City of Yellowknife v A.B. et al, 2017 NWTSC 63

S-1-CV-2016-000101

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

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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

Official Court Reporters

1

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

Official Court Reporters

2

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.

Official Court Reporters

3

1

2 Law

3 Part 44 of the Rules of the Supreme Court of

4 the Northwest Territories deal with judicial

5 review and appeals. Rule 596 states:

6 A tribunal named as a respondent in

an application for judicial review

7 or appeal shall seek leave and

directions from the Court where it

8 seeks to participate at the hearing

of the application or appeal, unless

9 the tribunal is already permitted to

do so by its enabling statute.

10

11 In this case, the tribunal has not been

12 named as a Respondent.

13 Rule 595 states that anyone directly

14 affected by the relief sought in the judicial

15 review or appeal or required to be named as a

16 party to the judicial review or appeal under a

17 statute shall be named as a Respondent by an

18 Applicant, and Rule 597 permits a person who can

19 demonstrate that they are directly affected by

20 the proceeding, that they can apply to take part

21 in the proceeding.

22 There is nothing in the Human Rights Act or

23 the Rules which require the Human Rights

24 Adjudication Panel to be named as a party in this

25 appeal and the tribunal is not directly affected

26 by the appeal. In this situation, the Rules are

27 silent on the participation of a tribunal in an

Official Court Reporters

4

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

Official Court Reporters

5

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

hearing, will be limited to

24 arguments on jurisdictional issues

and to explanations, if requested by

25 the court, of the record of the

proceedings. If the Board wishes to

26 have a broader role to play then, in

the absence of statutory guidelines,

27 it must seek leave of the court to

do so.

Official Court Reporters

6

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

absence of statutory provisions as

17 to standing, the tribunal is

confined to arguments on the issue

18 of its jurisdiction to make the

decision and to an explanatory role

19 with respect to the record ... The

reason, simply put, is that a

20 tribunal, which is required to be

impartial, should not be seen as an

21 advocate in its own cause.

22 This is not a clear-cut issue,

however, and the question of

23 standing is one that usually depends

on an exercise of the court's

24 discretion in the circumstances of a

particular case. [Citations omitted]

25

26 Neither the Rules nor the case law require

27 that the tribunal be named as a Respondent in

Official Court Reporters

7

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,

Official Court Reporters

8

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

Official Court Reporters

9

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

Official Court Reporters

10

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.

16 .................................

17

18

19 Certified Pursuant to Rule 723

of the Rules of Court

20

22

Jane Romanowich, CSR(A)

23 Court Reporter

24

25

26

27

Official Court Reporters

11