



Canada (Attorney General) v Jodhan

2012 FCA 161

Country: Canada

Region:

Year: 2012

Court: Federal Court of Appeal

Health Topics: Disabilities, Health information

Human Rights: Freedom from discrimination, Right of access to information

Facts

Decision and Reasoning

HEADNOTE

Ms. Jodhan, the respondent, was visually impaired and experienced numerous difficulties accessing government online services and information. The respondent claimed that the government had failed to develop and enforce standards to ensure all government websites and online services were accessible to visually-impaired individuals. The Federal Court held that the respondent was denied equal access to the online information and services, and this constituted discrimination on the basis of physical disability and therefore violated the appellant's rights under s. 15(1) of the Canadian Charter of Rights and Freedoms. The Federal Court of Appeal upheld the Federal Court's decision.

FACTUAL AND PROCEDURAL BACKGROUND

Ms. Jodhan, the respondent, who is visually impaired, runs an accessibility consulting business analyzing products and services for persons with special needs. The respondent experienced difficulties accessing different online services including: applying for employment through a government site (needing help by phone to complete her application), accessing information on Statistics Canada and Service Canada Web sites, failing to complete the 2006 online Census return, and obtaining information on the Canada Pension Plan and employment programs.

As part of the government's initiative to increase online informational and interactive services, the Treasury Board of Canada developed the Communications Policy of the Government of Canada (the "Policy"). As part of the policy, the Common Look and Feel Standards for the Internet (the "CLF Standard") were enacted and international guidelines were incorporated to ensure the online services were accessible to all Canadians. To be accessible to the visually impaired, web content must be designed in a compatible and accessible manner so that assistive technologies can navigate and interpret the information.

The respondent sought a declaration that the government had failed to develop, maintain, and enforce standards to ensure all Government of Canada websites and online services were accessible for visually-impaired individuals. The respondent alleged that this infringed her right to equal protection and equal benefit of the law without discrimination based on physical disability and therefore unjustifiably violated s. 15 of the Canadian Charter of Rights and Freedoms (the Charter).

The Federal Court held that the Communications Policy and CLF Standard created a distinction between the visually impaired and those who were not, due to systemic failures in application of the Policy and Standard, and this created a disadvantage for the blind. The Court held the denial of equal access to and benefit from online government information and services was discrimination on the basis of being blind, and a violation of the respondent's rights under s. 15(1) of the Charter. The Court also held that this case was representative of a broader system-wide failure by the Canadian government to monitor and ensure compliance with the accessibility standards, and this failure was an additional infringement of s. 15 of the Charter. The Attorney General appealed this decision, claiming that the respondent had not been discriminated against because there was no denial of a benefit, and there was no additional free-standing right owed to visually impaired persons for the government to monitor and enforce the CLF Standard.

RELEVANT LEGAL PROVISIONS

Canadian Charter of Rights and Freedoms

s. 15 (1): Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Policy Statement of the Communications Policy of the Government of Canada

s. 4: Employ a variety of ways and means to communicate, and provide information in multiple formats to accommodate diverse needs. Government information must be broadly accessible throughout society. The needs of all Canadians, whose perceptual or physical abilities and language skills are diverse, must be recognized and accommodated. Information must be accessible so citizens, as responsible members of a democratic community, may be aware of, understand, respond to and influence the development and implementation of policies, programs, services and initiatives. Information must be available in multiple formats to ensure equal access. All means of communication - from traditional methods to new technologies - must be used to reach and communicate with Canadians wherever they may reside. Modern government requires the capacity to respond effectively over multiple channels in a 24-hour, global communications network.

The Court held that there was no additional s. 15 Charter right that required the government to monitor and enforce accessibility standards, separate from the s. 15 rights owed in actual provision of the online information and services. Although failure to monitor and enforce the standards may have caused the violation of the respondent's s. 15 rights, it was not in itself an infringement of s. 15. The only right at issue in this case was the respondent's s. 15 right to equal benefit of the law, which in this case was benefit from access to online government information and services.

The Court held that the respondent's s. 15(1) Charter rights were violated by the government's failure to ensure equal access for the visually impaired to online government information and services. The Court found that the facially neutral Communications Policy and CLF Standard created a distinction between the visually impaired and others on the basis of their physical disability, because the Standard was not properly implemented or enforced and this resulted in many websites being inaccessible to the visually impaired. The respondent therefore received different treatment because of her disability. The Court further found that this distinction created a disadvantage that amounted to discrimination. The respondent and other visually impaired persons were systematically denied access to online government information and services. Although access to information and services was available through alternative means (e.g. by mail, telephone, and in-person visits), the respondent and the visually impaired were entitled to full access to Canadian government information and services including through online channels. The Communications Policy was meant to allow access to information at one's choice of time and place. If the visually impaired were relegated to alternative channels, these people would not be choosing their own time and place to access services. Furthermore, forcing the respondent to rely on sighted assistance was demeaning, and propagated the view that the visually impaired are less capable and worthy. This resulted in further stigmatization and reinforcement of stereotypes of visually impaired people, and infringed their independence, self-reliance, control, dignity and self-esteem. Properly enforcing accessibility standards could have prevented this discrimination.

The Court held that a s. 1 Charter defence was not raised by the Attorney General, and therefore was not considered.

The Court held that the appeal was allowed in part; the applicant was awarded costs and a declaration that the Treasury Board's failure to ensure equal access to online information and services violated the rights of those who are visually impaired under s. 15(1) of the Charter. The Treasury Board was obligated to bring the government departments and agencies under its control into compliance with the Charter.

Decision Excerpts

Para 130: "I understand the Attorney General to be saying that as long as the sought-after information and services are obtained, irrespective of the time lag and inconvenience encountered, there has been effective access and thus the same benefit has been received. In other words, if one person can access information online within a matter of minutes and another person can access the same information by traveling to a government office, waiting for his or her turn and then meeting with a government employee to obtain the same information, there has been effective access in both cases and thus both persons have received the same benefit of the law. I cannot agree with the Attorney General's position. In my view, one of the above two persons has not received the same benefit. They have not been treated equally."

Para 136-138: “First, [the judge] expressed the view that the Communications Policy and the CLF Standard were facially neutral with regard to website accessibility in that the applicable standards were identical for all users. However, in his view, Ms. Jodhan and the visually impaired were treated differently because of their disability. In support of that proposition, the judge found that the CLF 1.0 Standard had not been properly implemented nor enforced by the deputy heads of the 106 departments thus rendering many of the websites inaccessible to the visually impaired. He also found that 83 online departmental interactive rich Internet applications, which used “ePass”, were not accessible to the visually impaired. [!] As a result, the judge concluded, correctly in my view, that the impugned law created a distinction based on Ms. Jodhan’s physical disability. In other words, Ms. Jodhan and the visually impaired had received a different treatment because of their visual impairment.”

Para 155-156: “The government’s failure to ensure that Ms. Jodhan and the visually impaired be given the same access to its information and services as those given to the non visually impaired perpetuates, in Ms. Jodhan’s words, “the pre-existing disadvantage of people with disabilities by exacerbating their historic exclusion and marginalization from Canadian society” [!] Ms. Jodhan points out that the Attorney General has conceded in these proceedings that Ms. Jodhan and those like her have been historically subject to pre-existing disadvantage and subject to stereotyping that they were not as capable as those with sight. This leads Ms. Jodhan to argue that denying her and those like her access to government information and services online has the effect of reinforcing “existing inaccurate understandings of the merit, capabilities and worth of vision impaired persons. It results in their further stigmatization.” (Respondent’s Memorandum of Fact and Law, para. 104). Again, I can find no basis to disagree with that statement.”

Para 159: “It is clear to me that the principle of accommodation which we must consider at the subsection 15(1) stage are the positive steps which the government may take so as to deliver a benefit of law equally to disadvantaged groups. As the judge points out in his Reasons, implementing the accessibility standards would ameliorate the position of Ms. Jodhan and the visually impaired and prevent discrimination.”
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