The Adjudicative Process and the "New" Media Circus
The Impact of Technology on Courtroom Journalism, Decorum, and Privacy

This document is a working paper aimed at establishing the menu for the forthcoming "Dialogue Between Courts and Tribunals – The Adjudicative Process and New Information Technologies" national roundtable. Its five sections - Bloggers and Twitters and Texters, Oh My!; The Smoke and Mirrors of Publication Bans; Lights, Camera, Objection!; Social Networking: Giving Jurors the Keys to the Sub Trunk?; and Step Right Up: eAccess to Case Documents and Voyeurism – are meant to give participants a general outlook at the stakes involved with the use of new media with respect to research, broadcast, publish and comment on public trials.

The underlying circus theme, while offering a whimsical approach to the serious topic at hand, mainly serves as an allegory of the views of certain legal commentators, who often oppose greater public access to the adjudicative process: transforming the courtroom into a three-ring circus, at the expense of procedural law and the rules of evidence. Although these fears are, in our humble opinion, mostly unwarranted, they do raise a very important question: How do we strike a balance between public access to courtroom proceedings and the somewhat sanctimonious[1] nature of the adjudicative process? Since it would be overly optimistic – some would say pretentious – to claim to answer this question in the next few pages, our goal is simply to give readers enough background information on the underlying issues to allow for a healthy debate. For this reason, the tone of this paper is sometimes provocative (even somewhat incendiary), sometimes very critical. It does not necessarily reflect the author's personal opinions, but rather talking points and positions that need to be addressed in the context of an informed discussion. So without further ado, let's go on with the show…

Bloggers and Twitters and Texters, Oh My!

According to the Merriam-Webster dictionary[2], a blog is "a Web site that contains an online personal journal with reflections, comments, and often hyperlinks provided by the writer", while text messaging consists of "the sending of short text messages electronically especially from one cell phone to another". Twitter, on the other hand, "is a real-time information network powered by people all around the world that lets you share and discover what's happening now"[3]. Definitions aside, these three distinct yet similar technologies have in common the fact that they transform any device connected to the Internet (laptops, smart phones, etc.) into broadcasting apparatus. This means that, using an iPhone or Blackberry, anyone can post information on the Internet from anywhere… including a courtroom. However, just because the technology exists, doesn't mean that courts are enthused about their use, nor does it imply that judges will allow blogging, tweeting or texting from within the courtroom.

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[1] Although some would argue that the judicial process is, in some ways, "hypocritically pious or devout" with regard to certain outdated rules and rituals (see, for example Ethan KATSH, "The First Amendment and Technological Change: The New Media Have a Message" (1989) 57 *Geo. Wash. L. Rev.* 1459), our use of the word "sanctimonious" in this case refers to the old English definition of "possessing sanctity". See http://www.merriam-webster.com.

[2] http://www.merriam-webster.com.

[3] http://twitter.com/about.

For example, in *United States of America* v. *Shelnutt*[4], district Judge Clay D. Land found that tweeting was prohibited under section 53 of the *Federal Rules of Criminal Procedure*. As explained by the Court:

> "Rule 53 states in relevant part: "[T]he court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom." […] The Court finds that the term "broadcasting" in Rule 53 includes sending electronic messages from a courtroom that contemporaneously describe the trial proceedings and are instantaneously available for public viewing."

Similarly, in the Canadian case of *Director of Child and Family Services* v. *D.M.P. et al.*[5], a Court reporter was chastised for tweeting while inside the courtroom since instructions that "all electronic devices be turned off while court was in session" had been given. Interestingly, however, when informed that the tweets were sent from just outside the courtroom, the judge considered the matter settled. Putting aside the fact that the journalist was believed to have gone against clear instructions from the Clerk, what is the difference between the reproached act and tweeting from the hallway and, more importantly, why is tweeting from inside the courtroom even forbidden? Most people would agree that there is no real difference between a journalist who takes notes with a pen and paper and the one who does the same on his Blackberry. Since there is nothing to stop a journalist from exiting the courtroom, calling up his editor, and dictating the article over the phone or to email an article from the courthouse lobby, why forbid him from doing the latter thirty seconds sooner? Sending a tweet, or an email is not noisier or more distracting than taking notes on a laptop, and it is definitely less distracting than the noise made by the courtroom door as someone exits.

Of course, the reason the Clerk in *Director of Child and Family Services* v. *D.M.P. et al.* ordered that all electronic devices be shut off was probably to limit distractions such as cell phones ringing or to stop people from recording the proceedings. If such was the case, wouldn't clear indications be more appropriate and respectful of the public's right to information regarding court proceedings, especially since the Supreme Court has stated that "measures that prevent the media from gathering […] information, and from disseminating it to the public, restrict the freedom of the press" [6] on which that right hinges?

Considering the above remarks, why should judges continue to ban the use of twitter, text messaging or blogging from within the courtroom? The most robust argument that seems to be brought up[7] is that, in certain cases, information could be published or transmitted before the judge has time to order that a statement be stricken or a publication or broadcasting ban enacted[8]. However, the same outcome could occur if (as illustrated in old Hollywood movies) journalists

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[4] 2009 WL 3681827 (M.D.Ga.).

[5] 2009 MBQB 193.

[6] *Canadian Broadcasting Corp.* v. *New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, par. 23 and 26.

[7] See http://www.nationalpost.com/news/canada/story.html?id=1562685.

[8] See http://www.nationalpost.com/news/canada/story.html?id=1562685.

just sprinted out of the courtroom and jumped on the phone the second a juicy statement was uttered. This later scenario would be much more distracting to the proceedings than someone typing on a tiny qwerty keyboard and pressing "send".

This being said, some courts are starting to warm up to the idea of allowing journalists to tweet from within the courtroom. In a recent test case, journalism students from the University of Montana were allowed to use twitter to give live coverage of a case[9]. Although the judge declined to comment on whether he viewed the experiment as a success, members of the public seem to have appreciated the live play by play. Closer to home, the use of Twitter was also allowed in the courtroom during the trial of Ottawa Mayor Larry O'Brien[10], and the Ontario legal system has yet to be sent into disarray because of it.

It thus seems that courts are opening up to the idea of having journalists and researchers blog or tweet about the proceedings, but this does not mean that the technology doesn't come with new challenges. As experienced in the Montana case, parties and witnesses can now access these reports and use them to modify their testimony. Some observers argue that this problem is not new: "It's never been part of that rule that witnesses shouldn't read news coverage […] What is the difference from a legal perspective between reading a newspaper the next morning and reading Twitter immediately? What's the difference?" [11] The difference, according to the court, is that because of their frequency and almost instantaneous nature, tweets are sometimes more akin to court recordings than actual news coverage. Worst of all, they are sometimes biased and inaccurate court recording. Since witnesses are not granted access to court recordings during the trial (so as not to affect their testimony), giving them access to tweets would be counter-indicated. Following this same logic, it is interesting to note that, although some jurisdictions allow journalists to make audio recordings of the proceedings under certain conditions, broadcasting of said recordings is strictly forbidden[12]. This would therefore be an argument against tweeting from inside the courtroom.

Another question related to tweets and blogs is how rules aimed at the media are to be applied to so-called "citizen-journalists", i.e. people who do not work for established news organisations or even claim to be journalists, but still post freely-accessible content online. This would, of course, depend on how these individuals are viewed by the courts: are they citizens, journalists, or both? Whichever category they fall under, they have a right to attend public trials and even to report on what they observed. On this issue, the Supreme Court has been very clear: "[t]he requirement of a public trial is satisfied by **the opportunity of members of the public** and the press to attend the trial and **to report what they have observed**"[13] (emphasis added). However, it must be pointed out that this decision was rendered in 1991, before the Internet, before blogs, before twitter. "Reporting", as it related to non-journalists could then be equated to neighbourhood gossip or, at the most, a letter to

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[9] See Nadia WHITE, "UM's Grace Case Project", (2010) 35 *APR Mont. Law* 6.

[10] See http://www.nationalpost.com/news/canada/story.html?id=1562685.

[11] See Nadia WHITE, "UM's Grace Case Project", (2010) 35 *APR Mont. Law* 6.

[12] See Alberta's "New Audio Recording Policy Effective Sept. 2, 2008". See also section 136 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[13] *Vickery* v. *Nova Scotia Supreme Court (Prothonotary)*, [1991] 1 S.C.R. 671

the editor of a local paper. With blogs and tweets, members of the public can now reach as many potential readers as established journalists.

This being said, one could ask whether members of the public should be afforded the same rights as journalists. According to one American decision, the answer to such a question could be positive. In *O'Grady* v. *Superior Court*[14], it was decided that bloggers have the same rights as journalists "to protect the identity of their sources"[15]. Although the decision does not actually state that bloggers ARE journalists, it does open the door for such a recognition. Of course, if citizen-journalists benefit from the rights of journalists as per section 2(b) of the *Charter*, they should also share their obligation not to write or comment about a case during a ban which, as we will now see, is not always the case.

The Smoke and Mirrors of Publication Bans

In 2001, Montreal-based boxer Dave Hilton Jr. was convicted on 9 counts of sexual offences towards two minors. Because of the *Criminal Code*'s provisions regarding the publication ban in cases involving child witnesses[16], the facts of the case were not made public. Oddly enough, neither were the actual accusations, i.e. the sections of the *Criminal Code* he would ultimately be convicted under. In 2004, in their memoirs "Le Coeur au beurre noir"[17], Hilton's two daughters, Jeannie and Anne Marie Hilton, identified themselves as the two concealed victims of their father's abuse. This came as a shock to absolutely no one. Since the only reason not to publish the actual accusations was that they themselves could help identify the victims (in this case, one of the counts was under section 155(2): "every one who commits incest is guilty of an indictable offence […]"), the publication ban only served to fuel speculation, not to hide the identity of the minors. Ironically, the victims in this case were the ones who asked that the band be lifted so that they could be allowed to tell their own story…[18]

Up until the end of the last century, this was the main type of ban that commentators objected to since they appeared to be somewhat useless, even ridiculous: orders where the ban itself revealed rather than hid the identity of the parties it was supposed to protect. However, with the advent of the Internet, the number of inefficient bans seems to be growing exponentially. In this (relatively) new electronic age, the very idea of a "publication ban" is now considered by some to be obsolete[19].

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[14] 44 Cal. Rptr. 3d 72 (Cal. Ct. App. 2006), as reported in Sharon NELSON, John SIMEK, and Jason FOLTIN, "The Legal Implications of Social Networking", (2009) 22 *Regent U. L. Rev.* 1, 31.

[15] Sharon NELSON, John SIMEK, and Jason FOLTIN, "The Legal Implications of Social Networking", (2009) 22 *Regent U. L. Rev.* 1, 31.

[16] Criminal Code, section 486 (1.1). This section has since been replaced. The equivalent disposition can now be found at section 486 (2) (a).

[17] Montréal, Les intouchables, 152 p.

[18] *Éditions des Intouchables Inc.* v. *Québec (Procureur général)*, 2004 CanLII 30162 (QC C.S.)

[19] See *R.* v. *Bryan*, 2007 SCC 12, [2007] 1 S.C.R. 527, par 86, (Justice Abella, dissenting).

In 2009, for instance, the ex-girlfriend of an unnamed Quebec billionaire instigated proceedings against her former common-law spouse[20]. The woman claimed that since the couple had cohabitated for many years, she was entitled to the same legal protection as a divorcee and asked for millions in alimony. Because the couple had three children, the identity of all parties had to be kept secret as per section 815.4 of Quebec's *Code of civil procedure*: "No information that would allow the identification […] of a child whose interest is at stake in a proceeding may be published or broadcast […]". This led the Quebec media to refer to the former couple as "Eric and Lola". Of course, the fact that Eric is a Quebec billionaire narrowed the list of potential candidates down significantly[21], as did details regarding Lola's birthplace and the number of children involved. Furthermore, since the publication ban only applied within the jurisdiction of the Quebec Superior Court, foreign papers and gossip sites ran with the story. As a result, any Quebec citizen with an Internet connection now knows who Eric and Lola truly are.

And there lies the main problem as it relates to publication bans: "the salutory effect of any publication ban is undermined by the ease with which the ban can be circumvented"[22]. This is not to say that Internet publication bans could never and should never be ordered[23] or enforced[24], but as justice Lamer put it in *Dagenais v. Canadian Broadcasting Corp.*[25]:

> "It should also be noted that recent technological advances have brought with them considerable difficulties for those who seek to enforce bans. The efficacy of bans has been reduced by the growth of interprovincial and international television and radio broadcasts available through cable television, satellite dishes, and shortwave radios. It has also been reduced by the advent of information exchanges available through computer networks. In this global electronic age, meaningfully restricting the flow of information is becoming increasingly difficult."[26]

How can we justify banning Canadian journalists from printing a story when the same story can be published on an American website within minutes? In cases where the trial is of interest to foreign entities, such orders would seem to be somewhat pointless and, some might say, unfair towards our national media. Furthermore, interprovincial and international publications are no longer the only impediments to a ban's efficiency. Local exchanges of information are also showing the limits of these types of orders:

> "We can now add to the list of holes through which information can slip the realities of blogs, podcasts, satellite radio, specialty television channels, websites

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[20] See Droit de la famille — 091768, 2009 QCCS 3210 (CanLII).

[21] It is reported that there are currently only half a dozen billionaires in Quebec.

[22] *Toronto Star Newspapers Ltd.* v. *Canada*, 2009 ONCA 59, par. 106.

[23] See, for example, *R.* v. *Canadian Broadcasting Corporation*, 2007 BCSC 1970 (CanLII).

[24] See, for example, *R.* v. *The Canadian Press*, 2009 BCSC 988 (CanLII); See also http://kiddaa.ca/wordpress/wp-content/uploads/2010/03/Correspondence-March-17-2010.pdf

[25] [1994] 3 S.C.R. 835.

[26] *Id.*, page 886. Reaffirmed by justice Fish in *R.* v. *Bryan*, 2007 SCC 12, [2007] 1 S.C.R. 527, par. 124.

> such as "YouTube" and "facebook", and **the ever increasing number of personal websites.** Most, if not all, of these outlets lie outside any effective control by this court."[27] (emphasis added)

This lack of effective control can be explained in part by the fact that the wording of legislation pertaining to bans has not kept up with the times. For example, as alluded to earlier, section 815.4 of Quebec's *Code of Civil Procedure* states that:

> "No information that would allow the identification of a party to a proceeding or of a child whose interest is at stake in a proceeding may be **published** or **broadcast** unless the court or the law authorizes it or unless that publication or broadcast is necessary to permit the application of an Act or a regulation." […] (emphasis added)[28]

The words "publication" and "broadcast" are not defined anywhere in the *Code of civil procedure*. In fact, to our knowledge, neither of those words is defined anywhere under Quebec law. This has led judges to refer to dictionary definitions, which has caused important discrepancies within case law, most notably in matters pertaining to libel. For example, in *Investors Group Inc.* v. *Hudson*[29], the court found that Internet postings "can be considered by analogy to other means of communications, such as a newspaper"[30]. According to this logic, a blog posting should therefore be construed as a publication[31]. However, later cases[32] have steered clear of that position and it seems, for now, that information posted online does not constitute a publication under Quebec law. According to the decision rendered in *Vincent* c. *Forget*[33], blog postings could constitute a broadcast, but this probably wouldn't be the case for emails. Questions also arise regarding social networking sites such as Facebook or Myspace, which are often presented as private diaries or albums, not as public broadcasts.

These questions have recently come about in two Ontario murder cases involving minors[34]. As stated in section 111 of the *Youth Criminal Justice Act*[35], "no person shall publish the name of a child or young person, or any other information related to a child or a young person, if it would identify the child or young person as having been a victim of, or as having appeared as a witness

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[27] *R.* v. *J. S-R.*, 2008 CanLII 54303 (ON S.C.), par. 60.

[28] it's interesting to note that while the English version of section 815.4 forbids "publication **or** broadcast", the French version forbids "publication **and** broadcast". The English version of the text would therefore be more restrictive.

[29] REJB 1998-11214 (C.S.).

[30] *Investors Group Inc.* v. *Hudson*, REJB 1998-11214 (C.S.).

[31] Also see *Can-Am Immigration Services* v. *Société Radio-Canada*, EYB 2007-118278 (C.S.).

[32] *Vincent* v. *Forget*, EYB 2008-134639 ; *Centre laser Groupe L.R. inc.* v. *Centre Stop inc.*, 2008 QCCS 2444 ; and *Guilbert* v. *Guilleaume*, EYB 2008-142787.

[33] *Id.*

[34] See Betsy POWELL and Bob MITCHELL, "Gag orders in a Facebook age", (2008), http://www.thestar.com/news/article/290941.

[35] S.C. 2002, c. 1

in connection with, an offence committed or alleged to have been committed by a young person". In order to comply with the law, print and television journalists withheld the identity of the teens presumed to be involved in the murders. However, the friends and classmates of both victims were openly discussing the matter on Facebook. Although the Department of Justice claims that Facebook postings are publications under section 111 of the Act, no accusations or arrests have been made[36]. This could be due to the fact that Courts have yet to agree as to whether Facebook profiles are public or private in nature[37]. If profiles were deemed to be private, it would be difficult to claim that they are publications.

It therefore all comes down to how we define "publication". Defining it too broadly could mean equating private communications – such as certain Facebook profiles[38] – to publications, but defining it too narrowly would create a loophole for online content generated by those of us who aren't members of the press.

It's interesting to note that the now abrogated section 486(3) of the *Criminal Code*, which also used the terms "publication" and "broadcast" ("shall not be published in any document or broadcast in any way") has recently been replaced by section 486.4 (1) which states that "the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast **or transmitted** in any way" (emphasis added). In our view, the addition of "or transmitted in any way" would close the aforementioned loophole, although the question regarding social websites remains.

Lights, Camera, Objection!

In ancient societies, trials were held under a tree or next to a well, while in medieval times, marketplaces and churches were where justice was rendered[39]. This gives credence to the statement that "Courts are and have, since time immemorial, been public arenas"[40]. But this is not to say that "all venues within which the criminal law is administered will have to be accessible to the public, including jury rooms, a trial judge's chambers and the conference rooms of appellate courts"[41]. Furthermore, it's often forgotten that the right to a public trial is not conferred upon the public or the media; it's a right that, according to section 11d) of the Charter, strictly belongs to the accused[42]. Of course, as was stated by the Supreme Court:

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[36] See Betsy POWELL and Bob MITCHELL, "Gag orders in a Facebook age", (2008), http://www.thestar.com/news/article/290941.

[37] See *Murphy* c. *Perger*, [2007] O.J. No. 5511 ; *Leduc* v. *Roman*, 2009 CanLII 6838; *Wice* v. *The Dominion of Canada General Insurance Company*, 2009 CanLII 36310 ; and *Schuster* v. *Royal & Insurance Company of Canada*, 2009 CanLII 58971.

[38] See *Wice* v. *The Dominion of Canada General Insurance Company*, 2009 CanLII 36310.

[39] Antoine GARAPON, *L'âne portant des reliques*, 1985, Paris, Le Centurion, 211 p.

[40] *Canadian Broadcasting Corp.* v. *New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, par. 28.

[41] *Canadian Broadcasting Corp.* v. *New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, par. 28.

[42] See François OUELLETTE, *L'accès des caméras de télévision aux audiences des tribunaux*, Montréal, Thémis, 1997, p. 53.

> "The principle of a public trial goes beyond a particular accused and must be approached while keeping in mind the reasons that led to the right: that no person be convicted of a criminal offence behind closed doors or on secret and unknown evidence. It is the duty of all those involved in the administration of the criminal justice system to see that the principle is upheld. While the public, through the Attorney General, is involved in the administration of criminal justice, the media per se is not. Its interests are different. Its duty is to inform, its temptation to entertain. It was given and it should have the constitutional freedom to perform its duty to inform, but the gathering of information involves different considerations such as individual privacy, defamation, due process of law, fair trial..."[43]

As mentioned earlier, "[t]he requirement of a public trial is [now] satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed"[44]. According to the Supreme Court, this opportunity, also referred to as the principle of "open court", is "inextricably tied to the rights guaranteed by s. 2(b) [of the Canadian Charter]" [45]. Need the reader be reminded, section 2(b) of the Charter states that "Everyone has the […] freedom of the press and other media of communication". Therefore, although section 11 d) of the Charter doesn't effectively grant the press access to the courtroom, the Supreme Court's interpretation of section 2(b) does, since "[e]ssential to the freedom of the press to provide information to the public is the ability of the press to have access to this information" [46]. As per their mission, the press acts as the eyes and ears of private citizens who simply cannot go to the courthouse to witness a trial firsthand:

> "It is exceedingly difficult for many, if not most, people to attend a court trial. Neither working couples nor mothers or fathers house-bound with young children, would find it possible to attend court. Those who cannot attend rely in large measure upon the press to inform them about court proceedings -- the nature of the evidence that was called, the arguments presented, the comments made by the trial judge -- in order to know not only what rights they may have, but how their problems might be dealt with in court. It is only through the press that most individuals can really learn of what is transpiring in the courts. They as "listeners" or readers have a right to receive this information. Only then can they make an assessment of the institution. Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court. Practically speaking, this information can only be obtained from the newspapers or other media."[47]

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[43] Angers J.A. as quoted in *Canadian Broadcasting Corp.* v. *New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, par. 10.

[44] *Vickery* v. *Nova Scotia Supreme Court (Prothonotary)*, [1991] 1 S.C.R. 671

[45] *Canadian Broadcasting Corp.* v. *New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, par. 23.

[46] *Canadian Broadcasting Corp.* v. *New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, par. 24.

[47] Cory J., as quoted in *Canadian Broadcasting Corp.* v. *New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, par. 23.

But, as is well documented, newspapers are no longer the way most members of the public choose to receive their information. Internet broadcasts, blogs and television are the resources "du jour", when it comes to newsgathering, something that, according to some, urgently needs to be recognized by the legal system:

> "failure to accommodate the public's evolving expectations of access to public process threatens the court's ability not only to secure justice, but also to satisfy the appearance of justice. The way people receive information is undergoing one of the greatest transformations in the history of information technology. In today's media climate, an open courtroom not only means letting people into the building, but letting information out as well."[48]

This diagnostic further complicates the already far-reaching debate over whether or not broadcasting technology such as cameras should be allowed into the courtroom. The list of arguments on both sides of this debate is far too long and complex to go through with details in only a few pages – whole theses having been written on the topic[49]. Our comment will therefore mostly address one of the main issues put forth by those who object to the introduction of cameras into the courtroom: how it will affect the way interveners will act. As one commentator puts it:

> "Everybody knows if you take out the camera, people will smile for it and pose for it – it's an in-built thing. My concern underlying all of this is that putting a TV camera in there can affect the outcome of the case. And these effects are not recorded in the transcript"[50].

There is substantiated fear that some if not most hearings could turn into the O.J. Simpson trial – which was televised – "with all its witness histrionics, lawyer grandstanding, and soap-opera qualities"[51].

Yet, as reality television has taught us, "the more people experience camera access, the more comfortable they are with it"[52]. Comparisons can be drawn with the presence of hundreds of CCTV (closed circuit television) cameras on London streets. Although citizens first complained about how this would affect their privacy, they now go on with their lives and forget that the cameras are even there[53]. This also seems to have been the case in the few Canadian trials where

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[48] Nadia WHITE, "UM's Grace Case Project", (2010) 35 *APR Mont. Law* 6, 6.

[49] See François OUELLETTE, *L'accès des caméras de télévision aux audiences des tribunaux*, Montréal, Thémis, 1997.

[50] David Lepofsky, counsel with the Ontario Ministry of the Attorney General, as quoted by Susan GOLDBERG, "The Public Eye", (2007) 16(5) *National* 46, 49.

[51] Susan GOLDBERG, "The Public Eye", (2007) 16(5) *National* 46, 46.

[52] Daniel Henry, senior legal counsel at the CBC, as quoted by Susan GOLDBERG, "The Public Eye", (2007) 16(5) *National* 46, 49.

[53] Norbert CUNNINGHAM, "I Was A Sceptic… But I Think It's a Good Idea Now", 14(2) *Justice Report* 7.

video cameras were allowed into the courtroom[54]: initial unease followed by apathy. South of the border, cameras in the courtroom have become a common occurrence and it is believed that "the presence of the camera [has] little or no impact on the courtroom proceedings"[55]. In fact, onus is on the accused that opposes the presence of cameras to prove that "the camera had either compromised the ability of the jury to judge him fairly or adversely affected trial participants to such a degree as to constitute a denial of due process"[56]. This is not to say, however, that reporters and networks have been given free reign to turn the courtroom into a television studio. For example, in Florida, "the rules provide that not more than one portable television camera shall be permitted in any trial court Proceeding"[57]. Furthermore, "[o]nly television equipment "that does not produce distracting sound or light" can be used, and maximum levels of sound and light are set out"[58].

If we choose to accept this position, one problem relating to the broadcast of court cases still remains: that of privacy. In 2008, Lord Chief Justice, Lord Phillips of Worth Matravers, decided that British judges would no longer have to wear wigs[59]. Although some judges were relieved because wigs are "itchy, dirty (often), hot and old-fashioned", others were not so keen on seeing this tradition put to the curb. Although this ritual was seen as "out of touch", it did offer something cherished by many justices, especially those who preside over criminal trials: anonymity from criminals[60]. Allowing cameras and new media devices into the courtroom will undoubtedly have the same result, but on a much larger scale. Furthermore, what of the effects this will have on victims or witnesses prior to the trial. Could the presence of cameras make them more reluctant to come forward and testify than they already are? It has been suggested that witnesses be shielded by a screen[61] to protect their identity from the viewing public, but this would make it difficult for lawyers to interact with them, meaning that cameras would interfere with the process, something courts are desperately trying to avoid.

Therefore, the jury is still out on the admissibility of cameras in the courtroom. On the one hand, it would increase public access and awareness, but on the other, the potential negative effects on decorum and witnesses remain uncertain.

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[54] Dean JOBB, "In the Wake of the Truscott Case, Canadian Courts are Deciding Whether to Broadcast Future Cases", 28 *Lawyer Weekly*.

[55] John SILVESTER, "Courtroom Cameras Have Little Impact on Trial, Say U.S. Lawyers", 23 *Lawyers Weekly*.

[56] John SILVESTER, "Courtroom Cameras Have Little Impact on Trial, Say U.S. Lawyers", 23 *Lawyers Weekly*. See *Chandler* v. *Florida*, 449 U.S. 560 (1981).

[57] John SILVESTER, "Courtroom Cameras Have Little Impact on Trial, Say U.S. Lawyers", 23 *Lawyers Weekly*.

[58] John SILVESTER, "Courtroom Cameras Have Little Impact on Trial, Say U.S. Lawyers", 23 *Lawyers Weekly*.

[59] Frances GIBB, "Lord Chief Justice and his funky new gown", (2008), available at: http://business.timesonline.co.uk/tol/business/law/article3919653.ece (May 14th, 2008).

[60] Frances GIBB, "Lord Chief Justice and his funky new gown", (2008), available at: http://business.timesonline.co.uk/tol/business/law/article3919653.ece (May 14th, 2008).

[61] Dean JOBB, "In the Wake of the Truscott Case, Canadian Courts are Deciding Whether to Broadcast Future Cases", 28 *Lawyer Weekly*.

Social Networking: Giving Jurors the Keys to the Sub Trunk?

A sub trunk (short for substitution trunk) is an illusion where a magician is handcuffed, stuffed inside a mailbag, and then placed in a locked trunk. The magician is then expected to exit the box without any outside help. The symbolism of this short prelude, as it relates to jury trials, is obvious. When sequestered, jurors, like the magician, are believed to be isolated. They are perceived as being incapable of interacting with the outside World. While the magician can only rely on his cunning to escape the trunk, jurors have a much simpler method to escape their isolation: turning on their cell phone.

Cell phones, when combined with applications such as Google, Twitter, or Facebook, allow jurors to communicate with each other and with the outside world with ease. Technology allows them to gather and share information on the case, which, although contrary to procedural law, seems rational in order to make a decision that could ultimately cost an innocent man his freedom or set a guilty man free[62]. In a British case, a juror polled her friends on Facebook to see how she should vote[63]; in the USA, a juror tweeted the outcome of a trial during deliberations[64], etc. Google, MapQuest, and social networking sites have also been used by American jurors to gather information about cases, parties and even judges and lawyers[65].

As legal professionals, we are taught to only present and consider facts that are directly relevant to the case at hand; all other information is perceived as noise. It must be ignored if one hopes to have an "independent and impartial trial"[66]. As explained by justice Décary in *R.* v. *Généreux*[67], this is done:

> "to ensure that a person is tried by a tribunal that is not biased in any way and is in a position to render a decision which is based solely on the merits of the case before it, according to law. The decision-maker should not be influenced by the parties to a case or by outside forces except to the extent that he or she is persuaded by submissions and arguments pertaining to the legal issues in dispute."[68]

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[62] See Lisa C. WOOD, "Social Media Use During Trials: Status Updates from the Jury Box", (2009) 24 *Antitrust* 90; Jeffrey T. FREDERICK, "You, the Jury, and the Internet", (2010) 39 *Brief* 12; and Rosalind R. GREENE and Jan MILLS SPAETH, "Are Tweeters of Googlers in Your Jury Box?", (2010) 46 *Ariz. Att'y* 38.

[63] Sharon NELSON, John SIMEK, and Jason FOLTIN, "The Legal Implications of Social Networking", (2009) 22 *Regent U. L. Rev.* 1, 3; John G. BROWNING, "When All That Twitters is not Told", (2010) 73 *Tex. B.J.*, 216, 217.

[64] Sharon NELSON, John SIMEK, and Jason FOLTIN, "The Legal Implications of Social Networking", (2009) 22 *Regent U. L. Rev.* 1, 3.

[65] John G. BROWNING, "When All That Twitters is not Told", (2010) 73 *Tex. B.J.*, 216, 218.

[66] Section 11 d) of the *Canadian Charter of Rights and Freedoms*. See *Toronto Star Newspapers Ltd.* v. *Canada*, 2009 ONCA 59, par. 176 : "It is the application of these rules and protocols, together with other trial orders such as change of venue, that allow us to be satisfied that the accused is receiving a fair trial by an impartial jury."

[67] [1992] 1 S.C.R. 259 (dissenting opinion).

[68] *R.* v. *Généreux*, [1992] 1 S.C.R. 259

Therefore, "[i]t is incredibly important to the rules of justice that the jury decides the case based on the evidence presented to him within the four walls of the courtroom, and not by "googling" any term or doing any independent research on the case"[69]. But to a layperson, this type of wilful blindness is counter-intuitive. How can you make a just and informed decision if you do not have all the information?

As we're writing these lines, one of the dozens of American television shows about lawyers is playing on television. In this particular show, the story is told through the eyes of a deliberating jury. In one scene, when asked by another juror whether he has "reasonable doubt" about the defendant's guilt, the foreman answers something in the lines of "I don't know because I don't have reasonable information".

To fight jurors' urges to get "reasonable information", "[t]he common law has developed rules as well as discretionary protocols for trial judges to use to ensure that jurors either do not hear certain evidence, or if they do hear it, they are clearly instructed what use they can make of it"[70]. One of these protocols is the possibility to sequester the jury; another, is to hope that jurors will forget or ignore any information they have heard or gathered before the trial started. However, with the advent of Blackberries, iPhones and other types of "smart phones" which can surf the Web, and websites like the Internet Archive[71] that record all Web content for posterity, such hope is rapidly fading:

> "It is also, in my view, no longer appropriate or realistic to rely on jurors' faded memories of any pre-trial publicity by the time of the trial as the basis for confidence that they will not remember what they read or heard. Once something has been published, any juror need only "Google" the accused on the Internet to retrieve and review the entire story."[72]

As Shakespeare so eloquently put it, "there's the rub". Before the advent of the Internet, information was fickle and easily forgotten. If one wanted to read a newspaper from months earlier, he had to go to the library and look through microfiches. Now, " because of the nature of the Internet, information first published at the time of the bail hearing is always accessible, right up to the time of the trial" [73]. In other words, "the court cannot always simply rely upon the fact that time will have passed from when the information was first published and that this passage of time will lessen any prejudicial effects of the information" [74]. This means that, in order to be certain that all prejudicial information is out of reach from jurors, judges would have to either:

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[69] Dani MANOR, "Facebook And Twitter Increasingly Off Limits To Jurors", (2010) *Social Times:* *http://www.socialtimes.com/2010/04/facebook-twitter-jurors/?red=rb*.

[70] *Toronto Star Newspapers Ltd.* v. *Canada*, 2009 ONCA 59, par. 176.

[71] www.archive.org

[72] *Toronto Star Newspapers Ltd.* v. *Canada*, 2009 ONCA 59, par. 177.

[73] *Toronto Star Newspapers Ltd.* v. *Canada*, 2009 ONCA 59, par. 106.

[74] *Toronto Star Newspapers Ltd.* v. *Canada*, 2009 ONCA 59, par. 106.

1) Make publication bans retroactive which, due to the nature of the Internet, is practically impossible even if all parties (Internet service providers, portals, webmasters, etc.) were willing and able to enforce the ban;
2) Systematically sequester all juries and/or forbid them from having access to the Internet, i.e. confiscate their cell phones and other new media devices (iPods, eBook readers, laptops, USB keys, etc.). This latter method has been adopted by courts in Virginia, Michigan and New York[75]; or
3) Trust that jurors always "follow the directions which the judge will give them to focus exclusively on the evidence and to ignore anything they may have heard or read out of court"[76], and give them strict instructions regarding the use of new media to gather or exchange information.

Although some researchers doubt its effectiveness[77], this last option was chosen by the *Judicial Conference Committee on Court Administration and Case Management of the Judicial Conference of the United States*. Committee members recently put forth a new *Proposed Model of Jury Instructions*[78] emphasizing the need to address new media devices. The proposed instructions read as follows:

> **Before Trial:**
> You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom. This means that during the trial you must not conduct any independent research about this case, the matters in the case, and the individuals or corporations involved in the case. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case. Please do not try to find out information from any source outside the confines of this courtroom.
>
> Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end. I hope that for all of you this case is interesting and noteworthy. I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any

[75] Sharon NELSON, John SIMEK, and Jason FOLTIN, "The Legal Implications of Social Networking", (2009) 22 *Regent U. L. Rev.* 1, 5-6. Also see Lisa C. WOOD, "Social Media Use During Trials: Status Updates from the Jury Box", (2009) 24 *Antitrust* 90.

[76] *In the Matter of B*, [2006] EWCA Crim. 2692 ; as quoted in *R.* v. *Valentine*, 2009 CanLII 46171 (ON S.C.).

[77] See Gary T. TROTTER, *The law of bail in Canada*, 2nd ed., Scarborough, Carswell, 1999, 594 p.

[78] Available at : http://www.wired.com/images_blogs/threatlevel/2010/02/juryinstructions.pdf

> blog or website, through any internet chat room, or by way of any other social networking websites, including Facebook, My Space, LinkedIn, and YouTube.
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> **At the Close of the Case:**
> During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website such as Facebook, My Space, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict. (emphasis added)

Similar directions have been given inside courtrooms in states such as Georgia, Indiana, Florida, Texas[79], Oregon and Arkansas[80]. These instructions, if obeyed, could resolve some of the issues linked to the use of new technology by jurors, but, as one observer notes:

> "The question still remains, however, how exactly a court would enforce this new rule. Could jurors be forced to give up their login information and passwords? What if two jurors know each other, or are already "Facebook friends" or follow each other on Twitter prior to the trial? Even if login information could be collected, could personal inbox messages be screened without some sort of privacy invasion? What is a reasonable amount of surveillance compared to the threat that jurors are having unauthorized electronic contact? How likely is it that jurors are conducting independent research? As more jurisdictions consider and adopt or ignore these model jury instructions, these issues will continue to unfold as law and technology continue to intersect."[81]

Step Right Up: eAccess to Case Documents and Voyeurism

In February of 2010, the *Times Columnist* published a special report on the lack of uniformity regarding public access to court documents in British-Columbia[82]. According to the report, "B.C.'s courts routinely and wrongly deny access to information that should be available to the public". In situations such as the one observed in British-Columbia, eAccess to court files is seen as an efficient way to guarantee that the procedures put into place are the same no matter who is

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[79] Dani MANOR, "Facebook And Twitter Increasingly Off Limits To Jurors", (2010) *Social Times:* *http://www.socialtimes.com/2010/04/facebook-twitter-jurors/?red=rb*.

[80] Sharon NELSON, John SIMEK, and Jason FOLTIN, "The Legal Implications of Social Networking", (2009) 22 *Regent U. L. Rev.* 1, 6-7.

[81] Dani MANOR, "Facebook And Twitter Increasingly Off Limits To Jurors", (2010) *Social Times:* *http://www.socialtimes.com/2010/04/facebook-twitter-jurors/?red=rb*.

[82] The report is available at: http://www.timescolonist.com/news/Special+Report+Access+denied+open+court+system/2520905/story.html

behind the computer monitor. This also limits incoherent access procedures due to the clerk's personal understanding of policies or lack of experience. Of course, eAccess also raises the question of how much access is too much?

It is agreed that "[t]here is a strong presumption in favour of public access to court records"[83], and that said presumption "should be displaced only with the greatest reluctance and only because of considerations of very significant importance such as the protection of the innocent"[84], but this premise forces us to ask an often forgotten question: "who is the public?"[85]. This important point was brought up by the Canadian Judicial Council in a 2003 Discussion Paper on electronic access to court records[86]. As explained in this Paper, eAccess to court documents creates a new problem:

> "Where court records are open to access by the public but searching capacity is reduced by the need to identify files in court ledgers and file retrieval fees, "practical obscurity" prevails. The theoretical openness is limited by logistical barriers. However, where electronic access exists, the definition of "public" will likely expand"[87].

As the paper goes on to mention, because of the ease of the process, access is no longer limited to those who wish to "comment on the courts as an essential aspect of our democratic society"[88]. Now, "nosy neighbours", "possible predators" and the likes[89] can get the same information quickly and easily. This very problem is also being discussed with regards to websites such as CanLII[90] publishing court decisions containing private information regarding the parties. However, where anonymizing offers a solution with regards to decisions[91], there doesn't seem to be an equally satisfactory solution to control eAccess to court records.

The obvious starting point regarding eAccess is which documents access should be given to, and what does that access entail (right to copy, to broadcast, etc.). Regarding this later issue, it seems that access should not encompass the right to broadcast, at least not during the trial:

> "No case has come to my attention in which a Canadian appellate court has ruled that a media applicant is to have unfettered access to an exhibit of this nature for copying purposes so that it may broadcast the evidence during an ongoing jury

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[83] *R.* v. *Canadian Broadcasting Corporation*, 2007 CanLII 21124 (ON S.C.), par. 50.

[84] *R.* v. *Canadian Broadcasting Corporation*, 2007 CanLII 21124 (ON S.C.), par. 50.

[85] Page 35 of the paper.

[86] *Discussion Paper Prepared on Behalf of the Technology Advisory Committee for the Canadian Judicial Council on Open Courts, Electronic Access to Court Records , and Privacy*, May 2003.

[87] Page 36 of the paper.

[88] *Canadian Broadcasting Corp.* v. *New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, par. 26.

[89] Pages 36 and 37 of the paper.

[90] http://www.canlii.org.

[91] See Luc PLAMONDON, Guy LAPALME, and Frédéric PELLETIER, "Anonymisation de décisions de justice", TALN 2004, Fès, 19–21 avril 2004.

trial."[92]

Furthermore, access should always be weighed against the accused' right to a fair trial:

> "In this particular case, dissemination to the public and public access to this material in videotaped format can only serve to sensationalize the evidence with the real possibility of an adverse impact on the accused's fair trial rights."[93]

The previous statement brings forth another interesting question: does access have to been given to the original version of a document (e.g. a video recording), or is access to a transcript sufficient to meet the "strong presumption in favour of public access to court records"[94]? According to one decision, a transcript would be sufficient when the dissemination of footage could be prejudicial to the accused:

> "Having acknowledged that discretion, I caution myself that publication of court exhibits in pictorial form must not disrupt the proper and orderly discharge of this trial. Furthermore, the accused's right to a fair trial and the legitimate privacy rights of any witness or even non-witness must be protected from undue sensationalism. After all, written words tend to be more rational and less evocative than pictures or film. Pictures and film often evoke immediate visceral response whereas words generally require reflection and assessment. The public seeing the pictures or film lacks the calm serenity of a courtroom and the limiting instruction the trial judge gives the jury as to the use to be made of the pictorial exhibit."[95]

Of course, the previous examples all pertain to access during the proceedings, but what of the accessibility to these same documents AFTER the proceedings? Should it be allowed to ensure that the rule of public accessibility is respected, or disallowed because of the sensational nature of the requested contents? According to Dickson J. in *A.G. of Nova Scotia* v. *MacIntyre*[96]: "[t]he rule should be one of public accessibility, to be departed from only if necessary to protect […] "social values of superordinate importance", such as the protection of the innocent.

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These questions are just a survey of some of the issues brought forth by the use of new media within the courtroom. It's our responsibility, as members of the legal community and the press to address said issues so as to make sure that we reach a proper equilibrium between the rights of the public and the decorum that must be respected if trials are to remain independent, impartial

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[92] *R.* v. *Canadian Broadcasting Corporation*, 2007 CanLII 21124 (ON S.C.), par. 82.

[93] *R.* v. *Canadian Broadcasting Corporation*, 2007 CanLII 21124 (ON S.C.), par. 81.

[94] *R.* v. *Canadian Broadcasting Corporation*, 2007 CanLII 21124 (ON S.C.), par. 50.

[95] *R.* v. *Ranger*, [1998] O. J. No. 1654 (Ont. Ct. Justice, Gen. Div.).

[96] [1982] 1 S.R.C. 175, par. 14.

and fair. If we do not come to some sort of balance, court proceedings could very well be turned into a spectacle. The justice system is not a television show, or a sporting event and, therefore, shouldn't be treated as such by the public, the media or by its own stakeholders. But this is not to say that the courthouse needs to be the only building not to evolve with the times; if the courts want to stay relevant, they need to accept change whether it appears in the digital form or otherwise…