

**Date: 20060928**

**Docket: A-334-06**

**Citation: 2006 FCA 314**

**BETWEEN:**

**Tomasz Winnicki**

**Appellant**

**and**

**Canadian Human Rights Commission**

**Respondent**

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on September 28, 2006.

REASONS FOR ORDER BY: Malone J.A.

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**BETWEEN:**

**Tomasz Winnicki**

**Appellant**

**and**

**Canadian Human Rights Commission**

**Respondent**

**REASONS FOR ORDER**

**MALONE J.A.**

[1] Tomasz Winnicki (TW) is thirty years old and has lived with his parents in London, Ontario for the past five years. He has no criminal record.

[2] In September of 2003, a complaint was filed with the Canadian Human Rights Commission (the Commission) alleging that TW was discriminating against persons or groups of persons on the basis of religion, by repeatedly communicating messages throughout an internet website, that would likely expose persons of the Jewish faith to hatred or contempt, contrary to subsection 13(1) of the *Canadian Human Rights Act*, R.S., 1985, c. H-6 (the Act).

[3] Pending a final decision by the Canadian Human Rights Tribunal (the Tribunal) on October 4, 2005, de Montigny J., a Judge of the Federal Court, issued an interlocutory injunction ordering that TW be restrained from communicating by means of the internet messages that are likely to expose persons to hatred or contempt contrary to subsection 13(1) of the *Act*.

[4] On March 14, 2006, the Commission began contempt proceedings against TW for his alleged breach of the October 4, 2005 interlocutory injunction.

[5] On April 13, 2006, the Tribunal rendered its final decision regarding complaints against TW. It found that his internet messages violated section 13(1) of the *Act*. A cease and desist order was issued together with certain financial penalties.

[6] The Tribunal's decision was filed and entered as a Federal Court order for the purpose of enforcement on April 19, 2006. As a result, TW was ordered to pay a penalty in the amount of \$6,000 to be received by the Commission within 120 days of being notified of the decision. A further \$5,000 was to be paid by TW for special compensation and \$500 for pain and suffering.

[7] TW did not seek to have the Tribunal's decision judicially reviewed and has yet to comply with the April 19, 2006 order of the Federal Court in any respect.

[8] On July 12, 2006, TW was found to be in contempt of court and sentenced to a term of imprisonment of nine months by von Finckenstein J., a Judge of the Federal Court, for breaching the interlocutory injunction order of de Montigny J.

[9] TW has been incarcerated since July 13, 2006 at the Central North Correctional Centre, located at Penetanguishene, Ontario. Postings by TW on the Vanguard News Network (VNN) forum and website have stopped since July 11, 2006.

[10] Weapons charges against TW under the *Criminal Code of Canada*, for an alleged incident on September 12, 2004 at Toronto are pending.

[11] By notice of appeal dated August 3, 2006, TW requested that an acquittal of the contempt order be entered or a new trial ordered. Alternatively, he asked that his sentence be reduced to time served.

[12] TW now seeks bail pending his appeal with conditions in accordance with Rule 398 of the *Federal Court Rules*, SOR/98-106. Counsel for the Commission opposes his release and in the alternative, requests an expedited appeal and release on strict conditions.

[13] The Supreme Court of Canada has indicated that the test for whether a person convicted of contempt of court should be released pending appeal is akin to the test applied in cases where an interim injunction is sought. That three part test is more specifically set out in its seminal decision

in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraph 35

(hereafter *RJR-MacDonald*), namely:

1. There is a serious constitutional issue to be determined.
2. Compliance with the new regulations will cause irreparable harm.
3. The balance of convenience, taking into account the public interest, favours retaining the status quo until this court has disposed of the legal issues.

[14] On appeal, TW raises issues as to evidence being improperly admitted by von Finckenstein J. contrary to section 13 of the *Charter* as well as a failure to allow sentencing submissions and an unduly harsh sentence for a first offender. Without question, a serious issue has been raised on this appeal.

[15] Improper incarceration will cause irreparable harm to TW. Accordingly, part two of the test is also met.

[16] The third branch of the test is more difficult, i.e. the assessment of the balance of convenience to the parties. Here it must be determined which of the two parties will suffer the greater harm from the granting or refusal of a stay, pending a decision on the merits. In doing so, this Court must consider the interests of justice and the public interest, the latter being defined as both concerns for society generally and the particular interests of identifiable groups (see *RJR-MacDonald* at paragraphs 66 and 75).

[17] In my analysis, the balance of convenience clearly points to TW's release on strict conditions pursuant to Rule 398 as follows:

- (a) The Appellant shall reside at 12 Snowdon Crescent, London, Ontario, N6E 1G4, and provide this Court with his telephone number as well as his past or current employer's address and phone number. The Appellant shall not change either his place of residence or employment, or phone numbers without prior notification to this Court;
- (b) The Appellant shall remain within the Province of Ontario and his passport, if any, is to be delivered to and held by his counsel, Mr. James Foord;
- (c) The Appellant shall surrender himself into custody at the Central North Correctional Centre, located at 1501 Fuller Avenue, Penetanguishene, Ontario, on the day prior to the day on which the hearing of this Appeal A-334-06 is set, i.e. January 16, 2007;
- (d) The Appellant shall refrain from contacting or communicating directly or indirectly with Mr. Richard Warman or the members, staff or counsel of the Commission with the exception of communicating through his counsel, Mr. James Foord, for purposes directly related to this appeal;
- (e) The Appellant shall keep the peace and be of good behaviour;

- (f) The Appellant shall refrain from posting or writing any messages on the internet whatsoever, in whatever form, either directly or indirectly, under his name or a pseudonym previously used or not; and
- (g) The Appellant shall post with the Court cash bail of \$5,000.00 or its equivalent payable to the Receiver General for Canada.

[18] I would also order the following:

- (a) The order of von Finckenstein J. dated July 12, 2006, should be stayed and the appeal should be expedited;
- (b) Counsel for the Appellant and respondent shall agree to the contents of an appeal book on or before October 13, 2006;
- (c) The appeal book should be served and filed on or before Friday October 27, 2006;
- (d) The Appellant shall serve and file his memorandum of fact and law on or before Monday November 27, 2006;
- (e) The Respondent shall serve and file its memorandum of fact and law on or before Thursday December 14, 2006;

- (f) The hearing of this appeal will take place on Tuesday January 16, 2007 at 2:00pm at the Thomas D'Arcy McGee building, 10<sup>th</sup> floor, 90 Sparks Street in the City of Ottawa; and
  
- (g) The duration of the hearing shall be 2 hours.

“B. Malone”

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-334-06

**STYLE OF CAUSE:** Tomasz Winnicki  
and  
Canadian Human Rights Commission

**MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES**

**REASONS FOR ORDER BY:** Malone J.A.

**DATED:** 20060928

**WRITTEN REPRESENTATIONS BY:**

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FOR THE RESPONDENT

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