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COURT OF APPEAL FOR ONTARIO

**RE: Her Majesty the Queen in Right of Ontario (Appellant) - and -
Michael McKinnon and the Ontario Human Rights Commission
(Respondents)**

BEFORE: Catzman, Rosenberg, and Gillese JJA.

**COUNSEL: Dennis W. Brown, Q.C.
John P. Zarudny and
James Kendik
for the appellant**

**Kate Hughes and
Veena Verma
for the respondent Michael McKinnon**

**Jennifer Scott
for the respondent Ontario Human Rights Commission**

HEARD: December 6, 2004

**On appeal from the decision of the Divisional Court (Justice Tamarin M. Dunnet,
Justice John R. R. Jennings and Justice Colin L. Campbell), dated
December 23, 2003.**

ENDORSEMENT

[1] For the reasons that follow, we see no basis upon which to interfere with the decision of the Divisional Court and, accordingly, would dismiss the appeal.

[2] For the reasons given by the Divisional Court, the Human Rights Tribunal retained supervisory jurisdiction over the implementation of Order #12 that mandated the implementation of a human rights training program. We share the view of the Divisional Court that it was open to the Tribunal, as part of its ongoing obligation to oversee

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implementation, to recast its original orders to meet what it found to be a continuing problem.

[3] Indeed, there is no real dispute between the parties over whether the Tribunal retained supervisory jurisdiction over the implementation of its order as, in its 1998 decision, it expressly stated that it remained seized under s. 41. The real disputes on appeal are the extent of the Tribunal's supervisory jurisdiction and whether the Ministry had been afforded procedural fairness.

[4] The core of the problem here is that the Tribunal found that the Ministry did not act in good faith in attempting to comply with the order. The evidence supports that finding. The evidence called, while touching on matters beyond the Toronto East Detention Centre, related to Mr. McKinnon and the Ministry's response to the Tribunal's original order. The remedies devised by the Tribunal were responsive to the evidence. Given the findings of bad faith, the Tribunal could reasonably conclude that these system-wide remedies were necessary to address the complaint by this complainant and ensure that the order was effective.

[5] In terms of the scope of jurisdiction, again we affirm the reasons of the Divisional Court and note particularly its comments at para. 21 "We are confronted in this appeal with a unique situation in which outrageous discrimination continued unabated for a period of approximately fifteen years and in which the Tribunal's original remedies appear to have been at least in part, subverted."

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[6] With respect to procedural fairness, the Ministry submits that it was given insufficient notice of the case to be met. It appears that what the Ministry is really objecting to is the fact that it was never expressly told its good faith or the good faith of particular Ministry officials in implementing the 1998 orders was in issue. We see nothing in the record to support the submission that the Ministry was given insufficient notice.

[7] The scope of matters in issue was known to the Ministry. The parties exchanged documents and letters with the particulars of McKinnon's complaints. The Ministry was advised that expert evidence would be called on the appropriate remedies, including Ministry-wide remedies. The Ministry had full knowledge of the nature of the expert evidence since the expert was the lead consultant in the Ministry-generated Devlin review. The question of good faith of the Ministry officials arose as a consequence of the evidence that was led. At the hearing, McKinnon called evidence first, giving the Ministry notice of the nature of the widespread problems alleged. As found by the Tribunal, senior Ministry officials were made aware of Mr. McKinnon's complaints and failed to respond in an appropriate manner.

[8] From the nature of McKinnon's post-decision complaints it was apparent that the Ministry's conduct in failing to comply in good faith with the order was at issue. It should have been apparent to the Ministry, in the face of the 1998 findings and

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allegations of a continuing poisoned work environment after the 1998 decision, that one of the issues was whether the Ministry had truly tried to fix the problems.

[9] The appeal is therefore dismissed with costs to the respondent McKinnon fixed at \$20,000 and to the Commission at \$10,000, inclusive of GST and disbursements.

W. A. C. J.

M. L. J.

R. S. J.A.