Date: 20080502

Docket: A-345-07

Citation: 2008 FCA 170

CORAM: **NOËL J.A.**
NADON J.A.
RYER J.A.

BETWEEN:

JASON WATKIN

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Vancouver, British Columbia, on April 21, 2008.

Judgment delivered at Ottawa, Ontario, on May 2, 2008.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: NADON J.A.
RYER J.A.

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal from a decision of Justice Tremblay-Lamer of the Federal Court (the "applications judge") holding that the Canadian Human Rights Commission (the "Commission") did not have jurisdiction to deal with the complaint filed by Mr. Watkin (the "appellant") and associated complainants and that these individuals did not have the standing to institute the complaint in issue.

[2] According to this complaint, Health Canada acted contrary to section 5 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the "Act") by regulating herbal products in a discriminatory way, according to ethnic origin. The applications judge held that the Commission improperly assumed jurisdiction since the complaint relates to actions directed against a corporation, Biomedica Laboratories Inc. ("Biomedica"), and not individuals.

[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 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.

[4] The issue in this appeal is whether, according to the complaint as filed, the impugned actions of Health Canada are directed against him and the other complainants or whether they are directed against Biomedica, a corporate body which can claim no protection under the Act. A further issue – which was not addressed by the applications judge given her conclusion on the first issue – is whether the actions complained of are "services" within the meaning of section 5 of the Act.

RELEVANT FACTS

[5] The appellant is the President and CEO of Biomedica. Biomedica is owned by the Nutraceutical Medicine Company Inc. ("Nutraceutical"), a corporate entity owned by the appellant and three members of his immediate family.

[6] Biomedica sells and markets products under the name "Recovery" destined for both human and animal consumption. In February 2002, Health Canada requested that Biomedica cease and desist advertising in relation to this product as it found this advertising to be in contravention of section 3 of the *Food and Drugs Act*, R.S.C. 1985, c. F-27 (the "*Food and Drugs Act*"). After a series of events relating to continued advertising, and in the absence of a "New Drug Submission" being filed by Biomedica for its "Recovery" product, Health Canada conducted a Health Hazard Evaluation. As a result, Health Canada classified both the human and animal versions of "Recovery" as a "Class II Health Hazard" and a "new drug" under the *Food and Drugs Act*, and associated regulations. This finding was communicated to Biomedica in November 2002. At that time, Health Canada asked Biomedica to recall and cease the sale of its "Recovery" product.

[7] Subsequent to a full-page advertisement for "Recovery" in a national newspaper on December 7, 2002 and letters from Health Canada reiterating its recall request, Health Canada proceeded to seize a quantity of "Recovery" on December 20, 2002. It secured the seizure on Biomedica's premises with seizure tags and tape, leaving them on-site. Biomedica subsequently – acting in violation of the seizure – exported the product to the United States after receiving clearance from the United States' Food and Drug Administration.

[8] On June 4, 2004, the appellant filed a human rights complaint with the Commission against Health Canada, alleging that Health Canada had discriminated against Biomedica in the provision of services, contrary to section 5 of the Act. The particulars of the complaint read:

> We have reasonable grounds to believe that we have been discriminated against. We declare that the following information is true to the best of our knowledge.
>
> Our names are Bruce Dales and Jason Watkin and our complaint is against Health Canada Therapeutic Product Program Western Region (TPPWR). We believe that Health Canada gives preferential treatment to Asian Businesses, by regulating Asian Herbal Remedies less rigorously than they regulate non-Asian products.
>
> We also believe that Health Canada pursues a policy or practice that adversely impacts non-Chinese businesses. For instance, we have evidence that Health Canada's TPPWR is blocking more compliant and safer Canadian products from the Canadian market (and U.S. market) and are allowing certain Asian products (Chinese Herbal medicines) which are more dangerous and less compliant products on the Canadian market. We feel TPPWR applies an unfair rationale for allowing less compliant Asian products to be sold in the Vancouver Chinatown area in comparison to Canadian products across Canada and this is differential treatment based on national or ethnic origin.
>
> …
>
> [My emphasis]

[9] Six months later, on December 15, 2004, the appellant amended the complaint, adding the three other Nutraceutical shareholders (Trevor, Anna and Marlene Watkin) as complainants. The amended complaint further alleged that Health Canada's actions against Biomedica had a direct, adverse impact on the appellant and the three members of the Watkin family, by virtue of their immediate interest in the corporation and added a claim of discrimination as against a "First Nations" business. The salient portions of the amended complaint read:

> 34. The actions for Health Canada have had a substantial negative impact on Biomedica by creating confusion in the market place and by preventing the company to continue to grow as it would otherwise have done but for Health Canada's intervention. This has resulted in financial losses to the Watkins.

> 35. Health Canada has acted against Biomedica in such a way as to discriminate against Biomedica by giving significant or preferential treatment to Asian businesses by refusing or otherwise failing to act against these businesses in the same manner in which it has acted against Biomedica.
> 36. Health Canada's failure to apply its regulations and enforcement activities equally against Asian businesses has resulted in financial losses to Biomedica, and thereby to the Watkins.
>
> 37. Health Canada acted against Biomedica in such a way as to discriminate against Biomedica by giving significant preferential treatment to a putative First Nations business similar to Biomedica by refusing or otherwise failing to act against this business in the same manner in which it has acted against Biomedica.
>
> 38. Health Canada's failure to apply its requirements and enforcement of activities equally against a putative First Nations business similar to Biomedica has resulted in financial losses to Biomedica and thereby to the Watkins.
>
> 39. Health Canada acted against Biomedica in such a way as to discriminate against Biomedica by giving significant preferential treatment to businesses similar to Biomedica by refusing or otherwise failing to act against these businesses in the same manner in which it has acted against Biomedica.
>
> …
>
> 42. Health Canada is in violation of the Bader Order made March 11, 1998 by the Canadian Human Rights Tribunal. They are in violation of the Bader Order by, among other things, failing to cease the unequal enforcement of its policies and regulations as between retailer/wholesalers and importers.
>
> [My emphasis]

[10] The complainants ask for financial compensation computed by reference to an expert report which establishes Biomedica's lost revenues resulting from the actions of Health Canada at 4.4 million dollars. No other remedy is sought. [Nutraceutical has also commenced a civil action in the British Columbia Superior Court against Her Majesty the Queen and the Minister of Health, seeking damages of approximately $4.5 million in relation to Health Canada's enforcement activities against Biomedica, arising from the same factual situation.]

[11] When served with the amended complaint, Health Canada asked that the Commission refuse to deal with the complaint on the ground that it lacked jurisdiction. A preliminary investigation into the complaint was conducted. The final version of the investigator's report, dated February 17, 2006, advised the Commission that the matter was within its jurisdiction and should be referred to the Canadian Human Rights Tribunal for a hearing.

[12] The investigator's report contained the following recommendations:

> Based on the foregoing analysis, it is probable that the Watkins have presented a *prima facie* case of discrimination under section 5 of the Act, on the basis of a prohibited ground – namely, ethnic or national origin.
>
> It is not apparent that the Respondent's defenses in respect that to the lack of jurisdiction and lack of standing to bring the complaint on the grounds that the allegations are directed at a corporation, rather than an individual, would likely be successful, on the basis that there appears to be a sufficiently direct and immediate impact on the Watkins arising from the alleged discrimination against Biomedica by Health Canada.
>
> In respect of the defense raised regarding judicial review under the *Federal Courts Act*, it is not apparent that this argument would likely be successful on the grounds that the Act gives broad and liberal remedial authority to rectify human rights abuses in Canada. There is nothing the *Federal Courts Act* or Act that would displace the Commission's jurisdiction in this regard.
>
> On the issue of Health Canada acting within its authority under the *Food and Drugs Act* and *Regulations*, the evidence in this regard must be tested and weighted to determine if Health Canada does have a *bona fide* justification for the actions it has taken in respect of Biomedica.
>
> In addition, there are public interest considerations raised by this complaint; namely, that there is an allegation that Health Canada has failed to comply with an Order from the Tribunal and the limited jurisprudence and potentially broad impact on the issue of individual complaints when the discriminatory conduct is directed towards corporate entities. In our view, the Commission would benefit from participation at the Tribunal level on each of these matters.

[13] After considering the report, the Commission decided that the appellant had standing to bring the complaint and that the matter was within its jurisdiction. This decision was communicated to Health Canada by letter dated July 4, 2006 and the application for judicial review was initiated by Health Canada soon thereafter.

[14] Health Canada challenged the decision on the basis that the Commission was without jurisdiction since the actions complained of are not directed against an individual or individuals. It further argued that the Commission was without jurisdiction because the alleged discrimination did not arise "in the provision of …, services, … customarily available to the general public" within the meaning of section 5 of the Act.

[15] The applications judge allowed the judicial review application on the first ground. She held that the Commission was without jurisdiction to consider the complaint where the "victim" is a corporate "person" and not an "individual" (Reasons, para. 24). Given this conclusion, she found it unnecessary to examine whether Health Canada had provided "services" within the meaning of section 5 of the Act (Reasons, para. 35).

[16] The gist of the appellant's contention on appeal is that the applications judge failed to recognize that in this case, while the target of the discrimination was a corporation, the victim seeking redress was an individual (Appellant's Memorandum, para. 81). Even if the corporation was the target of the discrimination, given the sufficiently direct impact of the discrimination on the

appellant, the appellant qualified as a victim of the discriminatory practice (Appellant's Memorandum, paras. 73, 74, 101).

[17] In response, the respondent argues that the applications judge reached the correct conclusion essentially for the reasons that she gave. The respondent adds as a further argument that the actions complained of are not "services" within the meaning of section 5, a conclusion which if accepted is sufficient to deprive the Commission of jurisdiction over the complaint (Respondent's Memorandum, paras. 65-69). The appellant deals with this alternative argument at length (Appellant's Memorandum, paras. 143-153). According to the appellant so long as Health Canada provides some services, it is a "service provider" and all its actions are "services", regardless of their nature.

[18] At the hearing of the appeal, counsel for the respondent made the surprise announcement that he was not pursuing this alternative argument since it was not dealt with by the applications judge. It was made clear to counsel for both parties that this issue - which was properly before the applications judge and fully addressed in the respective memoranda - remained a live issue from the Court's perspective. Counsel for the respondent acknowledged that it was open to the Court to address the issue if it was found to be the appropriate basis for the disposition of the appeal, and counsel for the appellant could not point to anything which would prevent the Court from addressing it. Indeed, the appellant in his memorandum took the express position that it was appropriate for this Court to deal with the issue even though it had so far gone unaddressed

(Appellant's Memorandum, para. 161). Accordingly, the parties were invited to, and did, make the arguments which they wished to make on this issue.

DECISION

[19] As a preliminary comment, I note that it is difficult to detect any genuine human rights concern in the complaint brought by the appellant as it appears to be driven by purely commercial motives. This in itself is not determinative, but it takes away any hesitation that I might otherwise have in seeing the complaint brought to an end at this early stage.

[20] In my view, the applications judge came to the correct conclusion when she held that the Commission is without jurisdiction to hear the complaint. However, I reach that conclusion on the basis that the actions which form the object of the complaint are not "services" within the meaning of section 5:

5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public (*a*) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or (*b*) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.	**5.** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public : *a*) d'en priver un individu; *b*) de le défavoriser à l'occasion de leur fourniture.

[21] The essence of the complaint when read in its most favourable light from the perspective of the appellant is that Health Canada has in effect discriminated against the complainants by enforcing the *Food and Drugs Act* against their company, but not against other businesses who were deserving of the same treatment. This differential treatment is said to be based on ethnicity.

[22] In my view, Health Canada, when enforcing the *Food and Drugs Act* in the manner complained of is not providing "services, … customarily available to the general public" within the meaning of section 5. The actions in question are coercive measures intended to ensure compliance. The fact that these measures are undertaken in the public interest does not make them "services".

[23] I reach this conclusion applying a standard of correctness. As noted, the issue whether the actions complained of are "services" has not been addressed in the present proceedings so that there is no reasoning to which I could defer. In any event, this is a "true question of jurisdiction or *vires*" which must be reviewed on a standard of correctness (*Dunsmuir v. New Brunswick,* 2008 SCC 9*,* para. 59).

[24] In submitting that the Commission has jurisdiction, the appellant relies on the decision of the Canadian Human Rights Tribunal in *Bader v. Canada (National Health and Welfare)* (1996), 30 C.H.R.R. D/383 ("*Bader*") (aff'd on the issue of jurisdiction by a Review Tribunal (1998), 31 C.H.R.R. D/268), where it was found that Health Canada's enforcement actions were "services" within the meaning of section 5 of the Act. However, no basis is advanced for this conclusion in

these decisions, since, as noted by the Tribunal, the parties did not dispute the issue (*Bader, supra*, p. D/397, para. 52).

[25] The appellant also relies on the decision of this Court in *Canada (Attorney General) v. Rosin*, [1991] F.C.J. No. 391 (C.A.) ("*Rosin*"). However, the government actions which formed the basis of the alleged discrimination in that case – parachuting courses offered by the Armed Forces – were "services" within the commonly accepted meaning of that word. The issue which arises in this case is whether government actions which are not "services" within the commonly accepted meaning can nevertheless be treated as "services" under section 5.

[26] In this respect, reference should be made to the decision of this Court in *Singh (Re)*, [1989] 1 F.C. 430 ("*Singh*"), which was cited by the Canadian Human Rights Tribunal as authority for the proposition that all government actions come within section 5 of the Act regardless of their nature (see *Menghani v. Canada (Employment and Immigration Commission)* (1992), 17 C.H.R.R. D/236 at D/244 – D/246; ("*Menghani*")). In my respectful view, *Singh, supra,* does not stand for this proposition. In *Singh, supra*, the Court held that "services" under section 5 are not restricted to "market place" activities, but extend to the provision of services by government officials in the performance of their functions. In so holding, the Court declined to follow U.K. decisions rendered pursuant to the *Sex Discrimination Act 1975* (U.K.), 1975 c. 65 which held that government actions are not "services" under that Act regardless of their nature or character.

[27] The precise conclusion in *Singh, supra,* – which was reached in what was in effect a motion to strike for lack of jurisdiction (*Singh, supra,* p. 438) – was that it was "not by any means" clear at the preliminary stage when this decision was made that "the services rendered, both in Canada and abroad, by the officers charged with the administration of the *Immigration Act 1976*, SOR/78-172 ("*Immigration* Act") were not services customarily available to the general public" (*Singh, supra,* p. 440). Significantly, paragraph 3(*c*) of the then *Immigration Act* which the Court quotes at page 441 provided that one of the statutory objectives to be pursued by those charged with its administration was:

3. …	**3.** …
(*c*) to facilitate the reunion in Canada of Canadian citizens and permanent resident with their close relatives from abroad;	*c*) de faciliter la réunion au Canada des citoyens canadiens et résidents permanents avec leurs proches parents de l'étranger;

[28] Public authorities can and do engage in the provision of services in fulfilling their statutory functions. For example, the Canada Revenue Agency provides a service when it issues advance income tax rulings; Environment Canada provides a service when it publicizes weather and road conditions; Health Canada provides a service when it encourages Canadians to take an active role in their health by increasing their level of physical activity and eating well; Immigration Canada provides a service when it advises immigrants about how to become a Canadian resident. That said, not all government actions are services. Before relief can be provided for discrimination in the provision of "services", the particular actions complained of must be shown to be "services" (see *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571 ("*Gould*"), per Iacobucci J. for the majority at paras. 15, 16, 17 and per La Forest J. concurring in the result at para. 60).

[29] In *Singh, supra*, at page 440, the Court made the following comments in the course of an apparent *obiter* which merit comment:

> The wording of our section 5 is also instructive. While paragraph (*a*) makes it a discriminatory practice to deny services, etc. to an individual on prohibited grounds, paragraph (*b*) seems to approach matters from the opposite direction, as it were, and without regard to the person to whom the services are or might be rendered. Thus it is a discriminatory practice.
>
> **5.** … in the provision of … services … customarily available to the general public
>
> **…**
>
> (*b*) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.
>
> Restated in algebraic terms, it is a discriminatory practice for A, in providing services to B, to differentiate on prohibited grounds in relation to C. Or, in concrete terms, it would be a discriminatory practice for a policeman who, in providing traffic control services to the general public, treated one violator more harshly than another because of his national or racial origins ([Footnote: see *Gomez v. City of Edmonton* (1982), 3 C.H.R.R. 882]).
>
> It is indeed arguable that the qualifying words of section 5
>
> **5.** … provision of … services … customarily available to the general public … can only serve a limiting role in the context of services rendered by private persons or bodies; that, by definition, services rendered by public servants at public expense are services to the public and therefore fall within the ambit of section 5. <u>It is not, however, necessary to make any final determination on the point at this stage</u> …
>
> [My emphasis]

[30] As can be seen, the Court did not dispose of the point that it raised. However, to the extent that this passage can be taken as suggesting that all government actions are "services" within the meaning of section 5, it should be addressed.

[31] Addressing this question, I agree that because government actions are generally taken for the benefit of the public, the "customarily available to the general public" requirement in section 5 will

usually be present in cases involving discrimination arising from government actions (see for example *Rosin, supra* at para. 11, and *Saskatchewan Human Rights Commission v. Saskatchewan (Department of Social Services)* (1988), 52 D.L.R. (4th) 253 at 266-268). However, the first step to be performed in applying section 5 is to determine whether the actions complained of are "services" (see *Gould, supra*, per La Forest J., para. 60). In this respect, "services" within the meaning of section 5 contemplate something of benefit being "held out" as services and "offered" to the public (*Gould, supra*, per La Forest J., para 55). Enforcement actions are not "held out" or "offered" to the public in any sense and are not the result of a process which takes place "in the context of a public relationship" (*Idem*, per Iacobucci J., para. 16). I therefore conclude that the enforcement actions in issue in this case are not "services" within the meaning of section 5.

[32] Given this conclusion, the opinion expressed by the Canadian Human Rights Tribunal in *Bailey et al v. Minister of National Revenue* (1980), 1 C.H.R.R. D/193 at D/212 – D/214 ("*Bailey*") (applied in *LeDeuff v. The Canada Employment and Immigration Commission* (1987), 8 C.H.R.R. D/3690 at D/3693 (aff'd on this issue by a Review Tribunal without discussion (1989), 9 C.H.R.R. D/4479) that all government actions in the performance of a statutory function constitute "services" within the meaning of section 5 because they are undertaken by the "public service" for the public good, must be disavowed. The same comment applies to the decision of the Canadian Human Rights Tribunal in *Anvari v. Canada (Canadian Employment and Immigration Commission)* (1989), 10 C.H.R.R. D/5816 at para. 42271, aff'd by a Review Tribunal (14 C.H.R.R. D/292 at D/297, para. 19) (applied in *Menghani, supra*, at D/244, para. 26 which decision was later confirmed by the Federal Court on other grounds (*Canada (Secretary of State for External Affairs) v. Menghani*,

[1994] 2 F.C. 102)), insofar as it holds that all actions of immigration officials under the *Immigration Act* are "services" because the performance of a statutory duty is "by definition" a service to the public (see also *Bailey, supra* at p. D/214).

[33] Regard must be had to the particular actions which are said to give rise to the alleged discrimination in order to determine if they are "services" (*Gould, supra*, per Iacobucci J., para. 16, per La Forest J., para. 60), and the fact that the actions are undertaken by a public body for the public good cannot transform what is ostensibly not a service into one. Unless they are "services", government actions do not come within the ambit of section 5. As in the present case, the enforcement actions which form the object of the complaint are not "services" under any of the meanings that can be given to this word, the Commission is without jurisdiction to hear the complaint.

[34] In reaching this conclusion, I have had in mind throughout that the Act, being dedicated to the advancement and protection of human rights, should be given a broad, liberal and purposive interpretation in order to maximize its reach. However this is not a matter of giving the word "services" a generous meaning in order to achieve that goal; this is a matter of not giving that word a meaning that it cannot bear (*Gould, supra*, per La Forest J., para. 50 and per Iacobucci J., para. 13).

[35] Having reached this conclusion, I need not deal with the alternative basis relied upon by the applications judge for concluding that the Commission does not have jurisdiction over the complaint filed by the appellant.

[36] I would dismiss the appeal with costs.

"Marc Noël"
J.A.

"I agree.
M. Nadon J.A."

"I agree.
C. Michael Ryer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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