

**CANADIAN  
HUMAN RIGHTS  
TRIBUNAL**



**TRIBUNAL CANADIEN  
DES DROITS  
DE LA PERSONNE**

**BETWEEN/ENTRE:**

RICHARD WARMAN

**Complainant**

**Plaignant**

**and/et**

CANADIAN HUMAN RIGHTS COMMISSION

**Commission**

**Commission**

**and/et**

TOMASZ WINNICKI

**Respondent**

**Intimé**

**BEFORE/DEVANT:**

KAREN JENSEN

CHAIRPERSON/  
PRÉSIDENTE

CAROL ANN HARTUNG

REGISTRY OFFICER/  
L'AGENTE DU GREFFE

**FILE NO./N° CAUSE:**

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

SITTING AT JPR ARBITRATION CENTRE, 390 BAY STREET, 3rd FLOOR,  
TORONTO, ONTARIO ON TUESDAY, OCTOBER 18, 2005, AT 9:30 A.M.  
LOCAL TIME

CASE FOR HEARING/CAUSE DEVANT ÊTRE ENTENDUE

IN THE MATTER of the complaint filed under section 7 of the  
Canadian Human Rights Act by Richard Warman, dated September 7th,  
2002, and as amended against Tomasz Winnicki. The Complainant  
alleges that the Respondent has engaged in a discriminatory  
practice on the grounds of religion, race and national or ethnic  
origin, colour and retaliation in a matter relating to the usage  
of a telecommunications undertaking.

APPEARANCES/COMPARUTIONS

Richard Warman	on his own behalf
Monette Maillett Ikram Warsame	Counsel for the Commission
Chi-Kun Shi	Counsel for the Respondent

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Toronto, Ontario

--- Upon commencing on Tuesday, October 18, 2005  
at 9:45 a.m.

REGISTRY OFFICER: Order, please.

All rise. Please be seated.

THE CHAIRPERSON: Good morning.

MS MAILLET: Good morning.

MS SHI: Good morning.

MR. WARMAN: Good morning.

THE CHAIRPERSON: I trust that  
everyone had a productive afternoon.

We adjourned the matter yesterday to  
give all parties a chance to deal with a number of  
issues that came up yesterday, some of which  
involved -- related to preliminary matters and some of  
which related to disclosure issues.

I think what I am going to do is  
suggest that we deal with some of the preliminary  
matters raised by Ms Shi.

And, Ms Shi, since you raised the  
concerns yesterday, would you like to take the floor  
now and speak to the issues, I will then give Mr.  
Warman and Ms Maillet a chance to speak to them.

MS SHI: Thank you.

Yesterday the Registrar was good

1           enough to send me a list of the correspondence from the  
2           Tribunal's file and I, from that list, requested  
3           several documents which she was again good enough to  
4           send to me expeditiously, I got them around 5:00 p.m.  
5           yesterday.

6                               Now, if I could hand up one of the  
7           pages from the list of documents, perhaps it should be  
8           marked as Exhibit 1, Madam Chair, for the record.

9                               THE CHAIRPERSON: I don't think that  
10          would be appropriate at this moment, since we don't  
11          have a witness through whom to enter that document.

12                              MS SHI: Well, I'd like to have it as  
13          part of the record anyway. If you don't think that  
14          it's appropriate that it be an exhibit, let's mark it  
15          for identification then.

16                              THE CHAIRPERSON: I think that would  
17          be fine. We will mark it for identification.

18                              MS SHI: All right.

19                              THE CHAIRPERSON: And this is the  
20          list...

21                              MS SHI: That I received from the  
22          Registrar, yes, and this is one of the pages.

23                              THE CHAIRPERSON: Okay. So, we will  
24          mark it as T exhibit, which is Tribunal Exhibit 1 for  
25          identification purposes.

1 --- Discussion off the record

2 THE CHAIRPERSON: You can proceed.

3 MS SHI: Thank you.

4 And there is an e-mail dated July  
5 11th from Ms Maillet to the Tribunal. I have here a  
6 copy of that letter, of that e-mail which, if I may,  
7 I'd like to mark as Exhibit No. 2 for identification  
8 purpose, please.

9 THE CHAIRPERSON: Okay. So, I think  
10 instead we are going to mark them as respondent exhibit  
11 for identification, R-1 and R-2.

12 --- Short Pause

13 THE CHAIRPERSON: Okay. So, my  
14 understanding is that we should mark this as R-A and --  
15 sorry, A and B for identification purposes.

16 MS SHI: Thank you.

17 THE CHAIRPERSON: Okay, and Ms  
18 Hartung is going to read them into the record.

19 REGISTRY OFFICER: A one-page excerpt  
20 from the Tribunal's list of documents from its case  
21 file will be marked for identification as A.

22 EXHIBIT NO. A: A one-page  
23 excerpt from the Tribunal's list  
24 of documents from its case file.

25 REGISTRY OFFICER: E-mail message to

1 Holly Lemoine from Monette Maillet dated Monday, July  
2 11, 2005 will be marked for identification as B.

3 EXHIBIT NO. B: E-mail message  
4 to Holly Lemoine from Monette  
5 Maillet dated Monday, July 11,  
6 2005.

7 SUBMISSIONS

8 MS SHI: Thank you.

9 As you can see, Madam Chair, that the  
10 letter -- the e-mail in front of you dated July 11th,  
11 '05 was not sent to Mr. Winnicki and in it was Ms  
12 Maillet's request that the Tribunal provide its  
13 decision on the Commission's motion to amend the  
14 complaint.

15 And if we look at the -- well, I  
16 should back up and say, according to Ms Maillet's  
17 e-mail, the reason was that this was to accommodate her  
18 schedule so that she can go to the Federal Court to get  
19 an injunction against Mr. Winnicki based on the same  
20 case.

21 And if I could go back to Exhibit A,  
22 we will see that the Tribunal acceded to the request  
23 and rendered its decision on the motion to amend on the  
24 same day.

25 THE CHAIRPERSON: If I might just for

1 clarification purposes let you know that the ruling had  
2 already been prepared and was simply sent out  
3 coincidentally on the same day.

4 MS SHI: Well, Madam Chair, with all  
5 due respect, I do not have any information on that  
6 point.

7 THE CHAIRPERSON: No, I'm providing  
8 you with the information.

9 MS SHI: You may provide it with me.  
10 What I see from here is that the decision wasn't  
11 rendered and then Commission counsel asked that it be  
12 rendered quickly and it was rendered the same day the  
13 request was made.

14 Again, I think I should go back to  
15 say that what we are dealing with here is an appearance  
16 of bias, and that is the appearance that the Tribunal  
17 responded extremely expeditiously to the Commission's  
18 request and --

19 THE CHAIRPERSON: You have noted from  
20 the decision itself that all of the views of the  
21 parties had been taken into account, including the  
22 submissions of Mr. Winnicki.

23 MS SHI: Absolutely.

24 THE CHAIRPERSON: For which he had  
25 been provided several extended deadlines in order to

1           make his submissions. His submissions were made and  
2           coincidentally the ruling came in at the same time that  
3           Ms Maillet requested information about where the ruling  
4           was.

5                            You know, I don't see that there is  
6           any appearance of bias whatsoever raised by that.

7                            MS SHI: Well, let's take a look at  
8           Tobiass then, if I may. This is the authority that I  
9           handed up yesterday. This is a case that has some  
10          similarities with the situation, where the Department  
11          of Justice, unhappy with the pace at which the court  
12          was dealing with its case against Mr. Tobiass,  
13          contacted the Chief Justice of the Federal Court and  
14          complained, and the Chief Justice contacted the sitting  
15          judge who then indeed agreed and indeed expedited the  
16          matter and when it was disclosed, it came before the  
17          court on an apprehension of bias motion and it went all  
18          the way to the Supreme Court of Canada and that is the  
19          decision that we're looking at.

20                           If I could refer you to paragraph 67.

21          It says:

22                            "We conclude that the meeting  
23                            between Mr. Thompson..." from  
24                            the Department of Justice,  
25                            "...and Isaac C.J. and the

1 subsequent conduct of officials  
2 of the Department of Justice did  
3 indeed cause damage to the  
4 appearance of judicial  
5 independence."

6 And it goes on, paragraph 71:

7 "The essence of judicial  
8 independence is freedom from  
9 outside interference."

10 And then paragraph 77:

11 "Subsequent developments  
12 confirmed that the Associate  
13 Chief Justice had indeed finally  
14 received the Government's  
15 message."

16 And then 78:

17 "We do not see how a reasonable  
18 observer could fail at least to  
19 wonder whether the Government,  
20 through Mr. Thompson, had  
21 succeeded in influencing the  
22 Associate Chief Justice to take  
23 a position more favourable to  
24 the Government's interests than  
25 he would otherwise have done."



1 Justice to move more expeditiously was in response to  
2 the Government.

3 And I noticed that there is some  
4 implication that there was a statement made by Mr.  
5 Thompson -- by the Associate Chief Justice that all  
6 reasonable steps would be taken to avoid a reference to  
7 the Supreme Court of Canada.

8 MS SHI: Right.

9 THE CHAIRPERSON: So, there was some  
10 improper suggestions with regard to the way in which  
11 the ruling should be drafted.

12 MS SHI: No, I skipped that part of  
13 the facts because, in my view, it's not quite as  
14 germane to our case.

15 But what happened was that Mr.  
16 Thompson from the Department of Justice told Chief  
17 Justice Isaac at their meeting that either the cases  
18 are expedited or they're going to bring a reference to  
19 the Supreme Court of Canada, and the Chief Justice duly  
20 related that message to the Associate Chief Justice,  
21 who was the presiding judge, who then assured Mr.  
22 Thompson through the Chief Justice that all reasonable  
23 steps will be taken to avoid that reference.

24 That's the background facts, however,  
25 the court is very clear that the intervention of the

1 Chief Justice was not to affect the issue about the  
2 conduct of the Associate Chief Justice. It does not  
3 detract from the fact that he accepted undue influence  
4 from the Department of Justice and he, in fact, had ex  
5 parte communication with a party.

6 THE CHAIRPERSON: In this case, Ms  
7 Shi, the facts appear to me to be entirely different.  
8 There was a letter communicated to the Tribunal which  
9 coincided with the immediate -- with the release on the  
10 same day of the decision. The decision had been  
11 drafted, finalized, went out and, by coincidence, a  
12 letter came in from counsel requesting information as  
13 to whether the decision would be released.

14 In fact, the decision was ready to go  
15 by the end of June but, through oversight, was not  
16 issued until the same day, June 11th when I returned  
17 from holiday.

18 That is a coincidental kind of  
19 occurrence and I don't see that that relates at all.  
20 There was no, you know, no interference on the part of  
21 the Registrar or anyone putting any pressure whatsoever  
22 on me to release the decision at the same -- in  
23 response to that letter.

24 MS SHI: Well, Madam Chair, again, I  
25 would draw a distinction between actual bias, which I

1 am not alleging, but an appearance of it.

2 All that I am saying is all this  
3 could have been avoided and should have been avoided  
4 had Ms Maillet, or indeed the Tribunal staff had simply  
5 c.c.'d my client with an e-mail electronically, would  
6 have taken seconds to do, and it's a fundamental  
7 principle of the rule of law that Tribunal or anybody  
8 that's going to adjudicate a matter is going to hear  
9 from both sides.

10 THE CHAIRPERSON: It's true, but not  
11 everyone --

12 MS SHI: And parties are entitled to  
13 be fully informed of all communication to the Tribunal.

14 THE CHAIRPERSON: No, not all  
15 communication. There are communications that go on  
16 that regard -- that are procedural, that are  
17 administrative, shall I say, administrative in nature  
18 that are not communicated.

19 MS SHI: I would submit to you a  
20 request for the court to make up its mind more quickly  
21 is not --

22 THE CHAIRPERSON: No, it wasn't a  
23 request for the court to make up its mind, it was a  
24 request asking when the decision was going to be  
25 rendered and clarification, with the understanding that

1           there had been a commitment to render a decision by the  
2           end of June.

3                           MS SHI: Well, let's take a look then  
4           at the e-mail. It says:

5                           "Hello Ms. Lemoine,  
6                           At our last Conference call on  
7                           this file, we were advised that  
8                           we could expect a decision  
9                           regarding the amendment of Mr.  
10                          Warman's complaint (to add the  
11                          grounds of race and national and  
12                          ethnic origin) before the end of  
13                          the month of June. The timing  
14                          was critical to the Commission  
15                          as we intend to make an  
16                          application for an injunction in  
17                          this matter and I will be  
18                          unavailable to do so after  
19                          Thursday, July 14th. We also  
20                          wished to make our application  
21                          prior to the hearing of this  
22                          matter.

23                          I contacted the Tribunal  
24                          last week and was advised that  
25                          the Tribunal member was away

1 from the office and would return  
2 this morning, Monday, July 11th.  
3 We are now faced with a  
4 situation where Mr. Winnicki  
5 must be served today in London,  
6 Ontario in order to give him  
7 proper notice of our  
8 application, which now can only  
9 be heard on Thursday, July 14th.  
10 In order to give a process  
11 server any chance of possibly  
12 serving Mr. Winnicki today, we  
13 respectfully request, if at all  
14 possible, that the Tribunal  
15 provide a decision regarding the  
16 amendment of the complaint,  
17 perhaps with reasons to follow,  
18 as soon as possible."

19 There is a very specific request as  
20 to when the Tribunal should render its decision, and I  
21 respectfully submit for this correspondence not to go  
22 to all parties creates an appearance of bias in that  
23 one of the parties is placing influence on the way the  
24 Tribunal makes its decision.

25 And, indeed, the decision was

1 rendered and Ms Maillet was able to go to the Federal  
2 Court in the timeframe she wanted and she was  
3 successful.

4 The Tribunal, in that sense, in  
5 appearance, very much assisted the Commission's  
6 injunction application and contributed to its success.

7 THE CHAIRPERSON: I take issue with  
8 your comments in that regards.

9 I have said to you, and I think that  
10 you have to take on faith what I am saying --

11 MS SHI: I accept it.

12 THE CHAIRPERSON: -- that that was a  
13 coincidental ruling, that the Tribunal did not assist  
14 the Commission in any way.

15 There was a release of the decision  
16 coincidentally at the same time that this communication  
17 was received. There was no assisting involved  
18 whatsoever.

19 You can go ahead and make your  
20 appearance arguments, but to state that the Tribunal  
21 was assisting the Commission is not proper.

22 MS SHI: I did not say that the  
23 Tribunal was assisting, I said that there was an  
24 appearance, and I want to make it perfectly clear that  
25 appearance is all I'm talking about. That is all that

1 I'm talking about.

2 In the same way that in the Tobiass  
3 matter the Court was extremely critical of the  
4 behaviour of all concerned, but the discussion is about  
5 the appearance.

6 And the appearance of justice is  
7 every bit as important as whether there was actual  
8 justice or actual bias, because appearance is all we've  
9 got, who knows what goes on in people's heads.

10 And all this, the communication,  
11 happened without Mr. Winnicki's knowledge, he didn't  
12 know a thing about Ms Maillet's efforts to get the  
13 Tribunal to hurry up until yesterday at 5:00 p.m.

14 As I've said before, there's  
15 absolutely no reason why Mr. Winnicki could not have  
16 been informed by an e-mail c.c. of this request.

17 THE CHAIRPERSON: But when you look  
18 at the essential matter in terms of fundamental  
19 justice, and you look at the fact that Mr. Winnicki was  
20 given not one but two, possibly further opportunities,  
21 both orally and in writing to provide his submissions  
22 with regard to the amendment to the complaint, that he  
23 ultimately did so, and that those submissions were  
24 fully taken into account in the rendering of the  
25 decision with regard to the amendment of the complaint.

1                   You know, I think the fact that he  
2                   was given every single opportunity, notwithstanding the  
3                   fact that he was very difficult to contact, I think  
4                   that can't help but speak to the fairness -- the  
5                   essential fairness of the process and the impartiality  
6                   of the process.

7                   MS SHI: Well, Madam Chair, if I  
8                   could again refer to Tobiass.

9                   The Court did not consider how the  
10                  Associate Chief Justice conducted the rest of the case  
11                  or what breaks Mr. Tobiass got.

12                  Just because my client got a few more  
13                  chances to respond to the motion, he doesn't give up  
14                  the right to be fully informed of what's going on.

15                  Simply put, ex parte communication is  
16                  something that simply should not occur procedurally for  
17                  basic procedural fairness.

18                  And if I may, I would like to -- and  
19                  I wasn't going to mix them up together, but I think I'm  
20                  going to.

21                  As an illustration, you talked about  
22                  yesterday the direction you gave as to the implied  
23                  undertaking, that it was totally in conformity with the  
24                  law and that was part of the reasons why you didn't  
25                  feel that there was any problem with not informing Mr.

1 Winnicki, if I remember your comments correctly.

2 Well, I'm prepared to provide you  
3 with my submissions about that direction today.

4 THE CHAIRPERSON: Good, and I'm happy  
5 to hear them.

6 MS SHI: And that is, I need it  
7 changed. I need it changed -- should I go into it now,  
8 or should we save it for later?

9 THE CHAIRPERSON: That is a good  
10 question. I think we will save that for later.

11 MS SHI: All right.

12 THE CHAIRPERSON: I think those are  
13 two distinct...

14 MS SHI: But as a demonstration, with  
15 all your good will, good intentions and understanding  
16 of the law and don't see why you should need to hear  
17 from us, at the end of the day, in my view at least, in  
18 my humble opinion, I wish I had been contacted because  
19 I would have objected and I do so now object to that  
20 direction, and as I will relay in more detail later, I  
21 am going to ask the Tribunal to revise it.

22 THE CHAIRPERSON: And you are  
23 perfectly entitled to that and --

24 MS SHI: But that is why I should  
25 have been informed.

1 THE CHAIRPERSON: No, please don't  
2 interrupt me, Ms Shi.

3 MS SHI: I apologize.

4 THE CHAIRPERSON: And that is why I  
5 said to you yesterday that every opportunity will be  
6 provided to you and that, you know, truly in the  
7 circumstances, given that we were dealing with a  
8 four-day period during which Mr. Winnicki was prevented  
9 from using the disclosed material for any purpose  
10 outside of the litigation, there is four days there,  
11 and then the first immediate opportunity is provided to  
12 you on Monday morning to provide your submissions, I  
13 fail to see how fundamental justice is fundamentally  
14 affected by that, I really do.

15 I think that every opportunity was  
16 given to you as expeditiously as possible to provide  
17 your argument, and I am open to hearing those arguments  
18 and changing the direction if need be.

19 MS SHI: And I will, as I will go  
20 into more detail, I wish that the Tribunal had not  
21 issued those directions at all. It should never have  
22 been issued without my input, and I will explain  
23 further why.

24 THE CHAIRPERSON: I think that in  
25 the circumstances of the case it was entirely

1           appropriate, but I will certainly hear your argument in  
2           that regard and you will be given every opportunity to  
3           argue and, as I said, bring evidence if you need to.

4                           Have you concluded then your  
5           submissions in that regard?

6                           MS SHI: No, not yet. Not yet, and  
7           because of this example and the previous example that  
8           we looked at of ex parte communication, I respectfully  
9           submit that this shows that this issue is a serious  
10          problem.

11                          And I have noted the Tribunal's  
12          rigorous disagreement with me, but it is my respectful  
13          submission that it compromises the appearance of  
14          fairness and the procedural fair play of this forum and  
15          it must stop.

16                          In order to try and restore the  
17          appearance of justice being done, I submit the  
18          following direction must be issued.

19                          Effective immediately, all members  
20          and staff of the Tribunal shall not communicate with  
21          any party without providing all other parties with  
22          notice of such communication contemporaneously, within  
23          reason.

24                          THE CHAIRPERSON: Sorry, can you say  
25          that again, please.

1 MS SHI: Yes, yes.

2 Effective immediately, No. 1, all  
3 members and staff of the Tribunal shall not communicate  
4 with any party without providing all other parties with  
5 notice of such communication contemporaneously, within  
6 reason.

7 And No. 2, all parties shall not  
8 communicate with the Tribunal without providing  
9 advance, or the latest, contemporaneous notice to all  
10 other parties --

11 --- (cell phone ringing)

12 THE CHAIRPERSON: If I could just  
13 remind all those present at the back that all cell  
14 phones need to be turned off and, if you have not  
15 already done that, please do so now.

16 MS SHI: Thank you.

17 THE CHAIRPERSON: I'm sorry, Ms Shi,  
18 can you repeat No. 2?

19 MS SHI: Of course. No. 2, all  
20 parties shall not communicate with the Tribunal without  
21 providing advance, or the latest, contemporaneous  
22 notice to all other parties of such communication and  
23 its full contents.

24 The Tribunal shall require proof of  
25 such notice before accepting said communication. In

1 the absence of such proof, the Tribunal shall  
2 immediately provide full disclosure of such  
3 communication to all parties.

4 Madam Chair, I would submit to you --

5 THE CHAIRPERSON: Sorry, what was  
6 your last point, require...?

7 MS SHI: In the absence of such  
8 proof, the Tribunal shall immediately provide full  
9 disclosure of such communication to all parties.

10 That is, if the party making the  
11 communication hasn't done the informing, then the  
12 Tribunal shall do the informing.

13 And, Madam Chair, I would submit that  
14 this the directive that is completely consistent with  
15 fundamental and basic, basic tents of procedural  
16 fairness and it doesn't pose any hardship on anybody,  
17 especially now that I'm on the record, reachable by  
18 fax, by telephone, by e-mail. It is not going to be a  
19 burden on anybody and it's the only way to restore some  
20 integrity to this whole process.

21 I cannot put it in stronger terms. Ex  
22 parte communications must stop.

23 THE CHAIRPERSON: So, what you are  
24 asking for is a direction --

25 MS SHI: That's right.

1 THE CHAIRPERSON: -- on this file --

2 MS SHI: That's right.

3 THE CHAIRPERSON: -- issued from me  
4 today to this effect?

5 MS SHI: That's right.

6 So, if I may, I would like to now  
7 proceed to discuss the direction that is out there  
8 right now.

9 THE CHAIRPERSON: Fine.

10 MS SHI: May I?

11 THE CHAIRPERSON: Yes.

12 MS SHI: All right.

13 THE CHAIRPERSON: Actually, wait a  
14 minute, let me think here.

15 Perhaps we are better at this point  
16 to stop on that and I will turn to Ms Maillet and Mr.  
17 Warman for their submissions --

18 MS SHI: Absolutely.

19 THE CHAIRPERSON: -- regarding the  
20 first issue that you have raised.

21 SUBMISSIONS

22 MS MAILLET: Madam Chair, I take  
23 great issue with Ms Shi's description of how this  
24 Tribunal has functioned so far in a biased or  
25 appearance of bias way.

1                   We have been discussing this case  
2                   with Mr. Winnicki and all the parties present through  
3                   several conference calls throughout the year. Mr.  
4                   Winnicki will no doubt agree that at every opportunity  
5                   he was given more than ample chances and opportunities  
6                   to respond, to be provided with an opportunity to  
7                   retain counsel.

8                   Dates were -- conference calls were  
9                   adjourned to attempt to be able to contact him, in fact  
10                  everybody was bending over backwards throughout the  
11                  year to ensure that Mr. Winnicki was aware of what was  
12                  going on.

13                  This Tribunal has been more than fair  
14                  to Mr. Winnicki and, in fact, as you know, we had  
15                  started this hearing in August, a decision was made by  
16                  the Tribunal that his request for an adjournment was  
17                  denied. The Tribunal then, in all fairness, changed  
18                  its mind and allowed him to retain counsel and allowed  
19                  the adjournment, so that the rules of natural justice  
20                  would be complied with, in an abundance of caution.

21                  It's our submission that there are  
22                  certain administrative efficiencies that need to occur,  
23                  especially when we have very late disclosures from the  
24                  respondent, not wanting any further adjournments or  
25                  delay in this hearing, and that that's what has been

1           happening here, are simply administrative efficiencies.

2                       Ms Shi indicated that my request for  
3           a decision to be rendered with respect to the amendment  
4           of the complaint, was influencing the way the Tribunal  
5           made its decision. There's absolutely no evidence of  
6           that.

7                       It's our submission that this letter  
8           does not influence the way the Tribunal makes its  
9           decision.

10                      As stated in this e-mail, I indicate  
11           that at the last conference call, where Mr. Winnicki  
12           was present, the Tribunal had indicated when a  
13           decision would be rendered, Mr. Winnicki was there, it  
14           was agreed that time was of the essence at that  
15           conference call, I remember it clearly, and it was  
16           indicated, yes, a decision would be rendered by the end  
17           of June.

18                      As the summer was going on, of course  
19           people are on annual leave, and all that my e-mail  
20           consisted of was a reminder to the Tribunal that time,  
21           again, was of the essence and that we needed a decision  
22           as soon as possible. This does not affect the way that  
23           the decision is reached by the Tribunal.

24                      I would also like to point out to the  
25           Tribunal that correspondence to Mr. Winnicki goes

1 through the Tribunal. I don't have access to Mr.  
2 Winnicki's e-mail, I did not have his cell phone number  
3 at the time.

4 And as time was of the essence, once  
5 again, it's our submission that because of  
6 administrative efficiencies, I did not copy Mr.  
7 Winnicki on this e-mail, which just confirmed what was  
8 already discussed in a conference call, and that was  
9 that a decision was to be expected by the end of June  
10 and I was inquiring with respect to why that wasn't --  
11 with respect to when we could expect a decision based  
12 on the conference call.

13 So, there are no surprises here. Mr.  
14 Winnicki was well aware that we were expecting a  
15 decision and that time was of the essence.

16 I also submit there has been  
17 absolutely no prejudice to Mr. Winnicki in any of these  
18 correspondences that they claim create an appearance of  
19 bias. He's been given every opportunity to respond to  
20 everything, he has been given every opportunity to know  
21 the case against him.

22 Those are my submissions.

23 However, I have not read the case law  
24 that Ms Shi has just provided to me this morning. If I  
25 have further comments to make, I would like to be able

1 to do so once I have a chance to review those  
2 decisions, but those are my submissions at this point.

3 THE CHAIRPERSON: Okay, thank you.

4 Mr. Warman.

5 SUBMISSIONS

6 MR. WARMAN: It's been a while since  
7 I looked at the Tobiass decision but, as I remember it,  
8 we are a long way from the Tobiass decision.

9 This is not a situation where senior  
10 counsel for the Department of Justice holds a meeting  
11 with the Chief Justice of the Federal Court to express  
12 concern about the progress of the case and that what  
13 follows subsequently is a meeting between the Chief  
14 Justice and the presiding judge during which -- I don't  
15 want to call it an undertaking -- but some sort of  
16 effort is assured that things will proceed in a more  
17 expeditious manner.

18 Ms Maillet's e-mail to the Registrar,  
19 which is the appropriate contact point for the Tribunal  
20 between parties, and is, in fact, the appropriate point  
21 for forwarding materials to other parties.

22 Ms Maillet's e-mail inquires about  
23 the anticipated issuance of a pending decision that the  
24 Tribunal had already given some indication would be  
25 issued before the end of June and that, as is clear

1 from Ms Maillet's e-mail, is dated the 11th of July.

2 It is a situation dealing with the  
3 amendment of this complaint that was already supported  
4 by existing Tribunal case law as in Kybers.

5 Ms She has suggested that the  
6 Tribunal's action in issuing that decision facilitated  
7 the Commission's ability to seek an injunction against  
8 Mr. Winnicki pursuant to the time lines outlined in Ms  
9 Maillet's e-mail.

10 In fact, that is not the case. Due  
11 to what I understand to be the unavailability of  
12 justices of the Federal Court, the injunction  
13 application was not, in fact, made before the Federal  
14 Court until the 4th of August.

15 I wish to reiterate what Ms Maillet  
16 said in that, in fact, in an abundance of fairness to  
17 Mr. Winnicki, teleconference calls were actually  
18 rescheduled following his non-appearance for previously  
19 scheduled teleconference calls.

20 The last thing that I would say is  
21 that what really Ms Shi is asking in terms of a  
22 direction is to make explicit what is already implicit,  
23 in that the Tribunal shall forward as expeditiously as  
24 possible to other counsel matters of import or matters  
25 that have some direct bearing on the case and that are

1 not purely administrative or purely procedural.

2 So, in that regard, you know, I leave  
3 it at -- certainly my submission would be that that is  
4 up to the Tribunal's discretion as to whether there's  
5 any feeling that something of that nature is necessary.

6 And those are my submissions.

7 THE CHAIRPERSON: Thank you, Mr.  
8 Warman.

9 Reply submissions.

10 REPLY

11 MS SHI: Just a quick response.

12 Ms Maillet pointed out that she  
13 doesn't have Mr. Winnicki's e-mail address, but the  
14 Tribunal certainly does, and if we could go back to  
15 Exhibit A, you will see that the Tribunal e-mailed  
16 something on June 24th to Mr. Warman, Ms Maillet and  
17 Mr. Winnicki.

18 So, if that was an impediment  
19 certainly it would have been very easy to either  
20 inquire from the Tribunal or ask the Tribunal to  
21 forward a copy.

22 And earlier I neglected to also bring  
23 the Tribunal's attention in Tobiass to paragraph 71,  
24 where in the beginning it says:

25 "The essence of judicial

1 independence is freedom from  
2 outside interference."

3 Then it goes on the next page to talk  
4 about how the judges should have complete liberty to  
5 hear and decide the cases that come before them.

6 "...no outsider...should  
7 interfere...or attempt to  
8 interfere, with the way in which  
9 a judge...makes his or her  
10 decision. This core continues  
11 to be central to the principle  
12 of judicial independence."

13 And I would ask, Madam Chair, to  
14 consider that. Those are my submissions.

15 THE CHAIRPERSON: Can I ask you a  
16 question on that one?

17 MS SHI: Yes.

18 THE CHAIRPERSON: What are your  
19 thoughts then, Ms Shi, if the Tribunal receives  
20 correspondence from outside party -- in your view it's  
21 cured -- any potential difficulty regarding this  
22 interference, so-called interference is cured by  
23 disclosing that communication to all parties.

24 Is that your position?

25 MS SHI: Well, Madam Chair, I think

1           that's a start. Full disclosure and no ex parte  
2           communication in itself is a requirement for procedural  
3           fairness.

4                        As to how one deals with the  
5           substance of what may appear to be undue influence, I  
6           think, is a separate topic, but the procedure ought to  
7           be full disclosure, that the Tribunal doesn't see  
8           something from any of the parties without all the other  
9           parties knowing that this is before the Tribunal,  
10          because it could potentially influence the Tribunal.

11                      THE CHAIRPERSON: And, you know,  
12          correct me if I'm wrong, but undue influence would be  
13          an outside party attempting to make submissions on the  
14          substance of the amendment, or the substance of the  
15          ruling and those submissions not being disclosed to all  
16          parties. That is to me a breach of fundamental  
17          justice.

18                      When a party inquires about whether  
19          or not the decision is due to be released, those to me  
20          are not submissions.

21                      MS SHI: I agree, the inquiry is not  
22          a problem.

23                      If you notice, I haven't objected to  
24          Ms Maillet calling and asking, as she mentioned in her  
25          e-mail, I haven't objected to that, what I object to is

1 her request that the decision be made and released as  
2 soon as possible, which then I would agree the cases  
3 are not the same, but it does make one thing of  
4 Tobiass, the scheduling.

5 THE CHAIRPERSON: Mm-hmm.

6 MS SHI: Those are my submissions.

7 THE CHAIRPERSON: Thank you, Ms Shi.

8 Okay. I think then at this point it  
9 would be appropriate to move to the issue of the  
10 implied undertaking.

11 Will you be calling any evidence on  
12 this issue?

13 MS SHI: No, I just have a couple of  
14 authorities.

15 Perhaps I could start by going to the  
16 direction itself, Madam Chair.

17 THE CHAIRPERSON: Just a minute,  
18 please.

19 SUBMISSIONS

20 MS SHI: And I have difficulty with  
21 the part that says -- the last paragraph:

22 "The notes for the speech given  
23 by Mr. Warman in Toronto are  
24 being released to counsel to Mr.  
25 Winnicki..." meaning myself,

1                   "...who has both a professional  
2                   and legal obligation to ensure  
3                   that there is no breach."

4                   And I'd like to underline the ensure  
5                   and no breach.

6                   Madam Chair, in the time that you  
7                   issued the direction, up to now, and unless and until  
8                   you change it, this direction has imposed on me an  
9                   obligation that goes beyond my own conduct.

10                  THE CHAIRPERSON: No, I have to stop  
11                  you for a minute because I am having trouble locating  
12                  that comment in that direction. I thought I had it,  
13                  but it was the previous direction.

14                  MS SHI: I'm sorry.

15                  THE CHAIRPERSON: So, continue. You  
16                  have difficulty because there is an obligation to  
17                  ensure...?

18                  MS SHI: Ensure there is no breach.  
19                  I can ensure there is no breach from me, and if I could  
20                  hand up excerpt from the Rules of Professional Conduct,  
21                  the Law Society of Upper Canada provides guidance in  
22                  the Rules of Professional Conduct about undertakings.

23                  It says in rule 4.01(7), commentary:

24                                 "Unless clearly qualified, the  
25                                 lawyer's undertaking is a

1                                   personal promise and  
2                                   responsibility."

3                                   And I would like to underline  
4                                   personal.

5                                   And then at the next page under rule  
6                                   6 --

7                                   MR. WARMAN: I'm sorry, Madam Chair,  
8                                   I don't seem to have that page.

9                                   MS SHI: Oh, I apologize.

10                                  And then at the next page under rule  
11                                  (8) under the sub-heading of undertaking, it says:

12   "A lawyer shall not give an  
13   undertaking that cannot be  
14   fulfilled and shall fulfil every  
15   undertaking given."

16                                  Well, Madam Chair, an undertaking to  
17                                  ensure there is no breach is something that I simply  
18                                  cannot give because I simply have no control over what  
19                                  any other people do.

20                                  And so my request is that the  
21                                  direction be revised and I have a couple of  
22                                  suggestions.

23                                  The first one is that we look at the  
24                                  deemed undertaking provision in the Ontario Rules of  
25                                  Practice for the Superior Court of Ontario.

1 Under rule 30.1.01(3) it stipulates  
2 the terms of deemed undertaking, and I submit if the  
3 Tribunal sees fit it could consider modifying it to  
4 suit our purpose, for example, to read:

5 "All parties and their  
6 counsel..."

7 should undertake,

8 "...not to use evidence...",

9 and we can fill in Mr. Warman's speech there,

10 "...for any purposes other than  
11 those of the proceeding in which  
12 the evidence was obtained."

13 That's one suggestion.

14 THE CHAIRPERSON: Why would you say  
15 should instead of "are deemed"?

16 MS SHI: Well, you could say "are  
17 deemed" too. I was trying to adopt it because deemed  
18 undertaking is a doctrine, the exact wording seems to  
19 be peculiar to the Superior Court Rules, but the idea  
20 is the same.

21 THE CHAIRPERSON: Okay.

22 MS SHI: The other possibility is in  
23 the authority cited by the Tribunal, the Canadian  
24 Museum case --

25 THE CHAIRPERSON: Yes.

1 MS SHI: -- I did not make copies  
2 because I assumed that the Tribunal has a copy. Do I  
3 assume wrongly?

4 THE CHAIRPERSON: No.

5 MS SHI: Thank you.

6 THE CHAIRPERSON: You assume rightly.

7 MS SHI: The order is in paragraph  
8 19.

9 THE CHAIRPERSON: You assume rightly,  
10 but then locating that is a little bit trickier. Give  
11 me just a minute, please.

12 MS SHI: Of course.

13 THE CHAIRPERSON: Do you have an  
14 extra -- you don't have an extra copy?

15 MS SHI: No.

16 MS MAILLET: What is it that you're  
17 looking for? We have an extra copy.

18 THE CHAIRPERSON: That would be  
19 helpful.

20 MS MAILLET: (document handed)

21 THE CHAIRPERSON: Thank you.

22 MS SHI: So, the order is under  
23 paragraph 19, I notice that my friend's is not printed  
24 out from Quick Law, but it has a sub-heading 3 order,  
25 which to almost the end of the case.

1                   And I would suggest that the Tribunal  
2 consider taking paragraph and some of the language and  
3 modify it to read:

4                   "All parties and counsel shall  
5 not use..." (As read)

6                   And then put in something about Mr.  
7 Warman's speech, or his speech could be referred to in  
8 the preamble and say:

9                   "All parties and counsel shall  
10 not use the document above for  
11 any purposes other than those of  
12 this proceedings." (As read)

13                   And, Madam Chair, just a final point.  
14 Unless and until you choose to modify this direction,  
15 strictly speaking, if anybody had disclosed this speech  
16 outside these proceedings and violated the implied  
17 undertaking rule, strictly speaking, I'm in breach  
18 because the direction has imposed on me the  
19 responsibility to ensure there is no breach.

20                   And so, if I may, I want to go back  
21 to the point, that is why it isn't sufficient, in my  
22 respectful submission, that you now very patiently  
23 listen to all my submissions about the direction, the  
24 time when I was entitled to have been heard from was  
25 before the direction was made.

1                   And, of course, I know that had such  
2 a breach occurred, I couldn't have been held  
3 responsible, realistically speaking, nonetheless, it is  
4 a breach of an undertaking that had been imposed on me  
5 and I would submit to you it is unfair and it will be  
6 something on my professional record that I don't feel I  
7 deserve.

8                   Those are my submissions.

9                   THE CHAIRPERSON: Thank you.

10                  Ms Maillet.

11                  SUBMISSIONS

12                  MS MAILLET: Yes.

13                  As stated in the PSAC case, Madam  
14 Chair, it's the Commission's request that all parties  
15 be then given a written undertaking, and that includes  
16 Mr. Winnicki, with respect to non-disclosure of not  
17 only a speech, but of all of the documents that are the  
18 subject of this litigation.

19                  THE CHAIRPERSON: Can I just take  
20 issue with that with you, Ms Maillet.

21                  MS MAILLET: Yes.

22                  THE CHAIRPERSON: My understanding  
23 from the reading of this case is that it, in fact,  
24 requires written undertakings from all those who are  
25 not parties, or all those who are perhaps technically

1 parties but not directly involved in the litigation of  
2 the case, and that was why the implied undertaking in  
3 itself was seen to be insufficient.

4 MS MAILLET: That they could not  
5 ensure the confidentiality.

6 THE CHAIRPERSON: Exactly, because  
7 there were non-parties involved or there were people  
8 who were involved who may have been parties but were  
9 only peripherally involved.

10 MS MAILLET: Yes, Mr. Warman just  
11 advised me that there were non-parties as well as  
12 non-counsel involved in that case.

13 THE CHAIRPERSON: Yes, and that was  
14 the difficulty that was being addressed by that  
15 decision.

16 MS MAILLET: Right.

17 Well, in this case, we're seeking  
18 that the parties, and not only counsel, but Mr.  
19 Winnicki as well, should you decide that Ms Shi does  
20 not have an undertaking to ensure that Mr. Winnicki  
21 comply with the undertaking, that then we obtain an  
22 undertaking from him in writing that he comply with  
23 that rule.

24 THE CHAIRPERSON: And why is it that  
25 you feel you need the undertaking in writing when that

1 is -- it is standard that it is an implied undertaking,  
2 it is not typical to be reduced to writing?

3 MS MAILLET: Well, my concern would  
4 be that we do have concerns that the undertaking would  
5 not be respected and that Mr. Winnicki be advised, in  
6 having it in writing, that the seriousness of breaching  
7 that undertaking be brought home to him.

8 We do have concerns because of the  
9 volume of communication that goes on on the internet,  
10 which is in fact the subject of this complaint, we  
11 would have a concern that that undertaking -- and  
12 that's no disrespect to Mr. Winnicki -- but I would  
13 feel more comfortable that the undertaking be in  
14 writing.

15 THE CHAIRPERSON: Thank you for your  
16 submissions.

17 MS MAILLET: Thank you.

18 SUBMISSIONS

19 MR. WARMAN: I would simply add that  
20 if Madam Chair decides not to require a written  
21 undertaking, that in modifying the directions that have  
22 been made explicit, that Mr. Winnicki, as a party,  
23 shall not violate the equivalent, you know, sort of  
24 implied undertaking provision.

25 Thank you.

1 THE CHAIRPERSON: Thank you.

2 Ms Shi.

3 REPLY

4 MS SHI: Madam Chair, the concerns  
5 that I heard raised, in my respectful submissions, are  
6 all fully addressed by a new direction and in the  
7 wording that I was suggesting, Mr. Winnicki is  
8 included, and so is Mr. Warman and so are all the  
9 counsel involved here.

10 So, I don't think there is anything  
11 to be gained and I haven't heard any particular reason  
12 why Mr. Winnicki should be treated differently than  
13 other respondents before the Tribunal and be required  
14 to sign any written undertaking.

15 Undertakings, by law, and as  
16 stipulated in the direction, is every bit just as  
17 enforceable, so I would submit that there is no  
18 necessity for it.

19 THE CHAIRPERSON: Mm-hmm.

20 MS SHI: Thank you.

21 THE CHAIRPERSON: Thank you.

22 All right. I think what is  
23 appropriate at this point is that -- and this would be  
24 no surprise to you -- that we recess for half an hour  
25 and I will consider the submissions that have been

1 given to me now at this point and return to you in half  
2 an hour, and we can proceed from there.

3 SUBMISSIONS

4 MS SHI: Just purely housekeeping,  
5 Madam Chair, my friend hasn't indicated as to having  
6 received the tape yesterday, I believe probably around  
7 5:00 or 6:00 yesterday evening, whether she's prepared  
8 to proceed today or is she going to want to continue  
9 with her examination-in-chief.

10 I'd like to hear about that.

11 SUBMISSIONS

12 MS MAILLET: Yes, we did receive the  
13 videotape. We did have difficulty finding a place to  
14 view it, but we did in the end find a place where we  
15 could view the videotape.

16 It will still be my submission that  
17 it's completely irrelevant to the proceedings. I don't  
18 believe we need to continue with Mr. Warman's direct  
19 examination, and if the videotape is entered into  
20 evidence through cross, I believe I will be able to  
21 address that --

22 THE CHAIRPERSON: In reply.

23 MS MAILLET: -- in reply.

24 THE CHAIRPERSON: Okay.

25 All right, thank you for that.

1 Mr. Warman.

2 MR. WARMAN: Sorry, I have no  
3 submissions.

4 THE CHAIRPERSON: Okay.

5 REPLY

6 MS SHI: Madam Chair, excuse me, I'd  
7 like to make a submission about my friend's position.

8 I'm offering her to deal with the  
9 tape in-chief now. If she doesn't, I'm not too sure  
10 why she should be entitled to deal with it in reply, if  
11 it is a matter that she could and should have raised it  
12 in-chief, it's not like she's not aware.

13 So, I put it out there. I haven't  
14 decided if I'm going to insist that she does it now,  
15 but my first reaction is that she knows it's there, she  
16 knows it's going to be addressed.

17 I mean, my understanding of reply is  
18 to deal with issues that she didn't have a chance to  
19 deal with in the in-chief, reasonably that she couldn't  
20 know it was going to be raised in cross. That doesn't  
21 apply here certainly.

22 THE CHAIRPERSON: Well, but it is  
23 also her prerogative to put in her case as she sees  
24 fit, to raise the issues as she sees fit, and if she  
25 determines that this not an issue that is relevant to

1 her case, I don't think that she needs to be forced to  
2 raise an issue that she feels is not relevant.

3 If that comes in through  
4 cross-examination then -- you know, at this point we  
5 are not sure -- if that comes in through  
6 cross-examination, then that will be a new issue  
7 effectively that she would be entitled to deal with on  
8 reply.

9 MS SHI: I'm going to reserve my  
10 right to object when the time comes. For now I'm going  
11 to sit down.

12 THE CHAIRPERSON: Okay.

13 MS SHI: Because I'm not sure that  
14 this appropriate, but we'll cross that bridge when we  
15 get there, if that's agreeable with the Tribunal.

16 What I'm saying is, I may well object  
17 if I hear in reply a questions that I feel is not  
18 appropriate. I'm not conceding that Ms Maillet is  
19 going to be able to not deal with it in in-chief, quite  
20 deliberately, and then choose to deal with it in reply.

21 THE CHAIRPERSON: Okay. Well, that  
22 certainly will be your right to object.

23 MS CHI-KUN SHI: Thank you.

24 FURTHER SUBMISSIONS

25 MS MAILLET: As well, I just wanted

1 to make the point that Mr. Warman is a separate party,  
2 he also will be given an opportunity to cross-examine  
3 whoever it is that the tape goes in through, if that is  
4 the decision of the Tribunal ultimately.

5 So, it isn't just myself that is able  
6 to address this issue, Mr. Warman also will be given an  
7 opportunity to do so.

8 THE CHAIRPERSON: Okay, thank you.

9 MR. WARMAN: Sorry, Madam Chair.

10 THE CHAIRPERSON: We will recess for  
11 half an hour.

12 MR. WARMAN: Madam Chair.

13 THE CHAIRPERSON: Oh, I'm sorry.

14 Mr. Warman.

15 MR. WARMAN: I'm behind Madam  
16 Hartung, so I'm easy to miss.

17 THE CHAIRPERSON: It is very hard. I  
18 wish the dias was raised so that I could see everyone.

19 FURTHER SUBMISSIONS

20 MR. WARMAN: Just in terms of Ms  
21 Shi's final submission, I would just note that the  
22 one-hour documentary was disclosed at five or six  
23 o'clock last night, so taking sort of extensive issue  
24 with whether Ms Maillet should deal with it  
25 immediately, given the lateness of the disclosure, is

1 perhaps expecting a little much, given the lateness of  
2 the hour in which the video was disclosed.

3 So, I think some latitude should be  
4 implied when you are dealing with that late disclosure,  
5 that if counsel needs to address certain things at the  
6 end of the day, then in the interest of proceeding with  
7 the Tribunal hearing as expeditiously as possible, that  
8 that should be taken into account.

9 THE CHAIRPERSON: I do note that Ms  
10 Shi did make the submission that the Commission and Mr.  
11 Warman were both free to re-open their case, if need  
12 be, so I do note that.

13 MR. WARMAN: Thank you.

14 THE CHAIRPERSON: Thank you.

15 Okay. We will recess for half an  
16 hour.

17 REGISTRY OFFICER: Order, please.

18 --- Upon recessing at 10:45 a.m.

19 --- Upon resuming at 11:50 a.m.

20 REGISTRY OFFICER: Order, please.

21 All rise. Please be seated.

22 DIRECTION

23 THE CHAIRPERSON: Again, my apologies  
24 for the delay and thank you for your patience.

25 I have considered the submissions of

1 all counsel on all of the issues that have been raised,  
2 and I will deal firstly with the issue raised by Ms Shi  
3 regarding the appearance of bias on the part of the  
4 Tribunal.

5 Ms Shi raised two issues in that  
6 regard, one concerning the directions that were  
7 provided October 13th and, two, concerning the issue of  
8 an e-mail communication by counsel for the Commission  
9 with the Registry Officer in which she requested that  
10 an order with respect to the amendment of the complaint  
11 be issued as soon as possible. This e-mail  
12 communication was not provided to the other parties.

13 As I indicated, coincidentally the  
14 Tribunal issued a ruling on the same day which had  
15 absolutely nothing to do with Ms Maillet's  
16 communication, it just happened that the ruling was  
17 released at the same time that the e-mail was sent.

18 Thus, in my view, the facts are  
19 significantly different from the situation in Tobiass  
20 where there was evidence that the communication of one  
21 of the parties did influence the Court's behaviour.

22 However, in order to restore any  
23 possible lost confidence that may have resulted from  
24 this coincidence, as well as from issuance of my  
25 direction of October 13th, I am prepared to issue a

1 direct along the lines of those suggested to me by Ms  
2 Shi, with one qualification, and that is this:

3 It is not within my power as the  
4 Member of the Tribunal hearing this case to bind other  
5 Members of the Tribunal to my directives, moreover, it  
6 is not necessary. I am the Member that is seized with  
7 this case and I will remain in control of it.

8 Therefore, I will issue the directive  
9 suggested to me by Ms Shi with the qualifying words  
10 that:

11 Effective immediately, the Member  
12 hearing this case and all staff of the Tribunal shall  
13 not communicate with the parties without providing all  
14 parties with contemporaneous disclosure of that  
15 communication within reason.

16 So, I would ask Ms Shi if she would  
17 provide me with a wording in keeping with the  
18 qualification that I have suggested for my review and  
19 endorsement.

20 MS SHI: Yes, Madam Chair, if you  
21 like, I have it typed out here.

22 THE CHAIRPERSON: That would be  
23 useful.

24 MS SHI: If I may hand it up. I  
25 don't have a copy to distribute to my friend.

1                   That is the wording that was read  
2                   into the record when I made my submissions.

3                   MS MAILLET: The only question I  
4                   would have, Madam Chair, and you will see it when you  
5                   read it, is how proof is to be determined.

6                   THE CHAIRPERSON: Okay.  
7                   My suggestion in providing me with  
8                   the wording was so that I can review it and determine  
9                   whether or not there are any qualifications.

10                  MS SHI: Madam Chair, I would be  
11                  content, if it is agreeable with my friend, to just  
12                  leave it as it is and proof really by common sense, no  
13                  affidavit of service or anything formal like that  
14                  should be required. That is not the intention. Just  
15                  something that by common sense and as determined by the  
16                  Tribunal -- well, or the Member to be adequate. I  
17                  would be totally satisfied with that.

18                  THE CHAIRPERSON: I will let you  
19                  speak in just a minute, Mr. Warman.

20                  My concern is, you know, when we are  
21                  talking about communication, you know, when we are  
22                  talking about telephone communication, there is  
23                  sometimes telephone communication between the parties  
24                  as to dates and --

25                  MS SHI: Yes.

1 THE CHAIRPERSON: And filing  
2 submissions and so on.

3 MS SHI: Well, Madam Chair, the way I  
4 draw a distinction, and that is my submission, that it  
5 will be a sensible one to do is, when parties call  
6 staff to discuss administrative issues, this rule --  
7 this direction need not apply, but if it is any  
8 materials that is going to go before the Member,  
9 then -- for example, when Ms Maillet called, the  
10 Registrar to find out when the order will be issued,  
11 that is not ex parte communication because that is not  
12 communication that goes to the body determining this  
13 matter, and that's where I draw the line.

14 In terms of the proof, what I had in  
15 mind was, for example, an e-mail should show that c.c.,  
16 letter should show the c.c.

17 I don't expect that the Tribunal  
18 staff should need to inquire any further. I trust if  
19 any party puts a c.c. on the letter, that they are  
20 going to do it, and that's really what I had in mind.

21 THE CHAIRPERSON: Mr. Warman.

22 MR. WARMAN: Just a warning to ensure  
23 that any further direction is clear that my disclosure  
24 to the respondent will continue to occur through the  
25 Tribunal.

1 THE CHAIRPERSON: Yes. I think that  
2 is a given in this case, and it is in all cases dealing  
3 with section 13 of the Act, that correspondence is  
4 directed through the Tribunal.

5 MS SHI: I have no problem with that.

6 THE CHAIRPERSON: Okay. So, that  
7 will be something that will be issued forthwith, as  
8 soon as reasonably possible, possibly at the lunch  
9 break.

10 Now, with respect to the implied  
11 undertaking rule, as Ms Shi stated, really practically  
12 speaking, there is little likelihood that Ms Shi would  
13 be held responsible for breaches of the undertaking by  
14 her client, however, I am prepared to modify my  
15 direction to read:

16 All parties, and their counsel, shall  
17 undertake not to use the notes of Mr. Warman's speech  
18 for purposes other than those of this proceeding.

19 But I want to underscore the  
20 seriousness of this. I am not going to direct Mr.  
21 Winnicki to sign an express undertaking because he is  
22 bound by the implied undertaking and that has every bit  
23 as much force as an express written undertaking.

24 I consider this an extremely  
25 important rule and one that all parties and their

1 counsel are bound by, and there are serious  
2 consequences for breach of such an undertaking, and I  
3 would like to underscore that at this time.

4 Now, another issue was raised with  
5 respect to the use of the videotape in reply evidence,  
6 and in reviewing the law on this matter, I have come to  
7 the conclusion that Mr. Warman and Ms Maillet should be  
8 put on notice that if they choose not to deal with the  
9 videotape in examination-in-chief, they may well be  
10 prevented from dealing with it in reply evidence.

11 The rule is that it is only when the  
12 respondent has raised a new matter which could not have  
13 been anticipated, or for which they had no opportunity  
14 to deal with in examination-in-chief will they be  
15 permitted to raise the issue in reply.

16 So, therefore, if they could  
17 reasonably have anticipated that it would come up in  
18 cross-examination, then they should deal with it in  
19 chief, or risk the likelihood of being precluded from  
20 doing that in reply.

21 So, I do want you to be put on notice  
22 that that is my reading of the law on this point.

23 MS SHI: Madam Chair, and I would  
24 like to, if I may, add that I know that the disclosure  
25 of the tape was late and so I am in Ms Maillet's hands

1 as to whether she would like to have some time or not  
2 in order that she can be adequately prepared if she  
3 chooses to conduct -- to re-open the  
4 examination-in-chief.

5 THE CHAIRPERSON: Thank you, I  
6 appreciate that.

7 Ms Maillet.

8 MS MAILLET: Yes. I know we have  
9 spent a lot of time this morning, but I am wondering if  
10 possibly we could have a lunch break, I could think  
11 about it and decide what I'd like to do and how I'd  
12 like to deal with it.

13 THE CHAIRPERSON: Yes, indeed.

14 Are there any other matters that need  
15 to be dealt with at this point?

16 MS SHI: If I may add too, I don't  
17 want to put it totally on Ms Maillet's head, the lunch  
18 hour will be very useful because Madam Registrar quite  
19 correctly pointed out to me a that 14-inch or 10-inch  
20 screen, which seems to be the video equipment that I  
21 brought, will not be very helpful, and she is in the  
22 process of trying to secure some equipment for my  
23 cross-examination, so to that extent, it will be useful  
24 to have a bit of time for Ms Hartung to do that as  
25 well.

1 THE CHAIRPERSON: Okay. Then in the  
2 circumstances, would an hour and a half be appropriate,  
3 we would re-convene at 1:30. Is that sufficient time  
4 for all?

5 MS MAILLET: That's sufficient for  
6 me. I probably really only need an hour, but if there  
7 is some technology that needs to be dealt with...

8 THE CHAIRPERSON: Let's say an hour  
9 and a half, just to be on the safe side.

10 If everybody is ready to go earlier,  
11 I'm not going to be going anywhere, so, you know, we  
12 can re-convene earlier if everyone is ready to go  
13 earlier.

14 Okay. If there are no other matters  
15 for this morning, then I will adjourn the case until  
16 1:30, unless otherwise notified.

17 REGISTRY OFFICER: Order, please.

18 --- Upon recessing at 12:00 p.m.

19 --- Upon resuming at 1:40 p.m.

20 REGISTRY OFFICER: Order, please.

21 All rise. Please be seated.

22 THE CHAIRPERSON: Good afternoon.

23 I mentioned at the outset, or at the  
24 conclusion of this morning's session that I would come  
25 back to you with a revised ruling -- not a revised

1 ruling but, rather, a direction regarding  
2 communication, so I will read that into the record now.

3 REVISED DIRECTION

4 1. The Member seized with this case,  
5 and all staff of the Tribunal, shall not communicate  
6 with any party without providing all other parties with  
7 notice of such communication contemporaneously within  
8 reason.

9 2. All parties shall not communicate  
10 with the Tribunal without providing advance or, at the  
11 latest, contemporaneous notice to all other parties  
12 through the Tribunal of such communication and its full  
13 contents.

14 The Tribunal shall require proof of  
15 such notice before accepting said communication.

16 In the absence of such proof, the  
17 Tribunal shall immediately provide full disclosure of  
18 such communication to the parties.

19 That is my direction in that regard.

20 Are there any other preliminary  
21 matters that counsel wish to raise before we begin this  
22 afternoon?

23 MS SHI: Madam Chair, the direction  
24 with regards to undertaking?

25 THE CHAIRPERSON: I think I provided

1           that this morning.

2                           MS SHI:  Oh, all right then.  Thank  
3           you.

4                           THE CHAIRPERSON:  It is on the  
5           record.

6                           MS SHI:  Yes.  I do have an issue  
7           that I had advised my friend and Mr. Warman that I  
8           wished to raise.

9                           It had been brought to my attention  
10          that over the lunch hour today my witness, Mr. Fromm,  
11          was followed around for a bit from this building.

12                           He went down to the food court and he  
13          was followed by several members of the Anti-Racist  
14          Action Committee members who were here witnessing the  
15          proceedings.

16                           He -- Mr. Fromm then came back up  
17          from the food court, and they followed him back up.  He  
18          went out to Bay Street and he was followed until he got  
19          to York Street and went into a restaurant, at which  
20          point the following stopped.

21                           And I spoke to my friend and I was  
22          advised that it seems there has been some tit-for-tat  
23          mischief that may have been going on among some of the  
24          spectators, and I bring this to the Tribunal's  
25          attention because of our position as to the nature of

1           ARA's organization and I want to make sure that my  
2           witness isn't being intimidated.

3                                 And after hearing the concern, I  
4           tried to think of a way to deal with this that would be  
5           expeditious and, hopefully, effective, and so by way of  
6           suggestion, perhaps I could ask Madam Chair that when  
7           the hearing resumes, to the extent we have spectators  
8           here, they be reminded and, if they are new spectators,  
9           that they be also reminded that anyone who's interested  
10          in seeing these proceedings proceed expeditiously ought  
11          to govern themselves within the confines of law and  
12          intimidation of witnesses is not allowed.

13                                I saw that there was already a  
14          significant Toronto Police presence at the premises.  
15          Hopefully, that will prevent any incident from  
16          occurring.

17                                I, for myself, am not too sure at  
18          this point exactly what measures would be effective  
19          and, therefore, I said that what I propose are by way  
20          of suggestion.

21                                My overwhelming concern is that we  
22          get through this and get through this expeditiously,  
23          which I expect that we should be able to do by Friday,  
24          but I am concerned that people who are not parties to  
25          these proceedings do not try to exert any influence on

1 anyone involved, including my one witness.

2 Thank you.

3 THE CHAIRPERSON: Thank you, Ms Shi.

4 Can hear from you, Ms Maillet.

5 MS MAILLET: Yes. Madam Chair, it  
6 was also brought to our attention that there may have  
7 been some intimidation tactics, albeit the information  
8 came to us, of course, from the other side of the  
9 fence, that there may have been -- you know, there's no  
10 surprise that there are two groups that have an  
11 interest in this hearing, there are the anti-racist  
12 groups and, of course, for lack of a better word, the  
13 more racist groups, and that intimidation was happening  
14 from members of the racist groups toward the  
15 anti-racist groups.

16 I fully agree with my friend that  
17 this is unacceptable behaviour and, you know, the  
18 police are here, the security are here. I don't have  
19 any huge concerns around this issue at this point.

20 If the Tribunal feels it's necessary  
21 to give a reminder to spectators, I'll leave that to  
22 you, but as far as the Commission is concerned, I don't  
23 have concerns. This is why I didn't bring it up prior  
24 to my friend bringing it up.

25 THE CHAIRPERSON: Thank you.

1                   Mr. Warman.

2                   MR. WARMAN: The only thing I can add  
3                   is that the information which has just been provided to  
4                   the Tribunal Chair is, of course, third-hand  
5                   information, it makes allegations that certain  
6                   individuals are members of a group which may or may not  
7                   be substantiable and it indicates that they engaged in  
8                   conduct that appears not to have been witnesses  
9                   first-hand, so just that information is coming to the  
10                  Tribunal Chair, and I would ask to ensure that it not  
11                  be taken into account as part of the record other than  
12                  to deal with this specific issue.

13                  Thank you.

14                  MS SHI: I would just add, it's true  
15                  that I was not a witness to any of the events that I  
16                  described, however, my witness, Mr. Fromm, was able to  
17                  identify who followed him because he had encountered  
18                  them during the demonstration outside the West  
19                  Detention Centre, I believe it was earlier this year,  
20                  and he identified these people to be members of the  
21                  Anti-Racist Action Committee, and I believe -- Mr.  
22                  Fromm also advised me that at least one of them had a  
23                  binder that says on it, something like ARA Prowling.

24                  I think that's what it says. That's  
25                  the information I got.

1                   THE CHAIRPERSON: All right. Let me  
2 be very clear that none of this will be considered to  
3 be on the record for the purposes of the merits of this  
4 hearing.

5                   This is specifically to deal with  
6 concerns regarding intimidation of witnesses.

7                   Clearly, it is extremely important in  
8 proceedings like this that all witnesses feel  
9 completely free to come forward and to speak the truth  
10 from their point of view without any fear of reprisal,  
11 or any fear whatsoever of intimidation or untoward  
12 behaviour. It is an extremely issue to intimidate a  
13 witness.

14                   We do have police presence at the  
15 hearing, and if a witness feels that they are being  
16 closely followed, if they feel they are being harassed,  
17 if they feel endangered, I would strongly encourage  
18 them to speak with the police that are present and to  
19 take up that issue with them.

20                   From my point of view, I would like  
21 to underscore that -- I repeat Ms Shi's suggestion --  
22 that if these proceedings are to move along  
23 expeditiously, we need there to be a minimum amount of  
24 extraneous interference and confusion and untoward  
25 behaviour.

1                   So, I am asking for the good will on  
2                   the part of everyone. It is a public proceeding, it is  
3                   open to the public, people are allowed to attend and to  
4                   hear what is happening here, but they are not allowed  
5                   to interfere with the proceedings, so it is very  
6                   important that people do govern themselves according to  
7                   the law and refrain from any unnecessary behaviour  
8                   toward one another.

9                   So, with that in mind, I will then  
10                  ask Ms Maillet, do you intend to re-open your case?

11                  MS MAILLET: Yes, we do, Madam Chair.

12                  I would like to recall Richard  
13                  Warman.

14                  THE CHAIRPERSON: I would ask Mr.  
15                  Warman to please take the stand.

16                  Mr. Warman, I would like to remind  
17                  you that you are under an affirmation to tell the truth  
18                  during these proceedings.

19                  You may proceed, Ms Maillet.

20                  MS MAILLET: Thank you. Just give me  
21                  a moment.

22                  RICHARD WARMAN, RESUMED:

23                  EXAMINATION

24                  MS MAILLET: Mr. Warman, there have  
25                  been allegations and/or suggestions by respondent

1 counsel of criminal activity or criminal behaviour on  
2 your part. I'm just going to deal with some of the  
3 issues that flow from that.

4 Sir, you've testified that you were  
5 actively involved in monitoring and countering the  
6 activities of White Supremacist and other hate groups,  
7 and that was in your examination-in-chief in August.

8 Could you please explain to this  
9 Tribunal what tools you've used to monitor and counter  
10 the activities of these groups?

11 MR. WARMAN: Certainly. There have  
12 been a wide variety of methods used.

13 One has been efforts around  
14 education, not just in learning more about these  
15 groups, their activities, their history myself, but  
16 also in terms of public education by speaking about  
17 these events at various forums, conferences, meetings,  
18 that kind of a thing.

19 MS MAILLET: If I may just stop you  
20 for a moment, my colleague, Ms Warsame, has just  
21 indicated to me that there should be an order excluding  
22 witnesses.

23 THE CHAIRPERSON: Okay. That is an  
24 order excluding Mr. Fromm, I take it?

25 MS MAILLET: I understand he will be

1 the only witness for the respondent.

2 THE CHAIRPERSON: Okay. It is the  
3 Tribunal's procedure to issue an order excluding  
4 witnesses.

5 Do you have any submissions that you  
6 wish to make?

7 MS SHI: No, I have no objection.

8 THE CHAIRPERSON: I would like to  
9 also remind the witness that under our rules,  
10 specifically rule 9.11, where an order is made  
11 excluding a witness from a hearing, no person shall  
12 communicate with a witness regarding evidence given  
13 during his or her absence, nor provide the witness  
14 access to the transcript of the inquiry until after the  
15 witness has been called and has finished giving his  
16 evidence.

17 So, I would then as Mr. Fromm,  
18 please, to exclude himself from the hearing.

19 MS SHI: Madam Chair, I wonder if I  
20 could ask Mr. Fromm that he could be excused for today,  
21 because it's almost two o'clock now. Depending on how  
22 long Ms Maillet is, I do not anticipate we are going to  
23 reach Mr. Fromm.

24 THE CHAIRPERSON: That makes sense.

25 MS SHI: Thank you.

1 MS MAILLET: Thank you, Madam Chair.  
2 Now, Mr. Warman, you were talking  
3 about one of the ways in which you monitor and counter  
4 the activities of these groups is through education,  
5 including public education.

6 MR. WARMAN: Yes. There have been a  
7 number of other facets to that activity, one of which  
8 has been activities under the Canadian Human Rights  
9 Act.

10 So, where there was a sense where  
11 groups or individuals had overstepped the bounds of the  
12 anti-hate messaging provisions in the Human Rights Act,  
13 that I would consider filing Federal Human Rights  
14 complaints against them.

15 There has been contact with the  
16 police where I had concerns that criminal activity had  
17 taken place on the part of these groups.

18 There has been, in addition to that,  
19 I guess monitoring of the websites and forums used by  
20 White Supremacists, neo-Nazis and hate groups.

21 That has included, where possible,  
22 where needed, signing up as -- under a pseudonym as a  
23 member of these groups and has, on occasion, included  
24 participation in those groups pretending to be a member  
25 of those groups, or pretending to be in some way

1 interested or supportive of those groups.

2 MS MAILLET: Okay. Are there any  
3 other organizations with respect to the websites that  
4 you have been involved with or contacted?

5 MR. WARMAN: I am the Canadian  
6 representative within the international network against  
7 Cyber Hate. That is an international network of  
8 individuals and groups concerned with the spread of  
9 hatred over the internet, and I have participated in it  
10 accordingly.

11 MS MAILLET: You talked about public  
12 speaking with respect to this issue. Could you outline  
13 some of the communities or organizations that you've  
14 spoken at.

15 MR. WARMAN: Certainly, and there's a  
16 wide variety. I've spoken at at least 15 to 20  
17 different groups -- to different groups and  
18 organizations.

19 Those have included groups such as  
20 the Centre De Rechercher et Action Pour Relations de  
21 le Race, which is known by its acronym of CRARR in  
22 Quebec.

23 I have spoken at at least two  
24 universities, to other general special lectures or  
25 classes that deal with issues surrounding cyber hate

1 and the legalities thereof.

2 I have spoken to a joint Holocaust  
3 remembrance meeting that was called by the Law Society  
4 of Upper Canada and the B'Nai Brith League for Human  
5 Rights.

6 I have spoken at a number of  
7 community conferences where the participants were made  
8 up largely of representatives of the NGO and the  
9 policing or other law enforcement communities.

10 And I have, of course, also spoken at  
11 a recent meeting of the Anti-Racist Action Group.

12 MS MAILLET: Have you ever spoken to  
13 any legal groups or --

14 MS SHI: Excuse me, I'm sorry, I did  
15 not hear the question.

16 MS MAILLET: Legal tech groups -- I  
17 mean, I don't want to lead the witness. So, any other  
18 groups you may have...

19 MR. WARMAN: Yes, I have. Some of  
20 the other groups that have organized conferences at  
21 which I've participated in as a speaker have been the  
22 First Nations Legal Association, the Quebec Native  
23 Women's Association. Those are the ones that come to  
24 mind off the top of my head.

25 Oh, sorry, I should mention as well

1           that there's an upcoming lecture that I'll be giving  
2           that is organized jointed by the University of Toronto,  
3           or at a conference that is organized jointly by the  
4           Superior Court of Justice and the University of  
5           Toronto.

6                           MS MAILLET: Do you know any other  
7           people that are speaking at that conference?

8                           MR. WARMAN: I do. Former Justices  
9           Cory and Iacobucci of the Supreme Court of Canada, the  
10          head of the Canadian Jewish Congress. There are a  
11          number of other substantive members of the Human Rights  
12          community, whether within the legal community or  
13          outside of it across Canada.

14                          Those are the ones that come to mind  
15          off the top of my head.

16                          MS MAILLET: Now, in this work that  
17          you do to monitor and counter the activities of hate  
18          groups, have you ever been recognized for your work in  
19          this area?

20                          MR. WARMAN: I have. I have received  
21          an honorary membership in NGO here in Canada for my  
22          work. I have received a plaque from the Law Society of  
23          Upper Canada and B'Nai Brith League for Human Rights in  
24          recognition of what was described as my tireless  
25          efforts to fight hate in Canada.

1 I in general have received general  
2 thanks for having participated in the conferences and  
3 other fora.

4 MS MAILLET: Thank you. Sir, have  
5 you ever been convicted of any criminal activity  
6 surrounding your work?

7 MR. WARMAN: No, I have not.

8 MS MAILLET: Have you ever been  
9 charged with any activity?

10 MR. WARMAN: No, I have not.

11 MS MAILLET: Sir, I'd like to bring  
12 your attention to what's known as your speaking notes  
13 to the ARA meeting.

14 It's found at tab 37 of the  
15 respondent's book of documents.

16 THE CHAIRPERSON: I'm sorry, tab...?

17 MS MAILLET: 37, and it's in effect a  
18 copy of the speech that the Tribunal sent to the  
19 parties.

20 THE CHAIRPERSON: I have not, of  
21 course, seen this before. The documents are not --

22 MS MAILLET: Oh, I see.

23 THE CHAIRPERSON: They have to be  
24 entered into evidence before I see them.

25 MS MAILLET: Do you have a copy?

1 THE CHAIRPERSON: I do have a copy.

2 MS MAILLET: Mr. Warman, I have a  
3 copy here.

4 THE CHAIRPERSON: What I have at this  
5 tab aren't numbered, but I have a fax transmittal  
6 message, I have a letter from the Canadian Human Rights  
7 Tribunal --

8 MS MAILLET: It starts at page 207.

9 THE CHAIRPERSON: Page 207. Thank  
10 you.

11 So, this would be a respondent's  
12 exhibit -- Commission exhibit now.

13 MS MAILLET: I'll have Mr. Warman  
14 identify it and then we'll mark it.

15 Mr. Warman, are you familiar with  
16 this document?

17 MR. WARMAN: Yes. These are the  
18 speaking notes from the presentation that I gave to the  
19 annual meeting of the group, Anti-Racist Action, in  
20 Toronto on the 6th of July, 2005.

21 MS MAILLET: If I could enter that  
22 document into evidence as HR-2.

23 REGISTRY OFFICER: Document entitled:  
24 Maximum Disruption: Stopping Neo-Nazis By (Almost) Any  
25 Means Necessary with pagination 207-223 at tab 37 of

1 the respondent's book of documents will be marked as  
2 the Commission Exhibit HR-2.

3 EXHIBIT NO. HR-2: Document  
4 entitled: Maximum Disruption:  
5 Stopping Neo-Nazis By (Almost)  
6 Any Means Necessary with  
7 pagination 207-223 at tab 37 of  
8 the respondent's book of  
9 documents.

10 MS MAILLET: Mr. Warman, could you  
11 please advise the Tribunal how you came about giving  
12 this speech to the Anti-Racist Group?

13 MR. WARMAN: Yes. I was invited by  
14 Anti-Racist Action in the same way that I've been  
15 invited to any number of conferences. They contacted  
16 me initially, asked if I would be willing to act as the  
17 keynote speaker to their annual international  
18 conference.

19 They indicated that it would be under  
20 the context of addressing what is known as a broad  
21 front approach to dealing with racism and hatred within  
22 society. The broad front approach is basically how --  
23 or, my understanding of it is how to involve all  
24 elements of the community within the attempt to oppose  
25 these actions by neo-Nazis and White Supremacists.

1                   It addresses how best, sort of  
2 cooperation between the wide myriad of groups that are  
3 opposed to such beliefs may best be achieved.

4                   And it was based on that  
5 understanding that I agreed to go and give this  
6 presentation.

7                   MS MAILLET: If you could just take a  
8 moment and take the Tribunal through the essence of  
9 your speech and turn to whatever page you feel is  
10 necessary and point out to the Tribunal what you find  
11 is important in your speech.

12                  MR. WARMAN: Certainly. I'm sorry, I  
13 will refer to the -- that one just has different page  
14 numbers.

15                   What is the actual --

16                  MS MAILLET: It's tab 37, starts at  
17 page 207.

18                  MR. WARMAN: Thank you.

19                   In essence, it starts out with a  
20 brief introduction of my background, in that I guess as  
21 an upholder of the idea of a broad front about the fact  
22 that I believe in working with community NGO groups,  
23 that I believe in working with the police, that I  
24 believe in working with the Human Rights Commission in  
25 order to oppose neo-Nazi activity within Canada and

1           abroad.

2                                 It then goes on to talk a little bit  
3           about the nature of that.

4                                 At page 2, at the top, it indicates  
5           that I'll be talking about three different cases and  
6           will be giving my analysis of how I feel that the broad  
7           front approach has played out in those cases, the first  
8           one being Mr. Winnicki's, the second being Holocaust  
9           denier Ernst Zundel, and the last one being a neo-Nazi  
10          group that appeared and disappeared in 2004 called  
11          Western Canada For Us.

12                                I then gave a brief outline of what  
13          was involved in the Canadian Human Rights Act and the  
14          provisions within it that deal with hate messaging.

15                                Page 3 essentially just goes through  
16          the Acts, provisions and what the potential remedies  
17          are and the roles both of the Commission and that the  
18          Tribunal is an independent administrative tribunal  
19          created by the CHRA with responsibility with hearing  
20          the complaints and rendering a decision on the merits  
21          of the complaint.

22                                MS MAILLET: Now, at page 3 I see  
23          there are in square brackets [remedy slide] and then  
24          [Droege pic]. Was that just part of a Power Point  
25          presentation, or...

1 MR. WARMAN: Yes, it was and, in  
2 fact, ultimately on the day in question they did not  
3 have Power Point facilities available, so there were no  
4 images included with the presentation.

5 MS MAILLET: Now, if you could  
6 discuss where in your speech and the content of it that  
7 relates to Mr. Winnicki.

8 MR. WARMAN: Yes, it begins at the  
9 bottom of page 3.

10 It outlines the same kinds of remarks  
11 that I've made in the media, indicating that I believe  
12 that the hate propoganda put out by Mr. Winnicki is  
13 some of the most evil, both in terms of its quantity  
14 and viciousness.

15 I then go on to indicate that based  
16 on what I've experienced over the past two, two and a  
17 half years of dealing with this case, that it  
18 represents perhaps the best of times and the worst of  
19 times.

20 I then go through a number of  
21 different examples of the material that I believe Mr.  
22 Winnicki has posted to the internet.

23 I talk about the fact that I have  
24 filed formal complaints with the London Police Hate  
25 Crimes Unit in this regard.

1                   That on August 18th of 2004 myself,  
2                   along with representatives of the London Association  
3                   for the Elimination of Hate, the Guelph and District  
4                   Multicultural Centre, the African-Canadian Legal Clinic  
5                   of Toronto, and the Simon Wiesenthal Centre of Canada  
6                   issued a press release calling upon the London Police  
7                   Service to investigate Mr. Winnicki's actions, and  
8                   calling also on Attorney General of Ontario Michael  
9                   Bryant to uphold his commitment that Ontario has a zero  
10                  tolerance policy for such actions.

11                  It talks about the response of Mr.  
12                  Winnicki on the Vanguard News forum to that press  
13                  release -- or to that open letter.

14                  It talks about -- sorry, at page 5 it  
15                  continues to talk about the retaliation that Mr.  
16                  Winnicki engaged in against me for having filed the  
17                  Human Rights complaint against him.

18                  It mentions that the fact that the  
19                  hearing is scheduled to begin before the Human Rights  
20                  Tribunal then in Toronto, just following the  
21                  presentation which was on the weekend before the Monday  
22                  of the hearing commencing.

23                  It talked about the criminal charges  
24                  that Mr. Winnicki faces as a result of incidents  
25                  that -a demonstration outside the jail in which

1 Holocaust denier Ernst Zundel was imprisoned on the  
2 12th of September, 2004.

3 I then continue with a couple of  
4 other citations of Mr. Winnicki's hate mongering,  
5 outlining the fact that despite all of this attention  
6 that Mr. Winnicki's actions continue unabated and that,  
7 in fact, extend not just to hatred of individuals on  
8 the basis of race, national or ethnic origin and  
9 religion, but I believe also extent to mysogeny.

10 And given this, at the top of page 6,  
11 it deals with the fact that in light of Mr. Winnicki's  
12 unabated hate mongering, all of the previous  
13 individuals who had signed the open letter were joined  
14 by the Canadian Anti-racism Education and Research  
15 Society, the Canadian Arab Federation, the South Asian  
16 Legal Clinic of Ontario, and the B'Nai Brith League for  
17 Human Rights, who then signed a joint open letter to  
18 the Mayor of London, the Solicitor-General of Ontario  
19 and the Attorney General of Ontario, calling on them to  
20 enforce the law and to fulfil their promises about  
21 Ontario's zero tolerance for hate.

22 It expresses my disappointment in the  
23 responses that we received from the Solicitor-General  
24 and the Attorney General of Ontario and that although  
25 we received a letter response from the Mayor of London,

1           that at least she indicated that she had, in fact, read  
2           the materials, or looked at some of the materials and  
3           that she expressed her horror at the hate that she saw  
4           within.

5                                 She then indicated that the London  
6           Chief of Police had assured us that they were dealing  
7           with the matter and expressed concern about the  
8           provincial government's cooperation in dealing with  
9           such matters.

10                                I then talk about my opinion that  
11           over the past two years it's been disappointing in  
12           terms of trying to get a broad front approach from the  
13           local police, the Municipality of London and the  
14           provincial government, but that it has, in fact, been  
15           hugely successful in bringing together a wide disparity  
16           of community groups who might normally be hesitant  
17           about working together to take a collective stand on  
18           this issue and in this case.

19                                I proceed to talk about the fact that  
20           it's been the best of times and it's been the worst of  
21           times for the broad front in this case, that I believe  
22           that the work of the different community groups, that  
23           the ties between these groups have improved, and that  
24           the Human Rights complaints; namely, the violation of  
25           sections 13.1 and 14.1 and the work of the Canadian

1 Human Rights Commission will finally pay off once we  
2 get a decision both on the injunction application from  
3 the Federal Court and finish the hearings before the  
4 Canadian Human Rights Tribunal.

5 I indicate that I couldn't understand  
6 how Mr. Winnicki hadn't been charged criminally, but  
7 that by applying sort of a broad front approach to the  
8 case that progress was possible even where progress was  
9 not forthcoming in other avenues.

10 And I indicate at the close that I'm  
11 hopeful that Mr. Winnicki -- essentially, that I didn't  
12 believe that given Mr. Winnicki's response to all the  
13 previous open letters, the media attention, the Human  
14 Rights complaint, the fact that the police had  
15 confirmed that they were conducting an ongoing  
16 investigation of him, that it didn't appear that he  
17 would stop until there were serious consequences for  
18 his actions, and that in light of the injunction  
19 hearing and the Human Rights Tribunal I said that I'm  
20 hopeful that that time is fast approaching.

21 MS MAILLET: And then --

22 MR. WARMAN: The presentation then  
23 continues, dealing with the case of Ernst Zundel who  
24 was also found to have violated section 13 of the  
25 Canadian Human Rights Act.

1                   It talks a bit about the National  
2 Security Certificate proceedings that were against him,  
3 that Justice Blais of the Federal Court upheld the  
4 Certificate and found that Mr. Zundel had been involved  
5 with the movement that supports -- or, that propagates  
6 violent messages of hate and advocated the destruction  
7 of governments and multicultural societies.

8                   Then reviews a little bit more about  
9 the Security Certificate proceedings, talks about the  
10 involvement of Anti-Racist Action in the early -- well,  
11 throughout, sort of the past two decades, I guess, in  
12 attempting to oppose Mr. Zundel's activities both here  
13 in Toronto and his dispersal internationally of his  
14 hate propaganda and Holocaust denial material, and that  
15 I had in fact could remember attending some of the  
16 rallies that took place in opposition to Mr. Zundel's  
17 activities back in the early 1990s.

18                   I talk about the broad front approach  
19 and how that was somewhat more successful in dealing  
20 with the Zundel case and ultimately it was community  
21 action in the form of the Human Rights complaints filed  
22 by Sabina Citron and the Toronto Mayor's Committee on  
23 Race Relations that I feel were ultimately his undoing  
24 and resulted in his first fleeing from Canada to evade  
25 the results of the Human Rights Tribunal decision and,

1           subsequently, in his return from the United States and  
2           ultimate removal back to Germany where he's now  
3           awaiting trial.

4                           I, in the next paragraph, indicate  
5           that beyond the demonstrations that were conducted by  
6           Anti-Racist Action, there were more serious incidents  
7           such as the times when Zundel received mail bombs and  
8           had his bunker severely damaged by an arsonist.

9                           I stated:

10                                   "Please note that these last  
11                                   two examples are the kinds of  
12                                   things that I believe go beyond  
13                                   the "(almost) any means  
14                                   necessary"."

15                                   Which was the sub-title of my  
16           presentation.

17                           I then state:

18                                   "Indiscriminate violence that  
19                                   places the safety of other  
20                                   individuals at risk is not only  
21                                   suspect on a moral basis, but  
22                                   also puts in jeopardy broader  
23                                   public support that is essential  
24                                   to maintaining isolation of the  
25                                   neo-Nazis."

1 I then move into my third example  
2 during the discourse which was Western Canada For Us.

3 It talks a little bit about the  
4 origins of the group, their activities, some of their  
5 more prominent failings.

6 The involvement of young  
7 anti-racists, members of both Anti-Racist Action out  
8 west and other young anti-racists, whether they were  
9 involved in specific Human Rights groups or just as  
10 individuals in opposing the efforts of this group to  
11 organize.

12 Page 11 talks about some of the  
13 in-fighting that occurred and some of their efforts to  
14 arrange a meeting in Red Deer in February of 2004.

15 Page 12 continues with discussion of  
16 the actions of the groups to oppose this group from  
17 organizing.

18 Talks about the fact that they had  
19 organized demonstrations in support of Holocaust denier  
20 Ernst Zundel in coordination with similar protests  
21 organized by Paul Fromm in Toronto outside the jail  
22 where Mr. Zundel was being held before being deported  
23 back to Germany.

24 The bottom of page 12 starts --  
25 begins to talk about the work of the media and what I

1 believe their role was in the undoing of this neo-Nazi  
2 group.

3 Page 13 just continues with sort of  
4 more of the foibles and failings of the group.

5 Page 14 at the top talks about one of  
6 the two leaders of the group named Glen Bahr, about the  
7 fact that on a website he had posted on the 10th of  
8 March that gays and lesbians as well as the mentally  
9 disabled should be killed.

10 He posted, I believe, that no matter  
11 how or why you are a homosexual, your life should be  
12 terminated, they should be terminated along with  
13 retards and any other degenerates that nature would do  
14 away with in the wild.

15 Talks about a variety of the  
16 electronic books that were available through their  
17 website and the fact that I believed that Mr. Bahr's  
18 increasingly hateful postings and the presence of these  
19 electronic books ultimately resulted in his arrest and  
20 charging under section 3.19 with the willful promotion  
21 of hatred -- sorry, 3.19 of the Criminal Code, the  
22 willful promotion of hatred.

23 Then I talk about the fact that  
24 community groups, the media and the police all played a  
25 role in ensuring the downfall of this group.

1                   Page 16 continues with that and  
2 closes with my quotation of Martin Luther King, Jr.,  
3 indicating that:

4                   "Morality cannot be legislated  
5 but behaviour can be regulated.  
6 Judicial decrees may not change  
7 the heart, but they can restrain  
8 the heartless."

9                   And, ultimately, that in pursuit of  
10 the work, the Human Rights work that I'm engaged in,  
11 that I believe that it's imperative for all  
12 individuals, not merely those who are targeted, to  
13 stand together in solidarity because history has shown  
14 us repeatedly what the results are if that is not done.

15                  MS MAILLET: Thank you. Now, going  
16 back to your discussion of Mr. Winnicki at this  
17 conference, did you have any reason whatsoever to  
18 believe that your speech would incite any type of  
19 violence against Mr. Winnicki?

20                  MS SHI: Objection. Leading.

21                  THE CHAIRPERSON: Can you rephrase  
22 that question.

23                  MS MAILLET: Yes. Did you have any  
24 concerns whatsoever after giving your speech?

25                  MR. WARMAN: I did not. And, in

1 fact, the speech was essentially -- I can't say for  
2 certain, but it was almost carbon copy to the portion  
3 of the speech that I had given to the Law Society of  
4 Upper Canada and B'Nai Brith, to various other  
5 community groups, to at least one of the universities  
6 where I spoke.

7 No, it was essentially cut and paste.

8 MS MAILLET: And you indicated, and I  
9 just want to make sure, that it ended up that you could  
10 not provide images during your speech because there was  
11 no Power Point presentation.

12 Was there a photo of Mr. Winnicki  
13 which you provided at any time to the group that you  
14 attended the conference for?

15 MR. WARMAN: No.

16 MS MAILLET: Are you a member of this  
17 group, what's known as the ARA, Anti-Racist Action?

18 MR. WARMAN: No, I'm not.

19 MS MAILLET: Have you ever been a  
20 member of that group?

21 MR. WARMAN: No, I have not.

22 MS MAILLET: Those are all my  
23 questions, Mr. Warman, unless as a party you wish to  
24 provide to your own evidence.

25 Those are all my questions, Madam

1 Chair.

2 THE CHAIRPERSON: Thank you.

3 Mr. Warman, do you...

4 MR. WARMAN: No, I have other  
5 submissions.

6 THE CHAIRPERSON: Thank you.

7 Stay where you are.

8 Ms Shi, you may proceed.

9 MS SHI: Yes, thank you.

10 Madam Chair, if I may, during my  
11 cross-examination I'd like to refer to the messages  
12 that Mr. Warman complained of as subject messages.  
13 Would that be agreeable?

14 THE CHAIRPERSON: As subject  
15 messages -- so, you are saying for the defined term --

16 MS SHI: Just the defined term,  
17 exactly.

18 THE CHAIRPERSON: -- you are going to  
19 use the subject messages. And those are documents of  
20 the Human Rights Commission and the complainant?

21 MS SHI: The messages that Mr. Warman  
22 complained of.

23 Thank you.

24 EXAMINATION

25 MS SHI: Good afternoon.

1 MR. WARMAN: Good afternoon.

2 MS SHI: Mr. Warman, is it true that  
3 you're not Jewish?

4 MR. WARMAN: Yes.

5 MS SHI: Are you a target group of  
6 Mr. Winnicki's subject messages?

7 MR. WARMAN: Yes, I believe I am.

8 MS SHI: Which group?

9 THE CHAIRPERSON: I didn't understand  
10 that question, I'm sorry.

11 MS SHI: Whether Mr. Warman is a  
12 member of any of the target groups that the subject  
13 message is supposed to be directed at.

14 And your answer is yes?

15 MR. WARMAN: I believe that in Mr.  
16 Winnicki's belief I am, or that he had suspicions that  
17 I was.

18 MS SHI: It's not Mr. Winnicki's  
19 suspicion or belief that I'm interested in, it's  
20 whether you are.

21 MR. WARMAN: I object to the question  
22 on the grounds of relevance. If I was, what would the  
23 difference be?

24 MS SHI: I could advise the Tribunal  
25 as to the relevance, if Madam Chair would like to hear

1 it.

2 THE CHAIRPERSON: Mm-hmm.

3 MS SHI: The only request I would  
4 have is for the witness to leave the room. I know he  
5 is a party, however, often in cross-examination, if I  
6 have to lay out the background as to why I ask a  
7 question there is a danger that I will tip off the  
8 witness and thereby compromise the answers and my  
9 ability to fully cross-examine and test the witness.

10 So, I would ask the witness to leave  
11 the room while I make my submission as to why I asked  
12 the question.

13 MS MAILLET: If I could just make one  
14 comment. I'm not sure where Ms Shi is going with this,  
15 but it isn't only belonging to the particular  
16 prohibitive ground that is in issue, it's also  
17 perceptions of belonging to a particular group, so...

18 THE CHAIRPERSON: Yes. I am  
19 certainly aware of the law but, on this issue, I am  
20 going to rule that the information is relevant and I am  
21 going to allow you to proceed with the question.

22 MS SHI: Thank you.

23 MR. WARMAN: I'm not a member of any  
24 of the grounds that are listed within the complaint.

25 MS SHI: Thank you. But it is your

1 position that you are a victim of Mr. Winnicki's -- a  
2 victim of the subject messages; correct?

3 MR. WARMAN: I believe that pursuant  
4 to the case law, yes, I am.

5 MS SHI: Do you feel that you are?

6 MR. WARMAN: Yes, I do.

7 MS SHI: In what way?

8 MR. WARMAN: In the way that I  
9 elucidated within my testimony in examination-in-chief,  
10 and further in the fact that I believe that Mr.  
11 Winnicki targeted for discriminatory hate messaging on  
12 the basis that he was under the mistaken impression  
13 that I was Jewish, and I think that the evidence  
14 supports that.

15 MS SHI: Now, let's back up. I think  
16 you made a few points there.

17 You said that you were a victim in  
18 the sense that you had testified in the in-chief. I  
19 have the transcript here. Could you assist me by  
20 pointing out where you testified as to that, please.

21 MR. WARMAN: I'm afraid I don't have  
22 the transcript in front of me, but I would indicate  
23 that in the portions where Mr. Winnicki names me  
24 personally and attacks me on his supposition that I am  
25 a member of the Jewish faith and in the portions where

1 he retaliates against me for having filed a Human  
2 Rights complaint against him, and -- I'm sorry, I  
3 can't -- without the transcript in front of me, I can't  
4 go through it and be more specific.

5 MS SHI: There is a copy of the  
6 transcript that's available to you. Would you like a  
7 minute?

8 THE CHAIRPERSON: What portion of  
9 the --

10 MS SHI: August 8th. Mr. Warman  
11 would now --

12 THE CHAIRPERSON: It would be useful  
13 if you could point out the specific references in the  
14 transcripts.

15 MS SHI: Actually, it's Mr. Warman  
16 who said that he had testified to that in the in-chief  
17 and I'm really not too sure where in the  
18 examination-in-chief where he's referring to, so I'm  
19 not able to provide any guidance.

20 Madam Registrar, I believe it's the  
21 August 8th transcript. Would it perhaps be the bigger  
22 one --

23 REGISTRY OFFICER: Perhaps.

24 MS SHI: -- where the in-chief was  
25 conducted.

1 THE CHAIRPERSON: Mm-hmm.

2 MR. WARMAN: In fact, if I may, it  
3 may be more expeditious for me to go through the book  
4 of documents of the Canadian Human Rights Commission  
5 and simply indicate the VNN postings that name me  
6 personally.

7 MS SHI: It's not the naming person,  
8 I don't have a problem with that, you were very  
9 specific in your answer to the extent that he named you  
10 personally, you felt that you were victimized by him;  
11 correct?

12 MR. WARMAN: Yes.

13 MS SHI: And what about to the extent  
14 that he did not name you personally?

15 MR. WARMAN: Well --

16 MS SHI: Were you victimized by those  
17 messages?

18 MR. WARMAN: Certainly to the extent  
19 that Mr. Winnicki was attacking me on the basis that he  
20 presumed that I was Jewish, I took the messages that he  
21 was applying to the broader Jewish community, that his  
22 intention would be to apply those to me as well.

23 MS SHI: However, you are not  
24 really -- you are not Jewish yourself, as you said.

25 MR. WARMAN: I'm not Jewish.

1 MS SHI: Right. And, therefore,  
2 you're not a target group in the subject message?

3 MR. WARMAN: I believe that it was  
4 Mr. Winnicki's intention to target me as what he  
5 presumed to be a member of the Jewish faith and that,  
6 thus, by extension that would include his attacks on  
7 the Jews -- or on the Jewish community as a whole.

8 MS SHI: And so if I understand your  
9 answer correctly, then anyone who's been wrongfully  
10 identified as a Jewish person would also be a victim of  
11 those comments; correct?

12 MR. WARMAN: If Mr. Winnicki attacked  
13 them in his hate message postings, yes.

14 MS SHI: Well, let's go back a bit.  
15 I believe you said that you were victimized in roughly  
16 two ways: one, to the extent his messages name you;  
17 and, two, to the extent that his messages attack Jewish  
18 people because of his mistaken belief that you are  
19 Jewish; correct?

20 MR. WARMAN: As far as I know, yes.

21 MS SHI: Right. And, therefore,  
22 under the second heading of victimization, if I may --

23 MR. WARMAN: Sorry, it was on the  
24 basis that he had retaliated against me as well for  
25 having filed the Human Rights complaint.

1 MS SHI: Right, where you said that  
2 he named you and mistook you to be Jewish, right.

3 And it is under the ground where you  
4 said that because he mistook you to be Jewish,  
5 therefore, his attack on Jewish people is an attack on  
6 you; correct?

7 MR. WARMAN: I believe that his  
8 intention was to target the Jewish community and that  
9 he perceived me to be a part of that community.

10 MS SHI: Well, I think we know that  
11 section 13's focus is not on intent, it's on the  
12 effect. So, I'd like to talk to you about the effect  
13 of, you said, having been misidentified as a Jewish  
14 person, you are therefore victimized by the anti-Jewish  
15 message; correct?

16 MR. WARMAN: I believe so, yes.

17 MS SHI: And, therefore, anyone who  
18 gets identified as a Jewish person would be similarly  
19 victimized; correct?

20 MR. WARMAN: To the -- yes.

21 MS SHI: And --

22 MR. WARMAN: And members of the  
23 affected Jewish community, of course.

24 MS SHI: Yes. I'm particularly  
25 interested in that, and you have claimed \$60,000 for

1 pain and suffering; correct?

2 MR. WARMAN: That is incorrect.

3 MS SHI: It's not correct?

4 MR. WARMAN: No, it's not correct.

5 MS SHI: What have you claimed for  
6 pain and suffering?

7 MR. WARMAN: These are outlined in  
8 the statement of particulars.

9 MS SHI: Well, let's take a look at  
10 it.

11 Is it the May 18th, 2005 statement  
12 that you're referring to?

13 MR. WARMAN: Yeah, whatever the  
14 latest version of the statement of particulars was.

15 MS SHI: Well, could you take a look  
16 at tab 3.

17 THE CHAIRPERSON: Can you wait just a  
18 minute until we have all found that, please.

19 MS SHI: Yes. Tab 3 of the  
20 respondent's documents and advise if that is the  
21 statement of particulars that you are referring to?

22 MR. WARMAN: If that's the latest  
23 version then, yes. I can't remember off the top of my  
24 head whether it is.

25 THE CHAIRPERSON: Let's make sure

1           that it is.

2                           MS SHI:    Could you review it, please,  
3           and tell me if this is the latest version, as far as  
4           you know?

5                           MR. WARMAN:  I don't recall any  
6           subsequent ones.

7                           MS SHI:    Perhaps my friend can assist  
8           if there was another one.

9                           MS MAILLET:  I don't believe there  
10          was.  I know that there was some confusion around reply  
11          because there was several amended statements of  
12          particulars from the respondent, but I believe this was  
13          the only statement of particulars that we had.

14                          THE CHAIRPERSON:  I would like to get  
15          this clear.

16                          MS MAILLET:  I know that we amended  
17          the complaint thereafter, and that amendment is found  
18          at tab 5, but I don't believe that there was a  
19          further --

20                          MS SHI:    But that's the complainant.  
21          I believe the witness said that it was referring to the  
22          amended statement of particulars.

23                          MS MAILLET:  No, that was the  
24          amendment of that complaint by Mr. Warman.

25                          MS SHI:    Right.  As far as I can see

1           there is only one joint letter of particulars of the  
2           Commission and the complainant dated May 18th, 2005 and  
3           because the witness seems to have some hesitation, I  
4           just want to clarify that we are on the same page.

5                       MS MAILLET: We have the actual  
6           copies, if you will just give us one moment we will see  
7           if --

8                       THE CHAIRPERSON: The Tribunal has a  
9           reply dated September 8th, 2005 which doesn't appear to  
10          address the issue of ground...

11                      MS MAILLET: I have no reason to  
12          believe that this is not the only statement of  
13          particulars.

14                      MS SHI: All right, thank you.

15                      All right. Then, Mr. Warman, could I  
16          take you, please, to tab 3 and perhaps the Registrar  
17          could mark this as an exhibit.

18                      First of all, Mr. Warman, is this the  
19          statement of particulars for yourself and the  
20          Commission?

21                      MR. WARMAN: Yes, I believe it was a  
22          joint -- yes, it is a joint statement of particulars.

23                      REGISTRY OFFICER: The cover letter  
24          to Ms Hartung and Mr. Winnicki from Monette Maillet  
25          which includes the joint letter of particulars of the

1 Commission and the complainant found at tab 3 of the  
2 respondent's book of documents, will be marked as  
3 respondent Exhibit R-1.

4 EXHIBIT NO. R-1: Cover letter  
5 to Ms Hartung and Mr. Winnicki  
6 from Monette Maillet which  
7 includes the joint letter of  
8 particulars of the Commission  
9 and the complainant found at tab  
10 3 of the respondent's book of  
11 documents.

12 MS SHI: Thank you.

13 Now, can you please show me where the  
14 compensation that you're seeking is outlined?

15 MR. WARMAN: On page 12 under the  
16 heading, for breach of section 13, the second point, it  
17 indicates that we are seeking:

18 "An Order that the Respondent  
19 compensate the Complainant  
20 pursuant to section 54(1)(b) of  
21 the Canadian Human Rights Act."

22 MS SHI: Yes.

23 MR. WARMAN: That is on the basis of  
24 having been specifically identified in the  
25 communication that constituted discriminatory practice.

1 MS SHI: Right.

2 MR. WARMAN: Under the heading for  
3 breach of section 14.1, which is the retaliation  
4 complaint.

5 MS SHI: Yes.

6 MR. WARMAN: Under No. 5 there is a  
7 request for:

8 "An Order that the Respondent  
9 compensate the Complainant  
10 pursuant to section 53(2)(e) of  
11 the Act."

12 That is, that the person compensate  
13 the victim by an amount not exceeding \$20,000 for any  
14 pain and suffering that the victim experienced as a  
15 result of the discriminatory practice.

16 And that at No. 6 there is a further  
17 request for:

18 "An Order that the Respondent  
19 compensate the Complainant  
20 pursuant to section 53(3) of the  
21 Act."

22 And that is that in addition to any  
23 order under the pain and suffering clause, the Member  
24 or Panel may order the person to pay such compensation  
25 not exceeding \$20,000 to the victim, as the Member or

1 Panel may determine, if the Member or Panel finds that  
2 the person is engaging or has engaged in a  
3 discriminatory practice willfully or recklessly.

4 MS SHI: You have not specified any  
5 amount there. Do I take it that you are claiming the  
6 maximum amount; are you?

7 MR. WARMAN: I believe that was  
8 specified in previous indication -- in previous  
9 correspondence to the Tribunal.

10 Again, I can't remember off the top  
11 of my head, but I have a sense that it was.

12 MS SHI: All right. Then so, for  
13 section 13, 54(1)(b), \$20,000; correct?

14 MR. WARMAN: Yes, it's 20, 20 and 20.

15 MS SHI: 20, 20 -- 53(3), 20?

16 MR. WARMAN: Yes.

17 MS SHI: So, you're asking for  
18 \$60,000 altogether.

19 MR. WARMAN: That's correct.

20 MS SHI: Right. That's what I said.

21 MR. WARMAN: No, in fact, what you  
22 asked me was, was I seeking \$60,000 in damages for pain  
23 and suffering, and that's incorrect.

24 MS SHI: I see. It wasn't the amount  
25 but it was the itemization that you're clarifying for

1 us now?

2 MR. WARMAN: It was the  
3 characterization of the amounts.

4 MS SHI: I see. Thank you.

5 You've got the Human Rights Act out,  
6 could you turn it up, please.

7 So, what you're seeking for pain and  
8 suffering is under 14.1 is for \$20,000 under 53(2)(e);  
9 correct?

10 MR. WARMAN: Yes.

11 MS SHI: And then if I could ask you  
12 to turn to your complaint, please, the amended one. I  
13 believe it is under tab --

14 MR. WARMAN: Tabs 1 and 2 of the --

15 MS SHI: Well, I'm sorry, I think  
16 those complaints are not the amended ones. I'd like to  
17 have a look at the amended complaint, please, and  
18 that's tab 5.

19 You have added to your complaint the  
20 grounds of, in addition to religion, which was the  
21 original ground of your complaint about being  
22 misidentified and then discriminated against as a  
23 Jewish person, you've added race, national or ethnic  
24 origin and colour; correct?

25 MR. WARMAN: Yes.

1 MS SHI: Yes. And those do not apply  
2 to your misidentification as Jewish; does it?

3 MR. WARMAN: This was an amended  
4 complaint pursuant to the desire to amend the complaint  
5 from being just based on hate messaging, targeting  
6 Jewish persons, to including the subject categories of  
7 race, national or ethnic origin and colour.

8 MS SHI: Right.

9 MR. WARMAN: Those are the totality  
10 of my complaint.

11 MS SHI: Because, in your view, Mr.  
12 Winnicki's messages also target identifiable groups on  
13 the basis of race, national or ethnic origin and  
14 colour; correct?

15 MR. WARMAN: Absolutely.

16 MS SHI: On top of the Jewish faith;  
17 correct?

18 MR. WARMAN: Yes. Among others, yes.

19 MS SHI: Are you a member of an  
20 identifiable race?

21 MR. WARMAN: Yes.

22 MS SHI: Which one?

23 MR. WARMAN: Caucasian.

24 MS SHI: And you believe that his  
25 messages is likely to expose Caucasians to hatred?

1 MR. WARMAN: I believe if you look  
2 underneath it, it states:

3 "That would likely expose  
4 persons of the Jewish faith,  
5 black race and other  
6 non-Caucasian races and persons  
7 of African origin." (As read)

8 I believe those are the specifiers to  
9 the earlier headings.

10 MS SHI: And so to the extent Mr.  
11 Winnicki's -- or, I should say, the subject messages is  
12 likely to expose to hatred these identifiable groups,  
13 they do not target you; do they?

14 MR. WARMAN: No, Mr. Winnicki never  
15 attempted to identify me as any of those subject  
16 headings.

17 MS SHI: And so you're not victimized  
18 to that extent by that part of the messages?

19 MR. WARMAN: No, I don't believe so.

20 MS SHI: And, therefore, would you  
21 agree with me that you have no basis for asking for any  
22 compensation based on the subject messages that target  
23 these groups?

24 MS MAILLET: Madam Chair, I believe  
25 those are legal arguments that could be made at the end

1 about the basis for his remedies and damages.

2 MS SHI: Well, Mr. Warman has claimed  
3 for pain and suffering and for compensation. I'm  
4 entitled to probe on what basis he's claiming them.

5 MS MAILLET: Pain and suffering was  
6 on the basis of retaliation.

7 THE CHAIRPERSON: Though I think that  
8 she is entitled to examine what the basis is for his  
9 claim, the factual basis. So, I will allow you to  
10 proceed.

11 MS SHI: Thank you.

12 So, Mr. Warman, am I correct to say  
13 that you are, therefore, not entitled to ask for  
14 compensation --

15 THE CHAIRPERSON: No, I think that  
16 you need not put it in the legal terms. I think you  
17 need to put it in factual terms.

18 MS SHI: Right. I'm sorry, you're  
19 quite right.

20 And, therefore, would you agree with  
21 me that you incur no damages with respect to Mr.  
22 Winnicki's messages that target identifiable groups;  
23 namely, the black race and other non-Caucasian races  
24 and persons of African origin; correct?

25 MR. WARMAN: Yes.

1 MS SHI: And you're not victimized by  
2 those subject messages?

3 MR. WARMAN: Only in the sense of  
4 being a member of the broader community and the attack,  
5 I believe, diminishes the broader community as a whole.

6 MS SHI: But you would hardly say  
7 that you incur any pain and suffering?

8 MR. WARMAN: Only to the extent I've  
9 just discussed.

10 MS SHI: Are you claiming though that  
11 you did incur pain and suffering on those grounds?

12 MR. WARMAN: As a member of the  
13 broader community. I'm not saying that it's related to  
14 any request for damages for pain and suffering, but I  
15 do believe that the messages diminish the community as  
16 a whole.

17 MS SHI: And it causes you pain and  
18 suffering; does it?

19 MR. WARMAN: Hate messaging, yes.

20 MS SHI: Even the ones that do not  
21 target you?

22 MR. WARMAN: I believe, as I outlined  
23 in discussing the speech that I gave, that I believe  
24 very much in the solidarity principle and that people  
25 need to stand in solidarity with any of the target

1 groups that are attacked and that hate messaging and  
2 hate propaganda in general target the community as a  
3 whole and diminish it.

4 To that extent, I believe that every  
5 member of the community is diminished and has, or could  
6 theoretically suffer pain and suffering.

7 MS SHI: Theoretically, or did you?  
8 Did you suffer pain and suffering by reason of those  
9 subject messages?

10 MR. WARMAN: I believe yes, to the  
11 extent that every member of the community does.

12 MS SHI: But you're not claiming for  
13 those damages?

14 MR. WARMAN: No, I'm not.

15 MS SHI: Perhaps we could mark this  
16 amended complaint as an exhibit, please.

17 REGISTRY OFFICER: Amended complaint  
18 #20031843 of Richard Warman against Tomasz Winnicki,  
19 two pages, found at tab 5 of the respondent's book of  
20 exhibits, Volume I, will be marked as respondent's  
21 Exhibit R-2.

22 EXHIBIT NO. R-2: Amended  
23 complaint #20031843 of Richard  
24 Warman against Tomasz Winnicki,  
25 two pages, found at tab 5 of the

1                                   respondent's book of exhibits,  
2                                   Volume I.

3                                   THE CHAIRPERSON: Is it R-2 or R-3?

4                                   REGISTRY OFFICER: R-3.

5                                   MS SHI: Could you please turn to tab  
6                                   28, please.

7                                   MR. WARMAN: Sorry, Madam Chair. If  
8                                   there's no objection, could I just obtain my book of  
9                                   documents that I may mark the documents and have the  
10                                  record of them.

11                                  THE CHAIRPERSON: Yes, of course.

12                                  MR. WARMAN: I'm sorry, so tab No. 5  
13                                  was...?

14                                  THE CHAIRPERSON: R-3.

15                                  MR. WARMAN: R-3. Thank you.

16                                  MS SHI: You've got tab 28 in front  
17                                  of you?

18                                  MR. WARMAN: No, I'm sorry.

19                                  Yes, I do.

20                                  MS SHI: Do you recognize what this  
21                                  is?

22                                  MR. WARMAN: It is an article from  
23                                  the London Free Press, on-line version, I believe.

24                                  MS SHI: On-line version of an  
25                                  article; correct?

1 MR. WARMAN: Yes.

2 MS SHI: Could we please mark that as  
3 an exhibit, please?

4 REGISTRY OFFICER: The two-page  
5 article, London Free Press Special Reports --

6 THE CHAIRPERSON: Can I just  
7 intervene for a moment before we have that marked. I  
8 think we need to know the date.

9 MS SHI: It's on it, Madam Chair, if  
10 we look around here. 2005/03/26.

11 THE CHAIRPERSON: Okay, I'm sorry, I  
12 missed that.

13 MS SHI: It's very small.

14 REGISTRY OFFICER: The two-page  
15 document, London Free Press News Special Reports dated  
16 March 26, 2005, two pages, by Randy Richmond at tab 28  
17 of the respondent's book of documents, Volume I, will  
18 be marked as R-4.

19 EXHIBIT NO. R-3: Two-page  
20 document, London Free Press News  
21 Special Reports dated March 26,  
22 2005, by Randy Richmond at tab  
23 28 of the respondent's book of  
24 documents, Volume I.

25 MS SHI: Thank you.

1                   Mr. Warman, are you familiar with  
2           this article?

3                   MR. WARMAN:  Yes, I've seen it  
4           before.

5                   MS SHI:  In fact, your name shows up  
6           in it.  Were you interviewed by this reporter, Mr.  
7           Randy Richmond, before he wrote this article?

8                   MR. WARMAN:  Yes, I was.

9                   MS SHI:  And you will find in them  
10          some quotes, I believe, from the subject messages;  
11          correct?  It's on the first page.

12                  MR. WARMAN:  Some are.

13                  MS SHI:  Yes.  And did you provide  
14          Mr. Richmond with the quotes:

15                                "Go home muds!"

16                                "Jews, we're coming for you."

17                                "The Jewish Problem:  we must  
18                                expel them or we must massacre  
19                                them!"

20                                Did you provide these quotes to Mr.  
21          Richmond?

22                   MR. WARMAN:  If I did, I would have  
23          provided him with copies of the actual postings, I  
24          wouldn't have provided him with those quotes because I  
25          don't believe some of them are accurate, and certainly

1 some of them are not related to Mr. Winnicki.

2 MS SHI: Is that your way of telling  
3 me that you did not provide him with this, perhaps I  
4 could say more broadly, information?

5 Did he get it from somewhere else, as  
6 far as you know, or are you trying to say that he may  
7 have gotten the documents from you and lifted some  
8 information?

9 MR. WARMAN: Oh no, no, no. I have  
10 no qualm that I provided material to Mr. Richmond in  
11 terms of copies of the complaints and copies of some of  
12 the materials.

13 THE CHAIRPERSON: Can you stop just a  
14 minute. Ms Shi, while he's answering --

15 MS SHI: I'm sorry. Absolutely. I  
16 thought he was done. I apologize.

17 THE CHAIRPERSON: I want to hear that  
18 answer again.

19 MR. WARMAN: Yes. I just said that I  
20 had no qualms that I provided Mr. Richmond with  
21 materials on a number of occasions with respect to a  
22 large number of my -- well, sorry, I shouldn't say  
23 large number -- the Human Rights complaints that I  
24 filed that related to individuals from the London  
25 vicinity.

1 THE CHAIRPERSON: Did you give him  
2 copies of the complaints themselves?

3 MR. WARMAN: Yes.

4 MS SHI: And did you provide him with  
5 the information from which he got these quotes?

6 MR. WARMAN: I'm sorry, you'd have to  
7 ask Mr. Richmond that. I don't know where he got them  
8 from.

9 MS SHI: Thank you. Were you aware  
10 that Mr. Richmond intended to publish these messages in  
11 the London Free Press?

12 MR. WARMAN: No, I was not. I knew  
13 that he was intending to write a series on hate group  
14 activity in and around the London -- the City of  
15 London.

16 MS SHI: But you did give him  
17 materials containing a lot of the subject messages; did  
18 you?

19 MR. WARMAN: I provided him with  
20 copies of the materials that had been submitted  
21 pursuant to the complaints, sure.

22 MS SHI: Right. So, they contained  
23 the subject messages?

24 MR. WARMAN: Yes, yeah.

25 MS SHI: Yes.

1 MR. WARMAN: No, you know, I don't  
2 want to say that I provided him with all of them, but  
3 at the very least with examples of the kinds of  
4 materials that were submitted pursuant to the  
5 complaints.

6 MS SHI: If not all of them, a  
7 substantial amount of them. Would that be fair to say?

8 MR. WARMAN: I don't want to say that  
9 for certain. I would have provided at least examples  
10 of the materials, and I think certainly in this case it  
11 would have been far too voluminous -- in fact, I know  
12 that I didn't provide him with all of it because there  
13 was so much of it.

14 MS SHI: Did you ask him not to  
15 publish these messages in the London Free Press, the  
16 messages that you find so offensive?

17 MR. WARMAN: No, I don't think that's  
18 my role to dictate to a journalist how he's going to  
19 write a story.

20 And the second thing is, is I believe  
21 that in order to confront hate propaganda it's  
22 necessary and, in fact, essential for the community to  
23 have an understanding of just how vicious some of these  
24 messages are so that they have a comprehension of what  
25 the problem is and the extent of it and the depth of

1 the hatred that some people hold within our communities  
2 and that that's absolutely necessary pursuant to  
3 education.

4 MS SHI: So, I gather you don't  
5 object to Mr. Richmond publishing the subject messages,  
6 to the extent that he did?

7 MR. WARMAN: To the extent that's  
8 included in educational articles with the goal of  
9 eradicating hate propaganda and its dissemination  
10 within the community, no; in the same way that I  
11 wouldn't object to its presence in an academic article  
12 or similar documents.

13 MS SHI: I thought intention wasn't  
14 the focus for section 13. I know that you are very  
15 familiar with that. So, I would like to keep the focus  
16 on that.

17 Whether Mr. Richmond has good  
18 intentions or not, I think you agree with me it's  
19 irrelevant under section 13; correct? Is that your  
20 understanding?

21 MR. WARMAN: I don't believe that the  
22 posting of these documents on the -- sorry, I will say  
23 that intent is not relevant under section 13, sure.

24 MS SHI: Thank you. Would you agree  
25 with me that Mr. Richmond's article has given these

1 messages more publicity?

2 MR. WARMAN: More than their original  
3 audience, yes.

4 MS SHI: Right. And his article has  
5 made the message available to more people.

6 MR. WARMAN: Certainly.

7 MS SHI: And his article has,  
8 therefore, further disseminated these messages.

9 MR. WARMAN: I think that's clear.

10 MS SHI: Now, if I can take you to --

11 MR. WARMAN: Sorry, I should be  
12 specific, that the articles have disseminated the  
13 messages that are concerned within them and not in the  
14 sense that the subject matter of this complaint.

15 So, just to be specific, that they  
16 more broadly disseminate the quotes that are contained  
17 within them and not every piece of material that is  
18 found within the subject matter of the complaints that  
19 we're here hearing.

20 MS SHI: Right. I am speaking about  
21 the quotes that we find in Mr. Richmond's article.  
22 Thank you.

23 Now, let's go to tab 35, please.

24 I'm sorry, I want to look at a  
25 different tab. One moment, please.

1                                 Sorry, I had the wrong tab myself  
2       even though I think I told you the correct number, tab  
3       59.

4                                 Do you recognize this?

5                                 THE CHAIRPERSON:   Just a minute.

6       Tab...?

7                                 MS SHI:    59.

8                                 THE CHAIRPERSON:   So, that is in your  
9       red book?

10                                MS SHI:    Yes, Volume II.

11                                Do you recognize this?

12                                MR. WARMAN:   It appears to be a  
13       downloading of a London Free Press article from their  
14       website.

15                                MS SHI:    Yes.    Could we mark that as  
16       an exhibit, please.

17                                REGISTRY OFFICER:   Three-page London  
18       Free Press article dated Tuesday, October 11, 2005 by  
19       Randy Richmond found at tab 59 of the respondent's book  
20       of documents, Volume II, will be marked as respondent  
21       Exhibit R-5.

22                                EXHIBIT NO. R-4:   Three-page  
23       London Free Press article dated  
24       October 6, 2005 by Randy  
25       Richmond found at tab 59 of the

1                               respondent's book of documents,  
2                               Volume II.

3                               MS SHI: Thank you.

4                               This article quotes you, Mr. Warman;  
5                               isn't that right?

6                               MR. WARMAN: It does.

7                               MS SHI: And in the second page it  
8                               also reproduces some of the subject messages:

9                               "We're coming for you, you  
10                              Jew...and your servile dogs  
11                              too," warned one message"

12                             "Blacks are "dangerous animals,  
13                             cockroaches and don't belong in  
14                             white civilization." said  
15                             another"

16                             "Get out of our civilization  
17                             you...muds," he told Indians."

18                             Do you see that?

19                             MR. WARMAN: I do.

20                             MS SHI: Do you know it was -- did  
21                             you provide any information to Mr. Richmond with  
22                             regards to the injunction?

23                             MR. WARMAN: Certainly that we were  
24                             applying for it, yes.

25                             MS SHI: Did you provide him with any

1 documents that contain some of the subject messages?

2 MR. WARMAN: He, in fact, already had  
3 those pursuant to the examples that I had sent him for  
4 the broader article.

5 It's my belief that he may just have  
6 taken these excerpts from those.

7 MS SHI: Thank you.

8 MR. WARMAN: No, I didn't provide him  
9 with further documents, that I can remember.

10 MS SHI: And he published this after  
11 the Court forbid any more of such messages to be posted  
12 by Mr. Winnicki; correct?

13 MR. WARMAN: Yes, although I would  
14 note that the quotes aren't exact. They are, in fact,  
15 excerpts in a couple of them of the postings.

16 For instance, you'll note that:

17 "We're coming for you, you  
18 Jew..."

19 I believe that there was an obscenity  
20 there, and I believe also that he's eliminated an  
21 obscenity under:

22 "Get out of our civilization  
23 you...muds,"

24 MS SHI: But you would agree with me  
25 that messages like that was part of the subject of the

1 injunction?

2 MR. WARMAN: Certainly.

3 MS SHI: Right. And would you agree  
4 with me that this article by Mr. Richmond has further  
5 disseminated these messages?

6 MR. WARMAN: Yes.

7 MS SHI: And his article has given  
8 these messages more publicity?

9 MR. WARMAN: I think any time you  
10 re-publish something it does give it some further  
11 dissemination.

12 MS SHI: You were concerned that  
13 these messages as presented in the Vanguard News  
14 Network, or if I may from now refer to it as VNN, you  
15 were concerned that these messages as presented in VNN  
16 are likely to expose identifiable groups to hatred and  
17 contempt; correct?

18 MR. WARMAN: Yes, I am.

19 MS SHI: Were you concerned that  
20 these messages as presented in Mr. Richmond's article  
21 are likely to expose an identifiable group to hatred  
22 and contempt?

23 MR. WARMAN: Not in the same way, no.

24 MS SHI: In a different way?

25 MR. WARMAN: No, in the sense that I

1 don't believe that including excerpts -- small excerpts  
2 from subject material, when dealing with hate  
3 propaganda, to explain to the reader or the listener  
4 what the context of the material is and how vicious or  
5 diabolic it is, has the effect of promoting hatred  
6 against the identifiable groups.

7 In fact, I believe it is further to  
8 educational work that serves to alleviate this by  
9 educating the community and encouraging community  
10 action against this type of activity.

11 MS SHI: But the intent of educating  
12 isn't relevant, so do I take it that you are trying to  
13 say that it doesn't have such effect because Mr.  
14 Richmond's article condemns these messages?

15 MR. WARMAN: I believe the message  
16 that has come across strongly in all of Mr. Richmond's  
17 articles has been that these are extremist, racist,  
18 anti-Semitic postings and that, no, I don't believe  
19 that that would have the same effect as Mr. Winnicki's  
20 posting thereof.

21 MS SHI: Are you agreeing with me  
22 that it does not have the same effect as the postings  
23 on VNN because Mr. Richmond's articles condemn these  
24 messages?

25 MR. WARMAN: Yes, this and virtually

1 all of his other articles as well. I believe that's  
2 the tone of them.

3 MS SHI: Would you agree with me that  
4 it would have been more conducive to reducing  
5 discrimination if Mr. Richmond had written the article  
6 without repeating these alleged discriminatory comments  
7 in the London Free Press?

8 MR. WARMAN: That was a decision for  
9 Mr. Richmond and I wouldn't see to dictate it to him,  
10 but as I've already said, I don't believe that  
11 repeating small excerpts from hate propaganda furthers  
12 hatred and, in fact, I think it serves to eliminate it  
13 in the long run.

14 MS SHI: So, you actually think that  
15 by him repeating it in his article, it helps in  
16 reducing in discrimination?

17 MR. WARMAN: I believe it serves an  
18 educational function that serves to sensitize the  
19 community to the depth of the viciousness of the hatred  
20 that is put out by hate mongers and that, to that  
21 extent, that educational role, it brings the community  
22 to a broader awareness of the problem and encourages  
23 the community to take action against it.

24 MS SHI: Are you, again, speaking  
25 about the intent of the article?

1                   MR. WARMAN: I believe I would say it  
2 goes more towards context, but if you want to call it  
3 intent, I would say that it goes to both.

4                   MS SHI: All right. What about for  
5 the people who have read the messages on the VNN, if  
6 they read them again in Mr. Richmond's article, will it  
7 not re-inforce the alleged hatred in these messages?

8                   MR. WARMAN: No. Well, I'm sorry, I  
9 can't get inside the head of a hate monger. I wouldn't  
10 purport to understand exactly what it is that they  
11 thing.

12                   From my own personal perspective,  
13 given the broader context that these limited excerpts  
14 are put in, that the fact that there is now a legal  
15 action and that, in fact, the community treats it so  
16 seriously that the Federal Court of Canada has seen fit  
17 to issue an injunction to bring it to a halt, I believe  
18 that it would play an education role and it would, in  
19 fact, may serve to educate other hate mongers who had  
20 first read it on VNN, or non-hate mongers who had first  
21 read it on VNN to the fact that the community rejects  
22 this kind of behaviour.

23                   MS SHI: So, are you actually saying  
24 people who may have read the VNN messages may, upon  
25 reading Mr. Richmond's article, take a dimmer view of

1           these messages?

2                           MR. WARMAN:  It's possible.

3                           MS SHI:  That Mr. Richmond repeating  
4           these messages in his article has the effect of  
5           neutralizing the exposure of hatred that these messages  
6           had when it was posted on CNN -- VNN, I'm sorry.

7                           MR. WARMAN:  No, I don't believe  
8           that's the case.  I don't believe it neutralizes in any  
9           way the hate of the original posting.

10                           What I believe it does is take them,  
11           put them in a context within the broader societal  
12           response to hate propaganda and show that this kind of  
13           conduct is unacceptable.

14                           MS SHI:  But my question is, is  
15           effect on people upon reading Mr. Richmond's article.

16                           I think what I hear you say is,  
17           people who haven't read -- well, let's go down the  
18           list.

19                           For people who haven't read it on VNN  
20           and are reading it for the first time, it is your  
21           assertion, I take it, that it would have -- that it is  
22           not likely to create an environment of hate with  
23           respect to these people; am I correct, because I assume  
24           otherwise you're not --

25                           THE CHAIRPERSON:  Just a second.  I

1 think you need to let the witness finish his answer.

2 MS MAILLET: These are hypothetical  
3 questions that she's asking Mr. Warman to guess what  
4 effect it may have on a reader and I don't believe that  
5 he's in a position to answer that type of hypothetical  
6 question of what effect a person would have if they  
7 view (a) the website in question; and, (b) the media  
8 articles.

9 THE CHAIRPERSON: I am having a  
10 little bit of difficulty with your line of questioning  
11 on this, Ms Shi.

12 MS SHI: Madam Chair, I think what I  
13 was trying to say to Mr. Warman was to see if I could  
14 clarify as to the point of my question.

15 Mr. Warman himself is an advocate  
16 against the subject messages, no question about it, he  
17 is the complainant, and yet he has collaborated and  
18 assisted Mr. Randy Richmond again and again in  
19 preparing these articles that give these supposedly  
20 offensive messages more publicity and, therefore, I'm  
21 entitled -- and that's what I wanted to ask Mr. Warman,  
22 as to how these two facts reconcile with each other and  
23 that is what I am...

24 THE CHAIRPERSON: I hear that, but I  
25 think it is very difficult for him to put himself in

1 the position -- I think you are asking him to answer  
2 hypothetical questions about what certain categories  
3 might think and I think that is beyond his realm of  
4 knowledge.

5 MS SHI: Well, I think though that  
6 Mr. Warman must have been content that -- at this  
7 point, again, perhaps I raise the issue that, again, I  
8 am really not very comfortable arguing these  
9 cross-examination issues in front of the witness. If  
10 we're going to get into it...

11 THE CHAIRPERSON: If you want to ask  
12 him what his intent was in working -- the question you  
13 are putting now seems permissible.

14 MS SHI: No, but I am interested in  
15 particular as to whether it is, because -- perhaps let  
16 me try again.

17 THE CHAIRPERSON: Mm-hmm.

18 MS SHI: See if this works for you,  
19 Mr. Warman.

20 As I said, you collaborated with Mr.  
21 Richmond in more than one article where these -- some  
22 of the subject messages have been reproduced and you  
23 said yourself, sometimes not even accurately, and in  
24 one case after that injunction had been imposed against  
25 any further publication of such messages.

1                   Given that, I am putting to you the  
2                   reason why you do that is because you do not believe  
3                   the repeating of these messages and further  
4                   dissemination by Mr. Richmond has any harmful effect.

5                   Is that correct?

6                   MR. WARMAN: No, I wouldn't agree  
7                   with that.

8                   What I would respond is that, if you  
9                   will, it is a vaccine and that in order to treat a  
10                  broader illness you may at some point inject a small  
11                  amount of the illness pursuant to the idea that you  
12                  will thereby cancel out or annul the greater evil, and  
13                  that the use of extremely limited -- these are three,  
14                  four, five lines in a large article that are extracted  
15                  from hundreds of postings by Mr. Winnicki.

16                  If Mr. Richmond posted the full  
17                  extent of Mr. Winnicki's postings on the London Free  
18                  Press website, I would say that that is extremely  
19                  problematic.

20                  But in the context -- putting it in  
21                  context of the article that he's writing, I don't  
22                  believe it has the effect of promoting hatred of these  
23                  groups, or that any such effect would be limited by the  
24                  fact that it's put in this proper context of society's  
25                  overall rejection of this kind of conduct.

1 MS SHI: In fact, I think you said  
2 more, you said it's a vaccine, so it helps to prevent  
3 it?

4 MR. WARMAN: No, not in the sense of  
5 any repetition. I'm saying when it's put in its  
6 context of the broader social rejection of this, that  
7 there is a legal consequence to these actions, that  
8 it's treated so seriously, that Parliament has  
9 established laws specifically to deal with this -- not  
10 just under the Canadian Human Rights Act -- but also  
11 the Criminal Code, that the Human Rights Commission has  
12 referred this to a hearing, that hearings are being  
13 conducted before the Human Rights Tribunal, that the  
14 Commission made the decision to seek an injunction,  
15 just an extraordinary remedy, so rarely used within the  
16 legal community, and that that injunction was then  
17 granted by the Federal Court, that is the context in  
18 which I believe it can have the opportunity to act as a  
19 vaccine.

20 MS SHI: The way Mr. Randy Richmond  
21 published it --

22 MR. WARMAN: The context, the broader  
23 context.

24 MS SHI: -- has the effect of in fact  
25 preventing a section 13 breach.

1 MR. WARMAN: Well, prevent --  
2 hopefully demonstrating to the community that this kind  
3 of conduct is unacceptable and, thus, encouraging other  
4 people not to behave in that kind of conduct.

5 MS SHI: Well, does it prevent, or  
6 does it make it more likely that a section 13 breach  
7 will occur?

8 MS MAILLET: Madam Chair, I'm going  
9 to object to this line of question.

10 Mr. Warman is not an expert that can  
11 predict the effect of media articles on whether or  
12 not -- media articles with respect to hate mongering on  
13 the community and whether or not that would, in fact,  
14 prevent further breaches of section 13 or not.

15 I'm not sure these are proper  
16 questions to be put to Mr. Warman. He's not qualified  
17 to answer that question.

18 MS SHI: Well, Mr. Warman himself has  
19 said vaccine and I'm trying to follow up what he meant  
20 by that.

21 I thought I knew what he meant, but  
22 clearly he had qualification to the answer.

23 THE CHAIRPERSON: It seems like you  
24 have taken this line of questioning about as far as it  
25 can go.

1                   You have asked him, you know, what he  
2 perceives the effect of the article to be, the article  
3 and the use of the quotes within the context of the  
4 article.

5                   You have asked him whether he thinks  
6 that is preventative or curative and he has answered  
7 that.

8                   What more do you need?

9                   MS SHI: Well, I think the next  
10 question that I would like to ask is, whether he thinks  
11 that it's a vaccine even with respect to people who may  
12 have read the postings on the VNN already and are  
13 likely to buy the messages.

14                  THE CHAIRPERSON: But there again, Ms  
15 Shi --

16                  MS SHI: Does that even apply? I  
17 mean, I just want to clarify --

18                  THE CHAIRPERSON: -- you are into a  
19 line of conjecture where I don't know that that is the  
20 kind of thing you can ask a witness when he has no --  
21 you know, that is not within his knowledge.

22                  MS SHI: Well, Madam Chair, I think  
23 given the strong abhorrence that Mr. Warman has  
24 expressed against these messages, I would have thought  
25 that unless he knew with great confidence that Mr.

1 Randy Richmond repeating these messages are not going  
2 to incur any harm, that he isn't going to do it, that  
3 he would have no hesitation answering these questions.

4 In fact --

5 THE CHAIRPERSON: He has given those  
6 answers to you and I think that is where -- I think you  
7 have gotten your answer.

8 MS SHI: All right. So, you are  
9 really not sure what the effect of these republications  
10 are; am I right?

11 MR. WARMAN: Meaning, can I predict  
12 anything with one hundred per cent certainty? No.

13 MS SHI: No, you're not sure. All  
14 right.

15 MR. WARMAN: I would suggest that  
16 that was your answer, not mine.

17 MS SHI: Do you know? I thought you  
18 said that without -- I'm trying to understand. My  
19 question is whether it's true that you just don't know  
20 what the effect is when Mr. Richmond republished these  
21 messages, and I'm putting it to you that the answer is  
22 that you don't know; correct?

23 MR. WARMAN: I do not know with one  
24 hundred per cent certainty as to what the effect would  
25 be.

1 MS SHI: Well, I was going to leave  
2 it, but given your answer I'm going to have to ask you.  
3 If not a hundred per cent, then how many per cent?

4 MR. WARMAN: I'll object. It's  
5 following down the same line of questioning, it's  
6 asking me to predict, you know, whether it's "x" or  
7 "y", whether it's an orange or an apple, how many per  
8 cent, 10 per cent, 100 per cent, 90 per cent.

9 It's not something within my realm of  
10 possibility. I said I can't know for sure, and I think  
11 if you want to remove the question of percentage, then  
12 I'll substitute that.

13 But, otherwise, I think it's  
14 repeating the same question, it's asking me to engage  
15 in conjecture that I just have no real way of knowing.

16 THE CHAIRPERSON: Can you reword your  
17 question in some way that is not asking for that kind  
18 of mathematical certainty?

19 MS SHI: I wasn't going to ask for  
20 it, any quantifier, it was Mr. Warman that started  
21 quantifying and I would be content if Mr. Warman would  
22 accept my characterization as that you don't know.

23 MR. WARMAN: But I don't accept that  
24 and that is why I qualified it.

25 MS SHI: You don't accept that. Do

1           you accept you're not sure?

2                           MR. WARMAN:  Am I absolutely certain,  
3           no.

4                           MS SHI:  See, Madam Chair, there lies  
5           the difficulty.  I'm trying to not over quantify it,  
6           but then Mr. Warman is not content either.

7                           THE CHAIRPERSON:  But I am struggling  
8           to understand why you need certainty, where you are  
9           going with this?

10                          MS SHI:  Well, I think that it is  
11           actually pretty germane to this case, as I said, the  
12           credibility of the Crown's only witness on the impact  
13           of these messages and, therefore, I believe that Mr.  
14           Warman, if he has to answer fairly specifically and if  
15           he isn't able to simply say he isn't able to.

16                          I'm not saying he has to know that  
17           it's 48 or 59 or 22, but I think I'm entitled to answer  
18           where it's at.  He's not a hundred per cent sure, but  
19           he rejects the characterization that he doesn't know.

20                          He also rejects the characterization  
21           that he's not sure, and he says he's not -- I'm sorry,  
22           I can't even remember the last one.

23                          THE CHAIRPERSON:  So, what you have  
24           got is an equivocal answer.

25                          MS SHI:  An equivocal answer, yes.

1 Is that fair, equivocal as to its effect?

2 MR. WARMAN: Yes.

3 MS SHI: That's fair. Thank you.

4 Thank you, Madam Chair.

5 Perhaps this is a good time for a  
6 break.

7 THE CHAIRPERSON: I was just about to  
8 suggest that we perhaps could all use a little break  
9 now.

10 MS SHI: Absolutely.

11 THE CHAIRPERSON: I think we will  
12 take 20 minutes and we will resume again at -- my watch  
13 is a little bit past, so we will say twenty to four.  
14 Okay.

15 REGISTRY OFFICER: Order, please.

16 --- Upon recessing at 3:20 p.m.

17 --- Upon resuming at 3:45 p.m.

18 REGISTRY OFFICER: Order, please.

19 All rise. Please be seated.

20 THE CHAIRPERSON: Ms Shi, before you  
21 get started --

22 MS SHI: Yes.

23 THE CHAIRPERSON: -- I think that Ms  
24 Hartung has a clarification that she would like to  
25 address.

1 MS SHI: Yes.

2 REGISTRY OFFICER: I would like to  
3 just -- an error, renumbering of the respondent  
4 exhibits, starting with the exhibit that has been  
5 marked as respondent Exhibit R-3, will now be  
6 respondent Exhibit R-2, which is at tab 5, amended  
7 complaint.

8 THE CHAIRPERSON: Go slowly, please,  
9 so we can just get this. So, tab 5?

10 REGISTRY OFFICER: Five.

11 THE CHAIRPERSON: Is now...?

12 REGISTRY OFFICER: R-2.

13 THE CHAIRPERSON: R-2.

14 REGISTRY OFFICER: The amended  
15 complaint #20031843 of Richard Warman against Tomasz  
16 Winnicki.

17 The document previously marked as R-4  
18 at tab 28, will now be marked as R-3, that is a London  
19 Free Press News Special Report, Hate in the Forest City  
20 by Randy Richmond dated March 26, 2005.

21 And the document at tab 59, currently  
22 marked as Exhibit R-5, will be now remarked as  
23 respondent Exhibit R-4, that is a London Free Press  
24 article, Court rules Winnicki can't post hate on Net,  
25 dated October 6, 2005.

1 THE CHAIRPERSON: Thank you, Ms  
2 Hartung.

3 MS SHI: Mr. Warman, could you please  
4 turn to tab 32, please, of the respondent's documents.

5 MR. WARMAN: I'm sorry, tab...?

6 MS SHI: 32. Do you recognize this  
7 article?

8 MR. WARMAN: Yes, it appears to be a  
9 London Free Press article, although at the bottom I'm  
10 not sure what the source of this version is. It's an  
11 article that was written by Randy Richmond.

12 MS SHI: Does the article appear to  
13 be accurate?

14 MR. WARMAN: I don't see anything  
15 from a brief perusal that would be different.

16 MS SHI: Can we mark that as an  
17 exhibit, please.

18 REGISTRY OFFICER: The document at  
19 tab 32 of the respondent's book of documents, Volume I,  
20 two pages, London Free Press News Special Reports, Hate  
21 In the Forest City: Fight of a lifetime by Randy  
22 Richmond dated March 31st, 2005 will be marked as  
23 respondent Exhibit R-5.

24 EXHIBIT NO. R-5: Document at  
25 tab 32 of the respondent's book

1 of documents, Volume I, two  
2 pages, London Free Press News  
3 Special Reports, Hate In the  
4 Forest City: Fight of a  
5 lifetime by Randy Richmond dated  
6 March 31st, 2005.

7 MS SHI: Excuse me, it's actually  
8 five pages.

9 REGISTRY OFFICER: We only have two.

10 MR. WARMAN: I think the only  
11 confusion is between tab 32 and 31 --

12 THE CHAIRPERSON: I don't have five  
13 pages.

14 MR. WARMAN: I think she was  
15 referring to tab 32.

16 MS SHI: I thought I said tab 32.

17 THE CHAIRPERSON: Yes, you did.

18 REGISTRY OFFICER: Tab 32 only has  
19 two pages.

20 MS SHI: It should be page 127 to  
21 131.

22 REGISTRY OFFICER: It doesn't on my  
23 tab 32.

24 MS SHI: Oh, oh. I apologize. Let's  
25 see.

1 THE CHAIRPERSON: Do you have any  
2 additional tabs?

3 REGISTRY OFFICER: The document at  
4 tab 32, I'm not sure where that goes.

5 MS SHI: If you look at the index, it  
6 has numbering of the pages on it, and that appears to  
7 be correct, so that will provide some information as to  
8 where the pages should be.

9 And I apologize if your binder is not  
10 correct, Madam Registrar.

11 THE CHAIRPERSON: Now, to me this is  
12 dated March 31st.

13 MS SHI: Yes, 2005.

14 THE CHAIRPERSON: Yes.

15 REGISTRY OFFICER: Correction for the  
16 record, the document located at tab 32 of respondent's  
17 book of documents, Volume I, five pages, London Free  
18 Press News Special Report, Hate in the Forest City:  
19 Fight of a lifetime by Randy Richmond dated March 31st,  
20 2005 will be marked as respondent Exhibit R-5.

21 MS SHI: Thank you.

22 Mr. Warman, if I could take you to  
23 the second page of this document and the third complete  
24 paragraph down it is, as I can see it, it is describing  
25 you. It says:

1 "He is called "an enemy of free  
2 speech, and enemy of freedom,"  
3 the "high priest of  
4 censorship"."

5 Do you see that?

6 MR. WARMAN: I do.

7 MS SHI: Did you provide information  
8 to Mr. Richmond?

9 MR. WARMAN: I provided a copy of a  
10 book that was written by this individual who's  
11 indicated in the next sentence.

12 MS SHI: David Icke?

13 MR. WARMAN: Yes, that contains  
14 things that are similar to those -- at least the second  
15 part of the first quotation and the other ones, I don't  
16 recall providing them and I would presume that he  
17 simply found them through the internet.

18 MS SHI: The high priest of  
19 censorship, you don't believe that you provided that to  
20 him?

21 MR. WARMAN: Not -- well, no, I don't  
22 believe I did.

23 MS SHI: Were you aware that he got  
24 this information?

25 MR. WARMAN: When he printed the

1 article, yes.

2 MS SHI: So, you did not know that he  
3 was going to print it until he has already done so?

4 MR. WARMAN: No. He didn't provide  
5 me with an advance copy or anything.

6 MS SHI: Did you object to it after  
7 he printed it?

8 MR. WARMAN: No, I did not.

9 MS SHI: Could we go to tab 56,  
10 please. It should be page 471 to 488.

11 Mr. Warman, do you recognize this  
12 document?

13 MR. WARMAN: I do.

14 MS SHI: Could we mark that as an  
15 exhibit, please.

16 MS MAILLET: I'd like the respondent  
17 to establish the relevance of a completely different  
18 court proceeding in the Superior Court of Justice.

19 MS SHI: Sure. Could Mr. Warman  
20 leave the room for a moment, please.

21 THE CHAIRPERSON: Well --

22 MS SHI: I'm going to advise the  
23 Tribunal as to what my questions are.

24 MR. WARMAN: I'm going to object to  
25 any suggestion that I, as a party, leave the room.

1 THE CHAIRPERSON: Yes, this is a  
2 difficult situation and one, I have to say, I haven't  
3 encountered before where a party is also a witness is  
4 being asked to leave for the purposes of determining  
5 the relevance of a document.

6 MR. WARMAN: I should add that I'm  
7 also raising the same objection. Just to make it clear  
8 that it's not simply the Commission raising the  
9 objection regarding relevance.

10 THE CHAIRPERSON: We have two  
11 objections.

12 It would be --

13 MS SHI: The infringement on Mr.  
14 Warman's rights, I believe, is not as serious as the  
15 infringement on my client's right to have a fair  
16 cross-examination.

17 Commission counsel is here, they have  
18 taken a common front, so she can speak as to his  
19 position. I'm sure that Mr. Warman believes that Ms  
20 Maillet is capable of it.

21 THE CHAIRPERSON: Just a minute.  
22 Could you sit for a minute.

23 MS SHI: Whereas the effect of the  
24 cross-examination will be completely neutralized if the  
25 witness is to know in advance what the question I was

1 getting at.

2 THE CHAIRPERSON: Mr. Warman.

3 MR. WARMAN: The Commission does not  
4 represent my interests. The case law has established  
5 fully that the complainant and the Commission's  
6 interests, while they may be parallel, they're not the  
7 same.

8 There have been numerous instances  
9 where those interests have diverged. I don't believe  
10 that Ms Maillet would be in a role, or that it would be  
11 even appropriate for me to ask that she act as my legal  
12 counsel or that she act as my legal representative and  
13 make any submissions that I might think are appropriate  
14 when she can't even know what I might think was  
15 appropriate or what I might think was appropriate to  
16 object to, or why I might think that it's inappropriate  
17 that this document go into evidence.

18 It's asking someone to assume a role  
19 that is not their purpose under the Act. Even the  
20 enabling legislation indicates that the Commission --  
21 there's nothing in those that indicate the Commission  
22 is the representative of the complainant, in fact, the  
23 case law establishes that they are not.

24 THE CHAIRPERSON: Ms Maillet, did you  
25 have any...

1                   MS MAILLET: Yes, I completely agree  
2 with Mr. Warman's submissions. In fact, I have never  
3 seen this document, he's not my client. If he was my  
4 client, I might be aware of certain documents that are  
5 in his possession.

6                   This one I have never seen before.  
7 He is definitely in a better situation than I to talk  
8 about this document.

9                   But I completely agree, I represent  
10 the public interest, I represent the Commission and I  
11 think it's only proper that Mr. Warman stay in the room  
12 to discuss what the relevance of this document is.

13                  MS SHI: Well, Madam Chair, this  
14 document had been disclosed in advance and Ms Maillet  
15 had ample chance to consult Mr. Warman over it.

16                  If she had wanted to clarify about  
17 the role of this document, I assume that it's not just  
18 now that she has decided to raise an objection to  
19 relevance and, therefore, she has had ample time to  
20 make investigation.

21                  I'm not for a minute suggesting that  
22 Ms Maillet act as Mr. Warman's counsel, far from it.  
23 But it is pretty common in cases where parties have a  
24 common front where we could look at them as such that  
25 they are, in some ways -- if I could try an analogy,

1           like co-plaintiffs -- where it's not so offensive that  
2           Ms Maillet's arguments are going to be consistent with  
3           Mr. Warman's and I reject Ms Maillet's claim that she's  
4           completely ignorant about this document.

5                                 And, of course, it's a balancing of  
6           rights. My client has the right to a thorough  
7           cross-examination.

8                                 THE CHAIRPERSON: Okay. I have  
9           considered the objections, I have considered the  
10          submissions, and I am prepared in this case to order  
11          that Mr. Warman leave the room.

12                                I do believe that Ms Maillet is in a  
13          position to be able to represent the interests of Mr.  
14          Warman, as well as those of the Commission, and that  
15          there is, in this particular case -- though not in all  
16          cases -- sufficient alignment of interests to consider  
17          the two, if not the same interests, then one to be  
18          privy of the other.

19                                So, in this case, given the  
20          importance of the respondent's right to a full and  
21          ample cross-examination, I'm going to ask Mr. Warman to  
22          leave the room while we discuss the relevance of this  
23          particular document.

24                                MS SHI: Thank you, Madam Chair.

25                                Thank you, Mr. Warman.

1 --- The witness retires from the hearing room

2 MS SHI: Madam Chair, if we could go  
3 to page 483 where you will see paragraph 31 of the  
4 statement of claim, and that's the focus of my cross  
5 using this document.

6 Mr. Warman is the plaintiff in this  
7 action against Canadian Association for Free Expression  
8 Inc. and against Mr. Paul Fromm, who is my witness  
9 here -- but that is not a point germane this  
10 cross-examination.

11 In there, Mr. Warman is suing Mr.  
12 Paul Fromm for general damages of \$50,000, aggravated  
13 damages of \$50,000, punitive damages of \$50,000 and  
14 complete retraction that he claimed to be defamatory  
15 and one of them is in paragraph 31.

16 "Richard Warman, the high priest  
17 of Internet censorship..."

18 And paragraph 32 a. which you will  
19 find at page 484, it says:

20 "The Posting in question  
21 contained serious allegations  
22 against the Plaintiff, clearly  
23 stating, in its plain and  
24 ordinary meaning or by virtue of  
25 surrounding circumstances which

1                   give the words a defamatory  
2                   meaning inferentially or by  
3                   innuendo that:

4                   a. The Plaintiff is the high  
5                   priest of Internet  
6                   censorship..."

7                   So, Mr. Warman has claimed serious  
8                   damages for publication of this comment and it is trite  
9                   law of defamation that republication of any defamatory  
10                  comment, regardless of context, intention, disavow,  
11                  condemnation, is just as libel as the original  
12                  publication.

13                  And Mr. Warman, having been plaintiff  
14                  in more than one defamation actions, which I would  
15                  adduce from him, is totally completely aware of it.

16                  This, the fact that he would then go  
17                  around and cooperate with a journalist who then defames  
18                  him in his article, and Mr. Warman not follow up on it,  
19                  I respectfully submit, is germane to the issue of Mr.  
20                  Warman's credibility when he claims to be damaged and  
21                  to be harmed by my client's postings.

22                  In fact, in my respectful submission,  
23                  it goes to Mr. Warman's credibility.

24                  THE CHAIRPERSON: Let me see if I  
25                  understand your submissions correctly, and then I will

1 ask you to speak, Ms Maillet, because it is a little  
2 difficult to follow the thread, so I want to be sure I  
3 am with you entirely on this.

4 What you seem to be saying is that  
5 Mr. Warman has brought a civil action for defamation on  
6 the basis of statements that were made in a separate  
7 article that was written about him.

8 MS SHI: Yes, that's right.

9 THE CHAIRPERSON: About which he did  
10 not complain, and he has made the same -- he has said  
11 that this is libelous and he has claimed damages in his  
12 civil action on the basis of the harm that was done to  
13 him, and I am finding it hard to make the connection  
14 between that and his credibility in this particular  
15 case.

16 MS SHI: Well, in his civil action  
17 Mr. Warman is claiming that he's hurt by the  
18 publication --

19 THE CHAIRPERSON: In this civil  
20 action?

21 MS SHI: That's right, of the comment  
22 that he's the high priest of censorship. He claims  
23 that it hurts him, hurts him to the tune of \$150,000.

24 Now, in all fairness, he complained  
25 about other comments too, this is only one of them, but

1           this is a serious lawsuit.

2                           THE CHAIRPERSON:   Mm-hmm.

3                           MS SHI:   And Mr. Randy Richmond's  
4           article publishes this libelous comment.  His article  
5           comes after this statement of claim, not before it.

6                           And so it's not even just an issue of  
7           whether he selects to follow up when Mr. Fromm says it,  
8           but Mr. Richmond's article is, no doubt about it, a  
9           republication of a libelous comment -- according to Mr.  
10          Warman anyway.

11                          If the first comment made is  
12          libelous -- which Mr. Warman definitely claims it is --  
13          then so is the second one.

14                          And, Madam Chair, we're dealing here  
15          not with black and white tangible evidence of whether  
16          someone broke my chair and, therefore, should pay  
17          damages.

18                          Just like in defamation, in this case  
19          the pain and suffering and the harm that Mr. Warman is  
20          testifying to is, if I could say, intangible and,  
21          therefore, his credibility is crucial, especially when  
22          he claims compensation for pain and suffering, then his  
23          sensitivity is at issue and his credibility, you can't  
24          say one moment that your neck is hurt after a car  
25          accident and in the next moment you are able to be up

1 and about, dancing and all that, then people can cast  
2 your claim of pain in doubt. And it's the same thing  
3 here.

4 The claim of damages that Mr. Warman  
5 is asking in this civil lawsuit is no different from  
6 what people ask for from whiplash after an accident.  
7 There can't be no physical evidence of it. It is  
8 really what the victims says, even the doctor -- it's  
9 real hard for doctors to know, and just like here, it's  
10 the same thing.

11 And, therefore, Mr. Warman's  
12 credibility and whether he is consistent in the way he  
13 treats his so-called damages and pain and suffering is,  
14 in my view, germane to this action.

15 How can it be that he's libelled and  
16 seriously hurt by the same comment in one case and not  
17 the other, when even the law would recognize that the  
18 same liability attaches.

19 And that's why I want to put this  
20 evidence before the Tribunal for the Tribunal to  
21 consider the credibility of this complaint.

22 THE CHAIRPERSON: But his complaints  
23 with regard -- his claim for pain and suffering --

24 MS SHI: Yes.

25 THE CHAIRPERSON: -- do they flow

1 from these kinds of comments that were made?

2 MS SHI: Not this particular one, but  
3 you can't say that I'm hurt by a knife wound but I'm  
4 okay when somebody hit me with a bullet. There has got  
5 to be some consistency.

6 I mean, how is the Tribunal going to  
7 assess how much pain and suffering Mr. Warman suffered.

8 It's open to the Tribunal to grant  
9 him from zero to \$20,000 under each item, and the only  
10 evidence that the Tribunal is going to get is from  
11 witnesses, including Mr. Warman, as to how hurt he is.

12 And, therefore, his credibility is  
13 central to this whole case. How else is the Tribunal  
14 going to access?

15 Penalty is different, but  
16 compensation has to have some basis of the actual pain  
17 and suffering and the Tribunal simply cannot know  
18 unless it sees evidence and is able to assess the  
19 credibility of the source of that evidence.

20 And to scream asking for a  
21 substantial amount of money for the same libelous  
22 comment while, when it republishes somewhere else, it's  
23 A-OK, in my respectful submission, is a demonstration  
24 about how untrustworthy this witness is.

25 Those are my submissions.

1 THE CHAIRPERSON: Thank you.

2 Ms Maillet.

3 MS MAILLET: Yes. Madam Chair, you  
4 are absolutely correct in asking the question, how does  
5 the claim for pain and suffering flow from being called  
6 a high priest of censorship within the complaint of  
7 retaliation against Mr. Winnicki. I don't see a  
8 connection there.

9 I also don't understand how  
10 credibility is an issue here. The fact that you have a  
11 media article that cites somebody else, it's not --  
12 plus the fact that Mr. Warman was not clear exactly  
13 what material he provided to Randy Richmond.

14 Taken in context, this is a media  
15 article. My friend indicates that Randy Richmond  
16 defames Mr. Warman, I disagree with that. This is not  
17 a case where Randy Richmond defames Mr. Warman. He  
18 simply writes an article about Mr. Warman citing what  
19 his experiences have been in combatting hate on the  
20 internet. One of the consequences of combatting hate  
21 on the internet is that he is targeted by certain  
22 members of certain hate groups.

23 I still don't understand how this  
24 would affect his credibility in terms of him not suing  
25 Randy Richmond.

1                   I don't understand her point, I can't  
2 see how that would affect his credibility. The fact  
3 that he chose not to sue Randy for defamation with  
4 respect to comments that are reproduced --

5                   THE CHAIRPERSON: I think it is not  
6 so much the question of no suing Mr. Richmond, it is  
7 not taking issue with what Mr. Richmond had to say --

8                   MS MAILLET: That's right.

9                   THE CHAIRPERSON: -- with respect to  
10 the high priest of censorship comments.

11                   MS MAILLET: That's right. And Mr.  
12 Richmond's article are based on comments that are made  
13 by -- or against him, and this is one of the  
14 consequences of doing the type of work that Mr. Warman  
15 does.

16                   I still don't see where the  
17 credibility issue comes into it. The fact that he  
18 filed a retaliation complaint against Mr. Winnicki for  
19 material that is not at all related to this article,  
20 and that he seeks pain and suffering based on that  
21 retaliation and that he testified before the Tribunal  
22 in August how that affected him personally, I can't  
23 understand where the credibility issue comes into it  
24 with respect to him not taking issue with Mr. Richmond  
25 reproducing some of the consequences of his actions.

1 THE CHAIRPERSON: Well, this is where  
2 I need to be a little bit clearer about what is being  
3 asked for here.

4 Mr. Warman is claiming compensation  
5 for pain and suffering only with respect to the  
6 retaliation component?

7 MS MAILLET: That's correct.

8 THE CHAIRPERSON: Is that your  
9 understanding, Ms Shi?

10 MS SHI: No, that is not my  
11 understanding. If I may also, I neglected to point out  
12 why I said it's trite law that Mr. Richmond's  
13 republication of the comment is libel, is based on  
14 uncontroversial authority, it is so established that it  
15 is not disputed any more.

16 And as to his claim for damages, if  
17 we could look at the joint statement of issues -- joint  
18 letter of particulars, it's at tab 3 and I think we  
19 have marked it as an exhibit.

20 THE CHAIRPERSON: Yes, I believe so.  
21 It's R-1.

22 MS SHI: He certainly claimed for  
23 pain and suffering under 53(2)(e) for breach of section  
24 14.1, retaliation.

25 THE CHAIRPERSON: Mm-hmm.

1 MS SHI: But he has also claimed for  
2 pain and suffering as a victim who's been specific  
3 pursuant to section 54(1)(b), which refers to providing  
4 compensation under 53 --

5 MS MAILLET: That's correct. That  
6 goes more towards the willful and reckless behaviour;  
7 is that right?

8 MS SHI: But it's compensation.

9 MS MAILLET: It's compensation. I  
10 mean, we're getting into semantics, it wasn't -- it's  
11 not a pain and suffering award, it is for being  
12 personally named and so that goes more to the behaviour  
13 of the respondent, it's my submission, in terms of  
14 their willful and reckless behaviour.

15 MS SHI: But if it's compensation, it  
16 must have something to do with the alleged victim. And  
17 I would submit to you that --

18 THE CHAIRPERSON: The focus of  
19 this -- let me just get this straight here.

20 So, he is asking for compensation --

21 MS MAILLET: That's right. If you  
22 are named personally in hate messages, you are entitled  
23 to compensation because of the nature of the conduct is  
24 determined to be willful and reckless.

25 THE CHAIRPERSON: That is right.

1 MS SHI: If I may, that really is  
2 special, it says on the side bar that is special  
3 compensation, but it still is compensation, it doesn't  
4 call it --

5 THE CHAIRPERSON: But it is not  
6 compensation for pain and suffering, it is compensation  
7 based on a finding by the Tribunal that the respondent  
8 engaged willfully and recklessly in the impugned  
9 conduct.

10 So, the question there is not so much  
11 the credibility of the witness with regard to his own  
12 pain and suffering on that compensation issue. It is  
13 when you talk about retaliation, but it is not so much  
14 when you talk about 54(1)(b) referring to 53(3), there  
15 you would be focussing on compensation on the basis of  
16 willfulness and recklessness.

17 MS SHI: But I would submit to the  
18 Tribunal that when it says compensation, it's to make  
19 up for something and what is the compensation for?

20 The amount is to be fixed based on  
21 the respondent's conduct, I agree, however, what is the  
22 compensation for, I would submit, would still have to  
23 be determined based on the complainant and how he's  
24 affected, this I would submit to you, otherwise it is  
25 not compensation.

1                   If I may again draw a parallel with  
2 civil litigation, perhaps we could call it aggravated  
3 damages, but it still would have to flow from some kind  
4 of damages to the plaintiff, otherwise the word  
5 compensation would have no meaning.

6                   THE CHAIRPERSON: Well, it does  
7 specify compensation to the victim, so there is a sense  
8 in which --

9                   MS SHI: So, you have to be a victim  
10 first. How do you become a victim if you haven't  
11 suffered and how can we decide if Mr. Warman has  
12 suffered when he vacillates from being thinner skinned  
13 when Mr. Paul Fromm called him a high priest of  
14 censorship and very thick skinned when Mr. Randy  
15 Richmond republishes the comment.

16                   MS MAILLET: Madam Chair, I think  
17 it's perfectly reasonable to expect that when a  
18 journalistic article is put in context and is done for  
19 the purposes of explaining and making clear what the  
20 consequences of Mr. Warman's work is and how difficult  
21 it is for him, that's the context that it's put into  
22 with respect to a couple of very short snippets of  
23 material that was taken from, who knows where.

24                   And it's perfectly reasonable for him  
25 not to object to that, whereas -- I didn't see Mr.

1 Fromm's article, but I'm assuming that it, in fact,  
2 attacked Mr. Warman in a way that the article does not.  
3 And I don't think that's unreasonable.

4 I don't see where he's thick skinned  
5 on one side and thin skinned on the other.

6 THE CHAIRPERSON: So, you are saying  
7 the context makes all the difference?

8 MS MAILLET: Oh, absolutely. It's a  
9 media article which indicates -- it highlighted the  
10 work that Mr. Warman does to combat hate and sometimes  
11 doing that work has some consequences.

12 THE CHAIRPERSON: But why would it  
13 not be fair to put it to him that, you know, in one  
14 case he seemed not to be offended; why did he find that  
15 offensive in another case?

16 MS MAILLET: I suppose if he wants to  
17 answer about the context, he's fine to do that, I'm  
18 just not sure how this affects his credibility and how  
19 a document regarding a civil action is relevant to  
20 these proceedings.

21 MS SHI: Madam Chair, if I may just  
22 point out, I must say something about my friend's  
23 statement on the law on libel.

24 What I just handed up is from the law  
25 on defamation in Canada and it summarizes the current

1 law and it says, on page 732:

2 "Every repetition of a  
3 defamatory statement is a new  
4 publication for which a separate  
5 cause of action will lie." (As  
6 read)

7 And I will point out that in that  
8 statement of claim that we looked at under paragraph 31  
9 the label of high priest of censorship was complained  
10 about as a specific item of libel.

11 And then if we go to the next page in  
12 the authorities, 733:

13 "The law will not protect the  
14 publisher merely because he or  
15 she couches a defamatory comment  
16 in the form of a report or  
17 rumour, it is no justification  
18 to assert that someone else  
19 originally circulated the  
20 information." (As read)

21 And then to my friend's -- to answer  
22 directly my friend's comment, at 735:

23 "It will not avail the defendant  
24 to show that he or she did not  
25 adopt or embrace the defamatory

1                   remark or expressly disavow the  
2                   truth of the statement."

3                   That is the law.

4                   THE CHAIRPERSON: But it would seem  
5 to me that this kind of a thing is in the context of --  
6 you know, if Paul Fromm then took his article and  
7 rewrote it, or even someone else other than Paul Fromm  
8 took his article and rewrote it and published it in  
9 another forum, that that itself would be defamatory.

10                  MS SHI: Not the article, but it's  
11 this specific comment that's been singled out in the  
12 statement of claim.

13                  The statement of claim, and in all  
14 libel cases, you don't sue for a whole article, you  
15 have to be very specific, which part of it do you find  
16 offensive, and there quite properly Mr. Warman had  
17 outlined in great detail exactly which comments.  
18 They've been pinpointed.

19                  THE CHAIRPERSON: Are you saying he  
20 should have sued Randy Richmond also?

21                  MS SHI: Absolutely, or at least  
22 there should have been some complaint about, how can  
23 you reproduce a libel?

24                  THE CHAIRPERSON: But he put it in  
25 the context -- he put it in a context in which it would

1 not have been seen to be defamatory. It's all in the  
2 eye of the beholder.

3 If the individual reading the article  
4 takes offence to it and says, hey, wait a minute, you  
5 know, this is defamatory, then what this says is that  
6 it is no defence that it is put in the guise of a joke  
7 or a superfluous comment or something like that.

8 MS SHI: No, even if it disavows it,  
9 it's no defence.

10 THE CHAIRPERSON: That's right, but  
11 in this case he didn't take exception to it because it  
12 was put in the context of, you know, what in other  
13 words what a great guy he was. So, he would have found  
14 that not to be offensive and not something worth --

15 MS SHI: Despite the fact that if one  
16 is illegal, the other one is. I mean --

17 THE CHAIRPERSON: It distracts us, I  
18 think, from the real issue, which is: does this assist  
19 us in getting at what you seem to be alleging which is  
20 the credibility --

21 MS SHI: The sensitivity and  
22 credibility of Mr. Warman, what effect all this may be  
23 having on him.

24 And, I mean, it is central to our  
25 case, because isn't effect the focus of these sections?

1 I mean, that's what Taylor says, that we've got to  
2 focus on the effect, and I want to focus on the effect.

3 If he says that he can be hurt, then  
4 he should be consistently hurt under our legal  
5 framework, and he's not consistent. He can be hurt one  
6 minute but he can be not hurt the next minute.

7 Well, then I say we should listen to  
8 what he says about his hurt with a huge grain of salt,  
9 especially this is not a trivial lawsuit, it's  
10 \$150,000. How can it be that Mr. Warman's sensitivity  
11 departs so far from our law of defamation that one  
12 cause of action he finds absolutely to be consistent  
13 with his sense of what offends him, and the other cause  
14 of action for republication is something that  
15 recognizes a pain that he doesn't feel at all.

16 I would submit that it just makes no  
17 sense.

18 This is -- although this is not a  
19 court, but it's a Tribunal operating on the law and  
20 under a legal framework, what Mr. Warman has  
21 demonstrated is that his claim of sensitivity and hurt  
22 can vary in a whimsical way.

23 THE CHAIRPERSON: Yes, I hear what  
24 you are saying, Ms Shi, and I am sensitive to your  
25 desire to explore fully the range of Mr. Warman's --

1 MS SHI: If I could put it more  
2 bluntly --

3 THE CHAIRPERSON: If I can just  
4 finish.

5 MS SHI: I'm sorry.

6 THE CHAIRPERSON: But I think in this  
7 case we are looking at two very different contexts.

8 So, I think what I am inclined to do,  
9 is that I am going to allow very limited questioning on  
10 this document and I am going to allow it to be put into  
11 evidence and I will reserve my decision with respect to  
12 the weight that I will give to this.

13 MS SHI: That is fair.

14 THE CHAIRPERSON: Based on a decision  
15 that will ultimately be made in this case regarding the  
16 strength of the arguments that you are making, because  
17 I am going to ask you to keep your questions very  
18 focussed.

19 In my view whether he chose to bring  
20 a complaint of defamation and whether the other article  
21 was defamatory or not is not, strictly speaking,  
22 relevant. What his feelings were with regards to the  
23 comments that were made to him are relevant, and so I  
24 would like you to restrain yourself to those kinds of  
25 questions.

1 MS SHI: That's fair enough.

2 Madam Chair, perhaps I can then make  
3 a suggestion. In order for me to review my notes and  
4 make sure that my questions are sensitive to your  
5 comments, it's almost 4:30, perhaps we should adjourn  
6 now for tomorrow.

7 THE CHAIRPERSON: No, I think we are  
8 going to press on, I would like to press on, because I  
9 would like to --

10 MS SHI: Then can I have five minutes  
11 to look, because I would like to trim it down to make  
12 sure we don't --

13 THE CHAIRPERSON: Five minutes. Let  
14 me explain.

15 I do want to press on to five o'clock  
16 because I think we are on day two, it would be great if  
17 we could finish this by day five, and I think the only  
18 way we are going to do it is by doing that ourselves  
19 and sitting right through to five every day.

20 MS SHI: Sure.

21 THE CHAIRPERSON: So, we will break  
22 for five minutes.

23 REGISTRY OFFICER: Order, please.

24 --- Upon recessing at 4:30 p.m.

25 --- Upon resuming at 4:35 p.m.

1                   REGISTRY OFFICER: Order, please.

2                   All rise. Please be seated.

3                   THE CHAIRPERSON: We need to bring  
4                   Mr. Warman back into the room.

5                   --- The witness returns to the hearing room

6                   THE CHAIRPERSON: Ms Shi?

7                   MS SHI: Thank you.

8                   Mr. Warman, I'd like to proceed again  
9                   with the document in tab 56. Do you recognize this?

10                  I think you had earlier testified  
11                  that you have no reason to disbelieve that it's a copy  
12                  of the statement of claim; is that correct?

13                  MR. WARMAN: I'm sorry, it's been a  
14                  minute or two, but if I did, then yes.

15                  MS SHI: All right. Could we mark  
16                  this as an exhibit, please.

17                  THE CHAIRPERSON: What was your  
18                  answer to that?

19                  MR. WARMAN: It does -- it appears to  
20                  be a statement of claim that had been filed on my  
21                  behalf by my counsel against Mr. Paul Fromm.

22                  THE CHAIRPERSON: So, you do  
23                  recognize the document?

24                  MR. WARMAN: Yes, I do.

25                  THE CHAIRPERSON: Okay.

1                   REGISTRY OFFICER: The document at  
2                   tab 56 of Volume II of the respondent's book of  
3                   documents, in the Superior Court of Justice between  
4                   Richard Warman, the Canadian for Free Expression and  
5                   Paul Fromm, statement of claim, will be marked as  
6                   respondent Exhibit R-6.

7                   EXHIBIT NO. R-6: Document at  
8                   tab 56 of Volume II of the  
9                   respondent's book of documents,  
10                  in the Superior Court of Justice  
11                  between Richard Warman, the  
12                  Canadian for Free Expression and  
13                  Paul Fromm, statement of claim.

14                  MS SHI: Thank you.

15                  Now, Mr. Warman, I would draw your  
16                  attention to paragraph 31 of your statement of claim,  
17                  please.

18                  Do you have it in front of you?

19                  MR. WARMAN: I do.

20                  MS SHI: All right. And then where  
21                  you complain as follows:

22                  "The Plaintiff complains of the  
23                  following words, as were posted  
24                  to the Freedomsite website in an  
25                  article entitled "WARMAN WATCH:

1 MAKE INTERNATIONAL CRIMINALS OUT  
2 OF WEB DISSIDENTS!"

3 And quote:

4 "Richard Warman, the high priest  
5 of Internet censorship at the  
6 Canadian Human Rights  
7 Commission."

8 Do you see that?

9 MR. WARMAN: I do.

10 MS SHI: All right. And we had  
11 earlier looked at Mr. Randy Richmond's article in tab  
12 32 that's been marked as R-5.

13 Isn't it true that Mr. Richmond  
14 reproduced the words of, "high priest of censorship" in  
15 page 2 of his article and related that you had been  
16 called that; isn't that right?

17 MR. WARMAN: They are the same words,  
18 yes.

19 MS SHI: Right. And so, isn't it  
20 true that Mr. Richmond's article has republished what  
21 you consider a libelous comment?

22 MR. WARMAN: It is a republication of  
23 the same comment, yes.

24 MS SHI: That you consider libelous?

25 MR. WARMAN: Yes, I do.

1 MS SHI: You are a lawyer.

2 MR. WARMAN: Absolutely right.

3 MS SHI: Yes. And you are aware of  
4 the law of defamation then; are you?

5 MR. WARMAN: I have some knowledge of  
6 it.

7 MS SHI: Yes. Isn't it true that  
8 such republication by Mr. Richmond is libelous, by law?

9 THE CHAIRPERSON: Ms Shi, I think I  
10 directed that I wanted you to limit your questions to  
11 the issue of Mr. Warman's feelings.

12 MS SHI: Yes. Madam Chair, that is  
13 my only question. I just want to establish the basis  
14 for my question as to whether he is aware of that and  
15 I will move on after that.

16 Perhaps I could put it that way. I  
17 put it to you that by law Mr. Richmond's republication  
18 of those comments will be libelous according to your  
19 position in that statement of claim. Am I correct?

20 MR. WARMAN: Under the -- and, again,  
21 I don't want to get into a legal argument, but my  
22 understanding is that under the law of defamation there  
23 are exceptions and that there are limited exceptions  
24 provided for republication where it is the -- I don't  
25 want to try and get the exact wording -- but it's in

1 essence, the reporting of a civil action that has been  
2 filed in a court.

3 MS SHI: It is your understanding of  
4 the law then that you get to republish the libelous  
5 comment?

6 THE CHAIRPERSON: Ms Shi, I want you  
7 to stay away now --

8 MS SHI: Yes.

9 THE CHAIRPERSON: -- from the  
10 question of defamation and libel, that is not in issue  
11 in this case.

12 What is in issue are Mr. Warman's  
13 feelings around the publication of these documents.

14 MR. WARMAN: Sorry. I should also  
15 file an objection on the basis that -- and I'm not sure  
16 whether this has been disclosed -- but Ms Shi is, in  
17 fact, counsel for Mr. Fromm in the libel action, so  
18 there is a further concern that Ms Shi, whether  
19 intentionally or not, may be skirting into issues that  
20 are being dealt with in the context of the statement of  
21 claim against Mr. Fromm and as she has that dual role,  
22 I have a strong amount of concern in that regard.

23 MS SHI: I'm not getting into it.

24 THE CHAIRPERSON: You will limit your  
25 questions then to the feeling issue.

1 MS SHI: Thank you.

2 Did you sue Mr. Richmond for the  
3 republication?

4 MR. WARMAN: I have not launched a  
5 statement of claim against Mr. Richmond.

6 MS SHI: What about the London Free  
7 Press?

8 MR. WARMAN: No, I have not.

9 MS SHI: And is that because -- well,  
10 let me back up.

11 You were hurt by Mr. Fromm's comment  
12 as you related in your statement of claim; correct?

13 MR. WARMAN: I was and am.

14 MS SHI: Yes. But you're not hurt by  
15 Mr. Richmond's republication of the comment?

16 MR. WARMAN: No, I don't think that's  
17 a fair characterization of it.

18 I think -- my understanding of it is,  
19 is that the media have ability to report on legal  
20 actions, that that includes the ability to report on  
21 legal actions that have been filed in the Superior  
22 Court and that Mr. Richmond has the ability to take  
23 excerpts, and numerous other media have, in fact, done  
24 the same thing, and that because I am in no position to  
25 dictate to reporters how they report their stories, I,

1           you know, I have to come to some acceptance of that,  
2           that that's the way the law works, you know, according  
3           to my understanding.

4                       MS SHI:   So, are you saying that you  
5           were actually hurt by Mr. Richmond's republication;  
6           were you?

7                       MR. WARMAN:  No, what I'm saying is  
8           that I understand his ability to republish it in a  
9           perfect world.

10                      I'm not sure -- I certainly didn't  
11           ask him to republish it, I wouldn't ask him to  
12           republish it, but I understand his ability to do so  
13           and, you know, I understand his ability as a journalist  
14           to report on those kinds of things.  I can't dictate to  
15           him the content.

16                      MS SHI:   Well, as you heard, Madam  
17           Chair, that my questions are focused on your feeling  
18           about a situation.  I would like an answer as to  
19           whether you felt hurt by the republication of what you  
20           consider to be a libelous comment?

21                      MR. WARMAN:  Yes, I do.  Any time  
22           libel is further disseminated within the community,  
23           it's hurtful to me.

24                      MS SHI:   And so Mr. Richmond's  
25           republication hurt you?

1 MR. WARMAN: Any time a libel is  
2 republished within the community, and in this case Mr.  
3 Richmond's republication of it, to some extent, to me,  
4 yes, it's hurtful.

5 MS SHI: But you haven't sued him  
6 because you felt that he had the right to republish it?

7 MR. WARMAN: I don't want to go into  
8 solicitor/client privilege issues that I've discussed  
9 with my counsel with regard to it, but no, I haven't  
10 sued him and it's not my intention to do so at this  
11 time.

12 THE CHAIRPERSON: I think that is  
13 about enough.

14 MS SHI: Thank you. That's all I was  
15 going to ask.

16 I'd like to talk to you now about the  
17 VNN, the Vanguard News Network. How did you first come  
18 across the VNN?

19 MR. WARMAN: I can't remember exactly  
20 but it's possible that -- in that the first time I  
21 became aware of Mr. Winnicki was from the Northern  
22 Alliance's guest book, that the download of his posting  
23 there has been entered in as evidence and that the URL  
24 website of his personal Sympatico website was included  
25 within that posting, and that upon going to the -- Mr.

1 Winnicki's personal website, the downloadings there  
2 show -- and I forget what the exact term of the  
3 reference is, but there is a reference to the forum.

4 So, if I wasn't aware of it prior to  
5 July of 2003, then that's how I would have become aware  
6 of it at that time.

7 MS SHI: And what did you know about  
8 the VNN website before you entered it?

9 MR. WARMAN: I can't say that I knew  
10 a whole lot about it, apart from the fact that Mr.  
11 Winnicki was posting it as a reference on his personal  
12 Sympatico website.

13 MS SHI: Well, what about when you  
14 first called it up on your computer, what did you learn  
15 about it?

16 MR. WARMAN: By -- well, during the  
17 time that I've been looking at it, I've learned that it  
18 is essentially what I would describe as a neo-Nazi  
19 forum.

20 MS SHI: Does it basically tell you  
21 that when you first call it up?

22 MR. WARMAN: The material is -- it  
23 doesn't take a whole lot of digging to scratch beneath  
24 the surface and to figure out that it is, in fact, a  
25 neo-Nazi forum.

1 MS SHI: Let's go to take a look at  
2 it. Just a moment, please.

3 If I may go to tab 3 of the books of  
4 documents of the Commission and the complainant,  
5 please.

6 Mr. Warman, do you have it --

7 MR. WARMAN: I do.

8 MS SHI: -- in front of you? Do you  
9 recognize this?

10 MR. WARMAN: Yes. It's a document  
11 that I entered into evidence as having downloaded it  
12 from the Vanguard News Network forum.

13 MS SHI: Has this been entered as an  
14 exhibit?

15 THE CHAIRPERSON: I don't think so.

16 REGISTRY OFFICER: Yes, it has.

17 THE CHAIRPERSON: It has.

18 MS SHI: What's the exhibit number,  
19 please?

20 REGISTRY OFFICER: The whole book has  
21 been marked as HR-1.

22 THE CHAIRPERSON: But has it been  
23 identified?

24 REGISTRY OFFICER: Yes, it has.

25 MS SHI: Oh, I hadn't realized that

1 we marked the whole book. I thought we were doing  
2 them --

3 THE CHAIRPERSON: We marked the book  
4 for identification.

5 MS SHI: Right.

6 THE CHAIRPERSON: But certain  
7 documents therein have been identified, and this one  
8 you say has.

9 MS SHI: What's the exhibit number,  
10 please?

11 MS MAILLET: I believe most of these  
12 were marked as exhibits.

13 THE CHAIRPERSON: Were they?

14 MS MAILLET: Yeah, I believe so.

15 --- Discussion off the record

16 THE CHAIRPERSON: So, this one is  
17 what, what exhibit number?

18 REGISTRY OFFICER: It is HR-1 (Tab  
19 3).

20 MS SHI: So, has it simply been  
21 marked for identification purposes? Is it an exhibit?

22 THE CHAIRPERSON: It is an exhibit.

23 MS SHI: All right.

24 REGISTRY OFFICER: The book is HR-1  
25 and the documents have been identified.

1 THE CHAIRPERSON: It might be helpful  
2 for you, Ms Shi, at the end of today to get an  
3 indication from Ms Hartung exactly which documents --

4 MS SHI: Yes, that would be  
5 wonderful. Perhaps if Ms Hartung could e-mail me a  
6 list or something, some information, that will be very  
7 helpful to me, if that's possible.

8 THE CHAIRPERSON: Well, that would be  
9 in the transcripts.

10 MS SHI: For now I'd like to mark the  
11 first page as an exhibit, please.

12 REGISTRY OFFICER: The first page is  
13 an exhibit.

14 MS SHI: I thought but only for  
15 identification purposes.

16 THE CHAIRPERSON: No, it is an  
17 exhibit. What happened was the whole book of documents  
18 was marked for identification, and then -- okay, I am  
19 going to let Ms Hartung explain.

20 MS SHI: Okay.

21 REGISTRY OFFICER: The Commission and  
22 complainant's joint book of documents had been marked  
23 as Commission Exhibit HR-1, and then as the tabs were  
24 identified they were stamped official record by the  
25 Registrar and in the end, once we have gone through any

1 tabs that have not been identified will be removed  
2 simply.

3 So, the entire book is an exhibit.

4 MS SHI: So, pardon me for my  
5 confusion, because it seems to me the respondent's  
6 documents are being marked under a different system; is  
7 it? It's supposed to be marked under a different  
8 system?

9 REGISTRY OFFICER: There's no  
10 supposed to, not supposed to. We marked them simply  
11 because we started going back and forth, because the  
12 Commission marked the first exhibit in the respondent's  
13 book, it became HR-2 which meant that the respondent's  
14 books could not be marked in entirety as an exhibit, so  
15 now they're going in one by one.

16 MS SHI: I see also that this  
17 document is not numbered in terms of page numbering,  
18 and my copy only has four of the eight pages. I assume  
19 that's all that have been submitted.

20 REGISTRY OFFICER: That is correct.

21 MS SHI: But if you will bear with  
22 me, I would really like to make sure I sort it out once  
23 and for all.

24 If there is no record as to  
25 specifically what's in each tab, how do we know how

1 many pages there are.

2 MS MAILLET: If I may help my friend.

3 REGISTRY OFFICER: Please.

4 MS MAILLET: They were each marked as  
5 an exhibit after Mr. Warman identified them. He  
6 indicated, I have my notes here, that tab 3 he  
7 recognized the document, he observed it on the internet  
8 and printed it out on May 27th, 2004. He then went  
9 through the document. We would mark it as an exhibit  
10 at that time.

11 MS SHI: And we know that there are  
12 four pages to it.

13 MS MAILLET: That's right. That had  
14 been described in detail by Ms Hartung, she would have  
15 said, you know, a four-page document.

16 REGISTRY OFFICER: And that is  
17 enclosed in the transcript.

18 MS SHI: Okay, okay. All right.

19 All right, then. Then let's go to,  
20 it's HR-1, tab 3, page 1 then; is that correct?

21 REGISTRY OFFICER: That's right.

22 MS SHI: All right, thank you.

23 Mr. Warman, let me just direct you to  
24 the top there. It says: "Vanguard News Network  
25 Forum...", and right under "VNN Home", it says White

1 revolution.

2 Is that what you see when you first  
3 get into this website?

4 MR. WARMAN: No, it's not.

5 MS SHI: What do you see when you  
6 first get into this website; which part of this  
7 document do you see?

8 MR. WARMAN: You wouldn't in fact  
9 see. This is a thread within the broader forum, an  
10 individual thread, so what you would see instead would  
11 be -- if I recall correctly, would be essentially like  
12 any other forum, it would be sort of this is the name  
13 of the forum, there would be different categories of  
14 subjects that were being discussed and then within each  
15 of those categories there would be sub-threads that you  
16 can look at.

17 But if I recall correctly, when you  
18 first go into the VNN forum the first thing is simply  
19 the different categories and then you have to click on  
20 one of those categories to access the individual  
21 threads within that category.

22 MS SHI: Are you saying that it  
23 doesn't give you any indication as to the nature of the  
24 website, or does it?

25 MR. WARMAN: I think if you looked --

1 and, again, I can't remember off the top of my head if  
2 there's a specific download you want to show me, but  
3 I'm assuming that if either you looked at that and  
4 looked at the category headings -- sorry, I don't  
5 remember off the top of my head whether there is  
6 something in there that does indicate immediately or  
7 not.

8 MS SHI: Well, Madam Chair, Mr. Fromm  
9 will testify to it, but I put it to you that as soon as  
10 you get into the home page of this website, it's pretty  
11 clear to you the nature of the messages that you are  
12 going to find are white, nationalist viewpoints.

13 Do you think that's fair?

14 MR. WARMAN: I think I'll stick with  
15 the answer that I gave, that it doesn't take much  
16 digging to determine that it is a neo-Nazi forum.

17 Whether it's the second page or the  
18 fourth page or how much digging that takes, but I just  
19 simply don't remember.

20 MS MAILLET: I believe there may be  
21 some confusion, Madam Chair.

22 I believe my friend is first asking  
23 about what you see when you get into the home page as  
24 opposed to the forum. It would be two different --

25 THE CHAIRPERSON: Can you clarify

1           that?

2                           MS SHI: I think what I'm getting at  
3           is even before you see the postings, I would put it to  
4           you that you actually know more or less the nature of  
5           the messages that you are going to find.

6                           MR. WARMAN: I don't think I can  
7           elaborate on my last answer.

8                           MS SHI: And after you came across  
9           Mr. Winnicki's messages, isn't it true that you visited  
10          the VNN website again?

11                          MR. WARMAN: Yes. More than once,  
12          yes.

13                          MS SHI: And in order to access Mr.  
14          Winnicki's posting, you have to, yourself, get on the  
15          net, use your computer and you have to access it  
16          yourself using your own motor movements; isn't that  
17          right?

18                          MR. WARMAN: I'm sorry, your own  
19          modem or motor?

20                          MS SHI: Your motor skills.

21                          MR. WARMAN: Yes.

22                          MS SHI: You have to use your fingers  
23          and type in the website.

24                          MR. WARMAN: I did. Well, sorry, to  
25          be really specific, I would often just bookmark and

1 just use that.

2 MS SHI: But you have to do it?

3 MR. WARMAN: Yes, yes.

4 MS SHI: It doesn't pop up without  
5 you doing that, your bookmark or whatever it is; does  
6 it?

7 MR. WARMAN: Like virtually any other  
8 website.

9 MS SHI: Exactly. But you chose to  
10 go back in again and again; isn't that right?

11 MR. WARMAN: Pursuant to the research  
12 I was doing with regard to my suspicion that Mr.  
13 Winnicki had posted material there and it would likely  
14 violate section 13 of the Act, yes.

15 MS SHI: And if you hadn't gotten  
16 your bookmark out or put in the website with your  
17 fingers, you would not have been exposed to Mr.  
18 Winnicki's messages again; isn't that right?

19 MR. WARMAN: Those messages, no.

20 MS SHI: That's right. Isn't that  
21 right, or are you saying that I'm correct? Am I  
22 correct to say that you would not have been exposed to  
23 his messages again if you --

24 MR. WARMAN: It takes positive action  
25 to see the messages on the website.

1 MS SHI: On your part positive  
2 actions?

3 MR. WARMAN: On anyone's part, not  
4 just mine.

5 MS SHI: In your case, on your part;  
6 correct?

7 MR. WARMAN: Yes, yes.

8 MS SHI: Thank you. And, in fact,  
9 you did more than that, you started responding to some  
10 of Mr. Winnicki's messages by posing under an alias,  
11 Axetogrind; correct?

12 MR. WARMAN: I believe they're fairly  
13 limited in number, but, yes.

14 MS SHI: Let me see. If I could get  
15 you to go to tab 54 of the respondent's records, this  
16 is in Volume II, there are three pages, 350 to 352.

17 THE CHAIRPERSON: What is the tab  
18 number again, please?

19 MS SHI: 54. Do you recognize this,  
20 Mr. Warman?

21 MR. WARMAN: I recognize -- well, I  
22 have never seen this document other than it being  
23 supplied to me.

24 It appears to be a download from the  
25 VNN forum.

1 MS SHI: Right. And could we mark  
2 this as an exhibit, please.

3 REGISTRY OFFICER: The document found  
4 at tab 54 --

5 MR. WARMAN: Sorry, Madam Chair.

6 THE CHAIRPERSON: Yes.

7 MR. WARMAN: I'm going to object to  
8 it on the basis that, you know, I haven't seen this  
9 document other than it having been provided to me, I  
10 have no way of testifying to its authenticity.

11 MS SHI: Mr. Fromm will.

12 THE CHAIRPERSON: Yes.

13 MS SHI: I'm just marking it for  
14 identification purpose for now.

15 THE CHAIRPERSON: Okay.

16 MS SHI: Fair enough, Mr. Warman.

17 REGISTRY OFFICER: The document found  
18 at tab 54 of the respondent's book of documents, Volume  
19 II, the Vanguard News Network Forum Members' List will  
20 be marked for identification as C.

21 EXHIBIT NO. C: Document at tab  
22 54 of the respondent's book of  
23 documents, Volume II, the  
24 Vanguard News Network Forum  
25 Members' List.

1 MS SHI: And if I could take you to  
2 page 2 of the document, towards the bottom, it says,  
3 "Axetogrind". Do you see it, the second item from the  
4 top?

5 MR. WARMAN: From the bottom, yes.

6 MS SHI: From the bottom, excuse me.  
7 "Axetogrind Junior Member", and the  
8 second column which you look at page 1 tells you posts,  
9 and it's 32.

10 MR. WARMAN: Yes.

11 MS SHI: Does that sound about right  
12 as to the number of postings that you've made?

13 MR. WARMAN: It wouldn't surprise me.

14 MS SHI: And according to this -- so  
15 then, if I could ask you to go to tab 55, please.

16 Madam Chair, 55 is a rather big  
17 volume, I would like to have it all marked as an  
18 exhibit, again for identification purpose, please.

19 THE CHAIRPERSON: Okay. I also  
20 notice that there are some breaks in this -- what we  
21 did that was convenient with the exhibits that the  
22 Commission and the complainant put in is that we broke  
23 then down when they were large documents like this and  
24 where it was useful to do that, we had tab 1C, tab 2C  
25 and Ms Hartung is giving me the evil eye on that, I

1 don't think she likes that method of doing -- she would  
2 prefer that we mark them separately.

3 MS SHI: We do have page numbers that  
4 would provide some guidance.

5 THE CHAIRPERSON: Is it convenient to  
6 mark each section that you have separated out with blue  
7 papers?

8 MS SHI: I think it would be easier  
9 to mark the whole thing and go with the page numbers.

10 THE CHAIRPERSON: Okay, I am okay  
11 with that. We will mark the whole thing, but then we  
12 do need some kind of --

13 MS SHI: Yes, for identification  
14 purpose for now.

15 THE CHAIRPERSON: Yes, for  
16 identification purposes.

17 MS SHI: Exactly.

18 THE CHAIRPERSON: If you could  
19 provide us with a description of what this is so that  
20 we can then properly identify it after.

21 MS SHI: Well, Mr. Warman, I put it  
22 to you that tab 55 consists of all your postings, and  
23 you will see in the first six pages, being a summary of  
24 them, and then after that as you go through them, you  
25 will see the various full postings for each one.

1 THE CHAIRPERSON: So then, do I take  
2 it that this -- and it will be later identified as  
3 such, and so it is only for identification purposes at  
4 this point -- these are Mr. Warman's postings to the  
5 VNN?

6 MS SHI: That's correct. 54 provides  
7 you with the number of postings, 55, the first six  
8 pages give you the summary, the first line or so of the  
9 postings, and then after that are the complete ones.

10 THE CHAIRPERSON: So, what should we  
11 call this document?

12 MS SHI: Warman postings on VNN for  
13 now.

14 THE CHAIRPERSON: Ms Hartung, do you  
15 want to mark this for identification.

16 REGISTRY OFFICER: The documents at  
17 tab 55 of respondent's book of documents, Volume II,  
18 described as Mr. Warman's postings to the VNN Forum  
19 postings made by Axetogrind will be marked for  
20 identification as D for David.

21 EXHIBIT NO. D: Documents at tab  
22 55 of respondent's book of  
23 documents, Volume II, described  
24 as Mr. Warman's postings to the  
25 VNN Forum, postings made by

1                                   Axetogrind.

2                                   MS SHI: It is five o'clock, Madam  
3 Chair. I don't know what your thoughts are.

4                                   THE CHAIRPERSON: Yes.

5                                   MS SHI: I'm prepared to break here,  
6 if you think it's appropriate.

7                                   THE CHAIRPERSON: I think this would  
8 be the appropriate place to break, where we are at.

9                                   MR. WARMAN: Sorry. Just for the  
10 purposes of clarifying my answer, and just to make sure  
11 that Madam Shi and I are both on the first page, when  
12 she asked me the first question that led to this series  
13 of questions it was that I had posted on VNN in  
14 response to Mr. Winnicki's postings, so when I said yes  
15 but I believed that they were fairly limited, what that  
16 meant was that the responses to Mr. Winnicki's specific  
17 postings were fairly limited, and I see from this that  
18 there appear to be only four.

19                                   So, just to make sure that my answer  
20 was clear enough, that I'm not leading Madam Shi down  
21 the wrong track where she doesn't need to go.

22                                   MS SHI: No, no, I understand, some  
23 of your postings were not responding to Mr. Winnicki's,  
24 but there were 32 postings in all, some of them in  
25 response directly to Mr. Winnicki's comments, some not.

1 MR. WARMAN: I think I see four of  
2 them.

3 MS SHI: Something about Mr. Winnicki  
4 that someone else has said, but we'll get into that.

5 THE CHAIRPERSON: All right. I think  
6 this is the appropriate time to take a break now. It  
7 has been a long day.

8 So, I think we will adjourn for the  
9 day and resume again tomorrow at 9:30.

10 REGISTRY OFFICER: Order, please.  
11 --- Whereupon the hearing adjourned at 5:05 p.m.  
12 to resume on Wednesday, October 19, 2005  
13 at 9:30 a.m.

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HEREBY CERTIFY, to the best of  
my skill and ability, that the  
foregoing is a true and accurate  
transcript of the proceedings.



Beverley R. Dillabough, C.S.R.