HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Oksana Levkivska and Yuriy Grygorchuk

Applicant

-and-

Peel Condominium Corporation No. 231 and Elizabeth Ann deCasseres

Respondents

DECISION

Adjudicator: Mark Hart

Date: February 29, 2016

File Number: 2014-19412-I

Citation: 2016 HRTO 270

Indexed as: **Levkivska v. Peel Condominium Corporation No. 231**

APPEARANCES

Oksana Levkivska and Yuriy Grygorchuk, Applicants	)	Self-represented
Peel Condominium Corporation No. 231 and Elizabeth Ann deCasseres, Respondents	)	Bradley Chaplick, Counsel

[1] This is an Application filed on November 19, 2014 alleging discrimination with respect to the occupancy of accommodation because of family status, race, ethnic origin and reprisal contrary to the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*").

[2] In brief, the applicants were owners of a condominium unit in the building operated by the respondent condominium corporation ("PCC No. 231") and are the parents of two young children. They allege that they were unfairly accused and targeted by the respondents in relation to the alleged behaviour of their children, particularly in relation to alleged damage caused to the front gardens of the building which form part of the common elements.

[3] The events underlying this Application were the subject of companion proceedings in the Ontario Superior Court of Justice, which were commenced on October 27, 2014. PCC No. 231 filed an application in the Superior Court pursuant to s. 135 of the *Condominium Act, 1998*, seeking a declaration that the applicants had violated that Act and the condominium rules, certain injunctive relief, and reimbursement for all legal costs. The respondents in turn filed a counter-application in the Court proceedings, seeking a declaration that PCC No. 231 had breached its obligations under the Act, certain injunctive relief, a declaration that they were not responsible for legal costs incurred by PCC No. 231, and their own legal costs.

[4] On March 23, 2015, the Tribunal deferred the human rights Application pending the conclusion of the Court proceedings.

[5] The application and counter-application filed in Superior Court were initially heard on March 5, 2015 and adjourned for 60 days with reasons. The matter was further considered by the Court on May 19, 2015 at which time the Court awarded no costs to either side.

[6] The applicants thereafter sought re-activation of the human rights Application, which was granted by Interim Decision dated July 31, 2015 (2015 HRTO 1026). This

Interim Decision directed that a teleconference preliminary hearing be scheduled to hear oral submissions regarding the respondents' request to dismiss the Application pursuant to s. 45.1 of the *Code* or as an abuse of process.

[7] The teleconference preliminary hearing proceeded before me on December 8, 2015, at which time I heard the parties' oral submissions. I also have considered the pleadings and the written materials filed by the parties for the purpose of the preliminary hearing.

[8] Before proceeding to address the issues before me, I will address some confusion that has arisen regarding the identity of the applicants to this proceeding. On the Application as filed with the Tribunal, Ms. Levkivska is identified as the applicant and Mr. Grygorchuk (her husband) as an alternate contact. However, from Schedule "A" to the Application, which sets out the applicants' allegations, it is apparent that both Ms. Levkivska and Mr. Grygorchuk were intended to be applicants to the human rights Application. I have authority under the Tribunal's Rules of Procedure to remedy technical deficiencies in materials filed with this Tribunal, and I do so here to recognize Mr. Grygorchuk as an additional applicant.

[9] I also note that while the applicants did not check the grounds of race and ethnic origin at Point 5 of the Application form, it is clear from Schedule "A" that they are also raising alleged discrimination on these grounds.

Section 45.1 of the *Code*

[10] Section 45.1 of the *Code* states:

> The Tribunal may dismiss an Application, in whole or in part, in accordance with its rules if the Tribunal is of the opinion that another proceeding has appropriately dealt with the substance of the Application.

[11] Section 45.1 requires a two-part analysis: (1) whether there was another "proceeding" and, if so, (2) whether it "appropriately dealt with the substance of the Application": *Campbell v. Toronto District School Board*, 2008 HRTO 62.

[12] There is no question that an application and counter-application before the Ontario Superior Court of Justice is a "proceeding" within the meaning of s. 45.1 of the *Code*.

[13] As a result, the only remaining issue is whether the substance of the human rights Application was appropriately dealt with in the other proceeding.

[14] In *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52 at para. 34, the Court summarized the principles to be applied when considering whether another proceeding has appropriately dealt with the substance of a human rights application as follows:

- It is in the interests of the public and the parties that the finality of a decision can be relied on;

- Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, re-litigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings;

- The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature;

- Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision; and

- Avoiding unnecessary re-litigation avoids an unnecessary expenditure of resources.

[15] In assessing whether the substance of an application already has been "appropriately dealt with" in another proceeding, the Supreme Court of Canada in *Figliola* identified the following three factors (at para. 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.

[16] This Tribunal addressed the application of the *Figliola* decision to the interpretation and application of s. 45.1 of the *Code* in *Gomez v. Sobeys Milton Retail Support Centre*, 2011 HRTO 2297, which concluded (at para. 4):

> . . . the Court's reasoning in *Figliola* applies equally to the interpretation of s. 45.1 of the Ontario *Code*, and to whether an application should be dismissed when the issues have previously been addressed in another proceeding in which the parties have had the opportunity to know the case to be met and meet it. *Figliola* instructs this Tribunal not to consider the procedural or substantive correctness of the other proceeding or decision when deciding whether the application or part of the application can proceed. If the reasons in the other decision dispose of the human rights issues before the Tribunal, the application or part of the application must be dismissed on the basis that it was appropriately dealt with in the other proceeding.

[17] In *Okoduwa v. Husky Injection Molding Systems Ltd.*, 2012 HRTO 443, this Tribunal stated (at paras. 25-26):

> The Supreme Court of Canada's decision in *Figliola* provides guidance as to the interpretation of "appropriately dealt with" as it appears in s. 45.1. The Court makes clear that the Tribunal's role is not to sit in appeal of other decision-makers in their determination of human rights issues. Nor is it appropriate for the Tribunal to use s. 45.1 as a vehicle for a collateral attack on the merits of another decision-making process; the appropriate route for challenging another decision is through the appeal or judicial review routes available in the other decision-making process.
>
> Thus, the Tribunal's principal concern in applying s. 45.1 is not whether parallel litigation has correctly determined the human rights issues, but

> whether the applicant has already had an opportunity to have the human rights claim considered by an adjudicator who had jurisdiction to interpret and apply the *Code* . . .

[18] As a result of the more recent decision of the Supreme Court of Canada in *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, this Tribunal has held that, at least in the context of the statutory discipline processes, the factors to be considered when determining whether the substance of a human rights application has been "appropriately dealt with" extend beyond consideration of the three factors identified in *Figliola*: see *Claybourn v. Toronto Police Services Board*, 2013 HRTO 1298 aff'd at *Ontario (Community Safety and Correctional Services) v. De Lottinville*, 2015 ONSC 3085 (Div.Ct.); *K.M. v. Kodama*, 2014 HRTO 526 as also aff'd by the Div.Ct. in the same decision previously cited; *Ormesher v. Schwarz Law LLP*, 2014 HRTO 1757.

[19] In light of this more recent jurisprudence, this Tribunal in *Volnyansky v. Peel (Regional Municipality)*, 2014 HRTO 1716, expanded the three factors to be considered in the application of s. 45.1 of the *Code* to include consideration of fairness in contexts beyond statutory discipline proceedings, as follows (at para. 52):

> … once it has been confirmed that concurrent jurisdiction exists to decide the human rights issues, there are three primary questions to consider in order to determine if another proceeding has appropriately dealt with the substance of the Application. These are:
>
> 1. 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;
>
> 2. whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal; and
>
> 3. would it be unfair to apply the doctrine of issue estoppel in the particular circumstances of the case?

[20] Accordingly, in determining the issue under s. 45.1 of the *Code* raised in the instant case, I will consider the three factors identified in *Figliola* as well as the additional consideration of fairness as identified in *Volnyansky*.

[21] With regard to the issue of concurrent jurisdiction, it is clear from the *Code* that the Superior Court has jurisdiction to interpret and apply the *Code*, so long as the Court proceeding is not based solely on an infringement of a right under the *Code*: see s. 46.1. Section 46.1(1) gives the Court the power to make a finding of an infringement of a right under the *Code* and the power to order remedies for such infringement. These powers are available in any "civil proceeding", which includes a proceeding commenced by way of Notice of Application: see Rule 1.03 of the Rules of Civil Procedure.

[22] In the instant case, both the application and the counter-application in the Court proceedings were commenced by Notice of Application, and so constitute civil proceedings. The application and counter-application were both commenced pursuant to s. 135 of the *Condominium Act, 1998*, which states:

> (1) An owner, a corporation, a declarant or a mortgagee of a unit may make an application to the Superior Court of Justice for an order under this section.
>
> (2) On an application, if the court determines that the conduct of an owner, a corporation, a declarant or a mortgagee of a unit is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant, it may make an order to rectify the matter.
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> (3) On an application, the judge may make any order the judge deems proper including,
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> (a) an order prohibiting the conduct referred to in the application; and
>
> (b) an order requiring the payment of compensation.

[23] As is clear from s. 135 of the *Condominium Act, 1998*, the applicants as unit owners in PCC No. 231 were entitled to proceed with their counter-application against PCC No. 231 on the basis that the conduct of PCC No. 231 was or threatened to be oppressive or unfairly prejudicial to them or unfairly disregarded their interests, and the Court had the power to make any order it deemed proper, including an order prohibiting the conduct referred to in the counter-application and requiring the payment of monetary compensation. As a result, in the counter-application, the Court would have had the

power to make a finding of an infringement of the applicant's rights under the *Code* and order a remedy pursuant to s. 46.1(1) of the *Code*, as the counter-application would not be solely based on an infringement of a *Code* right.

[24] It also is clear that in the Court proceedings, there was an opportunity for the applicants to know the case to be met and have the chance to meet it. Numerous affidavits were filed by all parties in the Court proceedings, as well as a significant volume of documentation. Extensive cross-examinations were conducted on the affidavits filed. Application records and facta were filed by the parties for the purpose of the Court hearings, and the parties had full opportunity to make oral argument.

[25] One of the primary issues to be determined here is whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal. I appreciate that this Tribunal in the *Volnyansky* decision frames this factor by mirroring the specific language used by the Supreme Court in *Figliola*. However, in my view, this factor is better expressed in the context of the Ontario *Code* by more closely tracking the language of s. 45.1. In my view, this factor is better expressed in the context of the Ontario *Code* by asking whether the "substance" of the Court proceedings was essentially the same as the "substance" of the Application before this Tribunal, rather than narrowing the analysis to solely considering whether the "legal issue" in these two proceedings was essentially the same.

[26] I say this in light of this Tribunal's case law holding that, where the factual underpinnings of the allegations in the human rights Application are the same as the allegations raised in the other proceeding and where these factual underpinnings form a necessary component of establishing the alleged violations of the *Code*, this Tribunal will regard the "substance" of the human rights Application to be essentially the same as the "substance" of the other proceeding: see *Qiu v. Neilson*, 2009 HRTO 2187 at paras. 35 to 39; *Paterno v. Salvation Army*, 2011 HRTO 2298; *Reid v. Advantage Personnel Ltd.*, 2012 HRTO 1742; *V.N. v. Bartlett*, 2012 HRTO 1947; *Carrier v. National Capital Region YMCA-YWCA*, 2014 HRTO 1106; *Law v. Noonan*, 2013 HRTO 437; *Griffith v. Hurst*, 2013 HRTO 367; *Clarke v. Kingdom Hotel Toronto Ltd.*, 2013 HRTO 2002; *Hillier*

v. Benteler Automotive Canada Corporation, 2013 HRTO 655; *Benstead v. Niagara Regional Housing*, 2012 HRTO 1557; *Acosta v. Far Horizons Inc.*, 2012 HRTO 1478; *Caron v. Lakeside Plastics Limited*, 2014 HRTO 958; *Schildt v. POINTTS Advisory Limited*, 2014 HRTO 893.

[27] I appreciate that in *K.M. v. Kodama*, 2014 HRTO 526 aff'd at *Ontario (Community Safety and Correctional Services) v. De Lottinville*, 2015 ONSC 3085 (Div.Ct.) without reference to this point, it is stated this case law has been overtaken by the Supreme Court of Canada's decision in *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 and this Tribunal's decision in *Claybourn v. Toronto Police Services Board*, 2013 HRTO 1298. In the *Kodama* decision, the adjudicator expressed her view that it is now clear that the question under s. 45.1 of the *Code* is not so much whether there were findings in another proceeding that, if applied by the Tribunal, would make it impossible for the Application to succeed, but whether such findings ought to be applied so as to bar the human rights Application, based on the considerations outlined in *Penner*. In my view, this statement from the *Kodama* decision needs to be read in the context of this Tribunal's then-existing case law under s. 45.1, which stated that if the factual underpinnings were the same in the two proceedings and if the factual findings in the other proceeding preclude a finding of discrimination, then the human rights application must be dismissed. I read the *Kodama* decision as stating merely that, even if the factual underpinnings were the same in the two proceedings and even if the factual findings in the other proceeding (if adopted by this Tribunal) would preclude a finding of discrimination, this Tribunal still needs to consider the over-riding factor of fairness as articulated in *Penner*, *Claybourn*, *Kodama* and *Volnyansky*.

[28] There is no question that the factual underpinnings both of the instant human rights Application and of the application and counter-application in the Court proceedings are identical. The very same events and allegations described in the human rights Application form the basis of the issues raised in the Court proceedings as set out in the affidavits filed by the applicants in support of the counter-application. I appreciate that the legal issue before the Superior Court in relation to the counter-

application was whether the conduct of PCC No. 231 or its management was or threatened to be oppressive or unfairly prejudicial to the applicants or unfairly disregarded their interests, as opposed to the legal issue in the human rights Application being whether the applicants experienced discrimination or harassment with respect to the occupancy of accommodation because of the family status, race, ethnic origin or reprisal. But the events and allegations relied upon by the applicants in both proceedings to support an alleged violation of either the *Condominium Act, 1998* or the *Code* are identical.

[29] This leads to the issue of whether the Court "dealt with" the substance of the factual underpinnings of the Court proceedings in a manner that would make it impossible for the allegations in the human rights Application to succeed. In my view, the Court did. For the purpose of its rulings, the Court had before it extensive evidence regarding the same events and allegations raised in the human rights Application, including affidavits, transcripts of cross-examination and documentary materials. The Court reviewed and considered all of this evidence for the purpose of making its rulings. Having reviewed and considered all of this evidence as well as the parties' written and oral submissions, the Court did not have kind words for either side.

[30] In its March 5, 2015 ruling, the Court held: that Ms. Levkivska "has a rather low threshold for fear and a particularly strong sense that 'offence' is the best defence"; that the witnesses relied upon by PCC No. 231 "demand perfect quiet whereas 'quiet enjoyment' takes into account that others are entitled to reasonable use and enjoyment of common elements; that "the degree of fixation by these witnesses on Ms. Levkivska and her children makes Gladys Kravitz pale by comparison"; that the log kept by the personal respondent "was both frighteningly frequent and picayune" and that "there was nothing neighbourly or reasonable about that"; that "neither side displayed the cooperative foundation of condominium living" or "behaved like reasonable neighbours"; that PCC No. 231 engaged in "overkill" which may be attributable to the sense that the applicants would be responsible for full legal costs under the *Condominium Act, 1998*; and that "the vociferousness of the [applicants'] response is disproportionate to the

severity of the historical conduct alleged and more consistent with an effort to create a negotiating platform to avoid the negative costs outcome".

[31] In my view, what is most significant about the Court's ruling on March 5, 2015 is his determination that he did "not think that it is just or equitable to give relief to either side on the evidence before the court". This can only mean that, on the evidence before the Court (which would be the very same evidence before this Tribunal if a merits hearing were held), the Court expressly found that the applicants had not established that the conduct of PCC No. 231 or its management was or threatened to be oppressive or unfairly prejudicial to them or unfairly disregarded their interests to the extent that warranted any relief. This is supported by the Court's oral reasons for declining to award costs of the Court proceedings in the applicants' favour, on the basis that the applicants' counter-application was "unsuccessful".

[32] I appreciate that the March 5, 2015 ruling did not engage with the evidence in a detailed, event-by-event fashion. Indeed, while noting the conflicts in the evidence particularly as between Ms. Levkivska and the personal respondent, the Court expressly stated that in its view it was not necessary to address these conflicts in order to resolve the proceedings. However, it is clear to me from the Court's ruling that the Court did not think much of either sides' allegations against each other, and did not believe that these allegations warranted intervention by the Court to grant relief in favour of either of them. In my view, there is no reasonable expectation that this Tribunal would view the applicants' allegations any differently on the basis of the very same evidence.

[33] At the preliminary hearing, the applicants submitted that the counter-application did not expressly raise the issue of discrimination under the *Code*. That is true, and I will have more to say about this in the context of the abuse of process issue. My point, however, is that all of the very same events and allegations that the applicants have raised in their human rights Application also formed the basis of their counter-application in the Court proceedings, which was dismissed by the Court in a manner that was highly critical of them (as well as PCC No. 231 and its management). In the Court proceedings, amongst other questions, the Court was asked to determine if the

conduct of PCC No. 231 and its management "is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant." The court declined to make a finding in the applicants' favour on this question. In my view the Court's factual findings preclude the conclusion that the applicants' *Code* rights were breached.

[34] I also briefly will address the fact that, by the time of the March 5, 2015 hearing in Court, the applicants had decided to sell their condominium unit and in fact did so prior to the second hearing date before the Court on May 19, 2015. On this basis, counsel for the applicants in the Court proceedings took the position that the applicants were not interested in being financially compensated, and just wanted the alleged conduct to cease so that they could peacefully reside in their condominium unit. In light of their decision to sell their unit and provided there was an interim agreement to address any allegations of misconduct in the intervening period, counsel stated that they were prepared to abandon their claim for prohibitory and injunctive relief. By adjourning the Court proceedings for 60 days to allow the applicants to sell their unit and move out of PCC No. 231 and by affording the parties the opportunity to bring any new allegations forward regarding misconduct during the intervening period, the Court appears to have been swayed by this argument.

[35] Nonetheless, the Court made it clear in its March 5, 2015 ruling that the adjournment would not result in any new or different consideration of the events and allegations already raised in the Court proceedings. The Court's view of those events and allegations already has been discussed at length above. Further, the applicants were not abandoning both their claim to be relieved from any legal costs incurred by PCC No. 231 and their own claim for legal costs, both of which required the Court to engage in consideration of the merits or otherwise of the allegations raised by both sides and formed the foundation of the Court's finding that the applicants had not been successful in their counter-application.

[36] Accordingly, I find that the factual underpinnings of the Court proceedings and the human rights Application are essentially the same, and that the Court's factual findings preclude a finding of discrimination by this Tribunal.

[37] This leads to my consideration of the final factor, which is whether it would be unfair to dismiss the Application pursuant to s. 45.1 of the *Code* in the particular circumstances of this case. In my view, it would not be. Unlike in *Penner*, *Claybourn* and *Kodama*, the applicants had the ability to seek monetary compensation in the Court proceedings and, for whatever reason, made an express decision not to. Indeed, their counsel on the applicants' behalf expressly represented to the Court that the applicants were not interested in monetary compensation. Further, when considering the issue of fairness, I need to consider the fairness to all parties. The parties already have engaged in protracted and expensive litigation of all of these same events and allegations. Witnesses have sworn affidavits and been subject to cross-examination on these very same events and allegations. Extensive documentation already has been produced. In my view, it would be manifestly unfair to the respondents in these circumstances essentially to allow the applicants to have the proverbial "second kick at the can" by being allowed to proceed with the human rights Application and essentially re-litigate a matter that already has been extensively litigated in the Court proceedings.

[38] Accordingly, for all of these reasons, I find that the Application should be dismissed pursuant to s. 45.1 of the *Code*.

Abuse of process

[39] Finally, and in any event, I will briefly address the respondents' argument that the Application also should be dismissed as an abuse of process.

[40] This Tribunal has held that it is an abuse of process for an applicant to deliberately withhold allegations of a violation of her or his rights under the *Code* in the context of another proceeding and then to bring a separate application before this Tribunal, when the allegations could have been raised in another proceeding that dealt

with essentially the same underlying events: see *Asiamah v. Olymel S.E.C. / L.P.*, 2009 HRTO 1750; *Henderson v. Mutech Fire Protection Co. Ltd.*, 2010 HRTO 2153; *Manhas v. A.O. Smith Enterprises Ltd.*, 2010 HRTO 659.

[41] This principle is founded on the basis that a party is not entitled to "split its case" in two separate proceedings and thereby unfairly expose the respondent to further litigation and violate the principles of judicial economy and the integrity of the administration of justice.

[42] The applicants had every opportunity to raise any alleged violation of the *Code* in the Court proceedings and to seek all of the remedies sought in the human rights Application in the Court proceedings on the basis of the very same events and allegations at issue in both proceedings, and, again for whatever reason, deliberately chose not to do so. In my view, this constitutes an impermissible attempt by the applicants to split their case, and allowing them to do so would unfairly expose the respondents to re-litigation of essentially the same issues and would violate the principles of judicial economy and the integrity of the administration of justice.

[43] Accordingly, on this basis as well, the Application is dismissed as an abuse of process.

ORDER

[44] For all of the foregoing reasons, the Application is dismissed pursuant to s. 45.1 of the *Code* and as an abuse of process.

Dated at Toronto, this 29th day of February, 2016.

"signed by"

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Mark Hart
Vice-chair