Implications of SCC Ruling That Human Rights Tribunal Cannot Award Costs

By Barry W. Kwasniewski [*]

A. INTRODUCTION

In late 2011, the Supreme Court of Canada released its decision in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General).*[1.] At issue was whether the Canadian Human Rights Tribunal had the jurisdiction to award legal costs to a successful complainant. This case originated as a decision of the Canadian Human Rights Tribunal (the Tribunal), where legal costs were awarded to the victim of sexual harassment, in addition to a monetary award. The Supreme Court upheld the decision of the Federal Court of Appeal, denying the authority to award legal costs (see *Charity Law Bulletin* No. 195[2]) and firmly concluded that the Tribunal does not have the power to award legal costs.[3] As charities and not-for-profits are not immune from human rights claims, this decision is important to such organizations.

B. FACTS

Donna Mowat was employed as a traffic technician with the Canadian Forces for 14 years. After leaving her employment, Ms. Mowat filed a complaint with the Canadian Human Rights Commission (the Commission), which was subsequently heard by the Tribunal. The Tribunal determined that Ms. Mowat had been sexually harassed and awarded her $5000 for "suffering in respect of self and feelings" and $47,000 in legal costs. The Tribunal determined that it had the authority to award legal costs by virtue of sections 53(2)(c) and (d) of the *Canadian Human Rights Act*[4] (CHRA), which provides as follows:

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[1] 2011 SCC 53, online: <http://www.canlii.org/en/ca/scc/doc/2011/2011scc53/2011scc53.pdf>.

[2] Barry Kwasniewski, "Federal Court of Appeal Rules Successful Human Rights Complainants Cannot Be Awarded Their Legal Costs" *Charity Law Bulletin* No. 195 (25 February 2010) online: Carters Professional Corporation <http://www.carters.ca/pub/bulletin/charity/2010/chylb195.htm>.

[3] Note that because this matter came to the courts by way of "judicial review", each level of court also had to address whether the "standard of review" was reasonableness or correctness. This aspect of the decisions will not be addressed in this *Bulletin*.

[4] R.S.C. 1985, c.H-6.

> 53(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:
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> ...
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> (*c*) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;
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> (*d*) that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice;

The Tribunal based its decision on two considerations. First, it determined that the term "expenses incurred" in the relevant provisions was wide enough to include legal costs. Second, the Tribunal determined that there were compelling policy considerations to allow costs which related to access to the human rights adjudication process. As previously mentioned, this interpretation was rejected by the Federal Court of Appeal and the Supreme Court of Canada.

C. ANALYSIS OF THE SUPREME COURT OF CANADA DECISION

The Supreme Court determined that the question of whether the Tribunal has the authority to award costs is simply a question of statutory interpretation. According to the modern theory of statutory interpretation, this entails seeking the intent of Parliament by "reading the words of the provision in their entire context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of Parliament."[5] Further, because the legislation in question is human rights legislation, in must also be "interpreted liberally and purposively so that the rights enunciated are given their full recognition and effect."[6]

As such, the Court undertook an interpretive analysis, examining the text, context and purpose of the provisions. With regard to the text of the provision, the Court determined that the phrase "any expenses incurred by the victim as a result of the discriminatory practice" should not be

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[5] *Supra note 1,* at para 33.
[6] *Ibid.*

interpreted to include legal costs because each time the phrase is used in the legislation, it is preceded by a particular type of expense to be covered. That is, had Parliament intended for this phrase to include all costs and expenses, it would not have specified particular types of expenses. To interpret the provision otherwise would make the listing of types of expenses redundant. As Parliament is presumed to not create redundant legislation, the Court concluded that "any expenses" did not refer to legal costs.

In further examining the text of the provision, the Court noted that the term "cost" is a legal term of art that is well-understood to mean legal costs, a meaning that is distinct from compensation or expenses. The Court reasoned that if Parliament had intended for legal costs to be awarded, it would have used the widely accepted term. Finally, the legislation also included a $5000 limit to monetary awards for pain and suffering. The Court concluded that this limit is difficult to reconcile with an interpretation that would allow legal costs to be awarded in an unlimited amount.

With regard to the context of the provision, the Court considered its legislative history. The Court examined previous drafts of the legislation, which contained the term "costs". This suggests that Parliament had considered this language but deliberately chose not to include it. The legislative history further demonstrated that Parliament initially chose to give the Commission an active role in litigating on behalf of complainants instead of giving the Tribunal the jurisdiction to award costs.

The Court further examined the context by considering the Commission's own understanding of costs authority and by considering parallel provincial legislation. The Commission has consistently stated that the CHRA does not confer legal cost jurisdiction, and has repeatedly urged Parliament to address this. Further in any parallel provincial legislation in which there is the authority to award legal costs, the term "cost" is used.

Finally, with regard to the purpose, the Court concluded that though the interpretation is meant to be broad and liberal in order to give effect to the purpose of human rights legislation, it cannot replace a textual and contextual analysis. As such, the 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 the relevant provisions."[7]

D. IMPLICATIONS FOR CHARITIES AND NOT-FOR-PROFITS

The implications of this decision are potentially far reaching for individuals wishing to pursue human rights complaints that fall under federal jurisdiction. It is now clear that such complainants will have to bear their own costs of complaints brought to the Tribunal, whether they win or lose. Likewise, those who successfully defend a human rights complaint will not be able to recover their legal costs from the complainant.

Though the Ontario Human Rights Tribunal similarly lacks the authority to award legal costs, the provincial system provides legal support to complainants (but not respondents) through the Human Rights Legal Support Centre, so complainants are able to pursue their claims. However, under the federal human rights system, there is no such support.

For charities and not-for-profits, the legal costs of defending human rights proceedings are substantial. Unlike proceedings in civil courts, where the losing party is often required to pay a substantial portion of the successful party's legal costs, there is not such costs regime in human rights proceedings. Therefore, charities and not-for-profits, as well as their directors and officers, should consider protecting themselves from the costs of such proceedings by securing insurance coverage which would cover defence and indemnity costs in the event of such a claim. Insurance coverage of this type would typically fall under "Employment Practices Liability" coverage offered by several Canadian insurance companies.

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[7] *Ibid* at para 64.