

#OJENROEJFA22

OJEN's Fall 2022 Twitter Moot

Cameras In The Courtroom

Should Canadian Law Permit Live Media Broadcasting of Court Matters?

In spring 2022, the Johnny Depp and Amber Heard trial was broadcast live in the United States of America (USA). Globally, people could watch the trial live on TV or online without waiting for journalists to report on the proceedings or for a newspaper to publish an article.

Because of this, social media users were able to access this footage and to edit it. As a result, many shared raw or manipulated videos of the trial on platforms such as TikTok and Instagram to engage with audiences and as a source of entertainment.

The term "cameras in the courtroom" is a shorthand way to reference the practice of permitting live media broadcasting of legal trials. In contrast to the USA, Canada does not permit cameras in the courtroom.

However, due to the COVID-19 pandemic, many Canadian courts were required to convert their practices and procedures from in-person to virtual. To do so, many courts adapted to use technologies such as Zoom and similar video conferencing software in order to continue the administration of justice despite physical distancing measures. As these matters were often available to the public to view, this raised the question of whether Canada, like the USA, should permit cameras in the courtroom.

Should cameras be permitted in the courtroom?

OJEN invites Twitter Moot participants to prepare discussion points dealing with the **moral, social** and **legal** implications of cameras in the courtroom from a variety of perspectives.

Here is what the law currently says:

Relevant Law:

Section 136 (1) of the *Courts of Justice Act*, R.S.O. 1990, states:

"No person shall,

(a) take or attempt to take a photograph, motion picture, audio recording or other record capable of producing visual or aural representations by electronic means or otherwise,

(i) at a court hearing,

(ii) of any person entering or leaving the room in which a court hearing is to be or has been convened, or

(iii) of any person in the building in which a court hearing is to be or has been convened where there is reasonable ground for believing that the person is there for the purpose of attending or leaving the hearing;

(b) publish, broadcast, reproduce or otherwise disseminate a photograph, motion picture, audio recording or record taken in contravention of clause (a); or

(c) broadcast or reproduce an audio recording made..."¹

The Twitter Moot this fall is essentially asking whether this law should be changed to reflect changing technology and the way people use this technology.

Section 2(b) of the *Charter*

Is the prohibition of cameras in the courtroom an infringement of Section 2(b) of the *Canadian Charter of Rights and Freedoms*?

¹*Courts of Justice Act*, R.S.O. <https://www.ontario.ca/laws/statute/90c43>, 1990. Note that persons who require accommodations such as recording to participate in their own representation may be exempted.

Section 2(b) of the *Charter* states that everyone has the “freedom of thought, belief, opinion and expression, **including the freedom of the press and other media of communication.**”²

Canadian courts are open to the public, meaning any person is permitted to enter the courtroom and watch a trial or hearing, unless there is a publication ban³.

Some argue that since courts are open to the public, there is a strong public interest in being able to observe trials as they happen, without needing to be physically in attendance. They reason that if there is a benefit to public access to court matters, this benefit would increase by increasing opportunities and ways to have this access. In addition, journalists can already report on court proceedings, and commonly post live updates on Twitter or similar media platforms.

Section 11(d) of the *Charter*

Whether the defendant’s Section 11(d) right will be infringed if cameras are permitted in the courtroom?

Section 11(d) of the *Charter* says “any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.”⁴

This raises questions about how, and to what extent, cameras in the courtroom could influence lawyers, the judges, a witness, jury members, or TV-viewers.

Section 1 of the *Charter*

If permitting cameras in the courtroom violates the *Charter*, is that violation reasonable under Section 1?

Section 1 of the *Charter* clarifies that rights and freedoms are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”⁵

² *Constitution Act*, <https://laws-lois.justice.gc.ca/eng/const/page-12.html#:~:text=Guarantee%20of%20Rights%20and%20Freedoms&text=1%20The%20Canadian%20Charter%20of,a%20free%20and%20democratic%20society,1982> (emphasis added)

³ A publication ban prevents the publication and broadcasting of any information that could be used to identify a victim, a witness or other people involved in a trial. In addition to publication bans, judges have the discretion to restrict public access to trials over which they preside and the public is not generally permitted to attend matters while children are giving testimony.

⁴ *Ibid* at Note 3.

⁵ *Ibid* at Note 3.

When a right and/or freedom guaranteed by the *Charter* is violated, overriding the protected right and/or freedom is justified (or “saved”) if the action is connected to a broader objective.

To assess whether the violation is reasonable and demonstrably justified, the courts use the *Oakes* test.

The *Oakes* test⁶ has two steps:

The **first step** of the test asks whether there is a “pressing and substantial” objective to warrant overriding a constitutionally protected right or freedom.

The **second step** asks whether the means chosen to achieve the objective are reasonable and demonstrably justified. This second step involves three sub-questions:

- (a) Is there a **rational connection** between the objective and the violation?
- (b) Does the limit **minimally impair** the *Charter* right?
- (c) Is there **proportionality** between the benefits of the limit and its deleterious effects?

If the law fails to meet any one of these requirements, it is unconstitutional and is not “saved” under Section 1.

Relevant Cases:

R v. Squires (1992)

In *R v. Squires*, a Canadian Broadcasting Corporation (CBC) reporter was charged with filming in courthouse premises contrary to the former Section 67(2)(a)(ii) of the *Judicature Act*, which prohibited the photography or filming of persons entering or leaving a courtroom. CBC argued that s. 67 of the *Judicature Act* violated Section 2(b) of the *Charter*. This argument was not accepted by the trial judge. On appeal, the Court found that Section 2(b) was infringed however, that this was a reasonable limit, and saved under Section 1.

CBC v. Canada (2011)

Similar arguments were heard by the Supreme Court of Canada in 2011. Once again, the Court found that the restriction of media broadcasting was an infringement of section 2(b), but that this was justified via the *Oakes* test because the objective of the law was to protect the vulnerable by enduring participants’ right to consent to engage with media and was rationally

⁶ *R v. Oakes* [1986] 1 S.C.R. 103 <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/117/index.do>,

connected to the goal of due process by reducing stress on witnesses. Finally, the SCC found that the law was minimally impairing because only audio recordings were prohibited.

This case is interesting because the Court here determined that in fact, broadcasting court proceedings actually **undermined** the integrity of the judicial process, which is the objective that the open court principle seeks to guarantee.

R. v. Vader (2016)

In this case, the presiding judge ruled that media outlets could televise a verdict at the conclusion of Travis Vader's murder trial. This was the first time this was permitted in Alberta, and followed arguments from media organizations such as the CBC and Global News in favour of being allowed to do so. .

Here are additional questions to consider:

- Which of the rights guaranteed by the *Canadian Charter of Rights and Freedoms* are involved in this issue?
- Are cameras in the courtroom a privilege or a right?
- Is video broadcasting important to effectively inform the public of courtroom proceedings?
- Can litigants have a fair trial if cameras are permitted in the courtroom?
- Are there risks for witnesses giving testimony?
- Are there risks for jurors in jury trials?
- Who counts as "the media"?
- Should non-professionals also be permitted to record and broadcast hearings?
- Should "entertainment" and "informative" journalism be treated differently?

Additional Reading:

OJEN resources:

- [In Brief: Canadian Charter of Rights and Freedoms](#)
- [In Brief: Canadian Constitution](#)
- [In Brief: Section 1 of the Charter & the Oakes Test](#)

Canadian cases:

- [Alberta v. Hutterian Brethren of Wilson Colony](#), 2009 SCC 37, for the Section 1 analysis.
- [R v. Squires](#), 1992
- [R v. Vader](#), 2016

- [*Dagenais v. Canadian Broadcasting Corp.*](#), 1994 3 SCR 835
- [*Canadian Broadcasting Corp. v. Canada*](#), 2011 SCC 2
- [*AB v Bragg Communication*](#), 2011 NSCA 26

News articles:

- [TV in court? Canada should say no to the circus](#)
- [Cameras in the courtroom: a schadenfreude spectacle, or justice televised?](#)
- [Cameras in Courtrooms](#)
- [Judge rules cameras can be in courtroom for Travis Vader murder verdict](#)