2011 CAF 202, 2011 FCA 202
Federal Court of Appeal

Canada (Human Rights Commission) v. Canada (Minister of Social Development)

2011 CarswellNat 2098, 2011 CarswellNat 3329, 2011 CAF 202, 2011 FCA 202, 203 A.C.W.S. (3d) 352, 420 N.R. 136, 72 C.H.R.R. D/423

Attorney General of Canada (representing Social Development Canada, Treasury Board of Canada and Public Service Human Resources Management Agency of Canada), Appellants and Canadian Human Rights Commission, Respondent and Ruth Walden et al, Respondents

Carolyn Layden-Stevenson J.A., M. Nadon J.A., Robert M. Mainville J.A.

Heard: May 2, 2011
Judgment: June 13, 2011
Docket: A-477-10

Proceedings: affirming *Canada (Human Rights Commission) v. Canada (Minister of Social Development)* (2010), 2010 CF 1135, 2010 CarswellNat 5094, (sub nom. *Canadian Human Rights Commission v. Canada (Attorney General) et al.)* 377 F.T.R. 244 (Eng.), 2010 CarswellNat 4295, 2010 FC 1135, D.T.E. 2011T-22 (F.C.)

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Subject: Constitutional; Human Rights

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Human rights

VII Remedies
VII.2 Damages
VII.2.f Miscellaneous

Headnote

Human rights --- Remedies — Damages — General principles

Complainants were medical adjudicators — Medical adjudicators were group of predominantly female nurses who worked with medical advisors, group of predominantly male doctors — Tribunal held complainants had been discriminated against with respect to their job classification on basis of their gender — Tribunal denied compensation for lost wages, and awarded pain and suffering to only two complainants — Complainants and commission successfully brought applications for judicial review of remedies decision — Crown appealed wage loss aspect of judgment — Appeal dismissed — There was no reference in judge's reasons to suggest that he advocated standard of proof other than balance of probabilities — Judge's decision that tribunal erred in concluding that complainants had burden of establishing both existence and quantum of wage loss was proper — Judge was correct in concluding that tribunal had already determined existence of wage loss in its liability determination — Tribunal's decision was flawed because it proceeded on improper assumption that materially affected its determination as to compensation — It would have been inappropriate to accept Crown's argument that its appeal should be allowed

on basis that complainants did not establish quantum of wage loss — Question of wage loss and nature of proof required was matter best left to tribunal.

Table of Authorities

Cases considered by *Carolyn Layden-Stevenson J.A.*:

C. (R.) v. McDougall (2008), [2008] 11 W.W.R. 414, 83 B.C.L.R. (4th) 1, (sub nom. *F.H. v. McDougall*) [2008] 3 S.C.R. 41, 2008 CarswellBC 2041, 2008 CarswellBC 2042, 2008 SCC 53, 60 C.C.L.T. (3d) 1, (sub nom. *H. (F.) v. McDougall*) 297 D.L.R. (4th) 193, 61 C.P.C. (6th) 1, 61 C.R. (6th) 1, (sub nom. *F.H. v. McDougall*) 380 N.R. 82, (sub nom. *F.H. v. McDougall*) 439 W.A.C. 74, (sub nom. *F.H. v. McDougall*) 260 B.C.A.C. 74 (S.C.C.) — considered

Canada (Attorney General) v. Walden (2010), 2010 CF 490, 2010 CarswellNat 2954, 2010 CarswellNat 1290, 2010 FC 490, 368 F.T.R. 85 (Eng.), 2010 C.L.L.C. 230-023 (F.C.) — referred to

New Brunswick (Board of Management) v. Dunsmuir (2008), 372 N.R. 1, 69 Admin. L.R. (4th) 1, 69 Imm. L.R. (3d) 1, (sub nom. *Dunsmuir v. New Brunswick*) [2008] 1 S.C.R. 190, 844 A.P.R. 1, (sub nom. *Dunsmuir v. New Brunswick*) 2008 C.L.L.C. 220-020, D.T.E. 2008T-223, 329 N.B.R. (2d) 1, (sub nom. *Dunsmuir v. New Brunswick*) 170 L.A.C. (4th) 1, (sub nom. *Dunsmuir v. New Brunswick*) 291 D.L.R. (4th) 577, 2008 CarswellNB 124, 2008 CarswellNB 125, 2008 SCC 9, 64 C.C.E.L. (3d) 1, (sub nom. *Dunsmuir v. New Brunswick*) 95 L.C.R. 65 (S.C.C.) — referred to

O'Malley v. Simpsons-Sears Ltd. (1985), (sub nom. *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*) [1985] 2 S.C.R. 536, [1986] D.L.Q. 89 (note), 23 D.L.R. (4th) 321, 64 N.R. 161, 12 O.A.C. 241, 17 Admin. L.R. 89, (sub nom. *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.*) 9 C.C.E.L. 185, 86 C.L.L.C. 17,002, 7 C.H.R.R. D/3102, 52 O.R. (2d) 799 (note), 1985 CarswellOnt 887, 1985 CarswellOnt 946 (S.C.C.) — considered

P.S.A.C. v. Canada (Department of National Defence) (1996), (sub nom. *P.S.A.C. v. Staff of the Non-Public Funds, Canadian Forces*) 199 N.R. 81, 1996 CarswellNat 2593, [1996] 3 F.C. 789, (sub nom. *P.S.A.C. v. Staff of the Non-Public Funds, Canadian Forces*) 118 F.T.R. 319 (note), 27 C.H.R.R. D/488, 1996 CarswellNat 817 (Fed. C.A.) — considered

Q. v. College of Physicians & Surgeons (British Columbia) (2003), 2003 SCC 19, 2003 CarswellBC 713, 2003 CarswellBC 743, 11 B.C.L.R. (4th) 1, 223 D.L.R. (4th) 599, 48 Admin. L.R. (3d) 1, (sub nom. *Dr. Q., Re*) 302 N.R. 34, [2003] 5 W.W.R. 1, (sub nom. *Dr. Q. v. College of Physicians & Surgeons of British Columbia*) [2003] 1 S.C.R. 226, (sub nom. *Dr. Q., Re*) 179 B.C.A.C. 170, (sub nom. *Dr. Q., Re*) 295 W.A.C. 170 (S.C.C.) — referred to

Snell v. Farrell (1990), 110 N.R. 200, 1990 CarswellNB 218, 1990 CarswellNB 82, [1990] 2 S.C.R. 311, 72 D.L.R. (4th) 289, 107 N.B.R. (2d) 94, 267 A.P.R. 94, 4 C.C.L.T. (2d) 229, (sub nom. *Farrell c. Snell*) [1990] R.R.A. 660 (S.C.C.) — considered

Telfer v. Canada (Revenue Agency) (2009), [2009] D.T.C. 5046, 2009 CarswellNat 655, (sub nom. *CRA v. Telfer*) 2009 D.T.C. 5046 (Eng.), [2009] 4 C.T.C. 123, 386 N.R. 212, 2009 CarswellNat 5698, 2009 CAF 23, 2009 FCA 23 (F.C.A.) — referred to

Walden v. Canada (Minister of Social Development) (2007), 2007 CHRT 56, 2007 CarswellNat 5046, 2007 TCDP 56, D.T.E. 2008T-886, 2007 CarswellNat 6193, (sub nom. *Walden v. Canada (Human Resources and Social Development)*) 64 C.H.R.R. D/215, 2008 C.L.L.C. 230-003 (Can. Human Rights Trib.) — referred to

Statutes considered:

Canadian Human Rights Act, R.S.C. 1985, c. H-6
s. 7 — referred to

s. 10 — referred to

s. 11 — referred to

s. 53(2)(c) — considered

APPEAL by Crown from judgment reported at *Canada (Human Rights Commission) v. Canada (Minister of Social Development)* (2010), 2010 CF 1135, 2010 CarswellNat 5094, (sub nom. *Canadian Human Rights Commission v. Canada (Attorney General) et al.)* 377 F.T.R. 244 (Eng.), 2010 CarswellNat 4295, 2010 FC 1135, D.T.E. 2011T-22 (F.C.), granting complainants' and commission's applications for judicial review.

***Carolyn Layden-Stevenson J.A.*:**

1 Justice Kelen of the Federal Court (the judge) allowed two consolidated applications for judicial review of a decision of the Canadian Human Rights Tribunal (the tribunal). The tribunal declined to order compensation for lost wages in relation to a discriminatory job classification on the basis that the respondent complainants (the complainants) had not established that wage loss resulted from the discriminatory practice. The tribunal awarded compensation for pain and suffering to two of the approximately 413 complainants. The judge set aside the tribunal's decision with respect to both compensation for lost wages and pain and suffering and remitted the matter to a new panel for determination. The Attorney General of Canada, representing the various relevant governmental departments (the Crown), appeals from the judgment, in part. The Crown appeals with respect to the wage loss aspect of the judgment but does not appeal with respect to the pain and suffering portion. The judge's reasons are reported at [*Canada (Human Rights Commission) v. Canada (Minister of Social Development)*] 2010 FC 1135, 377 F.T.R. 244 (Eng) (F.C.). For the reasons that follow, I would dismiss the appeal.

Preliminary Observation

2 This matter gave rise to two final decisions from the tribunal because the proceeding was bifurcated. The tribunal addressed the complainants' complaint in phases: a liability phase and a compensation phase. I will refer to the tribunal's decisions in relation to each phase as the "liability determination" and the "compensation determination". Curiously, notwithstanding that the decision under appeal relates to the tribunal's compensation determination, resolution of the issue before the Court turns largely on the tribunal's liability determination.

Background

3 The background giving rise to the underlying complaint is comprehensively described in the tribunal's liability determination ([*Walden v. Canada (Minister of Social Development)*] 2007 CHRT 56 (Can. Human Rights Trib.)) and need not be repeated here. Succinctly, for context, the complainants comprise a group of nurses working as "Medical Adjudicators" (adjudicators) in the Canada Pension Plan (CPP) Disability Benefits Program. Ruth Walden (Walden) is one of the complainants. The adjudicators, predominantly female, work alongside a group of doctors, predominantly male, working as "Medical Advisors" (advisors). Together, adjudicators and advisors determine individuals' eligibility for disability benefits under the CPP.

4 Advisors are classified under the Medicine Classification Standard (MD) within the public service's Health Services Occupational Group (SH). The SH includes, by definition, positions that involve the application of medical or nursing knowledge (among other professional specialities) to the safety and physical and mental well-being of people. Adjudicators are classified under the Program Administration Classification Standard (PM) within the public service's Program and Administrative Services Occupational Group (PA). The latter group includes positions that primarily involve the planning, development, delivery or management of administrative and federal government policies, programs, services or other activities directed to the public or to the federal public service. Although the use of the advisors' professional knowledge (in the determination of eligibility for disability benefits) is reflected in the advisors' classification, the adjudicators' use of professional knowledge is not similarly reflected in their classification. In addition to professional recognition, advisors receive better compensation, benefits, training and opportunities for advancement than do adjudicators. Since 1988, the adjudicators have repeatedly and unsuccessfully sought better recognition through reclassification as health practitioners within the SH.

5 The complainants alleged they were subject to discrimination on the basis of gender (section 7 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the Act)) and that the Crown pursued a discriminatory practice that deprived them of employment opportunities (section 10 of the Act). In its liability determination, the tribunal concluded that the complainants' allegations were substantiated. The tribunal ordered the public service to cease the discriminatory practice of failing to recognize the professional nature of the work performed by the adjudicators in a manner proportionate to the professional recognition accorded to the advisors. It granted the parties time to negotiate an acceptable resolution but retained jurisdiction to determine any outstanding matters if the parties were unable to come to an agreement. An application for judicial review of the liability determination was dismissed by Justice Mactavish: [*Canada (Attorney General) v. Walden*] 2010 FC 490, 368 F.T.R. 85 (Eng.) (F.C.) (judicial review of liability determination). An appeal from her judgment was discontinued.

6 When the parties were unable to reach an agreement concerning adequate remedies, the tribunal scheduled a further hearing. In an interim ruling, the tribunal granted the Crown's request to adduce evidence regarding its proposal for redressing the discriminatory practice. It also indicated the type of comparative analysis that would be appropriate for purposes of the compensation phase.

7 In its compensation determination, the tribunal ordered that a new nursing classification subgroup be created for the adjudicators. The tribunal also detailed a number of problems with the evidence relating to compensable wage loss. The referenced evidence related to two witnesses. The first was the complainants' witness, an expert in job evaluation and compensation systems. His report, based on the tribunal's liability determination, its interim ruling and the job descriptions for the two positions, contained a comparative analysis of the work of the advisors and adjudicators. The second was the Crown's witness, a human resources consultant with expertise in job classification, compensation and organizational design. Her evidence was confined to a critical analysis of the expert's report. More specifically, the Crown's witness emphasized that the existence of wage loss had to be empirically tested and could not be based on inferences drawn from the liability decision. The tribunal basically accepted the critique proffered by the Crown's witness and concluded that the results of the expert's study could not be regarded as reasonably accurate.

8 The tribunal ultimately concluded that the complainants had failed to meet their burden of establishing the existence and quantum of compensable wage loss and declined to order compensation. It further declined to order the Crown to conduct a job evaluation study or to allow the complainants a further opportunity to gather additional evidence of wage loss. Both the Canadian Human Rights Commission (the Commission) and the complainants commenced applications for judicial review of the tribunal's compensation determination.

The Federal Court Decision

9 The two applications for judicial review were consolidated. The Commission and the complainants advanced the same basic position in their respective applications to the Federal Court. Before addressing the merits of the

applications before him, the judge reviewed the tribunal's liability determination and Justice Mactavish's reasons for judgment on judicial review of the liability determination. He explained that the crux of the liability determination was the discriminatory treatment that resulted from the fact that the adjudicators did not receive recognition for their work as health professionals. The judge noted that there was no challenge to the tribunal's determination that the most appropriate way to address the Crown's discriminatory practice was to create a new nursing subgroup in the SH. The judge also made the following observation at paragraph 50 of his reasons for judgment:

> [T]he Tribunal's Liability Decision, and the Federal Court Judgment of Justice Mactavish upholding the Tribunal's Liability Decision, held that the discriminatory classification of the medical adjudicators as Program Managers resulted in the medical adjudicators receiving less pay[,] fewer professional development opportunities and fewer employment benefits than available to nurses and doctors classified within the Health Services Occupational Group. Accordingly, there can be no dispute that the medical adjudicators did suffer a loss of income and benefits due to the discriminatory job classification. Accordingly, the issue for the Tribunal regarding appropriate remedies was the quantification of the loss of wages and benefits. (See also Justice Mactavish's Judgment at paragraph 146 confirming loss of income due to the discriminatory practice).

10 Noting the Crown's submission — that the tribunal found discrimination because of the manner in which the adjudicators had been classified but made no determination as to the existence of losses flowing from that classification — the judge held instead that the tribunal found discriminatory treatment because it identified certain elements of that treatment, including the lower salary and benefits paid to adjudicators. He relied on a number of excerpts from the tribunal's liability determination and the judicial review of liability determination to support that conclusion (reasons at paras. 50-57; liability determination at paras. 121, 143; judicial review of liability determination at paras. 136, 143, 146, 150). Turning to the applications before him, the judge concluded that they could be resolved by addressing only the tribunal's determinations relating to compensation for lost wages and for pain and suffering. As noted previously, the pain and suffering portion does not form part of this appeal.

11 With respect to the applicable standard of review, the judge characterized the issue as whether the tribunal erred in imposing an incorrect standard of proof upon the complainants. He concluded that the standard of review was correctness.

12 After summarizing the evidence on the issue of wage loss and acknowledging that the tribunal had rejected the complainants' evidence, the judge concluded that the tribunal erred in law by finding that the complainants had failed to establish on a balance of probabilities that wage loss resulted from the Crown's discriminatory practice. He found that the tribunal erred in holding the complainants to a more onerous standard of proof because it required them to prove the quantum of wage loss on a balance of probabilities despite that it had earlier determined that the discriminatory practice resulted in wage loss. In view of that earlier finding, the judge concluded that the tribunal had a duty to either assess the lost income or wages on the evidence before it, or refer the matter back to the parties to prepare better evidence on that issue.

The Statutory Provisions

13 The relevant statutory provisions are attached to these reasons as Schedule "A".

The Standard of Review

14 This Court's role, on appeal from an application for judicial review in the Federal Court, is to determine whether the judge identified the applicable standards of review and applied them correctly: *Q. v. College of Physicians & Surgeons (British Columbia)*, 2003 SCC 19, [2003] 1 S.C.R. 226 (S.C.C.); *Telfer v. Canada (Revenue Agency)*, 2009 FCA 23, [2009] D.T.C. 5046 (F.C.A.).

Analysis

15 The judge's approach to the standard of review is problematic. As noted above, he concluded that the standard of review was correctness. I will return to this aspect of his reasons later. For the moment, I will focus on the judge's characterization of what he found to be the tribunal's error. On the one hand, he described the error as the selection of an incorrect standard of proof (reasons at paras. 40, 64) while, on the other hand, he suggested the error was the tribunal's imposition of an incorrect onus or burden of proof on the complainants (reasons at paras. 47, 59, 60). Despite what I would describe as an unfortunate choice of language by the judge, and contrary to the submissions of the parties, I see no reference in the judge's reasons to suggest that he advocated a standard of proof other than the balance of probabilities.

16 It is settled law that the burden of proof in the human rights context is the same as in the civil context: he or she who alleges bears the burden of proving on a balance of probabilities: *O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 (S.C.C.) (*O'Malley*). See also: *C. (R.) v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41 (S.C.C.) (*McDougall*). Read holistically and fairly, the judge's reasons indicate that he considered the essence of the tribunal's error to be that it asked itself the wrong question. He concluded that it had already determined the existence of compensable wage loss. Therefore, the only question before it was the amount of the wage loss. In short, in the judge's view, the error lay in the tribunal's requirement that the complainants again establish the *existence* of wage loss. For reasons to be discussed later, I agree with the judge in that respect.

17 Returning to the judge's choice of the applicable standards of review, his conclusions do not materially affect his ultimate determination. However, for clarity, brief comments are warranted. The parties agree that the selection of the appropriate legal test is reviewable on a standard of review of correctness and I will say no more about that. However, to the extent that the judge may have considered that the assessment of compensation for wage loss under paragraph 53(2)(c) of the Act is reviewed for correctness, I respectfully disagree. Such an assessment constitutes a question of mixed fact and law. It is dependent upon the factual circumstances; it concerns the tribunal's appreciation and assessment of the evidence; it arises in connection with the tribunal's enabling statute; and it falls within the tribunal's expertise. The applicable standard of review is reasonableness. The tribunal's decision must demonstrate justification, transparency and intelligibility and fall within a range of possible, acceptable outcomes defensible in respect of the facts and the law: *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.).

18 In this case, the tribunal did not err simply by coming to an unreasonable assessment of compensation for wage loss. Rather, its decision is flawed because it proceeded on an improper assumption that materially affected its determination as to compensation under paragraph 53(2)(c) of the Act. The tribunal's compensation determination shows that it placed a burden on the complainants to demonstrate the *existence* of compensable wage loss (paras. 74, 147, 148, 151). As stated earlier, I concur with the judge's conclusion that the tribunal had already determined the existence of wage loss in its liability determination.

19 I acknowledge, as the Crown asserts, that the tribunal did not clearly articulate an express factual finding as to compensable wage loss in its liability determination. However, reasons are not to be parsed, but are to be read in totality. On a proper reading of the tribunal's reasons, the tribunal implicitly determined the existence of the requisite wage loss. At paragraphs 120 and 121 of its liability determination, the tribunal stated:

> [120] **The advisors bring a different kind of knowledge to the program, perform some different tasks and have been given different responsibilities than the adjudicators. This provides a reasonable and non-discriminatory explanation for some of the differences in salary and benefits**. It also explains why the advisor and the adjudicator positions might occupy different levels within a classification standard in Health Services.
>
> [121] **However, the differences in the work responsibilities of the respective positions are not extensive enough to explain the wide disparity in treatment between the advisors and the adjudicators.** In particular, the Respondent has failed to provide a reasonable non-discriminatory response to the following question: why have the advisors been recognized as health professionals, **and compensated accordingly**, when their primary function is to make eligibility

> determinations and yet, when the adjudicators perform the same primary function, they are designated as program administrators and **are paid half the salary of the advisors**? (my emphasis)

20 The "differences in the work responsibilities" to which the tribunal refers are those described in paragraphs 117-119 of its liability determination. The "wide disparity in treatment" to which the tribunal refers in paragraph 121 is the difference in "salary and benefits" described in the earlier paragraph.

21 The tribunal's consideration of the Crown's explanation for other aspects of differential treatment and lost employment opportunities is addressed in separate locations in the tribunal's reasons. For example, paragraph 136 of the liability determination deals specifically with the Crown's explanation for the differences in professional recognition between the two groups. Similarly, paragraph 137 deals explicitly with the Crown's explanation concerning differences in the payment of professional fees, educational/training opportunities and the provision of career advancement opportunities.

22 Further, the summary provided in the initial paragraphs of the liability determination is instructive. I refer specifically to the following paragraphs:

> [2] The Complainants say that the doctors (known as "medical advisors") and nurses (known as "medical adjudicators") do the same work: they apply their medical knowledge to determine eligibility for CPP disability benefits. When medical advisors perform that work, they are classified as health professionals within the Public Service classification system. However, when the medical adjudicators do this work, they are not classified as health professionals. Rather, they are designated as program administrators. **As a result of their classification, medical advisors receive better compensation**, benefits, training, professional recognition and opportunities for advancement than medical adjudicators.
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> . . . . .
>
> [5] The Complainants meet the legal requirement to establish a *prima facie* case under s. 7 of the Act. To meet that requirement the Complainants were required to produce credible evidence which, in the absence of a reasonable explanation from the Respondents, would substantiate their complaints.
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> [6] The Complainants' evidence supported their allegation that since 1972, medical adjudicators have performed the same or substantially similar work as the medical advisors. They both apply their medical qualifications and expertise to determine eligibility for CPP benefits. Yet, only the medical advisors are classified as health professionals within the Health Services (HS) Group in the Public Service, **and only the advisors receive the benefits** and recognition **that flow from that designation.**
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> . . . . .
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> [10] **The Respondents provided a reasonable explanation that rebutted part of the Complainants' *prima facie* case, but not all of it.** While there is a significant overlap in the common enterprise of eligibility determination, medical advisors exercise an oversight and advisory role that is not performed by the adjudicators. This results in some differences in the job tasks performed by advisors and adjudicators. These differences explain the distinction in the job titles and **explain some of the differences in compensation and benefits.**
>
> [11] **However, the differences are not significant enough to explain the wide disparity in treatment** and, more particularly, they do not explain why the advisors are recognized as health professionals and the adjudicators are not. The core function of both positions is applying professional knowledge to determine eligibility for CPP disability benefits. The Respondents have failed to provide a reasonable, non-discriminatory explanation as to why this function is medical work when the advisors do it, and program administration work when the adjudicators do it. (my emphasis)

23 The tribunal's determination that the differences explain "some" of the disparity in "compensation and benefits" leads to the inevitable conclusion that the differences do not explain all of the variance in those subcategories of

differential treatment. Notably, apart from the excerpts from the tribunal's reasons canvassed above, there are a number of other references contained in the judge's reasons (paras. 53-57) to support the finding of wage loss. Further, there are also additional relevant paragraphs in the reasons of Justice Mactavish (judicial review of liability determination at paras. 28, 34, 55 and 56). I reiterate that the Crown did not pursue its appeal of Justice Mactavish's judgment.

24 In my view, the inescapable result arising from the various references found throughout the tribunal's liability determination is that, read as a whole, the tribunal's reasons constitute a determination, albeit an implicit one, that some wage loss or benefits loss had been established as a result of the discrimination.

25 For these reasons, I find the judge's decision that the tribunal erred in concluding that the complainants had the burden of establishing both "the existence and quantum of wage loss" at the second phase of the hearing to be proper. I note peripherally that the compensation determination suggests that the tribunal may have been unduly influenced by the testimony of the Crown's witness (that wage loss resulting from the discriminatory practice must be empirically tested) and that it retreated from its earlier finding in the liability determination as a result (para. 119).

26 Yet, that does not end the matter for the Crown further submitted that, if it is found that the tribunal erred in concluding that the complainants had to establish wage loss, the appeal should nonetheless be allowed on the basis that the complainants did not establish the quantum of wage loss. Although this argument is superficially appealing, it must be rejected in view of the complainants' responsive submission.

27 Relying on this court's decision in *P.S.A.C. v. Canada (Department of National Defence)*, [1996] 3 F.C. 789 (Fed. C.A.) (*PSAC*), the complainants characterized this matter as "an onus case." That is, they maintained that since they had established the existence of wage loss, the onus shifted to the Crown to lead evidence as to quantum.

28 I have three observations to make regarding the respective submissions of the parties. First, the *PSAC* case concerned a complaint under section 11 of the Act. This is not a section 11 case; it is a case concerning sections 7 and 10 of the Act. There is a statutory presumption with respect to section 11. That is not the case in relation to sections 7 and 10. No authority was cited in support of the complainants' position in this respect.

29 Second, the proposition advanced by the complainants appears to run contrary to the reasoning in both *O'Malley* and *McDougall*. That is, he or she who alleges bears the burden of proving on a balance of probabilities. The general rule, however, is not absolute. The rationale underlying the requirement in *O'Malley* and *PSAC* — that the employer should bear the burden of proof because the employer is in possession of the necessary information to show either undue hardship (*O'Malley*) or job changes that would affect the wage gap (*PSAC*) — was explained by the Supreme Court in *Snell v. Farrell*, [1990] 2 S.C.R. 311 (S.C.C.) at paragraphs 30-33. Basically, if there is a significant imbalance in the access of the parties to evidence relating to a particular point, this imbalance can justify shifting the burden to the party with substantially greater access to the relevant evidence. This leads me to my third observation.

30 The tribunal's reasons are silent on this issue. In the absence of the issue being addressed by the tribunal, the Federal Court, and by extension this Court, is ill-equipped to determine whether the circumstances are such that the Crown is substantially better placed to access evidence relating to the quantum of compensable wage loss. The jurisprudence requires a significant gap before shifting the burden of proof. It is the tribunal, not the court, which possesses familiarity with the factual circumstances and the respective capacities of the parties to produce the evidence that the tribunal considers necessary to adjudicate the matter. The question is not an insignificant one and the tribunal's ruling will be of utmost importance to the parties.

31 In my view, in the circumstances, it would be inappropriate for this Court to pronounce on the issue of whether the burden of proof should shift. It would be equally inappropriate to accept the Crown's argument that its appeal should be allowed on the basis advanced.

Conclusion

32 Although I have taken a somewhat different path, I have arrived at essentially the same conclusion as the judge. I note that the judge's reasons state that the tribunal must "assess the lost income or wage losses on the material before it, or refer the issue back to the parties to prepare better evidence on what the wage losses would have been, but for the discriminatory practice." The formal judgment of the Federal Court sets aside the tribunal's compensation determination and refers it back to a new panel of the tribunal in accordance with the reasons for judgment. In my view, the question of quantum of wage loss and the nature of proof required for the purposes of paragraph 53(2)(c) is a matter best left to the tribunal, given its expertise in the interpretation of the Act. Consequently, I would leave it to the tribunal to determine how to go about conducting the redetermination of the compensation phase of the hearing. As I understand the situation, the pain and suffering aspect of the compensation determination is presently before the tribunal.

33 For these reasons, I would dismiss the appeal with costs to the respondent complainants. I would not award costs to the Commission.

***M. Nadon J.A.*:**

I agree

***Robert M. Mainville J.A.*:**

I agree

Schedule "A"

to the Reasons dated xx, xx, 2011 in A-477-10

Canadian Human Rights Act (R.S.C.1985, c. H-6)

7. It is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ any individual, or

(b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.

10. It is a discriminatory practice for an employer, employee organization or employer organization

(a) to establish or pursue a policy or practice, or

(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

11. (1) It is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value.

Assessment of value of work

(2) In assessing the value of work performed by employees employed in the same establishment, the criterion to be applied is the composite of the skill, effort and responsibility required in the performance of the work and the conditions under which the work is performed.

Separate establishments

(3) Separate establishments established or maintained by an employer solely or principally for the purpose of establishing or maintaining differences in wages between male and female employees shall be deemed for the purposes of this section to be the same establishment.

Different wages based on prescribed reasonable factors

(4) Notwithstanding subsection (1), it is not a discriminatory practice to pay to male and female employees different wages if the difference is based on a factor prescribed by guidelines, issued by the Canadian Human Rights Commission pursuant to subsection 27(2), to be a reasonable factor that justifies the difference.

Idem

(5) For greater certainty, sex does not constitute a reasonable factor justifying a difference in wages.

No reduction of wages

(6) An employer shall not reduce wages in order to eliminate a discriminatory practice described in this section.

Definition of "wages"

(7) For the purposes of this section, "wages" means any form of remuneration payable for work performed by an individual and includes

(a) salaries, commissions, vacation pay, dismissal wages and bonuses;

(b) reasonable value for board, rent, housing and lodging;

(c) payments in kind;

(d) employer contributions to pension funds or plans, long-term disability plans and all forms of health insurance plans; and

(e) any other advantage received directly or indirectly from the individual's employer.

53 (2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:

(c) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;

Loi canadienne sur les droits de la personne (L.R.C. 1985, ch. H-6)

7. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects:

a) de refuser d'employer ou de continuer d'employer un individu;

b) de le défavoriser en cours d'emploi.

10. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite et s'il est susceptible d'annihiler les chances d'emploi ou d'avancement d'un individu ou d'une catégorie d'individus, le fait, pour l'employeur, l'association patronale ou l'organisation syndicale:

a) de fixer ou d'appliquer des lignes de conduite;

b) de conclure des ententes touchant le recrutement, les mises en rapport, l'engagement, les promotions, la formation, l'apprentissage, les mutations ou tout autre aspect d'un emploi présent ou éventuel.

11. (1) Constitue un acte discriminatoire le fait pour l'employeur d'instaurer ou de pratiquer la disparité salariale entre les hommes et les femmes qui exécutent, dans le même établissement, des fonctions équivalentes.

Critère

(2) Le critère permettant d'établir l'équivalence des fonctions exécutées par des salariés dans le même établissement est le dosage de qualifications, d'efforts et de responsabilités nécessaire pour leur exécution, compte tenu des conditions de travail.

Établissements distincts

(3) Les établissements distincts qu'un employeur aménage ou maintient dans le but principal de justifier une disparité salariale entre hommes et femmes sont réputés, pour l'application du présent article, ne constituer qu'un seul et même établissement.

Disparité salariale non discriminatoire

(4) Ne constitue pas un acte discriminatoire au sens du paragraphe (1) la disparité salariale entre hommes et femmes fondée sur un facteur reconnu comme raisonnable par une ordonnance de la Commission canadienne des droits de la personne en vertu du paragraphe 27(2).

Idem

(5) Des considérations fondées sur le sexe ne sauraient motiver la disparité salariale.

Diminutions de salaire interdites

(6) Il est interdit à l'employeur de procéder à des diminutions salariales pour mettre fin aux actes discriminatoires visés au présent article.

Définition de « salaire »

(7) Pour l'application du présent article, « salaire » s'entend de toute forme de rémunération payable à un individu en contrepartie de son travail et, notamment:

a) des traitements, commissions, indemnités de vacances ou de licenciement et des primes;

b) de la juste valeur des prestations en repas, loyers, logement et hébergement;

c) des rétributions en nature;

d) des cotisations de l'employeur aux caisses ou régimes de pension, aux régimes d'assurance contre l'invalidité prolongée et aux régimes d'assurancemaladie de toute nature;

e) des autres avantages reçus directement ou indirectement de l'employeur.

53 (2) À l'issue de l'instruction, le membre instructeur qui juge la plainte fondée, peut, sous réserve de l'article 54, ordonner, selon les circonstances, à la personne trouvée coupable d'un acte discriminatoire:

c) d'indemniser la victime de la totalité, ou de la fraction des pertes de salaire et des dépenses entraînées par l'acte;

Appeal dismissed.

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Most Negative Treatment: Distinguished
Most Recent Distinguished: Rameau c. Canada (Procureur général) | 2015 FC 1180, 2015 CF 1180, 2015 CarswellNat 5070, 2015 CarswellNat 8531, 259 A.C.W.S. (3d) 534 | (F.C., Oct 19, 2015)

2014 CAF 110, 2014 FCA 110
Federal Court of Appeal

Johnstone v. Canada (Border Services Agency)

2014 CarswellNat 1415, 2014 CarswellNat 5878, 2014 CAF 110, 2014 FCA 110, [2014] F.C.J. No. 455, 15 C.C.E.L. (4th) 204, 2014 C.L.L.C. 230-031, 239 A.C.W.S. (3d) 826, 372 D.L.R. (4th) 730, 459 N.R. 82, 79 C.H.R.R. D/324, J.E. 2014-1064, D.T.E. 2014T-412

Attorney General of Canada, Appellant and Fiona Ann Johnstone and Canadian Human Rights Commission, Respondents and Women's Legal Education and Action Fund Inc., Intervener

J.D. Denis Pelletier, Robert M. Mainville, A.F. Scott JJ.A.

Heard: March 11, 2014
Judgment: May 2, 2014
Docket: A-89-13

Proceedings: refusing application for judicial review in part *Johnstone v. Canada (Border Services Agency)* (2010), [2010] C.H.R.D. No. 20, [2010] R.J.D.T. 1402, 2010 CHRT 20, 2010 CarswellNat 3213, 2010 C.L.L.C. 230-027, D.T.E. 2010T-750, Kerry-Lynne D. Findlay Member (Can. Human Rights Trib.); varying *Johnstone v. Canada (Border Services Agency)* (2013), (sub nom. *Canada (Attorney General) v. Johnstone*) 426 F.T.R. 163 (Eng.), 76 C.H.R.R. D/53, 357 D.L.R. (4th) 706, 2013 CarswellNat 1246, 2013 CF 113, [2013] F.C.J. No. 92, (sub nom. *Canada (AG) v. Johnstone*) 2013 C.L.L.C. 230-011, 2013 CarswellNat 152, 2013 FC 113, Leonard S. Mandamin J. (F.C.)

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Andrew Raven, Andrew Astritis, for Respondent, Fiona Ann Johnstone
Sheila Osborne-Brown, Daniel Poulin, Erin Collins, for Respondent, Canadian Human Rights Commission
Kate Hughes, Danielle Bisnar, Kim Stanton, for Intervener, Women's Legal Education and Action Fund Inc.

Subject: Civil Practice and Procedure; Constitutional; Public; Employment; Human Rights

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Human rights

III What constitutes discrimination
III.6 Family status
III.6.a Employment

Human rights

III What constitutes discrimination
III.6 Family status
III.6.c Benefits

Human rights

VII Remedies
VII.2 Damages
VII.2.d Wage loss

Human rights

VII Remedies
VII.6 Public interest remedies

Human rights

VIII Practice and procedure
VIII.5 Judicial review
VIII.5.d Standard of review

Headnote

Human rights --- What constitutes discrimination — Family status — Employment

Employee had childcare obligations which would only permit employee to work fixed daytime shifts — Employer only offered fixed daytime shifts on part-time basis — As result, employee did not qualify for employer's full-time benefits package — Employee brought human rights complaint, alleging discrimination in employment on basis of family status — Tribunal found that childcare obligations were contained within definition of "family status" in s. 3(1) of Canadian Human Rights Act, and that employer had not established defence based on bona fide occupational requirement that justified its refusal for work schedule accommodation, nor had it developed sufficient undue hardship argument to discharge it from its duty of accommodation — Employer brought application for judicial review — Application was dismissed, with exception of two issues — Employer appealed — Appeal allowed in part with respect to remedies — Family status in Act included parental obligations which engaged parent's legal responsibility for child, such as childcare obligations, as opposed to personal choices — Childcare obligations contemplated under family status were those with immutable or constructively immutable characteristics, such as those that form integral component of legal relationship between parent and child — Voluntary family activities, such as family trips and participation in extracurricular sports events, did not have this immutable characteristic since they resulted from parental choices rather than parental obligations — Employee clearly satisfied third leg of test for prima facie case, in that she made reasonable efforts to meet childcare obligations through reasonable alternative solutions, but no such alternative solution was reasonably available.

Human rights --- What constitutes discrimination — Family status — Benefits

Employee had childcare obligations which would only permit employee to work fixed daytime shifts — Employer only offered fixed daytime shifts on part-time basis — As result, employee did not qualify for employer's full-time benefits package — Employee brought human rights complaint, alleging discrimination in employment on basis of family status — Tribunal found that childcare obligations were contained within definition of "family status" in s. 3(1) of Canadian Human Rights Act, and that employer had not established defence based on bona fide occupational requirement that justified its refusal for work schedule accommodation, nor had it developed sufficient undue hardship argument to discharge it from its duty of accommodation — Employer brought application for judicial review — Application was dismissed, with exception of two issues — Employer appealed — Appeal allowed in part with respect to remedies — Family status in Act included parental obligations which engaged parent's legal responsibility for child, such as childcare obligations, as opposed to personal choices — Childcare obligations contemplated under family status were those with immutable or constructively immutable characteristics, such as those that formrf integral component of legal relationship between parent and child — Voluntary family activities, such as family trips and participation in extracurricular sports events, did not have this immutable characteristic since they resulted from parental choices rather than parental obligations.

Human rights --- Practice and procedure — Judicial review — Standard of review

Employee had childcare obligations which would only permit employee to work fixed daytime shifts but employer only offered fixed daytime shifts on part-time basis — As result, employee did not qualify for employer's full-time benefits package — Employee brought human rights complaint, alleging discrimination in employment on basis of family status — Tribunal found that childcare obligations were contained within definition of "family status" in s. 3(1) of Canadian Human Rights Act and that employer had not establish defence based on bona fide occupational requirement that justified its refusal for work schedule accommodation, nor had it developed sufficient undue hardship argument to discharge it from its duty of accommodation — Employer brought application for judicial review — Application was dismissed, with exception of two issues — Employer appealed — Appeal allowed in part with respect to remedies — Standard of correctness was to be applied with respect to two legal issues, namely meaning and scope of "family status" as prohibited ground of discrimination and applicable legal test under which finding of prima facie discrimination might be made under that prohibited ground — Constitutional issues were necessarily subject to review on correctness standard, and this approach extended to quasi-constitutional issues involving fundamental human rights set out in Canadian Human Rights Act and provincial human rights legislation — It was inconsistent to review legal questions at issue here on deferential standard but adopt correctness standard on appeal from decision of court at first instance on same legal question — Supreme Court of Canada determined in past that correctness standard of review applied to meaning and scope of family status under Act.

Human rights --- Remedies — Public interest remedies

Employee brought human rights complaint, alleging discrimination in employment on basis of family status — Tribunal awarded compensation for lost wages during time in which employee was on voluntary unpaid leave from work in order to assist with spouse's relocation — Tribunal also directed employer to develop policies in respect of childcare obligations family status claims and that these policies be made satisfactory to employee — Employer brought application for judicial review — Application was dismissed, with exception of two issues — Application judge found that compensation for time of unpaid leave was unreasonable and that Tribunal exceeded its jurisdiction when it ordered employer to establish written policies satisfactory to employee — Employer appealed — Appeal allowed in part to vary judgment by adding "order of tribunal decision varied by replacing words 'satisfactory to employee and Canadian Human Rights Commission' with 'in consultation with Canadian Human Rights Commission'" — There was substantial difference between developing policy in consultation with Commission and with having that policy subject to its approval — Without sufficient explanation from Tribunal as to statutory basis for making order and reasons why such order was required, impugned order lacked justification, transparency and intelligibility required to meet standard of reasonableness.

Human rights --- Remedies — Damages — Wage loss

Employee brought human rights complaint, alleging discrimination in employment on basis of family status — Tribunal awarded compensation for lost wages during time in which employee was on voluntary unpaid leave from work in order to assist with spouse's relocation — Tribunal also directed employer to develop policies in respect of childcare obligations family status claims and that these policies be made satisfactory to employee — Employer brought application for judicial review — Application was dismissed, with exception of two issues — Application judge found that compensation for time of unpaid leave was unreasonable and that Tribunal exceeded its jurisdiction when it ordered employer to establish written policies satisfactory to employee — Employer appealed — Appeal allowed in part to vary judgment by replacing date August, 2008 by date August, 2010 — Decision to award lost wages on full-time basis during first period of December, 2005 to August, 2007 rested on finding of fact that had employee been accommodated in her work schedule through static shifts on full-time basis, as she had initially requested, she would have accepted those hours — However, tribunal failed to justify its award of full-time lost wages for period from August, 2007 to August, 2008 during which employee moved to Ottawa to join husband on voluntary unpaid leave — There was no change in employee's situation during period of August, 2008 to August, 2010 as compared with period of August, 2007 to August, 2008, as she continued to live in Ottawa with her husband under work leave arrangement.

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Public Performance of Musical Works, Re (2012), 38 Admin. L.R. (5th) 1, 2012 CarswellNat 2378, 2012 CarswellNat 2379, 2012 SCC 35, 102 C.P.R. (4th) 204, (sub nom. *Shaw Cablesystems G.P. v. Society of Composers, Authors and Music Publishers of Canada*) 347 D.L.R. (4th) 235, (sub nom. *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*) 432 N.R. 1, (sub nom. *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*) [2012] 2 S.C.R. 283 (S.C.C.) — followed

Q. v. College of Physicians & Surgeons (British Columbia) (2003), 2003 SCC 19, 2003 CarswellBC 713, 2003 CarswellBC 743, 11 B.C.L.R. (4th) 1, 223 D.L.R. (4th) 599, 48 Admin. L.R. (3d) 1, (sub nom. *Dr. Q., Re*) 302 N.R. 34, [2003] 5 W.W.R. 1, (sub nom. *Dr. Q. v. College of Physicians & Surgeons of British Columbia*) [2003] 1 S.C.R. 226, (sub nom. *Dr. Q., Re*) 179 B.C.A.C. 170, (sub nom. *Dr. Q., Re*) 295 W.A.C. 170 (S.C.C.) — referred to

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(sub nom. *Ville de Montréal v. Mercier*) 2000 C.L.L.C. 230-020, (sub nom. *Québec (Commission des droits de la personne & des droits de la jeunesse) v. Montreal (City)*) 185 D.L.R. (4th) 385, 50 C.C.E.L. (2d) 247, [2000] L.V.I. 3115-1, (sub nom. *Québec (Commission des droits de la personne & des droits de la jeunesse) v. Montréal (Ville)*) 253 N.R. 107 (S.C.C.) — referred to

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Richards v. Canadian National Railway (2010), 2010 CHRT 24, 2010 CarswellNat 4522, 2010 CarswellNat 5660, (sub nom. *Richards v. CN Railway*) 2011 C.L.L.C. 230-006, 2010 TCDP 24 (Can. Human Rights Trib.) — referred to

Seeley v. Canadian National Railway (2010), 2010 CHRT 23, 2010 CarswellNat 4532, 2010 CarswellNat 5659, 2010 TCDP 23 (Can. Human Rights Trib.) — referred to

Sketchley v. Canada (Attorney General) (2005), 2006 C.L.L.C. 230-002, 2005 CAF 404, 2005 CarswellNat 5119, [2006] 3 F.C.R. 392, 2005 FCA 404, 2005 CarswellNat 4194, 344 N.R. 257, 44 Admin. L.R. (4th) 4, 56 C.H.R.R. D/490, 263 D.L.R. (4th) 113 (F.C.A.) — referred to

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Telfer v. Canada (Revenue Agency) (2009), 2009 CarswellNat 655, (sub nom. *CRA v. Telfer*) 2009 D.T.C. 5046 (Eng.), [2009] 4 C.T.C. 123, 386 N.R. 212, 2009 CarswellNat 5698, 2009 CAF 23, 2009 D.T.C. 5046, 2009 FCA 23 (F.C.A.) — referred to

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Whyte v. Canadian National Railway (2010), 71 C.H.R.R. D/316, 2010 CHRT 22, 2010 CarswellNat 4531 (Can. Human Rights Trib.) — referred to

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Woiden v. Lynn (2002), 43 C.H.R.R. D/296, 2003 C.L.L.C. 230-005, 2002 CarswellNat 4033 (Can. Human Rights Trib.) — referred to

Yu v. Canada (Attorney General) (2011), 2011 CAF 42, 2011 CarswellNat 1960, 414 N.R. 283, 2011 CarswellNat 239, 2011 FCA 42 (F.C.A.) — referred to

Statutes considered:

Alberta Human Rights Act, R.S.A. 2000, c. A-25.5
s. 3(1) — referred to

Canadian Human Rights Act, R.S.C. 1985, c. H-6
Generally — referred to

s. 2 — considered

s. 3(1) — considered

s. 7 — considered

s. 7(b) — considered

s. 10 — considered

s. 53(2)(a) — considered

s. 53(2)(b) — considered

s. 53(2)(c) — considered

s. 53(2)(d) — considered

s. 53(2)(e) — considered

s. 53(3) — considered

Charte des droits et libertés de la personne, RLRQ, c. C-12
en général — referred to

Code civil du Québec, L.Q. 1991, c. 64
art. 599 — considered

Criminal Code, R.S.C. 1985, c. C-46
s. 215(1) — considered

Human Rights Act, 2010, S.N. 2010, c. H-13.1
s. 9(1) — referred to

Human Rights Act, R.S.N.S. 1989, c. 214
s. 5(1)(r) — referred to

Human Rights Act, R.S.P.E.I. 1988, c. H-12
s. 13 — referred to

Human Rights Act, R.S.Y. 1986, c. 11 (Supp.)
Generally — referred to

Human Rights Code, S.B.C. 1984, c. 22
Generally — referred to

Human Rights Code, R.S.B.C. 1996, c. 210
s. 7(1) — referred to

s. 13(1) — considered

Human Rights Code, S.M. 1987-88, c. 45
s. 9(2) — referred to

Human Rights Code, R.S.O. 1990, c. H.19
Generally — referred to

s. 1 — referred to

Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1
s. 2(1)(m.01) "prohibited ground" [en. 2000, c. 26, s. 3(5)] — referred to

APPEAL by employer from judgment reported at *Johnstone v. Canada (Border Services Agency)* (2013), 2013 FC 113, 2013 CarswellNat 152, 2013 CF 113, 2013 CarswellNat 1246, 2013 C.L.L.C. 230-011, 357 D.L.R. (4th) 706, [2013] F.C.J. No. 92, 76 C.H.R.R. D/53, 426 F.T.R. 163 (Eng.) (F.C.), dismissing application for judicial review with exception of two issues on remedies.

***Robert M. Mainville J.A.*:**

1 This is an appeal from a judgment reported as 2013 FC 113 (F.C.) of Mandamin J. of the Federal Court (Federal Court Judge) dismissing the judicial review application of the Attorney General of Canada challenging a decision of the Canadian Human Rights Tribunal (Tribunal) reported as 2010 CHRT 20 (Can. Human Rights Trib.).

2 The Tribunal held that the Canadian Border Services Agency (CBSA) had discriminated within the meaning of section 10 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 against the respondent Fiona Ann Johnstone on the ground of family status by refusing to accommodate her childcare needs through work scheduling arrangements.

3 For the reasons set out below, I would allow the appeal in part to vary the judgment of the Federal Court Judge on the subject of two remedial measures flowing from the Tribunal's decision, and in all other respects I would dismiss the appeal with costs in favour of Ms. Johnstone.

Background and context

4 The full background to this litigation is extensively set out in the Tribunal's decision and need not be repeated here. It is sufficient for the purposes of this appeal to simply point out some of the salient facts.

5 Ms. Johnstone is an employee of the CBSA since 1998. Her husband also works for the CBSA as a supervisor. They have two children. After the eldest was born in January 2003, Ms. Johnstone returned to work from her maternity leave on January 4, 2004. The second child was then born in December 2004, and Ms. Johnstone returned to work on December 26, 2005.

6 Prior to returning to work from her first maternity leave, Ms. Johnstone asked the CBSA for an accommodation to her work schedule at the Pearson International Airport in Toronto.

7 The work schedule for full-time CBSA employees occupying positions similar to that of Ms. Johnstone is built around a rotating shift plan referred to as a Variable Shift Scheduling Agreement or VSSA. At the pertinent time, full-time employees rotated through 6 different start times over the course of days, afternoons, and evenings with no predictable pattern, and they worked different days of the week throughout the duration of the schedule. The schedule was based on a 56 day pattern, and employees were given 15 days notice of each new shift schedule, subject to the employer's discretion to change the schedule on 5 days' notice.

8 Full-time employees such as Ms. Johnstone were required to work 37.5 scheduled hours per week under the VSSA on the basis of an 8 hour day that included a one half hour meal break. Any individual who worked less than 37.5 hours a week was considered a part-time employee. Part-time employees had fewer employment benefits than full-time employees, notably with regard to pension entitlements and promotion opportunities.

9 It is useful to note that Ms. Johnstone's husband also worked on a variable shift schedule as a customs superintendent. Their work schedules overlapped 60% of the time but were not coordinated. The Tribunal concluded that Ms. Johnstone's husband was facing the same work scheduling problems, and that neither could provide the necessary childcare on a reliable basis.

10 In the past, the CBSA had accommodated some employees who had medical issues by providing them with a fixed work schedule (static shift) on a full-time basis. The CBSA also accommodated employee work schedules with respect to constraints resulting from religious beliefs. However, the CBSA refused to provide an accommodation to employees with childcare obligations on the ground that it had no legal duty to do so. Instead, the CBSA had an unwritten policy allowing an employee with childcare obligations to work fixed schedules, but only insofar as the employee agreed to be treated as having a part-time status with a maximum work schedule of 34 hours per week.

11 Prior to returning from her first maternity leave, Ms. Johnstone asked the CBSA to provide her with static shifts on a full-time basis. She wished to work 3 days per week for 13 hours a day (including one half-hour meal break) so that she could remain full-time. She requested this schedule since she only had access to child care arrangements with family members for the three days in question, and was unable to make other childcare arrangements on a reasonable basis. In light of its unwritten policy, CBSA only offered her static shifts for 34 hours per week resulting in her being treated as a part-time employee.

12 It is useful to note that the CBSA did not refuse to provide static shifts to Ms. Johnstone on a full-time basis on the ground that this would cause it undue hardship. Rather, it refused the proposed schedule on the ground that it had no legal duty to accommodate Ms. Johnstone's childcare responsibilities.

13 Ms. Johnstone was not satisfied with the CBSA's unwritten policy that required her to accept part-time employment in return for obtaining static shifts. As a result, she filed a complaint with the Canadian Human Rights Commission on April 24, 2004, alleging discrimination on the basis of family status contrary to sections 7 and 10 of the *Canadian Human Rights Act*.

14 The provisions of the *Canadian Human Rights Act* that are particularly pertinent for the purposes of Ms. Johnstone's complaint are subsection 3(1), paragraph 7(b) and section 10, which read as follows:

> **3**. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.
>
> [Emphasis added]
>
> **7**. It is a discriminatory practice, directly or indirectly,
>
> [...]

(*b*) in the course of employment, to differentiate adversely in relation to an employee,

on a prohibited ground of discrimination.

10. It is a discriminatory practice for an employer, employee organization or employer organization

(a) to establish or pursue a policy or practice, or

(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,

that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

3. (1) Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, l'état de personne graciée ou la déficience.

[Je souligne]

7. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects:

[...]

b) de le défavoriser en cours d'emploi.

10. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite et s'il est susceptible d'annihiler les chances d'emploi ou d'avancement d'un individu ou d'une catégorie d'individus, le fait, pour l'employeur, l'association patronale ou l'organisation syndicale:

a) de fixer ou d'appliquer des lignes de conduite;

b) de conclure des ententes touchant le recrutement, les mises en rapport, l'engagement, les promotions, la formation, l'apprentissage, les mutations ou tout autre aspect d'un emploi présent ou éventuel.

Procedural history

(a) Proceedings before the Canadian Human Rights Commission and related proceedings in the Federal Courts

15 The investigator who examined the complaint recommended that it be referred to the Tribunal. However, the Canadian Human Rights Commission did not follow this recommendation and instead dismissed the complaint. The Commission found that the CBSA had offered Ms. Johnstone accommodation in the form of a 34 hour a week part-time fixed work schedule. The Commission was not convinced that this policy constituted a serious interference with Ms. Johnstone's duties as a parent or that it had a discriminatory impact on the basis of family status.

16 Ms. Johnstone sought judicial review of this refusal before the Federal Court. In *Johnstone v. Canada (Attorney General)*, 2007 FC 36, 306 F.T.R. 271 (Eng.) (F.C.), Barnes J. allowed the judicial review application and remitted the matter back to the Commission for a new determination.

17 Applying a standard of correctness to the legal issue before him, Barnes J. rejected the test for *prima facie* discrimination taken from the British Columbia Court of Appeal's decision in *Campbell River & North Island Transition Society v. H.S.A.B.C.*, 2004 BCCA 260, 240 D.L.R. (4th) 479 (B.C. C.A.), (*Campbell River*) that the Commission had

adopted for screening out the complaint. Under the *Campbell River* test, "a *prima facie* case of discrimination is made out when a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial parental or other family duty or obligation of the employee": *Campbell River* at para. 39.

18 On the basis of the discussion of the Tribunal in *Hoyt v. Canadian National Railway*, 2006 CHRT 33 (Can. Human Rights Trib.) (*Hoyt*), Barnes J. found that (a) the *Campbell River* test conflated the threshold issue of *prima facie* discrimination with the second stage of the analysis relating to discrimination that deals with *bona fide* occupational requirements, and (b) the suggestion in *Campbell River* that *prima facie* discrimination only arises where the employer changes the conditions of employment was wrong in law. Barnes J. rather concluded that the threshold for *prima facie* discrimination on the ground of family status should be the same as for any other prohibited ground of discrimination. As a result, the simple fact that Ms. Johnstone had been adversely affected by the CBSA's unwritten policy was sufficient to establish a *prima facie* ground of discrimination. The matter was, therefore, remitted to the Commission for reconsideration on that basis.

19 The appeal from Barnes J.'s decision was dismissed by this Court in *Johnstone v. Canada (Attorney General)*, 2008 FCA 101, 377 N.R. 235 (F.C.A.) with no opinion being expressed as to whether the appropriate legal test for *prima facie* discrimination in this case should be based on *Campbell River* or on *Hoyt*.

20 The Commission subsequently referred the complaint to the Tribunal.

(b) The decision of the Tribunal

21 Following an extensive review of the case law, the Tribunal held that the prohibited ground of discrimination on family status includes family and parental obligations such as childcare obligations. It consequently rejected the Appellant's definition of family status that limited its scope to the status of being in a family relationship. In this regard, the Tribunal noted the following at paragraph 233 of its decision:

> [233] This Tribunal finds that the freedom to choose to become a parent is so vital that it should not be constrained by the fear of discriminatory consequences. As a society, Canada should recognize this fundamental freedom and support that choice wherever possible. For the employer, this means assessing situations such as Ms. Johnstone's on an individual basis and working together with her to create a workable solution that balances her parental obligations with her work opportunities, short of undue hardship.

22 With respect to the *prima facie* case of discrimination on the ground of family status, the Tribunal rejected the test set out in *Campbell River*. It rather followed the test propounded in *Hoyt* and approved by Barnes J. Under this approach, "an individual should not have to tolerate some amount of discrimination to a certain unknown level before being afforded the protection of the [*Canadian Human Rights*] Act": Tribunal's decision at para. 238.

23 As a result, the Tribunal held that Ms. Johnstone had made out a case of *prima facie* discrimination in that the "CBSA engaged in a discriminatory practice by establishing and pursuing an unwritten policy communicated to and followed by management that affected Ms. Johnstone's employment opportunities including, but not limited to promotion, training, transfer, and benefits on the prohibited ground of family status": Tribunal decision at para. 242.

24 The Tribunal further held that the CBSA had not established a defence based on a *bona fide* occupational requirement that would justify its refusal of the work schedule accommodation sought by Ms. Johnstone, nor had it developed a sufficient undue hardship argument to discharge it from its duty of accommodation. The Tribunal noted, at paragraphs 359 and 362 of its decision, that the position advanced on behalf of the CBSA throughout the proceedings was that it had no legal duty to accommodate Ms. Johnstone, rather than whether such an accommodation would lead to undue hardship.

25 The Tribunal, therefore, ordered the CBSA to cease its discriminatory practice against employees who seek accommodation on the basis of family status for purposes of childcare responsibilities, and to consult with the Canadian

Human Rights Commission to develop a plan to prevent further incidents of discrimination based on family status in the future: Tribunal's decision at para. 366. It further ordered the CBSA to establish written policies satisfactory to Ms. Johnstone and the Canadian Human Rights Commission that would implement a mechanism where family status accommodation requests would be addressed within 6 months, and include a process for individualized assessments of those making such requests: Tribunal's decision at para. 367.

26 The Tribunal also ordered the CBSA to compensate Ms. Johnstone for her lost wages and benefits from January 4, 2004, when she first commenced part-time employment, until the date of its decision. It awarded Ms. Johnstone $15,000 for pain and suffering pursuant to paragraph 53(2)(*e*) of the *Canadian Human Rights Act*.

27 The Tribunal further awarded the maximum amount of $20,000 for special compensation pursuant to subsection 53(3) of the *Canadian Human Rights Act*, as a result of its finding that the CBSA had engaged in the discriminatory practice wilfully and recklessly. This award was largely based on the Tribunal's conclusion that the CBSA had failed to follow *Brown v. Canada (Department of National Revenue - Customs & Excise)* [(April 20, 1993), Doc. T.D.7/93 (Can. Human Rights Trib.)], 1993 CanLII 683 (CHRT) (*Brown*), a prior decision of the Tribunal dealing with the issue of discrimination based on sex (pregnancy) and family status.

28 In *Brown*, the Tribunal had "ordered the Respondent to prevent similar events from recurring through recognition and policies that would acknowledge family status to be interpreted as involving 'a parent's rights and duty to strike a balance [between work obligations and child rearing] coupled with a clear duty on the part of any employer to facilitate and accommodate that balance'": Tribunal's decision at para. 57. In the Tribunal's view, this prior order had been ignored by the CBSA, thus justifying in this case an award of special compensation under subsection 53(3): Tribunal's decision at paras. 381 and 382.

(c) Judicial Review before the Federal Court

29 The Attorney General of Canada sought judicial review of the Tribunal's decision. The Federal Court Judge dismissed the application, with the exception of two issues. First, he referred the matter back to the Tribunal so as to allow it to reconsider its award of loss wages and benefits for the period from August 2007 to August 2008 during which Ms. Johnstone opted for unpaid leave so as to accompany her spouse to Ottawa, and (b) he excluded Ms. Johnstone as a party to be consulted with respect to the development of a written remedial policy by the CBSA.

30 The Federal Court Judge applied the reasonableness standard of review to all of the issues raised before him, including the legal definition and scope of the prohibited ground of discrimination on the basis of family status and the legal test for finding a *prima facie* case of discrimination on that ground

31 The Federal Court Judge held that the Tribunal had reasonably concluded that family status includes childcare responsibilities, since that interpretation was well within the scope of the ordinary meaning of the words, was consistent with the opinions of numerous human rights and labour relations adjudicative bodies that have considered the matter, and was consistent with the objectives of the *Canadian Human Rights Act*.

32 The Judge also held that the test used by the Tribunal for finding a *prima facie* case of discrimination was reasonable, as was its application of that test in this case. In so doing, he specifically discarded the "serious interference" test used in *Campbell River*.

33 However, the Federal Court Judge found fault with the Tribunal's remedies. He noted that the evidence showed that Ms. Johnstone had sought, and obtained, an unpaid leave from August 2007 to August 2008 to accompany her husband to Ottawa. Since he could not discern the basis on which the Tribunal awarded full wages to Ms. Johnstone for that period of time, he referred that issue back to the Tribunal for reconsideration.

34 The Federal Court Judge also concluded that the Tribunal exceeded its jurisdiction when it ordered the CBSA to establish written remedial policies satisfactory to Ms. Johnstone. In the Judge's view, the *Canadian Human Rights Act*

"does not provide that a victim may have a role or participate in the development of remedial polic[i]es to redress the discriminatory practices": Federal Court Judge's reasons at para. 167.

Issues raised in this appeal

35 The issues raised in this appeal may be set out as follows:

1. What is the applicable standard of review?

2. Did the Tribunal commit a reviewable error in concluding that family status includes childcare obligations?

3. Did the Tribunal commit a reviewable error in identifying the legal test for finding a *prima facie* case of discrimination on the ground of family status?

4. Applying the proper meaning and scope to family status, and using the proper legal test, did the Tribunal commit a reviewable error in finding that a *prima facie* case of discrimination on the ground of family status had been made out in this case?

5. Did the Tribunal commit reviewable errors with respect to its remedial orders, notably with respect to: (a) the award of lost wages for the period subsequent to December 2005; (b) the requirement that the CBSA establish a written policy satisfactory to the Canadian Human Rights Commission; and (c) the award of special damages under paragraph 53(3) of the *Canadian Human Rights Act*?

The standard of review

36 In an appeal of a judgment concerning a judicial review application, the role of this Court is to determine whether the application judge identified and applied the correct standard of review, and in the event he or she has not, to assess the decision under review in light of the correct standard: *Keith v. Canada (Correctional Service)*, 2012 FCA 117, 40 Admin. L.R. (5th) 1 (F.C.A.) at para. 41; *Yu v. Canada (Attorney General)*, 2011 FCA 42, 414 N.R. 283 (F.C.A.) at para. 19; *Telfer v. Canada (Revenue Agency)*, 2009 FCA 23, 386 N.R. 212 (F.C.A.) at para. 18.

37 This means, in effect, that an appellate court's focus is on the administrative decision; in this case, the decision of the Tribunal: *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 (S.C.C.) at para. 46; *Merck Frosst Canada Ltée c. Canada (Ministre de la Santé)*, 2012 SCC 3, [2012] 1 S.C.R. 23 (S.C.C.) at para. 247; *Kandola (Guardian at Law) v. Canada (Minister of Citizenship and Immigration)*, 2014 FCA 85 (F.C.A.) at para. 29.

38 The application judge's selection of the appropriate standard of review is itself a question of law subject to review on the standard of correctness: *Mugesera c. Canada (Ministre de la Citoyenneté & de l'Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100 (S.C.C.) at para. 35; *Q. v. College of Physicians & Surgeons (British Columbia)*, 2003 SCC 19, [2003] 1 S.C.R. 226 (S.C.C.) at para. 43; *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries & Oceans)*, 2006 FCA 31, [2006] 3 F.C.R. 610 (F.C.A.) at para. 14.

39 There is no dispute in this appeal that the conclusion of the Tribunal with respect to questions of fact and of mixed fact and law are to be reviewed on a standard of reasonableness. However, there is substantial disagreement as to the standard of review that applies to findings of law made by the Tribunal, particularly with respect to (a) the meaning and scope of family status as a prohibited ground of discrimination and (b) the applicable legal test under which a finding of discrimination may be made with respect to that prohibited ground.

40 The interpretation by an adjudicative tribunal of its enabling statute or of statutes closely related to its functions are presumed to be subject to deference on judicial review: *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, [2011] 3 S.C.R. 654 (S.C.C.) at paras. 34, 39 and 41; *British Columbia (Securities Commission) v. McLean*, 2013 SCC 67, 366 D.L.R. (4th) 30 (S.C.C.) at paras. 21, 22 and 33.

41 That presumption may, however, be rebutted if it can be concluded that Parliament's intent is inconsistent with its application: *Public Performance of Musical Works, Re*, 2012 SCC 35, [2012] 2 S.C.R. 283 (S.C.C.) at para. 15 (*Rogers Communications*). Indeed, the determination of the appropriate standard of review is essentially a search for legislative intent: *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.) (*Dunsmuir*) at para. 30; *Q. v. College of Physicians & Surgeons (British Columbia)*, above at para. 21.

42 Prior to *Dunsmuir*, the Supreme Court of Canada had specifically held that the standard of review pertaining to the meaning and scope of family status as a prohibited ground of discrimination was correctness: *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 (S.C.C.), at pp. 576-578 (*Mossop*). Our Court had also held that the standard of review for the test for *prima facie* discrimination is correctness: *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392 (F.C.A.). The question before us here is whether this is still good law in light of *Dunsmuir* and the decisions of the Supreme Court of Canada which have followed it.

43 That question was left unanswered by the Supreme Court of Canada in *Canada (Attorney General) v. Mowat*, 2011 SCC 53, [2011] 3 S.C.R. 471 (S.C.C.) (*Mowat*). That case concerned the interpretation by the Tribunal of paragraphs 53(2)(*c*) and (*d*) of the *Canadian Human Rights Act* with respect to its authority to award legal costs. In *Mowat*, LeBel and Cromwell JJ. applied a standard of reasonableness to the Tribunal's decision to award legal costs, and they concluded that the Tribunal's decision in that case was unreasonable. In so doing, they emphasized that a standard of correctness may well apply to decisions of the Tribunal dealing with broad human rights principles: *Mowat* at para. 23.

44 In light of the four factors discussed below, I conclude that, in this case, the presumption of reasonableness is rebutted and a standard of correctness is to be applied with respect to the two legal issues before us, namely (a) the meaning and scope of "family status" as a prohibited ground of discrimination, and (b) the applicable legal test under which a finding of *prima facie* discrimination may be made under that prohibited ground.

45 *First*, the Supreme Court of Canada has consistently held that fundamental rights set out in human rights legislation, such as the *Canadian Human Rights Act*, are "quasi-constitutional" rights: see notably *Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145 (S.C.C.), at pp. 157-158; *O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 (S.C.C.), at pp. 546-547; *University of Alberta v. Alberta (Human Rights Commission)*, [1992] 2 S.C.R. 1103 (S.C.C.) at p. 1154; *Québec (Commission des droits de la personne & des droits de la jeunesse) c. Maksteel Québec inc.*, 2003 SCC 68, [2003] 3 S.C.R. 228 (S.C.C.) at para. 43; *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667 (S.C.C.) at para. 81; *Potash Corp. of Saskatchewan Inc. v. Scott*, 2008 SCC 45, [2008] 2 S.C.R. 604 (S.C.C.) at para. 19.

46 As noted in *Dunsmuir* at paragraph 58, and for obvious reasons, constitutional issues are necessarily subject to review on a correctness standard. In my view, this approach extends as well to quasi-constitutional issues involving the fundamental human rights set out in *Canadian Human Rights Act* and provincial human rights legislation.

47 *Second*, a multiplicity of courts and tribunals are called upon to interpret and apply human rights legislation, including the *Canadian Human Rights Act*. As this appeal illustrates, labour arbitration boards, labour relations boards and superior courts throughout Canada are regularly called upon to adjudicate with respect to the fundamental human rights described in the *Canadian Human Rights Act* and other human rights legislation. As a result, courts have been called upon in the past and will be called upon in the future to examine the same legal issues the Tribunal is required to address in these proceedings.

48 As aptly noted in *Rogers Communications* at paragraph 14, it would be inconsistent to review the legal questions at issue here on judicial review of a decision of the Tribunal on a deferential standard, but adopt a correctness standard on an appeal from a decision of a court at first instance on the same legal question. This concurrent jurisdiction of a multiplicity of decisions makers, including the Tribunal and the courts, rebuts the presumption of reasonableness with regard to the two questions of law raised in this appeal: *Rogers Communications* at para. 15.

49 *Third*, in *Berg v. University of British Columbia*, [1993] 2 S.C.R. 353 (S.C.C.), at pp. 368 and 369 and 372-373 and in *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571 (S.C.C.) at paras. 47-48, the Supreme Court of Canada concluded that the interpretation of "service customarily available to the public" for the purposes of the British Columbia *Human Rights Act*, S.B.C. 1984, c. 22 and of "services to the public" in the Yukon *Human Rights Act*, R.S.Y. 1986 (Supp.) c. 11 were general questions of law to be reviewed on a standard of correctness, based on the principle that "in order for the interpretation of human rights legislation to be purposive, differences in wording among the various provinces should not be permitted to frustrate the similar purpose underlying these provisions": *Gould* at para. 47; Berg at p. 372-373.

50 Most provinces have adopted human rights legislation that prohibits discrimination on the basis of family status: *Human Rights Code*, R.S.O. 1990, c. H-19, s.1; *Human Rights Code*, R.S.B.C. 1996, c. 210, ss. 7(1); *Human Rights Act*, R.S.N.S. 1989, c. 214, par.. 5(1)(*r*); *Alberta Human Rights Act*, R.S.A. 2000, c. A-25.5. ss. 3(1); *The Human Rights Code*, C.C.S.M., H175, ss. 9(2); *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, par. 2(1)(*m.01*); *Human Rights Act*, S.N.L. 2010, c. H-13.1, ss. 9(1); *Human Rights Act*, R.S.P.E.I. 1988, c. H-12, s. 13.

51 The two principal legal issues raised in this appeal concern questions of fundamental rights and principles in a human rights context. These are not issues about questions of proof or mere procedure, or about the remedial authority of a human rights tribunal or commission. As such, for the sake of consistency between the various human rights statutes in force across the country, the meaning and scope of family status and the legal test to find *prima facie* discrimination on that prohibited ground are issues of central importance to the legal system, and beyond the Tribunal's expertise, which attracts a standard of correctness on judicial review: *Dunsmuir* at para. 60.

52 *Fourth*, *Dunsmuir* also stands for the proposition that when the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular question, the matter should be deemed settled. As noted above, the Supreme Court of Canada has determined in the past that a correctness standard of review applies to the meaning and scope of family status under the *Canadian Human Rights Act*: *Mossop* at pp. 576-578. Whether the jurisprudence of the Supreme Court of Canada post-*Dunsmuir* has implicitly overruled this prior approach with respect to fundamental human rights is a matter best left for the Supreme Court itself to decide. Until the Supreme Court of Canada decides otherwise, our Court is bound by *Mossop*: *Craig v. R.*, 2012 SCC 43, [2012] 2 S.C.R. 489 (S.C.C.) at para. 21.

The meaning and scope of family status

53 The appellant submits that the ordinary and grammatical meaning of the expression family status should prevail, and that this expression should therefore be interpreted as defining a legal status, like the ground of marital status. As a consequence, the prohibited ground of family status would be limited to the personal characteristic of whether or not one is part of a family or has a particular family relationship, but it would not include any substantive parental obligations such as childcare obligations.

54 The appellant notably submits that by defining family status broadly to include parental obligations, the Tribunal adopted a meaning that does not align with the other prohibited grounds of discrimination that are all based on immutable or constructively immutable personal characteristics. In the appellant's view, a person's absolute or relative family status is immutable or constructively immutable, but the same cannot be readily said of childcare obligations.

55 The appellant thus proposes a literal interpretation of the expression family status that excludes childcare obligations. According to this interpretation, by defining the ground in terms of status, Parliament did not intend to protect childcare responsibilities. Conflicts between these responsibilities and the terms and conditions of employment would not represent a disadvantage that is arbitrary or based on stereotypes concerning a person's family status.

56 The appellant finds comfort for this interpretation in the legislative history of the provision, and relies on a statement from the responsible Minister at the time the ground of family status was incorporated into the *Canadian Human Rights Act* to the effect that Parliament's intent was primarily to prevent discrimination based on one's relative family status.

57 The appellant further submits that by introducing into the *Canadian Human Rights Act* the notion of discrimination on the ground of childcare obligations, the Tribunal modified the Act in a significant way, and that a change of this magnitude raises difficult questions of social policy that Parliament, rather than the courts, is best placed to address.

58 However, the appellant cites no judicial authority that would directly support this restrictive interpretation of the expression family status. On the contrary, all the decisions of the courts, human rights tribunals and labour adjudicators that have been submitted to us in this appeal, and that have directly considered the matter, have decided the contrary.

59 In fact, judges and adjudicators have been almost unanimous in finding that family status incorporates parental obligations such as childcare obligations. This has been the position consistently held by:

> (a) the Tribunal: *Brown*, *Hoyt*, *Woiden v. Lynn* [2002 CarswellNat 4033 (Can. Human Rights Trib.)], 2002 CanLII 8171; *Closs c. Fulton Forwarders Inc.*, 2012 TCDP 30 (Can. Human Rights Trib.); *Richards v. Canadian National Railway*, 2010 CHRT 24 (Can. Human Rights Trib.); *Whyte v. Canadian National Railway*, 2010 CHRT 22 (Can. Human Rights Trib.); *Seeley v. Canadian National Railway*, 2010 CHRT 23 (Can. Human Rights Trib.);
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> (b) the Federal Court: *Johnstone v. Canada (Attorney General)*, 2007 FC 36, 306 F.T.R. 271 (Eng.) (F.C.) referred to above; *Patterson v. Canada (Revenue Agency)*, 401 F.T.R. 211 (Eng.) (F.C.) at paras. 34-35;
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> (c) the British Columbia Court of Appeal: *Campbell River* at para. 39;
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> (d) the Human Rights Tribunal of Ontario: *Devaney v. ZRV Holdings Ltd.*, 2012 HRTO 1590 (Ont. Human Rights Trib.); *Callaghan v. 1059711 Ontario Inc.*, 2012 HRTO 233 (Can. Human Rights Trib.); *McDonald v. Mid-Huron Roofing*, 2009 HRTO 1306 (Ont. Human Rights Trib.); *D. (C.) v. Wal-mart Canada Corp.*, 2009 HRTO 801 (Can. Human Rights Trib.);
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> (e) labour arbitrators: *Canada Post Corp. v. C.U.P.W.* (2006), 156 L.A.C. (4th) 109 (Can. Arb.) (Sommerville Grievance); *O.P.S.E.U. v. Ontario Public Service Staff Union*, [2005] O.L.A.A. No. 396 (Ont. Arb.).

60 Our Court is not bound by these decisions, but they are difficult to ignore since their logic is compelling and better reflects the large and liberal interpretation that is to be given to human rights legislation.

61 It is generally accepted that human rights legislation must be given a broad interpretation to ensure that the stated objects and purposes of such legislation are fulfilled. As a result, a narrow restrictive interpretation that would defeat the purpose of eliminating discrimination should be avoided: *Canadian National Railway v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114 (S.C.C.), at pp. 1137-1138 quoting approvingly from *Canadian Odeon Theatres Ltd. v. Saskatchewan (Human Rights Commission)*, [1985] 3 W.W.R. 717 (Sask. C.A.) at p. 735.

62 As also noted in numerous decisions of the Supreme Court of Canada, the key provisions of human rights legislation must be interpreted in a flexible manner and with an adaptive approach: *Québec (Commission des droits de la personne & des droits de la jeunesse) c. Montréal (Ville)*, 2000 SCC 27, [2000] 1 S.C.R. 665 (S.C.C.) at para. 76; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Lexis Nexis, 2008) at pp. 502-503.

63 The proper interpretative rule was set out as follows in *A. v. B.*, 2002 SCC 66, [2002] 3 S.C.R. 403 (S.C.C.) at para. 44:

> More generally, this Court has repeatedly reiterated the view that human rights legislation has a unique quasi-constitutional nature and ought to be interpreted in a liberal and purposive manner in order to advance the broad policy considerations underlying it: see, for example, *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571, at para. 120; *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353, at p. 370; *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, at pp. 89-90; *Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145, at pp. 157-58.

64 In that case, the Supreme Court of Canada was called upon to determine whether the expressions "marital status" and "family status" in the *Ontario Human Rights Code*, R.S.O. 1990, c. H.19 were broad enough to encompass a situation where an adverse distinction is drawn on the particular identity of a complainant's spouse or family member, or whether the ground was restricted to distinctions based on the mere fact that the complainant has a certain type of marital or family status. Iacobucci and Bastarache JJ. noted that the broad goal of anti-discrimination statutes is furthered by embracing a more inclusive interpretation of the expression family status: *A. v. B.*, above at para. 4.

65 That broad and purposive approach also applies in this case, particularly where due regard is given to the purpose of the *Canadian Human Rights Act* set out in section 2:

> **2**. The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.
>
> [Emphasis added]
>
> **2**. La présente loi a pour objet de compléter la législation canadienne en donnant effet, dans le champ de compétence du Parlement du Canada, au principe suivant: le droit de tous les individus, dans la mesure compatible avec leurs devoirs et obligations au sein de la société, à l'égalité des chances d'épanouissement et à la prise de mesures visant à la satisfaction de leurs besoins, indépendamment des considérations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, la déficience ou l'état de personne graciée.
>
> [Je souligne]

66 There is no basis for the assertion that requiring accommodation for childcare obligations overshoots the purpose of including family status as a prohibited ground of discrimination. Indeed, without reasonable accommodation for parents' childcare obligations, many parents will be impeded from fully participating in the work force so as to make for themselves the lives they are able and wish to have. The broad and liberal interpretation of human rights legislation requires an approach that favours a broad participation and inclusion in employment opportunities for those parents who wish or need to pursue such opportunities.

67 It is noteworthy that Parliament chose to use two distinct words for the word "status" in the French version of sections 2 and 3 of the *Canadian Human Rights Act*: "l'état matrimonial" for marital status and the much broader "situation de famille" for family status. The French word "situation" is broadly defined in *Le Nouveau Petit Robert* as "[e]nsemble des circonstances dans lesquelles une personne se trouve" (the whole of the circumstances in which an individual finds himself). In contrast, that same common dictionary defines "état" as "[m]anière d'être (d'une personne ou d'une chose) considérée dans ce qu'elle a de durable" (state of being of a person or thing considered in its enduring aspects). The distinction is important, and supports a much broader interpretation of "family status" that includes family circumstances, such as childcare obligations.

68 That being said, the precise types of childcare activities that are contemplated by the prohibited ground of family status need to be carefully considered. Prohibited grounds of discrimination generally address immutable or constructively immutable personal characteristics, and the types of childcare needs which are contemplated under family status must therefore be those which have an immutable or constructively immutable characteristic.

69 It is also important not to trivialize human rights legislation by extending human rights protection to personal family choices, such as participation of children in dance classes, sports events like hockey tournaments, and similar voluntary activities. These types of activities would be covered by family status according to one of the counsel who appeared before us, and I disagree with such an interpretation.

70 The childcare obligations that are contemplated under family status should be those that have immutable or constructively immutable characteristics, such as those that form an integral component of the legal relationship between a parent and a child. As a result, the childcare obligations at issue are those which a parent cannot neglect without engaging his or her legal liability. Thus a parent cannot leave a young child without supervision at home in order to pursue his or her work, since this would constitute a form of neglect, which in extreme examples could even engage ss. 215(1) of the *Criminal Code*, R.S.C. 1985, c. C-46; *R. v. Peterson* (2005), 34 C.R. (6th) 120, 201 C.C.C. (3d) 220 (Ont. C.A.) at para. 34; *R. v. Popen*, [1981] O.J. No. 921, 60 C.C.C. (2d) 232 (Ont. C.A.), at para. 18.

71 Even conduct which meets the criminal standard, minimal as it is, does not necessarily meet other legal standards of childcare, such as those found in the child welfare legislation of the various provinces or in article 599 of the Quebec *Civil Code*. Put another way, the parental obligations whose fulfillment is protected by the *Canadian Human Rights Act* are those whose non-fulfillment engages the parent's legal responsibility to the child.

72 Voluntary family activities, such as family trips, participation in extracurricular sports events, etc. do not have this immutable characteristic since they result from parental choices rather than parental obligations. These activities would not normally trigger a claim to discrimination resulting in some obligation to accommodate by an employer: *I.B.E.W., Local 636 v. Power Stream Inc.*, [2009] O.L.A.A. No. 447, 186 L.A.C. (4th) 180 (Ont. Arb.) (Bender Grievance) (*Power Stream*) at paras. 65-66.

73 I note that there is no fundamental discrepancy between an interpretation of family status as including childcare obligations that engage the parent's legal responsibility for the child and Parliament's intent in including that prohibited ground of discrimination in the *Canadian Human Rights Act*. Protection from discrimination for childcare obligations flows from family status in the same manner that protection against discrimination on the basis of pregnancy flows from the sex of the individual. In both cases, the individual would not require accommodation were it not for the underlying ground (family status or sex) on which they were adversely affected.

74 In conclusion, the ground of family status in the *Canadian Human Rights Act* includes parental obligations which engage the parent's legal responsibility for the child, such as childcare obligations, as opposed to personal choices. Defining the scope of the prohibited ground in terms of the parent's legal responsibility (i) ensures that the protection offered by the legislation addresses immutable (or constructively immutable) characteristics of the family relationship captured under the concept of family status, (ii) allows the right to be defined in terms of clearly understandable legal concepts, and (c) places the ground of family status in the same category as other enumerated prohibited grounds of discrimination such as sex, colour, disability, etc.

The legal test for finding a prima facie case of discrimination on the prohibited ground of family status

75 There is no fundamental dispute between the parties as to many aspects of the legal test that is used to determine whether there is discrimination on the prohibited ground of family status. All parties agree that the test comprises two parts. First, a *prima facie* case of discrimination must be made out by the complainant. Once that *prima facie* case has been made out, the analysis moves to a second stage where the employer must show that the policy or practice is a *bona fide* occupational requirement and that those affected cannot be accommodated without undue hardship.

76 The parties also agree that the first part of the test that concerns a *prima facie* case requires complainants to show that they have a characteristic protected from discrimination, that they experienced an adverse impact with respect to employment, and that the protected characteristic was a factor in the adverse impact.

77 Beyond that however, the parties disagree as to how the *prima facie* part of the test should be defined and applied. The appellant submits that an approach similar to the one used by the British Columbia Court of Appeal in *Campbell River* should be used, while the other parties submit that this would result in imposing a higher *prima facie* threshold for cases based on discrimination on the ground of family status.

78 *Campbell River* concerned an arbitration award under a collective agreement where the legal issue was the meaning and scope of the expression family status found in subsection 13(1) of the British Columbia *Human Rights Code*, R.S.B.C. 1996, c. 210. The complainant was the mother of a boy then aged thirteen who had severe behavioral problems requiring specific parental and professional attention. Her employer changed her work schedule from an 8am to 3pm shift to an 11:30am to 6pm shift. This shift change impeded the complainant from attending to the needs of her son after his school hours. The arbitrator denied the grievance brought by the complainant to challenge the work schedule change. The arbitrator found that the circumstances involving childcare arrangements did not raise an issue of discrimination based on the prohibited ground of family status. The British Columbia Court of Appeal overturned the arbitrator and remitted the grievance for a new determination. In so doing, the Court made the following conclusions of law:

> [39] [...] Whether particular conduct does or does not amount to *prima facie* discrimination on the basis of family status will depend on the circumstances of each case. In the usual case where there is no bad faith on the part of the employer and no governing provision in the applicable collective agreement or employment contract, it seems to me that a *prima facie* case of discrimination is made out when a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial parental or other family duty or obligation of the employee. I think that in the vast majority of situations in which there is a conflict between a work requirement and a family obligation it would be difficult to make out a *prima facie* case.
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> [Emphasis added]

79 The requirements of a "serious interference" with a "substantial" duty or obligation are the subjects of the controversy between the parties. The appellant invokes the reasoning in *Campbell River* as a practical approach, and thus proposes to limit *prima facie* cases of discrimination to circumstances where (a) the parental obligation at issue cannot be delegated to a third party, (b) the claimant has tried unsuccessfully to reconcile the non-delegable parental obligation with the employment duties, and (c) the non-delegable parental obligation at issue is substantial.

80 The other parties to this appeal submit that adopting this approach would entail a higher threshold for a finding of *prima facie* discrimination on the ground of family status than for the other prohibited grounds set out in the *Canadian Human Rights Act*. In their view, a *prima facie* case requires only that a person be differentiated adversely on a prohibited ground in the course of employment. They thus submit that the standard set out in *Campbell River* is wrong in law and fundamentally flawed in that it conflates the issue of *prima facie* discrimination — which is determined at the first stage of the test - and that of undue hardship - which is determined at the second stage of the test. They notably rely on the following criticism of *Campbell River* made by the Tribunal in its *Hoyt* decision:

> [119] A different articulation of the evidence necessary to demonstrate a *prima facie* case is articulated by the British Columbia Court of Appeal in [*Campbell River*]. The Court of Appeal found that the parameters of family status as a prohibited ground of discrimination in the *Human Rights Code* of British Columbia must not be drawn too broadly or it would have the potential to cause 'disruption and great mischief' in the workplace. The Court directed that a *prima facie* case is made out "when a change in a term or condition of employment imposed by an employer results in serious interference with a substantial parental or other family duty or obligation of the employee." Low, J.A. observed that the *prima facie* case would be difficult to make out in cases of conflict between work requirements and family obligations.

> [120] With respect, I do not agree with the Court's analysis. Human rights codes, because of their status as 'fundamental law,' must be interpreted liberally so that they may better fulfill their objectives [...] It would, in my view, be inappropriate to select out one prohibited ground of discrimination for a more restrictive definition.
>
> [121] In my respectful opinion, the concerns identified by the Court of Appeal, being serious workplace disruption and great mischief, might be proper matters for consideration in the *Meiorin* analysis and in particular the third branch of the analysis, being reasonable necessity. When evaluating the magnitude of hardship, an accommodation might give rise to matters such as serious disruption in the workplace, and serious impact on employee morale are appropriate considerations [...] Undue hardship is to be proven by the employer on a case by case basis. A mere apprehension that undue hardship would result is not a proper reason, in my respectful opinion, to obviate the analysis.

81 I agree that the test that should apply to a finding of *prima facie* discrimination on the prohibited ground of family status should be substantially the same as that which applies to the other enumerated grounds of discrimination. There should be no hierarchies of human rights. However, though the test should be substantially the same, that test is also necessarily flexible and contextual, as aptly noted by the Canadian Human Rights Commission in its submissions before this Court.

82 The starting point of the test to establish a *prima facie* case of discrimination is set out in *O'Malley v. Simpsons-Sears Ltd.*, above at p. 558, where McIntyre J. noted that the complainant in proceedings before a human rights tribunal must show a *prima facie* case of discrimination, and such a "*prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer."

83 The test is necessarily flexible and contextual because it is applied in cases with many different factual situations involving various grounds of discrimination. As noted by Evans J.A. in *Canada (Armed Forces) v. Canada (Human Rights Commission)*, 2005 FCA 154, 334 N.R. 316 (F.C.A.) at para. 28, a "flexible legal test of a *prima facie* case is better able than more precise tests to advance the broad purpose underlying the *Canadian Human Rights Act*, namely, the elimination in the federal legislative sphere of discrimination from employment...".

84 As a result, a *prima facie* case must be determined in a flexible and contextual way, and the specific types of evidence and information that may be pertinent or useful to establish a *prima facie* case of discrimination will largely depend on the prohibited ground of discrimination at issue.

85 As an example, in *Syndicat Northcrest c. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551 (S.C.C.) (*Amselem*) the Supreme Court of Canada considered the test for establishing a breach of the guarantee of religious freedom under the Quebec *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12. In that case, the Court rejected the idea that religious belief must be objectively grounded, and instead held that the issue is whether the individual has a sincerely held religious belief. For that purpose, the Court set out certain factors that can assist in assessing whether a *prima facie* case of religious discrimination is established *taking into account the particular nature of the prohibited ground at issue*. It is useful to review these factors that are set out at paragraphs 56 to 62 of *Amselem*:

> [56] Thus, at the first stage of a religious freedom analysis, an individual advancing an issue premised upon a freedom of religion claim must show the court that (1) he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and (2) he or she is sincere in his or her belief. Only then will freedom of religion be triggered.

> [57] Once an individual has shown that his or her religious freedom is triggered, as outlined above, a court must then ascertain whether there has been enough of an interference with the exercise of the implicated right so as to constitute an infringement of freedom of religion under the Quebec (or the Canadian) *Charter*.
>
> . . .
>
> [59] It consequently suffices that a claimant show that the impugned contractual or legislative provision (or conduct) interferes with his or her ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial. The question then becomes: what does this mean?
>
> [60] At this stage, as a general matter, one can do no more than say that the context of each case must be examined to ascertain whether the interference is more than trivial or insubstantial. But it is important to observe what examining that context involves.
>
> [61] In this respect, it should be emphasized that not every action will become summarily unassailable and receive automatic protection under the banner of freedom of religion. No right, including freedom of religion, is absolute [...].
>
> [62] Freedom of religion, as outlined above, quite appropriately reflects a broad and expansive approach to religious freedom under both the Quebec *Charter* and the Canadian *Charter* and should not be prematurely narrowly construed. However, our jurisprudence does not allow individuals to do absolutely anything in the name of that freedom. Even if individuals demonstrate that they sincerely believe in the religious essence of an action, for example, that a particular practice will subjectively engender a genuine connection with the divine or with the subject or object of their faith, and even if they successfully demonstrate non-trivial or non-insubstantial interference with that practice, they will still have to consider how the exercise of their right impacts upon the rights of others in the context of the competing rights of private individuals. Conduct which would potentially cause harm to or interference with the rights of others would not automatically be protected. The ultimate protection of any particular *Charter* right must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises.
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> [Emphasis in original]

86 As is readily apparent from these passages of *Amselem*, the specific types of evidence and information that may be applied to establish a *prima facie* case of discrimination largely depend on the nature of the prohibited ground of discrimination at issue.

87 In this case, the Federal Court Judge concluded, at paragraph 120 of his reasons, that "the childcare obligations arising in discrimination claim[s] based on family status must be one of substance and the complainant must have tried to reconcile family obligations with work obligations", adding that "this requirement does not constitute creating a higher threshold test for serious interference." I agree.

88 Normally, parents have various options available to meet their parental obligations. Therefore, it cannot be said that a childcare obligation has resulted in an employee being unable to meet his or her work obligations unless no reasonable childcare alternative is reasonably available to the employee. It is only if the employee has sought out reasonable alternative childcare arrangements unsuccessfully, and remains unable to fulfill his or her parental obligations, that a *prima facie* case of discrimination will be made out.

89 This principle has been recognized in numerous labour arbitration cases dealing with the issue. As noted in *Alberta (Solicitor General) v. A.U.P.E.*, [2010] A.G.A.A. No. 5 (Alta. Arb.) (*Jungwirth Grievance*) at para. 64, "[i]n order to work, all parents must take some steps on their own to ensure that they can fulfill both their parental obligations and their work commitments. Part of any examination of whether a *prima facie* case has been established for family status

discrimination must therefore include an analysis of the steps taken by the employee him or herself to balance their family life and workplace responsibilities."

90 The same principle was applied in *Ontario (Liquor Control Board of Ontario) and OPSEU (Thompson), Re*, [2012] O.G.S.B.A. No. 155 (Ont. Grievance S.B.) at para. 40: "This test requires an employee seeking accommodation to demonstrate he or she was not able to meet a family obligation by reasonable means other than accommodation in the workplace." That same principle was also applied by a Board of Inquiry established under the Ontario *Human Rights Code* in *Wight v. Ontario (Office of the Legislative Assembly)*, [1998] O.H.R.B.I.D. No. 13 (Ont. Bd. of Inquiry) at paras. 309 to 311, and in *Power Steam* at para. 62.

91 This approach is not adding an extra burden on complainants in cases involving family status. As aptly noted in *A.E.U., Unit 15 v. Customs & Immigration Union*, [2011] O.L.A.A. No. 24 (Ont. Arb.) (*Loranger Grievance*) at para. 45, complainants in disability cases must first establish that they have a disability and have an ongoing obligation to notify the employer of changes in their restriction; it is not more onerous to require a parent to establish the nature of the restrictions he or she faces in meeting both parental and employment obligations.

92 The Tribunal's decision in *Hoyt* also implicitly accepted the significance of the claimant's efforts in that case to seek childcare arrangements that would allow compliance with both parental and professional obligations. The Tribunal's finding of discrimination in that case rested on the claimant having made considerable efforts in this regard: *Hoyt* at paras. 123-124.

93 I conclude from this analysis that in order to make out a *prima facie* case where workplace discrimination on the prohibited ground of family status resulting from childcare obligations is alleged, the individual advancing the claim must show (i) that a child is under his or her care and supervision; (ii) that the childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to a personal choice; (iii) that he or she has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible, and (iv) that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.

94 The first factor requires the claimant to demonstrate that a child is actually under his or her care and supervision. This requires the individual claiming *prima facie* discrimination to show that he or she stands in such a relationship to the child at issue and that his or her failure to meet the child's needs will engage the individual's legal responsibility. In the case of parents, this will normally flow from their status as parents. In the case of *de facto* caregivers, there will be an obligation to show that, at the relevant time, their relationship with the child is such that they have assumed the legal obligations which a parent would have found.

95 The second factor requires demonstrating an obligation which engages the individual's legal responsibility for the child. This notably requires the complainant to show that the child has not reached an age where he or she can reasonably be expected to care for himself or herself during the parent's work hours. It also requires demonstrating that the childcare need at issue is one that flows from a legal obligation, as opposed to resulting from personal choices.

96 The third factor requires the complainant to demonstrate that reasonable efforts have been expended to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible. A complainant will, therefore, be called upon to show that neither they nor their spouse can meet their enforceable childcare obligations while continuing to work, and that an available childcare service or an alternative arrangement is not reasonably accessible to them so as to meet their work needs. In essence, the complainant must demonstrate that he or she is facing a *bona fide* childcare problem. This is highly fact specific, and each case will be reviewed on an individual basis in regard to all of the circumstances.

97 The fourth and final factor is that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation. The underlying context of each case in which the childcare

needs conflict with the work schedule must be examined so as to ascertain whether the interference is more than trivial or insubstantial.

98 It is not necessary to define in more precise terms the test for *prima facie* discrimination on the ground of family status resulting from childcare obligations. The test itself must be sufficiently flexible so as to advance the broad purpose of the *Canadian Human Rights Act* as set out in section 2 of that Act, notably the principle that individuals should have the opportunity equal with other individuals to make for themselves the lives they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on family status.

99 Consequently, deciding what specific types of evidence are required to meet all four factors of the above test for a *prima facie* case of discrimination in any given context will vary with the facts of each case, and is better left to be determined on a case-by-case basis.

Application to the circumstances of Ms. Johnstone

100 Applying the proper legal test, I can find no reviewable error in the Tribunal's conclusion that Ms. Johnstone has made out a *prima facie* case of adverse discrimination by the CBSA on the basis of family status.

101 *First*, it is not disputed that Ms. Johnstone had one and then two children under her care and supervision during the times pertinent to her complaint. Though this responsibility was shared with her husband, this does not detract from Ms. Johnstone's shared responsibility for the care and supervision of her two children. As a result, she satisfied the first leg of the test outlined above for establishing a *prima facie* case.

102 *Second*, both children were toddlers for which she and her husband were legally responsible. She and her husband could not leave the children on their own without adult supervision during their working hours without breaching their legal obligations towards them. As a result, they were legally required to provide their children with some form of childcare arrangement while they were away to attend to their work with the CBSA. As a result, Ms. Johnstone's childcare obligations engaged her legal responsibilities as a parent towards her children, as opposed to a personal choice. As such, Ms. Johnstone satisfied the second leg of the test.

103 *Third*, the Tribunal found as a matter of fact that Ms. Johnstone had made serious but unsuccessful efforts to secure reasonable alternative childcare arrangements: Tribunal's decision at paras. 187,188, 193 and 194. The Tribunal outlined the significant efforts of Ms. Johnstone to secure childcare arrangements that would allow her to continue to work the rotating and irregular schedule set out in her VSSA.

104 In particular, the Tribunal noted that Ms. Johnstone had investigated numerous regulated childcare providers, both near her home and near her work, but that none of these provided services outside standard work hours: Tribunal's decision at para. 79. The Tribunal also noted her efforts with unregulated childcare providers, including family members, as well as the broader inquiries she made to secure flexible childcare arrangements that would meet her work schedule: Tribunal's decision at paras. 80-81. The Tribunal found that the work schedules of Ms. Johnstone and of her husband were such that neither could provide the childcare needed on a reliable basis: Tribunal's decision at para. 82. The Tribunal further noted that the alternative of a live-in nanny was not an appropriate option in the circumstances, since Ms. Johnstone's family would have had to move into a home that could accommodate another adult person: Tribunal's decision at para. 83.

105 Consequently, Ms. Johnstone clearly satisfied the third leg of the test for a *prima facie* case, in that she made reasonable efforts to meet her childcare obligations through reasonable alternative solutions, but no such alternative solution was reasonably available

106 Fourth, the Tribunal found that Ms. Johnstone's regular work schedule based on the VSSA interfered in a manner that was more than trivial or insubstantial with the fulfillment of her childcare obligations.

107 The Tribunal notably relied on the evidence of Martha Friendly, who was qualified as an expert on childcare policy in Canada, including childcare availability for people who work rotating and fluctuating shifts on an irregular basis: Tribunal's decision at paras.174 to 195. Ms. Friendly testified that unpredictability in work hours was the most difficult factor in accommodating childcare, and that it made finding a paid third-party provider of childcare, regulated or unregulated, almost impossible: Tribunal's decision at paras. 178 and 179. She also testified that the next most difficult factor was the need for extended work hours outside standard operating hours, which also rendered childcare availability virtually impossible to find: Tribunal's decision at para. 180. She concluded that Ms. Johnstone's situation was "one of the most difficult childcare situations that she could imagine" based on different shifts at different times and different days including weekends, overtime, shifts at all hours of the day or night, and the fact her husband worked a similar type of job schedule: Tribunal's decision at para. 195.

108 As a result, Ms. Johnstone clearly made out a *prima facie* case of discrimination on the ground of family status resulting from childcare obligations, and the Tribunal committed no reviewable error in so finding.

109 Since the appellant is not asserting any *bona fide* occupational requirement or an undue burden in providing Ms. Johnstone fixed shifts on a full-time basis, the Tribunal's ruling that Ms. Johnstone's complaint under the *Canadian Human Rights Act* was substantiated must be upheld.

Remedies

110 The Attorney General of Canada submits that the Tribunal committed reviewable errors in its remedial orders, notably with respect to the award of lost wages for the period subsequent to December 2005, the requirement that the CBSA establish a written policy satisfactory to the Canadian Human Rights Commission, and the award of special damages under paragraph 53(3) of the *Canadian Human Rights Act*.

(a) Award of lost wages

111 The appellant submits that the Tribunal acted unreasonably in ordering lost wages to be paid to Ms. Johnstone for the periods of December 2005 to August 2007 and August 2008 to August 2010.

112 For the first period (December 2005 to August 2007) CBSA offered to Ms. Johnstone that she work part-time for 34 hours a week. She elected instead to work 20 hours per week. The appellant submits that since Ms. Johnstone was only available to work 20 hours per week during this period, she should not be entitled to wages on a full-time basis since there would be no causal connection between the award of full time wages for the period at issue and the alleged discrimination.

113 The Tribunal's decision to award lost wages on a full-time basis during the period of December 2005 to August 2007 rests on its finding of fact that had Ms. Johnstone been accommodated in her work schedule through static shifts on a full-time basis, as she had initially requested, she would have accepted those hours: Tribunal's decision at para. 372. A causal nexus was, therefore, established. The Tribunal's conclusion on this point was based on an assessment of Ms. Johnstone's testimony and was open to it. Given that this finding of fact is supported by the evidence in the record before us, there is no basis on which this Court could overturn the Tribunal's conclusion on this point. That conclusion is also supported by the fact the CBSA denied Ms. Johnstone's request to work three thirteen hour shifts per week: Tribunal's decision at paras. 99 and 100.

114 For the second period (August 2008 to August 2010) the appellant notes that the Federal Court Judge concluded that the Tribunal failed to justify its award of full time lost wages for the period from August 2007 to August 2008 during which Ms. Johnstone had moved to Ottawa to join her husband under a spousal relocation leave. When that leave expired, she then took care and nurturing leave. Since there was no change in Ms. Johnstone's situation during the period of August 2008 to August 2010 as compared with the period of August 2007 to August 2008 — she continued

to live in Ottawa with her husband under a work leave arrangement — the Federal Court Judge should have returned the matter back to the Tribunal for both periods.

115 Since Ms. Johnstone has not appealed from the judgment referring back to the Tribunal its award of full-time lost wages for the period of August 2007 to August 2008 when Ms. Johnstone opted for unpaid leave to accompany her husband to Ottawa, there is much logic in the appellant's submission that the same conclusion should apply to the period of August 2008 to August 2010 during which Ms. Johnstone continued to remain on leave in Ottawa. As a result, I would vary accordingly the judgment of the Federal Court Judge.

(b) Establishment of a written policy satisfactory to the Canadian Human Rights Commission

116 The appellant also seeks that this Court amend the judgment of the Federal Court Judge to reflect that the CBSA is required to establish a written remedial policy in consultation with the Canadian Human Rights Commission, rather that one that is satisfactory to the Commission.

117 The appellant relies for this purpose on the language of paragraph 53(2)(a) of the *Canadian Human Rights Act*:

> **53**. (2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:
>
> > (a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future ...
>
> [Emphasis added]
>
> **53**. (2) À l'issue de l'instruction, le membre instructeur qui juge la plainte fondée, peut, sous réserve de l'article 54, ordonner, selon les circonstances, à la personne trouvée coupable d'un acte discriminatoire:
>
> > a) de mettre fin à l'acte et de prendre, en consultation avec la Commission relativement à leurs objectifs généraux, des mesures de redressement ou des mesures destinées à prévenir des actes semblables [...]
>
> [Je souligne]

118 The interpretation of paragraph 53(2)(*a*) of the *Canadian Human Rights Act* by the Tribunal is to be reviewed on a standard of reasonableness: *Mowat* at paras. 24 to 27.

119 In this case, at paragraph 366 of its decision, the Tribunal crafted an order with specific reference to paragraph 53(2)(*b*). It thus ordered the CBSA "to *consult* with the Canadian Human Rights Commission, *in accordance with the provisions of Section 53 (2)(a) of the Act*, to develop a plan to prevent further incidents of discrimination based on family status in the future" [emphasis added].

120 However, at paragraph 367 of its decision, the Tribunal went further by specifically ordering that remedial policies be satisfactory to both Ms. Johnstone and the Canadian Human Rights Commission. The specific words used by the Tribunal are revealing: "this Tribunal *further orders* that CBSA establish written policies *satisfactory* to Ms. Johnstone and the CHRC to address family accommodation requests within 6 months, and that these policies include a process for individualized assessments of those making such requests" [emphasis added]. The Tribunal offers no explanation as to the statutory basis on which it can make such an order.

121 There is a substantial difference between, on the one hand, developing a policy in consultation with the Canadian Human Rights Commission, and on the other hand, having that policy subject to its approval. I do not exclude the

possibility that the word "consultation" used in paragraph 53(2)(a) reproduced above could include an approval for a proposed measure. However, without a sufficient explanation from the Tribunal as to the statutory basis for making its order in this case, and the reasons why such an order was required in the circumstances of this case, I conclude that the impugned order lacks the justification, transparency and intelligibility required to meet the standard of reasonableness: *Dunsmuir* at para. 47.

122 As a result, I would vary the judgment of the Federal Court Judge so as to require the CBSA to develop the policies referred to at paragraph 377 of the Tribunal's decision in consultation with the Canadian Human Rights Commission. The issue of whether the consultation required under paragraph 53(2)(a) of the *Canadian Human Rights Act* includes an implicit power of approval is best left to be decided later in the event the policies actually adopted by the CBSA are not indeed deemed satisfactory by the Commission.

(c) The award of special damages

123 The appellant also challenges the Tribunal's order of special damages made against it pursuant to subsection 53(3) of the *Canadian Human Rights Act*, which reads as follows:

> **53**. (3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.
>
> **53**. (3) Outre les pouvoirs que lui confère le paragraphe (2), le membre instructeur peut ordonner à l'auteur d'un acte discriminatoire de payer à la victime une indemnité maximale de 20 000 $, s'il en vient à la conclusion que l'acte a été délibéré ou inconsidéré.

124 The appellant submits that the Tribunal had no reasonable basis to conclude that the CBSA had engaged in the discriminatory practice wilfully or recklessly, particularly when regard is had to the flux in the law relating to family status as illustrated by the conflicting decisions of *Campbell River* and *Hoyt*.

125 I disagree with the appellant on this point. The Tribunal's conclusion of wilful or reckless practice was largely founded on the CBSA's disregard for the prior decision of the Tribunal in *Brown*. The Tribunal concluded that in *Brown* it had ordered the organization to which the CBSA succeeded to prevent similar events from recurring through recognition and policies that would acknowledge family status. This was a reasonable interpretation of *Brown* by the Tribunal and a reasonable finding as to the CBSA's failure to follow that prior decision. As a result, the Tribunal acted reasonably in concluding that wilful and reckless conduct had occurred in this case.

Conclusions

126 I would consequently allow the appeal in part to vary the judgment of the Federal Court Judge with respect to the two remedies described below:

> (a) the second paragraph of the judgment should be varied by replacing therein the date "August 2008" by the date "August 2010";
>
> (b) the third paragraph of the judgment should be varied by adding at the end the following sentence: "Moreover, the order of the Tribunal at paragraph 367 of its decision is varied by replacing therein the words 'satisfactory to Ms. Johnstone and the CHRC' by 'in consultation with the CHRC'".

127 In all other aspects, I would dismiss the appeal.

128 Since Ms. Johnstone has been largely successful in this appeal, I would order the appellant to pay her costs. There should be no order for costs with respect to the respondent the Canadian Human Rights Commission and with respect to the intervener the Women's Legal Education and Action Fund Inc.

***J.D. Denis Pelletier J.A.*:**

I agree

***A.F. Scott J.A.*:**

I agree

Appeal allowed in part.

Most Negative Treatment: Distinguished
Most Recent Distinguished: Bedford v. Canada (Attorney General) | 2012 ONCA 186, 2012 CarswellOnt 3557, 109 O.R. (3d) 1, 282 C.C.C. (3d) 1, [2012] O.J. No. 1296, 256 C.R.R. (2d) 143, 290 O.A.C. 236, 91 C.R. (6th) 257, 346 D.L.R. (4th) 385, 100 W.C.B. (2d) 704 | (Ont. C.A., Mar 26, 2012)

2010 SCC 3
Supreme Court of Canada

Khadr v. Canada (Prime Minister)

2010 CarswellNat 121, 2010 CarswellNat 122, 2010 SCC 3, [2010] 1 S.C.R. 44, [2010] S.C.J. No. 3, 185 A.C.W.S. (3d) 69, 206 C.R.R. (2d) 1, 251 C.C.C. (3d) 435, 315 D.L.R. (4th) 1, 397 N.R. 294, 71 C.R. (6th) 201, 87 W.C.B. (2d) 20

Prime Minister of Canada, Minister of Foreign Affairs, Director of the Canadian Security Intelligence Service and Commissioner of the Royal Canadian Mounted Police (Appellants) v. Omar Ahmed Khadr (Respondent) and Amnesty International (Canadian Section, English Branch), Human Rights Watch, University of Toronto, Faculty of Law - International Human Rights Program, David Asper Centre for Constitutional Rights, Canadian Coalition for the Rights of Children, Justice for Children and Youth, British Columbia Civil Liberties Association, Criminal Lawyers' Association (Ontario), Canadian Bar Association, Lawyers Without Borders Canada, Barreau du Québec, Groupe d'étude en droits et libertés de la Faculté de droit de l'Université Laval, Canadian Civil Liberties Association and National Council for the Protection of Canadians Abroad (Interveners)

McLachlin C.J.C., Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein, Cromwell JJ.

Heard: November 13, 2009
Judgment: January 29, 2010
Docket: 33289

Proceedings: reversing in part *Khadr v. Canada (Prime Minister)* (2009), 2009 FCA 246, 2009 CarswellNat 2364, 2009 CAF 246, 2009 CarswellNat 2699, (sub nom. *Khadr v. Prime Minister (Canada)*) 393 N.R. 1, 310 D.L.R. (4th) 462 (F.C.A.)**Proceedings: affirming *Khadr v. Canada (Prime Minister)* (2009), 2009 CarswellNat 1206, 341 F.T.R. 300 (Eng.), 2009 FC 405, 2009 CF 405, 2009 CarswellNat 1472 (F.C.)**

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Marlys A. Edwardh, Adriel Weaver, Jessica Orkin for Intervener, Canadian Civil Liberties Association
Dean Peroff, Chris MacLeod, H. Scott Fairley for Intervener, Protection of Canadians Abroad

Subject: International; Constitutional; Civil Practice and Procedure; Human Rights

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Constitutional law

XI Charter of Rights and Freedoms
XI.2 Scope of application
XI.2.a Bodies subject to Charter
XI.2.a.i Prerogative powers

Constitutional law

XI Charter of Rights and Freedoms
XI.3 Nature of rights and freedoms
XI.3.f Life, liberty and security
XI.3.f.i General principles

Constitutional law

XI Charter of Rights and Freedoms
XI.3 Nature of rights and freedoms
XI.3.f Life, liberty and security
XI.3.f.iii Miscellaneous

Constitutional law

XI Charter of Rights and Freedoms
XI.4 Nature of remedies under Charter
XI.4.a General principles

International law

III Extraterritorial application of domestic law
III.2 Of Canadian law outside Canada
III.2.a General principles

Headnote

International law --- Extraterritorial application of domestic law — Of Canadian law outside Canada — General principles

K was Canadian citizen who was arrested in Afghanistan in 2002 when he was 15 years old — K was detained in Cuba and subsequently charged with war crimes — In 2003, Canadian authorities questioned K and shared product of interviews with US authorities — In 2004, interview was conducted by Canadian official with knowledge that K had been subjected to sleep deprivation technique known as "frequent flyer program" — Government refused to repatriate K — K applied for judicial review of government's decision on grounds his rights under s. 7 of Canadian Charter of Rights and Freedoms were infringed — Trial judge held that K's s. 7 rights were violated by refusal and ordered government to request his return — Government appealed — Court of Appeal affirmed order with respect to K's return but defined s. 7 breach more narrowly as arising from 2004 interrogation — Government appealed —

Appeal allowed in part — Prior Supreme Court decision held that Charter applied to actions of Canadian officials operating in Cuba who handed fruits of interviews over to US authorities — Same rationale applied to present case.

Constitutional law --- Charter of Rights and Freedoms — Nature of rights and freedoms — Life, liberty and security — General principles

K was Canadian citizen who was arrested in Afghanistan in 2002 when he was 15 years old — K was detained in Cuba and subsequently charged with war crimes — In 2003, Canadian authorities questioned K and shared product of interviews with US authorities — In 2004, interview was conducted by Canadian official with knowledge that K had been subjected to sleep deprivation technique known as "frequent flyer program" — Government refused to repatriate K — K applied for judicial review of government's decision on grounds his rights under s. 7 of Canadian Charter of Rights and Freedoms were infringed — Trial judge held that K's s. 7 rights were violated by refusal and ordered government to request his return — Government appealed — Court of Appeal affirmed order with respect to K's return but defined s. 7 breach more narrowly as arising from 2004 interrogation — Government appealed — Appeal allowed in part — US was primary source of deprivation of K's life, liberty and security of person — To satisfy requirements of s. 7 of Charter, there must be sufficient causal connection between government's participation and deprivation ultimately effected — It was reasonable to infer from uncontradicted evidence that statements taken by Canadian officials contributed to continued detention of K, thereby impacting his liberty and security interests — Causal connection between Canadian conduct and deprivation of liberty and security of person was established.

Constitutional law --- Charter of Rights and Freedoms — Nature of rights and freedoms — Life, liberty and security — Miscellaneous

K was Canadian citizen who was arrested in Afghanistan in 2002 when he was 15 years old — K was detained in Cuba and subsequently charged with war crimes — In 2003, Canadian authorities questioned K and shared product of interviews with US authorities — In 2004, interview was conducted by Canadian official with knowledge that K had been subjected to sleep deprivation technique known as "frequent flyer program" — Government refused to repatriate K — K applied for judicial review of government's decision on grounds his rights under s. 7 of Canadian Charter of Rights and Freedoms were infringed — Trial judge held that K's s. 7 rights were violated by refusal and ordered government to request his return — Government appealed — Court of Appeal affirmed order with respect to K's return but defined s. 7 breach more narrowly as arising from 2004 interrogation — Government appealed — Appeal allowed in part — Conduct of Canadian government was sufficiently connected to denial of K's liberty and security of person — Canadian conduct in connection with K's case did not conform to principles of fundamental justice — Interrogation of youth, to elicit statements about most serious criminal charges while detained in conditions in issue and without access to counsel, and while knowing that fruits of interrogations would be shared with US prosecutors offended most basic Canadian standards about treatment of detained youth suspects — K established that Canada violated his rights under s. 7 of Charter.

Constitutional law --- Charter of Rights and Freedoms — Scope of application — Bodies subject to Charter — Prerogative powers

K was Canadian citizen who was arrested in Afghanistan in 2002 when he was 15 years old — K was detained in Cuba and subsequently charged with war crimes — In 2003, Canadian authorities questioned K and shared product of interviews with US authorities — In 2004, interview was conducted by Canadian official with knowledge that K had been subjected to sleep deprivation technique known as "frequent flyer program" — Government refused to repatriate K — K applied for judicial review of government's decision on grounds his rights under s. 7 of Canadian Charter of Rights and Freedoms were infringed — Trial judge held that K's s. 7 rights were violated by refusal and ordered government to request his return — Government appealed — Court of Appeal affirmed order with respect to K's return but defined s. 7 breach more narrowly as arising from 2004 interrogation — Government appealed — Appeal allowed in part — Trial judge erred in exercise of his discretion in granting remedy of order that Canada request of US that K be returned to Canada — Consistent with separation of powers and well-grounded reluctance of courts to intervene in matters of foreign relations, proper remedy was to grant K declaration that

his Charter rights were infringed while leaving government measure of discretion in deciding how best to respond in light of current information, its responsibility for foreign affairs and in conformity with Charter — Evidentiary uncertainties, limitations of court's institutional competence and need to respect prerogative powers of executive led to conclusion that proper remedy was declaratory relief.

Constitutional law --- Charter of Rights and Freedoms — Nature of remedies under Charter — General principles

K was Canadian citizen who was arrested in Afghanistan in 2002 when he was 15 years old — K was detained in Cuba and subsequently charged with war crimes — In 2003, Canadian authorities questioned K and shared product of interviews with US authorities — In 2004, interview was conducted by Canadian official with knowledge that K had been subjected to sleep deprivation technique known as "frequent flyer program" — Government refused to repatriate K — K applied for judicial review of government's decision on grounds his rights under s. 7 of Canadian Charter of Rights and Freedoms were infringed — Trial judge held that K's s. 7 rights were violated by refusal and ordered government to request his return — Government appealed — Court of Appeal affirmed order with respect to K's return but defined s. 7 breach more narrowly as arising from 2004 interrogation — Government appealed — Appeal allowed in part — Trial judge erred in exercise of his discretion in granting remedy of order that Canada request of US that K be returned to Canada — Consistent with separation of powers and well-grounded reluctance of courts to intervene in matters of foreign relations, proper remedy was to grant K declaration that his Charter rights were infringed while leaving government measure of discretion in deciding how best to respond in light of current information, its responsibility for foreign affairs and in conformity with Charter — Evidentiary uncertainties, limitations of court's institutional competence and need to respect prerogative powers of executive led to conclusion that proper remedy was declaratory relief.

K was Canadian citizen who was 15 years old when he was taken prisoner in 2002 by US forces in Afghanistan. K was later transferred to a US military institution in Cuba and charged with war crimes. In 2003, Canadian authorities questioned K about charges pending against him and shared product of those interviews with US authorities. In 2004, a Canadian official interviewed K, with knowledge that he had been subjected by US authorities to a sleep deprivation technique known as the "frequent flyer program." The Government of Canada refused to repatriate K. K brought an application for judicial review on the grounds that the government's refusal infringed his rights under s. 7 of the Canadian Charter of Rights and Freedoms. The trial judge concluded that the refusal offended a principle of fundamental justice and violated K's rights under s. 7 of the Charter. The trial judge ordered the government to present a request to the US for K's repatriation to Canada. The government appealed. On appeal, the trial judge's order was upheld but the s. 7 breach was defined more narrowly as arising from the 2004 interrogation. The government appealed.

Held: The appeal was allowed in part.

Per McLachlin C.J., Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein, Cromwell JJ.: K's rights under s. 7 of the Charter were violated, however, the order made by the lower courts was not an appropriate remedy under s. 24(1) of the Charter. Consistent with the separation of powers and the well-grounded reluctance of courts to intervene in matters of foreign relations, the proper remedy was to grant K a declaration that his Charter rights were infringed, while leaving the government a measure of discretion to decide how best to respond.

As per an earlier decision of the Supreme Court of Canada, the Charter applied to the actions of Canadian officials operating in Cuba who handed the fruits of their interviews over to US authorities.

The United States was the primary source of the deprivation of K's liberty and security of the person. It was reasonable to infer from the evidence that the statements taken by Canadian officials contributed to the continued detention of K, thereby impacting his liberty and security interests. The causal connection between Canadian conduct and the deprivation of liberty and security of person was established.

The conduct of the Canadian government was sufficiently connected to the denial of K's liberty and security of the person. Canadian conduct in connection with K's case did not conform to principles of fundamental justice. Interrogation of a youth, to elicit statements about the most serious criminal charges while detained in conditions in issue and without access to counsel, and while knowing that the fruits of the interrogations would be shared with the US prosecutors, offended the most basic Canadian standards about the treatment of detained youth suspects. K established that Canada violated his rights under s. 7 of the Charter.

With respect to remedy, the trial judge erred in the exercise of his discretion. The government's decision not to request K's repatriation was made in the exercise of its prerogative over foreign relations. The remedy ordered below gave too little weight to the constitutional responsibility of the executive to make decisions on matters of foreign affairs. The appropriate remedy was to declare that K's s. 7 rights were infringed and to leave it to the government to decide how to respond to the judgment in light of current information, its responsibility for foreign affairs and in conformity with the Charter. The evidentiary uncertainties, the limitations of the court's institutional competence and the need to respect the prerogative powers of the executive led to the conclusion that the proper remedy was declaratory relief.

Annotation

The continuing saga of Omar Khadr has produced, to say the least, some interesting jurisprudence. Most pertinent for readers of this reporter, *Khadr v. Canada (Prime Minister)* is the latest in a troubled line of cases about extraterritorial application of the *Charter*, stemming from the Supreme Court's 2007 decision in *R. v. Hape* (2007), 47 C.R. (6th) 96 (S.C.C.). The cases are "troubled" for three reasons. First, in *Hape* the Court held that there was a presumption against extraterritorial *Charter* application because to do so was unlawful under international law, but where Canada's international human rights law obligations were engaged, this presumption could give way. The Court's international law methodology on this point is unclear (see the annotation to *Hape*), but this problem has been left unaddressed in all subsequent decisions.

Second, even accepting the "human rights exception," the circumstances in which it will apply are not entirely clear. However, in *Khadr* the Court is firm on two scenarios: where Canadian officials participate in a foreign process that violates international law (i.e. the Guantanamo Bay military trial structure) and where a Canadian official violates basic human rights in an interrogation (here, the interrogation of Khadr after he had been subjected to the "frequent flyer" program), though it appears that the latter must be tied to the former. The Court's findings here, however, are shaped by the unique fact that the U.S. Supreme Court had already declared the Guantanamo process to be violative of international human rights law and the *Geneva Conventions*. While it does seem that *any* foreign process in which Canada cooperates is open to evaluation against international human rights law, this does not give either the Crown or defence much certainty as to when the *Charter* will apply.

Third is the question of remedy. *Hape* seemed to indicate that where Canadian police are involved in a dodgy foreign process, a s. 24(2) exclusion remedy could be granted, and *Khadr v. Canada (Minister of Justice)* (2008), 56 C.R. (6th) 255 (S.C.C.), made clear that disclosure remedies were also part of the package. Here, the Court clearly reserves the potential even for a remedy that impinges upon the federal executive's prerogative power over foreign affairs. Read together, these three decisions are capable of producing a fairly robust result: in the face of sufficient evidence, any co-operation between Canadian and foreign officials towards an unlawful foreign process will engage the *Charter*, and a full range of constitutional remedies will be available. However, the Court has been careful to link its *Charter* findings regarding Khadr to what it repeatedly emphasizes are the unique facts of the case. Moreover, the judgment also allows that there may be distinctions between conventional criminal cases and "intelligence gathering" for the purpose of uncovering the fundamental principles of justice in a s. 7 analysis. This signals, as does indeed the Court's

entire history with the Khadr matter, that it will continue to avoid any sweeping expansion of the law in this area and proceed cautiously — and with an eye to avoiding any construction of the law that may have precedent value.

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The Supreme Court of Canada has created more confusion than guidance in addressing the principles of fundamental justice in its decision in the most recent *Khadr* case. In addressing this point at paragraphs 24 and 25 of the judgment, the Court outlines the test for identifying a new fundamental principle of justice, and then concludes that the conduct of Canadian officials clearly violated at least one such principle. Having just reviewed the conduct of Canadian officials in the matter, the Court says:

This conduct establishes Canadian participation in state conduct that violates the principles of fundamental justice. Interrogation of a youth, to elicit statements about the most serious criminal charges while detained in these conditions and without access to counsel, and while knowing that the fruits of the interrogations would be shared with the U.S. prosecutors, offends the most basic Canadian standards about the treatment of detained youth suspects. [para. 25]

Which exactly is the identifiable principle of fundamental justice that was violated? Is it the more general principle that youth are generally less culpable for crimes than adults? Is it a more specific principle that a youth must be interrogated in the presence of an adult or counsel? Always, or only when the charge is a serious one? Is it that evidence collected in violation of international standards should not be shared without assurances that it will not be used against the accused? Is it that Canada should not participate in anything that violates international standards (even if that was not yet determined at the time of the participation)?

This statement from the Court seems narrowly tailored to Khadr's specific case, but the principles of fundamental justice are supposed to be basic tenets that can guide us about the limitations of the legal system generally. This unclear formulation of the principles of fundamental justice might not matter in the context of the *Khadr* case, since any of the above principles could be sufficient to ground his claim, but it might have a serious effect on ongoing matters involving Canadian authorities abroad. For example, while the Federal Court of Appeal has held that Afghan detainees captured by Canadian troops who are subsequently transferred to Afghan authorities do not have recourse to *Charter* rights (*Amnesty International Canada v. Canada (Minister of National Defence)*, 2008 FCA 401 (F.C.A.); leave to appeal to the Supreme Court denied on May 21, 2009), does that continue to apply if the detainee is a youth? What about any statements given to the Canadian authorities prior to the transfer? Can they be shared, and under what circumstances? The Court ought to have been more specific in detailing precisely which principle of fundamental justice was violated.

One other point is of interest regarding the issue of an appropriate remedy. Justice O'Reilly, the original reviewing judge in the Federal Court of Canada, and ultimately the Supreme Court of Canada itself, was put in the position of choosing between the two positions of the parties with virtually no middle ground. Khadr advanced the argument that he was entitled to have the Court order that Canada request his repatriation, and the Crown maintained the position that the Court should not interfere in the executive's responsibility to manage foreign affairs. In fact, the Court highlighted that at the trial stage the government presented no alternatives (para. 38), and it appears that none worth addressing were put to the Court in the appeal.

Faced with this choice, the Court accepted the government position that requiring repatriation was an inappropriate remedy and the correct course was to return the matter to the government for consideration, without guidance, as to an appropriate remedy for the ongoing breach of Khadr's *Charter* rights.

No one seems yet to have suggested the possibility that, rather than request repatriation, the government could take the less drastic step of requesting that the authorities in the United States provide assurances that the evidence gathered by Canadian officials from their interviews will not be used in Khadr's trial.

It is true that this proposal would not entirely remedy the breach. The violation of Khadr's rights led to evidence which itself is partly responsible for his continued detention, a situation the Court described as an "ongoing breach" (para. 30). While an assurance not to use the evidence will not remedy that situation in the same way that removing Khadr from American custody would, it would still at least partially address the concern that such evidence was gathered in violation of his *Charter* rights and might play a role in his eventual conviction and imprisonment.

Such a remedy is much less drastic than requesting repatriation and is less interference in the Crown prerogative power over foreign affairs. It does not involve asking the United States to forego their trial process, it merely asks that they voluntarily place limits on that process. Unlike repatriation, diplomatic assurances regarding limiting trial procedures and processes are much more common between the United States and Canada, such as the assurances that American authorities not seek the death penalty, which were made after the Court's decision in *United States v. Burns*, [2001] 1 S.C.R. 283, 39 C.R. (5th) 205 (S.C.C.). Further, as demonstrated by *Burns*, such a proposed remedy is clearly one that the Court itself is comfortable imposing as an appropriate remedy to a s. 7 breach.

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A surprising gap in this widely discussed *per curiam* judgment is that there is no consideration of the reality that Canada became a party to the *United Nations Convention Against Torture* by ratifying it in 1987 and fulfilled its obligations under article 4 by implementing the criminal provisions of the Convention into Canada's domestic law through the enactment of s. 269.1 (torture offence) and ss. 7(3.7) and 7(7) (extraterritorial jurisdiction) of the *Criminal Code*. Section 269.1 could not be plainer and makes it a crime for a state agent to torture to obtain information in or outside Canada. The section also says any evidence obtained by torture is inadmissible — a rare automatic exclusion rule. See further, Donald Mcdougall of the Justice Department, "Torture in Canadian Criminal Law," 24 C.R. (6th) 74.

Given the clear breach of a binding international law obligation and what the Court also determined was a continuing ongoing detention in breach of s. 7 of the *Charter*, the Court's decision on remedy is disappointingly weak-kneed. Khadr argued for an order that the Government of Canada request repatriation, the effective remedy first ordered by Justice O'Reilly of the Federal Court. However, the Supreme Court decided that it had to give appropriate weight to the constitutional responsibility of the executive to make decisions on foreign affairs. There should merely be a declaratory order of unconstitutionality, leaving it to the government to consider what actions to take to bring their actions in conformity with the *Charter*. Notwithstanding its deference to the executive, the highest court nevertheless declared the remedy of repatriation sought by the applicant to be inappropriate.

It is not clear why the Court did not consider a remedy of requiring the government to request assurances that the evidence gathered by the Canadian official from their interviews with this youth while he weakened by the frequent flyer method of torture not be used in Khadr's trial in the United States (as suggested by Jonathan Shapiro in his annotation above). At the very least, the Court ought to have given the government a fixed period of time to take action to comply with the *Charter* so that the Court would maintain jurisdiction over this troublesome case of human rights violations and government inaction.

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APPEAL by federal government from judgment reported at *Khadr v. Canada (Prime Minister)* (2009), 2009 FCA 246, 2009 CarswellNat 2364, 2009 CAF 246, 2009 CarswellNat 2699, (sub nom. *Khadr v. Prime Minister (Canada)*) 393 N.R. 1, 310 D.L.R. (4th) 462 (F.C.A.), ordering government to request return of applicant from United States.

***Per curiam*:**

I. Introduction

1 Omar Khadr, a Canadian citizen, has been detained by the United States government at Guantanamo Bay, Cuba, for over seven years. The Prime Minister asks this Court to reverse the decision of the Federal Court of Appeal requiring the Canadian government to request the United States to return Mr. Khadr from Guantanamo Bay to Canada.

2 For the reasons that follow, we agree with the courts below that Mr. Khadr's rights under s. 7 of the *Canadian Charter of Rights and Freedoms* were violated. However, we conclude that the order made by the lower courts that the government request Mr. Khadr's return to Canada is not an appropriate remedy for that breach under s. 24(1) of the *Charter*. Consistent with the separation of powers and the well-grounded reluctance of courts to intervene in matters of foreign relations, the proper remedy is to grant Mr. Khadr a declaration that his *Charter* rights have been infringed, while leaving the government a measure of discretion in deciding how best to respond. We would therefore allow the appeal in part.

II. Background

3 Mr. Khadr was 15 years old when he was taken prisoner on July 27, 2002, by U.S. forces in Afghanistan. He was alleged to have thrown a grenade that killed an American soldier in the battle in which he was captured. About three months later, he was transferred to the U.S. military installation at Guantanamo Bay. He was placed in adult detention facilities.

4 On September 7, 2004, Mr. Khadr was brought before a Combatant Status Review Tribunal which affirmed a previous determination that he was an "enemy combatant". He was subsequently charged with war crimes and held for trial before a military commission. In light of a number of procedural delays and setbacks, that trial is still pending.

5 In February and September 2003, agents from the Canadian Security Intelligence Service ("CSIS") and the Foreign Intelligence Division of the Department of Foreign Affairs and International Trade ("DFAIT") questioned Mr. Khadr on matters connected to the charges pending against him and shared the product of these interviews with U.S. authorities.

In March 2004, a DFAIT official interviewed Mr. Khadr again, with the knowledge that he had been subjected by U.S. authorities to a sleep deprivation technique, known as the "frequent flyer program", in an effort to make him less resistant to interrogation. During this interview, Mr. Khadr refused to answer questions. In 2005, von Finckenstein J. of the Federal Court issued an interim injunction preventing CSIS and DFAIT agents from further interviewing Mr. Khadr in order "to prevent a potential grave injustice" from occurring: *Khadr (Next Friend of) v. Canada*, 2005 FC 1076, [2006] 2 F.C.R. 505 (F.C.), at para. 46. In 2008, this Court ordered the Canadian government to disclose to Mr. Khadr the transcripts of the interviews he had given to CSIS and DFAIT in Guantanamo Bay, under s. 7 of the *Charter*: *Khadr v. Canada (Minister of Justice)*, 2008 SCC 28, [2008] 2 S.C.R. 125 (S.C.C.) ("*Khadr 2008*").

6 Mr. Khadr has repeatedly requested that the Government of Canada ask the United States to return him to Canada: in March 2005 during a Canadian consular visit; on December 15, 2005, when a welfare report noted that "[Mr. Khadr] wants his government to bring him back home" (Report on Welfare Visit, Exhibit "L" to Affidavit of Sean Robertson, December 15, 2005 (J.R., vol. IV, at p. 534)); and in a formal written request through counsel on July 28, 2008.

7 The Prime Minister announced his decision not to request Mr. Khadr's repatriation on July 10, 2008, during a media interview. The Prime Minister provided the following response to a journalist's question, posed in French, regarding whether the government would seek repatriation:

> [TRANSLATION] The answer is no, as I said the former Government, and our Government with the notification of the Minister of Justice had considered all these issues and the situation remains the same....We keep on looking for [assurances] of good treatment of Mr. Khadr.
>
> (http://watch.ctv.ca/news/clip65783#clip65783, at 2'3"; referred to in Affidavit of April Bedard, August 8, 2008 (J.R., vol. II, at pp. 131-32))

8 On August 8, 2008, Mr. Khadr applied to the Federal Court for judicial review of the government's "ongoing decision and policy" not to seek his repatriation (Notice of Application filed by the respondent, August 8, 2008 (J.R., vol. II, at p. 113)). He alleged that the decision and policy infringed his rights under s. 7 of the *Charter*, which states:

> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

9 After reviewing the history of Mr. Khadr's detention and applicable principles of Canadian and international law, O'Reilly J. concluded that in these special circumstances, Canada has a "duty to protect" Mr. Khadr (2009 FC 405, 341 F.T.R. 300 (Eng.) (F.C.)). He found that "[t]he ongoing refusal of Canada to request Mr. Khadr's repatriation to Canada offends a principle of fundamental justice and violates Mr. Khadr's rights under s. 7 of the *Charter*" (para. 92). Also, he held that "[t]o mitigate the effect of that violation, Canada must present a request to the United States for Mr. Khadr's repatriation to Canada as soon as practicable" (para. 92).

10 The majority judgment of the Federal Court of Appeal (*per* Evans and Sharlow JJ.A.) upheld O'Reilly J.'s order, but defined the s. 7 breach more narrowly. The majority of the Court of Appeal found that it arose from the March 2004 interrogation conducted with the knowledge that Mr. Khadr had been subject to the "frequent flyer program", characterized by the majority as involving cruel and abusive treatment contrary to the principles of fundamental justice: 2009 FCA 246, 310 D.L.R. (4th) 462 (F.C.A.). Dissenting, Nadon J.A. reviewed the many steps the government had taken on Mr. Khadr's behalf and held that since the Constitution conferred jurisdiction over foreign affairs on the executive branch of government, the remedy sought was beyond the power of the courts to grant.

III. The Issues

11 Mr. Khadr argues that the government has breached his rights under s. 7 of the *Charter*, and that the appropriate remedy for this breach is an order that the government request the United States to return him to Canada.

12 Mr. Khadr does not suggest that the government is obliged to request the repatriation of all Canadian citizens held abroad in suspect circumstances. Rather, his contention is that the conduct of the government of Canada in connection with his detention by the U.S. military in Guantanamo Bay, and in particular Canada's collaboration with the U.S. government in 2003 and 2004, violated his rights under the *Charter*, and requires as a remedy that the government now request his return to Canada. The issues that flow from this claim may be summarized as follows:

A. Was There a Breach of Section 7 of the *Charter*?

1. Does the *Charter* apply to the conduct of Canadian state officials alleged to have infringed Mr. Khadr's s. 7 *Charter* rights?

2. If so, does the conduct of the Canadian government deprive Mr. Khadr of the right to life, liberty or security of the person?

3. If so, does the deprivation accord with the principles of fundamental justice?

B. Is the Remedy Sought Appropriate and Just in All the Circumstances?

13 We will consider each of these issues in turn.

A. Was There a Breach of Section 7 of the Charter?

1. Does the Canadian Charter Apply to the Conduct of the Canadian State Officials Alleged to Have Infringed Mr. Khadr's Section 7 Charter Rights?

14 As a general rule, Canadians abroad are bound by the law of the country in which they find themselves and cannot avail themselves of their rights under the *Charter*. International customary law and the principle of comity of nations generally prevent the *Charter* from applying to the actions of Canadian officials operating outside of Canada: *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292 (S.C.C.), at para. 48, *per* LeBel J., citing *United States v. Dynar*, [1997] 2 S.C.R. 462 (S.C.C.), at para. 123. The jurisprudence leaves the door open to an exception in the case of Canadian participation in activities of a foreign state or its agents that are contrary to Canada's international obligations or fundamental human rights norms: *Hape*, at para. 52, *per* LeBel J.; *Khadr 2008*, at para. 18.

15 The question before us, then, is whether the rule against the extraterritorial application of the *Charter* prevents the *Charter* from applying to the actions of Canadian officials at Guantanamo Bay.

16 This question was addressed in *Khadr 2008*, in which this Court held that the *Charter* applied to the actions of Canadian officials operating at Guantanamo Bay who handed the fruits of their interviews over to U.S. authorities. This Court held, at para. 26, that "the principles of international law and comity that might otherwise preclude application of the *Charter* to Canadian officials acting abroad do not apply to the assistance they gave to U.S. authorities at Guantanamo Bay", given holdings of the Supreme Court of the United States that the military commission regime then in place constituted a clear violation of fundamental human rights protected by international law: see *Khadr 2008*, at para. 24, *Rasul v. Bush*, 542 U.S. 466 (U.S.S.C. 2004), and *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (U.S. Sup. Ct. 2006). The principles of fundamental justice thus required the Canadian officials who had interrogated Mr. Khadr to disclose to him the contents of the statements he had given them. The Canadian government complied with this Court's order.

17 We note that the regime under which Mr. Khadr is currently detained has changed significantly in recent years. The U.S. Congress has legislated and the U.S. courts have acted with the aim of bringing the military processes at Guantanamo Bay in line with international law. (The *Detainee Treatment Act of 2005*, Pub. L. 109-148, 119 Stat. 2739, prohibited inhumane treatment of detainees and required interrogations to be performed according to the Army field manual. The *Military Commissions Act of 2006*, Pub. L. 109-366, 120 Stat. 2600, attempted to legalize the Guantanamo regime after the U.S. Supreme Court's ruling in *Hamdan v. Rumsfeld*. However, on June 12, 2008, in *Boumediene v. Bush*,

128 S.Ct. 2229 (U.S. Sup. Ct. 2008), the U.S. Supreme Court held that Guantanamo Bay detainees have a constitutional right to *habeas corpus*, and struck down the provisions of the *Military Commissions Act of 2006* that suspended that right.)

18 Though the process to which Mr. Khadr is subject has changed, his claim is based upon the same underlying series of events at Guantanamo Bay (the interviews and evidence-sharing of 2003 and 2004) that we considered in *Khadr 2008*. We are satisfied that the rationale in *Khadr 2008* for applying the *Charter* to the actions of Canadian officials at Guantanamo Bay governs this case as well.

2. Does the Conduct of the Canadian Government Deprive Mr. Khadr of the Right to Life, Liberty or Security of the Person?

19 The United States is holding Mr. Khadr for the purpose of trying him on charges of war crimes. The United States is thus the primary source of the deprivation of Mr. Khadr's liberty and security of the person. However, the allegation on which his claim rests is that Canada has also contributed to his past and continuing deprivation of liberty. To satisfy the requirements of s. 7, as stated by this Court in *Suresh v. Canada (Minister of Citizenship & Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3 (S.C.C.), there must be "a sufficient causal connection between [the Canadian] government's participation and the deprivation [of liberty and security of the person] ultimately effected" (para. 54).

20 The record suggests that the interviews conducted by CSIS and DFAIT provided significant evidence in relation to these charges. During the February and September 2003 interrogations, CSIS officials repeatedly questioned Mr. Khadr about the central events at issue in his prosecution, extracting statements from him that could potentially prove inculpatory in the U.S. proceedings against him (CSIS Document, Exhibit "U" to Affidavit of Lt. Cdr. William Kuebler, November 7, 2003 (J.R., vol. II, at p. 280); Interview Summary, Exhibit "AA" to Affidavit of Lt. Cdr. William Kuebler, February 24, 2003 (J.R., vol. III, at p. 289); Interview Summary, Exhibit "BB" to Affidavit of Lt. Cdr. William Kuebler, February 17, 2003 (J.R., vol. III, at p. 292); Interview Summary, Exhibit "DD" to Affidavit of Lt. Cdr. William Kuebler, April 20, 2004 (J.R., vol. III, at p. 296)). A report of the Security Intelligence Review Committee titled *CSIS's Role in the Matter of Omar Khadr* (July 8, 2009), further indicated that CSIS assessed the interrogations of Mr. Khadr as being "highly successful, as evidenced by the quality of intelligence information" elicited from Mr. Khadr (p. 13). These statements were shared with U.S. authorities and were summarized in U.S. investigative reports (Report of Investigative Activity, Exhibit "AA" to Affidavit of Lt. Cdr. William Kuebler, February 24, 2003 (J.R., vol. III, at pp. 289 ff.)). Pursuant to the relaxed rules of evidence under the U.S. *Military Commissions Act of 2006*, Mr. Khadr's statements to Canadian officials are potentially admissible against him in the U.S. proceedings, notwithstanding the oppressive circumstances under which they were obtained: see *United States v. Jawad*, Doc. D-008 (U.S. Military Comm. September 24, 2008) Ruling on defense Motion to Dismiss — Torture of detainee (online: http://www.defense.gov/news/Ruling%20D-008.pdf). The above interrogations also provided the context for the March 2004 interrogation, when a DFAIT official, knowing that Mr. Khadr had been subjected to the "frequent flyer program" to make him less resistant to interrogations, nevertheless proceeded with the interrogation of Mr. Khadr (Interview Summary, Exhibit "DD" to Affidavit of Lt. Cdr. William Kuebler, April 20, 2004 (J.R., vol. III, at p. 296)).

21 An applicant for a *Charter* remedy must prove a *Charter* violation on a balance of probabilities (*R. v. Collins*, [1987] 1 S.C.R. 265 (S.C.C.), at p. 277). It is reasonable to infer from the uncontradicted evidence before us that the statements taken by Canadian officials are contributing to the continued detention of Mr. Khadr, thereby impacting his liberty and security interests. In the absence of any evidence to the contrary (or disclaimer rebutting this inference), we conclude on the record before us that Canada's active participation in what was at the time an illegal regime has contributed and continues to contribute to Mr. Khadr's current detention, which is the subject of his current claim. The causal connection demanded by *Suresh* between Canadian conduct and the deprivation of liberty and security of person is established.

3. Does the Deprivation Accord With the Principles of Fundamental Justice?

22 We have concluded that the conduct of the Canadian government is sufficiently connected to the denial of Mr. Khadr's liberty and security of the person. This alone, however, does not establish a breach of Mr. Khadr's s. 7 rights

under the *Charter*. To establish a breach, Mr. Khadr must show that this deprivation is not in accordance with the principles of fundamental justice.

23 The principles of fundamental justice "are to be found in the basic tenets of our legal system": *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486 (S.C.C.), at p. 503. They are informed by Canadian experience and jurisprudence, and take into account Canada's obligations and values, as expressed in the various sources of international human rights law by which Canada is bound. In *R. v. B. (D.)*, 2008 SCC 25, [2008] 2 S.C.R. 3 (S.C.C.), at para. 46, the Court (Abella J. for the majority) restated the criteria for identifying a new principle of fundamental justice in the following manner:

> (1) It must be a legal principle.
>
> (2) There must be a consensus that the rule or principle is fundamental to the way in which the legal system ought fairly to operate.
>
> (3) It must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.

24 We conclude that Canadian conduct in connection with Mr. Khadr's case did not conform to the principles of fundamental justice. That conduct may be briefly reviewed. The statements taken by CSIS and DFAIT were obtained through participation in a regime which was known at the time to have refused detainees the right to challenge the legality of detention by way of *habeas corpus*. It was also known that Mr. Khadr was 16 years old at the time and that he had not had access to counsel or to any adult who had his best interests in mind. As held by this Court in *Khadr 2008*, Canada's participation in the illegal process in place at Guantanamo Bay clearly violated Canada's binding international obligations (*Khadr 2008*, at paras. 23-25; *Hamdan v. Rumsfeld*). In conducting their interviews, CSIS officials had control over the questions asked and the subject matter of the interviews (Transcript of cross-examination on Affidavit of Mr. Hopper, Exhibit "GG" to Affidavit of Lt. Cdr. William Kuebler, March 2, 2005 (J.R., vol. III, at p. 313, at p. 22)). Canadian officials also knew that the U.S. authorities would have full access to the contents of the interrogations (as Canadian officials sought no restrictions on their use) by virtue of their audio and video recording (*CSIS's Role in the Matter of Omar Khadr*, at pp. 11-12). The purpose of the interviews was for intelligence gathering and not criminal investigation. While in some contexts there may be an important distinction between those interviews conducted for the purpose of intelligence gathering and those conducted in criminal investigations, here, the distinction loses its significance. Canadian officials questioned Mr. Khadr on matters that may have provided important evidence relating to his criminal proceedings, in circumstances where they knew that Mr. Khadr was being indefinitely detained, was a young person and was alone during the interrogations. Further, the March 2004 interview, where Mr. Khadr refused to answer questions, was conducted knowing that Mr. Khadr had been subjected to three weeks of scheduled sleep deprivation, a measure described by the U.S. Military Commission in *Jawad* as designed to "make [detainees] more compliant and break down their resistance to interrogation" (para. 4).

25 This conduct establishes Canadian participation in state conduct that violates the principles of fundamental justice. Interrogation of a youth, to elicit statements about the most serious criminal charges while detained in these conditions and without access to counsel, and while knowing that the fruits of the interrogations would be shared with the U.S. prosecutors, offends the most basic Canadian standards about the treatment of detained youth suspects.

26 We conclude that Mr. Khadr has established that Canada violated his rights under s. 7 of the *Charter*.

B. Is the Remedy Sought Appropriate and Just in All the Circumstances?

27 In previous proceedings (*Khadr 2008*), Mr. Khadr obtained the remedy of disclosure of the material gathered by Canadian officials against him through the interviews at Guantanamo Bay. The issue on this appeal is whether the breach of s. 7 of the *Charter* entitles Mr. Khadr to the remedy of an order that Canada request of the United States that

he be returned to Canada. Two questions arise at this stage: (1) Is the remedy sought sufficiently connected to the breach? and (2) Is the remedy sought precluded by the fact that it touches on the Crown prerogative power over foreign affairs?

28 The judge at first instance held that the remedy sought was open to him. The Federal Court of Appeal held that he did not abuse his remedial discretion. On the basis of our answer to the second of the foregoing questions, we conclude that the trial judge, on the record before us, erred in the exercise of his discretion in granting the remedy sought.

29 First, is the remedy sought sufficiently connected to the breach? We have concluded that the Canadian government breached Mr. Khadr's s. 7 rights in 2003 and 2004 through its participation in the then-illegal military regime at Guantanamo Bay. The question at this point is whether the remedy now being sought — an order that the Canadian government ask the United States to return Mr. Khadr to Canada — is appropriate and just in the circumstances.

30 An appropriate and just remedy is "one that meaningfully vindicates the rights and freedoms of the claimants": *Doucet-Boudreau v. Nova Scotia (Department of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3 (S.C.C.), at para. 55. The first hurdle facing Mr. Khadr, therefore, is to establish a sufficient connection between the breaches of s. 7 that occurred in 2003 and 2004 and the order sought in these judicial review proceedings. In our view, the sufficiency of this connection is established by the continuing effect of these breaches into the present. Mr. Khadr's *Charter* rights were breached when Canadian officials contributed to his detention by virtue of their interrogations at Guantanamo Bay knowing Mr. Khadr was a youth, did not have access to legal counsel or *habeas corpus* at that time and, at the time of the interview in March 2004, had been subjected to improper treatment by the U.S. authorities. As the information obtained by Canadian officials during the course of their interrogations may be used in the U.S. proceedings against Mr. Khadr, the effect of the breaches cannot be said to have been spent. It continues to this day. As discussed earlier, the material that Canadian officials gathered and turned over to the U.S. military authorities may form part of the case upon which he is currently being held. The evidence before us suggests that the material produced was relevant and useful. There has been no suggestion that it does not form part of the case against Mr. Khadr or that it will not be put forward at his ultimate trial. We therefore find that the breach of Mr. Khadr's s. 7 *Charter* rights remains ongoing and that the remedy sought could potentially vindicate those rights.

31 The acts that perpetrated the *Charter* breaches relied on in this appeal lie in the past. But their impact on Mr. Khadr's liberty and security continue to this day and may redound into the future. The impact of the breaches is thus perpetuated into the present. When past acts violate present liberties, a present remedy may be required.

32 We conclude that the necessary connection between the breaches of s. 7 and the remedy sought has been established for the purpose of these judicial review proceedings.

33 Second, is the remedy sought precluded by the fact that it touches on the Crown prerogative over foreign affairs? A connection between the remedy and the breach is not the only consideration. As stated in *Doucet-Boudreau*, an appropriate and just remedy is also one that "must employ means that are legitimate within the framework of our constitutional democracy" (para. 56) and must be a "judicial one which vindicates the right while invoking the function and powers of a court" (para. 57). The government argues that courts have no power under the Constitution of Canada to require the executive branch of government to do anything in the area of foreign policy. It submits that the decision not to request the repatriation of Mr. Khadr falls directly within the prerogative powers of the Crown to conduct foreign relations, including the right to speak freely with a foreign state on all such matters: P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at p. 1-19.

34 The prerogative power is the "residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown": *Effect of Exercise of Royal Prerogative of Mercy upon Deportation Proceedings, Re*, [1933] S.C.R. 269 (S.C.C.), at p. 272, *per* Duff C.J., quoting A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed. 1915), at p. 420. It is a limited source of non-statutory administrative power accorded by the common law to the Crown: Hogg, at p. 1-17.

35 The prerogative power over foreign affairs has not been displaced by s. 10 of the *Department of Foreign Affairs and International Trade Act*, R.S.C. 1985, c. E-22, and continues to be exercised by the federal government. The Crown prerogative in foreign affairs includes the making of representations to a foreign government: *Black v. Canada (Prime Minister)* (2001), 199 D.L.R. (4th) 228 (Ont. C.A.). We therefore agree with O'Reilly J.'s implicit finding (paras. 39, 40 and 49) that the decision not to request Mr. Khadr's repatriation was made in the exercise of the prerogative over foreign relations.

36 In exercising its common law powers under the royal prerogative, the executive is not exempt from constitutional scrutiny: *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.). It is for the executive and not the courts to decide whether and how to exercise its powers, but the courts clearly have the jurisdiction and the duty to determine whether a prerogative power asserted by the Crown does in fact exist and, if so, whether its exercise infringes the *Charter* (*Operation Dismantle*) or other constitutional norms (*Air Canada v. British Columbia (Attorney General)*, [1986] 2 S.C.R. 539 (S.C.C.)).

37 The limited power of the courts to review exercises of the prerogative power for constitutionality reflects the fact that in a constitutional democracy, all government power must be exercised in accordance with the Constitution. This said, judicial review of the exercise of the prerogative power for constitutionality remains sensitive to the fact that the executive branch of government is responsible for decisions under this power, and that the executive is better placed to make such decisions within a range of constitutional options. The government must have flexibility in deciding how its duties under the power are to be discharged: see, e.g., *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (S.C.C.), at paras. 101-2. But it is for the courts to determine the legal and constitutional limits within which such decisions are to be taken. It follows that in the case of refusal by a government to abide by constitutional constraints, courts are empowered to make orders ensuring that the government's foreign affairs prerogative is exercised in accordance with the constitution: *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283 (S.C.C.).

38 Having concluded that the courts possess a narrow power to review and intervene on matters of foreign affairs to ensure the constitutionality of executive action, the final question is whether O'Reilly J. misdirected himself in exercising that power in the circumstances of this case (*R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651 (S.C.C.), at para. 15; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297 (S.C.C.), at paras. 117-18). (In fairness to the trial judge, we note that the government proposed no alternative (trial judge's reasons, at para. 78).) If the record and legal principle support his decision, deference requires we not interfere. However, in our view that is not the case.

39 Our first concern is that the remedy ordered below gives too little weight to the constitutional responsibility of the executive to make decisions on matters of foreign affairs in the context of complex and ever-changing circumstances, taking into account Canada's broader national interests. For the following reasons, we conclude that the appropriate remedy is to declare that, on the record before the Court, Canada infringed Mr. Khadr's s. 7 rights, and to leave it to the government to decide how best to respond to this judgment in light of current information, its responsibility for foreign affairs, and in conformity with the *Charter*.

40 As discussed, the conduct of foreign affairs lies with the executive branch of government. The courts, however, are charged with adjudicating the claims of individuals who claim that their *Charter* rights have been or will be violated by the exercise of the government's discretionary powers: *Operation Dismantle*.

41 In some situations, courts may give specific directions to the executive branch of the government on matters touching foreign policy. For example, in *Burns*, the Court held that it would offend s. 7 to extradite a fugitive from Canada without seeking and obtaining assurances from the requesting state that the death penalty would not be imposed. The Court gave due weight to the fact that seeking and obtaining those assurances were matters of Canadian foreign relations. Nevertheless, it ordered that the government seek them.

42 The specific facts in *Burns* justified a more specific remedy. The fugitives were under the control of Canadian officials. It was clear that assurances would provide effective protection against the prospective *Charter* breaches: it was entirely within Canada's power to protect the fugitives against possible execution. Moreover, the Court noted that no public purpose would be served by extradition without assurances that would not be substantially served by extradition with assurances, and that there was nothing to suggest that seeking such assurances would undermine Canada's good relations with other states: *Burns*, at paras. 125 and 136.

43 The present case differs from *Burns*. Mr. Khadr is not under the control of the Canadian government; the likelihood that the proposed remedy will be effective is unclear; and the impact on Canadian foreign relations of a repatriation request cannot be properly assessed by the Court.

44 This brings us to our second concern: the inadequacy of the record. The record before us gives a necessarily incomplete picture of the range of considerations currently faced by the government in assessing Mr. Khadr's request. We do not know what negotiations may have taken place, or will take place, between the U.S. and Canadian governments over the fate of Mr. Khadr. As observed by Chaskalson C.J. in *Kaunda v. President of the Republic of South Africa*, [2004] ZACC 5 (South Africa Constitutional Ct.), 136 I.L.R. 452: "The timing of representations if they are to be made, the language in which they should be couched, and the sanctions (if any) which should follow if such representations are rejected are matters with which courts are ill-equipped to deal" (para. 77). It follows that in these circumstances, it would not be appropriate for the Court to give direction as to the diplomatic steps necessary to address the breaches of Mr. Khadr's *Charter* rights.

45 Though Mr. Khadr has not been moved from Guantanamo Bay in over seven years, his legal predicament continues to evolve. During the hearing of this appeal, we were advised by counsel that the U.S. Department of Justice had decided that Mr. Khadr will continue to face trial by military commission, though other Guantanamo detainees will now be tried in a federal court in New York. How this latest development will affect Mr. Khadr's situation and any ongoing negotiations between the United States and Canada over his possible repatriation is unknown. But it signals caution in the exercise of the Court's remedial jurisdiction.

46 In this case, the evidentiary uncertainties, the limitations of the Court's institutional competence, and the need to respect the prerogative powers of the executive, lead us to conclude that the proper remedy is declaratory relief. A declaration of unconstitutionality is a discretionary remedy: *Operation Dismantle*, at p. 481, citing *Solosky v. Canada* (1979), [1980] 1 S.C.R. 821 (S.C.C.). It has been recognized by this Court as "an effective and flexible remedy for the settlement of real disputes": *R. v. Gamble*, [1988] 2 S.C.R. 595 (S.C.C.), at p. 649. A court can properly issue a declaratory remedy so long as it has the jurisdiction over the issue at bar, the question before the court is real and not theoretical, and the person raising it has a real interest to raise it. Such is the case here.

47 The prudent course at this point, respectful of the responsibilities of the executive and the courts, is for this Court to allow Mr. Khadr's application for judicial review in part and to grant him a declaration advising the government of its opinion on the records before it which, in turn, will provide the legal framework for the executive to exercise its functions and to consider what actions to take in respect of Mr. Khadr, in conformity with the *Charter*.

IV. Conclusion

48 The appeal is allowed in part. Mr. Khadr's application for judicial review is allowed in part. This Court declares that through the conduct of Canadian officials in the course of interrogations in 2003-2004, as established on the evidence before us, Canada actively participated in a process contrary to Canada's international human rights obligations and contributed to Mr. Khadr's ongoing detention so as to deprive him of his right to liberty and security of the person guaranteed by s. 7 of the *Charter*, contrary to the principles of fundamental justice. Costs are awarded to Mr. Khadr.

Appeal allowed in part.

Footnotes

1 The opinions expressed are those of the author and should not be construed as representing the views or opinions of the Department of Justice, the Attorney General of Canada, or the Government of Canada.

2006 SCC 58
Supreme Court of Canada

McDiarmid Lumber Ltd. v. God's Lake First Nation

2006 CarswellMan 424, 2006 CarswellMan 425, 2006 SCC 58, [2006] 2 S.C.R. 846, [2006] S.C.J. No. 58, [2007] 1 C.N.L.R. 206, [2007] 2 W.W.R. 1, 152 A.C.W.S. (3d) 755, 212 Man. R. (2d) 7, 274 D.L.R. (4th) 577, 27 C.B.R. (5th) 204, 356 N.R. 1, 389 W.A.C. 7, 57 C.L.R. (3d) 1, J.E. 2007-53

God's Lake First Nation a.k.a. God's Lake Band, Appellant and McDiarmid Lumber Ltd., Respondent and Attorney General of Canada, Assembly of First Nations and Manitoba Keewatinook Ininew Okimowin, Interveners

McLachlin C.J.C., Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein JJ.

Heard: April 20, 2006
Judgment: December 15, 2006
Docket: 30890

Proceedings: affirming *McDiarmid Lumber Ltd. v. God's Lake First Nation* (2005), 2005 MBCA 22, 2005 CarswellMan 33, 192 Man. R. (2d) 82, 340 W.A.C. 82, 8 C.B.R. (5th) 244, [2005] 2 C.N.L.R. 155, 251 D.L.R. (4th) 93, [2006] 1 W.W.R. 486, 50 C.L.R. (3d) 17 (Man. C.A.); reversing *McDiarmid Lumber Ltd. v. God's Lake First Nation* (2004), [2004] 3 C.N.L.R. 192, 186 Man. R. (2d) 31, 2004 MBQB 156, 2004 CarswellMan 315 (Man. Q.B.)

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Subject: Public; Corporate and Commercial; Constitutional; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Aboriginal law

VI Debtors and creditors
VI.1 Garnishment
VI.1.a Exemptions and attachability

Debtors and creditors

III Garnishment
III.5 Attachability
III.5.e Bank accounts
III.5.e.v Miscellaneous

Headnote

Aboriginal law --- Debtors and creditors — Garnishment — Exemptions and attachability

Indian band and building supply company entered into agreement regarding supply of materials and services — Crown provided funding for essential reserve services through comprehensive funding arrangement — Band did

not meet terms of contract with building company, company brought legal proceedings, and parties entered into consent judgment for $1,101,692.60 — Company obtained garnishment order affecting funding arrangement money — Money from arrangement was held in bank off reserve — Band's motion to set aside garnishment order was granted — Motions judge found that funds were protected from garnishment through ss. 89 and 90 of Indian Act — Company's appeal was allowed — Appellate court found monies in account were not property on reserve — Appellate court found no fictional or notional concept was capable of creating sufficient nexus between property and rights of Indian qua Indian to prevent garnishment — Garnishment order did not erode Indian rights — Appellate court found importance of funding arrangement to band's ability to operate reserve was not determinative factor — Appellate court found funding arrangement was not related to Treaty No. 5, 1875 as contemplated under s. 90 of Indian Act — Appellate court found trial judge improperly considered ss. 91 and 92 of Constitution Act, 1867, as notice of constitutional question had not been given — Band appealed — Appeal dismissed — Funds were not located on reserve and were not given under treaty or treaty agreement — Indian Act did not prevent seizure of funds — Section 89 and s. 90 of Indian Act should be interpreted narrowly — Parliament did not intend to exempt Indian property from seizure in broad sense — Funds stemming from treaty obligations which are part of funding agreements are immune from seizure, although band had not demonstrated any funds at issue were immune.

Debtors and creditors --- Garnishment — Attachability — Bank accounts — Miscellaneous accounts

Indian band and building supply company entered into agreement regarding supply of materials and services — Crown provided funding for essential reserve services through comprehensive funding arrangement — Band did not meet terms of contract with building company, company brought legal proceedings, and parties entered into consent judgment for $1,101,692.60 — Company obtained garnishment order affecting funding arrangement money — Money from arrangement was held in bank off reserve — Band's motion to set aside garnishment order was granted — Motions judge found that funds were protected from garnishment through ss. 89 and 90 of Indian Act — Company's appeal was allowed — Appellate court found monies in account were not property on reserve — Appellate court found no fictional or notional concept was capable of creating sufficient nexus between property and rights of Indian qua Indian to prevent garnishment — Garnishment order did not erode Indian rights — Appellate court found importance of funding arrangement to band's ability to operate reserve was not determinative factor — Appellate court found funding arrangement was not related to Treaty No. 5, 1875 as contemplated under s. 90 of Indian Act — Appellate court found trial judge improperly considered ss. 91 and 92 of Constitution Act, 1867, as notice of constitutional question had not been given — Band appealed — Appeal dismissed — Funds were not located on reserve and were not given under treaty or treaty agreement — Indian Act did not prevent seizure of funds — Section 89 and s. 90 of Indian Act should be interpreted narrowly — Parliament did not intend to exempt Indian property from seizure in broad sense — Funds stemming from treaty obligations which are part of funding agreements are immune from seizure, although band had not demonstrated any funds at issue were immune.

Droit autochtone --- Débiteurs et créanciers — Saisie-arrêt — Exceptions et saisissabilité

Bande indienne a conclu un contrat de fourniture de matériaux et de services avec un compagnie fournissant des matériaux de construction — Couronne a octroyé du financement pour les services essentiels dans la réserve par le biais d'une entente globale de financement — Bande n'ayant pas respecté les termes du contrat, la compagnie a entamé des procédures judiciaires; les parties se sont entendues pour un jugement sur consentement de l'ordre de 1 101 692,60 $ — Compagnie a obtenu une ordonnance de saisie-arrêt de l'argent versé selon l'entente de financement — Argent versé selon l'entente était détenu dans une banque située en dehors de la réserve — Requête de la bande en annulation de l'ordonnance de saisie-arrêt a été accueillie — Juge saisi de la requête a estimé que les fonds étaient insaisissables en application des art. 89 et 90 de la Loi sur les Indiens — Pourvoi de la compagnie a été accueilli — Cour d'appel a conclu que l'argent versé dans le compte n'était pas un bien situé sur une réserve — Cour d'appel a conclu qu'il n'existait aucune fiction ou notion capable de créer un lien suffisant entre les biens et les droits des Indiens en tant qu'Indiens pour empêcher la saisie-arrêt — Ordonnance de saisie-arrêt n'affaiblissait pas les droits des Indiens — Cour d'appel a conclu que l'importance de l'entente de financement eu égard à la capacité de la bande de faire fonctionner la réserve ne constituait pas un facteur déterminant — Cour d'appel a conclu que l'entente de

financement n'avait aucun lien avec le Traité no 5 de 1875, contrairement à ce qu'envisageait l'art. 90 de la Loi sur les Indiens — Cour d'appel a conclu que le premier juge avait erronnément tenu compte des art. 91 et 92 de la Loi constitutionnelle de 1867, étant donné qu'aucun avis d'une question constitutionnelle n'avait été donné — Bande a interjeté appel — Pourvoi rejeté — Fonds n'étaient pas situés sur une réserve et n'avaient pas été octroyés en vertu d'un traité ou d'un accord conclu en vertu d'un traité — Loi sur les Indiens n'empêchait pas la saisie des fonds — Articles 89 et 90 de la Loi sur les Indiens devaient être interprétés de façon stricte — Parlement n'avait pas l'intention de rendre insaisissables dans un sens large les biens des Indiens — Sont insaisissables les fonds découlant d'obligations issues d'un traité qui font partie d'ententes de financement; dans ce cas-ci, la bande n'avait pas démontré que les fonds en question étaient insaisissables.

Débiteurs et créanciers --- Saisie-arrêt — Saisissabilité — Comptes bancaires — Comptes divers

Bande indienne a conclu un contrat de fourniture de matériaux et de services avec une compagnie fournissant des matériaux de construction — Couronne a octroyé du financement pour les services essentiels dans la réserve par le biais d'une entente globale de financement — Bande n'ayant pas respecté les termes du contrat, la compagnie a entamé des procédures judiciaires; les parties se sont entendues pour un jugement sur consentement de l'ordre de 1 101 692,60 $ — Compagnie a obtenu une ordonnance de saisie-arrêt de l'argent versé selon l'entente de financement — Argent versé selon l'entente était détenu dans une banque située en dehors de la réserve — Requête de la bande en annulation de l'ordonnance de saisie-arrêt a été accueillie — Juge saisi de la requête a estimé que les fonds étaient insaisissables en application des art. 89 et 90 de la Loi sur les Indiens — Pourvoi de la compagnie a été accueilli — Cour d'appel a conclu que l'argent versé dans le compte n'était pas un bien situé sur une réserve — Cour d'appel a conclu qu'il n'existait aucune fiction ou notion capable de créer un lien suffisant entre les biens et les droits des Indiens en tant qu'Indiens pour empêcher la saisie-arrêt — Ordonnance de saisie-arrêt n'affaiblissait pas les droits des Indiens — Cour d'appel a conclu que l'importance de l'entente de financement eu égard à la capacité de la bande de faire fonctionner la réserve ne constituait pas un facteur déterminant — Cour d'appel a conclu que l'entente de financement n'avait aucun lien avec le Traité no 5 de 1875, contrairement à ce qu'envisageait l'art. 90 de la Loi sur les Indiens — Cour d'appel a conclu que le premier juge avait erronnément tenu compte des art. 91 et 92 de la Loi constitutionnelle de 1867, étant donné qu'aucun avis d'une question constitutionnelle n'avait été donné — Bande a interjeté appel — Pourvoi rejeté — Fonds n'étaient pas situés sur une réserve et n'avaient pas été octroyés en vertu d'un traité ou d'un accord conclu en vertu d'un traité — Loi sur les Indiens n'empêchait pas la saisie des fonds — Articles 89 et 90 de la Loi sur les Indiens devaient être interprétés de façon stricte — Parlement n'avait pas l'intention de rendre insaisissables dans un sens large les biens des Indiens — Sont insaisissables les fonds découlant d'obligations issues d'un traité qui font partie d'ententes de financement; dans ce cas-ci, la bande n'avait pas démontré que les fonds en question étaient insaisissables.

An Indian band and a building supply company entered into an agreement for the supply of materials and services. The Crown provided funding for essential reserve services through a comprehensive funding agreement. The band did not meet the terms of its agreement with the building company. Legal proceedings were initiated and the band and building company entered consent judgment in the amount of $1,101,692.60. The company obtained a garnishment order affecting monies from the Crown's funding agreement. The money from the arrangement was held off the reserve in a bank account.

The band's motion to set aside the garnishment order was granted. The motions judge found that the funds were protected through s. 89 and s. 90 of the Indian Act.

The building company's appeal was allowed. The appellate court found that monies in the account were not properly considered to be on the reserve, and that no nexus between the property and rights under the Indian Act prevented garnishment. The appellate court found that the garnishment order did not erode any rights under the Indian Act. The band's ability to operate the reserve was not considered a determinative factor. The funding agreement was not related to Treaty No. 5, 1875, as contemplated by s. 90 of the Indian Act.

The band appealed.

Held: The appeal was dismissed.

Per McLachlin C.J.C. (Bastarache, LeBel, Deschamps, Charron, Rothstein JJ. concurring): The funds were not located on a reserve, and were not funds given under a treaty or treaty agreement. No portion of the Indian Act prevented garnishment of the funds. A concrete, text-based interpretation of s. 89 of the Act was in order, rather than adopting a contextual analysis. Similarly, the definition of agreement in s. 90(1)(b) of the Act should not be read broadly, but rather should be confined to agreements ancillary to treaties, based on the principle of associated meaning and the presumption against tautology. Parliament did not intend to exempt Indian property from seizure in a broad sense, but intended to create only narrow exceptions from the provincial property security regime. Both creditors and debtors were affected by the provisions at issue. Section 90(1)(b) should also be read narrowly because it restricts access to credit. Provisions regarding ministerial consent, found in s. 90(2) and 90(3), also indicated a narrow interpretation was required. Previous versions of the Act had clearly included all property, and the wording of the relevant section had been specifically changed to be dependent upon treaties and ancillary agreements.

Funds under the comprehensive funding agreement stemming from treaty obligations were immune from seizure under s. 90(1)(b) of the Act. However, delineation of funds under the comprehensive funding agreement between treaty agreement obligations and other sources was not possible on the available evidence. The band had not demonstrated that the funds at issue were connected to treaty obligations.

Binnie J. (Fish, Abella JJ. concurring) (dissenting): The funding agreement was a treaty agreement, as it dealt with the provision of essential services on the reserve. As such, the funds were exempt from garnishment. The words "treaty or agreement between a band and Her Majesty" in s. 90(1)(b) of the Indian Act required broad interpretation. A narrow interpretation would favour treaty bands over non-treaty bands. The funding agreement provided for essential services, and if they were garnished the government would be required to provide these services with other funds. Although the funds themselves were not located on a reserve, the community itself was too remote and poor to support a bank and should not be penalized for such. This result was not paternalistic.

Une bande indienne avait conclu un contrat de fourniture de matériaux et services avec une compagnie fournissant des matériaux de construction. La Couronne a octroyé du financement pour les services essentiels sur la réserve par le biais d'une entente globale de financement. La bande n'a pas respecté les termes du contrat avec la compagnie. Celle-ci a entamé des procédures judiciaires contre la bande, puis les deux parties se sont entendues sur un jugement par consentement de l'ordre de 1 101 692,60 $. La compagnie a obtenu une ordonnance de saisie-arrêt à l'égard de l'argent versé en vertu de l'entente de financement avec la Couronne. Cet argent était détenu dans un compte de banque situé en dehors de la réserve.

La bande a présenté une requête en annulation de l'ordonnance de saisie-arrêt et celle-ci a été accueillie. Le juge saisi de la requête a conclu que les fonds étaient insaisissables en application des art. 89 et 90 de la Loi sur les Indiens.

Le pourvoi de la compagnie a été accueilli. La Cour d'appel a estimé que l'argent versé dans le compte était erronément considéré comme situé sur la réserve et qu'il n'existait aucun lien entre les biens et les droits conférés par la Loi sur les Indiens qui puisse empêcher la saisie-arrêt. Elle a conclu que l'ordonnance de saisie-arrêt n'affaiblissait pas les droits conférés par la Loi sur les Indiens. La capacité de la bande de faire fonctionner la réserve ne constituait pas un facteur déterminant. L'entente de financement n'avait aucun lien avec le Traité no 5 de 1875, contrairement à ce qu'envisageait l'art. 90 de la Loi sur les Indiens.

La bande a interjeté appel.

Arrêt: Le pourvoi a été rejeté.

McLachlin, J.C.C. (Bastarache, LeBel, Deschamps, Charron, Rothstein, JJ., souscrivant à son opinion): Les fonds n'étaient pas situés sur une réserve et ils n'étaient pas des fonds octroyés en vertu d'un traité ou d'un accord conclu en vertu d'un traité. Rien dans la Loi sur les Indiens n'interdisait la saisie-arrêt de ces fonds. Il y avait lieu d'interpréter l'art. 89 de la Loi de façon concrète et fondée sur son libellé plutôt que de procéder à une analyse contextuelle. Pareillement, la définition du mot « accord » dans l'art. 90(1)b) de la Loi ne devrait pas être interprétée de façon large, mais devrait plutôt être limitée aux accords accessoires aux traités, et ce, en vertu de la règle des mots associés et de la présomption d'absence de tautologie. Le Parlement n'avait pas l'intention de rendre insaisissables au sens large les biens des Indiens; il voulait plutôt créer des exceptions strictes au régime provincial de garantie des biens. Les dispositions en cause avaient un impact tant sur les créanciers que sur les débiteurs. L'article 90(1)b) devait également être interprété de façon stricte parce qu'il limite l'accès au crédit. Les dispositions des art. 90(2) et 90(3) portant sur le consentement ministériel dénotaient également la nécessité d'une interprétation stricte. Les versions antérieures de la Loi incluaient clairement tous les biens; la formulation de l'article en cause avait été spécifiquement modifiée pour dépendre des traités et des accords accessoires.

Les fonds versés en vertu de l'entente globale de financement et découlant des obligations issues de traités étaient insaisissables en vertu de l'art. 90(1)b) de la Loi. Par ailleurs, la preuve disponible ne permettait pas de déterminer quels étaient les fonds de l'entente globale de financement qui découlaient des obligations issues de traités et quels étaient ceux qui découlaient d'autres sources. La bande n'avait pas réussi à établir que les fonds en question étaient liés à des obligations issues de traités.

Binnie, J. (Fish, Abella, JJ., souscrivant à son opinion) (dissident): L'entente de financement constituait un accord conclu en vertu d'un traité, étant donné qu'elle portait sur la fourniture de services essentiels dans la réserve. À ce titre, ces fonds étaient insaisissables. Les mots « traité ou accord entre une bande et Sa Majesté » dans l'art. 90(1)b) de la Loi sur les Indiens nécessitaient une interprétation large. Une interprétation stricte favoriserait les bandes soumises au régime d'un traité par rapport à celles qui ne le sont pas. L'entente de financement octroyait des fonds pour les services essentiels; si ces fonds étaient saisis, le gouvernement devrait octroyer d'autres fonds pour couvrir ces services. Même si les fonds eux-mêmes n'étaient pas situés sur la réserve, la communauté elle-même était trop éloignée et trop pauvre pour soutenir une banque et elle ne devrait pas être pénalisée pour cet état de fait. Un tel résultat n'était pas paternaliste.

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APPEAL by Indian band from judgment reported at *McDiarmid Lumber Ltd. v. God's Lake First Nation* (2005), 2005 MBCA 22, 2005 CarswellMan 33, 192 Man. R. (2d) 82, 340 W.A.C. 82, 8 C.B.R. (5th) 244, [2005] 2 C.N.L.R. 155, 251 D.L.R. (4th) 93, [2006] 1 W.W.R. 486, 50 C.L.R. (3d) 17 (Man. C.A.), allowing appeal by building company from judgment granting band's motion to exempt certain funds from garnishment order.

POURVOI de la bande indienne à l'encontre de l'arrêt publié à *McDiarmid Lumber Ltd. v. God's Lake First Nation* (2005), 2005 MBCA 22, 2005 CarswellMan 33, 192 Man. R. (2d) 82, 340 W.A.C. 82, 8 C.B.R. (5th) 244, [2005] 2 C.N.L.R. 155, 251 D.L.R. (4th) 93, [2006] 1 W.W.R. 486, 50 C.L.R. (3d) 17 (C.A. Man.), qui a accueilli le pourvoi de la compagnie de construction à l'encontre du jugement qui avait accueilli la requête de la bande visant à ce que certains de ses biens soient déclarés insaisissables.

***McLachlin C.J.C.*:**

1. Introduction

1 The appeal concerns the scope of ss. 89 and 90 of the *Indian Act*, R.S.C. 1985, c. I-5. These provisions, designed to prevent the erosion of property belonging to Indians *qua* Indians, confer immunity from seizure by creditors. The question on this appeal is whether ss. 89 and 90 extend this immunity to funds provided under individualized Comprehensive Funding Arrangements ("CFAs") between the federal government and aboriginal bands.

2 The case at bar involves band funds that have been deposited in an off-reserve account pursuant to a CFA between the God's Lake Band and the federal government. As part of a "co-management" approach to governance, the CFA funds are designed to be spent exclusively for certain designated purposes. One of these purposes — namely, on-reserve education — appears closely related to the Crown's obligations under Treaty No. 5 (1875), to which the band adhered in 1909. Others seem only indirectly related to such obligations. Still others seem to fall entirely outside the treaty obligations. The respondent, a creditor of the band that has obtained a consent judgment and garnishment order, is seeking to seize the funds.

3 I conclude that the funds in question are not protected directly by s. 89 of the *Indian Act*, which protects only property situated on a reserve. Nor, in my opinion, did the band discharge its burden of establishing protection under s. 90(1), which immunizes from seizure funds given "under a treaty or agreement." Accordingly, I would dismiss the appeal.

2. Issues

4 The appeal raises two issues:

1. How should the location of a banking debt be determined for the purposes of s. 89(1)? Is the debt protected because it is notionally on reserve?

2. Do the words "personal property ... given to Indians or to a band under a treaty or agreement between a band and Her Majesty" in s. 90(1)(*b*) apply to the funds provided under the CFA in the case at bar?

3. The Statute

5 Under s. 89 of the *Indian Act*, property situated on a reserve is protected from seizure. Under s. 90, other property may be deemed to be so situated for the purposes of taxation or seizure. The provisions read:

> 89. (1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.
>
> (1.1) Notwithstanding subsection (1), a leasehold interest in designated lands is subject to charge, pledge, mortgage, attachment, levy, seizure, distress and execution.
>
> (2) A person who sells to a band or a member of a band a chattel under an agreement whereby the right of property or right of possession thereto remains wholly or in part in the seller may exercise his rights under the agreement notwithstanding that the chattel is situated on a reserve.
>
> **90.** (1) For the purposes of sections 87 and 89, personal property that was
>
> (a) purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or bands, or
>
> (b) given to Indians or to a band under a treaty or agreement between a band and Her Majesty,

shall be deemed always to be situated on a reserve.

The provisions were initially adopted, in almost identical form, as ss. 88 and 89 in the *Indian Act* reforms of 1951 (S.C. 1951, c. 29).

4. Judicial History

6 Senior Master Lee of the Court of Queen's Bench of Manitoba found that there was a strong likelihood that some of, if not all, the attached monies had been received pursuant to a CFA. He stated that the monies were for essential services on the reserve and were "clearly in keeping with the public policy behind the development of the protection afforded pursuant to ss. 89 and 90 of *The Indian Act*". He rejected arguments regarding *situs* under the *Trust and Loan Companies Act*, S.C. 1991, c. 45. After verification of the portion of the monies received under the CFA, Senior Master Lee ordered $518,838.55 released from garnishment. $125,000 was set aside pending the resolution of the issues before us.

7 On appeal, Sinclair J. of the Court of Queen's Bench first asked whether the funds were "property situated on a reserve" and thus protected from seizure by s. 89 of the *Indian Act*. He rejected the common law natural meaning approach to *situs* in favour of a connecting factors test aimed at identifying a discernible nexus between the property in question and the Indian occupation of reserve land. He identified and considered seven factors: the nature of the CFA; the purpose of the funds provided; the location of the recipient band under the CFA; the location of the account into which the funds were deposited; the location of expenditures from the fund; the intended beneficiaries or recipients of payment from the fund; and the importance of the fund to the band's ability to occupy the reserve. Sinclair J. concluded that the funds constituted Indian property closely related to Indian occupation of reserve land and that they ought to be protected from seizure. He held:

> I am satisfied that there is more than a discernible nexus between the funds and the Band's ability to occupy its reserve. The connecting factors in this case are quite strong. That causes me to conclude that the funds are protected from seizure pursuant to s. 89 of the *Indian Act* regardless of s. 90.
>
> ((2004), 186 Man. R. (2d) 31, 2004 MBQB 156 (Man. Q.B.), at para. 83)

Sinclair J. went on to consider whether the funds were also protected by s. 90 of the *Indian Act*. He concluded that the CFA was an "agreement" within the meaning of s. 90, rejecting the view expressed in *Mitchell v. Sandy Bay Indian Band*, [1990] 2 S.C.R. 85 (S.C.C.), at pp. 134-42, *per* La Forest J., that for an agreement to come within s. 90, it must be connected to a treaty. Turning to the CFA at issue, Sinclair J. found that

> while it seems clear that the agreement between the Band and Canada was intended in part to allow Canada to fulfill its treaty obligations (for health and education for example), for the most part, the CFA covers areas of funding not mentioned in Treaty No. 5. [para. 87]

Being unable to say what portion of the CFA related to the treaty obligation made "no difference" given the broad meaning he accorded to the word "agreement" in s. 90. He concluded:

> I am of the view that the CFA reflects the federal government's responsibilities for Indians and lands reserved for Indians under s. 91(24) of the *Constitution Act 1867*. Such an agreement, therefore, is covered by s. 90 of the *Indian Act*. As such, the funds deposited in the Band's bank account at Peace Hills were deemed always to be situated on an Indian Reserve and therefore not attachable. [para. 87]

8 The Manitoba Court of Appeal, *per* Scott C.J.M and Philp J.A., allowed the appeal, finding that neither s. 89 nor s. 90 of the *Indian Act* applied to the garnished funds: (2005), 192 Man. R. (2d) 82, 2005 MBCA 22 (Man. C.A.). On s. 89, the court rejected the view that the CFA funds received by the band and deposited in the Winnipeg bank were personal property situated on a reserve. The court held that the motions judge had erred in applying a multi-factored "discernible nexus" test to determine whether the property was on the reserve, and in his evaluation of the factors that tied the band's

accounts to the reserve. While the provisions of the Act were to be liberally interpreted in favour of Indians, *Union of New Brunswick Indians v. New Brunswick (Minister of Finance)*, [1998] 1 S.C.R. 1161 (S.C.C.), at paras. 13-15, made clear that the words "situated on a reserve" in s. 87 should be given their ordinary and common sense meaning and that they do not include "notional situation" on a reserve. The only notional *situs* of personal property for the purposes of ss. 87 and 89 was found in the statutory deeming provisions of s. 90.

9 After reviewing the case law, the court determined that it would be inappropriate to apply a highly contextual test to determine the *situs* of personal property that may be subject to seizure. Even if such a test were applied, however, Scott C.J.M. and Philp J.A. found that the location of the funds in Winnipeg would be determinative:

> We conclude, as did Côté J.A. in the *Enoch Indian Band* decision, that whether one applies the common law *situs* principles or the *Williams* connecting factors test, the funds on deposit at Peace Hills were not property situated on a reserve. The funds were not exempt from garnishment by the plaintiff by virtue of s. 89 of the *Act*. [para. 91]

10 The court then turned to s. 90. It held that the governing authority was *Mitchell*, which restricted the scope of s. 90(1)(*b*) to personal property that enures to Indians through the discharge by Her Majesty of her treaty or ancillary obligations. It followed that the motions judge's broad reading of "agreement" in s. 90 was untenable. The only question was whether the CFA was ancillary to Treaty No. 5. The court noted that the CFA, for the most part, dealt with areas not covered by Treaty No. 5. There was "no evidence that established an explicit connection between the band's treaty rights and the CFA" (para. 126), and the importance of the funds to the band's viability did not change the agreement's nature.

5. Analysis

5.1 Determining Location Under Section 89(1)

11 Section 89(1) of the *Indian Act* provides that "the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band". The question is whether the expression "situated on a reserve" is to be given its plain meaning and subjected to the common law and statutory *situs* rules, or whether it has a more abstract meaning unique to the *Indian Act*.

12 The band relies on *Williams v. R.*, [1992] 1 S.C.R. 877 (S.C.C.). In that case, the issue was whether unemployment insurance benefits received by an Indian were "situated" on the reserve for the purposes of exemption from taxation under the *Indian Act*. The Court, *per* Gonthier J., found that the *situs* for this purpose was on the reserve, having regard to "a number of potentially relevant connecting factors" relating to the transaction and the parties involved (p. 893). Gonthier J., in *obiter*, suggested that the same approach would apply to seizures.

13 There is no dispute that under traditional common law approaches and the terms of the *Trust and Loan Companies Act*, the debt at issue here is located off-reserve at the Winnipeg bank branch. The question, therefore, is what approach applies to seizures — the concrete approach of the common law, or the multi-factored notional approach applied to taxation in *Williams*.

14 The band argues that the *Williams* approach better reflects the broader purpose of this protective provision of the *Indian Act*. That purpose, it submits, is to protect assets of Indians *qua* Indians where to permit seizure would neglect the realities of the aboriginal community in question or the options available to the parties. This is particularly true, the band contends, if a link to on-reserve activities is established.

15 Despite its evident appeal, this submission does not withstand scrutiny. Principle, policy and jurisprudence stand against it.

16 First, *Williams* is distinguishable. It was based on a different section of the *Indian Act* and referred to a different kind of property. At issue was s. 87, which accords an exemption from taxation for "personal property of an Indian or a

band situated on a reserve". The exemption was permitted in *Williams*, because "the benefits, *intangible personal property*, were effectively on the reserve at the time of taxation": *Union of New Brunswick Indians*, at para. 12 (emphasis added).

17 As Scott C.J.M. and Philp J.A. note, the Court in *Williams* used a "connecting factors" approach to determine the location of "something that is neither tangible personal property nor a chose in action" (para. 59). It makes sense to adopt a highly fact-specific form of analysis with respect to the location of a *transaction*, such as the provision of benefits, for taxation purposes. In this case, however, as Scott C.J.M. and Philp J.A. point out:

> We are not concerned with where a transaction is located for the purposes of taxation. We are concerned with the garnishment of the band's funds that are deposited in bank accounts at the Winnipeg branch of Peace Hills. The law is well settled that a bank deposit constitutes a debt owing by the bank to its customer. Gonthier, J, reasoned in *Williams*, it is "not apparent how the place where a debt may normally be enforced has any relevance to the question whether to tax ... would amount to the erosion of the entitlements of an Indian ..." On the other hand, the place where a debt may be enforced has everything to do with the seizure of a debt. [Emphasis added; para. 60.]

18 Adopting the contextual form of analysis developed for cases — such as one involving a taxation transaction — where the location is objectively difficult to determine does not mean that the ordinary sense of "location" should be changed where — as is true of the bank account in the case at bar — the location is objectively easy to determine.

19 Second, the cases overwhelmingly support a concrete common law interpretation. In *Union of New Brunswick Indians*, writing for the majority of this Court, I confirmed the view of Iacobucci J. in *R. v. Lewis*, [1996] 1 S.C.R. 921 (S.C.C.), that "on the reserve" is to be given "its ordinary and common sense" meaning throughout the *Indian Act*:

> The Court had earlier stated at p. 955 [of *Lewis*] that the phrase should be given the same construction wherever it is used throughout the *Indian Act*. The phrase "situated on a reserve" should be interpreted in the same way. The addition of the word "situated" does not significantly alter the meaning of the phrase in the circumstances of this case....
>
> The only qualification the case law admits to the rule that s. 87 catches only property physically located on a reserve is the rule that where property which was on a reserve moves off the reserve temporarily, the court will ask whether its "paramount location" is on the reserve. [paras. 13-14]

The Court of Appeal in the case at bar found this statement to have "foreclosed the existence of a discernible nexus test that would modify the requirement of s. 87 (and of s. 89) that property must be physically located on a reserve" (para. 34). I agree.

20 Third, this view is supported by the fact that when Parliament wished to depart from the physically situate test for personal property, it did so expressly by statutory language. Thus s. 90 provides that personal property given to Indians by the Crown under treaty obligations or purchased by moneys appropriated by Parliament for the benefit of Indians "shall be deemed always to be situated on a reserve". The existence of a deeming provision of this kind suggests that other provisions addressing location should not be interpreted according to a "notional" test.

21 I agree with the Court of Appeal that the funds in the Winnipeg bank account were not "situated on a reserve". Accordingly, the exemption granted by s. 89 of the *Indian Act* does not apply.

5.2 The Exemption Under Section 90(1) of the Indian Act

22 Section 90(1) of the *Indian Act* reads as follows:

> **90.** (1) For the purposes of sections 87 and 89, personal property that was
>
> > (a) purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or bands, or

(b) given to Indians or to a band under a treaty or agreement between a band and Her Majesty,

shall be deemed always to be situated on a reserve.

Is the deposited money at issue in this case covered by this deeming provision, and thus protected from garnishment, because of its source in an "agreement" with the Crown?

23 The appellant band is a 1909 adherent to Treaty No. 5, concluded at Norway House in 1875. In exchange for the extinguishment of claims, the Crown agreed, *inter alia*, to protect traditional activities on the surrendered land, provide annual grants, and maintain schools. In the case at bar, the funds in question were provided through a CFA under which funds are to be delivered to the band's off-reserve bank account on a monthly basis. The motions judge found that the band has "almost no independent sources of funding for its financial needs other than those provided by the federal government" (para. 5). The parties disagree about both the proper interpretation of the word "agreement" in s. 90(1) and the proper characterization of the CFA.

24 The question is one of statutory interpretation. What is the meaning of "agreement" in s. 90(1)(*b*)? Does it extend to any agreement between the government and an Indian band? Or is it confined to particular types of agreements, and if so, what types of agreements?

25 Precedent, principle and policy all suggest that Parliament's intent was that the word "agreement" in s. 90(1)(*b*) should not be accorded a broad meaning, but should instead be confined to agreements ancillary to treaties.

5.2.1 Precedent

26 This Court has already considered the meaning of "agreement" in s. 90(1)(*b*) and concluded that it should be restricted to agreements that flesh out commitments of the Crown to Indians in the treaty context of the surrender of their homelands: *Mitchell*, at pp. 124, 131 and 134. The band would have us overrule *Mitchell*. It is not the practice of this Court to reverse its previous decisions in the absence of compelling reasons to do so: *R. v. Chaulk*, [1990] 3 S.C.R. 1303 (S.C.C.), at pp. 1352-53; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740 (S.C.C.), at pp. 777-78; *Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2000] 1 S.C.R. 842, 2000 SCC 34 (S.C.C.), at para. 43. In this case, as will be discussed more fully below, no such reasons emerge. On the contrary, *Mitchell* appears to have been correctly decided.

27 The Court confirmed in *Williams* that the purpose of the exemptions in ss. 87, 88 and 89 of the *Indian Act* "was to preserve the entitlements of Indians to their reserve lands and to ensure that the use of their property on their reserve lands was not eroded by the ability of governments to tax, or creditors to seize" (p. 885). The purpose is to protect what the Indian band was "given" in return for the surrender of Indian lands. The exemptions are tied to the reserve lands and the Indians' ability to preserve their lands against outside intrusion and diminishment. As Gonthier J. stated in *Williams*, "the purpose of the sections was not to confer a general economic benefit upon the Indians" (p. 885). For example, they do not exempt from seizure or taxation contractual arrangements in the commercial mainstream that amount to normal business transactions, but only "property that enures to Indians pursuant to treaties and their ancillary agreements": *Mitchell*, at p. 138. Only the latter is protected by s. 90(1)(*b*).

28 To achieve this purpose, Parliament sought to ensure that the entitlements of Indians under treaties were not defined in a way that was unduly narrow or technical. La Forest J. reasoned that "[i]t must be remembered that treaty promises are often couched in very general terms and that supplementary agreements are needed to flesh out the details of the commitments undertaken by the Crown": *Mitchell*, at p. 124. The word "agreement" in the provision thus served to ensure that agreements that fulfil treaty obligations are treated as such.

29 In reaching this conclusion, the Court relied on the principle of associated meaning, discussed more fully below. Although La Forest J. did not refer to that principle expressly, he used the vocabulary traditionally associated with it and determined that "the terms 'treaty' and 'agreement' take colour from one another": *Mitchell*, at p. 124.

5.2.2 The Principle of Associated Meaning

30 It is a fundamental principle of statutory interpretation that when two or more words linked by "and" or "or" serve an analogous grammatical and logical function within a provision, they should be interpreted with a view to their common features: R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 173. This principle is known as the principle of associated meaning or *noscitur a sociis*. It is based on the idea that "[t]he meaning of a term is revealed by its association with other terms: *it is known by its associates*": *2747-3174 Québec Inc. c. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919 (S.C.C.), at para. 195 (emphasis in original). As explained by Bastarache J. in *Marche v. Halifax Insurance Co.*, [2005] 1 S.C.R. 47, 2005 SCC 6 (S.C.C.), at paras. 66-71, applying the principle enables courts to understand the "immediate context" of the statutory words whose meaning is in dispute.

31 Applying this principle may result in the scope of the broader term being limited to that of the narrower term: *R. v. Goulis* (1981), 33 O.R. (2d) 55 (Ont. C.A.). The question in *Goulis* was whether a bankrupt who had failed to reveal the existence of certain commercial property to his trustee in bankruptcy had "concealed" the property within the meaning of s. 350 of the *Criminal Code*, R.S.C. 1970, c. C-34, which provided:

> **350.** Every one who,
>
> (a) with intent to defraud his creditors,
>
> (i) makes or causes to be made a gift, conveyance, assignment, sale, transfer or delivery of his property, or
>
> (ii) removes, conceals or disposes of any of his property
>
> . . . . .
>
> is guilty of an indictable offence....

32 Although the term "conceals" in subpara. (ii) could be understood broadly to include a failure to disclose, Martin J.A. relied on the associated word principle to justify his adoption of a narrower meaning:

> In this case, the words which lend colour to the word "conceals" are, first, the word "removes", which clearly refers to a physical removal of property, and second, the words "disposes of", which, standing in contrast to the kind of disposition which is expressly dealt with in subpara. (i) of the same para. (*a*), namely, one which is made by "gift, conveyance, assignment, sale, transfer or delivery", strongly suggests the kind of disposition which results from a positive act taken by a person to physically part with his property. In my view the association of "conceals" with the words "removes" or "disposes of" in s. 350(*a*)(ii) shows that the word "conceals" is there used by Parliament in a sense which contemplates a positive act of concealment. [p. 61]

Having identified the shared feature of the three linked words as a physical act of some sort, Martin J.A. then used this feature to narrow the range of possible meanings of "conceal".

33 This Court applied the principle of associated meaning to similar effect in *R. v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031 (S.C.C.). It had been alleged that s. 13(1)(a) of Ontario's *Environmental Protection Act*, which targeted a contaminant that "causes or is likely to cause impairment of the quality of the natural environment for any use that can be made of it", was unconstitutionally vague. The majority of the Court, *per* Gonthier J., stated:

> [A]s I observed in *Nova Scotia Pharmaceutical Society* ... legislative provisions must not be considered in a vacuum. The content of a provision "is enriched by the rest of the section in which it is found ...". Thus, it is significant that the expression challenged by CP as being vague ... appears in s. 13(1)(*a*) alongside various other environmental impacts which attract liability. It is apparent from these other enumerated impacts that the release of a contaminant which poses only a trivial or minimal threat to the environment is not prohibited by s. 13(1). Instead, the potential impact

> of a contaminant must have some significance in order for s. 13(1) to be breached. The contaminant must have the potential to cause injury or damage to property or to plant or animal life (s. 13(1)(*b*)), cause harm or material discomfort (s. 13(1)(*c*), adversely affect health (s. 13(1)(*d*)), impair safety (s. 13(1)(*e*)), render property or plant or animal life unfit for use by man (s. 13(1)(*f*)), cause loss of enjoyment of normal use of property (s. 13(1)(*g*)), or interfere with the normal conduct of business (s. 13(1)(*h*)). The choice of terms in s. 13(1) leads me to conclude that polluting conduct is only prohibited if it has the potential to impair a use of the natural environment in a manner which is more than trivial. Therefore, a citizen may not be convicted under s. 13(1)(*a*) EPA for releasing a contaminant which could have only a minimal impact on a "use" of the natural environment. [Emphasis added; para. 64.]

Thus the Court relied on a shared feature of the paragraphs of s.13(1) of the Act to narrow the broad ambit of s. 13(1)(*a*).

34 The principle of associated meaning must be considered in the context of all relevant sources of legislative meaning: see Sullivan, at p. 175, citing *R. v. McCraw*, [1991] 3 S.C.R. 72 (S.C.C.). As with all rules of interpretation, the principle functions as an aid to ascertaining the intention of the legislature. Where the legislature links two concepts, ambiguity in one of them may be resolved by having regard to the other. As a result, a broad provision may be read more narrowly. This "immediate context" of the disputed words is important, but is just one factor among many that should be considered in examining the different contexts of a disputed provision: *Marche*, at para. 66; Sullivan, at pp. 260-62.

35 In *Mitchell*, this Court applied the principle of associated meaning to clarify the meaning of "agreement" in s. 90(1)(*b*) of the *Indian Act*. La Forest J. echoed the language of Martin J.A. in the earlier case of *Goulis*, at p. 61, stating that "the terms 'treaty' and 'agreement' ... take colour from one another" (p. 124). In my view, the Court did not err in applying this principle.

5.2.3 The Presumption Against Tautology

36 It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain: Sullivan, at p. 158. Thus "[e]very word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose." This principle is often invoked by courts to resolve ambiguity or to determine the scope of general words.

37 If "agreement" is interpreted broadly to cover all types of agreements between Indians and the government, the word "treaty" has no role to play. Treaties are special and particularly solemn agreements, but they are agreements nonetheless. This supports the view taken in *Mitchell* that "agreement" in s. 90(1)(*b*) should be read more narrowly as supplementing "treaty".

5.2.4 The Strict Construction of Exceptions and the Protection of Rights

38 The provincial credit regimes shape an important part of economic life in Canada. They are designed, almost by necessity, to apply universally. The provisions at issue in the case at bar serve to interfere with that scope. They act to carve out certain forms of Indian property from under the applicable credit regime, but leave others in. In short, they establish specific exceptions to the general rule that the provincial credit regime will apply to Indian property.

39 The wording of the provisions makes clear that Parliament did not seek to exempt Indian property in a broad sense. Instead, specific criteria were set out to describe the features of property that Parliament wanted to exclude from the credit regimes established by the provinces. Given the importance of access to the credit economy, and given Parliament's choice to create only limited exceptions to its application, it is not for the courts to adopt a reading of the statute that distorts that choice. Courts should be hesitant to find exceptions where they are not explicit, particularly when their effect is to materially affect the rights of citizens under statute or common law. The exceptional effect of the provisions at issue here is limited by the precise wording Parliament used and the underlying purpose that the provision serves. It should not be read more broadly than necessary to give meaning to the words and to give effect to Parliament's purpose.

40 The fact that the effect of the provisions is to suspend the rights of both creditors and debtors provides further support for a narrow interpretation of the exceptions. Provincial credit regimes create important and enforceable rights for the debtors and creditors who are governed by them. They enable debtors to leverage assets and creditors to take measured risks. They are the modern incarnation of the panoply of rules of credit developed at common law. It is against this backdrop that the exceptions created by the *Indian Act* provisions must be understood.

41 In the absence of express language, it is not the place of courts to read the *Indian Act* exceptions in such a way that would transform them into significant forms of interference with the applicable provincial regime and rights thereunder. Subject to the constraints established by the Constitution, it is for Parliament to make policy choices of that nature. Particularly in the case of a credit regime, courts have a responsibility to ensure a degree of certainty and predictability in the law and to approach the task of statutory interpretation with restraint.

5.2.5 Limiting Access to Credit

42 A further reason that the word "agreement" in s. 90(1)(*b*) should be read narrowly is that the section limits the ability of aboriginal peoples to access credit. This conclusion was reached by the Royal Commission on Aboriginal Peoples ("RCAP"). In its report, RCAP noted the difficulties that aboriginal peoples have in gaining access to capital, and listed a number of barriers that contribute to this problem: see Canada, *Report of the Royal Commission on Aboriginal* (1996), vol. 2, *Restructuring the Relationship*, at pp. 906-31. Among the barriers listed, the *first* barrier identified was the restrictions imposed by the *Indian Act*. RCAP described these barriers as follows at pp. 906-7: "The *Indian Act* contains certain provisions that make it very difficult for lenders to secure loans using land and other assets located on-reserve as collateral. These provisions serve as a significant deterrent to financing business activity on-reserve." RCAP considered a number of ways to overcome these barriers, including abolishing the restrictions in the *Indian Act*. Although this Court clearly cannot abolish the *Indian Act* restrictions, the concern about limited access to credit resulting from these restrictions is yet another reason that the word "agreement" in s. 90(1)(*b*) should be read narrowly.

5.2.6 Sections 90(2) and 90(3)

43 Further support for the view that s. 90(1)(*b*) should be interpreted narrowly comes from s. 90(2) and (3) of the *Indian Act*. The subsections read:

> (2) Every transaction purporting to pass title to any property that is by this section deemed to be situated on a reserve, or any interest in such property, is void unless the transaction is entered into with the consent of the Minister or is entered into between members of a band or between the band and a member thereof.
>
> (3) Every person who enters into any transaction that is void by virtue of subsection (2) is guilty of an offence, and every person who, without the written consent of the Minister, destroys personal property that is by this section deemed to be situated on a reserve is guilty of an offence.

44 These subsections are difficult to reconcile with an expansive reading of "treaty and agreement". If ministerial consent is required for *every transaction* that deals with property deemed to be situated on reserve by subs. (1), a broad interpretation of "treaty or agreement" could result in significant delays in the delivery of needed programs and services to band members.

45 My colleague, Binnie J., disagrees. He suggests that, in cases involving a CFA, the agreement itself will constitute ministerial consent for the transaction (para. 141). If the agreement directs funds to be used for a particular purpose, and those funds are indeed used for that purpose, I agree that the agreement itself may constitute ministerial consent for "*the* transaction". If, however, an agreement does not specify how funds are to be spent, or it does so, but the funds are not put to the proper use, I do not agree that the agreement itself would constitute ministerial consent for "*the* transaction". If this Court were to adopt a broad interpretation of "treaty or agreement", the result would be litigation about whether the agreement itself constitutes ministerial consent, followed by delays in the delivery of needed programs and services in

those cases where the agreement did not constitute ministerial consent. This is yet another reason that this Court should be cautious about adopting a broad interpretation of "agreement" in s. 90(1)(*b*).

5.2.7 The History of Section 90(1)(b)

46 It is often helpful to consider the history of a provision in assigning meaning to a disputed term. The events and debates surrounding the adoption of the provision may provide insight into Parliament's purpose.

47 The *Indian Act* seizure exemptions have a long history. The current provision, adopted in 1951 as s. 89 of the *Indian Act*, replaced s. 108 of the *Indian Act*, R.S.C. 1927, c. 98, which in turn was preceded by similar provisions in the 1906, 1886 and 1880 Acts. Section 108 and its predecessors made no reference to property given under a "treaty" or "agreement". Instead they protected from seizure "presents given to Indians or non-treaty Indians", "annuities or interest on funds" and "moneys appropriated by Parliament, held for any band of Indians", as well as related property purchased with those funds. The 1850 *Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury* also protected "annuities and presents" and associated property (S. Prov. C. 1850, 13 & 14 Vict., c. 74).

48 The scope of these protections was broad. Basically, any monies or gifts from the government to Indians appear to have been covered. By contrast, the words adopted in 1951 and retained to the present are more circumscribed; what is protected is a particular type of money or gifts — personal property which was purchased by the government and personal property "given to Indians or to a band under a treaty or agreement between a band and His Majesty". The change in the language used by Parliament is striking.

49 Why did Parliament in 1951 abandon the former approach of exempting certain kinds of property, in favour of an approach that based the exemption on whether the property was given under a treaty or agreement? The record reveals no definitive answer. What it does reveal, however, is a change in philosophy after 1951.

50 The 19th century exemption provisions were born of a fear that Indians and their lands and property were subject to exploitation by others. The aim was thus to provide broad protection for their property. The Preamble of the 1850 legislation is revealing:

> ... it is expedient to make provision for the protection of the Indians in Upper Canada, who, in their intercourse with the other inhabitants thereof, are exposed to be imposed upon by the designing and unprincipled, as well as to provide more summary and effectual means for the protection of such Indians in the unmolested possession and enjoyment of the lands and other property in their use of occupation....

This concern with the protection of Indians from those who might take advantage of them and divert funding provided by the Crown is consistent with broad protection against seizure. The section of the 1850 Act setting out the exemption notes that the provision of support was directed at "the common use and benefit" of Indians and "the encouragement of agriculture and other civilizing pursuits among them" (s. VIII).

51 The paternalism of the 19th century continued to animate many Indian policies and social and political attitudes well into the 20th century. By the 1930s and 1940s, however, other values had also become important. Increasingly, there was a realization that the paternalistic model that had been in place was no longer entirely appropriate. Self-determination and self-government had emerged as an aspiration, if not a reality, and bands were beginning to embark on projects to improve their economic situation.

52 The role of the federal government in supporting different forms of development was also changing. In 1938, s. 94B of the 1927 *Indian Act*, which enabled the federal government to introduce a "revolving loan fund" for aboriginal communities, was enacted (S.C. 1938, c. 31, s. 2). The words of the Minister of Mines and Resources in Parliament reflect some change in old attitudes:

> The second point involved is really a new departure in Indian administration. It is the creation of what is popularly called a revolving fund.... As it stands at present the Indians are, and of course will remain even under this legislation, the wards of the government. At present parliament appropriates certain moneys year by year for Indian welfare work. But these votes of money are expended the same as any other vote, and consequently are looked upon more in the way of grants or gifts.... One of the things that has impressed itself on my mind in the brief period I have had to do with Indian administration is the need to develop a spirit of self-reliance and independence in our Indian wards. My reading of the story of the relation between governments and Indians in Canada leads me to the conclusion that the expectation originally was, and indeed is still largely entertained, that the Indians will in course of time become absorbed into the ordinary citizenship of the country, and cease to be wards.... I must confess that I think in the past our attitude has often not been conducing to the achievement of that very desirable end. [Emphasis added.]
>
> (Canada, *House of Commons Debates*, May 30, 1938, at pp. 3349-50)

53 These changing attitudes were reflected in the work of the Special Joint Committee on the *Indian Act*, struck in 1946 in response to an increasing sense of a need to modernize Indian policy. The participation of Indians in the Second World War and a growing concern for human rights following that conflict had drawn the attention of the public and of Parliament to the conditions faced by Indians: see J. Leslie and R. Maguire, eds., *The Historical Development of the Indian Act* (2nd ed. 1978), at p. 132. The Committee's unprecedented consultative reach in the Indian community revealed the degree to which the needs of Indians varied from region to region and according to socio-economic conditions which were often unique to particular communities. The final report in 1948 made a series of recommendations "designed to make possible the gradual transition of Indians from wardship to citizenship and to help them to advance themselves": Canada, Special Joint Committee of the Senate and the House of Commons on the Indian Act, *Fourth Report*, June 22, 1948, at p. 187. The recommendations addressed electoral rights, increased funding to communities and the end of Indian-specific alcohol regulation, and revealed a new focus on accession to full citizenship and some form of greater self-government at the band level.

54 Yet tension between the old ways and the new remained. Two of the final report's recommendations capture this tension. On the one hand, the committee asked that "financial assistance be granted to Band Councils to enable them to undertake, under proper supervision, projects for the physical and economic betterment of the Band members" (p. 187). On the other hand, the committee urged that the new Act include "provisions to protect from injustice and exploitation such Indians as are not sufficiently advanced to manage their own affairs" (p. 187).

55 The adoption of the revised *Indian Act* in 1951, and of the present s. 90(1)(*b*), was born of this tension. Indians were to be encouraged to manage their own affairs and enter into commercial arrangements for their own betterment and economic advantage. This was incompatible with exemption from seizure of virtually all property that could be traced to government gifts and funds. At the same time, it was felt that basic protection from exploitation by others in society was still required. This was consistent with maintaining protection for funds flowing from treaty obligations, as well as for property situated on reserves. Minister Walter Edward Harris recognized the tension in Indian policy more generally:

> The problem is to maintain the balance of administration of the Indian Act in such a way as to give self-determination and self-government as the circumstances may warrant to all Indians in Canada, but that in the meantime we should have the legislative authority to afford any necessary protection and assistance.
>
> (Canada, *House of Commons Debates*, vol. 11, 4th Sess., 21st Parl., March 16, 1951, at p. 1352)

56 The record does not reveal precisely why Parliament chose to define the exemption from seizure in what is now s. 90(1)(*b*) in terms of funds given under a "treaty" or "agreement". It is therefore not possible to say that the history of the provision dictates a particular approach. However, what can be said is that the use of these terms is consistent with the recognition in 1951 that Indians should be encouraged to take steps toward greater self-governance and participation in economic enterprise.

57 Against this background, why did Parliament not content itself with personal property given under a "treaty"? Why did it add the word "agreement"?

58 As already discussed, La Forest J. in *Mitchell* identified an important reason: "It must be remembered that treaty promises are often couched in very general terms and that supplementary agreements are needed to flesh out the details of the commitment undertaken by the Crown" (p. 124). Thus "agreement" includes supplementary or ancillary agreements that describe the treaty obligations in greater detail. These are still treaty obligations, in the sense that they merely make more precise the obligations imposed by the treaty. On this view, the word "agreement" was added to ensure that personal property given pursuant to a treaty would be protected. Creditors would not be able to argue that property conferred in fulfillment of the treaty was not protected because the obligation was not expressly spelled out in the original treaty.

59 An alternative explanation is that "agreement" was added to cover those agreements between the federal government and treaty and non-treaty Indians providing funds for "basic" or "essential" public services. My colleague, Binnie J., prefers a variant of this alternative explanation, which he calls the "public sector services approach". Under this approach, s. 90(1)(*b*) is construed to protect monies provided by the federal government to Indian bands for education, housing, health and welfare and other similar government-type essential services on reserve (para. 129). Funding provided under CFAs would be wholly protected (para. 146).

60 Binnie J. suggests that this broader interpretation of "treaty or agreement" is justified for several reasons. First, it is justified, he suggests, because it avoids the differential treatment of treaty and non-treaty Indians, by protecting all "public sector services" funding, regardless of whether it is ancillary to a treaty. Given that non-treaty Indians had property protections under the older and much broader seizure provisions, this justification for a broader reading of "treaty or agreement" seems appealing at first blush. However, on further reflection, it seems much more likely that Parliament actually intended to single out property related to treaty entitlements for special treatment under s. 90(1)(*b*). Why? It seems to me that the answer may lie, at least in part, in the finality of the treaty-making process. Parliament may have intended to give special protection to property given under a treaty, because this property was considered to be unique, in the sense that, under most treaties, it represented the complete package of property that would be given to the band(s) in return for the surrender of Indian lands, and the extinguishment of possible claims. (This is not to say, that the package given to a band in exchange for the surrender of lands was fair or just.) As La Forest J. noted in *Mitchell*, at p. 124, the word "given" in s. 90(1)(*b*) "can be taken as a distinct and pointed reference to the process of cession of Indian lands".

61 Although this was perhaps not in the contemplation of Parliament in 1951, in retrospect, there seems to be a good reason for the differential treatment of treaty Indians and non-treaty Indians. It is open to the Crown to include provisions intended to protect the particular band in any funding agreements that it makes with the band. As was put to us in argument, the CFAs themselves often have numerous provisions to ensure that the monies are used to provide the benefits and the services that they are intended to cover. If the band is not using the money in that way, there is often a provision for a third-party manager to step in to remedy the problem. Different bands have different needs and desires. It may be best to let the federal government and the particular band determine what protective provisions will govern the funds in question, rather than imposing a "one size fits all" solution to protection from garnishment that may not suit the needs and desires of the band in question.

62 Second, Binnie J. suggests that his broader reading of "treaty or agreement" is justified because, unlike the *Mitchell* interpretation of "treaty or agreement", it would not adversely affect bands, like the God's Lake Band, that do not have on-reserve banking facilities. There are two problems with this justification. The first problem is that it fails to consider that, even if there is no deposit-taking financial institution on the God's Lake Reserve, it was open to the God's Lake Band to deposit its funding in financial institutions on other reserves. The funds would then have been protected, by virtue of s. 89 of the *Indian Act*. As Gonthier J. noted in *Williams*, at p. 887, "under the *Indian Act*, an Indian has a choice with regard to his personal property. ... Whether the Indian wishes to remain within the protected reserve system or integrate more fully into the larger commercial world is a choice left to the Indian." The second problem is that this justification

runs counter to the reasoning of this Court in *Union of New Brunswick Indians*, at paras. 37-42, in which, writing for the majority, I rejected the argument that the tax exemption in s. 87 of the *Indian Act* should be given an expansive scope, so as to protect property that Indians are obliged to purchase off the reserve for their needs on the reserve.

63 Third, Binnie J. suggests that his broader reading of "treaty or agreement" is justified because, unlike the *Mitchell* interpretation of "treaty or agreement", it would not result in the differential treatment of treaty Indians, *inter se*, resulting from the "vagaries of the treaty making process" (para. 124) and "serendipitous differences in the wording of the treaties" (para. 92). If, as I conclude, it seems likely that Parliament actually intended to protect only treaty entitlements, it is reasonable to assume that Parliament contemplated and accepted the differential treatment of treaty Indians, as it would logically flow that treaty Indians would receive different levels of protection, depending on the property "given" under the particular treaty. If Parliament now feels that treaty Indians (or, for that matter, treaty Indians and non-treaty Indians) should be treated equally under s. 90(1)(*b*), it is open to it to amend the *Indian Act* to so provide.

64 In my view, the key difficulty with the approach advocated by Binnie J. is that it would require the courts to engage in political decision-making. Absent statutory language or relevant constitutional imperatives, it is not the place of the judicial system to determine which elements of public spending relate to "essential services" and which do not. The purpose of the exemption provisions is neither to confer a "general economic benefit" on aboriginal communities or to nurture a particular model of public expenditure.

65 In addition, my colleague's approach would require courts to draw a line between "public sector services" agreements (which are included under s. 90) and those with "a more commercial orientation" (which are not included under s. 90) (paras. 129-30). This would involve difficult issues of interpretation, and is likely to lead to expensive and time-consuming litigation. Binnie J. attempts to circumvent this problem, by finding that all funds provided under a CFA are protected under s. 90(1)(*b*). The difficulty with this solution is that it would result in a sweeping extension of the protections that have up to now been conferred on the property of Indians. In a constitutional democracy, the task of extending the law in this manner falls properly to the legislature, as the elected branch of government, not the courts.

66 To sum up, the record does not disclose precisely why Parliament chose to replace the pre-1951 categories of protected property with protection based on whether the property had been given pursuant to a "treaty" or "agreement" with the Crown. Nor does it disclose precisely why the word "treaty" was supplemented with "agreement". However, Parliament's documented desire to move away from a purely paternalistic approach and encourage Indian entrepreneurship and self-government is consistent with an intention to confine protection from seizure to benefits flowing from treaties. Exempting property broadly would be inconsistent with self-sufficiency because it would deprive Indian communities of a cornerstone of economic development: credit. Eliminating all protection would neglect the persistent concerns about exploitation. These documented and potentially conflicting policy considerations suggest that Parliament wanted to provide limited protection for treaty entitlements while not interfering with the ability of Indians to achieve great economic independence. This supports the restricted meaning of "agreement" in s. 90(1)(*b*) adopted by this Court in *Mitchell*.

67 Indian bands may be the recipients of property under treaty obligations. They may also receive property in their capacity as partners in policy implementation, as representatives of local interests, or as administrators of public spending destined to improve conditions in Indian communities. All of this funding may be important, but the *Indian Act* singles out treaty funding as representing a different kind of property that benefits from special protections. The legislative protection acts to preserve the basic treaty patrimony of the band for present and future generations. Given that our Constitution also grants a special place to treaty obligations, Parliament's decision to distinguish between treaty and non-treaty property in the statutory scheme is not one that the Court can or should disturb.

68 The position of Indians in Canada has greatly changed. Many bands have achieved a substantial degree of economic independence. Aboriginal owned and operated commercial enterprises are common across the country. Other bands, however, remain substantially dependent on federal revenues. Often, bands rely on a mix of government and self-generated revenues. Some of the government revenues provided to aboriginal peoples represent basic treaty entitlements

and their modern counterparts or equivalents. Despite this different environment, Parliament has chosen not to repeal or reform the *Indian Act* provisions at issue, and so the case before us requires that we give them meaning 55 years after their introduction. By not reforming the *Indian Act* despite these new funding arrangements and evolving socio-economic and political conditions, Parliament has signalled its intent to maintain the distinction between those funds that give effect to treaty obligations and those that serve other ends. The task of the courts is to give effect to that intention.

5.2.8 Conclusion on the Meaning of "Agreement"

69 Textual, historical and policy considerations all support the conclusion of this Court in *Mitchell* that the word "agreement" in s. 90(1)(*b*) of the *Indian Act* should not be construed broadly as extending to any agreement between the government and Indians that confers benefits, or any agreement between the government and Indians that confers "public sector services" benefits. Rather, it should be understood in the sense of an arrangement that fleshes out treaty obligations of the Crown.

70 I note, for the sake of clarity, that modern land claims agreements (e.g., the Nisga'a Final Agreement (1999)) are protected under the *Mitchell* interpretation of "treaty or agreement". This conclusion flows logically from s. 35(3) of the *Constitution Act, 1982*, which provides that "'treaty rights' includes rights that exist by way of lands claims agreements or may be so acquired". This serves to mitigate, in some small measure, the exclusion of non-treaty Indians from s. 90 protection. Non-treaty Indians that are not currently protected under s. 90 may acquire protection in the future, if their band negotiates a land claims agreement with the federal government.

5.3 Is the CFA at Issue Protected by Section 90(1)(b) of the Indian Act?

71 Is the CFA at issue here an "agreement" that expressly, or by necessary implication, gives effect to the Crown's treaty obligations? This question is complicated for two reasons.

72 First, the fund created by the CFA is blended and is thus difficult to characterize for the purposes of applying s. 90(1)(*b*). It is a pool of money provided for several different purposes, reflecting the reach of the modern welfare state. It includes funds provided by the federal government in order to enhance the self-sufficiency and living standards of the band in a wide range of areas. If parts of the fund relate to treaty obligations, these have not been segregated by either the Crown or the band.

73 The solution of the law where blended funds are concerned is usually to require the party claiming protection to segregate or trace the protected portion of the fund from unprotected portions. The same rationale applies to parties claiming protection under the *Indian Act*, but this brings us to the second complication in this case. The record in the case at bar does not permit us to delineate the extent of the Crown's treaty obligations to determine whether, and to what extent, some of the funds may flow directly from those obligations. At the Court of Queen's Bench, Sinclair J. made reference to the Crown's treaty obligation in respect of education, but he failed to engage in an analysis of the relationship, if any, between the treaty obligation and the pool of funds in question. Given his reasoning that s. 90(1)(*b*) provided broad protection, this determination was unnecessary. Under the proper interpretation of the provision set out above, however, it would be determinative of the issues before us.

74 It is clear that any portion of the CFA funds that flows directly from treaty obligations is entitled to protection under s. 90(1)(*b*). The manner in which the Crown has decided to discharge its obligations under treaties does not alter the degree to which Parliament has decided to protect funds spent for that purpose. To put it another way, there is no magic in the label CFA. The *Indian Act* confers protection on property flowing from treaty obligations, and the onus is on the party claiming the protection to establish that the property it claims to be protected falls within that category. On the findings of the courts below, that burden was not discharged.

75 Funds given pursuant to treaty obligations will be protected under s. 90(1)(*b*). The nature and extent of those obligations should be determined according to the interpretive principles that this Court has set out in the past, and with due regard to the particular historical context of the relationship between the Crown and the band in each case.

The fact that the Crown provides funding for general public services, however, does not alter the fundamental treaty relationship that is the focus of these provisions. The underlying purpose of this statutory protection, as noted by La Forest J. in *Mitchell v. Sandy Bay Indian Band*, is not to improve socio-economic conditions but instead to protect the treaty property of Indians *qua* Indians. In all cases, the burden will be on the band to demonstrate that disputed funding is protected by virtue of its relationship to treaty obligations.

6. Conclusion

76 The record before us does not permit us to make a determination about the precise relationship between the funds in question and the treaty obligations of the Crown. As it is the burden of the band to demonstrate this connection, we cannot find that s. 90(1)(*b*) operates in this case to protect the funds. Accordingly, the appeal is dismissed with costs.

***Binnie J.*:**

77 I have read the reasons of the Chief Justice and I agree with much of her analysis. I disagree, however, with the narrowness of her interpretation of the words "treaty or agreement between a band and Her Majesty" in s. 90(1)(*b*) of the *Indian Act*, R.S.C. 1985, c. I-5. In my view, the Comprehensive Funding Arrangement ("CFA") between the God's Lake Band and Her Majesty is such an "agreement", and it follows that funds flowing to the band from Her Majesty under the CFA should be exempt from garnishment.

78 The *Indian Act* is a law of general application to Indians and lands reserved for Indians across Canada. I believe Parliament intended s. 90(1)(*b*) to operate equitably to all Indian bands, and should not be given an interpretation that favours treaty bands over non-treaty bands, and those with certain types of provision in their treaties over others. The *Indian Act* should be taken to reflect rational public policy, equitably administered, rather than a vehicle to perpetuate the anomalies of an on-again off-again treaty making process with a dodgy record that stretches back more than 250 years. If Parliament had intended such an inequitable result it could have said so in clear language. It did not do so, and I do not believe the Court should impose such a discriminatory result by a process of restrictive interpretation.

79 There is another important purpose served by s. 90(1)(*b*). It protects the interest of taxpayers in ensuring that funds appropriated by Parliament and transferred under an agreement with an Indian band are used for the designated purposes, and not, as here, diverted to other purposes chosen by the band council.

80 Having regard to both aspects, I would allow the appeal.

I. Overview

81 I agree with the Chief Justice that the word "agreement" in s. 90(1)(*b*) draws its meaning from context, but its proper context is broader than its juxtaposition (disjunctively) with the word "treaty", although that juxtaposition itself suggests "agreement" means something *different* from a treaty, and thus favours a broader not a more restrictive meaning of "agreement".

82 My colleague's argument that native reserves would benefit by greater access to credit in the market economy is an attractive concept for those bands in a position to take advantage of it, but Parliament must be taken to be aware of the realities of life on most reserves. There is the attractive concept, but then there is the reality. The God's Lake Reserve lies 1,037 kilometers northeast of Winnipeg. No conventional roads or railways link God's Lake to the rest of the province. The reserve is accessible only by air or by winter ice road after freeze-up. Sinclair J. found that local employment is limited to band government or its subsidiaries and small entrepreneurs, e.g., grocery stores ((2004), 186 Man. R. (2d) 31, 2004 MBQB 156 (Man. Q.B.), at para. 79). The band is entirely funded by the federal government through the annual CFA (para. 5). For the appellant, the prospect of significant participation in the off-reserve economy is likely as remote as their geographic location.

83 Of much greater immediacy is the need to protect the integrity of funds appropriated by Parliament for CFA disbursement. Parliament should be taken to intend to avoid making Canadian taxpayers pay twice over for delivery of the CFA services. The Attorney General of Canada acknowledges in his factum "the valid concern that garnishment of the funds in [the band's] accounts could lead to hardship or a loss of its capacity to deliver essential services". The small community of God's Lake, consisting of fewer than 1,300 people, accounts for 10 percent of all tuberculosis cases in Manitoba (*House of Commons Debates*, vol. 135, No. 176, 1st Sess., 36th Parl., at p. 11602). Only about 10 percent of the homes on the reserve have basic sewer systems. I agree with the Attorney General of Canada that CFA services are essential. Being essential, Parliament can be taken to be aware that, if garnishment of CFA funds is to be permitted, at some point the government will feel obliged to step in with more funds to ensure their continuance even if it means paying twice.

84 Quite apart from, and in addition to, the respondent's claim, the appellant's banker, Peace Hills Trust, asserts priority for $1,668,872 in respect of various lines of credit obtained by the band council outside the CFA framework. The record discloses that the total non-CFA debt run up by this band council is about $3 million. When this is compared with total annual CFA funding at the relevant time of $7,354,404, it demonstrates the scale of the public policy dilemma.

85 In making these observations, I do not suggest the band council's priorities were bad or wasteful. The details of those expenditures are not before us. My point is simply that the band council priorities seem to be different from the CFA priorities, and by permitting garnishment of CFA funds, the Court enables the band council to substitute its spending priorities for those of the CFA. Public funds set aside for CFA priorities will now be diverted to payment of debts run up by the band council outside the CFA framework. I appreciate the fact that if the band succeeds here it will on this occasion both have its cake and eat it too, but at least potential creditors of the appellant and other bands would be put on notice that CFA funds are not now or in future to be available for garnishment or execution.

86 My colleague points out, correctly, that the Crown can endeavour to protect CFA funds from diversion by contractual means. The Chief Justice writes:

> It is open to the Crown to include provisions intended to protect the particular band in any funding agreements that it makes with the band. As was put to us in argument, the Comprehensive Funding Arrangements themselves often have numerous provisions to ensure that the monies are used to provide the benefits and the services that they are intended to cover. If the band is not using the money in that way, there is often a provision for a third-party manager to step in to remedy the problem. [para. 61]

The problem, as will be discussed, is that such "protections" were included in *this* band's CFA and a "third-party manager" *was* put in place "to remedy the problem" but all of these contractual protections were circumvented by the band council. It incurred non-CFA debts it had no money to pay for, then consented to judgment in favour of the respondent which led to the seizure of the CFA funds. The result of the Court's decision today is that the band council was able simply to walk around the CFA contractual provisions designed to prevent this from happening.

87 Placing s. 90(1)(*b*) in the broader context of the *Indian Act* as a whole, and Parliament's legislative assumption of responsibilities for Indian bands under s. 91(24) of the *Constitution Act*, *1867*, I conclude for the reasons that follow that s. 90(1)(*b*) places under ss. 87 and 89 protection monies given by the federal Crown to Indians or a band, whether or not under treaty, pursuant to an agreement to provide on-reserve essential public services including housing, education, infrastructure, health and welfare. The CFA is such an agreement.

II. The Absence of On-Site Banking Facilities

88 Opinions may differ, of course, as to whether exemption from execution and garnishment is ultimately to the benefit of Indian bands, who thereby may have difficulty in providing security and establishing credit worthiness in a market economy. (There is no doubt that exemption from *taxation* is a benefit.) These exemptions have been a feature

of successive *Indian Acts* since before Confederation, as my colleague describes in some detail. The question before us is not the wisdom of the exemptions in ss. 87-90 but the scope of their intended application.

89 Section 90 "deems" certain personal property of Indians (including bank accounts) to be located on a reserve despite the fact that according to ordinary legal rules governing *situs* they are located elsewhere.

90 The God's Lake Band is too poor and its reserve too remote to attract a branch of a deposit-taking financial institution. If it were rich enough to have an on-site branch, the CFA deposit would constitute a debt located on the reserve and thus a form of personal property exempt from seizure or execution under s. 89 of the *Indian Act*. One of the recommendations of the Royal Commission on Aboriginal Peoples ("RCAP") was to improve the access of bands to on-reserve banking facilities: see Canada, *Report of the Royal Commission on Aboriginal Peoples* (1996) ("*RCAP Report*"), vol. 2, *Restructuring the Relationship*, at p. 911. Although the Chief Justice suggests that her conclusion will empower Indian bands to pursue economic opportunities, the reality is that as a result of today's decision only the more fortunate and economically developed bands, the handful of bands served on site by a deposit-taking financial institution, will receive their CFA funds free of taxation (s. 87) and "not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band" (s. 89(1)). The less advantaged bands will have their off-reserve funds subject to taxation and seizure. My colleague suggests (at para. 62) that a band council could avoid the impact of the narrow interpretation of s. 90(1)(*b*) by making use of the handful of on-reserve banking branches elsewhere in the province. It is possible, of course, that some of the over 50 bands in Manitoba will move their banking to the three or so reserves which do have on-site banking, thereby circumventing the "access to capital" rationale favoured by the Chief Justice, but this proposal doesn't address the fundamental problem in this case. Band councils which (as here) want to use the CFA income stream as collateral for other loans and priorities will now have little incentive to make on-reserve banking arrangements that if made would frustrate achievement of their non-CFA objectives.

III. Unnecessary Entrenchment of Anomalies

91 If, as the Chief Justice holds, s. 90(1)(*b*) applies only to treaties and agreements that "flesh out commitments of the Crown" (para. 26), an interpretation which is the most restrictive and least generous to band members of all those under consideration, further anomalies are presented. For example, in the present case my colleague acknowledges that CFA funding directed to education would be exempt from garnishment because such monies can be construed as "fleshing out" Treaty No. 5 (1875). But equivalent CFA funding to a treaty-less band in British Columbia would not be similarly protected because in that case the monies could not be attributed to a treaty or an ancillary agreement fleshing out a treaty. This is not equitable treatment. Nor would it be rational legislative policy.

92 Then, too, what is to be made of serendipitous differences in the wording of the treaties? Treaty No. 6 (1876), for example, obliges the Crown to keep a medicine chest on the reserve. Leaving aside the question of what the "medicine chest" clause means in 2006, it is difficult to identify any legislative purpose that would be served by protecting payments for on-reserve medical services in the case of Treaty No. 6 bands but not Treaty No. 5 bands (because Treaty No. 5 does not mention a medicine chest) or medical services provided on reserves to bands that have no treaty at all.

93 What about the east coast "peace and friendship" treaties that had fewer benefits than the post-Confederation numbered treaties, and vastly fewer benefits than the modern comprehensive land claims settlements (which are included in the definition of "treaty" under s. 35(3) of the *Constitution Act, 1982*)? I do not agree with my colleague that entrenchment of such disparities for the purposes of taxation, seizure and garnishment was in the contemplation of Parliament when it enacted s. 90(1)(*b*).

94 The Chief Justice argues that her restrictive interpretation fosters self-reliance, self-government and economic development. In fact, however, the opposite is more likely to be true. A band concerned about such matters as taxation seizure and garnishment would be better off letting the government provide services directly to the reserve rather than

attempting to provide the public services themselves through CFA funding. In the latter case, the monies (unlike direct government services) may be intercepted off-reserve by creditors.

95 I am in respectful agreement with Sinclair J. who concluded that the CFA reflects the responsibilities assumed by the Crown under laws in relation to Indians and lands reserved for Indians enacted under s. 91(24) of the *Constitution Act, 1867* (at para. 87). The responsibilities accepted by the Crown are not limited to *treaty* Indians. Indian bands have been recognized as possessing greater or lesser powers in the nature of self-governing institutions since the 1869 amendments (S.C. 1869, c. 6) to *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ord[i]nance Lands*, S.C. 1868, c. 42. This legislation predated even the initial phase of Treaty No. 5 negotiations. The adhesion of the God's Lake Band on August 6, 1909 also post-dated passage of the *Indian Act*, S.C. 1876, c. 18. These early enactments not only recognized exemptions from taxation seizure and execution, as noted by the Chief Justice, but also acknowledged that to a large extent Indian bands could, should and would continue to govern themselves. The trouble was (and is) that dispossession from much of their traditional economic base and subsequent changes in the economy have left most band governments too few resources to be self-sufficient. CFA funding is in the nature of government to government transfer payments, covering essential services such as education, housing, health and welfare. These are matters that were characterised in *Mitchell v. Sandy Bay Indian Band*, [1990] 2 S.C.R. 85 (S.C.C.), at pp. 134-35, as the type of program targeted by s. 90(1)(*b*). If, as *Mitchell* holds, a primary purpose of the *Indian Act* is to protect reserves and its members from economically-induced dispossession, why should s. 90(1)(*b*) not be interpreted as applicable to *all* reserves to achieve that objective?

96 All of the members of our Court in *Mitchell* agreed with the *Nowegijick* principle "that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians" (*Nowegijick v. R.*, [1983] 1 S.C.R. 29 (S.C.C.), at p. 36): La Forest J., at pp. 142-43, and Dickson C.J., at pp. 107-8. It is not necessary to resort to the *Nowegijick* principle in this case as I reach my conclusion based on ordinary principles of statutory construction, but *Nowegijick* certainly reinforces the conclusion I have reached.

IV. Facts

A. Treaty No. 5

97 In 1909, the God's Lake First Nation adhered to Treaty No. 5 which covers much of what is present day Manitoba and parts of northwestern Ontario. The Indian signatories to the treaty surrendered more than a hundred thousand square kilometers of land in two stages. In the first phrase (1875) the Crown accepted the surrender of the southern prairie lands of Manitoba by the Saulteaux (or Chippewa) and Swampy Cree First Nations. The surrender was considered "essential" to the westward expansion of non-aboriginal Canadians, as Alexander Morris, then Lieutenant-Governor of the North-West Territories, Manitoba and Kee-wa-tin, wrote at the time:

> This treaty [The Winnipeg Treaty, Number Five], covers an area of approximately about 100,000 square miles. The region is inhabited by Chippewas and Swampy Crees. The necessity for it had become urgent. The lake is a large and valuable sheet of water, being some three hundred miles long. The Red River flows into it and the Nelson River flows from it into Hudson's Bay. Steam navigation had been successfully established by the Hudson's Bay Company on Lake Winnipeg ... Moreover, until the construction of the Pacific Railway west of the city of Winnipeg, the lake and Saskatchewan River are destined to become the principal thoroughfare of communication between Manitoba and the fertile prairies in the west.... For these and other reasons, the Minister of the Interior reported "that it was essential that the Indian title to all the territory in the vicinity of the lake should be extinguished so that settlers and traders might have undisturbed access to its waters, shores, islands, inlets and tributary streams." [Emphasis added; pp. 143-44.]
>
> (A. Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on which They were Based, and Other Information Related Thereto* (2000), originally published in 1880.)

At the second stage, between 1908 and 1909, the surrender of more northerly lands in Manitoba as well as some areas of northwestern Ontario were negotiated with a number of other Cree First Nations, including the God's Lake Band, as well as bands at Split Lake, Nelson House, Norway House, Cross Lake, Fisher River, Oxford House, and Island Lake.

98 In exchange for the surrender of the aboriginal interest in these vast lands "Her Majesty the Queen" agreed to set aside certain reserves and undertook as well, among other things, to provide for the maintenance of schools on reserves, the right to pursue hunting and fishing throughout the unoccupied lands surrendered in the treaty, to provide farming and carpentry tools to families and bands, to provide seeds for planting, to provide cattle to each band, an amount of $500 per annum for ammunition and twine for nets to be divided among all Indians covered by the treaty and an annual grant of five dollars for each Indian person covered by the treaty (Treaty No. 5 between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians, 1875 and 1909).

B. The God's Lake Reserve

99 The God's Lake Band presently has inadequate resources to achieve financial independence in a market economy. Its CFA funds are administered according to the budget and the terms of the CFA, which is co-managed by Haugen Morrish Angers Chartered Accountants, who were appointed by the federal government. The co-manager is required to approve all proposed spending in order to ensure compliance with the CFA (Sinclair J., at para. 6). The funds are transferred by Indian and Northern Affairs Canada to the band's financial institution (Peace Hills Trust Company) in Winnipeg.

100 Under the CFA, the band is restricted to spending its money in specific budget areas which for convenience I would collect under the following headings:

Education

Instructional services formula

Low cost special education

Student transportation services

Guidance and counselling

Post-secondary education

Administration of post-secondary education

Schools operation and management

Teaching/Residences/Group homes operation and management

Special education

First Nations & Inuit career promotion and awareness program

First Nations & Inuit science and technology program

First Nations & Inuit student summer employment opportunities program

First Nations & Inuit youth work experience program

Social development

Basic needs

Special needs

Service delivery

In-home care

National child benefit reinvestment

Infrastructure

Capital planning and project infrastructure

Fire protection

Roads and bridges

Sanitation systems

Water systems

Electrical systems

Community buildings

Maintenance management

Solicitor General policing

On-Reserve Housing & Renovation

Indian government services

Band support funding

Band employee benefit plans - statutory contribution

Band employee benefit plans - non-statutory (flexible transfer payments)

Miscellaneous

Indian Registry administration

Economic development

Community and economic development organisation planning and operations

101 As mentioned, CFA funds are transferred in monthly payments which are not segregated by program. For example the God's Lake Band administers its own education programs on the reserve. At present it has 400 students enrolled in the on-reserve school (which gives some idea of the demographics of the reserve). The band employs 39 teachers and staff. According to the testimony of Mike Angers, co-manager of the God's Lake CFA, the garnishing order has frozen part of the money needed to operate and maintain the schools and school services. In addition to on-reserve students, the band also supports band children who attend post-secondary education off the reserve. Approximately $54,000 per month is spent on tuition, housing and support for these students. Mr. Angers testified that this funding was also frozen

by the garnishment order. By way of further example the band maintains its own Social Services program which provides money for the unemployed and the physically or mentally disabled, as well as in-home care for the elderly and infirm. As Sinclair J. put it:

> The [CFA] between the Band and the federal government is one intended by the parties to allow the Band to carry out what could be called administrative governmental functions. It is also a vehicle by which the government can meet its treaty obligations, such as the provision of educational services to Band members, through delegation to the Band. The members of the Band clearly rely on the funding for their existence on their reserve. Housing construction, as well as construction of other community buildings, appears to be contemplated by the agreement. In addition, salaries to Band employees are provided for, a matter essential to the functioning of Band government. The operation and maintenance of the Band's schools is covered by the agreement, as well as the provision of social assistance. It is safe to say that, without the agreement, the ability of the Band and its members to reside on the reserve would be clearly jeopardized. [Emphasis added; para. 73.]

C. The Situation of CFA-Funded Indian Bands More Generally

102 The RCAP found that aboriginal people suffer ill health, insufficient and unsafe housing, polluted water supplies, inadequate education, poverty and family breakdown at levels usually associated with impoverished developing countries. "The persistence of such social conditions in this country — which is judged by many to be the best place in the world to live — constitutes an embarrassment to Canadians, an assault on the self-esteem of Aboriginal people and a challenge to policy makers." See *RCAP Report*, vol. 3, *Gathering Strength*, p. 1. RCAP further observed that:

> Their traditional economies disrupted, reduced to a small fraction of their land and resource base, and subjected to inappropriate economic policies and practices, it is hardly surprising that Aboriginal nations are far from self-reliant. There are, of course, important exceptions, usually the result of advantageous location, particularly imaginative leadership, unusual resource endowments, or comprehensive claims agreements....On average, however, Aboriginal communities will require substantial rebuilding if they are to support Aboriginal self-government and if they are to meet current and anticipated income and employment needs.
>
> (*RCAP Report*, vol. 2, at p. 800)

103 According to the federal government, the purpose of its funding agreements with Indian bands is to "ensure that programs and services provided by Aboriginal governments and institutions are reasonably comparable to those provided in non-Aboriginal communities": see Indian Affairs and Northern Development, *Gathering Strength — Canada's Aboriginal Action Plan* (1997), Part III: Developing a New Fiscal Relationship, at p. 20. At present, the primary funding vehicle to achieve this important government objective is the CFA.

V. Relevant Statutory Provisions

104 See Appendix.

VI. Analysis

105 The importance of the reserves and their survival lies at the heart of the *Indian Act* and related federal policies as a place "where the bonds of community are strong and where Aboriginal culture and identity can be learned and reinforced". (See *RCAP Report*, vol. 2, at p. 812.) Depopulation of the reserves and migration of band members to the larger urban centres like Winnipeg risks loss of that culture and the likelihood of assimilation.

106 The history of Indian peoples in North America has generally been one of dispossession, including dispossession of their pre-European sovereignty, of their traditional lands, and of distinctive elements of their cultures. Of course, arrival of new settlers also brought considerable benefits. The world has changed and with it the culture and expectations of aboriginal peoples have changed, as they have for the rest of us. Yet it has been recognized since before the *Royal*

Proclamation of 1763 (reproduced in R.C.S. 1985, App. II, No. 1) that at some point the process of dispossession has to stop. Accordingly, even in periods when federal government policies favoured assimilation, which is to say for most of the first century of Canada's existence, Parliament's legislative policy was to protect reserves and their contents as a sanctuary for those Indians who wished to stay in their own communities and adhere to their own cultures. The promise in Treaty No. 5 of agricultural supplies is a 19th and 20th century recognition of the need to ameliorate the effects of dispossession. In my view, whatever legislative measures flow out of Parliament's recognition of the impact of that dispossession, and the desire for reconciliation of aboriginal and non-aboriginal peoples arising from that situation, should apply as much to bands dispossessed without a treaty as to those with whom treaties were made.

107 My colleague argues that the exemption from taxation and distraint in ss. 87-90 of the *Indian Act* is at best outdated and at worst paternalistic and harmful to the First Nations themselves, as isolating them from what La Forest J. called "the commercial mainstream" (*Mitchell*, at pp. 131 and 138). However, as the trial judgment makes clear, bands like God's Lake have no access to the commercial mainstream, and no realistic prospect of ever obtaining it. Although RCAP looked for ways to improve the access to capital for bands positioned realistically to participate in the commercial world, and noted in this respect provisions in the *Indian Act* "that make it very difficult for lenders to secure loans using land and other assets located on reserve as collateral", it made no recommendation to amend the *Indian Act* to remove such provisions: *RCAP Report*, vol. 2, at pp. 906-11. RCAP also noted the possibility of "using forms of collateral other than lands or property" but identified this as merely one of several "strategies ... worth considering" (p. 931). Under the existing *Indian Act* s. 90(2), bands with a commercial aptitude and prospects can obtain a ministerial waiver of ss. 88-90. In that respect there is no need to amend the Act.

108 I agree with the Chief Justice that the starting point of our analysis in this case is *Mitchell*. A number of courts, in addition to Sinclair J. in this case, have exempted funds for essential public services from seizure or execution: *Sturgeon Lake Indian Band v. Tomporowski Architectural Group Ltd.* (1991), 95 Sask. R. 302 (Sask. Q.B.); *Royal Bank v. White Bear Indian Band* (1991), [1992] 1 C.N.L.R. 174 (Sask. Q.B.); *Young v. Wolf Lake Band* (1999), 164 F.T.R. 123 (Fed. T.D.). I accept, as did Sinclair J., that not everything in the CFA can be construed as "fleshing out" the provisions of Treaty No. 5. It is also true, as it was put by counsel for the appellant, that it would be "incongruous to protect property such as some hoes, twine and cattle which were the basic needs of the Band one hundred years ago and not protect property such as the funding that maintains education, health, social services and housing which are the basic needs today for the Band members." Be that as it may, the outcome of the appeal turns on whether s. 90(1)(*b*) truly requires the CFA to be "ancillary" at all.

109 In *Mitchell* itself, the lead judgment of La Forest J., from which only Dickson C.J. dissented (although he agreed in the result), held that the purpose of the *Indian Act* exemptions from "taxation and distraint" was to counter the prospect of dispossession as follows:

> ... by terms of the "numbered treaties" concluded between the Indians of the prairie regions and part of the Northwest Territories, the Crown undertook to provide Indians with assistance in such matters as education, medicine and agriculture, and to furnish supplies which Indians could use in the pursuit of their traditional vocations of hunting, fishing, and trapping. The exemptions from taxation and distraint have historically protected the ability of Indians to benefit from this property in two ways. First, they guard against the possibility that one branch of government, through the imposition of taxes, could erode the full measure of the benefits given by that branch of government entrusted with the supervision of Indian affairs. Secondly, the protection against attachment ensures that the enforcement of civil judgments by non-natives will not be allowed to hinder Indians in the untrammelled enjoyment of such advantages as they had retained or might acquire pursuant to the fulfillment by the Crown of its treaty obligations. In effect, these sections shield Indians from the imposition of the civil liabilities that could lead, albeit through an indirect route, to the alienation of the Indian land base through the medium of foreclosure sales and the like.... [pp. 130-31]

It is evident that non-treaty Indians are equally at risk of "alienation of the Indian land base", although in their case the reserves were simply allocated rather than agreed to.

110 The *Mitchell* focus on "treaty obligations" is only one strand of La Forest J.'s analysis. It is convenient to say more about that case, as it forms the cornerstone of the judgment of my colleague, the Chief Justice.

A. The Facts of the Mitchell Case

111 The facts of *Mitchell* are important. The Peguis Indian Band had been represented by a lawyer (Mitchell) in negotiations with Manitoba Hydro over a tax invalidly imposed on the sale of electricity on a reserve. The Government of Manitoba subsequently settled the Indians' claim. The band's lawyers were unpaid, and obtained a prejudgment garnishing order against the settlement funds in the hands of the provincial Crown to the extent of their fees. The Peguis Indian Band applied to have the garnishing order set aside because the money, they argued, was paid by "Her Majesty" to the band and, under s. 90(1)(*b*) of the *Indian Act*, they argued, it was not subject to attachment by a non-Indian. The *Indian Act* defence was rejected by a majority of the Court, Dickson C.J. dissenting, but the band succeeded in the result because all members of our Court agreed that the provincial *Garnishment Act* did not authorize a garnishee against the Crown except in respect of work or services rendered to the Manitoba Crown.

112 The basis of the majority judgment rejecting the *Indian Act* defence was that the reference in s. 90(1) to "Her Majesty" was to the federal Crown only. Monies flowing under agreements of any description between the band and *provincial* Crowns were excluded from *Indian Act* protection. In the course of elaborating on that conclusion, however, La Forest J. (with whom five judges agreed) identified a number of considerations that, depending on emphasis, would lead to different results in the present case.

(1) Commercial Agreements Are Excluded

113 *Mitchell* clearly holds that "any dealings in the commercial mainstream in property acquired in this [ordinary commercial] manner will fall to be regulated by the laws of general application. Indians will enjoy no exemptions from taxation in respect of this property, and will be free to deal with it in the same manner as any other citizen" (p. 138). Noting that provincial governments have no constitutional responsibilities for Indian affairs, La Forest J. stated that if s. 90 were interpreted to include agreements with the provincial Crowns "there is no basis in logic for the further assumption that some, but not all agreements, between Indian bands and the Provincial Crown would be contemplated by [s. 90(1)(*b*)]" (p. 136).

(2) Protected Agreements Include All Agreements Between an Indian Band and Her Majesty in Right of Canada

114 As La Forest J. noted "Section 90(1)(*b*) does not qualify the term 'agreement'" (p. 137). Accordingly, speaking in the context of the *provincial* Crowns, he stated:

> Section 90(1)(*b*) does not qualify the term "agreement", and if one interprets "Her Majesty" as including the provincial Crown, it must follow as a matter of due course that s. 90(1)(*b*) takes in all agreements that could be concluded between an Indian band and a provincial Crown. [p. 137]
>
> . . . . .
>
> Once one accepts the assumption that "Her Majesty" includes the provincial Crowns, it would be more an exercise in divination than reasoned statutory interpretation to purport to be able to select from among the full spectrum of agreements that can be concluded between Indian bands and provincial Crowns and conclude that Parliament wishes s. 90(1)(*b*) to apply in one case but not in another. [p. 146]

115 By parity of reasoning, it could be said, *because* s. 90(1)(*b*) does not qualify the term "agreement" (and the French term "*accord*" is just as broad) there is no logical basis "to elect among the full spectrum" of agreements that could be concluded between an Indian band and the *federal* Crown, and therefore all such agreements fall within the protection of s. 90(1)(*b*).

(3) Only Agreements Between an Indian Band and Her Majesty in Right of Canada that Fund Governmental Responsibilities such as Education, Housing, Health and Welfare Are Protected

116 La Forest J. refers at several points to the federal authority over Indians and lands reserved for Indians under s. 91(24) of the *Constitution Act, 1867* and to the responsibilities assumed thereunder, which he links back to policies adopted by the British Crown in the *Royal Proclamation* of 1763:

> In summary, the historical record makes it clear that ss. 87 and 89 of the *Indian Act*, the sections to which the deeming provision of s. 90 applies, constitute part of a legislative "package" which bears the impress of an obligation to native peoples which the Crown has recognized at least since the signing of the Royal Proclamation of 1763. [p. 131]

The *Royal Proclamation* of 1763 was not a treaty, of course, but a unilateral declaration of policy by the Imperial Crown. Only a handful of treaties predated the *Royal Proclamation* of 1763 (such as the treaty with the Mi'kmaq Indians discussed in *Marshall v. Canada*, [1999] 3 S.C.R. 456 (S.C.C.)). In his reference to the *Royal Proclamation* of 1763, therefore, La Forest J. must be talking about fulfilment of policies of the Crown that *led* to the treaties, and not just to the treaties themselves. He goes on to say:

> From that time [i.e. 1763] on, the Crown has always acknowledged that it is honour-bound to shield Indians from any efforts by non-natives to dispossess Indians of the property which they hold *qua* Indians, i.e., their land base and the chattels on that land base. [p. 131]

Funding agreements for education, housing, health and welfare (such as the CFA) are of course intimately linked to enabling Indians to continue on their lands, as mentioned earlier. La Forest J. continued at p. 141:

> It is perfectly consistent with the tenor of the commitments made by the Crown to Indians through the centuries that the Crown would seek to protect payments of property owed to Indians pursuant to the Crown's treaty obligations in exactly the same way in which it protects all other property to which Indians may lay claim by virtue of their status as Indians.
>
> [Emphasis added.]

The underlined words are of significance. God's Lake First Nation possesses its reserve by virtue of Treaty No. 5 and its members live there by virtue of their status as Indians. Importantly, as Sinclair J. pointed out, the community at God's Lake, like many other First Nations' communities, would likely not survive without CFA funding of essential services administered by the band government.

(4) Only Monies Flowing Under "Treaties and Ancillary Obligations" Are Protected

117 In the end, La Forest J. chooses to limit s. 90(1)(*b*) to "treaties and ancillary agreements" which he explains at p. 124:

> ... Indian treaties are matters of federal concern and, as I see it, the terms "treaty" and "agreement" in s. 90(1)(*b*) take colour from one another. It must be remembered that treaty promises are often couched in very general terms and that supplementary agreements are needed to flesh out the details of the commitments undertaken by the Crown; see for an example of such an agreement *Greyeyes v. The Queen*, [1978] 2 F.C. 385. [Emphasis added.]

In *Greyeyes v. R.*, [1978] 2 F.C. 385 (Fed. T.D.), federal scholarship monies payable to an Indian student were held exempt from garnishment. La Forest J. characterized the scholarship agreement as "details of the [Crown's] promise in Treaty No. 6 to provide assistance for education" (p. 135). Some other treaties, particularly the pre-Confederation treaties, make no explicit mention of education. Presumably, under La Forest J.'s interpretation, such funds *could* be garnisheed, because he says at p. 136:

> In summary, I conclude that an interpretation of s. 90(1)(*b*), which sees its purpose as limited to preventing non-natives from hampering Indians from benefiting in full from the personal property promised Indians in treaties and ancillary agreements, is perfectly consistent with the tenor of the obligations that the Crown has always assumed *vis-à-vis* the protection of native property.
>
> [Emphasis added.]

B. Does Mitchell Control the Outcome of this Appeal?

118 As stated, the *ratio decidendi* of *Mitchell* did not depend on an interpretation of the *Indian Act* but on the Court's conclusion that the provincial *Garnishment Act*, R.S.M. 1970, c. G20, did not authorise garnishment of the funds in question.

119 In terms of doctrine, the Court divided over whether the term "Her Majesty" in s. 90(1)(*b*) of the *Indian Act* included the Crown in right of a province. The majority concluded that it did not. That holding, too, was dispositive of the appeal.

120 The further refinement that the word "agreements" with the *federal* Crown excludes agreements other than those "ancillary" to a treaty was certainly not necessary to resolve the *Mitchell* appeal, and in my view we ought to take a closer look at the issue in the context of this case where that precise point *is* dispositive.

C. Anomalies Are Created by the Treaty Approach

121 I have already mentioned what I believe to be some of the problems with the approach outlined by La Forest J. and adopted by the Chief Justice. The essential problem is that s. 90(1)(*b*) would operate inequitably among bands in relation to the same types of CFA funding for the same essential on-reserve services. It is convenient at this point to elaborate somewhat on the lack of equity which I think ought not to be attributed to Parliament in the absence of very clear language.

122 My colleague's approach excludes from s. 87 and s. 89 protection monies paid to bands in many parts of Canada (including most of British Columbia, but also many tracts of land across the country, among them lands not covered by treaty lying on the south watershed of the Ottawa River where the nation's capital sits). Even in areas where treaties were concluded there are ongoing disputes about which bands were or were not signatories (see, e.g., *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570 (S.C.C.), aff'g (1989), 58 D.L.R. (4th) 117 (Ont. C.A.), aff'g (1984), 15 D.L.R. (4th) 321 (Ont. H.C.)).

123 Secondly, even among the treaties the enumerated benefits vary greatly. *Greyeyes* dealt with Treaty No. 6 where education happened to be mentioned but many if not most of the pre-Confederation treaties do not mention education. On what rational basis would Parliament intend scholarship monies to be garnisheed in the case of some Indian students but not others?

124 Thirdly, La Forest J.'s focus in the context of Treaty No. 5 was on the benefits given by "the Crown, as part of the consideration for the cession of Indian lands" (p. 130). In the maritime provinces, however, nothing is said in at least some of the treaties about cession of lands. The Indians say these treaties were treaties of peace and friendship. Nevertheless, as the waves of non-aboriginal settlement arrived, the Indian bands still wound up being dispossessed of their traditional territories (except reserves) regardless of consent. To the extent the exemptions in s. 90 are seen as part of the purchase price for the cession of land, it makes little difference to the dispossessed whether dispossession occurred by agreement or not. The approach taken by the Chief Justice would result in a checkerboard of exemptions and non-exemptions across the country determined by the vagaries of the treaty-making process rather than rational legislative policy.

125 Fourthly, the definition of treaty (to which "agreements" must be found to be "ancillary") is elastic, running the gamut from any "engagements made by persons in authority" as may be brought within the term "the word of the white man" (*R. v. White* (1964), 50 D.L.R. (2d) 613 (B.C. C.A.), at p. 649, aff'd [1965] S.C.R. vi (S.C.C.)) to the elaborate

modern land claims settlements such as the *Nisga'a Final Agreement* (1999) or the *Umbrella Final Agreement Between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon* (1993). The range of benefits under the modern comprehensive treaties go well beyond the limited CFA categories of government to government-type funding. On what basis can it be said that the extensive modern treaty benefits should be free of tax and execution (unless the exemptions are negotiated away) whereas the CFA benefits even to *treaty* bands do not enjoy such exemptions unless they can be said to be "ancillary" to some 19th century Crown negotiator's sense of fairness incorporated in an 1875 document written in a language most of the Indians of God's Lake likely didn't understand?

126 No doubt the courts would generously interpret what agreements can be said to "flesh out" the treaties, but that does not help the bands which have no treaties at all.

127 Finally, it is curious that in s. 88, a neighbouring provision, the word "treaty" appears without the added "or agreement":

> **88.** [General provincial laws applicable to Indians] Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.

Either the addition of the words "or agreement" in s. 90(1)(*b*) means something different than "treaty" in s. 88 or it does not. If it does not, the words "or agreement" are surplusage, a result which courts try to avoid. If it does mean something different but only to the extent it covers agreements "fleshing out" treaties, it means that "agreements fleshing out treaties" are not exempted by s. 88 from provincial laws of general application that touch on "Indian-ness". The operation of s. 88 is complicated enough without this added dimension. It is more consistent with the legislative purpose of s. 88, it seems to me, to read the word "agreement" in s. 90(1)(*b*) as going beyond treaties and their modes of implementation.

D. Section 90(1)(b) Should Be Construed to Protect Monies Provided by the Federal Government to Indian Bands for Education, Housing, Health and Welfare and Other Similar Government-Type Essential Services on Reserves

128 The CFA essentially relates to services provided to other Canadians by their provincial, territorial and municipal governments. It is simply the vehicle by which the federal government delivers programs and services to First Nations with public funds appropriated by Parliament.

129 The government identifies what are generally referred to as essential programs and services that include health, housing, education, welfare and community infrastructure. Funding under the CFA is accounted for in accordance with ss. 32 and 34 of the *Financial Administration Act*, R.S.C. 1985, c. F-11. (See *Peace Hills Trust Co. v. Moccasin*, [2005] F.C.J. No. 1646, 2005 FC 1364 (F.C.), at para. 12.) In my view the word "agreement" in s. 90(1)(*b*) should include government to government transfers such as the CFA by embracing what I would call "the public sector services approach". Such an approach takes the categories of expenditure identified by La Forest J. at pp. 130 and 135 of *Mitchell* (namely education, housing, health and welfare) in the context of the numbered treaties and simply generalizes them more broadly (as I do not read La Forest J. as intending his list to be exhaustive) and applying them to Indian bands more generally (i.e., whether or not there is a treaty in place and irrespective of the benefits conferred by a particular treaty).

130 The public sector services funding approach would not include monies provided by the federal Crown with a more commercial orientation such as the Resource Partnerships Program, Economic Development Opportunity Fund, Resource Acquisition Initiative, Aboriginal Contract Guarantee Instrument, and Aboriginal Business Development Initiative. (See generally, *Gathering Strength — Canada's Aboriginal Action Plan: A Progress Report* (2000), at pp. 18-19.)

131 I accept that CFAs take a broad approach to what constitutes the "public sector". This recognizes the stubborn fact that in most reserves the potential for a significant private sector is extremely limited. Self-reliance is a wonderful

objective where the potential exists, but its allure should not blind us to deplorable socio-economic realities on the vast majority of reserves.

132 It seems to me a public sector services funding approach is consistent with the text, context and purpose of the relevant provisions of the *Indian Act* for the following reasons.

(1) The Text

133 Section 90(1)(*b*) does not qualify the term "agreement", and as pointed out by La Forest J. in *Mitchell* "it would be more an exercise in divination than reasoned statutory interpretation to purport to be able to select from among the full spectrum of agreements that can be concluded between Indian bands and provincial Crowns and conclude that Parliament wishes s. 90(1)(*b*) to apply in one case but not in another" (p. 146). The reason why *Mitchell* ultimately suggested differentiation among "agreements" was not the text of s. 90(1)(*b*) but because of the difference in provincial and federal responsibilities for Indian affairs under s. 91(24) of the *Constitution Act*, *1867* and the *Indian Act* and related Crown policies. I turn therefore to context.

(2) The Context

134 As mentioned, *Mitchell* identifies s. 90(1)(*b*) as "part of a legislative 'package' which bears the impress of an obligation to native peoples which the Crown has recognized at least since the signing of the Royal Proclamation of 1763" (p. 131). Part of that obligation is to address the issue of potential dispossession (*Mitchell*, at p. 131). Much of the *Indian Act* is concerned with the inalienability of reserves and "the exemption from taxation and distraint have historically protected the ability of Indians to benefit from [reserve] property" (*Mitchell*, at p. 130). I agree with my colleague that this context properly limits the scope of the word "agreement" in s. 90(1)(*b*), but I do not agree with where the Chief Justice would draw the line. In my view, the relevant context has little to do with treaties (after all s. 90(1)(*b*) says "treaty *or* agreement") and much to do with the general problems associated with First Nations' reserves and steps taken to protect and encourage their survival as liveable communities. It also has to do with statutory mechanisms put in place to ensure that public monies "given" to an Indian band for essential public services are used for the intended purposes.

(3) The Purpose

135 Survival of reserves is assured in the treaty context by "assistance in spheres such as education, housing and health and welfare" (*Mitchell*, at p. 135). The financial lifeline is provided these days by the CFAs. Survival of reserves for *non*-treaty Indian bands is assured by the same lifeline. Whether or not a band signed a treaty in 1909 (or 1809 for that matter) is irrelevant to the preservation and betterment of viable reserves. In my view the purpose of the "legislative package" is undermined rather than advanced by my colleague's interpretation of s. 90(1)(*b*). I believe the public sector services funding approach better serves the legislative purpose.

136 Firstly, the public sector services funding approach would still exclude commercial dealings (such as those under the Aboriginal Business Development Initiative) as well as monies provided by the Provincial Crown (e.g., the Casino Rama revenues addressed by the Court in *Ardoch Algonquin First Nation & Allies v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37 (S.C.C.)).

137 Secondly, the public sector services funding approach would avoid tying the exemption to the historical anomalies created by the treaty-making process. It would treat the non-treaty Salish bands of British Columbia on the same basis (for this purpose) as the Cree bands who signed treaties on the prairies. No dramatic consequence would flow from the fact that Treaty No. 6 refers to providing a "medicine chest" whereas other treaties do not. The emphasis would be on the public sector purpose of the funding rather than the elevation of historical anomalies to the level of legislative policy.

138 Thirdly, the public sector services funding approach puts the focus on the location where the needs of the band are to be met (the reserve) rather than on where the federal funds voted by Parliament for that purpose happen to be on deposit (off-reserve).

139 Fourthly, the public sector services funding approach avoids differential treatment of CFA funds depending on whether the band is rich enough to attract to its reserve a branch of a deposit-taking financial institution. The s. 89 exemption would not be limited to CFA funds on deposit at the Scotiabank branch on the Standoff Reserve of the Blood First Nation in Alberta, or the Royal Bank branch at the Norway House Reserve in Manitoba. By virtue of the deeming provision in s. 90(1)(*b*) the exemption would also cover CFA funds deposit in Winnipeg to the credit of the God's Lake Band (which adhered to Treaty No. 5 at roughly the same time as the Norway House Band).

140 As mentioned, other types of funding (e.g., for economic development) are, with minor exceptions handled outside the CFA framework. Thus federal government methods of funding make it relatively easy to segregate those funds protected under s. 90(1)(*b*). There will, of course, be issues of interpretation as to whether to characterize some agreements as falling within or outside government to government transfer payments for public on-reserve services, but these can be resolved on the basis of the "generous and liberal" principles of statutory interpretation favourable to the Indians established in *Nowegijick* and affirmed in *Mitchell*, at p. 142. In the interest of certainty, I would characterize funds flowing under the present CFA model as wholly protected, as discussed below.

141 The Attorney General of Canada expressed a concern that if s. 90(1)(*b*) included CFA funds then s. 90(3) would require ministerial approval for their disbursement. The short answer to that is that the CFA itself is ministerial authority for disbursement. The Chief Justice agrees to some extent (para. 45) but points out that the Minister cannot be taken to have given approval to expenditure of funds under agreements which "d[o] not specify how funds are to be spent" (a consideration that does not arise in the case of the CFA) nor can the Minister be taken to have approved funds "not put to the proper use". I agree with that qualification, of course, but the lack of ministerial agreement with improper diversion of funds is in any event clear from the terms of the CFA itself. Lack of ministerial consent will not prevent the funds from being diverted from the agreed CFA purposes. Only a purposeful as opposed to restrictive reading of s. 90(1)(*b*) will accomplish that objective.

(4) Is this Outcome "Paternalistic"?

142 I believe the concern about the need to avoid "paternalism" is, with respect, misdirected. The issue was related by La Forest J. to the *commercial* dealings of Indian bands:

> Indians, I would have thought, would much prefer to have free rein to conduct their affairs as all other fellow citizens when dealing in the commercial mainstream. [p. 146]
>
> . . . . .
>
> Any special considerations, extraordinary protections or exemptions that Indians bring with them to the marketplace introduce complications and would seem guaranteed to frighten off potential business partners. [p. 147]

143 I do not accept, with respect, that this concern should disqualify the CFAs from the protection of s. 90(1)(*b*). There is a great difference between withholding protection from funds passing under a tax settlement with the Manitoba government from the claim of the band lawyer to be paid his fees (the facts of *Mitchell*), and withholding protection from CFA funds provided by the federal government out of funds appropriated by Parliament for health, education, housing, welfare and infrastructure on a remote, impoverished, northern reserve (this case) and other disadvantaged reserves across the country.

(5) The CFA Should Be Exempted as a Whole

144 Exemption of the CFA based on the federal government's present model, advances the federal government policy of promoting "[f]inancially viable Aboriginal governments able to generate their own revenues and able to operate with *secure*, predictable government transfers" (emphasis added). See *Gathering Strength — Canada's Aboriginal Action Plan: A Progress Report*, at p. 3. As funding models change, the CFA exemption may have to be re-examined, but for the

moment I believe any disputes about the minutiae of the CFA should be resolved generously in favour of the Indians under the *Nowegijick* principle of statutory construction referred to earlier.

145 To impose, as the Chief Justice does, an onus on the band to prove which parts of CFA funding on deposit at any particular time "flesh out" treaty commitments of the Crown (para. 26) and which parts of CFA funding do not, is a burden they cannot discharge, given the deposit of blended monthly payments which are not segregated on a project by project basis.

146 The objective of predictability and certainty in economic relations between First Nations and non-aboriginal people is better served by a categorical denial of execution or garnishment of CFA funds whether those funds are parked at a financial institution on or off the reserve. The procedure suggested by my colleague, with respect, simply adds the uncertainties of litigation to an already complicated situation.

147 This is a test case to establish matters of legal principle. Litigation in the general run of cases over what is or what is not sufficiently connected to a treaty to qualify for s. 90(1)(*b*) protection will drain First Nation finances that should be put to better use elsewhere.

(6) Protection of Suppliers

148 The protection of suppliers such as the respondent is not difficult. Get your money up front. Alternatively, require the Chief and band council to obtain ministerial approval under s. 90(2) of a waiver of ss. 89-90 protection.

(7) The Public Purse May Now Pay Twice for the Same Services

149 As mentioned earlier, the appellant band appears to have incurred debts of about $3 million without the means of repayment. The creditors will seek to garnishee payment of those debts from the roughly $7 to $9 million annual CFA funding. If the garnishee is successful there will not be enough money to pay for essential public services. This means either band members will live in the "third world conditions" described by RCAP or the federal government will step in at some stage to fund the delivery of the essential services it had already funded under the CFA but which funds were diverted to other priorities determined by the band council. The first alternative is to perpetuate what RCAP calls a national embarrassment. The other alternative is for the public to pay twice. Neither is palatable public policy. In my view, Parliament cannot have intended an interpretation of s. 90(1)(*b*) that creates such a Hobson's choice.

VII. Conclusion

150 I would allow the appeal and restore the conclusion reached by Sinclair J.

Appeal dismissed.

Pourvoi rejeté.

Appendix

Indian Act, R.S.C. 1985 c. I-5

> 87. (1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83, the following property is exempt from taxation, namely,
>
> (a) the interest of an Indian or a band in reserve lands or surrendered lands; and
>
> (b) the personal property of an Indian or a band situated on a reserve.
>
> (2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(*a*) or (*b*) or is otherwise subject to taxation in respect of any such property.

(3) No succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any property mentioned in paragraphs (1)(*a*) or (*b*) or the succession thereto if the property passes to an Indian, nor shall any such property be taken into account in determining the duty payable under the *Dominion Succession Duty Act*, chapter 89 of the Revised Statutes of Canada, 1952, or the tax payable under the *Estate Tax Act*, chapter E-9 of the Revised Statutes of Canada, 1970, on or in respect of other property passing to an Indian.

89. (1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.

(1.1) Notwithstanding subsection (1), a leasehold interest in designated lands is subject to charge, pledge, mortgage, attachment, levy, seizure, distress and execution.

(2) A person who sells to a band or a member of a band a chattel under an agreement whereby the right of property or right of possession thereto remains wholly or in part in the seller may exercise his rights under the agreement notwithstanding that the chattel is situated on a reserve

90. (1) For the purposes of sections 87 and 89, personal property that was

(a) purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or bands, or

(b) given to Indians or to a band under a treaty or agreement between a band and Her Majesty,

shall be deemed always to be situated on a reserve.

(2) Every transaction purporting to pass title to any property that is by this section deemed to be situated on a reserve, or any interest in such property, is void unless the transaction is entered into with the consent of the Minister or is entered into between members of a band or between the band and a member thereof.

(3) Every person who enters into any transaction that is void by virtue of subsection (2) is guilty of an offence, and every person who, without the written consent of the Minister, destroys personal property that is by this section deemed to be situated on a reserve is guilty of an offence.

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2012 SCC 61
Supreme Court of Canada

Moore v. British Columbia (Ministry of Education)

2012 CarswellBC 3446, 2012 CarswellBC 3447, 2012 SCC 61, [2012] 12 W.W.R. 637, [2012] 3 S.C.R. 360, [2012] B.C.W.L.D. 9292, [2012] B.C.W.L.D. 9343, [2012] A.C.S. No. 61, [2012] S.C.J. No. 61, 220 A.C.W.S. (3d) 390, 328 B.C.A.C. 1, 351 D.L.R. (4th) 451, 38 B.C.L.R. (5th) 1, 436 N.R. 152, 558 W.A.C. 1, 75 C.H.R.R. D/369, J.E. 2012-2104

Frederick Moore on behalf of Jeffrey P. Moore, Appellant and Her Majesty the Queen in Right of the Province of British Columbia, as represented by the Ministry of Education, and Board of Education of School District No. 44 (North Vancouver), formerly known as The Board of School Trustees of School District No. 44 (North Vancouver), Respondents and Attorney General of Ontario, Justice for Children and Youth, British Columbia Teachers' Federation, Council of Canadians with Disabilities, Ontario Human Rights Commission, Saskatchewan Human Rights Commission, Alberta Human Rights Commission, International Dyslexia Association, Ontario Branch, Canadian Human Rights Commission, Learning Disabilities Association of Canada, Canadian Constitution Foundation, Manitoba Human Rights Commission, West Coast Women's Legal Education and Action Fund, Canadian Association for Community Living, Commission des droits de la personne et des droits de la jeunesse, British Columbia Human Rights Tribunal, First Nations Child and Family Caring Society of Canada, Interveners

McLachlin C.J.C., LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis JJ.

Heard: March 22, 2012
Judgment: November 9, 2012
Docket: 34040, 34041

Proceedings: reversed *Moore v. British Columbia (Ministry of Education)* (2010), 498 W.A.C. 185, 294 B.C.A.C. 185, (sub nom. *British Columbia (Ministry of Education) v. Moore)* 71 C.H.R.R. D/238, 12 B.C.L.R. (5th) 246, 326 D.L.R. (4th) 77, 2010 CarswellBC 3446, 2010 BCCA 478, [2011] 3 W.W.R. 383 (B.C. C.A.); affirmed *Moore v. British Columbia (Ministry of Education)* (2008), 2008 CarswellBC 388, 81 B.C.L.R. (4th) 107, 62 C.H.R.R. D/289, 2008 BCSC 264, [2008] 10 W.W.R. 518 (B.C. S.C.); reversed *Moore v. British Columbia (Ministry of Education)* (2005), 54 C.H.R.R. D/245, 2005 CarswellBC 3573, 2005 BCHRT 580 (B.C. Human Rights Trib.)

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Subject: Constitutional; Employment; Public; Civil Practice and Procedure; Human Rights

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Education law

V Pupils
V.6 Exceptional students (special education)
V.6.c Individualized education or program plan

Human rights

III What constitutes discrimination
III.7 Disability
III.7.b Mental disability
III.7.b.v Denial of public services or facilities

Headnote

Human rights --- What constitutes discrimination — Disability — Mental disability — Denial of public services or facilities

Complainant, J, was severely learning disabled (SLD) student — Specialized facility for intensive remediation (DC1) was closed for financial reasons before J could attend — J left public school system for private school — J filed successful complaint against respondents school district and Ministry of Education — Tribunal found that there was individual discrimination against J and systemic discrimination against SLD students in general, and reimbursed J's family for cost of private schooling and awarded them damages — Respondents brought successful petitions for judicial review — J brought unsuccessful appeal — J appealed — Appeal substantially allowed — District failed to meet J's educational needs — J required intensive remediation, DC1 was closed, and these services were not otherwise provided by district — Failure of district to meet J's educational needs constituted prima facie discrimination — District's conduct was not justified — District undertook no assessment of what alternatives were or could be reasonably available to accommodate SLD students if DC1 were closed — However, conclusion that province was liable for district's discriminatory conduct towards J could not be sustained — Evidence about provincial funding regime was too remote to demonstrate discrimination.

Education law --- Pupils — Exceptional students (special education) — Individualized education or program plan

Complainant, J, was severely learning disabled (SLD) student — Specialized facility for intensive remediation (DC1) was closed for financial reasons before J could attend — J left public school system for private school — J filed successful complaint against respondents school district and Ministry of Education — Tribunal found that there was individual discrimination against J and systemic discrimination against SLD students in general, and reimbursed J's family for cost of private schooling and awarded them damages — Respondents brought successful petitions for judicial review — J brought unsuccessful appeal — J appealed — Appeal substantially allowed — District failed to meet J's educational needs — J required intensive remediation, DC1 was closed, and these services were not otherwise provided by district — Failure of district to meet J's educational needs constituted prima facie discrimination — District's conduct was not justified — District undertook no assessment of what alternatives were or could be reasonably available to accommodate SLD students if DC1 were closed — However, conclusion that province was liable for district's discriminatory conduct towards J could not be sustained — Evidence about provincial funding regime was too remote to demonstrate discrimination.

Droits de la personne --- Ce qui constitue de la discrimination — Handicap — Handicap mental — Accès à des services ou à des établissements publics refusé

Plaignant, J, était un étudiant ayant des troubles d'apprentissage sévères (TAS) — Établissement spécialisé qui offrait des mesures de remédiation (DC1) a fermé pour des raisons financières avant que J ne puisse le fréquenter — J a quitté le système scolaire public et a été inscrit dans une école privée — J a déposé une plainte à l'encontre des intimés, soit le district scolaire et le ministère de l'Éducation, avec succès — Tribunal a conclu à l'existence de discrimination individuelle à l'encontre de J et de discrimination systémique à l'encontre des élèves ayant des TAS en général et a ordonné qu'on rembourse à la famille de J les frais relatifs à la fréquentation par J des écoles privées et qu'on leur verse des dommages-intérêts — Intimés ont déposé des requêtes en contrôle judiciaire, avec succès — J a interjeté appel, mais a échoué — J a formé un pourvoi — Pourvoi accueilli en grande partie — District scolaire n'a pas répondu aux besoins de J en matière d'éducation — Condition de J nécessitait des mesures de remédiation intensives, le DC1 était fermé et le district n'était pas en mesure de fournir autrement ces services — Omission du district de répondre aux besoins de J en matière d'éducation constituait de la discrimination à première vue — Il n'y avait aucune justification à la conduite du district — Ce dernier n'a procédé à aucune évaluation des solutions de rechange qui existaient ou auraient pu raisonnablement être trouvées pour répondre aux besoins d'étudiants ayant des TAS si la décision de fermer le CD1 était prise — Toutefois, il était impossible de confirmer la conclusion selon laquelle la province était responsable de la conduite discriminatoire du district à l'endroit de J — Preuve concernant le régime de financement provincial était trop indirecte pour établir la discrimination.

Droit de l'éducation --- Élèves — Élèves spéciaux (éducation adaptée) — Régime ou programme scolaire individualisé

Plaignant, J, était un étudiant ayant des troubles d'apprentissage sévères (TAS) — Établissement spécialisé qui offrait des mesures de remédiation (DC1) a fermé pour des raisons financières avant que J ne puisse le fréquenter — J a quitté le système scolaire public et a été inscrit dans une école privée — J a déposé une plainte à l'encontre des intimés, soit le district scolaire et le ministère de l'Éducation, avec succès — Tribunal a conclu à l'existence de discrimination individuelle à l'encontre de J et de discrimination systémique à l'encontre des élèves ayant des TAS en général et a ordonné qu'on rembourse à la famille de J les frais relatifs à la fréquentation par J des écoles privées et qu'on leur verse des dommages-intérêts — Intimés ont déposé des requêtes en contrôle judiciaire, avec succès — J a interjeté appel, mais a échoué — J a formé un pourvoi — Pourvoi accueilli en grande partie — District scolaire n'a pas répondu aux besoins de J en matière d'éducation — Condition de J nécessitait des mesures de remédiation intensives, le DC1 était fermé et le district n'était pas en mesure de fournir autrement ces services — Omission du district de répondre aux besoins de J en matière d'éducation constituait de la discrimination à première vue — Il n'y avait aucune justification à la conduite du district — Ce dernier n'a procédé à aucune évaluation des solutions de rechange qui existaient ou auraient pu raisonnablement être trouvées pour répondre aux besoins d'étudiants ayant des TAS si la décision de fermer le CD1 était prise — Toutefois, il était impossible de confirmer la conclusion selon laquelle la province était responsable de la conduite discriminatoire du district à l'endroit de J — Preuve concernant le régime de financement provincial était trop indirecte pour établir la discrimination.

The complainant, J, was a severely learning disabled (SLD) student. The specialized facility for intensive remediation (DC1) was closed for financial reasons before J could attend. J left the public school system for a private school. J filed a successful complaint against the respondents, namely the school district and the Ministry of Education. The tribunal found that there was individual discrimination against J and systemic discrimination against the SLD students in general, and reimbursed J's family for the cost of private schooling and awarded them damages.

The respondents brought successful petitions for judicial review. J brought an unsuccessful appeal. J appealed.

Held: The appeal was substantially allowed.

Per Abella J. (McLachlin C.J.C., LeBel, Deschamps, Fish, Rothstein, Cromwell, Moldaver, Karakatsanis JJ. concurring): The district failed to meet J's educational needs. J required intensive remediation, the DC1 was closed, and these services were not otherwise provided by the district. The failure of the district to meet J's educational needs constituted prima facie discrimination.

The district's conduct was not justified. The district undertook no assessment of what alternatives were or could be reasonably available to accommodate the SLD students if the DC1 were closed.

However, the conclusion that the province was liable for the district's discriminatory conduct towards J could not be sustained. The evidence about the provincial funding regime was too remote to demonstrate discrimination.

Le plaignant, J, était un étudiant ayant des troubles d'apprentissage sévères (TAS). L'établissement spécialisé qui offrait des mesures de remédiation (DC1) a fermé pour des raisons financières avant que J ne puisse le fréquenter. J a quitté le système scolaire public et a été inscrit dans une école privée. J a déposé une plainte à l'encontre des intimés, soit le district scolaire et le ministère de l'Éducation, avec succès. Le tribunal a conclu à l'existence de discrimination individuelle à l'encontre de J et de discrimination systémique à l'encontre des élèves ayant des TAS en général et a ordonné qu'on rembourse à la famille de J les frais relatifs à la fréquentation par J des écoles privées et qu'on leur verse des dommages-intérêts.

Les intimés ont déposé des requêtes en contrôle judiciaire, avec succès. J a interjeté appel, mais a échoué. J a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli en grande partie.

Abella, J. (McLachlin, J.C.C., LeBel, Deschamps, Fish, Rothstein, Cromwell, Moldaver, Karakatsanis, JJ., souscrivant à son opinion) : Le district scolaire n'a pas répondu aux besoins de J en matière d'éducation. La condition de J nécessitait des mesures de remédiation intensives, le DC1 était fermé et le district n'était pas en mesure de fournir autrement ces services. L'omission du district de répondre aux besoins de J en matière d'éducation constituait de la discrimination à première vue.

Il n'y avait aucune justification à la conduite du district. Ce dernier n'a procédé à aucune évaluation des solutions de rechange qui existaient ou auraient pu raisonnablement être trouvées pour répondre aux besoins d'étudiants ayant des TAS si la décision de fermer le CD1 était prise.

Toutefois, il était impossible de confirmer la conclusion selon laquelle la province était responsable de la conduite discriminatoire du district à l'endroit de J. La preuve concernant le régime de financement provincial était trop indirecte pour établir la discrimination.

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Renaud v. Central Okanagan School District No. 23 (1992), (sub nom. *Central Okanagan School District No. 23 v. Renaud*) [1992] 2 S.C.R. 970, (sub nom. *Renaud v. Board of Education of Central Okanagan No. 23*) 13 B.C.A.C. 245, [1992] 6 W.W.R. 193, (sub nom. *Central Okanagan School District No. 23 v. Renaud*) 95 D.L.R. (4th) 577, (sub nom. *Renaud v. Board of Education of Central Okanagan No. 23*) 24 W.A.C. 245, (sub nom. *Central Okanagan School District No. 23 v. Renaud*) 92 C.L.L.C. 17,032, 141 N.R. 185, 71 B.C.L.R. (2d) 145, 1992 CarswellBC 257, 16 C.H.R.R. D/425, 1992 CarswellBC 910 (S.C.C.) — referred to

VIA Rail Canada Inc. v. Canadian Transportation Agency (2007), 2007 SCC 15, 2007 CarswellNat 608, 2007 CarswellNat 609, 360 N.R. 1, 279 D.L.R. (4th) 1, (sub nom. *Council of Canadians with Disabilities v. Via Rail Canada Inc.*) 59 C.H.R.R. D/276, 59 Admin. L.R. (4th) 1, (sub nom. *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*) [2007] 1 S.C.R. 650 (S.C.C.) — referred to

Withler v. Canada (Attorney General) (2011), [2011] 4 W.W.R. 383, 87 C.C.P.B. 161, 300 B.C.A.C. 120, 509 W.A.C. 120, [2011] 1 S.C.R. 396, 2011 SCC 12, 15 B.C.L.R. (5th) 1, 329 D.L.R. (4th) 193, D.T.E. 2011T-181, 412 N.R. 149, 2011 CarswellBC 379, 2011 CarswellBC 380 (S.C.C.) — referred to

Statutes considered by *Abella J.*:

Administrative Tribunals Act, S.B.C. 2004, c. 45
s. 59 — considered

Human Rights Code, R.S.B.C. 1996, c. 210
Generally — referred to

s. 8 — considered

School Act, S.B.C. 1989, c. 61
Generally — referred to

Preamble [am. 1993, c. 6, s. 1] — referred to

Authorities considered:

British Columbia, Ministry of Education, *Mandate for the School System* (Vancouver: Ministry of Education, 1989)

British Columbia, Ministry of Education, *Special Programs: A Manual of Policies, Procedures and Guidelines* (Vancouver: Ministry of Education, 1985)

Brodsky, Gwen, Shelagh Day and Yvonne Peters, *Accommodation in the 21st Century* (Canadian Human Rights Commission, 2012) (online: http://www.chrc-ccdp.ca/pdf/accommodation_eng.pdf)

MacKay, A. Wayne, "Connecting Care and Challenge: Tapping Our Human Potential" (2008), 17 *E.L.J.* 37

APPEAL by complainant from judgment reported at *Moore v. British Columbia (Ministry of Education)* (2008), 2008 CarswellBC 388, 81 B.C.L.R. (4th) 107, 62 C.H.R.R. D/289, 2008 BCSC 264, [2008] 10 W.W.R. 518 (B.C. S.C.), dismissing complainant's appeal from decision granting respondents' petitions for judicial review.

POURVOI formé par le plaignant à l'encontre d'un jugement publié à *Moore v. British Columbia (Ministry of Education)* (2008), 2008 CarswellBC 388, 81 B.C.L.R. (4th) 107, 62 C.H.R.R. D/289, 2008 BCSC 264, [2008] 10 W.W.R. 518 (B.C. S.C.), ayant rejeté l'appel interjeté par le plaignant à l'encontre d'une décision ayant accordé les requêtes en contrôle judiciaire des intimés.

***Abella J.*:**

1 This case is about the education of Jeffrey Moore, a child with a severe learning disability who claims that he was discriminated against because the intense remedial instruction he needed in his early school years for his dyslexia was not available in the public school system. Based on the recommendation of a school psychologist, Jeffrey's parents enrolled him in specialized private schools in Grade 4 and paid the necessary tuition. The remedial instruction he received was successful and his reading ability improved significantly.

2 Jeffrey's father, Frederick Moore, filed a human rights complaint against the School District and the British Columbia Ministry of Education alleging that Jeffrey had been discriminated against because of his disability and had been denied "a service ... customarily available to the public", contrary to s. 8 of the *Human Rights Code*, R.S.B.C. 1996, c. 210.

3 The Human Rights Tribunal held 43 days of hearings, receiving evidence about the funding and administration of special education in the District and Province, the District's budgetary constraints at the relevant time, dyslexia generally, and Jeffrey's circumstances in particular.

4 The Tribunal concluded that the failure of the public school system to give Jeffrey the support he needed to have meaningful access to the educational opportunities offered by the Board, amounted to discrimination under the *Code*. I agree.

5 The preamble to the *School Act*, [1] the operative legislation when Jeffrey was in school, stated that "the purpose of the British Columbia school system is to enable all learners to develop their individual potential and to acquire the knowledge, skills and attitudes needed to contribute to a healthy, democratic and pluralistic society and a prosperous and sustainable economy". This declaration of purpose is an acknowledgment by the government that the reason all children are entitled to an education, is because a healthy democracy and economy require their educated contribution. Adequate special education, therefore, is not a dispensable luxury. For those with severe learning disabilities, it is the ramp that provides access to the statutory commitment to education made to *all* children in British Columbia.

Background

6 At the relevant time, public school funding in British Columbia was approved annually by the Province but administered by districts under the *School Act*. As of the 1990/91 school year, the Province instituted a block funding system, whereby an overall amount of money was made available for education and then allocated among the various districts by the Minister. The block amount, as determined in the base year, was adjusted annually to allow for changes in enrolment, mandated services, and economic indicators such as changes in the cost of resources. For a short period, the Province provided equalization grants to ease the transition for districts which had historically earned significant supplementary funds through local taxation.

7 For the purposes of funding special education, the Province classified students into various groups, including what it referred to as "high incidence/low cost" and "low incidence/high cost" programs. Severe learning disabilities like dyslexia were always treated as a high incidence/low cost disability. From 1987/88, the Province capped the specific funding that was available for high incidence/low cost students to a percentage of a district's student population in order to control the increasing number of students qualifying for this supplementary funding. Notably, as of 1991, the *School Act* set out minimum spending levels for high incidence/low cost and low incidence/high cost students. That meant that once a child was identified as having a severe learning disability, additional support was mandatory. As a result, districts were required to draw on the general provincial allocation to fund any high incidence/low cost students above the high incidence/low cost cap.

8 When Jeffrey entered kindergarten in 1991, students with special needs in the District were supported in several ways: they received assistance in and out of the classroom from special education Aides; they were referred to the school-based Learning Assistance Centre where they would work with learning assistance teachers or tutors; and a small number of them were placed in the Diagnostic Centre for more intensive assistance.

9 Following the implementation of the block funding model, there were significant financial pressures on Jeffrey's home District, School District No. 44. From 1991/92 to 1994/95, the District consistently faced budgetary shortfalls. It had relied on supplementary funds in the past and received declining equalization grants until 1992/93. Despite requests, it did not get additional funding from the Province but got permission to run temporary deficits. Consistent deficits during this period led to wide-scale budget cuts in the District between 1991/92 and 1994/95, including a reduction of almost $1.5 million in spending for high incidence/low cost students with learning disabilities.

10 In the 1994/95 budgetary process, possible solutions to the financial difficulties included restricting the availability of Aides or closing the District Diagnostic Centre, a program which provided intensive services and individualized assistance to students with severe learning disabilities. The District limited its cuts to Aide allocation because of the terms of its Collective Agreement with the teachers' association, which required a minimum of two hours a week of Aide time once a student was designated as being in a high incidence/low cost category. Other proposed cuts were implemented, including the closing of the Diagnostic Centre in 1994. In February 1996, the Province fired the Board of the District and replaced it with an Official Trustee.

11 Jeffrey Moore started kindergarten in September 1991 at Braemar Elementary School, his North Vancouver neighbourhood school in the District. While he was happy and energetic in nursery school, it quickly became apparent in kindergarten that Jeffrey needed extra support to learn to read. After scoring low on a screening test, Jeffrey was referred to the Elementary Learning Resource Team, a group of specialists who provided support and assistance to students in the District who had severe learning disabilities, including dyslexia.

12 After his first assessment in kindergarten, Jeffrey was observed in the classroom and given 15 minutes of individual help from an Aide three times a week. He was assessed twice by the Elementary Learning Resource Team in Grade 1 because he continued to fall behind in literacy skills. He started attending the Learning Assistance Centre three times a week, for half-hour individual sessions with Barbara Waigh, a learning assistance teacher. He also had two 40-minute sessions in the Learning Assistance Centre with a volunteer tutor. Because he still made poor progress, Jeffrey's parents, at the school's recommendation, hired a private tutor to work with Jeffrey.

13 In January 1994, while Jeffrey was in Grade 2, his parents, concerned about his worsening headaches, took him to a neurologist. They were told that Jeffrey was under significant stress which could be improved by addressing his learning difficulties. The next month, Jeffrey was again referred to the Elementary Learning Resource Team, with his teachers reporting slow academic progress and immature behaviour. He received a full psycho-educational assessment on April 1, 1994, a prerequisite to his designation as a Severe Learning Disabilities student. Following the assessment, Mary Tennant, a psychologist employed by the District, concluded that Jeffrey needed more intensive remediation than he had been receiving and suggested that he attend the Diagnostic Centre.

14 Ms. Tennant, Ms. Waigh, and Bryn Roberts, Braemar's principal, met with the Moores soon after this assessment. Ms. Tennant and Ms. Waigh told the Moores that because the Diagnostic Centre was being closed, Jeffrey could not obtain the intensive remediation he needed in the District's public schools. The necessary instruction was available only at Kenneth Gordon School, a private school specializing in teaching children who had learning disabilities.

15 Jeffrey could not enrol in Kenneth Gordon School until Grade 4. His pre-referral form to that school confirmed a serious lack of progress in reading and spelling as well as his poor self-esteem. Every week during Grade 3 at Braemar, he received two 30-minute sessions of individual assistance in the Learning Assistance Centre, two 40-minute periods of individual assistance with a tutor in the Learning Assistance Centre, and four 40-minute sessions with an Aide, primarily in the classroom.

16 Jeffrey attended Kenneth Gordon School from Grade 4 to Grade 7. When he left, he was reading at a Grade 5 level and was at Grade 7 level in math. He began Grade 8 in September 1999 at Fraser Academy, another private school specializing in children with learning disabilities. He remained there until the time of the hearing and eventually completed high school there.

Prior Proceedings

17 The Tribunal chair, Heather MacNaughton, found that there was general agreement among the experts about the significant, negative long-term consequences for students with unremediated learning disabilities. The experts also agreed that children with reading disabilities should be identified early and provided with intensive supports.

18 Based on this evidence, the Tribunal concluded that a range of services was necessary for these students, from a modified program within the classroom to full-time placement in a special program for Severe Learning Disabilities students.

19 The Tribunal accepted the evidence of experts and of District employees like Ms. Tennant that Jeffrey could not get sufficient services within the District after the closure of the Diagnostic Centre in 1994. Only one expert, who was called by the District, said that Jeffrey had received the services he needed at his public school and that the interventions had been of appropriate intensity.

20 The Tribunal concluded that there was both individual discrimination against Jeffrey and systemic discrimination against Severe Learning Disabilities students in general. It grounded its finding of discrimination against Jeffrey in the District's failure to assess Jeffrey's learning disability early, and to provide appropriately intensive instruction following the closing of the Diagnostic Centre. It ordered that the Moores be reimbursed for the costs related to Jeffrey's attendance at private schools, as well as $10,000 in damages for pain and suffering.

21 The finding of systemic discrimination against the District was based on the underfunding of Severe Learning Disabilities programs and the closing of the Diagnostic Centre. While accepting that the District's financial circumstances were compelling, the Tribunal found that there was no evidence that the District had considered any reasonable alternatives for meeting the needs of Severe Learning Disabilities students before cutting available services such as the Diagnostic Centre.

22 The Tribunal's finding of systemic discrimination against the Province was based on what it identified as four problems in the provincial administration of special education: the high incidence/low cost cap; the underfunding of the District; the failure to ensure that necessary services, including early intervention, were mandatory; and the failure to monitor the activities of the districts. It ordered a wide range of sweeping systemic remedies against both the District and the Province.

23 In the Supreme Court of British Columbia, Dillon J. allowed the application for judicial review ([2008] 10 W.W.R. 518 (B.C. S.C.) [*Moore v. British Columbia (Ministry of Education)*]). She found that Jeffrey's situation should be compared to other special needs students, not to the general student population as the Tribunal had done. There was no evidence about this comparison, nor was there evidence about how students with special needs were affected by funding mechanisms such as the high incidence/low cost cap or the closing of the Diagnostic Centre. The failure to identify and compare Jeffrey with the appropriate comparator group tainted the entire discrimination analysis. As a result, she set aside the Tribunal's decision.

24 A majority in the Court of Appeal dismissed the appeal, agreeing that Jeffrey ought to be compared to other special needs students ([2011] 3 W.W.R. 383 (B.C. C.A.) [*Moore v. British Columbia (Ministry of Education)*]). To compare him with the general student population was to invite an inquiry into general education policy and its application, which it concluded could not be the purpose of a human rights complaint.

25 In dissent, Rowles J.A. would have allowed the appeal. In her view, special education was the means by which "meaningful access" to educational services was achievable by students with learning disabilities. She found that a comparator analysis was both unnecessary and inappropriate. The Tribunal's detailed evidentiary analysis showing that Jeffrey had not received sufficiently intensive remediation after the closing of the Diagnostic Centre, justified the findings of discrimination.

Analysis

26 Section 8 of British Columbia's *Human Rights Code* states that it is discriminatory if "[a] person ... without a bona fide and reasonable justification ... den[ies] to a person or class of persons any accommodation, service or facility customarily available to the public" on the basis of a prohibited ground. That means that if a service is ordinarily provided to the public, it must be available in a way that does not arbitrarily — or unjustifiably — exclude individuals by virtue of their membership in a protected group.

27 A central issue throughout these proceedings was what the relevant "service ... customarily available to the public" was. While the Tribunal and the dissenting judge in the Court of Appeal defined it as "general" education, the reviewing judge and the majority defined it as "special" education.

28 I agree with Rowles J.A. that for students with learning disabilities like Jeffrey's, special education is not the service, it is the *means* by which those students get meaningful access to the general education services available to all of British Columbia's students:

> It is accepted that students with disabilities require accommodation of their differences in order to benefit from educational services. Jeffrey is seeking accommodation, in the form of special education through intensive remediation, to enable him equal access to the "mainstream" benefit of education available to all.... *In Jeffrey's case, the specific accommodation sought is analogous to the interpreters in* Eldridge: *it is not an extra "ancillary" service, but rather the manner by which meaningful access to the provided benefit can be achieved.* Without such special education, the disabled simply cannot receive equal benefit from the underlying service of public education.
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> [Emphasis added; para. 103.]

29 The answer, to me, is that the 'service' is education generally. Defining the service only as 'special education' would relieve the Province and District of their duty to ensure that no student is excluded from the benefit of the education system by virtue of their disability.

30 To define 'special education' as the service at issue also risks descending into the kind of "separate but equal" approach which was majestically discarded in *Brown v. Topeka Board of Education* (1954), 347 U.S. 483 (U.S. Kan. S.C. 1954). Comparing Jeffrey only with other special needs students would mean that the District could cut *all* special needs programs and yet be immune from a claim of discrimination. It is not a question of who else is or is not experiencing similar barriers. This formalism was one of the potential dangers of comparator groups identified in *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396 (S.C.C.).

31 If Jeffrey is compared only to other special needs students, full consideration cannot be given to whether he had *genuine* access to the education that all students in British Columbia are entitled to. This, as Rowles J.A. noted, "risks perpetuating the very disadvantage and exclusion from mainstream society the *Code* is intended to remedy" (see *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 (S.C.C.), at p. 1237; Gwen Brodsky, Shelagh Day and Yvonne Peters, *Accommodation in the 21st Century* (2012) (online), at p. 41).

32 A majority of students do not require intensive remediation in order to learn to read. Jeffrey does. He was unable to get it in the public school. Was that an unjustified denial of meaningful access to the general education to which students in British Columbia are entitled and, as a result, discrimination?

33 As the Tribunal properly recognized, to demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.

34 There is no dispute that Jeffrey's dyslexia is a disability. There is equally no question that any adverse impact he suffered is related to his membership in this group. The question then is whether Jeffrey has, without reasonable justification, been denied access to the general education available to the public in British Columbia based on his disability, access that must be "meaningful": *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 (S.C.C.), at para. 71; *Berg v. University of British Columbia*, [1993] 2 S.C.R. 353 (S.C.C.), at pp. 381-82. (See also *Québec (Commission des droits de la personne & des droits de la jeunesse) c. Montréal (Ville)*, [2000] 1 S.C.R. 665 (S.C.C.), at para. 80; *VIA Rail Canada Inc. v. Canadian Transportation Agency*, [2007] 1 S.C.R. 650 (S.C.C.), at paras. 121 and 162; A. Wayne MacKay, "Connecting Care and Challenge: Tapping Our Human Potential" (2008), 17 *E.L.J.* 37, at pp. 38 and 47.)

35 The answer is informed by the mandate and objectives of public education in British Columbia during the relevant period. As with many public services, educational policies often contemplate that students will achieve certain results. But the fact that a particular student has not achieved a given result does not end the inquiry. In some cases, the government may well have done what was necessary to give the student access to the service, yet the hoped-for results did not follow. Moreover, policy documents tend to be aspirational in nature, and may not reflect realistic objectives. A margin of deference is, as a result, owed to governments and administrators in implementing these broad, aspirational policies.

36 But if the evidence demonstrates that the government failed to deliver the mandate and objectives of public education such that a given student was denied *meaningful* access to the service based on a protected ground, this will justify a finding of *prima facie* discrimination.

37 As previously noted, the mandate and objectives for public education during the relevant period were set out in the *School Act*, which stated in its preamble that "the purpose of the British Columbia school system is to enable all learners to develop their individual potential and to acquire the knowledge, skills and attitudes needed to contribute to

a healthy, democratic and pluralistic society and a prosperous and sustainable economy". A related policy document, the 1989 *Mandate for the School System*, O.I.C. 1280/89, said that the government was "responsible for ensuring that all of our youth have the opportunity to obtain high quality schooling that will assist in the development of an educated society" (p. 96). The *Mandate* said that schools should develop students who are, among other things, "thoughtful, able to learn and to think critically ... can communicate information from a broad knowledge base ... [are] creative, flexible, self-motivated ... have a positive self image ... [are] capable of making independent decisions ... [are] skilled and can contribute to society generally, including the world of work" (p. 96).

38 There were divergent views when Jeffrey was in school about how 'special needs' students could best be educated. The Province's "Special Programs: A Manual of Policies, Procedures and Guidelines" (the "1985 Manual") contemplated a "cascade" model of service delivery, where a "range" of placements would be available, including a "very highly specialized" education environment for a small number of students (ss. 4.1 and 4.2). The predominant policy in the 1985 Manual, however, was the integration of special needs students into the general classroom whenever possible.

39 Notably, however, the 1985 Manual said that "[s]pecial education *shares the basic purpose of all education*: the optimal development of individuals as skilful, free, and purposeful persons, able to plan and manage life and to realize highest potential as individuals and as members of society" (s. 3.1 (emphasis added)). It added that "*[a]ll* children should be afforded opportunities to develop their full potential" (s. 3.1 (emphasis in original)).

40 These education goals in British Columbia informed the Tribunal's conclusion that the District did not take the necessary steps to give Jeffrey the education to which he was entitled. *Prima facie* discrimination was made out based, in essence, on two factors: the failure by the District to assess Jeffrey at an earlier stage; and the insufficiently intensive remediation provided by the District for Jeffrey's learning disability in order for him to get access to the education he was entitled to. Only the second is in issue before us, since the conclusions about early assessment which were quashed by the reviewing court, were not appealed to this Court. That leaves only the issue of the sufficiency of the services given to Jeffrey by the District.

41 There is no doubt that Jeffrey received some special education assistance until Grade 3, but in my view the Tribunal's conclusion that the remediation was far from adequate to give Jeffrey the education to which he was entitled, was fully supported by the evidence. To start, the Tribunal found that the Moores were told by District employees that Jeffrey required intensive remediation which, as a result of the closing of Diagnostic Centre, would only be available outside of the public school system. After Jeffrey's psycho-educational assessment in April 1994, Ms. Tennant concluded that he "needed more intensive remediation than he had been receiving", and recommended that he be considered for the Diagnostic Centre program. The Tribunal accepted the Moores' evidence that at a meeting with Ms. Tennant after this assessment, they were advised that since the Diagnostic Centre was not an option as a result of its pending closing, Kenneth Gordon School "was the only alternative that would provide the intense remediation that Jeffrey required".

42 The Tribunal also put great reliance on the views of Ms. Tennant and Ms. Waigh, who had "worked most closely with" Jeffrey at Braemar, and whose "professional judgment" it accepted. It found that Ms. Tennant had "recognized that Jeffrey needed intensive remediation in an alternate setting", and recommended that he look at the Diagnostic Centre. This recommendation was made "in addition to the Aide time to which Jeffrey was entitled under the provisions of the Collective Agreement". The Tribunal found that "Ms. Waigh agreed that Diagnostic Centre would have been beneficial to Jeffrey", and noted that

> Ms. Tennant described Jeffrey's case as one of the worst she had ever seen in her many years of experience. According to her, Jeffrey needed a high degree of intensive one-on-one instruction in a setting designed to minimize distractions. Her opinion was that Jeffrey needed intensive remediation which, in the District, was only offered by the Diagnostic Centre.

On the basis of this evidence, the Tribunal concluded that "[w]hile it is clear that the one-on-one attention he received was unusual, and that Ms. Waigh was a well-qualified specialist, the services were not intensive enough to meet his disability-related needs".

43 The Tribunal found that when the decision to close the Diagnostic Centre was made, the District did so without knowing how the needs of students like Jeffrey would be addressed, and without "undertak[ing] a needs-based analysis, consider[ing] what might replace Diagnostic Centre, or assess[ing] the effect of the closure on [Severe Learning Disabilities] students". The Tribunal noted that at the Board meeting on April 26, 1994, when the budget closing the Diagnostic Centre was approved, the Minutes stated that "[a]ll Trustees indicated in this discussion that they were adopting the bylaw as it was required by legislation and not because they believed it met the needs of the students". It concluded that Dr. Robin Brayne, the District's Superintendent of Schools, and the District in general "did not know how many students would be affected" by the closure. In fact, on the day of the Board vote, the District's Assistant Superintendent and the Coordinator of Student Services informed Dr. Brayne that it was "too early to know precisely how the needs of high incidence students will be addressed in the absence of the Diagnostic Centre".

44 Nor did the District consult Ms. Waigh or Ms. Tennant, despite their role in providing services to Severe Learning Disabilities students and their opposition to the closure. It was only at the end of June 1994, more than two months after the decision to close the Diagnostic Centre, that Dr. Brayne requested the development of a policy document to set out the District's plan for addressing the needs of Severe Learning Disabilities students in the absence of the Diagnostic Centre. The policy document was to be discussed in August, with training planned for the fall and winter of 1994/95. As a result, the Tribunal concluded that "nothing was in place in September when schools opened, other than what the schools already provided".

45 Moreover, the Tribunal rejected the District's argument that the educational philosophy of integration was "a consideration" in the closure of the Diagnostic Centre, since "[i]t was clear from the evidence of all of the District's witnesses that they thought the Diagnostic Centre provided a useful service". It noted that Dr. Brayne admitted in cross-examination that the closure was not motivated by educational policy, and acknowledged that "without [the] Diagnostic Centre, the range of options available to [Severe Learning Disabilities] students was reduced ... [and] according to the 1985 Manual, [the remaining resources] were not intended for [Severe Learning Disabilities] students". As a result, based on the "the evidence, the concurrent memoranda, and the speed at which the decision was made", the Tribunal concluded that "the *sole* reason for the closure was financial" (emphasis added).

46 The Tribunal was cognizant of the deference it owed to the District in delivering educational services, and the fact that Jeffrey's needs could have been met by means other than the Diagnostic Centre. In brief, the Tribunal found that when the decision to close the Diagnostic Centre was made, the District's motivations were exclusively financial, and it had failed to consider the consequences or plan for alternate accommodations.

47 This failure was crucial in light of the expert evidence that intensive supports were needed generally to remedy Jeffrey's learning disability, and that he had not received the support he needed in the public school system. The Tribunal acknowledged that it was impossible to compare Jeffrey's current abilities to what he might have achieved if he had received earlier and more intensive services. But while the failure to obtain a given result did not in itself constitute adverse treatment, the Tribunal accepted the evidence of two experts who, after examining Jeffrey, found that he "would have benefited from more intensive remediation earlier and from attending at the Diagnostic Centre".

48 It was therefore the combination of the clear recognition by the District, its employees and the experts that Jeffrey required intensive remediation in order to have meaningful access to education, the closing of the Diagnostic Centre, and the fact that the Moores were told that these services could not otherwise be provided by the District, that justified the Tribunal's conclusion that the failure of the District to meet Jeffrey's educational needs constituted *prima facie* discrimination. In my view, this conclusion is amply supported by the record.

49 The next question is whether the District's conduct was justified. At this stage in the analysis, it must be shown that alternative approaches were investigated (*British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U.*, [1999] 3 S.C.R. 3 (S.C.C.) ("*Meiorin*"), at para. 65). The *prima facie* discriminatory conduct must also be "reasonably necessary" in order to accomplish a broader goal (*Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202 (S.C.C.), at p. 208; *Renaud v. Central Okanagan School District No. 23*, [1992] 2 S.C.R. 970 (S.C.C.), at p. 984). In other words, an employer or service provider must show "that it could not have done anything else reasonable or practical to avoid the negative impact on the individual" (*Meiorin*, at para. 38; *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489 (S.C.C.), at pp. 518-19; *VIA Rail Canada Inc. v. Canadian Transportation Agency*, at para. 130).

50 The District's justification centred on the budgetary crisis it faced during the relevant period, which led to the closure of the Diagnostic Centre and other related cuts. There is no doubt that the District was facing serious financial constraints. Nor is there any doubt that this is a relevant consideration. It is undoubtedly difficult for administrators to implement education policy in the face of severe fiscal limitations, but accommodation is not a question of "mere efficiency", since "[i]t will always seem demonstrably cheaper to maintain the status quo and not eliminate a discriminatory barrier" (*VIA Rail*, at para. 125).

51 In Jeffrey's case, the Tribunal accepted that the District faced financial difficulties during the relevant period. Yet it also found that cuts were disproportionably made to special needs programs. Despite their similar cost, the District retained some discretionary programs, such as the Outdoor School — an outdoor campus where students learned about community and the environment — while eliminating the Diagnostic Centre. As Rowles J.A. noted, "without undermining the educational value of the Outdoor School, such specialized and discretionary initiatives cannot be compared with the accommodations necessary in order to make the core curriculum accessible to severely learning disabled students" (para. 154).

52 More significantly, the Tribunal found, as previously noted, that the District undertook *no* assessment, financial or otherwise, of what alternatives were or could be reasonably available to accommodate special needs students if the Diagnostic Centre were closed. This was cogently summarized by Rowles J.A. as follows:

> The Tribunal found that prior to making the decision to close [the] Diagnostic Centre, the District did not undertake a needs-based analysis, consider what might replace [the] Diagnostic Centre, or assess the effect of the closure on severely learning disabled students. The District had no specific plan in place to replace the services, and the eventual plan became learning assistance, which, by definition and purpose, was ill-suited for the task. The philosophy for the restructuring was not prepared until two months after the decision had been made (paras. 380-382, 387-401, 895-899). *These findings of fact of the Tribunal are entitled to deference, and undermine the District's submission that it discharged its obligations to investigate and consider alternative means of accommodating severely learning disabled students before cutting services for them.* Further, there is no evidence that the District considered cost-reducing alternatives for the continued operation of [the] Diagnostic Centre.
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> [Emphasis added; para. 143.]

The failure to consider financial alternatives completely undermines what is, in essence, the District's argument, namely that it was justified in providing no meaningful access to an education for Jeffrey because it had no economic choice. In order to decide that it had *no* other choice, it had at least to consider what those other choices were.

53 Given the Tribunal's findings that the District had other options for addressing its budgetary crisis, its conclusion that the District's conduct was not justified should not be disturbed. The finding of discrimination is thereby confirmed.

54 This brings us to the Province's role. The District's budgetary crisis was created, at least in part, by the Province's funding shortfalls. But in light of the Tribunal's finding that it was the District which failed to properly consider the

consequences of closing the Diagnostic Centre or how to accommodate the affected students, it seems to me that the conclusion that the Province was liable for the District's discriminatory conduct towards Jeffrey cannot be sustained.

55 This leads to considering the remedies imposed by the Tribunal which have been appealed to this Court. A remedial decision by the Tribunal is subject to a standard of patent unreasonableness according to s. 59 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45.

56 The Tribunal awarded the Moores the amount of tuition paid for Jeffrey to attend Kenneth Gordon School and Fraser Academy, up to and including Grade 12, half of the costs incurred for his transportation to and from those schools, and $10,000 for "the injury to [Jeffrey's] dignity, feelings and self-respect". This order, it seems to me, is sustainable given the actual scope of the complaint.

57 But the Tribunal's systemic remedies are so remote from the scope of the complaint, that in my view they reach the threshold set out in s. 59 of the *Administrative Tribunals Act*. Those problematic remedies are:

- That the Province allocate funding on the basis of actual incidence levels, establish mechanisms ensuring that accommodations for Severe Learning Disabilities students are appropriate and meet the stated goals in legislation and policies, and ensure that districts have a range of services to meet the needs of Severe Learning Disabilities students.

- That the District establish mechanisms to ensure that its delivery of services to Severe Learning Disabilities students meet the stated goals in legislation and policies, and ensure that it had a range of services to meet the needs of Severe Learning Disabilities students.

- The Tribunal remained seized of the matter to oversee the implementation of its remedial orders.

58 Having first found that Jeffrey had suffered discrimination at the hands of the District, the Tribunal then considered whether the broader policies of the District and the Province constituted systemic discrimination. I think this flows from the fact that it approached discrimination in a binary way: individual and systemic. It was, however, neither necessary nor conceptually helpful to divide discrimination into these two discrete categories. A practice is discriminatory whether it has an unjustifiably adverse impact on a single individual or systemically on several: *Griggs v. Duke Power Co.* (1971), 401 U.S. 424 (U.S. N.C. S.C. 1971). The only difference is quantitative, that is, the number of people disadvantaged by the practice.

59 In *Canadian National Railway v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114 (S.C.C.), this Court first identified 'systemic discrimination' by name. It defined it as "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 attributed rather than actual characteristics" (p. 1138). Notably, however, the designation did not change the analysis. The considerations and evidence at play in a group complaint may undoubtedly differ from those in an individual complaint, but the focus is always on whether the complainant has suffered arbitrary adverse effects based on a prohibited ground.

60 The inquiry is into whether there is discrimination, period. The question in every case is the same: does the practice result in the claimant suffering arbitrary — or unjustified — barriers on the basis of his or her membership in a protected group. Where it does, discrimination will be established.

61 It is true that before *Meiorin* and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 (S.C.C.) ("*Grismer*"), different remedial approaches had been applied for direct versus adverse impact discrimination. But in *Meiorin*, McLachlin J. observed that since few rules are framed in directly discriminatory terms, the human rights issue will generally be whether the claimant has suffered adverse effects. Insightfully, she commented that upholding a remedial distinction between direct and adverse effect discrimination "may, in practice, serve to legitimize systemic discrimination" (para. 39). The *Meiorin*/*Grismer* approach imposed a unified

remedial theory with two aspects: the removal of arbitrary barriers to participation by a group, and the requirement to take positive steps to remedy the adverse impact of neutral practices.

62 *Meiorin* and *Grismer* also directed that practices that are neutral on their face but have an unjustifiable adverse impact based on prohibited grounds will be subject to a requirement to "accommodate the characteristics of affected groups within their standards, rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them" (*Grismer*, at para. 19).

63 In that sense, it is certainly true that a remedy for an individual claimant can have a 'systemic' impact. In *Grismer*, for example, the issue was a rule that excluded individuals with a medical condition affecting peripheral vision — homonymous hemianopia — from obtaining a drivers' licence. The Court concluded that this rule had a discriminatory impact on Mr. Grismer and upheld the Tribunal's order that the Superintendent test Mr. Grismer individually. Although the remedy was individual to Mr. Grismer, it clearly had remedial consequences for others in his circumstances. Similarly, a finding that Jeffrey suffered discrimination and was entitled to a consequential personal remedy, has clear broad remedial repercussions for how other students with severe learning disabilities are educated.

64 But the remedy must flow from the claim. In this case, the claim was made on behalf of Jeffrey, and the evidence giving concrete support to the claim all centred on him. While the Tribunal was certainly entitled to consider systemic evidence in order to determine whether Jeffrey had suffered discrimination, it was unnecessary for it to hold an extensive inquiry into the precise format of the provincial funding mechanism or the entire provincial administration of special education in order to determine whether *Jeffrey* was discriminated against. The Tribunal, with great respect, is an adjudicator of the particular claim that is before it, not a Royal Commission.

65 The connection between the high incidence/low cost cap and the closure of the Diagnostic Centre is remote, given the range of factors that led to the District's budgetary crisis. There is no particular reason to think that these funding mechanisms could not be retained in some form while still ensuring that Severe Learning Disabilities students receive adequate support. It is entirely legitimate for the Province to choose a block funding mechanism in order to ensure that districts do not have an incentive to over-report Severe Learning Disabilities students, so long as it *also* complies with its human rights obligations. In other words, while systemic evidence can be instrumental in establishing a human rights complaint, the evidence about the provincial funding regime, and the high incidence/lost cost cap in particular, was too remote to demonstrate discrimination against *Jeffrey*. And the Tribunal's orders that the District establish mechanisms to ensure that accommodations for Severe Learning Disabilities students meet the stated goals in legislation and policies, and provide a range of services to meet their needs, in any event, essentially direct the District to comply with the *Human Rights Code*. They are, to that extent, redundant.

66 Moreover, the Tribunal's order that it remain seized of the matter to oversee implementation is hardly suited to a claim brought on behalf of an individual student who has finished his high school education and will not re-enter the public school system. It goes without saying that if the District is to avoid similar claims such as those Jeffrey brought, it will have to ensure that it provides a range of services for special needs students in accordance with the *School Act* and its related policies. There is no remaining need for the Tribunal to remain seized of the matter in order to satisfy *Jeffrey*'s claim.

67 In fairness to the Tribunal, I think the fact that the scope of the inquiry and the resulting remedial orders were expanded beyond Jeffrey's actual complaints can be traced to the unusual procedural history of this case. Frederick Moore's initial complaints under s. 8 alleged that the District and the Province had failed to identify Jeffrey's disability early enough and failed to provide him with sufficient support to enable him to access public education. He also complained that the District and the Province had failed to properly fund, support and monitor special education throughout the Province.

68 In a preliminary decision on the scope of the complaint and the required disclosure, a Tribunal member allowed the Moores to lead systemic evidence establishing the complaint. However, she properly noted that "[a]lthough

systemic discrimination does not have to be specifically pleaded, it must relate to the complaint *as framed by the Complainant*" (emphasis added). This, I think, was a clear direction to the Tribunal hearing the merits of the case that while systemic *evidence* could be helpful, the *claim* should remain centred on Jeffrey.

69 But the issue was complicated on judicial review where, in upholding this preliminary decision, Shaw J. said that the complaint "*includes* allegations of province-wide systemic discrimination by the Ministry against dyslexic students" (88 B.C.L.R. (3d) 343 (B.C. S.C.) [*British Columbia (Ministry of Education) v. Moore*] (emphasis added)). This does not appear to have been challenged before the Tribunal, and I think it was on this basis that the Tribunal appears to have departed from the actual focus of the complaint — Jeffrey — and imposed systemic remedies based on its systemic conclusions.

70 This does not in any way detract, however, from the cogency of the Tribunal's core analysis. Its finding of discrimination against Jeffrey Moore by the District should be upheld, as should the individual orders, which reimburse the Moores for the cost of private schooling and award them damages. These orders properly seek to compensate them for the harm that Jeffrey suffered and were well within the Tribunal's broad remedial authority. Given my earlier comments on the liability of the Province, however, the order for reimbursement and damages should apply only against the District. I would, however, set aside the remaining orders.

71 The appeal is therefore substantially allowed as discussed, with costs to the Moores throughout since they were successful in upholding the central finding that there was discrimination.

Appeal substantially allowed.

Pourvoi accueilli en grande partie.

Footnotes

1 S.B.C. 1989, c. 61, as amended in 1993 (*School Amendment Act*, 1993, c. 6).

Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): R. c. Baillargeon | 2016 QCCS 4443, 2016 CarswellQue 8593, EYB 2016-270429, 134 W.C.B. (2d) 330 | (C.S. Qué., Aug 23, 2016)

2013 SCC 43
Supreme Court of Canada

R. v. Imona-Russell

2013 CarswellOnt 10507, 2013 CarswellOnt 10508, 2013 SCC 43, [2013] 3 S.C.R. 3, [2013] S.C.J. No. 43, 108 W.C.B. (2d) 211, 291 C.R.R. (2d) 265, 300 C.C.C. (3d) 137, 308 O.A.C. 347, 363 D.L.R. (4th) 17, 447 N.R. 111, 4 C.R. (7th) 1, J.E. 2013-1364, EYB 2013-225080

Her Majesty The Queen, Appellant and Criminal Lawyers' Association of Ontario and Lawrence Greenspon, Respondents and Attorney General of Canada, Attorney General of Quebec, Attorney General of Manitoba, Attorney General of British Columbia, British Columbia Civil Liberties Association, Advocates' Society and Mental Health Legal Committee, Interveners

McLachlin C.J.C., LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner JJ.

Heard: December 12, 2012
Judgment: August 1, 2013
Docket: 34317

Proceedings: reversing *R. v. Imona-Russell* (2011), 2011 CarswellOnt 2608, 2011 ONCA 303, 104 O.R. (3d) 721, 86 C.R. (6th) 407, 234 C.R.R. (2d) 157, *(*sub nom. *R. v. Russel)* 277 O.A.C. 264, *(*sub nom. *R. v. Russel)* 270 C.C.C. (3d) 256 (Ont. C.A.)**Proceedings: affirming *R. v. Imona-Russell* (2009), 2009 CarswellOnt 9725 (Ont. S.C.J.)Proceedings: & affirming *Greenspon v. R.* (2009), 2009 CarswellOnt 7359 (Ont. S.C.J.)Proceedings: & affirming *R. v. Imona-Russell* (2010), 2010 CarswellOnt 10747 (Ont. S.C.J.)**

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Subject: Criminal; Civil Practice and Procedure; Constitutional; Public; Torts

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Criminal law

VIII Trial procedure
VIII.2 Preliminary matters

VIII.2.c Powers of court
VIII.2.c.xi Miscellaneous

Headnote

Criminal law --- Trial procedure — Preliminary matters — Powers of court — Miscellaneous

Court appointed amici curiae in four proceedings, and ordered Crown to pay rate higher than legal aid rate — Crown's appeal in all four cases was dismissed — Appellate court found judges of both superior courts and statutory courts had jurisdiction to appoint amicus curiae — Crown appealed — Appeal allowed — Absent statutory authority or constitutional challenge, courts do not have institutional jurisdiction to interfere with allocation of public funds — Court's control over its process allows for appointment of amicus curiae but does not provide power to determine what Attorney General must pay them — Amici may be appointed when they are essential to judge discharging judicial functions — Appointing amici to mirror role of defence counsel blurs lines between roles in that appointment might conflict with constitutional right to self-representation, might defeat judicial determinations to deny state-funded counsel, and could create conflict between duty to accused and their duty to court — Lawyer appointed as amicus who takes on role of defence counsel is no longer friend of court — Order that Attorney General must provide compensation at particular rate goes beyond order with ancillary financial consequences, and becomes order directing Attorney General to pay specific monies out of public funds — Fixing and managing fees would imperil integrity of judicial process — Judge should not make orders regarding payment that Attorney General would have no choice but to obey — If assistance of amicus is truly essential and matter cannot be amicably resolved between amicus and Attorney General, stay may be imposed — Allowing judges to instruct Attorney General regarding allocation of funds in piecemeal and inconsistent fashion would potentially undermine legal aid system.

Droit criminel --- Procédure lors du procès — Questions préliminaires — Pouvoirs du tribunal — Divers

Tribunal a nommé des amici curiæ dans quatre dossiers et a ordonné au ministère public de verser une rémunération à un taux plus généreux que celui de l'aide juridique — Appel interjeté par le ministère public dans chacun des dossiers a été rejeté — Cour d'appel a conclu que les cours supérieures de même que les tribunaux d'origine législative avaient compétence pour nommer un amicus curiæ — Ministère public a formé un pourvoi — Pourvoi accueilli — En l'absence d'une habilitation découlant d'une disposition législative ou d'une contestation constitutionnelle, une cour de justice n'a pas de compétence institutionnelle pour s'immiscer dans l'affectation de fonds publics — Pouvoir d'une cour de justice de faire respecter sa procédure lui permet de procéder à la nomination d'un amicus curiæ, mais pas de déterminer ce que le procureur général doit lui verser comme rémunération — Il est possible de procéder à la nomination d'amici si cela est essentiel pour permettre au juge de s'acquitter de sa fonction judiciaire — Si l'on nomme un amicus pour qu'il remplisse un rôle s'apparentant à celui de l'avocat de la défense, cela brouille la ligne de séparation entre ces deux fonctions en ce que la nomination risquerait d'entrer en conflit avec le droit constitutionnel d'un accusé d'assurer sa propre défense, risquerait d'aller à l'encontre de la décision d'un tribunal de refuser les services d'un avocat rémunéré par l'État et serait susceptible de créer un conflit entre les obligations de l'amicus envers l'accusé et ses obligations envers la cour — Avocat nommé comme amicus qui joue le rôle d'un avocat de la défense n'est plus un ami de la cour — Ordonnance qui enjoint au procureur général de rémunérer une personne selon un taux précis n'est plus une ordonnance qui a une incidence financière accessoire, mais bien une ordonnance qui somme le procureur général de verser telle somme prélevée sur le trésor — En fixant la rémunération et en la gérant, le tribunal risquerait de compromettre l'intégrité du processus judiciaire — Juge devrait s'abstenir de rendre une ordonnance concernant une rémunération à laquelle le procureur général n'aurait d'autre choix que d'obéir — Lorsque le recours à un amicus est vraiment essentiel et que l'avocat pressenti et le procureur général ne parviennent pas à s'entendre à l'amiable, la suspension de l'instance peut être ordonnée — Permettre aux juges d'ordonner au procureur général d'affecter des fonds de manière sporadique et contradictoire pourrait saper le régime d'aide juridique.

The court appointed amici curiae in four proceedings, and ordered the Crown to pay a rate higher than the legal aid rate.

In the case of the accused R, who was charged with first degree murder, there were two such appointments, because he had dismissed several counsel who had been working under legal aid certificates. The first appointment was not made by the trial judge but the second was. The first appointment was at legal aid rates, but the circumstances and involvement by the amicus changed substantially such that, over the objections of the Crown, the trial judge later modified the terms and conditions of the amicus provide for higher compensation and junior counsel. Legal Aid was to manage and monitor the accounts of the amicus, but when the amicus exceeded the budgeted hours for preparation, he applied to the trial judge, who appointed a third party assessor, again over Crown objections.

In the accused W's case, he had been convicted of several serious indictable offences and the Crown launched dangerous offender proceedings against him. He had dismissed two counsel. The trial judge appointed an amicus in whom the accused had confidence and rejected the Crown argument that legal aid counsel should be appointed. The trial judge also set compensation at a rate higher than the legal aid rate.

In the accused D's case, he had been charged with first degree murder along with five others. G had represented him for the nearly five years before the trial was to begin, but D discharged him. The trial judge appointed G as an amicus for D to ensure that the trial would proceed. Subsequently, D obtained new counsel. G applied to the trial judge to be compensated for preparation and other time, but the trial judge ordered only a limited amount of compensation.

The Crown's appeal in all four cases was dismissed. The Crown claimed that the courts did not have jurisdiction to set the terms and conditions, including compensation rates and monitoring of accounts.

The appellate court found judges of both superior courts and statutory courts had the jurisdiction to appoint amicus curiae. There was jurisdiction under the Canadian Charter of Rights and Freedoms to do so in order to avoid a Charter violation and, as a necessary incident of that jurisdiction, there was the power to set the rate of compensation. As well, for both superior and statutory courts, where the Charter was not applicable, there was an inherent power to appoint an amicus in order to control the processes of the court.

The appellate court found there was no fixed role for an amicus curiae. It was therefore a matter for the court, rather than the Attorney General or Crown counsel, to set the terms of appointment, including the rate of compensation, of an amicus. This did not offend the constitutional principle that only the legislature may allocate the expenditure of public funds, since setting the rate of compensation was a necessary incident of the power to appoint amici. Moreover, Ontario legislation authorized the spending of public funds in order to satisfy a court order.

The appellate court found the appointments and their terms and conditions were appropriate. While caution should be exercised by the courts in making orders that in effect authorize the expenditure of public funds, temporary stays were not appropriate in these cases because the appointments were made in order to have the cases proceed. The role of the amicus in each case was more substantial than the usual role of defence counsel and therefore it was appropriate for higher rates of compensation to be ordered. Because the orders were matters of judgment, it was not necessary for there to have been evidence in support of the rates of compensation that were ordered.

The Crown appealed.

Held: The appeal was allowed.

Per Karakatsanis J. (McLachlin C.J.C., Rothstein, Moldaver, Wagner JJ. concurring): Absent statutory authority or a constitutional challenge, courts do not have the institutional jurisdiction to interfere with the allocation of public funds. The court's control over its process allows for the appointment of amicus curiae but does not provide the power to determine what the Attorney General must pay them.

Amici may be appointed when they are essential to the judge discharging judicial functions. The authority of appointment must be used sparingly.

Appointing amici to mirror the role of defence counsel blurs the lines between the roles in that the appointment might conflict with the constitutional right to self-representation, might defeat judicial determinations to deny state-funded counsel, and could create conflict between the duty to the accused and their duty to the court. A lawyer appointed as an amicus who takes on the role of defence counsel is no longer a friend of the court.

The government bears the responsibility for weighing public priorities, designing programs and allocating resources. An order that the Attorney General must provide compensation at a particular rate goes beyond an order with ancillary financial consequences, and becomes an order directing the Attorney General to pay specific monies out of public funds. Such orders must be grounded in law, either from the court's inherent or implied jurisdiction, specific statutory authority, or a challenge under the Charter. The court's inherent or implied jurisdiction granted the power to set terms for the appointment of amici, but not to set costs. Fixing and managing fees would imperil the integrity of the judicial process. A judge should not make orders regarding payment that the Attorney General would have no choice but to obey. If the assistance of an amicus is truly essential and the matter cannot be amicably resolved between the amicus and the Attorney General, a stay may be imposed. Allowing judges to instruct the Attorney General regarding allocation of funds in a piecemeal and inconsistent fashion would potentially undermine the legal aid system.

Per Fish J. (dissenting) (LeBel, Abella, Cromwell JJ. concurring): The jurisdiction to fix the fees of amici curiae is necessarily incidental to the power of trial judges to appoint them. There is no constitutional impediment to vesting in trial judges the authority to do so when necessary. In the case of statutory courts, the power to appoint an amicus derives from the court's authority to control its own process in order to administer justice fully and effectively. The discretion of trial judges to appoint an amicus is not unrestricted. The power to appoint should be exercised sparingly and with caution and appointments should be in response to specific and exceptional circumstances.

A necessary corollary to a trial judge's power to appoint an amicus is the power to fix the amicus's remuneration. To not do so would unduly weaken the courts' appointment power and ability to name an amicus of their choosing. The integrity of the judicial process would be imperiled and should not be dependent on the conduct of the Crown. The impression of bias and a conflict of interest might result.

No constitutional impediment existed to a trial judge ordering the Ministry of the Attorney General to pay an amicus at a specific rate of remuneration fixed by the court. A consensual approach and good faith negotiations should be used to arrive at a rate of pay. The legal aid tariff should be taken into account but is not determinative.

Le tribunal a nommé des amici curiæ dans le cadre de quatre affaires et a ordonné au ministère public de verser un tarif plus élevé que celui de l'aide juridique.

Dans le dossier de l'accusé R, qui a été inculpé de meurtre au premier degré, il y a eu deux nominations, en raison du fait que l'accusé avait congédié plusieurs avocats ayant reçu un mandat de l'aide juridique. La juge du procès n'a pas procédé à la première nomination, mais à la deuxième. La première nomination a été proposée au taux de l'aide juridique, mais les circonstances et l'implication de l'amicus ont changé considérablement de telle sorte qu'en dépit

des objections du ministère public, la juge du procès a modifié les conditions d'embauche de l'amicus et a accordé une rémunération plus généreuse et a nommé un avocat moins expérimenté. Il revenait au bureau de l'aide juridique de gérer et de surveiller les comptes de l'amicus, mais lorsque l'amicus a excédé le nombre d'heures prévues au budget pour la préparation du procès, il a demandé à la juge du procès que l'on nomme un tiers évaluateur, toujours en dépit des objections du ministère public.

Dans le dossier de l'accusé W, ce dernier avait été déclaré coupable de plusieurs infractions criminelles graves et le ministère public avait entrepris des procédures afin de faire déclarer W délinquant dangereux. Ce dernier a congédié deux avocats. Le juge du procès a nommé un amicus en qui l'accusé avait confiance et n'a pas retenu l'opinion du ministère public selon qui un avocat de l'aide juridique devrait être nommé. Le juge du procès a également fixé la rémunération à un taux plus généreux que celui de l'aide juridique.

Dans le dossier de l'accusé D, ce dernier avait été inculpé de meurtre au premier degré en compagnie de cinq coaccusés. G l'avait représenté pendant presque cinq ans avant la tenue du procès, puis D l'a congédié. Afin de s'assurer que le procès puisse débuter, le juge du procès a nommé G à titre d'amicus pour assister D. Par la suite, D a trouvé un nouvel avocat. G a demandé au juge du procès d'être rémunéré pour la préparation du procès et d'autres tâches, mais le juge du procès n'a accordé qu'un montant limité à titre de rémunération.

L'appel interjeté par le ministère public dans chacun des quatre dossiers a été rejeté. Le ministère public faisait valoir que les tribunaux n'avaient pas compétence pour fixer les conditions de nomination, y compris le taux de rémunération et la surveillance des comptes.

La Cour d'appel a conclu que les juges des cours supérieures de même que les tribunaux d'origine législative avaient compétence pour nommer un amicus curiæ. Cette compétence, découlant de la Charte canadienne des droits et libertés, visait à éviter qu'une atteinte à la Charte ne se produise et, comme pouvoir ancillaire de cette compétence, ces tribunaux pouvaient fixer le taux de rémunération. Aussi, dans les cas où la Charte ne trouvait pas application, les cours supérieures ainsi que les tribunaux d'origine législative avaient le pouvoir inhérent de nommer un amicus afin de faire respecter la procédure.

La Cour d'appel a conclu que le rôle d'un amicus curiæ n'était pas toujours le même. Il appartenait, par conséquent, au tribunal, et non au procureur général ou à l'avocat du ministère public, de fixer les conditions de nomination d'un amicus, y compris le taux de rémunération. Cela ne contrevenait pas au principe constitutionnel voulant que seul le législateur puisse affecter des fonds publics, puisque la fixation du taux de rémunération était un pouvoir ancillaire indispensable découlant du pouvoir de nommer des amici. De plus, la législation ontarienne autorisait l'affectation de fonds publics pour permettre la mise en oeuvre d'une ordonnance du tribunal.

La Cour d'appel a conclu que les nominations et les conditions dont elles étaient assorties étaient appropriées. Bien que les tribunaux doivent faire preuve de prudence en prononçant des ordonnances ayant pour effet d'autoriser l'affectation de fonds publics, une suspension temporaire d'instance n'était pas indiquée dans les trois dossiers puisque les nominations avaient pour but de permettre la tenue des procès. Le rôle de l'amicus dans chacun des dossiers était plus important que celui joué habituellement par l'avocat de la défense et, conséquemment, il était approprié qu'un taux de rémunération plus généreux soit accordé. Comme le prononcé des ordonnances était une question de jugement, il n'était pas nécessaire que la fixation des taux de rémunération soit étayée par une preuve.

Le ministère public a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Karakatsanis, J. (McLachlin, J.C.C., Rothstein, Moldaver, Wagner, JJ., souscrivant à son opinion) : En l'absence d'une habilitation découlant d'une disposition législative ou d'une contestation constitutionnelle, une cour de justice n'a pas de compétence institutionnelle pour s'immiscer dans l'affectation de fonds publics. Le pouvoir d'une cour de justice de faire respecter sa procédure lui permet de procéder à la nomination d'un amicus curiæ, mais pas de déterminer ce que le procureur général doit lui verser comme rémunération.

Il est possible de procéder à la nomination d'amici si cela est essentiel pour permettre au juge de s'acquitter de sa fonction judiciaire. Le pouvoir de nommer un amicus doit être exercé parcimonieusement.

Si l'on nomme un amicus pour qu'il remplisse un rôle s'apparentant à celui de l'avocat de la défense, cela brouille la ligne de séparation entre ces deux fonctions en ce que la nomination risquerait d'entrer en conflit avec le droit constitutionnel d'un accusé d'assurer sa propre défense, risquerait d'aller à l'encontre de la décision d'un tribunal de refuser les services d'un avocat rémunéré par l'État et serait susceptible de créer un conflit entre les obligations de l'amicus envers l'accusé et ses obligations envers la cour. Un avocat nommé comme amicus qui joue le rôle d'un avocat de la défense n'est plus un ami de la cour.

Il incombe au gouvernement de déterminer les priorités publiques, de concevoir les programmes qui s'imposent puis d'affecter des ressources. Une ordonnance qui enjoint au procureur général de rémunérer une personne selon un taux précis n'est plus une ordonnance qui a une incidence financière accessoire, mais bien une ordonnance qui somme le procureur général de verser telle somme prélevée sur le trésor. Une telle ordonnance doit s'appuyer sur une règle de droit, que ce soit la compétence inhérente ou tacite de la cour, une autorisation légale expresse ou une contestation fondée sur la Charte. La compétence inhérente ou tacite de la cour permettait de fixer les conditions de nomination des amici, mais pas de déterminer la rémunération. En fixant la rémunération et en la gérant, le tribunal risquerait de compromettre l'intégrité du processus judiciaire. Un juge devrait s'abstenir de rendre une ordonnance concernant une rémunération à laquelle le procureur général n'aurait d'autre choix que d'obéir. Lorsque le recours à un amicus est vraiment essentiel et que l'avocat pressenti et le procureur général ne parviennent pas à s'entendre à l'amiable, la suspension de l'instance peut être ordonnée. Permettre aux juges d'ordonner au procureur général d'affecter des fonds de manière sporadique et contradictoire pourrait saper le régime d'aide juridique.

Fish, J. (dissident) (LeBel, Abella, Cromwell, JJ., souscrivant à son opinion) : Le pouvoir du juge du procès de fixer les honoraires de l'amicus curiæ est nécessairement accessoire à son pouvoir de le nommer. Nulle disposition constitutionnelle ne fait obstacle à l'octroi au juge du procès du pouvoir de déterminer les honoraires de l'amicus lorsque la situation l'exige. Dans le cas d'un tribunal d'origine législative, le pouvoir de nommer un amicus découle de la maîtrise de sa propre procédure aux fins de l'administration efficace et sans réserve de la justice. Le pouvoir discrétionnaire du juge du procès de nommer un amicus n'est pas absolu. Il doit être exercé parcimonieusement et avec circonspection et lorsque des circonstances particulières et exceptionnelles se présentent.

Le pouvoir du juge du procès de fixer la rémunération de l'amicus découle nécessairement du pouvoir qu'il a de le nommer. Si cela n'était pas le cas, il en résulterait un affaiblissement injustifié du pouvoir de nomination du tribunal et de sa faculté de nommer l'amicus de son choix. L'intégrité du processus judiciaire serait compromise et ne devrait pas être dépendante du comportement du ministère public. Cela pourrait créer une apparence de partialité ainsi qu'un conflit d'intérêts.

Nulle disposition constitutionnelle ne fait obstacle à ce qu'un tribunal ordonne au ministère du Procureur général de rémunérer un amicus à raison d'un taux fixé par ce tribunal. On devrait favoriser la démarche consensuelle ainsi que des négociations de bonne foi en vue de fixer le taux de rémunération. On devrait tenir compte du tarif de l'aide juridique, mais cet élément n'est pas décisif.

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R. v. Samra (1998), 129 C.C.C. (3d) 144, 1998 CarswellOnt 3601, 112 O.A.C. 328, 41 O.R. (3d) 434 (Ont. C.A.) — considered in a minority or dissenting opinion

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Statutes considered by *Karakatsanis J.*:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
Generally — referred to

s. 24(1) — considered

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5
Generally — referred to

s. 63 — considered

s. 92 ¶ 14 — considered

s. 96 — considered

Criminal Code, R.S.C. 1985, c. C-46
s. 694.1(1) [en. R.S.C. 1985, c. 34 (3rd Supp.), s. 13] — referred to

s. 694.1(3) [en. R.S.C. 1985, c. 34 (3rd Supp.), s. 13] — referred to

Legal Aid Manitoba Act, R.S.M. 1987, c. L105
s. 3(2) — considered

Legal Aid Services Act, 1998, S.O. 1998, c. 26
Generally — referred to

Ministry of the Attorney General Act, R.S.O. 1990, c. M.17
s. 5 — referred to

Supreme Court Act, R.S.C. 1985, c. S-26
s. 53(7) — considered

Statutes considered by *Fish J.* (dissenting):

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Generally — referred to

s. 24(1) — considered

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5
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s. 684 — referred to

Financial Administration Act, R.S.O. 1990, c. F.12
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s. 11.1(1) [en. 2002, c. 8, Sched. B, s. 2] — referred to

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Words and phrases considered:

amicus curiae

It is not disputed that a court may appoint a lawyer as amicus curiae, a friend of the court, to assist the court in exceptional circumstances

amicus

...[A] lawyer appointed as amicus who takes on the role of defence counsel is no longer a friend of the court.

Termes et locutions cités :

amicus curiæ

Nul ne conteste qu'une cour de justice peut nommer un avocat « amicus curiæ » (ou « ami de la cour ») pour l'épauler dans une situation exceptionnelle

amicus

. . . [U]ne fois nommé amicus, l'avocat qui accepte de tenir le rôle d'avocat de la défense n'est plus l'ami de la cour.

APPEAL by Crown from judgment reported at *R. v. Imona-Russell* (2011), 2011 CarswellOnt 2608, 2011 ONCA 303, 104 O.R. (3d) 721, 86 C.R. (6th) 407, 234 C.R.R. (2d) 157, *(*sub nom. *R. v. Russel)* 277 O.A.C. 264, *(*sub nom. *R. v. Russel)* 270 C.C.C. (3d) 256 (Ont. C.A.), dismissing Crown's appeal from three judgments regarding payment of amici curiae.

POURVOI formé par le ministère public à l'encontre d'un jugement publié à *R. v. Imona-Russell* (2011), 2011 CarswellOnt 2608, 2011 ONCA 303, 104 O.R. (3d) 721, 86 C.R. (6th) 407, 234 C.R.R. (2d) 157, *(*sub nom. *R. v. Russel)* 277 O.A.C. 264, *(*sub nom. *R. v. Russel)* 270 C.C.C. (3d) 256 (Ont. C.A.), ayant rejeté l'appel interjeté par le ministère public à l'encontre de trois jugements concernant la rémunération des amici curiæ.

***Karakatsanis J.* (McLachlin C.J.C. and Rothstein, Moldaver and Wagner JJ. concurring):**

I. Introduction

1 This case raises troubling implications that strike to the heart of the constitutional relationship between the judicial and other branches of government in our constitutional democracy.

2 It is not disputed that a court may appoint a lawyer as "*amicus curiae*", a "friend of the court", to assist the court in exceptional circumstances; or that the Attorney General is obligated to pay *amici curiae* when appointed. What is at issue is whether a court's inherent or implied jurisdiction extends to fixing the rates of compensation for *amici curiae*.

3 In the four matters under appeal, which all arose in the context of criminal proceedings in Ontario, trial judges appointed *amici curiae*, set higher rates of compensation than those offered by the Attorney General of Ontario and ordered the Attorney General to pay. The Attorney General took the position that, in these cases, the *amici* played a role similar to that of defence counsel and should accept legal aid rates. The Court of Appeal concluded that provincial and superior courts have the jurisdiction to fix the rates of compensation. The Attorney General appeals that decision, although it does not seek the return of any monies paid.

4 My colleague Fish J. concludes that the jurisdiction to fix the fees of *amici curiae* is necessarily incidental to a court's power to appoint them. He finds no constitutional impediment to this power.

5 Respectfully, I disagree. Absent statutory authority or a challenge on constitutional grounds, courts do not have the institutional jurisdiction to interfere with the allocation of public funds. While the jurisdiction to control court processes and function as a court of law gives courts the power to appoint *amici curiae*, it does not, in itself, provide the power to determine what the Attorney General must pay them. The scope of a superior court's inherent power, or of powers possessed by statutory courts by necessary implication, must respect the constitutional roles and institutional capacities of the legislature, the executive and the judiciary. As the Chief Law Officers of the Crown, responsible for the administration of justice on behalf of the provinces, the Attorneys General of the provinces, and not the courts, determine the appropriate rate of compensation for *amici curiae*.

6 For the reasons that follow, I would allow the appeal.

II. Background

7 These cases were not decided under the *Canadian Charter of Rights and Freedoms*. They did not proceed on the basis that the accused could not have fair trials without the assistance of counsel. Instead, the trial judges appointed counsel to assist the accused, who had in each case discharged counsel of their choice. The judges did so in order to maintain the orderly conduct of the trials or to avoid delay in these complex, lengthy proceedings. However, in each of these cases, the role of the *amici* closely mirrored the role of defence counsel, except that they could not be dismissed by the accused.

8 In *R. v. Imona-Russell*, 2009 CarswellOnt 9725 (Ont. S.C.J.) ("*Imona Russel #1*"), an *amicus* was appointed, at the request of the Crown, "to ensure the orderly conduct of the trial" (para. 6). The accused had discharged several experienced legal aid counsel and the court had twice refused the accused's request for an order under s. 24(1) of the *Charter* providing state-funded counsel in order to ensure a fair trial. The role of *amicus* was initially expanded so that he would "defend the case as if he had a client who was choosing to remain mute" (para. 13). Subsequently, at the request of the accused, the trial judge told the *amicus* to take instructions from and act on behalf of the accused as he would in a traditional solicitor-client relationship — except he could not be discharged or withdraw due to a breakdown in the relationship with the accused. Later, after the *amicus* applied for permission to withdraw from the case, the trial judge appointed a senior criminal lawyer to set a budget for the *amicus* and to review, monitor and assess his accounts on an ongoing basis (*R. v. Imona-Russell*, 2010 CarswellOnt 10747 (Ont. S.C.J.) ("*Imona Russel #2*").

9 In *R. v. Whalen* (September 18, 2009), Doc. 2178/1542 (Ont. C.J.), a dangerous offender application, the respondent was unrepresented and had a history of discharging lawyers. He had difficulty finding legal aid counsel, due to a boycott of legal aid cases by many members of Ontario's criminal defence bar. The judge appointed an *amicus* to "stabilize the litigation process" (A.R., at p. 26). Although the Attorney General had found other counsel who were available to act at legal aid rates, the respondent had developed a relationship of confidence with a particular lawyer who would not accept the legal aid rate. An *amicus* was appointed to establish a solicitor-client relationship with the respondent, with the ability to override the respondent's instructions in his best interest.

10 In *Greenspon v. R.*, 2009 CarswellOnt 7359 (Ont. S.C.J.), a former counsel, who had been discharged by one of six co-accused, was appointed as *amicus*. This was done to avoid delay, in the event that the accused could not find counsel ready to act in time. Ultimately, the accused found counsel who was able to proceed without delay and the *amicus* was not required.

11 In each of these cases, the *amicus* refused to accept the legal aid rate offered by the Attorney General. The trial judge fixed a rate that exceeded the tariff, ordering the Attorney General to pay. The Attorney General appealed all four decisions.

III. Decision of the Court of Appeal, 2011 ONCA 303, 104 O.R. (3d) 721 (Ont. C.A.)

12 The Court of Appeal considered the four appeals together and affirmed the decisions, as it was of the view that superior and statutory courts have the jurisdiction to appoint *amici* even where s. 24(1) of the *Charter* does not apply and there is no statutory provision for such an appointment. The capacity of a superior court to appoint an *amicus* stems from the court's inherent jurisdiction to act where necessary to ensure that justice can be done. For a statutory court, the capacity stems from the court's power to manage its own process and operate as a court of law, and arises in situations where the court must be able to appoint an *amicus* in order to exercise its statutory jurisdiction.

13 The Court of Appeal concluded that in order to ensure that serious criminal cases can proceed where difficulty is caused by an unrepresented accused, judges must have the ability to secure the assistance of an *amicus*. To the extent that the ability to fix rates of compensation for *amici* is linked to the capacity to appoint them, it should not be left in the hands of the Attorney General. The court concluded that this authority did not raise any institutional issues or social, economic or political policy concerns.

IV. Analysis

14 My colleague Fish J. provides three reasons for finding the power to set the rate of compensation to be incidental to a superior court's inherent jurisdiction and a statutory court's power to control its own processes: (1) the inability to set rates of compensation would unduly weaken the court's appointment power and ability to name the *amicus* of its choice (para. 123); (2) the integrity of the judicial process would be imperilled and should not be dependent upon the Crown (para. 124); and (3) unilateral control by the Attorney General over remuneration might create an apprehension of bias and place an *amicus* in a conflict of interest (para. 125). He concludes that there is no constitutional impediment to vesting such a power in trial judges.

15 I take a different view. The jurisdiction to appoint an *amicus* does not necessarily imply or require the authority to set a specific rate of compensation. The ability to order the government to make payments out of public funds must be grounded in law and a court's inherent or implied jurisdiction is limited by the separate roles established by our constitutional structure. Absent authority flowing from a constitutional challenge or a statutory provision, exercising such power would not respect the institutional roles and capacities of the legislature, the executive (including the Attorney General), and the judiciary, or the principle that the legislature and the executive are accountable to the public for the spending of public funds.

16 I propose to explain my conclusion by first addressing the constitutional framework that surrounds the exercise of a superior court's inherent jurisdiction. This framework also applies to the exercise of the jurisdiction implied by the ability of statutory courts to function as courts of law. Second, I will apply that constitutional framework to the particular context of *amicus* appointments.

A. The Constitutional Framework

(1) The Inherent Jurisdiction of Superior Courts

17 Canada's provincial superior courts are the descendants of the Royal Courts of Justice and inherited the powers and jurisdiction exercised by superior, district or county courts at the time of Confederation (*Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307 (S.C.C.), at pp. 326-27, *per* Estey J.). As such, superior courts play a central role in maintaining the rule of law, uniformity in our judicial system and the constitutional balance in our country.

18 The essential nature and powers of the superior courts are constitutionally protected by s. 96 of the *Constitution Act, 1867*. Accordingly, the "core or inherent jurisdiction which is integral to their operations ... cannot be removed from the superior courts by either level of government, without amending the Constitution" (*MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 (S.C.C.), at para. 15). The rationale for s. 96 has evolved to ensure "the maintenance of the rule of law through the protection of the judicial role" (*R. v. Campbell*, [1997] 3 S.C.R. 3 (S.C.C.) ("*Provincial Judges Reference*"), at para. 88).

19 In *MacMillan Bloedel*, a majority of this Court described the powers at the core of a superior court's jurisdiction as comprising "those powers which are essential to the administration of justice and the maintenance of the rule of law" (para. 38), which define the court's "essential character" or "immanent attribute" (para. 30). The core is "a very narrow one which includes only critically important jurisdictions which are essential to the existence of a superior court of inherent jurisdiction and to the preservation of its foundational role within our legal system" (*Reference re Act to Amend Chapter 401 of the Revised Statutes, 1989, the Residential Tenancies Act, S.N.S. 1992, c. 31*, [1996] 1 S.C.R. 186 (S.C.C.), at para. 56, *per* Lamer C.J.).

20 In his 1970 article, "The Inherent Jurisdiction of the Court", 23 *Curr. Legal Probs.* 23, which has been cited by this Court on eight separate occasions, [1] I. H. Jacob provided the following definition of inherent jurisdiction:

> ... the inherent jurisdiction of the court may be defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them. [p. 51]

21 As noted by this Court in *R. c. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78 (S.C.C.), at para. 24:

> These powers are derived "not from any statute or rule of law, but from the very nature of the court as a superior court of law" (Jacob, at p. 27) to enable "the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner" (p. 28).

22 In spite of its amorphous nature, providing the foundation for powers as diverse as contempt of court, the stay of proceedings and judicial review, the doctrine of inherent jurisdiction does not operate without limits. [2]

23 It has long been settled that the way in which superior courts exercise their powers may be structured by Parliament and the legislatures (see *MacMillan Bloedel*, at para. 78, *per* McLachlin J., dissenting on other grounds). As Jacob notes (at p. 24): "... the court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or by rule of court, so long as it can do so *without contravening* any statutory provision" (emphasis added) (see also *Caron*, at para. 32).

24 Further, even where there are no legislative limits, the inherent jurisdiction of the court is limited by the institutional roles and capacities that emerge out of our constitutional framework and values (see *Provincial Judges Reference*, at para. 108).

25 These limits were recognized in a thoughtful thesis on inherent jurisdiction written by Jonathan Desjardins Mallette:

> [TRANSLATION] As for the unwritten [constitutional] structural principles, they are particularly relevant to determining the limits of the exercise of the inherent jurisdiction of the courts. They require the courts to take into account the structure of our Constitution, which includes other fundamental principles, such as the rule of law and parliamentary supremacy.
>
> (*La constitutionnalisation de la juridiction inhérente au Canada: origines et fondements*, LL.M. thesis, Université de Montréal (2007), unpublished, reproduced in the Attorney General of Quebec's book of authorities, vol. II, at p. 375.)

26 With the advent of the *Charter*, the superior courts' inherent jurisdiction must also support their independence in safeguarding the values and principles the *Charter* has entrenched in our constitutional order. Thus, the inherent jurisdiction of superior courts provides powers that are essential to the administration of justice and the maintenance of the rule of law and the Constitution. It includes those residual powers required to permit the courts to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner — subject to any statutory

provisions. I would add, however, that the powers recognized as part of the courts' inherent jurisdiction are limited by the separation of powers that exists among the various players in our constitutional order and by the particular institutional capacities that have evolved from that separation.

(2) Separation of Powers

27 This Court has long recognized that our constitutional framework prescribes different roles for the executive, legislative and judicial branches (see *Fraser v. Canada (Treasury Board, Department of National Revenue)*, [1985] 2 S.C.R. 455 (S.C.C.), at pp. 469-70). The content of these various constitutional roles has been shaped by the history and evolution of our constitutional order (see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (S.C.C.), at paras. 49-52).

28 Over several centuries of transformation and conflict, the English system evolved from one in which power was centralized in the Crown to one in which the powers of the state were exercised by way of distinct organs with separate functions. The development of separate executive, legislative and judicial functions has allowed for the evolution of certain core competencies in the various institutions vested with these functions. The legislative branch makes policy choices, adopts laws and holds the purse strings of government, as only it can authorize the spending of public funds. The executive implements and administers those policy choices and laws with the assistance of a professional public service. The judiciary maintains the rule of law, by interpreting and applying these laws through the independent and impartial adjudication of references and disputes, and protects the fundamental liberties and freedoms guaranteed under the *Charter*.

29 All three branches have distinct institutional capacities and play critical and complementary roles in our constitutional democracy. However, each branch will be unable to fulfill its role if it is unduly interfered with by the others. In *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 (S.C.C.), McLachlin J. affirmed the importance of respecting the separate roles and institutional capacities of Canada's branches of government for our constitutional order, holding that "[i]t is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other" (p. 389). [3]

30 Accordingly, the limits of the court's inherent jurisdiction must be responsive to the proper function of the separate branches of government, lest it upset the balance of roles, responsibilities and capacities that has evolved in our system of governance over the course of centuries.

31 Indeed, even where courts have the jurisdiction to address matters that fall within the constitutional role of the other branches of government, they must give sufficient weight to the constitutional responsibilities of the legislative and executive branches, as in certain cases the other branch will be "better placed to make such decisions within a range of constitutional options" (*Khadr v. Canada (Prime Minister)*, 2010 SCC 3, [2010] 1 S.C.R. 44 (S.C.C.), at para. 37).

(3) The Administration of Justice in the Provinces

32 The framers of our Constitution established a delicate balance between the federal and provincial governments, anchored by s. 96 courts, whose independence and core jurisdiction and powers provide a unified, national judicial presence (see *Reference re Residential Tenancies Act (Ontario)*, [1981] 1 S.C.R. 714 (S.C.C.), at p. 728). While the federal government is responsible for the appointment of s. 96 judges, the Constitution has charged the provinces with the responsibility for the administration of justice in the provinces (*Constitution Act, 1867*, s. 92(14)).

33 Pursuant to this power, the provincial legislatures enact laws and adopt regulations pertaining to courts, rules of court and civil procedure, or delegate this function to another body. They also pass laws to provide the infrastructure and staff necessary to operate the courts and establish schemes to provide legal representation to persons involved in court proceedings. The provincial legislature votes the funds necessary to operate the justice system within the province, and the executive, mainly through the office of the Attorney General, is charged with the responsibility of administering

these funds and more broadly, the administration of justice itself. As Dickson J. stated in *Di Iorio v. Montreal Jail* (1976), [1978] 1 S.C.R. 152 (S.C.C.), at p. 200: "since Confederation, the provincial departments of the Attorney General have in practice 'administered justice' in the broadest sense, at great expense to the taxpayers ...".

(4) Role of the Attorney General in the Administration of Justice on Behalf of the Province

34 The first reference to the "*attornatus regis*" — the King's Attorney — dates back to the 13th century (J. L. J. Edwards, *The Law Officers of the Crown* (1964), at p. 16). The role of Attorney General was carried into Canada in the 18th century, with the first Attorney General of Upper Canada being appointed in 1791 (P. Romney, *Mr Attorney: The Attorney General for Ontario in Court, Cabinet, and Legislature 1791-1899* (1986), at pp. 6-7). The role was continued by the *Constitution Act, 1867*, as s. 63 explicitly mentions the Attorney General as one of the officers of the Executive Council of Ontario.

35 The Attorney General of Ontario, on behalf of the executive, acts pursuant to the province's responsibility under s. 92(14) of the *Constitution Act, 1867* for the administration of justice. As Chief Law Officer of the Crown, the Attorney General has special responsibilities to uphold the administration of justice (see, for example, *Ministry of the Attorney General Act*, R.S.O. 1990, c. M.17, s. 5). Idington J. noted in *R. v. Duff* (1910), 43 S.C.R. 434 (S.C.C.), at p. 443, that "custom, tradition and constitutional usage, hav[e] charged [the Attorney General] with the administration of justice within the province as his primary duty ...".

36 The Attorney General remunerates various participants in the criminal justice system — including provincial Crown counsel, court reporters, interpreters, registrars and law clerks. The Attorney discharges his obligation to provide counsel for indigent accused through the establishment of legal aid programs (see *R. v. Peterman* (2004), 70 O.R. (3d) 481 (Ont. C.A.)). Defence counsel appointed under s. 24(1) of the *Charter* (see, for instance, *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.)), are funded directly by the Attorney General. This does not create an apprehension of bias or a conflict of interest. Instead, this role is consistent with the Attorney's responsibilities and public accountability. Indeed, even provincial court judges are paid by the provincial Attorneys General and are still seen as independent (see *Provincial Judges Reference*).

37 The Attorney General is not an ordinary party. This special character manifests itself in the role of Crown attorneys, who, as agents of the Attorney General, have broader responsibilities to the court and to the accused, as local ministers of justice (see *R. v. Boucher* (1954), [1955] S.C.R. 16 (S.C.C.), at pp. 23-24, *per* Rand J.; *Nelles v. Ontario*, [1989] 2 S.C.R. 170 (S.C.C.), at pp. 191-92, *per* Lamer J.).

(5) Limitations on the Courts' Inherent Jurisdiction In the Context of the Administration of Justice

38 It is vital that each branch of government respect its proper institutional role and capacity in the administration of justice, in accordance with the Constitution and public accountability.

39 Section 96 judges possess inherent power to make orders necessary to protect the judicial process and the rule of law. The courts must of course safeguard their own constitutional independence to assure the fairness of the judicial process and to protect the rights and freedoms of Canadians that are entrusted to them under the *Charter*. As the Canadian Judicial Council noted in its 2006 report, "[i]t is crucial to bear in mind that inherent powers, by definition, inhere in courts and their jurisdiction and so cannot be analysed independently of the role the judiciary is expected to play in the constitutional structure" (*Alternative Models of Court Administration* (2006), at p. 46). As such, these powers are exercised within the framework for the administration of justice that the province has established.

40 As the Court made clear in the *Provincial Judges Reference*, judicial independence includes a core administrative component, which extends to administrative decisions that bear "directly and immediately on the exercise of the judicial function" (*Provincial Judges Reference*, at para. 117). These were listed in *R. v. Valente (No. 2)*, [1985] 2 S.C.R. 673 (S.C.C.), at p. 709, as including:

> ... assignment of judges, sittings of the court, and court lists — as well as the related matters of allocation of court rooms and direction of the administrative staff engaged in carrying out these functions ....

As this Court went on to hold in *Valente*, at pp. 711-12, while greater administrative autonomy or independence may be desirable, it is not essential to judicial independence (see also *Provincial Judges Reference*, at para. 253).

41 The proper constitutional role of s. 96 courts does not permit judges to use their inherent jurisdiction to enter the field of political matters such as the allocation of public funds, absent a *Charter* challenge or concern for judicial independence. For this reason, it is generally accepted that courts of inherent jurisdiction do not have the power to appoint court personnel. Staffing the courts is the responsibility of the provincial government.

42 Of course, a complaint that inadequate funding risks undermining the justice system may be subject to court oversight, whether by way of a *Charter* application or a challenge based on the constitutional principle of judicial independence, as was the case in the *Provincial Judges Reference*, where the closure of the Manitoba courts by withdrawing court staff on a series of Fridays, as a part of a wider deficit-reduction effort, was found unconstitutional (paras. 269-76).

43 However, the allocation of resources between competing priorities remains a policy and economic question; it is a political decision and the legislature and the executive are accountable to the people for it.

B. Amicus Curiae and the Inherent Jurisdiction of the Court

(1) Appointing Amici

44 While courts of inherent jurisdiction have no power to appoint the women and men who staff the courts and assist judges in discharging their work, there is ample authority for judges appointing *amici curiae* where this is necessary to permit a particular proceeding to be successfully and justly adjudicated.

45 *Amici curiae* have long played a role in our system of justice. As early as the mid-14th century, the common law courts from which our superior courts are descended received the assistance of *amici* (see S. C. Mohan, "The *Amicus Curiae*: Friends No More?", [2010] *S.J.L.S.* 352, at pp. 356-60). Indeed, as one scholar has noted, "[t]here can be no doubt as to the age and wide acceptance of the amicus curiae. As to its origin, on the other hand, there is a great deal of doubt. Like so many things of great age, its roots are lost even though the practice still continues" (F. M. Covey, Jr., "Amicus Curiae: Friend of the Court" (1959), 9 *DePaul L. Rev.* 30, at p. 33). A number of cases have recognized the practice; in addition, there are statutory provisions that provide for the appointment of *amicus* in certain circumstances. [4]

46 A court's inherent jurisdiction to appoint *amicus* in criminal trials is grounded in its authority to control its own process and function as a court of law. Much like the jurisdiction to exercise control over counsel when necessary to protect the court's process that was recognized in *Cunningham v. Lilles*, 2010 SCC 10, [2010] 1 S.C.R. 331 (S.C.C.), at para. 18, the ability to appoint *amici* is linked to the court's authority to "request its officers, particularly the lawyers to whom the court afforded exclusive rights of audience, to assist its deliberations" (B. M. Dickens, "A Canadian Development: Non-Party Intervention" (1977), 40 *Mod. L. Rev.* 666, at p. 671).

47 Thus, orders for the appointment of *amici* do not cross the prohibited line into the province's responsibility for the administration of justice, provided certain conditions are met. First, the assistance of *amici* must be essential to the judge discharging her judicial functions in the case at hand. Second, as my colleague Fish J. observes, much as is the case for other elements of inherent jurisdiction, the authority to appoint *amicus* should be used sparingly and with caution, in response to specific and exceptional circumstances (para. 115). Routine appointment of *amici* because the defendant is without a lawyer would risk crossing the line between meeting the judge's need for assistance and the province's role in the administration of justice. [5]

48 So long as these conditions are respected, the appointment of *amicus* avoids the concern that it improperly trenches on the province's role in the administration of justice.

(2) Amicus as Defence Counsel

49 Further, I agree with my colleague Fish J. that "[o]nce clothed with all the duties and responsibilities of defence counsel, the *amicus* can no longer properly be called a 'friend of the court'" (para. 114). *Amicus* and court-appointed defence counsel play fundamentally different roles (see D. Berg, "The Limits of Friendship: the *Amicus Curiae* in Criminal Trial Courts" (2012), 59 *Crim. L.Q.* 67, at pp. 72-74).

50 The issue of whether it was appropriate to appoint *amicus* to effectively act as defence counsel was raised by the Attorney General of Quebec and the Attorney General of British Columbia, who were interveners in this Court. It was not challenged by the Attorney General of Ontario. However, to the extent that the terms for the appointment of *amici* mirror the responsibilities of defence counsel, they blur the lines between those two roles, and are fraught with complexity and bristle with danger.

51 First, the appointment of *amici* for such a purpose may conflict with the accused's constitutional right to represent himself (see *R. v. Swain*, [1991] 1 S.C.R. 933 (S.C.C.), at p. 972).

52 Second, it can also defeat the judicial decision to refuse to grant state-funded counsel following an application invoking the accused's fair trial rights under the *Charter*. For instance, by expanding the role of the *amicus*, first to act as though he was defending a client who remained mute, and later to take instructions from the accused, the trial judge in *Imona Russel* undermined the court's earlier decisions to deny state-funded defence counsel.

53 Third, there is an inherent tension between the duties of an *amicus* who is asked to represent the interests of the accused, especially where counsel is taking instructions, as in *Imona Russel* and *Whalen*, and the separate obligations of the *amicus* to the court. This creates a potential conflict if the *amicus*' obligations to the court require legal submissions that are not favourable to the accused or are contrary to the accused's wishes. Further, the privilege that would be afforded to communications between the accused and the *amicus* is muddied when the *amicus*' client is in fact the trial judge.

54 Thus, it seems to me that this current practice of appointing *amici* as defence counsel blurs the traditional roles of the trial judge, the Crown Attorney as a local minister of justice and counsel for the defence. Further, the use of *amici* to assist a trial judge in fulfilling her duty to assist an unrepresented accused might result in a trial judge doing something indirectly that she cannot do directly. While trial judges are obliged to assist unrepresented litigants, they are not permitted to give them strategic advice. Where an *amicus* is assigned and is instructed to take on a solicitor-client role, as in *Imona Russel* and *Whalen*, the court's lawyer takes on a role that the court is precluded from taking.

55 Finally, there is a risk that appointing *amici* with an expanded role will undermine the provincial legal aid scheme. In this case, the Ontario legislature had passed the *Legal Aid Services Act, 1998*, S.O. 1998, c. 26, which provides for the representation of indigent accused. The inherent or implied jurisdiction of a court cannot be exercised in a way that would circumvent or undermine those laws. Absent a constitutional challenge, the judicial exercise of inherent or implied jurisdiction must operate within the framework of duly enacted legislation and regulations.

56 For all these reasons, I conclude that a lawyer appointed as *amicus* who takes on the role of defence counsel is no longer a friend of the court.

(3) Compensating Amici

(a) The Auckland Harbour Principle

57 I agree with my colleague Fish J. that the principle stated by the Privy Council in *Auckland Harbour Board v. R.* (1923), [1924] A.C. 318 (New Zealand P.C.), that "no money can be taken out of the consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorization from Parliament itself" (p. 326), does not resolve the issue before us.

58 However, the *Auckland Harbour* principle highlights the limits of the court's role in the administration of justice, a role that is based on history, convention, competence and capacity. As already noted, the government of the day bears the responsibility for weighing public priorities and then allocating the resources and designing the programs required to act on its policy choices.

59 Obviously, court decisions can have ancillary financial consequences. Moving to larger venues for jury selections involving a number of panels, or continuing a sitting of the court late into the day, incurring overtime expenses for court staff, implicate greater costs for the public purse. Yet, they are legitimate exercises of a court's inherent jurisdiction to control its own process. In much the same way, an order appointing an *amicus* does not take on the character of an appropriation, but rather is one of the countless decisions that may be taken by a court that will have incidental consequences for the public purse.

60 However, an order that the Attorney General must provide compensation at a particular rate goes beyond an order with ancillary financial consequences, and becomes an order directing the Attorney General to pay specific monies out of public funds. Such orders must be grounded in law.

61 If not derived from a *Charter* challenge or authorized by specific statutory authority, the jurisdiction to fix the compensation of *amici* must be found within a court's inherent or implied jurisdiction.

(b) Does the Courts' Inherent or Implied Jurisdiction Extend to Setting Rates of Compensation for Amici and Ordering the Province to Pay?

62 The question is whether a judge, acting properly in the exercise of her inherent or implied jurisdiction, can fix the rate of payment of an *amicus curiae* and order the province to pay the *amicus* out of public funds.

63 The Court of Appeal's approach rests on the premise that the inherent or implied power to appoint an *amicus* would be meaningless unless the court has the authority to ensure that rates of compensation will be adequate to retain the *amicus of its choice*. The submission is that it will sometimes be necessary for the court to name a specific person as *amicus* in order to manage or salvage a high-risk trial. Without the power to fix a rate of compensation, it is argued that the court's ability to ensure the effective conduct of a trial is weakened and the judicial process imperilled.

64 I agree that the courts have the jurisdiction to set terms to give effect to their authority to appoint *amici*. However, I do not accept the premise that the court's ability to fix rates of compensation for an *amicus* is essential to the power to appoint *amici*, or that its absence imperils the judiciary's ability to administer justice according to law in a regular, orderly and effective manner. To the contrary, the spectre of trial judges fixing and managing the fees of *amici* imperils the integrity of the judicial process.

(i) Necessity

65 Historically, courts have effectively appointed *amici* without the need to fix the rate of compensation. There is no dispute that a court has the ability to specify the general qualifications required for the task at hand. The Attorney General has the obligation to pay what is constitutionally adequate to serve the needs of the courts.

66 As well, the experience with *Rowbotham* orders over the last two and a half decades has confirmed an attitude of restraint, as, even in those *Charter* cases, courts have not considered it necessary to direct the rates to be paid to state-funded lawyers appointed to represent the accused. A number of appellate courts have considered the issue and found it unnecessary to direct the rate of compensation (see *R. v. Cai*, 2002 ABCA 299 (Alta. C.A.), (sub nom. *R. v. Cai*) (2002),

317 A.R. 240 (Alta. C.A.) [hereinafter Chan], at para. 9; *R. v. Ho*, 2003 BCCA 663, 190 B.C.A.C. 187 (B.C. C.A.), at para. 73, *Peterman*, at para. 30). This is in line with the approach outlined by this Court in *New Brunswick (Minister of Health & Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 (S.C.C.), at para. 104, where a rate of remuneration for state-funded counsel was not specified.

67 However, this is not to say that an order fixing rates of remuneration under the *Charter* is precluded, as s. 24(1) "should be allowed to evolve to meet the challenges and circumstances of [the case]" (*Doucet-Boudreau v. Nova Scotia (Department of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3 (S.C.C.), at para. 59). It remains open to a court of competent jurisdiction to award such a remedy where a *Charter* right is at stake and it is appropriate and just to do so.

68 Furthermore, this is not a case like *R. v. White*, 2010 SCC 59, [2010] 3 S.C.R. 374 (S.C.C.), where s. 694.1(3) of the *Criminal Code* provided statutory authority for the Registrar of this Court to fix the fair and reasonable fees and disbursements of counsel appointed by the Court pursuant to s. 694.1(1), where counsel and the Attorney General could not agree, or *R. v. Wong* (2003), 64 O.R. (3d) 321 (Ont. C.A.), where the Attorney General in effect delegated to the court the task of finding an independent prosecutor for contempt proceedings that had been brought against Crown officials in order to avoid the appearance of a conflict of interest (para. 18); counsel for the Attorney General conceded that the court had jurisdiction to fix compensation (para. 13). Apart from these two cases and the cases at bar, I have not been directed to, nor have I been able to find, any appellate decision which has concluded that it was necessary to fix the rates of remuneration for state-funded counsel.

(ii) Limitations Imposed by Our Constitutional Order

69 As I have explained, permitting judges to set rates and to order payment without authority based on a statute or derived from a constitutional challenge takes the judge out of the proper judicial role. A court's inherent or implied jurisdiction cannot surpass what the Constitution permits. As we have seen, the inherent jurisdiction of the court must respect the constitutional framework and the allocation of responsibility this framework makes. It is for the duly elected members of the legislature to determine what funds are expended on the administration of justice, not the judges.

70 In cases where the lawyer contemplated by the court opts not to accept the compensation offered by the Attorney General, the court does not, in my view, have the ability to specify a rate of remuneration in order to secure the *amicus* of its choice. The inability to have the *amicus* of its choice does not deprive the court of its nature as a court of law. Even the accused, whose right to a fair trial is at stake, is not entitled to be provided with state-funded counsel of choice, provided he or she receives legal representation that gives a fair opportunity to make full answer and defence (see *R. v. Rockwood* (1989), 91 N.S.R. (2d) 305 (N.S. C.A.)), at paras. 15-20; *Chan*, at para. 18; *A. (J.) v. Winnipeg Child & Family Services*, 2003 MBCA 154, 180 Man. R. (2d) 161 (Man. C.A.), at para. 45; *Peterman*, at paras 26-28; *R. v. Ryan*, 2005 NLCA 44, 199 C.C.C. (3d) 161 (N.L. C.A.), at paras. 7-8; *R. v. Gagnon*, 2006 YKCA 12, 230 B.C.A.C. 200 (Y.T. C.A.), at paras. 9-11).

71 In Ontario, the Attorney General typically finds a number of appropriate lawyers willing to act as *amicus* for the consideration of the trial judge. Such a process respects the institutional and complementary constitutional roles of the courts, the Attorney General on behalf of the executive, and the legislature.

72 The appointment of *amici* cannot be permitted to devolve into a routine way of getting complex trials completed. Fundamentally, providing judges with the assistance required to complete criminal trials in a fair and timely way is a matter concerning the administration of justice. As such, it is the responsibility of the province. Ultimately, it is the province's duty to find solutions to recurring problems such as those that arose in the cases before us. To routinely ask judges to resolve these problems by extraordinary orders taxes the inherent jurisdiction of the court with more than it can properly be made to bear.

73 For example, if the increasing demands on trial judges are best met by the appointment of *amici* to assist, but not act for, the unrepresented accused, the province may create a roster of available and qualified counsel who are prepared to

act at the rate offered by the Attorney General. The province may create a mechanism for the monitoring and oversight of those funds, or look to a staffed office to fulfill the role. It may be that the province chooses to enhance the legal aid plan or to establish a separate regime to address the different roles of *amici*.[6] It can choose to respond to public policy problems in a way that does not undermine other programs and priorities, including the legal aid program. What is more, the government is accountable to the public for such choices.

74 Of course, it remains the case that a failure to provide the appropriate support may compromise the judicial process in a specific case. For instance, in a criminal case, the absence of a qualified court reporter or interpreter may mean that the court cannot proceed with the trial. However, a trial judge cannot use her inherent jurisdiction to insist that the Attorney General pay the higher rates required to attract a particular court reporter or interpreter. Sometimes a trial cannot proceed, and must be rescheduled, despite the trial judge's or the Crown's best efforts.

75 In those exceptional cases where *Charter* rights are not at stake but the judge must have help to do justice and appoints an *amicus*, the person appointed and the Attorney General should meet to set rates and mode of payment. The judge may be consulted, but should not make orders regarding payment that the Attorney General would have no choice but to obey.

76 In the final analysis, if the assistance of an *amicus* is truly essential and the matter cannot be amicably resolved between the *amicus* and the Attorney General, the judge's only recourse may be to exercise her inherent jurisdiction to impose a stay until the *amicus* can be found. If the trial cannot proceed, the court can give reasons for the stay, so that the responsibility for the delay is clear.

(c) The Integrity of the Judicial Process Would Be Imperilled

77 Finally, recognizing that courts have the inherent or implied power to set rates of compensation creates a very real risk of compromising the judicial role. The respondent Criminal Lawyers' Association of Ontario says that courts use their inherent jurisdiction to set rates of remuneration for *amici* infrequently and for small amounts, such that the sums involved are modest and do not engage social, economic or political policy. However, the practical result is that, in Ontario, 242 superior court judges would have the ability to instruct the Attorney General in the expenditure of funds on the administration of justice, in a piecemeal and inconsistent fashion. As noted above, such orders would potentially undermine the province's legal aid system.

78 Decisions regarding rates of compensation for *amici* would put judges into the fray, requiring them to determine fair rates of compensation; to monitor the compensation claimed; or, as happened in *Imona Russel #2*, to appoint further counsel to monitor the fees and the time claimed, at a further fixed fee.

79 Given the cost of lengthy trials, compensation orders for lawyers in a long complex criminal trial can represent the expenditure of hundreds of thousands of dollars of public funds, reviewable only by an appellate court. There is a real risk that such a disregard of the separation of powers and the constitutional role and institutional capacity of the different branches of government could undermine the legal aid system and cause a lack of public confidence in judges and the courts. Indeed, as the High Court of Australia found in *Grollo v. Palmer* (1995) 184 C.L.R. 348, at p. 365, courts may not exercise non-judicial functions that would diminish public confidence in the integrity of the judiciary as an institution.

V. Conclusion

80 In summary, the ability to fix rates of compensation is not necessary for the court to make its power to appoint *amici curiae* effective, and the judicial process will not be weakened or imperilled if compensation cannot be ordered. Indeed, even following a *Rowbotham* application, when the courts have the jurisdiction to direct compensation for counsel appointed under s. 24(1) of the *Charter*, the courts have rarely found it necessary to direct the rates payable to defence counsel.

81 Allowing superior and statutory court judges to direct an Attorney General as to how to expend funds on the administration of justice, in the absence of a constitutional challenge or statutory authority, is incompatible with the different roles, responsibilities and institutional capacities assigned to trial judges, legislators and the executive in our parliamentary democracy.

82 In the end, what concerned the Court of Appeal was the proper course to follow if the Attorney General is unreasonable and a particular lawyer is not prepared to accept the rates for service as *amicus*. While trial judges have a number of options regarding how to proceed in the face of such an impasse, they do not have the power to determine what a reasonable fee is or to order the government to pay it. Such orders cross an impermissible line. The other pillars of government are accountable for establishing spending priorities and, so long as their initiatives pass constitutional muster, have the institutional capacity to define public policy and find program solutions. The Court must allow provinces the flexibility they require to meet their constitutional obligation to fund *amici*, when essential.

83 While the rule of law requires an effective justice system with independent and impartial decision makers, it does not exist independently of financial constraints and the financial choices of the executive and legislature. Furthermore, in our system of parliamentary democracy, an inherent and inalienable right to fix a trial participant's compensation oversteps the responsibilities of the judiciary and blurs the roles and public accountability of the three separate branches of government. In my view, such a state of affairs would imperil the judicial process; judicial orders fixing the expenditures of public funds put public confidence in the judiciary at risk.

84 For the reasons stated above, the ability to set rates of compensation for *amici* does not form part of the inherent jurisdiction of a superior court. Given this conclusion, it follows that the ability to set rates of compensation for *amici* does not form part of the implicit powers of a statutory court to function as a court of law.

85 Accordingly, I would allow the appeal. In light of the public importance of the issues engaged by this appeal, the parties will bear their own costs.

***Fish J.* (dissenting) (LeBel, Abella and Cromwell JJ. concurring):**

86 An *amicus curiae* is a friend of a court *in need* — and the friend *of that court* indeed.

87 Accordingly, courts may appoint an *amicus* only when they require his or her assistance to ensure the orderly conduct of proceedings and the availability of relevant submissions. And once appointed, the *amicus* is bound by a duty of loyalty and integrity *to the court* and not to any of the parties to the proceedings.

88 It is uncontested in this case that trial judges have jurisdiction to appoint an *amicus curiae* and to determine the role of the *amicus* in the proceedings before them. It is uncontested as well that the Attorney General who has conduct of the prosecution — in this case the Attorney General of Ontario — is then obliged to remunerate the *amicus* appropriately: A.F., at para. 3.

89 The only question on this appeal is whether trial judges can themselves fix the fees to be paid to the *amicus*. The appellant would answer that question in the negative; the respondents in the affirmative.

90 I agree with the respondents. In my view the jurisdiction to fix the fees of *amici curiae* is necessarily incidental to the power of trial judges to appoint them. There is no constitutional impediment to vesting in trial judges the authority to do so when necessary in the circumstances.

91 As I explain below, once a trial judge names and defines the role of an *amicus curiae*, a consensual approach ought to be favoured. The Attorney General and the *amicus* should be invited to agree on both the rate of remuneration and the manner in which the *amicus*'s budget is to be administered. If an agreement cannot be reached, the trial judge should fix the rate. The Attorney General then has the option of either paying the fee or staying the proceedings as a matter of prosecutorial discretion.

II

92 This appeal concerns four distinct judgments, rendered in three cases and joined both in the Court of Appeal and in this Court for hearing and decision.

93 In each instance, the trial judge appointed an *amicus curiae* and set the terms and conditions of the *amicus*'s compensation. The judge then ordered the Crown to remunerate the *amicus* at the rate and upon the conditions fixed by the court.

94 Two of the judgments before us relate to the trial of William Imona Russel. After Mr. Imona Russel had discharged several experienced lawyers whom he had retained under legal aid certificates, the Crown — not the accused — requested that the trial judge appoint an *amicus*. The appointment of an *amicus*, the Crown contended, would serve the interests of justice by ensuring the orderly conduct of the trial in the event that Mr. Imona Russel persisted in his serial discharge of defence counsel.

95 An *amicus curiae* was appointed on June 17, 2008. The order set out the duties of the *amicus* as follows:

> To familiarize himself with this brief. If the accused discharges his lawyer or if the Court so orders, to advise the accused about points of law and legal issues; to discuss legal issues with the Crown on behalf of the accused; to speak to the court on behalf of the accused in relation to legal issues.
>
> (*R. v. Imona Russel*, 2009 CarswellOnt 9725 (S.C.J.) ("*Imona Russel #1*"), at para. 7.)

The order also stated that the *amicus* would be paid at the legal aid rate and that Legal Aid Ontario would manage the funding.

96 After Mr. Imona Russel again dismissed his lawyer, Legal Aid refused to fund any new defence counsel. Mr. Imona Russel then brought an application for an order requiring the Attorney General to fund counsel as a remedy under s. 24(1) of the *Canadian Charter of Rights and Freedoms* for an infringement of his right to a fair trial (more commonly known as a "*Rowbotham* order": see *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.)). This application was denied and appeals against that decision were dismissed.

97 The trial judge felt bound in these circumstances to expand the role of the *amicus* previously appointed, despite Mr. Imona Russel's protests and his refusal to cooperate with the *amicus*. The *amicus* was instructed to cross-examine witnesses, make objections to inadmissible evidence and raise legal arguments on behalf of Mr. Imona Russel. Effectively, as the trial judge noted, he was told "to defend the case as if he had a client who was choosing to remain mute": *Imona Russel #1*, at para. 13.

98 Two months later, Mr. Imona Russel reversed his position and requested a further expansion of the role of the *amicus*. Subject to a minor disagreement as to privilege of the communications between the *amicus* and the accused, this expansion was supported by the Crown. In the result, the trial judge ordered the *amicus* to take instructions from and act on behalf of Mr. Imona Russel as he would in a traditional solicitor-client relationship, subject to two notable exceptions: Mr. Imona Russel could not discharge the *amicus* and the *amicus* could not withdraw his services due solely to a breakdown in the relationship with the accused.

99 Following this significant expansion of his duties and obligations, the *amicus* sought a variation of his order of appointment. The trial judge agreed to increase the *amicus*'s rate of remuneration to $192 per hour. This, she noted, was "the rate that would be paid [by the Attorney General] to a lawyer of [the *amicus*'s] year of call to prosecute or to represent the interests of a witness in a criminal case": *Imona Russel #1*, at para. 49.

100 Several months later, being of the opinion that the budget of hours authorized by Legal Aid Ontario was not sufficient to permit him to adequately represent Mr. Imona Russel, the *amicus curiae* requested the appointment of an

independent assessor to review Legal Aid's decision and to recommend a budget. Legal Aid initially agreed but later revised its position. The *amicus* then applied to the court for permission to withdraw.

101 The trial judge held that the *amicus*'s request for an independent third party assessor was entirely reasonable. He ordered that a senior criminal lawyer be appointed to set a budget and to review, monitor and assess the accounts of the *amicus* on an ongoing basis: *R. v. Imona-Russell*, 2010 CarswellOnt 10747 (Ont. S.C.J.) ("*Imona Russel #2*").

102 The second case on appeal concerns the trial of Paul Whalen. Mr. Whalen was convicted of a number of serious indictable offences and the Crown applied to have him declared a dangerous offender. Mr. Whalen had dismissed two lawyers since the commencement of proceedings and was unrepresented. He had been unable to retain counsel under his legal aid certificate because of an ongoing boycott of legal aid work by criminal defence lawyers in Ontario. The trial judge was of the view that, given the complex expert evidence that would be led on the application, the fairness of the proceedings would be compromised unless an *amicus curiae* was appointed by the court.

103 The trial judge appointed Anik Morrow as *amicus* because she had already started to develop a relationship of confidence with Mr. Whalen, a difficult client. The judge believed that appointing two other lawyers, as suggested by the Attorney General, created a risk of destabilizing the proceedings. The trial judge set Ms. Morrow's rate of compensation at $200 per hour and ordered Legal Aid Ontario to manage the account: *R. v. Whalen* (September 18, 2009), Doc. 2178/1542 (Ont. C.J.).

104 The final case on appeal was initiated by Lawrence Greenspon, a senior counsel. Wahab Dadshani was charged with first degree murder. His case had been before the courts for more than five years when, three months before his trial was to commence, he decided to discharge Mr. Greenspon. As a result, the court appointed Mr. Greenspon as *amicus curiae* in order to ensure that the trial proceeded as scheduled, whether Mr. Dadshani had counsel or not. Mr. Greenspon performed only 3.25 hours of work as *amicus* and his appointment lasted only until Mr. Dadshani's new counsel confirmed his presence at trial. The trial judge set Mr. Greenspon's rate of remuneration for his work as *amicus curiae* at $250 per hour. In fixing this rate, the trial judge noted that Mr. Greenspon had more than 28 years of experience at the bar and was certified by the Law Society of Upper Canada as a specialist in criminal litigation: *Greenspon v. R.*, 2009 CarswellOnt 7359 (Ont. S.C.J.), at para. 49.

105 The Crown appealed against all four decisions. In its view, trial judges have no jurisdiction to set the *amici*'s rates of remuneration, to determine how their budgets will be administered or order the Attorney General to pay the *amici* at the rates fixed by the court. In the alternative, the Crown contended that the trial judges should have adopted the "least restrictive approach" and stayed the proceedings rather than order payment.

106 The Ontario Court of Appeal unanimously dismissed the appeals. The Court found that incidental to a judge's power to appoint an *amicus* is the power to set the terms and conditions of that appointment, including the rate of compensation and the monitoring of accounts. It also held that since the cases under appeal do not engage the *Charter*, a temporary stay of proceedings — the least restrictive approach according to the Quebec Court of Appeal in *Québec (Procureur général) c. C. (R.)* (2003), 13 C.R. (6th) 1 (Que. C.A.), at paras. 162-65 — was not the appropriate remedy in the circumstances: *R. v. Imona-Russell*, 2011 ONCA 303, 104 O.R. (3d) 721 (Ont. C.A.).

107 The Crown now appeals to this Court against the judgment of the Ontario Court of Appeal.

III

108 Exceptionally, trial judges may appoint an *amicus curiae* to ensure the orderly conduct of proceedings and the availability of relevant submissions. They should not be required to decide contested, uncertain, complex and important points of law or of fact without the benefit of thorough submissions.

109 Courts are empowered in some instances by specific statutory provisions, such as s. 486.3 of the *Criminal Code*, R.S.C. 1985 c. C-46, to appoint counsel for particular purposes. They may also order the appointment of defence counsel pursuant to a *Rowbotham* application as a remedy under s. 24(1) of the *Charter*.

110 The appointment of *amici curiae* derives, however, from different sources and should be kept conceptually distinct.

111 Superior courts are empowered by their inherent jurisdiction to appoint *amici curiae*. Most recently, in *R. c. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78 (S.C.C.), at paras. 24 and 29, this Court described the inherent jurisdiction of superior courts as follows:

> The inherent jurisdiction of the provincial superior courts, is broadly defined as "a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so": I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Legal Probs.* 23, at p. 51. These powers are derived "not from any statute or rule of law, but from the very nature of the court as a superior court of law" (Jacob, at p. 27) to enable "the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner" (p. 28). ...
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> . . . . .
>
> ... In summary, Jacob states, "The inherent jurisdiction of the court may be invoked in an apparently inexhaustible variety of circumstances and may be exercised in different ways"....

See also *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 (S.C.C.), at paras. 29-30; *Cunningham v. Lilles*, 2010 SCC 10, [2010] 1 S.C.R. 331 (S.C.C.), at para. 18; *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626 (S.C.C.), at paras. 29-32; *Halsbury's Laws of England* (4th ed. (reissue) 2001), vol. 37, at para. 12.

112 In the case of statutory courts, the power to appoint an *amicus* derives from the court's authority to control its own process in order to administer justice fully and effectively. Their authority to appoint *amici* is necessarily implied in the power to function as a court of law: *Ontario v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575 (S.C.C.), at paras. 70-71; *Cunningham*, at para. 19.

113 The Crown did not, either before this Court or the courts below, contest the propriety of the *amicus* appointments in any of the cases before us. Nor did it challenge the established distinctions between defence counsel, whether appointed pursuant to a legal aid certificate or under a *Rowbotham* order, and *amicus curiae*. The Crown's appeal is restricted to a single question: whether trial judges have jurisdiction to fix an *amicus*'s rate of remuneration.

114 I think it useful nonetheless to provide some guidance regarding the circumstances in which an *amicus* appointment is appropriate. An *amicus curiae* may play many roles but it is important to recognize at the outset that an *amicus* is *not* a defence counsel. Once clothed with all the duties and responsibilities of defence counsel, the *amicus* can no longer properly be called a "friend of the court".

115 The discretion of trial judges to appoint an *amicus* is not unrestricted. The power to appoint should be exercised sparingly and with caution (see *Caron*, at para. 30), and appointments should be in response to specific and exceptional circumstances. Trial judges must not externalize *their* duty to ensure a fair trial for unrepresented accused by shifting the responsibility to *amici curiae* who, albeit under a different name, assume a role nearly identical to that of defence counsel.

116 An accused is entitled to forego the benefit of counsel and elect instead to proceed unrepresented. An *amicus* should not be appointed to impose counsel on an unwilling accused or permit an accused to circumvent the established procedure for obtaining government-funded counsel: *Cunningham*, at para. 9. In the vast majority of cases, as long as a trial judge provides guidance to an unrepresented accused, a fair and orderly trial can be ensured without the assistance of an *amicus*. Such is the case even if the accused's defence is not then quite as effective as it would have been had the accused retained competent defence counsel.

117 If appointed, an *amicus* may be asked to play a wide variety of roles: *R. v. Cairenius* (2008), 232 C.C.C. (3d) 13 (Ont. S.C.J.), at paras. 52-59, *per* Durno J. There is, as Rosenberg J.A. pointed out in *R. v. Samra* (1998), 41 O.R. (3d) 434 (Ont. C.A.), at p. 444, "no precise definition of the role of *amicus curiae* capable of covering all possible situations in which the court may find it advantageous to have the advice of counsel who is not acting for the parties".

118 Regardless of what responsibilities the *amicus* is given, however, his defining characteristic remains his duty to the court and to ensuring the proper administration of justice. An *amicus*'s sole "client" is the court, and an *amicus*'s purpose is to provide the court with a perspective it feels it is lacking — all that an *amicus* does is in the public interest for the benefit of the court in the correct disposal of the case: *R. v. Lee* (1998), 125 C.C.C. (3d) 363 (N.W.T. S.C.), at para. 12.

119 While the *amicus* may, in some circumstances, be called upon to "act" for an accused by adopting and defending the accused's position, his role is fundamentally distinct from that of a defence counsel who represents an accused person either pursuant to a legal aid certificate or under a *Rowbotham* order. Furthering the best interests of the accused may be *an incidental result*, but is not *the purpose*, of an *amicus* appointment.

120 As Durno J. explained in *Cairenius*, at para. 62:

> ... [an] *amicus* is generally not counsel for the accused/applicant, there is no solicitor-client relationship, and *amicus* does not take instructions from a client. The general role of *amicus* is to assist the court. *Amicus*, as a friend of the court, has an obligation to bring facts or points of law to the court's attention that might be contrary to the interests of the applicant. This is contrary to the traditional role of defence counsel described in *Rondel v. Worsley*, [1969] 1 A.C. 191 (H.L.) at 227-8, and cited with approval by Rosenberg J.A. in *Samra* ....

121 Where a trial judge appoints an *amicus*, these distinctions between an *amicus* and court-appointed defence counsel should be made clear both to the *amicus* and to the accused. The blurring of the line between the two roles in the present cases causes me some concern; however, as pointed out, that is not the issue before us.

122 I turn now to the main issue raised on this appeal. In my view, a necessary corollary to a trial judge's power to appoint an *amicus* is the power to fix the *amicus*'s remuneration. I am unable, for three reasons, to adopt the contrary position urged by the appellant — one that would grant the provincial Attorney General the exclusive power to fix an *amicus*'s rate of remuneration.

123 First, such a position would unduly weaken the courts' appointment power and ability to name an *amicus* of their choosing. Counsel available to serve as an *amicus* would be limited to those willing to accept appointment at the rate fixed by the Attorney General.

124 Second, the integrity of the judicial process would be imperilled. It has not been suggested that the Attorney General would set the rate of remuneration unreasonably or impracticably low. Nonetheless, the reasoning of this Court in another context is equally relevant here: the ability of the court to ensure a fair and orderly process "should not be dependent upon a reliance on the continuous exemplary conduct of the Crown, something that is impossible to monitor or control": *R. v. Bain*, [1992] 1 S.C.R. 91 (S.C.C.), at p. 104.

125 Finally, the Attorney General's unilateral control over the remuneration of *amici curiae* might create an appearance of bias and place *amici* themselves in an unavoidable conflict of interest. As *amici* often play a role that can be said to be adversarial to the Crown, if the Crown were permitted to determine unilaterally and exclusively how much an *amicus* is paid, the reasonable person might conclude that the "expectation ... of give and take" might lead the *amicus* to discharge his duties so as to curry favour with the Attorney General: *R. v. Campbell*, [1997] 3 S.C.R. 3 (S.C.C.), at para. 187.

126 There is, moreover, no constitutional impediment to a trial judge ordering the Ministry of the Attorney General to pay an *amicus* at a specific rate of remuneration fixed by the court.

127 The fundamental constitutional principle derived from the decision of the Privy Council in *Auckland Harbour Board v. R.* (1923), [1924] A.C. 318 (New Zealand P.C.), provides that only Parliament can authorize payment out of money from the consolidated revenue fund: see also *Constitution Act, 1867*, s. 126; *Financial Administration Act*, R.S.O. 1990, c. F.12 ("*FAA*"), s. 11.1(1).

128 The *Auckland Harbour* principle, however, finds no application in the case at bar. The principle acts only to constrain the ability of the executive branch of government to spend money in the absence of authorization by the legislature. Since, however, the Attorney General has the authority to disburse public funds to pay *amici curiae* when their rate of remuneration *is not* fixed by the court, then the same authority necessarily exists even if their rate *is* fixed by the court.

129 As a constitutional matter, the fees of *amici curiae* in this case can be paid by the Attorney General directly from the Consolidated Revenue Fund under a standing appropriation provided for in the *FAA*.

130 Section 13 of the *FAA* provides that "[i]f any public money is ... directed by the judgment of a court ... to be paid by the Crown or the Lieutenant Governor and no other provision is made respecting it, such money is payable under warrant of the Lieutenant Governor, directed to the Minister of Finance, out of the Consolidated Revenue Fund". See also *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27, s. 22. As the Legislative Assembly has pre-approved the disbursement of funds for the purpose of satisfying court orders, there can be no violation of the *Auckland Harbour* principle.

131 I note that s. 13 of the *FAA* does *not* itself grant courts the jurisdiction to order the Crown to expend money or remunerate *amici curiae*. Rather, this provision authorizes the executive branch to make payment once a valid court order is made and thus precludes the application of the *Auckland Harbour* principle.

IV

132 Once a trial judge names and defines the role of an *amicus curiae* — with or without the assistance of the parties — a consensual approach ought to be favoured. This approach would invite the Attorney General and the *amicus* to meet and agree on the rate of remuneration and on the administration of the budget.

133 Both parties should negotiate in good faith and with due regard for their respective obligations to the judicial process: Attorneys General should consider their duty to promote the sound administration of justice and *amici curiae* should keep in mind both the element of public service inherent in their role and the "privilege of belonging to a profession that is not simply a business": *R. v. Wong* (2003), 64 O.R. (3d) 321 (Ont. C.A.), at para. 28.

134 The provincial Attorney General and the *amicus* should be given a limited time to negotiate based upon the state of proceedings and the urgency of the appointment. In general, negotiations should be given as little time as is practicable. Any dispute regarding remuneration should be resolved expeditiously, in a manner that does not delay, much less derail, the proceedings. Moreover, the *amicus* should not be permitted to hold proceedings hostage by extending negotiations in order to secure more generous compensation.

135 If the Attorney General and the *amicus* cannot reach agreement, the trial judge should fix the rate of remuneration. The Attorney General then retains the option of either paying the fee or staying the proceedings.

136 The ultimate choice of whether to proceed with the prosecution in light of the associated costs appropriately remains that of the Attorney General. The proper balance between prosecutorial discretion and the jurisdiction of the court is thus preserved. A *Rowbotham* order achieves that same result by a different and well-established route, which is not in issue here. As Iacobucci and Major JJ. explained in *Krieger v. Law Society (Alberta)*, 2002 SCC 65, [2002] 3 S.C.R. 372 (S.C.C.), at para. 47:

> Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it. Decisions that do not go to the nature and extent of the prosecution ... do not fall within the scope of prosecutorial discretion. Rather, such decisions are governed by the inherent jurisdiction of the court to control its own processes once the Attorney General has elected to enter into that forum.
>
> [Emphasis in original.]

137 In fixing the rate of remuneration, the trial judge should take into account a number of considerations. I believe that the factors identified by the Ontario Court of Appeal in *Figueroa* in determining the rate of remuneration of an independent prosecutor are equally applicable in the case of an *amicus* appointment. Goudge J.A. set out these factors in *Figueroa*, at paras. 27-30:

> In my view, a number of considerations should go into this task. While not exhaustive, that list includes the importance of the assignment undertaken, the legal complexity of the work to be done, the skill and experience of counsel to be appointed and his or her normal rate charged to private sector clients. These considerations reflect the fact that, to some extent, this is a retainer like any other.
>
> However, in several respects this is not a retainer like any other. First, the independent prosecutor is being asked by the court to serve the needs of the administration of justice. In my view, acting in the public interest in this way constitutes one manifestation of the professional responsibility that has characterized the legal profession at its best. To the extent that an independent prosecutor is performing such a public service, he or she ought not to expect to be remunerated at private sector rates. It is part of the privilege of belonging to a profession that is not simply a business.
>
> Second, it must be remembered that the rate fixed for the independent prosecutor will be paid from public funds. In an age when there are so many pressing needs taxing that resource, I do not think that it should be used to pay at private sector rates.
>
> Thus I would add these two considerations to the list. It is relevant to fixing a reasonable rate for the independent prosecutor that he or she is performing a public service paid for with public funds.

See also *R. v. White*, 2010 SCC 59, [2010] 3 S.C.R. 374 (S.C.C.).

138 The Attorney General of Ontario urges us to accept that the legal aid tariff constitutes a presumptively reasonable remuneration for an *amicus*. While the legal aid tariff should be taken into account as a guide, it is certainly not determinative: *White*.

139 It must be recalled that *amici* are not bound by the legal aid regime. Their client is the court, not an indigent accused, and they are "not parties to that implicit agreement between the defence bar and the state through which, it appears, defence counsel have agreed to effectively contribute a portion of their services to ensure that the broadest number of indigent defendants are afforded the legal representation they could not otherwise retain": *R. v. Chemama*, 2008 ONCJ 140 (Ont. C.J.), at para. 11.

140 As mentioned earlier, I also favour a consensual approach to determining the manner in which an *amicus*'s budget and payment is to be managed. A reasonable budget is necessary to enable the *amicus* to do that which is expected of him. In my respectful view, subject to the agreement of an *amicus*, it would be inappropriate to consign the administration of *amici*'s budgets to Legal Aid. Legal Aid's expertise is in setting budgets for a person of modest means, which is not the applicable standard in the case of *amici* appointments.

V

141 It has not been suggested — nor can it be — that an immoderate or unreasonable fee was set by the trial judges in any of the cases before us. In each instance, the fees fixed are substantially lower than the *amicus*'s private practice rates and are virtually identical to the fees paid *by the Crown* to similarly qualified counsel retained as *ad hoc* prosecutors, or to represent witnesses in criminal cases, or pursuant to s. 684 of the *Criminal Code*: *Imona Russel #1*, at para. 49; *Figueroa*; *Chemama*, at para. 14.

142 The trial judges exercised their jurisdiction appropriately in setting the rates of remuneration and in providing for the management of the *amici*'s budgets. They committed no reviewable error of law in the exercise of their discretion.

VI

143 For all of the foregoing reasons, I would dismiss the appeal.

Appeal allowed.

Pourvoi accueilli.

Footnotes

1 *Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch v. Société des Acadiens du Nouveau-Brunswick Inc.*, [1986] 1 S.C.R. 549 (S.C.C.), at pp. 591-92, *per* Wilson J. (granting leave to appeal to a non-party); *B.C.G.E.U., Re*, [1988] 2 S.C.R. 214 (S.C.C.), at p. 240 (issuing injunction on the court's own motion to guarantee access to court facilities); *R. c. Morales*, [1992] 3 S.C.R. 711 (S.C.C.), at pp. 754-55, *per* Gonthier J. (discretion regarding bail); *R. v. Hinse*, [1995] 4 S.C.R. 597 (S.C.C.), at para. 21, *per* Lamer C.J. (stay of criminal proceedings for abuse of process); *MacMillan Bloedel*, at paras. 29-31, *per* Lamer C.J. (punishing for contempt out of court); *R. v. Rose*, [1998] 3 S.C.R. 262 (S.C.C.), at para. 64, *per* L'Heureux-Dubé J., and at para. 131, *per* Cory, Iacobucci and Bastarache JJ. (discretion to grant a right of reply in a criminal trial); *Cunningham v. Lilles*, 2010 SCC 10, [2010] 1 S.C.R. 331 (S.C.C.), at para. 18 (authority to refuse defence counsel's request to withdraw); *R. c. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78 (S.C.C.), at paras. 24-34, *per* Binnie J. (granting interim costs).

2 These limits are a topic that has also been considered by the highest courts in the United Kingdom and Australia, see *Al-Rawi v. Security Service*, [2011] UKSC 34, [2012] 1 A.C. 531 (U.K. S.C.), at paras. 18-22, *per* Dyson J.; *Batistatos v. Roads and Traffic Authority*, [2006] H.C.A. 27, 227 A.L.R. 425 (Australia H.C.), at paras. 121-36, *per* Kirby J.

3 The normative force of the separation of powers has been recognized by this Court on multiple occasions since *New Brunswick Broadcasting*. See *R. v. Power*, [1994] 1 S.C.R. 601 (S.C.C.), at pp. 620-21; *Doucet-Boudreau v. Nova Scotia (Department of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3 (S.C.C.), at paras. 33-34 and 106-11; *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, [2004] 3 S.C.R. 381 (S.C.C.), at paras. 104-5; *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667 (S.C.C.), at para. 21; *Khadr v. Canada (Prime Minister)*, 2010 SCC 3, [2010] 1 S.C.R. 44 (S.C.C.), at paras. 39-41.

4 In civil matters in Ontario, Rule 13.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, permits a court to appoint a friend of the court for the purpose of rendering assistance by way of argument. In this Court, Rule 92 of the *Rules of the Supreme Court of Canada*, SOR/2002-156, permits the Court or a judge to appoint an *amicus* in an appeal, while s. 53(7) of the *Supreme Court Act*, R.S.C. 1985, c. S-26, provides for the appointment of *amicus* to argue in favour of an unrepresented interest where the Governor in Council has referred a matter to the Court for its consideration, and authorizes the Minister of Finance to pay the reasonable expenses of counsel out of funds authorized by Parliament for expenses of litigation.

5 Making use of *amicus* in this manner is not universally endorsed. In the United Kingdom, the Attorney General and Lord Chief Justice jointly issued guidance to the judiciary regarding the use of advocates to the court, as *amicus* are known there (see "Memorandum — Requests for the appointment of an advocate to the court", reproduced in Lord Goldsmith, "Advocate to the Court", *Law Society Gazette*, February 1, 2002 (online). This guidance specified that advocates to the court are traditionally appointed on points of law and do not normally lead evidence, examine witness es, and, in particular, are not to be appointed solely because an accused is unrepresented (para. 4).

6 For instance, in Manitoba the appointment of *amici* is addressed in *The Legal Aid Manitoba Act*, C.C.S.M. c. L105, s. 3(2): "Subject to the approval of the council, Legal Aid Manitoba may provide legal aid requested by the minister, a judge, or an officer of a court or tribunal, *including providing representation as a friend of the court*, and legal information or advice to an organization or agency, or to persons within a geographic area."

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2015 CHRT 11, 2015 TCDP 11
Canadian Human Rights Tribunal

Wilson v. Canadian Human Rights Commission

2015 CarswellNat 1876, 2015 CarswellNat 5494, 2015 CHRT 11, 2015 TCDP 11

Claudette Wilson, Complainant and Canadian Human Rights Commission, Commission and Canada Border Services Agency, Respondent

Ronald Sydney Williams Member

Heard: November 19, 2014; November 20, 2014
Judgment: May 13, 2015
Docket: T1961/4113

Counsel: Claudette Wilson, for herself
No one for Canadian Human Rights Commission
Victoria Yankou, for Respondent

Subject: Civil Practice and Procedure; Constitutional; Employment; Human Rights

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Human rights

III What constitutes discrimination
III.2 Sex
III.2.b Employment
III.2.b.iv Transfer

Human rights

III What constitutes discrimination
III.3 Race, ancestry or place of origin
III.3.a Employment
III.3.a.v Miscellaneous

Headnote

Human rights --- What constitutes discrimination — Race, ancestry or place of origin — Employment — Miscellaneous

Complainant worked at same Immigration Holding Detention Centre ("IHDC") in Toronto, Ontario for 21 years — Complainant was transferred to another IHDC in Toronto following July 2010 workplace incident — Parties reached settlement of complainant's grievance against transfer — Complainant alleged transfer was motivated by new Operations Manager's reluctance to work with Black woman — Complainant alleged transfer constituted discrimination on basis of race and sex — Complaint dismissed — No prima facie connection between adverse treatment and prohibited grounds of discrimination — Operations Manager's actions were not related to complainant's race or gender — Complainant's contrary belief was insufficient to support complaint.

Human rights --- What constitutes discrimination — Sex — Employment — Transfer

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Statutes considered:

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Generally — referred to

s. 3 — considered

s. 3.1 [en. 1998, c. 9, s. 11] — referred to

s. 7 — considered

s. 7(b) — considered

s. 53(1) — pursuant to

COMPLAINT by employee accusing employer of discrimination on basis of race and sex.

***Ronald Sydney Williams Member*:**

I. Introduction

1 Claudette Wilson, a Black woman, alleges that Canada Border Services Agency ("CBSA") subjected her to employment discrimination on the grounds of race and sex when it transferred her from the location where she had worked for many years to another location in the same city.

II. Facts

2 Ms. Wilson had for 21 years been employed at the same Immigration Holding Detention Centre ("IHDC") in Toronto. For most of this time she worked as a security officer, but for two years leading to 2010 she was employed as a security supervisor.

3 It is important to note that Ms. Wilson was not directly employed by CBSA; rather, CBSA contracted out the security services. At the time in question, G4S Security Services (Canada) Ltd. ("G4S") held the contract for providing security personnel at the IHDC and it was Ms. Wilson's employer. CBSA provided supervisory, management and operations personnel. Ms. Wilson believed that she was an exemplary employee, valued by both the respondent, CBSA, and her employer, G4S.

4 June 2010 saw a new operations manager employed by CBSA, namely a Mr. Sajjad Bhatti. In July 2010, a workplace incident occurred in which she was involved, which resulted in the transfer of Ms. Wilson from her current location to another IHDC in Toronto. Mr. Bhatti was the author of the letter advising her that she was being transferred to the other site in Toronto.

5 Ms. Wilson objected to the transfer, which led to the matter of her transfer being adjudicated by way of grievance arbitration before the *Canadian Industrial Relations Board*. Ultimately minutes of settlement were signed.

6 Ms. Wilson claimed that she was removed because Mr. Bhatti did not want a Black woman at the site where he was working. In support of her claim, she testified that Mr. Bhatti had refused to interact with her on at least two occasions. On one occasion he did not respond to her greeting of "Good Morning Sir". On a second occurrence, while passing on a stairwell, Mr. Bhatti did not respond to her greeting, and proceeded past her. Her evidence was that he did not have "eye contact" with her and proceeded past her. She stated he said something "under his breath", but could not advise as to what if anything was stated. Ms. Wilson further testified that Mr. Bhatti had a discriminatory attitude. She was convinced that his treatment of her was motivated by her race and gender stating, "What else could it be, I am a woman and Black".

7 Ms. Wilson could not recall when the two aforementioned incidents occurred. She had no other witnesses. She did provide the Tribunal with copies of two letters - one, hand printed and signed "Justice Seekers", and the second, typed

and also signed "Justice Seekers" with 4 illegible signatures - both being offered as evidence in support of her complaint. I find that the letters have little probative value, for reasons that the signatures are indecipherable and the authors were not subject to cross examination. Moreover, the content of the letters provides no information dealing with Ms. Wilson's discrimination claim and is therefore unhelpful. She did not present any evidence as to damages, if any, that she suffered as a result of the alleged discrimination.

8 Mr. Bhatti was the only witness for the Respondent. Mr. Bhatti stated that he was born in Canada and of Pakistani heritage. He stated that as a child he was often the target of derogatory comments and abusive names, because of his skin colour. He stated that he had no recollection of the instances of which Ms. Wilson complains.

9 Mr. Bhatti stated that it is not his nature to be rude and if greeted as suggested by the Complainant, he believed that he would have responded in a respectful manner. Notwithstanding his evidence as to his general practice, he could not recall the two aforementioned incidents and was therefore unable to deny they occurred. Thus, Ms. Wilson's evidence as to the two incidents remains essentially uncontradicted. Mr. Bhatti did admit to having provided Ms. Wilson with a letter transferring her to another site.

III. The Legal Considerations

10 Ms. Wilson's complaint is brought under section 7 of the *Canadian Human Rights Act* R.S.C. 1985, c. H-6 (the "*Act*"). Subsection 7(b) makes it a discriminatory practice to differentiate adversely in relation to an employee in the course of their employment on a prohibited ground of discrimination. Section 3 of the *Act* includes sex, race and colour as prohibited grounds of discrimination.

11 I believe it is well settled that the burden is on Ms. Wilson to establish a *prima facie* case of discrimination. A *prima facie* case is "...one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the Complainant's favour, in the absence of an answer from the Respondent-employer" (*O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 (S.C.C.) at p. 558; *Johnstone v. Canada (Border Services Agency)*, 2014 FCA 110 (F.C.A.) at para.82).

12 Upon Ms. Wilson establishing on a *prima facie* basis that she was the subject of discrimination, the burden shifts to the Respondent to provide a reasonable explanation for the conduct in issue (*Baptiste v. Canada (Correctional Service)* [2001 CarswellNat 3504 (Can. Human Rights Trib.)], 2001 CanLII 5801, para. 6.).

13 There is no direct evidence in this case; rather, Ms. Wilson relies on circumstantial evidence. But this will be sufficient if the evidence offered in support of an inference of discrimination renders such an inference more probable than the other possible inferences or hypotheses (*Baptiste*, *supra*, para. 60; *Khiamal v. Canada (Human Rights Commission)*, 2009 FC 495 (F.C.), para.60).

14 It is not necessary that discriminatory considerations be the sole reason for the actions in issue for a complaint to succeed. It is sufficient that the discrimination be a basis for the employer's actions or decisions (*Holden v. Canadian National Railway* (1990), 14 C.H.R.R. D/12 (Fed. C.A.); *Baptiste*, *supra*, para11; *Khiamal*, *supra*, para 61).

15 Finally, the standard of proof in discrimination cases is the ordinary civil standard (*Baptiste*, *supra* para 10; *Khiamal*, *supra*, para. 60). He or she who alleges, bears the burden of proving on a balance of probabilities (*Canada (Human Rights Commission) v. Canada (Minister of Social Development)*, 2011 FCA 202 (F.C.A.), para. 16).

IV. Issues

16 The Respondent raised two basic issues to be considered, namely:

(1) Was CBSA, Ms. Wilson's employer, i.e. was there an employer-employee relationship within the meaning of section 7 (b) of the CHRA?; and

(2) Has the Complainant presented evidence of adverse differentiation on a prohibited ground within the meaning of section 7 (b) of the CHRA?

17 Because I find against the Complainant on the second issue, I do not believe it is necessary to address the first issue (whether the requisite employment relationship existed).

V. Analysis

18 Ms. Wilson believes that her re-assignment to the "new" location occurred as a result of Mr. Bhatti's adverse treatment of her, which was connected to her being a Black woman. Did the evidence she presented establish a *prima facie* case of adverse differentiation on a prohibited ground?

19 Ms. Wilson's evidence did not illustrate any *prima facie* connection between the adverse treatment she experienced and the prohibited grounds of discrimination invoked in this case. In other words, even assuming that Ms. Wilson's evidence is believed, I cannot see from her testimony how Mr. Bhatti's refusal to interact with her, viewed together with the decision to transfer her to another IDHC, were in any way related to her race, her gender, both grounds, or the effect of a combination thereof (see section 3.1 of the Act). Mr. Bhatti's conduct, as described in her testimony, could be the result of any number of circumstances. Ms. Wilson's *belief* that because she is a Black woman, Mr. Bhatti wanted her transferred; and Mr. Bhatti's non communication to her on the two undated occasions, is not sufficient to make out a *prima facie* case giving rise to the need for a rebuttal. Mere belief, without supporting evidence is not sufficient to support a claim of discrimination (*Filgueira v. Garfield Container Transport Inc.*, 2006 FC 785 (F.C.), paras, 30 - 31.

20 The evidentiary requirement for establishing *prima facie* discrimination is generally comprised of three elements. Complainants are required to show:

(1) that they have a characteristic protected from discrimination under the CHRA.

(2) that they experienced an adverse impact with respect to employment; and

(3) that the protected characteristic was a factor in the adverse impact. (See *Moore v. British Columbia (Ministry of Education)*, 2012 SCC 61 (S.C.C.), para.33; *Johnstone supra*, para. 76).

21 In the current matter, Ms. Wilson has presented evidence in support of the first and second elements (her race and gender, as well as her adverse work experience). But she has presented no evidence in support of the third element, apart from her own personal belief. In the words of section 7(b) she has presented no evidence, apart from her *belief* indicating that the adverse differentiation she experienced was on a prohibited ground. This is not complete and sufficient to justify a verdict in the Complainant's favour, in the absence of an answer from the Respondent.

22 That said, even if I were to find that a *prima facie* had been made out, I am not convinced on a balance of probabilities that Ms. Wilson's gender, race or the effect of a combination thereof played a role in CBSA's decision to transfer her. Having regard to Mr. Bhatti's evidence, a reasonable non-discriminatory explanation has been presented for the transfer, namely the July 2010 workplace incident. The burden of proof requires that Ms. Wilson convince the Tribunal, on a balance of probabilities that the explanatory evidence presented by Mr. Bhatti on behalf of CBSA is false or a pretext (*Pieters v. Peel Law Assn.*, 2013 ONCA 396 (Ont. C.A.), para.74, 83). This she has been unable to do.

23 I make the above finding having due regard to the principle that in the absence of direct evidence, discrimination may be inferred from other evidence presented. However, on the facts of this case, a non-discriminatory inference is more probable; the transfer resulted entirely from the workplace incident. Similarly, I cannot draw a probable inference from the evidence that Ms. Wilson's race and or gender played a role in Mr. Bhatti's uncommunicative behaviour toward her.

24 For all of the above reasons, and pursuant to section 53 (1) of the Act, I find that the complaint has not been substantiated and therefore, I dismiss the complaint.

Complaint dismissed.

End of Document

THE DICTIONARY OF CANADIAN LAW

by
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A Carswell Publication

ILLEGAL WILDLIFE. Any wildlife or part thereof that has been hunted, trapped, taken or held in possession contrary to this Act or the regulations. *Wildlife Act*, R.S.A. 1980, c. W-9, s. 1.

ILLEGITIMATE CHILD. In respect of the estate of his father, an illegitimate child who was born out of wedlock and has not been legitimized by operation of law, and who was under the care, control, maintenance or protection, either physically or financially, of his father for a period of not less than one year immediately preceding his father's death. *Estate Administration Act*, R.S.B.C. 1979, c. 114, s. 85.

ILLEVIABLE. *adj.* Describes a duty or debt which ought or cannot be levied.

ILL HEALTH. See NOTIFIABLE CONDITION OF ~.

ILLICIT. *adj.* Not lawful.

ILLICITUM COLLEGIUM. [L.] An unlawful corporation.

ILLNESS. See MENTAL ~; OCCUPATIONAL ~.

ILLOCABLE. *adj.* Incapable of being hired or rented.

ILLUMINATION. See LEVEL OF ~.

ILLUS QUOD ALIAS LICITUM NON EST NECESSITAS FACIT LICITUM; ET NECESSITAS INDUCIT PRIVILEGIUM QUOD JURE PRIVATUR. [L.] Necessity permits what otherwise is not permitted; and necessity establishes a privilege which is justly removed.

I.L.O. *abbr.* International Labour Organization.

I.L.R. *abbr.* 1. Canadian Insurance Law Reports. 2. Insurance Law Reporter (Can.).

I.M.C.O. CODE. The International Maritime Dangerous Goods Code published by the Inter-Governmental Maritime Consultative Organization. *National Harbours Board Operating By-law*, C.R.C., c. 1064, s. 106.

IMITATION. See COLOURABLE ~.

IMITATION DAIRY PRODUCT. Any food substance other than a dairy product, of whatever origin, source or composition, that is manufactured (i) wholly or in part from a fat or oil, other than that of milk, (ii) for human consumption, and (iii) for the same or similar use as, and in semblance of, a dairy product, but does not include margarine as defined in the Margarine Act or any product intended for use as a dessert topping or as a coffee whitener. *Dairy Industry Act*, S.A. 1981, c. D-1.1, s. 1.

IMITATION MILK PRODUCT. Any food substance other than milk or a manufactured milk product, of whatever origin, source or composition, that is manufactured for human consumption and for the same use as or in semblance of milk or a manufactured milk product, and that is manufactured wholly or in part from any fat or oil other than that of milk. *Milk Industry Act*, R.S.B.C. 1979, c. 258, s. 1.

IMMATERIAL AVERMENT. A statement which is not necessary.

IMMATERIAL ISSUE. An issue on some point which will not decide the outcome of an action.

IMMATURE. *adj.* (a) In relation to salmon, salmon in the parr or smolt stages or of less than 12 inches in length measured from the tip of the nose to the fork or cleft in the tail, and (b) in relation to ouananiche and rainbow trout, fish of less than 8 inches in length measured from the tip of the nose to the fork or cleft in the tail. *Newfoundland Fishery Regulations*, C.R.C., c, 846, s. 2.

IMMEDIATE ANNUITY. An annuity that becomes payable to the contributor immediately when the contributor becomes entitled. *Superannuation acts.*

IMMEDIATE BENEFIT. The benefit that accrues and is derived or derivable immediately upon completion of the works. *Municipal Act*, R.S.O. 1980, c. 302, s. 218.

IMMEDIATE FAMILY. 1. When used to indicate a relationship with any person, means (i) any spouse, son or daughter of that person who has the same home as that person, or (ii) any other relative of that person or of that person's spouse who has the same home as that person. 2. The husband, wife, son, daughter, brother, sister, mother, father or grandparent of an individual. *Credit Unions and Caisses Populaires Act*, S.M. 1977, c. 51, s. 1. 3. When used in reference to any person, includes (a) a parent or grandparent of the person; (b) a brother or sister of the person; (c) a brother or sister of the person's mother or father; (d) the spouse of any of the above, while the spouses are cohabiting; (e) the spouse of the parent, while the spouses are cohabiting. *Child and Family Services and Family Relations Act*, S.N.B. 1980, c. C-2.1, s. 1.

IMMEDIATELY. *adv.* Within reasonable time.

IMMEDIATE PENSION. A pension that becomes payable to a person immediately on his becoming entitled thereto. *Lieutenant Governors Superannuation Act*, R.S.C. 1985, c. L-8, s. 2.

IMMEDIATE PENSION BENEFIT. A pension benefit that is to commence within one year after the member becomes entitled to it. *Pension*