

SUPERIOR COURT OF JUSTICE

HER MAJESTY THE QUEEN

V.

LARRY O'BRIEN

RULING ON USE OF RECORDING DEVICES

BEFORE THE HONOURABLE JUSTICE D. CUNNINGHAM
On May 4, 2009, at Ottawa, Ontario

CHARGE: S.121(1)(d) CCC
S. 125(b) CCC

APPEARANCES:

S. Hutchison

Counsel for the Crown

M. Edelson

Counsel for the Accused

(I)

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E X H I B I T S

15 EXHIBIT NUMBER

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Transcript Ordered: May 4, 2009
Transcript Completed: Ma7 4, 2009
Counsel Notified:

R vs O'Brien

R U L I N G

CUNNINGHAM, J. (Orally):

Again, let me express my appreciation to counsel for their assistance in this somewhat novel issue.

As I indicated earlier, anything I rule upon today on the issue of Blackberries or other such devices will apply to this trial and should not be taken as a broad policy statement for this Court.

As I stated, jury trials may present a whole set of different problems, and perhaps more challenging issues, but that is for another day.

I agree with Mr. Hutchison that I need not treat this as a constitutional issue. This really goes to my power to control the process in an exercise of my discretion.

Section 136(2)(b) of the Courts of Justice Act is quite clear, that nothing in subsection 1 prohibits a journalist, indeed anyone else mentioned therein, from unobtrusively making an audio recording in a manner approved by the

judge. It is also for the purpose of supplementing or replacing handwritten notes.

What we are talking about here is instant text transmission to the blogosphere, but that is the world in which we live.

I recognize the concerns that have been registered; the distractions that may affect the court proceedings, the incompatibility of these devices with court equipment, but most significantly, the "genie in the bottle" concern that has been registered.

Even if I were to accept the 20-minute delay as proposed by the amicus curiae, I am not sure that it would have the desired affect.

I do not need to consider whether such a lag would offend Dagenais Mantuck test. In my view it would not because I am satisfied that what the amicus proposes is not a ban. But again, that is for another day.

I am simply not persuaded that exercising my discretion in that way would have any practical affect; in other words, I simply cannot see how a 20-minute delay could satisfy the concerns that have been registered.

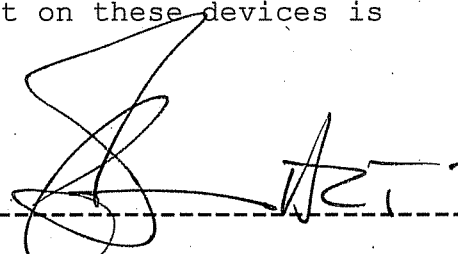
I also recognize that some private information or protected information could inappropriately be

disclosed but I am afraid that is a risk I will have to take, recognizing as I do, the caliber of counsel I have before me in this case.

So subject to my being satisfied as to the practical concerns, that they can be alleviated, Blackberries or such devices will be permitted so long as any texting is done in an unobtrusive way and does not affect the running of the trial.

They will be operated as silently as the devices permit and if problems develop later on, I will deal with them.

I should note that these devices are to be used for text or receiving purposes only so long as this does not interfere with the court proceedings. Needless to say, cell phones are not to be used for receiving or calling and I am sure I do not need to say that the use of any camera or video equipment on these devices is prohibited.



THE HONOURABLE JUSTICE CUNNINGHAM
SUPERIOR COURT OF JUSTICE

Certificate of Transcript
Evidence Act, subsection 5(2)

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I, Andrea Johnstone, certify that
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Which has been certified in Form 1
To the best of my skill and ability.

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Date:

May 5, 2009

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A.L. Johnstone,
Certified Court Reporter

Andrea Johnstone

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Note* Pursuant to subsection 5(3) of the Transcription
Manual, 2003, "A transcript prepared from a sound recording must
be certified by the person who prepared the transcript."

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