Federal Court of Appeal  Cour d'appel fédérale

Date: 20111026

Docket: A-468-10

Citation: 2011 FCA 297

CORAM: **NOËL J.A.**
PELLETIER J.A.
DAWSON J.A.

BETWEEN:

CANADIAN HUMAN RIGHTS COMMISSION

Appellant

and

RICHARD WARMAN

and

TERRY TREMAINE

Respondents

Heard at Vancouver, British Columbia, on September 19, 2011.

Judgment delivered at Ottawa, Ontario, on October 26, 2011.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: DAWSON J.A.
DISSENTING REASONS BY: PELLETIER J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20111026

Docket: A-468-10

Citation: 2011 FCA 297

CORAM: **NOËL J.A.**
PELLETIER J.A.
DAWSON J.A.

BETWEEN:

CANADIAN HUMAN RIGHTS COMMISSION

Appellant

and

RICHARD WARMAN

and

TERRY TREMAINE

Respondents

REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal by the Canadian Human Rights Commission (the Commission or the appellant) from a decision of Harrington J. of the Federal Court (the Federal Court Judge) wherein he dismissed the contempt proceedings brought against Terry Tremaine (the respondent or Mr. Tremaine) based on his alleged failure to abide by the cease and desist order issued against him by the Canadian Human Rights Tribunal (the Tribunal).

[2] Although the Federal Court Judge found that Mr. Tremaine acted in contempt of the order of the Tribunal, he held that contempt could only be pronounced for a deliberate breach of an order of the Federal Court and that as at the material time Mr. Tremaine was not advised that the Tribunal order had been registered in the Federal Court, he could not be found in contempt. The appellant contends that in so holding, the Federal Court Judge committed a number of legal errors.

[3] For the reasons which follow, I am of the view that the appeal should be allowed and that Mr. Tremaine should be found in contempt for having defied the order of the Tribunal.

FACTUAL BACKGROUND

[4] On October 13, 2004, Richard Warman (the complainant) filed a complaint against the respondent under section 13 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the Act) with the Commission. The complainant, a former employee of the Commission, stated that he has been monitoring for many years the activities of "white supremacist" and "neo-Nazi groups" in Canada and abroad. The complainant contended that the respondent had engaged in discriminatory practices on the grounds of religion, national or ethnic origin, race and color on the Internet. The Commission investigated the complaint and referred it to the Tribunal.

[5] On February 2, 2007, the Tribunal found the complaint to be well founded. At the hearing, the complainant testified that he had been monitoring the website "stormfront.org" for many years and that he specifically investigated postings by someone with the pseudonym "mathdoktor99". It is not disputed that the identity of the author of the postings under the pseudonym "mathdoktor99"

is Mr. Tremaine (Tribunal reasons, para. 52). The complainant also referred the Tribunal to the creation by the respondent of the website "nspcanada.nsfhost.com" where the respondent posted what he claimed to be the political program of the National-Socialist Party of Canada, a party "dedicated to the creation of a White racialist state in Canada" (Tribunal reasons, paras. 80 and 81).

[6] The Tribunal reviewed the evidence and concluded that the messages conveyed by the respondent were likely to expose persons of the Jewish faith, Blacks and other non-white minorities to hatred or contempt and that a discriminatory practice under subsection 13(1) of the Act had been established (Tribunal reasons, paras. 140 to 142). The Tribunal issued a cease and desist order and fined Mr. Tremaine $4,000. The order reads in part (Tribunal reasons, para. 169):

> …, the Tribunal finds that the complaint against [Mr.] Tremaine is substantiated and orders that:
>
> > 1. [Mr.] 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 [sub]section 13(1) in the present case, or any other message 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 [sub]section 13(1) of the [Act].
> >
> > …

[7] On February 13, 2007, the Commission filed a certified copy of the Tribunal's order with the Federal Court Registry, pursuant to section 57 of the Act (appeal book, p. 73). The respondent was not given notification of this procedure.

[8] The respondent sought judicial review of the Tribunal's order before the Federal Court. On September 12, 2008, in *Warman v. Tremaine*, 2008 FC 1032; [2008] F.C.J. No. 1265, Snider J. dismissed his application. The respondent did not appeal.

[9] Since the issuance of the Tribunal's order, many of the messages that had been found to violate section 13 of the Act by the Tribunal have remained on the Internet and a number of additional messages have been posted. The complainant has filed two affidavits attesting to these "fresh" messages and the continued presence of the earlier ones as of February 12, 2009 and March 19, 2010 respectively (appeal book, vol. 1, p.122 and vol. 3, p. 713).

[10] In March 2009, the Commission moved for a show cause order pursuant to rule 467 of the *Federal Courts Rules*, S.O.R./98-106 (the *Federal Courts Rules*). On June 22, 2010 the Federal Court Judge, satisfied that a *prima facie* case of contempt had been made out, issued a show cause order in *Warman v. Tremaine*, 2010 FC 680; [2010] F.C.J. No. 1002.

DECISION OF THE FEDERAL COURT

[11] The Federal Court Judge first questioned whether the case before him was one of criminal or civil contempt. He proceeded to conduct his analysis on the basis that civil contempt was being alleged (reasons, para. 9).

[12] The Federal Court Judge adopted the tripartite test for civil contempt set out in *Prescott-Russell Services for Children and Adults v. G.(N.)*, (2006), 82 O.R. (3d) 686 [*Prescott-Russell*]. Focusing on the second element of that test, *i.e.* that there must be a deliberate breach of an order, the Federal Court Judge identified Mr. Tremaine's "overriding defence" as follows (reasons, para. 23):

> … 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. …

The Federal Court Judge later identified March 2009 rather than August 2010, as the date on which Mr. Tremaine was made aware of this registration, a finding which is not being challenged in this appeal (reasons, para. 25).

[13] As to the offensive material which remained on the Internet after that date, the Federal Court Judge noted Mr. Tremaine's further argument that the order of the Tribunal was not sufficiently clear to require him to remove this material (reasons, paras. 22 and 29).

[14] Addressing the argument that Mr. Tremaine was not notified that the order had been registered, the Federal Court Judge acknowledged that there is no statutory requirement that this be

done (reasons, para. 6). However, he found that the common law of contempt requires the Commission to establish that the alleged contemnor had knowledge of a "Court order" as opposed to an order of a lower Tribunal. In this respect, the Federal Court Judge cited two passages from *Bhatnager v. Canada (Minister of Employment and Immigration)*, [1990] S.C.J. No. 62; [1990] 2 S.C.R. 217 [*Bhatnager*] and *Canada (Human Rights Commission) v. Taylor*, [1990] S.C.J. No. 129; [1990] 3 S.C.R. 892; [*Taylor*] as authority for the proposition that there must be a breach of an order of the Court before one can be pronounced in contempt of Court (reasons, paras. 24 and 27).

[15] While the respondent had knowledge of the Tribunal's February 2, 2007 order, he did not have knowledge that the order had been registered with the Court until at least March 2009 – when a copy of the certificate was included in the show cause materials (reasons, para. 25). As such, he could not be found guilty of contempt with respect to material posted on the Internet before that date (reasons, para. 28).

[16] As to the material which Mr. Tremaine allowed to remain on the Internet after March 2009, the Federal Court Judge accepted the respondent's argument that the order did not make it sufficiently clear that he was to remove this material (reasons, para. 29). In his view, the reference to "material of the type" in the Tribunal's order refers to material that is distinct and separate from the material which was actually found by the Tribunal to violate subsection 13(1).

[17] Having so found, the Federal Court Judge dismissed the application brought by the Commission seeking to have Mr. Tremaine found guilty of contempt (reasons, paras. 28 and 29).

[18] Although it was not necessary for him to do so, the Federal Court Judge addressed the other elements of the respondent's defence. Specifically, he rejected the contention that the respondent did not "communicate" within the meaning of subsection 13(1) of the Act. This argument was dismissed for a variety of reasons, notably on account of the fact that it had not been raised before the Tribunal or before the Federal Court in the prior proceedings (reasons, paras. 33 and 35). Finally, the argument that Mr. Tremaine was prohibited from accessing the Internet as a result of a bail condition in criminal proceedings against him in Saskatchewan was also dismissed as that condition was only issued in January 2008, and had no bearing on his contemptuous behaviour.

RELEVANT LEGISLATIVE PROVISIONS

[19] Section 57 of the Act provides for the enforcement of orders of the Tribunal as follows:

Enforcement of order	*Exécution des ordonnances*
57. An order under section 53 or 54 may, for the purpose of enforcement, be made an order of the Federal Court by following the usual practice and procedure or by the Commission filing in the Registry of the Court a copy of the order certified to be a true copy.	**57.** Aux fins de leur exécution, les ordonnances rendues en vertu des articles 53 et 54 peuvent, selon la procédure habituelle ou dès que la Commission en dépose au greffe de la Cour fédérale une copie certifiée conforme, être assimilées aux ordonnances rendues par celle-ci.

[20] Rule 424 of the *Federal Courts Rules* provides for the enforcement of such orders through the Federal Court as follows:

Enforcement of order of tribunal	*Exécution de l'ordonnance d'un office fédéral*
424. (1) Where under an Act of Parliament the Court is authorized to enforce an order of a tribunal and no	**424.** (1) Lorsque la Cour est autorisée, en vertu d'une loi fédérale, à

other procedure is required by or under that Act, the order may be enforced under this Part.

Filing of order

(2) An order referred to in subsection (1) shall be filed together with a certificate from the tribunal, or an affidavit of a person authorized to file such an order, attesting to the authenticity of the order.

poursuivre l'exécution forcée de l'ordonnance d'un office fédéral et qu'aucune autre procédure n'est prévue aux termes de cette loi ou de ses textes d'application, l'exécution forcée de l'ordonnance est assujettie à la présente partie.

Dépôt de l'ordonnance

(2) L'ordonnance visée au paragraphe (1) est déposée avec un certificat de l'office fédéral ou un affidavit de la personne autorisée à la déposer, attestant l'authenticité de l'ordonnance.

[21] Rules 466 to 472 of the *Federal Courts Rules* have codified the law of contempt as follows:

Contempt

466. Subject to rule 467, a person is guilty of contempt of Court who

(*a*) at a hearing fails to maintain a respectful attitude, remain silent or refrain from showing approval or disapproval of the proceeding;

(*b*) disobeys a process or order of the Court;

(*c*) acts in such a way as to interfere with the orderly administration of justice, or to impair the authority or dignity of the Court;

(*d*) is an officer of the Court and fails to perform his or her duty; or

Outrage

466. Sous réserve de la règle 467, est coupable d'outrage au tribunal quiconque :

a) étant présent à une audience de la Cour, ne se comporte pas avec respect, ne garde pas le silence ou manifeste son approbation ou sa désapprobation du déroulement de l'instance;

b) désobéit à un moyen de contrainte ou à une ordonnance de la Cour;

c) agit de façon à entraver la bonne administration de la justice ou à porter atteinte à l'autorité ou à la dignité de la Cour;

(*e*) is a sheriff or bailiff and does not execute a writ forthwith or does not make a return thereof or, in executing it, infringes a rule the contravention of which renders the sheriff or bailiff liable to a penalty.

d) étant un fonctionnaire de la Cour, n'accomplit pas ses fonctions;

e) étant un shérif ou un huissier, n'exécute pas immédiatement un bref ou ne dresse pas le procès-verbal d'exécution, ou enfreint une règle dont la violation le rend passible d'une peine.

Right to a hearing

467. (1) Subject to rule 468, before a person may be found in contempt of Court, the person alleged to be in contempt shall be served with an order, made on the motion of a person who has an interest in the proceeding or at the Court's own initiative, requiring the person alleged to be in contempt

(*a*) to appear before a judge at a time and place stipulated in the order;

(*b*) to be prepared to hear proof of the act with which the person is charged, which shall be described in the order with sufficient particularity to enable the person to know the nature of the case against the person; and

(*c*) to be prepared to present any defence that the person may have.

Droit à une audience

467. (1) Sous réserve de la règle 468, avant qu'une personne puisse être reconnue coupable d'outrage au tribunal, une ordonnance, rendue sur requête d'une personne ayant un intérêt dans l'instance ou sur l'initiative de la Cour, doit lui être signifiée. Cette ordonnance lui enjoint :

a) de comparaître devant un juge aux date, heure et lieu précisés;

b) d'être prête à entendre la preuve de l'acte qui lui est reproché, dont une description suffisamment détaillée est donnée pour lui permettre de connaître la nature des accusations portées contre elle;

c) d'être prête à présenter une défense.

Ex parte motion

(2) A motion for an order under

Requête *ex parte*

(2) Une requête peut être présentée

subsection (1) may be made *ex parte*.

Burden of proof

(3) An order may be made under subsection (1) if the Court is satisfied that there is a *prima facie* case that contempt has been committed.

Service of contempt order

(4) An order under subsection (1) shall be personally served, together with any supporting documents, unless otherwise ordered by the Court.

ex parte pour obtenir l'ordonnance visée au paragraphe (1).

Fardeau de preuve

(3) La Cour peut rendre l'ordonnance visée au paragraphe (1) si elle est d'avis qu'il existe une preuve *prima facie* de l'outrage reproché.

Signification de l'ordonnance

(4) Sauf ordonnance contraire de la Cour, l'ordonnance visée au paragraphe (1) et les documents à l'appui sont signifiés à personne.

Contempt in presence of a judge

468. In a case of urgency, a person may be found in contempt of Court for an act committed in the presence of a judge and condemned at once, if the person has been called on to justify his or her behaviour.

Outrage en présence d'un juge

468. En cas d'urgence, une personne peut être reconnue coupable d'outrage au tribunal pour un acte commis en présence d'un juge et condamnée sur-le-champ, pourvu qu'on lui ait demandé de justifier son comportement.

Burden of proof

469. A finding of contempt shall be based on proof beyond a reasonable doubt.

Fardeau de preuve

469. La déclaration de culpabilité dans le cas d'outrage au tribunal est fondée sur une preuve hors de tout doute raisonnable.

Evidence to be oral

470. (1) Unless the Court directs

Témoignages oraux

470. (1) Sauf directives contraires

otherwise, evidence on a motion for a contempt order, other than an order under subsection 467(1), shall be oral.

Testimony not compellable

(2) A person alleged to be in contempt may not be compelled to testify.

de la Cour, les témoignages dans le cadre d'une requête pour une ordonnance d'outrage au tribunal, sauf celle visée au paragraphe 467(1), sont donnés oralement.

Témoignage facultatif

(2) La personne à qui l'outrage au tribunal est reproché ne peut être contrainte à témoigner.

Assistance of Attorney General

471. Where the Court considers it necessary, it may request the assistance of the Attorney General of Canada in relation to any proceedings for contempt.

Assistance du procureur général

471. La Cour peut, si elle l'estime nécessaire, demander l'assistance du procureur général du Canada dans les instances pour outrage au tribunal.

Penalty

472. Where a person is found to be in contempt, a judge may order that

(*a*) the person be imprisoned for a period of less than five years or until the person complies with the order;

(*b*) the person be imprisoned for a period of less than five years if the person fails to comply with the order;

(*c*) the person pay a fine;

(*d*) the person do or refrain from doing any act

Peine

472. Lorsqu'une personne est reconnue coupable d'outrage au tribunal, le juge peut ordonner :

a) qu'elle soit incarcérée pour une période de moins de cinq ans ou jusqu'à ce qu'elle se conforme à l'ordonnance;

b) qu'elle soit incarcérée pour une période de moins de cinq ans si elle ne se conforme pas à l'ordonnance;

c) qu'elle paie une amende;

d) qu'elle accomplisse un acte ou s'abstienne de l'accomplir;

(*e*) in respect of a person referred to in rule 429, the person's property be sequestered; and	*e*) que les biens de la personne soient mis sous séquestre, dans le cas visé à la règle 429;
(*f*) the person pay costs.	*f*) qu'elle soit condamnée aux dépens.

[22] Finally, it is useful to reproduce section 13 of the Act:

Hate messages	*Propagande haineuse*
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 identifiable on the basis of a prohibited ground of discrimination.	**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 critères énoncés à l'article 3.
Interpretation	*Interprétation*
(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.

Interpretation	*Interprétation*
(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).

POSITION OF THE APPELLANT

[23] The appellant submits that the finding by the Federal Court Judge that the respondent was in contempt of the Tribunal's order in circumstances where this order had been filed in the Federal Court could only lead to a pronouncement of contempt, and that the Federal Court Judge erred in holding otherwise.

[24] Like the Federal Court Judge, the appellant submits that the test for civil contempt is found in *Prescott-Russell* and requires a clear and unequivocal order and a deliberate intent to disobey the order, beyond a reasonable doubt. Unlike the Federal Court Judge, however the appellant submits that it is knowledge of the order of the Tribunal that is material.

[25] The appellant submits that the Federal Court Judge erred in determining that the order of the Tribunal "became" an order of the Federal Court for purposes of section 57 of the Act. It points to the French text where it is stated that the order is "assimilé" to an order of the Federal Court.

According to the appellant, the order thus remains an order of the Tribunal (appellant's memorandum, para. 59).

[26] The appellant argues that aside from the requirements set out in section 57 of the Act and rule 424 of the *Federal Courts Rules*, there exists no other obligation to enforce an order of the Tribunal as an order of the Federal Court. Nowhere in the statutes is knowledge of registration required. The appellant notes that the certificate issued by the Federal Court is not signed by a judge, contains no obligations and does not contain any reasons.

[27] Alternatively, the appellant submits that rule 466(*c*) of the *Federal Courts Rules* applies. It relies on *Baxter Travenol Laboratories v. Cutter (Canada)*, [1983] 2 S.C.R. 388 [*Baxter Travenol*], a case in which the Supreme Court ruled that as soon as a judge has made his reasons public, disobeying them would constitute contempt, even if the contemptuous acts were to occur before the formal judgment is entered. The Supreme Court reasoned that holding otherwise would obstruct the course of justice and "subvert the whole process of going to court to settle disputes" (*Baxter Travenol*, p. 397).

POSITION OF THE RESPONDENT

[28] The main contention of the respondent is that the act of filing the Tribunal order in Federal Court is a separate and distinct discretionary act and is not automatic (respondent's memorandum, para. 2). He argues that the Federal Court Judge correctly applied the *Prescott-Russell* test for civil contempt. Like the Federal Court Judge, the respondent relies on *Bhatnager* to suggest that the

alleged contemnor must have personal knowledge of the Court order and that this must be proven beyond a reasonable doubt (respondent's memorandum, para 16). The respondent also refers to *Telus Mobility v. Telecommunications Workers Union*, 2002 FCT 656 [*Telus*], wherein a Prothonotary of the Federal Court found that an arbitrator's order under the *Canada Labour Code*, R.S.C. 1985, c. L-2, only came into effect when it had been filed with the Federal Court and served on all the relevant parties – the mere filing being insufficient (*Telus*, para. 4). The respondent emphasizes that Mr. Tremaine did not know that an order had been filed in the Federal Court, and suggests that the Commission might have purposefully kept him in the dark so as to bait him (respondent's memorandum, para 18).

[29] In addition, the respondent contends that he did not communicate or cause to be communicated subsequent to the Tribunal order. He submits that the Court order is clear and only required Mr. Tremaine to cease communicating or causing to be communicated. The respondent submits that the data that was already uploaded to the Internet prior to the order cannot be understood to have been communicated since the order, as communication requires transmission of a thought. He understands the order to only have targeted new acts of communication. The respondent relies on *Goldman v. R.*, [1980] 1 S.C.R. 976; and *Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers*, (1999) 1 C.P.R. (4th) 417, for the interpretation of a "communication". He further contends that uploading information to a foreign server was not an act of communication. It is rather the person downloading the information that performed the communication (respondent's memorandum, para. 13).

[30] With respect to this last contention, I note that despite the use of the words "foreign web server" (respondent's memorandum, para. 14) no submissions are made with reference to the fact that the server is located outside Canada.

[31] Finally, the respondent recalls that he was prohibited from accessing the Internet by a bail order and that as such he was precluded from removing the messages during the period of the alleged contempt.

ANALYSIS

Knowledge of a "Court order" as a pre-requisite of contempt

[32] It is important to note at the onset that Mr. Tremaine does not defend his case on the basis that he questioned whether the order of the Tribunal could legally be enforced because he was not informed that it had been registered with the Federal Court. Mr. Tremaine made it clear during his examination in chief that he was oblivious to the section 57 registration procedure (transcript, vol. 3, p. 474, lines 7 to 15).

[33] According to Mr. Tremaine's testimony, the reason why he chose to disregard the order of the Tribunal is that he had contempt for the Tribunal (*idem*, p. 476, lines 8 to 15) and believed that his views had to be addressed regardless of the Tribunal order (*idem*, p. 564, lines 5 to 7; see also appeal book, vol. 4, p. 964):

> My purpose in ignoring the cease and desist order was to address the urgent matter of impending white extinction.

[34] Relying on Mr. Tremaine's testimony, the Federal Court Judge had no difficulty in finding that Mr. Tremaine was in contempt of the order of the Tribunal (reasons, para. 1). However, he held that contempt could only be pronounced for the breach of an order of the Federal Court, and that as a result, Mr. Tremaine could not be found guilty of contempt with respect to anything done before March 2009, when he first became aware of the registration of the order of the Tribunal in the Federal Court.

[35] Both parties submitted, and the Federal Court Judge agreed, that the relevant test for civil contempt is that set out by the Ontario Court of Appeal in *Prescott-Russell*. Only the second prong of this test is in issue in this case (*Prescott-Russell*, para. 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 willfully. 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.]
>
> [My emphasis]

[36] As the Federal Court Judge made clear, a person cannot knowingly disobey an order unless he or she has knowledge of it. The issue in this case is whether the Federal Court Judge could hold, in the specific context where an order of the Tribunal has been filed with the Federal Court for enforcement purposes pursuant to section 57 of the Act, that knowledge of the Tribunal order alone

cannot give rise to a finding of contempt. The issue so described gives rise to a question of law which stands to be assessed on a standard of correctness.

[37] In holding that knowledge of a "Court order" was required, the Federal Court Judge relied on brief passages from two decisions of the Supreme Court where knowledge of a Court order was said to be a condition precedent to a finding of contempt (reasons, paras. 24 and 27). However, neither decision dealt with the issue with which we are concerned. In *Taylor*, the central element of the analysis is that there must be knowledge by the alleged contemnor that he or she is breaching an order (*Taylor*, paras. 71 and 72). In *Bhatnager*, the reference by Sopinka J. to a Court order is explained by the fact that the only order sought to be enforced in that case was an order of the Federal Court. Again, the central element of the analysis is knowledge that an order is being breached.

[38] In my view, the issue raised in this appeal turns on the registration provision set out in section 57 of the Act, and in particular whether the order enforced under the authority of that provision is the order of the Tribunal or the order of the Court.

[39] The answer to that question is relatively straight forward when one considers that the only order being enforced under this scheme is that of the Tribunal and that there is to-day no legal principle that restricts the use of contempt powers to orders issued by superior Courts.

[40] This last proposition flows from the decision of the Supreme Court in *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] S.C.J. No. 37; [1992] 1 S.C.R. 901 [*United Nurses*]. The issue in that case turned on subsection 142(7) of the *Labour Relations Act of Alberta*, R.S.A. 1980, c. L-1.1, a provision analogous to section 57 of the Act:

> **142. (7)** If any directive made by the Board pursuant to subsection (5) or (6) is not complied with, the Board may, …, file a copy of the directive with the clerk of the Court [of Queen's Bench] … and thereupon the directive is enforceable as a judgment or order of the Court.

[41] At issue was whether criminal contempt proceedings could validly be initiated further to the filing of a Board directive under that provision with the Alberta Court of Queen's Bench. One of the arguments made was that at common law, the power to punish for criminal contempt is available only in relation to orders of superior Courts, and since the directive sought to be enforced was that of a lower Tribunal, the Court did not have the jurisdiction to invoke its contempt powers in support of it (*United Nurses*, para. 70).

[42] McLachlin J. (as she then was) writing for the majority, rejected this argument. She explained that although Board orders are not the same as Court orders, that does not mean that they are any less enforceable by superior Courts through contempt proceedings (*United Nurses*, para. 71). In so holding, she adopted the reasoning of Blair J.A. in *Ajax and Pickering General Hospital v. Canadian Union of Public Employees, Local 906*, 132 D.L.R. (3d) 270; [1981] O.J. No. 1121 [*Ajax*], who held that a Board order issued pursuant to the equivalent provision of the

Ontario Labour Relations Act, R.S.O. 1980, c. 228, was enforceable as such from the time it was filed in the Court (*Ajax*, paras. 63 to 83).

[43] Earlier on in her reasons, McLachlin J. explained that there was a time when only orders of superior Courts were considered to be deserving of the respect which contempt proceedings are intended to secure. However, that time has passed; the question whether criminal contempt powers should be available with respect to orders of lower tribunals no longer raises an issue of jurisdiction but one of policy (*United Nurses*, para. 69):

> It questions whether the legislature should enact that breach of a tribunal order is subject to the same consequences as breach of a court order. The power of the legislature to do this cannot be questioned; legislatures routinely make changes in the law which empower or require federally appointed judges to impose certain remedies. Thus the question is one of policy; policy moreover, which can be debated. Against the argument that the contempt power is so serious that it should only be available for breaches of orders actually made by s. 96 judges, can be raised the argument that in reality important portions of our law are administered not by s. 96 judges but by inferior tribunals, and that these decisions, like court decisions, form part of the law and deserve respect and consequently the support of the contempt power.

[44] It is now settled law that decisions of lower Tribunals can be enforced on their own account through contempt proceedings because they, like decisions of the superior Courts, are considered by the legislator to be deserving of the respect which the contempt powers are intended to impose. This is what section 57 achieves with respect to orders made by the Tribunal under sections 53 and 54 of the Act.

[45] It follows that in the present case, there is only one order – the Tribunal order – which is enforced by the Federal Court pursuant to section 57 as though it was an order of that Court. This intent is best reflected by the French text according to which: "les ordonnances rendues en vertu des articles 53 et 54 […] peuvent […] être assimilées aux ordonnances rendues par celle-ci [*i.e.*, la Cour fédérale] ".

[46] The Federal Court Judge therefore erred when he held that the deliberate violation of the order of the Tribunal could not in itself give rise to a finding of contempt (reasons, para. 28).

[47] Counsel for Mr. Tremaine maintains that even if the violation of the order of the Tribunal can give rise to a finding of contempt, notice that the order of the Tribunal was registered with the Federal Court remains a pre-requisite.

[48] I note that there is no requirement in any of the statutory law with which we are concerned – whether it be the Act, the *Federal Courts Act* or *Rules* – that notice of registration be given. It follows that if there is such a requirement, it must be shown to exist under the common law.

[49] The only case on point appears to be the decision of Prothonotary Hargrave in *Telus* where he found, relying on *Bhatnager*, that knowledge of the "filed order", as opposed to the order itself, was a pre-requisite (*Telus*, paras. 3, 4 and 5). However, as explained earlier, *Bhatnager* was not a registration case. The issue was whether acceptance of service of an order

of the Federal Court by the solicitor for the two Ministers who were targeted by the order was sufficient to impart knowledge of that order on the Ministers so as to make them liable for contempt. Sopinka J., writing for the Court, held that it was not. According to him, the only common law requirement is that there be personal service or actual personal knowledge of the order sought to be enforced (*Bhatnager*, para. 16).

[50] It is common ground in this case that Mr. Tremaine had this knowledge.

[51] Counsel for Mr. Tremaine correctly points out that in *United Nurses*, as well as in all the cases that were brought to our attention where an analogous enforcement procedure was used, the evidence shows that the alleged contemnor had been notified of the registration of the Tribunal or Board order.

[52] It is easy to understand why that is so. As alluded to earlier, questions can arise about the enforceability of such orders before they are registered. However, such questions disappear altogether when the order is registered. In the present case, the order had been registered when the alleged acts of contempt took place and nothing turns on the fact that Mr. Tremaine was not so advised as he made it clear that this had no impact on the course of action which he chose to take.

[53] In my view, the only pre-requisite which can be derived from the Supreme Court's jurisprudence with respect to the second component of the civil contempt test is that there must

be actual knowledge of a legally binding order such that it can be shown beyond a reasonable doubt that the order is being disobeyed deliberately or willfully by the alleged contemnor. This is what the evidence establishes in the present case.

[54] Given that all the contemptuous acts were committed after Mr. Tremaine became aware of the Tribunal order, it is not necessary to address the appellant's alternative argument based on *Baxter Travenol*.

Scope of the Tribunal order

[55] The Federal Court Judge also accepted the respondent's argument that the order of the Tribunal was too vague to require him to remove the postings which the Tribunal had found to be offensive. Although it would be a strange result if the order of the Tribunal was construed as permitting the respondent to leave on the Internet the very material which the Tribunal found to be offensive, it is not necessary to spend time on this issue because the messages posted by Mr. Tremaine after he was made aware of the Tribunal order are clearly in breach of it. Indeed, counsel for the respondent acknowledged that the order requires Mr. Tremaine " to cease and desist, which is to stop and not do again" (respondent's memorandum, para. 22 (my emphasis)) and Mr. Tremaine chose to do exactly the opposite (appeal book, vol. 1, pp. 249 and 250; vol. 2, pp. 294, 301 to 305, 312 to 315, 356 to 359, 366 to 368, 457 to 463). I therefore find that Mr. Tremaine acted in contempt of the order of the Tribunal when he continued to post offensive messages after February 2, 2007 when he became aware of the Tribunal order.

Did the respondent "communicate"?

[56] The respondent notes that the order uses the language "communicating telephonically", without further description (respondent's memorandum, paras. 8 and 9). He contends that this is not sufficiently precise to capture communications which take place on the Internet.

[57] In this respect, I note, as the Federal Court Judge did, that the Tribunal order itself cannot be dissociated from the reasons given for its issuance (reasons, para 34). When regard is had to the reasons, it is clear that the respondent was prohibited from communicating on the Internet – (see for example, the decision of the Tribunal, para. 149).

[58] The respondent further submits that the mere uploading of data on a foreign web server does not constitute an act of communication (respondent's memorandum, paras. 13 to 15). Rather, the respondent maintains that (*idem*, para. 13):

> … Any communication of Mr. Tremaine's thoughts, ideas, words or information resulted from the new intervening act of the person who downloaded them, in this case the complainant, Richard Warman.

[59] There is again no merit to this contention. In the present case, the evidence establishes beyond a reasonable doubt that Mr. Tremaine placed his messages on a website where they could be and were accessed at least by like minded individuals (see for example, appeal book, vol. 1, pp. 249 and 250; vol. 2, pp. 294, 301 to 305 , 312 to 315, 356 to 359). Nothing more is required in order to establish that Mr. Tremaine "communicated" his messages as section 13 contemplates (section 13 of the Act).

The respondent's defence relating to the bail order

[60] Finally, the respondent argues that he could not remove the Internet messages because his bail conditions prohibited him from accessing the Internet. However, as found by the Federal Court Judge, the bail conditions were only issued in January 2008, and therefore cannot have had any bearing on Mr. Tremaine's contemptuous behaviour before that date. Furthermore, the record reveals that Mr. Tremaine did access the Internet after January 2008 despite the conditions imposed on him (appeal book, vol. 4, p. 959).

DISPOSITION

[61] For these reasons, I would allow the appeal, set aside the decision of the Federal Court Judge and giving the judgment which he ought to have given, I would find Mr. Tremaine in contempt of the order of the Tribunal for having communicated through the Internet prohibited material after February 2, 2007, and would remit the matter to the Federal Court Judge for sentencing, the whole with costs in favour of the Commission throughout.

"Marc Noël"

J.A.

"I agree
Eleanor R. Dawson J.A."

PELLETIER J.A. (Dissenting Reasons)

[62] I have read the reasons of my colleague Noël J.A. in draft. I am unable to agree with his disposition of this appeal. I would dismiss the appeal with costs to Mr. Tremaine.

[63] The difference between our positions is that, in my view, before a person can be found to be in contempt of court as a result of disobeying a tribunal order, that person must have notice that the tribunal order was filed in the Federal Court so that they aware that they are disobeying what is now a court order. As I understand my colleague's reasons, his position is that notice of filing of the tribunal order in the Federal Court is not necessary to support a finding of contempt of court. It is enough that the person knowingly and wilfully disobeys a tribunal order. While the filing of the order in Federal Court is a necessary step in the enforcement of the order so as to seize the court with jurisdiction over the matter, notice that the order has been filed is not necessary condition for a finding of contempt of court since it is knowledge of the tribunal order which is material.

[64] The difference which underlies our two positions is the nature of the order being enforced. In my view, upon filing with the Federal Court, a tribunal order becomes a court order for the purposes of enforcement. My colleague's position, as I understand it, is that the tribunal order remains a tribunal order, and only a tribunal order, even after it has been filed in the Federal Court. Nevertheless, a person who wilfully disobeys a tribunal order is liable to be found in contempt of court. For reasons which I will set out below, I am unable to agree with this position.

[65] Parliament has enacted a scheme for the enforcement of tribunal orders; it is a key element of that scheme that tribunal orders become court orders upon being filed in the court.

[66] Section 57 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (the CHRA), reproduced below, is one example of the type of statutory provision which Parliament has adopted in furtherance of its legislative scheme:

57. An order under section 53 or 54 may, for the purpose of enforcement, be made an order of the Federal Court by following the usual practice and procedure or by the Commission filing in the Registry of the Court a copy of the order certified to be a true copy	**57.** Aux fins de leur exécution, les ordonnances rendues en vertu des articles 53 et 54 peuvent, selon la procédure habituelle ou dès que la Commission en dépose au greffe de la Cour fédérale une copie certifiée conforme, être assimilées aux ordonnances rendues par celle-ci

[67] Other statutory provisions of the same kind can be found in the following federal statutes: *Broadcasting Act*, S.C. 1991, c. 11, s. 13, *Canada Oil and Gas Operations Act*, R.S.C. 1985, c. O-7, s. 13, *Canada Transportation Act*, S.C. 1996, c. 10 s. 33, *Copyright Act*, R.S.C., 1985, c. C-42, s. 66.7, *Employment Equity Act*, S.C. 1995, c. 44, s. 31, *National Energy Board Act*, R.S.C. 1985, c. N-7, s. 17, *Patent Act*, R.S.C. 1985, c. P-4 s. 99, *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 52, *Telecommunications Act*, S.C. 1993, c.38, s. 63. All of these provisions have a common thrust: the tribunal order is made an order of the Federal Court or of a provincial superior court by being filed in that court. The reference to the provincial superior courts does not make a material difference to the scheme. It simply provides the tribunal with the alternative of taking enforcement

proceedings in the provincial superior court. For the purposes of this discussion, I will simply refer to the filing of a tribunal order in the Federal Court.

[68] Another element of the legislative scheme is Part 12 of the *Federal Courts Rules,* SOR/98-106 (the *Rules*). Part 12 of the *Rules*, which includes Rules 423 and 424, is entitled "Enforcement of Orders":

423. All matters relating to the enforcement of orders shall be brought before the Federal Court.	**423**. Toute question concernant l'exécution forcée d'une ordonnance relève de la Cour fédérale.
424. (1) Where under an Act of Parliament the Court is authorized to enforce an order of a tribunal and no other procedure is required by or under that Act, the order may be enforced under this Part.	**424**. (1) Lorsque la Cour est autorisée, en vertu d'une loi fédérale, à poursuivre l'exécution forcée de l'ordonnance d'un office fédéral et qu'aucune autre procédure n'est prévue aux termes de cette loi ou de ses textes d'application, l'exécution forcée de l'ordonnance est assujettie à la présente partie.
(2) An order referred to in subsection (1) shall be filed together with a certificate from the tribunal, or an affidavit of a person authorized to file such an order, attesting to the authenticity of the order.	(2) L'ordonnance visée au paragraphe (1) est déposée avec un certificat de l'office fédéral ou un affidavit de la personne autorisée à la déposer, attestant l'authenticité de l'ordonnance.

[69] Part 12 then deals with all aspects of the enforcement of court orders including contempt of court. Rule 466 (*b*) provides that a person who disobeys an order or process of the Court is guilty of contempt of court. The French version of the Rule provides that a person is guilty of contempt of

court if they disobey "un moyen de contrainte ou à une ordonnance de la Cour" which I translate as an order, or a constraining measure, of the Court.

[70] The final element of the legislative scheme is the recognition, where a tribunal has a continuing interest in the subject matter of the order, that the tribunal order remains a tribunal order for all purposes other than enforcement, so that the tribunal retains the ability to alter or rescind its original order. When the original tribunal order is amended or rescinded the court order is vacated. An example of such a disposition is found in the *Telecommunications Act*:

63. (3) Where a decision of the Commission that has been made an order of a court is rescinded or varied by a subsequent decision of the Commission, the order of the court is vacated and the decision of the Commission as varied may be made an order of the court in accordance with subsection (2).	**63.** (3) Les décisions assimilées peuvent être annulées ou modifiées par le Conseil, auquel cas l'assimilation devient caduque. Les décisions qui sont modifiées peuvent, selon les modalités énoncées au paragraphe (2), faire à nouveau l'objet d'une assimilation.

[71] Other examples of this kind of provision are found in the following statutes: *Broadcasting Act*, s. 13(3), *Canada Oil and Gas Operations Act*, s.13 (3), *Canada Transportation Act*, s. 33(3), *Copyright Act*, s. 67.1(4) and the *Patent Act*, s. 99(3.) Such a disposition would not be necessary if tribunal orders, once filed in the Federal Court, did not become orders of the Court.

[72] Provisions of this sort do not foreclose the possibility that tribunal orders remain tribunal orders for all purposes within the tribunal's jurisdiction, even after they are filed in the Federal Court. They simply deal with the problem of amendments to a tribunal order after it has been filed.

[73] The combined effect of these various elements is that upon being filed in the Federal Court, a tribunal order becomes an order of the Federal Court. Disobedience of such an order is disobedience of a court order within the meaning of Rule 466(*b*) so as to constitute contempt of court. The procedures by which allegations of contempt of court are adjudicated are set out in Part 12 of the *Rules*, as well as in the common law of contempt. When the underlying tribunal order is varied or rescinded, the court order which results from the filing of the order is also rescinded. The transformation of a tribunal order into a court order is an essential element of this scheme.

[74] I do not agree with my colleague's position that the French version of s. 57 of the CHRA supports the view that tribunal orders do not become orders of the court upon being filed. When the words "assimilées aux ordonnances rendues par celle-ci" are read in the context of the legislative scheme discussed above, the shared meaning of the English and French versions of s. 57 which emerges is that a Tribunal order becomes a court order upon being filed in the Court. If it did not, the tribunal order by itself could not engage Rule 466 (*b*) which requires a breach of an order or other constraining measure *of the Court*.

[75] I do not believe that my reasoning is inconsistent with the decision of the Supreme Court in *United Nurses of Alberta v. Alberta (Attorney General),* [1992] 1 S.C.R. 901, [1992] S.C.J. No. 37, (*United Nurses of Alberta*), upon which my colleague relies. The debate in that case was whether non-compliance with a tribunal order which had been filed with the Court of Queen's Bench for Alberta was punishable by criminal contempt proceedings. There was no issue in that case about notice being given to the persons who were alleged to be in contempt of court. One of the

arguments advanced on behalf of the latter was that only disobedience of orders made by superior courts was punishable by criminal contempt. The passage quoted by my colleague occurs in the context of McLachlin J.'s disposition of that question. In order to understand McLachlin J.'s reasoning, it is important to read the paragraph which precedes the passage quoted by my colleague. Both are reproduced below:

> *But, it may be asked, is it right that the order of an inferior tribunal can be given the status of a court order by legislative fiat, leading to the consequence that its breach is elevated from breach of tribunal order to contempt of court?* Should the common law offence of criminal contempt be available to protect orders of an inferior tribunal, or should it be restricted to orders actually made by the court? Criminal contempt is a serious offence, it is argued, and one which it is neither necessary nor appropriate to use in a civil labour dispute.
>
> This argument is not one of jurisdiction, but of policy. It questions whether the legislature should enact that breach of a tribunal order is subject to the same consequences as breach of a court order. The power of the legislature to do this cannot be questioned; legislatures routinely make changes in the law which empower or require federally appointed judges to impose certain remedies. Thus the question is one of policy; *policy moreover, which can be debated*. Against the argument that the contempt power is so serious that it should only be available for breaches of orders actually made by s. 96 judges, can be raised the argument that in reality important portions of our law are administered not by s. 96 judges but by inferior tribunals, and that these decisions, like court decisions, form part of the law and deserve respect and consequently the support of the contempt power. … *Whatever the answers to these difficult issues*, where the legislature has acted properly within its jurisdiction, it is not open to the courts to substitute their views on the proper policy of the law for the views of the legislature.
> (my emphasis)
>
> *United Nurses of Alberta*, cited above, at paras. 68, 69

[76] On my reading of this passage, McLachlin J. did nothing more than settle the constitutional question as to whether provincial legislatures could provide that a breach of an order made by a provincially created tribunal would have the same consequences as a breach of an order of a

superior court. She found that the legislature could indeed do so; whether it chose to do so or not was a policy decision, a decision which raised the considerations she identified in the balance of this passage. As I understand the Supreme Court's decision, it held that the language used by the Alberta legislature had the effect of making directives of the Alberta Labour Relations Board, once filed in the Alberta Court of Queen's Bench, court orders for the purpose of enforcement.

[77] I am confirmed in this view by the fact that this is the very issue on which Sopinka J. dissented from the decision of the majority in that case: see *United Nurses of Alberta*, cited above, at para. 76.

[78] Parliament has considerable latitude in deciding what status to accord tribunal orders. It may, as it did in the *Competition Tribunal Act* R.S.C. 1985 c.19 (2nd Supp), confer on the tribunal all the powers of a superior court of record in relation to the enforcement of its orders, including the power of enforcement by contempt: see section 8. Or, it can (and it did) establish a scheme, applicable to various statutory tribunals, allowing for the enforcement of their orders as court orders, including recourse to contempt proceedings.

[79] It would be a curious result if this legislative scheme which has been in place for a long time were now to be displaced by a passing reference in *United Nurses of Alberta*, a case decided in 1992.

[80] As a result, I find that the order which the Commission seeks to enforce against Mr. Tremaine is, as of the date of its filing in the Federal Court, an order of the Federal Court.

[81] This leads to the question of whether notice that the order has been filed with the Court is a precondition to finding a person in contempt of that order. I agree with my colleague that the three part test in *Prescott-Russell Services for Children and Adults v. (G.N.)*, (2006) 82 O.R. (3d) 686 (Ont. C.A.) applies. The second leg of the test is that "the party who disobeys the order must do so deliberately and willfully". This requirement must be read in conjunction with Rule 466(b) which stipulates that a person who disobeys a Court order is liable to be found in contempt. Taking the two requirements together, a person who deliberately and willfully disobeys a court order is liable to be found in contempt of court. One can only deliberately and willfully disobey a court order if one knows that it is a court order. The deliberate and willful disobedience of a tribunal order is discreditable conduct for which other remedies are provided (see s. 127 of the *Criminal Code*, R.S.C. 1985, c. 46) but it is not contempt of court unless, to the knowledge of the person, the tribunal order has the legal and moral status of an order of the Federal Court.

[82] I agree with my colleague that the jurisprudence on this question is thin and that most of it can be distinguished, as he has done. The fact that there is little jurisprudence on this question, and that what little there is all points in the direction of requiring notice suggests that there has long been a common understanding that knowledge of the status of the order was required in order to support a finding of contempt of court. Since this requirement is easy to meet, persons seeking to enforce tribunal orders have generally organized themselves to meet it, as they could easily have done here.

The complete absence of jurisprudence in support of the position taken by my colleague, I suggest, is more significant than the limited jurisprudence in support of the position which I advance.

[83] I do not regard the need to give of notice that a tribunal order has been filed in the Federal Court as a mere technicality. Knowledge of the filing of a tribunal order in the Federal Court puts a person on notice that the stakes have changed, which may well operate as a deterrent in many cases. It seems to me that the prevention of breaches of tribunal orders by timely notice of the possible consequences is at least as important to the administration of justice as the enforcement of those orders by contempt proceedings when they have been breached. The giving of notice of filing of the tribunal order in the Federal Court advances both goals at very little cost to the party seeking to enforce the order.

[84] It follows from this that, in the case of Mr. Tremaine, acts committed, or a state of affairs which was allowed to continue, prior to his knowledge that the order of the Canadian Human Rights Tribunal had been filed in Federal Court cannot support a finding of contempt of Court. The Federal Court judge found that Mr. Tremaine was first made aware that the Tribunal's decision had been filed in the Federal Court in March 2009. The Federal Court judge found that since the postings which formed the basis of the show cause summons were posted prior to that time, Mr. Tremaine could not be found in contempt of court (see para. 28 of the Federal Court Judge's Reasons for Decision). The Federal Court judge also found that the order was not sufficiently clear to require Mr. Tremaine to remove from the internet the material which had been found by the Tribunal to offend section 13 of the CHRA.

[85] Did Mr. Tremaine breach the Tribunal order after he had notice that it had been filed in the Federal Court? The Commission filed the entire Tribunal decision in the Federal Court, but the Tribunal order itself reads as follows:

> 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*.

[86] I note that s. 53 of the CHRA provides that where the Tribunal is satisfied that a complaint is substantiated, it may make an order of a specified kind against the respondent. Section 57 then provides for the filing of that order in the Federal Court. There is no basis for the filing of the Tribunal's reasons for its order in the Federal Court. Only the order is to be filed. This is significant because only the order can be made an order of the Federal Court. The reasons for decision do not acquire any coercive effect by being filed in the Federal Court.

[87] Mr. Tremaine's defence is that the Tribunal order did not require him to remove, or take down from the internet the material which the tribunal found was in contravention of the CHRA. As for the subsequent postings, Mr. Tremaine relies on the fact that they were made before the Tribunal order was filed in the Federal Court.

[88] The law of contempt is an aspect of the rule of law. Those who are subject to an order of the court must comply with that order according to its terms. If there were no means of enforcing such compliance, the constitutional promise that disputes will be adjudicated impartially and according to law would be empty and the administration of justice would be brought into disrepute. Contempt of court is the means by which compliance with court orders is enforced.

[89] But the rule of law is a double edged sword. The court will only enforce orders according to their terms. The order the court makes is the order to be enforced, not the order which the court could have made, nor even the order which the court intended to make. The person who is subject to a court order must be able to tell from the order itself what he or she is to do or refrain from doing.

[90] For this reason, it has always been held that the order sought to be enforced by contempt proceedings must be clear and unambiguous: see *Prescott-Russell Services for Children and Adults v. N.G. et al.* (2006), 82 O.R. (3d) 686 at para 27 (C.A.), *Skipper Fisheries Ltd v. Thorburne* [1997] N.S.J. No. 56 (N.S.C.A.), 145 D.L.R. (4th) 28 at para.'s 31, 76, *Peel Financial Holdings Ltd. v. Western Delta Lands Partnership*, 2003 BCCA 551, [2003] B.C.J. No. 2392, at para. 36.

[91] In my view, the order made here does not contain a clear and unambiguous requirement that Mr. Tremaine remove from the internet the material which the Tribunal found to be in violation of s. 13 of the CHRA. In its material parts, the order reads:

> Terry Tremaine …cease the discriminatory practice of communicating material of the type that was found to violate section 13(1) in the present case…

[92] As the Federal Court judge pointed out, "material of the type" is not the original material: see para. 29 of the Federal Court judge's Reasons for Decision. It would have been easy enough for the Tribunal to order Mr. Tremaine to take down the website which he controlled and to cause to be removed from the Stormfront website the offensive material which he had posted there and to stipulate a date by which these things must be done. It did not do so; it contented itself with repeating substantial portions of s. 13 of the CHRA and adding a direct reference to Mr. Tremaine and those acting in concert with him. In my view, this is insufficient to support a finding of contempt.

[93] I note that no date was specified by which the order was to be complied with. This is consistent with the view that the order dealt with prospective conduct only.

[94] As for the postings which preceded Mr. Tremaine's receipt of notice of the filing of the Tribunal order in the Federal Court, I find that while they may well constitute a breach of the Tribunal order, they do not constitute a willful and deliberate refusal to comply with a court order. This is because Mr. Tremaine had no notice that the Tribunal order was a court order at the time he made the postings.

[95] As a result, I would dismiss the appeal with costs to Mr. Tremaine. I anticipate that some will find that this is an inadequate response to Mr. Tremaine's egregious conduct. I would simply point out that, to the extent that the result turns on the drafting of the Tribunal order and the time of

service of the notice of filing of the Tribunal order in the Federal Court, the outcome of this case is a self inflicted wound.

"J.D. Denis Pelletier"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-468-10

APPEAL FROM AN ORDER OF THE HONOURABLE Mr. JUSTICE HARRINGTON OF THE FEDERAL COURT DATED NOVEMBER 29, 2010, DOCKET NO. T-293-07.

STYLE OF CAUSE:	Canadian Human Rights Commission and Richard Warman and Terry Tremaine
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	September 19, 2011
REASONS FOR JUDGMENT BY:	NOËL J.A.
CONCURRED IN BY:	DAWSON J.A.
DISSENTING REASONS BY:	PELLETIER J.A.
DATED:	October 26, 2011

APPEARANCES:

Daniel Poulin	FOR THE APPELLANT
Douglas H. Christie	FOR THE RESPONDENT, Terry Tremaine

SOLICITORS OF RECORD:

Canadian Human Rights Commission Ottawa, Ontario	FOR THE APPELLANT
Douglas H. Christie Victoria, British Columbia	FOR THE RESPONDENT, Terry Tremaine