

Ombudsman May Review and Make Recommendations Regarding Decisions of Chief Commissioner of the Human Rights and Citizenship Commission

By Linda McKay-Panos

Cases Considered:

[*Alberta \(Ombudsman\) v. Alberta \(Human Rights and Citizenship Commission\)*, 2008 ABQB 168](#)

This case, although somewhat technical, is interesting from the perspective of a person who would like the Chief Commissioner of the Alberta Human Rights and Citizenship Commission ("Commission") to reconsider a decision. Though such cases may be brought to the Court of Queen's Bench, people often choose not to take that route because the court is limited judicial review – i.e. it will only look at whether the Chief Commissioner (or administrative official in other cases) exercised his or her power in an arbitrary, discriminatory or otherwise unreasonable way when making the decision. Courts do not usually review the evidence in the case, or the decision itself, but instead focus on the process that was followed in arriving at a decision.

Furthermore, in addition to the review powers of the court being quite limited, the process of taking an administrative decision to the Court of Queen's Bench for judicial review can be expensive. Hence, after receiving an unfavourable decision from the Chief Commissioner, instead of applying to the court, some people have chosen to apply to Alberta's Ombudsman for review of the Chief Commissioner's decisions under the *Ombudsman Act*, R.S.A. 2000, c. O-8. An ombudsman operates as a watch-dog, looking at the workings of administrative laws and the work done by various government tribunals and departments.

This case was launched by the Alberta Ombudsman (currently Gordon Button), who wanted a declaration from the Court of Queen's Bench as to whether his office could review and make recommendations regarding decisions made by the Chief Commissioner.

The facts surrounding the complaint itself are relevant insofar as they illustrate how the process of making a human rights complaint to the Commission works. A citizen complained to the Commission that his employment was terminated on grounds prohibited by the *Human Rights and Citizenship and Multiculturalism Act* ("*HRCMA*"), R.S.A. 2000, c. H-14. The complaint was handled by an investigator, who recommended against a panel hearing, but suggested that the employer receive some training about the *HRCMA*. The Director of the Commission accepted the investigator's recommendations and dismissed the complaint. The citizen appealed under s.

26(3) of the *HRCMA* to the Chief Commissioner, who issued a written decision in which he agreed with the Director.

The citizen could have applied to the Court of Queen's Bench for judicial review of the decision, but instead elected to wait until the appeal period was over (30 days) and then complained to the Ombudsman. The Ombudsman conducted an investigation and determined that although the decision was in all respects administratively fair, it did not address one of the citizen's grounds of appeal. The Ombudsman recommended that the Chief Commissioner issue an addendum to the decision to address this failing. The Chief Commissioner declined to implement the recommendation. The Ombudsman then applied to the Court of Queen's Bench for direction regarding his jurisdiction and how to resolve any operational conflicts that may exist between the *Ombudsman Act* and the *HRCMA*.

The Ombudsman argued that the *Ombudsman Act* authorizes him to investigate and make recommendations concerning decisions of the Chief Commissioner and also permits the Chief Commissioner to reconsider decisions in light of the Ombudsman's recommendations.

The Chief Commissioner agreed that the Commission is an "agency" over which the Ombudsman can exert jurisdiction and investigate the Chief Commissioner's procedure and process. However, he argued that operational conflicts must be resolved in favour of the *HRCMA*, thus precluding the Ombudsman from making recommendations regarding the Chief Commissioner's decisions and/or his ability to implement the Ombudsman's recommendations.

The Ombudsman reports to the Legislature about the body of administrative laws and those who administer them. The Supreme Court of Canada, in *British Columbia Development Corp. v. Friedmann*, [1984] 2 S.C.R. 447, said that the function of an ombudsman is to "address administrative problems that the courts, the legislature and the executive cannot effectively resolve" (at p. 461). In *Re Alberta Ombudsman Act*, (1970), 10 D.L.R. (3d) 47 (Alta. S.C.), Milvain C.J. stated that the basic purpose of an ombudsman is to be a "watch dog" designed to look at the entire workings of administrative laws, and includes the role of scrutinizing the work done by various administrative tribunals.

The *Ombudsman Act* s. 21.1 is referred to as the "reconsideration clause". It provides:

21.1(1) On the recommendation of the Ombudsman under section 21(3), a department, agency or professional organization may

(a) rehear a matter or reconsider a decision or recommendation made by the department or agency or professional organization or an officer, employee or member of it, and

(b) quash, confirm or vary that decision or recommendation or any part of it.

(2) If a matter is reheard or reconsidered pursuant to subsection (1), the provisions of the enactment governing the original hearing or consideration apply to the rehearing or reconsideration.

(3) This section applies notwithstanding any provision in any Act to the effect that

(a) any decision, recommendation, act or omission referred to in section 12(1) or 12.1(2) is final,

(b) no appeal lies in respect of it, or

(c) no proceeding or decision of the person, department, agency or professional organization whose decision, recommendation, act or omission it is may be challenged, reviewed, quashed or called in question.

Although there is nothing in Alberta's *Ombudsman Act* that precludes its application to the Chief Commissioner, section 35 of the *HRCMA* (referred to as "the finality clause") states:

35 A decision of the chief commissioner under section 26(3)(a) is final and binding on the parties, subject to a party's right to judicial review of the decision.

Subsection 1(1) of the *HRCMA* is sometimes referred to as a "supremacy clause". It states:

1(1) Unless it is expressly declared by an Act of the Legislature that it operates notwithstanding this Act, every law of Alberta is inoperative to the extent that it authorizes or requires the doing of anything prohibited by this Act.

In the case at bar, Madam Justice J.E. Topolniski of the Alberta Court of Queen's Bench addressed three issues:

1. Does the finality clause (*HRCMA* s. 35) oust the Ombudsman's jurisdiction?
2. Does s. 21.1 of the *Ombudsman Act* apply to bilateral adjudicative decisions (decisions that affect two parties, such as those made by the Chief Commissioner)?
3. Does the quasi-constitutional nature of human rights legislation, together with the finality clause and the supremacy clause, render the reconsideration clause inoperative?

First, she determined that the finality clause in the *HRCMA* was insufficient in itself to oust the Ombudsman's jurisdiction to investigate a Chief Commissioner's decision or to recommend that it be reconsidered. She was persuaded by the fact that the Legislature did not intend the Ombudsman to regard the decisions of the Chief Commissioner with the same degree of deference that the courts do.

Second, Justice Topolniski held that the Ombudsman was empowered to review bilateral adjudicative decisions because there was nothing in the legislation to limit the Ombudsman's jurisdiction to reviewing a particular type of decision.

Finally, Justice Topolniski said the jurisprudence that holds that human rights legislation is to be given a large and liberal interpretation should be seen as referring to the provisions which prohibit discrimination and not to the application of the *Ombudsman Act*. Further, the supremacy clause (*HRCMA*, s. 1) applies to the rights and freedoms guaranteed under the *HRCMA* and not to the decisions of the Chief Commissioner. Similarly, the finality clause (*HRCMA* s. 35) is about process, in that it does not permit the Chief Commissioner to rehear or reconsider a matter. The Ombudsman is not authorized to interfere with the substantive rights protected by the *HRCMA*. Reconsideration by the Chief Commissioner addresses those concerns associated with the Ombudsman's watch dog status.

This decision is very interesting as it provides Albertans who have made complaints to the Commission with the option of seeking review by the Ombudsman rather than applying to the Court of Queen's Bench for judicial review. However, the Ombudsman's authority is limited to making recommendations that the Chief Commissioner may choose not to follow. On the other hand, the remedies ordered by the Court after judicial review (for example, ordering the Chief Commissioner to reconsider the matter) must be followed by the Chief Commissioner.