

Forward from Figliola

Concurrent Jurisdiction and the Human Rights Code

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Where we began

- *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14.
- Absent legislative intent to the contrary SCC confirms that a body which can decide questions of law has an obligation to consider and apply human rights legislation.



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Human Rights Code

R.S.O. 1990, c.H.19 as amended

- S.45.1 The Tribunal may dismiss an application, in whole or in part, in accordance with its rules if the Tribunal is of the opinion that **another proceeding** has **appropriately dealt with the substance** of the application.
- Introduced with 2006 amendments which established direct access to HRTO.
- Came into effect June 30, 2008.



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BC Human Rights Code

- 27(1) A member or panel may (...) dismiss all or part of the complaint if that member or panel determines that (...):
- (f) the **substance of the complaint** or that part of the complaint has been **appropriately dealt with** in another **proceeding**



Both engage a two step analysis

- Was there a proceeding?
- Was the substance of the application appropriately dealt with?



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British Columbia (Workers' Compensation Board) v. Figliola, 2011 SCC 52

- Appeal of a decision of the British Columbia Human Rights Tribunal (“BCHRT”).
- The complainants challenge chronic pain policy as discriminatory before British Columbia Workers’ Compensation Board.
- The Board rejected the arguments.
- Complainants don’t seek judicial review. File a complaint about the policy with the BCHRT.



BCHRT

- The BCHRT refused Board's request to dismiss the complaints. Concerned about both the Board's procedure and substantive analysis.
- Board successful on judicial review. The Court finds the issues were conclusively determined in the earlier proceeding.



BC Court of Appeal 2011 BCCA 49

- The BCCA describes the determination as “whether the other proceeding substantively addressed the issues from the perspective of the Tribunal, informed by the policy considerations within its specialized knowledge in administering the *Code*” and concludes that the Legislature contemplated subsequent adjudication by the BCHRT.



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SCC

prevent inconsistency, multiplicity and delay.

- Respect vertical lines of review. No lateral “adjudicative poaching”. Para 38
- Respect for finality of a decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice. Failure to do so may create inconsistent results and unnecessarily duplicative proceedings. Para 34



Finality is key

- The method of challenging the validity or correctness of a judicial or administrative decision **should be through the appeal or judicial review mechanisms that are intended by the legislature.** Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision. Para 34



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Figliola's Analytical Framework

- was there concurrent jurisdiction to decide human rights issues;
- Is the previously decided legal issue essentially the same as what is being complained about to the Tribunal; and
- was there an opportunity for the complainants to know the case to be met and have the chance to meet it? Para. 37



Proceeding

- As long as the complainants had a chance to air their grievances before an authorized decision-maker, the extent to which they received traditional “judicial” procedural trappings should not be the Tribunal’s concern. para 49



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Substance

- Concerns with the quality of the other body's substantive human rights analysis are properly the subject of an appeal or judicial review. Para 50



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HRTO post Figliola

- SCC issues Figliola Oct 27, 2011
- Two 45.1 matters pending or on reserve
- OHRC intervenes. Parties provide submissions on *Figliola*
- Decisions issued December 22, 2011.
- *Gomez v. Sobeys* 2011 HRTO 2297
- *Paterno v. Salvation Army* 2011 HRTO 2298



Gomez v. Sobeys

2011 HRTO 2297

- Applicant injured in workplace. Several unsuccessful attempts to place him in accommodated work.
- Employer concludes cannot accommodate without undue hardship and terminates his employment.
- Union grieves termination.
- Human rights application filed.
- Arbitration hearing 6 days with arguments on the *Code*. Grievance dismissed.



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Gomez para 25

- While s. 45.1's placement in the statute and legislative history are not identical, these were not the primary factors in the Court's reasoning, which focused on the wording of the provision and the policy goals of avoiding relitigation of matters decided in another forum. This reasoning applies equally to s. 45.1.
- **I therefore agree with the Commission and the respondent that the analysis adopted in *Figliola* applies in Ontario and binds this Tribunal.**
- **It is not open to this Tribunal to consider the procedural or substantive correctness of another proceeding under s. 45.1.**



Gomez

- No question issues raised in this Application were dealt with in the arbitration. Found the respondent acted in a manner consistent with the *Code*. Not for this Tribunal to evaluate the substance of that decision. Para 27
- Not for this Tribunal to consider whether arbitrator was correct to go beyond the grievance, applied a proper *Code* analysis, or whether the grievor/applicant should have or did have notice of the March conference call. The place to raise these issues would have been a judicial review. Para 28



Paterno v. Salvation Army

2011 HRTTO 2298

- Applicant grieves discipline and discharge. Complains about discrimination but does not want arbitrator to consider discrimination claims. Employer pursues. Arbitrator finds just cause for discipline and discharge.
- Files three HRTTO applications.



Paterno

- arguments that the arbitrator erred in evaluating the *Code* or the evidence are not proper.
- Previous jurisprudence that suggested that the Tribunal should consider whether the other proceeding applied proper human rights principles is no longer applicable in light of *Figliola*. Para 24



Paterno

- finding just cause for discipline implicitly incorporates a legal finding that the discipline was not tainted by a violation of the *Code*. Para 3
- Not agree that the prohibition on relitigation in s.45.1 of the *Code* applies only when it is the applicant, not the respondent, who has raised *Code* issues in another proceeding. Para 3



Paterno

- Although the arbitrator did not specifically mention the ground of sex or reprisal it is evident he ruled on whether the discipline was consistent with the *Code*. Moreover, the applicant's allegations of reprisal and sex discrimination are foreclosed by the finding of just cause for discipline. Para 34



45.1 proceedings

- OLRB ESA
- WSIAT
- EI Board of Referees and Umpire
- Grievance procedures/arbitration boards/GSB
- LTB
- SBT
- OSET
- HPARB, College of Physicians and Surgeons, Royal College of Dental Surgeons
- LAT
- OCCPS
- Real Estate Council of Ontario
- LSUC
- Tarion New Home Warranty
- University Anti-Discrimination Tribunal
- Settlements made in course of these proceedings



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Not proceedings

- Internal employer investigation without formal guarantees of procedural fairness, impartiality or independence: *Mauer* para 11
- Front line WSIB decision makers? Pre-*Figliola* were not. Reassessing post-*Figliola*. OHRC and WSIB intervening. *Whitwell* 2012 HRTO 240
- *Police Services Act* complaints and investigations? HRTO conflicting decisions. Reassessing post-*Figliola*. Issue under reserve by 3 person panel. Interventions by OIPRD, OHRC, African Canadian Legal Clinic, Metro Toronto Chinese & Southeast Asian Legal Clinic, South Asian Legal Clinic of Ontario. *Claybourne* 2011 HRTO 1904



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Substance

- Human rights issues may be explicit or implicit
- If factual findings by the other tribunal determine human rights issue 45.1 will apply
- Not evaluate the features or quality of the other tribunal's remedial order



CUPE v. Lakeridge Health Corporation, 2012 ONSC 2051

- Pay Equity Hearings Tribunal dealing with compensation adjustments for wage grids of female job classes. In both cases, the Tribunal refused a union application to eliminate the different rates of progression through the wage grids of comparable male and female job classes, holding that the Act does not require the harmonization of wage grids.
- As well, the Tribunal rejected an argument that the interpretation it adopted was contrary to the *Code*.



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Bcakground

- Comparable male and female jobs classes. Employer must provide pay equity.
- The male job class gets to the top of its wage grid before the female job class gets to top its grid. Pay is equal at the top of each grid.
- Unions say pay should be equal through the grid. Says this is discrimination on basis of sex.
-



PEHT

- PEHT says no.
- Not consistent with *PEA* scheme and not contrary to the *Code*.
- The *PEA* provides a “complete scheme for ascertaining the presence of gender discrimination in employment compensation, and directing how compensation must be adjusted in the establishments where such discrimination exists”.
- “Counter-intuitive” to say an employer who complies with the *PEA* contravenes the *Code*.



Standard of review paras 57-63

- application of the *Code* does not raise a true question of jurisdiction attracting the standard of correctness.
- *PEA* confers the exclusive jurisdiction on the Tribunal to determine all questions of fact or law that arise in any matter before it. Given the holding in *Tranchemontagne*, the Tribunal had the jurisdiction to interpret and apply the *Code* in matters before it
- PEHT not drawing jurisdictional lines between itself and the Human Rights Tribunal.
- Issue not one of central importance to the legal system that was outside the special expertise of the adjudicator.
- PEHT had to determine whether its interpretation of the *PEA* required or authorized a contravention of the *Code*. In deciding that issue, the Tribunal had to consider the interpretation of its home statute, as well as the *Code*.
- The *PEA* is anti-discrimination legislation ... members have expertise in the areas of human rights, employment and collective bargaining. Given the nature of the question before the PEHT and its expertise, deference should be accorded to the PEHT



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Human Rights Adjudication

What are the limits? paras 74,76

- I do not understand *Tranchemontagne* to go so far as to confer jurisdiction on the Tribunal to deal with human rights violations in general.
- The role of the Pay Equity Hearings Tribunal is to deal with complaints of a contravention of the PEA (...) Clearly, it has jurisdiction to apply the *Code* to the extent that human rights issues arise directly in a complaint properly before it. **However, it does not have the authority to deal with stand-alone violations of the *Code* by employers.**



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The Limits para 79

- Clearly, the Legislature, in enacting the *PEA*, made a number of policy decisions about the way in which to achieve pay equity, enacting legislation that does not eliminate all systemic wage discrimination. (...) However, the Unions have failed to identify a provision of the *PEA* that is in conflict with the *Code*. As in *Malkowski v. Ontario (Human Rights Commission)* the Unions are seeking to use s.47(2) of the *Code* to change the pay equity legislation and extend its reach. **However, s. 47(2) does not authorize a tribunal to read words into a statute or amend it to ensure compliance with the *Code*.**



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