

CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE
LA PERSONNE

CANADIAN JEWISH CONGRESS

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

HENRY MAKOW

Respondent

RULING

MEMBER: Edward P. Lustig

2010 CHRT 13
2010/05/26

[1] This is a ruling concerning a motion by the Respondent dated September 4, 2009 for an adjournment of this matter *sine die*.

[2] The complaint in this matter was filed by the Complainant on January 29, 2007. The complaint alleges that the Respondent communicated messages over the internet that were likely to expose members of the Jewish community to hatred or contempt by reason of their membership in an identifiable group contrary to s. 13 (1) of the *Canadian Human Rights Act* (the "*CHRA*"). The complaint alleges that the impugned conduct occurred in a manner that was ongoing.

[3] On September 16, 2008, the Commission, pursuant to s. 44 (3) (a) of *CHRA* requested the Canadian Human Rights Tribunal (the "Tribunal") to institute an inquiry into the complaint.

[4] On September 2, 2009 the Tribunal released its decision in the matter of *Warman v. Lemire*, 2009 CHRT 26. That case involved a complaint under s. 13 (1) of the *CHRA*. In his very comprehensive decision, Member Hadjis concluded:

"... I have also concluded that s. 13 (1) in conjunction with ss. 54 (1) and (1.1) are inconsistent with s. 2 (b) of the Charter, which guarantees the freedom of thought, belief,

opinion and expression. The restriction imposed by these provisions is not a reasonable limit within the meaning of s. 1 of the Charter."

[5] On October 1, 2009, the Commission applied to the Federal Court for judicial review of the Tribunal's decision in *Warman v. Lemire* (See FC file no. T-1640-09).

[6] In its public release commenting on its application for Judicial Review dated October 1, 2009, the Commission commented as follows:

"The Commission applied for Judicial Review so that technical but important legal issues raised by the decision can be clarified. These issues go beyond this particular case and could have an impact on other administrative tribunals. As a result, the uncertainty created by the decision is not in the public interest and merits a binding decision by a higher court.

The application is based on two grounds. It is the Commission's view that:

- 1. The Tribunal erred in law when it found that the manner by which the applicant exercises its statutory mandate could render section 13 of the Canadian Human Rights Act unconstitutional; and*
- 2. The Tribunal's findings of unconstitutionality also resulted from the adoption of subsections 54 (1) (c) and (1.1) of the Canadian Human Rights Act, subsequent to the Supreme Court of Canada's decision in *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892. The Tribunal erred in law when it refused to apply section 13 of the Act because a refusal to apply subsections 54 (1) (c) and (1.1) would have provided a sufficient remedy in respect of this ground."*

[7] The parties filed with the Tribunal submissions with respect to the Respondent's motion for an adjournment. It is to be noted that the motion was filed prior to the Commission's application for Judicial Review in the *Warman v. Lemire* case.

[8] I have reviewed the submissions of the parties and have concluded that it would be appropriate and would properly serve the interests of justice if this matter was adjourned. While the Supreme Court of Canada has ruled in *Canada (Human Rights Commission) v. Taylor*, 1990 3 S.C.R. 892 that s. 13 (1) of the *CHRA* is constitutional, the application now before the Federal Court seeks to bring clarity to this issue in view of the distinct factual and legal context giving rise to this Tribunal's decision in *Warman v. Lemire*. Clearly Member Hadjis' decision goes beyond the consideration alone of the penalty provisions in s. 54 of the *CHRA*, as he chose not to "read out" the penalty provisions and preserve s. 13 of the *CHRA*. It is now up to the Federal Court to determine the operability of s. 13 of the *CHRA*. This will achieve the clarity that the Commission has indicated and that I agree is desirable in order to allow the Tribunal to be able to determine this and other cases brought under s. 13 of the *CHRA*.

[9] For these reasons I hereby adjourn these proceedings *sine die* pending the final outcome in the *Warman v. Lemire* case.

"Signed by"

Edward P. Lustig

OTTAWA, Ontario
May 26, 2010

PARTIES OF RECORD

| | |
|--------------------------------------|--|
| TRIBUNAL FILE: | T1330/6008 |
| STYLE OF CAUSE: | Canadian Jewish Congress v. Henry Makow |
| RULING OF THE TRIBUNAL DATED: | May 26, 2010 |
| APPEARANCES: | |
| Igor Ellyn | For the Complainant |
| Daniel Poulin / Sheila Osborne-Brown | For the Canadian Human Rights Commission |
| Barbara Kulaszka | For the Respondent |