

Federal Court



Cour fédérale

Date: 20181210

Docket: T-1857-17

Citation: 2018 FC 1236

Toronto, Ontario, December 10, 2018

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

ALEXANDRE PAPOUCHINE

Applicant

and

BEST BUY CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a Canadian Human Rights Commission [CHRC] decision, dated November 2, 2017, in which the CHRC decided not to deal with the Applicant's complaint on the grounds that it was not within the CHRC's jurisdiction [the Decision].

[2] As explained in more detail below, this application is dismissed, because I have found that the CHRC was correct in concluding that it did not have jurisdiction over the Applicant's human rights complaint.

II. Background

[3] The Applicant, Alexandre Papouchine, is a Russian-born Canadian citizen who lives in Toronto, Ontario. The Respondent is Best Buy Canada [Best Buy], a business with its head office in Burnaby, British Columbia, which is a retailer and, and as it describes itself, an "e-tailer", of products and services primarily within the consumer electronics category. Best Buy's website states that it operates nearly 200 locations across Canada.

[4] In October 2016, Mr. Papouchine visited a Best Buy retail store in Toronto and inquired about purchasing an "open-box" laptop. Because it was an open-box item, the laptop did not carry a manufacturer's warranty as it otherwise would. Mr. Papouchine asked for a discount because of the lack of protection. According to Mr. Papouchine, employees at the store informed him that they had no authority to offer such a discount but suggested Mr. Papouchine contact Best Buy's head office to inquire further.

[5] Mr. Papouchine then communicated by email with Best Buy customer service, which operates from the company's Burnaby head office. Mr. Papouchine's inquiry was addressed by a Best Buy employee who informed him that no further discount would be offered. Mr. Papouchine communicated further with customer service, raising concerns about this decision, including alleging discrimination, but Best Buy did not change its decision.

[6] Mr. Papouchine then filed a complaint with the British Columbia Human Rights Tribunal [BCHRT], which received the complaint on October 24, 2016. The grounds for the complaint were listed as discrimination in the area of services based on sex, gender identity, place of origin, and ancestry. The BCHRT wrote to Mr. Papouchine on November 30, 2016, advising that it did not accept the complaint for filing, finding that the events Mr. Papouchine described showed no connection to protected personal characteristics. It also noted that in the past the BCHRT has held that internet commerce constituted a telecommunications-type business, bringing such a complaint under federal jurisdiction (i.e. that of the CHRC) and that, even if the matter was not under federal jurisdiction, it would not be a matter for the BCHRT if the sale or communication took place in Ontario. The BCHRT stated that, as Mr. Papouchine's allegations did not establish that the event in question took place in British Columbia, the BCHRT did not appear to have jurisdiction over his allegations.

[7] Mr. Papouchine subsequently filed his complaint with the CHRC on February 19, 2017. In a report described as a "Section 40/41 Report," dated June 21, 2017, a Human Rights Officer recommended that the CHRC not deal with the complaint because it does not fall within federal jurisdiction. Mr. Papouchine made written submissions on July 12, 2017 on the subject of the CHRC's jurisdiction, and, on November 2, 2017, the CHRC issued the Decision that is the subject of this application for judicial review, deciding not to deal with the complaint on the grounds that it was not within the CHRC's jurisdiction.

III. Decision Under Review

[8] In its Decision, the CHRC agreed with and adopted the analysis of the Section 40/41 Report. The CHRC explained that it cannot deal with a complaint if the respondent does not fall under federal jurisdiction. The CHRC stated that, in deciding the jurisdiction question, it may consider the following factors:

- A. What are the regular day-to-day activities of the respondent? (Only regular day-to-day activities determine whether the respondent is federally or provincially regulated); and
- B. If the respondent is a transportation business, do its employees regularly travel between provinces and/or territories?

[9] The CHRC also noted that federal jurisdiction is only established where the nature of an organization's operations and its normal activities can be characterized as a federal undertaking, service or business.

[10] Following references to sections 91 and 92 of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 [*Constitution Act, 1867*] the CHRC described Best Buy as a retail store operator whose regular day-to-day activities are the sale of retail goods to customers at its stores and through its website, with each sale being a private contract between it and an individual customer. It concluded that Best Buy falls under Property and Civil Rights pursuant to s 92(13) of the *Constitution Act, 1867* and that its activities are entirely within the purview of provincial jurisdiction and not integral to the operations or functioning of a federal

undertaking. The CHRC also noted that, even if Mr. Papouchine's concerns stemmed from an internet transaction with Best Buy, this would not change the jurisdiction of the complaint, as internet commerce also falls under provincial jurisdiction and is not related to telecommunications.

[11] The CHRC therefore concluded that it does not have jurisdiction over Mr. Papouchine's complaint.

IV. Issues and Standard of Review

[12] Mr. Papouchine's Memorandum of Fact and Law identifies 13 issues raised by his application for judicial review. At the hearing of the application, his oral submissions focused upon what he described as the principal issue, whether the CHRC erred in concluding that it did not have jurisdiction over Best Buy, although he advised that he was not withdrawing any of the other issues.

[13] Best Buy submits that the sole issue for the Court's consideration, other than selecting the applicable standard of review, is whether the CHRC was correct in its conclusion that it does not have jurisdiction over Best Buy with respect to Mr. Papouchine's human rights complaint. As suggested by that articulation of the issue, Best Buy takes the position that the issue of jurisdiction as framed by Mr. Papouchine is constitutional in nature and the applicable standard of review is therefore correctness. Mr. Papouchine concurs in this position. I agree (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 58) and will therefore apply the correctness standard to my review of the CHRC's decision on its jurisdiction.

[14] I also agree with Best Buy that this is the sole issue for the Court's consideration. I have reviewed all the issues listed in Mr. Papouchine's Memorandum. These principally represent either alternative formulations of the jurisdictional question or arguments in support of Mr. Papouchine's position on that question. I consider these arguments below.

V. Analysis

[15] Section 41(1) of the *Canadian Human Rights Act*, RSC 1985, c H-6 provides that, subject to s 40 (which is not relevant to the issue before the Court), the CHRC shall deal with any complaint filed with it unless certain circumstances apply, including where it appears to the CHRC that the complaint is beyond its jurisdiction. It was pursuant to this provision that the CHRC declined to deal with Mr. Papouchine's complaint, as it concluded that Best Buy did not fall under federal jurisdiction and therefore did not fall within the jurisdiction of the CHRC.

[16] Mr. Papouchine argues that the CHRC erred in its conclusion that Best Buy's activities fall under provincial jurisdiction over "Property and Civil Rights in the Province" pursuant to s 92(13) of the *Constitution Act*, erred in concluding that Internet commerce falls under provincial jurisdiction, and erred in failing to conclude that Best Buy's activities fall under federal jurisdiction over "The Regulation of Trade and Commerce" pursuant to s 91(2) of the *Constitution Act, 1867*.

[17] With respect to s 92(13), Mr. Papouchine submits that the CHRC erred in that its Decision referred to this head of power as granting the provinces jurisdiction over "Property and Civil Rights" and omitted from its analysis consideration of the words "in the Province". His

position is that, as Best Buy's activities take place in several provinces and potentially involve communications and shipment of products between Best Buy employees in one province and customers in another, its activities do not fall under s 93(13). Rather, he submits that Best Buy's activities represent "commerce", within federal jurisdiction under s 91(2).

[18] Turning to the analysis performed by the CHRT, I consider it to have correctly focused upon Best Buy's regular day-to-day activities in assessing whether or not it falls within federal jurisdiction (see, e.g. *Northern Telecom Ltd v Communication Workers of Canada*, [1980] 1 SCR 115 at para 31). I also do not consider CHRT's failure to note that s 92(13) includes the words "in the Province" to suggest a misunderstanding of the scope of that provincial head of power. As explained by Professor Peter W. Hogg in *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Carswell, 2007), at 615, the provinces' jurisdiction over property and civil rights is extensive:

It remains true, however, that even after proper accommodation has been made for the catalogue of exclusive federal powers, property and civil rights in the province still covers most of the legal relationships between persons in Canada. The law relating to property, succession, the family, contracts and torts is mainly within provincial jurisdiction under s. 92(13). ...

[19] Further, as argued by Best Buy, the federal power to regulate trade and commerce is not inconsistent with the provincial jurisdiction over matters of private contract between parties (see *Parsons v Citizens' Insurance Co* (1880), 4 SCR 215, at 243).

[20] The Decision demonstrates that the CHRC considered whether the nature of Best Buy's regular day-to-day activities, involving the sale of consumer goods through retail store locations

and its website, are such that it can be characterized as a federal undertaking, service or business. It concluded that each sale between Best Buy and its customers constitutes a private contract, such that it is subject to provincial jurisdiction.

[21] The CHRC also considered the effect of sales stemming from Internet transactions and concluded that this would not change the jurisdictional analysis, as Internet commerce still falls under provincial jurisdiction and is not related to the federally-regulated field of telecommunications. Mr. Papouchine's arguments in this application focused significantly on this aspect of the analysis, with the parties relying on jurisprudence and tribunal decisions that they considered to support their respective positions on this issue.

[22] Mr. Papouchine relies on the decision of the Federal Court of Appeal in *Augustine's School Bus Inc v Asher*, 2001 FCA 109 [*Augustine's School Bus*], which concluded that a school bus line was subject to federal labour relations legislation, because its extra-provincial activity was continuous and regular, notwithstanding that such activity constituted only a small percentage of its business.

[23] Similarly, Mr. Papouchine refers the Court to the decision of the Ontario Court of Appeal in *Ottawa-Carleton Regional Transit Commission v Amalgamated Transit Union, Local 279 et al* (1983), 44 OR (2d) 560, (Ont CA) [*Ottawa-Carleton*], which concluded that a passenger bus service serving both Ottawa, Ontario and Hull, Québec was an interprovincial work or undertaking, within s 92(10)(a) of the *Constitution Act, 1867*, and was therefore subject to federal labour relations legislation, notwithstanding that only a small portion of the service

consisted of bus routes crossing from Ontario to Québec. The Court held that there was one undertaking, an integral part of which was the interprovincial component.

[24] I do not find these authorities, derived from the transportation industry, to be of particular assistance in the present context. In both *Augustine's School Bus* and *Ottawa-Carleton*, the nature of the parties' business operations was the transportation of passengers, which included to a limited extent the carriage of passengers across provincial boundaries. In the present case, the nature of Best Buy's business is the sale of consumer electronics and related products and services, which take place within a province. I do not consider the fact that it has retail stores in various provinces or that its communications with customers, or its transportation of products before delivery to customers, may cross provincial boundaries, to render it a federal undertaking.

[25] Nor do I consider such a result to arise from Best Buy's use of the Internet, which facilitates its business activities but is not at the core of those activities. On this point, both parties relied upon the decision of the British Columbia Human Rights Tribunal in *Cristiano v Canadian Society of Immigration Consultants*, 2016 BCHRT 175 [*Cristiano*], as informing the correct analysis to be performed when a party employs the Internet in the conduct of its business. That case involved a discrimination complaint against the respondent Canadian Society of Immigration Consultants [CSIC], a federally-incorporated not-for-profit society which ran an on-line training program for persons studying to become immigration consultants. In concluding that the CSIC's operation was under federal jurisdiction, the BCHRT held as follows at paragraphs 28 to 34:

[28] The commonality of the categories in s. 92(1)(a) of the *Constitution Act, 1867* is that there is a crossing of borders inherent

in the operation of the undertaking. Telegraphs had physical wires that went from place to place. Whether a particular message crossed any border was immaterial; the undertaking was within the jurisdiction of the government of Canada. Now, the same messaging is accomplished with the Internet and, perhaps, without the need of a wire.

[29] That said, the use of telephones and the Internet is ubiquitous in Canadian working life and leisure. Simply using these modes of communication cannot solely be determinative of jurisdiction. Many people rely on access to the Internet at work and for commerce.

[30] To demonstrate: a person can arrange a taxi ride in a number of ways. They could hail a taxi on the street. They could telephone the taxi company and ask for a taxi to meet them somewhere for pick-up. Finally, the potential rider could use an app on their smartphone, the app would use the GPS feature to locate the caller and the taxi would be dispatched via software. The writer gets the same service: a ride from point A to point B. Essentially, it is a locally provided service and is governed provincially due to other provisions in s. 92.

[31] The same kind of analysis can be made with on-line hotel reservations or other types of services. The aspect that these transactions have in common is that the service delivery occurs in one place.

[32] Compare and contrast with what occurs with CSIC. While it has a registered address in BC, the service it provides takes place across borders. At least one teacher is from the USA and Ms. Cristiano herself is not from BC so she does not receive her education in BC. The conversations that she had about her training took place in Ontario, not BC. As agreed, there is no “bricks and mortar” facility that is the school. The essence of the CSIC e-Academy is in cyberspace. Notwithstanding that it provides an educational service, it appears as if the only way it operates is via the Internet.

[33] I am drawn to the excerpt from Prof. Patrick Monahan in *Constitutional Law*, 2nd ed. at pps. 366-367 as quoted in *Stark*:

Since Internet service providers are integral to the transmission of telecommunications and from one province to another and around the world, they must be regarded as federal undertakings subject to exclusive federal jurisdiction pursuant to Section

92(1)(a). Moreover, any other undertakings that participate in or facilitate the transmission of communications or information via the Internet as a regular or continuous part of their business must be regarded as falling within exclusive federal jurisdiction.

[34] The education delivered by CSIC is delivered via the Internet, and in no other way. It must be concluded that the Internet is an integral and essential aspect of its operation. Thus, it appears to me that CSIC's operation is under federal jurisdiction.

[26] While a decision of an administrative tribunal is of somewhat limited precedential value, I consider the analysis in *Cristiano* to assist my consideration of the impact of the "e-commerce" aspect of Best Buy's business. While there is no particular evidence before the Court on the portion of Best Buy's business that is conducted through its website as opposed to its retail store locations, it is clearly at least in part a "bricks and mortar" retailer. Its business does not have the characteristics (its essence being in cyberspace and operating solely via the Internet) which resulted in the BCHRT concluding that the CSIC was under federal jurisdiction.

[27] Rather, I consider the analysis in paragraphs 29 to 31 of *Cristiano* to be applicable to Best Buy's operations. The fact that Best Buy uses its website as a sales tool, or in the case at hand used email as a communications tool, cannot be determinative of the jurisdictional question. Mr. Papouchine submits that the examples of a taxi or hotel company are distinguishable from Best Buy's operations as, regardless of how or from where a customer communicates with the taxi or hotel company, the service will ultimately be provided at one location in a particular province. In my view, the same analysis applies to Best Buy's business. Just as when one is booking a hotel, communications between the customer and Best Buy may take place across interprovincial boundaries. However, the effect of the resulting transaction is

Best Buy providing the customer with a product at a particular location in a particular province. While the product may have originated from another province, that fact is incidental to the transaction between Best Buy and the customer.

[28] I therefore find that the CHRC was correct in its constitutional analysis, leading to the conclusion that Best Buy does not fall within federal jurisdiction and that Mr. Papouchine's human rights complaint is not within the jurisdiction of the CHRC.

[29] Mr. Papouchine also advances arguments based on the conclusion by the BCHRT, in its November 30, 2016 decision, that it did not have jurisdiction over his complaint. He submits that, having reached that conclusion, the BCHRT therefore exceeded its jurisdiction by also concluding that he did not establish a *prima facie* case of discrimination. However, the Federal Court has no jurisdiction over the BCHRT, as it is not a federal board, commission or other tribunal over which the Court has jurisdiction to conduct judicial review under s 18 of the *Federal Courts Act*, RSC 1985, s F-7. I therefore make no finding on this argument.

[30] Mr. Papouchine also submits that the jurisdictional conclusion of the BCHRT, and the fact that Best Buy did not challenge that conclusion before the BCHRT, gives rise to issue estoppel, precluding the finding by the CHRC that it did not have jurisdiction over his complaint. In addressing this argument, I rely on the decision of the Supreme Court of Canada in *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at 477, which describes the preconditions to the operation of issue estoppel as: (a) that the same question has been decided; (b) that the judicial decision which is said to create the estoppel was final; and (c) that the parties to the judicial

decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[31] At the outset, I note that I have difficulty with the proposition that the decision of one administrative tribunal (in this case the BCHRT), as to the jurisdiction of another administrative tribunal (in this case the CHRC), can give rise to issue estoppel so as to be determinative of the latter tribunal's jurisdiction. However, regardless of that point, it is clear to me that the preconditions to the operation of issue estoppel do not apply in the present case, as the BCHRT decision of November 30, 2016 cannot be regarded as having decided the question whether the CHRC has jurisdiction over Mr. Papouchine's complaint.

[32] I agree with the characterization of that decision offered by Best Buy's counsel at the hearing of this application, that the decision was based principally on the merits of the complaint rather than the issue of the tribunal's jurisdiction. The BCHRT did not accept the complaint for filing because it failed to describe conduct that could contravene the *BC Human Rights Code*, RSBC 1996, c 210. The conclusion of the BCHRT was that Mr. Papouchine described nothing in Best Buy's conduct to suggest that it was influenced by a protected personal characteristic. The BCHRT does go on to address the jurisdictional issue, concluding that it does not appear to have jurisdiction over Mr. Papouchine's allegations. However, it raises the possibility that the matter would fall under either federal jurisdiction or that of Ontario and reaches no definitive conclusion on either. I therefore find no basis for the application of the principles of issue estoppel in this case.

VI. Conclusion

[33] Having considered the arguments raised by Mr. Papouchine and having found no reviewable error in the Decision, this application for judicial review must be dismissed.

[34] Best Buy has claimed costs and, having succeeded in responding to this application, is entitled to an award of costs. At the hearing, both parties expressed interest in making an effort to reach agreement on quantification of costs following receipt of my decision on the merits of the application. My Judgment will therefore provide the parties an opportunity to reach agreement, failing which they will have an opportunity to make brief written submissions on the quantification of costs.

JUDGMENT IN T-1857-17

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.
2. The Respondent is awarded costs of this application.
3. The parties shall confer with each other on the quantification of costs in this application and, within 14 days of the date of this Judgment, shall
 - a) advise the Court in writing if agreement has been reached on such quantification; or
 - b) failing such agreement, provide the Court with brief written representations, not exceeding two pages from each party, on such quantification.

"Richard F. Southcott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1857-17

STYLE OF CAUSE: ALEXANDRE PAPOUCHINE v BEST BUY CANADA

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: DECEMBER 3, 2018

JUDGMENT AND REASONS: SOUTHCOTT J.

DATED: DECEMBER 10, 2018

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