SUPREME COURT OF YUKON

Citation: *XY (Litigation Guardian of) v Yukon (Government of)*, 2022 YKSC 63

Date: 20221129
S.C. No. 20-AP006
Registry: Whitehorse

BETWEEN:

XY, BY HIS LITIGATION GUARDIAN YZ

PETITIONER

AND

YUKON GOVERNMENT (DEPARTMENT OF EDUCATION)

RESPONDENT

Before Chief Justice S.M. Duncan

Counsel for the Petitioner	Mark Wallace
Counsel for the Respondent	Amy Porteous
Counsel for the Yukon Human Rights Commission	Vida Nelson

REASONS FOR DECISION

Introduction

[1] XY, the petitioner, is a young man with a hearing impairment. He struggled in school especially with reading and language. He complained to the Yukon Human Rights Commission ("YHRC") on August 2, 2019, alleging the Government of Yukon, Department of Education ("Department of Education") discriminated against him because of his disability throughout his years at school, starting in 2007 when he was in kindergarten and continuing to 2018 when he was in Grade 10. In sum, he says the

Department of Education denied him meaningful access to education by failing to accommodate his disability.

[2] The YHRC accepted part of his complaint for investigation, but not all of it. The YHRC relied on s. 20(2) of the *Human Rights Act*, RSY 2022, c 116 (the "*Act*"), which provides that a complaint must be brought within 18 months of the alleged contravention or of the last instance of an alleged continuing contravention. The earliest allegations accepted for investigation by the YHRC occurred within 23 months of the making of the complaint. The YHRC rejected the allegations before that time because they were out of time, not a continuing contravention of discrimination occurring in later years, and did not merit an exercise of discretion. The YHRC did not accept XY's argument that the allegation of systemic discrimination was sufficient to oust the time limitation.

[3] This judicial review brought by XY is about whether this Court should intervene in the YHRC's interpretation of s. 20(2) of the *Act*. For the following reasons, the decision of the YHRC was reasonable and the application for judicial review is dismissed.

[4] I will review the background in this matter, summarize the issues, set out the applicable legal principles for standard of review, and provide my analysis and conclusion.

Background

[5] XY was a student in the public school system in the Yukon. He was diagnosed with a hearing impairment when he was four years old.

[6] The specific allegations in the complaint were summarized as follows:

a. May 2007, pre-kindergarten meeting – administrators did not recommend an Individual Education Plan ("IEP") for XY;

b. 2008, Grade 1 – XY's parents were told to adjust their expectations about his reading;

c. 2009, Grade 2 – XY was denied access to a Reading Recovery program and offered less than the recommended learning assistance teaching support; the parents' request for an educational psychological assessment was denied;

d. 2010, Grade 3 – the FM system to assist hearing impaired students was recommended by a teacher but not consistently used by teachers at XY's school;

e. 2011, Grade 4 – the teachers did not use the FM system, the literacy program was discontinued at Christmas and the school rejected the request for a tutor during school hours;

f. 2012, Grade 5 – the school discontinued pre-teaching accommodation for XY and the FM system was implemented inconsistently. The parents decided to home school XY partway through the year, after which he was denied access to school property;

g. 2013, Grade 6 – XY attended a virtual school but was denied access to learning assistance supports from his previous school and given a tutor for only part of the year;

h. 2014, Grade 7 – XY returned to the previous school but was denied pre-teaching/reading accommodations and the FM system was not implemented;

i. 2015, Grade 8 – XY begins to reject using the FM system, his written work was done exclusively by a scribe, contrary to his IEP, and pre-teaching strategies were not used. In the spring of 2016, XY withdrew from the school for the second time due to their failure to accommodate;

j. 2016, Grade 9 – while XY was being home schooled, the Department of Education denied a request for a new educational psychological assessment because the request was not made by the school;

k. 2017, Grade 10 – XY returned to the online school and the teacher's recommendation of visual supports was not implemented;

l. 2018, Grade 10 – XY attended another school in the spring of Grade 10. The teacher who had recommended supports was not permitted to attend XY's classes as a support person. XY abandoned the FM system because of the difficulty in getting teachers to use it and ASL interpretation was sporadic. In June 2018, the Department of Education declined funding for XY to attend the British Columbia School for the Deaf in Burnaby, British Columbia; and

m. 2018, Grade 11 – the Department of Education limited its offer of financial support to XY to the amount offered to Yukon students who travelled to Whitehorse from elsewhere in the Territory to study;

[7] The decision of the Commission members dated May 12, 2020, endorsed and adopted the reasoning of the Acting Director, set out in her letter dated December 23, 2019. Therefore, I will refer to the Acting Director's reasons, as well as to the Commission members conclusions. I will not refer to Exhibits A-L attached to the

affidavit of YZ, except to the extent they are replicated elsewhere in the material that was reviewed by the decision-makers, because they were not included in the application to the YHRC and not reviewed by the Acting Director or the Commission members.

[8] The Acting Director accepted the following allegations:

a. denial of funding to XY to attend the British Columbia School for the Deaf (June and September 2018); and

b. failure to accommodate during Grade 10 in 2017-18 by not implementing supports at the online school; not allowing a support person in class; failing to use the FM system; and sporadic use of ASL interpretation.

[9] The allegations of denial of funding occurred within 18 months of August 2, 2019, as required by s. 20(2) (June and September 2018). The second group of allegations was partially within that time period (February 2018 onwards). The allegations occurring at the beginning of that school year (September 2017) were accepted as timely on the basis they were a continuing contravention. They were related to other similar failures to accommodate in the same school year, were closely connected in time and involved the same actors.

[10] The allegations occurring before the 2017-18 school year were not accepted because they were not considered continuing contraventions and were therefore outside of the statutory time limit. The Acting Director's reasons for rejecting the earlier allegations as continuing contraventions were:

a. they were a different character than the later allegations;

b. they involved different people; and

c. they involved different types of accommodations.

[11] In addition, the Acting Director found that XY's Grade 9 year, in 2016-17, created a substantial gap in time that broke the continuity necessary to find the earlier allegations were part of a continuing contravention.

[12] In confirming the Acting Director's decision, the Commission members noted the complaint made allegations of systemic discrimination- "that is, the complaint alleges that institutional or organizational attitudes, patterns of behaviour, policies, or practices have created or perpetuated disadvantage for students with disabilities in Yukon, including XY." The Commission members confirmed that the YHRC investigation would include the consideration of whether the accepted allegations of discrimination are connected to systemic discrimination.

Issues

- What is the applicable standard of review?
- Is the YHRC's interpretation of s. 20(2) of the *Act* resulting in the acceptance of allegations from 2017 to 2018 and the rejection of earlier allegations appropriate? In other words, is the YHRC's understanding and application of continuing contravention in s. 20(2) of the *Act* subject to intervention by this Court?

Legal principles for standard of review

[13] The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*"), the leading authority on standard of review, revised the framework for determining the standard of review of administrative decisions. The following describes the relevant conclusions from that decision.

[14] Reasonableness is presumed to be the applicable standard in all cases unless there is a clearly expressed legislative intent or the rule of law requires a correctness review. More specifically, the following five categories of exceptions to the reasonableness standard of review were articulated: where there is a clearly expressed legislated standard of review or a statutory appeal mechanism exists; where the review is of a constitutional question, or of a general question of law of central importance to the legal system as a whole; or where the review is about a question of jurisdictional boundaries between administrative bodies. These categories are not closed but any new exception would be required to comply with the principles set out in *Vavilov*.

[15] The Supreme Court of Canada emphasized that the rationale for the presumption of reasonableness standard is:

> [30] … [t]he *very fact* that the legislature has chosen to delegate authority … In other words, respect for this institutional design choice and the democratic principle, as well as the need for courts to avoid "undue interference" with the administrative decision maker's discharge of its functions, is what justifies the presumptive application of the reasonableness standard: *Dunsmuir* [2008 SCC 9] at para. 27. (emphasis in original)

[16] A reasonableness review is meant to ensure that courts intervene in administrative matters only where it is necessary:

> [13] … to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers. However, it is not a "rubber-stamping" process or a means of sheltering administrative decision makers from accountability. It remains a robust form of review.

[17] The court described this balancing between deference and intervention. On one hand there is the need for "courts [to] recognize the legitimacy and authority of

administrative decision makers within their proper spheres". On the other hand, there is a need for administrative decision-makers to justify their exercise of public power in a way that is rational and fair (para. 14).

[18] The court in conducting a reasonableness review must focus on the administrative decision itself – the reasoning process and the outcome – and not on the decision the reviewing court would have made themselves in place of the administrative decision-maker.

[19] A reasonable decision is:

> [85] … one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker ...

[20] Both the reasoning process and the outcome must be reasonable. The court in *Vavilov* adopted their conclusion in *Dunsmuir* that reasonableness:

> [86] … "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process", as well as "with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of facts and law"…

[21] The decision must be justified, not justifiable.

Analysis

Presumption of reasonableness applies

[22] In this case, the standard of review is reasonableness. None of the five exceptions to the presumption of reasonableness applies in this case.

Petitioner's challenge to YHRC decision

[23] XY objects to the reasoning and conclusion of the YHRC about continuing contravention in three ways.

[24] First, XY says the temporal gap of one year identified during his Grade 9 year is an error. It is not justified by the statutory language in s. 20(2) which allows for a complaint to the YHRC to be made within 18 months of a contravention or of the last instance of a continuing contravention, not one year.

[25] Second, XY argues the YHRC's conclusion that the allegations of discrimination before the fall of 2017 cannot be considered because they were of a different character, involved different individuals and different types of accommodations was unreasonable. XY says this conclusion fails to meet the goals and objectives of the *Act*, including furthering the public policy that everyone is free and equal in dignity and rights; discouraging and eliminating discrimination; and promoting the inherent dignity and worth and the equal and inalienable rights of all members of the human family (s.1(1) of the *Act*).

[26] Third, XY says the YHRC's interpretation of continuing contravention was unreasonable because it failed to consider systemic discrimination. Systemic discrimination requires an examination of policies, practices, procedures and attitudes to determine, even if they are neutral, whether they disproportionately and detrimentally discriminate against an individual. It requires proof of patterns over time and not necessarily specific instances of discriminatory conduct. The petitioner characterizes all of the allegations in the complaint as the failure of the Department of Education to assess and accommodate his disability, resulting in a denial of meaningful access to education as required by the *Education Act*, RSY 2002, c. 61, and the *Act*. This denial of meaningful access was a product of systemic discrimination arising from the application of policies and practices that disproportionately affected XY. This

characterization should be sufficient for the YHRC to consider all of the allegations as part of a continuing contravention.

Subsection 20(2) – meaning of continuing contravention

[27] The determination of the reasonableness of YHRC's decision (its outcome and reasoning process) requires an examination of s. 20(2) and the meaning of continuing contravention. It is not defined in the *Act*. The YHRC has no published policy to assist in its interpretation and there was no case law from the Yukon provided at the judicial review hearing. The Acting Director in her reasons set out four factors she considered in assessing continuing contravention, drawn from case law in British Columbia and Ontario. Both parties referred to case law from British Columbia and Ontario, where the statutes set out time limits for bringing a complaint to the respective human rights tribunals.

[28] Subsection 20(2) of the *Act* provides: "[a] complaint must be made within 18 months of the alleged contravention or of the last instance of an alleged continuing contravention."

[29] Similarly, in British Columbia, s. 22(1) of the *Human Rights Code*, RSBC 1996, c 210 (the "*Code*"), provides a complaint must be filed within six months of the alleged contravention (before the statutory amendment of November 27, 2018, which changed the time limit from six months to one year). Subsection 22(2) of the *Code* states that if a continuing contravention is alleged in a complaint, the complaint must be filed within six months of the last alleged instance of contravention.

[30] The time frames in the Yukon legislation (18 months) are longer than those in the previous British Columbia legislation (six months), but the structure of the statutory provision and the principles underlying it are the same.

[31] The Court of Appeal for British Columbia in *School District v Parent obo The Child*, 2018 BCCA 136 ("*School District*") reviewed some cases decided under s. 22 of the *Code* before the November 27, 2018 amendment. These cases assist in interpreting s. 20(2) of the *Act* in the Yukon.

[32] The Court of Appeal in *School District* noted continuing contravention was authoritatively defined by the Manitoba Court of Appeal in *Manitoba v Manitoba Human Rights Commission*, [1983] 25 Man R (2d) 117 (MBCA), as follows:

> [18] … 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 which could be considered as separate contraventions of the Act, and not merely one act of discrimination which may have continuing effects or consequences.

[33] The Court of Appeal further observed that it approved this definition in *O'Hara v BC (Human Rights Commission)*, 2003 BCCA 139, followed in *Chen v City of Surrey*, 2014 BCSC 539; aff'd 2015 BCCA 57 ("*Chen*"). The Court of Appeal of British Columbia in *Chen* clarified the approach to be taken by the Tribunal: it must first conduct a preliminary assessment of the complaint to determine if there has been at least one act of discrimination alleged within six months of filing the complaint which, if proven, could be considered a separate contravention of the *Code*. If yes, then the complaint has been filed in time for those acts of discrimination. If no, then the complaint is out of time and the only way it may be heard is if the Tribunal exercises its discretion. The next step

occurs if the complaint is filed within time and also alleges contraventions outside the limitation period. Do those earlier contraventions meet the definition of continuing contravention? If the Tribunal finds a continuing contravention, the earlier allegations properly form part of the complaint. If the Tribunal determines there is no continuing contravention, the complaint will proceed only on the timely allegations. "The assessment of whether discrete sets of allegations, separated in time, will constitute a continuing contravention is a fact specific one which will depend very much on the individual circumstances of each case" (*Dickson v Vancouver Island Human Rights Coalition*, 2005 BCHRT 209 ("*Dickson*") at para. 17).

First objection of petitioner -gap in time in assessment of continuing contravention

[34] The purpose of the time limits for filing a complaint is two-fold, as explained by the Court of Appeal for British Columbia in *School District*. First, it is to encourage early resolution of complaints. By ensuring complaints are pursued with some diligence, remedies can be implemented, and recurrence of discriminatory conduct prevented. It is fairer to respondents for matters to be addressed in a timely way. Second, timely pursuit of complaints helps to ensure witnesses are available and memories are fresh.

[35] The YHRC and the parties referred to cases showing the effect in time gaps between allegations in the determination of whether the allegations were continuing contravention. These cases support the reasonableness of the decision in this case to consider the gap created by the Grade 9 school year sufficient not to find a continuing contravention.

[36] *Dickson* was a complaint of discrimination in the provision of a service on the basis of physical and mental disability. A nine-month gap between two sets of

allegations relating to different sets of interactions between the complainant and the respondent was sufficient for the Tribunal to find there was no continuing contravention for the purposes of the *Code*. Similarly see *Taylor v City of Penticton and others*, 2007 BCHRT 393 – allegations separated by seven and 11-month gaps; *Bozman v Vancouver Coastal Health*, 2008 BCHRT 425 – allegations separated by a two-year and a nine-month gap; *Low v Registered Nurses' Association of British Columbia*, 2004 BCHRT 70 – allegations separated by 15 months; *Schaab v Murphy*, 2010 BCHRT 349 ("*Schaab*") – allegations separated by four months; *Kafer v Sleep Country Canada and another*, 2013 BCHRT 137 – allegations separated by a seven-month gap, another brief gap of two months and all other gaps from 10-14 months. In all of these examples, the Tribunals found the gaps in time contributed to an inability to find there were continuing contraventions.

[37] In this case, the YHRC accepted allegations of discrimination occurring in September 2017, even though they were outside of the 18 months before the date of the submission of the complaint on August 2, 2019. The YHRC found they were continuing contraventions in part because they occurred during the same school year as the allegations in 2018. However, the gap in time during XY's Grade 9 year (2016-17), starting in the spring of Grade 8 (spring 2016) and ending in the fall of Grade 10 (fall 2017), during which there were no accepted allegations of discrimination, was sufficient to prevent the earlier allegations from becoming continuing contraventions. This gap in time was approximately 16 months.

[38] As noted above, the petitioner argues that the YHRC improperly used a time gap of one year, relying on Ontario Human Rights Tribunal cases, to deny the earlier

allegations. This was improper according to XY because the Yukon statute does not contain a one-year limitation period, unlike s. 34 of the Ontario *Human Rights Code*, RSO 1990, c H 19, which provides:

> 34(1) If a person believes that any of his or her rights under Part I have been infringed, the person may apply to the Tribunal for an order under section 45.2,
>
> (a) within one year after the incident to which the application relates; or
>
> (b) if there was a series of incidents, within one year after the last incident in the series.

[39] Section 34 is similar but not identical to s. 20(2). It does not use the phrase "continuing contravention", but a "series of incidents". The principles underlying both phrases appear similar.

[40] The Acting Director in her decision referred to two Ontario Tribunal decisions as examples of a significant temporal gap: *TJ v Ottawa Catholic School Board*, 2019 HRTO 1312 – seven months and 11 months (para. 24); and *ST v Ottawa-Carleton District School Board*, 2019 HRTO 575, three years and two years (paras. 11-12). She did not limit her consideration of a significant temporal gap to one year. She did not articulate that the temporal gap in this case was one year; instead, she referred to the gap as XY's Grade 9 year. She also referred to the Court of Appeal for British Columbia case of *School District* in support of the principles and purpose of ensuring timely allegations, emanating from the former s. 22 of the British Columbia statute.

[41] The cases from British Columbia do not make specific reference to the six-month time limit in their legislation in determining if a gap between allegations is too long for the earlier allegations to be considered timely. In one case, *Schaab,* the Tribunal held

that a gap of four months constituted an unacceptably long gap for the earlier allegation to be considered.

[42] The existence of a 15- or 16-month gap between allegations in this case, in the context of the examples of significant temporal gaps in the jurisprudence from British Columbia and Ontario, supports the reasonableness of YHRC's interpretation. The YHRC's finding that the gap in time of XY's Grade 9 year is long enough to prevent earlier allegations from consideration as continuing contraventions is reasonable.

Second objection of petitioner -character of allegations, same or different individuals and types of accommodations

[43] Other factors considered by the YHRC in their reasons and objected to by XY are whether the earlier allegations are of the same nature or character as the most recent instance of discrimination, involve the same or different people, or the types of accommodations are too unrelated to those in the timely allegations to be part of the same complaint. The Acting Director in her reasons refers to British Columbia jurisprudence and at the hearing, both counsel referred to jurisprudence from British Columbia and Ontario on this point.

[44] Examples from that jurisprudence where Tribunals considered these factors in determining whether a continuing contravention existed include:

a. two incidents in which a supervisor commented to the same subordinate employee about her cleavage were different enough that they did not form a continuing contravention. The first comment occurred when the two were at a social event, and the second occurred eleven months later when

they were on a business trip together (*Jimenez and Ayers v Primerica Financial and another*, 2009 BCHRT 230); and

b. incidents leading to a complaint of discrimination by a school board against a student on the basis of disability occurred at four different schools over 2014, 2015, and 2016, during which time the student was home schooled for two terms. Earlier allegations that included name-calling, bullying, lack of educational assistant support, and refusal of teachers to modify courses to meet his needs were "wholly unrelated to the incidents that follow[ed] and [we]re not part of a series of incidents to bring it within the one-year limitation." The timely allegations included the student's treatment by a school administrator when he started high school by refusing to give him a tour of the school, a lack of communication by the teachers and a suggestion the school was not implementing the IEP, a failure to ensure the student attended classes through intervention as required by the IEP, a failure to communicate to the teachers the student's need for accommodation or provide the needed accommodation in transportation, monitoring, and support in English and math (*ST v Ottawa-Carleton District School Board*, 2019 HRTO 575 at para. 11).

[45] Applying these principles, the Acting Director reasoned that the allegations of discrimination in XY's Grade 7 and 8 years, 2014-15 and 2015-16, were of a different character than the later allegations. Further, the earlier allegations occurred at a different school than the timely allegations and involved different individuals who allegedly acted in discriminatory ways and or who were witnesses to the alleged

conduct. Finally, the accommodations were described as a different type of accommodations than those in the later complaints. Specifically, the allegations of no pre-teaching or inconsistent use of the FM system differed from the allegations of failure to use ASL interpretation and XY's rejection of the FM system (which was also characterized by the Acting Director as a continuing effect of an earlier allegation and not a continuing contravention).

[46] Having found the allegations in Grades 7 and 8 were not continuing contraventions, the Acting Director reasoned that the earlier allegations from Kindergarten to Grade 6 were also too far removed temporally.

[47] Based on the existing jurisprudence, beginning with the Court of Appeal for British Columbia in *Chen* and including Tribunal decisions from British Columbia and Ontario, the YHRC's interpretation and application of continuing contravention by considering the factors of different individuals, different character of allegations, and different types of accommodations was reasonable.

Third objection of petitioner -systemic discrimination

[48] The final argument of the petitioner is that the complaint alleges systemic discrimination because XY was denied access to meaningful education through the various applications of attitudes, policies, practices and procedures adopted by the Department of Education over the years he attended school in the Yukon. In other words, the applications of those attitudes, policies, practices and procedures, while they may be neutral on their face, resulted in a disproportionate or adverse effect on XY amounting to discrimination against him. The petitioner did not identify any of these attitudes, policies, practices or procedures, but noted that certain decisions made must

have been based on one or more that had a discriminatory effect. As a result, all of the incidents described from 2007 and following form part of a continuing contravention because they arise from systemic discrimination created by the ongoing (unspecified) attitudes, policies, practices, or procedures.

[49] While the Acting Director did not address systemic discrimination specifically in her reasons, the Commission members acknowledged it in their decision. They stated the existence of systemic discrimination would be taken into account in considering the timely allegations. However, systemic discrimination did not influence the acceptance of the untimely allegations.

[50] The argument that systemic discrimination is sufficient to allow allegations that may otherwise be out of time to be considered, and the related argument that an ongoing discriminatory policy may allow out of time allegations to be accepted for investigation was addressed by the court in *School District*. The complainant in that case alleged that over a period of six years the school district discriminated against the child by failing to accommodate the child's educational requirements arising from the child's mental disabilities. The court rejected the interpretation of s. 22(2) of the *Code* that if the complaint is one of an ongoing or continuing state of affairs, there is no time limit to bringing the complaint. Instead, the only test, set out in *Chen*, is whether there is a succession or repetition of separate acts of discrimination of the same character. The Court of Appeal for British Columbia in *Chen* rejected the Tribunal's conclusion that a continuing contravention may be alleged where a discriminatory policy remains in place, or discriminatory conditions continue to exist. It is still necessary to raise allegations of discrimination within the time limits set out in the statute. In other words, the existence

of ongoing discrimination alone, without timely allegations, would not meet the test of continuing contravention. For the out of time allegations to be included as part of a continuing contravention, they need to meet the test set out in *Chen*.

[51] The Tribunal in *Grant v City of Vancouver (No 3)*, 2007 BCHRT 64 at para. 24, refined this conclusion by stating:

> When considering whether a policy which continues to be in place gives rise to a continuing contravention, it is crucial … to consider whether that policy continues to be applied to the complainant in a manner which has a discriminatory effect on him. In other words, it is not the continuing existence of that policy alone which gives rise to a continuing contravention, but the continuing allegedly discriminatory application of that policy to the complainant. …

[52] Here, there is some difficulty with the petitioner's argument that all the allegations in the complaint (2007-18) are continuing contraventions because they represent discriminatory conduct by the Department of Education against XY on the basis of his disability, resulting in the denial of meaningful access to the education of XY. It is not really an argument of systemic discrimination as legally defined. The petitioner at this stage of the proceeding cannot identify or articulate fully the attitudes, policies, practices or procedures that resulted in discrimination against XY. Without the identification of the ostensibly neutral attitudes, policies, practices or procedures it is impossible to determine whether they disproportionately affect XY in a way that results in discrimination. It is not enough to assert that XY was denied meaningful access to the service of education and therefore discrimination existed if the basis for that claim is an allegation of systemic discrimination.

[53] In support of his argument, the petitioner references a statement by the Supreme Court of Canada that a failure to deliver the mandate and objectives of public education

in a way that denies a student meaningful access to the service on a protected ground amounts to discrimination (*Moore v British Columbia (Education)*, 2012 SCC 61*("Moore")).* There are two reasons why this case is not relevant here. First, the factual and legal context in *Moore* is different from this case. There was no argument raised about the timeliness of the allegations in *Moore*; therefore there was no discussion of continuing contravention or the equivalent in the British Columbia statute. Second, the facts of *Moore* were that for financial reasons the school board closed a specialized school for intensive remediation so that the complainant who had severe learning disabilities could not attend. While the Tribunal analysed the case on the basis of both individual and systemic discrimination, the Supreme Court of Canada stated:

> [58] … It was, however, neither necessary nor conceptually helpful to divide discrimination into these two discrete categories. A practice is discriminatory whether it has an unjustifiably adverse impact on a single individual or systemically on several: *Griggs v. Duke Power Co*., 401 U.S. 424 (1971). …

[54] The Supreme Court of Canada went on to say:

> [60] The inquiry is into whether there is discrimination, period. The question in every case is the same: does the practice result in the claimant suffering arbitrary — or unjustified — barriers on the basis of his or her membership in a protected group. Where it does, discrimination will be established.

[55] The petitioner's argument about the existence of systemic discrimination as a reason for considering the earlier allegations is not helpful in determining whether the YHRC reasonably interpreted and applied "continuing contravention" in this case. This is in part because the analysis of systemic discrimination and individual discrimination is the same, as stated by the Supreme Court of Canada in *Moore*:

> [59] In *Canadian National Railway Co v Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, this Court first identified 'systemic discrimination' by name. It defined it as: "practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics" (p. 1138). Notably, however, the designation did not change the analysis. The considerations and evidence at play in a group complaint may undoubtedly differ from those in an individual complaint, but the focus is always on whether the complainant has suffered arbitrary adverse effects based on a prohibited ground.

[56] The petitioner also relies on an Ontario decision of *AM v Simcoe Muskoka Catholic School Board*, 2020 HRTO 439. The Tribunal found the evolving and changing needs of a student claiming discrimination by a school board against her on the basis of a reading disability and the school's response to those needs from 2014-19 constituted a series of incidents (the Ontario equivalent of a continuing contravention). This analysis allowed all events that occurred during the previous years to be accepted as timely allegations of discrimination. The Tribunal concluded at para. 12 that the respondent school board:

> … failed in its ongoing duty to assess and then accommodate AM's evolving disability-related needs throughout each of the school years, in order to provide her with meaningful access to education throughout the duration of her enrollment at the School.

[57] In that case, there was no allegation of systemic discrimination. The school board's objection to the acceptance of earlier allegations was there was not a series of incidents but a repetitive request for the same form of accommodation that was repeatedly refused to be implemented. The board also argued in the alternative there was a prohibitive temporal gap between the earlier allegations. This analysis was

rejected by the Tribunal, as noted above. The evolving and changing needs of the student and the school board's response over time was sufficient to constitute separate incidents, which were sufficiently similar in character and individuals to be accepted for consideration even though out of time. This was a different type of analysis than what the petitioner is asking the Court here to undertake. It was not an analysis or finding of systemic discrimination.

[58] Not only is the basis for systemic discrimination not clearly made out by the petitioner, but the cases they rely on in support of their argument that the earlier allegations should be accepted because of the existence of systemic discrimination do not support this argument.

[59] The characterization of the occurrences at XY's schools over the years as part of a continuing contravention amounting to discrimination because the incidents all relate to the various schools' responses to his hearing disability and allegedly resulted in a denial of meaningful access to education is a different way of interpreting and applying continuing contravention under the *Act* than the YHRC's conclusion. It is not necessary to find there was systemic discrimination to make this finding.

[60] A determination of reasonableness in a judicial review means that the reasoning and outcome must be within the range of reasonableness. There may be more than one reasonable approach and outcome. There may be a different approach that the petitioner or the court prefers. However, the existence of more than one or a preferred reasonable approach does not mean that an application for judicial review must succeed. Judicial restraint requires that the Court's inquiry be limited to whether the

reasons and decision arrived at by the YHRC were reasonable in all of the circumstances.

[61] Here, the YHRC's decision that the earlier allegations are not the same as or similar to the later ones and are separated by time, character, individual actors, and types of accommodations is reasonable. The YHRC's conclusion on the meaning and application of continuing contravention is why the earlier allegations were not accepted. The existence of a potentially discriminatory policy, procedure, practice or attitude in and of itself is not enough to bring earlier untimely allegations emanating from that same policy, procedure, practice or attitude into the complaint unless they are shown to continue to affect the complainant in a discriminatory way on a timely basis. The petitioner's argument that the YHRC's conclusion was unreasonable because it did not consider systemic discrimination fails because the petitioner is unable at this stage to identify the policies that allegedly resulted in the discrimination and the cases he relies on for his argument are not systemic discrimination cases, but are different interpretations of continuing contravention.

Conclusion

[62] The petitioner has identified three separate concerns about the YHRC reasons and decision, and this decision has likewise addressed the petitioner's arguments separately. However, it is important to note that the determination of continuing contravention requires a consideration of all of the factors set out above. The jurisprudence supports this approach. To determine the reasonableness of the outcome and reasons it is necessary to examine the totality of the YHRC's decision, including the reasons articulated by the Acting Director and the Commission members' rationale.

[63] The remedial purpose of the *Act* forms part of this determination. The Court of Appeal for British Columbia, in *School District No 44 (North Vancouver) v Jubran*, 2005 BCCA 201, acknowledged the Supreme Court of Canada's statement that human rights legislation is to be given a fair, large and liberal interpretation to ensure the attainment of its objects and so the rights set out are given their full effect (*Robichaud v Canada (Treasury Board)*, [1987] 2 SCR 84 and *Ontario Human Rights Commission and O'Malley v Simpsons-Sears Ltd*, [1985] 2 SCR 536). However, the Court of Appeal was clear to note the Supreme Court of Canada's statement that such an interpretation does not give a board or court licence to ignore the words of the *Act* in order to prevent discrimination wherever it is found. The scope of human rights legislation is not unlimited and the words of the statute cannot be ignored (para. 32).

[64] Here, the YHRC decision is based on the law – the statute and jurisprudence interpreting it, as set out above. The reasons and decision of the YHRC are within the range of reasonable outcomes. Making the determination of what constitutes a continuing contravention is a fact-specific endeavour. A succession or repetition of separate acts of discrimination of the same character, not separated in time significantly in order to maintain continuity, and involving the same individuals, is a reasonable, lawful interpretation of continuing contravention. It was applied here by the YHRC in a coherent way, taking into account the purpose and objectives of the statute, while respecting the statutory time limitations and the way they have been interpreted at law. While there were similarities in the allegations in that they all related to XY's experiences in addressing his disability at the various schools over the years, there were also enough differences in the allegations over time and gaps in time to support

the YHRC's decision. That decision is also consistent with the policy underlying the limitations of continuing contraventions, which is to assist with remedying discriminatory conduct as soon as possible, and ensuring witnesses are available and memories are fresh. I further note the Acting Director's statement in her reasons that XY's educational history as well as background information concerning his disability and evolving accommodation needs may be considered by the investigator to understand properly the allegations that were accepted.

[65] The application for judicial review is dismissed. Costs may be spoken to in case management if necessary.

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DUNCAN C.J.