

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 OF HUMAN RIGHTS OF B'NAI BRITH**

Interested Parties

RULING

MEMBER: Athanasios D. Hadjis

2006 CHRT 32
2006/08/16

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[1] The Respondent, Marc Lemire, has filed two notices of motion. In the first motion, he seeks “further particulars and disclosure” from the Complainant, Richard Warman, and the Canadian Human Rights Commission. In the second motion, he requests “production of documents from the Complainant and the Commission” with respect to the “constitutional issues”. Both motions therefore relate to the parties’ compliance with Rule 6 of the Tribunal’s Rules of Procedure.

[2] According to Rule 6(1), each party must serve and file with the Tribunal a Statement of Particulars setting out:

6(1)(a) the material facts that the party seeks to prove in support of its case; [and]

6(1)(d) a list of all documents in the party’s possession, for which no privilege is claimed, that relate to a fact, issue, or form of relief sought in the case, including those facts, issues and forms of relief identified by other parties under this rule.

[3] A copy of any document identified under Rule 6(1)(d) must be provided to the other parties (Rule 6(4)).

[4] Mr. Lemire is essentially alleging, a) that the material facts set out in Commission’s and Mr. Warman’s joint Statement of Particulars are insufficient or lacking in certain respects, and b) that they have not disclosed certain documents that should have been disclosed pursuant to Rule 6(1)(d).

[5] In *Public Service Alliance of Canada v. Northwest Territories (Minister of Personnel)*, [1999] C.H.R.D. No. 8 (C.H.R.T.)(QL), the Tribunal noted that the purpose of particulars is to define the issues, prevent surprises, enable the parties to prepare for trial, and facilitate the hearing. With respect specifically to the communication of material facts, the Tribunal stated that “the basic rule is that the parties should disclose sufficient facts to permit the other parties to prepare themselves for the hearing”. However, a party is only entitled to the material facts on which the other party is relying. It is not entitled to a summary of the evidence that the other party intends to call, nor its arguments and reasoning.

[6] Regarding the disclosure of documents, Rule 6(1)(d) dictates that documents relating to facts, issues and relief sought in the case must be disclosed. The test for relevance for these purposes has been expressed as being whether the document in question is "arguably relevant" to the hearing (see *Bushey v. Sharma*, [2003] C.H.R.D. No. 7 (C.H.R.T.)(QL) at para. 4). The question of relevance was addressed by the Tribunal in *Communication, Energy and Paperworkers Union of Canada v. Bell Canada*, [2005] C.H.R.D. No. 34, (C.H.R.T.)(QL). Referring to the Supreme Court's findings in *Smith & Nephew v. Glegg*, [2005] 1 S.C.R. 724, the Tribunal noted that on issues of relevance, a party must show that disclosure of the document will be useful, is appropriate, is likely to contribute to advancing the debate and is based on an acceptable objective he or she seeks to attain in the case, and that the document is related to the dispute.

[7] With these considerations in mind, I will now address the specific requests in Mr. Lemire's motions.

I. THE ORDERS REQUESTED IN THE NOTICE OF MOTION FOR FURTHER PARTICULARS AND DISCLOSURE

[8] At the end of this Notice of Motion, Mr. Lemire compiled an itemized list of orders that he is seeking from the Tribunal. I will address these requests item by item.

A. Items a), b), c), d) and e)

[9] Items a) through e) are similar in nature. The orders requested read as follows:

- a) That the complainant provide the name(s) of the Internet Service Provider(s) he used to access freedomsite.org, stormfront.org and jrsbookonline.com in 2003 and 2004 and the account name he used;

- b) That the complainant provide the location of the computer(s) which he used to access the freedomsite.org (ie. - home or from the offices of the Commission);
- c) That the complainant provide the email or emails he used to gain access to the freedomsite.org message board;
- d) That the complainant provide the password or passwords he used to gain access to the freedomsite.org message board;
- e) That the complainant provide the log-in name(s) (or pseudonym(s)) he used while on the freedomsite.org message board.

[10] These appear to be requests for further particulars, as opposed to disclosure of any specific documents. In the “material facts” section of Mr. Warman’s and the Commission’s joint Statement of Particulars, dated December 7, 2005, it is stated that the alleged hate messages were viewed by Mr. Warman on the freedomsite.org, stormfront.org and jrsbooksonline.com websites in November 2003 and October 2004.

[11] Mr. Lemire contends that in order to gain access to these websites and the “chat lines” found therein, one must register with the “message board” or enter as a guest using a computer with a unique Internet Protocol Address. To gain full access, a valid e-mail address must be provided. Mr. Lemire claims that he requires the particulars being sought under these items of his motion in order to “check the log files of the message board” and “confirm that Mr. Warman is telling the truth”.

[12] In my view, the material facts provided by Mr. Warman and the Commission regarding the websites visited and the dates of these visits are sufficient to allow Mr. Lemire to prepare for the hearing. Mr. Lemire has effectively been placed on notice that Mr. Warman intends to prove that he visited these sites and viewed the alleged hate messages. It will be up to Mr. Warman and the Commission to prove these facts. Any issues regarding the accuracy or veracity of the evidence

regarding these visits can be more appropriately explored by Mr. Lemire through cross-examination.

[13] The orders requested in Items a), b), c), d), and e) are therefore denied.

B. Item f)

[14] The item requested reads as follows:

- f) That the complainant provide copies of all printouts he made from freedomsite.org during the times he visited it and its message board;

[15] In support of this request, Mr. Lemire argued in his motion that Mr. Warman “may have made printouts of other messages that he decided not to use in the complaint” and that if “he printed out other messages from the web board, why did he not include them in the complaint?”

[16] An obvious answer may be that Mr. Warman did not perceive the other material as being in violation of the *Canadian Human Rights Act* and therefore did not include it in the complaint. Nonetheless, I am prepared to accept that any document in the possession of a party relating to the messages referred to in the complaint may be arguably relevant to the facts at issue in this case. I therefore order Mr. Warman to disclose, in accordance with Rules 6(1)(d) and 6(4), copies that are in his possession of any printouts he made from freedomsite.org and its message board during the times he visited them, prior to filing his complaint.

C. Item g)

[17] The item requested reads as follows:

- g) That the complainant provide copies of all messages which he posted on the freedomsite.org message board and the stormfront.org message board or any replies to messages that he posted on these web boards;

[18] Mr. Lemire claims in his motion that it is somehow relevant to this case whether Mr. Warman tried to refute the alleged hate messages or to advise the message board participants that some of the messages being posted were racist. With respect, I fail to see how this is relevant to the issues arising from the complaint. If the evidence establishes that Mr. Lemire communicated or caused to be communicated hate messages in the manner contemplated in s. 13 of the *Act*, his liability will be engaged, irrespective of Mr. Warman's actions or omissions.

[19] Mr. Lemire goes on to say, however, that the manner and ease with which people of opposing views can participate on those message boards may be relevant to the issues that he has raised regarding the constitutional validity of s. 13 of the *Act*. I am satisfied that Mr. Warman's postings are arguably relevant in this respect.

[20] Mr. Warman is therefore ordered to provide any copies in his possession of messages that he posted on the *freedomsite.org* and *stormfront.org* message boards, or any replies that he posted on these web boards.

D. Item h)

[21] The item requested reads as follows:

- h) That the complainant and the Canadian Human Rights Commission produce all documents relating to the identity of the person who posted the messages on the respondent's message board under the name "Craig Harrison" which is in their possession or which comes into their possession.

[22] In his reply to the submissions of the other parties, dated June 29, 2006, Mr. Lemire acknowledged that he was in the process of receiving the documents requested under this item. I can only assume that this request is therefore withdrawn.

E. Item i)

[23] The item requested reads as follows:

- i) That the complainant and the Commission produce a compilation of those messages which they allege to constitute “hate messages” within the meaning of section 13 of the *Canadian Human Rights Act* with appropriate markups of those parts specifically relied upon as exposing persons to hatred or contempt.

[24] Mr. Lemire points out in his motion that the Commission and Mr. Warman produced over 133 pages of messages as part of their disclosure, in which one finds “hundreds” of messages. None of the messages have any underlining or marking to indicate which portions are alleged to expose groups to hatred or contempt.

[25] Mr. Warman contends that he has provided sufficient particulars. He indicates in his submissions that his original complaint sets out 29 examples of the type of material from the disclosed documents that he alleges violate s. 13(1) of the *Act*. He contends that this is sufficient to fulfill his disclosure obligations and provide Mr. Lemire the ability to know the case that must be met.

[26] I disagree. To put forth over a hundred pages of messages and then reserve the right to pick out any one of these messages and argue at the hearing that it constitutes a violation of s. 13(1) of the *Act*, denies him a true and effective opportunity to know the case that he must meet. If the Commission and Mr. Warman take the position that each message found on each of the disclosed pages constitutes a hate message, then they should so indicate explicitly. Mr. Lemire can then consider himself forewarned and can prepare himself accordingly.

[27] However, if the Commission and Mr. Warman believe in good faith that only a number of the messages in the disclosed pages are in violation of the *Act*, then they should be forthright in declaring and detailing their positions to the other party.

[28] The Commission and Mr. Warman are therefore ordered to identify specifically those messages that they allege constitute hate messages within the meaning of s. 13 of the *Act*.

II. THE ORDERS REQUESTED IN THE NOTICE OF MOTION FOR PRODUCTION OF DOCUMENTS (CONSTITUTIONAL ISSUES)

[29] On November 25, 2005, Mr. Lemire filed a Notice of Constitutional Question in the present case, in which he alleged that ss. 13 and 54(1)(1.1) of the *Act* are in violation of ss. 2(a) and (b), 7, 26 and 31 of the *Canadian Charter of Rights and Freedoms*, and that these violations are not saved by s. 1 thereof. A violation of ss. 1(d) and (f) of the *Canadian Bill of Rights* is also alleged.

[30] In the present Notice of Motion, Mr. Lemire alleges that the Commission has failed to disclose documents that are relevant and useful to the constitutional question raised. In particular, he is requesting that the Commission disclose documents regarding the Commission's activities as they relate to s. 13 of the *Act*.

[31] Mr. Lemire points out that as part of the analysis of the constitutional question, the Tribunal may have to consider whether the alleged violation of the constitutional rights and freedoms invoked are justified pursuant to s. 1 of the *Charter*. He referred to the tests set out by the Supreme Court of Canada in *R. v. Oakes*, [1986] 1 S.C.R. 103, and in particular, the proportionality test discussed at paragraphs 70 and 71 of the decision. The Court noted that as part of the analysis, one must balance the interests of society with those of individuals or groups. There must be a proportionality between the *effects* of the measures that limit the *Charter* right or freedom and the objective of the measures. The Court added that the inquiry into the effects is wide-ranging. It is possible that because of the severity of the *deleterious effects* of a measure on individuals or groups, the measure will not be justified by the purposes it intends to serve.

[32] Mr. Lemire contends that the deleterious effects of s. 13 of the *Act* extend beyond the orders that the Tribunal may issue after adjudicating a complaint. He alleges that the

Commission, in exercising its powers under the *Act*, has engaged in activities that have had the deleterious effect of restricting *Charter* rights and freedoms, outside the scope of the Tribunal hearing process. For instance, it is argued by Mr. Lemire that the Commission may have influenced Internet service providers (ISPs) in such a manner that the ISPs have removed websites that the Commission finds objectionable, without a human rights complaint ever having been filed against the website's operator.

[33] In effect, the Commission would thereby achieve the result of having expressive material banned extrajudicially. This, it is argued, is a deleterious effect of s. 13, which must be explored as part of the proportionality test articulated in *Oakes*.

[34] The Commission's position, in reply, is basically two-fold: first, that the request for documents is "over-reaching and ambiguous" – a matter that I will address separately below – and that the documents sought are not arguably relevant to the constitutional question. In my view, the Commission does not directly address the argument raised by Mr. Lemire. The Commission has not demonstrated how Mr. Lemire's submissions with respect to the relevance to the constitutional analysis are unfounded.

[35] As I have already pointed out, according to Rule 6, documents that relate to an issue, whether raised by one party or another, must be disclosed. Mr. Lemire has raised the constitutionality of s. 13 as an issue in this case and as part of the analysis of this issue, the "deleterious effects" of s. 13 may need to be considered. This could include the manner in which these effects result in the violation of *Charter* rights and freedoms by means other than Tribunal orders following the adjudication of complaints. These effects relate to an issue identified by a party in this case and therefore, any document relating to these effects must be disclosed.

[36] The Attorney General of Canada, in its submissions on this motion, raises a different argument than the Commission. The Attorney General contends that Mr. Lemire, in bringing up as an issue "the manner in which the Commission discharges its mandate", is attempting to launch a *Charter* challenge against the Commission's interpretation and application of s. 13 of the *Act*, in fulfillment of its mandate under ss. 27 and 49(1). The only mechanism by which Mr. Lemire can

accomplish this, it is argued, is by judicial review before the Federal Court or by an application/ action for a declaration in a provincial superior court.

[37] Mr. Lemire replies that it is not a review of the lawfulness of the Commission's activities that he is seeking from the Tribunal. Rather, he is seeking a review of whether the "deleterious effects of the legislation on freedom of speech outweigh the salutary effects".

[38] In my view, both parties raise interesting points that can be properly submitted before the Tribunal adjudicating on the merits of the constitutional challenge and the complaint as a whole. At this stage, however, the question before me is very basic: do the documents being sought relate to an issue that has been raised by one of the parties to the case?

[39] I accept Mr. Lemire's submission that there exists a nexus between the issue of the constitutionality of ss. 13 and 54(1)(1.1) of the *Act*, and any documents relating to any Commission activities that may affect the rights and freedoms guaranteed under the *Charter*. The documents are therefore subject to disclosure, in accordance with Rule 6.

[40] But this does not end the matter. The Commission contends that Mr. Lemire's requests for production are over-reaching and ambiguous. In my view, this assessment seems particularly applicable to the items requested under headings (h), (k) and (n), of Paragraph 37 of the Notice of Motion, which read as follows:

- h) All internal documents relating to hate and the Internet from 1993 (excluding documents filed in Tribunal proceedings under section 13 of the Act, transcripts of such proceedings or any internal solicitor correspondence related to such files);
- k) All documents relating to the genesis and procedures of the special "anti-hate" team set up to deal with complaints under section 13 including any guidelines for determining what is "hate or contempt" and staff training for determining what is "hate" within the meaning of s. 13;

- n) All documents concerning the Commission's activities in relation to hate on the Internet pursuant to section 27 of the Canadian Human Rights Act.

[41] As the Tribunal noted in the *Bell Canada* ruling, *supra*, at paras. 12-14, requests for disclosure that are over-reaching and lacking in specificity, amounting basically to the proverbial "fishing expedition", will be denied.

[42] In my view, items (h), (k), and (n) fall within this category. The requests are excessively broad in nature and encompass aspects of Commission activities that are not likely to relate to the issues of this dispute. For instance, it is not at all clear how documents relating to internal activities of the Commission can have a "deleterious effect" on *Charter* rights and freedoms of persons outside the Commission. It is only once the reach of a Commission activity extends outside the organization and affects a *Charter* right or freedom, that a document relating thereto becomes arguably relevant to the issue identified by Mr. Lemire.

[43] On the other hand, I accept that the requests in items (j), (l) and (m) are arguably relevant and are not over-reaching or ambiguous:

- j) All documents relating to the Commission's relations with Internet Service Providers, including attempts to pressure ISPs to shut down websites or remove them;
- l) All documents relating to meetings, networking and consultation with any group representing one of the groups protected from discrimination under the *Canadian Human Rights Act*, and any police or governmental agencies, relating to hate on the Internet;
- m) All documents relating to educative or publicity activities of the Commission with respect to hate.

[44] Mr. Lemire had initially requested the production of two other sets of documents (Items (i) and (o)), but it would appear from his subsequent correspondence with the Tribunal that he has obtained these documents from alternate sources. I assume therefore that these requests have been withdrawn.

[45] To summarize, therefore, with respect to the second Notice of Motion, the Commission is ordered to disclose all documents in its possession relating to Items (j), (l) and (m) as hereinabove recited, and as listed in Paragraph 37 of the Mr. Lemire's Notice of Motion for the Production of Documents (Constitutional Issues), dated May 17, 2006.

[46] A schedule for the disclosure of these documents can be established at an upcoming case management conference call.

"signed by"

Athanasios D. Hadjis

OTTAWA, Ontario
August 16, 2006

CANADIAN HUMAN RIGHTS TRIBUNAL

PARTIES OF RECORD

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APPEARANCES:	
Richard Warman	On his own behalf
Giacomo Vigna / Ikram Warsame	On behalf of the Canadian Human Rights Commission
Barbara Kulaszka	On behalf of the Respondent
Simon Fothergill	On behalf of the Attorney General of Canada
Paul Fromm	On behalf of the Canadian Association for Free Expression
Douglas H. Christie	On behalf of the Canadian Free Speech League
Marvin Kurz	On behalf of the League for Human Rights of B'nai Brith
Joel Richler / Courtney Harris	On behalf of the Canadian Jewish Congress
Steven Skurka	On behalf of the Friends of Simon Wiesenthal Center for Holocaust Studies