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Jurisdiction can be a Significant Consideration in Human Rights Cases

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Cases Considered:

British Columbia (Workers Compensation Board) v Figliola ("*Figliola*"), 2011 SCC

A recent SCC case again demonstrates the importance of jurisdiction in human rights cases. In Alberta, and in other provinces, a number of tribunals may have human rights jurisdiction. Thus, in some situations, complainants have potential access to more than one tribunal to resolve their issues. This can, however, lead to challenges regarding accountability, consistency, and efficiency. On the one hand, complainants want a fair, yet reviewable resolution of their human rights issue—on the other hand, respondents would like a final resolution of the complaint and to know the matter is not subject to re-litigation by a second tribunal (See: The Court, Marina Chernenko, "Neighbouring Tribunals and 'Lateral Adjudicative Poaching': Forum Shopping for Human Rights in British Columbia v. Figliola")

In Alberta, the issue of exclusive, concurrent and overlapping jurisdiction of the human rights tribunal with other tribunals has been the subject of recent Court of Appeal decisions. (See my previous blog "Once Again ABCA deals with Jurisdiction Issue of Labour Arbitration Board vs. Human Rights Commission"). In addition, in 2009, Alberta added section 22 (1.1) to the *Alberta Human Rights Act*, RSA 200, c A-25.5 It reads:

> **22 (1.1)** Notwithstanding section 21, where it appears to the director at any time that a complaint
>
> (a) is one that could or should more appropriately be dealt with,
> (b) has already been dealt with, or
> (c) is scheduled to be heard,
>
> in another forum or under another Act, the director may refuse to accept the complaint or may accept the complaint pending the outcome of the matter in the other forum or under the other Act.
>
> RSA 2000 cH-14 s22; 2009 c26 s16

This is an attempt to deal with the issues that arise (as noted above) when more than one administrative body has jurisdiction over a human rights matter.

The *Figliola* case arose out of British Columbia (BC), where the provision of the BC *Human Rights Code* RSBC 1996, c 210, which is similar to Alberta's, reads:

> **27** (1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:
>
> > (a) the complaint or that part of the complaint is not within the jurisdiction of the tribunal;
> > …
> > (f) the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding;

The BC Workers' Compensation Board (WCB) awarded compensation based on an amount fixed by policy to a number of workers suffering from chronic pain. Several workers appealed to the Board's Review Division, arguing that a fixed award for chronic pain was patently unreasonable, and discriminated against them on the basis of disability under section 8 of the *Human Rights Code*. The Review Officer relied on the Supreme Court of Canada's decision in *Tranchemontagne v Ontario (Director, Disability Support Program*) 2006 SCC 14, that human rights tribunals have concurrent jurisdiction with other tribunals to apply human rights legislation, unless there is explicit language in a statute to the contrary. Thus, the WCB Review Officer had jurisdiction over the human rights complaint and held that the fixed chronic pain policy did not violate section 8 of the *Human Rights Code*.

The complainants next appealed to the WCB Appeal Tribunal, but before the matter was heard, the Tribunal's authorizing legislation was amended and explicitly removed its jurisdiction over human rights matters, and instead of applying for judicial review, the complainants moved their complaint to the BC Human Rights Tribunal ("HRT"). The WCB brought an application asking the HRT to dismiss the complaint under section 27(1) (f), as it had been appropriately dealt with by the WCB. The HRT decided not to grant this application, and found that the fixed chronic pain policy violated section 8 of the *Human Rights Code*. Thus, a legal dispute arose between the WCB and the complainants with respect to the appropriate scope of the HRT's discretion to determine whether a complaint has been "appropriately dealt with" when two administrative bodies have concurrent jurisdiction over human rights.

The Supreme Court of Canada (SCC) (per Justices McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell), unanimously found that the HRT's decision to assert its jurisdiction over the complaint was patently unreasonable because it was based on matters outside the scope of its mandate. Thus, the decision was set aside and the complaints dismissed. The SCC was split five to four on the issue of what was the proper legal test to be used to determine whether the complaint had been appropriately dealt with. The majority held that the prevention of forum shopping was of concern, because it results in inefficient use of resources and possibly inconsistent results.

The majority held that the correct test to be applied by a Tribunal in determining the scope of section 27(1) (f) was:

[37]……whether there was concurrent jurisdiction to decide human rights issues; whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal; and whether there was an opportunity for the complainants or their privies to know the case to be met and have the chance to meet it, regardless of how closely the previous process procedurally mirrored the one the Tribunal prefers or uses itself.

The HRT had failed to conduct a "flexible and global assessment" (para 96) of the competing policy issues in the case.

It seems that the result in the case means that the majority of the SCC believes that a final resolution of a complaint (usually the uppermost concern of the respondent) is favoured over obtaining a fair, yet reviewable resolution of the complaint (usually the uppermost concern of the complainant). In addition, the decision does not address whether there are sufficiently equivalent procedural safeguards in administrative bodies that have concurrent jurisdiction over human rights issues, or whether there will be forum shopping in any event. This is especially so in Alberta where the test is not whether the matter has been "appropriately dealt with" but rather "has already been dealt with" (whether appropriately or not).