Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Richard Warman

Complainant

- and -

Canadian Human Rights Commission

Commission

- and –

Marc Lemire

Respondent

- and -

Attorney General of Canada
Canadian Association for Free Expression
Canadian Free Speech League
Canadian Jewish Congress
Friends of Simon Wiesenthal Center for Holocaust Studies
League for Human Rights of B'nai Brith

Interested parties

Ruling

Member: Athanasios D. Hadjis
Date: June 5, 2008
Citation: 2008 CHRT 20

[1] This ruling is in regard to (i) the Respondent's request that the deadlines for written submissions on final arguments be extended and that the hearing of final arguments be postponed to September 2008, and (ii) the request by the interested party Canadian Association for Free Expression (C.A.F.E.) that closing arguments be postponed in order to call at least seven more witnesses to testify while "reserving the right to add further witnesses".

[2] The present complaint was filed with the Commission on November 24, 2003. The Commission referred the complaint to the Tribunal on August 24, 2005. On November 25, 2005, the Respondent filed a Notice of Constitutional Question, indicating his intention to "question the constitutional applicability, validity and effect of sections 13 and 54(1), (1.1) of the *Canadian Human Rights Act*". The Respondent proposed that the issue be argued as a preliminary motion. On December 6, 2005, the Respondent filed with the Tribunal his Notice of Motion on the constitutional issue together with his written submissions and Book of Authorities. On December 19, 2005, the Tribunal advised the parties that the motion would be dealt with at the hearing in the context of the factual framework of the case.

[3] On February 3, 2006, the Attorney General of Canada exercised the right, pursuant to s. 57 of the *Federal Courts Act*, RSC 1985, c. F.7, to participate and adduce evidence at the hearing, as well as to make submissions, in respect of the constitutional question. In the meantime, a number of groups petitioned the Tribunal to be granted interested party status, including C.A.F.E. The Tribunal authorized the groups' participation on February 2, 2006, (*Warman v. Lemire*, 2006 CHRT 8) but only regarding the constitutional issue. They were not to be permitted to overlap or repeat the evidence, cross-examination, or submissions of the Complainant, the Commission, the Respondent or the Attorney General of Canada.

[4] The Tribunal allotted time to the interested parties and the Attorney General of Canada to file their Statements of Particulars, expert reports, and related documents pursuant to the Tribunal's *Rules of Procedure*. During a case management conference held on May 19, 2006, all the parties provided their estimates for the duration of their evidence and their respective

availabilities. Hearing dates were set down for a total of four weeks, extending over a period beginning on January 29, 2007, and ending on March 2, 2007.

[5] On March 30, 2006, the Respondent wrote to the Commission requesting that documents relating to the activities of the Commission regarding "hate on the Internet", beyond the scope of the present complaint, be disclosed on the ground that they were arguably relevant to the constitutional issue. In a subsequent letter dated April 28, 2006, the Respondent's counsel said that it is "obviously highly relevant to this challenge that it be seen how s. 13 operates within the context of the *Canadian Human Rights Act* and the Canadian Human Rights Commission's broad powers and mandate".

[6] The Commission questioned the arguable relevance of this material, arguing that the issue regarding the constitutionality of s. 13 is "one of law" and what was being requested went "far beyond this scope", amounting to a fishing expedition. The Attorney General of Canada concurred, arguing that the Federal Court is the "correct forum" in which to raise the constitutional or any other legal challenge to the Commission's "exercise of discretion of the investigation of the complaint" or to address any allegation "of institutional or systemic bias on the part of the Commission towards those who advocate particular views".

[7] The parties joined issue, therefore, on this disclosure question and after formal submissions were filed, the Tribunal issued a ruling on August 16, 2006 (*Warman v. Lemire*, 2006 CHRT 32), authorizing in part the disclosure being sought by the Respondent. It is noted in the ruling (at paras. 31-33) that the Respondent claimed that he was seeking this disclosure because he intended to argue that the "deleterious effects" of s. 13 of the *Act* may be so severe that the measure is not justified by the purposes it intends to serve, in reference to the proportionality test set out in *R. v Oakes*, [1986] 1 S.C.R. 103. The Respondent assured the Tribunal that it was not a review of the lawfulness of the Commission's activities that he was seeking, but rather a review of whether the "deleterious effects of the legislation on freedom of speech outweigh the salutary effects" (para. 37).

[8] The Tribunal found that the parties on each side of the issue raised "interesting points" that could be properly submitted before the Tribunal adjudicating on the merits of the constitutional challenge and the complaint as a whole (*Warman v. Lemire*, 2006 CHRT 32).

[9] In the ensuing months, a debate developed between the Commission and the Respondent about whether the Commission's disclosure of documents in respect of the Commission activities issue was complete. In replying to a motion that the Respondent had filed in this regard, the Commission presented supporting affidavits from two of its employees, Dean Steacy and Harvey Goldberg. On January 16, 2007, the Respondent informed the Tribunal of his intention to cross-examine Messrs. Steacy and Goldberg on these affidavits. He also asked that the proceedings, which were scheduled to begin two weeks later, be adjourned.

[10] On January 26, 2007, the Tribunal advised the parties that all outstanding issues of disclosure and adjournment would be dealt with at the opening of the hearing, on January 29, 2007, in Toronto. On that first day, the Respondent requested subpoenas for Messrs. Steacy and Goldberg, as well as Ms. Hannya Rizk, another Commission employee, in order to have them testify. The Respondent amended his witness list to include these individuals. The Tribunal agreed to issue the subpoenas. Given that the hearing was about to begin, the Tribunal accepted the Respondent's suggestion that those three witnesses testify in Ottawa, where they reside, during a one-day hearing to be held following the four weeks that had already been scheduled.

[11] Several weeks later, as the hearing was progressing, the parties indicated to the Tribunal that it would be preferable to reserve separate hearing dates for final arguments, some time after the close of evidence, in order to better enable the parties to prepare and organize their submissions. Three days (May 9 to 11, 2007) were therefore set aside for that purpose.

[12] The initial four weeks of hearings, held in Toronto and Mississauga, ended on March 1, 2007, the parties declaring that there would be no other witnesses called other than the three who remained to testify in Ottawa (Mr. Steacy, Mr. Goldberg and Ms. Rizk). Although one day had originally been set aside for their evidence, due to Ms. Rizk's unavailability, the three days in

May that had been previously reserved for final arguments were reallocated to hearing the witnesses. Ms. Rizk testified on May 9, 2007, and Mr. Steacy testified on May 10, 2007. The May 11th date was cancelled due to the illness of Commission counsel. Mr. Goldberg, therefore, testified over a three-day period, from June 25 to 27, 2007, the three new days that had been set for arguments after the May 9 to 11 dates had been reallocated to hear witnesses. Thus, the one extra day that had been originally allocated to hear three witnesses ending up being extended to five days.

[13] Pursuant to undertakings made during Mr. Goldberg's testimony, the Commission disclosed, in July 2007, a series of documents, said to number 300 pages in total.

[14] During the course of Mr. Steacy's and Ms. Rizk's testimonies, the Commission made a number of objections under s. 37 of the *Canada Evidence Act*. As the Federal Court has the exclusive authority to rule on such objections, the questions objected to remained unanswered.

[15] On May 17, 2007, the Respondent filed an application to the Federal Court for adjudication of the s. 37 objections, and on July 5, 2007, the Respondent sought an adjournment of proceedings *sine die* from the Tribunal, pending the outcome of the Federal Court application. On August 17, 2007, the Tribunal granted the Respondent's request for an adjournment (*Warman v. Lemire*, 2007 CHRT 37). The Tribunal noted that had any of the parties indicated that they had any other evidence to adduce, aside from that which related to the s. 37 objection, the Tribunal would have continued the hearing pending the outcome of the Federal Court application, but that was not the case.

[16] The Federal Court ultimately ruled, on January 15, 2008, that it could not "properly" consider the s. 37 application, given the Commission's disclosure a few weeks earlier of the information regarding which the Commission had previously invoked s. 37.

[17] Consequently, the Tribunal directed that Ms. Rizk and Mr. Steacy could be recalled by the Respondent to testify and answer the previously objected to questions and any follow-up

questions directly related to those answers. Both Ms. Rizk and Mr. Steacy therefore testified on March 25, 2008.

[18] On March 31, 2008, the Respondent petitioned the Tribunal for an order that the Commission disclose additional documents and information. The Commission replied on April 10, 2008, that it did not oppose the order sought, although it noted that the records responsive of the request "will be of little or no relevance".

[19] The Commission sent a portion of the documents to the Respondent and other parties on April 25, 2008, and the remaining portion of ten additional pages was sent on May 1, 2008. The Commission had redacted some information from these documents, including the names and contact information of some individuals. On May 5, 2008, the Respondent contested these redactions and sought their full disclosure in original form. The Tribunal will be addressing this request in a separate ruling. The Respondent also sought an order to have final arguments, which had been rescheduled for June 11 to 13, 2008, postponed again to a later date to allow the Respondent to obtain disclosure of the documents in their original form and to apply to enter the documents as exhibits in the case.

[20] On May 12, 2008, the Tribunal agreed to extend the dates. The parties were asked to provide the Tribunal with their availability in the weeks of July 7th and 14th, 2008, for final arguments. The Tribunal also authorized the Respondent to file any of the recently disclosed documents directly into evidence by submitting them to the Tribunal Registry in a binder.

[21] The Respondent was apparently not satisfied with the extension given. On May 13, 2008, the Respondent wrote again to the Tribunal requesting a further extension for written submissions to August 2008 and carrying forward the hearing on final arguments to September 2008. His counsel pointed out that the case involves "thousands" of pages of exhibits and transcripts and she would have difficulty meeting her deadlines. She added that she is working alone while some of the other parties have the benefit of having more than one counsel assigned to the case.

[22] Parallel to the Respondent's requests for extensions, the interested party C.A.F.E. was making its own requests. On May 5, 2008, the interested party C.A.F.E. informed the Tribunal that it supported the Respondent's request for "the suspension of deadlines until at least the autumn" and made a "demand" that the hearing be re-opened to hear further testimony "occasioned by the material in the last minute disclosures or that may be revealed in the unredacted disclosures" that were being sought by the Respondent.

[23] On May 13, 2008, the interested party C.A.F.E. made a formal motion of its own to "postpone closing argument dates and to call additional witnesses". The interested party C.A.F.E. also made a motion "to argue Apprehension of Bias" by the Tribunal member in this case. This latter motion will be dealt with in a separate ruling.

[24] The interested party C.A.F.E. states in its motion that it proposes calling at least seven witnesses, including Mr. Steacy and Mr. Goldberg. The interested party C.A.F.E. also "reserves" itself the right to add further witnesses. The reason given for its request is the "extremely late and incomplete disclosure by the Commission". The interested party C.A.F.E. also raises the "ridiculous obstruction" by Mr. Steacy, who has restricted vision, in not bringing his assistant along when he testified on March 25, 2008, thus forcing counsel to read documents to him. One must wonder, however, how using the intermediary of the assistant to read the documents to him would have been any faster.

[25] The alleged late and incomplete disclosure consists of the documents communicated in July 2007 after Mr. Goldberg testified and the documents that the Commission provided in April/May 2008, pursuant to the Respondent's March 31, 2008 letter.

Analysis

[26] As I already indicated, this complaint was referred to the Tribunal almost three years ago. Section 48.9 (1) of the *Canadian Human Rights Act* provides that proceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural

justice and the rules of procedure allow. There is a duty upon human rights tribunals, and other tribunals as well, to ensure the timely disposition of complaints, a point that was highlighted by the Nova Scotia Court of Appeal in *Nova Scotia Construction Safety Association v. Nova Scotia Human Rights Commission*, 2006 NSCA 63, at paras. 76-7:

> [76] Recognizing the well known principle that a key objective of human rights legislation is to be remedial, the process for inquiring into and exposing acts of discrimination must be expeditious in order to be effective. Otherwise, the salutary benefit of public scrutiny, enlightenment and appropriate redress in the face of proved violations, is lost. An efficient and timely disposition of complaints is in the interest of both complainants and those whose behaviour is impugned. It is also in the public interest. People and businesses need to get on with their lives. Unlike fine wine, protracted human rights litigation does not improve with age.
>
> [77] In this I find the observations of LeBel, J., although in dissent, in [*Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44,] especially apt:
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> > 140 Unnecessary delay in judicial and administrative proceedings has long been an enemy of a free and fair society. At some point, it is a foe that has plagued the life of almost all courts and administrative tribunals. It's a problem that must be brought under control if we are to maintain an effective system of justice, worthy of the confidence of Canadians. ...

[27] More recently, in a case dealing with the judicial review of a Tribunal decision, *Canada Post v. P.S.A.C.* 2008 FC 223 at paras. 264-5, the Federal Court made similar observations, noting that a legal hearing without discipline and timeliness both delays and denies justice. The Court went on to recite the well-known axiom, "justice delayed is justice denied", adding that a fair hearing is not a continuous process. A fair hearing is one where a party knows the case against it and has an opportunity of addressing that case within a reasonable time, at which point the Tribunal has a duty to adjudicate upon the case.

[28] These observations by the courts have been reflected in the Tribunal's Practice Note No. 1, entitled Timeliness of Hearings and Decisions, which is found on the Tribunal's website, http://www.chrt-tcdp.gc.ca/about/tribunalrules_e.asp. The Practice Note concludes with a

reminder to all participants in Tribunal inquiries of their obligation to assist in the timely completion of the hearing and deliberation process and of the Tribunal's intention to adhere firmly to Parliament's directive in subsection 48.9(1) of the *Act*.

[29] There is another compelling reason to move in a timely manner that is specific to this case. As the Respondent noted in his submissions, a judicial review of a Tribunal decision is currently before the Federal Court, the proceedings of which have been stayed since April 2, 2007, pending the disposition of the present case (*Kulbashian v. Canada (Human Rights Commission)*, 2007 FC 354). The Court indicated that the outcome of the present hearing and any subsequent application for judicial review will provide it with "guidance" in deciding the *Kulbashian* case. I also understand that in at least one other s. 13 case currently pending before the Tribunal, the portion of the hearing dealing with a similar constitutional challenge has also been deferred, pending the outcome of this case. Thus, the longer it takes for the present case to run its course, the longer these - and perhaps other cases - will remain pending.

[30] The parties in the present case, including the interested parties, confirmed to the Tribunal that they had no intention to call any other witnesses after the testimonies of the three Commission employees, which would have been completed on June 27, 2007, after Mr. Goldberg's evidence, were it not for the s. 37 objections and ensuing application to the Federal Court for determinations thereof.

[31] The interested party C.A.F.E. claims that witnesses should be recalled and new ones summoned because of the "late" disclosure of documents arising from Mr. Goldberg's evidence. However, those documents have been in C.A.F.E.'s possession since July 2007. No request ever came to call new evidence in this regard until the last few weeks. The Tribunal did receive a request from the Respondent that these documents be entered directly into the record without the necessity of recalling the witness, and that request was granted. The communication of documents by the Commission in July 2007 does not, therefore, justify the recall of witnesses and calling of new witnesses at this stage.

[32] With respect to the documents provided in April and May 2008, the Tribunal has allowed their entry into evidence as well. More importantly, I have looked at all of these documents and quite simply, the documents speak for themselves. A portion of them are emails made by Mr. Steacy under an assumed name, similar to those upon which he testified. The remaining documents, which make up the bulk of the material in question, demonstrate that the Commission cooperates with several community groups and police services on matters relating to s. 13. These are basically the facts alleged in the Respondent's Amended Statement of Particulars dated December 18, 2006, at paragraph 75, in support of his arguments on the constitutional issue:

> 75. The Commission itself states that the complaint process is only "one part" of what it terms "the broader fight against hate motivated activity" in Canada. It works with ISP's, NGO's, the police and government departments in extra-judicial ways to stop the viewpoints which it deems to be hate. It is empowered by its legislation to undertake this destruction of free speech behind closed doors in private meetings and with favoured groups and organizations. The Commission works closely with Edmonton, Alberta and London, Ontario Police Hate Crime Units, among others, to seize computers and evidence in raids on the homes of people whom Mr. Warman has filed complaints against. This evidence is later used at Tribunal hearings. Section 13 is being used as a de facto criminal provision, using the police power of search and seizure to obtain evidence. Most of these people are never subsequently charged under the Criminal Code.

Furthermore, ample evidence of the cooperation between the Commission and police services as well as community groups has already been adduced during the earlier hearings. I do not see why this evidence needs to be revisited. As the Supreme Court noted in *R. v. Malmo-Levine; R. v. Caine*, 2003 SCC 74, at para. 27, a trial judge is not required to listen to repetitive evidence that does not advance the work of the court.

[33] What remains, therefore, to be determined is whether, on the one hand, the impugned Commission activity is evidence that the "deleterious effects" of s. 13 on freedom of speech are so severe that they outweigh the salutary effects, as the Respondent and some of the interested parties contend, or whether on the other hand, evidence of such activity has no bearing on the

proportionality analysis to be conducted under s. 1 of the *Canadian Charter of Rights and Freedoms*, as the Commission, the Attorney General, the Complainant and the other interested parties contend. This question will be addressed in final arguments, as I have said repeatedly during the case whenever I have ruled, over the emphatic objections of the Commission and the Attorney General, that this sort of evidence can be adduced.

[34] The interested party C.A.F.E.'s motion to recall witnesses and call additional witnesses is therefore dismissed.

[35] With respect to the Respondent's motion for an extension beyond the one which was already granted earlier this month, the Tribunal is obviously mindful of the significant amount of letters, motions, exhibits, and other documents exchanged in this case and particularly over the last few weeks. The Tribunal is also aware that the July hearing dates that it suggested to the parties in response to the extension requests were determined without any prior consultation with the parties as to their specific availability for three consecutive days during the weeks in July that the Tribunal is available. What is of fundamental importance to the Tribunal at this stage is ensuring that parties and their counsel be fully prepared to present all of their arguments to the Tribunal on all of the significant questions of law and fact in this case. In the circumstances, but in keeping with the requirement for an expeditious yet fair process, I see no harm in granting an extension for a few more weeks, thereby ensuring everyone's total preparation and availability for final arguments.

[36] As a result, the deadlines for written submissions can be rescheduled as well. The Attorney General has indicated that he takes exception to the accordance of additional time to the other parties to prepare their written submissions, claiming that unfairness would arise from their having viewed his submissions, which he filed on schedule on May 9, 2008. With respect, I do not see the prejudice. The whole point of the exercise is to place material before the Tribunal so that it may better understand the positions of the parties, particularly as they are presented during their oral arguments. If the Attorney General feels it important to supplement its

submissions due to the subsequent filings by the others, he may do so in accordance with the deadlines outlined in the following schedule:

> The Complainant and Canadian Human Rights Commission will file their submissions on the merits by **August 6, 2008**;
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> The Complainant, the Canadian Human Rights Commission, and the Respondent will file their submissions on the constitutional issue by **August 6, 2008**;
>
> The Respondent will file his submissions on the merits by **August 22, 2008**;
>
> With regard to the constitutional issue, the responding submissions of the main parties (and this of course would include the Attorney General of Canada, in reference to my earlier comments) and the principal submissions of the interested parties will be filed by **August 22, 2008**.

[37] The parties are to provide the Tribunal registry with their dates of availability in the weeks of September 8 or 15, 2008, for a hearing to be conducted in the western sector of the Greater Toronto Area.

Signed by

Athanasios D. Hadjis
Tribunal Member

Ottawa, Ontario
June 5, 2008

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1073/5405

Style of Cause: Richard Warman v. Marc Lemire

Ruling of the Tribunal Dated: June 5, 2008

Appearances:

Richard Warman, for himself

Margot Blight, for the Canadian Human Rights Commission

Barbara Kulaszka, for the Respondent

Simon Fothergill, for the Attorney General of Canada

Paul Fromm, for the Canadian Association for Free Expression

Douglas Christie For the Canadian Free Speech League

Joel Richler, for the Canadian Jewish Congress

Steven Skurka, for the Friends of Simon Wiesenthal Center for Holocaust Studies

Marvin Kurz, for the League for Human Rights of B'nai Brith