

IN THE MATTER OF the  
*Human Rights Act*, S.N.W.T., 2002, C.18, as amended

BETWEEN:

MORENO LODOVICI

Complainant

-and-

WAM DEVELOPMENT CORPORATION

Respondent

-and-

THERESE BOULLARD (DIRECTOR), NORTHWEST TERRITORIES  
HUMAN RIGHTS COMMISSION

Party

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DECISION

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## **Background**

[1] This is an appeal from the decision of the Director of Human Rights (the “Director”) dated August 26, 2009. The Director chose not to participate in this appeal and no submissions were made on behalf of the Director.

[2] The Complainant operated a store of 450 square feet called Tiger Sports Cards and Collectibles in Yellowknife Centre Mall in Yellowknife, Northwest Territories from 1996 until October 2006.

[3] In June 2004, the Respondent WAM Development Corporation (“WAM”) purchased the Yellowknife Centre Mall and commenced a redevelopment of the mall which included the space rented by Mr. Lodovici for his business.

[4] In October 2006, the Respondent terminated the Complainant's lease.

[5] Mr. Lodovici filed a complaint (the “Complaint”) with the Northwest Territories Human Rights Commission (the “Commission”) dated November 7, 2006. In the Complaint he alleged WAM discriminated against him on the basis of his association with individuals identified by race, ancestry and social condition.

[6] The Complaint was referred to an investigator (the “Investigator”) who conducted an investigation of the Complaint. The Investigator interviewed Mr. Lodovici who stated that the majority of his customers were aboriginal and young. He had a series of discussions with WAM about leasing options over a period of several years but the discussions did not result in a long term rental agreement. Mr. Lodovici said that in a conversation with Kelly Hayden, Vice President of WAM, he was advised that his lease would not be renewed because his business “attracted undesirable people”, a comment Mr. Lodovici took to mean his aboriginal or poor customers. Mr. Ludovici said these comments along with his other dealings with WAM lead him to believe he was discriminated against because of his association with individuals of a particular race, ancestry or social condition.

[7] The Investigator also interviewed Kelly Hayden who stated that WAM leased space to many businesses with an aboriginal focus and did not discriminate. He stated that the mall had a number of security and fire code issues and that a reconfiguration of the mall was planned which included the space leased by Mr. Lodovici. He went on to state that Mr. Lodovici did not have the volume of business to pay the new rent and other leasing alternatives were suggested in several meetings. He did acknowledge that those who are intoxicated, violent or engage in criminal activity and who create an unsafe shopping environment were of concern to WAM but denied that he used the word “undesirables” in referring to Mr. Lodovici’s customers. The Investigator also interviewed the owner of another business in the mall, a Mr. Crozier, who felt that WAM didn’t want kids or poor people in the mall, but was unsure whether WAM wanted to exclude aboriginals. The Investigator in her report concluded there was not a reasonable basis to link the termination of the lease and the inability to provide the complainant with appropriate rental space with the race, ancestry or social condition of Mr. Lodovici’s customers.

[8] The Director received the report of the Investigator, conducted a review of Mr. Lodovici’s Complaint, and responded to him by letter on August 26, 2009. The Director found that there was evidence that WAM wished to get rid of “undesirable” visitors to the mall and took several measures to change the environment, such as removing benches and pay phones, keying washroom doors and redeveloping the mall. The Director concluded that although there were differing interpretations as to the definition of “undesirables” there was no evidence that WAM wanted to get rid of Mr. Lodovici’s business and had offered alternative space in the mall, including the option of sharing space with another tenant. The Director noted that Mr. Lodovici’s business was not the only business impacted by WAM’s redevelopment plan. She found the allegations were not within the scope of the Northwest Territories *Human Rights Act* (the “Act”) or lacked any reasonable evidence or information to support them and dismissed the Complaint pursuant to Section 44(1) (c) of the Act.

[9] Mr. Lodovici filed an appeal of the Director's dismissal with the Human Rights Adjudication Panel ("HRAP") on September 21, 2009.

[10] Appeal Briefs were filed by legal counsel for both Mr. Lodovici and WAM.

[11] After several teleconferences this matter was heard in Yellowknife on January 9, 2014, before an Adjudicator at which time no additional evidence was submitted and oral submissions were made by legal counsel for both parties. The Adjudicator was unable to complete this matter and in late 2014, the Chair of HRAP, requested that I complete the matter. Both parties were advised of the change of Adjudicator and asked to express concerns, if any. No objections were received and I allowed the parties to make additional written submissions on the merits of the case. Counsel for Mr. Lodovici made additional submissions mainly dealing with clerical errors in the transcript of the hearing of January 9, 2014.

[12] The list of documents considered by me is annexed as Appendix "A" to this decision.

[13] Sections 5(1), 5(3), 6, and 12(1) of the Act state as follows:

5. (1) For the purposes of this Act, the prohibited grounds of discrimination are race, colour, ancestry, nationality, ethnic origin, place of origin, creed, religion, age, disability, sex, sexual orientation, gender identity, marital status, family status, family affiliation, political belief, political association, social condition and a conviction for which a pardon has been granted.

5. (3) Whenever this Act protects an individual from discrimination on the basis of a prohibited ground of discrimination, it also protects the individual from discrimination on the basis of

(a) two or more prohibited grounds of discrimination or the effect of a combination of prohibited grounds; and

(b) the individual's association or relationship, whether actual or presumed, with an individual or class of individuals identified by a prohibited ground of discrimination.

6. Discrimination in contravention of this Act does not require an intention to discriminate.

12. (1) No person shall, on the basis of a prohibited ground of discrimination and without a *bona fide* and reasonable justification,

(a) deny to any individual or class of individuals the right to occupy as a tenant any commercial unit or self-contained dwelling unit that is advertised or otherwise in any way represented as being available for occupancy by a tenant; or

(b) discriminate against any individual or class of individuals with respect to any term or condition or occupancy of any commercial unit or self-contained dwelling unit.

[14] Section 30 (1) of the Act requires the Director to conduct a review and inquiry into complaints to the extent that the Director determines such review and inquiry is warranted and Section 30 (3) requires the Director give notice of complaints to the party complained of unless the Director decides to dismiss the complaint under section 44.

[15] Section 44 (1) of the Act allows the Director to dismiss complaints for several reasons including (a) where the Act does not provide the jurisdiction to deal with the complaint, (b) where the acts or omissions are not covered by the Act and, (c) where the complaint is determined to be trivial, frivolous, vexatious or made in bad faith. Section 44 (2) requires the Director to give notice to the parties of any dismissal and the reason for dismissal. Section 45 allows the filing of an appeal for the Director's decision to dismiss a complaint.

[16] Section 62 (5) of the Act allows adjudicators to hear appeals from the Director's decisions and make orders affirming, reversing or modifying decisions of the Director.

## The Position of the Parties

[17] The Appeal Brief filed by legal counsel on behalf of Mr. Lodovici requests a hearing in this matter for the following reasons:

- The Investigator of this matter for the Northwest Territories Human Rights Commission did not give proper attention to a critical factual aspect of the Complaint. The Investigator had a duty to act fairly by considering and properly exploring all relevant facts. Her improper attention to this critical factual aspect abrogated that duty, resulted in an improper investigation, and thereby violated the Complainant's right to procedural fairness. As the investigation was incomplete, the Investigator's Report was also incomplete. The Investigator's error, and ultimately her incomplete report, had a significant (negative) impact on the Director's decision not to refer this matter to a hearing.
- The Director, had she known of the Investigator's error, would not have been able to dismiss this matter without a hearing. Alternatively, as the initial gatekeeper for Complaints under the NWT Human Rights Act (the "Act"), the Director had an independent duty to find the Investigator's obvious, critical error and either address or eliminate it, but failed to do so. The Director compounded the Investigator's error and further abrogated the Complainant's right to procedural fairness.
- The Director – by improperly weighing evidence – crossed the line and went outside her low threshold gatekeeper role and into the realm of the role of an adjudicator. In so doing, the Director erred by overstepping the discretionary authority given to her under the Act.

WAM's position as set out in the Appeal Brief filed by their legal counsel is that:

- the correct standard of review is reasonableness
- the decision of the Director was reasonable
- there was no breach of procedural fairness

- the Director made an assessment of the evidence before her and did not make findings of credibility

[18] At a hearing held in Yellowknife in January 2014, Mr. Lodovici's counsel submitted that apart from the issues raised in the initial Complaint, HRAP should consider another ground of discrimination that had not been properly addressed - discrimination on the basis of age. Counsel for WAM submitted that as the original complaint did not include age as a ground and as the Investigator had considered whether children fit within the definition of social condition and determined they did not, that this issue should not be considered. Counsel for WAM also submitted that if the failure to properly consider this issue is critical the issue should be referred back to the Investigator for further investigation.

## **Decision**

[19] The Supreme Court of Canada, in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 suggests that the process of determining the appropriate standard of review involved first ascertaining whether the existing jurisprudence has already determined the appropriate standard of review. A decision maker can undertake an analysis to determine the standard of review, if the existing jurisprudence does not provide the standard of review, of the following factors: the presence of absence of a private clause or statutory right of appeal; the nature of the issue decided by the tribunal (the expertise of the tribunal relative to that of the reviewing court), the purpose of the legislation and the provision in particular.

[20] The Supreme Court of Canada decision in *Dunsmuir* articulated two standards for the review of the merits of a tribunal decision:

- (1) Correctness: The tribunal's interpretation of questions of law must be correct.
- (2) Reasonableness: A court will not interfere with decisions that are reasonable. Reasonableness is concerned with justification, transparency

and intelligibility of the decision-making process and whether the decision falls within a range of possible and acceptable outcomes which are defensible.

[21] I have reviewed the case of *Aurora College v. Marie Niziol and Therese Boullard*, 2007 NWTSC 34 in which the Court determined that the standard of review under s.45 of the Act is “reasonableness”. Justice Schuler reviewed the role of adjudicators on appeal and stated as follows:

*“On the other hand, the adjudicator on appeal from the Director’s dismissal of a complaint has the powers of a Board appointed under the Public Inquiries Act to compel witnesses and production of documents [s.59]. Therefore, the adjudicator has broader powers than the Director in this regard, bearing in mind that the adjudicator’s task on such an appeal is not to adjudicate on the merits of the complaint, but only to decide whether it should have been dismissed by the Director. The appeal is not limited to the record that was before the Director; the adjudicator can hear new or other evidence: ss.52, 56, and 59. The adjudicator may, on hearing an appeal, affirm, reverse or modify the Director’s decision and provide any direction that he or she considers necessary: s. 62(5). Thus, the adjudicator’s decision also involves discretion.*

*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 judgement on the issues.”*

[22] I conclude from the Niziol case that I may in dealing with this appeal consider issues other than those dealt with by the Director including the issue raised by Mr. Lodovici’s counsel concerning the issue of young people who were customers of Mr. Lodovici and whose social condition (youth) in his view may have led to discrimination against Mr. Lodovici. Counsel for Mr. Lodovici notes that the Investigator in her report stated that *“In my opinion, while people who are homeless or perceived as “street people” may fit the definition of social condition, children as a group do not.”*



Counsel for Mr. Lodovici submits that a distinction should be drawn between children and youth and that youth could be considered a social group who WAM discriminated against leading to the termination of the lease. While I accept that youth could be a social group who could face discrimination, I find no evidence that any such discrimination existed and considerable evidence to the contrary (the offering of other space to Mr. Lodovici and the nature of the business of other tenants in the mall who catered to a wide variety of customers).

[23] The burden that Mr. Lodovici must discharge to proceed to a hearing has a low threshold of a prima facie case; that is some evidence to proceed to a hearing. While the burden is low complainants must be able to link the facts and circumstances to one of the grounds prohibited under section 5 of the Act.

[24] I must consider whether the decision is consistent with relevant legal principles, is logical and makes sense. I do not have to decide whether the decision was “correct”.

[25] In the case of *Diavik Diamond Mines Inc. v Boullard et al* 2007 NWTSC 83 Justice Vertes stated in dealing with a complainant’s evidence:

*“The respondent’s evidence is not to be ignored but, in determining whether there is sufficient merit in the case to take it above the trivial and frivolous threshold, the focus has to be on the complainant’s evidence. And it is not just any evidence, it is reasonable evidence (paragraph 44).”*

[26] The Director found the termination of Mr. Lodovici’s lease was not linked to any ground of discrimination and there was no connection between the termination and the racial or ethnic background or wealth of Mr. Lodovici’s customers. After reviewing the Investigator’s extensive report the Director found that WAM made efforts to accommodate Mr. Lodovici and accepted evidence that WAM’s changes to the mall impacted negatively various types of businesses with varying clienteles. References by employees of WAM to undesirables were capable of differing interpretations but the Director found that the information before her did not support the allegation that WAM

wanted to get rid of Mr. Lodovici's business. The Director concluded there was no information on file, apart from Mr. Lodovici's assertion, to support the allegation Mr. Lodovici's business was targeted for eviction because his client base was mostly aboriginal or poor.

[27] The Supreme Court of Canada in *Dunsmuir* provided clarification of the issue of reasonableness which is concerned with justification, transparency and intelligibility. The investigation and subsequent Director's decision were made after a thorough examination of the Complaint. The Director's decision analysed the Complaint, the response to the Complaint, the report of the Investigator and carefully addressed the relevant evidence as well as the provisions of the Act.

[28] Counsel for Mr. Lodovici submitted in his brief that the Director weighed the evidence and made findings of credibility. As noted above there must be reasonable evidence to proceed to a hearing and Mr. Lodovici's assertion that a comment a representative of WAM may have made, unsupported by any other evidence and which is capable of several interpretations, constituted discrimination, is not reasonable evidence. The Director found that the termination of Mr. Ludovici's lease was not linked to a ground of discrimination and the finding was not based on an evaluation of his credibility, but rather on the lack of any reasonable evidence.

[29] I affirm the Director's decision to dismiss the complaint.

[30] Costs may be awarded in limited circumstances pursuant to s.63 of the Act. Costs were not requested and I make no order for costs.

DATED at the Town of Fort Smith in the Northwest Territories this 29<sup>th</sup> day of November, 2015.

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Louis Sebert, Adjudicator

