

CANADA / JUDGMENT

British Columbia (Attorney General) v. Sanghera

2014 BCCA 221

COURT

British Columbia Court of Appeal

DECIDED

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2014 BCCA 221 British Columbia (Attorney General) v. Sanghera

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

British Columbia (Attorney General) v. Sanghera,

2014 BCCA 221

Date: 20140617

Docket: CA041316

Between:

Her Majesty the Queen in Right of the Province of British Columbia
as Represented by the Ministry of Attorney General operating as
Court Services Branch, Sheriff Services and Her Majesty the Queen
in Right of the Province of British Columbia as Represented by the
Ministry of Public Safety and Solicitor General operating as
British Columbia Corrections Branch

Appellants

(Petitioners)

And

Udham Singh Sanghera

Respondent

(Respondent)

Before:

The Honourable Mr. Justice Donald

The Honourable Madam Justice Neilson

The Honourable Mr. Justice Harris

On appeal from: An order of the Supreme Court of British Columbia,
dated September 25, 2013 (British Columbia (Attorney General) v. Sanghera,
Vancouver Docket S130713).

Counsel for the Appellants:

J.G. Penner

Counsel for the Respondent:

D. Soiseth &, J. Dalley

Place and Date of Hearing:

Vancouver, British Columbia

May 22, 2014

Place and Date of Judgment:

Vancouver, British Columbia

June 17, 2014

Written Reasons by:

The Honourable Mr. Justice Harris

Concurred in by:

The Honourable Mr. Justice Donald

The Honourable Madam Justice Neilson

Summary:

The Province appeals from the dismissal of its judicial review application of a decision by the Human Rights Tribunal.

HELD: Appeal dismissed. The Tribunal's decision was not patently unreasonable.

Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction

- [1] The Province appeals from the dismissal of a judicial review application. The judicial review arose from an application to the Human Rights Tribunal to strike a complaint on the grounds that it was inadequately particularized and was out of time. The Tribunal struck most of the complaint on the basis that it was filed out of time or was too vague and inadequately particularized to sustain an alleged breach of the Human Rights Code, R.S.B.C. 1996, c. 210 [Code].
- [2] The Tribunal allowed certain portions of the complaint to go forward. The Province sought judicial review, arguing that the decision was patently unreasonable because it was arbitrary. Its arbitrariness lay in the Tribunal's failure to recognize that the considerations that justified striking part of the complaint for being too vague applied equally to those portions the Tribunal allowed to proceed. The Province also argued there was no basis to support the Tribunal's finding of a continuing contravention, which allowed several alleged incidents of discrimination that occurred more than six months before the complaint was filed to proceed.
- [3] The chambers judge dismissed the application for judicial review. In my view, for the reasons that follow, he was correct to do so. I would dismiss the appeal.

Background

- [4] On October 3, 2011, Mr. Sanghera filed a complaint with the Tribunal alleging that "B.C. Corrections" and "Provincial Court Sheriffs" had discriminated against him with respect to a service customarily available to the public on the basis of his race, colour, ancestry, place of origin and religion contrary to s. 8 of the Code. Mr. Sanghera is a practicing Sikh.
- [5] The complaint canvassed a period between October 2009 and April 2011. In the complaint, Mr. Sanghera alleged that when he was in custody, Corrections employees confiscated his turban, thereby preventing him from fulfilling a Sikh religious obligation. In place of his turban he was offered a handkerchief. Mr. Sanghera also alleged that when he was required to appear in court, sheriffs confiscated the makeshift turban he was wearing and forced him to appear before the court with only a handkerchief covering his head. Mr. Sanghera alleged that the sheriffs at both the North Fraser Pre-Trial Centre and the B.C. Supreme Court laughed at his embarrassment.
- [6] The complaint was amended in February of 2012 to add dates on which some of the incidents were alleged to have occurred. Shortly after the complaint was accepted for processing, the Province requested particulars of the complaint, including the date of each alleged incident, a description and other details of what happened on each occasion, and which of Corrections or the Sheriff Service committed the alleged discrimination.

- [7] On March 24, 2012, Mr. Sanghera sent a letter providing some further information, indicating, amongst other things, that the discrimination occurred on "all" of the dates he listed in his letter.
- [8] In April 2012, an advocate from the B.C. Human Rights Coalition contacted the Tribunal and the Province to advise them that he would be representing Mr. Sanghera. The Tribunal informed Mr. Sanghera's advocate that he was required to file particulars of his complaint and to explain certain discrepancies in materials provided.
- [9] In May 2012, Mr. Sanghera provided further particulars of the dates on which he made court appearances or was in custody. His submissions again included dates as far back as May 2009. However, his submissions also indicated that events took place in the Supreme Court on March 28, 2011, and then continued until April 19, 2011 on specific identified days, when the charges against Mr. Sanghera were stayed.
- [10] It was at this point that the Province filed its response to the complaint and an application to dismiss it. The application set out three bases for dismissing the complaint:
- (a) the allegations in the complaint occurred more than 6 months before the Complaint was filed, and were therefore subject to being struck under s. 27(1)(g) of the Code because Mr. Sanghera could not satisfy the test in s. 22(3);
 - (b) the acts alleged in the Complaint did not constitute a breach of the Code, and as such the Complaint was subject to being struck under s. 27(1)(b) of the Code; and
 - (c) proceeding with the Complaint would not further the purposes of the Code, and as such the Complaint was subject to being struck out under s. 27(1)(d)(ii) of the Code.
- [11] Stripped to its essentials, the Province, beyond the issue of timeliness, argued that the complaint was too vague, included an inconsistent statement of relevant dates, and lacked sufficient particulars regarding where, what, when and who was involved in the allegations.
- [12] The Tribunal, in reasons indexed at 2012 BCHRT 418, treated the complaint as involving three categories of allegations. These were:
- 1. The confiscation of Mr. Sanghera's turban by employees of Corrections when he was taken into custody (Allegation One);
 - 2. The confiscation of Mr. Sanghera's makeshift turban by the sheriffs when he appeared in court (Allegation Two); and
 - 3. The sheriffs laughing at his embarrassment when they confiscated his makeshift turban (Allegation Three).
- [13] In the result, the Tribunal dismissed the complaints arising from the alleged incidents that took place in 2009 and 2010 because they were filed late and were not part of a continuing contravention of the Code. That result was not in issue on judicial review or on this appeal.

- [14] The Tribunal also dismissed Mr. Sanghera's complaint that sheriffs laughed at him on court appearance days under s. 27(1)(b) of the Code. Allegations One and Two, to the extent that they arose after March 28, 2011, were allowed to proceed. The Tribunal's reasons were the following:
- [29] I find that Allegations One and Two could, if proven, amount to a breach of the Code. Disclosure of all relevant documents by the Respondents should answer any ambiguity respecting the dates relevant to the allegations, and any further issues may be dealt with as they arise. I do find it necessary to consider Mr. Sanghera's affidavit in coming to this conclusion.
- [30] On the other hand, I find that Allegation Three is too vague to constitute a complaint, whether or not the Respondents disclose all relevant information. Mr. Sanghera was required to describe the conduct of the sheriffs with more detail. While the conduct he describes (laughing at him in the context of wearing the handkerchief) could, if proved, be discrimination, the allegation is too vague to articulate a contravention of the Code. Although the complaint specifies numerous court appearances, Mr. Sanghera does not identify or even estimate how many times the alleged discriminatory conduct occurred, when it occurred, or how many sheriffs were involved. He provides no identifying information about the sheriffs. For example, it is not clear whether the allegations relate to all or some of the 2009, 2010 and 2011 dates. If proven, the allegation of fact in Allegation Three is too vague to be a violation of the Code. Allegation Three is dismissed under 27(1)(b).
- [15] Specifically with respect to the continuing contravention that captured the alleged incidents of discrimination before April 3, 2011, the Tribunal stated:
- [34] Mr. Sanghera filed his complaint on October 3, 2011. As a result, to be timely, the conduct complained of must have occurred on or after April 3, 2011, or form part of a continuing contravention with a timely allegation. Mr. Sanghera has listed Provincial Court dates that run from April 6, 2009 to March 19, 2010. He has listed Supreme Court dates that run from March 1 to April 21, 2011 or March 28 to April 19, 2011. I acknowledge that Mr. Sanghera's dates include inconsistencies; however, the totality of his material indicates that some of the listed dates are filed on a timely basis. All of the allegations arose when Mr. Sanghera was in custody and under the purview of either of the Respondents. He alleges that he was prohibited from wearing a religious Sikh turban on all of the dates he was in custody and that, on court dates, his make-shift turban was confiscated and he was forced to appear before the court with only a handkerchief on this head.
- [35] Mr. Sanghera states that he is alleging a continuing contravention.
- [36] The Tribunal applies the following test to determine whether there was a continuing contravention of the Code.

To be a "continuing contravention", there must be a succession or repetition of separate acts of discrimination of the same character. There must be present acts of discrimination of the same character. There must be present acts of discrimination, which could be considered as separate contraventions of the act, and not merely one act of discrimination, which may have continuing effects or consequences. (*Lynch v. British Columbia* (Human Rights Tribunal), 2000 BCSC 1419 , 2000 BCSC 1419, adopted from *re: The Queen in Right of Manitoba and Manitoba Human Rights Commission, et al* reflex, (1983) 2 DLR (4th) 759 (Man. C.A.) (para. 35)[.]

[37] Accordingly, Mr. Sanghera's allegations before and after April 3, 2011 must be both continuing and of the same character for the earlier parts of the complaint to be timely.

[38] Mr. Sanghera's allegations appear to be a repetition of the same allegations for each date; that is, he was prohibited from wearing a religious Sikh turban; and that, on the dates he made court appearances, his makeshift turban was confiscated and he had to appear before the Court with a handkerchief on his head.

[41] In particular, I have considered Mr. Sanghera's explanation for why he cannot ascertain specific dates. In his affidavit, Mr. Sanghera deposed that all the notes he made while in custody were taken away from him upon application of the Crown and by order of the Court before he was released. He explained that this was why there may have been inconsistencies in the dates he provided as he was relying on his memory only. He states that he received a record of proceeding on May 3, 2012, on which basis he confirms that he was in custody and/or before the court as follows:

BC Provincial Court

In 2009, April 6, 17, May 22, 29, June 16, 29, 30, August 31, September 14, December 14, and 18.

In 2010, January 6, March 1, 3, 4, 15, 17, 18, and 19.

BC Supreme Court

In 2011; March 28, 29, 30, and 31; and April 1, 4, 5, 6, 7, 8, 11, 12, 14, 15, 18, and 19.

[42] Based on the dates provided by Mr. Sanghera, I note that there is a gap between the last Provincial Court date of March 19, 2010 and the first Supreme Court date of March 28, 2011 of over one year. The Tribunal has held that a significant gap in time militates against finding a continuing contravention: *Tevaarwerk v. VIHA and others*, 2010 BCHRT 64, 2010 BCHRT 64, para. 36; *Dickson v. Vancouver Island Human Rights Coalition*, 2005 BCHRT 209, paras. 16-17.

[43] I have decided that the gap in time is significant and unaccounted for. In these circumstances, I have determined that the 2009 and 2010 dates do not form part of the continuing contravention.

- [44] Therefore, I conclude that only the March and April 2011 dates form a continuing contravention and are accepted for filing under s. 22(2) of the Code. The 2009 and 2010 dates in Provincial Court are late-filed.
- [16] The Province sought a judicial review. It did not pursue judicial review of the Tribunal's decision to allow Allegation One to proceed. The chambers judge summarized the Province's submissions as follows:
- [27] With respect to Allegation Two, the Crown says that Mr. Sanghera repeatedly failed to provide particulars of the alleged incidents underlying this aspect of his Complaint and that there was therefore no evidence on which the Tribunal could find a continuing contravention spanning March and April 2011. In the Crown's submission, the Tribunal's finding is patently unreasonable as being both arbitrary and based on an unreasonable finding of fact.
- [28] The Crown notes that Allegation Two and Allegation Three were essentially combined in the original Complaint, and submits that therefore the Tribunal's finding that Allegation Three was too vague to be sustained should apply with equal force to Allegation Two.
- [17] The chambers judge concentrated his analysis on the issue of the continuing contravention:
- [35] In the present case, the Crown's concern about the lack of detail in the original Complaint was well founded. The vague reference to "two more incidents in March - April 2011" was not sufficient to permit either the Tribunal or the Crown to properly assess the Complaint and in particular to determine whether the alleged incidents formed part of a continuing contravention.
- [36] However, while not perfect, additional details were provided by Mr. Sanghera in his letter dated March 24, 2012, by the Human Rights Clinic in the further particulars provided on July 31, 2012, and in Mr. Sanghera's affidavit filed in response to the Crown's application to dismiss.
- [37] In the circumstances, it was open to the Tribunal to find, as it did, that the totality of the information provided by or on behalf of Mr. Sanghera established that some of the alleged discriminatory acts occurred within the six month timeframe dating back from the date on which the Complaint was filed.
- [38] It was also open to the Tribunal, in the exercise of its discretion, to find that those alleged acts which occurred prior to the six month timeframe formed part of a continuing contravention.
- [39] As noted by the Tribunal and as submitted by Mr. Sanghera, the nature of his allegations remained consistent with respect to all of the dates provided.

- [40] In my view, the Crown has sufficient information to allow it to properly respond to the Complaint, and it would not be unfairly prejudiced by the Complaint proceeding on the basis ordered by the Tribunal.
- [41] Accordingly, I find that the decision of the Tribunal to allow the elements of Allegation Two that allegedly occurred in March and April 2011 to proceed was not patently unreasonable, and I would dismiss the Crown's application for judicial review.
- [18] He did not specifically address the argument set out in para. 28 in his reasons, in which the Province argued that Allegations Two and Three were combined and distinguishing between them was arbitrary and unexplained.

On Appeal

- [19] The Province submits that the chambers judge erred by failing to address and then to conclude that it was patently unreasonable of the Tribunal to permit Allegation Two to proceed when Allegation Three was struck. It also submits that it was patently unreasonable for the Tribunal to find that Allegation Two was timely.
- [20] As recently stated by the Supreme Court of Canada in *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 at para. 27, the Province must establish that the chambers judge misdirected himself, came to a decision that is so clearly wrong that it amounts to an injustice, or gave no or insufficient weight to relevant considerations in order to be successful in this appeal.
- [21] The Province submits in its factum that at no point did the Tribunal explain how the same passage in Mr. Sanghera's complaint could, on the one hand, be too vague to constitute a complaint under the Code (because it failed to estimate how many times it occurred or when it occurred, and was not clear as to whether it related to all or some of the 2009, 2010, and 2011 dates) and, on the other hand, constitute a complaint under the Code with respect to which any ambiguity could be dealt with by disclosure of documents. The Province submits that this reasoning is incoherent and the Tribunal's failure to explain a critical aspect of its reasoning renders its decision arbitrary.
- [22] The chambers judge did not directly address this argument.
- [23] The Province also submits that the Tribunal acted arbitrarily when it held that Allegation Two alleged timely acts of continuing discrimination. It points out, correctly, that s. 22 of the Code provides that a complaint must be filed within six months of the alleged contravention. If a continuing contravention is alleged, the complaint must be filed within six months of the last alleged instance of the contravention.
- [24] The Province points to the complainant's original written submissions, which stated that "two more incidents did happen at B.C. Supreme Court Cells Mar-Apr 2011". In none of the subsequent iterations of Mr. Sanghera's "particulars" did he explain when these two incidents occurred, or why he had specifically referred to two incidents. Rather, he simply

listed dates spanning the period from, alternatively: March 1 to April 21, 2011 (particulars of February 27, 2012); March 1 to March 21, 2011 (particulars of March 24, 2012); or specified dates between March 28 and April 19, 2011 (particulars of May 3, 2012). In his particulars of March 24, 2012, he stated that his rights were infringed on "all" the dates mentioned (meaning March 1-21, 2011), while in his particulars of May 3, 2012, he simply said that he "made court appearances on/and or was 'In Custody' on [those] dates" (meaning the specified dates between March 28 and April 19).

[25] The Province argues that the Tribunal glossed over this difficulty by saying:

[34] I acknowledge that Mr. Sanghera's dates include inconsistencies; however, the totality of his material indicates that some of the listed dates are filed on a timely basis

[26] The Province submits that the Tribunal's failure to require Mr. Sanghera to sufficiently particularize his complaint is unfair to the Province and inconsistent with the Tribunal's jurisprudence, which requires a complainant to provide sufficient information to establish a continuing contravention. As a result, the Tribunal's decision with respect to the timeliness of Allegation Two under s. 27(1)(g) was patently unreasonable.

[27] I am, with respect, unable to discern any merit in the Province's position on this appeal. I accept that the chambers judge did not expressly address the argument that the Tribunal acted arbitrarily by allowing the complaint regarding the removal of Mr. Sanghera's turban to proceed while dismissing the complaint about the sheriffs laughing at his embarrassment when they did so. But I see nothing arbitrary in the way in which the Tribunal dealt with the matter.

[28] First, although in Mr. Sanghera's complaint the allegations were "combined", the combined complaint refers to a course of conduct with different aspects (removing the turban and reacting to doing so) that invite separate analysis for analytical purposes. There was nothing arbitrary in distinguishing between the different aspects of the conduct for the purpose of analyzing complaints of a different character. Moreover, there is a clear and categorical difference between conduct such as removing a turban and conduct that is interpreted by a complainant as embarrassing and humiliating. The removal of a turban is a discrete, concrete and objectively ascertainable act. Mr. Sanghera said it happened each time he appeared in court. Whether the sheriffs conducted themselves in a manner that could cause Mr. Sanghera to have been embarrassed or humiliated involves a more subjective analysis of their behaviour. Mr. Sanghera did not provide sufficient details of the alleged conduct giving rise to his humiliation, such as how many sheriffs were involved, or when it occurred, etcetera.

- [29] I see nothing arbitrary in the Tribunal drawing a distinction between the different aspects of the complaint. Such a distinction is there to be drawn, in the discretion of the Tribunal, because the conduct complained of is of a very different nature. I cannot see that the Tribunal reached a patently unreasonable decision in allowing certain aspects of the complaint to proceed and dismissing others.
- [30] Similarly, I see nothing patently unreasonable in the Tribunal's decision to allow the alleged incidents of discrimination occurring in March and April 2011, to proceed on the basis that they form part of a continuing contravention. I would dismiss this aspect of the appeal for the reasons given by the chambers judge.

Conclusion

[31] I would dismiss the appeal.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Mr. Justice Donald"

I agree:

"The Honourable Madam Justice Neilson"

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