



**Alberta Human Rights
and Citizenship Commission**

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HUMAN RIGHTS PANELS OF ALBERTA

BETWEEN:

Darren Lund

Complainant

-and-

Stephen Boissoin and the Concerned Christians Coalition Inc.

Respondent

PRE-HEARING

Panel Chair: Lori G. Andreachuk, Q.C.

Date: May 4, 2006

File Number: S2002/08/0137

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Decision

- [1] This matter comes before this Panel by way of a preliminary application relative to Dr. Darren Lund's complaint, filed on the grounds of sexual orientation in the area of publication notices, signs and statements.
- [2] This matter was originally raised in correspondence from Dr. Lund to the Human Rights Commission (the Commission), dated September 27, 2005, wherein Dr. Lund indicated that in providing materials to support his complaint, in light of the fact that the respondent has chosen to publish on the internet, a number of other confidential materials Dr. Lund had submitted to date, he was reluctant to produce further materials.
- [3] Dr. Lund indicated that he was concerned about the continued illegal posting of his confidential human rights complaint materials on the Concerned Christians Coalition (CCC) website, and on the new Free to Speak fundraising website www.freetospeak.ca.
- [4] Dr. Lund reported that both contained false and inflammatory material about him personally and about the complaint.
- [5] Dr. Lund takes the position that the respondent has been notified to remove illegal materials from the CCC website, but has not complied. He submits this is an obvious and ongoing violation of human right laws, and further states that he has received an increasing number of hate mail and emails over the past several weeks and that he is becoming increasingly worried about his family's physical safety.
- [6] Dr. Lund asked the Panel to address the matter.
- [7] As a consequence of Dr. Lund's concerns and perceived inability to provide materials in support of his application for the full hearing of the matter, the Panel adjourned the full hearing of the matter, pending a determination of the interim issue.
- [8] Dr. Lund submitted an affidavit on October 14, 2005 to the Commission, seeking an order that the respondent, Reverend Stephen Boissoin, and the CCC cease and desist from publishing confidential complainant materials on their website and from distributing these materials and links to these materials through electronic mail and by other means.
- [9] Paragraph 7 of Dr. Lund's affidavit refers to the September 19, 2005 letter from Ms. Audrey Dean, senior counsel of the Commission, to Mr. Craig Chandler, chief executive officer of the CCC, which stated that the Commission takes the position that the CCC does not have authority to post the investigative report on their website, as it is marked confidential.
- [10] In Reverend Boissoin's affidavit, he states at paragraph 9:

Although I take no issue with the dissemination of any of this information, I do take issue with any other order which would preclude my right to discuss or publish information of my own which could affect my ability to express myself freely in public on this important matter of public policy.

[11] Reverend Boissoin states that he has reviewed the Commission bylaws and legislation and does not find any duty of confidentiality on the parties to a complaint. He states that if the application of Dr. Lund for a publication ban on further discussion or dissemination of information respecting the matter is allowed, he will be prevented from fundraising and precluded from fully and properly responding to the complaint.

[12] Reverend Boissoin states that he was not aware of plans to post the complaint material on the CCC website, nor did he direct or consent to the posting of the material or assist the CCC in posting or disseminating this information. Reverend Boissoin states that he is not responsible for the posting of the complaint material on the CCC website.

[13] Reverend Boissoin further states that he has reviewed Dr. Lund's material and cannot find any evidence in support of his allegation that he is being harassed or has reason to fear for the physical safety of himself or his family.

[14] In conclusion, Reverend Boissoin denies any breach of confidentiality with respect to the complaint, and takes the view that he is not aware of any law that places the duty of confidentiality on him, as a respondent to a human rights complaint.

[15] Reverend Boissoin seeks a dismissal of the application brought by Dr. Lund that the respondent cease and desist from publishing confidential complaint materials on their website and from distributing these materials and links to these materials through electronic mail, mail and by any other means.

[16] Reverend Boissoin filed a supplemental affidavit on November 16, 2005, attaching a *Calgary Herald* article with respect to the "Gay Militia" and a decision of Provincial Court Judge, Bruce Fraser, along with the provision of a decision of the Supreme Court of Canada in *Her Majesty the Queen v. Toronto Star Newspapers Ltd., Canadian Broadcasting Corporation and Sun Media Corporation and Canadian Association of Journalists* (intervener).

[17] Dr. Lund filed a further affidavit, sworn on September 7, 2005, along with correspondence dated December 8, 2005 addressed to the Panel.

[18] Dr. Lund states that his request of the respondent to cease and desist from publishing confidential complaint materials has nothing to do with fundraising. Dr. Lund takes issue with the allegations of Reverend Boissoin, but he has no knowledge of the postings, as he states Reverend Boissoin's own comments during a June 11, 2005 radio interview with Mr. Chandler attests to his knowledge of and intent to publish the complainant materials on the CCC website.

He also states that Reverend Boissoin has posted confidential information about the complainant materials on a website on at least three occasions between September 25, 2005 and November 2, 2005.

[19] Dr. Lund represents himself in these proceedings, Gerald D. Chipeur of Chipeur and Advocates represents Reverend Boissoin, and the CCC remains unrepresented. It should be noted that the CCC has been asked to provide materials and submissions and to appear with respect to this matter, but they have chosen not to appear.

[20] The Panel has before them the materials submitted above and, as well Ms. Dean's letter to the CCC, which states the following to be confidential information, which may not become public, other than in the context of a Panel hearing or court hearing:

- a. The original request by Dr. Lund;
- b. The original dismissal by the Commissions;
- c. The appeal from Dr. Lund;
- d. The Alberta Human Rights Chief Commissioner shows blatant anti-Christian bias;

[21] The Panel requested Ms. Dean address the issue and indicate the basis upon which the Investigation Report was deemed by the Commission to be confidential. Ms. Dean filed a submission on March 13, 2006, indicating that the practice and policy of the Commission is to keep the Investigation Report confidential to the parties to the complaint. She reported that all parties are advised respecting this confidentiality.

[22] Ms. Dean reported that the reason behind the practice is that confidentiality is essential to facilitate the investigation and that it is administratively fair to keep matters relating to the investigation confidential until a ruling is made by the Panel.

[23] Ms. Dean also reported that the Investigation Report is not placed before a Panel and the investigator is protected from giving evidence.

[24] Ms. Dean's submissions indicated that the first document referenced by her, which was the original request by Dr. Lund, was the complaint attached to the Investigation Report. The second document, the original dismissal by the Commission, is attached to the Investigation Report. The other two documents, the appeal from Dr. Lund and the Alberta Human Rights Chief Commissioner, she indicates show blatant anti-Christian bias and are about the appeal of the dismissal of the investigation.

[25] Ms. Dean also submitted that the Commission, pursuant to Freedom of Information and Protection of Privacy (FOIP) legislation, is under duty to keep personal information confidential. She quoted from section 16 of FOIP, which relates to the unreasonable invasion of a third party's personal privacy.

[26] Counsel for the Reverend Boissoin filed further submissions in response to Ms. Dean's submissions on March 23, 2006, and states that confidentiality during the complaint process is a practice and policy of the Commission and all parties are advised of the same. He indicates that the Reverend Boissoin took no issue with that commentary. He reports that Ms. Dean does not state that there is a legislative or common law duty of confidentiality placed on the complainant or the respondent.

[27] In his response to Ms. Dean's submissions, counsel for Reverend Boissoin also stated that Ms. Dean does not set out a legislative or common law basis for a duty of confidentiality with respect to the respondent during the complaint process up to or following a Panel hearing. Counsel takes the position that Ms. Dean established a legislative duty on the Commission with respect to privacy, however, she has not presented argument in favour of legislative or common law duties of confidentiality on the parties to the complaint up to and following an Investigation Report. He states that she does not demonstrate a duty of confidentiality on any party, including the Commission, with respect to a Panel hearing.

[28] The issues before the Panel are as follows:

1. Is there a duty of confidentiality on the parties to a complaint, regarding complainant and respondent materials, prior to the Panel hearing?
2. If there is a duty of confidentiality, has Reverend Boissoin breached the duty of confidentiality?
3. Is there a connection between the CCC and Reverend Boissoin?
4. If a publication ban is granted, does it preclude Reverend Boissoin from fundraising and, therefore, from fully and properly responding to the complaint?
5. Has Dr. Lund been harassed and is his family's safety in jeopardy?

Issue 1

[29] In determining whether or not confidentiality exists in matters before the Commission, or whether a publication ban on matters relative to the complainant provided to the Commission, or generated by the Commission, it is necessary to review the law regarding publications bans in Canada.

[30] The Supreme Court of Canada dealt with the issue in *Dagenais v. Canadian Broadcasting Corp.* [1994] 3 S.C.R. 835. Although the matter related to a publication ban imposed in a criminal proceeding, the case provides a thorough analysis of the law as it relates to publication bans in civil proceedings as well.

[31] In the within application, essentially a request is being made by the applicant for the Panel to exercise its discretion in ordering a publication ban in the circumstances.

[32] It is well established that such discretion cannot be open-ended or exercised arbitrarily.

[33] Justice Lamer C.J., speaking for the majority of the Supreme Court of Canada in the *Dagenais* case, supra, states at paragraph 68:

Discretion cannot be open-ended. It cannot be exercised arbitrarily. More to the point, as I stated in Slight Communications Inc. V. Davidson, [1989] 1 S.C.R. 1038, at p. 1078, in the context of legislative conferrals of discretion:

As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the Charter, unless, of course, that power is expressly conferred or necessarily implied. Such an interpretation would require us to declare the legislation to be of no force or effect, unless it could be justified under s. 1.

I would extend this reasoning, and hold that a common law rule conferring discretion cannot confer the power to infringe the Charter. Discretion must be exercised within the boundaries set by the principles of the Charter; exceeding these boundaries results in a reversible error of law. In this case, then, we are dealing with an error of law challenge to a publication ban imposed under a common law discretionary rule.

[34] There is no provision in the *Alberta Human Rights, Citizenship and Multiculturalism Act* (the Act) which extends discretion of a Panel beyond the applicability of the Canadian Charter of Rights and Freedoms.

[35] The rule for publication bans established in the *Dagenais* case, supra, (paragraph 73), is as follows:

A publication ban should only be ordered when:

- (a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measure will not prevent the risk; and*
- (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.*

If the ban fails to meet this standard (which clearly reflects the substance of the

Oakes test applicable when assessing legislation under s. 1 of the Charter), then, in making the order the judge committed an error of law and the challenge to the order on this basis should be successful.

[36] Publication bans in and of themselves generally require a weighing of the freedom of expression versus the right of a fair trial. This analysis was considered by the Supreme Court of Canada in *Dagenais*, supra, where it stated at paragraphs 83, 84 and 85 the following:

Rather than simply focusing on the fact that bans always limit freedom of expression and usually aim to protect the right to a fair trial of the accused, it should be recognized that ordering bans may:

- limit freedom of expression (and thus undercut the purposes of s. 2(b) discussed above);*
- prevent the jury from being influenced by information other than that presented in evidence during the trial (for example, information presented in a tabloid television show and evidence discussed in the absence of the jury and held to be inadmissible);*
- maximize the chances that witnesses will testify because they will not be fearful of the consequences of publicity;*
- protect vulnerable witnesses (for example, child witnesses, police informants, and victims of sexual offences);*
- preserve the privacy for individuals involved in the criminal process (for example, the accused and his or her family as well as the victims and the witnesses and their families);*
- maximize the chances of rehabilitation for 'young offenders';*
- encourage the reporting of sexual offences;*
- save the financial and/or emotional costs to the state, the accused, the victims, and witnesses of the alternatives to publication bans (for example, delaying trials, changing venues, and challenging jurors for cause); and*
- protection national security.*

It should also be recognized that not ordering bans may:

- *maximize the chances of individual with relevant information hearing about a case and coming forward with new information;*
- *prevent perjury by placing witnesses under public scrutiny;*
- *prevent state and/or court wrongdoing by placing the criminal justice process under public scrutiny;*
- *reduce crime through the public expression of disapproval for crime; and*
- *promote the public discussion of important issues.*

These are intended to be illustrative rather than comprehensive lists of reasons for and against bans. They are simply intended to illustrate the breadth of issues that deserve a place but are not often found in the analysis of the justification of particular publication bans. These concerns have a place in each step of the analysis required under the common law rule outlined above – they are relevant to the initial consideration of whether a ban is necessary to safeguard the fairness of a trial, to the question of whether reasonable alternatives are available, and to the issue of the balance struck between the salutary and deleterious effects of a publication ban.

[37] The Dagenais rule is often referred to as the “Dagenais Mentuck Test”. The Supreme Court of Canada, in *R. v. Mentuck* [2001] 3 S.C.R. 442, stated at paragraphs 32 and 33:

In assessing whether to issue common law publication bans, therefore, in my opinion, a better way of stating the proper analytical approach for cases of this kind involved herein would be:

A publication ban should only be ordered when:

- (a) *such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and*
- (b) *the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.*

The reformulation of the Dagenais test aims not to disturb the essence of that test, but to restate it in terms that more plainly recognize, as Lamer C.J. himself did in

that case, that publication bans may invoke more interests and rights than the rights to trial fairness and freedom of expression. This version encompasses the analysis conducted in Dagenais, and Lamer C.J.'s discussion of the relative merits of publication bans remains relevant. Indeed, in those common law publication ban cases where [page 463] only freedom of expression and trial fairness issues are raised, the test should be applied precisely as it was in Dagenais. For cases where concerns about the proper administration of justice other than those two Charter rights are raised, the present, broader approach, will allow these concerns to be weighed as well. There may also be other cases which raise interests other than the administration of justice, for which a similar approach would be used, depending of course on the particular danger at issue and rights and interests at stake.

[38] It is the finding of this Panel that a publication ban in these proceedings is not necessary to prevent serious risk to the proper administration of justice. It is also the finding of the Panel that the salutary effects of a publication ban would outweigh the deleterious effects on the rights and interest of the parties and the public to freedom of speech.

[39] It is noted that the Commission chose to stamp "confidential" on the original request by Dr. Lund, the original dismissal of the Commission, the appeal from Dr. Lund, and potentially other documentation. It is the finding of this Panel that the stamping of "confidential" on such documentation does not in and of itself ban publication of such documents. Such a ban may only be justified in special circumstances in a case where serious risk to the fairness of a subsequent trial would be provided necessitating such a ban to prevent the publication of such documents in and of themselves, without the finding of the necessity of serious risk to a fair trial, prevents freedom of speech and the openness of court proceedings in Canada.

[40] The Panel agrees with the submissions of Dr. Boissoin's counsel that Ms. Dean has not set out a legislative or common law basis for a duty of confidentiality with respect to the respondent during the complaint process up to or following a Panel hearing. She has merely enumerated policy and practice of the Commission up to the conclusion of the Investigation Report. Ms. Dean has not demonstrated any duty of confidentiality to any party to the proceedings, including the Commission, with respect to the Panel hearing itself. It is also the finding of the Panel that once the Investigation Report is released to the parties, no need for confidentiality exists to protect the investigation, as at that point the investigation is complete.

[41] The Panel is cognizant of Dr. Lund's concern for his safety and that of his family and the Panel is conscious of correspondence received by Dr. Lund of a threatening nature. However, it cannot be held that the publication of the material referenced by Dr. Lund caused the conduct of individuals about whom he is complaining, as it is clear that Dr. Lund has held interviews with media with respect to the complaint and the issues in question.

[42] While this is most unfortunate, these concerns of Dr. Lund do not justify the granting of a

publication ban.

Issue 2

[43] It is not necessary to determine whether Reverend Boissoin is guilty of publishing such materials, as the application for a publication ban is dismissed.

Issue 3

[44] It is not necessary to determine whether there is a connection between the CCC and Reverend Boissoin, as the application for a publication ban is dismissed.

Issue 4

[45] It is not necessary to find that the publication ban may preclude Reverend Boissoin from fundraising, as no such publication ban will be granted.

Issue 5

[46] There is no evidence that Dr. Lund has been harassed or that his family's safety is in jeopardy. However, if Dr. Lund can submit such evidence to the Panel of a cogent nature, the Panel will do everything in its power to protect Dr. Lund and his family from any harassment or threats to their safety.

Conclusion

[47] The application of Dr. Lund that Reverend Boissoin and the CCC cease and desist from publishing confidential complaint material on their website and from distributing these materials and links to these materials through email, mail and other means is hereby dismissed.

May 4, 2006

ALL OF WHICH IS RESPECTFULLY SUBMITTED



LORFG. ANDREACHUK, Q.C.,
Panel Chair