Federal Court  Cour fédérale

Date: 20100625

Docket: T-293-07

Citation: 2010 FC 679

Ottawa, Ontario, June 25, 2010

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

RICHARD WARMAN

Complainant

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

and

TERRY TREMAINE

Respondent

AMENDED REASONS FOR ORDER AND ORDER - ROWBOTHAM
(Delivered from the Bench at Saskatoon, Saskatchewan, on June 17, 2010, as edited)

[1] In February 2007, the Canadian Human Rights Tribunal found Mr. Terry Tremaine had engaged in the discriminatory practice of communicating or causing to be communicated by the

means described in Section 13(2) of its Act, namely the Internet, material of the type which was found to violate Section 13(1) in the present case or any other matter of a substantially similar content that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or persons is identifiable on the basis of a prohibited ground of discrimination. The Tribunal issued a Cease and Desist Order and levied a fine of $4,000.

[2] Later that month the Order was filed with this Court and entered as a Federal Court Order for the purposes of enforcement. Mr. Tremaine sought a judicial review of the Tribunal's decision. Madam Justice Snider dismissed his application in September 2008. Her reasons are reported at 2008 FC 1032.

[3] In March 2009 the Commission filed a Notice of Motion for a Show Cause Order. The Commission sought an order under Rule 467 of the *Federal Courts Rules* requiring Mr. Tremaine to appear at a stipulated time and place to answer allegations of contempt, to be prepared to hear proof of the alleged contempt of court for communicating by means of the internet messages that are likely to expose persons to hatred or contempt by reason of race, national or ethnic origin, colour or religion, and to be prepared to present any defence he may have. That motion did not proceed. However on May 20, 2010 the Commission served Mr. Tremaine with an updated show cause motion presentable in Saskatoon on June 17, 2010. Mr. Tremaine, who to that point had been self-represented, filed a motion through counsel, Mr. Douglas H. Christie, who is with us today (June 17, 2010) by way of teleconference, to require that public funds be provided for his defence and that the motion to show cause be

adjourned in the interim. It was supported by a hearsay affidavit from Mr. Christie's legal secretary that he had been informed by Mr. Tremaine and believed that Mr. Tremaine was without sufficient funds to defend himself.

[4] That motion was made under Federal Courts Rule 369 whereby a party requests that it be decided on the basis of written representations. I grant that request. As I find the motion is without merit, I do not have to hear from Mr. Warman, who does not appear to have been served, or from the Commission. I dismiss it for these reasons.

[5] The issue before the Court on a motion to show cause is not whether Mr. Tremaine is in contempt, which must be proven beyond a reasonable doubt, but rather whether the Commission has established a *prima facie* case. If it has, then a hearing date is set down where live evidence is presented. Mr. Tremaine asserts that he faces double jeopardy as there is a criminal charge pending against him; that Section 13 of the Act with its enforcement provisions is unconstitutional as found by the Commission itself in the subsequent *Lemire* decision, 2009 CHRT 26**,** which I understand is currently under judicial review, and that in any event he did not "communicate" within the meaning of the Act.

[6] These assertions are *prima facie* wrong, which is not to prevent him from raising them if a show cause order is issued. The Tribunal's order is final. Madam Justice Snider's decision was not appealed. Furthermore, as she noted, there had been no notice given under Section 57 of the

Federal Courts Act of a constitutional question, and none has been given in these proceedings either. Without such a notice, this Court has to presume that the legislation is valid.

[7] Furthermore, and in any event, one must respect an unconstitutional order unless and until it is formally struck down or amended by the Court. In *Paul Magder Furs Limited v. Ontario (Attorney General*) (1991), 6 O.R. (3d) 188, Brooke J.A. of the Ontario Court of Appeal stated that it is elementary that so long as a law or an order of the court remains in force it must be obeyed. In *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, while the majority found it unnecessary to deal with the issue, McLachlin J. said at page 974:

> In my opinion, the 1979 order of the Tribunal, entered in the judgment and order book of the Federal Court in this case, continues to stand unaffected by the Charter violation until set aside. This result is as it should be. If people are free to ignore court orders because they believe that their foundation is unconstitutional, anarchy cannot be far behind. The citizens' safeguard is in seeking to have illegal orders set aside through the legal process, not in disobeying them.

[8] This particular motion for show cause is limited to cease and desist. The *Lemire* decision relates to other aspects such as the imposition of a fine, and the Section 13 of the *Canadian Human Rights Act* insofar as it relates to cease and desist orders was upheld by the *Taylor* decision to which I just made reference.

[9] Furthermore, *Rowbotham* orders, so called, have been held not to apply in civil contempt matters. I refer to the decision of the Ontario Supreme Court in *Burgoyne Holdings Inc. v. Magda* (2005), 74 O.R. (3d) 417. As well Rule 81(2) of the *Federal Court Rules* must be taken

into account. Although motions may be supported by affidavits on knowledge and belief, Rule 81(2) states:

> Where an Affidavit is made on belief, an adverse inference may be drawn from the failure of a party to provide evidence of persons having personal knowledge of material facts.

[10] Mr. Tremaine has personal knowledge of his financial situation and is present in the court. A cross-examination of the affiant, a straw man, would be useless. I draw an adverse inference.

[11] It was brought to my attention today that Mr. Tremaine had deposited an affidavit of assets with the Registry in Regina on 9 June 2010. Apparently it was not accepted for filing because it was not accompanied with proof that it had been served upon Mr. Warman and upon the Commission, and was in support of a motion not yet served and filed. It is unfortunate that during the course of the hearing neither Mr. Tremaine nor his counsel brought to my attention the existence of this affidavit, which did not form part of his motion record as filed by counsel. In the circumstances, an adverse inference under Rule 81(2) was not justified.

[12] Nevertheless, the outcome must remain the same as a Robowtham order does not apply in civil contempt matters.

ORDER

FOR REASONS GIVEN UPON A MOTION IN WRITING ON BEHALF OF THE RESPONDENT pursuant to Rule 369 for an order akin to a Rowbotham order, i.e. that his defence to the motion of the Canadian Human Rights Commission for a show cause order under Rule 467 that he be called upon to answer allegations of contempt of court be publicly funded and that the show cause motion be adjourned in the interim and for other relief;

THIS COURT ORDERS that:

1. The motion is dismissed.

2. The whole without costs.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-293-07
STYLE OF CAUSE:	Warman v. CHRC v. Tremaine
PLACE OF HEARING:	Saskatoon, Saskatchewan
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AS EDITED ON:	June 22, 2010
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APPEARANCES:

No one appeared	FOR THE COMPLAINANT
Daniel Poulin	FOR THE COMMISSION
Douglas H. Christie	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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