COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Gibraltar Mines Ltd. v. British Columbia (Human Rights Tribunal),* 2022 BCCA 234

Date: 20220621
Docket: CA48201

Between:

Gibraltar Mines Ltd.

Respondent
(Petitioner)

And

British Columbia Human Rights Tribunal

Appellant
(Respondent)

And

Lisa Harvey

Respondent
(Respondent)

Before: The Honourable Madam Justice Fenlon
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated March 10, 2022 (*Gibraltar Mines Ltd. v. Harvey*, 2022 BCSC 385, Vancouver Docket S2013768).

Oral Reasons for Judgment

Counsel for the Appellant (in person for hearing; via videoconference for oral reasons):	K.A. Hardie
Counsel for the Respondent, Gibraltar Mines Ltd.: J.D. Kondopulos in person for hearing; B.I. Hillis in person for hearing; via videoconference for oral reasons; J.H. Hoopes in person for hearing:	J.D. Kondopulos B.I. Hillis J.H. Hoopes

Counsel for the Proposed Intervenor, B.C. Human Rights Commissioner: L.A. Waddell in person for hearing and for oral reasons; H.D. Hoiness in person for hearing:	L.A. Waddell H.D. Hoiness
Counsel for the Proposed Intervenor, Canadian Association of Counsel to Employers:	D.J. Jordan, Q.C.
Counsel for the Proposed Intervenors, Canadian Union for Public Employees, BC General Employees' Union, British Columbia Teachers' Federation, Hospital Employees' Union, and Health Sciences Association of British Columbia (appearing via videoconference for hearing):	M.A. Boyd R.P.M. Trask J. Lannon T.D. Tsao
Counsel for the Proposed Intervenors, West Coast LEAF, Disability Alliance of British Columbia, and Society for Children and Youth of BC (appearing in person for hearing; via videoconference for oral reasons):	K. Feeney J.G. Blair
Place and Date of Hearing:	Vancouver, British Columbia June 20, 2022
Place and Date of Judgment:	Vancouver, British Columbia June 21, 2022

Summary:

On an appeal from a judicial review decision dealing with the interpretation of s. 13(1)(b) of the Human Rights Code, R.S.B.C. 1996, c. 210, four proposed intervenors seek leave to intervene: the British Columbia Human Rights Commissioner; the Canadian Association of Counsel to Employers; a group of five public sector unions; and a coalition of public interest groups comprising West Coast LEAF, the Disability Alliance of British Columbia, and the Society for Children and Youth of BC.

Held: Application of the Commissioner allowed in part, all other applications dismissed. Given the nature of the parties to the appeal, the Commissioner has a unique perspective that would assist the Court; leave to intervene is granted to make submissions on the test to be applied under s. 13 of the Code, except on the issue of Canada's international treaty commitments. The other applicants'

proposed submissions would either widen the scope of the appeal, or would be adequately addressed by the parties to the appeal.

[1] **FENLON J.A.**: The British Columbia Human Rights Tribunal (the "Tribunal") has appealed an order quashing a decision of the Tribunal. The central question on appeal is whether s. 13(1)(b) of the *Human Rights Code*, R.S.B.C. 1996, c. 210 [*Code*]—in the context of employment discrimination on the basis of family status—applies only where an employer has changed a term or condition of employment. A further question on appeal is whether the Tribunal has standing to bring this appeal absent the participation of the initial complainant. As I stated at the hearing, the issues on appeal are important but not particularly complex. The main question involves consideration of this Court's earlier jurisprudence interpreting s. 13 of the *Code*, and ultimately, the correct interpretation of the provision.

[2] Before me are four applications for leave to intervene in this appeal brought by:

a) The British Columbia Human Rights Commissioner (the "Commissioner");

b) The Canadian Association of Counsel to Employers ("CACE");

c) A group of public sector unions (the "Unions"), being:

   i. The Canadian Union of Public Employees;

   ii. The BC General Employees' Union;

   iii. The British Columbia Teachers' Federation;

   iv. The Hospital Employees' Union; and

   v. Health Sciences Association of British Columbia; and

d) A coalition of public interest groups, being: West Coast LEAF, the Disability Alliance of British Columbia, and the Society for Children and Youth of BC (collectively, the "Joint Applicants").

[3] The facts of the case underlying the appeal are described in detail in the reasons of the judicial review judge, which are indexed as 2022 BCSC 385. For the purposes of these applications, it suffices to note the following background.

[4] Lisa Harvey and her husband were both employed by the respondent, Gibraltar Mines Ltd. ("Gibraltar"), which is located about 60 kilometers north-east of Williams Lake, British Columbia; Ms. Harvey as a journeyman welder and her husband as a journeyman electrician. They both worked 12 hour shifts on the same schedule. After their first child was born, finding childcare that coincided with those shifts proved to be difficult.

[5] Ms. Harvey asked for a particular accommodation which Gibraltar refused. Gibraltar proposed various alternatives but they were rejected by Ms. Harvey. Ms. Harvey filed a complaint with the Tribunal, alleging employment discrimination on the basis of family status, marital status, and sex, contrary to s. 13 of the *Code*.

[6] Relying on this Court's decision in *Health Sciences Assoc. of B.C. v. Campbell River and North Island Transition Society*, 2004 BCCA 260 [*Campbell River*], Gibraltar denied any discrimination, arguing that there had not been any change to a term or condition of Ms. Harvey's employment, and that she had not alleged any serious interference with a substantial parental obligation. It further argued that it had proposed two reasonable options, but that Ms. Harvey had failed in her duty to participate in the search for an accommodation.

[7] In August 2019, Gibraltar filed an application to dismiss the human rights complaint under s. 27(1)(b), (c) and (d)(ii) of the *Code*. In reasons indexed at 2020 BCHRT 193, the Tribunal dismissed the complaint based on marital status and sex, but declined to dismiss it based on family status.

[8] The Tribunal considered *Campbell River*, canvassed previous decisions, and concluded it was not necessary for a worker to establish that discrimination involved an employer changing terms of employment. The Tribunal interpreted s. 13(1)(b) in the family status context as applicable to a failure to accommodate when the worker's circumstances had changed.

[9] Gibraltar applied for judicial review, submitting that the two-part test in *Campbell River* made a change in the terms of employment a pre-requisite to

establishing *prima facie* discrimination. After a thorough review of the jurisprudence, the reviewing judge agreed and quashed the Tribunal's decision under s. 27(1)(b) on the basis that Ms. Harvey's claim did not allege acts or omissions which could, if proven, contravene the *Code*.

[10] As I noted at the outset, it is the Tribunal that appeals that decision. Ms. Harvey did not participate in the judicial review, and has not participated in the appeal from that decision. Gibraltar challenges the standing of the Tribunal to appeal an order overturning one of its own decisions. That question of standing will be determined by the division hearing the appeal on October 24, 2022.

The Four Applications to Intervene

[11] None of the intervenors asserts a direct interest in the appeal; other than the Commissioner in relation to the issue of standing. All intervenors apply on the basis of public interest in the issues raised on the appeal.

[12] The factors to be considered when an applicant seeks intervenor status on the public interest basis are set out in *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCCA 282 at para. 14 (Chambers):

a) Does the proposed intervenor have a broad representative base?

b) Does the case legitimately engage the proposed intervenor's interests in the public law issue raised on appeal?

c) Does the proposed intervenor have a unique and different perspective that will assist the Court in the resolution of the issues?

d) Does the proposed intervenor seek to expand the scope of the appeal by raising issues not raised by the parties?

[13] I accept that all of the proposed intervenors meet the first two factors. Their applications turn on the latter two—in short, whether their participation will be of assistance to the Court without expanding the scope of the appeal.

[14] I turn now to each of the applications.

1. The BC Human Rights Commissioner

[15] The Commissioner is “an independent officer of the Legislature responsible for protecting and promoting human rights in B.C.” She seeks leave to intervene in this appeal in order to “fulfill her statutory mandate by ensuring that the *Code*’s protection against discrimination in employment on the basis of family status is given the broad and purposive interpretation the Supreme Court of Canada’s jurisprudence demands”.

[16] The Commissioner submits that her perspective and submissions will differ from those of the parties. She states that the Tribunal, as a neutral adjudicator of complaints under the *Code*, will be submitting its interpretation of the test for discrimination on the basis of family status while recognizing that it may be adjudicating the complaint at a future time, and that Gibraltar, as a private-sector employer, will advance its own interest without any obligation to advance the purposes of the *Code*. The Commissioner says she has a mandate to protect and promote human rights in the province which differs from the approach of these two parties.

[17] The Commissioner also seeks to address the issue of whether the Tribunal has standing to bring an appeal where no other litigant is able or willing to do so—a question that she says raises a direct interest as it will impact her ability to carry out her mandate. The Commissioner submits that her interest is directly engaged because, if the Tribunal has standing in appeals like this one, where the original complainant and respondent have chosen not to appeal, the Commissioner will have more opportunities to intervene, and such intervention would help her to promote human rights in the province.

[18] I agree with counsel for Gibraltar that this is insufficient to establish a direct interest in the appeal. A decision on the Tribunal’s standing to appeal where the original complainant and respondent have chosen not to, will not directly impact the Commissioner’s legal rights or impose any additional legal obligations resulting in a direct prejudicial effect. Whatever decision is made on this issue on appeal, the Commissioner’s mandate, powers, duties, and legal rights will remain the same.

[19] Nor do I find it appropriate to grant intervenor status to the Commissioner on the issue of standing under the category of public interest. The Tribunal will fully argue this issue and the relevant case law, and the importance of the

Tribunal's ability to develop the law in this area by carrying appeals forward on the important issues that would not otherwise reach appellate review.

[20] I am satisfied, however, that the Commissioner has a unique and broad perspective and that her participation in the appeal on the statutory interpretation issue will be of assistance to the Court. The Tribunal is, in a sense, an appellant by default. As a tribunal charged with the adjudication of conflicts between parties, and indeed as the tribunal that will ultimately adjudicate the substantive dispute between Ms. Harvey and Gibraltar, if the matter proceeds, its argument will be constrained by its continuing role as a neutral adjudicator. That is so even though the Tribunal has, as Gibraltar points out, taken on the role of appellant and has challenged the reviewing judge's interpretation of s. 13. The issue of Canada's international treaty commitments, would, however, in my view, expand the litigation unnecessarily.

[21] I therefore grant the Commissioner leave to intervene on the issue of the test to be applied under s. 13 of the *Code* in relation to *prima facie* discrimination on the basis of family status, more particularly, set out in para. 49 of the amended memorandum of argument; items (a)–(c) and (e)–(f)—in other words, not (d). For ease of reference, I set out that paragraph here:

> 49. If granted leave to intervene, the Commissioner proposes to make submissions to the effect that any interpretation of the test for *prima facie* discrimination on the basis of family status under s. 13 of the *Code* requiring that a complainant first establish that their employer has changed a term or condition of employment is: a. inconsistent with the plain language of s. 13 and the interpretation of equivalent legislative provisions across the country; b. inconsistent with the proper approach to the interpretation of quasi-constitutional legislation like the *Code*; c. inconsistent with the purposes of the *Code*, including the elimination of persistent patterns of gender inequality and impediments to full and free participation in the economic, social, political and cultural life of British Columbia; d. inconsistent with Canada's international human rights obligations as enshrined in the *Convention for the Elimination of all forms of Discrimination against Women*; e. inconsistent with the well-established test for *prima facie* discrimination as affirmed by the Supreme Court of Canada; and f. arbitrary and therefore contrary to the rule of law.

[22] The Commissioner may file a factum of 10 pages in length. Gibraltar may file a 10-page factum in response, should it choose to do so.

2. The Public Sector Unions

[23] The five Unions apply jointly for intervenor status. They represent more than 300,000 workers in British Columbia.

[24] The Unions submit that this case engages the interest of all workers in the province who may need accommodation at work as a result of their family obligations. The Unions seek to intervene in order to provide this Court with the perspective of both unionized workers and their unions.

[25] The Unions say they are uniquely positioned to address the challenges posed in applying different tests for *prima facie* discrimination where the protected ground under the *Code* is family status, as opposed to the test applied in relation to other protected grounds.

[26] If granted leave to intervene, the Unions say they will make submissions regarding:

a) The interest of workers in British Columbia in having a legal test for *prima facie* discrimination on the basis of family status that is consistent with the test for other protected grounds and the test for family status discrimination in other jurisdictions; and

b) The importance of providing labour arbitrators in British Columbia with clear guidance on the applicable legal test for *prima facie* discrimination on the basis of family status.

[27] I accept that the Unions have a great deal of experience in dealing with the uneven application of s. 13 in relation to family status across federal and provincial workplaces and the challenges of inconsistencies in arbitral rulings because of differing interpretations of the test to be applied in relation to family status complaints.

[28] However, the advantages of consistency across jurisdictions and in relation to other grounds of discrimination are not unique perspectives on this appeal. They are arguments that will be addressed by both the Tribunal and the Commissioner. I conclude, with respect, that the intervention by the Unions would therefore not assist the Court on this appeal.

[29] I would accordingly dismiss the Unions' application for intervenor status.

3. The Joint Applicants

[30] The Joint Applicants submit that this appeal raises important issues that affect the substantive equality of mothers and caregivers in the workplace, and which will have important impacts on children and families. They seek to intervene in order to provide a perspective on family status discrimination, "with particular focus on the unique and intimate link between the welfare of children with disabilities and the substantive equality of their primary caregivers, most of whom are women".

[31] If granted leave, the Joint Applicants intend to argue that in determining the test for family status discrimination under s. 13 of the *Code*, this Court should consider the impacts of that decision on vulnerable populations, including children with disabilities and their caregivers. This includes:

a) The importance of considering the intertwined equality of interests of parents and children, particularly parents of children with complex needs, because children cannot independently bring a complaint themselves in cases of discrimination against their parents; and

b) The shared interest of mothers, caregivers, and children in a broad protection against family status discrimination—if a change in a term or condition of employment is required, then many significant changes in caregiving obligations, including the needs of vulnerable children with disabilities, will not require accommodation by an employer.

[32] The arguments this intervenor group would make about the test in *Campbell River* excluding parents whose childcare obligations have changed will be addressed by the Tribunal and the Commissioner. To the extent that the Joint Applicants wish to address the impact of the *Campbell River* test on parents caring for children with disabilities, I agree with the respondent that to do so would be to expand the scope of the appeal. This Court dealt with children with complex needs in the *Campbell River* case.

[33] The significance of the first part of the *Campbell River* test can, on the family status accommodation, be understood and argued based on the facts of the case before the Court, which do not involve a disabled family member.

[34] Furthermore, the Court is capable of appreciating the additional challenges and needs of a parent caring for children with disabilities without bringing in statistics, academic literature, and international treaties, which would expand the record and place a significant burden on the respondent who, unlike the appellant Tribunal, is a private party. The Joint Applicants say the Commissioner has already expanded the record. If that is so, the material will be before the Court. In any event, there is an interest in preventing further expansion of the record given the issues on this appeal. I would accordingly, and with respect, deny the Joint Applicants leave to intervene.

4. The Canadian Association of Counsel to Employers

[35] The CACE is an association of management-side labour and employment lawyers with a core objective of providing "governments, courts, labour relations boards, and other administrative tribunals with input respecting policy and legislative reform from the perspective of lawyers acting on behalf of employers in Canada".

[36] If leave is granted to intervene, the CACE says it will take the following positions:

a) That the convention of "vertical *stare decisis*"—which says that administrative tribunals are bound by the rulings of superior courts—ought to be a key consideration in an analysis of the boundaries between courts and administrative tribunals; and

b) That it is inconsistent with *stare decisis* to have the Tribunal as the sole appellant in this appeal, as it ought to be an independent administrative tribunal with no interest in the outcome of this proceeding.

[37] The CACE argues that its submissions will assist the Court because it will address these issues more broadly than the individual parties on the appeal, and will emphasize the need for employers to be able to conduct themselves in accordance with binding authority without being concerned that "an administrative tribunal obliged by the convention of vertical *stare decisis* to apply binding precedent, will seek to subvert those binding precedents in furtherance of its own view of the appropriate interpretation of the *Code*".

[38] Again, as with the other intervenors, I have no doubt that counsel for the CACE would make able submissions on these topics, but I conclude that they would not amount to a unique and different perspective.

[39] The primary question on the appeal is one of statutory interpretation in the context of a line of cases. Interpreting legislation, reading and determining what earlier jurisprudence stands for, and the need to respect the well-settled principal of *stare decisis* is the daily fare of this Court. Indeed, it is the daily fare of all common law courts—as is evident from the reviewing judge's thorough analysis on the subject. The parties are well positioned to make arguments on this straightforward issue and indeed that is a focus of their factums. Gibraltar will also thoroughly address the standing of a tribunal to appeal in relation to its own decision.

[40] I accordingly dismiss the CACE's application to intervene.

[41] In summary, leave to intervene on the matters raised in para. 49 (a)–(c) and (e)–(f) of the amended memorandum of argument is granted to the Commissioner who may file a 10-page factum. The respondent Gibraltar has leave to file a 10-page factum in response.

[42] I adjourn the Commissioner's application seeking leave to make oral submissions at the hearing of the appeal to the date of the hearing to be decided by the division. I also leave to the division the question of whether costs should be awarded for or against the Commissioner in the circumstances of this appeal.

[43] The applications to intervene of the Unions, the Joint Applicants, and the CACE are dismissed.

"The Honourable Madam Justice Fenlon"