

**BEFORE THE YUKON HUMAN RIGHTS  
BOARD OF ADJUDICATION**

**Between**

**Thomas Molloy**

**Complainant**

**And**

**The Yukon Human Rights Commission**

**And**

**Government of Yukon**

**Respondent**

**Decision**

Thomas Molloy

Appearing on his own behalf

Corinne McKay

Counsel for the Yukon Human  
Rights Commission

Peter Csiszar

Counsel for the Respondent

Date and Place of Hearing

January 27, 2011  
Whitehorse, Yukon

**Background to this Decision**

This decision reflects the deliberations of the Yukon Human Rights Board of Adjudication (the "Board"), constituted in accordance with the May 1, 2009 Order of Mr. Justice Groberman, of the Supreme Court of the Yukon. Justice Groberman remitted this matter to the Board as part of an order overturning the decision of a previous Yukon Human Rights Board of Adjudication.

This matter was initiated in May 2005 when Thomas Molloy filed a complaint with the Yukon Human Rights Commission (the "Commission") alleging that he was

discriminated against in December 2004. He alleged that the Yukon Tourism Education Council (“YTEC”) and the Government of Yukon (“GY”) discriminated against him by terminating his employment due to his criminal record, and sought compensation for his losses, and an apology.

The Commission investigated the complaint. YTEC was removed as a Respondent and the complaint was referred for adjudication, with Thomas Molloy as the Complainant and GY as the sole Respondent. A Board of Adjudication heard the matter over 12 days in February, April and May of 2008. At the conclusion of the Commission’s evidence, the Respondent made a No Evidence Motion. The Board upheld the motion and dismissed the complaint in a ruling dated August 22, 2008, effectively deciding that the Commission had not led any evidence on which a properly instructed jury, acting reasonably, could find that the Complainant had been discriminated against.

The Commission appealed the Board’s dismissal of the complaint to the Yukon Supreme Court. On May 1, 2009 Justice Groberman rendered his decision that the original Board of Adjudication had made an error in law in allowing the Respondent’s No Evidence Motion, and sent the matter back for adjudication by a new Board.

Justice Groberman found the original Board to have made two errors. The first was that it misdirected itself in law by finding that an “employment relationship” with the Respondent was necessary in order for there to be discrimination in connection with employment, and by jumping to a consideration of whether or not the Complainant’s criminal record was relevant to his employment without considering whether or not the Complainant’s criminal record was a factor in the termination of his employment. Mr. Justice Groberman found that there was some evidence upon which a reasonable jury, properly instructed, might have concluded that the Complainant’s criminal record was a factor in the termination of his employment. He stated: “Since that conclusion was open to the Board of Adjudication, it ought not to have found that the no evidence motion could succeed.”

A new Board of Adjudication was constituted in the summer of 2010, and the matter was heard on January 27, 2011. Mr. Justice Groberman directed that the transcripts and exhibits from the original hearing in 2008 be accepted as evidence in the new hearing, and that the Respondent could present evidence if they wished. It was left to the new Board to determine whether or not the Complainant or the Commission would be allowed to present further evidence.

Both the Commission and the Respondent decided not to submit further evidence. The Complainant initially indicated that he would submit new evidence. The Board requested details about the nature of the additional evidence the Complainant intended to submit. The Complainant did not respond to this request or submit further evidence. The Board invited the parties to submit written closing submissions and authorities. Both the Commission and the Respondent provided written submissions; the Complainant did not.

Time was set on January 27 and 28, 2011 for each of the parties to make oral responses to the written submissions of the other parties. The Commission and Respondent appeared in person and the Complainant attended by telephone. The Commission, the Respondent, and the Complainant made oral submissions in response to the written submissions of the Commission and the Respondent.

## **ISSUES**

In addition to the issues argued before the Board, the original complaint also alleged discrimination, under section 9(e) of the Yukon *Human Rights Act* (“Act”), “in the negotiation or performance of any contract that is offered to or for which offers are invited from the public”. This allegation remained part of the complaint before the Board, but neither the Complainant nor the Commission advanced this argument. In their written closing argument submitted in January 2011, the Commission submitted that there was no evidence that the Complainant’s contract was offered to the public or was one for which offers were invited from the public. As a result, the Commission argued that section 9(e) of the Act was not engaged. Counsel for the Respondent also argued that section 9(e) did not apply. He made this argument both at the 2008 hearing and in his closing submissions in January 2011. As this claim was not pursued by any of the parties, it is not necessary for the Board to make any findings in relations to this allegation.

This complaint involves a number of issues, each of which must be addressed sequentially to determine whether, on the basis of his criminal record, the Complainant was discriminated against in connection with his employment, or any aspect of his employment. The five issues are as follows:

- 1. Was the Complainant engaged in employment when the alleged discrimination occurred?**
- 2. If the Complainant was engaged in employment when the alleged discrimination occurred, did the Respondent interfere with the Complainant’s employment, or any aspect of his employment, contrary to section 9(b) of the Act, which prohibits discrimination in connection with any aspect of employment?**
- 3. If the Respondent interfered with an aspect of the Complainant’s employment when it removed its employees from training the Complainant was retained by YTEC to facilitate, was this interference on the basis of a prohibited ground — that is, on the basis of the Complainant’s criminal record?**
- 4. If the Complainant’s criminal record was a factor in the Respondent’s decision to cancel the training, did the Respondent have reasonable cause for this decision, based on reasonable requirements or qualifications for**

**the work the Complainant was doing, or because the Complainant's criminal record was relevant to the work he was doing?**

**5. If discrimination is found, what remedy is appropriate?**

To summarize, the first two issues examine whether or not the activity the Complainant was engaged in when the alleged discrimination took place was an activity which is covered by the prohibition against discrimination under the Act. The next two issues examine whether or not the treatment complained of constitutes discrimination on a prohibited ground and without reasonable cause. The fifth issue pertains to what remedy is appropriate, if discrimination is found.

## **THE EVIDENCE**

### **Complainant's Situation**

The Complainant's evidence is that he is a management consultant, doing training and development in communication skills, team building, mediation, and leadership training and development. The Complainant does this work as a sole proprietor using the business name, Dynamic Leadership Training Systems International ("Dynamic"). He moved to the Yukon in about March 2003. The Complainant's business generated a number of contracts after arriving in Yukon. One of these contracts was with the Department of Education, who contracted with the Complainant to provide mediation services during the summer of 2003.

The Complainant has a significant and lengthy criminal record which includes convictions for fraud, and for sexual assault and assault. His most recent conviction was in September 9, 2004, when he was convicted of assaulting his common-law wife in June 23, 2004. This assault occurred at the workplace of the Complainant's spouse at the Government of Yukon. Other serious charges against Mr. Molloy did not proceed after he entered a guilty plea to this assault charge. The criminal charges against the Complainant, and his subsequent conviction, were well-publicized in a local newspaper and were common knowledge in the community.

In his efforts to establish his business in the Yukon as a facilitator specializing in team-building, the Complainant met with the Public Service Commissioner, Patricia Daws, who referred him to Cheryl Van Blaricom of the Staff Development branch.

According to the Complainant, he met with Van Blaricom in April 2003 and in May 2004. His evidence was that it was during the May 2004 meeting that he first learned that there was negative feedback about previous work he had undertaken for GY.

In late 2004, GY decided that groups of its employees within the Property Management Agency (PMA) were in need of workshops in team-building and customer service — specifically, the "Service Best" program. Donna McBee, the Complainant's common-law wife, who worked for the Staff Development branch of GY at that time, was tasked

with setting up this training. Through her, PMA engaged YTEC to provide these workshops. GY and YTEC entered into a memorandum of understanding (MOU) setting out the terms upon which YTEC would provide these workshops to PMA employees. YTEC, in turn, contracted with the Complainant to facilitate some of these workshops.

There was no evidence that the Complainant sought to become an “employee” of either GY or YTEC. In fact, throughout his testimony, he talked about his business, Dynamic, through which all of his consulting work is done. At times, he said, he hires other consultants to work with him on larger contracts. He described his business as a “sole proprietorship”, and said that his way of getting contract work is primarily through word of mouth from industry people who are aware of his background and successes. At one point in the Complainant’s testimony, he said that he doesn’t “want to be an employee of the Department of Education or anybody”. He said he likes what he is doing.

The Complainant said that when he came to the Yukon, he intended to continue working as a sole proprietor under the same business name. A copy of his business brochure was entered as an Exhibit at the hearing. His evidence was that he uses this brochure to introduce himself and the services he offers. He said that, since arriving in the Yukon, he had made calls to the City of Whitehorse, Dana Naye Ventures, and the Yukon Employees’ Union, amongst others, looking for work.

### **Complainant’s Relationship with YTEC**

YTEC is an organization that provides training and education for people working in tourism and service businesses in the Yukon. At the time of this Complaint, Darlene Doerksen was the Executive Director for YTEC. The Complainant’s first meeting with her was in early October 2004. During that conversation, arrangements were made to meet again when the Complainant returned from a trip to Edmonton. He could not recall exactly when the next meeting took place but thought it was either the early part of November or later in October 2004.

During this meeting the Complainant learned that there might be a training course that he could facilitate for YTEC, who had a contract with GY to provide customer service training. According to the Complainant, he had been told they would be using an already developed training program that would need to be customized. Ms. Doerksen estimated that approximately 25 percent of the program would need to be customized, and the Complainant undertook to do the customizing. In his words, he was asked to gear the whole workshop to government as opposed to the private sector. He said that his only contact with respect to the details of the training was with Ms. Doerksen.

The Complainant said he never met with the employees of PMA regarding the Service Best training course in advance of the workshop. Ms. Doerksen’s evidence was that they never had any input into him being selected as the facilitator, and the Complainant’s evidence is that Ms. Doerksen was very specific in her directions to him that he was only to deal with her.

The Complainant gave evidence about what he usually charges to facilitate a workshop or training course, and said that for this course, he and Ms. Doersken agreed on \$750 a day. The Complainant's evidence was that this was less than he normally charged, but he felt it was fair because of his understanding that there was potential for 20 to 24 such two-day workshops. The Complainant's evidence was that he invoices for his work through his business, which has a GST number registered with the Canada Revenue Agency. Dynamic's GST number appears on its invoices, and the work billed is for "professional services".

### **Events of December 2, 2004**

The Complainant provided one of the two-day workshops on November 29 and 30, 2004. He began to facilitate a second two-day session on December 1 and 2, 2004. At noon on December 2, 2004, the workshop participants left for lunch and did not return. There are a number of different versions of what was said about the reasons for the workshop being cancelled halfway through the second day. According to the Complainant, GY cancelled the workshop because of his criminal record.

The Complainant said that he was told, when the December workshop was cancelled, that it was because of his criminal record. He said he was told that participants had concerns because of his criminal record and that Steven Gasser, the Assistant Deputy Minister, had cancelled the contract on a directive from his superiors because of the Complainant's criminal record.

The Complainant testified that he believes he was discriminated against on the basis of his criminal record because he does have a significant criminal record, he believes the Respondent knew of his record, and he believes there was no other legitimate reason the work with YTEC ended. The Complainant's confidence that the Respondent knew of his criminal record is based on the fact that his convictions in September 2004 were reported in local newspapers. He also testified that another GY department was aware of his criminal record in connection with his wife's custody dispute with her former partner, and he believed the Public Service Commission knew about his criminal record in late 2003 as a result of rumors to that effect.

The Complainant's evidence was also that he believed his criminal record was the reason his employment ended because Darlene Doerksen said this was the case when she told him the workshop was cancelled. He said he was also told this later on by a course participant. During both direct and cross-examination, the Complainant repeatedly stated that Ms. Doerksen told him the course was cancelled due to his criminal record. Under cross-examination he admitted that in an earlier statement, he said he was told the cancellation was due to both his criminal record and for the health and safety of participants.

The Complainant further testified that he believed course participants were told by Mr. Gasser that the course was being cancelled because of his criminal record. He

testified that Mr. Gasser told him that his superiors directed him to cancel the course because of the facilitator's criminal record. Later in his testimony, the Complainant testified that course participants told him Mr. Gasser said the cancellation was "because he beats his wife".

The Complainant testified to his qualifications as a facilitator and to the positive reviews he received from previous work he had done, including the first time he facilitated the Service Best workshop, in November 2004. He argued that this was evidence that there was no other credible reason for the workshop being cancelled. Although GY initially wanted more workshops, YTEC abandoned their plans to present further sessions when they were unable to retain a different facilitator. The Complainant's testimony was that there was no evidence that his work in presenting the workshops was not of a satisfactory quality. He said that the evaluations from the first two-day workshop were positive.

The Complainant did not accept the Respondent's suggestion that, aside from his criminal record, there could be health and safety concerns for the workshop participants. He testified to his belief that the relationship issues which led to him having a criminal record were not relevant to his professional business, and that because all of his assaults were in the context of his domestic relationships, there was no risk of harm to anyone in a professional environment. In his closing statement, the Complainant argued that an assault on his spouse, even though it occurred at her workplace, is a domestic matter and should have no bearing on his professional business or cause employees to feel that they are at risk.

### **Patricia Daws, Public Service Commissioner**

Patricia Daws, the Public Service Commissioner for GY, gave evidence that in a situation such as this, where GY was contracting with a separate agency to provide training, there would be no direct relationship between GY and the facilitator. Rather, the relationship would be between GY and YTEC if they had agreed on a contract for service. In this case, Ms. Daws said that she was not aware of the contract between GY and YTEC, but that in a situation where GY has an agreement with a separate agency, and set standards for how the work would be performed, they would not be dealing directly with the facilitator if there were issues.

Ms. Daws said that in this case she became involved when she was made aware that employees attending the workshop did not feel that the workshop, with the Complainant facilitating it, was a safe environment to be in and did not want to attend. According to Ms. Daws, although she was involved in making the decision to cancel the workshop, she had no discussion directly with the Complainant.

Ms. Daws also testified that she was aware sometime before December 2004 that Staff Development had made a decision not to use the Complainant as a facilitator/trainer. She testified that this decision was based on feedback from other departments that the Complainant was not a "good fit". She testified that in one department, a female

employee reported, after participating in a team-building session where the Complainant was present, that she was not comfortable working with him. Ms. Daws testified that two other management employees also did not feel the Complainant was going to be a good fit for work in their departments. According to Ms. Daws, in another department, work involving the Complainant had not gone the way they had hoped. Ms. Daws testified to feeling that if employees did not feel safe, GY, as the employer, could not insist that they participate in the training with the Complainant as the facilitator.

Ms. Daws was the principal decision-maker in this matter, in collaboration with other GY officials, particularly Cheryl Van Blaricom and John Stecyk, Deputy Minister for the Department of Highways and Public Works, who, in turn, directed Steven Gasser.

Ms. Daws knew of the Complainant's criminal record but her testimony was firm and explicit that his criminal record was not the reason the course was cancelled. In direct examination she stated, "I didn't say it was because of his criminal record. I said it was the information that was in the paper and the stuff that was put in the paper that people were aware of ... people were aware of the descriptions of Mr. Molloy's behaviors."

Ms. Daws testified that employee safety was the primary concern. She said she had no discussion with workshop participants or with the employees who contacted the Victoria Faulkner Women's Centre to raise their concerns about the Respondent facilitating the workshop. She further testified that, in consultation with her colleague Mr. Stecyk, it was decided that if employees felt unsafe, the best course of action was to cancel the workshop.

While stating that she took the expressed safety concerns at face value and did not investigate the basis for them, Ms. Daws acknowledged that there had been a lot of publicity about the Complainant. Her understanding was that the women complaining felt personally threatened, and "didn't feel that they should have to be in a government training program with someone that had had a reputation of preying on women".

In addition to being aware of the workplace assault involving the Complainant and his common-law wife, Ms. Daws testified to understanding that there had been other problems with the Complainant in GY workplaces. She also outlined her understanding that, in October 2003, the Complainant's spouse had told her supervisor she was frightened and worried about the Complainant coming to her workplace. Ms. Daws understood that arrangements had been made to deal with this. She said she also understood there had been an incident where the RCMP were called and the Complainant had to be escorted out of a GY building. Other evidence suggests that the RCMP were called but that the Complainant was not escorted from the building.

## **Darlene Doerksen, Executive Director of Yukon Tourism Education Council**

Darlene Doerksen, the Executive Director of the Yukon Tourism Education Council (YTEC) said that YTEC entered into a Memorandum of Understanding with GY to provide customer service training for PMA employees. The course PMA wanted was a “canned program”, meaning one that already existed, known as “Service Best”. In addition to the Service Best program, PMA wanted additional training on “telephone standards”.

According to Ms. Doerksen, she was contacted by the Staff Development branch of GY to see if YTEC could provide the Service Best training program to PMA employees. Ms. Doerksen was told that the training needed to be done in the very near future, and she initially advised GY that YTEC did not have a trainer available within the short timeframe.

According to Ms. Doerksen, it was on the recommendation of an employee of the Staff Development branch that the Complainant’s name was put forward for consideration as a possible facilitator.

Ms. Doerksen said that she and the Complainant had several conversations, and on that basis, she decided to use him as the facilitator for the Service Best workshops. YTEC then entered into a Memorandum of Understanding with GY to provide the training. The MOU dealt with what services YTEC would provide. The MOU did not contain any particular criteria for a qualified facilitator.

Ms. Doerksen said that she regularly uses the same facilitators, all of whom are people known to her, and who are competent to provide various aspects of the industry training programs YTEC offers. She said that there was no formal or written contract with the Complainant.

Ms. Doerksen confirmed that the Complainant completed one two-day training session in November as well as the first day and a half of the second training session, on December 3 and 4, 2004, before the decision was made by GY to pull their employees from the training. Her evidence was that the training was stopped when the government pulled its employees out because of the facilitator.

According to Ms. Doerksen, there was discussion later on about continuing the contract (MOU) with GY (for the Service Best program) with a different trainer, but YTEC decided they would not proceed at all with this contract. Ms. Doerksen reported that YTEC paid the Complainant for the services he provided, but did not submit invoices to GY to cover these costs as the Board of Directors of YTEC felt that they had not satisfied the MOU.

Ms. Doerksen was the person who communicated directly with the Complainant that the course was being cancelled. She said she was not consulted or involved in the decision to remove employees from the workshop. Ms. Doerksen denied telling the Complainant

the workshop was being cancelled due to his criminal record. When challenged that the Complainant said otherwise, Ms. Doerksen emphatically denied this was the case and said she heard nothing of the Complainant's criminal record being a factor in the decision to cancel the workshop. In fact, she testified that she told the Complainant she did not know why the training was being cancelled. Ms. Doerksen testified that immediately following the workshop cancellation, she overheard an unidentified male course participant say to the Complainant, "you've been a bad boy".

### **Steven Gasser, Assistant Deputy Minister for Government of Yukon**

Steven Gasser's evidence was that he was not aware that the Complainant was the facilitator YTEC had contracted to provide the Service Best training. He indicated that he had been told by his supervisor to be careful selecting a facilitator, as there was an individual in town who the Public Service Commission didn't feel was appropriate to be working with government employees, but he didn't make the connection with the Complainant.

According to Mr. Gasser, when the decision was made to stop the Service Best training session, he went to where the workshop was being held and told the employees attending the workshop that it was ending immediately and that the employees should check in with their supervisors the next morning.

Mr. Gasser gave evidence that he was an intermediary in the process. He participated in discussions with other GY officials leading to the cancellation decision, and communicated the cancellation decision to Ms. Doerksen and to the course participants.

According to Mr. Gasser, he first became aware of safety concerns in relation to the Complainant when one of his staff expressed concerns based on a newspaper article about convictions in Ontario and abuse in Yukon. Mr. Gasser said he was in the process of evaluating these concerns when he learned that complaints had been received by the Public Service Commission from the Victoria Faulkner Women's Centre, via the Minister's office.

Mr. Gasser testified that his conversations about the concerns focused on employee safety and that he understood the Complainant "had a history of preying on women ... that he took opportunities in the workplace to target potential victims". He testified that, in keeping with employer obligations to protect employees' safety, he dealt with these concerns by consulting senior managers and the result was a decision was remove employees from the course.

Mr. Gasser testified that he told the course participants that the course was ending due to concerns about their safety at the workplace. He testified that he did not recall mentioning anything about the Complainant beating his wife. Mr. Gasser denied that the course was cancelled because of the Complainant's criminal record.

## Other Evidence

Course participant Margaret Coffey testified that one of the other participants told her the cancellation had something to do with the instructor's past marital problems. Another participant, whose name she could not recall, told her it had to do with the Complainant beating his wife. Ms. Coffey testified that Mr. Gasser did not tell her the course was being cancelled because the Complainant beat his wife.

No evidence was led by either party regarding the reasons the unidentified women complained to the Women's Centre about the Complainant facilitating the course.

## Credibility

Both the Commission and the Respondent directed the Board to the case of Faryna v Chorny, [1951] B.C.J. No. 152, [1952] 2 D.L.R. 354 (B.C.C.A.), for direction in assessing the credibility of the evidence. At paragraph 11 this case instructs:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience combining skillful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken.

The Respondent outlined a number of instances of conflicting evidence and submitted that the Complainant's testimony was, in every instance, less credible than the evidence of the other witnesses. The Respondent further suggested that uncorroborated self-serving statements by the Complainant should not be believed. On the issue of credibility, the Complainant simply emphasized his belief in the truth of all of his statements. The Commission made no argument with respect to credibility aside from referring to the guidelines described in the Faryna case.

In terms of the relationship between the Complainant and YTEC, and the Complainant and GY, there was little conflict in the evidence. It is when deciding whether or not the Complainant's criminal record was a factor in the termination of his services as a facilitator that the evidence of the parties diverges.

The Complainant's evidence is that he was fired because of his criminal record, and that he was told "people were concerned about" his criminal record. However, the Complainant either did not identify who provided this information to him or said these

things to him, or his assertions were contradicted by other witnesses. For example, the Complainant said that Mr. Gasser was told to cancel the contract because of the Complainant's criminal record. Mr. Gasser denied this.

The Complainant also alleged that Ms. Doerksen told him the training was cancelled because of his criminal record. Ms. Doerksen denied this and said that YTEC cancelled the training because they had no one to train once GY removed its employees. Ms. Doerksen's evidence is significant as she was not a party to these proceedings, and in fact, was called as a witness by the Board who initially heard this Complaint. She was a somewhat reluctant witness with nothing to gain from not being completely truthful in her evidence. Ms. Doerksen also testified that she never heard that the Complainant's criminal record was a factor in the decision by GY to remove its employees from the training.

The Complainant also testified that one of the participants in the training told him that Mr. Gasser had said the training was cancelled because the Complainant "beats his wife". Mr. Gasser denied saying anything about the Complainant beating his wife, and the participant who was called as a witness (Margaret Coffey) denied that Mr. Gasser told her the training was being cancelled because the Complainant beat his wife.

The Board found Ms. Doerksen, Mr. Gasser and Ms. Coffey to be credible. Not only was their evidence consistent with each other, the Complainant's evidence, on this key issue of what others said to him about why the course was being cancelled, was inconsistent with every other witness. The Complainant is the only witness to say that he was told the course was being cancelled because of his criminal record. Although others were present when the course was cancelled, no other witnesses were called to corroborate the Complainant's belief.

In relation to whether the Complainant's criminal record was a factor in GY's decision to end the training, the Board prefers the evidence of Ms. Doerksen, Mr. Gasser and Ms. Daws to the evidence of the Complainant. In reaching this decision, the Board has taken into account the contradictions described above, which are only a few examples of substantive contradictions between the evidence of the Complainant and the other witnesses. In addition, the Board has considered the way the Complainant minimized the seriousness of his criminal charges. Finally, the Board took into consideration the way the Complainant played with words in such a manner as to mislead the triers of fact. One example of this was that the Complainant denied ever being imprisoned, even though he later admitted he had spent a significant period of time in jail. His justification for this denial was that he did not characterize being in "jail" as being in "prison". In the Board's view, this is an example of the "half-lie" referred to in the Faryna case, used in an attempt to suppress the truth.

## **RELEVANT LAW**

According to Mr. Justice Groberman, it is necessary to examine the activity the Complainant was engaged in when the alleged discrimination occurred. The issue, in other words, is not whether or not GY employed the Complainant, but rather whether or not the Complainant was engaged in employment such that he is covered by the prohibition against discrimination in connection with any aspect of employment, in section 9(b) of the Act.

The first question, then, is what activity the Complainant was engaged in when the alleged discrimination occurred. While he was clearly not employed by GY in the traditional sense of master and servant, is the relationship he established with YTEC sufficient to bring his situation under the protection of the Act? If he was “engaged in employment” with YTEC, what was his relationship with GY? Would it be accurate to say that he was also “engaged in employment” with GY? If not, what is the ambit of the expression in the Act of “in connection with any aspect of employment”? These are the questions the Board has canvassed to determine whether or not the Complainant was discriminated against in connection with any aspect of his employment. This process involves reviewing the evidence carefully as well as looking at the applicable law. The onus is on the Complainant to prove that he was engaged in “employment” when he facilitated the Service Best workshop for YTEC.

### **1. Was the Complainant engaged in employment when the alleged discrimination occurred?**

Neither “employment”, nor “any aspect of employment”, is defined by the Act. The Respondent argued that the relationship between YTEC and the Complainant, through the Complainant’s business, Dynamic Leadership Systems International, does not constitute employment, and that the Complainant was not “employed”, so as to be covered by the prohibition against discrimination. The Respondent also argued that the Complainant is not covered by human rights legislation because he was an independent contractor. The Commission argued that the Complainant is covered by the broader wording of the Act, which prohibits discrimination in “connection with any aspect of employment”.

### **Meaning of “Employment”**

In reviewing the No Evidence Motion allowed by the original Board, Mr. Justice Groberman directed that the language of the Act requires a determination of whether or not the Complainant was “engaged in employment”, and said that “the correct question here is not whether the respondent employed the complainant but rather whether the complainant was discriminated against in connection with his employment. The issue, in other words, was not whether the government employed Mr. Molloy but rather, whether he was engaged in employment.” Although Justice Groberman was not weighing the evidence, he wrote that “There was some evidence on which it could be found that

sufficient control was exercised over Mr. Molloy's operations by YTEC such that Mr. Molloy could properly be regarded as "an employee" for the purposes of the *Act*."

The Respondent argued that the British Columbia case of Andrews v. Chilli Thai Bistro, 2007 BCHRT 88, provides direction on the limits of and types of relationships captured by the term "employment". In the Chilli Thai Bistro case, the issue was whether Andrews, the complainant, and a contractor, was in an employment relationship with the respondent, a restaurant owner the complainant contracted with to do renovations, so as to engage the section of the British Columbia *Human Rights Code* which prohibits discrimination "regarding employment or any term or condition of employment". The Respondent argued that the arrangement between the Chilli Thai Bistro and the contractor/ complainant bears many similarities to the relationship between YTEC and the Complainant.

Factors the British Columbia tribunal considered, in reaching the conclusion that Andrews was not "employed" by the Chilli Thai Bistro, were that the complainant was an independent business woman, she worked for clients other than the respondent, and invoiced for her work, she was paid a specific fee rather than wages or benefits, and the respondents did not exercise control over her or her work, except to the extent that they set the parameters for the timing of the project they contracted her to do. Further, there was no ongoing relationship contemplated between the contractor and the respondent, and the contractor had other customers and projects that were completely unrelated to the respondent or the work being performed for him. The tribunal also considered the fact that the contractor had her own company, and that she paid GST and hired and managed her own staff.

Although the British Columbia tribunal found, on the particular facts of that case, that the working relationship between the contractor and the respondent was not an "employment relationship", the tribunal observed that a broad and purposive interpretation of "employment" best fulfills the objects of human rights legislation.

In considering the applicability of the Chilli Thai Bistro decision to this case, it is important to note that the wording of the British Columbia *Human Rights Code* differs from the wording of the Yukon Act. The British Columbia legislation prohibits discrimination against a person "regarding employment", whereas the Yukon Act prohibits discrimination "in connection with any aspect of employment". In addition, the British Columbia *Human Rights Code* defines "employment" to include 'the relationship of master and servant, master and apprentice and principal and agent, if a substantial part of the agent's services relate to the affairs of one principal, and "employ" has a corresponding meaning'. This definition narrows the meaning of "employment" and provides some explanation for why Andrews was not found to be "employed" by the Chilli Thai Bistro under the British Columbia *Human Rights Code*. Despite the difference in the wording of these two statutes, the Chilli Thai Bistro case provides a helpful analysis.

The case of Cormier v. Alberta Human Rights Commission, 5 CHRR D/2441 (Alta. Ct. Q.B.), is also instructive. It involves the relationship of a truck driver, who owns and operates his own truck, with a company that contracts to haul material for a mine. In Cormier, the Court adopted a liberal interpretation of “to employ” as meaning “to use the services of a (person) ... in the transaction of some business”, and “employment” as meaning “any contract in which one person agrees to execute any work or labour for another”. The Cormier case reviews the development of the concept and definitions of “employment”, both in various contexts (e.g. tax, workers’ compensation, and vicarious liability cases), and based on various tests, including the “control” test, and the “organization” test. The “control” test looks at the level of control the employer has over the worker’s method of doing the work, as well as who owns the tools used, who stands to profit from the work, and who risks losing as a result of the work. The “organization” test looks at how integrated the worker is to the overall business or organization.

The recent Alberta case of Lockerbie & Hole Industrial Inc. v. Alberta (Human Rights and Citizenship Commission), 2011 ABCA 3, sheds additional light on the interpretation of “employment” in human rights cases. Like the Yukon Act, the *Alberta Human Rights Act* does not contain a definition of “employment”. There, the wording in the *Alberta Human Rights Act* is that “No employer shall discriminate against any person with regard to employment or any term or condition of employment” on any of the prohibited grounds.

The Court of Appeal, in Lockerbie, refers to employment, as a concept, having a long legal history built around the well-established relationship between a master and servant. According to the Court, where a legislature uses, without definition, a word that has a longstanding common-law meaning, the starting point in the analysis is that the intended meaning in the statute has, at its core, the common-law definition.

The Court, in Lockerbie, goes on to say that common-law concepts are subject to the express or implied provisions of statutes, and that courts have repeatedly confirmed that remedial statutes such as human rights legislation require a flexible and contextual interpretation. Where the context and purpose of the statute requires it, courts have expanded the definition of “employment” to include what might loosely be called “near-employment”, which includes relationships where one person provides services to another, but not within a traditional master-and-servant relationship.

Examples of this expanded definition of employment, in a human rights context, are found in cases such as the Alberta case of Pannu v. Prestige Cab Ltd. (1986), 47 Alta. L.R. (2d) 56, 73 A.R. 166 (C.A.). Prestige Cab did not employ its drivers in the conventional sense. Drivers who owned their own taxis paid a fee to Prestige Cab for services provided, such as dispatching and the provision of taxi stands. Drivers who rented a taxi from Prestige Cab paid a rental fee for that privilege. Prestige paid unemployment insurance premiums for the drivers. None of the drivers received remuneration directly from Prestige Cab, although Prestige Cab was the only person through whom they provided services, and it exercised a considerable degree of control

over the drivers' activities. The Alberta Court of Appeal found that although the working relationship described in the Pannu case would not be called "employment", at common law, to give effect to the remedial intent of human rights legislation, it fell within that term in the *Alberta Human Rights Act*.

Another example is in Re Prue (1984), 35 Alta. L.R. (2d) 169, 57 A.R. 140, where the Court held that a police officer is an employee for the purposes of the *Alberta Human Rights Act*, even though, at common law, police officers are considered to be public officers, not employees. Similarly, in Canada (Attorney General) v. Rosin, [1991] 1 F.C. 391 (C.A.), an army cadet was held to be covered even though he was not a common-law employee. On the other hand, the relationship between a hospital and a physician with admitting privileges was held not to be "employment" within the scope of the legislation, in Bugis v. University Hospitals Board (1990), 74 Alta. L.R. (2d) 60, 106 A.R. 224 (C.A.).

The Commission argued that the case of Canadian Pacific Limited v. Canada (Human Rights Commission) [1991] 1 F.C. 571 is relevant to the present case. In that case, Mr. Fontaine worked for Smith's Catering Company who provided catering services to Canadian Pacific. When Canadian Pacific learned that Mr. Fontaine was HIV positive, they refused to eat food he prepared, and Smith's Catering Company terminated his employment. The Court found that Canadian Pacific was an employer even though Mr. Fontaine's employer, in a direct, traditional, common-law sense, was Smith's Catering Company. The Court came to this conclusion on the basis that Canadian Pacific utilized Mr. Fontaine's services.

McDonald J, in the Cormier case, wrote that, 'The words "employer", "employ", and "employment", as used in the Alberta statute, must be regarded as ambiguous', capable of bearing a number of meanings depending on the context, and that, "There being ambiguity, the meaning attributed to them should be liberal, as far as that is consistent with the purpose of the Act and not inconsistent with some other provision of the Act, which must be read as a whole". He went on to say:

A liberal interpretation of the meaning of the word "employ" justifies application of the broad definition of the verb found in the Oxford English Dictionary: "to use the services of (a person) ... in the transaction of some business". Webster's Third New International Dictionary is to the same effect: "to use or engage the services of (e.g. a lawyer to straighten out a legal tangle). In my view, these dictionary definitions accurately reflect the common Canadian usage of "employ".

McDonald J, in Cormier, went on to say that it does not follow that everyone who contracts to perform work or labour for another can be said to be "employed" for the purpose of the Alberta statute, and that "if the essence of the contract is not the provision of some work or labour but a sale of goods to which the work or labour is ancillary, it cannot properly be said to be "employment".

## “Independent Contractor”

The Respondent’s second argument on this issue was that if the Complainant was an independent contractor, and not an employee of YTEC, then he cannot be considered to have been engaged in employment, and if he was not engaged in employment, then section 9(b) of the Act is not triggered. The Commission agreed that “independent contractor” accurately describes the Complainant’s relationship to YTEC, but argued that independent contractors are covered by human rights legislation.

The Complainant does not dispute that he was an independent contractor to YTEC — that is, YTEC contracted with him, through his business, to do a specific, discrete piece of work for them. This work involved facilitating workshops that YTEC had a contract to deliver to GY employees. This characterization of the relationship is also consistent with the Complainant’s evidence that he had his own business, that he sometimes hired other people to do work for him, and that he is able to work wherever there are clients.

The Respondent relied on the case of 71122 Ontario Ltd. v. Sagaz Industries Canada Inc., [2001] 2 S.C.R. 983, 2001 SCC 59, to support its argument that the Complainant was an independent contractor to YTEC, in business on his own account. The Sagaz case deals with vicarious liability and analyzes the categories of relationships that attract vicarious liability, the most common one being between master and servant, or employer and employee. This is contrasted with the relationship of an employer and an independent contractor which typically does not attract vicarious liability. The Court, in Sagaz, found that the determining factor for whether a person is performing services as an employee or as a person in business on his own account is the level of control the employer has over the worker’s activities.

While there are many parallels between the Sagaz case and this case, Sagaz is not a human rights case, but a labour case about vicarious liability, which means it has limited application in a human rights context. However, there is considerable human rights jurisprudence suggesting that employment, in a human rights context, should be defined more broadly than in other contexts. For example, in the Cormier case referred to earlier, the Alberta Court of Queen’s Bench found that even if the complainant was defined as an independent contractor, for other purposes, he would still be covered by the human rights legislation in Alberta. The rationale for this is that words used in stating a legal rule in one context may not mean the same where the words may be used to express a legal rule in another context. In other words, the fact that Mr. Cormier would be regarded as an independent contractor in one context, does not determine whether or not he would be considered an “employee” in a human rights context.

In the British Columbia case of Yu v. Shell Canada Limited and others, 2004 BCHRT 28, the task of the Tribunal was to decide whether there was an employment relationship between Ms. Yu, who operated a Shell station through her company, and a management company, who was a subsidiary of Shell Canada Ltd. The British Columbia Human Rights Tribunal found that the agreement between the parties, which

was essentially an independent contractual business arrangement, was sufficient to create a relationship between the parties that would be covered by the term “employment” in the British Columbia *Human Rights Code*. The basis for this finding was that the management company “utilized” Ms. Yu’s services, and as a result could be said to have “employed” her. One of the factors influencing this decision was the degree of control the management company had over Ms. Yu’s day-to-day operation of the gas station. In *Yu*, the tribunal said:

To find otherwise would open the door to employers successfully evading their responsibilities under the *Code* by means of legal constructs designed to render those whose services they utilize something other than employees and thus beyond the *Code*’s protections. Such a result would be contrary to the remedial purpose of the *Code* and the fair, large and liberal interpretation its protections are to be given.

The Board finds that, while the Complainant may in fact have been an independent contractor, this does not determine whether or not he was engaged in “employment” for the purposes of the Act or, more specifically, whether the activity he was engaged in, facilitating the training course for YTEC, is protected under section 9 of the Act.

While there are a variety of criteria used to determine whether or not a person is employed, so as to be protected by human rights legislation, it is necessary to carefully review both the facts of each case and the specific wording of the applicable human rights legislation.

The Board agrees with the Respondent that the facts in this case bear many similarities to the facts in the Chilli Thai Bistro case. However, the Yukon Act does not limit the definition of “employment” in the way the British Columbia statute does. Consequently, while the complainant in the Chilli Thai Bistro case did not come within the protection of the British Columbia *Human Rights Code*, the Complainant, in this case, is not excluded from protection by the wording or definition of “employment” in the Act, or according to other case law reviewed.

In this case, the Board finds that the Complainant was an independent contractor, and that his services were being utilized by YTEC to train GY employees in the Service Best program. As such, under the Act, he can accurately be said to have been engaged in “employment” with YTEC when the alleged discrimination occurred. That being said, as YTEC is not the Respondent in this matter and as there are no allegations that YTEC discriminated against the Complainant, it is necessary to look at the relationship between the Complainant and GY, and to consider whether that relationship is protected under Yukon human rights law.

**2. If the Complainant was engaged in employment when the alleged discrimination occurred, did the Respondent interfere with the Complainant's employment, or any aspect of his employment, contrary to section 9(b) of the Act, which prohibits discrimination in connection with any aspect of employment?**

There are two possible approaches to this question. The first is to consider whether or not the Respondent can be characterized as a secondary or co-employer of the Complainant, such that it is covered by the prohibition against discrimination in connection with employment. The second is to consider whether or not the Respondent is caught by the phrase, "in connection with *any aspect of employment*" (emphasis added).

The Respondent argued that there are compelling policy reasons why human rights legislation should not apply to all relationships in which there may be potential for discrimination, and that such legislation is intended to protect people from discrimination only in such specified relationships and contexts as are set out in the Act (e.g. employment, public services, and tenancy situations). According to the Respondents, while "employment" should be given a broad and liberal interpretation in line with the legislation's remedial objectives, it should not be stretched to the point that relationships are captured which cannot reasonably be described as "employment".

The Respondent argued that there was no employment relationship between the Complainant and the GY that would be covered by the prohibition against discrimination, and that there would have to be an "employment relationship" between the Complainant and GY for GY to be captured under section 9(b) of the Act. Neither the Commission nor the Respondent addressed the application of the phrase, "any aspect of employment".

### **Employment Relationship**

Having found that the Complainant was engaged in employment with YTEC, the Board must decide whether or not the Complainant was also engaged in employment with GY. In the Canadian Pacific Limited case referred to earlier, and relied on by the Commission, the Federal Court of Appeal agreed with the tribunal that the language of the statute, in that case, was broad enough to include discriminatory practices by someone who, by reason of his position, can bring about the termination of a person's employment even when that person is not directly employed by him. In this case, there is no dispute that it was GY who refused to allow its employees to attend the workshop facilitated by the Complainant.

There are numerous human rights cases that address the situation where there is a secondary or co-employer. The recent Lockerbie decision reviews many of these cases and provides clear direction. The Complainant, in that case, was a long-term employee of Lockerbie & Hole, working at a power plant near Fort McMurray, when Lockerbie & Hole decided to transfer him to the Syncrude site, where they had contracts to perform

work. Syncrude, however, had a policy that contractors could not bring workers onto the site unless they had passed a drug test. The complainant tested positive for marijuana use.

Lockerbie & Hole operated at arm's length from Syncrude and had many other customers and projects. Syncrude was never the complainant's employer in any conventional sense. It never hired him, paid him, or directed his activities; Lockerbie & Hole did. The complainant provided his labour under a collective agreement to which Lockerbie & Hole (but not Syncrude) was a party.

A human rights panel found that the complainant had a master-and-servant relationship with, and was therefore an employee of, Lockerbie & Hole (Luka v. Lockerbie & Hole and Syncrude Canada, N2004/09/0206, para. 55). The panel, however, reasoned that the concept of "employment", under the *Alberta Human Rights Act*, is not limited to master and servant relationships, but could also cover other relationships involving the "utilization" of services. The Panel concluded that Syncrude was also an employer because it was enjoying or utilizing the services of the complainant, indirectly, through Lockerbie & Hole. Although the Panel concluded that the complainant was covered by the human rights legislation in Alberta, they also found, for other reasons, that there was no discrimination.

Although Lockerbie & Hole were successful on the ultimate issue of discrimination, both they and Syncrude launched appeals of the finding that Syncrude was an employer, and the Alberta Court of Queen's Bench concluded that the panel was in error (Lockerbie & Hole Industrial Inc. v. Alberta (Human Rights and Citizenship Commission, Director), 2009 ABQB 241, 472 A.R. 217, 7 Alta. L.R. (5th) 248). While the Queen's Bench judge agreed that "employer", in the human rights context, need not be defined in the same way as the traditional common-law definition, he concluded that the definition was not wide enough to cover the relationship between the owner of an industrial site, and the employees of arm's-length contractors working on the site. The matter was appealed to the Alberta Court of Appeal who rendered its decision in January 2011.

Like the Yukon Act, the *Alberta Human Rights Act* does not contain a definition of "employer". In Lockerbie, the Alberta Court of Appeal set out to define "employer" for the purpose of human rights legislation, and to clarify the ambit of section 7(1) of the *Alberta Human Rights Act*, which provides that: "No employer shall ... discriminate against any person with regard to employment or any term or condition of employment ..." on any of the prohibited grounds.

The Lockerbie case falls into the category of cases where a person potentially has two employers. It is clear that the complainant, in that case, was employed by Lockerbie & Hole. The question that is relevant to this case is whether or not he could also be considered to be an "employee" of Syncrude. The Alberta Court of Appeal found that, 'While it is neither possible nor desirable to provide fixed rules on the meaning of "employment" in the Act, it will be rare that the concept can be extended so far as to

encompass employment by two different parties in circumstances such as appear on this record.’

The original tribunal in the Lockerbie case reasoned, in part, that Syncrude was an employer because Syncrude controlled the site where the employee worked. It was, in effect, Syncrude’s policy that prevented the complainant from entering the work site. Since Syncrude was controlling the situation, the human rights panel reasoned that it was the employer. According to the Alberta Court of Appeal, however, this reasoning is incomplete. That Court went on to say that while control is one indicator of an employment relationship, an employment relationship is not necessarily created just because the owner of property controls who can enter that property.

The Alberta Court of Appeal reasoned that at some point the proximity of the complainant to the proposed employer must be brought into the equation. In the Lockerbie case, the complainant was clearly an employee of Lockerbie & Hole. If, under the human rights legislation, he was also found to be the employee of someone else, it would be necessary to analyze how close that relationship was. The Alberta Court of Appeal said that, “Merely because the services provided by the complainant will indirectly accrue to the benefit of someone other than the immediate employer does not necessarily mean that the other indirect user of the services is also the employer of the complainant.”

The Alberta Court of Appeal suggested that another potential example is the person who provides services through a “one-person company” or professional corporation, and suggested that the presence or absence of a direct contractual link is a significant factor to consider. On this point, the Alberta Court of Appeal stated:

Where the complainant does have a direct link with one entity that is clearly an employer, but no direct link with the alleged co-employer, the relationship is less likely to fall under the *Act*. Also of significance is whether the alleged co-employer “benefits from” or “utilizes” the services of the complainant within a sufficiently close nexus, although mere benefit is not sufficient. That does not mean that the root word in the statute has been amended to “utilize”; the core of the analysis is still “employ”. Also of importance are elements of control and direction, and the extent to which the complainant is a part of the alleged co-employer’s organization. The “employer” is presumptively the entity to whom the complainant’s services are immediately provided, and from whom remuneration and direction are directly received.

The Alberta Court of Appeal, in Lockerbie, suggested that a contextual approach is required to determine whether a particular relationship qualifies as “employment” under human rights legislation. The following analysis, used in Lockerbie, is helpful in determining whether there was an employment relationship between the Complainant and GY.

- **Whether there is another more obvious employer involved**

In this case, the Board has already determined that the Complainant was, for the purpose of human rights legislation, engaged in employment with by YTEC. YTEC is the more obvious “employer” as it is YTEC who retained the Complainant’s services and directed his work. YTEC also enjoyed the benefits of the Complainant facilitating a course it offered.

- **The source of the employee’s remuneration and where the financial burden falls**

Although the Complainant was paid by YTEC, the funding for his fees came to YTEC from GY. However, when GY pulled its employees from the course, YTEC did not bill GY for the work done by the Complainant and bore the financial burden itself.

- **Normal indicia of employment, such as employment agreements, collective agreements, statutory payroll deductions, and T4 slips**

This indicia of employment it not relevant in this case as the Board has determined that the Complainant was an independent contractor to YTEC, not an employee in the traditional sense.

- **Who directs the activities of, and controls the employee, and has the power to hire, dismiss and discipline him**

YTEC retained the Complainant’s services and directed his activities. It was only YTEC who could decide whether or not to use the services of the Complainant, and they had the power to retain, or not retain, his services in the future. However, GY had the power to decide not to send its employees to courses facilitated by the Complainant, and in this sense, had power to determine whether or not he had the opportunity to continue with this work. GY’s actions, in removing its employees from the course, essentially meant there was no course for the Complainant to facilitate.

The evidence before the Board was that the Complainant understood that he was to report to and take direction from Darlene Doerksen, the Executive Director of YTEC. There is no evidence of him having direct contact or any involvement with GY, or any of GY’s employees, in relation to the training he was retained to do. Although GY contracted with YTEC to provide a particular training course, it was YTEC who directed the Complainant’s work and had control over it.

- **Who has the direct benefit of, or directly utilizes the employee’s services**

GY’s employees were to benefit directly from the workshop facilitated by the Complainant. YTEC would have benefited from the Complainant facilitating the workshop because they had a Memorandum of Understanding with GY to be paid for providing the workshop.

Further, although GY would benefit from its employees being trained in the Service Best program, it was YTEC and the Complainant who stood to profit or lose, in financial terms, from providing the training course. Further, it was YTEC who utilized the Complainant's services so that they could contract with GY to provide training to GY's employees.

- **The extent to which the employee is a part of the employer's organization, or is a part of an independent organization providing services**

The Complainant was not, in any way, a part of either YTEC or GY's organization except to the extent that he was one of a number of facilitators retained, from time to time, on an as-needed basis, by YTEC.

- **The perceptions of the parties as to who was the employer**

Both YTEC and the Complainant understood that YTEC was utilizing his services, but not "employing" him in any ongoing sense. Further, the perception of the parties was that YTEC and GY has a separate contractual relationship. In other words, no one perceived that GY employed the Complainant.

- **Whether the arrangement has deliberately been structured to avoid statutory responsibilities**

There was no evidence of this.

- **The nexus between any co-employer and the employee, including whether there is a direct contractual relationship between the complainant and the co-employer**

There was no direct contractual relationship between the co-employer (GY) and the Complainant. In fact, there was no evidence of a nexus of any kind between these two parties.

- **The independence of any alleged co-employer from the primary employer, and the relationship (if any) between the two**

There was a contractual relationship between GY and YTEC for YTEC to provide a training program to GY employees, and for GY to pay YTEC to provide this training. There was no evidence of any other relationship between the parties and there was evidence that this was the first time GY had contracted with YTEC to provide training.

- **The nature of the arrangement between the primary employer and the co-employer, for example, whether the co-employer is merely a labour broker, compared to an independent subcontractor**

In this case, the relationship between the primary employer (YTEC) and the co-employer (GY) was that of an independent contractual relationship for the provision of a specific service.

- **The extent to which the co-employer directs the performance of the work.**

The co-employer (GY) directed the content of the Service Best Program but YTEC directed the Complainant in how it was delivered. There was no suggestion that GY pulled its employees from the program because of the performance of the Complainant's work, or because of the content of the workshop.

## **Findings**

Based on the above analysis, the Board finds that the Complainant was engaged in employment with YTEC, but not engaged in employment with GY.

The Board also finds that there was no evidence of any sort of contract between the Complainant and GY. The Complainant cannot, therefore, be described as an "independent contractor" to GY. The parties have agreed that the Complainant was an independent contractor to YTEC. The "contract" between them was basically a verbal understanding of the work to be done by the Complainant. There was evidence of a Memorandum of Understanding between GY and YTEC. The Complainant, although aware of this document, was not a party to it.

### **"Aspect of Employment"**

As the Complainant was not engaged in employment with GY, the next question is whether or not, given that he was engaged in employment with YTEC, GY's actions are caught by the wording of section 9(b) which prohibits discrimination in connection with "any aspect of" his employment with YTEC.

Although the Act prohibits discrimination in connection "with any aspect of employment", it does not define what is meant by "any aspect". *The Human Rights Code* of Manitoba uses this same phrase but does define what is meant by "aspect of employment". *The Human Rights Code* of Manitoba states:

#### **Discrimination in employment**

14(1) No person shall discriminate with respect to any aspect of an employment or occupation, unless the discrimination is based upon bona fide and reasonable requirements or qualifications for the employment or occupation.

#### **"Any aspect", etc. defined**

14(2) In subsection (1), "**any aspect of an employment or occupation**" includes

- (a) the opportunity to participate, or continue to participate, in the employment or occupation;
- (b) the customs, practices and conditions of the employment or occupation;
- (c) training, advancement or promotion;
- (d) seniority;

- (e) any form of remuneration or other compensation received directly or indirectly in respect of the employment or occupation, including salary, commissions, vacation pay, termination wages, bonuses, reasonable value for board, rent, housing and lodging, payments in kind, and employer contributions to pension funds or plans, long-term disability plans and health insurance plans; and
- (f) any other benefit, term or condition of the employment or occupation.

Much of this definition protects a person once employed. However, section 14(2)(a) lists “the opportunity to participate, or continue to participate, in the employment or occupation” as covered by the phrase “aspect of employment”. The ordinary, dictionary meaning of “aspect” is “part, phase, or feature”. Using this ordinary meaning would mean that an aspect of employment means any part of employment. In the Board’s view, this could include the opportunity to participate in employment or occupation, as defined by the Manitoba statute. Applying this meaning to the situation the Complainant found himself in, the Board finds that GY very clearly interfered with the Complainant’s opportunity to continue participating in the work he was retained to do for YTEC. By removing its participants from the Service Best workshop, GY effectively created a situation where the Complainant lost the opportunity to continue with the work he had been retained to do for YTEC. Having found that the Complainant was not engaged in employment with GY, the Board finds, nonetheless, that GY interfered with an aspect of the Complainant’s employment relationship with YTEC.

**3. If GY interfered with an aspect of the Complainant’s employment when it removed its employees from training the Complainant was retained by YTEC to facilitate, was this interference on the basis of a prohibited ground — that is, on the basis of the Complainant’s criminal record?**

Having established that the alleged discrimination occurred in connection with an aspect of the Complainant’s employment, as prohibited by section 9 of the Act, the Board must then consider whether the action complained of constitutes discrimination on the basis of a prohibited ground, under section 7, specifically “criminal charges or criminal record”.

**Relevant Law**

The onus is on the Complainant to establish a *prima facie* case of discrimination, on a balance of probabilities. A *prima facie* case is one which covers the allegations made which, if believed, is sufficient to justify a finding in the Complainant's favour, absent an answer from the Respondent [Shopland v. Watson Lake Buslines (o/a Takhini Transport) [2004] Y.H.R.B.A.D. No. 1 (QL), Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd, 1985, 2, S.C.R. 536 at 558].

What is also required is that the evidence establishes a reasonable basis to infer a nexus between the prohibited ground and the adverse treatment. The Respondent argued that the case before the Board does not meet this standard. Relying on

Shopland, the Commission countered that direct evidence is not required if circumstantial evidence establishes a clear pattern.

Once the Complainant has established a *prima facie* case of discrimination, the burden shifts to the Respondent to adduce evidence of a legitimate, non-discriminatory, reason for its conduct, or to adduce a statutory defence.

The law is clear that a prohibited ground, such as criminal charges or a criminal record, in this case, does not have to be the sole or even the primary reason for the behavior complained of, but it does have to be a factor. The Board of Adjudication in Shopland, relying on Morris v. British Columbia Railway Co., 2003 BCHRTD 14, notes that "... the fact other factors may have been taken into account does not negate a finding of discrimination".

The Respondent argued that in order to determine whether or not discrimination took place, the Board must consider alternative explanations for the behaviour in light of the tests set out in Dhaliwal v. Westcoast Cellulose Ltd [1995] B.C.C.H.R.D. No. 16.

In the Dhaliwal case, the employee was terminated due to misrepresentation on his application. This misrepresentation came to light following a back injury. The tribunal recognized that "though his back injury may have indirectly brought about the termination, it did not form part of the reason for the decision to terminate". Although, in that case, the tribunal found that even though the complainant had the characteristic of a protected ground, there was no discrimination because the respondent provided legitimate non-discriminatory reasons to terminate the complainant's employment.

During argument on the No Evidence Motion, the Respondent argued two cases that are relevant to assessing whether or not there was discrimination on the basis of a prohibited ground in connection with employment. In both the Wright v. Boden and Magnone v. British Columbia Ferry Services Inc., 2008 BCHRT 191, the termination of the complainant's employment had the characteristic of a prohibited ground but the tribunals founds that the employment ended for non-discriminatory reasons. In both cases, the complainant did not establish a *prima facie* case of discrimination.

The Commission argued that Varma v. G.B. Allbright Enterprises Inc., [1988] 9 C.H.R.R. D/5290, is relevant. In Varma, the employer fired the employee because customers objected to her race. The Commission argued that the employer's actions were similar to the actions of the Respondent, effectively terminating the Complainant's employment on the basis of women's complaints about the Complainant as a course facilitator, rooted in a prohibited ground, specifically the Complainant's criminal convictions for spousal assault.

## Findings

The Board finds that the Public Service Commission was aware that the Complainant had a criminal record. In the Board's view, the Respondent's knowledge that the Complainant had a criminal record was likely based on the newspaper article in September 2004, and office talk, particularly in regard to the September 2004 conviction involving an assault on a GY employee at a GY worksite.

The Board accepts the Respondent's argument, based primarily on the testimony of Patricia Daws, that the primary reason GY cancelled the Service Best training was the concerns raised about the safety of employees. The Board finds it reasonable, given GY's prior knowledge of the Complainant's conduct, and a much earlier decision not to use him as a trainer/facilitator, that the safety concerns raised by female employees would be accepted at face value. Ms. Daws was a credible witness whose testimony was consistent and unshaken under extensive examination and cross-examination.

Ms. Doerksen was a reluctant but credible witness. Her evidence was that she had no prior knowledge of the Complainant's criminal and that she may have been out of town when the article was published. She said she was not otherwise aware that the Complainant had a criminal record. This evidence is accepted by the Board. While the Board finds it surprising that Ms. Doerksen did not ask Mr. Gasser why GY was cancelling the course on such short notice, there is no direct evidence that she was given a reason beyond concerns by GY for participant safety. Ms. Doerksen's testimony that she did not tell the Complainant the cancellation was due to his criminal record is also consistent with the testimony of Ms. Daws and Mr. Gasser that the Complainant's criminal record did not factor into their decision to cancel the training. The Board accepts this testimony, despite its conflict with the Complainant's evidence, as to what he was told, on the basis of the Board's finding that Ms. Doerksen, Mr. Gasser and Ms. Daws were more credible witnesses than the Complainant.

While the Board accepts that the Complainant believes that the Service Best course was terminated due to his criminal record, the Board does not accept his testimony that he was told this by Ms. Doerksen. The Board accepts that he may have been told, or heard comments about being "a bad boy" or about beating his wife.

It is not sufficient for the Board to determine that the primary reason for the Respondent's decision was safety. It is necessary to assess whether or not the Complainant's criminal charges or criminal record were a factor in GY's decision to terminate the training, in addition to, or underlying the concerns about employee safety.

The Board did not hear any direct evidence from the women who raised safety concerns about attending a workshop the Complainant was facilitating, or any evidence of what the women actually said, or the basis for their concerns. However, the Board is of the view that the concerns or motivations of these women are not determinative. Rather, the Board must assess whether the Complainant's criminal record or convictions were a factor in GY's process for deciding to terminate the Service Best training.

If the women who complained did so because they did not want to be in a team-building course led by a convicted “wife beater”, as the Commission suggests, this would only be relevant if GY accepted this as a reason to cancel the course. There was no evidence that this was the case. If, on the other hand, the women’s complaints prompted GY to pay attention to what was going on with the course, and who was facilitating it, and to consider whether or not employees might have legitimate reasons to feel unsafe, then a discriminatory basis for the women’s complaints does not necessarily prove a discriminatory basis for the Respondent’s decision. This analysis is consistent with the analysis in the Dhaliwal case.

The Commission submitted that “it is reasonable to infer these employees did not want to participate in the training with a facilitator who had been convicted of assaulting women, thereby making the Complainant’s criminal record a part of the chain of causation which led to his unfavourable treatment due to the actions and decisions of the Respondent”. The Respondent, in closing argument, suggested that no such inference can be drawn by speculation as to why these women complained about the Complainant as a facilitator. The Respondent contested the chain of causation argued by the Commission.

There is no evidence that the motivation behind, or foundation for, the Respondent’s decision to accept the safety concerns brought to them, and to take steps to address them, was based on the Complainant’s criminal record. Rather, the evidence is that the GY’s decision was based solely on their responsibility for the health and safety of their employees. The Board finds that this basis for GY’s decision is credible given the Complainant’s past actions and conduct in the GY workplace and involving GY employees.

While some of the Complainant’s conduct in the GY workplace, specifically blocking an employee’s egress from the Department of Environment workplace, did lead to criminal charges and a conviction, the Board finds that it was the inappropriateness of the Complainant’s conduct in the GY workplace, and toward a GY employee, that prompted the Respondent’s decision.

In making this decision, the Board has taken into account the way the Complainant compartmentalized his assaultive behaviour to distinguish domestic behavior from professional behavior. The Board finds that this compartmentalized approach is not realistic or credible. Based on this finding and the evidence of the other witnesses, the Board finds GY’s concern about an assault at the workplace putting employees at risk to be reasonable, legitimate, and non-discriminatory.

In summary, the Board finds that the Commission has not presented sufficient evidence to support the allegation of discrimination based on criminal record. Rather, the Complainant’s allegations are based on speculation unsupported by the evidence.

GY’s decision to terminate the Service Best training was based on some of the same behavior that gave rise to criminal charges but it is the behavior, not the criminal

charges or record that was the criteria for GY's decision. The fact that this same behavior was also found to be illegal is irrelevant.

Having found that the Respondent did not discriminate against the Complainant on the basis of his criminal record, this complaint is dismissed. As the Board has found that there was no discrimination on the basis of a prohibited ground, it is not necessary to deal with Issues 4 and 5.

**Dated at Whitehorse, Yukon, this 10th day of May 2011**



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**E. Joie Quarton, Chief Adjudicator for the  
Yukon Human Rights Board of Adjudication:**

**E. Joie Quarton  
Vicki Hancock  
Laura MacFeeters  
Renzo Ordonez**