CANADIAN HUMAN RIGHTS COMMISSION

Legal Report 1999

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TABLE OF CONTENTS

Introduction 1

Aspects of Equality 2

Resolution of Complaints 14

Age 14

Religion 15

Disability 16

Sex 19

Pay Equity 22

Hate Messages 26

Jurisdictional and Procedural Questions 29

Table of Cases 33

Introduction

The essence of equality is to be treated according to one's own merit, capabilities and circumstances. True equality requires that differences be accommodated.

— Beverley McLachlin
Supreme Court of Canada
1999

Human rights law is a cornerstone of civil society in Canada, and the new Chief Justice's words remind us of its purpose: pursuing true equality. This purpose is central to the brief of the Canadian Human Rights Commission, and has been reflected during 1999 in decisions of the Supreme Court of Canada and of various courts and tribunals.

The principal decisions of the year under review have given guidance on human rights legislation: the values that inform it; the scope of its protection; the limits to defences against it; and the correct analysis of complaints under the Canadian Human Rights Act and the Charter of Rights and Freedoms. The clearest direction, however, comes from the courts' emphasis on addressing discrimination systemically, instead of continuing to rely on individual analyses and solutions.

In *Law* v. *Canada (Minister of Employment and Immigration),* the Supreme Court of Canada set out guidelines for the interpretation of human rights legislation in Canada. By articulating the values that lie at the heart of equality — dignity and justice — Mr. Justice Frank Iacobucci provided direction for the future analysis of discrimination complaints.

In *M* v. *H,* the Court gave guidance on the scope of the protection against discrimination provided by section 15 of the Charter. Justices Peter Cory and Frank Iacobucci, for the majority, declared that the courts should consider whether legislation exacerbates pre-existing disadvantages and vulnerability when considering Charter challenges to it. Their decision, which determined that section 29 of Ontario's Family Law Act was unconstitutional because it treated same-sex couples differently from heterosexual common-law couples, further recognized equal status under the law for lesbians and gay men.

The Court's decisions in two cases clarified defences to complaints of discrimination. *British Columbia (Public Service Employee Relations Commission)* v. *British Columbia Government and Service Employees Union,* referred to as the *Meiorin* case, is one of the most important decisions in equality law. In establishing the correct legal test for *bona fide* occupational requirements, it removed the previous distinction between the remedies for "direct" discrimination, which clearly differentiates on prohibited grounds, and "adverse effect" discrimination, in which seemingly neutral actions have a hidden discriminatory effect.

Whether accommodation involves female firefighters like Tawney Meiorin, people with visual impairments like Terry Grismer, or those with any other characteristic protected by human rights law, it ensures that opportunities for all Canadians are not limited by discrimination. Mr. Grismer's case, *British Columbia (Superintendent of Motor Vehicles)* v. *British Columbia (Council of Human Rights),* extended the application of the *Meiorin* test to the provision of services. Both the *Meiorin* and *Grismer* decisions oblige federally regulated employers and service providers to ensure that their standards foster real equality. They emphasize the need for systemic accommodation to ensure equal opportunity, rather than individual exceptions on a case-by-case basis.

Finally, a Federal Court ruling in the case of the *Public Service Alliance of Canada* v. *Treasury Board of Canada* confirmed that it was proper to interpret pay equity legislation broadly in order to address systemic discrimination against women. Furthermore, in declaring that equal pay for work of equal value was a fundamental human right, Mr. Justice John Evans established that the pay equity provisions of the Canadian Human Rights Act, like the legislation as a whole, were quasi-constitutional.

Aspects of Equality

Some employment standards are still preventing women from working in non-traditional occupations, but legal developments are now addressing this issue. In September, the Supreme Court of Canada said that a mandatory fitness requirement, when applied equally to men and women, was discriminatory because it held women to a male standard. The case of *British Columbia (Public Service Employee Relations Commission)* v. *British Columbia Government and Service Employees Union,* referred to as the *Meiorin* case, marks a new development in the way these issues are dealt with. It compels employers to develop hiring standards based on substantive equality, rather than accommodating "difference" after the fact.

Tawney Meiorin had been employed by the province in an elite firefighting unit for more than two years. In 1994, on the recommendation of a coroner's inquest, the government introduced new fitness tests to assess whether candidates met the aerobic standard demanded of firefighters.

Ms. Meiorin passed three of the four tests, but failed the one that required running two and a half kilometres in eleven minutes or less. Despite a record of successfully fighting forest fires, she lost her job because her best time was 49.4 seconds too long.

The British Columbia Government and Service Employees Union grieved Ms. Meiorin's dismissal, arguing that the fitness standard inaccurately measured firefighters' job requirements.

Evidence at the arbitration demonstrated that most women have a lower aerobic capacity than most men, because of physiological differences. Although training can enable most men to meet the standard, most women, even with training, cannot increase their aerobic capacity to the level required. Moreover, the government failed to justify the test as a *bona fide* occupational requirement by providing any credible evidence that Ms. Meiorin's inability to meet the standard created a safety risk.

The labour arbitrator who heard the grievance concluded that the test was discriminatory; it had a disproportionately negative effect on women, and therefore excluded some people capable of fighting forest fires.

However, the British Columbia Court of Appeal quashed the arbitrator's order to reinstate Ms. Meiorin's employment with the province's Ministry of Forests. The Court commented that permitting her to continue in her job, despite the fact that she could not meet the test, would amount to "reverse discrimination."

In September 1999, the Supreme Court of Canada unanimously overruled the Court of Appeal and restored the arbitrator's award. In its decision, the Court rejected the "conventional analysis" that requires placing a case into one of two categories: "direct discrimination" or "adverse effect discrimination." In the case of direct discrimination, courts have, in the past, permitted employers to discriminate if they could demonstrate that a hiring or employment standard was a *bona fide* occupational requirement. In the case of adverse effect discrimination, i.e., when a job rule appears neutral but has an adverse effect on a particular group of people, the courts had previously required the employer to show only that there was a rational connection between the job and the standard, and that accommodating a particular employee was not possible without undue hardship.

In addressing adverse effect discrimination, the focus had been on accommodation rather than systemic change. This allowed employers and service providers to continue to apply discriminatory standards, as long as they took steps to accommodate people affected by them. The standards remained in place and continued to exclude those not prepared or able to challenge them or demand accommodation. This ultimately legitimized systemic discrimination.

The Court noted a number of other objections to the conventional approach. For example, not all cases can easily be characterized as direct or adverse effect discrimination. These categories are "malleable" — i.e., somewhat fluid — and an adjudicator might unconsciously classify a standard to fit the remedy that he or she was contemplating. Depending on the classification, the same discrimination could result in radically different remedies. Furthermore, there was little difference between what an employer had to establish as a defence to an allegation of direct discrimination and one of adverse effect discrimination. Finally, the conventional analysis differed from the approach taken to determine discrimination under the equality provisions of the Charter, which turned on a finding of discriminatory effect.

Speaking for the Court, Madam Justice Beverley McLachlin held that the conventional approach had outlived its usefulness. She wrote that it was "helpful in the interpretation of the early human rights statutes, and indeed represented a significant step forward in that it recognized for the first time the harm of adverse effect discrimination ... However well this approach may have served us in the past, many commentators have suggested that it ill serves the purposes of contemporary human rights legislation. I agree. In my view, the complexity and unnecessary artificiality of the aspects of conventional analysis attest to the desirability of now simplifying the guidelines that structure the interpretation of human rights legislation in Canada."

Justice McLachlin's new model for analysing whether a claim of a *bona fide* occupational requirement is acceptable involves three stages. The first is to identify the purpose of the standard and determine whether it is rationally connected to the performance of the job. This inquiry examines the legitimacy of the purpose, not the validity of the standard itself. If the purpose is not legitimate, or if it is not based on the actual needs of the job, then the resulting standard is not a *bona fide* occupational requirement.

At the second stage, the tribunal must decide whether the standard was established in an honest belief that it was necessary to accomplish the purpose identified in stage one. The employer must demonstrate that it thought the standard was necessary and that it was not motivated by discriminatory intent.

At the third stage, the tribunal must determine whether the standard is reasonably necessary to accomplish its purpose. The Court said that an employer, in order to defend a hiring or employment standard, would have to demonstrate that it was not excessive, and that avoiding discrimination against the claimant or others the standard had adversely affected was impossible without undue hardship. At this stage, the tribunal must consider whether non-discriminatory alternatives were explored by the employer; whether the employer's purpose could be

accomplished by establishing different standards for different workers; and whether third parties, such as unions, had assisted the employer in setting an appropriate standard. The judges did not refer in this case to what sort of financial, administrative or health considerations would constitute undue hardship, but previous cases provide guidance on this point.

In Ms. Meiorin's case, the Court held that the provincial government had met the requirements of the first and second stages, but had failed to meet the third — of demonstrating that the standard was reasonably necessary.

The Supreme Court of Canada found fault with the province on two counts. First, it had created standards based primarily on the abilities of several dozen elite, mostly male, firefighters, instead of testing a wider range of people to determine the minimum aerobic capacity necessary to do the job. Secondly, it had failed to demonstrate that this aerobic standard was needed in order to identify people able to work as firefighters safely and efficiently. Moreover, the province's studies failed to distinguish female from male test subjects. Therefore, the studies would not reveal whether a woman could satisfactorily perform a firefighter's duties even if she had a lower aerobic capacity than a man. Finally, the government provided no evidence of any hardship it would suffer if a different standard were used.

Accordingly, the Court held that the standard could not be used to justify Ms. Meiorin's dismissal. "There is no credible evidence showing that the prescribed aerobic capacity was necessary for either men or women to perform the work of a forest firefighter satisfactorily," Justice McLachlin wrote. "On the contrary, Ms. Meiorin had in the past performed her work well, without any apparent risk to herself, her colleagues or the public." The Court ordered that she be reinstated and compensated for her lost wages and benefits.

Confirming that the *Meiorin* case was the correct approach to considering defences to complaints of discrimination, the Supreme Court of Canada had the opportunity to apply the *Meiorin* test in an appeal of another case a few months later: *British Columbia (Superintendent of Motor Vehicles)* v. *British Columbia (Council of Human Rights),* referred to as the *Grismer* case. The Council is now known as the British Columbia Human Rights Commission. The *Grismer* case dealt with the provision of a service — motor vehicle licensing — and the claim, by the respondent, that it had a *bona fide* justification for its decision.

Terry Grismer had a stroke in 1984 at the age of 40. The only lasting damage he sustained was a condition known as homonymous hemianopia, which deprived him of left-side peripheral vision in both eyes. Even though he could compensate for poor peripheral vision by various means, his driver's licence was revoked because of

a blanket driving ban on people with this condition.

Although Mr. Grismer repeatedly passed the driving test, he could not persuade officials of the British Columbia Superintendent of Motor Vehicles to reinstate his licence. His homonymous hemianopia prevented him from meeting the requirement of having at least 120 degrees of peripheral vision. This requirement was strictly applied to people with this condition, but not to others. This standard had been developed by the British Columbia Medical Association for the Motor Vehicle Department, and was subsequently adopted by the Canadian Medical Association.

After his fourth licence refusal, Mr. Grismer filed a complaint with the British Columbia Human Rights Commission, which found in his favour. The Superintendent was ordered to assess Mr. Grismer and to place restrictions on his driver's licence if necessary. Unfortunately, shortly after the case was heard, Mr. Grismer died from complications following an accident while riding a horse. The British Columbia Court of Appeal reversed the decision, and it subsequently came before the Supreme Court of Canada.

Speaking for the Court, Madam Justice Beverley McLachlin opened by endorsing the principle that people with disabilities should be judged by what they are able to do, not by abstract standards. "This case is not about whether unsafe drivers must be allowed to drive," she noted. "Rather, this case is about whether, on the evidence ... Mr. Grismer should have been given a chance to prove through an individual assessment that he could drive. It is also about combating false assumptions regarding the effects of the disabilities on individual capacities. All too often, persons with disabilities are assumed to be unable to accomplish certain tasks based on the experiences of able-bodied individuals. The thrust of human rights legislation is to eliminate such assumptions and break down the barriers that stand in the way of equality for all."

The Court held that Mr. Grismer had demonstrated a *prima facie* case of discrimination by showing that he was denied a licence because of a physical disability. The onus then shifted to the Superintendent of Motor Vehicles to prove, on the balance of probabilities, that the standard was justified.

The Court applied the *Meiorin* test as follows. First, it determined that the purpose of the standard was highway safety. Some degree of risk was tolerable, otherwise very few people would be allowed to drive. Justice McLachlin compared Mr. Grismer's situation to that of elderly people, who are given a chance to prove they can drive. Like everyone else, they are required to establish that they can drive reasonably — but not perfectly — safely. The standard therefore tolerates a moderate degree of risk, striking a balance between the need for people to be licensed

to drive and the need for safety on the public roads.

Next came the question of whether the Superintendent had established that the goal of reasonable road safety was rationally connected to the function of issuing drivers' licences. As a matter of common sense, the Court stated, drivers' licences should go only to people who can demonstrate that they can drive reasonably safely.

The second stage of the *Meiorin* test, whether the visual standard was adopted in good faith in the belief that it was necessary to ensure safety, was also beyond question. But the third stage of the test, whether the standard was reasonably necessary to accomplish the goal of reasonable highway safety, proved more troublesome. To meet this requirement, the Superintendent had to show that he could not meet the goal of maintaining highway safety, and accommodate people like Mr. Grismer as well, without incurring undue hardship.

The Court found that there were two ways to demonstrate that a blanket prohibition was reasonably necessary in this case. One could show that no one with a particular disability could safely operate a motor vehicle on the highway. Alternatively, one could show that accommodation was unreasonable, because individual testing of people with homonymous hemianopia was completely impracticable.

The British Columbia Court of Appeal had reasoned that people who lack peripheral vision are at a greater risk of accidents. However, a study introduced by the Superintendent indicated that some drivers with homonymous hemianopia were able to drive safely, and were licensed to drive in Britain, Japan, Finland and many of the American states. The lack of international unanimity undermined the Superintendent's presumption that people with homonymous hemianopia could never drive safely. Other evidence showed that people with this condition can compensate, to some extent, for their lack of peripheral vision by using prism lenses and by turning their heads from side to side to survey the road. While not everyone could use these methods to reduce the risks associated with this condition, it appeared that Mr. Grismer was able to do so.

Having failed to prove that no one with Mr. Grismer's condition could ever drive reasonably safely, the Superintendent had to show that accommodation by individual assessment was not feasible. However, the evidence revealed that two tests for road safety had been developed for people with homonymous hemianopia. Other possibilities included laboratory testing or a conditional licence.

The Superintendent alluded to the cost associated with assessing people with homonymous hemianopia, yet offered no precise figures. The Court replied that "one must be wary of putting too low a value on accommodating the disabled ...

impressionistic evidence will not generally suffice."

Justice McLachlin summarized the Court's judgment as follows: "the Superintendent offered no evidence that he considered any of the options that might have made an assessment of Mr. Grismer's driving abilities viable and affordable. Content to rely on the general opinion of the medical community, and ignoring the evidence that some people with homonymous hemianopia can and do drive safely, he offered not so much as a gesture in the direction of accommodation. His position, quite simply, was that no accommodation was necessary.

"Under the *Meiorin* test," she continued, " it was incumbent on the Superintendent to show that he had considered and reasonably rejected all viable forms of accommodation. The onus was on the Superintendent, having adopted a *prima facie* discriminatory standard, to prove that incorporating aspects of individual accommodation within the standard was impossible short of undue hardship. The Superintendent did not do so. On the facts of this case, the Superintendent's blanket refusal to issue a driver's licence was not justified. He fell into error not because he refused to lower his safety standards (which would be contrary to the public interest), but because he abandoned his reasonable approach to licensing and adopted an absolute standard that was not supported by convincing evidence. The Superintendent was obliged to give Mr. Grismer the opportunity to prove whether he could drive safely by assessing Mr. Grismer individually."

The *Meiorin* and *Grismer* decisions should lead to the elimination of a wide variety of barriers, particularly to people with disabilities, from job requirements to standardized tests. In the future, employers and service providers will have to consider whether their standards should be reviewed in order to accommodate a broader range of capable people.

In the past, the Supreme Court of Canada has adopted varying views on how to define discrimination under the Charter. However, in the case of *Law* v. *Canada (Minister of Employment and Immigration)*, the Court reached unanimity on this often-contentious issue. Here the judges agreed that age discrimination is constitutional, provided it does not violate human dignity. In addition, the Court has produced a set of guidelines on how to analyse discrimination cases.

Nancy Law was 30 years old when she was widowed in 1991. Her husband had died at the age of 50, after having contributed to the Canada Pension Plan for 22 years. Soon after Mr. Law's death, his widow applied for survivor's benefits under the Plan. However, her application was refused because she had not reached 35 years of age at the time of her husband's death, she was not disabled, and she did not have any dependent children. She challenged the federal policy at two review boards and the Federal Court of Appeal, but lost at every level. Ms. Law brought

her appeal to the Supreme Court of Canada, arguing that the Plan discriminated against her on the basis of age, contrary to section 15(1) of the Charter.

In a decision written by Mr. Justice Frank Iacobucci, the Court said that a purposive and contextual approach to discrimination analysis was necessary. The purpose of section 15(1) is to "prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to enjoy equal recognition at law as human beings or as members of Canadian society, equally capable of concern, respect and consideration," he noted.

The guidelines adopted by the Court focus on three central issues: "(1) whether the law imposes differential treatment between the claimant and others, in purpose or effect; (2) whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment; and (3) whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee. The first issue is concerned with whether the law causes differential treatment. The second and third issues are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by section 15(1)."

Regarding the first issue, the Court asked, "does the law draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or fail to take into account the claimant's already disadvantaged position within Canadian society, resulting in substantially differential treatment between the claimant and others on the basis of one or more personal characteristics?"

The Canada Pension Plan grants benefits to surviving spouses over the age of 35 without dependent children immediately following the death of their spouses. People under the age of 35, however, must wait until the age of 65 before receiving any benefits. The Plan clearly distinguishes between claimants older than 35 and claimants younger than 35. The delay in the receipt of benefits constituted a denial of equal benefit of the law. This satisfied the first step of the equality analysis, the Court concluded.

The second issue requires the Court to ask, "is the claimant subject to differential treatment based on one or more enumerated or analogous grounds?" Age is one of the grounds of discrimination listed in section 15(1) of the Charter. In the Court's view, the survivor's pension clearly drew distinctions on the basis of age.

Regarding the third issue, the Court asked, "does the differential treatment discriminate by imposing a burden upon, or withholding a benefit from, the claimant in a manner that reflects the stereotypical application of presumed group or personal characteristics, or that otherwise has the

effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?"

In answer, the Court said that while the Canada Pension Plan rule undeniably treats younger people differently from older people, this is not because of prejudice. "The differential treatment of younger people does not reflect or promote the notion that they are less capable or less deserving of concern, respect and consideration, when the dual perspectives of long-term security and the greater opportunity of youth are considered," the Court said.

In summary, the Court agreed with the federal government that age 35 is a justifiable cutoff, because survivor benefits are meant to help older people with poor long-term prospects, not to ease an immediate short-term burden. "Parliament's intent in enacting a survivor's pension scheme with benefits allocated according to age appears to have been to allocate funds to those persons whose ability to overcome need was weakest," wrote Justice Iacobucci. As a young, healthy, childless woman, Ms. Law was in a good position to become self-sufficient, the Court found. "Younger people are more likely to find a new spouse, are more able to retrain or obtain new employment, and have more time to adapt to their changed financial situation before retirement ... In such narrow circumstances, where legislation does not demean the dignity of those it excludes in either its purpose or effects, it is open to the legislature to use age as a proxy for long-term need." Ms. Law will be eligible to collect the benefits when she turns 65.

In the case of *M* v. *H*, the Supreme Court of Canada added to a series of judicial victories for those seeking equality for gay men and lesbians. The Court held that section 29 of Ontario's Family Law Act was unconstitutional, because it treated same-sex couples differently from heterosexual common-law couples.

The case involves two women, known only by the initials M and H. After a decade-long relationship had come to an end, M applied for spousal support payments but was prevented by the Family Law Act's narrow definition of "spouse." Section 29 of the Act extends the definition of spouse to cohabiting, opposite-sex couples in relationships of some permanence to determine whether there exists an obligation to provide support payments to the dependent partner. While M could satisfy the requirements demonstrating need and permanency, her claim for support was disqualified because she and her partner were of the same, not the opposite, sex.

Although M and H have long settled their particular dispute, M agreed to let her case go to the Supreme Court of Canada as a legal challenge to the definition of spouse in the Family Law Act. After the Ontario Court of Appeal ruled that section 29 of the

Act was unconstitutional, the province's Attorney General appealed the decision to the Supreme Court of Canada. The Court dismissed the appeal, dividing eight to one on the issue. It applied the guidelines arising from *Law* v. *Canada (Minister of Employment and Immigration),* holding that by distinguishing between same-sex and opposite-sex partners, the Family Law Act was drawing a formal distinction between M and others on the basis of a personal characteristic, namely sexual orientation. In previous cases, the Court had held that sexual orientation was analogous to those grounds set forth in section 15(1) of the Charter.

Having concluded that the legislation constituted differential treatment on an analogous ground, the next issue for the Court to decide was whether this distinction was in fact discriminatory. The focus of this inquiry brought into play the purpose of section 15(1) of the Charter in remedying such ills as prejudice, stereotyping and historical disadvantage.

In deciding that the distinction was discriminatory, the court said that "the societal significance of the benefit conferred cannot be overemphasized. The exclusion of same-sex partners from the benefit of section 29 of the Family Law Act promotes the view that M, and individuals in same-sex relationships generally, are less worthy of recognition and protection. It implies that they are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples ... such exclusion perpetuates the disadvantages suffered by individuals in same-sex relationships and contributes to the erasure of their existence."

Equality is not an absolute right in the Charter. Like all other rights, it is "subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Under section 1 of the Charter, the burden is on the legislature to prove that the infringement of a right is justified. The Court asked itself what the "pressing and substantial objective" could be for denying spousal benefits to same-sex couples.

The Province of Ontario argued for retaining the heterosexual definition of spouse, on the grounds that women are especially vulnerable in relationships, since they are far more likely to be at an economic disadvantage when the relationships end. Furthermore, they still generally assume the primary responsibility for the care of children. The Court rejected this argument, because the Family Law Act entitles men in opposite-sex partnerships to apply for support, regardless of whether the relationship has produced children. The purpose of the Family Law Act is to promote economic equality following the end of an intimate relationship between "financially interdependent individuals." A second objective of the legislation is to alleviate the burden on the public purse to provide for dependent spouses. The exclusion of same-sex couples from this regime does not further any of these objectives.

The Court further rejected the Attorney General's submission that its decision in *Egan* restricts its latitude in other cases involving the definition of spouse; each case had to be determined on its own merits. Unlike the decision in *Egan*, which addresses the distribution of public resources, Ontario's Family Law Act was concerned with private economic rights. Therefore, the defence that Parliament must be permitted to approach the issue of same-sex benefits "incrementally" was not applicable to the dispute in this case.

The Court found that it would be excessive to strike down the whole Family Law Act. Instead, it ordered that the definition of spouse in section 29 was of "no force and effect." It suspended the application of the declaration for six months to give Ontario legislators time to amend the offending section of the legislation.

The Court cautioned that the decision was limited to the issue of spousal support following the breakdown of an intimate, long-term, financially interdependent relationship. Since the issue of marriage was not before the Court, it was not affected by the decision. However, it has called into question the constitutionality of many provincial statutes.

The government of Ontario has responded to the *M* v. *H* ruling by introducing legislation to extend certain rights and entitlements to gay and lesbian couples. On October 28, 1999, Bill 5, *Amendments because of the Supreme Court Decision in M* v. *H Act,* was passed. It adds the term "same-sex partner" to 67 statutes.

However, the Ontario government may find that its response to the ruling in *M* v. *H* does not go far enough to eliminate discrimination against same-sex couples. Instead of expanding the definition of spouse, Bill 5 added a third category of "same-sex partnership" to the existing categories of married spouses and common-law opposite-sex spouses. The federal government had taken a similar approach when it extended benefits to the same-sex partners of federal public servants by creating a separate category for them alone. Subsequently, in an appeal of *Moore and Akerstrom* v. *Treasury Board*, Mr. Justice Andrew MacKay of the Federal Court ruled that the "separate but equal" definition of "same-sex partnership relationship" was still discriminatory. Whether Ontario's new legislation will be challenged on similar grounds remains to be seen.

In May, the Supreme Court of Canada opened band elections to off-reserve natives for the first time. In *Corbiere* v. *Canada (Minister of Indian and Northern Affairs)*, the Court ruled that a section of the Indian Act that excludes off-reserve band members from electing chiefs and councils violates the Charter. This judgment will have major implications for Aboriginal women, who, if they married non-Aboriginal men, lost their Indian status, and therefore their band membership and right to live on the reserve. While the passage of Bill C-31 in

1985 restored status and membership to these women, many were prevented from returning to their communities because of housing shortages and a chronic lack of job opportunities. Because they could not return, they still could not, in most cases, vote for their chiefs or councillors.

The role of band members living off the reserves has long been a contentious issue among Aboriginal people. At stake is wealth from natural resources on some reserves, and access to government spending on Aboriginal social support systems. On one side, band councils have argued that off-reserve Aboriginal people will further impoverish bands by transferring wealth from the reserves to the cities. In addition, Aboriginal people not living on the reserves cannot possibly be informed on voting issues, and bands will not be able to protect their culture from the influence of "urbanized natives." On the other side, off-reserve Aboriginal people have accused band councils and chiefs of trying to protect their power base by limiting the number of voters.

On their own behalf and on behalf of all the non-resident members of the Batchewana Indian Band, John Corbiere, Charlotte Syrette, Claire Robinson and Frank Nolan sought a declaration that section 77(1) of the Indian Act violates the Charter. The section requires that, in order to vote in band elections, band members be "ordinarily resident" on the reserve. Fewer than one-third of registered members of the Batchewana band live on reserve lands.

In a unanimous decision, the Supreme Court of Canada affirmed an Ontario Court of Appeal decision that found the residency requirement infringed upon rights guaranteed under the Charter. The Court held that the law made a distinction that denied off-reserve Aboriginal people equal benefit of the law. Further, "aboriginality-residence" — off-reserve band member status — was a ground analogous to those enumerated in the Charter.

Another critical issue was that band members living off the reserve have generally experienced prejudice, and form part of a "discrete and insular minority" defined by race and residence. Madam Justice Claire L'Heureux-Dubé wrote that from the perspective of off-reserve band members, the choice of whether to live on or off the reserve is important to their sense of self, and is therefore fundamental.

Off-reserve band members have major interests in how their bands are governed. By denying them the right to vote, section 77(1) of the Indian Act implies that off-reserve band members are less important than members on the reserves, or are people who have chosen to be assimilated by mainstream society. On this basis, the Court found that the disenfranchisement resulting from the legislation was discriminatory.

Justices McLachlin and Bastarache wrote that the denial of the right to vote "presumes that Aboriginals living off-reserve are not interested in maintaining

meaningful participation in the band or in preserving their cultural identity, and are therefore less deserving members of the band ... This engages the dignity aspect of the section 15(1) analysis and results in the denial of substantive equality."

The members of the Court also agreed that the infringement was not justified under section 1 of the Charter. The restriction on voting is rationally connected to the aim of the legislation, which is to give a voice in the deliberations of the band council only to those people most directly affected by them. However, a complete exclusion of the non-residents' right to vote constitutes more than a minimal impairment of their rights. Even if some distinction may be justified to protect the legitimate interests of band members living on the reserve, the Court concluded that the appellants had not demonstrated that preventing non-resident band members from voting was necessary. The judges gave the federal government eighteen months to consult with First Nations to develop new electoral rules and set up the process needed to conduct broader elections on reserves across the country.

While the ruling expands the voter list, it does not give off-reserve residents the right to run for election or even nominate a candidate, and therefore limits their influence. The ruling affects only the native communities that conduct their elections according to the Indian Act, slightly fewer than half the reserves in the country. It does not apply to communities that elect councils according to custom. In many communities, however, the change means that the number of people living off the reserve who are now eligible to vote may be far greater than the size of the electorate living in the community.

Resolution of Complaints

Age

In 1986, Lance Olmstead filed suit against the Canadian Forces, claiming that its mandatory retirement provisions infringed upon his equality rights under section 15 of the Charter. Mr. Olmstead was seeking to avoid termination of his service when he turned 50 years old. The parties agreed that he could continue to work for the Forces until his 56th birthday, and settled the law suit out of court in June 1990. It was later asserted that by agreeing to the settlement, Mr. Olmstead was prohibited from making any further claims concerning the termination of his service with the Forces.

Several months before his extended term of service was due to expire, Mr. Olmstead filed a complaint with the Commission, claiming that he had been discriminated against because of his age. The Commission advised Mr. Olmstead that it could not deal with his complaint. Under section 15(b) of the Canadian Human Rights Act, termination of employment due to the Forces' mandatory retirement provisions in the Queen's Regulations and Orders was permissible. Mr. Olmstead began a new action against the Canadian

Forces in Federal Court, *Olmstead* v. *Attorney General of Canada*, seeking a declaration that section 15(b) of the Canadian Human Rights Act was contrary to the Charter.

Arguing that Mr. Olmstead was barred from pursuing the matter by the agreement he had signed in June 1990, the Attorney General brought a motion for a summary judgment to dismiss the case. However, as a third party to the law suit, the Commission argued that no one could contract out of his or her right to file a human rights complaint — a proposition that was supported by case law. In other words, the fact that Mr. Olmstead had signed a release did not preclude him from subsequently filing a human rights complaint.

Mr. Justice Frederick Gibson held that there was no genuine issue to be tried. He granted the Attorney General's motion for summary judgment and dismissed Mr. Olmstead's case. Justice Gibson found that there had been no "contracting out" of Mr. Olmstead's rights. At issue was a simple termination of employment in accordance with the June 1990 minutes of settlement. In his decision, Justice Gibson distinguished this case from those relied on by the Commission as authorities. "I do not interpret the case law cited by counsel for the Canadian Human Rights Commission as standing for the proposition that expiration of a term contract of employment voluntarily entered into by a person such as the plaintiff amounts to a 'contracting out' from rights under the Canadian Human Rights Act," he noted.

Justice Gibson's reasons for judgment appear not to have applied the principles set out in the "contracting out" cases. By characterizing the situation as a "contract of employment freely entered into," he implied that human rights protection is not applicable to employment contracts. An appeal has been filed because the decision, if allowed to stand, could open the door to a floodgate of rulings that could circumvent the paramountcy of human rights law.

Religion

In the case of *Nijjar* v. *Canada 3000 Airlines Ltd.,* a human rights tribunal limited the protection provided by the Canadian Human Rights Act against religious discrimination. The tribunal confined the protection to practices that are formally mandated by the tenets of a religion.

On April 11, 1996, Balbir Nijjar was denied permission to board a Canada 3000 flight because he was wearing a kirpan, or ceremonial dagger. As an initiated member of the Khalsa order of the Sikh faith, Mr. Nijjar had to wear a kirpan at all times. He had taken the precaution of donning a travel kirpan with a blade three and one-eighth inches long. He believed it conformed with policies that permit travel by air with a kirpan, as long as its blade does not exceed four inches. However, officials from the airline informed him that Canada 3000's rules did not permit any

knives that have “a greater potential for injury than utensils provided with in-flight meals.” Because the travel kirpan’s blade was sharper than a dinner knife, Mr. Nijjar was not permitted to board the flight.

The tribunal dismissed the case, holding that there was no *prima facie* complaint. It found that Mr. Nijjar’s choice of kirpan was a matter of personal preference, not religious conviction, since Sikhism does not prescribe a minimum or maximum size for kirpans.

The tribunal went on to discuss the issues of risk and reasonable accommodation. It used a standard of “sufficient risk,” based on the likelihood and seriousness of injury, and held that the likelihood of anyone being injured by a kirpan on an aircraft was low. As to the seriousness of potential injuries, the tribunal relied on the evidence of Canada 3000’s forensic expert to find that a kirpan with a blade shorter than four inches could indeed inflict life-threatening injuries, depending on its point, sharpness and rigidity. The tribunal also took into account the unique environment of an aircraft, where emergency medical and police assistance are not readily accessible.

Although the practice in Canada had been to allow knives on aircraft as long as their blades did not exceed four inches, this was not binding on the airlines — it was only a recommended standard for the industry. Each airline is ultimately responsible for developing its own safety standards for its own planes. The tribunal concluded that Canada 3000 had shown that a kirpan more dangerous than a dinner knife would present such a risk to public safety on its aircraft that it would constitute undue hardship.

Disability

The case of *Mills* v. *Via Rail* returned to the Canadian Human Rights Tribunal in 1999.

John Mills was employed as a chef by Via Rail when he suffered a back injury on the job. He was absent from work intermittently until October 1990. He reinjured his back in April 1991, and was absent from work again until October 1991. Despite his personal physician’s clearance, Via Rail’s doctor refused to allow Mr. Mills to return to work, demanding that he be seen by an orthopaedic surgeon. The specialist found Mr. Mills’s impairment to be about fifteen per cent, and noted that his work as a chef involved movement that could provoke more back pain. Via Rail’s physician then declared Mr. Mills unfit for his job as a chef and refused to allow him to return to active employment. He was offered a disability pension and was trained for a position in off-board services, but was never offered accommodation in his work as a chef.

Mr. Mills filed a grievance. On the day of the arbitration hearing, Via Rail agreed to allow him to return to work on certain conditions and without any compensation for lost wages. In July 1993, he returned to work, with the proviso that for the next two years he not have an absenteeism rate

higher than the average of chefs in the Atlantic region. Over the next fifteen months, Mr. Mills was off work on a number of occasions, as a result of injuries unrelated to his back. While he was off work for depression, Via Rail notified him that his employment was being terminated, effective October 7, 1994, for failing to meet the attendance requirement set out in the arbitrator's award.

Mr. Mills filed two complaints with the Commission. The first alleged that he was discriminated against when Via Rail refused to permit him to return to work in October 1991. The second alleged that he was discriminated against when Via Rail terminated his employment in October 1994.

A tribunal conducted a hearing into the first complaint and decided in the complainant's favour. The decision was overturned by the Federal Court, and the complaint was referred back to a tribunal for a new hearing. At the same time, the second complaint was referred to a tribunal by the Commission. Both complaints were dealt with in a single hearing and a decision was released in May 1999.

The tribunal found that Via Rail had discriminated against Mr. Mills when he was kept from work in 1991, and again when he was fired in 1994. The tribunal held that the evidence did not support the respondent's claim that its actions were based on a *bona fide* occupational requirement. While the tribunal agreed that physical fitness could be such a requirement, Via Rail had no objective physical fitness standards for on-board service employees against which it could compare Mr. Mills's abilities, and the medical opinions upon which the respondent relied did not specify precisely what the complainant could and could not do.

As further evidence for its conclusion, the tribunal pointed out that even though Via Rail had initially refused to let Mr. Mills return to his job as chef because of his physical condition, it subsequently changed its mind following arbitration. While Via Rail did not act maliciously when it first refused to allow Mr. Mills to return to work, it had not acted in good faith. Via Rail had failed to meet both the objective and the subjective elements of the test for establishing a *bona fide* occupational requirement.

The tribunal went on to state that, if the discrimination at issue was more properly characterized as adverse effect discrimination, then there was a duty to accommodate to the point of undue hardship, which Via Rail had failed to meet.

With respect to the nature and extent of the duty to accommodate, the tribunal stated that in its view, "accommodation is something that is usually tailored to the circumstances of an individual and will assist a particular employee. It could include assigning a part of an employee's work to another. Via Rail argued that a chef had certain job requirements and the

cook or another on-board employee could not be expected to do them. I disagree because the evidence of the other chef called as a witness was that the chef and the cook divided the work fifty-fifty. The chef was the supervisor of the cook and the work could be apportioned to accommodate the skills and abilities of each of them. Dividing the work in a different way can be accommodation as long as it doesn't cause undue hardship to the employer."

As for the second complaint, the tribunal accepted the Commission's argument that Mr. Mills would not have had to accept a conditional reinstatement if Via Rail had not discriminated against him in the first place. The discrimination in the second complaint flowed from the arbitrator's award, which penalized Mr. Mills for any disability. The tribunal noted that "there was no evidence that Via Rail had a policy or standard on medical absenteeism that was objectively related to work performance." Via Rail, by relying on an average rate of absenteeism in terminating Mr. Mills's employment, had inadvertently established that there were other employees whose absenteeism exceeded that average yet were not terminated. The tribunal held that there was no evidence that the arbitration award met any *bona fide* occupational requirement, or that Via Rail had accommodated Mr. Mills.

The tribunal ordered that Mr. Mills be returned to his former position as chef with full seniority, and that Via Rail pay him all of his lost wages and benefits, including lost pension benefits, with interest on a portion of his lost wages, without any deduction for amounts he received from workers' compensation, employment insurance or health benefits. Mr. Mills was also awarded $3,000.00 for hurt feelings, and reimbursed for the amounts he had spent on medication, medical care, and dental care.

The case of *Bernard* v. *Waycobah Board of Education* marks the first time that a human rights tribunal has ordered an employer to pay full salary for future losses until the complainant could be reinstated. The ruling came as a result of a complaint made by Janet Bernard, a Mi'kmaq and a member of the Waycobah First Nation. In March 1993, the complainant was hired by the Board of Education to work as a secretary to the Director of Education, and later reassigned to a position as a secretary at the elementary school.

On October 26, 1995, Ms. Bernard gave a lecture on aspects of Aboriginal spirituality to the students of the school to mark Mi'kmaq History Month. During the presentation, some of the students became loud and disruptive. At some point, Ms. Bernard approached a student and told her that she could communicate with her dead mother. This upset the student, who left the room, along with a group of friends and relatives. Shortly thereafter, the Director of Education entered the classroom, interrupted the presentation, and asked the complainant to end it. The following day, the Director sent her a letter terminating her employment. The Record

of Employment attached to the letter stipulated “illness or injury” as the reason for termination.

Ms. Bernard filed a complaint with the Commission. She alleged that the respondent had discriminated against her on the basis of a perceived mental disability, contrary to section 7 of the Canadian Human Rights Act. The respondent denied that this perception played any part in the decision to terminate her employment, indicating that she had been dismissed for just cause.

One of the issues before the human rights tribunal was whether the decision to terminate the complainant’s employment was exempt from scrutiny because it was carried out pursuant to the Indian Act. While this Act authorizes the Minister to establish, operate and maintain schools for Indian children, it was difficult to draw any substantive connection between the Act and the respondent’s decision to terminate the complainant. The tribunal therefore held that the termination of Ms. Bernard’s employment was not a decision made under the Indian Act.

Furthermore, there was much uncontradicted evidence that the people responsible for either recommending or terminating her employment perceived that she was mentally ill. This evidence strongly supported Ms. Bernard’s claim.

The community’s perception that the complainant was mentally ill could not excuse the conduct of the Board of Education. The parents’ threats to withdraw their children from the school might have been real. But if these threats derived from discriminatory attitudes, the respondent could not justify its own conduct by blaming the parents. In other words, a respondent cannot justify discrimination by blaming others for their actions.

The tribunal also objected to the manner in which the Board terminated the complainant’s employment. Her employer acted hastily, and did not allow her to explain her conduct. This seemed to indicate that the Board had decided that she was mentally ill, and that discussing the incident with her would serve no useful purpose.

The tribunal ordered the Board to pay Ms. Bernard $44,710.00 for lost wages plus interest, and to provide her, at the first reasonable opportunity, with a position as a secretary. In the meantime, she was to receive the sum of $325.00 per week, $5,000.00 as compensation for hurt feelings, and a written apology within 30 days of the decision. The respondent was also ordered to place a copy of the decision in the complainant’s personnel file, and pay the costs of her legal counsel.

Sex

If a tribunal’s ruling is justified by the evidence, an appeal court should not intervene. This principle was reinforced on April 28, 1999, when the Canadian Human Rights Commission’s application for

judicial review of a human rights tribunal's ruling was dismissed.

The decision stems back to a 1998 tribunal hearing in the case of *Franke* v. *Canadian Armed Forces*. The ruling stated that there was no evidence that Corporal Kimberley Franke had been sexually harassed or otherwise discriminated against because of her sex while she was a member of the Canadian Forces.

In 1991, Corporal Franke was posted to the Base Transportation Office at the Canadian Forces Base at Comox, British Columbia, where she alleged that she encountered a pattern of conduct from her superior officers that created a hostile work environment. She claimed that various officers repeatedly asked about her dating habits, used suggestive gestures, showed her a postcard of a bare-breasted woman, and made inappropriate comments such as calling her as a "sexatary" and a "Biker Mama." Corporal Franke filed grievances about these incidents, but was unsuccessful at all levels.

She claimed that these grievances resulted in the Canadian Forces treating her differently from other employees, culminating in her receiving a recorded warning for "insubordination" with the Dress and Deportment Committee. After unsuccessful appeals and extensive correspondence with her superiors regarding the alleged harassment, Corporal Franke's health deteriorated, and she was sent to a military psychiatrist for examination. She subsequently requested voluntary release from the Canadian Forces.

By a majority of two to one, the tribunal ruled that Corporal Franke had not been harassed and that her human rights complaint was made in retaliation for the recorded warning she received for insubordination. The tribunal rejected Corporal Franke's evidence as "self-serving and exaggerated," and further held that there was no differential treatment on the grounds of sex, as no link had been established between the alleged harassment and the issuance of the recorded warning.

In its decision on the appeal, the Federal Court indicated that the appropriate standard in an application for judicial review is that of "reasonableness." Provided the decision is justified by the evidence, the Court should not intervene.

The Court found that the tribunal had applied the appropriate test for sexual harassment as laid out in *Janzen* v. *Platy Enterprises*. To prove that sexual harassment has occurred, a complainant must show that the conduct was unwelcome, of a sexual nature, and persistent or repetitious. In some circumstances, however, a single incident may be enough to create a hostile work environment.

Madam Justice Danièle Tremblay-Lamer indicated that the determination of whether the conduct complained of was unwelcome depended on credibility. Although the proper inquiry would not necessarily

require a verbal "no" in all cases, the Court added, "nonetheless, the complainant must establish, for instance by her body language or by her repetitive failure to respond to the suggestive comments, that she had in some way signalled to the harasser that his conduct was unwelcome." Such a finding would, in most cases, be based on the evidence, and not on whether a "reasonable person" would have found the conduct to be unwelcome. The Court found that there was adequate evidence to support the tribunal's finding that Corporal Franke did not view the conduct as harassment at the time it occurred. A review of the transcript showed that she had participated freely in the joking that went on at the military base, and gave no indication that she was offended in any way.

The Court observed that an employee might endure offensive conduct without objecting to it if he or she feared being fired as a consequence. In that case, the assessment of whether the conduct was unwelcome would be based on the reaction of a reasonable person in the circumstances.

With regard to the second element of the *Janzen* test, the Court concurred with the tribunal that the conduct in question did not constitute harassment. The evidence showed that there was a fairly collegial atmosphere at the Base Transportation Office. This included occasional sexual jokes and comments, in which Corporal Franke actively participated.

Justice Tremblay-Lamer adopted the proportionality test proposed in Maurice Drapeau's *Le harcèlement sexuel au travail* (Sexual Harassment in the Workplace). "The more serious the conduct and its consequences are, the less repetition is necessary; conversely, the less severe the conduct, the more persistence will have to be demonstrated." Whether the conduct is sufficiently severe or persistent enough to create a poisoned workplace is determined, given the context, by using the objective "reasonable person" standard. A crude sexual joke, although in poor taste, would not generally be enough to constitute sexual harassment and would rarely create a negative work environment. On the other hand, a single incident, such as physical assault, may be enough to create a hostile work environment.

The Court stressed that the person harassed must inform the employer of the offensive conduct whenever possible. In adding the requirement of employer notification to the *Janzen* test, the Court emphasized the importance of fairness and prevention. The sooner that action is taken to eliminate harassing conduct, the less likely it is that this conduct will cause the work environment to deteriorate.

The Court also held that there was plenty of evidence to support the tribunal's finding that the complainant was not subjected to any adverse treatment because of her harassment complaint. The sexual harassment complaint was filed "only after the Recorded Warning for insubordination — four months after the

alleged incidents had ceased." Citing the respondent's expert witness, the Court agreed that the deterioration of Corporal Franke's health had little to do with any form of sexual harassment.

The Federal Court held that the tribunal's conclusion was reasonable and should not be disturbed. The weight of the evidence supported the tribunal's findings that the impugned conduct was not, in fact, unwelcome or unwanted at the time it occurred, and was not severe or persistent enough to constitute sexual harassment.

Pay Equity

On October 19, 1999, a decision by the Federal Court ended what was then the longest and largest human rights case in North America. Mr. Justice John Evans upheld a human rights tribunal's ruling that the federal government owed about 230,000 mostly female workers thirteen years of back pay. The case of the *Public Service Alliance of Canada* v. *Treasury Board of Canada* revolves around the problem of defining the value of work that men and women do in different job categories.

The pay equity dispute began in 1984, when a group of federal employees complained of pay inequities in the public service. The federal government is one of the largest employers of women in Canada, and the majority of them are represented by the Alliance. The Alliance filed a complaint on behalf of secretaries, clerks, data processors, library workers, educational support and health services staff, claiming that they had been systematically underpaid in violation of the Canadian Human Rights Act. The complaint eventually led to the implementation of the largest union-management study in Canadian history.

The Joint Union-Management Initiative, known as the JUMI study, evaluated over three thousand positions from predominantly male and female occupational groups. After approximately four years, the process broke down. The study's results showed a wide wage discrepancy between male and female work of equal value.

In 1991, a three-member human rights tribunal panel was appointed to hear the complaints. Holding hearings and issuing the decision took seven years to complete; the process included 256 days of argument and testimony. In 1996, the tribunal ruled that the joint study had provided a reasonable foundation for assessing whether wage discrimination existed, and accepted the validity of the study and its results. The tribunal thereafter heard arguments on wage adjustment methodology, and handed down a decision in favour of the Alliance in July 1998. The Treasury Board requested a judicial review of the decision, challenging the validity of the Commission's wage adjustment methodology. The Federal Court dismissed the government's request, stressing that the dispute had dragged on far too long, and at far too great a cost for all concerned.

Pay equity legislation embodies a principle — that men and women should receive equal pay for work of equal value. The Court affirmed that Parliament has empowered the Commission and the Canadian Human Rights Tribunal to apply and interpret that principle, with the assistance of experts in particular cases, and to issue guidelines for interpretation of section 11 of the Act.

The Attorney General argued that the tribunal erred by relying upon experts. However, the Court held that in this case the tribunal's reliance on experts was reasonable and necessary to interpret both the evidence and the Act. The Court also affirmed that contextual evidence was relevant to the interpretation of section 11, including studies concerning stereotypes about women's work, the under-representation of women in more highly paid work, and the pay policies and practices relating to a particular complaint.

According to the Attorney General, pay equity legislation was designed to redress only the pay differences that were directly attributable to sex. Arguing that the analysis of the study resulted in differences in pay that could be attributed not only to sex, but to differentials in bargaining power and market forces, the Attorney General objected to a wage adjustment methodology that did not consider these other causes.

The Court found that this approach would have the effect of imposing too narrow an interpretation on what was intended to be a broadly remedial piece of legislation. The tribunal's choice of analytical methodology was reasonable and consistent with methods used in other jurisdictions. Moreover, the Court found that a fair and reasonable interpretation of the legislation could not be achieved by attempting to distinguish between discrimination based directly on sex and discrimination that arose indirectly through systemic and market forces, influenced by historical gender inequality.

Given the context in which section 11 operates and has developed, a requirement that sex be identified as the sole cause of the discrimination would defeat the purpose of the Act, and section 11 in particular. Section 11 is aimed at redressing systemic discrimination, Justice Evans wrote. "The nature of systemic discrimination often makes it difficult to prove ... because systemic discrimination results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination ... an employer's wage policies and practices may be based on such deep-rooted social norms and assumptions about the value of the work performed by women that it would be extremely difficult to establish in a forensic setting that, if women were paid less than men for performing work of equal value, that difference was based on sex."

Justice Evans rejected the government's argument that the tribunal had failed to properly measure wage differences by

using a flawed formula to compare the value of work performed by women in predominantly female job categories to that of men in predominantly male occupations. The Attorney General's position was that the tribunal had erred in accepting methodology that did not restrict the comparison of rates of pay on an occupational group-to-occupational group basis, as is required by section 15 of the Equal Wages Guidelines. Rather, the methodology resulted in the comparison of portions of occupational groups. Some members who were part of compared male occupational groups were excluded by the analysis because their work was not of comparable value to the work of members in the female occupational groups.

Even though Justice Evans conceded that the tribunal might have erred in failing to compare the results group to group, the Court relied on its "remedial discretion" to accept this aspect of the interpretation. To overturn the decision based on a single flaw would be to impose an unacceptable delay in the resolution of the dispute.

In conclusion, the Court had two central criticisms of the government's arguments for judicial review. First, the government's approach to the interpretation of the Canadian Human Rights Act and the Equal Wages Guidelines was "too abstract: it is insufficiently grounded in the factual realities of the employment context under consideration, the testimony of the array of expert witnesses who assisted the Commission and tribunal, or analogous legislation in other jurisdictions."

Secondly, the Attorney General's argument was based on the narrowest possible interpretation of the Canadian Human Rights Act, the definition of pay equity, and the measures to be taken to combat this problem. "The government too often seemed to regard the relevant provisions of the Act as a straitjacket confining the tribunal, instead of as an instrument for facilitating [solutions to] longstanding problems of systemic wage differentials arising from occupational segregation by gender and the undervaluation of women's work," the judge noted. The government's approach paid only lip service to the admonitions from the Supreme Court of Canada that, as quasi-constitutional legislation, human rights statutes are to be interpreted in a broad and liberal manner. The government announced that it would not appeal the court's ruling shortly after the decision was released.

This decision is an affirmation of the work of the Commission's Pay Equity Directorate and its commitment to a systemic resolution of pay equity complaints. It will also provide meaningful application to current pay equity litigation involving the Government of the Northwest Territories, Canada Post, Canadian Airlines, and Bell Canada. In each of these cases, the respondents have sought to limit the application of the Canadian Human Rights Act by insisting that it is not intended to redress systemic discrimination.

Sending a clear signal that the Canadian Human Rights Tribunal had full

jurisdiction over these matters, the Supreme Court of Canada decided in July not to hear Bell Canada's appeal in the pay equity case of the *Communications, Energy and Paperworkers Union* v. *Bell Canada*.

In 1998, Mr. Justice Francis Muldoon of the Federal Court's Trial Division had endorsed a formula for calculating pay equity payments. He asserted that wage gap calculations should be based on job-to-job comparisons, not on a broader approach aimed at eliminating salary differences between predominantly female and male jobs throughout the company's workforce. Shortly thereafter, the Federal Court of Appeal overturned this decision, stating that Justice Muldoon had overstepped his authority when he set out a method for calculating pay levels.

When Bell sought leave to appeal this judgment, the Supreme Court of Canada, without giving any reasons, refused even to hear Bell's arguments, ruling that it was up to the tribunal to decide on any settlement for Bell employees. The case has been sent back to a human rights tribunal for a decision on the merits of the complaint.

On December 15, 1999, the Federal Court's Trial Division held that the Government of the Northwest Territories had neither the authority nor the standing to challenge the validity of the Canadian Human Rights Act.

The decision in the case of the *Government of the Northwest Territories* v. *the Public Service Alliance of Canada and the Canadian Human Rights Commission* referred to hearings by a human rights tribunal on a pay equity complaint against the Territory. Invoking the Bill of Rights, the Territory brought a motion alleging that the tribunal lacked impartiality because it was bound by the Equal Wages Guidelines issued by the Commission. The tribunal dismissed the motion, and the Territory applied for judicial review before the Federal Court's Trial Division.

The Commission challenged the authority of the Territory to apply for judicial review, arguing that because the Territory was not an entity distinct from the federal Crown, it was not able to challenge a federal Act. Attempting to challenge the validity of the Act under the Bill of Rights in order to avoid liability under it was tantamount to the Queen contesting the validity of a statute she had herself enacted and had specifically made binding upon herself. The Commission's counsel added that challenges to the validity of a federal statute under the Bill of Rights by the Crown should be brought by means of a reference to the Supreme Court of Canada, not by way of judicial review.

Mr. Justice Jean-Eudes Dubé agreed with the Commission's contention that the Northwest Territories were still a territory under simple delegation of power by Parliament. He rejected the Territorial Government's argument that the Territory's evolution towards responsible self-government placed it on the same footing as the ten Canadian provinces. He held that as an entity of Parliament, it is bound

by the Canadian Human Rights Act. Counsel for the Government of the Northwest Territories has filed an appeal in this matter.

Hate Messages

On November 19, 1996, the Canadian Human Rights Commission requested that a human rights tribunal inquire into whether a California web site, known as the "Zundelsite," promoted hatred against Jews in violation of the Canadian Human Rights Act. *Citron* v. *Zündel* is one of the first attempts to apply human rights law to information disseminated over the Internet. Since that time, Ernst Zündel has launched a series of legal actions to stop the hearings. Following is an account of four of the most recent developments in the case.

In March, the Federal Court's Trial Division denied Mr. Zündel's application for a stay of proceedings in *Zündel* v. *Canada (Canadian Human Rights Commission).* Mr. Zündel argued that the tribunal's proceedings were void, citing Madam Justice Donna McGillis's 1998 decision in *Bell Canada* v. *Canadian Telephone Employees Association.* She had held that the Canadian Human Rights Tribunal was not sufficiently independent from the Commission or government to render impartial decisions. Subsequent changes to the Canadian Human Rights Act have since created a new, independent Canadian Human Rights Tribunal.

In its decision on Mr. Zündel's motion, the Federal Court chose to apply the reasoning in the case of the *Human Rights Tribunal* v. *Atomic Energy of Canada Ltd.* Because Mr. Zündel had not raised the issue of apprehension of bias at the first reasonable opportunity, he had implicitly waived his right to object to the structure of the Canadian Human Rights Tribunal. The relevant provisions of the Act and the appointment of the members of a tribunal panel are matters of public record. Yet Mr. Zündel did not question the independence and impartiality of the Canadian Human Rights Tribunal until after the release of Justice McGillis's decision. While Mr. Zündel may not have appreciated the legal consequence of those facts, he could not rely on his insufficient knowledge of the law to excuse his failure to raise his objection at the outset of the proceedings.

For the cases that had begun proceedings before the creation of the new Canadian Human Rights Tribunal, this case clears up any uncertainty over the impact of Justice McGillis's decision.

In June, the Federal Court dealt with *Zündel* v. *Canada (Attorney General).* In this application for judicial review, Mr. Zündel challenged the decision of the Commission to request the appointment of a tribunal on five grounds. First, because of statements made by Michelle Falardeau-Ramsay, who was at that time the Deputy Chief Commissioner, the Commission's decision had been tainted by bias. Second, because material posted on the web site in the form of text or graphics is not communicated "telephonically" (as required by section 13

of the Act), the tribunal had no jurisdiction to inquire into the complaints. Third, because the server for the web site was located outside Canada, the tribunal had no jurisdiction. Fourth, the Commission ought to have dismissed the complaints, because they were vexatious and made in bad faith. Fifth, if the complaints were upheld this would constitute an infringement of Mr. Zündel's Charter right to freedom of expression.

The first issue was whether the speeches made by the Deputy Chief Commissioner biased the Commission's subsequent decision to refer the complaints to a tribunal. The general themes of her speeches were that hate messages threatened human rights and that the Canadian Human Rights Act contained provisions for dealing with them that were more appropriate and effective than the Criminal Code.

Mr. Justice John Evans held that the Commission's duty of impartiality could not be pitched so high that it undermined the ability of its members to combat discrimination through public education and information. The Act requires the Commission to develop and conduct information programs to foster public understanding of the Act and of the principle of equality. Giving speeches to community and professional groups on current human rights issues, the Court noted, is "a very appropriate way for members of the Commission, and particularly the Chief Commissioner and the Deputy Chief, to discharge these responsibilities."

The Court found no bias on the part of Mrs. Falardeau-Ramsay that would justify the Court's intervention. Mr. Zündel had not discharged his burden by showing that the Deputy Chief Commissioner's speeches indicated that her mind was closed when she participated in the decision to refer the complaints to a tribunal. Furthermore, the speeches were made before any complaints were filed against Mr. Zündel, and were thoughtful and informative in nature rather than inflammatory.

On the second issue raised by Mr. Zündel, regarding whether the Act could apply to written text posted on the Internet, the Court concluded that the word "telephonically" had to be construed in light of the overall purpose of the legislation and subsequent technological developments. It could not, therefore, be said that the Commission's interpretation that human rights law applies to information disseminated over the Internet lacked a rational basis.

On the third issue, extraterritoriality, Justice Evans held that there was sufficient evidence before the Commission to enable it to conclude that an inquiry by a tribunal was warranted. He concluded that for the purposes of section 13, a person causes to be communicated material posted on a web site located outside Canada if that person effectively controls the content of that material. To argue that those who access the web site from their computers

and call up the material they wished to see "caused it to be communicated" was sheer sophistry. The judge pointed out that by this reasoning, a person who reads a newspaper causes the articles to be communicated, rather than the journalists who wrote the items that appear in the newspaper.

On the fourth issue, the fact that Sabina Citron, who had originally laid a complaint against Mr. Zündel, was a determined opponent of him and his views, did not mean that she had made her complaint in bad faith. Nor does the fact that she had been unsuccessful in securing his conviction for criminal offences because of his publications indicate that her complaint was vexatious.

Finally, regarding Mr. Zündel's fifth argument concerning his Charter rights, the Court found that it had no place in an application for judicial review of a referral to a tribunal. The Commission does not have the authority to determine the constitutionality of the hate messages section of the Act under the Charter. Therefore, the Court could not, on judicial review, set aside the Commission's referral to a tribunal on the grounds that invoking section 13 of the Act against Mr. Zündel infringed upon his right to freedom of expression. The case should be permitted to proceed to a tribunal, which has the statutory authority to determine whether it is constitutionally permissible to apply the hate messages provisions of the Act to the facts before it. Accordingly, Justice Evans dismissed the application.

This is the first case to recognize that the Canadian Human Rights Commission's public program activities are not inherently incompatible with the Commission's duty of fairness. The decision is also significant in that it strongly suggests that section 13 of the Canadian Human Rights Act applies to information communicated through the Internet.

The third decision relating to this case, released by the Federal Court in April, was reported in *Zündel* v. *Citron.* It concerned Mr. Zündel's allegation that there was a reasonable apprehension of bias in relation to one of the tribunal panel members, Reva Devins. Mr. Justice Douglas Campbell of the Federal Court's Trial Division held that the apprehension of bias arose from Ms. Devins's previous membership of the Ontario Human Rights Commission at a time when it had made statements to the media applauding the criminal conviction of Mr. Zündel for publishing false statements. The conviction was subsequently overturned.

Justice Campbell said that the Ontario Commission's statement was "thoroughly inappropriate," as it undermined "the independence and neutrality required of such a body." However, Justice Campbell rejected Mr. Zündel's allegation that the bias had tainted the whole tribunal. The Canadian Human Rights Commission is party to an appeal of this decision to the Federal Court of Appeal.

Finally, in December 1999, the Federal Court's Trial Division considered a further

appeal by Mr. Zündel. The case of *Zündel* v. *Sabina Citron et al.* concerns the apprehension of bias arising from the qualification standards for members of the new Canadian Human Rights Tribunal.

In the spring of 1998, the new Tribunal was established under amendments to the Canadian Human Rights Act. In order to qualify for appointment as a member of the Tribunal, a candidate had to have "experience, expertise and interest in, and sensitivity to, human rights." Less than a year later, Mr. Zündel filed an application for judicial review challenging the impartiality of the Tribunal. He based his attack on the qualifications required of the panel members under the Act, focusing on the word "sensitivity."

In December, Mr. Justice Douglas Campbell of the Federal Court held that the qualification standards do not create a reasonable apprehension of bias against a tribunal to such a degree that its proceedings should be voided. While a high standard of impartiality must be met by members of the Canadian Human Rights Tribunal, the Court found that "section 48.1(2) of the Canadian Human Rights Act merely expresses what is generally expected of persons who are required to render impartial decisions: a high level of knowledge and understanding about the subject matter being litigated. In my opinion, the informed person would interpret the word 'sensitivity' in section 48.1(2) of the Act to mean just that."

This is the first time this section of the Act has been challenged on these grounds. The decision effectively closes the door to future challenges based on an alleged apprehension of bias arising from qualifications standards embodied in the Act.

Jurisdictional and Procedural Questions

Does the doctrine of issue estoppel prevent a human rights commission from investigating a discrimination complaint that has already been dismissed at arbitration? In two cases heard together, the Federal Court considered this issue and displayed a reluctance to interfere with the Commission's decisions in the early, administrative phase of the complaint process. The two cases were *Canada Post Corporation* v. *Murray Nolan and the Canadian Human Rights Commission* and *Canada Post Corporation* v. *André Barrette and the Canadian Human Rights Commission.*

On three separate occasions between 1984 and 1990, Murray Nolan, a letter carrier of long service with Canada Post, was convicted of indecent exposure. Following his conviction in 1990, he was sentenced to three months in jail and was fired. He grieved his dismissal and was reinstated in 1991, after a one-year suspension.

In 1995, Mr. Nolan was once again convicted of exposing himself in a public place and was fired a second time. Canada Post took the position that potential harm

to its reputation in the community justified Mr. Nolan's dismissal. He grieved again, but this time the arbitrator upheld the dismissal. Mr. Nolan proceeded to file a complaint with the Canadian Human Rights Commission, stating that his employer had discriminated against him on the grounds of disability because he had a psychological disorder.

The second case before the Federal Court involved another Canada Post employee, André Barrette, a supervisor at a mail processing plant. In 1992, he began to suffer from hypertension and was told by doctors that his condition rendered him unfit to supervise other employees, a requirement of his position. Canada Post accommodated Mr. Barrette by giving him another position in which he maintained his status as a full-time employee, but not his seniority. Soon thereafter, he asked to be returned to his supervisory work. The corporation denied the request because it was not satisfied that Mr. Barrette was fit to perform his duties as a supervisor. Mr. Barrette subsequently filed a grievance. Concluding there had been no change in the facts that led to Mr. Barrette's removal from his supervisory position, the arbitrator ruled against him. Dissatisfied with this outcome, he too filed a complaint with the Commission.

Canada Post asked the Commission to reject both complaints because the time limit for filing a complaint had expired. The Commission, however, chose to exercise its discretion under section 41(e) of the Canadian Human Rights Act. It accepted both complaints beyond the normal time limit.

Two issues came before the Court. First, whether the Commission had properly exercised its discretion under section 41(e) of the Canadian Human Rights Act, even though the complaints were filed more than a year after the last incidents of discrimination had taken place. Second, whether the Commission had erred in law in agreeing to investigate a discrimination complaint that had already been dismissed by a labour relations arbitrator.

In his decision, Mr. Justice John Evans noted that the Court's role was necessarily circumscribed in reviewing the Commission's decision to exercise its discretion, especially at a preliminary stage of the process. In the judge's view, it would be inappropriate for the Court to impose stringent procedural standards and scrutinize the Commission's actions before it had even begun to investigate the complaints.

The Act leaves the Commission with the discretion to hear complaints after one year has elapsed, confirming that the Court should not lightly interfere with the Commission's decision to deal with a complaint. Furthermore, since the law's purpose is to reduce inequality, a court should be reluctant to conclude that the Commission has erred by taking too broad a view of the exceptions to its statutory duty to deal with complaints of discrimination. Closer judicial scrutiny is

justified, however, when the Commission decides not to deal with a complaint. Likewise, the duty of fairness does not require the Commission to give a complete statement of its reasons for deciding to conduct an investigation.

In some circumstances, labour arbitrators also have the authority to hear grievances alleging that an employer has engaged in discriminatory conduct that contravenes the collective agreement. This availability of multiple forums led to Canada Post's principal argument that the complainants were given a chance to relitigate the same issues after having lost at arbitration.

In his analysis of this issue, Justice Evans considered other cases that addressed the issue of whether an employee could litigate the same complaint in two different forums. For example, in *Weber* v. *Ontario Hydro*, the Supreme Court of Canada held that a court had no jurisdiction over a claim that an employee's Charter rights were infringed upon by his employer, where the claim involved breach of the terms of the collective agreement and could have been pursued through arbitration.

Justice Evans distinguished these cases from *Weber*. Applying *Weber* to them, he said, would exclude the Commission from ever investigating a complaint that had already been decided by an arbitrator. This would clearly be wrong, because the Commission has powers and expertise in the area of human rights that arbitrators do not possess, as well as the statutory mandate to fight discrimination.

Justice Evans said that applying to the Federal Court to stay proceedings before the Commission had even begun to investigate a case was unlikely to receive the Court's approval. If Parliament intended to give the Commission discretion not to investigate when grievances and other procedures had been exhausted, it would surely have said so, rather then leaving the issue to be dealt with under the general jurisdiction clause in section 41(c) of the Canadian Human Rights Act.

Section 41 sets out the circumstances in which the Commission can refuse to deal with a complaint. It was intended to enable it to screen out cases that obviously had no merit, the Court held. It would be unduly burdensome to require the Commission, at a preliminary stage of the process, to engage in the extensive investigation that might be necessary before it determined whether to apply issue estoppel.

In the Court's view, the Commission may not refuse to investigate a complaint on the ground that the complainant has pursued the matter before a labour arbitrator and lost. Canada Post's application was denied.

The decision clarifies that human rights commissions have an expertise and a mandate that makes them the preferred forum for resolving human rights complaints. The Commission should not refuse to deal with a human rights complaint simply because an arbitrator has already dismissed an allegation of discrimination based on the same facts. Prior arbitrators' rulings can be considered

by the Commission in making its decision on a case, but the Commission still has the discretion to deal with a complaint, even though it was dismissed by an arbitrator, or the complainant did not pursue a grievance.

Canada Post has since filed an appeal with the Federal Court of Appeal.

In December, the Supreme Court of British Columbia decided that an individual could not sue the Canadian Human Rights Commission for damages for failing to deal with a human rights complaint.

Carol Ann Thibodeau filed a lawsuit in the Supreme Court of British Columbia against her former employer. She claimed, among other things, harassment in the workplace. In her statement of claim, the Canadian Human Rights Commission was also named as a defendant, apparently because it had not dealt with her complaint. Human rights officers had informed Ms. Thibodeau that the Commission had no jurisdiction to deal with her complaint because her employer was subject to provincial, not federal, human rights law.

The counsel for the Commission asked the Court to remove it as a party to this law suit or dismiss the action against it.

In his decision, Mr. Justice Sherman Hood held that the Federal Court Act prevents provincial superior courts only from judicially reviewing the administrative actions of federal agencies. “In essence,” he noted, “the federal Commission’s decision involves whether the Plaintiff’s complaint concerns a federal matter or a provincial matter, based on the delineated division of legislative powers found in subsections 91 and 92 of the Constitution Act, 1867. The decision does not involve the administration of the Canadian Human Rights Act. I find that this Court has jurisdiction to review the Commission’s decision to deny jurisdiction over the Plaintiff’s complaint.”

Justice Hood then went on to explain that if Ms. Thibodeau wanted to challenge the Commission’s decision in the Supreme Court of British Columbia, she had to bring an application under the Judicial Review Procedure Act.

Finally, however, the Court held that Ms. Thibodeau could not claim damages against the Commission for failing to deal with her claim, and dismissed the action against it. The judge held that it was “plain and obvious” that Ms. Thibodeau could not succeed with her action, and that her statement of claim disclosed no reasonable claim or arguable issue. He cited with approval the decision in *Morgan* v. *The Queen*, in which it was held that the Canadian Human Rights Act did not create a private right of action for breach of a statutory duty on the part of the Commission.

Table of Cases

1. Aspects of Equality

British Columbia (Public Service Employee Relations Commission) v. *British Columbia Government and Service Employees Union,* [1999] 3 S.C.R. 3.
British Columbia (Superintendent of Motor Vehicles) v. *British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868.
Law v. *Canada (Minister of Employment and Immigration),* [1999] 1 S.C.R. 497.
M v. *H,* [1999] 2 S.C.R. 3.
Corbiere v. *Canada (Minister of Indian and Northern Affairs),* [1999] 2 S.C.R. 203.

2. Age

Olmstead v. *Attorney General of Canada,* [1999] T-126-98 (F.C.T.D.).

3. Religion

Nijjar v. *Canada 3000* (1999), 36 C.H.R.R. D/76 (Canadian Human Rights Tribunal).

4. Disability

Mills v. *Via Rail* (1999), 35 C.H.R.R. D/127 (Canadian Human Rights Tribunal).
Bernard v. *Waycobah Band of Education* (1999), T.D. 2/99 (Canadian Human Rights Tribunal).

5. Sex

Franke v. *Canadian Armed Forces* (1999), 34 C.H.R.R. D/140 (F.C.T.D.).

6. Pay Equity

Public Service Alliance of Canada v. *Treasury Board of Canada,* [1999] T-1698-98 (F.C.T.D.).
Communications, Energy and Paperworkers Union v. *Bell Canada*, [1999] S.C.C.A. No. 1 (S.C.C.).
Government of the Northwest Territories v. *the Public Service Alliance of Canada and the Canadian Human Rights Commission,* [1999] T-2411-98 (F.C.T.D.).

7. Hate Messages

Zündel v. *Canada (Canadian Human Rights Commission),* [1999] 3 F.C. 58 (F.C.T.D.).
Zündel v. *Canada (Attorney General),* [1999] 4 F.C. 289 (F.C.T.D.).
Zündel v. *Citron,* [1999] 3 F.C. 409 (F.C.T.D.).
Zündel v. *Sabina Citron et al.*, [1999] T-190-99 (F.C.T.D.).

8. Jurisdictional and Procedural Questions

Canada Post Corporation v. *Murray Nolan and the Canadian Human Rights Commission* and *Canada Post Corporation* v. *André Barrette and the Canadian Human Rights Commission* (1998), 34 C.H.R.R. D/353 (F.C.T.D.).
Thibodeau v. *the Canadian Human Rights Commission*, [1999] C993716 (B.C. S.C.).

Key to Abbreviations

B.C. S.C.	Supreme Court of British Columbia
C.H.R.R.	Canadian Human Rights Reporter
F.C.	Federal Court of Canada Reports
F.C.T.D.	Federal Court Trial Division
S.C.C.	Supreme Court of Canada
S.C.C.A.	Supreme Court of Canada Applications for Leave to Appeal
S.C.R.	Canada Supreme Court Reports
T.D.	Tribunal Decision