SUPREME COURT OF CANADA

CITATION: Canadian Broadcasting Corp. *v.* Canada (Attorney General), 2011 SCC 2

DATE: 20110128
DOCKET: 32920

BETWEEN:

Canadian Broadcasting Corporation, Groupe TVA inc., La Presse Ltée and Fédération professionnelle des journalistes du Québec

Appellants

and

Attorney General of Canada, Attorney General of Quebec, the Honourable François Rolland in his capacity as Chief Justice of the Quebec Superior Court and Barreau du Québec

Respondents

- and -

Attorney General of Alberta, Canadian Civil Liberties Association, Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers Association, RTNDA Canada/Association of Electronic Journalists, Canadian Association of Journalists, Canadian Journalists for Free Expression, Canadian Publishers' Council and British Columbia Civil Liberties Association

Interveners

OFFICIAL ENGLISH TRANSLATION

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: (paras. 1 to 99) Deschamps J. (McLachlin C.J. and Binnie, LeBel, Fish, Abella, Charron, Rothstein and Cromwell JJ. concurring)

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CANADIAN BROADCASTING CORP. *v.* CANADA (A.G.)

Canadian Broadcasting Corporation,
Groupe TVA inc., La Presse ltée and
Fédération professionnelle des journalistes du Québec *Appellants*

v.

Attorney General of Canada,
Attorney General of Quebec,
the Honourable François Rolland,
in his capacity as Chief Justice of
the Quebec Superior Court,
and Barreau du Québec *Respondents*

and

Attorney General of Alberta,
Canadian Civil Liberties Association,
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British Columbia Civil Liberties Association *Interveners*

Indexed as: Canadian Broadcasting Corp. *v.* Canada (Attorney General)

2011 SCC 2

File No.: 32920.

2010: March 16; 2011: January 28.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law — Charter of Rights — Freedom of expression — Freedom of the press — Courthouses — Rules of practice and directive issued by Ministère de la Justice limiting filming, taking photographs and conducting interviews to predetermined locations and prohibiting broadcasting of official audio recordings of hearings — Whether these measures infringe freedom of expression — If so, whether infringement justifiable — Canadian Charter of Rights and Freedoms, ss. 1, 2(b) — Rules of practice of the Superior Court of Québec in civil matters, R.R.Q. 1981, c. C-25, r. 8, rr. 38.1, 38.2 — Rules of Practice of the Superior Court of the Province of Quebec, Criminal Division, 2002, SI/2002-46 (am. SI/2005-19), ss. 8.A, 8.B.

Constitutional law — Charter of Rights — Reasonable limits prescribed by law — Directive issued by Ministère de la Justice limiting filming, taking photographs and conducting interviews to predetermined locations in courthouses —

Directive infringing freedom of expression — Whether directive meets "prescribed by law" requirement of s. 1 of Canadian Charter of Rights and Freedoms.

The CBC, Groupe TVA, La Presse and the Fédération professionnelle des journalistes du Québec (the "media organizations") want to film, take photographs and conduct interviews in the public areas of courthouses, and they also want to broadcast the official audio recordings of court proceedings. There are rules that limit the places where the first of these activities may take place and that prohibit the second. The media organizations, which submit that these rules unjustifiably infringe the freedom of the press to which they are entitled, applied for a declaration that rules 38.1 and 38.2 of the *Rules of practice of the Superior Court of Québec in civil matters* and ss. 8.A and 8.B of the *Rules of Practice of the Superior Court of the Province of Quebec, Criminal Division, 2002* ("rules of practice"), together with Directive A-10 of Quebec's Ministère de la Justice entitled *Le maintien de l'ordre et du décorum dans les palais de justice*, are of no force or effect.

The Superior Court held that the activities were protected by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*, but that the impugned measures were justified within the meaning of s. 1. The Court of Appeal dismissed the media organizations' appeal, holding unanimously that the protection of s. 2(*b*) of the *Charter* does not give the media an unrestricted right to conduct interviews, film and take photographs in courthouses. On the issue of broadcasting recordings of hearings, the majority of the court found that this method of expression undermined the values

that underlie freedom of expression. The dissenting judges considered that the prohibition on broadcasting recordings infringed s. 2(*b*) and could not be justified under s. 1.

Held: The appeal should be dismissed. The constitutionality of the rules of practice and of Directive A-10 is confirmed.

Filming, taking photographs and conducting interviews outside courtrooms have the necessary expressive content to be protected by s. 2(*b*) of the *Charter*. Neither the location where these journalistic activities would take place nor the method of expression that would be used excludes them from this protection. The method for engaging in the expressive activities — the use of equipment to film, take photographs and record voices — is not in issue here. As for the location, the activities of filming, taking photographs and conducting interviews are not incompatible with the purpose of the public areas of courthouses. Although the primary purpose of a courthouse is to serve as a place to conduct trials and other judicial proceedings, the presence of journalists in the public areas of courthouses has historically been — and still is — authorized. When journalists conduct themselves appropriately, their presence enhances the values underlying s. 2(*b*), namely democratic discourse, self-fulfilment and truth finding. The purpose of the impugned measures is to limit filming, taking photographs and conducting interviews to certain predetermined locations. Since news gathering is an activity that forms an integral part of freedom of the press, these measures infringe s. 2(*b*) of the *Charter*.

Broadcasting the official audio recordings of hearings also has expressive content, thereby bringing this activity, *prima facie*, within the scope of s. 2(*b*) protection. In this case, the location where the activity would take place is not identified. The exercise by the media organizations of their right to freedom of the press is not limited to a specific location. Regarding the method of expression, namely the broadcasting of audio recordings, sound and tone of voice are not always linked to the content, but in the context of a trial, the value they add to the message is such that the content of the message and the method by which the message is conveyed are indissociable. Thus, the location and the method of expression cannot serve as a basis for excluding the expressive activity from the protection of s. 2(*b*) of the *Charter*. Since the prohibition against broadcasting the official audio recordings of court proceedings imposes a limit that the media organizations must comply with in engaging in their journalistic activities and since that limit affects the expressive content of the activities, the right to freedom of expression is infringed.

The standard of proof applicable to the justification of the infringement under s. 1 of the *Charter* should not entail a level of proof higher than the one required by *Oakes*. The test developed in that case is applicable, since the rules made by the judges of the Superior Court and by the Ministère de la Justice meet the "prescribed by law" requirement of s. 1 of the *Charter*. Directive A-10 imposes standards of behaviour on courthouse users, so its content is normative, not interpretive. It is also accessible and clear. As regards the wording of the relevant

passages from the directive, it is almost identical to that of the same passages from the rules of practice, the precision of which is not in dispute.

In this case, the limits imposed on freedom of expression by the rules of practice and by Directive A-10 are reasonable and are justified in a free and democratic society. The objectives of these measures advance concerns that are pressing and substantial. These objectives can be summarized as being to maintain the fair administration of justice by ensuring the serenity of hearings. The fair administration of justice is necessarily dependent on maintaining order and decorum in and near courtrooms and on protecting the privacy of litigants appearing before the courts. There is no question that this objective contributes to maintaining public confidence in the justice system.

It can be seen from the evidence that there is a rational connection between the means used and the legislature's objectives. The increase in the number of journalists together with a greater sophistication of the technologies they used in courthouses had adverse consequences for the administration of justice. In addition, the rules of practice and Directive A-10 form part of a general policy to protect witnesses. It was therefore reasonable to expect that these measures would have a positive effect on the maintenance of the fair administration of justice by fostering the serenity of hearings and decorum and by helping to reduce, as much as possible, the nervousness and anxiety that people naturally feel when called to testify in court.

The solution proposed in the rules of practice and in Directive A-10 with regard to filming, taking photographs and conducting interviews falls within a range of reasonable alternatives, as is required by the minimal impairment stage of the *Oakes* test. The judges and the Ministère de la Justice have opted for a solution that is less intrusive than a total ban on these journalistic activities in courthouses would have been. As for the audio recordings of hearings, they are made to conserve evidence. Journalists have a right to use those recordings to enhance the accuracy of reports they are preparing, but they cannot use them in a way that would have an impact on the testimony itself.

The salutary effects of the rules of practice and of Directive A-10 outweigh their negative effects. The evidence shows that witnesses, parties, members of the public and lawyers can now move about freely near courtrooms without fear of being pursued by the media. Lawyers can hold discussions with their witnesses and with counsel for the opposing party in hallways adjacent to courtrooms without being disturbed. Those who adopted the impugned measures took the vulnerability of participants in the judicial process into consideration and made sure that when such people consent to co-operate with the media, they do so as freely and calmly as possible. The controls on journalistic activities thus facilitate truth finding by not adding to the stress on witnesses. Furthermore, the impugned measures help minimize significantly the violation of privacy. Although the broadcasting of official audio recordings would add value to media reports and make them more interesting, the prohibition against broadcasting them does not adversely affect the ability of

journalists to describe, analyse or comment rigorously on what takes place in the courts. The negative effect that broadcasting the audio recordings would have on the proceedings and the real impact it would have both on those participating in the hearing and on the search for the truth are factors that must be taken into account. The recordings are, first and foremost, a means of keeping a record of such proceedings and conserving evidence, and journalists should not use them in a way that would distort that objective. To broadcast them in the name of freedom of the press would undermine the integrity of the judicial process, which the open court principle is supposed to guarantee.

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v. Quebec (Attorney General), [1989] 1 S.C.R. 927; *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *R. v. Butler*, [1992] 1 S.C.R. 452; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139; *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084; *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567; *R. v. Bryan*, 2007 SCC 12, [2007] 1 S.C.R. 527; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *R. v. Squires* (1992), 11 O.R. (3d) 385; *Vilaire v. Association professionnelle des sténographes officiels du Québec*, [1999] R.J.Q. 1609; *Morris v. Crown Office*, [1970] 1 All E.R. 1079; *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214.

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APPEAL from a judgment of the Quebec Court of Appeal (Robert C.J. and Nuss, Morissette, Doyon and Bich JJ.A.), 2008 QCCA 1910, [2008] R.J.Q. 2303, 62 C.R. (6th) 99, [2008] Q.J. No. 9949 (QL), 2008 CarswellQue 14639, affirming a decision of Lagacé J., 2006 QCCS 5274, [2006] R.J.Q. 2826, [2006] Q.J. No. 14255 (QL), 2006 CarswellQue 14112. Appeal dismissed.

Barry Landy and *François Demers*, for the appellants.

Pierre Salois and *Claude Joyal*, for the respondent the Attorney General of Canada.

Jean-François Jobin, Marie-Ève Mayer and Dominique A. Jobin, for the respondent the Attorney General of Quebec.

Raynold Langlois, Q.C., and *Marie Cossette*, for the respondent the Honourable François Rolland, in his capacity as Chief Justice of the Quebec Superior Court.

Douglas C. Mitchell and *Éric Cadi*, for the respondent Barreau du Québec.

Donald B. Padget, for the intervener the Attorney General of Alberta.

Mahmud Jamal and *Jason MacLean*, for the intervener the Canadian Civil Liberties Association.

Christian Leblanc and *Marc-André Nadon*, for the interveners Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers Association, RTNDA Canada/Association of Electronic Journalists, Canadian Association of Journalists, Canadian Journalists for Free Expression and Canadian Publishers' Council.

Simon V. Potter and *Michael A. Feder*, for the intervener the British Columbia Civil Liberties Association.

English version of the judgment of the Court delivered by

DESCHAMPS J. —

[1] The open court principle is of crucial importance in a democratic society. It ensures that citizens have access to the courts and can, as a result, comment on how courts operate and on proceedings that take place in them. Public access to the courts also guarantees the integrity of judicial processes inasmuch as the transparency that flows from access ensures that justice is rendered in a manner that is not arbitrary, but is in accordance with the rule of law.

[2] The right to freedom of expression is just as fundamental in our society as the open court principle. It fosters democratic discourse, truth finding and self-fulfilment. Freedom of the press has always been an embodiment of freedom of expression. It is also the main vehicle for informing the public about court proceedings. In this sense, freedom of the press is essential to the open court principle. Nevertheless, it is sometimes necessary to harmonize the exercise of freedom of the press with the open court principle to ensure that the administration of justice is fair. In this appeal, this Court must determine whether certain rules are consistent with the delicate balance between this right, this principle and this objective, all of which are essential in a free and democratic society.

[3] The appellants want to film, take photographs and conduct interviews in the public areas of courthouses, and they also want to broadcast the official audio recordings of court proceedings. There are rules that limit the places where the first of these activities may take place and that prohibit the second. The appellants submit that these rules unjustifiably infringe the freedom of the press to which they are entitled. For the reasons that follow, I consider that the activities in question are protected by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* ("*Charter*"), but that the limits on them are justified. I would therefore dismiss the appeal.

1. Impugned Provisions and Positions of the Parties

[4] In conducting a constitutional analysis, a court must consider the context in which the impugned provisions were adopted. I will accordingly review the legislative history of the provisions in these reasons, but I will begin by presenting them and summarizing the positions of the parties.

[5] The appellants, the Canadian Broadcasting Corporation, Groupe TVA, La Presse Ltée and the Fédération professionnelle des journalistes du Québec (the "media organizations"), are asking this Court to declare rules 38.1 and 38.2 of the *Rules of practice of the Superior Court of Québec in civil matters*, R.R.Q. 1981, c. C-25, r. 8 ("RPC"), ss. 8.A and 8.B of the *Rules of Practice of the Superior Court of the Province of Quebec, Criminal Division, 2002*, SI/2002-46, am. SI/2005-19 ("RPCr"), and Directive A-10 of Quebec's Ministère de la Justice entitled *Le*

maintien de l'ordre et du décorum dans les palais de justice (the "impugned measures") to be of no force or effect. Rules 38.1 and 38.2 RPC, the wording of which is almost identical to that of ss. 8.A and 8.B RPCr, read as follows:

> **38.1 Interviews and use of cameras.** In order to ensure the fair administration of justice, the serenity of judicial hearings and the respect of the rights of litigants and witnesses, interviews and the use of cameras in a courthouse shall only be permitted in the areas designated for such purposes by directives of the chief justices.
>
> **38.2 Broadcasting prohibited.** Any broadcasting of a recording of a hearing is prohibited.

Directive A-10 sets out not only the rule to be followed, but also certain contextual information. I quote it here in its entirety:

> [TRANSLATION]
>
> June 23, 2005
>
> Increased media interest in judicial activities and the excesses that have occurred in recent years have led the Ministère de la Justice, taking the views of the judiciary in this respect into account, to review its practices with a view to establishing more effective rules to govern situations in which judicial proceedings generate public and media interest in courthouses.
>
> As a result, the Direction générale des services de justice, as the main occupant of and authority responsible for the courthouses, adopts the following rules to ensure the fair administration of justice, the serenity of judicial hearings and the respect of the rights of litigants and witnesses.
>
> In public areas that fall under the authority of the Direction générale des services de justice, and in the context of court hearings,
>
> - Although free movement of courthouse users is the rule, general or specific safety instructions must be complied with (e.g., cordoned-off areas and security zones);

- obstructing or hindering the free movement of users or blocking their passage is prohibited;

- harassing or following persons in and in front of courthouses, including with cameras and microphones, is prohibited;

- subject to the rules applicable in courtrooms, audio or visual recording of a person is permitted only in front of a courthouse and, inside a courthouse, only, unless otherwise expressly authorized by the director of the courthouse, in areas designated by pictograms;

- it is permitted to request an interview from a person, but not to block the person's passage or to prevent him or her from moving about freely;

- if a person consents to give an interview involving audio or visual recording, the interview must take place in the area of the courthouse designated for this purpose, as identified by pictograms; and

- all persons to whom the above rules apply must comply with them, and failure to do so may result in action up to and including expulsion by the special constables and security officers responsible for enforcing the rules.

The locations of pictograms are to be determined, after consultation with the judiciary and with officials from the Ministère de la Sécurité publique, on the basis of the following criteria:

- access to courtrooms and free movement of persons involved in court proceedings;

- public and media access to judicial information;

- order, serenity and decorum in places where justice is administered; and

- no line of sight to courtroom interiors is authorized.

(Ministère de la Justice, *Guide des relations avec les médias et de la gestion des événements d'envergure et à risque* (2005), appendix 4)

[6] The media organizations submit that the impugned measures limit their right to freedom of the press under s. 2(*b*) of the *Charter* and that the limits in question cannot be justified under s. 1 thereof. Where filming, taking photographs and conducting interviews are concerned, the media organizations argue that these activities are not incompatible with the location in which they would be undertaken, namely courthouses. They argue that these activities have always taken place in Quebec courthouses and that there is no evidence that such activities have disrupted court proceedings. As for the broadcasting of recordings of hearings, the media organizations submit that the chosen method of expression, in and of itself, conveys a meaning and must therefore be protected. They also argue that the respondents have failed to submit cogent evidence that the adoption of the impugned measures was justified.

[7] The respondents do not dispute that the activities in issue have expressive content and that they fall *prima facie* within the scope of s. 2(*b*). However, they submit that these activities cannot be protected by the *Charter*, since the location of the activities is incompatible with the values underlying freedom of expression in the case of filming, taking photographs and conducting interviews, as is the method of expression in the case of the broadcasting of recordings. The respondents assert that even if the Court were to find that freedom of expression had been infringed, the infringement would be justified, as the prohibited journalistic activities have an adverse effect on decorum, on the serenity of hearings, on truth finding and on the privacy of participants in the justice system.

2. Judicial History

[8] After a hearing that lasted 17 days, at which many lay and expert witnesses were heard and extensive documentary evidence was adduced, Lagacé J. of the Superior Court dismissed the application of the media organizations (2006 QCCS 5274, [2006] R.J.Q. 2826). Conducting the analysis proposed by this Court in *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141, he found that the activities prohibited by the impugned measures had expressive content and that neither the method of expression nor the location in which the activities would be undertaken conflicted with the purposes s. 2(*b*) of the *Charter* was intended to serve. On that basis, he found that the activities were protected by s. 2(*b*), but he held that the measures were justified within the meaning of s. 1 of the *Charter*. His judgment was appealed.

[9] The Court of Appeal dismissed the appeal, holding unanimously that the protection of s. 2(*b*) of the *Charter* does not give the media an unrestricted right to conduct interviews, film and take photographs in courthouses (2008 QCCA 1910 (CanLII), [2008] R.J.Q. 2303). Robert C.J.Q., writing for the court, concluded that allowing photographers and journalists to move about freely to film, take photographs or conduct interviews will always be likely to disturb the tranquility and decorum that are essential in light of the purpose of the place (para. 65). The five judges accordingly found that although the prohibited journalistic activities were expressive in nature, they were incompatible with the purpose of a courthouse (para. 66).

[10] On the issue of broadcasting recordings of hearings, the majority of the Court of Appeal (Robert C.J.Q. and Morissette and Doyon JJ.A.) found that this method of expression undermined the values that underlie freedom of expression, since [TRANSLATION] "unrestricted re-transmission of the voices of parties, judges, and lawyers in the media is [not] compatible with a proper administration of justice" (para. 67). According to the majority, "freedom of the press [does] not include the right to the best image or the most penetrating reporting" (para. 72).

[11] Nuss and Bich JJ.A., dissenting on the issue of broadcasting recordings, considered that the prohibition on broadcasting recordings infringed s. 2(*b*) of the *Charter* and could not be justified under s. 1. They found that the impugned measures were overbroad in that they prohibited audio broadcasts not only of the testimony of ordinary witnesses, but also of what was said by judges and counsel. To remedy this infringement, Nuss J.A. suggested that the impugned provisions be read down, whereas Bich J.A. would have left it to the Superior Court judges to establish new rules.

3. Issues

[12] The Chief Justice stated six constitutional questions on May 28, 2009. They can be summarized as follows:

1. Do rules 38.1 and 38.2 of the *Rules of practice of the Superior Court of Québec in civil matters*, R.R.Q., c. C-25, r. 8, ss. 8.A and 8.B of the

Rules of Practice of the Superior Court of the Province of Quebec, Criminal Division, 2002, SI/2005-19, and Directive A-10 of the Ministère de la Justice du Québec entitled *Le maintien de l'ordre et du décorum dans les palais de justice* infringe s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

2. If so, is the infringement a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

4. Analysis

[13] This case concerns two activities, each of which is governed by specific provisions. Although the analyses to determine whether the two impugned measures are constitutional require the consideration of distinct factors, the applicable principles are, for the most part, the same in both cases.

4.1 *Context of the Adoption of the Impugned Measures*

[14] The statutory provisions that authorize the judges of the Superior Court to make rules of practice are art. 47 of the Quebec *Code of Civil Procedure*, R.S.Q., c. C-25 ("*C.C.P.*"), and ss. 482(1) and 482.1(1) of the *Criminal Code*, R.S.C. 1985, c. C-46 ("*Cr. C.*"). The purpose of the rules of practice applicable in civil matters is to ensure the "proper carrying out" of the *C.C.P.* (art. 47 *C.C.P.*), while one of the purposes of the rules of practice applicable in criminal matters relates to "the determination of any matter that would assist the court in effective and efficient case management" (s. 482.1(1)(*a*) *Cr. C.*) (see *Lac d'Amiante du Québec Ltée v.*

2858-0702 Québec Inc., 2001 SCC 51, [2001] 2 S.C.R. 743, at paras. 36-38, and D. Ferland and B. Emery, *Précis de procédure civile du Québec*, vol. 1 (4th ed. 2003), at p. 112). The rules of practice applicable in civil matters are published in the *Gazette officielle du Québec* (art. 48 *C.C.P.*), while those applicable in criminal matters are published in the *Canada Gazette* (s. 482(4) *Cr. C.*).

[15] The rules of practice of course contain more than just the impugned measures. They establish a code of conduct for users of courtrooms. For example, they provide that all persons attending a hearing must rise when the judge enters the courtroom and remain standing until the judge is seated (rule 33 RPC and s. 4 RPCr), and that everyone must be suitably attired (rule 35 RPC and s. 7 RPCr). Article 14 *C.C.P.* provides that "[p]ersons present at sittings of the courts must maintain a respectful attitude, remain silent and refrain from showing their approval or disapproval of the proceedings". It is clear from these rules that courtrooms are places with a specific purpose, and that purpose requires that special attention be paid to the proceedings taking place in courtrooms and to the people who participate in those proceedings.

[16] The original rule applicable to the activities of journalists in civil courtrooms was rule 16 of the 1966 *Rules of practice of the Superior Court*, (1966) 98 Q.O.G. II, 4094, which prohibited reading newspapers and taking photographs in courtrooms. In 1974, rule 16 was amended to prohibit, at hearings, "anything that interferes with the decorum and good order of the court", as well as "[t]he reading of

newspapers [and] the practice of photography, cinematography, broadcasting or television" (*Rules of practice of the Superior Court of the Province of Québec in civil matters*, (1974) 106 Q.O.G. II, 1955, rule 32). It was also in 1974 that the first rules of practice applicable in criminal matters — rule 5 of which reproduced the words of the rule applicable in civil matters — were made (*Rules of Practice of the Court of Queen's Bench (Crown Side) of the Province of Quebec*, SI/74-53, (1974) 108 Can. Gaz. II, 1535). In the 1981 revision of Quebec's regulations, rule 32 became rule 36 (*Rules of practice of the Superior Court of Québec in civil matters*, R.R.Q. 1981, c. C-25, r. 8).

[17] Then, in 1988, the rules of practice — both those applicable in civil matters and those applicable in criminal matters — were amended to add the following provision: "Sound recording of the proceedings and of the decision, as the case may be, by the media, shall be permitted unless the judge decides otherwise. Such recordings shall not be broadcast" (*Amendments to the Rules of Practice of the Superior Court of Québec in Civil Matters*, (1988) 120 G.O.Q. II, 1941; *Rules of Practice of the Superior Court of the Province of Quebec, Criminal Division, amendment*, SI/89-52, (1989) 123 Can. Gaz. II, 1016, s. 2). The evidence shows that this permission to record proceedings was granted to the media to facilitate their work and foster reporting accuracy (Sup. Ct., at para. 16).

[18] The prohibition against broadcasting their own recordings led some media organizations to broadcast excerpts from the courts' official audio recordings

(Sup. Ct., at para. 59; R.F. HFR, at para. 9; A.F., at para. 13). In the opinion of the Superior Court judges, the purpose of the prohibition in the 1988 rule was to prevent the broadcasting of any recordings, and using official recordings was simply a way to circumvent that prohibition (R.F. HFR, at paras. 8-9). They then adopted rule 38.2 RPC and s. 8.A RPCr, which expressly prohibit the broadcasting of official recordings, as a corrective measure.

[19] Before the impugned measures were adopted, journalists could move about freely in the public areas of Quebec courthouses, with or without equipment for recording sound, filming or taking photographs. According to the evidence accepted by the motion judge, "on-the-spot" interviews make journalists' reports more interesting. However, as a result of the way journalists went about their work, crowds would form in front of courtroom doors, it would be difficult to get through doorways and there would be crushes, races down hallways and jostling. The evidence also shows that media representatives did not always comply with special security measures implemented by courthouse administrators (Sup. Ct., at paras. 46, 62 and 66).

[20] In addition to affecting the serenity of hearings and decorum, the increased presence of journalists in courthouses was a source of great stress for witnesses and their families. Some participants even refused to appear in court for this reason. Some lawyers testified that they had been forced to adopt a strategy of

making a brief statement prepared in advance in order to [TRANSLATION] "negotiate their right of passage" (Sup. Ct., at paras. 68-69 and 74).

[21] In June 2004, in response to certain incidents, the associate deputy minister and the director general of the Direction générale des services de justice set up a working group to study the problems related to the increased presence of journalists in Quebec courthouses and to propose possible solutions. In a report submitted on October 19, 2004 (the "Report"), the working group made the following observations:

> [TRANSLATION]
> - Incidents of jostling involving media representatives are not uncommon. They can take all kinds of turns. . . .
>
> - All too frequently as well, journalists and camera operators harass witnesses, victims and accused persons or their families by following them in courthouse hallways, escalators or elevators, or outside to parking lots and cars. . . .
>
> - Lawyers, both those for the prosecution and those for the defence, must also go through scrums, which are crushes that take place regularly at courtroom exits in which they are forced to answer a myriad of questions on the spot. . . .
>
> . . .
>
> - Because the hallways are often narrow, jostling can entail a risk of injuries. . . .
>
> - When the jostling becomes particularly unruly, it can cause damage to equipment.
>
> - The conduct and the serenity of hearings can be disrupted, with all the inconveniences, or even pernicious consequences, that this entails. . . .
>
> . . .

> - The public, participants' families and friends, and members of the media are frustrated when they have trouble getting into courtrooms or when there is not enough room for them inside, which often leads to disturbances and commotions around and even inside the rooms.
>
> (*Rapport du Groupe de travail sur les relations avec les médias dans les palais de justice* (2004), at pp. 7-8)

[22] The Report convinced the judges of the Superior Court that they had to act to restore order. At a general meeting convened for that purpose, they adopted rules 38.1 and 38.2 RPC and ss. 8.A and 8.B RPCr (*Regulation (2005) amending the Rules of practice in civil matters*, (2004) 136 G.O.Q. II, 3527; *Rules Amending the Rules of Practice of the Superior Court of the Province of Quebec, Criminal Division, 2002*, SI/2005-19, (2005) 139 Can. Gaz. II, 417). After these rules had been adopted, the Chief Justice of the Superior Court made the *Rules governing filming, picture taking and interviewing*, which applied to cases heard by the Superior Court in courthouses of the Montréal Division (the *Rules governing filming, picture taking and interviewing* are reproduced in the Appendix).

[23] Since the Superior Court's rules of practice did not apply to all judicial activities in Quebec, Directive A-10 was subsequently issued to ensure consistency (R.F. AGQ, at para. 14). This directive sets out rules for the use of certain public areas of all courthouses. It is not a measure of internal management. Rather, its purpose is to regulate certain aspects of the use by the public and by journalists of spaces located inside courthouses, thereby establishing a framework for the relations of the public and of journalists with the government. The enabling provision for this

directive is s. 3(*c*) of the *Act respecting the Ministère de la Justice*, R.S.Q., c. M-19, which provides that the Minister of Justice exercises superintendence over "all matters connected with the administration of justice in Québec except those assigned to the Minister of Public Security". The management of courthouses and the adoption of rules governing access to courthouses and to judicial information clearly relate to the administration of justice. Paragraph 2 of Directive A-10 states that the directive was issued by the Ministère de la Justice [TRANSLATION] "to ensure the fair administration of justice, the serenity of judicial hearings and the respect of the rights of litigants and witnesses".

[24] Directive A-10 was published, *inter alia*, as an appendix to the *Guide des relations avec les médias et de la gestion des événements d'envergure et à risque* in November 2005.

[25] After the impugned measures were adopted, pictograms and floor markings were placed in courthouses to indicate the areas where interviews, filming and taking photographs would be permitted. The locations of these areas vary from one courthouse to another. Certain changes were made in response to requests from journalists.

[26] This brief overview paints a general picture of the context of the adoption of the impugned measures. This brings me to an analysis of the validity of each of these measures under s. 2(*b*) of the *Charter*.

4.2 *Protection of Journalistic Activities*

[27] The case law on the right to freedom of expression and the open court principle is extensive. Since my analysis will be based on those authorities, it will be helpful to summarize the key principles. I will then apply these principles to the review of the impugned measures.

[28] In *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 183, Dickson J. (as he then was) quoted the following passage from Bentham: "In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice." "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity." Thus, openness fosters the fair administration of justice and, like a watchdog, protects citizens from arbitrary state action (*Toronto Star Newspapers Ltd. v. Canada*, 2010 SCC 21, [2010] 1 S.C.R. 721, at para. 1; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at para. 22). It therefore helps to maintain and to enhance public confidence in, and serves in a way as a guarantee of, the integrity of the court system. To be able to provide adequate support for this multifaceted role of openness, journalists must have access to information relating to the courts and must be able to broadcast it as freely as possible.

[29] Openness not only guarantees the integrity of the judicial system, but also makes it possible for the public to obtain information, and to express opinions and criticisms, regarding the administration of justice. In *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at p. 1340, Cory J. pointed out that "[i]t is only through the press that most individuals can really learn of what is transpiring in the courts" (see also *New Brunswick*, at para. 23). In saying this, he was echoing Fauteux C.J.'s comment that [TRANSLATION] "[o]penness would be a myth if the media were not given legitimate access to the courts in order to witness all stages of proceedings, and the freedom to make accurate and honest reports of those proceedings" (G. Fauteux, *Le livre du magistrat* (1980), at p. 70, quoted in *R. c. Southam Inc.*, [1988] R.J.Q. 307 (C.A.), at p. 312).

[30] It is clear from the multifaceted role of openness that this principle has a direct relationship with the freedom of expression of the public — including freedom of the press — and with other rights — such as those to a fair trial, to liberty and to privacy — at stake in court proceedings. Freedom of the press and the principle of the proper administration of justice are therefore closely interrelated in several respects, but care must nevertheless be taken not to confuse them with one another.

[31] In the instant case, it is freedom of expression, including freedom of the press, that the media organizations are relying on first. The media organizations argue that courthouses are places where the protection of freedom of expression is

strong and where there are no restrictions on the ability of the media to employ the means available to them to prepare more accurate reports.

[32] This Court has noted on numerous occasions that s. 2(*b*) protection is not without limits and that governments should not be required to justify every exclusion or regulation of a form of expression — whether it concerns the location or the means of employing that form of expression — under s. 1 (*City of Montréal*, at para. 79; *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673, at para. 20; *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295, at para. 28; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815, at para. 30). This is just as true in the context of freedom of the press. Therefore, what must be determined in the case at bar is whether the activities the media organizations want to engage in are protected by s. 2(*b*) and, if so, whether the limits on engaging in those activities that are imposed by the impugned provisions are justified.

[33] In *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, Dickson C.J. and Lamer and Wilson JJ. proposed a two-step analysis for determining whether a given expressive activity is protected by the *Charter*. The court must first ask whether the activity falls within a sphere protected by freedom of expression, and if the answer is yes, it must then inquire into the purpose or effect of the government

action in issue so as to determine whether freedom of expression has been restricted (pp. 967 and 971).

[34] Where the first step of the analysis is concerned, *Irwin Toy* lay the groundwork for a large and liberal interpretation of freedom of expression. *Prima facie*, freedom of expression protects all expressive activity (p. 970). For an expressive activity to be protected, the plaintiff must show not that the activity actually conveyed a message with a meaning, but simply "that it was performed to convey a meaning" (p. 969).

[35] It was also recognized in *Irwin Toy* that an expressive activity has both form and content and that certain forms of expression — where, for example, violence is the method of expression — may cause the activity to be excluded from the scope of the constitutional protection (*Irwin Toy*, at pp. 968-70; see also *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, at para. 31; *Greater Vancouver*, at para. 28; *City of Montréal*, at para. 60; *Baier*, at para. 20; and *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 105). This approach to freedom of expression was clarified in *City of Montréal*. Although the Court confirmed that all expressive content is, *prima facie*, worthy of protection, it then added that an expressive activity may be excluded from s. 2(*b*) protection because of how it is undertaken — the *method* of expression — or because of the *location* where it would take place.

[36] The *method* of expression is one aspect of the form of a message, regardless of the content being conveyed (*R. v. Keegstra*, [1990] 3 S.C.R. 697, at p. 729; *Irwin Toy*, at p. 968; *R. v. Butler*, [1992] 1 S.C.R. 452, at p. 488). In some circumstances, however, the form and the content of the message can be inextricably connected and inseparable (*Irwin Toy*, at p. 968; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at p. 748).

[37] For either the method or the location of the conveyance of a message to be excluded from *Charter* protection, the court must find that it conflicts with the values protected by s. 2(*b*), namely self-fulfilment, democratic discourse and truth finding (*City of Montréal*, at para. 72). The following factors are relevant in this respect: (a) the historical or actual function of the location of the activity or the method of expression; and (b) whether other aspects of the location of the activity or the method of expression suggest that expression at that location or using that method would undermine the values underlying free expression (*City of Montréal*, at para. 74). However, the analysis must not be limited to the primary function of the method of expression or the location of the activity. For example, in *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084, *City of Montréal* and *Greater Vancouver*, this Court found that airports, hydro poles, city streets and buses are locations where engaging in certain expressive activities is not inconsistent with the other values s. 2(*b*) is meant to foster even though their primary function is not expression. Although conveying messages was not of course the primary purpose of these

locations, the fact that they were historically used for expression showed that neither aspects of them nor their functions made them unsuitable for exercising the right to freedom of expression.

[38] In sum, to determine whether an expressive activity is protected by the *Charter*, we must answer three questions: (1) Does the activity in question have expressive content, thereby bringing it, *prima facie*, within the scope of s. 2(*b*) protection? (2) Is the activity excluded from that protection as a result of either the location or the method of expression? (3) If the activity is protected, does an infringement of the protected right result from either the purpose or the effect of the government action? (*Criminal Lawyers' Association*, at para. 32, summarizing the test developed in *City of Montréal*, at para. 56).

[39] I will now apply these rules to the activities in which the media organizations in the instant case wish to engage. The media organizations submit that they have a right to film, take photographs and conduct interviews in the public areas of courthouses, as well as a right to broadcast court proceedings using the official audio recordings. These two activities engage the two aspects referred to in the *City of Montréal* test, namely the location of the activity and the method of expression. I will begin by considering the issue of filming, taking photographs and conducting interviews in the public areas of courthouses — which involves the analysis of the location of the activity — after which I will discuss the prohibition against

broadcasting recordings of hearings — which involves the analysis of the method of expression.

4.2.1 Filming, Taking Photographs and Conducting Interviews

[40] At the first step of the analysis developed by this Court in *City of Montréal*, it must be asked whether the activity in question has the necessary expressive content to be protected by s. 2(*b*).

[41] Both the Superior Court and the Court of Appeal concluded that filming, taking photographs and conducting interviews outside courtrooms are activities that have the necessary expressive content. The respondents do not dispute this conclusion, with which I agree.

[42] At the second step, it must be determined whether the activities in question are excluded from s. 2(*b*) protection as a result of either the *location* where the journalistic activities would take place or the *method* of expression that would be used.

[43] The Court of Appeal, relying on the trial judge's findings, concluded that crowds, pushing and shoving, and pursuing possible subjects in order to interview, film or photograph them were incompatible with the purposes of a courthouse, namely, *inter alia*, to provide an ordered environment so as to ensure the serenity of

judicial proceedings (paras. 65-66). Quite obviously, if the activities the media organizations wish to engage in were defined solely by reference to crowds and pushing and shoving, it would be easy to conclude that they are incompatible with the function of a courthouse and that the method used to engage in them cannot be consistent with the standards of conduct that must be met to ensure the serenity of judicial hearings. But these are not the activities the media organizations say they want to engage in. They rightly point out that they [TRANSLATION] "are not claiming the right to cause or participate in what the Respondents referred to as 'excesses'. Obviously, there is no right to prevent access to courtrooms or to jostle people in hallways" (A.F., at para. 99). As the Court clearly stated in *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477, at para. 38, not all news gathering techniques are protected by s. 2(*b*) of the *Charter*. In focussing uniquely on the excesses that led to the adoption of the impugned measures, the Court of Appeal was describing the loss of control the judges want to avoid, not the activities the media organizations wish to engage in. In my view, with all due respect for the Court of Appeal, its characterization of the activities in issue is too narrow. What the media organizations want to do is instead to film, take photographs and conduct interviews outside courtrooms. The expressive activities in question must therefore be clearly distinguished from any excesses that may result from them.

[44] The method for engaging in the expressive activities — the use of equipment to film, take photographs and record voices — is not in issue here. In fact, this method of expression has been authorized for a long time and continues to be

expressly authorized in designated areas. Since the use of this method of expression has a historical basis and is not precluded by the impugned rules and directive, it would be difficult to conclude that the activities are excluded from s. 2(*b*) protection as a result of the method itself. It must therefore be asked whether they are excluded as a result of the location where the activities would take place, namely the public areas of courthouses.

[45] Although the primary purpose of a courthouse is to serve as a place to conduct trials and other judicial proceedings, the presence of journalists in the public areas of courthouses has historically been — and still is — authorized (see the testimony of P.-C. Jobin, A.R., vol. IV, at pp. 10-11). As I mentioned above, the presence of journalists in courthouses is essential. When they conduct themselves appropriately, their presence, far from undermining the values underlying s. 2(*b*), generally enhances those values. Without it, the public's ability to understand our justice system would depend on the tiny minority of the population who attend hearings, and the inevitable result would be to erode democratic discourse, self-fulfilment and truth finding. Moreover, for journalists, the public areas serve not only as spaces they pass through to enter courtrooms, but also as places where they can gather information that may enhance the public's understanding of trials. It is therefore my opinion that the activities of filming, taking photographs and conducting interviews are not incompatible with the purpose of the public areas of courthouses.

[46] At the third step of the *City of Montréal* analysis, it must be determined whether an infringement of the protected right results from either the purpose or the effect of the measures adopted by the government. The evidence shows that the purpose of the impugned measures was to limit filming, taking photographs and conducting interviews to certain predetermined locations. These measures limit news gathering techniques even when those techniques are used in a way that is compatible with the function of a courthouse and that ensures the serenity of hearings. Since news gathering is an activity that forms an integral part of freedom of the press, I find that the measures that limit filming, taking photographs and conducting interviews infringe s. 2(*b*) of the *Charter*. I will now discuss whether this is also true of the prohibition against broadcasting the audio recordings of hearings.

4.2.2 Broadcasting the Audio Recordings of Hearings

[47] The media organizations are contesting the validity of the prohibition pursuant to which they may not broadcast the official audio recordings of hearings. To assess the merits of their challenge, the three questions of the *City of Montréal* test must be answered.

[48] The first question is whether the activity has expressive content. The answer to it is not in doubt, since the official recordings are made available to the media to foster accuracy in their reporting, and reporting constitutes an expressive activity.

[49] The second question concerns both the method of expression, namely the broadcasting of audio recordings, and the location where the activity would be undertaken. In the instant case, that location is not identified. The exercise by the media organizations of their right to freedom of the press is not limited to a specific location. Since no specific location is at issue, the activity is not excluded from constitutional protection as a result of this factor.

[50] The method of expression requires a more careful analysis. The problem that arises in the case at bar flows from the fact that the method of expression and the expressive content are inseparable, not from how the Court applies the criteria for analysing the method of expression.

[51] The media organizations submit that the choice of a method of expression itself conveys a message (A.F., at para. 32). For this proposition, they rely on *Ford*, in which this Court recognized that language is inextricably related to oral expression and that "[l]anguage is not merely a means or medium of expression; it colours the content and meaning of expression" (p. 748).

[52] I cannot accept that the choice of a method of expression always conveys a message. The method used to convey the message is not always related to the content of the message. Moreover, as can be seen from *City of Montréal*, it is possible for the medium of a message not to be protected even though its content is. For example, the content of a protest message conveyed by putting a poster in the

middle of a street would not be affected by a limit prohibiting the obstruction of public streets. In the instant case, however, the argument based on *Ford* is sound. The content of the message the media organizations wish to convey consists of testimony, examinations, submissions, judgments and other sounds captured by courthouse equipment during hearings. This content can be conveyed in many different ways, whether by broadcasting the official audio recordings of hearings, by publishing written reports, by transcribing what is said at hearings or by broadcasting oral reports by journalists. But it must be conceded that the message conveyed by broadcasting the official audio recordings of hearings is not the same as one conveyed using another method of expression. In the case at bar, I agree with Bich J.A. that the informative content conveyed by the method of expression the media organizations wish to use is not the same as when a transcript is used or even when the most accurate possible description is given.

[53] Indeed, it is the privileged position of the trial judge, who is able to see and hear the witnesses while they testify, that justifies the deference shown him or her by appellate courts. Sound and tone of voice are not always linked to the content, but I must find that in the context of a trial, the value they add to the message is such that the content of the message and the method by which the message is conveyed are indissociable. Thus, on the facts of this case, the method of expression cannot be considered separately from the content and cannot serve as a basis for excluding the expressive activity from the protection of s. 2(*b*) of the *Charter*.

[54] At the final step of the analysis, it must be determined whether either the purpose or the effect of the measures results in an infringement of the protected right. In the case at bar, the impugned measures impose a limit that the media organizations must comply with in engaging in their journalistic activities. That limit affects the expressive content of the activities. I can only conclude that the right to freedom of expression is infringed.

4.3 *Justification of the Impugned Measures*

[55] Since I find that the impugned measures infringe freedom of expression, I must now determine whether they are justified under s. 1 of the *Charter*. To do so, I must consider the three arguments raised by the media organizations in this regard: the standard of proof, the fact that in their opinion Directive A-10 does not meet the "prescribed by law" requirement, and a lack of justification for the impugned measures.

4.3.1 Standard of Proof

[56] The media organizations argue that the standard of proof applicable to the justification of the infringement should correspond to [TRANSLATION] "a very high degree of probability", that is, in their view, to a degree of proof similar to the one required for discretionary orders, in respect of which the courts apply the test from *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *R. v. Mentuck*,

2001 SCC 76, [2001] 3 S.C.R. 442 ("*Dagenais*/*Mentuck*"). What would be required is a level of proof higher than that of a rational connection required by the test from *R. v. Oakes*, [1986] 1 S.C.R. 103. This argument must fail. The *Dagenais*/*Mentuck* rule requires neither more nor less than the one from *Oakes*. In fact, it incorporates a rule equivalent to the one from *Oakes* into a discretionary decision where the openness of court proceedings is in issue (*Mentuck*, at para. 23). This rule requires "consideration both of the objectives of a publication ban, and the proportionality of the ban to its effect on protected *Charter* rights" (*Dagenais*, at p. 878).

[57] If a measure meets the "prescribed by law" requirement of s. 1 of the *Charter* and if it limits a right protected by the *Charter*, the test developed by Dickson C.J. in *Oakes* will be applied.

4.3.2 Prescribed by Law

[58] In this Court, the media organizations are no longer disputing that the rules of practice adopted by the judges of the Superior Court meet the "prescribed by law" requirement of s. 1 of the *Charter*. However, they argue that Directive A-10 is merely a rule of internal management that is not binding on its maker and is not sufficiently accessible and precise to constitute "law". In my opinion, these arguments must fail. I have already discussed the enabling provision under which the Minister of Justice issued the directive (para. 23), but it is not the source of the

authority that is in issue here so much as the nature of the directive and the form chosen to establish the rule.

[59] The directive in question was issued by the government to ensure consistency with the rules of practice applicable in the Superior Court. Insofar as the function of a courthouse does not vary depending on what jurisdiction is responsible for hearing a case in respect of which a litigant or a user is on the premises, the rules made by the Ministère de la Justice must be similar to those made by the judges of the Superior Court. In this sense, the directive is related to the rules of practice, and its content cannot differ at the whim of its author. As a result, it is a rule that has characteristics similar to those of the rules of practice, the form of which is not being challenged.

[60] It seems clear to me from the content of Directive A-10 that this directive directly targets courthouse users. It imposes standards of behaviour on the users themselves by placing limits on information-gathering methods and ensuring that respect is shown to individuals who are participating in the judicial process in one capacity or another. It is not an interpretive tool to guide courthouse employees in performing their duties. Its content is normative, not interpretive.

[61] Moreover, Directive A-10 was initially published by the Ministère de la Justice as an appendix to the *Guide des relations avec les médias et de la gestion des événements d'envergure et à risque*, and it can be consulted on the Internet. And the

pictograms and floor markings provided for were placed in all courthouses. I therefore find it hard to agree that the directive is inaccessible or unclear.

[62] As regards the wording of the relevant passages from Directive A-10, it is almost identical to that of the same passages from the rules of practice, and no one is disputing the precision of the latter passages. On this issue, this Court stressed in *Greater Vancouver*, at para. 54, quoting *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, at p. 94, that "[u]nless the impugned law 'is so obscure as to be incapable of interpretation with any degree of precision using the ordinary tools', it will be deemed to have met the 'prescribed by law' requirement". I do not believe, as the media organizations contend, that the words [TRANSLATION] "harassing" and "following" are too vague to enable members of the public to understand their obligations. Thus, the wording of Directive A-10 is sufficiently precise for it to meet the "prescribed by law" requirement.

[63] I therefore conclude that Directive A-10 meets the "prescribed by law" requirement of s. 1 of the *Charter*.

4.3.3 Justification of the Measures

[64] The test developed by Dickson C.J. in *Oakes* is well known. When a protected right is infringed, the government must justify the limit by identifying a pressing and substantial objective, demonstrating that there is a rational connection

between the objective and the infringement of the right, and showing that the chosen means interferes as little as possible with the right and that the salutary effects of the measure outweigh its deleterious effects.

[65] To constitute a justifiable limit to a right or a freedom, the objective of the impugned measure must advance concerns that are pressing and substantial in a free and democratic society (*New Brunswick*, at para. 45). On the issue of filming, taking photographs and conducting interviews, Lagacé J. expressed the opinion that the impugned measures had the following objectives:

> [TRANSLATION]
> - To maintain the integrity of and public confidence in the administration of justice;
>
> - To ensure the impartiality of trials and the serenity of judicial hearings;
>
> - To ensure the safety of litigants and their families and friends, and respect for their dignity and privacy;
>
> - To maintain order and decorum in and near courtrooms; and
>
> - To ensure that all users of courthouses have safe access to courtrooms and that they can move about freely and testify calmly and without fearing that members of the media will catch them off guard, invade their privacy and follow or even chase after them. [para. 177]

[66] The Court of Appeal agreed with Lagacé J.'s conclusion. The media organizations contend that this conclusion is the result of nothing more than supposition and extrapolation, since the respondents failed to produce any direct

evidence that these various objectives were pressing and substantial concerns. I disagree.

[67] The evidence adduced at first instance, including the Report, shows that allowing journalists to film, take photographs and conduct interviews in courthouses without restrictions had many adverse consequences for the administration of justice. For example, these activities accentuated the anxiety and stress witnesses felt when compelled to testify in court, which in the long run undermined the search for the truth. The prohibition on broadcasting audio recordings of hearings also had preserving the integrity of testimony as an objective. As David Lepofsky says,

> [a]ny new pressure introduced into the courtroom's subtly pressured environment can well affect what the witness says in the stand, how he or she says it, and how he or she looks while testifying. This in turn can influence how the judge or jury perceives the witness as he or she gives evidence. Every jury is instructed by the presiding judge that to assess a witness's credibility they should take into account the witness's testimonial demeanour. Juries and judges routinely interpret a witness's nervousness or reluctance as a possible sign of dishonesty, or dubious credibility.
>
> ("Cameras in the Courtroom — Not Without My Consent" (1996), 6 *N.J.C.L.* 161, at p. 178)

[68] Thus, the evidence shows that the presence and the conduct of journalists outside courtrooms had a negative effect on the decorum and serenity of hearings. "When the testimony of a victim or witness is compromised in any way, it not only hurts the defendant's case, but also the structure of our judiciary in its search for the truth" (W.J. Harte, "Why Make Justice a Circus? The O.J. Simpson, Dahmer and

Kennedy-Smith Debacles Make the Case Against Cameras in the Courtroom" (1996), 39 *Trial Lawyer's Guide* 379, at p. 404).

[69] The objectives of the impugned measures can be summarized as being to maintain the fair administration of justice by ensuring the serenity of hearings. The fair administration of justice is necessarily dependent on maintaining order and decorum in and near courtrooms and on protecting the privacy of litigants appearing before the courts, which are measures needed to ensure the serenity of hearings. There is no question that this objective contributes to maintaining public confidence in the justice system. It is therefore my opinion that the objective of the government and the judges of the Quebec Superior Court was pressing and substantial.

[70] At the second stage of the *Oakes* analysis, the court must determine whether there is a rational connection between the means used and the legislature's objectives. Here, the defendant must establish a connection between the infringement and the benefit that was sought in adopting the means, and this is to be done either by providing concrete evidence or, where it is impossible to provide such evidence, on the basis of reason or logic (*Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 48; *R. v. Bryan*, 2007 SCC 12, [2007] 1 S.C.R. 527; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at paras. 153-54). "The government must show that it is reasonable to suppose that the limit may further the goal, not that it will do so" (*Hutterian*, at para. 48).

[71] Where filming, taking photographs and conducting interviews are concerned, the evidence shows that at the time the measures were adopted, the courts were dealing with a proliferation of communication technologies, which led to an increase in the number of journalists in courthouses. For example, during certain trials that attracted extensive media coverage, there could be as many as 30 or 40 journalists at the Montréal courthouse.

[72] According to the evidence, this increase in the number of journalists together with a greater sophistication of the technologies they used in courthouses had adverse consequences for the administration of justice. For example, photographers and camera operators climbed onto furniture to take photographs or to film. Some journalists filmed courtroom interiors through glass doors or doors left ajar. Some accused persons or family or friends of accused persons had to be escorted by special constables because they were unable to enter or exit courtrooms.

[73] The increased presence of journalists also appears to have created great stress for witnesses and their family members. Witnesses refused to testify or to continue to testify after having been filmed or photographed by media representatives. At first instance, an expert witness, Michel Sabourin, presented a report about a study he had conducted in which participants had expressed the opinion that the presence of journalists outside courtrooms could be disturbing for witnesses or could cause them stress, and that these effects could be quite serious and lasting. Although he conceded that his study was affected by methodological

constraints, he warned against positing that the activities of journalists have no impact on trials. He also testified that a person's [TRANSLATION] "performance" declines considerably when he or she is subjected to a significant increase in stress, which can cause memory loss, confusion or poor thought structure.

[74] Where the establishment of a rational connection between the objective and the infringing measure is concerned, the evidence presented with respect to filming, taking photographs and conducting interviews is relevant to the broadcasting of recordings of hearings, but other evidence was also adduced on this point. The motion judge's findings as regards the context relevant to his decision are clear. By far most participants in a judicial proceeding feel nervous and anxious (para. 87). Moreover, [TRANSLATION] "the growing media coverage of judicial proceedings . . . in light of the vulnerability of many of those involved, brings considerable pressure to bear on the management of order and decorum in, and the serenity of, hearings in courthouses" (para. 176) (see also E.L. Greenspan, "Comment: Another Argument Against Television in the Courtroom", in P. Anisman and A.M. Linden, eds., *The Media, the Courts and the Charter* (1986), 497, at p. 498).

[75] The impugned measures form part of a general policy to protect witnesses. In this respect, the Ministère de la Justice, together with representatives of the judiciary and the Barreau du Québec, had issued the "Statement of Principle regarding Witnesses" (1988), in which the signatories recognized "the importance of maintaining the primacy of the person in the administration of justice" and stated that

they were committed to take "appropriate action . . . to protect the rights of witnesses and to minimize inconvenience to witnesses" (R.R. AGQ, vol. IV, at p. 1).

[76] In my opinion, it was therefore reasonable to expect that the measures would have a positive effect on the maintenance of the fair administration of justice by fostering the serenity of hearings and decorum and by helping to reduce, as much as possible, the nervousness and anxiety that people naturally feel when called to testify in court. Moreover, this Court acknowledged in *Dagenais* that publication bans may "maximize the chances that witnesses will testify because they will not be fearful of the consequences of publicity" (p. 883).

[77] McLachlin J. (as she then was) summarized the third stage of the *Oakes* analysis as follows in *RJR-MacDonald*, at para. 160:

> The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement . . . .

[78] In its report, in seeking a solution tailored to the context, the working group set up by the Ministère de la Justice proposed six options to resolve the problems resulting from media activities in courthouses: (1) to enter into negotiations with the Fédération professionnelle des journalistes du Québec ("FPJQ") to establish

guidelines; (2) to either adopt a legislative provision that might designate certain areas in courthouses where filming, taking photographs and conducting interviews would be permitted, prohibit those activities in courthouses, or adopt the same rules as Ontario; (3) to leave it up to the judiciary to make rules of procedure to regulate the conduct of journalists; (4) to leave it up to the Ministère de la Justice to establish operating rules; (5) to maintain the status quo; and (6) to prepare a guide for organizing trials in the media spotlight (p. 20).

[79] In my opinion, the solution proposed in the impugned measures with regard to filming, taking photographs and conducting interviews falls "within a range of reasonable alternatives". The judges and the Ministère de la Justice have opted for a solution that is less intrusive than a total ban on these journalistic activities in courthouses would have been. Furthermore, since journalists do not belong to a professional order and since only a fraction of the people who say that they work as journalists in courthouses are members of the FPJQ (for example, of the six journalists who testified for the appellants at first instance, only three were FPJQ members), it would have been impossible to reach the desired result by negotiating with the FPJQ. The *Professional Code of Ethics for Quebec Journalists*, which was adopted at a general meeting of the FPJQ, expressly states in its preamble that it is not compulsory (A.R., vol. VI, at p. 110). For this same reason and for the others given above, preparing a "guide" would not have been effective.

[80] I should point out that the impugned measures that limit filming, taking photographs and conducting interviews do not preclude all expressive activities. In *R. v. Squires* (1992), 11 O.R. (3d) 385, the Ontario Court of Appeal heard an appeal concerning the validity of s. 67(2)(*a*)(ii) of the *Judicature Act*, R.S.O. 1980, c. 223, which provided for a ban that was similar to the one in issue in the case at bar, but that prohibited taking photographs or motion pictures "of any person entering or leaving the room in which the judicial proceeding is to be or has been convened". Unlike the measure in the instant case, which authorizes filming, taking photographs and conducting interviews at certain locations within courthouses, the ban in *Squires* applied everywhere inside courthouses. Houlden J., writing for the majority of the Court of Appeal, nonetheless upheld the validity of s. 67(2)(*a*)(ii) and reached the following conclusions:

> Section 67(2)(*a*)(ii) does not absolutely prohibit the taking of photographs or televising of participants in court proceedings. Such activities can and do take place outside the courthouse.
>
> The fair and impartial administration of justice requires a calm, dignified atmosphere. If photographing and televising is permitted of persons entering or leaving the courtroom, that atmosphere will, I believe, be disrupted.
>
> Furthermore, the taking of photographs of persons entering or leaving the courtroom, can, in my opinion, lead to "wolf-pack" journalism in which photographers and cameramen descend *en masse* on the person that they wish to photograph. Without s. 67(2)(*a*)(ii), the photographers would be able to stalk the hallways of the courthouse, waiting to pounce on participants as they move in and out of the courtroom. This can lead to shoving and shouting outside the courtroom door and the consequent disruption of proceedings in the courtroom. [p. 394]

[81] Under the measures adopted in the case at bar, journalists are expressly authorized to ask a person who is heading toward or exiting a courtroom if he or she would agree to give an interview while being photographed or filmed in an area provided for that purpose. Such areas are designated on every floor, near places participants must go through in order to enter and exit the courthouse (R.F. BQ, at para. 26). And journalists remain free to go anywhere in the courthouse and report on what they see. The impugned measures are a way to assure courthouse users that they will not be taken by surprise or harassed by journalists and that they will be interviewed, photographed or filmed only with their full consent.

[82] I must also reject the media organizations' argument that the objective could be attained by having judges make ad hoc orders. Such a mechanism would not offer those who might be filmed or photographed or whose words might be recorded sufficient certainty that their rights would be respected (*Toronto Star*, at para. 43). Furthermore, the authors of the Report noted that [TRANSLATION] "[t]he diversity of the media and the variety in the profiles and specialties of journalists necessarily mean that they do not all have the same needs", adding that "trials that attract media coverage are not all the same" (Report, at p. 5). It is as a result not always possible to foresee which hearings will attract the attention of journalists (Sup. Ct., at paras. 179 and 199). What is more, [TRANSLATION] "excesses" may occur outside courtrooms prior to the trial itself, at the time of the appearance, for example, so harm may be sustained by participants long before they appear before the trial judge. Finally, witnesses other than the parties to proceedings are rarely represented by counsel,

which means that any mechanism based on making an application to the court for an order limiting the activities of journalists would be impracticable.

[83] The official audio recordings of hearings reproduce the words of people who have participated in court proceedings and were compelled, either morally or legally, to do so. Such people are not free to refuse to appear. A person, whether a party or a witness, who is summoned to testify in court must address his or her testimony to the court, in the courtroom, not to the media's audience outside the room. To broadcast the audio recordings of hearings would be to alter the forum in which the testimony is given. Of course, except in cases involving *in camera* hearings and publication bans, journalists may — and even must — broadcast or print information they gather during hearings. However, courtrooms have always been heavily regulated. This regulation ensures, *inter alia*, that witnesses can participate as calmly as possible in the truth finding process. Possession of a copy of the recording of a hearing does not authorize the holder to alter the environment in which the hearing takes place.

[84] Audio recordings of hearings are made to conserve evidence. This method of capturing and conserving testimony is the modern alternative to having stenographers take notes in the courtroom. The recording method used in courtrooms must be authorized by the government and may be used only by staff members designated by the court or its clerk (R.F. AGQ, at para. 35; arts. 324 *et seq*. *C.C.P.*; ss. 540, 646 and 801 *Cr. C.*; *Vilaire v. Association professionnelle des sténographes*

officiels du Québec, [1999] R.J.Q. 1609 (C.A.)). Journalists have a right to use those recordings to enhance the accuracy of reports they are preparing, but they cannot use them in a way that would have an impact on the testimony itself.

[85] This Court recently confirmed that freedom of the press does not protect all journalistic activities (*National Post*, at para. 38). More specifically, not all techniques or methods are protected. If, in the final analysis, the broadcasting of recordings is protected by the *Charter* when the government makes a particular method of expression available to the media to foster freedom of the press, this implies that the government can also adopt measures to ensure that trials take place peacefully, that is, that it can act to ensure that journalists do not appropriate or use such recordings in a way that compromises the very objectives being pursued in making them available.

[86] It is therefore my opinion that the measures are "carefully tailored so that rights are impaired no more than necessary" (*RJR-MacDonald*, at para. 160).

[87] The first three stages of the *Oakes* analysis are anchored in the assessment of the impugned law's purpose. "Only the fourth branch takes full account of the 'severity of the deleterious effects of a measure on individuals or groups'" (*Hutterian*, at para. 76). At this stage, therefore, it is necessary to assess the consequences of the impugned measure (*Toronto Star*, at para. 50).

[88] In the case at bar, the negative effects of the measures have of course been proven. Even when journalists act in a manner that is compatible with the function of the courthouse, the proceeding under way in it and the rights of users, the measures limit news gathering. Moreover, the rules of practice and Directive A-10 prohibit holding interviews, filming and taking photographs at many locations in courthouses where journalistic activities were formerly permitted.

[89] However, a review of the consequences of the impugned measures reveals numerous salutary effects. The evidence shows that witnesses, parties, members of the public and lawyers can now move about freely near courtrooms without fear of being pursued by the media. Lawyers can hold discussions with their witnesses and with counsel for the opposing party in hallways adjacent to courtrooms without being disturbed (Sup. Ct., at paras. 75 and 184-85). Those who adopted the impugned measures took the vulnerability of participants in the judicial process into consideration and made sure that when such people consent to co-operate with the media, they do so as freely and calmly as possible. The controls on journalistic activities thus facilitate truth finding by not adding to the stress on witnesses who must participate in a process that, for most of them, is already distressing enough.

[90] Another salutary effect of the impugned measures relates to the privacy of participants. The following comment by La Forest J. is relevant here: "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" (*New*

Brunswick, at para. 39). When litigants participate in the justice system, they do not waive their right to privacy (*Lac d'Amiante*, at para. 72; see also G.-A. Parent, "Les médias: Source de victimisation" (1990), 23:2 *Criminologie* 47, at p. 54). In the instant case, the impugned measures help minimize significantly the violation of privacy.

[91] The media organizations assert that the broadcasting of audio recordings is common practice at the Court of Québec, but the evidence does not show that to be so and the respondents dispute the assertion. The rules of practice of the Court of Québec prohibit the broadcasting of recordings made by journalists (*Regulation of the Court of Québec*, R.R.Q. 1981, c. C-25, r. 1.01.1, s. 12). The judges of the Superior Court, when faced with the circumvention of a similar prohibition, adopted an explicit measure. Any attempt to explain why the Court of Québec has not also done so would be purely speculative.

[92] Although I accept that the broadcasting of official audio recordings would add value to media reports and make them more interesting, I cannot find that the prohibition against broadcasting these recordings adversely affects the ability of journalists to describe, analyse or comment rigorously on what takes place in the courts.

[93] The negative effect that broadcasting the audio recordings would have on the proceedings and the real impact it would have both on those participating in the

hearing and on the search for the truth inherent in the judicial process are factors that must be taken into account. The recordings are, first and foremost, a means of keeping a record of such proceedings, and journalists should not use them in a way that would distort that objective. The raison d'être of the recordings must not be altered. They are a means of conserving evidence. To broadcast them in the name of freedom of the press would undermine the integrity of the judicial process, which the open court principle is supposed to guarantee.

[94] When the salutary and the negative effects of the impugned measures are balanced, it must be concluded that the former outweigh the latter. In the court context, freedom of expression, like all other fundamental rights, must be reconciled with the fair administration of justice. As Salmon L.J. wrote in *Morris v. Crown Office*, [1970] 1 All E.R. 1079 (C.A.), at pp. 1086-87 (quoted with approval by Dickson C.J. in *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, at p. 249):

> 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.

Like litigants, the media have an interest in contributing to the fair administration of the judicial system. An approach under which only the immediate interests of a few journalists indifferent to the proper functioning of the courts are taken into account

would not foster freedom of the press. The press would be far less useful if, in seeking to fulfil its function of reporting information of public interest, it were to compromise the serenity of hearings and the search for the truth. The presence of journalists would then be not only ineffectual, but harmful.

[95] I would note that most of the provinces have also adopted measures to limit journalistic activities outside courtrooms (for example, Ontario prohibits photographing or filming any person in a courthouse where there is a reasonable ground for believing that the person is there for the purpose of attending or leaving a hearing (*Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 136(1)(a)(iii)); Nova Scotia has designated areas for the use of cameras on the various floors of the courthouses to which its measures apply, and interviews must be conducted in specified areas (*Guidelines for Press, Media, and Public Access to the Courts of Nova Scotia*, Appendix A)). British Columbia recently adopted new rules, but it is too soon to assess their effectiveness (Supreme Court of British Columbia, "Practice Direction: Television Coverage of Court Proceedings", PD — 23, July 1, 2010). As for the broadcasting of recordings of hearings, it is regulated by all the provinces.

[96] In addition, a number of countries have adopted measures that are similar to or even stricter than the measures being challenged in the case at bar. For example, in the United Kingdom it is prohibited to take any photograph or even to make any sketch in court of any participant in legal proceedings, including in the building and its precincts, and to broadcast recordings of judicial proceedings (*Criminal Justice*

Act, 1925, 15 & 16 Geo. 5, c. 86, s. 41; *Contempt of Court Act 1981*, 1981, c. 49, s. 9). France also prohibits the use in courtrooms of any device for recording or broadcasting sound (*Code de procédure pénale*, art. 308). This national, indeed international, consensus confirms that measures intended to regulate the work of the media in courthouses are necessary to maintain the fair administration of justice.

[97] Thus, the limits imposed on freedom of expression are reasonable and are justified in a free and democratic society.

5. Conclusion

[98] Freedom of the press and the fair administration of justice are essential to the proper functioning of a democratic society and must be harmonized with one another. Each one is just as vital as the other. Freedom of the press cannot foster self-fulfilment, democratic discourse and truth finding if it has a negative impact on the fair administration of justice. In the instant case, the government has taken action to reconcile those two values. Since no right is absolute, this reconciliation must be accepted.

[99] I would dismiss the appeal with costs and confirm that the impugned measures are constitutional.

APPENDIX

RULES GOVERNING FILMING, PICTURE TAKING AND INTERVIEWING

In order to ensure the fair administration of justice, the serenity of judicial hearings and the respect of the rights of litigants and witnesses:

1. It is prohibited to obstruct or hinder the free movement of persons in public areas, including by stopping in front of them or by blocking their passage.

2. Filming, picture taking and interviewing are permitted only within the areas marked by pictograms in the public sections of the court house. For certain court houses, such areas are identified in the floor plan annexed hereto.

3. It is forbidden to follow individuals with cameras or microphones in court houses.

4. No filming, picture taking or interviewing may take place in the general vicinity of court rooms, including near entrance and exit doors.

5. It is, however, permitted to request an interview from a person exiting [a] court room.

6. Where the person consents to give an interview, the media representative and this person must move to the area of the court house designated for that purpose, as identified by pictograms.

7. Notwithstanding the preceding, safety instructions and security zones must be respected at all times.

8. Any person may contact the security service of the courthouse in order to have the present rules enforced.

9. The present rules shall come into effect on May 16, 2005.

François Rolland
Chief Justice
Quebec Superior Court

Appeal dismissed with costs.

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