

The Role of Courts in Assisting Individuals in Realizing Their s. 2(b) Right to Information about Court Proceedings

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Introduction

Individuals are entitled, under s. 2(b) of the *Canadian Charter of Rights and Freedoms*, to information about court proceedings (including information about court documents).¹ One way of obtaining this information is through visits to courthouses, where individuals may attend trials and consult court documents, among other information-gathering activities. However, not all individuals are able to attend court in person, in which case they are dependent on information about court proceedings being made available in alternative ways in order to fully realize this aspect of their s. 2(b) right.

The news media play an important role in ensuring that individuals unable to attend court in person have access to information about court proceedings. Noting how difficult it is for many individuals to attend court in person, Cory J, in *Edmonton Journal v Alberta (Attorney General) (Edmonton Journal)*, a 1989 decision of the Supreme Court of Canada (SCC), went so far as to write that “[p]ractically speaking, [information about court proceedings] can only be obtained from the newspapers or other media” (emphasis added).² In a speech delivered on January 31, 2012, at Carleton University, Chief Justice McLachlin also referred to *Edmonton Journal* in noting that “[o]nly through the efforts of the press can the vast majority be informed of proceedings before the courts and their judgments” (emphasis added).³

In 1989, the year in which the SCC's judgment in *Edmonton Journal* was handed down, the media may have been the only party with the ability to disseminate court information quickly and efficiently to the public. Technological developments since this date, however, including the development of the World Wide Web, the rise of social networking sites such as Facebook and Twitter, and the wide availability of internet access, have significantly enhanced the ability of parties other than the media to disseminate court information broadly, quickly, accurately, and efficiently. As a result of these technological developments, the media are no longer the only party capable of conveying information about court proceedings to the public.

In this paper, I will challenge the idea that the media are the only party capable of assisting individuals unable to attend court in person to fully realize their s. 2(b) right to information about court proceedings. Technological developments have enabled a number of other parties, including members of the public and courts themselves, to play this role as well. I will also argue that as "guardians of the Constitution and of individuals' rights under it,"⁴ Canadian courts in particular ought to take all reasonable steps to assist individuals in fully realizing their s. 2(b) right to information about court proceedings, both by providing individuals with online access to information about court proceedings (directly and by partnering with third parties), and by implementing policies on the use of electronic devices in courts that minimize restrictions on the ability of individuals and news media to disseminate information about court proceedings to the public.

This is not to say, however, that courts should make all information about court proceedings available online; that limitations should never be imposed on the use, by the media or members of the public, of electronic devices in courtrooms; or that there should be no subsequent limitations on the ability of the media or members of the public to disseminate court information. As noted by Abella J in *AB v Bragg Communications Inc (AB v Bragg)*, citing Dickson J's judgment in *Attorney General of Nova Scotia v MacIntyre*, "there are cases in which the protection of social values must prevail over openness."⁵ This includes cases such as *AB v Bragg*, in which a girl's "privacy from the relentlessly intrusive humiliation of sexualized online bullying" was held to be a value that warranted restricting the dissemination of information about court proceedings and the application of the open-court principle.⁶

This paper will proceed as follows. I will begin by establishing that individuals are entitled, under s. 2(b) of the *Charter*, to information about court proceedings (see below). I will also demonstrate how this aspect of an individual's s. 2(b) right to freedom of expression is linked to, but separate from, the open-court principle. Next, I will discuss the technological developments that have enhanced the ability of parties other than the media (such as courts themselves and members of the public) to disseminate court information quickly and efficiently to the public (see page 100). In the part that follows, I will describe how Canadian courts have used these technological developments to provide a significant degree of court information to the public, either directly or in partnership with other parties. I will then describe the electronic-device policies enacted by Canadian courts. At the same time as Canadian courts have made additional information about court proceedings available online, a number of courts have also enacted policies regarding the use of electronic devices in courtrooms that—at least in some cases—have significantly limited the extent to which both media and members of the public can disseminate court information. Finally, I will discuss the types of limitations that might be imposed on court information made available online and on the use of electronic devices in courts, in order to protect countervailing constitutional rights and values such as privacy (see page 108).

Individuals Are Entitled, under s. 2(b) of the *Charter*, to Information about Court Proceedings

The Canadian *Charter of Rights and Freedoms*, which came into force in 1982, guarantees, in s. 2(b), the right to freedom of expression.⁷ This right protects both individuals' ability to express themselves and to receive expression.⁸ Furthermore, in certain contexts, s. 2(b) gives individuals the right to access information held by the government. Information to which individuals are entitled under s. 2(b) includes information about court proceedings (including "the nature of the evidence that was called, the arguments presented, and the comments made by the trial judge") as well as "information pertaining to court documents."⁹

In *Canadian Broadcasting Corp v New Brunswick (Attorney General)*, La Forest J linked the s. 2(b) right to information about court proceedings to the open-court principle.¹⁰ As La Forest J noted:

Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.¹¹

Thus, access to court information is protected under s. 2(b), as noted by McLachlin CJ and Abella J in their reasons for judgment in *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, on the basis that it is "necessary for the meaningful exercise of free expression on matters of public or political interest."¹²

Technological Changes Have Allowed Parties Other than News Media to Disseminate or Otherwise Make Available Large Amounts of Information about Court Proceedings

In order to assist individuals in exercising their s. 2(b) right to information about court proceedings, courts have opened their doors to the public, allowing individuals to attend court proceedings, review court documents, and otherwise be present in court facilities. However, as Cory J wrote in his reasons for judgment in *Edmonton Journal*, "[i]t is exceedingly difficult for many, if not most, people to attend a court trial. Neither working couples nor mothers or fathers house-bound with young children, would find it possible to attend court."¹³

One way for members of the public unable to attend court in person to obtain information about court proceedings is through the news media. The production capabilities possessed by the news media (including the services of reporters responsible for covering court proceedings or justice issues), and the distribution networks to which the news media have access, can and have been used to disseminate information quickly and accurately to the public at large, ensuring that the public has timely and regular access both to information about court proceedings and to commentary about such proceedings.

As noted above, in *Edmonton Journal*, Cory J wrote that “[p]ractically speaking, [information about court proceedings] can *only* be obtained from the newspapers or other media” (emphasis added).¹⁴ At least in part, however, this statement was rooted in the technological context of the period in which it was written. As I will discuss below, since *Edmonton Journal* was handed down, technological developments—including the development of the World Wide Web, the emergence and popularity of social networking websites such as Twitter and Facebook, the rapid increase in the number of individuals with access to the Internet, the greater speed with which individuals can access information on the Internet, and the development of smartphones—have broadened the range of parties capable of communicating large amounts of information (including information about court proceedings) to the public in a quick, accurate, and efficient manner, as well as the ways through which this information can be disseminated.

World Wide Web

1989—the year in which *Edmonton Journal* was handed down—was a landmark year in the evolution of digital communications. Specifically, in 1989, Tim Berners-Lee, at that time a researcher at the European Organization for Nuclear Research (CERN), wrote and circulated a proposal to create a system that he called the “World Wide Web.”¹⁵ Released outside CERN for the first time in 1991, the World Wide Web has enabled a wide range of parties to make information (including court information) available through the internet to the public through the creation of websites.¹⁶ It has been estimated that as of April 2015, there were approximately 932 million websites.¹⁷

Social Networking Sites

Social networking sites are another vehicle through which parties may make information (including information about court proceedings) available to the public. Johnny Ryan describes sixdegrees.com, established in 1997 by Andrew Weinreich, as “the first social network.”¹⁸ Ryan writes that this network “allowed users to build a personal network of their friends by entering the e-mail addresses of people they knew.”¹⁹ Three of the most popular social networks in existence in 2015 are Facebook, Twitter, and YouTube. One function of each of these social networks is to provide a platform for the sharing of information. Facebook writes on its website that as of December 31, 2014, it had 1.39 billion monthly active users,²⁰ Twitter

writes that 500 million tweets are sent each day;²¹ and YouTube states that “300 hours of video are uploaded to YouTube every minute.”²²

Rates of Internet Connectivity and Internet Speed

Another factor that has impacted the ability of the public to obtain information made available online is the degree to which the public has access to the internet. A 2012 study by Statistics Canada indicated that 83% of individuals in Canada have access to the internet at home.²³ Furthermore, this study showed that out of the households with internet access in 2012, 97% had a high-speed connection.²⁴ Internet access is also available in many public spaces (including certain courthouse libraries).²⁵ While not everyone has internet access (the 2012 study, for instance, noted that “[a]bout 20% of households reported having no [home internet] access because of the cost of the service or equipment”²⁶), the wide availability of internet access both in households and in public spaces has meant that a significant percentage of Canada’s population can access information about court proceedings made available online.

Handheld Devices through Which Information about Court Proceedings Can Be Transmitted and Received

A study released by Catalyst Canada & Group M Next indicated that in 2015 68% of Canadians owned a smartphone.²⁷ The prevalence of handheld devices with internet connectivity has meant that individuals can both obtain and disseminate information (including information about court proceedings) in or from a much greater range of spaces.

Canadian Courts Have Used Technological Developments to Expand the Range of Information about Court Proceedings Available to the Public

As described above, technological developments have given a broad range of parties the ability to disseminate information quickly and efficiently to the public. In a number of ways, as will be discussed in more detail below, Canadian courts have used these technological developments to disseminate information about court proceedings to the public. First, all Canadian courts operate websites on which they make available specific court information. Second, some Canadian courts convey information directly to individuals through email notifications. Third, Canadian courts work with third parties

to disseminate court information on third-party websites such as CanLII and Lexum. Fourth, some Canadian courts use social networking sites such as Twitter and Facebook to disseminate information about court proceedings to the public.

Canadian Courts Make Information about Court Proceedings Available on Their Websites

In each province and territory, courts operate websites that provide information about provincial courts, superior courts, and courts of appeal (among other courts and tribunals).²⁸ As well, websites have been created by the Supreme Court of Canada (SCC), the Federal Court, the Federal Court of Appeal, the Tax Court of Canada, and the Court Martial Appeal Court of Canada, among other courts.²⁹

Canadian courts make available, on their websites, a wide range of information about court proceedings. The exact range of information made available varies depending on the court in question. For instance, many courts make hearing lists available online, providing individuals with basic information about upcoming court cases.³⁰ While the SCC is the only Canadian court to make factums available online,³¹ several Canadian courts make court-record information available online.³² In addition, a number of courts make a subset of their judgments available through their websites.³³ Although no Canadian courts make audio of their proceedings available online, one court—the SCC—webcasts its proceedings live on its website³⁴ and makes the archives thereof available online.³⁵ Certain other Canadian courts are engaged (or have engaged) in pilot projects regarding the webcasting of court proceedings.³⁶

Canadian Courts Convey Information to Individuals Through Email and Other Notifications

In addition to making information available on websites, some courts have created electronic bulletins, mailing lists, or subscription services which they use to provide court information to individuals. The Federal Court, for instance, notes that

[b]y sending a blank message...with the words “media subscription” in the subject line, anyone may register to be sent Federal Court Bulletins. The bulletins provide notice of Court decisions for which there is special media interest, as well as other Court news such as judicial appointments or retirements.³⁷

Additionally, a number of courts (including the Federal Court) offer the opportunity to individuals to subscribe to Rich Site Summary (RSS) feeds as a way to receive notifications about decisions handed down and announcements made.³⁸

Canadian Courts Work with Third Parties to Make Information about Court Proceedings Accessible Online

In addition to making information about court proceedings available on their websites, some Canadian courts work with third parties to provide online access to information relating to court proceedings. The SCC, for instance, partners with Lexum to make its judgments available online.³⁹ Similarly, judgments rendered by the Courts of Québec are freely available online from the *Société québécoise d'information juridique* (SOQUIJ).⁴⁰ A number of courts indicate on their websites that their judgments are available through CanLII.⁴¹ Court judgments can also be accessed by the public for a fee through subscription-based services like Westlaw Canada and LexisNexis Quicklaw.⁴²

Canadian Courts Use Social Media Tools to Disseminate Information about Court Proceedings

Several Canadian courts use Twitter to disseminate information about court proceedings. For instance, the Nova Scotia Courts have several Twitter accounts: (@CourtsNS_NSSC ["Get decisions of the Nova Scotia Supreme Court and Supreme Court Family Division"]; @CourtsNS_News ["Keep up on news from the Courts of Nova Scotia"]; and @CourtsNS_NSCA ["Get decisions of the Nova Scotia Court of Appeal"]); the Manitoba Courts have a Twitter account, (@MBCourts ["This account will provide notification of Manitoba court news, such as judicial appointments, notices and practice directions and website initiatives"]); and the Court of Québec has two Twitter accounts: (@cour_du_quebec and @CQ_info_avocats).⁴³ Lexum tweets information about recently released SCC decisions at @Lexum_inc.⁴⁴

Very few Canadian courts use Facebook and YouTube as mechanisms through which to disseminate information about court proceedings. Only the Supreme Court of Canada appears to have an official Facebook page.⁴⁵ As well, the only Canadian court to have a YouTube channel appears to be the Saskatchewan Law Courts.⁴⁶

Courts Have Restricted the Extent to Which Individuals Can Disseminate Information Using Electronic Devices in Courtrooms

As described above, Canadian courts have used technological opportunities to disseminate a significant amount of information about court proceedings to the public. However, while doing so, they have also enacted policies restricting the extent to which media and individuals can use electronic devices to disseminate information about court proceedings to the public. In enacting these policies, courts have limited the extent to which both individuals and the news media can assist individuals to fully realize their s. 2(b) right to freedom of expression.

Generally speaking, policies enacted by Canadian courts regarding the use of electronic devices in courts both indicate who may use electronic devices in courts while courts are in session and set out the range of uses that are either permitted or prohibited. The types of electronic device policies enacted by Canadian courts can be situated on a spectrum from most permissive to least permissive (or, said differently, from least restrictive to most restrictive).⁴⁷ In this section, I will describe three categories of policies on this spectrum: policies that can be characterized as permissive; policies under which some types of uses are prohibited and others permitted; and policies that can be characterized as restrictive.⁴⁸

Permissive Policies

The most permissive policies enacted by Canadian courts with respect to the use of electronic devices in courtrooms permit a wide range of individuals—including but not limited to members of the media and members of the public—to receive and transmit text on a range of electronic devices while in courtrooms and while court is in session, provided the devices are used discreetly and do not disrupt court proceedings. The most permissive policies also permit audio recording for a range of uses. Even the most permissive policies enacted by Canadian courts, however, do not permit video recording without prior permission, or voice communication while in courtrooms.

The most permissive policy adopted by Canadian courts with respect to the use of electronic devices in courtrooms is that of the SCC.⁴⁹ The SCC's policy indicates that "[t]he use of laptops and hand-held devices such as Blackberries and cell phones is permitted, as long

as the sound is turned off.”⁵⁰ The SCC “provides [both] power outlets at the media seats as well as free wireless access.”⁵¹ In addition, the SCC is unique amongst Canadian courts in permitting the use of audio recorders in the courtroom by both media and the public without requiring prior permission from the presiding judicial officer.⁵²

The policy on the use of electronic devices in courtrooms enacted by the Ontario Court of Justice (OCJ) also permits the use, by all individuals, “of electronic communication devices in silent or vibrate mode.”⁵³ A number of types of uses, however, are explicitly prohibited under this policy, including the taking of photos and videos.⁵⁴ Audio recording is permitted for a range of individuals (namely counsel, licensed paralegals, court staff, members of the media and litigants) for note-taking purposes.⁵⁵ This policy expressly indicates that “[m]embers of the public are also permitted to make audio recordings for note-taking purposes...if the express permission of the presiding judicial officer is first obtained.”⁵⁶

A third example of a permissive policy is the policy enacted by the Courts of Nova Scotia that applies in the Court of Appeal, Supreme Court, Supreme Court Family Division, Provincial Court, Domestic Violence Court, Drug Court, Small Claims Court, Probate Court, and Bankruptcy Court.⁵⁷ This policy, referred to specifically as the “permissive” version of the electronic devices policy, can be contrasted with the “restrictive” version of this policy (discussed below), which applies in the Youth Court, Mental Health Court, and Family Court.⁵⁸

Under the Courts of Nova Scotia’s permissive policy, “the transmission of text information about court proceedings from inside a courtroom while court is in session, for publication and by any means (including Twitter, Texting, E-mail, etc.), *is allowed* unless the presiding Judge orders otherwise” (emphasis in original).⁵⁹ Under this policy, members of the media may also make audio recordings of court proceedings in order to “augment their note-taking.”⁶⁰

The Federal Courts have also enacted permissive policies for the use of electronic devices in courtrooms. The Federal Court’s policy document indicates that “[f]or the purpose of note-taking or electronic communication, [electronic devices]...are generally permitted in court provided they do not cause any disturbance to the proceedings. This applies to members of the media, counsel and members of the public.”⁶¹ The Federal Court permits audio recordings to be made by accredited media for note verification

purposes.⁶² Similarly, the Federal Court of Appeal's policy document indicates that "[t]he use of electronic devices in the courtroom is permitted, provided the devices are used in 'silent' or 'vibration' mode so as not to affect the decorum, the good order and the course of the proceedings."⁶³

Lastly, under the Policy on Use of Electronic Devices in Courtrooms in use in the Courts of British Columbia (another policy that, at least with respect to the use of electronic devices in the British Columbia Court of Appeal, can be characterized as permissive), it is noted that in Court of Appeal courtrooms, "any person may use an electronic device to transmit or receive text in a discreet manner that does not interfere with the proceedings."⁶⁴

Policies that Permit the Use of Electronic Devices by Some Categories of Individuals While Restricting Use by Members of the Public

A number of policies enacted by Canadian courts permit the use of electronic devices in courtrooms by certain individuals or categories of individuals (for instance, media), while at the same time prohibiting their use by members of the public. Some of these policies are framed as total prohibitions on the use of electronic devices in courts, with certain categories of users (not including members of the public) exempted from this prohibition. Other policies explicitly prohibit the use of electronic devices in courtrooms by members of the public while permitting their use by others.

1. Total Prohibitions, With Certain Categories of Users Exempted (None Being Members of the Public)

One policy framed as a total prohibition on the use of electronic devices in courtrooms, with certain categories of users exempted from this prohibition, is that of the Court of Queen's Bench of Alberta.⁶⁵ This policy states that "[a]ll devices must be turned off in courtrooms."⁶⁶ However, both counsel and "members of the media who have signed an undertaking with the Court" are "exempted from this restriction."⁶⁷ A second policy consistent with this category is that of the Manitoba courts, which sets out that "[o]nly members of the legal profession and eligible media may use electronic devices to transmit and receive data during a court proceeding or hearing before a court."⁶⁸ A third policy consistent with this category is the New Brunswick Courts' policy document, which states that "[t]ext shall not be transmitted."⁶⁹ An exception is made, under the New Brunswick Courts' policy

document, for journalists, who are permitted to “use electronic devices to capture notes and transmit text.”⁷⁰

The Saskatchewan Law Courts’ Twitter protocol

allows media who have been accredited by the Court Services Division of the Ministry of Justice to activate and use in silent mode, a mobile phone, small laptop or similar piece of equipment to perform live text-based communications from court, unless the presiding judge gives instructions otherwise.⁷¹

More broadly, however, in the Saskatchewan Law Courts, “all [electronic and wireless] devices must be turned off in courtrooms.”⁷² Several categories of users are exempted. Specifically, “[l]egal counsel and those members of the media who have been accredited ... may keep their devices turned on in silent mode and use them to receive and transmit information, provided they are not disruptive to court proceedings.”⁷³ Media may also make audio recordings “for purposes of accuracy.”⁷⁴

Under the Policy on Use of Electronic Devices in Courtrooms in use in the British Columbia courts, “[e]xcept as permitted under this policy, the use of electronic devices in courtrooms to transmit and receive text is prohibited.”⁷⁵ In courtrooms of the Supreme Court and the Provincial Court, both accredited media and lawyers who are members of the Law Society of British Columbia “may use electronic devices to transmit and receive text in a discreet manner that does not interfere with the proceedings.”⁷⁶ In all British Columbia courts, audio recordings are only able to be made by accredited media, and only for “verifying...notes.”⁷⁷

Lastly, under the policy implemented by the Supreme Court of Yukon, “[w]ith the exception of counsel and accredited media, no real-time communication is permitted from any courtroom in which proceedings are taking place.”⁷⁸ This policy document explicitly states that “counsel and accredited media are permitted to use devices...inside the courtroom for the purposes of making notes and/or transmitting digital information about the proceedings, including tweeting and blogging.”⁷⁹

2. *Certain Categories of Users Permitted to Use Electronic Devices; Members of the Public Expressly Prohibited From Use*

One policy that explicitly prohibits the use of electronic devices in courtrooms by members of the public, while permitting their use by

others, is that of the Court of Appeal of Alberta, which states that “[m]embers of the public are not permitted to use electronic devices in the courtroom. Electronic devices possessed by members of the public must be turned off and kept out of sight.”⁸⁰ However, lawyers and members of the media are—with certain exceptions—“permitted to use electronic devices in the courtroom.”⁸¹

A second policy consistent with this category is the policy enacted by the Courts of Prince Edward Island, which states that “[m]embers of the public are not permitted to use electronic devices in the courtroom, unless the presiding judge orders otherwise.”⁸² Authorized Persons, however (defined by the court as “mean[ing] only members of the Bar, law clerks, law students, law enforcement officers, self-represented litigants, and members of the media”), “may use an Electronic Device in silent mode and in a discreet and unobtrusive manner in the Court.”⁸³ For greater clarity, this policy states that “[a]n Authorized Person may use an Electronic Device to transmit information from the courtroom to a publicly accessible medium (e.g., via Twitter, Facebook, or live blog).”⁸⁴ Authorized persons are also permitted to make audio recordings for the purpose of note-taking.⁸⁵

A third policy consistent with this category is that of the Ontario Superior Court of Justice.⁸⁶ Under this policy, “[m]embers of the public are *not permitted* to use electronic devices in the courtroom unless the presiding judge orders otherwise” (emphasis in original).⁸⁷ By contrast, under this policy

the use of electronic devices in silent mode and in a discreet and unobtrusive manner is *permitted* in the courtroom by counsel, paralegals licensed by the Law Society of Upper Canada, law students and law clerks assisting counsel during the proceeding, self-represented parties, and media or journalists [emphasis in original].⁸⁸

Only counsel, self-represented parties, media, and journalists are allowed to make audio recordings, and only for note-taking purposes.⁸⁹

A fourth policy consistent with this category is that of the Nunavut Court of Justice.⁹⁰ Under this policy, media can “use live text-based communication technology to send copy to their employers from the courthouse and courtrooms.”⁹¹ By contrast, “[t]he use of

live text-based communications by members of the public in the courthouse or courtrooms is prohibited without special leave.”⁹²

3. *Restrictive Policies*

The most restrictive policies adopted by Canadian courts prohibit—without exception—all persons from using electronic devices, in courtrooms, to transmit or receive text. One example of a restrictive policy is that enacted by the Courts of Nova Scotia for application in the Youth Court, Mental Health Court, and Family Court. Under this policy, “the transmission of text information about court proceedings from inside a courtroom while court is in session, for publication and by any means ..., *is not allowed* without the permission of the presiding Judge” (emphasis in original).⁹³

The policy enacted by the Northwest Territories Courts also falls within this range of the spectrum.⁹⁴ This policy notes that “[t]he use of [electronic] devices...is prohibited” for the general public.⁹⁵ Furthermore, although lawyers, justice professionals, and members of the media may use electronic devices in the courtroom, they must “turn [] off or otherwise disable [...]the device’s transmitting and receiving features.”⁹⁶ This policy specifically notes that “[e]mails and texts are not to be sent or received; [t]here is no electronic broadcasting in any manner whatsoever from the courtroom; audio output is turned off or otherwise disabled (silent mode is on).”⁹⁷ As well, no photographs are to be taken, nor audio or videos recorded.⁹⁸

The policy enacted by the Courts of Québec, as well, can be situated on the restrictive end of the spectrum.⁹⁹ This policy provides that “[w]itnesses and members of the public must always turn off their electronic devices within a courtroom and keep them turned off.”¹⁰⁰ This policy also provides that “[i]t is prohibited at all times ...to send or communicate text messages, observations, information, notes, photographs or audio or visual recordings from within a courtroom to outside a courtroom.”¹⁰¹

Cases in Which the Protection of Other Social Values Must Prevail over the s. 2(b) Right to Information about Court Proceedings

I am not arguing that courts should make all information about court proceedings available online, or that limitations should never be imposed on the use, by members of the public, of electronic devices

in courtrooms. Rather, I am arguing that given that individuals are entitled to information about court proceedings as an aspect of their s. 2(b) right to freedom of expression, the starting point with respect to both information made available by courts online and the policies put in place by courts with respect to the use, by media and members of the public, of electronic devices in courtrooms, should be openness. This starting point is consistent with recent statements of the SCC concerning the “critical importance of the open court principle”¹⁰² as well as with the approach taken by the SCC to the s. 2(b) analysis more broadly.¹⁰³

However, as is the case with any other aspect of the s. 2(b) right to freedom of expression—or any *Charter* right more broadly—it is entirely appropriate for courts or legislatures to impose reasonable limitations on the exercise of this right in order to protect other countervailing constitutional rights and values. In an address entitled “The Relationship Between the Courts and the Media,” McLachlin CJ noted that “[c]oncerns of privacy, security and court process may ... justify limits on *how* the media go about gathering and transmitting information about judicial proceedings” (emphasis in original).¹⁰⁴ Similarly, such concerns may justify limits, imposed by courts, on how members of the public might go about gathering and transmitting such information; on how courts themselves go about transmitting information relating to judicial proceedings; and on what types of information are collected and disseminated, and by whom.

Commentators have suggested a number of ways in which the collection and dissemination of court information should be limited in order to take into consideration other countervailing constitutional rights and social values. Nicolas Vermeys, for instance, suggests that concerns about the impact of eAccess to court records on privacy, a “social value of superordinate importance,”¹⁰⁵ could be addressed in part by the use of technological means to limit access to or the use of court information (Vermeys, Chapter 4 of this volume).

Vermeys suggests that “[i]n the case of eAccess, Code [or eAccess software] can be used to control access to a document, by means of a restricted view technique, such as blanking. It could also be used to set constraints on consultation periods, to block aggregation tools, or to simply limit research functions within certain types of documents” (Vermeys, Chapter 4 of this volume).

Karen Eltis has also written about the need to guard against “unrestrained disclosure” of court information, which she argues

can “disturbingly chill access to the courts.”¹⁰⁶ Eltis argues that one important step is to “clearly define” both the values of privacy and access.¹⁰⁷ As she put it:

If privacy is more broadly understood as deriving from human dignity then it can be viewed as a facilitator rather than detractor of accessibility and comport with the court’s various duties (to foster transparency and to protect litigants and control its documents). In other words, judges would presumably be more inclined to use their discretion to protect litigants’ (and other participants’) privacy if doing so would not be regarded as sacrificing openness or transparency but rather as a facilitator of access and enabler of court control over its records.¹⁰⁸

A complete discussion of the ways in which the collection, dissemination, and use of court information should be limited in order to take into consideration other countervailing constitutional rights and social values such as privacy is beyond the scope of this paper.¹⁰⁹ Such a discussion, however, plays an integral part in any attempt to implement the principles and core ideas discussed in this paper (for instance the reconsideration, by Canadian courts, of their policies regarding the use of electronic devices in courtrooms).

Conclusion

For many years, the press was one of, if not the only, entity capable of disseminating information about court proceedings quickly and efficiently to the public. As a result, it played, and was recognized by Cory J in *Edmonton Journal* as playing, a “fundamentally important” role in assisting individuals unable to attend court in person to realize their s. 2(b) right to information about court proceedings.¹¹⁰

In this paper, I have argued that it is no longer the case that the news media are the only entities capable of assisting individuals in fully realizing their s. 2(b) right to information about court proceedings. As outlined above, technological developments have significantly enhanced the ability of parties other than the news media—including members of the public and courts themselves—to disseminate information about court proceedings to the public.

I have also argued that empowered by these technological developments, Canadian courts in particular—as “guardians of the

Constitution and of individuals' rights under it"¹¹¹—can and should play a central role in assisting individuals in fully realizing their s. 2(b) right to information about court proceedings. Canadian courts can do so both by providing individuals with information about court proceedings (directly and by partnering with third parties), and by implementing policies on the use of electronic devices in courts that minimize restrictions on the ability of individuals and news media to disseminate information about court proceedings to the public.

I have argued that the starting point with respect to both of these sets of policies should be openness. As is the case with the application of the s. 2(b) right to freedom of expression in other contexts, however, it is appropriate to impose reasonable limits on the collection, use, and dissemination of court information in order to protect countervailing constitutional rights and values, such as privacy, security, courtroom management, and fairness in the administration of justice.¹¹²

As described above, while some courts, such as the SCC, the Federal Courts, the Courts of British Columbia, the Courts of Nova Scotia, and the Manitoba Courts, have provided online access to a wide range of court information, other courts have not followed suit to the same degree. As well, although certain Canadian courts such as the SCC, the Federal Courts, the Ontario Court of Justice, the Courts of Nova Scotia and the Courts of British Columbia have adopted policies with respect to the use of electronic devices in courts that can be characterized—at least in certain ways—as permissive, other courts have adopted more restrictive policies.

In reconsidering their policies relating to the collection, use, and dissemination of court information, courts will need to make a series of decisions with respect to the types of information that should be made available online by courts, the ways through which this information should be made available, and the reasonable restrictions that might be applied both to the types of information made available by courts and the use of electronic devices in courtrooms. While each court could consider these questions independently, they could also be considered in the context of a national conversation.¹¹³ Such an initiative—for instance, one that is led or facilitated by the Canadian Judicial Council—could result in the creation of best-practice guidelines that could be adopted by courts across the country. As well, to the extent that certain courts are not taking steps to make information available due to a lack of resources, a nation-wide discussion could lead to cost-sharing or resource-sharing solutions being proposed and adopted.

Ultimately, the responsibility to provide individuals with access to information about court proceedings need not and must not be borne by news media alone. Rather, it is through the joint efforts of the press, the courts, and members of the public that individuals unable to attend court in person will fully realize their s. 2(b) right to access information about court proceedings. Courts, in particular, play an integral role in this process. In addition to setting their own policies with respect to the types and extent of court information made available online, courts also set policies that have a significant impact on the ability of both media and members of the public to disseminate information about court proceedings (for instance, policies with respect to the use of electronic devices in courts). Courts should draft these policies with an eye to the “fundamentally important” role that they play in assisting individuals in fully realizing their s. 2(b) right to information about court proceedings, as well as with an eye to all relevant countervailing constitutional rights and values.¹¹⁴

Notes

- 1 *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. See *Edmonton Journal v Alberta (Attorney General)* [1989] 2 SCR 1326 at paras 10–11, 64 DLR (4th) 577 [Edmonton Journal].
- 2 *Edmonton Journal*, *supra* note 1 at para 10. In 2011, in *Canadian Broadcasting Corp v. Canada (Attorney General) (CBC)*, Deschamps J, who delivered the judgment of the Court, echoed Cory J’s remarks, writing that without the presence of journalists in courthouses, “the public’s ability to understand our justice system would depend on the tiny minority of the population who attend hearings.” *Canadian Broadcasting Corp v Canada (Attorney General)* 2011 SCC 2 at para 45, [2011] 1 SCR 19 [CBC].
- 3 Chief Justice Beverley McLachlin, “The Relationship Between the Courts and the Media (Address at Carleton University)” (31 January 2012) *Supreme Court of Canada*, online: <<http://www.scc-csc.gc.ca/court-cour/judges-juges/spe-dis/bm-2012-01-31-eng.aspx>>.
- 4 *Hunter v Southam Inc*, [1984] 2 SCR 145 at 169, 11 DLR (4th) 641.
- 5 *Attorney General of Nova Scotia v MacIntyre* [1982] 1 SCR 175 at 186–87, 132 DLR (3d) 385, cited in *AB v Bragg Communications Inc*, 2012 SCC 46 at para 13, [2012] 2 SCR 567 [AB v Bragg].
- 6 *AB v Bragg*, *supra* note 5 at para 14. McLachlin, *supra* note 3 (other types of concerns that might warrant limiting the dissemination of court information include “security and court process”).

- 7 *Charter*, *supra* note 1 at s 2(b).
- 8 As noted by the Court in *Ford v Québec (Attorney General)*, the s. 2(b) right to freedom of expression protects “listeners as well as speakers” (*Ford v Québec (Attorney General)* [1988] 2 SCR 712 at para 58, 54 DLR (4th) 577).
- 9 *Edmonton Journal*, *supra* note 1 at paras 10–11.
- 10 *Canadian Broadcasting Corp v New Brunswick (Attorney General)*; *Re R. v. Carson*, [1996] 3 SCR 480, 182 NBR (2d) 81.
- 11 *Ibid.* at para 23.
- 12 *Ontario (Public Safety and Security) v Criminal Lawyers’ Association* 2010 SCC 23 at para 36, [2010] 1 SCR 815.
- 13 *Edmonton Journal*, *supra* note 1 at para 10.
- 14 *Edmonton Journal*, *supra* note 1 at para 10.
- 15 Tim Berners-Lee, *Weaving the Web* (New York: Harper Collins, 1999) at 21–23.
- 16 Neither the internet nor the World Wide Web were discussed by the SCC until many years after they had been introduced. The first SCC case to reference the internet, for instance, was *United Food and Commercial Workers, Local 1518 (UFCW) v Kmart Canada Ltd*, a 1999 decision. In this decision, Cory J, who delivered the judgment of the Court, referenced “Internet mailing” as a mechanism through which people could be persuaded not to buy something. Similarly, the SCC’s first reference to the World Wide Web is in a 2004 decision (*Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers*, 2004 SCC 45, [2004] 2 SCR 427).
- 17 Internet Live Stats, “Total Number of Websites,” online: <<http://www.internetlivestats.com/total-number-of-websites/>>.
- 18 Johnny Ryan, *A History of the Internet and the Digital Future* (London: Reaktion Books, 2010) at 149.
- 19 *Ibid.*
- 20 Facebook, “Company Info,” online: <newsroom.fb.com/company-info/>.
- 21 Twitter, “Company,” online: <<https://about.twitter.com/company>>.
- 22 YouTube, “Statistics,” online: <<https://www.youtube.com/yt/press/statistics.html>>.
- 23 Statistics Canada, *Canadian Internet Use Survey, 2012* at 1, online: <www.statcan.gc.ca/daily-quotidien/131126/dq131126d-eng.htm>.
- 24 *Ibid.* at 2.
- 25 See e.g., Courthouse Libraries BC, “Vancouver Branch,” online: <www.courthouselibrary.ca/about/libraries/vancouver.aspx?Libid=faad9cb1-86c2-4929-a515-11910eb4b30d>.
- 26 Statistics Canada, *supra* note 23 at 2.
- 27 Brett Langlois, “With Growth Comes Changes: The Evolving Canadian Mobile Landscape,” *Catalyst Canada*, online: <catalyst.ca/2015-canadian-smartphone-market/>.

- 28 See, for instance, Court of Appeal of British Columbia (1 January 2009), online: <www.courts.gov.bc.ca/Court_of_Appeal/>; Supreme Court of British Columbia (1 January 2009), online: <www.courts.gov.bc.ca/supreme_court/>; Provincial Court of British Columbia, online: <www.provincialcourt.bc.ca/>; Court of Appeal of Alberta, online: <<https://albertacourts.ca/court-of-appeal/>>; Court of Queen's Bench of Alberta, online: <<https://albertacourts.ca/court-of-queens-bench/>>; Provincial Court of Alberta, online: <<https://albertacourts.ca/provincial-court/>>; Saskatchewan Law Courts, online: <www.sasklawcourts.ca/>; Manitoba Court of Appeal (28 February 2014), online: <www.manitobacourts.mb.ca/court-of-appeal/>; Manitoba Court of Queen's Bench (24 November 2014), online: <<http://www.manitobacourts.mb.ca/court-of-queens-bench/>> accessed May 1, 2015; Manitoba Provincial Court (March 13, 2014), online: <www.manitobacourts.mb.ca/provincial-court/>; Court of Appeal for Ontario, online: <www.ontariocourts.ca/coa/en/>; Ontario Superior Court of Justice, online: <www.ontariocourts.ca/scj/>; Court of Appeal of Quebec, online: <courdappelduquebec.ca/en/>; Superior Court of Québec, online: <www.tribunaux.qc.ca/mjq_en/c-superieure/index-cs.html>; Court of Québec, online: <www.tribunaux.qc.ca/mjq_en/c-quebec/index-cq.html>; Nova Scotia Court of Appeal, online: <www.courts.ns.ca/Appeal_Court/NSCA_home.htm>; Nova Scotia Provincial Court, online: <www.courts.ns.ca/Provincial_Court/NSPC_home.htm>; New Brunswick Court of Appeal, online: <<https://www.gnb.ca/cour/03COA1/index-e.asp>>; New Brunswick Court of Queen's Bench, online: <<https://www.gnb.ca/cour/04CQB/index-e.asp>>; New Brunswick Provincial Court, online: <<https://www.gnb.ca/cour/06PCNB/index-e.asp>>; Supreme Court of Newfoundland and Labrador (Court of Appeal), online: <www.court.nl.ca/supreme/appeal/index.html>; Supreme Court of Newfoundland and Labrador (General Division), online: <www.court.nl.ca/supreme/general/index.html>; Provincial Court of Newfoundland and Labrador, online: <<http://www.court.nl.ca/provincial/>>; Court of Appeal of Prince Edward Island, online: <www.courts.pe.ca/appeal/>; Supreme Court of Prince Edward Island, online: <www.courts.pe.ca/supreme/>; Provincial Court of Prince Edward Island, online: <www.courts.pe.ca/index.php?number=1051070>; Court of Appeal for the Northwest Territories, online: <<https://www.nwtcourts.ca/Courts/ca.htm>>; Supreme Court of the Northwest Territories, online: <<https://www.nwtcourts.ca/Courts/sc.htm>>; Territorial Court of the Northwest Territories, online: <<https://www.nwtcourts.ca/Courts/tc.htm>>; Court of Appeal for Yukon, online: <www.yukoncourts.ca/courts/appeal.html>; Supreme Court of Yukon, online: <www.yukoncourts.ca/courts/supreme.html>; Territorial Court of Yukon, online: <www.yukoncourts.ca/courts/territorial.html>; Nunavut Court of Justice (June 2, 2011), online: <www.nucj.ca/welcome.htm>.

- 29 See Supreme Court of Canada (8 April 2015), online: <www.scc-csc.gc.ca/home-accueil/index-eng.aspx>; Federal Court of Canada (2 November 2013), online: <cas-ncr-ntero3.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Index>; Federal Court of Appeal (14 June 2013), online: <cas-ncr-ntero3.cas-satj.gc.ca/portal/page/portal/fca-caf_eng>; Tax Court of Canada (10 June 2014), online: <cas-ncr-ntero3.cas-satj.gc.ca/portal/page/portal/tcc-cci_Eng/Index>; and Court Martial Appeal Court of Canada (13 February 2015), online: <www.cmac-cacm.ca/index-eng.shtml>.
- 30 See, for instance, Supreme Court of Canada, "Scheduled Hearings," online: <www.scc-csc.gc.ca/case-dossier/info/hear-aud-eng.aspx>; Federal Court of Canada, "Hearing Lists," online: <cas-ncr-ntero3.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Hearing_Lists>; Federal Court of Appeal, "Hearing Schedule," online: <cas-ncr-ntero3.cas-satj.gc.ca/portal/page/portal/fca-caf_eng/hearings-auditions_eng>; Tax Court of Canada, "Hearing Schedule," online: <cas-ncr-ntero3.cas-satj.gc.ca/tcc_hearings/hearings_schedule_e.php>; Court Martial Appeal Court of Canada, "Hearing List," online: <www.cmac-cacm.ca/business/hearing_list-eng.shtml>; Court of Appeal for British Columbia, "Hearing List," online: <www.courts.gov.bc.ca/court_of_appeal/hearing_list/>; Court of Appeal of Alberta, "Hearing Lists," online: <<https://albertacourts.ca/court-of-appeal/sittings-hearing-lists-locations/current-hearing-lists>>; Manitoba Court of Appeal, "Scheduled Appeal Hearings," online: <www.manitobacourts.mb.ca/court-of-appeal/location-and-hours/court-schedule/>; Court of Appeal for Ontario, "Case List," online: <www.ontariocourts.ca/coa/en/caselist/>; Court of Appeal of Quebec, "Rolls," online: <courdappelduquebec.ca/en/rolls/>; The Courts of Nova Scotia, "Dockets of the Courts," online: <www.courts.ns.ca/General_Content/dockets_on_line.htm>; Supreme Court of Newfoundland and Labrador (Court of Appeal), "Sitting Schedule," online: <www.court.nl.ca/supreme/appeal/schedule.html>; Prince Edward Island Court of Appeal, "Court Schedule," online: <www.gov.pe.ca/courts/supreme/schedule/index.php3>; Northwest Territories Courts, "Court Schedule," online: <<https://www.nwtcourts.ca/Schedule/schedule.htm>>.
- 31 See, for instance, Supreme Court of Canada, "SCC Case Information – Factums on Appeal – 35918," online: <www.scc-csc.gc.ca/case-dossier/info/af-ma-eng.aspx?cas=35918>.
- 32 See, for instance, Supreme Court of Canada, "SCC Case Information – Search," online: <www.scc-csc.gc.ca/case-dossier/info/search-recherche-eng.aspx>; Federal Courts, "Proceedings Queries," online: <cas-ncr-ntero3.cas-satj.gc.ca/IndexingQueries/infp_queries_e.php>; Manitoba Courts, "QB Court Registry," online: <www.jus.gov.mb.ca>. In British Columbia, court record information is available online on British Columbia Ministry of Justice, "Court Services Online," online: <<https://>>

- justice.gov.bc.ca/cso/index.do>. There is a link to Court Services Online on the Courts of British Columbia homepage (www.courts.gov.bc.ca).
- 33 See, for instance, Courts of British Columbia, "Search Judgments," online: <www.courts.gov.bc.ca/search_judgments.aspx?court=0>; Manitoba Courts, "Recent Judgments," online: <www.manitobacourts.mb.ca/court-of-appeal/recent-judgments/>; Court of Appeal for Ontario, "Decisions of the Court," online: <www.ontariocourts.ca/decisions_index/en/>; Federal Court of Canada, "Decisions of the Federal Court," online: <decisions.fct-cf.gc.ca/fc-cf/en/nav.do>; Court of Appeal of New Brunswick, "Decisions," online: <www.gnb.ca/cour/03COA1/decisions-e.asp>; Courts of Nova Scotia, "Decisions of the Courts of Nova Scotia," online: <www.courts.ns.ca/Decisions_Of_Courts/decisions_recent.htm>; Yukon Courts, "Territorial Court Judgments," online: <www.yukoncourts.ca/courts/territorial/judgments.html>; Government of the Northwest Territories, "Judgment Database Search," online: <<https://www.nwtcourts.ca/dbtw-wpd/nwtjqbe.shtml>>.
 - 34 Supreme Court of Canada, "Webcasts by Session," online: <www.scc-csc.gc.ca/case-dossier/info/webcasts-webdiffusions-eng.aspx>.
 - 35 Ibid.
 - 36 See Courts of British Columbia, "British Columbia Court of Appeal Webcast Pilot Project," online: <www.courts.gov.bc.ca/Court_of_Appeal/webcast/Webcast.html>; Manitoba Courts, "Information for Media," online: <www.manitobacourts.mb.ca/information-for-media/#initiative>; Courts of Nova Scotia, "Live Webcasts," online: <www.courts.ns.ca/Webcasts/webcasts_live.htm>; Ontario Ministry of the Attorney General, "Webcasting of Court Proceedings Begins Today" (7 September 2007), online: <www.attorneygeneral.jus.gov.on.ca/english/news/2007/20070907-cam-nr.asp>.
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- Prince Edward Island, "Court Decisions," online: <www.courts.pe.ca/supreme/index.php?number=1050808&lang=E>; Supreme Court of Newfoundland and Labrador, "Decisions of the Court of Appeals," online: <www.court.nl.ca/supreme/appeal/decisions.html>; Nunavut Court of Justice, "Decisions of the Nunavut Court of Justice," online: <www.nucj.ca/decisions.htm>.
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- 100 Ibid.
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- 102 *AB v Bragg*, *supra* note 5 at para 13.

- 103 See e.g., *Irwin Toy Ltd v Quebec (Attorney General)* [1989] 1 SCR 927, 58 DLR (4th) 577.
- 104 McLachlin, *supra* note 3.
- 105 Citing to *MacIntyre*, *supra* note 5 at para 14 and *AB v Bragg*, *supra* note 5 at para 13.
- 106 Karen Eltis, "The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context," *McGill Law Journal* 56 (2011):289 at para 20.
- 107 *Ibid.* at para 20.
- 108 *Ibid.* at para 56.
- 109 For works that address this issue, see Vermeys, Chapter 4 of this volume; Eltis, *supra* note 106; Amanda Conley et al., "Sustaining Privacy and Open Justice in the Transition to Online Court Records: A Multidisciplinary Inquiry," *Maryland Law Review* 71 (2012) at 772; Jane Bailey, "'Sexualized Online Bullying' Through an Equality Lens: Missed Opportunity in *AB v. Bragg?*," *McGill Law Journal* 59:3 (2014) at 709; Timothy Bottomer, "Dagenais 2.0: Technology and its Impact on the Dagenais Test," *UBC L Rev* 45 (2012) at 1.
- 110 *Edmonton Journal*, *supra* note 1 at 10.
- 111 *Hunter*, *supra*, note 4 at 169.
- 112 As noted in the Nunavut Court of Justice's policy on use of technology in the courtroom, "[t]he use of live text-based technology inside a courtroom has the potential to interfere with the administration of justice. In the context of a criminal trial, live text-based communication or audio recording technology from inside a courtroom can be used to inform or coach potential witnesses about developments in the trial or evidence heard from other witnesses. This type of communication can circumvent a Court's exclusion order and influence the testimony to be given by subsequent witnesses. Justice may suffer as a result. Information posted from the courtroom on, for example, Twitter or Facebook about evidence ruled inadmissible by a Court may also adversely influence a jury. In a civil or family law context, simultaneous reporting from the courtroom may create additional pressure on witnesses by distracting or worrying them" (Nunavut Court of Justice, "Media Use of Technology in the Courtroom and Courthouse", *supra* note 90). See also McLachlin, *supra* note 3, where McLachlin CJ writes both that "sometimes the pressing concerns of privacy or security trump openness" and that "[c]oncerns of privacy, security and court process may also justify limits on *how* the media go about gathering and transmitting information about judicial proceedings" (emphasis in original).
- 113 One example of such an initiative is the National Guidelines Regarding the Use of Electronic Devices in Court Proceedings, developed by a Canadian Center for Court Technology (CCCT) working group and

released in December 2012 (Canadian Centre for Court Technology, “National Guidelines Regarding the Use of Electronic Communication Devices in Court Proceedings” (17 December 2012), online: <wiki.modern-courts.ca/images/9/96/Use_of_Electronic_Communication_Devices_in_Court_Proceedings.pdf>. As well, in the Federal Court of Canada’s Policy on Public and Media Access, it is noted that “[t]he Court is committed to ongoing consultation about this policy with representatives of the media, the bar and others, and to making adjustments in its application with experience” (Federal Court of Canada, “Policy on Public and Media Access,” *supra* note 37).

114 *Edmonton Journal*, *supra* note 1 at 10.

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