

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

THE GOVERNMENT OF THE NORTHWEST TERRITORIES

Appellant

-and-

ELIZABETH PORTMAN

Respondent

MEMORANDUM OF JUDGMENT

[1] This is an application to stay an order of the Northwest Territories Human Rights Adjudication Panel. The Respondent, Elizabeth Portman appeared on her own behalf. The Northwest Territories Adjudication Panel appeared through counsel but did not make representations. The Human Rights Commission indicated through counsel at an earlier appearance that it would not take a position in this application and would not appear.

BACKGROUND

[2] Elizabeth Portman made a complaint to the Northwest Territories Human Rights Commission (the “HRC”) against the Government of the Northwest Territories (“GNWT”) relating to her employment, pursuant to the *Human Rights Act*, SNWT 2002, c 18. She applied to have a lawyer appointed (ie. legal aid)

under the *Legal Services Act* through the Legal Services Board of the Northwest Territories (the “LSB”)¹. Her application was denied, both at the first instance and on appeal to the LSB.

[3] The LSB’s reason for denying Ms. Portman’s application was based on its policy that “. . . given the lack of expertise and funding limitations the LSB will not fund matters arising out of WSCC claims or complaints to the NWT Human Rights Commission”. *LSB Resolution 2011-B-4*.

[4] In May of 2012, Ms. Portman filed a complaint about this with the HRC. The basis of the complaint was discrimination based on disability. Ms. Portman has multiple sclerosis. Although there was no evidence before me about the extent of her disability, the Adjudicator stated “Due to her condition she experiences periods of debilitating fatigue and diminished cognitive functioning”. *Portman v The Government of the Northwest Territories (Department of Justice), infra*, at para 65. The basis upon which the Adjudicator made this finding is not clear from the decision and I draw no conclusion respecting whether it was appropriate for him do so. It is raised here to provide context.

[5] Ms. Portman’s claim was dismissed by the Director of the HRC. She appealed that decision to the Human Rights Adjudication Panel. The Adjudicator overruled the Director, allowed the complaint and made the following order against the GNWT with respect to the issue of legal aid:

122. I direct that the Respondent, the Government of the Northwest Territories to:

(a) cease the contraventions complained of: reconsider Ms. Portman’s application for legal aid in light of both her disability and the adverse negative impact which a refusal of legal aid would have on her access to the human rights complaint process taking into consideration the Legal Services Board’s duty to accommodate her to the point of undue hardship;

(b) discontinue the blanket practice of refusing to fund matters arising out of human rights complaints for applicants such as Ms. Portman without fully considering the impact their disability may have on their access to the human

¹ The *Legal Services Act*, RSNWT 1988 c L-4 was repealed December 28, 2014 and replaced by the *Legal Aid Act*, SNWT 2012, c 17. The Legal Services Board was continued as the Northwest Territories Legal Aid Commission, *per s. 4(1) of the Legal Aid Act, supra*.

rights complaint process, and consider possible options of accommodation for such persons to the point of undue hardship:

(a) *[sic]* make available to Ms. Portman, the rights and privileges that were denied contrary to this Act: namely a proper consideration of her application for legal aid to pursue her human rights complaints in light of her disability and the adverse negative impact which a refusal of legal aid would have on her access to the human rights complaint process and the Government's duty to accommodate her to the point of undue hardship;

(b) *[sic]* compensate Ms. Portman for any wages or income lost or expenses incurred by reason of the contravention of this Act;

(c) compensate Ms. Portman in the amount of \$10,000.00 for the distress and injury to her dignity, feelings and self respect. This has been a very distressing experience for Ms. Portman and has, on occasion, exacerbated the symptoms of her Multiple Sclerosis.

Portman v The Government of the Northwest Territories,
2016 CanLII 47992 (NT HRAP), para 122.

[6] The LSB was not a party to the proceedings before the HRC, nor the proceedings before the Adjudication Panel. Its successor, the Legal Aid Commission, has not been made a party to this appeal. Counsel for the GNWT indicated he does not act for the Legal Aid Commission.

[7] The GNWT has appealed the Adjudicator's order on a number of grounds. These are set out in the Originating Notice and may be summarized as follows:

- a. The Adjudicator exceeded his jurisdiction by hearing and deciding the merits of the main complaint at the same time as he heard and decided the merits of the Director's decision to dismiss it;
- b. He erred in finding the Director assessed the complaint on its merits and that in assessing the complaint, the Director failed to analyze or address issues of systemic discrimination and justification appropriately;
- c. He erred in finding legal aid for matters arising out of human rights complaints is a service customarily available to the public and in determining the LSB was required to accommodate Ms. Portman to the point of undue hardship;

- d. He incorrectly characterized the issue as whether the LSB's policy adversely affected Ms. Portman's ability to access the complaint process under the *Human Rights Act, supra*, rather than whether the denial of legal aid was denial of a service customarily available to the public on the basis of disability;
- e. The Adjudicator did not receive expert evidence respecting Ms. Portman's disability before determining she was adversely affected by the LSB's policy, nor did he have before him evidence respecting Ms. Portman's financial circumstances when he determined she was unable to pay for legal counsel on her own;
- f. He erred in law by failing to recognize the LSB as an independent entity responsible for, *inter alia*, setting and enforcing policies respecting the provision of legal aid and considering applications for legal aid, including financial eligibility. Moreover, he erred in making the order against the Government of the Northwest Territories, rather than against the LSB;
- g. He erred in law by failing to provide the GNWT with an opportunity to make submissions on damages and by awarding compensation for lost wages, a remedy Ms. Portman did not seek;
- h. The Adjudicator erred in law or mixed fact and law in finding Ms. Portman was denied access to the human rights complaints process without legal aid and in failing to consider the assistance provisions in the *Human Rights Act, supra*; and
- i. He erred in law or mixed fact and law in failing to recognize the GNWT and/or the LSB would suffer undue hardship by accommodating Ms. Portman's request for legal aid.

[8] The GNWT seeks a stay of the Adjudicator's order pending the outcome of the appeal, pursuant to Rule 600(1) of the *Rules of the Supreme Court of the Northwest Territories*. That rule provides the Court may make any interim order necessary to preserve an applicant's position, subject to being provided for or prohibited by an Act.

[9] Ms. Portman appeared at the hearing of this application. She did not make extensive submissions; however, she indicated she was flummoxed by this process. I am proceeding on the basis that she is opposed to a stay being granted.

ANALYSIS

[10] In this context, a stay is a discretionary remedy meant to preserve a party's position pending the outcome of an appeal or judicial review. In deciding whether to exercise its discretion to grant a stay, the Court must consider first, if there is a serious issue of fact and/or law to be tried; second, whether there will be irreparable harm if the stay is not granted; and third, whether the balance of convenience favours granting a stay. The Court must apply its discretion in a flexible manner. *GNWT v Thorson*, 2013 NWTSC 30 at para 8; *Pankiw v Canada (Canadian Human Rights Commission)*, 2006 FC 601 at paras 7-9.

(a) *Is there a serious issue to be determined?*

[11] There are no hard and fast criteria for determining whether an issue is "serious"; however, the threshold is a low one. It is not for the court to delve deeply into the merits of the appeal at this stage, nor is an applicant required to demonstrate the suit has a high probability of success. The merits must be determined by the judge who ultimately hears the matter, with the benefit a full record of evidence and argument. The court's task is to conduct a preliminary assessment of the appeal. If it is determined the issues are serious, in the sense that they are not frivolous or vexatious, then the court may go on to the next steps of assessing whether the relief is required to prevent irreparable harm and favoured by the balance of convenience. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311 at 337-38.

[12] The GNWT has raised several grounds of appeal. Many of them involve questions of jurisdictional error. The most compelling of these is the question of whether the Adjudicator exceeded his jurisdiction by ordering the GNWT to do certain things, including changing policy and considering Ms. Portman's application for legal aid. The GNWT argues these are things within the exclusive statutory purview of what is now the Legal Aid Commission, an entity separate from the GNWT.

[13] A cursory overview of the *Legal Services Act*, RSNWT 1988 c L-4 (repealed December 28, 2014) and its replacement, the *Legal Aid Act*, SNWT 2012, c 17, suggests it is not the GNWT which has the authority to approve and provide legal aid to individuals. Rather, that power appears to have resided exclusively with the

LSB at the time of Ms. Portman's application, and now with the Legal Aid Commission. The statutory framework appears to be set up to allow decisions respecting the provision of legal aid to be made independently from government. Arguably, compelling the GNWT to step in and consider an application for legal aid would run counter to the statutory framework. This is a serious legal question with significant implications.

[14] The questions of whether the Adjudicator properly characterized the issue and whether providing legal aid is a service customarily available to the public are also very serious. The answers have implications for both the breadth of legal aid services provided and the expenditure of public funds allocated for that purpose.

[15] The issues raised respecting the Adjudicator's alleged failure to allow the GNWT to make submissions on damages and the GNWT's assertion that he exceeded his jurisdiction by ruling on the merits of Ms. Portman's complaint, rather than the issue of whether the Director should have dismissed her complaint in the first instance are also serious. These are questions about procedural fairness, something which goes to the heart of the justice system.

[16] The GNWT has demonstrated there are serious questions to be determined on appeal. My finding in this regard should in no way be taken as a determination on the merits of the appeal in any final sense. It is a preliminary assessment. As noted, the threshold is a low one and the merits remain to be determined by the judge who ultimately hears the appeal.

(b) Will irreparable harm result if the stay is not granted?

[17] For reasons following, I find that irreparable harm is likely to result if a stay is not granted but the appeal is ultimately successful.

[18] Smallwood, J., considered irreparable harm and the balance of convenience, respectively, as well as their application, in *Thorson, supra*:

[9] This test has also been applied by the British Columbia Human Rights Tribunal: *Armstrong v. B.C. (Min. of Health)*, 2009 BCHRT 341 (CanLII) at para. 31; *J.J. v. School District No. 43*, 2012 BCHRT 371 (CanLII) at para. 7; *A. v. The University and others (No. 3)*, 2013 BCHRT 45 (CanLII) at para. 10. In *Armstrong, supra* at para. 43, the tribunal held that a global approach should be taken in which the questions of irreparable harm and the balance of convenience are decided together. In considering these factors, considerations such as "conserving individual and institutional resources, and the avoidance of hearing and deciding a matter when the legal analysis to

be used is in question, all form part of the contextual matrix.” *Armstrong, supra* at para. 43; *A., supra* at para. 11.

[10] In considering what constitutes irreparable harm, it has been determined to be “harm which either cannot be quantified in monetary terms or is uncollectible” and “refers to the nature of the harm rather than its magnitude.” *Armstrong, supra* at para. 31-32.

[11] In *Pankiw, supra* at para. 14, the court held that irreparable harm can be found:

[O]nce it is established that, unless the stay of proceedings is granted, irreparable harm of a nature such that it could not be remedied by an award in monetary damages, or otherwise adequately treated if the applicant ultimately succeeded on the underlying application for judicial review.

[19] The GNWT filed an affidavit from Ms. Karen Wilford, the Executive Director of the Legal Aid Commission, in support of its application. Ms. Wilford provided evidence respecting the consequences which could flow from the implementation of the Adjudicator’s order. While not all of these are demonstrative of irreparable harm, there I find that overall, there is a sufficient basis provided overall for finding such harm would flow if an appeal is successful but the GNWT has in the meantime been forced to comply with the Adjudicator’s order.

[20] First, Ms. Wilford says the order is directed to the wrong organization. In my view, this concern is in and of itself enough to demonstrate that irreparable harm will ensue should the appeal succeed with a stay not having been granted. It cannot be quantified. The Adjudicator’s order calls for the GNWT to do something which the GNWT argues it has no authority to do. It cannot comply with the order without stepping into the role occupied exclusively by the Legal Aid Commission. If it purports to comply with the order, and the appeal succeeds on this point, the GNWT will have usurped the authority of the Legal Aid Commission to set policies and determine eligibility for legal aid.

[21] Second, Ms. Wilford deposes that if the Legal Aid Commission is required to consider – and possibly grant – applications for legal aid for complaints under the *Human Rights Act, supra*, and the GNWT’s appeal is ultimately allowed, there may be multiple applicants who will have been approved for legal aid improperly and on whose behalf expenditures will have been improperly incurred. She notes that legal aid funding is very limited at this time.

[22] This is also demonstrative of irreparable harm. It cannot be quantified in any meaningful sense and, given that legal aid is provided to assist individuals who are otherwise unable to pay for these services, recouping the costs could be an insurmountable task for the Legal Aid Commission. It could also leave those who might be improperly approved without the benefit of assistance to finish what was started and it would require legal counsel who are “on the record” in a human rights complaint to the expend time and money required to withdraw from the case.

[23] Third, Ms. Wilford points out there is no guarantee that Ms. Portman will receive legal aid, even upon reconsideration of her application with a view to accommodating her disability. Applicants must meet certain financial eligibility requirements. Further, applications for legal aid must be supported by a legal opinion from a lawyer that it is reasonable for an applicant to commence and maintain proceedings in the circumstances. Ms. Wilford is concerned that if the application is again denied, albeit on a different basis, it will lead to a perpetual cycle of appeals and complaints from Ms. Portman under the *Human Rights Act, supra*.

[24] Without appropriate evidence to the contrary, it cannot be presumed Ms. Portman, or a person in similar circumstances, would appeal decisions of the Executive Director respecting eligibility for legal services without a genuine belief that she has valid grounds to do so. Thus, I do not consider this to be indicative of irreparable harm.

[25] Fourth, Ms. Wilford deposes she is aware Ms. Portman is supported through income assistance and that if the GNWT is required to pay Ms. Portman the \$10,000.00 in damages ordered by the Adjudicator, it will be difficult to recover if the appeal ultimately succeeds. Again, in the absence of evidence respecting Ms. Portman’s current means, I am unable to determine that this is demonstrative of irreparable harm. Given my findings with respect to the first two concerns, however, it is unnecessary to opine on it further.

c. Does the balance of convenience favour granting a stay?

[26] I turn finally to the balance of convenience, which must be considered in light of the foregoing. *Thorson, supra*. The balance of convenience favours granting the stay. This is based on the nature of the questions before the Court, the potential for irreparable harm for the GNWT and the implications for the legal aid system should the appeal ultimately succeed.

ORDER

[27] The application is granted. The order of the Human Rights Adjudication Panel against the GNWT as set out in paragraph 122 of the ruling of Adjudicator W.D. McFetridge, Q.C. dated July 25, 2016 is hereby stayed until further order of this Court.

[28] The issue of costs should be addressed in conjunction with the appeal itself.

K. M. Shaner
JSC

Dated in Yellowknife, NT this
3th day of October, 2016

Counsel for the Appellant:

Christopher Buchanan

Counsel for the Northwest Territories Human
Rights Adjudication Panel:

Cynthia Levy

The Respondent was self-represented

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