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

Decision

File No.: T1073/5404
Member: Edward P. Lustig
Date: February 27, 2014
Citation: 2014 CHRT 6

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I. Background

[1] This case returns to the Canadian Human Rights Tribunal following an appeal of judicial review at the Federal Court of Appeal (2014 FCA 18). The Tribunal is now tasked with executing the order issued by the Federal Court (2012 FC 1162) as varied by the judgment of the Court of Appeal.

II. Mr. Warman's Complaint against Mr. Lemire

[2] Mr. Warman's complaint referenced only to material found on Freedomsite.org. He alleged in the complaint that Mr. Lemire was the owner and webmaster of the website. The material referred to in the complaint consisted mainly of postings by registered users of the site on the website's message board.

[3] At the hearing into the complaint, however, Mr. Warman and the Commission expanded the complaint to include material found on JRBooksonline.com and Stormfront.org. They alleged that Mr. Lemire was the registered owner of JRBooksonline.com and thus responsible for its content. With respect to Stormfront.org, they alleged that Mr. Lemire posted messages on the website's message board that violated s. 13 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (*CHRA* or the *Act*).

III. Canadian Human Rights Tribunal's Decision (2009 CHRT 26)

[4] Member Hadjis held that Mr. Warman and the Commission were not able to substantiate their claim of Mr. Lemire's proprietorship over JRBooksonline.com (para. 47). He also found that Mr. Lemire's posting on Stormfront.org was not hate speech as covered by the *Act*. Finally, Mr. Lemire was found not to have caused the communication of hateful material on Freedomside.org, for which he is the administrator, when Craig Harrison posted hateful content (see *Warman v. Harrison*, 2006 CHRT 30).

[5] Only the "AIDS Secrets" article on Freedomsite.org was found to constitute a discriminatory practice within the meaning of s. 13(1), by expressing "unusually strong and deep-felt emotions of detestation and vilification towards homosexuals in particular" (*Warman v. Lemire*, 2009 CHRT 26, para. 207). In the article, "[h]omosexuals are presented as dangerous and immoral persons, who, motivated by a selfish desire to indulge their own sexual deviance and not have their blood donations tested, are responsible for the deaths of untold thousands of persons" (para. 200). The article also used statistics out of context to define HIV/AIDS as an inherently Black disease (para. 195).

[6] On the constitutional question as to whether s. 13 violates s. 2(b) of the *Canadian Charter of Rights and Freedoms*, the Tribunal was only prepared to deviate from the Supreme Court of Canada's decision in *Canada (Human Rights Commission) v. Taylor*, [1990] 3 SCR 892, if Mr. Lemire could distinguish the circumstances of his case from those in *Taylor* (para. 221).

[7] Member Hadjis found that the current enactment of s. 13 of the *Act*, amended after the ruling in *Taylor*, no longer minimally impaired the infringed freedom of expression because the penalties for a finding of communicating hate speech or causing hate speech to be communicated — ss. 54(1)(c) and 54(1.1) — are now too similar to *criminal* sanctions as opposed to an administrative penalty. He also found that "[t]he process can no longer be considered exclusively remedial, preventative, and conciliatory in nature, which was at the core of the Court's finding in *Taylor* that s. 13(1)'s limitation of freedom of expression is demonstrably justified in a free and democratic society, and thereby 'saved' under s. 1 of the *Charter*" (para. 279). Moreover, the Tribunal determined that the Commission's decision to send the case to the Tribunal for inquiry despite removal of the offending content, and the Commission's general disuse of any measures to conciliate, rendered the impugned legislation unconstitutional in light of its practical effect (paras. 283 and 284). Thus, the Tribunal refused to apply ss. 13(1), 54(1)(c) and 54(1.1) of the *CHRA*.

IV. Federal Court's Decision (2012 FC 1162)

[8] On judicial review, on a standard of correctness, the Court agreed that the remedial measures under s. 54 had become unconstitutionally punitive, but that the Tribunal erred in not applying the doctrine of severance; the Tribunal should have severed ss. 54(1) and (1.1), and found s. 13 constitutional to the extent it had been upheld in *Taylor*. The Court therefore declared ss. 54(1) and (1.1) unconstitutional and remitted the matter to the Tribunal to issue a declaration under s. 13 in respect of the one discriminatory article and consider whether a remedy should be imposed under ss. 54(1)(a) and/or (b) (paras. 138 and 139).

[9] The Court also found that "there is nothing in ss 50-54 of the Act, which define the Tribunal's powers in conducting an inquiry, to give it [authority to review the actions of the Commission]" (para. 52). The Tribunal may only consider *Charter* issues that arise at the hearing, as it has no jurisdiction to review how the Commission makes decisions in its administrative role; only the courts may scrutinize the Commission's decision-making process, and the proper way to do this is by way of judicial review (para. 57). Therefore, the propriety of the Commission's decision to mediate and conciliate, or refer the matter to the Tribunal, was outside the mandate of the Tribunal and should have had no bearing on the Tribunal's constitutional analysis.

V. Federal Court of Appeal's Decision (2014 FCA 18)

[10] Evans JA of the Federal Court of Appeal fully endorsed the constitutionality of ss. 13, 54(1)(c) and 54(1.1). He ruled that s. 13 — as well as its penalty provisions — are constitutional, especially in light of the government's pressing and substantial objective to prevent the vilification of vulnerable groups. Moreover, the financial sanctions possible in the event a respondent is found to have breached s. 13 are not truly penal, but administrative, and therefore also constitutional. He varied the Federal Court's order by setting aside the declaration of unconstitutionality, but otherwise left the Federal Court's order intact (para. 107).

[11] The Court agreed that "the effects of a legislation may invalidate it if they flow necessarily from its terms", but unconstitutional administrative action does not carry the same implications as unconstitutional legislation (para. 47). However, it disagreed with the Federal Court's holding that the Tribunal did not have the jurisdiction to inquire into the Commission's application of its administrative powers. "The Judge's narrow construction of the Tribunal's jurisdiction to 'inquire into the complaint' would undermine the reasons for conferring legal authority on it to decide the constitutional validity of its enabling legislation" (para. 51). So long as the Commission's action is relevant to the determination of the legal question before the Tribunal, the Tribunal may inquire into it. In this case, however, the Commission's actions were not relevant to the constitutional issue (para. 52).

[12] Relying heavily on the Supreme Court of Canada's decision in *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 SCR 467, the Federal Court of Appeal determined that the message sent to Canadians by having hate speech laws is part of a necessary endeavour to promote equality in society, and that the actual effectiveness of the legislation where the impugned Internet content is stored on foreign servers is not relevant to the constitutionality of such legislation (paras. 60-63). Subsection 13(2), which makes the section applicable to the Internet — where, it was argued, targeted groups have ample opportunity to respond — *is* also a minimal impairment of the right to freedom of expression under s. 2(b) of the *Charter* because hate speech actually *prevents* oppressed groups from contributing as equals in social discourse (paras. 64 and 70). The Federal Court of Appeal also rejected the suggestion that the Internet facilitates an educative exchange of views on topics of the sort raised in material captured by s. 13; "because of the extreme nature of prohibited hate speech it strikes me as fanciful to imagine that those who engage in it are likely to be open to an educative exchange of ideas" (para. 65).

[13] When it comes to the financial sanctions for a breach of s. 13, Evans JA affirmed:

> Financial penalties imposed for non-compliance with a statutory scheme and payable into the general revenue fund have been found not to be penal in nature for the purpose of determining if the procedural protections of section 11 of the *Charter* apply … Penalties for non-compliance imposed by regulatory legislation

> for the protection of the public in accordance with the objectives of the statute are not necessarily penal in nature for the purpose of section 11. (para. 78)

[14] Evans JA was deferential to Parliament's decision to impose a financial penalty to induce compliance with, and deter breach of s. 13 of the *Act*, noting that sanctions need not be perfect (para. 91). Combined with the objective of "protecting the societal standing of vulnerable groups and preventing discrimination against them," (para. 92) and that the sanction prevents offenders from avoiding liability when they target groups as opposed to individuals (para. 93), Evans JA said:

> When viewed in the context of the *CHRA's* remedial scheme, the imposition of a penalty under paragraph 54(1)(*c*) and subsection 54(1.1) carries no more of a moral stigma than a finding that an individual has wilfully or recklessly engaged in the communication of hate speech [subsection 53(3) of the *Act*, which was unchallenged], and by virtue of paragraph 54(1)(*b*) is required to compensate specifically identified individuals. (para. 98)

[15] As such, the financial sanctions are not penal but administrative and impose "accountability for the damage caused by the vilification of targeted groups and of deterring the communication of hate speech in order to decrease discrimination against them" (para. 104).

VI. Reassignment of the Case

[16] It should be noted that subsequent to the Court's remittance order, the CHRT Acting Chairperson assigned this case to a different Tribunal Member, as the term of Tribunal Member Hadjis expired in early 2010.

VII. Issues before the Tribunal

[17] The Tribunal is currently seized with the following issues that require decision:

1. Should the Tribunal adjourn the matter until the judicial review litigation has been finally determined, i.e. until the appellant forfeits his opportunity to seek leave to appeal, the Supreme Court of Canada denies leave, or grants leave and decides the appeal?

2. Should the Tribunal convene a hearing to hear evidence and submissions on Mr. Lemire's claim for a stay based on abuse of process?

3. Implementation of the remittance order, as varied by the Federal Court of Appeal?

1. Should the Tribunal adjourn the matter until the judicial review litigation has finally been determined?

[18] The Respondent has taken the position that this matter should be adjourned *sine die* pending the final determination of any and all appeal proceedings in the aforementioned judicial review. In his view, the case raises important issues going to one of the most fundamental freedoms of Canadians, that of freedom of expression. Those issues have not yet been finally determined and will not be so until all appeals are completed. In his words: "[t]his matter may yet proceed to the Supreme Court of Canada."

[19] I cannot accept the Respondent's arguments.

[20] Decisions of the Tribunal, and remittance orders from the Federal Courts, are not subject to an automatic stay pending appeal or leave to appeal. The Tribunal must act upon a higher court's order, unless a party is able to obtain a judicial stay. Furthermore, under s. 48.9(1) of the *Canadian Human Rights Act*, the Tribunal is compelled to conduct proceedings "as informally and expeditiously as the requirements of natural justice and the rules of procedure allow." As such, the Tribunal will not adjourn the matter pending completion of judicial review appeals in the same matter.

[21] Parties may seek a stay through s. 50 of the *Federal Courts Act*, R.S.C., 1985, c. F-7, or s. 65.1(1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26.

[22] Mr. Lemire has not, in his submissions on an application for adjournment *sine die*, demonstrated that a denial of natural justice or procedural fairness would occur without the adjournment. This is significant because a potential breach of natural justice would have

constituted legitimate grounds for the Tribunal not proceeding expeditiously: s. 48.9(1) of the *CHRA*.

[23] In view of the foregoing, the request for an adjournment *sine die* is denied.

2. Should the Tribunal convene a hearing to hear evidence and submissions on Mr. Lemire's claim for a stay based on abuse of process?

[24] In the alternative, the Respondent requests a hearing to deal with "outstanding matters", which he submits includes a motion for a stay of proceedings on the grounds of abuse of process. In this last regard, he claims that the prosecution of the complaint by both Complainant and Commission was oppressive, malicious, contemptible, and carried out in bad faith, such as to bring the administration of human rights law into disrepute.

[25] In order to succeed in a motion for a stay based on abuse of process, which would necessarily require relitigation of the case, Mr. Lemire would have to comply with the Supreme Court's holdings on abuse of process through relitigation of facts, as set out in *Toronto (City) v. CUPE Local 79*, 2003 SCC 63, [2003] 3 SCR 77 (*Toronto v. CUPE*). Otherwise, Mr. Lemire's abuse of process motion would itself constitute an abuse of process. In *Toronto v. CUPE*, the Court said:

> There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context. (para. 52)

[26] The first proceeding was before a Member who is no longer with the Tribunal. In his ruling, he thoroughly analyzed the processes of the Commission both in the case before the Tribunal and their practices in general. The Member found that the Commission's administrative practices contributed to the unconstitutionality of the hate message provisions. The Federal Court held that the Tribunal lacked jurisdiction to take said practices into account. The Federal Court of

Appeal disagreed on the jurisdictional point, but held that in the current case such administrative practices were simply not relevant. Now, back before the Tribunal, the Respondent seeks to advance the same arguments, reframed as "a motion for a stay of proceedings on the ground of abuse of process."

[27] It is unnecessary to go any further in the analysis. The context in which Mr. Lemire would claim that the Commission and Mr. Warman's pursuit of this case was an abuse of process is not at all different from the initial hearing. The facts and evidence in question were clearly before the original member; there is no fresh or new evidence that was previously unavailable; moreover, there is no new context that would prevent the Federal Court of Appeal's decision from binding the Tribunal and the parties.

[28] Therefore, Mr. Lemire's abuse of process motion would not conform to the requirements in *Toronto v. CUPE* and would in itself constitute an abuse of process as it seeks the relitigation of previously decided matters. Hearing this motion would also violate the Tribunal's s. 48.9(1) mandate to proceed expeditiously. Therefore, there will be no hearing or submissions on Mr. Lemire's claim for a stay based on abuse of process.

[29] I would add as a final observation on this issue that it was open to the Respondent to argue, before both the Federal Court and the Federal Court of Appeal, that any order remitting the matter to the Tribunal should direct the Tribunal to consider — or in effect reconsider — his abuse of process arguments. Whether or not the Respondent sought such a direction, none can be found in either Court's order. I am unwilling to infer one from the clear dispositive language used in both judgments.

3. Implementation of the remittance order, as varied by the Federal Court of Appeal

(a) Declaration

[30] The Court ordered the Tribunal to issue a declaration in regard to the discriminatory communication. There is no discretion exercisable by the Tribunal in complying with this portion

of the order. Accordingly, the Tribunal hereby declares that Mr. Lemire did violate s. 13 of the *CHRA*, causing hate speech to be communicated, when he posted the "AIDS Secrets" article to the public forum Freedomsite.org.

(b) Order to Cease the Discriminatory Practice

[31] The Tribunal, in accordance with ss. 54(1)(a) and 53(2)(a) of the *CHRA*, orders Mr. Lemire to cease engaging in the above noted discriminatory practice, that is to say to cease communicating or causing to be communicated, by the means described in s. 13, namely the Internet, any matter of the type contained in the "AIDS Secrets" article that is likely to expose a person or persons to hatred or contempt by reason of the fact that the person or persons are identifiable on the basis of a prohibited ground of discrimination. The Commission acknowledges that Mr. Lemire took down the offending post before the first hearing, but that is immaterial to the purpose of a cease and desist order under the *Act*. "The purpose of a Cease and Desist Order under s. 54 (1) (a) of the *Act* is to both remediate conduct found to be contrary to s. 13 (1) of the *Act* and to send a message to others that such conduct is not acceptable" (*Warman v. Northern Alliance*, 2009 CHRT 10, at para. 57 (*Northern Alliance*)). Furthermore, to limit the order to specifically the content impugned in this case would defeat the purpose of such legislation designed to remedy systemic and persistent discrimination in Canadian society. The order is thus to ensure that the Respondent, Mr. Lemire, no longer engage in the kind of conduct found to be discriminatory in this case (*Northern Alliance*, para. 57).

(c) Compensation for reckless or wilful discrimination to a victim specifically identified in the communication

[32] No order shall be issued under s. 54(1)(*b*), as none was sought by the parties.

Signed by

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
February 27, 2014

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1073/5404

Style of Cause: Richard Warman v. Marc Lemire

Decision of the Tribunal Dated: February 27, 2014

Parties of Record:

Richard Warman	For himself
Margot Blight Giacomo Vigna Philippe Dufresne Ian Fine	For the Canadian Human Rights Commission
Barbara Kulaszka	For the Respondent
Simon Fothergill Alysia Davies	For the Attorney General of Canada
Douglas Christie	For the Canadian Free Speech League
Joel Richler Ryder Gilliland Charlotte Kanya-Forstner	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