

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N:

RICHARD WARMAN

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

MARC LEMIRE

Respondent

- and -

**ATTORNEY GENERAL OF CANADA,
CANADIAN ASSOCIATION FOR FREE EXPRESSION,
CANADIAN FREE SPEECH LEAGUE,
CANADIAN JEWISH CONGRESS,
FRIENDS OF SIMON WIESENTHAL CENTRE FOR HOLOCAUST STUDIES
and LEAGUE OF HUMAN RIGHTS OF B'NAI BRITH**

Interested Parties

A R G U M E N T

1. This is a motion by Rogers Publishing Limited, A Division of Rogers Media Inc. on behalf of Maclean's Magazine (hereafter collectively referred to as "Rogers") for an order permitting representatives of Maclean's Magazine to attend, observe and report on the evidence tendered by Dean Steacy and others at the hearing scheduled to continue in this matter on March 25, 2008, relating to their activities as employees or agents of the Canadian Human Rights Commission.

2. The Affidavit of Kenneth Charles Gillis, sworn March 14, 2008, has been delivered on behalf of Rogers in support of this motion and Rogers relies on that Affidavit.

THE ISSUE

3. Why should Maclean's Magazine be excluded from covering this important case?

ARGUMENT AND LAW

4. The Canadian Human Rights Commission and its Tribunal are subject to the same rules of openness as our public courts. The themes in the major cases as to openness are applicable in this instance.

5. The Supreme Court of Canada has repeatedly confirmed the importance of the "openness principle". As Dickson J. stated in *MacIntyre*: "At every stage the rule should be one of public accessibility and concomitant judicial accountability." More recently, in *CBC v. New Brunswick*, the openness principle was recognized by the Supreme Court of Canada, unanimously, as an important aspect of s. 2(b) of the *Charter*:

The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). 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. Cory J. in *Edmonton Journal* described the equally important aspect of freedom of expression that protects listeners as well as speakers and ensures that this right to information about the courts is real and not illusory. At pages 1339-40, he states:

That is to say as listeners and readers, members of the public have a right to information pertaining to public institutions and particularly the courts. Here the press plays a fundamentally important role. It 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. Those who cannot attend rely in large measure upon the press to inform them about court proceedings – the nature of the evidence that was called, the arguments presented, the comments made by the trial judge – in order to know not only what

rights they may have, but how their problems might be dealt with in court. *It is only through the press that most individuals can really learn of what is transpiring in the courts. They as “listeners” or readers have a right to receive this information. Only then can they make an assessment of the institution. Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court. Practically speaking, this information can only be obtained from newspapers or other media.* [emphasis added by LaForest J.]

Attorney General of Nova Scotia v. MacIntyre, [1982] 1 S.C.R. 175 at 185;

Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1996] 3 S.C.R. 480 at 496.

6. In 2004, in *Vancouver Sun*, the Supreme Court of Canada summarized the openness values as follows:

The open court principle has long been recognized as a cornerstone of the common law: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at paras. 21. The right of public access to the courts is “one of principle ... turning, not on convenience, but on necessity”: *Scott v. Scott*, [1913] A.C. 417 (H.L.), *per* Viscount Haldane L.C., at p. 438. Justice is not a cloistered value”: *Ambard v. Attorney General for Trinidad and Tobago*, [1936] A.C. 322 (P.C.), *per* Lord Atkin, at p. 335. “[P]ublicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity”: J.H. Burton, ed., *Bethamiana or, Select Extracts from the Works of Jeremy Bentham* (1843), p. 115.

Public access to the courts guarantees the integrity of judicial processes by demonstrating “that justice is administered in a non-arbitrary manner, according to the rule of law”: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at paras. 22. Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public’s understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts.

The open court principle is inextricably linked to the freedom of expression protected by s. 2(b) of the *Charter* and advances the core values therein: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at paras. 17. The freedom of the press to report on judicial proceedings is a core

value. Equally, the right of the public to receive information is also protected by the constitutional guarantee of freedom of expression: *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Edmonton Journal, supra*, at pp. 1339-40. The press plays a vital role in being the conduit through which the public receives that information regarding the operation of public institutions: *Edmonton Journal, supra*, at pp. 1339-40. Consequently, the open court principle, to put it mildly, is not to be lightly interfered with.

Vancouver Sun (Re), [2004] S.C.J. No. 41 at paras. 24-26.

7. In the case of *Toronto Star v. Ontario*, the Supreme Court summarized, “(I)n any constitutional climate, the administration of justice thrives on exposure to light – and withers under a cloud of secrecy.”

Toronto Star Newspapers Ltd. v. Ontario, [2005] S.C.J. No. 41 at para. 1.

8. Reporting on great trials is a fundamental strand of our approach to liberty and the difficult delivery of justice.

9. I address this argument to you, Athanasios D. Hadjis, as you are trying this matter. Will you as the “judge” be indifferent to the evidence; agitated by the evidence; angry at the evidence or just plain blasé? Will you radiate a sense of hurried justice? Or will you exhibit judicial restraint in the tradition of Patrick LeSage? We don’t know. That is why the press is entitled to be present.

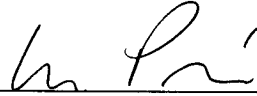
10. The public can only tell how justice is being protected if it can see and read of your reactions, the nature of the court, the attentiveness of the participants. After all, the keyhole to justice requires eyes. It is crucial we observe how you react to testimony about the conduct of the very institution you represent and champion.

ORDER SOUGHT

11. Rogers seeks an order permitting representatives of Maclean’s Magazine to attend, observe and report on the evidence tendered by Dean Steacy and others at the hearing

scheduled to continue in this matter on March 25, 2008, relating to their activities as employees or agents of the Canadian Human Rights Commission.

DATE: March 14, 2008.



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RICHARD WARMAN
Complainant

v.

CANADIAN HUMAN RIGHTS COMMISSION
Commission

Tribunal File No. 1073/5405

**CANADIAN HUMAN RIGHTS
TRIBUNAL**

ARGUMENT

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