

IN THE SUPERIOR COURT OF JUSTICE

B E T W E E N:

ST. ELIZABETH HOME SOCIETY (HAMILTON, ONTARIO)

Plaintiff

- AND -

CITY OF HAMILTON, in its capacity as successor
of the Corporation of the City of Hamilton,
CITY OF HAMILTON, in its capacity as successor
of the Regional Municipality of Hamilton-Wentworth,
RUTH SCHOFIELD AND MARILYN JAMES

Defendants

REASONS FOR JUDGMENT ON SHOW CAUSE HEARING

Delivered by The Honourable Mr. Justice D. Crane, on December 1
and 2, 2004, at the Superior Court of Justice, Hamilton, Ontario

APPEARANCES:

J. Falconer Counsel on behalf of the Plaintiff
R. Macklin Counsel on behalf of the Plaintiff
G. Babits Counsel on behalf of the Plaintiff

J. Evans, Q.C. Counsel on behalf of the Regional
G. Brailsford Municipality of Hamilton-Wentworth

P. Jacobsen Counsel on behalf of City of Hamilton
C. Martins Counsel on behalf of City of Hamilton

B. Rogers Counsel on behalf of Kenneth Peters

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December 1, 2004

REASONS FOR JUDGMENT

CRANE J. (Orally):

It is well to remember that my freedom to waive my hand stops short of the tip of my neighbour's nose. Society is about limits and citizenship is about subjecting ourselves to the law.

A direct challenge to the authority of the law in the face of the court when found, must be met and defended against on behalf of the administration of justice.

Out of respect for the Charter values of freedom of expression and of the press, this court made all reasonable efforts to avoid a direct confrontation with the position of Mr. Peters to keep his source undisclosed. Rulings were made to eliminate names and suggestions were made to Mr. Peters' counsel to respond with information, while not naming the source. When in the witness box, an alternative route was offered of identifying a witness to the transaction. Mr. Peters was asked the less direct question. Mr. Peters had considered his position in advance of his testimony. He made the choice not to answer.

It is my finding that Mr. Peters' undertaking had a limit in law. When he was required to answer by the court, he had reached that limit.

Mr. Peters, in his refusal to answer, may have believe the source question had not then been

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5 ruled upon. I find this to be a mitigating factor. I find the actions of Mr. Peters in going to his source to discuss his undertaking and its release to be a mitigating factor.

10 It is also noted that on the Monday of the 22nd of November meeting with Mr. Merling, Mr. Peters told Mr. Merling that he, Peters, planned to keep his word. That is, as I understand this evidence, that Mr. Peters was prepared, if necessary, to face continuing contempt proceedings.

15 The evidence is that Mr. Peters' employer, through its city editor, agreed in April of 1995 with Mr. Peters' decision to extend anonymity to the source. The Spectator acted on that agreement by publishing the contents of the documents that had been obtained on Mr. Peters' undertaking to the source. It is on these publications of April 20 1995 that much of the plaintiff's case rests.

20 Mr. Peters' evidence is that the undertaking is personal to himself. However, the evidence is that he readily gave up the identity of the source to his employer, represented by Mr. Robbins, when the latter asked.

25 I find on all the evidence that the Spectator does exercise management over the function of confidential sources.

30 Based on the evidence of this hearing, I am obliged to conclude that those who are in the business of selling "the news" employ journalists

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to search out newsworthy information using as one means, the undertakings of confidentiality to sources.

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The evidence of Mr. Robbins and of Professor Carlin is that there is a culture of the newsroom; that is the employer's place of employment that the undertaking to a source is personal to the journalist in the service of which that journalist, at the limits, is to break the law and endure the punishment.

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It is all very well for the employer and the educator to say the protection of a source is a matter for the individual conscience of the journalist, when they also say any journalist that has revealed a source will never again be employed in a newsroom.

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The oppressive nature of this culture on the individual has been the cause of the very real turmoil that Mr. Peters has been in for the last two weeks. The pressures on him have been enormous. He has been obliged to decide as he sees it, between continuing in the only occupation he has had and to which he is very dedicated or perhaps disobeying the law, being found to be a criminal and sentenced to a lengthy imprisonment, taking the worst case scenario of contempt of court.

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Relying on the evidence presented, what feeds this conflict of values is a view that the media enjoys an autonomy of power and authority, perhaps

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believed to be borne out of the ancient status of 'the fourth estate'.

I make this observation, having made the distinction from that of a conscientious objector. Bertram Russell, himself a conscientious objector, said that such an objector is one who knowingly breaks the law and willingly accepts the punishment.

A reasonable person who had not heard the evidence given at this hearing, might well assume that there is an implied term to the undertaking and to the relationship of journalist and informant that the journalist will be bound by the law. Not so. This seems to be unique, this situation, of not being bound by the law. It seems to be unique among commercial transactions conducted by non-criminals.

In my view, the most salutary consequence of this hearing would be a directive by the Spectator to its employees, that all undertakings of confidentiality to sources are to contain the condition that the journalist will protect the anonymity of the source to the full extent of the law. Or, put another way, that the journalist's undertaking will be to exert all lawful means to protect the confidence.

These findings and observations are in response to the evidence called at this show cause hearing. It is seldom that the court has both philosophy and relevance. It is appropriate here, and this

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5 court commends counsel for calling the evidence as it is material to whether Mr. Peters is to be held in contempt, and if so, the just and appropriate penalty.

A learned discussion of the defences to a citation for contempt is found in the text, "The Law of Contempt in Canada" written by Mr. Jeffrey Miller and published by Carswell.

10 If Mr. Peters was under the belief that the court had not ruled on whether he was to answer the question of his source's identity, can this constitute a defence?

15 Counsel asked Mr. Peters, "Who is B.?" The court permitted the question, there being no objection. Mr. Peters refused to answer. In a tense atmosphere, this court told Mr. Peters to leave the witness box, breaking off counsel's examination. (See Addendum attached)

20 Mr. Peters was immediately thereafter cited for contempt of court and a discussion followed with his counsel as to the date for the hearing.

25 Mr. Peters could not have understood anything other than that he was ordered to answer counsel's question and that his refusal was taken as contemptuous behaviour by the court.

30 Mr. Peters' evidence in the hearing is that he was well aware that he faced a contempt hearing for refusing to answer a question that the court held to be a proper question for him to answer.

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Mr. Peters is represented throughout by competent counsel. He was present and heard his motion to quash the subpoena argued. He heard the court's reasons and decision. He knew that there is no law of class privilege.

On the 17th of November, upon Mr. Peter's refusal to answer, the proceedings of this court stopped. The trial was in crisis. The only witness to a most central issue in this very long trial had refused to provide his evidence. The plaintiff was being denied the opportunity to attempt to prove a vital element of its case.

At that time, the matter could not have been more serious. The administration of justice had been denied. The authority of the court had been refused. I find on all the evidence, that the offence is proven beyond reasonable doubt.

I am obliged, Mr. Peters, on the evidence and on the law, to find that on the 17th of November, 2004, you were in contempt of this court.

I conclude from my earlier reasons that Mr. Peters was a pawn in a much larger game. This court has sympathy for Mr. Peters in his dilemma, which is an ethical one, as he sees it. He has suffered in anguish between the court and what he has been told is the role of a journalist.

My present state of mind is not to imprison or to fine Mr. Peters. The private parties in this trial have suffered a hardship in the costs of

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5 their legal counsel attending in court on matters resulting from Mr. Peters' contempt of the 17th of November.

I should like to hear submissions as to whether an order for costs should be imposed as the just means to purge the contempt.

10 December 2, 2004

ADDENDUM TO REASONS FOR JUDGMENT

CRANE J. (Orally):

15 Before going into court yesterday, I had, amongst a volume of materials, read a transcript of the proceedings of 17 November. I was troubled that there was an omission of evidence. Then, in court, when giving my reasons, I inadvertently omitted to state in my outline of the events of 17 November, part of those events.

20 In effect, it is that after Mr. Peters refused to answer counsel's question of "Who is B.?" stating that to name B. would disclose his source, I had Mr. Peters step down. I asked for argument, after which I ruled that A.'s undertaking did not apply to B. so that the question of counsel to Mr. Peters must be answered.

25 Mr. Peters was returned to the witness box and counsel put the question again. Mr. Peters again refused to answer.

30 **MR. FALCONER:** Your Honour, may I put briefly, a matter on the record?

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HIS HONOUR: Yes.

MR. FALCOWER: Your Honour, first of all, I would be pleased to convey - in any event, Your Honour, the issue about the transcript that Your Honour referred to, I must take some responsibility for it.

As I understand the sequence of events, I ordered simply the evidence of Mr. Peters with respect to November 17th, 2004. It is my understanding that a copy of what I ordered was forwarded to Your Honour, absent submissions and rulings or anything else.

I had simply ordered a transcript that is evidence for my own purposes as counsel on an ongoing examination. I understand that that ended up with Your Honour, and therefore, there would have been omissions because I had actually asked only for evidence and because of the short period of time in which I asking for the transcript.

I apologize, because I think I started a quagmire there.

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