



Canada (Canadian Human Rights Commission) v. Canada (Attorney General), 2011 SCC 53, [2011] 3 SCR 471

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SUPREME COURT OF CANADA

CITATION: Canada (Canadian Human Rights Commission) v.
Canada (Attorney General), 2011 SCC 53, [2011] 3 S.C.R. 471

DATE: 20111028
DOCKET: 33507

BETWEEN:

Canadian Human Rights Commission and Donna Mowat
Appellants
and
Attorney General of Canada

Respondent
- and -
Canadian Bar Association and Council of Canadians with Disabilities
Intervenors

CORAM: McLachlin C.J. and LeBel, Deschamps, Abella, Charron, Rothstein and Cromwell JJ.

**JOINT REASONS FOR
JUDGMENT:**
(paras. 1 to 65)

LeBel and Cromwell JJ. (McLachlin C.J. and
Deschamps, Abella, Charron and Rothstein JJ.
concurring)

Canada (Canadian Human Rights Commission) v. Canada (Attorney General), 2011 SCC 53,
[2011] 3 S.C.R. 471

**Canadian Human Rights Commission and
Donna Mowat**

Appellants

v.

Attorney General of Canada

Respondent

and

**Canadian Bar Association and
Council of Canadians with Disabilities**

Intervenors

**Indexed as: Canada (Canadian Human Rights Commission) v. Canada (Attorney
General)**

2011 SCC 53

File No.: 33507.

2010: December 13; 2011: October 28.

Present: McLachlin C.J. and LeBel, Deschamps, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Administrative law — Judicial review — Standard of review — Canadian Human Rights Tribunal awarding legal costs to complainant — Whether standard of reasonableness applicable to Tribunal’s decision to award costs — Whether Tribunal made a reviewable error in awarding costs to complainant — [Canadian Human Rights Act, R.S.C. 1985, c. H-6, s. 53\(2\)\(c\), \(d\)](#).

Administrative law — Boards and tribunals — Jurisdiction — Costs — Canadian Human Rights Tribunal awarding legal costs to complainant — Whether Tribunal having jurisdiction to award costs — [Canadian Human Rights Act, R.S.C. 1985, c. H-6, s. 53\(2\)\(c\), \(d\)](#).

M filed a human rights complaint with the Canadian Human Rights Commission alleging that the Canadian Forces had discriminated against her on the ground of sex contrary to the provisions of the [Canadian Human Rights Act](#) (“CHRA”). The Canadian Human Rights Tribunal (“Tribunal”) concluded that M’s complaint of sexual harassment was substantiated in part and she was awarded \$4,000 to compensate for “suffering in respect of feelings or self-respect”. M applied for legal costs. The Tribunal determined that it had the authority to order costs pursuant to [s. 53\(2\)\(c\)](#) and [\(d\)](#) of the [CHRA](#) and awarded M \$47,000 in this regard. The Federal Court upheld the Tribunal’s decision on its authority to award costs. The Federal Court of Appeal allowed an appeal of this decision and held that the Tribunal had no authority to make a costs award.

Held: The appeal should be dismissed.

Administrative tribunals are generally entitled to deference in respect of the legal interpretation of their home statutes and laws or legal rules closely connected to them. However, general questions of law that are both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise must be reviewed on a standard of correctness. The proper standard of review of the Tribunal's decision to award legal costs to the successful complainant is reasonableness. Whether the Tribunal has the authority to award costs is a question of law which is located within the core function and expertise of the Tribunal and which relates to the interpretation and the application of its enabling statute. This issue is neither a question of jurisdiction, nor a question of law of central importance to the legal system as a whole falling outside the Tribunal's area of expertise within the meaning of *Dunsmuir*.

The precise interpretive question before the Tribunal was whether the words of [s. 53\(2\)\(c\)](#) and [\(d\)](#), which authorize the Tribunal to "compensate the victim . . . for any expenses incurred by the victim as a result of the discriminatory practice" permit an award of legal costs. An examination of the text, context and purpose of these provisions reveals that the Tribunal's interpretation was not reasonable. Human rights legislation expresses fundamental values and pursues fundamental goals. It must be interpreted liberally and purposively so that the rights enunciated are given their full recognition and effect. However, the intent of Parliament must be respected by reading the words of their provision in their entire context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the Act. The words "any expenses incurred by the victim" taken on their own and divorced from their context are wide enough to include legal costs. However, when these words are read in their statutory context, they cannot reasonably be interpreted as creating a stand-alone category of compensation capable of supporting any type of disbursement causally connected to the discrimination. The Tribunal's interpretation violates the legislative presumption against tautology, makes the repetition of the term "expenses" redundant and fails to explain why the term is linked to the particular types of compensation described in those paragraphs. Moreover, the term "costs" has a well-understood meaning that is distinct from compensation or expenses. If Parliament intended to confer authority to confer costs, it is difficult to understand why it did not use this very familiar and widely used legal term of art to implement that purpose. The legislative history of the [CHRA](#), the Commission's understanding of costs authority as well as a review of parallel provincial legislation all support the conclusion that the Tribunal has no authority to award costs. Finally, the Tribunal's interpretation would permit it to make a free-standing award for pain and suffering coupled with an award of legal costs in a potentially unlimited amount. This view is difficult to reconcile with either the monetary limit of an award for pain and suffering or the omission of any express authority to award expenses in [s. 53\(3\)](#).

No reasonable interpretation of the relevant statutory provisions can support the view that the Tribunal may award legal costs to successful complainants. Faced with a difficult point of statutory interpretation and conflicting judicial authority, the Tribunal adopted a dictionary meaning of "expenses" and articulated what it considered to be a beneficial policy outcome rather than engaging in an interpretative process taking account of the text, context and purpose of the

provisions in issue. A liberal and purposive interpretation cannot supplant a textual and contextual analysis simply in order to give effect to a policy decision different from the one made by Parliament.

Cases Cited

Applied: *Dunsmuir v. New Brunswick*, [2008 SCC 9 \(CanLII\)](#), 2008 SCC 9, [2008] 1 S.C.R. 190; **disapproved:** *Canada (Attorney General) v. Thwaites*, [1994 CanLII 3469 \(FC\)](#), [1994] 3 F.C. 38; *Canada (Attorney General) v. Stevenson*, [2003 FCT 341 \(CanLII\)](#), 2003 FCT 341, 229 F.T.R. 297; *Canada (Attorney General) v. Brooks*, [2006 FC 500 \(CanLII\)](#), 2006 FC 500, 291 F.T.R. 32; **referred to:** *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998 CanLII 778 \(SCC\)](#), [1998] 1 S.C.R. 982; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987 CanLII 109 \(SCC\)](#), [1987] 1 S.C.R. 1114; *Canada (Citizenship and Immigration) v. Khosa*, [2009 SCC 12 \(CanLII\)](#), 2009 SCC 12, [2009] 1 S.C.R. 339; *Smith v. Alliance Pipeline Ltd.*, [2011 SCC 7 \(CanLII\)](#), 2011 SCC 7, [2011] 1 S.C.R. 160; *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004 SCC 19 \(CanLII\)](#), 2004 SCC 19, [2004] 1 S.C.R. 485; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990 CanLII 49 \(SCC\)](#), [1990] 2 S.C.R. 1324; *Dickason v. University of Alberta*, [1992 CanLII 30 \(SCC\)](#), [1992] 2 S.C.R. 1103; *Canada (Attorney General) v. Mossop*, [1993 CanLII 164 \(SCC\)](#), [1993] 1 S.C.R. 554; *University of British Columbia v. Berg*, [1993 CanLII 89 \(SCC\)](#), [1993] 2 S.C.R. 353; *Gould v. Yukon Order of Pioneers*, [1996 CanLII 231 \(SCC\)](#), [1996] 1 S.C.R. 571; *Celgene Corp. v. Canada (Attorney General)*, [2011 SCC 1 \(CanLII\)](#), 2011 SCC 1, [2011] 1 S.C.R. 3; *Nolan v. Kerry (Canada) Inc.*, [2009 SCC 39 \(CanLII\)](#), 2009 SCC 39, [2009] 2 S.C.R. 678; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007 SCC 15 \(CanLII\)](#), 2007 SCC 15, [2007] 1 S.C.R. 650; *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, [2007 SCC 14 \(CanLII\)](#), 2007 SCC 14, [2007] 1 S.C.R. 591; *Toronto (City) v. C.U.P.E., Local 79*, [2003 SCC 63 \(CanLII\)](#), 2003 SCC 63, [2003] 3 S.C.R. 77; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979 CanLII 23 \(SCC\)](#), [1979] 2 S.C.R. 227; *Housen v. Nikolaisen*, [2002 SCC 33 \(CanLII\)](#), 2002 SCC 33, [2002] 2 S.C.R. 235; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998 CanLII 837 \(SCC\)](#), [1998] 1 S.C.R. 27; *R. v. Proulx*, [2000 SCC 5 \(CanLII\)](#), 2000 SCC 5, [2000] 1 S.C.R. 61; *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985 CanLII 35 \(SCC\)](#), [1985] 1 S.C.R. 831; *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, [2005 SCC 70 \(CanLII\)](#), 2005 SCC 70, [2005] 3 S.C.R. 425; *Hills v. Canada (Attorney General)*, [1988 CanLII 67 \(SCC\)](#), [1988] 1 S.C.R. 513; *Hilewitz v. Canada (Minister of Citizenship and Immigration)*, [2005 SCC 57 \(CanLII\)](#), 2005 SCC 57, [2005] 2 S.C.R. 706; *Doré v. Verdun (City)*, [1997 CanLII 315 \(SCC\)](#), [1997] 2 S.C.R. 862; *M. v. H.*, [1999 CanLII 686 \(SCC\)](#), [1999] 2 S.C.R. 3; *Will-Kare Paving & Contracting Ltd. v. Canada*, [2000 SCC 36 \(CanLII\)](#), 2000 SCC 36, [2000] 1 S.C.R. 915; *Harel v. Deputy Minister of Revenue of Quebec*, [1977 CanLII 10 \(SCC\)](#), [1978] 1 S.C.R. 851; *Nowegijick v. The Queen*, [1983 CanLII 18 \(SCC\)](#), [1983] 1 S.C.R. 29; *Canada (Attorney General) v. Public Service Alliance*

of Canada, [1991 CanLII 88 \(SCC\)](#), [1991] 1 S.C.R. 614; *Morguard Properties Ltd. v. City of Winnipeg*, [1983 CanLII 33 \(SCC\)](#), [1983] 2 S.C.R. 493; *Bell Canada v. Bell Aliant Regional Communications*, [2009 SCC 40 \(CanLII\)](#), 2009 SCC 40, [2009] 2 S.C.R. 764.

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APPEAL from a judgment of the Federal Court of Appeal (Létourneau, Sexton and Layden-Stevenson JJ.A.), [2009 FCA 309 \(CanLII\)](#), 2009 FCA 309, [2010] 4 F.C.R. 579, 312 D.L.R. (4th) 294, 4 Admin. L.R. (5th) 192, 395 N.R. 52, [2009] F.C.J. No. 1359 (QL), 2009 CarswellNat 3405, setting aside a decision of Mandamin J., [2008 FC 118 \(CanLII\)](#), 2008 FC 118, 322 F.T.R. 222, 78 Admin. L.R. (4th) 127, [2008] F.C.J. No. 143 (QL), 2008 CarswellNat 200. Appeal dismissed.

Philippe Dufresne and Daniel Poulin, for the appellant the Canadian Human Rights Commission.

Andrew Raven, Andrew Astritis and Bijon Roy, for the appellant Donna Mowat.

Peter Southey and Sean Gaudet, for the respondent.

Reidar M. Mogerman, for the intervener the Canadian Bar Association.

David Baker and Paul Champ, for the intervener the Council of Canadians with Disabilities.

The judgment of the Court was delivered by

LEBEL AND CROMWELL JJ. —

I. Overview

[1] The Canadian Human Rights Tribunal may order a person who has engaged in a discriminatory practice contrary to the [Canadian Human Rights Act, R.S.C. 1985, c. H-6](#) (“[CHRA](#)” or “Act”), to compensate the victim for any lost wages, for all additional costs of obtaining alternative goods, services, facilities or accommodation, and “for any expenses incurred by the victim as a result of the discriminatory practice” ([s. 53\(2\)](#)). The main question before us is whether the Tribunal made a reviewable error in deciding that this power to order compensation for “any expenses incurred by the victim as a result of the discriminatory practice” permits it to order payment of all or a portion of the victim’s legal costs.

[2] The Tribunal’s decision affirming this authority was reviewed by the Federal Court on the standard of reasonableness and upheld [2008 FC 118 \(CanLII\)](#), (2008 FC 118, 322 F.T.R. 222). However, the Federal Court of Appeal set aside the decision, holding that the proper standard of review was correctness and that the Tribunal’s decision was incorrect [2009 FCA 309 \(CanLII\)](#), (2009 FCA 309, [2010] 4 F.C.R. 579). The Court of Appeal also was of the view that even if the Tribunal’s decision should be reviewed on the reasonableness standard, its decision was unreasonable.

[3] Ms. Mowat did not participate at the Federal Court of Appeal but now appeals to this Court for reinstatement of the Tribunal’s award. The Canadian Human Rights Commission, which was not a party before the Tribunal or Federal Court, and intervened before the Federal Court of Appeal, now joins Ms. Mowat as an appellant. (We will refer to Ms. Mowat as the appellant and to the Canadian Human Rights Commission as the Commission.)

[4] The further appeal to this Court raises a threshold question of the appropriate standard of judicial review of the Tribunal’s decision and the main question of whether the Tribunal made a reviewable error in finding that it had the authority to award legal costs. We would hold that the Tribunal’s decision should be reviewed on the reasonableness standard but that its interpretation of this aspect of its remedial authority was unreasonable. We would therefore dismiss the appeal.

II. Background

[5] The Canadian Forces compulsorily released the appellant, Ms. Mowat, in 1995, following a 14-year career as a traffic technician. Over the course of her time in the military, the appellant had made many formal complaints and grievances against members of her chain of command and others. Many of these were taken to the Chief of the Defence Staff, the highest level in Canadian Forces grievance resolution, and none was substantiated (2005 CHRT 31, 54

C.H.R.R. D/21 (the “merits decision”), at paras. 20, 81-82, 94, 143, 193, 207-8, 216, 218, 231, 236, 286, 294, 297 and 299). The Canadian Forces conducted an internal investigation into comments made by one of the appellant’s co-workers which she alleged were sexually harassing. The investigation found that they were (para. 303). The recommendations from several reports on the incidents were implemented by the appellant’s Commanding Officer and the employee responsible was disciplined (paras. 83-87).

[6] However, in 1998, three years after leaving the Forces, the appellant filed a complaint with the Canadian Human Rights Commission alleging sexual harassment, adverse differential treatment, and failure to continue to employ her on account of her sex, pursuant to [ss. 7](#) and [14](#) of the [CHRA](#). The matter was ultimately heard before the Canadian Human Rights Tribunal.

III. Proceedings

A. *Canadian Human Rights Tribunal, 2005 CHRT 31, 54 C.H.R.R. D/21*

[7] The hearing before the Tribunal occupied six weeks and the case record comprised more than 4,000 pages of transcript evidence and over 200 exhibits. The presiding Tribunal member, J. Grant Sinclair, was highly critical of the way in which the appellant Mowat conducted the proceedings. He observed that the complaint was “marked by a fundamental lack of precision in identifying the theory of the . . . case” and referred to the allegations as a “conspiracy theory” and a “scatter-shot complaint with the allegations all over the place” (merits decision, at paras. 4, 357 and 408).

[8] However, the presiding Tribunal member concluded that the appellant’s complaint was substantiated in part. He found that her claim of sexual harassment, based on three comments made by a male co-worker, was substantiated and that the military’s response had not been adequate or in accordance with its own policies (paras. 42, 47, 49 and 312-22). The rest of her complaint was dismissed.

[9] The Tribunal awarded \$4,000 (plus interest, taking the award to the maximum of \$5,000, the statutory limit at the time), to compensate the appellant for “suffering in respect of feelings or self-respect” (para. 7). It found that the version of the Act which was in force when Ms. Mowat filed her claim applied to the case, and substantial amendments made in 1998 should not apply retroactively (paras. 399-401). It then asked for further submissions regarding her claim for legal costs, which she indicated totalled more than \$196,000. At issue was whether the Tribunal’s authority to award a complainant “any expenses incurred by the victim as a result of the discriminatory practice” under [s. 53\(2\)\(c\)](#) and [\(d\)](#) of the [CHRA](#) includes the authority to award legal costs.

[10] In a separate decision, Member Sinclair reviewed the conflicting Federal Court jurisprudence and policy considerations favouring reimbursement and found that he was empowered to award legal costs [2006 CHRT 49 \(CanLII\)](#), (2006 CHRT 49 (CanLII) (the “costs decision”)). Without recovery of legal costs, he found, any victory would be “pyrrhic” (para. 29). He then awarded \$47,000 in partial satisfaction of Ms. Mowat’s legal bills, an amount which he based on the volume of evidence for the substantiated sexual harassment allegation in comparison with the rest of the unsubstantiated complaints.

B. *Judicial Review — Federal Court of Canada*, [2008 FC 118 \(CanLII\)](#), 2008 FC 118, 322 F.T.R. 222

[11] The Attorney General of Canada applied for judicial review of the costs decision; the appellant did not participate. Turning first to the standard of review, Mandamin J. applied the four factors from *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998 CanLII 778 \(SCC\)](#), [1998] 1 S.C.R. 982, and conducted a pragmatic and functional analysis to arrive at a reasonableness *simpliciter* standard. He classified the question as one of law, but noted that the Tribunal was engaged in interpretation of its home statute on a matter at the “core” of its expertise (para. 24). He also relied upon the “human rights policy approach to statutory interpretation” (para. 41), purportedly arising from this Court’s decision in *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987 CanLII 109 \(SCC\)](#), [1987] 1 S.C.R. 1114, to ground his analysis and explain why a one-sided costs regime is permissible. This approach calls for a broad, purposive interpretation of the *CHRA*, commensurate with its remedial goals and special status. He then concluded that the Tribunal’s decision about its authority to award costs was reasonable (para. 40). However, Mandamin J. found that the presiding Member had not adequately explained the quantification of the \$47,000 award and that this constituted a breach of the principles of procedural fairness. The judicial review judge therefore quashed the decision and sent it back to the Tribunal on this ground. That aspect of the matter has not been appealed and it is not at issue before this Court.

C. *Federal Court of Appeal*, [2009 FCA 309 \(CanLII\)](#), 2009 FCA 309, [2010] 4 F.C.R. 579

[12] The Attorney General of Canada appealed the decision to the Federal Court of Appeal, which unanimously allowed the appeal and held that the Tribunal had no authority to make a costs award. Layden-Stevenson J.A. applied the standard of review principles enunciated by this Court in *Dunsmuir v. New Brunswick*, [2008 SCC 9 \(CanLII\)](#), 2008 SCC 9, [2008] 1 S.C.R. 190, which had been released after the Federal Court hearing. She applied the correctness standard of review, based primarily on her conclusion that the issue was a question of law both outside the Tribunal’s expertise and of central importance to the legal system (para. 42). The Tribunal’s human rights expertise was not engaged by the issue, which instead required one clear and consistent answer (para. 47).

[13] The Federal Court of Appeal went on to conclude that the Tribunal's decision to award legal costs was incorrect. After a comprehensive review of the conflicting Tribunal and Federal Court jurisprudence, Layden-Stevenson J.A. turned to the legislative history of the provision in question. In her view, it evinced a clear Parliamentary intent to eschew a costs regime in favour of an active role for the Commission (paras. 65-67 and 88). She noted that the Commission itself, in a Special Report to Parliament, acknowledged that the [CHRA](#) did not allow for costs recovery (paras. 68 and 90). Further, "costs" is a legal term of art (para. 76), the power to award which must be derived from statute (para. 78). She also relied on a comparative analysis of comparable human rights statutes across Canada, many of which explicitly mention costs jurisdiction in addition to reimbursement of expenses (paras. 70-74 and 84-87). In conclusion, Layden-Stevenson J.A. found that policy considerations and a liberal and purposive approach to interpretation could not be used to override clear Parliamentary intent (paras. 99-100). She reasoned that the decision to provide the Tribunal with the power to award costs is a policy decision best left to Parliament (para. 101). She noted that even on a reasonableness standard, the Tribunal's award of legal costs should be set aside (para. 96).

IV. Analysis

A. *The Issues*

[14] As noted, this appeal raises two issues:

1. What is the appropriate standard of review of the decision of the Tribunal as to the interpretation of its power to award legal costs under s. 53(2)(c) and (d) of the Act?
2. Did the Tribunal make a reviewable error in deciding that it could award compensation for legal costs?

B. *The Dunsmuir Analysis*

[15] In *Dunsmuir and Canada (Citizenship and Immigration) v. Khosa*, [2009 SCC 12 \(CanLII\)](#), 2009 SCC 12, [2009] 1 S.C.R. 339, the Court simplified an analytical approach that the judiciary found difficult to implement. Being of the view that the distinction between the standards of patent unreasonableness and reasonableness *simpliciter* was illusory, the majority in *Dunsmuir* eliminated the standard of patent unreasonableness. The majority thus concluded that there should be two standards of review: correctness and reasonableness.

[16] *Dunsmuir* kept in place an analytical approach to determine the appropriate standard

of review, the standard of review analysis. The two-step process in the standard of review analysis is first to “ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review” (para. 62). The focus of the analysis remains on the nature of the issue that was before the tribunal under review (*Khosa*, at para. 4, *per* Binnie J.). The factors that a reviewing court has to consider in order to determine whether an administrative decision maker is entitled to deference are: the existence of a privative clause; a discrete and special administrative regime in which the decision maker has special expertise; and the nature of the question of law (*Dunsmuir*, at para. 55). *Dunsmuir* recognized that deference is generally appropriate where a tribunal is interpreting its own home statute or statutes that are closely connected to its function and with which the tribunal has particular familiarity. Deference may also be warranted where a tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context (*Dunsmuir*, at para. 54; *Khosa*, at para. 25).

[17] *Dunsmuir* nuanced the earlier jurisprudence in respect of privative clauses by recognizing that privative clauses, which had for a long time served to immunize administrative decisions from judicial review, may point to a standard of deference. But, their presence or absence is no longer determinative about whether deference is owed to the tribunal or not (*Dunsmuir*, at para. 52). In *Khosa*, the majority of this Court confirmed that with or without a privative clause, administrative decision makers are entitled to a measure of deference in matters that relate to their special role, function and expertise (paras. 25-26).

[18] *Dunsmuir* recognized that the standard of correctness will continue to apply to constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator’s expertise, as well as to “[q]uestions regarding the jurisdictional lines between two or more competing specialized tribunals” (paras. 58, 60-61; see also *Smith v. Alliance Pipeline Ltd.*, [2011 SCC 7 \(CanLII\)](#), 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 26, *per* Fish J.). The standard of correctness will also apply to true questions of jurisdiction or *vires*. In this respect, *Dunsmuir* expressly distanced itself from the extended definition of jurisdiction and restricted jurisdictional questions to those that require a tribunal to “explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter” (para. 59; see also *United Taxi Drivers’ Fellowship of Southern Alberta v. Calgary (City)*, [2004 SCC 19 \(CanLII\)](#), 2004 SCC 19, [2004] 1 S.C.R. 485, at para. 5).

[19] Having outlined the principles governing the judicial review analysis, we must now focus on how it should be applied to the decision of the Tribunal. As recommended by *Dunsmuir*, we must first consider how the existing jurisprudence has dealt with the decisions of the Tribunal and of similar bodies tasked with addressing human rights complaints. Over the years, a substantial body of case law about the standards of review of these decisions has developed. Generally

speaking, the reviewing courts have shown deference to the findings of fact of human rights tribunals (P. Garant, *Droit administratif* (6th ed. 2010), at p. 553). At the same time, they have granted little deference to their interpretations of laws, even of their own enabling statutes. It is well known that courts have traditionally extended deference to administrative bodies responsible for managing complex administrative schemes in domains like labour relations, telecommunications, the regulation of financial markets and international economic relations (*National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990 CanLII 49 \(SCC\)](#), [1990] 2 S.C.R. 1324, at pp. 1339 and 1341, *per* Wilson J., and pp. 1369-70, *per* Gonthier J.). On the other hand, reviewing courts have not shown deference to human rights tribunals in respect of their decisions on legal questions. In the courts' view, the tribunals' level of comparative expertise remained weak and the regimes that they administered were not particularly complex (see A. Macklin, "Standard of Review: The Pragmatic and Functional Test", in C. M. Flood and L. Sossin, eds., *Administrative Law in Context* (2008), 197, at p. 216).

[20] Several examples can be found in the jurisprudence of the Court. In *Dickason v. University of Alberta*, [1992 CanLII 30 \(SCC\)](#), [1992] 2 S.C.R. 1103, this Court held that absent a privative clause and specialized skill, a human rights commission or tribunal must interpret legislation correctly (pp. 1125-26). In subsequent decisions of this Court, the questions of whether the definition of "family status" as a prohibited ground of discrimination in the federal Act included same-sex couples (*Canada (Attorney General) v. Mossop*, [1993 CanLII 164 \(SCC\)](#), [1993] 1 S.C.R. 554), or what constituted a "service customarily available to the public" or "public service" under the provincial human rights legislation (*University of British Columbia v. Berg*, [1993 CanLII 89 \(SCC\)](#), [1993] 2 S.C.R. 353; *Gould v. Yukon Order of Pioneers*, [1996 CanLII 231 \(SCC\)](#), [1996] 1 S.C.R. 571) were held to be questions of law in which human rights adjudicators had no particular expertise *vis-à-vis* the courts and which had to be reviewed under a standard of correctness.

[21] But given the recent developments in the law of judicial review since *Dunsmuir* and its emphasis on the deference owed to administrative tribunals, even in respect of many questions of law, we must discuss whether all decisions on questions of law rendered by the Tribunal and similar bodies should be swept under the standard of correctness. At this point, we must acknowledge a degree of tension between some policies underpinning the present system of judicial review, when it applies to the decisions of human rights tribunals.

[22] The nature of these tribunals lies at the root of these problems. On the one hand, *Dunsmuir* and *Khosa*, building upon previous jurisprudence, recognize that administrative tribunals are generally entitled to deference, in respect of the legal interpretation of their home statutes and laws or legal rules closely connected to them. On the other hand, our Court has reaffirmed that general questions of law that are both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, must still be reviewed on a standard of correctness, in order to safeguard a basic consistency in the fundamental legal order of

our country. The nature of the “home statute” administered by a human rights tribunal makes the task of resolving this tension a particularly delicate one. A key part of any human rights legislation in Canada consists of principles and rules designed to combat discrimination. But, these statutes also include a large number of provisions, addressing issues like questions of proof and procedure or the remedial authority of human rights tribunals or commissions.

[23] There is no doubt that the human rights tribunals are often called upon to address issues of very broad import. But, the same questions may arise before other adjudicative bodies, particularly the courts. In respect of some of these questions, the application of the *Dunsmuir* standard of review analysis could well lead to the application of the standard of correctness. But, not all questions of general law entrusted to the Tribunal rise to the level of issues of central importance to the legal system or fall outside the adjudicator’s specialized area of expertise. Proper distinctions ought to be drawn, especially in respect of the issue that remains before our Court.

[24] In this case, there is no doubt that the Tribunal has the power to award compensation for “any expenses incurred by the victim as a result of the discriminatory practice” pursuant to s. 53(2)(c) and (d) of the Act. The issue is whether the Tribunal could order the payment of costs as a form of compensation. Although *Dunsmuir* maintained the category of jurisdictional questions, it took the view that this category should be interpreted narrowly. Indeed, our Court has held since *Dunsmuir* that issues which in other days might have been considered by some to be jurisdictional, should now be dealt with under the standard of review analysis in order to determine whether a standard of correctness or of reasonableness should apply (see, e.g., *Celgene Corp. v. Canada (Attorney General)*, [2011 SCC 1 \(CanLII\)](#), 2011 SCC 1, [2011] 1 S.C.R. 3, at paras. 33-34; *Nolan v. Kerry (Canada) Inc.*, [2009 SCC 39 \(CanLII\)](#), 2009 SCC 39, [2009] 2 S.C.R. 678, at paras. 28-34). In substance, if the issue relates to the interpretation and application of its own statute, is within its expertise and does not raise issues of general legal importance, the standard of reasonableness will generally apply and the Tribunal will be entitled to deference.

[25] The question of costs is one of law located within the core function and expertise of the Tribunal relating to the interpretation and the application of its enabling statute (*Dunsmuir*, at para. 54). Although the respondent submitted that a human rights tribunal has no particular expertise in costs, care should be taken not to return to the formalism of the earlier decisions that attributed “a jurisdiction-limiting label, such as ‘statutory interpretation’ or ‘human rights’, to what is in reality a function assigned and properly exercised under the enabling legislation” by a tribunal (*Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007 SCC 15 \(CanLII\)](#), 2007 SCC 15, [2007] 1 S.C.R. 650, at para. 96, *per* Abella J.). The inquiry of what costs were incurred by the complainant as a result of a discriminatory practice is inextricably intertwined with the Tribunal’s mandate and expertise to make factual findings relating to discrimination (see *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, [2007 SCC 14 \(CanLII\)](#), 2007 SCC 14, [2007] 1 S.C.R. 591, at para. 112, *per* Abella J., *Toronto (City) v. C.U.P.E., Local 79*, [2003 SCC 63](#)

([CanLII](#)), 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 76, *per* LeBel J.). As an administrative body that makes such factual findings on a routine basis, the Tribunal is well positioned to consider questions relating to appropriate compensation under [s. 53\(2\)](#). In addition, a decision as to whether a particular tribunal will grant a particular type of compensation — in this case, legal costs — can hardly be said to be a question of central importance for the Canadian legal system and outside the specialized expertise of the adjudicator. Compensation is frequently awarded in various circumstances and under many schemes. It cannot be said that a decision on whether to grant legal costs as an element of that compensation and about their amount would subvert the legal system, even if a reviewing court found it to be in error.

[26] Subjecting costs to a correctness review would represent a departure from *Dunsmuir*, and from this Court's recent decision in *Smith*. We note, though, that in that case there was a complex and substantial factual background. The issue was whether a tribunal with a mandate to arbitrate disputes relating to mandatory land expropriation and to award "legal, appraisal and other costs" could award costs of related proceedings which, in its view, had been necessary to secure compensation for the expropriation. Fish J., writing for the majority of this Court, concluded that the award of costs was reviewable on the standard of reasonableness since the tribunal was interpreting a provision of its home statute, and "[a]wards for costs are invariably fact-sensitive and generally discretionary" (para. 30). In his view, the tribunal's sole responsibility for determining the nature and the amount of costs was also grounded in the statutory language, and furthermore, involved an inquiry where the legal issues could not be easily separated from the factual issues (paras. 30-32). As the tribunal in *Smith*, the federal Tribunal in this case was interpreting a provision in its home statute that necessitated a fact-intensive inquiry and afforded the Tribunal a certain margin of discretion.

[27] In summary, the issue of whether legal costs may be included in the Tribunal's compensation order is neither a question of jurisdiction, nor a question of law of central importance to the legal system as a whole and outside the Tribunal's area of expertise within the meaning of *Dunsmuir*. As such, the Tribunal's decision to award legal costs to the successful complainant is reviewable on the standard of reasonableness.

C. *Reasonableness of the Decision*

[28] In *Dunsmuir*, the majority of this Court described reasonableness as

a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a

review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [para. 47]

[29] Reasonableness is therefore a deferential standard that shows respect for an administrative decision maker's experience and expertise. The concept of deference is fundamental in the context of judicial review, as this Court held in the seminal case of *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979 CanLII 23 \(SCC\)](#), [1979] 2 S.C.R. 227. Deference to an administrative tribunal reflects recognition of interpretive choices. Such a recognition makes it possible to ask whether the tribunal or the court is better placed to make the choice (Macklin, at p. 205).

[30] The concept of deference is also what distinguishes judicial review from appellate review. Although both judicial and appellate review take into account the principle of deference, care should be taken not to conflate the two. In the context of judicial review, deference can shield administrative decision makers from excessive judicial intervention even on certain questions of law as long as these questions are located within the decision makers' core function and expertise. In those cases, deference would therefore extend to protect a range of reasonable outcomes when the decision maker is interpreting its home statute (see R. E. Hawkins, "Whither Judicial Review?" (2010), 88 *Can. Bar Rev.* 603).

[31] By contrast, under the principles of appellate review set down in *Housen v. Nikolaisen*, [2002 SCC 33 \(CanLII\)](#), 2002 SCC 33, [2002] 2 S.C.R. 235, an appellate court owes no deference to a decision maker below on questions of law which are automatically reviewable on the standard of correctness. In *Khosa*, a majority of the Court confirmed that these principles of appellate review should not be imported into the judicial review context.

D. Application — Reasonableness of Tribunal's Interpretation

[32] The Tribunal held that any authority to award legal costs must come from either s. 53(2)(c) or (d) of the Act (costs decision, at para. 11). The appellant and the Commission have not raised any other provisions capable of supporting the result sought and conceded during oral argument that they were relying on both provisions together. The precise interpretative question before the Tribunal, therefore, was whether the words of [s. 53\(2\)\(c\)](#) and (d), which authorize the Tribunal to "compensate the victim . . . for any expenses incurred by the victim as a result of the discriminatory practice", permit an award of legal costs. The Tribunal decided they did. However,

in our view, this interpretation of these provisions is not reasonable, as a careful examination of the text, context and purpose of the provisions reveal.

[33] The question is one of statutory interpretation and the object is to seek the intent of Parliament by reading the words of the provision in their entire context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of Parliament (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, quoted in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998 CanLII 837 \(SCC\)](#), [1998] 1 S.C.R. 27, at para. 21). In approaching this task in relation to human rights legislation, one must be mindful that it expresses fundamental values and pursues fundamental goals. It must therefore be interpreted liberally and purposively so that the rights enunciated are given their full recognition and effect: see, e.g., R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 497-500. However, what is required is nonetheless an interpretation of the text of the statute which respects the words chosen by Parliament.

[34] The Tribunal based its conclusion that it had the authority to award legal costs on two points. First, following three decisions of the Federal Court, the Tribunal reasoned that the term “expenses incurred” in [s. 53\(2\)\(c\)](#) and [\(d\)](#) is wide enough to include legal costs: *Canada (Attorney General) v. Thwaites*, [1994 CanLII 3469 \(FC\)](#), [1994] 3 F.C. 38, at p. 71; *Canada (Attorney General) v. Stevenson*, [2003 FCT 341 \(CanLII\)](#), 2003 FCT 341, 229 F.T.R. 297, at paras. 23-26; *Canada (Attorney General) v. Brooks*, [2006 FC 500 \(CanLII\)](#), 2006 FC 500, 291 F.T.R. 32, paras. 10-16. Second, the Tribunal relied on what it considered to be compelling policy considerations relating to access to the human rights adjudication process. For reasons that we will set out, our view is that these points do not reasonably support the conclusion that the Tribunal may award legal costs. When one conducts a full contextual and purposive analysis of the provisions it becomes clear that no reasonable interpretation supports that conclusion.

(1) Text

[35] Turning to the text of the provisions in issue, the words “any expenses incurred by the victim”, taken on their own and divorced from their context, are wide enough to include legal costs. This was the view adopted by the Tribunal and the three Federal Court decisions on which it relied. However, when these words are read, as they must be, in their statutory context, it becomes clear that they cannot reasonably be interpreted as creating a stand-alone category of compensation capable of supporting any type of disbursement causally connected to the discrimination. The contention that they were in our view, ignores the structure of the provision in which the words “any expenses incurred by the victim” appear.

[36] For ease of reference, we reproduce [s. 53\(2\)](#) and [\(3\)](#) as they read at the time the appellant’s complaint was filed:

53. . . .

(2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, it may . . . make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in that order any of the following terms that it considers appropriate:

(a) that the person cease the discriminatory practice and, in order to prevent the same or a similar practice from occurring in the future, take measures, including

(i) adoption of a special program, plan or arrangement referred to in subsection 16(1), or

(ii) the making of an application for approval and the implementing of a plan pursuant to section 17,

in consultation with the Commission on the general purposes of those measures;

(b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, such rights, opportunities or privileges as, in the opinion of the Tribunal, are being or were denied the victim as a result of the practice;

(c) that the person compensate the victim, as the Tribunal may consider proper, for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice; and

(d) that the person compensate the victim, as the Tribunal may consider proper, for any or all additional cost of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice.

(3) In addition to any order that the Tribunal may make pursuant to subsection (2), if the Tribunal finds that

(a) a person is engaging or has engaged in a discriminatory practice wilfully or recklessly, or

(b) the victim of the discriminatory practice has suffered in respect of feelings or self-respect as a result of the practice,

the Tribunal may order the person to pay such compensation to the victim, not exceeding five thousand dollars, as the Tribunal may determine.

[37] It is significant, in our view, that the phrase “that the person compensate the

victim . . . for any expenses incurred by the victim as a result of the discriminatory practice” appears twice, in two subsequent paragraphs. The wording is identical, but on each occasion it appears, the reference to expenses is preceded by specific, but different, wording. The repetition of the reference to expenses and the context in which this occurs strongly suggest that the expenses referred to in each paragraph take their character from the sort of compensation contemplated by the surrounding words of each paragraph. So, in [s. 53\(2\)\(c\)](#), the person must compensate the victim for lost wages and any expenses incurred by the victim as a result of the discriminatory practice. In [s. 53\(2\)\(d\)](#), compensation is for the additional costs of obtaining alternate goods, services, facilities, or accommodation in addition to expenses incurred. If the use of the term “expenses” had been intended to confer a free-standing authority to confer costs in all types of complaints, it is difficult to understand why the grant of power is repeated in the specific contexts of lost wages and provision of services and also why the power to award expenses was not provided for in its own paragraph rather than being repeated in the two specific contexts in which it appears. This suggests that the term “expenses” is intended to mean something different in each of paragraphs (c) and (d).

[38] The interpretation adopted by the Tribunal makes the repetition of the term “expenses” redundant and fails to explain why the term is linked to the particular types of compensation described in each of those paragraphs. This interpretation therefore violates the legislative presumption against tautology. As Professor Sullivan notes, at p. 210 of her text, “It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose.” As former Chief Justice Lamer put it in *R. v. Proulx*, [2000 SCC 5 \(CanLII\)](#), 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 28, “It is a well accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage.” See also *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985 CanLII 35 \(SCC\)](#), [1985] 1 S.C.R. 831, at p. 838.

[39] The appellant received an award for pain and suffering under [s. 53\(3\)](#) of the [CHRA](#). The Tribunal also expressly disallowed her medical expense claims (merits decision, at paras. 404-6). Unlike [s. 53\(2\)\(c\)](#) and (d), there is in subs. (3) no provision for the reimbursement of expenses. Once again, if the intention had been to grant free-standing authority to award costs, the meaning of this omission in light of the repeated specific provision for compensation for expenses is hard to fathom in the context of compensation for lost wages in paragraph (c) and for additional costs of obtaining goods and services in paragraph (d).

[40] Moreover, the term “costs”, in legal parlance, has a well-understood meaning that is distinct from either compensation or expenses. It is a legal term of art because it consists of “words or expressions that have through usage by legal professionals acquired a distinct legal meaning”: Sullivan, at p. 57. Costs usually mean some sort of compensation for legal expenses and services incurred in the course of litigation. If Parliament intended to confer authority to order

costs, it is difficult to understand why it did not use this very familiar and widely used legal term of art to implement that purpose. As we shall see shortly, the legislative history of the statute also strongly supports the inference that this was not Parliament's intent.

[41] Finally, in relation to the text of the Act, it is noteworthy that it very strictly limits the amount of money the Tribunal may award for pain and suffering experienced as a result of the discriminatory practice and, as noted, does not explicitly provide for reimbursement of expenses in relation to such an award. At the time of these proceedings, the limit was \$5,000. The Tribunal's interpretation permits it to make a free-standing award for pain and suffering coupled with an award of legal costs in a potentially unlimited amount. This view is hard to reconcile with either the monetary limit or the omission of any express authority to award expenses in [s. 53\(3\)](#).

(2) Context

[42] Turning to context, three matters must be considered: legislative history, the Commission's own consistent understanding of the Tribunal's power to award costs, and parallel provincial and territorial legislation. These contextual matters, when considered along with the provisions' text and purpose, demonstrate that the Tribunal's interpretation does not fall within the range of reasonable interpretations of these provisions.

(a) *Legislative History*

[43] The legislative evolution and history of a provision may often be important parts of the context to be examined as part of the modern approach to statutory interpretation: *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, [2005 SCC 70 \(CanLII\)](#), 2005 SCC 70, [2005] 3 S.C.R. 425, at para. 28, *per* Binnie J.; *Hills v. Canada (Attorney General)*, [1988 CanLII 67 \(SCC\)](#), [1988] 1 S.C.R. 513, at p. 528, *per* L'Heureux-Dubé J.; *Hilewitz v. Canada (Minister of Citizenship and Immigration)*, [2005 SCC 57 \(CanLII\)](#), 2005 SCC 57, [2005] 2 S.C.R. 706, at paras. 41-53, *per* Abella J. Legislative evolution consists of the provision's initial formulation and all subsequent formulations. Legislative history includes material relating to the conception, preparation and passage of the enactment: see Sullivan, at pp. 587-93; P.-A. Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at pp. 496 and 501-8.

[44] We think there is no reason to exclude proposed, but unenacted, provisions to the extent they may shed light on the purpose of the legislation. While great care must be taken in deciding how much, if any, weight to give to these sorts of material, it may provide helpful information about the background and purpose of the legislation, and in some cases, may give direct evidence of legislative intent: Sullivan, at p. 609; Côté, at p. 507; *Doré v. Verdun (City)*,

[1997 CanLII 315 \(SCC\)](#), [1997] 2 S.C.R. 862, at para. 37. This Court, in *M. v. H.*, [1999 CanLII 686 \(SCC\)](#), [1999] 2 S.C.R. 3, has held that failed legislative amendments can constitute evidence of Parliamentary purpose: paras. 348-49, *per* Bastarache J.

[45] The legislative evolution and history of the [CHRA](#) shed light on two important matters. First, it strongly supports the inference that it is likely that Parliament would have chosen the familiar legal term of art had it been the intention to confer a power to award costs. Parliament is presumed to know the law and it is a reasonable inference that its failure to use familiar terms of art shows that some other meaning was intended. The history of the enactment of the provisions in issue supports applying that reasonable inference because the legal term of art “costs” was used in some draft provisions but not others. Second, the role envisioned for the Commission explains why the power to award costs was not part of Parliament’s intent.

[46] Before the [Canadian Human Rights Act](#) was enacted in 1977, there was an earlier attempt to enact similar legislation. In 1975, Bill C-72, *An Act to extend the present laws in Canada that proscribe discrimination and that protect the privacy of individuals*, 1st Sess., 30th Parl., received first reading. It provided a specific costs jurisdiction for the Tribunal *in addition to* authority to award expenses which was expressed in wording that was virtually identical to the current [s. 53\(2\)](#). Clause 37(4) of Bill C-72 read as follows:

37. . . .

(4) The costs of and incidental to any hearing before a Tribunal are in the discretion of the Tribunal, which may direct that the whole or any part thereof be paid by any party to such hearing.

[47] Bill C-72 died on the order paper. When Bill C-25, which ultimately became the [CHRA](#) in 1977, was introduced, the explicit authority to award costs, which had been granted in cl. 37(4) of Bill C-72, was deleted, while the authority to award expenses was retained. In addition, a provision relating to the role of the Commission was inserted which we will discuss in a moment.

[48] This piece of the legislative history of the provision before us strongly suggests that “costs” was used as a term of art when the intention was to confer authority to award legal costs. This view is further reinforced by amendments that were proposed, but not enacted, in 1992. Clause 24(3) of Bill C-108, *An Act to amend the Canadian Human Rights Act and other Acts in consequence thereof*, 3rd Sess., 34th Parl., 1991-92, provided that the Tribunal could order the Commission to pay costs. It read as follows:

24. . . .

(3) Subsections 53(3) and (4) of the said Act are repealed and the following substituted therefor:

. . .

(6) The Tribunal may order the Commission to pay costs in accordance with the rules made under section 48.9 to

(a) a complainant, if the complaint is substantiated and

(i) the Commission did not appear before the Tribunal, or

(ii) separate representation for the complainant was warranted by the divergent interests of the complainant and the Commission or by any other circumstances of the complaint; or

(b) a respondent, if the complaint is not substantiated and is found to be trivial, frivolous, vexatious, in bad faith or without purpose or to have caused the respondent excessive financial hardship.

Clause 21 (adding s. 48.9(1)(h)) also would have allowed the Human Rights Tribunal Panel, with the approval of the Governor in Council, to make rules of procedure governing awards of interest and costs.

[49] These provisions received first reading in December of 1992, but did not proceed further and were not enacted. However, they again show that the word “costs” was understood to be a legal term of art to be used when the intention was to confer authority to order payment of legal costs.

[50] Another aspect of legislative history suggests that the authority to award costs and the role envisaged for the Commission were related subjects in Parliament’s view.

[51] We mentioned earlier that the 1975 draft bill which was not ultimately enacted expressly authorized the Tribunal to award “costs of and incidental to any hearing” before it. That express power, as we have noted, was not contained in the 1977 bill that ultimately became the [CHRA](#). However, while the power to award costs was removed, a provision relating to the role of the Commission was added. This section currently reads:

51. In appearing at a hearing, presenting evidence and making representations,

the Commission shall adopt such position as, in its opinion, is in the public interest having regard to the nature of the complaint.

We agree with the respondent that the clear implication of this chain of events is that Parliament chose an active role for the Commission, which could include litigating on behalf of complainants, instead of cloaking the Tribunal with a broad costs jurisdiction.

[52] The 1992 proposed amendments which we have noted earlier are consistent with this view. It is noteworthy that the authority to award costs contemplated by those provisions could only be awarded under this regime if the Commission did not take carriage of the matter. This supports the respondent's contention that an authority to award costs was rejected in favour of an active role for the Commission in presenting complaints to the Tribunal.

(b) *The Commission's Understanding of Costs Authority*

[53] A further element of context is that the Commission itself has consistently understood that the [CHRA](#) does not confer jurisdiction to award costs and has repeatedly urged Parliament to amend the Act in this respect. Despite the limited weight of the factor, this Court has permitted consideration of an administrative body's own interpretation of its enabling legislation, for example, in *Will-Kare Paving & Contracting Ltd. v. Canada*, [2000 SCC 36 \(CanLII\)](#), 2000 SCC 36, [2000] 1 S.C.R. 915. Binnie J. (in dissent) relied on excerpts from speeches to the Canadian Tax Foundation made by both the Minister of Finance and an employee of Revenue Canada when interpreting an income tax provision. Binnie J. states, "Administrative policy and interpretation are not determinative but are entitled to weight and can be an important factor in case of doubt about the meaning of legislation", at para. 66, citing *Harel v. Deputy Minister of Revenue of Quebec*, [1977 CanLII 10 \(SCC\)](#), [1978] 1 S.C.R. 851, at p. 859, *per de Grandpré J.*, and *Nowegijick v. The Queen*, [1983 CanLII 18 \(SCC\)](#), [1983] 1 S.C.R. 29, at p. 37, *per Dickson J.* (as he then was). While of course not conclusive, this sort of opinion about the proper interpretation of the provision may be consulted by the court provided it meets the threshold test of relevance and reliability (see Sullivan, at p. 575; Côté, at pp. 633-38). In my view, the considered and consistent view of the Commission itself about the meaning of its constitutive statute meets these requirements.

[54] In its 1985 annual report, the Commission asked that the Act be amended to empower the Tribunal to award costs:

The Commission recommends to Parliament that the Canadian Human Rights Act be amended to include a provision to allow a human rights tribunal discretionary power to award costs to parties appearing before it.

The intent of this recommendation is to provide tribunals with a wider discretion in disposing of a complaint where undue hardship may be a factor.

(*Annual Report 1985* (1986), at p. 12 (italics in original))

The Commission made similar recommendations in each of its 1986, 1987, 1988, 1989 and 1990 annual reports to Parliament.

[55] Most recently, in its *Special Report to Parliament: Freedom of Expression and Freedom from Hate in the Internet Age* (2009), the Commission stated that “[t]he [CHRA](#) does not allow for the awarding of costs” (p. 34). In this respect, the report makes mention of the simplified process that complainants must follow to file a complaint, and the assistance they get from both the Commission and the Tribunal during the investigation and litigation stages, as reasons why complainants do not need to hire lawyers to proceed. The Commission went on to recommend that Parliament amend the Act to allow discretion to award legal costs, but only if the Tribunal finds that one party has abused the Tribunal process.

[56] While, as noted, the Commission’s views about the limits of its statutory powers are not binding on the court, they may be considered. The Commission is the body charged with the administration and enforcement of the [CHRA](#) on a daily basis and possesses extensive knowledge of and familiarity with the Act. Its long-standing and consistently held view that the Act does not allow for costs, while not determinative, is entitled to some weight in the circumstances of this case.

(c) *Parallel Provincial and Territorial Legislation*

[57] The respondent also urges us to consider parallel legislation in the provinces and territories and we agree that this is a useful exercise in this case. Of course, we do not suggest that consulting provincial and territorial legislation is always helpful to the task of discerning federal legislative intent. However, Professor Sullivan confirms that cross-jurisdictional comparison of statutes dealing with the same subject matter may be instructive (pp. 419-20).

[58] The Court has made use of parallel legislation as an interpretative aid in other cases. For example, in *Canada (Attorney General) v. Public Service Alliance of Canada*, [1991 CanLII 88 \(SCC\)](#), [1991] 1 S.C.R. 614, Sopinka J. looked at several pieces of comparable provincial legislation to assist him in determining whether the federal legislation allowed the Public Service Staff Relations Board to decide who is an employee under its enabling legislation (pp. 631-32). Another example of this approach is found in *Morguard Properties Ltd. v. City of Winnipeg*, [1983 CanLII 33 \(SCC\)](#), [1983] 2 S.C.R. 493, where Estey J. relied on a comparative analysis between Manitoba’s legislation, and that of the other provinces, when deciding whether

Winnipeg intended to freeze property tax assessments (pp. 504-5).

[59] In this case, resort to parallel provincial and territorial legislation is helpful in one limited respect. It tends to confirm the view that the word “costs” is used consistently when the intention is to confer the authority to award legal costs.

[60] For example, British Columbia allows costs to be awarded if there is “improper conduct” during the course of the complaint ([Human Rights Code, R.S.B.C. 1996, c. 210, s. 37\(4\)](#)). In Manitoba and the Northwest Territories, the conduct must be “frivolous or vexatious” ([Human Rights Code, S.M. 1987-88, c. 45, s. 45\(2\)](#); [Human Rights Act, S.N.W.T. 2002, c. 18, s. 63](#)). In Alberta, Prince Edward Island, and Newfoundland ([Alberta Human Rights Act, R.S.A. 2000, c. A-25.5, s. 32\(2\)](#); [Human Rights Act, R.S.P.E.I. 1988, c. H-12, s. 28.4\(6\)](#); [Human Rights Act, 2010, S.N.L. 2010, c. H-13.1, s. 39\(2\)](#)), tribunals can make any “appropriate” cost order, in Québec a tribunal may award costs “as it determines”, [Charter of human rights and freedoms, R.S.Q., c. C-12, s. 126](#); and in Saskatchewan it is any “appropriate” cost order but not against the Commission ([Saskatchewan Human Rights Code Regulations, R.R.S., c. S-24.1, Reg. 1, s. 21\(1\)](#)). In Ontario, the offending party’s conduct must be “unreasonable, frivolous or vexatious or . . . in bad faith” and the Tribunal can make its own rules pertaining to costs awards ([Statutory Powers Procedure Act, R.S.O. 1990, c. S.22, s. 17.1\(2\)](#)). In all provinces, this costs jurisdiction is *in addition to* broad compensatory jurisdiction for expenses incurred; the wording of these expense reimbursement provisions is very similar to the language of [s. 53\(2\)](#) of the [CHRA](#).

(3) Purpose

[61] The appellant urges the Court to give the provisions authorizing compensation for expenses a broad and purposive interpretation which will permit the Tribunal to make victims of discrimination whole. This was the second point relied on by the Tribunal in finding it could award costs.

[62] As we noted earlier, the [CHRA](#) has been described as quasi-constitutional and deserves a broad, liberal, and purposive interpretation befitting of this special status. However, a liberal and purposive interpretation cannot supplant a textual and contextual analysis simply in order to give effect to a policy decision different from the one made by Parliament: *Bell Canada v. Bell Aliant Regional Communications*, [2009 SCC 40 \(CanLII\)](#), 2009 SCC 40, [2009] 2 S.C.R. 764, at paras. 49-50, *per* Abella J.; *Gould*, at para. 50, *per* La Forest J., concurring.

[63] The genesis of this dispute appears to be the fact that, in 2003, the Commission decided to restrict its advocacy on behalf of complainants (R.F., at paras. 47-48). This policy

change may have been in response to the Report of the [Canadian Human Rights Act](#) Review Panel, chaired by the Honourable Gérard La Forest, which recommended that the Commission act only in cases that raised serious issues of systemic discrimination or new points of law (*Promoting Equality: A New Vision* (2000)). Interestingly, this report also acknowledged that the [CHRA](#) does not provide any authority to award costs. The Report recommended clinic-type assistance to potential claimants (pp. 71-72 and 74-78). The latter recommendation was not acted upon, while the former was. As a result, the role of the Commission in taking complaints forward to the Tribunal was restricted without provision for alternative means to assist complainants to do so. Significantly, however, these changes occurred without changing the legislation in relation to the power to award costs.

[64] In our view, the text, context and purpose of the legislation clearly show that there is no authority in the Tribunal to award legal costs and that there is no other reasonable interpretation of the relevant provisions. Faced with a difficult point of statutory interpretation and conflicting judicial authority, the Tribunal adopted a dictionary meaning of “expenses” and articulated what it considered to be a beneficial policy outcome rather than engage in an interpretative process taking account of the text, context and purpose of the provisions in issue. In our respectful view, this led the Tribunal to adopt an unreasonable interpretation of the provisions. The Court of Appeal was justified in reviewing and quashing the order of the Tribunal.

V. Disposition

[65] We would dismiss the appeal without costs.

Appeal dismissed.

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