Canada months and years after they gave their evidence to the Royal Commission. This could only serve to ensure that the serious invasion of their privacy posed by the cameras at the hearing itself was perpetuated and re-aggravated.

Similarly, when two Crown attorneys filed sexual harassment allegations against a Toronto Provincial Court judge, their testimony was televised during the ensuing 1993 judicial discipline inquiry. Cameras captured the moment when they described the details of their sexual harassment and broke into tears. This was repeatedly replayed not only on the nightly news but also in television commercials for news programs. No matter how tough and professional these women may be as Crowns, this repeated violation could only be expected to make them wonder why they subjected themselves to this process in the first place. Female Crown attorneys who are sexually harassed by judges in the future will undoubtedly think twice before they file complaints, for fear that they too, will be splashed across television screens in their most vulnerable moments.

Society of British Columbia, *supra* note 30.

Even if the experience with cameras at Royal Commissions had been problem free, it would not justify the introduction of cameras into Canadian courts absent participant consent. Royal Commissions are not the same as court proceedings, even though they superficially look similar in some respects. Royal Commissions do not decide the rights of the parties. A Royal Commission's purpose is to have as public as possible an airing of some controversial issue. In contrast, court proceedings aim at resolving the legal rights and obligations of opposing parties. While court proceedings must be conducted in public to secure public confidence and to avoid official abuse, they need not be televised.

IV. CONCLUDING CONSIDERATIONS

A. Cameras in the Courtroom and the Charter's Free Expression Guarantee

The preceding discussion has addressed the cameras in the courtroom issue as a policy debate. Some camera advocates have argued that cameras in the courtroom are not only desirable as a matter of policy, but that the media has a constitutional right to film in court if they wish. They contend that the guarantee of freedom of expression including freedom of the press and other media of communication in Charter section 2(b) includes a constitutional right to televise court proceedings, even over the objection of court participants.

There is little authoritative appellate Canadian caselaw on point. When the CBC argued before the Supreme Court of Canada that it had a constitutional right to televise provincial legislative proceedings in Nova Scotia, a majority of the court dismissed the claim on other grounds, without probing the meaning of Charter section 2(b) in so far as media filming is concerned.[32]

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

In the case of *R.* v. *Squires*,[33] CBC television journalist Catherine Squires was charged with contravening section 67 of Ontario's *Judicature Act*.[34] This section restricted the use of television cameras in courtrooms and
in courthouse corridors, to film court participants and court proceedings on terms akin to those in the successor provision of Ontario's *Courts of Justice Act*, discussed earlier.[35] She had directed a CBC camera technician to film a victim/witness on a charge of

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33. *Supra* note 2.

34. Section 67 of the *Judicature Act*, *supra* note 7, provides as follows:

67(1) *In this section,*

a) "judge" means the person presiding at a judicial proceeding;

b) "judicial proceeding" means a proceeding of a court of record;

c) "precincts of the building" means the space enclosed by the walls of the building.

(2) Subject to subsection (3), no person shall,

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

i) at a judicial proceeding, or

ii) of any person entering or leaving the room in which the judicial proceeding is to be or has been convened, or

iii) of any person in the precincts of the building in which the judicial proceeding is to be or has been convened where there is reasonable ground for believing that such person is there for the purpose of attending or leaving the proceeding; or

b) publish, broadcast, reproduce or otherwise disseminate any photograph, motion picture or record taken or made in contravention of clause (a).

(3) Subsection (2) does not apply to any photograph, motion picture or record taken or made upon authorization of the judge,

a) where required for the presentation of evidence or the making of a record or for any other purpose of the judicial proceeding;

b) in connection with any investive, ceremonial, naturalization or similar proceedings; or

c) with the consent of the parties and witnesses, for such educational or instructional purposes as may be approved by the judge.

(4) Every person who is in contravention of this section is guilty of an offence and on conviction is liable to a fine of not more than $10,000, or to imprisonment for a term of not more than six months, or to both.

35. Section 67 of the *Judicature Act* was subsequently replaced by section 136 of Ontario's *Courts of Justice Act*, *supra* note 7, which reads almost identically to the predecessor provision with two differences. First, the new provision imposes the same restriction on audio recording of judicial proceedings as has been the case for video recording. Second, an exception is made for audio recording of judicial proceedings which is permitted as an aid to note-taking, so long as the audio tape is not broadcast.

attempted murder in a courthouse corridor, while he attempted to exit in his wheelchair from an Ottawa courtroom. He had just testified at a preliminary hearing into the attempted murder charges against the suspected terrorist who had allegedly wounded him, causing him permanent mobility disability.

The accused reporter moved to quash these charges.[36] She argued that the Act's restrictions on filming in courtrooms and in courthouse corridors unconstitutionally infringe the freedom of expression and press guaranteed by Charter section 2(b).[37] At trial, a five-week evidentiary hearing ensued on the constitutional free expression issue. Both the Crown and defence called numerous experts from Canada and the U.S. to testify on the alleged benefits and harms associated with cameras in the courtroom and in courthouse corridors. The trial judge held that the Act did not violate Charter section 2(b)'s free expression and press guarantee. He went on to hold that if this section had infringed the freedom of expression, its restrictions on filming in courtrooms and in courthouse corridors would nevertheless be saved from constitutional attack as a reasonable limit on the freedom of expression, immunized under Charter section 1.[38]

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36. *Supra* note 2.

37. Charter section 2(b) provides as follows:

    2. *Everyone has the following fundamental freedoms:*

    [...]

    b) freedom of thought, belief, opinion and expression including freedom of the press and other media of communication [...].

38. Charter section 1 provides as follows:

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

The accused unsuccessfully appealed her conviction to the Ontario District Court.[39] The District Court judge upheld her conviction. Unlike the trial judge, he ruled that Charter section 2(b) does constitutionally guarantee to the media a *prima facie* right to film in courtrooms and in courthouse corridors. However, he concluded that the law's consent requirement for filming in courtrooms and courthouse corridors was constitutionally saved under Charter section 1.[40]

The accused further appealed her conviction to the Ontario Court of Appeal.[41] A five-justice panel of the Court of Appeal unanimously decided that the only constitutional question that properly arose on this conviction appeal, and which required a ruling from the court, concerned the validity of the *Judicature Act*'s restrictions on filming in courthouse corridors. This is because the accused reporter was charged and convicted of filming in a courthouse corridor. She did not try to film in a courtroom, and was not charged with trying to do so. Thus, it was not necessary for the court to rule on the validity of the law's restrictions on courtroom filming.

A majority of the Court held that the *Judicature Act*'s restriction on filming in courthouse corridors did violate Charter section 2(b). A majority also held that the provision was saved from Charter attack under Charter section 1 as a reasonable limit. Hence, the Court of Appeal's interpretation of Charter section 2(b) may arguably be seen as *obiter*. The Supreme Court of Canada refused leave to appeal from this decision.[42]

On a principled construction of Charter section 2(b), it is my view that this provision does not confer a constitutional right to force court participants to be filmed by

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39. *Supra* note 2.

40. The District Court suggested that the legislation's restriction on filming in court to circumstances of "educational or instructional purposes" was unjustified and severable. However, it is arguable in light of the subsequent decision of the Ontario Court of Appeal in this case that the District Court's conclusion in this regard is *obiter dicta* and hence non-binding.

41. See *R.* v. *Squires* (1993), *supra* note 2.

42. See *R.* v. *Squires* (1994), *supra* note 2. Apart from the *Squires* case, there have been incidents where courts have turned down requests to film court proceedings, where the requests were founded in whole or in part on Charter arguments. In *R.* v. *Vander Zalm*, B.C. Supreme Court, unreported released May 14 1992 per Esson, C.J., the B.C. Supreme Court refused to permit the CBC and other applicants to bring television cameras into the highly publicized trial of former Premier William Vander Zalm. The court relied upon its unwritten long-standing and well-known rule that no cameras may be used in a courtroom during a legal proceeding. It declined to rule on the merits of the media arguments in favour of cameras. It did so, in large part, because the applicants had waited until only a few days before the trial was to begin to bring their application. It was known that to litigate the substantive questions surrounding courtroom filming would require weeks of court time.

    In *R.* v. Fleet, (2 November 1994), (N.S.S.C.) [unreported], Palmeter A.C.J., a documentarian's Charter section 2(b) claim was dismissed on its merits. The court did not refer to *Squires* or any other major free expression Charter case law in so deciding. The court expressed concerns about the potential harmful impact of courtroom filming on the process, and the alleged benefits said to derive from cameras in court.

the media in the courtroom over their objection.[43] As the preceding discussion demonstrates, there is much that can be debated about cameras in the courtroom in the policy arena. Yet, if something is turned into a constitutional right, then it is presumptively taken out of the policy arena. It becomes a mandatory constitutional requirement, unless the state can discharge the burden of justification for limiting the activity under Charter section 1 as a reasonable limit on the right which can be demonstrably justified in a free and democratic society.

Constitutional rights tend to include those entitlements that we consider fundamental to our democracy. They are comprised of entitlements that our tried and true. This includes things like the right to a fair trial, the right to choose one's religion and to practice its teachings, and the right to engage in peaceful demonstrations and assemblies.

In contrast, courtroom filming is neither tried nor true in Canada. It is an innovation which is best left to be debated in the policy arena. It is certainly not a core and indispensable facet of Canadian democracy.

Turning to the specifics of a claim that Charter section 2(b) guarantees a constitutional right to film in court over the objection of court participants, such a position is discordant to existing Canadian caselaw on the meaning of the freedom of expression. Freedom of expression includes the right to freely express one's self, without government censorship of the message on account of its viewpoint or content.[44] The Supreme Court has held that "expression" means activity which conveys meaning to others, that is, by words or symbolic actions.[45] The act of operating a video camera to record something such as proceedings in court is not "expression" within this meaning. It is not itself expressive. It does not convey meaning. Put simply, when a person sets up and turns on a video camera in a courtroom, what message is he or she thereby conveying? There is a fundamental difference from the constitutional perspective between disseminating information, which is "expression" within the meaning of section 2(b) on the one hand, and operating an electronic device to record information on the other hand, which is not.

Even if the act of using a camera were construed as "expression", the media would be no better off in advancing a claim that cameras in the courtroom are constitutionally required. The freedom of expression includes, among other things, the right of every person to express their views or to refuse to engage in expression if they wish.[46] If filming is expression, then so is the act of being filmed. If a witness or other court participant does not wish to be filmed, then he or she must have a commensurate constitutional right to refuse to be filmed, that is to refuse to engage in "expression". Hence, if we accept the suggestion that the very act of filming constitutes expression, then

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43. I do not propose here to critique the specific analysis employed by the various levels of court in the *Squires* case, as I was counsel in those cases. Rather, I simply set out here my own approach to the analysis of this constitutional issue.

44. *Irwin Toy* v. *Quebec (Attorney General)*, [1989] 1 S.C.R. 927 and *R.* v. *Keegstra*, [1990] 3 S.C.R. 697.

45. *Irwin Toy*, *ibid.*

46. *Slaight Communications Inc.* v. *Davidson*, [1989] 1 S.C.R. 1038.

a law that permits courtroom filming only with the consent of those being filmed respects and advances the freedom of expression of court participants.

Freedom of expression including freedom of the press does not confer on the media the right to do whatever they want in pursuit of the news. It would severely overinflate section 2(b) to construe the freedom of expression including the freedom of the press as presumptively immunizing from legal responsibility any activity which a journalist undertakes in furtherance of the gathering of the news. Freedom of expression entitles the media to communicate to a willing audience about subjects of its choosing, and to relate any information that it wishes, and that it has lawfully acquired. This entitlement is abundantly respected where the courtroom is open to the public, including reporters, and where reporters are free to report on any aspect of the proceeding they wish, without being subjected to restrictions such as publication bans.

Media advocates will argue that Charter section 2(b) should be interpreted as including a right to use cameras in courtrooms since this will advance the values of public access to court and open justice. This article's refutation of such claims in the policy arena are equally applicable in the constitutional context. Put another way, restrictions on courtroom filming would have at most only a trivial and insubstantial impact on news reporting on courts for the reasons discussed earlier in this article. Section 2(b) is not violated where the burden on the media is only trivial and insubstantial in degree.[47]

Even if it were assumed that courtroom filming served those values which section 2(b) aims to achieve,[48] this alone does not translate cameras in the courtroom into a constitutional right. Charter section 2(b) does not constitutionally protect all human activities which promote the purposes of the freedom of expression. Rather, it protects the specific activity of engaging in the freedom of expression in order to advance those purposes.

Camera proponents support their invocation of Charter section 2(b) by arguing that without courtroom footage, the television audience will not be willing to watch news reports on court proceedings for more than a short period of time. Even if this claim were assumed to be factually true despite the discussion in this article, this contention has no constitutional significance in construing the Charter's free expression guarantee. The Charter does not guarantee to the television industry an assured audience for its news broadcasts. As McLachlin, J., ruled in *R.* v. *Keegstra*:[49] "Freedom of expression guarantees the right to let loose one's ideas on the world; it does not guarantee the right to be listened to or to be believed".

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47. *R.* v. *Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 and *Shell Canada Products Ltd.* v. *Vancouver (City)*, [1994] 1 S.C.R 231, McLachlin J.

48. The Supreme Court has enumerated the purposes of the freedom of expression in *Irwin Toy* v. *A.G. Quebec*, *supra* note 44 as including the promotion of the search for truth, the fostering of democracy and social and political participation, and individual self-fulfillment. I examine in detail section 2(b)'s purposes in M.D. Lepofsky, "Towards a Purposive Approach to the Freedom of Expression and its Limitation" in F.E. McArdle, ed., *Cambridge Lectures 1989* (Montreal: Yvon Blais, 1990) 1.

49. *Supra* note 44 at 831-832. While she was dissenting in this case, her views on this point were not the subject of disagreement with the majority opinion.

Media advocates would also rely on the Supreme Court's ringing endorsement of the principles of open justice and the media's constitutional right to report on court proceedings in *Edmonton Journal* v. *A.G. Alberta*.[50] There the Supreme Court struck down an old Alberta statute that prohibited publication of virtually any information about matrimonial proceedings in the province. It also banned pretrial publication of most information concerning other civil proceedings in Alberta.

When carefully scrutinized however, that case is of little assistance to a claim that the Charter guarantees to the media a right to force non-consenting court participants to submit to being filmed in court. That case does include a powerful judicial re-affirmation of the importance in Canada of traditional principles of open justice. However, this article's position is not premised on any departure from such a position. Rather, it's analysis is built on the firm foundation that our justice system must be wide open to public attendance and full media reporting, except in the most limited exceptional circumstances of pressing necessity.

Edmonton Journal does not address the specific constitutional question considered here. It did not involve a media assertion of a right to televise court proceedings. Rather, the media there claimed a constitutional right to report to the public on information that they had learned at open and public civil and matrimonial proceedings.

All parties to the appeal conceded that the law's sweeping publication ban violated section 2(b). This was an unremarkable event since previously the Supreme Court had unanimously held that legislative bans on media reporting of a sex assault complainant's identity contravened Charter section 2(b) and had to be justified under section 1.[51] *Edmonton Journal* is thus not an authoritative pronouncement on an issue which was neither raised there nor the subject of contested argument.

Additionally, media advocates will endeavour to construct their constitutional claim on the basis of Ontario Court of Appeal rulings to the effect that Charter section 2(b) confers a right to personally attend court proceedings.[52] While superficially attractive at first blush, these cases ultimately do not provide the strong support that camera proponents would claim. This is because this article's policy and constitutional analysis proceeds on the assumption that Charter section 2(b) includes, among other things, a constitutional right for members of the public, including journalists to personally attend court proceedings.

The Supreme Court of Canada has not yet considered whether section 2(b) includes a right to personally attend court proceedings. The Ontario Court of Appeal's rulings on point did not apply the Supreme Court's landmark decision in *Irwin Toy* v. *A.G. Quebec*,[53] which mapped out a three-step test for assessing whether a law abridges

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50. *Supra* note 16.

51. *Canadian Newspapers Co.* v. *Canada (Attorney General),* [1988] 2 S.C.R. 122.

52. The Ontario Court of Appeal so held in *Re Southam Inc. and the Queen (No. 1)* (1983), 41 O.R. (2d) 113, and reaffirmed this position in *Southam Inc.* v. *Coulter* (1991), 75 O.R. (2d) 1.

53. *Supra* note 44.

the freedom of expression. This is hardly surprising. The first of these Ontario Court of Appeal rulings was decided before *Irwin Toy*.[54] The second was decided some months after *Irwin Toy*. However, it appears that *Irwin Toy* was not cited to the Court of Appeal in that case. The Crown appears to have agreed that there was present a breach of section 2(b). There is room to question whether the Court of Appeal's decisions would be decided in the same way if the *Irwin Toy* free expression analysis had been applied. A full consideration of this question is beyond this article's scope. Hence, this discussion assumes that those cases were correctly decided.

Even if correct, the Ontario Court of Appeal's rulings do not require a finding that Charter section 2(b) gives the media a constitutional right to engage in courtroom filming. Those rulings were predicated on two critical considerations, neither of which support a right to film in court. First, the right to personally attend court proceedings is based on the long-standing historical practice of open court, dating back centuries. There is no comparable long-standing Anglo-Canadian tradition of televised court. Second, the rulings were based on the fact that the alternative to open court, namely closed and secret justice, presents the real risk of Star Chamber injustice and official abuse. In contrast, when proceedings are already open to public attendance and conventional media coverage, these fears disappear. Hence there is no necessity for televising the proceeding to prevent such abuses. The requirement of open court already provides the benefit of nullifying the harms of secret justice. Televising court cannot be justified as a constitutional requirement on the ground that it will provide the benefit of avoiding Star Chamber justice.

No jurisdiction outside Canada has held that freedom of expression including freedom of the press encompasses a constitutional right to televise court proceedings. As is mentioned earlier, while 47 U.S. states have admitted cameras into their courts as a matter of policy choice, American courts have consistently held that the First Amendment's guarantee of freedom of speech and press does not include a constitutional right to record and broadcast court proceedings.[55] This is so even though the first amendment has often been construed more broadly than Canada's constitutional equivalent, particularly in the open justice context.[56]

It must be remembered that if Charter section 2(b) conferred on the media a constitutional right to use cameras in the courtroom, then this entitlement must equally be bestowed on all members of the public who wish to film in court. As I have argued elsewhere,[57] reporters and the media are not a special constitutional elite who enjoy special and superior rights under Charter section 2(b) beyond those extended to all members of the public by the freedom of expression. Charter section 2(b) states that freedom of the press and other media of communication is included within the "freedom of expression"

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54. *Re Southam Inc. and the Queen (No. 1)*, *supra* note 52.

55. See authorities cited *supra* note 5.

56. Compare *Canadian Newspapers Co.* v. *Attorney General of Canada*, *supra* note 51, and *Re Global Communications and Attorney General for Canada*, (1984), 10 C.C.C. (3d) 97 (Ont. C.A.) with *Nebraska Press Assn.* v. *Stuart*, 96 S.Ct. 2791 (1976); *Cox Broadcasting Corp*. v. *Cohn*, 95 S.Ct. 1029 (1975).

57. See M.D. Lepofsky, *supra* note 25 at 89-119.

and that this right is guaranteed to "everyone". The simple fact that section 2(b) refers to "other media of communication" does not mean that it confers special or superior rights on the television industry.

Thus, if reporters can use video or still cameras in the courtroom, so can any number of spectators, including friends and associates of an accused who want personally to film the victim and other Crown witnesses even if the media does not. In the U.S., the media advanced its arguments in support of cameras in court at a time over a decade ago when for practical purposes, video cameras were only owned and used by television stations. Now, anyone can buy a small, portable and silent video camera, and can bring it to court with ease.

Even if it were assumed that section 2(b) of the Charter conferred a right to use cameras in a courtroom, it would be a reasonable and demonstrably justified limit on that right to require the consent of all parties and witnesses before courtroom filming could occur. A consent requirement for courtroom filming should be saved from constitutional attack by Charter section 1. In *Squires*, the trial judge and the District Court judge at the first level of appeal both sustained such a legislative consent rule under Charter section 1, based on a substantial evidentiary record. The Ontario Court of Appeal did not address this issue. A consent rule promotes several pressing and substantial objectives, each of which has been endorsed under Charter section 1 in other contexts, including protecting the right to a fair trial,[58] the proper administration of justice and effective law enforcement,[59] the dignity rights and privacy of court participants,[60] the dignity and decorum in court,[61] and the right of access to justice.[62] Such a restriction constitutes a minimal burden on the media's constitutional rights, since representatives of the media remain free to attend court proceedings, and to fully report on them through conventional media coverage. Such a restriction minimally impairs any asserted Charter rights, because it is narrowly tailored to address only the specific impact of courtroom filming, and because it allows such filming to occur when the required consents are obtained. Courts afford a greater margin of appreciation to government under Charter section 1 where, as here, an issue involves the balancing of the claims of competing groups, such as the resolution of the competing claims of the media for graphic film footage from courtrooms and courthouse corridors and the needs described above of victims, witnesses, law enforcement officials, accused persons, and others involved in the judicial system.[63]

Should section 1 have to be reached, an insight into the Supreme Court's possible approach to this issue can be gleaned from its disposition of a media challenge to the constitutionality of the Criminal Code provision which entitles sex crime complainants to

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58. *Global Communications and Attorney General for Canada*, *supra* note 56 at 113.

59. *Southam Inc.* v. *Coulter*, *supra* note 52 at 17.

60. *Supra* note 16 at 1345 and *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30.

61. *Committee for the Commonwealth of Canada* v. *Canada*, [1991] 1 S.C.R. 139 at 249, McLachlin J.

62. *Supra* note 16 at 1379, La Forest J. dissenting on other grounds; *supra* note 51, at 130; *B.C.G.E.U.* v. *Attorney General of British Columbia*, [1988] 2 S.C.R. 214 at 248-249.

63. *Irwin Toy*, *supra* note 44 at 990.

ask a trial judge to ban publication of their names, and which mandatorily requires the judge to issue the ban if asked to do so. In *A.G. Canada* v. *Canadian Newspapers*,[64] the core issue before the court was whether such bans should be mandatory when the complainant seeks one — a consent rule — or whether the trial judge should retain a discretion to decide on a case-by-case basis whether the ban is needed in the circumstances. The Crown defended the statute's consent rule. The media urged that it be replaced by a judicial discretion option. This dispute parallels the positions taken by the Crown and the media in disputes over whether courtroom filming should only be allowed with party/witness consent, or whether the trial judge should retain a discretion to decide when courtroom filming is appropriate.

In *Canadian Newspapers*, the Supreme Court rejected the media's contention that a judicial discretion was preferable under Charter section 1 to a complainant consent requirement when determining if the court should ban the media from identifying a sex crime complainant. It upheld the constitutionality of the consent rule. It held that sex crime complainants require certainty from the outset that their identities would not be published. If the fate of their request for a non-publication order was left to a trial judge's discretion, the complainant would not have the assurance or certainty that they need before reporting their victimization to the police. A comparable argument supports a consent requirement *vis-à-vis* cameras in the courtroom.

B. Experimenting with Cameras in the Courtroom

There is very little support in the public, the legal profession, the law enforcement community or among the judiciary for cameras in the courtroom in Canada. For most, this debate raises one big non-issue. Yet, media advocates occasionally argue that we should undertake an "experiment" with cameras in the courtroom to see whether they will pose the difficulties which are feared, and to document their benefits. They note that several American states have undertaken such experiments, and thereby have proven cameras in court to be beneficial.

It is critical to pin down exactly what the subject of the proposed experiment will be, as well as its intended format. The key policy question in issue in the cameras in the courtroom debate is whether the administration of justice will suffer adverse effects where court participants are forced to submit to cameras in the courtroom without their consent. If one wished to "experiment" in relation to this question, it would be necessary to study cases where cameras in the courtroom are forced upon court participants without their consent.

Yet, it would be fundamentally unethical to force court participants to be subjected to cameras in the courtroom without their consent, for the purpose of studying whether or not this will cause harmful effects on them. In the medical context, experimentation with new drugs on non-consenting human subjects is considered to be

64. *Supra* note 51.

inherently offensive. It is similarly offensive to subject human beings to experimentation with courtroom filming, when they have much at stake in a legal proceeding, and when they do not agree to participate in the experiment. Section 7 of Canada's Charter confers the fundamental constitutional right not to have one's liberty deprived except in accordance with the principles of fundamental justice. To force non-consenting persons who are on trial for their liberty to participate in such experimentation arguably would violate the principles of fundamental justice. While Charter section 7 does not confer similar rights on civil litigants, it is nevertheless equally offensive to make those who come to court to have their civil disputes resolved submit to such experimentation over their objection.

If court participants are prepared to consent to the experiment, then this ethical problem disappears. However, experimentation on consenting court participants will not yield information of much assistance to those who wish to know about the potential adverse effects of filming in the courtroom on non-consenting persons.

American states in fact engaged in this kind of experimentation on non-consenting court participants. For example, Florida and California did so in the mid-1970's and early 1980's respectively. At least in the case of Florida, this included forcing at least one accused, who was on trial for capital offences, to submit to courtroom filming. This reflects an unreasonable undervaluation of the rights of the individual.

During these U.S. experiments, camera advocates took the position that if their cameras caused any adverse effects, the accused or other objecting party could always appeal. This, however provides no answer. Many court participants have no standing to appeal, such as jurors and witnesses. Moreover, the parties who do have a right to appeal, such as the accused, may not be able to make out their objection on appeal, for the reasons discussed earlier in this article, in conjunction with the limited utility of appeals to redress camera-induced problems. It is unfair to introduce cameras as an experiment on non-consenting parties, and then to place upon accused persons or other court participants the burden of proving whether adverse effects occurred.

Even if experimentation were to be undertaken, it is critical that the experiment be designed to detect the effects for which we are looking. Typically, when so-called "experiments" have been attempted in the past in the U.S., they usually involve some sort of post-trial formal or informal surveying of judges, lawyers and perhaps some other participants on the question of whether cameras had an effect on them, or on others they observed.[65]

Surveys are not an appropriate instrument for assessing these effects. Surveys do not assess the cameras' actual objective effects. They only assess the participant's subjective perception of camera-induced effects. The court participant may not be aware

65. It is noteworthy that Florida's survey was not addressed to accused persons. Clearly, they have the most at stake when their trial is televised. The omissions of accused persons from their survey was one of the many serious flaws with the so-called Florida experiment with courtroom filming in the 1970's, on which so many other U.S. states relied so heavily.

of the effect. Also, they may be surveyed so late after the event (as was the case in the Florida experiment), that their recollections would be incomplete and unreliable.

The most frequently surveyed court participants in the U.S. are judges. Yet, judges may well be unable to detect camera-induced effects, as discussed earlier.

If there were to be an experiment, it would have to involve the examination of two randomly-selected and adequately-sized pools of cases, one pool with cameras and one without, with trained observers in place to detect potential impacts. This experimentation would be very costly, and would require the media to agree to film cases which they may not otherwise be interested in filming, in order to make the experiment work. Those who advocate for experimentation must be prepared to advocate for appropriate experimentation. Yet, appropriate experimentation is either unethical, unworkable, or both.

CONCLUSIONS

Several concluding thoughts about the cameras in the courtroom debate are worth considering. First, camera advocates often argue that cameras in the courtroom are the way of the future and are inevitable. If they are inevitable, the argument goes, we might as well set about ensuring that they are implemented in an orderly and appropriate fashion. Similarly, some who themselves oppose courtroom filming may feel resigned to its inevitability.

The response to this contention is simple. In 1984, when I first undertook carriage of the defence of Ontario's legislative restrictions on cameras in the courtroom in the *Squires* case, many with whom I spoke also expressed the view, happily or unhappily, that courtroom filming was inevitable in Canada. A decade has passed since that time. The "inevitable" has still not happened in Canadian courts.

Though perhaps paradoxical, cameras in the courtroom are only "inevitable" if we allow them to be. They may seem "inevitable" because they are a form of technology, and technology seems inevitable. However, the technology of cameras has existed for decades. This is not essentially a technological question. It is a justice policy question. So long as the people of Canada have the capacity to democratically govern themselves, they have the capacity to shape their justice system in a fashion which best promotes the aims of justice. If it is believed that the ends of justice are not promoted when persons caught up in the judicial process are forced to submit to television cameras in the courtroom, we should be able to maintain control over our justice system to avoid their introduction, particularly in the absence of participant consent.

There has been no overwhelming public ground swell or outcry in support of courtroom filming in Canada in recent years. This is so despite the substantial Canadian exposure to U.S. television which has included some high-profile televised court proceedings. Even the Canadian journalistic community is itself divided on the wisdom of going the American route in this context.

Every few years, when a major U.S. case secures extensive television coverage, some Canadian media outlets will rally with a few current affairs items, panel discussions and editorial columns on point. These programs tend at times to have a bias in favour of the pro-camera perspective. This is hardly surprising both because the media produce these programs and because there is no well-organized, highly-funded anti-camera lobby to mount an effective response to the entrenched pro-camera position. After these brief spurts of media attention on the cameras debate, the issue again fades into obscurity.

Second, it is critical that the debate over cameras in the courtroom be put in the real world context. It cannot take place in some rarefied environment devoid of an air of reality. Much of the rhetoric which the media advances in support of its desire to film court proceedings suffers from this kind of unreal atmospherics. A salient example of this is when, as discussed earlier, camera advocates claim that they want cameras in courtrooms to educate the public on the justice system.

Another example of discordant rhetoric is where media advocates claim that the media is the agent of the public when it covers court proceedings. As I have argued elsewhere, the public relies on the media for much of their information about judicial proceedings. However, this does not transform journalists, working for public sector or private-profit making media mega-corporations into the agents of the public.[66] We neither can hire them nor fire them, nor direct them in how to carry out their business. Were they the agents of the public, we would be able to superimpose upon them rather strict rules about how courtroom footage should be used. However, journalist and news organizations would strenuously resist any effort by the public to direct the media in how to use courtroom footage.

Third, it is simply too simplistic to suggest that open justice is an "all or nothing" phenomenon. Openness can serve justice and justice can serve openness only when a very finely tuned delicate balance is maintained between the interests of all those involved in this complex policy debate. Canada's overall approach to open justice since the enactment of the Charter has involved a carefully-tuned and sophisticated approach to media coverage of court proceedings, which avoids the veritable absolutism of American jurisprudence in this context.

Fourth, it is insufficient for some media advocates to dismiss opponents to coerced courtroom filming as being simply "anti-media" or as being "out to punish the media for bad coverage". The premise of the position advanced here is not that the media should be allowed to have cameras in the courtroom only when they do a "good job" in the view of lawyers, judges or politicians. Rather, the position articulated here is that cameras in the courtroom can only be permitted with participant consent because courtroom filming threatens serious harms in the absence of the consent of court participants. This is so regardless of the good or poor quality of journalistic practices when filming is permitted.

Canada has managed up until now to resist the trend prevailing in the United States towards having cameras in the courtroom. For reasons set out in this article, this

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66. M.D. Lepofsky, *Open Justice 1990*, *supra* note 26.

Canadian approach is fully warranted. It should continue well into the future. Shakespeare once wrote that all the world's a stage. We should not accept the claims of camera advocates, lest all the worlds' courtrooms become a sound stage.