



Decision on Application to Strike Comments from the Record

Introduction

1. The Human Rights Coalition (“HRC”) has applied for an order to strike out certain comments made by a panelist in a consultation panel held on October 2, 2024. In this decision, I explain why I would dismiss the application.

Background

2. On October 2, 2024, the Commission held a series of consultation panels. A consultation panel differs from witness evidence in several ways. Individuals on consultation panels do not testify under oath. They do not provide evidence and, consequently, they are not subject to cross-examination. Rather, they provide general background information that can assist in contextualizing other evidence that I do receive.

3. Consultation panel participants were instructed by Commission counsel not to make allegations of misconduct against identifiable persons in Canada. The reason for this was a concern for procedural fairness: if an allegation of misconduct against an identifiable person were made, it might not be possible to permit the subject of that comment to meaningfully respond.

4. This was a particular concern with the October 2 consultation panels because most participants would be discussing their and their communities’ experiences of foreign interference. If they identified specific people as being foreign interference actors or state proxies, it would be impossible to provide those individuals with a



meaningful right of response due, in part, to the inability of the Commission to disclose any classified information that might exist relevant to such an allegation.

5. Participants in the consultation panels were cautioned that, if they were to make such allegations, Commission counsel would direct them away from making further comments. If such comments continued, it might be necessary to suspend the panel. They were also told that I would disregard any allegations that might be made.

The Application

6. Following one of the consultation panels on October 2, counsel for HRC rose to bring an oral application to strike out certain comments made by one of the consultation panel members. I directed counsel to bring their application in writing. They did so on October 7, and provided additional submissions on October 8.

7. The HRC submits that one of the panelists (“the panelist”) indirectly identified an individual in Canada (“the specific individual”) and made allegations against him.

8. The comments in question arose in the context of the panelist discussing their views about how foreign interference narratives can cause negative impacts on the ability of others to express their views, including in an academic context. The HRC points to two sets of comments that it says are objectionable.

9. The first comment arose in response to a question from Commission counsel about the panelist’s views on how to better respond to foreign interference while avoiding negative effects. The panelist made reference to an article from a major Canadian newspaper. He went on to state that “this kind of alarmism, to my view, is not



helpful. It stokes unnecessary fears and can lead to the targeting of innocent people. It should be avoided.”

10. The HRC submitted that an individual could take steps to identify the author of the article based on the description provided by the panelist. It submits that the panelist therefore indirectly identified the specific individual, who was the author of the article.

11. Secondly, the HRC points to remarks from the panelist from earlier in the day, in which the panelist told a story about how a Canadian thinktank published a report that referred to the panelist’s blog as an example of an extremist Website. The panelist explained that he made a complaint to the thinktank who, following an independent investigation, retracted this reference in its report. The HRC submits that this story was provided by the panelist as an example of a “tendency to accuse [people who do not adhere to conventional narratives regarding Russia], normally with no evidence, of being Kremlin influencers, Russian proxies [or] agents of influence.” The panelist indicated that this type of conduct creates “a toxic environment in which proper, reasoned conversation on important topics is not possible.”

12. The HRC submits that an individual could identify the report based on the description provided by the panelist. The HRC submits that this too is indirect identification of the specific individual, who was the author of the report.

13. The HRC submits that the panelist’s comments constitute allegations of misconduct, and not statements of opinion. It submits that the comments from the panelist allege that the specific individual inflates the threat of Russian disinformation; perpetrates alarmism; leads to innocent people being targeted; accuses people of



wrongdoing without evidence; engages in unethical journalism; has work products that are of poor quality and can lead to innocent people getting hurt.

14. The HRC submits that the panelist's comments violate the direction given to panelists by Commission counsel and constitute assertions of fact and not opinion. The HRC therefore asks that the comments of the panelist "be struck from the record."

15. In its supplemental written submissions, the HRC reiterated the main points set out in its application. It also submitted that the common law duty of fairness, as well as section 13 of the *Inquiries Act* also required that the panelist's comments be struck.

Submissions by Participants

16. Pursuant to Rule 63, I directed that this application is communicated to the Parties. I also directed that it be communicated to the panelist. I did not direct that it be communicated to the specific individual, as this person had already provided their observations through the HRC's application.

17. The Commission received written submissions from the Russian Canadian Democratic Alliance ("RCDA"), the panelist and the Attorney General of Canada.

18. The RCDA's submissions focus on what it says is a lack of procedural fairness from the Commission in permitting the panelist to "testify" without notice being given to the RCDA or providing them with an opportunity to cross-examine the panelist. I note that, as I have indicated above, none of the panelists testified in the sense of providing sworn evidence. The RCDA states that while the panelist did not name the RCDA or any of its members, their remarks were harmful to segments of the Russian diaspora. It



further submits that by permitting the panelist to speak during the public hearings, the Commission has amplified a message that, out of fairness, the RCDA should have been permitted to cross-examine in order to challenge. The RCDA suggests that the *Charter* rights of members of the Russian-Canadian community were limited by the comments by the panelist. The RCDA requests that the Commission go further than what is asked for by the HRC and either strike the panelist's comments in their entirety or else recall the panelist and permit the participants to cross-examine him.

19. The panelist submits that he did not violate any direction made by the Commission to not name specific individuals in Canada. The panelist also states that his comments did not constitute a charge of misconduct against the identifiable person. He submits that they expressed a difference of opinion focused not on any individual, but rather the impact of particular words that were written in publicly available documents. The panelist further submits that the HRC is incorrect in its reading of the transcript, and that several of the comments that the panelist made were not about the identifiable individual at all.

20. The Attorney General of Canada took no position on the application.

Analysis

21. I would dismiss the application.

22. The HRC is correct that Commission counsel directed consultation participants not to make allegations against identifiable persons in Canada. This reflects the more general concern about ensuring fairness.



23. The primary concern of the commission in the context of the October 2 consultation panels was ensuring that participants did not accuse specific people of engaging in foreign interference. The majority of the participants appeared to discuss their experiences with foreign interference, and so there was a risk that they might – in the course of providing their stories – identify specific individuals as foreign interference actors or proxies of foreign states. This would create a serious problem since such allegations would clearly constitute allegations of serious misconduct and trigger a right to respond. However, for both practical reasons related to the Commission's schedule, as well as considerations of national security confidentiality, the Commission would likely be unable to provide such individuals with a meaningful opportunity to respond to such allegations.

24. The issue identified by the HRC in its application falls outside of the concern that animated the Commission's caution to panelists. The comments by the panelist did not allege that the specific individual engaged in foreign interference. I view this as relevant.

25. However, I accept that fairness concerns could also apply to allegations of misconduct unrelated to foreign interference, and that the Commission's direction to panelists was not strictly limited to making allegations of foreign interference.

26. I am also prepared to accept, for the purposes of this application, that the comments of the panelist could indirectly identify the specific individual. However, obtaining this information would take some effort. This is not a situation where the identity of the specific individual would be readily apparent to a member of the public.



27. An important consideration in considering this application is the nature of the relief being sought by the HRC.

28. The HRC has asked for the panelist's comments to be "struck from the record." It is not obvious what this means, as that term is not used or known in the Canadian legal system. However, I interpret the request as for relief in the nature of a publication ban on broadcasting the specific comments made by the panelist and a sealing order over portions of the Commission's transcript of the proceedings.

29. A measure such as this would constitute a limit on the open court principle. I have discussed the application of this principle to this Commission on two previous occasions.¹

30. The open court principle is a long-standing doctrine that is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of our democracy.² Before a measure limiting the openness of proceedings can be imposed, it must pass the analysis required under the *Dagenais/Sherman Estate* framework. This includes assessing whether court openness poses a serious risk to an important public interest; whether the proposed limit is necessary to prevent this serious risk; and whether, as a matter of proportionality, the benefits of limiting court openness outweigh its negative effects.³

¹ Foreign Interference Commission, [Decision on an Application to Disclose Standing Applications](#) (February 8, 2024), paras. 9-14; Foreign Interference Commission, [Decision on Anonymous Participation in a Consultation Panel](#) (October 4, 2024), paras. 19-41.

² *Sherman Estate v. Donovan*, [2021] 2 SCR 75, para. 30.

³ *Decision on Anonymous Participation*, *supra* at para. 20.



31. In my view there are at least three reasons why the HRC's request cannot pass muster under this framework.
32. The first is the nature of the impugned comments.
33. Contrary to the submissions of the HRC, I view the panelist's comments as being statements of opinion, and not allegations of misconduct or wrongdoing against the specific individual. They are also fairly viewed as general opinions for which particular examples were given for illustration purposes.
34. The comment that appears to have generated the HRC's application was the reference by the panelist to certain writings being "alarmist" and "not helpful." Stating that comments of this type stoke "unnecessary fear and can lead to targeting of innocent people" are, fairly viewed, a commentary about how the use of language respecting foreign interference can produce negative consequences, and not an allegation that the specific individual has engaged in misconduct.
35. Other comments by the panelist seem even more tangentially related to the specific individual and are also statements of opinion about general problems that exist, which use specific examples for illustrative purposes.
36. At its highest, the panelist has made indirect references to publications by the specific individual that serve, in his view, as examples of the sort of thing that can give rise to negative consequences. The views expressed by the panelist are less serious when they are contrasted with the Commission's primary concern – direct allegations that specific persons are foreign interference threat actors working to undermine Canada's democratic institutions.



37. The second important consideration for me is the circumstances in which the panelist's comments were made. They did not occur in the course of sworn evidence, but rather as part of a consultation panel. Consultation panels are non-evidentiary by nature. The comments of participants are not evidence, and, as I have repeatedly stated, I will not make any findings of fact based upon them.

38. This is not to say that an allegation made during a consultation panel could not impact the reputation of a person or otherwise impact their interests. But it underscores the point that there is no risk that I would make any finding respecting the specific individual's conduct as the result of any comment made by the panelist.

39. The third consideration flows from the fact that I will not be making findings about the specific individual.

40. The second step of the *Dagenais/Sherman Estate* framework directs me to consider whether there exists any lesser measure to respond to a serious harm to an important public interest.

41. In my view, even if the HRC's requested relief could pass the first step of the *Dagenais/Sherman Estate* framework, it would fail on the second as there are less intrusive measures that could respond to any harm that might exist in this case. Rather than impose restrictions on public access to the Commission's hearings, I can simply choose to ignore the panelist's comments to the extent that they relate to a specific individual. Indeed, I would have done so even in the absence of an application by the HRC. The purpose of the panel was not for me to receive evidence and would not lead me to make factual findings. The sole purpose was to provide me with general context



information and exposure to a range of perspectives. The panelist's comments have done no more than that.

42. Put simply, the HRC's request is disproportionate to the issue that it has identified. In an appropriate case, I might impose a limit on the open court principle if a witness or panelist were to make allegations of misconduct against an identifiable individual in Canada. However, this is simply not a case in which such a measure is necessary in order to respond to a threat to an important public interest.

43. The HRC's arguments based on the common law duty of fairness or section 13 of the *Inquiries Act* do not change my analysis.

44. A common law duty of fairness applies to any administrative decision that impacts the rights, privileges or interests of an individual. When a state authority exercises a power that impacts an individual, they must do so in a procedurally fair manner.

45. In this case, there is no allegation that the Commission has exercised a power impacting the rights, privileges or interests of the specific individual. The issue raised by the HRC relates to the conduct of the panelist, not the Commission.

46. Section 13 of the *Inquiries Act* provides that:

No report shall be made against any person until reasonable notice has been given to the person of the charge of misconduct alleged against him and the person has been allowed full opportunity to be heard in person or by counsel.



47. This provision is essentially a statutory codification of an aspect of the duty of procedural fairness. A commission of inquiry cannot make a finding of misconduct against a person unless it first ensures that they have been provided with certain procedural rights. This provision governs certain types of criticism that a Commission may make about individuals. It does not apply to criticisms that private individuals may make about each other.

48. The RCDA's submissions go beyond any of the relief sought by the HRC, and raise allegations not made by the HRC in its application. The RDCA has not itself brought any application. However, even if I do consider the RCDA's submissions and requested relief, I would reject them. I do not see how the interests of the pro-Democracy Russian diaspora as a whole have been impacted by the unsworn comments of the panelist.

49. Further, the RCDA's submission fails to acknowledge the fundamental difference between a witness who testifies as part of my fact-finding process, and the Commission's public consultation process. I have met with over 100 diaspora community members as part of this consultation process to hear their views, concerns and ideas related to foreign interference. The public consultation panels held on October 2 are an extension of that process, and not the Commission's factual hearings. None of the persons I have met have been subject to cross-examination. Indeed, ensuring that these persons could speak with me in a safe environment has been integral to the Commission's ability to hear their views and perspectives.



50. The fact that some might strongly disagree with some of the views expressed in the Commission's public consultation meetings, or view them as harmful, does not give rise to a right to cross-examine a consultee. Indeed, the RCDA has never suggested, until now, that such a right might arise. This is notwithstanding the extensive use the Commission has made of both public and private consultation panels, including one organized with the assistance of the RCDA and composed of members of the Russian diaspora.

51. As I have reiterated several times, I do not make factual findings on the basis of anything that I hear from consultation panels. Cross-examinations of consultees, including the panelist, would be both unjustified and inappropriate.

Conclusion

52. The Application is dismissed.

Signed

Commissioner Marie-Josée Hogue

October 29, 2024