

CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS
DE LA PERSONNE

RICHARD WARMAN

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

NORTHERN ALLIANCE AND JASON OUWENDYK

Respondents

RULING

MEMBER: J. Grant Sinclair 2008 CHRT 14
2008/05/08

Charter Challenge

[1] The Respondent, Jason Ouwendyk, has filed a Notice of his intention to question the constitutional applicability, validity and effect of ss. 13, 54(1) and 54(1.1) of the *Canadian Human Rights Act*. He alleges that these provisions violate ss. 2(a), 2(b), 2(d) and 7 of the *Canadian Charter of Rights and Freedoms*, and that they are not saved by s. 1 thereof.

[2] The Tribunal invited the parties to file submissions as to how the question would be addressed during the hearing process. Mr. Ouwendyk suggests that the matter should proceed "as in" the *Warman v. Lemire* case, Tribunal File T1073/5405. This is a case dealing with another s. 13 complaint in which the respondent has raised a virtually identical *Charter* challenge regarding the same provisions of the *Act*. In that case, the evidence with respect to the constitutional issue as well as on the merits of the complaint was heard together. After a total of more than five weeks of hearings, the parties (which include a number of interested third parties and the Attorney General of Canada) are scheduled to make their final arguments in June 2008.

[3] Given that there are other cases in addition to *Warman v. Lemire* where the constitutionality of these provisions is being challenged, and that the outcome of these cases may "come to fruition" before the end of the present case, the Commission submits that the constitutional issue be dealt with in a separate hearing after the evidence regarding the complaint's allegations has been heard and a finding is made thereon.

[4] A similar issue arose in respect of the judicial review before the Federal Court regarding the Tribunal decision in *Warman v. Kulbashian et al.*, Tribunal File T869/1903 and Court File no. T-572-06. The respondents in that case challenged the constitutional validity of the same sections of the *Act* that Mr. Ouwendyk is challenging in the present

case, but they brought forward their challenge for the first time before the Federal Court. The matter had not been raised before the Tribunal. The Commission and the Attorney General of Canada argued that the judicial review should be stayed pending the outcome of the *Lemire* case. The Court agreed, stating that "a stay of the present proceedings is appropriate on the grounds that the sole issue raised in the Applicants' Amended Notice of Application is currently the subject of adjudication before a tribunal in the *Lemire* matter" (See 2007 FC 354, at para. 42). Among the factors considered by the Court were the risk of inconsistent findings, excessive costs and the capacity of the Court to grant the complete or comprehensive remedy. The Court noted that the Tribunal's disposition of the *Lemire* case, including any subsequent application for judicial review, will be available for the guidance of the Court when the *Kulbashian et al.* matter proceeds.

[5] These factors are equally relevant to the present case. For the same reasons cited by the Court, it would be inappropriate to proceed with a virtually identical constitutional challenge as in the *Lemire* case.

[6] The Tribunal therefore directs that the hearing into this complaint should proceed at this time, but solely on the evidence regarding the complaint's allegations. The hearing on the question of the constitutional validity of the impugned sections of the *Act* will be deferred pending the outcome in *Lemire*. If the complaint is substantiated, the Tribunal will not issue any order until the final determination by the Courts of the constitutional question.

Motion to deny the issuance of subpoenas

[7] The Respondent has requested that the Tribunal issue subpoenas for six Commission employees and a former Canadian Human Rights Tribunal member. The Respondent proposes to call these witnesses in support of their *Charter* challenge.

[8] The Commission has filed a motion seeking an order denying this request. Given this decision to defer the hearing on the constitutional question, neither the Respondents' request nor the Commission's motion need be addressed at this time.

"Signed by"

J. Grant Sinclair

OTTAWA, Ontario

May

8,

2008

PARTIES OF RECORD

TRIBUNAL FILE:	T1216/2807 and T1217/2907
STYLE OF CAUSE:	Richard Warman v. Northern Alliance and

	Jason Ouwendyk
RULING OF THE TRIBUNAL DATED:	May 8, 2008
APPEARANCES:	
Richard Warman	For himself
Daniel Poulin	For the Canadian Human Rights Commission
No one appearing	For the Respondent Northern Alliance
Alexan Kulbashian	For the Respondent Jason Ouwendyk