Federal Court  Cour fédérale

Date: 20240215

Docket: T-231-23

Citation: 2024 FC 248

Ottawa, Ontario, February 15, 2024

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

ELIZABETH PORTMAN

Applicant

and

NATIONAL RESEARCH COUNCIL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Elizabeth Portman, suffers from a progressive form of multiple sclerosis. She brings this judicial review regarding the decision of the Canadian Human Rights Commission [Commission] declining to deal with her complaint [Decision] against the Respondent, the National Research Council of Canada [NRCC]. The Decision followed—and

adopted—a report for decision [Report] prepared by a human rights officer [Officer], which forms part of the Decision: *Canada (Attorney General) v Karas*, 2021 FC 594 at paras 24-48.

[2] The Applicant's complaint is rooted in discrimination based on the lack of accessibility resulting from buildings built in accordance with the National Building Code of Canada [Code], created by the NRCC. This impacts, according to the Applicant, housing, transportation, shopping, government services, hospitals and other built environments.

[3] The main issue on this judicial review is the reasonableness of the Decision. The more granular issues focus on: (i) the appropriateness of the Commission's factual determinations; (ii) whether the Commission should have addressed specifically the Applicant's reply submissions to the Report; and (iii) the sufficiency of the Commission's analysis.

[4] A reasonable decision is one that exhibits the hallmarks of justification, transparency and intelligibility, and is justified in the context of the applicable factual and legal constraints: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 99. The Applicant has the burden of establishing the decision was unreasonable: *Vavilov*, above at para 100.

[5] I am not persuaded that the Applicant has met her onus. For the more detailed reasons that follow, this judicial review application will be dismissed.

II. Additional Background

[6] The core of the Applicant's complaint is that built environments created using the Code are not accessible to persons with a disability like the Applicant, because the Code's minimum standards do not create accessible or barrier-free built environments. The Applicant frames the issue, i.e. the creation and implementation of the Code, as a discriminatory provision of services contrary to section 5 of the *Canadian Human Rights Act*, RSC 1985, c H-6 [*CHRA*]. See Annex "A" for relevant statutory provisions.

[7] The Commission declined to consider the complaint pursuant to paragraph 41(1)(d) of the *CHRA*, which deals with trivial, frivolous, vexatious, and bad faith complaints. After reviewing the complaint, the Report, and the Applicant's submissions responding to the Report, the Commission adopted the Report's recommendations and decided that the Code is not a "service" within the meaning of the *CHRA*.

[8] The Applicant argues that a service provider, offering services in a building, is not responsible for the built environment; rather, the minimum standards (i.e. the Code) are responsible. The Applicant thus sought a full hearing.

III. Analysis

A. *Appropriateness of the Commission's factual determinations*

[9] Contrary to the Applicant's submissions, I am not convinced that the Commission did not accept the complaint's factual backdrop as true.

[10] The Applicant relies on this Court's decision in *Alliance for Equality of Blind Canadians v Canada (AG)*, 2021 FC 860 [*Alliance FC 2021*] at para 37 for the proposition that the Commission must accept the allegations of facts in the complaint to be true. In the same cited paragraph, however, the Court adds that "…if the Commission locates the appropriate law, a court on judicial review must defer to the Commission's application of the legal standard to the uncontested facts before it, so long as the result is supportable on the record." In my view, this is what the Commission did here—it reasonably applied the applicable legal standard or test to facts in the complaint it accepted as true.

[11] The Applicant characterizes the Code as a "standard," and asserts that the territories rely on the Code for their "bare minimum" accessibility requirements. The Applicant recognizes, however, in pre- and post-Report submissions, that the Code is a non-binding template used by the provinces and territories, and that it is primarily adopted in full. This means that it may not be adopted in full, including in the Northwest Territories, where the Applicant previously resided. The Applicant specifically acknowledged that the *Human Rights Act*, SNWT 2002, c 18 exceeds the Code.

[12] The Report repeats these facts, albeit with different words, stating: "[The Code] is a document which is generally accessed for building purposes and by provincial and territorial

stakeholders, not by the general public" (at paragraph 31). Relying on these facts, the Commission determined that the Code was not a service.

[13] That the Report also describes the Code as a "reference tool" is not inconsistent, in my view, with the Commission's consideration of whether the Code is a service. The term "service" has been ascribed a jurisprudential meaning, i.e. something of benefit held out and offered to the public, and further, the benefit or assistance to the public is the essential nature of the service: *Watkin v Canada (Attorney General)*, 2008 FCA 170 [*Watkin*] at para 31; *Canada (Canadian Human Rights Commission) v Pankiw*, 2010 FC 555 [*Pankiw*] at paras 29, 32. I find that this meaning was the focus of the Officer's consideration of whether the Code is a "service," as is evident from the conclusion that "[i]t is not something of benefit that is held out to the general public, nor is it the essential nature of the Respondent" (at paragraph 32 of the Report).

[14] I find that the Applicant's arguments in this regard demand a level of perfection of the Decision that is not warranted in the circumstances: *Vavilov*, above at para 91.

[15] As this Court previously has observed, the "characterization of the complaint was also a factually-suffused task that [engages] the expertise of the Commission" and calls for "considerable deference": *Alliance FC 2021*, above at para 51, aff'd 2023 FCA 31 at para 7. I am not persuaded that the Commission's characterization of the Code is untenable or that the decision maker fundamentally misapprehended the facts before it (i.e. those taken as true in the complaint): *Vavilov*, above at para 125; *Alliance FC 2021*, above at paras 49-50.

B. *The Commission's consideration of the Applicant's reply submissions*

[16] I am not persuaded that the Applicant's reply submissions were not considered by the Commission or should have resulted in a supplemental report. In my view, the reply submissions did not raise any factual discrepancies; instead, they disagreed with the Officer's findings and repeated or restated earlier arguments.

[17] For example, the Applicant argues that the Commission did not respond to her submissions and jurisprudence regarding the test for frivolity, specifically *Konesavarathan v University of Guelph Radio*, 2020 FCA 148 and *McIlvenna v Bank of Nova Scotia*, 2014 FCA 203. Although the Report relies on different cases for the test, in my view there is no contradiction between the cases or with the Officer's statement of the law at paragraph 24 of the Report.

[18] In her reply submissions, the Applicant also argues that the *CHRA* should be given a large, liberal and purposive interpretation, and that almost all government activities are public services since they are incidental to a public relationship. These submissions were summarized at paragraph 22 of the Report. The Officer dismissed them at paragraph 27, saying that "not all government actions come within section 5 of the Act" and citing *Watkin* above. The Applicant's reply cites *Watkin* as well. In *Watkin*, the FCA noted that government actions will usually meet the "customarily available to the general public" criteria, but confirmed that the first step is always to determine whether the action is a "service." In that case, enforcement actions were not considered "services" (para 31).

[19] Further, while the Applicant's reply submissions criticize the Officer's description of a hypothetical situation in paragraph 31 of the Report, in my view the Officer here restates in a general way the Applicant's lived experiences described in the complaint in considering who is providing services. The Officer refers to the Applicant's recourse if she hypothetically could not enter the door of a building to access government services. The Applicant's complaint acknowledges that the ultimate service providers are not those who created the Code. Rather, the service providers rely on the Code to tell them what to do (at a minimum, as the Applicant asserts) for built environments.

C. *Sufficiency of the Commission's analysis*

[20] I find that the Officer's analysis is intelligible, logical and justified in light of the applicable factual and legal constraints.

[21] The Officer reviews the parties' submissions, summarizes the law, and explains why the Code is not a "service." Specifically, the Officer outlines the following characteristics of a "service": (a) it is a benefit held out as a service and offered to the public; and (b) the benefit to the public must be the essential nature of the service.

[22] The Officer determines that the Codes is not a service, because "[i]t is a document which is generally accessed for building purposes and by provincial and territorial stakeholders, <u>not by the general public</u>" (emphasis added) (paragraph 31 of the Report). Because the applicable test is conjunctive, the Officer's finding that the Code is not accessed by the general public means that

it was not necessary for the Officer to elaborate further on the conclusion that the Code is not the "essential character of the Respondent."

[23] In other words, read holistically and contextually, the reasons permit the Court to "to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn": *Vavilov*, above at para 97, citing *Komolafe v Canada (Minister of Citizenship and Immigration)*, 2013 FC 431 at para 11.

[24] That the Officer could have come to a different conclusion, including in respect of the interpretation of "service," in itself is insufficient to establish the unreasonableness of the Decision: *Pankiw*, above at para 33; *National Bank of Canada v Lavoie*, 2013 FC 642 at para 30. In my view, the Commission's determination not to deal with the Applicant's complaint pursuant to paragraph 41(1)(d) of the *CHRA*, is supportable on the record.

[25] Contrary to the Applicant's argument, I am satisfied that the Officer, in agreeing with the Respondent's submissions that the Code is not held out to the public, given the intended users, does not simply repeat the Respondent's submissions but instead makes a reasonable factual finding, notwithstanding the Applicant's disagreement with the characterization of the Code.

[26] I add that, in my view, the Respondent's submissions verge on unacceptable bolstering by raising public policy concerns and arguing that a "service" requires a direct impact on, or connection to, the public, rather than focusing on the test actually considered and applied by the Commission.

IV. Conclusion

[27] For the above reasons, the Applicant's judicial review application thus will be dismissed.

[28] I recognize that this outcome will be deeply disappointing to the Applicant. By bringing this judicial review application, she was attempting to "attack the root" of her lived inaccessibility to many built environments, rather than having to "clip the weeds one by one." While litigating building by building no doubt is exhausting and frustrating, there may be other non-litigious avenues open to the Applicant and others for effecting changes to the Code.

[29] Regarding the issue of costs, taking into account the Court's discretion under rule 400 of the *Federal Courts Rules*, SOR/98-106, I decline to award costs in this matter.

JUDGMENT in T-231-23

THIS COURT'S JUDGMENT is that:

1. The Applicant's application for judicial review is dismissed.

2. No costs are awarded.

"Janet M. Fuhrer"
Judge

Annex "A": Relevant Provisions

***Canadian Human Rights Act*, RSC 1985, c H-6.**
***Loi canadienne sur les droits de la personne*, LRC 1985, ch H-6.**

Denial of good, service, facility or accommodation **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.	**Refus de biens, de services, d'installations ou d'hébergement** **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.
Complaints **40 (1)** Subject to subsections (5) and (7), any individual or group of individuals having reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice may file with the Commission a complaint in a form acceptable to the Commission. […] **Investigation commenced by Commission** **(3)** Where the Commission has reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice, the Commission may initiate a complaint.	**Plaintes** **40 (1)** Sous réserve des paragraphes (5) et (7), un individu ou un groupe d'individus ayant des motifs raisonnables de croire qu'une personne a commis un acte discriminatoire peut déposer une plainte devant la Commission en la forme acceptable pour cette dernière. […] **Autosaisine de la Commission** **(3)** La Commission peut prendre l'initiative de la plainte dans les cas où elle a des motifs raisonnables de croire qu'une personne a commis un acte discriminatoire.
Commission to deal with complaint **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	**Irrecevabilité** **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) 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.	**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.

***Federal Courts Rules*, SOR/98-106.**
***Règles des Cours fédérales*, DORS/98-106.**

Awarding of Costs Between Parties **Discretionary powers of Court** **400 (1)** The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.	**Adjudication des dépens entre parties** **Pouvoir discrétionnaire de la Cour** **400 (1)** La Cour a le pouvoir discrétionnaire de déterminer le montant des dépens, de les répartir et de désigner les personnes qui doivent les payer.

FEDERAL COURT

SOLICITORS OF RECORD

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