Federal Court  Cour fédérale

Date: 20121220

Docket: T-1706-10

Citation: 2012 FC 1530

Ottawa, Ontario, December 20, 2012

PRESENT: The Honourable Mr. Leonard J. Mandamin

BETWEEN:

CANADIAN COUNCIL ON SOCIAL DEVELOPMENT, COMMUNITY SOCIAL PLANNING COUNCIL OF TORONTO, SOCIAL PLANNING COUNCIL OF WINNIPEG COMMUNITY DEVELOPMENT HALTON, CANADIAN ARAB FEDERATION, ONTARIO COUNCIL OF AGENCIES SERVING IMMIGRANTS, COUNCIL OF AGENCIES SERVING SOUTH ASIANS, CANADIAN MENTAL HEALTH ASSOCIATION – TORONTO, AFRICAN CANADIAN LEGAL CLINIC, NATIONAL ABORIGINAL HOUSING ASSOCIATION, SOUTH ASIAN LEGAL CLINIC OF ONTARIO, METRO TORONTO CHINESE & SOUTHEAST ASIAN LEGAL CLINIC

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application by the Canadian Council on Social Development and eleven other civil society organizations for a declaration that "the failure to include questions pertaining to race, ethnic or national origin, disability and Aboriginal ancestry in the 2011 Census breaches section 15(1) of the Charter and that this breach is not justified under section 1 of the Charter."

[2] For the reasons that follow, this application must be dismissed.

[3] Some legal context is necessary to situate this application. The requirement that the government conduct a census arises from our Constitution. In particular, section 8 of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, proclaims that a "Census of the Population of Canada" shall be taken in the year 1871 "and in every Tenth Year thereafter," in which "the respective Populations of the [then] Four Provinces shall be distinguished." The census is only mentioned again in the Constitution for its relevance to readjustments of representation in the House of Commons (*Constitution Act, 1867*, s 51), a long-since obsolete and repealed requirement that Canada pay to each province certain sums, partly on a per-capita basis, "for the Support of their Governments and Legislatures" (*Constitution Act, 1867*, s 118), and the procedure for amending the Constitution (*Constitution Act, 1982*, s 38, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11), all of which only require that the census provide an accurate counting of heads geographically. Section 91 of the *Constitution Act, 1867* gives the Parliament of Canada exclusive legislative authority over "The Census and Statistics."

[4] Pursuant to its authority under the Constitution, Parliament enacted the *Statistics Act*, RSC, 1985, c S-19. Certain provisions are relevant to this application:

19. (1) A census of population of Canada shall be taken by Statistics Canada in the month of June in the year 1971, and every fifth year thereafter in a month to be fixed by the Governor in Council.	19. (1) Le recensement de la population du Canada est fait par Statistique Canada à tous les cinq ans, à compter de juin 1971, dans le mois qui est fixé par le gouverneur en conseil.
(2) The census of population shall be taken in such a manner as to ensure that counts of the population are provided for each federal electoral district of Canada, as constituted at the time of each census of population.	(2) Le recensement de la population est fait de façon à veiller à ce que le dénombrement de la population soit établi pour chaque circonscription électorale fédérale du Canada, telle qu'elle est constituée lors du recensement.
(3) A reference in any Act of Parliament, in any order, rule or regulation or in any contract or other document made thereunder to a decennial census of population shall, unless the context otherwise requires, be construed to refer to the census of population taken by Statistics Canada in the year 1971 or in any tenth year thereafter.	(3) Lorsque, dans une loi fédérale ou dans une ordonnance, un décret, un arrêté, une règle, un règlement ou dans un contrat ou autre document qui en découle, il est fait mention d'un recensement décennal de la population, cette mention doit, sauf si le contexte s'y oppose, être interprétée comme désignant le recensement de la population fait par Statistique Canada en 1971 ou dans la dernière année de l'une des décennies subséquentes.
[…]	[…]
21. (1) The Governor in Council shall, by order, prescribe the questions to be asked in any census taken by Statistics Canada under section	21. (1) Le gouverneur en conseil prescrit, par décret, les questions à poser lors d'un recensement fait en vertu des articles 19 ou 20.

19 or 20.

(2) Every order made under subsection (1) shall be published in the Canada Gazette not later than thirty days after it is made.	(2) Chaque décret pris en vertu du paragraphe (1) est publié dans la Gazette du Canada au plus tard trente jours après qu'il a été pris.

[5] Pursuant to subsections 19(1) and 21(1) of the *Statistics Act*, Order in Council 2010-1077 ("Order in Council"), published in the Canada Gazette on August 21, 2010, prescribed both the timing of and the questions to be asked in the 2011 census. In a departure from recent practice, the Order in Council prescribed only one form of census, as opposed to both a "short-form" and a "long-form" census. The long-form census had been given to fewer households in Canada and canvassed the population on a broader range of population characteristics than the short-form census. The 2011 census contains questions relating to age, sex, and marital status, but does not address, as the long-form census previously did, race, ethnic or national origin, disability and Aboriginal ancestry. Those characteristics will be canvassed by the government in a separate, non-mandatory survey called the National Household Survey, authorized by section 8 of the *Statistics Act*.

[6] It is because of the inclusion of questions pertaining to age, sex, and marital status that these Applicants seek a declaration, as stated above, "that the failure to include questions pertaining to race, ethnic or national origin, disability and Aboriginal ancestry in the 2011 Census breaches section 15(1) of the Charter and that this breach is not justified under section 1 of the Charter." Despite some inconsistency, the Applicants eventually clarified at the hearing of this application that the discrimination they are claiming is on the face of the Order in Council

and that this application is not about any "adverse effect discrimination" that may result from, for example, unreliable data collection in the new scheme briefly described above, as was argued unsuccessfully in *Native Council of Nova Scotia v Canada (Attorney General)*, 2011 FC 72 [*Native Council of Nova Scotia*], and *Fédération des communautés francophones & acadienne du Canada c Canada (Procureur général)*, 2010 CF 999:

> Counsel for the applicants: "That [the arguments in those two cases] was the adverse effect argument, Justice. We are not making that argument. I want to be very clear here. This is a direct discrimination argument."

Discrimination under section 15(1)

[7] The parties agree that the test for discrimination under section 15(1) of the *Charter* was most recently confirmed by the Supreme Court of Canada in *R v Kapp*, 2008 SCC 41 at paragraph 41, as follows:

1. Does the law create a distinction based on an enumerated or analogous ground?; and
2. Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

[8] The Applicants rely on *Vriend v Alberta*, [1998] 1 SCR 493 [*Vriend*] regarding the first prong of the test, and argue:

> "In sum, because of its underinclusiveness, the 2011 Census creates an express distinction on the [sic] between age, marital status and sex and ethnic origin, Aboriginal ancestry and disability. Though this distinction does not cause members of these groups to be entirely deprived of all benefits under the *Statistic Act* [sic], it

> prevents them from being counted according to their race, disability and Aboriginal ancestry. As such, the Applicants have met the first aspect of the equality analysis."

[9] Beyond the faulty premises implied from that excerpt, the fatal and obvious flaw in the Applicants' argument is that it equates a distinction between protected or analogous grounds with a distinction based on a protected or analogous ground.

[10] In *Vriend*, the exclusion of "sexual orientation" as a ground for complaint under Alberta's human rights legislation was found to have a disproportionate impact on homosexuals compared to heterosexuals: See para 82. Even though the impugned legislation in that case was neutral on its face, because of its effects a distinction was created that was based on a protected or analogous ground, namely sexual orientation: See paras 86 and 88. *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 [*Eldridge*], also relied on by the Applicants, involved the discriminatory effects, as between deaf and hearing persons, of the translation services available at hospitals in British Columbia, thus, again, involving a distinction based on a protected or analogous ground, namely physical disability: See paras 55 and 60.

[11] The Order in Council in this case simply does not draw any explicit distinction based on an enumerated or analogous ground. It is within, not between grounds that one must look. A driver licensing regulation prescribing that a driver's date of birth (i.e. age), but not religion, be reflected on the face of drivers' licenses does not draw any explicit distinction based on an enumerated or analogous ground; rather, the distinction is between grounds, and is not offensive on that basis to the equality guarantee in section 15 of the *Charter*. On the other hand, if the

driver licensing regulation prescribed that membership in a specific religion be displayed, there would be an explicit distinction based on an enumerated or analogous ground, namely religion. Justice Zinn also readily came to the conclusion that there is no explicit distinction in the Order in Council based on an enumerated or analogous ground in *Native Council of Nova Scotia*: See para 46.

[12] Of course, even though no explicit distinction based on an enumerated or analogous ground is drawn on the face of the Order in Council, it may very well be that a distinction is created by the effects of that order, as was the case in both *Vriend* and *Eldridge*. However, as I have tried to make very clear above, the Applicants in no uncertain terms abandoned any argument that the Order in Council was discriminatory in light of its adverse effects. Thus, no distinction based on the effects of the Order in Council was advanced, much less proven in this application.

[13] This application therefore fails to meet the first prong of the section 15(1) test and is dismissed on that basis.

The application is also out of time

[14] The Respondent Attorney General raised the preliminary issue that this application was launched outside of the thirty day time limit pursuant to subsection 18.1(2) of the *Federal Courts Act*, RSC 1985, c F-7, and should therefore be dismissed for lateness.

[15] Subsection 18.1(2) of the *Federal Courts Act* provides as follows:

(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.	(2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

[Emphasis added]

[16] The Respondent raised the issue of the time limitation in his factum filed on May 9, 2011. The Applicants did not exercise their right of reply. The Applicants first took any position on this issue at the hearing of this application on November 23, 2011, which was that "based on [their] characterization of the application, [they did] not need a motion to extend." In particular, while the Respondent's authorities involved "specific administrative decisions" against the particular parties in those proceedings, theirs was an application involving "the exercise of general administrative authority and it's not the same kind of issue."

[17] If I have understood the Applicants' submission on this issue correctly, they argue that because Order in Council 2010-1077 was not an order made against them directly, or specifically

identifying them, the time limitation in subsection 18.1(2) of the *Federal Courts Act* does not apply to their application for judicial review of that order.

[18] There is simply no authority for that proposition. On the contrary, according to the plain wording of subsection 18.1(2), the thirty day window begins when the "federal board, commission or other tribunal [communicates the decision or order] … to the party directly affected by it [emphasis mine]." The Applicants must be parties "directly affected" by the Order in Council, for otherwise they would have no standing under the *Federal Courts Act* to bring the within application:

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.	18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

[Emphasis added]

[19] As I mentioned above, the Order in Council was published in the Canada Gazette on August 21, 2010, and it was not until two months later (i.e. twice the time limit) that the within application was launched.

[20] I am not convinced that the holding in *Krause v Canada*, [1999] FCJ No 179, 86 ACWS (3d) 4 (CA), a case referred to by the Applicants, acts so as to prevent the application of the time limitation to this application as framed. Critically, in *Krause*, the Federal Court of Appeal held that the Applicants did not seek to impugn any particular "decision or order:" See paras 20 and

23. Here, the Applicants seek nothing other than to impugn through declaration a discrete order – the Order in Council – on the basis that it is discriminatory on its face. Had this application been about adverse effect discrimination, on the other hand, *Krause* might be more apt since evidence of any adverse effects might not be available, and thus the application not ripen, until well after the publication of the Order in Council and the thirty day window following that. In this case, however, as I have said, the alleged discrimination is on the face of the Order in Council. Certainty demands that where this is the case, the application be brought promptly, within the timeframes created by the *Federal Courts Act*.

[21] The Order in Council, made pursuant to subsections 19(1) and 21(1) of the *Statistics Act*, is undoubtedly an "order" "of a federal board, commission or other tribunal" pursuant to subsection 2(1) of the *Federal Courts Act*, which provides:

"federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*;	« office fédéral » Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale, à l'exclusion de la Cour canadienne de l'impôt et ses juges, d'un organisme constitué sous le régime d'une loi provinciale ou d'une personne ou d'un groupe de personnes nommées aux termes d'une loi provinciale ou de l'article 96 de la *Loi constitutionnelle de 1867*.

[Emphasis added]

[22] For greater certainty, the Federal Court of Appeal recently confirmed in *Attorney General (Canada) v Larkman*, 2012 FCA 204 [*Larkman*], that "[a] thirty day deadline applies to applications for judicial review seeking to set aside a[n] […] Order in Council," "made under a federal statutory regime:" see paras 2 and 11. Although the particular relief sought in that case was *certiorari* (i.e. setting aside), *certiorari* and "declaratory relief" co-exist undistinguished in paragraph 18(1)(a) of the *Federal Courts Act*, and subsection 18(3) of the same statute provides that all the relief described in subsection 18(1) "may be obtained only on an application for judicial review [emphasis mine]." As excerpted above, the time limitation applies in respect of all "application[s] for judicial review in respect of a decision or an order [emphasis mine]." Thus, the plain meaning of the *Federal Courts Act* is that relevant to whether the time limitation provided in subsection 18.1(2) applies is whether the relief sought is "in respect of a decision or order," not what type of relief is sought.

[23] I am therefore satisfied that the time limitation in subsection 18.1(2) applies to this application as framed. Having determined that, it must be mentioned that this Court nevertheless has broad discretion to allow an extension of time before or after the expiry of the limitation period, according to the following well-established test:

(1) Did the moving party have a continuing intention to pursue the application?

(2) Is there some potential merit to the application?

(3) Has the Crown been prejudiced from the delay?

(4) Does the moving party have a reasonable explanation for the delay?

See: *Larkman*, above, at para 61; *Muckenheim v Canada (Employment Insurance Commission)*, 2008 FCA 249.

[24] The burden to satisfy this test is, and was the Applicants'. As mentioned above, the Respondent Attorney General took the position in his factum and also at the hearing of this application that the time limitation applied to this application. He was right. However, presumably because the Applicants have taken the position that they "do not need a motion to extend," they have neither brought such a motion nor adduced any evidence in this application to satisfy the above-mentioned discretionary test, either before or after the hearing of this application.

[25] Because the Applicants did not request an extension of time and adduce the evidence relevant to the above-mentioned test, I find this application is out of time.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application is dismissed.

2. The Respondent is awarded its costs which are fixed at $1,500.00, inclusive of fees, disbursements and taxes.

"Leonard S. Mandamin"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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