

**MANITOBA HUMAN RIGHTS COMMISSION
BOARD OF COMMISSIONERS' POLICY**

**POLICY # P-3
version 1.2
Previously # L-26**

SECTION: Procedure

Effective date: December 18, 2002
REVISED DATE: January 1, 2022

SUBJECT: JURISDICTION – CONCURRENT JURISDICTION

Purpose:

This policy sets out the Commission's considerations when it is advised that the substance of a complaint is being or has been determined in another forum with concurrent jurisdiction to apply *The Human Rights Code* ("The Code"). The purpose of this policy is to avoid inconsistent decisions, unfairness, and relitigation. Where there is any conflict between this policy and *The Code*, *The Code* will be followed.

Context:

The Supreme Court of Canada has recognized that a variety of forums have the jurisdiction to deal with human rights matters or have concurrent jurisdiction over human rights matters.

The Commission follows *Dick v. The Pepsi Bottling Group (Canada), Co.*, 2014 CanLII 16055 (MB HRC) ("*Dick*") and *British Columbia (Worker's Compensation Board) v. Figliola*, 2011 SCC 52 ("*Figliola*") when considering whether it should proceed (or, alternatively, stop its process) where the human rights issue is being or has already been dealt with in another forum.

The above decisions confirm that when a decision is being or has already been made in another forum, finality principles may apply. Finality principles include the legal doctrines of issue estoppel, abuse of process, and collateral attack. The overall purpose of these doctrines is to ensure "finality, fairness, and the integrity of the justice system by preventing unnecessary inconsistency, multiplicity and delay" (*Figliola, supra*, at para 36).

Issue estoppel means that the issue is stopped, or cannot proceed, because it has previously been litigated and determined in another legal proceeding. The purpose of this doctrine is to ensure consistency and finality by preventing re-litigation of the same issue(s).

The requirements for issue estoppel are:

- (a) the same question has been decided – i.e.: the issue(s) of discrimination;

- (b) the prior decision is final (any appeal options are completed or not pursued);
and
- (c) the parties to the other proceeding or their privies are the same persons/entities as the parties to the human rights proceeding.

The term “privy” in this last requirement means that if the people in both administrative processes are not identical, they must have a common interest. In *Dick*, the adjudicator found that the complainant and his union were privies. This will not always be true and must be considered on a case-by-case basis.

Even where the requirements for issue estoppel are met, the Commission may still continue where it would be unfair to terminate its involvement. It may consider the purpose and wording of the law authorizing the prior decision, whether an appeal process was available, safeguards available to the parties in the prior proceeding, expertise of that decision maker, circumstances giving rise to the prior proceeding, and any potential injustice.

The Commission may also apply the legal doctrine of abuse of process, which is about fair process including the interests of finality, consistency, and efficiency. This means that where there is a final decision regarding the issues in the human rights complaint but the requirements of issue estoppel are not met, the Commission may still choose not to proceed. In making this decision, the Commission will consider whether it would be unfair to terminate its involvement due to new evidence that conclusively impeaches the original decision, fraud or dishonesty in the first proceeding, or other reasons.

The Commission may also apply the factors laid out in *Figliola* in order to determine whether a human rights complaint is being or has been dealt with appropriately in another forum. According to *Figliola*, the Commission will ask:

1. Does the other administrative body have concurrent jurisdiction to decide human rights issues?
2. Is the legal issue in the alternate forum essentially the same as the legal issue in the human rights complaint?
3. Did the complainant have the opportunity to know the case to meet and have a chance to meet it?

If the Commission determines that the answer to all three of these questions is “yes”, it may dismiss a complaint because it has been—or is being—dealt with appropriately in another forum.

Upon considering the above doctrines, their underlying principles, and the test from *Figliola*, the Commission may dismiss the complaint without investigation under subsections 26(2)(a) and/or 26(2)(d) of *The Code*. After investigation, the Commission

must dismiss a complaint under subsections 29(1)(a) and/or 29(1)(d) if it finds that the finality doctrines or their underlying principles apply. Where only a portion of the complaint has been decided, the Commission may proceed with respect to the unresolved issues. Where the complaint has systemic issues, the Commission may be less likely to terminate its involvement.

The Commission will consider each situation in which concurrent jurisdiction arises on a fact-specific basis and will proceed cautiously with regard to the above considerations.

APPROVED BY:

“John Burchill”
Chairperson

January 1, 2022
Date