

Federal Court of Appeal



Cour d'appel fédérale

Date: 20200923

Docket: A-1-19

Citation: 2020 FCA 148

**CORAM: STRATAS J.A.
LASKIN J.A.
MACTAVISH J.A.**

BETWEEN:

KOVARTHANAN KONESAVARATHAN

Appellant

and

**UNIVERSITY OF GUELPH RADIO / RADIO
GRYPHON / CFRU-FM**

Respondent

Heard at Toronto, Ontario, on September 23, 2020.
Judgment delivered from the Bench at Toronto, Ontario, on September 23, 2020.

REASONS FOR JUDGMENT OF THE COURT BY:

LASKIN J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Toronto, Ontario, on September 23, 2020).

LASKIN J.A.

[1] This appeal is from a judgment of the Federal Court (2018 FC 1217) dismissing an application for judicial review of a decision of the Canadian Human Rights Commission. In its decision, the Commission determined, applying paragraph 41(1)(d) of the *Canadian Human*

Rights Act, R.S.C. 1985, c. H-6, that it would not deal with the complaint of the appellant, Kovarthanan Konesavarathan.

[2] Paragraph 41(1)(d) authorizes the Commission not to deal with a complaint where it appears to the Commission that the complaint is trivial, frivolous, vexatious or made in bad faith. The Commission treats a complaint as frivolous where it appears plain and obvious that the complaint cannot succeed. The Commission decided that Mr. Konesavarathan's complaint was frivolous.

[3] Mr. Konesavarathan describes himself as a racialized person, and a person with a disability. His complaint arose from his unsuccessful candidacy for a seat on the board of the respondent (CFRU), a community radio station. CFRU's bylaws require that not less than 50% of its directors be women.

[4] In November 2015, an election was held at CFRU's annual general meeting to fill four open seats on the board. Two other vacant seats were not opened up for election, because they were reserved for women. Mr. Konesavarathan was one of six candidates for the four open seats. Along with the other candidates, he had and exercised an opportunity to speak to his qualifications. He was not elected.

[5] Mr. Konesavarathan filed a complaint with the Commission alleging discrimination on the basis of race, national origin, colour, and disability in employment, employment applications or advertisements, and a policy or practice. He alleged that he was discriminated against because CFRU members chose the four directors "based on race, the white privilege," and preferred less

qualified white candidates over him, a highly qualified visible minority. He submitted that CFRU gave higher importance to one Code ground, sex, and ignored disability and race.

[6] After considering a Section 40/41 Report from Commission staff and Mr. Konesavarathan's submissions in response, the Commission concluded that the complaint was frivolous. In dismissing Mr. Konesavarathan's application for judicial review of the Commission's decision, the Federal Court rejected Mr. Konesavarathan's submissions that the Commission violated his right to procedural fairness and that its decision was unreasonable.

[7] We see no basis to interfere with the Federal Court's conclusions. First, the Federal Court made no reviewable error in failing to find a denial of procedural fairness. We do not agree with the Federal Court's statement at paragraph 20 of its reasons that Mr. Konesavarathan's procedural rights "fall at the low end of the spectrum" referred to in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at 837, 174 D.L.R. (4th) 193. The factors *Baker* sets out for determining the degree of fairness to which a party is entitled include "the nature of the statutory scheme and the terms of the statute pursuant to which the body operates" (*Baker* at 838). Human rights legislation like the *Canadian Human Rights Act* is quasi-constitutional in nature, and the protections it affords are fundamental to our society: *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62 at para. 31, [2017] 2 S.C.R. 795.

[8] But precisely where on the spectrum Mr. Konesavarathan's procedural rights properly fall is not determinative in this appeal. As the Federal Court observed, Mr. Konesavarathan was afforded ample opportunity to express his views, including on the Section 40/41 Report. There is

also no basis to conclude that the Commission mischaracterized his argument. The Commission's process was procedurally fair even on a high standard of procedural fairness.

[9] We are also not persuaded that the Federal Court made any reviewable error in concluding that the Commission's decision was reasonable. Read together with the Section 40/41 Report, the Commission's reasons provided a transparent and intelligible justification for its decision.

[10] In his written and oral submissions on appeal, Mr. Konesavarathan raises a number of issues that he did not raise before the Federal Court or the Commission. One of these is Canada's compliance with the *International Covenant on Civil and Political Rights*, December 16, 1966, [1976] Can T.S. No. 47, an issue also not found in his lengthy notice of appeal. As Mr. Konesavarathan himself states, his memorandum in this Court is mainly focused on how, in his view, Canada fails to comply with the ICCPR. His primary thesis appears to be that Parliament has failed to provide for competent and impartial commissioners and judges to adjudicate human rights cases. He also states in his memorandum that he is bringing this appeal to exhaust domestic remedies so that he can take the matter to the Human Rights Committee of the United Nations. Given the proper scope of judicial and appellate review, the submissions directed to the ICCPR are not properly before us, and we will not address them.

[11] In the Federal Court, costs of \$6,000 were ordered against Mr. Konesavarathan. In this appeal, he served a notice of constitutional question, challenging the constitutional validity of the costs regime in rule 400 of the *Federal Courts Rules*, SOR/98-106, as well as what he describes

as “the common law presumption” that the successful party in litigation is entitled to costs. He bases his claim on subsection 15(1) 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. He argues that the current costs regime infringes subsection 15(1) by perpetuating the disadvantage of the “underrepresented population, who belong either to the enumerated grounds or analogous grounds.”

[12] While this issue was raised in the notice of appeal, it is well established that Charter issues should not be decided in a factual vacuum. A party seeking to raise a Charter issue bears the burden of proving facts that establish that Charter rights are implicated, and of doing so based on an actual evidentiary record: *Revell v. Canada (Citizenship and Immigration)*, 2019 FCA 262 at para. 67, leave to appeal refused, 2020 CanLII 25169 (SCC). Here there is no actual evidentiary record. There is only Mr. Konesavarathan’s argument and a submission on costs reform made to the Rules Committee. We decline to consider the constitutional issue.

[13] An award of costs is a discretionary matter. We do not consider the award of \$6,000, while high, to be vitiated by any palpable and overriding error in the circumstances.

[14] For these reasons, we will dismiss the appeal with costs fixed in the amount of \$1,500.

“J.B. Laskin”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

A-1-19

**(APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE MANSON
DATED DECEMBER 4, 2018, DOCKET NO. T-224-18)**

STYLE OF CAUSE:

KOVARTHANAN
KONESAVARATHAN v.
UNIVERSITY OF GUELPH
RADIO / RADIO GRYPHON /
CFRU-FM

PLACE OF HEARING:

TORONTO, ONTARIO

DATE OF HEARING:

SEPTEMBER 23, 2020

REASONS FOR JUDGMENT OF THE COURT BY:

STRATAS J.A.
LASKIN J.A.
MACTAVISH J.A.

DELIVERED FROM THE BENCH BY:

LASKIN J.A.

APPEARANCES:

Kovarthanan Konesavarathan

APPELLANT
(on his own behalf)

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