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Cost Decision from Canadian Human Rights Commission Case: Implications for Albertans

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Decision Considered:
Canadian Human Rights Commission v Canada (AG), 2011 SCC 53 ("*Mowat*")

The Supreme Court of Canada's ("SCC") decision about costs in the Mowat case was released in October, and this will have significant ramifications in cases under the *Canadian Human Rights Act*, RSC 1985, c H-6 (*CHRA*). (See my blog on the decision of the Federal Court of Appeal for a discussion of the facts of the case here). The issue of costs in the context of human rights cases is significant, as it may become an access to justice issue, especially in cases with public interest issues.

In the *Mowat* case, the Canadian Human Rights Tribunal found that Mowat's sexual harassment complaint was partially substantiated and awarded her $4,000 for hurt feelings. Ms. Mowat asked to be compensated for her legal fees and the Tribunal determined it could award her costs in the amount of $47,000. (Mowat claimed that her legal account totalled over $196,000, but she only expected to recover a reasonable amount.) The Federal Court of Appeal held that, based on the wording of clause 53(2) (d) of the *CHRA*, the Tribunal did not have jurisdiction to award costs. On appeal to the SCC, the Canadian Human Rights Commission argued that the Federal Court of Appeal applied a narrow and legalistic interpretation of the *CHRA*, which frustrates the purpose of human rights law and could jeopardize access to justice.

The SCC upheld the decision of the Federal Court of Appeal.

CHRA, subsection 53(2) (d) stated:

> If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, it may. . . make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that it considers appropriate:
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> > ….
> > (*d*) that the person compensate the victim, as the Tribunal may consider proper, for any or all additional cost of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice.

The SCC held that the underlined wording was not sufficient to give the Tribunal the power to award costs. The SCC agreed that the power to award legal costs is a special power, which must be based on a reasonable interpretation of the legislation (para 64). The SCC contrasted the

CHRA with other provincial legislation, such as the *Alberta Human Rights Act* (RSA 2000, c A-25.5) ("*AHRA*"), which in subsection 32(2) explicitly provides that tribunals can make "appropriate" cost orders.

The issue of costs in human rights cases is relevant in Alberta. As with the Canadian Human Rights Commission, costs are largely related to the cost of legal counsel, whether for complainants or respondents. While human rights commission processes were initially developed with the intention that complainants and respondents would not require separate legal advice, in many cases, respondent companies do use legal counsel. And, with increasingly complex human rights cases with public interest aspects, often complainants feel they need independent legal counsel. In some cases, if they want legal counsel, they must engage a lawyer.

For example, in the case of *Lund v Boissoin*, (see previous blogs here and here), Darren Lund brought forth his complaint as a matter of public interest (protection of gays and lesbians from hateful or discriminatory publications). In Alberta, since 1996, when the director of the Alberta Human Rights Commission ("Commission") decides that a complaint should be dismissed, and the complainant successfully appeals this decision to the Chief Commissioner, who then orders that a Tribunal hear the matter, the complainant has carriage of the matter (*AHRA*, section 29). This means that the complainant is not provided with legal advice and must hire his or her own lawyer or represent him or herself. The Commission only provides legal representation for the complainant when the Tribunal is hearing a matter that was determined by the Commission staff to have merit. This is what happened to Darren Lund, who made his complaint as a public interest matter, yet had carriage of the complaint once it went before the Panel (now "Tribunal"). He thus had to rely on the volunteer assistance of two law students. Consequently, the issue of costs did not come up before the Panel.

When the Lund matter was appealed to the Alberta Court of Queen's Bench by the respondent, both parties had to provide their own legal counsel. The decision of the Panel (now "Tribunal") was overturned. At the Court of Queen's Bench, the issue of costs is up to the Court. Justice Earl Wilson rejected Boissoin's claim for full indemnification (100% repayment) and said that costs would be in the cause (meaning costs would go to the ultimately unsuccessful party).

Mr. Boissoin applied to the Court of Queen's Bench for an order for costs to be party-and-party in relation to all proceedings, including those that had been heard by the Panel. This meant that Boissoin wanted to be paid by Lund for his legal costs based on a schedule set out in the *Alberta Rules of Court* (then Alta Reg 390/1968). Dr. Lund argued that either no costs should be awarded or that a lesser amount be awarded based on a different schedule of costs. Justice Wilson ordered that each party should bear its own costs, which was a departure from the general rule that costs are awarded on a party-and-party basis against an unsuccessful litigant. However, the court has the discretion to depart from this rule when the case is one of public interest (*Pauli v ACE INA Insurance Co*, [2004] AJ No 883 at para 21) (Note: the *Lund v Boissoin* case is currently on appeal to the ABCA).

Often, human rights and civil liberties cases involve public interest questions. It is a great deterrent for an interested citizen to bring forward a legal issue that is in the public interest if he or she thinks that s/he will have to pay the other party's costs in the event of losing the case. As it was, Lund, a public interest litigant, was liable for significant legal costs of his own, as he had carriage of the complaint before the Tribunal.

Likewise, Ms. Mowat applied to be reimbursed for her own legal costs. While lawyers may donate their time and resources for public interest litigants or low income persons, there is no legal requirement that they do so, particularly in human rights cases. In addition, in Mowat's case, counsel from the Commission did not appear at the Tribunal, thus leaving Mowat in much the same position as Lund was before the Alberta Panel. In addition, the *CHRA* provides that the maximum monetary award in a case where there is no loss of wages is limited to $20,000. Thus, Ms. Mowat incurred very significant legal costs and recovered a modest $4,000 in her successful case.

Inability to afford legal counsel has become a critical issue that can lead to an acute lack of access to justice across Canada. Even in Tribunal matters, where one is not required to be legally represented, such as the human rights process in Alberta, not having legal representation can have significant consequences for both the litigants and the courts. This reality, together with the lack of cost awards available for complainants under the *CHRA*, and the possibility that even a successful complainant could have to bear at least his or her own legal costs before the courts in Alberta (and other jurisdictions) certainly lead to the conclusion that many potential complainants will not pursue human rights cases—even those that are in the public interest—because they cannot afford it.

Hopefully, the *CHRA* will be amended at minimum to allow for costs, and both the *AHRA* and the *CHRA* will be changed to provide for counsel in all cases before the Tribunal.