QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2005 SKQB 342**

Date: **20050815**
Docket: Q.B.G. No. 724/2005
Judicial Centre: Saskatoon

IN THE MATTER OF *THE SASKATCHEWAN HUMAN RIGHTS CODE* AND A COMPLAINT OF WOMEN 2000 AGAINST THE UNIVERSITY OF SASKATCHEWAN AND THE DECISION OF THE SASKATCHEWAN HUMAN RIGHTS TRIBUNAL DATED APRIL 18, 2005 AND PART 52 OF THE RULES OF THE COURT OF QUEEN'S BENCH

BETWEEN:

UNIVERSITY OF SASKATCHEWAN

APPLICANT

- and -

WOMEN 2000, a group of individuals composed of Natashia Neumann, Rhonda Gough, Arlene Rey, Henriette Morrelli, Tracy Marchant, Bev West and Glenis Joyce, and THE SASKATCHEWAN HUMAN RIGHTS COMMISSION

RESPONDENTS

Counsel:

Catherine A. Sloan and Nicole A. Rudachyk	for the applicant, University of Saskatchewan
Milton C. Woodard, Q.C.	for the respondent, The Saskatchewan Human Rights Commission
W. Brent Gough, Q.C.	for the respondent, Women 2000

FIAT DOVELL J.
August 15, 2005

[1] This Court is not prepared to quash the September 1, 2004, decision of the Chief Commissioner of the Saskatchewan Human Rights Commission remitting the matter of the complaint to a tribunal for an inquiry, to quash the preliminary decision of the Saskatchewan Human Rights Tribunal of April 18, 2005, or to prohibit the

Saskatchewan Human Rights Tribunal from continuing with the hearing of the complaint.

A. Background Facts

[2] On April 4, 2000, Natashia Neumann, Rhonda Gough, Arlene Rey, Henriette Morrelli, Tracy Marchant, Bev West and Glenis Joyce, members of a group known as Women 2000, filed a complaint with the Saskatchewan Human Rights Commission against the University of Saskatchewan alleging that in or about 1999 and continuing women on the campus of the University of Saskatchewan and those who might want to attend were being discriminated against by the University of Saskatchewan on the basis of sex.

[3] Particulars of the alleged violation as contained in the complaint included the following:

> We are members of a women's collective known as Women 2000. The University of Saskatchewan offers services and facilities to which the public is customarily admitted or which are offered to the public, and it is a university as identified in Section 13 of the *Saskatchewan Human Rights Code*.
>
> The University of Saskatchewan offers a hockey program through Huskie Athletics. It is our belief that the women's hockey program is treated in an inferior manner as compared to the men's program. For example, funding is allocated inequitably; the men's team receives greater public recognition by the university, and the travel budget is less for the women's team. Men have greater access to more competitive events. The qualifications, experience and numbers of coaches are greater for men's hockey than women's, and the men's team has paid assistants whereas the women's team does not. Fund-raising is greater for men's hockey. The number and duration of practice times is greater for men. The allocation of scholarships is greater for men. We believe these factors and more result in an inferior program for

> women wishing to play hockey, than those recruited to play men's hockey.
>
> We have reason to believe and we do believe that the University of Saskatchewan discriminates against women in the provision of public services, facilities, and education, to Section 12 and 13 of the Saskatchewan Human Rights Code.

[4] On April 24, 2000, Dean Robert A. Faulkner of the College of Kinesiology, University of Saskatchewan, filed with the Saskatchewan Human Rights Commission a detailed respondent questionnaire.

[5] Little, if anything, is known by the Court as to what transpired as between the complainants, the University of Saskatchewan and the Saskatchewan Human Rights Commission between April 2000, and September 2004, a period in excess of four years other than there is reference in a letter dated November 29, 2004, to counsel for the University of Saskatchewan from the Commission's counsel that the parties had made some attempt to mediate the matter at some point in time during those four years.

[6] What is known is that on November 15, 2001, extensive amendments were made to both *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, and *The Saskatchewan Human Rights Code Regulations*, Sask. Reg. 216/79.

[7] On September 1, 2004, the Chief Commissioner of the Saskatchewan Human Rights Commission wrote a letter to the University of Saskatchewan. In that letter the Chief Commissioner advised the University of Saskatchewan pursuant to s. 28(2) of *The Saskatchewan Human Rights Code* that she had decided to request that the Chairperson of the Human Rights Tribunal Panel appoint a tribunal to conduct an inquiry respecting the complaint.

[8] On November 10, 2004, a notice of appointment was made by the Chairperson of Saskatchewan Human Rights Tribunal Panel appointing Anil Pandila to conduct an inquiry as requested by the Chief Commissioner pursuant to s. 28(2) of the Code.

[9] The University of Saskatchewan at the commencement of the inquiry raised several preliminary matters objecting to the validity of the proceedings to date. On April 18, 2005, the Tribunal provided its written preliminary decision with regard to those preliminary objections to the inquiry proceeding, dismissing all of the University of Saskatchewan's objections.

[10] It is from that preliminary decision of the Human Rights Tribunal of April 18, 2005, and the September 1, 2004, decision of the Chief Commissioner to hold an inquiry of this complaint that the University of Saskatchewan is now seeking *certiorari* to quash both of those decisions on numerous grounds as well as an order of prohibition prohibiting the inquiry from proceeding any further.

B. Issues to be Determined

a. Jurisdiction of the Tribunal;

b. Failure of the Chief Commissioner to properly exercise her discretion:

   i. to remit the matter to a tribunal before making a probable cause determination;

ii. to consider or properly consider the standing or identity of the complainants;

iii. to determine whether the consent of the alleged victims was necessary.

C. Analysis

(a) Jurisdiction of the Tribunal

[11] A human rights tribunal is a creature of statute. Pursuant to s. 28(2) of *The Saskatchewan Human Rights Code*, when the Chief Commissioner at any time after a complaint is filed requests the chairperson of the human rights tribunal panel to appoint a human rights tribunal to conduct an inquiry, the chairperson of the human rights tribunal panel pursuant to s. 29(1) appoints that human rights tribunal. In this case the Chief Commissioner on September 1, 2004, decided to request the Chairperson of the Human Rights Tribunal Panel to appoint a tribunal to conduct an inquiry respecting the complaint. The Chairperson of the Human Rights Tribunal Panel appointed that Tribunal on November 10, 2004.

[12] The specific powers of the Tribunal are set out in s. 29.2 of the Code and its responsibilities are set out in s. 29.3 of the Code.

[13] The University of Saskatchewan's position is that the Tribunal has the power to review the reasons why the Chief Commissioner requested the appointment of a tribunal to conduct an inquiry into a complaint and to quash a decision of the Chief

Commissioner for requesting the appointment of a tribunal to conduct an inquiry into a complaint.

[14] The Commission's position is that the Tribunal has no such powers under the Code and unlike a superior court, has no inherent jurisdiction.

[15] The Tribunal in its preliminary decision of April 18, 2005, concluded that it did not have jurisdiction to review the reasons for the Chief Commissioner's decision to refer the matter for an inquiry in the peculiar circumstances of this case. The Court agrees with that conclusion.

[16] The Tribunal only has the powers as specifically outlined in the Code. There is absolutely no provision in the Code for the powers the University of Saskatchewan is suggesting the Tribunal has. The only specific situation in which the Tribunal reviews the decision of the Chief Commissioner is as outlined in s. 29.4 of the Code, that being the situation when the Chief Commissioner has dismissed a complaint and the complainant requests an inquiry respecting the complaint. That certainly is not the case here.

[17] Although pursuant to s. 29.2(2)(a), the Human Rights Tribunal has the power to make decisions at a pre-hearing conference respecting the merits of a complaint that are binding on the parties, that power would not include the power to review the reasons why the Chief Commissioner has requested the appointment of it. That power is only with a superior court which in this case is by way of judicial review to the Court of Queen's Bench for Saskatchewan under Part 52 of *The Queen's Bench Rules*. It is the intention of this Court to now make a determination of that judicial review.

(b)(i) Failure of the Chief Commissioner to properly exercise her discretion in remitting the matter to a tribunal before making a probable cause determination.

[18] When the Chief Commissioner wrote to the University of Saskatchewan on September 1, 2004, she stated at the second paragraph of her letter:

> Section 28(2) authorizes me to request a tribunal hearing "at any time after a complaint is filed." I do not necessarily have to conclude that a violation will likely be substantiated. I need only conclude that a hearing is the most appropriate way to determine if there is a violation. For the reasons stated below, this is my conclusion.

[19] The University of Saskatchewan's position is that since the complaint was filed prior to the 2001 amendments to *The Saskatchewan Human Rights Code* and Regulations, there was a requirement for a finding of probable cause before the Chief Commissioner could refer the matter to a tribunal for hearing pursuant to old Regulation 14(1) as it existed prior to the amendments. The University's position is that it had a vested substantive right to have the Chief Commissioner determine the question of probable cause prior to referring the matter for an inquiry and that this was not simply a procedural change. As such, the University is requesting that the complaint be quashed on this ground.

[20] The Commission's position is that the pre-amendment requirement for a determination of probable cause was a procedural matter only and not a substantive right. As a result, the Commission's position is that the new Code and Regulation provisions apply and that the Chief Commissioner was not required to make a finding of probable cause, prior to referring the matter for an inquiry.

[21] The Tribunal in its April 18, 2005, preliminary decision concluded that the pre-amendment requirement for a determination of probable cause was a procedural matter only and not a substantive right. This Court agrees with that conclusion.

[22] Old Regulation 14(1) under *The Saskatchewan Human Rights Code*, prior to the 2001 amendments provided:

> 14(1) If a complaint is not settled and a finding of probable cause for the complaint is made, the Director or Assistant Director shall consult either the Chief Commissioner or the Deputy Chief Commissioner. The complaint will then be placed on the agenda of the next regular meeting of the Commission for consideration under subsection (1) of section 29 of The Human Rights Code.

[23] Old s. 29 of *The Saskatchewan Human Rights Code* authorized the Commission to direct a formal inquiry into the complaint to an administrative tribunal then referred to as a Board of Inquiry.

[24] There is no such regulation in the new regulations as amended in 2001. The new provisions for the initiation of an inquiry are contained in s. 28(2) of the new Code. That section provides:

> 28(2) The Chief Commissioner may, at any time after a complaint is filed or initiated pursuant to section 27, request the chairperson of the human rights tribunal panel to appoint a human rights tribunal to conduct an inquiry respecting the complaint.

[25] When legislation is amended or repealed, the general rule is that substantive rights are not retroactively affected unless the new legislation expressly states so. However, changes in procedure take place immediately and immediately affect how

matters are processed.

[26] As outlined by the Tribunal at p. 2 of its April 18, 2005, preliminary decision:

> In *Sullivan and Driedger on the Construction of Statutes* (4th ed) Butterworths, Markham, 2002, the author states as follows at page 582:
>
> *"Procedural legislation is about the conduct of actions. It indicates how actions will be prosecuted, proof will be made and rights will be enforced in the context of a legal proceeding. Such legislation is presumed to apply prospectively for it applies only to stages in proceedings or procedural events that occur after its coming into force. However . . . it is presumed to apply immediately to ongoing proceedings, including those commenced but not completed before its coming into force. In some cases, this could also entail giving it a retrospective application"*

[27] That common law proposition has been codified in portions of ss. 34 and 35 of *The Interpretation Act, 1995,* S.S. 1995, c. I-11.2, which provide:

> 34(1) The repeal of an enactment does not:
>
> . . .
>
> (b) affect the previous operation of the repealed enactment or anything done or permitted pursuant to it;
>
> (c) affect a right or obligation acquired, accrued, accruing or incurred pursuant to the repealed enactment.
>
> 35(1) Where an enactment is repealed and a new enactment is substituted for it:
>
> . . .
> (d) a proceeding commenced pursuant to the repealed

> enactment shall be continued pursuant to and in conformity with the new enactment as far as is consistent with the new enactment;
>
> (e) the procedure established by the new enactment shall be followed as far as it can be adapted in relation to the matters that happened before the repeal.

[28] The previous "probable cause determination" was part of a previous procedural scheme for the investigation and adjudication of human rights complaints. That procedural scheme was replaced in November 2001, by a completely new one that does not require a determination of "probable cause". Even when the old scheme was in place the Chief Commissioner was not necessarily the one that made the probable cause determination as the Chief Commissioner was only one member of the Commission. The statutory duties were actually performed by a human rights officer who did the investigations supervised by a director. In the new legislation the positions of human rights officers and directors have been abolished.

[29] All of the relevant amendments with regard to this ground of judicial review were purely procedural in nature and did not impact on any of the University of Saskatchewan's substantive rights. These procedural amendments are no different than the procedural amendments considered by the Saskatchewan Court of Appeal when previous amendments were made to the Code in *Peters v. University Hospital Board* (1983), 23 Sask. R. 123, 147 D.L.R. (3d) 385.

[30] Thus, the University's application to quash the complaint on this ground is therefore dismissed.

(b)(ii) Failure of the Chief Commissioner to properly exercise her discretion in considering or properly considering the standing or identity of the

complainants.

[31] With regard to the standing of the complainants, the University of Saskatchewan's first position is that the complaint is void *ab initio* as the complainant is an unincorporated association and as such is not included in the definition of "person" under the Code.

[32] The position of the Commission is that the complainants are seven individuals and thus are "persons" within the Code but alternatively even if the complainants were classified as an unincorporated association, that entity is a "person" within the meaning of the Code and therefore is capable of initiating a complaint.

[33] The Tribunal in its preliminary decision of April 18, 2005, concluded that the complaint was of seven individuals and was entitled to proceed as such. Even in the event the complainants intended to bring a complaint on behalf of an unincorporated association, that would not make the complaint void *ab initio* as they could apply to amend the complaint under the provisions of s. 5(2) of *The Saskatchewan Human Rights Code Regulations*, R.R.S. c. S-24.1, Reg. 1.

[34] The conclusion of the Tribunal is correct.

[35] The complaint was not made by "Women 2000" but by the "undersigned members of the group known as Women 2000". The word "we" is consistently used throughout the April 4, 2000, complaint including the last paragraph which reads:

> We have reason to believe and we do believe that the University of Saskatchewan discriminates against women in the provision of public services, facilities, and education, to Section 12 and 13 of

> the Saskatchewan Human Rights Code.

[36] These seven individual women are "persons" within the meaning of the Code and thus have standing to make a complaint to the Saskatchewan Human Rights Commission.

[37] The University of Saskatchewan argued that the December 11, 2004, letter from the complainants' lawyer clearly indicates that the complaint was not made by seven individuals. In part that letter reads:

> As the complaint reveals, this is a systemic discrimination case and not one launched by individual complainants. These women have brought forward a commonly held concern as engaged and articulate members of the University and broader Saskatoon community.

[38] The Court in considering this statement is very conscious of the fact that it has not been provided with the correspondence which predated this specific response letter or the details of any conversations that may have taken place between counsel to put the particular phrase in proper context. The Court, however, accepts that the allegations of the complainants are systemic in nature and the Court is prepared to accept the argument of the Commission that the proper interpretation of this phrase is as follows:

> As the complaint reveals, this is a systemic discrimination case and not one launched by individual complainants on their own behalf.

[39] Even if these seven individuals as complainants were to be classified as an unincorporated association or organization, the complaint would not be void *ab initio* in this case. There is case law to support providing standing to an unincorporated association or organization as a "person" in human rights proceedings.

[40] In *Human Rights Commission (Sask.) v. Engineering Students' Society, University of Saskatchewan* (1989), 72 Sask. R. 161, 56 D.L.R. (4th) 604 (C.A.), Vancise J.A. in his dissenting opinion, held that the Engineering Students' Society as a respondent fell within the definition of "person" under the Code and was properly named as a respondent in the proceedings despite being an unincorporated association. This was in keeping with the rule of statutory interpretation which requires that words such as "person" be interpreted as broadly as possible to give effect to the important social goals of eliminating discrimination and providing relief to those that are discriminated against. While Vancise J.A. was in the minority in the outcome, the issue of standing of an unincorporated association was not addressed by the majority.

[41] The reasoning of Vancise J.A. was adopted by the Saskatchewan Human Rights Board of Inquiry in *Community Awareness Project v. Saskatoon Downtown Business Improvement District* (1995), 29 C.H.R.R. D/237 in which it was held that an unincorporated association complainant was a "person" within the meaning of the Code.

[42] The second position of the University of Saskatchewan with regard to the standing of the complainants is that the complaint was intended to be a class complaint and as such the Chief Commissioner totally failed to comply with either the old or new Code regulations regarding the pre-conditions to a valid class complaint.

[43] The Commission's position is that this is not a class complaint as it was not commenced on behalf of a class and even if it were, the failure of the Chief Commissioner to comply with the regulations does not automatically mean that the complaint is void *ab initio*.

[44] The Court agrees with the position of the Commission. This is not a class complaint. It is commenced by a number of women who feel that the University of Saskatchewan is answerable under the Code for not fulfilling its duty to provide equal opportunity to men and women in the University's hockey program. Even if it were to be considered a class complaint there are curative provisions in the regulations.

[45] Regulation 28 provides:

> 28(1) Non-compliance with these regulations does not render any proceeding void unless the tribunal so directs.
>
> (2) The tribunal may order the matter returned to the commission to remedy any non-compliance with these regulations.

[46] Thus, the Court is not prepared to quash the September 1, 2004, decision of the Chief Commissioner on any ground as put forward by the University on the issue of standing of the complainants.

(b)(iii) Failure of the Chief Commissioner to properly exercise her discretion to determine whether the consent of the alleged victims was necessary.

[47] Section 27(2) of the Code provides:

> 27(2) Where a complaint is made by a person, other than the person who it is alleged was dealt with contrary to the provisions of this Act, or any other Act administered by the commission, the commission may refuse to act on the complaint unless the person alleged to be offended against consents.

[48] The University of Saskatchewan is asking that the complaint be quashed as the Chief Commissioner has failed to consider the exercise of this discretion in failing to

consider at all the identity of the complainants let alone any victims that may be involved. In support of that argument is a letter from Commission's counsel dated November 29, 2004, which in part reads:

> I can confirm that the identity of the individuals who were members of Women 2000 was not formally considered when determining whether to allow them to file their complaint.

[49] The Commission admits that it did not look into the identity of the seven individuals as outlined in the complaint or that it took any steps under s. 27(2) to determine whether the consent of any alleged victims of the discrimination should be obtained.

[50] The Commission is under no duty to undertake any process under s. 27(2) in all cases especially when it is not obvious that there are any specific victims whose consent should be obtained in the circumstances of a particular complaint. It is a discretionary section and the Court accepts that the Commission in this case accepted that the complainants were acting in good faith and that there were no obvious victims of the alleged discriminatory conduct that were opposing the complaint and whose consent should be obtained to the process. This is not a case in which someone came forward and requested the Commission not act on the complaint or that there was an obvious victim whose consent the Commission in its discretion should have obtained.

[51] The Court is not prepared to quash the complaint on this ground as put forward by the University of Saskatchewan.

D. Conclusion

[52] For all of the reasons as outlined in this fiat, the Commission had the jurisdiction to accept the complaint on April 4, 2000, of seven women individuals that the University of Saskatchewan was not providing equality in its allocation of resources to its male and female students in the University hockey program. The complaint was made by seven women individuals not by an unincorporated organization. Nor was the complaint made as a class complaint requiring compliance by the Chief Commissioner with the regulations concerning class complaints. In the circumstances of this case it was within the discretion of the Chief Commissioner not to require the consent of any of the alleged victims in the circumstances of this case.

[53] The amendments as made to *The Saskatchewan Human Rights Code* and Regulations in 2001 that have relevance to this application were all procedural in nature and did not affect any vested substantive right of the University of Saskatchewan that it possessed before the new legislation. As such, compliance with the procedural provisions of the new Code and Regulations is required by the Chief Commissioner and the Tribunal with regard to the complaint made in April 2000. It was therefore not necessary that the Chief Commissioner make a determination of probable cause before referring this matter to the Tribunal for an inquiry.

[54] Having determined that the Chief Commissioner and Tribunal in this matter have not exceeded their jurisdiction nor acted without jurisdiction, the applications of the University of Saskatchewan for orders of *certiorari* and prohibition are dismissed. The Court fixes the costs of this application payable to the Commission by the University of Saskatchewan at $750.00.

_____j.
M.L. DOVELL