

Justice Received After Nineteen Years. Delay in Walsh Case: What's to blame?

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Cases Considered:

[*Delorie Walsh v Mobil Oil Canada – Decision on Remedy*](#), September 2, 2010

In a [previous blog](#) about the *Walsh* case, I commented on the delay in this case and how it is an extreme example of why this issue deters some people from making a human rights complaint. Now that Ms. Walsh has received the remedy award in her case—which is in itself interesting to analyze—it is also interesting to analyze what the causes of the delay in justice were.

The facts of the case are summarized in paragraphs 2 through 31 of the Alberta Court of Appeal decision ([*Walsh v Mobil Oil Canada*](#), 2008 ABCA 268). In short, Walsh made a human rights complaint in 1991 of gender discrimination in employment under the equal pay for equal work provision (now s. 6) of the (revised) [*Alberta Human Rights Act*](#), R.S.A. 2000, c. A-25.5 (*AHRA*). On August 15, 1995, Walsh filed a second human rights complaint against Mobil, alleging it had retaliated against her for making the initial human rights complaint. Both the original human rights complaint and the retaliation complaint were referred by the Commission to a one-person human rights panel for a hearing. The Panel did not release its decision until December 2005.

The Panel in [*Delorie Walsh v Mobil Oil*](#), December 16, 2005 (Beth Bryant, Chair) held that it could only consider the alleged human rights contraventions that had occurred between August 1990 and August 1991 and August 1994 and August 1995 (based on the Panel's interpretation of s. 20(2)(b), which says that a complaint must be made within one year after the alleged contravention occurs). The Panel held that Walsh had not been paid commensurate with her male counterparts and ordered that she receive damages to compensate for the differential in salary between August 1990 and 1991. Damages were to be determined in a later proceeding. The Panel found that the behaviour of the supervisors did not amount to gender discrimination, and also found there was no retaliation and dismissed Walsh's second complaint.

Walsh appealed the Panel's decisions regarding the limitation period(s), equal pay, gender discrimination, retaliation and procedural fairness ([*Walsh v Mobil Oil*](#), 2007 ABQB 599). The Court of Queen's Bench (per Macleod J.) allowed the appeal and held that the conduct of the supervisors was indeed discriminatory and that retaliation had occurred. The complaint was remitted back to the Panel for reconsideration and for the assessment of damages. The Court held that the complainant was entitled to damages arising from discrimination for a period starting two years before the complaint was filed to the time her employment with Mobil was terminated. The judge also ordered that solicitor-client costs (costs which the solicitor charges the client) be awarded to Walsh.

Mobil appealed Macleod J.'s decision. Mobil did not dispute that the Panel had erred in its interpretation of the limitation provision of the legislation. The Alberta Court of Appeal (2008 ABCA 268, heard by Justices Côté, Paperny, and Ritter) wrote two separate judgments, both of which concurred in the result. Justices Ritter and Côté held that Walsh was discriminated against on the basis of gender. They held that Mobil had retaliated against Walsh for making a human rights complaint. They stated that in order to demonstrate retaliation, first a complainant needed to show, directly or by inference, on a balance of probabilities that the respondent's treatment was connected to the initial complaint, and second, that the respondent intended to pay back the complainant for making a complaint. The majority also held that the Q.B. judge should not have made any damage directions to the Panel, and that costs should have been party and party costs (costs agreed to between the parties or set by the court; usually lower than solicitor and client costs).

Madam Justice Paperny agreed with the conclusions of the majority, but disagreed on two points. First, she held that evidence of an intention to retaliate was not necessary to prove retaliation (although she agreed that retaliation would have been found in either case here). Second, she held that the question of costs is at the discretion of the trial judge and should not have been interfered with.

The matter was then returned to the Panel (now called the Tribunal under the *AHRA*), resulting in the current decision on remedy. Noting that the parties were not at fault for the 19-year delay, the Tribunal stated (at para. 199) that "common sense and reasonableness would suggest that some limit upon liability is required." The Tribunal determined that December 2000 should be the cutoff point for the determination of liability related to the discrimination and retaliation experienced by Walsh. In addition, Mobil argued that because the Worker's Compensation Board had pursued a legal action on Ms. Walsh's behalf with regard to a work-related car accident, Ms. Walsh was "forum shopping". Mobil argued that in Walsh's motor vehicle accident matter, she claimed that the loss of income was due to the accident, and in the human rights forum, she was attributing her loss of income to the mental stress caused by Mobil in the discrimination and retaliation case. The Tribunal concluded (at para. 210) that Ms. Walsh had the right to pursue her claims in both forums because "each forum would address the claims differently based on their distinct mandates."

With respect to general damages (damages for humiliation, etc.) the Tribunal awarded Walsh \$10,000 for the discrimination and \$25,000 for the retaliation, noting (at para. 212) that the amount awarded for retaliation exceeded the usual \$5,000 to \$10,000 awarded for this type of damage in Alberta because Justice Macleod had used the words "insensitive" and "cruel" to describe Mobil's retaliatory actions. Loss of income for the period of August 14, 1989 to December 31, 2000 was determined to be \$472,766, based on calculations made by Brown Economic Consulting Inc. Additionally, loss of pension benefits for the same period was calculated at \$139,154. Treatment/counseling expenses of \$10,000 were awarded to help Walsh deal with the closure of the case and its impact on her. The Tribunal declined to award employment expenses related to the month Walsh was terminated because it had no further information upon which to determine the eligibility of the expenses. Pre-judgment interest and costs were to be agreed upon between the counsel on the case. While Walsh had argued that she was entitled to damages exceeding \$4 million plus pre-judgment interest and costs, she was awarded just under \$650,000, plus interest and costs.

The Court of Queen's Bench (in 2004) and the Tribunal (in 2010) commented on the causes and consequences of the delay in this case. Walsh's first complaint was filed on August 14, 1991 and

Mobil responded on September 19, 1991. The Commission investigated the complaint and issued an investigative report on September 9, 1994, over three years after the original complaint. On February 16, 1995, the Commission informed Walsh that her complaint had been dismissed. Very little explanation is provided as to why the Commission took 3½ years to complete the initial complaint conciliation process. Clearly, the Court and Tribunal did not fault Ms. Walsh or Mobil for this delay.

As was her right under the human rights legislation, Ms. Walsh requested the Chief Commissioner to review the Director's decision to dismiss the complaint. Once again, the parties were encouraged to settle the complaint.

However, five days after the Director dismissed the first complaint (on February 21, 1995), Mobil terminated Walsh's employment. Walsh laid a second complaint on August 15, 1995 that indicated that Mobil's termination of her employment was an act of retaliation for the first complaint and was a contravention of human rights law. Mobil responded to the second complaint on September 1, 1995 and on May 30, 1996, an investigator's report was issued by the Human Rights Commission on the second complaint. On June 13, 1996, the Director dismissed Walsh's second complaint and on July 13, 1996, Walsh requested the Chief Commissioner to review this second complaint dismissal.

On February 13, 1997, the Commission advised the parties that a decision by the Chief Commissioner on the second complaint would be withheld until the first complaint was resolved. While there were some settlement negotiations after that, no settlement was resolved in 1997 or 1998. On September 21, 1998, more than seven years after the first complaint was filed, the Chief Commissioner issued a letter referring both complaints to a panel hearing.

On October 21, 1998, Walsh wrote the Commission advising that she would take carriage of both complaints before the Panel, but asked that the date be set after she received some pending medical treatment. Although the Panel wrote to Walsh in December, 1999, February, 2000 and July, 2000, asking her when she would take carriage of the complaint, a panel to hear both complaints was not appointed until November, 2000 due to Walsh's medical concerns.

Eventually, the dates of April 30 to May 4, 2001 were set as tentative dates for the hearing. However, at a pre-hearing teleconference, Mobil indicated that it was going to bring a preliminary action to determine if the Panel had actually lost jurisdiction because of delay. Due to the unavailability of the Chief Commissioner, the preliminary action of Mobil was finally heard on September 19 and 20, 2001, with the Panel decision being released in January 2002.

The Panel ([*Walsh v Mobil Oil*](#), January 2002, Diane Colley-Urquhart, Preliminary Application) dismissed Walsh's first human rights complaint on the basis of abuse of process on account of undue delay. Walsh's complaint on retaliation was allowed to proceed.

The Panel noted that during the critical times of the complaints, the Commission was undergoing transition and reorganization. For example the Chief Commissioner was appointed on March 12, 1995. The new (at the time) *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14 came into effect in December 1996. The Panel held that because nine years had transpired since the filing of the first complaint, the delay was simply too long for Mobil to adequately respond to the complaints, resulting in a "real and substantial prejudice, such that the public's sense of decency and fair play is affected and the principles of natural justice are compromised" (Panel, 2002 at para. 91).

On appeal to the Court of Queen's Bench ([*Walsh v Mobil Oil Canada*](#), 2004 ABQB 675) the Court ruled that with regard to the first human rights complaint, the complainant had met her burden of proof in demonstrating that despite the delay, Mobil had not been denied its right to a fair hearing or to defend itself. The Court ordered that the matter be considered by a new Panel.

The 2010 Tribunal decision on remedy discussed the delay and stated (at para. 162):

The Tribunal is most concerned about the 19 years that have lapsed between the filing of Ms. Walsh's first complaint and this remedy hearing, and the resultant effect of the delay on all parties. However, the Tribunal finds that no party acted unreasonably or in any way maliciously caused these delays. Each party had the right to pursue or defend their conduct utilizing all legal means. In this case both parties have exercised their right to appeal. It is very unfortunate that it has taken this long, but the human rights process is fairly structured in such a way as to allow for appeals at significant junctures and this takes time.

It is disappointing that the Tribunal focuses mostly on the appeals of the parties and the medical issues of the complainant as the reasons for the delay, rather than some of the Commission's own inefficient procedures. The change in Chief Commissioner and the new legislation are mentioned but it isn't very clear how these might cause a delay in this particular case. While the delay was examined from the perspective of the impact on the respondent Mobil, little mention is made of how the delay might have negatively impacted Walsh. Nineteen years is a very long time to wait for compensation for discrimination and for resolution of the matter. It is clear that Walsh must have really believed in the principles of her case in order to maintain her position for that long. Unfortunately, many others would not have been able or willing to persevere.