December 4, 2001

Anne Roland
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Supreme Court of Canada
Wellington Street
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Dear Me Roland,

Re: Media Lockups

I am writing in response to your letter of October 22, 2001 requesting comments on pre-judgment lockups for members of the media. There is a divided view within the CBA on this issue.

We all appreciate the difficulty that journalists encounter in reporting on decisions of the Court, particularly considering the time constraints under which they operate. Supreme Court decisions are frequently lengthy and often involve complex legal issues. Even lawyers who are familiar with a case, including counsel for the parties and interveners, often need at least a day or two to fully appreciate the broad impact of a decision. Frequently, the only immediate information that we can give our clients is that an appeal was allowed or dismissed.

The Supreme Court of Canada Liaison Committee ("the Liaison Committee") and the National Civil Litigation Section are not sure that a pre-judgment lockup for the media will improve the quality of same-day reporting of cases. A Court officer currently briefs the media on the facts and background of the case before the reasons for judgment are released. In complex cases, it is questionable whether allowing journalists extra time to read a decision will help them appreciate its nuances. To the extent that reporters interview members of the legal community for their stories, those interviewees would not be able to provide any earlier input than would be the case without a media lockup.

While the Liaison Committee and the Civil Litigation Section are skeptical of the benefit of lockups, we believe that the main concern with providing the media with early access to a decision is the appropriateness of the media receiving the decision before the litigants do.

However, we believe that, if the parties in a given case are prepared to consent to a media lockup, it would not be appropriate for us, as outsiders, to second guess that decision.

On the other hand, the National Media and Communications Law Section (the "Media Section") takes the view that pre-judgment lockups can only improve the quality and accuracy of reporting on the Court's cases, especially in the electronic media where deadlines are tighter. More time would assist journalists, who frequently scramble to understand these judgments.

The Media Section is of the view that the need for lockups is such that they should be available regardless of whether the parties consent. Therefore, the primary area of disagreement among our members relates to whether the consent of the parties should be required.

Requiring Consent of the Parties - Proponents

The Liaison Committee and the Civil Litigation Section believe that the parties to a case have a primary interest in appeals that is different from the interests of the media or the general public. While decisions of the Court generally have impact beyond the parties to the appeal, it is the parties who are usually most directly affected by a decision. While it may be in the parties' interests to have accurate media coverage, it should be up to the parties to make that determination on a case-by-case basis. If media lockups would improve the accuracy of media reports and that is of concern to the parties, then presumably the parties will consent.

Many, if not most, high profile cases have government parties. Frequently, the public expects a quick government reaction or response. In such cases, we do not believe it is reasonable for the media to know the result of a decision before the government officials who will be immediately questioned on their reaction. Even though members of the media who are in the lockup cannot leak the results of a case before it is released, we question whether they should have access to a case like the *Secession Reference* or *R. v. Sharpe* before the parties do. Indeed, the Parliamentary Press Gallery has suggested that the consent of the parties could be a condition of media lockups (see letter dated September 18, 2001 from the president of that organization, enclosed in your October 22 letter).

However, we do not think that the media's early access to a decision should be dependent upon the consent of everyone involved in arguing a case. We are concerned with the interests of the "primary litigants". We do not feel that the consent of interveners, who have no direct interest in the case, should be necessary. On the other hand, we would include in "primary litigants" an intervening attorney general from the jurisdiction where

the litigation arose who has primary responsibility for defending a constitutional challenge. We also believe that counsel for the parties should have the option to participate in the lockup.

We would hope that a requirement for consent to a media lockup would provide counsel with a meaningful opportunity to obtain instructions from their clients. We would have concerns with adopting a process similar to that for videotaping hearings, where counsel are asked to sign consent forms the morning of the hearing and frequently feel no option other than to consent.

With these comments in mind, the Liaison Committee and the National Civil Litigation Section would support the one-time experiment suggested by the Parliamentary Press Gallery if the parties in the test case consented. An experiment would give a better idea of the benefits and drawbacks of media lockups, as well as the practical issues in accommodating them.

Requiring Consent of the Parties - Opponents

The Media Section takes the view that there is no property in a decision. Therefore the decision as to whether the parties should have a virtual veto over whether there should be a media lockup lies with the Court. There are considerations that go well beyond the narrow interests of the litigants in a particular case. Furthermore, requiring consent of the parties installs an unnecessary roadblock. The Media Section believes that media lockups serve the parties' interests and any risks to those interests are speculative. If journalists have less understanding of a case, they are more likely to get it wrong. Media lockups are not harmful as long as the media do not disclose the contents of the judgment before it is released.

The Media Section points out that members of the Court have commented that media reporting on its decisions is vital to public understanding of the Court's judgments. The Court has also stated in a number of decisions that the media is the eyes and ears of the public, who often do not have the time or resources to review court decisions or attend court hearings.

The Media Section believes that the only drawback to the proposal is that journalists would see a judgment before the parties do. This is not a problem because the journalists will be "locked up", so they won't be able to disclose the judgment until it is released. Counsel for the parties who would receive the judgment later would already be familiar with the issues and therefore in a better position to understand the judgment quicker.

It is the Media Section's position that the potential benefits of a media lockup clearly outweigh the speculative deleterious effects of a media lockup.

Overall, the Media Section believes that it is worth trying media lockups. If they raise problems in practice, then they can be revised to meet those concerns. The Section is concerned that a one-time experiment may not produce sufficient useful information to decide whether to continue with such a project.

Conclusion

Thank you for the opportunity to provide input on this issue. While we have not been able to reach a consensus on the question of the need for consent of the parties, we hope our exploration of the different sides of the issue will assist the Court.

Yours truly,

Shawn Greenberg
Chair, Supreme Court of Canada
Liaison Committee