SUPREME COURT OF YUKON

Citation: Yukon College v. Human Rights Board of Adjudication, 2011 YKSC 90

Date: 20111201
S.C. No. 11-AP004
Registry: Whitehorse

Between:

YUKON COLLEGE, MARGOT NEELY (HARVEY), and RAY MARNOCH

Appellants

YUKON HUMAN RIGHTS BOARD OF ADJUDICATION, YUKON HUMAN RIGHTS COMMISSION, SUSAN MALCOLM and SARAH BAKER

Respondents

Before: Mr. Justice R.P. Marceau

Appearances:

Larry Page	Counsel for Yukon College, Margot Neely(Harvey) and Ray Marnoch
Debra Fendrick	Counsel for Yukon Human Rights Board of Adjudication
Colleen Harrington	Counsel for Yukon Human Rights Commission
Zeb Brown	Counsel for Susan Malcolm and Sarah Baker

REASONS FOR JUDGMENT

BACKGROUND AND FACTS

[1] In 2004 and 2005, the respondents Susan Malcolm and Sarah Baker (Malcolm and Baker) were enrolled at Yukon College. On November 8, 2004, they made complaints against the appellants, Yukon College and two of its instructors, Margot Neely (Harvey) and Ray Marnoch (the instructors). On December 10, 2007, Barbara Evans was appointed Chief Adjudicator under the Yukon *Human Rights Act*, R.S.Y. 2002, c. 116, for a three-year term. Ms. Evans appointed herself to hear the complaints

of Malcolm and Baker. The complaints were heard by Ms. Evans. The final arguments were completed in September 2010. On December 9, 2010, Ms. Evans' term as Chief Adjudicator (and therefore as an adjudicator) ended because her term was not renewed.

[2] On May 11, 2011, Ms. Evans signed her decision in respect of the complaints of Malcolm and Baker, and on May 25, 2011, her decision was delivered to the parties. The appellants say there is but one issue in this case and that is whether Ms. Evans had the jurisdiction to issue a decision after her term had expired. In this appeal, Ms. Evans' jurisdiction to hear the complaint is not in issue, nor have the appellants raised any other issue of jurisdiction other than her jurisdiction to render the decision after her term had expired.

[3] The appellants cite three decisions of the Supreme Court of Canada which state that it is a fundamental principle of administrative law that officials, tribunals, institutions, and other public decision-makers must act in accordance with the law, and their actions and decisions have no legal force unless authorized by grant of statutory authority. See ***Roncarelli v. Duplessis***, [1959] S.C.R. 121, 16 D.L.R. (2d) 689; ***Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council***, 2010 SCC 43, [2010] 2 S.C.R. 650; and ***R. v. Conway***, 2010 SCC 22, [2010] 1 S.C.R. 765.

[4] These cases stand for that proposition of law and they are binding on me. The Respondent Yukon Human Rights Commission agrees with the appellants' position. It follows that unless the other respondents, Yukon Human Rights Board of Adjudication,

Susan Malcolm, and Sarah Baker, can persuade me that those cases have no application, their opposition must fail.

[5] Although there are several issues of contention raised in the factum of the remaining respondents, I find that disposition of four issues determines this appeal.

ISSUES

1. Did the Appellants waive their right to question Ms. Evans' jurisdiction?
2. Was the decision "made" prior to the expiration of Ms. Evans' appointment?
3. If not, should the court read in a "grace period" allowing members of the Board of Adjudication to complete decisions after the expiration of their appointment?
4. If not, did Ms. Evans continue to have the jurisdiction to hear the complaint after the expiration of her appointment?

ANALYSIS

4. Waiver or Estoppel

[6] The Respondents Malcolm and Baker claim that, by their conduct, the Appellants have waived their right to question the jurisdiction of Ms. Evans to give her decision after her appointment to the panel of adjudicators had expired.

[7] The Respondents' first argument is that Yukon College should have known that Ms. Evans' appointment expired on December 9, 2010, because she was appointed by

the legislator on December 10, 2007 for a term of three years. They should also have known that there was considerable publicity when a new chief adjudicator was appointed by the legislature in November, 2010; at that point, it was obvious Ms. Evans' appointment would not continue. The simple answer to this complaint is that there is no evidence Yukon College knew these facts. In any event, there is no duty that I know of that lies on any party to litigation to ensure a tribunal or court maintains jurisdiction so that it can render a decision. Rather there is the opposite; the authority of a judge or government official is presumed valid: ***R. v. Crischuk***, 2010 BCSC 716 at paras. 36-38, affirmed 2010 BCCA 391, 2010 D.T.C. 5141.

[8] The second argument deals with a letter, Exhibit A to the affidavit of Vicki Hancock, filed September 16, 2011. That letter is from Debra Fendrick, counsel for the Respondent Yukon Human Rights Board of Adjudication, and is addressed to the Respondent Yukon Human Rights Commission, counsel for the Respondents Malcolm and Baker, and counsel for the Appellants. In that letter, Ms. Fendrick indicates that Ms. Evans' appointment ended December 9, 2010. The letter says that the decision has now been made, but the term of appointment of the adjudicator responsible for the decision has expired. The letter goes on to say that the Board is prepared to communicate the decision to the parties but is "first inviting the parties to address any procedural concerns it [*sic*] may have in this situation." In response, counsel for the Respondents Malcolm and Baker asked a number of questions and at para. 8 of their email, counsel wrote:

> Please forward a copy of the written decision to me immediately without any terms, conditions or undertakings.

[9] Counsel for the Appellants simply asked that anything sent to counsel for Malcolm and Baker also be sent to them. The decision was then sent to all parties.

[10] Counsel for Malcolm and Baker argue that by not immediately questioning the authority of Ms. Evans to make the decision, the Appellants have laid in the weeds waiting to see the decision, and have waived any irregularity in the decision. In other words, the Appellants have waived their right to question the decision. It seems to me that if this were a valid argument, then the Appellants could turn around and argue that by insisting on seeing the decision "without any terms, conditions or undertakings", Malcolm and Baker wanted to see the decision and then decide whether to question jurisdiction. The estoppel argument cuts both ways.

[11] The simple answer is that acquiescence by either party has no effect on the legal validity of an administrative decision. In this case, the validity of Ms. Evans' decision depends solely on whether she *had* jurisdiction, not whether any party *questioned it.* If she had no jurisdiction to act, her decision would be void in law: Jones de Villars, *Principles of Administrative Law* (5th ed.) (Toronto: Thomson Reuters, 2009) at 149. A decision that is void cannot be salvaged by inaction. The argument of waiver fails.

2. Timing of the Decision

[12] The respondent Board of Adjudicators presented evidence, by way of the affidavit of Vicky Hancock sworn September 15, 2011, that Ms. Evans had told Vicky Hancock that Ms. Evans had already made her decision prior to the termination of her

appointment but did not finalize her decision until May 2011. The appellants object that Ms. Hancock's evidence is hearsay and should not be received by this court at all. I think the hearsay objection is a valid one, but I would have allowed evidence to be led that, for example, the decision was typed in final form, waiting for signature prior to December 10, 2010, and was not signed until later because Ms. Evans was ill. I will, however, deal with the argument that Vicky Hancock's affidavit is proof that Ms. Evans' decision was made during her tenure. The finding that Ms. Evans' mind was made up before December 10, 2010 is a very difficult proposition, since the decision was not even sent in draft form to the panel of adjudicators until January 25, 2011, and then went through editing and formatting changes until it was finalized on May 11, 2011. In my view, a decision of a tribunal is not "made" when the adjudicator has in his or her mind subjectively come to a conclusion. Rather, a decision is not "made" until, depending on the forum, it is deposed in writing or formally announced. I make this distinction because some decisions need not be signed or committed to writing before they are decisions. Most oral decisions made with the parties present are final decisions which take effect on the date they are delivered. Other decisions, those reserved, are not considered decisions until they are signed and filed as a decision of that authority.

[13] In this case, I do not have to decide whether Ms. Evans' decision was "made" on May 11, 2011, when it was signed, or on May 25, 2011, when it was delivered to the parties, because both of those dates are well beyond the date of her tenure. The simple answer is that a decision which can be changed is not a final decision. Throughout the period at least until May 11, 2011, when Ms. Evans may have made up her mind without giving reasons, or signing a decision, or formally filing it as a record of the

tribunal, or communicating its content to the parties, it simply remained a decision in the making. Certainly, if someone wrongfully obtained a copy of a draft judgment which only required formatting and editing, it could be argued that the judge had "made up his mind". It would, however, be absurd to suggest that the judge's decision is made at that point and could not be changed, because that would bring a lot of uncertainly into the judicial process.

[14] In their factum, the Board of Adjudicators cite ***Lewis v. Grand Trunk Railway Co.*** (1913), 18 B.C.R. 329, 13 D.L.R. 152 (C.A.) for the proposition that an arbitrator has completed his task when he has done all he can do, namely reduced his award to writing and published it as his award. They agree that this case stands for the principle that a tribunal member has not "declared his final mind" before that point. However, they cite ***Zwirner v. University of Calgary*** (1977), 6 A.R. 271, 79 D.L.R. (3d) 81 (C.A.), as authority indicating that an arbitrator's decision communicated to the other two arbitrators, but not signed by that arbitrator because that arbitrator was ill and later died, is nevertheless sustainable as a decision of the Board. This case is distinguishable for two reasons. First, the decision of the three arbitrators was in fact reduced to writing. All that remained in that case was to modify it in style and format before it was ready for signature. This is the point at which the chairman became ill and was unable to sign. Justice of Appeal Prowse specifically disagreed with the statement that an award had to be signed by all the arbitrators, holding that the signatures were simply something that was of assistance in proving that it was the award of the arbitrators. The facts here do not come close to those in ***Zwirner***, *supra*. There was no indication that Ms. Evans had committed any decision of any kind to some form of writing, even a short memorandum

of decision. Secondly, the decision in ***Zwirner*** can be sustained simply because in that case, the agreement to arbitrate provided that "the award of a majority ... shall be the award of the Board."

[15] At para. 29, Prowse J.A. wrote:

> In my view the Chairman's incapacity should be treated as having a similar effect to a refusal to concur where, as here, the arbitrators have heard the submissions, consulted and deliberated together and made their decisions. All that remained to be done was to communicate the decision to the parties. In such circumstances the majority have jurisdiction to make an award which becomes the award of the Board.

[16] And at para. 31:

> The fact that the award is worded as an award of three and not as an award of a majority of them is not fatal and any words to the effect that it was an award of all may be treated as surplusage: See White v. Sharp, *supra*.

[17] ***Blattgerste v. Heringa***, 2008 BCCA 186, 82 B.C.L.R. (4th) 62 is helpful in illustrating the principle that it is not wise to search for evidence of when a judge may have made a decision. One of the issues dealt with was that the judge who heard the petition (for winding up of two companies) died before signing the reasons for judgment he had prepared. They were ultimately released by the Chief Justice posthumously. At paras. 19 and 21, Mr. Justice Frankel wrote:

> [19] The principal issue in this case is the legal status of unsigned reasons for judgment left behind when a judge dies. Can they, as happened here, be signed and released by another judge in the name of the deceased judge, or are they, as contended by the losing parties in this litigation, of no force and effect? There is a dearth of Canadian authority on this question.

> [21] For the reasons that follow, I have concluded that unsigned reasons cannot be regarded as final and complete. They are of no force and effect, and any formal order entered to give effect to them cannot stand. As the reasons in this case should not have been released, I express no view as to their correctness.

Later, at para. 32, as part of Practice Directions concurred in by Madam Justice Huddart, Justice Frankel wrote:

> [32] In my view, reasons for judgment cannot be said to be final and complete unless they are signed by the judge who wrote them. The act of signing evinces that the judge is fully satisfied with what he or she has written with respect to the facts, the law, and the result. Until reasons are signed they are a work in progress, subject to being revised, or even abandoned. Regardless of how complete draft reasons appear to be, the reason they are unsigned may be because the judge wishes to give them further thought. In affixing a signature to reasons for judgment, the judge is, in effect, certifying that he or she considers them to be a final opinion. This is not diminished by the fact that, as discussed in *Harrison v. Harrison*, 2007 B.C.C.A. 120, 64 B.C.L.R. (4th) 318 (at paras. 28, 29), a judge has a discretion to re-open a matter after reasons for judgment have been released (or delivered orally), but before the formal order has been entered.

[18] I am somewhat concerned by the Saskatchewan Court of Appeal case ***Regina (City) v. Newell Smelski Ltd.*** (1996), 152 Sask. R. 44, 68 A.C.W.S. (3d) 228 (C.A.). The decision was concurred in by Vancise J.A. and Lane J.A. and was written by Cameron J.A. The facts are set out at paras. 41 and 42, and the decision is at paras. 46 and 47.

> [41] Based upon the case as stated, the facts pertaining to these questions may be summarized as follows: Some months after the Committee had deferred decision on the matter in controversy, Mr. Robinson wrote "the majority decision," in the words of the stated case, upholding the regularity of the appeals and the jurisdiction of the Committee to deal with them. A week or so later, in mid July of 1995, Mr. Gallagher signed the decision, "indicating his

> concurrence with its contents." Rather than release the decision, together with Mr. Fieldgate's dissent, the Committee decided to postpone release, pending clarification of the status of the case.
>
> [42] The other case had earlier given rise to similar questions of regularity and jurisdiction, and the Committee was expecting a request to place the matter before this Court. The request was received as expected, but as it turned out there was no need to refer the matter to the Court, for nothing decisive turned on it.
>
> [46] While it remained open to each of them to change his mind before "release of the decision," in the words of the statement of fact, this is beside the point. The point is whether they had in fact decided the matter in controversy. And of that there can be little doubt, having regard for the statement of fact. "Re 'majority decision," as referred to, was reduced to writing by Mr. Robinson, was signed by Mr. Gallagher before he resigned, and was simply not "released," pending clarification of the status of the other case. Form aside, since it is the substance of the matter that counts, what was issued was the majority decision, concurred in by Mr. Gallagher and signed by him before his resignation.
>
> [47] As for the effect of this, it might be noted that deciding a matter reserved for decision, reducing the decision to writing, and signing it is one thing. The mere act of releasing the decision is quite another, one of an essentially administrative kind.

[19] I think this decision must rest on the fact that even after a decision has been written and signed, it may be changed, but if it is not, then the written, signed decision, unamended (or, perhaps, since Mr. Gallagher had resigned, it became unamendable), then it is a final decision. This decision does not assist the Respondents who wish to uphold the decision of the Board of Adjudicators, as neither the submission of a copy or a revised copy, nor the signing and the releasing of the decision had taken place before Ms. Evans' term as an adjudicator expired on December 9, 2010.

[20] On this issue, I conclude that the complaint was not adjudicated upon until, at the earliest, May 11, 2011.

3. The Grace Period

[21] The respondents Malcolm and Baker served a Notice of Constitutional Question, which at paras. 6 – 11 read:

> 6. The only stated ground of appeal is that the term of appointment of the sole adjudicator who constituted the Board had technically expired when the Board issued its written decision.
>
> 7. The intent of the *Human Rights Act* is that human rights complaints be heard in conformity with the principles of fundamental justice.
>
> 8. As such, a Board of Adjudication attracts the constitutional protections of an independent tribunal, including security of tenure.
>
> 9. If the stated ground of appeal has merit, the *Human Rights Act* fails to provide Boards of Adjudication with constitutionality sufficient security to tenure in that:
>
> (a) The jurisdiction of a Board of Adjudication depends upon its member adjudicators continuing to hold appointment;
>
> (b) The Legislative Assembly can cause a Board to lose jurisdiction by refusing to extend an adjudicator's appointment.
>
> 10. The absence of a provision in the *Act* enabling members of a Board of Adjudication to continue beyond the expiry of their tenure until the completion of the matter is a mere oversight which has been recognized and addressed in other jurisdictions.
>
> 11. Susan Malcolm and Sarah Baker seek an interpretation of the *Human Rights Act* whereby the jurisdiction of a Board of Adjudication, once constituted as an independent tribunal, is insulated from the Legislative Assembly's unquestioned political control over the appointment of adjudicators.

[22] The Yukon *Human Rights Act*, *supra*, reads in part:

> 22 (1) There shall be a panel of adjudicators to be called on as required to adjudicate complaints.
>
> (2) The panel of adjudicators shall consist of not less than three members, one of whom shall be designated Chief Adjudicator, who shall be appointed for a term of three years by the Legislature.
>
> (3) A member of the panel may only be removed from the panel by resolution of the Legislature.
>
> ...

[23] The above was the wording of the statute at the time of Ms. Evans' appointment in December 2007. Section 22(2) was amended by *An Act to Amend the Human Rights Act,* R.S.Y. 2009, c. 6. It provided that the panel of adjudicators should consist of not less than 6 members, but the term of the appointment remained three years.

[24] Malcolm and Baker argue the absence of an explicit provision for extending the term of tenure of sitting adjudicators invokes the doctrine of necessary implication. Their argument is that I should read into the legislation a provision that the term of an adjudicator is extended to include time to finish hearing a complaint, including time to render the decision where the hearing commenced during the adjudicator's term. They point to sections in other statutes such as s. 48.2(2) of the Canadian *Human Rights Act*, R.S.C. 1985, c. H-6, which provides for extensions to terms of adjudicators to allow for the completion and adjudication of hearings. They also argue that boards of adjudication are intended to function as quasi-judicial tribunals with all the hallmarks of independence, including security of tenure. I agree with the last statement.

[25] These respondents then quote ***Bell Canada v. Canadian Telephone Employees Association***, 2003 SCC 36, [2003] 1 S.C.R. 884 as stating that the discretionary renewal of panel appointments does not provide adequate security of tenure, because the power to extend fixed-term appointments of tribunal members should not rest with the executive. Actually ***Bell Canada v. Canadian Telephone Employees Association***, *supra*, is authority for the opposite proposition. At paras. 51 – 53 of the judgment of the court, Chief Justice McLachlin and Justice Bastarache wrote:

> **51** Bell challenges the Chairperson's power to extend appointments of Tribunal members in ongoing inquiries. Bell argues that this power robs members of the Tribunal of sufficient security of tenure. In addition, Bell contends that it threatens members' impartiality.
>
> **52** There is an obvious need for flexibility in allowing members of the Tribunal to continue beyond the expiry of their tenure, in light of the potential length of hearings and the difficulty of enlisting a new member of a panel in the middle of a lengthy hearing. It would not, for this reason, be practicable to suggest that members simply retire from a panel upon the expiry of their appointment, with no official having the power to extend their appointments. And of the officials who could exercise this power, the Tribunal Chairperson seems most likely both to be in a good position to know how urgent the need to extend an appointment is and also to be somewhat distant from the Commission.
>
> **53** In any case, the question of whether this power compromises the independence of Tribunal members is settled by *Valente, supra*. That case concerned legislation that conferred a discretionary power upon the Chief Justice of the provincial court to permit judges who had attained retirement age to hold office until the age of 70, and that conferred a discretionary power upon the Judicial Council for Provincial Judges to further approve the extension of a judge's term of office from age 70 to 75. Prior to amendments in the legislation, these powers had rested with the executive. At p. 704, Le Dain J. wrote of the amendments that:

> This change in the law, while creating a post-retirement status that is by no means ideal from the point of view of security of tenure, may be said to have removed the principal objection to the provision ... since it replaces the discretion of the Executive by the judgment and approval of senior judicial officers who may be reasonably perceived as likely to act exclusively out of consideration for the interests of the Court and the administration of justice generally.

> In our view, this passage resolves the question. If the discretionary power of the Chief Justice and Judicial Council of the provincial courts to extend the tenure of judges does not compromise their independence in a manner that contravenes the requirements of judicial independence, then neither does the discretionary power of the Tribunal Chairperson compromise the independence of Tribunal members in a manner that contravenes common law procedural fairness.

[26] I conclude that the Supreme Court of Canada has stated that there is an obvious need to allow members to continue beyond the expiry of their tenure. The reasons for this need are stated at para. 52, as "the potential length of hearings and the difficulty of enlisting a new member of a panel in the middle of a lengthy hearing." In my view, it certainly would have been wise for the Legislature to provide a mechanism to extend the term of an adjudicator beyond three years, in order to enable the adjudicator to hear a long hearing that was started within the three years, or to allow for the decision to be made beyond the three-year term. However, failure to do so does not infringe on the impartiality or independence of the tribunal. The legislation lacks flexibility but does not infringe on the independence of the tribunal. It is not the court's role to imply terms and legislation the court thinks are practical so long as the legislation is lawful, and, in this case, the *Human Rights Act* is "lawful".

4. Jurisdiction to Hear the Complaint Post-Appointment

[27] The Respondents Malcolm and Baker argue the Evans Board did not lose jurisdiction when it failed to render a decision before the expiry of Ms. Evans' term as adjudicator. The argument is that while Ms. Evans' term as chief adjudicator and as the person who could be appointed to the Panel of Adjudicators expired in December, 2010 when she was not reappointed, her appointment to the Board of Adjudication with jurisdiction to hear and determine the complaint was not limited in time and therefore should continue until the matter is finalized by a decision.

[28] The argument is attractive. The reasons the Respondents advance for interpreting the legislation in this way are four-fold.

[29] First, board hearings are subject to collapse on the eve of decision after years of evidence and arguments.

[30] Second, the duration of the panel appointment is unrelated to the work done by a board. If a panel is appointed at the end of the appointed term, it could collapse almost immediately.

[31] Third, I quote para. 53 from the Respondents Malcolm and Baker's argument:

> 53. Third, coupling the Board's jurisdiction to the panel appointment undermines the separation of the Legislative Assembly from the Board of adjudication. Using its discretionary power to renew expiring panel appointments, the Legislative Assembly would possess absolute control over whether a board could complete its work (as this case also demonstrates).

[32] I find that this argument mirrors the earlier argument about the security of tenure. It is answered by the decision ***Valente***, *supra*.

[33] Fourth, board hearings often last multiple years and may exceed the three year limit of the panel appointment such that under the normal operation of the legislation, it may be impossible to adjudicate some complaints.

[34] Points 1, 2 and 4 really are the same argument but expressed by Chief Justice McLachlin and Justice Bastarache in para. 52 of the ***Bell Canada***, *supra*, decision:

> 52. There is an obvious need for flexibility in allowing members of the Tribunal to continue beyond the expiry date of their tenure, in light of the potential length of hearings and the difficulty of enlisting a new member of a panel in the middle of a lengthy hearing. It would not, for this reason, be practicable to suggest that members simply retire from a panel upon the expiry of their appointment, with no official having the power to extend their appointments. And of the officials who could exercise this power, the Tribunal Chairperson seems most likely both to be in a good position to know how urgent the need to extend an appointment is and also to be somewhat distant from the Commission.

[35] Of course, the other difficulty is loss of jurisdiction before the decision is reached. The law in this case is clear.

[36] I have come to the conclusion that if I were to interpret the Yukon *Human Rights Act* as including a clause extending the appointment of a panel to include the date of the decision or the finalization of the matter, I would be usurping the legislator's powers. In coming to this conclusion, I have found it extremely useful to turn to the legislation governing similar administrative tribunals in other parts of Canada.

[37] The Canadian *Human Rights Act*, R.S.C. 1985, c. H-6, s. 48.2(1) reads:

> 48.2(1) The Chairperson and Vice-chairperson are to be appointed to hold office during good behaviour for terms of not more than seven years, and the other members are to be appointed to hold office during good behaviour for terms of not more than five years [...].
>
> (2) A member whose appointment expires may, with the approval of the Chairperson, conclude any inquiry that the member has begun, and a person performing duties under this subsection is deemed to be a part-time member for the purposes of sections 48.3, 48.6, 50 and 52 to 58.

[38] First, the problem of overly short terms is specifically addressed by the Canadian Human Rights legislation. The Chairperson and the Vice-chairperson are appointed for not more than seven years, and the other members for not more than five years. Secondly, and more importantly for this case, the appointment may be continued to complete an inquiry under s. 48.2(2).

[39] Provisions allowing for a "grace period" to complete outstanding decisions can be found in other similar statutes. Section 7 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 provides as follows:

> 7(1) If a member resigns or their appointment expires, the chair may authorize that individual to continue to exercise powers as a member of the tribunal in any proceeding over which that individual had jurisdiction immediately before the end of their term.

[40] When the Alberta *Human Rights Act*, R.S.A. 2000, c. A-25.5 was enacted, it dealt with transitional matters in s. 45, which reads:

> 45 A human rights panel that was appointed under section 27 to deal with a complaint before the coming into force of this section remains appointed as a human rights tribunal, and the members of the human rights panel continue to serve as members of the human rights tribunal, in respect of the complaint.

[41] I note the Alberta *Human Rights Act* in section 15(1) provides for an "Alberta Human Rights Commission" which consists of members appointed by the Lieutenant Governor in Council. There are no words of limitation as far as the term is concerned.

[42] Similar "grace period" provisions can be found in legislation governing the administration of courts in Canada. These statutes have long recognized that if federally appointed judges retired, died or reached the age of mandatory retirement, they would cease to have the jurisdiction to render decisions as members of that court. Section 41.1(1) of the *Judges Act*, R.S.C. 1985, c. J-1 provides retiring Supreme Court justices with a six-month "grace period" to complete their participations in any cases they were hearing. Section 7 of the Alberta *Court of Queen's Bench Act*, R.S.A. 2000, c. C-31 provides a three-month "grace period" to complete judgments. Section 9 of the Alberta *Court of Appeal Act*, R.S.A. 2000, c. C-30 provides a six-month "grace period" for justices of the Court of Appeal. I think it would be difficult to argue that a judge who had retired maintained any jurisdiction beyond the three- or six-month period to render judgments on matters heard prior to retirement.

[43] Clearly, the courts and many administrative tribunals have taken care to address the issue of an adjudicator losing his/her jurisdiction before their decision is complete. In contrast, the Yukon *Human Rights Act*, S.Y. 2002, c. 116 is completely silent on any "grace period" to complete outstanding judgments. Section 22, the only section relevant to the board of adjudication, reads:

> 22(1) There shall be a panel of adjudicators to be called on as required to adjudicate complaints.

(2) The panel of adjudicators shall consist of not less than three members, one of whom shall be designated Chief Adjudicator, who shall be appointed for a term of three years by the Legislature.

(3) A member of the panel may only be removed from the panel by resolution of the Legislature.

(4) When the commission asks that a complaint be adjudicated, the Chief Adjudicator shall establish a board of adjudication and determine its membership.

[44] Administrative tribunals must operate strictly within the confines of their enabling legislation: ***Supermarchés Jean Labrecque Inc. v. Flamand***, [1987] 2 S.C.R. 219 at para. 45. Unless there is a statutory provision allowing a retired tribunal member to complete any outstanding duties, he/she would be acting without jurisdiction and his/her decision would be void: see Robert W. Macaulay & James L.H. Sprague, *Practice and Procedure before Administrative Tribunals* (Toronto: Carswell, 2011) at 22-10.1; de Villars, *supra* at 139, 149.

[45] I am strengthened in my conclusion by the British Columbia Supreme Court decision in ***Bhullar v. British Columbia Veterinary Medical Association***, 2010 BCSC 85. In that case, the Legislation governing the Council of the Veterinary Medical Association did not import any of the provisions of the *Administrative Tribunals Act*, *supra*, including s. 7 that provided for a "grace period." The court held at paras. 21-23 that there was a serious question to be determined on appeal whether Council members who had resigned before the written decision was signed lost their authority to continue to exercise powers as Council members. Notably, after this decision was made, the British Columbia Legislature introduced a new *Veterinarians Act*, S.B.C. 2010, c. 15, which expressly provided for a "grace period."

[46] The principles of administrative law discussed above make it clear that a "grace period" must be supplied by the Legislator. As the Legislation discussed above illustrates, it is routinely so supplied. If the Yukon Legislature wished to provide for an extension of appointment to complete outstanding judgments, it could have done so by enacting an amendment, much like the other jurisdictions did. It chose not to do so. If I were to interpret the *Human Rights Act* as providing such an extension, I would be usurping the legislative role: Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed.) (Markham, Ont.: LexisNexis, 2008) at 165. Where the Legislator intends to regulate an area but fails to anticipate and provide for a particular set of facts, it is up to the legislature to remedy those gaps. The Court cannot encroach upon an area where it does not belong: Sullivan at 187; ***Pointe-Claire (City) v. Quebec (Labour Court)***, [1997] 1 S.C.R. 1015 at para. 63.

[47] This, however, does not end the inquiry.

[48] The Respondents Malcolm and Baker argue that interpretation of the Nova Scotia *Human Rights Act*, R.S.N.S. 1989, c. 214 is of assistance in interpreting the Yukon *Human Rights Act*. The Respondents submit as follows at para. 57 of their factum:

> 57. The Nova Scotia scheme and the Yukon scheme are similar in that neither establishes a standing body of permanent adjudicators; they only provide a process for selecting candidates and then establishing an adjudicative body "as required" to deal with complaints. The adjudicative body, once established, is not

made subject to the constraints that applied to the original selection of candidates.

[49] In other words, the Respondents argue that once the board of adjudication is established, it is a separate entity from the panel of adjudicators, and there are no limitations imposed by the Yukon legislation as to how long that board of adjudication may take to render the decision.

[50] An answer to this question requires a very careful reading of the Yukon *Human Rights Act*. I quote again from s. 22, which provides as follows:

> 22(1) There shall be a panel of adjudicators to be called on as required to adjudicate complaints.
>
> (2) The panel of adjudicators shall consist of not less than three members, one of whom shall be designated Chief Adjudicator, who shall be appointed for a term of three years by the Legislature.
>
> (3) A member of the panel may only be removed from the panel by resolution of the Legislature.
>
> (4) When the commission asks that a complaint be adjudicated, the Chief Adjudicator shall establish a board of adjudication and determine its membership.
>
> [*Emphasis added.*]

[51] Section 22 establishes two distinct bodies: the panel of adjudicators and the board of adjudication. The panel of adjudicators is comprised of members appointed for a fixed three-year term by the Legislature. The board of adjudication is a distinct *ad hoc* body established to adjudicate on a particular complaint: ***Yukon v. McBee***, 2010 CarswellYukon 124 (Yuk. C.A.) at para. 18.

[52] Subsection (4) states broadly that when the Chief Adjudicator establishes the board of adjudication, she "shall ... determine its membership." On a plain reading of these words, there is no direction to the Chief Adjudicator to select members of the board of adjudication only from the panel of adjudicators. She is free to "determine [the] membership" in any way she desires. Although s. 22(1) suggests that members of the panel of adjudicators are meant "to be called on" to adjudicate complaints, this language is simply an indication of the Legislature's apparent desire, nothing more. It is not obvious that legislatures always require that appointments to a human rights tribunal be limited to a select group of government nominees. In fact, the Nova Scotia legislation, while apparently empowering the Human Rights Commission to select persons at large for the board of inquiry, specifically excludes all members, officers, and employees of the Commission from being eligible to sit on the board: *Human Rights Act*, R.S.N.S. 1989, c. 214, s. 32A(3).

[53] The relevant section of the Yukon Legilsation, s. 22(4), does not limit the Chief Adjudicator's discretion. The Legislature did not turn its apparent desire into a requirement, and it is a fair interpretation of the language of s. 22(4) that the Chief Adjudicator could go outside the appointed panel to "determine [the] membership" of the board of adjudication as she pleased.

[54] It is not up to this court to extend the meaning of plain language to accord with what the court thinks the legislature probably intended. I find the decision of the Ontario Court of Appeal in ***Beattie v. National Frontier Insurance Co.*** (2003), 68 O.R. (3d) 60,

233 D.L.R. (4th) 329 extremely helpful in this regard. At issue in that case was the interpretation of a statutory accident benefits scheme. The Court unanimously held that even where a drafting oversight brings about a result that contradicts the likely legislative intention, the courts have no jurisdiction to redraft the Act for the Legislature:

> 16 Section 30(4) uses language with the precision that one expects in modern legislation, yet s. 30(4) fails to achieve the legislative purpose of s. 30. Indeed, as a result of a likely drafting oversight, s. 30(4) has achieved the opposite purpose. While in some cases the court will come to the rescue of the legislature by correcting its drafting error, these cases involve minor and obvious errors that can easily be corrected, unlike this case in which the correction of the error as proposed by the insurer would involve a substantial exercise in impermissible judicial redrafting. Moreover, in asking the court to do so, the insurer recognizes that the textual meaning of s. 30(4) is plain and clear.
>
> 19 Applying the presumption that the legislature does not make mistakes, if it had intended to completely exclude the insurer from its statutory obligation to pay SABS to injured persons convicted of a criminal offence, it would have inserted the necessary language to make that clear. That the legislature failed to do so as a result of a likely oversight does not permit the court to remedy the oversight by redrafting the regulation.
>
> [*Emphasis added.*]

[55] I find that the case at bar falls squarely within the situation in ***Beattie***. The meaning of s. 22(4) is plain and clear: the Chief Adjudicator is at liberty to appoint any person to the board of adjudication. Even though this contradicts the apparent legislative intention, as expressed in s. 22(1), and even if this situation is due to an oversight by the Yukon Legislature, this court has no jurisdiction to engage in judicial redrafting. This is not the case of a minor and obvious error that a court can fix. There is no unclear language to clarify. Giving effect to the legislative purpose requires this court to strike out the words of s. 22(4) and add new language in their place. That would be amendment, not interpretation: Sullivan at 182.

[56] I am strengthened in my conclusion by the amendments subsequently enacted to the Yukon *Human Rights Act*. After December 10, 2009, section 22(4) reads:

> **22 (4)** When the commission asks that a complaint be adjudicated, the Chief Adjudicator shall establish a board of adjudication consisting of members of the panel of adjudicators.
>
> [*Emphasis added.*]

[57] Although subsections 25(2) and 25(3) of the *Interpretation Act*, R.S.Y. 2002, c. 125 provide that an amendment should not be interpreted as a declaration as to the previous state of the law, or that the previous law was somehow different, I find that the 2009 amendments clarify the previously ambiguous intention of the Legislature. They do exactly what this court has no power to do. The very fact that the Legislature passed these amendments indicates that the case at bar does not present a minor and obvious error that this court can fix.

[58] In sum, at the time the Evans board was constituted, nothing in the Yukon *Human Rights Act* required members of the board of adjudication to be appointed members of the panel of adjudicators. Ms. Evans had unlimited discretion to determine the membership of the board. The Evans board was validly constituted under the old Legislation. As a result, the expiration of Ms. Evans' appointment on December 9, 2010 did not rob her of the jurisdiction to make the decision.

REMEDY

[59] The Appellant has asked in its prayer for relief that the decision of the Board be set aside and the Yukon Human Rights Board should be directed to conduct a new

hearing. The Respondents Malcolm and Baker, and the Respondent Yukon Human Rights Board of Adjudication have asked that the decision of the adjudicator be affirmed. The Respondent Human Rights Commission, as distinct from the Yukon Human Rights Board of Adjudication, has asked that the appeal be allowed, and the decision of Ms. Evans be declared a nullity and set aside. They have also asked that the acting chief adjudicator should be directed to establish a board of adjudication to conduct a new hearing utilizing the transcripts of the previous hearing before Ms. Evans, and that the panel of adjudicators should bear the costs of preparing for the rehearing.

CONCLUSION

[60] Section 28(3) of the Yukon *Human Rights Act* reads:

> (3) An appeal under this section may be made on questions of law and the court may affirm or set aside the order of the Board and direct the Board to conduct a new hearing.

[61] I conclude that my mandate is limited to those two alternatives. I affirm the decision of the Board of adjudication dated May 11, 2011.

COSTS

[62] At the hearing, I was told the Human Rights Commission and the Board of adjudicators would not seek costs, regardless of the outcome. I was also assured the Respondents Malcolm and Baker and the Appellants would not be seeking costs against the Commission or the Board, regardless of the outcome. Therefore, I direct that if the other parties, i.e., the Appellants and the Respondents Malcolm and Baker seek

costs against each other, they arrange with the Trial Co-ordinator for a costs hearing limited to those parties.

Dated this 25th day of November, 2011.

MARCEAU J.