

**CANADIAN
HUMAN RIGHTS
TRIBUNAL**



**TRIBUNAL CANADIEN
DES DROITS
DE LA PERSONNE**

BETWEEN/ENTRE:

RICHARD WARMAN

Complainant

le plaignant

and/et

CANADIAN HUMAN RIGHTS COMMISSION

Commission

la Commission

and/et

**CANADIAN HERITAGE ALLIANCE
MELISSA GUILLE**

Respondents

les intimées

BEFORE/DEVANT:

PIERRE DESCHAMPS

**CHAIRPERSON/
PRÉSIDENT**

LINDA BARBER

**REGISTRY OFFICER/
L'AGENTE DU GREFFE**

FILE NO./N^o CAUSE:

T1089/7005 & T1090/7105

VOLUME:

3

LOCATION/ENDROIT:

TORONTO, ONTARIO

DATE:

2006/11/22

PAGES:

435 - 607

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CANADIAN HUMAN RIGHTS TRIBUNAL/
TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

HEARING HELD AT THE JPR ARBITRATION CENTRE, 390 BAY STREET,
FOURTH FLOOR, TORONTO, ONTARIO ON WEDNESDAY, NOVEMBER 22, 2006,
AT 9:30 A.M. LOCAL TIME

CASE FOR HEARING/CAUSE DEVANT ÊTRE ENTENDUE

IN THE MATTER of the complaints filed under section 13.1 of the Canadian Human Rights Act by Richard Warman dated August 11, 2004, against Melissa Guille and the Canadian Heritage Alliance. The complainant alleges that the respondents have engaged in a discriminatory practice on the grounds of sexual orientation, religion, race, colour and national or ethnic origin in a matter related to the usage of a telecommunication undertaking.

APPEARANCES/COMPARUTIONS

Richard Warman	On his own behalf
Karen Ceilidh Snider Don Hawkins	For the Commission
Alexan Kulbashian	For Melissa Guille
Paul Fromm	For Canadian Heritage Alliance

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1 Toronto, Ontario

2 --- Upon commencing on Wednesday, November 22, 2006

3 at 9:30 a.m.

4 REGISTRY OFFICER: Order, please.

5 Please be seated.

6 THE CHAIRPERSON: Good morning,
7 everyone.

8 MR. WARMAN: Good morning.

9 THE CHAIRPERSON: So, are there any
10 housekeeping matters that I should address before
11 Mr. Kulbashian continues with his motion?

12 MS CEILIDH SNIDER: Yes, I have one.
13 I attempted to have a case by the name of -- Supreme
14 Court of Canada case named Mossop printed out and,
15 unfortunately, it was delivered to me incorrectly
16 printed. So, I have to have it re-printed.

17 I'm going to be using one sentence
18 from this case which is some 58 pages in length and at
19 a dollar a page, I'm hoping that the Tribunal will
20 indulge me that I can go back to the photocopying place
21 where I had originally had intended to have it done and
22 get it done at a more reasonable cost than getting it
23 done here.

24 THE CHAIRPERSON: Do you expect to be
25 using it this morning?

1 MS CEILIDH SNIDER: Yes.

2 THE CHAIRPERSON: So, how do you want
3 us to proceed?

4 MS CEILIDH SNIDER: I can make
5 reference to the one passage and then provide the case
6 to everyone at the break.

7 THE CHAIRPERSON: But could you just
8 photocopy the sentence you want to use and eventually
9 provide a copy to --

10 MS CEILIDH SNIDER: They copied the
11 wrong case.

12 THE CHAIRPERSON: Pardon?

13 MS CEILIDH SNIDER: They copied the
14 wrong case. I have the case on my computer, but they
15 copied the wrong one, they took it off the memory stick
16 and used the wrong one.

17 THE CHAIRPERSON: And do you have it
18 on your computer?

19 MS CEILIDH SNIDER: Yes, I do.

20 THE CHAIRPERSON: Could you print out
21 that one page?

22 MS CEILIDH SNIDER: Yeah, I can try,
23 yeah.

24 MR. FROMM: In the interest of the
25 taxpayers of Canada, I think Mr. Kulbashian and I would

1 agree to proceed with the one page.

2 MS CEILIDH SNIDER: Okay, thank you.

3 THE CHAIRPERSON: And if there's a
4 need to have --

5 MS CEILIDH SNIDER: A five-minute
6 adjournment then and I'll print that one page.

7 Thank you.

8 MR. KULBASHIAN: Actually there are
9 some housekeeping matters that we have, just two, and
10 just to get back, depending on what -- sorry, depending
11 on what that one page entails, because the entire
12 decision is not really available to me at this time.

13 I could check it on line but I can't
14 really get on line with my laptop right now, even
15 though there are facilities to get on line in this room
16 right now.

17 If we could get the entire decision
18 in order for us to rebut, because one page isn't
19 generally the entire context of the ruling and we've
20 seen before that the application of individual cases
21 could differ from case to case.

22 THE CHAIRPERSON: No, I understand
23 that, but I think what I was suggesting is that if Ms
24 Snider wants to make her own submissions with respect
25 to your motion and she wants to refer to this excerpt

1 or passage from the decision, she could make that
2 available and then have the full complete decision
3 available to you.

4 This is what I gathered you were
5 suggesting?

6 MS CEILIDH SNIDER: Yes, absolutely.

7 MR. KULBASHIAN: Yes, well that will
8 be fine as long as it's available within I guess the
9 time limit for me to be able to rebut it today.

10 THE CHAIRPERSON: Yes.

11 MR. KULBASHIAN: She could do that on
12 the break I guess.

13 Another issue that I wanted to get
14 into is the issue of will-say statements that came up
15 yesterday.

16 On June 20th there was an issue that
17 they stated that the will-statement that Ms Guille
18 provided was inadequate.

19 If I can direct the Tribunal to the
20 communication on June 29th, 2006 which I believe is
21 when Mr. Warman filed his will-say statements, and on
22 July 11th, '06 Ms Guille and the CHA filed their will-
23 statements.

24 Basically what I want to try to
25 figure out is why, or under what -- on what grounds

1 they state that the will-say statement is inadequate
2 because Mr. Warman's will-say statement was effectively
3 just three paragraphs, one of which was a large
4 paragraph just talking about himself and his experience
5 monitoring the computer hate groups, so I'm trying to
6 figure out and trying to solve this issue from the
7 start before if there is any issue when she comes up to
8 testify.

9 THE CHAIRPERSON: Is this an issue,
10 Ms Snider, Ms Guille's will-say statement?

11 MS CEILIDH SNIDER: No. I had
12 indicated in my communications in writing and orally
13 that the will-say statement of Ms Guille was adequate,
14 it was the will-say statement of other purported
15 witnesses that were problematic.

16 In particular, I believe that of
17 Mr. Kulbashian. I haven't looked at this
18 correspondence for quite some time, so I would need to
19 refresh my memory.

20 It's my understanding, in any event,
21 that at this point in time it's not the intention of
22 the respondents to have Mr. Kulbashian testify.

23 MR. KULBASHIAN: We stated no intents
24 to have me testify, so we have got nothing to testify
25 on.

1 THE CHAIRPERSON: It would seem as if
2 Ms Guille's will-say statement is an issue.

3 MR. KULBASHIAN: Because yesterday I
4 believe -- what I heard was that Ms Guille's will-say
5 statement was inadequate or --

6 MS CEILIDH SNIDER: No.

7 MR. KULBASHIAN: So, the idea as I
8 said --

9 THE CHAIRPERSON: No, it doesn't seem
10 to be.

11 MR. KULBASHIAN: I just wanted to get
12 this cleared up --

13 THE CHAIRPERSON: Okay, yeah.

14 MR. KULBASHIAN: -- before she gets
15 up to testify, so we don't have to get a fight about
16 that later.

17 Another issue that I want to get into
18 is yesterday when they made a request for a list of
19 individuals involved in the day-to-day operation of the
20 CHA, they stated that they were not, I guess, satisfied
21 with the response, however they let it drop.

22 The one issue I want to -- I want to
23 actually get into that issue very briefly to find out
24 if there's anything else that can be done so it doesn't
25 come up later on down the line and it doesn't, I guess,

1 cause any trouble, for example, while Mr. Warman is
2 testifying or when the documents are put on the stand.

3 If there is any issue or if it's
4 actually being dropped entirely.

5 MS CEILIDH SNIDER: No, sure, I'll
6 respond to that. We had anticipated receiving a list
7 of members on the executive group of the Canadian
8 Heritage Alliance which is what I heard from your
9 statement that you were going to provide us with that
10 were involved with the day-to-day operations of the
11 Canadian Heritage Alliance.

12 What we were provided with was the
13 name of Melissa Guille as the administrator of the
14 website and that was all, and that's not what we were
15 expecting to receive.

16 But I realize that this is a point of
17 contention and that, you know, so what I was expecting
18 to receive, as I said, was a more fulsome list of the
19 individuals involved in the day-to-day running of the
20 Canadian Heritage Alliance which is what I had
21 understood that you had indicated that you would be
22 providing.

23 MR. KULBASHIAN: The respondents'
24 position is that this is the only name of individuals
25 involved in the Canadian Heritage Alliance because we

1 do contend it is only a website and there is no actual
2 group and there is no actual list of executives.

3 So, at least they believe at various
4 times, if they believe that anyone else was involved --

5 THE CHAIRPERSON: But I think that Ms
6 Snider indicated that she would not pursue the matter
7 further.

8 MR. KULBASHIAN: I just wanted to --

9 MS CEILIDH SNIDER: For example, the
10 name of Chris Guille is listed on various pamphlets
11 that we looked at yesterday as being the secretary of
12 the Canadian Heritage Alliance, and so clearly there is
13 a secretary, there is a president, or someone in that
14 capacity.

15 THE CHAIRPERSON: What I gather is
16 that at this point in time you are not pursuing the
17 matter further with respect to obtaining a list?

18 MS CEILIDH SNIDER: Yeah.

19 THE CHAIRPERSON: But that doesn't
20 mean --

21 MS CEILIDH SNIDER: That does not
22 mean I'm dropping this as an issue to be determined by
23 the Tribunal, it merely means that I don't wish to --
24 unless the respondents intend to provide a
25 supplementary list of names, I don't intend to expend

1 further Tribunal time on this issue, I believe that we
2 will be able to deal with this issue through testimony
3 and through the evidence that will go in on a
4 documentary basis.

5 But I just want to assure the
6 respondents that this in no way means that the
7 Commission or the complainant is withdrawing their
8 contention that Canadian Heritage Alliance is a group.

9 THE CHAIRPERSON: So, this is still a
10 live issue?

11 MS CEILIDH SNIDER: Absolutely.

12 THE CHAIRPERSON: The only, well,
13 decision that you made is you won't be asking for more
14 information with respect to a membership list, but that
15 doesn't mean that in the course of your evidence or in
16 cross-examination that you would not be putting
17 questions to --

18 MS CEILIDH SNIDER: That's correct.

19 MR. KULBASHIAN: Well, I guess the
20 only issue is that the name Chris Guille appeared in a
21 document that was dated from 2003. They did not
22 request a list of individuals that were in any way
23 involved in the day-to-day operations in 2003, they
24 just stated they wanted a list of individuals that were
25 actually involved in the day-to-day operations.

1 THE CHAIRPERSON: But given the fact
2 that the Commission has decided not to pursue the
3 matter further --

4 MR. KULBASHIAN: Okay.

5 THE CHAIRPERSON: -- there is no
6 purpose -- well, there is no need for you at the
7 present time to provide them with a more detailed list,
8 but that doesn't mean that this issue as to -- is there
9 a membership list, does the Canadian Heritage Alliance
10 have members, it is still a live issue which will come
11 up in the course of the evidence.

12 MR. KULBASHIAN: From what I heard
13 from Ms Snider, the only live issue is how many
14 executives it has.

15 THE CHAIRPERSON: No.

16 MR. KULBASHIAN: She did state
17 that -- what she stated was who was involved in the
18 day-to-day operations and the respondents contend that
19 this the only individual involved the in day-to-day
20 operations.

21 THE CHAIRPERSON: And that's fine.
22 If that is your contention and Ms Snider says that I
23 won't pursue the matter further, that doesn't mean and
24 you can expect the Commission and Mr. Warman to raise
25 that issue in the course of the cross-examination or in

1 examination-in-chief.

2 So, you shouldn't be surprised if
3 this comes up again and at that point in time you can
4 object saying that, well, this issue has already been
5 resolved, it's not -- the issue per se is not resolved.

6 MR. KULBASHIAN: Okay, that's fine.
7 I'll deal with that.

8 MS CEILIDH SNIDER: I think the Chair
9 has it. Thank you.

10 MR. KULBASHIAN: That's as long as
11 it's clear. I guess, if there are any other issues --

12 THE CHAIRPERSON: Please continue
13 with your motion to have documents excluded if no
14 expert evidence is presented and there were like two
15 issues that arose from that, the fact that you stated
16 yesterday that when Mr. Warman testifies he is not --
17 he does not have the expertise to qualify the hate
18 messages that could be tendered in evidence because he
19 is not an expert. This is one issue that you raise.

20 The second issue that you raise is
21 that it may be that for some hate messages, or any
22 documents, that there would be a need for someone --
23 for an expert to determine if this is or isn't a hate
24 message.

25 MR. KULBASHIAN: Yes, sir.

1 THE CHAIRPERSON: I think these were
2 the two points that you made yesterday and that are to
3 be addressed this morning. Am I right in
4 summarizing --

5 MR. KULBASHIAN: Well, those are the
6 points I made thus far yesterday, however, there will
7 be points I will bring up but, I guess, I should
8 continue then.

9 THE CHAIRPERSON: Yes. But am I
10 correct --

11 MR. KULBASHIAN: You are.

12 THE CHAIRPERSON: -- in stating that
13 this is what we -- the issues that we did address
14 yesterday.

15 PRELIMINARY MOTION BY MR. KULBASHIAN (Cont'd)

16 MR. KULBASHIAN: That's right.

17 Now, as far as documents that need to
18 be excluded, the only thing -- the only document that I
19 am going to be specifically referring to would be a
20 document at HR-1, tab, C at the moment. Any other
21 documents will come up over the course of
22 cross-examination, I guess, or examination-in-chief.

23 THE CHAIRPERSON: We haven't marked
24 any exhibits yet.

25 MR. KULBASHIAN: Okay. In that case,

1 I guess the best way to put it, any documents in which
2 either the complainant or Commission express their
3 opinion as to whether or not any articles are hate,
4 including any documents that suggest that any articles
5 are hate, I will be objecting to, because --
6 --- Reporter appeals

7 MR. KULBASHIAN: I would be
8 suggesting that any documents that include any
9 inferences or suggestions that any article or any of
10 the disclosure pages constitute a hate message should
11 be included.

12 I'm not going to name specific
13 documents -- should be excluded, sorry. I'm not going
14 to name specific documents, but basically my position
15 is that any opinion that's expressed by either the
16 Commission or the complainant, especially if he
17 expressed, like, opinions, it's his opinion as an
18 anti-racist and anti-, I guess I would call it activist
19 and, therefore, it cannot be a professional opinion.

20 So, any opinion will be -- will have,
21 I would say, a political motive or an agenda behind it
22 as opposed to having an actual objective opinion of the
23 article.

24 Whether or not there is an objective
25 opinion or whether or not it's, in my view, an

1 objective opinion, that's a different issue.

2 But I don't believe Mr. Warman can
3 testify as an activist himself.

4 The next thing I want to talk about
5 is, this puts us in a somewhat difficult situation in
6 this hearing. If Mr. Warman can only testify that he
7 saw certain articles on the website and certain, like,
8 messages being posted and he printed them up this date,
9 et cetera, the Tribunal will have no evidence at all in
10 front of it as to which messages are hate and for that
11 reason I submit the Tribunal cannot make a finding that
12 any documents are actually contrary to section 13 in
13 that situation.

14 The reason why I believe that is
15 because this Tribunal hearing is about a balance of
16 probabilities, the Tribunal in my opinion, if there is
17 evidence given or evidence that was put in the record
18 by any witness that states this article is hate or that
19 article is hate, even if it's opinion evidence and it
20 was allowed, then on that note the Tribunal can't come
21 to the issue and say, well, I believe him it is hate.

22 However, if no witness gets up and
23 says this document is hate, then that information or
24 that evidence is not in front of the Tribunal for
25 evaluation and, therefore, the purpose of this hearing

1 becomes, I guess, somewhat moot, it serves no purpose,
2 the only evidence that will be on record is that these
3 documents existed, that Mr. Warman downloaded these
4 documents or printed these documents.

5 I guess the biggest issue we have is
6 why we do need expert evidence in a Tribunal hearing.

7 Everyone -- I mean, at some point or
8 another everyone has their own biases, has there own, I
9 guess, opinions on what kind of effect each message
10 constitutes and an expert, experts basically create
11 somewhat of a consistent and scientific analysis of the
12 documents before the Tribunal or any kind of issue
13 before a Tribunal for that matter.

14 For example, what's the point of ever
15 obtaining expert evidence on opinions and having a
16 hearing if the Tribunal can come to a decision on its
17 own.

18 The thing I would submit is that the
19 Tribunal can't actually make an determination as to
20 what -- as to whether or not an article is hate on a
21 balance of probabilities, unless there is some evidence
22 in front of the Tribunal to state that that document is
23 hate.

24 Therefore, as a kind of example so I
25 can world it better, if there is an issue about a ball

1 and no one -- and one person says a red ball and one
2 person says a blue ball, the Tribunal is going to come
3 to a decision saying, I believe this individual because
4 of so and so factors and the weight that's provided to
5 their testimony, however, if no one says the ball is
6 red or the ball is blue, there is no evidence as to
7 what colour the ball is at all, meaning the Tribunal
8 can't at that point come up and state, well, I believe
9 that I'm entitled to express my opinion in the ruling
10 and I believe the ball is red or the ball is blue
11 because there is actually no evidence to lay out.

12 So, therefore, if no one says that
13 the article is hate, then a ruling that the article is
14 hate can't be achieved.

15 That's my position.

16 The major thing is, the Tribunal
17 Chair is effectively or technically a party to the
18 hearing, in the sense that the Tribunal Chair in many
19 cases that I have read state themselves that they are
20 not experts.

21 THE CHAIRPERSON: But just to correct
22 you on something. The Tribunal is not a party.

23 MR. KULBASHIAN: What I mean
24 effectively in the sense, that if Mr. Warman can't give
25 an opinion on an article because he is not actually --

1 he is not tendered as an expert in hate or hate
2 propaganda and neither can the respondents.

3 On the same note the Tribunal who
4 doesn't -- who may, I mean, if they do have expert
5 evidence -- if they are experts in a specific field, I
6 believe that there may be some latitude for a Tribunal
7 to be able to give their opinion on an article,
8 however, if the Tribunal or the Chair or Member does
9 not state that they themselves are an expert in that
10 field, I believe they should be bound by the same
11 regulations of any of the witnesses that are testifying
12 and not, I guess, be able to give opinion on the
13 article.

14 THE CHAIRPERSON: What you are saying
15 is that this Tribunal could not, in your view,
16 determine if a message should be considered as a hate
17 message without having an expert.

18 MR. KULBASHIAN: Without having any
19 kind of facts in front of them. That's what I'm
20 saying.

21 Basically, if there are no facts that
22 come out during the course of the hearing that state
23 that this article is hate, then there are no facts for
24 the Tribunal Chair to be able to evaluate, meaning it's
25 the idea that the Tribunal -- let's say, if the

1 respondent did not show up at this hearing, the
2 Tribunal would not basically take the position of the
3 respondents and state, however, this is a possibly what
4 could have happened, the Tribunal would just take the
5 evidence -- the Tribunal Chair would take the evidence
6 submitted before him or her and they will weigh it,
7 categorize it and then come to a ruling.

8 However, in the situation where there
9 is no evidence being provided that any article is hate,
10 because my position is that the Tribunal just can't
11 state on their own that the article is in fact hate
12 because there is no evidence to be put to that effect.

13 It is an issue of balance of
14 probabilities. And if one person says the article is
15 hate, then you could state that the scale is tipped one
16 way, and if no one says it, then the scales are
17 effectively balanced and the Commission and complainant
18 don't meet their requirement to prove the complaint.

19 THE CHAIRPERSON: But are you saying
20 in order for the Tribunal to determine if a message
21 constitutes a hate message, there would need to be some
22 expert evidence presented in a way stating that this is
23 what constitutes a hate message?

24 MR. KULBASHIAN: Not necessarily.
25 There wouldn't have to be any evidence at all.

1 Now, if the complainant were allowed
2 to get up on the stand and state, I believe this
3 article is hate, even if he's not tendered as an expert
4 but there were no objections from the respondent's
5 side, then the Tribunal would be in a position to say
6 that I have evidence here that someone stated that this
7 article is hate, therefore, I can evaluate based on
8 that level and then give it proper weight; however, if
9 no one states that an article is hate, then effectively
10 the article just exists, it's not -- basically matters
11 that are not brought before the Tribunal can't be ruled
12 on, is the point I'm making.

13 THE CHAIRPERSON: But, in fact you
14 are saying that on the one hand Mr. Warman, and you
15 will object to that --

16 MR. KULBASHIAN: I will.

17 THE CHAIRPERSON: -- to Mr. Warman
18 qualifying a message or a document that could have been
19 tendered in evidence as a hate message because, in your
20 view, -- well, amongst other things, he's not an
21 expert?

22 MR. KULBASHIAN: That's right.

23 THE CHAIRPERSON: And that if he's
24 not able to qualify a message as a hate message, then
25 in order to get that type of qualification you would

1 need to have expert evidence to that effect?

2 MR. KULBASHIAN: That's right.

3 THE CHAIRPERSON: Am I summarizing
4 what you are saying correctly?

5 MR. KULBASHIAN: Yes, you are to a
6 certain extent. I'll get into more detail on these
7 issues in a little bit.

8 The major concern is if the Tribunal
9 states that on specific documents they believe that
10 they can come to an opinion that is hate or not, or on
11 certain documents they can't, they need experts, the
12 problem is who makes that determination?

13 Would somebody who basically made
14 rants against African Americans hope he doesn't get an
15 African American Tribunal Chair, or someone who made
16 rants against women hope he doesn't get a female
17 Tribunal Chair.

18 Because basically what happens is,
19 individuals are affected by different messages based on
20 their individual being, meaning that if someone is an
21 African American, he might be more affected by the
22 message than somebody who is -- a female might be more
23 affected by a message against females.

24 So, therefore, the Tribunal Chair is
25 not really in a position to make an actual, I believe

1 to add its own evidence to the record and state that
2 these messages were put before me and I am going to
3 evaluate whether or not they are hate when there is no
4 evidence put before you that they are hate to start.

5 All -- the only evidence that will be
6 put before the Tribunal is that the documents exist,
7 that they were downloaded from a specific site at a
8 specific time and who downloaded them, et cetera, but
9 there will be no evidence before the Tribunal to state
10 that whether or not document is hate at all.

11 Expert opinion under the Canada
12 Evidence Act is given more weight primarily because
13 it's considered almost to be in sorts of -- in essence,
14 almost a fact put before the Tribunal in evidence.

15 If somebody gets up and testifies,
16 like Mr. Warman gets up and testifies and states that
17 these articles are hate, we will object, primarily
18 because he is not tendered as an expert in that field.

19 Whether or not he has a hobby or some
20 kind of extra-curricular activity that gives him some
21 level of knowledge, regardless of that fact, any
22 opinion that he gives will be in his capacity as an
23 activist, as he stated himself in his statement of --
24 in his will-say statement and, you know, stating that
25 he's monitoring the activities of White Supremacists

1 and neo-Nazi group activity in Canada, internationally
2 as well, has general knowledge, that's not an expert
3 CV, that's not an expert's CV, that's not an expert's
4 report, that is just in a way self-promoting statement
5 more than anything that actually gives him any kind of
6 rights to give an opinion on whether or not an article
7 is hate.

8 And purely this message that he wrote
9 itself states that:

10 "I will discuss the nature of
11 material found on both the main
12 website and the forum based on
13 my 15 years of monitoring the
14 activities..."

15 If I watch the news or the, like, the
16 business report for 15 years in a row and monitor every
17 day, doesn't mean I become a businessman or in any way
18 get qualification that allows me to give expert opinion
19 or in any way professional opinion about a matter.

20 So, ultimately, if there is -- no
21 witness that gets up and states that an article is
22 hate, our position is that the Chair cannot rule on
23 evidence that wasn't put before him or her.

24 The only thing you can rule on is
25 whether or not those articles exist and, again, as I

1 said, the point of the case becomes moot.

2 One second. See, the Tribunal Chair
3 is not -- in its ruling, is not, in my position, able
4 to give opinions of his own.

5 For example, in a situation where
6 there is contradicting information, a judge or chair
7 member usually states that -- why he will have to --
8 why he takes one expert -- one witness' testimony over
9 the other and the reason for taking that over the
10 other.

11 The Tribunal Chair is not in a
12 position to just state, my opinion is that he is right,
13 it has to be, I believe, he is right because for such
14 and such facts and, therefore, in essence, in order to
15 create a more fair system in this administrative courts
16 as well as in criminal courts the judges or individuals
17 presiding over the hearings are generally restricted
18 from giving their opinion in a ruling when there is no
19 information to suggest that opinion in the first place.

20 THE CHAIRPERSON: And what you are in
21 fact implying is that the Tribunal -- it is not a
22 question or issue of credibility of the witness --

23 MR. KULBASHIAN: It's an issue that
24 the information was not put before the Tribunal to
25 evaluate. If no one states that this article is hate,

1 then the Tribunal can't come to a decision on its own
2 because there is no evidence to even state that it's
3 hate, there is only evidence to state that articles
4 exist and, therefore, expert testimony -- I mean, I
5 would understand, if the respondent did not object to a
6 witness giving evidence and the witness started giving
7 evidence and that evidence went on the record, then the
8 Tribunal Chair would, say he's not an expert, however,
9 I believe because of these reasons that he might know
10 what he is saying and, therefore, I take those facts,
11 and since there is no contradicting facts I will come
12 to this ruling.

13 But if no one says anything at all,
14 then basically there's no evidence to be used to come
15 to a ruling.

16 THE CHAIRPERSON: And you are saying
17 that you will object to Mr. Warman providing the
18 Tribunal with any opinion evidence?

19 MR. KULBASHIAN: Yeah. In fact, I
20 will object to him providing any opinion evidence or
21 submitting any documents that state an opinion,
22 including any documents, for example, that have a
23 headings like, Hate Message Content from the Canadian
24 Heritage Alliance, Summary of Material Likely to Expose
25 Individuals to Hatred or Contempt on the Basis of

1 Prohibited Grounds, things like that would be -- that
2 would have been a document filed by Mr. Warman to the
3 Commission and that document would be Mr. Warman's own
4 personal opinion and not actual evidence that can be
5 entered and that evidence would greatly prejudice the
6 case against the respondents and, therefore, we would
7 be objecting to documents like that and other ones that
8 suggest that articles are hate unless an expert is
9 brought to testify to those facts.

10 My position is that the only time the
11 Tribunal Chair or judge or anyone presiding over a
12 hearing can, I believe, form an opinion is to fill
13 minor gaps in evidence.

14 For example, if a bit of information
15 is missing, then they can in some way surmise, like, or
16 logically try to figure out, well, this should be here
17 because such and such support that being there.

18 However, if there's nothing to fill
19 the gaps, if there is nothing to create gaps, then the
20 gaps can't be filled, is basically my position.

21 And those are my submissions, for
22 now. I believe Mr. Fromm has some submissions as well.

23 THE CHAIRPERSON: Thank you,
24 Mr. Kulbashian.

25 Mr. Fromm?

1 SUBMISSIONS BY MR. FROMM

2 MR. FROMM: Mr. Chairman, in a number
3 of the earlier section 13.1 cases there was expert
4 evidence led. In Taylor, for instance, the first 13.1
5 case, back in the days when the object of the section
6 13.1 was telephonic communication, or I suppose in
7 everyday terms telephone answering machines, back in
8 the Taylor case, what the Human Rights Commission was
9 going after when people recorded a message and, in some
10 cases, passed out business cards and people would phone
11 up a number and listen to a message that would change
12 from time to time.

13 And the original 13.1 case involved
14 John Ross Taylor and the Western Guard, and at that
15 time there was an expert witness who testified that the
16 content of Mr. Taylor's messages were likely to expose
17 various groups to hatred or contempt.

18 The next big case, and this is one
19 where we began to get into the Internet, but it was
20 controversial then, there was quite an argument as to
21 whether the Internet was telephonic communication was
22 the Ernst Zundel case, or the Toronto Mayor's Committee
23 on Community and Race Relations and Sabina Citron v.
24 Ernst Zundel.

25 And that case, I'm sure you know,

1 went from 1996 to 2002 sporadically and that at that
2 case expert evidence in the form of, I believe,
3 Professor Kudo(ph) from the University of Alberta was
4 led as to the nature of the messages and there was also
5 other expert evidence, and I believe the man's name was
6 Professor Schweitzer, but there was evidence as to the
7 content of the messages.

8 The next case, and this too was a
9 border line case, in the sense that there was still an
10 argument as to whether the Internet was covered and
11 this was the John Micka case in Vancouver and there was
12 a fellow I think it was Schnell v. John Micka and
13 something Emprized.

14 But anyway, that case also involved
15 postings on the Internet by Mr. Micka and these were
16 postings aimed at pedophiles and homosexuals and there
17 was an expert witness led in that case who argued about
18 the impact of the messages.

19 Then there was the more recent case
20 and then the law was changed or clarified with the
21 Anti-Terrorism Act in late 2001 which made it clear
22 that 13.1 did apply to the Internet, and this was the
23 case involving Mr. Kulbashian, Richard Warman v.
24 Mr. Kulbashian and Mr. Richardson, et al. And in that
25 case too expert evidence was led.

1 But since then, to my knowledge, in
2 13.1 cases there has been no expert evidence.

3 In Richard Warman v. Tomasz Winnicki,
4 and that's T-o-m-a-s-z, Winnicki, or Richard Warman v.
5 Harrison, or Richard Warman v. Terry Tremayne, or
6 Richard Warman v. Glenn Bahr and Western Canada For Us,
7 in those four cases, I'm aware, no expert evidence was
8 led, there was simply the testimony of Mr. Warman
9 referring to a number of messages that he alleged
10 constituted, or were likely to expose various groups to
11 hatred or contempt.

12 And that, to the best of my
13 knowledge, was the Commission's case.

14 What you are faced with though, sir,
15 is an interpretation of some extremely subjective
16 words, likely to expose to hatred or contempt.

17 Now, I know there is some
18 jurisprudence on the meaning of hatred and on the
19 meaning of contempt, but in any particular case you are
20 being asked to weigh words and determine what the
21 likely effect is of those words, and I entirely adopt
22 the submissions of Mr. Kulbashian that, in fairness,
23 and to assist you, you do need expert evidence.

24 There also a concern as I look
25 through some of the passages that are impugned that a

1 passage that can be taken out of context, and so you
2 are being asked to weigh not just the words in
3 isolation but the words as used in that context, and
4 then on a more complicated level, what those words in
5 that context, what effect they are likely, whatever
6 that word means, to have.

7 And, in my submission, sir, you need
8 the assistance of an expert witness.

9 I'm going to hand out -- sorry, the
10 proper procedure is I give the whole lot to you.

11 REGISTRY OFFICER: Sure.

12 MR. FROMM: Now, the first page I
13 think it's in about 24-point type. If I were not a
14 Libertarian and if I did wish to make mischief for
15 people, I could find this book, "The Adventures of
16 Huckleberry Finn" on the Internet and I might select
17 out this passage, page 27, Chapter 6:

18 "Here's a govment that calls
19 itself a govment, and lets on to
20 be a govment, and thinks it is a
21 govment, and yet's got to set
22 stock-still for six whole months
23 before it can take ahold of a
24 prowling, thieving, infernal,
25 white-shirted free nigger,

1 and --"

2 I can take that passage and I could
3 say that passage is likely to expose people to hatred
4 or contempt because of colour. A list of nasty terms
5 there and the inflammatory word 'nigger'.

6 Now, this is an accurate quotation
7 from a book that is available on the Internet and a
8 book that I'm sure almost everyone in this room has
9 read and it's called, "The Adventures of Huckleberry
10 Finn".

11 Now, this is a passage that is
12 accurately quoted.

13 Now, the next page that I have handed
14 out is the context, it's where that passage came from,
15 pages 26 and 27 of this particular edition of "The
16 Adventures of the Huckleberry Finn", and this may take
17 a few minutes to read, but I think this provides the
18 context.

19 Now, sir, if you were asked just to
20 judge this passage without the assistance of an expert
21 in American literature or a linguist or an expert in
22 communications, you might, I suggest might, be
23 persuaded that this passage is likely to expose people,
24 blacks to hatred or contempt. Like I say, it's a
25 possibility.

1 Here is the context, and the voice
2 here is that of Huckleberry Finn:

3 "I got the things all up to the
4 cabin, and then it was about
5 dark. While I was cooking
6 supper the old man took a swig
7 or two and got sort of warmed
8 up, and went to ripping again.
9 He had been drunk over in town,
10 and laid in the gutter all
11 night, and he was a sight to
12 look at. A body would a thought
13 he was Adam, he was just all
14 mud. Whenever his liquor begun
15 to work, he most always went for
16 the govment. This time he says:
17 "Call this a govment! why,
18 just look at it and see what
19 it's like. Here's the law
20 a-standing ready to take a
21 man's son away from him -- a
22 man's own son, which he has
23 had all the trouble and all
24 the anxiety and all the
25 expense of raising. Yes,

1 just as that man has got
2 that son raised at last, and
3 ready to go to work and
4 begin to do suthin' for him
5 and give him a rest, the law
6 up and goes for him. And
7 they call that govment!
8 That ain't all, nuther. The
9 law backs that old Judge
10 Thatcher up and helps him to
11 keep me out o' my property.
12 Here's what the law does.
13 The law takes a man worth
14 six thousand dollars and
15 upards, and jams him into an
16 old trap of a cabin like
17 this, and lets him go round
18 in clothes that ain't fitten
19 for a hog. They call that
20 govment! A man can't get
21 his rights in a govment like
22 this. Sometimes I've a
23 might notion to just leave
24 the country for good and
25 all. Yes, and I told'em so;

1 I told old Thatcher so to
2 his face. Lots of 'em heard
3 me, and can tell what I
4 said. Says I, for two cents
5 I'd leave the blamed country
6 and never come anear it
7 agin. Them's the very
8 words. I says, look at my
9 hat -- if you call it a
10 hat -- but the lid raises up
11 and the rest of it goes down
12 till it's below my chin, and
13 then it ain't rightly a hat
14 at all, but more like my
15 head was shoved up through a
16 jint o' stove-pipe. Look at
17 it, says I -- such a hat for
18 me to wear -- one of the
19 wealthiest men in this town,
20 if I could git my rights.
21 "Oh, yes, this is a
22 wonderful govment,
23 wonderful. Why, looky,
24 here. There was a free
25 nigger there, from Ohio; a

1 mulatter, most as white as a
2 white man. He had the
3 whitest shirt on you ever
4 see, too, and the shiniest
5 hat; and there ain't a man
6 in that town that's got as
7 fine clothes as what he had;
8 and he had; and he had a
9 gold watch and chain and a
10 silver-headed cane--the
11 awfulest old gray-headed
12 nabob in the State. And
13 what do you think? they said
14 he was a p'fessor in a
15 college, and could talk all
16 kinds of languages, and
17 knowed everything. And that
18 ain't the wust. They said
19 he could vote, when he was
20 at home. Well, that let me
21 out. Thinks I, what is the
22 country a-coming to? It was
23 'lection day, and I was just
24 about to go and vote,
25 myself, if I warn't too

1 drunk to get there; but when
2 they told me there was a
3 State in this country where
4 they'd let that nigger vote,
5 I drawed out. I says I'll
6 never vote again. Them's
7 the very words I said; they
8 all heard me; and the
9 country may rot for all
10 me -- I'll never vote agin
11 as long as I live. And to
12 see the cool way of that
13 nigger -- why, he wouldn't a
14 give me the road if I hadn't
15 shoved him out o' the way.
16 I says to the people, why
17 ain't this nigger put up at
18 auction and sold?--that's
19 what I want to know. And
20 what do you reckon they
21 said? Why, they said he
22 couldn't be sold till he'd
23 been in the State six
24 months, and he hadn't been
25 there that long yet. There,

1 now -- that's a specimen.
2 They call that a govment
3 that can't sell a free
4 nigger till he's been in the
5 State six months. Here's a
6 govment that calls itself a
7 govment, and lets on to be a
8 govment, and thinks it is a
9 govment, and yet's got to
10 set stock-still for six
11 whole months before it can
12 take ahold of a prowling,
13 thieving, infernal,
14 white-shirted free nigger,
15 and --"

16 Pap was agoing on so, he never
17 noticed where his old limber
18 legs was taking him to, so he
19 went head over heels over the
20 tub of salt port, and barked
21 both shins, and the rest of his
22 speech was all the hottest kind
23 of language -- mostly hove at
24 the nigger and the govment,
25 though he give the tub some,

1 too, all along, here and there.
2 He hopped around the cabin
3 considerable, first on one leg
4 and then on the other, holding
5 first one shin and then the
6 other one, and at last he let
7 out with his left foot all of a
8 sudden and fetched the tub a
9 rattling kick. But it warn't
10 good judgment, because that was
11 the boot that had a couple of
12 his toes leaking out of the
13 front end of it; so now he
14 raised a howl that fairly made a
15 body's hair raise, and down he
16 went in the dirt, and rolled
17 there, and held his toes; and
18 the cussing he done then laid
19 over anything he had ever done
20 previous. He said so his own
21 self, afterwards. He had heard
22 old Sowberry Hagan in his best
23 days, and he said it laid over
24 him, too; but I reckon that was
25 sort of piling it on, maybe.

1 After supper pap took the
2 jug, and said he had enough
3 whiskey there for two drunks and
4 one delirium tremens. That was
5 always his word. I judged he
6 would be blind drunk in about an
7 hour, and then I would steal the
8 key, or saw myself out, one or
9 'tother. He drank, and drank,
10 and tumbled down on his
11 blankets, by-and-by; but luck
12 didn't run my way. He didn't go
13 sound asleep, but was uneasy.
14 He groaned, and moaned, and
15 thrashed around this way and
16 that, for a long time. At last
17 I got so sleepy I couldn't keep
18 my eyes open, all I could do,
19 and so before I knowed what I
20 was about I was sound asleep,
21 and the candle burning."

22 Now, the passage by itself might lead
23 to certain conclusions, I say might, however, in the
24 context of Huckleberry Finn, the character uttering
25 these words is Pap, or Huckleberry's father, and the

1 character that emerges -- and I'm certainly not
2 testifying as an expert -- but the reasonable inference
3 is, is that this character is not being held up as a
4 credible or likeable person or a role model that, in
5 fact, he is being mocked as something of a low life, a
6 hypocrite, a loud mouth, he'd contradictory, he says of
7 this black, he's a Professor and so on, but he abuses
8 him as a thieving, prowling sort of person.

9 There's no evidence in the rest of
10 his speech that this black was any of those things.
11 Mark Twain is clearly in this passage criticizing or
12 satirizing or mocking a person of very limited
13 intelligence who has some very strong and biased views,
14 in this context.

15 It will be my submission that there
16 is no way that the passage I read to you would fall
17 under section 13.1. But that is the reason, in my
18 submission -- this is an example and I hope it hasn't
19 taken up too much time -- but this an example of why
20 this Tribunal needs the assistance of an expert
21 witness, so that the passages that are impugned can be
22 assessed fairly.

23 And I hope that the short passage
24 that I did isolate illustrates the danger of taking a
25 few inflammatory words, or more nasty names like

1 'nigger', and drawing the conclusion, oh, therefore,
2 it's likely to hatred or contempt.

3 And beyond just what the passage
4 means, in my submission, you need the assistance, and I
5 think this is really the tricky part, of what the
6 impact is. I mean, is this passage that's read, if
7 it's read by a person, a reasonable person, is it
8 likely to have the effect of exposing these groups to
9 hatred or contempt.

10 At the end of the day I'm going to
11 have a lot more submissions, not on this motion, but on
12 this entire thing.

13 And I suggest you might draw some
14 inference from the fact that -- some conclusions from
15 the fact that this complaint is not brought by any of
16 the groups that are allegedly being exposed to hatred
17 or contempt.

18 THE CHAIRPERSON: So, you are
19 supporting Mr. Kulbashian when he says that the
20 Tribunal would need expert evidence in order to make a
21 determination as to whether or not a message
22 constitutes a hate message with all the effect that
23 hate messages can have on different groups in society?

24 MR. FROMM: Yes. Well, the test in
25 the Act is whether the message is likely to expose one

1 of the protected groups to hatred or contempt, and I
2 think you have to go -- I think you need assistance to
3 make the leap from, well, those are some pretty harsh
4 words about that particular group.

5 For instance, this one:

6 "...prowling, thieving,
7 infernal, white-shirted free
8 nigger."

9 Those are pretty harsh words. You
10 need assistance to know whether you can make the leap
11 from that and say, oh yeah, that language to that
12 group, therefore, it's exposing them to hatred or
13 contempt.

14 I think in reading the entire passage
15 it's not blacks who are held up to contempt, it's I
16 guess what it used to be in the South, white trash,
17 people who use bad language is clearly a low life
18 character, Pap is and that is the message.

19 But, if you were not given the whole
20 passage, you were not given the whole context you
21 wouldn't be able to draw that conclusion.

22 And it seemed to me if this were what
23 the passage that were under attack or that was being
24 complained about that you would require at least an
25 expert in communications or preferably an expert in

1 American literature to be able to give you the context
2 and assist you as to whether or not Mark Twain was
3 trying to expose blacks to hatred or contempt or
4 whether there is something different going on.

5 So, I think you need assistance on
6 two levels from experts, No. 1 you need the context of
7 the message, but you also need assistance in actually a
8 more esoteric area and, that is, what is the impact on
9 the average intelligent person, in other words, is the
10 passage likely, is its effect likely to expose these
11 groups to hatred or contempt.

12 In my submission it's likely more
13 than just some facts or criticism of a group, that they
14 would have to go a lot farther than that to expose them
15 to hatred or contempt, but I certainly adopt
16 Mr. Kulbashian's submissions that for fairness and to
17 assist you to draw these conclusions, that there should
18 be expert evidence.

19 THE CHAIRPERSON: Thank you,
20 Mr. Fromm.

21 Mr. Warman?

22 REPLY SUBMISSIONS BY MR. WARMAN

23 MR. WARMAN: Mr. Chair, I have three
24 extremely brief submissions to make.

25 The first one is to refer you to

1 section 48.1(2) of the Canadian Human Rights Act which
2 states that you and all other Members of the Tribunal:

3 "That persons appointed as
4 members of the Tribunal must
5 have experience, expertise,
6 interest in and sensitivity to
7 human rights."

8 With regard to whether there's some
9 need to show some sort of factual harm or likelihood of
10 exposure to harm that could only come from an expert
11 witness, I would refer you to paragraphs 42 to 51 and
12 64 of the Winnicki decision.

13 My final submission is that the
14 motion displays a fundamental misapprehension of
15 decisions that are made regarding factual evidence
16 versus what is a legal decision, which is what the
17 Tribunal must make.

18 The Tribunal's role is to hear the
19 factual evidence and render a legal decision based on
20 it.

21 For instance, in a criminal trial, if
22 a witness says that he or she saw "X" shoot "Y" 10
23 times with a gun the judge is perfectly within their
24 capacity as a decision-maker to make a decision that
25 "Y" was in fact murdered based on the evidence before

1 him or her.

2 And in this case the evidence is
3 clear on its face. It will be our submission, or my
4 submission at the very least that it constitutes
5 material that is quite clearly and self-evidently in
6 violation of section 13.1 of the Canadian Human Rights
7 Act.

8 THE CHAIRPERSON: But what I have
9 been hearing from Mr. Kulbashian and Mr. Fromm, the
10 first thing is that -- and I think this is an issue
11 that we have to deal with is -- when you testify and
12 you go over certain documents, they will object to you
13 testifying as to the nature of these documents or
14 messages saying that, on the one hand from what I
15 heard, is that you are not an expert and the fact that
16 you have been monitoring different websites for a
17 number of years, doesn't make you an expert.

18 And, secondly, what they are saying
19 is that you present yourself -- they state that you are
20 an activist and what I'm hearing from the respondents
21 is that they will object any time or every time you
22 will try to qualify a message or a document tendered in
23 evidence as a hate message for these two reasons.

24 So, we haven't gotten into the
25 evidence yet, but I can expect that for each document

1 that you will tender in evidence that there will be an
2 objection to you making any comments on the nature of
3 that document.

4 The second thing that the respondents
5 have put before the Tribunal is that in the past there
6 were cases where expert evidence was presented or led
7 in order to help the Tribunal in determining if a
8 message did in fact constitute a hate message with all
9 the consequences that are attached to that.

10 You have referred to section 48.1,
11 paragraph 2 where it is stated that:

12 "Persons appointed as members of
13 the Tribunal must have
14 experience, expertise and
15 interest in and sensitivity to
16 human rights."

17 The question I am putting to you that
18 even if that is the case, in some instances the
19 Tribunal will hear expert evidence even though the
20 Tribunal is considered to have expertise, experience
21 and sensitivity to human rights, and it means that the
22 Tribunal sometimes, for some technical issues or for
23 some issues that are beyond, you know, the knowledge of
24 the Tribunal, that expert evidence is needed.

25 So, the question I am putting to you

1 is, in what instances is there a need to have expert
2 evidence in these types of questions under section 13.1
3 and in what cases, you know, there is no need for that?

4 And I think we have to sort this out
5 right now because if you are to present your evidence
6 and if we were to have objections, it means that at the
7 end of the day, you know, I will have to rule on these
8 objections and determine if the respondents are right
9 in making these objections, and that will happen at the
10 end of the day.

11 MR. WARMAN: Perhaps I can respond on
12 the concerns that you have raised.

13 The first one is that I'm not being
14 tendered as an expert witness, I'm being tendered as a
15 witness of fact. I will not be attempting to -- or
16 perhaps more accurately stated, it is the Tribunal's
17 ultimate role to make a decision based on the evidence
18 before you as to whether the material constitutes hate
19 messages that are likely to expose a person or persons
20 to hatred or contempt on the basis of a prohibited
21 ground of discrimination.

22 One of the reasons behind I believe
23 the petering off, if you will, of expert witness
24 evidence is that a number of Tribunal decisions make
25 comments in passing, if you will, that although the

1 expert witness evidence might have been of interest, it
2 was of little assistance in making the ultimate
3 decision, which is the sole responsibility of the
4 Tribunal.

5 Specifically, with regard to how the
6 likelihood of exposure to hatred or contempt is to be
7 determined by the Tribunal Member, I would refer you to
8 paragraphs 52 to 55 of the Winnicki decision which
9 deals explicitly with how a Tribunal Member is to go
10 about making that determination.

11 And at paragraph 64, Tribunal Member
12 Jensen states:

13 "...I must focus on whether it
14 is reasonable to conclude on the
15 basis of the language, tone,
16 presentation and content of the
17 impugned messages that they
18 might well have exposed members
19 of the targeted groups to hatred
20 and contempt."

21 And that's at paragraph 64 of the
22 Winnicki decision.

23 With regard to the historical usage
24 of expert versus fact testimony, I believe my
25 colleague, Ms Snider on behalf of the Commission will

1 be addressing that in greater detail.

2 THE CHAIRPERSON: Thank you,
3 Mr. Warman.

4 MR. WARMAN: Thank you.

5 THE CHAIRPERSON: Ms Snider?
6 Yes, I see that you are looking at
7 your watch.

8 MS CEILIDH SNIDER: Yes, with respect
9 to the housekeeping matter that we noted earlier at the
10 outset of the day, I had indicated that I would print
11 off at least the first page of the page that I'm going
12 to refer to the Mossop decision.

13 So, if I may, could we have a brief
14 break at this point in time, it's a quarter to 11:00,
15 so I can do that.

16 THE CHAIRPERSON: Yes, if you are to
17 be using --

18 MS CEILIDH SNIDER: Yes.

19 THE CHAIRPERSON: -- the decision,
20 might as well do it now.

21 MS CEILIDH SNIDER: Thank you.

22 THE CHAIRPERSON: Take the break now.

23 MS CEILIDH SNIDER: Thank you.

24 MR. FROMM: Just before the break,
25 can I ask Mr. Warman to repeat the passages in Winnicki

1 that he mentioned in his original submission.

2 THE CHAIRPERSON: I think it's 42 to
3 51 and 64.

4 MR. WARMAN: Yes, although I would --

5 MS CEILIDH SNIDER: I'll be covering
6 many of those passages as well.

7 MR. WARMAN: Sorry, it should have
8 been 42 to 55 and then 64. So, 42, 55 and then 64.

9 THE CHAIRPERSON: Thank you.

10 So, whenever you are ready just tell
11 the court officer.

12 MS CEILIDH SNIDER: Thank you.

13 REGISTRY OFFICER: Order, please.

14 --- Upon recessing at 10:48 a.m.

15 --- Upon resuming at 11:15 a.m.

16 REGISTRY OFFICER: Order, please.

17 Please be seated.

18 MS CEILIDH SNIDER: Thank you for
19 your indulgence.

20 THE CHAIRPERSON: Ms Snider?

21 SUBMISSIONS BY MS CEILIDH SNIDER

22 MS CEILIDH SNIDER: The Commission
23 opposes the motion of the respondents to require the
24 Commission and complainant to lead expert evidence with
25 respect to the issues of what comprises hateful and

1 contemptuous content within the respondents' impugned
2 messages on two grounds.

3 First, it is the position of the
4 Commission that the Tribunal has both the authority and
5 the ability to make such a determination; and, second,
6 parties to a complaint have the right to determine for
7 themselves what witnesses they call and how they
8 conduct their cases, so long as they comply with the
9 Act and the rules of procedure.

10 The following are the Commission's
11 submissions on the first point.

12 As we know, subsection 13.1 of the
13 Canadian Human Rights Act makes it a discriminatory
14 practice for a person or a group of persons acting in
15 concert to communicate any matter that is likely to
16 expose a person or persons to hatred or contempt by
17 reason of the fact that that person or those persons
18 are identifiable on the basis of the prohibited ground
19 of discrimination.

20 In order to make a decision as to
21 whether or not the complaint alleging discrimination by
22 the respondents contrary to section 13 of the Canadian
23 Human Rights Act has been made out, the Tribunal will
24 need to determine, amongst other issues, whether or not
25 the subject matter of the messages is likely to expose

1 a person or persons to hatred or contempt by reasons of
2 the fact that they are identifiable on the basis of the
3 prohibited ground of discrimination.

4 The respondents have brought a motion
5 requiring the Commission and complainant to lead expert
6 evidence as to whether the subject matter of particular
7 messages are likely to expose a person or persons to
8 hatred or contempt on prohibited grounds.

9 The respondents assert that absent
10 expert evidence the Tribunal lacks the ability to
11 determine for itself whether the impugned messages are
12 likely to expose persons to hatred or contempt.

13 I would refer the Tribunal and
14 parties to subsection 50.2 of the Canadian Human Rights
15 Act.

16 This subsection expressly confers on
17 the Tribunal the power to determine all questions of
18 law and or fact necessary to determine the matter under
19 inquiry.

20 Mr. Warman has discussed the
21 qualifications required of Tribunal members as set out
22 there in subsection 48.1(2) of the Act.

23 The Supreme Court of Canada has
24 recognized Human Rights Tribunals as experts in matters
25 relating to fact finding and adjudication in a human

1 rights context.

2 I refer you to Canada, the Attorney
3 General v. Mossop [1993] 1 S.C.R. 554 at paragraph 45
4 for this proposition.

5 As Mr. Warman submitted in his
6 discussion earlier he is a fact witness, that is, in
7 his testimony he will be giving evidence as to the
8 facts as he found them.

9 This is in contrast to the evidence
10 of experts. The evidence of experts is an exception to
11 the general rules of evidence in that they testify to
12 their opinions about matters which are in the area of
13 their expertise.

14 As noted in Sopinka at paragraph
15 12.26 and I passed out copies of this --

16 MR. KULBASHIAN: Is this paragraph
17 45?

18 MS CEILIDH SNIDER: That's the Mossop
19 decision. This morning you were provided with it.

20 So, I'm referring you to paragraph
21 12.26. This exception, that is, the exception for
22 experts, was carved out of the rules of evidence as a
23 means of assisting in the understanding of complex
24 technical issues where the subject in question was
25 beyond the capabilities of inexperienced persons who

1 could not form correct judgments without such
2 assistance.

3 Further, at paragraph 12.35 also of
4 Sopinka which you were provided with, the learned
5 authors reference the Supreme Court of Canada's
6 decision in R. v. Mohan and state that the opinion
7 evidence must be necessary in order to allow the fact
8 finder:

9 "(1) to appreciate the facts due
10 to their technical nature, or;
11 (2) to form a correct judgment
12 on a matter if ordinary persons
13 are unlikely to do so without
14 the assistance of persons with
15 special knowledge."

16 The Supreme Court of Canada has
17 provided guidance to the Tribunal and courts, a test if
18 you will, as to how they were to determine whether the
19 contents of the impugned messages are likely to expose
20 persons to hatred and contempt on prohibited grounds.

21 This test is now well established.
22 As noted in Warman v. Winnicki at tab 16, page 11,
23 paragraph 43, the Supreme Court of Canada adopted the
24 Tribunal's definition of hatred and contempt in Taylor.
25 The Winnicki decision provides an excellent summary of

1 the salient points, and I will reference a number of
2 paragraphs from that decision which is before you.

3 At paragraph 44:

4 "...Hatred" is defined as
5 active dislike, detestation,
6 enmity, ill-will and
7 malevolence. It means, in
8 effect, that one finds no
9 redeeming qualities in the
10 object of one's detestation. It
11 is a term, however, which does
12 not necessarily involve the
13 mental process of "looking down"
14 on another...It is quite
15 possible to "hate" someone who
16 one feels is superior to one in
17 intelligence, wealth or power."

18 And at paragraph 44:

19 "Contempt", in contrast, does
20 suggest a mental process of
21 "looking down" upon or treating
22 as inferior the object of one's
23 feelings. This reflects the
24 dictionary definition of
25 despise, dishonour or disgrace."

1 Going on expose which is another
2 element the Tribunal will have to consider.

3 "Expose" means: to leave a
4 person unprotected; to leave
5 without shelter or defence; to
6 lay open to danger, ridicule or
7 censure."

8 Again referencing the Taylor decision
9 at 29:

10 "In Taylor, the Tribunal held
11 that "expose" is a more passive
12 word than "incite". This
13 suggests that active effort or
14 intent on the part of the
15 communicator is not envisaged.
16 Similarly, the use of the word
17 "expose" in s. 13(1) suggests
18 that a violent reaction on the
19 part of the recipient of the
20 message is not envisaged. In
21 other words, the Tribunal
22 stated, if one is creating the
23 right conditions for hatred to
24 flourish, leaving the
25 identifiable group open or

1 vulnerable to ill-feeling or
2 hostility, if one is putting
3 them at risk of being hated, in
4 a situation where hatred or
5 contempt are inevitable, one
6 then falls within the compass of
7 s. 13(1) of the Human Rights
8 Act."

9 Again, from Winnicki, at paragraph
10 46, Member Jensen writes very well:

11 "The Tribunal in Nealy v.
12 Johnston stated that the use of
13 word "likely" in s. 13(1) means
14 that it is not necessary that
15 evidence be adduced to prove
16 that any particular individual
17 or group took the messages
18 seriously and directed hatred or
19 contempt towards others. Nor is
20 it necessary to show that, in
21 fact, anyone was victimized."

22 Turning to the second issue raised by
23 the respondents which can be characterized as the
24 likelihood of exposure to harm, Member Jensen in the
25 Winnicki case confronted the precise issue that we have

1 here before us. Thus her decision in Winnicki
2 continues to be very instructive.

3 At paragraph 53, Member Jensen noted:

4 "In Citron v. Zundel, (No.
5 4)...at para. 141, the Tribunal
6 stated that, although the expert
7 evidence in that case was
8 helpful, it was the language
9 used in the messages themselves
10 that persuaded the Tribunal that
11 the material offended s. 13(1)
12 of the Act. Similarly, in
13 Warman v. Kyburz, 2003 CHRT 18,
14 the Tribunal noted the expert's
15 evidence that suggested the
16 messages were likely to expose
17 people of the Jewish faith to
18 hatred and contempt, but the
19 Tribunal found that it was
20 evident from the messages
21 themselves that they exposed
22 Jewish people to hatred."

23 The Tribunal suggested that expert
24 testimony may be of assistance in instances where hate
25 messaging is particularly subtle or nuanced.

1 In Warman v. Kulbashian, at tab 15,
2 paragraph 63, at page 22, the Commission's expert was
3 held not to provide any significant insight into the
4 material at the hearing as an expert in racism and hate
5 propaganda.

6 In the view of the Panel Member the
7 expert's:

8 "...report and testimony
9 consisted essentially of her
10 opinion about the ultimate
11 question before the Tribunal.
12 She did not..."

13 that is the expert,

14 "...did not provide the Tribunal
15 with any particular insight into
16 the stereotypical or racist
17 aspects of the Hate Messages and
18 how these aspects could expose
19 persons to hatred or contempt,
20 certainly no more so than the
21 Tribunal can assess for itself
22 or can garner from the body of
23 jurisprudence relating to s. 13
24 of the Act."

25 Furthermore, because the expert's

1 evidence consisted of opinion on the ultimate question
2 before the Tribunal, it was not considered.

3 The ultimate question of whether or
4 not a message is likely to expose persons to hatred or
5 contempt is a decision solely for the Tribunal to make,
6 it is not for an expert to decide.

7 An expert would usurp the role of the
8 Tribunal Member in attempting to do so.

9 As Mr. Warman outlined, a variety of
10 cases heard by this Tribunal have made decisions in the
11 absence of experts. For example, Warman v. Winnicki,
12 Warman v. Warman and Warman v. Harrison.

13 Other cases, complaints heard by this
14 Tribunal including Bahr and others were heard in the
15 absence of expert testimony.

16 Just bear with me a moment.

17 Turn briefly to the issue of standard
18 of proof.

19 The standard of proof refers to the
20 degree of probability that must be established by the
21 evidence which entitles the party with the onus of
22 proof to succeed in proving his or her case or on an
23 issue in the case.

24 The standard of proof applicable in a
25 human rights case is the balance of probabilities. The

1 standard is met where the Tribunal can conclude that
2 the allegations are more probable than not. I submit
3 this is not a high standard.

4 In determining whether the content of
5 the messages are hateful or contemptuous, the standard
6 of proof is the balance of probabilities. The standard
7 is met where the Tribunal can conclude that the
8 messages are more probable than not hateful or
9 contemptuous.

10 The Commission respectfully submits
11 that this is not a case, this case of Warman v. Guille
12 and Canadian Heritage Alliance is not a case where the
13 impugned messages are of such a subtle or technical
14 nature that an expert would be necessary to assist the
15 Tribunal in determining whether the content is likely
16 to expose a person or persons to hatred and contempt on
17 the prohibited grounds.

18 We are not dealing here with messages
19 from Huckleberry Finn, as you will see.

20 And on that, rather than go through
21 the entire decision, the issue of what is tolerable,
22 which Mr. Fromm went into in terms of tolerable
23 messages to society is discussed at Winnicki at tab 16,
24 pages 15 to 17 of Ms Jensen's decision.

25 Before I leave this particular area,

1 I just wanted to note and address a concern raised by
2 the respondent that messages may be taken out of
3 context and that if you don't look at the whole of the
4 message you may be misled or misunderstand or
5 misconstrue the nature of the message.

6 It is for this reason that in
7 responding to the direction of Member Jensen the
8 Commission has referred all of the content, the
9 entirety of the messages in the forum and the articles
10 that are at issue under tab C and the numbered tabs
11 within, the entirety will be put into evidence, not
12 simply passages.

13 Now, Mr. Warman may not go through in
14 his testimony and read in the entire messages, but rest
15 assured the entire message or the entire article will
16 be put into evidence.

17 Turn now to my second response, which
18 is much briefer and, that is, the Commission contends
19 respectfully that there is no basis in law for the
20 Tribunal to order the Commission or any other party to
21 lead particular evidence in a case, as noted at the
22 outset, as long as the party complies with the Act, the
23 Tribunal's rules of procedure and any other applicable
24 rules of evidence or procedure as a party to the
25 hearing.

1 The Commission is entitled to
2 determine for itself how it wishes to proceed with its
3 case, including whether or not to call expert
4 witnesses.

5 The Commission is mindful of both the
6 Tribunal's rules of procedures and exhortation that all
7 proceedings before the Tribunal are to be conducted as
8 informally and expeditiously as possible.

9 Tendering expert witnesses is a very
10 complex process. It requires an expert be obtained --
11 retained, that they be provided with the material they
12 are to review, that they prepare a report, that they
13 prepare a CV in an acceptable form to the Tribunal,
14 that they submit their report to all parties in ample
15 time to enable the parties to review the report, to
16 obtain their own expert in response, if so decided.

17 It requires time and expense for the
18 other party to then have their expert prepare a
19 responding report of an expert nature and provide that
20 to, in this instance, for example, the Commission.

21 The Commission's expert must then
22 review that report and prepare a reply report which is
23 then provided to the parties.

24 At this stage of the Tribunal hearing
25 an expert must first be qualified as an expert and the

1 particular area of his or her expertise has to be
2 ascertained to ensure that (a) the expert has
3 particular knowledge that will be of assistance to the
4 Tribunal, that the expert does not have a particular
5 affiliation or bias that would come through in the
6 provision of their testimony, and that is an issue that
7 is often addressed as credibility.

8 It is, in summation, a complex
9 process and a very lengthy and often costly process.

10 The Commission has full confidence in
11 both the expertise of this Tribunal and that the
12 material to be tendered as evidence will be found to be
13 in violation of the Act on its face and no expert
14 testimony need be led.

15 The Commission would, therefore, ask
16 the Tribunal to dismiss the respondent's motion.

17 Do you have any questions?

18 THE CHAIRPERSON: No.

19 Any response Mr. Fromm or
20 Mr. Kulbashian?

21 REPLY SUBMISSIONS BY MR. FROMM

22 MR. FROMM: Mr. Chairman, I'm not
23 certain I heard it right, but I believe I heard Ms
24 Snider to say as she outlined the trouble and
25 complexity of obtaining an expert witness, that we're

1 told it's a complex process, the expert plus be
2 provided with the documentation, must prepare a report,
3 must prepare a curriculum vitae, there must be ample
4 time provided so that the report can be circulated to
5 the parties, the other party may wish to obtain an
6 expert and prepare an expert report in refutation, that
7 report will have to go to the Commission, they will
8 have study it. We are told this is a complex, lengthy,
9 costly process.

10 I'm not trying to be flippant, sir,
11 but are we to conclude, well, it's just too much
12 trouble to do this, let's just convict the lady anyway
13 and fine her.

14 MS CEILIDH SNIDER: Excuse me, that's
15 not remotely what I suggested.

16 MR. FROMM: Well, we were told it was
17 a complex process, it's costly.

18 Certainly if the objection is that
19 it's going to take some time, you already indicated
20 yesterday, sir, that we're not going to conclude this
21 week, so there is time before this Tribunal reconvenes
22 for the Commission to obtain an expert witness, if
23 they're serious about advancing their case rather than
24 making accusations.

25 You were referred to section 50.2 of

1 the Canadian Human Rights Act which reads:

2 "In the course of hearing and
3 determining any matter under
4 inquiry, the member or panel may
5 decide all questions of law or
6 fact necessary to determine the
7 matter."

8 I don't think anybody is challenging
9 your power or authority, it's a matter of how are you
10 going to determine questions of, in this case it's
11 questions of law, do the impugned passages violate
12 section 13.1 of the Act.

13 What you will have essentially is two
14 positions, a passage, one side is going to say, yes, it
15 does violate section 13.1, the other side is going to
16 say, no, it doesn't violate section 13.1.

17 It's perhaps analogous to a
18 situation, a body is found on the sidewalk and not far
19 away from that a man is holding a knife. Do we just
20 create a court of people on the spot and say the fellow
21 with the knife looks guilty.

22 As a trier of fact no judge would be
23 able to draw that conclusion. The judge is going to
24 have to be provided with some sort of expert evidence.
25 Was the knife in question the knife that killed the

1 individual?

2 The mere allegation is not enough and
3 that's why we are seeking for the Commission to have to
4 provide expert evidence to assist you.

5 Ms Snider said that the balance of
6 probabilities is not a high standard. Regrettably
7 that's true, but certainly keeping in mind that you
8 still are governed by the Charter of Rights and
9 Freedoms and the right of the respondents to freedom of
10 speech, freedom of expression, freedom of the press,
11 while they are somewhat circumvented by section 13.1,
12 those rights still exist.

13 In my submission, you have to have
14 some assistance in determining whether words that may
15 seem inflammatory, as in the passage I showed you from
16 Huckleberry Finn, whether or not they do cross the
17 threshold of being likely to incite -- sorry, being
18 likely to expose various groups to hatred or contempt.

19 Now, you were directed to the
20 decision in Warman v. Tomasz Winnicki, and I'm certain
21 you probably know far better than I, but while these
22 other decisions may be instructive, they are not
23 absolutely determinative, you have to interpret the law
24 and apply it to the passages that will probably be
25 presented to you in this case.

1 One of the most difficult words that
2 I think you have to try to interpret is likely. Now,
3 Member Jensen takes an extremely broad interpretation
4 of the word, but it will certainly be argued on our
5 side that there has to be at least some evidence.
6 Likely has to be a little bit more than the words are
7 nasty or the words are inflammatory. You have to draw
8 a conclusion as to whether those words in that
9 particular context cross some threshold of likeliness
10 to expose groups to hatred or contempt.

11 Of course, as Mr. Warman pointed out,
12 Members of the Tribunal are selected, among other
13 things, for a sensitivity to human rights issues. That
14 does not make, does not assume though that the person
15 is an expert in linguistics and communications, nor
16 should it.

17 The areas that you have to decide are
18 not simply 13.1 cases, and with all due respect, you
19 may have sensitivity and undoubtedly do have
20 sensitivity to human rights and human rights issues,
21 that doesn't necessarily mean that you can look at a
22 passage and determine whether or not it is likely to
23 expose various groups to hatred or contempt.

24 It is my submission that the
25 unwillingness of the Commission to produce an expert

1 witness suggests a somewhat disrespectful attitude to
2 this process and disrespectful attitude to the rights
3 of the respondents.

4 If these passages are likely to
5 expose certain groups to hatred or contempt, then you
6 should be assisted by an expert witness to make that
7 case. That of course is not turning over the
8 Tribunal's decision powers to an expert, as Ms Snider
9 said, it is entirely possible that the respondents
10 might have an expert as well that might try to refute
11 their expert, but that is the adversarial process.

12 But to go beyond the accusation which
13 is undoubtedly the Commission's case, some passages
14 which will be shown are likely to expose groups to
15 hatred or contempt and the respondents retort, no they
16 don't, you have to have some assistance and that's what
17 the expert would do. That's what we think ought to be
18 required at least.

19 The decision of the Attorney General
20 of Canada v. Mossop, I don't think particularly assists
21 the Commission's argument. The highlighted passage
22 says:

23 "...the superior expertise of
24 the human rights Tribunal
25 relates to fact finding and

1 adjudication in human rights
2 contents."

3 That doesn't say that a Human Rights
4 Tribunal can decide matters of facts in a human rights
5 context with no expert evidence at all and, again
6 meaning no disrespect, you probably are not a
7 communications expert, but I think what the court is
8 saying is that with proper expertise and proper
9 assistance, the background of a Tribunal, gives it a
10 certain expertise in human rights context.

11 The citations from Sopinka, while
12 they explain what an expert is, don't in any way
13 undermine the arguments that we are submitting to you.

14 Sopinka, 12.26:

15 "In order to provide the trier
16 of fact with the necessary
17 technical or scientific basis
18 upon which to properly assess
19 the evidence presented, the
20 courts recognize an
21 exception...",

22 et cetera, et cetera.

23 And this is really our submission, to
24 provide the trier of fact with the necessary technical
25 in this case basis to make a decision.

1 The whole argument is, well, what is
2 the -- likely, put it that way, what is the likely
3 impact of these passages which perhaps contain
4 inflammatory words or perhaps contain startling facts,
5 but those would be obvious to you, but what is the
6 impact and, in our submission, you would need the
7 assistance of an expert probably in communications,
8 just as I suggested earlier in the Huckleberry Finn
9 passage, that probably an expert in American literature
10 might be able to clarify whether or not the brief
11 quotation I read that ended up with the word 'nigger'
12 was in fact likely to expose people of colour to hatred
13 or contempt.

14 Just the fact that there was an
15 inflammatory word there and some nasty comments
16 wouldn't necessarily, taking the thing in context, have
17 the effect of exposing groups to hatred or contempt.

18 The reference to Warman v. Kulbashian
19 and the comment by Member Hadjis that the expert in
20 that case was not helpful, is in no way a criticism of
21 the role of experts in general, it was just that in
22 that particular case perhaps the quality of the
23 Commission's expert or the cross-examination skills of
24 the respondent made that particular expert's
25 contribution of little value. That does not in any way

1 undermine our case, or our submission that you do need
2 the assistance of expert evidence to assess the
3 passages in their context and what the likely impact of
4 those passages might be.

5 And the likely impact, in our
6 respectful submission, goes beyond just, well, is there
7 something nasty or upsetting there.

8 Even Member Jensen in her decision in
9 Warman v. Winnicki allows for the fact that often words
10 can be disturbing, upsetting, obnoxious but don't cross
11 the threshold of being likely to expose groups to
12 hatred or contempt, and it's our respectful submission
13 that you need that assistance.

14 I was glad to get the precise
15 passages that Mr. Warman drew to your attention and I
16 suggest that they are not especially telling you the
17 steps you must take to come to -- to make a decision as
18 to whether the passages impugned expose groups to
19 hatred or contempt. Obviously those are the steps that
20 you would have to take and consider.

21 But the problem though is in taking
22 those steps, can you do that without the assistance, or
23 we would argue, the evidence of an expert.

24 Because, in our submission, what you
25 will have are yes and no, yes, the Commission will

1 argue here is some passages and they violate section
2 13.1; on this side we will be saying, no, they do not.

3 You have an accusation but the
4 accusation is not evidence. In our submission, the
5 evidence will come --

6 MR. WARMAN: Mr. Chairman, I hate to
7 interrupt, but this sounds suspiciously like repetition
8 rather than submissions or response to those of Ms
9 Snider.

10 Just in the interest of proceeding
11 with the actual hearing itself, it may be of some use
12 to direct submissions.

13 MR. FROMM: Well, the time taken to
14 make the objection, I was about to conclude in two
15 sentences, but...

16 THE CHAIRPERSON: So, go ahead with
17 your concluding two sentences.

18 MR. FROMM: It's our submission that
19 the experts will provide you with the evidence or the
20 likely evidence, just as in the hypothetical murder
21 case, the judge would need at the very least some sort
22 of expert evidence to testify whether the knife in the
23 hands of the fellow who was caught on the scene was in
24 fact the knife used to kill the victim.

25 Those are all my submissions.

1 THE CHAIRPERSON: Thank you,
2 Mr. Fromm.

3 Mr. Kulbashian?

4 REPLY SUBMISSIONS BY MR. KULBASHIAN

5 MR. KULBASHIAN: I would like to go
6 in somewhat of a logical order to avoid repetition.

7 I'll start off by responding to what
8 Mr. Warman stated. Mr. Warman read section 48.1(2)
9 where it states:

10 "Persons appointed as members of
11 the Tribunal must have
12 experience, expertise and an
13 interest in and sensitive to
14 human rights issues."

15 The allegations here are not a
16 violate -- even if we can take that to mean that they
17 are experts in human rights, the allegations here are
18 not a violation of human rights in the specific content
19 of the issue of human rights, it's requires an
20 expertise of hate propaganda or communication, as
21 Mr. Paul Fromm says.

22 Hate propaganda, I don't know, but I
23 can surmise is not the specific expertise of very many
24 individuals.

25 In the situation of how can we

1 determine whether or not there is an expert or there is
2 the necessity for expert or not necessity for an
3 expert, who will make that determination in the first
4 place.

5 Will the Chair feel that I'm somewhat
6 comfortable with handling this issue so I don't need an
7 expert, or will the Chair want to error on the side of
8 caution and state that I might feel comfortable, but
9 there might be issues that I'm not aware of because all
10 this is an issue of technical information and not just
11 facts.

12 Difference between technical
13 information and facts are facts are straight forward,
14 because they are. Technical information requires some,
15 or in some cases a lot of interpretation, and technical
16 information is not part, like, basically coming up with
17 technical information is not part of the mandate of the
18 Chair.

19 If evidence is not put before him or
20 her then he cannot come up with the information
21 himself.

22 Mr. Warman read the Winnicki
23 transcripts -- I'm sorry, but I have to get my book of
24 authorities -- which was I believe tab 16, sorry, tab
25 16, paragraph 64.

1 He is stating:

2 "For these reasons..."

3 I'm just reading the last paragraph
4 that he read primarily because I don't want to read the
5 entire thing back into the record:

6 "...for these reasons to
7 determine whether or not the
8 impugned messages are likely to
9 expose persons to hatred or
10 contempt. I cannot give any
11 weight to the wide-spread
12 existence of other messages that
13 are alleged to have the same
14 effect, rather, I must focus on
15 whether it is reasonable to
16 conclude on the basis of the
17 language, tone, presentation and
18 content of the impugned messages
19 that they might well have
20 exposed members of the targeted
21 groups to hatred and contempt."

22 This brings up two issues, in the
23 Winnicki case there wasn't an issue of articles that
24 were written as much as conversations that happened on
25 line, which may change the way that the Tribunal would

1 review the content that was being posted on line.

2 Another issue is that in the Winnicki
3 case Mr. Warman did in fact testify that he believed
4 the content was hate, which means that there was
5 evidence before the Tribunal that according to him the
6 content was hate. Without any evidence stating content
7 was hate, then the Tribunal cannot come to that
8 decision.

9 Coming back to an example that
10 Mr. Warman gave saying if somebody states he saw "X"
11 shoot "Y" and the judge can make a summation based on
12 what he heard whether that person killed him. The
13 issue here is no one is saying anything.

14 That way the individual chairing or
15 basically overseeing the hearing will not have any
16 information to actually interpret, meaning there is no
17 information that states it is hate.

18 They might say it, as Mr. Fromm said,
19 they might say, yes, we might say no, but the fact of
20 the matter is no one is going to actually get up and
21 say that it is hate unless there is expert evidence.

22 Now, coming to the Commission's
23 submissions, first of all, I want to just state that we
24 only have the partial print-out of the decision here
25 and I reserve my right to make further submissions

1 after we get the full print-out.

2 MS CEILIDH SNIDER: We have the full
3 case for you now.

4 MR. KULBASHIAN: That's fine. Just
5 because I don't have it in front of me and I have never
6 read that case before, therefore, after a break I guess
7 afterwards I'll make -- I'll continue if there's any
8 other issues.

9 However, I do have a lot of points I
10 have to make on what the Commission stated in rebuttal.

11 THE CHAIRPERSON: Okay.

12 MR. KULBASHIAN: The Commission
13 stated they have the right to call any witness they
14 want.

15 Where the Commission and possibly the
16 complainant may have misunderstood is we're not stating
17 they have to call an expert witness, that is their
18 business whether or not they call an expert witness,
19 they are the ones that have to make the case and prove
20 to the Tribunal whether or not their allegations are
21 founded.

22 What we're stating is without an
23 expert witness this information is effectively useless
24 because the Tribunal will only have information that
25 this information exists.

1 THE CHAIRPERSON: Isn't it a question
2 of argument.

3 MR. KULBASHIAN: In what sense?

4 THE CHAIRPERSON: In the following
5 sense. If you are saying that you acknowledge that the
6 Commission has the right to bring whatever evidence it
7 feels need to be brought in order to establish its case
8 and that the Tribunal cannot compel the Commission to
9 put on its list of witnesses an expert, what I am
10 saying is, isn't it something at the end of the day you
11 can argue, that the Commission failed to present the
12 necessary evidence or witnesses in order to make its
13 case and, for that reason, the complaint should be
14 dismissed.

15 Isn't it a matter of argument?

16 MR. KULBASHIAN: Somewhat, however --

17 THE CHAIRPERSON: Rather than --

18 MR. KULBASHIAN: However, this is
19 where they're confused.

20 Coming back to the issue, I'm just
21 going to be referring to, I'm not going to be getting
22 into details.

23 When Mr. Warman started out with the
24 order to have me excluded from the hearing as, I guess,
25 an agent or representative for Ms Guille --

1 THE CHAIRPERSON: An agent.

2 MR. KULBASHIAN: An agent. He stated
3 that he read passages from articles and that were in
4 the ruling and in a way whether or not those articles
5 have any -- whether or not, like, ...in fact the
6 articles are read causes some level of prejudice, cause
7 some level of prejudice in the sense that the articles
8 themselves...

9 MS CEILIDH SNIDER: I fail to see
10 where we're going with this.

11 MR. KULBASHIAN: This is where I'm
12 going with it, I'm going to get to that, like, in a
13 couple of seconds.

14 The articles themselves were not the
15 reason why I shouldn't be here, he was stating that the
16 fact that I was found to be liable in section 13
17 complaint and I hadn't obeyed the order is the reason I
18 was here, but reading the articles was nothing but
19 creating an effect and in some essence prejudice.

20 THE CHAIRPERSON: Well, you can see
21 from my ruling --

22 MR. KULBASHIAN: I understand.

23 THE CHAIRPERSON: -- that the effect
24 was minimal.

25 MR. KULBASHIAN: I understand that.

1 I don't mean in any sense that --

2 THE CHAIRPERSON: Every party is free
3 to present, as long as it's relevant to --

4 MR. KULBASHIAN: Yes.

5 THE CHAIRPERSON: -- an issue the
6 arguments that it deems to be essential to make its
7 point. And that is the way the system works, and it is
8 the Tribunal who has to, by listening to both sides,
9 determine, you know, what the Tribunal feels must be
10 done and in a way make a ruling accordingly.

11 MR. KULBASHIAN: That I understand.
12 That is -- I understand I might be kind of slow in
13 organizing my thoughts or, like, making it apparent but
14 I am getting to the point where it should be more clear
15 what I need to say.

16 THE CHAIRPERSON: Okay.

17 MR. KULBASHIAN: The Commission read
18 section 50.2. It says:

19 "In the course of hearing and
20 determining any matter under
21 inquiry, the member or panel may
22 decide all questions of law or
23 fact necessary to determine the
24 matter."

25 And this states that by the meaning

1 law and fact, in fact means they can refer to law and
2 jurisprudence as well as the facts heard in the case,
3 it doesn't state that the panel or member can give
4 their opinion on the article without having anything to
5 prompt them to the opinion.

6 In essence, if -- it just gets back
7 to the core issue, if the Commission is alleging that
8 these articles are hate, at this point only the
9 statement of particulars are on the record
10 hypothetically that states in any number of words that
11 this violates the act in these possible ways.

12 After that point of the statement of
13 particulars being submitted, the Commission and
14 complainant will be no longer able to state in any way,
15 shape or form that any article they bring to the
16 witness stand or bring to the record do in fact violate
17 section 13 which means, aside from the statement of
18 particulars, no one during -- in the process of the
19 hearing will be alleging that the articles violate
20 section 13, because in order for allegations to be
21 made -- well, they can allege it violates section 13,
22 ultimately from the perspective of opening the
23 complaint and bringing it to hearing, however, they
24 can't speak that this article is racist because it is
25 against minorities, it is such and such minorities,

1 because they are not in a position to do that any more.

2 THE CHAIRPERSON: What I see how
3 things will unravel is Mr. Warman will testify,
4 Mr. Warman would put in evidence certain documents, if
5 he in a way provides opinion evidence on these
6 articles, you will object because you state that
7 Mr. Warman can only, in a way --

8 MR. KULBASHIAN: Testify to the
9 facts.

10 THE CHAIRPERSON: -- bring to the
11 attention of the Tribunal messages that he found on the
12 net that he alleges and that is part of the complaint
13 to be contrary to section 13 of the Act, and if he goes
14 further than that you will object.

15 But then when the time for providing
16 submissions to the Tribunal, I would expect Mr. Warman
17 and the Commission to rely on the criteria set out in
18 the case law with respect to what constitutes hatred,
19 contempt, likely, and tell the Tribunal, well, look at
20 these messages and given the criteria that are found in
21 the case law we argue that these constitute hate
22 messages.

23 This is how I see the Commission and
24 Mr. Warman presenting their case.

25 MR. KULBASHIAN: That I understand.

1 However, the fact of the matter is in the very end, as
2 Mr. Fromm read passages from Huckleberry Finn, the
3 issue here isn't that an expert will be required only
4 to match segments to the context of the article, but an
5 expert is also required to match the article to the
6 context of the entire website because the website that
7 may be anti-racist, posting one racist article to be
8 found somewhere else exposes, will not be --

9 THE CHAIRPERSON: But this is an
10 argument that you can make.

11 MR. KULBASHIAN: That I understand.

12 THE CHAIRPERSON: And the argument
13 that you can make and what I am hearing from you is at
14 the end of the day if there is no expert evidence that
15 is brought by the Commission you will argue that this
16 Tribunal is not in a position to determine if this
17 constitutes or not a hate message or whatever.

18 But this is a matter for
19 argumentation and you will tell maybe the Tribunal that
20 the Commission has failed to establish that these --
21 and for the following reasons, these are things that
22 you will be able to argue before the Tribunal.

23 But you have already acknowledged
24 that the Tribunal cannot compel the Commission to
25 provide or to present expert evidence.

1 MR. KULBASHIAN: Therefore, my
2 initial motion was not that the Commission should
3 compel the expert evidence, it was if they do not
4 provide expert evidence, documents should be excluded.

5 THE CHAIRPERSON: Well --

6 MR. KULBASHIAN: That's the initial
7 thing, they should not be able to bring --

8 THE CHAIRPERSON: But then I think
9 the way that this will go ahead is, if a document --
10 and I have not seen any document yet -- if a document
11 is tendered in evidence, you could object and I will
12 take the objection under reserve and determine if this
13 is something for which I am not in a position, given
14 the criteria that exists, to make a determination as to
15 whether or not it's a violation of section 13 of the
16 Act.

17 But you will still have, you know, a
18 right to object to the production of such document.

19 MR. KULBASHIAN: If I continue maybe
20 I can make myself a little bit more clear.

21 THE CHAIRPERSON: Go ahead.

22 MR. KULBASHIAN: Section 12.26 of --
23 I think it was paragraph 12.26 under opinion of
24 experts. I don't remember what -- I guess this is
25 probably Canada Evidence Act.

1 THE CHAIRPERSON: This part of...

2 MS CEILIDH SNIDER: It's from a
3 textbook called: Law of Evidence in Canada by John
4 Sopinka, Sydney and Liederman and Alan Bryant and it is
5 the --

6 MR. KULBASHIAN: That's fine. I just
7 wanted to identify it in some way.

8 MS CEILIDH SNIDER: And this is the
9 1999 edition.

10 MR. KULBASHIAN: All right, that's
11 fine.

12 12.26 it states:

13 "In order to provide the trier
14 of fact...",

15 And that's key word, the trier of
16 fact, the Tribunal is not there to do much else other
17 than try the facts that were put before it. Even in
18 submissions, to tell the Tribunal to look at the
19 documents and determine for itself, again, it comes to
20 a position as to there are no specific allegations
21 being made against any specific documents, because if
22 their closing statements, for example, start saying
23 that, well, we allege that this document is this, and
24 so the Tribunal can decide and this document is this
25 and the Tribunal can decide, they're effectively in

1 their closing arguments putting information that they
2 did not put before the Tribunal initially through the
3 hearing.

4 The closing arguments cannot contain
5 new information. Closing arguments can only
6 information that might be summarized and in some ways,
7 I guess, stressed based on what kind of case they are
8 trying to bring forward.

9 So, they cannot come into the thing
10 and state, all of a sudden start stating that, oh, we
11 believe this violates that or this or it is our view
12 that this violates that, et cetera, et cetera, et
13 cetera.

14 THE CHAIRPERSON: Well, the
15 Commission can say given the documents that were put in
16 evidence and looking at the criteria that have been
17 spelled out in the case law, we argue it's not a matter
18 of opinion, it's a matter of argument that the content
19 meets the criteria that exists and for that reason we
20 submit to the Tribunal that this constitutes a
21 violation of section 13.

22 This is how I see the case that the
23 Commission wants to bring.

24 MR. KULBASHIAN: That part I
25 understand, however, the thing is we are not arguing

1 about the meaning of common terms like e-mail and
2 things like -- in some case we might say that people
3 could not argue that trying to figure out what e-mail
4 means so we need an expert in computers in order to
5 describe what e-mail is. Those are common terms.

6 What we are arguing about is whether
7 or not the language of an article specifically would
8 likely expose individuals to hate and the problem here,
9 lies that there is no victim here testifying, to even
10 state what effect it had on him.

11 So, ultimately whether or not --

12 MR. WARMAN: Mr. Chair, again, this
13 is simply repetition over and over again of the same
14 arguments that have already been heard.

15 MR. KULBASHIAN: I'm responding to
16 the Chair's statement at this point.

17 Otherwise I will just continue and
18 leave it like that. I'll just continue, I guess, from
19 paragraph 12.35

20 THE CHAIRPERSON: It's just that the
21 point I am making, Mr. Kulbashian, is that you have
22 agreed that I cannot force the Commission to hire an
23 expert and bring expert evidence. It seems that this
24 is an issue that is settled.

25 MR. KULBASHIAN: Well --

1 THE CHAIRPERSON: Now, if the
2 Commission -- I cannot compel the Commission to bring
3 expert evidence that means that the only witness that
4 the Commission will have is Mr. Warman and Mr. Warman
5 will testify as to facts, and that you will be able to
6 object to him providing any form of opinion as to the
7 nature of hate message or message that will be tendered
8 in evidence.

9 This is how I see things developing,
10 but then, as I said, you will object and at the end of
11 the day you will be able to argue.

12 Now, if I can't force the Commission
13 or Mr. Warman to provide expert evidence, there will
14 not be any expert evidence --

15 MR. KULBASHIAN: That I understand.

16 THE CHAIRPERSON: -- presented in
17 this case.

18 MR. KULBASHIAN: However, if they
19 don't bring expert evidence, then my belief is the case
20 should be dismissed, based on the fact that the only
21 thing that will happen is identification of documents
22 which are central to the complaint and the location
23 where they came from, otherwise there will be no
24 evidence as to whether or not the documents actually do
25 violate section 13.1.

1 THE CHAIRPERSON: Well, this is what
2 you are putting forward, but what I am telling you is
3 that there are criteria that exist, that you can argue
4 that at the end of the day that, given the evidence,
5 given the lack of expert evidence, you are asking the
6 Tribunal to dismiss the complaint.

7 But at the present time I cannot --

8 MR. KULBASHIAN: At the present
9 time --

10 THE CHAIRPERSON: With respect to
11 your motion to have documents excluded if the
12 Commission is not prepared to bring expert evidence --

13 MR. KULBASHIAN: As we stated, this
14 was actually a preliminary issue that we're dealing
15 with that in order to not have to deal with it every
16 time it comes up.

17 THE CHAIRPERSON: But what I am
18 telling you is that the way I see we should proceed is
19 that whenever a document is tendered in evidence you
20 can object, but I can't, you know, off hand decide that
21 because the Commission is not prepared to have an
22 expert testify to certain things, that the document
23 should be excluded.

24 MR. KULBASHIAN: Well, in essence,
25 the problem becomes whether or not the Commission has

1 experts I guess ultimately is their choice, however, in
2 the Tribunal's choice is to determine whether or not
3 without an expert this case should go on.

4 THE CHAIRPERSON: Well, it will all
5 depend on the type of evidence that is put before the
6 Tribunal and, as I said, there are some criteria that
7 exist in the law stating that in order for a message to
8 be considered as a hate message the following criteria
9 must be met, and you might argue that I cannot make
10 that determination without expert evidence, the
11 Commission is saying that, yes, I can make that
12 determination.

13 But then this at the end of the day
14 will be a matter for you to argue with respect to the
15 different documents that will have been tendered in
16 evidence.

17 MR. KULBASHIAN: Well, the major --
18 see, this seemed -- as you said yesterday, this seemed
19 to be more a preliminary matter, not a motion per se,
20 which is what we're actually dealing with at this point
21 so the issues don't keep coming up, especially because
22 these issues will be coming up in my objections to a
23 lot of the documents being produced in the first place,
24 meaning that they are prejudicial, as opposed to the
25 actual case, as opposed to actually serving the purpose

1 because basically --

2 THE CHAIRPERSON: But you will be
3 able to object.

4 MR. KULBASHIAN: I understand that I
5 will be able to object. I'm dealing with this as a
6 preliminary matter, as I stated yesterday and the
7 reason why this actually doesn't matter now is because
8 should they be able to bring up documents when --
9 ultimately, when I finish my submissions, should he
10 they be able to bring up documents when there is --
11 basically, if they're ultimately trying to make a
12 determination as to whether or not the case is --
13 whether or not a message is hate.

14 They could bring the documents and
15 show that they exist but documents, in my view, becomes
16 irrelevant if there's no way to tie the document in
17 with the actual allegation itself.

18 Because if they're making an
19 allegation that the document is hate because -- so, for
20 example, it discriminates against women, discriminates
21 against African Americans, discriminates against people
22 of Jewish faith, what happens is if they can't tie that
23 specifically to this case, that document becomes
24 ultimately irrelevant.

25 That is the point I'm trying to make.

1 THE CHAIRPERSON: That will have to
2 be done on a document by document basis.

3 MR. KULBASHIAN: Document by document
4 basis.

5 THE CHAIRPERSON: And the reason I am
6 entertaining this motion is because I don't want, when
7 we start hearing Mr. Warman, that this issue will just
8 come up and then we will have to spend half a day or a
9 day just dealing with that in the course of
10 Mr. Warman's cross-examination or even examination.

11 This is why we are doing this, maybe
12 it is unusual to do that, but given the present
13 circumstances I think that we are better off doing this
14 rather than having Mr. Warman start testifying and then
15 we stop for half a day or a day, and then we have to
16 resume.

17 What I want to set is how we would
18 proceed.

19 MR. KULBASHIAN: Well, I just want to
20 put the Commission and complainant on notice that I
21 guess I'll be objecting to every document produced
22 unless they can actually tie it in with their case, and
23 also I'll be objecting to any kind of suggestion that
24 documents do either contravene section 13 of the Act
25 because neither of them are here to testify to that,

1 the only testimony will be from Mr. Warman at this
2 point, but neither of them are here to actually testify
3 to that, and I'll also be objecting to any allegation
4 that whether or not Mr. Warman himself finds the
5 document to be offensive or any allegation of
6 offensiveness.

7 I'll also put them on notice that I
8 will be objecting to -- one moment, please -- to any
9 and all documents initially, unless they provide an
10 actual -- I guess an actual link, actual information as
11 to how they would link it to their actual -- to their
12 final -- basically the idea that I'm trying to get to
13 is, if I bring out documents in the wrong order without
14 providing some kind of explanation as to how they are
15 relevant.

16 I understand that the documents are
17 the purpose -- are part of the complaint, however, the
18 actual allegations in the complaint or that she
19 violated section 13 of the Act by discriminating
20 against individuals.

21 The problem is they cannot actually
22 bring allegations to the table through the evidence,
23 just bringing the documents themselves that are
24 irrelevant.

25 THE CHAIRPERSON: No, but the way I

1 understand it is that there are allegations that are
2 made that there was a violation of section 13,
3 documents will be put in in evidence and then that will
4 be part of the evidence, and then the Commission and
5 Mr. Warman will argue that these documents meet the
6 criteria that are established by the case law and that
7 meeting these criteria they constitute -- these
8 messages, hate messages that are in violation of
9 section 13.

10 So, there is an allegation, there is
11 proof and there is argumentation.

12 MR. KULBASHIAN: In essence.

13 THE CHAIRPERSON: So, this how I
14 think the case will be presented by the Commission.
15 This is a logical way of looking at the evidence being
16 presented in this case.

17 And, as I said, you can object and
18 then most probably the objection, I will take it under
19 advisement and at the end of the day I will determine
20 on these objections.

21 But given the fact that you presented
22 a motion to exclude documents and that in accordance
23 with your motion things did arise with respect to is
24 there a need for an expert to be retained by the
25 Commission and with respect to Mr. Warman's testimony,

1 I think we have dealt with these issues.

2 With respect to the motion as
3 presented, I cannot at the present time exclude
4 documents that haven't been tendered into evidence and
5 I will have to wait for that to occur.

6 MR. KULBASHIAN: In that case, I
7 would like to, I guess, put the Commission and
8 complainant on notice that I will be filing, basically
9 making a motion to have the case dismissed unless an
10 expert witness is brought in.

11 After Mr. Fromm is done with his
12 motion, there will be a motion along the same lines,
13 however, it will work the other way around, in the
14 sense that --

15 THE CHAIRPERSON: Well, I don't
16 think, Mr. Kulbashian, that we can in a way --

17 MR. KULBASHIAN: Well, the issue
18 is --

19 THE CHAIRPERSON: -- add one motion
20 to the other. I think the motion that you want to make
21 is something that you can make at the end of the day.

22 But even though you were to present
23 such a motion, I think I am ruling on it because the
24 Commission has stated that it is master of its own case
25 and that it won't be bringing an expert as a witness.

1 MR. KULBASHIAN: That I understand,
2 however, my motion will be actually to have the case
3 dismissed from this point, at this point before
4 evidence is being heard, unless they intend to have
5 someone -- bring expert evidence.

6 So, that would be my motion, that the
7 case should actually not even begin after the
8 preliminary stage.

9 THE CHAIRPERSON: But I don't think
10 that my findings or my ruling would be different. You
11 know, it's like, given the fact that the Commission
12 will not be presenting an expert witness, given the
13 fact that, as I stated, the law provides criteria for
14 the person adjudicating on a human rights complaint
15 under section 13 to rely on, and this serves as a
16 guide, so to dismiss the complaint because someone is
17 not bringing in expert evidence, I don't think that --

18 MR. KULBASHIAN: Well, the position
19 that I will have is that the case cannot actually be
20 made without expert testimony, to start, not as after
21 what's heard you can make a determination.

22 My position will be that you are not,
23 the Tribunal Chair or member is not in a position to
24 actually even make a determination without expert
25 testimony that would be --

1 THE CHAIRPERSON: You don't need to
2 bring another motion for that, I will rule on your
3 motion as it stands right now and cover that, because I
4 don't want -- you know, I am ready to entertain a
5 preliminary motion, but up to a point. I don't want to
6 in a way multiply the motions now.

7 I can rule on what you have just
8 submitted without having to hear another motion.

9 MR. KULBASHIAN: For my issues --

10 MS CEILIDH SNIDER: If it would be of
11 assistance, the Commission would be prepared to respond
12 immediately on this point, as I am sure Mr. Deschamps
13 would do in any event.

14 I would just refer the respondents
15 for his assistance to the Act at --if its' okay with
16 Mr. Deschamps --

17 THE CHAIRPERSON: Yes.

18 MS CEILIDH SNIDER: -- to section 53
19 of the Canadian Human Rights Act, subsection 1(b) and
20 it says:

21 "At the conclusion of an
22 inquiry, the member or panel
23 conducting the inquiry shall
24 dismiss the complaint if the
25 member or panel find that the

1 complaint is not substantiated."

2 Now, this means, and there is
3 jurisprudence on this, but I don't think we need to go
4 there, I'm sure Mr. Deschamps is prepared to deal with
5 this in an appropriate fashion, but this inquiry has
6 not even yet begun, we are at a preliminary stage.

7 The Act requires there to be an
8 inquiry by the Tribunal before the Tribunal Member can
9 make a determination whether or not the complaint is
10 substantiated or not and then on that basis to dismiss
11 it or uphold it. The Act does not permit the Tribunal
12 to dismiss a case out of hand without hearing the
13 matter first.

14 Thank you.

15 MR. KULBASHIAN: Well, the one thing
16 that I wanted to bring up again is basically relating
17 to yesterday in the evening at the end of the hearing,
18 this wasn't actually a motion, this was a preliminary
19 issue that had to be dealt with.

20 THE CHAIRPERSON: Yes.

21 MR. KULBASHIAN: And as you stated
22 yourself, Mr. Chair, these were issues that were
23 brought up in order to --

24 THE CHAIRPERSON: Expedite matters --

25 MR. KULBASHIAN: Expedite matters

1 when the hearing came up, sorry, when the witness went
2 on the stand.

3 And so, ultimately, what we are
4 looking for wasn't a ruling as much as for a chance to,
5 in effect, clear up this issue before testimony took
6 place.

7 THE CHAIRPERSON: But my concern is
8 that given the fact that the Commission will not bring
9 expert testimony, you said that you would make another
10 motion to have this complaint dismissed --

11 MR. KULBASHIAN: Yes.

12 THE CHAIRPERSON: -- for that reason.

13 Now, I am asking you, is this
14 something that you want to pursue, because if this is
15 something you want to pursue, we will deal with this
16 right now.

17 As I said, and I hope I was clear, is
18 that given the way this inquiry will take place, you
19 have allegations, you have evidence and then you have
20 submissions, and we have to distinguish the truth and
21 you have already put the Commission and Mr. Warman on
22 notice to the fact that you will objection to the
23 production of certain documents, that you will object
24 to him giving expert testimony, and I think this is
25 clear for the record.

1 Do we need to --

2 MR. KULBASHIAN: Actually, you just
3 made it much easier for me to kind of understand with
4 you.

5 I won't be bringing a motion for
6 dismissal, however, I guess ultimately my notice is
7 that I'm putting the Commission and complainant on
8 notice that the facts --

9 THE CHAIRPERSON: Just a second. If
10 you are putting the Commission and Mr. Warman on
11 notice --

12 MR. KULBASHIAN: It will require --

13 THE CHAIRPERSON: -- well, it is
14 important for them to hear what you have to say.

15 MR. KULBASHIAN: I'm putting them on
16 notice that --

17 THE CHAIRPERSON: No, it's just
18 that --

19 MR. KULBASHIAN: That I will be
20 objecting to a lot more than just documents that they
21 will produce to try to substantiate their case,
22 otherwise, I guess, this preliminary matter is pretty
23 much dealt with, as far as I'm concerned, unless
24 Mr. Warman has submissions.

25 MR. WARMAN: I'm just at a bit of a

1 loss as to what we spent the entire morning doing, if
2 it was not to clarify and give some direction as to
3 what objections might legitimately be raised, perhaps
4 what objections might not be legitimately raised.

5 So, if Mr. Kulbashian is mapping out
6 how we can structure the entire hearing, then --
7 --- Reporter appeals

8 MR. WARMAN: I guess I'm just at a
9 loss as to what we've just done over the past several
10 hours in terms of what cause and effect it will have in
11 directing an orderly entry of all the evidence, in
12 fact.

13 I guess, I'm just hoping that in fact
14 that the Tribunal will issue some direction or ruling
15 to assist in that so that this hasn't been a hearing of
16 opinions on what constitutes a legitimate objection
17 versus what constitutes an illegitimate objection.

18 THE CHAIRPERSON: But, Mr. Warman, I
19 think at the start of the morning the issue was, does
20 the Commission or yourself have to bring expert
21 testimony to substantiate your allegation, that was the
22 core of the discussion.

23 After having heard the parties, I
24 think I have started to make myself clear that given
25 what you argued, given what was argued, that I can't

1 force the Commission to bring expert testimony and that
2 expert testimony is not essential according to the case
3 law for a Tribunal to hear a complaint dealing with
4 section 13. This is what we have accomplished up until
5 now, so that that's clear.

6 It was clear in your mind, the
7 Commission's mind, but I think now it's clear in the
8 respondents' mind that this, you know, how the law
9 stands right now.

10 Now, if the respondents want to
11 object to the production of documents, they will be
12 able to do so and most probably if the evidence is
13 relevant to your case, I will take that objection under
14 advisement and we will continue with the case and we
15 will not, you know, be in a situation where we will
16 have to stop for each and every document and have a
17 voir dire on that, so that we will spend half a day
18 with respect to every document.

19 I think this is I think clear in my
20 mind.

21 MR. WARMAN: Thank you.

22 THE CHAIRPERSON: So, that when we
23 start hearing Mr. Warman we can expect objection and we
24 shouldn't be surprised by these objections, but if the
25 document -- and these are the rules of evidence -- if

1 the document is relevant to someone's case, you know,
2 if you were to come up with something that you took
3 from a website which was not the Canadian Heritage
4 Alliance website, then maybe I would question how
5 relevant is it to your case.

6 But all of this I think might be seen
7 as time that was improperly used, but I'm doing this so
8 that when we start, and I hope that I'm clear.

9 It's clear also, from what I have
10 heard, that if there is an opinion that is made or
11 voice on certain a document where you would say that
12 this constitutes a hate message there will be an
13 objection and I will have to rule on that.

14 It's just that when we start it won't
15 be like we start and we stop for half a day and then we
16 continue.

17 MR. KULBASHIAN: Actually, what is
18 actually funny, this started off as a way to clarify
19 the reason behind objections that would come up during
20 his testimony and somehow it actually expanded to --
21 basically expanded scope to include many things like
22 the Tribunal's ability.

23 I think at some level that was my
24 fault because I did to some aspect start off on that
25 issue and then when the Commission may have responded

1 to that it continued, but the major issue was, just to
2 be clear, that these were some submissions that I have
3 made that will basically apply in general to many of
4 the objections that I will make, that we don't have to
5 keep objecting and then give my reasons and then keep
6 objecting, give my reasons.

7 It's kind of a general package of
8 like, please see here.

9 THE CHAIRPERSON: This is what I
10 gather and what we have accomplished today that you
11 will be objecting and you will state maybe for the
12 first document your objection and why you object and
13 then it will be, like, for the second document, if
14 that's the case, for the same reason that I've just
15 mentioned with respect to the first document.

16 MR. KULBASHIAN: Right.

17 THE CHAIRPERSON: So, I think maybe
18 will save some time.

19 Now, do you want to entertain your
20 motion to have the complaint dismissed because of the
21 Commission not providing an expert witness?

22 MR. KULBASHIAN: I think at this
23 point I think the need for experts would be a lot more
24 than just an expert in hate propaganda or racism and I
25 think at this point it would probably be better for our

1 case to not keep that, like, basically just withdraw
2 that notice and continue from there, I guess, just out
3 of --

4 THE CHAIRPERSON: So, there is no
5 need for me to rule on that preliminary matter?

6 MR. KULBASHIAN: I don't think it was
7 really something that could be ruled on at this point.

8 THE CHAIRPERSON: But I hope that
9 what I have just stated is clear for the record and
10 that these constitute directives from the Tribunal as
11 to how the hearing will proceed when we start hearing
12 Mr. Warman and eventually Ms Guille.

13 There is another motion that the
14 Tribunal has to entertain.

15 MR. FROMM: Yes, sir.

16 THE CHAIRPERSON: Mr. Fromm.

17 Could you, just before we break for
18 lunch, just give us --

19 MR. FROMM: Well, I think I can
20 guess, this will take me probably no longer than an
21 hour, so we'll do it right after lunch.

22 THE CHAIRPERSON: Yes. And it's a
23 motion to have the complaint dismissed because...?

24 MR. FROMM: Yes. Well, we submit --
25 sorry, I have a motion to have the complaint dismissed

1 at this time because apparent actions of the
2 complainant --

3 --- Reporter appeals

4 MR. FROMM: Oh, sorry. It's a motion
5 to have the complaint dismissed at this time because
6 apparent actions of the complainant have caused,
7 created a poisoned environment and have led to
8 intimidation of the parties, or at least one of the
9 parties.

10 THE CHAIRPERSON: So, that would be
11 the last motion that the Tribunal would have to
12 entertain?

13 MR. FROMM: For me, yes.

14 THE CHAIRPERSON: And then we can
15 start after that with Mr. Warman's testimony.

16 MR. WARMAN: It's my belief -- I
17 would have two things.

18 The first one is given the amount of
19 time that has been spent on these preliminary issues, I
20 am wondering if it might be possible to take an hour
21 for lunch rather than an hour and a half.

22 There is a food court downstairs for
23 ample --

24 THE CHAIRPERSON: Resume at a quarter
25 to 2:00.

1 MR. WARMAN: Yes, that would be
2 great.

3 The second is, rather than spend what
4 is likely to be an hour further, I would ask that the
5 Tribunal ask for some indication of a factual or legal
6 basis for what is proposed as a motion before we spend
7 an entire hour listening to the motion just to satisfy
8 ourselves that there is some diminimus standard for
9 granting the motion being requested.

10 MR. FROMM: I have a motion here with
11 affidavit and --

12 THE CHAIRPERSON: Well, we'll see
13 after lunch.

14 And then if you have any objection,
15 and if you have submissions to make, make them then.

16 I was wondering for the court
17 reporter if it would be better for everyone not to rise
18 but to speak in the mike so that people wouldn't be so
19 far away from the microphone that it hinders your work.
20 --- Discussion off the record

21 THE CHAIRPERSON: Everyone, so you
22 don't have to stand up in order to address the
23 Tribunal, because I saw Ms Snider having to put a box
24 so that she could be able to be at the microphone
25 level.

1 MS CEILIDH SNIDER: Thank you.

2 MR. FROMM: May we have the regular
3 lunch hour today, I made a brief appointment believing
4 that we'd have an hour and --

5 THE CHAIRPERSON: At two o'clock
6 would it be --

7 MS CEILIDH SNIDER: It's acceptable.
8 Promise is to keep it sharp.

9 THE CHAIRPERSON: Two o'clock sharp?

10 MS CEILIDH SNIDER: Yes.

11 REGISTRY OFFICER: Order, please.

12 --- Upon recessing at 12:50 p.m.

13 --- Upon resuming at 2:05 p.m.

14 REGISTRY OFFICER: Order, please.

15 Please be seated.

16 MR. WARMAN: I'm sorry, just one very
17 quick housekeeping matter.

18 When I did distribute copies of the
19 submission to the B'Nai Brith 2005 Report on
20 Anti-Semitic Incidents, I should note that that is a
21 copyrighted work and that I do protect copyright on all
22 copyrighted works, just for the benefit of the parties,
23 to give a copy to them too.

24 (Off microphone...)

25 --- Reporter appeals

1 THE CHAIRPERSON: So, does Mr. Warman
2 need to repeat what he has said?

3 MR. WARMAN: I stated simply for the
4 record that the work entitled: Countering Hate on the
5 Internet, The Canadian Experience which is distributed
6 that forms part of the 2005 B'Nai Brith Report on
7 Anti-Semitic Incidents is, of course, a copyrighted
8 work and that I protect vigorously copyright in all of
9 my works.

10 THE CHAIRPERSON: Thank you.

11 MR. KULBASHIAN: I didn't hear the
12 last part, just the last few words that he stated, he
13 said, you object vigorously to...?

14 MR. WARMAN: No, I protect vigorously
15 the copyright in all my works.

16 MR. KULBASHIAN: Okay, okay, sorry.

17 MR. FROMM: Has this been
18 distributed?

19 MR. KULBASHIAN: It has been
20 distributed, yeah, it's somewhere around here.

21 THE CHAIRPERSON: So, Mr. Fromm, you
22 have a motion to present to the Tribunal.

23 And as Mr. Warman asked, could you
24 provide the gist of your motion. It's a motion to have
25 the complaint dismissed because of the --

1 MR. FROMM: Because of, in my
2 submission, the poisoned environment and retaliation
3 against myself.

4 THE CHAIRPERSON: Mr. Warman?

5 MR. WARMAN: Sorry, Mr. Chair, but
6 just because the motion, I'm presuming, I don't know
7 whether he is going to add on any tack-on evidence, but
8 because the same motion has been submitted in four --
9 at least three maybe four other cases and has
10 previously been rejected by the Tribunal as being
11 without merit, I'm just wondering if he can establish
12 just in a nutshell the legal foundation for the motion.

13 MR. FROMM: This is just not true,
14 this motion has not been submitted in any other
15 hearing. I gave notice that something similar might be
16 submitted in the Warman v. Lemire case, there's been no
17 decision made on it, because I haven't submitted it.

18 So, this the first time this baby has
19 seen the light of day.

20 MR. WARMAN: If he could establish
21 some legal basis for the motion that he is about to
22 make, whether it's a duplicate of all previous motions
23 that he's made, which I believe are likely on the same
24 basis, or whether if, as he states, there is in fact
25 some -- if he could establish some basis for this new

1 and improved motion.

2 THE CHAIRPERSON: Can you do that?

3 MR. FROMM: Can I just submit the
4 motion. It's not new, I'm sorry, it is new, it's not
5 improved, it's new material, it's not been raised in
6 any other Tribunal.

7 THE CHAIRPERSON: Well, given what
8 Mr. Fromm has said, I will just listen and we'll see if
9 you want to object at one point or, just please do so.

10 Mr. Fromm?

11 MR. WARMAN: Mr. Chair, even without
12 looking at it, I am raising a rule 9 objection that
13 there has been no notice, this motion was brought on no
14 notice, there has been no evidence given as yet as to
15 why it shouldn't have been brought on notice or why the
16 parties should be learning of it at this point for the
17 very first time, and I don't believe that the rules
18 permit a person who is not counsel, or who is not a
19 paralegal or is not legally trained to simply ignore
20 them.

21 THE CHAIRPERSON: And I think earlier
22 on this week Mr. Fromm did say that he would make a
23 motion.

24 MR. WARMAN: But whether it was
25 earlier this week, the fact is that it's brought the

1 first time at the actual hearing and that unless there
2 is some new evidence that has just come about on the
3 weekend, there is no reason why notice should not have
4 been provided and been provided.

5 THE CHAIRPERSON: It's just that I am
6 in a difficult position where still we are like 10
7 minutes into this motion and I don't even know what
8 type of motion and what is the basis for it, and unless
9 I hear from Mr. Fromm -- you know, I haven't even
10 looked at the content of the document -- and unless,
11 you know, I let Mr. Fromm present the motion, I could
12 summarily dismiss it, but I don't even know what I
13 would be dismissing at this point in time.

14 MS CEILIDH SNIDER: Perhaps if
15 Mr. Fromm could simply establish the reason why, I
16 believe this issue was brought forward two days ago
17 now, and just from looking at the affidavit that's
18 presented, it would appear that he would have had prior
19 intention at least to bring this motion prior to the
20 commencement of this hearing, and I think it might be
21 prudent and within the rules to require him to at least
22 state the basis upon which he was unable to provide
23 proper notice, and the rules do require that he seek
24 and obtain leave from the Tribunal in order to bring a
25 motion in such a circumstance.

1 MR. KULBASHIAN: Just to respond to
2 Ms Snider's comments, first of all, again, there can't
3 be double standards on issues with motions, et cetera,
4 because Mr. Fromm, as we stated, had over two months he
5 had notified the Commission and complainant that he was
6 going to be basically representing the Canadian
7 Heritage Alliance, they had two months' notice and,
8 again, in the same manner they brought a motion in last
9 day immediately and to have him ruled so on the same
10 not, I don't understand why they are objecting.

11 THE CHAIRPERSON: I don't want to
12 spend too much time on arguing on a motion that I don't
13 even know the content of, and I don't even know -- I
14 haven't looked at the document that Mr. Fromm has
15 produced.

16 I'll just let him start his motion
17 and if, you know, there is no need for such a motion to
18 be brought at this point in time, I will dismiss it,
19 but until I know what type of motion it is and what's
20 the basis for it, it is hard for me to say I won't hear
21 the motion or start hearing it.

22 Because if we start discussing
23 something that I am not aware of, we will spend maybe
24 half an hour just doing that and then this might be --
25 the time could be spent in a better way.

1 So, let's go ahead and we'll see.

2 PRELIMINARY MOTION BY MR. FROMM

3 MR. FROMM: Mr. Chairman, the basic
4 two legal points upon which this is based is 14.1,
5 which seeks to protect a complainant against
6 retaliation. I think in the broad and liberal
7 interpretation of human rights legislation that's urged
8 by the Supreme Court in Taylor, for instance, it may be
9 possible to see that the some unique situation that I
10 bring before you could fit under that.

11 Also I think there is an obligation
12 that hearings be carried on in a fair way and where
13 there is not intimidation on any of the parties.

14 It's also a concept in human rights
15 understanding that environments not be poisoned and I
16 will argue very strongly that the environment here has
17 been, again no reflection on yourself, sir.

18 I'd like to, if I might, take you
19 through my affidavit which is at tab 1, and I'm not
20 going to read it all to you, but just to give you,
21 again, a substance of what --

22 THE CHAIRPERSON: But you are asking
23 the Tribunal to dismiss the complaint.

24 MR. FROMM: Yes, because, sir, I
25 think it's a basic concept that the complainant must

1 know that there will be objections in this hearing, one
2 could say, well, he's doing this because he's in bad
3 faith or because he wants to retaliate against me.

4 MR. FROMM: No, I'm sorry, I'm not
5 making that argument. I know Mr. Warman was within his
6 legal rights to object, I'm not saying that proves
7 anything.

8 THE CHAIRPERSON: The second thing is
9 that the complaint now before this Tribunal has been
10 referred to the Tribunal, not by Mr. Warman, not by the
11 complainant but by the Commission and I think this is
12 important to keep in mind.

13 It is not Mr. Warman who has seized
14 the Tribunal of his complaint, but through the system
15 he made a complaint to the Commission, the Commission
16 investigated the complaint and the Commission decided
17 that, yes, it was appropriate to refer the complaint to
18 the Tribunal, and this is how the complaint has come
19 before this Tribunal. It's not directly through
20 Mr. Warman.

21 Now, if someone is not satisfied with
22 the referral process, that person can always challenge
23 it before the Federal Court, but we are a way past this
24 time and we are now before the Tribunal with a
25 complaint which has been, I would say, validly referred

1 to the Tribunal and the Tribunal has to, in a way,
2 inquire, as the law states, into that complaint.

3 So, I don't know if your argument is
4 to say that Mr. Warman in fact is now before this
5 Tribunal and it's because he has divergent views or
6 ill-feelings towards you, it may be so, but that
7 doesn't in any way impact on the fact that the
8 complaint was, it appears, because it was never
9 challenged, properly referred to the Tribunal.

10 MR. KULBASHIAN: Mr. Chair, I don't
11 think Mr. Fromm is just stating that there is the issue
12 of the complaint.

13 First of all, I would challenge the
14 characterization of how the complaint came to be and
15 how it came here, but that's not the point of this.

16 It's not just the fact that the
17 complaint might have got here through means, maybe even
18 in fact that Mr. Warman is an ex-employee of CHRC and
19 he was afforded some liberty with the way you file a
20 complaint, however, the other issue is that Mr. Warman
21 is a party here and Mr. Fromm is a party here and they
22 are both parties here, however, the major issue becomes
23 a fact that just recently Mr. Warman was, with some
24 evidence, involved in a potentially violent
25 intimidation --

1 THE CHAIRPERSON: But that --

2 MR. KULBASHIAN: -- tactic against
3 Mr. Fromm who is here right now.

4 THE CHAIRPERSON: But this --

5 MR. KULBASHIAN: This becomes an
6 issue of how -- this is recent, it's not like -- he is
7 not talking about a situation that happened four or
8 five years ago, it's more of a recent intimidation
9 tactic, that there is some evidence that Mr. Warman was
10 involved in against Mr. Fromm.

11 THE CHAIRPERSON: Well, I don't --

12 MR. KULBASHIAN: And that -- see, the
13 problem is the parties who are here right now, I
14 mean -- I mean, ultimately maybe in some way I
15 understand that this might have to do with the
16 complaint process, but also has to do with the Tribunal
17 process.

18 If you could just hear what Mr. from
19 has to say, because primarily there's issues here which
20 will be raised how when Mr. Fromm was testifying at
21 another Tribunal hearing he was intimidated by the same
22 individuals that will be outlined in the thing.

23 This has to do with the Tribunal
24 hearing itself, not the complaint process, not the
25 overview of how the complaint came to be, it has to do

1 with the hearing itself, how tactics of intimidation
2 were used.

3 THE CHAIRPERSON: Against...?

4 MR. KULBASHIAN: Mr. Fromm while he
5 was a witness at one of the hearing as well as
6 intimidation that was used against Mr. Fromm as a
7 result of him being a representative of somebody at
8 hearings.

9 So, it is in direct relation to
10 Tribunal hearings, but not the actual complaint
11 process.

12 THE CHAIRPERSON: But even if that
13 was the case, that Mr. Fromm was intimidated in another
14 hearing --

15 MR. KULBASHIAN: Well, there's
16 basically been --

17 THE CHAIRPERSON: Why should the
18 Tribunal at this stage of the proceedings, given the
19 fact that it's the Commission which referred the
20 complaint for inquiry to the Tribunal, the Tribunal
21 should dismiss this complaint without having inquired
22 into the complaint?

23 MR. KULBASHIAN: Because if --

24 THE CHAIRPERSON: If you want to
25 attack the credibility of Mr. Warman, I think that can

1 be done in the process of cross-examination.

2 But I fail to see, even if Mr. Fromm
3 was correct as to the fact that he was retaliated
4 against, that the consequence of that would be that I
5 should dismiss summarily the complaint and not inquire
6 into the complaint that's been properly referred to the
7 Tribunal by the Commission.

8 MR. KULBASHIAN: Can I just briefly
9 talk to Mr. Fromm.

10 THE CHAIRPERSON: Yes.

11 MR. FROMM: Perhaps I could assist in
12 this.

13 THE CHAIRPERSON: Well, if
14 Mr. Kulbashian wants to --

15 MR. FROMM: I would be content if you
16 hear the motion and reserve on it.

17 I understand what you are saying that
18 you feel your obligation under the Act is to hear the
19 case referred to you by the Commission and my motion is
20 not an attempt to attack the Commission's work, I mean
21 we have reservations but that is not what the motion is
22 about.

23 I will be content if you hear the
24 motion. Naturally we'd like you to dismiss the charge
25 right now, but if you wanted to reserve on this until

1 you have heard all the rest of the testimony, I would
2 be content.

3 What this really deals with --

4 THE CHAIRPERSON: Just a second.

5 MR. FROMM: Is the --

6 THE CHAIRPERSON: Just a second,

7 Mr. Fromm.

8 MR. WARMAN: The fundamental
9 objection to this, now having had a chance to review
10 the material, this is the exact same motion Mr. Fromm
11 has brought in at least three, possibly four other
12 cases -- I shouldn't say exact, he has added some
13 tack-on material, but at its pith and substance it is
14 the exact same motion that has already been rejected by
15 the Tribunal, by Member Doucet in October.

16 Mr. Fromm is aware of this. Member
17 Doucet said these issues, Mr. Fromm is attempting to
18 raise are completely irrelevant to the matters I am
19 seized of as a Tribunal Member hearing a complaint.

20 So, to somehow sit here and waste
21 another hour, even another minute of the Tribunal's
22 time when we already know that the motion that is being
23 brought before you has no basis in fact or law --

24 THE CHAIRPERSON: But the problem I
25 have, Mr. Warman, is that I don't know what the motion

1 is. I don't know what -- Mr. Doucet it seems, as if by
2 what you are saying, did entertain the motion.

3 MR. WARMAN: Indeed.

4 THE CHAIRPERSON: Did hear the
5 motion. Mr. Fromm is saying that this is a motion
6 which is different.

7 MR. WARMAN: Even if Mr. Fromm states
8 that it is different, you have no power to grant the
9 remedy that he's seeking, so to waste the Tribunal's
10 time and everyone's time --

11 THE CHAIRPERSON: Do you have a copy
12 of Mr. Doucet's...

13 MR. WARMAN: I do.

14 THE CHAIRPERSON: Anyway, we'll have
15 to spend some time in dealing with this matter
16 whether --

17 MR. WARMAN: It goes to the whole
18 reason why, when you have people who are not counsel
19 and not paralegals and not subject to ethical or
20 professional obligations that they have to at least, at
21 the very least respect the same issues of not engaging
22 in vexatious motions and not engaging in pernicious
23 activity whose sole purpose is to waste Tribunal time.

24 MR. KULBASHIAN: I want to object.

25 THE CHAIRPERSON: Mr. Warman, when

1 you say pernicious, I think it's --

2 MR. WARMAN: I speak only from
3 experience, having seen the exact same motion brought
4 forward again and again which has absolutely no legal
5 or factual basis.

6 THE CHAIRPERSON: If you are to show
7 the Tribunal that this is pernicious and vexatious, I
8 can look at what the decision by Mr. Doucet said and
9 ask Mr. Fromm if that's the same type of issue that he
10 is now -- because I can't, you know...

11 MR. WARMAN: I would greatly
12 appreciate it.

13 MR. FROMM: What happened is that --

14 THE CHAIRPERSON: Just a second,
15 Mr. Fromm and Mr. Kulbashian.

16 The problem I have is I cannot rule
17 on something which I'm not aware of and to just
18 summarily dismiss a motion without knowing what is the
19 gist, I think, would be unfair to the process.

20 I know that it can be, in some
21 circumstances, frustrating, but what you are asking me
22 to do is to look at Mr. Doucet's decision and then I
23 will have to see from that if --

24 Mr. Fromm says, well, that's quite
25 different from the motion that was before Mr. Doucet,

1 well, and what I gather is that Mr. Doucet did hear the
2 motion and dismissed it, so...

3 Mr. Fromm?

4 MR. FROMM: Mr. Chair, not exactly.

5 I will eventually, I hope, get to my story, but suffice
6 it to say that the story was of great concern to me and
7 because both these cases, Richard Warman v. Glenn Bahr
8 and Western Canada For Us and Richard Warman v. Terry
9 Tremayne, I was their agent in both cases, but a
10 decision had not been rendered and it's still not been
11 rendered in these cases, to my knowledge.

12 When this incident arose in late
13 August, I communicated through the Tribunal to Member
14 Lloyd and to Member Doucet that I wanted those cases
15 re-opened. I did not have a motion, but I did
16 summarize the situation and said I think this matter is
17 so serious that it poisons the environment of the
18 Tribunal, I would like to re-open the case, both those
19 Members said essentially the hearing is already over,
20 we're in the process of making the decision and they
21 did not grant my request.

22 I did not have the documentation to
23 present a motion, I simply summarized the story.

24 That's what Mr. Warman is referring
25 to. I didn't present a motion, I said I would like to

1 present a motion, I'd like to re-open the case and both
2 said no, but they said no for completely different
3 reasons from what is going on here today.

4 THE CHAIRPERSON: But before I hear
5 from, Mr. Fromm, further I will ask Mr. Warman and Ms
6 Snider to -- because you have raised, let's say, an
7 objection, so could you --

8 MR. WARMAN: I think if you read the
9 decision of Member Doucet, you'll see that Mr. Fromm's
10 description of it is actually far from -- it's vaguely
11 accurate, but it doesn't give the entire story.

12 Member Doucet states that:

13 "The motion dealt with
14 Mr. Fromm's request to re-open
15 it on the basis of "a poisoned
16 environment and harassment upon
17 him as a representative of the
18 respondent "X"."

19 He makes the exact same motion here
20 except in the sense that he wants to make it a current
21 motion.

22 Submissions were received in
23 opposition from the complainant and the Commission.

24 Member Doucet states:

25 "I will not deal with the

1 allegations contained in
2 Mr. Fromm's letter since they
3 are not relevant to any of the
4 issues raised in the complaint
5 and, furthermore, the parties
6 referred to in this letter were
7 not parties to this complaint."

8 The exact same circumstances here.

9 "If I was to re-open the case as
10 requested, I would be dealing
11 with a totally new issue
12 concerning new parties. I also
13 take notice of the fact that the
14 respondent..."

15 In that case "X" in this case "Y"
16 in the exact same circumstances:

17 "...did not address the Tribunal
18 on this matter or indicate how
19 these events might have affected
20 their case. I must add that
21 even if the respondent had
22 brought this matter to my
23 attention, there would have been
24 no justification for the
25 re-opening of the case on the

1 basis of those allegations. I
2 fail to see the connection
3 between the allegations made by
4 Mr. Fromm in his letter and the
5 issues that I have to deal with
6 in my decision."

7 MR. KULBASHIAN: Mr. Chair, I'd like
8 to submit that so far we've talked a lot about this
9 motion that we haven't heard but we've read a decision
10 that Mr. Warman states was a similar, same or similar
11 motion that we still haven't heard, we don't know
12 anything about.

13 The one thing that I can point to is
14 the first line that says:

15 "Although no motion was
16 officially filed before the
17 Tribunal, I have decided to
18 dispose of this matter by my
19 formal ruling."

20 It doesn't state an official motion
21 was filed, in fact it says:

22 "In this letter Mr. Fromm
23 requested that the case be
24 re-opened."

25 The fact of the matter is whether or

1 not Mr. Fromm summarized some incidents, right now
2 there is what seems to be almost a 20-page document
3 before you, so in effect, as much as Mr. Warman likes
4 to characterize it as the same thing over and over
5 again, it is in fact not the same thing.

6 The date on this is November 20th,
7 there is an affidavit in here -- one second -- which is
8 sworn, like a sworn affidavit, so there is no issues as
9 to whether or not you know this affidavit --

10 MR. WARMAN: Sorry, what's the date
11 on the affidavit?

12 MR. KULBASHIAN: It's August 21st,
13 2006.

14 I'm sorry, Mr. Warman, could remind
15 us as to whether or not the affidavit was filed as well
16 in the other motions or whether or not he is just
17 assuming it's the same thing and he's just assuming
18 that this whole issue comes out he'll be prejudiced.

19 Otherwise, if his major concern is
20 that he doesn't want time being wasted, so far we have
21 wasted 35 minutes trying to not hear the motion when we
22 could have read it in maybe five.

23 THE CHAIRPERSON: But I think we will
24 have to accept the fact that some time will be "spent"
25 on these motions, I won't use the word that you use,

1 we have to spend time in order to in a way at one point
2 in time get this hearing moved forward.

3 MR. KULBASHIAN: If I could just
4 suggest that they save their objections to their
5 response to the motion if they would like to, once the
6 motion is heard.

7 THE CHAIRPERSON: No, because I think
8 Mr. Warman, if he feels that at this point in time he
9 needs to object, I don't know if what Mr. Fromm wants
10 to present to the Tribunal has to do with him
11 personally because you are not a party to this hearing,
12 you are an agent to the Canadian Heritage Alliance.

13 Does your motion have to do with
14 something that pertains to the Canadian Heritage
15 Alliance, to Ms Guille, or is it something that has to
16 do with yourself and Mr. Warman, because if that's the
17 case, then it's like something that has to do with you
18 as an agent of Canadian Heritage Alliance.

19 MR. FROMM: Yes. Well, if I could
20 lay the facts before you, I think a reasonable
21 interpretation is that it has to do with my role
22 certainly as an agent for the Canadian Heritage
23 Alliance and other incidents with agents for these
24 other people.

25 But I might also point out that what

1 I did not, I had not yet submitted a motion to Member
2 Doucet or to Member Lloyd, I was only writing a letter
3 summarizing the events saying I would like to re-open
4 the case in order to present a motion.

5 In both cases they took the view
6 that, I guess as outlined certainly in this letter from
7 Member Doucet, that the hearing was over, had passed
8 and incidents that had happened after the hearing,
9 whatever they were, were not relevant.

10 THE CHAIRPERSON: Does just tell me,
11 does your motion have to do with something that
12 happened between yourself and Mr. Warman; is it --

13 MR. FROMM: Yes, I believe so and it
14 would appear to have to do with my role in some of
15 these Tribunal hearings acting as an agent for people
16 like the Canadian Heritage Alliance or Terry Tremayne.

17 THE CHAIRPERSON: Are you alleging
18 that Mr. Warman had an improper conduct or --

19 MR. FROMM: Well, if I can lay the
20 facts before you. It's hard for me to allege and
21 except that there are people who have said that he
22 funded the activity that I'm complaining about and the
23 point in law, in section 14.1 of the Act which seems to
24 recognize the importance that the Tribunal conduct its
25 business, and which would probably be contentious, free

1 of an atmosphere of intimidation.

2 Now, I agree that 14.1 explicitly
3 prohibits retaliation against a complainant, but I
4 think the spirit of that is that the hearing should not
5 be conducted in an atmosphere, one side intimidating --
6 retaliating or intimidating the other, and I think the
7 facts would strongly suggest that's what happened here.

8 THE CHAIRPERSON: But I would --

9 MR. KULBASHIAN: Let me just make a
10 very, one-sentence submission.

11 Basically the idea is if a
12 representative of a respondent is being intimidated,
13 then the respondent, him or herself is also being
14 prejudiced in the hearing.

15 Like, basically, if I was being
16 intimidated right now because I decided to take -- act
17 as a representative for Ms Guille, then her case will
18 also suffer.

19 And that's the basic issue, where the
20 representative, effectively could be a lawyer, is being
21 intimidated for taking up a case in order to defend
22 against allegations in a court of law.

23 So, that does poison the environment,
24 it does make Mr. Fromm ineffective, it does make him
25 fear for his safety in some situations where he should

1 actually be doing work in order to defend against these
2 allegation, so, it prejudices the respondent and not
3 only Mr. Fromm himself.

4 THE CHAIRPERSON: The thing I can say
5 is if a party feels, and I'm speaking generally, if a
6 party feels that counsel or legal representative has
7 acted inappropriately, there are other recourses that
8 can be taken outside of this hearing room, and this has
9 happened in the past.

10 Someone can complain to the
11 professional body of which a person can be a member of
12 if he feels that the professional conduct of that
13 individual was inappropriate.

14 But if Mr. Fromm wants to present to
15 this Tribunal that the conduct of Mr. Warman was in his
16 view inappropriate, I don't think I can entertain that,
17 it is for another forum to look into that.

18 And even if I felt personally that
19 maybe Mr. Warman did something that he should not have
20 done, this could not, unless you can show me otherwise,
21 give me the authority to dismiss a complaint that has
22 been validly referred to the Tribunal by the Commission
23 because something happened between Mr. Fromm and
24 Mr. Warman in another forum which would, in fact,
25 provide me with a basis for dismissing the Commission's

1 complaint.

2 MR. KULBASHIAN: Actually, first of
3 all, just ask that Mr. Chair didn't characterize it as
4 a complaint that's validly referred to the Tribunal.
5 There are some major issues --

6 THE CHAIRPERSON: No, but,
7 Mr. Kulbashian, the complaint has been referred, this
8 is how the process works.

9 MR. KULBASHIAN: That's right.

10 THE CHAIRPERSON: If the complaint is
11 referred and the referral is not challenged before the
12 Federal Court --

13 MR. KULBASHIAN: It has been
14 challenged before the Federal Court, it is actually in
15 the process of being challenged before the Federal
16 Court, the stay application was a motion under the
17 greater application for judicial review of the
18 Commission's decision to refer this to the Tribunal.

19 So, it is actually being challenged
20 before the Federal Court.

21 THE CHAIRPERSON: So, the referral is
22 being challenged?

23 MR. KULBASHIAN: That's right.

24 THE CHAIRPERSON: Before the Federal
25 Court.

1 MR. KULBASHIAN: That's right, on the
2 ground that no section 44.1 evaluation was done even
3 though there was a response.

4 THE CHAIRPERSON: There was no -- the
5 Federal Court did not --

6 MR. KULBASHIAN: It was a timing
7 issue, they haven't done yet, they're not even done
8 yet.

9 THE CHAIRPERSON: They haven't
10 granted any stay in these proceedings?

11 MS CEILIDH SNIDER: No.

12 MR. KULBASHIAN: No, they haven't.

13 THE CHAIRPERSON: So...

14 Yes, Ms Snider.

15 MS CEILIDH SNIDER: As I notified the
16 Tribunal on I believe Thursday or Friday, the
17 Commission discovered that a motion for stay had been
18 brought by Ms Guille and the motion was dismissed by
19 the Federal Court on Friday.

20 We provided notice of that and a copy
21 of the decision of the Federal Court dismissing Ms
22 Guille's motion for stay that was in conjunction with
23 her application for judicial review of the Commission's
24 decision to refer.

25 MR. KULBASHIAN: The major issue is,

1 basically, I guess this gets into another issue, so I
2 really don't want to get into that, but the major issue
3 is there still is an active ongoing application for
4 judicial review against this hearing and the reason why
5 a stay application was rejected was not for the reason
6 that there was no ground for a stay as much as it
7 wasn't done in a timely manner, however, there is still
8 an ongoing application for judicial review.

9 THE CHAIRPERSON: It still remains
10 that there is no stay.

11 MR. KULBASHIAN: That's right.

12 THE CHAIRPERSON: And the Tribunal
13 will go ahead.

14 MR. KULBASHIAN: That I understand.

15 THE CHAIRPERSON: Unless --

16 MR. KULBASHIAN: I just --

17 THE CHAIRPERSON: Unless someone is
18 able to convince the Tribunal that the hearing should
19 end now or should be adjourned to a later date, which
20 is not the case.

21 Now, what I want to know is if the
22 basis of the motion is something that happened between
23 Mr. Warman and Mr. Fromm in other proceedings and it is
24 something that has to do with Mr. Warman as a lawyer
25 and Mr. Fromm as agent of the Canadian Heritage

1 Alliance, then this is a matter that as a Tribunal I
2 cannot entertain.

3 If Mr. Fromm wants to in a way seize
4 the Law Society of Ontario of improper conduct on the
5 part of Mr. Warman, he is free to do so, but I cannot
6 in a way, even though he was able to show that in
7 another hearing Mr. Warman might have done something
8 wrong which, you know, I can't say, how would this
9 impact on this hearing.

10 Ms Snider?

11 MS CEILIDH SNIDER: If I may, I'm
12 not -- I haven't been embroiled in these various hate
13 messaging cases and I'm looking at this document that's
14 been distributed by Mr. Fromm for the first and I'm
15 seeing it for the first time.

16 I guess on behalf of the Commission I
17 have objections to this being heard. One is, as I
18 noted before we broke, there is no basis for the
19 Tribunal to dismiss the complaint without inquiring
20 into it and giving all parties before it the proper
21 opportunity to be heard, and that's what is provided
22 for both under the Act and the rules.

23 And, secondly, in reviewing briefly
24 the affidavit submitted by Mr. Fromm in support of his
25 motion, there is no reference at any point to either Ms

1 Guille or to the Canadian Heritage Alliance who are the
2 parties, who are the respondent parties in this matter.

3 There is a reference to Mr. Warman.
4 It doesn't appear to me at all that there is any nexus
5 between the issues that are before you in this hearing
6 and the issues raised in this motion, and on that basis
7 the Commission would object to this even being
8 entertained.

9 MR. KULBASHIAN: Mr. Chair, we find
10 ourselves in kind of a tough situation.

11 As unrepresented respondents -- well,
12 as respondents not represented by actual legal counsel,
13 we are in a position where so far, like I really don't
14 mean to in any way disrespect the Commission on this,
15 especially not the representative here right now
16 because her duties actually to the hearing, I guess.

17 However, we find that the Commission
18 tends to be extremely biased in cases that deal with
19 Mr. Warman and that becomes a situation, however --
20 that becomes a situation where no matter, it creates an
21 atmosphere of injustice because the complaint has been
22 referred to the Tribunal, where it might not have been
23 referred to the Tribunal if they had not filed proper
24 procedure, it comes at great cost to Ms Guille.

25 So, ultimately, what is happening

1 right now we are fighting over a situation that it
2 might not be the proper forum for it, I agree, however,
3 I guess one way to put it is, what other venues, like
4 does the Tribunal have the right to order a stay in
5 these hearings and adjourn it for another day?

6 THE CHAIRPERSON: No. The only way
7 that the Tribunal could adjourn a hearing in certain
8 circumstances but, otherwise, unless there is a stay
9 coming from the Federal Court, you know, the Tribunal
10 will in a way conduct the inquiry as the law provides.

11 Now, as I said, if Mr. Fromm has
12 issues with Mr. Warman's conduct, then there is another
13 forum where he can address that and, as I have said, I
14 have seen this happening in other cases.

15 But even if Mr. Fromm was to say that
16 Mr. Warman did something which could amount to
17 retaliation, that it's retaliation 14.1 against a
18 complainant, even if he was able to prove this or to
19 show that, I don't see how this would prevent this
20 Tribunal to inquire into the complaint which is now
21 before the Tribunal.

22 The fact that a poisoned environment
23 and harassment, you know, situation might exist between
24 Mr. Fromm and Mr. Warman, that is something that I
25 cannot deal with.

1 MR. KULBASHIAN: My submission is
2 that the Tribunal's role is to not only inquire into
3 the complaint but also to preserve natural justice in
4 order to not allow any situations to happen, because
5 the Tribunal does have a certain level of authority
6 over the parties which it is involved and the issue
7 here is, where the situation arises that actually in
8 effect diminishes the chance of a respondent getting
9 natural justice, then the Tribunal has to step in and
10 state this is basically not right, at least.

11 THE CHAIRPERSON: But if something
12 had happened with respect to this hearing, I can
13 entertain -- if there was something that did occur
14 between Mr. Warman and Mr. Fromm in the course of this
15 hearing, that would be one thing, but with respect to
16 something that happened in other hearings, as I said,
17 there is another forum that can be seized of that.

18 MR. FROMM: The time sequence, I'm
19 not talking about something that happened in another
20 hearing, the events referred to occurred after other
21 hearings and prior to this one, in other words,
22 relatively -- in a relatively short period of time
23 prior to this hearing, if we're looking at a time
24 sequence.

25 I'm not talking about what happened

1 in some other hearing, I'm talking about events that
2 occurred prior to this hearing.

3 THE CHAIRPERSON: But if were to
4 submit that Mr. Warman intimidated you or used tactics
5 to intimidate you before this hearing, if that is the
6 case, I have no power to rule on that.

7 MR. KULBASHIAN: Actually --

8 MR. FROMM: Sorry.

9 THE CHAIRPERSON: It would be for the
10 Law Society of Lower Canada --

11 MR. FROMM: Upper Canada.

12 THE CHAIRPERSON: Upper Canada to
13 deal with that.

14 MS CEILIDH SNIDER: Mr. Fromm, the
15 issue is not so much chronology, and I appreciate the
16 point that you are trying to make --

17 MR. FROMM: Sorry.

18 MS CEILIDH SNIDER: Mr. Fromm, the
19 issue is not so much chronology, I understand the point
20 that you are trying to make and the concerns that you
21 have, the issue more is related to what the powers of
22 the Tribunal actually are and the nexus that is
23 necessary between the concerns that you have and the
24 parties that are present here before the Tribunal and
25 the complaint that the Tribunal is seized with to hear

1 and to inquire into.

2 So, the Commission sustains its
3 objections.

4 MR. FROMM: Can I come at it then
5 from what would seem to be the spirit of section 14.1.

6 Section 14.1 envisions --

7 MR. WARMAN: Mr. Chair, the simple
8 reading of the legislation, section 14.1 states:

9 "Complaint"

10 It states:

11 "Retaliation against the
12 individuals who filed the
13 complaint or the alleged
14 victim."

15 Mr. Fromm is clearly neither of
16 those.

17 MR. FROMM: I appreciate Mr. Warman's
18 assistance in a simple reading, but the submission I
19 wanted to make is this: section 14.1 anticipates an
20 imbalance in power in the normal complainant, except
21 under section 13.1 is usually an individual alleging
22 discrimination in terms of employment or opportunity,
23 usually alleged discrimination against a large employer
24 like the Government of Canada, Department of Government
25 of Canada, a Crown corporation or one of their

1 industries regulated by the Act.

2 Now, in a case like that you have a
3 relatively powerless individual, a complainant against
4 a big entity, usually a corporation or a government
5 department. 14.1 says that the big boy can't
6 intimidate or cannot retaliate against the complainant
7 because of the imbalance in power.

8 In 13.1 cases --

9 THE CHAIRPERSON: Yes, but --

10 MR. FROMM: -- it's flipped entirely.

11 THE CHAIRPERSON: But, Mr. Fromm, you
12 are not here as a respondent, you are here as an
13 agent --

14 MR. FROMM: Yes.

15 THE CHAIRPERSON: -- of the
16 respondent, the Canadian Heritage Alliance, we are
17 clear on that.

18 MR. KULBASHIAN: Can I --

19 THE CHAIRPERSON: Now, if we are
20 clear on that, if you look at the Act it has to do with
21 complainant, the complainant who is being retaliated
22 against.

23 Now, even if it was, let's say, the
24 respondent, you are not the respondent, you're the
25 agent of the respondent, so article 14.1, even if we

1 were to extend it to a respondent, you are not the
2 respondent.

3 This is why I am saying, you are here
4 as an agent and if Mr. Warman, you say, retaliated or
5 intimidated you as agent, the proper recourse is to
6 make a complaint before the Law Society of Upper Canada
7 as agent of Canadian Heritage Alliance.

8 This is why when you try to use 14.1
9 in a way to support your argument, 14.1 doesn't apply
10 to lawyers or legal representatives, it applies to the
11 complainant, as I said, if we want to stretch it to a
12 respondent, you are not here in your capacity as a
13 respondent, you are an agent of the respondent.

14 MR. KULBASHIAN: Mr. Chair --

15 THE CHAIRPERSON: So, I fail to see
16 how 14.1, even if we were to stretch it, can apply to
17 your case.

18 MR. KULBASHIAN: If I could just kind
19 of go on the same, I guess, thought pattern.

20 If Mr. Fromm was targeted in order to
21 not act as an agent for someone, that would directly
22 affect the respondent as well.

23 THE CHAIRPERSON: No, but he was --
24 it would affect the respondent as well.
25 Mr. Kulbashian...

1 MR. KULBASHIAN: By targeting
2 somebody's lawyer you're affecting the respondent as
3 well. If you target somebody's lawyer for who he is
4 representing, you are also targeting the respondent.

5 THE CHAIRPERSON: Yes, but in these
6 proceedings, unless you show me that in the course of
7 this week Mr. Warman retaliated or intimidated
8 Mr. Fromm that would be something different, and even
9 then, then I would have to say, well, I don't have the
10 jurisdiction to deal with that.

11 But this doesn't seem to be what is
12 at the basis or forms the basis of his motion, it has
13 to do with him acting as an agent in other proceedings.

14 Now, I fail to see how this even
15 comes close to issues in this case. And mind you, I
16 haven't even looked at the document that was presented
17 to me because I don't want to in a way even look at it
18 and form an idea as to what's coming, but from what I
19 have heard from the objection made by Mr. Warman, from
20 what I heard from Mr. Fromm and the reference to 14.1,
21 I fail to see how 14.1 is relevant to Mr. Fromm acting
22 as an agent here and the fact that Mr. Warman objected
23 to him being a representative or an agent, he was
24 entitled to do that and I ruled that, yes, I did
25 recognize Mr. Fromm as an agent of the Canadian

1 Heritage Alliance and I did recognize you as an agent
2 of Ms Guille.

3 MR. KULBASHIAN: I understand.

4 THE CHAIRPERSON: So, unless you have
5 further submissions to make, because from what I have
6 heard, you know, we are still at the starting line.

7 MR. KULBASHIAN: In that case, can I
8 just have a few minutes.

9 MR. FROMM: Can I just rephrase.

10 14.1 makes it a discriminatory
11 practice for the respondent to retaliate against the
12 complainant, but it's fair game for anybody else in the
13 process to retaliate or --

14 THE CHAIRPERSON: No, I am not saying
15 that it's fair game. What I've said is that if someone
16 acts in such a way that it is conduct unbecoming, let's
17 say, of a legal representative, there are other forums
18 where this can be addressed, but not here, not before
19 the Canadian Human Rights Tribunal which has no power
20 to sanction the professional conduct of a lawyer or
21 legal representative.

22 MR. KULBASHIAN: Can I have a minute?

23 THE CHAIRPERSON: Even if I was to
24 find that someone was acting contrary to his
25 professional code of conduct, the Tribunal could always

1 raise that, but the Tribunal could not deal with that
2 per se.

3 MR. FROMM: Would we be able to have
4 a five-minute recess to consider our position.

5 THE CHAIRPERSON: Sure. So, let's
6 take five or 10 minutes.

7 REGISTRY OFFICER: Order, please.

8 --- Upon recessing at 3:05 p.m.

9 --- Upon resuming at 3:25 p.m.

10 REGISTRY OFFICER: Order, please.

11 Please be seated.

12 THE CHAIRPERSON: So, Mr. Fromm?

13 MR. FROMM: We are wondering -- I am
14 wondering whether you would entertain my presenting the
15 motion and reserve on it.

16 THE CHAIRPERSON: Mr. Fromm, I have
17 looked back at article 14.1 because it seems as if your
18 motion is based on article 14.1, from what I gather,
19 and it's stated that it is a discriminatory practice
20 where a person against whom a complaint has been filed
21 under part 3, or any person acting on their behalf to
22 retaliate or threaten retaliation against the
23 individual who filed the complaint or the alleged
24 victim.

25 And when I look at Mr. Doucet's

1 decision where I think it is stated in paragraph 1,
2 where you are asking that the complaint of Mr. Warman
3 be dismissed because of a poisoned environment and
4 harassment on you as a representative of the
5 respondent, as a representative of the respondent Terry
6 Tremayne, the Act in article 14.1 doesn't deal with
7 legal representatives and, as I stated, you are here as
8 a legal representative, not as a victim, nor as a
9 complainant and not as a respondent.

10 So if, you know, you are saying to
11 me, to the Tribunal that the basis of your motion is
12 article 14.1, then with what I have just read and what
13 I have just said, there is no legal basis for you to
14 present that motion and why should I entertain a motion
15 when the legal basis is non-existent.

16 And, as I said, in many instances or
17 in some instances if a legal representative acts in an
18 improper manner, then there are recourses that do
19 exist, but these recourses are not contemplated by the
20 Canadian Human Rights Act, unless you can show me
21 otherwise. Those recourses are outside, you know, the
22 sphere of this Tribunal.

23 Now, it is you who have to decide if
24 you will avail yourself of these recourses as a legal
25 representative. So, in all logic, you know, it is

1 inappropriate for me even to entertain your motion
2 when, on the facts, you know, you don't even meet the
3 status or the conditions for 14.1 to apply.

4 That doesn't mean that, you know, you
5 mightn't have been the object of some form of
6 retaliation. If you feel that way, then you have
7 recourses, but the plain reading of 14.1 I think
8 indicates that those who are covered are the victim and
9 the complainant, as I said.

10 If we want to extend it to the
11 respondent, you are not a respondent in this hearing,
12 you are the legal representative.

13 So, for these reasons, I will not
14 entertain your motion.

15 MR. FROMM: I was wondering then, in
16 that case, if Ms Barber can collect them and give them
17 back.

18 THE CHAIRPERSON: Sure. As I said
19 earlier on, I haven't looked at the motion or the
20 documents in the motion.

21 MR. KULBASHIAN: Just one more issue,
22 if I may. I would ask that Mr. Warman as a lawyer and
23 as a member or, sorry, a party involved in this hearing
24 not use derogatory, belittling or any kind of, I guess,
25 patronizing terms to describe unrepresented

1 respondents.

2 For example, see, this is what you
3 get with unrepresented respondents, or this is what you
4 get when you don't have lawyers and issues like that.

5 That does nothing but create tension
6 during the hearing, and if he chooses to continue
7 using, I guess, terms and expressions like, as he did
8 to describe us as the two parties involved here, then I
9 mean, I just wonder if it's fair game to use the same
10 exact same term terminology back at him because
11 ultimately we find it very offensive that when we are
12 not here, but I myself are here by choice and so is
13 Mr. Fromm, however, the parties, the respondents are
14 not here out of their own free will, per se, that he
15 not use, like, saying this is what you get when you
16 have no legal experience this, what you get when they
17 are individuals who are just regular citizens, et
18 cetera, things like that.

19 MR. FROMM: That had been your
20 direction yesterday, I think you asked before he not
21 use comments like that.

22 THE CHAIRPERSON: Yes.

23 MR. KULBASHIAN: He did that again
24 today.

25 THE CHAIRPERSON: And I did --

1 MR. KULBASHIAN: I want to address it
2 again.

3 THE CHAIRPERSON: And I did intervene
4 this afternoon because I don't think that this is the
5 proper language to be used and I would direct the
6 parties, if at any point in time you feel that improper
7 language is being used, you can raise -- I would say
8 make it a question of privilege and interrupt whatever
9 is happening and say, this is improper language because
10 I agree with you, Mr. Kulbashian, we have to keep some
11 form of decorum in this room and, as I said, you have
12 the status to represent Ms Guille, Mr. Kulbashian. The
13 fact that you are not a lawyer doesn't in any way
14 affect your duty to represent Ms Guille and the same
15 goes to Mr. Fromm, and I will treat all counsel or
16 everyone as a duly appointed representative of, whether
17 the Commission, the complainant, you Ms Guille and the
18 Canadian Heritage Alliance.

19 I think I am making myself very clear
20 and if at any point in time improper language is used,
21 make it a question of privilege and we will address
22 that.

23 MR. KULBASHIAN: Thank you very much,
24 Mr. Chairman.

25 THE CHAIRPERSON: So, are there any

1 other motions or preliminary issues that have to be
2 dealt with?

3 MR. KULBASHIAN: There is only one
4 minor issue and this is something that's been of
5 concern at the moment.

6 I'm not sure if the court wants to
7 entertain this, it's just an issue of disclosure, just
8 the issue of one document, if I can just get the
9 document ready right now.

10 Sorry about that. It's just
11 regarding a document that was submitted as our
12 disclosure, it's identified as W-A-002/1, and I was
13 just wondering if, like, why there are blacked out
14 sections on this document. I believe it's a photocopy
15 of an envelope, and I am just wondering --

16 MS CEILIDH SNIDER: It's likely a
17 disclosed document from the Commission.

18 MR. KULBASHIAN: That's right. It
19 just states --

20 MS CEILIDH SNIDER: May I just have a
21 quick look, it might be easier. It would be, although
22 I don't know because I didn't see the document prior to
23 it being blacked out, I would suspect that the blacked
24 out section is Mr. Warman's home address.

25 MR. KULBASHIAN: I just wondered why

1 it is blacked out on this document, it just doesn't
2 seem --

3 MS CEILIDH SNIDER: I would be
4 speculating, I don't know, and I don't -- I suspect
5 it's not germane to the issues before us.

6 MR. KULBASHIAN: I understand, that's
7 why I said it was a minor issue, just an issue that --

8 THE CHAIRPERSON: Ms Snider, what is
9 the source?

10 MS CEILIDH SNIDER: It's sourced from
11 the Commission, there is a reference number W-A-002/1,
12 which is a disclosure number issued on documents
13 disclosed by the Commission.

14 It would have been disclosed to the
15 parties in the course of the Commission's disclosure
16 and it doesn't form one of the documents that the
17 Commission is relying upon in the course of the hearing
18 or that's contained in the book of documents.

19 It simply says: For Ms Suzanne Best
20 intake manager, documents from Richard Warman and there
21 is something blacked out beside it. That may be his
22 address, I don't know.

23 MR. KULBASHIAN: The major thing I'm
24 just wondering, I understand his address is blacked
25 out, I was just wondering what is blacked out in the

1 top there.

2 MS CEILIDH SNIDER: Yeah, I'm sorry,
3 I'm not sure. I conferred with Mr. Warman and I would
4 imagine this was some time ago, 2004 or thereabouts and
5 he is not -- he can't recall either, and I presume that
6 if it was blacked out it was blacked out for some
7 appropriate reason. I don't know.

8 MR. KULBASHIAN: Well --

9 THE CHAIRPERSON: Are you satisfied?

10 MR. KULBASHIAN: More or less, yes.

11 MS CEILIDH SNIDER: Just says:

12 "Hi Suzanne: Please accept this
13 formal complaint. Thanks very
14 much, Richard."

15 MR. KULBASHIAN: That's fine. I
16 guess this would have been of more relevance in the
17 judicial review application to Federal Court, but
18 that's fine. for now thank you very much.

19 THE CHAIRPERSON: So, are we ready to
20 start with -- how do you want to proceed? Do you want
21 to make an opening statement or --

22 MS CEILIDH SNIDER: I think that
23 that's what our intention had been and my understanding
24 is that Mr. Warman would like to go first and the
25 Commission will follow.

1 And then if the respondents would
2 like to make an opening statement in the normal course,
3 you can perhaps give them instructions on how that is
4 to proceed.

5 THE CHAIRPERSON: So, it varies from
6 one hearing to another. Sometimes the parties will
7 elect to make an opening statement in order to set the
8 stage for the evidence that they want to present to the
9 Tribunal.

10 So, Mr. Warman will make an opening
11 statement setting out what he intends to prove and rely
12 on and Ms Snider will do the same thing.

13 I don't know if you are aware of that
14 and if you will want to make an opening statement and,
15 if so, in all fairness to you, do you need some time to
16 just prepare it, and the same applies to Mr. Fromm, but
17 anyways, we can this afternoon start off with
18 Mr. Warman and Ms Snider and Mr. Kulbashian.

19 MS CEILIDH SNIDER: Sometimes, just
20 to -- sometimes respondents make an opening statement
21 at the opening of the hearing or sometimes they choose
22 to make their opening statement prior to commencing
23 their -- leading their own evidence. There are
24 options.

25 MR. KULBASHIAN: I mean, I guess

1 opening statements, I don't know. I guess what is
2 still an issue is whether Ms Guille will be testifying,
3 so I guess ultimately after they are done making their
4 opening statements, I have never seen a hearing before,
5 so I'm kind of new to this aspect.

6 However, that's fine. I guess if we
7 need time after they are done their opening
8 statements...

9 THE CHAIRPERSON: Okay. So, let's
10 proceed with Mr. Warman's and Ms Snider's, the
11 Commission's opening statement.

12 Mr. Warman.

13 MR. WARMAN: But I will ensure that I
14 enunciate and speak in a forthright fashion.

15 Section 13.1 of the Canadian Human
16 Rights Act states as follows:

17 "It is a discriminatory practice
18 for a person or group of persons
19 acting in concert to communicate
20 telephonically or to cause to be
21 so communicated repeatedly, in
22 whole or in part, by means of
23 the facilities of a
24 telecommunication undertaking
25 within the legislative authority

1 of Parliament any matter that is
2 likely to expose a person or
3 persons to hatred or contempt by
4 reason of the fact that that
5 person or those persons are
6 identifiable on the basis of a
7 prohibited ground of
8 discrimination."

9 Subsection 2 states:

10 "For greater certainty, ss. 1
11 applies in respect of a matter
12 that is communicated by means of
13 computer or a group of
14 interconnected or related
15 computers, including the
16 Internet."

17 At its core section 13 of the
18 Canadian Human Rights Act is simply a modern extension
19 of the golden rule, thou shall not use the telephone or
20 Internet to spread hate propaganda against thy
21 neighbour.

22 The Supreme Court in Taylor has
23 defined the terms hatred and contempt, with hatred
24 meaning the expression of extreme ill-will, that the
25 targets of the message have no redeeming qualities and

1 that it evokes feelings of detestation, enmity and
2 malevolence.

3 Contempt, which is described as the
4 condition of being condemned or despised, that of
5 dishonour or disgrace and looking down upon or as
6 inferior the object of one's feelings

7 I believe by the end of this hearing
8 you will have ample evidence before you to conclude
9 that the material put forward on the Internet by Ms
10 Guille and the Canadian Heritage Alliance amply meets
11 this test.

12 Before finishing my opening I'd like
13 to address briefly the power of the Internet and the
14 power of words.

15 With regard to the power of the
16 Internet, in his decision of the 24th of February, 2005
17 Justice Blais of the Federal Court of Canada upheld the
18 reasonableness of the security certificate that was
19 signed against Ernst Zundel designating him a security
20 threat.

21 Having reviewed all of the evidence
22 Justice Blais held against Zundel upholding the
23 certificate and declaring that Mr. Zundel constituted
24 a threat to Canada's national security.

25 In his decision, Justice Blais

1 summarized what the Internet has meant to the neo-Nazi
2 community.

3 "The White Supremacist network
4 is still very much alive and
5 active. The use of the Internet
6 has created new methods of
7 communication which have
8 replaced traditional ones. No
9 longer must halls or pubs be
10 rented in order to have
11 meetings, rather communication
12 can now take place easily and
13 anonymously between adherents of
14 the White Supremacist Movement,
15 as well as anyone else curious
16 enough to visit websites or
17 log-on to chat rooms dedicated
18 to keeping this network alive."

19 Mr. Zundel was deported from Canada
20 to Germany on the 1st of March, 2005 and is now on
21 trial in Manheim finally being held accountable for his
22 Holocaust denial that a judge in another German case
23 described as "moral arson"

24 That is what the power of the
25 Internet has meant to the ability to communicate hate

1 propaganda, and I think it's important to recall why it
2 is that messages contained in such material are so
3 important.

4 I come now to the power of words.

5 Polonius states:

6 "What do you read, my Lord?"

7 Hamlet replies:

8 "Words, words, words."

9 Later Polonius states:

10 "How pregnant sometimes his
11 replies are."

12 This is from Hamlet Act II, Scene II.

13 And I believe it speaks to the power of words, that
14 words that are stated cannot just mean what are on
15 their face but can have much greater meaning.

16 And some would argue that such
17 marginal views in our society are better ignored when
18 they are distributed in the form of hate propaganda and
19 that no real harm can come from them.

20 But in a speech given to the Canadian
21 Bar Association in Winnipeg in August of 2004, then
22 Justice Minister Irwin Cotler noted the destructive
23 power of words. Citing the Andrews decision,
24 Mr. Cotler said:

25 "As the Supreme Court of Canada

1 put it, in upholding the
2 constitutionality of our
3 anti-hate legislation, the
4 Holocaust did not begin in the
5 gas chambers, it began with
6 words. These, as the court put
7 it, are the chilling facts of
8 history."

9 Now, I note that while Irwin Cotler
10 was quoting from the Supreme Court's decision in
11 Andrews, the Supreme Court was actually quoting from
12 the decision of the Ontario Court of Appeal in that
13 case.

14 Chief Justice Dickson writing on
15 behalf of the majority described at paragraph 20 the
16 treatment of the case by the Ontario Court of Appeal.

17 Chief Justice Dickson as he then was
18 stated:

19 "In the concluding part of his
20 judgment, Justice of Appeal
21 Corey explained why his position
22 regarding section 1 differed
23 from the Alberta Court of Appeal
24 in Keikstra. Most importantly,
25 he rejected the Alberta Court's

1 contention that s. 319.2 the
2 wilful clause in the Criminal
3 Code could not be saved under
4 section 1 because it did not
5 require proof of the acceptance
6 of the hate monger's message and
7 that it had caused actual harm
8 or the serious risk of harm to
9 the identifiable group."

10 In the view of Justice of Appeal
11 Corey much of the Criminal Code is aimed at crime where
12 no crime has been occasioned and, thus, stated, quoting
13 Justice Corey:

14 "For example, the very serious
15 crime of attempted murder may be
16 established where no harm has
17 been suffered by the intended
18 victim, by some fortuitous
19 circumstances the aimed bullet
20 missed its mark, pointed knife
21 was deflected, the poisoned cup
22 was spilled on the ground.

23 Although there was no damage or
24 injury occasioned, a serious
25 crime was nonetheless committed.

1 As well, a conspiracy to import
2 a large amount of heroin
3 constitutes a crime. This is
4 so, even if the conspiracy is
5 not brought to fruition and the
6 heroin was never imported,
7 nonetheless the crime was
8 committed, although no actual
9 harm or risk of harm was
10 demonstrated. A driver with a
11 blood alcohol count of over 80
12 is guilty of an offence although
13 it has not been demonstrated
14 that the particular accused had
15 occasioned any danger in itself,
16 rather, the very basis for
17 creating the offence of driving
18 over 80 mg is ground upon
19 empirical evidence as to the
20 danger of people driving a motor
21 vehicle with such a blood
22 alcohol count constitute to
23 members of the public. The
24 empirical data derived from the
25 history of the Third Reich and

1 the studies of the Cohen
2 Committee..."

3 And in that he refers to the 1965
4 study to the dangers of hate propaganda led by then
5 Dean of Law, McGill University Maxwell Cohen, Pierre
6 Trudeau, Mark McGuigan and one or two others.

7 Justice Corey continues:

8 "That these things are I think
9 entitled to the same weight.
10 They establish not only the risk
11 of harm occasioned to the
12 identifiable groups by the
13 promotion of hatred but the
14 actual harm caused. They
15 establish the need to restrain
16 its promotion and they fully
17 justify the application of
18 section 1 of the Charter to its
19 provisions. The impugned
20 section is not simply
21 paternalistic, well-intentioned
22 meddling by Parliament cutting
23 back on free speech for no real
24 reason, it is based upon the
25 hard chilling facts of history."

1 And that I believe speaks directly to
2 the importance of words and the importance of the words
3 contained in the hate propaganda that we will put
4 before you in this hearing.

5 Thank you.

6 THE CHAIRPERSON: Thank you,
7 Mr. Warman.

8 MR. KULBASHIAN: Mr. Chair, if I
9 could just ask a quick question. What ultimate purpose
10 or weight does an opening statement have on the
11 evidence that is put before the Tribunal?

12 THE CHAIRPERSON: That is not
13 evidence before the Tribunal, it's just an opening
14 statement where a party will in a way not even
15 summarize but give the context in which his evidence --
16 the evidence will be given.

17 MR. KULBASHIAN: I understand.

18 THE CHAIRPERSON: But it's not
19 evidence in any shape or form.

20 MR. KULBASHIAN: That's what I was
21 trying to figure out. I never pleaded my case, there
22 weren't any opening statements, so I was trying to
23 figure out what the opening actual purpose was in the
24 opening statement.

25 Thank you very much.

1 THE CHAIRPERSON: Ms Snider?

2 MS CEILIDH SNIDER: Thank you.

3 The matters before the Tribunal today
4 involve two complaints filed by Mr. Warman pursuant to
5 section 13 of the Canadian Human Rights Act. These
6 complaints allege that the respondents, Melissa Guille
7 and the Canadian Heritage Alliance have discriminated
8 against persons based on a handful of grounds and these
9 include the ground of religion, the ground of race,
10 that of colour, national and ethnic origin and the
11 ground of sexual orientation.

12 The respondents we allege did so by
13 communicating messages over the Internet that would
14 likely expose individuals who are non-Christian, namely
15 of the Jewish and Muslim faiths, to hatred and/or
16 contempt.

17 The respondents also discriminated
18 against persons on the grounds of race based on being
19 non-caucasian contrary to section 13 of the Act.

20 The main race that has been targeted
21 in that category is the black race, however, the
22 respondents have also directed their hatred and
23 contempt towards First Nations, Arabs, Roma, also known
24 as gypsies and other non-caucasians in addition to gays
25 and lesbians.

1 The communication of hate messages is
2 immunicable to the purposes of the Canadian Human
3 Rights Act which seeks to protect and uphold the
4 principle expressed in section 2 of the Act which
5 states:

6 "All individuals should have the
7 opportunity equal with other
8 individuals to make for
9 themselves the lives that they
10 are able and to which they have
11 and to have their needs
12 accommodated consistent with
13 their duties and obligations as
14 members of society without being
15 hindered in or prevented from
16 doing so by discriminatory
17 practices based on race,
18 national or ethnic origin,
19 colour, religion, age, sex,
20 sexual orientation, marital
21 status, disability and so
22 forth."

23 Mr. Warman has in his opening
24 statement taken the Tribunal through the various
25 provisions of section 13 and I don't propose to go

1 there again, but I will mention subsection 3 of
2 section 13 provides for an exemption, and this section
3 states:

4 "For the purposes of this
5 section no owner or operator of
6 a telecommunications undertaking
7 communicates or causes to be
8 communicated any matter
9 described in subsection 1 by
10 reason only that the facilities
11 of a telecommunication
12 undertaking owned or operated by
13 that person are used by other
14 persons for the transmission of
15 that matter."

16 It is the position of the Commission
17 that subsection 3 exemption applies narrowly to the
18 owner of a telecommunications undertaking, for example,
19 it has no knowledge of the messaging content used on
20 its facilities, for example, Bell Canada or Rogers,
21 whose only connection to section 13 is limited to the
22 fact that the impugned messages are being communicated
23 other the telecommunications that they own.

24 During the course of the hearing you
25 will hear testimony from Mr. Warman that show that

1 these hateful and contemptuous messages against a broad
2 spectrum of target groups were communicated by the
3 respondents acting in concert through the website
4 called the canadianheritagealliance.com found on the
5 Internet.

6 The evidence will also show that Ms
7 Guille is intimately connected with all aspects of the
8 website canadianheritagealliance.com.

9 Melissa Dean Guille is the site
10 administrator, the technical contact, the billing
11 contact and the registrant contact for the Canadian
12 Heritage Alliance website.

13 The evidence will show that Ms Guille
14 communicated and caused to be communicated hate
15 messages.

16 The evidence will also show that as
17 the name implies, the Canadian Heritage Alliance is a
18 group of persons acting in concert, they are organized
19 and you will hear that they go so far as to issue
20 supporter cards to their members who have voting
21 privileges.

22 You will hear that Ms Guille is a
23 member of the Canadian Heritage Alliance and indeed a
24 founding member.

25 The complainant Mr. Richard Warman

1 will go through the documents which he observed on the
2 website associated with the Canadian Heritage Alliance
3 and that he downloaded and provided to the Commission
4 with his complaint.

5 Mr. Warman will also testify to the
6 documents that he downloaded from the Internet which
7 establish a link between Ms Guille and the Canadian
8 Heritage Alliance and the website
9 canadianheritagealliance.com.

10 There are three issues which must be
11 considered by the Tribunal in determining whether the
12 complaint has been made out.

13 The first issue, did the respondents
14 communicate or cause to be communicated the messages
15 found on the website.

16 The second issue, were these messages
17 communicated by way of the Internet.

18 And the third issue, is the subject
19 matter of the messages likely to expose a person or
20 persons to hatred or contempt by reasons of the fact
21 that they are identifiable on the basis of a prohibited
22 ground of discrimination.

23 The test that you must bear in mind
24 for determining whether the subject matter of the
25 messages you will hear testimony about are likely to

1 expose persons to hatred and contempt are well
2 established and have been outlined by Mr. Warman and
3 previously by the Commission in our submissions on the
4 respondents' motion to require expert evidence to be
5 tendered by the Commission which has been dispensed
6 with today.

7 In determining whether the contents
8 of the messages are hateful or contemptuous, a standard
9 of proof is the balance of probabilities. This
10 standard is met where the Tribunal can conclude that
11 the messages are more probably than not hateful or
12 contemptuous.

13 The Commission is confident that the
14 material that will be presented to the Tribunal will be
15 sufficient to find that it constitutes matters that are
16 likely to expose members of the Jewish and Islamic
17 faiths, as well as blacks and other non-whites and
18 homosexuals to hatred or contempt and that the
19 respondents were part of a group of persons acting in
20 concert to communicate them and, in fact, that Ms
21 Guille did also communicate them.

22 Those are the Commission's
23 submissions, or opening statement.

24 THE CHAIRPERSON: Thank you, Ms
25 Snider.

1 Mr. Kulbashian or Mr. Fromm?

2 MR. FROMM: I was wondering, if we
3 could have until tomorrow morning to consider our
4 opening statements, we need a bit of time draw from
5 what we have heard and where we think we are going, so
6 we can give you an outline in a similar fashion.

7 THE CHAIRPERSON: I don't have any
8 problem with that. In all fairness to the respondents,
9 I know that maybe we're losing 45 minutes, Mr. Warman,
10 but it's a question of --

11 MR. WARMAN: Perhaps if we can trade
12 off, we can have one hour for lunch on Thursday and
13 Friday and lose the 45 minutes now.

14 THE CHAIRPERSON: Can we trade off on
15 that?

16 MR. KULBASHIAN: Sure, unless there's
17 unforeseen issues that actually --

18 THE CHAIRPERSON: No, but we will try
19 to stick to the one hour lunch hour.

20 As one member of the Bar in Ontario,
21 he was from Quebec, once said that one hour for someone
22 who's from French descent is not enough, but I think we
23 can manage.

24 MR. WARMAN: I believe he stated it
25 was uncivilized.

1 THE CHAIRPERSON: Yes, he said it was
2 uncivilized. I didn't want to use as strong a word as
3 uncivilized, but I think we'll do our best and if we
4 are to adjourn, if we take a 15 minute break or if we
5 set like 15 minutes, we should be back within 15
6 minutes.

7 So, maybe we need to be more
8 disciplined in that respect.

9 So, we will resume the hearing --

10 MR. FROMM: Which bar was that, sir?

11 THE CHAIRPERSON: He was from the
12 Quebec Bar, but he was a lawyer from -- well, he was
13 practising in Ontario and he didn't like the Tribunal's
14 procedures with respect to the lunch hour break.

15 So, this said, tomorrow morning at
16 9:30.

17 REGISTRY OFFICER: Order, please.

18 --- Whereupon the hearing adjourned at 4:00 p.m.
19 to be resumed on Thursday, November 23, 2006
20 at 9:30 a.m.

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I hereby certify that I have
taken down in Stenograph and
transcribed the foregoing to the
best of my skill and ability.


Beverley Dillabough, C.S.R.