OUTLINE OF CLOSING SUBMISSION BY MACLEAN'S

MAY IT PLEASE THE TRIBUNAL

Overview:

1. Maclean's respectfully submits that the article by Mark Steyn entitled "*The New World Order*" which appears at pages 30 to 37 of the hard copy October 23, 2006 edition of *Maclean's* does not convey hatred or contempt, or otherwise contravene s. 7(1)(b) of the BC *Human Rights Code.*

2. This week long hearing has concerned two complaints.

3. Maclean's submits that this Tribunal should dismiss Case #4885, which is brought in the name of Dr. Mohamed Elmasry, an Ontario resident, ostensibly in representation of all "*Muslim residents of the province of British Columbia*."

4. Maclean's submits that this Tribunal should also dismiss Case #4887, which is brought in the name of Dr. Naiyer Habib. He filed in his personal capacity. The Tribunal ruled that his testimony was given in that capacity and not as a representative of the Canadian Islamic Congress.

5. As the evidence revealed, Case #4887 is in reality the complaint of Ontario articled students Khurrum Awan, Muneeza Sheihk, and Naseem Mithoowani, who along with the CIC's legal counsel, Mr. Faisal Joseph, of London, Ontario, travelled from Ontario to be able to appear before this specially-convened three-member panel in a Provincial Courtroom in Vancouver.

6. With respect to this complaint, Maclean's reminds the Tribunal of Mr. Awan's evidence about the careful "*forum shopping*" the Ontario articled law students carried out before deciding to put in motion this expensive process. This process reflects the articled students' political enthusiasm to obtain "*a successful outcome in this complaint [that] could provide an impetus for prohibiting discriminatory publications in other provinces* [presumably including Ontario?], [See Exhibit 33 for the political context of this complaint, as explained by the articled students in initial communications with their "experts"]

7. Maclean's is not seeking any relief under the free speech guarantee in s. 2(b) of the *Canadian Charter of Rights and Freedoms* because this Tribunal *does not have jurisdiction to hear such arguments. Maclean's cannot complain before this Tribunal that innocent intent is not a defence, nor is truth, nor is fair comment on true facts, nor is publication in the public interest and for the public benefit, nor is responsible journalism.* These matters may eventually come before a Court but cannot be considered in this hearing.

8. If this were an ordinary court proceeding, Maclean's would be seeking an order that the Complainants pay costs, because of the inordinate expense and inconvenience involved.

However, out of a show of respect for this Tribunal, and a show of respect for the Muslim community, Maclean's is not seeking costs.

Mark Steyn's Article – "The New World Order"

9. Maclean's reminds the Tribunal that the real title of Mr. Steyn's article is not "*The Future Belongs to Islam.*" That is the title of the Internet version over which this Tribunal expressly disclaimed any jurisdiction in letters sent to the complainants early on in these proceedings. "*The New World Order*" is so a play on the first President Bush's mischaracterization of the USA's sole super-power role following the first Gulf War that Maclean's felt it unnecessary to make this point to the Ontario articled students in Maclean's opening statement on Monday this week when all of us first convened in this security-enhanced setting.

10. How should Maclean's describe "*The New World Order*"? We have been taken through the article so often, and so painstakingly, paragraph by paragraph, in the evidence of Mr. Awan, Instructor Harji, and other complainant witnesses, that a line-by-line review is unnecessary in this submission.

11. This is the article that Dr. Ayoub (who like the Ontario articled students travelled from as far as California to be with us in Vancouver this week) spoke of in the following terms:

    "*I have not read Mr. Steyn before and I am interested in the way he writes, because it's interesting"*

    "*Mr. Steyn did not write as a journalist. It is a very entertaining style he has*."

12. The Complainants' expert witness Dr. Andrew Rippin, gave his testimony about the "New World Order" in remarkably calm tones.

13. This witness for the Complainants, who is obviously so well-plugged into Islamic Affairs in this Province that he participated in the fall of 2006 along with others in the City of Victoria's Islamic History Month, was completely unaware of Mr. Steyn's article until the Ontario articled students brought it to his attention.

14. Maclean's respectfully suggests that this Tribunal draw the necessary inference that Mr. Steyn's "*interesting*" and "*entertaining style*" did not make a ripple in the sea of information about Islam and Muslims in newspapers, radio and television broadcasts, cable, and Internet expression.

15. Dr. Elmasry, who obviously took the time when this all began to sign his name to the Case 4885 complaint prepared by the Ontario articled students, did not send any message to this Tribunal explaining why he could not appear in this hearing room this week to conduct his own line-by-line review of "*The New World Order*."

16. Suffice to say that his interest in his self-proclaimed mandate to represent all "Muslims in the province of British Columbia" must have slipped far down his list of priorities. Maclean's respectively submits that the Tribunal must draw the inference that "*The New World Order*" does not seriously engage his interest.

17. Or perhaps Dr. Elmasry shares the views of Ontario articled student Khurrum Awan, who told Mike Duffy Live viewers in early May: "*Our position very publicly is that Maclean's can continue publishing the articles they want, Mr. Steyn can continue publishing the articles they want, we just simply want to extend free speech to extend free speech to make it more inclusive of the communities in question.*"

18. Piecing all the bits of this week-long puzzle together, Maclean's says these double-barrelled complaints are not about hate-speech at all.

19. These Complaints seek a fundamental change in speech-regulation by Human Rights authorities which would empower the tribunals across the country to force magazines, newspapers, broadcasters and others to print or run at the latter's own expense replies of equal length and prominence to publications they disagree with. This political objective is not new.

20. Just before World War 2 the Alberta provincial government legislated to compel newspapers in that province to print accurate news and information at the government's request, to offset disagreeable messages penned by journalists. The Supreme Court of Canada struck down that interference with freedom of expression in 1938 (free speech was not then protected by a *Canadian Charter of Rights*) with an eye on ominous developments on that continent.

21. Maclean's respectfully submits that this Tribunal is not the appropriate forum for a debate about the necessary virtues or vices of a government-compelled right of reply. This debate is for a political forum, where anyone may exercise their Constitutional right of freedom of expression, including freedom of speech and other media of communication, in the political forum.

22. A brief examination of the existing law follows:

7(1)(b) of the British Columbia *Human Rights Code*

23. This provision is intended to make publishers liable for speech which is <u>not</u> criminal. In practice, as this proceeding has demonstrated, the strict liability wording of s. 7(1)(b) coupled with the absence of an effective "*screening*" mechanism for this type of complaint, means that anyone can now be dragged into costly, time-consuming hearings, without the safeguards provided by a judicial process or by the federal criminal law concerning hate speech. Hate speech charges cannot be laid under the federal *Criminal Code* without the

express approval of the attorney general, who is duty-bound to review the evidence to ensure that an adequate basis exists to set the criminal process in motion.

24. No such review by the attorney general or by anyone else occurs under the *Human Rights Code*. S. 7(1)(b), as this proceeding now demonstrates, was a big step down the slippery slope that leads to total censorship. It represents an insidious encroachment upon personal liberty. In this proceeding, the Complainants seek to extend that encroachment beyond censorship to compulsory publication of their views in an article of equal length and with equal prominence. A hard shove down the slippery slope to be sure, but one Maclean's says must be met with unflagging resistance from everyone who values freedom in a democratic society.

25. This provision reads in material part as follows:

Discriminatory publication

7(1) A person must not publish, issue, or display or cause to be published, issued or displayed, any statement, publication, notice, sign, symbol, emblem or other representation that

(b) is likely to expose a person or a group or class of persons to hatred or contempt

because of the ... religion ...of that person or that group or class of persons.

Meaning of 7(1)(b)

Hatred or Contempt

26. The phrase "*hatred and contempt*" is to be given a restrictive interpretation. This phrase appears in s. 13(1) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, which reads as follows:

13.(1) It is a discriminatory practice for a person or group of persons acting in concert to communicate telephonically or cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a persons or persons <u>to hatred or contempt</u> by reason of the fact that the person or those persons are identifiable on the basis of a prohibited ground of discrimination.

27. In *Canada (Human Rights Commission) v Taylor*, [1990] 3 S.C.R. 892, Dickson C.J.C. discussed the meaning of "hatred and contempt" at paragraphs 61 -62:

61. The approach taken in [the decision of the human rights tribunal] gives full force and recognition to the purpose of the Canadian Human Rights Act while remaining consistent with the Charter. The reference to <u>"hatred" in the above quotation speaks</u>

of "extreme" ill-will and an emotion which allows for "no redeeming qualities" in the person at whom it is directed. "Contempt" appears to be viewed as similarly extreme, though is felt by the Tribunal to describe more appropriately circumstances where the object of one's feelings is looked down upon. According to the reading of the Tribunal, s. 13(1) [Hatred and contempt] *thus refers to unusually strong and deep-felt emotions of detestation, calumny and vilification, and I do not find this definition to be particularly expansive.*

62. In sum, the language employed in s. 13(1) of the Canadian Human Rights Act extends only to that expression giving rise to the evil sought to be eradicated and provides a standard of conduct sufficiently precise to prevent the unacceptable chilling of expressive activity. Moreover, as long as the Human Rights Tribunal continues to be well aware of the purpose of s. 13(1) and pays heed to the ardent and extreme nature of the feeling described in the phrase "hatred and contempt", there is little danger that subjective opinion as to offensiveness will supplant the proper meaning of the section. **[underlining added for emphasis]**

Likely to Expose

28. The provision in the Canadian Human Rights Act under consideration in *Taylor* prohibited communications which were "*likely to expose*" individuals to hatred and contempt. The same language appears in s. 7(1)(b) of the BC *Human Rights Code*.

Objective Test

29. In *Owens v Saskatchewan (Human Rights Commission)*, 2006 SKCA 41, the Saskatchewan Court of Appeal considered the scope of s. 14(1)(b) of the Saskatchewan Human Rights Code, which provided that "*No person shall publish ... any ... statement or other representation: (b) that exposes or tends to expose to hatred, ridicules, belittles, or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground.*"

30. Writing for a unanimous Court in *Owens*, Richards J.A. held that test for the prohibited expression is objective, not subjective:

58.... the question of how a particular individual or particular individuals understand a message cannot determine whether it should be found to involve hate, belittlement, ridicule or is an affront to dignity. Injecting that sort of subjectivity into the analysis would make the reach of the section entirely unpredictable and, as a result, would create an unacceptable chilling effect on free speech." ...

50. As a result, it is apparent that s. 14(1)(b) must be applied using an objective approach. The question is whether, when considered objectively by a reasonable person aware of the relevant context and circumstances, the speech in question would be understood as

exposing or tending to expose the member of the target group to hatred, ridiculing, belittling or affronting their dignity within the restricted meaning of those terms prescribed by [Saskatchewan (Human Rights Commission) v Bell, [1994] 5 W.W.R. 458 (Sask. C.A.)]

31. *Owens* was discussed with apparent approval by the British Columbia Supreme Court in *Maughan v University of British Columbia*, 2008 BCSC 14 at paragraphs 342 to 345, albeit in the context of a claim pursuant to the *Civil Rights Protection Act*, R.S.B.C. 1996, c. 49.

Collins 1 and Collins 2

32. The Complainants refer to *Canadian Jewish Congress v. North Shore Press* [1997] B.C.H.R.T.D. No 23 ["Collins 1"] and *Abrams v North Shore Free Press* [1999] B.C.H.R.T.D. No. 5 ["Collins 2"].

33. These decisions are of uncertain value.

34. Collins 2 makes it clear that this Tribunal sees itself as an "*administrative*" tribunal and therefore does not consider itself bound by its prior decisions. See Patch Member, at paragraphs 41-42:

> *41... [a]n administrative tribunal is not bound by its prior decisions. Indeed, administrative agencies are obliged not to treat earlier decisions as precedent. The purpose of this rule is to ensure flexibility. ...*
>
> *42. Macaulay and Sprague describe the purpose of this rule at 6-6:*
>
> ....
>
> *Decisions of administrative agencies do not create precedents for anyone, including the agency.*

35. Collins 1 and Collins 2 were decided before *Owens* and *Maughan*. These judicial decisions, which at least have the status of legal precedent, articulate a simple, clearly-expressed objective test. Maclean's suggests that the Tribunal not attempt to emulate Collins 1 or Collins 2 where earlier Tribunals articulated unnecessarily complex (and conflicting) tests.

Application of the objective test of hatred and contempt

36. Maclean's submits that considered objectively by a reasonable person aware of the relevant context and circumstances, the October 23, 2008 article titled "*The New World Order*" would not be understood as exposing or tending to expose the Complainant Dr. Naiyer Habib or the Complainant Elmasry to hatred or contempt because of their religion.

37. Adopting the objective approach described in Court decisions, and obviously followed in *Taylor*, this Tribunal must simply ignore Khurrum Awan's extensive testimony about the

meaning he attributed to the October 23, 2008 article. His subjective views do not determine whether s. 7(1)(b) was violated. They are merely background narrative.

38. This observation also applies to Dr. Naiyer Habib. His subjective reaction to the October 23, 2008 article cannot be considered by the Tribunal in determining what meaning to give it.

39. The objective test also means that the blogs and the postings on the blogs are irrelevant to this Tribunal's determination whether s. 7(1)(b) has been infringed.

40. Even a genuine, honest subjective blogging interpretation of the October 23, 2008 article would be of no assistance to the Tribunal in determining whether the Maclean's article infringes s. 7(1)(b). The test is objective.

41. A blog or posting is <u>at best</u> nothing more than a subjective assessment of meaning.

42. There is no guarantee, however, that a blog or posting even reflects the author's genuine belief. A mischievous or malevolent individual might illegally access an innocent third party's Internet account in order to post hateful messages on an Internet website simply to stir up trouble for that website. Postings on blogs are invariably anonymous so no reader is ever alerted to this type of mischief by strange poster names.

43. There is no reason in logic, common sense or simple justice to hold Maclean's or any other publisher responsible for deranged, idiotic, imbecilic, wacko, or psychopathic Internet speech, whether or not that speech originates in this Province, in Alberta, in such American sates as California, and Texas, or in European countries such as Belgium.

Relevant Context and Circumstances

Expert evidence

Dr. Hirji

44. No weight should be given to the evidence of Instructor Hirji concerning the contents of "*The New World Order*."

45. Instructor Hirji did not analyze stereotypes of Muslim minorities in the October 23, 2008 article. Her testimony amounted to what lawyers and judges refer to as "special pleading" – it was merely an argument on behalf of the Complainants, made from the witness box instead of the counsel table.

46. In this context, Maclean's reminds the Tribunal that the April 22, 2008 "*in solidarity*" email sent to Dr. Hirji (and other experts) was preceded by the March 26, 2008 email discussing the Complainants' long term political goal of getting Ontario to re-write its own human rights legislation.

47. When she was not giving purported "expert" testimony, Instructor Hirji did provide some contextual information to this Tribunal. On cross-examination by Maclean's, Instructor Hirji described the debate in Ontario over the proposed introduction of Sharia law to govern family law arbitration in Ontario, and the fact that the Canadian Islamic Congress and other religious groups supported that public policy choice. Others did not, but the importance of free and open debate on these issues, unconstrained by the chill of threatened "hate speech" prosecutions, was evident from this testimony.

Dr. Rippin

48. Dr. Andrew Rippin on cross-examination by Maclean's described an ancient and radical brand of Islam which took a theological approach to sin, and embodies a debate which goes on in the Muslim world today. Dr. Rippin acknowledged that Osama Bin Laden is part of this ancient heritage and what Osama Bin Laden speaks about is not new.

49. Carried forward into the 20th century by Saudi scholar Iban Baz, who re-wrote "10 things which nullify one's Islam", this theological approach includes the following statements in the 4th thing:

> *4. Anyone who believes any guidance to be more perfect, or a decision other than the Prophet's decision, to be better, is an unbeliever. This applies to those who prefer the rule of Evil (taghut) to the Prophet's rule. Some examples of this are:*
>
> *(a) To believe that systems and laws made by human beings are better than Shari'a of Islam, for example,*
>
> *That the Islamic system is not suitable for the twentieth Century.*
>
> *That Islam is the cause of the backwardness of the Muslims.*
>
> *Or that Islam is a relationship between Allah and the Muslim that should not interfere in other aspects of life.*
>
> *(b) To say that enforcing the punishments prescribed by Allah, such as the cutting off the hand of the thief or the stoning of adulterers, is not suitable for this day and age.*

50. Dr. Rippin acknowledged on cross-examination that what Ibn Baz says, and it is extraordinarily strict, is a powerful trend in the entire community. Dr. Rippin did say, of course, that the views of Ibn Baz disagrees with Dr. Rippin's own interpretation of the flexibility and evolution of the interpretation of the Koran, but also acknowledged that it is part of the variety of Islam which goes from a very liberal to a very conservative position. Dr. Rippin adopted on cross-examination his own statement that Ibn Baz' statement "reflects an Islam which is dedicated to keeping close reins over its members, and to demanding rigid adherence to a narrow set of rules and regulations in order to protect that the unity of the

community in the face of perceived outside and inside pressures. It suggests a deep involvement of state powers in controlling the behaviour of community members." Exhibit 24, pages 200-201].

51. Dr. Rippin acknowledged that Osama Bin Laden opened the rupture between Muslims even more strongly, although many feel that such a dissonance is implicit in the Saudi-exported Islam as well.

52. In his cross-examination testimony, Dr. Rippin explained that a large number of mosque leaders, Imams, have been Saudi-trained, and that those people are provided to communities, especially in North America.

53. Cross-examined about his chapter in "The Twenty-First Century Confronts Its Gods, Globalization, Technology and War", Dr. Rippin acknowledged that the Salman Rushdie incident is a consequence of the views of Ibn Baz: "Anyone who believes that it is possible for people to leave the religion Islam is an unbeliever. God has said, "And whoever seeks a religion other than Islam, it will not be accepted of him, and in the hereafter, he will be among the losers." In Dr. Rippin's words, "the ghost of Salman Rushdie lurks behind" this statement by Ibn Baz. [Exhibit 25, page 138] "There are definite authoritarian aspects to these proclamations, and those who support them are firm in their belief that they are correct. That violence may erupt in such a situation is, unfortunately, a reality."

Dr. Ayoub

54. In cross-examination, Dr. Ayoub was asked about the statements of Osama Bin Laden, and he agreed that the following statements would be of concern:

> *I have only a few words for America and its people: I swear by God Almighty Who raised the heavens without effort that neither America nor anyone who lives there will enjoy safety until safety becomes a reality for us living in Palestine and before all the infidel armies leave the land of Muhammad. God is greatest and glory to Islam. October 7, 2001*
>
> *TA: Alright, but Sheikh, those who monitor your speeches and documents have noted the oath you have given recently, in which you have said, word for word: "I swear to Almighty God who raised the heavens, that neither American nor anyone who lives there will be able to dream of security until we live it as a reality in Palestine." So, it is easy for any follower of these events to make a connection between the terrorist events that happened in New York and Washington, and your previous statement. So what is your opinion on these observations?*
>
> *OBL: Making connections is easy. If this implies that we have incited these attacks, then yes, we've been inciting for years, and we have released decrees and documents concerning this issue and other incitements which were published and broadcast in the*

media. So if they mean, or if you mean, that there is a connection as a result of our incitement, then that is true. So we incite, and incitement is a duty – and God has asked it from the best of humans, the Prophet.

God said: "the fight [O Muhammad] in the Cause of God, you are not held responsible except for yourself , and incite the believers [to fight along with you] – it may be that God will restrain the evil might of the disbelievers. And God is Stronger in Might and Stronger in punishing."

And what He meant is fighting and combat against the disbelievers. So this connection is indeed right. We have incited and urged the killing of Americans and Jews. That is true.

Non-Expert Witnesses

Khurrum Awan

55. Mr. Awan's evidence about the meeting with Ken Whyte and Mark Stevenson of Maclean's on March 30, 2007 is not relevant to a determination of whether s. 7(1)(b) is infringed.

56. The Complaints filed April 20, 2007 do not allege [see "*E. Details of the alleged discrimination*"] that Maclean's alleged refusal to permit the publication of a proposed response constitutes a violation of s. 7 of the BC *Human Rights Code*. No application has been made by the Complainants to amend the "Details of the alleged discrimination" described in either Complaint to address Maclean's decision to refuse the Complainants' request for a published response.

57. Second, nothing in s. 7(1) of the BC *Human Rights Code* creates any obligation on a publisher to publish a complainant's response to a publication which allegedly infringes s. 7(1).

58. In purported particulars of relief sought which were provided to Maclean's on October 26, 2007, the Complainants seek, among other things, a declaratory Order that the alleged refusal of Maclean's <u>to permit the publication of a proposed response</u> by the Complainants to the October 23, 2006 article infringes s. 7(1) of the BC *Human Rights Code*. [Maclean's underlining added for emphasis]. This is nothing more than an inappropriate attempt to have this Tribunal re-write s. 7(1)(b).

59. In this context, Maclean's acknowledges that the Elmasry Complaint (#4885) alleges that the "*Muslim community's efforts to resolve this matter were rebuffed by the respondent Maclean's magazine <u>in other provinces</u>*" [Maclean's underlining for emphasis]. However, there is no allegation in that Complaint that Maclean's alleged refusal to publish "*an article authored by a recognized member or members of the Muslim community ... which responds to the inflammatory material contain (sic) in the Article*" constitutes a breach of s. 7(1) of the

Human Rights Code. Nor could there be such an allegations as s. 7(1) clearly does not create such an obligation, as noted above.

60. Maclean's is a national publication which is printed and published outside British Columbia.

61. The Tribunal has no jurisdiction to Order that Maclean's publish anything to anyone outside British Columbia.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Vancouver, June 6, 2008

_____
Julian Porter, Q.C.

_____
Roger D. McConchie

_____
R. Alan McConchie