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# Buterman's Appeal on the Issue of Settlements Dismissed: Was that Reasonable?

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**Cases Commented On:** *Buterman v St. Albert Roman Catholic Separate School District No. 734*, 2017 ABCA 196 (CanLII) (*Buterman*, ABCA); *Buterman v Board of Trustees of the Greater St. Albert Roman Catholic Separate School District No. 734*, 2016 ABQB 159 (CanLII) (*Buterman*, ABQB 2016)

Jan Buterman wants to have a public airing on the merits of his human rights complaint, but he seems to have been stymied again. The current matter involves two appeals of decisions of the Alberta Human Rights Tribunal (AHRT) on preliminary matters. Hearings on procedural aspects of Buterman's case have been going on for eight years. The last two cases deal with procedural aspects of the case, and also focus on the standard of review of the procedural decisions made by the AHRT.

The standard of review of decisions made by administrative tribunals has been the subject of many recent legal discussions. There have been a number of ABlawg posts by legal experts dealing with standard of review in human rights tribunals or other statutory tribunal appeals. See, for example, posts by Shaun Fluker and Jennifer Koshan.

In general, the standard of review is the amount of deference given by a reviewing court to the decisions made by lower courts or tribunals. The standard of review refers to how closely a judge will review an administrative board's decision. There are two standards of review:

- **Reasonableness**: If the "reasonableness" approach is adopted, a judge will simply consider whether the administrative board's decision falls within the wide and flexible range of "reasonable" outcomes. As such, under the "reasonableness" standard, the judge is more likely to respect the board's ruling and leave it untouched.
- **Correctness**: The reviewing judge will intervene with the Board's decision if it is not "correct". Under the "correctness" standard, a judge will not refer to a wide and flexible range of outcomes. Rather, it will review the decision and determine if it was correct. It is more likely that a decision will be overturned or altered if the court adopts the "correctness" approach.

The procedure followed under a judicial review is very confusing for most members of the public. At the Alberta Civil Liberties Research Centre we get so many questions about judicial review, we created a separate informational tab on our website.

**Procedural History**

Jan Buterman was a substitute teacher with the Greater St. Albert Catholic Regional School Division No. 29 [School District No. 734] (referred to by the AHRT as "GSACRD" or "Respondent" and by the courts as "Respondent" or "Board") from March to October 2008. On October 1, 2009, he complained to the Alberta Human Rights Commission ("AHRC") that he was discriminated against in the area of employment on the grounds of gender and mental and physical disability. Buterman claimed that when he advised the GSACRD that he was diagnosed with gender identity disorder, and that he intended to undergo hormone therapy and sexual reassignment surgery, the GSACRD terminated him by removing his name from the substitute teacher roster. The GSACRD denied that it had discriminated against Buterman, arguing that it would be undue hardship to maintain Buterman's employment because gender reassignment is inconsistent with the teachings of the Catholic Church (*Buterman v Greater St. Albert Regional School Division No. 29*, 2014 AHRC 8 (CanLII) (Preliminary Matters Decision Regarding Settlement), paras 1-2 (*Buterman*, AHRT 2014)).

In *Buterman*, ABCA, the Court set out the events that occurred after the human rights complaint was filed as follows:

> [5] On October 2, 2009 the Board offered to settle the human rights complaint by way of a cash settlement of $78,000 (five years pay as a substitute teacher) in exchange for withdrawal of the complaint, a covenant not to advance any further human rights complaints or legal process in relation to the complaint, and a standard release containing a confidentiality clause. Mr Buterman rejected that offer.
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> [6] Almost a year later, on September 8, 2010, the Board made a different offer. Mr Buterman rejected that offer but in the letter of rejection his counsel wrote the following:
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> > Mr. Buterman has instructed us to notify you that he is willing to accept the proposal put forward by GSACRD on October 2, 2009 according to which GSACRD would make a conciliation payment to Mr. Buterman in the amount of $78,000. In view of GSACRD's commitment to finding a fair and reasonable resolution, we expect that this offer is still open for acceptance notwithstanding Mr. Buterman's earlier rejection of the offer. We would appreciate if you could confirm whether your client is still prepared to resolve Mr. Buterman's complaint on this basis. Once we receive this confirmation, we can discuss the details of the settlement. (emphasis added)
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> [7] Later that day the Board advised that the offer of October 2, 2009 had remained open continuously from October 2, 2009, and agreed to the acceptance of that offer. In its letter of September 8, 2010 the Board included an excerpt of its October 2, 2009 letter, setting out the offer:
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> > Please consider this as a formal offer for The Greater St. Albert C.R.D. No.29 to pay to Jan Buterman the sum of $78,000.00 in exchange for the following:
> >
> > 1. Withdrawal of the Human Rights Complaint of October 1, 2009;

> 2. A covenant that no further Human Rights Complaint or legal process will be commenced after this date arising out of the circumstances by which [Jan Buterman's] name [was] removed from the substitute teaching list for The Greater St. Albert C.R.D. No. 29; and
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> 3. Provision of a standard Release from Jan Buterman, containing a confidentiality clause prohibiting Jan Buterman from disclosing the existence or terms of the settlement with anyone other than [Jan Buterman's] legal counsel.

> [8] Some months later, after an exchange of correspondence regarding the form of the release and confidentiality agreement, Mr Buterman's counsel returned the monies and the unsigned documents. Mr Buterman's counsel ceased to act and in April, 2011 the Board's counsel sent the draft settlement documents directly to Mr Buterman. Although Mr Buterman did not directly communicate with the Board on April 10, 2011, he advised the media that he had rejected the Board's settlement offer due to the confidentiality clause contained in the release.

In a previous post, I provide more details of the complex factual history of the case involving a lawyer who had acted for Buterman during settlement negotiations.

On May 20, 2011, the Director of the AHRC dismissed the complaint. On June 27, 2011, Buterman appealed the Director's decision to the Chief of Tribunals, and on July 12, 2012, the Chief overturned the Director's dismissal and referred the matter to the AHRT.

There were two interlocutory applications for judicial review of these internal procedural decisions of the AHRC after 2012.

In *Greater St. Albert Regional School Division District No. 734 v Buterman*, 2014 ABQB 14 (CanLII) (*Buterman*, ABQB 2014), the GSACRD applied for judicial review of the decision of the Chief Commissioner to refer the matter to a Tribunal hearing and his decision not to refer the matter back to the Director of the AHRC for settlement purposes. Madam Justice Greckol held that the Director reasonably concluded that he did not have the statutory authority to decide settlement issues at the point in the process he was requested to do so, and that the Chief Commissioner reasonably decided he did not have the authority to order the Director to decide the settlement issues. In dismissing the application for judicial review, Justice Greckol noted that the activities to date had served only to delay a hearing on the merits (*Buterman*, ABQB 2014, para 183). She went on to state:

> [184] Human rights process is not only for the lion-hearted and well-heeled conversant with litigation, but also for the timorous and impecunious - for all Albertans. The expeditious resolution of complaints becomes an issue of access to justice; justice delayed is justice denied since true, restorative remedies become increasingly elusive by effluxion of time.

In a fairly rare occurrence, perhaps indicating the complexity of the issues, a three-member panel (usually it is a one member panel) of the AHRT was appointed to hear the settlement issues.

Prior to the start of hearings before the AHRT, the GSACRD brought a motion before the AHRT that the AHRT had no jurisdiction to hear the complaint because the parties had entered into a binding settlement. The AHRT held hearings on July 7, 8 and 9, 2014 on the preliminary motion of the GSACRD. The three-member panel released a majority decision (William J. Johnson, Q.C., Tribunal Chair and Joanne Archibald, B.A., LL.B., Tribunal Member) and a dissenting decision (Sharon Lindgren-Hewlett, B.Comm., LL.B., Tribunal Member) (*Buterman*, AHRT 2014).

The AHRT then addressed the settlement issues. The majority found that the parties had reached a settlement of Buterman's complaint on September 8, 2010, and it remained for the parties to determine the outcome of their executory (not yet fully completed) settlement agreement (*Buterman*, AHRT 2014, para 70). Further, the AHRT majority held that it would reserve its jurisdiction in order to address any further issues that may arise with respect to the execution (completion) of the settlement agreement *(Buterman*, AHRT 2014, para 71).

The dissenting AHRT member found that there was no meeting of the minds with respect to the essential terms of the settlement. Since human rights issues are constitutional or quasi-constitutional in nature, they are very important to each party, and the nature of the human rights alleged to have been violated and the nature of any defences affect the essential terms (*Buterman*, AHRT 2014, paras 73-4). Further, there was insufficient evidence to establish that the three settlement documents contained terms that could be reasonably implied (*Buterman*, AHRT 2014, para 75). The GSACRD was bringing the preliminary application for an order that the AHRT had lost jurisdiction, so it had the onus of establishing that a meeting of the minds had occurred so as to enable a finding that there was a final settlement agreement. This had not been established, so the application should be dismissed (*Buterman*, AHRT 2014, para 76).

In the alternative, the dissenting member found that the GSACRD had tendered potentially excessive documents to complete a settlement that did not match the terms of the final agreement previously reached, and thus had repudiated the agreement or made a counteroffer. Thus, there could be no final and binding settlement agreement that would be the basis of a loss of the AHRT's jurisdiction (*Buterman*, AHRT 2014, para 77).

The preliminary decision of the AHRT majority was appealed (Appeal #1) to the ABQB (*Buterman*, ABQB 2016), and later to the ABCA (*Buterman*, ABCA).

While there was an agreement to adjourn the matter and to stay any further steps until Appeal #1 was heard by the ABQB, the AHRT convened a hearing on December 3, 2014 and issued a decision on February 4, 2015 (*Buterman v Greater St. Albert Regional Division No. 29*, 2015 AHRC 2 (CanLII) (*Buterman*, AHRT 2015)). This decision also had the same two-member majority and one-member dissent, and is the subject of the second appeal (Appeal #2) to the ABQB and the ABCA (*Buterman*, ABCA, para 9).

As noted in my earlier blog, the *Buterman*, AHRT 2015 decision addressed whether the AHRT had any remaining jurisdiction over the matter, given the course of dealings between the parties since the October 30, 2014 matter was decided. The key dealings are set out in the *Buterman*, ABCA decision at paras 13 and 14:

> [13] On November 5, 2014 the Board's counsel wrote to Mr Buterman's counsel and enclosed a cheque in the amount of $78,000 plus interest and the settlement documents indicating that they were merely draft documents for discussion purposes. The Board indicated that it was open to further negotiation and changes to the documents. The letter made clear that the Board was not rescinding the September 8, 2010 settlement agreement.
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> [14] On November 14, 2014 Mr Buterman filed a notice of appeal of the Tribunal's decision. On November 24, 2014, the Board's counsel wrote to Mr Buterman's counsel advising that it waived the execution of the settlement documents as those terms were for its unilateral benefit. It took the position that the settlement had been concluded.

In the *Buterman*, AHRT 2015 decision, the same AHRT majority members concluded that the AHRT had no remaining jurisdiction over the complaint because the parties had entered into a settlement agreement, which had been fully executed. Thus, Buterman had given up his human rights complaint in favour of the settlement.

Both appeals of the AHRT decisions in 2014 and 2015 (Appeal #1 and Appeal #2) were heard together by the Alberta Court of Queen's Bench (per Justice Donald Lee). Justice Lee held that in both AHRT decisions, the majority's decisions were reasonable (*Buterman,* ABQB 2016). Because the matter included issues of fact and law, and not any pure questions of law, Justice Lee determined that the standard of review of all issues for both cases was reasonableness (*Buterman,* ABQB 2016, para 60). The decision of Justice Lee is summarized in paragraphs 137-138:

> [137] Having concluded that the standard of review pertaining to all of the issues raised by the Appellant is reasonableness, I find that the Tribunal majority has met that standard relevant to the issues raised on this appeal specifically:
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> > a. The majority Tribunal decision of October 30, 2014 that '…the parties reached a settlement of Mr. Buterman's human rights complaint on September 8, 2010. It remains for the parties to determine the outcome of their executory Settlement Agreement' is reasonable.
> >
> > b. The Tribunal's majority decision of October 30, 2014 that 'the parties before the Tribunal are at the stage of documenting their Settlement Agreement. Neither party has insisted on the execution of the documents in any particular form.' and at paragraph 71 that the Tribunal '…will remain seized of this matter pending that outcome and to permit it to address any further issues that may arise in the execution of the Settlement Agreement' is reasonable.
> >
> > c. The Tribunal's majority decision of February 4, 2015 that 'The Tribunal is without jurisdiction to proceed further with Mr. Buterman's human rights complaint. The executory settlement as found by the majority in the Tribunal's decision of October 30, 2014 has been full[y] executed' is reasonable.
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> [138] 'Reasonableness' in this context means the Tribunal majority reasons support their conclusions. Deference allows the Court to supplement the Tribunal's reasoning as long

> as their reasoning, taken as a whole, is tenable. The [T]ribunal majority reasons in this case allow me to understand how it made its decisions and they are sufficient. I determine that their conclusions are within the range of acceptable outcomes [citations omitted].

The ABQB dismissed Buterman's appeals of the AHRT October 2014 (Appeal #1) and February 2015 (Appeal #2) decisions.

In 2017, the ABCA confirmed the ABQB decision, dismissing Buterman's appeal. The ABCA held that the ABQB correctly determined that the reasonableness standard of review applied to the review of the AHRT's decisions. Further, the ABQB had correctly applied the reasonableness standard of review to the AHRT's decisions (in Appeal #1 and Appeal #2) (*Buterman*, ABCA, para 61).

Buterman argued before the ABQB and the ABCA, among other arguments, that the settlement agreement was unconscionable or unenforceable because it contained the unenforceable term that he refrain from all potential future human rights claims. Since Buterman was very concerned that there be a public airing of his issues, this term concerned him greatly. Justice Lee of the ABQB held that the fact that the settlement agreement contained potentially unenforceable terms was "of no great importance" (*Buterman*, ABQB 2016, para 126). The ABCA pointed to this holding when it addressed the same submission by Buterman on appeal (*Buterman*, ABCA, para 57). Further, the ABCA noted that the issue of unconscionability had not been discussed by the majority of the AHRT and that it had only been raised in passing by the dissent (*Buterman*, ABCA, para 54). Further, since unconscionability is an equitable doctrine, any remedy is discretionary. The ABCA was not persuaded to exercise its discretion. The ABCA concluded that the most reasonable inference that could be drawn was that Buterman regretted his decision to settle the complaint (*Buterman*, ABCA, para 60).

**Commentary**

Based on the history of this case, it is indeed clear that Buterman regrets how the events transpired in this case. The dissenting tribunal member was persuaded that there was no "meeting of the minds" to indicate a settlement had been completed. Thus, the facts of the case must have at least left the door open for some doubt, which would have given Buterman a little hope that the case would actually be heard on its merits. However, in this particular situation, it looks like Buterman will have to be satisfied with the publicity that the procedural cases have engendered. Once again, however, as with many recent human rights and other tribunal appeals, the issue of standard of review was prominent.

The leading case on standard of review is *Dunsmuir v New Brunswick*, 2008 SCC 9 (CanLII). This case has been written about at length. Of particular interest is the effect of the Supreme Court of Canada ("SCC") decision in *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 (CanLII) (*Saguenay*), which applied *Dunsmuir* principles to an appeal from a human rights tribunal, and which was relied upon by Justice Lee in *Buterman*, ABQB 2016. The SCC states in *Saguenay* that the standard of review on a statutory appeal (one in which the right to appeal is provided in the statute) of an administrative tribunal such as the AHRT is the same as the standard of review for a judicial review of any decision of an administrative tribunal (*Saguenay*, para 38).

The *Alberta Human Rights Act*, RSA 2000, c A-25.5 ("AHRA"), allows for a statutory appeal of AHRT decisions in section 37. This appeal was historically thought to be an "appeal *de novo*", or one in which the reviewing court had the authority to re-visit the facts and law and re-determine the issues at hand. See, for example *Walsh v Mobil Oil Canada*, 2008 ABCA 268 (CanLII). When the reviewing court hears appeals on a *de novo* basis, it acts like it is considering a question of law for the first time, and thus does not defer to the decisions below. This allows the court to substitute its own judgment about whether the court (tribunal) applied the law correctly. Even under statutory appeals, human rights tribunals may have been afforded some deference with respect to findings of fact and credibility, because they had heard *viva voce* evidence. Generally, the role of the review court is much more limited in a judicial review as compared to its role in an appeal hearing *de novo*.

By following *Saguenay* on the issue of standard of review on statutory appeals, Justice Lee (among other recent decision-makers) appears to have cast considerable doubt on the traditional view that appeal hearings on decisions of the AHRT are to be conducted on a *de novo* basis. At the ABQB, Buterman's counsel relied on the ABCA's decision in *Edmonton (East) Capilano Shopping Centres Ltd v Edmonton (City)*, 2015 ABCA 85 (CanLII) (*Capilano*, ABCA), where, in the case of a statutory appeal, the reviewing court applied a correctness standard of review, stating that the presence of a statutory right of appeal demonstrates that the legislature intended that the judiciary have a greater supervisory role in reviewing the decisions of the tribunals. Since the AHRA provided for a statutory appeal, Buterman argued that the correctness standard of review should apply in his case. In Shaun Fluker's post, "The Supreme Court of Canada (By a Slim Majority) Confirms the Presumption of Deference in Alberta", he notes that the SCC subsequently overturned the *Capilano*, ABCA decision. This would seem to support the ABQB's rejection of Buterman's submission. However, as Shaun Fluker notes in his post, perhaps the slim majority (5 to 4) in the SCC in *Capilano* indicates a growing "fissure [is] developing at the Supreme Court over standard of review."

The view on standard of review of the ABQB and the ABCA in *Buterman* is supported by the holding of the SCC in *Stewart v Elk Valley Coal Company*, 2017 SCC 30 (CanLII) at para 20:

> Reviewing courts generally approach the decisions of tribunals under human rights statutes with considerable deference. It is the tribunal's task to evaluate the evidence, find the facts and draw reasonable inferences from the facts. And it is the tribunal's task to interpret the statute in ways that make practical and legal sense in the case before them, guided by applicable jurisprudence. Reviewing courts tread lightly in these areas.

Nevertheless, I have some sympathy for the view of some of the dissenting judges in some of the other standard of review cases that the presence of the right of statutory appeal should make some difference; human rights cases are extremely contextual. Further, traditionally, the AHRT has turned to the court for guidance on interpretation of the AHRA (e.g., the correct legal test for discrimination). This would seem to support a notion that the correctness standard of review might be applicable in more cases than the majority of the SCC in *Capilano* or *Stewart* might have considered.

Whether a different standard of review in the *Buterman* case would have made any difference, is questionable, however. On the one hand, there is a very important contextual aspect to the case; on the other hand, it appears to be a case involving factual determinations made by a majority of

the AHRT. Buterman argued that the AHRT did not have jurisdiction, which would have required the courts to apply a correctness standard of review, as provided in *Dunsmuir*. Further, it is arguable that the AHRT had any particular expertise about contract law (e.g., whether a settlement had been agreed upon). The ABQB concluded that the decision of the majority of the AHRT engaged discretionary decisions regarding process and findings of fact or mixed fact and law and therefore did not trigger a question of true jurisdiction (*Buterman*, 2016 ABQB, para 59). In addition, the AHRT did have expertise in assessing whether a settlement had been reached in a human rights complaint (*Buterman*, 2016 ABQB, para 62). All of these factors led the ABQB to conclude that reasonableness was the appropriate standard of review, and, when applying this standard, all of the decisions of the majority of the AHRT were reasonable.

No wonder the public has difficulty understanding standard of review; it is very difficult for even the learned minds at the Supreme Court of Canada to agree on it, especially in the context of a statutory human rights appeal.

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This post may be cited as: Linda McKay-Panos "Buterman's Appeal on the Issue of Settlements Dismissed: Was that Reasonable?" (31 July, 2017), online: ABlawg, http://ablawg.ca/wp-content/uploads/2017/07/Blog_LMP_Buterman.pdf