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Access to Justice and Human Rights Cases

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Cases Considered:

McClary v Geophysical Services Inc., 2011 ABQB 112

Not being able to afford legal representation occurs quite frequently in civil and criminal legal cases. Some individuals choose to self-represent—either because they cannot afford legal counsel, or because they want to present their own cases. Inability to afford legal counsel has become a critical problem that leads to an acute lack of access to justice in Canada. In Alberta, recent cuts to the Legal Aid program will likely have serious effects on people with both civil and criminal issues. Even in tribunal matters, or matters where one is not required to be legally represented, such as the human rights process in Alberta, not having legal representation can have important consequences, both for the courts and for the litigants. While in some matters at the Commission (and later on appeal to the courts), the Act permits counsel to be assigned to represent and advise complainants, *McClary* was not such a matter. Also, it is important to note that in all matters before the Commission, respondents must hire their own legal representation should they desire it. The limited availability of legal counsel for parties in human rights cases exists partly because the human rights process is supposed to be user-friendly and low-cost to complainants and respondents.

McClary, however, illustrates how an unrepresented litigant can create difficulties for both the court and the complainant. It is not clear from the decision that McClary could not afford legal counsel, or whether he chose not to hire a lawyer. Either way, the fact that he was self-represented had an impact. On February 13, 2007, McClary filed a complaint with the Alberta Human Rights and Citizenship Commission ("Commission", now the Alberta Human Rights Commission) alleging that he was discriminated against in the area of employment on the ground of physical disability under the *Human Rights, Citizenship and Multiculturalism Act*, RSA 2000, c H-14 ("Act", now the *Alberta Human Rights Act*, RSA 2000, c A-25.5). McClary alleged he was terminated because he had diabetes. After a confidential conciliation process by the Commission failed, an investigation was launched and an investigator prepared a report on April 3, 2009, recommending that McClary's complaint be dismissed. The Director of the Commission dismissed the complaint. McClary requested that the Chief Commissioner review the dismissal of the complaint. After reviewing McClary's request, together with further information provided by McClary, the Chief Commissioner upheld the dismissal of the complaint (January 21, 2010).

Section 35 of the Act provides that a decision of the Chief Commissioner is final and binding on the parties, subject to a right to apply for judicial review of the decision. McClary applied to the Court of Queen's Bench for judicial review of the decision to dismiss his complaint.

McClary was self-represented before the Court of Queen's Bench. In addition to seeking remedies that were not available (discussed below), McClary also asked that fresh affidavit evidence be admitted without first applying for the Court's permission. His affidavit evidence related to the merits of the Commissioner's decision, which was not relevant or admissible on an application for judicial review (para. 26). In addition there were numerous deficiencies in the affidavit; for example portions of it contained argument rather than facts, it was redundant, and it raised irrelevant issues (para. 28). Justice Ron Stevens ruled that the affidavit could not be introduced as evidence (para. 29). Presumably if McClary had been represented by counsel, the affidavit would have contained relevant information and counsel would have properly applied to the Court to have it included in evidence, should that have been necessary. McClary simply did not know the proper procedure for additional affidavit evidence to be introduced in a judicial review application.

Judicial review of administrative acts involves examining the exercise of authority to see if it was performed in an arbitrary, discriminatory or otherwise unreasonable way. Canadian courts have been refining the reviewing court's procedures when performing a judicial review. By way of comparison, the role of the court during an *appeal* of a Commission decision involves the review of the tribunal's decision for errors in law and fact.

The *Alberta Rules of Court* which governed at the time of the judicial review provided for the following types of relief (Rule 753.04):

- Mandamus – an order to perform an act which that body is required by law to perform or to refrain from performing an act which one is obliged by law to refrain from doing;
- Prohibition – an order to a lower court (or tribunal) not to exercise jurisdiction in a particular case;
- Certiorari – an order issued from a higher court ordering a lower court (or tribunal) to review the decision that it made;
- Quo warranto – an order to require the person to show what authority they have for exercising some right or power they claim to have;
- Habeas corpus – a court order to allow a person being detained to be produced before a judge for a hearing to determine whether the detention is legal;
- Declaration – where the court pronounces its decision about the legal status of a person or a law;
- Injunction – a court order that requires a party to do, or to refrain from doing, certain acts.

The *Rules of Court* also provided that a court could direct a decision-maker to reconsider and determine the whole or any part of a matter to which the application for judicial review related, if the decision had been set aside (Rule 753.06(1)).

However, McClary, who was unrepresented, asked that a Human Rights Tribunal be ordered to hear the complaint, and also asked for the following remedies (which the Court determined were not available in the judicial review application) (para. 20):

> (a) the sum of $230,000.00 plus interest for two years' of salary and bonuses based on the Applicant's claim that his employment was wrongfully terminated;
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> (b) the sum of $273,000.00 plus interest for Group Health Benefits based on the Applicant's breach of contract claim;

(c) an award of special damages and punitive damages;

(d) an Order setting aside the Chief Commissioner's decision is requested as alternative relief to the Applicant's claim for damages; and

(e) an Order for the Alberta Human Rights Commission to reopen the Applicant's complaint against WesternGeco Canada, a subsidiary of Schlumberger Canada Limited (a complaint unrelated to this matter).

So, another significant effect of not being represented by counsel was that McClary asked for several remedies that were not available in a judicial review of the Chief Commissioner's decision.

When a court is performing judicial review, it first must determine upon what standard it will review the administrative decision (e.g., should the court determine whether the decision was *reasonable* or whether it was *correct*?) A complex set of legal principles set out the standard of review for various decisions made by administrative tribunals. Because McClary was not represented by counsel, and had not addressed the standard of review in his submissions, and because of the technical nature of this area of the law, the Chief Commissioner's counsel was permitted to provide written submissions in order to assist the Court in the matter. McClary was not able to provide any submissions on the standard of review because he was unrepresented. Although the Commissioner's counsel did a thorough presentation, an adversarial legal system is based on the notion that both sides of an argument are strenuously presented to the court so that a just decision is reached. Since the situation did not permit that, the Court had to rely on lawyers who were on one side of the case to provide "both sides" of the issue.

Justice Stevens concluded that the standard of review in the case was reasonableness. A leading case in the Supreme Court of Canada, *Dunsmuir v New Brunswick*, 2008 SCC 9, set out the test for reasonableness as follows:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

In determining that the Chief Commissioner's decision to uphold the dismissal was reasonable, Justice Stevens noted that the Chief Commissioner had (para. 51):

- considered the evidence gathered by the investigator, summarizing the allegations made by the Applicant in the Complaint and to the investigator;

- evaluated the quality of the evidence gathered by the investigator, noting the number of witnesses interviewed and also their knowledge of the matters reached, together with the consensus on the reason McClary was terminated; and
- considered the additional evidence provided by the Applicant, setting out the general details of the arguments and supporting documents provided by McClary in the request for review.

Further, there was "justification, transparency and intelligibility within the Chief Commissioner's decision-making process" (para. 52) and the decision fell "within the range of possible, acceptable outcomes which are defensible in respect of the facts" (para. 52) and the law.

Finally, Justice Stevens ordered that the Respondent company be granted costs in the matter (para. 53).

It is not clear from the Court of Queen's Bench ruling whether McClary had actually made any relevant submissions on the reasonableness of the decision-making process of the Chief Commissioner. It is quite possible that since he was unrepresented, he did not address key applicable issues and legal principles, but rather sought to re-litigate the entire case, which is partially evidenced by McClary's seeking to introduce additional affidavit evidence that contained argument and dealt with redundant, irrelevant matters. As is evident from his application to introduce the affidavit evidence and the requested remedies (set out above), McClary did not appear to be aware of the purpose of the judicial review hearing or the remedies that actually could have been obtained.

This case demonstrates that even in human rights matters, particularly once the matter arrives in court (having been at the tribunal), the law and procedures demand that parties have effective representation. Otherwise, the court is placed in the position of dealing with improper evidence and arguments, together with an application for remedies that are not available. At the same time, the unrepresented complainant does not adequately address relevant issues or present his or her side of the case. Thus, lack of legal representation can ultimately result in a lack of access to justice for the complainant.