Date: 20080613

Docket: T-1132-06

Citation: 2008 FC 734

Ottawa, Ontario, June 13, 2008

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

ATTORNEY GENERAL OF CANADA (Representing the DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES CANADA)

Applicant

and

BOB BROWN, and the CANADIAN HUMAN RIGHTS COMMISSION, and the NATIONAL CAPITAL COMMISSION

Respondents

and

THE COUNCIL OF CANADIANS WITH DISABILITIES

Intervener

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This application for judicial review brought by the Department of Public Works and Government Services Canada (the applicant or Public Works) forms the second of two such applications levelled against the decision of the Canadian Human Rights Tribunal, dated June 6,

2006, which found that Public Works was liable under section 5 of the *Canadian Human Rights Act* (the "*Act*"), R.S.C. 1985, c. H-6, for its failure to participate properly in the process of accommodating Mr. Bob Brown (the respondent or Mr. Brown) at the York Street Steps (the Steps). The Tribunal held that as an agent of the Crown and by virtue of its proximity to the Steps, there is enough nexus between Public Works and the National Capital Commission (the "NCC") to impose a special duty on Public Works.

[2] These reasons are released concurrently with those of the first application for judicial review brought by the NCC in Federal Court File T-1117-06 *National Capital Commission (NCC) v. Bob Brown, the Canadian Human Rights Commission, and the Attorney General of Canada representing the Department of Public Works and Government Services Canada*) and the *Council of Canadians with Disabilities*. On January 17, 2007, this Court granted intervener status to the Council of Canadians with Disabilities (CCD), in both files T-1117-06 & T-1132-06, which were heard together in Ottawa on April 7 to 9, 2008.

II Facts

[3] On August 31, 1999, Mr. Bob Brown filed a human rights complaint with the Canadian Human Rights Commission (the Commission), against the NCC, alleging that it discriminated against him by failing to provide universal access at the York Street Steps.

[4] As the complaint form indicates, the respondent is the NCC. Neither Public Works nor its representative, the Attorney General of Canada was cited by Mr. Brown as a party to his complaint.

[5] Public Works is a Federal Government Department, which operates and maintains the Connaught Building located at 555 MacKenzie Avenue. This heritage building houses the Customs and Revenue Agency of Canada.

[6] The Connaught Building is bordered to the West by MacKenzie Avenue, and to the East by Sussex Drive. It stands between NCC owned lands – the Daly Building and elevator to the South and to its immediate North, stand the York Street Steps, a public amenity constructed and maintained by the NCC to create an additional point of access between upper town and lower town. The U.S.A. Embassy (U.S. Embassy) is located North of the Steps.

[7] The Steps connect MacKenzie Avenue -across from Major's Hill Park, at the top and Sussex Drive at the bottom, where York Street meets Sussex Drive at a T-intersection. The Steps do not have an elevator or a ramp. As such, people with mobility limitations cannot use the Steps to go up and down between these two Streets.

[8] To rectify this situation and provide reasonable accommodation at the Steps, the NCC undertook consultations with the Steps' neighbours: the U.S. Embassy to the North and Public Works to the South. In addition, the NCC consulted in-house and external architects, as well as disability groups.

[9] Following these consultations, the NCC elected to adopt several alternative measures, including widening and upgrading the sidewalks, installing proper signage, lighting and seating along the two Streets. Finally, it included an immutable clause in its Development Agreement with Claridge Building Corporation, the private developer of the Daly Building site, to provide a stand alone universally accessible elevator, which would be available to the general public 24 hours a day. This elevator is located 130 meters away from the Steps and became operational in summer 2005.

[10] The Commission investigated Mr. Brown's human rights complaint against the NCC. On June 13, 2000, the investigation report recommended that the Commission dismiss the complaint because the evidence did not support the allegations of discrimination.

[11] Public Works was not party to this investigation.

[12] By letter dated June 25, 2000, Mr. Brown wrote to the Commission requesting that it reconsider the conclusions of the investigation report. The Commission requested a supplementary investigation, with the direction among others that expert opinion be sought on how the location could be made accessible to wheelchair users.

[13] The expert opinion provided by Mr. David Rapson, a Project Manager at the Universal Design Institute, which is a semi-independent non-profit organization affiliated with the Faculty of Architecture, University of Manitoba, acting on behalf of the Progressive Accessibility Re-Form

Associates (PARA), included two reports, dated June 14, 2001 and May 15, 2003, as well as oral testimony before the Tribunal in Ottawa on July 8, and 9, 2003 and May 18, 19 and 20, 2004.

[14] In his first Report, Mr. Rapson recommended to the Commission that the NCC should consult and negotiate with the appropriate persons of the Connaught Building to upgrade the existing entrances/exits and interior elevator. This recommendation formed the basis of the Investigation Report – Supplementary dated June 29, 2001, as disclosed to the NCC and Mr. Brown.

[15] Public Works was not party to this process before the Tribunal. Consequently, it was not informed of the supplementary investigation report or of Mr. Rapson's recommendation that the Connaught Building is a natural option for accommodation.

[16] Despite this recommendation in the Supplementary Investigation Report, neither Mr. Brown nor the Commission sought to amend or file a new complaint form to add Public Works as a third party co-respondent.

[17] In letters dated November 5 and 30, 2001, the Commission informed Mr. Brown and the NCC that it had appointed a conciliator to attempt to bring about a settlement of the complaint.

[18] Public Work was not informed nor did it participate in the conciliation process, which failed to resolve the matter, as indicated in the Conciliator's Report dated September 6, 2002.

[19] On December 20, 2002, Mr. Brown and the NCC were informed that the Commission would request that a Human Rights Tribunal be appointed to inquire into the complaint. This was done by letter from the Commission to the Tribunal, on December 31, 2002.

[20] The Tribunal began hearings into the complaint in Ottawa on Friday, July 4, 2003, with Mr. Brown as its first witness. Mr. Rapson followed on Tuesday, July 8, 2003 as expert witness for the Commission. On July 9, 2003, the Tribunal brought the hearing to a halt in light of Mr. Rapson's testimony first, acknowledging that accommodation at the site was unfeasible and second, suggesting that going through the Connaught Building provided a natural means of access to the Steps at the site. The Hearing was suspended *sine die* and upon the Tribunal's request, the Commission brought a motion to add Public Works as a third party. The Tribunal accorded the motion on December 9, 2003.

[21] On January 7, 2004, Public Works brought an application for judicial review of the Tribunal's decision in Federal Court File T-26-04. With the consent of the parties, Public Works brought a motion to the Federal Court to expedite this application for judicial review since the Tribunal intended to resume its hearing on May 18, 2004. However, without deciding the merits of the application, Mr. Justice Luc Martineau, denied the motion to expedite the application by Order dated February 17, 2004. To avoid parallel proceedings, Public Works discontinued its application.

[22] Public Works joined the Tribunal's proceedings when they resumed on Tuesday, May 18, 2004. The Tribunal rendered its decision on June 6, 2006 and it is this decision, which is the subject of the present application for judicial review.

III. Impugned decision

[23] The Tribunal made the following findings with respect to liability of Public Works:

- On a balance of probabilities, Public Works' failure to participate properly in the process of accommodating Mr. Brown constituted a discriminatory form of conduct;
- Public Works is not immune from a finding of liability;
- Paragraph 48.9(2)(b) of the *Act* clearly contemplates the addition of parties;
- The emphasis of the *Act* is in finding a remedy;
- This is the sole purpose of adding Public Works as a co-respondent;
- The Connaught Building cannot be considered as an option of providing access unless Public Works is a party to the hearing;
- Subsection 53(2) of the *Act* only gives the Tribunal authority to make an order against the person found to be engaging or having engaged in the discriminatory practice.
- This shifts the inquiry in that it is enough to ground liability against Public Works for having failed to assist the NCC and the Commission in resolving the complaint;
- There is a general duty to facilitate accommodation;
- There is enough of a nexus between Public Works and the NCC to impose a special duty on Public Works to assist the NCC in its investigation of the Connaught Building as a possible location for an elevator; and
- The Crown is the ultimate owner of both the York Street Steps and the Connaught Building and it is the stewardship of the two that has been called into question in the present case.

[24] With respect to the allegations of a breach of natural justice, the Tribunal held that it was too late to complain of a defect in the process for the following reasons:

- There was no prejudice to Public Works as the Commission did not fail to provide proper particulars;
- Public Works waived its right to object by choosing not to raise the issue until the end of the process;
- The Commission did overreach itself by arguing that Public Works has discriminated against Mr. Brown by failing to provide access through the Connaught Building.

[25] The Tribunal stated as follows among its major findings:

> 6. The NCC had an obligation to investigate the possibility of using the Connaught Building. Public Works had an obligation to co-operate in the investigation. Both Respondents failed in their obligations. I am satisfied that Public Works is independently liable for its failure to co-operate with the other parties in making the Steps accessible after the complaint was filed.
> [. . .]
>
> 8 Public Works is legally obliged to participate in the process of consultation.

[26] The Tribunal therefore found that in order to provide a remedy, Public Works had to participate in the process because the Connaught Building based on the Commission's expert opinion was the natural solution to accommodation at the Steps. By failing to participate in the process, Public Works was liable.

IV. Issues

[27] This Application raises the following three issues:

1) Did the Tribunal overstep its jurisdiction by adding Public Works as a third party respondent to the inquiry before it?

2) Did the Tribunal err in fact or in law by finding Public Works liable for failing to participate properly in the process of accommodating Mr. Brown at the York Street Steps?

3) Did the Tribunal breach the principles of procedural fairness and natural justice by making remedial orders contrary to its decision to bifurcate the issues of liability and remedy?

[28] For the reasons that follow, the Court responds in the affirmative to each of these questions. The Tribunal did not have Rules of Procedure at the time it added Public Works as a third party; contrary to the express statutory provisions. The Tribunal also erred in law by finding Public Works liable for the action or inaction of the NCC. Finally, by turning its mind to the question of remedy, the Tribunal breached the principles of natural justice by ignoring its undertaking to bifurcate the matter and deal only with liability; thereby depriving the applicant of the opportunity to make representations on its remedial considerations. Consequently, the present application for judicial review will be allowed.

V Relevant legislation

[29] The Rules of Procedure for proceedings before the Canadian Human Rights Tribunal are set out in section 48.9(2) of the *Act*, where paragraph (g) grants authority to the Tribunal to add interested third parties to its proceedings provided that there are rules of procedure in place. It provides as follows:

Tribunal rules of procedure 48.9(2) The Chairperson may make rules of procedure governing the practice and procedure before the Tribunal, including, but not limited to, rules governing [. . .] (b) the addition of parties and interested persons to the proceedings; [. . .]	**Règles de pratique** 48.9 (2) Le président du Tribunal peut établir des règles de pratique régissant, notamment : [. . .] b) l'adjonction de parties ou d'intervenants à l'affaire; [. . .]

[30] Similarly, where a complaint is substantiated, the Act provides as follows in subsection 53(2):

53. [. . .] **Complaint substantiated** (2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate: [. . .]	**53.** [. . .] **Plainte jugée fondée** (2) À l'issue de l'instruction, le membre instructeur qui juge la plainte fondée, peut, sous réserve de l'article 54, ordonner, selon les circonstances, à la personne trouvée coupable d'un acte discriminatoire : [. . .]

VI Standard of Review

[31] In this application for judicial review the applicant alleges errors of jurisdiction, general law and denial of natural justice; each of which is subject to the correctness standard. In this regard, the Court adopts its reasoning in the companion file T-1117-06 concerning the unrevised status of the

standard of correctness, as observed by the Supreme Court of Canada in its recent decision in *Dunsmuir v. New Brunswick* (*Dunsmuir*), 2008 SCC 9 , at paragraph 50:

> 50 As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct. [Emphasis of the Court]

[32] The Court will intervene and substitute its own position only where it has determined that the Tribunal erred in law in its resolution of each issue.

VII Analysis

1) Did the Tribunal overstep its jurisdiction by adding Public Works as a third party respondent to the inquiry before it?

[33] In its ruling dated December 9, 2003 to add Public Works as a co-respondent, the Tribunal granted the intervention for the following reasons:

- The Tribunal had already required the Commission Counsel to file a motion seeking the addition of Public Works as a party;
- The *Act* gives the Tribunal jurisdiction to add parties;
- The addition of Public Works is necessary to resolve the matter before it; and
- The prejudice that may affect Public Works can be remedied by way of an adjournment.

[34] Moreover, the Tribunal found that if Public Works were not party to the complaint, it would inhibit the Tribunal's consideration of a potential form of accommodation in the Connaught Building. The Tribunal wrote as follows:

> The problem with the position adopted by Public Works is that it may leave persons who are discriminated against without an effective remedy. If I have to choose between the right of Public Works to stay out of the dispute and the rights of the disabled, I would think that any reading of the purpose and preamble of the Act leaves little doubt as to where my responsibilities lie. The Commission is entitled to follow discrimination to its logical remedy, in accordance with the larger public interest, wherever that remedy might lead.

[35] Counsel for the Attorney General of Canada representing Public Works argues that as part of its gate-keeping function; only the Commission can add a respondent. Consequently, the Tribunal exceeded its jurisdiction when it added Public Works as a party to the hearing. The *Act* gives jurisdiction to the Tribunal not merely to add third parties as stipulated in paragraph 48.9(2)(b) but rather it clearly grants the discretion to the Chairperson of the Tribunal who "may make rules of procedure governing the practice and procedure before the Tribunal, including, but not limited to, rules governing [. .] the addition of parties and interested persons to the proceedings."

[36] Counsel for the Attorney General argues that at the time the decision was made to add Public Works, on December 9, 2003, the Tribunal did not have Rules of Procedure pertaining to the addition of parties. Counsel for the Commission responds that while the Tribunal's interim rules of procedure were silent with respect to the procedure for adding parties, the Tribunal's new rules expressly provide a process whereby parties can be added. Section 10 sets out the transitional provisions of when these rules came into effect. They state as follows:

> 8(3) Where the Commission, a respondent or a complainant seeks to add a party to the inquiry, it may bring a motion for an order to this effect, which motion shall be served on the prospective party, and the prospective party shall be entitled to make submissions on the motion. (See *Canadian Human Rights Tribunal Rules of Procedure,* 03-05-04)
>
> 10(1) Where a complaint is referred to the Tribunal under the *Canadian Human Rights Act* after April 30, 2004, all procedural matters and hearings in respect of the complaint shall be dealt with in accordance with these Rules. [Emphasis by the Court]

[37] After a careful review of the arguments of the parties and the wording of the statute, the Court agrees that the Tribunal did not follow the express provisions of the *Act* for adding third parties. The Court also recognizes that Public Works discontinued its application for judicial review in the interests of judicial economy to avoid a multiplicity of proceedings. While the Court is not indifferent to the arguments of the Commission, including the fact that the Tribunal has subsequently filled the gap in its Rules of Procedure to permit the addition of parties under the *Act*, the Tribunal overstepped its jurisdiction at the time when it added Public Works as a co-respondent.

[38] Had it not moved in the way that it did to add Public Works, the Tribunal would have recognized that before it could add Public Works as a third party, co-respondent, it was incumbent on the Chairperson to adopt appropriate rules of procedure that would permit such an addition. Counsel for the Attorney General is correct in his broad and generous interpretation of the *Act*. Parliament has given express authority to the Commission to receive complaints and to add parties. Had it intended to share this gate-keeping function with the Tribunal, Parliament would not have circumscribed such authority with the discretionary precondition of the adoption of rules of

procedure. When the Tribunal exercised its statutory discretion to add parties, it ought to have done so according to the *Act.*

[39] By failing to do so the Tribunal deprived the applicant of the benefits of the Commission. Further, the Tribunal's own jurisprudence does not support the addition of new parties without proper Rules of Procedure clearly in place unless there are exceptional circumstances. At paragraph 30 of *Syndicat des Employés d'Exécution de Québec-Téléphone, section locale 5044 du SCFP v. Canadian Human Rights Commission* and *Telus Communications (Québec) Inc. (Telus),* 2003 CHRT 31, member Deschamps held as follows:

> The Panel is of the opinion that the forced addition of a new respondent once the Tribunal has been charged with inquiring into a complaint is appropriate, in the absence of formal rules to this effect, if it is established that the presence of this new party is necessary to dispose of the complaint of which the Tribunal is seized and that it was not reasonable foreseeable, once the complaint was filed with the Commission, that the addition of a new respondent would be necessary to dispose of the complaint.

[40] The Court concludes that the Tribunal's inquiry did not meet the requirements set out in *Telus,* above, which was rendered on September 15, 2003 or just three months prior to the Tribunal's decision to allow the motion to add Public Works. First, the Tribunal itself acknowledged that it was acting upon the recommendation of the Commission's expert witness whose suggestion that the Connaught Building is the natural solution was not based on a visit or intimate knowledge of the Connaught Building and was based on mere conjecture. Second, it was not foreseeable to either Mr. Brown or to the Commission indeed the NCC that the addition of Public Works would be necessary to dispose of the complaint.

[41] The Court concludes that while the Tribunal has subsequently adopted Rules of Procedure pursuant to paragraph 48.9 (2) (b), effective April 30, 2004, there is no indication in the *Act* that the statute has retrospective application. The Tribunal therefore erred in law at the relevant time; when the applicant's full rights of judicial review were still alive.

2) Did the Tribunal err in fact or in law by finding Public Works liable for failing to participate properly in the process of accommodating Mr. Brown at the York Street Steps?

[42] The Tribunal found that neither NCC nor its architect pursued the option of the Connaught Building sufficiently. The Tribunal felt that this was inadequate and Public Works should have been more active and therefore is liable because its decision to rule out any accommodation was not supported by any evidence of undue hardship including prohibitive costs. The Tribunal held in addition that further assessments would reveal that the Connaught Building could be made accessible to the public without jeopardizing the government of Canada security requirements.

[43] The NCC declined to make representations on this application and did not address the matter of liability against Public Works or its alleged duty to consult and to participate in finding a solution to make the York Street Steps accessible.

[44] The Attorney General of Canada observes that the conclusions of fact the Tribunal made, do not imply that Public Works had, in law, a duty to accommodate Mr. Brown at the Steps. Moreover, the Tribunal erred by finding that the applicant was liable for failing to participate properly in the

NCC process to make the Steps universally accessible to Mr. Brown and others with mobility limitations.

[45] Finally, it is the position of Public Works that before the Tribunal could impose a duty to accommodate and find it liable for not participating in the consultation process, it was indispensable to the Tribunal's analysis that it first establish that the Connaught Building constituted reasonable accommodation. It states, "It (the Tribunal) cannot conclude that a third party to the complaint failed to accommodate without first deciding that the accommodation this third party allegedly failed to provide is in fact reasonable."

[46] The Tribunal did not so find. At paragraphs 282 and 286, the Tribunal held as follows:

> 282 The one aspect of these submissions from Public Works that I would accept is that the CHRC has over-reached itself, in arguing that Public Works has discriminated against Mr. Brown by failing to provide access through the Connaught Building. This goes too far on the evidence, as well as the particulars, and it is premature to say whether Public Works has any obligation to provide the use of its premises for the purposes of access.
> [. . .]
>
> 286 These concerns must be weighed and evaluated, along with a host of other considerations, in deciding whether it would be appropriate to use the Connaught Building to provide access at the York Street Steps. The problem is that Public Works has treated these concerns as a legal bar to any discussion of the possibility of accommodation. I reject this position. The process of accommodation contemplated by the Canadian Human Rights Act and the case law cannot be circumvented so easily.

These passages from the Tribunal's decision reflect the flaws in the merits of the Tribunal's case against Public Works.

[47] The transcripts of the Hearing on July 9, 2003, reveal that the Tribunal laid the blame squarely on a letter from Mr. Charette, the property manager for the Connaught Building who wrote to Gerald Lajeunesse, NCC, in a letter dated September 13, 2001, ruling out any possibility of the Connaught Building being used as a point of public access between Sussex Drive and Mackenzie Street. Mr. Charette wrote as follows:

> Dear Mr. Lajeunesse
>
> Thank you for your correspondence and information package regarding the universal access at the York Stairs.
>
> Public Works and Government Services Canada is committed to following all Treasury Board Accessibility guidelines. These guidelines which encompass all occupants and visitors to the Connaught building have been met.
>
> With respect to access from Mackenzie Street (*sic)* through the Connaught Building, the Canadian Human Rights Commission Investigator's Report dated August 31, 1999 concluded that the National Capital Commission has considered accessibility options through its consultation process and the parties agreed that direct access at this location was not recommended.
>
> The high security requirements of Canada Customs and Revenue Agency's Headquarters at the Connaught Building and prohibitive cost of altering this heritage building to accommodate a public elevator precludes us from opening this building for public access between Mackenzie Avenue and Sussex Drive.
>
> Trusting this meets your requirements.
>
> Raymond F. Charette
>
> Property and Facility Manager

The Tribunal felt that this letter from Mr. Charette pre-empted any discussion of the issue. The Tribunal member wondered out aloud why everyone, Mr. Brown, the Commission and the NCC unquestioningly accepted his word as coming from on high.

[48] Public Works argues that the evidence does not support the proposition that the Connaught Building was a reasonable form of accommodation. First, the evidence clearly shows that the architects and disabled community who participated in NCC's consultations were against the proposal to use the Connaught Building for several reasons including the following: the Sussex Drive entrance is on the ground floor, while the MacKenzie Avenue entrance is on the third floor; the elevator is not near either entrance but imbedded in the building's main corridor; and to install an elevator would require a large reworking of the entire interior of this Heritage Building. Furthermore, there would be safety and security concerns about using such an elevator because it would not be visible to passers-by and as an enclosed heated corridor, it would be prone to harbouring homeless people.

[49] Second, the Commission's witness, Mr. McMahon, a long-time friend and colleague of Mr. Brown's and a former Chair of the Accessibility Advisory Committee of Ottawa who is disabled and uses a wheelchair, testified before the Tribunal on May 20 and 21, 2004. He testified that the Connaught Building was not an attractive option because it meant going inside a building and thus being out of sight. Also, as a government building it may be subject to lockdowns for security purposes and thus be completely inaccessible at times. The following passages from the transcripts of his testimony are revelatory:

> **Q.** Are you familiar with the Connaught Building?
> **A.** I am.
>
> **Q.** If it were an option that you would have access from the Connaught Building, the extremity that is closest to the York Street Steps, how would you feel about that option --- going through the Connaught Building elevator?

A. My only concern about something like that is ---I was working with Public Works when we had the Desert Storm lockdown basically. All government buildings were locked down. So I would be concerned that there would be a change of policy, or directives that government buildings would not be accessible.

Unless this is going to change to being a non-government building---
[. . .]

Q. But in terms of physical location in relation to the York Street Steps, how do you feel about having access at that physical point?

A. The physical location ---it's an alternative. To me, it is like a possibility.

I hate to lose visual contact with the people I am travelling with, for instance. It is either that we all take the elevator together, or we all kind of stay within visual contact.

If my family is going up the stairs and I am taking the elevator, at least I will meet them at the top of the stairs. Whereas, in this particular scenario, I have to leave the building, and then we are out of sight basically.

So I think that it would be less appealing than to have an elevator on the exterior, directly associated with the Steps.
[. . .]

[50] Third, Public Works submitted in evidence the security reasons that would eliminate the Connaught Building as a reasonable option to provide accommodation at the Steps. Idelle Matte, Manager of National Base Building Security Operation, Corporate Security Directorate of Public Works testified before the Tribunal and indicated that Mr. Charette had approached her following the Human Rights Complaint regarding the possibility of using the Connaught Building as an alternative point of access adjacent to the Steps.

[51] Ms. Matte testified that this would be impractical. First, the elevator to the third floor leads to the Minister's office. It would thus require the installation of a new elevator and corridor dedicated to the general public. Second, shortly after the events of September 11, 2001, the Privy Council Office reclassified all federal government buildings, including the Connaught Building to security readiness level two, which means that only staff with proper identification and a security pass would be allowed inside the building. Visitors and members of the public are required to pass through a metal detector, have their belongings searched and be accompanied by staff at all times. The same measures would apply to members of the public using a new elevator and corridor. Finally, as a federal government building housing one tenant, the Canada Revenue Agency, the Connaught Building would therefore not be accessible to members of the public 24 hours a day seven days a week.

[52] Finally, Mr. Rapson conceded under cross examination on Tuesday, May 18, 2004 that the Connaught Building was not a viable option and would not constitute reasonable accommodation for Mr. Brown. As the passages below from his testimony indicate, Mr. Rapson admitted that he had never been inside the Connaught Building; he did not know what needed to be done to make the Connaught Building accessible; he was unaware of the security level of the Connaught Building; both of the options he proposed require use of an interior corridor or passageway; such an interior passageway presented several concerns, including the possibility that it would harbour the homeless because it is an enclosed heated area; and the use of the existing elevators would necessarily involve public servants and the general public using the same elevator; an option Mr. Rapson discarded:

Q. **p. 961 Examination in Chief (Vigna)**

Q. Have you gone in the building yourself?
A. No.
[. . .]

p. 1333 on cross examination by Counsel for Public Works (Lester):
Q. When you said in your first report the obvious solution to the problem is the Connaught Building, you had no knowledge as to the inside of the Connaught Building other than based on the plans.
A. Other than based on the plans.

Q. Then when you made your second suggestion as to the new elevator two years later, you had no greater knowledge of what was inside the Connaught Building other than what you had in June 2001. That's right, isn't it?
A. Yes, other than in the report I had pictures showing a level entrance on Mackenzie and that level entrance beside the service area.

Q. I'm talking about the interior, Mr. Rapson.
A. The interior, no.

Q. So you have no more knowledge as to the interior of the Connaught Building between June 2001 your first report, and June 2003, your second report.
A. Correct.

[. . .]
p. 962 Examination in Chief (Vigna)
Q. When you wrote the first report on June 14, 2001, from the information you had at the time and the different problems you identified earlier, can you tell us what recommendations you made at the time?
[. . .]
A. I felt that probably the best option was the Connaught Building, if negotiations –
I wasn't sure who owned it or what the situation was, but reading some of the other documentation there was a concern about access there.

> I think that was the main thing. The Connaught Building would probably be the best one, in that the other options - - although, for example, the proposed elevator is a good idea and it should carry through, but it is not, according to universal design principles, equitable on that site - - equitable access in terms of stairs and either to be at the site or immediately adjacent to the site, in terms of accessibility standards. [. . .]

From the above passages, the Court finds that Mr. Rapson made a suggestion about the Connaught Building without having the proper knowledge and information to come to that conclusion.

[53] In addition to the above-mentioned evidence confirming that the Connaught Building was not a viable option, Counsel for the Attorney General of Canada argues that Public Works did not have a duty to Mr. Brown as owner of the neighbouring property and as agent of the Crown. The Tribunal erred in reaching this conclusion without first having established that the Connaught Building was reasonable accommodation.

[54] The Court agrees. As notes Counsel for the Attorney General of Canada at paragraph 93 of his factum, "None of the conditions precedent to this eventual liability are fulfilled in this case, in law and in fact." First, Public Works neither built nor operates the Steps. It cannot therefore be held responsible for the actions of others. Further, the duty to accommodate applies to owners and operators of public facilities. See *Saskatchewan (Human Rights Commission) v. Canadian Odeon Theatres Ltd.* (1985), 18 D.L.R. (4th) 93 at p. 118.

[55] Second, the Court accepts that the evidence does not confirm that the Connaught Building is a reasonable option to giving members of the general public ingress and egress between the two streets. Indeed, Mr. Rapson, whose suggestion gave rise to this matter had not even been in the Connaught Building. Third, if it cannot be established that the Connaught Building is a form of reasonable accommodation, the question is moot. Public Works has discharged any collateral duty that the Tribunal has sought to impose on it.

[56] The Court shares the view of the Applicant that in order for the Tribunal to find Public Works liable, it must first have committed, omitted to or contributed to the act of discrimination. No where among the reams of paper that constitute this file, which began in 1999 and lasted 6 years before the Tribunal reached its decision, is there any evidence that Public Works played any role, directly or indirectly in the design and construction of the Steps. It cannot be found to be liable for a wrong it did not commit. To follow the logic of the Tribunal, the American Embassy could be liable by virtue of its proximity.

[57] However, the Tribunal would have us believe that the nexus is not physical but metaphysical. Simply because the NCC and Public Works are agents of the Crown, they are one and the same to be held liable in order to provide a remedy to the alleged discriminatory act of the NCC. This tautological reasoning is erroneous and was rightly rejected recently by the *British Columbia (Ministry of Health Services) v. British Columbia (Emergency Health Services Commission),* [2007] B.C.J. No. 681, 2007 BCSC 460, where Justice Ballance held in part at paragraph 145 as follows:

> 145 Placed in a human rights context, the Decision is somewhat unique in that the Tribunal's finding is not aimed at ensuring a discriminatory act will go unremedied or that the person/entity who discriminated does not escape liability. It is not disputed that the pool of available alternate positions for disabled ambulance paramedics is relatively limited; certainly far more limited than the pool available for injured BCGEU government workers. The conclusion on the employer issue was driven by the Tribunal's expressly stated concern that accommodation opportunities for disabled ambulance paramedics are limited within the Commission such that, the "pool of alternative positions needs to be larger and more varied than the BCAS alone can provide" (para. 108). Relying on the case of *Brown v. National Capital Commissio*n, 2006 CHRT 26, counsel for Mr. Crane asserts that it is possible to involve the government in these proceedings as a third party because its involvement is necessary to remedy the discrimination. That proposition may be valid in particular circumstances, but I find that it is untenable in circumstances where, as here, the purported basis for the involvement of such third party is as a co-employer and yet the factors of control, utilization and financial burden and the surrounding statutory framework do not support a finding that such third party is in an employment relationship with the complainant. [Emphasis added.]

[58] As in Justice Balance's reasoning, the circumstances in the present case do not provide a basis for stating that the NCC and Public Works were partners responsible for the design and or construction of the Steps. Such evidence is conspicuous by its absence. The Tribunal erred by stating that simply because both public bodies find their source in Crown hands, they therefore have a duty not only to provide accommodation but they also have the added legal burden to consult. This is, to borrow the recently abandoned phraseology, patently unreasonable.

[59] For these reasons, the Court is compelled to intervene and correct the Tribunal's error of law. In so doing and in keeping with the guidance of in *Dunsmuir*, above, the Court substitutes its own view to correct this error and states that the Connaught Building is not a reasonable accommodation to the York Street Steps. Public Works has no duty to accommodate Mr. Brown through its building. Finally, the Court concludes that the evidence does not show that Public Works failed to participate properly in NCC's efforts to make the Steps universally accessible.

3) Did the Tribunal breach the principles of procedural fairness and natural justice by making remedial orders contrary to its decision to bifurcate the issues of liability and remedy?

[60] The Tribunal did agree at the outset to bifurcate its inquiry into liability and remedy; reserving the latter pending the outcome of its conclusions on the former. Notwithstanding the consent of the parties, the Tribunal proceeded to address the question of remedy in its reasons without granting them, an opportunity to make submissions or to be heard. In its remedial order, the Tribunal directed the parties to undertake consultations to determine an appropriate form of accommodation for accessibility at the Steps. This is surely the beginning of a remedy. It stated at paragraph 298 as follows:

> 18. The parties are accordingly directed to return to their negotiations. Once these negotiations are completed, and the NCC has determined what accommodation it is willing to provide, it is directed to deliver a formal letter of intention or other notice of proposed action to the other parties, setting out its plans for rectifying the situation. This document shall be signed by the Chair of the NCC, the Chair's designate, or an officer of the agency, with the authority to bind the NCC.

[61] This, Counsel for the Attorney General of Canada argues is a clear breach of the principles of natural justice and as such the decision must be set aside. See *Sketchley v. Canada (Attorney General)*, [2005] F.C.J. No. 2056 at paragraph 54.

[62] The Commission adopts the position that there was no breach of procedural fairness, as the Tribunal did not make a final pronouncement on remedy. It is argued that the only order the Tribunal made with respect to Public Works is that it should participate properly in NCC's consultation process, which should include all the parties. Moreover, the Tribunal did indicate that it could not make a decision with respect to the appropriateness of the Connaught Building or indeed any other solution as a remedy. That is why it retained jurisdiction over the remedy and indicated that it should be contacted if the parties ran into difficulties during the consultation.

[63] Having reviewed the evidence and the Tribunal's decision and more particularly its conclusions as set out in paragraph 298, there is some inconsistencies in the position of the Tribunal. On the one hand it states that it has bifurcated the inquiry and cannot determine that the Connaught Building is an appropriate and reasonable accommodation. On the other hand, the Tribunal does Order the parties, as a remedy to return to the negotiation table to consult widely to reach a solution. Surely, the Commission would not disagree that the Tribunal cannot, with the accord of the parties, say that it is going to do one thing and then turn around in the decision and do quite the opposite without first apprising the parties and soliciting their views.

[64] For these reasons, the Court must set aside the decision on this ground.

VIII Costs

[65] Public Works seeks costs against the Commission in the event that the application is successful. But for its acquiescence to the Tribunal's repeated requests to add Public Works as a co-respondent, this application would not have been necessary. The Commission has the same duty to the Tribunal to act in the public interest, as a prosecutor has when appearing before a criminal Court of law. Section 51 of the *Act* stipulates as follows:

Duty of Commission on appearing	**Obligations de la Commission**
51. In appearing at a hearing, presenting evidence and making representations, the Commission shall adopt such position as, in its opinion, is in the public interest having regard to the nature of the complaint.	51. En comparaissant devant le membre instructeur et en présentant ses éléments de preuve et ses observations, la Commission adopte l'attitude la plus proche, à son avis, de l'intérêt public, compte tenu de la nature de la plainte.

Counsel for the Attorney General submits that the Commission failed to protect the public interest by giving in to the Tribunal's persistent views. It was not in the public interest during the inquiry into Mr. Brown's complaint against the NCC, to add a neighbour simply because the neighbour happened to be an agent of the Crown.

[66] In its submissions regarding costs, the Commission opposes the order sought by Public Works as it was following its statutory duty to protect public interest when it eventually agreed to add Public Works as a co-respondent. By acceding to the Tribunal's request, the Commission was fulfilling its duty under the *Act* by ensuring that all possible options of accommodation were rightly before the Tribunal.

[67] The Court appreciates the Commission's position however, the Court has found fully in favour of Public Works and it is therefore entitled to its costs.

[68] The Attorney General of Canada also notes that Mr. Brown is in a different position than the Commission as he did not file a complaint against Public Works and resisted the Tribunal's insistence that Public Works should be added as a co-respondent. Consequently, the Attorney General of Canada does not seek costs against Mr. Brown, unless he argues against the relief it seeks.

[69] The Court is in agreement with this view. In fact, not only did Mr. Brown not file a complaint against Public Works, but he did not seek to amend his complaint form to add Public Works as a co-respondent, following the supplementary investigator's report of June 29, 2001. Moreover, the Court is not unmindful of Mr. Brown's initial reaction to the Tribunal's interruption of the hearing to introduce for the first time the prospect of Public Works as a co-respondent.

[70] The Court notes also that while Mr. Brown was self represented at the hearing, his interventions were not without merit and were to his credit. To cite but one example, Mr. Brown wanted to know why the Tribunal would not include the other neighbour the U.S. Embassy, when the Tribunal member persisted and insisted that Public Works be brought to the table. The Tribunal's response to Mr. Brown's reasonable and logical question reveals the following:

> **Mr. Brown:** To carry your thought further, Mr. Chair, using your same argument, then I guess the question would be should we have the U.S. embassy here because - -
>
> **The Chairperson:** No, the U.S. embassy is a different issue, and I am not going to get into questions of international law and diplomatic immunity and I don't know what. I really don't see that the U.S. embassy is in any way in the same position.
>
> If the Commission or another party wanted to join, heaven help us, the American embassy as a party, they could make that application, but it is not the same situation, Mr. Brown, at all, at least on the face of it.

[71] The Respondent Bob Brown argues that the Attorney General should not be seeking costs against him for this general public interest litigation. Counsel for Respondent Brown also argues that the Tribunal had jurisdiction to add Public Works as a third party. Finally, it is submitted that the Crown is not divisible and the NCC and Public Works are the same in law.

[72] Notwithstanding and in light of all the circumstances, the Court does not grant costs against Mr. Brown.

IX Conclusion

[73] The Tribunal erred in law by adding Public Works where there were no Rules of Procedure as required by the *Act* for doing so. This was clearly wrong. In addition, the Tribunal relied on the suggestions of an expert witness whose recommendations are based not on personal knowledge of the interior of the Connaught Building but rather on dated plans and conjecture. The Tribunal is to be held to a higher standard than the simple reliance on a "mere suggestion" when there are such far reaching consequences for everyone involved, including Mr. Brown. Finally, the Tribunal failed to follow its own undertaking to bifurcate the proceedings and thereby robbed Public Works of the right to make submissions with respect to remedy. Public Works has no legal duty to fix a problem it did not create.

[74] Consequently, the application for judicial review is allowed and the Tribunal's decision to add Public Works as a third party and hold it liable for the lack of accessibility of the York Street Steps is quashed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES THAT:

- This application for judicial review is allowed
- The decision of the Canadian Human Rights Tribunal dated June 6, 2006 with respect to its addition of and findings against Public Works and Government Services Canada is quashed.
- With costs against the Canadian Human Rights Commission and no award of costs against the respondent Mr. Brown is granted.

"Simon Noël"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1132-06
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA (representing PUBLIC WORKS AND GOVERNMENT SERVICES CANADA) Applicant and BOB BROWN, CANADIAN HUMAN RIGHTS COMMISSION and the NATIONAL CAPITAL COMMISSION Respondents and THE COUNCIL OF CANADIANS WITH DISABILITIES Intervener
PLACE OF HEARING:	Ottawa
DATE OF HEARING:	7-8-9 April 2008
REASONS FOR JUDGMENT AND JUDGMENT:	The Honourable Mr. Justice Simon Noël
DATED:	June 13, 2008

APPEARANCES:

Mr. Alain Préfontaine Ms. Zoe Oxaal	FOR THE APPLICANT
Mr. David Baker Mr. Faisal Bhabha	FOR THE RESPONDENT
Mr. Philippe Dufresne	FOR THE RESPONDENT

Ms. Ikram Warsame

Mr. Lynn Harnden Mr. Sébastien Huard	FOR THE RESPONDENT
Ms. Debra McAllister	FOR INTERVENER

SOLICITORS OF RECORD:

John H. Sims Q.C. Deputy Attorney General of Canada Ottawa, Ontario	FOR THE APPLICANT
Mr. David Baker Bakerlaw Toronto, Ontario	FOR THE RESPONDENT
Mr. Philippe Dufresne Canadian Human Rights Commission Ottawa, Ontario	FOR THE RESPONDENT
Mr. Lynn Harnden Mr. Sébastien Huard Emond Harnden Barristers & Solicitors Ottawa, Ontario	FOR THE RESPONDENT
ARCH Disability Law Centre Toronto, Ontario	FOR INTERVENER