Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Keith Dreaver, Norma Fairbairn, Susan Gingell, Pamela Irvine, John Melenchuk, Richard Ross, Ailsa Watkinson, Harlan Weidenhammer and Carman Willett

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Jim Pankiw

Respondent

- and -

House of Commons

Interested party

Decision

Members: J. Grant Sinclair, Karen A. Jensen, Edward P. Lustig
Date: March 6, 2009
Citation: 2009 CHRT 8

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I. Introduction

[1] If you had resided in the Federal riding of Saskatoon-Humbolt in 2002-2003, you would have found in your mail box the usual assortment of bills, advertising, personal and business mail, similar to that received by millions of other Canadian households.

[2] But from time to time in 2002-2003, you would have found something else - three Householders containing messages from your Member of Parliament, Dr. Jim Pankiw - your representative in Ottawa; your voice in the House of Commons. The messages bore the imprimatur of this institution, clothing them with legitimacy and authority.

[3] A Householder is a printed brochure sent to households within a constituency by the Member of Parliament. The resources for producing the Householders are provided by the House of Commons. Each Member of Parliament is entitled to send out four Householders per year. The Householders enable the Members of Parliament to maintain their visibility in their constituencies by reporting on the Members' parliamentary activities and thoughts on issues.

[4] What did Dr. Pankiw's Householders say? One of them featured the slogan "Stop Indian Crime". It said that the Federal Government turns a blind eye to "Indian crime" and gives Aboriginal people a "get-out-of jail-free card". It contained a picture purporting to be of an "Indian Terrorist". Another Householder stated that Aboriginal children are entitled to "race-based privileges", while non-aboriginal children are not. It condemned the practices of "racist" "Indian lobbyists" who blackmail and extort millions of dollars from the Canadian taxpayer. The Householders linked some Aboriginal Canadians with higher crime rates, lack of accountability for their criminality, extortion, blackmail and terrorism. The messages exhorted the reader to respond to these statements.

[5] Some constituents were deeply offended by these messages from their MP. Nine members of this group, including several individuals of First Nations' ancestry, sought recourse under the *Canadian Human Rights Act*.

[6] On various dates in 2003, they filed complaints with the Canadian Human Rights Commission alleging that the Householders expressed discriminatory views about First Nations people contrary to ss. 5, 12 and 14 of the *Canadian Human Rights Act* (the *CHRA* or the *Act*).

[7] The *CHRA* articulates the principle that all individuals should have an equal opportunity to make for themselves the lives that they are able and wish to have without being hindered in doing so by discriminatory practices based on race, colour and national or ethnic origin, among other grounds.

[8] In particular, the *Act* provides redress for those who experience adverse treatment or harassment in the provision of services, based on the fact that they are of Aboriginal descent (among other grounds). It also sanctions the publication of notices that express discrimination, or incites others to discriminate, in regard to Aboriginal people. The nine Complainants believe that the three Householders they received from their Member of Parliament fall within these categories.

[9] Not all discriminatory conduct is caught by the *CHRA.* For the reasons that follow, the Tribunal finds that the three Householders in question, sent by Dr. Pankiw are not subject to the provisions of the *Canadian Human Rights Act*. Accordingly, the complaints have not been substantiated and are dismissed.

A. Does Section 5 of the *CHRA* Apply to Householders?

[10] Section 5 of the *CHRA* makes it a discriminatory practice to differentiate adversely in relation to any individual on a prohibited ground of discrimination in the provision of goods, services, facilities or accommodation customarily available to the general public.

[11] The Complainants and the Canadian Human Rights Commission (the Commission) argue that communication by means of the Householders constitutes a “service customarily available to the public” within s. 5 of the *CHRA*. Further, according to the Complainants and the Commission, the Householders denigrate First Nations people on the basis of their race and this

constitutes adverse differentiation on the basis of a prohibited ground. Therefore, they argue, Dr. Pankiw violated s. 5 of the *CHRA* when he sent out the Householders.

[12] The first question is whether creating and mailing Householders to constituents amounts to a "service" within s. 5. In dealing with this question, it must be stressed that the contents of the three Householders are not relevant. That is, the question here is whether the Householders are a "service" irrespective of their content. The *CHRA* does not define this term.

[13] There is some suggestion in the jurisprudence that the term "services" is not restricted to marketplace activities, but may extend to all services provided by government or public officials in the performance of their functions (*Singh (Re)*, [1989] 1 F.C. (C.A.) 430).

[14] There are however, authorities that view "services" in a more limited way. In *Watkin v. Attorney General of Canada*, 2008 FCA 170, at para. 31, the Federal Court of Appeal stated that while many public authorities can and do engage in the provision of services in fulfilling their statutory functions, not all do. The Court stated that the term "services" in s. 5 contemplates something of benefit being held out as a service and offered to the public. Thus, before one can say that a public authority is providing services, one must first establish that a benefit or assistance is being provided by the action.

[15] The question in *Watkin* was whether the regulation of herbal products under the *Food and Drug Act* constituted a "service" within the meaning of s. 5 of the *CHRA*. The Court of Appeal found that it was not possible to characterize the enforcement activities of Health Canada as "services" because they did not provide a benefit to the public; they were coercive actions intended to ensure compliance with the *Act*.

[16] In *Watkin*, the Court provided the following examples of "services" provided by public authorities:

(1) the provision of advance income tax rulings by Canada Revenue Agency;

(2) the publication of weather and road conditions by Environment Canada;

(3) the encouragement offered to Canadians to take an active role in their health by increasing their level of physical activity and eating well;

(4) the provision of advice to immigrants about how to become a Canadian resident.

In all of the examples listed above, the recipients would obtain some improvement, benefit or assistance from the services that are offered. The service meets a need or a want that people have in society.

[17] Similarly, in *Okanagan Rainbow Coaltion v. Kelowna (City)* 2000 BCHRT 21, the British Columbia Human Rights Tribunal held that the ordinary definition, or plain meaning of "services" is a broad one, which includes a benefit to others, a beneficial or useful act, or an act of helping another.

[18] The *Okanagan* case is an interesting one because, following the lead of three other cases, the Tribunal held that a mayoral proclamation was a "service customarily available to the public": *Oliver v. Hamilton (City)* (1995), 24 C.H.R.R. D/298 (Ont. Bd. Inq.), *Hudler v. London (City)* (1997), 31 C.H.R.R. D/500 (Ont. Bd. Inq.), and *Hill v. Woodside* (1998), 33 C.H.R.R. D/349 (N.B. Bd. Inq.).

[19] In the *Okanagan* case, the Mayor was willing to proclaim a "Gay and Lesbian Day" but refused to add the words "pride" to the proclamation. In *Oliver, Hudler* and *Hill*, the mayors refused to issue proclamations proclaiming a day or week "Lesbian and Gay Pride" day or week.

[20] The mayoral proclamation was held to be a service because "it is generally perceived in the community as being a benefit to the groups that seek it and therefore it should be seen as a legitimate privilege to which citizens have access without fear of discrimination" (*Oliver, supra,* at D/302). In all four cases, the refusal to provide the proclamations as requested was found to constitute discrimination in the provision of services customarily available to the public.

[21] However, not all actions taken by government officials that confer a benefit or provide assistance to an individual have been found to be "services" within the meaning of s. 5. For example, in *Forward and Forward v. Citizenship and Immigration Canada* 2008 CHRT 5, the Tribunal examined whether the grant of citizenship was a "service customarily available to the public".

[22] Arguably, the grant of citizenship confers a benefit upon an individual. However, the Tribunal stated that to characterize it as a mere service would be to ignore the fundamental role of citizenship in defining the relationship between individuals and the state. (See also: *Canada (Attorney General) v. McKenna* [1999] 1 F.C. 401 in which the Federal Court of Appeal expressed doubt that citizenship was a "service" under s. 5(b) of the *CHRA*.)

[23] What emerges from this analysis of the law is that to determine whether actions by a public official constitute a "service" under s. 5(b) of the *CHRA*, one must ask whether the activity provides a benefit or assistance to people. A related question is whether the characterization of the activity as a service is compatible with the essential nature of the activity.

[24] Did Dr. Pankiw's Householders provide a benefit to his constituents in the sense of meeting a need or a desire? Or, did they assist the constituents, as the proclamations did in the proclamation cases, to accomplish a goal?

[25] Arguably, Householders could be said to provide a benefit to, or assist constituents, by providing them with information about the views, agenda and activities of their elected representative. In the case of Dr. Pankiw's Householders, the documents apparently also afforded constituents the opportunity to give feedback to their MP about the views expressed therein. If Environment Canada is providing a service within the meaning of s. 5 of the *CHRA* when it publicizes weather and road conditions (*as per Watkin*), could it not be said that Dr. Pankiw is doing the same when he publicizes social conditions—as he sees them?

[26] The Tribunal disagrees. While some constituents may derive some benefit from these Householders, this is not their fundamental purpose and character. Through the Householder budgetary allocation, the House of Commons is providing financial support to each Member in order to further his or her own political communications needs. It is the sender of the document who is its prime beneficiary.

[27] The funding of Householders is an adjunct of the elected office. All elected officials are expected to account for their actions to those who elected them, and the subsidized Householder facilitates fulfillment of this expectation. One cannot equate the information disseminated by Dr. Pankiw, or any other MP, in a Householder, with information disseminated by Environment Canada in a weather bulletin. The former, while it may contain facts, is a politically partisan document ultimately designed to influence voter behaviour in the democratic process, to the benefit of the sender. The latter emanates from the public administration, is operational in nature, and is designed solely to benefit the recipients.

[28] The Householders in the present case provided Dr. Pankiw with a means to make his political views known and to obtain support for his position. In them, Dr. Pankiw expressed his view that the criminal, political and economic situation in Canada would be improved if First Nations people were treated no differently than non-First Nations people.

[29] Dr. Pankiw solicited feedback for this view through the questionnaire portion of the Householders. He testified that this was the most important part of the Householders. Completed questionnaires in support of his views allowed him to say in Parliament that he had his constituents' backing on the views that he was advancing. The Householders were, therefore, political messages that provided a benefit primarily to Dr. Pankiw. For this reason, the Tribunal finds that the Householders were not "services", within the meaning of s. 5 of the *CHRA*.

[30] However, even if the Householders could be said to constitute a "service" within s. 5 of the *CHRA*, the Tribunal is still required to examine the next step in the analysis under s. 5. This involves determining whether the service creates a public relationship between the service

provider and the service user (*Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571 per La Forest J. at para. 69; *Watkin v. Attorney General of Canada* 2008 FCA 170 at para. 31).

[31] In *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R 571, the Supreme Court of Canada provided important guidance on this issue. The case involved a complaint by Ms. Gould that she had been denied membership in the Yukon Order of Pioneers on the basis of her gender. The Order was a fraternal order whose activities and goals included the collection and preservation of the literature and incidents of Yukon's history. These historical materials were made available to the public.

[32] Ms. Gould argued that discrimination resulted from the collection and creation of the historical material since these activities were exclusively assigned to Members of the Order who were all male. The intervener, the Yukon Status of Women Council argued that in light of the Order's activities and place in the community, membership in the organization was itself a service offered to the public and consequently refusal of membership to women constituted discrimination.

[33] A majority of the Supreme Court justices held that the collection and creation of the historical material *could* constitute a service offered to the public *if* the process itself took place in the context of a public relationship. However, the facts of the case did not lend itself to this interpretation. The service that was offered to the public in that case was the end product, namely, the historical data or documents produced. The majority held that this product was offered to the public without discrimination, in the sense that no one was denied the product on the basis of a prohibited ground of discrimination. Therefore, there was no contravention of the *Act*.

[34] Concurring in the result, La Forest J. also held that the collection and recording of historical material by the Order did not give rise to a public relationship. These activities were undertaken by a volunteer historian who was also a member of the Order. There was no evidence that the Order made its facilities for collection and recording of Yukon history available

to the public. Therefore, the collection and creation of the historical materials did not give rise to a public relationship.

[35] The Court's reasoning in *Gould* suggests that the creation of the content of the Householders in the present case would not be subject to the *CHRA* unless the public was provided with an opportunity to participate in that process. The public was not invited to participate in the *creation* of the Householders (and thus, the development of its content). The part of the process that most clearly gave rise to Dr. Pankiw's relationship with the public was the *distribution* of the Householder. There was no discrimination in that part of the process; everyone was provided with the Householder regardless of race, and there was no other adverse differentiation in the distribution process.

[36] Moreover, when the French and English versions of s. 5(b) of the *CHRA* are read together, it becomes apparent that the provision cannot be interpreted to encompass the creation of the content of the Householder.

[37] The French version of s. 5 reads as follows: "constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de services destinés au public de défavoriser un individu *à l'occasion de leur fourniture*".

[38] The English version of s. 5 speaks of discrimination in the "*provision* of services". The common meaning between the two official versions is that it is only when the service is **provided** to the recipients that the service provider becomes subject to the requirements of s. 5.

[39] Indeed, in *Gould* La Forest J. found that the use of the term "when" in the phrase "when offering or providing services…" in the *Yukon Human Rights Act* (and also in the French version of s. 5(b) of the *CHRA)* indicated that "it is not until the service, accommodation, facility, etc. passes from the service provider and has been held out to the public that it attracts the anti-discrimination prohibition" (*Gould,* para 55). Thus, the creation of the Householders or their content would not be subject to s. 5(b) of the *CHRA*, only their distribution.

Section 5 in the Context of Other Provisions of the *CHRA*

[40] When s. 5(b) is interpreted in the context of other provisions in the *Act*, as we are directed to do by the Supreme Court in *Gould*, it seems unlikely that Parliament intended the communication of political messages through media such as the Householders to be covered by the *Act* (*Gould, supra,* at para. 7).

[41] Section 5 deals with discrimination in the provision of services to the public, among other things. Section 13 of the *Act*, on the other hand, deals with discrimination in the communication of messages. Section 13 makes it a discriminatory practice to communicate any material by means of a telephone or a computer that is likely to expose a person to hatred or contempt on the basis of a prohibited ground of discrimination.

[42] Section 12 makes it a discriminatory practice to publish or display any notice, sign, symbol, emblem or other representation that either expresses or implies discrimination or an intention to discriminate, or incites others to discriminate.

[43] It is clear from the Complainants' testimony in the present case that their main concern with the Householders was that they were likely to expose First Nations' people and people of Aboriginal descent to hatred or contempt. However, since s. 13 limits communication-related discrimination to those that are transmitted telephonically via the Internet, it does not apply to the facts of the present case.

[44] Section 5 should **not** be extended to include written communications such as the Householders since to do so would be to extend the limitations Parliament placed on discriminatory communication. Parliament deliberately turned its mind to the question of discriminatory communication in ss. 12 and 13 of the *Act.* To extend s. 5 to activity that is essentially communicative in nature would run counter to the deemed intent of Parliament to limit discriminatory communication to ss. 12 and 13. The Tribunal is not authorized to interpret

s. 5 of the *Act* so as to extend its protections beyond those intended by Parliament (*Gould*, at para. 50).

B. Does Section 12 of the *CHRA* Apply to Householders?

[45] Section 12 of the *CHRA* states that it is a discriminatory practice to publish or display before the public any notice, sign, symbol, emblem or other representation that (a) expresses or implies discrimination or an intention to discriminate, or (b) incites or is calculated to incite others to discriminate if the discrimination expressed or implied would otherwise, if engaged in, be a discriminatory practice described in any of sections 5 to 11 or in section 14.

[46] The Commission, contrary to its Statement of Particulars, argued at the hearing that s. 12 of the *CHRA* did **not** apply to the present case. The Complainants, however, maintained that s. 12 applies. They argued that the Householders were "representations" within the meaning of s. 12 of the *CHRA.*

[47] The Complainants argued that in the Householders, Dr. Pankiw implied that he would not provide services to his First Nations constituents. Since one of Dr. Pankiw's responsibilities, as a Member of Parliament, was to provide services to his constituents, a refusal to do so for his First Nations' constituents on the basis of their race would constitute a violation of s. 5 of the *Act*. On that basis, the Complainants argued that s. 12 was violated.

[48] There is good authority for the view that the term "representation" in human rights legislation such as s. 12 of the CHRA does **not** apply to the content of written material such as newspaper articles, and by extension, the content of publications such as the Householders. In *Re Warren and Chapman*, (1984), 11 D.L.R. (4^{th}) 474 (Man. Q.B.), the Manitoba Court of Queen's Bench was required to decide whether a newspaper article came within the meaning of "notice, sign, symbol, emblem or other representation" as used in s. 2(1) of the *Manitoba Human Rights Act*. The Court held that newspaper articles did **not** constitute a "representation". In coming to this interpretation the Court relied on the *ejusdem generis* rule, i.e., the meaning of words is drawn from those with which they are associated.

[49] The word “representation” is associated with the words “notice, sign, symbol, emblem”, in the former *Manitoba Human Rights Act* and in the present *CHRA.* The Court in *Re Warren and Chapman* stated that these words mean an “image, likeness, or reproduction”. The term “representation” takes its meaning from its association with these similar words. Therefore, the Court held that the word “representation” could not include articles or written statements since they were not akin to images, likenesses or reproductions.

[50] The same interpretation was given to a similar provision in *Saskatchewan (Human Rights Commission) v. Engineering Students’ Society* (1989), 56 D.L.R. (4th) 604 (Sask. C.A.), leave to appeal refused: [1989] 1 S.C.R. xiv. The issue in that case was whether certain articles in the Engineering Student newspaper offended s. 14(1) of the *Saskatchewan Human Rights Code*. That provision prohibited the publication or display of any “notice, sign, symbol, emblem or other representation” which exposed, or tended to expose to hatred, ridiculed, belittled, or otherwise affronted the dignity of any person on the basis of a prohibited ground.

[51] The Court held that articles or statements were not “representations” within the meaning of the *Code* and hence, written or oral statements that resulted in discrimination were not prohibited by the *Code*. The Court stated that the provision simply did not have the kind of sweep to include “statements” or “articles”. If it had, the term “representation” would gather in statements in newspapers, magazines, books, movies, songs, plays, performances, dissertations, and the like. That, according to the Court, was not what was ordinarily comprehended by the briefly written and graphic forms of statement found in “notice, sign, symbol, emblem or other representation”.

[52] Like the Manitoba and Saskatchewan human rights legislation at the time, s. 12 of the *CHRA* speaks of the publication or display of any notice, sign, symbol, emblem or other representation. As in *Forward and Forward v. Citizenship and Immigration Canada* 2008 CHRT 5 where this Tribunal applied the associated words rule to the term “services” in s. 5, the Tribunal in the present case finds that the application of that rule to s. 12 renders it impossible to interpret “representation” as covering the written content of the Householder.

[53] It is worth noting that section 14(1) of the *Saskatchewan Human Rights Code* was subsequently amended to include the words "article" and "statement" so that written content such as newspapers are now subject to that provision. A number of other provinces have also included terms such as this in their statutes. For example, in British Columbia and Alberta, provisions which are similar to s. 12 include the terms "statements and publications". In Manitoba, s. 2(1) of the *Manitoba Human Rights* Act was amended to include the word "statement" so that the content of written and oral statement is now included in the provision dealing with discriminatory signs.

[54] In contrast, s. 12 of the *CHRA* has not been amended to include words such as "statement", "article" or publications". If Parliament had intended s. 12 of the *CHRA* to encompass written statements of the kind that are in issue in this case it could have, like the Saskatchewan and Manitoba legislatures, added a term that would make it clear that articles or statements were included in s. 12. It has not done so.

C. Does Section 14 of the *CHRA* apply to the Present Case?

[55] Section 14 of the *Act* provides that it is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public to harass an individual on a prohibited ground of discrimination.

[56] The Tribunal has concluded that the Householders do not constitute "services customarily available to the general public". In closing argument, the Commission conceded that if the Householders were found not to constitute "services" then s. 14 would not apply. The Tribunal agrees. Since the Householders were not services, there can be no harassment in the provision of services on the basis of a prohibited ground. Section 14 does not apply in the present case.

D. The Constitutional Issues

[57] The House of Commons was granted interested party status in the present complaint to provide argument on the constitutional limits that can or ought to be placed on communications

between Members of Parliament and their constituents. However, given the Tribunal's finding that the term "services" in sections 5 and 14 and the term "representation" in s. 12 do not apply to the Householders, it is not necessary to deal with the constitutional issues in the present case.

E. Conclusion

[58] For the reasons set out above, the complaints in the present case are dismissed.

Signed by

J. Grant Sinclair
Tribunal Member

Karen A. Jensen
Tribunal Member

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
March 6, 2009

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T0969/8904

Style of Cause: Keith Dreaver, Norma Fairbairn, Susan Gingell, Pamela Irvine, John Melenchuk, Richard Ross, Ailsa Watkinson, Harlan Weidenhammer and Carman Willett v. Jim Pankiw

Decision of the Tribunal Dated: March 6, 2009

Date and Place of Hearing: October 20, 21 and 22, 2008

Saskatoon, Saskatchewan

Appearances:

Susan Gingell, John Melenchuk, Richard Ross and Ailsa Watkinson, for themselves

No one appearing, for the Complainants, Keith Dreaver, Norma Fairbairn, Pamela Irvine, Harlan Weidenhammer and Carman Willett

Daniel Poulin, for the Canadian Human Rights Commission

Jay D. Watson, for the Respondent

Steven R. Chaplin, for the Interested Party