

THE YUKON HUMAN RIGHTS BOARD OF ADJUDICATION

IN THE MATTER OF THE YUKON HUMAN RIGHTS ACT

AND IN THE MATTER OF

JACK WHITEHOUSE

COMPLAINANT

AND

GOVERNMENT OF YUKON

RESPONDENT

REASONS FOR DECISION

Heard November 20-22, 2000
December 11, 2000

Date of Decision: Oral Decision: December 11, 2000
Written reasons: January 10, 2001

Adjudicators: R. Lee Francoeur, Chief Adjudicator
Michael Dougherty
Renzo Ordonez

Reasons by: R. Lee Francoeur, Chief Adjudicator

Appearances by: Jack Whitehouse / for himself

Michael W. Cozens / Counsel for the Yukon Human Rights
Commission

Penelope Gawn / Counsel for the Respondent

Introduction

- [1.] On December 3, 1997, Jack Whitehouse filed a Human Rights Complaint with the Yukon Human Rights Commission alleging that the Government of Yukon discriminated against him on the prohibited grounds of ancestry and religion by failing to consider Mr. Whitehouse's cultural and religious duties in their interpretation and application of Article 24.06 of the Collective Agreement.
- [2.] On October 27, 1999, the Yukon Human Rights Commission requested that the Yukon Human Rights Board of Adjudication decide the matter. The Board gave notice and set a hearing date for November 20 - 24, 2000.
- [3.] The hearing was held on November 20 to 22, 2000. The hearing was then adjourned until December 11, 2000. The Commission and the Government of Yukon provided written arguments to the Board prior to the closing arguments on December 11, 2000.
- [4.] On December 11, 2000, after hearing the final arguments of the Complainant, the Commission and the Government of Yukon, the Board delivered an oral decision as follows:
 1. On the issue of jurisdiction the Board reserved judgement pending these written reasons for decision.
 2. However, on the issue of *prima facie* discrimination, the Board found that the Government of Yukon did not discriminate against Mr. Whitehouse by failing to grant Special Leave to the complainant under Article 24.06 of the Collective Agreement.
 3. On the issue of accommodation, the Board found that even if the Board was wrong, and there was a discrimination, the Government of Yukon did fulfill their duty to accommodate the Complainant by allowing Mr. Whitehouse to take the time off without penalty as vacation leave, comp time, or as leave without pay.
 4. The Board found that since there was no discrimination, there was no need to determine the issue of remedy.

Factual Background

- [5.] Mr. Whitehouse is currently employed by the Respondent at the Whitehorse Correctional Facility and has worked at the Correctional Facility since 1987.
- [6.] Mr. Whitehouse is a First Nation person of Tr'ondek Hwech'in ancestry. In April and May of 1997, the Tr'ondek Hwech'in Han Nation was engaged in their final land

selections under the Yukon land claim negotiation process. The land selections affecting Mr. Whitehouse were completed on May 15, 1997.

- [7.] Since Mr. Whitehouse was the eldest family member living near Dawson, he felt he had an obligation to personally research and attend the land claim meetings to ensure that the family's traditional lands were protected. The lands were used and occupied by the Tr'ondek Hwech'in for hundreds of years and included known family grave sites. The family's lands were identified as S-161 in the land claim negotiations.
- [8.] In particular, Mr. Whitehouse was concerned that the federal and territorial government would prioritize developments and third party interests over the hundreds of years of Tr'ondek Hwech'in use and the historical family's occupation of S-161. Parts of the family's lands were being used as a campground for seasonal workers since at least 1995.
- [9.] Mr. Whitehouse's concerns were validated over the years by several examples of developments and land allocations to third parties. Two examples that disturbed Mr. Whitehouse were the Yukon River Bridge development plans in 1994 and the four proposed outhouses for seasonal workers in 1996. Both of these development plans were on S-161 and specifically acknowledged the family's grave site in their reports but nonetheless recommended the development.
- [10.] In addition, Mr. Whitehouse felt that the federal government seemed to be more concerned about protecting a federal lease to Mr. Reinmuth on a portion of S-161 than addressing the outstanding concerns of the First Nation.
- [11.] Furthermore, on September 12, 1995, over the specific objection of Mr. Whitehouse and the Tr'ondek Hwech'in First Nation, the Yukon Land Application Review Committee, granted a lease for a campground over S-161. Later, as part of the final land selection process in May, 1997, Mr. Whitehouse's family agreed to take over the campground lease for at least seven years in order to secure the lands. Mr. Whitehouse testified that taking over the lease has been a burden on his family and has cost them thousands of dollars.
- [12.] Therefore, in April and May of 1997, given Mr. Whitehouse's concerns with the negotiations, and since a final land selection was expected, Mr. Whitehouse felt he had no choice but to attend the land claim meetings. A final land selection agreement was concluded on May 15, 1997, and any lands not included in the selection would have been lost forever.
- [13.] In order to prepare for and attend the land selection meetings, Mr. Whitehouse did not attend work for a period of time prior to May 15, 1997, when the final land selection agreement was completed. Following May 15, 1997, Mr. Whitehouse did not attend work due to the stress he felt during the negotiation process. In total Mr. Whitehouse did not attend work for 31 days. The shifts that Mr. Whitehouse did not work were:

April 16, 18, 21 (presumably he worked on April 17, 19 and 20)
April 25 - May 1
May 6 - 12
May 16 - 22
May 26 - June 2

[14.] On May 13, 1997, Mr. Whitehouse submitted seven Application for Leave Forms requesting Special Leave for the 31 days absent from work. In particular, Mr. Whitehouse asked in advance for Special Leave for the weeks of May 16 - 22 and May 26 - June 2, 1997, due to stress. In fact, on May 6, 1997, Mr. Whitehouse obtained a note from his physician which stated, "The above has been involved with a lot of stressful situations. I would recommend his request for time off (be it holiday or stress leave)".

[15.] Mr. Whitehouse was asked to provide a reason for his Applications for Special Leave. However, Mr. Whitehouse did not request time off for stress leave. On July 20, 1997, Mr. Whitehouse provided reasons as follows:

All of these special leave forms are for the same reason. This reason being to research find documents, object to and approach [sic] the Gov't of the Yukon for having leased out our Native Graves - and land to the City of Dawson. This extraordinary event was caused by Gov't of Yukon. I will talk to who ever on this matter and show proof of what happened.

[16.] Special Leave is provided under Article 24.06 of the Collective Bargaining Agreement between the Government of Yukon and the Public Service Alliance of Canada. Article 24.06 provides as follows:

At the discretion of the Employer, special leave with pay may be granted when circumstances not directly attributable to the regular employee prevent his/her reporting for duty.

[17.] Mr. Whitehouse testified that he did not apply for sick leave provided for in Article 25 of the Collective Agreement because he did not think he was sick, despite the letter from his doctor dated May 6, 1997. At the time of applying for Special Leave, Mr. Whitehouse had accumulated nearly 29 Special Leave days available to him.

[18.] On August 6, 1997, following a conversation with Mr. Whitehouse, Michael McBride, the Staff Relations Advisor of the Public Service Commission, wrote Mr. Whitehouse confirming that Mr. Whitehouse's Application for Special Leave was denied because he was not actually prevented from reporting for work.

[19.] Mr. McBride testified that while the Public Service Commission appreciated that the matter was of the utmost importance to Mr. Whitehouse, Special Leave under Article 24.06 is intended for special circumstances that actually physically prohibit an employee from attending work.

- [20.] Mr. Whitehouse was not disciplined for missing work in any way, and the Public Service Commission offered to allow Mr. Whitehouse the time off as vacation leave, comp time, or as leave without pay in an attempt to accommodate him.
- [21.] Mr. Whitehouse did discuss the denial of his Special Leave application with his union representative, but did not file a grievance under the terms of the Collective Agreement.

Relevant Legislative and Contractual Provisions

- [22.] The Yukon Human Rights provides in part:

Objects

1. (1) The objects of this Act are

- (a) To further in the Yukon the public policy that every individual is free and equal in dignity and rights
- (b) to discourage and eliminate discrimination
- (c) to promote recognition of the inherent dignity and worth of the equal and inalienable rights of all members of the human family, these being the principles underlying the *Canadian Charter of Rights and Freedoms* and the *Universal Declaration of Human Rights* and other solemn undertakings, international and national, which Canada honors.

Prohibited Grounds

6. It is discrimination to treat any individual or group unfavorably on any of the following grounds:
- (a) ancestry, including color or race,
 - (d) religion or creed, or religious belief, religious association, or religious activity

Prohibited Discrimination

8. No person shall discriminate
- (b) in connection with any aspect of employment or application for employment,
 - (c) in connection with any aspect of membership in or representation by any trade union, trade association, occupational association, or professional association,

Reasonable cause

9. It is not discrimination if treatment is based on
- (a) reasonable requirements or qualifications for the employment,
 - (d) other factors establishing reasonable cause for the discrimination.

Complaints

- 19.(1) Any person believing that there has been a contravention of the Act against him or her may complain to the commission who shall investigate the complaint unless
- (a) the complaint is beyond the jurisdiction of the commission

- [23.] Section 77 of the Public Service Staff Relations Act provides, in part, as follows:

- 77.(1) Where any employee feels himself to be aggrieved
- (a) by the interpretation or application in respect of him of
 - (i) a provision of an Act, or of a regulation, bylaw, direction or other instrument made or issued by the employer, dealing with terms and conditions of employment, or
 - (ii) a provision of a collective agreement or an arbitral award, or
 - (b) as a result of any occurrence or matter affecting his terms and conditions of employment, other than a provision described in clause (a)(i) or (a)(ii)

In respect of no administrative procedure for redress is provided in or under an Act, he is entitled, subject to section (2), to present the grievance at each of the levels, up to and including the final level, in the grievance process provided for by this Act.

- (2) An employee is not entitled to present any grievance relating to the interpretation or application in respect of him of a provision of a collective agreement or an arbitral award unless he has the approval of and is represented by the bargaining agent for the bargaining unit to which the collective agreement or arbitral award applies, or any grievance relating to any action taken pursuant to an instruction, direction or regulation given or made as described in section 100.

[24.] The Collective Agreement between the Government of Yukon and the Public Service Alliance of Canada provides in part:

ARTICLE 24 - SPECIAL LEAVE

- 24.01 (1) A regular employee, other than an employee who is on retiring leave pursuant to Article 25.04, shall be credited with six (6) days special leave credits upon commencement of his/her first year of service and upon commencement of each continuous year of service thereafter up to a maximum of thirty (30) days.
- 24.06 At the discretion of the Employer, special leave with pay may be granted when circumstances not directly attributable to the regular employee prevent his/her reporting for duty.
- 28.04 Subject to and as provided in Section 77 of the Yukon Public Service Staff Relations Act, an employee who feels that he/she has been treated unjustly or considers himself/herself aggrieved by any action or lack of action by the Employer, is entitled to present a grievance in the manner prescribed in Clause 28.02, except that where there is another administrative procedure provided by or under any other Act to deal with his/her specific complaint, such procedure must be followed.

Issues

- [25.] There were four issues presented to the Board for determination
1. Does the Board have jurisdiction to hear this Complaint when the Complainant did not pursue a grievance under the rights granted him pursuant to the Agreement?
 2. If so, has a *prima facie* case of discrimination been made out by the Complainant?
 3. If so, has the Respondent complied with their duty to accommodate the Complainant?
 4. If not, what is the appropriate remedy?

Analysis

Jurisdiction

- [26.] The Respondent submitted that the Board should decline jurisdiction to hear this complaint as it is an issue to be strictly decided under the Collective Agreement and the Board is not the proper forum to hear and decide this complaint of denial of Special Leave.
- [27.] On December 11, 2000, the Board reserved judgement on this issue. However, after consideration and review, the Board finds that in some cases the Board will have jurisdiction to hear complaints that may arise under the Collective Agreement.
- [28.] The Board accepts the Commission's submission, citing *Cadillac Fairview Corp. Ltd. v. Saskatchewan (Human Rights Comm.)* 31 C.H.R.R. D/107 (Sask. Q.B.) at paras. 14, 15:
- Human rights are more than just statutory rights. They are fundamental, quasi-constitutional rights which embody fundamental values and public policy... Moreover, human rights are not private rights, but public rights which constitute fundamental public policy. For this reason, parties are not able to contract out of human rights provisions.... Complaints under the Code affect not only private and economic rights, but human rights which are of a unique nature. They are fundamental, quasi-constitutional rights which embody public policy and reflect the broader public interest.
- [29.] The Board finds that even though an employee is bound by the terms of the Collective Agreement, an employee must still possess basic human rights as provided for under the Yukon Human Rights Act. An employer and employee cannot contract out human rights by entering into a collective agreement. The provisions of the collective agreement and the Public Service Staff Relations Act must be subject to the Human Rights Act.

[30.] Furthermore, it is the Yukon Human Rights Board of Adjudication that is responsible for determining whether the human rights of employees are being respected. An adjudicator under the Public Service Staff Relations Act is not in the position to determine if an employer is respecting the human rights of an employee under the terms of the collective agreement.

[31.] In fact, the Collective Agreement itself recognizes that other legislation may take precedence over the Agreement. Article 28.04 of the Collective Agreement says:

Subject to and as provided in Section 77 of the Yukon Public Service Staff Relations Act, an employee who feels that he/she has been treated unjustly or considers himself/herself aggrieved by any action or lack of action by the Employer, is entitled to present a grievance in the manner prescribed in Clause 28.02, **except that where there is another administrative procedure provided by or under any other Act to deal with his/her specific complaint, such procedure must be followed.**

[emphasis added]

[32.] Therefore, if an employee feels an employer has violated the Yukon Human Rights Act in their application of a collective agreement, an employee may choose not to grieve under the collective agreement and may file a human rights complaint.

[33.] Finally, the Board notes, without deciding on the issue, that the issue of jurisdiction in the Yukon Human Rights Act and Regulations may be an issue determined by the Commission. Section 19 of the Act provides:

19. Any person believing that there has been a contravention of this Act against him or her may complain to the commission who shall investigate the complaint unless

(a) the complaint is beyond the jurisdiction of the commission

[34.] Once the commission determines it has jurisdiction and requests the board to determine a complaint, the jurisdiction of the board may be limited by section 8 of the Regulations, which provides:

8.(1) Having received from the Commission a request that a complaint be decided by a board of adjudication, the Chief Adjudicator shall forthwith establish a board of adjudication to decide the complaint and shall give the Commission, the complainant, and the respondent at least 30 days notice of when the board will hear the complaint.

[35.] Thus, an employer may have to dispute the jurisdiction of the commission to investigate a complaint if they feel that the commission does not have jurisdiction.

[36.] In conclusion, the Board finds that it does have jurisdiction to determine whether or not

there was a discrimination in the application of the Collective Agreement, notwithstanding the fact that the complainant did not file a grievance under the terms of the Collective Agreement.

Discrimination

- [37.] As stated in our oral decision on December 11, 2000, the Board has determined that a *prima facie* case of discrimination has not been made against the Respondent.
- [38.] The Complainant alleges that the respondent employer "failed, and continues to fail, to recognize and consider my cultural and religious duties as a First Nation elder when they interpreted and applied Article 24.06 to my request."
- [39.] As stated above, Article 24.06 of the Collective Agreement provides
- 24.06 At the discretion of the Employer, special leave with pay may be granted when circumstances not directly attributable to the regular employee prevent his/her reporting for duty.
- [40.] The Board notes that the Commission limited their submission to a claim of discrimination to the dates from April 16, 1997 until May 16, 1997. The Commission submitted that for the period from May 17 until June 2, 1997, Mr. Whitehouse was no longer engaged directly in activities related to his ancestral / religious obligations and should have applied for sick leave under Article 25 of the Collective Agreement.
- [41.] Mr. Whitehouse, on the other hand, submits that, in addition to the period from April 16 to May 16, 1997, the discrimination continued until June 2, 1997. Mr. Whitehouse submits that the stress he experienced following the land selection process was directly connected with his ancestral / religious duties and therefore should be included.
- [42.] The Board accepts the submission of the Commission that, for the period from May 17 until June 2, 1997, Mr. Whitehouse was not engaged in activities directly related to his ancestral / religious duties. The board finds that for time off in respect of the stressful period following the conclusion of the land selection process, Mr. Whitehouse should have applied for sick leave under Article 25 of the Collective Agreement.
- [43.] However, the Board finds that for the period from April 16 to May 16, 1997, the Respondent did not discriminate against Mr. Whitehouse in their interpretation and application of Article 24.06.

- [44.] Firstly, Mr. Whitehouse could have applied for sick leave under Article 25 of the Collective Agreement for part of the period from April 16 to May 16, 1997. On May 6, 1997, Mr. Whitehouse obtained a letter from his doctor recommending time off for holiday or sick leave.
- [45.] Rather than requesting time off for sick leave during what the Board accepts was a very stressful situation for Mr. Whitehouse, the Complainant on May 13, 1997 submitted seven Special Leave Application forms with no reasons for the request.
- [46.] Secondly, the Board finds that the employer did not exercise their discretion in an unreasonable manner in rejecting Mr. Whitehouse's Special Leave Application. The Ontario Crown Employees Grievance Settlement Board in *Ontario (Ministry of Government Services) and O.P.S.E.U. (Kimmel/Leaf)* (1991), 21 L.A.C. (4th) 129, found that a proper exercise of discretion includes the following considerations:
1. the decision must be made in good faith and without discrimination;
 2. it must be a genuine exercise of discretionary power, as opposed to rigid policy adherence;
 3. consideration must be given to the merits of the individual application under review;
 4. all relevant facts must be considered and conversely irrelevant consideration must be rejected.
- [47.] The Respondent asked Mr. Whitehouse to provide reasons for his Applications for Special Leave. On July 20, 1997, Mr. Whitehouse provided reasons as follows:
- All of these special leave forms are for the same reason. This reason being to research find documents, object to and approach [sic] the Govt of the Yukon for having leased out our Native Graves - and land to the City of Dawson. This extraordinary event was caused by Gov't of Yukon. I will talk to who ever on this matter and show proof of what happened.
- [48.] On August 6, 1997, following a conversation with Mr. Whitehouse, the Public Service Commission wrote to Mr. Whitehouse confirming that Mr. Whitehouse's Application for Special Leave was denied because he was not actually prevented from reporting for duty.
- [49.] Mr. McBride testified that Article 24.06 is really intended for instances where the employee is physically or otherwise actually prevented from reporting for duty. The Article is not intended for instances where the employee chooses not to attend work.

- [50.] Mr. Whitehouse, on the other hand, submits that the employer failed to realize that he, in fact, had no choice but to attend the land selection meetings as part of his ancestral / religious duties.
- [51.] The Board does not accept Mr. Whitehouse's submission that there was no choice but to attend the land selection meetings rather than attend work. There were other options available to Mr. Whitehouse that the Complainant did not explore. For example, Mr. Whitehouse could have requested sick leave, attempted to change his schedule, or bank hours.
- [52.] The Ontario Court of Appeal in the *Ontario v. Grievance Settlement Board* decision, [2000] O.J. No. 3411 (Quicklaw), held that an employer is not discriminating against an employee by requesting the employee to make schedule changes or bank hours to make up the time off.
- [53.] In this case, the employee did not attempt to consider other options other than to attend the land selection meetings and not report for duty. The employer did consider all of the relevant evidence, and made a reasonable decision in rejecting Mr. Whitehouse's request.
- [54.] Furthermore, as part of their decision in rejecting Mr. Whitehouse's request, as explained below, the Respondent did attempt to accommodate the request as much as possible in the circumstances.
- [55.] Thirdly, the Board does not dispute that Mr. Whitehouse felt that he had no choice but to attend the meetings. The Board acknowledges that Mr. Whitehouse's attendance at the meeting was very important in protecting his family's land interests. However, the Board can not accept that an employer must allow employee's time off work with pay whenever an employee feels they have no choice but to report for duty.
- [56.] An integral part of human nature is that 'things' come up all the time. Some of these things require people to make very difficult choices. Mr. McBride testified about the difficult choice he had to make when his mother was very ill. Mr. McBride knew there was no way that he could attend work, but recognized that he was making a choice.
- [57.] The employer carefully considers each of these requests on a case by case basis, and either accepts or rejects the request on its merits. An employer will not automatically be discriminating against a First Nation employee if they do not accept a First Nation request.
- [58.] Additionally, not all land claims have been finalized in the Yukon. Other First Nation employees would surely want to take time off with pay to ensure they protect their family's interests in the land claim process. However, if First Nations get additional time off with pay for land claim purposes, this could have the adverse effect of making the

Government of Yukon, a major employer in the Yukon, reluctant to employ other First Nation peoples. However, obviously this action in itself would be a discrimination, but the concern could invisibly underlie a final decision against a First Nation employee.

- [59.] To always allow Special Leave when a First Nation employee makes a request could have the effect of discriminating against other employees who feel they can not report for duty because of their obligations. For example, as submitted by the Respondent, the employer could be responsible for having to grant time off for negotiations for individuals in disputes with the Vital Statistics Branch regarding their rights to a same sex marriage.

Accommodation

- [60.] Even though this Board has found there was no discrimination for the period from April to May 16, 1997, the Board finds that, even if we are wrong, the Respondent attempted to reasonably accommodate the employee in his request for time off.
- [61.] Mr. Whitehouse failed in his duty to assist the employer in attempting to accommodate his request. Firstly, Mr. Whitehouse initially called in sick when he failed to report for duty. Then, on May 13, 1997, after already missing all but one of his shifts between April 16 and May 16, 1997, Mr. Whitehouse makes his Special Leave Application, but provides no reasons for the request. After being asked to provide reasons, Mr. Whitehouse advises that he took time off to "research find documents, object to and approach [sic] the Gov't of the Yukon for having leased out our Native Graves - and land to the City of Dawson."
- [62.] Since the request was made after the time was taken, this left the employer with very few options. Mr. Whitehouse could have explored options with the employer other than simply requesting time off with pay under Article 24.06.
- [63.] The Federal Court of Appeal in the *Richmond v. Canada (Attorney General)* [1997] 2 F.C. 946, [1997] F.C.J. No. 305 case held that the balance of the collective agreement is a very important factor in considering the actions of the employer.
- [64.] In this case, Mr. McBride, for the Respondent, explained that Article 24.06 is located as part of the Special Leave articles under the Collective Agreement. Mr. McBride explained that the employer exercises their discretion in the context of the other provisions that allow a maximum of six days of paid leave for special circumstances. Clearly, allowing 18 days of leave with pay would be a radical departure from the way the policy is currently administered.

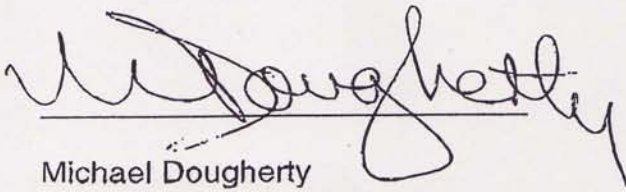
- [65.] Although the wording of 24.06 clearly does not limit the employer from allowing more than six days of paid leave under 24.06, the employer would carefully scrutinize any Special Leave Application that is substantially outside the six day limit. In this case, the Special Leave Application was for 31 days of paid leave over a six week period. Even considering the Commission's submission that paid leave be granted for 18 days, this is substantially outside the intended purpose of the Article.
- [66.] The Board notes that even though the Commission has conceded that the claim be limited to 18 days, Mr. Whitehouse's actual Special Leave Application was for 31 days. The employer was not in a position to determine that a portion of the Special Leave Application should be rejected or given as sick leave, and that the remainder of the Special Leave Application be given as special leave under Article 24.06.
- [67.] The employer's difficult position is highlighted by the fact that Mr. Whitehouse did not co-operate with the employer in finding a suitable accommodation. As stated above, Mr. Whitehouse did not clearly communicate what his needs were, or even what the leave was taken for. Additionally, the Special Leave Applications were made long after the time was actually taken off. This did not leave many options for the employer to consider.
- [68.] Therefore, since the employer was asked to consider a request substantially outside the scope of the Collective Agreement, and the request was not clearly communicated, this Board finds that in the circumstances, the employers decision to allow time off, without penalty, as vacation leave, comp time or as time off without pay, was reasonable.

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Remedy

[69.] This Board ordered on December 11, 2000 that since there was no discrimination, or alternatively, that any discrimination was accommodated by the Respondent, there is not need to consider the issue of remedy.

This Decision of the Yukon Human Rights Board of Adjudication has been made this 10th day of ~~February~~, 2001 at the City of Whitehorse in the Yukon Territory.
~~January~~

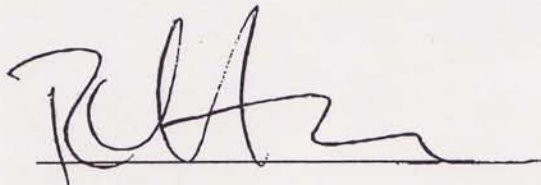


Michael Dougherty

Member

Renzo Ordonez

Member



Lee Francoeur, Chief Adjudicator