

RICHARD WARMAN

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

MARC LEMIRE

Respondent

RULING

MEMBER: Athanasios D. Hadjis 2008 CHRT 8
2008/03/20

[1] On May 9th and 10th, 2007, two Commission employees, Hanny Rizk and Dean Steacy, testified in this case. I ruled at that time that persons other than the parties and their representatives be excluded from the hearing room while both witnesses testified, pursuant to s. 52 of the *Canadian Human Rights Act*. Their evidence was transcribed by court reporters. The transcripts were not subject to the exclusionary order and were provided to the parties.

[2] Both witnesses are now scheduled to continue their evidence on March 25, 2008. Mr. Lemire and the Canadian Association for the Freedom of Expression have requested that the Tribunal revisit its ruling. Rogers Publishing Limited, a division of Rogers Media Inc., has made a similar request on behalf of Maclean's Magazine, specifically asking that representatives of the magazine be permitted to attend, observe and report on the evidence to be tendered at this hearing. The Attorney General of Canada states, for its part, that this hearing should be conducted in accordance with the "usual procedure of holding open hearings in Tribunal cases, unless the Tribunal is satisfied that closing the hearing room is necessary to ensure the safety of the participants".

[3] The Commission proposes in its submissions that the order be maintained but that other measures be put in place to "better accommodate" members of the public who wish to attend the hearing, including a video "link" to another room where the public could observe the hearing without being able to observe the witnesses.

[4] I have come to the conclusion that my previous ruling should be rescinded.

[5] In addressing this matter, it is important to understand the context in which my initial ruling was made. At Mr. Lemire's request, the Tribunal had issued subpoenas summoning Ms. Rizk and Mr. Steacy to attend the hearing and give evidence. In the afternoon of May 8, 2007, the Commission sent a letter by fax to the Tribunal stating that pursuant to s. 37 of the *Canada Evidence Act*, it formally objected to the disclosure of the visual appearance of its employees during the Tribunal proceedings and "certified" that this information was not to be disclosed on the basis of the public interest in ensuring the security of these individuals during and after the testimony. The Commission added that as a result of its s. 37 objection, it had "instructed Ms. Rizk and Mr. Steacy not to attend the Tribunal hearing but to remain available until the matter of this objection" was resolved.

[6] When Commission counsel appeared at the hearing on May 9, 2007, his position was unambiguous: "...we have invoked section 37. If there are no measures put in place, we are invoking it. If the measures that I am asking for today are put in place, then we will not invoke, we will withdraw our objection on the basis of section 37, for the purpose of their attending and the disclosure of their visual appearance".

[7] I issued my ruling regarding the exclusion of non-parties from the hearing room orally that morning. The ruling was premised in large part by this looming likelihood that the Commission would invoke s. 37 unless the "measures" that it was demanding were "put in place". The hearing proceeded but the Commission nonetheless invoked s. 37 numerous times to object to questions posed by Mr. Lemire's counsel to Ms. Rizk and Mr. Steacy. The Commission alleged public security concerns in making its objections.

[8] Mr. Lemire later challenged those objections before the Federal Court, which has the exclusive authority to rule when such matters arise before the Tribunal. Interestingly, however, it appears that a few weeks before the January 15, 2008, Federal Court hearing into these objections, the Commission disclosed to Mr. Lemire the information that was the subject of the s. 37 application. The Court therefore determined that since the information had been disclosed, it could no longer "properly" consider the s. 37 application, which the disclosure had effectively rendered moot. In effect, the Commission disclosed the very information that it had previously claimed could not be disclosed pursuant to s. 37. I note that the Commission also withdrew, before the Federal Court, its s. 37 objection to the issuance of a subpoena of Bell Canada (see the Federal Court's ruling, January 15, 2008, Docket no. T-860-07).

[9] The outcome of the s. 37 matter gives me pause to question the soundness of the Commission's invocation of public security concerns with respect to the testimony of these witnesses.

[10] More significantly, however, having now had the benefit of considering the question in circumstances different than those in which I was placed on the morning of May 9, 2007, I am not persuaded that the witnesses are exposed to a *real and substantial* risk that undue hardship will be caused to the persons involved, as contemplated in s. 52(1)(c) of the *Act*, nor that there is a *serious* possibility that the life, liberty or security of a person will be endangered, as contemplated by s. 52(1)(d) of the *Act*. The excerpts from the Internet cited by the Commission in its submissions do not, in my view, satisfy these criteria. They are indicative of no greater risk than that which has been suggested in the past by comments addressed to other participants in this and other s. 13 cases, including counsel, Tribunal members and staff, and the parties themselves.

[11] I am therefore rescinding the order. The hearing will be conducted in public, as mandated by s. 52(1) of the *Act*. I would note for the record that the Commission is mistaken in its submissions that the order came about pursuant to my ruling of May 7, 2007, which had merely excluded cameras from the Tribunal premises. That ruling preceded the exclusion order. No request has been made for me to revisit the May 7th ruling and as a result, cameras will remain excluded from the Tribunal's premises.

"Signed by"

Athanasios D. Hadjis

OTTAWA, Ontario

March

20,

2008

PARTIES OF RECORD

TRIBUNAL FILE:	T1073/5405
STYLE OF CAUSE:	Richard Warman v. Marc Lemire
RULING OF THE TRIBUNAL DATED:	March 20, 2008
APPEARANCES:	
Richard Warman	For himself
Margot Blight/Philippe Dufresne	For the Canadian Human Rights Commission
Barbara Kulaszka	For the Respondent
Simon Fothergill/Alysia Davies	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/Ryder Gilliland	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
Julian Porter	For Rogers Publishing Limited, A Division of Rogers Media Inc.