

**IN THE MATTER OF an appeal of  
a decision of the Director of Human Rights  
pursuant to section 45 of the *Human Rights  
Act*, S.N.W.T. 2002, c. 18, as amended**

**BETWEEN:**

**BRIAN KWONG**

**Complainant**

- and -

**THE GOVERNMENT OF THE NORTHWEST TERRITORIES  
(FINANCIAL MANAGEMENT BOARD SECRETARIAT)**

**Respondent**

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**Appearances:**

**Mr. Brian Kwong**

**Ms. Karen Lajoie, Legal Counsel for the Respondent**

**REASONS FOR DECISION**

**Introduction:**

This case concerns the exercise of statutory discretion by the Director of Human Rights to dismiss a human rights complaint because it was not filed within the statutory limitation period of two years. It also concerns the exercise of discretion by an adjudicator to allow the hearing of new evidence on appeal.

Section 45 of the NWT *Human Rights Act* allows any party to appeal the dismissal of a complaint to the adjudication panel. The parties to every appeal made under section 45 are (a) the parties to the complaint and, (b) the Director. In this case the Director declined to participate in the appeal however she agreed to give evidence under oath at the hearing of the appeal, and to be subject to cross-examination in relation to the new evidence raised by the Complainant.

The Respondent appeared at the hearing through legal counsel; Mr. Kwong was self-represented.

## **The Legislation:**

Subsection (2) of section 29 of the *NWT Human Rights Act* sets out the 2 year limitation period for filing a human rights complaint and subsection (3) sets out the circumstances in which the Director may extend the 2 year limitation period:

- 29 (2) Subject to subsection (3), a complaint must be filed with the Commission
- (a) within two years after the contravention of this Act that is alleged in the complaint; or
  - (b) if a continuing contravention is alleged in the complaint, within two years after the last alleged instance of the contravention.
- (3) The Director may extend the time limit for filing the complaint or part of the complaint under subsection (2) if the Director is satisfied that the delay in filing the complaint or part of the complaint was incurred in good faith and will not substantially prejudice any person.

Section 44 of the *Act* sets out the criteria that the Director is to take into account in deciding whether a complaint is to be dismissed. In particular, s. 44(1)(e) refers to the limitation period described in s. 29 (2) and (3) above.

44. (1) The Director may, at any time before a complaint is referred for an adjudication under section 46, dismiss all or part of the complaint if the Director is satisfied that
- (a) this Act provides no jurisdiction to deal with the complaint or that part of the complaint;
  - (b) the acts or omissions alleged in the complaint or that part of the complaint are not the kinds of acts or omissions to which this Act applies;
  - (c) the complaint or that part of the complaint is trivial, frivolous, vexatious or made in bad faith;
  - (d) the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding, or
  - (e) the complaint or that part of the complaint alleges a contravention of this Act that occurred more than two years before the complaint is required to be filed under subsection 29(2)...unless the Director extends the time limit for filing the complaint or that part of the complaint under subsection 29(3).

With regard to the admission of evidence, generally, before the Adjudication Panel, section 56 of the *Act* states:

56. (1) Evidence may be given before an adjudicator in any manner that the adjudicator considers appropriate and, subject to subsection (2), the adjudicator is not bound by the rules of law respecting evidence in civil actions or proceedings.

## **Review of the Record**

For the purpose of hearing Mr. Kwong's appeal, the parties agreed that I may review and use in making my decision a Record of documents and correspondence retained by the Director's offices. A list of the materials comprising the Record is attached to my Decision as Appendix I.

Brian Kwong sent a letter to the Chair of the NWT Human Rights Commission on December 21<sup>st</sup>, 2007 expressing his intention to file a human rights complaint against his former Employer, the Respondent. In the letter he alleged that he was not paid the same amount of salary paid to other employees of the Respondent who performed the same work. In response to that letter (and a conversation between he and a Human Rights Officer -“HRO”) the same day he was sent a copy of the *NWT Human Rights Act* and referred to section 9 of the *Act* which prohibits discrimination in the pay of employees who perform the same or similar work on the basis of any of the prohibited grounds of discrimination set out in section 5 of the *Act*. The HRO also sent a letter asking Mr. Kwong to tell her what prohibited ground applied in his case. He responded in writing on January 2<sup>nd</sup>, 2008 stating that he believed that he did not receive ‘pay equity’ because of his ethnic origin.

On January 24<sup>th</sup>, 2008, the HRO wrote to Mr. Kwong advising of the requirements for acceptance of a complaint by the Director of Human Rights. One of those stated requirements was that a complaint must be “filed within two years from when the discrimination occurred”. The HRO also explained to Mr. Kwong that although his complaint appeared to fall within the “Commission’s jurisdiction” his complaint “falls outside of [the] time limit”. The letter recapped the circumstances surrounding Mr. Kwong’s complaint and noted that he was denied equal pay in December of 2004 and that (in the Director’s view) “[Mr. Kwong] had two years to file a complaint with the NWT Human Rights Commission” and that his December 2007 exceeded the limitation period by more than a year. In the same letter the HRO set out the provisions of s. 44(1)(e) contained in the *Act* and invited him to contact a lawyer “to explore [his] options to resolve this issue”, and provided him with the telephone number of Legal Aid. The letter also invited him to call the Director’s offices “If [he had] any further questions about the information in [the January 24<sup>th</sup>] letter...”

On February 11<sup>th</sup>, 2008, apparently after another telephone conversation with Mr. Kwong, the HRO sent Mr. Kwong a letter setting out the provisions contained in s. 29(3) of the *Act* and advised him that in order to obtain an extension of the 2 year limitation, he must:

1. Explain why, at the time of the incident, you did not file a complaint with the NWT Human Rights Commission. The onus is on the person filing the complaint to show that the delay was incurred in good faith.
2. Explain why pursuing with (sic) your complaint will not substantially prejudice you or the GNWT.
3. Review and sign the attached Complaint Details. This document is based on the information you submitted in writing and the conversations we have had. Please call me if you would like to make any changes to this document.
4. Sign the Complaint Information Form (CIF). The CIF is an internal form required by the Commission before opening a file. It states your allegations and the sections of the *NWT Human Rights Act* that it contravenes.

5. Sign the Consent Form. This form gives the Commission the permission to gather and disclose information about you as needed to process your complaint.

The letter also advised Mr. Kwong that “If the Director is satisfied that you have answered reasonably to the issue of timeliness, your answers and your complaint details will be provided to the GNWT. The GNWT will then have an opportunity to submit a response to the issue of timeliness just as you have”. Finally, the letter advised Mr. Kwong that “If the Director is not satisfied that the delay was incurred in good faith and that it will not substantially prejudice any person, then [his] complaint may be dismissed by the Director as stated in Section 44(1)(e) of the *Act*...”

On February 20<sup>th</sup>, 2008, Mr. Kwong signed the Consent Form, the CIF and a Complaint Details form. The latter documents were returned by mail to the Director’s office. In addition, he enclosed a letter to the HRO requesting an extension of the 2 year limitation period. The letter explained his reasons for the delay as follows:

Since I was laid off by the GNWT, I have been busy arranging relocation, looking for employment, renovating my home, helping my family settle down, accompanying my wife to medical visits, and caring for my elderly mother, thinking that I would have two years on termination of my employment to file my complaint.

I thought that I met the two-year time limit to file my complaint in last December until you informed me recently that the timeline commenced in December 2004. The delay in filing my complaint was caused by my misunderstanding of the time limit and I believe it will not substantially prejudice any person as it was occurred (sic) in good faith.

(underlining added)

On March 18<sup>th</sup>, 2008, the Director of Human Rights (the “Director”) dismissed Mr. Kwong’s complaint. The Director’s letter of March 18<sup>th</sup>, 2008 sets out her reasons for dismissing his complaint. After recapping the Background of the complaint and stating that Mr. Kwong “... believed [he] was within [the] two year time limit because [he] filed [his] complaint within two years of the termination of [his] employment...”, the letter states:

#### Reasons for Decision

The issue of equal pay was addressed as of December of 2004 when your rate of pay was adjusted to match those of your counterparts. Effective August 2004 to January 2007 you were paid the same rate of pay as your counterparts.

You state that you were under the impression that you would have two years from the termination of your employment to file a complaint. Your complaint information indicates that you seek to have the issue of retroactivity dealt with through the human rights process.

Based on the information you’ve provided, it has been at least three years from the time the alleged discrimination last occurred until you contacted our office. Although your employment with the GNWT continued until January 2007, you were being paid at the same rate of pay as your counterparts and are not alleging discrimination between August 2004 and January 2007. There have been no new occurrences or allegations of discrimination.

There is no information to indicate that you were otherwise unable to exercise your option to contact our office in December 2004, or within two years of that time to discuss the timelines to file your complaint. Under the circumstances, I have decided not to exercise my discretion to extend the timeline in this matter.

I am therefore dismissing your complaint further to section 44(1)(e) of the *Act*. Your complaint is now closed and our office will not be taking any further action on this matter.

On May 6<sup>th</sup>, 2008 Mr. Kwong filed an appeal of the Director's decision in which he gave the following reasons for filing the appeal:

In 2006 I called the NWT Human Rights Commission office to explain my alleged complaint pertaining to racial discrimination. The officer told me that I would have two years from the date of employment termination, January 2007, to file my complaint. However I have been declined by the Commission based on the timeline on which I filed my complaint. Had this miscommunication not occurred my file would have been accepted. My case is an opportunity for the Commission to have a precedent case for my situation. Accepting my case is a step towards dissolving racial discrimination. I ask that the Commission reconsider my complaint. (underlining added)

### **Findings of Fact:**

A hearing took place on Friday, July 17<sup>th</sup>, 2008, at Yellowknife. Mr. Kwong appeared via teleconference as did his one witness, his wife, Shirley Kwong, both of whom gave evidence under solemn affirmation. The Director of Human Rights also gave solemnly affirmed evidence. Karen Lajoie, legal counsel for the Respondent, appeared in person before me.

There was little controversy over the facts in this case except that the Respondent tested the Complainant's memory and credibility on the question of whether he was told during an alleged telephone conversation with staff at the Director's office in February or March, 2006 that the limitation period would begin to run upon the termination of his employment.

### **The Evidence of the Director of Human Rights:**

Ms. Boullard's evidence was that her staff were (in 2006) and are today, instructed not to take, or at least keep notes of, the content of telephone enquiries. The rationale is that telephone enquiries are treated as confidential to encourage openness in discussion between HROs and possible Complainants and to avoid the retention of records containing not only unproven allegations but allegations which are very often not related to human rights contraventions under the *Act*. In the Director's view telephone inquiries are not "complaints" and so there is no statutory requirement for records of them to be kept (the Director has an obligation under s. 27(1)(a) of the *Act* to keep a registry of "complaints"). The Director testified that the only time that such notes are taken and kept is where the disclosed circumstances reveal the need to call the RCMP or Child Protection Services.

According to Ms. Boullard, in 2006 her offices received 419 telephone inquiries. During the same period of time, Ms. Boullard's office was staffed with a Deputy Director and a full time HRO besides herself. The Director said that 2006 was, to date, the busiest year for telephone inquiries so far. The Director explained that in February and March of 2006 it was just she and the Deputy Director in the office and that the HRO position had to be (or had only recently been) "back-filled".

The Director was unable to give any evidence as to what happened in Mr. Kwong's case both because of the absence of telephone enquiry records and because of the lapse of time, i.e. she did not expect anyone in her office to remember the details of telephone enquiries that took place in 2006. Ms. Boullard could not confirm nor deny whether Mr. Kwong called her offices in 2006.

Ms. Boullard also testified that her staff are trained in how to answer inquiries. She said that the information that is given to callers by her staff in response to enquiries is "very general" and that the Director's staff do not provide legal advice but rather provide "enough information" to allow people who call to make their own decision as to whether they will file a complaint or not. For example, if someone inquired about the limitation period contained in the *Act* or if the circumstances discussed raised questions about when the alleged contravention of the *Act* took place, the inquirer would be told about the two year limitation period and about the Director's discretion to extend the time for filing a complaint. Ms. Boullard testified that her staff had a Training Manual at hand which explains the limitation period and in what circumstances the Director will consider in exercising her discretion.

Ms. Boullard was asked to provide the parties and myself with a copy of the relevant pages in the Training Manual which she agreed to do.

Both Mr. Kwong and the Respondent's legal counsel chose not to cross-examine Ms. Boullard.

Post-hearing, the Director provided me with several pages from the "Training Manual" which appears to have been in use by her staff at least as far back as September, 2004. On page 95, the following appears under the general heading "Time Limit for Filing a Complaint – Section 29":

#### Timeliness

Complaints must be filed within two years of the alleged act of discrimination unless the Director extends the time period. Only the director, or if delegated, the Deputy Director, can make the decision to extend time.

The Director will consider the following factors in extending the time to file:

1. Complainant's good faith, including an honest belief, the absence of malice, and the absence of a design to seek unreasonable advantage.

2. Reasons for the delay. These include, among others, incapacitation or other major life crisis, pursuit of other remedies, and genuine ignorance of human rights law or procedure. (underlining added)
3. Length of the delay. A lengthy delay may adversely reflect on the complainant's good faith. Depending on the circumstances a lengthy delay may also be likely to result in prejudice to the respondent.
4. Substantial prejudice for the respondent, including the unavailability of records, the disappearance of witnesses, the deterioration of evidence, or other evidentiary disadvantages which deny the respondent the opportunity to adequately answer the complaint.

#### Mr. Kwong's Evidence:

Mr. Kwong is of Chinese ancestry. He came to Canada in 1983. He arrived in the Northwest Territories in 1988 and obtained the position of Area Comptroller with the Government of the Northwest Territories ('GNWT') Department of Finance. As a Comptroller, he was considered "management". He was not during any material times mentioned in these proceedings represented by a Labour Union. Mr. Kwong testified that he speaks, writes and reads the English language and that although he has what he described as "impaired hearing" he did not believe that it was the source of any misunderstanding that arose during the course of his communications with the Director's office.

According to the written Complaint prepared by Mr. Kwong, he was one of six regional comptrollers the other five of whom were "White". He stated that each comptroller's position had "virtually the same" qualifications and responsibilities yet he remained two pay levels below them when he was hired. In 1989 he was upgraded to one pay level below the other comptrollers. He stated that his supervisor at the time treated him differently both in terms of communications with him and in relation to his salary because of his ethnic origin.

Mr. Kwong's Complaint also states that in 1993, despite a departmental reorganization resulting in increased duties and functions and despite his peer comptrollers receiving a three level increase in pay, his own pay level was increased just two levels leaving him two pay levels behind the other comptrollers.

Mr. Kwong's Complaint further states that he raised the alleged inequity between his and his fellow comptroller's pay and the lack of retroactive pay with his new supervisor. The supervisor told him that both would be reviewed "in the future". Mr. Kwong said that his requests for action were "ignored" because of his ethnic origin.

In December of 2004, Mr. Kwong finally achieved "pay equity" with his fellow comptrollers. The effective date of the change in pay was August 31<sup>st</sup>, 2004. Thus Mr. Kwong received four months retroactive pay.

Mr. Kwong states in his Complaint that he raised the issue of what he felt was the inadequacy of the retroactive pay with his supervisor who said the decision was made – not by him – but by a “Senior Management Committee”.

Under oath, Mr. Kwong stated that he left employment with the Respondent in December 2005 however he continued to receive a salary until January, 2007 when he was “laid-off” and received (an undisclosed amount of) severance pay. He testified that he moved his family – consisting of his wife, his elderly mother and his teenaged son – to Vancouver in March of 2006. The relocation and several months thereafter was a busy time for Mr. Kwong. He had to find employment (which he did in April), he was busy renovating his new home and his wife had some health problems at the time (he took her five times to the Tuberculosis clinic during the first six months of their arrival). In addition, he was caring for his elderly mother and getting his son settled into a new school.

Mr. Kwong testified that he called the Commissioner of Human Rights office (which is also the office of the Director of Human Rights) in February or March of 2006 and spoke to “a lady” who encouraged him to provide more information to her. He was told by her that he had two years from the date of termination of his employment with the Respondent to file a human rights complaint.

Mr. Kwong’s written complaint says that he asked the Financial Management Board Secretariat in September of 2007 “to review [his] pay files to determine the amount of salaries owed to [him] however [he] was declined”. He then initiated correspondence with the Director’s office in December of 2007 claiming that his pay equity rights had been breached. As demonstrated by the Record, Mr. Kwong finally filed the forms necessary to initiate the complaint process on February 20<sup>th</sup>, 2008.

On cross-examination Mr. Kwong’s evidence was that in his telephone communications with the Director’s office prior to initiating the complaint process (before December 21<sup>st</sup>, 2007) he did not mention the advice he allegedly received in February or March of 2006 about the limitation period because he did not want to jeopardize his relationship with the Human Rights Commission. He felt that criticizing or embarrassing the Director’s staff might adversely affect any decisions they might make.

He also testified that before he left his employment permanently in 2005, he made “many” verbal request to the Respondent for more back pay without success. According to Mr. Kwong, he last made a request to the Respondent for retroactive pay in September of 2007.

Mr. Kwong confirmed that he looked at the Human Rights Commission’s website where, in the “Complaint Guide”, the two year limitation period is mentioned. Mr. Kwong stated that he did not review the *Act* itself. He was aware of the two year limitation period, he said, because it was drawn to his attention by the person he spoke to in the Director’s office in February or March of 2006. He kept no notes of that telephone

conversation, could not remember the date with any precision but remembered what was said.

Mr. Kwong's wife gave evidence to the effect that she was present during the 2006 and December 2007 conversations that Mr. Kwong had with the Director's offices. However Mrs. Kwong did not hear what was said by anyone other than Mr. Kwong and could not say to whom Mr. Kwong had spoken. She recalled, though, that Mr. Kwong was told during the 2006 conversation that he had two years from the date of his termination of employment to file a complaint.

Mrs. Kwong declined to give any further details about how the family – and Mr. Kwong in particular – were affected by the relocation to Vancouver in 2006.

### **The Standard of Review**

Legal Counsel for the Respondent, Ms. Lajoie, referred me to two cases to assist me in determining the correct standard of review on appeals under the *Act*: *Dunsmuir v. New Brunswick* 2008 SCC 9 (CanLII); and *Diavik Diamond Mines Inc. v. Boullard et al*, 2007 NWTSC 83.

In *Boullard*, Vertes, J., after reviewing the law relating to the judicial review of a decision made by the Director of Human Rights to send a complaint to a hearing, found that the correct standard of review by a court was reasonableness *simpliciter*. The court also noted (at para. 31) that:

The jurisprudence is clear that the courts should not interfere with the exercise of a discretion by a statutory decision-maker merely because the court might have exercised the discretion in a different manner. Where statutory authority has been exercised in good faith and in accordance with the principles of natural justice and where reliance has not been placed on extraneous or irrelevant considerations then a court should not interfere: *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817 (at para. 53).

In the recent case of *Dunsmuir*, the majority of the Supreme Court of Canada determined that there are only two standards for judicial review: correctness and reasonableness.

“Correctness” would apply when a reviewing court was charged with reviewing jurisdictional matters and questions of law decided by the agency below. The reviewing court would not be required to exercise deference to the decision-maker below in those circumstances.

“Reasonableness”, the court stated, would apply in other circumstances and Ms. Lajoie urged me to apply that standard in the manner contemplated in *Dunsmuir* in this case. My attention was drawn to para. 47 of the case which states:

[47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable

conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

I also note that the majority in *Dunsmuir* agreed with previous decisions of the court which found that where the question under consideration on judicial review involves the exercise of a discretion, “deference [to the decision-maker below, e.g. the Director] will usually apply automatically”: e.g. *Canada (Attorney General) v. Mossop* 1993 CanLII 164 (S.C.C.).

In addition to the latter cases, I have reviewed the decision of Schuler, J. in *Aurora College v. Marie Niziol and Therese Boullard*, 2007 NWTSC 34, in which the court determined that the standard of review applicable to an appeal under s. 45 of the *Act* is “reasonableness”.

In *Niziol* (paras. 30 and 31) Schuler, J. reviewed the role of adjudicators on appeal. Her finding was that the appellate role of adjudicators is broader than that of a court on judicial review:

All of this suggests that the s. 45 appeal is similar to an “appeal by way of rehearing”, where the adjudicator is not limited to a scrutiny of the Director’s decision but should form his own judgment on the issues, as in an appeal under the *Residential Tenancies Act*...so described by Vertes J. in *Inuvik Housing Authority v. Kendi* 2005 NWTSC 46.

Although the adjudicator under the Northwest Territories *Human Rights Act* has to be mindful of the fact that he is sitting on an appeal and is not considering the matter at first instance, a wider scope is appropriate for his role than that of a Court because he is the final level of appeal within the administrative scheme. As Berger J. noted... “the human rights dispute process... is promoted if access is facilitated rather than impeded or deterred”... (underlining added)

Indeed the remedial powers of an adjudicator on appeal confirm that broader role and authority that adjudicator’s enjoy vs. that of a court on judicial review:

62. (5) The adjudicator may, on hearing an appeal made under section 45,
  - (a) make an order that affirms, reverses or modifies the dismissal; and
  - (b) provide any direction that he or she considers necessary.

The Director’s decision to dismiss a complaint may be an administrative, gate-keeping function for which a measure of deference is appropriate however the circumstances relating to each appeal bear careful scrutiny because such decisions may foreclose complainants and possibly others affected by their complaints from pursuing remedial action that is consistent with the statutory objective to “promote respect for and observance of human rights in the Northwest Territories” (Preamble to the *Act*, para. 3).

Taking into account the discretionary authority given to the Director under section 29(3), and the facts in this particular case, I have decided that the standard of review is “reasonableness”.

### **Was the Director’s decision “reasonable”?**

I am satisfied that the allegations of Mr. Kwong do not constitute a situation of continuing discrimination so in my view the Director chose the correct time period for the application of the statutory limitation. Nor do any denials by his former employer to reconsider or revisit his entitlement to retroactive pay after December, 2004 amount to new instances of discrimination: *Greenwood v. Alberta (Workers’ Compensation Board)* [2001] 4 W.W.R. 145; *Re: the Queen in Right of Manitoba and Manitoba Human Rights Commission* (1984) 2 D.L.R. 4<sup>th</sup> @759. If discrimination of the kind described by Mr. Kwong in his complaint actually occurred, the contravention occurred in December 2004.

Having determined that the two year limitation period began to run in December 2004, the Director then reviewed the documents which form the Record to this decision. As far as I can tell, the Director’s review of the Record represents the entire extent of the review and inquiry (under section 30(1) of the *Act*) made in this case.

The Director concluded that more than three years had elapsed since the alleged contravention of the *Act* had occurred. She stated that Mr. Kwong gave her “no information” as to why Mr. Kwong was “unable” for the two years following December 2004 to contact the Director’s offices “to discuss the timelines to file [his] complaint”. Although I note that there was at least some information in Mr. Kwong’s February 20<sup>th</sup>, 2008 letter indicating that he had been “busy” following his relocation to British Columbia, there was very little detail. Most of his letter refers to what he stated was his “misunderstanding” of the two year time limit.

In short: the reason that the Director dismissed Mr. Kwong’s complaint was because of the expiry of the two year limitation period and the failure of Mr. Kwong to satisfy her “that the delay in filing the complaint ...was incurred in good faith” under section 29(3) of the *Act*.

Based on what the Director considered in reaching her decision to dismiss Mr. Kwong’s complaint I am not able to say that the Director’s decision is “unreasonable”. However in this case the very reason for Mr. Kwong’s appeal was not because he did not “misunderstand” the limitation period rather he said he was misinformed about it by a member of the Director’s staff. Consequently I need to determine whether the new evidence presented in his Notice of Appeal is admissible on this appeal. If not, the decision of the Director will stand; if so, I will need to consider the impact of that evidence on the reasonableness of the decision.

## New Evidence on Appeal

As noted above, section 56 of the *Act* gives adjudicators broad discretion in deciding what rules of evidence are applicable at hearings. That discretion was confirmed in the *Niziol* case, *infra*, at para. 29.

“New” (sometimes called “fresh”) evidence is factual information that is raised for the first time on an appeal, i.e. evidence which was not raised before the Director, the decision-maker below. In this case the new evidence is contained in Mr. Kwong’s Notice of Appeal where he says that the reason for his appeal is that he received advice from the “Human Rights Commission Office” (the Office of the Director) in February or March of 2006 from an HRO. The advice he received was that he had two years from the date of termination of his employment to file a complaint with the Commission. That advice effectively challenges the finding made by the Director that “...it has been at least three years from the time the alleged discrimination last occurred until [he] contacted [the Director’s] office”.

There were three prehearing conferences held in this matter. Neither the Director nor the Respondent indicated that they would oppose the admissibility of the new evidence presented by Mr. Kwong set out in his Appeal. At the hearing, the focus of submissions made by legal counsel for the Respondent was on the question of the standard of review and the reasonableness of the Director’s decision (and Mr. Kwong’s credibility which I will deal with below).

Nonetheless I cannot overlook the guidance that the Supreme Court of Canada has given courts and tribunals with appellate jurisdiction when it comes to receiving “new evidence”.

The rules relating to the exercise of discretion to admit fresh or “new evidence” were stated in *Palmer v. The Queen* [1980] 1 S.C.R. 783:

1. The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in a civil case...
2. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
3. The evidence must be credible in the sense that it is reasonably capable of belief, and
4. It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

While *Palmer* dealt with a criminal matter, the rules have been applied in civil and administrative law cases, *Janz vs. Labour Standards Board et al* [2002] W.W.R. 305, *Dechant v. The Law Society of Alberta*, 2000 ABCA 265).

I am satisfied that on applications to introduce new or fresh evidence, generally, that the considerations set out in *Palmer* are an appropriate guide for an adjudicator to use in deciding whether to admit new evidence on an appeal or not bearing in mind the broad

discretion given to adjudicators in s. 56 of the *Act*, infra, and the remedial purposes of Human Rights legislation generally.

I note that in *Palmer*, McIntyre, J. made specific reference to the (then) criminal code provision [section 610(1)(d)] which allowed the admission of “new evidence” when it was “in the interests of justice”. McIntyre, J. said:

Parliament has given the Court of Appeal a broad discretion in s. 610(1)(d). The overriding consideration must be in the words of the enactment “the interests of justice” and it would not serve the interests of justice to permit any witness by simply repudiating or changing his trial evidence to reopen trials at will to the general detriment of the administration of justice.

In my view the overriding consideration of the “interests of the administration of justice” encompasses, in the context of appeals under the *Act*, considerations like the effect of disallowing new evidence on the “public interest” aspect of a case (particularly where there are allegations of institutional or systemic discrimination) and where new evidence suggests that procedural rights may have been breached.

In applying the principles in *Palmer* to this case, I am satisfied that if the evidence contained in Mr. Kwong’s Notice of Appeal had been presented to the Director before her decision was made it could have changed her decision decisively. Certainly if her subsequent section 30 review and inquiry had confirmed his allegations or raised doubts about advice he received from an HRO, that would have been considered on the question of “good faith” under section 29 (3) of the *Act*.

I am also satisfied that if Mr. Kwong’s decision not to draw the allegedly bad advice of the HRO was a tactical decision which, if true, would excuse any lack of diligence in bringing that advice to the attention of the Director, on his part (*R. v. Maciel* 2007 ONCA 196 CanLII). Consequently the principal factor in this case that bears consideration is whether the evidence of Mr. Kwong is “reasonably capable of belief”.

The Ontario Court of Appeal in *R. v. Babinski* (1999) 135 C.C.C. (3<sup>rd</sup>), para 55, considered how the expression “reasonably capable of belief” might be applied by appeal courts:

(55) In my view, the credibility requirement is expressed in these terms because the advantage and expertise of an appellate court lies in its reviewing function rather than as the primary fact-finder. In some cases, the court of appeal may be satisfied, based on its own assessment of the proposed fresh evidence, that it is truthful and reliable. On the other hand, in many cases, the court, while unable to make that determination, may also be unable to reject the evidence as not credible. Such evidence is, in my view, reasonably capable of belief within the meaning of the third *Palmer* requirement. It should not be rejected at the credibility stage, since evidence that is not rejected as incredible is still capable of affecting a verdict in a criminal case.

### **The submissions of the Respondent**

The Respondent’s cross examination of Mr. Kwong demonstrated that Mr. Kwong could not recall the details of the alleged conversation with an HRO. The Respondent argued

that there was “no tangible evidence” of who Mr. Kwong spoke to or what was said. It was submitted that Mr. Kwong was a “well educated man” and knew or ought to have known that the limitation period had expired when he filed his complaint. On the other hand, the Respondent argued that the Director’s staff had procedures in place – based on the Training Manual – that would ensure that if Mr. Kwong called, he would have received correct information.

### **Is Mr. Kwong’s Evidence Reasonably Capable of Belief?**

Upon review of the Record, the evidence given at the hearing of this appeal and the submissions of the Respondent and Mr. Kwong, I am of the view that Mr. Kwong’s evidence is reasonably capable of belief. I do so in part because Mr. Kwong’s solemnly affirmed evidence is essentially uncontradicted.

The Director’s evidence (and the submissions of the Respondent’s legal counsel) suggested that I should draw an adverse inference based on the existence of the Training Manual which was in the hands of the Director’s staff in 2006. It contains information about the limitations provisions in the Act. The adverse inference would be that Mr. Kwong misunderstood what advice he was given (which is what he stated in his letter requesting an extension of the limitation period).

However I find Mr. Kwong’s evidence of the conversation he had with an HRO in the spring of 2006 believable. I do not find any contradiction in the evidence of the Director. The evidence of the Director was quite candid on the state of her office in the spring of 2006: just two staff members, one of whom was a recently backfilled position and the highest volume of telephone inquiries to date. Neither the Director nor her staff kept records of those calls regardless of what the nature of the inquiries were nor the responses given. Nothing was adduced in her evidence – nor in the training manual subsequently produced - that would lead me to believe that a communication error did not occur nor indeed was unlikely to occur during the relevant period of time.

Further, Mr. Kwong’s first letter to the Commission, dated December 21<sup>st</sup>, 2007, disclosed the date of December 2004 as being the date upon which the discriminatory conduct took place. The response of the Human Rights Officer – which reiterated the details of Mr. Kwong’s complaint based on a conversation with him – asked Mr. Kwong to clarify the grounds upon which his claim was based. The HRO did not raise the limitation issue at all at that time. That issue was not brought to Mr. Kwong’s attention until three weeks later in another request made by the Human Rights Officer. I infer from that evidence that the significance of the limitations provisions in the *Act* – including the effect of the passage of time on an application for an extension of the limitation period - may very well not have been fully understood by the Director’s staff at the material time.

I also find that the new evidence is reasonably capable of belief in part because while Mr. Kwong could not recall all of the details of the actual conversation with the HRO in the spring of 2006, his recollection of the advice he received was specifically related to the

termination of his employment. It is difficult to imagine that Mr. Kwong could have made the connection between the termination of his employment and the commencement of the limitation period without the assistance of someone in the Director's offices. There is no specific reference to limitation periods in relation to discrimination in employment on the website that Mr. Kwong looked at.

Finally, I find his reason for not disclosing the telephone conversation in his February 20<sup>th</sup> letter to the Human Rights Officer – and taking responsibility for misunderstanding the limitation period – is believable. I observed that during the presentation of his evidence, when he offered the opinion that the HRO may not have given him the correct procedural advice, he spoke in an almost whispered tone. Mr. Kwong was, even then, reluctant to be critical of the Director's staff.

I must also observe that had the Director's office followed up with the obvious question arising from Mr. Kwong's February 20<sup>th</sup>, 2008 statement to the effect that after being laid off he was "thinking that [he] would have two years on termination of employment to file [his] complaint", e.g. by asking why he thought that was the case, the Director might have discovered and dealt with the "fresh evidence" then rather than now.

In my view, the preponderance of probabilities that emerged from the evidence that I heard in this case suggest that Mr. Kwong's evidence is credible: *Faryna v. Chorny* [1952] 2 D.L.R. @354.

In any event, having found the new evidence admissible, I must decide what to do with it.

### **The Effect of the New Evidence on the Appeal**

The reason that Mr. Kwong's complaint was dismissed was because his application to extend the time for filing a complaint was denied; the application was denied because of what the Director found to be a lack of "information" as to why he was "unable to exercise [his] option" to contact the Director's offices within the limitation period. However I have decided that the new evidence is believable and admissible on this appeal. The new evidence is that Mr. Kwong had contact with the Director's office in the spring of 2006 and received advice that resulted in his failure to file his complaint within the two year limitation period.

The Record shows that Mr. Kwong's complaint arose in December 2004. He filed a complaint in the Director's office on or about the 20<sup>th</sup> of February 2008. Since more than three years have passed since the complaint arose, I am going to make a direction that I believe is necessary to ensure the continuity of these proceedings and facilitate a reasonably expeditious conclusion to Mr. Kwong's application for an extension of the limitation period.

Under the circumstances, I reverse the decision of the Director and allow Mr. Kwong's request to extend the time for filing his complaint subject to the Respondent having the opportunity to demonstrate in written argument to me that the extension should not be

granted because it will substantially prejudice someone: section 29(3) of the *Act*. The Respondent shall have thirty (30) days from the date of this decision to do so. Mr. Kwong may have ten days from the date of service of the said written argument upon him to respond, if he wishes. If he chooses not to respond, he is directed to let the Adjudication Panel Office know immediately to facilitate the earliest possible decision on the matter.

Once I have received the written arguments of the parties I will decide the issue in question and render a written decision.

Dated this 17<sup>th</sup> day of November, 2008

**James R. Posynick**  
**Member, Adjudication Panel**

## Appendix I

1. Letter dated December 21, 2007 from Mr. Kwong to the Chair, NWT Human Rights Commission.
2. Letter dated December 21, 2007 from the NWT Human Rights Commission to Mr. Kwong.
3. Letter dated January 2, 2008 from Mr. Kwong to the NWT Human Rights Commission.
4. Letter dated January 24, 2008 from the NWT Human Rights Commission to Mr. Kwong.
5. Letter dated February 11, 2008 from the NWT Human Rights Commission to Mr. Kwong.
6. Letter dated February 20, 2008 from Mr. Kwong to the NWT Human Rights Commission.
7. Letter dated March 18, 2008 from the Director of Human Rights, Therese Boullard, to Brian Kwong.
8. Memorandum from the NWT Human Rights Commission dated April 3, 2008 to file regarding returned registered letter
9. Registered mail receipt dated April 15, 2008 confirming delivery of April 7, 2008 letter.
10. Letter dated May 23, 2008 from the Director of Human Rights, Therese Boullard, to Jim Posynick, Chair of the Adjudication Panel.
11. Prehearing Memorandum from June 12, 2008.
12. Prehearing Memorandum from July 2, 2008.
13. Prehearing Memorandum from July 11, 2008.
14. Letter dated July 17, 2008 from Therese Boullard, Director of Human Rights to Jim Posynick, Chair of the Adjudication Panel, with a four page attachment from the Training Manual.