Date: 20080620

Docket: T-1190-07

Citation: 2008FC781

Toronto, Ontario, June 20, 2008

PRESENT: Kevin R. Aalto, Esquire, Prothonotary

BETWEEN:

DONNA JODHAN

Applicant

and

ATTORNEY GENERAL OF CANADA
(REPRESENTING THE TREASURY BOARD OF CANADA, SECRETARIAT, PUBLIC SERVICE COMMISSION OF CANADA, AND STATISTICS CANADA)

Respondents

REASONS FOR ORDER AND ORDER

[1] The Applicant, Donna Jodhan, is visually impaired, a recognized disability under s.15 of the *Charter of Rights and Freedoms* ("Charter"). She brings this Application for judicial review "in respect of the denial of full access to the visually impaired to and equal benefit of the Government of Canada's web materials and services including Statistics Canada's 2006 Census and the website of the Public Service Commission". Specifically, she seeks a declaration that Federal Government websites and on-line services are inaccessible to her as a visually impaired Canadian, and that as

such, her rights under section 15 of the Charter have been breached. She seeks a systemic remedy to cure the systemic problems with Federal Government websites which prevent her, as a visually impaired Canadian, from having equal access to government services and information.

[2] The motion brought by the Respondent, Attorney General of Canada, is to dismiss the application on the ground that there is no "decision or order", no defined "matter", nor any identifiable "decision-maker" or "tribunal record" which can be the subject of judicial review. Further, they argue that the thrust of this proceeding is to judicially review a general policy - the adequacy and implementation of a Federal Government standard known as the "Common Look and Feel Standards", a policy designed to ensure the online accessibility of government websites for all Canadians with disabilities, including the visually impaired. If the matter is allowed to proceed the Respondent argues it should be in the form of an action and the action should be stayed pending the outcome of complaints made by the Applicant to the Canadian Human Rights Commission ("CHRC").

[3] Counsel for both parties have each submitted extensive Written Representations and three joint volumes of authorities together with some additional authorities and motion records. As the result of decisions in two cases (*Amnesty International Canada et al.* v. *Chief of the Defence Staff et al.*, [2007] FC 1147 and *Apotex Inc.* v. *Les Laboratoires Servier et al*, 2007 FCA 350), which were decided after the initial hearing, the parties were invited to make further submissions on the merits of the motion. Additionally, because of subsequent events the Crown sought leave to file additional evidence. As the additional evidence was not viewed as affecting the issues in the motion, the request to grant further evidence was dismissed.

Background

[4] In order to understand the issues in play, a review of the background is required. As noted, Ms. Jodhan, who is a Canadian citizen, is legally blind. Prior to the commencement of this application, Ms. *Jodhan* made three separate complaints to the CHRC. The complaints were made against the Treasury Board of Canada, Secretariat ("TBS"), Statistics Canada ("SC") and the Public Service Commission of Canada ("PSC"). The complaints had a common element: the alleged inaccessibility of government websites for the visually impaired. In addition, they also raised issues concerning whether Ms. Jodhan was reasonably accommodated, was treated differently because of her disability, and whether the "*Policy on the Duty to Accommodate Persons with Disabilities in the Federal Public Service*" (the "Policy") was properly implemented or its implementation sufficiently monitored.

[5] This application targets the same three government entities with the common denominator being the alleged *inaccessibility* of government websites for the visually impaired. The Applicant only seeks declarations against each of the three government entities. Those declarations are as follows:

- A declaration that the failure of the Treasury Board and the Treasury Board Secretariat to develop, maintain, and enforce standards which ensure that all government of Canada websites and online services are accessible for individuals with visual impairments infringes her right to equal protection and equal benefit the law without discrimination based on physical disability, and therefore violates section 15 of the *Charter*, and that such violation is not justified under section 1 of the *Charter*;

- A declaration that Statistics Canada's failure to ensure that the 2006 online Census was accessible to those with visual impairments infringes her right to equal protection and equal benefit of the law without discrimination based on physical disability, and therefore violates section 15 of the Charter, and that such violation is not justified under section 1 of the *Charter*;

- A declaration that the Public Service Commission of Canada's failure to ensure that its website and online application services are accessible to those with visual impairments infringes her right to equal protection and equal benefit of the law without discrimination based on physical disability, and therefore violates section 15 of the *Charter*, and that such violation is not justified under section 1 of the *Charter*.

[6] No damages or other relief is sought.

Complaint Against TBS

[7] On September 5, 2005, the Applicant filed a complaint against TBS with the CHRC under section 5 of the *Canadian Human Rights Act*. The substance of the complaint was that TBS had discriminated against the Applicant because as the Applicant states in her complaint:

> They have failed to ensure that their departments carry out their policies.
> They have failed to monitor their policies.
> They have failed to ensure that one of their departments provided me with my exams in an alternative format as I requested.
> They have failed to provide websites that are accessible to blind and visually impaired Canadians and I am a visually impaired Canadian.

[8] In April 2006, an investigator with CHRC wrote to the Applicant and advised "Although the TBS is the employer of the Public Service, it has no involvement, monitoring or otherwise in accommodation during the staffing process". Later, after completing her report the investigator noted that TBS is "not the party responsible for the alleged discriminatory acts". On January 11, 2007, the CHRC dismissed the Applicant's complaint on the ground that TBS "is not the party responsible for the alleged discriminatory acts". No appeal was taken by the Applicant from this decision.

[9] The CHRC dismissed the complaint against TBS on the ground that TBS was not the party responsible for the alleged discriminatory acts. As acknowledged in the Written Submissions of the Applicant: "This application does not relate to a specific incident. Rather, this Application pertains to the systemic accessibility barriers prevalent in Federal Government websites created by a series of decisions reflective of a general policy." The Applicant takes the position that TB is the general manager responsible for setting and overseeing government policy on communications. No judicial review application was commenced with respect to this decision of the CHRC.

Complaint Against Statistics Canada

[10] The Applicant tried to apply for a job with SC online. She encountered difficulty and required the aid of a sighted PSC employee to complete the application. As part of the application process, all Applicants were required to take an examination. The Applicant asked to be accommodated and take hers in Braille. After this request, the Applicant was advised that as she did not meet the criteria her application was screened out. Subsequently, SC offered the Applicant the

opportunity to take the examination in Braille but the Applicant declined on the basis she was no longer interested in working for SC. In September, 2005, the Applicant filed a complaint against SC with the CHRC. The substance of the complaint is that the Applicant was discriminated against because of the failure to provide an examination in Braille. The essence of the complaint is summarized by the Applicant in the complaint as follows:

> To summarize: I believe that as a visually impaired Canadian I have been discriminated against because my exam was not provided to me in Braille; the process used for the general public was not the one used for me, and I was unable to submit my application in the regular manner because the website was not accessible to special needs persons.

[11] In November, 2006, the investigator assigned to deal with the Applicant's complaint made the following recommendation:

- the evidence suggests the Respondent failed to accommodate the complainant's disability; and
- the evidence suggests that the Respondent treated the complainant in a different manner than other candidates who applied for the MA position.

[12] Subsequently, a conciliation session was held in late April, 2007. The conciliation session did not result in a settlement and the complaint was to be resubmitted to the CHRC. It appears no decision has yet been rendered by CHRC on this complaint.

Complaint against PSC

[13] In September 2006, the Applicant initiated a third complaint to the CHRC, this time against PSC. PSC is the government entity responsible for implementing both the CLF standards and the Policy in the online job application process. This complaint was made on the basis that discrimination and lack of accommodation on the online job application process. Specifically, the Applicant alleges that she had "experienced significant difficulty navigating through the online application process at www.jobs.gc.ca website without sighted assistance, which led to unmitigated lack of accommodation and subsequent discrimination". The parties agreed to mediation which occurred in February 2007. The matter did not settle and appears not yet to have been determined by CHRC.

[14] As noted, no appeal was taken from the one CHRC complaint that was dismissed and notwithstanding that there remain two open CHRC complaints this application seeking a systemic remedy was launched.

Issues

[15] This motion raises the following issues:

1. Should the application be dismissed as being outside the jurisdiction of the Court under s. 18.1 of the Act in that there is no "decision or order" or other justiciable issue?

2. If the application is to be dismissed, should it be converted into an action and stayed pending the resolution of the Applicant's complaints to the CHRC against the same government entities and relating essentially to the same issue?

Analysis

[16] A motion to strike an application has a very high onus for the moving party. The parties cited many authorities on the principles to be applied on motions to strike an application. Recently, the principles governing motions to strike applications for judicial review have very usefully been analyzed in depth and summarized by Justice Mactavish in the case of *Amnesty International Canada et al.* v. *Chief of the Defence Staff et al.*, [2007] FC 1147. Many of the authorities reviewed by Justice Mactavish were cited by the parties on the within motion. Justice Mactavish's summary is as follows:

> **Legal Principles Governing Motions to Strike**
>
> [22] Applications for judicial review are intended to be summary proceedings, and motions to strike Notices of Application add greatly to the cost and time required to deal with such matters.
>
> [23] Moreover, as the Federal Court of Appeal observed in *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1994] F.C.J. No. 1629, the striking out process is more feasible in actions than in applications for judicial review. This is because there are numerous rules governing actions which require precise pleadings as to the nature of the claim or the defence, and the facts upon which the claim is based. There are no comparable rules governing Notices of Application for Judicial review.

[24] As a consequence, the Federal Court of Appeal has observed that it is far more risky for a court to strike out a Notice of Application for Judicial review than a conventional pleading. Moreover, different economic considerations come into play in relation to applications for judicial review as opposed to actions. That is, applications for judicial review do not involve examinations for discovery and a trial - matters which can be avoided in actions by a decision to strike: *David Bull*, at ¶10.

[25] In contrast, the full hearing of an Application for Judicial review proceeds in much the same way that a motion to strike the Notice of Application would proceed, namely on the basis of affidavit evidence and argument before a judge of this Court.

[26] As a result, the Federal Court of Appeal determined that applications for judicial review should not be struck out prior to a hearing on the merits of the application, unless the application is "so clearly improper as to be bereft of any possibility of success".

[27] The Federal Court of Appeal further teaches that "Such cases must be very exceptional and cannot include cases ... where there is simply a debatable issue as to the adequacy of the allegations in the notice of motion": *David Bull*, at ¶15.

[28] Unless a moving party can meet this very stringent standard, the "direct and proper way to contest an originating notice of motion which the Respondent thinks to be without merit is to appear and argue at the hearing of the motion itself." (*David Bull*, at ¶10. See also *Addison & Leyen Ltd. v. Canada*, [2006] F.C.J. No. 489, 2006 FCA 107, at ¶5, rev'd on other grounds [2007] S.C.J. No. 33, 2007 SCC 33).

[29] The reason why the test is so strict is that it is ordinarily more efficient for the Court to deal with a preliminary argument at the hearing of the application for judicial review itself, rather than as a preliminary motion: see the comments of the Federal Court of Appeal in *Addison & Leyen*, at ¶5.

[30] By analogy to the process prescribed in the *Federal Courts Rules* with respect to the striking out of statements of claim, as a general rule, no evidence may be led on a motion to strike a Notice of Application. In addition, the facts asserted by the Applicant in the Notice of Application must be presumed to be true: *Addison & Leyen Ltd. et al.*, above, at ¶6.

> [31] However, the Court is not obliged to accept as true allegations that are based upon assumptions and speculation. Nor is the Court obliged to accept as true allegations that are incapable of proof: see *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441, at ¶27.
>
> [32] There is an exception to the general principle that no evidence may be led on a motion such as this. That is, where the jurisdiction of the Court is contested, the Court must be satisfied that there are jurisdictional facts or allegations of such facts supporting the attribution of jurisdiction: see *MIL Davie Inc. v. Hibernia Management & Development Co.* (1998), 226 N.R. 369.
>
> [33] Finally, in deciding whether an Application for Judicial review should be struck as bereft of any possibility of success, the Notice of Application should be read as generously as possible, in a manner that accommodates any inadequacies in the allegations that are merely the result of deficiencies in the drafting of the document: see *Operation Dismantle*, at ¶14.

[17] In *Amnesty International*, the Applicants brought an application for judicial review with respect to "actions or potential actions" of the Canadian Forces deployed in the Islamic Republic of Afghanistan. Specifically, the application sought to review the conduct of the Canadian Forces with respect to detainees held by the Canadian Forces in Afghanistan and the transfer of those individuals to Afghanistan authorities. The Respondents sought an Order striking the Applicant's Notice of Application on the grounds that the Applicants had no standing with regard to the issues in the Notice of Application nor did the application have any chance of success. Justice Mactavish ultimately determined, following her thorough analysis of the law relating to the striking of applications, that the matter was not bereft of any chance of success and concluded that the Applicants were entitled to public inter-standing in order to pursue the issues in the application.

[18] In my view, after having considered at length the thorough submissions of counsel and the many authorities which they have cited including *Amnesty International*, that this case is not bereft of any chance of success for the following reasons.

[19] The Applicant argues that *The Canadian Association of the Deaf* v. *Her Majesty the Queen*, 2006 FC 971, ("CAD case") a decision of Justice Mosley, is on all fours with this application. Having reviewed the CAD case in depth and considered its application to these facts, I am of the view that it is substantially similar.

[20] The CAD case involved access to government by the hearing disabled. It dealt with the Federal Government's Guidelines for Administration of its Sign Language Interpretation Policy ("Sign Language Policy"). The Applicants in the CAD case sought a declaration "that the individual Applicants' rights under section 15 of the *Canadian Charter of Rights and Freedoms* were violated on the basis of disability and that professional sign language interpretation services are to be provided and paid for by the Government of Canada, upon request, where a deaf or hard of hearing person accesses services from the Government of Canada or seeks input in government decision-making" [par. 1]. In the CAD case, Justice Mosley was confronted with issues similar to those here including the issue of justiciability of a "decision". Justice Mosley concluded that a breach of the Charter was established and the Applicants were entitled to a remedy.

[21] The specific elements of discrimination raised in the CAD case have some significant similarity to this case including a denial of an opportunity to contract with the Federal

Government and denial of opportunities to participate in the Statistics Canada Labour Force Survey. In the CAD case, the Applicants were not seeking review and reconsideration of final governmental decisions but rather "redress for systemic acts of discrimination that by their very nature, are continuing". It is because of the declaratory relief sought and the continuing acts of discrimination that the 30-day time limitation for bringing a judicial review application was not applicable in the CAD case, nor is it applicable here.

[22] One of the issues raised in this case is whether there is an issue which is justiciable. Justice Mosley grappled with the same issue in the CAD case. It was argued in the CAD case that the Applicants were seeking a remedy in which the Court was being asked to prescribe in what manner the Federal Government should provide services to the hearing impaired. Directing the Federal Government on matters of policy is not within the purview of the Court's jurisdiction. Matters of policy are for the Federal Government to determine. However, as Justice Mosley noted:

> [76] In order to be justiciable a matter must be properly before the court and capable of being disposed of judicial review is not restricted to decisions or orders that a decision-maker was expressly charged to make under the enabling legislation. The word 'matter' found in s.18.1 of the *Federal Courts Act*, 1998 is not so restricted by encompasses any matter in regard to which a remedy might be available under s. 18 or s-s 18.1(3): *Morneault v. Canada (Attorney General)*, [2001] 1 F.C. 30, 189 D.L.R. (4th) 96 (F.C.A.).
>
> [77] If I considered that the purpose of the application was to seek a reversal of the government's decision to transfer the responsibility for provision of sign language interpretation services from the Translation Bureau to individual department's and agencies, I would agree with the Respondent that this is a non-

> justiciable policy decision outside the scope of the Court's mandate. But that is not how I see the matter.
>
> [78] The Applicants submit that they are not asking for the Court to prescribe the manner in which the government provides translation services, but rather to declare what the scope of such services should be. They allege that the current scope of the guidelines infringes the individual Applicants' rights under section 15 of the Charter as there is a failure to accommodate their disabilities. This is a justiciable issue.

[23] Similarly, in this case, the approach of the Federal Government in providing services to the visually impaired may result in a finding that there is an infringement of the Applicant's rights under section 15 of the Charter as there is a failure to accommodate. The evidence of the Applicant includes several affidavits all of which describe the manner is which the Federal Government's actions fail to accommodate the disabilities. At this juncture of the proceeding, given the high test which has to be met, it cannot be conclusively determined that this application is without merit and bereft of any possibility of success. The jurisprudence summarized by Justice Mactavish in *Amnesty International* combined with the analysis of Justice Mosley in the CAD case lead to the conclusion that there is a sufficient case made out in the Notice of Application to justify dismissing this motion.

[24] In subsequent submissions during a further hearing, the Crown reiterated its position that this matter cannot proceed as an application but should be converted to an action and stayed pending the outcome of the human rights complaint process initiated by the Applicant. They argue that a policy cannot be challenged in the abstract but can only be challenged when the policy is applied and when someone is directly affected. They do concede that a policy may be challenged

where there is no other means by which the policy can be challenged. Thus, they argue that since the policy has been applied and has directly affected Ms. Jodhan the challenge should be directed to one of these applications.

[25] The Respondent relies upon the decision of the Federal Court of Appeal in *Timberwest Forest Corp.* v. *Canada*, 2007 FCA 389 in which the Court ruled that a policy "is beyond the reach of the Courts" and that "it is not the role of the Courts to determine the constitutionality of policies". In that case, a federal scheme controlling the export of logs harvested from private lands in British Columbia was being challenged. The scheme was promulgated as part of a Federal Policy Statement. This issue was whether the policy or scheme was constitutionally valid. After a full hearing on the merits, the Court determined that the policy was constitutionally valid. The analysis of the Court did not determine that a policy could not be judicially reviewed but only that in this case the policy in question was properly authorized and therefore constitutional.

[26] A further case referred to at length by the parties is *Krause* v. *Canada*, [1999] F.C.J. No. 179. This decision of the Federal Court of Appeal dealt with an appeal from a decision striking the claim. The claim sought, in essence, a direction that certain funds be paid by the government to a superannuation account and that the funds in the account not be used by the government for other purposes. The Applicants were members of various associations who were either contributors to or beneficiaries of the pension plans maintained pursuant to various statues establishing the superannuation accounts. The Respondent to the application sought to dismiss the application primarily on the ground that the proceeding was filed beyond the thirty day time limit specified in the *Federal Court* Act. The Applicants' position was that the actions for which mandamus,

prohibition and declaration were sought were not “decision” within the meaning of s.18.1(2) but a series of annual decision reflective of an ongoing policy or practice of the government. The Federal Court of Appeal analyzed carefully the provisions of s.18.1(2) of the *Federal Courts Act* and concluded that the word “matter” found in that subsection is “reflective of the necessity to find a word to cover a variety of administrative actions.” The Court concluded that the word “matter” embraced not only a “decision or order” but “any matter in respect of which a remedy may be available under section 18 of the *Federal Court Act*. The Court also held that the jurisdiction under s.18 did not depend on the existence of a “decision or order”. Such is the case here.

[27] It is obvious in this application that there is a resource imbalance between the parties. The Applicant is a Public Interest Applicant who is not seeking an award of damages. Her private interests are subordinated to the public interests which she is pursuing on behalf of those Canadians who are visually impaired.

[28] The Respondent further argues that the Applicant, by virtue of pursing the complaints before the CRHC, has available remedies. However, those proceedings are specific to the Applicant and do not engage the wider general public interest which is being pursued in this case and which is analogous, to some extent, to the claims put forward by the Applicants in the *Amnesty International* case. The allegation is that specific policies and practices of the Respondents have violated the Applicants Section 15 *Charter* Rights which is a matter that directly affects her as a visually impaired person and is a matter that is ongoing much as the allegations were in the A*mnesty International* case.

[29] In the end result, I am not persuaded that this application is bereft of any possibility of success or is so plain and obvious that the claim will not succeed. This is so, even though the Applicant has outstanding complaints to the CHRC. The Applicant's judicial review application for a declaration that her section 15 *Charter* rights have been breached is a matter within the jurisdiction of this Court. The Respondent has also argued that there is insufficient specificity of the alleged breaches. However, in reviewing the Notice of Application it is apparent what the issues are of which the Applicant seeks judicial review. As this matter proceeds the Court is available to assist in refining the issues or giving the necessary directions to ensure the Respondent is not prejudiced in presenting its case.

[30] This is also a matter that should proceed by way of application. There is no benefit to engaging in possible lengthy production and discovery as would be required in an action. All of the relevant evidence can be compiled within this Application which can now proceed expeditiously to a resolution of the important issues raised by the Applicant. As noted, the Court can assist the parties in refining the issues or providing directions concerning any matter relating to the proceeding. Subsequent to the second round of argument the Respondent withdrew its request that this application be stayed pending the outcome of the CHRC proceedings as decisions have now been made in those proceedings. For the reasons noted above that relief would not have been granted in any event.

[31] The Court is grateful to counsel for their very helpful and thorough written and oral submissions.

ORDER

THIS COURT ORDERS that

1. This motion is dismissed.

2. The Attorney General of Canada be named as the Respondent in this Application and the style of cause be amended accordingly.

3. The time for the serving and filing of the Respondents' Affidavits be extended to August 22, 2008 and that all other time limits are extended accordingly.

4. The parties may seek a case conference with the Court at any time to address any matters regarding a timetable for next steps in the proceeding or any other issue.

5. Costs of this motion are to the Applicant in the cause.

"Kevin R. Aalto"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

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	DONNA JODHAN v. ATTORNEY GENERAL OF CANADA (REPRESENTING THE TREASURY BOARD OF CANADA, SECRETARIAT, PUBLIC SERVICE COMMISSION OF CANADA, AND STATISTICS CANADA)
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 2, 2007
REASONS FOR ORDER AND ORDER:	AALTO P.
DATED:	June 20, 2008

APPEARANCES:

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MS. GAIL SINCLAIR, MS. CHRISTINE MOHR AND MS. MICHELL RATPAN	FOR THE RESPONDENTS

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