Commission des droits de la personne et des droits de la jeunesse Québec

RECENT DEVELOPMENTS / DÉVELOPPEMENTS RÉCENTS

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Presented at the national conference of the Canadian Association of Statutory Human Rights Agencies (CASHRA), *Gathering Wisdom – Exploring Common Challenges and Crafting Meaningful Solutions,* Yellowknife, Northwest Territories, June 18-10, 2007. Présenté à la conférence nationale de l'Association canadienne des commissions et conseil des droits de la personne (ACCCDP), *Place à l'expérience – Explorer les défis communs et élaborer des solutions judicieuses,* Yellowknife, Territoires du Nord-Ouest, 18-19 juin 2007

REASONABLE ACCOMMODATION–TRANSPORTATION SERVICES –ACCESS BY PERSONAL WHEELCHAIR

- **Council of Canadians with Disabilities v. Via Rail Canada Inc. (2007), CHRR Doc. 07-179, 2007 SCC 15, March 23, 2007.**

  McLachlin C.J. and Bastarache, LeBel, **Abella** and Charron JJ.; Binnie, **Deschamps**, Fish and **Rothstein** JJ., dissenting.

In 2000, Via Rail («VIA») purchased 139 rail cars and car parts no longer required for overnight train service through the Channel Tunnel. These rail cars, known then as the "Nightstock" fleet, were renamed the "Renaissance cars" by VIA. The total cost of the Renaissance cars was approximately $139 million, including purchase price and cost to prepare the equipment for service. This was a comparatively low purchase price; at the time of the purchase, VIA's capital expenditure budget was $401.9 million. However, none of the cars was accessible to persons with disabilities using personal wheelchairs. Moreover, there was no "plan document" to enhance accessibility when the cars were purchased. VIA's position was that the cars were sufficiently accessible. Instead of renovations that would enable passengers with personal wheelchairs to independently meet their own needs, VIA proposed that its employees would transfer passengers into on-board wheelchairs, deliver their meals, assist them with the use of washroom facilities, and provide other necessary services.

On December 4, 2000, the Council of Canadians with Disabilities («CCD») applied to the Canadian Transportation Agency complaining about the lack of accessibility of the Renaissance cars. CDD alleged that some 46 features of the Renaissance cars constituted "undue obstacles" to the mobility of persons with disabilities. CCD also relied on VIA's non compliance with the 1998 *Code of Practice — Passenger Rail Car Accessibility and Terms and Conditions of Carriage by Rail of Persons with Disabilities* («*Rail Code*»), a voluntary code agreed to by VIA, setting minimum standards applicable to its transportation network. Under the *Rail Code*, lower standards are applied to existing equipment in recognition of the fact that it may be difficult or impossible for this older equipment to be made to comply with modern accessibility standards. Higher standards are applied to new rail cars or cars undergoing a major refurbishment. The Code stipulates that for new or substantially refurbished rail cars, at least one car on each train should be accessible to persons using their own wheelchairs. The most significant of these standards is that passengers with disabilities be able to use their personal wheelchairs on the train.

The *Canada Transportation Act* (CTA) establishes a «National Transportation Policy» which states that Canada's transportation services are to be accessible to persons with disabilities. Under the *CTA*, responsibility for determining whether there is an «undue obstacle» to the mobility of persons with disabilities is assigned to the Canadian Transportation Agency («Agency»). PART V of the *CTA* deals specifically with the *Transportation of Persons with disabilities* and the Agency is granted two remedial approaches to the

removal of undue obstacles from the federal transportation network : regulation-making powers under s. 170 (1) and complaint adjudication powers under s. 172 (1). Where undue obstacles are found to exist, the Agency may determine what corrective measures are appropriate (ss. 172 (1) (3)).

After lengthy proceedings, the Agency issued a preliminary decision dated March 27, 2003. By issuing a «show cause» order, VIA was given the opportunity to provide additional evidence to explain why the obstacles identified by the Agency should not be considered undue. It was also asked to file answers to specific questions regarding remedial measures, their economic and operational feasibility. In the face of VIA's failure to cooperate, the Agency issued its final decision on October 29, 2003, based on the record before it. It ordered changes to 30 of the 139 newly purchased cars so that one car per train would be accessible to persons with disabilities using their own wheelchairs.

VIA successfully sought leave to appeal to the Federal Court of Appeal. The majority of the Court of Appeal found that the Agency decision was made without considering VIA's entire network, the interests of non-disabled persons, and the interests of persons with disabilities other than wheelchair users. It also found that the Agency had not properly balanced the competing interests between the rights of persons with disabilities and those of transportation service providers. Evans J. disagreed with the network approach. However, the Federal Court of Appeal was unanimous in its view that, having identified the modifications it thought necessary, the Agency violated VIA's procedural fairness rights by failing to give VIA an adequate opportunity to respond to the Agency's requests for cost and feasibility information.

In a majority decision (5-4), the Supreme Court of Canada allows the appeal.

Standard of review : The majority finds that the standard for reviewing the Agency's decision as a whole is patent unreasonableness. The dissenting judges were of the opinion that, on questions of jurisdiction and the determination of the applicable human rights law principles in the federal transportation context, the Agency does not have greater relative expertise than a court and the standard of review on these issues is correctness. (It is worth noting that the latter standard is the one generally applied to specialized human rights tribunals on questions of law.)

Statutory interpretation : The VIA case involves a legislative scheme which provides a separate source of human rights protection in the federal transportation context. The Court finds that where there is a conflict between human rights law and other specific legislation, human rights legislation, as a collective statement of public policy, must govern. The Agency is therefore obliged to apply the principles of the *Canadian Human Rights Act* when defining and identifying «undue obstacles» in the transportation context. Thus, when assessing the scope of an applicant's right not to be confronted with undue obstacles to mobility, the Agency is bound by the Court's decision in *Meiorin*.

Reasonable accommodation : The majority finds that the Agency properly applied the guiding principles established by the Court in *Meiorin* and *Grismer* regarding reasonable accommodation, adding:

> *To redress discriminatory exclusions, human rights law favours approaches that encourage, rather than fetter, independence and access. This means an approach that, to the extent structurally, economically and otherwise reasonably possible, seeks to minimize or eliminate the disadvantages created by disabilities. It is a concept known as reasonable accommodation.* (110)

After a detailed analysis of principles related to reasonable accommodation (121-135), the Court finds that the factors set out in the *Canada Transportation Act*, such as cost, economic viability, safety and quality of service to all passengers, flow out of the balancing inherent in a reasonable accommodation analysis and are compatible with those that apply under human rights legislation.

The accessibility paradigm is access by personal wheelchair : Based on the Canadian Standards Association (CSA), *Barrier-Free Design Standard*, which sets out minimum standards for making buildings and other facilities accessible to persons with disabilities, many of which are incorporated into the Rail Code, the accessibility paradigm is access by personal wheelchair. This standard was adopted in the *Rail Code*, which provides that newly manufactured coach cars or sleeping cars to be wheelchair-accessible should be designed to be accessible to a person in a personal wheelchair. A similar definition has been incorporated by Transport Canada into its *Passenger Car Safety Rules*, which prescribe mandatory safety standards.

Personal wheelchair-based access as the appropriate accessibility paradigm is also consistent with the Court's human rights jurisprudence. According to *Grismer*, standards must be as inclusive as possible. Those governed by human rights legislation are required *in all cases* to accommodate the characteristics of affected groups within their standards, rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them.

The fact that VIA found a good bargain in purchasing the Renaissance cars is not, in the context of the expansion and upgrading of its fleet, a legitimate justification for sustained inaccessibility: «*In the expansion and upgrading of its fleet, VIA was not entitled to ignore its legal obligations and public commitments. The situation it now finds itself in was preventable in a myriad of ways.*»

The ‘network defence’ : The majority rejects the ‘network defence’ that VIA successfully argued before the Federal Court of Appeal. The fact that there are accessible trains travelling along some routes does not justify inaccessible trains on others. It is the global network of rail services that should be accessible.

The *ad hoc* provision of taxis or a network of rail services with only some accessible routes is not adequately responsive to the goals of s. 5 of the *Canada Transportation Act*. Section 5 provides that the transportation services under federal legislative authority are, themselves, to be accessible. It is the rail service itself that is to be accessible, not alternative transportation services such as taxis : «*Persons with disabilities are entitled to ride with other passengers, not consigned to separate facilities.*»

Duty to prevent new barriers : As for practices that have the effect of creating new barriers, the Court states:

> *The twin goals of preventing and remedying discrimination recognized in Canadian National Railway Co. v. Canada (Canadian Human Rights Commission) cannot be accomplished if the creation of new, exclusionary barriers can be defended on the basis that they are no more discriminatory than what they are replacing. This is an approach that serves to perpetuate and exacerbate the historic disadvantage endured by persons with disabilities. Permitting VIA to point to its existing cars and special service-based accommodations as a defence overlooks the fact, that while human rights principles include an acknowledgment that not every barrier can be eliminated, they also include a duty to prevent new ones, or at least, not knowingly to perpetuate old ones where preventable.* (186)

Dissent : Justices Binnie, **Deschamps**, Fish and **Rothstein** dissent. In their opinion, efficiency and economic viability are objectives of the National transportation Policy under s. 5 of the CTA. The Agency wrongly emphasized the obstacles created by the Renaissance cars and failed to consider the full range of reasonable alternatives offered through the network. It was an error not to determine a total cost estimate and, therefore, they would have remitted the application for the Agency to determine the cost and corrective measures and Via's ability to fund them.

REASONABLE ACCOMMODATION – COLLECTIVE AGREEMENT – CLAUSE ALLOWING JOB LOSS AFTER THREE-YEAR ABSENCE DUE TO ILLNESS

- ***McGill University Health Centre (Montreal General Hospital)* v. *Syndicat des employés de l'Hôpital général de Montréal, 2007 SCC 4,* January 26, 2007**

  Deschamps J. (Binnie, LeBel, Fish, Charron and Rothstein JJ. concurring); concurring reasons: **Abella J**. (McLachlin C.J. and Bastarache J. concurring)

McGill University Health Centre (Montreal General Hospital)

On March 24, 2000, following a nervous breakdown, Alice Brady took a leave of absence from her job as a medical secretary for the McGill University Health Centre, at the Montreal General Hospital («Hospital»), a position she had held since 1985. Between June 2000 and February 2001, on her doctor's orders, she attempted a gradual return to work. No progress was noted in an evaluation dated February 2001, and the Hospital notified Brady that she would have to stay home until she was able to work full time. Brady attempted a second return to work in the Fall, without success. Subsequently, her doctor recommended that a new gradual return to work be attempted beginning March 11, 2002, but the Hospital, relying on the lack of progress observed during the previous rehabilitation periods, rejected this recommendation. A return to full-time work was scheduled for September 2002. Unfortunately, Brady had an automobile accident on July 28, 2002.

On March 12, 2003, the Hospital notified Brady that her employment would be terminated on April 3, 2003. It cited her prolonged absence as the reason for its decision. The collective agreement contained a clause providing that an employee would lose his or her job after a three-year period of absence due to illness. The Union filed a grievance contesting the decision and asked the Hospital to negotiate a reasonable accommodation with Brady. The arbitrator dismissed the grievance, pointing out that the Hospital had already accommodated Brady by granting her rehabilitation periods more generous than those provided for in the collective agreement, and that she was still unfit for work at the end of the three-year period provided for in the agreement. The Superior Court dismissed the Union's application for judicial review. However, on appeal, the Quebec Court of Appeal reversed the judgment and concluded that the arbitrator had not assessed the issue of reasonable accommodation on an individualized basis and had wrongly applied the provision of the collective agreement in a mechanical way. The Supreme Court of Canada allows the Hospital's appeal.

Labour Relations and the duty to accommodate : According to Deschamps J., the duty to accommodate in the workplace arises when an employer seeks to apply a standard that is prejudicial to an employee on the basis of specific characteristics that are protected by human rights legislation. This can occur in the context of a sick employee's right to be absent from work, as in the case at bar, or of a similarly protected right, such as a woman's right to be absent from work owing to pregnancy.

Collective agreements often contain clauses providing for termination of the employment relationship after an absence for a specified period of time. Insofar as the operation of an enterprise relies on its workforce, there is no doubt that an employer may establish *bona fide* measures to ensure employees' regular attendance. Moreover, parties to a collective agreement have a right to negotiate clauses to ensure that sick employees return to work within a reasonable period of time. The establishment of a maximum period of time for absences is thus a form of negotiated accommodation. In this instance, the clause providing for a three-year period during which the employee can be absent before the employment relationship will be terminated, represents, like the right to return to work part time, but one of the measures implemented in the enterprise to enable a sick employee to be accommodated.

Justice Deschamps goes on to say that the accommodation provided for in the collective agreement does not necessarily provide a complete answer to a complaint that seeks more generous accommodation measures. However, it is no more appropriate to say that the benefit incorporated into the collective agreement should not be taken into account in the overall assessment of the accommodation granted by the employer. It is a «significant factor» that the arbitrator must take into account in assessing undue hardship : « *In these circumstances, and depending on the duration of the authorized period of absence, such a clause can serve as evidence of the maximum period beyond which the employer will face undue hardship. This evidence may prove very useful, especially in the case of a large organization, where proving undue hardship resulting from an employee's absence could be complex.*»

In this case, Deschamps J. finds that the arbitrator did not simply apply the clause of the collective agreement automatically. He was aware of the scope of the employer's duty to accommodate but had no reason to believe that the employee would be returning to work in the foreseeable future. He therefore correctly concluded that the employer could not continue to employ someone who had been declared to be disabled for an indeterminate period.

Justice Abella (McLachlin C.J. and Bastarache J. concurring) reaches the same result but for different reasons. Abella J. rejects the argument that «automatic» termination clauses necessarily amount to *prima facie* discrimination: «*It is hard to see how three years of job protection for a disabled employee – a significantly longer period than the […] period required by Quebec's Act respecting labour standards – constitutes an arbitrary disadvantage merely because it is finite.*» From a policy perspective, designating such clauses as presumptively discriminatory removes the incentive to negotiate mutually acceptable absences. Moreover, there is nothing inherently discriminatory in a trade-off which provides a guarantee of job protection for three years for employees on sick or disability leave who would otherwise face the uncertainty of dismissal on an individual case-by-case and *ad hoc* basis.

Abella J. therefore finds that the claimant did not establish *prima facie* discrimination. Absent this, the employer was not called upon to justify the standard or its conduct. The appeal should be allowed.

RETROACTIVE AND PROSPECTIVE REMEDIES – THE ALLOCATION OF PUBLIC RESOURCES – THE ROLE OF GOVERNMENT AND PARLIAMENT

- ***Canada (Attorney General)* v. *Hislop, 2007 SCC 10,* March 1, 2007**

  LeBel and Rothstein JJ. (McLachlin C.J. and Binnie, Deschamps and Abella JJ. concurring); Concurring reasons by Bastarache J.

Following the 1999 decision of the SCC in *M. v. H.*, the federal government amended the *Canada Pension Plan* ("*CPP*") in 2000 to extend survivor benefits to same-sex partners by changing the definition of «spouse» to conform with the equality rights provisions of s. 15(1) of the *Canadian Charter of Rights and Freedoms*. New provisions were also added. Eligibility was limited to same-sex partners whose spouse died on or after January 1, 1998 (s. 44(1.1)). In addition, benefits were not retroactive to 1985, when s. 15(1) came into force, nor to the date on which the spouse died. Payments to same-sex survivors were precluded for any period preceding the 2000 amendments (s. 72(2)). The effect of s. 72(2) came to an end as of June 2001 and, subsequently, same-sex and opposite-sex survivors benefited from the general rule in s. 72(1), which limits survivors' arrears benefits to a 12-month period prior to the application. Finally, a general provision not affected by the 2000 amendments, limits the right of estates of survivors from obtaining benefits if the application for the benefits is not made within 12 months after the death of the survivor (s. 60(2)).

A class action was commenced by same-sex survivors («Hislop class»), challenging the constitutionality of four sections of the law. The Ontario Court of Appeal found that ss. 44(1.1) and 72(2) were unconstitutional, but held that ss. 60(2) and 72(1) did not infringe s. 15(1). Sections 44(1.1) and 72(2) were struck down, leaving a same-sex surviving spouse entitled to survivor benefits subject only to the 12-month cap on arrears and the limitation on estate claims, which applied to all claimants. The SCC dismissed the appeal. The Court rules that the fact that the amendments constitute remedial legislation does not immunize it from *Charter* review.

Should survivors of same-sex conjugal relationships in which the contributing partner died prior to January 1, 1998 be eligible to receive CPP survivorship benefits?

The government argued that the *Charter* should be interpreted in a manner recognizing the evolution of societal opinions and the incremental recognition of analogous grounds, including that of sexual orientation. Dismissing this argument, the Court finds that the question is not whether there was recognition of same-sex discrimination prior to 1998. Rather, the question is whether the prior discrimination which was recognized by the *Modernization of Benefits and Obligations Act* («*MBOA*») is or is not <u>now</u> being remedied. If survivors of same-sex conjugal relationships whose partners died before 1998 continue to be ineligible for CPP survivorship pensions, the prior discrimination that has been recognized by Parliament in enacting the MBOA continues for such survivors. For these reasons, the Court rejects the government's evolution argument in respect of s. 44(1.1), which limited eligibility to same-sex partners whose spouse died after Jan. 1, 1998, and finds it an invalid response to the s. 15(1) claim.

Similarly, the Court finds that s. 72(2), which denied the payment of benefits to a survivor of a same-sex relationship for any period preceding the 2000 amendments, violates s. 15(1) and is not saved by s. 1 of the *Charter*. It finds that same-sex survivors are entitled to up to 12 months of pension arrears, pursuant to s. 72(1).

Should survivors of same-sex conjugal relationships in which the contributing partner died at any time after April 17, 1985 be entitled to retroactive CPP benefits from the month following the death of the contributing partner?

On this issue it is important to note that the majority concur with the reasons given by Justices LeBel and Rothstein on this issue. While agreeing with the result, Justice Bastarache takes a different approach.

Retroactive and prospective remedies: In a debate regarding retroactive and prospective remedies under the *Charter*, the majority distinguish between the «declaratory approach» (the «*Blackstonian approach*») to constitutional remedies, in which case a declaration of constitutional invalidity involves the nullification of the law from the outset, and the theory according to which judges do not merely declare law : they also make law. (The judge as *Law Maker*).

Where courts apply pre-existing legal doctrine to a new set of facts, Blackstone's declaratory approach remains appropriate and remedies are necessarily retroactive. Because courts are adjudicative bodies that, in the usual course of matters, are called upon to decide the legal consequences of past happenings, they generally grant remedies that are retroactive to the extent necessary to ensure that successful litigants will have the benefit of the ruling. There is, however, an important difference between saying that judicial decisions are *generally* retroactive and that they are *necessarily* retroactive. When judges fashion new legal rules, i.e. when the law changes through judicial intervention, courts operate outside of the Blackstonian paradigm. In those situations, it may be appropriate for the court to issue a prospective rather than retroactive remedy.

The question then becomes what kind of change and which conditions will justify the crafting of prospective (as opposed to retroactive) remedies.

What kind of change ? LeBel and Rothstein JJ. go on to discuss the kind of change that is necessary to determine whether a prospective remedy is appropriate. Change in the law occurs in many ways. «*Clear break with the past*» catches some of its diversity. It includes situations where, in Canadian law, the Supreme Court departs from its own jurisprudence by expressly overruling or implicitly repudiating a prior decision. Other forms of substantial change include situations, especially in constitutional adjudication, where courts must give content to broad, but previously undefined, rights, principles or norms. Similarly, the definition of a yet undetermined standard or the recognition that a situation is now covered by a constitutional guarantee also often expresses a substantial change in the law: «*The right may have been there, but it finds an expression in a new or newly recognized technological or social environment.*» A legal response to such developments often justify the use of prospective remedies.

Once the "substantial change" threshold is met, other factors must also be considered. The list of factors is not closed. They include reasonable or in good faith reliance by governments; the fairness of the limitation (to retroactivity) to the litigants; whether a retroactive remedy would unduly interfere with the constitutional role of legislatures and democratic governments in the allocation of public resources.

Allocation of public resources: Making a distinction between cases involving moneys collected by the government and benefits cases, Justices LeBel and Rothstein state the following: Where the government has collected taxes in violation of the Constitution, there can be only one possible remedy: restitution to the taxpayer. In contrast, where a scheme for benefits falls foul of the s. 15 guarantee of equal benefit under the law, we normally do not know what the legislature would have done had it known that its benefits scheme failed to comply with the *Charter*. In benefits cases, a range of options is open to government. In our political system, choosing between those options remains the domain of governments. This principle points towards limiting the retroactive effect of remedies in s. 15 benefits cases in which the other criteria are also met.

In this case, the majority finds that the *M. v. H.* decision marked a departure from pre-existing jurisprudence on same-sex equality rights, and all the other relevant factors also weigh in favour of limiting retroactive relief. A retroactive remedy in the instant case would encroach unduly on the inherently legislative domain of the distribution of government resources and of policy making in respect of this process.

Thus, the retroactive relief sought by the Hislop class that survivors of same-sex relationships in which the contributing partner died at any time after April 17, 1985 be entitled to retroactive *CPP* benefits from the month following the death of the contributing partner, is unavailable under the law applicable to constitutional remedies. The Court found it unnecessary to carry out a s. 15(1) analysis in respect of s. 72(1).

Concurring reasons by Bastarache J.: While agreeing with the disposition of the appeal by LeBel and Rothstein JJ., Justice Bastarache finds that the reliance on the existence of a «*substantial change of law*» criterion is an inappropriate consideration in the context of rights guaranteed by the *Canadian Charter of Rights and Freedoms* and is, in any event, inapplicable to this case. The decision to deny retroactive relief, and the appellants' challenge to s. 72(1) of the *Canadian Pension Plan*, should be based purely on the balancing of interests that must take place in any claim for relief from an unconstitutional law. (143)

REMEDY – WRONGFUL DISMISSAL CONTRARY TO HUMAN RIGHTS LEGISLATION – PUNITIVE DAMAGES

- **Keays v. Honda Canada Inc., 2006 CanLII 33191 (ONT. C.A.), September 29, 2006. Motion for leave to appeal and cross-appeal granted by the SCC on March 29, 2007, file no. 31739.**

  Rosenberg, Goudge (dis. in part) and Feldman JJ.A.

Kevin Keays was terminated by Honda Canada Inc. on March 29, 2000, after fourteen years of employment. He had developed Chronic Fatigue Syndrome (CFS) and had been directed by his employer to meet with its occupational medicine specialist, Dr. Brennan. He declined to do so without clarification from Honda as to the purpose of the meeting, the methodology to be used, and the parameters of Dr. Brennan's assessment. Honda refused to provide him with such clarification, and terminated him for disobeying its direction.

Keays sued for wrongful dismissal. The trial judge concluded that Keays had been terminated without just cause, fixed fifteen months as the period of reasonable notice and added a further nine months for the manner of Keays' dismissal. In addition, he ordered $500,000 in punitive damages because he found that Honda's treatment of Keays constituted discrimination and harassment, was contrary to Ontario human rights legislation, and was both outrageous and high-handed.

On appeal, there was agreement that Keays had been terminated without just cause and that it was open to the trial judge to award punitive damages. The employer's motivation for terminating the employee was essentially to avoid its obligation to accommodate his disability. Honda attempted to intimidate Keays into seeing its occupational medicine specialist who employed a hardball approach to employee absence. It did all of this in full knowledge of the respondent's particular vulnerability because of his disability.

However, the majority reduced the quantum to $ 100,000. on the grounds that there was no evidence to support the finding of a «*protracted corporate conspiracy*». Moreover, the trial judge failed to apply the principle of proportionality, i.e. he should have taken into account the compensatory awards (reasonable notice period of 24 months) already made. Goudge, J. dissented in part and would have confirmed the award for punitive damages in the amount of $ 500,000.

In this case, the Court of Appeal confirmed that an *action for wrongful dismissal* can be properly based on a dismissal that constitutes discrimination contrary to human rights legislation. In addition, the courts recognized that evidence of discrimination and harassment in violation of human rights legislation can constitute evidence of an *independent actionable wrong*, giving rise to an award for punitive damages.

However, the Court of appeal rejected attempts to have it revisit *Bhadauria*, in order to establish an independent cause of action of discrimination. The question may however be raised once more before the Supreme Court of Canada which has granted leave to appeal.

DISABILITY – DRIVER'S LICENCE CANCELLED – INDIVIDUAL ASSESSMENT DENIED – CROWN IMMUNITY (NO)

- **British Columbia v. Bolster (2007), CHRR Doc. 07-071, 2007 BCCA 65. Application for leave to appeal has been filed with the Supreme Court of Canada, file no. 31963.**

  Levine, Newbury and Chiasson JJ.A.

This appeal raises the question of whether the British Columbia government can be ordered to pay compensation to a person who has been found to have been discriminated against by a government employee exercising statutory authority.

Facts : Mr. Bolster's class 1 licence was cancelled by the Superintendent without notice in 1998, on the basis of the recommendation by a retired medical doctor, with no specialty in ophthalmology or optometry and despite the fact that Bolster had worked as a commercial driver for some 13 years without difficulty. Repeated attempts and requests by Bolster to undergo an individual assessment met with little success. He moved to Alberta in 2002 where he applied for a class 1 driver's licence which was approved and issued to him in February 2003. It was only after his complaint to the Human Rights Commission in January 2003, that the Superintendent finally agreed to have Mr. Bolster undergo an individual assessment. The Superintendent finally accepted the assessment and on February 12, 2004, issued Mr. Bolster a class 1 driver's licence with the same restrictions that had been in place before his class 1 licence was cancelled in October 1998.

The B.C. Human Rights Tribunal found that the Superintendent of Motor Vehicles had discriminated against William Bolster by failing to provide him an individual functional driving assessment, so that Mr. Bolster could demonstrate his fitness to hold a commercial driver's licence despite a visual disability which prevented him from meeting the vision standards usually applied by the Superintendent. The Tribunal ordered the Province to pay compensation under the *Human Rights Code* in the amount of $141,939.38 for the loss during the period from October 1998 to January 2003, when Mr. Bolster was unable to earn a living driving a truck because his commercial driver's licence had been cancelled by the Superintendent.

The Tribunal's decision was upheld on judicial review. The government challenged the Tribunal's jurisdiction to order that it pay compensation under the *Code*, and if the Tribunal has that jurisdiction, challenged the order calculating the compensation from 1998, when Mr. Bolster's commercial driver's licence was cancelled. The chambers judge found that the Superintendent was not exercising quasi-judicial functions, but rather was exercising a "business power". He said that if he was wrong in that conclusion, it was not possible to view the decision to cancel Mr. Bolster's licence as a good faith exercise of the Superintendent's powers.

In a unanimous ruling, the B.C. Court of Appeal rejects the government's substantive arguments and dismisses the appeal. There is no Crown immunity from an award of compensation for the contravention of the ***Code*** by the Superintendent; the *de facto* doctrine does not apply to limit the calculation of compensation for the period before ***Grismer SCC*** was released; and neither the Tribunal nor the chambers judge erred in law in finding that the discrimination continued between July 1999 and the fall of 2002, and in finding that there was "continuing discrimination" from October 1998 to January 2003.

QUÉBEC - ARTICLE 12 – BIENS ET SERVICES ORDINAIREMENT OFFERTS AU PUBLIC – ORGANISME PUBLIC - BÉNÉFICES REFUSÉS EN APPLICATION D'UNE LOI

- ***Commission des droits de la personne et des droits de la jeunesse (Marie-Andrée Bertrand)* c. *Le Procureur général du Québec et Tribunal administratif du Québec et Bernard Cohen, en sa qualité de membre du Tribunal, et Commission de la santé et de la sécurité du travail (Direction de l'indemnisation des victimes d'actes criminels), 2006* QCCA 1506, 21 novembre 2006**

  Juges : Beaudoin, Nuss, Dufresne

Dans cette affaire, la Commission soumettait que le refus de la CSST de reconnaître la plaignante comme une « *personne à charge* » de sa conjointe victime d'un acte criminel et de lui verser des prestations de « *conjointe survivante* » était discriminatoire en raison de son orientation sexuelle. Le litige est né avant les modifications législatives intervenues en 1999 reconnaissant les « *personnes de même sexe* » au même titre que les « *personnes de sexe opposé* » quant à la notion de « *conjoint* ».

Le Tribunal administratif du Québec (T.A.Q.) a déclaré inapplicable à l'égard de Marie-Andrée Bertrand l'article 2.1e) de la *Loi sur les accidents du travail* concluant que la définition du terme « conjoint » était alors contraire aux articles 10, 12 et 52 de la *Charte des droits et libertés de la personne* du Québec. La Cour supérieure a accueilli la requête en révision judiciaire du gouvernement au motif que les termes « *[…] refuser de conclure un acte juridique ayant pour objet des biens ou des services ordinairement offerts au public* » (article 12) font essentiellement référence à un concept de droit civil qui implique une manifestation de volonté de la part des parties

impliquées. Ainsi, l'article 12 se limiterait aux stricts rapports de nature contractuelle et ne viserait pas une situation où un corps public refuse de verser des bénéfices à une personne en appliquant une loi. La Cour d'appel a confirmé ce jugement et la CSC a refusé l'autorisation d'en appeler.

DISCRIMINATION FONDÉE SUR L'ÂGE – RETRAITE OBLIGATOIRE – DÉFENSE DE L'EMPLOYEUR – CRITÈRES APPLICABLES

- ***Potash Corp. of Saskatchewan Inc.* c. *Scott* (2006), CHRR Doc. 06-503, 2006 NBCA 74, 20 juillet 2006**

  Robertson, Turnbull, Daigle (dis.) JJ.A.

Melrose Scott a été forcé de quitter son emploi de mineur pour prendre sa retraite lorsqu'il a atteint l'âge de 65 ans en raison de la politique sur la retraite obligatoire que contenait le régime de pension de son employeur. Il a ensuite déposé auprès de la Commission des droits de la personne du Nouveau-Brunswick une plainte dans laquelle il alléguait avoir été victime de discrimination fondée sur l'âge relativement à l'emploi. Lorsque l'affaire a été renvoyée devant une commission d'enquête des droits de la personne, les parties ont convenu, avant que l'affaire ne soit entendue sur le fond, de demander qu'il soit statué sur une question de droit préjudicielle se rattachant à la bonne interprétation de l'al. 3(6)a) du *Code.* La question préjudicielle soumise au tribunal de première instance était la suivante : «À quels critères faut-il satisfaire pour déterminer qu'un régime de pension est un régime de pension effectif (*bona fide*) de manière à satisfaire à l'exigence du paragraphe 3(6)?»

Bien que le par. 3(1) impose une interdiction générale contre toutes les formes de discrimination fondées sur l'âge, le par. 3(5) offre un moyen de défense aux employeurs qui peuvent établir que la limite d'âge est une qualification professionnelle réellement requise. Toutefois, ce n'est pas la fin de l'histoire. En effet, l'al. 3(6)a) prévoit ensuite que les dispositions du par. 3(1) ne s'étendent pas aux mises à la retraite forcées imposées par un régime de pension effectif. C'est dans ce contexte que les parties soulèvent des questions d'interprétation entourant la signification de l'expression «régime de pension effectif» et l'applicabilité de deux arrêts de la Cour suprême : *British Columbia (Public Service Employee Relations Commission) c. B.C.G.S.E.U.,* (*«Meiorin»*), et *Zurich Insurance Co. c. Ontario (Human Rights Commission) («Zurich»).*

La commission d'enquête a conclu que les critères établis dans *Meiorin* devaient s'appliquer. Dans le cadre d'une révision judiciaire, la Cour du Banc de la Reine a statué que c'était plutôt ceux énoncés par la Cour suprême du Canada dans *Zurich* qu'il fallait appliquer. Ces critères comportent deux éléments: le premier, l'élément de la «bonne foi» est subjectif et, le deuxième, portant sur le «caractère raisonnable» du régime, est objectif. Ce dernier exige également que l'on évalue s'il existe une solution utile autre que la pratique discriminatoire, comme l'exige aussi le 3^{e} élément des critères énoncés dans l'arrêt *Meiorin.*

La majorité estime qu'il est inadmissible de conclure que l'al. 3(6)a) renferme implicitement les critères de *Meiorin.* Une telle interprétation serait contraire à l'intention du législateur : faire en sorte que les employeurs ne soient pas obligés de justifier des politiques sur la retraite obligatoire en satisfaisant à l'exigence des qualifications professionnelles réellement requises énoncée au par. 3(5). Les employeurs peuvent plutôt invoquer l'existence d'un régime de pension effectif comme moyen de défense. Bref, sur le plan interprétatif, il ne ferait aucun sens d'avoir une exigence relative aux qualifications professionnelles réellement requises à la fois au par. 3(5) et à l'al. 3(6)a). La majorité rejette ainsi l'appel de la Commission. Elle accueille cependant l'appel reconventionnel de l'employeur concluant que seul l'élément subjectif des critères de *Zurich* doit s'appliquer. Le juge Daigle, dissident, aurait appliqué les critères de *Meiorin.*

ABORIGINAL RIGHTS DOCTRINE – INTERPRETATION OF «INTEGRAL TO A DISTINCTIVE CULTURE» TEST.

- **R. v. Sappier; R. v. Gray, 2006 SCC 54, [2006] 2 S.C.R. 686, December 7, 2006**

  Bastarache J. (McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ. concurring); Concurring reasons by Binnie J.

The three respondents were charged with unlawful possession or cutting of Crown timber under the N.B. *Crown Lands and Forests Act*. Sappier and Polchies are Maliseet, and Gray is Mi'kmaq. The logs in their possession were to be used in the construction of a house, to make furniture and then made available to the Reserve for fire wood. There was no intention of selling the logs or any product made from them. In defence, the respondents argued that they possess an aboriginal and treaty right to harvest timber for personal use.

In a unanimous decision, the S.C.C. rules that the respondents established an aboriginal right to harvest wood for domestic use.

The relevant practice in this case is characterized as a right to harvest wood for domestic uses as a member of the aboriginal community. The right so characterized has no commercial dimension. The harvested wood cannot be sold, traded or bartered to produce assets or raise money. This is so even if the object of such trade or barter is to finance the building of a dwelling.

The aboriginal rights doctrine, constitutionalized by s. 35, arises from the simple fact of prior occupation of the lands now forming Canada. The «integral to a distinctive culture» test must be understood in this context. Section 35 seeks to protect integral elements of

the way of life of aboriginal societies, including their traditional means of survival. It is not necessary to establish that the practice upon which the aboriginal right is claimed goes *to the core of the society's identity.* The claimant need only show that the practice was *integral* to the aboriginal society's pre-contact distinctive culture. Nor must it be shown that the culture would be *fundamentally altered* without it.

What is meant by «culture» is really an inquiry into the pre-contact way of life of a particular aboriginal community, including their means of survival, their socialization methods, their legal systems, and, potentially, their trading habits. The use of the word «distinctive» as a qualifier is meant to incorporate an element of aboriginal specificity. However, «distinctive» does not mean «distinct», and the notion of aboriginality must not be reduced to «racialized stereotypes of Aboriginal peoples». It would be a mistake to reduce an entire pre-contact distinctive culture to canoe-building and basket-making. To hold otherwise would be to fall in the trap of reducing an entire people's culture to specific anthropological curiosities and, potentially, racialized aboriginal stereotypes. Instead, the Court must inquire into the way of life of the Maliseet and Mi'kmaq, pre-contact. These were migratory communities using the rivers and lakes of Eastern Canada for transportation and living essentially from hunting and fishing. In the present cases, the practice of harvesting wood for domestic uses including shelter, transportation, fuel and tools is directly related to the way of life just described. The fact that harvesting wood for domestic uses was undertaken for survival purposes is sufficient to meet the integral to a distinctive culture threshold. The Court therefore concludes that the practice of harvesting wood for domestic uses was integral to the pre-contact distinctive culture of both the Maliseet and Mi'kmaq peoples.

The Court also finds that the right to harvest wood for the construction of temporary shelters must be allowed to evolve into a right to harvest wood by modern means to be used in the construction of a modern dwelling. Any other conclusion would freeze the right in its pre-contact form. Ancestral rights may find modern form. If aboriginal rights are not permitted to evolve and take modern forms, then they will become utterly useless.

In his concurring reasons, Justice Binnie agrees with Bastarache J. but favours a more flexible concept regarding the exercise of aboriginal rights : In aboriginal communities pre-contact, there existed a division of labour. This would justify a more flexible concept of the exercise of aboriginal rights *within* modern aboriginal communities. Barter (and, its modern equivalent, sale) *within* the reserve or other local aboriginal community would reflect a more efficient use of human resources than requiring all members of the reserve or other local aboriginal community to which the right pertains to do everything for themselves. However, trade, barter or sale *outside* the reserve or other local aboriginal community would represent a commercial activity outside the scope of the aboriginal right established in this case. In other respects, Binnie J. agrees with his colleagues. The Court did not find it necessary to decide whether the respondents also benefited from a treaty right to harvest wood.

CHARTER RIGHTS – NATIONAL SECURITY

- **Charkaoui v. Canada (Citizenship and Immigration), 2007 SCC 9, February 23, 2007**

McLachlin C.J. (Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ. concurring)

The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("*IRPA*") allows the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness to issue a certificate of inadmissibility leading to the detention of a permanent resident or foreign national deemed to be a threat to national security. The certificate and the detention are both subject to review by a judge, in a process that may deprive the person named in the certificate of some or all of the information on the basis of which the certificate was issued or the detention ordered.

The question is whether the process related to these certificates of inadmissibility conforms to the Constitution, and in particular the guarantees in the *Canadian Charter of Rights and Freedoms* that protect against unjustifiable intrusions on liberty, equality and the freedom from arbitrary detention and from cruel and unusual treatment.

Charkaoui is a permanent resident, while Harkat and Almrei are foreign nationals who had been recognized as Convention refugees. All were living in Canada when they were arrested and detained. At the time of the decisions on appeal, all had been detained for some time — since 2003, 2002 and 2001 respectively. In 2001, a judge of the Federal Court determined Almrei's certificate to be reasonable; another determined Harkat's certificate to be reasonable in 2005. The reasonableness of Charkaoui's certificate has yet to be determined. Messrs. Charkaoui and Harkat were released on conditions in 2005 and 2006 respectively, but Mr. Harkat has been advised that he will be deported to Algeria, which he is contesting in other proceedings. Mr. Almrei remains in detention. In all these cases, the detentions were based on allegations that the individuals constituted a threat to the security of Canada by reason of involvement in terrorist activities.

C and H were released on conditions in 2005 and 2006 respectively, but A remains in detention. Both the Federal Court and the Federal Court of Appeal upheld the constitutional validity of the *IRPA*'s certificate scheme.

Details of the scheme : The *IRPA* requires the ministers to sign a certificate declaring that a foreign national or permanent resident is inadmissible to enter or remain in Canada on grounds of security, among others. A judge of the Federal Court then reviews the certificate to determine whether it is reasonable. The review may be conducted *in camera* and *ex parte* at the government's request. The person named in the certificate has no *right* to see the material on the basis of which the certificate was issued. In other words, non-sensitive material may be disclosed but, if the government objects, sensitive or confidential material will not be disclosed. The named person and his or her lawyer cannot see undisclosed material, although the ministers and the reviewing judge may rely on it.

The judge provides a summary of the case which does not however disclose material that might compromise national security. If the judge determines that the certificate is reasonable, there is no appeal nor any possibility of judicial review.

The consequences of the issuance and confirmation of a certificate of inadmissibility vary, depending on whether the person is a permanent resident of Canada or a foreign national whose right to remain in Canada has not yet been confirmed. Permanent residents who the ministers have reasonable grounds to believe are a danger to national security *may* be held in detention. In order to detain them, the ministers must issue a warrant stating that the person is a threat to national security or to another person, or is unlikely to appear at a proceeding or for removal. Foreign nationals, meanwhile, *must* be detained once a certificate is issued : detention is automatic.

Detention : While the detention of a permanent resident must be reviewed within 48 hours, a foreign national, on the other hand, must apply for review, but may not do so until 120 days after a judge of the Federal Court determines the certificate to be reasonable. In both cases, if the judge finds the certificate to be reasonable, it becomes a removal order. Such an order deprives permanent residents of their status; their detention is then subject to review on the same basis as that of other foreign nationals. The removal order cannot be appealed and may be immediately enforced.

The appellants argued that the *IRPA*'s certificate scheme under which their detentions were ordered is unconstitutional, violating the s. 7 guarantee of life, liberty and security of the person; the s. 9 guarantee against arbitrary detention; the s. 10(*c*) guarantee of a prompt review of detention; the s. 12 guarantee against cruel and unusual treatment, and the s. 15 guarantee of equal protection and equal benefit of the law. They also allege violations of unwritten constitutional principles of the rule of law.

Section 7 and national security issues: In examining s. 7, the Court finds that national security issues may inform the analysis of fundamental fairness in the process, however, «*security concerns cannot be used to excuse procedures that do not conform to fundamental justice at the s. 7 stage of the analysis.* » The bottom line is : « *If the context makes it impossible to adhere to the principles of fundamental justice in their usual form, adequate substitutes may be found. But the principles must be respected to pass the hurdle of s. 7.*» (23)

The Court finds that «*[t]he greater the effect on the life of the individual by the decision, the greater the need for procedural protections to meet the common law duty of fairness and the requirements of fundamental justice under s. 7 of the Charter*».

While the Court appears willing to entertain the possibility that «*the protection may not be as complete*» in cases where national security constraints operate, a meaningful and substantial protection must nonetheless exist : the protection of due process that lies at the heart of s. 7 of the Charter cannot be eroded nor can it effectively be gutted as in this case.

In conclusion, the Court finds that, in the *IRPA*, an attempt was made to meet the requirements of fundamental justice essentially through one mechanism, i.e. the designated judge charged with reviewing the certificate of inadmissibility and the detention. An attempt was also made to give the designated judge the powers necessary to discharge the role in an independent manner, based on the facts and the law. However, the secrecy required by the scheme denies the named person the opportunity to know the case put against him or her, and thus to challenge the government's case. This, in turn, undermines the judge's ability to come to a decision based on all the relevant facts and law.

Section 1 : In conducting its section 1 analysis, the Court further finds that alternatives that Canada has already relied upon in the past and the use of special counsel in other countries, for instance, in the context of anti-terrorism legislation in the United Kingdom, are alternatives that suggest that the *IRPA* regime, which places on the judge the entire burden of protecting the person's interest, does not minimally impair the rights of non-citizens, and hence cannot be saved under s. 1 of the *Charter*.

Thus, the Court concludes that the *IRPA*'s procedures for determining whether a certificate is reasonable and for detention review cannot be justified as minimal impairments of the individual's right to a judicial determination on the facts and the law and right to know and meet the case. Mechanisms developed in Canada and abroad illustrate that the government can do more to protect the individual while keeping critical information confidential than it has done in the *IRPA*. Precisely what more should be done is a matter for Parliament to decide. But it is clear that more must be done to meet the requirements of a free and democratic society.

The Court further finds that denial of review for foreign nationals for 120 days after the certificate is confirmed cannot be considered a minimal impairment. Therefore, the lack of timely review of the detention of foreign nationals violates s. 9 and s. 10(*c*) and cannot be saved by s. 1.

Extended periods of detention : However, in the Court's view, the extended periods of detention pending deportation under the certificate provisions of the *IRPA* do not necessarily violate ss. 7 and 12 of the *Charter* if accompanied by a process that provides regular opportunities for review of detention, taking into account all relevant factors, including the following: (*a*) the reason for detention; (*b*) the length of time in detention; (*c*) whether there are any elements that can assist in determining the length of time that detention is likely to continue and, if so, that length of time; (*d*) any unexplained delays or unexplained lack of diligence caused by the Department or the person concerned; and (*e*) the existence of alternatives to detention. These are «prescribed factors» considered by the Immigration and Refugee Board. This does not however preclude the possibility of a judge concluding at a certain point that a particular detention constitutes cruel and unusual treatment or is inconsistent with the principles of fundamental justice, and therefore infringes the *Charter* in a manner that is remediable under s. 24(1) of the *Charter*.

Equality Rights : In response to the Equality Rights arguments raised by the appellant Charkaoui who argued that the *IRPA* certificate scheme discriminates against non-citizens, contrary to s. 15(1) of the *Charter*, the Court finds that s. 6 of the *Charter* specifically allows for differential treatment of citizens and non-citizens in deportation matters: only citizens are accorded the right to enter, remain in and leave Canada (s. 6(1)). A deportation scheme that applies to non-citizens, but not to citizens, does not, for that reason alone, violate s. 15 of the *Charter*: *Chiarelli*.

In addition, it was argued that detention could become indefinite and that the detention could continue in a manner no longer related to the goal of deportation. In *Re A*, the House of Lords found that the legislation expressly provided for indefinite detention – and thus went well beyond the concerns of immigration legislation and thus wrongfully discriminated between nationals and non-nationals. In this instance, the Court finds it has not been shown that the detentions have become «unhinged» from the state's purpose of deportation.

Argument based on the «Rule of law»

As for the «*Rule of law*» argument, the Court finds that the constitutional protections surrounding arrest and detention are basically set out in the *Charter*, and «*it is hard to see what the rule of law could add to these provisions*.»

Appeal therefore allowed.