Date: 20080912

Docket: T-371-07

Citation: 2008 FC 1032

Ottawa, Ontario, September 12, 2008

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

TERRY TREMAINE

Applicant

and

RICHARD WARMAN and the CANADIAN HUMAN RIGHTS COMMISSION

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Mr. Terry Tremaine, has used a website to post material related to various groups of people. On October 13, 2004, Mr. Richard Warman, one of the Respondents, filed a complaint to the Canadian Human Rights Commission (the Commission), alleging that:

> Terry Tremaine has discriminated against persons on the basis of race, colour, national or ethnic origin, and religion by repeatedly communicating messages through an Internet website that would likely expose blacks, Asians, Aboriginals, and other non-whites, and Jews to hatred and/or contempt contrary to section 13(1) of the *Canadian Human Rights Act*.

[2] The complaint was referred by the Commission to the Canadian Human Rights Tribunal (the Tribunal). An oral hearing was held before a member of the Tribunal who issued a decision dated February 2, 2007. In its decision, the Tribunal concluded that material posted to the website by Mr. Tremaine violated s. 13(1) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the Act) and thus found that the complaint against Mr. Tremaine was substantiated. The Tribunal ordered that Mr. Tremaine cease the discriminatory practice of communicating "material of the type which was found to violate section 13(1) in the present case, or any other messages of a substantially similar content" (the cease and desist order) and that he pay a penalty of $4000.

[3] Mr. Tremaine seeks judicial review of the Tribunal's decision. In the alternative, he requests that the Court stay this judicial review pending the disposition of the case of *Richard Warman v. Marc Lemire*, Tribunal Case No. T1073/5405 (*Lemire*), in which the constitutionality of s.13 of the Act is at issue.

[4] At the hearing of this application, I heard oral submissions from the Commission and Mr. Tremaine. Mr. Warman did not appear; nor did he file written submissions.

I. Issues

[5] The issues that are raised by this application are as follows:

1. Did the Tribunal err by finding that Mr. Tremaine acted contrary to s.13 of the Act?

2. By imposing the cease and desist order under s. 54(1)(a) of the Act, did the Tribunal err by taking into account irrelevant considerations; specifically, to deliver a "public denunciation" and to "educate" others?

3. In fixing a penalty of $4000 under s.54(1)(c) of the Act, (a) did the Tribunal fail to take into account the financial means of Mr. Tremaine; and (b) did the Tribunal take into an irrelevant consideration, specifically, Mr. Tremaine's lack of remorse?

4. Does s.13 of the Act violate ss. 2(a) and (b) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the *Charter*) in a manner not justified under s.1 thereof, therefore being of no force or effect?

5. Should the Court grant a stay of proceedings pending the disposition of the case of *Lemire*?

II. Statutory Framework

[6] Mr. Tremaine has been found to be in violation of s. 13(1) of the Act. That provision is as follows:

13. (1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in	13. (1) Constitue un acte discriminatoire le fait, pour une personne ou un groupe de personnes agissant d'un commun accord, d'utiliser ou de faire utiliser un téléphone de

whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.	façon répétée en recourant ou en faisant recourir aux services d'une entreprise de télécommunication relevant de la compétence du Parlement pour aborder ou faire aborder des questions susceptibles d'exposer à la haine ou au mépris des personnes appartenant à un groupe identifiable sur la base des critères énoncés à l'article 3.

[7] Because the method of communication in issue is the Internet, s. 13(2) of the Act is relevant.

This provision was added to the Act in 2001 (S.C. 2001, c. 41, s. 88) and states that:

(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.

[8] Where the Tribunal finds that a complaint related to a discriminatory practice described in s. 13 is substantiated, the Tribunal may issue a cease and desist order, as provided for in s. 53(2)(a), which states:

> (2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:
>
> (*a*) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including
>
> (i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or
>
> (ii) making an application for approval and implementing a plan under section 17;

> (2) À l'issue de l'instruction, le membre instructeur qui juge la plainte fondée, peut, sous réserve de l'article 54, ordonner, selon les circonstances, à la personne trouvée coupable d'un acte discriminatoire :
>
> *a*) de mettre fin à l'acte et de prendre, en consultation avec la Commission relativement à leurs objectifs généraux, des mesures de redressement ou des mesures destinées à prévenir des actes semblables, notamment :
>
> (i) d'adopter un programme, un plan ou un arrangement visés au paragraphe 16(1),
>
> (ii) de présenter une demande d'approbation et de mettre en oeuvre un programme prévus à l'article 17;

[9] In addition, the Tribunal may order that the person found to be in violation of s. 13 "pay a penalty of not more than $10,000" (s. 54(1)(c)). When ordering a person to pay a penalty, s. 54(1.1) provides a list of factors that must be taken into account.

(1.1) In deciding whether to order the person to pay the penalty, the member or panel shall take into account the following factors: (*a*) the nature, circumstances, extent and gravity of the discriminatory practice; and (*b*) the wilfulness or intent of the person who engaged in the discriminatory practice, any prior discriminatory practices that the person has engaged in and the person's ability to pay the penalty.	(1.1) Il tient compte, avant d'imposer la sanction pécuniaire visée à l'alinéa (1)*c*) : *a*) de la nature et de la gravité de l'acte discriminatoire ainsi que des circonstances l'entourant; *b*) de la nature délibérée de l'acte, des antécédents discriminatoires de son auteur et de sa capacité de payer.

III. Analysis

A. *Standard of Review*

[10] I begin by examining the appropriate standard of review for the Tribunal's decision. A determination of whether Mr. Tremaine's web postings fell within the ambit of s.13 of the Act is a question of mixed law and fact. The Tribunal's decisions to issue a cease and desist order and to order Mr. Tremaine to pay a $4000 fine are exercises of the Tribunal's discretion; these decisions are mainly fact driven and discretionary.

[11] The Supreme Court of Canada stated in *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 57, that courts may rely on existing jurisprudence in determining the proper standard of review.

[12] The existing jurisprudence indicates that the appropriate standard of review for issues of mixed law and fact from the Tribunal is reasonableness. (See *Chopra v. Canada (Attorney General)*, 2006 FC 9, 285 F.T.R. 113 at para. 40, aff'd 2007 FCA 268, [2008] 2 F.C.R. 393, *International Longshore & Warehouse Union (Marine Section), Local 400 v. Oster* (T.D.), 2001 FCT 1115, [2002] 2 F.C. 430 at para. 22, *Goodwin v. Birkett*, 2007 FC 428, 312 F.T.R. 71 at para. 15).

[13] The reasonableness standard should therefore apply to the first three issues. On this standard, the decision, the cease and desist order and the penalty must fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." (*Dunsmuir, supra* at para. 47). The *Charter* challenge (Issue #4) is a new matter, raised by Mr. Tremaine for the first time on this judicial review; there is no Tribunal decision and, thus, no standard of review. Finally, the question of whether a stay is appropriate (Issue #5) is unrelated to the Tribunal's decision; again, no standard of review is applicable.

B. *Issue #1: Reasonableness of the s. 13 finding*

[14] As noted, the Tribunal found that the s. 13 complaint was substantiated. Mr. Tremaine submits, in essence, that the decision was not reasonable.

[15] I have read the decision and the material that was before the Tribunal and considered the written and oral arguments of Mr. Tremaine. In my view, the Tribunal's decision was reasonable and well-founded.

[16] The Tribunal examined each element of a proscribed discrimination under s.13 of the Act and carefully applied the facts to the law. As evidenced by the record, the messages were clearly communicated repeatedly by means of a proscribed means of telecommunication (Internet) by Mr. Tremaine. Mr. Tremaine does not dispute that the messages were posted by him. The Tribunal provided a detailed analysis of the meanings of "hatred" and "contempt" and carefully examined evidence of Mr. Tremaine's numerous postings. The Tribunal noted the extreme and violent nature of the postings and concluded that it would offer readers reason to hate and to be suspicious of minorities. It must also be noted that the Tribunal was careful to balance Mr. Tremaine's freedom of expression right with the equality rights of all individuals in reaching this decision. Ultimately, the Tribunal correctly applied the evidence to the relevant factors in determining the s.13 violation. The decision was not unreasonable.

C. *Issue #2: Cease and desist order*

[17] Mr. Tremaine submits that the Tribunal erred by imposing the cease and desist order in order to publicly denounce him. He submits that the Act ought to be remedial, attaching no moral approbation to a human rights complaint. By imposing the cease and desist order in order to publicly denounce Mr. Tremaine and to educate other Canadians that hate messages would not be tolerated, Mr. Tremaine asserts that the Tribunal erred. I do not agree.

[18] Once the Tribunal determined that Mr. Tremaine's Internet postings were in violation of s.13 of the Act, s. 53(2)(a) gives the Tribunal the authority, in its discretion, to issue a cease and desist order. In its decision, the Tribunal noted that a cease and desist order can serve several purposes, such as bringing the accused person's attention the harmful effect of his messages, while also preventing and eliminating discriminatory practices. Since continued promulgation of Mr. Tremaine's messages would likely submit certain groups to hatred and contempt, the Tribunal reasonably exercised the discretion assigned to it under the Act. By the standard of reasonableness, the Tribunal did not err.

D. *Issue #3: $4000 fine*

[19] Mr. Tremaine submits that the Tribunal failed to take into account the fact that he had no ability to pay a $4000 fine and also submits that the Tribunal erred in citing his lack of remorse as a ground for imposing the penalty. I disagree.

[20] In assessing a $4000 penalty, the task of the Tribunal was to consider all of the factors listed under s. 54(1.1), including Mr. Tremaine's financial situation. No one factor in s. 54(1.1) is determinative. The tribunal must weigh all of the evidence before it in determining an appropriate fine. In this case, the Tribunal did exactly what was required of it. No evidence was ignored. The Tribunal made note of the fact that Mr. Tremaine had lost his job, did not own a car or a house and was working a minimal wage job part-time. Although Mr. Tremaine's ability to pay was clearly limited by his monthly salary, the Tribunal correctly balanced this factor with the extreme, malicious nature of the discriminatory practice.

[21] I disagree with Mr. Tremaine's submission that the Tribunal erred by considering his lack of remorse in making this order. Lack of remorse is clearly part of a consideration of the Applicant's wilfulness and intent – a factor enumerated under s. 54(1.1)(b). It should also be noted that the Tribunal gave Mr. Tremaine credit for not having committed any prior discriminatory practices.

[22] After balancing all of the relevant factors, the Tribunal ordered a fine of $4,000, an amount that is less than 50% of the $10,000 maximum provided for in s. 54(1)(c). In sum, the Tribunal came to a reasonable decision with respect to the penalty.

E. *Issue #4: Constitutionality of s. 13(1) of the Act.*

[23] Although Mr. Tremaine did not argue the constitutionality of s. 13(1) before the Tribunal, he has raised a *Charter* challenge in this judicial review. Specifically, Mr. Tremaine asserts that s.13 of the Act violates ss. 2(a) and (b) of the *Charter* in a manner not justified under s.1 thereof, therefore being of no force or effect.

[24] As acknowledged by Mr. Tremaine, the Supreme Court of Canada has considered the constitutionality of the provision in *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892. The majority in that case upheld the constitutionality of s. 13(1), concluding that, while the provision infringes s. 2 of the *Charter*, it does so in a manner that is justified under s. 1. The thrust of Mr. Tremaine's argument appears to be that the *Taylor* case was decided with respect to telephone communication and before the Act was amended to make explicit reference to the Internet. Accordingly, he submits that the Court has not dealt with the constitutionality of s. 13(1) and 13(2) in relation to the Internet.

[25] Mr. Tremaine is correct that the Supreme Court made its decision in *Taylor* before the inclusion of s. 13(2), as it now reads. There may be an issue to be decided; I express no view whatsoever. However, the assertion that s. 13(1) cannot constitutionally apply to Internet postings was not argued before the Tribunal and, beyond a bald assertion, has not been developed in the context of this application for judicial review. Further, Mr. Tremaine has not served a Notice of a Constitutional Question, as required under s.57 of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

[26] In short, Mr. Tremaine has not presented a foundation upon which the *Charter* challenge can be argued and determined by this Court. His request that I declare s. 13(1) to be inoperative will be dismissed.

F. *Issue #5: Appropriateness of a stay*

[27] In the alternative, Mr. Tremaine requests a stay of the current judicial review until the constitutional challenge of s.13 of the Act is finally determined in the ongoing case of *Lemire*. He submits that he has no resources to call witnesses and experts which have already been called in the *Lemire* case. Furthermore, it is submitted that a stay was granted in *Kulbashian v. Canada (Canadian Human Rights Commission)*, 2007 FC 354, another case in which the constitutionality of s.13 is challenged.

[28] I begin by addressing Mr. Tremaine's submission that a stay ought to be granted on the basis that another proceeding is before the Tribunal with respect to the constitutionality of s.13. This was, in essence, the reason that Justice Heneghan granted the stay order in *Kulbashian, supra*. In that

case, Justice Heneghan considered the factors set out in *WIC Premium Television Ltd. V. General Instrument Corp.*, [1999] F.C.J. No. 862 (F.C.T.D.) (QL), including the risk of inconsistent findings, excessive costs and the capacity of the court to grant the complete or comprehensive remedy. Since the constitutionality of s.13 had been put in issue by the applicant, Justice Heneghan saw fit to stay the proceedings pending the outcome of *Lemire*.

[29] The present hearing can be distinguished from *Kulbashian* by the fact that the constitutionality of s.13 is not properly put in issue before this Court. In the preceding section, I dismissed the Applicant's *Charter* challenge.

[30] In any event, it is well established that a party seeking a stay must satisfy the Court of three factors (see, for example, *Manitoba (A.G.) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110; *RJR MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311)). Mr. Tremaine must demonstrate that: (i) there is a serious issue to be tried in the underlying judicial review; (ii) he would suffer irreparable harm if the application were dismissed; and (iii) the balance of inconvenience favours him. All three elements must be met before a stay is granted.

[31] In this case, Mr. Tremaine fails on all three elements. Firstly, even if I assume that the constitutionality of s. 13 is a serious issue, I have already determined that it is not an issue that is properly before me in this case. Further, Mr. Tremaine has not persuaded me that he would suffer irreparable harm or that the balance of convenience favours the granting of the stay. Accordingly, I will dismiss the application for a stay of this judicial review.

IV. Conclusion

[32] In conclusion, Mr. Tremaine has not persuaded the Court that the decision of the Tribunal should be overturned. Further, he has failed to convince me that a stay would be appropriate. The application for judicial review will be dismissed, with costs to the Commission.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application for judicial review is dismissed;

2. Costs are awarded to the Respondent, the Canadian Human Rights Commission.

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-371-07
STYLE OF CAUSE:	TERRY TREMAINE v. RICHARD WARMAN and CANADIAN HUMAN RIGHTS COMMISSION
PLACE OF HEARING:	Regina, Saskatchewan
DATE OF HEARING:	September 3, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	SNIDER J.
DATED:	September 12, 2008

APPEARANCES:

Mr. Terry Tremaine	FOR THE APPLICANT (on his own behalf)
Mr. Daniel Poulin	FOR THE RESPONDENT (CANADIAN HUMAN RIGHTS COMMISSION)
(no one appearing)	FOR THE RESPONDENT (RICHARD WARMAN)

SOLICITORS OF RECORD:

N/A	FOR THE APPLICANT
Canadian Human Rights Commission, Litigation Services Division Ottawa, Ontario	FOR THE RESPONDENT (CANADIAN HUMAN RIGHTS COMMISSION)