Federal Court  Cour fédérale

Date: 20150630

Docket: T-569-15

Citation: 2015 FC 807

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, June 30, 2015

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

DAVID LESSARD-GAUVIN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

[1] This is a motion by the respondent asking the Court to strike out, without leave to amend, the amended notice of application filed by the applicant, on the ground that a final decision has yet to be issued by the federal board, commission or tribunal at issue, in this case the Canadian Human Rights Commission [Commission], with regard to various complaints of discrimination filed by the applicant.

[2] Paragraph 221(1)(*a*) of the *Federal Courts Rules*, SOR/98-106 [Rules] provides that the Court may, upon motion, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, if it discloses no cause of action or defence, as the case may be. The Court shall allow a motion to strike under paragraph 221(1)(*a*) only Rules only where, assuming the facts alleged in the notice of application are true, the Court concludes that the application is so clearly improper as to be bereft of any possibility of success (*David Bull Laboratories (Canada) Inc v Pharmacia Inc*, [1995] 1 FCR 588, 1994 CanLII 3529 (FCA); see also *Hunt v Carey Canada Inc*, [1990] 2 SCR 959, 1990 CanLII 90 (SCC) at p. 980). The Court must exercise its power to strike out pleadings with considerable prudence and reluctance (*Canada v Prentice*, 2005 FCA 395 at para 23). I have determined that the amended notice of application should be struck in its entirety, but that the applicant should be allowed to serve and file a re-amended notice of application.

[3] In his amended notice of application, the applicant is currently challenging a so-called "decision" dated March 12, 2015, by which a Commission officer indicated that the Commission accepted complaints where there was a direct link between the discriminatory act and at least one of the prohibited grounds of discrimination set out in the *Canadian Human Rights Act*, RSC 1985, c H-6 [Act]. However, the issues raised by the applicant are language-related and do not constitute a prohibited ground of discrimination. This letter states that the Commission is unable to help the applicant and refers him to the Office of the Commissioner of Official Languages. In his amended notice of application, the applicant also asks the Court to make a number of declarations of unconstitutionality, in particular a declaration that any Canadian statutory instrument that includes a closed, restricted or exhaustive list of prohibited grounds of discrimination is incompatible with section 15 of the *Canadian Charter of Rights and Freedoms*,

Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act (UK), 1982*, c 11 [Charter] and must therefore be interpreted as comprising an open list that would implicitly include any ground explicit or analogous to section 15 of the Charter, in addition to declaring the omission of language, political opinion or conviction, and social condition, as prohibited grounds of discrimination under the Act, as a breach of section 15 of the Charter.

[4] The respondent argues that the amended notice of application discloses no cause of action and is doomed to fail. First, the letter dated March 12, 2015, is not a decision, order, act or proceeding of a federal board, commission or other tribunal within the meaning of paragraph 18.1(3)(*b*) of the *Federal Courts Act*, RSC 1985, c F-7. In fact, the letter dated March 12, 2015, was written by an employee who has no decision-making authority and was therefore merely a courtesy letter for information purposes only (see *Kourtchenko v Canada (Minister of Citizenship and Immigration*), 1998 CanLII 7213 (FC); *Chiu v Canada (National Parole Board)*, 2005 FC 1516). Second, the application for review has become moot, given that, following the filing of the judicial review application, the Commission notified the applicant that it would hear his discrimination complaint. Third, the application for review is premature because there has been no final decision on the admissibility or merits of the applicant's discrimination complaint (as well as on five other complaint files involving the current applicant) (*Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 at paras 30-33 [*CB Powell*]) and, consequently, the applicant has no current interest in obtaining a declaration of unconstitutionality. The applicant must therefore file a new application for judicial review, if necessary, when a final decision is rendered by the Commission. And there is nothing keeping him from asking the Court to consolidate the judicial review applications once the Commission

has issued its final decision in the six complaint files the applicant refers to in his pleadings or written representations.

[5] For his part, the applicant counters that the letter dated March 12, 2015, constitutes a decision, as demonstrated by the Commission's Section 40/41 Reports, which indicate that his file was closed following the letter dated March 12, 2015, then reopened after the applicant filed his application for judicial review. Moreover, it is important that the Court be able to examine the lawfulness of the process followed by the Commission, given that in this case the applicant's complaint document was discredited and taken to be merely a request for information. Furthermore, in the event that the Commission did not dismiss the applicant's complaints, there would be no debate as to the constitutionality of the provisions in issue and the Commission could continue to dismiss complaints filed on these grounds by others. In addition, the applicant notes that certain aspects of the amended notice of application do not depend on the impugned decision. The applicant is seeking to have upcoming decisions to be made by the Commission regarding the six complaints raising prohibited grounds of discrimination not set out in section 3 of the Act (language, social condition and political convictions) consolidated in a single application for judicial review, where appropriate. Subsidiarily, the Court should only strike out those paragraphs in the amended notice of application that refer to the "decision" of March 12, 2015, to close his file. Moreover, while awaiting a final decision by the Commission, the Court should stay the proceedings – the applicant claiming that this way of proceeding is more economical and that the respondent would suffer no prejudice.

[6] The Court was informed at the hearing that the Commission is likely to issue a decision shortly on the admissibility of the complaint at issue in this application for judicial review once

the applicant has submitted his comments regarding the recommendation to dismiss his complaint, on the grounds that it is frivolous. During oral submissions by the Commission's counsel, who asked to intervene only on certain aspects of the file, he indicated to the Court that the Commission has no jurisdiction to examine constitutional issues or to declare a provision of its enabling statute inoperative. However, given that there is no final decision on the matter from the Commission as of yet, it would be an ungainly solution to separate the requests for a declaration of unconstitutionality from the rest of the application for judicial review, without converting it into an action.

[7] All things considered, I agree with the respondent's argument that the application for judicial review is premature and that there is no decision to review at this time. As the evidence in the record shows, the letter dated March 12, 2015, is not a decision or act of a federal board, commission or other tribunal and in the absence of a final decision, the Court must refuse to hear the application because it is premature (*CB Powell*, above). On the other hand, it is clear that the requests for a declaration of unconstitutionality are intrinsically linked to the application for judicial review as it is currently worded and, from a pragmatic view, the Court cannot separate the part of the application regarding alleged unconstitutionality from the part of the application that concerns the letter dated March 12, 2015, without creating a notice of judicial review that would contain no decision to review. In this case, the applicant has given no indication that he wishes to convert his judicial review application into a declaratory action, because he feels that the Court must have a complete factual portrait of the proceedings before the Commission before making determinations on the constitutional issues he intends to raise in the matter. In view of the submissions made by both parties at the hearing before the Court, it is highly likely that the

Commission will dismiss the applicant's complaints due to the fact that they are not based on one of the prohibited grounds of discrimination set out in section 3 of the Act.

[8] In this case, no suggestion has been made by the respondent that the declarations of unconstitutionality potentially sought by the applicant– in the event his complaints are dismissed for not involving one of the prohibited grounds of discrimination set out in section 3 of the Act – are frivolous or vexatious. Considering that the complaints review process is already well underway, and that there is every reason to believe that final decisions on the admissibility of the complaints will be issued shortly, it is in the interests of justice to allow the applicant to serve and file a re-amended notice of application once a final decision has been made, rather than force him to commence a new proceeding (*Simon v Canada*, 2011 FCA 6 at paras 8 *et seq.* [*Simon*]; *Hryniak v Mauldin*, [2014] 1 SCR 87, 2014 SCC 7 at paras 27-29).

[9] However, the same cautions set out by Justice Dawson in *Simon* at paras 17-18 apply here: the applicant must ensure that any further pleading comply with the Rules of the Federal Court governing pleadings, such as Rule 174, as a failure to comply with these Rules could lead to the new pleading being struck out (see for example *Simon v Canada*, 2011 FC 582). I would hasten to add, though, that the striking out of the amended notice of application, as it is currently worded, is solely due to its prematurity and the absence of a final decision; however, this does not mean that the applicant cannot submit a request for a declaration of unconstitutionality or that he cannot challenge the process followed by the Commission once it has made its final decision(s).

[10] For these reasons, the Court will order the striking out of the amended notice of application and a stay of proceedings until the Commission has rendered a final decision in the applicant's file.

ORDER

THE COURT allows the respondent's motion to strike and **ORDERS** that the amended notice of application currently before the Court be struck out, while providing an opportunity for the applicant to serve and file a re-amended notice of application, in the event the Commission were to dismiss the applicant's complaint on the ground that language does not constitute a prohibited ground of discrimination. In the interim, the proceedings before the Federal Court are stayed.

"Luc Martineau"
Judge

Certified true translation
Sebastian Desbarats, Translator

FERDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-569-15
STYLE OF CAUSE:	DAVID LESSARD-GAUVIN v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	QUÉBEC CITY, QUEBEC
DATE OF HEARING:	JUNE 18, 2015
ORDER AND REASONS:	MARTINEAU J.
DATED:	JUNE 30, 2015

APPEARANCES:

David Lessard-Gauvin	FOR THE APPLICANT (ON HIS OWN BEHALF)
Marie-Emmanuelle Laplante	FOR THE RESPONDENT
Daniel Poulin	FOR THE CANADIAN HUMAN RIGHTS COMMISSION

SOLICITORS OF RECORD:

David Lessard-Gauvin	FOR THE APPLICANT (ON HIS OWN BEHALF)
William F. Pentney Deputy Attorney General of Canada Québec City, Quebec	FOR THE RESPONDENT
Daniel Poulin Litigation Services Division	FOR THE CANADIAN HUMAN RIGHTS COMMISSION