

CANADA / JUDGMENT

HMTQ v. Cho et al

2000 BCSC 1162

COURT

Supreme Court of British Columbia

DECIDED

18 July 2000

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IN THE SUPREME COURT OF BRITISH COLUMBIA

RULING ON REQUEST FOR COURT APPROVAL FOR

AUDIO/VISUAL RECORDING OF TRIAL

THE HONOURABLE JUSTICE R.A. MCKINNON

18 JULY 2000

HER MAJESTY THE QUEEN

AGAINST

YANG-KUK CHO, CHUNG-UN CHOI, CHONG-SUB PARK,

CHANG-YOUNG KIM, CHONG-UN KIM, YOUNG-HO KIM, SUN-KUN KO,

DOOK YUN IM, SANG-SIN O

Counsel for Crown: P. La Prairie

K. Low

Counsel for: Yang-Kuk Cho:

Counsel for: Chung-Un Choi:

Chong-Sub Park:

Counsel for: Chang-Young Kim:

Chong-Un Kim:

Counsel for: Young-Ho Kim:

Counsel for: Sun-Kun Ko

Counsel for: Dook Yun Im:

Sang-Sin O: B. Curry

B. Hickford

T. Russell

R. Farvolden

N. Pye

R. Farvolden

J. Oman

Place & Date of Hearing:

Victoria, B.C.

18 July, 2000

Ruling On Request For Approval For

Audio/Visual Recording Of Trial

- [1] On or about July 3, 2000, I received a letter by fax from Ms. Mary Griffin of the Canadian Broadcasting Corporation seeking Court approval for audio and visual recording of this trial. The letter was accompanied by a 28 page article written by Daniel J. Henry entitled, "Electronic Public Access To Court - An Idea Whose Time Has Come".
- [2] On my return to Court July 4, I informed all counsel in open Court of this request with the comment that although I had no personal objection to it, felt it a matter of sufficient importance that it should be addressed separately by all persons having an interest in the issue. We were then much occupied (and continue to be) with motions, argument and general trial matters.

- [3] I took the application under advisement and on July 11 indicated that I would permit interested parties to address the Court on commencement of proceedings July 13. The jury had been sent away for several days to accommodate various issues and were not scheduled to return until July 18.
- [4] On July 13, Mr. Daniel Burnett appeared and made submissions for the Canadian Broadcasting Corporation and Mr. M. Scherr appeared for the Times Colonist newspaper. I permitted the letter and material supplied by Ms. Griffin to be characterized as an application, having provided all counsel with copies of it several days previously.
- [5] Mr. Scherr filed an application and submitted a brief in support. The Times Colonist seeks the ability to take still photographs within the courtroom and to "exercise such access in an unobtrusive manner and, as always subject to the directions, if any, provided by the learned trial judge".
- [6] In a remarkable display of unity unprecedented in this trial, both defence and Crown counsel were opposed to the application. Both considered it unfair to permit such an application at this stage of the trial. Crown suggested the very principle sought by the press, that is to provide the public with an accurate rendition of the trial, was compromised because the Crown's case was complete and no member of the public would thus see anything but defence witnesses.
- [7] Defence says it would be unfair, or at least leave the impression of unfairness, because the accused and their witnesses would be subjected to a process that Crown witnesses were not required to face. Defence also advise that the accused are in great fear for their safety and do not want their features publicly displayed.
- [8] Mr. Burnett sought approval for a single fixed camera capable of swiveling on a fixed pivot, without artificial light and with its own single microphone. It would be utilized subject to the direction of the trial judge.
- [9] In support of this request, he submitted that filming a trial is merely extending the public courtroom to the vast numbers of persons who cannot physically attend. It would, he argues, provide an opportunity for all of these persons to assess the trial process in the same manner as one who is in physical attendance and thus give spirit and meaning to the concept of an open judicial system.
- [10] Mr. Burnett commented that all Supreme Court of Canada cases are filmed, and 47 jurisdictions in the United States permit filming of trials. Also in Canada, public enquiries and quasi-judicial proceedings such as Securities Commission hearings are routinely filmed.

- [11] Citing Jeremy Bentham that "publicity is the soul of justice", and Mr. Justice Cory's comments in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 that "freedom to know about the courts is fundamental to a democracy", he suggested that our society is well past the era when we discriminate as to the tools news gatherers may bring to a courtroom.
- [12] Mr. Scherr, for the *Times Colonist*, submitted that there is a powerful legal presumption that court proceedings are open to the public and to publicity. He relied upon s. 486 of the *Criminal Code* which mandates that any proceedings against an accused, "shall be held in open court", subject to certain limited situations therein prescribed.
- [13] He cited as well the provisions of s. 2(b) of the *Charter of Rights and Freedoms* which enshrines as a fundamental freedom, "freedom of the press and other media communication". Both counsel in support of the application explained the details of various pieces of equipment that might be used and that such equipment has now advanced to the point where it can be utilized with virtually no distraction to the proceedings. There is no artificial light required, no film advance noise and no need to alter position once set up.
- [14] The thrust of the applications was, that given these rights and given the advances in technology, there is simply no good reason to exclude the use of modern equipment capable of accurately recording a public trial.
- [15] Although time and circumstances do not permit an exhaustive review of the historical perspective, it is useful to consider the state of the matter in both this and other jurisdictions.
- [16] In British Columbia there is no statutory prohibition and little substantive law arising from the few cases that have considered the issue. Mr. Henry's article provides a useful summary of the Canadian situation.
- [17] In *R. v. Vander Zalm* (14 May 1992), (B.C.S.C.) [Unreported], Esson C.J.B.C. (as he then was) responded to an application by the media to televise a trial having legitimate public interest. He denied the application because it was brought one week before commencement of the trial, though he seemed to have considered that timing was not the only factor. He offered the following comment:

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

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

[18] Counsel for the applicant suggested that, since there was no statutory prohibition, any limit on a Charter right had to be "prescribed by law" before it could be justified under section 1. In response Esson C.J.B.C. stated:

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

I am inclined to the view that it has the force of law, but as I have not had full submissions on that, I leave that question open.

[19] In *R. v. Fleet* (2 November 1994), (N.S.S.C.) [Unreported], a film company applied to the trial judge to film a murder trial. In denying the application, Palmetier A.C.J. was not convinced that "there is a right to have cameras in the courtroom and, accordingly, that there would be a breach of s. 2(b) of the Charter if the practice ban on cameras was continued". It was his opinion that the presence of cameras "would be disruptive and not in the best interests of justice" and that consent of all involved would be required. He also spoke of the court having some ability to "edit" the filming to ensure "accuracy" of reporting.

[20] The experience in Ontario is somewhat different in that the Judicature Act, R.S.O. 1980 c. 223, s. 67 and subsequent replacement statutes prohibit filming in a courthouse without the permission of the parties, the witnesses, and the judge, for such educational or instructional purposes as the judge may approve. In *R. v. Squires* (1993), 78 C.C.C. (3d) 97, a C.B.C. reporter was convicted under this section for filming someone emerging from a courtroom. The case wound its way to the Ontario Appeal Court and the following comments of Mr. Henry found at p. 7 of his article indicate the conundrum faced by that Court.

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

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

The decision was 3-2 with three separate judgments in the majority, and Tarnopolsky J.A. writing for both himself and Krever J.A. in the minority. Four of the five judges agreed that section 2(b) was infringed by the provision, and the fifth did not make much of an issue of that conclusion. Two of the majority judges were careful to restrict their support for the saving of the provision

through section 1 to the specific mischief associated with filming in the doorway area of the courtroom. They went out of their way to indicate that different considerations applied to cameras in the court and even in the hallway areas of courthouses. They noted that inside the court, unlike in the courtroom entrance and exit areas where disruption can occur, the judge is in complete control. Inside the court as well, there is no right of privacy, apart from that afforded to sexual assault victims or jurors.

[21] The case is instructive, particularly for a jurisdiction such as British Columbia that has no statutory prohibition but relies upon the common law. The minority view of Krever and Tarnopolsky, expressed by the latter made the following comments found at pp. 7 and 8 in Mr. Henry's article in reference to electronic access:

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

[22] Mr. Henry commented that after reviewing the ruling in *Southam No. 1 - Southam Inc. and The Queen (No 1)* (1983), 146 D.L.R. (3d) 408, (Ont. C.A.), which court held that free access to the courts is "an integral and implicit part of the guarantee given to everyone of freedom of opinion and expression which, in terms includes freedom of the press", Tarnopolsky J.A. repeated the summary of Wilson J. in *Edmonton Journal* of the purpose of openness of court proceedings to the news media:

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

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

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

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

[23] Finally on this issue, when discussing the application of section 1 of the Charter to the statutory prohibition, and concluding it did not meet the minimal impairment test, Tarnopolsky stated at p. 127:

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

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

[24] Perhaps the most instructive case for a jurisdiction that has relied upon the common law is found in *Dagenais v. Canadian Broadcasting Corporation* [1994] 3 S.C.R. 835. In that case, the Supreme Court of Canada considered a publication ban on a television drama that was said to closely follow a trial about to commence in Ontario. The basis for issuing the ban was that it could prejudice potential jurors such that the accused would be denied a fair trial. The Supreme Court of Canada held that the ban should never have been made.

[25] On page 4 of Mr. Henry's article, he reproduced the comments of Lamer C.J.C. as follows:

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

A publication ban should only be ordered when:

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

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

- [26] Mr. Burnett referred to comments of the Supreme Court of Canada in *Edmonton Journal* (cited above) where Cory J. commented at p. 1407:

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

- [27] 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. Indeed, when one considers the discussion in *Dagenais and Squires*, the reverse might now be the situation. Given the provisions of s. 2 of the Charter, against the obiter referred to, it could be argued that, subject to the overriding duty and right of the individual trial judge to control his or her process, the time has now arrived to permit the introduction of equipment designed to more accurately depict public events.

- [28] Mr. Purvis suggested that a case such as this ought to be referred to the Chief Justice, to make whatever policy decisions he considers appropriate to the issue. With respect, I do not see that the issue in British Columbia requires such a reference. There is no requirement

here to consider the constitutionality of any statute prohibiting such equipment, rather it has been a common law prohibition. No one has seriously questioned the right and obligation of each trial judge to control proceedings in his or her courtroom. The Ontario Court of Appeal in *Squires*, considered this a given.

- [29] There will be many trials where the issue of media access is easily resolved by reference to the statutory protection afforded certain witnesses and trials. In those cases it is a blanket protection, no media report of any kind is permitted. There will be other occasions when the process might be considered "too disruptive" due to antiquated equipment, or some other cogent reason. Perhaps consent might be required from certain persons. Insofar as this trial is concerned, none of those points were raised.
- [30] No counsel addressed the issue of consent. I tend to the view that such a process would defeat the objective. Consent is a factor in the Ontario legislation which, though the Ontario Court of Appeal found the impugned section to be constitutional, nevertheless did so on very narrow grounds. No person is asked to consent to having his or her sketch taken, nor whether any testimony offered could be reproduced in a news item either on television or in print. So far as I am aware there is no privacy right afforded in court to any person save for those statutory rights protecting certain witnesses and events. It is also open to the trial judge to consider any request for exclusion based upon a real or potential issue of safety and/or fairness.
- [31] There may be issues of consent that will arise in a particular trial. I leave that argument for another day. I merely say that in the instant case, no one raised it and I was not required to resolve the point.
- [32] In the case at bar, the objections of Crown and defence go primarily to fairness and safety, though as indicated they differ in terms of defining the fairness aspect. An aspect of this "fairness" issue is the joint submission that the applications come too late, they ought to have been made at the commencement of this trial when if allowed, it would have created a level playing field. It seems, from the cases I have reviewed on the topic, that news applicants are always told by the courts that their application is too late.
- [33] The applications here came after the close of the Crown's case and before election by defence. If allowed, only the defence witnesses would be the subject of coverage requested by this application. The defence argues that this is "unfair". The accused, who are foreigners, unfamiliar with either our language or process cannot understand why they should be the subject of television and still photographs when the Crown witnesses were not.
- [34] The jury was selected following a challenge for cause based upon pre-trial publicity and the Crown says that the introduction of the proposed equipment adds to that mix of "publicity" but at a time when the jury cannot be polled on the potential effects upon them.
- [35] I am not entirely sure just what difference it would make to a jury, but I accept that perhaps there is a perception, if not a reality to the impact it might have.

[36] The most helpful direction comes from the Dagenais case which, though concerned with a publication ban, offers instructive comments that can be equated with this type of application. In that case at p. 299 Lamer C.J.C. stated:

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

[37] Given the fairness issues raised by both Crown and defence, coupled with the suggestion of potential harm to the accused against the comments of the Supreme Court in Dagenais, I accept that applications to videotape and take still photographs of defence witnesses and/or the accused generally, should be denied.

[38] 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 counsels' submissions to the jury and my instructions.

[39] I want to be perfectly clear that there will be no filming of the accused and no filming of the jurors. On this trial, the experiment will be restricted to filming the submissions at the close of the trial, should the media wish to avail themselves of the opportunity.

[40] I used the word "experiment" because it is something new. There may be problems that arise respecting disruption to the proceedings that has been much talked about in other applications. In my view that argument falls within the "speculative" proffered by Lamer C.J.C. in Dagenais. It converts to reality only when it is tried and found wanting.

[41] Crown suggested that partial video coverage would not satisfy the stated intention of the applicants to provide a "faithful rendition of events" because it would not include Crown witnesses. In accepting that a perception of unfairness might arise in this trial if I acceded to the application, I would not want to leave the impression that this court is concerned with the notion of "partial coverage".

[42] No one suggests the requested process is intended to cover the entire case. News outlets almost never publish complete trial proceedings. Editing is done every day. A person in actual attendance at a trial might read news items of that trial and conclude that the report either had not got it right, or left an erroneous impression of the proceedings. That would certainly not be a reason to deny access to the courts.

[43] Sketches sometimes bear no resemblance to the subject and news stories sometimes fail to reflect the proceedings. Editing, as noted, is done all the time. Merely because a trial is covered from start to finish, does not mean that it will all be reported. It is no part of my job to edit, comment or otherwise indicate what I think should or should not be reported.

[44] In the result, for this trial, I will permit the requested access for the final submissions and instruction only.

"R.A. McKinnon, J."

The Honourable Mr. Justice R.A. McKinnon

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