Human Rights Digest

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SCC Finds Prayer in Municipal Council Discriminatory

RELIGION AND CREED — municipal by-law regarding recitation of Lord's prayer and religious symbols at a town hall — conflict between religious beliefs and other freedoms — non-belief — PUBLIC SERVICES AND FACILITIES — discriminatory treatment by municipal government — public meeting — town hall — FUNDAMENTAL FREEDOMS — balance between freedom of religion and other fundamental freedoms — CANADIAN CHARTER OF RIGHTS AND FREEDOMS — s. 2(a) (freedom of conscience and religion)

APPEALS AND JUDICIAL REVIEW — error of law in determining standard of review and in interpreting evidence — ADMINISTRATIVE TRIBUNALS — COURTS — standard of review of court over administrative tribunals — INTERPRETATION OF STATUTES — case law and legal text or treatise as aids to interpretation — HUMAN RIGHTS — principles used to interpret the *Charter* applied to human rights legislation — EVIDENCE — expert evidence — DAMAGES — moral damages — punitive damages — REMEDIES — declaration that municipal by-law is invalid — cease discriminatory practice

The Supreme Court of Canada ruled that the recitation of a prayer at City Council meetings in Saguenay, Quebec breaches the State's duty of neutrality. The Supreme Court considered an appeal by Mouvement laïque québécois from the Quebec Court of Appeal's decision (76 C.H.R.R. D/430) in this case. The Quebec Court of Appeal ruled that the Quebec Human Rights Tribunal (CHRR Doc. 11-3009) erred when it found that the recitation of the prayer breached the exercise of freedom of conscience and religion. The Supreme Court of Canada allowed the appeal.

The Supreme Court of Canada held that the opening prayer at Council meetings is contrary to the requirements of the Quebec *Charter of Human Rights and Freedoms* which prohibits discrimination in the provision of public services and protects freedom of conscience and religion in ss. 3 and 10.

The appellants are Alain Simoneau, an atheist, and Mouvement laïque québécois. The respondents are the City of Saguenay and the Mayor.

The complaint concerned the Mayor of Saguenay's practice of reciting a prayer at the start of Council meetings, after making the sign of the cross while saying "In the name of the Father, the Son and the Holy Spirit". Other Councillors and Officers would also cross themselves at the beginning of the prayer.

There were two versions of the prayer. Between 2002 and November 2008 the prayer was:

> O God, eternal and almighty, from Whom all power and wisdom flow, we are assembled here in Your presence to ensure the good of our city and its prosperity.
>
> We beseech You to grant us the enlightenment and energy necessary for our deliberations to promote the honour and glory of Your holy name and the spiritual and material well-being of our city. Amen.

A subsequent version of the prayer, adopted by by-law on November 3, 2008, was:

> Almighty God, we thank You for the great blessings that You have given to Saguenay and its citizens, including freedom, opportunities for development and peace. Guide us in our deliberations as City Council members and help us to be aware of our duties and responsibilities. Grant us the wisdom, knowledge and understanding to allow us to preserve the benefits enjoyed by our City for all to enjoy and so that we may make wise decisions. Amen.

The complaint also concerned religious symbols that were present in the Council chamber: a Sacred Heart statue with a red votive electric light, and a crucifix hanging on the wall.

The Supreme Court of Canada found that the Court of Appeal erred with respect to the standard of review. The Court of Appeal applied two different standards – standards for judicial review and standards applicable to appeals. The Human Rights Tribunal is a specialized administrative tribunal, not a court. Therefore, administrative law principles apply to the Tribunal's decision, namely reasonableness and correctness. To the extent that the Court of Appeal applied appellate standards of palpable and overriding error, the Court of Appeal erred.

> *Neutrality requires that the State must neither encourage nor discourage any form of religious conviction whatsoever.*

Also, to the extent that the Court of Appeal applied standards for judicial review, it erred by holding the Tribunal to a correctness standard on issues concerning which the Tribunal is entitled to deference. The standard that should have been applied to determining the scope of the state's duty of religious neutrality was correctness. However, the Court of Appeal erred by applying the standard of correctness to other issues. The Tribunal was entitled to deference, for example, with regard to the determination of whether the prayer was religious in nature, the extent to which the prayer interfered with

the complainant's freedom, and whether it was discriminatory. The Tribunal was also entitled to deference with regard to qualification of experts and assessment of evidence. The only requirements for those determinations that fall squarely within the Tribunal's expertise are that the reasoning be transparent and intelligible, and that the conclusions fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

The Court found that the Tribunal did not have jurisdiction to rule on the symbols – the Sacred Heart and the crucifix – as such, because the Commission had declined to investigate the complaint regarding the symbols. However, the symbols could be considered as part of the context for determining whether the prayer was religious or discriminatory.

With regard to the prayer, the Court found that sponsorship of one religious tradition by the State is a breach of the State's duty of neutrality and amounted to discrimination.

The Court held that freedom of conscience and religion in the Quebec *Charter*, which must be interpreted in light of s. 2 of the *Canadian Charter of Rights and Freedoms*, protects both religious beliefs and the freedom not to believe. The duty of State neutrality results from an evolving interpretation of freedom of conscience and religion.

Neutrality requires that the State neither favour nor hinder any particular belief, including non-belief. Neutrality is required of institutions and the State, not of individuals. It is part of the democratic imperative to encourage everyone to participate freely in public life regardless of their beliefs. The Supreme Court of Canada disagreed with the Court of Appeal's view that the State can engage in "benevolent neutrality". The Court found, on the contrary, that neutrality requires that the State must neither encourage nor discourage any form of religious conviction whatsoever.

What Was Said…

"With respect, what is in issue here is not complete secularity, but true neutrality on the state's part and the discrimination that results from a violation of that neutrality. In this regard … I do not think that the state's duty to remain neutral on questions relating to religion can be reconciled with a benevolence that would allow it to adhere to a religious belief. State neutrality means … that the State must neither encourage nor discourage any form of religious conviction whatsoever. If the state adheres to a form of religious expression under the guise of cultural or historical reality or heritage, it breaches its duty of neutrality. If that religious expression also creates a distinction, exclusion or preference that has the effect of nullifying or impairing the right to full and equal recognition and exercise of freedom of conscience and religion, there is discrimination."

Mouvement laïque québécois v. Saguenay (Ville) (Apr. 15, 2015), 2015 SCC 16, CHRR Doc. 15-3037 at para. 78 (Gascon J.)

It will always be essential to review the circumstances carefully to determine whether a challenged practice is religious and whether it impairs religious freedom. In this case, the prayer was a practice of a religious nature. This conclusion was supported by various contextual factors: the prayer was clearly identified with Catholicism; both wordings constituted an invocation to God; and the by-law expressly provided for a period before the official opening of the meeting to enable those who did not wish to attend the recitation of the prayer to leave the Council chamber. The by-law served to highlight the exclusive effect of the prayer and accentuated its religious nature. The ritual behaviour of the Mayor and Councillors surrounding the recitation revealed its true religious nature.

There was also expert opinion concerning the religious nature and the discriminatory effect of the prayer which the Tribunal was entitled to take into account.

The Court conceded that neutrality does not require the State to abstain from celebrating its religious heritage. But the recitation of the prayer was not the simple expression of a tradition. It was a practice by which the State actively, and with full knowledge of what it was doing, professed a theistic position.

The Court found that the recitation of the prayer impaired Mr. Simoneau's right to full and equal exercise of freedom of conscience and religion. Although non-believers could participate in municipal democracy, the price for doing so was isolation, exclusion and stigmatization, which Mr. Simoneau, as a non-believer, experienced.

Non-belief and neutrality are different. True neutrality presupposes abstention by the State. It does not amount to taking a stand in favour of atheism or agnosticism. The issue is separation of Church and State. The purpose of neutrality is to ensure that the State is, and appears to be, open to all points of view, regardless of spirituality. The reference to the supremacy of God in the *Canadian Charter of Rights and Freedoms* does not grant privileged status to theistic religious practices.

The Court confirmed the Tribunal's declaration that the

Saguenay by-law is invalid, confirmed the Tribunal's order that the respondents cease the recitation of the prayer, and found that the Tribunal's orders with regard to compensation were reasonable.

In a concurring judgment, Justice Abella wrote that the standard of reasonableness should have been applied as the sole standard of review for all the issues in the appeal, bearing in mind that legislatures have assigned issues of discrimination to specialized tribunals, not courts.

Mouvement laïque québécois v. Saguenay (Ville) (Apr. 15, 2015), 2015 SCC 16, CHRR Doc. 15-3037 (Gascon J.)

Tribunal Ruling Against Street Homeless People Overturned

APPEALS AND JUDICIAL REVIEW — error of law in determining whether there was a *prima facie* case — CANADIAN CHARTER OF RIGHTS AND FREEDOMS — s. 15(1) (equality) — EQUALITY — relationship between equality under human rights legislation and equality under the *Charter* — HUMAN RIGHTS — nature and purpose of human rights legislation — principles used to interpret the *Charter* applied to human rights legislation

SOCIAL CONDITION — harassment on the basis of poverty — ABORIGINAL PEOPLES — discriminatory provision of public services — discrimination based on stereotype — DISABILITY — discriminatory treatment of the disabled — stereotype — RACE, COLOUR AND PLACE OF ORIGIN — discriminatory provision of public services — stereotype

ADMINISTRATIVE TRIBUNALS — COURTS — standard of review of court over administrative tribunals — PUBLIC SERVICES AND FACILITIES — public space — discriminatory treatment by security personnel — BURDEN OF PROOF — elements of a *prima facie* case — DISCRIMINATION — adverse effect discrimination — *Meiorin* test — EVIDENCE — statistical evidence — REMEDIES — referral to tribunal for reconsideration

The B.C. Supreme Court overturned a decision of the B.C. Human Rights Tribunal (73 C.H.R.R. D/376), which held that the Pivot Legal Society ("Pivot") failed to establish a *prima facie* case of discrimination in a complaint filed against the Downtown Vancouver Business Improvement Association ("DVBIA").

Pivot filed a complaint on behalf of a class of persons "who are or appear to be street homeless and/or drug addicted and engaged in rough sleeping, sitting or lying down in public spaces, panhandling, vending, begging or binning, or other behaviours related to those personal circumstances, within the geographical jurisdiction of the DVBIA". Pivot alleged that the DVBIA Downtown Ambassadors Program ("Program") discriminated against this class of persons on the basis of race, colour, ancestry, and mental or physical disability by "removing" them from places that were public property, or facilities customarily available to the public, because they were considered undesirable.

The DVBIA contracts the services of the Program from a security company. The Program was partially paid for by the City of Vancouver. The Ambassadors, who wear an identifiable uniform, patrol in the downtown Vancouver area. They have no authority to enforce the law, but they regularly "remove" people by talking to them, waking them if they are sleeping, informing them of any law that they appear to be breaking, and encouraging them to move on. Ambassadors call the police if they decide that it is warranted.

The Ambassadors keep a database that includes entries for all encounters, with time and place, type of encounter, and result. Information from this database was provided to Pivot so that it could analyze the information regarding the Ambassadors' activities. No direct testimony from members of the class who had been "removed" by Ambassadors was presented.

The Tribunal concluded that Pivot did not make out a *prima facie* case of discrimination. The complainant was required to show evidence of practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of their membership in one or more protected groups. Pivot needed to show that the members of the class belong to a protected group; that they have experienced adverse treatment; and that there is a connection or link between the adverse treatment and the protected grounds.

> *It would be insensitive to the underlying social context of this case to conclude that the claim failed because street homeless people were unavailable to testify.*

The Tribunal accepted evidence that among the home-

less and street people, Aboriginal persons are over-represented, as are persons with addictions and mental or physical disabilities. The Tribunal concluded that members of the class belong to groups protected by the *Code*, and that these groups are disproportionately represented among the street homeless.

The Tribunal accepted that public parks, sidewalks and alleys are facilities customarily available to the public within the meaning of s. 8 of the *Code*. The Tribunal also found that being asked to leave a public park or other area customarily available to the public constitutes adverse treatment. Such requests, in and of themselves, communicate, in part, that the individual is socially undesirable. In addition, where the individual actually leaves the area, there is a loss of use and enjoyment of public space, which also constitutes adverse impact.

Despite these findings, the Tribunal concluded that, in the absence of testimony from members of the class, Pivot did not show the connection or link between the adverse treatment and membership in the class. Pivot established that the Ambassadors' actions are targeted to the homeless population, which is disproportionately composed of members of protected groups, and that some of these actions have adverse effects. However, the Tribunal ruled that Pivot did not establish that the Ambassadors' actions have an adverse effect in practice. According to the Tribunal, there was no actual evidence of a negative outcome or impact.

The B.C. Supreme Court found that the Tribunal erred at the third step in the analysis of the test for a *prima facie* case. The B.C. Supreme Court noted that in *Moore v. British Columbia (Education)* (75 C.H.R.R. D/369), the Supreme Court of Canada stated that the third step of the *prima facie* test requires that "the protected characteristic was a factor in the adverse impact". The Tribunal erred by requiring that there be evidence that there is a greater effect on the protected class, not simply because they make up a great proportion of a group, but because they are treated or affected differently.

The B.C. Supreme Court concluded that at the third step, the Tribunal narrowed the analysis to only those persons affected by the Program. The Tribunal then required evidence that members of the group who were protected by *Code* grounds were affected more adversely or differently than those who were not, rather than focusing on the difference in treatment between the affected group and all members of the public who have unrestricted use and access to public space in downtown Vancouver.

The evidence that satisfied the first two steps in the *prima facie* test, namely, that the affected group was protected by the grounds in the *Code*, and that the actions of removal by the Ambassadors had an adverse effect on the group, was sufficient to prove the third step. No additional evidence was needed.

The Tribunal erred in two ways: by making the third step too onerous, and by concluding that there was no evidence to meet it.

The Court ruled that a *prima facie* case of discrimination was established. The case was remitted to the Tribunal for consideration of whether there is a *bona fide* justification for the discriminatory conduct of the Program.

Vancouver Area Network of Drug Users v. British Columbia (Human Rights Tribunal) (Apr. 10, 2015), 2015 BCSC 534, CHRR Doc. 15-3031 (Sharma J.)

Filipino Domestic Worker Was "Virtual Slave"

SEXUAL HARASSMENT — sexual harassment of caregiver — sexual assault by employer — verbal abuse and denigration — poisoned work environment — stereotype — definition of sexual harassment — RACE, COLOUR AND PLACE OF ORIGIN — harassment based on place of origin — stereotype — FAMILY STATUS — discriminatory treatment in employment for mother — stereotype

DISCRIMINATION — multiple grounds — RETALIATION — intimidation after filing human rights complaint, — EVIDENCE — expert evidence — DAMAGES — damages assessed for injury to dignity and self-respect, sexual harassment and wages — overtime pay — determining quantum by considering previous awards

The B.C. Human Rights Tribunal ruled that FR and MR discriminated against PN by sexually assaulting her and harassing her, and discriminating against her because of her sex, race, place of origin and family status.

PN is a mother of two children. She was 28 years old at the time of these events. She is from the Philippines, and her children live there. She was hired through an agency to work in the respondents' home in Hong Kong as a housekeeper and caregiver for the respondents' two children. She worked for the respondents in Hong Kong for about one year. She came with the respondents when they moved to Canada and worked for them in Richmond. She had been in Canada for about six weeks when she fled the respondents' home, which at the time was a two-bedroom suite in a hotel. She alleged that for much of her employment she was the victim of ongoing sexual assault by FR and harassment, including assault,

by his wife, MR.

PN had to borrow money to pay for her travel from the Philippines to Hong Kong, and she had a contract of employment with the respondents which required her to live with the respondents. She received room and board and about $600 a month.

PN looked after the respondents' two children and kept house. She started working at about 5:30 a.m. and worked until after 11 p.m. She ate standing up, her food was controlled by MR, she was given no time for breaks, and money was deducted from her pay if she broke anything. MR spoke to her in a demeaning way, yelled at her and constantly monitored her activity.

When MR was out, FR would put lotion on PN's hand and make her stroke his penis. He would remind her that she had debts to pay. She obeyed him because she was intimidated and felt that she had no choice.

FR put pressure on her to go to Canada with the family. He told her it would be good for her and her children. He took her to the Canadian consulate in Hong Kong and arranged for her to have a visa to accompany them. FR then had her sign a new contract which required her to repay the cost of plane tickets and the visa fee if she broke the contract. The visa, which FR secured was only good for three months, but PN did not know this.

In Canada, the respondents bought a house in Richmond. While the house was being prepared for them to move in, the family stayed in a suite in a hotel near the airport. The suite had two bedrooms and a small kitchen area. FR stayed in the master bedroom with his son. MR stayed in the other bedroom with her daughter. PN had to sleep on the couch in the living area. She had no private space and nowhere she could rest or be alone. She received $454.76 in wages while she was in Canada. FR claimed that he had deposited the rest of PN's wages directly to an account in the Philippines, but she was unable to access it. Because MR controlled her food, she was hungry most of the time.

FR's sexual assaults continued, occurring about twice a week, when MR was away. MR's treatment of PN worsened in Canada. She called her "garbage", "stupid", "evil" and made fun of her in front of other people.

PN became more depressed and on the afternoon of August 18, 2013, when she went to empty the garbage, she simply walked away from the hotel. She had no money, nor did she have her passport – which had been taken away from her for "safekeeping" – or extra clothing or her eyeglasses. She got help from a hotel employee, the police, and eventually a hostel for women who have been trafficked, called Deborah's Gate.

PN was a virtual slave. Every aspect of her employment as a domestic worker was exploitative and discriminatory.

The Tribunal accepted evidence from the counselor at Deborah's Gate that PN was malnourished and sleep deprived when she arrived, and suffered from nightmares and flashbacks. She had experienced coercion, intimidation, emotional abuse, isolation, economic abuse and male domination.

The Tribunal also accepted evidence that Filipino domestic workers are stereotyped, particularly in Hong Kong, as financially desperate and likely to be sexually available. The Tribunal noted that most Filipino domestic workers pursue overseas employment and endure their poor working conditions because there are no viable jobs in the Philippines that provide earnings remotely comparable to what they can earn as domestic workers abroad.

The Tribunal found that FR repeatedly sexually harassed PN. The harassment was regular and she was unable to avoid it. It underscored her general powerlessness in the relationship.

The Tribunal also found that PN was a virtual slave. She could not go anywhere or do anything without permission. She could not go out on her own or speak to people in her own language. She slept in between the respondents' bedrooms and was essentially on call 24 hours a day. She was humiliated and demeaned by MR, who threatened her and called her names.

Her characteristics as a young mother from the Philippines, who was unlikely to complain, were key factors which allowed the respondents to take advantage of her.

The Tribunal concluded that every aspect of PN's employment, including the contract, was exploitation that amounts to discrimination.

The Tribunal also found that the respondents retaliated against PN for filing a human rights complaint.

The Tribunal awarded PN $5,866.89 as compensation for lost wages, which represents compensation for the hours she worked at minimum wage, and includes overtime rates for the hours beyond 8 hours in a day.

The Tribunal also awarded her $50,000 as compensation for injury to dignity.

P.N. v. F.R. (No. 2) (Apr. 1, 2015), 2015 BCHRT 60, CHRR Doc. 15-0060 (McCreary)

Vancouver Police Discriminate against Transsexual

ARREST AND DETENTION — SEX DISCRIMINATION — PUBLIC SERVICES AND FACILITIES — discriminatory treatment of transgender person by police service — SYSTEMIC DISCRIMINATION — pattern of conduct discriminatory on the basis of gender — definition of systemic discrimination — REASONABLE ACCOMMODATION — gender identity — DAMAGES — injury to dignity and self-respect — REMEDIES — transgender policy

The B.C. Human Rights Tribunal found that Vancouver police officers discriminated against a male to female transsexual by failing to recognize the complainant's post-surgical gender identity and responding appropriately.

Following gender reassignment surgery, the complainant, Angela Dawson, wished to be treated as a woman and known as Angela Dawson. In interactions with the Vancouver Police the complainant was known by various names, including Jeffrey Alan Dawson, a legal name which Angela Dawson retained.

The complainant had numerous interactions with Vancouver police officers and staff at the Vancouver jail. The complaint included six alleged instances of discrimination. The Tribunal found that the allegations were substantiated in part.

The Tribunal found that in 2010 Angela Dawson experienced discrimination at the Vancouver jail. While incarcerated, Ms. Dawson requested post-surgical medical treatment in the form of vaginal dilation, which was refused because a male nurse refused to believe that Ms. Dawson had a vagina. When Ms. Dawson refused to be examined by the nurse, the nurse did no independent investigation of whether Ms. Dawson's claims about the surgery and her need for post-surgical vaginal dilation were true, but rather terminated the nursing relationship.

The Tribunal found that the Vancouver Police Department was liable for the discrimination, which took the form of denial of medical service.

Soon after this incident, Angela Dawson was again detained in jail, while still recovering from gender reassignment surgery. The Tribunal found that the Vancouver Police Department discriminated against Angela Dawson by referring to Ms. Dawson as male and failing to ensure that Ms. Dawson could undertake the medically prescribed post-surgical procedure of vaginal dilation.

There were additional incidents involving Ms. Dawson being given traffic tickets showing the name that appears on Ms. Dawson's legal documents. At least one of these incidents, the Tribunal found was discriminatory.

The Tribunal found there was significant inconsistency in how Vancouver police officers identified Angela Dawson, using both male and female pronouns, and both Angela and Jeffrey, often in the same encounter, which was hurtful to Angela Dawson.

The Tribunal found that the Vancouver Police Department has a duty to accommodate transsexual persons and that Vancouver police officers need to have some guidance and training as to how to accomplish this.

The Vancouver Police Department has a duty to accommodate transsexual persons by recognizing their post-surgical gender identity and responding appropriately.

The Tribunal ordered compensation for Angela Dawson in the amount of $15,000 for injury to dignity. The Tribunal also ordered the Vancouver Police Department to develop non-discriminatory policies with regard to gender identification and training for officers to implement the policy.

Dawson v. Vancouver Police Board (No. 2) (Mar. 24, 2015), 2015 BCHRT 54, CHRR Doc. 15-0054 (McCreary)

Bob's Taxi Discriminated on the Basis of Race

RACE, COLOUR AND PLACE OF ORIGIN — PUBLIC SERVICES AND FACILITIES — taxi service denied — racial slurs and harassment — PROCEDURE — adjudicating issue dealt with in prior proceeding as abuse of process — HUMAN RIGHTS — difference between human rights proceedings and criminal proceedings — EMPLOYMENT — employment relationship between taxi operator and taxi company — LIABILITY — taxi company for taxi operator

EVIDENCE — balance of probabilities — BURDEN OF PROOF — elements of a *prima facie* case — DAMAGES — damages assessed for injury to dignity and self-respect — quantum by considering previous awards, determining — REMEDIES — education or training program for employees — human rights complaints procedure

A Nova Scotia Board of Inquiry ruled that Aleksey Osipenkov and Bob's Taxi discriminated against Javonna Borden because of race and colour.

Ms. Borden, who is an African-Canadian woman, got into Mr. Osipenkov's taxi with her teen-aged African-Canadian nephews, Jordan Smith and Davhon Smith. They were on their way home from a birthday dinner celebration for one of the boys, at a Dartmouth restaurant. Mr. Osipenkov had responded to a dispatch call. When Ms. Borden and the boys entered the car and one of the boys, Jordan, got into the front seat, Mr. Osipenkov yelled at him to get out of the front seat. Ms. Borden yelled back that he could not speak to her nephew in that way. Osipenkov then said, "Get out of the car, you fucking niggers".

Bob's Taxi, for whom Mr. Osipenkov was driving, discontinued all future service to Ms. Borden, based on the false information that Ms. Borden had threatened to kill Mr. Osipenkov.

Mr. Osipenkov, an immigrant from Russia, denied all the allegations, including that he had been present at the scene. The Board of Inquiry found that the evidence, including documentation obtained from Bob's Taxi, supported the complainants. The Board noted that Mr. Osipenkov's behaviour during the hearing had allowed the Board to see him erupt with anger with little warning, barely control himself if challenged, and deliberately engage in behaviour intended to intimidate. The Board concluded that it was clear from the evidence and his conduct at the hearing that Mr. Osipenkov had little regard for anyone who disagreed with him. His allegation that Ms. Borden had called Bob's Taxi and threatened him was not supported by the evidence.

A driver for Bob's Taxi told African-Canadian customers to "get out of my taxi, you fucking niggers".

Regarding liability, the Board held that Mr. Osipenkov had discriminated against the complainants based on race and colour and that there was no justification for his actions. The Board also found that Bob's Taxi was in a relationship of sufficient control and dependency with Mr. Osipenkov to make it an employer within the meaning of the *Code* and therefore also liable.

The Board noted that the use of the word "nigger" by Mr. Osipenkov is deplorable, demeaning and humiliating to African-Canadians. It is often dismissed as arising from anger or loss of control, but it asserts a dangerous sense of racial superiority, reveals an underlying disrespect and hostility, and must not be tolerated.

The Board also noted that Bob's Taxi failed to respond quickly or to investigate at all when notified of the allegations, and demonstrated no grasp of its corporate responsibility.

The Tribunal ordered that each of the complainants be compensated in the amount of $7,500 for the verbal assault by Mr. Osipenkov, taking into account the fact that it led to a denial of further service and the company did nothing to investigate the complaints. The Board also awarded Ms. Borden an additional $2,500 for the subsequent denial of service and the continued assertion that she had threatened Mr. Osipenkov.

The Board ordered Bob's Taxi to work with the Human Rights Commission to develop a mandatory human rights training program for its drivers, as well as an internal policy regarding complaint investigation. Mr. Osipenkov was ordered to undertake human rights training with the Human Rights Commission.

Borden v. Bob's Taxi (Mar. 2, 2015), CHRR Doc. 15-3018 (N.S. Bd.Inq.; James)

NS Liquor Board Discriminated against Female Manager

PREGNANCY — SEX DISCRIMINATION — discriminatory treatment in employment — harassment — compulsory employment transfer — DISABILITY — discriminatory treatment on the basis of anxiety disorder and depression — discipline of disabled person — REASONABLE ACCOMMODATION — duty to accommodate short of undue hardship — complainant's duty to accommodate

EMPLOYMENT EVALUATION AND TESTING — evaluation procedures free from gender bias — standard of performance — BURDEN OF PROOF — elements of a *prima facie* case — EVIDENCE — expert evidence — medical evidence

A Nova Scotia Board of Inquiry found that the Nova Scotia Liquor Board discriminated against Pearl Kelly based on the grounds of sex and mental disability.

After years of employment with the Nova Scotia Liquor Board, during which Ms. Kelly received glowing performance appraisals, Ms. Kelly encountered conflict with her employer. This conflict began in 2004 when she was told that it would not be appropriate for her to work at a wine fair because she was pregnant. The Board found that although the incident was not formally part of the complaint because of the passage of time since it occurred, the incident was nonetheless evidence that supported the Board's conclusion of ongoing misconduct.

The Board found that at a subsequent managers' meeting, the complainant, who was herself a manager, was dubbed "Pregnant Pearl in Pictou" and a fellow manager, Mr. Barnhill, commented that whenever Ms. Kelly became pregnant she received a promotion. The Board found that this was evidence of a sexist attitude toward Ms. Kelly in her male-dominated managerial work environment.

In 2006–2007, the Board found that the Liquor Board discriminated against Ms. Kelly, based on the ground of sex, in relation to performance appraisals carried out by Danny Whittemore, a supervisor. In particular, Ms. Kelly was held to higher performance standards than her male peers, subjected to greater criticism, and deprived of support and direction for a development plan. This lack of support imposed a burden on Ms. Kelly that was not imposed on a male manager who had also been said to have performance deficiencies.

During 2008, there was further conflict between Ms. Kelly and Mr. Whittemore, which among other things, caused her to exercise her rights as a unionized employee and culminated in a retaliation order against the Liquor Board under the *Occupational Health and Safety Act*.

As of May 28, 2008, Ms. Kelly was suffering from a mental disability in the form of acute situational anxiety or panic attacks, for which she required an extended medical leave.

The Board found that this situational anxiety was brought on by the way that Mr. Whittemore treated her in the workplace. Although she also made decisions that contributed to her illness, Mr. Whittemore sent her down this path by failing to deal with her in a fair, objective and transparent manner. There were various decisions that Mr. Whittemore should have handled differently including transferring her to another store, taking of photographs of her store and making notes without her knowledge.

The Board found that in December 2008, while Ms. Kelly was still off sick, there was an incident at the liquor store. Ms. Kelly attempted to collect some wine without speaking to the acting manager. The wine had been set aside for staff for Christmas, as was the usual practice. There was a confrontation which culminated in the Liquor Board issuing a letter of discipline to Ms. Kelly accusing her of disruptive behaviour and a lack of integrity, without making any inquiries about her health status.

The Board found that the timing of sending the letter was insensitive. Ms. Kelly received it by registered mail on December 19, 2008, and her evidence was that it resulted in her attendance at the Crisis Centre at Aberdeen Hospital. Although Ms. Kelly overstepped by taking the wine without speaking with the acting manager, the Board found that the Liquor Board ought to have known that Ms. Kelly's behaviour in the store was the result of a disability, and contemplated the effect that the letter would have on her. There was no history of her taking something she was not entitled to. The Liquor Board knew she was on leave due to disability and that there was a Workers' Compensation Board claim pending based on Ms. Kelly's symptoms of workplace anxiety. The Board concluded that the discipline letter was evidence of ongoing discriminatory conduct towards Ms. Kelly, this time based on disability.

In 2009, after Ms. Kelly filed a human rights complaint, the Liquor Board, the Union and Ms. Kelly entered mediation and established a detailed protocol for her return to work, which the Board viewed as a significant accommodation. However, Ms. Kelly remained of the view that she could no longer work under Mr. Whittemore's supervision. The Board left open the question of whether it would cause the Liquor Board undue hardship to prohibit Mr. Whittemore from ever supervising Ms. Kelly. The Board was of the view that first of all an attempt should be made to implement the protocol, which, it found, was consistent with the duty to accommodate.

A hearing on remedy was deferred.

Kelly v. Nova Scotia Liquor Corp. (Mar. 16, 2015), CHRR Doc. 15-3023 (N.S. Bd.Inq.; Connors)

School Division Discriminates Against Disabled Employee

DISABILITY — employment terminated on the basis of shoulder injury — DISCRIMINATION — ability to work — REASONABLE ACCOMMODATION — procedural/substantive component of undue hardship — duty to accommodate short of undue hardship — *Meiorin* test and *Moore* test for reasonable accommodation

JURISDICTION — concurrent jurisdiction — RES JUDICATA AND ESTOPPEL — prior workers' compensation board proceeding — BURDEN OF PROOF — elements of a *prima facie case* — DAMAGES — determining quantum by considering previous awards — damages assessed for injury to dignity and self-respect — wages

The Alberta Human Rights Tribunal ruled that Rocky View School Division No. 41 ("School Division") discriminated against Kathalin Horvath because of a disability. The School Division terminated her employment because of disability-related restrictions on her work.

Ms. Horvath was employed as a caretaker. She suffered a full dislocation of her right shoulder while cleaning beneath a desk at Langdon School where she worked. Following surgery and a period of leave and rehabilitation, the Workers Compensation Board ("WCB") determined that Ms. Horvath was fit to return to work and could perform modified duties with temporary restrictions. However, the opinion of the surgeon, subsequently obtained by WCB, was that Ms. Horvath's medical restrictions with regard to lifting with her right arm would be permanent.

The School Division took the position that it did not have a suitable permanent position for Ms. Horvath to return to, and terminated her employment. Ms. Horvath was unsuccessful in applying for other positions both inside and outside the School Division.

The Tribunal found that the evidence clearly established *prima facie* discrimination. The Tribunal did not accept that the Division had accommodated Ms. Horvath to the point of undue hardship. It did not take more than cursory steps to explore what accommodation might have been necessary to allow Ms. Horvath to return to work with permanent restrictions.

The Rocky View School Division had a policy of not permanently accommodating any of its employees. After six to eight weeks of temporary accommodation every employee was required to return to their pre-injury position and duties. The Tribunal found that this policy had no justification in law and it placed arbitrary and unwarranted restrictions on the School Division's duty to accommodate.

The School Division failed to consider alternatives for Ms. Horvath. Had the Division attempted to evaluate Ms. Horvath's ability to contribute meaningfully to the workplace in relation to other work or positions within its more than 40 schools, reasonable and practical options worthy of consideration would likely have become apparent. However, the School Division's single-minded focus was on returning Ms. Horvath to the full duties of her caretaker position. Rocky Mountain did not demonstrate what changes in job duties, including possible reassignment or reallocation of tasks would have been required to accommodate Ms. Horvath's temporary or permanent disabilities. The employer failed to assess options and undermined its own defense. There was no foundation on which to plead undue hardship.

Because the School Division had a policy of not permanently accommodating any of its employees, it failed to assess options for the complainant.

The Tribunal ordered the School Division to compensate Ms. Horvath for lost income and to pay her $15,000 in general damages as compensation for the injury to Ms. Horvath's dignity and for her distress.

Horvath v. Rocky View School Div. No. 41 (Mar. 5, 2015), 2015 AHRC 5, CHRR Doc. 15-3020 (Archibald)

Briefly Noted

Alberta

Al-Ghamdi v. Peace County Health Region, 2015 ABQB 155, CHRR Doc. 15-3019 (Topolniski J.)

APPEALS AND JUDICIAL REVIEW — HUMAN RIGHTS COMMISSIONS / Judicial review of the Commission's decision to dismiss a complaint of discrimination in employment on the basis of race, colour, ancestry, place of origin, religious beliefs and age. The Court concluded that (1) the Commission's decision meets the standard of reasonableness, (2) the Chief Commissioner was able to reach the decision to dismiss fairly and (3) that the Commission complied with the requirements of procedural fairness. Dismissed: Mar. 5, 2015.

Cooper v. 133668899 Ltd., 2015 AHRC 6, CHRR Doc. 15-3024 (Luhtanen)

DISABILITY — REASONABLE ACCOMMODATION / Decision on a complaint of discrimination in employment on the basis of disability. The Tribunal found that the respondent did not provide a reasonable justification for its conduct or show that it accommodated the complainant to the point of undue hardship. The respondent was ordered to pay the complainant three months' lost wages and $15,000 for pain and suffering. Allowed: Mar. 11, 2015.

British Columbia

Edwards v. 0720941 B.C. Ltd. (No. 2), 2015 BCHRT 59, CHRR Doc. 15-0059 (Walter)

DISABILITY / Decision on a complaint of discrimination in employment on the basis of physical disability. The Tribunal found that the respondent discriminated against the complainant by terminating him due to his forthcoming surgery. The Tribunal ordered the respondent to refrain from any similar contravention in the future, and awarded $5,000 for injury to dignity, feelings and self-respect. Allowed: Mar. 24, 2015.

Meszaros v. Hendry Swinton McKenzie Insurance Services (No. 2), 2015 BCHRT 36, CHRR Doc. 15-0036 (Rilkoff)

DISABILITY / Decision on a complaint of discrimination in employment on the basis of disability. The complainant suffers from a progressive eye disease that will eventually make him functionally blind. He alleges that he was dismissed from his employment for his refusal to sign a contract with a clause that would have required him to maintain a driver's license. The respondents argued that the complainant was dismissed due to job performance issues. The Tribunal found that the clause did not violate the *Code* on its face, and that the respondent would have renegotiated it had the complainant raised any concerns, which he did not. The respondent therefore did not fail to accommodate the respondent, as it was never asked to. The complaint was dismissed. The respondent's application for costs was denied. Feb. 27, 2015.

Sebastian v. Vancouver Coastal Health Authority (No. 2), 2015 BCHRT 56, CHRR Doc. 15-0056 (Trerise)

RACE, COLOUR AND PLACE OF ORIGIN — SEX DISCRIMINATION / Decision on a complaint of discrimination in employment on the basis of race, colour and sex. The Tribunal found that the complainant failed to establish a *prima facie* case of discrimination, and could not establish a connection between his treatment and his race, colour, or sex. Dismissed: Mar. 26, 2015.

Ontario

Lewis v. Toronto Transit Comm. (No. 7), 2015 HRTO 256, CHRR Doc. 15-0756 (Whist)

RACE, COLOUR AND PLACE OF ORIGIN / Decision on an application alleging discrimination in employment on the basis of race, colour, place of origin and reprisal. The Tribunal found that the applicant did not provide clear, convincing and cogent evidence to support his perceptions that he was subject to discriminatory treatment while the respondent provided persuasive, non-discriminatory reasons for its actions. Dismissed: Mar. 4, 2015.

Sweet v. 1790907 Ontario Inc., 2015 HRTO 433, CHRR Doc. 15-0933 (Cook)

DISABILITY / Decision on an application alleging discrimination in services on the basis of disability. The Tribunal found that the applicant was denied service at the respondent restaurant because she had her service dog with her. The Tribunal awarded $2,500 as compensation for injury to dignity, feelings, and self-respect. The respondent was ordered to develop a human rights policy that sets out what to do if a customer comes to a restaurant with an animal. Allowed: Apr. 1, 2015.

Tesfamariam v. Camcor Manufacturing (No. 3), 2015 HRTO 219, CHRR Doc. 15-0719 (Cook)

COMPLAINTS / Decision on an application alleging discrimination in employment on the basis of disability. The respondent submitted that the application should be dismissed on the basis that the WSIB appropriately dealt with the substance of the application, and that the applicant was essentially attempting to appeal that original decision through the Tribunal, after having already abandoned a WSIB appeal. The Tribunal concluded that the substance of the complaint has been dealt with in another proceeding. Dismissed: Feb. 19, 2015.

View Point…

A Virtual Slave in Canada

In an unusual decision, the B.C. Human Rights Tribunal ruled recently that a young Filipino domestic worker was a "virtual slave" when she came to Canada with a family who was moving from Hong Kong (CHRR Doc. 15-0060, p. 4 in this issue). Her circumstances reveal how, because of a number of intersecting vulnerabilities, domestic workers like PN can be in our midst, but lack the protections that most Canadians take for granted.

PN is a 28-year-old woman with two children of her own in the Philippines. She moved to Hong Kong to work with a family because, as the Tribunal heard from expert witnesses, she, like other Filipino women, cannot find jobs at home that will pay them wages that are even close to those that they can earn abroad.

When the family moved to Canada they pressured her to come with them, took her to the Canadian consulate, got her a visa – which was temporary although she did not know it – and required her to sign a contract that stipulated she would pay back the plane fare and visa fee (together worth thousands of dollars) if she broke the contract. In exchange, she would receive room and board and approximately $600 (CDN) a month.

Her conditions were extreme. The family moved temporarily into a hotel suite in Richmond because the house they had bought was not ready for occupancy. There were two bedrooms. The father, FR, slept in one room with his son, and the mother, MR, slept in the other room with her daughter. PN slept on the sofa in the living room, where she had no privacy at any time of the day or night. She worked from 5:30 in the morning until 11 at night. MR controlled her food, often leaving her hungry, and she berated, demeaned and humiliated PN in front of other people. FR regularly sexually abused her when MR was absent by putting lotion on her hand and making her stroke his penis. She was prohibited from speaking her own language to anyone at the hotel, and her passport was taken away for "safekeeping".

After six weeks, PN walked away from the family with nothing but the clothes she was wearing – no money, no passport, no eyeglasses. She found her way to a shelter for trafficked women, and eventually made a human rights complaint. Her lawyer, Devyn Cousineau, says that PN represents the "tip of the iceberg" because there are many other women in similar circumstances who are too afraid to claim their rights. PN tolerated the abuse for as long as she did because she was afraid that she would have to pay back money she did not have, and that no one would help her. She was lucky, but her fears were justified.

What is unusual is not just that PN came forward, but also the ruling of the Tribunal. Unsurprisingly, the Tribunal found that FR sexually harassed and assaulted PN by coercing her into stroking his penis. However, the Tribunal also ruled that "virtually every aspect of her employment, including the contract, was exploitation that amounts to discrimination". In other words, having canvassed the intersecting vulnerabilities of PN based on race, sex, and place of origin, the Tribunal found that the conditions of work were so harsh and PN's treatment so demeaning that it constituted discrimination. The Tribunal avoided requiring an artificial comparison with another worker's conditions or treatment.

We are left to worry about how other women who come to Canada in similar circumstances can obtain help, as well as about what happens to them if they do. Canada issues very few temporary residence permits to women who have been trafficked to Canada as "virtual slaves", as PN was. Only 89 such permits were issued between 2006 and 2012. That means that women who come to Canada as "slaves" have little chance of staying to become residents or citizens.

Shelagh Day, President and Senior Editor,
Canadian Human Rights Reporter

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