

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

RICHARD WARMAN

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

MARC LEMIRE

Respondent

- and -

ATTORNEY GENERAL OF CANADA

CANADIAN ASSOCIATION FOR FREE EXPRESSION

CANADIAN FREE SPEECH LEAGUE

CANADIAN JEWISH CONGRESS

FRIENDS OF SIMON WIESENTHAL CENTER FOR HOLOCAUST STUDIES

LEAGUE FOR HUMAN RIGHTS OF B'NAI BRITH

Interested Parties

RULING

MEMBER: Athanasios D. Hadjis 2007 CHRT 16
2007/05/07

[1] The Canadian Human Rights Commission has made a motion seeking an order that special measures be adopted with regard to the upcoming testimony of three witnesses, Hannya Rizk, Harvey Goldberg and Dean Steacy.

[2] These individuals are employees of the Commission. The circumstances giving rise to Mr. Goldberg and Mr. Steacy being called to testify relate back to affidavits that they

each swore shortly before the start of the hearing. These affidavits were produced by the Commission in support of its position that it had complied with its disclosure obligations, a position with which Mr. Lemire took issue. Mr. Lemire's counsel, Barbara Kulaszka, therefore, sought leave from the Tribunal to cross-examine these individuals on their affidavits. Given that the affidavits were filed 17 days prior to the start of the hearing, I directed that if Ms. Kulaszka wanted to cross-examine the affiants, she could simply call them as witnesses at the hearing.

[3] Ms. Rizk, for her part, was apparently the Commission employee who investigated Mr. Warman's complaint. Mr. Lemire contends that during her investigation, she was unable to locate some of the impugned material that Mr. Warman alleges to have viewed on the Internet. Mr. Lemire is also claiming that Ms. Rizk had been investigating Mr. Lemire's activities on the Internet well before Mr. Warman had filed the present complaint.

[4] The matter of the three witnesses' testimony was discussed at the opening of the hearing, in Toronto, on January 29, 2007. Ms. Kulaszka confirmed her intent to call the three witnesses, who all apparently reside in the National Capital Region. In order to facilitate matters, Ms. Kulaszka proposed that their evidence be given in Ottawa. None of the parties raised any objection to this choice of venue and I accepted Ms. Kulaszka's proposal. The witnesses would testify following the close of the four weeks of hearings that ended on March 2, 2007, in Toronto. The dates for their testimony were ultimately set down for May 9 to 11, 2007, at the Tribunal's offices in downtown Ottawa.

[5] The Commission is now seeking the adoption of special measures regarding these witnesses' evidence, namely, that they be allowed to testify from a different location than the Tribunal's hearing room by video conference. Their physical and visual appearance would be seen by the Tribunal and counsel via video while everyone else, including Mr. Lemire, would be seated in a separate room where they would only be able to hear the audio portion of the testimonies.

[6] During the four weeks of hearings in Toronto, the Commission made no request for the "special measures" it is now seeking. However, on March 2, 2007, the Commission filed a motion to quash the subpoenas, which I dismissed on March 14, 2007.

[7] The Commission has filed copies of numerous postings on the Internet that it contends show that the Commission has "legitimate reason to fear for the safety and security of its employees". Some of this material is abhorrent and very troubling. It includes a "fictional" account of a shooting at a Tribunal hearing, numerous messages calling for the death of Mr. Warman, judges, and Tribunal members, and details regarding Mr. Warman's home address. All of these postings are, of course, made anonymously or with pseudonyms. I gather that they have been made on websites based in the USA. There is no evidence before me linking this material to Mr. Lemire.

[8] Photographs of Mr. Warman have also been posted on the web, as well as those of one individual who is alleged to be involved with a group called Anti-Racist Action. In 2006, prior to the start of the hearing, photographs of all the intended expert witnesses in this case (Mr. Lemire's, as well as the Commission's and the Attorney General's) were presumably posted by Mr. Lemire on a web page dealing principally with the present case, which is located on the freedomsite.org website. The photo of Dr. Karen Mock, the Commission's expert, was edited to portray her in a manner that she found objectionable.

The Commission made known her objections and it is my understanding that by the time the hearing commenced, her photo had been removed.

[9] The Commission submits that the evidence it has filed provides a reasonable ground for the fear regarding the personal and professional safety of the Commission witnesses. Yet, the special measures that the Commission is asking the Tribunal to adopt do not relate to the witnesses' security at the hearing. In a previous ruling, I made it clear to all parties that disturbances or intimidation inside or outside the hearing room would not be tolerated and that I would take appropriate measures to deal with such problems. Indeed, as has been the Tribunal's practice with regard to all s. 13 complaints, additional security measures were taken in this case. Moreover, it was evident at the hearing that the Commission had put in place additional security measures of its own with regard to counsel and its witnesses.

[10] The issue therefore, for the Commission, does not seem to be security at the hearing but rather the witnesses' identities or more correctly, the capture and publication of the three witnesses' images. The Commission explains the motivation for its request as follows:

That the physical appearance/identity of its employees summoned as witnesses by the Respondent be protected and not be revealed to ensure that its employees are not recognizable in their every day lives and become vulnerable when in society and/or their photos be placed on the Internet as has been the case with the experts and Mr. Warman as illustrated by the evidence in the exhibits provided.

[11] Interestingly, no similar request was made when Mr. Warman and the expert witnesses testified in Toronto, although it would appear that their images could already be found on the Internet.

[12] The Commission has directed me to a number of decisions where courts have ordered that special measures be taken regarding the evidence of witnesses. I note, however, that the special measures in these cases relate to the concealment of the witnesses' names. In the present case, we not only know the names of the witnesses but we also know that they are employees of the Commission.

[13] The option being proposed by the Commission would result in Mr. Lemire being denied the opportunity to be in the hearing room while these witnesses testify. Section 52(1) states that the Tribunal's inquiry shall be conducted in public. The Tribunal may, on application, take measures that it considers necessary to ensure the *confidentiality* of the inquiry if the Tribunal is satisfied that certain conditions are present:

<p>52. (1) An inquiry shall be conducted in public, but the member or panel conducting the inquiry may, on application, take any measures and make any order that the member or panel considers necessary to ensure the confidentiality of the inquiry if the member or panel is satisfied, during the inquiry or as a result of the inquiry being conducted in public, that</p> <p>(a) there is a real and substantial risk that matters involving public security will be</p>	<p>52. (1) L'instruction est publique, mais le membre instructeur peut, sur demande en ce sens, prendre toute mesure ou rendre toute ordonnance pour assurer la confidentialité de l'instruction s'il est convaincu que, selon le cas :</p> <p>a) il y a un risque sérieux de divulgation de questions touchant la sécurité publique;</p>
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disclosed;

(b) there is a real and substantial risk to the fairness of the inquiry such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public;

(c) there is a real and substantial risk that the disclosure of personal or other matters will cause undue hardship to the persons involved such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public; or

(d) there is a serious possibility that the life, liberty or security of a person will be endangered.

(2) If the member or panel considers it appropriate, the member or panel may take any measures and make any order that the member or panel considers necessary to ensure the confidentiality of a hearing held in respect of an application under subsection (1).

b) il y a un risque sérieux d'atteinte au droit à une instruction équitable de sorte que la nécessité d'empêcher la divulgation de renseignements l'emporte sur l'intérêt qu'a la société à ce que l'instruction soit publique;

c) il y a un risque sérieux de divulgation de questions personnelles ou autres de sorte que la nécessité d'empêcher leur divulgation dans l'intérêt des personnes concernées ou dans l'intérêt public l'emporte sur l'intérêt qu'a la société à ce que l'instruction soit publique;

d) il y a une sérieuse possibilité que la vie, la liberté ou la sécurité d'une personne puisse être mise en danger par la publicité des débats.

(2) Le membre instructeur peut, s'il l'estime indiqué, prendre toute mesure ou rendre toute ordonnance qu'il juge nécessaire pour assurer la confidentialité de la demande visée au paragraphe (1).

[14] It is important to note that the measures contemplated in s. 52 are to "ensure the confidentiality of the inquiry". What is restrained, under s. 52, is the public's access to the proceedings, not a party's access. Typically, the measures adopted by the Tribunal to maintain confidentiality where warranted are those that result in the hearing being conducted *in camera*.

[15] This is not what the Commission is seeking here. The request goes well beyond that. If granted, Mr. Lemire will be excluded from the hearing examining his own alleged conduct. He will be denied the opportunity to view the evidence. His opportunity to assist and instruct his lawyer will be restricted. Section 50(1) provides that all parties shall be given a "full and ample opportunity, in person or through counsel, to appear at the inquiry, present evidence and make representations". As Mr. Justice Mackay noted in *Canadian Radio-television and Telecommunications Commission v. Canada (Human Rights Tribunal) (T.D.) ("Deegan")*, [1991] 1 F.C. 141, at 153, (F.C.T.D.):

The opportunity to present evidence and make representations implies, as I see it, the necessity to know the evidence and representations of others in order to respond with relevancy in the context of the hearing conducted by the Tribunal.

[16] The reference to "counsel" in s. 52 is intended to assure a party of his or her right to be represented by counsel. The presence of counsel does not nullify the right of a party to be present. Each party has a right to appear at the inquiry regardless of whether he or she is represented by counsel. This right flows not only from s. 50(1) but as a matter of natural justice.

[17] I note that Mr. Lemire has not been a passive participant in these proceedings even though he has been represented by legal counsel. I have observed this throughout the course of the four weeks of hearings. He has been assisting Ms. Kulaszka in all manners; he organizes the numerous documents and exhibits for her, he takes notes, he suggests questions to her, he has even made representations to the Tribunal on occasion. In this regard, I find the Court's finding in *Deegan, supra* at 153-4, instructive:

[P]arties to a complaint should be free to attend and hear the evidence presented and without their consent should not be excluded under a general order excluding witnesses whether they represent themselves *or are represented by counsel whose effectiveness should not be limited by the exclusion* as a potential witness *of a party who alone can instruct counsel*.

(emphasis added)

[18] Outside of the hearing, Mr. Lemire has at times communicated directly with the Tribunal registry, particularly with regard to the organization and format of exhibits.

[19] In her submissions on this motion, Ms. Kulaszka concludes that in these circumstances, Mr. Lemire should be entitled to see the witnesses and their reactions to questions, and to instruct counsel regarding any matters that arise during their testimony. I agree. I would add that I therefore see no reason why the witnesses' evidence should not be given in the physical presence of all parties, at the Tribunal's facilities in Ottawa.

[20] This being said, the Commission's concerns are not without some basis. There is evidence that photos have been taken of the alleged Anti Racist Action representative while he was in attendance at another Tribunal hearing relating to a s. 13 complaint. These images were apparently later posted on the web. According to the Commission, the three witnesses fear that if their images are publicized, their ability to do their jobs investigating hate on the Internet may be compromised. Ms. Kulaszka points out that the image of at least one of the three witnesses is already available on the Internet. Nevertheless, I do not see this aspect of the Commission's request as unreasonable. I would note, however, that no evidence has been brought before me of any photos having been taken during the previous four weeks of hearings into this complaint that were later posted on the Internet. There is one exception. The webpage dealing with this case, found on the freedomsite.org website, contains photos, taken in the hearing room during a break in proceedings, of persons identified as the "defence team", including Ms. Kulaszka, Paul Fromm (representing the interested party, CAFE) and Mr. Lemire.

[21] In all of the circumstances, I therefore order that no person be allowed to bring into the hearing room, cameras of any sort including computer cameras, video cameras and camera-phones. The capturing of any visual image will be forbidden. I direct the Tribunal Registry to take the necessary measures for the enforcement of this order.

[22] The Commission, on a secondary point, requests an order that all questions to be asked of the witnesses "fall within the strict parameters of the constitutional question in issue to the exception of Hannya Rizk who would also be asked questions regarding her investigation of the present complaint".

[23] This request is denied. Any objections that may be raised by the parties regarding the scope of the evidence of these witnesses will be dealt with by the Tribunal as they arise.

[24] The Commission's motion as presented is dismissed.

"Signed by"

Athanasios D. Hadjis

OTTAWA, Ontario
May 7, 2007

PARTIES OF RECORD

TRIBUNAL FILE:	T1073/5405
STYLE OF CAUSE:	Richard Warman v. Marc Lemire
RULING OF THE TRIBUNAL DATED:	May 7, 2007
APPEARANCES:	
Richard Warman	For himself
Giacomo Vigna	For the Canadian Human Rights Commission
Barbara Kulaszka	For the Respondent
Simon Fothergill	For the Attorney General of Canada
Paul Fromm	For the Canadian Association for Free Expression
Douglas Christie	For the Canadian Free Speech League
Joel Richler	For the Canadian Jewish Congress
Steven Skurka	For the Friends of Simon Wiesenthal Center for Holocaust Studies
Marvin Kurz	For the League for Human Rights of B'nai Brith