

Date: 20090924

**Dockets: A-382-08
A-440-08**

Citation: 2009 FCA 273

**CORAM: SEXTON J.A.
LAYDEN-STEVENSON J.A.
TRUDEL J.A.**

BETWEEN:

**CANADIAN HUMAN RIGHTS COMMISSION
and BOB BROWN**

Appellants

and

**THE NATIONAL CAPITAL COMMISSION
and THE ATTORNEY GENERAL OF CANADA**

Respondents

Heard at Ottawa, Ontario, on September 23, 2009.

Judgment delivered at Ottawa, Ontario, on September 24, 2009.

REASONS FOR JUDGMENT BY:

LAYDEN-STEVENSON J.A.

CONCURRED IN BY:

**SEXTON J.A.
TRUDEL J.A.**

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REASONS FOR JUDGMENT

LAYDEN-STEVENSON J.A.

[1] The Canadian Human Rights Commission and Bob Brown appeal from a decision of the Federal Court allowing, in part, the National Capital Commission's (NCC) application for judicial review of a decision of the Canadian Human Rights Tribunal (CHRT). The appeals were consolidated by order of Pelletier J.A. dated October 24, 2008. The application judge's decision is reported as 2008 FC 733.

[2] Mr. Brown is a quadriplegic and requires the use of a wheelchair. The CHRT found that the NCC discriminated against Mr. Brown in constructing the York Street Steps, between Sussex Drive and MacKenzie Avenue in Ottawa, without universal access. It further held that the elevator constructed at the Daly Site, 130 metres from the steps, did not constitute reasonable accommodation.

[3] The application judge identified and determined five issues. He applied a correctness standard of review to each issue (paragraphs 64, 90 and 92 of the reasons for judgment). The principal basis of this appeal is with respect to his determination that Mr. Brown had not been discriminated against because reasonable accommodation had been provided. I will confine my brief comments to this issue.

[4] The appellants contend that the application judge erred in applying a standard of review of correctness. Relying on *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 (*Dunsmuir*), the appellants maintain that “deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity.” Further, in *Chopra v. Canada (Attorney General)*, [2008] 2 F.C.R. 393 (*Chopra*) this Court concluded that the standard of review of a human rights tribunal on questions of law will not always be correctness and will call for deference “on those questions of law with which it is most intimately familiar.”

[5] For clarity, the central issue on appeal may be reformatted to ask whether the CHRT erred in concluding that there was discrimination for which there was not a *bona fide* defence. This is a

question of mixed fact and law and requires the CHRT to apply its enabling legislation to the facts before it. The *Canadian Human Rights Act*, R.S., 1985, c. H-6 does not contain a privative clause nor is there a statutory right of appeal. The particular question in issue is one with which the CHRT is intimately familiar and one that falls within its specialized expertise. Consequently, in my view, the reasoning in *Dunsmuir* and *Chopra* dictates a standard of review of reasonableness.

[6] The application judge's penultimate conclusion was that "the Daly site elevator is a reasonable alternative form of accommodation to the York Street Steps." The appellants maintain that it was not open to the application judge to substitute his opinion for that of the CHRT. I agree. The application judge, having identified a number of errors on the part of the CHRT, ought to have returned the matter to the CHRT.

[7] That said, I see no error in the application judge's findings that the analysis of reasonable accommodation requires looking at the situation globally (paragraphs 121-129 of the reasons for judgment) and that the assessment of reasonable accommodation is possible only after a proper balancing of the factors (paragraphs 137-139 of the reasons for judgment). The CHRT gave short shrift to these requirements (paragraph 249 of its reasons). It is obvious to me from the application judge's reasons that, had he applied a reasonableness standard of review, he would have concluded that the failure of the CHRT to conduct its analysis in accordance with these requirements renders its decision unreasonable.

[8] I would add that I find the determinations of the CHRT regarding the underlying purpose for the construction of the steps (paragraphs 88, 175, 180 and 262 of its reasons) internally inconsistent with its findings that the NCC ought to have provided access at the steps (paragraphs 251, 252 and 254 of its reasons). The latter finding is inconsistent with the accepted purposes, having regard to the available options at the time of construction.

[9] On the one hand, the CHRT held that the steps should have been constructed in a manner such that access could be provided at the site. On the other hand, it held that considerations of aesthetics, architecture and history were permissible. To construct the steps in a manner that provides access at the site, of necessity, would require compromising the very considerations which the CHRT determined were appropriate.

[10] The noted inconsistency is but one indication illustrative of the application judge's finding that the CHRT failed to balance the factors required by the reasonable accommodation analysis and failed to consider the issue globally. Either it was unreasonable for the NCC to construct the York Street steps in such a manner or it was unreasonable for it to provide access at the site. It cannot be both.

[11] I would allow the appeal. I would set aside the judgment of the application judge and rendering the judgment he ought to have given, I would set aside the decision of the CHRT and remit the matter to a differently constituted CHRT for determination on the existing record along

with such additional evidence as the parties deem necessary. In the circumstances, I would make no order for costs.

[12] A copy of these reasons will be placed in Court File Number A-440-08.

"Carolyn Layden-Stevenson"

J.A.

"I agree
J. Edgar Sexton J.A."

"I agree
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS: A-382-08, A-440-08

**APPEAL FROM A JUDGMENT OF THE FEDERAL COURT, DATED JUNE 13, 2008,
DOCKET NO. T-1117-06**

STYLE OF CAUSE: CANADIAN HUMAN RIGHTS
COMMISSION and BOB BROWN
v. NATIONAL CAPITAL
COMMISSION AND THE AGC

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: September 23, 2009

REASONS FOR JUDGMENT BY: LAYDEN-STEVENSON J.A.

CONCURRED IN BY: SEXTON J.A.
TRUDEL J.A.

DATED: September 24, 2009

APPEARANCES:

Mr. Philippe Dufresne FOR THE APPELLANT
CHRC

Mr. David Baker FOR THE APPELLANT
Bob Brown

Mr. Lynn H. Harnden FOR THE RESPONDENT
Mr. Sébastien Huard National Capital Commission

No one appearing FOR THE RESPONDENT
Attorney General of Canada

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