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

2008 CHRT 29
2008/06/26

[1] The interested party, Canadian Association for Free Expression, Inc. (CAFE), has made a motion "demanding" that I recuse myself from this case on the basis of a reasonable apprehension of bias. In its motion, CAFE states:

Recently, due to Internet searches, it has come to the attention of CAFE that member Hadjis has on numerous occasions worked with the Canadian Jewish Congress, who have received Interested Party Status in these proceedings over the vigorous objections of the Respondent.

[2] The Respondent indicated in his submissions on CAFE's motion that he "supports CAFE's submissions that there is a reasonable apprehension of bias" but sees "no benefit to another member hearing either the motion or the case". I take it, therefore, that the Respondent is not seeking an order that I recuse myself. The interested party, Canadian Free Speech League (CFSL), has advised the Tribunal that it "supports" CAFE's "argument" that there is a reasonable apprehension of bias. None of the other parties has indicated any support of CAFE's motion.

[3] CAFE requested in its motion that a separate Tribunal member hear this motion. However, as the Federal Court pointed out in *Samson Indian Nation and Band v. Canada* [1998] 3 F.C. 3 (F.C.T.D.), [1997] F.C.J. No. 1652 (Q.L.) at para. 66, aff'd *Samson Indian Nation and Band v. Canada*, 1998 CanLII 7815 (F.C.A.), "the judge against whom a disqualification application is made should hear the application for recusal". No authority has been cited to me to support the assertion that a Tribunal member other than the one against whom the disqualification allegation is made must hear the application. Sara Blake states in *Administrative Law in Canada*, 4th ed. (Markham: LexisNexis Canada, 2006) at 114-5:

When an allegation of bias is made, the tribunal should rule on the allegation. If it rules that it is not biased, it may continue with the hearing. It is not obliged to halt the proceeding. A tribunal is not to be paralysed every time someone alleges bias.

In *Flamborough (Town) v. Canada (National Energy Board)* [1984] F.C.J. No. 526 (F.C.A.), Justice Mahoney stated:

I should have added that the proposition that a member of a tribunal against whom an allegation of an apprehension of bias has been made cannot, himself, dispose of or participate in disposing of that allegation is utterly fatuous. The practical effect, if that were the law, would be the paralysis of tribunals, and trial courts, at the whim of anyone willing to allege bias. The availability of judicial review and appeal ensures that such charges will, ultimately, be dealt with by a disinterested judiciary.

I note that in *Arsenault-Cameron v. Prince Edward Island*, [1999] 3 S.C.R. 851, Justice Bastarache personally dealt with the motion seeking his recusal from the case. Where allegations of bias have been made before the Canadian Human Rights Tribunal in the past, it has been the practice for Tribunal members to hear and rule on the motions for recusal that have been brought against them (see e.g. *Caza v. Télé-Métropole inc.*, (2002), 43 C.H.R.R. D/336; *Warman v. Bahr*, 2006 CHRT 46).

[4] I will therefore render the ruling on CAFE's application for recusal.

The Test for Reasonable Apprehension of Bias

[5] The test for reasonable apprehension of bias, as restated by the Supreme Court in *Wewaykum Indian Band v. Canada*, 2003 SCC 45 at para. 74, and derived from its previous decision in *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369, is as follows:

What would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude?

The Court in *Wewaykum* noted that the standard refers to an apprehension of bias that rests on "serious grounds", citing an excerpt from *Committee for Justice and Liberty* at 395, which states:

The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

[6] It is noteworthy that the Supreme Court in *Wewaykum*, a case dealing with judicial bias, applied the *Committee for Justice and Liberty* test, which was developed in the context of administrative tribunals.

[7] I have considered the matters raised by CAFE in its motion and have determined that the test for reasonable apprehension of bias has not been satisfied, for the reasons set out below.

Facts Alleged

[8] Although CAFE's motion refers to my having worked on "numerous occasions" with the Canadian Jewish Congress, only one incident is cited in its motion:

On November 24, 1997, Athanasios Hadjis issued a joint press release with the Canadian Jewish Congress denouncing Jacques Parizeau, claiming that Mr. Parizeau "blame[s] particular communities around the result of a democratic process". Mr. Hadjis went on to say that "such an attitude is irresponsible as it contributes to the exacerbation of tensions within our society". The Canadian Jewish Congress states in its press release that the CJC and Mr. Hadjis's Hellenic Congress of Quebec are a "coalition".

[9] CAFE did not provide the Tribunal with a copy of the press release in question and I do not specifically recollect it. I can state though that it most certainly would not have been a joint press release by me and the CJC, and that the Hellenic Congress of Quebec (HCQ) was definitely not "Mr. Hadjis's". Obviously some clarification is needed. The HCQ was an umbrella organization for various associations active within Quebec's Greek (Hellenic) community. The HCQ's mandate, as I recall, included articulating the views of Quebecers of Hellenic origin on matters of public interest. I served on the Board of Directors of the HCQ from about 1993 until January 1999.

[10] During the 1990's, as all Canadians are well aware, Quebecers engaged in a public debate about the province's future within Canada. Part of this discussion touched upon the role and views of Quebec's minorities on the matter, and the HCQ did not hesitate to express the Hellenic community's opinions and concerns in this regard. It eventually became evident that other cultural communities (ethnic groups) within Quebec shared similar opinions. Thus, the HCQ occasionally issued joint statements and presented briefs with organizations representing these other communities, in particular the Italian community (National Congress of Italo-Canadians) and the Jewish community (Canadian Jewish Congress, Quebec Region). The "joint press release" referred to in CAFE's motion may have been one of those joint statements. The role of HCQ spokesperson was rotated amongst the members of the HCQ's Board of Directors. In addition to these media statements, the three groups also organized meetings between members of their communities and other Quebecers in order to encourage and foster dialogue.

[11] At no time did any of the matters discussed between these organizations while I was involved deal with any of the issues arising in the present complaint, including hate messages, freedom of expression, the *Canadian Human Rights Act*, and the Canadian Human Rights Commission. Furthermore, I do not know nor have I ever dealt with any of the individuals who have represented the CJC in the present case. I would note finally that I have never been a member of the CJC nor have I ever acted as their counsel.

Analysis

[12] To begin with, as the Supreme Court noted in *Wewaykum*, *supra*, at para. 85, the passage of time is a "significant factor" that must "inform the perspective of the reasonable person assessing the impact" of a member's or judge's involvement. The Court pointed out that most arguments for disqualification rest on circumstances that are either contemporaneous to the decision-making, or that occurred within a short time prior to the decision-making. My involvement with the HCQ dates back over nine years, and my last dealings with the CJC Quebec Region, to even earlier than that. This is a significant period of time.

[13] In *Zündel v. Citron*, [2000] 2 F.C. 225 at paras. 43-5, the Federal Court of Appeal highlighted the fact that the Tribunal member in question had been assigned to the case nine years after the publication of a press release that was the basis of the recusal application. The Court held that this passage of time, along with certain other factors, was sufficient to expunge any taint of bias. In *Weywaykum*, *supra*, the issue giving rise to the request for Justice Binnie's recusal had taken place 15 years prior to the hearing in which he was sitting. The Court found that a reasonable person, viewing the matter realistically, would not come to the conclusion that Justice Binnie's prior activity affected his ability, even unconsciously, to remain impartial (at para. 90 of the decision).

[14] The nature of the adjudicator's involvement is also a significant factor. In *Arsenault-Cameron, supra*, at para. 4, Justice Bastarache cited with approval a finding from a South African court to the effect that "no recusal application could be founded on a relationship of advocate unless the advocacy was regarding the case to be heard". However, even when there is involvement in the same case, the passage of time can serve to mitigate the apprehension of bias. In *Wewaykum*, the matter in question related to Justice Binnie's involvement, as Assistant Deputy Minister in the federal Justice Department, in the very case under appeal that he was now adjudicating as a member of the Court, and in which the Attorney General of Canada was a party. Nonetheless, the Court concluded that a reasonable apprehension of bias had not been established and Justice Binnie was not disqualified from hearing the appeals.

[15] As I have already indicated, my involvement with the HCQ and, more importantly, its dealings with the CJC Quebec Region, were not related in any way to the matters at issue in this case. I find that this factor together with the significant passage of time would, on that basis alone, lead an informed person, viewing the matter realistically and practically, to conclude that there does not exist a reasonable apprehension of bias in this case.

[16] However, CAFE has cited a number of events that occurred during the hearing to argue that there is in fact a reasonable apprehension of bias. Before addressing them, I think it is important to note the comments of the British Columbia Court of Appeal in *Middelkamp v. Fraser Valley Real Estate Board*, 1993 CanLII 2884 at paras. 11, 13, cited with approval in *Samson, supra* (F.C.T.D.):

As I believe the Chief Justice of this Court has said on more than one occasion, a trial is not a tea party. But bias does not mean that the judge is less than unfailingly polite or less than unfailingly considerate. Bias means a partiality to one side of the cause or the other. It does not mean an opinion as to the case founded on the evidence nor does it mean a partiality or preference or even a displayed special respect for one counsel or another, nor does it mean an obvious lack of respect for another counsel, if that counsel displays in the judge's mind a lack of professionalism.

. . .

Bias does not equate with what might be found in the end to be an unsatisfactory trial.

I will leave it to others to judge whether I have been "unfailingly polite" and "considerate" with all parties in this case, but even a failure to meet these standards does not necessarily constitute evidence of bias.

[17] CAFE suggests in its motion that my ruling early in this hearing process to allow the CJC to participate as an interested party over the "vigorous objections" of the Respondent indicates bias. My decision to grant the CJC leave to participate in this case along with all the other interested parties (*Warman v. Lemire*, 2006 CHRT 8) was given with self-explanatory reasons that would not, in my view, lead an informed person viewing the matter realistically and practically to conclude that a reasonable apprehension of bias exists. Furthermore, like any Tribunal ruling, it is subject to judicial review. I would also note in passing that the Tribunal granted CAFE interested party status in this case over the equally "vigorous objections" of the Commission.

[18] CAFE places great emphasis as well on the Tribunal's alleged "rush to end the case" even though a number of documents had been "recently disclosed". CAFE suggests that this is demonstrative of "some" party's pressure on the Tribunal to "get this hearing over".

The matter of the case's scheduling and the treatment of documents that have been produced since June 2007 has been addressed in my ruling of June 5, 2008, *Warman v. Lemire*, 2008 CHRT 20. I believe it should be evident from paragraphs 26 and following of that decision what factors were considered by the Tribunal for the scheduling of hearing dates in this case. They are not demonstrative, in my view, of any undue influence by, or bias in favour of, "some" party in this case.

[19] CAFE also claims that bias was demonstrated by me when "all the work was put onto Respondent counsel to argue why the hearing should proceed" following the Federal Court's decision of January 15, 2008, with respect to the application that he had mounted pursuant to s. 37 of the *Canada Evidence Act*. I would note, first of all, that the Court had indicated, without providing details, that the information that formed the subject of the s. 37 application had been disclosed. This raised the possibility that any further examinations of the witnesses who were to testify regarding this information were no longer necessary. Furthermore, all parties were invited to make submissions on how the case should proceed, not just the Respondent. The Respondent was asked to present his submissions first, partially because his counsel had indicated, during the case management conference call of February 6, 2008, that she intended to file some additional evidence. The Respondent's counsel did not express any objection to proceeding this way during the conference call. In any event, I fail to see how these circumstances are demonstrative of bias.

[20] CAFE makes a similar claim with respect to my decision to request that the Respondent provide me with "mountains of documents". These were in fact digital copies of Commission documents containing redactions to which the Respondent objected, which were sent to the Tribunal by email, in PDF file form. As I explained in my ruling, *Warman v. Lemire*, 2008 CHRT 16, at para. 1, I had asked the Respondent to provide me with those copies in order to gain a better understanding of the subject matter of the dispute that had given rise to an exchange of numerous letters amongst the parties. After viewing the documents, I issued the above mentioned ruling in which I ordered the Commission to provide me with the unredacted version of those documents, for comparison and determination of the validity of those redactions. Again, I do not see how these facts are demonstrative of bias.

[21] In sum, therefore, I am not persuaded that the information and submissions put forward by CAFE would lead an informed person, viewing the matter realistically and practically - and having thought the matter through - to conclude that a reasonable apprehension of bias exists. The "serious" or "substantial" grounds required for such an apprehension of bias have not been established.

[22] I would also underscore CAFE's statement in its motion that the "joint press release" only came to its attention "recently, due to Internet searches". There is no evidence to indicate that this information has not been publicly available on the Internet or elsewhere since CAFE's involvement began in this case (February 23, 2006) nor indeed since 1997 when the press release was apparently published. Arguably, CAFE may have impliedly waived any assertion of a reasonable apprehension of bias as a result (see *In Re Human Rights Tribunal and Atomic Energy of Canada Ltd.* [1986]1 F.C. 103 (F.C.A.)). I need not make any findings on this point, however, given my earlier conclusions on the bias claim.

[23] For these reasons, CAFE's application for my recusal is denied.

"*Signed by*"

Athanasios D. Hadjis

OTTAWA, Ontario
June 26, 2008

PARTIES OF RECORD

TRIBUNAL FILE:	T1073/5405
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RULING OF THE TRIBUNAL DATED:	June 26, 2008
APPEARANCES:	
Richard Warman	For himself
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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