

## Costs Take Centre Stage in Human Rights Case

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### Cases Considered:

[\*Alberta \(Human Rights and Citizenship Commission Panel\) v. Tequila Bar & Grill Ltd.\*, 2009 ABQB 226](#)

The issue of costs does not normally merit discussion in a blog. However, in the *Tequila Bar & Grill* case, the Respondent raises some interesting arguments about costs that speak to the multiple functions of the Human Rights and Citizenship Commission ("Commission").

Mr. Khalid Alibhai was denied entry into the Tequila Bar and Grill Ltd. ("Respondent") on February 21, 2004. He complained to the Commission that he was discriminated against in the provision of services customarily available to the public on the ground of race or colour and religious beliefs. The parties were not able to reach a settlement and the Director of the Commission referred the complaint to the Chief Commissioner, who appointed a Panel to hear the matter. In [\*Khalid Alibhai v. Tequila Bar and Grill Ltd. o/a Tequila Nightclub\*](#), Panel Chair Diane Colley-Urquhart dismissed the complaint. She held that the complainant failed to establish a *prima facie* case of discrimination because he provided no evidence that the denial of entry was based on race or colour, ancestry or place of origin and religious beliefs. Although Alibhai argued that the night club had deliberately or negligently erased a surveillance video that might have assisted with the case, the Panel was satisfied that the Respondent had viewed the video recording and had found nothing incriminating, thus allowing it to be overwritten. The Respondent had argued that it was actually imposing an age restriction (under 25) and the Panel held that the club was entitled to impose age restrictions at certain times of the day. There was evidence that the Respondent had allowed patrons of a variety of races into the premises. Further, the Respondent employed an ethnically diverse staff. Finally, many patrons were turned away on the same evening as the complainant and his friends.

The matter was appealed to the Alberta Court of Queen's Bench (*Alberta (Director, Human Rights & Citizenship Commission) v. Tequila Bar and Grill Ltd.*, 2009 CarswellAlta 646 [not available on the Alberta Courts website]). Madam Justice Sheilah Martin quashed the Panel decision and sent it back to a new panel for a re-hearing. First, there was evidence that an incident involving an 18-year-old wielding a beer bottle and injuring someone on the neck had not occurred on the night in question as alleged by the Respondent, but actually 7 months earlier. Justice Martin held that this evidence and the cross-examination it would produce would be

crucial to a full and fair determination. Second, the Panel's credibility assessment of Mr. Alibhai was "replete with incorrect assessments, errors, unreasonable evidentiary rulings and therefore erroneous findings" (at para. 14). Further, there was no recognition in the Panel's decision that discrimination could be established by circumstantial evidence (at para. 18). In addition, the Panel could have drawn a negative inference from the bar's failure to produce the videotape or call witnesses with direct knowledge. In the result, the Panel failed to apply correct legal principles regarding what constitutes *prima facie* discrimination and the general rules of evidence (at para. 23).

At the end of the hearing, the lawyer representing the Tequila Bar and Grill applied for solicitor-client costs. These are the costs that the lawyer charges his client for his services. He argued that his client faced a profoundly flawed tribunal who issued profoundly flawed reasons, and thus had been put through the cost of that hearing and the appeal.

The Memorandum of Decision on the issue of costs was released on April 16, 2009. In *Alberta (Human Rights and Citizenship Commission Panel) v. Tequila Bar and Grill Ltd.*, 2009 ABQB 226, Madam Justice Martin awarded costs to the Commission and declined to order costs to the Respondent.

The Respondent argued that the time and money spent to date on the case was completely wasted and the fault for this lay entirely with the Commission. It argued that the Commission acts as investigator, prosecutor and adjudicator of complaints brought before it. The Respondent had incurred the costs of responding to the complaint since June 2004 and had provided a response and participated in an investigation, a conciliation process and a hearing (at para. 4). Now the Respondent must attend a new hearing, marshal evidence and argue again five years after the fact before a new Panel. At the same time, the Complainant had incurred no costs, and it is contrary to public policy that individuals bear the costs of protecting themselves from the improper action of the Commission.

The Director of the Commission argued that it was charged with the carriage of this human rights complaint, it had launched the appeal, and it was the successful party. Further, a Human Rights Panel is a separate, independent and distinct decision-making body from the Director, and the Director's counsel does not represent the Panel. The role of the Director is to advocate the public interest, which it did in this case, and it was successful on appeal (at para. 7).

Madam Justice Martin noted that generally, solicitor-client costs are reserved for cases in which the conduct of a party has been reprehensible, scandalous or outrageous. Further, costs are only awarded against tribunals in exceptional circumstances. Unless a Panel acted maliciously or capriciously or lacked good faith, the reviewing court will not ordinarily award costs against it. The Director of the Commission has never been ordered to pay costs where it has been successful on an appeal, including when a Panel decision has been quashed and returned to the Panel for rehearing (at para. 8).

The Director of the Commission also argued that no costs should be payable to an unsuccessful party who pursued and actively promoted the arguments which led the Panel into error (at para. 9).

Madam Justice Martin accepted the arguments of the Director and held that the Director and the Panel have separate functions, thus, the Director is not responsible for the decisions of the Panel, and second, the Panel ought not to bear responsibilities for costs except in exceptional circumstances (which did not exist in this case) (at para. 10). In addition, she ordered that the Commission be awarded costs of the appeal, including \$750 for its written argument.

One perhaps troubling aspect of the structure and function of the Commission is highlighted by this case. The Alberta Commission is responsible for performing public education (*Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14 (“*HRCMA*”), s. 16(1)), conducting human rights investigations (*HRCMA*, s. 23(1)), conducting conciliation and settlements (*HRCMA*, s.21), and performing an adjudicative function (*HRCMA*, s. 25). While there are different employees and/or Commissioners performing these various roles, having them all exist under the guise of “the Commission” can create confusion and a perception of partiality. Also, because the Human Rights Panel exists under the umbrella of the Commission, when the Commission has the role of carrying the complaint during Panel hearings (i.e., the Director appoints a lawyer to argue the complainant’s case), this may be interpreted as problematic from a procedural fairness perspective. In Alberta, the Chief Commissioner is appointed by the Lieutenant Governor (*HRCMA*, s. 15(2)). The Director of the Commission determines whether complaints will be forwarded to the Panel or if they will be dismissed, and this decision is appealable to the Chief Commissioner (*HRCMA*, s. 26). The Chief Commissioner is also responsible for appointing the Human Rights Panel (*HRCMA*, s. 27(1)), consisting of one or more members of the Commission, one of whom may be the Chief Commissioner (unless he or she was involved in reviewing a decision of the Director). The Director of the Commission has carriage of the proceedings, except where the Chief Commissioner overturns the Director’s decision on review. In such a case, the complainant will have carriage over the proceedings (*HRCMA*, s. 29(1)).

In some jurisdictions, for example, Ontario, a separate direct access tribunal has been developed. The Commission performs exclusively public education and the tribunal deals directly with complaints of discrimination under the human rights legislation.

Arguably, the notion that the Commission should pay costs in the *Tequila Bar and Grill* case arose in part because the functions of the Commission are difficult to conceptually separate from each other; hence the argument that the Respondent incurred costs because of the errors of the Panel and the further argument that the Commission should pay these costs. While Justice Martin alludes to the separate functions of the Director and the Panel, it would be perhaps less troublesome to see them as separate if the educative, investigative and adjudicative functions were clearly structurally separate.