

Human Rights Digest

January 2000



Terry Grismer Wins

DISABILITY — *services denied on the basis of visual impairment (homonymous hemianopsia)* — **PUBLIC SERVICES AND FACILITIES** — *driver's licence denied — individual assessment as alternative to setting discriminatory standard* — **EVIDENCE** — *sufficient evidence to establish defence* — **BURDEN OF PROOF** — *onus on respondent*

DISCRIMINATION — *Meiorin test — adverse effect discrimination — bona fide justification and cost of individual testing as reasonable cause — reliance on medical advice — safety risk — sufficient risk — definition of discrimination* — **REASONABLE ACCOMMODATION** — *reasonable accommodation principle — duty to accommodate where bona fide qualification exists — duty to accommodate short of undue hardship — individual testing*

The Supreme Court of Canada ruled that the B.C. Superintendent of Motor Vehicles discriminated against Terry Grismer by refusing him a driver's licence because he had homonymous hemianopia ("H. H.") which eliminated most of his left side peripheral vision in both eyes.

Terry Grismer had a stroke in 1984 at age 40. As a result of the stroke, he suffered from H.H. Persons with H.H. always have less than 120 degrees of peripheral vision and no person with H.H. is issued a driver's licence in B.C. The Motor Vehicles Branch cancelled Grismer's licence.

Grismer claimed that through the use of glasses with prisms, extra mirrors on his truck, and regular movement of his head, he could compensate for his disability and drive safely. He alleged that he was discriminated because he was not given an individual assessment. Instead, the simple fact that he had H.H. barred him from having a driver's licence.

Applying the new unified test that was

fashioned in *British Columbia (Public Service Employee Relations Comm.) v. B.C.G.E.U.* (1999), 35 C.H.R.R. D/257 (S.C.C.) ("Meiorin"), McLachlin J., writing for a unanimous Court, ruled that the Superintendent of Motor Vehicles was required to show that the "no H.H." standard was adopted for a purpose rationally connected to the regulation of driving; that the standard was adopted in good faith; and that the standard was reasonably necessary because the Superintendent could not accommodate persons such as Mr. Grismer without undue hardship, whether that hardship took the form of impossibility, serious risk or excessive cost.

The Superintendent's goal was to maintain reasonable highway safety. The evidence showed that the Superintendent had not set a goal of absolute safety since he licenced many people with various forms of disability. Such a goal would not be feasible in any case, since no one is a perfect driver.

The central issue was whether the "no H.H." standard was necessary to meet the goal of reasonable highway safety. There were two ways that the Superintendent could show that a standard like this one, that permits no accommodation, is reasonably necessary. First, he could show that no one with H.H. could ever meet the desired objective of reasonable highway safety. Alternatively, he could show that accommodation is unreasonable because testing individuals to determine whether they can drive safely despite their disabilities is impossible short of undue hardship.

The Court found that the Superintendent had not demonstrated that no person with H.H. could drive safely. In fact, there was evidence to show that some people with H.H. may be able to drive safely and that Terry Grismer may have been among them. The Superintendent also failed to

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Inside Page

Welcome to the *Human Rights Digest*! At the Canadian Human Rights Reporter ("CHRR") we care about keeping Canadians informed about human rights. As we celebrate our twentieth anniversary of service in the human rights field, the Board and staff are proud to launch this new publication.

The *Digest* is designed to keep busy people up to date on developments in human rights law. Human rights is a fast-moving and quickly changing area of law. So staying current is important. Eight times a year, the *Digest* provides summaries of all human rights decisions handed down by tribunals and courts during the preceding six weeks. The *Digest* is designed to provide crucial and timely information in a format that can be quickly scanned.

The *Digest's* coverage is comprehensive. This means that human rights decisions noted in the *Digest* deal with all areas covered by human rights legislation—employment, services, tenancy, contracts, and occupational associations—and with all grounds of discrimination. Also, the *Digest* documents the latest developments regarding procedural, jurisdictional and interpretive issues, such as the authority of arbitrators to deal with human rights disputes, and the meaning of the duty to accommodate.

Having comprehensive information is essential because decisions in one area affect decisions in another. A decision about discrimination in employment can affect decisions about services, accommodation, and tenancy. Similarly, a decision about sex discrimination can affect the outcome of a decision about disability discrimination. For those who need to know about human rights, having a handle on overall trends is vital.

As well as being a source of comprehensive information on its own, the *Digest* is designed to mesh with other services provided by CHRR, for those who need another level of information. CHRR provides the full text of tribunal and court decisions, from all Canadian jurisdictions, in both unedited and edited formats, in print and online. The *Digest* provides an easy way to identify decisions that are of special interest.

In this issue of the *Digest*, some important new developments are noted. In *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* ("Grismer"), for example, the Supreme Court of Canada for the first time applied its new unified approach to analyzing both direct and adverse effect discrimination in a case dealing with services and disability. The effect of this new unified approach, set out by the Court in the women firefighter's case *British Columbia (Public Service Employee Relations Comm.) v. B.C.G.E.U.* (1999), 35 C.H.R.R. D/257 ("Meiorin"), is to make the duty to accommodate a key issue in all discrimination cases. It is clear that from now on evidence offered by employers and service providers to demonstrate that they cannot accommodate an individual or a group will be scrutinized much more critically by tribunals and courts.

Decisions that set new directions, like *Meiorin* and *Grismer*, are handed down regularly in the human rights field. For those who want to stay on top of trends and changes, the *Digest* is an invaluable new tool. Please enjoy this issue of the *Digest*, and please stay with us!



Human Rights Digest

is a publication of the Canadian Human Rights Reporter, a non-profit organization established to provide access to human rights law in Canada, primarily through publications and research services of interest to professionals in the human rights, legal, human resources, and related fields, as well as to the general public.

Human Rights Digest provides summaries and digests of recent tribunal and court human rights decisions from all jurisdictions in Canada.

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show that individual assessment was impossible without incurring undue hardship. Some forms of testing were available. The

Superintendent alluded to the cost associated with assessing people with H.H., but offered no precise figures. The Court responded that while in some circumstances excessive cost may justify a refusal, it is too

easy to cite increased cost as a reason for refusing disabled persons equal treatment. Impressionistic evidence of increased expense will not generally suffice.

The Court concluded that the Superintendent erred in this case because he abandoned his reasonable approach to licensing and adopted an absolute standard, which was not supported by convincing evidence. The Superintendent was obliged to give Mr. Grismer the opportunity to prove whether or not he could drive safely, by assessing him individually. His failure to do so was a breach of the B.C. *Human Rights Act*.

“Key Words”

An employer may justify [an] impugned standard by establishing on the balance of probabilities:

- (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
- (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of the legitimate work-related purpose; and
- (3) that the standard is reasonably necessary to the accomplishment of the legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

British Columbia (Public Service Employee Relations Comm.) v. B.C.G.E.U. (1999), 35 C.H.R.R. D/257 at D/275, § 54 (S.C.C.)



British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights) (Dec. 16, 1999) File No. 26481 (S.C.C.) (Eng. 30 pp. / Fr. 33 pp., CHRR Doc. 99-240) [To be reported in 36 C.H.R.R.]

Jurisdiction of Arbitrators Ousted

BOARDS OF ARBITRATION — JURISDICTION — *authority to hear case arising out of collective agreement — court of competent jurisdiction to determine whether contract provision contravenes human rights legislation — application of human rights legislation — order redress* — **TRADE UNIONS** — *arbitration board to determine all issues arising out of collective agreement — collective agreement incorporates discriminatory provision* — **COMPLAINTS** — *requirement to exhaust grievance procedures before filing complaint*

HUMAN RIGHTS — *nature and purpose of human rights legislation* — **INTERPRETATION OF STATUTES** — *case law and legislative intent as aids to interpretation — definition of “administrative procedure for redress”*

Dealing with three joined cases, the Federal Court of Appeal recently ruled that adjudicators appointed under the *Public Service Staff Relations Act* (“PSSRA”) do not have jurisdiction to decide disputes relating to human rights that arise under a collective agreement. Because of the operation of s.

91(1) of the PSSRA, these disputes must be dealt with under the *Canadian Human Rights Act* unless the Canadian Human Rights Commission exercises its discretion to require a complainant to exhaust grievance procedures.

Section 91(1) permits federal government employees to use the grievance process set out in the PSSRA unless there is another “administrative procedure for redress” provided under another Act of Parliament.

In the three cases, employees of the federal government filed grievances alleging breaches of non-discrimination clauses in their collective agreements. Two arbitrators declined jurisdiction because of the operation of s. 91(1). One arbitrator assumed jurisdiction and found that discrimination had occurred. In this latter case, the Attorney General of Canada took no exception to the arbitrator’s assumption of jurisdiction until the judicial review stage. The Federal Court Trial Division quashed the decision of the arbitrator.

The appellants argued that the procedures for resolving labour disputes set out in the collective agreements governing federal employees ought not to be ousted by

s. 91(1) of the PSSRA. If they are, employees are denied rights which they won in collective bargaining and non-discrimination clauses are made valueless because employees are forced to use the *Canadian Human Rights Act* procedures as though those clauses did not exist.

However, the Court rejected this argument. The Court found that s. 91(1) is clear in its intent. If another administrative procedure for redress is available to a grievor, as it is in the human rights area, it must be used, as long as it provides a real remedy. Though this may be a rather complex, costly and time-consuming method of resolving human rights disputes that arise under collective agreements, Parliament has made a clear legislative choice that must be honoured.

The Court dismissed the appeals with costs.



Mohammed v. Canada (Treasury Board) (Dec. 2, 1999) File Nos. A-405-98, A-724-98 and A-56-99 (F.C.A.: Stone, Linden and Seaton J.J.A.) (Eng. 21 pp., CHRR Doc. 00-005) [To be reported in 36 C.H.R.R.]

Discrimination Against Foreign-Trained Doctors

RACE, COLOUR AND PLACE OF ORIGIN — *employment (medical internship) denied on the basis of ancestry — medical internship and medical residency denied on the basis of place of origin — licence to practice medicine denied — definition of place of origin — DISCRIMINATION — Meiorin test — adverse effect discrimination — direct discrimination — definition of discrimination — BURDEN OF PROOF — elements of a prima facie case — EVIDENCE — statistical evidence*

EMPLOYMENT — *employment relationship between doctor and medical licensing board — definition of employment — EMPLOYMENT EVALUATION AND TESTING — licensing as a condition of employment — SYSTEMIC DISCRIMINATION — pattern of conduct discriminatory on the basis of place of origin — definition of systemic discrimination — PUBLIC SERVICES AND FACILITIES — licence to practice medicine denied — definition of public services and facilities — INTERPRETATION OF STATUTES — definition of “occupational association” and “service”*

A British Columbia Human Rights Tribunal has ruled that foreign-trained doctors were discriminated against on the basis of place of origin by a requirement of the College of Physicians and Surgeons of British Columbia that they have an additional year of post-graduate training in order to be eligible for registration.

Under rules in place until 1993, the College had different eligibility requirements for the registration of doctors who were trained in Canada, the U.S., Great Britain, Eire, Australia, New Zealand, or South Africa (Category I) and doctors trained elsewhere (Category II). A graduate of a Category I medical school was required to do a twelve month rotating internship in an approved hospital, or have completed specialty training. A graduate of a Category II medical school was required to complete two years of post-graduate training, one year of which had to be a rotating internship and one year of which had to be in Canada, or have completed specialty training.

Doctors trained in Category II medical schools faced a dilemma. They were required by the College to complete extra training, one year of it in Canada. However, they were also virtually excluded from internship positions in Canada because there were too few internship positions and hospitals preferred to give places to Canadian graduates.

The complainants in this case were all graduates of Category II medical schools who could not satisfy the eligibility requirements of the B.C. College of Physicians and Surgeons. In addition to alleging that the College's Rule 73, which set out the distinction between Category I and Category II doctors, was discriminatory, the complainants also alleged that various B.C. hospitals discriminated against foreign-trained doctors by using a system for the selection of interns that gave a preference to Canadian-trained candidates. Further, they alleged that the B.C. Ministry of Health participated in the discrimination by failing to fund enough internship positions in the province so that foreign-trained doctors could obtain the required internship training.

The B.C. Human Rights Tribunal considered whether the allegation of discrimination against the College of Physicians and Surgeons could be dealt with under s. 3 of the former B.C. *Human Rights Act*, which prohibits discrimination in services offered to the public, or s. 8 which prohibits discrimination in employment, or s. 9 which prohibits discrimination with respect to membership in occupational associations. The Tribunal determined that s. 8 did not apply because few doctors are employed by anyone and consequently it would stretch the meaning of s. 8 beyond the intention of the Legislature to treat membership in the College as a prerequisite for “employment.” The Tribunal also concluded that for the purposes of this case alone, s. 3 was inapplicable because the

service being offered by the College, which is registration and the consequent right to practice medicine in B.C., is indistinguishable from membership in the College. Since membership in occupational associations is dealt with specifically by s. 9 of the *Act*, the Tribunal reasoned that this section was the appropriate focus of its analysis.

Though race and ancestry were pleaded by the complainants as grounds of discrimination in addition to place of origin, the Tribunal found that place of origin was the relevant ground. Place of origin certainly refers to place of birth. Here the Tribunal concluded that a place of birth in a defined set of countries, such as Category II countries, constitutes a place of origin within the meaning of the *Act*. Further, the Tribunal accepted evidence that the correlation between place of origin and place of graduation from medical school is high. The complainants presented a list of College members to show that of those members with Category II places of medical graduation, 97 percent were born in Category II countries. Of those with Category I places of medical graduation, 86.8 percent were born in Category I countries.

The Tribunal ruled that the College of Physicians and Surgeons contravened s. 9 by placing additional requirements for registration on Category II doctors. The College required persons with Category II medical training to complete a year of internship in Canada. This was a requirement that was virtually impossible for them to meet. The result was that physicians seeking registration with the College who trained in Category II countries had a burden imposed on them, because of their place of origin, that was not imposed on those who trained in Category I countries. This additional year of training may have been intended to ensure competence to practice medicine, but was based on the premise that training modelled on a British system resulted in competence, while other training did not. In short, the College did

Foreign-trained doctors faced a dilemma. They were required to complete extra training. However, they were also virtually excluded from internship positions in Canada.

not consider the educational and professional qualifications of individuals in the Category II group.

The Tribunal rejected the College's argument that Rule 73 was reasonably necessary to ensure that foreign-trained doctors had sufficient training to perform competently. While the College established that some distinction between those trained in Category I and Category II countries was justified, because many Category II graduates require pre-internship programs that orient them to the Canadian context in order to perform satisfactorily in internship positions, it did not establish that the onerous and inflexible requirements of Rule 73 were reasonably necessary.

Regarding the complaints against B.C. hospitals, the Tribunal found that the hospitals used a Canada-wide computer matching process for selecting interns.

Once a year internship candidates ranked the internship programs they wanted to enter, and the hospitals ranked the internship candidates based on grades, letters of reference, and sometimes interviews. Internship candidates and hospitals were then matched. The evidence established that foreign medical school graduates were almost always unsuccessful in obtaining internships with the hospitals through the matching process and that preference was given to Canadian graduates. Of 2,537 applications made by Category II graduates to B.C. hospitals from 1988 to 1992, only one was successful.

The Tribunal found that the hospitals made a distinction based on place of origin in the selection of interns. However, the Tribunal determined that there was no discrimination because the advantage that Canadian-trained graduates have is that

the hospitals are in a better position to assess their individual abilities.

Finally, the Tribunal concluded that the B.C. Ministry of Health as the principal funder of internship positions did not discriminate on the basis of place of origin. It placed no stipulation on the funding except that all internships be filled on the basis of merit. In the absence of discriminatory conduct by the Ministry, it was not required to expend funds to remedy the problems faced by foreign-trained graduates.

The Tribunal retained jurisdiction to deal with remedy.



Bitonti v. British Columbia (Ministry of Health) (No. 3) (Dec. 8, 1999) (B.C.C.H.R.: Patch) (Eng. 118 pp., CHRR Doc. 99-241) [To be reported in 36 C.H.R.R.]

Employer Must Initiate Accommodation

DISABILITY — *employment terminated on the basis of voice impairment* — **BONA FIDE OCCUPATIONAL QUALIFICATION** — *absence of voice impairment* — **DISCRIMINATION** — *Meiorin test* — *adverse effect discrimination* — *bona fide justification and job performance as reasonable cause* — **EMPLOYMENT EVALUATION AND TESTING** — *evaluation procedures to determine fitness-for-work* — **REASONABLE ACCOMMODATION** — *duty to accommodate where bona fide qualification exists* — *complainant's duty to accommodate* — *duty to accommodate short of undue hardship* — **BURDEN OF PROOF** — *onus on respondent*

The Canadian Human Rights Tribunal ruled that Rogers Cablesystems Ltd. discriminated against Rita Conte on the ground of disability when it terminated her employment as a consultant at its Burnaby Call Centre. Conte worked for Rogers Cablesystems between 1992 and 1994 and from May to November 1995. Her job required her to talk to customers on the phone for 95 percent of each shift to deal with general inquiries, billings, and new orders and to sell Rogers' products.

During both periods of employment, Conte had problems with her voice and re-

quired time off. Conte experienced hoarseness, sometimes had soreness and pain in her throat, and her doctors discovered that she had nodules on her vocal chords.

Conte's employment as a consultant was terminated in November 1995 because of her voice disability. Rogers did not dispute that she was terminated because of the disability.

In December 1995, after Conte's employment had been terminated and she had been off work for six weeks, her specialist noted that she was still having trouble with her voice and that the combination of vocal nodules, throat clearing, and a tense muscle state in a vocally demanding job had produced a significant voice disability.

The Tribunal found that the job standard requiring consultants to speak on the telephone for 95 percent of their shift time had a discriminatory impact on Conte. The Tribunal accepted that the job standard was adopted in good faith for a purpose related to the performance of the consultants' job. However, Rogers could not establish that the standard was reasonably necessary unless it could show that it had made efforts to accommodate Conte's dis-

ability to the point of undue hardship. The Tribunal found that Rogers did not.

More than mere negligible effort is required of an employer in this circumstance. The employer must initiate the process of accommodation by engaging in an examination of the employee's current medical condition, the prognosis for recovery, and the employee's capabilities for alternative work. Rogers did not investigate either Conte's medical condition and prognosis, or the possibility of alternative work.

Although Conte was not as forthcoming and candid as she should have been about her condition, and her limitations, this did not vitiate Rogers' failure to accommodate her.

The Tribunal upheld the complaint, retaining jurisdiction to deal with remedy at a later date.

More than mere negligible effort is required of an employer.



Conte v. Rogers Cablesystems Ltd. (Nov. 10, 1999) T.D. 4/99 (Can. Trib.: Pensa) (Eng. 24 pp., CHRR Doc. 99-227) [To be reported in 36 C.H.R.R.]

Damages for Poisoned Environment

DAMAGES — *damages assessed for wilful or reckless discrimination — damages awarded against each respondent — general damages — special damages — statutory limit on awards — injury to dignity and self-respect — lost employment opportunity — lost wages — medical expenses — wilful exploitation — survey of the law — LIABILITY — employer liability for supervisor — joint liability — mitigation of effects of discrimination*

REMEDIES — *apology — employment counselling — reinstatement — interview for position openings — letter of reference — human rights complaints procedure to be filed with commission — distribution of decision — survey of the law — EMPLOYMENT — obligation to provide workplace free from discrimination — RETALIATION — employment terminated after filing of human rights complaint*

An Ontario Board of Inquiry awarded remedies, after issuing a decision in 1998 in which it found that Kinark Child and Family Services and its manager, Harry Oswin, had infringed the rights of James Moffatt. In particular, the Board of Inquiry found that Kinark and Oswin had infringed Moffatt's right to be free from discrimination in employment on the basis of his sexual orientation, and had also infringed his right to claim and enforce his rights under the Ontario *Human Rights Code* without reprisal.

Moffatt is a gay man who held a supervisory position with Kinark. Over a five-year period Moffatt was subjected to discriminatory rumours in the workplace. When he asked that the rumours be investigated, his manager, Oswin, failed to take appropriate steps. Moffatt's employment was terminated in a manner that the Board of Inquiry found unfair, but not discriminatory. Subsequent to his termination, however, the Board of Inquiry found that a misleading and inaccurate report of child abuse was made by Oswin to the Children's Aid Society and that this was, in part, an act of reprisal against Moffatt for claiming that his rights were infringed.

The remedial authority of the Board of

Inquiry is set out in s. 41(1) of the Ontario *Human Rights Code*. The Board found that there are several categories of remedies, which may be awarded under this section. Under s. 41(1)(a) a Board of Inquiry can order personal remedies, such as promotion or reinstatement in employment. It can also order public interest remedies, such as the establishment of workplace anti-discrimination remedies. Under s. 41(1)(b), a Board of Inquiry can order monetary compensation for specific losses, such as lost earnings (sometimes referred to as special damages), and compensation for the loss of the right to freedom from discrimination (sometimes referred to as general damages). Also under s. 41(1)(b) a Board can order compensation for mental anguish up to the statutory limit of \$10,000, where the discriminatory conduct has affected the psychological well-being of the complainant, and has been wilful or reckless.

The Commission sought \$100,000 on behalf of Moffatt as compensation for his experience of discrimination and the mental anguish arising from it. The Commission justified this figure by arguing that there should be separate awards against Oswin and Kinark for each of the violations.

The key issues raised by the requested award were: (1) was the Commission seeking double recovery by requesting separate compensation for the poisoned work environment and for the failure to investigate and address it; (2) is there a statutory limit on monetary compensation for the complainant's experience of discrimination, as well as on mental anguish awards; (3) could each respondent be ordered to compensate the complainant in respect of each infringement; and (4) did Kinark's corporate liability support a separate award?

Kinark submitted that the Commission was seeking double recovery by requesting separate awards for the poisoned work environment and for the failure of management to investigate. The Board of Inquiry

considered the decision in *Naraine v. Ford Motor Co. of Canada (No. 5)* (1996), 28 C.H.R.R. D/267 (Ont. Bd.Inq.), which was upheld by the Divisional Court on appeal. In that case, the Board of Inquiry ordered what could be called a "double award" but on a different basis. That award was made on the basis that two different sections of the *Code* were violated. Here only one section of the *Code* was violated.

The Board of Inquiry determined that where there is a finding that a complainant has been subjected to discriminatory working conditions which are not addressed appropriately by management, the infringement of the right to be free from discrimination constitutes one basis for compensation under s. 41(1)(b) not two.

The Commission argued that, notwithstanding the \$10,000 limit on awards for mental anguish, there is no similar limit on compensation for the experience of discrimination. However, the Board of Inquiry found that there is an implied limit of \$10,000 on a monetary award for humiliation, loss of dignity and hurt feelings. Because s. 41(1)(b)

provides that an award of up to \$10,000 can be made only if a complainant has suffered mental anguish, and only if the infringement was wilful and reckless, it would not be consistent to allow unlimited awards for the emotional impact of discrimination that did not cause mental anguish and was not engaged in wilfully or recklessly.

The Commission sought separate awards against each respondent, Kinark and Oswin. The Board of Inquiry ruled that the wording of s. 41(1)(b) supports the interpretation that each party who has infringed a right can be ordered to compensate the complainant. If more than one party has infringed a complainant's right, a Board of Inquiry can order each party to pay an appropriate amount of compensation, including up to \$10,000 for the experience of discrimination, and up to \$10,000 for mental anguish. However, if the liability

The secondary liability of the corporation cannot become a basis for a separate additional award. The liability of the employee flows through to the employer, but it is only one liability.

of one of the respondents arises through the conduct of another person, who may or may not be named as a respondent, other considerations may apply.

The Commission sought against Kinark a maximum award of \$10,000 for general damages and \$10,000 for mental anguish for each infringement. This raised the issue of whether Kinark was liable once, or twice, for the infringements caused by Oswin's conduct.

The Board of Inquiry determined that a corporate respondent can be held liable, or jointly and severally liable, for the discriminatory conduct of an employee. However, the secondary liability of the corporation cannot become a basis for a separate additional award. The liability of the employee flows through to the employer, but it is only one liability.

The Board of Inquiry concluded that the following general principles should be applied in fashioning a monetary remedy under s. 41(1)(b) in this case:

- damages of up to a maximum of \$10,000 can be ordered to compensate a complainant for humiliation and hurt feelings associated with the experience

- of discrimination (general damages);
- a separate award of up to a maximum of \$10,000 can be ordered if the infringement was wilful or reckless and caused mental anguish;
- where there is discriminatory conduct by more than one respondent, monetary compensation can be ordered against each respondent for general damages and for mental anguish;
- where a respondent infringes more than one right, monetary compensation can be ordered in respect of each right;
- a finding of vicarious or corporate liability for the actions of an employee does not support a further separate award.

The Board of Inquiry ordered Kinark Child and Family Services and Harry Oswin, jointly and severally, to pay to James Moffatt \$10,000 as compensation for his experience of sexual orientation discrimination; \$10,000 as compensation for the mental anguish arising from the discrimination; \$6,000 as compensation for the violation of his right to enforce human rights protections without reprisal; \$10,000 for mental anguish arising from the reprisal; compensation for lost earnings from the time of his

dismissal to the commencement of new employment in 1993. Interest was ordered on this award.

In addition, the Board of Inquiry ordered Kinark Child and Family Services to reimburse the complainant for counselling services up to \$5,000; to provide the complainant with appropriate written and oral references; to offer Moffatt an interview for any open supervisory position with Kinark for a period of two years; to circulate a copy of the decision of the Board of Inquiry to all staff; and to develop and implement an internal human rights complaint procedure. Finally, the Board of Inquiry required Kinark to negotiate with Moffatt a mutually satisfactory employment contract, and retained jurisdiction to deal with this last issue if it should be necessary.



Moffatt v. Kinark Child and Family Services (No. 5) (Nov. 2, 1999) Dec. No. 99-015 (Ont. Bd. Inq.: Laird) (Eng. 91 pp., CHRR Doc. 99-225) [To be reported in 36 C.H.R.R.]

Damages for Tenancy Discrimination

DAMAGES — *damages assessed for rent differential and moving expenses — damages awarded to party with no standing — general damages — special damages — compensation for injury to dignity and self-respect — duty to mitigate*

In a decision on remedy alone, a Nova Scotia Board of Inquiry awarded a total of \$12,558.87 to John Christie to compensate him for being evicted from his apartment in a student housing complex because he was living with a woman to whom he was not married.

John Christie was a Ph.D student at Dalhousie University in Halifax. In 1994 he rented an apartment for himself and his young son in Peter Green Hall, a "family-oriented" facility run by and for students to provide affordable housing. In 1997 Christie and a fellow student, Donna D., agreed to marry and she moved into Christie's apartment. Donna was in the process of getting a divorce and the two

planned to marry as soon as her divorce was finalized. A couple of months after Donna moved in, Christie was evicted by the Student Housing Association because of a rule, which prohibited unmarried adults from living together.

The Student Housing Society conceded that discrimination had occurred, permitting the Board of Inquiry to deal with the sole issue of remedy. The Board of Inquiry awarded Christie \$1,500 as compensation for damage to feelings and self-respect. It also awarded him compensation in the amount of \$11,058.87 for the additional expense he incurred because he had to move and pay for alternative, more costly accommodation.

The Board of Inquiry found that it could have awarded damages to Christie's partner, Donna D., since s. 34(8) of the Nova Scotia *Human Rights Act* empowers a Board of Inquiry to order any party "to rectify any injury caused to any person or to make compensation therefor." This lan-

guage would permit the Board of Inquiry to make an award to Donna D. though she was not a party to the complaint. However, the Board of Inquiry declined to make such an award, since no evidence was presented regarding the impact of the discrimination on Donna D.



Christie v. Halifax Student Housing Society (Nov. 1, 1999) (N.S. Bd. Inq.: Wood) (Eng. 5 pp., CHRR Doc. 99-243) [To be reported in 36 C.H.R.R.]

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Charter Issue Remitted to Tribunal

JURISDICTION — *authority to determine whether provision contravenes the Charter* — **BOARDS OF INQUIRY / TRIBUNALS** — *authority to rule on Charter issue — decision subject to appeal only if final* — **COURTS** — **ADMINISTRATIVE TRIBUNALS** — *standard of review of court over administrative tribunals — authority of court to remit matter back to board/tribunal* — **INTERPRETATION OF STATUTES** — *definition of "final order"*

Responding to an application by the Attorney General of British Columbia, the B.C. Supreme Court remitted constitutional issues that arose in the context of a complaint filed by Harry Abrams against Doug Collins and the *North Shore News* to the B.C. Human Rights Tribunal for hearing.

Prior to the hearing of this complaint, Collins successfully applied to have the issue of the constitutionality of the hate messages section of the B.C. *Human Rights Code*, s. 7(1)(b), severed from the issue of whether there was a violation of that section in this case.

In February 1999 the B.C. Human Rights Tribunal ruled that Doug Collins and *North Shore News* had violated the *Code* by publishing articles that were likely to expose Jewish people to hatred and contempt. Collins and the *North Shore News* were ordered to pay Abrams \$2,000 and to publish a summary of the Tribunal's judgment (reported 33 C.H.R.R. D/435). The *North Shore News* complied with this order.

After this ruling, Collins applied for judicial review, seeking to quash the Tribunal's order on the grounds that it violated the freedom of expression guarantee in s. 2(b) of the *Charter*; that s. 7(1)(b) itself violates s. 2(b) of the *Charter*; that s. 7(1)(b) is *ultra vires* the power of the province; and that the *Code* establishes a Tribunal which is neither independent nor impartial, and this lack of institutional independence creates a reasonable apprehension of bias.

The Attorney General of B.C. then applied for an order to strike out parts of Collins' application for judicial review on the grounds that they disclosed no reason-

able claim, and for an order remitting the matter back to the Tribunal.

The B.C. Supreme Court found that the order of the Tribunal was not a final order, since the Tribunal had not completed its work. Consequently, Mr. Collins' application for a review of the validity of the order was premature. The Tribunal has the power to determine the constitutionality of its enabling legislation, and though the Court can also make this determination, in this case there will need to be a full hearing of the evidence relating to the constitutionality of s. 7(1)(b). The Court concluded that the Tribunal was in a better position to conduct this hearing.

The issue of the constitutional validity of s. 7(1)(b) of the *Code* and the questions of institutional bias were remitted to the Tribunal.



Collins v. Abrams (Dec. 2, 1999) (B.C.S.C.: Quijano J.) 99/1644 (Victoria) (Eng. 11 pp., CHRR Doc. 99-239) [To be reported in 36 C.H.R.R.]

Right to Witness Statements

HUMAN RIGHTS COMMISSIONS — *human rights commission's refusal to supply information from investigator's report — fairness in investigation of complaint* — **PRODUCTION OF DOCUMENTS** — *investigation file* — **SETTLEMENT** — *definition of settlement* — **PROCEDURE** — *procedural fairness* — **NATURAL JUSTICE** — *right to a fair hearing* — **INTERPRETATION OF STATUTES** — *"attempt to settle the complaint"*

The respondents in this case made a preliminary application to the Board of Inquiry for a stay of proceedings on the grounds that the Saskatchewan Human Rights Commission

statements and related evidence that would permit settlement discussions to take place.

The Board concluded that settlement negotiations were not a determination of the rights of the respondents against whom the complaint was made.

The respondents contended that realistic discussion of settlement could only take place if the Commission disclosed its full case, including witness statements. They argued that the purpose of settlement discussions was to reveal the strengths and weaknesses of the positions of the parties. By refusing to disclose the documentation, the Commission barred the respondent from entering into this critical evaluation.

The Commission argued, in reply, that it had no obligation to disclose witness statements and other evidence until a final determination to refer a complaint to hearing

was made. Under *The Saskatchewan Human Rights Code* such a determination can only be made after settlement efforts have been made and have failed.

The Board concluded that settlement negotiations were not a determination of the rights of the respondents against whom the complaint was made, and consequently full disclosure at this stage was not required as a matter of fairness.

The Board found further that if the duty of fairness did apply at this stage, the Commission had fulfilled that duty by disclosing the substance of the case against the respondents.

The application was dismissed.



Sabo v. Mullen (Nov. 12, 1999) (Sask. Bd. Inq.: Silversides) (Eng. 15 pp., CHRR Doc. 99-253) [To be reported in 36 C.H.R.R.]

Delay Justifies Dismissal

COMPLAINTS — *dismissal of complaint* — *timeliness in filing complaint* — *requirement to exhaust grievance procedures* — **HUMAN RIGHTS COMMISSIONS** — *discretion to dismiss complaint* — **INTERPRETATION OF STATUTES** — *definition of "good faith"* — **ADMINISTRATIVE TRIBUNALS** — **COURTS** — *judicial review of court over administrative tribunals* — **APPEALS AND JUDICIAL REVIEW** — *judicial review of human rights commission's decision to dismiss complaint*

The B.C. Supreme Court upheld the decision of the B.C. Human Rights Commission to dismiss a complaint because it was filed more than one year after the alleged discrimination occurred.

In 1995 George Brent Riches was dismissed from his job as a Corrections Officer because he engaged in personal harassment and sexual harassment. He grieved his dismissal unsuccessfully and subsequently in 1997 he filed a human rights complaint alleging that his employer had

discriminated against him because of an illness, namely an underlying endogenous depression that affected his speech and behaviour.

The Commissioner of Investigation and Mediation ("CIM") of the B.C. Human Rights Commission dismissed the complaint without investigation on two grounds: (1) that the delay in filing the human rights complaint was not incurred in good faith because of the delay between May 1997, when Riches learned that arbitration proceedings were at an end, and December 1997, when Riches filed the complaint; and (2) that the substance of the complaint was appropriately dealt with through the arbitration proceeding because the arbitrator concluded on the evidence that Riches' illness "did not cause him to speak and behave the way he did."

The Court found that the question of whether delay was incurred in good faith is a question of mixed fact and law. The question of law is whether the decision maker is

to apply a subjective or an objective test to determine whether there was good faith.

The Court determined that an objective test should be applied and that the CIM did so. Regarding the facts, the reasoning of the CIM had foundation and was logically coherent. The Court found no reason to overturn the decision.

Having found that the CIM's decision to dismiss on the ground of lack of timeliness was justifiable, the Court declined to review the decision on other grounds.

The application was dismissed.

The delay in filing the human rights complaint was not incurred in good faith.



Riches v. British Columbia (Council of Human Rights) (Nov. 2, 1999) 21084 (Nanaimo) (B.C.S.C.: Downs J.) (Eng. 15 pp., CHRR Doc. 99-228) [To be reported in 36 C.H.R.R.]

Tribunal Cannot Hear Dismissed Complaint

BOARDS OF INQUIRY / TRIBUNALS — *authority to review human rights commission's decision to appoint board/tribunal* — *authority to inquire into limits of its own jurisdiction* — *authority to discontinue proceedings* — **JURISDICTION** — *jurisdiction to hear complaint dismissed by human rights commission* — **HUMAN RIGHTS COMMISSIONS** — *authority to reconsider decision to appoint tribunal* — **INTERPRETATION OF STATUTES** — *legislative intent* — *definition of "final"* — *amendment*

The B.C. Human Rights Tribunal ruled that it had no jurisdiction to hear a complaint because the Commissioner of Investigations and Mediation ("CIM") of the B.C. Human Rights Commission had dismissed it.

Valerie Hunter filed a complaint in 1998 against the Ministry of Health. She alleged that the Ministry discriminated against her

on the basis of her marital status and family status by refusing to permit her to hire her husband as her caregiver.

The complaint was dismissed pursuant to s. 27(1)(b) of the B.C. Human Rights Code in October 1998 by a delegate of the CIM. The CIM's delegate reasoned that the policy to prohibit family members from being paid caregivers was not discriminatory because it applied to all clients regardless of their marital status or family status.

In February 1999, after Hunter disputed the decision to dismiss the complaint, another delegate of the CIM revoked the decision and assigned a human rights officer to investigate. In August 1999, the complaint was referred to the Tribunal for hearing.

The Ministry of Health requested the Tribunal to acknowledge that it had no jurisdiction over the complaint because it was dismissed by the CIM.

Two issues arose here: (1) did the Tribunal have jurisdiction to consider this application; and (2) did the Tribunal have jurisdiction over the complaint?

The Deputy Chief Commissioner of the B.C. Human Rights Commission argued that only a court could consider this application because it required reviewing a decision of the CIM, and the

Tribunal has no supervisory or appellate jurisdiction over the CIM. The Tribunal rejected this argument. It found that, although the courts can also deal with issues regarding the jurisdiction of the Tribunal,

The Tribunal has no jurisdiction to proceed with the complaint because it was dismissed by the Commission.

the Tribunal itself has the authority to consider whether it can properly proceed with a complaint.

On the second question, the Deputy Chief Commissioner and the complainant argued that the Tribunal did have jurisdiction to hear the complaint because the CIM was permitted to reconsider a decision, and had done so in this case. However, the Tri-

bunal found that the decision of the CIM was made under s. 27(1) of the Code and s. 28 provides that such decisions are final. Not just the Commission, but the Tribunal is bound by s. 28, which states that after a decision to dismiss "no further proceedings may be taken under this Code."

The Ministry's application was granted. The Tribunal ordered that proceedings be-

fore the Tribunal with respect to this complaint be discontinued.



Hunter v. British Columbia (Attorney General) (Dec. 21, 1999) (B.C.Trib.: Iyer) (Eng. 17 pp., CHRR Doc. 99-254) [To be reported in 36 C.H.R.R.]

Respondent's Counsel Barred from Interview

HUMAN RIGHTS COMMISSIONS — *authority to interview witnesses — fairness in investigation of complaint* — **COUNSEL** — *bar counsel from interview of witness by human rights commission* — **EVIDENCE** — *refusal by witness to be interviewed without counsel* — **HUMAN RIGHTS** — *nature and purpose of human rights legislation*

The Nova Scotia Human Rights Commission applied to the Nova Scotia Supreme Court for an order requiring Ian MacDonald, a witness in a human rights complaint, to be interviewed without the respondent's legal counsel present. The Commission also applied for a declaration of the court that legal counsel for any party to a complaint brought under the Nova Scotia *Human Rights Act* may not be present during interviews of witnesses conducted by the Nova Scotia Human Rights Commission.

In March 1995 Archibald Kaiser filed a complaint alleging that he was discriminated against by the Government of Nova Scotia with respect to employment because of his political belief or affiliation. Ian MacDonald was a potential witness to the complaint of Kaiser. When he was contacted by the Commission with a view to arranging an interview, MacDonald indicated that he was unwilling to be interviewed without the presence of Randall Duplak, solicitor for the respondent in this proceeding. Mac-

Donald did not claim that Duplak was his counsel, but stated that he wished to have Duplak present to provide "support and assistance." The position of the Commission was that MacDonald was entitled to have counsel present, but not counsel representing a party to the complaint.

Section 30 of the Nova Scotia *Human Rights Act* provides that the Commission may require any person to furnish information or records that may be necessary for an investigation, and s. 31(1) permits the Commission to make an application to the Supreme Court for an order directing that information or records be furnished where any person refuses to do so. The respondent argued that the court could not provide the remedy requested because MacDonald did not refuse to furnish information. The Commission could not demand that an individual be interviewed. Information could be furnished by letter or in answer to interrogatories.

However, the Court rejected these arguments, finding it "inconceivable" that the legislature intended a witness to dictate the procedures the Commission must follow in order to obtain information. The manner in which information is to be furnished is for

the Commission to decide. To suggest that a witness could simply write out a statement or answer programmed inquiries does not take account of the Commission's need to be thorough in its inquiries.

The Court found that Ian MacDonald's refusal to attend an interview unless Randall Duplak was present amounted to a refusal to furnish information under s. 31(1). An order can issue for Ian MacDonald to attend an interview, with the right to bring counsel who is completely independent of the issues in the proceeding.

With respect to the requested declaration, the Court found that it was not necessary since the Court had determined that the Commission can adopt its own procedure for investigating complaints.

The Court found it "inconceivable" that the legislature intended a witness to dictate the procedures the Commission must follow in order to obtain information.



Nova Scotia (Human Rights Comm.) v. MacDonald (Nov. 26, 1999) (N.S.S.C.: Davison J.) (Eng. 6 pp., CHRR Doc. 99-244) [To be reported in 36 C.H.R.R.]

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Briefly Noted

FEDERAL

Tahmourpour v. M.N.R. / F.C.A.: Robertson, Rothstein and McDonald JJ.A. / A-601-98

APPEALS AND JUDICIAL REVIEW / Appeal of decision (1998), C.H.R.R. NP/98-188 (F.C.T.D.) upholding Canadian Human Rights Commission decision to dismiss complaint of discrimination in employment on the basis of national or ethnic origin. Dismissed: Nov. 29, 1999.
(Eng. 4 pp., CHRR Doc. 00-004)

BRITISH COLUMBIA

Hussey v. British Columbia (Ministry of Transportation and Highways) / B.C.Trib.: Patch

DISABILITY — PUBLIC SERVICES AND FACILITIES / Decision regarding complaint of discrimination in the provision of services on the basis of disability (Class 4 driver's licence refused to hearing impaired individual). Allowed: Dec. 3, 1999.
(Eng. 26 pp., CHRR Doc. 99-242)

Lavigne v. BMC Enterprises Ltd. / B.C.Trib.: Iyer

PREGNANCY / Decision regarding complaint of discrimination in employment on the basis of pregnancy. Dismissed: Nov. 3, 1999.
(Eng. 13 pp., CHRR Doc. 99-230)

NOVA SCOTIA

Redden v. Saberi / N.S. Bd.Inq.: Girard

PREGNANCY — COMPLAINTS / Decision regarding complaint of discrimination in employment on the basis of pregnancy. Complaint allowed (motion regarding delay was dismissed): Nov. 22, 1999.
(Eng. 11 pp., CHRR Doc. 99-245)

ONTARIO

Eldridge v. 2887126 Canada Ltd. / Ont. Bd.Inq.: Laird / 99-016

PROCEDURE — PARTIES / Interim decision on a motion by the Ontario Human Rights Commission seeking a declaration that effective service was made to specific respondents. Allowed in part: Nov. 26, 1999.
(Eng. 7 pp., CHRR Doc. 99-233)

QUÉBEC

Fredette c. Société des Loteries et Courses du Québec / Trib.Qué.: Brossard J. et les assesseurs Bernstein et Savoie / 500-53-000118-990 (Montréal)

JURISDICTION / Requête en irrecevabilité concernant la compétence du Tribunal. Accueillie : 9 déc. 1999.
(Fr. 6 pp., CHRR Doc. 00-001)

Hyland c. Société des Casinos du Québec Inc. / Trib.Qué.: Brossard J. et les assesseurs Hyppolite et Gendreau / 500-53-000114-999 (Montréal)

JURISDICTION / Requête de la défenderesse en exception déclinatoire et en irrecevabilité et pour être relevée du défaut et suspendre le délai de production de son mémoire. Le Tribunal, s'appuyant sur un jugement de la Cour d'appel du Québec, l'affaire *Ménard c. Rivet*, CHRR Doc. 99-057, énonce qu'il décline sa compétence dans le présent dossier. Accueillie : 22 nov. 1999.

(Fr. 5 pp., CHRR Doc. 99-249)

Pacquette c. Montréal, Comm. scolaire / Trib.Qué.: Brossard J. et les assesseurs Savoie et Schabas / 500-53-000116-994 (Montréal)

JURISDICTION / Requête verbale en irrecevabilité concernant la compétence du Tribunal. Accueillie : 10 déc. 1999.

(Fr. 5 pp., CHRR Doc. 00-002)

Québec (Comm. des droits de la personne et des droits de la jeunesse) c. Candiac (Ville) / Trib.Qué.: Rivet J. et les assesseurs Gendreau et LeComte / 505-53-000001-997 (Longueuil)

JURISDICTION / Requête en exception déclinatoire et en irrecevabilité concernant la compétence du Tribunal à entendre une plainte de discrimination fondée sur l'orientation sexuelle parce que le Tribunal ne possède pas la compétence de se prononcer sur la validité d'une disposition législative en regard de la Charte. Rejetée : 8 nov. 1999.

(Fr. 18 pp., CHRR Doc. 99-247)

Québec (Comm. des droits de la personne et des droits de la jeunesse) c. Montréal (Communauté urbaine) (N° 1) / Trib.Qué.: Brossard J. / 500-53-000119-998 (Montréal)

PARTIES / Requête intérimaire pour faire interdire la divulgation, la publication et la diffusion du nom et d'autres renseignements concernant le plaignant. Accueillie : 9 nov. 1999.

(Fr. 3 pp., CHRR Doc. 99-248)

Québec (Comm. des droits de la personne et des droits de la jeunesse) c. Montréal (Communauté urbaine) (N° 2) / Trib.Qué.: Brossard J. / 500-53-000119-998 (Montréal)

PARTIES / Requête pour faire interdire la divulgation, la publication et la diffusion du nom et d'autres renseignements concernant le plaignant. Accueillie : 2 déc. 1999.

(Fr. 4 pp., CHRR Doc. 99-251)

Québec (Comm. des droits de la personne et des droits de la jeunesse) c. Samares, Comm. scolaire / Trib.Qué.: Rivet J. et les assesseurs Bernstein et Demers / 705-53-000010-994 (Joliette)

JURISDICTION / Requête en irrecevabilité concernant la compétence du Tribunal pour entendre le litige quant aux conclusions recherchées par la Commission sur un programme d'accès à l'égalité. Rejetée : 29 nov. 1999.

(Fr. 19 pp., CHRR Doc. 99-250)

Legislative Notes

BRITISH COLUMBIA

Tribunal's Rule-Making Ability Expanded

The *Human Rights Code*, R.S.B.C. 1996, c. 210 has been amended to expand the ability of the Human Rights Tribunal to make rules to assist in the resolution of complaints. The new rules allow the creation of a new case management system providing more options for pre-hearing intervention. Changes were also made to the rules for disclosure of documents.

ONTARIO

Protection for Same-Sex Partnerships Added

Effective November 1999, same-sex partnership status was added as a protected ground in the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, as amended by S.O. 1999, c. 6, s. 28.

QUEBEC

Changes to Quebec *Charter*

S.Q. 1999, c. 40, s. 47 enacted changes to harmonize the *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12 with the *Civil Code*.

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