WeirFoulds LLP

# Case Law Update: British Columbia (Workers Compensation Board) v Figliola

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By Mark Edelstein

2011 SCC 52 (Released October 27, 2011)

**Administrative Law Human Rights Tribunal Jurisdiction**

This decision addressed the jurisdiction of the British Columbia Human Rights Tribunal ("**BCHRT**") to consider an application regarding a Workers Compensation Board ("**WCB**") policy, when the substance of the application had already been heard by a WCB Review Officer, who had considered the policy and determined that it adhered to the B.C. *Human Rights Code*. The respondents could have applied for judicial review of the decision but instead decided to re-litigate the matter at the BCHRT.

The WCB sought to dismiss the application pursuant to s. 27(1)(f) of the *Code*, which allows the BCHRT to dismiss an application if it had been appropriately dealt with in another proceeding. The BCHRT dismissed the motion, applying the issue estoppel analysis set out in *Danyluk v Ainsworth Technologies Inc*. The BCHRT decision was overturned on judicial review, but restored by the Court of Appeal.

The Supreme Court split five to four, but both decisions allowed the appeal and held that the BCHRT's decision to permit the application was patently unreasonable.

Justice Abella, writing for the majority, emphasized that the principles underlying s. 27(1)(f) are respect for the finality and integrity of other administrative processes, the importance of respecting available appeal and review mechanisms, avoiding needless re-litigation, and preventing forum shopping. She emphasized that in applying s. 27(1)(f) the BCHRT should consider the existence of concurrent jurisdiction to consider the Code if the matters at issue are the same, and if there was an opportunity to address these issues in some form. The majority concluded that s. 27(1)(f) did not permit the BCHRT to engage in a form of judicial review and that the provision was meant to create "territorial respect" towards other tribunals.

The majority noted that this narrow reading was supported by the placement of s. 27(1)(f) among types of proceedings that ought to be dismissed and by its legislative history.

The majority found that the BCHRT's consideration of a number of irrelevant or inappropriate factors, such as the merits of the Officer's decision, the procedure used, and the expertise of the Officer, meant that its decision was patently unreasonable. The majority also noted that a strict application of *Danyluk* in this context undermined the concurrent jurisdiction of the WCB over the *Code*.

The majority dismissed the BCHRT application.

Justice Cromwell's concurring decision took a broad view of the discretion provided to the BCHRT under s. 27(1)(f). He noted that the WCB's jurisdiction over the *Code* had evolved over time and the Officer's jurisdiction to consider the *Code* was uncertain, indicating the difficulty in simply applying finality principles to parallel administrative proceedings. He disagreed with the majority's assessment of the statutory context as a factor that favoured a narrow reading of the provision. Instead he held that legislative history and other factors indicated that the s. 27(1)(f) discretion ought to be broad, and it permits the BCHRT to consider a broad range of factors in deciding whether or not to dismiss an application, including the merits of the decision and if the proceedings were conducted fairly.

Justice Cromwell found, however, that the BCHRT decision turned on an improper consideration of whether the Officer was sufficiently independent, failed to consider the availability of Judicial Review, and failed to consider if the Officer had addressed the substance of the application. Justice Cromwell concluded, therefore, that the BCHRT's assessment of s. 27(1)(f) was patently unreasonable as it failed to give weight to the principles of finality and instead improperly engaged in a strict application of *Danyluk*. Due to these errors he would have remitted the matter back to the BCHRT for reconsideration.

WeirFoulds LLP

www.weirfoulds.com

Toronto Office
4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office
1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035