November 6, 2013

Order in the Court! The Use of Electronic Devices in Alberta Courts and Freedom of Expression

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Policies commented on: Policy on the Use of Electronic Devices in Courtrooms, Alberta Court of Appeal, October 28, 2013; Electronic and Wireless Devices Policy**,** Court of Queen's Bench of Alberta, January 2012

Last week the Alberta Court of Appeal (ABCA) issued a Notice to the Profession attaching its Policy on the Use of Electronic Devices in Courtrooms. The Policy applies to all ABCA courtrooms, and prohibits use of electronic devices in those courtrooms by members of the public. For those persons, "Electronic devices … must be turned off and kept out of sight" (section 3). Only lawyers and "accredited media members" are permitted to use such devices in ABCA courtrooms (section 4), subject to certain restrictions. Anyone who uses an electronic device contrary to the Policy may face sanctions including being required to leave the courtroom or declared in civil contempt of court (section 12). The Alberta Court of Queen's Bench (ABQB) has a similar Electronic and Wireless Devices Policy, requiring that all electronic devices be turned off in its courtrooms, but exempting counsel and some members of the media from that rule. The Provincial Court of Alberta (ABPC) has adopted the ABQB Policy. This post will describe the details of these policies, and will examine whether the policies are consistent with freedom of expression as protected by section 2(b) of the *Canadian Charter of Rights and Freedoms*.

The Policies

The ABCA Policy applies to all electronic devices capable of "transmitting and/or recording data or audio, including smartphones, cellular phones, still and video cameras, voice recorders, computers, laptops, tablets, notebooks, personal digital assistants and other similar devices" (section 2(b)). As noted, there is a general rule against using electronic devices in ABCA courtrooms by members of the public (section 3). Lawyers may use electronic devices in these courtrooms, but are not permitted to audio record proceedings (section 6). "Accredited media members" are also permitted to use electronic devices, and are defined as those who are listed on the Court of Queen's Bench of Alberta's Media Undertakings List (section 2(a)). This list consists of "media representatives … who have submitted Undertakings that they will not broadcast audio recordings, and that they will not engage in unacceptable use of electronic networked devices in courtrooms." A quick perusal of the list shows that it only includes those associated with established media organizations. Members of the media who are on the list may audio record ABCA proceedings, but only for the purpose of verifying their notes, and they are not allowed to transcribe, copy, share, sell, or transmit such recordings (section 5).

Those permitted to use electronic devices must ensure they are in silent mode and are used discreetly (section 7), that they are not used for voice communication, to video record or to take photographs (section 8), and that they comply with all publication bans and other restrictions on publication (section 11). Lawyers and accredited members of the media may be asked to produce identification to verify their entitlement to use these devices (section 9). The Policy also stipulates that electronic devices must not "interfere with courtroom decorum or the proper administration of justice" or "interfere with court recording equipment or other courtroom technology" (section 8), which gives us some sense of the purposes behind the ABCA Policy. The permissions noted above remain subject to "the authority of the Court to determine what use, if any, can be made of electronic devices in the courtroom" (section 10).

The ABQB Policy is more explicit about its purposes, noting that the Policy "is intended to promote the fairness of the administration of justice." The general rule is that all electronic and wireless devices are to be turned off in ABQB courtrooms, but counsel and members of the media who have signed an undertaking with the Court are exempted. Jurors are advised that the presiding justice will provide them "with specific directions which will supersede the directions contained in this policy." Everyone must refrain from "unacceptable use" of such devices, i.e. those uses that "cause a disturbance, interfere with court operations, or are offensive." More specific examples of unacceptable use include:

> a. Causing interference with court sound systems or other technology, whether deliberate or inadvertent
> b. Taking photographs or movies of anyone in a courtroom, or anywhere in the courthouse
> c. Making an audio recording of proceedings in any courtroom, jury room, chambers or hearing room unless permitted by the presiding judge or by court policy (media)
> d. In the courtroom or hearing room, any use inconsistent with court business
> e. Any use that may lead to a breach of privacy or courtroom decorum, or interferes with the administration of justice.

Similar to the ABCA Policy, anyone who engages in unacceptable use under the ABQB Policy may be required to turn off or forfeit their device or to leave the courtroom, and may be cited in contempt.

Freedom of Expression

Section 2(b) of the *Charter* provides that everyone has the fundamental freedom "of thought, belief, opinion and expression, including freedom of the press and other media of communication." Section 2(b) protects all activities that convey meaning (*Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927). While no content-based restrictions on expression are permitted without section 1 *Charter* justification, there are some internal limits on the methods and locations of expression that are protected under section 2(b).

In *Montréal (City) v 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 SCR 141, the Supreme Court of Canada clarified the test for when expression in a public or government-owned location will be protected under the *Charter*. According to Chief Justice McLachlin and Justice Deschamps, writing for a majority of the Court, "The basic question … is whether the place is a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s. 2(b) is intended to serve, namely (1) democratic discourse, (2) truth finding and (3) self-fulfillment." Two factors are to be considered in answering this question: "(a) the historical or actual function of the place; and (b) whether other aspects of the place suggest that expression within it would undermine the values underlying free expression" (at para 74). The historical and actual functions of the place must be examined with a view to whether "the space [is] essentially private, despite being government-owned" or whether "the activity going on there [is] compatible with open public expression" (at paras 75-76). The Court noted that "Many government functions, from cabinet meetings to minor clerical functions, require privacy. To extend a right of free expression to such venues might well undermine democracy and efficient governance" (at para 76). However, "Changes in society and technology may affect the spaces where expression should be protected having regard to the values that underlie the guarantee" (at para 77).

In adopting this values + function approach, the Court rejected the argument that expression in all public locations should be protected, stating that:

> [79]… governments should not be required to justify every exclusion or regulation of expression under s. 1… Otherwise, uncertainty will prevail and governments will be continually forced to justify restrictions which, viewed from the perspective of history and common sense, are entirely appropriate. Restricted access to many government-owned venues is part of our history and our constitutional tradition. The *Canadian Charter* was not intended to turn this state of affairs on its head.

Applying the Supreme Court's reasoning to the ABCA and ABQB electronic devices policies, we might all agree that section 2(b) should not protect someone who decided to use a courtroom for a soapbox type of speech, or those who entered a courtroom carrying placards expressing an opinion about the matter before the court. We would not expect constitutional protection for those forms of expression in courtrooms because they conflict with the court's historical and actual functions. Courtrooms are places where trials and applications are conducted, i.e. witnesses give evidence, lawyers make arguments, and judgments and rulings are delivered. All of this occurs in a context we expect to be governed by the rule of law, procedural fairness, and the independence and impartiality of decision makers. Expression that clearly interrupted or interfered with court proceedings and the principles underlying them would probably not be protected under the Supreme Court's approach.

But does the use of electronic devices by members of the public necessarily interfere with the historical or actual functions of courtrooms? We must acknowledge the Supreme Court's point that changes in technology may influence our understanding of where particular forms of expression should be protected. Members of the public who are not accredited media members nevertheless may have a strong interest in using electronic devices to tweet or live-blog courtroom proceedings, and may do so in a way that is not disruptive of those proceedings or the administration of justice. They would be promoting the value of democratic discourse without interfering with the historical or actual functions of the place. We must be mindful of a number of Supreme Court decisions holding that courtrooms are places where justice must be seen to be done via hearings open to the public. For example, in its ruling in *Canadian Broadcasting Corp. v Canada (Attorney General)*, 2011 SCC 2, [2011] 1 SCR 19 [*Canadian Broadcasting Corp*] the Court stated that:

> [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.

It should be recognized that certain uses of electronic devices in courtrooms could actually promote the open court principle and the accessibility of the public to courtroom proceedings. (And note that the Supreme Court does not itself appear to have a policy limiting electronic devices in its courtroom).

Consider also the example of a self-represented litigant waiting for their matter to be called, who might wish to use their cell phone to read work-related emails or to be in contact by text message with daycare staff in the case of a sick child. This person would be engaged in expression that at the very least promoted the value of self-fulfillment without disrupting the courtroom's functions. Given the number of self-represented litigants in the courts these days, restricting their use of electronic devices in these sorts of circumstances may have widespread impact.

At the same time, other uses of electronic devices might still be disruptive to courts' functions and fall within the internal limits of section 2(b) protection – for example, taking photos of witnesses or parties in the courtroom. On the other hand, in the *Canadian Broadcasting Corp* case, the Supreme Court found that the media's taking of photos in the public areas of courthouses outside of actual courtrooms was protected expression (as was conducting interviews and broadcasting official audio recordings of court proceedings, although limits on all of these activities could be justified under section 1 of the *Charter*). Any analysis of whether freedom of expression should be protected must focus on the specific form and method of expression in the context of the specific public location that is at issue.

Perhaps the challenge in the minds of those who developed the policies in the Alberta courts was that if electronic devices were permitted to be used in courtrooms by anyone, it would be hard to control those uses. All of us have been in situations where someone's cell phone carelessly goes off, and this would be bound to happen if electronic devices were allowed to be turned on and used. Yet not everyone has to turn electronic devices off under these policies. Lawyers and members of the media are exempted, seemingly because the courts have more control over them than they do over members of the public in light of professional obligations and undertakings. But are the risks of unacceptable uses of electronic devices or inadvertent disruptions to the functions of courts by members of the general public sufficient to say that expression using electronic devices should not be protected under section 2(b)? I would prefer an interpretation of freedom of expression that would require this blanket limit on members of the public to be justified under section 1 of the *Charter*. Absolute bans are always more difficult to justify under section 1 than bans that are carefully tailored to the concerns underlying them (see e.g. *Montréal (City) v 2952-1366 Québec Inc.* at para 90). The courts should be required to justify why members of the public cannot use electronic devices even in circumstances where those devices are not reasonably likely to be disruptive of the courts' functions, yet promote important values underlying freedom of expression and the open court principle.

One final point. In a hallway chat about the ABCA Policy last week, my colleague Nigel Bankes remarked that he hoped the policy would be disseminated more broadly than through a Notice to the Profession, since the persons most likely to be affected were members of the general public. Even if readers disagree with my analysis, I hope that you will spread the word about this policy.