Federal Court  Cour fédérale

Date: 20101129

Docket: T-293-07

Citation: 2010 FC 1198

Ottawa, Ontario, November 29, 2010

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

RICHARD WARMAN

Complainant

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

and

TERRY TREMAINE

Respondent

REASONS FOR ORDER AND ORDER

[1] The Canadian Human Rights Commission has proven beyond a reasonable doubt that Terry Tremaine has deliberately flaunted an order of the Canadian Human Rights Tribunal to cease communicating matters that are likely to expose persons to hatred or contempt on prohibited

grounds. He is in contempt of the order of the Tribunal – indeed, he brags about it and admitted it before me. The issue, however, is whether he is in contempt of this Court. I reluctantly conclude he is not. The only reason he is not is that the Commission failed to bring to his attention the fact that it had registered the Tribunal's order with this Court.

[2] Mr. Tremaine thinks (or perhaps just wishes) he is better than others because of the colour of his skin. He is a white supremacist. Although his dislike of others based on the colour of their skin knows no bounds, he has particular enmity for blacks and Canada's aboriginal peoples.

[3] He is also a neo-Nazi. He is virulently anti-Jewish. He draws no distinction between Jewishness and Zionism. According to him, Jews are parasites who will take over the world unless they are stopped. The blacks are their stupid lackeys and the First Nations are in league with them. He is fond of Adolph Hitler; who got it right - even though the holocaust is a hoax.

[4] Not content to keep his thoughts to himself, he has used the Internet to place them where they can be found. He claims to be the leader of an unregistered political party, the National Socialist Party of Canada (NSP Canada), and in connection therewith has personally set up a website. He has also regularly posted messages on Stormfront, an American website. Stormfront's motto is "White Pride-World Wide." Richard Warman, who has made it a practice for 20 years to search the Internet for what he considers hate messages, complained about Mr. Tremaine to the Canadian Human Rights Commission. The Commission investigated and determined the complaint should be referred to the Tribunal.

[5] After the hearing, at which both Mr. Warman and Mr. Tremaine testified, and a number of entries from the NSP Canada website and his postings on Stormfront were exhibited, the Tribunal issued a cease-and-desist order and fined Mr. Tremaine $4,000.

[6] The decision and order were issued 2 February 2007 and are reported at 2007 CHRT 2, 59 C.H.R.R. D/391. Section 57 of the *Canadian Human Rights Act* provides that an order of the Tribunal may be made an order of the Federal Court for the purpose of enforcement by filing a certified copy with the Federal Court Registry. That was done on 13 February 2007. Neither the Act, the *Federal Courts Act*, nor the *Federal Courts Rules* specifically require that a copy of the Federal Court certificate be served upon the respondent, and it must be kept in mind that it was not obligatory for the order to be registered with the Federal Court in the first place.

[7] Mr. Tremaine was obviously aware of the Tribunal's decision, as he sought judicial review thereof from this Court. In *Warman v. Tremaine*, 2008 FC 1032, 334 F.T.R. 78, Madam Justice Snider dismissed his application. To the extent there were legal issues involved, such as there being no defence of fair comment, she held that the Tribunal was correct. Otherwise the applicable standard of review was reasonableness. She found the decision to be reasonable. Mr. Tremaine did not appeal.

[8] In March 2009, the Commission moved this Court for a show cause order that Mr. Tremaine ultimately be found in contempt of court. Included in the motion material served on Mr. Tremaine was a copy of the certificate from the Federal Court evidencing that the Tribunal's decision and order had been registered with the Court on 13 February 2007. The motion was supported by an

affidavit from Mr. Warman exhibiting Internet downloads in 2007, after the order had been registered. These downloads were from Mr. Tremaine's website NSP Canada and from Stormfront. For various reasons, the motion for show cause was only heard on 17 June 2010. By then, the record had been bolstered by a second affidavit from Mr. Warman. Satisfied that a *prima face* case had been made out, I issued a show cause order, on 22 June 2010, reported as *Warman v. Tremaine*, 2010 FC 680, [2010] F.C.J. No. 1002 (QL).

CONTEMPT OF COURT: A THREE-STEP PROCESS

[9] By way of introduction, distinctions must be drawn between criminal contempt and civil contempt; between contempt in the face of the Court (*in facie curiae)* or not (*ex facie curiae*) and between tribunals which are courts of record, and those which are not. There are a great many cases on point. It is not necessary to cite them all. In *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, the Supreme Court distinguished "criminal contempt" from "civil contempt" on the basis that there is an element of public defiance that accompanies "criminal contempt." It must be proven beyond a reasonable doubt that the contemptor defied an order in a public way, with intent, knowledge or at least reckless to the fact that the public disobedience would tend to depreciate the authority of the Court. The Commission does not submit that Mr. Tremaine is guilty of criminal intent. I agree that this is a "civil contempt" case.

[10] The distinction between *in facie* contempt and *ex facie* contempt is that inferior courts only have inherent jurisdiction with respect to *in facie* contempt, while other bodies, such as the Canadian Human Rights Tribunal, only have such powers as conferred upon them by statute. This is a case of *ex facie* contempt.

[11] This brings us to the third preliminary point, the status of the body whose orders have been defied. It was held by the Supreme Court in *Canadian Broadcasting Corp. v. Quebec (Police Commission)*, [1979] 2 S.C.R. 618, that the Commission had no power to punish the CBC for violating a publication ban. That is the rule applicable to bodies which are not courts of record, absent specific legislation (*Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394) and the rule applicable here. However the court of record with which a decision is registered for enforcement purposes, including this Court, may cite for contempt of that decision (*Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892).

[12] For a general analysis of the law of contempt, see Miller, *The Law of Contempt in Canada* (Carswell: Toronto, 1997).

[13] Rule 466 and following of the *Federal Courts Rules* reflect the common law. They provide, among other things, that a person who disobeys a process or order of the Court, or acts in such a way as to interfere with the orderly administration of justice or to impair the authority or dignity of the Court is guilty of contempt of court.

[14] The first step, which may be made *ex parte* if the Court so wishes (*Canada (Canadian Human Rights Commission) v. Winnicki*, 2006 FC 350), is a motion for a show cause order. As aforesaid, that order will be issued if the Court is satisfied that a *prima face* case has been made. If a show cause order is not issued, that is the end of the matter, subject to appeal. If issued, the person alleged to be in contempt is served with the order requiring him to appear and to be prepared to hear

proof of the act with which he is charged, which must be described with sufficient particulars. He should be prepared to present any defence he may have. Unless otherwise directed, the evidence is oral. The person alleged to be in contempt need not testify, and a finding of contempt must be based on proof beyond a reasonable doubt. If, as in this case, there is no finding of contempt, that is the end of the matter, subject again to the right of appeal.

[15] If a finding of contempt is made, then the third stage deals with the appropriate sentence (*Warman v. Winnicki*, 2007 FCA 52, 359 N.R. 101). A person found in contempt may be imprisoned for up to five years, less a day, or until he or she complies with the order.

THE CASE AGAINST MR. TREMAINE

[16] The case against Mr. Tremaine was set out as follows in the show cause order:

> Mr. Tremaine is to be prepared to hear proof of the Act of contempt with which he is charged, namely failing to cease and desist as ordered in the decision of the Canadian Human Rights Tribunal, dated 2 February 2007, the particulars of such failure being found in the affidavits of Richard Warman, dated 12 February 2009 and 19 March 2010, and to be prepared to present any defence that he may have.

[17] The three pronged test for civil contempt was summarized by the Ontario Court of Appeal in *Prescott-Russell Services for Children and Adults v. G. (N.)* (2006), 82 O.R. (3d) 686, at paragraph 27:

> The criteria applicable to a contempt of court conclusion are settled law. A three-pronged test is required. First, the order that was breached must state clearly and unequivocally what should and should not be done. Secondly, the party who disobeys the order must do so deliberately and wilfully. Thirdly, the evidence must show contempt beyond a reasonable doubt. Any doubt must clearly be

> resolved in favour of the person or entity alleged to have breached the order. [Citations omitted.]

That case was applied by the same Court in *Bell ExpressVu Limited v. Torroni*, 2009 ONCA 85, 94 O.R. (3d) 614, and in *Hobbs v. Hobbs*, 2008 ONCA 598, 54 R.F.L. (6th) 1, which states it must be clear to a party exactly what must be done to be in compliance with the terms of an order. These cases were all favourably referred to by Mr. Justice Martineau, of this Court, in *Canadian Private Copying Collective v. Fuzion Technology Corp.*, 2009 FC 800, 349 F.T.R. 303.

[18] What was actually ordered in this case? The order of the Tribunal reads:

> [169] For the foregoing reasons, the Tribunal finds that the complaint against Terry Tremaine is substantiated and orders that:
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> > Terry Tremaine, and any other individuals who act in concert with Mr. Tremaine, cease the discriminatory practice of communicating telephonically or causing to be communicated telephonically by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, material of the type that was found to violate section 13(1) in the present case, or any other messages of a substantially similar content, that are likely to expose a person or persons to hatred or contempt by reason of the fact that that person or persons are identifiable on the basis of a prohibited ground of discrimination, contrary to section 13(1) of the *Canadian Human Rights Act*.

[19] The Commission submitted that Mr. Tremaine was in contempt of the Tribunal's order in two respects. The first is that he allowed the hate messages identified in the Tribunal's reasons to remain on the Internet. The second is that he continued to post fresh material of the type that was found to violate section 13(1) of the *Canadian Human Rights Act*.

[20] On the first point, it was established that Mr. Tremaine was, and is, the webmaster of the NSP Canada website and was, and is, technically able to remove the messages specifically identified by the Tribunal.

[21] Although not Stormfront's webmaster, at the very least, it was submitted, he could have requested them to remove his own postings, which formed part of conversation "threads". Stormfront may or may not have agreed. It is open to this Court to order someone within the jurisdiction to request someone outside the jurisdiction to do or not do something. Consider the case of *Smith v. Canada (Attorney General)*, 2009 FC 228, [2010] 1 F.C.R. 3, where Mr. Smith was, and still is, on death row in Montana. Mr. Justice Barnes declared that the respondent's decision to withdraw diplomatic support for his claim to clemency was unlawful and ordered him to renew all reasonable steps to support his case before the Government of Montana. The intercessions have not been successful to date. An order to make submissions has also been at the heart of the various *Khadr* decisions (*Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44).

MR. TREMAINE'S DEFENCE

[22] Mr. Tremaine does not defend himself on the basis that the postings subsequent to the Tribunal's order and registration thereof with this Court were not of the type found to violate section 13(1) of the *Canadian Human Rights Act*. Indeed, it is beyond any doubt that the messages are of the same type. Nor does he take the position that there is insufficient connection with Canada to try him for contempt. Rather he has defended himself on the bases that:

a. he was not served with the certificate that the Tribunal's order had been registered with this Court until after the alleged infractions thereof were committed;

b. in any event, he was not ordered to delete existing messages from his website and was not ordered to request Stormfront to do likewise;

c. he did not violate section 13(1) of the *Canadian Human Rights Act* because:

    i. he did not "communicate"; or

    ii. if he did, it was not telephonically or by means of a federal telecommunication undertaking;

d. he was under order of the Court of Queens' Bench of Saskatchewan not to access the Internet; and

e. he is being persecuted by Mr. Warman.

[23] Mr. Tremaine's overriding defence is that he did not know the Tribunal's order had been registered with this Court until August 2010, when he was specifically so served. He had no intention of defying this Court. However, the certificate formed part of the show cause material served upon him in March 2009. He may not have appreciated that the material included the Federal Court certificate, but he was certainly aware of the show cause motion as he personally attended at the hearing originally scheduled for July 2009, a hearing which was postponed. The only change of circumstances between those two dates is one posting on Stormfront's site on 22 July 2009, a posting which was not identified in Mr. Warman's material which formed the basis of the show cause order. Consequently, it is not necessary to determine precisely when Mr. Tremaine was imparted with knowledge, as that posting does not form part of the case against him.

[24] The applicant must always establish that the alleged contemptor had knowledge of the order alleged to have been breached. In *Bhatnager v. Canada (Minister of Employment and Immigration)*, [1990] 2 S.C.R. 217, Mr. Justice Sopinka, speaking for the Court, stated at paragraph 16:

> On the cases, there can be no doubt that the common law has always required personal service or actual personal knowledge of a court order as a precondition to liability in contempt. Almost two centuries ago, in *Kimpton v. Eve* (1813), 2 V. & B. 349, 35 E.R. 352, Lord Chancellor Eldon held that a party could not be held liable in contempt in the face of uncontradicted evidence that he or she had no knowledge of the order. In *Ex parte Langley* (1879), 13 Ch. D. 110 (C.A.), Thesiger L.J. stated the principle as follows, at p. 119:
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> > ... the question in each case, and depending upon the particular circumstances of the case, must be, was there or was there not such a notice given to the person who is charged with contempt of Court that you can infer from the facts that he had notice in fact of the order which had been made? And, in a matter of this kind, bearing in mind that the liberty of the subject is to be affected, I think that those who assert that there was such a notice ought to prove it beyond reasonable doubt.

[25] The Commission has established beyond a reasonable doubt that Mr. Tremaine had early knowledge of the order of the Tribunal. However, it has not established that he had knowledge that the order had been registered with this Court until March 2009 at the earliest. As mentioned above, there is one posting in issue between March and August 2009, a posting on the Stormfront site which was not part of the case Mr. Tremaine was called upon to meet. All that need be said at this time is that in that posting Mr. Tremaine expressed dissatisfaction with the decision of Madam Justice Snider in which she dismissed his application for judicial review of the Tribunal's decision.

[26] Mr. Poulin, on behalf of the Commission, submits that the distinction between the Tribunal's order, and the registration thereof with this Court, is artificial. While I agree that it would

not be necessary to serve or otherwise provide notice of the certificate of registration before enforcing an order, say a money order, the Canadian Human Rights Tribunal itself has no inherent jurisdiction to enforce its orders, by way of injunction or otherwise, or to find someone in contempt. The lynchpin has to be the registration of the order with this Court, and in cases of contempt knowledge thereof.

[27] In *Taylor*, above, which upheld the constitutional validity of section 13(1) of the Act, Chief Justice Dickson stated at paragraph 72:

> …Indeed, the risk that incarceration will follow the unknowing transmission of discriminatory messages is further reduced by the requirement that a contempt order be based upon a finding that an individual has wilfully engaged in action prohibited by a court order (*Re Sheppard and Sheppard* (1976), 67 D.L.R. (3d) 592 (Ont. C.A.), at pp. 595-96). In short, a term of imprisonment is only possible where the respondent intentionally communicates messages which he or she knows have been found likely to cause the harm described in s. 13(1), and I therefore cannot agree that the possibility of a contempt order issuing against an individual unduly chills the freedom of expression.
>
> [My Emphasis.]

In that case, like this one, the Tribunal's order had been registered with this Court. It was violation of the Court order, not the Tribunal order, which led to contempt.

[28] The charges of contempt, as set out in the show cause order, must be dismissed since all of the events occurred before Mr. Tremaine had knowledge of court registration.

[29] I also accept Mr. Tremaine's defence that the order did not make it sufficiently clear that he was ordered to remove, or at least exercise his best efforts to have removed, from the Internet the

material found hateful by the Tribunal, and material of like nature posted up to that time. The order was with respect to "material of the type which was found to violate section 13(1)", not the material which was actually found to violate section 13(1). "Material of the type" is not the same material.

[30] Mr. Tremaine also submitted that he did not "communicate" within the meaning of section 13(1) of the Act. What Mr. Tremaine did was "upload" from his computer in Canada to websites located in the United States. He was the only person involved in that process. Mr. Warman "downloaded" from those American websites to his computer in Canada. Without Mr. Warman's intervention there was no completed communication, and so it was Mr. Warman who communicated, not Mr. Tremaine.

[31] The submission that the communication was not done telephonically or by means of a federal telecommunication undertaking is based on section 13(2) of the Act which reads:

(2) For greater certainty, subsection (1) applies in respect of a matter that is communicated by means of a computer or a group of interconnected or related computers, including the Internet, or any similar means of communication, but does not apply in respect of a matter that is communicated in whole or in part by means of the facilities of a broadcasting undertaking.	(2) Il demeure entendu que le paragraphe (1) s'applique à l'utilisation d'un ordinateur, d'un ensemble d'ordinateurs connectés ou reliés les uns aux autres, notamment d'Internet, ou de tout autre moyen de communication semblable mais qu'il ne s'applique pas dans les cas où les services d'une entreprise de radiodiffusion sont utilisés.

[32] This amendment was made after 9-11. It obviously postdates *Taylor*, and its constitutionality has not been finally determined. In any event, the submission is that the order did not prohibit Mr. Tremaine from using the Internet.

[33] It is far too late to make these arguments in this case. No constitutional question was ever submitted as required by section 57 of the *Federal Courts Ac*t and it has been held time and time again, including in *Taylor*, that the alleged invalidity of a court order cannot serve as an excuse to disobey it. The order itself must be set aside.

[34] Furthermore, section 13(2) of the Act is merely declaratory. As the order itself refers specifically to the reasons which preceded it, and since those reasons dealt at length with both "communication" and the "Internet", it was not necessary to refer to the Internet in the order itself.

[35] Mr. Tremaine was not represented by legal counsel before the Tribunal or in the application for judicial review before Madam Justice Snider. That does not permit his present counsel, Mr. Christie, to raise these points now. When the right case comes along, he will have to deal with the decision of the Federal Court of Appeal in *Shaw CableSystems G.P. v. Society of Composers, Authors and Music Publishers of Canada*, 2010 FCA 220, 323 D.L.R. (4th) 42, a case which dealt with downloading music from the Internet. At paragraph 39, Mr. Justice Pelletier stated:

> In my view, there is authority to support the proposition that whether or not a communication is a communication to the public is a function of two factors: the intention of the communicator, and the reception of the communication by at least one member of the public. If those two conditions are met, then there has been a communication to the public.

[36] The material posted by Mr. Tremaine on the Internet also led to charges being laid in Saskatchewan under section 319(2) of the *Criminal Code* that he had communicated statements wilfully promoting hatred against an identifiable group. One of his bail conditions was that he not access the Internet. However that condition was only issued in January 2008, and has no bearing on his contemptuous behaviour during 2007. His bail conditions were subsequently relaxed somewhat, again a matter not relevant to the present case.

[37] Finally, Mr. Warman's character was called into question during cross-examination. He wrote a letter to the University of Saskatchewan where Mr. Tremaine was a part-time lecturer. Shortly after his contract was not renewed. It was suggested this led to his impecuniosity so that he could not retain counsel to represent him before the Tribunal and at the judicial review. He has sued over 50 entities for defamation. He has been awarded damages and costs and has built a reputation based on his complaints to the Canadian Human Rights Commission, where he once worked. He was criticized by one of the Tribunal's panels. I stated during the hearing, and I repeat now, that none of this is relevant to the case at bar. Mr. Warman did not participate in any Stormfront conversation thread and cannot be said to have entrapped Mr. Tremaine in any way.

COSTS

[38] There is no reason to depart from the normal practice that costs follow the event. However since the motion for contempt is being dismissed because the moving party, the Commission, failed to take steps to inform Mr. Tremaine that the Tribunal's order had been registered with this Court, costs shall be against it only.

ORDER

UPON A SHOW CAUSE HEARING that Mr. Tremaine be found in contempt of court;

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. The motion is dismissed, with costs against the Canadian Human Rights Commission.

2. Mr. Warman shall neither benefit from nor be burdened with costs.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-293-07
STYLE OF CAUSE:	RICHARD WARMAN v. TERRY TREMAINE
PLACE OF HEARING:	Victoria, British Columbia
DATES OF HEARING:	November 8-10 and 12, 2010
REASONS FOR ORDER AND ORDER:	HARRINGTON J.
DATED:	November 29, 2010

APPEARANCES:

Richard Warman	FOR THE COMPLAINANT (ON HIS OWN BEHALF)
Daniel Poulin	FOR THE COMMISSION
Douglas H. Christie	FOR THE RESPONDENT

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