Federal Court of Appeal | Cour d'appel fédérale

Date: 20130311

Docket: A-145-12

Citation: 2013 FCA 75

CORAM: **PELLETIER J.A.**
STRATAS J.A.
WEBB J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

CANADIAN HUMAN RIGHTS COMMISSION,
FIRST NATIONS CHILD AND FAMILY CARING SOCIETY,
ASSEMBLY OF FIRST NATIONS, CHIEFS OF ONTARIO,
AMNESTY INTERNATIONAL

Respondents

and

CANADIAN CIVIL LIBERTIES ASSOCIATION

Intervener

Heard at Ottawa, Ontario, on March 6, 2013.

Judgment delivered at Ottawa, Ontario, on March 11, 2013.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: PELLETIER J.A.
WEBB J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] The Attorney General appeals from the judgment dated April 18, 2012 of the Federal Court (*per* Mactavish J.): 2012 FC 445. For the following reasons, I would dismiss the appeal without costs.

A. Introduction

[2] This matter arises from a complaint under the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, brought by the respondents, the First Nations Child and Family Caring Society and the Assembly of First Nations (the "complainants"). The complainants allege that the Government of Canada has engaged in prohibited discrimination by under-funding child welfare services for on-reserve First Nations children, and denying them services available to other Canadian children.

[3] The Canadian Human Rights Commission referred the complaint to the Canadian Human Rights Tribunal for hearing.

B. Proceedings before the Tribunal

[4] Before the Tribunal, the Attorney General brought a preliminary motion alleging that the complaint could not succeed. The Tribunal granted the motion and quashed the complaint: 2011 CHRT 4.

[5] The Tribunal considered the complaint to raise paragraph 5(*b*) of the Act, not paragraph 5(*a*) of the Act. Section 5 of the Act reads as follows:

5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public	**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

> (*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.

> *a*) d'en priver un individu;
>
> *b*) de le défavoriser à l'occasion de leur fourniture.

[6] The Tribunal considered whether the complainants could establish that the Government of Canada "differentiate[d] adversely" under paragraph 5(*b*) of the Act concerning its funding for assistance programs for Aboriginal children. On its view of paragraph 5(*b*), the Tribunal concluded that in order to succeed, the complainants would have to point to some other similarly situated group, such as another group receiving the same assistance programs from the Government of Canada.

[7] The Tribunal's conclusion is best seen in the following passages in the Tribunal's reasons (at paragraphs 10-12):

> [10] In order to find that *adverse differentiation* exists, one has to compare the experience of the alleged victims with that of someone else receiving those *same* services from the *same* provider. How else can one experience *adverse differentiation*? These words of the [Act] must be accorded their clear meaning as intended by Parliament. These words are unique to the CHRA.... These words... requir[e] a comparative analysis.... Further the complaint itself seeks a comparison. The heart of the complaint involves comparing [Indian and Northern Affairs Canada's] funding to provincial funding.
>
> [11] Regarding the issue of choice of comparator, the parties agree that [Indian and Northern Affairs Canada] does not fund or regulate child welfare for off-reserve children. The provision of child welfare to off reserve children is entirely a provincial matter.... Can federal government funding be compared to provincial government funding to find adverse differentiation as set out in section 5(b) [sic] of the Act? The answer is no.

> [12] The Act does not allow a comparison to be made between *two different* service providers with *two different* service recipients. Federal funding goes to on-reserve First Nations children for child welfare. Provincial funding goes to all children who live off-reserve. These constitute separate and distinct service providers with separate service recipients. The two cannot be compared. [emphasis in original]

Accordingly, the Tribunal held that the complainants could not succeed under paragraph 5(*b*) of the Act and quashed the complaint: there is no relevant comparator group because the Government of Canada does not provide welfare funding for any other children.

C. Proceedings before the Federal Court

[8] The Federal Court set aside the Tribunal's decision for two reasons:

(1) *The decision was substantively unreasonable*. The Federal Court identified three matters that took the Tribunal's decision outside of the range of the acceptable and defensible and made it unreasonable:

- The Tribunal improperly characterized the complaint as raising only paragraph 5(*b*). The complaint also raised paragraph 5(*a*). The Tribunal did not deal with paragraph 5(*a*) of the Act, as it should have. (See Reasons, at paragraphs 207-221.)

- By making the existence of a comparator group a mandatory requirement in paragraph 5(*b*), the Tribunal adopted a "rigid and formulaic interpretation" of paragraph 5(*b*), an interpretation that was "inconsistent with the search for

substantive equality mandated by the [Act] and Canada's equality jurisprudence" (Reasons, at paragraph 9). A comparator group might be evidence that is helpful on the issue of discrimination, but is not a prerequisite to a finding of discrimination. In the Federal Court's words (at paragraph 290): "A comparator group is not part of the *definition* of discrimination" but is "an *evidentiary tool* that may assist in identifying whether there has been discrimination in some cases" [emphasis in original]. (See also Reasons, at paragraphs 280-315.)

- In the alternative, even if the complainants had to point to a comparator group, the Tribunal unreasonably found that one did not exist – in its funding policies, the Government of Canada has adopted provincial child welfare standards. (See Reasons, at paragraphs 367-390.)

(2) *The decision was procedurally unfair*. The Tribunal improperly considered a large volume of extrinsic material in arriving at its decision. (See Reasons, at paragraphs 167-204.)

[9] The Attorney General appeals to this Court.

D. The substantive reasonableness of the decision

[10] The Federal Court reviewed the Tribunal's decision on the basis of the deferential standard of reasonableness: Reasons, at paragraphs 234-240. This was the proper standard of review. Reasonableness is the presumptive standard of review of a tribunal's interpretation of its own statute: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at paragraph 34. Further, the Supreme Court has recently confirmed reasonableness to be the presumptive standard of review when the Tribunal is interpreting the Act: *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 at paragraphs 15-27 (also known as the *Mowat* decision).

[11] The Attorney General submits that the Federal Court misapplied the reasonableness standard by adopting an insufficiently deferential posture. In particular, the Attorney General says the Federal Court developed its own interpretation of paragraph 5(*b*) and used it as a yardstick to judge the Tribunal's interpretation.

[12] I disagree. A review of the Federal Court's reasons as a whole shows that it appreciated the test for reasonableness – whether the Tribunal's decision falls within a range of acceptability and defensibility on the facts and the law – and applied it deferentially: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 47.

[13] As the Attorney General accepted in argument before us, one must remember that the range of acceptability and defensibility "takes its colour from the context," widening or narrowing

depending on the nature of the question and other circumstances: *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 at paragraphs 17-18 and 23; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paragraph 59; and see also *Canada (Attorney General) v. Abraham*, 2012 FCA 266 at paragraphs 37-50.

[14] In this case, the range is relatively narrow. The Tribunal's decision primarily involves statutory interpretation – a matter constrained by the text, context and purpose of the statute. It also involves equality law – a matter constrained by judicial pronouncements. In this case, the Tribunal had less room to manoeuvre than in a case turning upon one or more of factual appreciation, fact-based discretions, administrative policies, or specialized experience and expertise not shared by the reviewing court on the particular point in issue.

[15] The Supreme Court's decision in *Mowat*, *supra* – also involving a review of the Tribunal's interpretation of the Act – illustrates this well. There, the Supreme Court reviewed the Tribunal on the basis of the deferential standard of reasonableness. However, acting under that standard, the Supreme Court engaged in an exacting review of the Tribunal's decision, a review more exacting than that of the Federal Court in this case. Some might describe what the Supreme Court did in *Mowat* as disguised correctness review. I disagree. *Mowat* is reasonableness review, still deferential, conducted in recognition that, as far as the Supreme Court was concerned, the Tribunal had only a narrow range of acceptability and defensibility open to it, given the constrained nature of the matter before it. Within that range, the Tribunal was entitled to deference. For similar examples, see *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422 and

Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright), 2012 SCC 37, [2012] 2 S.C.R. 345.

[16] In this case, the Federal Court concluded that the Tribunal's interpretation of paragraph 5(*b*) – an interpretation requiring the complainants to point to a similarly situated comparator group in order to succeed – was outside the range of acceptability and defensibility and, thus, was unreasonable. In reaching this conclusion, the Federal Court relied upon the following matters, each of which it found to be inconsistent with the Tribunal's interpretation:

- the text of paragraph 5(*b*) (Reasons, at paragraphs 251-275);

- the surrounding wording in the Act and the wider context, including the repeal of section 67 of the Act (Reasons, at paragraphs 276-279 and 341-347);

- the purposes underlying the Act (Reasons, at paragraphs 243-250);

- this Court's jurisprudence concerning similar provisions of the Act (Reasons, at paragraph 299; and see, e.g., *Morris v. Canada (Canadian Armed Forces)*, 2005 FCA 154);

- Canada's international obligations, with which Canada's domestic legislation is presumed to accord unless ousted by clear, contrary legislative intent (Reasons, at

paragraphs 348-356; and see *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292 at paragraph 53); and

- Canada's equality jurisprudence, including the recent diminution of the role of comparator groups in the equality analysis ((Reasons, at paragraphs 280-340). The Federal Court's analysis reflects the position articulated by the Supreme Court in *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396 at paragraph 59: in some cases "finding a mirror [comparator] group may be impossible, as the essence of an individual's or group's equality claim may be that, in light of their distinct needs and circumstances, no one is like them for the purposes of comparison." See also *Withler* at paragraphs 2, 3, 45-48, 55 and 80-81.

[17] Despite the able submissions of the Attorney General, I am not persuaded that the Federal Court erred in its conclusion that the Tribunal's decision was unreasonable. To the contrary, the careful, reflective and scholarly reasoning of the Federal Court amply demonstrates that the Tribunal's decision fell outside the range of the acceptable and defensible and, thus, was unreasonable.

[18] On the inconsistency between the Tribunal's decision requiring the complainants to show a comparator group under paragraph 5(*b*) and Canada's equality jurisprudence, cases postdating the Federal Court's decision have confirmed the reduced role of comparator groups in the equality analysis:

- In *Moore v. British Columbia (Education)*, 2012 SCC 61, the Supreme Court reiterated that the existence of a comparator group does not determine or define the presence of discrimination, but rather, at best, is just useful evidence. It added that insistence on a mirror comparator group would return us to formalism, rather than substantive equality, and "risks perpetuating the very disadvantage and exclusion from mainstream society the [*Human Rights*] *Code* is intended to remedy" (at paragraphs 30-31). The focus of the inquiry is not on comparator groups but "whether there is discrimination, period" (at paragraph 60).

- In *Quebec (Attorney General) v. A.*, 2013 SCC 5 at paragraph 346 (*per* Abella J. for the majority), the Supreme Court has reaffirmed that "a mirror comparator group analysis may fail to capture substantive equality, may become a search for sameness, may shortcut the second stage of the substantive equality analysis, and may be difficult to apply": *Withler*, supra at paragraph 60. The Supreme Court went so far as to cast doubt on the authority of *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83, [2002] 4 S.C.R. 325, an earlier case in which an unduly influential or determinative role was given to the existence of a comparator group – similar to what the Tribunal did here.

In light of these recent cases, the Tribunal's decision lies even further outside of the range of reasonableness.

[19] In oral submissions, the Attorney General questioned the Federal Court's examination of cases under section 15 of the Charter instead of restricting its analysis to cases specific to the Act. In my view, the Federal Court *had* to have regard to the Charter cases – and the same can be said for the Tribunal. The equality jurisprudence under the Charter informs the content of the equality jurisprudence under human rights legislation and *vice versa*: see *e.g.*, *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at pages 172-176; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at paragraph 27; *Moore*, *supra* at paragraph 30; *A.*, *supra* at paragraphs 319 and 328.

[20] As mentioned previously, the Federal Court based its conclusion of unreasonableness upon a second ground: the Tribunal's failure to consider the complaint under paragraph 5(*a*) of the Act. Here, in my view, the Federal Court's analysis is unimpeachable. The complaint refers globally to "section 5" (*i.e.*, both paragraphs 5(*a*) and 5(*b*)), certain of the allegations in the complaint do raise matters that potentially fall under paragraph 5(*a*), and earlier proceedings show that paragraph 5(*a*) was part of the complaint: Reasons, at paragraphs 216-220.

[21] The Federal Court relied upon an alternative ground for its finding of unreasonableness, namely that comparison with the provinces might be appropriate in light of the Government of Canada's adoption of provincial child welfare standards in its funding policies. I prefer not to comment upon this. The legal significance and factual relevance of the Government of Canada's adoption of provincial child welfare standards in its funding policies – and, for that matter, larger issues such as whether comparison can be made to provincial child welfare funding and whether

provincial funding constitutes relevant evidence deserving of weight in the analysis of discrimination – is best left for the Tribunal to consider alongside all of the evidence it will receive.

[22] In this regard, it bears recalling that discrimination is a broad, fact-based inquiry. Among other things, it requires "going behind the facade of similarities and differences", and taking "full account of social, political, economic and historical factors concerning the group": *Withler, supra* at paragraph 39. Consequently, the relevance and significance of particular facts, such as the existence or non-existence of a comparator, will vary in the circumstances. As the Supreme Court wrote in *Withler*, "the probative value of comparative evidence…will depend on the circumstances" (at paragraph 65).

[23] Accordingly, nothing in these reasons should be taken to express any view concerning what relevance and significance, if any, the Tribunal should assign to any of the evidence placed before us in this appeal. These matters will be for the Tribunal to decide in accordance with proper legal principles.

E. Procedural fairness

[24] The Tribunal considered material outside of the formal record on the motion. Accepting, for the sake of argument, this material is "extrinsic," I agree with the Federal Court that the Tribunal committed procedural unfairness in the circumstances of this important and hard-fought motion to dismiss the complaint. In these circumstances, the parties were entitled to know exactly what the Tribunal was considering and to have the opportunity to address it.

[25] The Attorney General submits that the respondents have not shown any prejudice arising from the Tribunal's consideration of extrinsic evidence and so the Federal Court should not have set aside the Tribunal's decision.

[26] The Attorney General is correct that in an appropriate case a court may find a lack of prejudice and, in its discretion, decide to leave the procedurally-flawed decision in place: *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202. However, on the facts before it, the Federal Court exercised its discretion to the contrary: Reasons, at paragraph 204. This Court can reverse the Federal Court's fact-based discretion only upon demonstration of palpable and overriding error or failure to give weight to all relevant considerations: *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6 at paragraph 43; *Community Panel of the Adams Lake Indian Band v. Adams Lake Band*, 2011 FCA 37 at paragraph 31. No such error has been shown here.

F. Disposition

[27] The parties have agreed that there should be no costs. Accordingly, I would dismiss the appeal without costs.

"David Stratas"
J.A.

"I agree
J.D. Denis Pelletier J.A."

"I agree
Wyman W. Webb J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-145-12
APPEAL FROM A JUDGMENT OF THE HONOURABLE MADAM JUSTICE MACTAVISH DATED APRIL 17, 2012, DOCKET NOS. T-578-11, T-630-11 AND T-638-11	
STYLE OF CAUSE:	The Attorney General of Canada v. Canadian Human Rights Commission *et al.*
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	March 6, 2013
REASONS FOR JUDGMENT BY:	Stratas J.A.
CONCURRED IN BY:	Pelletier and Webb JJ.A.
DATED:	March 11, 2013

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