Federal Court  **Cour fédérale**

Date: 20140307

Docket: T-1404-12

Citation: 2014 FC 231

Ottawa, Ontario, this 7th day of March 2014

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

KIDANE HAGOS and
SHAMAR MAINTENANCE INC.

Applicants

And

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Discrimination is a scourge in a society. Any society. Its eradication is a just and noble cause and Canadian courts have enforced the law with a good measure of robustness. However, a simple allegation without more that someone has been discriminated against does not suffice to establish discrimination. Indeed, under the *Canadian Human Rights Act*, RSC 1985, c H-6 (the

"Act"), a number of legal requirements must be met before a complaint is proceeded with, including that a complaint is not dealt with unless it constitutes a discriminatory practice according to sections 5 to 14.1 of the Act.

[2] In this case, the applicants allege discrimination against them on the part of employees of the Department of Public Works and Government Services Canada and they would want for the Canadian Human Rights Commission (the "Commission") to receive a complaint made pursuant to section 40 of the Act. However, the Commission shall deal with a complaint unless one of the paragraphs found at subsection 41(1) of the Act applies. The subsection reads:

41. (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that

(*a*) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;

(*b*) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;

(*c*) the complaint is beyond the jurisdiction of the Commission;

(*d*) the complaint is trivial, frivolous, vexatious or made in bad faith; or

(*e*) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.

41. (1) Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants :

a) la victime présumée de l'acte discriminatoire devrait épuiser d'abord les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;

b) la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale;

c) la plainte n'est pas de sa compétence;

d) la plainte est frivole, vexatoire ou entachée de mauvaise foi;

e) la plainte a été déposée après l'expiration d'un délai d'un an après le dernier des faits sur lesquels elle est fondée, ou de tout délai supérieur que la Commission estime indiqué dans les circonstances.

[3] This is an application for judicial review arising from a decision of the Canadian Human Rights Commission, dated June 22, 2012, dismissing a complaint against Public Works and Government Services Canada [PWGSC]. It is brought under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

[4] The Commission found that the corporate complainant, Shamar Maintenance Inc., did not have standing. Furthermore, after initially requiring the applicants to comment on the application of paragraph 41(1)(*c*) of the Act, the Commission concluded that paragraph 41(1)(*d*) found application and that it should not consider further the complaint made by the applicants.

[5] The applicants take issue with the findings and seek judicial review of that decision from this Court. They make two broad allegations. One is that Commission's staff was biased against the applicants in that the manner in which they conducted themselves gave rise not only to a reasonable apprehension of bias, but they actually were biased. Second, the applicants argue that the decision to find their complaint frivolous is an obviously unreasonable exercise of discretion which ought to be reversed by this Court. For the reasons that follow, I have come to the conclusion that neither one of these grounds has been established before this Court.

[6] There was not, in my estimation, an iota of evidence that there was any bias against the applicants nor, for that matter, an appearance of bias. The difficulty encountered by the applicants was that their complaint did meet the requirements of the Act. As for the reasonableness with respect to the decision to apply paragraph 41(1)(*d*) of the Act, the complaint was seen as frivolous in the sense that it was plain and obvious that the complaint did not have a chance of success.

However, and contrary to what the applicants seem to believe, if it is plain and obvious that the complaint does not have a chance of success, it is because the complaint does not disclose a matter that can be dealt with under the *Canadian Human Rights Act*. The Commission did not conclude, as it did not have to do, that the words complained of were not spoken. It sufficed that the complaint did not meet some of the basic requirements of the *Canadian Human Rights Act*.

The complaint

[7] The source of the conflict between PWGSC and the applicants is a series of contracts between Shamar Maintenance Inc. [Shamar] and PWGSC for the maintenance of a number of buildings operated by the Government. The applicants, including Mr. Kidane Hagos, allege discrimination and harassment because a number of maintenance service contracts have either been allowed to expire without being renewed or, in the case of one such contract, it has been terminated.

[8] It is not disputed that Mr. Hagos is the principal behind Shamar Maintenance Inc.; it is not disputed either that the contract is between PWGSC and the company.

[9] Paragraph 3 of the complaint provides in my view an adequate summary of what this complaint is all about. It reads:

> [3] The perpetrators have arbitrarily and systematically withdrawn maintenance service contracts from Mr. Hagos because he dared complain to them of the discriminatory treatment they are subjecting him to, and they even tell Mr. Hagos right in his face behind closed doors that he cannot do anything about it!!! In fact, as with all other arbitrarily and racially motivated terminated contracts, Ms. Lynne Bergeron recently sent another notice by e-mail on September 20, 2011 informing Mr. Hagos that his maintenance contract EK219-093406/001/FK, at the Health Protection Building ("HPB"), number 7, will not be renewed come September 30, 2011.

[10] The complaint goes on to allege that the dispute between the company and the Government on the non-performance of the maintenance contracts was actually motivated by racism towards Shamar and Mr. Hagos.

[11] In order to support those allegations of racism, the complainants referred in their complaint to utterances they claim were made over time by PWGSC's employees.

[12] A careful and fair reading of the complaint can only leave the reader with the conclusion that there was a commercial dispute between the company and PWGSC resulting in seven maintenance contracts not being renewed or terminated. The complainants want to give these non-renewals or terminations a racial overtone.

The decision

[13] The decision of the Commission in this matter was made on June 22, 2012. The Commission is tasked by law with investigating a complaint and determining whether there is a reasonable basis for it to proceed to the next stage. It concluded that the matter was not to be pursued further. Thus, "the Commission decided, pursuant to paragraph 41(1)(*d*) of the *Canadian Human Rights Act*, not to deal with the complaint." The record of decision states as the reasons for decision:

> Corporate entities do not have the requisite standing to file a human rights complaint. While the complaint was filed in the name of the CEO of the Shamar, the termination of the contract by the respondent, regardless of any adverse impact it may have on the complainants' commercial endeavours, does not constitute an act of discrimination has contemplated by the Act. As such, the matter is beyond the jurisdiction of the Commission.

[14] As instructed by the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, [*Newfoundland and Labrador Nurses' Union*] the adequacy of reasons is not anymore a stand-alone basis for quashing a decision (at paragraph 14). The lack of adequate reasons does not give rise anymore to successful procedural fairness arguments. Rather they have to be considered with the record as a whole in order to decide if the decision is reasonable. In the case at hand, the Court will also have to consider the report made by an officer of the Commission which looked into the complaint made and provided a recommendation which was followed. Indeed, the record of decision reflects *verbatim* the conclusion reached by the officer with the exception that after the quoted words from the reasons for decision, the report added: "Thus, the complaint is frivolous."

[15] An examination of the report under section 41 of the Act shows clearly that the two complainants were dealt with. Having concluded that the corporation is not an individual who may be the victim of a discriminatory practice, the report goes on to examine more carefully the situation of the other complainant. The central issue of the complaint of Mr. Hagos is considered to be "whether alleged treatment and termination of the contract were due to the complainant's race (Black), national or ethnic origin (Eritrean), or colour (brown)?" The officer goes on to state that "[W]hile the decisions of the respondent terminated one of its contracts with the complainant, this was not appear [*sic*] to have been due to a ground of discrimination listed in section 2 or 3 of the Act but rather as a result of the business relationship with Shamar."

[16] Accordingly, the officer was of the view that the complaint is frivolous as the notion is understood in our law. It was plain and obvious, in his view, that the complaint could not be

successful because it was about a commercial dispute and the termination of the contracts was not due to a ground of discrimination as they are listed in the Act.

Issues

[17] As indicated before, the applicants contend that the Commission and its officers were biased against them. They also contend that their ability to respond to the examination conducted by the Commission under section 41 was deficient, thus raising procedural fairness issues. Finally, their complaint was not frivolous. I will examine these allegations in turn.

Standard of review

[18] With respect to allegations of bias and lack of procedural fairness, the standard of review is correctness and no deference is owed. The parties agree (see generally *Judicial Review of Administrative Action in Canada*, by Brown & Evans, Carswell, #7:1600 et al.).

[19] As for the issue of whether or not the Commission ought to have declined to pursue the matter further in application of paragraph 41(1)(*d*), the decision in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] as amplified in *Information and Privacy Commissioner v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654, leads inexorably to the conclusion that a reasonableness standard applies:

> [53] Where the question is one of fact, discretion or policy, deference will usually apply automatically (*Mossop*, at pp. 599-600; *Dr. Q*, at para. 29; *Suresh*, at paras. 29-30). We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.

Analysis

[20] Three issues were raised. First, the Commission was biased against the applicants. Second, procedural fairness was deficient in that, in the words of counsel for the applicants, the Commission used a "shifting post strategy". In essence, the Commission is not allowed to consider paragraph 41(1)(*d*) if it has already sought the parties' position on paragraph 41(1)(*c*). Actually the applicants also argue that the "shifting post strategy" was for the purpose of finding a ground that would be "rather vague and arbitrary" (paragraph 41(1)(*d*)) in order to decline to pursue the complaint. Thirdly, the applicants argue that the Commission was mistaken to deny the complaint on the basis of paragraph 41(1)(*d*).

1. *Corporation as victim of discriminatory practices*

[21] Before addressing the three issues, the Court should dispose of the argument that the Commission was wrong to have concluded that a corporation cannot be the victim of discriminatory practices under the Act.

[22] The Commission relied on the decision of this Court in *Attorney General of Canada v Watkin*, 2007 FC 745 [*Watkin*]. The case, which is concerned with the Canadian Human Rights Commission and its application of section 41 of the Act in the case of alleged discrimination of a government department against a corporation, is on all fours. The Commission referred specifically to *Watkin* in order to conclude that the complaint made by Shamar cannot be proceeded with because, in the words of this Court in *Watkin*:

> [28] . . . The Commission did not have the jurisdiction to deal with a complaint alleging discriminatory practices against a corporation such as Biomedica.

[23] The case stands also for the proposition that the shareholder, as an individual, cannot stand in the place of the corporation in order to fill the gap if the discriminatory practice by the government institution is against the corporation.

[24] The applicants have argued that *Watkin* was reversed by the Federal Court of Appeal at 2008 FCA 170. They cite one sentence of paragraph 3 of *Watkin*: "To the extent that the appellant is a victim of a discriminatory practice, he has standing to bring the complaint forward and the Commission has jurisdiction to dispose of it." From that sentence, the applicants argue that the Court of Appeal has decided that corporations have standing.

[25] Unfortunately for the applicants, the paragraph must be read in its entirety and in context:

> [3] The appellant argues that given his close relationship to Biomedica, he suffered financial loss as a result of Health Canada's discriminatory practices and therefore should qualify as a victim, with standing to bring the complaint, for the purposes of the Act. To the extent that the appellant is a victim of a discriminatory practice, he has standing to bring the complaint forward and the Commission has jurisdiction to dispose of it.

As can be readily seen, the Court is merely stating in the paragraph the position of the appellant, Mr. Watkin.

[26] The Federal Court of Appeal in *Watkin* chose to dispose of the appeal on an alternate basis. It relied on its conclusion that the alleged discriminatory practice under section 5 of the Act did not apply in the circumstances. As is well known, it is not enough to allege one of the prohibited grounds of discrimination of section 3 of the Act. It must be in relation to one of the discriminatory

practices defined at sections 5 to 14 of the Act. If no discriminatory practice is established, there cannot be a valid complaint. That is the conclusion reached by the Federal Court of Appeal.

[27] There is in the decision no indication whatsoever that the Court of Appeal disagreed with the first judge. In fairness, there is not either anything to conclude that the Federal Court decision was endorsed on appeal. The decision is left standing simply because the Court of Appeal chose another route to dismiss the appeal.

[28] I would respectfully decline to read in the silence of the Court of Appeal anything. As with denied leave applications, they are not to be taken as being an agreement or a disagreement with the judgment (*Canadian Western Bank v Alberta*, 2007 SCC 22, [2007] 2 SCR 3 at paragraph 88; *Telezone Inc. v Canada (Attorney General)* (2004), 69 OR (3d) 161 (ONCA)). As a result, the Commission was not entitled to ignore *Watkin*.

[29] This Court was not asked by the applicants to disagree with *Watkin*. Had I been asked to do so, I doubt that I would have disagreed with the persuasive reasons given by Justice Danièle Tremblay-Lamer to conclude that corporations cannot complain under the *Canadian Human Rights Act*. It does not have standing, as section 40 of the Act requires that a complaint be made by "any individual or group of individuals". I fail to see how any of the grounds listed at section 3 can apply to a corporation. Furthermore, the applicant did not raise, and I am not aware of, any case that would support such a contention. Indeed, even the case-law under section 15 of the *Canadian Charter of Rights and Freedoms* is unanimous that corporations do not qualify for the protection afforded by section 15. The Commission did refuse to pursue the matter of the complaint made by

the corporation. In the circumstances, the decision was also reasonable. Furthermore, as we shall see later, I am of the view that none of the discriminatory practices required to ground jurisdiction were present in this case.

2. *Bias*

[30] The applicants make the very serious allegation that not only is the Court faced with a perception of bias on the part of the Commission, but rather actual bias took place in the treatment of the complaint made. If these allegations were to be supported by some evidence, obviously the Court would have to step in. However, I have come to the conclusion that these allegations are baseless.

[31] The applicants make allegations about three Commission's officers. They claim that the fact that the Commission examined the complaint on the basis of paragraph 41(1)(*c*) initially, to then consider it on the basis of paragraph 41(1)(*d*), was a tactical shift, the purpose of which was to create a basis for declining to deal with their complaint. As paragraph 41(1)(*c*) is said to be more intelligible, Commission's officers "shifted gears to a rather vague and arbitrary subsection 41(1)(*d*) of the Act" (application, page 5). They claim that these officers gave PWGSC preference and that they were singled out for being late in producing submissions. They take issue with the Commission enforcing its rules as to the number of pages that are allowed in making submissions and complaints. They complain that two of the officers refused to recuse themselves in spite of the numerous requests made by the complainants through their counsel.

[32] After a careful review of the allegations made by the applicants, I have been unable to find any support for them.

[33] Case in point, the application alleges that the Commission shared with the respondent the complainants' submissions with respect to the applicability of paragraph 41(1)(*d*) of the Act, thus allowing the respondent to tailor its submissions, the whole in breach of the "*audi alteram partem* principle, to equally respond to the commentaries by the Respondent before it is placed before the Commissioners?" (at page 8 of the application). For some reason, the complainants believed that the respondent made its submissions after those made by the complainants and that it had had access to those submissions through Commission's personnel. However, the record before the Court, which was available to the applicants, shows that the respondent's submissions on the applicability of paragraph 41(1)(*d*) of the Act were faxed to the Commission on April 4, 2012, at 10:27 a.m. A copy of that letter of April 4 was transmitted to the applicants on April 12, 2012. As for the complainants, their submissions were made on April 7, 2012, after the respondent. Other than agreeing with the report, the respondent had no comment to make. Not only is the record clear that the letter was sent on April 4, 2012, but the Memorandum of Fact and Law of the respondent makes the point vividly.

[34] Another allegation strongly presented as evidence of bias was that the complainants had been singled out, with some animus towards them, where, in a letter sent by a Commission officer on March 13, 2012, it is specifically referred to the delay for providing submissions on the applicability of paragraph 41(1)(*d*). Lo and behold, the record contains the very same letter, with the same warning about deadlines, that had been sent the same day to PWGSC.

[35] Finally, the applicants made an assortment of allegations that would suggest, they claim, animus towards them, from the letter of March 13, 2012 asking for comments on the Commission's officer's draft report which refers to paragraph 41(1)(*d*) to letters from Commission's officers that speak in terms of "complainant" instead of "complainants". These allegations are groundless. The use of the singular merely reflects the officers' view that the corporation cannot be a complainant, which explains their focus on Mr. Hagos. As for the March 13 letter, it is true that its author refers to a previous letter which would have indicated that the focus would be on paragraph 41(1)(*d*); the complainants are right that there was not such previous letter. However, the purpose of the March 13 letter was to bring to the attention of the parties the draft report and to seek comments on the use of paragraph 41(1)(*d*). I am hard pressed to understand the importance of a reference to a previous letter. Both parties received the same letter, containing the same minor mistake, and both parties were invited to comment.

[36] The applicants took issue with the Commission's decision to consider their complaint through the prism of paragraphs 41(1)(*c*) and (*d*).

[37] They seem to draw two arguments. One is that this is further evidence that the Commission had pre-ordained its ultimate conclusion. It was looking for a way to dismiss the complaint at this early stage. That is part of the bias argument. Second, somehow the applicants would have been prevented from arguing their case.

[38] Contrary to the applicants' allegation, paragraph 41(1)(*d*) is neither vague nor arbitrary. "Frivolous" is a term of art whose meaning is well known. The motion to strike under the *Federal*

Courts Rules, SOR/98-106, uses language quite similar to that of paragraph 41(1)(*d*). The case-law is abundant to the effect that the test applicable in that context is whether it is plain and obvious that the claim cannot succeed because, for instance, there is no reasonable cause of action. For instance, our Court has ruled in *Hérold v Canada Revenue Agency*, 2011 FC 544 [*Hérold*] that:

> [35] Third, the test for determining whether or not a complaint is frivolous within the meaning of section 41(1)(d) of the *Act* is whether, based upon the evidence, it appears to be plain and obvious that the complaint cannot succeed.

[39] The test under paragraph 41(1)(*d*) is not any more vague or arbitrary than the test under Rule 221.

[40] There is simply no air of reality to the argument that paragraph 41(1)(*d*) is an instrument that can be abused to reach a pre-ordained conclusion. It is a test known to law.

[41] Then, the applicants contend that they have not been given an opportunity to comment on submissions made by the respondent. As far as I can see, the only authority referred to by the applicants is *Canada Post Corporation v Barrette*, [2000] 4 FC 145, [*Barrette*] which is not on point. The applicants have sought to rely on *Barrette* for the proposition that the courts will look dimly at the Commission for not having dealt seriously with its complaint. Presumably, that includes an ability afforded complainants to comment on submissions made by respondents. In particular, they referred often to paragraph 22, which reads:

> [22] It seems to me, having read the memorandum of fact and law of the Commission and heard from its counsel, that the Commission does not take very seriously the preliminary screening process set out in section 41 of the Act. It is true that the courts have repeatedly held that they would not intervene lightly with decisions of the

> Commission made in the performance of its screening function under section 44 of the Act and even less so when the decisions are made in the performance of the Commission's preliminary screening function under section 41 of the Act. However, these judicial rulings were made on the assumption that the Commission did in fact perform its functions under these two sections and that it did not do so lightly.

[42] In *Barrette*, the Court of Appeal was critical of the Commission for not performing its vetting role as mandated by law. Where the Court of Appeal speaks of the Commission not taking very seriously the preliminary screening process, it does not refer to the Commission excluding too many complaints, but rather that the Commission was not vetting properly. Here, the Commission has performed its screening role, albeit not to the satisfaction of the applicants.

[43] Be that as it may, the comment made at paragraph 22 in *Barrette* seems to me to apply either way. The Commission must perform its role very seriously and not lightly, either to proceed with a complaint or to decline to proceed with a complaint. I have no doubt that the Commission endeavors to do so but, in appropriate cases, the lack of seriousness would be examined under the reasonableness standard. The exercise of a power done lightly will seldom be reasonable.

[44] To a large extent, the Commission is the master of its own procedure. It must however satisfy some basic requirements. As this Court put it in *Deschênes v Attorney General of Canada*, 2009 FC 1126:

> [10] That said, matters of procedural fairness are reviewable against the standard of correctness (*Bateman v Canada (Attorney General)*, 2008 FC 393, at paragraph 20). Procedural fairness dictates that the parties be informed of the substance of the evidence obtained by the investigator which will be put before the Commission and that the parties be provided the opportunity to respond to this evidence and make all relevant representations in

> relation thereto: *SEPQA*, above; *Lusina v Bell Canada*, 2005 FC 134, at paragraphs 30 and 31.

[45] That requirement was met in this case. The March 13 letter was seeking the parties' submissions. As pointed out earlier, the respondent chose not to make specific submissions (letter faxed on April 4). The applicants made extensive submissions three days later; they received a copy of the respondent's response to the invitation to make submissions, dated April 4, on April 12. As already noted, there was no respondent's submission other than indicating its agreement with the report. The applicants were able to comment and, as a matter of fact, they did. That, in and of itself, makes it difficult to complain that no opportunity was afforded to respond to submissions. Procedural fairness was afforded fully in my view: they were given a full opportunity to respond.

[46] As put eloquently by Hugessen J.A. in *Slattery v Canadian Human Rights Commission* (1996), 205 NR 383:

> [1] We are all of the view that the Commission fully complied with its duty of fairness to the complainant when it gave her the investigator's report, provided her with full opportunity to respond to it, and considered that response before reaching its decision. . . .

3. *Was the Commission's decision to apply paragraph 41(1)(d) unreasonable?*

[47] The applicants did not make submissions on the standard of review applicable other than to state in their submissions to this Court that "(T)he tactical shift from subsection 41(1)(*c*) to subsection 41(1)(*d*) of the Act is to avoid the strict standard of correctness on jurisdictional issues in judicial reviews at the Federal Court …".

[48] In my view, the standard of review of the decision of the Commission to decline to pursue the matter in application of paragraph 41(1)(*d*) calls for a standard of reasonableness. The respondent has referred to decisions of this Court where the reasonableness standard was used (*Bateman v Attorney General of Canada*, 2008 FC 393; *A.J. v Attorney General of Canada*, 2008 FC 591; *Hicks v Attorney General of Canada*, 2008 FC 1059). Reference can also be made to *Wu v Royal Bank of Canada*, 2010 FC 307, and especially *Morin v Canada*, 2007 FC 1355 and *Hérold v Canada Revenue Agency*, *supra*.

[49] In the case at bar, the Court deals with the application of a standard known to the Commission on the basis of the facts disclosed in the complaint. The Commission's decision is discretionary and benefits from considerable deference (*Greaves v Air Transat Inc.*, 2009 FC 9, at paragraph 14). The Federal Court of Appeal spoke in terms of "a remarkable degree of latitude where it (the Commission) is performing its screening function on receipt of an investigation report" (*Bell Canada v Communications, Energy and Paper Workers Union of Canada*, [1999] 1 FC 113 at paragraph 38). These point clearly in the direction of a standard of reasonableness (*Dunsmuir*, *supra*, at paragraph 51).

[50] The standard of reasonableness carries with it a measure of deference. The Supreme Court of Canada explained carefully what is implied in *Dunsmuir*:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities

> that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[51] The Commission's decision was reasonable in that it reached one of the acceptable outcomes defensible in respect of the facts and the law. Put another way, it was reasonable to conclude that it was plain and obvious that the complaint has little likelihood of success. There are many reasons for that conclusion.

[52] The complaint, as framed by the applicants, is about a commercial dispute between a corporation and a government institution. The applicants complain bitterly that contracts they had with PWGSC have been terminated or have expired. The Act is not to be used to arbitrate commercial disputes.

[53] When read together, the June 22, 2012 decision by the Commission and the report find that there was not an act of discrimination as contemplated by the Act. As pointed out during the hearing of this case, it is only a discriminatory practice described at sections 5 to 14.1 of the Act that can be the subject of a valid complaint (section 4 of the Act). The complaint referred to paragraph 7(*b*) and sections 11, 13, 14(1) and 14.1. It was obvious that section 11 (equal wages between male and female employees performing work of equal value), section 13 (hate messages by means of the facilities of a telecommunication undertaking), section 14 (harassment in limited circumstances) and

section 14.1 (retaliation because complaint had been filed) cannot find application on the face of the complaint.

[54] The Commission did not consider either that the relationship between one of the complainants, Mr. Hagos, and the respondent was such that it qualifies as one of employment. Thus, paragraphs 7(*b*) and 14(1)(*c*) are of no assistance to the complainants. It follows that the complainants, including the corporation, cannot succeed, thus making their complaint frivolous.

[55] The applicants complained that the report focused on section 7 and did not discuss the other sections. It appears to me to be clear that the other sections were hopelessly invoked, without even an air of reality. The only real issue for further consideration was the applicability of section 7.

[56] During the course of the hearing, it became apparent that the applicants' best argument revolved around subsection 7(*b*) and paragraph 14(1)(*c*) of the Act. They read:

7. It is a discriminatory practice, directly or indirectly (*b*) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.	**7.** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects : *b*) de le défavoriser en cours d'emploi.
14. (1) It is a discriminatory practice, (*c*) in matters related to employment, to harass an individual on a prohibited ground of discrimination.	**14.** (1) Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le faite de harceler un individu : *c*) en matière d'emploi.

There would have to be, however, a broad interpretation of the notion of employment, in order to be helpful to the applicants given the facts of this case. Counsel for the applicants indicated that he seemed to recall case-law that would bolster his argument that Mr. Hagos' complaint could survive. He was given an opportunity to submit such case-law and he did bring to the attention of the Court the case of *Attorney General v Lapierre*, 2004 FC 612 [*Lapierre*].

[57] The applicants argue that the employer-employee relationship must be given a large and liberal interpretation, as was done in *Lapierre*. *Lapierre* speaks of three factors that would be assessed and, in the words of Justice Pierre Blais, as he then was, they are: "there is a situation of control, there is some remuneration and the alleged employer derived some benefit from the work performed." In that case, Ms. Lapierre had signed a contract with the Canadian Space Agency which clearly was not intended to establish the traditional employer-employee relationship. She was not to be employed by the Space Agency. Nevertheless, the Court found that the factors listed above were met and agreed with the Commission that it should pursue the complaint for sexual harassment made in that case.

[58] As can be readily seen, there was a contract between an individual, Ms. Lapierre, and a government institution. That is a pre-requisite in order to consider further the matter, as, "employment" is broadened in the circumstances of the case to include "a contractual relationship with an individual for the provision of services personally by the individual". Hence, without a contract with an individual for the provision of services personally, there is no employment, even for the purposes of the *Canadian Human Rights Act*. Subsection 7(*b*) and paragraph 14(1)(*c*) could not find application in this case because there was no contract between Mr. Hagos and PWGSC to

provide services personally. The only contract was between the corporate entity Shamar Maintenance Inc. and a government institution. There was no contractual relationship as described in section 25 of the Act:

25. In this Act,	**25.** Les définitions qui suivent s'appliquent à la présente loi.
"employment" includes a contractual relationship with an individual for the provision of services personally by the individual;	"emploi" Y est assimilé le contrat conclu avec un particulier pour la fourniture de services par celui-ci.

The case of *Lapierre* helps to highlight the basic requirement of a contract with an individual. There could not have been employment in our case. Thus, it would not have been reasonable for the Commission to find jurisdiction on the basis of those provisions.

[59] Finally, the report examined the statements attributed to employees of PWGSC. The report considers that there is only one that may draw a link to one of the grounds listed at section 3 of the Act. The report concludes however that the termination of the contract was due to the business relationship, not that possible link to a ground listed at section 3. I cannot see how such conclusion was unreasonable in view of the facts revealed in the complaint.

[60] Upon reflection, I wonder if the argument made by the applicants concerning the application of the "frivolous" standard does not proceed from a misunderstanding. As suggested recently by the Supreme Court of Canada, "… legal terms of art are not always self-defining …" (*Her Majesty the Queen v MacDonald*, 2014 SCC 3, at paragraph 72). The applicants, in their written submissions, seem to fault the Commission because it was pronouncing on the merits of the complaint without even investigating the facts. At paragraph 35 of their submissions to this Court, the applicants speak

of "subsection 41(1)(*d*) of the Act is substantive and fact-driven, giving the CHRC the possibility not to deal with a complaint on the basis that the factual matrix renders a complaint frivolous". The applicants seem to have taken the word "frivolous" to mean "foolish, lighthearted, not sensible or serious" (*The Canadian Oxford Dictionary*, Oxford University Press Canada, 2001) instead of "lacking a legal basis on legal merit" (*Black's Law Dictionary*, 7th ed., West Group).

[61] With respect, the latter meaning represents the scope of the analysis under section 41 and it is the kind of analysis conducted by the Commission in this case. Taking the complaint as it is, the Commission has to decide whether the complaint had some likelihood of success. It concluded that a corporation cannot bring itself as a victim of discrimination under the Act. It also concluded that Mr. Hagos, the second complainant, could not have the benefit of the Act because the prohibited discriminatory practices under the Act did not fit the circumstances presented in the complaint; none of the discriminatory practices invoked by the applicants could apply and the crux of the matter was actually the business relationship between the applicants and PWGSC. Thus, the complaint had no legal basis, no legal merit. The Commission did not even suggest that it was commenting on the statements alleged to have been made. As such it did not suggest any foolishness or lack of seriousness. The matter was to be addressed and decided at a different level. The Commission merely applied the law to the complaint and, without making any finding on the credibility of the allegations, whether the words, if spoken, were appropriate or not, concluded that it could not succeed because it falls outside of the Act. That was reasonable, as the notion is described in *Dunsmuir*, above, and the Court must show a measure of deference (*Newfoundland and Labrador Nurses' Union*, *supra*, at paragraphs 17 and 18).

[62] As a result, the application for judicial review must be dismissed. As for the issue of costs, the *Rules of the Federal Courts* provide a broad discretion. The integrity of at least three officers of the Commission was impugned by the applicants. As I have tried to show, these accusations were baseless. Costs are granted to the respondent. Counsel for both parties were clear that they would be satisfied with rule 407, the default position, unless the Court orders otherwise. In view of the fact that the respondent did not seek higher costs, they shall be assessed in accordance with column III of the table to Tariff B.

JUDGMENT

The application for judicial review of a decision of the Canadian Human Rights Commission, dated June 22, 2012, dismissing the applicants' complaint against Public Works and Government Services Canada, is dismissed. Costs are awarded to the respondent and shall be assessed in accordance with column III of the table to Tariff B.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JANUARY 21, 2014
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APPEARANCES:

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