Indexed as:

R. v. Pilarinos

Between
Her Majesty the Queen, and
Dimitrios Pilarinos and Glen David Clark, and
BCTV, a Division of Global Communications Limited,
CKVU, a Division of Global Communications Limited,
CKNW, a Division of Corus Entertainment Inc.,
Canadian Broadcasting Corporation, CTV Inc., CTV Television Inc., CIVT, a Division of CTV Television Inc. (d.b.a. Vancouver Television, the Radio Television News Directors' Association of Canada and AD IDEM - Advocates In Defence of Expression of the Media, and the Vancouver Sun, applicants

[2001] B.C.J. No. 1936

2001 BCSC 1332

158 C.C.C. (3d) 1

88 C.R.R. (2d) 33

51 W.C.B. (2d) 255

Vancouver Registry No. CC0011402

British Columbia Supreme Court
Vancouver, British Columbia

Bennett J.

Heard: September 10 - 14, 2001.
Judgment: September 25, 2001.

(232 paras.)

Civil rights -- Trials, due process, fundamental justice and fair hearings -- Criminal and quasi-criminal proceedings -- Freedom of the press -- Limitations -- Court proceedings (incl. televising) -- Canadian Charter of Rights and Freedoms -- Application, policies of court -- Application, exceptions -- Reasonable limits prescribed by law (Charter, s. 1).

Application by several media organizations for television and radio access to a criminal trial. The organizations also applied for a declaration that a court policy that restricted media access to trials was inconsistent with the right of freedom of the press contained in section 2(b) of the Canadian Charter of Rights and Freedoms. The former premier of British Columbia, Clark, was charged along with the accused Pilarinos. The Crown alleged that Pilarinos improved Clark's property in exchange for his assistance to obtain a casino license. The policy allowed radio and television coverage of trials only if the parties consented.

HELD: Application dismissed. Reporters were allowed to bring audio recording devices into the trial only to verify their notes. No portion of the recordings could be used for any media broadcast or for any other purpose. Tape recorders could only be used if they did not become disruptive. The media was to provide a list of reporters who wished to bring the recorders into court so that they could be provided with an authorization letter. The court had the inherent power to make any order or policy regarding the publicity of the proceedings. That order or policy had to be consistent with constitutional requirements. It also had to take into account the facts of the case and comply with the common law. The policy did not have the force of law. The common law also had to comply with the Charter. The onus was on the applicants to show that the Charter was violated. The common law rule was that cameras could not be brought into a courtroom during a trial or other proceeding. The Charter right of freedom of the press did not provide absolute protection to all expressive activities. The gathering of information on film, video or audiotape was not an expressive activity that was protected by the Charter. The Charter right of freedom of the press did not give the media any rights beyond those enjoyed by the Canadian public. Even if the gathering of information by film, video or audiotape was a protected expressive activity, the Charter was not violated by the common law or the policy. It was not appropriate to have this type of activity in a courtroom. The presence of such devices would have a negative effect on the parties, on witnesses, on counsel and on the triers of fact. Even if there was a violation, the common law and the policy was a reasonable limit on the application of the Charter. The common law and the policy sought to promote the right of an accused to a fair trial, the maintenance of dignity and decorum and the ability of trial participants to have some degree of privacy. Expanded media coverage would harm these interests. The media was not denied the right to attend the trial. The right to freedom of expression was minimally impaired by the exclusion of cameras and audio recording devices.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, ss. 1, 2, 2(b).

Constitutional Question Act, R.S.B.C. 1979, c. 63, s. 8.

Courts of Justice Act, R.S.O., s. 136, 136(1).

Criminal Code, ss. 121, 122, 341, 397, 486.

Judicature Act, R.S.O., s. 67.

Court Note:

On application for expanded media coverage.

Counsel:

W.B. Smart, Q.C., and J. Esson, for the Crown.
I. Donaldson, Q.C., and D. Clements, for Dimitrios Pilarinos.
D. Gibbons, Q.C., R. Fowler and M. Nathanson, for Glen David Clark.
D. Burnett and H. Maconachie, for the applicants.
K. Woodall, for the Vancouver Sun.
G. Copley, Q.C., and R. de Boer, for the Attorney General of British Columbia.
J. Wood, Q.C., P. Juk and R. Millen, amicus curiae.

BENNETT J.:--

BACKGROUND

1 On October 20, 2000, Glen Clark, a former Premier of British Columbia, was charged with violating ss. 121 and 122 of the Criminal Code, R.S. 1985, c. C-46. Dimitrios Pilarinos was charged with violating ss. 121, 122, 341 and 397 of the Criminal Code. Both men were charged together in a direct indictment. The charges arise, inter alia, from allegations that Mr. Pilarinos improved Mr. Clark's real property in exchange for his assistance in respect of an application for a casino license. This application relates to the extent and form the media may provide coverage of the trial.

2 The trial of the two men is to commence with preliminary arguments on September 24, 2001. The trial is presently scheduled to proceed with a judge and jury. Jury selection is scheduled to commence on October 15, 2001. The defence has advised that it cannot determine whether to proceed to trial with a jury or with a judge alone until this application is determined. In order to ensure that the trial proceeds as scheduled, I advised counsel that I would release the decision on September 24, 2001. As a result, these reasons will not do justice to the extensive, thorough and very able argument I received from the applicants, amicus curiae and the Province of British Columbia. Counsel for the accused played a lesser role in these proceedings, but both adopted the position taken by the amicus curiae and the Province of British Columbia. Both also offered thoughtful submissions with respect to their respective positions.

THE NATURE OF THE APPLICATION

3 The media bring two separate applications. Counsel for the Vancouver Sun adopted the submissions and materials of lead counsel, Mr. Burnett. Near the end of the hearing, Court TV, a new digital television station which will broadcast Canadian trials in their entirety, also joined in, not as a party or intervenor, but as an organization that will join into the camera pool, if permitted.

4 The application by the media arises as a result of a Policy adopted by the British Columbia Supreme Court and made public on April 18, 2001. The Policy is as follows:

> The British Columbia Supreme Court has adopted the following with respect to the televising of court proceedings:
>
> The Court has agreed as a matter of court policy that:
>
> There shall be no broadcasting, televising, recording or taking of photographs in the courtroom, or areas immediately adjacent thereto, during sessions of court or recesses between sessions, unless the parties to the proceeding consent, and unless prior permission has been expressly granted by the presiding judge, following application upon timely notice to the parties, and subject to such conditions as the presiding judge may prescribe to protect the interests of justice and to maintain the dignity of the proceedings [the "Policy"].
>
> The Court will also be preparing guidelines for the broadcast or televising of court proceedings. To ensure general acceptance these will be prepared by the judiciary in consultation with the bar, the media and others with a demonstrable interest.

5 The Court also released a 43-page report on the Supreme Court Policy on Television in the Courtroom, which explains the Policy in depth, [Exhibit W]. The draft guidelines have been circulated, and the process of consultation is presently underway.

6 The following passage is contained at p. 3 of the report:

> Policy will not have the force of law (unless it should be legislatively enacted) and will not bind individual judges in particular cases, but it may serve to inform and guide the media and the court on applications for television coverage.

7 The application by the media is stated as follows:

> TAKE NOTICE that an application will be made by BCTV, a division of Global Communications Limited, CKVU, a division of Global Communications Limited, CKNW, a division of Corus Entertainment Inc., the Canadian Broadcasting Corporation, CTV Inc., CTV Television Inc., and CIVT, a division of CTV Television Inc., (dba Vancouver Television), the Radio Television News Directors' Association of Canada and Ad Idem - Advocates in Defence of Expression of the Media (the "Applicants") to the Honourable Chief Justice Brenner on a date to be set, at the Law Courts, 800 Smithe Street, Vancouver, British Columbia for orders as follows:
>
> 1. Granting television and radio access to the entire trial of this matter, currently scheduled to commence September 17, 2001, subject to the ongoing control and discretion of the Trial Judge;
> 2. Declaring that portion of the Policy respecting broadcasting or recording in courtrooms issued by the Honourable Chief Justice by way of Press Release dated April 18, 2001, (the "Policy") which prohibits electronic access to trials "unless the parties to the proceeding consent" to be of no force or effect by virtue of its inconsistency with s. 2(b) of the Canadian Charter of Rights and Freedoms;

8 Additionally, the Vancouver Sun newspaper joins the applicants and seeks to have still photographs taken during the proceedings.

9 The applicants served a Notice pursuant to s. 8 of the Constitutional Question Act, which reads as follows:

> [The Applicants] hereby give notice pursuant to s. 8 of the Constitutional Question Act, R.S.B.C. 1979, c. 63, that an issue will be raised by them at the hearing of their application (copy attached) for television and radio access to the trial of this matter on a date to be set, at The Law Courts, 800 Smithe Street, Vancouver, B.C., which concerns the constitutional interpretation or validity of the Policy on broadcasting and recording court proceedings issued by the Honourable Chief Justice of the British Columbia Supreme Court on April 18, 2001 (the "Policy"), a copy of which is attached.
>
> AND FURTHER TAKE NOTICE that the Applicants take the position that:
>
> 1. The Policy infringes section 2(b) of the Canadian Charter of Rights and Freedoms ("Charter") in that it restricts news gathering and news presentation by broadcast media;
> 2. The infringement of the constitutional right by virtue of the Policy is not "proscribed by law" within the meaning of section 1 of the Charter and is therefore incapable of being saved as a reasonable limit. Alternatively, the Policy is not a reasonable limit upon section 2(b) of the Charter under a section 1 analysis.

10 The Court appointed Josiah Wood, Q.C. as amicus curiae to assist the court and provide an analysis of the law and evidence. The amicus curiae took no position with respect to the facts of this case, but submitted that the court was entitled to permit or deny "Expanded Media Coverage" in the courtroom.

11 Counsel for Mr. Clark, Mr. Pilarinos and the Attorney General of British Columbia oppose the application by the media. Mr. Clark and Mr. Pilarinos do not consent to Expanded Media Coverage.

12 The application was initially set to be heard in June, 2001, by the Chief Justice of the Supreme Court of British Columbia, however, as the trial judge has the ultimate decision with respect to Expanded Media Coverage, it was determined that I, as the trial judge, should hear the application. Further, counsel for the Attorney General and the amicus curiae had only recently become involved, and could not be ready for a June hearing. The matter was then set for a week of hearing in September.

13 Unlike the case of R. v. Squires, infra, this case proceeded with only affidavit evidence. If viva voce evidence had been called, the application could not have been heard without disrupting the trial process. [See R. v. Bernardo, [1995] O.J. No. 585 (Ont. Ct. of Justice (General Div.)].

14 The Attorney General points out in his argument that the media could have brought a challenge to the Policy by way of a Writ and Statement of Claim. If the application had proceeded this way, the matter would not be tied to a specific criminal trial. The difficulty with this approach is that the media wish to have Expanded Media Coverage at Mr. Clark's trial. Regardless whether an application was made for a declaration regarding the Policy, the media would still be required to make an application to the trial judge with respect to this case. Further, hearing the constitutional arguments in the course of the criminal case provide context to the hearing that would otherwise not be available.

ISSUES

15 There was some disagreement about the framing of the issues. For example, the media disagrees with the amicus curiae and the Attorney General's position that the media's challenge is to the existing common law.

16 I have concluded that in order to perform a logical analysis of the issues, the issues need be stated in the manner suggested by the amicus curiae. The issues are stated as follows:

(a) The inherent jurisdiction of the Court

- (i) What is the origin of the court's jurisdiction over courtroom procedures?
- (ii) What is the legal status of the policy?
- (iii) What is the state of the law regarding media activities in courtrooms?

(b) Section 2(b) of the Charter

- (i) Does s. 2(b) grant absolute protection to all expressive activity?
- (ii) Is gathering information on film, video or audiotape expressive activity?
- (iii) Do members of the media have special rights under s. 2(b), beyond those of the general public?
- (iv) If gathering information on film, video, or audiotape is expressive activity, is it protected by s. 2(b) when the activity occurs in or immediately adjacent to courtrooms?
- (v) If gathering information on film, video or audiotape in or immediately adjacent to courtrooms is protected activity, does the common law regarding media activities in courtrooms infringe s. 2(b)?

(c) Section 1 of the Charter

(i) Does the Charter apply to the common law?
(ii) If the common law limits s. 2(b), would an order consistent with the common law constitute a limit prescribed by law?
(iii) What are the interests at stake in the balancing process engaged by s. 1?
(iv) What is the nature of the infringement?
(v) Does the common law constitute a reasonable limit on Charter rights?

DISCUSSION

The Media's position

17 The application by the media began as a broad-based challenge to the ability of this court to refuse Expanded Media Coverage in the courtroom. However, as the application progressed, the media advised that this application was for this trial, and considerations relating to, for example, vulnerable witnesses, should not be taken into account. Additionally, the media submitted that this was not an all or nothing proposition. If the entire trial could not be subjected to film, video and audio, then parts of the trial could be covered, such as closing arguments or the instructions to the jury. The media is not seeking to film any jury member. The media seeks to install one camera in the courtroom at a fixed location. One cameraman would operate the camera and all media outlets would pool into the single camera. The radio reporters would have their audio tape recorders, and a single still photographer would be taking photographs.

18 The coverage would be quite different than the carnival-like atmosphere surrounding such trials as Hauptmann, (the murder of Charles Lindbergh's son), where there were 700 reporters and 120 cameramen taking photos, or the Scopes trial, where the proceedings included such comments as, "Come a little more forward, Mr. Darrow" and "Put your face a little more this way, Judge". As a result of the coverage of Hauptmann, cameras were banned from most courtrooms in the United States for over 50 years. [Goldfarb, Ronald, "TV or Not TV - Television, Justice and the Courts" New York University Press, 1998; Strickland R.A. and Moore R.H. (November-December 1994) "Cameras in state courts: A historical perspective" Judicature Volume 78, Number 3 pp. 128-135].

Evidentiary Foundation for the application

19 Limiting the argument to this case presents an evidentiary problem that was not raised by any of the participants. A Charter challenge is not to be heard unless there is a sufficient factual foundation. In Danson v. Ontario (Attorney General), [1990] 2 S.C.R. 1086, Sopinka J. said, at p. 1099:

> This Court has been vigilant to ensure that a proper factual foundation exists before measuring legislation against the provisions of the Charter, particularly where the effects of impugned legislation are the subject of the attack....

And at p. 1101:

> In general, any Charter challenge based upon allegations of the unconstitutional effects of impugned legislation must be accompanied by admissible evidence of the alleged effects. In the absence of such evidence, the courts are left to proceed in a vacuum, which, in constitutional cases as in nature, has always been abhorred...

[See also Mackay v. Manitoba, [1989] 2 S.C.R. 357].

20 A number of the decisions referred to in Danson, supra, were cases challenging legislation under s. 2(b) of the Charter.

21 There is no evidence with respect to the basis of the allegations facing Mr. Clark and Mr. Pilarinos. Nor is there evidence from the two accused regarding the nature of the defence. One would not expect to know the defence at this stage of the proceeding. Indeed, in C.B.C. v. Dagenais, infra, Lamer C.J.C. recognized

the difficulty for an accused if he or she was obliged to reveal defence strategy prior to the closing of the Crown's case. He said, "...the accused must not be placed in the position of having to risk prejudice to one aspect of his or her right to a fair trial in order to protect another aspect of this right."

22 There is much evidence filed before me with respect to the effect of cameras in the courtroom on witness, litigants, counsel, judges, jurors and other participants in the process.

23 In Danson, no affidavits were filed and no facts were alleged. In this case, counsel have filed affidavits of many participants in trials on both sides of the camera issue, as well as many studies and scholarly articles. An index to this evidence is Exhibit X in the proceedings. The evidence gives the application the necessary context, as does the fact that a well-known public figure is on trial. I have concluded that the application may be determined in the context of the evidence that has been filed.

24 The issue of whether s. 2(b) is infringed by the prohibition of cameras and audio recording devices must, of necessity, be determined on a much broader basis than this trial. The general question of whether there is a constitutional right to bring Expanded Media Coverage into the courtroom needs to be answered. Limitations pursuant to s. 1 or the exercise of the court's discretion will be informed by the parameters of this trial.

25 I turn now to the issues as framed above:

THE INHERENT JURISDICTION OF THE COURT

(i) What is the origin of the court's jurisdiction over courtroom procedures?

26 There is no question that a judge has the ability, and indeed, the duty, to control the procedures in his or her courtroom. The court must maintain its authority and dignity over the process in order to ensure that every litigant receives a fair trial. The power to control the process is also necessary in order to foster respect for the courts and maintain decorum. This jurisdiction is summarized by I.H. Jabob in "The Inherent Jurisdiction of the Court" (1970), 23 C.L.P. 23 at p. 27-8:

> For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute. Without such power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law. The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner.

27 Similar statements have been made or adopted in relation to the court's general inherent jurisdiction and, in particular, its power to proceed with contempt of court. [See B.C.G.E.U. v. British Columbia (Attorney General) (1988), 53 D.L.R. (4th) 1 at p. 19; Balogh v. Crown Court at St. Albans, [1974] All. E.R. 283 (C.A.) at 288].

28 In Canadian Broadcasting Corp. v. New Brunswick (Attorney General) (1996), 139 D.L.R. (4th) 385 (S.C.C.), the court, in the context of a constitutional challenge to s. 486(1) of the Criminal Code (excluding public and media from the courtroom), said the following at p. 400:

> In B.C.G.E.U., supra, Dickson C.J. affirmed the power of courts to act in furtherance of the proper administration of justice. While said in the context of discussing contempt of court, the principle of permitting a court to control its own process may be said to extend to situations, such as the one at bar, where the court is granted a discretion to act in the interests of the proper administration of justice to exclude the public from criminal proceedings.

> Related to a court's power to control its own process is the power to regulate the publicity associated with its proceedings. As such, it has been held that a legislative provision mandating a publication ban upon request by the complainant or prosecutor in sexual assault cases is constitutional; see Canadian Newspapers, supra. This Court has also recognized a common law discretion on the part of courts to order a publication ban; see Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12 (S.C.C.).
>
> The court's power to regulate the publicity of its proceedings serves, among other things, to protect privacy interests, especially those of witnesses and victims.

29 The Court went on to recognize the protection of privacy interests in court proceedings.

30 Thus, the law is clear that this court has the inherent power to make any order in relation to the publicity of the proceedings. However, any order must be consistent with constitutional requirements. It must take into account the facts in the case and comply with the common law.

31 The court therefore is also entitled to enact policy affecting courtroom procedures.

(ii) What is the legal status of the Policy?

32 As noted, the Policy does not have the force of law. Nor does the Policy purport to bind any judge. It is not an order of the Chief Justice. The Policy does not fetter the discretion of any judge who hears an application for Expanded Media Coverage. This Policy does not affect the independence of the judiciary and its ability to make independent decisions based on the evidence before it, guided only by the law and not affected by any outside influence.

33 If the Policy does not have the force of law, does section 1 of the Charter of Rights and Freedoms have any application? Section 1 of the Charter "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 amicus curiae takes the position that the Policy must be consistent with the spirit of the Charter. If it is not, then it cannot be saved by section 1 because it is not "prescribed by law". I agree with this position.

34 This does not end the analysis should I reach s. 1 of the Charter because the common law is also subject to and must be consistent with the principles enunciated in the Charter. Any ruling the court makes becomes part of the common law.

35 In summary, the court has the ability to make a policy. It is not a court rule or an order of the court. It is intended to guide parties and the media on the applicable law, and explain the background to the issues involved in an application for televised access in any particular case.

36 Applications by the media for access to exhibits, to oppose publication bans, and now to expand media coverage of trials are becoming more frequent. Sometimes these applications are lengthy and complicated and divert the court and counsel's attention from the trial at hand.

37 Further, litigants are entitled to know the parameters of their litigation, and whether there will be Expanded Media Coverage permitted into the courtroom. The Policy, while not binding on any individual judge, assists both the public and litigants in knowing what to likely expect at a trial.

38 If the Policy is inconsistent with s. 2(b) of the Charter, it is not saved by s. 1. However, s. 1 is available to support an order of this court which follows the Policy as it forms part of the common law.

(iii) What is the state of the law regarding media activities in the courtroom?

39 There is no statute in British Columbia dealing specifically with the issue of Expanded Media Coverage.

40 Members of the media are entitled, as are all citizens, to enter all courtrooms in the Supreme Court of British Columbia, except in the rare case where a courtroom is having an in camera hearing. Such hearings are usually in relation to an application to adduce prior sexual conduct of a complainant, or pursuant to s. 486 of the Criminal Code. Courts have heard evidence in camera where it is apparent that a witness will not otherwise be able to give evidence.

41 However, a closed courtroom is an exception, and the rule is open courtrooms. The media are permitted to take notes during the proceedings, sketch artists are allowed to draw the participants in the proceedings, reporters have been allowed access to court exhibits, and reporters may apply to listen to the court's tapes of the proceedings or order transcripts. There is no suggestion that the courtroom will be closed during any of this trial. The courtroom will be open. The only issue is whether Expanded Media Coverage can come in.

42 The only restriction upon the media is the prohibition to bring cameras and audio recording devices into the courtrooms and the courthouse.

The Common Law Rule

43 Prior to the publication of the Policy, and the decision in R. v. Cho et al (2000), 189 D.L.R. (4th) 180 (B.C.S.C.), the common law in this province precluded the media from bringing cameras and audio recording devices into the courtroom. The media argued that this was not the common law. However, the authorities convince me otherwise. In R. v. Vander Zalm, [1992] B.C.J. No. 3065 (S.C.) the media applied to televise the trial of a former premier. In refusing the application, Esson C.J.B.C. (as he then was), said the following at para. 3:

> The applications have been brought because of the longstanding and well-known rule of this court that no cameras may be used in the courtroom during a trial or other proceeding. That rule is not statutory and is nowhere written down. But that it exists has never, to my knowledge, been questioned, nor has it ever been questioned that it has been applied in this province without exceptions. Its origins may be said to be lost in the mists of time; but its existence, rather than its origins, is what is significant.

44 In Cho, supra, McKinnon J. permitted cameras into the courtroom on a limited basis, permitting filming of closing arguments and his instruction to the jury. Neither the jury nor the accused could be filmed. This order was made over the objection of both the Crown and the defence. Counsel for the media candidly advised me that I have much more information and more thorough argument than that advanced before McKinnon J.

45 It is not clear from the judgment in Cho whether McKinnon J. acknowledged the common law prohibition and overruled it or whether he did not acknowledge such a prohibition. At para. 27 he said: "The sum of the many cases referred to suggests to me that insofar as British Columbia is concerned, there is no common law basis for excluding modern technology from the court room." At para. 38, he said, "However, given my view of the state of the law and particularly the absence of any cogent reasons in support of the existing common law ban, I am prepared to permit the introduction of the video and still cameras to record counsel's submissions to the jury and my instructions."

46 I conclude that McKinnon J. recognized the existing common law ban referred to by Esson C.J.B.C., and determined that in his case, he would conduct, in his words, "an experiment" and permit recording of the proceedings on a very limited basis.

47 I have, prima facie, two conflicting decisions from this level of court. One concludes that there is an existing common law prohibition while the other concludes that the time has come to make an exception to the common law in order to conduct what he referred to as an experiment. If the common law is as stated by Esson C.J.B.C., then the Policy of the court is a relaxation of the common law rule. I conclude that McKinnon J. did not purport to overrule Esson C.J.B.C. The decision in Cho is clearly limited to an experiment. [See Re Hansard Spruce Mills (1954), 13 W.W.R. 285 (B.C.S.C.)]

48 The other recent application for television coverage in British Columbia was in R. v. McSorley, [2000] B.C.J. No. 2639 (Prov. Ct.). Cameras were not permitted to film the trial. Kitchen P.C.J. observed that the decision in Cho was an experiment, and thus it was not a binding decision.

49 In R. v. Fleet (1994), 137 N.S.R. (2d) 156 (S.C.), the court held that s. 2(b) of the Charter does not guarantee the right of cameras in the courtroom.

50 In Ontario, video and still cameras are restricted pursuant to s. 136 of the Courts of Justice Act, as follows:

> 136(1) Subject to subsections (2) and (3), no person shall,
>
> (a) take or attempt to take any 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 proceeding;
>
> (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).

51 This provision (previously s. 67 of the Judicature Act) has been upheld by the Ontario District Court as a reasonable limit on freedom of the press in R. v. Squires (1989), 69 C.R. (3d) 337 (Ont. Dist. Ct.) [affirming (1986) 25 C.C.C. (3d) 44 (Ont. Prov. Ct.)], which was upheld by the Ontario Court of Appeal in R. v. Squires (1992), 78 C.C.C. (3d) 97, although the court's comments were limited to the factual foundation before the court relating to filming persons entering or leaving the courtroom.

52 The Supreme Court of Canada has videotaped its proceedings for a number of years. The court controls the camera and the process. It permits CPAC to broadcast some of the proceedings.

53 The media argues that the law permits Expanded Media Coverage in the courtroom. It submits that this court's Policy infringes s. 2(b) of the Charter, particularly as it imposes the requirement of the "consent" of the litigants before there can be any Expanded Media Coverage.

54 The Attorney General argues that the common law is as stated by Esson C.J.B.C. in Vander Zalm, supra, and if the Policy is unconstitutional, then the courts will revert to the common law, as it is not challenged in these proceedings.

55 The Attorney General's argument does not recognize that if the Policy is unconstitutional, the common law must also be unconstitutional, as the policy is an expansion to the common law as stated by Esson C.J.B.C.

56 I conclude that the common law in British Columbia is unequivocally that as stated by Esson C.J.B.C. in the Vander Zalm case.

57 The next issue is whether the common law infringes s. 2(b) of the Charter of Rights and Freedoms. If the common law does not infringe s. 2(b), the policy is also constitutionally valid, as it is more permissive than the common law.

SECTION 2(b) of the Charter

(i) Does s. 2(b) grant absolute protection to all expressive activity?

58 Sections 1 and 2 of the Charter state that:

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

59 Any analysis of s. 2(b) of the Charter must begin with Irwin Toy Ltd. v. Quebec (Attorney General) (1989), 58 D.L.R. (4th) 577 (S.C.C.). Irwin Toy was a case involving advertising aimed at children, and sets out a framework for analysis when it is alleged that a s. 2(b) right is infringed. [See also R. v. Big M Drug Mart Ltd. (1985), 18 D.L.R. (4th) 321 at 350 (S.C.C.)].

60 The first question asked was whether this advertising fell within the scope of freedom of expression. This question needs to be answered before deciding whether there had been a limitation on the freedom. In Irwin Toy, the court said at p. 605, "Clearly, not all activity is protected by freedom of expression...".

The framework for the analysis of a s. 2 (b) violation

61 The first part of the analysis in this case is to determine whether Expanded Media Coverage falls within the scope of freedom of expression (at p. 606, ibid). If so, the second step is to consider the purpose of the impugned limitation. If the purpose of the impugned limitation is to restrict the content of expression, by singling out particular meanings that are not to be conveyed, it necessarily limits the guarantee of free expression, and the analysis shifts to s. 1 of the Charter (at p. 609).

62 If the purpose of the impugned limitation is to restrict a form of expression in order to control access by others to the meaning being conveyed or to control the ability of the person conveying the meaning to do so, it necessarily limits the guarantee of free expression, and again, the analysis shifts to s. 1 of the Charter (at p. 612).

63 If, on the other hand, the purpose of the impugned limitation seeks to control only consequences flowing from the form of expression, regardless of the meaning being conveyed, its purpose is not to control expression and the analysis then moves on to consider the effect of the limitation (at p. 612). In other words, is the limitation based on content or is it content-neutral?

64 When the analysis shifts to the effect of the impugned limitation, the burden of proof is on the applicant to demonstrate, on a balance of probabilities, that the expressive activity which is limited promotes one or more of the values underlying the freedom protected by section 2(b) (at p. 612). In order to meet that burden of proof, the applicant must be able to identify the meaning intended to be conveyed by the expression and how it promotes the:

(1) pursuit of truth;

(2) participation in the community; or
(3) individual self-fulfillment and human flourishing.[p. 613]

Freedom of Expression

65 There is no doubt that freedom of expression is an important constitutional right. In Edmonton Journal v. Alberta (Attorney General) (1989), 64 D.L.R. (4th) 577 (S.C.C.), at 607, Cory J. said this:

> It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be overemphasized...It seems that the rights enshrined in s. 2(b) should therefore only be restricted in the clearest of circumstances.

66 It is trite to say that the rights guaranteed by the Charter are to be interpreted broadly and purposively. However, as noted above, the right of freedom of expression is not absolute.

67 A perspective was placed on the right of freedom of expression in Morris v. Crown Office, [1970] 2 W.L.R. 792 (Eng. C.A.), in response to charges of contempt of court arising from individuals singing, chanting and scattering pamphlets at a court hearing, and completely disrupting the process. Salmon L.J. said this at pp. 800-801:

> Everyone has the right publicly to protest against anything which displeases him and publicly to proclaim his views, whatever they may be. It does not matter whether there is any reasonable basis for his protest or whether his views are sensible or silly. He can say or write or indeed sing what he likes when he likes and where he likes, provided that in doing so he does not infringe the rights of others. Every member of the public has an inalienable right that our courts shall be left free to administer justice without obstruction or interference from whatever quarter it may come. Take away that right, and freedom of speech together with all the other freedoms would wither and die, for in the long run it is the courts of justice which are the last bastion of individual liberty.

68 This passage was cited with approval by Dickson C.J.C. in B.C.G.E.U. v. British Columbia, supra, at p. 26.

69 It is therefore well-established on the authorities that s. 2(b) does not provide absolute protection to all expressive activities.

(ii) Is gathering information on film, video or audiotape expressive activity?

70 The amicus curiae identifies two sub-issues. First is whether s. 2(b) guarantees the right of members of the media to gather news. Second, is whether creating a film or audiotape is expressive activity protected by s. 2(b).

71 The authorities support the right of the media to gather news. The amicus curiae submits that this right is guaranteed under s. 2(b) and I agree that this right is protected. However, I am not convinced that the right to gather news includes the right to film the proceedings in a courtroom.

72 In Edmonton Journal, Cory J. stressed the importance of the open courts at p. 610. He held that freedom of expression "protects listeners as well as speakers". He identified the "fundamentally important role" the press plays with respect to informing the public about the courts. This role, he says, is especially important in a time when few people have the leisure hours to attend court proceedings. None of these comments can be questioned.

73 However, this assessment was made in the context of a case where the media was prohibited from

printing and publishing almost every aspect of all matrimonial cases.

74 Similarly, in Canadian Broadcasting Corp. v. New Brunswick (Attorney General) (1996), 139 D.L.R. (4th) 385 (S.C.C.), a challenge was brought to s. 486(1) of the Criminal Code, when a judge excluded the public and the media from a courtroom during a sentencing proceeding. La Forest J. said, at p. 396-7:

> From the foregoing, it is evident that s. 2(b) protects the freedom of the press to comment on the courts as an essential aspect of democratic society. It thereby guarantees the further freedom of members of the public to develop and to put forward informed opinions about the courts. As a vehicle through which information pertaining to these courts is transmitted the *press must be guaranteed access to the courts in order to gather information*. As noted by Lamer J., as he then was, in Canadian Newspapers Co. v. Canada (Attorney General), [1988] 2 S.C.R. 122, at p. 129, 52 D.L.R. (4th) 690 (S.C.C.): "Freedom of the press is indeed an important and essential attribute of a free and democratic society, and measures which prohibit the media from publishing information deemed of interest obviously restrict that freedom." *Similarly, it may be said that measures that prevent the media from gathering that information, and from disseminating it to the public, restrict the freedom of the press.* To the extent that such measures prohibit public access to the courts and to information about the courts, they may also said to restrict freedom of expression in so far as it encompasses the freedom of listeners to obtain information that fosters public criticism of the courts. [Emphasis added].

75 The decisions that say the press has the "right to gather information" were made in the context of rulings or legislation that prevented the press from entering the courtroom altogether, and therefore prevented the press from "gathering information". Excluding cameras and tape recorders from the courtroom does not prevent the gathering of information, as the courts are open to everyone. It only limits the technical manner in which information is gathered. I conclude that the latter is a not a constitutionally protected right.

76 The analysis does not end here, however. As noted above, the issue also includes whether filming constitutes expressive activity. This issue was specifically addressed in R. v. Butler (1992), 70 C.C.C. (3d) 129 (S.C.C.). Butler operated a video store and was charged, inter alia, with possessing obscene material for the purpose of sale. He was offering pornographic movies for sale.

77 One of the intervenors, the Attorney General of British Columbia, argued that a distinction should be made between written works and films. Written works, it was said, inherently attempt to convey meaning; however, the medium of film can be used for a purpose "not significantly communicative". The argument was that if the activity was not expression, the fact that it was captured by the technology of a camera does not "magically transform them into expression". Sopinka J., writing for the majority rejected this argument. He said, at p. 154:

> In my view, this submission cannot be maintained...in creating a film, regardless of its content, the maker of the film is consciously choosing the particular images which together constitute the film. In choosing his or her images, the creator of the film is attempting to convey some meaning.

78 Does this statement capture the filming of court proceedings? In R. v. Squires, supra, the Ontario Court of Appeal applied Butler, supra, and held that filming participants in an area adjacent to the courtroom was "expressive activity". I respectfully disagree. There is a distinction between film that is a work of art and filming events as they occur. The expression captured is not that of the film-maker, but that of the participants in the courtroom.

79 I find that filming court proceedings is not a protected right to "gather information". I further find that filming court proceedings is not expressive activity protected by s. 2(b).

80 I will, for the purposes of the remainder of these reasons assume they are protected and continue with

the analysis.

(iii) Do members of the media have special rights under s. 2(b), beyond those of the general public?

81 This issue poses the problem a court will face if the media are entitled (as opposed to permitted), to bring cameras and audio recording devices into the courtroom. If there is a constitutional right to visually and audio record court proceedings for members of the media, do all members of the public have a co-existing right to take still photos, home videos and audio recordings of the proceedings?

82 It is useful at this time to repeat the s. 2(b) right:

2. *Everyone* has the following fundamental freedoms:

(b) freedoms of thought, belief, opinion and expression, *including* freedom of the press and other media of communication... [Emphasis added]

83 There can be no question that the media play an important role in society. I have made some reference to this role, and will be making further reference to it later in these reasons. However, the bulk of the authority supports the proposition that the media have no greater rights regarding freedom of expression than any other citizen.

84 Re Southam Inc. and the Queen (No. 1) (1983), 146 D.L.R. (3d) 408 (Ont. C.A.), was a case considering provisions of the Juvenile Delinquents Act, R.S.C. 1970, c. J.3, requiring in camera hearings. A reporter brought the challenge to the legislation; however, the court held that free access to the courts was an integral part of the guarantee of freedom of expression, which included freedom of the press. The court held, at p. 418, that the reporter, as a member of the public, had established that his rights pursuant to s. 2(b) had been infringed.

85 This case was cited in New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly) (1991), 80 D.L.R. (4th) 11 (N.S.S.C.A.D.) by Hallett J.A. (dissenting)at p. 45, for this proposition:

> In Re Southam Inc. and the Queen (No. 1) (1983), 146 D.L.R. (3d) 408 (Ont. C.A.), the Ontario Court of Appeal found that the freedom of the press provisions of s. 2(b) of the Charter do not confer on the media in general or any branch thereof any special rights over and above those conferred on the public...

86 In Re Moysa v. Labour Relations Board et al. (1986), 28 D.L.R. (4th) 140 (Alta. Q.B.), MacCallum J. held, at p. 147-148, that the press had no special privilege beyond that enjoyed by all citizens.

87 This principle was clearly articulated by Kileen J. in National Bank of Canada v. Melnitzer (1991), 5 O.R. (3d) 234 at 239, where the court held:

> It is to be noted that freedom of the press is set out in s. 2(b) as an included fundamental freedom under the broader rubric of "freedom of thought, belief, opinion and expression". This included position of the free press principle must have been deliberate on the part of Parliament and can hardly mean that freedom of the press was meant to be broader in sweep than the freedom or freedoms of which it is expressly stated to be a part. I say this not to denigrate the vital principle of a free press but simply to say that *it is not a limitless freedom which gives the press, or other media, a preferred position in our constitutional scheme of things* ... [underlining added].

88 Of interest and assistance on this point is the decision of Nixon v. Warner Communications, Inc. 435 U.S. 589, 55 L Ed 2d 570 (U.S. Supreme Court)(1978). This case involved the application by the press to obtain some of the "Watergate" tapes to broadcast and sell during the trial of former President Nixon.

89 The First Amendment to the U.S. Constitution appears to endow the press with more rights than that of s. 2(b) of the Canadian Charter. It reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

90 The Court held, at p. 587 (L Ed):

> The First Amendment generally grants the press no right to information about a trial superior to that of the general public. "Once beyond the confines of the courthouse, a news-gathering agency may publicize, within wide limits, what its representatives have heard and seen in the courtroom. But the line is drawn at the courthouse door; and within, a reporter's constitutional rights are no greater than those of any other member of the public" Estes v. Texas, 381 US 532, 589 L Ed 2d 543, 85 S Ct 1628 (1965)

91 In British Columbia, our Court of Appeal addressed the question of the breadth of the rights of the press in Blackman v. British Columbia Review Board, [1995] B.C.J. No. 95. The court held, at para. 42:

> The suggestion, moreover, that this section [2(b)] guarantees privileges to "the press and other media of communication" which are not available to other members of the public has no obvious support in its wording. The section treats freedom of the media, in what seems to be a very deliberate way, as an integral part of the freedoms of the intellect and communication guaranteed to "everyone". The suggestion is contrary to the common law concept of "freedom of the press", which accords to newspaper and other publishers and broadcasters only the right to publish to the world that which every private citizen is entitled to say or write, free from administrative or judicial restraint or interference...(citations omitted). The "free press" has at common law been understood to have neither special legal duties or responsibilities, on the one hand, nor special legal privileges, on the other, although some privileges have been accorded to the media by statute in the field of defamation.

92 In Needham v. British Columbia (1992), 76 C.C.C. (3d) 146 at 153, Goldie J.A., in dealing with an order excluding the public and banning publication said:

> In my view, the interests of the press under s. 2(b) are largely subsumed in the larger public interest in the efficacy and integrity of the justice system.

93 Only one decision finds that the press have rights beyond those of the public at large. In R. v. Squires, supra, Mercier J. of the Ontario District Court, held that the media do have rights beyond their capacity as members of the public (p. 347). I respectfully disagree with this assessment, and prefer the reasoning of the other authorities mentioned.

94 Thus, section 2(b) does not suggest that the media or press have any rights beyond those enjoyed by all persons in Canada. The authorities support this conclusion. Although the press have been correctly described as the "eyes and ears of the public", they possess no rights beyond those of the citizens who they purport to represent when reporting on matters, including proceedings in the courtroom.

95 The media submits that the fact they have no more rights than the general public should not hamper their application for Expanded Media Coverage. The press says that the trial judge has the right to control the courtroom, and is entitled to place limitations on the public regarding cameras and audio recordings. The press are only seeking to have one still camera and one video camera in the courtroom. The press says that any citizen may also "feed into" the video pool they are creating for filming the court process.

96 These arguments on limiting access are more relevant to the section 1 analysis if section s. 2(b) is engaged. If the right to free expression is infringed by prohibiting cameras or audiotape recorders in the

courtroom, then it is infringed for everyone. Any question of control or limitation is applicable when discussing s. 1. If s. 2(b) is not infringed, then this discussion is relevant to whether I should exercise my discretion in this case and permit Expanded Media Coverage.

(iv) If gathering information on film, video or audiotape is expressive activity, is it protected by s. 2(b) when the activity occurs in or immediately adjacent to courtrooms?

97 I have found that gathering information on film, video or audiotape is not expressive activity in the context of the courtroom. However, for the purpose of the argument and analysis, I will assume that it is expressive activity. Before turning to the question as posed, I will first address the issue of whether the common law prohibition is a "publication ban" and which party bears the onus of proof.

Publication Ban and Onus of Proof

98 The question of who bears the burden or onus of proof is a contentious issue in this application. The amicus curiae and the Attorney General take the position that the applicants bear the burden to establish that Expanded Media Coverage engages and infringes s. 2(b) and only then does the burden shift to the Attorney General to uphold the common law pursuant to s. 1 of the Charter.

99 The media takes the position that refusing to permit Expanded Media Coverage into the courtroom has the same effect as a publication ban. The media submits that the reasoning in Dagenais v. Canadian Broadcasting Corp. (1994), 120 D.L.R. (4th) 12 (S.C.C.), which places the onus with the party seeking to impose a publication ban, also applies to this application.

100 Dagenais and the other accused were or had been Christian Brothers. They were charged with various sexually related offences against children who were former pupils in a Catholic training school. The trials were to commence at different times. Dagenais's trial was underway when the application was brought. The Canadian Broadcasting Corporation had made a fictional account of sexual and physical abuse suffered by children in a Catholic institution. The four-hour mini-series was entitled, "The Boys of St. Vincent". The show was scheduled to be televised the day before and the day that the jury was to be instructed in Dagenais's trial. The respondent's brought an application to prevent the publication of the show. The application was brought before a judge other than the trial judge. The injunction was granted; it prevented broadcast of the show and of the fact of the injunction application throughout Canada until all the trials were concluded.

101 The Ontario Court of Appeal affirmed the order, but limited it to Ontario and an English channel from Montreal. The details regarding the application for an injunction could also be published.

102 The court held that a publication ban infringes s. 2(b) rights [Dagenais, supra, p. 37-8]. The exclusion of the public infringes s. 2(b) rights as it prevents the press from "gathering" the information [C.B.C. v. New Brunswick, supra, at p. 397]. There are statutory bans, particularly relating to sexual offences, young witnesses and pretrial application which have been upheld as constitutional. The press argues that excluding cameras and audio equipment from the courtroom is a publication ban.

103 The media submits that reporters cannot obtain a complete account by simply taking notes. The reporter cannot grasp the nuances of the words of the witness, or the emotions, pregnant pauses, gestures and emotion. [Wyatt affidavit, MacDonald affidavit]. Thus, it submits, the media is banned from publishing much of the trial.

104 If the media is correct in its analysis, then the onus rests with those wishing to prevent Expanded Media Coverage from coming into the courtroom.

105 No one questions that open courtrooms epitomize the cornerstone of a free and democratic society. Judges are not permitted to try matters in secret. In Needham, supra, Goldie J.A. referred to some of the reasons why openness in the courts is the rule and "covertness is the exception." He referred to the maintenance of public confidence in the integrity of the justice system and improving the public's

understanding of the court system [p. 153, also Nova Scotia (Attorney General) v. MacIntyre (1982), 65 C.C.C. (2d) 129 at pp. 145-6]. However, these are not the only reasons for an open court. The open court was entrenched in England from before the time of the Norman Conquest [Richmond Newspapers Inc. v. Commonwealth of Virginia, 448 U.S. 555, U.S. Supreme Court (1980)]. With the Act of Settlement of 1701, the Court of Star Chamber was abolished, and judges achieved independence. As noted by Goldie J.A., in Needham, supra, at p. 153, William Blackstone said the following, describing how evidence was given in the courts of law (Commentaries on the Laws of England, vol. III (1768), para. 372):

> And all this evidence is to be given in open court, in the presence of the parties, their attornies, the counsel, and all bystanders, and before the judge and jury: each party having liberty to except to its competency, which exceptions are publicly stated, and by the judge are openly and publicly allowed or disallowed, in the face of the country: which must curb any secret bias or partiality that might arise in his own breast.

106 The Charter of Rights and Freedoms protects an accused's right to a "fair and public hearing" (s. 11(d)). As Jeremy Bentham said, "Where there is no publicity, there is no justice. Publicity is the soul of justice."

107 Anyone can attend court and listen to the proceedings. Some communities have organized regular court watchers to observe what occurs in the trial process. Often media people attend court to report on cases that they think the public will find interesting. Most of the thousands of cases heard in the courts each year receive no publicity or media attention. They are not sensational or compelling.

108 There are many people who cannot attend court because of the many obligations people face due to employment and family obligations. Those who are interested in court proceedings, but cannot attend, must receive their information from those who were in attendance, most often the media.

109 Therefore does the inability of the media to record every emotion, nuance or gesture amount to a ban of publication or an exclusion from the courtroom? I think not. No one is prevented from entering the courtroom, observing or taking notes about the proceedings. No one is banned from publishing anything in the proceedings simply because they are not permitted to record the proceedings by video or audio. The prohibition on cameras and audio recording devices is not analogous to the prevention of gathering or publishing information.

110 I conclude that the decision in Dagenais is not determinative of the analysis in relation to the infringement of s. 2(b). The burden of proof to establish an infringement of s. 2(b) lies with the applicants.

Is s. 2(b) infringed?

111 I turn now to the analysis of whether s. 2(b) is infringed by the common law prohibition of Expanded Media Coverage in the courtroom. In Committee for the Commonwealth of Canada v. Canada (1991), 77 D.L.R. (4th) 385 (S.C.C.), the court provided a framework for the analysis of any alleged infringement of s. 2(b) in relation to government property. The case involved a group distributing political pamphlets at a government-owned airport. Three separate lines of reasoning emerged from the court. The predominant lines of reasoning were first, from Lamer C.J.C., joined by Sopinka J. and Cory J, second was that of McLachlin J. (as she then was) and joined by Gonthier J. and La Forest J. Justice L'Heureux-Dube took a different approach. She found that any limitation of freedom of expression on government property should be subjected to a s. 1 analysis.

112 Both Lamer C.J.C. and McLachlin J. agreed that s. 2(b) rights were not absolute. Each concluded that there must be a threshold to cross before s. 2(b) is engaged.

113 Lamer C.J.C. modified the "public forum" test used in the United States. He applied a compatibility test, at p. 392:

> . . . I am of the view that when a person claims that his freedom of expression was infringed while he was trying to express himself in a place owned by the government, the

> legal analysis must involve examining the interests at issue, namely the interest of the individual wishing to express himself in a place suitable for such expression and that of the government in effective operation of the place owned by it.

114 He continued, at pp. 394-5, and held that the freedom to communicate must be circumscribed by the interests of those using the government facility. He held at p. 395, ". . . the individual will only be free to communicate in a place owned by the state if the form of expression he uses is compatible with the principle function or intended purpose of that place". The burden of establishing compatibility lies with the person wishing to express himself or herself. For example, a person cannot shout political messages in a library, as that expression is incompatible with the function of the library, a place of silence.

115 McLachlin J. found that the compatibility test did not provide a sufficient framework for analysis for the many contingencies that exist in assessing whether the expression can co-exist with the function of the property in question.

116 McLachlin J., instead opted for a values based test. She said, at p. 454:

> It should be based on the values and interests at stake and not be confined to the characteristics of particular types of government property. Reflecting the concepts traditionally associated with free expression; it should extend constitutional protection to expression on some but not all government property. The analysis under s. 2(b) should focus on determining when, as a general proposition, the right to expression on government property arises. The task at this stage should be primarily definitional rather than one of balancing, and the test should be sufficiently generous to ensure that valid claims are not excluded for want of proof. Once it has been determined that the expression in question at the location in question falls within the scope of s. 2(b) thus defined, the further question arises of whether the government's limitation on the property's use for the expression in question is justified under s. 1.

117 In applying the test, McLachlin J. returns to the approach in Irwin Toy. In Irwin Toy, the court recognized two forms of restrictions: restrictions on the forum which are content-based and restrictions which are content-neutral aimed, not at the words or message conveyed, but to "avoid the harmful consequence of the particular conduct in question, (Irwin Toy, at p. 611); for example, to prevent interference with the proper and orderly functioning of government-owned property" (p. 455). The former will usually attract s. 2(b); the latter may not be an infringement of expression at all. McLachlin J. held, that "in such a case, the claimant must establish that the expression in question (including its time, place and manner) promotes one of the purposes underlying the guarantee of free expression". As noted above, these are:

1) The seeking and obtaining the truth;
2) Participation in social and political decision-making; and
3) The encouragement of diversity in forms of individual self-fulfillment and human flourishing by cultivating a tolerant, welcoming environment for the conveyance and reception of ideas.

118 McLachlin J. expanded on the meaning of these three purposes. At p. 457, she said this:

> The pursuit of truth, as that notion has developed in the context of freedom of expression, relates to the function of free and open discussion in arriving at the truth. The encouragement of "social and political decision making" (Irwin Toy, at p. 612), which is the essence of the value of "community participation", recognizes the value of public discussion and debate on social and political matters. Finally, the encouragement of a tolerant and welcoming environment which promotes diversity in forms of self-fulfillment and human flourishing recognizes the role of expression in maximizing human potential and happiness through intellectual and artistic communication.

119 I will return to this analysis after reviewing the decisions that have considered the Commonwealth

decision.

120 It appears that the only other decision from the Supreme Court which has considered the Commonwealth case is Ramsden v. Peterborough (City) (1993), 106 D.L.R. (4th) 233. Iacobucci J., writing for the court, did not need to resolve which of the three approaches to adopt. Applying all three, the court held that a bylaw prohibiting placing posters on utility poles was unconstitutional.

121 In MacMillan Bloedel v. Simpson (1994), 113 D.L.R. (4th) 368 (B.C.C.A.), at 383, the court relied on the approach of Lamer C.J.C. in the Commonwealth case to discount the argument that blockading a road was a limit of freedom of expression. While it appears that the B.C. Court of Appeal has applied the compatibility test, I prefer to apply both lines of reasoning to the issue, as the proper approach has not been settled by the Supreme Court of Canada.

122 The Federal Court of Appeal considered the three approaches, applied all three and came to the same conclusion, in Weisfeld v. Canada (Minister of Public Works) (1994), 116 D.L.R. (4th) 232.

123 I turn now to the decision in R. v. Squires, supra, which is the case most factually close to the issue before this court.

124 At issue was s. 67 of the Judicature Act in Ontario, (now s. 136 of the Courts of Justice Act, supra) which, as mentioned above, prohibits cameras in the courtroom and areas adjacent to the courtroom. Squires was charged with directing the taking of motion pictures of persons leaving the courtroom contrary to this Act. The trial of Squires took some six weeks, and much evidence was called regarding the effect of cameras in the courtroom. Some of that evidence has been filed in this proceeding.

125 The case made its way to the Court of Appeal, on the narrow issue of filming in the area adjacent to the courtrooms. Four judgments were rendered. The majority agreed that the provisions of the Judicature Act were saved by s. 1. Dubin C.J. raised a question whether s. 2(b) was engaged based on the reasoning of Lamer C.J.C., in the Commonwealth case. He questioned, at 389, whether the activity prohibited was compatible with the principal function of the courthouse. Since he was alone on this point, he chose not to explore it further.

126 Houlden J.A. relied on the reasoning in R. v. Butler, supra, to find that filming a person entering or leaving a courtroom was a violation of freedom of expression, and turned to s. 1. He did not refer to the Commonwealth decision.

127 Tarnopolsky J.A., in dissent, found that the provisions infringed section 2(b). He had concerns regarding the application of the Commonwealth case. The amicus curiae points out two flaws in his reasoning in coming to that conclusion. I respectfully agree with the position of the amicus curiae.

128 First, Tarnopolsky J.A. said in his reasons, at p. 402, that, "The only activity which has been held to fall outside the s. 2(b) protection, thus far, is expression in a violent form". With respect, I do not think the decision in Irwin Toy limited non-protected expression to violence. At p. 607 of the majority judgment, the court held:

> The content of expression can be conveyed through an infinite variety of forms of expression: for example, the written or spoken word, the arts, and even physical gestures or acts. While the guarantee of free expression protects all content of expression, certainly violence as a form of expression receives no such protection. *It is not necessary here to delineate precisely when and on what basis a form of expression chosen to convey a meaning falls outside the sphere of the guarantee.* But it is clear, for example, that a murderer or rapist cannot invoke freedom of expression in justification of the form of expression he has chosen ... [Emphasis added].

129 Next, and perhaps more significant, he states that McLachlin J.'s second test (after finding the expression was not content-controlled), is as follows: "where, however, it is characterized as content-neutral, a claimant may still establish a violation by demonstrating a *link* [emphasis added] between expression and

one of the three purposes of the free speech guarantee [noted above].

130 To repeat, McLachlin J. held, that "*in such a case, the claimant must establish that the expression in question (including its time, place and manner) promotes one of the purposes underlying the guarantee of free expression".* [Emphasis added].

131 There is a fundamental difference between demonstrating a link between expression and the purpose of free speech and establishing that the expression in question, including its time, place and manner promotes one of the purposes of freedom of expression. The latter takes into account numerous factors, and does not 'overshoot' the purpose of s. 2(b). The former is not a filtering process at all, as a link is easily established. This analysis would require a section 1 analysis in most cases, although the freedom had not been in fact limited.

132 Osborne J.A., on the other hand, found that the activity in question was expressive activity which works to further the values underlying s. 2(b) of the Charter, and is therefore constitutionally protected. He performed a compatibility analysis within the context of s. 1, rather than at the first stage.

133 It is also useful to review some of the authorities from the United States at this juncture. With one exception, which I will deal with shortly, no state court or federal court has held that there is a constitutional right to bring cameras into the courtroom.

134 The applicants took the position that no trial had ever been reversed because of television in the courtroom. This is not correct. In one of the first cases to consider the issue, the United States Supreme Court held that an accused was deprived of due process by the televising and broadcasting of his trial (Estes v. Texas, 381 U.S. 532 (1965)). In that case, the presence of the media and camera men caused considerable disruption during the pretrial process. Considerable restrictions were imposed on the media during the trial itself. The arguments put forward on behalf of the applicants are similar to those in this case: that there was no evidence of distractions, that the public has a right to know what occurs in the courtroom, and televising trials would enlighten the public and promote greater respect for the courts [p. 549]. The court held that it was not necessary on the part of the appellant to demonstrate actual prejudice to the fairness of the trial. The "probability of prejudice" was sufficient. The court also considered the effect on each juror regarding the fact that the case itself was important enough to attract cameras. The court also found that the quality of the testimony would be affected. The court expressed concerns about the effect on witnesses and judges. It also said this about the effect on the accused, at p. 554:

> Finally, we cannot ignore the impact of the courtroom television on the defendant. Its presence is a form of mental - if not physical harassment, resembling a police line-up or third degree. The inevitable close-ups of his gestures and expressions during the ordeal of his trial might well transgress his personal sensibilities, his dignity, and his ability to concentrate on the proceedings before him - sometimes the difference between life and death - dispassionately, freely and without the distraction of wide public surveillance. A defendant on trial is entitled to a day in court, not in a stadium, or a city or a nationwide arena. The heightening public clamor resulting from radio and television coverage will inevitably result in prejudice.

135 The court held that there was no constitutional right to televise a trial.

136 A similar result was reached in Nixon, supra. In that case, the media argued that the 6th Amendment guarantee of a public trial required the release of the Watergate tapes. They argued that the public's understanding of this very high profile case was "incomplete", as they could not listen to the tapes. The court said the following, at p. 587:

> In this first place, this argument proves too much. The same could be said of the testimony of a live witness, yet there is no constitutional right to have such testimony recorded and broadcast. [Reference to Estes v. Texas, supra, citations omitted]. Second, while the guarantee of a public trial, in the words of Mr. Justice Black, is "a

> safeguard against any attempt to employ our courts as instruments of persecution". In re Oliver [citations omitted], it confers no special benefit on the press. [citations omitted]. Nor does the Sixth Amendment require that the trial - or any part of it - be broadcast live or on tape to the public. The 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. . . That opportunity abundantly existed here.

137 In Chandler et al. V. Florida, 449 U.S. 560 (1981), [1981] SCT-QL 359, the United States Supreme Court again considered the issue of cameras in a state court. They held that while the constitution did not require cameras in the courtroom, it also did not prohibit them either. In delivering the opinion of the Court, Chief Justice Burger began with these comments, at para. 13, "Over the past 50 years, some criminal cases characterized as "sensational" have been subjected to extensive coverage by news media, sometimes seriously interfering with the conduct of the proceedings and creating a setting wholly inappropriate for the administration of justice."

138 Around 1974, state courts began to permit cameras in the courtroom. At this time all 50 states have some form of televised court proceedings. Some are limited to appellate argument, however, 37 permit coverage of trials. [Affidavit of Douglas Jacobs, Affidavit of Daniel Henry].

139 In 1979, the Florida Supreme Court concluded that cameras should be permitted in their courtrooms [In re Petition of Post-Newsweek Stations, Florida, Inc., 370 So. 2d 764, (1979)]. In so holding, the court specifically rejected the argument that the media had a constitutional right to bring cameras into the courtroom. The court concluded that televised court proceedings would increase public confidence in the process, and result in a wider acceptance and understanding of decisions. The court set guidelines for the media, including one camera and one camera man, pooling of coverage, using existing microphones and so on, similar to that which is proposed here. The evidence indicates that these conclusions are supported by some of the surveys and reviews. [Affidavit of Douglas Jacobs].

140 Chandler objected to the camera. The media covered only one Crown witness and closing arguments. They covered no defence witnesses. In total, less than three minutes of the trial was broadcast, and only the prosecution's side was shown.

141 The U.S. Supreme Court considered the decision in Estes, supra, and concluded that it did not stand for the proposition that all trial coverage by cameras in criminal trials is inherently a denial of due process. The court noted that the problems of cumbersome equipment in Estes was now less of a concern.

142 The case of General William Westmoreland v. Columbia Broadcasting, 752 F. 2d 16 (2nd Cir. 1984), offers helpful analysis. This was a defamation trial of high national interest. The parties consented to the televising of the trial, and the trial judge concluded that the trial should be broadcast, but ruled that it could not be broadcast because of the rule prohibiting televising proceedings in the federal court.

143 The court reaffirmed that CNN, (the applicant), had no status greater than that of the ordinary citizen. CNN argued that the public had the First Amendment right to see the trial, and that the trial serves as a "public forum". The argument that the courtroom was a "public forum" was predicated on the fact that trials are "public", and a form of "political expression".

144 The court held that the law provides the right of the citizen to attend trials, not to view them on television. The court was not prepared to accept that, even in cases of public importance, there was a right to see a trial televised.

145 The court listed some of the concerns over televising trials, concerns which are maintained, at p. 23:

> . . . concerns with expenditure of judicial time on administration and oversight of broadcasting; the necessity of sequestering juries so that they will not look at the television program of the trial itself; the difficulty in empanelling an impartial jury in the case of a retrial; the necessity of larger jury panels or increased use of marshals; the psychological effects on witnesses, jurors, lawyers, and judges; and related

> considerations of "solemnity", "dignity", and the like are considered secondary or basically irrelevant as impediments to the search for truth when a given case is televised at such a time the presumption may well be that all trials should be televised, or televisable, at least where the parties agree.

146 The Court further held, at 24, that the right to enter a courtroom is a right "created by the consent of the judiciary, which has control over the courtrooms...".

147 In the context of the public forum and the use of the courtroom, the court said this, at p. 24, footnote 13, quoting Shepherd v. Maxwell, 384 U.S. 333, 358, 86 S. Ct. 1507):

> ". . . the courtroom and the courthouse premises are subject to the control of the court". Moreover, courts, like schools and libraries, are at most only secondarily institutions to foster public debate. Rather courts exist primarily to adjudicate legal controversies. Thus, they are public forums only in a special sense, "with the government enjoying", as one commentator has put it, "the power to preserve such tranquility as the facilities' central purpose requires."

148 The public forum doctrine has been considered in other contexts, and has limited the use to which the public may use government property. In Greer v. Spock, 424 U.S. 828 (1976), candidates for political office sought to give speeches on a military base. The Supreme Court of the United States stated that there is no constitutional principle that simply because the public are permitted to visit government owned or operated premises, the premises becomes a "public forum".

149 The single case in which a court held that there is a right to bring cameras into the courtroom is The People of the State of New York v. Kenneth Boss et al, 28 Media L.Rep. 1731 (Supreme Court of New York, Albany County)(2000). The challenge was to New York Civil Rights Law Degree 52 which banned all courtroom audio-visual coverage. The court held that the absolute ban was unconstitutional, but also held that the media did not have an unfettered right to televise all aspects of every proceeding. The court held that the case had high public interest. The judge said at the conclusion of the reasons:

> The quest for justice in any case must be accomplished under the eyes of the public. The denial of access to the vast majority will accomplish nothing but more divisiveness while the broadcast of the trial will further the interests of justice, enhance public understanding of the judicial system and maintain a high level of public confidence in the judiciary.

150 I now turn again to the decision in Squires. There is no doubt that the Ontario Court of Appeal is entitled to great deference. However, I am, not bound by their decisions. I respectfully disagree with the analysis of the court in relation to s. 2 (b). Needless to say, the media pressed upon me the importance of their analysis and submitted that I should apply that reasoning in the analysis of s. 2(b).

151 I prefer to apply the approach of the Commonwealth decision to the issue before me. Both the amicus curiae and the Attorney General argued that the Commonwealth case was determinative of the issue I must decide. In their submission, the section 2(b) right of freedom of expression is not limited by the common law given the purpose of the courthouse and the rights to be protected.

152 I thus return to the analysis of section 2(b) within the framework of the Commonwealth and Irwin Toy decisions.

153 The first question is whether the purpose of the common law rule is content-based or content-neutral. The prohibition is clearly content-neutral. It is not aimed at restricting the content. The content may be reported or broadcast. The restriction is applicable to all trials, not singling out individual cases. It is to "prevent the interference with the properly and orderly functioning of government property". Both the analysis of Lamer C.J.C. and McLachlin J. require an examination of the purpose of the government facility (Lamer C.J.C.) or the values at stake (McLachlin J.). When applying the analysis to the courtroom, the purpose and the values seem to overlap to some degree.

154 What then is the purpose of the courtroom? Many writers have articulately described the purpose or nature of the courtroom. The purpose embraces values such as a fair trial before an impartial and independent judge, and it is the source of the proper administration of justice. It is a place where citizens can bring their disputes and know that the rule of law will be applied. The courts are the foundation of a civilized world, where citizens do not become vigilantes and take matters into their own hands.

155 A court is a place of quiet, calm and dignity. The lawyers and judges partake in formalities, such as wearing gowns, bowing, and using a respectful manner of address.

156 It is a place governed by rules of evidence and procedures designed to seek out the truth, not in a general way, but in the context of specific dispute resolution. These rules also endeavour to ensure the fairness of the trial process.

157 What will Expanded Media Coverage bring into this process which might by incompatible (Lamer C.J.C.) with this function or will affect the values and interests at stake (McLachlin J.)? The amicus curiae has provided a list of concerns, and source references. For ease of reference, I will refer to these, as well as raising other concerns that emerge from the evidence.

(a) Media coverage could contaminate, or be perceived to contaminate, the trier of fact through the dissemination of information about material that might be inadmissible as evidence. The material filed suggests that more juries are sequestered for the duration of trials when the trial is being televised. The pressure on a juror is immense without also being sequestered. Sequestering jurors as a method of preventing contamination by media coverage is not acceptable. [M.D. Lepovsky "Cameras in the Courtroom - Not Without My Consent" 6 N.J.C.L. 161, Estes v. Texas, supra, V.P. Hans and J.L. Dee, "Media Coverage of Law" American Behavioural Scientist 32(5) p. 136-150.] The media submits that the judge can order the cameras turned off when the jury is absent.

(b) The presence of cameras could heighten the anxiety and stresses experienced by the parties and effect the outcome of the proceedings. This is a common sense conclusion for anyone involved in litigation. It is confirmed by those involved in the trial process: [See for example, the "Statement of Chief Judge Edward R. Becker on Behalf of the Judicial Conference of the United States before the U.S. Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, regarding Bill S. 721, Allowing Cameras and Electronic Media in the Courtroom", September 6, 2000]. The media submits that this is not a real substantiated risk.

(c) The editorial capabilities of electronic media could effectively distort the reality of the proceedings. This in fact occurred in the C.B.C. documentary of the trial of Regina v. Clow. The C.B.C. prepared a documentary, filming the murder trial, with the consent of the parties. The witnesses' testimony as shown on the documentary was sometimes reversed or moved to a different place in the trial. It was not broadcast in a chronological manner. [M.D. Lepovsky, supra, at 171; Christo Lassiter, "TV or Not TV - That is the Question," 86 Journal of Criminal Law and Criminology 928 at p. 980]. The media submits that the choice of reporting is at the heart of freedom of expression, apart from the sub judice rule.

(d) Witnesses may be reluctant to testify when faced with the glare of the television camera. [Jack Litman, Minority Report of the Committee on Audio-Visual Coverage of Court Proceedings at p. 19.]. The media submits that the court can deal with this issue if it arises.

(e) Witnesses who have yet to testify may change their testimony on the basis of what other witnesses have said before them. In most trials, witnesses are excluded from the courtroom to prevent them from altering their evidence in accordance to what others have said in court. Even with such orders excluding witnesses, it is not unknown for trials to be affected because witnesses have discussed their evidence. [R. v. Chin [1989] B.C.J. No. 539; Estes v. Texas,

supra.] The media submits that this can be dealt with by a warning to the witnesses.

(f) Television could put unnecessary pressure on jurors and affect their judgment. [William Harte, "Why Make Justice a Circus? The O.J. Simpson, Dahmer and Kennedy-Smith Debacles Make the Case Against Cameras in the Courtroom" Trial Lawyer's Guide]. The media submits that there is no real evidence supporting this point. The media is not asking to film the jurors. In several cases, including the O.J. Simpson trial and R. v. Clow (a trial filmed in Kingston, Ontario, with consent, for a C.B.C. documentary), jurors were accidentally filmed and their image broadcast in spite of a prohibition by court order.

(g) Recording instruments may intercept communications between counsel and their clients. This occurred in the O.J. Simpson trial. The media submitted that this problem could be remedied by not permitting the media to wire into the microphones at counsel table.

(h) By focussing on sensational cases, television may diminish the dignity of the courts and foster disrespect for the process, to the point where television coverage may actually decrease public confidence in the judicial system. Several problems arise within this category. First, the material demonstrates that the media uses very little of what it records. It plays the so-called 30- second clip (which can be a short as 10 seconds), often with a voice-over, and often with an editorial perspective. The public learns little from the coverage, and far less than they would learn if they read newspaper coverage. Further, these clips may be kept and played over and over from archival files. Court TV proposes "gavel to gavel" coverage, which would present a more thorough picture. Several media outlets propose to webcast the trial, which presents innumerable problems in and of itself, not the least of which is that once the trial is on the web, the court will lose all control over the proceedings. [Dr. William Bowers, College of Criminal Justice, Northeastern University - A Proposal to the National Academy of Sciences to Address the National Dilemma of Cameras in the Courts January 2001]

(i) Television could inhibit access to the courts by discouraging victims of crimes from reporting crimes, and civil parties from bringing actions for fear of publicity. This 'chilling effect' on the course of litigation has been recognized and relied upon when justifying bans of publication and applications for complainant's private records [R. v. Mills, infra]. Citizens who do not wish to appear on television and air their complaints so the nation can see may not bring their disputes to court. This is a grave infringement on the right of every citizen to have access to justice [BCGEU, supra; Dr. Williams Bowers, supra]. The media submits that there is no evidence in this case to support unwilling victims or witnesses.

(j) Television could jeopardize the safety and privacy of trial participants. This is an issue of real concern. Judges and counsel have been threatened in this province in relation to cases they have conducted. While no concerns have been raised in the Clark and Pilarinos trial, trial participants generally run the risk of becoming public figures through no choice of their own. They potentially become the targets for disgruntled citizens who are displeased with the conduct or outcome of a certain case. [Statement of Chief Judge Becker, supra, at p. 10.]

(k) Human nature and the tendency to "pose for the camera" could have an effect on the attitude of witnesses that might affect the outcome of the case. [Harte, supra p. 388; Litman, supra, pp. 46-48]

(l) Allowing cameras into the courtroom may force judges to monitor media compliance with court rules, in addition to attending to their regular duties. This problem is amply supported by the material filed. Further, judges who are busy taking notes, ruling on motions or objections, and running the courtroom, may not pick up on subtle problems with jurors or witnesses. How often has a judge, busy taking notes or observing a witness, turned around and found a juror member

dozing off? The judge has to be on guard at all times, not only to exclude the jury from the courtroom if inadmissible evidence is blurted out, but now the judge has to worry about telling the cameraman to shut the camera off to ensure that nothing improper or inadmissible is recorded. It presents an onerous task for the trial judge.

(m) Counsel have the ability to manipulate the proceedings to their advantage, which changes the process and may affect the outcome. [Affidavit of Joel Hirschorn].

(n) Juries may be affected by what the media covers. Are they covering only witnesses the media sees as important? If the camera is turned off for a certain witness, will the jury or the public think she has something to hide? These are all factors that may affect the conclusion reached by the jury, and have nothing to do with the truth-finding process. [The Kennedy-Smith trial]

(o) The judge and jury are advised of the evidence in the courtroom at the same time the public is made aware, along with the media's interpretation of that evidence and the public's reaction to it. The media submits that there can be a time delay in terms of recording and broadcasting.

(p) At the end of the day, the media is driven by financial concerns - who will have the most viewership, listeners or readership in order to sell the most advertising. As a result, only the most sensational trials will be broadcast; this will provide to the public little enlightenment, if any, about how the Canadian justice system operates.

(q) If the media have the right to bring video equipment into the courtroom, then any citizen is entitled to bring his video camera into the courtroom. The purpose of the courtroom would be wholly undermined by this public activity.

(r) The national and international coverage of trials in the Supreme Court would place the buildings at a greater risk from terrorists who tend to choose targets that will give the 'message' wide exposure. [Testimony of Chief Judge Becker, supra, at p. 11]

158 The media submits that there is no evidence that substantiates a negative effect on trials as a result of Expanded Media Coverage. The material filed demonstrates a variety of results, which will be discussed in more detail shortly. Suffice to say that, in spite of cameras being in the courtroom for a number of years, the evidence is inconclusive regarding whether they have an effect on the trial process.

159 The media argues there are positive benefits to cameras:

(a) The principal source of news for the vast majority of the Canadian public is the electronic media. Therefore, the duty to report the activities of governmental institutions, including the courts, falls particularly heavily on the television media.

(b) The general Canadian public is fundamentally unfamiliar with its judicial system. What little the public knows about judicial proceedings generally relates to American and not Canadian proceedings, due to the influence of American television, and the widespread practice of televising court proceedings in the United States.

(c) Greater access by the Canadian public to its court system by means of televised proceedings would result in:

(i) demystification of the judicial process;

(ii) greater informed deliberation and critical assessment of the judiciary based on the public's ability to readily observe judicial proceedings;

(iii) increased understanding of and respect for the judiciary based on the public's increased ability to observe the daily working of the courts;

(iv) improved journalistic standards relative to court reporting resulting from greater coverage of court proceedings and the development of court reporters specializing in judicial matters.

160 Part of the difficulty with the argument regarding increasing the public's understanding and respect for the system, is that the public will get much less information on television than they presently get in the newspaper coverage. A better understanding would be fostered by "gavel to gavel" coverage, however, this is a small aspect of the application. I was advised that two million people have signed up for the many new digital television stations. How many of those will actually watch Court TV is unknown.

161 The education factor is far better addressed by the attendance of the hundreds of high school and second language students who arrive at the courts annually to watch and learn about the Canadian judicial system.

162 The courtroom is a place of solemn inquiry. It is not a place of entertainment. The many problems associated with Expanded Media Coverage clearly reach the incompatibility threshold set by Lamer C.J.C. There are strong arguments and evidence that Expanded Media Coverage would negatively affect the administration of justice and would be incompatible with the function of the court.

163 Applying McLachlin J.'s test involves the application of different considerations. Her analysis allows for a consideration of the functional aspect of the courtroom. However, she requires a further assessment, and that is whether the expression in question promotes one of the purposes underlying the guarantee of free expression. Her analysis considers time, place and manner. The place is the courtroom.

164 The courtroom is not a place of public debate aimed at promoting the truth. The expression is the recording of the presentation of evidence in order for a judge to resolve a dispute, according to strict rules of evidence. In any event, the press can cover the trial thoroughly and the addition of Expanded Media Coverage does not advance the search for truth.

165 Similarly, the courtroom is not a place of debate to facilitate social or political decision-making. It is a place for dispute resolution. Politicians are not permitted to make speeches at the courthouse, no more than they may on a military base.

166 Finally, the courthouse is the last place to encourage self-fulfillment and human flourishing by encouraging the conveyance and reception of ideas.

167 I conclude that applying either the Lamer test or the McLachlin test, the common law prohibition of Expanded Media Coverage in the courtroom or in the courthouse, does not violate s. 2(b) of the Charter.

168 It follows that the Policy, including the consent rule, as an expansion of the common law rule, does not violate the spirit of the Charter of Rights. The activity in question is not protected by s. 2(b).

> (v) If gathering information on film, video or audiotape in or immediately adjacent to courtrooms is protected activity, does the common law regarding media activities in courtrooms infringe s. 2(b)?

169 If I am wrong, and the gathering of information on film, video or audiotape is protected activity pursuant to s. 2(b), then s. 2(b) would be infringed by both the Policy and the common law. The analysis must turn to section 1.

170 The s. 1 analysis relates to the common law, not the Policy of this court because the Policy does not have the force of law. As noted above, if I apply the Policy in the exercise of my discretion, then my ruling becomes part of the common law. If the absolute prohibition is a "reasonable limit prescribed by law", then the Policy applied in a judgment is a relaxation of that prohibition and is also saved by s. 1.

Section 1 of the Charter of Rights and Freedoms

Objection to evidence

171 Before I turn to the s. 1 analysis, I must first address a preliminary objection raised by the Attorney General in relation to some of the evidence filed. The Attorney General objected to considerable evidence

filed by the applicants. He argues that the material is not proper evidence and some is not proper reply.

172 I will first consider the material that was filed as "reply". This matter was approached in a way that resulted in the orderly filing of evidence from all the parties. However, it was acknowledged that if something came to light after the filing date, then I would consider it. The rationale being that as much material as possible should be considered.

173 The Attorney General has valid points in relation to some of the evidence filed. The matter is proceeding by way of affidavit, however, the material filed must still conform to the rules of evidence. (See Chamberlain v. Surrey School District No. 36 [1998] B.C.J. No. 2923 at para. 7-8). The objections are based on the grounds of irrelevancy, hearsay and argument. Some of the evidence is objected to on the basis of lack of expertise (Henry, Freeman). I will consider this evidence but take the objection as to expertise into consideration when assessing the weight of the evidence.

174 The following evidence I have deleted from my consideration:

(a) Affidavit of Steve Wyatt - Para. 6 - "What appears as anger might be claimed by someone else to be forcefulness. What appears to be hesitancy might be said by someone else to be carefulness". This is argument, not evidence. Para. 12 - refers to comments made by counsel after the Cho experiment. These comments, found on the video tape are hearsay. Para. 13 - "The public's understanding of and confidence in our justice system is undermined by its inability to see our system in operation". This is opinion, not evidence.

(b) Affidavit of Gordon Macdonald: para. 8 - "...its [CKNW] desire to gather and express news in that way will be severely limited". This is an opinion, not evidence.

(c) Affidavit of Daniel Henry #1: Para. 7: "All the members of the Ontario Bench and Bar Committee considered it a successful experiment". This is pure hearsay. Para. 17 - "I am aware of positive feedback from many of them". Again, this is hearsay. Para. 18 - "I was personally involved in some of those initiatives and believe all of the experiments to have been successful". Mr. Henry's personal belief is irrelevant. Para. 19 - "The court and media expressed satisfaction with the experiment". This is hearsay. Para. 34 - "The facts stated in both articles are accurate and the views expressed in them are honestly held". This is in reference to academic articles written by Mr. Henry and appended to his affidavit. Counsel for the media conceded that this was not admissible affidavit evidence. Para. 36 - "Both these internet experiences were considered successful". This is either hearsay, or Mr. Henry's opinion, neither of which is admissible.

(d) Affidavit of Daniel Henry #2: Some of his evidence, which was objected to, consisted of "he wasn't aware of any problems". I interpret this type of evidence as simply that - if there were problems, he did not know about them. I do not conclude from his evidence that there were no problems. Para. 15 - Except for the first two sentences, this entire paragraph is hearsay, opinion and argument. Para. 16 - is an opinion that Mr. Henry is not qualified to provide. He is counsel for CBC. He is, I am told, not a person generally involved in litigation before the courts.

175 The Attorney General had many more objections to the evidence. I conclude that the remaining objections are without merit.

The state of the evidence regarding s. 1

176 Counsel for the defence felt pressed for time with respect to preparing s. 1 evidence. They had to prepare for what may be a long trial with complicated issues. They also had to prepare for this application. I advised the defence that if I ruled that s. 2(b) is engaged, I would entertain an application by them to call further evidence. As I have ruled that the prohibition does not engage s. 2(b), I have not called upon the defence to make further submissions. I mention this aspect of the application as I am embarking on an analysis pursuant to s. 1 of the Charter with the material filed by the three main advocates - the applicants, Attorney General and amicus curiae.

(i) Does the Charter apply to the common law?

177 There is no doubt that every law must conform to Charter principles. The law, including the common law and the court's discretionary power must be read, applied or interpreted in a manner consistent with the Charter. If it cannot be, then it is of no force and effect. [See R.W.D.S.U. v. Dolphin Delivery Ltd. (1986), 33 D.L.R. (4th) 174 (S.C.C.); Dagenais, supra].

(ii) If the Common Law limits s. 2(b), would an order consistent with the common law constitute a limit prescribed by law?

178 Any order of this Court becomes part of the common law. Section 1 would apply as any common law limit is prescribed by law.

179 At this stage of the proceeding the burden of proof lies with the party seeking to uphold the Charter limitation to demonstrate that it is justified. [R. v. Oakes (1986), 24 C.C.C. (3d) 321 (S.C.C.).

(iii) What are the interests at stake in the balancing process engaged by s. 1?

180 The assessment under s. 1 begins by determining what values are at stake. This approach was taken recently by McLachlin C.J.C., in R. v. Sharpe (2001), 194 D.L.R. (4th) 1 (S.C.C.) at 22. She balanced freedom of expression regarding possession of child pornography against the right to privacy and society's need to protect children from the harm associated with pornography. This approach has been taken in a number of cases. One right does not automatically trump the other. The rights must be considered, weighed and balanced.

181 There are a number of interests at stake in this application that go directly to the foundation of Charter principles. These include:

(a) the interests of the Crown, the accused and the public in holding a trial that is fair and is seen to be fair; [See Charter, s. 11 (d); R. v. Levogiannis (1993), 85 C.C.C. (3d) 327 (S.C.C.); R. v. Dagenais, supra];
(b) the interests of the media and the public in maintaining freedom of the press; [Edmonton Journal, supra; Dagenais, supra];
(c) the interests of the public and the media in ensuring open justice; [R. v. Sophonow (No. 2) (1983), 150 D.L.R. (3d)590 (Man. C.A.)];
(d) the interests of participants in the trial process in maintaining a degree of privacy; (C.B.C. v. New Brunswick, supra at p. 400-402; Dagenais, supra, at p. 41). A number of the studies from the United States also recognized the privacy rights of litigants and witness, contrary to the submission of the media that there are no privacy rights when one enters a courtroom. I conclude that witnesses and litigants have privacy rights that must be considered;
(e) the interests of the court and the public in maintaining the dignity and decorum in the administration of justice, and;[R. v. Cho, supra; R. v. Squires, supra; New Brunswick Broadcasting v. Nova Scotia, supra, Committee for the Commonwealth of Canada v. Canada, supra; many, if not all of the United States studies identified this interest];
(f) access to justice for citizens. This raises the concern identified by many authors and case law regarding the 'chilling effect' cameras in the courtroom will have regarding the willingness of litigants to bring their cases to court.

182 The cases make it clear that the goal is to achieve a balance of all the competing rights. For example, in Dagenais, Lamer C.J.C. said this at para. 72:

> A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the Charter and when developing the common law. When the protected rights of two individuals come into conflict, as can occur in the case of publication bans, Charter principles require a balance to be achieved that fully respects

the importance of both sets of rights.

183 Sometimes a balance cannot be achieved, and then one right must give way to the other. For example, in R. v. Mills (1999), 139 C.C.C. (3d) 321 (S.C.C.) at 370, in assessing the production of confidential records, the Court held that where the right to full answer and defence was not engaged because the accused was seeking to distort the truth, the privacy rights of the complainant prevailed. Where the records bore directly on the right to full answer and defence, "privacy rights must yield to the need to avoid convicting the innocent".

184 It is also important to look at the rights involved in the context of this application. The context is that the applicants wish to bring Expanded Media Coverage into the courtroom to cover the trial of the former Premier of British Columbia. It is obvious that this is a case with a high public profile. I add that the co-accused, Mr. Pilarinos, is not a public figure and his case, if it were not tied to the charges against Mr. Clark, would likely not draw as much interest.

185 I reiterate that the media wish to bring one camera into the courtroom and pool to the other media outlets. The camera would likely be unobtrusive. Reporters wish to bring in audio tape recorders to confirm accuracy of their notes as well as have audio clips available. It is also intended to webcast the trial and show the trial 'gavel to gavel' on a new Court TV station.

(iv) What is the nature of the infringement of the Charter rights?

186 It is important to define the infringement. The infringement is not as broad-based as the applicants submit. [See the analysis in Sharpe, at p. 25]. The common law rule does not prohibit filming or taping of participants. It prohibits filming and taping in the courthouse. There is no restriction regarding filming outside the courthouse. There is no restriction regarding attending in court and taking notes, drawing pictures, or upon request, accessing exhibits. The restriction relates to the means of gathering the information and the place where it may be gathered. The Policy permits Expanded Media Coverage, with the consent of the parties, and the permission of the trial judge.

187 The evidence demonstrates that the court's consent requirement, while not an absolute bar to Expanded Media Coverage, is a significant limiting factor. [Affidavits of Daniel Henry and Eva Czigler].

188 Thus, I frame the infringement as suggested by the amicus curiae, "a partial restriction on the rights of the press to use specific means to gather information in specific places".

(v) Does the Common Law Rule constitute a reasonable limit on Charter rights?

189 Although the burden to establish that the infringement is a reasonable limit lies with the Attorney General, it is important not to lose sight of the context of this case. This is not simply a situation where the right is justified solely for the greater good. This is in the context of competing rights, not only public rights, but the right of the accused to a fair trial.

190 The test under s. 1 is set out in R. v. Oakes, supra, and recently reviewed in R. v. Sharpe, supra, at p. 42-52. First, is the legislative objective pressing and substantial? Next, is there proportionality between the limitation on the right and the benefits of the law? Under this second arm, there are three branches: Is the law "rationally connected" to the goal in which it was derived, does the law impair the right of free expression only minimally, and finally, whether the benefit of the law, that is limiting or prohibiting Expanded Media Coverage in the courthouse, outweigh the detrimental effects of the law on the right of free expression.

Is the objective pressing and substantial?

191 The common law rule seeks to promote at least three important principles: the right of the accused to a fair trial, the maintenance of dignity and decorum in and near the courtroom to preserve the solemnity and respect for the purpose of the courts, and the ability of participants in the trial process, including witnesses, parties, jurors, lawyers, judges and other participants, some degree of privacy. I include lawyers and judges because of the aforementioned safety and security issues. I have already concluded that privacy rights are to

be weighed. This also raises the 'chilling effect' on litigation as a result of introducing Expanded Media Coverage. [Gallup Ontario Omnibus Poll, New York State Bar Association Special Committee on Cameras in the Courtroom, Final Report to the House of Delegates, pp. 82-85, New York State Committee to Review Audio-Visual Coverage of Court Proceedings, An Open Courtroom: Cameras in New York courts, p. 39, R. v. Loveridge [2001] EWCA Crim 973 (Eng. C.A. Crim. Div.) at para. 30 (Lord Woolf C.J.)].

192 I conclude that these objectives are clearly pressing and substantial.

Proportionality Between the Limitation and the Right and the Benefits of the Law?

(a) Rational Connection

193 The Attorney General must show that Expanded Media Coverage in the courtroom would cause harm to the other rights in question - the right to the fair trial, the maintenance of the dignity and decorum of the courthouse and the right to privacy. The test is not "scientific proof based on concrete evidence." The test is a "reasoned apprehension of harm" [Sharpe at p. 42].

194 The applicants submit that there must be an actual demonstration of harm or a real likelihood of harm to a societal value before a limitation can be justified. I conclude that this is not the test to be applied in this analysis. Here, there is no outright denial of the freedom of expression (such as there was in Dagenais), and the common law is concerned with other, equally-pressing rights. [See Hill v. Church of Scientology, [1995] 2 S.C.R. 1130, [1995] S.C.J. No. 64 at para. 98]. If an actual breach of Mr. Clark's or Mr. Pilarinos's right to a fair trial was established, there would have to be a mistrial. It is difficult to envision how, in most cases, actual harm could be demonstrated until it was too late.

195 The first question is whether there is a likelihood that the fair trial rights of the accused or rights to privacy or the dignity and decorum of the courtroom will be harmed by the admission of Expanded Media Coverage in the courtroom?

196 There was a great deal of evidence provided in this case in the form of surveys, scientific studies, learned articles and opinions. Some of the surveys demonstrate that anecdotally, many participants in the justice system who have participated in Expanded Media Coverage, do not believe that the cameras make any difference to the court proceeding. [Affidavits of Dr. Freeman, Douglas Jacobs, Daniel Henry; Susan Harding, "Cameras and the Need for Unrestricted Electronic Media Access to Federal Courtrooms" Southern California Law Review Vol. 69:827, 1996]. There are many articulate arguments put forward to support cameras in the courtroom based on the now some twenty years experience with cameras in some of the states in the United States.

197 There are a number of studies that are inconclusive regarding whether or not cameras have an effect on jurors, witnesses, lawyers and judges and trial fairness. [Bowers, supra, Affidavit of Dr. Borgida, Affidavit of Dr. Ogloff, Affidavit of Dr. Freeman]. There are a number of surveys and anecdotal opinions that support the conclusion of a serious and significant effect on trial fairness, as well as causing an effect on witnesses, judges, lawyers and jurors. [See for example, William Harte, "Why Make Justice a Circus? The O.J. Simpson, Dahmer and Kennedy-Smith Debacles Make the Case Against Cameras in the Courtroom" Trial Lawyer's Guide"; Affidavit of P. LaPrairie; Affidavit of J. Hirschhorn; Stepniak, infra, at para. 6.21; Lassiter TV or Not TV at p. 981 ff.] Indeed one article pointed to a trial judge who was televised in a very high-profile case who obtained the services of a press agent. There is evidence to support the contention that some trial judges will succumb to public pressure and issue reasons that would conform to the public's expectation rather than applying the rule of law. [Electronic Media Coverage of Courts, a Report prepared for the Federal Court of Australia by Daniel Stepniak, December 1998, at paras. 4.17-4.42 and 8.50. The Stepniak Report is comprehensive and one of the most useful documents filed in terms of an overview of the issue].

198 There is evidence to support the 'chilling effect' of reluctance on the part of citizens to bring their cases to court if they are going to be televised. [Ernest Short, Evaluation of California's Experiment with Extended Media Coverage of the Courts; Affidavit of Richard Fox; Stepniak at paras. 4.26-4.32].

199 I do not have the leisure to recite a comprehensive review of the evidence filed, however, I will touch

on some of the highlights. For example, the study commissioned by the Federal Courts in the United States after a pilot project indicated that 64% of the judges felt the cameras made the witnesses more nervous and 41% were of the view that cameras affected the witnesses in the courtroom. The minority report, prepared by Jack Litman in the 1994 study in New York is of considerable relevance. [See also News Release: Judicial Conference Opposes Bill to Bring Cameras into Federal Courts" Administrative office of the U.S. Courts, September 6, 2000; Statement of Chief Judge Becker on Behalf of the Judicial Conference.]

200 Dr. Borgida criticizes the methodology of some of the evaluations and so-called experiments with cameras in the courtroom. He points out that these surveys and evaluations do not meet the rigorous social scientific standards required for reliable results.

201 Dr. Freeman deposes that Dr. Borgida's study and a study by S.M. Kassin are methodologically sound. Dr. Freeman agrees that the research on television in the courtroom is limited. However, he opines that conclusions may still be drawn from the research. Dr. Freeman says this at para. 27:

> My disagreement with Borgida and Ogloff on this is similar to the familiar metaphor of how one looks as [sic]a glass that is not full. In this instance, they seem to be saying that the glass is one-tenth empty (i.e. the research shows no negative effects, but there is not enough research and it is not good enough to draw definitive conclusions) while I am saying that it is nine-tenths full (i.e. although there is not a great deal of research and it is limited, the overwhelming results are that there is no indication of any negative impact).

202 There is agreement amongst the experts that there is not a great deal of scientifically validated research. Many of the authors of the various surveys acknowledge the limitations in their work. The problem with drawing conclusions based on limited research is that what is at risk, amongst other things, is the fair trial right of an accused. This right is too important to risk based on inconclusive or insufficient evidence.

Privacy Issues

203 Serious privacy issues are also at stake in this application. If the trial were webcast on the Internet, it would provide millions of people with uncontrolled access to the proceedings. The ability to manipulate images on the Internet is well-known and would seriously affect not only the privacy of all those whose images are captured and broadcast, but also the dignity and decorum of the courtroom.

204 If all members of the public were entitled to bring their own video cameras and flash cameras into the courtroom, there would be considerable disruption, along with a pervasive invasion of privacy.

205 The filming of jurors presents another problem of invasion of privacy, as well as public pressure. Most jurisdictions which permit Expanded Media Coverage restrict filming jurors. As noted, in both the filming of R. v. Clow (the C.B.C. production) and the O.J. Simpson trial, the media violated these restrictions and images of jurors were broadcast.

206 The other concern relating to privacy is the fact that tapes can be archived. Images can be shown time and again, and in contexts that are unrelated to the present proceedings. CTV is currently and repeatedly showing images, including that of Robert Latimer, to advertise its news program.

207 While the bona fide scientific evidence is inconclusive regarding the effects of Expanded Media Coverage in a courtroom, the evidence overwhelmingly supports at minimum, a "reasoned apprehension of harm" and indeed reaches the Dagenais test of "a real and substantial risk". Therefore, the Oakes test of a "rational connection between the purpose of the law and the means adopted to effect this purpose" has been established.

Minimal impairment

208 The impugned law does not have to be the least restrictive means of achieving its end. It is sufficient if the means adopted falls within a range of reasonable solutions to the problems confronted. The law must be

reasonably tailored to its objectives. It must impair the right no more than reasonably necessary, having regard to the practical difficulties and conflicting tensions that must be taken into account [R. v. Sharpe at p. 46].

209 The restriction in this case is not a publication ban. It is a "time, place and manner" restriction. The press are not restricted from attending the courtroom and gathering information to broadcast in the form of note-taking and drawings. There is also a lessening of the restriction on audio recordings, as some judges of this court have permitted reporters to tape the proceedings to confirm the accuracy of their notes.

210 The long-standing principle of open courtrooms as the rule is not affected by the prohibition of Expanded Media Coverage. The common law rule does not prohibit anyone from entering the courtroom, observing the proceedings and reporting to others who did not attend. The law does not guarantee anyone a seat in the courtroom. [Attorney General v. McIntryre, supra, C.B.C. v. New Brunswick, supra, Re Southam Inc. and the Queen, supra, Nixon v. Warner Communications, supra, para. 44]

211 The open courtroom protects the accused from bias and unfairness when matters are tried in secret. The open courtroom is one of the ways to guarantee a fair trial.

212 In the Westmoreland case, supra, the court said, after discussing the law with respect to the open courtroom, "these cases articulate a right to attend trials, not a right to view them on a television screen" (at para. 23). If this were not true, the public could claim a constitutional right to view all trials on television. In reality, the media cover the scandals, the celebrities, and crime, primarily in short sound bites. Remarkably, it covers that which is equivalent to the entertainment in television programs. Little is added to the news story as a result of filmed images. [Molly Treadway and Carol Krafka, "Electronic Media Coverage of Federal Civil Court Proceedings", at p. 32-36, which is the official summary of the Federal Court; Lorraine Luski, Mass Media Effects Upon Pre-Trial and Trial Proceedings: An Examination of the Empirical Literature, at p. 45].

213 The presumption of open courts does not stand for the right to have trials presented on television for home entertainment. [See the New York State Bar Association Final Report, at p. 74; New York State Committee to Review Audio-Visual Coverage of Court Proceedings, An Open Courtroom, Cameras in New York Courts at p. 37; Hans and Dee, Media Coverage of the Law].

214 As recognized in C.B.C. v. New Brunswick, supra, the open court principle is not absolute. If there are not enough seats in the courtroom, the citizens' rights are not violated because he or she cannot attend.

215 I conclude that the right to freedom of expression is minimally impaired when Expanded Media Coverage is prohibited from the courtroom and the courthouse. If, in the exercise of my discretion, I give effect to the Policy of this court, the freedom is even less impaired, as it permits Expanded Media Coverage in some circumstances.

Proportionality

216 The proportionality assessment considers all those matters discussed under the previous headings and balances them to determine whether the Attorney General has established that the common law restriction on the freedom of expression is demonstrably justified in a free and democratic society.

217 In balancing the various considerations, I take into account the submission of the applicants, that this is not an all or nothing proposition. The media submits that if I conclude that the cameras are not entitled to film the entire trial (or those parts of it the applicants deem worth recording), then I should permit the cameras in for closing arguments and the charge to the jury. The media submits that many of the concerns are not raised by a limited broadcast.

218 It is true that there is a less concern, as the witnesses have left the building. However, there are still other considerations, including the effect on jurors, lawyers, judges, the accused and the privacy rights which are still alive and well at the end of the trial, as well as the beginning.

219 While the evidence is inconclusive regarding the effect on the trial process, the position of many

involved in the justice system, and those who have had experience with Expanded Media Coverage is divided.

220 It is important to keep in mind the fundamental right that is being weighed against freedom of expression, and that is the right to a fair trial. In Dagenais, Lamer C.J.C., said the following at pp. 46-47:

> It is also important to recognize, however, that the objective usually underlying such bans - the diminution of the risk that a trial might be tainted by unfairness - is directly related to the accused's constitutionally protected right to a fair trial . . there are times when the rights of the accused will be in direct conflict with the expressive rights of the media. In such cases, I believe it is necessary to apply the common law proportionality analysis in a manner that reflects the fact that two fundamental rights are in jeopardy. That is, it is essential in these circumstances to recognize the pressing and substantial objective at issue [the fair trial right]is itself a fundamental right and that, as such, it is a matter of exceptional importance...When examining alternative measures, it will be important to carefully consider both rights at issue, so as to ensure that any alternative measures that impair free expression to a lesser degree than a publication ban also reasonably protect the right to a fair trial.
>
> . . . Similarly, when considering the proportionality of the impact of the ban on free expression to its salutary effects on the fairness of the trial, it will be necessary to bear in mind the fundamental importance of trial fairness both to the accused and to society.

221 The effect on the media is minimal. The potential effect on the trial is significant. The prohibition and the application of the draft policy by a court meets the proportionality test. Therefore, the restriction, if it violates s. 2(b), is saved by section 1.

Exercise of discretion

222 I am asked to exercise my discretion and permit Expanded Media Coverage into the courtroom. The applicant's submit that I should not follow the consent requirement, as it is an absolute prohibition. The case of R. v. Clow demonstrates that it is not an absolute prohibition. Once the parameters were established, it was not that difficult to obtain the consent of the parties to televise the Clow trial.

223 The people who can best assess the effect of the Expanded Media Coverage in the courtroom are those who are most intimately involved in the presentation of the evidence. In other words, the litigants. In this case, it is the Crown and Mr. Clark and Mr. Pilarinos. To forego the consent requirement would result in me second-guessing, with no foundation, the effect on witnesses, some known only to the defence. The defence has no obligation to disclose its case at this stage of the proceeding.

224 The consent requirement provides a balanced approach to permitting cameras into the courtroom.

225 The common law evolves gradually. Often, technology is far ahead of the both the legislature and the common law. One need only look at the field of biotechnology and the many legal problems with the Internet to recognize this.

226 Our legal tradition is not generally that of the United States, but that of the United Kingdom. Expanded Media Coverage is not permitted in the English courts. Canada, like New Zealand and Australia, is at the experimental stage of examining the possibilities brought about by new and improved media technology.

227 The issue is of grave significance to the judiciary, the players in the justice system, the media, and the public as a whole. It is not an issue that should be developed on a case-by-case basis. It is a matter for organized, supervised trials that are conducted with the approval of the judiciary as a whole. There are and have been experiments regarding cameras in the courtroom in Canada. It is the controlled experiments and the scientific studies that will determine if fair trial rights will be violated by the introduction of cameras in the courtroom. The studies to date are inconclusive; some use suspect methodology; there will be bias in

anecdotal reporting, and the sample surveyed sometimes has been very limited. There has been no study that I have been referred to that is not without some difficulty. Risking the fair trial rights of the accused on this quality of research is not acceptable.

228 These final comments do not demonstrate any bias I have for or against television in the courtroom. The arguments put forward by the applicants are compelling. There are good reasons presented for permitting Expanded Media Coverage in a courtroom, particularly where there will be complete coverage of the trial. My simple conclusion is that we do not know the effect of Expanded Media Coverage in the courtroom. Until we do, the policy of the Supreme Court of British Columbia is a sensible and permissive approach to the issue.

229 In conclusion, the application for Expanded Media Coverage is dismissed. I have not overlooked the fact that this application includes the request to bring audio recording devices into court for radio broadcasts. Many of the concerns raised also affect audio recordings when they are prepared for broadcast.

230 However, I have concluded that it will be appropriate to make the following order: reporters may bring audio recording devices into the courtroom for the sole purpose of providing verification of their notes. No parts of the recordings may be used on any form of media broadcast or any other purpose. The tape recorders may be used unless they become disruptive. Media outlets are to provide a list of reporters to me, either through counsel or directly through the Criminal Registry, who wish to bring an audio tape recorder into the courtroom, and permission will be granted to each individual reporter. Each reporter will be provided with a letter authorizing him or her to audio record the proceedings. This letter should be carried with the reporter when in the courtroom. The sheriffs will monitor each person who brings an audio recorder into the courtroom to ensure that the person is authorized to do so. This ruling is for this trial only. It does not grant blanket authority to bring in audio recorders for every trial.

231 To state the obvious - the court tape recordings are the Official Record of the proceeding.

232 The application for Expanded Media Coverage is dismissed, with the exception noted above.

BENNETT J.

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