Date: 20071016

Docket: T-2148-05

Citation: 2007 FC 1059

Ottawa, Ontario, October 16, 2007

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

MELISSA GUILLE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This is the judicial review of a decision of the Canadian Human Rights Commission (Commission) to request the Chairperson of the Canadian Human Rights Tribunal (Tribunal) to institute an inquiry into a complaint against the Applicant and the Canadian Heritage Alliance (CHA). The CHA was not a party to this judicial review.

[2] The basis of the Commission's decision is the contention that the Applicant administers and maintains the CHA website and that the Applicant and CHA communicated or caused to be communicated material on the website that would expose individuals who are of any non-Christian religion, non-Caucasian races or national or ethnic origins, and homosexuals to hatred or contempt.

II. FACTUAL BACKGROUND

[3] Richard Warman filed a Complaint against the Applicant and CHA. The Complaint was split such that there was one against the Applicant alone for hate messages that she authored and another against the Applicant and CHA for providing a forum in which hate messages could be communicated and exchanged.

[4] The allegation is that the Applicant (and CHA) violated s. 13(1) of the *Canadian Human Rights Act* (Act). Section 13 reads in full 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 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	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 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

identifiable on the basis of a prohibited ground of discrimination.	critères énoncés à l'article 3.
(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.
(3) For the purposes of this section, no owner or operator of a telecommunication undertaking communicates or causes to be communicated any matter described in subsection (1) by reason only that the facilities of a telecommunication undertaking owned or operated by that person are used by other persons for the transmission of that matter.	(3) Pour l'application du présent article, le propriétaire ou exploitant d'une entreprise de télécommunication ne commet pas un acte discriminatoire du seul fait que des tiers ont utilisé ses installations pour aborder des questions visées au paragraphe (1).

[5] In the Complaint Mr. Warman provided the Commission with excerpts of material posted on the CHA website. The Applicant alleges that she initially received only 8 of the 37 items from the Commission. This point was only raised in oral argument by her agent.

[6] In responding to the Complaint, the Applicant denied responsibility for the articles on the website on the basis that the CHA website is a telecommunication undertaking within the meaning of s. 13(3) of the Act and therefore the Complaint is outside the Commission's jurisdiction.

[7] The issue of s. 13(3) of the Act was not raised by either party to this judicial review. The Commission investigator concluded that the s. 13(3) exemption did not apply because the website was supported by an internet service provider (ISP) located in New Jersey. This jurisdictional matter not having been specifically addressed in the application for judicial review, the Court will leave the matter for disposition elsewhere.

[8] The Commission conducted an investigation in which the Applicant filed responses and stated her position. The Applicant also responded to the report of the investigation (Report) in which the investigator recommended that the Commission request the appointment of a Tribunal panel to inquire into the Complaint.

[9] The material found on the website included "posts" comparing non-white immigration, cross-breeding, miscegenation, blending and assimilation with the 13th Century plague, allegations that Jews are the literal children of Satan and similar such comments on other racial, ethnic, religious and other groups.

[10] The Report concluded that the material was observed on the internet, that the communication had taken place in part in Canada since the CHA website listed the Applicant as the

administrator resident in Ontario, that the CHA and the Applicant caused the material to be communicated and the material would likely expose individuals to hatred or contempt based on sexual orientation, religion, race and colour, national or ethnic origin.

[11] The Commission essentially adopted the Report's recommendation and requested the Tribunal to conduct an inquiry. The Applicant attacks the Commission's decision by attacking the investigation. The Applicant, in her Memorandum of Fact and Law, raised three principal points:

1. that the Commission breached the principles of natural justice by allowing an erroneous report to be submitted and used;
2. that the Commission failed to conduct a thorough investigation; and
3. that the Commission was engaged in a penal matter and breached her s. 11(d) *Charter* rights as to the presumption of innocence.

[12] At the oral hearing before the Court, The Applicant raised additional grounds for challenge:

- that the Commission should have required the Complainant to give notice to the Applicant of the offending materials before investigating the matter because the Complainant was required to exhaust his grievance and review procedures as required by s. 41(1)(a) and s. 44(2)(a) which read:

41. (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that	41. (1) Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants :
(*a*) the alleged victim of the	a) la victime présumée de

discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;	l'acte discriminatoire devrait épuiser d'abord les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;
…	…
44. (2) If, on receipt of a report referred to in subsection (1), the Commission is satisfied	44. (2) La Commission renvoie le plaignant à l'autorité compétente dans les cas où, sur réception du rapport, elle est convaincue, selon le cas :
(a) that the complainant ought to exhaust grievance or review procedures otherwise reasonably available,	a) que le plaignant devrait épuiser les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;

- that the Applicant's s. 7 *Charter* rights have been infringed because she has to defend her actions without adequate legal resources and at personal inconvenience as a single mother;
- that the Applicant was only given some of the offending articles at the time of the investigation;
- that the Commission failed to conduct an analysis of whether the Complaint was trivial, vexatious or in bad faith; and
- that the Commission is in a conflict of interest (reasonable apprehension of bias) because the Complainant has been so successful in complaints filed with the Commission.

III. ANALYSIS

[13] The Court will briefly address each of the grounds raised by the Applicant but before doing so the Court is required to address the standard of review applicable to the Commission's decision. The Applicant made no submissions on this issue.

A. *Standard of Review*

[14] The Court is required to conduct a pragmatic and functional analysis in each case before it as held in *Sketchley v. Canada (Human Rights Commission)*, 2005 FCA 404. However, this does not mean that the Court cannot adopt the analysis used in respect of a similar case in an earlier Court decision.

[15] It is important to recognize the nature of the decision at issue – a decision to refer the matter on for further hearing. This decision does not conclude the complaint process and court decisions which examine Commission decisions dismissing a complaint have only limited application as regards the applicable standard of review.

[16] In *Canadian Imperial Bank of Commerce v. Durrer*, 2005 FC 1064, Justice Snider performed the pragmatic and functional analysis of a Commission decision to refer a matter to the Tribunal. I adopt her analysis and her conclusion that the applicable standard of review is patent unreasonableness. The Court recognizes that this high standard of deference is, as the Supreme Court has cautioned from the early days of the standard of review analysis, to be relied upon

sparingly. However, the Commission decision merely continues a process at which the Applicant will have a full opportunity to address the allegations against her.

[17] As to the issues of procedural fairness, it is accepted that in this type of case, it must be measured against a standard of correctness. However, what procedural fairness may be at this stage of the complaint process is not the same as that before a tribunal. Dubé J. in *Miller v. Canada (Canadian Human Rights Commission) (re Goldberg)*, [1996] F.C.J. No. 735 (QL) captured the core of the obligation at paragraph 22:

> The rule of procedural fairness requires that a complainant know the substance of the case against him or her. The complainant is not entitled to every detail but he should be informed of the broad grounds of the case. The complainant is not entitled to the investigator's notes of interviews or the statements obtained from persons interviewed. He must be informed of the substance of the case and he has every right to expect that the investigator's report fully and fairly summarize the evidence obtained in the course of his investigation. He must be given the opportunity to respond.

B. *Erroneous Report/Thoroughness*

[18] As presented, these two issues are so similar as to be dealt with as one. The Court in *Slattery v. Canada (Human Rights Commission)*, [1994] F.C.J. No. 181 (QL), aff'd. [1996] F.C.J. No. 385 (C.A.) (QL) (Nadon J., as he then was) in paragraphs 53-57 confirmed the obligation of "thoroughness of investigation" but held that the manner in which an investigator conducts an investigation is a matter to be accorded considerable deference.

[19] While the Applicant may disagree with the Report and its conclusion, there is no evidence that the investigation was not thorough, that each side's position was not considered nor that the Applicant was denied an opportunity to respond to the Report. She received the eight-page Report, the Summary and the Complaint form.

[20] At the hearing the Applicant expanded her argument on thoroughness to include the failure of the Commission to include all the articles which were attached to the original Complaint.

[21] All of the articles are of a similar type containing attacks on race, religion, sexual orientation, and the like. In that regard, the Applicant was never at a loss as to the substance of the Complaint against her even if she did not receive all of the articles attached to the Complaint. Justice Dubé in *Miller*, *supra*, put the matter succinctly:

> In order to constitute a reviewable error, the complainant must demonstrate that the information was wrongly withheld and that such information is fundamental to the outcome of the case.

[22] The Applicant has not met this burden. If some of the articles were withheld (and the record is not clear on this point), the materials are referred to in the Complaint. No demand for them was made and refused. Under these circumstances, I cannot find, given that the Applicant was aware of the type of information at issue, that she was denied information fundamental to her ability to respond.

[23] As to alleged factual errors, the Applicant's argument is largely one of disagreement with the conclusions to be drawn from the facts rather than the facts themselves. For example, the Applicant's contention that there was a factual error in concluding that she was the owner of the website is countered by evidence that the CHA website listed her as the administrator and by the Applicant's own reliance on the exemption in s. 13(3) which is dependent on her being the owner or operator of a telecommunication undertaking.

[24] The Applicant has not met the burden of showing a perverse or capricious finding of fact or that there were no other facts on which it could reasonably base its conclusions (see *Stelco Inc. v. British Steel Canada Inc. (C.A.)*, [2000] 3 F.C. 282) (C.A.).

C. *Further Notice*

[25] The Applicant argues that the Commission lacked jurisdiction because the alleged victim (s. 41(1)(a)) or complainant (s. 44(2)(a)), failed to exhaust grievance or review procedures before the Commission undertook further action. This argument is based on the fact that the Complainant did not first complain to the Applicant so that she could remove the offending materials from the website. It was argued that this requirement for notice is part of the remedial nature of the Act.

[26] Firstly, there are no legislated or consensual grievance or review procedures binding on the Complainant. These remedies are more applicable to the employment situation and are part of the Act to require that, most obviously, in employment situations, issues are resolved firstly through

those employment remedies before resorting to the Commission. They are not applicable to the Complainant.

[27] Furthermore, the remedial nature of the legislation does not mean that if, given advanced warning of a complaint, and the offending party ceasing the offending conduct, the Commission lacks jurisdiction to investigate. The Applicant is not entitled to some “free pass” because she cleaned up her offending conduct if such conduct is found by the Tribunal.

D. *Charter*

[28] The Applicant raised s. 11(d) and s. 7 of the *Charter* as being offended because she has been investigated and must now defend her conduct before a Tribunal. Only s. 11(d) was raised in the Memorandum.

[29] Justice Evans, when in the Trial Division, in *Zündel v. Canada (Attorney General)*, [1999] F.C.J. No. 964 (QL), captured the essence of the consequence of the Commission’s investigation, at paragraph 25:

> Of course, while the Commission's decision did not decide Mr. Zündel’s legal liability under section 13 it obviously had serious consequences for him. In particular, it exposed him to the expense, anxiety and commitment of time inevitably associated with lengthy legal proceedings, not to mention the risk of an adverse determination of his rights by the Tribunal. However, I should also note parenthetically that for those, like Mr. Zündel, whose political views are well out of the mainstream, Tribunal hearings may provide a not altogether unwelcome publicity that they would not otherwise receive.

[30] The Commission's decision to refer the complaints to the Tribunal has not in any way affected the Applicant's right to be presumed innocent nor is the Commission's process a "penal matter". It is also premature to presume what the Tribunal's disposition may be.

[31] In addition to the fact that s. 7 of the *Charter* was never put to the Commission or even raised in the Applicant's written material, there is no s. 7 matter to be answered.

E. *Frivolous/Vexatious*

[32] The Applicant now argues that the Commission failed to conduct a separate analysis of whether the Complaint was "trivial, frivolous, vexatious or made in bad faith" as required by s. 41(1)(d). There is no substance to this argument.

[33] The provision is an exception to the Commission's first obligation – to deal with any complaint filed. To fall within the exception, the fact that the Complaint is frivolous or vexatious would have to be plain on its face or be substantiated by the person against whom the complaint is filed. Neither circumstance exists in this case.

[34] The Commission's adoption of the Report is a complete answer to whether this Complaint was trivial, frivolous, vexatious or made in bad faith. It is evident that the Commission considered the merits of the Complaint and it need not conduct a separate analysis of this exception.

F. *Bias*

[35] Lastly, the Applicant alleges that the Commission is in a conflict of interest. This conflict, in the nature of a claim of bias or reasonable apprehension of bias, is predicated on the fact that the Complainant, a former Commission employee, has been highly successful in complaints against persons espousing the views which the Applicant and CHA are alleged to have espoused on the website.

[36] The principles relevant to this claim are fully set forth in *Zündel* at paragraphs 17-25. Issues of the active and educative roles of the Commission are not at issue here.

[37] There are simply no facts to support this allegation. No reasonable person being aware of the facts could harbour any reasonable apprehension of bias. The Complainant's past successes may be more fairly ascribed to the merits of the previous complaints than anything else.

G. *Review of Decision*

[38] Given a standard of review of patent unreasonableness, I would only quash the Commission's decision if there was no rational basis in law or on the evidence to support the Commission's conclusion. The issues in this Complaint, as they relate to s. 13 of the Act, are reasonably more appropriate for a full hearing before a Tribunal. Therefore, the Commission's conclusion to refer the matter to Tribunal is in no way patently unreasonable.

[39] There have been no breaches of fairness or natural justice nor are the *Charter* arguments sustainable on this record.

IV. CONCLUSION

[40] Therefore, this application for judicial review will be dismissed with costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed with costs.

"Michael L. Phelan"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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