Court File Nos: 34040 & 34041

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for the Province of British Columbia)

BETWEEN:

FREDERICK MOORE on behalf of JEFFREY P. MOORE

Appellant
(Appellant)

- and -

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA AS REPRESENTED BY THE MINISTRY OF EDUCATION and BOARD OF EDUCATION SCHOOL DISTRICT No.44 (NORTH VANCOUVER) formerly known as THE BOARD OF SCHOOL TRUSTEES OF SCHOOL DISTRICT No.44 (NORTH VANCOUVER)

Respondents
(Respondents)

- and -

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3.	*Arzem v. Ontario (Ministry of Community & Social Services)*, 2006 HRTO 17
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ADGA Group Consultants Inc. v. Lane et al.

[Indexed as: ADGA Group Consultants Inc. v. Lane]

Superior Court of Justice, Divisional Court, Cusinato, Ferrier and Lofchik JJ. *August 8, 2008*

Human rights — Discrimination — Disability — Complainant and Commission not having to establish comparator group where complaint is of discriminatory termination of employment on basis of disability — Tribunal finding that employer discriminated against complainant on basis of disability by dismissing him from position as software program tester when he revealed that he had bipolar disorder and started exhibiting pre-manic symptoms — Tribunal's decision reasonable.

Human rights — Discrimination — Reasonable accommodation — Employer discriminating against complainant on basis of disability by dismissing him from position as software program tester ten days after he started work when he revealed that he had bipolar disorder and started exhibiting pre-manic symptoms — Tribunal's conclusion that employer failed to meet its procedural and substantive duty to accommodate complainant's disability reasonable.

Human rights — Remedies — Damages — Tribunal having power under s. 41(1)(b) of Code to award general damages to compensate for loss of right to be free from discrimination and for experience of victimization — Tribunal awarding $35,000 to complainant who was dismissed ten days after he started work when he revealed that he had bipolar disorder and started exhibiting pre-manic symptoms — Tribunal also awarding damages of $10,000 for mental anguish — Awards reasonable — Human Rights Code, R.S.O. 1990, c. H.19, s. 41(1)(b).

The complainant had bipolar disorder, characterized by manic and depressive episodes with periods of stability. He was hired by the employer as a software program tester. The job was described to the complainant as being stressful and as involving tight deadlines. When he applied for the job, the complainant did not reveal that he had bipolar disorder. Shortly after starting work, the complainant disclosed to his supervisor C that he had bipolar disorder, told her how to identify when he was becoming manic, and asked her to intervene if she observed any inappropriate behaviour on his part. Shortly afterwards, the complainant entered a pre-manic phase and began to exhibit signs of manic behaviour. Ten days after starting work, the complainant was terminated on the basis that he had misrepresented his ability to perform the essential duties of the position for which he was hired. After his dismissal, the complainant's condition escalated to full-blown mania within hours and he was hospitalized. He subsequently experienced severe depression, his family's financial situation deteriorated and his marriage broke up. The complainant filed a human rights complaint alleging that the employer discriminated against him on the basis of a disability, namely his bipolar disorder. The Human Rights Tribunal found that the employer had discriminated against the complainant contrary to s. 5 of the *Human Rights Code* and that it had failed to establish that it could not accommodate the complainant's disability without undue hardship. In addition to special damages, the tribunal awarded the complainant general damages in the amount of $35,000, damages for mental anguish in the amount of $10,000 and granted certain public interest remedies under s. 41(1)(*a*) of the Code. The employer appealed. The Commission cross-appealed, seeking to increase the award of general damages.

Held, the appeal should be allowed in part; the cross-appeal should be dismissed.

The Tribunal did not err in qualifying as an expert witness a person with bipolar disorder who had no qualifications as a medical practitioner and was the president of an advocacy group for people with depression, bipolar disorder and associated illnesses. That witness provided relevant and useful background and contextual information about bipolar disorder which was outside the experience and knowledge of the Tribunal. The Tribunal also did not err in qualifying as an expert witness the head of a university department of psychiatry and in relying on his evidence on the diagnosis, treatment and management of bipolar disorder and issues of stigmatization of those with the disorder. The evidence relating to stigma was relevant and necessary to understanding the complainant's reasons for not initially disclosing his bipolar disorder to the employer and responding to the employer's allegation that the complainant had lied about his condition in the course of the hiring process.

The Tribunal's finding of discrimination was reasonable. In cases of disability in the employee termination context, it is not necessary or appropriate to have to establish a comparator group. The Tribunal did not err in finding that the employer did not meet its procedural duty to accommodate the complainant as it failed to obtain all relevant information about the complainant's disability, his ability to perform job duties and his capabilities for alternative work. Nor did the Tribunal err in finding that the employer did not meet its substantive duty to accommodate the complainant's disability short of undue hardship. Undue hardship cannot be established by relying on impressionistic or anecdotal evidence or after-the-fact justifications. The Tribunal found that the complainant was fully capable of performing the essential duties of the job for which he was hired when he was not heading towards or was already at one of the two ends of the bipolar spectrum.

The Tribunal has the power under s. 41(1)(*b*) of the Code to award general damages to compensate for the loss of the right to be free from discrimination and for the experience of discrimination. There is no ceiling on awards of general damages under the Code. Human Rights Tribunals must ensure that the quantum of general damages is not set too low, since doing so would trivialize the social importance of the Code by effectively creating a "licence fee" to discriminate. The complainant's disability and his decision to reveal it made him vulnerable. He was the classic "thin-skulled employee". The employer had a duty to act reasonably and in good faith, and its actions had foreseeable tragic consequences to the complainant. The award of $35,000 was reasonable. The award of $10,000 as damages for mental anguish was also reasonable.

Two of the public interest remedies granted by the Tribunal were unreasonable and were struck out. Otherwise, the public interest remedies were affirmed.

British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (BCGSEU) (Meiorin Grievance), [1999] 3 S.C.R. 3, [1999] S.C.J. No. 46, 176 D.L.R. (4th) 1, 244 N.R. 145, [1999] 10 W.W.R. 1, J.E. 99-1807, 127 B.C.A.C. 161, 66 B.C.L.R. (3d) 253, 46 C.C.E.L. (2d) 206, 99 CLLC ¶230-028, 68 C.R.R. (2d) 1, 90 A.C.W.S. (3d) 764; *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council for Human Rights)*, [1999] 3 S.C.R. 868, [1999] S.C.J. No. 73, 181 D.L.R. (4th) 385, 249 N.R. 45, [2000] 1 W.W.R. 565, J.E. 2000-43, 131 B.C.A.C. 280, 70 B.C.L.R. (3d) 215, 47 M.V.R. (3d) 167, 93 A.C.W.S. (3d) 524, REJB 1999-15531;

addresses discrimination on the ground of disability; and post the policy in plain and obvious locations at all places where ADGA does business and include the policy in orientation materials for new employees.

Standard of Review

[72] An exhaustive standard of review analysis is not required in every case. When such an analysis has been previously undertaken for similar or identical questions, the existing jurisprudence may be referenced in determining the standard: *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, 2008 SCC 9.

[73] In earlier decisions, the standard of review of "reasonableness" has been applied to findings of fact and the application of the law to those findings of fact; and the standard of "correctness" applies to questions of law: *Ontario (Attorney General) v. Ontario (Human Rights Commission)* (2007), 88 O.R. (3d) 455, [2007] O.J. No. 4978 (Div. Ct.), at paras. 29, 32; *Quereshi v. Ontario (Human Rights Commission)*, [2006] O.J. No. 1782, 215 O.A.C. 102 (Div. Ct.), at paras. 18-20; *Smith v. Ontario (Human Rights Commission)*, [2005] O.J. No. 377, 195 O.A.C. 323 (Div. Ct.), at para. 3 ("*Smith*"); *Entrop v. Imperial Oil Ltd.* (2000), 50 O.R. (3d) 18, [2000] O.J. No. 2689 (C.A.), at para. 42 ("*Entrop*").

[74] Those standards apply here.

[75] In applying the reasonableness standard generally, the reviewing court should recognize that Tribunals have a margin of appreciation within the range of acceptable and rational solutions. Deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers: *Dunsmuir*, *supra*, at paras. 47, 49.

[76] In reviewing questions of fact, it is not the role of a reviewing court to posit alternate interpretations of the evidence. Rather, its role is to determine whether the Tribunal's interpretation of the evidence is reasonable, *i.e.*, "whether it had some basis in the evidence" for its findings: *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, [2003] S.C.J. No. 18, 223 D.L.R. (4th) 599, at para. 41.

Issue One: Was the Tribunal's finding of discrimination reasonable?

Comparator group — Appellant's submissions

[77] ADGA submits that the decision of the Tribunal must fall because Lane and the Commission did not establish a correct

comparator group — indeed any comparator group against which the treatment of Lane could be measured.

[78] ADGA submits that "discrimination" in a human rights context prohibits an employer from treating employees with disabilities differently from other employees within the same comparator group. Therefore, the Tribunal could only make a finding of discrimination if there was evidence that the complainant was treated differently than other employees in a particular comparator group because of his disability.

[79] ADGA submits that it was not incumbent on ADGA to describe a correct comparator group. Rather, the Commission must establish discrimination and cannot do so without establishing against which group Lane has been treated in a discriminatory fashion. The Commission has failed to establish or identify any comparator group and this is fatal to its case.

[80] Citing *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657, [2004] S.C.J. No. 71, ADGA submits that the choice of an appropriate comparator group is essential in discrimination analysis, and that there is no discrimination in this case when the appropriate comparator is selected.

[81] ADGA submits that even if one accepts that Lane has a disability, this fact alone does not establish a case of "discrimination". Section 5 of the Code creates the following right with respect to employment:

> 5. Every person has a right to equal treatment with respect to employment without discrimination because of . . . disability.

[82] The Supreme Court of Canada in *C.N.R. v. Canada (Human Rights Commission)* defined discrimination as follows:

> The discrimination is then reinforced by the very exclusion of the disadvantaged group because exclusion fosters the belief, both within and outside the group, that the exclusion is the result of "natural" forces . . .

And in *Andrews v. Law Society of British Columbia* as follows:

> . . . discrimination may be described as a distinction, . . . relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society.

C.N.R. v. Canada (Human Rights Commission), [1987] 1 S.C.R. 1114, [1987] S.C.J. No. 42, at para. 34; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, [1989] S.C.J. No. 6, at para. 37

[83] ADGA submits that in order to answer this question, the Tribunal is required to turn its mind as to whom Lane should be compared in order to find an act of "discrimination". In *Post Office v. Union of Post Office Workers and another*, the House of Lords stated:

> Discrimination implies a comparison. . . . that by some reason of the discrimination he is worse off than someone else in a comparable position against whom there has been no discrimination.

Post Office v. Union of Post Office Workers, [1974] 1 All E.R. 229 (H.L.), at pp. 9 and 10 (QL).

[84] The Supreme Court of Canada has stated that the choice of the correct comparator group is "critical" in cases of alleged discrimination:

> First, the choice of the correct comparator is crucial, since the comparison between the claimants and this group permeates every stage of the analysis. "[M]isidentification of the proper comparator group at the outset can doom the outcome of the whole s. 15(1) analysis". . . .
>
> Second, while the starting point is the comparator chosen by the claimants, the Court must ensure that the comparator is appropriate and should substitute an appropriate comparator if the one chosen by the claimants is not appropriate. . . .
>
> Third, the comparator group should mirror the characteristics of the claimant or claimant group relevant to the benefit or advantage sought, except for the personal characteristic related to the enumerated or analogous ground raised as the basis for the discrimination: . . . The comparator must align with both the benefit and the "universe of people potentially entitled" to it and the alleged ground of discrimination: . . .
>
> Fourth, a claimant relying on a personal characteristic related to the enumerated ground of disability may invite comparison with the treatment of those suffering a different type of disability, or a disability of greater severity: . . .

Auton (Guardian ad litem of) v. British Columbia (Attorney General), supra, at paras. 51-54 (citations omitted).

[85] ADGA submits that the proper comparator group was those employees (those who suffered from a disability and those who did not) who are probationary employees. Using a broader comparator group, such as the organization as a whole, is inappropriate as it does not permit comparison of similarly situated employees, and fails to take into account the purpose of the probationary period assessing the suitability and performance of the employees. There was no evidence before the Tribunal that the Complainant was treated differently from any other probationary employee, and no comparison of other employees who for whatever reason showed tangible evidence that they would be unable to perform the essential duties of the

job. However, there was evidence that employees on probation are released for an inability to perform the essential duties of their positions.

Comparator group — Respondent's submissions

[86] The Commission submits that the comparator group analysis does not apply. Rather, the Supreme Court has established that disability-based employment-discrimination analysis calls for the following inquiries to determine whether there has been a *prima facie* case of discrimination under the relevant human rights legislation: (1) the existence of a distinction; (2) the distinction is based on disability or perceived disability; and (3) the distinction has the effect of nullifying the right to full and equal exercise of human rights and freedoms: *Mercier, supra*, at para. 84; *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council for Human Rights)*, [1999] 3 S.C.R. 868, [1992] S.C.J. No. 73, at para. 23 ("*Grismer*").

[87] If these three things are established, then the analysis proceeds to considering the accommodation of the individual, *i.e.*, what are the needs associated with the disability? Can the employer accommodate those needs without causing undue hardship?: *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (BCGSEU) (Meiorin Grievance)*, [1999] 3 S.C.R. 3, [1999] S.C.J. No. 46, at paras. 54-55, 69, 70 ("*Meiorin*"); *Entrop, supra*, at paras. 81, 83-84.

[88] None of those inquiries call for the identification of a comparator group. The comparator group analysis is unnecessary when an employee with a disability seeks accommodation, and thereby seeks to be treated individually and differently: *Ottawa (City) v. Ottawa-Carleton Public Employees' Union, Local 503*, [2007] O.J. No. 735, 221 O.A.C. 224 (Div. Ct.), at paras. 62-65, 67 [*Ottawa-Carleton P.E.U.*]; *British Columbia Government and Service Employees' Union v. British Columbia (Public Service Employee Relations Commission)*, [2005] B.C.J. No. 445, 2005 BCCA 129, at paras. 46-49 and 67, Levine J.A., dissenting.

[89] The Commission submits that the comparator group analysis is inappropriate because a person with a disability who seeks accommodation of his or her needs does not seek to be treated the same way that others are treated. Avoiding discrimination on the basis of disability requires distinctions to be made taking into account the actual personal characteristics of people with disabilities. It is the failure to accommodate needs

[94] ADGA argues that Lane was terminated because he had misrepresented his ability to perform the essential duties of the position for which he was hired and as such his termination was completely unrelated to his disability. This argument was made before the Tribunal and rejected [at paras. 137-39]:

> . . . I reject the argument that ADGA had the right to dismiss Mr. Lane once it had discovered that he had lied about his bipolar condition in the course of the hiring process or at the very least, had failed to reveal a factor that was critical to any determination that he was qualified to perform the job for which he was being considered. The expert evidence of Philip Upshall established why it was that those with bipolar disorder are extremely reluctant to reveal their disorder to prospective employers. In the particular case, this was manifest in the testimony of both Mr. Lane and Ms. Lane as they revealed the anguish that Mr. Lane had gone through in deciding if and when to reveal his condition to his employer . . .
>
> Similarly I reject the contention that in effect Mr. Lane dismissed himself by telling Ms. Corbett at one of their meetings that he could not take the pressure of the job and admitting to Mr. Germain at the termination interview that he was not qualified for the position. . . . Given that he had just accepted the position a few days earlier knowing that it was a job that could be highly pressured, I do not find it plausible that Mr. Lane would so soon thereafter, and without any experience of the kind of pressure that the job could generate, state that he could not handle the pressure of the position . . . Similarly, I do not accept that Mr. Lane told Mr. Germain that he was not able to perform the essential duties of the position . . .
>
> In fact, the evidence established that, subject to some reservations as to his experience as a team leader, Mr. Lane was fully capable of performing the essential duties of the job to which he was hired at least when he was not heading towards or at one of the two ends of the spectrum of bipolar disorder.

Conclusion on the issue of the comparator group

[95] I agree with the submissions of the respondent Commission. In cases of disability in the employee termination context, it is not necessary or appropriate to have to establish a comparator group.

[96] Disability cases bring with them particular and individualized situations. Once it is established that the termination of the employee was because of, or in part because of, the disability, the claimant has established a *prima facie* case of discrimination. The onus then shifts to the employer to establish that it met its duty of procedural and substantive fairness to the point of undue hardship.

[97] The above-noted references to *Mercier*, *Grismer*, *Meiorin*, *Entrop*, *Eaton*, *Eldridge* and *Ottawa-Carleton P.E.U.* support this conclusion.

[98] The Tribunal made an extensive and careful analysis of the evidence and came to the conclusion that Lane was "dis-

missed because of his disability and perceptions as to the impact of that disability on workplace performance".

[99] ADGA's position is that Lane misrepresented his ability to do the job for which he was hired. The Tribunal held that he did not do so. The Tribunal found that out of fear of a stereotypical reaction to someone with a mental illness leading to a decision not to hire, Lane did not reveal his illness to his prospective employer and misrepresented the number of his sick days in the preceding year.

[100] The expert testimony of Upshall supported Lane's perception that he would not get the job if he revealed his disability because of a stereotypical reaction which would be triggered in most employers.

[101] In these circumstances, the Tribunal held that ADGA could not rely on "Lane's lying" as "an independent basis for dismissal and thereby avoid having to account for its treatment of him as someone exhibiting the symptoms of bipolar disorder in the workplace".

[102] In this the Tribunal was correct. Lane was under no obligation to disclose his disability — nor indeed his record of sick days. The Tribunal held as a fact that he did not misrepresent his ability to perform the tasks required of him. The Tribunal held as a fact that he was terminated because of his disability.

[103] In summary, the Tribunal correctly applied the law to the facts which it found. The conclusions on the facts were reasonable in the determination that the Commission had made out a *prima facie* case of discrimination.

Issue two: Was the finding of the Tribunal that ADGA failed both the procedural and substantive duties to accommodate reasonable?

[104] Employers have procedural and substantive duties to accommodate employees with disabilities up to the point of undue hardship. The onus is on the employer to establish that it has met these duties: ***Meiorin, supra***, at para. 62; ***Grismer, supra***, at paras. 22, 32.

[105] The Tribunal concluded that ADGA failed both their procedural and substantive duties to accommodate Lane. ADGA had the burden of proof with respect to demonstrating that it could not accommodate Lane short of undue hardship. ADGA failed to discharge this burden.

[106] As is revealed in the following passage from the Tribunal's decision, the Tribunal acknowledged that ADGA was legitimately concerned about Lane's behaviour in the workplace and

Her Majesty The Queen in Right of Alberta (Minister of Aboriginal Affairs and Northern Development) and Registrar, Metis Settlements Land Registry *Appellants*

v.

Barbara Cunningham, John Kenneth Cunningham, Lawrent (Lawrence) Cunningham, Ralph Cunningham, Lynn Noskey, Gordon Cunningham, Roger Cunningham, Ray Stuart and Peavine Métis Settlement *Respondents*

and

Attorney General of Ontario, Attorney General of Quebec, Attorney General for Saskatchewan, East Prairie Métis Settlement, Elizabeth Métis Settlement, Métis Nation of Alberta, Métis National Council, Métis Settlements General Council, Aboriginal Legal Services of Toronto Inc., Women's Legal Education and Action Fund, Canadian Association for Community Living, Gift Lake Métis Settlement and Native Women's Association of Canada *Interveners*

Sa Majesté la Reine du chef de l'Alberta (Ministre des Affaires autochtones et Développement du Nord) et Registraire, Metis Settlements Land Registry *Appelants*

c.

Barbara Cunningham, John Kenneth Cunningham, Lawrent (Lawrence) Cunningham, Ralph Cunningham, Lynn Noskey, Gordon Cunningham, Roger Cunningham, Ray Stuart et Peavine Métis Settlement *Intimés*

et

Procureur général de l'Ontario, procureur général du Québec, procureur général de la Saskatchewan, East Prairie Métis Settlement, Elizabeth Métis Settlement, Métis Nation of Alberta, Ralliement national des Métis, Métis Settlements General Council, Aboriginal Legal Services of Toronto Inc., Fonds d'action et d'éducation juridiques pour les femmes, Association canadienne pour l'intégration communautaire, Gift Lake Métis Settlement et Association des femmes autochtones du Canada *Intervenants*

INDEXED AS: ALBERTA (ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT) *v.* CUNNINGHAM

2011 SCC 37

File No.: 33340.

2010: December 16; 2011: July 21.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Constitutional law — Charter of Rights — Right to equality — Ameliorative programs — Alberta Metis Settlements Act providing that voluntary registration

RÉPERTORIÉ : ALBERTA (AFFAIRES AUTOCHTONES ET DÉVELOPPEMENT DU NORD) *c.* CUNNINGHAM

2011 CSC 37

N° du greffe : 33340.

2010 : 16 décembre; 2011 : 21 juillet.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Droit constitutionnel — Charte des droits — Droit à l'égalité — Programmes améliorateurs — La Metis Settlements Act de l'Alberta prévoit que l'inscription

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

A. *The Purpose of Section 15(2)*

[38] Section 15 of the *Charter* protects against discriminatory laws and government actions. Its goal is to enhance substantive equality. It does this in two ways.

[39] First, s. 15(1) is aimed at *preventing* discrimination on grounds such as race, age and sex. Laws and government acts that perpetuate disadvantage and prejudice, or that single out individuals or groups for adverse treatment on the basis of stereotypes, violate s. 15(1) and are invalid, subject to justification under s. 1 of the *Charter*: *Kapp*; *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396.

[40] Second, s. 15(2) is aimed at permitting governments to *improve* the situation of members of disadvantaged groups that have suffered discrimination in the past, in order to enhance substantive equality. It does this by affirming the validity of ameliorative programs that target particular disadvantaged groups, which might otherwise run afoul of s. 15(1) by excluding other groups. It is unavoidable that ameliorative programs, in seeking to help one group, necessarily exclude others.

[41] The purpose of s. 15(2) is to save ameliorative programs from the charge of "reverse discrimination". Ameliorative programs function by targeting specific disadvantaged groups for benefits, while excluding others. At the time the *Charter* was being drafted, affirmative action programs were being challenged in the United States as discriminatory — a phenomenon sometimes called reverse discrimination. The underlying rationale of s. 15(2) is that governments should be permitted to

(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques.

A. *L'objet du par. 15(2)*

[38] L'article 15 de la *Charte* assure une protection contre les lois et les mesures gouvernementales discriminatoires. Son objectif est de renforcer l'égalité réelle, ce qu'il fait de deux manières.

[39] Premièrement, le par. 15(1) vise à *empêcher* la discrimination pour des motifs comme la race, l'âge et le sexe. Les lois et les actes gouvernementaux qui perpétuent un désavantage et un préjugé, ou qui imposent à certains individus ou groupes un traitement préjudiciable fondé sur des stéréotypes, violent le par. 15(1) et sont invalides, dans la mesure où ils ne sont pas justifiés au regard de l'article premier de la *Charte* : *Kapp*; *Withler c. Canada (Procureur général)*, 2011 CSC 12, [2011] 1 R.C.S. 396.

[40] Deuxièmement, le par. 15(2) vise à permettre aux gouvernements *d'améliorer* la situation des membres de groupes défavorisés ayant souffert de discrimination dans le passé dans le but de renforcer l'égalité réelle. Cet objectif est réalisé en confirmant la validité des programmes amélioratours visant des groupes défavorisés particuliers, ce qui pourrait autrement contrevenir au par. 15(1) en excluant d'autres groupes. Il va de soi que ces programmes, en voulant aider un groupe, en excluent d'autres.

[41] Le paragraphe 15(2) a pour objet de prémunir les programmes améliorateurs contre les accusations de « discrimination à rebours ». Ces programmes ciblent des groupes défavorisés particuliers afin qu'ils soient admissibles à certains avantages, tout en en excluant d'autres. Au moment de la rédaction de la *Charte*, des programmes de promotion sociale étaient contestés aux États-Unis au motif qu'ils étaient discriminatoires — un phénomène parfois appelé « discrimination à rebours ».

Case Name:
Arzem v. Ontario (Minister of Community and Social Services)

Between
Ontario Human Rights Commission, Commission, and Arzem, et al. "Group A", Aslanboga, et al. "Group B", Brooke, et al. "Group C", Ciccone, et al. "Group D", Athanasopoulos, et al. "Group E", Burrows "Group F", Cariou, et al. "Group G", Martin "Group H", and McKee, et al. "Group I", Complainants, and
Her Majesty the Queen in Right of Ontario (as represented by the Minister of Community and Social Services, the Minister of Education, and the Minister of Children and Youth Services), Respondents

[2006] O.H.R.T.D. No. 17

2006 HRTO 17

56 C.H.R.R. D/426

File Nos. HR-0602-04 to HR-0722-04 (Group A);

HR-0747-04 to HR-0825-04 (Group B); HR-0844-04 to

HR-0845-04 (Group C); HR-0870-04 to HR-0882-04

(Group D); HR-0921 to HR-0931-05 (Group E); HR-541-03;

HR-0567-03 (Group F); HR-0966-05 to HR-0974-05

(Group G); HR-0987-05 (Group H); and HR-1038 to

HR-1044-05 (Group I)

Ontario Human Rights Tribunal

P.E. DeGuire (Vice-Chair)

June 23, 2006.

(173 paras.)

Appearances:

analysis or the enquiry or both, and that likely would lead to inaccurate results. Ordinarily, the claimant chooses the comparator. However, the Court has reserved the selecting of the proper comparator to the power of a court or tribunal to refine or modify the comparator selected by the complainant if it is inaccurate.

29 The method of identifying the proper comparator has been stated by the Court in Law, at para. 58:

> When identifying the relevant comparator, the natural starting point is to consider the claimant's view. It is the claimant who generally chooses the person, group, or groups with whom he or she wishes to be compared for the purpose of the discrimination inquiry, thus setting the parameters of the alleged differential treatment that he or she wishes to challenge. However, the claimant's characterization of the comparison may not always be sufficient. It may be that the differential treatment is not between the groups identified by the claimant, but rather between other groups. Clearly a court cannot, ex proprio motu, evaluate a ground of discrimination not pleaded by the parties and in relation to which no evidence has been adduced: see Symes, supra, at p. 762. However, within the scope of the ground or grounds pleaded, I would not close the door on the power of a court to refine the comparison presented by the claimant where warranted. [Emphasis added]

30 In Arzem, 2005 HRTO 11, the Commission argued that the proper comparator was "non-autistic children, adults with mental disabilities and persons with physical disabilities". That identification, it argued, was based on Ontario's erroneous characterisation of the ground of discrimination as "age" and not disability. (See para. 43). At that time, the Tribunal concluded that identifying the proper comparator was best done during the hearing on the merits. It had commented that it appeared that the proper comparator was a non-disabled person with a lifetime physical or mental illness other than an autistic child. (See para. 73 and 75).

31 The Tribunal is now asked to determine a constitutional question, and in this enquiry it must turn its mind to selecting the appropriate or relevant comparator. Further, at this juncture the ground of age is now properly before it.

32 In this motion the Commission states that the proper comparator group is individuals over the age of 18. The characteristics of the claimants in this proceeding are: children with a mental disability. Thus, the Tribunal concludes that the proper comparator group is, adults without a mental disability, but may include adults with a physical disability.

B. Contextual Factors

33 There are two general contextual factors: (i) the appropriate perspective and (ii) general contextual factors. The latter include four sub-factors, namely: (a) pre-existing disadvantage; (b) the relationship between the ground and the claimant's characteristics or circumstances; (c) the ameliorative purpose or effect of the impugned provision; and (d) the nature of the interest affected.

B.1 The Appropriate Perspective

34 Determining the appropriate comparator, and evaluating the contextual factors -- which determines whether the legislation has the effect of demeaning the dignity of the Complainants -- must be done from the Complainants' point of view. The determination about whether the Complainants' equality rights have been infringed must be considered objectively within the context of the impugned legislation and the systemic past and present treatment of the Complainants and of other persons or groups with similar characteristic or circumstances: Law, at para. 59).

35 Essentially, the plain language of the definition of age under subsection 10(1) of the Code precludes children -- persons under 18 -- from gaining access to justice in the human rights system because of age. The definition of age under the Code makes a distinction based on age, which is an enumerated ground of discrimination under subsection 15(1) of the Charter. The question that arises is whether this distinction is discriminatory under subsection 15(1)?

Proper Perspective Test

36 By inference, simultaneously, a minor's views and developmental needs must be considered subjectively, and the purpose of the limitation on age in the Code and societal treatment of children, past and present, must be considered objectively.

37 McLachlin C.J., writing for the majority in Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), [2004] 1 S.C.R. 76, and Law, at para. 53 states it this way:

> The test is whether a reasonable person possessing the claimant's attributes and in the claimant's circumstances would conclude that the law marginalizes the claimant or treats her as less worthy on the basis of irrelevant characteristics: Law, supra. Applied to a child claimant, this test may well confront us with the fiction of the reasonable, fully apprised preschool-aged child. The best we can do is to adopt the perspective of the reasonable person acting on behalf of a child, who seriously considers and values the child's views and developmental needs. To say this, however, is not to minimize the subjective component; a court assessing an equality claim involving children must do its best to take into account the subjective viewpoint of the child, which will often include a sense of relative disempowerment and vulnerability.

38 Thus, the question before the Tribunal is whether the Legislature's choice to exclude minors from gaining access to the human rights system in Ontario offends their human dignity and freedom by marginalizing them or treating them as less worthy without regard for their actual circumstances?

39 In Law, the Court states that numerous factors ought to be considered when determining whether impugned legislation demeans the dignity of the complainant. But what is "human dignity"? The Court has acknowledged that human dignity cannot be defined exhaustively, but gives a blueprint of that concept for an analysis of subsection 15(1) of the Charter.

> ... There can be different conceptions of what human dignity means. For the purpose of analysis under s. 15(1) of the Charter, however, the jurisprudence of this Court reflects a specific, albeit non-exhaustive, definition. As noted by Lamer C.J. in Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519, at p. 554, the equality guarantee in s. 15(1) is concerned with the realization of personal autonomy and self-determination. Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances, which do not relate to individual needs, capacities, or merits. It is enhanced by laws, which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted

> with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?

40 In Law, the Court earmarks four factors to be the most important ones to apply in a contextual analysis. Those factors are listed in paragraph 28 above. Below, each factor is discussed and applied separately to this case, seriatim.

B.2 Are the Four Contextual Factors Satisfied?

41 Before addressing whether the Commission and the Complainants have met the Pre-existing Disadvantage factor, the Tribunal makes comments on the interpretative and applicable relationship between the Charter and human rights legislation. This is a direct commentary to Ontario's position that within the context of the Code, children, as a group, are not historically disadvantaged because they are not treated "equally" with adults. Therefore, the Court's conclusion in the Canadian Foundation case that children experience pre-existing disadvantage and vulnerability is not applicable in this case.

The Context of the Congruent Instruments: Charter and Human Rights Interpretation and Application

42 Under the first of the four contextual factors, pre-existing disadvantage, Ontario puts forth the position that "in the context of the Code", children are not historically disadvantaged because they are not treated equally with adults. In other words, Ontario's position is, in the context of human rights, children are not historically disadvantaged in comparison to adults. That view is inconsistent with the Supreme Court's finding in Canadian Foundation, that as a group, children are "highly vulnerable" members of Canadian society: paras. 56 to 58. In that case, the Court considered and upheld the constitutional validity of section 43 of the Criminal Code of Canada, which permits the use of reasonable force by specified persons to discipline children. The relevance of this factor is profound.

43 Ontario's position gives rise to the question whether human rights legislation ought to be reflective of Charter interpretation and application and vice versa. Invariably, the answer should be yes. The short answer is, both have a common noble philosophy and objective: the recognition and protection of the human dignity and worth of every person. The deviation that follows explains and supports this proposition.

44 Quite broadly, Canada has a psychology of human rights, which have been codified into legislation as early as 1944. Human rights legislation, which pre-dates the patriation of the Constitution Act, 1982 -- including the Charter -- is the expression of core philosophical preferences, in particular those that correlate with Canada's libertarian ideologies; describes the arrangement of the lives of its citizens; and orders public and private institutional schema to achieve a mode of being. Today, in each province or territory, human rights legislation enjoys a supreme position to other provincial statutes: e.g., subsection 47(1) of the Code. Although human rights legislation does not have to "mirror" the Charter's text, Vriend v. Alberta, [1998] 1 S.C.R. 493, critically, such legislation is subject to section 52 of the Constitution Act, 1982.

45 The Canadian Constitutional texts, in particular the Charter, are the outcomes of representative processes and sensible, collaborative deliberations written by drafters, who were informed by the Canadian philosophy of human rights. The Constitution texts are the ordering of the Canadian polity: the definition of the arrangements of the essential powers of the executive, the legislature and the judiciary; and have authority over all governmental institutions.

46 The Constitution Act, 1982, particularly the Charter, is the entrenchment and continuation of the philosophical ideals and the attendant protections of human rights, which have become integral to the fabric of Canada's societal norms. Human rights legislation extends these democratic ideals to the

any evidence to support its submissions. This is not to say that Ontario bears the onus in the subsection 15(1) enquiry. Simply put, Ontario's position is untenable; it cannot be supported by the legislative history it presents to the Tribunal.

73 Another argument Ontario presents is that the Legislature chose to retain age 18 as the age of majority, but amended the Code to address situations where 16 and 17 year olds were no longer under their parents' protection, and thus had to assume financial responsibility for themselves: subsection 4(1). Such children, Ontario argues, were often denied accommodation in the private market and had no recourse under the Code. Further, Ontario argues that easily, one can name numerous private enterprises with "perfectly legitimate reasons for limiting or regulating the goods and services they might offer to children depending on their age". It is noted that in allowing certain minors to enter into contracts for accommodation, the Legislature hastened to protect private enterprise by making said minors legally responsible for contracts of accommodation entered into by them: subsection 4(2).

74 It cannot be said with any conviction that at age 16 or 17, where a child has removed herself or himself from parental responsibility and must seek a livelihood to support herself or himself financially, the risk of harm is minimal or that he or she stands in a more advantaged position because of their youth. As noted above, such a child is highly vulnerable to discrimination and needs the protection of the Code with respect to employment. The Code as it is now does not recognise that children are highly vulnerable to discrimination with respect to employment and that children need protection, and thus, extend such protection to them.

75 As Iacobucci J. states in Law, at para. 104, it is open to the Legislature to use age as a proxy for long-term needs where legislation does not demean the dignity of those it excludes in either its purpose or its effect. For these Complainants, the age restriction does not provide a need or protection; it facilitates the perpetuation of being devalued, which has dire long-term negative effects. Giving children statutory permission to work, for example, and yet failing to provide protection to them on the very characteristic which renders them vulnerable is destructive of dignity and worth from anyone's perspective, including the fictitious reasonable person who seriously considers and values the child's views and developmental needs.

76 Indeed, the determination of whether the impugned legislative provision violates a claimant's dignity must be considered in the full context of the claim: Law, at para. 105. At this juncture, having not heard all the evidence, the Tribunal does not know the full context of the claim. However, by the evidence before the Tribunal to date, these Complainants are markedly disadvantaged because of their tender age and a debilitating disability: an incurable mental illness. They seek to challenge the very legislation, the supreme law of Ontario, which has as its noble purpose, the recognition of the "inherent dignity and worth of every person in Ontario, and to provide them with equal rights and opportunities without discrimination that is contrary to law". The definition of age in subsection 10(1) of the Code in purpose and effect, withholds that protection from children as a class, which not only demeans these Complainants, but also reinforces or perpetuates the stereotype that they are not equally capable and equally deserving of concern, consideration, and respect.

77 These Complainants are doubly vulnerable: they are very young minors with a mental disability. On each ground separately, they are already subject to unfair circumstances or treatment in society. The Tribunal takes judicial notice that as a group, the mentally ill are highly vulnerable, and have experienced pre-existing disadvantages, stereotyping and general social prejudice. For centuries, the mentally ill have been systematically isolated and segregated from main stream society, devalued, ridiculed, and excluded from participation in ordinary social and political processes (R. v. Swain, [1991] 1 S.C.R. 933, at p. 974); and endured non-therapeutic sterilization (Re Eve.) The intersection of the Complainants' age and mental disability make them markedly more vulnerable. Thus, precluding them

from gaining access to the human rights system will no doubt contribute to the perpetuation or promotion of their unfair social characterisation and will have a more severe impact upon them, since they are already vulnerable: Law, at para. 63.

(b) The Corresponding Factor or the Relatedness between the Ground and the Complainants' Characteristics or Circumstances

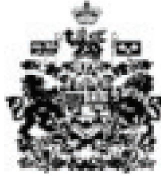
78 In applying this factor, the Tribunal considers whether the impugned legislative provision corresponds to the actual needs and circumstances of children: Canadian Foundation, at para. 56. Where the law properly accommodates the claimant's needs, capacities and circumstances, generally it will not offend subsection 15(1) of the Charter: Law, at para. 70; Canadian Foundation, at para. 57. On the other hand, if the law imposes restrictions or denies benefits because of presumed or unjust attributed characteristics, it denies essential human worth, and is thus discriminatory: Canadian Foundation, at para. 57, citing Gosselin v. Quebec (Attorney General), [2002] 4 S.C.R. 429, at para. 37.

79 The Commission and the Complainants argue that the overall effect of the definition of age in subsection 10(1) of the Code is a blanket denial of children's ability to make complaints because of age discrimination. They argue that there is no correspondence between a blanket denial of the protection against age discrimination and a child's vulnerability and need for protection. Further, they claim that only a limited relationship exists, for example, between the minimum drinking age, compulsory school age, and the age definition and the actual needs and capacities of children. There is no evidence before the Tribunal to support the latter argument.

80 The Complainants argue that the Legislature has failed to keep current with the principles of the Charter and other jurisdictions in enacting legislation to protect the rights of children. They aver that children may experience discrimination because of age in the provision of or access to public services, e.g., education or health as is alleged in these Complaints. As members of the work force, children may be denied, arbitrarily, opportunities to participate in the community or to reach their full potential simply because they are perceived to be too young. Nonetheless, they argue, children are barred from seeking justice in the human rights system because of age under sections 1, 2, 3, 6, and subsection 5(1) of the Code. That is the result of the definition of age under subsection 10(1). Conversely, once a person reaches age 18, such claims can be brought. Ontario contends that the Code's definition of age allows government and the private sector to use age as a proxy to regulate and safeguard children's development.

81 The problem with Ontario's argument is that it presupposes that the Legislature has the capacity to envisage every eventuality when drafting legislation. Nothing is farther from the truth. The very existence of the blunt constitutional and quasi-constitutional instruments which apply to government contradict that notion. The Tribunal agrees with Ontario's major proposition that it is appropriate to have legal differentiation of children at different ages, to do otherwise would deny that there are fundamental differences in the psychological capabilities among children at different ages. The obvious difficulty with Ontario's argument is that it undermines the very major premise on which Ontario asserts its case. The definition of age in the Code refutes that proposition. By the definition of age in the Code, all children, from birth to 17 years and 364 days -- regardless of their "psychological capabilities", whether they are under parental control, financially self-supporting, or gainfully employed -- are denied access to the human rights justice system under sections 1, 2, 3, 6, and subsection 5(1) because of age. In some circuitous way -- under some substratum akin to age-protection, like "family status" -- they may try to achieve protection under the Code where the pith and substance of their complaint is age discrimination.

82 That children are in need of protection in many areas of life is a concept the Commission argues it recognises. It submits that compared to adults, children are less able to make informed decisions in



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
Interveners

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 *Interveners*

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.

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] 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] 3 F.C. 38, at p. 71; *Canada (Attorney General) v. Stevenson*, 2003 FCT 341, 229 F.T.R. 297, at paras. 23-26; *Canada (Attorney General) v. Brooks*, 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.

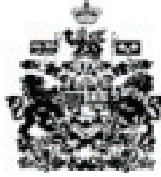
[36] For ease of reference, we reproduce s. 53(2) and (3) as they read at the time the appellant's complaint was filed:

> **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

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, [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



COUR SUPRÊME DU CANADA

RÉFÉRENCE : Canada (Commission canadienne des droits de la personne) *c.* Canada (Procureur général), 2011 CSC 53, [2011] 3 R.C.S. 471

DATE : 20111028
DOSSIER : 33507

ENTRE :

Commission canadienne des droits de la personne et Donna Mowat
Appelantes
et
Procureur général du Canada
Intimé
- et -
Association du Barreau canadien et Conseil des Canadiens avec déficiences
Intervenants

TRADUCTION FRANÇAISE OFFICIELLE

CORAM : La juge en chef McLachlin et les juges LeBel, Deschamps, Abella, Charron, Rothstein et Cromwell

MOTIFS DE JUGEMENT CONJOINTS : (par. 1 à 65)	Les juges LeBel et Cromwell (avec l'accord de la juge en chef McLachlin et des juges Deschamps, Abella, Charron et Rothstein)

Canada (Commission canadienne des droits de la personne) *c.* Canada (Procureur général), 2011 CSC 53, [2011] 3 R.C.S. 471

Commission canadienne des droits de la personne et
Donna Mowat *Appelantes*

c.

Procureur général du Canada *Intimé*

et

Association du Barreau canadien et
Conseil des Canadiens avec déficiences *Intervenants*

Répertorié : Canada (Commission canadienne des droits de la personne) *c.* Canada (Procureur général)

2011 CSC 53

N° du greffe : 33507.

2010 : 13 décembre; 2011 : 28 octobre.

Présents : La juge en chef McLachlin et les juges LeBel, Deschamps, Abella, Charron, Rothstein et Cromwell.

[33] Il nous faut interpréter le texte législatif et discerner l'intention du législateur à partir des termes employés, compte tenu du contexte global et du sens ordinaire et grammatical qui s'harmonise avec l'esprit de la Loi, son objet et l'intention du législateur (E. A. Driedger, *Construction of Statutes* (2e éd. 1983), p. 87, cité dans l'arrêt *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21). Dans le cas d'une loi relative aux droits de la personne, il faut se rappeler qu'elle exprime des valeurs essentielles et vise la réalisation d'objectifs fondamentaux. Il convient donc de l'interpréter libéralement et téléologiquement de manière à reconnaître sans réserve les droits qui y sont énoncés et à leur donner pleinement effet (voir, p. ex., R. Sullivan, *Sullivan on the Construction of Statutes* (5e éd. 2008), p. 497-500). On doit tout de même retenir une interprétation de la loi qui respecte le libellé choisi par le législateur.

[34] La conclusion du Tribunal selon laquelle il possède le pouvoir d'accorder des dépens s'appuie sur deux éléments. Premièrement, il invoque trois décisions de la Cour fédérale pour conclure que le syntagme « dépenses entraînées » employé aux al. 53(2)*c*) et *d*) est suffisamment large pour englober les dépens : *Canada (Procureur général) c. Thwaites*, [1994] 3 C.F. 38, p. 71; *Canada (Procureur général) c. Stevenson*, 2003 CFPI 341 (CanLII), par. 23-26; *Canada (Procureur général) c. Brooks*, 2006 CF 500 (CanLII), par. 10-16. Deuxièmement, le Tribunal fait fond sur ce qu'il tient pour d'importantes considérations de politique juridique liées à l'accès à la justice en matière de droits de la personne. Pour les motifs exposés ci-après, nous estimons que ces facteurs n'étayent pas raisonnablement la conclusion selon laquelle

le Tribunal peut adjuger des dépens. Il appert d'une analyse exhaustive de nature contextuelle et téléologique qu'aucune interprétation raisonnable des dispositions n'appuie cette conclusion.

(1) Le texte

[35] En ce qui concerne le texte des dispositions en cause, considérés isolément et indépendamment de leur contexte, les mots « des dépenses entraînées par l'acte » sont suffisamment larges pour englober les dépens. Tel est le point de vue du Tribunal ainsi que celui de la Cour fédérale dans les décisions qu'il invoque à l'appui. Or, lorsque ces mots sont dûment considérés dans le contexte de la loi, il devient manifeste qu'on ne peut pas raisonnablement les interpréter de manière à créer une catégorie distincte d'indemnité susceptible de viser tout type de débours ayant un lien de causalité avec l'acte discriminatoire. La prétention contraire fait selon nous abstraction de la structure des dispositions dans lesquelles figurent les mots « des dépenses entraînées par l'acte ».

[36] Pour en faciliter la consultation, nous reproduisons les par. 53(2) et (3) dans leur version en vigueur au moment où l'appelante a déposé sa plainte :

> **53.** . . .
>
> (2) À l'issue de son enquête, le tribunal qui juge la plainte fondée peut [. . .] ordonner, selon les circonstances, à la personne trouvée coupable d'un acte discriminatoire :

l'ordonnance qui [TRADUCTION] « convient » à ce chapitre, mais il ne peut condamner la Commission aux dépens (*Saskatchewan Human Rights Code Regulations*, R.R.S., ch. S-24.1, règl. 1, par. 21(1)). En Ontario, la partie en cause doit avoir une conduite « déraisonnable, frivole ou vexatoire » ou « agi[r] de mauvaise foi », et le Tribunal peut établir ses propres règles pour l'adjudication des dépens (*Loi sur l'exercice des compétences légales*, L.R.O. 1990, ch. S.22, par. 17.1(2)). Dans tous ces ressorts, le pouvoir d'adjudication des dépens *s'ajoute au* pouvoir général d'indemniser une partie des dépenses engagées. Le libellé des dispositions prévoyant le remboursement des dépenses est très semblable à celui du par. 53(2) de la *LCDP*.

(3) L'objet

[61] L'appelante demande à la Cour d'interpréter de manière large et téléologique les dispositions qui autorisent le Tribunal à indemniser de ses dépenses la victime de l'acte discriminatoire, pour garantir le caractère intégral de l'indemnisation. Cet argument reprend le deuxième motif invoqué par le Tribunal pour étayer sa conclusion qu'il peut adjuger des dépens.

[62] Certes, la *LCDP* demeure considérée comme une loi quasi constitutionnelle qui appelle une interprétation large, libérale et téléologique en rapport avec cette nature particulière. Toutefois, on ne saurait substituer à l'analyse textuelle et contextuelle une interprétation libérale et téléologique dans le seul but de donner effet à une autre décision de principe que celle prise par le législateur (*Bell*

Canada c. Bell Aliant Communications régionales, 2009 CSC 40, [2009] 2 R.C.S. 764, par. 49-50, la juge Abella; *Gould*, par. 50, le juge La Forest, motifs concordants).

[63] Le présent litige paraît découler de la décision de la Commission, datant de 2003, de restreindre le nombre de cas dans lesquels elle épaule le plaignant (m.i., par. 47-48). Ce changement d'orientation a pu donner suite au rapport du Comité de révision de la Loi canadienne sur les droits de la personne présidé par l'honorable Gérard La Forest. En effet, ce rapport recommandait que la Commission ne comparaisse que dans les dossiers soulevant des questions sérieuses de discrimination systémique ou des points de droit nouveaux (*La promotion de l'égalité : Une nouvelle vision* (2000)). Il reconnaissait en outre que la *LCDP* n'accordait pas le pouvoir d'adjuger des dépens et il recommandait la création d'une clinique juridique appelée à offrir son aide aux éventuels plaignants (p. 77-79 et 81-85). Contrairement à la première recommandation, cette dernière n'a pas été suivie, de sorte que le rôle de la Commission dans la présentation des plaintes au Tribunal s'est restreint bien qu'aucune autre mesure n'ait été prise pour aider les plaignants. Il est toutefois révélateur que ces changements soient intervenus sans modification de la loi au sujet du pouvoir d'adjuger des dépens.

[64] À notre avis, il appert nettement du texte de la loi, de son contexte et de son objet que le Tribunal ne possède pas le pouvoir d'adjuger des dépens, et les dispositions applicables ne se prêtent à aucune autre interprétation raisonnable. Aux prises avec une question difficile d'interprétation législative et une jurisprudence

Action Travail des Femmes *Appellant*

v.

Canadian National Railway Company *Respondent*

and

Canadian Human Rights Commission *Mis en cause*

and

Attorney General of Canada *Intervener*

and between

Canadian Human Rights Commission *Appellant*

v.

Canadian National Railway Company *Respondent*

and

Action Travail des Femmes, Denis Lemieux, Nicole Duval-Hesler, Joan Wallace and the Attorney General of Canada *Mis en cause*

INDEXED AS: CANADIAN NATIONAL RAILWAY CO. *v.* CANADA (CANADIAN HUMAN RIGHTS COMMISSION)

File Nos: 19499, 19500.

1986: November 5, 6; 1987: June 25.

Present: Dickson C.J. and Beetz, Estey, McIntyre, Chouinard *, Lamer, Wilson, Le Dain and La Forest JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Civil rights — Discrimination — Employment — Systemic discrimination against an identifiable group — Human Rights Tribunal imposing employment equity program on employer — Tribunal's order setting employment goal and fixing hiring quota — Whether the Tribunal had jurisdiction to make such order — Canadian Human Rights Act, S.C. 1976-77, c. 33, ss. 2, 15(1), 41(2)(a).

* Chouinard J. took no part in the judgment.

Action Travail des Femmes *Appelante*

c.

Compagnie des chemins de fer nationaux du Canada *Intimée*

et

Commission canadienne des droits de la personne *Mise en cause*

et

Le procureur général du Canada *Intervenant*

et entre

Commission canadienne des droits de la personne *Appelante*

c.

Compagnie des chemins de fer nationaux du Canada *Intimée*

et

Action Travail des Femmes, Denis Lemieux, Nicole Duval-Hesler, Joan Wallace et le procureur général du Canada *Mis en cause*

RÉPERTORIÉ: COMPAGNIE DES CHEMINS DE FER NATIONAUX DU CANADA *c.* CANADA (COMMISSION CANADIENNE DES DROITS DE LA PERSONNE)

N[os] du greffe: 19499, 19500.

1986: 5, 6 novembre; 1987: 25 juin.

Présents: Le juge en chef Dickson et les juges Beetz, Estey, McIntyre, Chouinard *, Lamer, Wilson, Le Dain et La Forest.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Libertés publiques — Discrimination — Emploi — Discrimination systémique contre un groupe identifiable — Imposition par un tribunal des droits de la personne d'un programme d'équité en matière d'emploi à un employeur — Ordonnance du tribunal fixant un objectif d'emploi et des contingentements d'embauche — Le tribunal est-il compétent pour rendre une telle ordonnance? — Loi canadienne sur les droits de la personne, S.C. 1976-77, chap. 33, art. 2, 15(1), 41(2)a).

* Le juge Chouinard n'a pas pris part au jugement.

Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact. Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal *Interpretation Act* which asserts that statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained. See s. 11 of the *Interpretation Act*, R.S.C. 1970, c. I-23, as amended. As Elmer A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87 has written:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The purposes of the Act would appear to be patently obvious, in light of the powerful language of s. 2. In order to promote the goal of equal opportunity for each individual to achieve "the life that he or she is able and wishes to have", the Act seeks to prevent all "discriminatory practices" based, *inter alia*, on sex. It is the practice itself which is sought to be precluded. The purpose of the Act is not to punish wrongdoing but to prevent discrimination.

The last point is an important one and it deserves to be underscored. There is no indication that the purpose of the *Canadian Human Rights Act* is to assign or to punish moral blameworthiness. No doubt, some people who discriminate do so out of wilful ignorance or animus. Many of the first anti-discrimination statutes focussed solely upon the behaviour of such individuals, requiring proof of "intent" to discriminate before imposing any sanctions. See Walter S. Tarnopolsky, *Discrimination and the Law in Canada* (1982), at pp.

La législation sur les droits de la personne vise notamment à favoriser l'essor des droits individuels d'importance vitale, lesquels sont susceptibles d'être mis à exécution, en dernière analyse, devant une cour de justice. Je reconnais qu'en interprétant la Loi, les termes qu'elle utilise doivent recevoir leur sens ordinaire, mais il est tout aussi important de reconnaître et de donner effet pleinement aux droits qui y sont énoncés. On ne devrait pas chercher par toutes sortes de façons à les minimiser ou à diminuer leur effet. Bien que cela puisse sembler banal, il peut être sage de se rappeler ce guide qu'offre la *Loi d'interprétation* fédérale lorsqu'elle précise que les textes de loi sont censés être réparateurs et doivent ainsi s'interpréter de la façon juste, large et libérale la plus propre à assurer la réalisation de leurs objets. Voir l'article 11 de la *Loi d'interprétation*, S.R.C. 1970, chap. I-23 et ses modifications. Comme Elmer A. Driedger l'a écrit à la p. 87 de *Construction of Statutes* (2nd ed. 1983):

> [TRADUCTION] De nos jours, un seul principe ou méthode prévaut pour l'interprétation d'une loi: les mots doivent être interprétés selon le contexte, dans leur acception logique courante en conformité avec l'esprit et l'objet de la loi et l'intention du législateur.

Les objets de la Loi sembleraient tout à fait évidents, compte tenu des termes puissants de l'art. 2. Pour que tous puissent avoir des chances égales d'«épanouissement», la Loi cherche à interdire «les considérations» fondées notamment sur le sexe. C'est l'acte discriminatoire lui-même que l'on veut prévenir. La Loi n'a pas pour objet de punir la faute, mais bien de prévenir la discrimination.

Ce dernier point est important et mérite d'être souligné. Rien n'indique que l'objet de la *Loi canadienne sur les droits de la personne* soit d'attribuer une responsabilité morale ou de la punir. Il ne fait pas de doute que certaines personnes qui établissent des distinctions illicites le font délibérément ou par ignorance volontaire. Parmi les premières lois antidiscriminatoires, beaucoup s'intéressaient uniquement au comportement des personnes de ce genre et exigeaient la preuve de l'«intention» d'établir une distinction illicite pour

109-122. There were two major difficulties with this approach. One semantic problem was a continuing confusion of the notions of "intent" and "malice". The word "intent" was deprived of its meaning in common parlance and was used as a surrogate for "malice". "Intent" was not the simple willing of a consequence, but rather the desiring of harm.

This imputed meaning was coherent in the context of a statute designed to punish moral blameworthiness. However, as the second problem with a fault-based approach was revealed—that moral blame was too limited a concept to deal effectively with the problem of discrimination—an attempt was made by legislatures and courts to cleanse the word "intent" of its moral component. The emphasis upon formal causality was restored and the intent required to prove discrimination became the intent to cause a discriminatory result. The judgment of the Federal Court of Appeal in *Canadian National Railway Co. v. Canadian Human Rights Commission and Bhinder*, [1983] 2 F.C. 531, is an example of this approach (aff'd on different grounds in *Bhinder v. Canadian National Railway Co.*, [1985] 2 S.C.R. 561). The difficulty with this development was that "intent" had become so encrusted with the moral overtones of "malice" that it was often difficult to separate the two concepts. Moreover, the imputation of a requirement of "intent", even if unrelated to moral fault, failed to respond adequately to the many instances where the effect of policies and practices is discriminatory even if that effect is unintended and unforeseen. The stated purpose of human rights legislation (in the case of the Canadian Act, to prevent "discriminatory practices") was not fully implemented.

The first comprehensive judicial statement of the correct attitude towards the interpretation of human rights legislation can be found in *Insurance Corporation of British Columbia v. Heerspink*,

que puissent être imposées des sanctions. Voir Walter S. Tarnopolsky, *Discrimination and the Law in Canada* (1982), aux pp. 109 à 122. Cette conception soulevait deux difficultés majeures. Il y avait d'abord un problème de sémantique: la confusion permanente entre la notion d'«intention» et celle d'«intention de nuire». Le terme «intention» perdait son sens ordinaire pour devenir synonyme d'«intention de nuire». L'«intention» ne consistait plus simplement à vouloir une conséquence, c'était vouloir nuire.

Le sens attribué était logique dans le contexte d'une loi conçue pour punir la responsabilité morale. Toutefois, avec la révélation du second problème que suscitait une conception basée sur la faute, savoir que le blâme moral était un concept trop limité pour résoudre vraiment la question de la discrimination, les législateurs et les tribunaux ont tenté de dépouiller le terme «intention» de sa connotation morale. L'insistance sur la causalité formelle a été rétablie et l'intention requise pour prouver la discrimination est devenue l'intention d'arriver à un résultat discriminatoire. L'arrêt de la Cour d'appel fédérale *Compagnie des chemins de fer nationaux du Canada c. Commission canadienne des droits de la personne et Bhinder*, [1983] 2 C.F. 531, est un exemple de cette conception (confirmé pour des motifs différents dans l'arrêt *Bhinder c. Compagnie des chemins de fer nationaux du Canada*, [1985] 2 R.C.S. 561). La difficulté que posait ce changement, c'est que l'«intention» s'entourait tellement de la connotation morale d'«intention de nuire» qu'il devenait souvent difficile de séparer les deux concepts. De plus, l'imputation d'une exigence d'«intention», même non liée à la faute morale, ne répondrait pas adéquatement aux nombreux cas où des politiques et pratiques ont un effet discriminatoire, même si cet effet n'a été ni voulu ni prévu. L'objectif arrêté de la législation sur les droits de la personne (qui, dans le cas de la Loi canadienne, est d'empêcher les «actes discriminatoires») n'était pas entièrement réalisé.

Le premier énoncé judiciaire complet de l'attitude à adopter au sujet de l'interprétation de la législation sur les droits de la personne se retrouve dans l'arrêt *Insurance Corporation of British*

[1982] 2 S.C.R. 145, at p. 158, where Lamer J. emphasized that a human rights code "is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law". This principle of interpretation was further articulated by McIntyre J., for a unanimous Court, in *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150, at p. 156:

Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement.

The emphasis upon the "special nature" of human rights enactments was a strong indication of the Court's general attitude to the interpretation of such legislation.

In *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, the Court set out explicitly the governing principles in the interpretation of human rights statutes. Again writing for a unanimous Court, McIntyre J. held, at pp. 546-47:

It is not, in my view, a sound approach to say that according to established rules of construction no broader meaning can be given to the Code than the narrowest interpretation of the words employed. The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment . . ., and give it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary—and it is for the courts to seek out its purpose and give it effect. The Code aims at the removal of discrimination.

There can be no doubt that Canadian human rights legislation is now typically drafted to avoid reference to intention. As noted previously, the

Columbia c. Heerspink, [1982] 2 R.C.S. 145, à la p. 158, où le juge Lamer souligne qu'un code des droits de la personne ne doit pas être considéré «comme n'importe quelle autre loi d'application a générale, il faut le reconnaître pour ce qu'il est, c'est-à-dire une loi fondamentale.» Ce principe d'interprétation a été précisé davantage par le juge McIntyre, au nom d'une Cour unanime, dans l'arrêt *Winnipeg School Division No. 1 c. Craton*, b [1985] 2 R.C.S. 150, à la p. 156:

Une loi sur les droits de la personne est de nature spéciale et énonce une politique générale applicable à des questions d'intérêt général. Elle n'est pas de nature constitutionnelle, en ce sens qu'elle ne peut pas être c modifiée, révisée ou abrogée par la législature. Elle est cependant d'une nature telle que seule une déclaration législative claire peut permettre de la modifier, de la réviser ou de l'abroger, ou encore de créer des exceptions à ses dispositions.

d L'accent mis sur la «nature spéciale» des textes législatifs portant sur les droits de la personne constituait une forte indication de l'attitude générale que prendrait la Cour au sujet de l'interprétae tion de tels textes.

Dans l'arrêt *Commission ontarienne des droits de la personne c. Simpsons-Sears Ltd.*, [1985] 2 R.C.S. 536, la Cour énonce explicitement les prinf cipes applicables à l'interprétation des lois sur les droits de la personne. S'exprimant encore une fois au nom de la Cour à l'unanimité, le juge McIntyre conclut, aux pp. 546 et 547:

Ce n'est pas, à mon avis, une bonne solution que d'affirg mer que, selon les règles d'interprétation bien établies, on ne peut prêter au Code un sens plus large que le sens le plus étroit que peuvent avoir les termes qui y sont employés. Les règles d'interprétation acceptées sont suffisamment souples pour permettre à la Cour de reconh naître, en interprétant un code des droits de la personne, la nature et l'objet spéciaux de ce texte législatif [. . .] et de lui donner une interprétation qui permettra de promouvoir ses fins générales. Une loi de ce genre est d'une nature spéciale. Elle n'est pas vraiment de nature i constitutionnelle, mais elle est certainement d'une nature qui sort de l'ordinaire. Il appartient aux tribunaux d'en rechercher l'objet et de le mettre en application. Le Code vise la suppression de la discrimination.

j Il ne peut y avoir de doute que la législation canadienne sur les droits de la personne est normalement rédigée aujourd'hui de façon à éviter toute

Falkiner et al. v. Director, Income Maintenance Branch, Ministry of Community and Social Services et al.; Canadian Civil Liberties Association et al., Intervenors

Thomas v. Director of Income and Maintenance Branch of the Ministry of Community and Social Services

[Indexed as: Falkiner v. Ontario (Ministry of Community and Social Services)]

Court of Appeal for Ontario, Osborne A.C.J.O., Laskin and Feldman JJ.A. May 13, 2002*

Charter of Rights and Freedoms — Equality rights — Discrimination — Enumerated and analogous grounds — Receipt of social assistance constituting analogous ground of discrimination under s. 15(1) of Charter — Canadian Charter of Rights and Freedoms, s. 15(1).

Charter of Rights and Freedoms — Equality rights — Social assistance — Definition of spouse in Regulation under Family Benefits Act capturing relationships that are not spousal — Definition discriminating on grounds of sex, marital status and receipt of social assistance — Violation of s. 15 of Charter not justified under s. 1 of Charter — Canadian Charter of Rights and Freedoms, ss. 1, 15(1) — Family Benefits Act, R.S.O. 1990, c. F.2 — R.R.O. 1990, Reg. 366, s. 1(1)(d).

Social assistance — Interpretation — "Spouse" — Disabled recipient of benefits under Family Benefits Act living with friend of opposite sex — Social Assistance Review Board erring in finding that relationship between recipient and his friend amounted to cohabitation for purposes of definition of "spouse" in Regulation under Family Benefits Act — Board erring in focusing on amount of time recipient and friend spent together and in failing to consider whether relationship was truly marriage-like — Board also erring in failing to consider whether recipient's disability explained why he and friend spent so much time together — Family Benefits Act, R.S.O. 1990, c. F.2 — R.R.O. 1990, Reg. 366, s. 1(1)(d).

Between 1987 and 1995, the definition of "spouse" in the Regulations under the *Family Benefits Act* mirrored the definition of "spouse" under the *Family Law Act*, R.S.O. 1990, c. F.3. Persons were deemed to be spouses if they had lived together continuously for at least three years. In 1995, the definition of spouse in s. 1(1)(d) of Regulation 366 under the *Family Benefits Act* was amended. The amendment defined spouse to include persons of the opposite sex living in the same place who had "a mutual agreement or arrangement regarding their financial affairs" and a relationship that amounted to cohabitation. Under this amended definition, once persons of the opposite sex began living together, they were presumed to be spouses unless they provided evidence to the contrary. Each of the respondents in the F appeal was an unmarried woman with a dependent child or children and was in a "try on" relationship with a man with whom she had lived for less than a year. Each respondent had received social assistance until the 1995 definition of "spouse" came

* Osborne A.C.J.O. did not take part in this decision.

[70] From the respondents' perspective, the comparison urged by the government does not accurately reflect the differential treatment imposed by clause (iii) of s. 1[(1)](d) and complained of in this case. The respondents contend that they have been subjected to differential treatment on the basis that they are single mothers on social assistance. That is the group with which they identify themselves. Put another way, the respondents share three relevant characteristics: they are women, they are single mothers solely responsible for the support of their children and they are social assistance recipients. They argue that the differential treatment imposed on them by the definition of spouse flows from these three characteristics.

[71] Because the respondents assert that they have been discriminated against on the basis of more than one personal characteristic, no single comparator group will capture all of the differential treatment complained of in this case. Instead, the respondents urge us to undertake a set of comparisons, each one bringing into focus a separate form of differential treatment. The respondents claim three forms of differential treatment and thus use three comparator groups. First, they compare themselves with persons who are not on social assistance. Second, they contrast the effect of the definition on women on social assistance and its effect on male social assistance recipients. Finally, they offer a variation on this latter comparison by contrasting the effect of the definition on single mothers on social assistance and its effect on other social assistance recipients.

[72] Because the respondents' equality claim alleges differential treatment on the basis of an interlocking set of personal characteristics, I think their general approach is appropriate. Multiple comparator groups are needed to bring into focus the multiple forms of differential treatment alleged. Even accepting this general approach, however, the court is still entitled to refine the complainants' chosen comparisons to more accurately reflect the subject-matter of the complaint. See *Law* at p. 532 S.C.R.; *Granovsky*, *supra*, at p. 730 S.C.R. As will become apparent, I think some refinement of the comparator groups is warranted in this case. I now deal with the alleged differential treatment.

[73] First, the respondents allege that they have been treated unequally on the basis of the personal characteristic of being a social assistance recipient. As I stated above, the respondents urge a comparison between themselves and persons who are not on social assistance. In my view, the respondents' claim of differential treatment on the basis of being a social assistance recipient can best be assessed by comparing their treatment to the treatment of single persons not on social assistance. Framing the

Canadian Human
Rights Tribunal

Tribunal canadien
des droits de la personne

BETWEEN:

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA

- and -

ASSEMBLY OF FIRST NATIONS

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

ATTORNEY GENERAL OF CANADA
(REPRESENTING THE MINISTER OF THE DEPARTMENT OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT CANADA)

Respondent

- and -

CHIEFS OF ONTARIO

- and -

AMNESTY INTERNATIONAL

Interested Parties

RULING

Shirish P. Chotalia, Q.C.,
Chairperson

2011 CHRT 4
2011/03/14

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APPENDIX "A"

I. DECISION SUMMARY

[1] Indian and Northern Affairs Canada (INAC, the Crown, the respondent) provides funding to First Nations service providers who provide child welfare services (child welfare) to First Nations children residing on reserves. The First Nations Child and Family Caring Society of Canada (the Society or complainant) and the Assembly of First Nations (AFN or complainant) assert that INAC does more than fund. They say INAC provides child welfare directly or indirectly to these children. They say the funding is inadequate when compared to the funding that provinces provide to other children residing off reserve. They say this funding differentiates adversely against these First Nations children contrary to section 5(b) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (*CHRA or Act*).

[2] The Crown brings a motion for a ruling that questions arising out of the complaint are not within the jurisdiction of the Canadian Human Rights Tribunal (the Tribunal). It argues principally that funding / transfer payments do not constitute the provision of "services" within the meaning of the *CHRA*, and that INAC's funding cannot as a matter of law be compared to provincial funding. It says that these two questions may be dealt with now and without a full hearing wherein witnesses would testify and more evidence would be tendered.

[3] The *CHRA* does not require that the Tribunal hold a hearing with witnesses in every case. The onus is on the Crown in this motion to demonstrate that this is the case here. The Tribunal must be satisfied that the parties have had a full and ample opportunity to be heard and to present their evidence. The Tribunal will only entertain a motion to dismiss a complaint wherein more evidence could not conceivably be of any assistance: where the Crown has shown that the facts are clear, complete and uncontroverted, or where the Crown has shown that the issues involve pure questions of law. If the Crown meets this onus, the Tribunal may decide the substantive questions in a motion forum.

[4] There are two principle questions that the Crown wishes me to answer in this motion:

i. Is INAC's funding program a "service" within the meaning of s. 5(b) of the *Act*?

ii. Can two different service providers be compared to each other to find adverse differentiation, or for that matter, is a comparison even required?

[5] On the services question, the Crown has not met its onus of demonstrating that the facts are clear, complete and uncontroverted. I cannot decide the question. On the comparator question, the Crown has met its onus. It has satisfied me that the "comparator" question is a pure question of law. I can decide this question on the basis of the materials filed in this motion. I find that the *CHRA* does require a comparison to be made, but not the one proposed by the complainants. Two different service providers cannot be compared to each other. Accordingly, even if I were to find that INAC is a service provider as asserted by the complainants, the *CHRA* does not allow INAC as a service provider to be compared to the provinces as service providers. The complaint could not succeed, even if a further hearing were held on the services question. Accordingly the complaint must be dismissed. A summary of my reasons follow.

A. Services

[6] The Crown's motion has resulted in the following evidence being placed before me. In this case, the Crown, and the complainants, and two interveners, Chiefs of Ontario (The Ont. Chiefs) and Amnesty International (Amnesty), have filed the documents and the submissions as outlined in Appendix "A". I have vetted the materials filed relevant to this motion, more than 10,000 pages. Ironically, this volume of materials appears to be grossly insufficient to address the scope and breadth of this complaint.

[7] INAC's funding is complex. INAC's funding supports 108 First Nations child welfare service providers to deliver child welfare to approximately 160,000 children and youth in approximately 447 of 663 First Nations. There may be at least 50 to 60 funding agreements and

memoranda relating to Directive 20-1 alone that are involved (not yet filed). There are provincial and territorial differences in funding schemes and differences in service models: e.g. self-managed reserves versus other First Nations reserves. What are the terms and conditions of these various funding agreements? What are the terms and conditions of each of the various memoranda of understanding? Does INAC control the type of child welfare delivered through any or each of the funding terms and conditions? Do these terms and conditions define the content of child welfare? As well, do INAC's auditing measures go beyond simply ensuring accountability of funds? Do INAC's auditing measures in fact constitute an action by INAC demonstrating that INAC is delivering child welfare? Again, even if the transfer payments are on the whole only transfer payments, is there a discrete subset of the program administration wherein INAC can be said to control the content of child welfare? The Crown has not met its onus. The material facts are not clear, complete and uncontroverted. This is due in part to the scope and breadth of this complaint that exceeds any complaint filed with the Tribunal to date. In this case, the Canadian Human Rights Commission (the Commission) did not conduct an investigation of the relevant facts before referring the complaint to the Tribunal for a hearing. Rather, it wrote that the "main arguments being adduced are legal and not factual in nature and are not settled in law".

[8] Irrespective of the Commission's referral decision, it is incumbent on the Tribunal to help the parties to diligently narrow the broad and complex factual issues, while identifying and determining any clear legal issues that arise in this complaint. As one means of achieving this objective, I offered the parties a Tribunal Member to work with them in process mediation to narrow the factual and legal issues. The parties did not reach agreement on material facts. The parties chose not to file with the Tribunal to date a consolidated Agreed Statement of Facts. Given the expanse of the complaint, and a lack of reasonable definition to its parameters, I cannot decide the services issue on the evidence filed.

B. Comparator

[9] However, on the evidence and submissions filed, I can decide the comparator issue. I can determine whether the allegation of *adverse differentiation* is legally deficient. Section 5(b) of the *CHRA* states that a service provider may not *adversely differentiate* against an individual in

providing services customarily available to the public. Whether these words in the *CHRA* require a comparison, and if so, the manner of comparison, are pure questions of law. The Crown has met its onus of demonstrating that this is a pure question of law that may be decided now. The parties have had full and ample opportunity to be heard on this question of law. There is no further evidence that the complainants can file that will further their position.

[10] I decide as follows: In order to find that *adverse differentiation* exists, one has to compare the experience of the alleged victims with that of someone else receiving those <u>same</u> services from the <u>same</u> provider. How else can one experience *adverse differentiation*? These words of the *CHRA* must be accorded their clear meaning as intended by Parliament. These words are unique to the *CHRA*. These words have been decided by the Federal Court of Appeal as requiring a comparative analysis in the case of *Singh v. Canada (Department of External Affairs)*, [1989] 1 F.C. 430 (F.C.A.) [*Singh*]. Further, the complaint itself seeks a comparison. The heart of the complaint involves comparing INAC's funding to provincial funding.

[11] Regarding the issue of choice of comparator, the parties agree that INAC does not fund or regulate child welfare for off-reserve children. The provision of child welfare to off reserve children is entirely a provincial matter falling within section 92 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. Can federal government funding be compared to provincial government funding to find adverse differentiation as set out in section 5(b) of the *Act*? The answer is no.

[12] The *Act* does not allow a comparison to be made between <u>two different</u> service providers with <u>two different</u> service recipients. Federal funding goes to on-reserve First Nations children for child welfare. Provincial funding goes to all children who live off-reserve. These constitute separate and distinct service providers with separate service recipients. The two cannot be compared.

[13] Let us look at how the *Act* works. As an example, the *Act* allows an Aboriginal person who receives lesser service from a government to file a complaint if a non-Aboriginal person receives better service from the <u>same government</u>. However, the *Act* does not allow an Aboriginal

person, or any other person, to claim differential treatment if another person receives better service from a different government.

[14] Were it otherwise, the far-reaching impact of the proposed reasoning would also extend to employment. As another example, the *Act* allows an Aboriginal employee who receives different treatment from an employer to file a complaint if a non-Aboriginal employee receives better treatment from the same employer. However, the *Act* does not allow an Aboriginal employee, or any other employee, to claim differential treatment if another employee receives better treatment from a different employer.

[15] In addition, such reasoning would extend to allow a member of one First Nation to argue that her First Nation adversely differentiated against her by comparing the services she received with those offered by another First Nation to another First Nation member.

[16] There would be no limit to the comparisons that could be made. Further, in this case, the comparison sought to be made is between constitutionally independent jurisdictions: the federal government and the provincial / territorial governments.

[17] On this issue, the parties have had a full and ample opportunity to file affidavits, cross-examine on affidavits, appear before the Tribunal with their lawyers, and submit arguments. Further, the parties were granted an opportunity to file submissions until August 23, 2010 and December 23, 2010 (see Appendix "A") respectively, with respect to three new decisions. These were *New Brunswick Human Rights Commission v. Province of New Brunswick (Department of Social Development)*, 2010 NBCA 40 [*NBHRC v. PNB*] released on June 3, 2010, and two decisions of the Supreme Court of Canada being *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45 [*NIL/TU,O*], and C*ommunications, Energy and Paperworkers Union of Canada v. Native Child and Family Services of Toronto*, 2010 SCC 46 [*Native Child and Family Services of Toronto*] rendered together on November 4, 2010. They were also granted the opportunity to file submissions with respect to the *United Nations Declaration on the Rights of Indigenous Peoples* GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49 (2008) 15 [*UNDRIP*].

No further evidence in a further hearing with witnesses can make this legal issue any clearer. Indeed, a further hearing may result in the devotion of time and resources to a protracted and lengthy fact finding exercise that is irrelevant to the legal flaw identified. Any further hearing would be moot. The complaint cannot succeed on this legal point.

Cultural Considerations – Canada's First Nations People – Oral Tradition

[18] The hearing of this motion opened with an Algonquin prayer recited by Elder Bertha Commanda. In deciding this motion, I am acutely aware of the need to be cognizant and respectful of the cultural concerns of Canada's First Nations people. The AFN, the Society and the Commission make vigorous submissions to move towards both a hearing and a determination that the *CHRA* allows a finding of adverse differential treatment by comparing the actions of one race based service provider or funder, in this case, INAC, to that of the provinces. I acknowledge the importance of the oral tradition to the First Nations people. However, had this complaint proceeded to a hearing with witnesses, which would be fruitless, the hearing would have been complex and lengthy, potentially stretching into years of protracted litigation. Such a hearing would have been mired with the requisite burden of emotional and legal costs for all parties and the witnesses. In fact, the Tribunal has been criticized by the Federal Court of Appeal for mismanaging a pay equity hearing that spanned more than ten years before the Tribunal, and is still in litigation (*Public Service Alliance of Canada v Canada Post Corporation*, 2010 FCA 56 at para. 145 [*Canada Post*] (leave to appeal to SCC granted Docket No. 33668, 33669, 33670). Proceeding to a *viva voce* hearing on a complaint that cannot succeed on a legal basis does not serve the parties or the justice system. This is not access to justice. This is contrary to access to justice.

[19] It is important to understand that the name of the *CHRA* is misleading. Even though its name imports a notion that the *CHRA* and the Tribunal may cure a range of human rights violations, the Tribunal's mandate is restricted to remedying discrimination on the legislated grounds in legislated areas such as employment, services, and residential accommodation, to name a few. Thus, Canada's First Nations people and their fellow Canadians are restricted from obtaining broader human rights remedies that do not involve a discriminatory practice within the

meaning of the *Act*. Unless the subject matter of the complaint falls within a section of the anti-discrimination statute, it cannot succeed.

[20] Finally, I am mindful of the constitutional quagmire that Canada's First Nations people find themselves in. However, the legal tools for contesting allegedly inequitable funding do not lie in s. 5(b) of the *CHRA* as it is currently framed. The Tribunal is not a court seized with a constitutional challenge. It does not have the ability to redefine the meaning of adverse differentiation to suit the circumstances. The Tribunal must reside with integrity within the four corners of the statute that creates it. The claims may well be cognizable through the initialization of other legal processes, or in political action and / or ongoing federal and provincial consultations, or may ultimately even require statutory amendments. The laudable arguments of the complainant group may be well received by those appropriately charged with hearing them.

C. What Does "Differentiate Adversely" Mean in the Context of Section 5(b) of the *Act*? How is s. 5(b) of the *Act* to be Interpreted?

[108] Section 5 of the *Act* states:

Denial of good, service, facility or accommodation	Refus de biens, de services, d'installations ou d'hébergement
5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public	5. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public :
(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or	a) d'en priver un individu;
(b) to differentiate adversely in relation to any individual,	b) de le défavoriser à l'occasion de leur fourniture.
on a prohibited ground of discrimination.	
1976-77, c. 33, s. 5.	1976-77, ch. 33, art. 5.

[109] The Supreme Court of Canada has a specific procedure to be followed when interpreting bilingual statutes (*R. v. Daoust*, 2004 SCC 6 at para. 27 [*Daoust*]). The first step is to determine whether there is discordance between the English and French versions of s. 5(b) of the *Act* and, if so, whether a shared meaning can be found (see *R. v. S.A.C.*, 2008 SCC 47 at para. 15 [*S.A.C.*]; *Daoust*, *supra*, at para. 27). If s. 5(b) of the *CHRA* may have different meanings, the Tribunal has to determine what kind of discrepancy is involved. In *The Interpretation of Legislation in Canada*, 3rd ed. (Scarborough, Ont.: Carswell, 2000), Côté suggests that there are three possibilities. First, the English and French versions may be irreconcilable. In such cases, it will be impossible to find a shared meaning and the ordinary rules of interpretation will accordingly apply (*S.A.C.*, *supra*, at para. 15; *Daoust*, *supra*, at para. 27; Côté, *supra*, at p. 327). Second, one version may be ambiguous while the other is plain and unequivocal. The shared meaning will then be that of the version that is plain and unambiguous (*S.A.C.*, *supra*, at para. 15; *Daoust*,

supra, at para. 28; Côté, *supra*, at p. 327). Third, one version may have a broader meaning than the other. Where one of the two versions is broader than the other, the common meaning would favour the more restricted or limited meaning (*S.A.C., supra*, at para. 15; *Daoust*, *supra*, at para. 29; Côté, *supra*, at p. 327). At the second step, it must be determined whether the shared meaning is consistent with Parliament's intent (*S.A.C., supra,* at para. 16; *Daoust, supra,* at para. 30; Côté, *supra,* at p. 328).

[110] In *Vaid*, *supra*, the Supreme Court of Canada affirmed that proper statutory interpretation requires that "...the words of an Act […] be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (at para. 80).

[111] Such interpretative principles apply with special force in the application of human rights laws given the quasi-constitutional status of the *Act* (*Vaid*, *supra*, at paras. 80-81). While it is accepted that human rights statutes are to be interpreted in a "large and liberal" fashion, it is also well established that the words of the statute must be capable of bearing the interpretation sought (*Gould*, *supra*, at para. 13). This approach is reinforced by s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that "[e]very enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects". In *Berg*, *supra*, former Chief Justice Lamer had this to say about the "broad, liberal and purposive approach" in applying it to the British Columbia human rights statute:

> This interpretive approach does not give a board or court license to ignore the words of the *Act* in order to prevent discrimination wherever it is found. While this may be a laudable goal, the legislature has stated, through the limiting words in s. 3, that some relationships will not be subject to scrutiny under human rights legislation. It is the duty of boards and courts to give s. 3 a liberal and purposive construction, **without reading the limiting words out of the *Act* or otherwise circumventing the intention of the legislature.** [emphasis added]
>
> (at p. 371)

[112] Within this analysis the intention of Parliament must be respected. The *CHRA* is a statutory creature with its genesis within the legislative control of the Parliament. Any exemption from its provisions must be clearly stated (*Vaid*, *supra*, at para. 81). International covenants, such as the *UNDRIP*, may inform the contextual approach to statutory interpretation (see *Baker*, *supra*). However, "effect cannot be given to unincorporated international norms that are inconsistent with the clear provisions of an Act of Parliament" (*Rahaman v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 89 at para. 36). Thus, the starting point of any analysis is to carefully scrutinize the specific provision at issue.

D. Analysis

(i) Adverse Differentiation is a Comparative Concept

1. No Shared Meaning – English is Clear but French May or May Not Require a Comparator

[113] In English, the plain meaning of "differentiate adversely" necessitates a comparison between two groups. The word "adverse" in a legal context is to be "opposed" or "contrary" (*Black's Law Dictionary,* 6th ed*., s.v.* "Adverse") and "differentiates" in the ordinary context means "recognize or identify as different, distinguish" (*The Oxford English Dictionary,* 2d ed*., s.v.* "Differentiates"). The plain meaning of the phrase requires a comparison through the word "differentiate". "Differentiate" involves being different from something or someone else. It involves distinguishing, or the drawing of a distinction. In order to determine whether there has been adverse differential treatment on the basis of a proscribed ground, by definition, it is necessary to compare the situation of the complainant with that of a different individual.

[114] In French, the plain meaning of "défavoriser" in s. 5(b) of the *Act* does not necessarily require a comparator. The definition may include a comparative concept: "priver d'un avantage", "priver d'un avantage (consenti a un autre ou qu'on aurait pu lui consentir)" import a comparison; however, "desservir", "frustrer, handicaper" do not import a comparison (*le Petit Robert, 2006, s.v.* "défavoriser"). The first group includes the possibility of a comparison while the second group of

words do not. The meaning is ambiguous in that it can have two meanings. Accordingly, the normal rules of statutory construction must be utilized to determine Parliamentary intention.

2. Parliament Intended that s. 5(b) of the *Act* be Interpreted as Requiring the Making of a Comparison

[115] The *Act* is a unique creature of Parliament and s. 5(b) is unique and specific to the aspirations of Parliament within the *CHRA*. The historical genesis of s. 5 of the *Act* is closely linked to the prohibition of discrimination in employment and adverse differentiation during the course of employment. The *Act* originated from piece meal disparate legislation stemming largely out of proscribing discrimination in employment, but also from censuring discrimination against persons in public services (see W.S. Tarnopolsky, J., *Discrimination and the Law*, rev. by W. Pentney (Toronto: Carswell, 1993) (ongoing supplement) at pp. 2-3 - 2-4). This is salient as the phrase “differentiate adversely” is common to sections 6(b) and 7(b) of the *Act* as well. Thus the analysis used in s. 5(b) of the *CHRA* is equally applicable to the areas of employment and commercial tenancy. The interpretation of s. 5(b) must be equally coherent and appropriate for sections 6(b) and 7(b) of the *Act*.

[116] The scheme and object of the *Act* can be gleaned from s. 2 being the purpose section wherein the *Act* enshrines the principle that “all individuals should have an opportunity equal with other individuals...”. The French text uses the phrase “…à l’égalité des chances d’épanouissement…”. The purpose section affirms that the *CHRA* is founded upon a comparator concept. In both English and French the concept of equality denotes a comparative concept. “Equal” as used in law implies “...not identity but duality and the use of one thing as the measure of another” (*Black’s Law Dictionary,* 6th ed*., s.v.* “Equal”). “Equal” as used generally means “...the same in quantity, quality, size, degree, rank, level etc.” (*The Concise Oxford Dictionary, 9th* ed*., s.v.* “Equal”). In French, “égalité” is derived from the word “égal" which means “[q]ui est de même quantité, dimension, nature, qualité ou valeur” (*le Petit Robert*, 2006, *s.v.* “égal”). The definitions in both languages impute a comparison.

[117] Indeed, the Federal Court of Appeal in *Singh*, *supra*, at para. 17, restated the s. 5(b) test in algebraic terms: it is a discriminatory practice for A, in providing services to B, to differentiate on prohibited grounds in relation to C. The Court illustrated this by using a concrete example: it would be a discriminatory practice for a policeman who, in providing traffic control services to the general public, to treat one violator more harshly than another because of his national or racial origins.

[118] More recent jurisprudence continues to confirm the need for a comparator. Mactavish J. in *Canada (Attorney General) v. Walden*, 2010 FC 490 [*Walden*], pronounced as follows:

> Equality is inherently a comparative concept. In order to determine whether there has been adverse differential treatment on the basis of a proscribed ground, it is therefore necessary to compare the situation of the complainant group with that of a different group. [at para. 78]

[119] In *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2005 FCA 154, while Evans J. did not squarely address the issue of comparator, he implicitly accepted the need for comparative evidence in addressing the evidentiary burden of the *prima facie* case:

> Moreover, as counsel for the Commission pointed out, it is now recognized that comparative evidence of discrimination comes in many more forms than the particular one identified in *Shakes*. [at para. 28]

[120] One may also refer to *Canada (Human Rights Commission) v. M.N.R.*, 2003 FC 1280 [*Wignall*], wherein O'Reilly J. wrote,

> A court or tribunal cannot decide whether a person has been discriminated against without making comparisons to the treatment of other persons. Comparisons are inevitable. [at para. 22]

3. Arguments to Use Case Law Arising Under *Charter* not Faithful to the *CHRA*

[121] At this juncture it is important to distinguish jurisprudence arising out of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being schedule B to the

Canada Act 1982 (U.K.), 1982, c. 11 [*Charter*]. The specific wording of the *Act* in s. 5(b) of the *CHRA* "differentiate adversely" must be respected. Jurisprudence emanating from the *Charter* may be helpful to the analysis. However, it cannot be transposed unsupervised into the *CHRT* regime without a careful search for Parliament's intent. In *Wignall*, *supra*, the Federal Court found that the Tribunal had erred when it said that there has been a convergence in the approaches under human rights statutes and subsection 15(1) of the *Charter*. The Federal Court found that the Tribunal made an error when it analysed the complaint according to the full terms of the decision in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 [*Law*]. In particular, the Federal Court stated that the "...definition of "discrimination" under subsection 15(1) of the *Charter*, and outlined in the *Law*, *supra*, case, does not apply to human rights legislation" [*Wignall*, *supra*, at para. 8]. The Federal Court went on to explain that *Law*, *supra*, is concerned with the meaning to be given to the constitutional standard of equality as set out in the *Charter*, and the Supreme Court gave no indication that its approach should apply more broadly to human rights codes or statutes, whether in provincial or federal law.

[122] For the same reasons, I do not find the decision in *Cunningham v. Alberta (Aboriginal Affairs and Northern Development)*, 2009 ABCA 239, to be useful in determining this case. This decision arose out of a request for a declaration that ss. 75 and 90(1)(a) of the *Métis Settlements Act*, R.S.A. 2000, c. M-14, breach ss. 2(d), 7, and 15(1) of the *Charter*. The Alberta Court of Appeal's analysis focused exclusively on the third stage of the *Law*, *supra*, analysis, namely, whether the differential treatment amounted to discrimination.

[123] I would add as a final point on this issue that none of the complainant group before me has contested the constitutional validity of s. 5(b) of the *CHRA*.

4. Arguments to Use Case Law Arising Under Other Human Rights Statutes not Faithful to the *CHRA*

[124] The Society argues that the failure to identify an appropriate comparator should not be fatal to a discrimination complaint given that it is unclear whether comparator groups are required in human rights analysis. The Society refers to *Lane v. ADGA Group Consultants Inc.* (2008),

295 D.L.R. (4th) 425, 91 O.R. (3d) 649 (Ont. Sup. Ct. J. (Div. Ct.)) [*ADGA*]. This is an employment termination case grounded in Ontario's *Human Rights Code*, R.S.O. 1990, c. H-19. In the *ADGA*, judgment, *supra*, the Court makes clear at para. 94 that "[i]n cases of disability in the employee termination context, it is not necessary or appropriate to have to establish a comparator group". Disability cases bring with them particular and individualized situations. Once it is established that the termination of the employee was because of, or in part because of, the disability, the claimant has established a *prima facie* case of discrimination. Thus, the lack of need for a comparator group in *ADGA*, *supra*, was largely driven by the fact that—unlike the case before me—it involved termination of employment in the context of disability.

[125] Moreover, the result in *ADGA*, *supra*, is not surprising when one considers that Parliament has dispensed with the need for a comparator in termination cases under the *CHRA* (see s. 7(a)), nor does it require a comparator in cases where there is a *denial* of services (see s. 5(a)), a *denial* of occupancy of premises (see s. 6(a)), or a *denial* of residential accommodation (see s. 6(a)). However, Parliamentary intention may be very different between the same subsections of a section of the *Act*. Thus, in contrast to the foregoing provisions, sections 5(b), 6(b) and 7(b) of the *Act* specifically mention "differentiate adversely" and a comparator analysis is therefore called for. The *ADGA* case, *supra*, cannot be invoked to defeat Parliament's clearly articulated legislative choices.

[126] For the same reasons, I do not find the comments in *NBHRC v. PNB*, *supra*, to be of much assistance to this Tribunal in interpreting the specific wording of the *CHRA*. The New Brunswick human rights statute addresses denial of services and sanctions discrimination *vis-à-vis* the provision of services. It does not address adverse differential treatment as does the *CHRA*.

5. Conclusion

[127] Accordingly, section 5(b) of the *Act* requires a comparison. This is the meaning that, in my view is most consistent with the words, scheme and object of the *Act*, and with Parliament's intent.

(ii) Section 5(b) does not Allow for Comparisons Between Two Service Providers

[128] Neither the English nor the French text of s. 5(b) of the *Act* expressly state that only one service provider may be used in making a finding of adverse differentiation. However, in my view, the grammatical and ordinary sense of the words of s. 5(b) of the *CHRA* contemplate that a single service provider is to be held accountable for adverse differentiation in the provision of services to two different persons. This is consistent with the analysis in *Singh*, *supra.*

[129] Furthermore, the use of more than one service provider expands the reach of the section to nonsensical parameters. Any expansion of s. 5(b) mandates a similar expansion of sections 6(b) and 7(b) of the *Act*. To accept an interpretation that one service provider may be compared to another, and that more than one employer may be compared to another, is to open the flood gates to a barrage of new types of complaints not only in services, but also in employment. For example, an employee of one employer could complain that she is being adversely differentiated against when compared to an employee of a different employer (e.g. an employee of Bank "A" could complain of differential benefits when compared to an employee of Bank "B"; a First Nations employee of a First Nation in Ontario could complain of differential employment policies from an employee of a First Nation in British Columbia). In the area of *services* alone, a customer of Restaurant "A" could complain of differential treatment in services from a customer of Restaurant "B" on the basis of race. A First Nations member of a First Nation in Quebec could complain of differential funding when compared to a First Nations member of a different First Nation in Alberta, arguing that race was a factor as the First Nations only serves First Nations persons.

[130] Finally, the addition of the constitutional separation of powers adds an additional layer of complexity that makes the comparison even more illogical. How and when could federal government department employers be compared to provincial government employers, and federal departmental funders with provincial departmental funders?

[131] The interpretation of section 5(b) of the *Act* that the complainant group advocates is so expansive and has such far reaching implications that it could not, in my respectful view, have

been contemplated by Parliament. Such a sea-change in the analytical framework would require in my view clear direction from Parliament.

(iii) Complainants' Arguments that Race Based Funding Require an Interpretative Exception – Hard Facts Make Bad Law

[132] The complainant group urges me to accept that no comparator is required in a case where the services are being delivered only to one race or people. Upon extensive reflection of the complainant group's position, I note that the preferential interpretation of the complainant group would result in potentially incongruous and illogical ramifications for First Nations themselves.

[133] The Crown is not the only provider of race based services. As stated above, in my view, if race based considerations could be given significant credence within the current statutory language in a manner such as to place liability upon INAC, the analysis would also extend to liability, in other cases, squarely upon First Nations themselves. First Nations, as does INAC, provide race based services to their members. First Nations provide education, housing, social services, and all other services to their members. The proffered analysis would dictate that one First Nation could potentially be compared to another First Nation with respect to the level of funding and services that a Nation provides to its members. Each First Nation could be compared to services rendered by the provinces and others. This analysis would potentially encompass each First Nation and potentially bind it to provide a level of funding and services comparable to other First Nations and provinces.

[134] The complainant group cites *CN v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, as being a ground-breaking novel case from its day that demonstrates that the Tribunal may and should enlarge the traditional application of the *Act* to new areas of alleged discrimination. In that case, Action Travail des Femmes alleged that CN was guilty of discriminatory hiring and promotion practices by denying employment opportunities to women in certain unskilled blue-collar positions. The Tribunal found that the recruitment, hiring and promotion policies at CN prevented and discouraged women from working on blue-collar jobs. Pursuant to section s. 41(2)(a) [now s. 53(2)(a)] of the *Act*, the Tribunal imposed an employment

equity program on CN to address the problem of systemic discrimination in the hiring and promotion of women. The question put before the Supreme Court of Canada was whether the Tribunal had the power to impose an employment equity program under s. 41(2)(a) of the *Act*. The Supreme Court of Canada upheld the order directing an employment equity program as falling within the scope of - or meeting the requirements of - s. 41(2) of the *Act*. While the order was unique there was a clear legislative base for the direction made. Furthermore, the Tribunal in that case did not contemplate a new area of alleged discrimination; rather, it explored the extent of its remedial powers. As a result, this case is distinguishable from the circumstances in the present case.

[135] The complainant group also relied on the decision in *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566 [*Gibbs*], to support the arguments proffered. In that case, a Saskatchewan insurance company discriminated against mentally disabled insured persons when compared to physically disabled insured persons. The case involved one service provider and how it could not discriminate between two service recipients on these grounds by narrowing the parameters of service recipients. The group's argument that the only difference between the service recipients in this case, being First Nations children on reserve, is that they do not receive the same or similar child welfare. Otherwise they are the same in age and require child welfare and similar treatment. There is nothing in *Gibbs*, *supra*, suggesting two different service providers.

(iv) The Complainants' Arguments that the Crown's Position Results in an Unacceptable Situation is not Consonant with the Clear Words of the *CHRA*

[136] The Society advocates that the failure to hold a hearing, and ultimately determine that the *CHRA* does not provide relief to First Nations children in this case has unacceptable consequences. Effectively, First Nations children are deprived of the protection of the *CHRA*, which is tantamount to approving a separate but equal racial discrimination construct akin to the situation in the United States leading to the ruling of *Brown et al. v. Board of Education of Topeka et al.*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (U.S. Sup. Ct.1954). The Ont. Chiefs refer to the government's repeal of s. 67 of the *CHRA* that formerly prevented the Tribunal from hearing

cases that arose under the auspices of the *Indian* Act, R.S.C. 1985, c. I-5. The Ont. Chiefs argue that, in spite of the repeal of s.67 of the *CHRA,* INAC would be more or less immune from the *CHRA*. The complainant group argues that Parliament has deliberately repealed s. 67 of the *Act* to divide and conquer First Nations persons.

[137] In addressing this argument, I observe that the issue of Parliament's intention in repealing s. 67 of the *Act* is not directly before me in deciding this motion. The repeal of s. 67 of the *CHRA* provides a quasi-judicial / judicial obligation upon First Nations *vis-à-vis* their members to comply with the *Act*. The practical result of the amendment will be to encourage division amongst the First Nation executive and its members. From a contextual perspective, as it relates to this case, I observe that the repeal, on its face, requires the Federal government and First Nations, as with other federally regulated public and private sector service providers and employers, to adhere to the *CHRA*. The two results are that: federal government departments may not discriminate against First Nations persons on prescribed grounds when providing services to Aboriginal persons. For example, the government may not offer services to First Nations members and discriminate against disabled First Nations members, or female First Nations members. Concurrently, First Nations may not discriminate against First Nations members when providing services to members in their individual Nations. For example, First Nations may not offer services to its members and discriminate against disabled persons or women within the Nation. Far from exempting either the First Nations or the government, including INAC, from liability under the *Act*, the repeal of s. 67 places liability upon both of these potential respondents.

[138] I agree that the repeal of s. 67 of the *CHRA* contemplates that new types of cases may now become the subject of adjudication before this Tribunal. These cases may well be anticipated to be complex and of great consequence to entire communities of First Nations Canadians. They will stretch the imagination of the Tribunal to manage them in an appropriate and culturally sensitive manner. Each such case will have to be determined on its merits on a case by case basis. The fact that there is no relief in the circumstances of this complaint, does not equate to the fact that other complaints may not be made out. While, it may well be true, that in the circumstances of this case, a complaint of discrimination cannot be made out against INAC, and that this *result* may well be disconcerting to the First Nations communities; however, the *CHRA* cannot be

interpreted using a *results* based analysis. It is the words of the *CHRA* that must govern the ambit of both the complaint and the remedy. Unfortunately, if the *CHRA* provides no remedy in this case, then the remedy may lie elsewhere (e.g.: a constitutional challenge to the *Act*, or seeking political redress).

[139] While I am alive to the ramifications of the above analysis for on-reserve First Nations children, for the reasons set out above, not only is the expansion of the comparator analysis illogical, it is also potentially self-defeating for First Nations themselves. Also, AFN suggested that the Tribunal should compare on-reserve First Nations children who are receiving child welfare through the federal government scheme with on-reserve First Nations children who are receiving child welfare through the provincial system. However, section 5(b) of the *Act* requires that any differential treatment be based on a prohibited ground of discrimination. This alternative argument fails to identify such a ground. As well, it again is grounded in comparing two different service providers.

[140] Given my finding on the comparator issue it is not necessary to address the Crown's argument regarding residency. Nor is there any need to address the issue of remedy in relation to Jordan's principle.

VIII. CONCLUSION

[141] Although I cannot decide the services issue in this motion on the basis of the current evidentiary record, I can decide the legal issue of the comparator group. For the reasons given above, the Crown's motion is granted on this comparator issue. I find that the complaint does not come within the provisions of section 5(b) of the *Act*. Therefore, the complaint is dismissed.

Signed by

Shirish P. Chotalia, Q.C.
Chairperson

OTTAWA, Ontario
March 14, 2011

Delbert Guerin, Joseph Becker, Eddie Campbell, Marg Charles, Gertrude Guerin and Gail Sparrow suing on their own behalf and on behalf of all the other members of the Musqueam Indian Band *Appellants*;

and

Her Majesty The Queen *Respondent*;

and

The National Indian Brotherhood *Intervener.*

File No.: 17507.

1983: June 13, 14; 1984: November 1.

Present: Laskin C.J.* and Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard, Lamer and Wilson JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Indians — Reserve lands — Surrender — Lease entered by Crown on Band's behalf — Lease bearing little resemblance to terms approved at surrender meeting — Whether or not breach of fiduciary duty, breach of trust, or breach of agency — Indian Act, R.S.C. 1952, c. 149, s. 18(1) — Trustee Act, R.S.B.C. 1960, c. 390, s. 98 (now R.S.B.C. 1979, c. 414).

An Indian Band surrendered valuable surplus reserve lands to the Crown for lease to a golf club. The terms obtained by the Crown, however, were much less favourable than those approved by the Band at the surrender meeting. The surrender document did not refer to the lease or disclose the terms approved by the Band. The Indian Affairs Branch officials did not return to the Band for its approval of the revised terms. Indeed, they withheld pertinent information from both the Band and an appraiser assessing the adequacy of the proposed rent. The trial judge found the Crown in breach of trust in entering the lease and awarded damages as of the date of the trial on the basis of the loss of income which might reasonably have been anticipated from other possible uses of the land. The Federal Court of Appeal set aside that judgment and dismissed a cross-appeal seeking more damages.

* The Chief Justice took no part in the judgment.

Delbert Guerin, Joseph Becker, Eddie Campbell, Marg Charles, Gertrude Guerin et Gail Sparrow, en leur nom personnel et au nom de tous les autres membres de la bande indienne Musqueam *Appelants*;

et

Sa Majesté La Reine *Intimée*;

et

The National Indian Brotherhood *Intervenante.*

N° du greffe: 17507.

1983: 13, 14 juin; 1984: 1er novembre.

Présents: Le juge en chef Laskin* et les juges Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard, Lamer et Wilson.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Indiens — Terres d'une réserve — Cession — Bail conclu au nom de la bande par Sa Majesté — Conditions du bail conclu très différentes de celles approuvées à l'assemblée de la cession — Y a-t-il eu manquement à des obligations de fiduciaire ou manquement à des obligations de mandataire? — Loi sur les Indiens, S.R.C. 1952, chap. 149, art. 18(1) — Trustee Act, R.S.B.C. 1960, chap. 390, art. 98 (maintenant R.S.B.C. 1979, chap. 414.)

Une bande indienne a cédé des surplus de terre de grande valeur à Sa Majesté pour que celle-ci les loue à un club de golf. Cependant, les conditions du bail consenti par Sa Majesté étaient beaucoup moins favorables que celles approuvées par la bande à l'assemblée de la cession. L'acte de cession ne mentionne ni le bail ni les conditions approuvées par la bande. Les fonctionnaires de la direction des Affaires indiennes ne sont pas retournés devant la bande pour qu'elle approuve les nouvelles conditions. En fait, ils ont caché des renseignements utiles à la bande et à un évaluateur chargé de déterminer si le loyer proposé était adéquat. Le juge de première instance a conclu que Sa Majesté avait manqué à ses obligations de fiduciaire en signant le bail et il a accordé des dommages-intérêts calculés à la date du procès en fonction de la perte du revenu qu'on aurait pu raisonnablement s'attendre à tirer d'autres utilisations possibles des terres. La Cour d'appel fédérale a infirmé ce jugement et rejeté l'appel incident visant à faire augmenter le montant des dommages-intérêts.

* Le Juge en chef n'a pas pris part au jugement.

(3d) 385 (Ont.C.A.), at p. 392: *Goldex Mines Ltd. v. Revill* (1974), 7 O.R. 216 (Ont.C.A.), at p. 224.

It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship. As the "political trust" cases indicate, the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function. The mere fact, however, that it is the Crown which is obligated to act on the Indians' behalf does not of itself remove the Crown's obligation from the scope of the fiduciary principle. As was pointed out earlier, the Indians' interest in land is an independent legal interest. It is not a creation of either the legislative or executive branches of government. The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty. Therefore, in this *sui generis* relationship, it is not improper to regard the Crown as a fiduciary.

Section 18(1) of the *Indian Act* confers upon the Crown a broad discretion in dealing with surrendered land. In the present case, the document of surrender, set out in part earlier in these reasons, by which the Musqueam Band surrendered the land at issue, confirms this discretion in the clause conveying the land to the Crown "in trust to lease . . . upon such terms as the Government of Canada may deem most conducive to our Welfare and that of our people". When, as here, an Indian Band surrenders its interest to the Crown, a fiduciary obligation takes hold to regulate the manner in which the Crown exercises its discretion in dealing with the land on the Indians' behalf.

par exemple, les arrêts *Laskin v. Bache & Co. Inc.* (1971), 23 D.L.R. (3d) 385 (C.A. Ont.), à la p. 392; *Goldex Mines Ltd. v. Revill* (1974), 7 O.R. 216 (C.A. Ont.), à la p. 224.

Il nous faut remarquer que, de façon générale, il n'existe d'obligations de fiduciaire que dans le cas d'obligations prenant naissance dans un contexte de droit privé. Les obligations de droit public dont l'acquittement nécessite l'exercice d'un pouvoir discrétionnaire ne créent normalement aucun rapport fiduciaire. Comme il se dégage d'ailleurs des décisions portant sur les «fiducies politiques», on ne prête pas généralement à Sa Majesté la qualité de fiduciaire lorsque celle-ci exerce ses fonctions législatives ou administratives. Cependant, ce n'est pas parce que c'est à Sa Majesté qu'incombe l'obligation d'agir pour le compte des Indiens que cette obligation échappe à la portée du principe fiduciaire. Comme nous l'avons souligné plus haut, le droit des Indiens sur leurs terres a une existence juridique indépendante. Il ne doit son existence ni au pouvoir législatif ni au pouvoir exécutif. L'obligation qu'a Sa Majesté envers les Indiens en ce qui concerne ce droit n'est donc pas une obligation de droit public. Bien qu'il ne s'agisse pas non plus d'une obligation de droit privé au sens strict, elle tient néanmoins de la nature d'une obligation de droit privé. En conséquence, on peut à bon droit, dans le contexte de ce rapport *sui generis*, considérer Sa Majesté comme un fiduciaire.

Le paragraphe 18(1) de la *Loi sur les indiens* confère à Sa Majesté un large pouvoir discrétionnaire relativement aux terres cédées. En la présente espèce, l'acte de cession, reproduit en partie précédemment, par lequel la bande Musqueam a cédé les terres en cause, confirme l'existence de ce pouvoir discrétionnaire dans la clause qui prévoit la cession des terres à Sa Majesté [TRADUCTION] «en fiducie, pour location . . . aux conditions, que le gouvernement du Canada jugera les plus favorables à notre bien-être et à celui de notre peuple.» Lorsque, comme c'est le cas en l'espèce, une bande indienne cède son droit à Sa Majesté, cela fait naître une obligation de fiduciaire qui impose des limites à la manière dont Sa Majesté peut exercer son pouvoir discrétionnaire en utilisant les terres pour le compte des Indiens.

I agree with Le Dain J. that before surrender the Crown does not hold the land in trust for the Indians. I also agree that the Crown's obligation does not somehow crystallize into a trust, express or implied, at the time of surrender. The law of trusts is a highly developed, specialized branch of the law. An express trust requires a settlor, a beneficiary, a trust corpus, words of settlement, certainty of object and certainty of obligation. Not all of these elements are present here. Indeed, there is not even a trust corpus. As the *Smith* decision, *supra*, makes clear, upon unconditional surrender the Indians' right in the land disappears. No property interest is transferred which could constitute the trust *res*, so that even if the other *indicia* of an express or implied trust could be made out, the basic requirement of a settlement of property has not been met. Accordingly, although the nature of Indian title coupled with the discretion vested in the Crown are sufficient to give rise to a fiduciary obligation, neither an express nor an implied trust arises upon surrender.

Nor does surrender give rise to a constructive trust. As was said by this Court in *Pettkus v. Becker*, [1980] 2 S.C.R. 834, at p. 847, "The principle of unjust enrichment lies at the heart of the constructive trust." See also *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436. Any similarity between a constructive trust and the Crown's fiduciary obligation to the Indians is limited to the fact that both arise by operation of law; the former is an essentially restitutionary remedy, while the latter is not. In the present case, for example, the Crown has in no way been enriched by the surrender transaction, whether unjustly or otherwise, but the fact that this is so cannot alter either the existence or the nature of the obligation which the Crown owes.

The Crown's fiduciary obligation to the Indians is therefore not a trust. To say as much is not to deny that the obligation is trust-like in character.

Je suis d'accord avec le juge Le Dain pour dire qu'avant une cession, Sa Majesté ne possède pas les terres en fiducie pour les Indiens. Je suis également d'accord pour dire qu'au moment de la cession l'obligation de Sa Majesté ne se cristallise pas d'une manière ou d'une autre en fiducie explicite ou implicite. Le droit des fiducies constitue un domaine juridique très perfectionné et spécialisé. Pour qu'il y ait fiducie explicite, il faut un disposant, un bénéficiaire, une masse fiduciaire, des mots portant disposition, certitude quant à l'objet et certitude quant à l'obligation. Ces éléments ne sont pas tous présents en l'espèce. En fait, il n'y a même pas de masse fiduciaire. Il ressort clairement de l'arrêt *Smith*, précité, qu'à la suite d'une cession inconditionnelle il y a disparition du droit des Indiens sur le bien-fonds. Aucun droit de propriété pouvant constituer l'objet de la fiducie n'est transféré, de sorte que, même s'il est possible d'établir l'existence des autres indices d'une fiducie explicite ou implicite, on ne satisfait pas à l'exigence fondamentale d'une disposition de biens. Par conséquent, bien que la nature du titre indien ainsi que le pouvoir discrétionnaire conféré à Sa Majesté suffisent pour donner naissance à une obligation de fiduciaire, la cession ne crée ni une fiducie explicite ni une fiducie implicite.

La cession n'engendre pas non plus de fiducie par interprétation. Comme l'a affirmé cette Cour dans l'arrêt *Pettkus c. Becker*, [1980] 2 R.C.S. 834, à la p. 847, «Le principe de l'enrichissement sans cause est au coeur de la fiducie par interprétation.» Voir aussi l'arrêt *Rathwell c. Rathwell*, [1978] 2 R.C.S. 436. Toute ressemblance entre une fiducie par interprétation et l'obligation de fiduciaire qu'a Sa Majesté envers les Indiens tient uniquement à ce que les deux résultent de la loi; la première vise essentiellement la restitution, alors que ce n'est pas le cas de la dernière. Dans la présente instance, par exemple, la cession n'a procuré à Sa Majesté aucun enrichissement de manière injuste ou autrement, mais le fait qu'il en soit ainsi ne change rien à l'existence ou à la nature de l'obligation qui lui incombe.

L'obligation de fiduciaire qu'a Sa Majesté envers des Indiens ne constitue donc pas une fiducie. Toutefois, cela ne revient pas à dire que, de

As would be the case with a trust, the Crown must hold surrendered land for the use and benefit of the surrendering Band. The obligation is thus subject to principles very similar to those which govern the law of trusts concerning, for example, the measure of damages for breach. The fiduciary relationship between the Crown and the Indians also bears a certain resemblance to agency, since the obligation can be characterized as a duty to act on behalf of the Indian Bands who have surrendered lands, by negotiating for the sale or lease of the land to third parties. But just as the Crown is not a trustee for the Indians, neither is it their agent; not only does the Crown's authority to act on the Band's behalf lack a basis in contract, but the Band is not a party to the ultimate sale or lease, as it would be if it were the Crown's principal. I repeat, the fiduciary obligation which is owed to the Indians by the Crown is *sui generis*. Given the unique character both of the Indians' interest in land and of their historical relationship with the Crown, the fact that this is so should occasion no surprise.

The discretion which is the hallmark of any fiduciary relationship is capable of being considerably narrowed in a particular case. This is as true of the Crown's discretion *vis-à-vis* the Indians as it is of the discretion of trustees, agents, and other traditional categories of fiduciary. The *Indian Act* makes specific provision for such narrowing in ss.18(1) and 38(2). A fiduciary obligation will not, of course, be eliminated by the imposition of conditions that have the effect of restricting the fiduciary's discretion. A failure to adhere to the imposed conditions will simply itself be a *prima facie* breach of the obligation. In the present case both the surrender and the Order in Council accepting the surrender referred to the Crown's leasing the land on the Band's behalf. Prior to the surrender the Band had also been given to understand that a lease was to be entered into with the Shaughnessy Heights Golf Club upon certain terms, but this understanding was not incorporated into the surrender document itself. The effect of

par sa nature même, l'obligation n'est pas semblable à une fiducie. Comme ce serait le cas s'il y avait fiducie, Sa Majesté doit détenir les terres à l'usage et au profit de la bande qui les a cédées. L'obligation est donc soumise à des principes très semblables à ceux qui régissent le droit des fiducies, en ce qui concerne notamment le montant des dommages-intérêts en cas de manquement. Le rapport fiduciaire entre Sa Majesté et les Indiens présente aussi une certaine analogie avec le mandat, puisque l'obligation imposée peut être qualifiée de devoir d'agir pour le compte des bandes indiennes qui ont cédé des terres, en engageant des négociations en vue de leur vente ou de leur location à des tiers. Mais Sa Majesté n'est pas le mandataire pas plus qu'elle n'est le fiduciaire des Indiens; non seulement le pouvoir qu'a Sa Majesté d'agir pour le compte de la bande est-il dépourvu de tout fondement contractuel, mais encore la bande n'est partie ni à la vente ou ni au bail finalement conclus, comme ce serait le cas si elle était le mandant de Sa Majesté. L'obligation de fiduciaire qu'a Sa Majesté envers les Indiens est, je le répète, *sui generis*. Vu la nature unique à la fois du droit des Indiens sur leurs terres et de leurs rapports historiques avec Sa Majesté, cela n'est guère surprenant.

Le pouvoir discrétionnaire qui constitue la marque distinctive de tout rapport fiduciaire peut, dans un cas donné, être considérablement restreint. Cela s'applique aussi bien au pouvoir discrétionnaire que possède Sa Majesté à l'égard des Indiens qu'au pouvoir discrétionnaire des fiduciaires, des mandataires et des personnes qui relèvent des autres catégories traditionnelles de fiduciaire. Les paragraphes 18(1) et 38(2) de la *Loi sur les Indiens* prévoient expressément une telle restriction. Il va toutefois sans dire que l'obligation de fiduciaire n'est pas supprimée par l'imposition de conditions ayant pour effet de restreindre le pouvoir discrétionnaire du fiduciaire. Le défaut de remplir ces conditions constitue tout simplement, à première vue, un manquement à l'obligation. En l'espèce, l'acte de cession et le décret acceptant la cession parlent tous les deux de la location des terres par Sa Majesté au nom de la bande. Avant la cession, on avait aussi laissé entendre à la bande qu'un bail serait conclu avec le Shaughnessy

** Translation **

Case Name:

Lavoie v. Canada (Treasury Board of Canada)

Between
Brigitte Lavoie, Complainant, and
Canadian Human Rights Commission, Commission, and
Treasury Board of Canada, Respondent

[2008] C.H.R.D. No. 27

2008 CHRT 27

File No. T1154/3606

Canadian Human Rights Tribunal
Ottawa, Ontario

Kathleen Cahill, Member

Heard: September 24, 25, 27, 28, 2007, January 21, 22, 23, 24 and 25, 2008.
Decision: June 20, 2008.

(199 paras.)

Appearances:

Lise Leduc and Colleen Bauman, for the Complainant.

Giacomo Vigna, for the Canadian Human Rights Commission.

Nadine Dupuis and Vincent Veilleux, for the Respondent.

DECISION

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I. INTRODUCTION

1 On January 19, 2004, Brigitte Lavoie (Ms. Lavoie) filed a complaint against Treasury Board of Canada (the respondent) alleging that the new Term Employment Policy (the new policy) discriminates on the basis of sex.

2 Ms. Lavoie alleges that paragraph 7(2)(*a*) of the new policy breaches sections 7, 8 and 10 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the *Act*), based on the fact that periods of maternity leave or parental leave without pay are not counted in calculating the cumulative three-year working period required for conversion from term employee status to indeterminate employee (permanent) status in the federal Public Service.

3 The Canadian Human Rights Commission (the Commission) attended the hearing which was held at Ottawa on September 24, 25, 27 and 28, 2007, and from January 21 to January 25, 2008.

4 Based on an agreement made when the first complaint of discrimination was filed by Ms. Lavoie on July 10, 2007, the respondent contends that Ms. Lavoie cannot dispute the new policy in a personal capacity, which includes claiming relief on a personal basis. For the reasons given in the decision, I dismiss this ground of inadmissibility.

5 For the reasons stated below, I have determined that the respondent differentiated adversely against Ms. Lavoie in the course of employment when it refused to count the period of parental leave in

138 In order to meet this objective, the respondent provided that term employees employed for a cumulative working period of three years without a break in service longer than 60 consecutive calendar days "must [be] appoint[ed] ... indeterminately at the level of his/her substantive position." For the purposes of the analysis, I will describe the right to be appointed as an indeterminate employee the [TRANSLATION] "conversion entitlement".

139 This "conversion entitlement" is the issue in this matter. In matters of discrimination, a distinction must be made between the rights resulting from compensatory benefits and non-compensatory benefits, i.e. those relating to the employee's status. And so, a bilingualism bonus conditional on the performance of work falls under the first category. Performance of the work is required to obtain the bonus. Accrual of seniority, the right to employment, the right to keep one's employment, the right to tenure are described as non-compensatory benefits and relate to the status of the employee. Underlying this second category is the notion that performance of the work is not required to acquire or maintain the right. We are therefore referring to a benefit or a right that results from employee status (see primarily: *Ontario Nurses Association v. Orillia Soldiers Memorial Hospital,* (1999), 42 O.R. (3d) 692, paragraphs 63, 70 and 71, applying the same criteria: *Fernandes v. IKEA Canada*, (2007) BCHRTD. No. 259, paragraphs 24, 25, 26, 27 and 31).

140 In this case, the "conversion entitlement" falls under the second category. It is intrinsically connected to the status of the employee. Accordingly, this implies that Ms. Lavoie and the other female term employees who take maternity leave and/or parental leave must be compared to all term employees who did not take a break in service longer than 60 consecutive calendar days (see: *Ontario Nurses Association* v. *Orillia Soldiers Memorial Hospital, supra*, at paragraphs 63, 70 and 71).

141 The respondent submitted that the relevant comparator group was all of the employees on leave without pay. Accordingly, I could not find *prima facie* evidence of discrimination since all of the employees of this classification were treated equally (see: *Bernatchez v. La Romaine (Conseil des Montagnais)*, 2006 CHRT 37 and *Dumont-Ferlatte v. Canada (Employment and Immigration Commission),* 1996 D.C.D.P. No. 9). In both of these decisions, the complainants were claiming benefits described as compensatory, i.e. those that I described from the first category. Therefore in *Bernatchez*, the complainant was challenging the fact that her employer did not calculate the additional maternity leave benefits on the basis of the annual earnings of the persons who performed the work. The indemnity at issue was a benefit extended to employees on maternity leave and did not constitute earnings. Accordingly, the complainant had to be compared to persons on leave without pay. In *Dumont-Ferlatte*, the complainants alleged that it was discriminatory to deprive women on maternity leave of cumulative annual leave and sick leave credits and of the right to benefit from a monthly bilingualism bonus. Once again, the rights at issue are described as compensatory benefits.

142 The respondent also referred to *Cramm* (see: *Cramm v. Canadian National Railway Company*, 1998 IIJCan 2938 H.R.R.T. and *Canadian Human Rights Commission v. Canadian National Railway Company* (*re Cramm*), (2000) IIJCan 15544 (F.C., Mr. Justice MacKay). Contrary to *Ontario Nurses Association*, I note that in *Cramm*, the debate bears primarily on the performance of work requirement. The Tribunal does not describe the nature of the right sought by Mr. Cramm. In other words, for the reviewing court, was this a right under the first or second category? In my opinion, this question is fundamental since the answer identifies the comparator group. As I already stated, I consider that the "conversion entitlement" falls under the second category. For the reasons given in the foregoing paragraphs, I find that the comparator group is that of employees who did not take a break in service longer than 60 consecutive calendar days.

143 I must point out that it is not always necessary to determine a comparator group. In this case, it is my opinion that for maternity leave, determining a comparator group appears pointless since only

women take maternity leave. On this point, I agree with the comments made by the Court of Appeal of Québec in *Commission des écoles catholiques du Québec v. Gobeil*, (see: [1999] R.J.Q. 1883 (Robert J.)) where the Court held that a school board's refusal to hire, on a part-time basis, a teacher who was not available based on her pregnancy was discriminatory:

> [TRANSLATION]
>
> Pregnant women, but for their pregnancy, would be available. *For this reason, I cannot adhere to a comparative analysis likening them to unavailable persons in order to determine whether or not there is a distinction. A rule that has the effect of depriving pregnant women of the right to be hired when they otherwise would have had access thereto necessarily breaches the right to full equality.* The distinction created by the availability clause arises from the fact that childbirth and maternity leave hinder women from getting the contract to which they would be entitled.
>
> [Emphasis added.]

144 On its very face, excluding maternity leave absences of more than 60 consecutive days from the calculation of the cumulative service, in the course of employment, differentiates adversely in relation to term employees exercising their right to this leave (section 7) and deprives or tends to deprive them of employment opportunities (section 10). To use the wording of the Court of Appeal in *Gobeil* (*supra*), the connection between discrimination on the basis of sex and not including maternity leave "is self-evident." In fact, only women take maternity leave. Further, when a woman takes maternity leave for 17 weeks, the time recognized for term employees, her absence necessarily exceeds the 60 calendar days. As a result, women who take maternity leave also extend the time for acquiring the "conversion entitlement" and even risk being deprived of this right if the term contract is not renewed in such a way as to recover the time that was not counted. This is in itself sufficient to establish *prima facie* evidence of discrimination on the basis of sex.

145 For parental leave, *prima facie* evidence must include establishing that there is a disproportionate negative effect on women since parental leave applies to men as well as women. For this reason, I must examine the statistical evidence (see: *Walden v. Canada (Social Development)*, (2007) CHRD No. 54, paragraphs 39, 40 and 41, *Premakumar, supra*, paragraph 80).

146 Ms. Lavoie and the Commission submit that the statistical data clearly establish that it is largely women who take parental leave of more than 60 consecutive days. Ms. Lavoie and the Commission relied on table 12j (October 2007), primarily on the figures for the years 2003-2004. In this timeframe, 204 women took maternity leave and 164 took parental leave in the 52 weeks following the birth or adoption of a child. Indeed, we observe that 49 men benefited from parental leave in the same timeframe. In 2004-2005, 151 women took maternity leave, 169 women and 38 men took parental leave. In 2005-2006, 141 women took maternity leave, 136 women and

36 men took parental leave. During the same periods, table 12d (October 2007) indicates that a majority of men take parental leave for less than 60 days.

147 Besides the fact that we note that the data provided by the respondent at the request of the Commission indicates that in 2003-2004, one man went on maternity leave, it is my opinion that these figures are trustworthy. Accordingly, I dismiss the respondent's argument to the effect that the statistics are unreliable. These figures establish sufficient evidence of a disproportionate negative effect of the new policy on women who take parental leave. In fact, it is clear that more women than men take parental leave for more than 60 consecutive days. In 2003-2004, 77% of persons taking parental leave

Robert Lovelace, on his own behalf and on behalf of the Ardoch Algonquin First Nation and Allies, the Ardoch Algonquin First Nation and Allies, Chief Kris Nahrgang, on behalf of the Kawartha Nishnawbe First Nation, the Kawartha Nishnawbe First Nation, Chief Roy Meaniss, on his own behalf and on behalf of the Beaverhouse First Nation, the Beaverhouse First Nation, Chief Theron McCrady, on his own behalf and on behalf of the Poplar Point Ojibway First Nation, the Poplar Point Ojibway First Nation, and the Bonnechere Métis Association *Appellants*

and

Be-Wab-Bon Métis and Non-Status Indian Association and the Ontario Métis Aboriginal Association *Appellants*

v.

Her Majesty The Queen in right of Ontario and the Chiefs of Ontario *Respondents*

and

The Attorney General of Canada, the Attorney General of Quebec, the Attorney General for Saskatchewan, the Council of Canadians with Disabilities, the Mnjikaning First Nation, the Charter Committee on Poverty Issues, the Congress of Aboriginal Peoples, the Native Women's Association of Canada and the Métis National Council of Women *Interveners*

INDEXED AS: LOVELACE *v.* ONTARIO

Neutral citation: 2000 SCC 37.

File No.: 26165.

1999: December 7; 2000: July 20.

Robert Lovelace, en son nom et au nom de la Première nation algonquine d'Ardoch et ses alliés, la Première nation algonquine d'Ardoch et ses alliés, le chef Kris Nahrgang, au nom de la Première nation Kawartha Nishnawbe, la Première nation Kawartha Nishnawbe, le chef Roy Meaniss, en son nom et au nom de la Première nation de Beaverhouse, la Première nation de Beaverhouse, le chef Theron McCrady, en son nom et au nom de la Première nation ojibway de Poplar Point, la Première nation ojibway de Poplar Point et l'Association des Métis de Bonnechere *Appelants*

et

La Be-Wab-Bon Métis and Non-Status Indian Association et l'Association des Métis autochtones de l'Ontario *Appelantes*

c.

Sa Majesté la Reine du chef de l'Ontario et les Chefs de l'Ontario *Intimés*

et

Le procureur général du Canada, le procureur général du Québec, le procureur général de la Saskatchewan, le Conseil des Canadiens avec déficiences, la Première nation de Mnjikaning, le Comité de la Charte et des questions de pauvreté, le Congrès des peuples autochtones, l'Association des femmes autochtones du Canada et le Métis National Council of Women *Intervenants*

RÉPERTORIÉ: LOVELACE *c.* ONTARIO

Référence neutre: 2000 CSC 37.

N° du greffe: 26165.

1999: 7 décembre; 2000: 20 juillet.

the claim is based and the actual need, capacity, or circumstances of the claimant or others, (iii) the ameliorative purpose or effects of the impugned law, program or activity upon a more disadvantaged person or group in society, and (iv) the nature and scope of the interest affected by the impugned government activity. As the following discussion of those contextual factors will reveal, I conclude that no discrimination exists through the operation of the casino program.

(a) *Pre-Existing Disadvantage, Stereotyping, Prejudice or Vulnerability*

69 As I have already pointed out, this enquiry does not direct the appellants and respondents to a "race to the bottom", i.e., the claimants are not required to establish that they are more disadvantaged than the comparator group. However, it is important to acknowledge that all aboriginal peoples have been affected "by the legacy of stereotyping and prejudice against Aboriginal peoples" (*Corbiere*, *supra*, at para. 66). Aboriginal peoples experience high rates of unemployment and poverty, and face serious disadvantages in the areas of education, health, and housing (*Report of the Royal Commission on Aboriginal Peoples*, vol. 3, *Gathering Strength* (1996), at pp. 108-114, 166-75, 366-69, 438-44; see also U.N. Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights* (Canada), E/C. 12/1/Add.31, 4 Dec. 1998, at paras. 17 and 43; and Carol Agocs and Monica Boyd, "The Canadian Ethnic Mosaic Recast for the 1990s" in *Social Inequality in Canada: Patterns, Problems, Policies* (2nd ed. 1993), 330, at pp. 333-36).

70 Apart from this background, the two appellant groups face a unique set of disadvantages. Although the two appellant groups emphasize their respective cultural and historical distinctness as Métis and First Nations peoples, both appellant groups submit that these particular disadvantages can be traced to their non-participation in, or

de correspondance, entre les motifs sur lesquels l'allégation est fondée et les besoins, les capacités ou la situation véritables du demandeur ou d'autres personnes; (iii) l'objet ou l'effet améliorateur de la loi, du programme ou de l'activité contesté eu égard à une personne ou un groupe défavorisés dans la société; (iv) la nature et l'étendue du droit touché par l'activité gouvernementale contestée. Comme le révélera l'examen de ces facteurs contextuels, j'estime que l'exploitation du programme relatif au casino ne crée pas de discrimination.

a) *La préexistence d'un désavantage, de stéréotypes, de préjugés ou d'une situation de vulnérabilité*

Comme je l'ai déjà souligné, cet examen n'engage pas les parties appelantes et les intimés dans une «course vers le bas», en d'autres mots les demandeurs ne sont pas tenus de démontrer qu'ils sont plus défavorisés que le groupe de comparaison. Il est toutefois important de reconnaître que tous les peuples autochtones subissent les effets «de l'héritage de stéréotypes et préjugés visant les peuples autochtones» (*Corbiere*, précité, au par. 66). Les peuples autochtones sont aux prises avec des taux élevés de chômage et de pauvreté, et ils font face à d'importants désavantages dans les domaines de l'éducation, de la santé et du logement (*Rapport de la Commission royale sur les peuples autochtones*, vol. 3, *Vers un ressourcement* (1996), aux pp. 120 à 128, 186 à 197, 414 à 417, et 494 à 501; voir également Comité des droits économiques, sociaux et culturels des Nations Unies, *Observations finales du Comité des droits économiques, sociaux et culturels* (Canada), E/C. 12/1/Add. 31, 10 déc. 1998, aux par. 17 et 43; ainsi que Carol Agocs et Monica Boyd, «The Canadian Ethnic Mosaic Recast for the 1990s» dans *Social Inequality in Canada: Patterns, Problems, Policies* (2e éd. 1993), 330, aux pp. 333 à 336).

Indépendamment de ce contexte, les deux groupes appelants font face à un ensemble unique de désavantages. Bien que les deux groupes appelants fassent valoir le caractère distinctif de leur héritage culturel et historique respectif en tant que Métis et Premières nations, chaque groupe affirme que ces désavantages particuliers sont imputables à

Case Name:

Morris v. Canada (Canadian Armed Forces)

Between
Canadian Human Rights Commission, appellant, and
Attorney General of Canada (representing the Canadian Armed Forces), respondent

[2005] F.C.J. No. 731

[2005] A.C.F. no 731

2005 FCA 154

2005 CAF 154

334 N.R. 316

[2005] CLLC para. 230-018

139 A.C.W.S. (3d) 344

55 C.H.R.R. D/1

Docket A-588-03

Federal Court of Appeal
Toronto, Ontario

Décary, Evans and Malone JJ.A.

Heard: April 5, 2005.
Judgment: May 3, 2005.

(38 paras.)

Human rights law -- Discrimination -- Context -- Employment -- Promotion -- Grounds -- Age -- Administrative law -- Judicial review and statutory appeal -- Standard of review -- Correctness -- Reasonableness.

Appeal by the Canadian Human Rights Commission from the order of the Federal Court allowing the Attorney General's application for judicial review and setting aside the decision of the Canadian Human Rights Tribunal finding that the Canadian Armed Forces had discriminated against an individual, Morris, on the basis of his age when it refused to grant him a promotion. Cross-appeal by the Attorney General of Canada from the finding that the Tribunal's rejection of the Forces' explanation was not unreasonable. Morris had served in the Forces until his retirement at age 55. When he was 46 years old,

he unsuccessfully applied for a promotion. He did not receive the promotion, notwithstanding his exemplary performance and examination results. The Tribunal found that the Commission could demonstrate a prima facie case of discrimination without adducing evidence as to the age of the successful candidates, so long as age was a factor in the decision denying Morris a promotion. It then held that the Forces had not provided an explanation for the denial to counter the prima facie case. The applications judge held that the Tribunal had used the wrong legal test for determining whether the Commission had made out a prima facie case of age discrimination and that, if she was wrong on the matter of the legal test, the Forces had not demonstrated that the Tribunal's rejection of its explanation was unwarranted in the absence of comparative evidence.

HELD: Appeal allowed. Cross-appeal dismissed. The question of whether the Tribunal used the correct legal test was a question of law which was reviewable on a standard of correctness. The legal definition of a prima facie case did not require the Commission to provide evidence to prove that Morris was the subject of discrimination. The question of what evidence was sufficient to establish a prima facie case was more within the domain of a specialized Tribunal than the Court and was reviewable on a standard of unreasonableness simpliciter.

Statutes, Regulations and Rules Cited:

Canadian Human Rights Act, R.S.C. 1985, c. H-6, ss. 3(1), 4, 5, 7(b), 14.1.

Counsel:

Leslie Reaume, for the appellant.

Liz Tinker, for the respondent.

The judgment of the Court was delivered by

EVANS J.A.:--

A. INTRODUCTION

1 This is an appeal by the Canadian Human Rights Commission, and a cross-appeal by the Attorney General, from an order of a Judge of the Federal Court, which is reported as Canada (Attorney General) v. Canadian Human Rights Commission, [2003] F.C.J. No. 1746, 2003 FC 1373.

2 The Applications Judge allowed an application for judicial review by the Attorney General and set aside a decision by the Canadian Human Rights Tribunal, dated December 20, 2001, that the Canadian Armed Forces ("CAF") had discriminated against George A. Morris contrary to paragraph 7(b) of the Canadian Human Rights Act, R.S.C. 1985, c. H-6. The Tribunal found that age was a factor in the CAF's failure to promote Mr. Morris from the rank of Warrant Officer to Master Warrant Officer.

3 The Applications Judge held that the Tribunal had erred in law by using the wrong legal test for determining whether the Commission had made out a prima facie case of age discrimination. However, she also decided that, if she was wrong on this point, the CAF had not satisfied her that the Tribunal's rejection of its explanation was unwarranted on the evidence. This latter conclusion is the subject of the Attorney General's cross-appeal.

4 The appeals raise three issues. Did the Tribunal err in law in its selection of the test for a prima facie case? If not, did the Tribunal err in concluding that the Commission had adduced sufficient evidence to make out a prima facie case? Did the Tribunal err by drawing an adverse inference from the CAF's failure to support its explanation by reference to the test scores of the Warrant Officers competing for promotion to Master Warrant Officer who had been ranked higher than Mr. Morris?

5 In my opinion, the Commission's appeal should be allowed and the Attorney General's cross-appeal dismissed.

B. FACTUAL BACKGROUND

6 The facts are fully described in the comprehensive and careful reasons of the Tribunal, and can be stated quite briefly here. Mr. Morris served in the CAF from 1963, when he was 19 years old, until his mandatory retirement at age 55 in 1999. He had joined as a Private and won successive promotions to the ranks of Corporal, Master Corporal and Sergeant. He became a Warrant Officer in 1981 when he was 37 years old.

7 In order to become eligible for promotion to Master Warrant Officer, Mr. Morris had, among other things, to complete a course, the 7th Qualification Level ("QL7"), which he did in 1990 when he was 46. Decisions on the promotion of eligible candidates were made by the National Merit Board on the basis of recommendations of their Commanding Officer, their Performance Evaluation Report ("PER") and an assessment of their potential. This information was used to rank candidates on the National Merit List.

8 Mr. Morris was never ranked sufficiently high on the National Merit List to be promoted. The nub of his complaint is that, over the years, there was a discrepancy between, on the one hand, the very favourable recommendations that he received and his high scores on the PER, and, on the other, his lower scores for "potential", which steadily decreased. He says that, unlike the other bases of evaluation, the assessment of "potential" is very subjective and disadvantages older candidates.

C. TRIBUNAL'S DECISION

9 On the first issue, namely, the legal test for a prima facie case of discrimination, the Tribunal relied (at para. 67) on Ontario Human Rights Commission v. Simpsons-Sears, [1985] 2 S.C.R. 536 at 558 ("O'Malley"), as authority for the following proposition.

> A prima facie case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer.

10 O'Malley concerned a complaint of discrimination in an employment context. The Tribunal also considered Shakes v. Rex Pax Ltd. (1982), 3 C.H.H.R. D/1001 (Ont. Bd. Inq.), where it was said (at para. 8918) that, in employment cases, the Commission usually establishes a prima facie case by proving that: (a) the complainant was qualified for the particular employment; (b) the complainant was not hired; and (c) someone obtained the position who was no better qualified than the complainant, but lacked the attribute on which the complainant based their human rights complaint.

11 Although described as "relatively fixed in the case law", the Shakes test was modified by the Tribunal in Israeli v. Canadian Human Rights Commission (1983), 4 C.H.H.R. D/1616 at para. 13865, in order to deal with a situation where no appointment was made, but the employer continued to seek applicants after rejecting the complainant who was qualified for the position.

12 It was argued before the Tribunal in the present case that the Commission had not established a prima facie case of discrimination because it had not adduced evidence on the qualifications or age of the Warrant Officers who were promoted in the years that Mr. Morris was passed over. The Tribunal rejected this argument. First, it distinguished (at para. 74) Shakes and Israeli on the ground that this was a case where discrimination was alleged in respect of promotion, not hiring, and where decisions were made on the basis of a merit list compiled after a complex process.

13 Second, the Tribunal said (at para. 75) that the Commission could establish a prima facie case without adducing comparative evidence of the kind identified in Shakes, if other

> ... evidence establishes that discrimination was a factor in denying the Complainant an employment opportunity, ...

Referring to Chander v. Canada (Department of National Health and Welfare), [1995] C.H.R.D. No. 16 (C.H.R.T.), the Tribunal held that, if the evidence established that discrimination was a factor in denying a complainant an employment opportunity, a prima facie case will have been made out, irrespective of the qualifications and characteristics of the successful candidates.

14 After a meticulous examination of the evidence, the Tribunal concluded (at para. 144) that the Commission's evidence was sufficient to satisfy the O'Malley test of a prima facie case, in that the evidence adduced by the Commission was sufficient, if believed and not satisfactorily explained, for the complaint to be made out.

15 Thus, having held that the Commission had shifted the evidential burden to the CAF by establishing a prima facie case of discrimination, the Tribunal considered the non age-related explanations offered by the CAF for Mr. Morris's low scores for potential. These included: the fact his extra-curricular activities were directed, not to the military, but to his career after the military; his weaknesses in communication, the French language, and leadership; his unwillingness to take up a new posting outside southwestern Ontario; his years of service outside the regiment; and his lack of deployment on operational missions.

16 The Tribunal noted (at paras. 173-74) that, although it had directed the parties to disclose to each other all relevant documents in their possession for which privilege was not claimed, the CAF had not disclosed the PERs of the Warrant Officers who had been promoted, even though

> ... they constitute the only manner for determining if Mr. Morris's low scores on potential were due to the explanations provided with respect to the designated factors. Yet, this material was never disclosed. The Respondent's failure to adduce this evidence before the Tribunal serves to undermine all of its explanations for Mr. Morris's low score on potential. ...

Consequently, the Tribunal concluded, the CAF had not provided a reasonable explanation that rebutted the Commission's prima facie case of discrimination.

D. DECISION OF THE FEDERAL COURT

17 The Applications Judge held (at para. 24) that the Tribunal erred in law when it relied on Chander as authority for the proposition that a prima facie case could be established in the absence of comparative evidence. Unlike the present case, the Judge said (at para. 25), there were no other candidates in Chander with whom to compare the complainant. Hence, the PERs were required in this case in order to establish a prima facie case of discrimination.

18 However, after considering the evidence adduced by the Commission to establish a prima facie case, the Judge concluded (at para. 29) that, if comparative evidence had not been available, the evidence adduced by the Commission would have been sufficient to constitute prima facie proof of discrimination.

19 As for the adequacy of the CAF's explanations, the Applications Judge stated that the CAF had the burden of proving that there were reasonable, non-discriminatory explanations for the fact that Mr. Morris was not promoted, even though he had completed the QL7 course, and had received excellent performance ratings and strong recommendations. She concluded that, if a prima facie case had been established, it was reasonable for the Tribunal not to accept the CAF's explanations in the absence of comparative data.

E. LEGISLATIVE FRAMEWORK

20 Age is listed in subsection 3(1) of the Canadian Human Rights Act as a prohibited ground of discrimination. Section 4 provides that discriminatory practices described in sections 5 to 14.1 of the Act may be the subject of a complaint to the Commission and that a person found to have engaged in one or more of them may be the subject of an order by the Tribunal.

21 The provision of the Act most relevant to this appeal is paragraph 7(b).

> 7. It is a discriminatory practice, directly or indirectly,
>
> ...
>
> (b) in the course of employment, to differentiate adversely in relation to an employee,
>
> on a prohibited ground of discrimination.
>
> * * *
>
> 7. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :
>
> ...
>
> b) de le défavoriser en cours d'emploi.

E. ISSUES AND ANALYSIS

Issue 1: Standard of review

22 In Lincoln v. Bay Ferries Ltd., (2004), 322 N.R. 50, 2004 FCA 204, the Court stated (at para. 16) that the parties agreed on the standards of review applicable to the different kinds of questions decided by a Tribunal under the Canadian Human Rights Act. Thus, questions of law decided by the Tribunal are reviewable on a standard of correctness; questions of mixed fact and law are reviewable on a standard of reasonableness simpliciter; and "fact-finding and adjudication in a human rights context" are reviewable for patent unreasonableness.

Issue 2: Did the Tribunal err in law in formulating the test of a prima facie case?

23 The parties agree that whether the Tribunal selected the appropriate test of a prima facie case is a question of law and reviewable on a standard of correctness.

24 Counsel for the Attorney General argued that, as a matter of law, a prima facie case of discrimination can normally only be established in employment cases if the Commission adduces comparative evidence in the form of information about the successful candidates. While there can be exceptions (as, for instance, where there were no other candidates or comparative information is not available), a Tribunal must apply Shakes. It is a question of law whether Shakes is applicable to the adjudication of any given employment discrimination complaint. Therefore, counsel said, because comparative information was available in this case, the Tribunal erred in law by not applying Shakes.

25 I do not agree. The definition of a prima facie case in the adjudication of human rights complaints was considered in Lincoln v. Bay Ferries Ltd., which was decided after the decision under appeal in the present case was rendered. Writing for the Court, Stone J.A. said (at para. 18):

> The decisions in Etobicoke, [1982] 1 S.C.R. 202, supra, and O'Malley, supra, provide the basic guidance for what is required of a complainant to establish a prima facie case of discrimination under the Canadian Human Rights Act. ... The tribunals' decisions in Shakes, supra, and Israeli, supra, are but illustrations of the application of that guidance. ... As was recently pointed out by the tribunal in Premakumar v. Air Canada, [2002] C.H.R.D. No. 3, at paragraph 77:
>
>> While both the Shakes and the Israeli tests serve as useful guides, neither test should be automatically applied in a rigid or arbitrary fashion in every hiring case: rather the circumstances of each case should be considered to determine if the application of either of the tests, in whole or in part, is appropriate. Ultimately, the question will be whether Mr. Premakumar has satisfied the O'Malley test, that is: if believed, is the evidence before me complete and sufficient to justify a verdict in Mr. Premakumar's favour, in the absence of an answer from the respondent?

26 In my opinion, Lincoln is dispositive: O'Malley provides the legal test of a prima facie case of discrimination under the Canadian Human Rights Act. Shakes and Israeli merely illustrate what evidence, if believed and not satisfactorily explained by the respondent, will suffice for the complainant to succeed in some employment contexts.

27 In other words, the legal definition of a prima facie case does not require the Commission to adduce any particular type of evidence to prove the facts necessary to establish that the complainant was the victim of a discriminatory practice as defined in the Act. Paragraph 7(b) requires only that a person was differentiated adversely on a prohibited ground in the course of employment. It is a question of mixed fact and law whether the evidence adduced in any given case is sufficient to prove adverse differentiation on a prohibited ground, if believed and not satisfactorily explained by the respondent.

28 A flexible legal test of a prima facie case is better able than more precise tests to advance the broad purpose underlying the Canadian Human Rights Act, namely, the elimination in the federal legislative sphere of discrimination from employment, and from the provision of goods, services, facilities, and accommodation. Discrimination takes new and subtle forms. Moreover, as counsel for the Commission

pointed out, it is now recognized that comparative evidence of discrimination comes in many more forms than the particular one identified in Shakes.

29 To make the test of a prima facie case more precise and detailed in an attempt to cover different discriminatory practices would unduly "legalise" decision-making and delay the resolution of complaints by encouraging applications for judicial review. In my opinion, deciding what kind of evidence is necessary in any given context to establish a prima facie case is more within the province of the specialist Tribunal, than that of the Court.

30 Nor are more detailed legal tests of a prima facie case likely to bring greater certainty to the administration of the Act. As the jurisprudence illustrates, even within the single area of discrimination in employment, variations in fact patterns are infinite. Whether, as a question of law, Shakes would be found to apply in any given situation might be far from easy to predict. Increasing the number and specificity of legal rules does not necessarily enhance certainty in the administration of the law.

Issue 3: Was the evidence sufficient to establish a prima facie case of discrimination?

31 As already noted, the Applications Judge held that, if she had not been of the view that the law required the Commission to produce comparative evidence in order to establish a prima facie case of discrimination, she would have concluded that the evidence adduced by the Commission was sufficient to shift the evidential burden to the CAF.

32 I did not understand counsel for the Attorney General seriously to challenge this aspect of the Judge's reasons. Rather, her concern was to support the Judge's view that, as a matter of law, where, as here, comparative evidence exists about the qualifications and attributes of successful candidates for promotion, a prima facie case of discrimination cannot be established without it.

33 Whether there was sufficient evidence before the Tribunal to constitute a prima facie case involves the application of a legal rule to facts, and is thus a question of mixed fact and law reviewable on a standard of unreasonableness simpliciter: Canada (Canadian Human Rights Commission) v. Canada (Canadian Armed Forces), [1999] 3 F.C. 653 (T.D.) at para. 28; Lincoln v. Bay Ferries Ltd. at paras. 16 and 23.

Issue 4: Did the Tribunal err in law by drawing an adverse inference from the respondent's non-disclosure of the successful candidates' PERs?

34 On the cross-appeal, counsel for the CAF submitted that the Applications Judge erred in saying that the Tribunal was entitled to draw an adverse inference from the CAF's failure to produce the PERs of the officers with whom Mr. Morris was in competition for promotion. Counsel argued that the Attorney General should not have been penalised for the non-production of documents that it was believed did not have to be produced.

35 Counsel submitted that the Attorney General was not under a broad duty to disclose all the PERs relating to other Warrant Officers. This is because: the Commission did not raise its claim that the Attorney General should have disclosed the PERs until its closing argument before the Tribunal; the Commission had not included the qualifications of other Warrant Officers in the statement of particulars; the Attorney General had adduced voluminous material concerning Mr. Morris and the merit board system; and, since the PERs contain confidential information about the Warrant Officers to whom they

relate, their disclosure should only be ordered after the Warrant Officers' privacy interests have been taken into account.

36 In my opinion, however, the passages from the Tribunal's reasons relied upon by the Attorney General, and set out in the reasons of the Applications Judge, do not, when read as a whole, draw an adverse inference from a breach of the Attorney General's duty to disclose. Rather, the Tribunal simply concluded that the CAF had the burden of rebutting the Commission's prima facie case of discrimination and that it had failed to do so. Without the PERs, the Tribunal could not determine whether the particular non age-related explanations offered by the CAF justified Mr. Morris's low scores for potential. The Tribunal was merely assessing the weight of the evidence before it, a largely factual exercise.

37 As with the definition of a prima facie case, the Attorney General is seeking to elevate to the level of questions of law what are essentially questions of evidence. I agree with the Applications Judge's conclusion (at para. 33) that

> ... it was reasonable for the Tribunal to question the validity of the explanations for the Complainant's low score under the heading "potential" in the absence of Comparison Evidence.

F. CONCLUSIONS

38 For these reasons, I would allow the appeal with costs, dismiss the cross-appeal with costs, set aside the order of the Federal Court, dismiss the application for judicial review, and restore the decision of the Tribunal.

EVANS J.A.
DÉCARY J.A.:-- I agree
MALONE J.A.:-- I agree

cp/e/qlaim/qlhcs

New Brunswick (Human Rights Commission) *Appellant*

v.

Potash Corporation of Saskatchewan Inc. *Respondent*

and

Nova Scotia Human Rights Commission and Alberta Human Rights and Citizenship Commission *Interveners*

Nouveau-Brunswick (Commission des droits de la personne) *Appelante*

c.

Potash Corporation of Saskatchewan Inc. *Intimée*

et

Nova Scotia Human Rights Commission et Alberta Human Rights and Citizenship Commission *Intervenantes*

INDEXED AS: NEW BRUNSWICK (HUMAN RIGHTS COMMISSION) *v.* POTASH CORPORATION OF SASKATCHEWAN INC.

Neutral citation: 2008 SCC 45.

File No.: 31652.

2008: February 19; 2008: July 18.

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

ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK

Human rights — Discriminatory practices — Discrimination on basis of age — Mandatory retirement — Pension plans — Employee filing complaint alleging age discrimination after being asked to retire at 65 pursuant to mandatory retirement policy contained in pension plan — Provincial human rights legislation expressly declaring that age discrimination provisions not applicable if employer's decision to terminate employment taken pursuant to "bona fide pension plan" — Criteria required to show that pension plan is "bona fide pension plan" — Human Rights Code, R.S.N.B. 1973, c. H-11, s. 3(6)(a).

Pensions — Pension plans — Bona fide pension plans — Criteria required to show that pension plan is "bona fide pension plan" — Human Rights Code, R.S.N.B. 1973, c. H-11, s. 3(6)(a).

RÉPERTORIÉ : NOUVEAU-BRUNSWICK (COMMISSION DES DROITS DE LA PERSONNE) *c.* POTASH CORPORATION OF SASKATCHEWAN INC.

Référence neutre : 2008 CSC 45.

N° du greffe : 31652.

2008 : 19 février; 2008 : 18 juillet.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Abella, Charron et Rothstein.

EN APPEL DE LA COUR D'APPEL DU NOUVEAU-BRUNSWICK

Droits de la personne — Mesures discriminatoires — Discrimination fondée sur l'âge — Retraite obligatoire — Régimes de pension — Plainte de discrimination fondée sur l'âge présentée par un employé après sa mise à la retraite à l'âge de 65 ans conformément à la règle pertinente d'un régime de pension — Loi provinciale sur les droits de la personne prévoyant expressément que ses dispositions interdisant la discrimination fondée sur l'âge ne s'appliquent pas lorsque la décision de mettre un employé à la retraite est prise conformément à un « régime de pension effectif » — Critères auxquels un régime de pension doit satisfaire pour constituer un « régime de pension effectif » — Code des droits de la personne, L.R.N.-B. 1973, ch. H-11, art. 3(6)a).

Pensions — Régimes de pension — Régime de pension effectif — Critères auxquels un régime de pension doit satisfaire pour constituer un « régime de pension effectif » — Code des droits de la personne, L.R.N.-B. 1973, ch. H-11, art. 3(6)a).

[67] It also follows that in interpreting human rights statutes a strict grammatical analysis may be subordinated to the remedial purposes of the law. Thus, this Court "has repeatedly stressed that it is inappropriate to rely solely on a strictly grammatical analysis, particularly with respect to the interpretation of legislation which is constitutional or quasi-constitutional in nature": *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, [2000] 1 S.C.R. 665, 2000 SCC 27 ("*Quebec v. Montréal*"), at para. 30 (citing *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571, and *O'Malley*).

[67] Il s'ensuit en outre que, dans l'interprétation de dispositions sur les droits de la personne, l'analyse grammaticale stricte peut se trouver subordonnée à l'objet réparateur de la loi. En effet, notre Cour « a souligné à maintes reprises qu'il n'y a pas lieu de s'en rapporter uniquement à la méthode d'interprétation fondée sur l'analyse grammaticale, notamment en ce qui concerne l'interprétation de lois de nature constitutionnelle et quasi-constitutionnelle » : *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Montréal (Ville)*, [2000] 1 R.C.S. 665, 2000 CSC 27 (« *Québec c. Montréal* »), par. 30 (citant les arrêts *Gould c. Yukon Order of Pioneers*, [1996] 1 R.C.S. 571, et *O'Malley*).

[68] It is also established that in interpreting human rights legislation, courts should strive for an interpretation that is consistent with the interpretation accorded to similar human rights provisions in other jurisdictions. Different jurisdictions may phrase the protections and their limitations in different ways. Nevertheless, they should be interpreted consistently unless the legislature's intent is clearly otherwise: *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353, at p. 373. This principle, *inter alia*, supported the conclusion in *Meiorin* that B.C.'s *Human Rights Code*, although it made no reference to direct and adverse impact discrimination, should be interpreted as addressing both together, since doing so was consistent with other Canadian human rights codes (paras. 46 and 52).

[68] Il est également établi que l'interprétation d'une loi sur les droits de la personne doit s'harmoniser avec celle de dispositions comparables dans d'autres ressorts. La formulation des garanties et des exceptions peut varier, mais leur interprétation doit demeurer cohérente, sauf intention contraire manifeste du législateur : *Université de la Colombie-Britannique c. Berg*, [1993] 2 R.C.S. 353, p. 373. C'est notamment sur ce principe que repose la conclusion de notre Cour dans l'arrêt *Meiorin*, à savoir que le *Human Rights Code* de la Colombie-Britannique, bien qu'elle ne fasse pas expressément mention de la discrimination directe et de la discrimination par suite d'un effet préjudiciable, doit être interprétée comme si elle visait les deux, car les autres codes des droits de la personne en vigueur au Canada le font (par. 46 et 52).

[69] Finally, when the meaning of a provision in a human rights statute is open to more than one interpretation, as here, it must be interpreted in a manner consistent with the provisions of the *Canadian Charter of Rights and Freedoms*: *Quebec v. Montréal*, at para. 42; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038. The respondent employer makes much of the fact that this appeal is not a *Charter* challenge. Nevertheless, in interpreting the ambiguous phrase here at issue, the *Charter* properly informs the analysis.

[69] Enfin, lorsqu'une disposition sur les droits de la personne se prête à plus d'une interprétation, comme dans la présente affaire, son interprétation doit s'harmoniser avec la *Charte canadienne des droits et libertés* : *Québec c. Montréal*, par. 42; *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038. L'employeur intimé insiste beaucoup sur le fait qu'il ne s'agit pas en l'espèce d'une contestation fondée sur la *Charte*, mais il reste que celle-ci éclaire l'analyse que requiert l'interprétation du libellé ambigu des dispositions en cause.

[70] I conclude that the right to be protected against age discrimination preserved by s. 3 of the

[70] Je conclus que la garantie contre la discrimination fondée sur l'âge prévue à l'art. 3 du Code

Ronald Edward Sparrow *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The National Indian Brotherhood / Assembly of First Nations, the B.C. Wildlife Federation, the Steelhead Society of British Columbia, the Pacific Fishermen's Defence Alliance, Northern Trollers' Association, the Pacific Gillnetters' Association, the Gulf Trollers' Association, the Pacific Trollers' Association, the Prince Rupert Fishing Vessel Owners' Association, the Fishing Vessel Owners' Association of British Columbia, the Pacific Coast Fishing Vessel Owners' Guild, the Prince Rupert Fishermen's Cooperative Association, the Co-op Fishermen's Guild, Deep Sea Trawlers' Association of B.C., the Fisheries Council of British Columbia, the United Fishermen and Allied Workers' Union, the Attorney General for Ontario, the Attorney General of Quebec, the Attorney General of British Columbia, the Attorney General for Saskatchewan, the Attorney General for Alberta and the Attorney General of Newfoundland *Interveners*

INDEXED AS: R. *v.* SPARROW

File No.: 20311.

1988: November 3; 1990: May 31.

Present: Dickson C.J. and McIntyre*, Lamer, Wilson, La Forest, L'Heureux-Dubé and Sopinka JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Aboriginal rights — Fishing rights — Indian convicted of fishing with net larger than permitted by Band's licence — Whether or not net length restriction inconsistent with s. 35(1) of the Constitution Act, 1982 — Constitution Act, 1982, ss. 35(1), 52(1) — Fisheries Act, R.S.C. 1970, c. F-14, s. 34 — British Columbia Fishery (General) Regulations, SOR/84-248, ss. 4, 12, 27(1), (4).

* McIntyre J. took no part in the judgment.

Ronald Edward Sparrow *Appelant*

c.

Sa Majesté la Reine *Intimée*

et

La Fraternité des Indiens du Canada / Assemblée des premières nations, la B.C. Wildlife Federation, la Steelhead Society of British Columbia, la Pacific Fishermen's Defence Alliance, Northern Trollers' Association, la Pacific Gillnetters' Association, la Gulf Trollers' Association, la Pacific Trollers' Association, la Prince Rupert Fishing Vessel Owners' Association, la Fishing Vessel Owners' Association of British Columbia, la Pacific Coast Fishing Vessel Owners' Guild, la Prince Rupert Fishermen's Cooperative Association, la Co-op Fishermen's Guild, Deep Sea Trawlers' Association of B.C., le Fisheries Council of British Columbia, le Syndicat des pêcheurs et travailleurs assimilés, le procureur général de l'Ontario, le procureur général du Québec, le procureur général de la Colombie-Britannique, le procureur général de la Saskatchewan, le procureur général de l'Alberta et le procureur général de Terre-Neuve *Intervenants*

RÉPERTORIÉ: R. *c.* SPARROW

N° du greffe: 20311.

1988: 3 novembre; 1990: 31 mai.

Présents: Le juge en chef Dickson et les juges McIntyre*, Lamer, Wilson, La Forest, L'Heureux-Dubé et Sopinka.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit constitutionnel — Droits ancestraux — Droits de pêche — Indien reconnu coupable d'avoir pêché avec un filet plus long que celui autorisé par le permis de la bande — La restriction quant à la longueur du filet est-elle incompatible avec l'art. 35(1) de la Loi constitutionnelle de 1982? — Loi constitutionnelle de 1982, art. 35(1), 52(1) — Loi sur les pêcheries, S.R.C. 1970, ch. F-14, art. 34 — Règlement de pêche général de la Colombie-Britannique, DORS/84-248, art. 4, 12, 27(1), (4).

* Le juge McIntyre n'a pas pris part au jugement.

opinion, this does not mean that any law or regulation affecting aboriginal rights will automatically be of no force or effect by the operation of s. 52 of the *Constitution Act, 1982*. Legislation that affects the exercise of aboriginal rights will nonetheless be valid, if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1).

There is no explicit language in the provision that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet, we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with s. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with the liberal interpretive principle enunciated in *Nowegijick*, *supra*, and the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by *Guerin v. The Queen*, *supra*.

We refer to Professor Slattery's "Understanding Aboriginal Rights", op. cit., with respect to the task of envisioning a s. 35(1) justificatory process. Professor Slattery, at p. 782, points out that a justificatory process is required as a compromise between a "patchwork" characterization of aboriginal rights whereby past regulations would be read into a definition of the rights, and a characterization that would guarantee aboriginal rights in their original form unrestricted by subsequent regulation. We agree with him that these

l'article premier de la *Charte*. Cela ne veut pas dire, selon nous, que toute loi ou tout règlement portant atteinte aux droits ancestraux des autochtones sera automatiquement inopérant en vertu de l'art. 52 de la *Loi constitutionnelle de 1982*. Un texte législatif qui touche l'exercice de droits ancestraux sera néanmoins valide s'il satisfait au critère applicable pour justifier une atteinte à un droit reconnu et confirmé au sens du par. 35(1).

Le paragraphe en question ne contient aucune disposition explicite autorisant notre Cour ou n'importe quel autre tribunal à apprécier la légitimité d'une mesure législative gouvernementale qui restreint des droits ancestraux. Nous estimons pourtant que l'expression «reconnaissance et confirmation» comporte les rapports de fiduciaire déjà mentionnés et implique ainsi une certaine restriction à l'exercice du pouvoir souverain. Les droits qui sont reconnus et confirmés ne sont pas absolus. Les pouvoirs législatifs fédéraux subsistent, y compris évidemment le droit de légiférer relativement aux Indiens en vertu du par. 91(24) de la *Loi constitutionnelle de 1867*. Toutefois, ces pouvoirs doivent maintenant être rapprochés du par. 35(1). En d'autres termes, le pouvoir fédéral doit être concilié avec l'obligation fédérale et la meilleure façon d'y parvenir est d'exiger la justification de tout règlement gouvernemental qui porte atteinte à des droits ancestraux. Une telle vérification est conforme au principe d'interprétation libérale énoncé dans l'arrêt *Nowegijick*, précité, et avec l'idée que la Couronne doit être tenue au respect d'une norme élevée — celle d'agir honorablement—dans ses rapports avec les peuples autochtones du Canada, comme le laisse entendre l'arrêt *Guerin c. La Reine*, précité.

Nous nous référons à «Understanding Aboriginal Rights», *op. cit.*, du professeur Slattery pour ce qui est d'envisager un processus de justification au par. 35(1). Le professeur Slattery souligne, à la p. 782, qu'un processus de justification s'impose à titre de compromis entre une caractérisation «composite» des droits ancestraux qui ferait entrer dans la définition de ceux-ci les règlements antérieurs et une caractérisation qui garantirait les droits ancestraux sous leur forme initiale sans aucune restriction apportée par des règlements ultérieurs. Nous

Indexed as:
Singh (Re) (C.A.)

In the Matter of the Canadian Human Rights Act
And in the Matter of a complaint by Subhaschan Singh dated November 27, 1986, filed pursuant to section 32(1) of the Canadian Human Rights Act against Department of External Affairs
And in the Matter of the jurisdiction of the Canadian Human Rights Commission to conduct an investigation into the said complaint pursuant to section 35 of the Canadian Human Rights Act

[1989] 1 F.C. 430

[1988] F.C.J. No. 414

Court File No. A-7-87

Federal Court of Canada - Court of Appeal

Mahoney, Hugessen and Desjardins JJ.A.

Heard: Ottawa, April 20 and 21, 1988.
Judgment: Ottawa, May 9, 1988.

Human rights -- References from Canadian Human Rights Commission as to whether it has jurisdiction to investigate complaints of discrimination in refusal to grant visitors' visas and to allow close relatives to sponsor family members for landing -- Impossible to say Departments concerned not engaged in provision of services customarily available to general public, within meaning of Act, s. 5 -- Cannot be said person who, on prohibited grounds, is denied opportunity to sponsor application for landing is not victim within Act, and if Canadian citizen or permanent resident within meaning of s. 32(5)(b), Commission can hear complaint.

Immigration -- Whether Department of External Affairs and Canada Employment and Immigration Commission are engaged in provision of services customarily available to general public, within meaning of s. 5 Canadian Human Rights Act -- Person denied opportunity, on prohibited grounds, to sponsor application for landing may be victim within Act, and Canadian Human Rights Commission has jurisdiction to investigate complaint.

These are ten references to the Court by the Canadian Human Rights Commission for a determination as to whether it has jurisdiction to investigate complaints concerning refusals by the Department of External Affairs and the Canada Employment and Immigration Commission to grant visitors' visas to close family relatives and to allow close relatives to sponsor members of the family class for immigration to Canada. It was argued that the Commission lacked jurisdiction because the Departments concerned are not engaged in the provision of services customarily available to the general public within

the meaning of section 5 of the Canadian Human Rights Act, and that the victims of the alleged discriminatory practices are not Canadian citizens or permanent residents of Canada so as to bring the cases within the provisions of paragraph 32(5)(b) of the Canadian Human Rights Act.

Held, the questions in the references should be answered in the affirmative.

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The Commission has the right to investigate a complaint which may turn out to be beyond the Commission's jurisdiction. Subparagraph 36(3)(b)(ii) clearly envisages that the Commission will determine whether or not a complaint is within its jurisdiction. The Court should prohibit it from acting only where it is clear that the tribunal is without jurisdiction. The questions raised are whether the complaints cannot possibly relate to discriminatory practices in the provision of services customarily available to the general public and whether complainants could not possibly be described as victims of the alleged discriminatory practices. It is not clear that services rendered, both in Canada and abroad, by the officers charged with the administration of the Immigration Act, 1976, are not services customarily available to the general public. The sponsor's interest is expressly recognized in the Act and consistent with the objective of paragraph 3(c) which is to facilitate the reunion of close relatives. A person who, on prohibited grounds, is denied the opportunity to sponsor an application for landing is a "victim" within the meaning of the Act. That being so, it cannot be said that the victim in any of the subject references was not a Canadian citizen or permanent resident within the meaning of paragraph 32(5)(b) of the Act.

Statutes and Regulations Judicially Considered

Canadian Human Rights Act, S.C. 1976-77, c. 33, ss. 2, 5, 32(5)(b), 33(b)(ii), 36(3)(b)(ii) (as am. by S.C. 1985, c. 26, s. 69).
Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, s. 28(4).
Immigration Act, 1976, S.C. 1976-77, c. 52, ss. 3(c),(e), 79.
Immigration Regulations, 1978, SOR/78-172, ss. 4, 5, 6.
Sex Discrimination Act 1975 (U.K.), 1975, c. 65, s. 29.

Cases Judicially Considered

Applied:
Lodge v. Minister of Employment and Immigration, [1979] 1 F.C. 775 (C.A.).
Attorney General of Canada v. Cumming, [1980] 2 F.C. 122 (T.D.).
Gomez v. City of Edmonton (1982), 3 C.H.R.R. 882.

Considered:
Amin v. Entry Clearance Officer, Bombay, [1983] 2 All E.R. 864 (H.L.).
Kassam v. Immigration Appeal Tribunal, [1980] 2 All E.R. 330 (C.A.).
Canadian National Railway Co. v. Canada (Canadian Human Rights Commission), [1987] 1 S.C.R. 1114.
Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Limited et al., [1985] 2 S.C.R. 536.

Counsel:

Russell G. Juriansz, for the Canadian Human Rights Commission.

[page432]

J. Grant Sinclair, Q.C., for the Department of External Affairs, Canada Employment and Immigration Commission and the Attorney General of Canada.

Solicitors:

Blake, Cassels & Graydon, Toronto, for the Canadian Human Rights Commission.
Deputy Attorney General of Canada for the Department of External Affairs, Canada Employment and Immigration Commission and the Attorney General of Canada.

The following are the reasons for judgment rendered in English by

1 **HUGESSEN J.**:-- These are ten references by the Canadian Human Rights Commission pursuant to subsection 28(4) of the Federal Court Act.[1] The resolutions authorizing the references are as follows:

[Court File No. A-7-87]

> Subhaschan Singh v. Department of External Affairs
>
> The Commission resolved to refer the following question to the Federal Court of Canada:
>
> "Can the Canadian Human Rights Commission authorize an investigator under subsection 35(2) of the Canadian Human Rights Act to carry out or continue an investigation in respect of a complaint made by Subhaschan Singh, a person lawfully present in Canada, that the Department of External Affairs is engaging or has engaged in a discriminatory practice because of family status, marital status and age by refusing to issue a visitors' visa to Subhaschan Singh's sister, Ousha Davi Singh?"

[Court File No. A-8-87]

> Subhaschan Singh v. Canada Employment and Immigration Commission
>
> The Commission resolved to refer the following question to the Federal Court of Canada:
>
> "Can the Canadian Human Rights Commission authorize an investigator under subsection 35(2) of the Canadian Human Rights Act to carry out or continue an investigation in respect of a complaint made by Subhaschan Singh, a person lawfully present in Canada, that the Canada Employment and Immigration Commission is engaging or has engaged in a discriminatory practice because of family status, marital status and age by refusing to issue a visitors' visa to Subhaschan Singh's sister, Ousha Davi Singh?"

(a) every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have... .

[page442]

In my view, a person who, on prohibited grounds, is denied the opportunity to sponsor an application for landing is a "victim" within the meaning of the Act whether or not others may also be such victims.

22 I would, however, go a great deal further. The question as to who is the "victim" of an alleged discriminatory practice is almost wholly one of fact. Human rights legislation does not look so much to the intent of discriminatory practices as to their effect.[8] That effect is by no means limited to the alleged "target" of the discrimination and it is entirely conceivable that a discriminatory practice may have consequences which are sufficiently direct and immediate to justify qualifying as a "victim" thereof persons who were never within the contemplation or intent of its author. Thus, even in the case of the denial of visitors' visas, it is by no means impossible that the complainants in Canada who were seeking to be visited by relatives from abroad should not themselves be victims of discriminatory practices directed against such relatives. A simple example will illustrate the point: could it seriously be argued that a Canadian citizen who required a visit from a sibling for the purposes of obtaining a lifesaving organ transplant was not victimized by the refusal, on prohibited grounds, of a visitors' visa to that sibling?

23 It is not, of course, necessary to go so far as to postulate life-threatening situations. I have already referred to paragraph 3(c) of the Immigration Act, 1976. I do not see the purpose there stated as being limited to the facilitating of applications for permanent residence and thereby excluding an application for a simple visit. But family reunification is not the only purpose of the Immigration Act, 1976: paragraph 3(e) is expressly directed to visitors and states, as one of the Act's objectives:

3. ...

(e) to facilitate the entry of visitors into Canada for the purpose of fostering trade and commerce, tourism, cultural and scientific activities and international understanding;

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If a visitors' visa were denied on prohibited grounds in such a way as to deprive a Canadian citizen or permanent resident of Canada of significant commercial or cultural opportunities, it would certainly be arguable that he or she was one of the victims of the discriminatory practice.

24 That being so, it is impossible for me at this stage to affirm that in any of the subject references the victim was not a Canadian citizen or a permanent resident within the meaning of paragraph 32(5)(b) of the Canadian Human Rights Act.

25 For all the foregoing reasons, I would answer the questions posed in the various references in the affirmative.

MAHONEY J.:-- I agree.
DESJARDINS J.:-- I agree.

Delwin Vriend, Gala-Gay and Lesbian Awareness Society of Edmonton, Gay and Lesbian Community Centre of Edmonton Society and Dignity Canada Dignité for Gay Catholics and Supporters *Appellants*

v.

Her Majesty The Queen in Right of Alberta and Her Majesty's Attorney General in and for the Province of Alberta *Respondents*

and

The Attorney General of Canada, the Attorney General for Ontario, the Alberta Civil Liberties Association, Equality for Gays and Lesbians Everywhere (EGALE), the Women's Legal Education and Action Fund (LEAF), the Foundation for Equal Families, the Canadian Human Rights Commission, the Canadian Labour Congress, the Canadian Bar Association — Alberta Branch, the Canadian Association of Statutory Human Rights Agencies (CASHRA), the Canadian AIDS Society, the Alberta and Northwest Conference of the United Church of Canada, the Canadian Jewish Congress, the Christian Legal Fellowship, the Alberta Federation of Women United for Families, the Evangelical Fellowship of Canada and Focus on the Family (Canada) Association *Interveners*

INDEXED AS: VRIEND *v.* ALBERTA

File No.: 25285.

1997: November 4; 1998: April 2.

Present: Lamer C.J. and L'Heureux-Dubé, Sopinka,* Gonthier, Cory, McLachlin, Iacobucci, Major and Bastarache JJ.

* Sopinka J. took no part in the judgment.

Delwin Vriend, Gala-Gay and Lesbian Awareness Society of Edmonton, le Gay and Lesbian Community Centre of Edmonton Society et Dignity Canada Dignité for Gay Catholics and Supporters *Appelants*

c.

Sa Majesté la Reine du chef de l'Alberta et le procureur général de la province de l'Alberta *Intimés*

et

Le procureur général du Canada, le procureur général de l'Ontario, l'Alberta Civil Liberties Association, Égalité pour les gais et les lesbiennes (EGALE), le Fonds d'action et d'éducation juridiques pour les femmes (FAEJ), la Foundation for Equal Families, la Commission canadienne des droits de la personne, le Congrès du travail du Canada, l'Association du Barreau canadien — Division de l'Alberta, l'Association canadienne des commissions et conseils des droits de la personne (ACCDP), la Société canadienne du SIDA, l'Alberta and Northwest Conference of the United Church of Canada, le Congrès juif canadien, le Christian Legal Fellowship, l'Alberta Federation of Women United for Families, l'Evangelical Fellowship of Canada et la Focus on the Family (Canada) Association *Intervenants*

RÉPERTORIÉ: VRIEND *c.* ALBERTA

N° du greffe: 25285.

1997: 4 novembre; 1998: 2 avril.

Présents: Le juge en chef Lamer et les juges L'Heureux-Dubé, Sopinka*, Gonthier, Cory, McLachlin, Iacobucci, Major et Bastarache.

* Le juge Sopinka n'a pas pris part au jugement.

99 Apart from the immediate effect of the denial of recourse in cases of discrimination, there are other effects which, while perhaps less obvious, are at least as harmful. In *Haig*, the Ontario Court of Appeal based its finding of discrimination on both the "failure to provide an avenue for redress for prejudicial treatment of homosexual members of society" and "the possible inference from the omission that such treatment is acceptable" (p. 503). It can be reasonably inferred that the absence of any legal recourse for discrimination on the ground of sexual orientation perpetuates and even encourages that kind of discrimination. The respondents contend that it cannot be assumed that the "silence" of the *IRPA* reinforces or perpetuates discrimination, since governments "cannot legislate attitudes". However, this argument seems disingenuous in light of the stated purpose of the *IRPA*, to prevent discrimination. It cannot be claimed that human rights legislation will help to protect individuals from discrimination, and at the same time contend that an exclusion from the legislation will have no effect.

Outre l'effet immédiat de la privation de tout recours en cas de discrimination, il existe d'autres répercussions qui, bien qu'elles puissent être moins évidentes, sont à tout le moins aussi préjudiciables. Dans l'arrêt *Haig*, la Cour d'appel de l'Ontario a conclu à l'exercice d'une discrimination sur le fondement à la fois [TRADUCTION] «de l'omission de prévoir une voie de recours au bénéfice des homosexuels qui sont victimes d'actes préjudiciables» et «du fait que l'omission permet de conclure que de tels actes sont acceptables» (p. 503). Il est plausible que l'absence de tout recours légal en cas de discrimination fondée sur l'orientation sexuelle perpétue, voire encourage, ce genre de discrimination. Les intimés soutiennent qu'on ne peut supposer que le «silence» de l'*IRPA* renforce ou perpétue la discrimination, étant donné que l'État «ne peut régir les mentalités». Toutefois, cet argument semble captieux étant donné que l'*IRPA* vise expressément à empêcher la discrimination. On ne peut dire qu'une loi sur les droits de la personne contribuera à protéger les individus contre la discrimination et, en même temps, prétendre qu'une exclusion du bénéfice de la loi n'aura aucun effet.

100 However, let us assume, contrary to all reasonable inferences, that exclusion from the *IRPA*'s protection does not actually contribute to a greater incidence of discrimination on the excluded ground. Nonetheless that exclusion, deliberately chosen in the face of clear findings that discrimination on the ground of sexual orientation does exist in society, sends a strong and sinister message. The very fact that sexual orientation is excluded from the *IRPA*, which is the Government's primary statement of policy against discrimination, certainly suggests that discrimination on the ground of sexual orientation is not as serious or as deserving of condemnation as other forms of discrimination. It could well be said that it is tantamount to condoning or even encouraging discrimination against lesbians and gay men. Thus this exclusion clearly gives rise to an effect which constitutes discrimination.

Cependant, supposons, malgré toutes les conclusions qu'il est raisonnable de tirer, que l'exclusion d'un motif ouvrant droit à la protection prévue par l'*IRPA* n'a pas pour effet d'accroître la discrimination fondée sur ce motif. Cette exclusion, établie délibérément dans un contexte où il est évident que la discrimination fondée sur l'orientation sexuelle existe dans la société, transmet néanmoins un message à la fois clair et sinistre. Le fait même que l'orientation sexuelle ne soit pas un motif de distinction illicite aux termes de l'*IRPA*, laquelle constitue le principal énoncé de politique du gouvernement contre la discrimination, laisse certainement entendre que la discrimination fondée sur l'orientation sexuelle n'est pas aussi grave ou condamnable que les autres formes de discrimination. On pourrait même soutenir que cela équivaut à tolérer ou même à encourager la discrimination contre les homosexuels. En conséquence, cette exclusion a manifestement un effet qui constitue de la discrimination.

Hazel Ruth Withler and Joan Helen Fitzsimonds *Appellants*

v.

Attorney General of Canada *Respondent*

and

Attorney General of Ontario and Women's Legal Education and Action Fund *Interveners*

INDEXED AS: WITHLER *v.* CANADA (ATTORNEY GENERAL)

2011 SCC 12

File No.: 33039.

2010: March 17; 2011: March 4.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Charter of Rights — Right to equality — Discrimination based on age — Federal pension legislation reducing supplementary death benefit by 10 percent for each year by which plan member exceeds prescribed ages — Surviving spouses receiving reduced supplementary death benefits — Whether reduction provisions discriminate against surviving spouses — Canadian Charter of Rights and Freedoms, ss. 1, 15(1) — Canadian Forces Superannuation Act, R.S.C. 1985, c. C-17, s. 60(1) — Public Service Superannuation Act, R.S.C. 1985, c. P-36, s. 47(1).

Constitutional law — Charter of Rights — Right to equality — Contextual analysis — Whether use of comparator groups is appropriate in analysis of equality rights — Canadian Charter of Rights and Freedoms, s. 15(1).

The appellants, representative plaintiffs in two class actions, are widows whose federal supplementary death benefits were reduced because of the age

Hazel Ruth Withler et Joan Helen Fitzsimonds *Appelantes*

c.

Procureur général du Canada *Intimé*

et

Procureur général de l'Ontario et Fonds d'action et d'éducation juridiques pour les femmes *Intervenants*

RÉPERTORIÉ : WITHLER *c.* CANADA (PROCUREUR GÉNÉRAL)

2011 CSC 12

N° du greffe : 33039.

2010 : 17 mars; 2011 : 4 mars.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit constitutionnel — Charte des droits — Droit à l'égalité — Discrimination fondée sur l'âge — Réduction par des lois fédérales sur les pensions de la prestation supplémentaire de décès de 10 p. 100 pour chaque année de l'âge du participant ultérieure à l'âge prescrit — Versement aux conjoints survivants d'une prestation supplémentaire de décès réduite — Les dispositions imposant une réduction créent-elles une discrimination à l'endroit des conjoints survivants? — Charte canadienne des droits et libertés, art. 1, 15(1) — Loi sur la pension de retraite des Forces canadiennes, L.R.C. 1985, ch. C-17, art. 60(1) — Loi sur la pension de la fonction publique, L.R.C. 1985, ch. P-36, art. 47(1).

Droit constitutionnel — Charte des droits — Droit à l'égalité — Analyse contextuelle — Le recours à des groupes de comparaison est-il opportun dans l'analyse portant sur les droits à l'égalité? — Charte canadienne des droits et libertés, art. 15(1).

Les appelantes, qui représentent les demandeurs dans le cadre de deux recours collectifs, sont des veuves ayant touché des prestations fédérales supplémentaires

the ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will also colour the discrimination analysis.

[39] Both the inquiries into perpetuation of disadvantage and stereotyping are directed to ascertaining whether the law violates the requirement of substantive equality. Substantive equality, unlike formal equality, rejects the mere presence or absence of difference as an answer to differential treatment. It insists on going behind the facade of similarities and differences. It asks not only what characteristics the different treatment is predicated upon, but also whether those characteristics are relevant considerations under the circumstances. The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group. The result may be to reveal differential treatment as discriminatory because of prejudicial impact or negative stereotyping. Or it may reveal that differential treatment is required in order to ameliorate the actual situation of the claimant group.

[40] It follows that a formal analysis based on comparison between the claimant group and a "similarly situated" group, does not assure a result that captures the wrong to which s. 15(1) is directed — the elimination from the law of measures that impose or perpetuate substantial inequality. What is required is not formal comparison with a selected mirror comparator group, but an approach that looks at the full context, including the situation of the claimant group and whether the impact of the impugned law is to perpetuate disadvantage or negative stereotypes about that group.

(2) The Role of Comparison Under Section 15: The Jurisprudence

[41] As McIntyre J. explained in *Andrews*, equality is a comparative concept, the condition of which may "only be attained or discerned by comparison

de prestations, comme c'est le cas en l'espèce, son effet d'amélioration sur la situation des autres participants et la multiplicité des intérêts qu'elle tente de concilier joueront également dans l'analyse du caractère discriminatoire.

[39] Que l'on cherche à savoir s'il y a perpétuation d'un désavantage ou application d'un stéréotype, il faut déterminer si la mesure transgresse l'impératif d'égalité réelle. L'égalité réelle, contrairement à l'égalité formelle, n'admet pas la simple différence ou absence de différence comme justification d'un traitement différent. Elle transcende les similitudes et distinctions apparentes. Elle demande qu'on détermine non seulement sur quelles caractéristiques est fondé le traitement différent, mais également si ces caractéristiques sont pertinentes dans les circonstances. L'analyse est centrée sur l'effet réel de la mesure législative contestée, compte tenu de l'ensemble des facteurs sociaux, politiques, économiques et historiques inhérents au groupe. Cette analyse peut démontrer qu'un traitement différent est discriminatoire en raison de son effet préjudiciable ou de l'application d'un stéréotype négatif ou, au contraire, qu'il est nécessaire pour améliorer la situation véritable du groupe de demandeurs.

[40] Ainsi, une analyse formelle fondée sur une comparaison du groupe de demandeurs à un groupe « se trouvant dans une situation semblable » ne garantit pas la suppression du mal auquel le par. 15(1) vise à remédier — l'élimination des mesures législatives qui ont pour effet d'imposer ou de perpétuer une inégalité réelle. L'exercice requis n'est pas une comparaison formelle avec un groupe de comparaison donné aux caractéristiques identiques, mais une démarche qui tienne compte du contexte dans son ensemble, y compris la situation du groupe de demandeurs et la question de savoir si la mesure législative contestée a pour effet de perpétuer un désavantage ou un stéréotype négatif à l'égard du groupe.

(2) Le rôle de la comparaison sous le régime de l'art. 15 : la jurisprudence

[41] Comme l'a expliqué le juge McIntyre dans *Andrews*, l'égalité est un concept comparatif, dont la matérialisation ne peut « être atteinte ou perçue

with the condition of others in the social and political setting in which the question arises" (p. 164). However, McIntyre J. went on to state that formal comparison based on the logic of treating likes alike is not the goal of s. 15(1). What s. 15(1) requires is substantive, not formal equality.

que par comparaison avec la situation des autres dans le contexte socio-politique où la question est soulevée » (p. 164). Le juge McIntyre a cependant précisé qu'une comparaison formelle fondée sur le principe voulant que les personnes se trouvant dans une situation analogue reçoivent un traitement analogue ne servait pas l'objet du par. 15(1). Le paragraphe 15(1) vise l'égalité réelle, et non pas une égalité formelle.

[42] Comparison, he explained, must be approached with caution; not all differences in treatment entail inequality, and identical treatment may produce "serious inequality" (p. 164). For that reason, McIntyre J. rejected a formalistic "treat likes alike" approach to equality under s. 15(1), contrasting substantive equality with formal equality.

[42] La démarche comparative, aux dires du juge, appelle la prudence, puisque toute différence de traitement ne produira pas forcément une inégalité, et qu'un traitement identique peut engendrer de « graves inégalités » (p. 164). C'est pourquoi il a rejeté l'approche formaliste du « traitement analogue » pour l'application du par. 15(1), en distinguant l'égalité réelle de l'égalité formelle.

[43] The Court's s. 15(1) jurisprudence has consistently affirmed that the s. 15(1) inquiry must focus on substantive equality and must consider all context relevant to the claim at hand. The central and sustained thrust of the Court's s. 15(1) jurisprudence has been the need for a substantive contextual approach and a corresponding repudiation of a formalistic "treat likes alike" approach. This is evident from *Andrews*, through *Law*, to *Kapp*. When the Court has made comparisons with a similarly situated group, those comparisons have generally been accompanied by insistence that a valid s. 15(1) analysis must consider the full context of the claimant group's situation and the actual impact of the law on that situation. In *Lovelace v. Ontario*, 2000 SCC 37, [2000] 1 S.C.R. 950, for example, Iacobucci J., for the Court, having found "that the whole context of the circumstances warrants a refinement in the identification of the comparator group", stated: "I find that the s. 15(1) inquiry must proceed on the basis of comparing band and non-band aboriginal communities" (para. 64). However, he emphasized that "we must ask whether the impugned law, program or activity has a purpose or effect that is substantively discriminatory" (para. 53).

[43] Dans ses décisions sur le par. 15(1), la Cour a toujours affirmé que l'analyse requise par cette disposition doit être centrée sur l'égalité réelle et tenir compte de tous les éléments contextuels pertinents relativement à l'allégation dont le tribunal est saisi. La Cour a posé en principe fondamental, à maintes reprises, la nécessité de procéder à une analyse contextuelle au fond et de rejeter, en conséquence, l'approche formaliste d'un « traitement analogue ». C'est ce qui ressort de ses décisions, depuis *Andrews* jusqu'à *Kapp*, en passant par *Law*. Lorsque la Cour a fait une comparaison avec un groupe se trouvant dans une situation semblable, elle a généralement pris soin de préciser que l'analyse requise par le par. 15(1) commande l'appréciation de tous les éléments contextuels de la situation du groupe de demandeurs et de l'effet réel de la mesure législative sur leur situation. Dans *Lovelace c. Ontario*, 2000 CSC 37, [2000] 1 R.C.S. 950, par exemple, le juge Iacobucci, au nom de la Cour, ayant conclu que « le contexte global commande de préciser davantage l'identité du groupe de comparaison », a déclaré : « [J]'estime que l'analyse fondée sur le par. 15(1) doit être faite en comparant les communautés autochtones constituées en bandes et celles qui ne le sont pas » (par. 64). Toutefois, il a insisté qu'« il faut se demander si la loi, le programme ou l'activité contesté a un objet ou un effet qui est source de discrimination réelle » (par. 53).

prejudice or stereotyping? (See *Kapp*, at para. 17.) Comparison plays a role throughout the analysis.

[62] The role of comparison at the first step is to establish a "distinction". Inherent in the word "distinction" is the idea that the claimant is treated differently than others. Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1).

[63] It is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination. Provided that the claimant establishes a distinction based on one or more enumerated or analogous grounds, the claim should proceed to the second step of the analysis. This provides the flexibility required to accommodate claims based on intersecting grounds of discrimination. It also avoids the problem of eliminating claims at the outset because no precisely corresponding group can be posited.

[64] In some cases, identifying the distinction will be relatively straightforward, because a law will, on its face, make a distinction on the basis of an enumerated or analogous ground (direct discrimination). This will often occur in cases involving government benefits, as in *Law*, *Lovelace* and *Hodge*. In other cases, establishing the distinction will be more difficult, because what is alleged is indirect discrimination: that although the law purports to treat everyone the same, it has a disproportionately negative impact on a group or individual that can be identified by factors relating to enumerated or analogous grounds. Thus in *Granovsky*, the Court noted that "[t]he CPP contribution requirements, which on their face applied the same set of rules to all contributors, operated unequally in their effect on persons who want to work but whose

perpétuation d'un préjugé ou l'application de stéréotypes? (Voir *Kapp*, par. 17.) La comparaison joue un rôle du début à la fin de l'analyse.

[62] Le rôle de la comparaison consiste, à la première étape, à établir l'existence d'une « distinction ». Il ressort du mot « distinction » l'idée que le demandeur est traité différemment d'autrui. La comparaison entre donc en jeu, en ce sens que le demandeur prétend qu'il s'est vu refuser un avantage accordé à d'autres ou imposer un fardeau que d'autres n'ont pas, en raison d'une caractéristique personnelle correspondant à un motif énuméré ou analogue visé par le par. 15(1).

[63] Il n'est pas nécessaire de désigner un groupe particulier qui corresponde précisément au groupe de demandeurs, hormis la ou les caractéristiques personnelles invoquées comme motif de discrimination. Dans la mesure où le demandeur établit l'existence d'une distinction fondée sur au moins un motif énuméré ou analogue, la demande devrait passer à la deuxième étape de l'analyse. Cette démarche offre la souplesse requise pour l'examen des allégations fondées sur des motifs de discrimination interreliés. Elle permet également d'éviter le rejet immédiat de certaines demandes s'il se révèle impossible de désigner un groupe dont les caractéristiques correspondent précisément à celles du demandeur.

[64] Dans certains cas, il sera relativement simple d'établir l'existence d'une distinction, par exemple lorsque la loi, à sa face même, crée une distinction fondée sur un motif énuméré ou analogue (discrimination directe). Il en est souvent ainsi lorsqu'il est question de prestations gouvernementales, comme c'était le cas dans les affaires *Law*, *Lovelace* et *Hodge*. Dans d'autres cas, ce sera plus difficile, parce que les allégations portent sur une discrimination indirecte : bien qu'elle prévoie un traitement égal pour tous, la loi a un effet négatif disproportionné sur un groupe ou une personne identifiable par des facteurs liés à des motifs énumérés ou analogues. Ainsi, dans l'arrêt *Granovsky*, la Cour a fait remarquer que « [l]es exigences en matière de cotisation du RPC, qui, à première vue, appliquaient les mêmes règles à tous les cotisants,

IN THE MATTER OF the Ontario *Human Rights Code, 1981*, S.O. 1981, c. 53, as amended;

and

IN THE MATTER OF the complaint made by Mr. Michael G. Bates, of Islington, Ontario, alleging discrimination in the right to contract and services, goods and facilities by the Zurich Insurance Company, 188 University Avenue, Toronto, Ontario

Ontario Human Rights Commission *Appellant*

v.

Zurich Insurance Company *Respondent*

and

Michael G. Bates *Complainant*

and

Commission des droits de la personne du Québec and Alberta Human Rights Commission *Interveners*

INDEXED AS: ZURICH INSURANCE CO. *v.* ONTARIO (HUMAN RIGHTS COMMISSION)

File No.: 21737.

1991: November 5; 1992: June 25.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, McLachlin and Iacobucci JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Human rights — Discrimination on basis of sex, age and marital status — Insurance — Young unmarried male drivers charged higher car insurance premiums

DANS L'AFFAIRE DU *Code des droits de la personne (1981)*, L.O. 1981, ch. 53, et modifications;

a et

DANS L'AFFAIRE DE la plainte déposée par M. Michael G. Bates, de la ville *b* d'Islington (Ontario), alléguant la discrimination relativement à son droit à un traitement égal en matière de contrats et de services, de biens ou d'installations par *c* Zurich Insurance Company, 188, avenue University, Toronto (Ontario)

Commission ontarienne des droits de la *d* personne *Appelante*

c.

Zurich Insurance Company *Intimée*

e et

Michael G. Bates *Plaignant*

f et

Commission des droits de la personne du Québec et Alberta Human Rights *g* Commission *Intervenantes*

RÉPERTORIÉ: ZURICH INSURANCE CO. *c.* ONTARIO (COMMISSION DES DROITS DE LA PERSONNE)

h N° du greffe: 21737.

1991: 5 novembre; 1992: 25 juin.

Présents: Le juge en chef Lamer et les juges La Forest, *i* L'Heureux-Dubé, Sopinka, Gonthier, McLachlin et Iacobucci.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

j *Droits de la personne — Discrimination fondée sur le sexe, l'âge et l'état matrimonial — Assurance — Jeunes conducteurs célibataires tenus de payer des primes*

versely, insurance rates are set based on statistics relating to the degree of risk associated with a class or group of persons. Although not all persons in the class share the same risk characteristics, no one would suggest that each insured be assessed individually. That would be wholly impractical. Sometimes the class or group classification chosen will coincide with a prohibited ground of discrimination, bringing the rating scheme into conflict with human rights legislation. The Code, in s. 21 and other sections, has recognized the special problem of insurance. It exempts an insurer from liability for discrimination if based on reasonable and *bona fide* grounds. The Board of Inquiry in this appeal determined that these words had the same meaning as the *bona fide* occupational qualification or requirement provision which applies in employment cases. It is necessary to determine whether the test developed in employment cases can be transplanted to the special field of insurance and, in particular, to the setting of insurance rates.

In approaching the interpretation of a human rights statute, certain special principles must be respected. Human rights legislation is amongst the most pre-eminent category of legislation. It has been described as having a "special nature, not quite constitutional but certainly more than the ordinary. . ." (*Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, at p. 547). One of the reasons such legislation has been so described is that it is often the final refuge of the disadvantaged and the disenfranchised. As the last protection of the most vulnerable members of society, exceptions to such legislation should be narrowly construed (*Brossard (Town) v. Quebec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279, at p. 307; see also *Bhinder v. Cana-*

des caractéristiques d'un groupe. Inversement, les taux d'assurance sont calculés à partir de statistiques ayant trait au degré de risque présenté par une catégorie ou un groupe de personnes. Bien que toutes les personnes d'une même catégorie ne possèdent pas les mêmes caractéristiques du point de vue du risque, personne ne proposerait de procéder à l'évaluation individuelle de tous les assurés. Ce serait tout à fait irréaliste. Parfois, la classification en catégories ou en groupes coïncidera avec un motif interdit de discrimination, et entraînera un conflit entre le régime d'établissement des primes et la législation des droits de la personne. Le Code, à l'art. 21 et dans d'autres dispositions, a reconnu le problème spécial du domaine des assurances. Il ne tient pas un assureur responsable d'une discrimination si celle-ci est fondée sur des motifs justifiés de façon raisonnable et de bonne foi. En l'espèce, la commission d'enquête a donné à cette expression le même sens que celui donné en jurisprudence à une exigence professionnelle réelle en matière d'emploi. Il est nécessaire d'établir si le critère élaboré dans les affaires d'emploi peut être transposé au domaine spécial des assurances, plus particulièrement à la fixation des taux d'assurance.

Dans l'examen de l'interprétation d'une loi sur les droits de la personne, il faut respecter certains principes spéciaux. Les lois sur les droits de la personne se classent parmi les lois les plus prééminentes. Notre Cour a affirmé qu'une telle loi est «d'une nature spéciale. Elle n'est pas vraiment de nature constitutionnelle, mais elle est certainement d'une nature qui sort de l'ordinaire» (*Commission ontarienne des droits de la personne c. Simpsons-Sears Ltd.*, [1985] 2 R.C.S. 536, à la p. 547). Une des raisons pour lesquelles nous avons ainsi décrit les lois sur les droits de la personne c'est qu'elles constituent souvent le dernier recours de la personne désavantagée et de la personne privée de ses droits de représentation. Comme les lois sur les droits de la personne sont le dernier recours des membres les plus vulnérables de la société, les exceptions doivent s'interpréter restrictivement (*Brossard (Ville) c. Québec (Commission des droits de la personne)*, [1988] 2 R.C.S. 279, à la p. 307, voir aussi *Bhinder c. Compagnie des chemins de*