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CASE LAW UPDATE

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Canada (Canadian Human Rights Commission) v Canada (Attorney General)

2011 SCC 53 (Released October 28, 2011)

Administrative Law – Remedial Jurisdiction – *Canadian Human Rights Act* – Legal Costs – Standard of Review – Statutory Interpretation

The Supreme Court of Canada unanimously held that the Canadian Human Rights Tribunal ("**the Tribunal**") does not have the authority to award legal costs.

The applicant, Donna Mowatt, was compulsorily released from her position as a traffic technician for the Canadian Forces. Following her release, Ms. Mowatt filed a complaint with the Canadian Human Rights Commission ("**the Commission**"), alleging sexual harassment, adverse differential treatment, and failure to continue to employ her on the basis of her sex. In addition to awarding $4,000 plus interest for suffering, the Tribunal considered conflicting Federal Court jurisprudence and concluded that it had the authority to award legal costs pursuant to s. 53(2) of the *Canada Human Rights Act* ("**the *Act***"), which allows the Tribunal to compensate "for any expenses incurred by the victim as a result of the discriminatory practice". The Tribunal awarded Ms. Mowatt $47,000 in legal costs.

After an extended standard of review analysis, the Supreme Court concluded that the question of whether legal costs may be included in a compensation order by the Tribunal was to be reviewed on a "reasonableness" standard, since it was neither a question of jurisdiction, nor a question of law of central importance to the legal system, nor outside the Tribunal's expertise.

The Court held, however, that the Tribunal's conclusion that it had the power to award legal costs was not reasonable considering the text, context, and purpose of the provision. With respect to the text of the *Act*, the Court observed that the phrase "expenses incurred by the victim" appears in two separate remedial provisions—one citing lost wages and expenses incurred (s. 53(2)(c)), and one citing additional costs of obtaining goods and services and expenses incurred (s. 53(2)(d)). The Court concluded that the repetition of the phrase "expenses incurred" in these different contexts and the legislative presumption against tautology weighed against a finding that the phrase "expenses incurred" was intended to create a free-standing jurisdiction to award legal costs. In analyzing the text of the *Act*, the Court also noted that the term "costs" is a legal term of art, and that the legislature's choice not to use this term

suggests an intention not to make such remedies available. Finally, the Court noted that the subsection providing for damages for suffering and wilful or reckless discrimination is capped at a modest amount ($5000 at the time), and contains no parallel phrasing for “expenses incurred”.

In assessing the context of s. 53(2) of the *Act*, the Court observed that a predecessor bill to the *Act* includes express authority to award “costs”, which was deleted from the bill which became the *Act*. Further, once the *Act* was in force, a proposed amendment that would have ordered the Commission to pay “costs” in certain circumstances was never enacted. The Court also held that the legislative history of the scheme suggested a deliberate choice to forego a scheme of legal cost awards in favour of a strong Commission which would advocate for complainants and the public interest, thereby reducing the need for independent legal representation. Finally, the Court also found some support in the Commission’s many statements that the *Act* did not confer jurisdiction to award costs, and in the fact that provincial and territorial human rights legislation deploy the word “costs” when they intend to confer such jurisdiction.

The Court confirmed that in principle human rights legislation should be given a broad and purposive interpretation, but emphasized that this could not replace an interpretation based in the text and context of the *Act*.