

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

**RICHARD WARMAN**

**Complainant**

**- and -**

**CANADIAN HUMAN RIGHTS COMMISSION**

**Commission**

**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 21  
2007/05/17

[1] Marc Lemire has requested that I issue a subpoena to be served on Bell Canada for "all documents and information concerning the IP Address 70.48.181.203".

[2] During the examination of Canadian Human Rights Commission employee, Dean Stacey, on May 10, 2007, evidence was adduced regarding postings on the Stormfront.org message board that were made by someone using the account identified as "Jadewarr". Mr. Lemire claims that this person is in fact a Commission employee. His conclusion is based on the testimony given by Richard Warman in another Tribunal

hearing, as well as a number of documents that have been produced in the present case. According to Mr. Lemire, this evidence demonstrates that the Commission has been "actively engaging" on message boards with him and other individuals who are respondents in similar human rights cases. This indicates, he argues, that the Commission's activities are going "far beyond attempting to ameliorate discrimination, and are impacting the fairness of its procedures, the rights of complainants and respondents both, and the guarantees to Charter rights". In addition, this evidence would contradict the testimony of Mr. Steacy to the effect that the Commission does not participate in message board discussions.

[3] Apparently, Mr. Lemire has additional documentation in his possession indicating that the IP Address assigned to the computer from which Jadewarr posted was 70.48.181.203. I gather that the Internet Service Provider who assigned this address to the end user was Bell Canada. Mr. Lemire wishes, therefore, to summon a Bell Canada representative to bring all documents and information concerning the IP Address to the hearing, and perhaps definitively establish whether a Commission employee was posting on the message board under the Jadewarr account.

[4] The Commission has filed a "formal" objection to the disclosure of this information, pursuant to s. 37 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5. In a letter from its Acting Senior Counsel, Philippe Dufresne, the Commission "certifies to the Tribunal that this information should not be disclosed on the basis of the public interest as the disclosure of this information would be prejudicial to the Commission's investigative process".

[5] The relevant provisions of s. 37 of the *CEA* are the followi

SPECIFIED PUBLIC INTEREST	RENSEIGNEMENTS D'INTÉRÊT PUBLIC
<p><b>37.</b> (1) Subject to sections 38 to 38.16, a Minister of the Crown in right of Canada or other official may object to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying orally or in writing to the court, person or body that the information should not be disclosed on the grounds of a specified public interest.</p> <p>(1.1) If an objection is made under subsection (1), the court, person or body shall ensure that the information is not disclosed other than in accordance with this Act.</p>	<p><b>37.</b> (1) Sous réserve des articles 38 à 38.16, tout ministre fédéral ou tout fonctionnaire peut s'opposer à la divulgation de renseignements auprès d'un tribunal, d'un organisme ou d'une personne ayant le pouvoir de contraindre à la production de renseignements, en attestant verbalement ou par écrit devant eux que, pour des raisons d'intérêt public déterminées, ces renseignements ne devraient pas être divulgués.</p> <p>(1.1) En cas d'opposition, le tribunal, l'organisme ou la personne veille à ce que les renseignements ne soient pas divulgués, sauf en conformité avec la présente loi.</p> <p>(2) Si l'opposition est portée devant une cour supérieure, celle-ci peut décider la question.</p>

<p>(2) If an objection to the disclosure of information is made before a superior court, that court may determine the objection.</p> <p>(3) If an objection to the disclosure of information is made before a court, person or body other than a superior court, the objection may be determined, on application, by</p> <p>(a) the Federal Court, in the case of a person or body vested with power to compel production by or under an Act of Parliament if the person or body is not a court established under a law of a province; or</p> <p>(b) the trial division or trial court of the superior court of the province within which the court, person or body exercises its jurisdiction, in any other case.</p> <p style="text-align: right;">[...]</p>	<p>(3) Si l'opposition est portée devant un tribunal, un organisme ou une personne qui ne constituent pas une cour supérieure, la question peut être décidée, sur demande, par :</p> <p>a) la Cour fédérale, dans les cas où l'organisme ou la personne investis du pouvoir de contraindre à la production de renseignements sous le régime d'une loi fédérale ne constituent pas un tribunal régi par le droit d'une province;</p> <p>b) la division ou le tribunal de première instance de la cour supérieure de la province dans le ressort de laquelle le tribunal, l'organisme ou la personne ont compétence, dans les autres cas.</p> <p>[...]</p>
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[6] Section 36.1 of the *CEA* states that the term "official" has the same meaning as in s. 118 of the *Criminal Code*, which in turn provides that an "official" means a person who holds an office or who is appointed to discharge a public duty. I am satisfied that Mr. Dufresne, in his capacity as Acting General Counsel for the Commission, is a person appointed to discharge a public duty, within the meaning of s. 118. I would note, furthermore, that this is not the first time that Commission lawyers have invoked s. 37 to prevent the disclosure of information in this case. At no time has any party argued on those occasions or the present one, that Commission counsel is not an official within the meaning of s. 37.

[7] Once an official has made an objection under s. 37(1) of the *CEA*, the court, person or body in receipt of the objection is required to "ensure that the information is not disclosed" other than in accordance with the *CEA* (s. 37(1.1)). In hearings before the Canadian Human Rights Tribunal, the objection may only be determined, on application, by the Federal Court (s. 37(3)(a)).

[8] One of the interested parties in this case, the Canadian Association for Free Expression (CAFE), submits that the Commission's objection is premature. It contends that the words of s. 37 do not preclude the "obtaining of information", only its production as evidence. I disagree. Section 37(1) states that an official may object to the disclosure of information before a court, person or body. The restriction is not limited to "production as evidence". Moreover, the Tribunal's power to issue the subpoena being sought by Mr. Lemire is derived from s. 50(3)(a) of the *Canadian Human Rights Act*, which provides that the Tribunal may summon and enforce the attendance of witnesses

and compel them to give oral or written evidence on oath and *to produce any documents and things* that the member or panel considers necessary for the full hearing and consideration of the complaint. Thus, the subpoena that Mr. Lemire is seeking would compel the Bell Canada representative to attend the hearing and produce the documents relating to the above noted IP Address, not to merely enable Mr. Lemire to "obtain information".

[9] For his part, Mr. Lemire contends that since s. 37(1) states that an official may object to the disclosure of information *before a court, person or body* with jurisdiction to compel the production of information, the objection can only be made when the Bell Canada witness physically appears before the Tribunal at the hearing.

[10] I do not agree with this submission either. Section 37(1) is, in my view, explicit in this regard. The phrase "before a court, person or body" relates to the disclosure of information. It is the act of disclosing the information before the court, person or body, to which the officer may object. In addition, according to s. 37(1), an official may certify the objection orally or *in writing*. If an objection under s. 37 was only intended to be made in "open court", why would the legislator have given officials the option of certifying their objections in writing? Logically, this provision must contemplate the possibility of an official making his or her objection known in advance of the moment when the information is to be disclosed. Mr. Dufresne's objection is therefore not premature.

[11] Furthermore, Mr. Dufresne's certification in writing of the objection states that the specific information referenced in the subpoena request should not be disclosed on the grounds of a specified public interest. In these circumstances, it would be absurd for the Tribunal to summon the witness and compel him or her to produce documents that we know are the object of a s. 37 objection. Given that the witness, according to the subpoena request, would not have any other evidence to present, I do not consider his or her evidence or documents as "necessary for the full hearing of the complaint", within the meaning of s. 50(3)(a) of the *Canadian Human Rights Act*. As is noted in the text of Alan W. Mewett & Peter J. Sankoff, *Witnesses*, looseleaf (Toronto: Carswell, 2004) at 7-17, n. 104, where it is clear that a witness cannot offer any admissible evidence because, for example, any such evidence would be privileged, the subpoena may be quashed.

[12] Mr. Lemire's request for a subpoena of Bell Canada "for all documents and information concerning the IP Address 70.48.181.203" is therefore denied.

"Signed by"

Athanasios D. Hadjis

OTTAWA, Ontario  
May 17, 2007

PARTIES OF RECORD

TRIBUNAL FILE:	T1073/5405
STYLE OF CAUSE:	Richard Warman v. Marc Lemire
RULING OF THE TRIBUNAL DATED:	May 17, 2007
APPEARANCES:	
Richard Warman	For himself
Giacomo Vigna / Philippe Dufresne	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