QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2018 SKQB 27**

Date: **2018 01 23**
Docket: CRIM 40 of 2017
Judicial Centre: Battleford

BETWEEN:

CTV, a division of BELL MEDIA INC., CANADIAN BROADCASTING CORPORATION, GLOBAL NEWS, a division of CORUS ENTERTAINMENT INC., POSTMEDIA NETWORK INC., and ABORIGINAL PEOPLES TELEVISION NETWORK,

APPLICANTS

- and -

HER MAJESTY THE QUEEN,

RESPONDENT

- and -

GERALD STANLEY,

RESPONDENT

PUBLICATION BAN: Pursuant to ss. 645(5) and 648 of the *Criminal Code*, no information regarding any portion of the trial taking place in the absence of the jury may be published in any document or broadcast or transmitted in any way until the jury retires to consider its verdict.

Counsel:

F. William Johnson, Q.C.	for the applicants
William G. Burge, Q.C., and Christopher J. Browne	for the Crown
Scott R. Spencer and Dustin L. Gillanders	for Gerald Stanley

REASONS re APPLICATION TO PERMIT CAMERAS IN THE COURTROOM TO RECORD AND BROADCAST CERTAIN SEGMENTS OF THE TRIAL

POPESCUL C.J.Q.B.

January 23, 2018

I. INTRODUCTION

[1] Gerald Stanley is charged with the second degree murder of Colten Boushie. The incident giving rise to the charge occurred on August 9, 2016. Mr. Stanley was committed to stand trial on April 6, 2017. Preliminary motions were scheduled, and heard, the week of November 20, 2017. Decisions respecting all of the preliminary motions have been rendered. The trial is scheduled to commence on January 29, 2018.

[2] On November 27, 2017, counsel for the applicants [Media], first provided a general indication to the Court that it intended to bring a formal application respecting permission to place cameras in the courtroom during the upcoming trial.

[3] Formal notice of the application was served on the Crown and defence and filed with the Court on December 12, 2017. The application consists of a notice of application, the affidavits of Karyn Pugliese and David Hutton, a written submission and a draft order. The affidavits, albeit informative, provide a relatively thin foundation for an application such as this that could have far-reaching consequences. The Crown and defence chose not to call any evidence or file any affidavits, although did submit comprehensive written submissions.

[4] The application was heard on January 16, 2018. Both the Crown and the defence oppose the application. The Media's materials contain an email from a lawyer, who represents the family of Mr. Boushie, in which he states that the deceased's family is in favour of the application.

[5] No other entities or organizations were given formal notice of the application. The application does not challenge the constitutional validity of the

current guidelines regulating the use of cameras in Saskatchewan courtrooms, or of the provisions of the *Criminal Code*, RSC 1985, c C-46, pertaining to publication bans.

[6] The Media sought formal standing to make the within application. Both the Crown and defence agreed that the Media should have standing. In light of their consent, the Court granted the Media standing.

[7] The fact that an application was being made by the Media to broadcast certain segments of the trial was reported in the media. Apparently, no consideration was given to the possibility that the application itself would be caught by either a mandatory or temporary publication ban. This issue was raised at the outset of the hearing. The Media contended that the application did not fall within the mandatory publication ban provisions and that a discretionary publication ban was not appropriate. The Crown and defence took the opposite position. Each side seemed to be taken off-guard by the position of the other. Since the parties were not prepared to comprehensively address the issue, they were given leave to file written arguments on the question. In the meantime, a temporary publication ban was ordered pending release of this decision.

II. THE REQUEST

[8] The Media requests permission to electronically record and publish "all or excerpts" of the following segments of the upcoming trial:

> (a) the opening remarks of the Trial Judge to those persons who are in the courtroom following the empanelling of the Jury;
>
> (b) the opening remarks of [the Crown prosecutor] and [defence counsel] to the Jury;
>
> (c) the closing submissions of [the Crown prosecutor] and [defence counsel] to the Jury once the Trial Judge calls on

them to do so;

(d) the charge to the Jury by the Trial Judge;

(e) the verdict delivery by the spokesperson for the Jury; and

(f) the remarks of the Trial Judge following the delivery of the verdict, including sentencing, if any.

[9] The basis for making the application, as set out in the Media's notice of application is as follows:

1). Administration of Justice

a). granting the requested relief will assist this Honourable Court in explaining to Saskatchewan citizens the nature and management of a murder trial including in particular the roles of the judge, jury, counsel, and court staff;

b). the victims' family welcomes such communication using courtroom camera images thereby not only eliminating what would otherwise have been a major concern in this area of administration of justice but in fact supporting this initiative;

c). the Open Court principle, a central component of the administration of justice responsibility, will be respected, and enhanced; and,

d). Gerald Stanley's right to a fair trial will be protected by guarding against the perceived risks to the all-important oral evidence presentation, consideration, and acceptance or rejection process, when cameras even though non-obtrusive in the courtroom are known to witnesses.

2). Freedom of Expression

a). in this digital age where human communication is increasingly by internet digitally transferred camera recorded words and images, whether using cellular telephone digital cameras or other forms of digital cameras such as those proposed by the Applicants, the proposed relief will respect the Applicants' and their audiences' freedom to express and receive by pictures and sounds the identified portions of the trial; and,

b). the limited authorizations sought will balance such freedoms of expression with Gerald Stanley's right to a fair trial.

III. PUBLICATION BAN RESPECTING THIS APPLICATION

[10] At the commencement of the hearing I raised the issue of whether this application is subject to a mandatory publication ban or, if not, whether a discretionary publication ban should be imposed. This seemed to catch counsel by surprise. Counsel for the Media had not considered the possibility that a publication ban might apply to his application. On the other hand, counsel for the Crown and defence seemed to be under the initial impression that a mandatory publication ban would necessarily be in place since this was an application being heard by the trial judge in the absence of the jury. Unfortunately, counsel were not prepared to adequately address the issue at the hearing.

[11] It was agreed by all counsel that a temporary publication ban should be put in place until a decision is rendered on the merits of the Media's application. In the meantime, counsel was invited to consider their respective positions and submit to the Court written argument respecting the publication ban issue.

[12] All counsel filed their written briefs, as requested, setting forth their respective positions and their legal arguments supporting those positions.

[13] Counsel for the Media asserts that the circumstances of this case do not attract the mandatory publication ban provisions of the *Criminal Code* and further argues that a discretionary publication ban is not appropriate.

[14] The position of both the Crown and defence is diametrically opposed to that of the Media. They contend that the publication ban is mandatory and, if found not to be mandatory, that a discretionary publication ban should be put in place until the jury is sequestered.

[15] The relevant sections of the *Criminal Code* are:

> 645(5) In any case to be tried with a jury, the judge before whom an accused is or is to be tried has jurisdiction, before any juror on a panel of jurors is called pursuant to subsection 631(3) or (3.1) and in the absence of any such juror, to deal with any matter that would ordinarily or necessarily be dealt with in the absence of the jury after it has been sworn.
>
> 648 (1) After permission to separate is given to members of a jury under subsection 647(1), no information regarding any portion of the trial at which the jury is not present shall be published in any document or broadcast or transmitted in any way before the jury retires to consider its verdict.

[16] The question of publication bans in the context of pre-trial motions has been considered by courts throughout this country on several occasions. Unfortunately, the conclusions reached have not been consistent.

[17] In *R v Stobbe*, 2011 MBQB 293, 284 CCC (3d) 123 [*Stobbe*], Martin J. discussed the interplay of the two relevant *Criminal Code* provisions at paras. 13-15:

> 13 Section 648 is an automatic, or mandatory, ban aimed at ensuring trial fairness. It means to ensure that a jury would not be potentially exposed to, or biased by, the content or rulings of proceedings conducted by the trial judge in their absence. Those proceedings would not be published until the jury retires to consider its verdict, when it is normally sequestered and thus would not see or hear of the publication until its deliberations were complete.
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> 14 Section 645(5) was enacted in 1985, after s. 648 was already in effect. It meant to allow the trial judge to deal with all matters and motions that would normally be dealt with in the absence of the jury, but to do so before the jury was selected so that once the jury was selected, the trial could proceed efficiently without significant interruptions, delay or inconvenience to the jury. The provision is aimed at effective trial management.
>
> 15 However, considered together, the two sections have been a source of some confusion. While at first blush the two sections would appear designed to function hand in glove, they have not always been interpreted this way. Further, there is no crisp line, in statute or the common law, delineating the type of motions automatically banned by s. 648 where s. 645(5) is in play. The situation has become more opaque as many, if not almost all, anticipated motions and *voir dires* are now routinely heard, pursuant to s. 645(5), before the jury is

> summoned or selected and the types of pre-trial motions have grown exponentially, especially since the enactment of the ***Charter***. As well, some issues or applications can be dealt with by a motions judge other than the trial judge. Finally, new amendments to the ***Code*** now also come into play.

[18] Justice Martin follows the approach taken by Heeney J. in *R v Sandham* (2008), 248 CCC (3d) 543 (Ont Sup Ct). The approach concludes that mandatory publication bans apply, by virtue of the combined operation of ss. 648 and 645(5), to all motions or applications that would ordinarily or necessarily be dealt with by the trial judge, in the absence of the jury, after the trial had started. By operation of s. 645(5) the publication restriction respecting information provided in the absence of the jury extends to motions and applications that are now permitted to be heard in advance of the jury being selected.

[19] At its core, the approach in *Stobbe* would include within the mandatory publication ban any motions dealing with the admissibility of evidence, such as statements of the accused, photographs, character, demeanour, similar fact and the like, but would exclude procedural motions that would not ordinarily be dealt with in the absence of the jury, such as a change of venue, quashing the indictment, releasing exhibits for testing, challenging the jury panel, and adjournments. See *Stobbe* at paras 48-49.

[20] More recently, Goodman J. in *Canadian Broadcasting Corp. v Millard,* 2015 ONSC 6583, 338 CCC (3d) 227 [*Millard*], considered the effects of creating such ambiguity in regard to ss. 645(5) and 648 on the media, the accused and the overarching administration of justice. Justice Goodman explains that the mandatory ban at issue is of a temporal nature, limiting the media's ability to publish only until the jury is sequestered. Alternatively, the effects experienced by the accused, including his right to a fair trial, and on the administration of justice, including an increased number of pre-trial applications to determine whether a motion would

ordinarily be brought before the trial court, are immediate and foundational.

[21] Justice Goodman's analysis finds that in order to prevent uncertainty all motions or applications dealt with by the trial judge, in the absence of the jury, whether litigated before or after the jury is selected are subject to a mandatory publication ban. By operation of s. 645(5) the publication restriction respecting information provided in the absence of the jury extends to motions and applications that are now permitted to be heard in advance of the jury being selected, regardless of whether those applications are substantive or procedural in nature.

[22] The *Millard* approach acknowledges the common ground among the judicial dialogue that the scope of the mandatory publication ban must accord with the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*], and that the temporal ban on publication of all pre-trial motions in the jury context is not a draconian result, but rather a necessary procedural protection to ensure the paramount consideration of trial fairness.

[23] I agree with the approach adopted in *Millard.* This is an issue of statutory interpretation whereby the plain meaning of the provisions must be discerned. Such interpretation must defer to the intention of Parliament and give the same full effect. At issue is the meaning of "no information regarding any portion of the trial at which the jury is not present". Where, as here, the provision is not ambiguous, ambiguity should not be read in. I adopt the conclusion and analysis of Goodman J. where he says, at para. 64:

> 64 ... In my opinion, all pre-trial motions adjudicated by the designated trial judge, fall under the s. 648 umbrella. Section 645(5) is a jurisdictional assist, nothing more, as it permits a judge to decide matters that were once delayed until after a jury is selected. Section 645(5) does not limit the operation of s. 648.

[24] Furthermore, the *Millard* approach promotes consistency in the application of the law and judicial economy. It rejects a case-by-case analysis of what is, what might be, and what is not prejudicial. Such an approach, respects the paramount importance of the accused's right to a fair and public hearing by providing a mandatory safeguard of information that could be of a prejudicial nature. A consistent approach is not only preferred, but best respects the plain meaning of the provision and the rights enshrined in the *Charter*. These concerns were noted by Goodman J. when he opined about the broad framing of s. 648, at para. 65:

> 65 ... To adopt an approach requiring counsel to attempt to determine if a particular motion or evidence would "ordinarily" be brought before the trial court and invite argument as to which class particular motions belong would inject significant uncertainty where none should exist. Moreover, I agree with the respondents that to split pre-trial motions into two classes is to increase the burden on litigants and make the proceedings more complex and drawn out than they need to be. I query whether as trial judge, in cases involving multiple pretrial motions, it would be a useful exercise of judicial resources to review all of the applications and rulings to select what potential segmented information could be released to the public; in the face of ensuring that the accused are not prejudiced or their fair trial rights negatively impacted.

[25] Therefore, following the reasoning in *Millard*, I conclude that the Media's application is subject to a mandatory publication ban, by virtue of the combined operation of ss. 648 and 645(5).

[26] Finding that a mandatory publication ban does apply in these circumstances is conclusive of this issue. However, given the uncertainty in the state of the law it is useful to consider the alternative legal framework. In the event that the publication ban regarding this application is discretionary, I would have found that the interests of justice are best served by utilizing my discretion to order a publication ban, or more accurately a publication delay, until the jury is sequestered. My reasons are as follows.

[27] The test to be applied on applications to restrict the openness of legal proceedings was established in the Supreme Court of Canada decisions of *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 SCR 835 [*Dagenais*], and *R v Mentuck*, 2001 SCC 76, [2001] 3 SCR 442 [*Mentuck*]. The *Dagenais/Mentuck* test provides that the constitutional right to disseminate information about judicial proceedings can only be restricted when:

(a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

This test applies to all discretionary court orders that limit freedom of expression and freedom of the press in legal proceedings. The onus rests on the parties seeking the ban to displace the open court principle.

[28] Both the Crown and defence argue that the publication ban should be in place until after the jury commences deliberations. They submit that information respecting the evidence and arguments presented at the hearing before me ought not be permitted to be disseminated because it could have the effect of tainting the jury pool. The Crown and defence argue that placing a temporary publication ban on information related to the within motion until the jury retires, is a reasonable limitation to the open court principle, and would prevent the possibility of jury panel contamination.

[29] Counsel for the Media argues, on the other hand, that there is nothing in

the application that deals with evidence *per se* and that fair trial concerns are not engaged. The Media submits that the parties seeking the publication ban have failed to establish that there is a justifiable basis to interfere with the open court principle.

[30] During the course of the hearing before the Court, much of the discussion centred around the somewhat sterile, and, in some respects, esoteric question of whether we have arrived at a point where cameras should be allowed in courtrooms. Counsel provided their respective positions on the reasons why, or why not, cameras should be allowed to record and broadcast certain portions of the upcoming trial.

[31] However, during submissions, reference was made to the facts, evidence and circumstances of the upcoming trial. Although most of the references were general, some comments risk tainting or influencing potential jurors. Such comments were made in regard to the credibility of witnesses, actions undertaken by the lawyer for the Boushie family as well as inaccuracies between media reporting of evidence and what is anticipated at trial.

[32] In balancing the deleterious and salutary effects of a publication delay in this case, valid concerns were raised about potential contamination of the jury pool. The impact of publishing the comments made at this hearing on the trial remains largely unknown, but could include colouring the views of potential jury members, or influencing the testimony of expected witnesses. The impact of a temporary publication ban on the Media, that is, a brief delay in reporting what was said at the hearing of the application and this decision itself, is minimal. In light of the serious concerns raised, publication of this application is not worth the risk it poses to trial fairness.

[33] The Crown and defence have convinced me that a publication ban

should be in place respecting the application hearing and this decision.

[34] Accordingly, I find that the provisions of the *Criminal Code* provide for a mandatory publication ban respecting this matter. In the alternative, a discretionary publication ban ought to be imposed. I hereby order that a publication ban on the hearing of the application and this decision is in place and will remain in place until such time that the jury is sequestered for final deliberations.

IV. POSITION OF THE PARTIES

A) Applicants

[35] The Media argues that standing to make the application should be granted based on the scope of the language in the "Saskatchewan Law Courts Electronic and Wireless Devices Policy, 2012", and the low threshold for standing identified by James Rossiter (James Rossiter, *Law of Publication Bans, Private Hearings and Sealing Orders*, loose-leaf (2010-Rel 2) (Toronto: Thomson Canada, 2006)). The Media suggests that *101114386 Saskatchewan Ltd. v Saskatchewan (Financial and Consumer Affairs Authority)*, 2013 SKCA 122, 427 Sask R 25, evidences the low threshold for standing in cases involving restrictions on media publication.

[36] The Media asserts two grounds on which the application requesting cameras be allowed into the trial be granted: i) the administration of justice, and ii) freedom of expression, as guaranteed by s. 2(b) of the *Charter*. The arguments underlying both points focus on the principle that courts must be open to the public.

[37] First, relying on the Supreme Court of Canada decision in *Re Vancouver Sun*, 2004 SCC 43, [2004] 2 SCR 332, the Media asserts that the *Dagenais/Mentuck*

framework, developed in the context of publication bans, is the appropriate test for this Court to employ. The Media asserts, in accordance with the *Dagenais/Mentuck* framework, that their application should be dismissed only if the Crown or defence demonstrates, on a balance of probabilities, that the proposed media coverage presents "a serious risk to the administration of justice".

[38] The Media argues that permitting the use of cameras in the courtroom enhances their ability to fulfil their essential role in informing and educating the public about the justice system and that the same will support the court in administering justice. The argument is rooted in the reality that not all members of the public are able to attend proceedings. The Media leverages the public interest in this case as an excellent opportunity to reach Saskatchewan citizens, and those outside our provincial boarders.

[39] Second, the Media argues that past restrictions on cameras in courtrooms focused on preserving the serenity of the proceedings and that such concerns have been placated by the tailored request before this Court. The Media does not challenge the justified infringement of s. 2(b) recognized by past courts, but argues that the scope of this request is a "win-win" for both s. 2(b) and the administration of justice. This assertion is grounded in the modernization of technology and the Supreme Court of Canada's continued acknowledgement that the Media's access to court houses and courtrooms enhances the values underlying s. 2(b). See *Canadian Broadcasting Corp. v Canada (Attorney General)*, 2011 SCC 2, [2011] 1 SCR 19 [*CBC v Canada*]; and *Endean v British Columbia*, 2016 SCC 42, [2016] 2 SCR 162.

B) Crown

[40] The Crown requests that the Media's application be dismissed on the

basis that further investigation is required to ensure fairness in the trial process and that s. 2(b) does not vest in the Media a right to film and broadcast proceedings.

[41] The Crown argues that decisions regarding cameras in the courtroom and live-streaming of trials should not be made on a case-by-case basis given the extensive concerns that may be incompatible with the Court's function to ensure fairness of the trial process. Such concerns include:

i. distortion of the reality of the proceedings as a result of the editorial capabilities of electronic media;

ii. television could put unnecessary pressures on jurors and affect their judgment;

iii. judges may be required to monitor media compliance in addition to their regular duties; and

iv. television could jeopardize the safety and privacy of the trial participants as well as court buildings.

The Crown argues that the significance of this issue on the justice system requires evidence, thorough analysis and consideration by the judiciary as a whole. The fair trial rights of the accused should not be risked in an *ad hoc* manner.

[42] The *Charter* does not provide absolute protection of all expressive activities. The Crown relies on the Court's finding in *R v Pilarinos*, 2001 BCSC 1332, 158 CCC (3d) 1 [*Pilarinos*], aff'd [2001] SCCA No 497 (QL), that videotaping in court is not expressive activity protected by the *Charter*. The Crown asserts that therefore prohibiting the use of cameras in the courtroom does not infringe s. 2(b). Alternatively, if an infringement is found, the Crown asserts that the same would be a justifiable limit pursuant to s. 1 of the *Charter* (see *CBC v Canada* at para 97).

[43] The Crown disputes the Media's opinion that the *Dagenais/Mentuck* test is determinative of applications for extended media coverage. For this position, the Crown relies on Bennett J.'s decision in *Pilarinos* which found that the Media has the onus of proving a s. 2(b) violation.

C) Defence

[44] The defence opposes the application and requests that the same be dismissed. Counsel asserts that the Media's application is motivated by entertainment purposes, does not increase court openness and poses a risk to both the administration of justice and trial fairness.

[45] The defence asserts that the court's function is one of truth-finding and inquiry – not of entertainment. By broadcasting only select portions of the argument the Media is not furthering public understanding of how the court accomplishes this function. Further, the defence argues that such fragmented coverage serves only the Media's interest, not that of the public or the accused.

[46] The underlying principle of court openness requires that justice must not only be done, but be seen to be done. The defence asserts that the Media's proposal will allow broadcast of information to a greater audience in a way that distorts and diminishes the principle by creating a collateral trial by the public based solely on argument, not on facts. Alternatively, excluding cameras from the courtroom does not detract from the longstanding ability of the Media to report on the proceedings, or the ability of the public to attend.

[47] The defence asserts that the public's right and Mr. Stanley's right to a fair trial will be jeopardized by permitting cameras at trial. Trial fairness can be affected through undue pressure on any of the participants. Jurors should not be subjected to undue pressure, real or imagined, from knowledge of a concurrent media

trial, or from family and friends informed only by the newsworthy segments of the trial. Furthermore, counsel will be limited in fulfilling their function if they are forced to consider how each statement or argument may sound in the media when edited or taken out of context.

[48] Further, the defence reminds this Court, that the Media does not have a constitutional right to film and broadcast proceedings (see *Pilarinos*). Prohibiting cameras in the courtroom has a neutral effect on the Media's right to expression and the freedom of the press, but a negative effect on Mr. Stanley's right to a fair trial (see *CBC v Canada*). During oral argument, defence counsel also raised the issue of Mr. Stanley as well as counsel's s. 2(b) rights, and the possible infringement that would result if images of participants in the court process, who are compelled to attend, are broadcast without their consent. The defence asserts that there is no balance created by the Media's request, only hardship for the trial process and the administration of justice.

[49] In addition to the arguments above, the defence also raises concerns about the need to protect societal values. It is argued that in the months following Mr. Boushie's death, there was widespread anger and division across the province, largely as a result of the fragmented portrayal of the events of that day and the alleged motives behind the shooting. The defence argues that broadcasting counsels' argument is for purely entertainment purposes and creates the risk of further division and anger within the province.

V. CAMERA ACCESS TO THE COURTROOM

[50] The importance of the open court principle, freedom of expression and the Media's ability to report on matters taking place in courts across this country

cannot be understated. The open court principle ensures that our justice system functions not behind closed doors, but in the public eye whereby citizens can better understand the laws that govern our nation, the processes that enforce the law and comment on the same. It is the essential role played by the media, facilitated through freedom of expression, which ensures Canadian citizens are able to see justice being done. However, it does not follow that cameras must be allowed into the courtroom in order to uphold these principles with resolute determination.

[51] The court recognizes the pivotal role that the media plays in informing the public about what happens in courtrooms throughout the country. Courts are open to the public, albeit, relatively few members of the public have the time or inclination to observe court proceedings first-hand. The media serves as the eyes and ears of the public, reporting to them matters of interest and concern.

[52] Television cameras and broadcast of live or recorded events are not new phenomenon. They have been in popular use for decades. Granted, technology has changed, and the size, capability and quality, has improved exponentially. These advancements have not gone unrecognized by those debating the role of cameras in the courtroom.

[53] The debate about whether and if so, to what extent, cameras should be allowed in the courtroom is also not new. Many jurisdictions around the world have experimented with filming and broadcasting court proceedings, including, the United States, the United Kingdom, Israel, Scotland, South Africa and New Zealand, to name a few. As such, there is no shortage of national and international literature setting forth the pros and cons of having cameras in the courtroom. In Canada this question has been passionately debated, examined, discussed and analyzed for a long time.

[54] Initially, there was an outright ban of all types of cameras in all levels of

court in Canada. This prohibition was grounded primarily on the premise that the existence of cameras in the courtroom would have a negative impact on the participants of first instance trials, including judges, jurors, lawyers and witnesses. There were also concerns expressed respecting the potential of advertent or inadvertent distortions that could damage the credibility of the court system and the administration of justice in general.

[55] The Canadian Judicial Council [CJC] is composed of 39 federally appointed Chief Justices and Associate Chief Justices from throughout our nation and is chaired by the Chief Justice of Canada. In 1983 the CJC first stated its formal position respecting cameras in the courtroom concluding that televising court proceedings "... is not in the best interests of the administration of justice" (Canadian Judicial Council, *Council modifies position on cameras in the courts* (Ottawa: Canadian Judicial Council, 2002), online: Canadian Judicial Council, https://www.cjc-ccm.gc.ca/english/news_en.asp?selMenu=news_2002_0328_en.asp (22 January 2018)). This position was modified in 1994 to exempt the Supreme Court of Canada and, in 2002, further amended to exempt appellate courts. In 2015, the CJC, arguably softened its position when it passed the following resolution regarding the use of cameras in the courtroom:

> The Canadian Judicial Council supports the open courts principle by encouraging respective courts to pursue policies designed to remove barriers to public access.
>
> The Council recommends that courts continue to reflect on ways to achieve a balance between open courts and preserving the integrity of the administration of justice. Council recognizes that for some jurisdictions, this may mean allowing the presence of cameras, while for others these may be limited or prohibited entirely.

The position of the CJC is a non-binding recommendation, developed after considerable thought and reflection, intended to provide guidance to the courts. It is not a position that should be lightly disregarded.

[56] A gradual shift is evident in the evolution of the CJC's position to permit the use of cameras in the courtroom. The shift recognizes that some of the fears initially expressed in relation to televising proceedings have not borne out. For instance, the evolution of and increased access to technology has resulted in people becoming more comfortable in the presence of cameras. The most recent resolution maintains judicial discretion to ensure that the open court principle and the integrity of the administration of justice are appropriately balanced.

[57] In a similar vein, the Courts of this province have devised policies respecting cameras in the courtroom. The general policy, as set forth on the Courts of Saskatchewan website, is that cameras are not permitted in courtrooms, other than for ceremonial purposes; however, the policy is not mandatory. This policy was recently overtaken by the Saskatchewan Court of Appeal in a specific policy statement issued on June 2, 2017 that expressly sets forth the process by which media outlets can apply for permission to record and broadcast appeals being heard in that court. The Court of Appeal has, on at least one occasion, granted permission for their proceedings to be recorded and broadcast.

[58] It is a fair observation that the notion of recording and broadcasting appellate court proceedings is now generally accepted as appropriate. However, serious concerns still remain respecting the impact that cameras may have on trial proceedings.

[59] Introducing television cameras into the courtroom to record and publish certain segments of the trial would be a revolutionary step, thus far, permitted only in limited circumstances in courts across this country, and then generally only with the consent of the parties regarding specific portions of the trial and on an experimental basis (see *R v Cho*, 2000 BCSC 1162, 189 DLR (4th) 180). Counsel for the Media urges this Court to take this unprecedented step.

[60] Although the Media have raised a number of arguments worthy of serious consideration, the Crown and defence have also raised a number of valid concerns respecting the prospect of cameras in the courtroom in this case.

[61] Both of these positions are deserving of serious consideration and raise meritorious arguments requiring careful analysis. I am not satisfied, however, that there is sufficient time to consider this application, that all of the concerned parties are before me, that enough information has been made available to the Court for me to make a decision with such far-reaching consequences, or that it would be fair to the participants of the upcoming trial to, on short notice, change a longstanding practice upon which they would have rightfully relied.

[62] In more detail, my concerns are as follows.

[63] First, I am concerned that I may not have all of the truly interested parties before me to assist in marshalling all the relevant considerations that should be taken into account before making such a potentially ground-shifting decision. Although the Crown and defence have been served with the application, other potentially interested groups have not been given the opportunity to seek formal intervener status and provide evidence, insights and legal arguments.

[64] The Canadian Bar Association, the Saskatchewan Trial Lawyers Association, First Nations organizations, Crown counsel associations, Victim Rights associations, civil liberty associations, the federal government, unions representing sheriffs and registrars, and the like have not been given an opportunity to be heard. Organizations such as these might be able to provide a broad public interest perspective beyond what is currently before the Court. The importance of these perspectives can be gleaned from *CBC v Canada*, wherein intervener status was granted to the Attorney General of Alberta, Canadian Civil Liberties Association,

Canadian Newspaper Association, Canadian Association of Journalists and British Columbia Civil Liberties Association. Likewise in *Reference re Criminal Code of Canada (B.C.)*, 2010 BCSC 1684 [*Polygamy Reference*], 29 lawyers represented the interests of 14 distinct stakeholders.

[65] Further, it would be useful for the Court to have had the opportunity to appoint an *amicus curiae* to assist by providing an independent analysis of the law and the evidence as was done in *Pilarinos*.

[66] Second, the record upon which this application is based is very sparse. The two affidavits filed along with the notice of application provide the entire evidentiary base for the application. Undoubtedly, within those two affidavits, there is helpful and cogent information that supports the position taken by the Media. However, a more complete evidentiary base to support an application of this nature would be preferable. Expert testimony and empirical data respecting the ramifications of cameras in the courtroom on the various participants and the public at large is crucial and would provide the opportunity to base a decision on evidence as opposed to supposition. In the absence of this information, the Court can only guess whether broadcasting certain segments would or would not impact on the trial and, if so, whether such an impact would be negative or positive.

[67] In *Pilarinos*, Bennett J. had a full record, the benefit of an *amicus curiae* and was satisfied that she could determine the application in the context of the evidence that had been filed:

> 22 There is much evidence filed before me with respect to the effect of cameras in the courtroom on witness [*sic*], litigants, counsel, judges, jurors and other participants on the process.
>
> 23 ... counsel have filed affidavits of many participants in trials on both sides of the camera issue, as well as many studies and scholarly articles. ... The evidence gives the application the necessary context ... .

Such comments cannot be said to apply here.

[68] Jurisprudence focusing on this issue echoes the need for thorough evidence and careful consideration of the effects that allowing cameras into the courtroom might prompt. Moreover, thorough research, discussion and analysis are necessary to ensure that the appropriate legal test is identified. See for instance: *Pilarinos* at paras 99-110; *Re Sinclair*, 2010 MBPC 18 at paras 47 and 66, [2010] 7 WWR 688; *R v Dickinson*, 2012 BCPC 28 at para 9; *Polygamy Reference* at para 6; and *Carter v Canada (Attorney General)*, 2011 BCSC 1866 at para 30 [*Carter*].

[69] Third, the application has been brought less than two weeks before the trial is scheduled to start. Admittedly, the Media provided informal notice of their intention to bring the application two months before the day the trial was supposed to begin. The application was scheduled as soon as all participants could make themselves available. Nonetheless, the Court is placed in the difficult position of trying to provide an answer to an unprecedented request in a very compressed time frame. It is simply not possible, given the time frame and the other demands on the Court to give this request the full consideration that it deserves.

[70] Similar concerns have been expressed where consideration of applications, such as this, may result in delay of the underlying proceedings. In *Polygamy Reference*, Bauman C.J.S.C. (as he then was), rejected an application to televise a proceeding brought at the eleventh hour on the basis that "this is not the time to advance the debate" although the question of whether the proceedings should be televised was of fundamental importance. Chief Justice Bauman explained, that the issue cannot be hastily decided:

> 4 ... They should be debated, but they should be debated in a calm and orderly fashion so we get any policy arising out of the debate right.

> 5 This application does not permit a calm and deliberate review of these difficult issues. It is brought on the eve of this reference proceeding. As I say, it contemplates fundamental changes to an established protocol dealing with television coverage of court proceedings. I have concluded this is not the time to advance the debate.

[71] Justice Smith in *Carter*, arrived at a similar conclusion, when she rejected a request to broadcast made by a media outlet that was initiated shortly before the hearing was to take place. That trial sought to be televised involved a constitutional question regarding physician-assisted death. In dismissing the media's application, Smith J. commented as follows, at para. 30:

> 30 ... the application in this case raises issues of fundamental importance. Addressing the issues would require weighing the competing constitutional interests at stake in order to decide whether changes are required to the established court practice regarding the presence of television cameras in courtrooms. Addressing the issues properly would require evidence, thorough argument, and time for consideration. In fairness to the parties to this litigation, which already involves challenging and complex issues of its own, and in recognition of the importance of the issues raised by the application, I decline to embark on such a review in the context of this case.

[72] Fourth, it would not be fair to fundamentally change the courtroom landscape less than two weeks before the trial proper. In *Pilarinos*, which was also a criminal trial, Bennett J. emphasized that litigants have a right to know the parameters of the litigation and what to expect at trial, and that court guidelines, though discretionary, are essential in this regard. The longstanding court policy to not permit cameras in the courtroom, although not binding on an individual judge, serves the useful function of informing the public and the litigants as to what likely to expect at trial.

[73] At the outset of this process and for the vast majority of the time it has progressed through the system, Mr. Stanley, defence counsel, the Crown and the witnesses who are anticipating being called to testify had no reason to anticipate that

the trial would be televised. Both the Crown and defence oppose this application. Moreover, defence counsel has brought forward serious privacy concerns. The parties to the trial did not prepare with this possibility in mind, and although, the Court is confident that each would be capable and would rise to the task of being televised, to add such an exceptional burden to the parties without their consent at this late stage would not accord with the fair administration of justice, nor with the integrity of the system as a whole. A precipitous change on the eve of trial does not serve the interests of justice.

[74] Without discounting the articulate and persuasive arguments made before this Court, this application cannot be granted. Simply stated, more information, time and input from interested parties is needed before such an unprecedented request can be acted upon.

[75] Although, in the instant circumstances, the Court is not able to grant this application, the open court principle is alive and well and the media will be accommodated as best as the Court is able to do, given the restriction of conducting a modern trial in a heritage building. These accommodations include:

(a) media space will be reserved in the courtroom for representatives of as many accredited media outlets as the space permits;

(b) an overflow courtroom with a live-stream of the proceedings has been reserved in order to accommodate an increased number of attendees;

(c) an exclusive media room will be established in the court house wherein the trial will be live-streamed so that as many accredited media representatives can be present as possible;

(d) accredited media representatives, as always, are permitted to audio

record the proceedings to ensure accuracy in reporting, such audio recordings cannot be broadcast;

(e) accredited media, as always, are permitted to live tweet and post or engage in other live text-based communications from court; and

(f) the Court has a designated media contact person available so that the media will always know who to contact should questions or concerns arise during the course of the trial.

VI. CONCLUSION

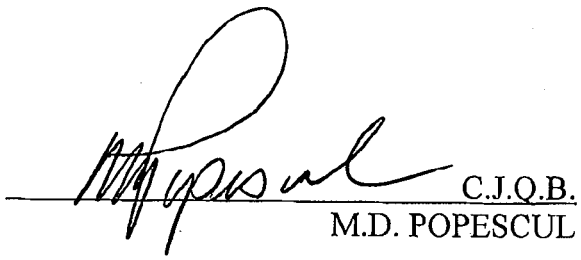
[76] Considering all of the foregoing this application cannot succeed.

[77] The relief requested is a marked departure from the longstanding principle that cameras are not permitted in courtrooms. In order to deviate from such a longstanding principle a thorough analysis informed by multiple entities is necessary to safeguard the key principles underlying our justice system. The same would require that notice of the hearing be provided to multiple stakeholders; that a sufficient evidentiary basis is established from which the known and unknown risks and benefits of extended media coverage can be understood; and, that sufficient time is available for due consideration of each concern raised. The importance of a decision to break from tradition and televise trials cannot be understated and should not be made in an *ad hoc* manner.

[78] This is not the right case to put in a petri dish for experimental purposes. In opposition to this motion, both Crown and defence raise pertinent concerns that cannot be adequately addressed without evidence and analysis. The jeopardy faced by Mr. Stanley is of the most serious in Canada, and the risks that could result from

allowing such an experiment could undermine the integrity and administration of our justice system. Despite the goodwill of everyone, it is not possible to gauge the negative unintended consequences that might flow from a decision to change the status quo.

[79] The application is dismissed.



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