Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

BETWEEN:

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 37
2007/08/17

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

BETWEEN:

[1] The Respondent, Marc Lemire, has made a motion for the adjournment *sine die* of the present proceedings, pending the determination by the Federal Court of several claims of public interest immunity made by the Canadian Human Rights Commission, pursuant to s. 37 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 (*CEA*).

[2] On May 9 and 10, 2007, Mr. Lemire's legal counsel, Barbara Kulaszka, called two Commission employees to testify at the hearing into the complaint. Ms. Kulaszka had indicated that these individuals and one other witness, who has since testified, would be her last witnesses. Her case would then have been closed. The other parties had stated that they did not intend to adduce any additional evidence. The Tribunal had therefore already set dates for final argument.

[3] During Ms. Kulaszka's questioning of the abovementioned Commission employees, the Commission objected numerous times to the disclosure of the information being sought, on the grounds of a specified public interest, pursuant to s. 37(1) of the *CEA.* In addition, subsequent to these hearing dates, the Commission invoked s. 37 in its objection to Mr. Lemire's request for the issuance of a subpoena (see my ruling in this regard, *Warman v. Lemire*, 2007 CHRT 21).

[4] On May 17, 2007, Mr. Lemire filed a Notice of Application to the Federal Court, Court File no. T-860-07, for a determination of the Commission's claims of public interest immunity, in accordance with s. 37(3) of the *CEA.*

[5] In making the present adjournment request, Mr. Lemire submits that it is the "normal and expected procedure" where a s. 37 objection has been made before a court, person or body other than a superior court, for that instance to adjourn its proceedings while the determination of the matter is before the superior court. As the British Columbia Court of Appeal pointed out in *Re Attorney General of Canada et al. and Sander*, 1994 CanLII 1658 at para. 84:

> Thus, when an objection to disclosure under s. 37 is made at trial by the Crown in a court other than a superior court, the trial proceedings should be adjourned so the objection may be determined in a superior court.

[6] The Court reiterated this point in *R. v. Sander*, 1995 CanLII 1229 at para. 29 (B.C.C.A.):

> Where the trial is in Provincial Court, an application under s. 37 operates to interrupt the trial, to remove to another court the determination of an issue ordinarily determined by the trial judge.

[7] Mr. Lemire points out that determinations by the superior court, made pursuant to s. 37 of the *CEA*, constitute separate and independent inquiries, not interlocutory appeals or reviews of the lower tribunal's ruling. He adds that the Tribunal in the present case did not make any ruling with respect to the Commission's s. 37 *CEA* claim other than to state that once the immunity is invoked, the matter was out of its hands. The question could only be further addressed by the Federal Court, on application.

[8] It is well established that administrative tribunals are masters of their own proceedings and, as such, they possess significant discretion in ruling upon requests for adjournments. Tribunals such as the Canadian Human Rights Tribunal, which exercise judicial or quasi-judicial functions, must use their discretion in keeping with the principles of natural justice (*Baltruweit v. Canadian Security Intelligence Service*, 2004 CHRT 14 at paras. 15-17).

[9] I share the view expressed in *Baltruweit* and *Leger v. Canadian National Railways Company, Ruling No. 1*, CHRT File T527/2299, (Nov. 26, 1999), that the Tribunal should not apply the three-stage test set out in *RJR-Macdonald Inc. v. Canada* [1994] 1 S.C.R. 311, when dealing with adjournment requests. The RJR-Macdonald test is suited to situations where a supervisory court is asked to stay the proceedings of a lower court or tribunal, pending an appeal or judicial review application. That is not the case with regard to the present motion.

[10] The Commission and the Attorney General of Canada oppose the adjournment request. They point out that the information being withheld by the Commission relates to investigative and other actions that the Commission has taken pursuant to the *Canadian Human Rights Act* (*CHRA*). They contend that given the limitations of the Tribunal's jurisdiction to adjudicate constitutional matters, and the absence of any jurisdiction to inquire into the manner in which the Commission investigates complaints or discharges its mandate under the *CHRA*, the information being withheld by the Commission is not relevant to the issues of this case and is not required in order to adjudicate the complaint. The Commission also argues that this information constitutes a

"small amount of evidence in issue". On this latter point, I fail to see how the size or magnitude of the evidence should have any bearing on the question.

[11] This is not the first time that the Commission and the Attorney General have raised the scope of the evidence as an issue. Similar objections were made at the early stages of the hearing and, after some debate, I ruled that evidence regarding the Commission's activities relating to s. 13 of the *CHRA*, is admissible for the purposes of challenging the constitutionality of this provision. The question of whether any of this evidence should be considered by the Tribunal in ultimately determining the constitutional issues of this case was deferred to final argument. All the parties have proceeded through this hearing based on this understanding. It should be noted, nonetheless, that the Commission and the Attorney General have, from time to time, reaffirmed their positions that this evidence is ultimately of no relevance. On these occasions, I have reiterated that debate on this question is reserved for final argument.

[12] The Tribunal has a duty to conduct its proceedings as informally and expeditiously as the requirements of natural justice and rules of procedure allow (s. 48.9(1) *CHRA*). In my view, it would be unfair to Mr. Lemire and a denial of natural justice to require him to close his case when there is a possibility that the s. 37 application may be determined in his favour, thereby making potentially relevant evidence available to him. This is evidence that Mr. Lemire sought to introduce in a timely manner. Section 50 of the *CHRA* grants him a "full and ample opportunity" to present evidence at the inquiry. If it turns out that the s. 37 public interest immunity applies, the evidence at issue is inadmissible. But closing the Tribunal inquiry before the Federal Court has given its answer pre-judges the question of relevance and admissibility, and renders useless any relief that Mr. Lemire may obtain from that Court.

[13] Any delay in the completion of this case is regrettable. I am convinced that all parties look forward with some earnest to a pronouncement on all of the issues before the Tribunal. Mr. Lemire points out that had the Commission invoked public interest immunity under the common law, instead of making an objection under s. 37 of the *CEA*, the Tribunal could have addressed the disclosure questions directly. Any challenges to the Tribunal's findings would have

been dealt with through judicial review. David M. Paciocco makes this point in *The Law of Evidence, Third Edition,* (Toronto: Irwin Law Inc., 2002) at 222, where he notes:

> Prior to the amendments [brought about by the *Anti-Terrorism Act*, 2001, S.C., c.41, s.43], courts found that section 37 had not displaced the common law. The amendments have not changed this. What this means is that it is still open to the Crown to object to disclosure under the common law. An objection under the common law will not trigger the section 37 process. Most importantly, although the section does not provide for provincial courts to hear "an objection made under section 37," this does not preclude the provincial courts, either in the course of a preliminary inquiry or a trial, from hearing a claim for immunity under the common law. In fact, such a procedure is to be encouraged. This will save the inconvenience of adjourning the matter to be heard in the superior court of the province, as is required by the section.

[14] The examples given by the author in this excerpt arise in the context of the criminal law. All of the jurisprudence relied upon by Mr. Lemire in his motion, in fact, relates to criminal trials. The Attorney General argued that these authorities are therefore distinguishable on this ground alone. However, neither the Attorney General nor the Commission produced any decisions (civil or criminal in nature) to counter the findings in those cases with regard to the practice of adjourning proceedings pending s. 37 determinations. Furthermore, I fail to see why deciding whether to adjourn a proceeding pending a determination by a superior court should depend on whether the trial at first instance is criminal or civil in nature. Section 37 makes no such distinction.

[15] I am therefore granting the adjournment *sine die* being sought by Mr. Lemire. Had any of the parties indicated that they had any other evidence to adduce, aside from that which relates to the s. 37 objection, I would have continued the hearing pending the outcome of the Federal Court application, but that is not the case.

[16] The parties should take note that if the delay engendered by the s. 37 application becomes prolonged, the public interest in an expeditious inquiry may require that the Tribunal re-visit its decision to defer making a definitive finding on the relevance of the evidence sought. Case management conference calls will therefore be conducted by the Tribunal on a regular basis to

follow up on the progress of the s. 37 application before the Federal Court. The Tribunal expects the parties to cooperate and act with due diligence towards the hearing of the application.

"Signed by"

Athanasios D. Hadjis

OTTAWA, Ontario
August 17, 2007

CANADIAN HUMAN RIGHTS TRIBUNAL

PARTIES OF RECORD

TRIBUNAL FILE:	T1073/5405
STYLE OF CAUSE:	Richard Warman v. Marc Lemire
RULING OF THE TRIBUNAL DATED:	August 17, 2007
APPEARANCES:	
Richard Warman	For himself
Margot Blight	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