

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF the Human Rights Act,  
S.N.W.T. 2002, c.18, as amended;

AND in the MATTER OF the Decision of the Adjudicator  
of the Human Rights Adjudication Panel, No. 11-12 dated  
December 14, 2016

BETWEEN:

THE MUNICIPAL CORPORATION OF  
THE CITY OF YELLOWKNIFE

Appellant

- and -

A.B.

Respondent

- and -

THE NORTHWEST TERRITORIES  
HUMAN RIGHTS COMMISSION

Respondent

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Transcript of the Oral Decision delivered by The Honourable  
Justice S. H. Smallwood, sitting in Yellowknife, in the  
Northwest Territories, on the 3rd day of August, 2017.

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APPEARANCES:

Ms. M. Theriault: Counsel for the Appellant

Mr. G. Rutland: Counsel for the Respondent, A.B.

Ms. A. Akgungor: Counsel for the Respondent, The NWT  
Human Rights Commission

Ms. C. Levy: Counsel for the Human Rights  
Adjudication Panel

Official Court Reporters

1 THE COURT: Good morning.

2 So the Appellant, the Municipal Corporation  
3 of the City of Yellowknife has appealed the  
4 decision of an adjudicator in the hearing of  
5 A.B.'s human rights complaint. The appeal itself  
6 is scheduled to be heard on December 6th to 7th,  
7 2017.

8 This is a matter which arose from the  
9 pre-hearing conference and was dealt with in  
10 regular Chambers on July 14th, 2017, and concerns  
11 the extent to which the Northwest Territories  
12 Human Rights Adjudication Panel can participate  
13 in the appeal.

14 The Respondent, A.B., filed a complaint with  
15 the Respondent, Northwest Territories Human  
16 Rights Commission, alleging discrimination on the  
17 basis of family status by the Appellant,  
18 Municipal Corporation of the City of Yellowknife.

19 The hearing was conducted before an  
20 adjudicator in November 2015, a decision on the  
21 merits was issued in April 2016, and a decision  
22 on remedy in December 2016.

23 The adjudicator found that the City of  
24 Yellowknife had subjected A.B. to discrimination  
25 on the basis of family status and had not met its  
26 duty to accommodate.

27 The City of Yellowknife appealed the



1 decisions of the adjudicator in May 2016 and  
2 January 2016. The two appeals were consolidated  
3 into a single proceeding by an Order of the Court  
4 in February 2017.

5 Pursuant to Rule 604 of the Rules of the  
6 Supreme Court of the Northwest Territories, a  
7 pre-hearing conference was held on June 9, 2017.  
8 At the pre-hearing conference, counsel for the  
9 City of Yellowknife, A.B., the Human Rights  
10 Commission, and the Human Rights Adjudication  
11 Panel were present. At the pre-hearing  
12 conference, counsel for the City of Yellowknife  
13 raised an objection to the participation of the  
14 Human Rights Adjudication Panel in the appeal.  
15 The position of the City was that if the Panel  
16 was going to participate, they were required to  
17 seek leave of the Court to be added as a party,  
18 and the City also raised concerns with the Panel  
19 making submissions on the standard of review.

20 The Adjudication Panel wants to participate  
21 in the appeal and indicated that it wanted to  
22 make submissions on jurisdiction and standard of  
23 review and felt that it was not necessary to be  
24 added as a party based on the practice in this  
25 jurisdiction. A.B. and the Human Rights  
26 Commission took the position that there was no  
27 need for the Panel to become a party and there



1 was no concern with the Panel participating and  
2 making submissions on jurisdiction and standard  
3 of review.

4 At the pre-hearing conference, Justice  
5 Charbonneau framed the issues to be decided in  
6 Chambers as follows: One, whether the Human  
7 Rights Adjudication Panel is required to be named  
8 as a Respondent in order to participate in the  
9 appeal; two, if they are permitted to  
10 participate, would the Human Rights Adjudication  
11 Panel be permitted to make submissions on the  
12 standard of review.

#### 13 14 The Position of the Parties

15 The position of the City of Yellowknife is  
16 now somewhat different than expressed at the  
17 pre-hearing conference. The City is not opposed  
18 to the Human Rights Adjudication Panel making  
19 submissions on the standard of review in addition  
20 to jurisdiction. Their position has not changed  
21 that the Adjudication Panel should be named as a  
22 party on the appeal and that the Panel is  
23 responsible for seeking leave to participate as a  
24 party. The only issue then is whether the Human  
25 Rights Adjudication Panel is required to be named  
26 as a Respondent in order to participate in the  
27 appeal.





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Law

Part 44 of the Rules of the Supreme Court of the Northwest Territories deal with judicial review and appeals. Rule 596 states:

A tribunal named as a respondent in an application for judicial review or appeal shall seek leave and directions from the Court where it seeks to participate at the hearing of the application or appeal, unless the tribunal is already permitted to do so by its enabling statute.

In this case, the tribunal has not been named as a Respondent.

Rule 595 states that anyone directly affected by the relief sought in the judicial review or appeal or required to be named as a party to the judicial review or appeal under a statute shall be named as a Respondent by an Applicant, and Rule 597 permits a person who can demonstrate that they are directly affected by the proceeding, that they can apply to take part in the proceeding.

There is nothing in the Human Rights Act or the Rules which require the Human Rights Adjudication Panel to be named as a party in this appeal and the tribunal is not directly affected by the appeal. In this situation, the Rules are silent on the participation of a tribunal in an



1 appeal when it is not required to be named as a  
2 party.

3 The Rules of Court govern the Court's  
4 procedure and ideally would be comprehensive;  
5 however, it unrealistic to expect that the Rules  
6 could address every situation, and this is  
7 acknowledged in the Rules. Rule 4 provides that  
8 the Court can specify a procedure which is not  
9 inconsistent with the Rules or any statute where  
10 a provision for the exercise of a right is not  
11 included in the Rules.

12 The Rules of Court are also supplemented by  
13 the issuance of practice directions by the Court  
14 and by the development of case law. In this  
15 sense, the Rules of Court are comprehensive  
16 because where the Rules are silent, the Court is  
17 able to determine a procedure having reference to  
18 the general principles set out in the Judicature  
19 Act and the Rules of Court as well as the  
20 existing jurisprudence in the area.

21 The practice of this Court has developed  
22 that tribunals have participated in judicial  
23 reviews or appeals and their participation has  
24 generally been limited to making submissions on  
25 jurisdiction, the record and/or the standard of  
26 review. See *Carter v. Northwest Territories*  
27 *Power Corp.*, 2014 NWTSC 19. This is subject to



1 the Court's discretion to determine the extent of  
2 the tribunal's participation.

3 Generally, tribunals do not seek to  
4 participate in every judicial review or appeal  
5 and there are situations where their  
6 participation may not be necessary. For example,  
7 where the standard of review has been well  
8 established, it may be that the Court will decide  
9 that hearing from the tribunal on standard of  
10 review is not necessary, barring some new  
11 argument being presented or recent developments  
12 in the case law.

13 There have also been decisions in this  
14 jurisdiction which have considered the role of a  
15 tribunal when participating in a judicial review  
16 or appeal. In *Baffin Plumbing & Heating Limited*  
17 *v. Labour Standards Board and the Labour*  
18 *Standards Officer*, 1993 NWTR 301, the Court held  
19 that the Board should not be named as a party  
20 unless the sole basis for appeal was  
21 jurisdictional error. The Court went on to state  
22 at paragraph 36:

23 The Board, if it appears on the  
24 hearing, will be limited to  
25 arguments on jurisdictional issues  
26 and to explanations, if requested by  
27 the court, of the record of the  
proceedings. If the Board wishes to  
have a broader role to play then, in  
the absence of statutory guidelines,  
it must seek leave of the court to  
do so.



1           The idea that the tribunal's findings who  
2           were being appealed should not be named as a  
3           party was endorsed also in Karl Mueller  
4           Construction Ltd. v. Commissioner of the NWT,  
5           2007 NWTSC 97, at paragraph 94.

6           In Graham v. WCB et al, 2007 NWTSC 54, the  
7           Court commented on the appeal tribunal's role in  
8           judicial review proceedings. In that case, the  
9           appeals tribunal had been added as a party by  
10          consent prior to the hearing. The issue in that  
11          case was not whether the appeals tribunal should  
12          be a party but, instead, what should be the  
13          extent of the appeals tribunal's participation.  
14          In that case, the Court noted at paragraphs 58  
15          and 59:

16                 The traditional view is that in the  
17                 absence of statutory provisions as  
18                 to standing, the tribunal is  
19                 confined to arguments on the issue  
20                 of its jurisdiction to make the  
21                 decision and to an explanatory role  
                with respect to the record ... The  
                reason, simply put, is that a  
                tribunal, which is required to be  
                impartial, should not be seen as an  
                advocate in its own cause.

22                 This is not a clear-cut issue,  
23                 however, and the question of  
24                 standing is one that usually depends  
25                 on an exercise of the court's  
                discretion in the circumstances of a  
                particular case. [Citations omitted]

26           Neither the Rules nor the case law require  
27           that the tribunal be named as a Respondent in





1 order to participate in the appeal. There are  
2 situations where the tribunal will be named as a  
3 Respondent, such as when they are required to be  
4 named by the statute or where there is no other  
5 party to be named. See Ontario Energy Board v.  
6 Ontario Power Generation Inc., 2015 SCC 44, at  
7 paragraph 54.

8 The bigger issue, in my view, and this is  
9 the focus of much of the case law in this area,  
10 is the extent of the participation of a tribunal  
11 in an appeal. Courts have had to balance the  
12 valuable information and expertise that a  
13 tribunal can bring to an appeal and also with  
14 ensuring that their participation respects the  
15 principles of finality and impartiality; finality  
16 being the principle where the tribunal should not  
17 speak on a matter once it has made its decision  
18 and provided reasons for its decision, and  
19 impartiality involves maintaining confidence in  
20 the tribunal's impartiality because the tribunal  
21 may have to hear similar issues in the future and  
22 some decisions may be remitted to the tribunal  
23 for further consideration.

24 Ultimately, the extent of the tribunal's  
25 participation in an appeal, if it is not  
26 prescribed by statute, is within the discretion  
27 of the Court. See Ontario Energy Board, supra,



1 at paragraphs 49 to 59.

2 The issue of the extent of the participation  
3 of a tribunal in an appeal should be addressed at  
4 the pre-hearing conference held pursuant to Rule  
5 604. In that sense, Rule 596 is applicable and a  
6 tribunal who wishes to participate at the  
7 judicial review hearing or appeal should seek  
8 leave and directions from the Court regarding its  
9 participation. That will ensure that everyone  
10 involved in the appeal will know the extent of  
11 the tribunal's participation prior to the  
12 hearing, and, in my view, it is not necessary,  
13 subject to my earlier comments, to add the  
14 tribunal as a Respondent in order for the  
15 tribunal to participate in the appeal.  
16 Therefore, the Human Rights Adjudication Panel is  
17 permitted to participate in the appeal and they  
18 do not have to be added as a Respondent. The  
19 Adjudication Panel has leave to make submissions  
20 on matters related to jurisdiction, standard of  
21 review, and any explanation of the record that is  
22 required.

23 The Human Rights Adjudication Panel seeks  
24 their costs for this portion of the proceeding,  
25 arguing that it was an unnecessary proceeding and  
26 that the City of Yellowknife introduced  
27 additional formality to the process. The City of



1 Yellowknife argues that there should be no costs  
2 as the City was only asking the Panel to comply  
3 with the Rules and no costs would have been  
4 incurred if the Panel had agreed to enter into a  
5 consent order, being added as a party prior to  
6 the hearing before me. The Panel had declined to  
7 enter into a consent order on the basis that they  
8 were not required to be added as a party and they  
9 felt there would continue to be issues with  
10 regard to the extent of their participation and  
11 that this matter would have ended up in court on  
12 this issue in any event.

13 In my view, this matter could easily have  
14 been dealt with at the pre-hearing conference.  
15 The issue of whether the Panel needed to be added  
16 as a Respondent in order to participate in the  
17 appeal is not a question that needed to be  
18 answered given that the parties ultimately agreed  
19 on the extent of the Panel's participation.  
20 Pursuing this added level of formality and  
21 parsing of the Rules is not in line with Rule 3  
22 which states that the Rules are intended to  
23 secure the just, speedy, and inexpensive  
24 determination of every proceeding. Therefore,  
25 A.B., the Northwest Territories Human Rights  
26 Commission and the Northwest Territories Human  
27 Rights Adjudication Panel will have their costs



1 for the appearance in July 14, 2017 and for  
2 today's appearance. Pursuant to Rule 606.1,  
3 these costs will be according to Column 3 of  
4 Schedule "A".

5 Thank you, counsel. Is there anything else  
6 that we need to address?

7 MR. RUTLAND: No, Your Honour.

8 MS. LEVY: No, Your Honour.

9 MS. THERIAULT: No, Your Honour.

10 THE COURT: Ms. Akgungor?

11 MS. AKGUNGOR: No. Thank you, Your Honour.

12 THE COURT: All right. Then we will  
13 adjourn. Thank you.

14 COURT CLERK: All rise. I declare the  
15 Supreme Court closed.

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19 Certified Pursuant to Rule 723  
20 of the Rules of Court

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23 Jane Romanowich, CSR(A)

24 Court Reporter

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