

## CANADIAN ARTS LAW UPDATE

ROGER D MCCONCHIE<sup>1</sup>

[227] The anaemic guarantee of freedom of expression contained in s 2(b) of the *Canadian Charter of Rights and Freedoms*<sup>2</sup> continues to frustrate the news media. Unlike the *First Amendment to the Constitution of the United States*, s 2(b) has no direct application to civil defamation law which is the basis of most litigation against publishers and broadcasters. Although the *Charter* does apply to ‘government action,’ Canadian courts seem less interested in expanding freedom of expression than in shaping new protection for individual privacy,<sup>3</sup> which is not expressly protected by the *Charter*. Further, although the news media occasionally persuade Courts to strike down federal or provincial statutes which infringe freedom of expression, the most powerful provision in the *Charter* continues to be s 1, which subjects all *Charter* guarantees to ‘such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.’<sup>4</sup> The following summary reports recent developments concerning these subjects.

### Canadian defamation verdicts — inflationary times

The Canadian Broadcasting Corporation recently cemented its costly position as the top-paying media defendant in the common law provinces and in Quebec. In companion judgments released on 12 June 2001, the Ontario Court of Appeal unanimously sustained a trial judge’s damage award of \$950,000 to cardiologist Dr Frans Leenen<sup>5</sup> and increased another trial judge’s damage award to cardiologist Martin Myers<sup>6</sup> to \$350,000 by adding \$150,000 aggravated damages to the lower [228] court’s general damage award of \$200,000. In *Leenen* and *Myers*, which both arose over a single episode of the CBC feature television program known as ‘the fifth

---

<sup>1</sup> Barrister and Solicitor, Borden Ladner Gervais LLP, Vancouver, British Columbia, Canada; <rmconchie@blgcanada.com>.

<sup>2</sup> Part I of the *Constitution Act 1982*, being Sch B to the *Canada Act 1982* (UK).

<sup>3</sup> Canadian issues concerned with privacy will be considered in issue 6(4) of the *Media & Arts Law Review*.

<sup>4</sup> A person seeking to sustain legislation under section need not tender ‘concrete evidence’ but need only show a ‘reasoned apprehension of harm’: *R v Sharpe* [2001] SCC 2, para 85.

<sup>5</sup> *Leenen v Canadian Broadcasting Corporation* (2000) 48 OR (3d) 356 (SC) affirmed [2001] OJ No 2229 (CA).

<sup>6</sup> *Myers v Canadian Broadcasting Corporation* (1999) 47 CCLT (2d) 272 (SC) varied [2001] OJ No 2228 (CA).

estate,' the Ontario Court of Appeal abstained from mentioning the *Charter* and did not hint that a Court might exercise restraint in awarding libel damages in view of the importance of the guarantee of freedom of expression in s 2(b).<sup>7</sup> In Quebec, the Superior Court ordered the CBC and Society of Quebec Notaries in June 2000 to pay communications adviser Gilles Néron and his company the sum of \$1,264,207 over defamatory expression which accused Néron of acting unprofessionally.<sup>8</sup> There is no suggestion in *Néron* that *Charter* free speech values might dictate restraint when defamation damages are assessed against a news media defendant.<sup>9</sup>

Although the CBC may seek leave to appeal the Ontario Court of Appeal rulings to the Supreme Court of Canada, the prospect of Canada's highest court interfering with these substantial awards is remote. The Supreme Court of Canada has not granted leave to appeal in a defamation case since its landmark companion decisions in *Hill v Church of Scientology of Toronto*<sup>10</sup> and *Botiuk v Toronto Free Press*<sup>11</sup> in 1995. Earlier this year the *Globe and Mail* newspaper was refused leave to appeal the decision of the Ontario Court of Appeal in *Hodgson v Canadian Newspapers Co* which approved a trial judge's award of \$400,000 general damages and \$380,000 special damages (the Court of Appeal quashed the trial award of \$ 100,000 punitive damages).<sup>12</sup> Similarly, the Supreme Court of Canada refused to permit a defendant to appeal the decision of the British Columbia Court of Appeal in *Southam Inc v Chelekis*,<sup>13</sup> which unanimously dismissed arguments by a defendant newsletter publisher that an award of general damages of \$250,000 was unduly high (that award formed part of an aggregate trial damage award of \$875,000).

In 1995 in *Hill v Scientology*, the Supreme Court of Canada emphatically rejected defence arguments that non-pecuniary damages in defamation cases should be capped

---

<sup>7</sup> Compare the pre-*Hill v Scientology* decision of the British Columbia Court of Appeal in *Derrickson v Tomat* (1992) 10 CCLT (2d) 1, leave to appeal to SCC dismissed [1992] 6 WWR viii, where the majority ruled that the guarantee of freedom of expression in s 2(b) requires the Courts to exercise restraint in awarding damages for politically motivated defamation.

<sup>8</sup> *Gilles E Néron communication marketing inc c Chambre des notaires du Québec* [2000] JQ no 2011 (SC).

<sup>9</sup> The CBC has filed an appeal to the Court of Appeal of Quebec.

<sup>10</sup> [1995] 2 SCR 1130.

<sup>11</sup> [1995] 3 SCR 3.

<sup>12</sup> (1998) 39 OR (3d) 235 (SC), varied [2000] OJ No 2293 (CA), leave to appeal refused [2000] SCCA 465.

as in Canadian personal injury cases. Speaking for Canada's highest court, Cory J stated:

From 1987 to 1991, there only 27 reported libel judgments in Canada, with an average award of \$30,000. Subsequent to the [trial] decision in this case, from 1992 to 1995, there have been 24 reported libel judgments, with an average award of less than \$20,000 ... Therefore there is no indication that a cap is required in libel cases.<sup>14</sup>

It is now clear that Justice Cory's lack of concern about the inflationary impact of *Hill v Scientology's* \$1.6 million award was misplaced. Prior to *Hill*, the largest trial verdict for defamation sustained on appeal was \$135,000, awarded by a Quebec jury as non-pecuniary damages against a Montreal daily newspaper.<sup>15</sup> In *Hill*, Canada's highest court unanimously upheld an award more than ten times higher, rendered by an Ontario jury in favour of a lawyer employed by the provincial Ministry of Attorney General which funded his libel action through all stages of the litigation. Before the defendant *Scientology's* appeal was heard by the Supreme Court of Canada, the plaintiff was appointed a judge of the Ontario High Court. This unprecedented \$1.6 million award, which did not include special damages [229] as none were proven, was guaranteed not only to increase the level of libel damages awards but also to encourage litigants to pursue libel claims against the media and others.

In the six years since *Hill v Scientology*, there have been more than 150 defamation verdicts in Canada. The value of defamation damage awards has soared dramatically. The current top 10 Canadian judgments, in terms of aggregate awards to all plaintiffs in the lawsuit, are as follows in order of descending magnitude (including *Hill*):

- (1) \$1,600,000: consisting of \$300,000 general damages, \$500,000 aggravated damages, and \$800,000 punitive damages: *Hill v Scientology*.<sup>16</sup>
- (2) \$1,264,207: consisting of the following awards: i) to the individual plaintiff, \$300,000 non-pecuniary general damages, \$475,000 pecuniary damages for loss of income, and \$164,207 for lawyers' fees and time incurred to prepare the case; ii) to the corporation plaintiff, \$25,000 non-pecuniary general damages and

---

<sup>13</sup> (2000) 133 BCAC 253, leave to appeal refused [2000] SCCA No 177.

<sup>14</sup> Ibid para 169.

<sup>15</sup> *Snyder v Montreal Gazette* [1982] 1 SCR 494.

\$200,000 pecuniary damages. In addition, the individual and corporate plaintiffs were each awarded \$100,000 punitive damages: *Gilles E Néron communication marketing inc c Chambre des notaires du Québec*.<sup>17</sup>

- (3) \$950,000: consisting of \$400,000 general damages, \$350,000 aggravated damages, and \$200,000 punitive damages. In addition, the Court awarded trial costs of \$836,178.94: *Leenen v CBC*.<sup>18</sup>
- (4) \$875,000: consisting of general damages totalling \$675,000, aggravated damages of \$100,000 and punitive damages of \$100,000 against a number of defendants in relation to various related libels and slander: *Southam Inc v Chelekis*.<sup>19</sup>
- (5) \$780,000: consisting of \$400,000 general damages and \$380,000 special damages: *Hodgson v Canadian Newspapers Co*.<sup>20</sup>
- (6) \$705,000: consisting of \$500,000 general damages and \$205,000 punitive damages in favour of a number of individual and corporate plaintiffs against a number of defendants: *ATU v ICTU*.<sup>21</sup>
- (7) \$634,855: consisting of \$100,000 non pecuniary general damages, \$189,757 pecuniary damages for income loss, \$38,459.40 for other pecuniary loss, \$40,000 punitive damages, and \$267,138.64 for legal fees and expert witness fees: *Guitoni c Société Radio-Canada*.<sup>22</sup>
- (8) \$465,000: consisting of \$140,000 general and aggravated damages including the present value of future pecuniary loss, and \$325,000 pecuniary damages for loss of income: *Botiuk v Toronto Free Press Publications Ltd*.<sup>23</sup>
- (9) \$450,000: consisting of \$100,000 general damages, \$150,000 aggravated damages, and \$300,000 pecuniary damages: *Duke v Puts*.<sup>24</sup>
- (10) \$350,000: consisting of \$200,000 general damages and \$150,000 aggravated

---

<sup>16</sup> *Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130.

<sup>17</sup> *Gilles E Néron communication marketing inc c Chambre des notaires du Québec* [2000] JQ no 2011.

<sup>18</sup> *Leenen v Canadian Broadcasting Corporation* (2000) 48 OR (3d) 356 (SC), affirmed [2001] OJ No 2229 (CA).

<sup>19</sup> *Southam Inc v Chelekis* (2000) 133 BCAC 253, leave to appeal refused [2000] SCCA No 177.

<sup>20</sup> *Hodgson v Canadian Newspapers Co* (1998) 39 OR (3d) 235 (SC), varied [2000] OJ No 2293 (CA), leave to appeal refused [2000] SCCA 465.

<sup>21</sup> *Amalgamated Transit Union v Independent Canadian Transit Union* [1997] 5 WWR 662 (Alta QB).

<sup>22</sup> *Guitouni c Société Radio-Canada* [2000] JQ no 3264 (SC).

<sup>23</sup> *Botiuk v Toronto Free Press Publications Ltd* [1995] 3 SCR 3.

<sup>24</sup> *Duke v Puts* [2001] SKQB 130.

damages: *Myers v CBC*.<sup>25</sup>

[230] This top 10 list excludes a 1996 verdict of an Ontario jury which awarded \$700,000 to Toronto lawyer T Allen Eagleson against *The Globe and Mail* newspaper. This award of \$600,000 general damages and \$100,000 aggravated damages was settled for an undisclosed sum before the defendants' appeal was heard by the Ontario Court of Appeal.

Aside from a handful of small claims court verdicts, there have been 27 other damage awards against Canadian publishers or broadcasters in the six years since *Hill v Scientology* ranging from a handful of verdicts over \$100,000 to miniscule awards more suited to small claims verdicts. These awards are as follows, ranked in descending order of magnitude: (1) \$145,000 — *Hayer v Chardhi Kala Punjabi Newspaper Society*;<sup>26</sup> (2) \$110,000 — *Prodor v Canwest Publishers Limited*;<sup>27</sup> (3) \$101,425 — *Lacroix v Gazette inc*;<sup>28</sup> (4) \$100,000 — *Barrière c Fillion*;<sup>29</sup> (5) \$80,000 *Grassi v WIC Radio*;<sup>30</sup> (6) \$86,500 — *Pressler v Lethbridge and Westcom TV Group Ltd*;<sup>31</sup> (7) \$60,000 — *Taylor-Wright v CHBC-TV*;<sup>32</sup> (8) \$60,000 *Earle v Coltsfoot Publishing Co*;<sup>33</sup> (9) \$40,000 — *Parizeau v Lafferty Harwood & Partners Ltd*;<sup>34</sup> (10) \$37,000 — *Editions HMX inc c Le Clerc*;<sup>35</sup> (11) \$37,000 — *Wolf v Drzewiecka*;<sup>36</sup> (12) \$30,000 — *Yellowhead Honda v Canadian Broadcasting Corporation*;<sup>37</sup> (13) \$30,000 — *Rankin v Southeast Asia Post*;<sup>38</sup> (14) \$30,000 — *Bal v Kular*;<sup>39</sup> (15) \$30,000 *Ramsey v Pacific Press*;<sup>40</sup> (16) \$28,700 — *Lepine v Proulx*;<sup>41</sup> (17) \$26,225

<sup>25</sup> *Myers v CBC* (1999) 47 CCLT (2d) 272 (SC), varied [2001] OJ No 2228 (CA).

<sup>26</sup> [1996] BCJ No 1426.

<sup>27</sup> BCJ No 2504.

<sup>28</sup> [2001] JQ no 1028.

<sup>29</sup> [1999] JQ no 548, RRA 712.

<sup>30</sup> [2000] 5 WWR 119 (BCSC).

<sup>31</sup> [1998] BCJ no 1195 (SC), varied [2000] BCCA 639.

<sup>32</sup> (1999) BCJ no 334, affirmed [2000] BCCA 629.

<sup>33</sup> [2000] NSJ no 69 (SC).

<sup>34</sup> [2000] JQ no 682 (Que SC).

<sup>35</sup> [2000] JQ no 688, RJQ 1260 (Que SC).

<sup>36</sup> [2001] JQ no 625 (Que SC).

<sup>37</sup> [1996] AJ no 689 (Alta QB).

<sup>38</sup> [1999] BCJ no 2409 (SC).

<sup>39</sup> [2000] BCSC 1424.

<sup>40</sup> [2000] BCSC 1551.

<sup>41</sup> [1996] AQ no 1197, [1996] RRA 718 (Que SC).

— *Des Rosiers v Nelson*;<sup>42</sup> (18) \$25,000 — *Ungaro v Toronto Star*;<sup>43</sup> (19) \$25,000 — *Duval c Parent*;<sup>44</sup> (20) \$18,000 — *Hamel c Turcotte*;<sup>45</sup> (21) \$15,000 — *Falcon v Cournoyer*;<sup>46</sup> (22) \$10,000 — *Fulton v West End Times Ltd*;<sup>47</sup> (23) \$5,000 — *Gouveia v Toronto Star Newspapers Ltd*;<sup>48</sup> (24) \$5,000 — *Beaudoin v La Presse Ltee*;<sup>49</sup> (25) \$4,500 — *Carter v Gair*;<sup>50</sup> (26) \$2,500 — *Nepvue v Limoges*;<sup>51</sup> and (27) \$1,000 — *Quintos v Filipino Forum*.<sup>52</sup>

[231] The general inflationary trend in defamation damage awards also applies to non-media verdicts. In addition to the awards which appear in the top ten list above, the non-media aggregate awards break down as follows:

- one verdict over \$300,000;
- five verdicts from \$200,000 to \$299,999;
- 12 verdicts from \$100,000 to \$199,999;
- nine verdicts from \$50,000 to \$99,999;
- 27 verdicts from \$25,000 to \$49,999;
- 22 verdicts from \$10,000 to \$24,999;
- 34 verdicts from \$1.00 to \$9,999.

### **Court publication bans — common law discretion**

In 1994, the Supreme Court of Canada in *Dagenais v Canadian Broadcasting Corporation* delivered guidelines for publication bans in criminal cases. That ruling was initially trumpeted by the news media as a victory for freedom of expression and a check on the growing tendency of trial and appellate courts to erode the principle of the 'open court.'<sup>53</sup> Setting aside an Ontario injunction which prohibited CBC television from broadcasting *The Boys of St Vincent* mini-series, the Court held (6–3) that free speech rights are not subordinate to an accused's right to a fair trial. The

---

<sup>42</sup> [1997] AQ no 1300, RRA 477 (Que SC).

<sup>43</sup> (1997) 144 DLR (4th) 84 (Ont Gen Div).

<sup>44</sup> [1995] JQ no 2550 (Que SC).

<sup>45</sup> [2000] JQ no 1399 (Que SC).

<sup>46</sup> [2000] JQ no 1 (Que SC).

<sup>47</sup> (1998) BCLR (3d) 288 (SC).

<sup>48</sup> [1998] OJ no 3830, (1998) OTC 186 (Gen Div).

<sup>49</sup> [1997] AQ no 3721, [1998] RRA 224.

<sup>50</sup> (1999) 170 DLR (4th) 204 (BCCA).

<sup>51</sup> [1996] AQ no 4141, [1997] RRA 25.

<sup>52</sup> [2000] JQ no 2791 (Que SC).

Supreme Court of Canada, ostensibly recognizing freedom of expression as a paramount value, not to be infringed unless absolutely necessary, provided directions to criminal judges about steps they must take before issuing publication bans, the content of permissible bans, and the procedure to be followed by media who wish to challenge publication bans. The guidelines envisaged that a publication ban should only be ordered where necessary to prevent a real and substantial risk to the fairness of the trial or because reasonable alternate measures would not prevent the risk that the salutary effects of the ban would outweigh the deleterious effects to the free expression of those affected by the ban.

Unfortunately for the media, the majority decision in *Dagenais* also contained the germs of future problems. *Dagenais* unhappily endorsed the proposition that a superior court judge has an inherent jurisdiction to pronounce a publication ban after weighing competing privacy interests against the 'open court' principle. In its reasons for judgment, the Supreme Court of Canada was silent about the warning in the House of Lords' 1913 landmark decision in *Scott v Scott*<sup>54</sup> that

there is no greater danger of [encroachment on the open administration of justice] than that which proceeds little by little, under cover of rules of procedure, and at the instance of the judges themselves.

In the recent past, Canadian judges have used their *Dagenais*-discretion liberally. They have banned publication of extradition proceedings,<sup>55</sup> banned reporting the [232] names of lawyers and law firms searched in a money laundering investigation,<sup>56</sup> banned reporting police investigation techniques,<sup>57</sup> banned identification of

---

<sup>53</sup> *Dagenais v Canadian Broadcasting Corporation* [1994] 3 SCR 835.

<sup>54</sup> [1913] AC 417.

<sup>55</sup> *Germany v Ebke* [2000] NWTSC 74, para 47, (2000) 150 CCC (2d) 252 (ban on the broadcast or publication of the evidence and submissions to be given at the extradition hearing into the outstanding charges against Ebke in Germany; ban did not apply to describing the actual charges or the nature of the charges).

<sup>56</sup> *Canada (Attorney General) v Several Clients* [2000] NSJ no 236 (SC), affirmed [2000] NSCA 139.

<sup>57</sup> *R v GWF* [2000] BCSC 802, para 3; contra *R v Mentuck* [2000] MJ no 69 (Man QB), pending determination of application for leave to appeal to SCC, the latter court granted an interim publication ban *SCC Bulletin* (2000) 312, leave to appeal granted [2000] SCCA no 60, appeal heard and reserved 18 June 2001 [2000] SCCA no 60.

undercover police officers,<sup>58</sup> banned reporting of evidence in a criminal trial pending conclusion of a second trial,<sup>59</sup> banned naming a jailhouse informant,<sup>60</sup> prohibited identification of a young Aboriginal male found guilty of date rape,<sup>61</sup> and banned publication of the names of affiants of affidavits filed in a dispute over ownership of Catholic schools.<sup>62</sup> Judges in civil matters have also recently conferred anonymity on 'vulnerable' parties and witnesses to avoid 'unnecessary' damage to reputation,<sup>63</sup> defying decades of pre-*Dagenais* jurisprudence. In one instance, an appellate court on its own motion banned publication of the names of those involved in a criminal case involving an accused convicted by a jury of sexual assault and sexual touching of his stepdaughter although no ban was ordered by the trial court.<sup>64</sup>

As would be expected, however, some Courts have applied the *Dagenais* principles to reject ban applications, typically citing a prior decision of the Supreme Court of Canada in *Attorney General of Nova Scotia v MacIntyre*<sup>65</sup> for the proposition that the curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. For example, in *Waxman v Waxman*<sup>66</sup> the Ontario Superior Court of Justice rejected an application for a non-publication order respecting a portion of the defendant's testimony based on possible harm, including devastating publicity, injury to reputation, damage to business opportunities, and harm to the witness' family. In concluding that Waxman was not a person in whom the public had no interest, who should not be further victimized in the media, the Court noted the case was 'commercial litigation in which the parties

---

<sup>58</sup> *R v Mentuck* [2000] MJ no 69 (Man QB), leave granted to appeal to SCC, appeal heard and reserved 18 June 2001 [2000] SCCA no 60.

<sup>59</sup> *R v Shrubbsall* [2001] NSJ no 315, (2000) 187 NSR (2d) 310 (SC) (media allowed to report on evidence in first trial except reporting results of search of accused's room; media not allowed to publish accused's legal difficulties in the US, including his plea of guilty to manslaughter, sexual offences for which he stood trial and fact he absconded before verdict, forfeiture of his bail money in US).

<sup>60</sup> *R v Baptiste* [2000] OJ no 1642 (SC).

<sup>61</sup> *R v BK* [2001] OJ no 2708 (SC).

<sup>62</sup> *Rowland v Vancouver College Ltd* [2000] BCSC 1221, [2000] 8 WWR 85.

<sup>63</sup> *John Doe v Smith* [2001] ABQB 277.

<sup>64</sup> *R v GM* [2000] OJ no 5007 (Ont CA). The order relied on s 134, *Courts of Justice Act*, RSO 1990, c C43.

<sup>65</sup> [1982] 1 SCR 175. This decision was based on the common law as the *Canadian Charter of Rights and Freedoms* was not then in effect.

<sup>66</sup> [2000] OJ no 1523, 48 CPC (4th) 305 (SC).

have chosen to litigate with hard punches ... in the public forum with the attendant risk of embarrassment for the corporate entity and themselves.’<sup>67</sup>

On the other hand, court bans in criminal matters are now frequently worded to prohibit publication on the internet. In civil decisions posted on court websites, many judges on their own motion employ pseudonyms in the style of cause, edit their reasons, or stipulate that certain matters may not be published to protect the litigant’s privacy.<sup>68</sup>

[233] The media can also point to a number of other successful battles against discretionary publication bans.<sup>69</sup> However, the Canadian media must remain vigilant because of the potential for the common law discretion to erode the right to publicize court proceedings. In *Olmstead v United States of America*,<sup>70</sup> Mr. Justice Brandeis warned that the ‘greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding.’ That warning has not registered with many Canadian courts.

### **Statutory publication bans — enforcement**

Consistent with the general direction of recent legislative modifications to the ‘open court’ principle, the federal *Criminal Code*<sup>71</sup> was amended in December 1999 to enact a specific statutory discretion permitting a judge to make an ‘order directing that the identity of a victim or a witness, or any information that could disclose their identity, shall not be published in any document or broadcast in any way, if the judge or justice is satisfied that the order is necessary for the proper administration of justice.’<sup>72</sup> The factors to be considered by the Court in the course of determining whether the Crown has met the burden of proof for a sought after ban include:

(a) the right to a fair and public hearing;

---

<sup>67</sup> Ibid para 39 (Sanderson J) quoting Farley J. in *Dodd v Cossar* 16 CPC (4th) 132, 138.

<sup>68</sup> *British Columbia (Securities Commission) v BDS* [2000] BCSC 159, para 1, *Malcolm v Fleming* [2000] BCJ no 2400 (SC) para 2. An odd case in which the court reversed its non-publication order after checking with the parties and determining that they each wanted their names published.

<sup>69</sup> *R v Budai* [2000] BCCA 266, (2000) 185 DLR (4th) 510 (ban on publication of appeal evidence refused), *R v Dell* [2000] OJ no 968 (SC) (application by woman accused of murder for ban on publication of criminal indictments was dismissed).

<sup>70</sup> 277 US 438.

<sup>71</sup> RS, c C-34.

<sup>72</sup> SC 1999, c 25, s 2, adding s 486(4.1).

- (b) whether there is a real and substantial risk that the victim or witness would suffer significant harm if their identity were disclosed;
- (c) whether the victim or witness needs the order for their security or to protect them from intimidation or retaliation;
- (d) society's interest in encouraging the reporting of offences and the participation of victims and witnesses;
- (e) whether effective alternatives are available to protect the identity of the victim or witness;
- (f) the salutary and deleterious effects of the proposed order;
- (g) the impact of the proposed order on the freedom of expression of those affected by it; and
- (h) any other factor that the judge or justice considers relevant.<sup>73</sup>

Unless the judge refuses to order a publication ban, it is an offence to publish or broadcast the contents of the application for the ban, any evidence taken, information given, or submissions made at the hearing for the ban, or any other information that could identify the victim or witness.<sup>74</sup>

The first case to consider this new *Criminal Code* discretion to ban publication was a decision of the Nova Scotia Provincial Court in *R v Rhyno* in April, 2001, where a ban was rejected because the 'only salutary effect of the proposed order would have been to save the alleged victims the possibility of some embarrassment or humiliation.' This did not outweigh the public interest in the freedom of the media to inform the public about the proceedings.<sup>75</sup>

#### [234] **Cameras in court**

A handful of recent British Columbia Supreme Court decisions temporarily held out the promise of a reversal of long-standing common law and statutory prohibitions against cameras in Canadian trial courtrooms.

---

<sup>73</sup> S 486(4.7).

<sup>74</sup> S 486(4.9).

<sup>75</sup> *R v Rhyno* [2001] NSPC 9, para 23–4.

In July 2000 in *R v Cho*,<sup>76</sup> over the objections of the Crown and the accused, the British Columbia Supreme Court permitted the Canadian Broadcasting Corporation to videotape closing arguments by counsel in the criminal trial of alleged illegal immigrants, using a single fixed camera capable of swivelling on a fixed pivot, without artificial light, and with its own single microphone, stating:

... there is no common law basis for excluding modern technology from the court room ... Given the provisions of s 2 of the Charter [the Canadian Charter of Rights and Freedoms] ... 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.

Although the issue of consent was not raised by the parties, the Court stated in obiter dicta that requiring consent would 'defeat the objective' and noting that although issues of consent may arise in a particular trial, he was not required to resolve the point.

As the CBC application was made after the Crown's case had been closed and before election by the defence whether or not to call evidence, the Court was persuaded it would be unfair to televise only the accused and accordingly prohibited videotapes or still photographs of the accused or the jurors.

The first web cast of Canadian court proceedings occurred in February 2001 when British Columbia's superior trial court permitted the Vancouver Independent Media Centre to videotape and post on its internet news service the judicial review hearing into a \$16.7 million award made by a trade tribunal against Mexico under the North

---

<sup>76</sup> *R v Cho* [2000] BCSC 1162, (2000) 189 DLR (4th) 180; but see *R v McSorley* [2000] BCPC 114 where BC Provincial Court Kitchen Prov J rejected an application by the CBC, Rogers Cable and Global Television to televise the assault trial of an NHL hockey player. Kitchen Prov J declined to follow *R v Cho*, ruling that whether or not to allow television cameras in Court is a matter of policy to be decided in consultation with other judges, although he stated that he personally was 'probably in favour' of televising court proceedings and 'would likely advocate in favour of us ultimately reaching this position where the television cameras are allowed in the courtroom.'

American Free Trade Agreement.<sup>77</sup> The Canadian federal government also posted the written transcripts of the hearing to its own website.

These developments provoked the Chief Justice of the British Columbia Supreme Court to issue a '*Policy on Television in the Courtroom*' on 9 March 2001 which provides 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.<sup>78</sup>

---

<sup>77</sup> *The United Mexican States v Metalclad Corporation; AG of Canada and AG of Quebec, Intervenors*, Docket: L002904, Vancouver Registry, SC of BC. The decision on the merits of the judicial review may be cited as [2001] BCSC 664.

<sup>78</sup> The full text is available online via <[www.courts.gov.bc.ca/SC/TV/](http://www.courts.gov.bc.ca/SC/TV/)>. It includes a convenient summary of the relevant case law and the guidelines in Canada, the Commonwealth and the United States. The Policy states in part: 'To adopt a policy of an absolute ban is really to do nothing. Now that *R v Cho* has become part of the common law, a policy statement banning cameras in the courts would be both ineffective and inappropriate ... 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.'