

Court of Appeal Rules in Walsh Case: End of a Seventeen Year Journey?

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Cases Considered:

[Walsh v. Mobil Oil Canada, 2008 ABCA 268](#)

People often cite the length of time it takes to resolve human rights complaints as a deterrent to making such complaints. Delorie Walsh's case may be cited as an extreme example. And, if the respondents appeal the current decision to the Supreme Court of Canada, the case might not be over yet.

The facts of the case are summarized in paragraphs 2 through 31 of the Alberta Court of Appeal decision. Delorie Walsh was hired by Canadian Superior Oil (which later merged with Mobil Oil) in 1984 as a junior map clerk. Having a B.Sc. in Agriculture, Ms. Walsh wished to be a land agent. At that time, there had never been a female land agent working for the company. Walsh pursued her interest in becoming a land agent and obtained a licence. She also moved into a clerical position in the land department and later became a land representative. Walsh received good performance appraisals, yet encountered a number of obstacles in becoming a land representative in the field. These barriers related to her being a woman in a field dominated by men. Although Walsh's responsibilities increased significantly, her designation and pay scale did not increase with her responsibilities.

In December 1990, Walsh was offered a field position in Olds, subject to a three month probation period. She was required to commute on her own time, using her own vehicle and did not receive any salary change. Other male land agents were not required to undergo probation, nor were they required to commute using their own vehicle. When Walsh expressed her concerns about these differences to her supervisors, their responses led her to conclude that if she did not accept the offer with the differential conditions, her continued employment at Mobil would be jeopardized. Eventually, Walsh was assigned a company vehicle to commute to Olds and was transferred to the Olds office.

In August 1991, Walsh filed a human rights complaint with the Alberta Human Rights and Citizenship Commission ("Commission") against Mobil, alleging discrimination based on gender under the equal pay for equal work provision (now s. 6 of the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14 ("HRCMA")). She alleged that, despite her abilities, she had been prevented from advancing, and regardless of the degree of responsibility she was given relative to men doing similar work, she did not receive appropriate employment designations and compensation. Mobil responded denying that there was any discrimination.

In the meantime, Walsh was transferred to Wimborne/Lone Pine in 1992 and was promoted to Land Representative II in March 1993. Her workload was very heavy and her performance appraisals indicated that this might have affected her follow-through with administrative tasks. At the time, she was reporting to three supervisors.

In early January 1994, Walsh was involved in a car accident while working and suffered severe whiplash. At the same time, relations with one of her supervisors, McNamara, were strained and he had said to her that the human rights complaint was at least in part responsible. On September 6, 1994, Walsh received a performance appraisal indicating that she needed improvement, and she was told that if her performance issues continued she would be dismissed. She was also assigned to a supervisor, North, who developed for her a three-month action plan, which included reading *Seven Habits of Highly Effective People* and conducting surveys of landowners and co-workers about her performance. On September 9, 1994, the Commission sent a letter to Walsh with the investigator's report and recommendation that the Commission dismiss the complaint.

Walsh's action plan progress was regularly monitored by North, and the plan records indicate that Walsh met a number of the targets. Nevertheless, North focussed on Walsh's completion of surveys, lists of activities, time sheets and communication/network problems. The plan was revised in November 1994, and several additional expectations were added. Walsh was notified that she was on written notice about serious performance problems regarding her ability to work as part of a team and her ability to follow through. North continued to be dissatisfied with Walsh's performance in early 1995, and although Walsh attempted to clarify his expectations, contest his criticism and justify her actions, North recommended that Walsh be terminated, and she was indeed terminated on February 21, 1995. On the same day, Walsh was notified by the Commission that her human rights complaint was being dismissed as per the investigator's recommendation.

On August 15, 1995, Walsh filed a second human rights complaint against Mobil, alleging it had retaliated against her for making the first 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 ("Panel") for a hearing.

The Panel in [*Delorie Walsh v. Mobil Oil*](#), December 16, 2005 (Beth Bryant, Chair) held that it could only consider the alleged contraventions of the *HRCMA* 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) that 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. The Panel also found there was no retaliation and dismissed Walsh's second complaint.

Walsh appealed the Panel's decisions regarding the limitation period, equal pay, gender discrimination, retaliation and procedural fairness ([*Walsh v. Mobil Oil*](#), [2007 ABQB 305](#)) 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. At the request of counsel for Walsh, Justice Macleod provided directions to the Panel 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 *HRCMA*. The Alberta Court of Appeal (heard by Justices Jean Côté, Marina Paperny, and Keith Ritter) wrote two separate judgments, both of which concurred in the result. Ritter and Côté held that Walsh was discriminated against on the basis of gender, and 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. They 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.

Perhaps ironically in this case, it was the respondent who formally complained about how long it was taking to resolve. In 2002, Mobil requested a stay of proceedings or dismissal of the complaint due to procedural failings and delay. The Panel ([Walsh v. Mobil Oil \(January 2002; Alta. H.R.P., Diane Colley-Urquhart, Preliminary Application\)](#)) 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. 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.

One has to admire the sheer tenacity of Ms. Walsh in staying with her case for seventeen years.