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

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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

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 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

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 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

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 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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 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

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 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

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 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.

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 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]

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 26 Neither the Rules nor the case law require

 27 that the tribunal be named as a Respondent in

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 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,

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 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

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 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

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 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 .................................

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 19 Certified Pursuant to Rule 723

 of the Rules of Court

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 Jane Romanowich, CSR(A)

 23 Court Reporter

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