CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

JACQUELINE BROWN

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

ROYAL CANADIAN MOUNTED POLICE

Respondent

RULING ON THE QUESTION WHETHER THE TRIBUNAL HAS THE POWER TO AWARD COSTS

MEMBER: Dr. Paul Groarke

2004 CHRT 30
2004/09/01

I. INTRODUCTION

[1] I have already awarded the Complainant a remedy. The only remaining issue is the question of costs. The Respondent has taken the position that the Tribunal has no power to award costs. I think that a proper resolution of this question requires considerable review of the caselaw, both in the courts and before the Tribunal.

[2] The Respondent submits that the *Canadian Human Rights Act* does not give the Tribunal the power to award costs. The complainant demurs. Her counsel advises me that she has incurred legal costs in the range of $11,000.00 since the matter first arose. Most of these costs arise out of the hearing. Counsel has submitted that the failure of the Tribunal to order the Respondnt to pay her costs will effectively deprive her of the compensation to which she is entitled under the *Act*.

II. DAMAGES

A. Damages do not Include Costs

[3] The basic rule in our law is simple. The power to award damages does not include the power to award costs. The *Canadian Human Rights Act* gives the Tribunal the power to award compensation. I think this is a form of damages and must be distinguished from costs.

[4] The decision of the Cour d'appel de Quebéc in *Hrtschan c. Montréal (Ville)*, REJB 2004-55545, at para. 60, holds that the distinction between damages and costs is a causal one:

60. Dans la logique de la responsabilité civile, laquelle requiert un lien de causalité directe entre la faute et le préjudice, il ne suffit pas de dire qu'il a fallu recourir aux services d'un avocat pour conclure, au terme d'un procès qui tranche le cas, que la *totalité* de la note des honoraires et débours engagés par la victime donne la mesure du préjudice subi. (emphasis added)

At para. 75, Justice Pelletier cites Professor A. Popovici, in *Le Sort des honoraires extrajudiciares*, (2002) R. du B. 53, as authority for the proposition that costs are not damages.

The Respondent provided me with an English translation of the passage at para. 60, which is conveniently quoted, without commenting on the precision of the translation.

60. In the logic of civil responsibility, which requires a direct causal link between the fault and the prejudice, a victim cannot rely on the assertion that he had to resort to the services of a lawyer to then be automatically awarded fees and disbursements at the end of the trial, on the basis that the lawyer's total bill equals the prejudice suffered.

There is a sense in which the legal costs of a trial or a hearing do not flow directly from the injury. They have a second, contractual origin. As a result, they do not form an ordinary head of damages or compensation.

[5] This gives rise to the principle that damages and costs must be recovered separately. It follows that the power to award costs requires a discrete and explicit head of authority. This principle applies, rather resolutely, in both the common law and civil law systems. A tribunal and indeed a court only enjoys the power to award costs in the manner and on the terms set out in the relevant legislation.

B. Initial Fees

[6] The test is causal and the question is open to considerable refinement. In spite of the general rule, some legal costs qualify as damages. The decision in *Hrtschan*, for example, recognizes that a party with a legal complaint is entitled to seek the advice of a lawyer. The fees for such advice are a recoverable head of damages.

[7] This does not change the general rule.

61. Si la nécessité des premières consultations et des premières prestations de service peut, à première vue, conférer à la réclamation pour frais extrajudiciaires une légitimité du genre de celle que je viens d'évoquer, il n'en va pas nécessairement de même pour la suite des événements. De fait, la situation risque de s'embrouiller très rapidement au fil du déroulement du conflit judiciaire.

There is a difference between a party's initial consultation with a lawyer and the representation provided during the course of a hearing or trial.

[8] A person who has been discriminated against will in the normal and entirely predictable course of events seek the advice of a lawyer. This preliminary advice is sufficiently close in the causal chain to constitute a direct and inevitable consequence of the original wrong. It accordingly constitutes a foreseeable part of the damages that the complainant has suffered as a consequence of the discrimination. The actions of the discriminator are the proximate cause of the expenses that a complainant incurs in seeking such advice.

[9] I take it that the original recourse to a lawyer and the advice of a legal representative constitutes an exception to the general rule that costs are not damages. The ultimate issue in each case is causal. The question in logical terms is whether the legal costs claimed by a Complainant are a necessary consequence of the discrimination. Once the original advice has been tendered, received and paid for, a Complainant is in a position to instruct counsel. At this point, the causal chain is broken and any decisions regarding the provision of legal services derive logically from factors that are only indirectly related to the original cause of action.

[10] The exception to the general rule has been recognized in the law of human rights. In *Waters v. British Columbia (Ministry of Health Services)* 2003 BCHRT 13, the B.C. Tribunal dealt with legal fees that were incurred prior to the filing of a complaint. At para. 212, the Tribunal held that these expenses were recoverable:

In *Radloff v. Stox Broadcast Corp.*, [1999] BCHRTD No. 36, the Tribunal held that "legal expenses that arise from the contravention but which cannot be characterized as costs' of the proceeding may be compensable": *Radloff* at para. 99 (see also *Leeder v. O'Cana Enterprises Ltd. (c.o.b. "Alisa Japanese Restaurant")*, [1999] B.C.H.R.T.D. No.1 at para. 29).

The point is that there was a sufficient nexus between the contravention of the *Act* and the expenditure to characterize it as compensation or damages.

[11] There are other cases where the exception arises. In *Curling v. Torimiro* [2000] O.H.R.B.I.D. No. 169 (QL), at para. 61, for example, a Board of Inquiry held that it was entitled to award compensation for a Complainant's legal expenses "as part of a restitutional award" under the Ontario *Code*.

[12] Where, as in this case, a complainant incurs legal expenses which are directly caused by the conduct of a respondent in violation of the complainant's rights under the *Code*, a respondent can, in an appropriate case, be ordered to pay compensation in respect of these expenses as part of a "make whole" remedy.

The decisive words are "directly caused". The Board found, at para. 62, that the Complainant was claiming legal expenses that were incurred specifically:

as a result of the retaliatory actions which have been found to infringe her rights under s. 8. It is significant that the retaliatory conduct took the form of legal action and threatened legal action, and necessitated a legal response.

Curling recognizes that there are cases where the causal link between the costs and the discrimination is so close that a party is entitled to legal expenses, on the basis that they flow directly from the discrimination.

C. Legal Fees from the Hearing

[13] The legal expenses that occur later in the process come within the exclusionary rule, however. They should not be construed as damages. This includes the cost of an expert's report and other expenses that arise from the litigation, rather than the original discrimination. The source of these expenses lies in the instructions of the parties and the advice that they receive. This is inherently variable. The appropriateness of the decision whether to call witnesses or raise certain points of law is an incurable matter of judgement. Different persons may make these decisions differently.

[14] Justice Pelletier expresses reservations with the idea that judges should enter into this area. It is not for adjudicators to second-guess the parties, in determining what services were appropriate. There is also the danger of retrying the case. This says nothing of the problem of dealing with matters handled in confidence or under the cloak of privilege. There are public policy considerations that prevent an adjudicator from looking too closely at the personal decisions of the parties or evaluating their conduct of the case.

III. COSTS

A. The Common Law Rule: The Power to Award Costs Requires Statutory Authority

[15] The common law has always held that an adjudicative body does not enjoy the power to award costs unless it has been expressly given such a power. There is a separate power that permits it to deal with abuses.

[16] This rule does not admit exceptions. The power to award costs is an extraordinary power, which requires explicit statutory authority. In *Family and Children's Services of Annapolis County v. Clark*, [1983] N.S.J. No. 586, for example, the Nova Scotia Appeal

Division held that the Family Court of Nova Scotia had no power to award costs. At para. 5, the court sets out the historical position:

The Family Court is a statutory court of record created by S.N.S. 1967, c. 98. As such it can only have jurisdiction in the substantive matter of costs if such jurisdiction is expressly given it by the *Act* creating it or some other Act. There is no inherent jurisdiction in statutory courts to award costs. This was made clear by this court then differently structured and constituted in Re *Charles Brown* (1928), 60 N.S.R. 76; 49 C.C.C. 402. The issue there was whether a County Court judge had the power and jurisdiction to award costs on a successful *habeas corpus* application. The statutory power to hear the application was given by the *County Court Act*, R.S.N.S. 1923, c. 215, as amended by S.N.S. 1924, c. 50, s. 3. The *Act*, however, was silent as to costs. This court held that the County Court judge did not have the power to award costs. The judgment of the court was delivered by Chisholm, J. (later C.J.N.S.), who said (pp. 78, 79 N.S.R.):

"... The recovery of costs *eo nomine* was unknown to the common law; the courts have no inherent power to award costs which can only be granted in any case or proceeding by virtue of express statutory authority. 2 Coke's Inst. 288; *Duffill v. McFall* (1878), 42 U.C.Q.B. 597; *Lehigh Valley Railroad Co. v. McFarland* (1882), 44 N.J.L. 674 5 Ency of P. and Prac. 108."

I have quoted such a long passage because it illustrates the unequivocal nature of the common law rule.

[17] There are similar decisions in the area of human rights. In *Ontario (Liquor Control Board) v. Ontario (Ontario Human Rights Commission)*, for example, [1988] O.J. No. 167 (QL), three judges of the Ontario High Court of Justice dealt summarily with the issue:

The applicants/appellants submitted that Baum erred in law and jurisdiction by awarding costs to the respondents Karumanchiri, Ng and Yan. There is no inherent jurisdiction in a court, nor in any other statutory body, to award costs.

Re *Brown*, [1928] 3 D.L.R. 234, 49 C.C.C. 402, 60 N.S.R. 76 (N.S.S.C.)

Orkin, The Law of Costs, 1968, Canada Law Book Limited, Toronto, p. 1

The Board of Inquiry is created by the *Ontario Human Rights Code*, 1981, S.O. 1981, c. 53. As a statutory body it can only have jurisdiction to award costs if such jurisdiction is expressly given to it either by the *Code* or some other act.

Re *Lachawski and Federated Mutual Insurance Co.* (1980), 29 O.R. (2d) 273, 19 C.P.C. 126, 113 D.L.R. (3d) 209 (Div. Ct.)

Franco v. Kornatz et al. (1982), 29 C.P.C. 38 (Ont. H.C.)

Re *Clark and Family and Children's Services of Annapolis County* (1983), 37 R.F.L. (2d) 171, 39 C.P.C. 168, 3 D.L.R. (4th) 728 (N.S.C.A.) affirming (1983), 34 C.P.C. 57 (N.S. Co. Ct.) which varied (1983), 57 N.S.R. (2d) 77, 120 A.P.R. 77 (Fam. Ct.)

Re *Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee, Inc. et al.* (1985), 51 O.R. (2d) 23 (Div. Ct.) [n.p.]

This reflects the development of the law of costs in Ontario, which derives from the common law.

[18] The bench in *Ontario Liquor Control Board* holds specifically that restitution does not include costs:

The legislature has expressly provided for the recovery of costs in limited circumstances "to the person complained against" under s. 40(6) of the *Ontario Human Rights Code*, 1981, S.O. 1981, c. 53. The power of the Board of Inquiry under s. 40(1) to "make restitution including monetary compensation" is not an express provision for the award of costs to complainants under the *Code*. The rule of liberal interpretation to carry out the objects of the *Code* to, as far as possible, remedy the effects of and prevent discrimination do not apply to procedural matters or the question of costs. [n.p.]

There is also the decision of the New Brunswick Court of Appeal in *Moncton v. Buggie and N.B. Human Rights Commission* [1985] N.B.J. No. 276 (QL), at para. 35, which holds that a Board of Inquiry has no power to award costs.

B. Other Sources of the Power to Award Costs

[19] It may be significant that the rule was different in equity. In *Oasis Hotel Ltd. v. Zurich Insurance Co.* [1981] B.C.J. No. 690 (QL), the B.C. Court of Appeal reviewed the history of the power in the courts of equity. The Supreme Court of British Columbia enjoys the powers of the English High Court of Chancery, apparently as they stood in 1858. The Court of Appeal held that this gave it the power to award costs, in the words of Middleton J. in Re *Sturmer and Town of Beaverton* (1912) 2 D.L.R. 501, (Ont. Div. Ct.), at para. 11, "not from any authority but from conscience and *arbitrio boni viri*". This latin maxim is explained by Albert Mayrand, *Dictionnaire de maxims et locutions latines utilisées en droit (3d, Yvon Blais)*, as the equivalent of "Selon l'arbitrage d'un bon citoyen".

[20] The courts of equity seem to have had a mandate to provide effective remedies. This may help to explain why the remedial powers of a statutory body seem to be significant in determining whether it has the power to award costs. Thus, in *Banca Nazionale v. Lee-Shanok*, [1988] F.C.J. No. 594 (QL), a unanimous bench of the Federal Court of Appeal reviewed s. 61.5(9) of the *Canada Labour Code*, R.S.C. 1970, c. L-1, which gave an adjudicator the authority to order an employer who had dismissed an employee to reinstate the employee and "do any other like thing that it is *equitable* to require the employer to do in order to remedy or counteract any consequence of the dismissal." (italics added) The court held that the purpose of the section was to make whole an employee who has been wrongly treated by his employer. "The difficulty I have", writes Stone J.A.,

is in viewing an award of compensation, gained at some considerable expense to a complainant in terms of legal costs, as having the effect of making him whole. Legal costs incurred would effectively reduce compensation for lost remuneration, while their allowance would appear to remedy or, at least, to counteract a consequence of the dismissal.

The court accordingly held that the *Labour Code* gave the adjudicator the power to award costs.

IV. THE POSITIONS OF THE PARTIES

A. The Position of the Respondent

[21] The Respondent submits that the general rule with respect to federal legislation is clear. It has provided me with a number of authorities on the matter. In *Big Island Band v. Big George*, [1995] F.C.J. No. 543 (QL), for example, the court considered the same provision that was before the court in *Banca Nazionale*. The case can be distinguished from the decision in *Banca Nazionale*, since the adjudicator had found against the claimant but awarded costs. At para. 6, Justice Nadon quotes Sara Blake in *Administrative Law in Canada* (Butterworths), at page 105. He then writes, at para. 8,

I am in entire agreement with the proposition set forth by the learned author in *Administrative Law in Canada* that express authority is necessary to empower a board or tribunal to make an award of costs against a party. I should add that, in my view, an adjudicator has no inherent jurisdiction to make such an award.

It is evident, on this view, that a statutory tribunal like the Human Rights Tribunal has no power to award costs unless the statute explicitly gives it such a power.

[22] The Respondent also provided me with a number of excerpts from other federal Acts. Section 251.12(4)(a) of the *Canada Labour Cod*e, for example, gives a referee on a matter under appeal the power to "award costs in the proceeding". Under section 25.1(1) of the *Canada Transportation Act*, the Canadian Transportation Agency "has all the powers that the Federal Court has to award costs in any proceeding before it." Section 30.16(1) of the *Canadian International Trade Tribunal Act* states that the Canadian International Trade Tribunal "may award costs of, and incidental to, any proceedings before it". Other Acts contain the same explicit language.

[23] There are other arguments on the Respondent's side. Part 11 of the *Federal Court Rules* deals with costs. The court has assessment officers. The rules deal with matters like security for costs. There is also a Tariff. There is an entire scheme to deal with costs. The Respondent submits that there is nothing of this nature in the *Canadian Human Rights Act*. The *Act* is completely silent on the matter.

[24] The Respondent also submits that the Complainant incurred costs because the Commission withdrew from the hearing. This decision was taken relatively late in the process. If anyone should be responsible for those costs, the argument goes, it is the Commission. There is at least a suggestion in *Canada (A-G) v. Morgan* (1991) 21 C.H.R.R. D/87, at para. 67, that Respondents should not be held responsible for problems that arise out of the conduct of the Commission.

B. The Position of the Complainant

[25] Counsel for the Complainant relied on the caselaw that I have discussed below. He essentially took the position that the remedial provisions of the *Act* would be rendered ineffective without an award of costs.

[26] Counsel for the Complainant also submitted that the Tribunal has the same power as arbitrators, who apparently have the authority to award costs. He relied on the decision of the British Columbia Labour Relations Board in Re *Graham* [2000] BCLRBD No. 1 (QL), where the Board held at para. 46 that its jurisdiction "to award costs and expenses . . . as a form of damages is well-established". At para. 48, it continued as follows: "The Board described the intent of an order for reimbursement of reasonable costs as the bringing about [of] a situation whereby the successful complainant obtains a `break-even finale rather than a loss': *Tony McNamara and Pierre Comeau*, IRC No. 302/88 (Reconsideration of C25/88), p. 12."

C. The Position of the Commission

[27] The Canadian Human Rights Commission was advised that the question of costs was before me. It chose not to appear, however, and has not taken a position on the matter. I accordingly do not know the circumstances under which the Commission withdrew from the case.

V. LEGISLATION

A. *The Canadian Human Rights Act*

[28] The parties agreed that the fundamental starting point in any inquiry into the question before me is that the Tribunal is a creature of statute. As a result, it enjoys the powers that are granted to it by the *Act*.

[29] It has generally been accepted that the only provisions in the *Act* that could provide the Tribunal with the power to award costs are found in section 53(2)(c) and 53(2)(d) of the *Act*, which gives a Tribunal the authority to make an order:

(c) that the person [engaging in the discriminatory practice] compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;

(d) that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice ...

Both of these provisions have been used in the jurisprudence. It is evident that the exception regarding the fees paid for initial advice would come under (d).

[30] There are two fundamental arguments against the use of these provisions as the source of the Tribunal's power to award costs. The first is that they refer to expenses incurred by the victim "as a result of the discriminatory practice". This identifies the expenses as damages. There must be an uninterrupted causal link between the discrimination and the expenses that are being claimed.

[31] The second argument is that the principles of statutory interpretation do not support such a reading of the *Act*. There are at least two principles that apply. The first is *ejusdem generis*, which holds that the meaning of general terms is restricted by the particular terms that precede them. Thus, the reference to "expenses" in section 53(2)(d) is a reference to expenses *like* the expenses incurred in "obtaining alternative goods, services, facilities or accommodation". The reference in section 53(2)(c) is to the kind of expenses incurred by the victim as a result of the loss of wages.

[32] The second principle is *expressio unius est exclusio alterius*. In *Driedger on the Construction of Statutes* (3d; Butterworths), at p. 168, Ruth Sullivan writes that this principle applies "whenever there is reason to believe that if the legislature had meant to include a particular thing within the ambit of its legislation, it would have referred to that thing expressly." Justice Lemieux relies on this kind of argument in *Green*, *infra*, at para. 186, where he writes: "if Parliament had intended the Tribunal to award legal costs, it would have said so." The argument is that Parliament has set out a number of specific heads of relief. If it had wanted to give the Tribunal the power to award costs, it would have included this within the list. The rule takes added force in the immediate instance from the extraordinary nature of the power to award costs, which is only available if the enabling legislation expressly grants it.

[33] There may be other problems. I am inclined to think that section 53(2)(c) contemplates the full recovery of the expenses incurred by the Complainant. This is not the general rule with legal costs, which are usually awarded on a more qualified basis. To

suggest otherwise would treat fees as disbursements. Indeed I note that the entry for "expense" in *The New Shorter Oxford Dictionary* lists the word "disbursement" as a synonym. I think this is the kind of meaning that attaches to the use of the word in the section.

[34] There are also practical issues. The Canadian Human Rights Tribunal is an expert tribunal, with a thorough knowledge of the legal and factual issues that commonly arise in the context of discrimination. It has no experience in the taxation of accounts, which has been recognized as an independent area of expertise. There is a relatively complex body of rules and principles governing legal accounts.

[35] The immediate case also presents a good example of the problematic nature of an inquiry into costs. If the Tribunal has the power to award costs, I have been advised that the Respondent wishes to dispute the fees charged by the representative for the Complainant. This may take the Tribunal into the without prejudice negotiations between the parties.

B. Other Human Rights Legislation

[36] In *Discrimination and the Law* (Carswell; 2004, Rel.2), at p. 15-124, William Pentney writes that provisions concerning costs "vary greatly" across the country. Section 37(4) of the *British Columbia Human Rights Code*, for example, allows a Tribunal to award costs if a party "has engaged in *improper conduct*". This is a high standard: see *Cook v. Citizens Research Institute*, 2002 BCHRTD 6.

[37] There are analogous provisions in Alberta, Prince Edward Island, Newfoundland (against any party who deserves such a penalty), and Manitoba (for frivolous or vexatious conduct). The Ontario *Code* allows a Board of Inquiry to award costs against the Ontario Human Rights Commission for a claim that is "frivolous or vexatious, or made in bad faith". The legislation in the Yukon and Saskatchewan restrict an award of costs to the party contravening the *Act*.

[38] There are Acts with language similar to the provisions in the federal *Act*. Section 28.4(1)(iv) of the *Human Rights Act* of Prince Edward Island, for example, allows a human rights panel:

(iv) to compensate the complainant or other person dealt with contrary to this *Act* for all or any part of wages or income lost or expenses incurred by reason of the contravention of this *Act*;

The similarities are apparent. Section 28.4(6) of the provincial *Act*, however, states a panel "may make any order as to costs that it considers appropriate." The Respondent submits that this only demonstrates what is missing from the federal *Act*.

[39] Pentney has the following to say about the *Canadian Human Rights Act*:

Neither the federal *Act* nor the legislation of the Northwest Territories, New Brunswick or Nova Scotia specifically confers a power on the respective tribunals to award costs. However, it could be plausibly argued that in [each case] this power could be inferred from the plenary jurisdiction of the tribunals to bring about *restitutio in integrum* and/or to further the purposes of the enactments. (15-125)

The reality however is that the federal legislation lacks the kind of explicit provision that the common law requires.

[40] The decision in *Ontario (Liquor Control Board) v. Ontario (Ontario Human Rights Commission), supra*, seems to go the other way.

[41] I was also provided with a copy of the recent decision of a Nova Scotia Board of Inquiry in *Johnson v. Halifax Regional Police Service* (unrpt.; 28 May 2004), which held that it had the power to award the Complainants the costs of retaining independent counsel. The Board paid particular attention to the federal jurisprudence. I do not find the decision helpful however. Although the *Human Rights Act* of Nova Scotia is silent on the question of costs, s. 8, its remedial section is much broader than the comparable provisions in the federal *Act*. Pentney describes this provision as the "most general, and probably the broadest, remedial power" available in Canada. It is of no real assistance in interpreting the *Canadian Human Rights Act*.

VI. JURISPRUDENCE UNDER THE *CANADIAN HUMAN RIGHTS ACT*

[42] The question whether the Tribunal has the power to award costs under the *Canadian Human Rights Act* has a relatively long history in the jurisprudence.

A. Early Cases

(i) *Morrell*: The Tribunal Rules that it Does Not Have the Power to Award Costs

[43] The early cases seem to hold in favour of the Respondent. In *Morrell v. Canada (Employment & Immigration Commission)* (1985), 6 C.H.R.R. D/3021, at para. 24348, the Tribunal held that section 53(2)(d) does not give the Tribunal the power to award costs:

> [Paragraph 53(2)(d)] is intended to cover expenses directly related to the discriminatory conduct, and not expenses related to legal proceedings under the *Human Rights Act*. The latter are more a question of costs, and there is no provision in the *Act* for recovery of costs. Consequently, I do not believe I have any authority to make an award for expenses related to the hearing.

This passage from *Morrell* may be the simplest and most straightforward statement of the law in the jurisprudence. It distinguishes between the costs of the litigation and the expenses "incurred as a result of the discriminatory practice", such as counselling or medical expenses borne by the Complainant. The former expenses do not flow from the original injury and cannot be compensated under the *Act*.

(ii) Other Cases

[44] *Morrell* was followed by a number of cases where the Tribunal "recommended" or "urged" that the Commission pay the Complainant's costs. In *Hinds v. Canada Employment and Immigration Commission*, 1988 CHRT 88, for example, a certain Ms. Mactavish appeared for the Complainant. At the end of the case, she argued that the Tribunal had the power to award costs. Although the Tribunal recognized her singular contribution to the case, it refused to order costs and merely urged the Canadian Human Rights Commission to indemnify the Complainant.

[45] The same kind of practice was followed in *Oliver v. Canada (Parks Canada)* (1989), 11 C.H.R.R. D/456, where the Tribunal criticized the Commission and stated that it was unfair to hold the Respondent responsible for the costs of the Complainant.

B. *Thwaites*: The Federal Court holds that the Tribunal has the Power to Award Costs

[46] The position of the Tribunal changed in the early nineties. In *Thwaites v. Canadian Armed Forces* (1993), T.D. 9/93, a panel of the Tribunal ordered the Respondent to pay for the legal fees incurred by the Complainant during the course of the hearing. At the end of the decision, the panel held:

> We feel, given the complex nature of this case, that Ms. Reierson served an important and useful function in acting as counsel for Thwaites. We agree with the Tribunal in *Grover*

v. *National Research Council* (T.D. 12/92) that Section 53(2)(c) of the *CHRA*, granting the Tribunal power to compensate "for any expenses incurred by the victim as a result of the discriminatory practice" is of sufficient latitude to encompass the power to award costs. That Tribunal stated at p. 91:

If the purpose of remedies is to fully and adequately compensate a complainant for the discriminatory practices, then surely the consequence of costs is part and parcel of a meaningful remedy for a successful complainant.

Accordingly, in the circumstances of this case, we order the CAF to pay the reasonable legal costs of Thwaites, including the actuarial fees incurred in support of the presentation of his case. If the parties cannot agree as to the amount, the costs should be assessed on the Federal Court scale.

The matter was subsequently reviewed in the Federal Court.

[47] In *Canada (AG) v*. *Thwaites*, [1994] 3 F.C. 38 (QL), at para. 56, Justice Gibson endorsed the position taken by the Tribunal at the hearing:

The fact that lawyers and judges attach a particular significance to the term "costs" or the expression "costs of counsel" provides no basis of support for the argument that "expenses incurred" does not include those costs unless they are specifically identified in the legislation. On the basis of the principle that the words of legislation should be given their ordinary meaning unless the context otherwise requires, and finding nothing in the relevant context that here otherwise requires, I conclude that the Tribunal did not err in law in awarding Thwaites reasonable costs of his counsel including the cost of actuarial services.

This was the first of four rulings from the Federal Court on the matter. There is no escaping the fact that it runs counter to the common law, which holds that a statutory body has no power to award costs without an express statutory warrant.

[48] The decision in *Thwaites* was followed by the Tribunal in *Swan v*. *Canada (Armed Forces)*, [1994] CHRT 15, where the Tribunal ordered the Respondent "to pay to the Complainant the costs of his legal counsel to be taxed as applicable under the Rules of Court for the Province of Manitoba."

C. *Lambie*: The Federal Court rules that the Tribunal does not have the Power to Award Costs

[49] The second decision from the Federal Court is found in *Canada (Attorney General) v*. *Lambie*, [1996] F.C.J. No. 1695, where the question was whether the Complainant was entitled to claim "expenses" for "leave and time spent to develop and prepare his complaint". The case was heard by Justice Nadon, who had rendered the decision in *Big George, supra*. He seems to have been unaware of the decision in *Thwaites*.

[50] The Decision in *Lambie*, like the decision in *Big George*, recites the common law rule. At the end of his decision, Justice Nadon quotes the passage from *Morrell v*. *Canada, supra*, at para. 24348, where the Tribunal held that paragraph 53(2)(d) is not intended to cover "expenses related to legal proceedings under the *Human Rights Act*." There is no provision in the *Act* that gives the Tribunal an express power to award costs. It follows that the Tribunal has no power to do so.

D. Intervening Cases: The Tribunal continues to hold that it has the Power to Award Costs

[51] The decision in *Lambie* would support the original position of the Tribunal in *Morrell*. In spite of this, the Tribunal continued to hold in the intervening cases that section 53 of the *Act* gives it the power to award costs. I was a member of the panel in

Koeppel v. Department of National Defence (1997), T.D. 5/97, which awarded costs to the Complainant on the basis of *Grover* and *Thwaites*. We did not inquire into the substantive issue, however, and were unaware of the decision from the Federal Court in *Lambie*. In *Bernard v. Waycobah Board of Education*, [1999] C.H.R.T. 2, a Tribunal also ordered the Respondent to "pay the costs of Ms. Bernard's legal counsel on the Federal Court Scale". The case does not discuss the jurisdictional issue.

E. *Green*: The Federal Court rules for the second time that the Tribunal does not have the Power to Award Costs

[52] The jurisdictional issue resurfaced in *Canada (Attorney General) v. Green*, [2000] 4 F.C. 629 (QL), where the Tribunal awarded the Complainant the legal costs that she had incurred while the matter was before the Commission. The Complainant had apparently retained the services of counsel for the purposes of arguing that the complaint should be referred to the Tribunal.

[53] Like Justice Nadon in *Lambie*, Justice Lemieux gave the idea that the Tribunal has the power to award costs very short shrift. At para. 185-186, he holds:

[185] The Attorney General cites *Canada (Attorney General) v. Lambie* (1996), 124 F.T.R. 303 (F.C.T.D.), where my colleague Nadon J. said at page 315 that the Act does not confer jurisdiction to award costs although Parliament could easily have included such a power.

[186] I agree with my colleague that if Parliament had intended the Tribunal to award legal costs, it would have said so. Reference is had to paragraph 53(2)(d) which refers to compensation to the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation. There is no mention of legal costs, an indication Parliament did not intend the Tribunal have the power to order the payment of legal costs. This follows the principle of *expressio unius*. It also follows the common law rule. The court held that the Tribunal has no power to award costs unless the *Act* expressly provides it. The fees in the case nonetheless appear to come under the exception relating to the initial cost of consulting a lawyer.

F. *Nkwazi*: The Tribunal continues to rule that it has the Power to Award Costs

[54] The decisions in *Lambie* and *Green* did not resolve the matter. The issue was revisited by Ms. Mactavish, now the Chairperson of the Tribunal, in *Nkwazi v. Canada (Correctional Service)*, [2001] CHRT 29. The case is notable in the present instance because the facts were similar to the facts before me. The fundamental problem was that the Commission had withdrawn.

[55] The substance of the Respondent's submissions was that the Commission should pay the Complainant's costs. At para. 20, Ms. Mactavish writes:

According to counsel for CSC, Ms. Nkwazi's legal expenses were incurred entirely as a result of the decision of the Canadian Human Rights Commission to withdraw from this proceeding. The Commission's decision to withdraw constitutes a *novus actus interveniens* and breaks the chain of causation between the discrimination suffered by Ms. Nkwazi and her decision to retain independent counsel.

This line of reasoning comes from the common law. It goes more properly to damages, however, rather than costs.

[56] Ms. Mactavish at least implicitly suggests that *Green* may have been decided on a misreading of *Lambie*, which dealt with the jurisdiction of the Tribunal to compensate a

Complainant for the "time spent to develop and prepare [the] complaint". At para. 12, she accordingly follows the lead of Justice Gibson in *Thwaites*.

I do not accept CSC's contention that the term 'expenses' should be given a restricted meaning, based upon the *ejusdem generis* principle of statutory interpretation. I agree with Mr. Justice Gibson that the ordinary meaning of 'expenses incurred' includes legal expenses, and that there is nothing in the context in which the term is used in paragraph 53 (2) (c) that requires a different interpretation.

It will be apparent that I find myself in a different position. If the rule at common law applies, I think there is little doubt that *Morrell*, *Lambie* and *Green* were correctly decided. The principles of *ejusdem generis* and *expressio unius* apply.

[57] The Tribunal in *Nkwazi* also relies on the principle of *restitutio in integrum* however. At para. 17, Ms. Mactavish states:

... the interpretation of the word 'expenses' espoused by Gibson J. in *Thwaites* is one consistent with the principle governing remedial orders under the *Canadian Human Rights Act*. Where a complaint is substantiated, the task of the Tribunal is to attempt, insofar as may be possible, to make whole the victim of the discriminatory practice, subject to principles of foreseeability, remoteness and mitigation. A victim of a discriminatory practice could hardly be said to have been made whole if she were unable to seek reimbursement for the legal expenses associated with the pursuit of her complaint. This is in keeping with the reasoning of the Federal Court of Appeal in *Banca Nazionale*, *supra*.

[58] The Tribunal in *Nkwazi* also felt that the decision not to award costs in those cases where the Commission does not appear would essentially deprive Complainants of the right to bring a complaint before the Tribunal. At para. 15, Ms. Mactavish holds:

Interpreting the term 'expenses' in the narrow and restricted way that Lemieux J. did in *Green*, so as to deny victims of discriminatory practices the right to recover their reasonable legal expenses associated with the pursuit of their complaints would, in my respectful view, be contrary to the public policy underlying the *Canadian Human Rights Act*. The practical result of such an interpretation would inevitably be that the quasi-constitutional equality rights guaranteed by the *Act* would become meaningless in cases where the Canadian Human Rights Commission withdraws from the hearing: complainants of modest means such as Beryl Nkwazi would simply be unable to proceed further with their claims.

This brings in larger policy concerns.

G. *Premakumar* and *Milano*: The Tribunal follows *Nkwazi*

[59] Ms. Mactavish followed *Nkwazi* in *Premakumar v. Air Canada* 2002 CHRT 04/26, where she relied specifically on the principle of *restitutio in integrum*. At para 31, she held:

[31] Where a complaint is substantiated, the task of the Tribunal is to attempt, insofar as may be possible, to make whole the victim of a discriminatory practice, subject to principles of foreseeability, remoteness and mitigation. Section 53 (2) (c) of the *Canadian Human Rights Act* empowers the Tribunal to reimburse the victim for any expenses incurred by that individual as a result of the discriminatory practice.

The point is simple: to "deny Mr. Premakumar reimbursement for his reasonable legal expenses would render his victory before the Tribunal essentially a Pyrrhic one".

[60] Ms. Mactavish also awarded "reasonable legal expenses" in *Milano v. Triple K Transport* 2003 CHRT 30, on the same basis.

H. *Stevenson*: The Federal Court follows *Nkwazi*

[61] The matter came to a head in *Stevenson v. Canada (Canadian Security Intelligence Service)* [2003] 2003 FCT 341, where Justice Rouleau reviews both streams of authority. Like Ms. Mactavish, who was recently appointed to the Federal Court, he holds that the ruling in *Lambie* merely limits the jurisdiction of the Tribunal to award costs to "exceptional cases". My difficulty with such a position lies in the plain statement, in *Lambie*, at para. 42: "The statute does not confer the jurisdiction to award costs although Parliament could easily have included such a power." Perhaps this is obiter.

[62] More significantly, Justice Rouleau then adopts the position of Justice Gibson in *Thwaites* and Madam Mactavish in *Nkwazi*. I am not convinced that this completely resolves the matter. For one thing, the legal costs awarded in *Stevenson* were for the costs associated with filing a complaint and making submissions to the Commission. This is apparent in the decision of the Tribunal, at [2001] C.H.R.D. No. 40, para. 108, where the member held:

I am satisfied ... that the Complainant did have a right to consult counsel with regard to the possibility of making a complaint to the Canadian Human Rights Commission and that the legal assistance given him in respect of the submissions made to the Commission was necessary. These expenses were a reasonably foreseeable outcome of the discriminatory conduct.

The case accordingly does not deal with the recovery of costs incurred during the course of the hearing.

[63] The costs awarded in Stevenson are therefore more properly considered under the exception in the law relating to the initial costs of consulting a lawyer. At para. 25, for example, Justice Rouleau states:

The fact that the words "legal costs" or "costs of counsel" are not expressly mentioned in either paragraphs 53(2)(c) or (d) does not support the argument that "expenses incurred as a result of the discriminatory practice" excludes "legal expenses" incurred by a complainant in bringing a complaint for discrimination. In a case such as this, *where a complainant consults a lawyer regarding the well-foundedness of his complaint*, an expense of that nature is entirely justifiable. (italics added)

And at para. 26:

In my view therefore, costs of counsel or any legal costs *incurred in the course of filing a complaint for discrimination* constitute "expenses incurred by the victim as a result of the discriminatory practice" as referred to in the legislation and the tribunal has accordingly acted within its jurisdiction in awarding legal expenses to the respondent. (italics added)

It is apparent that these kinds of damages come properly under section 53(2)(d) of the *Canadian Human Rights Act*. The historical issue regarding costs arises later in the process, with regard to the costs incurred in the course of litigating the case.

[64] The decisions in *Stevenson* and *Nkwazi* have nevertheless been followed by the Tribunal in *Boudreault v. Great Circle Marine Services*, 2004 CHRT 21, where Member Doyon awarded the Complainant legal fees in the sum of six thousand dollars.

I. The Question posed by *Nkwazi*

[65] The decisions in *Nkwazi*, *Stevenson* and some of the other cases raise an obvious question. If the Tribunal has some power to award costs, why doesn't the *Act* deal with

the matter? I think the answer lies in the role of the Canadian Human Rights Commission, which has changed over the years. The *Act* was passed in 1985, almost twenty years ago. I do not believe that Parliament, the Commission, or any of the interested parties, foresaw the current situation.

[66] The general assumption in the early cases was that the Commission would be appearing in the hearings before the Tribunal. I am inclined to think that Parliament shared this assumption when it originally passed the *Canadian Human Rights Act*. As a practical matter, it follows that the cost of litigating the Complainant's case would be borne by the Commission. There was no need for Parliament to deal explicitly with the question of the Complainant's costs. The *Act* is nevertheless premised on the idea that a successful Complainant will receive the compensation to which she is entitled without a set-off for legal costs.

[67] The more recent jurisprudence reflects the fact that the Commission has reconsidered its position. At paragraph 28 of *Premakumar*, for example, Ms. Mactavish distinguishes between the role of counsel for the Commission and counsel for the Complainant. She then holds:

[29] In light of my conclusion as to the respective roles of the Commission and the complainant, I have some difficulty with the reasoning of the Tribunals in *Potapczyk* and *Pond*. *[Potapczyk v. MacBain*, (1984), 5 C.H.R.R. D/2285 and *Pond v. Canada Post Corp.*, (1994) 94 C.L.L.C. 17,024]. In these cases, successful complainants were denied their legal costs, in the absence of any identifiable conflict between the position of the Commission and that of the Complainant. While noting the obligation of the Commission to represent the public interest, the Tribunal in *Potapczyk* went on to observe that the *Canadian Human Rights Act* "... permits an individual who has a complaint to have it prosecuted by competent counsel for the Commission without incurring personal expense." This observation was subsequently relied on by the Tribunal in *Pond* to deny Ms. Pond her legal expenses.

These are telling remarks.

[68] I am not completely comfortable with this distinction between the roles of counsel. It seems to me that every human rights complaint has a public interest component, since that is what gives the legislation its particular force. This is not the issue before me however. The reality is that the Commission no longer appears before the Tribunal on a regular basis. As a result, the burden in most cases falls on the Complainant rather than the Commission. I agree with Madam Mactavish that the reasoning in cases like *Potapcyzyk* and *Pond* can no longer be sustained.

[69] The changes in the practice before the Tribunal have made the matter of costs more significant than it was in the past. It also explains why the *Act* fails to address such a pivotal matter. The old reasoning may still apply in cases where the Commission appears before the Tribunal.

VII. ISSUE

A. The Tribunal does not have a Common Law Power to Award Costs

[70] The question posed by the parties is whether the Tribunal has the power to award costs. I think this question has two different answers. The first is that the Tribunal does not have a common law power to award costs. It is of little avail to argue that the *Act* should be interpreted liberally, or in a manner that favours complainants. The power to award costs cannot be found in the *Act*. It is simply not there. I am accordingly in

agreement with what was said by the Federal Court in *Lambie* and *Green*. If Parliament intended to give the Tribunal the power to award costs, it would have done so, in accordance with the rules and conventions governing the matter.

B. The Tribunal nevertheless has the Power to Protect the Viability of the Remedies under the *Act*

[71] The Tribunal nevertheless has adjudicative responsibility for the remedies under the *Act*. There are certain powers that flow from this. This reflects the remedial nature of the legislation and the fundamental nature of the rights of the person. I think that the *Act* gives the Tribunal the power that it needs to protect the viability and integrity of the remedies under the *Act*.

[72] The same kind of issue arises in other contexts. In *Day v. DND*, No. 4, 2002/12/18, at paragraph 20, I suggested that something more than a doctrine of necessary powers but less than the doctrine of inherent jurisdiction was needed to provide the legal basis for some aspects of the Tribunal's authority.

[73] I think there is considerable merit in the Respondent's submissions concerning the jurisdiction of the Tribunal. I say this because, in my view, the jurisdiction of the Tribunal derives more from the Tribunal's mandate under the *Canadian Human Rights Act* than from the literal wording of the *Act*. This mandate is broad, remedial, and quasi-constitutional. In my view, the Tribunal has all the incidental powers that are necessary to carry out the role that the legislation has assigned to it.

I think that this kind of implied or instrumental reasoning is sufficient to provide the Tribunal with the necessary power to protect the viability of the remedies under the *Act*.

[74] These kinds of powers must be traced to the provisions of the *Canadian Human Rights Act*. The Tribunal remains a statutory body, which only enjoys the powers granted by the *Act*. There is even a sense in which these powers must be express, as the common law suggests. The decision in *Banca Nazionale* addresses these concerns, however, and I think it is sufficient if there is an express intention to make a successful Complainant whole. This can be found in those provisions of the *Act* that deal with personal remedies.

[75] The relevant subsection reads as follows:

53(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate . . .

The word "include" might be thought to leave the Tribunal with some additional powers, but the French text suggests that it is limiting. The subsection then contemplates an order:

(b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;

(c) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;

(d) that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice ...

I think it is the cumulative effect of these provisions that is significant. The Tribunal has the power to order that the person discriminating provide the victim with rights, opportunities and privileges; that it repay wages and wage-related expenses; and that it reimburse the Complainant for the cost of any alternative goods, services, facilities, accommodation and the expenses related thereto. There is no reason to discuss the precise meaning of the different provisions. Taken together, the intention is to give the Tribunal the power to redress any loss that the Complainant has suffered as a result of the discrimination. The legislative intention is to make the victim whole.

[76] The jurisprudence in the area supports such an interpretation. The real question in this context is not whether the Tribunal has an explicit power to award costs. It is whether the failure of the Tribunal to award costs would subvert the right of a successful complainant to restitution. I think the answer is plain. The legal fees in a case like the one before me could easily be greater than the damages awarded to a complainant. There will also be cases, as Ms. Mactavish recognized in *Nkwazi*, where the complainant does not receive a monetary award.

[77] I have already held that the Tribunal does not have an express power to award costs. It nevertheless has the power to preserve the viability of its process. This includes the power to order the payment of costs, in order to preserve the damages to which a complainant is entitled. The governing principle is that the complainant is entitled to receive the bulk of the damages intact. Anything less would not be *resititutio in integrum*.

[78] This is a residual power, which gives the Tribunal the power to protect the efficacy of the remedies awarded under the *Act*. There are limits to such a precept. The principle of *restitutio in integrum* applies to damages, not costs, and does not give a successful complainant a right to claim the entirety of their legal costs. It follows that any costs are subject to the normal rules of taxation. This includes the cost of expert's reports and other expenses related to the conduct of the hearing.

[79] It is important to recognize that one of the purposes of the *Act* is to bring the question of discrimination under public scrutiny. This is not possible unless complainants are willing to come forward with complaints of discrimination. The Tribunal should not interpret the *Act* in a way that discourages those with legitimate complaints from seeking their legal remedies.

[80] It is evident that this and other cases may serve notice on Parliament that the present *Act* deserves attention. It does not seem entirely fair, for example, to restrict costs to a successful complainant. The only question in the present case however is whether the failure of the legislation to specifically address the question of costs--when there was no real reason to do so--should be allowed to defeat the manifest purpose of the legislation. The answer is plain.

C. The Complainant Has a Right to an Effective Remedy

[81] There is another side to this. Much of the impetus for the passage of the *Canadian Human Rights Act* came from international sources, such as the *Charter* of the United Nations and the *Universal Declaration of Human Rights*. There are international obligations in the area. The law of human rights is fundamental. The prohibition against discrimination in section 15 of the *Canadian Charter of Rights* also gives the parallel provisions in the *Canadian Human Rights Act* constitutional backing.

[82] It would be wrong if the provisions of the *Canadian Human Rights Act* served to defeat the remedies that it provides. The Complainant provided me with a copy of a

briefing paper by Joanna Birenbaum and Bruce Porter (apparently available on the Department of Justice website) on the "right to adjudication" under the *Canadian Human Rights Act*. The paper does not deal specifically with the question of costs. It nevertheless contains the following passage:

The denial of adjudication of human rights claims is clearly inconsistent with international law, particularly Article 2 of the *International Covenant on Civil and Political Rights* (ICCPR) which guarantees that "any person whose rights or freedoms...are violated shall have an effective remedy" and that "any person claiming such a remedy shall have this right thereto determined by competent judicial, administrative or legislative authorities".

The same paper states that sections 7 and 15 of the *Charter of Rights* guarantee the same rights.

[83] There are important policy issues here. The purpose of the *Canadian Human Rights Act* has always been characterized as remedial. This purpose must be respected. The *International Covenant on Civil and Political Liberties* speaks to this the best, in requiring that state parties provide "effective remedies" for those persons whose rights have been infringed. The present case concerns marital and family status. I think that article 23 of the *Covenant* recognizes the particular importance of such a status, which is at least implicitly included in the prohibition against discrimination in article 26.

[84] The right to an effective remedy is also an integral part of our own law. Perhaps this comes from equity; I cannot say. An "effective remedy" is nevertheless one that is meaningful and concrete. It is unimpaired by the circumstances that exist outside the immediate purview of the process. I think that the Tribunal has the power and indeed an obligation to see that the remedies under an act like the *Canadian Human Rights Act* are not frustrated by extraneous factors like the costs of a hearing. This would defeat the purpose of the litigation, the intention behind the *Act*, and the fundamental law of human rights.

VIII. ADDITIONAL ISSUES

A. Can a Lay Representative Appear Before the Tribunal?

[85] Mr. Finding acted for the Complainant throughout the course of the hearing. He is not a lawyer. Although the Respondent was aware of this, it did not object to his participation in the hearing. The Respondent nevertheless took the position in its final submissions that he was not entitled to act for the Complainant. It also took the position that he had contravened the *Legal Profession Act*, R.S.B.C. 198, c. 9, in doing so.

[86] The issue for the Tribunal arises out of the wording of s. 50(1) of the *Act*, which states that the Tribunal shall give the parties "a full and ample opportunity, in person or through counsel, to appear at the inquiry, present evidence and make representations". The French version of the section states that the Tribunal shall give the parties "la possibilité pleine et entière de comparaître et de présenter, en personne ou par l'intermédiaire d'un avocat, des éléments de preuve ainsi que leurs observations."

[87] The word "avocat" in the French text certainly suggests that the word "counsel" should be restricted to lawyers. There is a recent decision in *Beaudet-Fortin v. Société Canadienne des Postes*, [2004] CHRT 23, in spite of this, where the Member states that it has been the practice of the Tribunal to permit representatives who are not lawyers to appear. The matter has not been definitively decided and should be resolved in a case where there is a live issue.

[88] The Respondent provided me with a number of cases that deal with the services of representatives who are not lawyers. There seems to be a concern that such representatives may be practicing law, in contravention of the provincial legislation that governs such matters. I share these concerns. They are better dealt with, however, in a hearing where the matter has been properly raised at the outset of the process.

B. Are the Fees of a Lay Representative Recoverable?

[89] The more immediate question concerns the power to award costs. If the Tribunal has such a power, the Respondent argues, it should be restricted to lawyer's fees. There is no authority under the *Act*, in its view, to award costs for the services of a lay representative.

[90] Counsel for the Complainant submitted that there was no reason to distinguish between representatives who are lawyers and representatives who are not. The Labour Relations Board in *Graham*, *supra*, for example, recognized that the fees of such representatives should be recoverable. At para. 49, the Board held: "Regardless of the form of representation chosen, the intent of the Board's award of costs is to provide the successful complainant with a full indemnity for fees and expenses reasonably incurred." This is not a true indemnity, but the point remains. At para. 50, the Board relies on *Orkin, The Law of Costs*, 2nd ed., p. 3-37 (para. 311), in setting out a series of factors that provide a "rough guide" in assessing solicitor-and-client costs. Counsel for the Complainant suggests that the Tribunal should adopt the same approach.

C. Waiver

[91] The real issue lies elsewhere however. Counsel for the Complainant argued that the Respondent waived any right to object to Mr. Finding's fees. After all, the Respondent knew from the beginning that Mr. Finding was not a lawyer. Counsel knew that he was charging fees for his services. If Counsel wanted to contest the matter, it should have done so at the beginning of the hearing.

[92] The Respondent replied by citing *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.* [1994] 2 S.C.R. 400, [1994] S.C.J. No. 59 (QL), at paras. 19 and 20, for the proposition that the doctrine of waiver should be narrowly construed. At para. 20, the Supreme Court held:

Waiver will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them.

There is a reason for the use of such strong language:

The creation of such a stringent test is justified since no consideration moves from the party in whose favour a waiver operates.

It follows that the waiver must be explicit.

[93] The Respondent argues that it may have waived any objections to the use of a representative who is not a lawyer. It did not take a position on the issue of fees however. This is true enough. There is nothing to suggest that it consciously intended to abandon its right to contest the question of costs. The Complainant submits that this does not resolve the matter however. The RCMP should have raised the issue earlier.

[94] I think the Respondent acquiesced. The decision not to object to Mr. Finding's participation in the hearing constitutes a waiver, in my judgement, that applies to the entirety of the proceedings. It is too late to speak of retraction. Nor can the Respondent waive the issue piecemeal. I do not see how it can say that it waived its right to dispute

the matter for some purposes and not for others. There is nothing in the record to support such a position.

[95] I see no reason why the Respondent cannot place limitations on its original waiver. These conditions must be explicit and prospective however. They cannot be introduced after the fact. The caselaw holds that a waiver must be explicit. But the same goes for the fine print. If a party intends to add exceptions and conditions to its waiver, however, that must also be explicit. It is the Respondent who must accordingly take responsibility for the failure to clarify the matter in the present case. It follows that Mr. Finding's lack of professional status cannot be used to prevent the Complainant from recovering her costs.

IX. RULING

[96] For all of the above reasons, I would rule as follows:

1. Section 53(2)(c)

[97] There is no jurisdictional issue with respect to legal costs that can be characterized as damages or compensation. The initial fees for obtaining legal advice can be construed as "expenses incurred" by the Complainant as a result of the discriminatory practice under s. 53(2)(c). It would be wrong to deny a complainant the natural legal reflex, in seeking the advice of counsel.

[98] The Complainant is accordingly entitled to recover the cost of her initial consultations with a lawyer. I think this extends to preliminary discussions with the other side, for the purpose of determining whether it was necessary to file a complaint.

2. Costs

[99] I am satisfied that the Tribunal has a residual power to award costs in order to preserve the compensation awarded to a successful complainant. The Complainant is accordingly entitled to her reasonable costs. The Respondent has nevertheless raised a legitimate question on the jurisdictional issue before me. In the circumstances, each party will bear its own costs for any fees incurred with respect to the present application.

[100] Since the Tribunal is under the supervision of the Federal Court, it makes sense to make use of the Federal Court rules in deciding such a matter. Rule 400(3), which is attached as Appendix A to the present ruling, sets out a list of factors that may be considered in determining what costs are appropriate under the *Act*. I think this provides the right starting point in such an exercise.

[101] If the parties cannot settle the matter by themselves, they are invited to make written submissions to the Tribunal. I will retain jurisdiction for three months from the date of this ruling. I would also like to thank counsel on both sides for their assistance. The material provided by counsel for the Respondent was particularly helpful.

Signed by
Dr . Paul Groarke

OTTAWA, Ontario

September 1, 2004

PARTIES OF RECORD

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APPEARANCES:

Charles Gordon	For the Complainant
Edward Burnet Keitha Richardson	For the Respondent

Ref: 2004 CHRT 5
2004 CHRT 24

APPENDIX A

Federal Court Rules, 1998 SOR/98-106, as am.

PART 11

COSTS

AWARDING OF COSTS BETWEEN PARTIES

400. (1) The court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid. ...

Factors in awarding costs

(3) In exercising its discretion under subsection (1), the Court may consider

(a) the result of the proceeding;

(b) the amounts claimed and the amounts recovered;

(c) the importance and complexity of the issues;

(d) the apportionment of liability;

(e) any written offer to settle;

(f) any offer to contribute made under rule 421;

(g) the amount of work;

(h) whether the public interest in having the proceeding litigated justifies a particular award of costs;

(i) any conduct of a party that tented to shorten or unnecessarily lengthen the duration of the proceeding;

(j) the failure by a party to admit anything that should have been admitted or to serve a request to admit;

(k) whether any step in the proceeding was

i. improper, vexatious or unnecessary, or

ii. taken through negligence, mistake or excessive caution;

.../2

(l) whether more than one set of costs should be allowed, where two or more parties were represented by different solicitors or were represented by the same solicitor but separated their defence unnecessarily;

(m) whether two or more parties, represented by the same solicitor, initiated separate proceedings unnecessarily;

(n) whether a party who was successful in an action exaggerated a claim, including a counterclaim or third party claim, to avoid the operation of rules 292 to 299; and

(o) any other matter that it considers relevant.