Citation: Pollock et al v Human Rights Commission (Manitoba) et al, 2019 MBCA 110
Date: 20191028
Docket: AI18-30-09197

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Barbara M. Hamilton
Madam Justice Jennifer A. Pfuetzner
Madam Justice Lori T. Spivak

B E T W E E N:

RON POLLOCK, DELPHINE KINVIG, DOUG GORDON and SUSAN RENARD	)	***R. Pollock,***
	)	***D. Kinvig,***
	)	***D. Gordon*** *and*
(Applicants) Appellants/Respondents by Cross Appeal	)	***S. Renard***
	)	*on their own behalf*
	)	
- and -	)	***I. Khan***
	)	*for the Respondent*
MANITOBA HUMAN RIGHTS COMMISSION	)	*Manitoba Human Rights Commission*
	)	
(Respondent) Respondent	)	***T. C. Andres***
	)	*for the Respondent/Appellant by Cross Appeal*
- and -	)	*Winnipeg Condominium Corporation No. 30*
	)	
WINNIPEG CONDOMINIUM CORPORATION NO. 30	)	***M. A. Bodner***
	)	*for the Respondent*
(Respondent) Respondent/Appellant by Cross Appeal	)	*The Government of Manitoba*
	)	
- and -	)	*Appeal heard:*
	)	***June 11, 2019***
THE GOVERNMENT OF MANITOBA	)	
	)	*Judgment delivered:*
(Intervener) Respondent	)	***October 28, 2019***

On appeal from 2018 MBQB 170

HAMILTON JA

[1] Over 12 years ago, the appellants, Ron Pollock, Delphine Kinvig, Doug Gordon and Susan Renard (collectively, the applicants), filed complaints of discrimination under *The Human Rights Code*, CCSM c H175 (the *Code*), asserting discrimination based on disability and a failure to reasonably accommodate their special needs based on their disabilities.

[2] Their complaints related to the decision of the respondent, Winnipeg Condominium Corporation No. 30 (the condo corporation), to replace the exterior windows in its condominium complex (the complex) where the applicants lived.

[3] This appeal and cross appeal are from the applicants' unsuccessful application to the Court of Queen's Bench for judicial review of the decisions of the adjudicator dismissing their complaints.

[4] At the heart of the applicants' appeal is the adjudicator's preliminary ruling that the respondent, Manitoba Human Rights Commission (the Commission), was not required to have carriage of the applicants' complaints at the hearing before her. The applicants seek a new adjudication of their complaints.

[5] The essence of the condo corporation's cross appeal is its assertion that the reviewing judge in the Court of Queen's Bench denied it procedural fairness by not hearing its submission with respect to costs. The condo corporation seeks an order of costs against the applicants for the proceedings in the Court of Queen's Bench.

[6] For the reasons that follow, I would dismiss the appeal and allow the cross appeal.

Background

[7] In 2004, the condo corporation's board of directors decided to replace the exterior clear glass windows in the complex with tinted glass windows (the project). There was much debate and controversy about the project and its costs. The condo corporation levied a special assessment and filed liens and notices of exercising power of sale against the units of owners who did not pay the special assessment, including the units owned by the applicants.

[8] As well, Mr. Pollock and other unit owners commenced various proceedings in the Court of Queen's Bench to stop the project. These proceedings were either struck, dismissed or withdrawn.

[9] All the windows in the complex have been changed except for the windows in the applicants' units (Mr. Gordon's bedroom window was changed in 2007 as part of the project). The condo corporation decided to permit the applicants to keep their existing windows while they lived in the units. Ms Kinvig sold her unit on May 1, 2007 and moved. The other applicants continue to own and live in their respective units.

The Proceedings Under the *Code*

[10] The applicants filed their complaints in 2006 and 2007.

[11] Mr. Pollock owns a unit in the complex jointly with his sister, N.P. He filed his complaint on behalf of N.P. who suffers from anxiety and panic

attacks (the *Code* allows for complaints to be filed by third parties). He alleged that the new windows would reduce the natural light and air circulation which would "affect [N.P.'s] disabilities."

[12] Ms Kinvig, Mr. Gordon and Ms Renard have limited vision and are legally blind. They complained that the tinted windows would impair their ability to see. Ms Renard also complained that the tinted windows would exacerbate her epilepsy.

[13] After an investigation, the Commission referred the complaints to the Human Rights Adjudication Panel for a final decision and remedial order, as appropriate.

[14] After the Commission determined that the complaints would be referred to an adjudicator, the condo corporation offered to remedy each of the complaints in a manner that the Commission determined was reasonable. The applicants rejected the offers. The Commission then moved, pursuant to section 29(2)(b) of the *Code* (which was subsequently repealed by section 13(1) of *The Human Rights Code Amendment Act*, SM 2012, c 38), to terminate the proceedings before the adjudication could proceed. The applicants objected, arguing that the Commission did not have the authority to terminate the proceedings.

[15] The adjudicator rejected the Commission's argument that section 29(2)(b) provided the Commission with the right to terminate the proceedings both before and after a complaint was referred to an adjudicator. She ruled (the carriage ruling) that, because the complaints had been referred to adjudication prior to the communication of the offers of settlement: the Commission was *functus*; the hearing of the complaints could proceed; and

the Commission was still a party to the adjudication but could withdraw from actively participating in the adjudication.

[16] Therefore, while the Commission was required to be a party to the proceedings, it was not required to have "carriage" of the complaints on behalf of the applicants, as asserted by them.

[17] As a result, the Commission engaged in a limited way during the 12 days of hearing in 2012. The Commission attended each day of the hearing but did not call evidence. It made closing submissions with respect to the various onuses and legal tests and addressed certain public-interest remedies.

[18] In her decisions dismissing the complaints, which were delivered in 2016, the adjudicator noted that there was no issue that each applicant (N.P. in the case of the Pollock decision) suffered from a disability and had special needs. However, she concluded that none of the applicants had established a need for non-tinted windows, nor had they established a duty on the condo corporation to investigate such a need. Furthermore, she found, in the alternative, that the applicants had been reasonably accommodated by the condo corporation.

The Proceedings Before the Reviewing Judge

[19] Each applicant represented themselves. They relied on one motion brief.

[20] The Commission and the Government of Manitoba (Manitoba) were also parties. Manitoba was a party because the applicants raised

arguments asserting breaches of their rights under the *Canadian Charter of Rights and Freedoms* (the *Charter*).

[21] The hearing took two and one-half days. On the first appearance, the reviewing judge encouraged the parties to settle and the matter was adjourned. When the parties did not settle, they reconvened before the reviewing judge to present their submissions. During the submissions, counsel for the condo corporation had the following exchange with the reviewing judge:

> [COUNSEL:] . . . no matter what the decision is that you make, I would ask that we be entitled to return and make submissions on the issue of costs. Obviously there's without-prejudice correspondence that . . . we would submit, but we can't do that before a decision has been rendered. So --
>
> THE COURT: Whatever, whatever decision I make, depending on who is successful, there's always the clause that if the parties cannot agree on costs they may make an appointment to speak to costs with me. So . . . yeah.

The Decision of the Reviewing Judge

[22] The central issue before the reviewing judge was the adjudicator's carriage ruling which called for the interpretation of certain sections of the *Code*.

[23] The applicants argued that the adjudicator erred in her interpretation of the *Code* and that the applicable standard of review was correctness. They also asserted that they were entitled to a rehearing of their complaints, at which the Commission would have conduct of the hearing, because of the delay in resolving their complaints.

[24] The essence of the reviewing judge's decision with respect to the carriage ruling is that:

1. the standard of review applicable to the adjudicator's carriage ruling, being a matter of statutory interpretation of her home statute, is reasonableness;

2. the adjudicator's carriage ruling was one of the possible outcomes open to her and was therefore reasonable; and

3. while the delay was extraordinary, the applicants have not demonstrated "any prejudice that would justify any form of relief due to delay" (at para 126).

[25] At the conclusion of his reasons, the reviewing judge indicated he could "only speculate" about the "time and money" (at para 147) spent by the parties and stated that "[t]his case must end" (at para 149). He concluded that, "Given my obiter comments, each party shall bear their own costs" (at para 154).

The Applicants' Appeal

Position of the Applicants

[26] The applicants filed one factum under their respective names. They each spoke at the appeal hearing. Mr. Pollock spoke first and Ms Kinvig, Mr. Gordon and Ms Renard endorsed and augmented his remarks.

[27] They assert that the reviewing judge should have applied the correctness standard of review for the carriage ruling and that the adjudicator's interpretation of the *Code* was incorrect. In the alternative,

they say that the carriage ruling was unreasonable if the standard of review is reasonableness.

[28] More specifically, they submit that the adjudicator incorrectly interpreted section 34(a) of the *Code* and rely, in part, on the French version of that section. As a result, they say that the adjudicator wrongly allowed the Commission to abandon its responsibilities to have conduct of the hearing and represent their interests.

[29] At the appeal hearing, the applicants' argument with respect to delay was only that the extraordinary delay in this case should not preclude a new hearing.

[30] The applicants seek costs of the appeal against the condo corporation and the Commission. At the appeal hearing, Ms Kinvig specifically asked for enhanced costs against the Commission for "abandoning" the applicants.

Position of the Condo Corporation

[31] The condo corporation asserts that the reviewing judge correctly determined that the standard of review was reasonableness and that he applied it correctly. In holding that the adjudicator's conclusions were possible outcomes, the condo corporation says that the reviewing judge followed precedent that the Commission does not have to play an active role in the proceedings when the public-interest mandate is satisfied.

[32] As for the delay, the condo corporation says that the reviewing judge's finding that the applicants had not suffered any prejudice as a result

of the delay, justifying any relief, is entitled to deference because the reviewing judge did not make a palpable and overriding error.

[33] The condo corporation seeks dismissal of the appeal with costs.

Position of the Commission

[34] The Commission's position is that the reviewing judge correctly selected and applied the standard of review of reasonableness and did not err in finding that the adjudicator's decision with respect to the Commission's role was reasonable.

[35] As for the delay, the Commission says that a new hearing is not in the interests of justice and would not further the objectives of the *Code* or assist the Commission with discharging its responsibilities.

[36] In its factum, the Commission seeks dismissal of the appeal with costs but, at the hearing, counsel indicated that the Commission would be prepared to forego costs.

[37] The Commission takes no position with respect to the cross appeal.

Position of Manitoba/Intervener

[38] Manitoba's role was minimal given that the applicants' argument at the appeal hearing with respect to delay did not involve an argument relying on the *Charter*. Its position is that there is no reviewable error with respect to delay.

[39] Manitoba takes no position with respect to the carriage ruling.

Analysis and Decision for the Applicants' Appeal

Standard of Review

[40] The parties appropriately agree that the question on appeal has two parts:

1. whether the reviewing judge was correct when he chose the standard of review of reasonableness for the carriage ruling and, if so;

2. whether he applied that standard properly.

[41] This is a question of law and, as such, no deference is owed to the reviewing judge's selection and application of the standard of review (see *Dr Q v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at para 43; *Friesen (Brian Neil) Dental Corp et al v Director of Companies Office (Man) et al*, 2011 MBCA 20 at para 78; *Korsch v Human Rights Commission (Man) et al*, 2012 MBCA 108 at para 8; and *The Armstrong's Point Association Inc v The City of Winnipeg et al*, 2013 MBCA 110 at para 3).

[42] Deference is owed to the reviewing judge's original findings of fact (based on the standard of palpable and overriding error) and exercise of discretion unless there has been an error in principle or the decision is so clearly wrong as to amount to an injustice (see *Northern Regional Health Authority v Manitoba Human Rights Commission et al*, 2017 MBCA 98 at para 39). This applies to the reviewing judge's determinations with respect to delay which was an issue raised for the first time before the reviewing judge.

Selection of the Standard of Review by the Reviewing Judge

[43] The principles for selecting the applicable standard of review for a decision of an administrative tribunal were first established in the leading case of *Dunsmuir v New Brunswick*, 2008 SCC 9. The application of the *Dunsmuir* principles typically leads to the conclusion that the appropriate standard of review for most decisions of administrative decision-makers is reasonableness (see *Loewen v Manitoba Teachers' Society*, 2015 MBCA 13 at paras 39-41).

[44] Here, the adjudicator, sitting as the human rights tribunal, was the administrative decision-maker and she was dealing with her home statute, the *Code*. The presumptive standard of review for a decision of a human rights tribunal with respect to the evaluation of the evidence or interpretation and/or application of the *Code* is reasonableness (see *Korsch* at para 9; and *Northern Regional Health Authority* at para 42).

[45] Therefore, the reviewing judge correctly identified that the standard of review for the carriage ruling was reasonableness. This standard calls for deference and "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process" (*Dunsmuir* at para 47). It calls for a reviewing court to determine whether the decision is "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (*ibid*).

[46] As explained by Rothstein JA (as he then was) in *Prairie Acid Rain Coalition v Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31, leave to appeal to SCC refused, 31370 (20 July 2006), to decide whether the reviewing court applied the appropriate standard of review correctly, the

appellate court must step “into the shoes” (at para 14) of the reviewing court and consider the decision of the administrative tribunal.

Application of the Standard of Review of Reasonableness to the Carriage Ruling by the Reviewing Judge

[47] The adjudicator rejected the applicants' argument that section 34(a) of the *Code* required the Commission to have conduct of the proceedings before her. Section 34 reads as follows:

> **Parties to adjudication**
> **34** The parties to an adjudication under this Code are
>
> (a) the Commission, which shall have carriage of the complaint;
>
> (b) the complainant;
>
> (c) any person, other than the complainant, named in the complaint and alleged to have been dealt with in contravention of this Code;
>
> (d) the respondent; and
>
> (e) any other person added as a party under section 24 or section 40.
>
> [emphasis added]

[48] In her carriage ruling, the adjudicator reviewed the remedial purpose of the *Code*, rightly noted that it was entitled to a broad and liberal interpretation, and explained that the Commission had a gatekeeper role in the complaint process and a mandate to represent the public interest.

[49] She reviewed the positions of the parties in detail and correctly identified and applied the modern principle of statutory interpretation, requiring the words of an act to be read in their entire context and in their

grammatical and ordinary sense harmoniously with the scheme of the act, the object of the act and the intention of the Legislature.

[50] With respect to the Commission's role at the hearing, she wrote (at paras 136-37):

> Each party . . . has a separate and independent status, and their own role to play, at the adjudication.
>
> The role of the complainant and the respondent as parties to the adjudication is to advance or protect their own individual interests.
> The role of the Commission is different. . . . I agree with the Commission that its role as a party to the adjudication is to represent and advance the public interest. The different roles and functions to be performed by the various parties are consistent with the objectives of the *Code*.
>
> [emphasis added]

[51] As for the words "carriage of the complaint" in section 34(a) of the *Code*, she attributed a procedural meaning to the words, not a substantive one, relying upon *Tilberg v McKenzie Forest Products Inc*, 1999 CarswellOnt 4676 (Sup Ct J (Div Ct)).

[52] The adjudicator correctly understood that the interests of the Commission did not necessarily coincide with those of the applicants and rejected the applicants' assertion that they were on the "same team" as the Commission (at para 141).

[53] The applicants say that the adjudicator's interpretation was not one that was reasonably open to her, particularly when the French version of the section is considered. It reads as follows:

Parties à l'arbitrage

34 Les parties à un arbitrage en vertu du présent code sont les suivantes:

(a) la Commission, qui est responsable de la conduite des procédures relatives à la plainte.

[54] The applicants have not persuaded me that, had the adjudicator considered the French version of section 34(a), her carriage ruling would have been different. While both versions are equally authoritative, I see no conflict or discrepancy between the English and French versions that warrants a bilingual interpretation analysis.

[55] The carriage ruling by the adjudicator was reasonable, intelligible and transparent and resulted in a result that fell within a range of possible outcomes available to her. The reviewing judge did not err when he dismissed the application for judicial review.

Delay

[56] Given my conclusion about the carriage ruling, the argument that the delay should not preclude a rehearing of the complaints is moot.

Dismissal of the Appeal

[57] I would dismiss the applicants' appeal with costs in favour of the condo corporation under the applicable tariff in the Manitoba, *Court of Appeal Rules*, Man Reg 555/88R (the *CA Rules*). The applicable tariff in this case is Tariff C which allows $2,000 for the determination of the appeal and $1,000 for the factum fee, as well as reasonable disbursements. I would set costs (inclusive of disbursements) at $3,000.

The Cross Appeal

Background

[58] Just prior to the appeal hearing, counsel for the condo corporation appeared before the reviewing judge to ask him to reconsider the matter of costs. The reviewing judge declined to do so for the reason that he was "functus."

[59] For the appeal, the condo corporation filed a notice of motion to adduce fresh evidence with respect to the matter of costs in the Court of Queen's Bench. After the panel questioned counsel for the condo corporation whether the matter of costs should be sent back to the reviewing judge if the condo corporation's procedural fairness argument was successful, the condo corporation abandoned its motion to adduce fresh evidence and requested that the panel address the matter of costs.

[60] The panel asked the condo corporation to file a further brief outlining its position with respect to the costs that it was seeking in the Court of Queen's Bench. The applicants were given a month to file their response brief.

Position of the Condo Corporation

[61] The condo corporation asserts that the reviewing judge erred in law by denying it the opportunity to be heard on the matter of costs, thus breaching the duty of procedural fairness.

[62] As for the amount of costs to be awarded, the condo corporation seeks costs in excess of the tariff (enhanced costs) or, in the alternative, costs

on the basis of double the tariff or, in the further alternative, costs on a party-and-party basis.

[63] The condo corporation submits that the applicable tariff under the Manitoba, *Court of Queen's Bench Rules*, Man Reg 553/88 (the *QB Rules*), is the one for Class 3 proceedings. Under this tariff, it says that its counsel fee is $6,600 and the amount for allowable disbursements is $279 for photocopying its application brief and book of authorities.

[64] It argues that enhanced costs are appropriate because it made a settlement offer in 2010 that the Commission deemed to be objectively reasonable, which was rejected by the applicants, and that the applicants changed their positions throughout the course of the proceedings from wanting to keep their old windows to demanding new ones.

[65] The condo corporation also argues that Mr. Pollock's leadership role in this litigation is a circumstance that warrants enhanced costs. It notes that Mr. Pollock is not a lawyer and is subject to an order in favour of the Law Society of Manitoba prohibiting him from carrying on the practice of law (see *The Law Society of Manitoba v Pollock*, 2007 MBQB 51). The condo corporation argues that his conduct during these proceedings should be punished by a significant award of costs.

Position of the Applicants

[66] The applicants assert that the reviewing judge made no error with respect to costs and his ruling is entitled to deference.

[67] As for Mr. Pollock's role, Ms Kinvig, Mr. Gordon and Ms Renard stated that, while they worked together with Mr. Pollock, they each

represented themselves and were fully aware of the order against Mr. Pollock.

[68] As for the determination by the Commission that the condominium corporation made a reasonable offer in 2010, they say that the settlement offer was too late, as evidenced by the adjudicator's decision, and should have no bearing on the matter of costs in the Court of Queen's Bench.

[69] In their additional brief, the applicants indicated that, in the event costs need to be addressed, they prefer that this Court address the issue rather than sending it back to the reviewing judge.

[70] They also say that the condo corporation did not obtain leave from the reviewing judge under section 90(1) of *The Court of Queen's Bench Act*, CCSM c C280, to bring this cross appeal.

Position of the Commission and Manitoba

[71] The Commission and Manitoba take no position on the cross appeal.

Decision

[72] Section 90(1) states:

> **Consent order, costs not appealable**
> **90(1)** An order that is made
>
> (a) with the consent of the parties; or
>
> (b) as to costs only;
>
> is not subject to an appeal except by leave of the judge making the order.

[73] While a question arose about whether the cross appeal concerned only the matter of costs, I agree with the condo corporation that section 90(1) does not apply in this case because the cross appeal concerns the alleged legal error that the reviewing judge breached procedural fairness when he did not hear the condo corporation's submissions with respect to costs. The amount of costs, if any, to be awarded to the condo corporation, and who should decide that, are questions of remedy.

[74] A party's right to be heard is a fundamental principle of a fair hearing. The Court has a duty to ensure procedural fairness which includes ensuring that those affected by a decision are given the opportunity to be heard (for example, see *A (LL) v B (A)*, [1995] 4 SCR 536 at para 27; *Director of Child and Family Services (Man) v JA*, 2006 MBCA 44 at para 30; and *Aquila v Aquila*, 2016 MBCA 33 at para 27). In this case, the record of the proceedings before the reviewing judge establishes that the condo corporation had the legitimate expectation that it would be heard by the reviewing judge on the matter of costs. Counsel for the condo corporation specifically requested an opportunity to make a submission on costs and was led to believe that this would be provided. The reviewing judge erred in law by not providing the condo corporation with that opportunity. As a result, the reviewing judge's ruling that the parties bear their own costs cannot be sustained. The remedy is for the parties to be heard on the matter of costs and for a decision to be given.

[75] The condo corporation and the applicants all expressed the desire that this Court address the matter of costs if it became necessary to do so. Given this, the submissions already made and the extraordinary passage of

time, I agree that the matter of costs to be awarded in the Court of Queen's Bench should be addressed by this Court.

[76] The condo corporation was successful before the reviewing judge. Normally, the successful party is entitled to costs (see *Gabb v Gabb*, 2001 MBCA 19; and *232 Kennedy Street Ltd v King Insurance Brokers (2002) Ltd*, 2009 MBCA 22). I see no reason to deny the condo corporation its entitlement to costs. The question then is, what is the appropriate amount to be awarded?

[77] The incredible delay in this case occurred before the proceedings in the Court of Queen's Bench, as did the offer made by the condo corporation under the *Code* in 2010. In my view, the focus for the issue of costs is more appropriately on the proceedings in the Court of Queen's Bench and not what occurred prior to that time.

[78] As for Mr. Pollock's involvement, while I accept that the proceedings were complicated and lengthier because the applicants were self-represented, I do not accept that Mr. Pollock's involvement is a reason to award enhanced costs. In fact, proceedings were extended in the Court of Queen's Bench because the reviewing judge urged the parties to try to settle the case. This required the parties to re-engage in out-of-court discussions and re-attend to court to present their submissions when settlement was not possible.

[79] In my view, an award of costs that reflects proceedings under Class 3 of the applicable tariff in the *QB Rules* is a reasonable and just award. The applicants should bear the costs on a joint and several basis. I accept the condo corporation's submissions as to the calculation of their

counsel fee and disbursements. Therefore, I would order costs in the Court of Queen's Bench in favour of the condo corporation in the amount of $7,000 (inclusive of disbursements) against the applicants on a joint and several basis.

Costs in the Court of Appeal

[80] Costs in the Court of Appeal are a separate matter from the costs in the Court of Queen's Bench.

[81] As is usual, the successful party in an appeal is entitled to costs under the applicable tariff in the *CA Rules*. As indicated above, the applicable tariff in this case is Tariff C which allows $2,000 for the determination of the appeal and $1,000 for the factum fee, as well as reasonable disbursements.

[82] The condo corporation, as the successful party in the cross appeal, is seeking costs of $3,000 based on Tariff C and photocopying and printing costs of $802.50 (for the appeal and cross appeal). The material filed was extensive and I accept that the costs for photocopies and printing fairly reflects what is allowable.

[83] I would order costs in the Court of Appeal in favour of the condo corporation in the amount of $4,000 (inclusive of disbursements) against the applicants on a joint and several basis.

Conclusion

[84] With respect to the applicants' appeal, the reviewing judge correctly identified the standard of review of reasonableness and correctly applied it to the adjudicator's decisions.

[85] I would dismiss the applicants' appeal and order costs in favour of the condo corporation in the amount of $3,000, inclusive of disbursements, to be paid by the applicants on a joint and several basis.

[86] With respect to the condo corporation's cross appeal, the reviewing judge erred in law when he did not give the condo corporation an opportunity to be heard on the matter of costs. Therefore, the reviewing judge's order that each party bear its own costs must be set aside.

[87] I would allow the condo corporation's cross appeal and order costs in the Court of Queen's Bench in favour of the condo corporation in the amount of $7,000 (inclusive of disbursements), to be paid by the applicants on a joint and several basis. I would order costs in this Court in favour of the condo corporation in the amount of $4,000, inclusive of disbursements, to be paid by the applicants on a joint and several basis.

_____ JA

I agree: _____ JA

I agree: _____ JA