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Legal Report 1998

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L E G A L
R E P O R T
1 9 9 8

Table of Contents

L E G A L R E P O R T 1 9 9 8

Introduction

No citizen's right can be greater than that of the least protected group.

Frank R. Scott
Professor of Constitutional Law
McGill University, 1946

Human rights laws should be measured against a simple standard: do they offer realistic and effective protection to the individuals and groups in society who are most vulnerable and least able to protect themselves? From this perspective, 1998 can be viewed as a year in which some important steps were taken in Canadian equality law.

The most significant change at the federal level was the passage of the long-awaited amendments to the Canadian Human Rights Act. These changes add an express mention of the duty to accommodate special needs, create a new, smaller, more permanent and independent Canadian Human Rights Tribunal, and increase the limit on damages for pain and suffering.

The creation of the new Tribunal also clears up the cloud of uncertainty over the hearing system created by a decision of the Federal Court, which had ruled that the former system was not sufficiently independent and impartial. This decision called into doubt many long-running hearings and could have delayed new ones, but by the year's end much of this uncertainty had been resolved.

The year also charted some important delineations of legal protection, after long and difficult struggles. The decision of the human rights tribunal in the federal public service pay equity case sets out the building blocks for an effective application of that principle in federal workplaces. Drug testing is now clearly against federal law, according to the Federal Court of Appeal in the *Toronto-Dominion Bank* case, especially if it is performed randomly and targets a select group of employees. And guidance on the duty to accommodate employees with learning disabilities is provided in clear terms in the *Green* case. All of these decisions help to fill in gaps in federal human rights law, and extend the previous case law on human rights into key new areas.

At a national level, perhaps the most significant event was the decision of the Supreme Court of Canada in *Vriend* v. *Alberta*. Although the narrow focus of the decision is on sexual orientation, it also sends a strong signal to all vulnerable minorities that their rights will be protected, if not by legislatures and governments, then by the Courts as a last resort.

The Supreme Court decision in *Vriend* emphasizes the continuing truth of the words of Frank Scott, quoted above — that no one's rights are safe unless everyone's rights are protected. These may seem like easy platitudes to utter on the fiftieth anniversary of the Universal Declaration of Human Rights and the twentieth anniversary of the Canadian Human Rights Commission. But if human rights law is to have any meaning or importance at all, then these sentiments must also guide our decision-makers when a minority comes forward to seek protection in the face of real rights violations. That is what *Vriend* is all about, and it should hearten us all to know that we live in a society in which "human rights" are not just empty words — in which they have real meaning when they are most needed.

Aspects of Equality

A seven-year campaign to include sexual orientation on the list of prohibited grounds of discrimination in Alberta's human rights legislation ended with a unanimous verdict in the case of *Vriend* v. *Alberta* in 1998. The Supreme Court held that the omission of sexual orientation in the Individual's Rights Protection Act, or IRPA, was an unjustified violation of the equality provisions of the Canadian Charter of Rights and Freedoms. It also marked the first time that the Court has amended legislation by reading into law new rights that elected politicians had expressly refused to grant.

Delwin Vriend was employed as a laboratory coordinator by a Christian college in Alberta. Throughout his term of employment he received positive evaluations, salary increases and promotions for his work performance. In 1990, in response to an inquiry by the President of the College, Mr. Vriend disclosed that he was homosexual. In 1991, the college's board of governors adopted a position statement that homosexuality was "contrary to the college's Statement of Faith and inconsistent with its mission." Shortly thereafter, the President of the College asked for a letter of resignation from Mr. Vriend. When he refused to resign, his employment was terminated, and the sole reason given was his non-compliance with the college's policy on homosexual practice. When Mr. Vriend attempted to file a complaint with the Alberta Human Rights Commission, he was turned away because the Commission's governing legislation did not ban discrimination based on sexual orientation. A trial judge ruled in Mr. Vriend's favour, finding that the statute's omission of sexual orientation offended the Charter's equality provisions, but the Alberta Court of Appeal overturned this decision.

The Supreme Court held that the Charter guaranteed gay men and lesbians protection from discrimination. The majority decision was jointly written by Mr. Justice Peter Cory and Mr. Justice Frank Iacobucci. Justice Cory addressed the issues of the application of the Charter, whether Mr. Vriend had standing, and the breach of the section 15 equality provisions, and Justice Iacobucci dealt with the section 1 analysis, remedy, and disposition.

Justice Cory dismissed the province's theory that silence on the issue of sexual orientation in the IRPA was "neutral," and not therefore an appropriate subject for a section 15 analysis. It was not necessary to find that the disadvantages experienced by a group in society flowed directly from the legislation, in order to determine that it created a potentially

discriminatory distinction, he said. The "silence" of the IRPA was not "neutral." Gay men and lesbians were treated differently from other disadvantaged groups and from heterosexuals. Other groups received protection from discrimination on the grounds that were likely to be relevant to them, yet the IRPA failed to afford homosexuals protection against the discrimination that was most likely to affect them — namely, discrimination on the basis of their sexual orientation. The exclusion of legislative omissions from a section 15 analysis would enable legislatures to undermine the Charter with ease. Justice Cory concluded that such an interpretation was illogical, unfair, and inconsistent with previous decisions of the Supreme Court, in which the Court had held that discrimination could arise from under-inclusive legislation.

The province had also disputed Mr. Vriend's standing to challenge the provisions of the Individual's Rights Protection Act that related to discrimination in housing, goods, or services. The court disagreed, and found that Mr. Vriend had standing to challenge provisions other than the employment sections of the IRPA. As the provisions were similar, and not dependent on unique factual contexts, there was no need to adduce additional evidence regarding each provision. Mr. Vriend had a direct interest in the exclusion of sexual orientation from all forms of discrimination, the Court held. Requiring separate adjudication of each provision wasted judicial resources and would impose delay, expense, and personal vulnerability to discrimination on potential applicants.

The omission of sexual orientation from the IRPA as a protected ground denied homosexuals equal benefit and protection of the law in two ways: denial of access to the remedial procedures established by the Act, and exclusion from the government's stated policy against discrimination. With regard to the broader social context, Justice Cory spoke of the dangers of singling out a particular group as less worthy of protection than others. "[T]he 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."

Having found that the IRPA violated section 15 of the Canadian Charter of Rights and Freedoms, the Court turned to the issue of whether the omission of human rights protection was a reasonable limit on the equality rights of lesbians and gay men, within the meaning of section 1 of the Charter. Justice Iacobucci held that, in the absence of a compelling argument emanating from the legislation itself, governments had to adduce evidence of "pressing and substantial" legislative objectives to justify the Charter infringement. The Attorney General of Alberta failed at the first stage of analysis, offering no evidence to uphold a "pressing and substantial" objective for the omission. No support for the exclusion of sexual orientation as a prohibited ground of discrimination could be found in the IRPA itself, which was intended to promote the equality of all citizens. Even if there were, the omission of sexual orientation was not rationally connected to the goal of the IRPA; it

was antithetical to it. Justice Iacobucci held that it was illogical to argue that the goal of protecting individuals from discrimination could be advanced by the exclusion of a historically disadvantaged group.

Regarding concerns about religious freedom, the Court found that the IRPA contained an internal mechanism for balancing the conflicting demands of religious institutions and the rights of homosexuals. The IRPA provided broad defences to discrimination "where it is reasonable and justifiable in the circumstances," or alternatively where the discrimination could be linked to a *bona fide* occupational requirement. The Alberta legislature therefore could not excuse the failure to include sexual orientation on the grounds of conflict with the rights of other protected groups.

The Court also responded to the Alberta Court of Appeal's condemnation of judicial interference in the legislative process. Critics have long maintained that courts should not interfere with the democratic functioning of the legislature; however, the Court was vocal in defending its constitutional role of correcting unfair government action. Justice Iacobucci stressed that the nation explicitly chose to give judges the role of declaring legislation valid or invalid. Courts and legislatures engage in a "dialogue" as they seek to improve legislation, which "has the effect of enhancing the democratic process, not denying it."

Especially noteworthy is the Court's rejection of the idea that a court must defer to the legislature because human rights is an evolving area that should be approached incrementally. The Court took the view that it was not acceptable for the disenfranchised to wait for their equality rights. "In my opinion, groups that have historically been the target of discrimination cannot be expected to wait patiently for the protection of their human dignity and equal rights while governments move towards reform one step at a time. If the infringement of the rights and freedoms of these groups is permitted to persist while governments fail to pursue equality diligently, then the guarantees of the Charter will be reduced to little more than empty words," Justice Iacobucci wrote.

As noted above, the court read into Alberta's human rights legislation, now known as the Alberta Human Rights, Citizenship and Multiculturalism Act, the term "sexual orientation" rather than striking the Act down altogether. On this point the sole dissenting judge was Mr. Justice John Major. While he agreed that the exclusion of sexual orientation breached the Charter, he was against rewriting the legislation. In his opinion, the Alberta government might prefer to have no legislation at all rather than be forced to include a provision it clearly opposed. The omission of sexual orientation was deliberate, and not the result of an oversight by the Alberta legislature. Under the circumstances, according to Justice Major, the appropriate remedy was to strike down the IRPA but delay the order for one year to allow the Alberta legislature to respond.

Bolstered by the Supreme Court's decision in *Vriend*, the Ontario Court of Appeal has dismantled another barrier to equal rights for gay men and lesbians in the workplace in *Rosenberg* v. *Canada (Attorney General)*. In the past, federal income tax rules have served as a stumbling block to equal pension benefits for homosexual employees. The Income Tax Act

permits the registration of a private pension plan with Revenue Canada only if the plan restricts survivor pension benefits to spouses of the opposite sex. If a pension plan provides survivor benefits to same-sex spouses, then it cannot not be registered, or risks being deregistered. Only registered plans receive significant tax benefits. Many employers have refused same-sex coverage, arguing that it is not financially feasible without the large tax deferral advantages that come with the registration of a pension plan.

In a unanimous decision, the Court of Appeal held that the definition of "spouse" under these provisions of the Income Tax Act had to be expanded to include same-sex couples. The ruling came as a result of a court action taken by employees of the Canadian Union of Public Employees, Nancy Rosenberg and Margaret Evans, and by the union itself. CUPE expanded its pension plan in 1992 to extend survivor benefits to the same-sex spouses of its employees. The appellants went to court after Revenue Canada refused to accept the extension, seeking a declaration that the definition of "spouse" in the Income Tax Act, as it applied to the registration of pension plans, was contrary to section 15 of the Canadian Charter of Rights and Freedoms.

All the parties agreed that the definition of "spouse" in the Income Tax Act violated the equality provisions of the Charter; therefore, the only issue to be decided by the Court was whether the infringement of the equality rights was a "reasonable and demonstrably justified" limit under section 1 of the Charter.

Writing for the Ontario Court of Appeal, Madam Justice Rosalie Abella held that the Supreme Court decision in *Vriend* had clarified the analysis required by section 1 of the Charter. The focus of the inquiry must be on the limitation that infringes the equality right, not the objective of the statute. The significance of this distinction is critical, because when the focus is on the objective of the overall legislative scheme, the burden on the government to justify the limitation is significantly lowered. Under the second part of the *R.* v. *Oakes* test, the government is required to demonstrate that the means chosen to meet the legislative objective are reasonable and proportional to the limitation. "It is easier to justify the means used when measured against a broad and generally desirable social policy objective [of the law]," she wrote. "This, in turn, makes equality infringements easier to justify as subordinate to a more generalized and pressing social interest." Justice Abella emphasized that this did not make the purpose of the legislation irrelevant, but confined it to "providing a context rather than the focus for the *Oakes* analysis."

As for the first part of the *Oakes* test, the Court had to decide whether the exclusion of cohabiting gay and lesbian partners of contributing employees from the pension plan had a "pressing and substantial objective." Since aging and retirement are not unique to heterosexuals, the government's objective of singling out heterosexual couples for income protection during their elder years was not "pressing or substantial," the judge held. The fact that survivor pension benefits might originally have been intended to protect the economic rights of women in traditional relationships did not justify excluding homosexuals from the benefit. Survivor benefits were now available to both male and female spouses regardless of need or gender, the judge observed. It is the employee's

preference and the nature of the relationship that determine whether someone would be a beneficiary. Accordingly, the Court held that the government had not satisfied the onus on it under the first part of the *Oakes* test.

With regard to the second part of the *Oakes* test, whether the means used to satisfy the objective were reasonable, Justice Abella held that it was difficult to see the rational connection between protecting heterosexual spouses from income insecurity on the death of their partners and denying cohabiting gay and lesbian partners the same protection. In each case, the survivors would be partners of former employees who had contributed to the plan, and on this basis should have equal entitlement to the benefits. The sexual orientation of surviving partners was no "more relevant to whether they should be entitled to income protection their partners have paid for, than would be their race, colour or ethnicity."

Justice Abella rejected the government's claim that it had a right to address equality issues one step at a time. While elected governments might wait for attitudes to change in order to preserve public confidence and credibility, the courts had to be free to make independent judgments, notwithstanding these same attitudes. She also held that there was no cost justification for the exclusion of same-sex survivor benefits. Cost is not an appropriate justification for denying constitutional rights to equality. Moreover, what evidence there was before the Court on the issue of cost indicated that extending the benefit to homosexuals would actually increase government revenues.

Finally, Justice Abella ruled that the Act's definition of spouse did not minimally impair the equality rights of homosexuals, and observed that, "because there is a complete denial of the benefit," it could not be said that the exclusion of homosexual couples from access to the survivor pension benefit was proportional to the provision's objective, to assist women who were in traditional conjugal relationships.

In conclusion, Justice Abella held that the government had not proved that the inequality resulting from the restricted definition of "spouse" in the Income Tax Act was reasonable or demonstrably justified. It was therefore unconstitutional. The appropriate remedy was for the words "or same sex" to be read into the definition of "spouse" in the Income Tax Act.

Although the court decision does not force employers to provide survivor pension benefits to the same-sex spouses of its employees, a decision not to do so can now be challenged as discriminatory. As one of several intervenors in the case, the Canadian Human Rights Commission can now confidently pursue a number of complaints, by federal employees denied spousal pension benefits, that had been placed on hold pending a decision in this case. However, the Commission is prevented from inquiring into pension rights pursuant to statutes enacted before 1978. See *Canada (Attorney General)* v. *Magee*.

On occasion, Charter arguments have been used to defeat the equality rights of complainants. The case of *Blencoe* v. *British Columbia (Human Rights Commission)* is one example. In 1995, an allegation of sexual harassment was made against Robin Blencoe, then a Cabinet Minister in the British Columbia government, by an assistant in his office. Subsequently, Mr. Blencoe was removed from Cabinet and eventually from the New

Democratic Party caucus. Later that same year, two other women filed complaints with the British Columbia Human Rights Commission against Mr. Blencoe and the Provincial Crown, alleging sexual harassment contrary to the Human Rights Act. One complainant was an employee in Mr. Blencoe's office, and the other had met Mr. Blencoe in his capacity as Minister for Sport. In both cases, it was alleged that Mr. Blencoe tried to touch and kiss the complainants without their encouragement or consent.

The complaint process began in the spring of 1995. A preliminary issue regarding the timeliness of the complaints was resolved in April 1996 after Mr. Blencoe's lawyer objected to the investigation because the complaints had been filed beyond the time limit. An investigator was appointed in September, and the investigator's final report was completed in May 1997. One of the complaints was referred to a tribunal with hearings scheduled for March 1998. All told, there was a delay of some thirty months between the laying of the complaint and its hearing by a tribunal.

In November 1997, Mr. Blencoe applied for an order prohibiting a hearing of the complaint against him on the basis of undue delay. At issue was whether section 7 of the Canadian Charter of Rights and Freedoms protected respondents from unreasonable delay in human rights cases. Section 7 prohibits infringements of the right to life, liberty and security of the person, except in accordance with the principles of fundamental justice, and is usually invoked in criminal proceedings. However, a majority of the British Columbia Court of Appeal held that in this particular case Mr. Blencoe had been deprived of his Charter rights, and stayed the proceedings against him.

Writing for the majority, Chief Justice McEachern found a delay of thirty months excessive. "In my view, a delay of over thirty months from the date of the complaints to a hearing on the merits is far too long. If Mr. Blencoe had been charged in the criminal courts with this type of sexual assault, the charge would very likely be dismissed on grounds of delay," he wrote. Given the simplicity of the facts and the seriousness of the allegations, the Commission's lack of resources did not excuse the delay. He stated that "[a]llegations of the kind involved here, having the potential for destroying both the reputation and the social and economic life of a respondent must receive prompt attention. If they do not, the burden of undue delay cannot be imposed only upon the respondent, and a stay of proceedings in many cases is the only proper judicial response."

Chief Justice McEachern noted that Mr. Blencoe had lost his career, money, reputation and peace of mind since the allegations of harassment had surfaced. The Commission argued that the prejudice suffered by Mr. Blencoe was not caused by the human rights proceedings, but rather by the action of the Premier in dismissing him from the Cabinet and the consequent media attention. However, the judge concluded that the excessive delay exacerbated the state of affairs in Mr. Blencoe's case. Relying on the Supreme Court of Canada decision in *Rodriguez* v. *British Columbia*, he ruled that exacerbation of a state of affairs might trigger section 7 protection of the right to security of the person.

Chief Justice McEachern observed that the law relating to the application of section 7 of the Charter in a non-criminal context was "fraught with considerable difficulty" because

the Supreme Court had yet to rule on this matter. He acknowledged that the cases were divided on this issue. However, in Chief Justice McEachern's view, if complainants in criminal sexual assault cases could assert the protection of section 7, then the respondents in sexual harassment hearings "facing a protracted intrusion into the intimate details of their lives based on as yet unproven charges, must also be extended the same protection. The stigma and general prejudice they face, though not the same, [are] analogous."

After canvassing the relevant case law, he concluded that there were no binding precedents. He decided to follow what he identified as the emerging view in the Supreme Court of Canada, namely, that section 7, "under the rubric of liberty and security of the person operates to protect both the privacy and dignity of citizens against the stigma of undue prolonged humiliation and degradation of the kind suffered by [Mr. Blencoe]." He held that a legal process cannot be open-ended in the sense that human dignity, even for wrongdoers, cannot be compromised for an unduly long time. Having concluded that section 7 applied to this case, Chief Justice McEachern then found that the undue delay and prejudice suffered by Mr. Blencoe were not in accordance with the principles of fundamental justice.

The judge was careful to point out that the criminal law jurisprudence of unreasonable delay could not be applied in all human rights cases. Mr. Blencoe's case was in some ways exceptional. Mr. Blencoe was a public figure whose political career was ruined, and had suffered from depression because of the loss of his reputation, job and savings. The judge observed that the thirty-month delay was clearly excessive when weighed against the seriousness of the charge and the simplicity of the issue, so that it could not be viewed as reasonable under any test. However, a more refined test for unreasonableness would be required in a borderline case. Allowing the hearings to continue would further deprive Mr. Blencoe of his Charter rights, and the proceedings against him were stayed.

It seems unlikely that human rights cases older than thirty months will be tossed out of backlogged human rights commissions across Canada, but individual respondents now have an opportunity to claim a violation of section 7 of the Charter where an investigation has been delayed. The application of section 7 to a civil law context such as a human rights proceeding is still undecided. The British Columbia Human Rights Commission intends to appeal this decision to the Supreme Court. The Canadian Human Rights Commission, together with several other human rights commissions and interest groups, has applied for Intervenor status in this case.

Resolution of Complaints

Race, Colour, National or Ethnic Origin

In 1997, a human rights tribunal found that the Department of Health discriminated against racial minorities by failing to promote them to senior jobs. The complaint that led to the landmark ruling was filed by a race-relations organization headed by Dr. Shiv Chopra. Unfortunately, Dr. Chopra's personal human rights complaint did not fare as well. Another tribunal in the same year found that while Dr. Chopra had been treated badly by his managers, there was no evidence that this was because of racism. Dr. Chopra and the

Commission appealed the ruling, and in April 1998 the Federal Court set aside this decision and ordered the Canadian Human Rights Tribunal to reconsider his case in *Chopra* v. *the Department of National Health and Welfare*.

On September 6, 1992, Dr. Chopra had filed a complaint against the Department of National Health and Welfare, as Health Canada was then officially known, alleging that his race had been a factor in the Department's failure to promote him to the position of Director of the Bureau of Human Prescription Drugs. A tribunal concluded that "the equivocal and even contradictory conduct of management discloses insensitivity to employees generally and a failure to have a clear approach toward employee career development," but this was not evidence of differential treatment prohibited by the Canadian Human Rights Act. More importantly, the tribunal did not allow the Commission to introduce, as circumstantial evidence, statistics showing significant under-representation of members of visible minority groups in senior management positions at Health Canada. It ruled that evidence of systemic discrimination was not admissible in a case where the complainant alleged individual discrimination.

The Federal Court Trial Division decision affirms the importance of circumstantial evidence in cases of racial discrimination, and that evidence of representation of visible minorities in the workplace is an essential element of such circumstantial evidence — even in cases of individual discrimination. The Court ruled that the tribunal had erred in disallowing the applicants from adducing general evidence in the form of statistics aimed at showing a systemic pattern of differential treatment, as circumstantial evidence to infer that discrimination probably occurred in this particular case.

Mr. Justice Richard found that there was no evidence of actual prejudice to the respondent in allowing this type of evidence. He cited two authorities for the proposition that "[s]tatistics represent a form of circumstantial evidence from which inferences of discriminatory conduct may be drawn ... They may show that subjective and discretionary decisions by employers are being made in a discriminatory manner." Health Canada is appealing this decision.

In March, a review tribunal ordered Health Canada to put in place new food and drug policies that would not discriminate against merchants on the basis of their race or ethnic origin. The verdict in *Bader* v. *Canada (Department of National Health and Welfare)* reverses a human rights tribunal decision that had dismissed allegations that the Department of National Health and Welfare had discriminated against non-Chinese merchants who sold Chinese herbal products. David Bader claimed that the Department enforced Food and Drug Act regulations governing the importation and sale of certain health foods and herbal products more vigorously against Caucasian health food merchants than against merchants of Chinese origin.

The original tribunal ruled that Mr. Bader had standing to bring the complaint and was entitled to relief under the Act, even though the direct impact of the alleged discriminatory practice was on a corporation, Don Bosco Agencies Ltd., rather than on him. The review tribunal agreed, holding that the Canadian Human Rights Act should be given a large and liberal interpretation, and that it would be

improper to place certain instances of discrimination outside the Act because the complainant ran his business through a closely held company. The "sufficiently direct and immediate" test had been satisfied where the interests of David Bader (who was a shareholder, director and President of Don Bosco Agencies Ltd.) and his company had merged, and it was not possible to distinguish between the actions directed against Mr. Bader and the actions directed against the company. Where the party actually affected lacks the means of asserting the right in question, and where there is no other reasonable and effective manner in which the issue may be determined, an individual ought not to be prevented from availing himself of the remedial provisions of the Act because of the existence of his own corporate veil.

The review tribunal also agreed with the original tribunal's finding that Mr. Bader had produced a *prima facie* case of discrimination in the enforcement of regulations, based on race and ethnic origin. The crucial issue was whether the respondent Department had made out a defence of *bona fide* justification. The original tribunal found that, while the Department's policy of not enforcing regulations against the Chinese ethnic community was based on assumptions, these assumptions were not unfounded. The Department's assessment that there was a low risk when ethnic retailers were selling Chinese products was based on the assumption that ethnic retailers were selling only to their own community, and that consumers in the ethnic community were knowledgeable about the proper use of these products.

The review tribunal decided that the original tribunal had erred in law by accepting these assumptions. The evidence supporting a "low risk" assessment policy for ethnic Chinese importers and retailers was not of sufficient quality and weight to meet the requirements of a *bona fide* justification. The evidence was almost entirely "impressionistic," and the tribunal had erred in basing its conclusions on this kind and quality of evidence. In relying exclusively on perceptions and opinions, the Department was advancing unsubstantiated subjective information to meet an objective test.

The review tribunal also objected to the Department's enforcement policy. The original tribunal had erred when it found that concentrating the Department's resources at the importation level was objectively reasonable. "[T]here was overwhelming evidence that the enforcement activities of the Health Protection Branch at the import level demonstrated preferential treatment of ethnic Chinese importers," which was not justified on the evidence, according to the review tribunal. The original tribunal was wrong when it concluded that any differentiation was between enforcement at ports of entry and enforcement at the retail level, when in fact the differentiation was based on ethnic origin. In addition, the original tribunal had erred when it found that there was equal enforcement between Chinese ethnic importers and Mr. Bader at the import level, when "in fact, the evidence demonstrated the opposite to be true."

The original tribunal also failed to address evidence of lack of good faith by the Health Protection Branch in its treatment of ethnic Chinese herbal products in general, and in particular of the herb dong quai. The evidence showed that many of the herbal products of

ethnic Chinese importers and retailers contained injurious substances such as lead, arsenic, and codeine. In view of the serious health hazards in some of the Chinese herbal products, "it was difficult to ascribe to the policies and practices of [the Health Protection Branch] a sincerely held belief that those policies and practices were imposed in the interests of adequate enforcement of the Food and Drug Act and regulations." In adopting its so-called "low risk" policy, the Health Protection Branch was not acting in the interests of the general public, including the ethnic Chinese community. Neither the risk assessment policy nor the enforcement policy met the test for a *bona fide* justification.

The review tribunal held that the broad range of remedies proposed was justified because the discrimination had occurred in an agency of the government that had a mandate to protect the health of the general public. It ordered Health Canada to put into place policies and practices that would cease differentiation in the enforcement of the Food and Drug Act between herb and botanical dealers on the basis of race and ethnic origin. It also ordered the Department to cease the unequal enforcement of the Food and Drug Act based on the "ethnicity" of the product or the ethnic origin of the consumer of the product.

The review tribunal also ordered the Minister to carry out a national review of enforcement policies, practices and compliance strategies concerning herbs and botanicals, in order to eliminate unsound distinctions based on the ethnic origin of the dealer, product, or consumer. Furthermore, the Department was ordered to devise racially neutral compliance enforcement strategies to be communicated by a Letter to Trade within 90 days. Mr. Bader is appealing the decision of the tribunal not to award him personal damages.

In 1998, two complaints initiated by the Assembly of Manitoba Chiefs, or AMC, were settled with agreements to provide more work opportunities for Aboriginal people. In July, Canadian Airlines International and the AMC signed an agreement to implement a comprehensive, five-year employment equity action plan designed to improve the workforce representation of Aboriginal people in all occupational groups at the airline. In particular, the airline will endeavour to raise its recruitment level of Aboriginal employees to three per cent, through outreach initiatives related to recruitment in Aboriginal communities and ongoing consultation with the Assembly of Manitoba Chiefs. This agreement resolves a complaint filed by the AMC in 1990, alleging that Canadian Airline International's employment policies and practices deprived Aboriginal people of employment opportunities on the grounds of race, colour and ethnic or national origin.

A second complaint filed that same year against the Canadian Pacific Railway was resolved in October under similar terms, including a recruitment target of three per cent, outreach initiatives, and ongoing consultation with the Assembly of Manitoba Chiefs. The Railway has also agreed to provide the AMC with information on available contract work. The Commission will monitor the implementation of both settlements over the next five years.

Age

A growing number of middle-aged Canadians face discrimination in today's changing workplace because of the tendency of some employers to devalue the experience and skills that older workers bring. A recent tribunal decision, *Singh* v. *Statistics Canada*, has recognized that older qualified candidates have much to offer the workplace and that qualified candidates should not be refused a promotion simply because of age.

Surendar Singh began working for Statistics Canada in a clerical position in 1981. In 1985, he began applying for an entry level ES-01 position in the hope of launching a career as an economist. While his qualifications were never an issue, his age was, and notwithstanding his efforts, he was unsuccessful in obtaining a permanent junior economist post. Mr. Singh filed a complaint with the Canadian Human Rights Commission, alleging that his employer had discriminated against him on the basis of age and his race; he was an East Indian. He was forty-seven years old at the time of the complaint.

Although the tribunal dismissed the aspect of the complaint dealing with race, it found that Mr. Singh's age was a factor in Statistics Canada's failure to put his name on an eligibility list for a competition in which he ranked second after the successful candidate, despite a general need for qualified candidates. There was evidence that in the late 1980s, Statistics Canada had become concerned about the aging of its management, and had set about recruiting a younger workforce. The Department argued that Mr. Singh's age was not a consideration in its decision; however, statistical evidence "provided compelling circumstantial evidence of an organizational predisposition against promoting older internal candidates into ES positions." The tribunal concluded that "... the failure to put Mr. Singh's name on the eligibility list was at least in part because, at 43 or 44, Mr. Singh did not fit the profile that Statistics Canada had in mind for ES-01 level recruits." The tribunal noted that there was no guarantee that Mr. Singh would have been given a junior economist position had his name been put on the eligibility list; this issue helped in the assessment of the quantification of damages.

As a remedial award, the Commission and Mr. Singh asked that he be promoted to an ES-03 economist position. The tribunal stated that it had to be satisfied that there was at least a serious possibility that the complainant would have been promoted to the position but for the discrimination. Based on the evidence before it, the tribunal concluded that while it was probable that Mr. Singh would have obtained an ES-01 position at some point, it was by no means certain that he would have obtained the ES-03 position. The tribunal ordered Statistics Canada to promote Mr. Singh to an entry-level economist position at the first available opportunity, and to pay him the difference between his salary and the salary he would have received had he been promoted on August 2, 1989, the mid-point of the validity period for the eligibility list. Statistics Canada was also ordered to adjust Mr. Singh's pension and other employment benefits, as well as to pay him three thousand dollars as special compensation. Statistics Canada has applied to the Federal Court for judicial review of this decision.

Sex

A study into sexual harassment sponsored by the Commission recommended, among other things, that the Commission interpret circumstantial evidence very broadly and liberally, by paying attention to the history of the incident that triggered the sexual harassment complaint. Unfortunately, the Commission's efforts to do this do not always succeed, as the decision in *Franke* v. *Canadian Armed Forces* demonstrates. Kimberley Franke alleged that she was sexually harassed while a member of the Canadian Forces and that she was treated in an adverse, differential manner once she began complaining of the harassment; ultimately her career was destroyed and she required psychiatric care.

In a split decision, a majority of the tribunal, relying on the opinion of a Canadian Forces psychiatrist, held that there was insufficient evidence to prove that Corporal Franke was a victim of sexual harassment or of any discriminatory practices based on her sex. Despite the testimony of the complainant's three friends that she expressed concerns to them at the time, the tribunal found that the complainant had not viewed the comments and gestures of her superior officers as sexual harassment at the time they were made. Furthermore, the majority believed that Corporal Franke's human rights complaint was made in retaliation for the disciplinary action she received for her "disrespectful behaviour" with the Dress Committee, and not because she refused to "play the sexual games" that she alleged formed a part of the daily routine in her office.

The majority found that the complainant was not treated differently, and that her superiors responded in "almost measured terms" despite the fact that her "correspondence in general reveals an attitude of contempt for those with whom she works." They examined three comments allegedly made by her superiors, but found that either these comments did not affect the supervisors' decisions or that the complainant misinterpreted them. With respect to an order that Corporal Franke be "committed for medical observation and psychiatric assessment," the majority found that the officer who issued the order, Colonel MacGee, was reasonably concerned about her mental state.

In her dissenting opinion, the Chair of the tribunal held that the complainant found the comments unwelcome at the time they were made. She held that it was for the decision-maker and not a psychiatrist to determine whether harassment had occurred. Furthermore, the complainant's reaction was consistent with "... the nature of the military environment and the rank structure [that] imposes limitations [on] a junior [member's ability] to confront a senior officer. The expectation within the military environment is that the members, irrespective of gender, submit to the higher authority and rank."

The Chair of the tribunal found that the conduct, which included comments using terms such as "sexatary" and "biker mama," the display of a post card depicting a bare-breasted female, conversations between Corporal Franke and a male superior officer about her dating habits, and questions about her financial situation, poisoned her working environment. These actions "set into motion a downward spiral with her supervisors that culminated with [a recorded warning for insubordination with the Dress and Deportment Committee] ...

The recorded warning became a link in this chain of events, which was reasonably understood by the complainant as punishment for her lack of acceptance of the status quo." When the incidents were viewed together, there was sufficient evidence to meet the reasonable person standard of sexual harassment.

The Chair of the tribunal also found that there was differential treatment after Corporal Franke complained of harassment. The complainant was targeted for close monitoring, and when she complained about this she was severely and unfairly criticized and recommended for psychiatric assessment. The recommendation of the harassment investigator that the complainant "be placed under close, direct supervision and on a regular basis formally counselled on her performance, conduct and response to direction," was inconsistent with the investigator's "finding of the *bona fide* nature of the complaint and ... had the effect of penalizing the complainant for her *bona fide* attempt to ensure a sexual harassment free workplace." The Chair of the tribunal noted that the complainant's own behaviour was not above reproach. However, she relied on the *Pitawanakwat* decision that if discrimination was "a factor" even if not "the sole reason" for the Canadian Forces' decision or action, then there was "sufficient evidence that the complainant was the subject of adverse discrimination," when she was closely monitored and exposed to unreasonable criticism. The Chair of the tribunal would have awarded the complainant two years of lost wages and five thousand dollars for hurt feelings in damages.

The Commission has appealed this decision. It is the Commission's position that by focusing on the complainant's conduct, the tribunal's majority overlooked the importance of the surrounding circumstances, and did not adequately focus on the respondent's duty to react fairly and impartially to complaints of sexual harassment.

On a more positive note, the Canadian Forces have agreed to institute a special anti-harassment training program for cadets. The initiative is part of a settlement of a sexual harassment case filed with the Canadian Human Rights Commission by Harmony Poirier, a former member of the Royal Canadian Cadets. As part of the settlement, the Canadian Forces have agreed to develop an age-sensitive sexual harassment and racism prevention training program and a policy for cadets. The training program will be provided nationwide, and will begin in September 1999. The Forces also agreed to submit the sexual harassment training program to the Commission for review prior to its implementation.

Leila Paul, a reporter and weekend anchor, filed a complaint with the Commission against the CBC in 1989 after a younger woman was chosen to anchor a late-night newscast. Ms. Paul, then 44, complained that she was the victim of age and sex discrimination when a far less experienced co-worker, aged 27, got the job. After years of legal challenges, an investigation report was completed in 1996 that was based in part on interviews with Ms. Paul and CBC employees or former employees. The investigation report concluded that at the CBC "a climate existed whereby a man, by virtue of gender, was considered more credible, particularly in a solo news format." The Commission subsequently decided to appoint a tribunal to inquire into Ms. Paul's complaint.

The CBC applied for judicial review of this decision, challenging the Commission's jurisdiction and claiming that the investigation report was incomplete and biased.

The Federal Court held that a grievance arbitration decision could be considered by the Commission, but the Commission still had discretion to deal with a complaint, even though it had been dismissed by an arbitrator or the complainant chose not to pursue a complaint through the grievance process, as had happened in this case. The Supreme Court decision in *Weber,* that an arbitrator has exclusive jurisdiction to determine differences arising out of a collective agreement, was found not to apply in all cases. *Weber* did not address a situation in which there was concurrent jurisdiction given by the legislator to another forum. Furthermore, section 41(1) of the Canadian Human Rights Act gave jurisdiction to the Commission to decide whether to deal with any complaint arising from a collective agreement.

The Court held that there was not sufficient evidence to warrant the appointment of a tribunal. Evidence of a general tendency towards favouring younger anchors within the CBC did not provide sufficient grounds for the Commission to request the appointment of a tribunal. Specific material facts had to be found that could be linked to Ms. Paul's own allegations. Indications that a problem might exist in a particular industry provided, at best, only corroborating evidence.

Madam Justice Tremblay-Lamer found that the Commission had conducted a "biased" investigation, because relevant information had been omitted from the report. The court listed six "significant"omissions in the investigation that led to the tribunal, including the facts that Ms. Paul did not make the short list for the job, that she had received a poor performance rating before the competition, that the people interviewed did not think her age or sex was a factor, and that she had not mentioned any discrimination based on age or sex in her internal grievances. Justice Tremblay-Lamer chose not to send the case back to the Commission for reconsideration, as she felt that after ten years the parties needed to have an end to the litigation. Ms. Paul is appealing this decision.

Pay Equity

In 1978, the Canadian Human Rights Act made it discriminatory to pay women less than men for doing work of equal value. However, it was only in July 1998 that any court or tribunal issued a decision based on a thorough examination into the meaning, scope and proper application of the pay equity provisions of the Act. The case of *Public Service Alliance* v. *Treasury Board of Canada* contains important findings on key issues related to pay equity, such as the appropriate methodology to determine wage adjustments, how far back retroactive wage adjustments should go, whether there should be interest payments on the wage adjustments, and whether damages should be awarded to employees.

The decision stems back to one of five pay equity complaints filed by the Public Service Alliance of Canada in 1984. The union alleged that clerks, secretaries, librarians, data processors, hospital workers and education support staff, working in the lowest-paid categories in the federal public service, had been systemically underpaid in violation of the Canadian Human Rights Act. More than

85 per cent of the affected employees are women, and 80 per cent earn less than $30,000 a year.

Between 1985 and 1989 the Treasury Board and the Alliance conducted a joint study on sex-based wage discrepancies in the public service. The Joint Union-Management Initiative, or JUMI study, began with 5,000 questionnaires distributed to employees in 52 different occupational groups. The results showed a wide wage discrepancy between male and female work of equal value. The two sides disagreed about the reliability of the findings, and the study broke down in 1990.

In March 1990, the Treasury Board decided unilaterally to adjust the wages of secretaries and clerks in order to close the gap. The Board gave them back pay to 1985 and yearly wage adjustments. The Public Service Alliance said the payments were not sufficient, and filed a second omnibus complaint with the Canadian Human Rights Commission. After an investigation, the Commission concluded that the government owed the employees more money to close the gap, and referred the complaint to a human rights tribunal for a hearing. In 1996, the tribunal ruled that the joint study had provided a reasonable foundation for assessing whether any wage discrimination persisted.

The July 1998 tribunal decision is clearly historic. Its scope and size are unprecedented in Canadian history, and it strongly endorses both the principles and the practice of pay equity. The tribunal held that section 11 of the Canadian Human Rights Act was aimed at redressing systemic discrimination in pay, i.e., sex discrimination in pay systems resulting in unequal wages for female employees performing work of equal value to male employees' work. As the decision notes, "section 11 of the Act is an attempt to remedy what has become an issue of social justice. The fundamental purpose and goal of the Act is to give effect to the principle of equality, which in our opinion favours equal treatment for female work relative to male work. Therefore we believe that section 11 is aimed at redressing a wage gap between male and female employees who perform work of equal value. Where the work is deemed to be of equal value it should be paid the same."

The Treasury Board argued that section 11 required the complainant to prove that the difference in pay was caused by sex discrimination, and not for some other reason. The tribunal specifically rejected this approach, because it failed to examine systemically how the employer viewed the value of male work in comparison to the value of female work. "The tribunal is of the opinion that the notion of causality may be appropriate in other situations. It is not, in our opinion, appropriate when the discrimination complained of is systemic in nature ... it is apparent that section 11 of the Act is premised on gender difference."

The tribunal also held that there was no requirement to limit the remedy in the Act simply because the cost would be too high for the employer or the taxpayers of Canada. Redressing wage discrimination and making the complainants whole is the purpose and goal of the Act. The only defence to a breach of section 11 is found in section 16 of the Equal Wage Guidelines 1986, where differences in wages between male and female employees performing work of equal value are attributable to regional wage rates.

The tribunal adopted the Commission's proposed methodology to identify the extent of the wage gap as the best approach for this case, given the sample size. The government had contended that predominantly female jobs should be compared to a narrow selection of the lowest-paid, predominantly male positions. The tribunal rejected this approach as not consistent with section 11. The Commission's "level to segment" statistical approach compares all male work to all female work in the same value range in order to identify which male work in the employer's establishment is indeed equal in value to the predominantly female work, regardless of the occupational group into which the male work has been classified for pay purposes. Not all male jobs or occupational groups are paid the same when they are contributing work of equal value. It is therefore necessary to seek the pattern of pay for the male work in the employer's establishment, not the highest or lowest-paid job in the occupational group, which might emphasize atypical salaries. This methodology helps to identify the employer's overall approach to remuneration of predominantly male work compared to its approach to remuneration of predominantly female work.

With respect to how far back in time an order for lost wages could be made in a pay equity complaint, the tribunal emphasized the need for applying reason and "common sense." It chose a compromise retroactivity period that began on March 8, 1985, the date of the announcement of the JUMI study. This was two years prior to the gathering of the job information. Even though the respondent was aware of the complaint from as early as December 1984, and was engaging in ongoing discussions with the unions and the Commission leading up to the announcement, the tribunal was not willing to place too high an onus upon the respondent to prove that the systemic discrimination had not commenced earlier than March 8, 1985.

The tribunal also ordered simple interest set at the Canada Savings Bond rate for each year to be paid on the pre-judgment and post-judgment award. It rejected the Alliance's bid for legal costs and its request for compensation for hurt feelings for the individual members in the predominantly female complainant groups. The Alliance had asked for the maximum amount of five thousand dollars for each complainant. The Commission had left the amount to the discretion of the tribunal, but had argued that in principle there should be some award made, given the lengthy struggle and the recalcitrant position of the employer over the past two decades. However, there was no direct evidence that each represented complainant had individually suffered from hurt feelings. The Commission submitted that the calling of such evidence was logistically impossible in a large group complaint, and that this obstacle should not be used to preclude an order of damages.

The tribunal rejected these arguments, finding that, in complaints of systemic discrimination, where the discrimination arose in a pay system and there was no evidence of individual hurt or degradation presented, an award of damages was not allowable. The denial of an award for damages because the complaint is of systemic discrimination is worrisome, and presents a real barrier for victims of systemic discrimination. The case is nevertheless a milestone in the struggle to narrow the wage gap between men and women.

The tribunal's findings are applicable only to employees of the federal government and federally regulated businesses — banks, airlines, interprovincial transportation and telecommunications firms. The methodology, coupled with the ruling's decision on retroactive pay and interest, will invariably set precedents for other outstanding pay equity complaints against Bell Canada, Air Canada, Canadian Airlines, the government of the Northwest Territories, Canada Post and the House of Commons — all at some stage of litigation. The government has applied for judicial review of this decision.

There is no area of human rights more contentious than that of pay equity. The large amounts of money involved, and a system that relies on the filing of complaints, turn pay equity into an invitation to litigate. To illustrate the point, one need only look to the Bell Canada complaint, which could potentially cost the company between sixty and eighty million dollars. The Bell complaint, the largest pay equity complaint filed against a private-sector employer, came from two unions — the Communications, Energy and Paperworkers Union and the Canadian Telephone Employees' Association — and an employee group called Femmes Action, representing telephone operators, clerks and sales associates who were mostly women. A 1992 study by Bell and its unions found that the mostly female workers earned approximately two to six dollars less an hour than workers in predominantly male jobs. When negotiations failed to close that gap, the Commission, which investigated the complaint, referred it to a tribunal for further inquiry. Since then, Bell has launched a series of legal actions in an attempt to stop the hearings. The following are three of the most recent decisions.

On March 17, 1998, Mr. Justice Muldoon of the Federal Court ruled in favour of Bell Canada's motion to quash pay equity proceedings against it, and heavily criticized the Canadian Human Rights Commission for its role in the process. In *Bell Canada* v. *CEPU (No. 5)*, the judge found that not only had the Canadian Human Rights Commission and Bell's unions not "behaved honourably" towards Bell, "but more to the point, the CHRC's treatment of Bell, in law, was unfair." Bell had complained that while the Commission was purporting to act as an impartial arbiter, it was on the side of the union, and was advising them on how to lay complaints. Bell said it carried out a pay equity study with its unions to be used only for future bargaining purposes, but the Commission had used those confidential results to substantiate pay equity complaints. Justice Muldoon said that under the circumstances, there was no reasonable possibility of the Canadian Human Rights Commission appointing an impartial tribunal to hear a case in which it had not only supported, but apparently solicited, the complaints under consideration.

Moreover, he criticized the Commission for trying to compare wage rates, not job by job, but between predominantly male and predominantly female positions in general, calling it a "new concept" not enshrined in the legislation, and overly vague. Justice Muldoon also suggested that unions who negotiate wage rates could not later complain that they were unfair. Furthermore, in order to proceed with a complaint, the unions should have had the express permission of all the people whose jobs formed part of the complaint. This was particularly unrealistic, as many employees had retired or moved away.

In November, the Federal Court of Appeal overturned every element of Justice Muldoon's decision in *Bell Canada* v. *CEP and CTEA*. In the Court's unanimous ruling, the three appeal judges clearly said that Justice Muldoon was wrong to decide that there were no grounds to send the case to a human rights tribunal. The decision criticized him for referring exclusively to the evidence filed by Bell Canada in his ruling — without giving any explanation for doing so — and listed several problems with his judgment. Furthermore, the Court confirmed the Canadian Human Rights Tribunal's role as the primary interpreter of the pay equity provisions of the Canadian Human Rights Act.

The Court said that the merits of the case were irrelevant. The law grants the Commission "a remarkable degree of latitude" to decide whether there is sufficient evidence to investigate a case and send it to a tribunal. In particular, the Court found that the Commission's decision to refer the case to a tribunal was reasonable, given the results of the joint study and the Commission's own investigation. The procedures followed by the Commission were fair, as both Bell and the complainants had full opportunity to review and comment on all reports and other material placed before the Commissioners.
The Court ruled that Justice Muldoon's statement on methodology went beyond the facts needed to reach his decision, but refused to comment on the soundness of his opinion. The Court refused to interpret the case "without the benefit of a tribunal decision."

Finally, the Court of Appeal dismissed Bell's argument that the complaints were vexatious and in bad faith, and that the unions should be estopped from attacking wages that they had freely negotiated. The decision said that the Canadian Human Rights Act clearly makes only the employer liable for wage gaps between work of equal value. The Court concluded: "it would fly in the face of the clear wording of the Act and the obvious intent of Parliament to find unions equally liable ... for having participated in the establishment of different wages with respect to work of equal value." The Act does not force the unions to pursue the issue of equal wages for equal value to an impasse during the collective bargaining process before they can file pay equity complaints with the Commission. Nor do they need to obtain the consent of all their members, as "the whole history of the case suggests that the alleged victims had endorsed the actions of their union throughout." The Court concluded by saying that although it might seem unethical for a union to use section 11 to force, for all practical purposes, the revision of the collective agreement it had negotiated, it was not legally wrong if it was not done in bad faith.

Barely a week after Justice Muldoon released his decision, the impartiality of the Canadian Human Rights Tribunal's structure was called into question by the Federal Court in *Bell Canada* v. *CEPU (No. 6)*. Madam Justice McGillis halted the tribunal's hearing into the pay equity complaint by Bell workers, ruling that human rights tribunals were not sufficiently independent from the Commission or the government to render impartial decisions. She held that the Canadian Human Rights Tribunal's ties to the Commission could give rise to an apprehension of bias in tribunal decisions. Under the system then in operation, the Commission was required by law to fix the remuneration, travel and living expenses of the members of the Canadian Human Rights Tribunal, which would then be subject to the

Treasury Board's approval. The Commission also had the statutory power to issue guidelines binding on the Tribunal.

Justice McGillis held that there were three essential conditions of judicial independence: security of tenure, financial security, and administrative independence. Given that the Canadian Human Rights Tribunal had a purely adjudicative role and performed functions relating to fundamental rights, a high level of independence was required. She then went on to consider whether that level of independence existed.

With respect to security of tenure, Justice McGillis found that the Act did not accord a member of the Canadian Human Rights Tribunal whose appointment had expired the right to continue hearing a case after the expiry of the appointment. In such circumstances, the President of the tribunal panel had to ask the Minister of Justice for an extension of the member's appointment in order to enable the case to be completed. The Act was therefore inadequate, in that it failed to provide members of the Canadian Human Rights Tribunal with the statutory right to fulfil their adjudicative role without any intervention from the executive or legislative branches of the government.

As for financial security, Justice McGillis concluded that "the legislative scheme in the Act does not respect the essence of the condition of financial security in that the remuneration of the members of a tribunal is controlled by the Commission, an interested party in all Tribunal proceedings."

These failures compromised the institutional independence of the Canadian Human Rights Tribunal to such an extent that there was a reasonable apprehension of bias, Justice McGillis concluded. The Tribunal was therefore not an independent, quasi-judicial body capable of providing a fair hearing. She quashed the proceedings and ordered that there be no further proceedings in the matter until the problems she identified in relation to security of tenure and financial security were corrected by legislative amendments to the Act.

In the past, the Commission and various officials of the Tribunal Panel had actively lobbied for legislative changes, and a bill was already before Parliament to create a new, permanent Canadian Human Rights Tribunal. Bill S-5 became law on June 30, 1998, effectively cutting the umbilical cord between the Commission and the tribunals. The Tribunal now has control over its own internal administration, and the Tribunal members' pay is fixed by the Governor in Council.

Despite the legislative amendments, the Commission had filed an appeal because of the implications for existing cases. Cases recently decided by federal human rights tribunals, or proceedings then underway, might be assailed by parties seeking to have them voided on the basis of this decision. (See *Zundel* v. *Attorney General of Canada*).

In December, a tribunal decision in *Public Service Alliance* v. *Government of Northwest Territories* confirmed the independence of the newly created Canadian Human Rights Tribunal. This cleared the way for hearings of the Government of the Northwest Territories pay equity case.

The Union of Northern Workers, a component of the Public Service Alliance, had filed a pay

equity complaint with the Commission. It alleged that the Government of the Northwest Territories discriminated against its employees in predominantly female job categories by paying these employees less than employees in predominantly male jobs for work of equal value. The union also alleged that the employees in predominantly female groups had to work longer to reach their maximum salaries than employees in predominantly male occupations. The Commission had referred a number of the union's allegations to a tribunal.

In September 1998, the Territorial Government filed a motion alleging that, notwithstanding Bill S-5 amendments, the Canadian Human Rights Tribunal lacked institutional independence and impartiality. In its decision, the tribunal replied that "it [had] the institutional capacity to provide a fair hearing in the present case and should proceed to hear the complaint." The Territorial Government has applied for judicial review of this decision.

In late 1998, a tribunal issued a disappointing decision, quashing the proceedings in the pay equity case of the *Canadian Union of Public Employees* v. *Canadian Airlines International and Air Canada*. The Canadian Union of Public Employees, or CUPE, had filed complaints with the Commission, alleging that flight attendants for both airlines were underpaid when compared with other predominantly male occupational groups. The issue before the tribunal was whether the flight attendants worked in a different "establishment" from flight crew or pilots. Section 11 of the Canadian Human Rights Act states that "it is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the *same establishment* who are performing work of equal value." [Emphasis added].

From the outset, the airlines maintained that pilots, flight attendants and flight crew worked in different "establishments," as there were no common wage or personnel policies among the employee groups, and each group was governed by a separately negotiated collective agreement. The Commission and CUPE contended that the primary criterion in determining whether one or more groups worked in the same establishment was whether the employees were involved in the same operational line of business or core function of the employer. In this case, the core function was the business of transporting passengers and cargo by air, domestically and internationally. The tribunal found that this approach would make virtually all corporations, apart from major conglomerates, single establishments for the purposes of the Act. The complainant pointed to the common work location, in and around various aircraft, the daily interaction between flight attendants and employees from other bargaining groups, joint training and employee committees, and general corporate human resources policies as evidence of a single establishment, but this argument was rejected.

The tribunal concluded that the three major employee groups at Air Canada and Canadian Airlines did not form a "single establishment" for the purposes of the pay equity provisions of the Act. The complaint could not, therefore, proceed. In the decision, the tribunal said that collective bargaining had to be taken into consideration in determining what was meant by "establishment." The tribunal stated that "the bargaining units comprising pilots, flight attendants and technical operations employees

negotiate separate collective agreements that contain the vast majority of the wage and personnel policies applicable to each of the functional branches of the respondent companies. These collective agreements, taken together with the branch-specific manuals, prevent the creation of a single establishment comprising the pilots, flight attendants and technical operations at Air Canada and Canadian Airlines. The existence of general human resources policies and common negotiating strategies at each of the respondent companies that may apply to all employees, unless superseded by the relevant collective agreement, cannot by themselves establish a single establishment comprising the pilots, flight attendants and technical operations at each of the respondent companies."

The decision is a narrow interpretation of the pay equity provisions of the Act, reinforcing the inequities in bargaining positions between predominantly male and predominantly female groups, and will limit the ability of many employees in predominantly female jobs to file a complaint based on the pay equity provisions of the Act.

The Commission has therefore applied for judicial review of this decision.

Marital and Family Status

In March, a tribunal upheld Peter and Trudy Jacobs' complaint against the Mohawk Council of Kahnawake, or MCK. The ruling in *Jacobs and Jacobs* v. *Mohawk Council of Kahnawake* is believed to be the first that deals with the human rights of children adopted by Aboriginal people. Peter Jacobs is recognized as a status Indian, but neither he nor his immediate family are acknowledged as members of the Kahnawake First Nation. The Jacobs family contended that the Mohawk Council of Kahnawake discriminated against them in the provision of goods and services by refusing them benefits available to other members of the Mohawk community.

Peter Jacobs was adopted at birth by two Mohawks and has lived most of his life on the reserve. His biological parents were of black and Jewish descent. He lost his membership in the Mohawk community at the age of twenty-one because of his biological origins, but he regained his Indian status in 1988 under the provisions of Bill C-31, which amended the Indian Act, restoring adoptees' Aboriginal status. In April 1988, the complainant was informed by the Council that even though he was entitled to be registered as an Indian with the Department of Indian Affairs and Northern Development, he did not meet the criteria for becoming a registered Indian in Kahnawake. Furthermore, his wife Trudy, who had been born a Mohawk, lost her right to be on the Kahnawake membership list because she had married a non-native. As a consequence the couple was denied water and sewer services and a housing loan.

The tribunal held that, except insofar as it related to the right of the Jacobs family to vote or hold office in any future election of the Mohawk Council of Kahnawake, a *prima facie* case of discrimination had been established. The tribunal was satisfied that there had been a denial of access to goods and services constituting direct discrimination based on race, national or ethnic origin, and family status. By not being on the Mohawk membership list, the Jacobs family was effectively being denied the right to apply to

the Council for the rights, benefits and privileges available to members of the Kahnawake community.

The tribunal rejected the argument advanced by the Jacobs family that the Council was not acting in good faith. In 1981 the Mohawk Council of Kahnawake enacted a moratorium that stated that "in order to be recognized by the Kahnawake Mohawk Territory as being Indian, a person must possess fifty per cent or more Indian blood," and "any Indian man or woman who marries a non-Indian man or woman is not eligible for ... the ... benefits that are derived from the Kahnawake Mohawk Territory." In applying the membership criteria set out in the Moratorium of 1981 and the Mohawk Law of 1984, the respondent was acting honestly, and in the sincere belief that these criteria were necessary to insure the survival of Kahnawake as a culturally distinct Mohawk community and to protect its limited land base.

While the tribunal accepted that there was some basis for determining membership by considering the blood lineage and blood quantum, it was not satisfied that the legitimate objectives of the community could not be met even if people who were not Indian, but who were adopted at infancy and raised as Mohawks, were included. It also indicated that it was not satisfied that no practical alternative existed. In the tribunal's view, the fear that too many people might seek similar rights, benefits and privileges did not constitute a defence against an allegation of discrimination. Finally, the tribunal was not satisfied that the exclusion of Peter and Judy Jacobs and their children, and others in their unusual situation, from the opportunity to enjoy the rights, benefits and privileges that were available to others ordinarily residing at Kahnawake, was reasonably necessary.

The tribunal ordered the Mohawk Council to "cease and desist from committing acts of discrimination against [the Jacobs family] by refusing them access to the rights, benefits, privileges and services available to other members of the Mohawk community of Kahnawake." These benefits included land allotment and land rights, housing assistance, welfare, education, burial, medicines and tax privileges.

In his original complaint to the Canadian Human Rights Commission, Mr. Jacobs requested that he and his family be recognized as members of the Kahnawake First Nation. The tribunal said that it was unable to order the Kahnawake community to accept the Jacobs family. "... [A]cceptability within a community is for the mind, the soul and the spirit and is not the subject of Orders. No matter what we might do, we cannot make Peter and Judy members of this community ... only the community can do that."

Disability

The Canadian Human Rights Act now includes an express reference to a "duty of accommodation" that requires employers to address the needs of people who are protected under the Act, including people with disabilities. Nevertheless, even employers who have committed themselves to providing equal opportunities for disabled employees have fallen short. In *Green* v. *Public Service Commission, Treasury Board and Human Resources Development Canada,* the complainant, who has auditory dyslexia, applied for a position as Manager of Employment Equity Consulting

Services at the Canada Employment and Immigration Commission, now part of Human Resources Development Canada, and was rated first on knowledge, ability and personal suitability in a competition.

As part of the orientation process, Ms. Green was required to take a test that would determine whether she had the ability to learn French within the time allotted by Treasury Board policy. The Public Service Commission measures second language "aptitude" by testing auditory abilities for sound and symbol discrimination, for rote memory of speech sounds, and for grammatical structure. The complainant could not understand words when they were broken down and out of context, so she failed when she was tested to determine her aptitude to learn French. Ms. Green was unaware of her disability when she took the Public Service Commission's second language aptitude test: her learning disability, "dyslexia affecting auditory processing function," was only diagnosed after she failed the test. Despite the fact that she had, through part-time language instruction, acquired enough French to make it possible for her to receive a "positive prognosis" from the Public Service Commission, and thus the opportunity to take full-time, government-funded, second-language instruction, no steps were ever taken to reassess her situation. Subsequently she was demoted from her acting position as Manager of Employment Equity Consulting.

In September 1989, she complained to the Canadian Human Rights Commission that she was being held back because of her disability. She filed a systemic discrimination complaint against the Treasury Board, alleging that it had a policy that deprived people with disabilities of employment opportunities. The policy at issue fixed the maximum time allotted for government-sponsored, full-time second-language training. She also filed a complaint against the Public Service Commission, alleging that she was denied French-language training and a promotion as a result of the "negative prognosis" that she received in the Public Service Commission's second-language aptitude tests.

The tribunal held that the evidence supported a *prima facie* case of discrimination, and that Ms. Green's employer had failed to accommodate her learning disability. Although the Treasury Board had a policy to accommodate people like Nancy Green, it took no steps "to address the aptitude test as a systemic barrier for persons with diagnosed learning disabilities."

The tribunal rejected the Public Service Commission's position that it was unable to accommodate Nancy Green's disability because it was unaware of the disability at the time she took the test. It also rejected the respondent's argument that the disability was the barrier, not the test, noting that "there appears to be a lack of understanding about the nature of learning disabilities and effective action needed to accommodate them."

The tribunal added that ignorance about learning disabilities might be the cause of the "inability to meld the fine human rights theories ... with the practical procedures which have to be taken at all levels to make those theories work ... There was little or no effective training in how to deal with the theory of accommodation." The tribunal said that part of the difficulty lay with the hierarchical nature of the public service and "pervasive" problems of communication, noting that "the attitudes and

practices of the Public Service Commission created a situation where it could not implement its own human rights and employment equity policies."

The tribunal ordered the Treasury Board to work with the Canadian Human Rights Commission to create, within six months, an education and training program for all its employees on accommodating people with learning disabilities in the workplace. Employees of the Treasury Board, the Public Service Commission, and Human Resources Development Canada were to be given this training. The Public Service Commission was ordered to create an alternate method of testing the aptitude of people with learning disabilities to complete a language training program. It also ordered the establishment of a procedure to review cases in which a person with a disability appeared not to come within the ambit of a policy or procedure.

Given that Nancy Green's career was essentially over once she had failed the French-language aptitude test and that she had subsequently experienced "ten years of employment doldrums," the tribunal ordered that she should be promoted immediately to the level she was seeking, and then moved on to the executive level — without competition — as soon as a position became available and she had completed the necessary training. The order included admission to a government-sponsored French-language training program, lost wages, and an award of five thousand dollars for hurt feelings.

The government has appealed this decision.

In July, the Federal Court of Appeal held in *Canadian Civil Liberties Association* v. *Toronto-Dominion Bank* that the Toronto-Dominion Bank's mandatory pre-employment drug-testing policy discriminated against people with disabilities and therefore violated the Canadian Human Rights Act. The Toronto-Dominion Bank was the only Canadian bank that carried out mandatory drug testing, but the judgment could affect similar policies by employers across Canada.

Under the Bank's policy, all new employees and those rehired after a three-month absence were required to submit to a urine test within forty-eight hours of accepting an offer of employment. Those who refused to take the test were dismissed for failing to comply with a condition of employment. Employees who tested positive and were identified as drug dependent could lose their jobs if they refused to take part in a treatment program, paid for by the company, or if rehabilitation was unsuccessful.

An earlier tribunal decision had concluded that the policy was valid, despite evidence that employees were terminated because of their dependency. Subsequently, the Federal Court upheld the tribunal's decision in part, but sent the case back for reconsideration because it had failed to rule on whether the drug-testing policy was "rationally connected" to job performance. An appeal was launched by all parties — the Bank, the Civil Liberties Association, and the Canadian Human Rights Commission — to the Federal Court of Appeal.

By a majority of two to one, the Court found that the Bank's policy was a discriminatory practice contrary to section 10 of the Canadian Human Rights Act, and ordered the case referred back to a tribunal for reconsideration. Unfortunately, Justices Robertson, McDonald

and Isaac were unable to reach a consensus on the nature of the discrimination caused by the Bank's drug-testing policy. Justices McDonald and Isaac held that the policy was indirectly discriminatory, i.e., seemingly neutral but with an adverse effect on a particular group of people. Justice Robertson concluded that the policy was directly discriminatory because it specifically targeted drug-dependent individuals, a group protected under the Act.

Justice Robertson held that the tribunal had erred in finding that the Civil Liberties Association failed to establish a case of *prima facie* discrimination. The tribunal had based its decision on the mistaken belief that evidence of reasonable accommodation on the part of the employer transformed a *prima facie* discriminatory policy into a non-discriminatory policy. Accommodation was a defence to allegations of discrimination, but it did not change the fact that the action was discriminatory in the first place, he stated. Furthermore, the tribunal failed to appreciate that if an employment rule was not "reasonably necessary" or if there was no "rational connection" to job performance, then it was irrelevant whether an employer was willing to accommodate. A policy intended to ensure a drug-free working environment must necessarily adversely affect those employees who were drug dependent, he ruled. The question to be determined was whether that discrimination was direct or indirect; each one had its own reasoning and defences.

Justice Robertson noted that indirect discrimination arose incidentally, as a consequence of an apparently neutral policy. A neutral employment rule, he held, was more likely to be directed at how work is performed, not at isolating people believed to be incapable of adequately performing assigned tasks because of disability. Justice Robertson concluded that the Bank's drug-testing policy could not be described as a neutral employment rule, as it specifically targeted the removal of drug-dependent employees.

Justice Robertson next considered whether the Bank could defend the policy on the ground that it was a *bona fide* occupational requirement. In order to establish a *bona fide* occupational requirement, the Bank was required to show that the policy was imposed in good faith, and that it was reasonably necessary for work performance. The Bank argued that drug testing was necessary to reduce the risk of internal crime, improve job performance, and maintain public confidence in the integrity and honesty of the Bank as a financial institution. Justice Robertson said that "the issue of integrity might be more persuasive in the context of law enforcement personnel or professional or amateur athletics. But I cannot see how it advances the Bank's case. Integrity is the foundation of all employment relationships. Whether or not it is of primary importance to the Banks, or as alleged, they have special concerns, are largely non-justiciable matters." Hence the Bank failed to show that drug testing was a *bona fide* occupational requirement that would justify the imposition of a discriminatory employment practice.

In the event that he was incorrect in finding "direct discrimination," Justice Robertson held that the policy also constituted indirect discrimination, which could only be justified if the Bank could demonstrate that the policy was "rationally connected" to work performance. Once a rational connection is established, the employer had to show that it

reasonably accommodated the employees affected by the policy, short of undue hardship. In this case there was "insufficient evidence to establish that a drug problem exists within the Bank," and "no correlation between illegal drug use and crime, nor evidence to support such a concern," to show that a rational connection existed between the policy and job performance. "[A]t best, the Bank's policy reveals whether an employee has been exposed to certain drugs within a certain time frame. Such information reveals nothing about an employee's ability to do the job in question."

Justice McDonald agreed with Justice Robertson that the Bank's policy was *prima facie* discrimination against drug-dependent employees; however, he was of the opinion that the policy constituted indirect discrimination. He found that the drug-testing policy was directed at casual users as well as drug-dependent users. Since it was designed to catch all drug users, but negatively affected drug-dependent employees, the policy was indirectly discriminatory.

He concluded the Toronto-Dominion Bank's policy was not rationally related to the objective of ensuring optimal performance, because it only applied to new workers and there was no evidence that employees' work performance was being affected by drugs. "If the Bank was truly concerned with the correlation between drug use and employee job performance and responsibility, it would have adopted a rule of random testing which applies to all employees, including those at the senior level," Justice McDonald wrote. "It would have also tested for a wide variety of other drugs. A finding of trace amounts of drugs in one's system does not mean the employee is unproductive or about to engage in a work-related crime."

Justice McDonald said that for a drug-testing policy to be legal, it must not be random. It must be linked to an employee's job performance, except perhaps in safety-sensitive industries. "If an employee is not abusing drugs while at work, and his or her work performance meets the employer's job requirements, then the disability poses no problems ... If, however, an employee exhibits poor performance and the Bank reasonably believes it may be related to a drug dependency, then and only then should the Bank be able to test the employee, and, if necessary, send the employee to some form of rehabilitation or counselling program." While the rehabilitation program provided by the Bank met the reasonable accommodation requirement, the policy still failed, because rehabilitation was not triggered by an assessment of an employee's performance.

In dissent, Chief Justice Isaac said the Toronto-Dominion Bank's policy was not discriminatory, but an employment rule "honestly made for economic and business reasons."

While he agreed that the policy was properly characterized as indirect or adverse effect discrimination, he disagreed that the Bank had failed to establish a rational connection between the policy and job performance. "[T]he underlying concerns of the [Bank] in adopting its policy are to maintain a safe, healthy and productive workplace for all employees and to safeguard customer, employee and the [Bank's] funds and information and to protect its reputation. The policy also acknowledges the impact of drugs

on work performance in that it affects alertness, perception and other working abilities ...” The Chief Justice further concluded that the rehabilitative program constituted reasonable accommodation.

This was the second ruling in 1998 to throw out a major company’s random drug-testing program. In February, Imperial Oil’s alcohol and drug screening program was found to violate the Ontario Human Rights Code. The Toronto-Dominion Bank has since dropped its drug-testing program.

In June, a review tribunal overturned a finding that Canadian National and a union had discriminated against disabled employees in calculating their years of service, in *Cramm* v. *CNR and the Brotherhood of Maintenance of Way Employees*. Barry Cramm, a former welder with a subsidiary of Canadian National, suffered severe burns in an industrial accident and was unable to work from September 1980 to March 1984. In 1988 his employer, Terra Transport, shut down operations when the railroad closed in Newfoundland. Under the Employment Security and Income Maintenance Agreement negotiated by the union, permanent employees who had eight years of service were offered jobs or a buyout of their salary until they turned 55. Those with less than eight years of service had their pension contributions returned to them. In calculating his years of service, the Company refused to consider the thirty months during which Mr. Cramm could not work because of his injuries, leaving him five months short of the eight-year cutoff, and therefore only eligible for the smaller compensation package.

The original tribunal ruled in Mr. Cramm’s favour, holding that the formula used by Canadian National to calculate years of service contravened the Canadian Human Rights Act. The requirement to work one day in a calendar year was discriminatory, because it penalized employees with long-term disabilities who could not work one day a year. The hundred-day limit was also discriminatory, because it treated employees with short-term disabilities differently from those with long-term disabilities.

The review tribunal held that the employment security and maintenance agreement did not differentiate adversely against employees on the basis of disability, and therefore the Commission had failed to establish a *prima facie* case of discrimination. The review tribunal appears to have based its decision on the theory that people on jury duty, at committee meetings, and attending court as witnesses would have suffered the same loss as Mr. Cramm and other people absent from work due to disability, if they were absent for more than one hundred days in a calendar year. Since this comparison group, which does not fall within a class protected by human rights legislation, would suffer the same “qualitative impact” on the calculation of their service as disabled employees, there could not be any adverse effect discrimination. The tribunal found that it was irrelevant that more disabled employees were likely to experience a negative impact as a result of the imposition of the collective agreement. Indeed, the respondent did not introduce any statistical evidence to show that this comparison group even existed. The notion that the same treatment does not always mean equal treatment appears to have eluded the review tribunal.

It is the Commission’s position that this approach to adverse effect discrimination

places a further barrier in the path of people with temporary and permanent disabilities and is not in keeping with the principles of interpretation that should be applied to human rights legislation. The reasoning in this case could jeopardize findings of adverse effect discrimination in employment equity cases, and cases involving physical fitness tests and height requirements, since it would be very hard to prove that the complainants in these cases suffered a greater "qualitative loss" than other groups. The Commission has applied for judicial review of this decision.

Sexual Orientation

In another legal victory for gay men and lesbians, the federal government has been told that it cannot create a "separate but equal" health and dental benefit plan for homosexual public servants. A Federal Court Trial Division judge ruled that the government must integrate gay men and lesbians into existing programs by changing the definition of "spouse" to include same-sex couples.

In *Moore and Akerstrom* v. *Treasury Board,* a 1996 human rights tribunal held that the federal government had to extend employee medical and dental benefits to the same-sex partners of its employees. Dale Akerstrom had been denied family health benefits. Stanley Moore, a foreign service officer, was denied moving, housing, medical and dental benefits for his partner when he was posted to Indonesia in 1991. The tribunal ordered the government to prepare an inventory of all legislation, regulations and directives containing a discriminatory definition of "spouse" and to "cease and desist" from applying a definition of "spouse" in the existing plans and collective agreements that restricted that term to members of the opposite sex. The government refused to amend the definition of spouse in the collective agreement, and instead created a separate category of "same-sex partner relationship" that required employees to declare publicly that they were in a homosexual partnership in order to receive employment benefits. Subsequently the tribunal was reconvened to clarify the remedial award, and it ruled that setting up a separate category for the beneficiaries of same-sex spouses did not comply with the original order. The words "spouse" or "common-law spouse" were to be interpreted as if the words "of the opposite sex" or any reference to gender were not included. The Treasury Board appealed the tribunal's decision before the Federal Court.

Mr. Justice MacKay addressed the government's first ground of appeal, holding that the Canadian Human Rights Tribunal had the power to revisit its decisions to ensure that its remedial orders were effectively implemented. He went on to rule that the majority of the Supreme Court in *Egan* v. *Canada* had set a standard for the definition of spouse necessary to meet the requirements of the Charter; namely, that it not include a reference to the "opposite sex." He further concluded that the scheme proposed by the employer established a regime of "separate but equal" that distinguished between relationships on the basis of sexual orientation of the participants. The plan was still discriminatory even though the benefits were the same, and he likened it to the "appalling doctrine" that helped maintain segregation in the United States. "It is no more appropriate for the employer in this case to have established a separate definition for persons in same-sex relationships than it would have been for the employer to create separate definitions for

relationships of persons based on their race, colour or ethnicity," Justice MacKay wrote.

Justice MacKay also ruled that the tribunal had the authority to order the government to prepare an inventory of all federal laws, regulations and directives that discriminated against same-sex couples in employment-related benefits, along with proposals on how to revise them.

Hate Messages

In April 1998, the Supreme Court of Canada confirmed that the Commission could continue to seek injunctions from the Federal Court to shut down telephone lines with hate messages pending a hearing by a human rights tribunal. However, *CHRC* v. *Canadian Liberty Net* establishes a very strict standard for the grant of injunctions, in order to ensure that free speech is not unduly restricted.

In December 1991, the Commission had received several complaints alleging that Canadian Liberty Net and Tony McAleer operated a telephone answering service that played hate messages in contravention of section 13(1) of the Canadian Human Rights Act. These messages included denials of the existence or extent of the Holocaust; assertions that non-white "aliens" were importing crime and other problems into Canada; suggestions that violence would be helpful to correct problems caused by "aliens"; complaints about the alleged domination of the entertainment industry by Jews; and allegations that well-known leaders of the white supremacist movement were being persecuted.

The Commission applied to the Federal Court Trial Division for an injunction to stop the respondents from placing these messages on their answering machine, pending a determination by the tribunal. Mr. Justice Muldoon granted the injunction. Meanwhile, the respondents changed their message to refer callers to a new service that operated from the United States. This line contained many of the same messages that the respondents had been previously ordered not to disseminate, and the Commission therefore sought and obtained a finding of contempt against them. The Federal Court of Appeal affirmed the finding of contempt, but found that Justice Muldoon did not have the jurisdiction to grant the earlier injunction. The Commission appealed the jurisdiction finding, and Tony McAleer and Canadian Liberty Net appealed the contempt order.

There were three issues before the Supreme Court: Did the Federal Court have jurisdiction to issue the injunction? Was the issuance of an injunction appropriate in this case? And finally, if the injunction was wrongly issued, could the defendants be held in contempt of court for a breach of the order?

Mr. Justice Michel Bastarache, for the majority, decided that the Federal Court had the authority to issue an injunction. The Federal Court Act and the Canadian Human Rights Act contain provisions that indicate that the Federal Court is to have a high degree of supervision over the Canadian Human Rights Tribunal. Justice Bastarache concluded that Parliament intended to grant general administrative jurisdiction over federal tribunals to the Federal Court. He relied upon his interpretation of section 44 of the Federal Court Act, which authorizes the Court to grant interlocutory injunctions "in addition to" other

forms of relief. Madam Justice Beverley McLachlin and Mr. Justice John Major dissented on this point, and found that the Federal Court did not have jurisdiction to issue freestanding injunctions.

Justice Bastarache ruled that since the injunction would prohibit the expression of opinion, it should be governed by the same principles that have developed in cases involving injunctions to restrain defamation. Under these rules, in order to obtain an injunction, it is necessary to show beyond any doubt that the impugned words violate the law, and an injunction should be issued only in the "rarest and clearest of cases." Since the injunction in this case had lapsed when the tribunal issued a "cease and desist" order in September 1993, he did not rule on whether the messages in this case would meet this test.

The Court was unanimous in finding that the respondents deliberately and knowingly violated the injunction order, and therefore upheld the finding of contempt. The Court rejected the respondents' arguments that the location of the telephone line in the United States brought it outside the jurisdiction of the Canadian court, because a significant portion of the activities that constituted contempt in this case occurred in Canada. The respondents advertised the American number on their Canadian telephone line, and this involved the communication of messages through the use of Canadian telecommunication systems. In contempt proceedings, the order must be considered valid until it is set aside by legal process. Thus, even if the injunction order was ultimately ruled to be invalid, that finding would provide no defence.

In future cases the Commission will need to establish that the contents of the messages clearly violate section 13 of the Act and are extremely harmful in order to obtain this kind of injunction. This decision may also serve as a precedent for other cases in which the Commission wants to stop other types of discriminatory activity pending a tribunal hearing.

In 1998, tribunal hearings continued into whether a California web site known as the "Zundelsite" violated the Canadian Human Rights Act. The case, *Zundel* v. *Attorney General*, is one of the first attempts to apply human rights law to information disseminated over the Internet. Ernst Zundel is accused of using his web site to promote hatred against Jews. A complaint was filed by the Toronto Mayor's Committee on Community and Race Relations and Sabina Citron, a founding member of the Canadian Holocaust Remembrance Association. Mr. Zundel has argued that the web site is operated and controlled in California by a resident of the United States. Citing Madam Justice McGillis in *Bell Canada* v. *CEPU (No. 6)*, a ruling on a pay equity complaint of Bell Canada workers that questioned the independence and impartiality of human rights tribunals, Mr. Zundel attempted to block the inquiry, without success. Mr. Justice Richard ruled that Mr. Zundel's concerns about the tribunal's impartiality should have been raised before the hearings began. Thirteen witnesses had already testified in the case, which began in the fall of 1997, and it was not in the "public interest" to halt human rights tribunals already under way.

On the legislative front, amendments to the Canadian Human Rights Act that came into

force on June 30, 1998 allow victims specifically identified in hate messages to receive compensation. The individuals responsible for disseminating hate propaganda may also be ordered to pay a penalty of up to ten thousand dollars.

Jurisdictional and Procedural Questions

The cases of *Charlebois* v. *CHRC and OC Transpo* and *Charlebois* v. *Amalgamated Transit Union* recognize the Commission's discretion in conducting its own investigation and establish whether the Commission has a right to rely upon the factual findings of other decision-making bodies.

Gilles Charlebois had his employment with OC Transpo terminated in 1990 for "gross insubordination." Shortly after his reinstatement, he began a lengthy medical leave, providing his employer with a doctor's certificate authorizing his absence from work because he had a psychiatric condition. Upon his return to work, Mr. Charlebois went on a previously scheduled week of holidays. After that, he was summoned to a disciplinary meeting with management, and two days later received notice that he was being terminated once again because he had failed to meet the conditions of his reinstatement or maintain an adequate level of performance.

Mr. Charlebois filed a human rights complaint against both his employer and his union. Initially, the Commission was reluctant to accept the complaint against the union because it was felt that there were insufficient grounds. Both complaints were subsequently dismissed. Mr. Charlebois appealed. The main issue raised in his application for judicial review was the thoroughness of the Commission's investigation. He also alleged bias in the investigation of his complaint against the union, because the Commission's staff had originally advised him that his complaint would not be accepted, as he had failed to establish any link between his allegation and his disability.

After reviewing the relevant case law on the degree of neutrality and thoroughness required in an investigation by the Commission, Mr. Justice Campbell agreed that the investigation into OC Transpo's action was not thorough enough, and ordered that the complaint be referred back to a different investigator for further investigation. With respect to Mr. Charlebois's complaint against his union, Mr. Justice Campbell rejected Mr. Charlebois's allegation that the investigation was biased. During the course of the formal investigation, Mr. Charlebois had been accorded the "usual, if not attentive consideration," and the judge found no evidence of bad faith on the part of anyone who acted in his case.

Furthermore, the judge dismissed the allegation that the Commission had improperly fettered its own discretion by placing undue weight on the results of a Canada Labour Relations Board hearing into a grievance filed by Mr. Charlebois. "I do not believe that where a full evaluation of evidence has occurred by an independent tribunal on particular pertinent factual issues, as is the case here, it is necessary to duplicate that activity simply because the tribunal's jurisdictional focus is somewhat different ... If the facts found are on the basis of the same evidence, and the findings are made in a credible way, these findings can, and

should, be accepted to maintain an efficient and cost-effective investigation service," he wrote. Mr. Charlebois failed to establish a connection between the way he was treated by certain members of his union and his disability, and therefore the Commission was correct in dismissing his complaint.

Last year's Legal Report mentioned the case of *Perera* v. *Canada*, in which the Federal Court held that federal employees who have grounds for complaint under the Canadian Human Rights Act might also bring equality rights lawsuits under section 15 of the Canadian Charter of Rights and Freedoms. In June, the Federal Court of Appeal confirmed that government employees alleging Charter breaches would not be restricted to the Canadian Human Rights Commission's complaint process.

Dr. Ranjit Perera argued that his dismissal from his position as a senior development officer with the Canadian International Development Agency, or CIDA, was the culmination of a process of individual and systemic discrimination on the basis of race, national or ethnic origin, and colour. According to Dr. Perera, he was also denied promotions, received critical performance appraisals, and was placed on fewer overseas postings because of his race. Dr. Perera's complaints of individual and systemic discrimination had been dismissed by the Commission, so he commenced a separate Charter action in the Federal Court seeking $800,000 in damages, $200,000 in punitive damages, a letter of apology, and an order directing CIDA to cease its discriminatory practices and to implement an employment equity program. Although the Federal Court was of the view that both human rights and Charter processes could be invoked at the same time, the Court stated that it did not have the jurisdiction to grant a letter of apology or a systemic remedy in the form of an employment equity program.

The Federal Court of Appeal held that the litigants could pursue systemic remedies under section 24 of the Charter. Dr. Perera had asked that CIDA adopt a special program "designed to rectify the adverse effect of the discriminatory practices on visible minorities in CIDA," and that CIDA implement an employment equity program that would "ensure that at least 20 per cent of all new appointments to senior management and at least 20 per cent of all new hires in CIDA be members of visible minorities."

Mr. Justice Létourneau wrote that if courts find for a plaintiff in an action under the Charter, they must be free "to fashion the remedies that they deem appropriate in the circumstances." Citing the Supreme Court decision in *Robichaud* v. *Canada*, he stated that "in cases where attitudes or behaviour need to be changed, an instrumental approach to remedies is necessary in order to enforce compliance with the purposes and objectives of human rights codes or legislation ... It necessarily follows, in my view, [that] the courts must have, under section 24 of the Charter, the power to impose similar remedies when they deem it appropriate."

He also found that the trial judge further erred in striking out a paragraph seeking a letter of apology from the minister responsible for CIDA. The apology would by its nature contravene the Charter provision protecting freedom of expression, and consequently could only be granted if justifiable under section 1. That question, he said, could not be answered

in the abstract without knowledge of the circumstances of the case.

Although human rights proceedings have been criticized because complainants have limited control over the proceedings, are not guaranteed a hearing, and are not entitled to reasons if the complaint is dismissed, it is unlikely that many parties will choose to pursue their rights through Charter litigation, as the cost can be prohibitive.

As a result of the decision in *Canada (Attorney General)* v. *Magee,* and the decision of the Supreme Court in *Bell and Cooper*, the only avenue of recourse for those who have a complaint arising out of a pension plan established by an Act of Parliament before March 1978 is to seek a declaration that section 62 of the Canadian Human Rights Act is unconstitutional. The Commission itself does not have the power to determine the constitutional validity of the Act, and thus has no choice but to apply subsection 62(1).

Laurence Magee is the widow of Charles Magee, a former member of the Canadian Forces. In 1981, after 22 years of marriage, they separated. They never divorced and remained legally married until Charles Magee died in 1985, leaving his wife as sole beneficiary of his will. After his death, Mrs. Magee enquired about any pension entitlement she might have as the surviving widow of a member of the Canadian Forces. In 1986, the Treasury Board denied her application for a survivor's pension because she had been living apart from her husband at the time of his death. Laurence Magee filed two complaints with the Canadian Human Rights Commission, alleging that the Treasury Board and the Department of National Defence had discriminated against her on the grounds of marital and family status. The Attorney General, acting for the respondents, appealed the Commission's decision to refer the case to a tribunal. The Attorney General argued that the Commission had exceeded its jurisdiction because section 62(1) of the Canadian Human Rights Act stated that the Act does not apply to pension plans and superannuation plans established before March 1, 1978. The Canadian Forces Superannuation Act, or CFSA, was enacted in 1959.

Counsel for the Commission argued that the numerous post-1978 amendments to the CFSA have had a transformative effect on the Act, such that the plan had been "re-created" or "re-established" after 1978 and was therefore within the Commission's jurisdiction. Human rights legislation, they said, should be broadly and purposively construed so as to advance and give effect to the object of the Canadian Human Rights Act, and should not operate as a bar to any enquiry into complaints that arise from the application of legislation that predates March 1978.

In response, the Attorney General contended that section 62(1) should be construed by its plain meaning, applying the doctrine of merger. Under the doctrine of merger, when a statute is amended, the new law merges with the old law; therefore, amending legislation is not tantamount to creating new legislation.

The judge held that the Commission erred in law and exceeded its jurisdiction by referring the complaint to a tribunal. The post-1978 amendments, even if taken collectively, did not create a new plan. "Given the fact that Parliament did not address the effect of legislative amendments on the pension or

superannuation plans which are the subject of section 62(1), I find no compelling reason to agree with the Commission's argument that the post-1978 amendments to the CFSA have the effect of bringing that Act within the Commission's jurisdiction, particularly in light of the applicability and appropriateness of the doctrine of merger," the judge stated.

The Federal Court followed the same reasoning in *Canada (Attorney General)* v. *Bigney,* holding that the Canada Pension Plan was also outside the Commission's jurisdiction. The Canada Pension Plan came into force on May 5, 1965. James Bigney, Kevin Cowie and Michael Regnier filed complaints against Human Resources Development Canada, alleging discrimination on the basis of sexual orientation, because each was denied a surviving spouse's benefits under the Plan. The Commission had argued that a 1986 amendment to the Act, reducing the previously required cohabitation period from three years to one year, had significantly increased the pool of recipients of the plan, effectively creating a new and different plan. The Court held that the issues raised were identical to those canvassed in *Magee,* and that the outcome was therefore the same.

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Key to Abbreviations

B.C. S.C.	Supreme Court of British Columbia
C.A.	Court of Appeal
C.H.R.R.	Canadian Human Rights Reporter
F.C.	Federal Court of Canada Reports
F.C.A.	Federal Court Appellate Division
F.C.T.D.	Federal Court Trial Division
F.T.R.	Federal Trial Reports
O.R.	Ontario Reports
QL	QuickLaw
S.C.R.	Canada Supreme Court Reports
T.D.	Tribunal Decision