Grey Areas

SML
Steinecke Maciura LeBlanc
Barristers & Solicitors

Access to Hearings and Exhibits

By: Richard Steinecke
February 2011 - No. 153

Tribunals holding hearings are increasingly being asked to provide the public, including the media, with access to the exhibits and to permit the recording of the proceedings. Recently the Supreme Court of Canada affirmed that public access to hearings is protected by the freedom of expression provisions of the *Canadian Charter of Rights and Freedoms*. Any restriction to those rights need to be minimal in nature and justified by the requirements of the hearing process. While the two cases dealt with access to court hearings, the principles likely apply to tribunal hearings as well.

One of the two companion cases dealt with access to an exhibit at the hearing. In *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3, Mr. Dufour was acquitted in the charge of assisting in a suicide. After the trial was over, the media were given access to a tape of a statement made by Mr. Dufour to the police. The tape had been made an exhibit at the hearing. However, the media were not permitted to broadcast the tape. The media challenged that limitation.

The Court held that the freedom of expression protections of the *Charter* applied. As a result, exhibits were ordinarily available to the public. Anyone opposing unrestricted public access had to justify that position. In this case, even though the trial was over, the presiding Judge was still the best person to make the ruling. The presiding Judge had discretion when balancing the competing interests. The Court was concerned that Mr. Dufour had a disability that might be negatively affected by the broadcast. The Court said:

> At the end of the trial of the person who made the statement, the judge may have to assess the impact that broadcasting the statement might have on the trial of a co-accused or on the accused personally. In his factum, Mr. Dufour argues that the impact on him of broadcasting the statement would be particularly dire because of his intellectual disability. The fact that Mr. Dufour has been acquitted and his particular vulnerability are factors that give full meaning to Dickson J's comment in *MacIntyre*, at pp. 186-87, that there are cases in which the protection of social values must prevail over openness. In my view, a situation requiring the protection of vulnerable individuals, especially after they have been acquitted, is one such case.

Thus tribunals should have a process for determining whether an exhibit should be released to the public. Preferably, that procedure should be supported by Rules of Procedure (as any infringement of the freedom of expression should be based on law). Exhibits from an open hearing will be released to the public unless there is a good reason, based on the reasonable needs of the justice system, to say no.

The second case involved a ban on the ability to broadcast an audio recording of the hearing itself. It also dealt with restrictions preventing media from approaching hearing participants in various parts of the court house (e.g., in the courtrooms and the hallways just outside of the courtrooms). In *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2 the Court again held that the freedom of expression protections of the *Charter* applied. Any restrictions would have to be justified by the reasonable needs of the justice system.

In upholding these restrictions, the Court identified the following considerations:

> The objectives of the impugned measures can be summarized as being to maintain the fair administration of justice by ensuring the serenity of hearings. The fair administration of justice is necessarily dependent on maintaining order and decorum in and near courtrooms and on protecting the privacy of litigants appearing before the courts, which are measures needed to ensure the serenity of hearings. There is no question that this

FOR MORE INFORMATION
This newsletter is published by Steinecke Maciura LeBlanc, a law firm practising in the field of professional regulation. If you are not receiving a copy and would like one, please contact: Richard Steinecke, Steinecke Maciura LeBlanc, 401 Bay Street, Suite 2308, P.O. Box 23, Toronto, ON M5H 2Y4, Telephone: 416-626-6897
Facsimile: 416-593-7867, E-Mail: rsteinecke@sml-law.com

> objective contributes to maintaining public confidence in the justice system. It is therefore my opinion that the objective of the government and the judges of the Quebec Superior Court was pressing and substantial....
>
> However, a review of the consequences of the impugned measures reveals numerous salutary effects. The evidence shows that witnesses, parties, members of the public and lawyers can now move about freely near courtrooms without fear of being pursued by the media. Lawyers can hold discussions with their witnesses and with counsel for the opposing party in hallways adjacent to courtrooms without being disturbed …. Those who adopted the impugned measures took the vulnerability of participants in the judicial process into consideration and made sure that when such people consent to co-operate with the media, they do so as freely and calmly as possible. The controls on journalistic activities thus facilitate truth finding by not adding to the stress on witnesses who must participate in a process that, for most of them, is already distressing enough.
>
> Another salutary effect of the impugned measures relates to the privacy of participants. …. "The court's power to regulate the publicity of its proceedings serves, among other things, to protect privacy interests, especially those of witnesses and victims" …. When litigants participate in the justice system, they do not waive their right to privacy …. In the instant case, the impugned measures help minimize significantly the violation of privacy.

Again, it would be prudent to place these restrictions in a tribunal's Rules of Procedure. Any limitations should be the least restrictive ones possible.

The two cases can be found at: www.canlii.org.

FOR MORE INFORMATION
This newsletter is published by Steinecke Maciura LeBlanc, a law firm practising in the field of professional regulation. If you are not receiving a copy and would like one, please contact: Richard Steinecke, Steinecke Maciura LeBlanc, 401 Bay Street, Suite 2308, P.O. Box 23, Toronto, ON M5H 2Y4, Telephone: 416-626-6897
Facsimile: 416-593-7867, E-Mail: rsteinecke@sml-law.com

WANT TO REPRINT AN ARTICLE
A number of readers have asked to reprint articles in their own newsletters. Our policy is that readers may reprint an article as long as credit is given to both the newsletter and the firm. Please send us a copy of the issue of the newsletter which contains a reprint from Grey Areas.