"WHERE THERE IS NO PUBLICITY, THERE IS NO JUSTICE"

Attorneys General Failure to Protect the Public Interests- Concealment of the 2008 Report

1. The public's repeated plea to reclaim their constitutional rights and declare s. 136 of the *CJA* unconstitutional, is not an attempt "*to create a default authorization for video recording*" which *"would be contrary to the* Act*"* when the *Act* is in violation of the Constitution[1].

2. For decades, advocates for an open justice system have been pushing for cameras in courtrooms without any success as reported in *Michail v. OECTA,* 2019 ONCA 319 para.11*:*

> Proposals to amend the *Act* to allow video recording of hearings of motions and appeals, as the moving party pointed out, have been made from time to time. Whatever the merits of those proposals, they have not been adopted legislatively, and are not law.

3. In 2005, The Attorney General of Ontario ("AGO") Michael Bryant established a blue-ribbon Panel[2] to address courtroom cameras' initiative. **A Comprehensive Report was issued in 2006** stating:

> **Recommendation #3: Cameras in the courtroom**
> The Panel recommends that: The Courts of Justice Act should be amended to permit cameras for proceedings in the Court of Appeal and Divisional Court, and for applications or motions in the Superior Court of Justice and the Ontario Court of Justice, where no witnesses will be examined at the hearing, subject to the discretion of the panel or judge, which discretion should be exercised recognizing the primacy of openness.
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> Further, on those unusual occasions where witnesses are called to testify in any of the above appeals, applications or motions, cameras for such proceedings would be permitted where the presiding judge, the parties and witnesses agree.

4. P. 19 of the Report states that the Canadian Judicial Council modified its position to exempt the SCC, and in 2002 also exempted all appellate courts. Its concern is now focused on trial court.

5. **A Pilot Project 2007** was run by the ONCA where proceedings were livestreamed.

6. **In 2008 a Second Report**[3] branded the pilot project an overwhelming success and recommended that courtroom cameras should be continued in the ONCA, their use expanded to other Appellate Courts and an amendment to s. 136 of the *CJA* is justified. Instead of implementing the recommendation, this report was concealed from the public. I was required to complete and submit a formal freedom of information request to access a document that should be public.

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[1] *Michail v. Ontario English Catholic Teachers' Association*, 2019 ONCA 319 para. 11
[2] See report p. 54, 55 for a list of all participants which include MacPherson J.A. and Zarnett J.A.
[3] May 2008 – Blue Ribbon Committee Final Report **p. 4, 5, 11, 12,13, 14, 15, 16**

7. **The Ministry of Justice and all Attorneys General since 2008,** which includes, Chris Bently (2007), John Gerretsen (2011), Madeleine Meilleur (2014), Yasir Naqvi (2016), Caroline Mulroney (2018) and Doug Downey (2019) did not implement the recommendations.

8. It is my position, that the AG have failed the public by not implementing the crucial recommendations in the 2008 report, despite their knowledge of the deleterious effects of s.136:

- In March, 14, 2011, AGO Bentley, reported to be "*prepared to speak with the judiciary about their interest in having the discussion at this point in time*."[4] Nothing was done and no information regarding the outcome of such talks.
- March 17, 2016, when asked if there was any appetite for cameras in courts. AGO Madeleine Meilleur stated, without context or follow up: "To tell you the truth, no"[5].

Following My March 20, 2019 Hearing

- A few days after my hearing, on April 8, 2019, Macpherson J.A., on his own initiative, surprised Canadians with a groundbreaking order to broadcast the Carbon tax hearings.[6]
- The same day, Brian Gray, a spokesman with Ontario's Ministry of the AG, stated the ministry has no immediate plans to consider again any amendments to the Courts of Justice Act to allow a broader use of cameras in Ontario courts.[7]
- May 9, 2019, a spokesperson for AG said it's "*not a high priority*."[8]
- June 16, 2019: AG Mulroney states: "*It's not a priority for me*."[9]
- June 24, 2019: In an interview with a Toronto Star Reporter, former Superior Court Chief Justice Heather Smith when asked about her thoughts on cameras in the courtroom, stated:

> There is a place for cameras in the courtroom — such as has been done recently in a case of high public interest at the Court of Appeal for Ontario and they may well be appropriate for

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[4] The Canadian Press: "Ontario to consider allowing cameras in courts"
[5] The Canadian Press: "As Ghomeshi case resumes next week, cameras in courts remain elusive",
[6] The Canadian Press: "*Ontario's top court allowing rare livestream of carbon-price legal fight*".
[7] The Law times: "Ontario courts should get cameras",
[8] Loonie Politics: "Ontario needs to address the lack of transparency in courtrooms".
[9] The Canadian Press:*AG Caroline Mulroney says it's 'essential' that Ontario* courts modernize

courts such as the Superior Court's Divisional Court (which hears appeals from administrative tribunals and regulatory bodies.)

Following the Rouleau, Miller and Fairburn JJ.A. 2019 ONCA 319, **Ruling:**

- April 24, 2019, an article in the Canadian Press stated:

  > While judges do have authority to allow video or audio recordings of proceedings under certain circumstances – such as in disputes with wide public significance – the court said Myriam Michail had not persuaded them this was one of those circumstances.[10]

- May 14, 2019: Brian Gray said he could not comment on the ruling "*As this matter is still within the period to seek leave to the Supreme Court of Canada,*"[11]

- On March 3, 2021, John Struthers, president of the Criminal Lawyers' Association, commenting on Anne Molloy J.'s decision to stream online in a live YouTube her decision on a notorious case stated:

  > The creative and completely appropriate use of YouTube to ensure the public could have access to this important case may foster a greater understanding of our system of justice, Open courts are a critical component of free and fair society.[12]

9. The above comments are evidence that it is time for this Court to address this pressing issue of real open justice. This case provides the context necessary to make this determination.

Open Court Constitutional Principle - Rule of Law

10. In *MacIntyre v. Nova Scotia (Attorney General), 1982* CanLII 14 (SCC) Dickson J. wrote:

> … It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. … The authorities have held that subject to a few well-recognized exceptions, … all judicial proceedings must be held in public.

11. In *Can*adian Broadcasting Corp v New Brunswick *(1996)* 3 SCR 480, the SCC stated at par. 21 to 23:

> The open court principle, seen as "the very soul of justice" and the "security of securities", acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law. ... The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). …

12. In *R. v. Campbell*, [1997] 3 S.C.R. 3 at para. 10:

> One of these goals is the maintenance of public confidence in the impartiality of the judiciary, which is essential to the effectiveness of the court system. Independence contributes to the perception that justice will be done in individual cases. *Another social goal served by judicial*

[10] Canadian Press: "Ontario court rules open-court principle does not mean right to record proceedings
[11] Lawtimes: "Fight to release audio and video recordings fails".
[12] Lawtimes: Lawyers applaud use of YouTube for Minassian verdict

independence is the maintenance of the rule of law, one aspect of which is the constitutional principle that the exercise of all public power must find its ultimate source in a legal rule. [Emphasis added]

13. In *Edmonton Journal v. Alberta* *("Edmonton Journal")*[13], Wilson J. stated that the public interest in open courts is rooted in the need:

> 1) to maintain an effective evidentiary process;
> 2) to ensure a judiciary and juries that **behave** fairly and that are sensitive to the values espoused by the society;
> 3) to promote a shared sense that our courts operate with integrity and dispense justice; and
> 4) to provide an ongoing opportunity for the community to learn how the justice system operates and how the law being applied daily in the courts affects them.

14. In *Vancouver Sun*, 2004, the SCC provided *"The Parameters of the Open Court Principle"* at par. 23-31:

> 23 This Court has emphasized on many occasions that the "open court principle" is a hallmark of a democratic society and applies to all judicial proceedings: … "
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> 25 … 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.
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> 26 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. … Consequently, the open court principle, to put it mildly, is not to be lightly interfered with.
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> 27 ... Dickson J. found "it difficult to accept the view that a judicial act performed during a trial is open to public scrutiny but a judicial act performed at the pretrial stage remains shrouded in secrecy": MacIntyre, at p. 186.

15. The open justice principle plays a crucial role in a democracy as stated by Fish J.[14]:

> [2] … What goes on in the courts ought therefore to be, and manifestly is, of central concern to Canadians.
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> [4] ... Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would subvert the ends of justice or unduly impair its proper administration.
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> [7] I would dismiss the appeal. In my view, the Dagenais/Mentuck test applies to all discretionary court orders that limit freedom of expression and freedom od the press in relation to legal proceedings. Any other conclusion appears to me inconsistent with an unbroken line of authority in this Court over the past two decades. And it would tend to undermine the open court principle inextricably incorporated into the core values of s. 2(b) of the Charter. [emphasis added]

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[13] *Edmonton Journal v. Alberta*, 1989 CanLII 20 (SCC) para. 22
[14] *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 para. 2, 4, 7, 26, 27, 28

16. In *Named Person v. Vancouver Sun*, 2007 SCC 43, Bastarache J. wrote:

> 88 .... It is clear that members of the public must have access to the courts in order to freely express their views on the operation of the courts and on the matters argued before them. …

17. In *Canadian Broadcasting Corp. v. Canada*, 2011 SCC 2, Deschamps J. Stated:

> [1] ... 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.

18. Based on the foregoing overview of the case law, it is well-established that the open justice principle plays a crucial role in a democracy to ensure judicial independence from political interference and to maintain public confidence in the administration of justice.

19. The legal system is funded by public monies, which entitles the public to an open legal process. Withholding recordings, decisions and transcripts prevents the public from knowing of any wrongful conduct in our courts, ultimately preventing any systemic issues coming to light.

20. Technology fosters inclusion. Individuals who are constricted by disability, schedule, family, distance, resources or any other limitation should not have their rights denied.

21. Comments of counsels and judges should not be hidden from public view. What happens in our courts should be likened to what happens in our executive and legislative branches of government; both of which are broadcast, recorded, and available to the public.

Covertness Has Become the Rule and Openness the Exception

22. The issue of real open and transparent courts should have never become a point of contention between the public, the government and the judiciary. The failure of justice in my case highlights the detrimental impact of covertness on our system. The words of English philosopher Jeremy Bentham resonate strongly:

> In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice." "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while

trying under trial." "The security of securities is publicity.[15]

23. The ruling in my matter, *Michail v. OECTA*, 2019 ONCA 319, and judges refusal to release transcripts, confirm the discouraging reality that covertness has become the rule. Without providing reasons, my right to video record or disseminate any recordings of my own hearings was denied. Dickson J. stated:

> It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered."[16]

24. Many Canadians have raised concerns regarding the ailing judicial system. Justice Mary Lou Benotto (as she then was) spoke out against the use of "*Inflated claims, speculative legal theories and scorched earth tactics are a routine part of counsel's arsenal*"[17].

25. March J. stated[18]: "Matters have become so bad that many citizens and even some lawyers are speaking in terms of outright corruption of the court system, including corruption by many of the judges.

26. In 2012, retired judge John Gomery stated that judges suffering from "judicial cowardice" "still ignore the rules and impose limits on media coverage of the courts."[19]

27. On February 5, 2018, during a ceremony marking his appointment to the SCC, Chief Justice Richard Wagner pointed out shortcomings in the system stating:

> the court system, in general, needs to be updated to reflect a desire for increased openness" and "While Canadians expect transparency and accountability, we continue to operate under 1970s models of judicial administration. [20]

28. The elimination of these impugned provisions would ensure accountability and increase public confidence and respect in our judicial system. Our justice system must be transparent.

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[15] Quoted in *Canadian Broadcasting Corp. v. New Brunswick* (AG) Re R. v. Carson [1996] SCJ No. 38
[16] *A.G. (Nova Scotia) v MacIntyre* (Attorney General), [1982] 1 S.C.R. 175, para. 185
[17] *Ethics in Family Law:* Is Family Law Advocacy a Contradiction in Terms? M. Benotto J.
[18] A guide to recording your own court hearing in Ontario By Mike March, presently a Superior Court Judge.
[19] "Judges who limit media access to courts accused of "judicial cowardice"" By Kailah Bharath
[20] Source: The Canadian Press · Posted: Feb 05, 2018