

Legal costs can be an issue in human rights cases

By [Linda McKay-Panos](#)

Cases Considered:

[Canadian Human Rights Commission v. Attorney General of Canada, et al.](#), 2009 FCA 309, leave to appeal to Supreme Court of Canada granted, SCC Bulletin April 23, 2010, #33507, [2010 CanLII 20527](#)

In the past few years, the issue of whether and how much legal costs should be awarded in human rights cases has arisen several times in Alberta (see my [post](#) on *Boissoin v. Lund*, for example). The costs issue has also arisen in a federal human rights case and will soon be addressed by the Supreme Court of Canada.

Why are legal costs an issue? In Alberta, since 1996, when the director of a human rights commission decides that a complaint should be dismissed, and the complainant successfully appeals that decision to the Chief Commissioner, who then orders that a Tribunal hear the matter, the complainant has carriage of the matter (see *Alberta Human Rights Act*, R.S.A. c. A-25.5, s. 29, formerly the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14, s.29). This means that he or she is not provided with legal advice and must hire his or her own lawyer or represent him or herself. Before 1996, legal representation was provided by the Commission, but not for respondents -- it has always been the case that respondents had to hire their own lawyers for these procedures. The Alberta Human Rights Tribunal has the jurisdiction to make any order as to costs that it considers appropriate (s. 32(2)). Thus, in many cases, the legal costs of the case can be significant to either the complainant or the respondent, or both, and thus the parties ask the Tribunal to award them their legal costs.

The *Canadian Human Rights Act*, R.S. 1985, c. H-6, s. 53(2)(c) (*CHRA*), provides that the Canadian Human Rights Tribunal (CHRT) can order that the person “compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice” (emphasis added). Unlike Alberta’s human rights legislation, the *CHRA* does not specifically address costs.

In the federal case, Donna Mowat had been a Master Corporal in the Canadian Armed Forces (CAF). She alleged that the CAF discriminated against her on the grounds of sex. The Canadian Human Rights Commission (CHRC) did not take carriage of the matter and Mowat had her own legal representation in the hearing before the CHRT.

Ms. Mowat’s case took six weeks of hearing time. The CHRT found that her sexual harassment complaint was substantiated and awarded her \$4,000 plus interest for suffering and loss of self-respect. Mowat claimed that her legal account totalled over \$196,000, but stated that she did not

expect to recover all of her costs – only a reasonable amount. The CHRT awarded Ms. Mowat \$47,000 in legal costs as expenses arising from discrimination under the *CHRA*.

The CAF applied to the Federal Court for judicial review of the cost decision (*Canada (Attorney General) v. Donna Mowat*, 2008 FC 118), arguing, among other things, that the CHRT did not have jurisdiction to award legal costs, and that if it did, it exceeded its jurisdiction in awarding those costs; further, the CHRT had failed to give adequate reasons for its cost decision.

The Federal Court (per Mr. Justice Mandamin, formerly of the Provincial Court of Alberta) held that the CHRT’s interpretation of the *CHRA*, as giving it jurisdiction to award legal costs as an expense arising from discriminatory conduct, was reasonable. The Court noted that the CHRT was not awarding costs to the “winning” litigant, but rather was providing the award as a result of proven discrimination.

The Federal Court also noted the complexity of the proceedings and held that the CHRT was under a duty to provide reasons for its costs award. The CHRT had declined to assess costs following the *Federal Costs Rules* but did not provide any instruction about how the \$47,000 was arrived at by the CHRT in light of the three factors that were considered (the description of legal services set out in Mowat’s legal accounts; the quantity of evidence and number of exhibits submitted at the hearing; the bill of costs submitted by each party calculated on a party/party basis). The decision on costs was quashed and the matter was remitted back to the CHRT to decide anew, but without further submissions or hearing.

The Attorney General of Canada (AG) appealed the Federal Court decision to the Federal Court of Appeal. The CHRC intervened in the case. The AG argued that the applicable standard of review was correctness rather than reasonableness, and that the Federal Court erred in concluding that the CHRT had jurisdiction to award legal costs. The Federal Court of Appeal (per Justices Carolyn Layden-Sevenson, Gilles Lévesque and J. Edgar Sexton) concluded that the CHRT had no jurisdiction to award legal costs.

The Federal Court of Appeal determined that expertise in human rights is not required to determine whether the *CHRA* provides the CHRT with jurisdiction to order payment of the complainant’s legal costs. The Court also noted (at para. 45) that the issue had not been consistently dealt with by the CHRT and the Federal Court. In fact, there were two conflicting lines of cases interpreting the legislation. Because there could be cost consequences to both the complainant and the respondent, the Federal Court of Appeal held that all parties are entitled to know, if the claim is substantiated, whether significant cost consequences may follow. Thus, the interpretation of the statute is reviewable on a standard of correctness.

In determining whether the CHRT had jurisdiction to award legal costs, the Federal Court of Appeal examined conflicting cases from the CHRT and the Federal Court, the history of the legislation, contemplated amendments and reports to Parliament. The Federal Court of Appeal also examined the cost provisions in the human rights codes across Canada. For example, in Manitoba, a party must pay his or her own costs, unless a complaint or reply is regarded as frivolous or vexatious. In Alberta, Quebec, Prince Edward Island and Newfoundland and Labrador, the legislation empowers adjudicators to make any order as to costs they consider appropriate.

The Federal Court of Appeal noted the definitional differences between “expenses” and “costs” (the federal legislation refers to the former), and examined case interpretation and provisions of

other jurisdictions. In particular, the court noted that the award of “expenses” was provided for in Alberta (and the other listed provinces) in provisions strikingly similar to the *CHRA* s. 53(2)(c), and yet each of those provinces had a separate provision in which “costs” were expressly addressed. Thus, the Federal Court of Appeal determined that Parliament did not intend to grant to the CHRT the jurisdiction to award costs.

The Supreme Court of Canada has granted the Canadian Human Rights Commission’s application to appeal this decision. The CHRC is arguing that the Federal Court of Appeal applied a narrow and legalistic interpretation of the *CHRA*, which frustrates the purpose of the human rights law, and could jeopardize access to justice.

Whether costs can be awarded in human rights cases may seem like a rather mundane issue, but there are significant practical and policy implications. In many human rights cases (e.g. *Boissoin v. Lund*), the matter is one of principle rather than winning or losing a case. If costs are not awarded to the complainant who brings forward an issue because of principle, individuals facing large legal bills may be dissuaded from bringing forward issues in the public interest. It is said that the purpose of human rights legislation is not to be punitive, but rather to educate people about human rights and dignity. The remedies are intended to compensate the complainants rather than to penalize the respondents. As such, if people will be required to bear their own legal costs—which is often the case when the Commission does not have carriage of the complaint—they may not be able or willing to complain to the Commission. Respondents may also suffer from having inadequate legal advice or representation during the process. Either way, important human rights issues may not be publicly addressed.