

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

DIAVIK DIAMOND MINES INC.

Applicant

- and -

THERESE BOULLARD in her capacity as
DIRECTOR OF HUMAN RIGHTS and
PETER HUSKEY

Respondents

Application for judicial review and an order quashing a decision of the Director of Human Rights. Application dismissed.

Heard at Yellowknife, NT, on October 3, 2007.

Reasons filed: October 16, 2007.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z. VERTES

Counsel for the Applicant: Paul N.K. Smith

Counsel for the Respondent
(Director of Human Rights): Kristan A. McLeod

The Respondent, Peter Huskey, appeared in person.

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REASONS FOR JUDGMENT

[1] The applicant, Diavik Diamond Mines Inc., seeks judicial review and an order quashing the decision of the Director of Human Rights, dated March 5, 2007, directing that a complaint filed by Mr. Peter Huskey proceed to a hearing before an adjudication panel of the Northwest Territories Human Rights Commission. The applicant raises issues of procedural fairness, abuse of discretion and errors of law. For the reasons that follow, the application is dismissed.

[2] Because this application arises in the context of the legislative framework established by the *Human Rights Act*, S.N.W.T. 2002, c.18, it is necessary to set out how the complaints and adjudicative provisions of the Act operate.

Legislative Framework:

[3] The purpose of the *Human Rights Act* is to promote respect for and observance of human rights in the Northwest Territories. To achieve that purpose it sets out

prohibitions against discrimination on the basis of various grounds, including in regard to employment.

[4] The Act establishes a Human Rights Commission to promote the principles underlying the Act and to advise the Legislative Assembly on human rights issues: s.20. The Act also provides for the appointment of a Director of Human Rights to carry out the responsibilities assigned by the Act: s. 23. The Director is appointed by the Commissioner of the Northwest Territories on the recommendation of the Legislative Assembly. While the Director does not need any particular professional qualification, he or she must be a person with “experience and an interest in, and a sensitivity to, human rights”: s. 23(2).

[5] The Act also creates an adjudication panel of at least three persons also appointed by the Commissioner on the recommendation of the Legislative Assembly: s.48(1). To be appointed as a member of the adjudication panel a person must have experience in, and sensitivity to, human rights and either be a lawyer or have had experience as a member of an administrative tribunal or a court: s.48(3).

[6] The Act is in many respects similar to human rights legislation in other Canadian jurisdictions in that it sets up a comprehensive scheme for the investigation and treatment of complaints of discrimination. Anyone complaining of a violation of the Act may file a complaint with the Commission. The Director must review and inquire into a complaint: s.30(1). The Director may attempt to settle the complaint by mediation or otherwise: s.33. The Director may refer a complaint for investigation by an investigator: s.35. In such a case the investigator has extensive powers to make inquiries and examine documents: s.36. The investigator prepares a report for the Director who must in turn provide a copy of it to the parties: s.41.

[7] The Director can dismiss a complaint under certain circumstances. This is set out in s.44(1) of the Act:

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) or initiated under subsection 29(4), unless the Director extends the time limit for filing the complaint or that part of the complaint under subsection 29(3).

[8] As can be seen, the grounds for dismissal are essentially either jurisdictional or limitations ones or where a complaint can be said to be “trivial, frivolous, vexatious or made in bad faith”. These terms are, of course, terms of art. So, for example, the terms “trivial” and “frivolous” are not to be equated with little likelihood of success. They refer instead to the lack of any apparent merit in the alleged complaint.

[9] It can also be seen that the power to dismiss is a discretionary one. The Director is not obligated to dismiss a complaint (although with respect to the jurisdictional grounds there may be less discretion than on other grounds). On the other hand, if the complaint is not dismissed under s.44(1) of the Act, the Director must refer the complaint to the adjudication panel for a hearing on the merits. This is found in s.46(1) of the Act:

46. (1) The Director shall refer a complaint to the adjudication panel for an adjudication if the Director is of the opinion that
- (a) the parties to the complaint are unable to settle the complaint; and
 - (b) the complaint should not be deferred under section 43 or dismissed under section 44.

[10] The power to dismiss under s.44(1) of the Act can be characterized as a “gatekeeping” role. Human rights statutes in most other Canadian jurisdictions have similar provisions (although the ambit of the dismissal power varies depending on the specific statute in question). In general, it is meant to screen out at a preliminary stage those complaints that are without any merit whatsoever.

[11] The issues in this case revolve around the question of what standard the Director should apply when considering to dismiss a complaint, particularly under the ground of the complaint being trivial or frivolous as provided by ss.41(1)(c).

[12] The Act has some other relevant provisions.

[13] If the Director dismisses a complaint, any party to the complaint may appeal the dismissal to the adjudication panel: s.45. There is no similar right of appeal of a decision to not dismiss a complaint at the preliminary screening stage.

[14] If a complaint is referred to the adjudication panel for hearing, then it is heard by a single adjudicator. The adjudicator has broad powers in the conduct of the hearing. An order of the adjudicator may be filed with the Supreme Court and may be enforced in like manner as an order of the court: s.64. There is a right of appeal to the Supreme Court from an order of an adjudicator whether that order is made in relation to a complaint after a hearing or an appeal from a decision to dismiss a complaint at the preliminary screening stage: s.66.

Chronology of Events:

[15] Mr. Huskey was employed by the applicant Diavik at its diamond mine north of Yellowknife. His employment was terminated in September 2005. On October 7, 2005, Mr. Huskey lodged a complaint with the Northwest Territories Human Rights Commission alleging discrimination on the basis of disability and family status (being two of the prohibited grounds of discrimination). Diavik responded to the complaint and, in March 2006, the Director of Human Rights appointed an investigator to investigate the matters referred to in the complaint.

[16] The investigator provided his report to the Director on July 14, 2006. In it he recommended that the complaint be dismissed (pursuant to ss.44(1)(c) of the Act) because the matters did not warrant further inquiry. The Director provided this report to the parties and gave them an opportunity to comment further.

[17] On March 5, 2007, the Director issued her decision to refer the complaint to an adjudication panel for a hearing. In her decision the Director reviewed the facts and information provided by the parties. She also analyzed, to a limited extent, the positions advanced by each. She noted that the decision to dismiss a complaint or to refer it to a panel is a preliminary decision. It does not decide whether any allegation of discrimination has been proven or that a violation of the Act has occurred. As she

phrased it in her decision: “It simply means that the issues raised in the complaint cannot be dismissed at a preliminary stage.”

[18] In her discussion of the decision-making function under s.44, the Director wrote:

In a recent, unpublished decision of the NWT Human Rights Adjudication Panel, the Panel Member directed the Director to consider the following principles when exercising this decision-making authority:

“... that *all of the circumstances* of a case must be considered; that there only be a *reasonable basis in the evidence* to proceed to a hearing; that the enquiry must be as to whether there is *any* (reasonable) evidence; that *regardless of the respondent's evidence*, if the evidentiary burden is discharged a hearing is warranted. (emphasis in original, underline added)”

[19] The Director concluded her decision as follows:

The investigator provided his opinion that DDMI [Diavik] did not discriminate based on disability when it reassigned Mr. Huskey from operator trainee to labourer. However, the decision on whether this action was or was not discriminatory is a decision that must be made at adjudication.

While DDMI provided compelling reasons to terminate Mr. Huskey's employment and to place him in the position of labourer, the threshold set by the Adjudication Panel states that *regardless of the respondent's evidence*, if Mr. Huskey discharges his evidentiary burden a hearing is warranted. It's my view that Mr. Huskey has discharged his evidentiary burden. [Emphasis in original].

[20] It is the Director's reference to, and reliance on, the above-quoted extract from an earlier, unpublished, decision of an adjudication panel that is at the heart of this judicial review application.

Issues:

[21] The applicant raised a number of issues in its brief but they can be reduced to the following:

1. Did the Director err in law when she applied the direction contained in the earlier decision of the adjudication panel? This requires a determination as to what should be the legal standard to be applied by the Director.
2. Did the Director commit jurisdictional error by following the earlier decision of the adjudicative panel and thereby fettering the discretion granted to her by s.44 of the Act?
3. Did the Director breach the requirements of procedural fairness by relying on an unpublished decision of the adjudication panel without first either notifying the parties of her intention to rely on the decision or giving the parties an opportunity to make submissions?
4. Was the Director's decision to refer the complaint to the adjudication panel, in the circumstances of this case, an unreasonable decision? This issue requires a determination of the appropriate standard of review.

Standard of Review:

[22] I will start my analysis of the issues with the question of the standard of review since we are instructed that, in every case where a court is called upon to review a decision by a statutory decision-maker, whether it is by way of an application for judicial review or a statutory right of appeal, the court must begin by determining the appropriate standard of review.

[23] The determination of the appropriate standard of review requires application of the pragmatic and functional approach described in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982. That approach focuses on the fundamental question of whether the issue before the statutory decision-maker was intended by the legislators to be left to the decision maker. This analytical approach requires an assessment of four contextual factors, none conclusive in itself: the presence or absence of a privative clause; the relative expertise of the decision-maker in question; the purpose of the legislation and the particular provision in issue; and, the nature of the problem (whether it is a question of law, fact, or mixed law and fact).

[24] In this case, counsel for the applicant and for the Director agree that the appropriate standard is one of reasonableness *simpliciter*. This is what has been

referred to as the mid-point on a spectrum of curial deference, ranging from patent unreasonableness at one end (being the most deferential standard of review), through reasonableness *simpliciter*, to correctness at the other end (being the most exacting standard). Reasonableness involves the court in an examination of the decision and determining whether the reasons, taken as a whole, support the decision. It is not a question of whether the court would have decided the same way: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 (at paras. 45-47).

[25] It is interesting that in Ontario, where its *Human Rights Code* has a provision (s.34) in essentially the same form as s.44 of the Northwest Territories statute, the weight of authority is that the standard of review is one of patent unreasonableness: *Losenno v. Ontario Human Rights Commission* (2005), 78 O.R. (3d) 161 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 531; *McLean v. Ontario Human Rights Commission*, [2006] O.J. No. 1216 (Div. Ct.). There are also some cases, however, that have applied the reasonableness standard: *Jazairi v. Ontario Human Rights Commission* (1997), 146 D.L.R. (4th) 297 (Div.Ct.), affirmed (1999), 175 D.L.R. (4th) 302 (Ont.C.A.); *Pritchard v. Ontario Human Rights Commission* (1999), 45 O.R. (3d) 97 (Div.Ct.).

[26] In this jurisdiction, the only case to date that has considered this question in relation to this statute is *Aurora College v. Niziol*, [2007] N.W.T.J.No. 37 (S.C.). That case was an appeal from a decision of the adjudicator on an appeal (under s.45 of the Act) of a decision by the Director to dismiss a complaint pursuant to s.44 of the Act. In the course of that judgment, Schuler J. had occasion to consider what was the proper standard of review to be employed by the adjudicator to the decision of the Director. She concluded that the standard is one of reasonableness (at para. 36).

[27] Notwithstanding the fact that counsel may agree on the standard of review, or that other cases, including a previous decision of this court, has determined the standard, there is still a need to conduct a fresh analysis in this case. The standard of review is a question of law dependant on the facts and circumstances of each case: *Monsanto Canada Inc. v. Ontario*, [2004] 3 S.C.R. 152; *Alberta (Workers' Compensation Board) v. Appeals Commission*, [2005] A.J. No. 1012 (C.A.).

[28] When I consider the relevant factors I am satisfied that a standard of reasonableness *simpliciter* is the appropriate one.

[29] The Act does not contain a privative clause but neither does it provide for an appeal from a Director's decision to refer a complaint to the adjudication panel. There is an appeal from a decision to dismiss however. One may well ask why the statute draws a distinction. I think the answer is found in the purpose of the statute, that being, as phrased in the Act's preamble, "to promote respect for and observance of human rights". This is realized by facilitating access to the complaints and adjudication process. As noted in the Alberta case of *Economic Development Edmonton v. Wong*, [2005] A.J. No. 1051 (C.A.) (at para. 19): "the human rights dispute process ... is promoted if access is facilitated rather than impeded or deterred." The decision to dismiss a complaint at a preliminary stage impedes access to resolution of alleged discriminatory acts. It has an element of finality. Therefore, in the spirit of accessibility, it is understandable that such a decision should be reviewable on appeal. The decision to refer a complaint to a hearing, on the other hand, has no element of finality. It decides no substantive issues. Those are left for the adjudicator to decide after a full and public hearing.

[30] The statute therefore envisages a high degree of deference to a decision to forward a complaint to the adjudication panel. This is consistent with the fact that these types of decisions are essentially fact-driven. The Director, who is expected to have experience in the field of human rights, and whose primary function is the processing of complaints, has a relative expertise in making this type of decision. The Director is engaged in a screening function, not an adjudicative one. As Schuler J. stated in the *Aurora College* case (at para. 34): "It is an administrative function with a low threshold of assessment of merit."

[31] It is also important to remember that the Director, under s.44, is exercising a discretionary decision-making power. 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).

[32] For these reasons, considerable deference is to be shown to the Director's decision. The only qualification is that where the Director addresses questions of legal interpretation then no deference is owed. The Director, unlike members of the

adjudication panel, has no particular expertise in law. Hence, my conclusion that the appropriate standard is one of reasonableness.

[33] In this case the applicant has also raised discrete issues of procedural fairness and errors of law. Those issues are to be reviewed on a standard of correctness.

[34] Where a decision is attacked on the basis of a breach of procedural fairness, then it is not necessary to engage in the pragmatic and functional analysis. Instead, the court is required to determine the applicable duty of fairness and to decide whether the decision-maker adhered to that duty: *Baker (supra)*. With respect to errors of law, if the decision-maker has some specialized expertise that is engaged by a question of law, then that normally attracts a standard of reasonableness. Where, as here, the decision-maker has no special expertise, alleged errors of law are reviewed on a standard of correctness: *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249.

[35] With these observations serving as the parameters for this review, I will now consider each of the four issues listed above.

Did the Director err in law when she applied the direction contained in the earlier Adjudication Panel decision?

[36] The applicant submitted that the standard applied by the Director, as propounded by the adjudication panel, was an error of law. That standard, which the Director (and the applicant) described as a “direction”, was as follows:

...that *all of the circumstances* of a case must be considered; that there need only be a *reasonable basis in the evidence* to proceed to a hearing; that the enquiry must be as to whether there is *any* (reasonable) evidence; that *regardless of the respondent's evidence*, if the evidentiary burden is discharged a hearing is warranted. [Emphasis in original]

[37] Applicant's counsel described this as an unreasonable statement of how the Director should approach her decision-making under s.44. He submitted that this would, in effect, render s.44 meaningless, in particular the power to dismiss a complaint that is trivial or frivolous and where, as here, it has been found to be without merit by an investigator. Counsel argued that its application would mean that only the

most frivolous complaints would be screened out. Every complaint with any evidence whatsoever would be referred to a hearing. There would be little incentive for any respondent to reply to a complaint at the investigation stage since the standard speaks of disregarding the respondent's evidence.

[38] Applicant's counsel argued that this standard misconceives the responsibility of the Director in the screening process. The proper approach is to determine whether there is a reasonable basis in the evidence for proceeding to a hearing (as per *Syndicat des employés de production du Québec et de L'Acadie v. Canada (Human Rights Commission)*, [1989] 2 S.C.R. 879) and, in order to do that, the Director should consider and assess the whole of the evidence (as per *Rogers v. British Columbia (Council of Human Rights)*, [1993] B.C.J. No. 698).

[39] The Director's counsel cautions, however, that one must take care in applying principles articulated in cases from other jurisdictions with different statutory provisions. For example, the statute in the *Syndicat* case had a provision that required the screening body to satisfy itself that the complaint has been "substantiated" before referring it to a hearing. The statute in the *Rogers* case instructed the screening body to make a "determination" after an investigation as to whether a proceeding should be dismissed. These provisions imply some assessment of the merits of the complaint. Under the Northwest Territories statute the only assessment is whether the complaint is trivial, frivolous, vexatious or made in bad faith. The other categories that may lead to a dismissal at the screening stage are relatively straight forward ones relating to jurisdiction, or an available alternative forum, or limitations. Any assessment of the merits under s.44 is therefore a highly limited one.

[40] Director's counsel submitted that it was not unreasonable for the Director to rely on an articulated legal standard to guide her in her screening function. Counsel noted that the Act is relatively new and the Director is required to interpret and apply the Act in her screening function. The Director is required to have expertise in human rights but is not required to have a legal background.

[41] I agree with these submissions. The Director was entitled to rely on the legal standard articulated by the adjudication panel. Indeed she would be expected to until and unless a court determined that the standard was wrong. After all, the adjudication panel exercises an appellate oversight of decisions to dismiss by the Director. It only makes sense for the appellate body to articulate guidelines for the Director (and it

makes even more sense for the Director to follow them). This is part of the responsibility of those appointed to carry out the provisions of the Act in order to maintain a rational and coherent approach to their functions.

[42] The adjudicator's statement of law quoted above was part of the decision that was the subject of the appeal in the *Aurora College* case (cited previously). Schuler J. had occasion to comment on it. It was argued before her that the adjudicator's articulation of the standard to be applied meant that the complainant's evidence should be assessed in isolation to determine whether there is evidence to warrant a hearing. Schuler J. rejected that interpretation and wrote as follows (at para. 59):

In my view, the adjudicator was simply noting that there must be a reasonable basis in the evidence to proceed to a hearing. Since an adjudication panel at a hearing could accept a complainant's version of events rather than a respondent's, where there is contradictory evidence, the person screening the complaint should consider whether, if the complainant's version is accepted, the complaint could be found to have merit. If so, a hearing will likely be warranted even though the respondent may be able to point to contrary evidence. I do not understand the adjudicator to be suggesting that the respondent's evidence is to be completely disregarded in deciding whether a hearing should be ordered.

[43] I respectfully agree with these comments. The standard to be applied is not dissimilar to that applied on a motion for non-suit in a civil action. Is there evidence which, if believed, could substantiate the complaint? This is really no different, in essence, than the various tests articulated in other cases. It is not a determination where the evidence is weighed as it would be by the ultimate decision-maker. It is simply a matter of determining whether there is sufficient evidence to warrant a hearing.

[44] It is obvious that the main point of concern is the phrase "regardless of the respondent's evidence". It may be preferable to phrase this as "regardless of the *weight* of the respondent's evidence" since that is really the point. 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. That is what I understand the adjudicator to be saying and I conclude that it is the correct standard to be applied by the Director.

Did the Director commit jurisdictional error by following the earlier decision of the Adjudicative Panel and thereby fettering her discretion?

[45] The applicant submitted that the Director fettered the exercise of the discretionary power under s.44 by adopting and applying the direction of the adjudicator. In counsel's view, the adoption of a legal rule is no different than the adoption of some inflexible policy. In effect she failed to exercise her own judgment on the facts of the case before her.

[46] The general principle is that a discretion must be exercised by the authority to which it is committed. That authority must genuinely address itself to the matter before it; it must not act under the direction of some other body; and, it is not to fetter the exercise of that discretion by the blind application of some inflexible policy regardless of the merits of the particular case: *Braden-Burry Expediting Services Ltd. v. Northwest Territories (Workers' Compensation Board)*, [1998] N.W.T.J. No. 174 (S.C.), appeal dismissed [1999] N.W.T.J. No. 84 (C.A.). A fettering of discretion is, to be accurate, an abuse of discretion and has traditionally led to a loss of jurisdiction. The error is jurisdictional because the fetter prevents the decision-maker from exercising its discretion at all: see Jones & deVillars, *Principles of Administrative Law* (4th ed., 2004), at pp.192-197.

[47] In my opinion, reliance on a legal standard is not the fettering of discretion. As argued by the Director's counsel, legal interpretation of the enabling statute is not analogous to the adoption of some policy that does not allow the decision-maker to consider the particular facts of the case. Here, the Director applied the legal standard articulated by the adjudication panel. But that standard did not pre-determine her decision. She considered the facts of the case before her to make her decision.

[48] To draw a broad analogy, judges are called on to make discretionary decisions all the time. Courts, and particularly courts of appeal, have interpreted the statutes that enable such discretion and often set guidelines on what legal principles to apply. No one would suggest that following those guidelines is tantamount to a fetter on the judge's discretion. It is still the judge's responsibility to consider the facts of the particular case before him or her and then apply the guidelines to those facts. That is what in essence the Director did in this case. I find no error in her approach.

Did the Director breach the requirements of procedural fairness by relying on an unpublished decision of the Adjudication Panel?

[49] As noted previously, the legal standard relied on by the Director, and reproduced in her decision, was taken from an earlier case (the case that went on to appeal in the *Aurora College* decision). The reason it was unpublished was because of a sealing order issued by the adjudicator. He was concerned about people drawing premature conclusions from unproven allegations against various named individuals in that case. The adjudicator was not, in that case, determining the merits of a complaint but sitting on appeal from the Director's decision to dismiss the complaint. Thus the evidence had not been tested.

[50] The Director took the view that, in light of the sealing order, she could not divulge any part of the decision beforehand to the parties. The sealing order had been continued by Schuler J. when the matter came before her.

[51] The applicant takes issue with the Director's reliance on this unpublished decision because it breached a fundamental principle of procedural fairness, that being that a party is entitled to know the case it has to meet. Applicant's counsel submitted that the applicant had no opportunity to comment on the proposition of law relied on by the Director. The applicant was unable to determine if the adjudicator's decision was made on the basis of facts similar to the case at bar, whether the decision was based on irrelevant considerations, whether the part quoted was *obiter dicta*, or whether the decision relied on other cases that have since been overturned or distinguished. The applicant's counsel relied on the general principle that a decision must not be based on a point of law or a policy unless it has been first put to the parties and submissions invited: *Brown & Evans, Judicial Review of Administrative Action in Canada* (1998, looseleaf ed.), at para. 12:4323. It should be noted that the judgment in *Aurora College*, where Schuler J. commented on the adjudicator's decision, did not come out until after the Director made her decision in this case.

[52] Applicant's counsel referred me to a decision of the British Columbia Supreme Court as an analogous situation. In *Investors Group Financial Services v. Corby*, [2005] B.C.J. No. 1035, the plaintiff sought judgment on a debt created by an agreement. The trial judge (in small claims court) granted the defendant relief from forfeiture of the penalty provisions pursuant to the British Columbia *Law and Equity Act*. The plaintiff appealed to the Supreme Court arguing that the claim for relief from

forfeiture had not been pleaded or argued and arose for the first time in the judgment. The Supreme Court set aside the judgment on the basis of a breach of procedural fairness. The plaintiff had not been afforded the opportunities of presenting evidence or argument on the issue and it was fundamentally unfair to base the decision on it.

[53] There is no question that every statutory decision-maker owes a duty of fairness to the parties whose interests are affected by that decision. The case law makes clear however that the duty of fairness is variable and its content depends on the context of each case. But, at a minimum, the duty requires that those affected by the decision be informed of the case to meet and be able to bring evidence and advance argument. As stated by L'Heureux-Dubé J. in *Baker (supra)* at para. 22:

... the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected by the decision to put forward their views and evidence and have them considered by the decision-maker.

[54] I have no hesitation in saying that it is certainly preferable for any decision-maker, in any case, to alert the parties to guiding case law if they are going to rely on it and the parties have not referred to it. That holds true for judges as well as administrative decision-makers. But it is not a hard and fast rule. It is a question of the materiality of the authority relied on by the decision-maker. In this regard I draw a distinction between, for example, a case that is determinative of a particular factual or legal situation and a case that merely states some overarching principle or methodology for analysis.

[55] In the *Investors Group* case the fault was that the decision-maker relied on a statute that was not pleaded to decide on the basis of a principle that was not argued. That is a different situation than the one, as here, where the decision-maker refers to a case for a general proposition and then conducts an analysis of the facts and arguments presented to her. If I may be so bold as to draw another broad analogy, I have already in these reasons referred to some authorities that were not provided by counsel but none of them are decisive of the decision I have to make based on the arguments presented to me.

[56] It is also important to put this question into context. The Act delegates to the Director the function of a gatekeeper to sort out those complaints that warrant a

hearing and those that do not. It is a preliminary screening function with a low threshold. The Director makes no finding of discrimination or other violation of the Act. Her decision is still important, of course, because it can lead to a full public adjudication with all the attendant expense and potential for an adverse ruling, but it is not a decision on the merits. In this case the parties were provided with the investigator's report and given an opportunity to submit comments to the Director before she made her decision. I think this met the requirements of procedural fairness in the context of this case and the Director's reliance on the decision, without notice, did not undermine that.

[57] The Director, in her exercise of the screening function, is not engaged in an adjudicative hearing-like process based on the adversarial system of procedure where the parties control what evidence will be called and what arguments will be made. The Act requires the Director to inquire into a complaint. That is essentially an investigative or inquisitorial process. The requirements of procedural fairness are attenuated by the summary nature of this process.

[58] In any event, as I stated earlier, the adjudicator's decision, or the extract relied on by the Director, merely stated a methodology for determining if the threshold had been met for referring the complaint to a hearing. The applicant made submissions on what that threshold should be. In a letter dated December 5, 2005, to the Commission, the applicant's counsel wrote that the Director "has the discretion to dismiss complaints where a *prima facie* case is not even made out". It seems to me that the legal standard articulated by the adjudicator, and followed by the Director, is really nothing more than the manner by which one can determine if there is a *prima facie* case.

Was the Director's decision to refer the complaint to the Adjudication Panel an unreasonable decision?

[59] The applicant's counsel concentrated his oral submissions on the procedural fairness and abuse of discretion issues. However, in his written submissions, counsel also argued that the Director's decision was an unreasonable one.

[60] The reasonableness standard and the test for unreasonableness was described in *Ryan (supra)* in para. 55:

A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere (see *Southam*, at para. 56). This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling (see *Southam*, at para. 79).

[61] The applicant's first submission on this point is that the Director's unwillingness to consider any of the evidence of the applicant is unreasonable. The answer to this is that the Director did consider the applicant's evidence. Her decision outlines point by point the facts and arguments submitted by both parties. There is no indication that she either was unwillingly to or in fact did not consider the applicant's evidence.

[62] The applicant's second submission is that there can be no other conclusion, based on the uncontradicted evidence, but that the complaint should be dismissed. The Director's counsel points out, however, that there are discrepancies, in both the evidence and the legal conclusions to draw from the evidence. The director chose not to resolve any such discrepancies since to do so would require her to weigh the evidence and to form legal conclusions which, both parties agree, are beyond her jurisdiction in the screening process.

[63] In my opinion, what the applicant is asking me to do on this application is to engage in an assessment of the merits of the case so as to conclude that the complaint is trivial or frivolous. But that is what a court cannot do on a judicial review application. What I must do is examine the Director's reasons to see if her decision is supported by a tenable explanation. When I do that I am satisfied that her decision is a reasonable one. Her reasons reveal a thorough and thoughtful analysis of the evidentiary and legal issues, albeit on a relatively modest level which is appropriate to the decision she must make. They provide the tenable explanation that is required by this standard.

Conclusions :

[64] For these reasons the application is dismissed.

[65] Counsel are agreed that costs should follow the event. Rule 648(7) provides that where judgment is given in an action in which the relief is other than the payment of

money, the applicable scale of costs is Column 2 of the tariff set by the Rules of Court. Having regard to the complexity of the arguments in this case I think it would be appropriate to increase that scale by a suitable multiplier. I therefore order the payment of party-and-party costs by the applicant to the Director, such costs to be calculated on the basis of triple Column 2.

[66] It should be noted that the respondent, Peter Huskey, appeared in person at the hearing. An order was made at that time adding him as a party respondent. He made brief oral submissions but otherwise took no part in the hearing. Therefore there will be no order as to costs either payable to or by Mr. Huskey.

J.Z. Vertes
J.S.C.

Dated this 16th day of October, 2007.

Counsel for the Applicant: Paul N.K. Smith

Counsel for the Respondent
(Director of Human Rights): Kristan A. McLeod

The Respondent, Peter Huskey, appeared in person.

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

DIAVIK DIAMOND MINES INC.

Applicant

- and -

THERESE BOULLARD in her capacity as
DIRECTOR OF HUMAN RIGHTS and
PETER HUSKEY

Respondents

REASONS FOR JUDGMENT OF
THE HONOURABLE JUSTICE J.Z. VERTES
