Federal Court

Cour fédérale

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Date:	November 24, 2009 — 4:00 PM
Subject:	Attorney General of Canada v. First Nations Child and Family Caring Society of Canada et al Court File No.: T-1753-08
Total number of pages including this one	8

Comments: **BY FAX ONLY**

Counsel,

Please find the Order of the Court issued today.

Regards,

Annette Houle

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Federal Court Cour fédérale

Date: 20091124

Docket: T-1753-08

Ottawa, Ontario, November 24, 2009

PRESENT: Madam Prothonotary Roza Aronovitch

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA AND THE ASSEMBLY OF FIRST NATIONS

Respondents

ORDER

UPON motion by the First Nations Child and Family Caring Society of Canada (FNCFS) and the Assembly of First Nations (AFN) for:

a) an Order of the Court striking the within application;

b) in the alternative, an Order of the Court staying the within application until disposition of the Complaint before the Canadian Human Rights Tribunal in file T1340/7008;

c) the costs of this motion and this application;

d) the costs of those aspects of the Respondents' motion seeking case management and a stay pending the hearing of the within motion, in any event of the outcome of this motion and/or application; and

e) such further and other relief as counsel may advise and this Honourable Court deem just.

ENDORSEMENT

The respondents have brought this motion to strike out the applicant's notice of application on the grounds that it is bereft of a possibility of success. Striking out an application is an exceptional remedy that will be granted only in the clearest of cases. *David Bull Laboratories (Can.) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588, (sub nom. *Pharmacia Inc. v. Canada (Min. of National Health & Welfare)* 176 N.R. 48 (C.A.). For the reasons that follow, I am not satisfied that this is such a case and that the application ought to be struck.

The respondents' principal ground for striking is based on the premise that the impugned decision of the Commission will attract a high degree of defence, a standard of review that the Attorney General of Canada (Attorney General) cannot hope to meet in the circumstances, and which therefore dooms the application to failure.

The respondents explain as follows. When the Human Rights Commission (Commission) makes a decision to refer a matter to the Canadian Human Rights Tribunal (Tribunal) for inquiry, it is exercising a screening function, such that a complaint is to be dismissed only if it "appears to the Commission" that the complaint is beyond its jurisdiction. Otherwise, the Commission must deal with any complaint that is filed with it.

The scope of judicial review of such a decision is narrow. As stated by Rothstein J. (as he then was,) where a question of jurisdiction is at issue, "the preferable course for the Court is to leave the Tribunal free to carry out its inquiries and not to prohibit it save in a case where it is *clear and beyond doubt* that the Tribunal is without jurisdiction to deal with the matter before it." *Attorney General of Canada v. Cumming*, [1980] 2 F.C. 122 at 132-33; *Canada Post Corp. v. Canada (Human Rights Commission)* [1997] F.C.J. No. 578 (T.D.), aff'd [1999] F.C.J. No. 705 (C.A.) at paragraphs 2-5. (emphasis mine)

The respondents characterize the two issues raised by the application as the "Service Issue" and the "Comparator Issue". The first, is as to whether Indian and Northern Affairs Canada (INAC) may be said to be a "service provider" within the meaning of the *Canadian Human Rights Act* (*CHRA*). The second issue deals with whether INAC's funding of on-reserve child and family service

providers may be said to "adversely differentiate" within the meaning of the *CHRA*, and more particularly as to who may be a proper "comparator" to the on-reserve recipients of those services.

The respondents point out that the Commission did not positively decide that it had jurisdiction. Nor did it decide who is a service provider, or the appropriate comparator, either as questions of fact, or law. Despite this, say the respondents, the applicant challenges the Commission's "decisions" or findings in that regard, and seeks as its primary relief in the underlying judicial review that the respondents' complaint be dismissed, and only in the alternative, that the matter be referred back to the Commission.

The respondents say that it was the Commission's role solely to determine, as it did, that the issues were arguable and not settled at law, and that there was a sufficient link to a prohibited ground. It is precisely because the issues, and the Commission's want of jurisdiction were not clear and beyond doubt, that the matter was referred to be determined by the Tribunal. The FNCFS and AFN also maintain that the two central issues are not true issues of "jurisdiction" and that even if they were, the standard would be reasonableness, and the Attorney General could not possibly succeed unless he could show they were crystal clear.

The applicant responds that the standard will not be as high as the respondent suggests and that, in the context of a motion to strike, it is well established that the moving party itself has an exceptionally high burden to meet which the applicant maintains the respondent has not met.

In oral argument, the applicant urged on the Court that the application, as cast, is broad enough to encompass the following ground for the judicial review, namely, that the Commission erred in *not* deciding that it did *not* have jurisdiction. In other words, that the Commission was bound under s. 41 of the *CHRA* to positively find it lacked jurisdiction to hear the complaint. By not doing so, it committed an error of law and should be held to a standard of correctness. In this regard, the applicant principally relies on *Canada (Attorney General) v. Watkin*, 2008 FCA 170, to show at least one of the issues involved, the Service Issue, has been treated as a true question of jurisdiction and reviewed on a correctness standard in the context of a Commission screening decision. Indeed, in that case, Noël J.A. applied a correctness standard to the question of whether a government agency provided a service within the meaning of s. 5(a) of the *Canada Human Rights Act*. The same standard, the applicant submits, ought to apply in this case.

The arguments in this motion essentially reduce to a dispute over the standard of review that is appropriate to the underlying application. In my view, the applicable standard of review is for the reviewing court to determine, and is not appropriate for determination on an interlocutory motion. All the more so, when the determination of the correct standard will almost certainly be determinative of the application for judicial review. The applicant has demonstrated in this motion that it has an argument concerning the proper standard of review which finds some support in case law. I am not satisfied that the applicant's position is so clearly improper as to be bereft of a possibility of success. That being the case, I cannot conclude the present case is one of those most exceptional situations where the application for judicial review should be struck.

Adequate Alternate Remedy

The respondents' further ground for striking is that the Tribunal inquiry can provide an adequate alternate remedy in respect of the questions that from the basis of the judicial review. They argue that the alleged errors of the Commission can best be determined by the Tribunal, whose decision is thereafter open to further review by this Court if the applicant is not satisfied with the Tribunal's ruling on the merits.

Having taken the following factors into account, I conclude that the application cannot be struck on the grounds of the existence of an alternate adequate remedy. By coming to this Court the applicant, in this case, is not making a choice of preferred venue. Rather, for a variety of reasons, the within application has been delayed in its prosecution, is not yet perfected, and can now only run concurrently with a proceeding it sought to avoid. In addition, the Commission's decision in this case without doubt is reviewable, and only by this Court. The Court's mandate is to examine the Commission's decision which the Tribunal cannot do. The Tribunal, for its part, has a mandate to examine the issues, on the merits, in the context of the complaint.

From that perspective, I concur with the applicant's submissions as to the factors in *Agustawestland International Ltd. v. Canada* (*Minister of Public Works and Government*), 2004 FC 1545 (*Agustawestland*), that do not support a finding of an adequate alternate remedy in this case; the powers of the alternate body, and the legal framework out of which the matter arises.

The Tribunal is not an appellate body. It does not have discretion with respect to holding an inquiry into a complaint, and does not exercise supervisory jurisdiction over the actions or decisions of the Commission. That jurisdiction lies within the exclusive purview of this Court. *Tweten v. RLT Robinson Enterprises Ltd.*, [2004] C.H.R.D. No. 14 (QL).

The fact that the Tribunal will not review the Commission's decision itself is not immaterial, or a "distinction without a difference", as characterized by the respondents. At the end of the day, the Attorney General may well be satisfied to merely challenge the Tribunal's decision. He cannot, however, be precluded from exercising his choice, or be left without recourse to also impugn the Commission's decision to send the matter on for inquiry.

Stay of Proceedings

As an alternative to striking the application, the respondents request a stay of the judicial review in this Court pending resolution of the Tribunal's hearing. The parties agree that the proper test for granting such a stay is embodied in the three well-recognized criteria from *RJR MacDonald Inc. v. Canada* (*AG*), [1994] 1 S.C.R. 311 at para. 43:

> First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

The parties appear to agree as well, that the Service Issue and the Comparator Issue constitute serious issues to be tried.

The respondents submit that they will suffer prejudice amounting to irreparable harm by the continuance of the judicial review. The thrust of their argument is that the two issues outlined above are novel, will get precedent, and cannot be separated from the merits of the human rights complaint. Should they be determined in a preliminary application by this Court, based on a limited record, it will deprive the respondents of the full hearing based on a complete record which the issues deserve. Since the issues at stake are complex, and of importance to aboriginal peoples, a full exploration by the body Parliament intended to investigate such complaints is warranted.

The applicant takes the position that it will itself be subject to irreparable harm should the application be stayed. The argument is essentially that since the Tribunal does not supervise the jurisdiction of the Commission, a stay would deny its only opportunity to challenge the Commission's decision. This, it says, would amount to an injustice. The applicant does not advert to its right and possibility of renewing the judicial review application and its challenge to the Commission's decision after the Tribunal completes its inquiry, nor to the potential that the Tribunal may ultimately rule in its favour, rendering the further pursuance of the application unnecessary. Further, it will have the right to bring a fresh judicial review of any decision the Tribunal may reach. In my view, the potential prejudice to the respondents is far greater.

The subject matter of the complaint being serious and complex, I agree that it should not be determined in summary fashion and in the absence of the factual record necessary to fully appreciate the matters in issue.

I note, in that regard, the following comments of Joyal J. in *Canada (Attorney General) v. Public Service Alliance of Canada* (1991), 48 F.T.R. (*PSAC*) regarding the issue of pay equity in the public service.

> Although the principle of equal pay for work of equal value may be simply stated, the problem of bringing the principle down to earth when large groups are involved requires the application of various criteria relating to statistical analysis and methodology, the complexities of which are evident.

The same, in my view, may be said of the principle of equality as it relates to the provision of services for aboriginal children.

In addition, if both proceedings are allowed to go forward, there is a real risk that the Tribunal will have issued its decision before the Court rules, raising the specter of conflicting decisions based on different facts and evidence. These factors, in my view, pose a risk of irreparable harm to the respondents.

The balance of convenience as well as consideration of the public interest also favour the respondents. Some of the applicant's arguments against the stay rest on the assumption that this Court will determine the judicial review before the Tribunal issues its decision. That outcome can not be presumed. In any case, whether from the point of view of the expenditure of resources, or otherwise, it is not in the public interest to allow these proceedings to continue concurrently in the two venues.

There is an interest however, in allowing a full and thorough examination in the specialized forum of the Tribunal, of issues which may have impact on the future ability of aboriginal peoples to make discrimination claims.

Taking the circumstances as we find them, I believe it just and equitable to stay this proceeding pending the outcome of the Tribunal's decision. This will avoid parallel proceedings, their attendant inefficiencies, and the potential for conflicting findings while preserving the applicant's ability, ultimately, to impugn the Commission's decision itself, as well as that of the Tribunal on the merits of the complaint.

Costs

I have considered the submissions of the parties in respect of the present motion, the motion for case management, and the applicant's motion to strike the affidavit of Ms. Blackstock.

As relates to the skirmishing between counsel relating to Ms. Blackstock's attendance or lack thereof for cross-examinations, the correspondence on topic shows intransigence and unreasonableness on both sides. I find it appropriate in the circumstances that the parties bear their own costs of their apparent inability to co-operate.

As to the applicant's motion for case management and a stay pending the hearing of this motion, these issues were not contested. Also, I find no basis or explanation for the lump sum award of $4,000 requested by the respondents. Costs of the motion, fixed in the amount of $500 will accordingly be ordered payable, in the cause.

In respect of the costs of this motion, success being divided, the costs of the motion fixed in the sum of $2,000, will be payable, in the cause.

While the motion with respect to the Blackstock affidavit was settled prior to hearing, it was a substantial motion that was nevertheless made necessary. In the circumstances, it may be said of

that motion, as well, that success was divided. I will accordingly fix the costs of the motion at $800 to be paid in the cause.

THIS COURT ORDERS that

1. The motion is granted as follows and is otherwise denied.

2. The within proceeding is stayed until disposition of the complaint before the Canadian Human Rights Tribunal in file T-1340/7008.

3. The applicant shall advise the Court within thirty (30) days of the disposition of the complaint by the Tribunal as to the further prosecution of the within application.

4. The costs of this motion, fixed in the sum of $2,000, shall be in the cause.

5. The costs of the respondents' motion for case management, fixed in the sum of $500, shall be in the cause.

6. The costs of the motion to strike out portions of the affidavit of Ms. Blackstock, fixed in the sum of $800, shall be in the cause.

"R. Aronovitch"
Prothonotary