

Canadian Human Rights Tribunal Cannot Award Legal Costs

COSTS — complainant's legal expenses — definition of costs — survey of the law — tribunal's authority to award — **DAMAGES** — legal expenses — expenses caused by contravention of human rights legislation — survey of the law

HUMAN RIGHTS TRIBUNALS — **ADMINISTRATIVE TRIBUNALS** — **COURTS** — authority of tribunal to order costs — standard of review of court over administrative tribunals — appeal court's authority to hear appeal based on fact or mixed fact and law — curial deference — privative clause — **APPEALS AND JUDICIAL REVIEW** — error of law in awarding costs, determining damages and findings of fact — reasons for decision are unreasonable — difference between appeals and judicial review

HUMAN RIGHTS — legislative history of human rights legislation — nature and purpose of human rights legislation — survey of human rights legislation — **INTERPRETATION OF STATUTES** — case law, legislative history and legislative intent as aids to interpretation — human rights commission's policy — parliamentary reports — definition of "costs" ("dépens") and "expenses" ("dépenses") — grammatical rule *ejusdem generis* — purposive approach

The Supreme Court of Canada dismissed an appeal from a decision of the Federal Court of Appeal (67 C.H.R.R. D/381), which ruled that the Canadian Human Rights Tribunal has no authority to award legal costs.

Donna Mowat is a former Master Corporal with the Canadian Forces. In 1998, she filed a complaint alleging discrimination against her on the grounds of her sex and sexual harassment. The Canadian Human Rights Commission did not appear. Ms. Mowat was unsuccessful, except with respect to the sexual harassment component of her

complaint (54 C.H.R.R. D/21). She was awarded \$4,000 plus interest for injury to dignity. Ms. Mowat sought compensation for various expenses including her legal costs in the amount of \$196,313. The Tribunal interpreted s. 53(2)(c), which permits a Tribunal to order compensation for "any expenses incurred by the victims as a result of the discriminatory practice", to include compensation for legal costs. Since she was unsuccessful on a number of allegations, the Tribunal awarded her partial compensation for her legal costs in the amount of \$47,000 (CHRR Doc. 06-757).

On judicial review, the Federal Court (67 C.H.R.R. D/366) found that making an award of costs was consistent with a broad and purposive interpretation of the *Canadian Human Rights Act*. It concluded that the Tribunal's decision regarding its authority to award costs was reasonable.

On appeal from that decision, the Federal Court of Appeal considered two questions: (1) what is the appropriate standard of review; and (2) does the Tribunal have the authority to award legal costs because it can award compensation for "expenses incurred because of the discrimination".

The Court of Appeal ruled that the appropriate standard of review is correctness, not reasonableness, because determining whether the Tribunal can make an award for legal costs is a question of law outside the specialized expertise of the Tribunal. For that reason, no deference is owed to the Tribunal and the standard is correctness.

On the question of whether the decision to award costs was correct, the Court of Appeal found that a review of human rights legislation in other jurisdictions shows that some do not permit any awards for legal costs, while oth-

ers permit such awards against a party that has conducted itself in an improper or injurious manner.

The Court of Appeal ruled that Parliament did not intend to give the Tribunal the authority to award legal costs. The decision about whether the Tribunal can make an award for legal costs is for Parliament to make, not the Tribunal.

The text, context and purpose of the legislation clearly show that there is no authority in the Tribunal to award legal costs.

Before the Supreme Court of Canada, the two questions were the same: (1) what is the appropriate standard of review of the Tribunal's decision regarding the interpretation of its power to award legal costs;

and (2) did the Tribunal make a reviewable error in deciding that it could award compensation for legal costs?

The Supreme Court of Canada noted that, following *Dunsmuir v. New Brunswick* (2009 SCC 9), general questions of law that are both of central importance to the legal system as a whole and outside an administrative tribunal's specialized area of expertise, must be reviewed on a standard of correctness. However, administrative tribunals are generally entitled to deference when they are interpreting their home statutes and laws or legal rules closely connected to them.

A decision as to whether a particular tribunal will grant a particular type of compensation — in this case, legal costs — can hardly be said to be a question of central importance for the Canadian legal system and outside the specialized expertise of the adjudicator, since compensation is frequently awarded by administrative tribunals in various circumstances and under many different schemes. In this case, the Canadian Human Rights Tribunal is well positioned to consider questions relating to appropriate compensation under s. 53(2).

What Was Said...

"The genesis of this dispute appears to be the fact that, in 2003, the Commission decided to restrict its advocacy on behalf of complainants... As a result, the role of the Commission in taking complaints forward to the Tribunal was restricted without provision for alternative means to assist complainants to do so. Significantly, however, these changes occurred without changing the legislation in relation to the power to award costs."

Canada (Human Rights Comm.) and Mowat v. Canada (Attorney General)
(2011), CHRR Doc. 11-3098, 2011 SCC 53 at § 63

The Supreme Court concluded that the issue of whether legal costs may be included in the Tribunal's compensation order is neither a question of jurisdiction, nor a question of law of central importance to the legal system as a whole that is outside the Tribunal's areas of expertise. As such, the Tribunal's decision to award legal costs to the complainant is reviewable on the standard of reasonableness, not correctness.

On the second question, the Supreme Court ruled that the decision that the Tribunal could award legal costs was unreasonable. The Supreme Court noted that the text of the *Act* refers to "compensation for expenses incurred" in two paragraphs — one regarding compensation for discrimination in employment and one regarding compensation for discrimination in services. If "compensation for expenses incurred because of the discrimination" were intended to include legal costs, there would be no reason to repeat the phrase in the specific contexts of lost wages and provision of services.

The Court also noted that the legislative history of the *Canadian Human Rights Act* shows that when it was first introduced in 1975 it included a provision permitting the awarding of costs. This legislation died on the order paper and when it was re-introduced in 1977, that provision had been removed. A similar provision regarding costs was introduced in 1992, but was not proceeded with. The Supreme Court concluded that Parliament chose an active role for the Commission, which could include litigating on behalf of complainants, instead of cloaking the Tribunal with a broad costs jurisdiction.

The genesis of the dispute about the awarding of costs appears to be the fact that, in 2003, the Commission decided to restrict its advocacy on behalf of complainants. This may have been in response to the Report of the Canadian Human Rights Act Review Panel, chaired by the Honourable Gerard La Forest, which recommended that the Commission act only in cases that raised serious issues of systemic discrimination or new points of law. The

Report recommended clinic-type assistance to potential claimants. The latter recommendation was not acted upon, while the former was. There was no legislative amendment to the *Act*, but the Commission chose to limit its own role in taking complaints forward to the Tribunal, even though no provision was made for alternative means to assist complainants.

Ms. Mowat and the Canadian Human Rights Commission urged the Court to give the provisions authorizing compensation for expenses a broad and purposive interpretation which would permit the Tribunal to make victims of discrimination whole. However, the Supreme Court found that a liberal and purposive interpretation cannot supplant a textual and contextual analysis simply in order to give effect to a policy decision different from the one made by Parliament.

The Supreme Court concluded that the text, context and purpose of the legislation clearly show that there is no authority in the Tribunal to award legal costs and that there is no other reasonable interpretation of s. 53(2).

The appeal was dismissed.



Canada (Human Rights Comm.) and Mowat v. Canada (Attorney General) (Oct. 28, 2011), CHRR Doc. 11-3098, 2011 SCC 53 (Reasons by Cromwell and LeBel JJ.)

Tribunal Should Have Dismissed Complaint

HUMAN RIGHTS TRIBUNALS — ADMINISTRATIVE TRIBUNALS — COURTS — tribunal's discretion to defer complaint — standard of review of court over administrative tribunals — APPEALS AND JUDICIAL REVIEW — error of law in determining abuse of process, in determining jurisdiction and in determining standard of review — findings of fact are patently unreasonable — human rights tribunal's decision to hear complaint — COMPLAINTS — substance of complaint dealt with in another proceeding JURISDICTION — jurisdiction to hear complaint concerning workers' compensation benefits — concurrent jurisdiction — PROCEDURE — adjudicating issue dealt with in prior proceeding as abuse of process — collateral attack as abuse of process — RES JUDICATA AND ESTOPPEL — issue estoppel — prior workers' compensation board proceeding — INTERPRETATION OF STATUTES — legislative history and intent as aids to interpretation

The Supreme Court of Canada overturned a decision of the B.C. Court of Appeal (70 C.H.R.R. D/163), which ruled that it is open to the B.C. Human Rights Tribunal to hear a complaint alleging that the chronic pain policy of the B.C. Workers' Compensation Board ("WCB") is discriminatory, even though the WCB Review Division held that the policy is not discriminatory.

The B.C. *Human Rights Code* gives the Human Rights Tribunal discretion to refuse to hear a complaint if the substance of that complaint has already been appropriately dealt with in another proceeding. The issue in this appeal was how that discretion should be exercised.

The complainants, Guiseppe Figliola, Kimberley Sallis and Barry Dearden, all suffer from chronic pain as a result of work-related injuries. Under the WCB policy, any award for chronic pain is set at 2.5 percent of the total disability award made to a worker. Having been unsuccessful in challenging the policy before the WCB Review Division, the complainants did not seek judicial review of

the Review Division's decision, but sought to have the validity of the policy adjudicated by the Human Rights Tribunal.

The WCB asked the Tribunal to dismiss the complaints without a hearing under s. 27(1)(f) because the issue had been dealt with by the Review Division. The Tribunal declined to do so (CHRR Doc. 08-674).

The WCB applied to the B.C. Supreme Court, which quashed the decision of the Tribunal on the grounds that the issue was fully dealt with by the Review Division and its disposition was final (CHRR Doc. 09-0883). A re-hearing before the Human Rights Tribunal would be a duplication of proceedings and an abuse of process.

The complainants appealed. The Court of Appeal determined that, if an issue has been dealt with by another body, the Human Rights Tribunal has the authority, by virtue of s. 27(1)(f), to either exercise or not exercise its jurisdiction. The legislative scheme specifically recognizes that the Tribunal can adjudicate a complaint even if another body has already dealt with the substance of the same matter. The fact that a body such as the WCB Review Division has dealt with a human rights issue does not have the effect of nullifying the Human Rights Tribunal's jurisdiction.

The Court of Appeal did not agree that allowing the Tribunal to proceed is tantamount to permitting it to exercise appellate jurisdiction over the Review Division. The Tribunal has jurisdiction; the issue is whether to exercise its authority to proceed. If the Tribunal decides to proceed, its decision will be based on an evidentiary record and submissions that may well be

The Tribunal based its decision to hear Mr. Figliola's complaint on irrelevant factors; consequently, the decision was patently unreasonable.

substantially different from those that were before the other body, and the parties may not be the same.

Since the decision to proceed is discretionary, the Court of Appeal found that the standard of review is whether the decision is patently unreasonable. It found that the decision of the Tribunal to proceed was not patently unreasonable. The Tribunal did not exercise its discretion arbitrarily, in bad faith, or for an improper purpose. The Court of Appeal allowed the appeal and set aside the decision of the B.C. Supreme Court.

The Supreme Court of Canada issued two decisions, one written by Abella J. and one written by Cromwell J. All members of the Court were in agreement that the Tribunal's decision not to dismiss the complaint was patently unreasonable. However, they disagreed, in a 5-4 split, on the reasons and on the remedy.

The Abella-lead majority found that s. 27(1)(f) does not codify the common law doctrines of issue estoppel, collateral attack, *res judicata* and abuse of process, but it does embrace their underlying principles in pursuit of finality, fairness, and the integrity of the justice system by preventing unnecessary inconsistency, multiplicity and delay.

The underlying principles are: to protect the interests of the public and the parties in the finality of a decision; to avoid the loss of confidence in the fairness and integrity of adjudicatory forums which may be caused by relitigation; to ensure that the method of challenging the validity or correctness of a decision is through the designated appeal or judicial review mechanisms; to avoid unnecessary expenditure.

Abella wrote that, relying on these underlying principles, the Tribunal should have asked itself; (1) whether there was concurrent jurisdiction to decide human rights issues; (2) whether the previously decided legal issue was essentially the same as what was being complained of to the Tribunal; and (3) whether there was an opportunity for the complainants to know the case to be met and

have the chance to meet it. These questions go to determining whether the substance of a complaint has been appropriately dealt with. The majority found further that the discretion in s. 27(1)(f) was limited, based on a reading of the other factors listed in s. 27 and on the legislative history.

The majority concluded that the Tribunal based its decision on irrelevant factors, namely by adhering strictly to the application of issue estoppel. Consequently, the decision was patently unreasonable, and it would unnecessarily prolong and duplicate proceedings to refer it back to the Tribunal for reconsideration. The majority allowed the appeal and quashed the decision of the Tribunal.

The Cromwell-lead minority did not disagree with the majority's conclusion, but it disagreed with its reasons.

The minority found that in the administrative law context, common law finality doctrines must be applied flexibly to maintain the necessary balance between finality and fairness. In this case, the decision that the WCB relied on as a final decision was in fact an internal review deci-

sion given after a paper review in which the employer did not participate. Whether the Review Officer had the authority to consider the human rights issue was at least debatable, because of changes that were made to the WCB's jurisdiction to deal with human rights matters while this case was in process. In these circumstances, whether a Review Officer's decision should bar any future consideration by the Human Rights Tribunal of Mr. Figliola's complaint could not be decided by simply looking at the three factors set out by the majority. A highly flexible approach to applying finality doctrines should be taken.

The minority also found that s. 27(1)(f) does not confer a limited discretion. Rather it directs the Tribunal to deal with the "substance" of the complaint and to determine whether it has been dealt with "appropriately". The legislative history supports the view that broad, not limited, discretion is conferred on the Tribunal.

Where the Tribunal has before it a complaint whose substance has been determined elsewhere, it must decide whether there is something in the circumstances of the particular case to make it inappropriate to apply the gen-

eral principle that the earlier decision should be final. The most important consideration is whether giving effect to the earlier decision will cause an injustice.

The minority concluded that the Tribunal based its decision on irrelevant factors, by basing its decision on the alleged lack of independence of the Review Officer and by ignoring the potential availability of judicial review. More fundamentally, however, the Tribunal failed to consider whether the "substance" of the complaint had been addressed and thereby failed to take this threshold statutory requirement into account.

The minority of the Court would allow the appeal, but remit the matter back to the Tribunal for reconsideration.



British Columbia (Workers' Compensation Board) v. Figliola (Oct. 27, 2011), CHRR Doc. 11-3097, 2011 SCC 52 (Abella J. for the majority)

Condominium Failed to Accommodate Promptly

DISABILITY — access to parking space denied to scooter user — **HOUSING ACCOMMODATION** — condominium discriminates on the basis of disability — **REASONABLE ACCOMMODATION** — duty to accommodate short of undue hardship

REMEDIES — charitable donation — human rights training — amendment of strata property by-laws — **COMPLAINTS** — failure to file response to complaint — **PARTIES** — respondent's failure to appear at hearing

The Human Rights Tribunal of Ontario ruled that Toronto

Standard Condominium Corp. No. 1626 discriminated against Thomas Jakobek because of his disability.

Mr. Jakobek and his wife have lived in their condominium unit, which is owned by Toronto Standard Condominium Corp., since September 2006. The unit is owned by the applicant's son and daughter-in-law, Ms. Deborah Morrish. At the time Mr. Jakobek filed his complaint he was 88 years old. He has difficulty walking distances and his doctor confirmed that his medical condition makes it difficult for him to walk for more than 300 feet without resting.

To assist him to remain mobile, his children arranged for him to have a motorized scooter. Mr. Jakobek wanted to park his scooter in one of the two parking spots that are designated for his unit in the underground parking garage, instead of parking the scooter in his apartment, where it takes up a great deal of space and is a potential safety hazard. The bylaws at the time permitted parking cars, bicycles and shopping carts in the garage but were silent on motorized scooters. In June

It took the respondents two years to make a simple modification to the doors to the parking garage so that the complainant could park his motorized scooter there.

2008, Mr. Jakobek's daughter-in-law, Ms. Morrish, asked the respondents for permission to park his scooter in the garage. She also asked that the door between the elevator and the parking garage be equipped with an automatic door opener, since these doors were too heavy for Mr. Jakobek to open by himself.

The respondents replied in August 2008 denying Mr. Jakobek permission to park his scooter in the garage, and providing no reasons. In December 2008, the respondents changed their minds and gave Mr. Jakobek permission to park his scooter in the garage. They informed him that they were "investigating" modifying the doors between the elevator and the garage. In the meantime, Mr. Jakobek continued to park his scooter in his apartment, since he still could not access his scooter

if it was in the garage.

The respondents did finally modify the doors, but it took them two years to do it. The Tribunal found that the respondents failed in both their procedural and substantive obligations to accommodate Mr. Jakobek. Once the request for accommodation was made, the respondents had an obligation to investigate and act promptly on his request. The accommodation was provided, but not in a timely manner. The 2008 permission to park the scooter in the garage was useless to Mr. Jakobek until the doors were modified. He was not accommodated until September 2010.

Mr. Jakobek and his family were hurt and angered that it took so long to respond to his modest request, particu-

larly as the family had offered to pay the cost of putting in the door opener. Mr. Jakobek did not seek monetary compensation for himself, but asked that the respondents be ordered to pay \$5,000 to the March of Dimes.

The Tribunal ordered the respondents to pay \$5,000 to the March of Dimes, ensure that the respondents' bylaws specifically permit scooters to be parked in the garage, and complete human rights courses provided by the Ontario Human Rights Commission.



Jakobek v. Toronto Standard Condominium Corp. No. 1626 (No. 5)
(Oct. 21, 2011), CHRR Doc. 11-2401, 2011 HRT0 1901 (Renton)

Complaint Against Union Dismissed

TRADE UNIONS — union supports discriminatory policy — grievance process — union fails to support process — union as respondent — LIABILITY — liability of union — REASONABLE ACCOMMODATION — union's duty to accommodate

HUMAN RIGHTS TRIBUNALS — role of tribunal — JURISDICTION — court of competent jurisdiction to rule on fair representation issue — INTERPRETATION OF STATUTES — case law as aid to interpretation

The Human Rights Tribunal of Ontario dismissed a complaint against the Canadian Auto Workers, Local 88 ("CAW"). The complaint was filed by Yavuz Gungor, who alleged that his union discriminated against him with respect to employment because of his disability. A complaint against his employer, General Motors of Canada Ltd., was settled.

Mr. Gungor has been employed by CAMI Automotive Inc. and General Motors of Canada Ltd. for almost 21 years in

a variety of positions, including as a Team Leader in the Assembly Department. In the early 1990s, he suffered a work-related injury to his back which resulted in permanent medical restrictions requiring no repetitive bending or stooping and no prolonged walking or ladder climbing. He later sustained a work-related injury to his shoulder which initially restricted him from repetitive overhead work, and from any lifting greater than 20 pounds. As of October 2004, these restrictions were re-assessed, and he was only restricted from overhead work.

There was no evidence that the union participated in the formulation of a work rule that discriminated against the complainant.

In January 2005, a large number of new jobs were posted, and Mr. Gungor applied for over 25 Team Leader positions. On all but two of the postings, Mr. Gungor was

not the most senior applicant. However, an applicant with less seniority was chosen for Team Leader – Weld Alignment, a job which Mr. Gungor believed that he was capable of performing. Mr. Gungor protested the appointment of a person with less seniority, but the employer refused to change its mind on the grounds that Mr. Gungor needed to do 100 percent of the job and his restrictions would not permit him to do that. Mr. Gungor believed that he could do the job, should be given a trial, and should be accommodated.

The complaint before the Tribunal is that Mr. Gungor's union did not support a grievance on his behalf against the employer, and condoned management's breach of its duty to accommodate. Mr. Gungor also complained that union officials made discriminatory remarks about his disability, including commenting that "he was lucky to have a job". He appealed the denial of his grievance to his local membership and lost. He then wrote to CAW National to ask for reconsideration. But reconsideration was refused when the union learned that he had filed a complaint against the union.

Subsequently, Mr. Gungor was asked to relieve in the

Weld Repair position and worked in this position off and on from 2005 to 2008 without problems. In May 2008, he was placed on the Weld Repair team on a medical trial. He continued in this position until he became a Weld Check Team Leader in 2010.

The Tribunal found that following the Supreme Court of Canada's decision in *Renaud* (16 C.H.R.R. D/425) union liability for a failure of accommodation can arise in two ways: (1) if the union participated in the formulation of the work rule which has a discriminatory effect; and (2) if the union impedes the reasonable efforts of an employer to accommodate. In this case, there was no provision in the collective agreement between the union and the employer that had a discriminatory effect on Mr. Gungor, and no evidence that the union participated in the formulation of a work rule that discriminated against him. It

was the employer who apparently assumed that Mr. Gungor must be able to perform 100 percent of the job duties of all members of the team. Even if the union accepted this, and did not challenge it, that is not the same as having participated in the formulation of the rule.

Nor did the union impede or block the employer's reasonable efforts to accommodate Mr. Gungor. No efforts were made to accommodate him. As no efforts were made, there was nothing for the union to block or impede.

The Tribunal also considered whether the union breached s. 6, which prohibits discrimination with respect to union membership. It determined that a union's alleged inadequacy in its representation of a member on a human rights issue is not a sufficient basis by itself to

support a finding of union liability under s. 6. In the absence of evidence that a union's action or inaction was based on a discriminatory factor, a union's failure to file or pursue a grievance is not in itself discriminatory; nor is a union's failure to advocate on the member's behalf, or to assist a member in addressing discrimination or to contest the employer's actions. This kind of conduct may or may not provide a basis for a complaint that the duty of fair representation was breached under s. 74 of the *Labour Relations Act*. However, it is not Human Rights Tribunal's jurisdiction to determine that.

The Tribunal dismissed the complaint.



Gungor v. C.A.W., Local 88 (No. 5)
(Sept. 27, 2011), CHRR Doc. 11-2260,
2011 HRTO 1760 (Hart)

Licensed Premises and Medical Marijuana Users

DISABILITY — discriminatory provision of services on the basis of irritable bowel syndrome — medicinal drug use — PUBLIC SERVICES AND FACILITIES — government services discriminatory — public place — restaurant access denied — definition of services — public safety — EVIDENCE — expert evidence — medical evidence

DISCRIMINATION — government regulation and safety risk as reasonable cause — *Meiorin/Grismer* test — EXEMPTIONS — human rights legislation

The Human Rights Tribunal of Ontario ruled that s. 45(2) of Reg. 719, *Licences to Sell Liquor*, under the *Liquor Licence Act* is not discriminatory, except to the extent that it does not permit persons with valid Authorizations to Possess ("ATP") to "hold" medical marijuana while attending liquor licenced establishments.

Marko Ivancicevic has an ATP pursuant to the federal government's *Marijuana Medical Access Regulations* ("MMAR"). He filed a complaint alleging discrimination on

the basis of disability in the area of services because s. 45 (2) of Reg. 719 to the *Liquor Licence Act* prohibits him from possessing or using marijuana in licensed establishments. He sought an order permitting him to smoke marijuana on the uncovered patios of licenced premises where tobacco smoking is permitted by law.

The prohibition against smoking marijuana in licenced premises is reasonably necessary to protect the health and safety of non-users.

Mr. Ivancicevic was 28 years old and living in Toronto when he filed his complaint. He was born with several conditions, including a club foot and the absence of a bone in his leg. He has had ten surgeries. His left ankle is fused and he has screws and pins throughout his leg. He also has scoliosis and Irritable Bowel Syndrome ("IBS").

Because of the scoliosis, Mr. Ivancicevic has severe pain,

which comes and goes. His IBS is also difficult on some days, making it hard to eat and causing a "knot" in his stomach, which is worse when he is stressed. He has tried various pain medications, including codeine, morphine, Demerol and Percocet. They eased the pain, but debilitated him, making it difficult to think, walk, or go out. His doctor helped him to apply for an ATP and he received ATPs in 2008 and 2009. He uses medical marijuana when he needs it for pain management, wherever he is at that time. He does not smoke it indoors or around children.

Mr. Ivancicevic, and other witnesses who were also medical marijuana users, described being treated in a discriminatory way in restaurants, concert halls, and other public places, when they have shown their ATPs and asked permission to stand in an open, outdoor area to smoke their marijuana. Mr. Ivancicevic argued that in a licenced premise with an outdoor patio where clients are permitted to smoke tobacco he should be allowed to smoke marijuana. However, he has been told by owners of licenced premises that, because of s. 45(2), they can lose their licences if they permit marijuana to be smoked anywhere in the establishment, or if anyone has marijuana in their possession.

The Tribunal found that Mr. Ivancicevic has a disability-related need to smoke marijuana. It ruled that Mr. Ivancicevic had made out a *prima facie* case that the disputed regulation is discriminatory because it prohibits him from smoking marijuana for pain management when he needs to, and from having marijuana in his possession when in licenced premises.

The Minister of Consumer Services and the Alcohol and Gaming Commission of Ontario claimed that the reason for the strict prohibition is that second-hand marijuana smoke can cause impairment to non-users who are in the vicinity of a user. They argued that the regulation is only a minor restriction on the behaviour of medical marijuana

users in order to avoid exposing other individuals to the risks associated with marijuana smoke. The Tribunal accepted the evidence of the respondents' expert, Dr. Ferslew, that side-stream smoke poses a serious risk to passive inhalers even in open-air environments such as uncovered patios of restaurants and bars. Some level of "impairment" is possible. The Tribunal concluded that the prohibition against smoking marijuana in licenced premises is reasonably necessary to protect the health and safety of non-users.

However, the Tribunal found that the prohibition against "holding" or being in possession of marijuana was not reasonably necessary. Accordingly, insofar as the regula-

tion prohibits the possession of medical marijuana on licenced premises by persons with valid ATPs, it is contrary to the *Human Rights Code*.

The Tribunal ordered that to the extent that s. 45(2) of Reg. 719 does not permit persons with valid ATPs to "hold" medical marijuana while attending liquor licenced establishments, it should not be enforced.



Ivancicevic v. Ontario (Consumer Services) (No. 2) (Sept. 19, 2011), CHRR Doc. 11-2214, 2011 HRTO 1714 (Eyolfson)

Respondent Chose Not to Appear at the Tribunal

APPEALS AND JUDICIAL REVIEW — error of law in findings on the evidence and in interpreting evidence — HUMAN RIGHTS TRIBUNALS — reasonable apprehension of bias — CONSTITUTIONAL LAW — constitutional validity of human rights legislation

The Saskatchewan Court of Appeal dismissed an appeal by John Pontes and Howard Johnson Inn from a decision of the Saskatchewan Human Rights Tribunal, which found that the respondents had discriminated against Leslie Tataquason, a First Nations man.

Mr. Tataquason is a member of the Yellowquill First Nation. He is a common-law partner of Roseann Durocher, who worked at the Howard Johnson Inn in Saskatoon, as a waitress, bookkeeper and dishwasher.

On June 8, 2006, Ms. Durocher had been working at the Inn for a month. Mr. Tataquason went into the restaurant at about 1:45 p.m. to have a coffee while he waited for a bus. After he had been there for a while, Mr. Pontes came

to the table and aggressively asked him who he was and what he was doing. Mr. Pontes yelled at him "Get out – this is not the Friendship Centre" and escorted Mr. Tataquason to the door in full view of the patrons and employees of the restaurant.

Mr. Pontes did not provide any reply to the complaint, and did not appear at the hearing. The Tribunal accepted the unchallenged evidence of Mr. Tataquason, Ms. Durocher, and a long-time employee, Brenda Boulet, who testified that Mr. Pontes regularly abused employees and patrons who were of Aboriginal ancestry.

The Tribunal ruled that Mr. Pontes discriminated against Mr. Tataquason and ordered the respondents to pay him \$7,000 as some compensation for the injury to his dignity (67 C.H.R.R. D/69).

Mr. Pontes and Howard Johnson Inn appealed this decision to the Court of Queen's Bench on the grounds that: (1) the Tribunal was biased; (2) s. 12 of *The Saskatchewan*

Human Rights Code, which prohibits discrimination in services, is unconstitutional for vagueness; (3) the Tribunal erred in finding that there was a denial of a service; (4) the Tribunal erred in finding discrimination because of Mr. Pontes's reference to the "Friendship Centre"; (5) the Tribunal erred in its assessment of the credibility of witnesses; and (6) the Tribunal erred by finding that Mr. Tataquason suffered psychological harm without having heard medical evidence.

The Court of Queen's Bench found that the Tribunal's decision was reasonable on all the contested points, and dismissed the appeal (67 C.H.R.R. D/75).

In the Court of Appeal, Mr. Pontes' main argument was that the Tribunal did not accurately understand what had happened in the restaurant. Mr. Pontes had a different version of events. He denied being in any way racist and questioned why anyone would think he would ever want to offend customers or potential customers.

The respondent's opportunity to tell his version of the facts was at the proceeding before the Tribunal.

The Court of Appeal found that Mr. Pontes and Howard Johnson Inn deliberately chose not to participate in the Tribunal hearing. As a result, the Tribunal dealt with the evidence before it. Mr. Pontes cannot come forward now with an alternate version of the facts and ask the Court of Appeal to act on it. His opportunity was at the proceeding before the Tribunal.

Regarding bias, Mr. Pontes argued that Donald Worme, the Tribunal member who heard the complaint, was biased because he is a First Nations person himself. There is no merit in this submission, the Court of Appeal ruled. If it is correct, the Court wrote, "then former Chief Justice Laskin could never have heard a civil liberties case and former U.S. Supreme Court Justice Thurgood Marshall could never have heard a race relations appeal".

The Court rejected the argument that s. 12 is unconstitutional because of "vagueness". It is not vague in any constitutional sense. Specifically, the term "services" is not so lacking in precision that it cannot be given legal interpretation.

The Court concluded that the Court of Queen's Bench made no error and dismissed the appeal.



Howard Johnson Inn v. Saskatchewan (Human Rights Tribunal) (Oct. 3, 2011), CHRR Doc. 11-3080, 2011 SKCA 110 (Richards, Ottenbreit and Herauf JJ.A.)

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Not Discriminatory to Retire Pilots at 60

RETIREMENT — TRADE UNIONS — mandatory retirement of airline pilots — normal age of retirement — collective agreement incorporates discriminatory provision — INTERPRETATION OF STATUTES — definition of “normal age of retirement”

DISCRIMINATION — REASONABLE ACCOMMODATION — *bona fide* qualification — comparator group — *Meiorin* test for reasonable accommodation — EVIDENCE — statistical evidence

The Canadian Human Rights Tribunal ruled that Air Canada and the Air Canada Pilots Association did not discriminate by retiring pilots at age 60.

This proceeding involved 70 complainants. All were pilots with Air Canada who were required to retire on the first day of the month following their 60th birthday. The respondents do not dispute that the pilots’ employment was terminated solely because of their age.

The respondents offered two defences. The first defence is provided by s. 15(1)(c) of the *Canadian Human Rights Act*, which states that it is not a discriminatory practice to retire a person at the “normal age of retirement” for employees working in similar positions. The second defence is found in s. 15(1)(a) which states that a requirement is not discriminatory if an employer can show that it is a *bona fide* occupational qualification for the position.

In its April 2009 decision in *Vilven v. Air Canada* (69 C.H.R.R. D/362) the Federal Court ruled that for the purposes of s. 15(1)(c) Air Canada pilots had to be compared

to other pilots “working for Canadian airlines who fly aircraft of varying sizes and types to both domestic and international destinations, through Canadian and international airspace”.

The Tribunal compared pilots for Air Canada with pilots working for other airlines who met the *Vilven* criteria for the years 2005 through 2009. It determined that in this period Air Canada pilots were approximately 60 percent of all pilots working in similar positions. Since 60 was the normal age of retirement for the majority of pilots who meet the *Vilven* criteria, the Tribunal concluded that 60 was the normal age of retirement for pilots, and retiring pilots at age 60 was not discriminatory.

However, the respondents failed to prove that being under 60 was a *bona fide* occupational qualification for a pilot. The Tribunal noted that Transport Canada does not impose any age limit when it licenses pilots and Canada permits pilots from other countries who are 60 years or older, who hold medically valid licences, to fly into Canadian airspace.

Canada is a party to the *Chicago Convention on International Civil Aviation* whose purpose is to harmonize the standards for international commercial aviation operations. Prior to November 2006 the rule for parties to the Convention was that pilots over 60 should not be pilot-in-command (“PIC”) of an aircraft providing international air services. In 2006 this rule changed so that a PIC can be over 60 if there is a co-pilot who is under 60. This is now referred to as the “over/under rule”. The Tribunal heard

evidence about the difficulty that the under/over rule may create for scheduling because Air Canada may have to pair pilots based on age and at the same time respect the pilots’ rights to bid for flights and blocks of flying time based on seniority.

The complainants did not ask that Air Canada accommodate pilots as PICs over age 65. They argued that Air Canada did not show that it cannot accommodate pilots between the ages of 60 and 65. The Tribunal agreed. It concluded that the impact of eliminating the age 60 retirement rule did not amount to an undue hardship for Air Canada or for the Air Canada Pilots Association, either before November 2006 or after November 2006.

The Tribunal concluded that the respondents failed to make out a case that being younger than age 60 is a *bona fide* occupational requirement for the position of pilot. However, the respondents can rely on s. 15(1)(c) because requiring retirement at 60, which is the normal age of retirement for pilots, is not discriminatory practice.

The Tribunal concluded that 60 was the normal age of retirement for the pilots, and consequently retiring pilots at age 60 was not discriminatory.



Thwaites v. Air Canada Pilots Assn. (No. 3) (Aug. 10, 2011), CHRR Doc. 11-3086, 2011 CHRT 11 (Sinclair)

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Research Cardiologist Denied Promotion

RACE, COLOUR AND PLACE OF ORIGIN — EDUCATION — discriminatory treatment of professor on the basis of race — discrimination based on stereotype — DISCRIMINATION — job qualifications — EMPLOYMENT EVALUATION AND TESTING — fairness in selection process — BURDEN OF PROOF — elements of a *prima facie* case — EVIDENCE — expert evidence

The Human Rights Tribunal of Ontario dismissed a complaint filed by Kofoworola Ogunyankin against Queen's University. Dr. Ogunyankin alleged that he was discriminated against because of his race when he was denied promotion to Associate Professor in the Division of Cardiology at the School of Medicine.

Dr. Ogunyankin is a Nigerian-born physician with a specialty in cardiology and additional expertise in the field of echocardiography. He identifies as a Black man. Dr. Ogunyankin completed a degree in Medicine and Surgery at the University of Lagos in 1985. He did an internship in Nigeria, and then emigrated to the United Kingdom in 1987, where he completed his residency training and became a fellow in cardiology. In 1992 he moved to the United States where he was required to repeat two years of residency training. He became a fellow in cardiology at the State University of New York and then at UCLA. In 1997, he obtained a fourth year fellowship at Tufts University and in 1998 he was a visiting Assistant Professor in the cardiology division at the West Los Angeles Veteran Administration/UCLA Medical Center. From 1998 to 2001 he was employed as an Assistant Professor of Clinical Medicine at Columbia University and an attending staff cardiologist and director of echocardiography at Bassett Healthcare in Cooperstown, New York.

In 2000, the Division of Cardiology at the School of Medicine at Queen's University was looking to hire an addi-

tional echocardiography specialist and Dr. Ogunyankin was actively recruited. He accepted a position as Assistant Professor in September 2000. The offer was subject to Dr. Ogunyankin's ability to secure licensure with the Province of Ontario. He received the required licensure from the College of Physicians and Surgeons of Ontario ("CPSO") on the condition that he practice medicine only in a clinical teaching unit and only to the extent required by the teaching or research requirements of his appointment. The certificate to practice had a term of five years with the expectation that within that time Dr. Ogunyankin would either obtain certification by examination by the Royal College of Physicians and Surgeons of Canada or be promoted to the rank of Associate Professor. He began teaching at Queen's University in May 2001.

In December 2003, Dr. Ogunyankin was offered re-appointment for a five-year term as an Assistant Professor from July 2004 to June 2009 contingent upon him continuing to meet the terms of his licensure by the CPSO. In December 2004, he obtained a letter from the Royal College of Physicians and Surgeons of Canada indicating that before he could sit for his examination, he would need to complete six months residency training. This was not acceptable to Dr. Ogunyankin as he had already completed residency training in the United Kingdom, and further residency training in the United States. Dr. Ogunyankin informed the University that he had no intention of undergoing any further residency training. He received a

The Tribunal found that there was no evidence that race was a factor in the assessment of Dr. Ogunyankin's research productivity, publication record or teaching.

two-year extension of his licensure to May 2008. Since he was unwilling to do further residency training, the only means by which he could maintain his licensure with the CPSO was to obtain promotion to the rank of Associate Professor by May 2008.

Dr. Ogunyankin applied for promotion in September 2006. However, he was turned down for promotion because he had not published enough in peer-reviewed journals, nor had he obtained peer-reviewed funding for his research projects. While his teaching record was good, it was not excellent, which was the standard he was required to meet for promotion.

The Tribunal took note of the Final Report of the Principal's Advisory Committee on Race Relations in 1991, the University's Senate Educational Equity Committee ("SEEC") report in 2004 (the "Henry report"), and the SEEC's response to the Henry report in 2006. These reports identified a problem of racism at the University and noted that racial minority employees were under-represented on the campus, particularly among the faculty. The University was described as having a "culture of whiteness"; this finding was endorsed by the SEEC.

Despite the backdrop of systemic under-representation of racial minority faculty members, the Tribunal found that there was no evidence that race was a factor in the assessment of Dr. Ogunyankin's research productivity, publication record or teaching. The Tribunal concluded that there were legitimate non-discriminatory reasons for denying promotion to Dr. Ogunyankin.

The complaint was dismissed.



Ogunyankin v. Queen's University (No. 6)
(Oct. 21, 2011), CHRR Doc. 11-2410, 2011 HRT0 1910

Briefly Noted

Federal

Aboriginal Peoples Television Network v. Canada (Human Rights Comm.) (2011), CHRR Doc. 11-3073, 2011 FC 810 (Lutfy C.J.)

APPEALS AND JUDICIAL REVIEW / Judicial review of (*sub nom. First Nations Child and Family Caring Society of Canada v. Canada (Attorney General) (No. 1)*) (2010), CHRR Doc. 10-1414, 2010 CHRT 16 which refused a request to record and broadcast the Tribunal's hearing. The Court found that the Tribunal failed to provide reasons why a total ban on broadcasting was necessary. Allowed: June 30, 2011.

British Columbia

Heilman v. First Canada ULC (No. 3) (2011), CHRR Doc. 11-0260, 2011 BCHRT 260 (Marion)

COSTS / Decision on the respondent's application for costs against the complainant for improper conduct. The Tribunal found that the complainant's repeated use of inflammatory, derogatory, disrespectful and inappropriate comments constitutes improper conduct. The Tribunal order the complainant to pay the respondent \$750. Granted: Sept. 19, 2011.

Ontario

E.M. v. Centre for Early Learning Inc. (No. 3) (2011), CHRR Doc. 11-2428, 2011 HRTO 1928 (Hart)

ABORIGINAL PEOPLES / Decision on an application alleging discrimination in the provision of services on the basis of ancestry and disability (failure to take reasonable steps to address bullying). The Tribunal found that the evidence does not support the allegation that the applicants experienced discrimination because of their First Nations ancestry arising out of the respondents' decision to discontinue child care services. Dismissed: Oct. 25, 2011.

Pilon v. Cornwall (City) (No. 3) (2011), CHRR Doc. 11-2195, 2011 HRTO 1695 (Muir)

DISABILITY — SEX DISCRIMINATION / Decision on an application alleging discrimination in employment on the basis of sex, disability and reprisal. The Tribunal found that the applicant was harassed by a fellow employee who complained to management about her use of the washroom and that the respondents did not properly address the harassment. The Tribunal also found that the respondents failed to appropriately respond to

the request for accommodation. However, the Tribunal did not find that the respondent's actions were reprisal. Allowed in part: Sept. 14, 2011.

Whale v. Keele North Recycling Inc. (No. 5) 2011, CHRR Doc. 11-2224, 2011 HRTO 1724 (Keene)

SEX DISCRIMINATION — DAMAGES / Decision on an application alleging discrimination in employment on the basis of sex. The Tribunal concluded that it is more likely than not that the applicant, whom the respondents admit was competent and qualified for the work, was dismissed because of her sex. The applicant was awarded \$6,390 for lost wages and \$10,000 for injury to dignity and self-respect. Allowed: Sept. 20, 2011.

Prince Edward Island

Bartmann v. University of Prince Edward Island (2011), CHRR Doc. 11-3090 (P.E.I.H.R.P.; Nicholson)

DAMAGES — REMEDIES / Decision on damages following a complaint of discrimination in employment on the basis of age after a finding of liability against the respondent in CHRR Doc. 10-1592 (P.E.I.H.R.P.). The Panel awarded each party pre-judgment and post-judgment interest, pension plan contributions, \$8,000 for general damages and \$1,000 in costs. The Panel awarded \$219,751 to Barry Bartmann and \$101,474 to Ronald Collins for lost income. Barry Bartmann was also awarded \$4,800 for lost professional development credits. Sept. 1, 2011.

Québec

Québec (Comm. des droits de la personne et des droits de la jeunesse) c. 9051-5396 Québec inc. (2011), CHRR Doc. 11-3084, 2011 QCTDP 16 (Brosseau J.)

INCAPACITÉ — SERVICES ET INSTALLATIONS PUBLICS / Plainte de discrimination fondée sur le handicap dans l'accès à un service ordinairement offert au public. Le Tribunal a conclu que l'intimée a discriminé en refusant au plaignant l'accès au terrain de camping accompagné de son chien d'assistance. Le Tribunal a ordonné aux intimés de payer au plaignant 8 000 \$ à titre de dommages moraux et 1 000 \$ à titre de dommages punitifs. Accueillie : 30 sept. 2011.

DISABILITY — PUBLIC SERVICES AND FACILITIES / Complaint of discrimination in services on the basis of disability. The Tribunal found that the respondent discriminated when it refused the complainant access to the camp ground when he was accompanied by his service dog. The Tribunal ordered the respondents to pay \$8,000 in moral damages and \$1,000 in punitive damages. Allowed: Sept. 30, 2011.

View Point...

Canadian Human Rights Tribunal Cannot Award Legal Costs

The Supreme Court of Canada ruled on October 28, 2011, that the Canadian Human Rights Tribunal cannot award legal costs to a successful complainant. The Act permits the Tribunal to award compensation for “expenses incurred” because of discrimination. But “expenses” does not include legal costs.

The Court ruled in the case of Donna Mowat (CHRR Doc. 11-3098, 2011 SCC 53), a former Master Corporal with the Canadian Forces. In 1998 she filed a complaint alleging sex discrimination and sexual harassment. Because the Canadian Human Rights Commission did not represent her, Mowat paid for her own legal counsel. She was successful on the sexual harassment claim, and the Tribunal awarded her \$4,000 for injury to dignity, and \$47,000 for legal costs (CHRR Doc. 06-757), which Mowat indicated was just a portion of her total legal costs of \$196,000.

The Supreme Court of Canada ruled that the Tribunal has no authority to make such an award, because Parliament did not intend “expenses incurred” to include legal costs. The Tribunal itself, and some interveners at the Supreme Court level, argued that the Tribunal should be empowered to award legal costs, because without recovery of legal costs for complainants like Ms. Mowat, any victory would be “pyrrhic”.

Legislative history shows that complainants are now arguing for legal costs to be included under the rubric of “expenses incurred” because successive federal governments have failed to amend the *Canadian Human Rights Act* in order to ensure that complainants are able to obtain adequate legal representation.

As the Supreme Court of Canada pointed out, the practice of the Canadian Human Rights Commission has changed since the Act came into force in 1979. There was no provision for legal costs when the Act was originally drafted because Parliament chose an active role for the Commission, which included litigating on behalf of complainants. When the Commission itself represented complainants, the fact that the Tribunal did not have a broad jurisdiction to award legal costs was irrelevant.

However, in 2003, the Commission changed its practice. The Court speculated that this may have been in response to the Report of the Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision*, chaired by former Supreme Court Justice, Gérard La Forest. The Panel recommended that the Commission act only in cases that

raised serious issues of systemic discrimination or new points of law. To ensure that this shift would not result in complainants being left without legal representation, the Panel also recommended that a legal clinic be set up to provide representation for them when the Commission did not act on their behalf.

The first of these recommendations the Commission acted on, as it could without any amendment to the law, or any assignment of new resources. The second was not acted on; it required a new structure and new resources, which neither Liberals nor Conservatives, as majority or minority governments, have provided.

The upshot is that since 2003 complainants like Donna Mowat have been alone. What choices do they have? They can represent themselves — a perilous prospect considering how complex many human rights cases are. Or they can hire a lawyer to represent them, knowing that they will not be able to recover the full cost even if they win. So the choices are: be a self-represented complainant and take a high risk of losing, or hire a lawyer and incur irrecoverable cost.

Now that the Supreme Court of Canada has ruled, it is clear that we are facing a crisis in the federal human rights system. A human rights system cannot abandon complainants in this way, and continue to be credible.

The answer is not to amend the Act to give the Tribunal a broad jurisdiction to award legal costs. This approach treats human rights complaints as disputes between private parties, where parties should pay their own costs, or obtain costs from each other when they are successful.

However, human rights claimants are not simply acting in their own interest. They are also serving the public, community interest in the elimination of discrimination from workplaces and services. Since human rights legislation is fundamental public policy, the public has an interest in ensuring that complainants have effective access to the exercise of their rights, and sometimes that means access to legal counsel.

It is time to act on the recommendation of the Canadian Human Rights Act Review Panel and create a human rights clinic so that those who make complaints under the *Canadian Human Rights Act* can receive the legal assistance they need. As the Panel wrote in its Report: “The practical result of no [legal] assistance [is] to deny access”.

*Shelagh Day, President and Senior Editor,
Canadian Human Rights Reporter*

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