Federal Court of Appeal | Cour d'appel fédérale

CANADA

Date: 20091026

Docket: A-89-08

Citation: 2009 FCA 309

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

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

DONNA MOWAT

Respondent

and

CANADIAN HUMAN RIGHTS COMMISSION

Intervener

Heard at Toronto, Ontario, on September 16, 2009.

Judgment delivered at Ottawa, Ontario, on October 26, 2009.

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

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

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REASONS FOR JUDGMENT

LAYDEN-STEVENSON J.A.

[1] The issue for determination on this appeal has not been previously considered by this Court. The primary question is whether the Canadian Human Rights Tribunal (the Tribunal) has the authority to grant legal costs to a successful complainant under the provisions of the *Canadian Human Rights Act*, R.S. 1985, c. H-6 (the Act).

[2] A judge of the Federal Court (the application judge) reviewed the Tribunal's decision on a standard of review of reasonableness and concluded that the Tribunal's determination that it had the authority to award costs was reasonable.

[3] The appellant Attorney General of Canada (AG) asserts that the application judge erred in choosing the applicable standard of review. Further, he erred in concluding that the Tribunal has the power to award costs. The AG maintains that no such authority exists, on any standard of review. The intervener, the Canadian Human Rights Commission (the Commission), says otherwise.

[4] Resolution of these issues requires a determination of the appropriate standard of review to be applied to the Tribunal's decision and an examination of the application judge's analysis. The application judge was required to choose the proper standard of review and to apply it correctly.

[5] For the reasons that follow, I conclude that the applicable standard of review is correctness. I also find that Parliament did not grant the Tribunal the authority to award legal costs to a successful complainant. Consequently, I would allow the appeal.

Background

[6] The respondent, Donna Mowat, is a former Master Corporal with the Canadian Forces (CF). In 1998, she filed a human rights complaint with the Commission alleging that the CF had discriminated against her on the ground of sex, contrary to the provisions of the Act. Specifically, she claimed that the CF failed to provide her with an harassment-free workplace, adversely

differentiated against her in employment and refused to continue her employment. The harassment complaint included an allegation of sexual harassment.

[7] The respondent claimed compensation of more than $430,685 against the CF. Over a six-week period between November 2003 and February 2004, the Tribunal heard the matter. The respondent was represented by counsel. Commission counsel did not appear. The Tribunal rendered its decision in August 2005 (the merits decision). The respondent was largely unsuccessful. The Tribunal concluded that only the sexual harassment complaint was substantiated. It awarded $4,000 plus interest to a maximum of $5,000 for "suffering in respect of feeling or self respect."

[8] The respondent also sought compensation for various expenses, as well as legal costs in the amount of $196,313. The Tribunal heard both parties on the issue of the Tribunal's jurisdiction to award costs. In a decision dated November 15, 2006 (the costs decision), the Tribunal awarded the respondent $47,000 for legal costs plus interest from the date of the decision to the date of payment.

[9] The AG sought judicial review of the costs decision in the Federal Court. The entries in the Federal Court file disclose that, although she filed a notice of appearance, the respondent otherwise did not respond to the application. The reasons of the Federal Court judge indicate that the respondent's counsel advised the court that he had lost contact with his client and he was granted leave to withdraw from the hearing.

[10] The Federal Court judge identified two issues for determination. First, he asked "[d]oes the CHRT have jurisdiction to order compensation for legal expenses under s. 53(2)(*c*) [of the Act]?" Second, "[d]id the CHRT fail to observe the principles of procedural fairness by failing to give adequate reasons for its decision?" The application judge answered both questions in the affirmative. Although not specifically identified as an issue, the application judge conducted a pragmatic and functional analysis (as it was formerly known) to determine the applicable standard of review in relation to the Tribunal's decision.

[11] The AG filed a notice of appeal with respect to the Federal Court's determinations in relation to the standard of review and the "jurisdictional" issue. The Commission applied for, and was granted, leave to intervene. The respondent did not respond to the AG's appeal and did not appear at the hearing.

The Tribunal Decision

[12] The Tribunal reasoned that, if it had jurisdiction to award legal costs, it must be found in either paragraphs 53(2)(*c*) or 53(2)(*d*) of the Act which empower it to order compensation "for any expenses incurred by the victim as a result of the discriminatory practice."

[13] The Tribunal reviewed the divisive jurisprudence from the Federal Court as well as *Nkwazi v. Canada (Correctional Service)* (2001), C.H.R.D. No. 29 (Q.L.) (*Nkwazi*) with respect to the issue. It concluded that the predominance of authority from the Federal Court recognizes the Tribunal's jurisdiction to award legal costs under subsection 53(2) of the Act. On the basis of those

authorities and *Nkwazi*, the Tribunal concluded that "absent the power in the Tribunal to award legal costs where a complaint of a discriminatory practice is substantiated, such a finding would amount to no more than a pyrrhic victory for the complainant." The Tribunal found that such a result would frustrate the remedial provisions and purposes of the Act.

[14] The Tribunal then asked itself "what is a reasonable award of costs in this case?" Considering the authorities and the parties' submissions, it awarded $47,000 for legal costs under paragraph 53(2)(*c*) of the Act. It noted that interest is not an expense under subsection 53(2). Rather, the Tribunal is granted discretion to provide it pursuant to subsection 53(4). Interest prior to the date of the decision was denied, but interest on costs from the date of the decision to the date of payment was granted.

The Federal Court Decision

[15] The application judge conducted what is now known as a standard of review analysis. He considered the presence or absence of a privative clause or statutory right of appeal, the expertise of the tribunal, the purpose of the legislation and the relevant provision, and the nature of the question. He found that two of the three factors (expertise of the tribunal and purpose of the legislation and provision) required deference be given to the decision.

[16] The application judge regarded the fourth factor (nature of the question) as determinative in view of *Chopra v. Canada (Attorney General)*, 2007 FCA 268; [2008] 2 F.C.R. 393 (*Chopra*). He was of the view that this Court "in effect concluded that the standard of review in reviewing the

[Tribunal's] interpretation of subsection 53(2)(*c*) of the [Act] was reasonableness…". The Federal Court judge considered that since the particular question of law – jurisdiction to order compensation for expenses arising from discrimination – is one very much at the core of the human rights subject matter in which it has expertise, the Tribunal's interpretation of the subsection to determine whether it has jurisdiction to order compensation for legal expenses is entitled to more deference. Last, he noted that subsection 50(2) of the Act authorizes the Tribunal to decide questions of law or fact. Thus, Parliament contemplated situations where the Tribunal may have to decide questions of law in order to determine matters before it.

[17] The Federal Court judge concluded that the standard of review "in a judicial review of the Tribunal's decision on its jurisdiction arising from subsection 53(2)(*c*) to award compensation for legal expenses is reasonableness *simpliciter*."

[18] Next, the application judge asked whether the Tribunal's decision was reasonable and concluded that it was. In so doing, he summarized the Tribunal's chronological review of conflicting jurisprudence in the Federal Court, noted the Federal Court's approval of the *Nkwazi* reasoning in *Brooks v. Canada (Attorney General)*, 2006 FC 500 (*Brooks*) and reviewed the human rights policy approach to statutory interpretation articulated in *C.N.R. v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114 (*CNR*).

[19] On the basis of the remedial purpose of human rights legislation, the *CNR* approach to statutory interpretation of such legislation and the *Chopra* decision, the Federal Court judge

concluded that the Tribunal's interpretation that "subsection 53(2)(*c*) gives it the jurisdiction to award legal costs as an expense arising from discriminatory conduct is reasonable."

[20] Last, the application judge found that the Tribunal breached the principles of procedural fairness by failing to provide adequate reasons to justify its costs award. That finding is not in issue on this appeal.

The Legislative Context

[21] Human rights legislation is fundamental law and quasi-constitutional in nature. The purpose of the Act, set out in section 2, is to ensure people have an equal opportunity to make for themselves the life that they are able and wish to have without being hindered by discriminatory practices.

[22] In order to promote the goal of equal opportunity for each individual, the Act seeks to prevent discriminatory practices. Its purpose is not to punish wrongdoing but to prevent discrimination: *CNR*. Specific prohibited grounds of discrimination and discriminatory practices are set out in the Act.

[23] The Commission and the Tribunal are established pursuant to the Act. Among other things, the Commission is charged with responsibility for human rights research and public education, the investigation and processing of complaints up to the point of adjudication, maintaining close liaisons with similar bodies in the provinces and considering recommendations from public interest

groups. On its appearances before the Tribunal, the Commission represents the public interest (section 51 of the Act).

[24] The Tribunal functions as an adjudicative body. Its responsibilities were described in *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884 (*Bell Canada*), at paragraph 23, as follows:

> It conducts formal hearings into complaints that have been referred to it by the Commission. It has many of the powers of a court. It is empowered to find facts, to interpret and apply the law to the facts before it, and to award appropriate remedies. Moreover, its hearings have much the same structure as a formal trial before a court. The parties before the Tribunal lead evidence, call and cross-examine witnesses, and make submissions on how the law should be applied to the facts. The Tribunal is not involved in crafting policy, nor does it undertake its own independent investigations of complaints; the investigative and policy-making functions have deliberately been assigned by the legislature to a different body, the Commission.

[25] This case is concerned with subsection 53(2) of the Act which furnishes the Tribunal with broad remedial powers where, at the conclusion of the inquiry, the Tribunal finds that the complaint is substantiated. Specifically in issue is paragraph 53(2)(*c*). It provides:

Canadian Human Rights Act, R.S. 1985, C. H-6	*Loi canadienne sur les droits de la personne* (L.R., 1985, ch. 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:	53(2) À l'issue de l'instruction, le membre instructeur qui juge la plainte fondée, peut, sous réserve de l'article 54, ordonner, selon les circonstances, à la personne trouvée coupable d'un acte discriminatoire :
…	[…]
	c) d'indemniser la victime de la

(*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;	totalité, ou de la fraction des pertes de salaire et des dépenses entraînées par l'acte;

The Role of an Appellate Court

[26] The role of an appellate court ─ in instances where the Court of Appeal is dealing not with judicial review of an administrative decision, but with appellate review of a subordinate court ─ is to determine, first, whether the reviewing judge has chosen the correct standard of review: *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 (*Dr. Q*). Next, the appellate court must determine whether the standard of review was applied correctly. In performing this analysis, this Court "steps into the shoes of the subordinate court": *Zenner v. Prince Edward Island College of Optometrists*, [2005] 3 S.C.R. 645 (*Zenner*); *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, [2006] 3 F.C.R. 610 (F.C.A.) (*Prairie Acid Rain*).

The Standard of Review

[27] It is common ground that the proper standard of review for the application judge's choice of standard is correctness: *Dr. Q* (para. 43). In this instance the debate centers on the Federal Court judge's choice of the reasonableness standard of review with respect to the Tribunal's decision.

[28] *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 (*Dunsmuir*) established a two-step process for determining the applicable standard of review. The first step requires the court to

"ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question" (para. 62).

[29] Historically, the Supreme Court of Canada, in addressing human rights tribunals, has nearly unanimously held that where the general question is one of statutory interpretation, it constitutes a question of law and is to be reviewed on a standard of correctness. The superior expertise of human rights tribunals relates to fact-finding and adjudication in a human rights context and does not extend to general questions of law: *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 (*Mossop*); *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353 (*Berg*); *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (*Pezim*); *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571 (*Gould*); *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 (*Ross*).

[30] *Dunsmuir*, and more recently *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (*Khosa*) cautioned that "with or without a privative clause, a measure of deference has come to be accepted as appropriate where a particular decision had been allocated to an administrative decision maker rather than to the courts. This deference extended not only to facts and policy but to a tribunal's interpretation of its constitutive statute and related enactments…"(*Khosa* (para. 25)). This proposition has been characterized as a presumption that tribunals' interpretation of their enabling legislation is normally reviewable on a standard of reasonableness: *Dunsmuir* at paragraph 146; *Public Service Alliance of Canada v. Canadian Federal Pilots Association and Attorney*

General of Canada, 2009 FCA 223 (*PSAC*) (para. 36). Given the teachings of *Dunsmuir* and *Khosa*, prudence dictates that a standard of review analysis is advisable.

The Appellant

[31] The AG contends that the standard of review is correctness. The submission is that, although the application judge cited and applied *Brooks* on the merits of the decision, he failed to follow it with regard to the standard of review. In relation to the factors arising from the standard of review analysis delineated in *Dunsmuir*, the AG maintains that the deference for expertise does not extend to findings of law on which the Tribunal has no expertise. The question of "whether Parliament has extended the power of the tribunal to order a respondent to pay the complainant's legal costs" is one of "pure law or jurisdiction over which courts have greater expertise." Further, the appellant argues that *Chopra* was concerned with "how the Tribunal could fashion a remedy" rather than the "jurisdiction to grant legal costs." The application judge erred in relying on *Chopra* as he did.

[32] The AG further asserts that jurisdictional questions must be answered correctly and, in support, refers to the following excerpt from para. 59 of *Dunsmuir* :

> Jurisdiction is intended in the narrow sense of whether the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret its grant of authority correctly or its action will be found to be ***ultra vires*** or to constitute a wrongful decline of jurisdiction. (Attorney General's emphasis).

He argues that this case fits squarely within the Supreme Court's comments. In sum, "either Parliament has granted the Tribunal the jurisdiction to award legal costs, or it has not."

The Commission

[33] The Commission maintains, in view of *Dunsmuir* and *Khosa*, the proper standard of review is "reasonableness with deference". This is because the Tribunal has developed particular expertise in the application of the law in a specific statutory context. Moreover, the Tribunal was interpreting its own statute, with which it has particular familiarity. The Commission relies on *Vilven v. Air Canada*, 2009 FC 367 (*Vilven*) where the Federal Court, after conducting a standard of review analysis, determined that the applicable standard of review ─ with respect to the Tribunal's decision in relation to whether a binding rule is required for there to be a "normal age of retirement" for the purposes of paragraph 15(1)(*c*) of the Act ─ is reasonableness.

Analysis

[34] The questions before the Tribunal and the Federal Court were whether the Tribunal had the authority to award costs to the complainant and whether the authority could be found in paragraph 53(2)(*c*) of the Act which authorizes the Tribunal to compensate a complainant for any expenses incurred as a result of the discriminatory practice.

[35] It is not disputed that the Tribunal had the authority to determine these questions. What is in issue is whether the Tribunal's decision had to be correct or whether it sufficed that it be reasonable. In other words, what is the standard of review applicable to the decision of the Tribunal and did the Federal Court apply the correct standard to the determination of the issue?

[36] Determining the standard of review requires "an analysis of the factors making it possible to identify the proper standard of review" *Dunsmuir* (para. 62). The analysis is contextual (para. 64).

[37] Before addressing the factors of the standard of review analysis, it bears repeating that the applicable standard of review will normally be that of reasonableness: *Dunsmuir*; *Khosa*. The Tribunal is accorded deference because of its experience and expertise, provided that the process it used is justified, transparent and intelligible and that its decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir* (para. 47). However, if the standard of review analysis yields a standard of review of correctness, no deference is owing.

[38] *Dunsmuir* identified three situations where the correctness standard of review is appropriate. A true question of jurisdiction "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter" is the first situation (para. 59). The second is where there is a question of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" (para. 60). The third situation is where a determination of jurisdiction between two competing tribunals is required (para. 61).

[39] I turn now to the factors of the standard of review analysis. The Act does not contain a privative clause. There is no statutory right of appeal. The application judge determined that this

factor tends toward a lesser degree of deference. While I do not disagree, the absence of a privative clause is by no means determinative and may be regarded as neutral.

[40] The legislative context has been discussed earlier in these reasons. The purpose of the Act is remedial and it seeks to prevent discriminatory practices. It serves the public interest and also engages a private interest in that it seeks to remedy specific violations of the Act. The particular provision in issue deals with the Tribunal's power to compensate a victim for "wages the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice."

[41] The Tribunal functions as an adjudicative body, conducts formal hearings into complaints that have been referred to it by the Commission and awards appropriate remedies pursuant to the powers accorded it by subsection 53(2) of the Act. Subsection 48.1(2) requires that members of the Tribunal have "experience, expertise and interest in, and sensitivity to, human rights." Subsection 50(2) empowers the Tribunal to decide "all questions of law or fact necessary to determining the matter." This has been described as "a general power to consider questions of law, including questions pertaining to the *Charter* and the *Canadian Bill of Rights*": *Bell Canada* (para. 47) citing *Cooper v. Canada (Canadian Human Rights Commission)*, [1996] 3 S.C.R. 854; see also *Mossop* (para. 44) and *Ross* at p. 849. This factor, on its own, tends to favour deference.

[42] The nature of the question is narrow and discrete. Does compensation for "any expenses incurred by the victim as a result of the discriminatory practice" include payment of the victim's legal costs in relation to the hearing before the Tribunal? The interpretation of the provision is

critical because the Tribunal's jurisdiction to award legal costs will ultimately turn on it. For the reasons that follow, I conclude that it is both a question of general law of central importance to the legal system as a whole and one that is outside the specialized expertise of the Tribunal.

[43] There is no debate that the Tribunal is a specialized one in relation to matters of human rights. However, the concern is not with either general or specialized expertise. Rather, it is with the Tribunal's expertise in relation to the specific issue before it. I do not believe that the nature of the question at hand engages the human rights subject matter in which the Tribunal has expertise.

[44] This is not a context-specific setting. There is no factual component entailed in the analysis. Expertise in human rights is not required and does not assist in the interpretation of the narrow question arising from the provision. The Tribunal's authority to award costs of a proceeding to a successful complainant has nothing to do with the substance of human rights. Rather, the Tribunal must determine a pure question of law, specifically, one that determines the bounds of its authority. The Tribunal has no institutional or experiential advantage over the court and is no better-positioned than the court in this respect.

[45] The question has not been answered consistently by the Tribunal and is the subject of diverse opinions in the Federal Court. It comes before this Court for the first time. It is difficult, if not impossible, to conclude that the answer (either yes or no) can be said to fall within a range of possible acceptable outcomes. There is much to be said for the argument that where there are two conflicting lines of authority interpreting the same statutory provision, even if each on its own could

be found to be reasonable, it would not be reasonable for a court to uphold both: *Taub v. Investment Dealers Association of Canada*, 2009 ONCA 628 (*Taub*) (para. 65). I endorse and adopt the comments in *Abdoulrab v. Ontario (Labour Relations Board)*, 2009 ONCA 491 (*Abdoulrab*) (para. 48) where Juriansz J.A. stated:

> From a common sense perspective, it is difficult to accept that two truly contradictory interpretations of the same statutory provision can both be upheld as reasonable. If two interpretations of the same statutory provision are truly contradictory, it is difficult to envisage that both would fall within the range of acceptable outcomes. More importantly, it seems incompatible with the rule of law that two contradictory interpretations of the same provision of a public statute, by which citizens order their lives, could both be accepted as reasonable.

[46] As Feldman J.A. commented in *Taub*, "it accords with the rule of law that a public statute that applies equally to all affected citizens should have a universally accepted interpretation" (para. 67).

[47] Further, in my view, alleged victims of discriminatory practices are entitled to know, in circumstances where they retain counsel to represent them at the hearing before the Tribunal, whether, if successful, they may be entitled to legal costs in relation to the proceeding. Alleged discriminators are similarly entitled to know, if the claim is substantiated, whether significant cost consequences may follow. Further, because of the public interest mandate of the Tribunal and the public interest nature of the legislation, the issue has an influence on society at large. The question is one that calls for certainty and consistency. Consequently, I regard the question as both a general question of law of central importance to the legal system as a whole and one that is outside the specialized area of the Tribunal's expertise. In accordance with the teaching of *Dunsmuir*, the standard of review is correctness (para. 55).

[48] This result is not inconsistent with recent jurisprudence. In *Chopra*, this Court concluded that the standard of review applicable to the issue before it was reasonableness. However, the Court was considering whether it was appropriate for the Tribunal to apply the principles of foreseeability and mitigation to reduce the compensation that would otherwise be payable to the victim under the heading "wages of which he was deprived" as a result of the employer's discriminatory practice. The Tribunal's authority to award compensation for lost wages arising from the discrimination was not in question. Pelletier J.A. specifically noted that the standard of review varies with the nature of the legal question in issue. While the standard may be correctness, it need not be so (para. 17).

[49] In *Vilven*, the Tribunal was interpreting terminology directly related to the discriminatory provisions of the Act, an area within its specialized expertise. A similar situation occurred in *Canadian Human Rights Commission et al. v. National Capital Commission et al.*, 2009 FCA 273.

[50] There is binding authority to the effect that different standards of review can apply to different legal questions depending on the nature of the question and the relative expertise of the tribunal in those particular matters: *Canada (Deputy Minister of National Revenue – M.N.R.) v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100 (*Mattel*) (para. 27); *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650 (*VIA Rail*) (para. 278).

[51] Having regard to the purpose of the Tribunal, the nature of the question and the expertise of the Tribunal, the applicable standard of review is correctness. It follows that the application judge erred in concluding that the standard of review is reasonableness.

Interpretation of the Provision

[52] For convenience, the pertinent provision is reproduced again.

Canadian Human Rights Act, R.S. 1985, C. H-6	*Loi canadienne sur les droits de la personne* (L.R., 1985, ch. 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: …	53(2) À l'issue de l'instruction, le membre instructeur qui juge la plainte fondée, peut, sous réserve de l'article 54, ordonner, selon les circonstances, à la personne trouvée coupable d'un acte discriminatoire : […]
(*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; …	*c*) d'indemniser la victime de la totalité, ou de la fraction des pertes de salaire et des dépenses entraînées par l'acte; […]

[53] The AG and the Commission agree on a number of basic propositions. First, as a creature of statute, the Tribunal derives its powers solely from its enabling legislation. Second, human rights legislation, generally, is to be given a purposive and liberal interpretation that will advance the purposes and objects of the Act. Narrow restrictive determinations or strictly grammatical approaches tending to defeat the legislation's purpose are to be avoided. Third, to the extent possible, the interpretation of provisions should be viewed in light of analogous provisions in various human rights statutes in Canada. Minor differences in terminology should be minimized.

The Federal Court Decision

[54] As noted earlier, the application judge summarized the Tribunal's chronological review of conflicting jurisprudence in the Federal Court, noted the Federal Court's approval of the *Nkwazi* reasoning in *Brooks* and reviewed the human rights policy approach to statutory interpretation articulated in *CNR*. He considered that the human rights policy approach to statutory interpretation of paragraph 53(2)(*c*) resulted in an interpretation that an "award of compensation for expenses, here legal expenses, is an award that arises as a result of proven discrimination and not an award based on the success of a party to litigation."

The Appellant

[55] The AG argues that "costs" is a legal term of art with a distinct meaning, separate from "expenses". The principles of statutory construction dictate that clear and unambiguous language is required to enable the Tribunal to award costs. The principles of "implied exclusion" and "presumption of perfection" are cited in support of this position. The *ejusdem generis* principle is relied upon to "confirm that the word 'expenses' does not include costs."

[56] The AG maintains that the power to award costs must not be confused with the power to compensate. Costs, normally discretionary, do not refer to the wrong but to the success or failure of the litigation. Moreover, absent the most explicit language, Parliament cannot be presumed to have established a one-sided regime whereby respondents can never recover costs, which is the effect of the decision of the Tribunal and the Federal Court.

The Commission

[57] The Commission submits that legal expenses are not excluded from the definition of "expenses". Since there is nothing in the Act that rules out legal expenses, a restrictive reading of the provision is contrary to the intention of Parliament. At the hearing of the appeal, counsel took the position that paragraph 53(2)(*c*) of the Act does confer express authority on the Tribunal to award costs, subject only to a causal connection between the discriminatory practice and the loss. In contrast, I note that paragraph 33 of the Commission's memorandum of fact and law states, "[t]he CHRA does not contain an express provision granting the Tribunal the authority to order the payment of costs."

[58] In response to the AG's suggestion that common law costs are distinct from damages, the Commission claims this is irrelevant. Referring to *Chopra*, the Commission maintains that these "principles do not fully apply to a statutory scheme for compensation." The Commission submits "there can be no justice if the costs to ask for justice prove greater than the potential award that can be obtained."

The Tribunal's Approach

[59] Various approaches to its capacity to award legal costs have been taken by the Tribunal:

- Commission counsel had carriage of the matter in the public interest and the complainants' interest was adequately represented, therefore, legal fees were redundant and denied on that basis (*Potapczyk*, TD8/84);

- its authority extended to expenses related to discrimination, not expenses related to the legal proceedings under the act (*Morell*, TD5/85);
- it was empowered to order costs under paragraph 41(2)(*c*) [now 53(2)(*c*)] in suitable circumstances, however, no award of costs was made against the respondent, rather, the Commission was urged to pay them (*Cashin* TD9/85);
- costs were denied on the basis that it did not have jurisdiction to award them (*Corlis*, TD6/87);
- costs were awarded without reasons (*Druken et al*., TD7/87);
- costs were warranted when the Commission's actions led to the need for separate counsel – the respondent was not required to pay them, but the Commission was urged to do so (*Hinds*, TD13/88 and *Oliver*, TD15/89);
- without reasons, a complainant was awarded legal costs (*Kurvits*, TD7/91);
- costs could be awarded under section 53 as expenses (*Grover*, TD12/92);
- where complainant's counsel was found to have played an important role in a complex case, costs were awarded (*Thwaites*, TD9/93);
- when the positions of the complainant and the Commission were consistent, independent counsel was redundant and costs were not awarded (*Pond*, TD9/94);
- costs could be expenses (*Swan* TD5/94);
- compensation was awarded, without reasons, for leave and time spent to develop and prepare the complaint. Legal costs were also awarded (*Lambie*, TD13/95);

- time off to attend the hearing and related lost wages were not connected to discriminatory practices, but legal costs were awarded as it was reasonable for the complainant to have retained outside counsel (*Koeppel*, TD5/97);
- the purpose of the remedies in the human rights context being to make the complainant whole, costs were awarded with respect to legal advice (*Green*, TD6/98);
- where the complainant's counsel did an excellent job and played an important role, costs were awarded (*Bernard*, TD2/99);
- on being satisfied that the respondent's offer protected the public interest, the Commission withdrew from the proceeding and costs were awarded on a solicitor-and-client basis against the respondent as expenses. Paragraph 53(2)(c) was sufficiently broad to encompass legal representation (*Nkwazi*, TD1/01);
- complainant was not represented by counsel, but costs were awarded for the preparation of the complaint and the advice of a lawyer in this respect (*Stevenson*, TD16/01);
- noting that the role of Commission counsel was to represent the public interest, costs were awarded against the respondent notwithstanding that there was no conflict between Commission counsel and the complainant's counsel (*Premakur*, T622/01);
- self-represented complainant was awarded "out of pocket expenses" of $11,248.26 as the costs "to obtain advice and assistance in the pursuit of his complaint" (*Milano*, 2003 CHRT 30);
- initial costs of legal advice in bringing a complaint can be characterized as compensation because of the causal connection with the discrimination, but expenses incurred in the hearing cannot be so characterized. Nonetheless, premised on a power to

preserve its remedies, the Tribunal concluded that it had authority to award costs (*Brown*, 2004 CHRT 30); and

- referring to an evolving situation and surmising that, although Parliament, at the time the legislation was drafted, did not intend to give to the Tribunal the power to award costs, this did not mean that Parliament intended to deprive it of such power in the current circumstances (Commission counsel not appearing). Costs of $105,000 were awarded against the respondent (*Brooks*, 2005 CHRT 14)

The Federal Court Jurisprudence

[60] The dispute in *Canada (Attorney General) v. Thwaites*, [1994] 2 F.C. 38 (T.D.) (*Thwaites*), concerned the appropriate quantum of compensation for past and future income as well as an award for the "reasonable costs of counsel and actuarial services." The Federal Court concluded that counsel and actuarial costs are, in ordinary usage of English language, expenses incurred. The fact that particular significance is attributed to "costs" in the legal sense does not provide a basis of support for an argument that "expenses incurred" does not include those costs unless specifically identified in the legislation. The word "expenses" should be given its ordinary meaning unless the context requires otherwise. Since nothing in the context required otherwise, the costs award was upheld.

[61] In *Canada (Attorney General) v. Lambie* (1996), 124 F.T.R. 303 (T.D.) (*Lambie*), Commission counsel was present. The complainant successfully claimed additional costs for "leave and time spent to develop and prepare his complaint." The court set aside the decision in its entirety.

In addressing costs, it held that "the word 'expense' is not broad enough to cover time spent in preparation except in exceptional circumstances" and that the Act "does not confer [upon the Tribunal] the jurisdiction to award costs although Parliament could easily have included such a power."

[62] In *Canada (Attorney General) v. Green*, [2000] 4 F.C. 629 (T.D.) (*Green*), the court upheld a finding of discrimination with respect to a public servant claiming discrimination on the basis of disability, but overturned the costs award. The court stated, "if Parliament had intended the Tribunal to award legal costs, it would have said so…[t]here is no mention [in the Act] of legal costs, an indication Parliament did not intend the Tribunal have the power to order payment of legal costs."

[63] In *Stevenson v. Canada (Canadian Security Intelligence Service)* (2003), 229 F.T.R. 297 (T.D.) (*Stevenson*), the Service challenged the Tribunal's award of $2,000 legal costs to the complainant and its order directing a letter of apology from the Service's director. The court reviewed the conflicting jurisprudence and preferred the approach in *Thwaites*. It concluded that the Tribunal had jurisdiction to award legal costs in very exceptional cases. Legal costs incurred in the course of filing a complaint for discrimination constituted "any expenses incurred by the victim" as described in section 53 of the Act.

[64] In *Brooks*, the respondent challenged the Tribunal's award of legal costs in the amount of $105,000 in favour of Mr. Brooks. The reasoning in *Stevenson* was reviewed and adopted. The court in *Brooks* rejected the submission that *Stevenson* addressed only the recoverable costs of

consulting counsel with respect to filing a complaint and not the costs of ongoing legal representation. The court concluded that the intent in *Stevenson* was not so restricted.

The Legislative History

[65] There have been various amendments to the Act since its inception. The content of what is now paragraph 53(2)(*c*) remains as it has always been. However, changes have been contemplated. Bill C-108 passed first reading on December 10, 1992 (Bill C-108, An Act to amend the *Canadian Human Rights Act* and other Acts in consequence thereof, 3rd Sess., 34th Parl., 1992). Clause 24(3) of Bill C-108 provided as follows:

(6) The Tribunal may order the Commission to pay costs in accordance with the rules made under section 48.9 to	(6) Le tribunal peut accorder, aux dépens de la Commission, les frais et dépens qu'il détermine suivant les barèmes fixés dans les règles visées à l'article 48.9 :
(*a*) complainant, if the complaint is substantiated and	(*a*) au plaignant qui a gain de cause, soit lorsque la Commission n'a pas comparu devant lui, soit lorsque le plaignant a un représentant distinct à cause de la divergence de ses intérêts et de ceux de la Commission, ou des circonstances de la plainte;
(i) the Commission did not appear before the Tribunal, or (ii) separate representation for the complainant was warranted by the divergent interests of the complainant and the Commission or by any other circumstances of the complainant; or	
(*b*) a respondent, if the complaint is not substantiated and is found to be trivial, frivolous, vexatious, in bad faith or without purpose or to have caused the respondent excessive financial hardship.	(*b*) au défendeur qui a gain de cause, lorsqu'il estime que la plainte est sans objet, dénuée de tout intérêt, faite de mauvaise foi ou a causé une contrainte financière excessive à celui-ci.

[66] The feature of this provision was that costs could be awarded to either party and would be paid by the Commission. Additionally, clause 48.9 (1) directed the President of the Human Rights Tribunal Panel, in consultation with the other members of the Panel and with the approval of the Governor in Council, to make rules of procedure governing the inquiries into complaints and the practice and procedure before the Tribunals to ensure that proceedings were conducted informally, expeditiously and fairly, including rules governing, among other things, awards of interest and costs (48.9(1)(*h*)).

[67] Bill C-108 was never formally enacted and consequently did not become law. Since 1992, minor amendments have been made to the Act almost annually. Substantial amendments were enacted in 1998. The Act remains silent with respect to costs.

[68] The *Canadian Human Rights Commission Special Report to Parliament: Freedom of Expression and Freedom from Hate in the Internet Age*, June 2009 (Minister of Public Works and Government Services 2009, Cat. No. HR4-5/2009; ISBN 978-0-662-06896-9) addressed the matter of costs. The following excerpt appears at pages 34 and 35 of the Report:

> Awarding of costs
>
> Concerns have been expressed that there is an undue financial burden on respondents when complaints are filed against them. Even if a complaint is dismissed, respondents must bear their own costs. The CHRA does not allow for the awarding of costs.
>
> At the Commission level, neither respondents nor complainants are required to have legal counsel to represent them. The process is simple. The CHRA requires the Commission to designate investigators to investigate each complaint with which it deals. The investigation process comprises an exchange of documents, and interview with witnesses and parties. When the investigation is completed, the parties are informed of the findings. Parties can

make written submissions. The investigation report and any submissions in the case file are given to Commissioners for a decision. The decision is based entirely on documentary evidence; no hearings are held and the Commission can make no finding of liability.

At the Tribunal, many parties feel a need for legal representation although there is no statutory requirement for it. As with many administrative tribunals and courts, unrepresented litigants are provided guidance by the Tribunal to ensure their cases are properly presented.

The 2000 report of the *Canadian Human Rights Act* Review Panel, chaired by retired Supreme Court Justice Gérard La Forest, considered the issue of the awarding of costs and recommended that costs be awarded, but only in special situations where there has been misconduct by a party:

> We considered the issue of whether the Act should specifically empower the Tribunal to award costs. We do not think that costs of legal proceedings are generally appropriate in human rights cases under the Act.
>
> However, we do think that costs should be awarded against a party that has intentionally delayed the hearing of a case or is guilty of misconduct in the proceedings. (My emphasis)

The Commission agrees with this recommendation.

RECOMMENDATION 3
It is recommended that the *Canadian Human Rights Act* be amended to allow for an award of costs in exceptional circumstances where the Tribunal finds that a party has abused the Tribunal process.

[69] The Review Panel and the Commission endorsed the regulatory, rather than the compensatory, function of costs.

Human Rights Statutes in Canada

[70] The treatment of costs varies significantly in the human rights legislation throughout the provinces and territories. In British Columbia, it provides for an award of costs against a party if the

party has engaged in improper conduct during the course of the complaint (*Human Rights Code*, R.S.B.C. 1996, c. 210, s. 37(4)). The Manitoba Act requires the parties to pay their own costs unless a complaint or reply is regarded as frivolous or vexatious or the frivolous or vexatious conduct of a party has prolonged the adjudication. In such cases, the responsible party may be required to pay some or all of the costs of the affected party (*Human Rights Code*, S.M. 1987-88, c. 45. s. 45).

[71] The legislation of the North West Territories and Nunavut contains provisions similar to those of Manitoba. The North West Territories Act also provides for an award of costs where there are extraordinary reasons for making such an order in the particular case (*Human Rights Act*, S.N.W.T. 2002, c. 18, s.63). Nunavut has additionally provided for costs in circumstances where a complaint is based on information the complainant knew to be false. In such cases, damages for injury to the respondent's reputation may be awarded in addition to part or all of the costs of defending against the complaint (*Human Rights Act*, S.Nu. 2003, c. 12, s. 35).

[72] The Yukon legislation mirrors Nunavut's provision regarding a complaint based on false information. However, its statute also allows for costs payable to a successful complainant by the party responsible for the discrimination. Additionally, where a complaint is found to be frivolous or vexatious, the Tribunal may order the respondent's costs to be paid by the Commission (*Human Rights Act*, R.S.Y. 2002, c. 116, ss. 24-26).

[73] The Saskatchewan, New Brunswick, Nova Scotia and Ontario Acts do not provide for costs. The Nova Scotia Act allows for costs to the extent they are permitted by the regulations, but no regulations have been enacted. Similarly, in New Brunswick, the Act authorizes the enactment of

regulations respecting any matter necessary to carry out effectively the intent and purpose of the Act. No regulations have been enacted. (*Human Rights Act*, R.S.N.S. 1989, c. 214, s. 34(8) and *Human Rights Act*, R.S.N.B. 1973, c. H-11, s. 16). The situation in Ontario is of similar effect.

[74] Conversely, Alberta, Québec, Prince Edward Island and Newfoundland and Labrador in their respective Acts have empowered their respective adjudicators to make any order as to costs considered appropriate (*Human Rights Act*, R.S.A. 2000, A-22-5, s. 32(2); *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12, s. 126; *Human Rights Act*, R.S.P.E.I. 1988, c. H-12, s. 28.4(6); *Human Rights Co*de, R.S.N.L. 1990, c. H-14, s. 28(2)).

Analysis

[75] The proper approach to statutory interpretation has been articulated repeatedly by the Supreme Court of Canada and is so entrenched that reference to specific authority is not necessary. The goal is to seek the intent of Parliament by reading the words of the provision in context and according to their grammatical and ordinary sense, harmoniously with the scheme and the object of the statute. In accordance with this fundamental principle, the search for parliamentary intent constitutes an exercise in ascertaining what Parliament set out to accomplish. In this case, the quest is to determine whether Parliament intended to endow the Tribunal with the authority to award costs to a successful complainant. For the reasons that follow, I conclude that Parliament did not intend to grant, and did not grant, to the Tribunal the power to award costs.

[76] The exercise requires an examination of the words “expenses” (“dépenses” in French) and “costs” (“dépens”). The Act does not define “expenses” and is silent with respect to “costs”. The provision in issue is a compensatory one: *CNR* (para. 39). In paragragh 53(2)(*c*), the word “expenses” is broad and non-specific. It takes its colour from the word “compensate”, for only those expenses incurred as a result of the discriminatory practice qualify for compensation. The word “costs”, however, is another matter. I agree with the appellant that the word “costs” is a legal term of art.

[77] A legal term of art is a word or expression that, through usage by legal professionals, has acquired a distinct legal meaning. It has a technical meaning because of its conventional use by lawyers and judges: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont.: LexisNexis Canada, 2008) at 57 and 61. That is, it has a settled legal definition.

[78] In *National Energy Board Act (Can.) (Re)*, [1986] 3 F.C. 275 (C.A.), leave to appeal dismissed, (1986), 23 Admin, L.R. xxi (*NEB Reference*), the Federal Court of Appeal referred to the “accurate and useful discussion as to the normal legal meaning of ‘costs’” of the Ontario Divisional Court in *Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee, Inc. et al*. (1985), 51 O.R. (2d) 23 (Div.Ct.) (*Hamilton-Wentworth*), where it was determined that the word “costs” as used in the legal sense is a word having a well-defined meaning. In *Hamilton-Wentworth*, the court stated “[f]rom the earliest times, it has been recognized that the power to award ‘costs’ must be found in a statute.” Describing the nature of costs, it said:

> The characteristics of costs, developed over many years are:
> (1) They are an award to be made in favour of a successful or deserving litigant, payable by the loser.
> (2) Of necessity, the award must await the conclusion of the proceeding, as success or entitlement cannot be determined before that time.
> (3) They are payable by way of indemnity for allowable expenses and services incurred relevant to the case or proceeding.
> (4) They are not payable for the purpose of assuring participation in the proceedings.

[79] The concept of costs in the context of administrative tribunals carries the same general connotation as legal costs: *Bell Canada v. Consumers' Association of Canada*, [1986] 1 S.C.R. 190; see also *Re. Bell Canada and Telecom. Decision CRTC 79-5*, [1982] 2 F.C. 681 (C.A.), leave to appeal dismissed, [1982] S.C.C.A. No. 299.

[80] In the specific context of human rights legislation, the matter of costs was discussed in *Ontario (Liquor Control Board) v. Ontario (Ontario Human Rights Commission)* (1988), 25 O.A.C. 161, 27 O.A.C. 246 (addendum) (Div. Ct.). The court concluded as follows:

> There is no inherent jurisdiction in a court, nor in any other statutory body, to award costs…The Board of Inquiry is created by the Ontario Human Rights Code [citation omitted]. As a statutory body it can only have jurisdiction to award costs if such jurisdiction is expressly given to it either by the Code or some other act…The power of the Board of Inquiry under s. 40(1) to make "restitution including monetary compensation" is not an express provision for the award of costs to complainants under the Code. The rule of liberal interpretation to carry out the objects of the Code to, as far as possible, remedy the effects of and prevent discrimination do not apply to procedural matters or the question of costs.

[81] Similarly, in *Moncton v. Buggie and N.B. Human Rights Commission* (1985), 21 D.L.R. (4^{th}) 266; 65 N.B.R. (2d) 210 (C.A.) (*Buggie*), leave to appeal dismissed, [1986] S.C.C.A. No. 21, the New Brunswick Court of Appeal concluded that although paragraph 21(1)(*c*) of the New

Brunswick Act provided the Commission the power to "issue whatever order it deems necessary to carry into effect the recommendation of the Board", such power did not carry with it the power to award costs against a party.

[82] In *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2005 NSCA 70; 253 D.L.R. (4th) 506; 232 N.S.R. (2d) 16 (*Halifax*), MacDonald C.J. examined the provision in the Nova Scotia legislation empowering a board of inquiry to order any party who has contravened the Act to "do any act or thing that constitutes full compliance with the Act and to rectify any injury caused to any person or class of person or to make compensation therefore". In comprehensive and thoughtful reasons, the Chief Justice reviewed the history of costs and the relevant jurisprudence. He arrived at the following conclusions:

- a compensation award is separate and distinct from an award for costs. The former relates to the victim's injury, the latter relates to the process;
- legal fees flowing from, but unrelated to prosecuting the claim can be compensable, but legal fees incidental to prosecuting the claim are not compensable;
- it is one thing to give the legislation a broad and liberal interpretation so as to ensure its objects are met. It is quite another to cloak the Board with jurisdiction that the legislature did not give to it;
- the Board had no power to award the complainant legal costs.

[83] The Federal Court jurisprudence was distinguished on the basis that the federal legislation authorizing compensation "for any expenses…as a result of the discriminatory practice" may arguably include legal fees (my emphasis).

[84] An examination of the human rights statutes of the provinces and territories where specific provision is made for costs is telling, particularly in view of the Supreme Court's admonition with respect to the importance of developing an interpretation that is consistent with other Canadian human rights statutes. The legislation permits the Tribunal or the Board, as the case may be, upon determination that a complaint is justified, to compensate as follows:

- in British Columbia, "compensate the person discriminated against for all, or a part the member or panel determines, of any wages or salary lost, or expenses incurred, by the contravention", para. 37(2)(*d*)(ii);
- in Manitoba, "compensate any party adversely affected by the contravention for any financial losses sustained, expenses incurred or benefits lost by reason of the contravention, or for such portion of those losses, expenses or benefits as the adjudicator considers just and appropriate", para. 43(2)(*b*);
- in the North West Territories, "compensate any party dealt with contrary to this Act for all or any part of any wages or income lost or expenses incurred by reason of the contravention of this Act", para. 62(3)(iv);
- in Nunavut, "compensate any party dealt with contrary to this Act or the regulations for all or any part of any wages or income lost, expenses incurred or other losses by reason of the contravention of this Act or the regulations", para. 34(3)(iv);

- in the Yukon, “pay damages for any financial loss suffered as a result of the discrimination”, para. 24(1)(*c*);
- in Alberta, “compensate the person dealt with contrary to this Act for all or any part of any wages or income lost or expenses incurred by reason of the contravention of this Act”, para. 32(1)(*b*)(iv);
- in Quebec, “compensation for the moral or material prejudice resulting therefrom”, section 49;
- in Prince Edward Island, “compensate the complainant or other person dealt with contrary to this Act for all or any part of wages or income lost or expenses incurred by reason of the contravention of this Act”, para. 28.4(1)(*b*)(iv); and
- in Newfoundland and Labrador, “provide compensation to the person discriminated against, including compensation for all or a part of wages or income lost or expenses incurred because of the discriminatory action”, para. 28(1)(*b*)(iv).

[85] The wording of the above-referenced provisions is strikingly similar. To the extent that differences exist, they are minor and insignificant. The point to be made is that the provisions are not fundamentally different than paragraph 53(2)(*c*) of the Act; to the contrary, they are fundamentally the same. Yet, in addition, costs are expressly addressed in the legislation of each of the above-noted jurisdictions.

[86] Further, there is no material difference in the wording of the compensatory provisions of those jurisdictions where the authority to award costs is not expressly granted. If anything, some of

the provisions may be broader than the one under consideration. The legislation provides that the Tribunal or Board may make an order:

- in Ontario, "directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect", para. 45.2(1)(1);
- in Saskatchewan, "requiring that person to compensate any person injured by that contravention for any or all of the wages and other benefits of which the injured person was deprived and any expenses incurred by the injured person as a result of the contravention", para. 31.3(*c*);
- in Nova Scotia, "to do any act or thing that constitutes full compliance with the Act and to rectify any injury caused to any person or class of persons or to make compensation therefore", para. 34(8); and
- in New Brunswick, "to compensate any party adversely affected by the violation for any consequent expenditure, financial loss or deprivation of benefit, in such amount as the Board considers just and appropriate."

[87] To accord different treatment to the federal legislation ─ bearing in mind that the courts of Ontario, New Brunswick and Nova Scotia have determined, absent express authorization, no power to award costs exists ─ flies in the face of the express interpretive direction of the Supreme Court and yields an anomalous, if not absurd, result.

[88] There are other indicia that militate against a conclusion that Parliament intended the word "expenses" to include "costs". Bill C-108 demonstrates that Parliament specifically turned its mind to the matter of costs. Notably, the proposed Bill would have provided for the payment of costs by the Commission in specified circumstances and would have empowered the Tribunal to make rules governing, among other things, costs.

[89] The AG overstates the significance of the fact that Bill C-108 was not enacted in asserting that this constitutes conclusive proof that Parliament did not intend, and does not intend, to vest the Tribunal with the power to award costs. I would not go so far. There is nothing in the record that explains why the bill died and it is not the function of the court to engage in speculation. The reason may be more benign than that suggested. However, in my view, it does indicate that the existing provisions are not intended to authorize the awarding of costs. Parliament has considered a grant of authority but, thus far, has not given it.

[90] Indeed, it appears that as recently as June of 2009 the Commission was of the same view since it recommended an amendment to the Act that would enable the Tribunal to award costs in specified and much more limited circumstances than those awarded by the Tribunal: paragraph 68 of these reasons.

[91] I have not overlooked the issue of implied jurisdiction although I have some difficulty with the notion that a power to award costs could exist because of implied authority when it appears to be

settled law that nothing less than express authority will suffice. However, if the power in issue is susceptible to a grant by way of implication, the prerequisite to found it is not present.

[92] The concept of implied jurisdiction is summarized in *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, [2006] 1 S.C.R. 140 (*ATCO*) at paragraph 51 as follows:

> ...[T]he powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature [citation omitted]. Canadian courts have in the past applied the doctrine to ensure that administrative bodies have the necessary jurisdiction to accomplish their statutory mandate.

[93] There is no evidence of practical necessity for the exercise of the power to award costs to enable the Tribunal to attain the objects expressly prescribed by Parliament. In *Halifax*, MacDonald C.J. concluded that "this authority [to award costs] is not necessary to achieve the stated legislative objectives." In coming to that conclusion, he referred to the comments of the Supreme Court in *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626 (*Canadian Liberty Net*) (para. 16) to the effect that a power can only be implied where "that power is actually necessary for the administration of the terms of the legislation; coherence, logicality, or desirability are not sufficient."

[94] I also agree with the observation of Heald J. in *NEB Reference* that there is an additional reason for not invoking the doctrine of necessary implication. At paragraph 14, he opined that the Parliament of Canada and the provincial legislatures have demonstrated their ability in various pieces of legislation to explicitly confer on tribunals a general power to award costs. "From this I

think it possible to infer that in the absence of an express statutory provision conferring the power to award costs, such power should not be implied." Notably, express provision is made for witness fees (s. 50(6)) and the awarding of interest (s. 53(4)).

[95] I return to where I began. The quest is to determine whether Parliament intended to endow the Tribunal with the authority to award costs to a successful complainant. For the reasons given, I conclude that Parliament did not intend to grant, and did not grant, to the Tribunal the power to award costs. To conclude that the Tribunal may award legal costs under the guise of "expenses incurred by the victim as a result of the discriminatory practice" would be to introduce indirectly into the Act a power which Parliament did not intend it to have.

[96] Finally, if I am wrong in my choice of the applicable standard of review and the appropriate standard is reasonableness, I would conclude, for the foregoing reasons, that an interpretation of paragraph 53(2)(*c*) of the Act that the Tribunal has authority to award costs is unreasonable.

[97] At the end of the day, the "mandate of the court is to determine and apply the intention of Parliament without crossing the line between judicial interpretation and legislative drafting": *ATCO* (para. 51).

[98] There is no doubt that human rights legislation occupies a privileged position in the Canadian legal landscape. The Commission's submission, at paragraph 16 of its memorandum of fact and law, that to accept the AG's interpretation "would result in most complainants who are

represented by counsel to be denied access to justice by rendering accessing justice unaffordable" is compelling. That same rationale has led the Tribunal to conclude that a purposive approach to the interpretation of human rights legislation and compelling policy considerations relating to access to the human rights adjudicative process favours the inclusion of legal costs under the head of "expenses incurred…as a result of the discriminatory practice."

[99] The problem with this approach is twofold. First, the purposive and liberal interpretation approach must be grounded in the statute. It does not provide the Tribunal, or the court, a licence to ignore the words of the Act or to rewrite it: *Gould* (para. 50); *Berg* (para. 27). Moreover, because the authority to award costs is not a necessary incident to any of the Tribunal's functions or powers, it is inappropriate to engage in an extensive analysis of what is desirable to carry out the aims of the Act: *Canadian Liberty Net* (para. 18). Second, policy cannot be used to ground authority that is not otherwise provided for in the legislation: *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40 (paras. 49, 50).

[100] The issue of costs in human rights adjudication is a policy matter. The question is which entity is best placed to make the policy choices. It is evident from an examination of the provisions of the legislation in the provinces and territories where costs provisions have been enacted that there is no "one size fits all."

[101] These are issues that require the consideration of Parliament, for example, the desirability of empowering the Tribunal to award costs and, if desirable, the manner and the limits in which it

should be accomplished. The role of Commission counsel may be a factor for contemplation as its role in the adjudicative process has changed significantly over the years. For many years, Commission counsel appeared at most Tribunal hearings, but that practice appears to have changed. The former procedure may have impacted Parliament's decision regarding the propriety of costs awards in human rights proceedings. Counsel advised that in 2003 the Commission revisited its interpretation of its role under section 51 of the Act. Finally, if authority to award costs is to be granted to the Tribunal, the nature of the costs regime must be determined. There are a number of potential permutations.

[102] The ultimate decision and the policy choices inherent in making it are for Parliament, not the Tribunal or the court.

Conclusion

[103] I would allow the appeal and set aside the judgment of the Federal Court. Making the judgment that should have been made, I would declare that the Canadian Human Rights Tribunal has no authority to make an award of costs under the provisions of the *Canadian Human Rights Act*. In the circumstances, I would not award costs of this proceeding.

"Carolyn Layden-Stevenson"
J.A.

"I agree.
Gilles Létourneau J.A."

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

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-89-08
(APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE MANDAMIN, DATED FEBRUARY 28, 2008, NO. T-2199-06)	
STYLE OF CAUSE:	AGC v. Donna Mowat and CHRC
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September 16, 2009
REASONS FOR JUDGMENT BY:	Layden-Stevenson J.A.
CONCURRED IN BY:	LÉTOURNEAU J.A. SEXTON J.A.
DATED:	October 26, 2009

APPEARANCES:

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