Court File No. T-1621-19

FEDERAL COURT

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

-and-

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA, ASSEMBLY OF FIRST NATIONS, CANADIAN HUMAN RIGHTS COMMISSION, CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL and NISHNAWBE ASKI NATION

Respondents

REPLY MOTION RECORD OF NISHNAWBE ASKI NATION
(Motion to Stay Tribunal's Order; Motion to Stay Judicial Review)

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Court File No. T-1621-19

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AFFIDAVIT OF ODI DASHSAMBUU
(Stay Motion; Abeyance Motion)

I, Odi Dashsambuu, of the City of Toronto, in the Province of Ontario, **MAKE OATH AND SAY:**

1. I am a legal assistant at the firm Falconers LLP, counsel of record for the Respondent Nishnawbe Aski Nation ("NAN"), and as such have knowledge of the following to which I herein depose. Unless otherwise stated, all information is based on information provided by Molly Churchill ("Ms. Churchill"), a lawyer at Falconers LLP involved with this file and whose information I do verily believe to be true.

2. I understand that in his affidavit sworn on October 3, 2019, Sonny Perron states that the systemic remedies previously ordered by the Canadian Human Rights Tribunal ("CHRT") in the *Caring Society* proceedings (CHRT Docket T1340/7008) have either been fully

implemented or are being implemented. Mr. Perron's affidavit and the rest of Canada's Application and Motion material was served on counsel for NAN on the afternoon of October 4, 2019.

3. On the morning of October 4, 2019, NAN filed a Notice of Motion with the CHRT in the *Caring Society* proceedings (CHRT Docket T1340/7008) seeking a finding of non-compliance by Canada regarding relief for remote agencies and communities. Attached as **Exhibit "A"** to my affidavit is a true copy of the Notice of Motion filed that day.

4. I make this affidavit for the purposes of responding to the motions in this matter, brought by Canada and the Caring Society, respectively, for no other or improper purpose.

SWORN BEFORE ME this)
8th day of November 2019,)
in the City of Toronto,)
in the Province of Ontario.)

A Commissioner, etc.
Aliah El-houni
LSO #77300E

Odi Dashsambuu

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Docket: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA and ASSEMBLY OF FIRST NATIONS

Complainants

-and-

CANADIAN HUMAN RIGHTS COMMISSION

Commission

-and-

ATTORNEY GENERAL OF CANADA
(representing the Minister of Indigenous and Northern Affairs Canada)

Respondent

-and-

CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL, and NISHNAWBE ASKI NATION

Interested Parties

NOTICE OF MOTION OF THE INTERESTED PARTY NISHNAWBE ASKI NATION ("NAN") re NON-COMPLIANCE AND RELIEF FOR REMOTE COMMUNITIES

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Lawyers for the Interested Party, Nishnawbe Aski Nation (NAN)

This is Exhibit A referred to in the affidavit of Odi Dashsambuu sworn before me this 8 day of November 20 19

A COMMISSIONER FOR TAKING AFFIDAVITS

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Docket: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

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FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA and ASSEMBLY OF FIRST NATIONS

Complainants

-and-

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ATTORNEY GENERAL OF CANADA
(representing the Minister of Indigenous and Northern Affairs Canada)

Respondent

-and-

CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL, and NISHNAWBE ASKI NATION

Interested Parties

NOTICE OF MOTION OF THE INTERESTED PARTY NISHNAWBE ASKI NATION ("NAN") re NON-COMPLIANCE AND RELIEF FOR REMOTE COMMUNITIES

TAKE NOTICE that the Interested Party, Nishnawbe Aski Nation ("NAN"), will make a motion in the ***First Nations Child and Family Caring Society v. Canada*** proceedings, seeking a finding of non-compliance by Canada regarding relief for remote agencies and communities, and seeking relief orders for First Nations children in remote and northern communities.

NAN will make a motion to the Canadian Human Rights Tribunal at a time, date and location to be determined by the Tribunal. The motion is made under Rule 3 of the *Canadian Human Rights Tribunal Rules of Procedure*, and is for orders under Rules 1(6), 3(1), and 3(2)(d) and pursuant to the Canadian Human Rights Tribunal's continuing jurisdiction regarding remoteness remedies in this matter. The proposed motion will be heard orally.

THE MOTION IS FOR a finding of non-compliance and relief orders for First Nations children in remote and northern communities, and particularly to NAN First Nations, as follows:

MMIWG Calls to Justice

1. An order that Canada implement the Calls for Justice issued by the National Inquiry into Missing and Murdered Indigenous Women and Girls ("MMIWG") as more particularly described herein and specifically as related to child and family services;

Remoteness Quotient

2. An order that Indigenous Services Canada ("ISC") cease using the inequitable "Casino Rama Formula" ("CRF") and its 10% remoteness allotment to distribute child and family services funding, and any related funding, to NAN First Nations;
3. An order for application of the Remoteness Coefficient and Remoteness Quotient ("RQ") work and conclusions in the reports prepared by the Barnes Management Group and filed with this Tribunal ("the RQ work") to all distributions of child and family services funding, and related funding, by ISC to NAN First Nations;
4. An order that ISC fund the three NAN agencies for their remoteness costs in accordance with the RQ work;
5. An order for direction regarding next steps in developing the national dimension of the RQ

work; and

6. Such further and other relief as this Tribunal may deem appropriate.

AND FURTHER TAKE NOTICE that the following documents will be referred to in support of such motion:

1. The Factum of the Interested Party, Nishnawbe Aski Nation;
2. *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls;*
3. *A Legal Analysis on Genocide: National Inquiry into Missing and Murdered Indigenous Women and Girls Supplementary Report*;
4. The Phase I Remoteness Quotient report, filed with the Tribunal on September 8, 2017;
5. The Phase II Remoteness Quotient Interim Report, filed with the Tribunal on August 22, 2018;
6. The Phase II Remoteness Quotient Final Report, filed with the Tribunal on March 29, 2019;
7. Affidavit(s) of NAN Representative(s), to be filed; and
8. Such further and other material as Counsel may advise and may be permitted.

AND FURTHER TAKE NOTICE that the said motion shall be made on the following grounds:

Overview: MMIWG Report and Calls for Justice

1. On June 3, 2019, the Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place*, was released in ceremony after approximately three (3) years of family statement gathering, expert and knowledge keeper testimony, and comprehensive research by the Commission;

2. At the same time, *A Legal Analysis on Genocide: National Inquiry into Missing and Murdered Indigenous Women and Girls Supplementary Report* was released. This supplementary report explained that "[t]he National Inquiry is of the opinion that the definition of genocide in international law, as it stands, encompasses the past and current actions and omissions of Canada towards Indigenous Peoples" (p. 7);
3. The supplementary report concludes that this genocide consists of a composite wrongful act that triggers responsibility of the Canadian state under international law. Canada has breached its international obligations through a series of actions and omissions taken as a whole, and this breach will persist as long as genocidal acts continue to occur and destructive policies are maintained (p. 26);

Report and Calls for Justice Relate to Child Welfare in Remote Communities

4. The Final Report concludes that "[t]he Canadian state has used child welfare laws and agencies as a tool to oppress, displace, disrupt, and destroy Indigenous families, communities and Nations. It is a tool in the genocide of Indigenous Peoples" (p. 355);
5. The Final Report finds that the challenges of children living on-reserve in First Nations communities relating to infrastructure, housing, and poverty violate Article 24 of the *Convention on the Rights of the Child* (p. 342). Furthermore, the Report categorizes the lack of food security in northern communities as "a crisis of significant dimensions" (p. 341);
6. The Report further finds the following:

> Gaps in child and family services and infrastructure in northern and remote communities result in the disproportionately high rate of Inuit, Metis, and First Nations children being sent out of their communities and regions to obtain services and care in other jurisdictions. This can result in jurisdictional neglect and culturally unsafe services. Further, it can result in the denial of the human rights and Indigenous rights of the children and their families (p. 355);

Calls for Justice Are Legal Imperatives

7. The mandated Calls for Justice are "legal imperatives" which are "not optional"; they arise from international and domestic human and Indigenous rights laws including the *Canadian Charter of Rights and Freedoms*, the Constitution, and the Honour of the Crown (p. 168);
8. Further, the Calls for Justice are to be interpreted and implemented in an **equitable and non-discriminatory way**, addressing the needs of distinct Indigenous Peoples, and taking into account factors that make them distinct including but not limited to geographical or regional specific information; on-reserve/off-reserve; **remote and northern**; and communities and settlements (p. 172);
9. The Final Report concludes that Canada has a legal obligation to fully implement these Calls for Justice, and to ensure that Indigenous women, girls, and 2SLGBTQQIA people live in dignity (p. 172). As noted in the National Inquiry's Interim Report, there has been limited movement to implement recommendations from previous reports, and what little efforts have been made have focused more on reactive then preventative measures (p. 172);
10. The Commissioners heard that one of the biggest fears survivors and family members had in opening themselves up for a process as intense as the Inquiry was that in the end the report would gather dust on a shelf, with recommendations left unimplemented (Final Report, Volume A, p. 66). The Final Report explained that "holding those with power to act on these recommendations to account is an essential step of the process, and evaluating the progress made to date is an important indicator of the work left to accomplish" (Final Report, Volume A, p. 66);

11. From the Interim Report, the Commission called for immediate action in respect of *inter alia*, the following, which as of the date of this motion, remain unfulfilled:

    a. Implementation of all of the Calls to Action of the Truth and Reconciliation Commission, particularly those that impact Indigenous women and children, including the immediate implementation of Jordan's Principle and the immediate and full implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* as a framework for reconciliation, and including a federal action, strategies and other concrete measures to achieve the goals; and

    b. Full compliance with the Canadian Human Rights Tribunal ruling (2016) that found that Canada was racially discriminating against First Nations children;

Calls for Justice Specific to Child and Family Services

12. The Calls for Justice most directly relating to child and family services are reproduced here:

> 12.1 We call upon all federal, provincial, and territorial governments to recognize Indigenous self-determination and inherent jurisdiction over child welfare. Indigenous governments and leaders have a positive obligation to assert jurisdiction in this area. We further assert that it is the responsibility of Indigenous governments to take a role in intervening, advocating, and supporting their members impacted by the child welfare system, even when not exercising jurisdiction to provide services through Indigenous agencies.
>
> 12.2 We call upon on all governments, including Indigenous governments, to transform current child welfare systems fundamentally so that Indigenous communities have control over the design and delivery of services for their families and children. These services must be adequately funded and resourced to ensure better support for families and communities to keep children in their family homes.
>
> 12.3 We call upon all governments and Indigenous organizations to develop and apply a definition of "best interests of the child" based on distinct Indigenous perspectives, world views, needs, and priorities, including the perspective of Indigenous children and youth. The primary focus and objective of all child and

family services agencies must be upholding and protecting the rights of the child through ensuring the health and well-being of children, their families, and communities, and family unification and reunification.

12.4 We call upon all governments to prohibit the apprehension of children on the basis of poverty and cultural bias. All governments must resolve issues of poverty, inadequate and substandard housing, and lack of financial support for families, and increase food security to ensure that Indigenous families can succeed.

12.5 We call upon all levels of government for financial supports and resources to be provided so that family or community members of children of missing and murdered Indigenous women, girls, and 2SLGBTQQIA people are capable of caring for the children left behind. Further, all governments must ensure the availability and accessibility of specialized care, such as grief, loss, trauma, and other required services, for children left behind who are in care due to the murder or disappearance of their caregiver.

12.6 We call upon all governments and child welfare services to ensure that, in cases where apprehension is not avoidable, child welfare services prioritize and ensure that a family member or members, or a close community member, assumes care of Indigenous children. The caregivers should be eligible for financial supports equal to an amount that might otherwise be paid to a foster family, and will not have other government financial support or benefits removed or reduced by virtue of receiving additional financial supports for the purpose of caring for the child. This is particularly the case for children who lose their mothers to violence or to institutionalization and are left behind, needing family and belonging to heal.

12.7 We call upon all governments to ensure the availability and accessibility of distinctions based and culturally safe culture and language programs for Indigenous children in the care of child welfare.

12.8 We call upon provincial and territorial governments and child welfare services for an immediate end to the practice of targeting and apprehending infants (hospital alerts or birth alerts) from Indigenous mothers right after they give birth.

12.9 We call for the establishment of a Child and Youth Advocate in each jurisdiction with a specialized unit with the mandate of Indigenous children and youth. These units must be established within a period of one year of this report. We call upon the federal government to establish a National Child and Youth Commissioner who would also serve as a special measure to strengthen the

framework of accountability for the rights of Indigenous children in Canada. This commissioner would act as a national counterpart to the child advocate offices that exist in nearly all provinces and territories.

12.10 We call upon the federal, provincial, and territorial governments to immediately adopt the Canadian Human Rights Tribunal 2017 CHRT 14 standards regarding the implementation of Jordan's Principle in relation to all First Nations (Status and non-Status), Métis, and Inuit children. We call on governments to modify funding formulas for the provision of services on a needs basis, and to prioritize family support, reunification, and prevention of harms. Funding levels must represent the principle of substantive equity.

12.11 We call upon all levels of government and child welfare services for a reform of laws and obligations with respect to youth "aging out" of the system, including ensuring a complete network of support from childhood into adulthood, based on capacity and needs, which includes opportunities for education, housing, and related supports. This includes the provision of free post-secondary education for all children in care in Canada.

12.12 We call upon all child and family services agencies to engage in recruitment efforts to hire and promote Indigenous staff, as well as to promote the intensive and ongoing training of social workers and child welfare staff in the following areas:

- history of the child welfare system in the oppression and genocide of Indigenous Peoples
- anti-racism and anti-bias training
- local culture and language training
- sexual exploitation and trafficking training to recognize signs and develop specialized responses

12.13 We call upon all governments and child welfare agencies to fully implement the Spirit Bear Plan.

12.14 We call upon all child welfare agencies to establish more rigorous requirements for safety, harm-prevention, and needs-based services within group or care homes, as well as within foster situations, to prevent the recruitment of children in care into the sex industry. We also insist that governments provide appropriate care and services, over the long term, for children who have been exploited or trafficked while in care.

12.15 We call upon child welfare agencies and all governments to fully investigate deaths of Indigenous youth in care;

Overview: RQ

13. On January 26, 2016, the Canadian Human Rights Tribunal ("the Tribunal") issued its decision in *First Nations Child and Family Caring Society v Canada*, 2016 CHRT 2, finding that Canada has been discriminating against First Nations children and families on the basis of race. Specifically, the Tribunal found that the design, management, and control by Indigenous and Northern Affairs Canada ("INAC", now ISC) of the First Nations Child and Family Services Program along with its corresponding funding formulas and other related provincial/territorial agreements, resulted in denials of services and created adverse impacts for many First Nations children and families living on reserve. The Tribunal ordered INAC to reform the First Nations Child and Family Services Program and *Memorandum of Agreement Respecting Welfare Programs for Indians* ("the *1965 Agreement*") to reflect the findings in the Tribunal's decision, and to cease applying its narrow definition of Jordan's Principle. The Tribunal retained jurisdiction over the case ("the Caring Society proceedings") and directed the parties to file submissions regarding remedies;

14. By way of Notice of Motion dated March 18, 2016, NAN sought interested party status in the Caring Society proceedings to make submissions regarding short-, medium-, and long-term remedies. On May 5, 2016, in *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 11, the Tribunal granted NAN such status because NAN's direct affiliation with remote communities would assist the Tribunal in crafting effective remedies. The Tribunal directed that NAN's submissions on remedies should focus on "the

specific considerations of delivering child and family services to remote and northern communities in Ontario and the factors required to successfully provide those services in those communities" (at para 15);

15. The Tribunal ordered INAC to immediately address how it determines funding for remote FNCFS Agencies. The Tribunal specified the determination should account for such things as travel to provide or access services; the higher cost of living and service delivery in remote communities; and the ability of remote FNCFS Agencies to recruit and retain staff (e.g., see 2016 CHRT 2 at paras. 213-233 and 291; 2016 CHRT 10 at para 20; 2016 CHRT 16 at paras 36-81);
16. By way of submissions on immediate relief dated May 19, 2016, NAN emphasized the importance of avoiding a one-size-fits-all approach to remedies and reform. NAN asked this Tribunal to apply a "Northern Remoteness Framework" in its approach to remedies;
17. As explained in NAN's May 19, 2016 submissions, an integral component of a Northern Remoteness Framework is that allocations of child and family services funding should be informed by a Remoteness Quotient ("RQ"). The RQ is "a mechanism by which the remote northern realities can be assessed, quantified, and applied to all [funding] remedies affecting remote communities" (para 44 of submissions);
18. The Tribunal subsequently sought further information from the Respondent to the Tribunal's 2016 CHRT 16 ruling. The Respondent filed two compliance reports, the first on September 30, 2016 and the second on October 31, 2016;
19. The Respondent's compliance reports did not produce specific immediate relief for northern and remote communities;
20. In INAC's October 31, 2016 compliance report, INAC stated that it was not providing

funding for remoteness due to insufficient data and information on which to base calculations for remoteness funding (INAC Compliance Report, Oct. 31, 2016 at p. 9, Section G);

21. By way of submissions dated February 28, 2017, regarding non-compliance of immediate relief orders, NAN sought specific orders relating to remoteness and application of an RQ;

22. In early March of 2017, NAN and INAC agreed to Terms of Reference for a Remoteness Quotient Table ("the Terms of Reference"). The intention of the RQ Table was "to allow NAN and Canada to collaborate in the spirit of reconciliation on solutions to the deficiencies in remoteness funding for Indigenous child welfare" as found by this Tribunal. The main objective of the RQ Table was "to develop a remoteness quotient that can be used for funding First Nation child welfare agencies that serve various remote communities." [all quotes from the Terms of Reference];

23. By way of order dated March 29, 2017, this Tribunal adopted the Terms of Reference and ordered INAC and NAN to "work to develop and implement an immediate relief funding formula for the three FNCF[S] Agencies that serve NAN communities, in accordance with the Terms of Reference" (*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2017 CHRT 7, at paras 21, 24). This Tribunal retained jurisdiction to be able to return to the issue of the RQ (at paras 22, 24);

24. INAC and NAN agreed that Dr. Tom Wilson and the Barnes Management Group would be hired as experts to further the work of the RQ Table. They decided that the experts' work would be divided into phases;

25. The RQ Table met regularly until March 2019, inclusive;

26. INAC and NAN jointly filed the experts' Phase I report with the Tribunal on September 8, 2017;

27. INAC and NAN jointly filed the experts' Phase II Interim Report ("the Interim Report") with the Tribunal on August 22, 2018. NAN filed the experts' Phase II Final Report ("the Final RQ Report") on March 29, 2019;

28. The development of the RQ was part of medium- and long-term relief. The Tribunal stated that while the RQ was being developed, "adjustments reflecting northern remoteness realities can be undertaken in the immediate term" (2016 CHRT 16 at paras 80-81);

29. To date, ISC has not only failed to make meaningful adjustments reflecting northern remoteness realities while the RQ work was being developed, but has further failed to implement or apply any of the findings and conclusions of the experts' RQ work – thereby failing to remedy discrimination against First Nations children and families in remote communities, including specifically those in NAN territory;

Equitable Distribution of Prevention and Other Funds to First Nations in Ontario

30. NAN has long objected to use of the Casino Rama Formula ("CRF") – developed to distribute gaming revenues amongst First Nations in Ontario – for determining distribution amounts of child and family services funding to NAN First Nations. This has been due to NAN's long-standing concern that the CRF is inequitable for failing to adequately account for the higher cost of service delivery in remote communities. The CRF allots 10% of a fixed pot of funds on the basis of remoteness;

31. ISC has insisted on using an inherently problematic approach to distributing child and family services funding to First Nations in Ontario. ISC has been using a fixed-pot approach that encourages divisions amongst First Nations in the province. Most recently,

ISC has distributed 10% of the fixed pot on the basis of remoteness;

32. The Interim Report includes a detailed look at the CRF and its use in distribution of child and family services funding. The Interim Report explains, "Any equitable allocation of prevention funds should reflect both demand for services and the varying costs for services including population demographics and remoteness" (p. 54). The experts note the "limited allocation to remote communities" under the CRF and state that data gathered and analyzed by the experts "supports an alternative formula that better reflects the demands and costs for child welfare and prevention services" (p. 54);

33. Despite this expert opinion – provided by experts engaged for the RQ Table, of which ISC and NAN are the two parties – ISC has not ceased using the CRF as the basis for determining distribution of funds to NAN First Nations. ISC refuses to use data-informed measures to determine distribution amounts for NAN First Nations;

34. NAN communities reject the appropriateness of the 10% remoteness allotment to determine funding amounts for NAN communities. NAN has communicated this rejection and rationale to ISC. This rejection is validated by the Interim Report findings;

35. ISC's refusal to apply the RQ work is depriving First Nations children and families in NAN communities from needed funding which they are entitled to by the principle of substantive equality. In determining funding for NAN communities through application of the CRF or minor variations thereof, ISC compounds discrimination against First Nations children and families in already under-resourced NAN communities. This is unjustifiable, particularly in light of the RQ work;

36. NAN thus seeks relief for NAN communities, that ISC cease to determine funding levels for NAN communities on the basis of the CRF, and particularly the use of a 10%

remoteness allotment. Continued use of this approach in decisions regarding NAN communities is disrespectful of the challenges faced in NAN communities. Determinations of funding for NAN communities should be made on a needs-based basis;

37. The relief sought by NAN is specific to NAN First Nations. NAN cannot and does not speak for other First Nations, who may be content with continued use of a fixed-pot approach distributed according to the CRF;

Funding Agencies' Remoteness Costs

38. ISC and NAN agreed to have a third-party reviewer assess the economical and statistical work performed by the experts in their Final RQ Report, in which the experts developed a Remoteness Coefficient and related Remoteness Quotient. This work represents the first economical modeling of remoteness-associated costs of delivering child and family services;

39. The Final RQ Report passed the third-party review process in February of 2019;

40. NAN filed the Final RQ Report with the Tribunal on March 29, 2019;

41. The Remoteness Coefficient "is a variable that can be applied to child and family services funding [to] agencies to determine the additional funding required to provide the same standard of service to these communities. The remoteness coefficient for Tikinagan, at 1.68, indicates an increase in funding of 68 per cent, for Payukotayno at 1.59 an increase of 59 per cent, and for Kunuwanimano at 1.47 an increase of 47 per cent";

42. The experts emphasize the above amounts account for the increased cost of providing services in remote communities served by the agencies, and not for the actual level of demand for services. They emphasize the need for any funding formula to incorporate actual community needs in addition to remoteness costs;

43. ISC has not increased funding to the agencies to account for their remoteness costs in accordance with the RQ work;

Developing the National Dimension of the RQ Work

44. The RQ Table Terms of Reference contemplated that the work produced at the Table could have national implications, stating that "the work of the Table may inform remedies that will affect other organizations";

45. The Engagement Letter developed by NAN and ISC and signed by the RQ Experts states that the experts must "explain whether this remoteness coefficient [they are to develop] could be applied nationally and, if not, explain what would be required to make the remoteness coefficient applicable across Canada" (emphasis added);

46. This national dimension has been recognized by the Tribunal and other parties to the proceedings. In 2016 CHRT 16, at para 81, the Tribunal stated the following (emphasis added):

> The Panel again agrees with the NAN that while a robust, empirically-based remoteness quotient is being developed, adjustments reflecting northern remoteness realities can be undertaken in the immediate term. The Panel also agrees with the AFN that this should not only apply to Ontario but, rather, the application of remoteness factors ought to be considered across Canada;

47. The experts have explained that the method developed to produce the Remoteness Coefficients and Remoteness Quotients presented in the Final RQ Report can be applied in other jurisdictions, provided similar data is available;

48. NAN is committed to developing the national dimension of the RQ work;

49. ISC has not demonstrated commitment to further developing the national dimension of the RQ work;

50. NAN seeks direction of the Tribunal regarding next steps in developing the national dimension of the RQ work;

51. The Tribunal reserved jurisdiction over the RQ work;

52. The Tribunal has the jurisdiction to issue the requested orders under subsections 16(1), 16(3) and 53(2) of the *Canadian Human Rights Act*;

53. Rules 1(6), 3(1), and 3(2)(d) of the *Canadian Human Rights Tribunal Rules of Procedure*; and

54. Such further and other grounds as counsel may advise and may be permitted.

Dated: October 4, 2019

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ATTORNEY GENERAL OF CANADA
Applicant

-and-

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA ET AL.

RESPONDENTS

Court File No.: T-1621-19

FEDERAL COURT

AFFFIDAVIT OF ODI DASHSAMBUU

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Court File No. T-1621-19

FEDERAL COURT

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

-and-

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA, ASSEMBLY OF FIRST NATIONS, CANADIAN HUMAN RIGHTS COMMISSION, CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL and NISHNAWBE ASKI NATION

Respondents

WRITTEN REPRESENTATIONS OF THE RESPONDENT, NISHNAWBE ASKI NATION
(Motion to Stay Tribunal's Order; Motion to Stay Judicial Review)

Contents

PART 1 – STATEMENT OF FACT

A. Overview

> *"On the issue of child and family services, we recognize the tribunal's ruling that says that children need to be compensated, and we will be compensating them."*
>
> - The Right Honourable Justin Trudeau, October 7, 2019[1]

> *"We believe that collaboration, rather than litigation, is the best way to right historical wrongs and advance reconciliation with Indigenous peoples, and the Government has committed to engaging in discussions around compensation for the benefit of those individuals compensated."*
>
> - Seamus O'Regan, Minister of Indigenous Services Canada, October 2019[2]

1. On September 6, 2019, the Canadian Human Rights Tribunal ("the Tribunal") issued a decision finding that certain First Nations children and their primary caregivers are entitled to compensation for Canada's wilful and reckless violation of their human rights through Canada's discriminatory funding and structuring of on-reserve child and family services as well as its failure to properly implement Jordan's Principle. The Tribunal ordered Canada to enter into discussions with other parties to the Tribunal proceedings around the issue of a compensation *process* and return to the Tribunal with recommendations no later than December 10, 2019. The Tribunal will subsequently issue a final order on compensation, outlining the compensation process and potentially clarifying or modifying its initial order on compensation entitlement.

2. Canada is seeking judicial review of the Tribunal's September 6th decision and seeking a stay of the Tribunal's order pending judicial review. Canada is suggesting irreparable harm will flow either from something Canada has not yet been ordered to do (make compensation payments and set up the infrastructure required to administer such payments) or from doing precisely what the Prime Minister and other members of parliament have said Canada is committed to doing:

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[1] Exhibit 7 to the Affidavit of Cindy Blackstock affirmed October 24, 2019.
[2] Exhibit 6 to the Affidavit of Cindy Blackstock affirmed October 24, 2019.

engaging in discussions to determine the best way to compensate First Nations victims of Canada's discriminatory conduct.

3. The Caring Society seeks to have the judicial review held in abeyance until the Tribunal has issued its final compensation order, which will include an order regarding process. Canada could then continue with its judicial review of the September 6th decision along with the final compensation order. Pursuant to the Caring Society's proposal, the Tribunal's decision to address the topic of compensation through two decisions – an initial one on compensation entitlement and a final one on compensation process which will potentially clarify or modify the entitlement decision – will be respected. The possibility of having two consecutive, drawn-out judicial review proceedings will be avoided. The Caring Society's proposal avoids bifurcation before this Court of the issues of compensation entitlement and compensation process and delay that would flow from such bifurcation.

4. These submissions serve as the response of Nishnawbe Aski Nation ("NAN") to both motions. NAN supports the position of the Caring Society on these two motions. Canada has failed to meet the test on a motion to stay test with respect to the Tribunal's September 6th order. The Caring Society's proposal is in the interests of justice as it achieves the most appropriate balance between Canada's desire to have the Tribunal's determination on compensation reviewed by this honourable Court, and ensuring minimal delay and minimal confusion in final resolution on the question of compensation.

5. NAN asks that this honourable Court dismiss Canada's motion to stay. NAN asks that this honourable Court grant the Caring Society's motion to hold the judicial review in abeyance until such time as the Tribunal has issued its final order on compensation.

B. Additional Facts

6. NAN repeats and relies upon the facts as set out in the factum of the Caring Society, and has only a few points to add.

7. First, by way of background, NAN was granted interested party status in the proceedings before the Canadian Human Rights Tribunal by way of decision dated May 5, 2016[3] after the Tribunal had issued its decision on the merits. The Tribunal recognized that NAN's direct affiliation with remote and northern First Nations communities would be of benefit to the Tribunal in crafting effective remedies, recognizing there are unique challenges faced by such communities in the provision of child and family services and unique aspects to the discrimination children and families from remote communities have experienced.[4]

8. Second, there is currently a non-compliance motion before the Tribunal, brought by NAN because of what NAN sees as Canada's ongoing failure to address discrimination by providing adequate funding to account for the significant remoteness costs experienced by NAN agencies and communities in relation to child and family services.[5] Thus in addition to the findings of non-compliance made by the Tribunal following its decision on the merits outlined in the evidence and submissions of the Caring Society, there is a non-compliance motion yet to be adjudicated by the Tribunal.

9. Third, the Tribunal's decision of September 6, 2019, specified that the Canadian Human Rights Commission ("the Commission"), Chiefs of Ontario ("COO"), Amnesty International, and NAN should be consulted – if they so desire – in the discussion process between Canada, the

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[3] *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 11.
[4] *Ibid.*, at paras 9-11.
[5] Exhibit A to the Affidavit of Odi Dashsambuu affirmed November 8, 2019 [NAN's Motion Record, Tab 1].

Caring Society, and the Assembly of First Nations ("AFN") on the topic of a compensation process.[6] This was to be done in advance of the December 10, 2019, deadline for making submissions to the Tribunal on the compensation process and/or the wording and content of its September 6th order. As outlined in the evidence and submissions of both the Caring Society and the AFN, Canada has not engaged with these parties or the interested parties.

PART II – STATEMENT OF THE POINTS IN ISSUE

10. The test this court must apply on a motion to stay an order of the Tribunal pending judicial review of the Tribunal's order is well-established:

i. Is there is a serious question to be tried?;

ii. Will the moving party suffer irreparable harm if the stay is refused?; and

iii. Does the balance of convenience lie in favour of the moving party?[7]

11. The test is conjunctive. In other words, in order to succeed on its motion to stay implementation of the September 6th order, Canada must establish an affirmative answer to each of the above-listed questions.[8]

12. Prior to engaging in the above-described analysis, however, this honourable Court must be satisfied that the underlying application for judicial review has not been brought prematurely – or if it has, that there are exceptional circumstances that warrant permitting early recourse to the courts.[9]

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[6] *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2019 CHRT 39, at para 269.

[7] *Canada (Attorney General) v. Oshkosh Defense Canada Inc.*, 2018 FCA 102 (CanLII) at para 21 [*Oshkosh Defense*] [Caring Society's Book of Authorities, Tab 5]; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311, 1994 CanLII 117 (SCC) [Applicant's Book of Authorities, Tab 36]

[8] *Oshkosh Defense* at para 21 [Caring Society's Book of Authorities, Tab 5]

[9] *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61 (CanLII) at paras 30-33 [*C.B. Powell*] [NAN's Motion Record, Tab 3a].

13. The test this court must apply on a motion to stay its own exercise of discretion to judicially review an order of the Tribunal is less demanding: would it be in the interests of justice to stay the judicial review?[10] Delaying adjudication of a matter is not something a court will do lightly; the Court must consider the factual circumstances presented to it.[11]

14. NAN agrees with the Caring Society that Canada has not met the requirements of a motion to stay the Tribunal's September 6th order, and that it would be in the interests of justice to hold judicial review of the order in abeyance until the Tribunal has issued a final order on compensation.

PART III - SUBMISSIONS

A. Canada Has Not Met the Requirements to Succeed on a Motion to Stay

i. The Judicial Review is Premature

15. It is well established that, as a general rule, a party will have access to the courts only after an administrative process has run its course.[12] Where an application for judicial review is brought prematurely and the Federal Court is determining a motion to stay in relation to that application, the Federal Court need not consider the merits of the issues of the underlying application or the further questions of irreparable harm or balance of convenience.[13] Instead, the motion should be dismissed on the basis that the application was brought prematurely.[14]

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[10] *Bernard v. Canada (National Revenue)*, 2017 FC 536 (CanLII) at para 14 [NAN's Motion Record, Tab 3B], citing to *Mylan Pharmaceuticals ULC v AstraZeneca Canada, Inc.*, 2011 FCA 312 (CanLII) at paras 3-14 [*Mylan Pharmaceuticals*] [Caring Society's Book of Authorities, Tab 15].
[11] *Mylan Pharmaceuticals* at para 5 [Caring Society's Book of Authorities, Tab 15].
[12] *C.B. Powell*, at paras 30-31 [NAN's Motion Record, Tab 3A].
[13] *Jaser v. Canada (Public Safety and Emergency Preparedness)*, 2019 FC 368 (CanLII), at para 25 [NAN's Motion Record, Tab 3C].
[14] *Ibid.*

16. In the present case, the Tribunal, as master of its own procedure[15], elected to determine the issue of individual compensation in two steps: an initial decision outlining the categories of people to be entitled to compensation and ordering Canada to consult with the parties on a compensation process; and a subsequent, final order that will outline the compensation process and potentially clarify, refine or modify the categories of people entitled to compensation. The only operable part of the order at this point in time is for Canada to discuss a compensation process with the parties and return to the Tribunal before December 10, 2019. The September 6th order is, in effect, an interlocutory order. At the present time, the Tribunal's process has not run its course because the final order on compensation is outstanding. It would be contrary to the principle of judicial deference to administrative decision-makers to interfere with the Tribunal's process and engage in judicial review of its initial decision on compensation before it has completed its process and issued its final order on compensation.[16]

17. Furthermore, some of Canada's public statements about its concerns with the Tribunal's order are that the category of children entitled to compensation is not broad enough, as it does not include children who experienced discrimination prior to 2006.[17] This is an issue that Canada can bring to the Tribunal for consideration, as the Tribunal has indicated it may be open to clarifying or modifying the categories of people entitled to compensation as outlined in the September 6th decision.[18]

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[15] *Berberi v. Canadian Human Rights Tribunal*, 2011 FC 485 at para 37 [NAN's Motion Record, Tab 3D]; *Canadian Human Rights Act*, ss. 48.9(1), 48.9(2); *Canadian Human Rights Tribunal Rules Of Procedure*, R. 1(6).
[16] *C.B. Powell*, at para 32 [NAN's Motion Record, Tab 3A]; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] 3 SCR 471, 2011 SCC 53, at paras 23-25 [NAN's Motion Record, Tab 3E].
[17] Exhibit 13 to the Affidavit of Cindy Blackstock affirmed October 24, 2019 (pp. 7, 9-10 of Exhibit).
[18] 2019 CHRT 39, at para 270.

18. It is only once the Tribunal issues its *final* compensation order that this Court will have all of the Tribunal's findings and reasons available for review, and these may be suffused with expertise and valuable experience. For this reason, and to prevent fragmentation of the administrative process and piecemeal court proceedings, this Court should not entertain the judicial review until there is a final order from the Tribunal on the issue of compensation.[19] To do otherwise risks inappropriately "short-circuiting the decision-making role of the tribunal"[20] and bifurcating a review process before this Court.

19. As the judicial review application was brought prematurely, the motion to stay should be dismissed.

ii. No Serious Issue is Raised

20. Canada's judicial review raises serious issues only in relation to aspects of the September 6th decision that are not yet operable. Questions of compensation eligibility, quantum and process can amount to serious issues that could eventually be reviewed on a reasonableness standard – but they have been raised prematurely. NAN agrees with the Caring Society that there is no serious issue raised regarding the Tribunal's jurisdiction to order parties to consult under the *CHRA* in the context of complex cases of discrimination. NAN adopts and relies on the Caring Society's submissions on this point. Furthermore, there is no serious issue to be raised regarding the Tribunal's authority to establish its own process. Canada's motion to stay the Tribunal's order that Canada discuss a compensation process with the parties and return to the Tribunal before December 10, 2019, should therefore be dismissed for failing to raise a serious issue.

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[19] *C.B. Powell*, at para 32 [NAN's Motion Record, Tab 3A].
[20] *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, [2012] 1 SCR 364, 2012 SCC 10 (CanLII) at para 36 [NAN's Motion Record, Tab 3F].

iii. Canada Will Not Suffer Irreparable Harm

21. NAN adopts and relies upon the Caring Society's submissions on this point. Any allegations of harm flowing from an order to implement a compensation process and pay compensation cannot be considered at this point, as there is no operable order in place to cause such alleged harm. The only operable part of the December 6th decision is an order for Canada to consult with the parties and return to the Tribunal. It is disingenuous for Canada to argue that it will suffer irreparable harm if forced to do exactly what the Prime Minister and other high-ranking public officials have publicly committed to doing. Canada's motion to stay should be dismissed on the basis of Canada's failure to establish it will experience irreparable harm.

iv. The Balance of Convenience Favours Dismissing the Motion to Stay

22. NAN adopts and relies upon the submissions of the Caring Society and the Canadian Human Rights Commission on this point. Additionally, NAN wishes to emphasize that if a stay is granted, both the Respondents and the public will be deprived of receiving, in a timely manner, a final decision on the issue of compensation by the specialized Tribunal that Parliament has tasked with making determinations about discrimination, including how to properly remedy discrimination. In addition to the irreparable harm that will be experienced by victims of discrimination through delayed payment of compensation should the judicial review ultimately be dismissed, NAN submits that the harm of depriving the parties from a timely final determination by the Tribunal on the issue of compensation would be detrimental to the administration of justice.

23. Furthermore, when the government is the moving party on a motion to stay, the public interest must be considered at both the irreparable harm stage and the balance of convenience

stage of the analysis.[21] Justice Mandamin of this honourable Court has discussed over-arching public interest considerations that arise in the context of Canada's interactions with First Nations:

> [The public interest is served when the public has] confidence that the government's relationship with First Nations people is in accord with the notions of reconciliation reflected in s. 35 of the *Constitution Act, 1982* and not with a continuation of the past colonial attitude of overbearing government control and indifference to First Nations' concerns.[22]

24. While Canada has suggested that engaging in compensation discussions pursuant to the Tribunal's order will damage its relationship with Indigenous people[23], this assertion by Canada's witness is not borne out on the evidence.[24] In the present case, by asking to be relieved of its obligation to engage with the parties to discuss compensation, Canada risks perpetuating a colonial attitude of indifference to First Nations' concerns. This is not in the public interest.

25. It is clear that the balance of convenience weighs in favour of dismissing the motion to stay.

B. It is in the Interests of Justice to Hold the Judicial Review in Abeyance Until the Tribunal has Issued a Final Order on Compensation

26. NAN repeats and relies upon the submissions of the Caring Society on this point. Additionally, NAN repeats and relies upon paragraphs 15-18 of this present factum to further support its position that staying the judicial review is in the interests of justice.

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[21] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311, 1994 CanLII 117 (SCC) [Applicant's Book of Authorities, Tab 36].
[22] *Alderville First Nation v. Canada*, 2017 FC 631 (CanLII) at para 59; see also para at 73 [NAN's Motion Record, Tab 3G].
[23] Affidavit of Sony Perron affirmed October 3, 2019 at paras 42-45 [AGC's Motion Record, Tab 3].
[24] E.g. Exhibit 26 to the Affidavit of Cindy Blackstock affirmed October 24, 2019; Exhibit 13 to the Affidavit of Cindy Blackstock affirmed October 24, 2019, especially at p. 23; Affidavit of Jonathan Thompson affirmed November 8, 2019, at paras 32-35.

PART IV: ORDER SOUGHT

27. NAN seeks an order:

i. Dismissing Canada's motion for a stay;

ii. Placing Canada's application for judicial review in abeyance, with leave to Canada to amend its application for judicial review within 30 days of the Tribunal's final decision on compensation; and

iii. Directing the parties, no later than 5 days following Canada filing any amended application for judicial review, to provide their availability for a Case Management Conference.

28. NAN seeks costs against Canada on a substantial indemnity basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Thunder Bay, this 19th day of November 2019.

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Counsel for the Appellants

PART V: LIST OF AUTHORITIES

1. *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 11

2. *Canada (Attorney General) v. Oshkosh Defense Canada Inc.*, 2018 FCA 102

3. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311, 1994 CanLII 117 (SCC)

4. *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61

5. *Bernard v. Canada (National Revenue)*, 2017 FC 536

6. *Mylan Pharmaceuticals ULC v AstraZeneca Canada, Inc.*, 2011 FCA 312

7. *Jaser v. Canada (Public Safety and Emergency Preparedness)*, 2019 FC 368

8. *Berberi v. Canadian Human Rights Tribunal*, 2011 FC 485

9. *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] 3 SCR 471, 2011 SCC 53

10. *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, [2012] 1 SCR 364, 2012 SCC 10

11. *Alderville First Nation v. Canada*, 2017 FC 631

12. *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2019 CHRT 39

APPENDIX A

Canadian Human Rights Act, RSC 1985, c H-6

Conduct of proceedings

48.9 (1) Proceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow.

Tribunal rules of procedure

(2) The Chairperson may make rules of procedure governing the practice and procedure before the Tribunal, including, but not limited to, rules governing

(a) the giving of notices to parties;

(b) the addition of parties and interested persons to the proceedings;

(c) the summoning of witnesses;

(d) the production and service of documents;

(e) discovery proceedings;

(f) pre-hearing conferences;

(g) the introduction of evidence;

(h) time limits within which hearings must be held and decisions must be made; and

(i) awards of interest.

Canadian Human Rights Tribunal Rules Of Procedure (03-05-04)

Rules not exhaustive

1(6) The Panel retains the jurisdiction to decide any matter of procedure not provided for by these Rules.

Date: 20100223

Docket: A-245-09

Citation: 2010 FCA 61

CORAM: **NADON J.A.**
EVANS J.A.
STRATAS J.A.

BETWEEN:

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY and THE ATTORNEY GENERAL OF CANADA

Appellants

and

C.B. POWELL LIMITED

Respondent

Heard at Montreal, Quebec, on February 2, 2010.

Judgment delivered at Ottawa, Ontario, on February 23, 2010.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: NADON J.A.
EVANS J.A.

Federal Court of Appeal		Cour d'appel fédérale

Date: 20100223

Docket: A-245-09

Citation: 2010 FCA 61

CORAM: **NADON J.A.**
EVANS J.A.
STRATAS J.A.

BETWEEN:

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY and THE ATTORNEY GENERAL OF CANADA

Appellants

and

C.B. POWELL LIMITED

Respondent

REASONS FOR JUDGMENT

STRATAS J.A.

A. Introduction

[1] The respondent, C.B. Powell Limited, imported bacon bits into Canada. The Canada Border Services Agency ("CBSA") assessed certain duties on the bacon bits. C.B. Powell disagreed with the CBSA's assessment. So, pursuing its rights under subsection 60(1) of the *Customs Act*, R.S.,

1985, c. 1 (2nd Supp.), C.B. Powell asked the President of the Canada Border Services Agency to rule on the matter.

[2] The President of the CBSA ruled that he did not have jurisdiction to decide the matter. Under subsection 67(1) of the Act, "decisions" of the President can be appealed to the Canadian International Trade Tribunal ("CITT"). But C.B. Powell did not follow that route. Instead, it brought a judicial review in the Federal Court, essentially seeking the advice of that court about whether there was a "decision" that could be appealed under subsection 67(1) of the Act. It asked for a declaration to that effect. Harrington J. of the Federal Court granted that declaration: 2009 FC 528. The Crown appeals to this Court, arguing that the President of the CBSA was correct in deciding that he did not have jurisdiction to decide the matter and so there was no "decision" that could be appealed to the CITT under subsection 67(1) of the Act.

[3] In my view, the appeal must be allowed.

[4] The Act contains an administrative process of adjudications and appeals that must be followed to completion, unless exceptional circumstances exist. In this administrative process, Parliament has assigned decision-making authority to various administrative officials and an administrative tribunal, the CITT, not to the courts. Absent extraordinary circumstances, which are not present here, parties must exhaust their rights and remedies under this administrative process before pursuing any recourse to the courts, even on so-called "jurisdictional" issues.

[5] In this case, C.B. Powell's recourse against the President's ruling is to pursue an appeal to the CITT under subsection 67(1) of the Act. It is for the CITT to interpret the word "decision" in subsection 67(1) and decide whether it has jurisdiction to consider C.B. Powell's appeal in these circumstances and, if so, to decide the appeal on its merits. When the CITT completes that task, the administrative process under the Act will be exhausted. Only at that point can an aggrieved party pursue a judicial review to this Court under subsection 28(1)(*e*) of the *Federal Courts Act*, R.S., 1985, c. F-7.

B. The facts

[6] I shall describe what happened in this particular case by examining each step in the administrative process of adjudications and appeals under the Act.

The customs form

[7] Under the Customs Act, an importer of goods, such as C.B. Powell, must report and declare and pay such duty and sales taxes as may be owing. It does so by submitting a form. Among other things, the importer declares the value of the imported goods, specifies a particular tariff treatment, and states a particular tariff classification number.

[8] In this case, C.B. Powell imported bacon bits from the United States in 2005. On the form, it declared the value of the bacon bits, specified Most Favoured Nation tariff treatment and entered a particular classification number.

Going beyond the form

[9] When the goods are imported, the CBSA can go beyond the form and determine the origin, tariff classification and value for duty of the goods. This is set out in subsection 58(1):

58. (1) Any officer, or any officer within a class of officers, designated by the President for the purposes of this section, may determine the origin, tariff classification and value for duty of imported goods at or before the time they are accounted for under subsection 32(1), (3) or (5).	**58.** (1) L'agent chargé par le président, individuellement ou au titre de son appartenance à une catégorie d'agents, de l'application du présent article peut déterminer l'origine, le classement tarifaire et la valeur en douane des marchandises importées au plus tard au moment de leur déclaration en détail faite en vertu des paragraphes 32(1), (3) ou (5).

[10] However, where the CBSA receives the form and does not immediately go beyond it, the origin, tariff classification and value for duty of the goods are deemed to be determined by what was entered on the form. This is set out in subsection 58(2):

(2) If the origin, tariff classification and value for duty of imported goods are not determined under subsection (1), the origin, tariff classification and value for duty of the goods are deemed to be determined, for the purposes of this Act, to be as declared by the person accounting for the goods in the form prescribed under paragraph 32(1)(*a*). That determination is deemed to be made at the time the goods are accounted for under subsection 32(1), (3) or (5).	(2) Pour l'application de la présente loi, l'origine, le classement tarifaire et la valeur en douane des marchandises importées qui n'ont pas été déterminés conformément au paragraphe (1) sont considérés comme ayant été déterminés selon les énonciations portées par l'auteur de la déclaration en détail en la forme réglementaire sous le régime de l'alinéa 32(1)*a*). Cette détermination est réputée avoir été faite au moment de la déclaration en détail faite en vertu des paragraphes 32(1), (3) ou (5).

[11] In this case, the CBSA did not go behind the form, and so the entries of C.B. Powell were taken as declared.

The audit and the re-determination

[12] However, under sections 42, 42.01 and 42.1 of the Act, the CBSA can conduct audits and verifications of the forms. The findings from those audits and verifications can cause it to "re-determine the origin, tariff classification or value for duty of imported goods" under section 59 of the Act. The relevant portions of section 59 are as follows:

59. (1) An officer, or any officer within a class of officers, designated by the President for the purposes of this section may	**59.** (1) L'agent chargé par le président, individuellement ou au titre de son appartenance à une catégorie d'agents, de l'application du présent article peut :
(*a*) in the case of a determination under section 57.01 or 58, re-determine the origin, tariff classification, value for duty or marking determination of any imported goods…; and	*a*) dans le cas d'une décision prévue à l'article 57.01 ou d'une détermination prévue à l'article 58, réviser l'origine, le classement tarifaire ou la valeur en douane des marchandises importées…;
(*b*) further re-determine the origin, tariff classification or value for duty of imported goods…on the basis of an audit or examination under section 42, a verification under section 42.01 or a verification of origin under section 42.1 ….	*b*) réexaminer l'origine, le classement tarifaire ou la valeur en douane…d'après les résultats de la vérification ou de l'examen visé à l'article 42, de la vérification prévue à l'article 42.01 ou de la vérification de l'origine prévue à l'article 42.1….
(2) An officer who makes a determination under subsection 57.01(1) or 58(1) or a re-determination or further re-determination under subsection (1) shall without delay give notice of the determination, re-determination or further re-determination, including the rationale on which it is made, to the prescribed persons.	(2) L'agent qui procède à la décision ou à la détermination en vertu des paragraphes 57.01(1) ou 58(1) respectivement ou à la révision ou au réexamen en vertu du paragraphe (1) donne sans délai avis de ses conclusions, motifs à l'appui, aux personnes visées par règlement.

[13] In this case, in 2008, the CBSA audited the form submitted for the bacon bits. It discovered a mistake: C.B. Powell had entered the wrong classification number on the form. Before issuing a re-determination under section 59, it invited C.B. Powell to examine the matter.

C.B. Powell's examination

[14] C.B. Powell accepted that the classification number it had entered was wrong. But it discovered a further mistake.

[15] C.B. Powell discovered that it should have claimed NAFTA treatment with no duty, rather than Most Favoured Nation treatment with 12.5% duty. Under subparagraph 74(3)(*b*)(ii) of the Act, such a mistake can be corrected within one year. But three years had elapsed.

[16] Nevertheless, C.B. Powell advised the CBSA of the mistaken tariff treatment. After all, the CBSA was correcting the mistaken classification number under section 59, so, in C.B. Powell's view, the CBSA could also correct the mistaken tariff treatment.

The section 59 re-determination

[17] The CBSA issued its section 59 re-determination. It corrected only the classification number. It left unchanged the tariff treatment, with its 12.5% duty:

> This decision represents a re-determination of the tariff classification only. The tariff treatment has not been reviewed and is not being re-determined on this detailed adjustment statement.

C.B. Powell takes the matter further

[18] C.B. Powell pursued its rights under subsection 60(1) of the Act and asked the President of the CBSA to conduct a re-determination of the tariff treatment (known as "tariff origin" under the Act). Subsection 60(1) provides as follows:

60. (1) A person to whom notice is given under subsection 59(2) in respect of goods may, within ninety days after the notice is given, request a re-determination or further re-determination of origin, tariff classification, value for duty or marking. The request may be made only after all amounts owing as duties and interest in respect of the goods are paid or security satisfactory to the Minister is given in respect of the total amount owing.	**60.** (1) Toute personne avisée en application du paragraphe 59(2) peut, dans les quatre-vingt-dix jours suivant la notification de l'avis et après avoir versé tous droits et intérêts dus sur des marchandises ou avoir donné la garantie, jugée satisfaisante par le ministre, du versement du montant de ces droits et intérêts, demander la révision ou le réexamen de l'origine, du classement tarifaire ou de la valeur en douane, ou d'une décision sur la conformité des marques.

The ruling of the President of the CBSA

[19] The President of the CBSA declined to look at the matter. In his view, he could act under subsection 60(1) only if there had been an earlier determination of tariff treatment by the CBSA. This is because subsection 60(1) uses the words "re-determination" and "further re-determination." In his view, since the CBSA had not determined tariff treatment earlier, there was nothing for him to "redetermine" or "further redetermine" under subsection 60(1).

Section 67 of the Act

[20] Section 67(1) of the Act provides for a further administrative appeal from the President of the CBSA to the CITT:

67. (1) A person aggrieved by a decision of the President made under section 60 or 61 may appeal from the decision to the Canadian International Trade Tribunal by filing a notice of appeal in writing with the President and the Secretary of the Canadian International Trade Tribunal within ninety days after the time notice of the decision was given.	**67.** (1) Toute personne qui s'estime lésée par une décision du président rendue conformément aux articles 60 ou 61 peut en interjeter appel devant le Tribunal canadien du commerce extérieur en déposant par écrit un avis d'appel auprès du président et du secrétaire de ce Tribunal dans les quatre-vingt-dix jours suivant la notification de l'avis de décision.

[21] However, C.B. Powell proceeded immediately to Federal Court by way of judicial review, rather than pursuing an appeal to the CITT.

The judicial review in the Federal Court

[22] In the Federal Court, C.B. Powell sought "an order" (in reality a declaration) that a decision had been made under subsection 60(1) and so there was an appeal available to it under subsection 67(1). In case the Federal Court found that no decision had been made under subsection 60(1), C.B. Powell alternatively sought an order of mandamus that would force the President to make a decision under subsection 60(1).

[23] The Crown took the position that, on the facts of this case, no re-determination was possible under subsection 60(1). As a result, there was no decision that could be judicially reviewed, nor could the Federal Court order any decision to be made under subsection 60(1).

[24] In the Federal Court, both parties were content to have the court decide these issues. No one took the position that the Federal Court should decline jurisdiction. No one took the position that the CITT should deal with the matter by way of appeal under subsection 67(1). However, just in case, the parties did agree that the time limits for an appeal to the CITT would not apply, pending judicial determination.

The judgment of the Federal Court

[25] The Federal Court granted the application for judicial review and declared that the president's decision is "a negative decision…to which an application lies to the Canadian International Trade Tribunal pursuant to s. 60.2…".

[26] I assume that the reference to subsection 60.2 is a typographical error, as that subsection deals with applications to the CITT for an extension of time to appeal to the President of the CBSA. It is clear from the reasoning of the Federal Court that it found that an appeal to the CITT was available and, as noted above, subsection 67(1) is the relevant provision.

[27] In reaching this result, the Federal Court engaged in a thorough review of the case law. It found that *Mueller Canada Inc. v. Canada (Minister of National Revenue-M.N.R.)* (1993), 70

F.T.R. 197 governed the outcome of the application. In *Mueller*, Rouleau J. held that a so-called "non-decision" or refusal to exercise jurisdiction could be appealed to the CITT.

C. Analysis

Parliament has established an administrative process to be followed

[28] Under the Act, Parliament has established an administrative process of adjudications and appeals in this area. This administrative process consists of initial CBSA decisions or deemed assessments under section 58, further determinations by CBSA officials under section 59, additional determinations by the President of the CBSA under section 60 and appeals to the CITT under subsection 67(1). The courts are no part of this. Allowing the courts to become involved in this administrative process before it is completed would inject an alien element into Parliament's design.

[29] In addition to designing an administrative process without courts, Parliament, for good measure, has gone further and has forbidden any judicial interference. At every stage of this administrative process, in subsections 58(3), 59(6) and 62, Parliament has specified that the only permissible reviews, re-determinations or appeals are found in the administrative process described in the Act:

58. (3) A determination made under this section is not subject to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by sections 59 to 61.	**58.** (3) La détermination faite en vertu du présent article n'est susceptible de restriction, d'interdiction, d'annulation, de rejet ou de toute autre forme d'intervention que dans la mesure et selon les modalités prévues aux articles 59 à 61.
...	[...]
59. (6) A re-determination or further re-determination made under this section is not subject to be restrained, prohibited,	**59.** (6) La révision ou le réexamen fait en vertu du présent article ne sont susceptibles de restriction, d'interdiction,

removed, set aside or otherwise dealt with except to the extent and in the manner provided by subsection 59(1) and sections 60 and 61.	d'annulation, de rejet ou de toute autre forme d'intervention que dans la mesure et selon les modalités prévues au paragraphe 59(1) ou aux articles 60 ou 61.
...	[...]
62. A re-determination or further re-determination under section 60 or 61 is not subject to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by section 67.	**62.** La révision ou le réexamen prévu aux articles 60 ou 61 n'est susceptible de restriction, d'interdiction, d'annulation, de rejet ou de toute autre forme d'intervention que dans la mesure et selon les modalités prévues à l'article 67.

The principle of judicial non-interference with ongoing administrative processes

[30] The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. The importance of this rule in Canadian administrative law is well-demonstrated by the large number of decisions of the Supreme Court of Canada on point: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 at paragraphs 38-43; *Regina Police Association Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14 at paragraphs 31 and 34; *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44 at paragraph 14-15, 58 and 74; *Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141, 2003 SCC 14; *Vaughan v. Canada*, [2005] 1 S.C.R. 146, 2005 SCC 11 at paragraphs 1-2; *Okwuobi v. Lester B. Pearson School Board*, [2005] 1 S.C.R. 257, 2005 SCC 16 at paragraphs 38-55; *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, 2005 SCC 30 at paragraph 96.

[31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

[32] This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway: see, *e.g.*, *Consolidated Maybrun*, *supra* at paragraph 38; *Greater Moncton International Airport Authority v. Public Service Alliance of Canada*, 2008 FCA 68 at paragraph 1; *Ontario College of Art v. Ontario (Human Rights Commission)* (1992), 99 D.L.R. (4th) 738 (Ont. Div. Ct.). Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience: see, *e.g.*, *Consolidated Maybrun*, *supra* at paragraph 43; *Delmas v.*

Vancouver Stock Exchange (1994), 119 D.L.R. (4th) 136 (B.C.S.C.), aff'd (1995), 130 D.L.R. (4th) 461 (B.C.C.A.); *Jafine v. College of Veterinarians (Ontario)* (1991), 5 O.R. (3d) 439 (Gen. Div.). Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like judges, have decision-making responsibilities to discharge: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 48.

[33] Courts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously. This is shown by the narrowness of the "exceptional circumstances" exception. Little need be said about this exception, as the parties in this appeal did not contend that there were any exceptional circumstances permitting early recourse to the courts. Suffice to say, the authorities show that very few circumstances qualify as "exceptional" and the threshold for exceptionality is high: see, generally, D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (looseleaf) (Toronto: Canvasback Publishing, 2007) at 3:2200, 3:2300 and 3:4000 and David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at pages 485-494. Exceptional circumstances are best illustrated by the very few modern cases where courts have granted prohibition or injunction against administrative decision-makers before or during their proceedings. Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted: see *Harelkin*, *supra*; *Okwuobi*, *supra* at paragraphs 38-55; *University of Toronto v. C.U.E.W, Local 2* (1988), 52 D.L.R.

(4th) 128 (Ont. Div. Ct.). As I shall soon demonstrate, the presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts.

Customs Act decisions in this area

[34] The general principle against judicial interference with ongoing administrative processes has already been applied a number of times to the *Customs Act* regime that is in issue in this appeal.

[35] The court below appropriately cited *Mueller*, *supra*, for the proposition that so-called "non-decisions" or refusals to exercise jurisdiction under this statutory regime were "decisions" that could be appealed to the CITT.

[36] The court below also appropriately cited *Her Majesty the Queen v. Fritz Marketing Inc.*, 2009 FCA 62. The issue in *Fritz Marketing* was whether the Federal Court, on judicial review, should set aside a CBSA determination made under section 59 of the Act because it was based on evidence that was obtained contrary to s. 8 of the Charter. Sharlow J.A., writing for this Court, stated (at paragraph 33) that the validity of the section 59 determination, including the Charter issue, should have been pursued under the administrative process set out in the Act.

[37] In this case, the court below was very mindful of these authorities and others to similar effect. However, it wondered whether the situation was different because the President's ruling was a "jurisdictional" determination. For example, it did not see *Fritz Marketing* as being necessarily determinative of the issues in this case because it did not concern "jurisdictional facts" (at paragraph

33). Further, it noted that the parties did not cite any authorities of this Court concerning a decision of the President made "on jurisdictional grounds" (at paragraph 34).

[38] The CITT has also wondered about its ability to hear an appeal under subsection 67(1) from "non-decisions" or "jurisdictional" determinations by the President of the CBSA under subsection 60(1): see *Vilico Optical Inc. v. Canada (Deputy Minister of National Revenue – M.N.R.),* [1996] C.I.T.T. No. 33 (Q.L.). As the court below observed (at paragraph 36), the CITT has been leaving it to the Federal Court to deal with "non-decisions" or "jurisdictional" determinations.

"Jurisdictional" grounds and "jurisdictional" determinations

[39] When "jurisdictional" grounds are present or where "jurisdictional" determinations have been made, can a party proceed to court for that reason alone? Put another way, is the presence of a "jurisdictional" issue, by itself, an exceptional circumstance that allows a party to launch a judicial review before the administrative process has been completed?

[40] In my view, the answer to these questions are negative. An affirmative answer would resurrect an approach discarded long ago.

[41] Long ago, courts interfered with preliminary or interlocutory rulings by administrative agencies, tribunals and officials by labelling the rulings as "preliminary questions" that went to "jurisdiction": see, *e.g.*, *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756. By labelling

tribunal rulings as "jurisdictional," courts freely substituted their view of the matter for that of the tribunal, even in the face of clear legislation instructing them not to do so.

[42] Over thirty years ago, that approach was discarded: *C.U.P.E. v. N.B. Liquor Corporation*, [1979] 2 S.C.R. 227. In that case, Dickson J. (as he then was), writing for a unanimous Supreme Court declared (at page 233), "The courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so." Recently, the Supreme Court again commented on the old discarded approach, disparaging it as "a highly formalistic, artificial 'jurisdiction' test that could easily be manipulated": *Dunsmuir*, *supra*, at paragraph 43. Quite simply, the use of the label "jurisdiction" to justify judicial interference with ongoing administrative decision-making processes is no longer appropriate.

[43] The inappropriateness of this labelling approach is well-illustrated by the ruling of the President of the CBSA in this case. In his ruling, the President considered his "jurisdiction." He did this by interpreting the words of subsection 60(1), determining the nature of C.B. Powell's request for a ruling, and deciding whether C.B. Powell's request fell within the scope of the subsection, as interpreted. These are questions of law, questions of fact and questions of mixed fact and law, respectively.

[44] But these are exactly the same questions that the President of the CBSA normally considers. For example, when deciding upon the tariff classification that ought to apply to particular imported goods under subsection 60(1), the President must determine the nature of the imported goods, what

classifications are legally available, and, finally, what classifications ought to apply to these goods. These are, respectively, determinations of questions of fact, law and mixed fact and law. Calling one ruling "jurisdictional" and the other not, when they are both really the same type of ruling, is, in reality, result-oriented labelling.

[45] It is not surprising, then, that courts all across Canada have repeatedly eschewed interference with intermediate or interlocutory administrative rulings and have forbidden interlocutory forays to court, even where the decision appears to be a so-called "jurisdictional" issue: see *e.g.*, *Matsqui Indian Band*, *supra; Greater Moncton International Airport Authority*, *supra* at paragraph 1; *Lorenz v. Air Canada*, [2000] 1 F.C. 452 (T.D.) at paragraphs 12 and 13; *Delmas*, *supra*; *Myers v. Law Society of Newfoundland* (1998), 163 D.L.R. (4th) 62 (Nfld. C.A.); *Canadian National Railway Co. v. Winnipeg City Assessor* (1998), 131 Man. R. (2d) 310 (C.A.); *Dowd v. New Brunswick Dental Society* (1999), 210 N.B.R. (2d) 386, 536 A.P.R. 386 (C.A.).

[46] I conclude, then, that applying the "jurisdictional" label to the ruling of the President of the CBSA under subsection 60(1) of the Act in this case changes nothing. In particular, applying the "jurisdictional" label to the President's ruling did not permit C.B. Powell to proceed to Federal Court, bypassing the remainder of the administrative process, namely the appeal to the CITT under subsection 67(1) of the Act.

What should happen in this case

[47] It follows that if C.B. Powell wishes to have recourse against the ruling of the President of the CBSA, it should pursue an appeal to the CITT under subsection 67(1). It is not for the Federal Court or this Court to interpret the word "decision" in subsection 67(1) and determine whether the CITT can hear C.B. Powell's appeal. That is the task of the CITT when an appeal is brought to it under subsection 67(1).

[48] According to the court below (at paragraph 36), the CITT believes, based on its reading of *Mueller*, *supra*, that only the Federal Court can rule that a "non-decision" or "jurisdictional decision" is a "decision" under subsection 67(1) of the Act. Further, the CITT believes, based on its reading of *Mueller*, that only "decisions on the merits" can be appealed to the CITT under subsection 67(1) of the Act: *Vilico*, *supra* at paragraph 11.

[49] I do not read *Mueller* as supporting either of these beliefs. Further, *Mueller* was decided on an application for judicial review that was brought prematurely – before the parties had exhausted the administrative process of adjudications and appeals under the Act. Under that administrative process, it was not the task of the Federal Court in *Mueller* to interpret the word "decision" in subsection 67(1) of the Act. It was the CITT's task. Under subsection 67(1), the CITT alone is to interpret the word "decision" and decide whether it can hear an appeal. After the CITT has done that and has ruled on any appeal properly before it, an aggrieved party can ask this Court to review the CITT's decision by way of an application for judicial review under s. 28(1)(e) of the *Federal Courts Act*.

[50] In this case, if an appeal is brought to it, the CITT should interpret the word "decision" in subsection 67(1) of the Act without regard to what was said in *Mueller*. After doing so, the CITT might decide that the ruling of the President of the CBSA in this case was a "decision"; if so, it will go on to decide C.B. Powell's appeal on the merits. Alternatively, the CITT might decide that the ruling of the President of the CBSA was not a "decision"; if so, it will decline to hear C.B. Powell's appeal on the merits. Either way, the CITT's decision, accompanied by meaningful reasons for decision, will mark the end of the administrative process of adjudications and appeals under the Act. At that point, an aggrieved party will be able to come to this Court and ask it to review the CITT's decision under s. 28(1)(e) of the *Federal Courts Act*.

[51] It follows from the foregoing analysis that the court below in this case should have dismissed C.B. Powell's application for judicial review as premature. The normal rule against judicial interference with ongoing administrative processes applies in this case, with full force. The record does not disclose any exceptional circumstances that would permit early recourse to the Federal Court, nor did the parties contend that there are any. Judicial involvement in the ongoing administrative process under the Act is not warranted at this time.

D. Conclusion

[52] Therefore, I would allow the appeal, set aside the judgment of the Federal Court and dismiss C.B. Powell's application for judicial review. As neither party objected to the jurisdiction of the

Federal Court to determine the judicial review, I would order that there be no costs both here and below.

"David Stratas"

J.A.

"I agree
M. Nadon J.A."

"I agree
John M. Evans J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-245-09
APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE SEAN J. HARRINGTON DATED MAY 21, 2009, NO. T-1376-08	
STYLE OF CAUSE:	The President of the Canada Border Services Agency and the Attorney General of Canada v. C.B. Powell Limited
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	February 2, 2010
REASONS FOR JUDGMENT BY:	Stratas J.A.
CONCURRED IN BY:	Nadon J.A. Evans J.A.
DATED:	February 23, 2010

APPEARANCES:

Jacques Savary	FOR THE APPELLANTS
Michael D. Kaylor	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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Lapointe Rosenstein LLP Montreal, Quebec	FOR THE RESPONDENT

Federal Court  Cour fédérale

Date: 20170531

Docket: T-81-17

Citation: 2017 FC 536

Ottawa, Ontario, May 31, 2017

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

ELIZABETH BERNARD

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

JUDGMENT AND REASONS

[1] This is an appeal, brought by the Applicant pursuant to Rules 51 and 369 of the *Federal Court Rules*, SOR/98-106 ("Rules"), of the Order of Prothonotary Tabib, dated April 21, 2017, wherein she stayed the Applicant's application for judicial review until July 1, 2017.

[2] Discretionary orders of prothonotaries should only be interfered with when such decisions are incorrect in law or are based on a palpable and overriding error in regard to the facts (*Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at

paras 64 and 79, application for leave to appeal to the Supreme Court of Canada filed on December 9, 2016 in 2016 CarswellNat 7112 (WL)).

[3] On January 18, 2017 the Applicant filed an application for judicial review of the December 19, 2016 decision of the Minister of National Revenue ("Minister") to waive the reporting requirements for all labour organizations and labour trusts, pursuant to s 149.01 of the *Income Tax Act*, RSC, 1985, c 1 (5th Supp) ("ITA"), for fiscal periods starting in 2017.

[4] Section 149.01 came into force on December 30, 2015 and requires such entities to provide information returns to the Canada Revenue Agency ("CRA"), including detailed financial information, failure to comply being an offence pursuant to s 239 (2.31)). Pursuant to s 149.01(4), information contained in the information return shall be made available to the public by the Minister, including by publication on the department's website. Pursuant to s 220 (2.1), the Minister has the discretion to waive the requirement to file prescribed forms or information.

[5] The Applicant is an employee in a unionized workplace who pays union dues to a labour organization subject to s 149.01 of the ITA.

[6] On February 7, 2017, the Respondent brought a motion seeking to strike out the application for judicial review and to suspend all further steps in the litigation until the motion was addressed. Alternatively, that the matter be held in abeyance pending the passing of Bill C-4, subsequent to which the matter would be moot. This was because s 149.01 and s 239(2.31)

would be repealed by Bill C-4 which, at the time of the motion, was on second reading before the Senate.

[7] The motion to strike raised a number of grounds, lack of standing, mootness and abuse of process. The Prothonotary did not accept these grounds but granted the alternate relief. She concluded that, although at that time the matter could not be declared moot, Parliament had expressed a clear intention to repeal s 149.01 and, given the legislation's progress, it was reasonable to believe that this would occur by July 1, 2017. Even in the absence of the challenged waiver by the Minister, the earliest any union or trust would be required to report pursuant to s 149.01 is July 1, 2017. The Prothonotary concluded that staying the application until that date struck the appropriate balance between avoiding needless expenditure of funds and resources in the very likely event that the matter may become moot before the waiver truly takes effect, and ensuring that in the event the legislation to repeal the reporting requirement stalls or fails, the judicial review can proceed without delay.

[8] On April 12, 2017, the Senate passed Bill C-4, with amendments, with the result that it was returned to the House of Commons to consider the amendments.

[9] The Applicant submits that the failure to consider a required element of a legal test, or similar error in principle, can be characterized as an error of law and subject to a standard of correctness (*Housen v Nikolaisen*, 2002 SCC 33 at para 36). She asserts that there is no evidence that the Prothonotary considered or applied the *Apotex Inc v Astrazeneca Canada Inc*, 2003 FCT 149 ("*Apotex*") test for applying s 50(1) of the *Federal Courts Act*, RSC, 1985, c F-7, which

provision permits the Court to stay a proceeding. Nor did the Respondent provide evidence or argument to establish that the continuance of the action would work an injustice because it would be oppressive or vexatious or would be an abuse of process or that a stay would not cause an injustice to the Applicant. Accordingly, the Respondent failed to meet its burden of proof.

[10] The Applicant also submits that the Prothonotary inappropriately deferred to the convenience of the Minister. Delaying the matter on the possibility of legislative change is an error in principle and an improper exercise of the Prothonotary's discretion. Further, that it is the role of the Court to hear and decide a citizen's challenge, not to facilitate a decision-maker's obvious attempts to immunize her decision from judicial oversight. The Court must apply the law as it currently exists. Staying a proceeding while Parliament considers legislative changes is tantamount to allowing the intrusion by the legislative branch upon matters entrusted to the judicial branch. Further, even if the matter becomes moot the Court retains the discretion to determine the matter *(Borowski v Canada (Attorney General)*, [1989] 1 SCR 342). It was procedurally unfair for the Prothonotary to presume that the matter would not proceed without giving the parties the opportunity to be heard on this point.

[11] For its part, the Respondent submits that the Prothonotary properly determined that a stay of proceedings to July 1, 2017 would be in the interests of justice when both chambers of Parliament have clearly spoken in favour of the repeal. The Prothonotary balanced the cost to the justice system against the prejudice a stay might create to the Applicant and her right to pursue her application. This balance was struck by selecting a date before which no return can have become due, July 1, 2017, even if there had been no waiver. The Prothonotary took into

account the expenditure of public funds necessary to carry on with the litigation of a matter that will very likely become moot and balanced it against the Applicant's lack of prejudice when no return can possibly have become due. This approach is in keeping with the applicable guiding principles (*Coote v Lawyers' Professional Indemnity Company*, 2013 FCA 143 at paras 8-11) ("*Coote*")).

[12] Having considered the Applicant's submissions, including those made in reply, as well as the submissions of the Respondent, I am not persuaded that the Prothonotary erred in law.

[13] In an application for judicial review, the Court may, pursuant to s 18.2 of the *Federal Courts Act*, make any interim order that it considers appropriate pending the final disposition of the application. Pursuant to s 50(1)(b), the Court may, in its discretion, stay any proceeding or matter where it is in the interest of justice to do so. And, as set out in Rule 3, the Rules are to be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.

[14] In *Coote*, the Federal Court of Appeal, in the context of staying of appeals, found that the Court had jurisdiction to effect a stay based on s 50 of the Federal Courts Act and its plenary jurisdiction to manage and regulate its own proceedings. Further, that the three-part test in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 had no application. Rather, in that circumstance the Court need only determine whether a stay is in the interest of justice (*Mylan Pharmaceuticals ULC v AstraZeneca Canada, Inc.*, 2011 FCA 312 at paras 3-14 ("*Mylan*"); *Federal Courts Act* s 50(1)(b)) and stated:

> [11] As explained in *Mylan*, there is a difference between this Court issuing a stay to enjoin another body from exercising its jurisdiction and this Court issuing a stay to refrain from exercising its own jurisdiction in a pending appeal. The *RJR-MacDonald* test, a test suitable for injunctive relief, applies to the former. With respect to the latter,
>
> > ...we are exercising a jurisdiction that is not unlike scheduling or adjourning a matter. Broad discretionary considerations come to bear in decisions such as these. There is a public interest consideration – the need for proceedings to move fairly and with due dispatch – but this is qualitatively different from the public interest considerations that apply when we forbid another body from doing what Parliament says it can do. As a result, the demanding tests prescribed in RJR-MacDonald do not apply here.
>
> (*Mylan*, *supra* at paragraph 5.)

[15] And, whether the Court would issue a stay to refrain from exercising its own jurisdiction over a pending appeal depended on the factual circumstances as guided by certain principles, including Rule 3. Additional principles guide the Court in the exercise of its plenary jurisdiction to manage and regulate proceedings. As long as no party is unfairly prejudiced and it is in the interest of justice, the Court should exercise its discretion against the wasteful use of judicial resources (*Coote* at paras 8-13; also see *Mylan* at paras 5-14).

[16] The Applicant asserts that the test for a stay under s 50(1)(b) is whether, in all of the circumstances, the interests of justice support the application being delayed (*Mylan*, at para 14). She also asserts, however, that the applicable test is found in *Apotex* where this Court, in the context of s 50(1)(a), stated:

> [13] The jurisprudence of this Court which has considered subsection 50(1) of the Act is to the following effect:

> i) The power to stay should be exercised sparingly and a stay will only be ordered in the clearest of cases;
>
> ii) In order to justify a stay two conditions must be met, one positive and one negative. They are that:
>
> a) The defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to the defendant or would otherwise be an abuse of process; and
>
> b) The stay must not cause an injustice to the plaintiff.
>
> The burden of proof is on the defendant to establish both conditions.
>
> iii) Where there are fundamental jurisdictional reasons for bringing an action in both a provincial superior court and the Federal Court of Canada, a stay of the Federal Court proceedings is not appropriate.
>
> See: Varnam v. Canada (Minister of National Health and Welfare) et al. (1987), 12 F.T.R. 34 (T.D.); Figgie International Inc. v. Citywide Machine Wholesale Inc. (1993), 50 C.P.R. (3d) 89 (F.C.T.D.).

[17] However, the 2003 decision of *Apotex* was not mentioned by the Federal Court of Appeal in *Coote*. In addition, *Apotex* concerned the granting of a stay under s 50(1)(a) on the basis that the proceeding was already before another court. That is not the situation in this case. Accordingly, I am not persuaded that the Prothonotary erred in law by failing to consider the "test" set out in *Apotex*.

[18] In any event, the Prothonotary recognized that it was very likely that by July 1, 2017 Bill C-4 would have been passed, thereby repealing s 149.01 of the ITA.

[19] She also recognized the significance of the date July 1, 2017 being that, even in the absence of the challenged waiver by the Minister, this was the earliest possible date that any union or trust would be required to report pursuant to s 149.01. This is significant because the Applicant could not suffer any prejudice prior to July 1, 2017. If the subject provisions are repealed on or before that date, with or without the waiver there will be no information reported and that information will not be made public. Thus, on a practical level, the Applicant cannot be prejudiced by the stay as she will not be deprived of this information.

[20] The Prothonotary also recognized that there was a balance to be struck between avoiding needless expenditure of public funds and resources in the very likely event that matter may become moot before the waiver has any practical effect and ensuring, if the repealed legislation is delayed or fails, that the matter can proceed without undue delay.

[21] The Prothonotary considered the factual circumstance in the context of the appropriate guiding principles. In my view, although her reasons were brief, it is apparent that she applied the approach described by the Federal Court of Appeal in *Coote*.

[22] As to the Applicant's submission that it was procedurally unfair for the Prothonotary to presume that the matter would not proceed even if it is rendered moot by the repealing of the subject provisions, this is not a basis upon which the Order can be appealed. Nor was there anything preventing the Applicant from making that argument when appearing before the Prothonotary and addressing the mootness ground nor precluding her from bringing a motion to that effect if the repeal is effected by July 1, 2017.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Appeal from the Order of Prothonotary Tabib dated April 21, 2017 is dismissed.

2. There shall be no order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-81-17
STYLE OF CAUSE:	ELIZABETH BERNARD v MINISTER OF NATIONAL REVENUE

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE FEDERAL COURTS RULES

JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	MAY 31, 2017

WRITTEN REPRESENTATIONS BY:

Elizabeth Bernard	FOR THE APPLICANT (ON HER OWN BEHALF)
Charles Camirand	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT

Federal Court  Cour fédérale

Date: 20190325

Docket: IMM-6389-18

Citation: 2019 FC 368

Ottawa, Ontario, March 25, 2019

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

RAED JASER

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

I. Overview

[1] The applicant, Mr. Raed Jaser, brings this motion seeking to stay a hearing before the Immigration Division [ID] of the Immigration and Refugee Board of Canada, scheduled to take place on March 29, 2019, where the Minister of Public Safety and Emergency Preparedness [Minister] seeks to have him declared inadmissible to Canada.

[2] For the reasons that follow, the motion is denied.

II. Background

[3] Mr. Jaser was convicted in the Ontario Superior Court of Justice in March 2015 on three terrorism-related offences arising from his involvement in a plot to derail a Via Rail passenger train. He was sentenced to life imprisonment on the first count and to periods of five years and eight years imprisonment on the remaining two counts. He must serve 10 years of his sentence from the date of arrest before becoming eligible for parole. He has appealed his convictions to the Ontario Court of Appeal.

[4] Mr. Jaser is not a Canadian citizen, but rather a permanent resident of Canada.

[5] In parallel with the ongoing appeal of his criminal convictions, the Minister initiated admissibility proceedings before the ID in January 2017 seeking to have Mr. Jaser found inadmissible for reasons of serious criminality and for engaging in terrorism pursuant to sections 34 and 36 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[6] Mr. Jaser had been assisted by several different lawyers before the ID. The record indicates that changes in counsel resulted from circumstances beyond Mr. Jaser's control and that the hearing before the ID had been postponed on a number of prior occasions. The matter was scheduled to be heard on December 13, 2018.

[7] In late November 2018 and shortly before the scheduled hearing, Mr. Jaser's newly retained counsel wrote to the ID advising that he had been recently retained, seeking clarification as to what documentation had been filed before the ID, and requesting that the December 13 hearing be adjourned *sine die*. Counsel submitted that an adjournment would allow the criminal appeal to resolve before the immigration matters proceeded and that this would be in the interests of fairness and judicial economy. It would also avoid the irreparable harm Mr. Jaser would suffer if the ID found him to be inadmissible based on convictions that were later overturned.

[8] The ID refused Mr. Jaser's request for a *sine die* adjournment, noting its obligation to conduct hearings without delay and finding it was not necessary to delay proceedings to allow for the outcome of related criminal appeals. In refusing the *sine die* adjournment, the ID did convert the December 13, 2018 hearing to a case management conference in recognition of the parties' need to adequately prepare for the hearing. The admissibility hearing was subsequently scheduled to be heard on March 29, 2019.

[9] Mr. Jaser initiated an Application for Leave and Judicial Review of the ID's interlocutory decision refusing the *sine die* adjournment and brought this motion seeking a stay of the admissibility hearing pending final disposition of the underlying Application for Leave and Judicial Review.

III. Issue

[10] The motion raises a single issue: has the applicant satisfied the tripartite test for the granting of interim injunctive relief sought in the form of an order staying the March 29, 2019 hearing?

IV. Analysis

A. *The Test*

[11] To succeed on a request for a stay, an applicant must satisfy the tripartite test set out in *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302 at para 6 (FCA) [*Toth*], by demonstrating the following:

(i) a serious issue exists:

(ii) the applicant would suffer irreparable harm if the stay is not granted; and

(iii) the balance of convenience favours the applicant.

[12] The test is conjunctive, and an applicant's failure to establish any one of the three factors will result in a denial of the relief sought (*Abdi v Canada (Minister of Public Safety and Emergency Preparedness)*, 2018 FC 202 at para 9).

B. *Does a serious issue exist?*

[13] The threshold for establishing a serious issue is low. The applicant need merely demonstrate that the issues raised are not frivolous or vexatious (*RJR MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at 335; *Thanabalasingham v Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 486 at para 7). However, where the relief sought by an applicant is the same as on the underlying application, as is the case here, the threshold to establish a serious issue is elevated: the applicant must demonstrate that an issue is raised that has a "likelihood of success" (*Wang v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148 at para 11).

[14] Mr. Jaser submits that the underlying application raises a number of serious issues. He argues that while he has no right to an adjournment, where issues of fairness arise, an adjournment may be appropriate. He submits that the ID has a heightened duty of fairness based on the criteria set out by the Supreme Court in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, as the ID's decision will amount to a final determination of his rights that will be unable to be undone should his criminal appeal be allowed. He is also of the view that the ID erred by (1) wrongly concluding that judicial economy favoured the refusal of the adjournment; and (2) placing too much emphasis on the indeterminacy of the adjournment, as the Ontario Court of Appeal had set an appeal date and "resolution was on the horizon." He relies largely on *Li v Canada (Minister of Citizenship and Immigration)*, 2018 FC 478 [*Li*].

[15] The respondent argues no serious issue arises as the underlying application is premature and Mr. Jaser has failed to demonstrate that the ID committed any reviewable error in refusing the *sine die* adjournment. On the issue of prematurity, the respondent notes that the denial of the adjournment request is an interlocutory decision and that absent exceptional circumstances the decision is not subject to judicial review until the ID's underlying proceeding is complete (*Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 [*CB Powell*]; *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 [*Halifax*]). The respondent submits there are no exceptional circumstances and an appropriate remedy is available at the conclusion of the ID's proceedings in the form of an application for leave and judicial review of the final decision. In the course of that review, any arguments regarding the ID's interlocutory rulings could be advanced and considered. I agree.

[16] In *CB Powell*, the Federal Court of Appeal addressed the normal rule that parties will only have access to the courts after an administrative process has run its course. Justice Stratas states, beginning at paragraph 30:

> [30] The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. The importance of this rule in Canadian administrative law is well-demonstrated by the large number of decisions of the Supreme Court of Canada on point: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 at paragraphs 38-43; *Regina Police Association Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14 at paragraphs 31 and 34; *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44 at paragraph 14-15, 58 and 74; *Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141, 2003 SCC 14; *Vaughan v. Canada*, [2005] 1 S.C.R. 146, 2005 SCC 11 at paragraphs 1-2; *Okwuobi v. Lester B. Pearson School Board*,

[2005] 1 S.C.R. 257, 2005 SCC 16 at paragraphs 38-55; *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, 2005 SCC 30 at paragraph 96.

[31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

[32] This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway: see, *e.g.*, *Consolidated Maybrun*, *supra* at paragraph 38; *Greater Moncton International Airport Authority v. Public Service Alliance of Canada*, 2008 FCA 68 at paragraph 1;*Ontario College of Art v. Ontario (Human Rights Commission)* (1992), 99 D.L.R. (4th) 738 (Ont. Div. Ct.). Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience: see, *e.g.*,*Consolidated Maybrun*, *supra* at paragraph 43; *Delmas v. Vancouver Stock Exchange* (1994),119 D.L.R. (4th) 136 (B.C.S.C.), aff'd (1995), 130 D.L.R. (4th) 461 (B.C.C.A.); *Jafine v. College of Veterinarians (Ontario)* (1991), 5 O.R. (3d) 439 (Gen. Div.). Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like judges, have decision-making responsibilities to discharge: *Dunsmuir v.New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 48.

> [33] Courts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously. This is shown by the narrowness of the "exceptional circumstances" exception. Little need be said about this exception, as the parties in this appeal did not contend that there were any exceptional circumstances permitting early recourse to the courts. Suffice to say, the authorities show that very few circumstances qualify as "exceptional" and the threshold for exceptionality is high: see, generally, D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (looseleaf) (Toronto: Canvasback Publishing, 2007) at 3:2200, 3:2300 and 3:4000 and David J. Mullan,*Administrative Law* (Toronto: Irwin Law, 2001) at pages 485-494. Exceptional circumstances are best illustrated by the very few modern cases where courts have granted prohibition or injunction against administrative decision-makers before or during their proceedings. Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted: see *Harelkin*, *supra*; *Okwuobi*, *supra* at paragraphs 38-55; *University of Toronto v. C.U.E.W, Local 2* (1988), 55 D.L.R. (4th) 128 (Ont. Div. Ct.). As I shall soon demonstrate, the presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts.

[17] The Supreme Court of Canada has observed that "reviewing courts now show more restraint in short-circuiting the decision-making role of the tribunal" and in doing so has highlighted the risks of early judicial intervention:

> [36] [...] Early judicial intervention risks depriving the reviewing court of a full record bearing on the issue; allows for judicial imposition of a "correctness" standard with respect to legal questions that, had they been decided by the tribunal, might be entitled to deference; encourages an inefficient multiplicity of proceedings in tribunals and courts; and may compromise carefully crafted, comprehensive legislative regimes: [citations removed]
>
> (*Halifax* at para 36)

[18] Mr. Jaser acknowledges that intervention in the interlocutory decisions of the ID should only occur in exceptional circumstances but argues those circumstances exist in this case.

[19] He submits that the prevention of bifurcation, the protection of judicial economy, and the possibility that an applicant will ultimately obtain the relief sought are among the key reasons for the court's reluctance to intervene on an interlocutory basis. He argues that, in this case, all of those factors actually favour intervention. The determinative process in this instance is the criminal appeal, and early judicial intervention will allow the criminal appeal to resolve the core question before the ID—are the criminal convictions sound? The effect, in this instance, will be to limit, not promote, bifurcation. It is also submitted that intervention will protect judicial economy by avoiding complex and convoluted litigation that may arise in respect of the interpretation and application of the IRPA. Finally, it is unlikely that Mr. Jaser will obtain a favourable result if the ID admissibility hearing proceeds.

[20] As previously noted, Mr. Jaser relies heavily on the decision of Justice Keith Boswell in *Li* in support of his position that a serious issue arises from the ID's interlocutory decision. The facts in *Li* are similar. Mr. Li had sought an adjournment before the ID pending determination of his appeal of a criminal conviction. The adjournment was denied. On judicial review, Justice Boswell concluded that the ID had erred in refusing the adjournment.

[21] *Li*, however differs in one material respect. Unlike the circumstance here, Mr. Li did not seek judicial review of the interlocutory refusal to grant an adjournment. Instead, he waited until

the proceedings before the ID were completed and then sought review of the ID's final decision. In doing so, he also challenged the reasonableness of the ID's adjournment decision.

[22] The ability to review interlocutory decisions as part of a review of a final decision is not controversial; an applicant may seek review of any error "whether it results from [the] final judgment or from an interlocutory decision" (*Szczecka v Canada (Minister of Employment and Immigration)* (1993), 170 NR 58 at para 6 (FCA); also see *Omobude v Canada (Minister of Citizenship and Immigration)*, 2015 FC 602 at paras 23–24). This occurred in *Li*, and the risks of early judicial intervention identified by the Supreme Court of Canada were avoided. The result was an efficient use of both the tribunal's and the Court's limited resources, and Mr. Li received an effective and meaningful remedy that placed him in no better or worse a position than he would have been in had the remedy been obtained on an interlocutory basis.

[23] Mr. Jaser argues that he will be left without a remedy if found inadmissible but his criminal appeal is ultimately successful and that this warrants early intervention on an exceptional basis. The respondent takes issue with the view that a remedy will be unavailable.

[24] While Mr. Jaser's circumstances may be unusual, even unique, he has not demonstrated that he will be prejudiced or unable to fully advance the issue of remedy should he seek a review of the ID's final decision upon the completion of that process. This is not one of those very few circumstances where a party should have early recourse to the courts; the availability of judicial review of the ID's final decision means an adequate remedy will be available once a final

decision has been made, and the ongoing process before the ID should not be disrupted to allow a challenge at this stage.

[25] Having concluded that the underlying application is premature, I need not consider the merits of the issues raised or the remaining two prongs of the tripartite *Toth* test.

ORDER IN IMM-6389-18

THIS COURT ORDERS that:

1. The motion is dismissed; and

2. There is no order as to costs.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6389-18
STYLE OF CAUSE:	RAED JASER v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 19, 2019
ORDER AND REASONS:	GLEESON J.
DATED:	MARCH 25, 2019

APPEARANCES:

Simon Wallace	FOR THE APPLICANT
Ian Hicks	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Simon Wallace Barrister and Solicitor Refugee Law Office Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT

Federal Court  Cour fédérale

Date: 20110421

Docket: T-1433-09

Citation: 2011 FC 485

Ottawa, Ontario, April 21, 2011

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

DETRA BERBERI

Applicant

And

CANADIAN HUMAN RIGHTS TRIBUNAL AND ATTORNEY GENERAL OF CANADA (RCMP)

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] Ms. Detra Berberi (the "Applicant") seeks judicial review of the decision of the Canadian Human Rights Tribunal (the "CHRT" or the "Tribunal"), dated July 27, 2009. The Attorney General of Canada (the "Respondent") represents the Royal Canadian Mounted Police (the "RCMP") in this proceeding.

[2] In its decision of July 27, 2009, the Tribunal granted an award to the Applicant, pursuant to paragraph 53(2)(e) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the "Act") for pain and suffering, in the amount of $4,000, together with the amount of $5,814 for legal costs, in connection with a complaint that she had filed against the RCMP. The Applicant now seeks the following relief:

> The applicant makes application for: the discriminatory complaint against the RCMP to be fully presented as the Applicant did not have her "day in court." The Applicant will be representing herself and wishes to present the original complaint in precise detail. All the evidence was not presented.
> A job offer was made to a RCMP office other than the one the Applicant was originally to be employed at however, the time and distance to the other job location are significantly longer.
> There was no compensation nor any kind of relief offered in order to travel the extra distance to the Milton office.
> Also, the Pain and Suffering aspect of the complaint needs to be re-addressed as the monetary compensation of $4,000 was not justifiable considering what the Applicant has had to deal with for the past 4 years.
> Finally, the income loss, the Applicant suffered, from 2005 to 2009 was not taken into consideration. The Applicant should have been allowed to provide Income Tax Returns.

[3] The hearing of this application for judicial review was heard on October 20, 2010. In a letter dated October 22, 2010, the Applicant sought to supplement the arguments that she had made during the hearing. The Respondent was given the opportunity to make submissions concerning the Applicant's letter and advised the Court that no further comment would be made.

[4] The Court did not request further submissions from the Applicant and she did not obtain leave to file a supplementary record pursuant to Rule 312 of the *Federal Courts Rules*, SOR/98-106. As such, the Applicant's letter of October 22, 2010 will not be considered.

Background

[5] The relevant facts are taken from the Affidavit, including the several exhibits attached thereto, filed by the Applicant in support of this application. In addition to her Affidavit, the Applicant also filed some 22 tabbed documents, some of which are also attached to her Affidavit. Documents that are not attached to an affidavit will not be considered. Likewise, the Court will not consider evidence that was not before the Tribunal. In this regard I refer to the Federal Court of Appeal's decision in *Ontario Assn. of Architects v. Assn. of Architectural Technologists of Ontario*, [2003] 1 F.C. 331 (F.C.A.).

[6] The Applicant included the following request for the production of documents from the Tribunal in her application for judicial review:

> The applicant requests The Canadian Human Rights Tribunal to send a certified copy of the following material that is not in the possession of the applicant but is in the possession of the Canadian Human Rights Tribunal to the applicant and to the Registry: All documents that pertain to complaint T1311/4108 and that may have been submitted, without the Applicant's knowledge, particularly on or after June 01, 2009.

[7] The Court file contains a letter dated September 9, 2009 from Mr. Gregory M. Smith, Registrar of the CHRT, objecting to the production of the documents requested by the Applicant. In part, the letter provides as follows:

> In addition, the Applicant, pursuant to Rule 317(1) of the Federal Court Rules has requested the Tribunal to send to the Court, as well as to the Applicant, a certified copy of the full record of proceedings related to the Tribunal hearing.

> This is to advise that pursuant to Rule 318(2) of the Court Rules, the Tribunal objects to the provision of these documents.
>
> Rule 317(1) of the Federal Court Rules states:
>
> > "A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested." (emphasis added)
>
> The Tribunal is of the opinion that Rule 317(1) applies only to those documents which are not in the possession of the Applicant.
>
> It is the Tribunal's understanding that the documents requested in the Notice of Application **are** in the possession of the Applicant (Detra Berberi). Accordingly, pursuant to Rule 317(1), the Tribunal is not obliged to present these documents to the Court and the Applicant. This responsibility rests with the Applicant.
>
> Having said this, the Tribunal understands that during the course of hearings documents are sometimes written on, or are otherwise marked, making them unsuitable for filing with the Federal Court. The Tribunal is prepared to provide copies of these documents, at cost, upon request [emphasis in original].

[8] There is no record in the Index of Recorded Entries or in the Court file that the Applicant brought a motion to compel the production of any documents or transcripts from the Tribunal.

[9] The Applicant is employed with Human Resources and Skills Development Canada ("HRSDC") as a Client Service Consultant. In December 2004 she applied for a permanent Administrative Assistant deployment position with the RCMP. At the request of Corporal Mark DuPuy, she attended an interview for the position on March 8, 2005.

[10] On March 10, 2005, the Applicant was advised by one Diane Mallett that she was the successful candidate for the position.

[11] On May 18, 2005, Corporal DuPuy advised the Applicant that a new staff sergeant had been hired and that the new staff sergeant wanted to meet her. The Applicant attended at the RCMP office on May 25, 2005 to meet new Staff Sergeant Mabee. She was interviewed about past absenteeism and about any injuries that she suffered. The Applicant, in response to an inquiry as to her willingness to disclose her personnel leave file from HRSDC, agreed to such disclosure.

[12] By letter dated August 10, 2005, attached as part of Exhibit 6 to the Applicant's Affidavit filed in support of this application for judicial review, the RCMP advised the Applicant that her application for the position would not be given further consideration. The operative part of the letter provides as follows:

> We regret to inform you that your request for deployment to the above noted position will not be given further consideration due to the fact that affected employees have been identified and will, therefore, be given priority consideration.

[13] The Applicant claims that she did not receive this letter until much later, that is in December 2005.

[14] The Applicant subsequently filed a complaint with the Canadian Human Rights Commission (the "CHRC" or the "Commission") in August 2006, alleging a discriminatory practice, that is "refuse to employ", on the basis of the prohibited ground of disability, contrary to section 7 of the Act. In her narrative supporting her complaint the Applicant outlined the history of

her job application and interviews with the RCMP, leading up to the letter of August 10, 2005, quoted above. The Applicant's narrative, in part, reads as follows:

> I am a "duty to accommodate" and due to 2 motor vehicle accidents (in 1998 + 1999) I have been off and on due to my injuries….
>
> On March 10, 2005 I was advised that I was successful and was thus offered the position .by [sic] Diane Mallett. Staffing Officer – London, Ont….
>
> On May 25, 2005 I was requested to meet with the S/Sgt at the time. During this meeting the S/Sgt expressed his concerns regarding my past illness and the times I had been off because of it. He asked me to give my personnel officer, Marie Casey (SDC) permission for him to go and look over my whole leave personnel file. I in fact complied with this request and S/Sgt went to the Etobicoke SDC office and sat in an office with Marie Casey and reviewed my whole leave file.
>
> On August 10, 2005 a letter was mailed to me advising me that I was in fact not being deployed to the RCMP CR 04 position.
>
> I believe I was denied the CR 04 position because of my disability and past absentism [sic].

[15] By letter dated May 25, 2009, Counsel for the RCMP advised the Tribunal as follows:

> Prior to the commencement of the hearing in this matter scheduled to commence June 1, 2009, the respondent wishes to admit the issue that the Tribunal would inquire into at that time: whether the decision not to employ the complainant was in part based on a perceived disability. The hearing could then proceed with the issue of damages alone and significantly shorten the number of hearing days required.

[16] A hearing took place on June 1 and 2, 2009 before the Tribunal Member J. Grant Sinclair. In its decision, the Tribunal reviewed the history of the Applicant's complaint. It noted that the RCMP had admitted that the decision to not employ the Applicant "was based in part on a perceived disability". It noted that the hearing could proceed on the issue of remedy alone, and set out the Applicant's position as follows:

> [32] At the hearing, the RCMP offered Ms. Berberi an indeterminate CR-04 finance/administrative position at the RCMP detachment in Milton, which is one of her preferred locations. The only condition was that Ms. Berberi obtain a top secret security clearance. The RCMP also offered to conduct a functional ability assessment and provide the necessary accommodations to ensure that she succeeds in this position.
>
> [33] Ms. Berberi accepted this offer and agreed that this satisfied her remedy request for a permanent position with the RCMP. The parties agreed that no order from the Tribunal was necessary.

[17] The Tribunal reviewed the Applicant's claim for lost income that she had calculated on the basis of her earnings in 2007, 2008 and part of 2009, if she had been awarded the RCMP position. She claimed $3,000 for 2007, on the basis that this was the difference between the annual RCMP salary of $44,946 and the amount of $41,474 that she was paid for her employment with the Government of Ontario.

[18] For 2008, the Applicant claimed $14,000, being the difference between the RCMP salary and $30,000 that she received from Sun Life as long-term disability benefits.

[19] The Applicant claimed $4,000 to $5,000 for part of 2009 for the same reason. She also sought recovery of contributions she would have made to her pension, the Canada Pension Plan ("CPP") and Employment Insurance ("EI"), as well.

[20] According to the Tribunal's decision the Applicant argued that the "precipitating event" underlying her claim for lost income for the years 2007, 2008 and part of 2009 was her "anxiety and panic attack on December 29, 2006", which caused her to be off work from that date until April 14, 2009. The Tribunal noted that the Applicant argued that the panic attack was due to the failure of

the RCMP to award her the position for which she had applied, "which failure was based on a discriminatory act".

[21] The Tribunal rejected this argument and set out several reasons for doing so, in particular the lack of medical evidence to support a causal connection between the panic attack and the failure of the RCMP to offer her the job. The Applicant's claim for salary loss and collateral claims were denied.

[22] The Tribunal then addressed the Applicant's request for compensation for pain and suffering as a result of the discriminatory act. This compensation is authorized by paragraph 53(2)(e) of the Act.

[23] The Tribunal referred to relevant jurisprudence, that is the decisions in *Richard Warman v. Kyburz*, 2003 CHRT 18 and *Woiden et al. v. Dan Lynn*, (2002), 43 C.H.R.R.C/296. In *Warman*, an award of $15,000 was made for pain and suffering, together with another award of $15,000 as special compensation for wilful and reckless conduct. The discriminatory behaviour in that case consisted of the communication of "hate" messages on the complainant's website. The wilful and reckless conduct included persistent efforts to interfere with the complainant's employment and threats to his life.

[24] The *Woiden* case, according to the Tribunal, involved sexual harassment of four employees by their supervisor which led three complainants to leave their employment. The Tribunal noted that the complainants in *Woiden* settled with their employer, which included amounts for pain and

suffering, but the Tribunal awarded $8,000 to three complainants, and $6,000 to the fourth, for pain and suffering. The complainants in *Woiden* were also awarded $10,000 for the wilful and reckless conduct of the respondent.

[25] In this case, the Tribunal noted the Applicant's evidence that she was "devastated and depressed" when she learned that she had been rejected for the RCMP position. He found that she had made no argument nor adduced any other evidence that would justify her claim for $12,000 to $15,000 for pain and suffering. At paragraph 55, the Tribunal made the following findings:

> [55] Using the *Warman* and *Woiden* cases as a measure, this is certainly not a case for an award in the upper limit for pain and suffering. It calls for an award in the lower range. Taking into account her evidence of the impact of the refusal of the RCMP to offer her the deployment, and the fact that Ms. Berberi continued to work at the Brampton location after December 1, 2005 until March 2006 within her acceptable commuting distance from her home, I award her the amount of $4,000 for pain and suffering.

[26] The Tribunal then addressed the Applicant's claim for compensation for wilful and reckless conduct by the RCMP, in engaging in a discriminatory practice against her. This claim was rejected as follows, from paragraph 56 of the decision:

> [56] Ms. Berberi also claims that, in denying her application, the RCMP engaged in the discriminatory practise wilfully or recklessly. She claims damages of $12,000-$15,000. It is true that Staff Sergeant Mabee had concerns about her previous work absenteeism and that her back problems could result in further significant absenteeism. This evidence, however, goes to the issue of liability which the RCMP has conceded. It is not enough to show wilful or reckless conduct.

[27] The Applicant also sought recovery of out-of-pocket expenses that she estimated to be in the area of $1,000. These expenses were attributed to photocopying fees and charges for doctors' letters. In the absence of supporting receipts, this claim was denied.

[28] Finally, the Applicant sought recovery of legal expenses. She submitted one account in the amount of $614.25. This item was denied since the Tribunal was not satisfied as to the nature of the legal services nor when they were provided.

[29] The Tribunal then addressed the issue of fees charged by the lawyer who represented the Applicant in connection with the June 2009 hearing. According to the decision, the lawyer provided a computer printout for legal work provided to the Applicant from May 8, 2009 to June 2, 2009.

[30] The Tribunal noted that the lawyer was a senior Counsel, having been called to the Bar in 1968. It also noted that the senior lawyer was assisted by a junior lawyer whose hourly rate was lower. Finally, the Tribunal took into account the fact that Counsel was not experienced in dealing with complaints under the Act and that he had to familiarize himself with the Act and relevant jurisprudence. At paragraphs 65 and 66 of its decision, the Tribunal made the following conclusion:

> [65] The RCMP admitted liability for the discriminatory act thereby considerably shortening the scheduled hearing time. In terms of the remedy that she was seeking, Ms. Berberi had limited success. At the hearing, the RCMP agreed to provide Ms. Berberi with a CR-04 position at Milton, one of her preferred locations. Other than that, of all the compensation she was seeking, the only compensation that the Tribunal awarded her was $4,000 for pain and suffering, an amount considerably less than the $12,000-$15,000 she asked for.
>
> [66] On the other hand, I agree with Mr. Kostyniuk that the hearing was more efficient and focused than probably would have been the case if Ms. Berberi had appeared unrepresented. Taking all these

> factors into account, I award Ms. Berberi the sum of $5,814 for legal expenses.

Issues

[31] In this application for judicial review the Applicant raises several issues. First, she argues that the Tribunal erred in not postponing the hearing of June 2009. Then she argues that it erred by only addressing the issue of remedies, rather than reviewing her complaint in its totality. Next, she submits that it erred by failing to fully address sections 7 and 53 and in failing to compensate her accordingly.

[32] Further, the Applicant argues that the Tribunal committed an error by assuming that the RCMP would act in good faith in following through with the job offer in Milton and in processing a Security Clearance for her. Finally, she argues that her counsel was incompetent.

Discussion and Disposition

[33] The first matter to be addressed is the applicable standard of review. According to the decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, decisions of administrative decision-makers are reviewable on one of two standards, that is correctness or reasonableness. Questions of procedural fairness will be reviewable on the standard of correctness; *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339 at para. 43. Questions of fact and of mixed fact and law are reviewable on the standard of reasonableness; see *Dunsmuir* at para. 53.

[34] The Applicant argues that the Tribunal erred in failing to address sections 7 and 53 of the Act. Issues dealing with the interpretation of the statute that governs the operation of the

Commission and the mandate of the Tribunal are subject to review on the standard of reasonableness; see *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7.

[35] Further, in its decision in *Dunsmuir*, the Supreme Court of Canada said at para. 57 that where prior jurisprudence has established the applicable standard of review, that standard can be applied.

[36] In the present case, the Applicant raises some issues of procedural fairness and the standard of correctness will apply to those issues. In my opinion, three issues raise questions of procedural fairness and are reviewable on the standard of correctness; that is the postponement issue, the alleged error of the Tribunal in dealing only with the question of remedies, and the competency of counsel.

[37] The matter of granting or denying a postponement of a hearing is a matter wholly within the discretion of the Tribunal. The Tribunal is the master of its own procedure; see *Prassad v. Minister of National Revenue*, [1989] 1 S.C.R. 560.

[38] In this case, there is no evidence regarding the Applicant's request for a postponement. There is no mention of such a request in the decision. There is no transcript of the proceedings before the Tribunal. Although the Applicant's initial request for a transcript was denied by the Tribunal, the Applicant could have brought a motion before the Court, seeking an order for the production of materials by the Tribunal, including a transcript. She did not do so.

[39] In the absence of evidence to support the Applicant's submissions, I am not persuaded that any breach of procedural fairness arose from the Tribunal's refusal to postpone the hearing.

[40] The Applicant submits that the Tribunal erred by dealing only with the remedy, rather than reviewing her complaint in its totality. In other words, the Applicant argues that the Tribunal should have considered whether the actions of the RCMP constituted a discriminatory act.

[41] I have characterized the issue as one of procedural fairness because it relates to the ultimate task before the Tribunal. Did the Tribunal do its job?

[42] In my opinion, that question must be answered in the affirmative.

[43] The record shows that in a letter dated May 25, 2009, Counsel for the RCMP advised the Tribunal that the employer admitted to a discriminatory practice in failing to hire the Applicant. This letter was sent mere days before the commencement of the hearing on June 1, 2009.

[44] The Tribunal referred to this letter in its decision and further noted that counsel "then suggested that the hearing into her complaint could proceed on the issue of remedy". I understand the Tribunal to be saying that Counsel for the RCMP had suggested the hearing address only the issue of remedy.

[45] It is worth noting that the Applicant was represented by Counsel at the hearing in question. In my opinion, if she had disagreed with the proposed manner of proceeding, she could have made her views known through her Counsel.

[46] However, more importantly, the Tribunal's decision to deal only with remedy was correct in light of the fact that the employer, that is the RCMP, had admitted commission of a discriminatory act. In these circumstances, it was unnecessary for the Board to conduct a hearing on the issue of liability. There is no merit in this issue as framed by the Applicant.

[47] The remaining issue of procedural fairness concerns the competency of counsel. The Applicant alleges that her lawyer was unable to properly represent her since he lacked experience in dealing with complaints under the Act.

[48] The Applicant has presented no evidence to support this allegation. She was cross-examined upon the Affidavit that she filed in support of this application for judicial review. The transcript of that cross-examination shows that she had consulted at least three other lawyers before engaging the counsel who represented her before the Tribunal. She expressed little confidence in at least two of those lawyers.

[49] The test to be met when a party alleges incompetence of counsel amounting to a breach of procedural fairness is discussed by the Supreme Court of Canada in *R. v. G.D.B.*, [2000] 1 S.C.R. 520, which held as follows at para. 26:

> ...For an appeal to succeed, it must be established, first, that counsel's acts or omissions constituted incompetence and second, that a miscarriage of justice resulted.

[50] In my opinion, the Applicant has failed to establish either element of this test. Her arguments on this ground must fail.

[51] I turn now to the remaining issues. The Applicant argues that the Tribunal erred in failing to address sections 7 and 53 of the Act.

[52] Section 7 of the Act provides as follows:

Employment	Emploi
7. It is a discriminatory practice, directly or indirectly,	7. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :
(a) to refuse to employ or continue to employ any individual, or	a) de refuser d'employer ou de continuer d'employer un individu;
(b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.	b) de le défavoriser en cours d'emploi.

[53] Subsections 53(2) and (3) are relevant and provide as follows:

Complaint substantiated	Plainte jugée fondée
(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or	(2) À l'issue de l'instruction, le membre instructeur qui juge la plainte fondée, peut, sous réserve de l'article 54,

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:

ordonner, selon les circonstances, à la personne trouvée coupable d'un acte discriminatoire :

(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, including

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, notamment :

(i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or

(i) d'adopter un programme, un plan ou un arrangement visés au paragraphe 16(1),

(ii) making an application for approval and implementing a plan under section 17;

(ii) de présenter une demande d'approbation et de mettre en oeuvre un programme prévus à l'article 17;

(b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;

b) d'accorder à la victime, dès que les circonstances le permettent, les droits, chances ou avantages dont l'acte l'a privée;

(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;

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

(d) that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and	d) d'indemniser la victime de la totalité, ou de la fraction des frais supplémentaires occasionnés par le recours à d'autres biens, services, installations ou moyens d'hébergement, et des dépenses entraînées par l'acte;
(e) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.	e) d'indemniser jusqu'à concurrence de 20 000 $ la victime qui a souffert un préjudice moral.
Special compensation	Indemnité spéciale
(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.	(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.

[54] It is not necessary for me to comment further on the manner in which the Tribunal dealt with section 7 of the Act. The RCMP had admitted the commission of a discriminatory act. As discussed above, no purpose would have been gained if the Tribunal had proceeded to deal with the question of liability, in the face of that admission. The Tribunal correctly went on to deal with the issue of a remedy, including monetary compensation.

[55] In the first place, I note that subsection 53(2) authorizes the Tribunal, in its discretion, to make an order against the person found to have engaged in a discriminatory practice. That order could address several matters, including a directive that the person stop the discriminatory practice; that the person offer the injured party, on the first reasonable occasion, the rights, opportunities or privileges that were denied as a result of the prohibited practice; and/or that the injured person be compensated for lost wages, ancillary damages and for pain and suffering.

[56] Subsection 53(3) allows the Tribunal, again in the exercise of its discretion, to order the payment of special compensation if the discriminatory practice was engaged in a wilful or reckless manner.

[57] The Tribunal specifically addressed all of these elements. At the outset of the body of its decision, the Tribunal recorded that the RCMP had offered the Applicant an indeterminate CR 04 finance/administrative position at the RCMP detachment in Milton, one of the places that the Applicant had designated as a suitable workplace. The offer was accepted by the Applicant and according to paragraph 33 of the Tribunal's decision, the "parties agreed that no order from the Tribunal was necessary".

[58] The Tribunal carefully reviewed the components of compensation that are identified in paragraphs 53(2)(c), (d) and (e). It determined that the Applicant suffered no loss of wages as a result of the discriminatory practice engaged in by the RCMP. The Tribunal provided clear and intelligible reasons in that regard at paragraphs 39 to 45 of its decision.

[59] In the same way, the Tribunal carefully considered the Applicant's claim to recover out-of-pocket expenses. The reasons for rejecting that claim are clear and the Tribunal properly noted that the Applicant had provided no evidence to support this claim.

[60] The Tribunal considered the Applicant's claim for compensation for pain and suffering. It considered relevant jurisprudence. It assessed an award of $4,000. This is less than the Applicant wants but she has not shown that the Tribunal erred in making this award, particularly in light of the fact that paragraph 53(2)(e) of the Act sets a cap of $20,000 on an award for pain and suffering.

[61] The Tribunal also addressed the Applicant's claim for special compensation pursuant to subsection 53(3). Again, the Tribunal reviewed relevant jurisprudence, including the facts at issue in those cases. I am not persuaded that the Tribunal erred in the exercise of its discretion in dismissing this aspect of the Applicant's claim.

[62] Finally, I turn to the last issue raised by the Applicant, that the Tribunal had erred in assuming that the RCMP would act in good faith in honouring the offer of a job in Milton and in facilitating the issuance of a Security Clearance. I have characterized this issue as one of mixed fact and law, reviewable on the standard of reasonableness.

[63] In my opinion, the answer to this issue lies in the Tribunal's acknowledgement at paragraph 33 of the decision that the "parties agreed that no order from the Tribunal was necessary" relative to the job offer that was made by the RCMP and accepted by the Applicant.

[64] The Applicant was represented by counsel at the hearing before the Tribunal. She had the option of requesting an order. She did not do so.

[65] The responsibilities of the Tribunal were discharged once the issues of remedy, including compensation for pain and suffering and a contribution towards legal fees, were adjudicated. The Applicant is at liberty to seek an order from the Tribunal with respect to implementation of the remedy. She has failed to show that the Tribunal made any assumptions on the basis of any error, and this argument is dismissed.

[66] In conclusion, the Applicant is attempting to re-visit the proceedings that were conducted by the Tribunal. She is asking this Court to "second guess" the decision-maker. That is not the purpose of judicial review where the Court is limited to a review of the procedures that were followed by the original decision-maker, in this case the Tribunal. A judicial review application is neither a trial *de novo*, with witnesses, nor an appeal where the Court can substitute its own decision; see *Bekker v. Minister of National Revenue* (2004), 323 N.R. 195 (F.C.A.).

[67] In the result, this application for judicial review is dismissed with costs to the Respondent. If the parties cannot agree on costs, brief submissions can be made as follows:

(i) by the Respondent by April 27, 2011;

(ii) by the Applicant by May 2, 2011.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed, with costs. If the parties cannot agree, brief submissions, not exceeding 4 pages, to be served and filed as follows:

(i) by the Respondent by April 27, 2011;

(ii) by the Applicant by May 2, 2011.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1433-09
STYLE OF CAUSE:	DETRA BERBERI v. CANADIAN HUMAN RIGHTS TRIBUNAL and ATTORNEY GENERAL OF CANADA (RCMP)
PLACE OF HEARING:	Toronto, ON
DATE OF HEARING:	October 20, 2010
FURTHER SUBMISSIONS:	October 22, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	HENEGHAN J.
DATED:	April 21, 2011

APPEARANCES:

Detra Berberi	FOR THE APPLICANT (ON HER OWN BEHALF)
Shelley Quinn	FOR THE RESPONDENT

SOLICITORS OF RECORD:

N/A	FOR THE APPLICANT (ON HER OWN BEHALF)
Myles J. Kirvan Deputy Attorney General of Canada Toronto, ON	FOR THE RESPONDENT

Canadian Human Rights Commission and Donna Mowat *Appellants*

v.

Attorney General of Canada *Respondent*

and

Canadian Bar Association and Council of Canadians with Disabilities *Interveners*

Indexed as: Canada (Canadian Human Rights Commission) *v.* Canada (Attorney General)

2011 SCC 53

File No.: 33507.

2010: December 13; 2011: October 28.

Present: McLachlin C.J. and LeBel, Deschamps, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Administrative law — Judicial review — Standard of review — Canadian Human Rights Tribunal awarding legal costs to complainant — Whether standard of reasonableness applicable to Tribunal's decision to award costs — Whether Tribunal made a reviewable error in awarding costs to complainant — Canadian Human Rights Act, R.S.C. 1985, c. H-6, s. 53(2)(c), (d).

Administrative law — Boards and tribunals — Jurisdiction — Costs — Canadian Human Rights Tribunal awarding legal costs to complainant — Whether Tribunal having jurisdiction to award costs — Canadian Human Rights Act, R.S.C. 1985, c. H-6, s. 53(2)(c), (d).

M filed a human rights complaint with the Canadian Human Rights Commission alleging that the Canadian Forces had discriminated against her on the ground of sex contrary to the provisions of the *Canadian Human Rights Act* ("*CHRA*"). The Canadian Human Rights Tribunal ("Tribunal") concluded that M's complaint of sexual harassment was substantiated in part and she was awarded $4,000 to compensate for "suffering in respect

Commission canadienne des droits de la personne et Donna Mowat *Appelantes*

c.

Procureur général du Canada *Intimé*

et

Association du Barreau canadien et Conseil des Canadiens avec déficiences *Intervenants*

Répertorié : Canada (Commission canadienne des droits de la personne) *c.* Canada (Procureur général)

2011 CSC 53

N° du greffe : 33507.

2010 : 13 décembre; 2011 : 28 octobre.

Présents : La juge en chef McLachlin et les juges LeBel, Deschamps, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit administratif — Contrôle judiciaire — Norme de contrôle — Adjudication des dépens à la plaignante par le Tribunal canadien des droits de la personne — La norme du caractère raisonnable s'applique-t-elle à la décision du Tribunal d'adjuger des dépens? — Le Tribunal a-t-il commis une erreur susceptible de contrôle judiciaire en adjugeant les dépens à la plaignante? — Loi canadienne sur les droits de la personne, L.R.C. 1985, ch. H-6, art. 53(2)c), d).

Droit administratif — Organismes et tribunaux administratifs — Compétence — Dépens — Adjudication des dépens à la plaignante par le Tribunal canadien des droits de la personne — Le Tribunal a-t-il le pouvoir d'adjuger des dépens? — Loi canadienne sur les droits de la personne, L.R.C. 1985, ch. H-6, art. 53(2)c), d).

M a saisi la Commission canadienne des droits de la personne d'une plainte selon laquelle les Forces canadiennes avaient fait preuve à son endroit de discrimination fondée sur le sexe et ainsi contrevenu aux dispositions de la *Loi canadienne sur les droits de la personne* (« *LCDP* »). Le Tribunal canadien des droits de la personne (« Tribunal ») a conclu que M avait établi en partie le bien-fondé de sa plainte de harcèlement

of feelings or self-respect". M applied for legal costs. The Tribunal determined that it had the authority to order costs pursuant to s. 53(2)(*c*) and (*d*) of the *CHRA* and awarded M $47,000 in this regard. The Federal Court upheld the Tribunal's decision on its authority to award costs. The Federal Court of Appeal allowed an appeal of this decision and held that the Tribunal had no authority to make a costs award.

Held: The appeal should be dismissed.

Administrative tribunals are generally entitled to deference in respect of the legal interpretation of their home statutes and laws or legal rules closely connected to them. However, general questions of law that are both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise must be reviewed on a standard of correctness. The proper standard of review of the Tribunal's decision to award legal costs to the successful complainant is reasonableness. Whether the Tribunal has the authority to award costs is a question of law which is located within the core function and expertise of the Tribunal and which relates to the interpretation and the application of its enabling statute. This issue is neither a question of jurisdiction, nor a question of law of central importance to the legal system as a whole falling outside the Tribunal's area of expertise within the meaning of *Dunsmuir*.

The precise interpretive question before the Tribunal was whether the words of s. 53(2)(*c*) and (*d*), which authorize the Tribunal to "compensate the victim . . . for any expenses incurred by the victim as a result of the discriminatory practice" permit an award of legal costs. An examination of the text, context and purpose of these provisions reveals that the Tribunal's interpretation was not reasonable. Human rights legislation expresses fundamental values and pursues fundamental goals. It must be interpreted liberally and purposively so that the rights enunciated are given their full recognition and effect. However, the intent of Parliament must be respected by reading the words of their provision in their entire context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the Act. The words "any expenses incurred by the victim" taken on their own and divorced from their context are wide enough to include legal costs. However, when these words are read in their statutory context, they cannot reasonably be interpreted as creating a stand-alone category of compensation capable of supporting any type of disbursement causally connected

sexuel et il lui a accordé la somme de 4 000 $ pour préjudice moral. M a demandé le remboursement de ses frais de justice. Estimant que les al. 53(2)*c*) et *d*) de la *LCDP* lui conféraient le pouvoir d'adjuger des dépens, le Tribunal a fait droit à la demande de M en lui accordant 47 000 $ à ce titre. La Cour fédérale a confirmé que le Tribunal avait le pouvoir d'adjuger des dépens, mais la Cour d'appel fédérale a accueilli le pourvoi formé contre cette décision, statuant que le Tribunal n'avait pas ce pouvoir.

Arrêt : Le pourvoi est rejeté.

Un tribunal administratif a droit en principe à la déférence en ce qui concerne l'interprétation de sa loi constitutive et des règles de droit qui s'y rattachent de près. Toutefois, les questions de droit générales qui revêtent une importance capitale pour le système juridique dans son ensemble et qui sont étrangères au domaine d'expertise de l'organisme juridictionnel sont assujetties à la norme de la décision correcte. La norme applicable à la décision du Tribunal d'adjuger des dépens à la plaignante après que celle-ci eut obtenu gain de cause est celle de la décision raisonnable. La question de savoir si le Tribunal peut adjuger des dépens constitue une question de droit qui relève essentiellement du mandat et de l'expertise du Tribunal liés à l'interprétation et à l'application de sa loi constitutive. Elle ne représente ni une question de compétence ni une question de droit d'une importance capitale pour le système juridique dans son ensemble, étrangère au domaine d'expertise du Tribunal au sens de l'arrêt *Dunsmuir*.

La question d'interprétation précise dont était saisi le Tribunal était celle de savoir si les mots employés aux al. 53(2)*c*) et *d*) pour l'autoriser à « indemniser la victime [. . .] des dépenses entraînées par l'acte [discriminatoire] » confèrent le pouvoir d'adjuger des dépens. L'examen du texte des dispositions, de leur contexte et de leur objet révèle que l'interprétation du Tribunal n'était pas raisonnable. Une loi relative aux droits de la personne exprime des valeurs essentielles et vise la réalisation d'objectifs fondamentaux. Il convient de l'interpréter libéralement et téléologiquement de manière à reconnaître sans réserve les droits qui y sont énoncés et à leur donner pleinement effet. Il faut néanmoins respecter l'intention du législateur qui se dégage des termes employés, compte tenu du contexte global et du sens ordinaire et grammatical qui s'harmonise avec l'esprit de la Loi et son objet. Considérés isolément et indépendamment de leur contexte, les mots « des dépenses entraînées par l'acte » sont suffisamment larges pour englober les dépens. Or, lorsque ces mots sont considérés dans le contexte de la loi, on ne peut pas raisonnablement les

to the discrimination. The Tribunal's interpretation violates the legislative presumption against tautology, makes the repetition of the term "expenses" redundant and fails to explain why the term is linked to the particular types of compensation described in those paragraphs. Moreover, the term "costs" has a well-understood meaning that is distinct from compensation or expenses. If Parliament intended to confer authority to confer costs, it is difficult to understand why it did not use this very familiar and widely used legal term of art to implement that purpose. The legislative history of the *CHRA*, the Commission's understanding of costs authority as well as a review of parallel provincial legislation all support the conclusion that the Tribunal has no authority to award costs. Finally, the Tribunal's interpretation would permit it to make a free-standing award for pain and suffering coupled with an award of legal costs in a potentially unlimited amount. This view is difficult to reconcile with either the monetary limit of an award for pain and suffering or the omission of any express authority to award expenses in s. 53(3).

No reasonable interpretation of the relevant statutory provisions can support the view that the Tribunal may award legal costs to successful complainants. Faced with a difficult point of statutory interpretation and conflicting judicial authority, the Tribunal adopted a dictionary meaning of "expenses" and articulated what it considered to be a beneficial policy outcome rather than engaging in an interpretative process taking account of the text, context and purpose of the provisions in issue. A liberal and purposive interpretation cannot supplant a textual and contextual analysis simply in order to give effect to a policy decision different from the one made by Parliament.

Cases Cited

Applied: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; **disapproved:** *Canada (Attorney General) v. Thwaites*, [1994] 3 F.C. 38; *Canada (Attorney General) v. Stevenson*, 2003 FCT 341, 229 F.T.R. 297; *Canada (Attorney General) v. Brooks*, 2006 FC 500, 291 F.T.R. 32; **referred to:** *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114; *Canada (Citizenship and Immigration)*

interpréter de manière à créer une catégorie distincte d'indemnité susceptible de viser tout type de débours ayant un lien de causalité avec l'acte discriminatoire. L'interprétation retenue par le Tribunal va à l'encontre de la présomption d'absence de tautologie qu'établissent les règles d'interprétation législative, rend superflue la répétition du mot « dépenses » et n'explique pas le rattachement de ce terme à l'indemnité visée à ces alinéas. Qui plus est, le terme « dépens » possède un sens bien défini qui diffère de celui d'indemnité ou de dépenses. Si le législateur a entendu conférer le pouvoir d'adjuger des dépens, on comprend mal pourquoi il n'a pas employé ce terme juridique consacré et largement répandu pour le faire. L'historique de la *LCDP*, l'opinion de la Commission concernant son pouvoir d'adjuger des dépens et l'examen des lois comparables adoptées par les provinces donnent aussi sérieusement à penser que le Tribunal n'est pas habilité à adjuger des dépens. Enfin, l'interprétation que retient le Tribunal l'autorise à indemniser le préjudice moral de manière distincte, d'une part, et à adjuger des dépens dont le montant peut être illimité, d'autre part. Il est difficile de concilier cette interprétation avec la limitation de l'indemnité pour préjudice moral ou le fait que le par. 53(3) ne prévoit pas expressément le pouvoir d'accorder le remboursement des frais.

Nulle interprétation raisonnable des dispositions pertinentes n'appuie la conclusion selon laquelle le Tribunal peut adjuger des dépens au plaignant qui a gain de cause. Aux prises avec une question difficile d'interprétation législative et une jurisprudence contradictoire, le Tribunal a retenu la définition de « dépense » figurant au dictionnaire et il a formulé ce qu'il tenait pour une solution bénéfique sur le plan des principes au lieu d'entreprendre une démarche d'interprétation fondée sur le texte, le contexte et l'objet des dispositions en cause. On ne saurait substituer à l'analyse textuelle et contextuelle une interprétation libérale et téléologique dans le seul but de donner effet à une autre décision de principe que celle prise par le législateur.

Jurisprudence

Arrêt appliqué : *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190; **arrêts critiqués :** *Canada (Procureur général) c. Thwaites*, [1994] 3 C.F. 38; *Canada (Procureur général) c. Stevenson*, 2003 CFPI 341 (CanLII); *Canada (Procureur général) c. Brooks*, 2006 CF 500 (CanLII); **arrêts mentionnés :** *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 982; *Compagnie des chemins de fer nationaux du Canada c. Canada (Commission canadienne des droits de la personne)*,

v. Khosa, 2009 SCC 12, [2009] 1 S.C.R. 339; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554; *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353; *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571; *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650; *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61; *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831; *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, 2005 SCC 70, [2005] 3 S.C.R. 425; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513; *Hilewitz v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57, [2005] 2 S.C.R. 706; *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; *M. v. H.*, [1999] 2 S.C.R. 3; *Will-Kare Paving & Contracting Ltd. v. Canada*, 2000 SCC 36, [2000] 1 S.C.R. 915; *Harel v. Deputy Minister of Revenue of Quebec*, [1978] 1 S.C.R. 851; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *Canada (Attorney General) v. Public Service Alliance of Canada*, [1991] 1 S.C.R. 614; *Morguard Properties Ltd. v. City of Winnipeg*, [1983] 2 S.C.R. 493; *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764.

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Admin. L.R. (4th) 127, [2008] F.C.J. No. 143 (QL), 2008 CarswellNat 200. Appeal dismissed.

Philippe Dufresne and *Daniel Poulin*, for the appellant the Canadian Human Rights Commission.

Andrew Raven, *Andrew Astritis* and *Bijon Roy*, for the appellant Donna Mowat.

Peter Southey and *Sean Gaudet*, for the respondent.

Reidar M. Mogerman, for the intervener the Canadian Bar Association.

David Baker and *Paul Champ*, for the intervener the Council of Canadians with Disabilities.

The judgment of the Court was delivered by

LeBel and Cromwell JJ. —

I. Overview

[1] The Canadian Human Rights Tribunal may order a person who has engaged in a discriminatory practice contrary to the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 ("*CHRA*" or "Act"), to compensate the victim for any lost wages, for all additional costs of obtaining alternative goods, services, facilities or accommodation, and "for any expenses incurred by the victim as a result of the discriminatory practice" (s. 53(2)). The main question before us is whether the Tribunal made a reviewable error in deciding that this power to order compensation for "any expenses incurred by the victim as a result of the discriminatory practice" permits it to order payment of all or a portion of the victim's legal costs.

[2] The Tribunal's decision affirming this authority was reviewed by the Federal Court on the standard of reasonableness and upheld (2008 FC 118, 322 F.T.R. 222). However, the Federal Court of Appeal set aside the decision, holding that the proper standard of review was correctness and that the Tribunal's decision was incorrect (2009 FCA

Admin. L.R. (4th) 127, [2008] A.C.F. nº 143 (QL), 2008 CarswellNat 200. Pourvoi rejeté.

Philippe Dufresne et *Daniel Poulin*, pour l'appelante la Commission canadienne des droits de la personne.

Andrew Raven, *Andrew Astritis* et *Bijon Roy*, pour l'appelante Donna Mowat.

Peter Southey et *Sean Gaudet*, pour l'intimé.

Reidar M. Mogerman, pour l'intervenante l'Association du Barreau canadien.

David Baker et *Paul Champ*, pour l'intervenant le Conseil des Canadiens avec déficiences.

Version française du jugement de la Cour rendu par

Les juges LeBel et Cromwell —

I. Vue d'ensemble

[1] Le Tribunal canadien des droits de la personne peut ordonner à l'auteur d'un acte discriminatoire contraire à la *Loi canadienne sur les droits de la personne*, L.R.C. 1985, ch. H-6 (« *LCDP* » ou « Loi ») d'indemniser la victime des pertes de salaire et des frais supplémentaires occasionnés par le recours à d'autres biens, services, installations ou moyens d'hébergement, ainsi que « des dépenses entraînées par l'acte » (par. 53(2)). La principale question à trancher en l'espèce est celle de savoir si, en décidant que ce pouvoir d'ordonner l'indemnisation de la victime « des dépenses entraînées par l'acte [discriminatoire] » lui permettait également d'ordonner le paiement total ou partiel des dépens de la victime, le Tribunal a commis une erreur susceptible de contrôle judiciaire.

[2] Saisie d'une demande de contrôle judiciaire, la Cour fédérale a appliqué la norme de la décision raisonnable et a confirmé la décision du Tribunal selon laquelle il possédait ce pouvoir (2008 CF 118, 322 F.T.R. 222). La Cour d'appel fédérale a toutefois annulé la décision au motif que la norme de contrôle applicable était celle de la décision

309, [2010] 4 F.C.R. 579). The Court of Appeal also was of the view that even if the Tribunal's decision should be reviewed on the reasonableness standard, its decision was unreasonable.

[3] Ms. Mowat did not participate at the Federal Court of Appeal but now appeals to this Court for reinstatement of the Tribunal's award. The Canadian Human Rights Commission, which was not a party before the Tribunal or Federal Court, and intervened before the Federal Court of Appeal, now joins Ms. Mowat as an appellant. (We will refer to Ms. Mowat as the appellant and to the Canadian Human Rights Commission as the Commission.)

[4] The further appeal to this Court raises a threshold question of the appropriate standard of judicial review of the Tribunal's decision and the main question of whether the Tribunal made a reviewable error in finding that it had the authority to award legal costs. We would hold that the Tribunal's decision should be reviewed on the reasonableness standard but that its interpretation of this aspect of its remedial authority was unreasonable. We would therefore dismiss the appeal.

II. Background

[5] The Canadian Forces compulsorily released the appellant, Ms. Mowat, in 1995, following a 14-year career as a traffic technician. Over the course of her time in the military, the appellant had made many formal complaints and grievances against members of her chain of command and others. Many of these were taken to the Chief of the Defence Staff, the highest level in Canadian Forces grievance resolution, and none was substantiated (2005 CHRT 31, 54 C.H.R.R. D/21 (the "merits decision"), at paras. 20, 81-82, 94, 143, 193, 207-8, 216, 218, 231, 236, 286, 294, 297 and 299). The Canadian Forces conducted an internal investigation into comments made by one of the appellant's co-workers which she alleged were sexually

correcte et que la décision du Tribunal était incorrecte (2009 CAF 309, [2010] 4 R.C.F. 579). Elle a également estimé que même au regard de la norme de la décision raisonnable, la décision du Tribunal était déraisonnable.

[3] M^me^ Mowat n'a pas pris part à l'instance en Cour d'appel fédérale, mais elle demande aujourd'hui à notre Cour de rétablir la décision du Tribunal. La Commission canadienne des droits de la personne, qui n'a pas été partie aux instances devant le Tribunal et la Cour fédérale, mais qui est intervenue en Cour d'appel fédérale, se constitue aujourd'hui partie appelante aux côtés de M^me^ Mowat. (Dans les présents motifs, « appelante » s'entend de M^me^ Mowat, et « Commission », de la Commission canadienne des droits de la personne.)

[4] Le pourvoi formé devant notre Cour soulève la question préliminaire de la norme de contrôle judiciaire qu'il convient d'appliquer à la décision du Tribunal, ainsi que la question principale de savoir si le Tribunal a commis une erreur susceptible de contrôle judiciaire lorsqu'il a conclu qu'il avait le pouvoir d'adjuger des dépens. Nous sommes d'avis que la norme applicable est celle de la décision raisonnable et que le Tribunal a interprété de manière déraisonnable cette facette de son pouvoir d'accorder réparation. Nous sommes par conséquent d'avis de rejeter le pourvoi.

II. Faits à l'origine de l'instance

[5] En 1995, après avoir exercé pendant 14 ans la fonction de technicienne des mouvements, M^me^ Mowat a fait l'objet d'une libération obligatoire des Forces canadiennes. Au cours de sa carrière militaire, l'appelante a présenté un grand nombre de plaintes et de griefs en bonne et due forme, notamment contre des membres de sa chaîne de commandement. Bon nombre de ces plaintes et de ces griefs ont été soumis à l'état-major de la Défense — le palier le plus élevé de règlement des griefs au sein des Forces canadiennes —, mais aucun n'a été jugé fondé (2005 TCDP 31, 54 C.H.R.R. D/21 (la « décision sur le fond »), par. 20, 81-82, 94, 143, 193, 207-208, 216, 218, 231, 236, 286, 294, 297 et 299). Les Forces canadiennes ont ouvert une

harassing. The investigation found that they were (para. 303). The recommendations from several reports on the incidents were implemented by the appellant's Commanding Officer and the employee responsible was disciplined (paras. 83-87).

[6] However, in 1998, three years after leaving the Forces, the appellant filed a complaint with the Canadian Human Rights Commission alleging sexual harassment, adverse differential treatment, and failure to continue to employ her on account of her sex, pursuant to ss. 7 and 14 of the *CHRA*. The matter was ultimately heard before the Canadian Human Rights Tribunal.

III. Proceedings

A. *Canadian Human Rights Tribunal, 2005 CHRT 31, 54 C.H.R.R. D/21*

[7] The hearing before the Tribunal occupied six weeks and the case record comprised more than 4,000 pages of transcript evidence and over 200 exhibits. The presiding Tribunal member, J. Grant Sinclair, was highly critical of the way in which the appellant Mowat conducted the proceedings. He observed that the complaint was "marked by a fundamental lack of precision in identifying the theory of the . . . case" and referred to the allegations as a "conspiracy theory" and a "scatter-shot complaint with the allegations all over the place" (merits decision, at paras. 4, 357 and 408).

[8] However, the presiding Tribunal member concluded that the appellant's complaint was substantiated in part. He found that her claim of sexual harassment, based on three comments made by a male co-worker, was substantiated and that the military's response had not been adequate or in accordance with its own policies (paras. 42, 47, 49 and 312-22). The rest of her complaint was dismissed.

enquête interne au sujet des propos d'un collègue de travail qui, de l'avis de l'appelante, constituaient du harcèlement sexuel à son endroit. Il a été conclu qu'il s'agissait effectivement de harcèlement sexuel (par. 303). Les recommandations formulées dans les quelques rapports établis à la suite des incidents ont été suivies par le commandant de l'appelante, et des mesures disciplinaires ont été prises contre le collègue visé par la plainte (par. 83-87).

[6] Cependant, en 1998, trois ans après son départ des Forces armées, l'appelante a saisi la Commission, sur le fondement des art. 7 et 14 de la *LCDP*, d'une plainte alléguant le harcèlement sexuel, la distinction défavorable en cours d'emploi et le refus de continuer de l'employer en raison de son sexe. L'affaire a finalement été portée devant le Tribunal canadien des droits de la personne.

III. Historique judiciaire

A. *Tribunal canadien des droits de la personne, 2005 TCDP 31, 54 C.H.R.R. D/21*

[7] Le Tribunal a consacré six semaines à l'audition de l'affaire, et son dossier comptait au moins 4 000 pages de transcription de témoignages et plus de 200 pièces. Son président et membre instructeur, J. Grant Sinclair, critique sévèrement la conduite de l'appelante pendant le déroulement de l'instance. Il fait observer que la plainte est « marquée par un manque fondamental de précision de la part de la plaignante quant à sa thèse », ses allégations relevant de la « théorie de la conspiration », et il déplore qu'il s'agisse d'une « plainte diffuse qui comporte des allégations décousues » (décision sur le fond, par. 4, 357 et 408).

[8] Il conclut toutefois que l'appelante a établi en partie le bien-fondé de sa plainte. À son avis, l'allégation de harcèlement sexuel, consécutive aux propos tenus par son collègue de travail à trois reprises, est prouvée, et il ajoute que les Forces armées n'ont pas pris de mesures adéquates ou conformes à leurs politiques (par. 42, 47, 49 et 312-322). Les autres allégations sont rejetées.

[9] The Tribunal awarded $4,000 (plus interest, taking the award to the maximum of $5,000, the statutory limit at the time), to compensate the appellant for "suffering in respect of feelings or self-respect" (para. 7). It found that the version of the Act which was in force when Ms. Mowat filed her claim applied to the case, and substantial amendments made in 1998 should not apply retroactively (paras. 399-401). It then asked for further submissions regarding her claim for legal costs, which she indicated totalled more than $196,000. At issue was whether the Tribunal's authority to award a complainant "any expenses incurred by the victim as a result of the discriminatory practice" under s. 53(2)(*c*) and (*d*) of the *CHRA* includes the authority to award legal costs.

[10] In a separate decision, Member Sinclair reviewed the conflicting Federal Court jurisprudence and policy considerations favouring reimbursement and found that he was empowered to award legal costs (2006 CHRT 49 (CanLII) (the "costs decision")). Without recovery of legal costs, he found, any victory would be "pyrrhic" (para. 29). He then awarded $47,000 in partial satisfaction of Ms. Mowat's legal bills, an amount which he based on the volume of evidence for the substantiated sexual harassment allegation in comparison with the rest of the unsubstantiated complaints.

B. *Judicial Review — Federal Court of Canada, 2008 FC 118, 322 F.T.R. 222*

[11] The Attorney General of Canada applied for judicial review of the costs decision; the appellant did not participate. Turning first to the standard of review, Mandamin J. applied the four factors from *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, and conducted a pragmatic and functional analysis to arrive at a reasonableness *simpliciter* standard. He classified the question as one of law, but noted that the Tribunal was engaged in interpretation of its home statute on a matter at the "core" of its expertise

[9] Le Tribunal accorde à l'appelante la somme de 4 000 $ qui, majorée de l'intérêt, atteint 5 000 $, soit le maximum alors prévu par la loi pour le préjudice moral (par. 7). Il conclut à l'application des dispositions de la Loi qui étaient en vigueur au moment où M^me^ Mowat a déposé sa plainte et à la non-rétroactivité des modifications substantielles apportées en 1998 (par. 399-401). Il demande ensuite à l'appelante de lui présenter des observations complémentaires au sujet des dépens réclamés s'élevant au total à plus de 196 000 $. Il lui fallait décider si le pouvoir du Tribunal d'indemniser la victime « des dépenses entraînées par l'acte [discriminatoire] » conféré aux al. 53(2)*c*) et *d*) de la *LCDP* comprenait celui d'adjuger des dépens.

[10] Dans une décision distincte, après examen de la jurisprudence contradictoire de la Cour fédérale et des considérations de principe favorables au paiement des frais de justice, le membre instructeur Sinclair s'estime investi du pouvoir d'adjuger des dépens (2006 TCDP 49 (CanLII) (la « décision relative aux dépens »)). Il conclut que le plaignant qui aurait gain de cause sans pouvoir recouvrer ses dépens remporterait une victoire fort « coûteuse » (par. 29). Il accorde alors à M^me^ Mowat 47 000 $ pour ses frais juridiques, un montant qu'il établit en fonction du nombre d'éléments de preuve présentés à l'appui de l'allégation de harcèlement sexuel — dont le bien-fondé est reconnu — par rapport au reste de la preuve offerte à l'appui des allégations rejetées.

B. *Contrôle judiciaire — Cour fédérale du Canada, 2008 CF 118 (CanLII)*

[11] Le procureur général du Canada a demandé le contrôle judiciaire de la décision relative aux dépens, mais l'appelante n'a pas pris part à l'instance. Examinant en premier lieu la question de la norme de contrôle, le juge Mandamin applique les quatre facteurs formulés dans l'arrêt *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 982, puis il se livre à une analyse pragmatique et fonctionnelle pour retenir la norme de la décision raisonnable *simpliciter*. Il considère qu'une

(para. 24). He also relied upon the "human rights policy approach to statutory interpretation" (para. 41), purportedly arising from this Court's decision in *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, to ground his analysis and explain why a one-sided costs regime is permissible. This approach calls for a broad, purposive interpretation of the *CHRA*, commensurate with its remedial goals and special status. He then concluded that the Tribunal's decision about its authority to award costs was reasonable (para. 40). However, Mandamin J. found that the presiding Member had not adequately explained the quantification of the $47,000 award and that this constituted a breach of the principles of procedural fairness. The judicial review judge therefore quashed the decision and sent it back to the Tribunal on this ground. That aspect of the matter has not been appealed and it is not at issue before this Court.

C. *Federal Court of Appeal, 2009 FCA 309, [2010] 4 F.C.R. 579*

[12] The Attorney General of Canada appealed the decision to the Federal Court of Appeal, which unanimously allowed the appeal and held that the Tribunal had no authority to make a costs award. Layden-Stevenson J.A. applied the standard of review principles enunciated by this Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, which had been released after the Federal Court hearing. She applied the correctness standard of review, based primarily on her conclusion that the issue was a question of law both outside the Tribunal's expertise and of central importance to the legal system (para. 42). The Tribunal's human rights expertise was not engaged by the issue, which instead required one clear and consistent answer (para. 47).

[13] The Federal Court of Appeal went on to conclude that the Tribunal's decision to award legal

question de droit est en litige, mais il fait observer que le Tribunal s'est livré à une interprétation de sa loi constitutive sur un sujet qui « touche au cœur même » de son expertise (par. 24). Il invoque également « [l]'approche stratégique en matière de droits de la personne à l'interprétation [des lois] » (par. 41) censée découler de l'arrêt *Compagnie des chemins de fer nationaux du Canada c. Canada (Commission canadienne des droits de la personne)*, [1987] 1 R.C.S. 1114, pour étayer son analyse et justifier l'existence d'un régime partial d'adjudication des dépens. Dès lors s'impose une interprétation à la fois large et téléologique de la *LCDP*, adaptée à ses objectifs réparateurs et à sa nature particulière. Le juge Mandamin conclut ensuite que la décision du Tribunal sur son pouvoir d'adjuger des dépens est raisonnable (par. 40). Il estime toutefois que le membre instructeur n'a pas bien expliqué sa démarche pour arriver au montant de 47 000 $, ce qui constitue un manquement à l'obligation d'équité procédurale. Il annule donc la décision et renvoie le dossier au Tribunal pour ce motif. Ce volet de l'affaire n'a pas été porté en appel, de sorte qu'il ne fait pas l'objet du présent pourvoi.

C. *Cour d'appel fédérale, 2009 CAF 309, [2010] 4 R.C.F. 579*

[12] Le procureur général du Canada s'est tourné vers la Cour d'appel fédérale, qui a accueilli son appel à l'unanimité, statuant que le Tribunal n'avait pas le pouvoir d'adjuger des dépens. La juge Layden-Stevenson applique les principes relatifs à la norme de contrôle énoncés par notre Cour dans *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, un arrêt rendu après l'audience en Cour fédérale. Elle arrête son choix sur la norme de la décision correcte pour la raison principale que le litige porte sur une question de droit à la fois étrangère au domaine d'expertise du Tribunal et d'une importance capitale pour le système juridique dans son ensemble (par. 42). La question, qui commande une réponse certaine et cohérente, ne fait pas intervenir l'expertise du Tribunal en matière de droits de la personne (par. 47).

[13] La Cour d'appel fédérale conclut ensuite que la décision du Tribunal d'adjuger des dépens est

costs was incorrect. After a comprehensive review of the conflicting Tribunal and Federal Court jurisprudence, Layden-Stevenson J.A. turned to the legislative history of the provision in question. In her view, it evinced a clear Parliamentary intent to eschew a costs regime in favour of an active role for the Commission (paras. 65-67 and 88). She noted that the Commission itself, in a Special Report to Parliament, acknowledged that the *CHRA* did not allow for costs recovery (paras. 68 and 90). Further, "costs" is a legal term of art (para. 76), the power to award which must be derived from statute (para. 78). She also relied on a comparative analysis of comparable human rights statutes across Canada, many of which explicitly mention costs jurisdiction in addition to reimbursement of expenses (paras. 70-74 and 84-87). In conclusion, Layden-Stevenson J.A. found that policy considerations and a liberal and purposive approach to interpretation could not be used to override clear Parliamentary intent (paras. 99-100). She reasoned that the decision to provide the Tribunal with the power to award costs is a policy decision best left to Parliament (para. 101). She noted that even on a reasonableness standard, the Tribunal's award of legal costs should be set aside (para. 96).

incorrecte. Après un examen approfondi de la jurisprudence contradictoire du Tribunal et de la Cour fédérale sur ce point, la juge Layden-Stevenson se penche sur l'historique de la disposition en cause et conclut qu'il témoigne de l'intention manifeste du législateur d'écarter l'adjudication des dépens et de conférer un rôle plus actif à la Commission (par. 65-67 et 88). La juge fait observer que dans un rapport spécial au Parlement, la Commission reconnaît elle-même que la *LCDP* ne permet pas à une partie de recouvrer ses dépens (par. 68 et 90). Elle ajoute que le mot « dépens » est un terme technique propre au domaine juridique (par. 76) et que le pouvoir d'accorder des dépens doit être conféré par la loi (par. 78). Elle se fonde également sur l'analyse comparative de lois équivalentes sur les droits de la personne applicables dans d'autres ressorts canadiens. Bon nombre de ces lois mentionnent expressément le pouvoir d'adjuger des dépens en plus de celui d'ordonner le remboursement des dépenses (par. 70-74 et 84-87). En conclusion, la juge Layden-Stevenson estime qu'aucune considération de politique générale, non plus que l'usage d'une méthode d'interprétation libérale et téléologique, ne justifierait la neutralisation de l'intention manifeste du législateur (par. 99-100). Elle explique qu'il vaut mieux laisser au législateur le soin de décider de conférer ou non au Tribunal le pouvoir d'adjuger des dépens (par. 101). Elle fait observer que même au regard de la norme de la décision raisonnable, il y a lieu d'annuler la décision du Tribunal relative à l'adjudication des dépens (par. 96).

IV. Analysis

A. *The Issues*

[14] As noted, this appeal raises two issues:

1. What is the appropriate standard of review of the decision of the Tribunal as to the interpretation of its power to award legal costs under s. 53(2)(*c*) and (*d*) of the Act?

2. Did the Tribunal make a reviewable error in deciding that it could award compensation for legal costs?

IV. Analyse

A. *Questions en litige*

[14] Comme nous le signalons précédemment, le présent pourvoi soulève deux questions :

1. Quelle norme de contrôle judiciaire s'applique à la décision du Tribunal concernant son pouvoir d'adjuger des dépens sur le fondement des al. 53(2)*c*) et *d*) de la Loi?

2. Le Tribunal a-t-il commis une erreur susceptible de contrôle judiciaire lorsqu'il a conclu qu'il pouvait accorder une indemnité pour les dépens?

B. *The Dunsmuir Analysis*

[15] In *Dunsmuir* and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, the Court simplified an analytical approach that the judiciary found difficult to implement. Being of the view that the distinction between the standards of patent unreasonableness and reasonableness *simpliciter* was illusory, the majority in *Dunsmuir* eliminated the standard of patent unreasonableness. The majority thus concluded that there should be two standards of review: correctness and reasonableness.

[16] *Dunsmuir* kept in place an analytical approach to determine the appropriate standard of review, the standard of review analysis. The two-step process in the standard of review analysis is first to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review" (para. 62). The focus of the analysis remains on the nature of the issue that was before the tribunal under review (*Khosa*, at para. 4, *per* Binnie J.). The factors that a reviewing court has to consider in order to determine whether an administrative decision maker is entitled to deference are: the existence of a privative clause; a discrete and special administrative regime in which the decision maker has special expertise; and the nature of the question of law (*Dunsmuir*, at para. 55). *Dunsmuir* recognized that deference is generally appropriate where a tribunal is interpreting its own home statute or statutes that are closely connected to its function and with which the tribunal has particular familiarity. Deference may also be warranted where a tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context (*Dunsmuir*, at para. 54; *Khosa*, at para. 25).

B. *Analyse au regard de l'arrêt Dunsmuir*

[15] Dans les arrêts *Dunsmuir* et *Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339, la Cour simplifie une démarche analytique jugée ardue par les tribunaux. Estimant que la distinction entre la norme de la décision manifestement déraisonnable et celle de la décision raisonnable *simpliciter* est illusoire, les juges majoritaires suppriment la norme de la décision manifestement déraisonnable et concluent qu'il ne doit y avoir désormais que deux normes de contrôle : celles de la décision correcte et de la décision raisonnable.

[16] Dans *Dunsmuir*, la Cour consacre la démarche en deux étapes qui permet d'arrêter la norme de contrôle applicable : l'analyse relative à la norme de contrôle. Premièrement, la cour saisie « vérifie si la jurisprudence établit déjà de manière satisfaisante le degré de déférence correspondant à une catégorie de questions en particulier. En second lieu, lorsque cette démarche se révèle infructueuse, elle entreprend l'analyse des éléments qui permettent d'arrêter la bonne norme de contrôle » (par. 62). L'analyse doit demeurer axée sur la nature de la question soumise au tribunal administratif en cause (*Khosa*, par. 4, le juge Binnie). Les facteurs dont il doit être tenu compte pour déterminer si, dans un cas donné, la déférence s'impose à l'endroit du tribunal administratif sont les suivants : l'existence d'une disposition d'inattaquabilité (ou « *clause privative* » dans le vocabulaire juridique traditionnel), l'existence d'un régime administratif distinct et particulier dans le cadre duquel le décideur possède une expertise spéciale et la nature de la question de droit (*Dunsmuir*, par. 55). La Cour reconnaît que la déférence est généralement de mise lorsque le tribunal administratif interprète sa propre loi constitutive ou une loi étroitement liée à son mandat et dont il a une connaissance approfondie. La déférence peut également s'imposer lorsque le tribunal administratif a acquis une expertise dans l'application d'une règle générale de common law ou de droit civil dans son domaine spécialisé (*Dunsmuir*, par. 54; *Khosa*, par. 25).

[17] *Dunsmuir* nuanced the earlier jurisprudence in respect of privative clauses by recognizing that privative clauses, which had for a long time served to immunize administrative decisions from judicial review, may point to a standard of deference. But, their presence or absence is no longer determinative about whether deference is owed to the tribunal or not (*Dunsmuir*, at para. 52). In *Khosa*, the majority of this Court confirmed that with or without a privative clause, administrative decision makers are entitled to a measure of deference in matters that relate to their special role, function and expertise (paras. 25-26).

[17] Dans l'arrêt *Dunsmuir*, notre Cour nuance la jurisprudence antérieure sur les dispositions d'inattaquabilité en reconnaissant que celles-ci, qui ont longtemps permis de soustraire les décisions administratives au contrôle judiciaire, peuvent donner lieu à l'application d'une norme déférente. Mais leur présence ou leur absence ne sont plus déterminantes quant à savoir si la déférence s'impose ou non à l'endroit du tribunal administratif (*Dunsmuir*, par. 52). Dans l'arrêt *Khosa*, les juges majoritaires de notre Cour confirment qu'indépendamment de l'existence d'une disposition d'inattaquabilité, une certaine déférence s'impose à l'égard du tribunal administratif dans une affaire ayant trait au rôle, à la fonction et à l'expertise propres à ce décideur (par. 25-26).

[18] *Dunsmuir* recognized that the standard of correctness will continue to apply to constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise, as well as to "[q]uestions regarding the jurisdictional lines between two or more competing specialized tribunals" (paras. 58, 60-61; see also *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 26, *per* Fish J.). The standard of correctness will also apply to true questions of jurisdiction or *vires*. In this respect, *Dunsmuir* expressly distanced itself from the extended definition of jurisdiction and restricted jurisdictional questions to those that require a tribunal to "explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter" (para. 59; see also *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485, at para. 5).

[18] L'arrêt *Dunsmuir* reconnaît que la norme de la décision correcte continue de s'appliquer aux questions constitutionnelles, aux questions de droit qui revêtent une importance capitale pour le système juridique dans son ensemble et qui sont étrangères au domaine d'expertise du décideur, ainsi qu'aux questions portant sur la « délimitation des compétences respectives de tribunaux spécialisés concurrents » (par. 58, 60-61; voir également l'arrêt *Smith c. Alliance Pipeline Ltd.*, 2011 CSC 7, [2011] 1 R.C.S. 160, par. 26, le juge Fish). La norme de la décision correcte vaut aussi pour les questions touchant véritablement à la compétence. À cet égard, la Cour se distancie expressément des définitions larges de la compétence de façon qu'une question se rapportant à celle-ci se pose uniquement lorsque le tribunal administratif « doit déterminer expressément si les pouvoirs dont le législateur l'a investi l'autorisent à trancher une question » (par. 59; voir également l'arrêt *United Taxi Drivers' Fellowship of Southern Alberta c. Calgary (Ville)*, 2004 CSC 19, [2004] 1 R.C.S. 485, par. 5).

[19] Having outlined the principles governing the judicial review analysis, we must now focus on how it should be applied to the decision of the Tribunal. As recommended by *Dunsmuir*, we must first consider how the existing jurisprudence has dealt with the decisions of the Tribunal and

[19] Après l'énoncé des principes applicables à l'analyse que commande le contrôle judiciaire, notre examen doit maintenant porter sur la façon dont ces principes doivent être appliqués à la décision du Tribunal. Ainsi que le recommande la Cour dans l'arrêt *Dunsmuir*, il faut d'abord s'intéresser à

of similar bodies tasked with addressing human rights complaints. Over the years, a substantial body of case law about the standards of review of these decisions has developed. Generally speaking, the reviewing courts have shown deference to the findings of fact of human rights tribunals (P. Garant, *Droit administratif* (6th ed. 2010), at p. 553). At the same time, they have granted little deference to their interpretations of laws, even of their own enabling statutes. It is well known that courts have traditionally extended deference to administrative bodies responsible for managing complex administrative schemes in domains like labour relations, telecommunications, the regulation of financial markets and international economic relations (*National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, at pp. 1339 and 1341, *per* Wilson J., and pp. 1369-70, *per* Gonthier J.). On the other hand, reviewing courts have not shown deference to human rights tribunals in respect of their decisions on legal questions. In the courts' view, the tribunals' level of comparative expertise remained weak and the regimes that they administered were not particularly complex (see A. Macklin, "Standard of Review: The Pragmatic and Functional Test", in C. M. Flood and L. Sossin, eds., *Administrative Law in Context* (2008), 197, at p. 216).

la jurisprudence relative aux décisions du Tribunal et à celles d'organismes apparentés auxquels il incombe de statuer sur des plaintes en matière de droits de la personne. Au fil des ans, une abondante jurisprudence s'est constituée sur la question des normes de contrôle applicables à ces décisions. En règle générale, les juridictions de révision déférent aux conclusions de fait des tribunaux des droits de la personne (P. Garant, *Droit administratif* (6e éd. 2010), p. 553). Par contre, elles font preuve de peu de déférence envers ces mêmes tribunaux lorsqu'ils interprètent la loi, y compris leur propre loi habilitante. Il est bien connu que les cours de justice font traditionnellement preuve de respect vis-à-vis des organismes administratifs chargés de l'application de régimes administratifs complexes dans certains domaines comme les relations de travail, les télécommunications, la réglementation des marchés financiers et les relations économiques internationales (*National Corn Growers Assn. c. Canada (Tribunal des importations)*, [1990] 2 R.C.S. 1324, p. 1339 et 1341, la juge Wilson, et p. 1369-1370, le juge Gonthier). En revanche, les juridictions de révision ne se montrent pas déférentes envers les tribunaux des droits de la personne appelés à trancher des questions de droit. À leur avis, l'expertise relative de ces tribunaux administratifs demeure minime, et les régimes qu'ils administrent ne sont pas particulièrement complexes (voir A. Macklin, « Standard of Review : The Pragmatic and Functional Test », dans C. M. Flood et L. Sossin, dir., *Administrative Law in Context* (2008), 197, p. 216).

[20] Several examples can be found in the jurisprudence of the Court. In *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103, this Court held that absent a privative clause and specialized skill, a human rights commission or tribunal must interpret legislation correctly (pp. 1125-26). In subsequent decisions of this Court, the questions of whether the definition of "family status" as a prohibited ground of discrimination in the federal Act included same-sex couples (*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554), or what constituted a "service customarily available to the public" or "public service" under the provincial

[20] La jurisprudence de la Cour recèle plusieurs exemples. Dans l'arrêt *Dickason c. Université de l'Alberta*, [1992] 2 R.C.S. 1103, la Cour statue qu'en l'absence d'une disposition d'inattaquabilité, la commission ou le tribunal des droits de la personne qui n'a pas de connaissances spécialisées doit interpréter la loi correctement (p. 1125-1126). Dans des décisions subséquentes, elle juge que la question de savoir si le terme « situation de famille » — un motif de distinction illicite prévu par la loi fédérale — englobe le couple homosexuel (*Canada (Procureur général) c. Mossop*, [1993] 1 R.C.S. 554), et celle de savoir ce

human rights legislation (*University of British Columbia v. Berg*, [1993] 2 S.C.R. 353; *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571) were held to be questions of law in which human rights adjudicators had no particular expertise *vis-à-vis* the courts and which had to be reviewed under a standard of correctness.

[21] But given the recent developments in the law of judicial review since *Dunsmuir* and its emphasis on the deference owed to administrative tribunals, even in respect of many questions of law, we must discuss whether all decisions on questions of law rendered by the Tribunal and similar bodies should be swept under the standard of correctness. At this point, we must acknowledge a degree of tension between some policies underpinning the present system of judicial review, when it applies to the decisions of human rights tribunals.

[22] The nature of these tribunals lies at the root of these problems. On the one hand, *Dunsmuir* and *Khosa*, building upon previous jurisprudence, recognize that administrative tribunals are generally entitled to deference, in respect of the legal interpretation of their home statutes and laws or legal rules closely connected to them. On the other hand, our Court has reaffirmed that general questions of law that are both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, must still be reviewed on a standard of correctness, in order to safeguard a basic consistency in the fundamental legal order of our country. The nature of the "home statute" administered by a human rights tribunal makes the task of resolving this tension a particularly delicate one. A key part of any human rights legislation in Canada consists of principles and rules designed to combat discrimination. But, these statutes also include a large number of provisions, addressing issues like questions of proof and procedure or the

qu'il faut entendre par les expressions « services habituellement offerts au public » ou « services publics » employées dans les lois provinciales sur les droits de la personne (*Université de la Colombie-Britannique c. Berg*, [1993] 2 R.C.S. 353; *Gould c. Yukon Order of Pioneers*, [1996] 1 R.C.S. 571) constituent des questions de droit à l'égard desquelles tribunaux et organismes des droits de la personne ne possèdent pas d'expertise particulière par rapport aux cours de justice et qu'elles emportent l'application de la norme de la décision correcte.

[21] Mais en raison de l'évolution récente du droit en matière de contrôle judiciaire depuis l'arrêt *Dunsmuir*, et de l'accent mis sur la déférence qui s'impose à l'endroit d'un tribunal administratif, même en ce qui concerne bon nombre de questions de droit, il nous faut déterminer si toute décision du Tribunal ou d'un organisme apparenté sur une question de droit est assujettie à la norme de la décision correcte. Nous devons ici reconnaître l'existence d'une tension entre certains des principes qui sous-tendent l'actuel régime de contrôle judiciaire lorsqu'il s'applique aux décisions d'un tribunal des droits de la personne.

[22] Cette difficulté s'explique par la nature d'un tel tribunal. D'une part, faisant fond sur la jurisprudence antérieure, les arrêts *Dunsmuir* et *Khosa* reconnaissent qu'un tribunal administratif a droit en principe à la déférence d'une cour de justice en ce qui concerne l'interprétation de sa loi constitutive et des règles de droit qui s'y rattachent de près. D'autre part, la Cour réaffirme que les questions de droit générales qui revêtent une importance capitale pour le système juridique dans son ensemble et qui sont étrangères au domaine d'expertise de l'organisme juridictionnel demeurent assujetties à la norme de la décision correcte, et ce, dans un souci de cohérence de l'ordre juridique fondamental du pays. La nature de la « loi constitutive » qu'administre un tribunal des droits de la personne rend très délicat le maintien de l'équilibre entre ces deux énoncés contradictoires. Au Canada, un volet essentiel de toute loi sur les droits de la personne énonce les principes et les règles visant à contrer la discrimination. Or, cette loi

remedial authority of human rights tribunals or commissions.

[23] There is no doubt that the human rights tribunals are often called upon to address issues of very broad import. But, the same questions may arise before other adjudicative bodies, particularly the courts. In respect of some of these questions, the application of the *Dunsmuir* standard of review analysis could well lead to the application of the standard of correctness. But, not all questions of general law entrusted to the Tribunal rise to the level of issues of central importance to the legal system or fall outside the adjudicator's specialized area of expertise. Proper distinctions ought to be drawn, especially in respect of the issue that remains before our Court.

[24] In this case, there is no doubt that the Tribunal has the power to award compensation for "any expenses incurred by the victim as a result of the discriminatory practice" pursuant to s. 53(2)(*c*) and (*d*) of the Act. The issue is whether the Tribunal could order the payment of costs as a form of compensation. Although *Dunsmuir* maintained the category of jurisdictional questions, it took the view that this category should be interpreted narrowly. Indeed, our Court has held since *Dunsmuir* that issues which in other days might have been considered by some to be jurisdictional, should now be dealt with under the standard of review analysis in order to determine whether a standard of correctness or of reasonableness should apply (see, e.g., *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3, at paras. 33-34; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678, at paras. 28-34). In substance, if the issue relates to the interpretation and application of its own statute, is within its expertise and does not raise issues of general legal importance, the standard of reasonableness will generally apply and the Tribunal will be entitled to deference.

renferme aussi un grand nombre de dispositions qui ont trait, par exemple, à la preuve et à la procédure ou au pouvoir de réparation du tribunal ou de la commission des droits de la personne.

[23] Nul doute qu'un tribunal des droits de la personne est souvent appelé à se prononcer sur des questions de très large portée. Or, les mêmes questions peuvent être soulevées devant d'autres organismes juridictionnels, en particulier des cours de justice. À l'issue de l'analyse relative à la norme de contrôle proposée dans l'arrêt *Dunsmuir*, la norme applicable aux décisions sur certaines de ces questions pourrait bien être celle de la décision correcte. Mais les questions de droit générales que le Tribunal est appelé à trancher n'équivalent pas toutes à des questions d'une importance capitale pour le système juridique et elles ne sont pas toutes étrangères au domaine d'expertise de l'organisme décisionnel. Il convient d'établir les distinctions qui s'imposent, surtout en ce qui concerne le litige qu'il nous faut aujourd'hui trancher.

[24] Dans le cas qui nous occupe, le Tribunal possède sans aucun doute le pouvoir d'indemniser la victime « des dépenses entraînées par l'acte [discriminatoire] » suivant les al. 53(2)*c*) et *d*) de la Loi. Il faut alors se demander s'il pouvait adjuger des dépens à titre d'indemnité. Même si, dans *Dunsmuir*, elle ne supprime pas la catégorie des questions de compétence, la Cour juge que celles-ci appellent une interprétation stricte. Ainsi, depuis cet arrêt, des questions que certains auraient pu auparavant considérer comme des questions de compétence doivent désormais faire l'objet de l'analyse relative à la norme de contrôle afin que l'on détermine si elles sont assujetties à la norme de la décision correcte ou à celle de la décision raisonnable (voir, p. ex., *Celgene Corp. c. Canada (Procureur général)*, 2011 CSC 1, [2011] 1 R.C.S. 3, par. 33-34; *Nolan c. Kerry (Canada) Inc.*, 2009 CSC 39, [2009] 2 R.C.S. 678, par. 28-34). En somme, lorsqu'il s'agit d'interpréter et d'appliquer sa propre loi, dans son domaine d'expertise et sans que soit soulevée une question de droit générale, la norme de la décision raisonnable s'applique habituellement, et le Tribunal a droit à la déférence.

[25] The question of costs is one of law located within the core function and expertise of the Tribunal relating to the interpretation and the application of its enabling statute (*Dunsmuir*, at para. 54). Although the respondent submitted that a human rights tribunal has no particular expertise in costs, care should be taken not to return to the formalism of the earlier decisions that attributed "a jurisdiction-limiting label, such as 'statutory interpretation' or 'human rights', to what is in reality a function assigned and properly exercised under the enabling legislation" by a tribunal (*Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, at para. 96, *per* Abella J.). The inquiry of what costs were incurred by the complainant as a result of a discriminatory practice is inextricably intertwined with the Tribunal's mandate and expertise to make factual findings relating to discrimination (see *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591, at para. 112, *per* Abella J., *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 76, *per* LeBel J.). As an administrative body that makes such factual findings on a routine basis, the Tribunal is well positioned to consider questions relating to appropriate compensation under s. 53(2). In addition, a decision as to whether a particular tribunal will grant a particular type of compensation — in this case, legal costs — can hardly be said to be a question of central importance for the Canadian legal system and outside the specialized expertise of the adjudicator. Compensation is frequently awarded in various circumstances and under many schemes. It cannot be said that a decision on whether to grant legal costs as an element of that compensation and about their amount would subvert the legal system, even if a reviewing court found it to be in error.

[26] Subjecting costs to a correctness review would represent a departure from *Dunsmuir*, and

[25] La question des dépens constitue une question de droit qui relève essentiellement du mandat et de l'expertise du Tribunal liés à l'interprétation et à l'application de sa loi constitutive (*Dunsmuir*, par. 54). L'intimé prétend qu'un tribunal des droits de la personne ne possède pas d'expertise particulière en la matière. Toutefois, il faut se garder de retomber dans le formalisme antérieur qui accolait une « étiquette limitative de compétence, comme celle d'"interprétation législative" ou de "droits de la personne", à ce qui est en réalité une fonction confiée [à un tribunal administratif] et exercée correctement [par lui] en vertu de la loi habilitante » (*Conseil des Canadiens avec déficiences c. VIA Rail Canada Inc.*, 2007 CSC 15, [2007] 1 R.C.S. 650, par. 96, la juge Abella). La détermination des dépenses engagées par la plaignante à cause de l'acte discriminatoire dont elle a été victime demeure inextricablement liée au mandat du Tribunal et à sa compétence spécialisée qui lui permettent de tirer des conclusions de fait au chapitre de la discrimination (voir *Lévis (Ville) c. Fraternité des policiers de Lévis Inc.*, 2007 CSC 14, [2007] 1 R.C.S. 591, par. 112, la juge Abella; *Toronto (Ville) c. S.C.F.P., section locale 79*, 2003 CSC 63, [2003] 3 R.C.S. 77, par. 76, le juge LeBel). En tant qu'organisme administratif couramment appelé à tirer de telles conclusions de fait, le Tribunal se trouve bien placé pour examiner des questions se rapportant à l'indemnité dont il convient d'ordonner le versement en application du par. 53(2). De plus, on ne saurait affirmer que la décision d'un tribunal d'accorder ou non un type particulier d'indemnité, en l'occurrence des dépens, revêt une importance capitale pour le système juridique canadien dans son ensemble ni qu'elle est étrangère au domaine d'expertise du décideur. L'indemnisation intervient souvent dans des circonstances variées et en application de régimes multiples. On ne saurait dire non plus de la décision d'accorder ou non des dépens dans le cadre de cette indemnisation, ni de la détermination de leur montant, qu'elles mettraient en péril le système juridique, et ce, même si une juridiction de révision concluait que la décision est erronée.

[26] Assujettir l'octroi de dépens à la norme de la décision correcte irait à l'encontre de *Dunsmuir* et de

from this Court's recent decision in *Smith*. We note, though, that in that case there was a complex and substantial factual background. The issue was whether a tribunal with a mandate to arbitrate disputes relating to mandatory land expropriation and to award "legal, appraisal and other costs" could award costs of related proceedings which, in its view, had been necessary to secure compensation for the expropriation. Fish J., writing for the majority of this Court, concluded that the award of costs was reviewable on the standard of reasonableness since the tribunal was interpreting a provision of its home statute, and "[a]wards for costs are invariably fact-sensitive and generally discretionary" (para. 30). In his view, the tribunal's sole responsibility for determining the nature and the amount of costs was also grounded in the statutory language, and furthermore, involved an inquiry where the legal issues could not be easily separated from the factual issues (paras. 30-32). As the tribunal in *Smith*, the federal Tribunal in this case was interpreting a provision in its home statute that necessitated a fact-intensive inquiry and afforded the Tribunal a certain margin of discretion.

notre récent arrêt *Smith*. Il convient de faire observer que le contexte factuel de cette dernière affaire était à la fois complexe et considérable. La Cour devait en effet décider si le tribunal administratif investi du pouvoir de trancher tout litige consécutif à l'expropriation forcée d'un terrain et d'indemniser l'exproprié de « tous les frais, notamment de procédure et d'évaluation » entraînés par l'exercice du recours, pouvait accorder les frais et dépens afférents aux instances connexes qui, à son avis, avaient été nécessaires à l'obtention de l'indemnité d'expropriation. Au nom des juges majoritaires de la Cour, le juge Fish conclut que la décision relative aux frais et dépens est assujettie à la norme de la décision raisonnable étant donné que le tribunal interprète une disposition de sa loi constitutive portant sur l'adjudication des dépens et que « [l]es décisions à cet égard sont invariablement tributaires des faits et ont en règle générale un caractère discrétionnaire » (par. 30). À son avis, le texte de la loi traduit la volonté du législateur de confier à ce seul tribunal le soin de déterminer la nature et le montant des frais qu'il convient d'accorder, un processus qui soulève par ailleurs des questions qui ne se prêtent pas aisément à la dissociation du droit et des faits (par. 30-32). Tout comme ce décideur administratif, le tribunal fédéral en cause dans la présente affaire a interprété une disposition de sa loi constitutive qui requérait un examen approfondi des faits et qui lui laissait une certaine marge d'appréciation.

[27] In summary, the issue of whether legal costs may be included in the Tribunal's compensation order is neither a question of jurisdiction, nor a question of law of central importance to the legal system as a whole and outside the Tribunal's area of expertise within the meaning of *Dunsmuir*. As such, the Tribunal's decision to award legal costs to the successful complainant is reviewable on the standard of reasonableness.

[27] En résumé, la question de savoir si le Tribunal peut adjuger des dépens dans le cadre de l'indemnisation qu'il ordonne ne représente ni une question de compétence ni une question de droit d'une importance capitale pour le système juridique dans son ensemble, étrangère au domaine d'expertise du Tribunal au sens de l'arrêt *Dunsmuir*. La décision du Tribunal d'adjuger des dépens à la plaignante, après que celle-ci eut obtenu gain de cause, est par conséquent susceptible de contrôle judiciaire au regard de la norme de la décision raisonnable.

C. *Reasonableness of the Decision*

C. *Caractère raisonnable de la décision*

[28] In *Dunsmuir*, the majority of this Court described reasonableness as

[28] Dans l'arrêt *Dunsmuir*, les juges majoritaires définissent comme suit la norme du caractère raisonnable :

a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [para. 47]

La norme déférente du caractère raisonnable procède du principe à l'origine des deux normes antérieures de raisonnabilité : certaines questions soumises aux tribunaux administratifs n'appellent pas une seule solution précise, mais peuvent plutôt donner lieu à un certain nombre de conclusions raisonnables. Il est loisible au tribunal administratif d'opter pour l'une ou l'autre des différentes solutions rationnelles acceptables. La cour de révision se demande dès lors si la décision et sa justification possèdent les attributs de la raisonnabilité. Le caractère raisonnable tient principalement à la justification de la décision, à la transparence et à l'intelligibilité du processus décisionnel, ainsi qu'à l'appartenance de la décision aux issues possibles acceptables pouvant se justifier au regard des faits et du droit. [par. 47]

[29] Reasonableness is therefore a deferential standard that shows respect for an administrative decision maker's experience and expertise. The concept of deference is fundamental in the context of judicial review, as this Court held in the seminal case of *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227. Deference to an administrative tribunal reflects recognition of interpretive choices. Such a recognition makes it possible to ask whether the tribunal or the court is better placed to make the choice (Macklin, at p. 205).

[29] La norme du caractère raisonnable constitue donc une norme déférente qui se veut respectueuse de l'expérience et de l'expertise du décideur administratif. La notion de déférence joue un rôle fondamental en matière de contrôle judiciaire, comme le conclut la Cour dans l'arrêt charnière *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227. La déférence envers un tribunal administratif tient compte de la possibilité de plusieurs interprétations concurrentes. Cette prise en compte permet de se demander qui du tribunal administratif ou de la cour de justice est le mieux placé pour faire ce choix (Macklin, p. 205).

[30] The concept of deference is also what distinguishes judicial review from appellate review. Although both judicial and appellate review take into account the principle of deference, care should be taken not to conflate the two. In the context of judicial review, deference can shield administrative decision makers from excessive judicial intervention even on certain questions of law as long as these questions are located within the decision makers' core function and expertise. In those cases, deference would therefore extend to protect a range of reasonable outcomes when the decision maker is interpreting its home statute (see R. E. Hawkins, "Whither Judicial Review?" (2010), 88 *Can. Bar Rev.* 603).

[30] La notion de déférence permet également de distinguer le contrôle judiciaire de l'appel. Bien que les deux tiennent compte du principe de déférence, il faut se garder de les confondre. Dans le cas du contrôle judiciaire, la déférence peut protéger le décideur administratif d'une immixtion judiciaire trop poussée, même à l'égard de certaines questions de droit dès lors que celles-ci touchent au cœur même du mandat et du domaine d'expertise du décideur. En pareil cas, la déférence a pour effet de protéger toute une gamme d'interprétations raisonnables possibles de sa loi constitutive par le tribunal (voir R. E. Hawkins, « Whither Judicial Review? » (2010), 88 *R. du B. can.* 603).

[31] By contrast, under the principles of appellate review set down in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, an appellate court owes no deference to a decision maker below on questions of law which are automatically reviewable on the standard of correctness. In *Khosa*, a majority of the Court confirmed that these principles of appellate review should not be imported into the judicial review context.

D. *Application — Reasonableness of Tribunal's Interpretation*

[32] The Tribunal held that any authority to award legal costs must come from either s. 53(2)(*c*) or (*d*) of the Act (costs decision, at para. 11). The appellant and the Commission have not raised any other provisions capable of supporting the result sought and conceded during oral argument that they were relying on both provisions together. The precise interpretative question before the Tribunal, therefore, was whether the words of s. 53(2)(*c*) and (*d*), which authorize the Tribunal to "compensate the victim . . . for any expenses incurred by the victim as a result of the discriminatory practice", permit an award of legal costs. The Tribunal decided they did. However, in our view, this interpretation of these provisions is not reasonable, as a careful examination of the text, context and purpose of the provisions reveal.

[33] The question is one of statutory interpretation and the object is to seek the intent of Parliament by reading the words of the provision in their entire context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of Parliament (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, quoted in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21). In approaching this task in relation to human rights legislation, one must be mindful that it expresses fundamental values and pursues fundamental goals. It must therefore be interpreted liberally and purposively so that the rights enunciated are given their full recognition and effect: see, e.g.,

[31] En revanche, suivant les principes régissant l'appel qu'a posés l'arrêt *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, la juridiction d'appel n'est tenue à aucune déférence envers la juridiction inférieure sur une question de droit qui rend la décision automatiquement susceptible de contrôle selon la norme de la décision correcte. Dans l'arrêt *Khosa*, la Cour confirme à la majorité qu'on ne doit pas appliquer au contrôle judiciaire ces principes propres à l'appel.

D. *Application — Caractère raisonnable de l'interprétation du Tribunal*

[32] Le Tribunal a estimé que tout pouvoir d'adjuger des dépens devait se fonder sur l'al. 53(2)*c*) ou *d*) de la Loi (décision relative aux dépens, par. 11). L'appelante et la Commission n'ont pas invoqué d'autres dispositions susceptibles de justifier le résultat recherché, et elles ont reconnu en plaidoirie se fonder à la fois sur l'une et l'autre dispositions. La question d'interprétation précise dont était saisi le Tribunal était donc celle de savoir si les mots employés aux al. 53(2)*c*) et *d*) pour l'autoriser à « indemniser la victime [. . .] des dépenses entraînées par l'acte [discriminatoire] » confèrent le pouvoir d'adjuger des dépens. Le Tribunal a décidé que tel était le cas. Or, nous croyons que son interprétation n'est pas raisonnable, ce que révèle l'examen attentif du texte des dispositions, de leur contexte et de leur objet.

[33] Il nous faut interpréter le texte législatif et discerner l'intention du législateur à partir des termes employés, compte tenu du contexte global et du sens ordinaire et grammatical qui s'harmonise avec l'esprit de la Loi, son objet et l'intention du législateur (E. A. Driedger, *Construction of Statutes* (2e éd. 1983), p. 87, cité dans l'arrêt *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21). Dans le cas d'une loi relative aux droits de la personne, il faut se rappeler qu'elle exprime des valeurs essentielles et vise la réalisation d'objectifs fondamentaux. Il convient donc de l'interpréter libéralement et téléologiquement de manière à reconnaître sans réserve les droits qui y sont énoncés et à leur donner pleinement effet (voir,

R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 497-500. However, what is required is nonetheless an interpretation of the text of the statute which respects the words chosen by Parliament.

[34] The Tribunal based its conclusion that it had the authority to award legal costs on two points. First, following three decisions of the Federal Court, the Tribunal reasoned that the term "expenses incurred" in s. 53(2)(*c*) and (*d*) is wide enough to include legal costs: *Canada (Attorney General) v. Thwaites*, [1994] 3 F.C. 38, at p. 71; *Canada (Attorney General) v. Stevenson*, 2003 FCT 341, 229 F.T.R. 297, at paras. 23-26; *Canada (Attorney General) v. Brooks*, 2006 FC 500, 291 F.T.R. 32, paras. 10-16. Second, the Tribunal relied on what it considered to be compelling policy considerations relating to access to the human rights adjudication process. For reasons that we will set out, our view is that these points do not reasonably support the conclusion that the Tribunal may award legal costs. When one conducts a full contextual and purposive analysis of the provisions it becomes clear that no reasonable interpretation supports that conclusion.

(1) Text

[35] Turning to the text of the provisions in issue, the words "any expenses incurred by the victim", taken on their own and divorced from their context, are wide enough to include legal costs. This was the view adopted by the Tribunal and the three Federal Court decisions on which it relied. However, when these words are read, as they must be, in their statutory context, it becomes clear that they cannot reasonably be interpreted as creating a stand-alone category of compensation capable of supporting any type of disbursement causally connected to the discrimination. The contention that they were in our view, ignores the structure of the provision in which the words "any expenses incurred by the victim" appear.

p. ex., R. Sullivan, *Sullivan on the Construction of Statutes* (5e éd. 2008), p. 497-500). On doit tout de même retenir une interprétation de la loi qui respecte le libellé choisi par le législateur.

[34] La conclusion du Tribunal selon laquelle il possède le pouvoir d'accorder des dépens s'appuie sur deux éléments. Premièrement, il invoque trois décisions de la Cour fédérale pour conclure que le syntagme « dépenses entraînées » employé aux al. 53(2)*c*) et *d*) est suffisamment large pour englober les dépens : *Canada (Procureur général) c. Thwaites*, [1994] 3 C.F. 38, p. 71; *Canada (Procureur général) c. Stevenson*, 2003 CFPI 341 (CanLII), par. 23-26; *Canada (Procureur général) c. Brooks*, 2006 CF 500 (CanLII), par. 10-16. Deuxièmement, le Tribunal fait fond sur ce qu'il tient pour d'importantes considérations de politique juridique liées à l'accès à la justice en matière de droits de la personne. Pour les motifs exposés ci-après, nous estimons que ces facteurs n'étayent pas raisonnablement la conclusion selon laquelle le Tribunal peut adjuger des dépens. Il appert d'une analyse exhaustive de nature contextuelle et téléologique qu'aucune interprétation raisonnable des dispositions n'appuie cette conclusion.

(1) Le texte

[35] En ce qui concerne le texte des dispositions en cause, considérés isolément et indépendamment de leur contexte, les mots « des dépenses entraînées par l'acte » sont suffisamment larges pour englober les dépens. Tel est le point de vue du Tribunal ainsi que celui de la Cour fédérale dans les décisions qu'il invoque à l'appui. Or, lorsque ces mots sont dûment considérés dans le contexte de la loi, il devient manifeste qu'on ne peut pas raisonnablement les interpréter de manière à créer une catégorie distincte d'indemnité susceptible de viser tout type de débours ayant un lien de causalité avec l'acte discriminatoire. La prétention contraire fait selon nous abstraction de la structure des dispositions dans lesquelles figurent les mots « des dépenses entraînées par l'acte ».

[36] For ease of reference, we reproduce s. 53(2) and (3) as they read at the time the appellant's complaint was filed:

53. . . .

(2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, it may . . . make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in that order any of the following terms that it considers appropriate:

(*a*) that the person cease the discriminatory practice and, in order to prevent the same or a similar practice from occurring in the future, take measures, including

(i) adoption of a special program, plan or arrangement referred to in subsection 16(1), or

(ii) the making of an application for approval and the implementing of a plan pursuant to section 17,

in consultation with the Commission on the general purposes of those measures;

(*b*) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, such rights, opportunities or privileges as, in the opinion of the Tribunal, are being or were denied the victim as a result of the practice;

(*c*) that the person compensate the victim, as the Tribunal may consider proper, 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; and

(*d*) that the person compensate the victim, as the Tribunal may consider proper, for any or all additional cost of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice.

(3) In addition to any order that the Tribunal may make pursuant to subsection (2), if the Tribunal finds that

(*a*) a person is engaging or has engaged in a discriminatory practice wilfully or recklessly, or

[36] Pour en faciliter la consultation, nous reproduisons les par. 53(2) et (3) dans leur version en vigueur au moment où l'appelante a déposé sa plainte :

53. . . .

(2) À l'issue de son enquête, le tribunal qui juge la plainte fondée peut [. . .] 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 destinées à prévenir des actes semblables, notamment :

(i) d'adopter un programme, plan ou arrangement visé au paragraphe 16(1),

(ii) de présenter une demande d'approbation et de mettre en œuvre un programme prévus à l'article 17;

b) d'accorder à la victime, dès que les circonstances le permettent, les droits, chances ou avantages dont, de l'avis du tribunal, l'acte l'a privée;

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

d) d'indemniser la victime de la totalité, ou de la fraction qu'il juge indiquée, des frais supplémentaires occasionnés par le recours à d'autres biens, services, installations ou moyens d'hébergement, et des dépenses entraînées par l'acte.

(3) Outre les pouvoirs que lui confère le paragraphe (2), le tribunal peut ordonner à l'auteur d'un acte discriminatoire de payer à la victime une indemnité maximale de cinq mille dollars, s'il en vient à la conclusion, selon le cas :

a) que l'acte a été délibéré ou inconsidéré;

(*b*) the victim of the discriminatory practice has suffered in respect of feelings or self-respect as a result of the practice,

the Tribunal may order the person to pay such compensation to the victim, not exceeding five thousand dollars, as the Tribunal may determine.

b) que la victime en a souffert un préjudice moral.

[37] It is significant, in our view, that the phrase "that the person compensate the victim . . . for any expenses incurred by the victim as a result of the discriminatory practice" appears twice, in two subsequent paragraphs. The wording is identical, but on each occasion it appears, the reference to expenses is preceded by specific, but different, wording. The repetition of the reference to expenses and the context in which this occurs strongly suggest that the expenses referred to in each paragraph take their character from the sort of compensation contemplated by the surrounding words of each paragraph. So, in s. 53(2)(*c*), the person must compensate the victim for lost wages and any expenses incurred by the victim as a result of the discriminatory practice. In s. 53(2)(*d*), compensation is for the additional costs of obtaining alternate goods, services, facilities, or accommodation in addition to expenses incurred. If the use of the term "expenses" had been intended to confer a free-standing authority to confer costs in all types of complaints, it is difficult to understand why the grant of power is repeated in the specific contexts of lost wages and provision of services and also why the power to award expenses was not provided for in its own paragraph rather than being repeated in the two specific contexts in which it appears. This suggests that the term "expenses" is intended to mean something different in each of paragraphs (*c*) and (*d*).

[37] Il nous paraît significatif que l'expression « indemniser la victime [. . .] des dépenses entraînées par l'acte » figure dans deux alinéas successifs. Le texte est identique, mais chaque fois, le renvoi aux dépenses est précédé d'un libellé particulier et différent. La répétition du mot « dépenses » et le contexte dans lequel celui-ci est employé donnent franchement à penser que la nature des dépenses visées dépend du type d'indemnité prévu par le libellé particulier de chacun de ces alinéas. Ainsi, à l'al. 53(2)*c*), l'auteur de l'acte discriminatoire est tenu d'indemniser la victime des pertes de salaire et des dépenses entraînées par l'acte. À l'alinéa 53(2)*d*), l'indemnité vise les frais supplémentaires occasionnés par le recours à d'autres biens, services, installations ou moyens d'hébergement, en plus des dépenses entraînées par l'acte discriminatoire. Si l'emploi du mot « dépenses » vise à conférer le pouvoir distinct d'accorder des dépens pour tous les types de plaintes, on conçoit difficilement que ce pouvoir soit attribué non seulement dans le contexte de la perte de salaire, mais aussi dans celui de la fourniture de services et que le pouvoir d'adjuger des dépens ne fasse pas l'objet d'un alinéa distinct au lieu d'être prévu dans le contexte précis de deux alinéas. On peut en conclure que l'intention du législateur était de faire en sorte que le mot « dépenses » ait un sens différent à chacun des al. *c*) et *d*).

[38] The interpretation adopted by the Tribunal makes the repetition of the term "expenses" redundant and fails to explain why the term is linked to the particular types of compensation described in each of those paragraphs. This interpretation therefore violates the legislative presumption against tautology. As Professor Sullivan notes, at p. 210 of her text, "It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every

[38] L'interprétation retenue par le Tribunal rend superflue la répétition du mot « dépenses » et n'explique pas le rattachement de ce terme à l'indemnité visée par chacun des alinéas. Elle va à l'encontre de la présomption d'absence de tautologie qu'établissent les règles d'interprétation législative. La professeure Sullivan signale d'ailleurs à la p. 210 de son ouvrage que [TRADUCTION] « [l]e législateur est présumé ne pas utiliser de mots superflus ou dénués de sens, ne pas se répéter inutilement

word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose." As former Chief Justice Lamer put it in *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 28, "It is a well accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage." See also *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831, at p. 838.

[39] The appellant received an award for pain and suffering under s. 53(3) of the *CHRA*. The Tribunal also expressly disallowed her medical expense claims (merits decision, at paras. 404-6). Unlike s. 53(2)(*c*) and (*d*), there is in subs. (3) no provision for the reimbursement of expenses. Once again, if the intention had been to grant free-standing authority to award costs, the meaning of this omission in light of the repeated specific provision for compensation for expenses is hard to fathom in the context of compensation for lost wages in paragraph (*c*) and for additional costs of obtaining goods and services in paragraph (*d*).

[40] Moreover, the term "costs", in legal parlance, has a well-understood meaning that is distinct from either compensation or expenses. It is a legal term of art because it consists of "words or expressions that have through usage by legal professionals acquired a distinct legal meaning": Sullivan, at p. 57. Costs usually mean some sort of compensation for legal expenses and services incurred in the course of litigation. If Parliament intended to confer authority to order costs, it is difficult to understand why it did not use this very familiar and widely used legal term of art to implement that purpose. As we shall see shortly, the legislative history of the statute also strongly supports the inference that this was not Parliament's intent.

[41] Finally, in relation to the text of the Act, it is noteworthy that it very strictly limits the

ni s'exprimer en vain. Chaque mot d'une loi est présumé avoir un sens et jouer un rôle précis dans la réalisation de l'objectif du législateur. » Comme l'explique l'ancien juge en chef Lamer dans l'arrêt *R. c. Proulx*, 2000 CSC 5, [2000] 1 R.C.S. 61, au par. 28, « [s]uivant un principe d'interprétation législative reconnu, une disposition législative ne devrait jamais être interprétée de façon telle qu'elle devienne superfétatoire. » Voir également l'arrêt *Procureur général du Québec c. Carrières Ste-Thérèse Ltée*, [1985] 1 R.C.S. 831, p. 838.

[39] L'appelante a obtenu une indemnité pour préjudice moral en application du par. 53(3) de la *LCDP*. Le Tribunal a par ailleurs refusé expressément le remboursement de ses frais médicaux (décision sur le fond, par. 404-406). À la différence des al. 53(2)*c*) et *d*), le par. (3) ne fait aucune mention du remboursement de dépenses. Là encore, si le législateur a voulu conférer un pouvoir distinct d'adjuger des dépens, on s'explique mal son omission de le faire explicitement dans la mesure où l'indemnisation des dépenses est expressément prévue pour la perte de salaire, à l'al. *c*), puis pour les frais supplémentaires occasionnés par le recours à d'autres biens et services, à l'al. *d*).

[40] Qui plus est, dans le vocabulaire juridique, le terme « dépens » possède un sens bien défini qui diffère de celui d'« indemnité » ou de « dépenses ». Il s'agit d'un terme technique propre à la langue du droit en ce qu'il correspond à [TRADUCTION] « un mot ou une expression qui, du fait de son emploi par les professionnels du droit, a acquis un sens juridique distinct » (Sullivan, p. 57). Les « dépens » s'entendent habituellement d'une indemnité accordée pour les frais de justice engagés et les services juridiques retenus dans le cadre d'une instance. Si le législateur a entendu conférer le pouvoir d'adjuger des dépens, on comprend mal pourquoi il n'a pas employé ce terme juridique consacré et largement répandu pour le faire. Nous verrons plus loin que l'historique de la loi donne aussi sérieusement à penser que telle n'était pas l'intention du législateur.

[41] Enfin, pour ce qui est du texte de la Loi, il vaut la peine de signaler qu'il plafonne très

amount of money the Tribunal may award for pain and suffering experienced as a result of the discriminatory practice and, as noted, does not explicitly provide for reimbursement of expenses in relation to such an award. At the time of these proceedings, the limit was $5,000. The Tribunal's interpretation permits it to make a free-standing award for pain and suffering coupled with an award of legal costs in a potentially unlimited amount. This view is hard to reconcile with either the monetary limit or the omission of any express authority to award expenses in s. 53(3).

strictement le dédommagement que le Tribunal peut accorder pour le préjudice moral infligé par l'acte discriminatoire. Rappelons aussi qu'il ne prévoit pas explicitement le remboursement des frais engagés pour l'obtention de ce dédommagement. Au moment d'engager l'instance, la somme maximale susceptible d'être accordée s'élevait à 5 000 $. L'interprétation que retient le Tribunal l'autorise à indemniser le préjudice moral de manière distincte, d'une part, et à adjuger des dépens dont le montant peut être illimité, d'autre part. Il est difficile de concilier cette interprétation avec la limitation de l'indemnité ou le fait que le par. 53(3) ne prévoit pas expressément le pouvoir d'accorder le remboursement des frais.

(2) Context

[42] Turning to context, three matters must be considered: legislative history, the Commission's own consistent understanding of the Tribunal's power to award costs, and parallel provincial and territorial legislation. These contextual matters, when considered along with the provisions' text and purpose, demonstrate that the Tribunal's interpretation does not fall within the range of reasonable interpretations of these provisions.

(2) Le contexte

[42] À propos du contexte, trois éléments doivent être pris en compte : l'historique législatif, l'opinion constante de la Commission concernant le pouvoir du Tribunal d'adjuger des dépens et les dispositions législatives comparables adoptées par les provinces et les territoires. Lorsque ces éléments sont considérés de pair avec le texte des dispositions et leur objet, l'interprétation retenue par le Tribunal ne fait pas partie de celles qui sont raisonnables.

(a) *Legislative History*

[43] The legislative evolution and history of a provision may often be important parts of the context to be examined as part of the modern approach to statutory interpretation: *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, 2005 SCC 70, [2005] 3 S.C.R. 425, at para. 28, *per* Binnie J.; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513, at p. 528, *per* L'Heureux-Dubé J.; *Hilewitz v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57, [2005] 2 S.C.R. 706, at paras. 41-53, *per* Abella J. Legislative evolution consists of the provision's initial formulation and all subsequent formulations. Legislative history includes material relating to the conception, preparation and passage of the enactment: see Sullivan, at pp. 587-93; P.-A. Côté, with the collaboration of S. Beaulac and

a) *Historique législatif*

[43] Souvent, l'évolution et l'historique législatifs d'une disposition peuvent constituer des aspects importants du contexte dont il doit être tenu compte dans une démarche moderne d'interprétation des lois (*Merk c. Association internationale des travailleurs en ponts, en fer structural, ornemental et d'armature, section locale 771*, 2005 CSC 70, [2005] 3 R.C.S. 425, par. 28, le juge Binnie; *Hills c. Canada (Procureur général)*, [1988] 1 R.C.S. 513, p. 528, la juge L'Heureux-Dubé; *Hilewitz c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2005 CSC 57, [2005] 2 R.C.S. 706, par. 41-53, la juge Abella). L'évolution législative s'entend de la formulation initiale, puis subséquente, d'une disposition, et l'historique législatif, des éléments touchant à la conception, à l'élaboration et à l'adoption du texte de loi : Sullivan, p. 587-593;

M. Devinat, *Interprétation des lois* (4th ed. 2009), at pp. 496 and 501-8.

[44] We think there is no reason to exclude proposed, but unenacted, provisions to the extent they may shed light on the purpose of the legislation. While great care must be taken in deciding how much, if any, weight to give to these sorts of material, it may provide helpful information about the background and purpose of the legislation, and in some cases, may give direct evidence of legislative intent: Sullivan, at p. 609; Côté, at p. 507; *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, at para. 37. This Court, in *M. v. H.*, [1999] 2 S.C.R. 3, has held that failed legislative amendments can constitute evidence of Parliamentary purpose: paras. 348-49, *per* Bastarache J.

[45] The legislative evolution and history of the *CHRA* shed light on two important matters. First, it strongly supports the inference that it is likely that Parliament would have chosen the familiar legal term of art had it been the intention to confer a power to award costs. Parliament is presumed to know the law and it is a reasonable inference that its failure to use familiar terms of art shows that some other meaning was intended. The history of the enactment of the provisions in issue supports applying that reasonable inference because the legal term of art "costs" was used in some draft provisions but not others. Second, the role envisioned for the Commission explains why the power to award costs was not part of Parliament's intent.

[46] Before the *Canadian Human Rights Act* was enacted in 1977, there was an earlier attempt to enact similar legislation. In 1975, Bill C-72, *An Act to extend the present laws in Canada that proscribe discrimination and that protect the privacy of individuals*, 1st Sess., 30th Parl., received first reading. It provided a specific costs jurisdiction for the Tribunal *in addition to* authority to award expenses which was expressed in wording that was virtually identical to the current s. 53(2). Clause 37(4) of Bill C-72 read as follows:

P.-A. Côté, avec la collaboration de S. Beaulac et M. Devinat, *Interprétation des lois* (4e éd. 2009), p. 496 et 501-508.

[44] Nous croyons que rien ne justifie d'oublier les dispositions envisagées mais non retenues dans la mesure où elles peuvent contribuer à la détermination de l'objet de la loi. Une grande prudence s'impose quant à l'importance éventuelle qu'il convient de leur accorder. Cependant, elles peuvent renseigner utilement sur l'historique et l'objet de la loi et, dans certains cas, offrir un élément de preuve direct de l'intention du législateur (Sullivan, p. 609; Côté, p. 507; *Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862, par. 37). Dans l'arrêt *M. c. H.*, [1999] 2 R.C.S. 3, notre Cour a statué qu'un projet de modification législative rejeté pouvait servir à établir l'intention du législateur : par. 348-349, le juge Bastarache.

[45] L'évolution et l'historique de la *LCDP* nous éclairent sur deux points importants. Premièrement, ils donnent fortement à penser que le législateur aurait eu recours au terme juridique consacré s'il avait voulu conférer le pouvoir d'adjuger des dépens. Le législateur est présumé connaître la loi, et l'omission d'employer un terme technique usité en droit permet d'inférer que le terme utilisé a une autre signification. L'historique de l'adoption des dispositions en cause étaye cette inférence raisonnable, car le terme juridique « dépens » a été employé dans l'ébauche de certaines dispositions, mais pas dans d'autres. En second lieu, le rôle qu'il projetait de confier à la Commission explique que le législateur n'a pas voulu lui attribuer le pouvoir d'adjuger des dépens.

[46] L'adoption en 1977 de la *Loi canadienne sur les droits de la personne* a été précédée par le dépôt, en 1975, du projet de loi C-72 intitulé *Loi visant à compléter la législation canadienne actuelle en matière de discrimination et de protection de la vie privée*, 1re sess., 30e lég., qui a franchi l'étape de la première lecture. Le projet conférait expressément au Tribunal le pouvoir d'adjuger des dépens *en plus de* celui d'accorder une indemnité pour les frais. Le libellé des dispositions en cause était pour ainsi dire identique à celui de l'actuel par. 53(2). Le paragraphe 37(4) du projet de loi C-72 disposait :

37. . . .

(4) The costs of and incidental to any hearing before a Tribunal are in the discretion of the Tribunal, which may direct that the whole or any part thereof be paid by any party to such hearing.

[47] Bill C-72 died on the order paper. When Bill C-25, which ultimately became the *CHRA* in 1977, was introduced, the explicit authority to award costs, which had been granted in cl. 37(4) of Bill C-72, was deleted, while the authority to award expenses was retained. In addition, a provision relating to the role of the Commission was inserted which we will discuss in a moment.

[48] This piece of the legislative history of the provision before us strongly suggests that "costs" was used as a term of art when the intention was to confer authority to award legal costs. This view is further reinforced by amendments that were proposed, but not enacted, in 1992. Clause 24(3) of Bill C-108, *An Act to amend the Canadian Human Rights Act and other Acts in consequence thereof*, 3rd Sess., 34th Parl., 1991-92, provided that the Tribunal could order the Commission to pay costs. It read as follows:

24. . . .

(3) Subsections 53(3) and (4) of the said Act are repealed and the following substituted therefor:

. . .

(6) The Tribunal may order the Commission to pay costs in accordance with the rules made under section 48.9 to

(*a*) a complainant, if the complaint is substantiated and

(i) the Commission did not appear before the Tribunal, or

(ii) separate representation for the complainant was warranted by the divergent interests of the complainant and the Commission or by any other circumstances of the complaint; or

(*b*) a respondent, if the complaint is not substantiated and is found to be trivial, frivolous, vexatious, in bad faith or without purpose or to have caused the respondent excessive financial hardship.

37. . . .

(4) Les dépens de l'enquête et les frais qui en découlent sont laissés à la discrétion du tribunal.

[47] Le projet de loi C-72 est mort au Feuilleton. Lors du dépôt du projet de loi C-25, devenu la *LCDP* en 1977, le pouvoir exprès d'adjuger des dépens que prévoyait le par. 37(4) du projet de loi C-72 a été omis, alors que celui d'indemniser des frais occasionnés a été retenu. De plus, une disposition portant sur le rôle de la Commission a été ajoutée. Nous y reviendrons.

[48] Ce volet de l'historique des dispositions qui nous intéressent permet de conclure que le terme technique « dépens » est employé lorsqu'il s'agit de conférer le pouvoir d'indemniser une partie de ses frais de justice. Cette interprétation se voit confirmée par les modifications proposées en 1992, mais non adoptées par la suite. En effet, le par. 24(3) du projet de loi C-108 — *Loi modifiant la Loi canadienne sur les droits de la personne et d'autres lois en conséquence*, 3e sess., 34e lég., 1991-92 — prévoyait que le Tribunal pouvait condamner la Commission aux dépens. En voici le libellé :

24. . . .

(3) Les paragraphes 53(3) et (4) de la même loi sont abrogés et remplacés par ce qui suit :

. . .

(6) Le tribunal peut accorder, aux dépens de la Commission, les frais et dépens qu'il détermine suivant les barèmes fixés dans les règles visées à l'article 48.9 :

a) au plaignant qui a gain de cause, soit lorsque la Commission n'a pas comparu devant lui, soit lorsque le plaignant a un représentant distinct à cause de la divergence de ses intérêts et de ceux de la Commission, ou des circonstances de la plainte;

b) au défendeur qui a gain de cause, lorsqu'il estime que la plainte est sans objet, dénuée de tout intérêt, faite de mauvaise foi ou a causé une contrainte financière excessive à celui-ci.

Clause 21 (adding s. 48.9(1)(*h*)) also would have allowed the Human Rights Tribunal Panel, with the approval of the Governor in Council, to make rules of procedure governing awards of interest and costs.

[49] These provisions received first reading in December of 1992, but did not proceed further and were not enacted. However, they again show that the word "costs" was understood to be a legal term of art to be used when the intention was to confer authority to order payment of legal costs.

[50] Another aspect of legislative history suggests that the authority to award costs and the role envisaged for the Commission were related subjects in Parliament's view.

[51] We mentioned earlier that the 1975 draft bill which was not ultimately enacted expressly authorized the Tribunal to award "costs of and incidental to any hearing" before it. That express power, as we have noted, was not contained in the 1977 bill that ultimately became the *CHRA*. However, while the power to award costs was removed, a provision relating to the role of the Commission was added. This section currently reads:

> **51.** In appearing at a hearing, presenting evidence and making representations, the Commission shall adopt such position as, in its opinion, is in the public interest having regard to the nature of the complaint.

We agree with the respondent that the clear implication of this chain of events is that Parliament chose an active role for the Commission, which could include litigating on behalf of complainants, instead of cloaking the Tribunal with a broad costs jurisdiction.

[52] The 1992 proposed amendments which we have noted earlier are consistent with this view. It is noteworthy that the authority to award costs contemplated by those provisions could only be

De plus, l'art. 21 (qui ajoutait l'al. 48.9(1)*h*)) aurait permis au Comité du tribunal des droits de la personne d'établir, avec l'approbation du gouverneur en conseil, des règles de procédure régissant l'adjudication des frais, des dépens et des intérêts.

[49] Ces dispositions ont franchi l'étape de la première lecture en décembre 1992, mais elles n'ont connu aucune suite, de sorte qu'elles n'ont pas été adoptées. Cependant, elles montrent encore une fois que le mot « dépens » était perçu comme un terme technique propre au droit et que son emploi visait à conférer le pouvoir de condamner au paiement des frais de justice.

[50] Un autre aspect de l'historique législatif permet de conclure que, dans l'esprit du législateur, pouvoir d'adjuger des dépens et rôle projeté de la Commission étaient liés.

[51] Rappelons que le projet de loi de 1975, qui n'a pas connu de suite, autorisait expressément le Tribunal à accorder les « dépens de l'enquête et les frais qui en découlent ». Or, ce pouvoir exprès n'a pas été repris dans le projet de loi de 1977 dont est issue la *LCDP*. Toutefois, même si le législateur a écarté le pouvoir d'adjuger des dépens, il a ajouté une disposition relative au rôle de la Commission qui, dans sa version actuelle, prévoit ce qui suit :

> **51.** En comparaissant devant le membre instructeur et en présentant ses éléments de preuve et ses observations, la Commission adopte l'attitude la plus proche, à son avis, de l'intérêt public, compte tenu de la nature de la plainte.

Nous convenons avec l'intimé qu'il appert nettement de cette succession de mesures que le législateur a choisi de confier un rôle actif à la Commission, dont celui d'agir au nom d'un plaignant, au lieu d'investir le Tribunal d'un vaste pouvoir d'adjudication des dépens.

[52] Les modifications proposées en 1992 et dont nous faisons précédemment état s'accordent avec cette interprétation. Il convient également de signaler que le pouvoir d'adjuger des dépens que

awarded under this regime if the Commission did not take carriage of the matter. This supports the respondent's contention that an authority to award costs was rejected in favour of an active role for the Commission in presenting complaints to the Tribunal.

(b) *The Commission's Understanding of Costs Authority*

[53] A further element of context is that the Commission itself has consistently understood that the *CHRA* does not confer jurisdiction to award costs and has repeatedly urged Parliament to amend the Act in this respect. Despite the limited weight of the factor, this Court has permitted consideration of an administrative body's own interpretation of its enabling legislation, for example, in *Will-Kare Paving & Contracting Ltd. v. Canada*, 2000 SCC 36, [2000] 1 S.C.R. 915. Binnie J. (in dissent) relied on excerpts from speeches to the Canadian Tax Foundation made by both the Minister of Finance and an employee of Revenue Canada when interpreting an income tax provision. Binnie J. states, "Administrative policy and interpretation are not determinative but are entitled to weight and can be an important factor in case of doubt about the meaning of legislation", at para. 66, citing *Harel v. Deputy Minister of Revenue of Quebec*, [1978] 1 S.C.R. 851, at p. 859, *per* de Grandpré J., and *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 37, *per* Dickson J. (as he then was). While of course not conclusive, this sort of opinion about the proper interpretation of the provision may be consulted by the court provided it meets the threshold test of relevance and reliability (see Sullivan, at p. 575; Côté, at pp. 633-38). In my view, the considered and consistent view of the Commission itself about the meaning of its constitutive statute meets these requirements.

[54] In its 1985 annual report, the Commission asked that the Act be amended to empower the Tribunal to award costs:

prévoyaient ces dispositions ne pouvait être exercé que si la Commission n'assurait pas la conduite de l'instance, ce qui tend à appuyer la thèse, défendue par l'intimé, de l'abandon du pouvoir d'adjuger des dépens au profit de l'octroi à la Commission d'un rôle actif dans la présentation des plaintes au Tribunal.

b) *Opinion de la Commission concernant son pouvoir d'adjuger des dépens*

[53] S'inscrit également dans le contexte le fait que la Commission elle-même a toujours considéré que la *LCDP* ne conférait pas le pouvoir d'adjuger des dépens et qu'elle a maintes fois exhorté le législateur à corriger la situation en modifiant la Loi. Dans l'arrêt *Will-Kare Paving & Contracting Ltd. c. Canada*, 2000 CSC 36, [2000] 1 R.C.S. 915, par exemple, notre Cour a permis la prise en compte de l'interprétation de sa loi habilitante par un organisme administratif, malgré l'importance relative de cet élément. Dissident, le juge Binnie s'y fonde sur des extraits d'allocutions prononcées devant l'Association canadienne d'études fiscales par le ministre des Finances et un employé de Revenu Canada relativement à l'interprétation d'une disposition de la loi de l'impôt sur le revenu. Il écrit : « La politique et l'interprétation de l'administration ne sont pas des sources concluantes, mais elles ont un certain poids en cas de doute sur la signification d'un texte législatif » (par. 66), citant à l'appui les arrêts *Harel c. Sous-ministre du Revenu du Québec*, [1978] 1 R.C.S. 851, p. 859, le juge de Grandpré, et *Nowegijick c. La Reine*, [1983] 1 R.C.S. 29, p. 37, le juge Dickson, plus tard Juge en chef. L'opinion de ce type sur la juste interprétation de la disposition en cause n'est évidemment pas concluante, mais le tribunal peut en tenir compte si elle satisfait au critère minimal de la pertinence et de la fiabilité (Sullivan, p. 575; Côté, p. 633-638). À notre avis, l'opinion réfléchie et constante de la Commission quant à la portée de sa loi constitutive satisfait à cette exigence.

[54] Dans son rapport annuel de 1985, la Commission demandait la modification de la Loi afin de doter le Tribunal du pouvoir d'adjuger des dépens :

The Commission recommends to Parliament that the Canadian Human Rights Act be amended to include a provision to allow a human rights tribunal discretionary power to award costs to parties appearing before it.

The intent of this recommendation is to provide tribunals with a wider discretion in disposing of a complaint where undue hardship may be a factor.

(*Annual Report 1985* (1986), at p. 12 (italics in original))

The Commission made similar recommendations in each of its 1986, 1987, 1988, 1989 and 1990 annual reports to Parliament.

[55] Most recently, in its *Special Report to Parliament: Freedom of Expression and Freedom from Hate in the Internet Age* (2009), the Commission stated that "[t]he CHRA does not allow for the awarding of costs" (p. 34). In this respect, the report makes mention of the simplified process that complainants must follow to file a complaint, and the assistance they get from both the Commission and the Tribunal during the investigation and litigation stages, as reasons why complainants do not need to hire lawyers to proceed. The Commission went on to recommend that Parliament amend the Act to allow discretion to award legal costs, but only if the Tribunal finds that one party has abused the Tribunal process.

[56] While, as noted, the Commission's views about the limits of its statutory powers are not binding on the court, they may be considered. The Commission is the body charged with the administration and enforcement of the *CHRA* on a daily basis and possesses extensive knowledge of and familiarity with the Act. Its long-standing and consistently held view that the Act does not allow for costs, while not determinative, is entitled to some weight in the circumstances of this case.

(c) *Parallel Provincial and Territorial Legislation*

[57] The respondent also urges us to consider parallel legislation in the provinces and territories

La Commission recommande au Parlement de modifier la Loi canadienne sur les droits de la personne de façon à y inclure une disposition conférant au tribunal des droits de la personne un pouvoir discrétionnaire l'habilitant à condamner aux dépens les parties aux plaintes qu'il instruit.

Cette recommandation vise à laisser aux tribunaux une plus grande discrétion dans la suite à donner aux plaintes dans les cas où des contraintes excessives peuvent entrer en compte.

(*Rapport annuel 1985* (1986), p. 12 (en italique dans l'original))

La Commission a formulé des recommandations au même effet dans chacun de ses rapports annuels au Parlement en 1986, 1987, 1988, 1989 et 1990.

[55] Plus récemment, dans son *Rapport spécial au Parlement : Liberté d'expression et droit à la protection contre la haine à l'ère d'Internet* (2009), la Commission relève que « [l]a LCDP ne permet pas d'allouer des dépens » (p. 37). À ce propos, elle renvoie à la procédure simplifiée que suit le plaignant pour déposer une plainte, de même qu'à l'assistance sur laquelle il peut compter de sa part et de celle du Tribunal tant à l'étape de l'enquête qu'à celle de l'instruction, pour expliquer que le plaignant n'a pas besoin d'un avocat pour exercer son recours. La Commission recommande la modification de la Loi afin que le Tribunal ait le pouvoir discrétionnaire d'allouer des dépens, mais seulement lorsqu'il juge qu'une partie a abusé de sa procédure.

[56] Comme nous le signalons précédemment, même si elle n'est pas liée par la conception que la Commission se fait de l'étendue de son pouvoir légal, une cour de justice peut en tenir compte. La Commission administre et applique la *LCDP* au quotidien, si bien qu'elle en a une connaissance approfondie. Le fait qu'elle estime depuis longtemps et avec constance que la Loi ne permet pas d'adjudication des dépens revêt une certaine importance dans les circonstances de l'espèce même s'il n'est pas décisif.

c) *Dispositions législatives comparables des provinces et des territoires*

[57] L'intimé nous incite par ailleurs à tenir compte des dispositions législatives parallèles des

and we agree that this is a useful exercise in this case. Of course, we do not suggest that consulting provincial and territorial legislation is always helpful to the task of discerning federal legislative intent. However, Professor Sullivan confirms that cross-jurisdictional comparison of statutes dealing with the same subject matter may be instructive (pp. 419-20).

[58] The Court has made use of parallel legislation as an interpretative aid in other cases. For example, in *Canada (Attorney General) v. Public Service Alliance of Canada*, [1991] 1 S.C.R. 614, Sopinka J. looked at several pieces of comparable provincial legislation to assist him in determining whether the federal legislation allowed the Public Service Staff Relations Board to decide who is an employee under its enabling legislation (pp. 631-32). Another example of this approach is found in *Morguard Properties Ltd. v. City of Winnipeg*, [1983] 2 S.C.R. 493, where Estey J. relied on a comparative analysis between Manitoba's legislation, and that of the other provinces, when deciding whether Winnipeg intended to freeze property tax assessments (pp. 504-5).

[59] In this case, resort to parallel provincial and territorial legislation is helpful in one limited respect. It tends to confirm the view that the word "costs" is used consistently when the intention is to confer the authority to award legal costs.

[60] For example, British Columbia allows costs to be awarded if there is "improper conduct" during the course of the complaint (*Human Rights Code*, R.S.B.C. 1996, c. 210, s. 37(4)). In Manitoba and the Northwest Territories, the conduct must be "frivolous or vexatious" (*Human Rights Code*, S.M. 1987-88, c. 45, s. 45(2); *Human Rights Act*, S.N.W.T. 2002, c. 18, s. 63). In Alberta, Prince Edward Island, and Newfoundland (*Alberta Human Rights Act*, R.S.A. 2000, c. A-25.5, s. 32(2); *Human Rights Act*, R.S.P.E.I. 1988, c. H-12, s. 28.4(6); *Human Rights Act, 2010*, S.N.L. 2010, c. H-13.1, s. 39(2)), tribunals can make any

provinces et des territoires et nous convenons qu'il s'agit d'une entreprise utile en l'espèce. Évidemment, nous ne laissons pas entendre que la consultation des lois provinciales et territoriales s'avère toujours pertinente pour discerner l'intention du législateur fédéral. La professeure Sullivan confirme toutefois que la comparaison des lois fédérales, provinciales et territoriales portant sur un même sujet peut se révéler instructive (p. 419-420).

[58] La Cour a déjà examiné en parallèle les dispositions législatives de différents ressorts. Ainsi, dans l'arrêt *Canada (Procureur général) c. Alliance de la Fonction publique du Canada*, [1991] 1 R.C.S. 614, le juge Sopinka étudie quelques lois provinciales comparables afin de déterminer si la loi fédérale considérée permet à la Commission des relations de travail dans la Fonction publique de décider qui est un employé en application de sa loi habilitante (p. 631-632). De même, dans l'arrêt *Morguard Properties Ltd. c. Ville de Winnipeg*, [1983] 2 R.C.S. 493, le juge Estey recourt à une analyse comparative de la loi manitobaine et de celles d'autres provinces pour décider si la ville de Winnipeg entendait geler des évaluations foncières (p. 504-505).

[59] Dans le cas qui nous occupe, le recours aux dispositions législatives équivalentes des provinces et des territoires n'est indiqué qu'à une fin bien précise. La démarche tend à confirmer que le législateur emploie toujours le mot « dépens » lorsqu'il veut conférer le pouvoir d'adjuger des dépens.

[60] Par exemple, la Colombie-Britannique permet d'adjuger des dépens en cas de [TRADUCTION] « comportement répréhensible » pendant l'examen de la plainte (*Human Rights Code*, R.S.B.C. 1996, ch. 210, par. 37(4)). Au Manitoba et dans les Territoires du Nord-Ouest, la conduite reprochée doit être « futile ou vexatoire » (*Code des droits de la personne*, L.M. 1987-88, ch. 45, par. 45(2); *Loi sur les droits de la personne*, L.T.N.-O. 2002, ch. 18, art. 63). En Alberta, à l'Île-du-Prince-Édouard et à Terre-Neuve (*Alberta Human Rights Act*, R.S.A. 2000, ch. A-25.5, par. 32(2); *Human Rights Act*, R.S.P.E.I. 1988, ch. H-12, par. 28.4(6);

"appropriate" cost order, in Québec a tribunal may award costs "as it determines", *Charter of human rights and freedoms*, R.S.Q., c. C-12, s. 126; and in Saskatchewan it is any "appropriate" cost order but not against the Commission (*Saskatchewan Human Rights Code Regulations*, R.R.S., c. S-24.1, Reg. 1, s. 21(1)). In Ontario, the offending party's conduct must be "unreasonable, frivolous or vexatious or . . . in bad faith" and the Tribunal can make its own rules pertaining to costs awards (*Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, s. 17.1(2)). In all provinces, this costs jurisdiction is *in addition to* broad compensatory jurisdiction for expenses incurred; the wording of these expense reimbursement provisions is very similar to the language of s. 53(2) of the *CHRA*.

Human Rights Act, 2010, S.N.L. 2010, ch. H-13.1, par. 39(2)), le tribunal peut rendre l'ordonnance qui [TRADUCTION] « convient » quant aux dépens. Au Québec, il peut rendre l'ordonnance « qu'il détermine » en la matière (*Charte des droits et libertés de la personne*, L.R.Q., ch. C-12, art. 126). En Saskatchewan, il peut aussi rendre l'ordonnance qui [TRADUCTION] « convient » à ce chapitre, mais il ne peut condamner la Commission aux dépens (*Saskatchewan Human Rights Code Regulations*, R.R.S., ch. S-24.1, règl. 1, par. 21(1)). En Ontario, la partie en cause doit avoir une conduite « déraisonnable, frivole ou vexatoire » ou « agi[r] de mauvaise foi », et le Tribunal peut établir ses propres règles pour l'adjudication des dépens (*Loi sur l'exercice des compétences légales*, L.R.O. 1990, ch. S.22, par. 17.1(2)). Dans tous ces ressorts, le pouvoir d'adjudication des dépens *s'ajoute au* pouvoir général d'indemniser une partie des dépenses engagées. Le libellé des dispositions prévoyant le remboursement des dépenses est très semblable à celui du par. 53(2) de la *LCDP*.

(3) Purpose

(3) L'objet

[61] The appellant urges the Court to give the provisions authorizing compensation for expenses a broad and purposive interpretation which will permit the Tribunal to make victims of discrimination whole. This was the second point relied on by the Tribunal in finding it could award costs.

[61] L'appelante demande à la Cour d'interpréter de manière large et téléologique les dispositions qui autorisent le Tribunal à indemniser de ses dépenses la victime de l'acte discriminatoire, pour garantir le caractère intégral de l'indemnisation. Cet argument reprend le deuxième motif invoqué par le Tribunal pour étayer sa conclusion qu'il peut adjuger des dépens.

[62] As we noted earlier, the *CHRA* has been described as quasi-constitutional and deserves a broad, liberal, and purposive interpretation befitting of this special status. However, a liberal and purposive interpretation cannot supplant a textual and contextual analysis simply in order to give effect to a policy decision different from the one made by Parliament: *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764, at paras. 49-50, *per* Abella J.; *Gould*, at para. 50, *per* La Forest J., concurring.

[62] Certes, la *LCDP* demeure considérée comme une loi quasi constitutionnelle qui appelle une interprétation large, libérale et téléologique en rapport avec cette nature particulière. Toutefois, on ne saurait substituer à l'analyse textuelle et contextuelle une interprétation libérale et téléologique dans le seul but de donner effet à une autre décision de principe que celle prise par le législateur (*Bell Canada c. Bell Aliant Communications régionales*, 2009 CSC 40, [2009] 2 R.C.S. 764, par. 49-50, la juge Abella; *Gould*, par. 50, le juge La Forest, motifs concordants).

[63] The genesis of this dispute appears to be the fact that, in 2003, the Commission decided to restrict its advocacy on behalf of complainants (R.F., at paras. 47-48). This policy change may have been in response to the Report of the Canadian Human Rights Act Review Panel, chaired by the Honourable Gérard La Forest, which recommended that the Commission act only in cases that raised serious issues of systemic discrimination or new points of law (*Promoting Equality: A New Vision* (2000)). Interestingly, this report also acknowledged that the *CHRA* does not provide any authority to award costs. The Report recommended clinic-type assistance to potential claimants (pp. 71-72 and 74-78). The latter recommendation was not acted upon, while the former was. As a result, the role of the Commission in taking complaints forward to the Tribunal was restricted without provision for alternative means to assist complainants to do so. Significantly, however, these changes occurred without changing the legislation in relation to the power to award costs.

[64] In our view, the text, context and purpose of the legislation clearly show that there is no authority in the Tribunal to award legal costs and that there is no other reasonable interpretation of the relevant provisions. Faced with a difficult point of statutory interpretation and conflicting judicial authority, the Tribunal adopted a dictionary meaning of "expenses" and articulated what it considered to be a beneficial policy outcome rather than engage in an interpretative process taking account of the text, context and purpose of the provisions in issue. In our respectful view, this led the Tribunal to adopt an unreasonable interpretation of the provisions. The Court of Appeal was justified in reviewing and quashing the order of the Tribunal.

V. Disposition

[65] We would dismiss the appeal without costs.

[63] Le présent litige paraît découler de la décision de la Commission, datant de 2003, de restreindre le nombre de cas dans lesquels elle épaule le plaignant (m.i., par. 47-48). Ce changement d'orientation a pu donner suite au rapport du Comité de révision de la Loi canadienne sur les droits de la personne présidé par l'honorable Gérard La Forest. En effet, ce rapport recommandait que la Commission ne comparaisse que dans les dossiers soulevant des questions sérieuses de discrimination systémique ou des points de droit nouveaux (*La promotion de l'égalité : Une nouvelle vision* (2000)). Il reconnaissait en outre que la *LCDP* n'accordait pas le pouvoir d'adjuger des dépens et il recommandait la création d'une clinique juridique appelée à offrir son aide aux éventuels plaignants (p. 77-79 et 81-85). Contrairement à la première recommandation, cette dernière n'a pas été suivie, de sorte que le rôle de la Commission dans la présentation des plaintes au Tribunal s'est restreint bien qu'aucune autre mesure n'ait été prise pour aider les plaignants. Il est toutefois révélateur que ces changements soient intervenus sans modification de la loi au sujet du pouvoir d'adjuger des dépens.

[64] À notre avis, il appert nettement du texte de la loi, de son contexte et de son objet que le Tribunal ne possède pas le pouvoir d'adjuger des dépens, et les dispositions applicables ne se prêtent à aucune autre interprétation raisonnable. Aux prises avec une question difficile d'interprétation législative et une jurisprudence contradictoire, le Tribunal a retenu la définition de « dépense » figurant au dictionnaire et il a formulé ce qu'il tenait pour une solution bénéfique sur le plan des principes au lieu d'entreprendre une démarche d'interprétation fondée sur le texte, le contexte et l'objet des dispositions en cause. Avec respect pour l'opinion contraire, cette démarche a amené le Tribunal à opter pour une interprétation déraisonnable des dispositions. La Cour d'appel était justifiée de contrôler puis d'annuler l'ordonnance du Tribunal.

V. Dispositif

[65] Nous sommes d'avis de rejeter le pourvoi sans dépens.

Appeal dismissed.

Solicitor for the appellant the Canadian Human Rights Commission: Canadian Human Rights Commission, Ottawa.

Solicitors for the appellant Donna Mowat: Raven, Cameron, Ballantyne & Yazbeck, Ottawa.

Solicitor for the respondent: Attorney General of Canada, Toronto.

Solicitors for the intervener the Canadian Bar Association: Camp Fiorante Matthews, Vancouver.

Solicitors for the intervener the Council of Canadians with Disabilities: Champ & Associates, Ottawa.

Pourvoi rejeté.

Procureur de l'appelante la Commission canadienne des droits de la personne : Commission canadienne des droits de la personne, Ottawa.

Procureurs de l'appelante Donna Mowat : Raven, Cameron, Ballantyne & Yazbeck, Ottawa.

Procureur de l'intimé : Procureur général du Canada, Toronto.

Procureurs de l'intervenante l'Association du Barreau canadien : Camp Fiorante Matthews, Vancouver.

Procureurs de l'intervenant le Conseil des Canadiens avec déficiences : Champ & Avocats, Ottawa.

F

Halifax Regional Municipality, a body corporate duly incorporated pursuant to the laws of Nova Scotia *Appellant*

v.

Nova Scotia Human Rights Commission, Lucien Comeau, Lynn Connors and Her Majesty The Queen in Right of the Province of Nova Scotia *Respondents*

and

Canadian Human Rights Commission *Intervener*

Halifax Regional Municipality, personne morale constituée sous le régime des lois de la Nouvelle-Écosse *Appelante*

c.

Nova Scotia Human Rights Commission, Lucien Comeau, Lynn Connors et Sa Majesté la Reine du chef de la province de la Nouvelle-Écosse *Intimés*

et

Commission canadienne des droits de la personne *Intervenante*

INDEXED AS: HALIFAX (REGIONAL MUNICIPALITY) *v.* NOVA SCOTIA (HUMAN RIGHTS COMMISSION)

2012 SCC 10

File No.: 33651.

2011: October 19; 2012: March 16.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein and Cromwell JJ.

RÉPERTORIÉ : HALIFAX (REGIONAL MUNICIPALITY) *c.* NOUVELLE-ÉCOSSE (HUMAN RIGHTS COMMISSION)

2012 CSC 10

N° du greffe : 33651.

2011 : 19 octobre; 2012 : 16 mars.

Présents : La juge en chef McLachlin et les juges LeBel, Deschamps, Fish, Abella, Rothstein et Cromwell.

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

Administrative law — Judicial review — Standard of review — Complaint filed with Nova Scotia Human Rights Commission — Commission requesting appointment of board of inquiry — Decision set aside on judicial review — Board prohibited from proceeding — Appeal allowed — Whether chambers judge applied correct standard of review — Whether Commission erred in requesting appointment of board of inquiry.

EN APPEL DE LA COUR D'APPEL DE LA NOUVELLE-ÉCOSSE

Droit administratif — Contrôle judiciaire — Norme de contrôle — Dépôt d'une plainte à la Commission des droits de la personne de la Nouvelle-Écosse — Commission ayant demandé la nomination d'une commission d'enquête — Décision annulée lors d'un contrôle judiciaire — Interdiction faite à la commission d'enquête d'aller de l'avant — Appel accueilli — Le juge en cabinet a-t-il appliqué la bonne norme de contrôle? — La Commission a-t-elle eu tort de demander la nomination d'une commission d'enquête?

The complainant, a francophone Acadian parent who had children enrolled in one of the French-first-language schools in Halifax, filed complaints alleging that the funding arrangements for the schools discriminated against him and his children on the basis of their Acadian ethnic origin. Following municipal amalgamation and the consequent amalgamation of the affected school boards, Halifax imposed a tax to allow it to satisfy the statutory requirement that it

Acadien francophone et père d'enfants inscrits à un établissement d'enseignement en français langue première de Halifax, le plaignant a allégué que les modalités de financement des écoles établissaient une distinction discriminatoire sur le fondement de l'origine ethnique acadienne de ses enfants et de la sienne. Par suite de la fusion municipale et du regroupement consécutif des conseils scolaires touchés, Halifax a prélevé une taxe pour satisfaire à son obligation légale de

maintain supplementary funding to schools that had received such funding prior to amalgamation. However, Halifax schools that formed part of the newly created Conseil scolaire acadien provincial, a province-wide public school board that administers French-first-language schools, did not receive supplementary funding. Legislation did not require Halifax to provide it to these schools.

After investigating the complaints, the Commission requested that a board of inquiry be appointed. Shortly thereafter, a *Charter* challenge brought by other parents led to a statutory amendment providing for supplementary funding for Conseil schools in Halifax. The *Charter* challenge was dismissed on consent. Halifax applied for judicial review of the Commission's decision to refer the complaint against it to a board of inquiry. A judge of the Nova Scotia Supreme Court set the referral decision aside and prohibited the board from proceeding. The Nova Scotia Court of Appeal reversed and cleared the way for the board of inquiry to go ahead.

Held: The appeal should be dismissed.

Judicial intervention is not justified at this preliminary stage of the Commission's work. The Commission did not decide that the complaint fell within the purview of the Act. Instead, the Commission made a discretionary decision that an inquiry was warranted in all of the circumstances. That decision should be reviewed for reasonableness. The decision was reasonable in the circumstances of this case. Whether judicial intervention is justified at this preliminary stage of the Commission's work turns mainly on the ongoing authority of this Court's decision in *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756 ("*Bell* (1971)"). It remains good authority for the proposition that referral decisions are subject to judicial review, but, beyond that, it should no longer be followed and courts should exercise great restraint in intervening at this early stage of the process. Under the contemporary Canadian law of judicial review, questions that would have been considered jurisdictional under *Bell* (1971) would not be so quickly labelled as such. Moreover, the notion of "preliminary questions", which permeates the reasoning in *Bell* (1971), has long since been abandoned. Even more fundamentally, contemporary courts would not so quickly accept that questions such as the one dealt with in *Bell* (1971) can be answered by an abstract interpretive exercise conducted without regard to the statutory context. Early judicial intervention also risks depriving the reviewing court of a full record bearing on the issue; allows for judicial imposition of

continuer d'offrir un financement supplémentaire aux établissements qui bénéficiaient d'une telle aide avant la fusion. Or, les écoles de Halifax qui faisaient partie du Conseil scolaire acadien provincial récemment créé, un conseil scolaire public chargé de l'administration des établissements d'enseignement en français langue première à la grandeur de la province, ne touchaient pas de fonds supplémentaires. La législation n'obligeait pas Halifax à leur en verser.

Après examen des plaintes, la Commission a demandé la nomination d'une commission d'enquête. Peu après, une action intentée par d'autres parents en application de la *Charte* a entraîné une modification législative prévoyant le financement supplémentaire des écoles du Conseil à Halifax, et l'action a été rejetée sur consentement. Halifax a demandé le contrôle judiciaire de la décision de la Commission de renvoyer la plainte à une commission d'enquête. Un juge de la Cour suprême de la Nouvelle-Écosse a annulé le renvoi et interdit à la commission d'enquête d'aller de l'avant. La Cour d'appel de la Nouvelle-Écosse a infirmé le jugement et donné le feu vert à la commission d'enquête.

Arrêt : Le pourvoi est rejeté.

L'intervention judiciaire n'est pas justifiée à cette étape préliminaire de la procédure administrative. La Commission n'a pas décidé que la plainte tombait sous le coup de la Loi. Elle a plutôt décidé, dans l'exercice de son pouvoir discrétionnaire, qu'une enquête était justifiée compte tenu de l'ensemble des circonstances. Cette décision était assujettie à la norme de contrôle de la décision raisonnable et, eu égard aux circonstances de l'espèce, elle était raisonnable. La réponse à la question de savoir si le contrôle judiciaire était justifié à cette étape préliminaire de la procédure de la Commission dépend essentiellement de ce que l'arrêt *Bell c. Ontario Human Rights Commission*, [1971] R.C.S. 756 (« *Bell* (1971) ») a toujours valeur de précédent ou non. Cet arrêt continue d'avoir valeur de précédent pour ce qui est du contrôle judiciaire auquel peut donner lieu le renvoi, mais il ne devrait plus être suivi par ailleurs, et les cours de justice devraient faire preuve de grande retenue lorsqu'elles sont appelées à intervenir à cette étape initiale du processus. Suivant les règles actuelles du droit canadien en matière de contrôle judiciaire, les questions qui auraient été considérées comme des questions de compétence dans *Bell* (1971) ne seraient pas aussi spontanément qualifiées ainsi. Par ailleurs, la notion de « question préliminaire », qui imprègne le raisonnement de la Cour dans l'arrêt *Bell* (1971), a depuis longtemps été abandonnée. Mais plus fondamentalement encore, de nos jours, une cour de justice ne serait pas aussi encline à convenir que l'on peut statuer sur

a "correctness" standard with respect to legal questions that, had they been decided by the tribunal, might be entitled to deference; encourages an inefficient multiplicity of proceedings in tribunals and courts; and may compromise carefully crafted, comprehensive legislative regimes. Moreover, contemporary administrative law accords more value to the considered opinion of the tribunal on legal questions, whether the tribunal's ruling is ultimately reviewable in the courts for correctness or reasonableness.

Given the breadth of the Commission's discretion and the preliminary nature of its referral decision, a reviewing court should intervene in such a decision only if there is no reasonable basis in law or on the evidence to support it. This standard of review ensures that the reviewing court gives due deference to both the administrative decision and the administrative process. Whatever the ultimate merit of the complaints in this case might be, the information before the Commission provided it with a reasonable basis for referring the novel and complex complaints to a board of inquiry. The report of the Commission's investigator, along with the surrounding circumstances, provided a reasonable basis in law and on the evidence for the Commission's decision and it made no reviewable error.

Cases Cited

Overruled: *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756, rev'g *R. v. Tarnopolsky, Ex parte Bell*, [1970] 2 O.R. 672; **referred to:** *Cowan v. Aylward*, 2002 NSCA 76, 205 N.S.R. (2d) 324; *Green v. Human Rights Commission (N.S.)*, 2011 NSCA 47, 303 N.S.R. (2d) 211; *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854; *Zündel v. Canada (Attorney General)*, [1999] 4 F.C. 289, aff'd (2000), 195 D.L.R. (4th) 394; *Bell Canada v. Communications, Energy and Paperworkers Union of Canada*, [1999] 1 F.C. 113; *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879; *Losenno v. Ontario Human Rights Commission* (2005), 78 O.R. (3d) 161; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *R. v. Tottenham and District Rent*

une question comme celle en litige dans *Bell* (1971) en recourant à une interprétation abstraite, sans égard au contexte législatif. Une intervention judiciaire hâtive risque aussi de priver le tribunal de révision d'un dossier complet sur la question, elle ouvre la porte à l'assujettissement à la norme de la « décision correcte » de questions de droit qui, si elles étaient tranchées par le tribunal administratif, pourraient commander la déférence judiciaire, elle nuit à l'efficacité des recours par la multiplication des procédures administratives et judiciaires et elle peut compromettre un régime législatif complet soigneusement conçu par le législateur. Qui plus est, le droit administratif contemporain reconnaît une valeur accrue à l'opinion réfléchie d'un tribunal administratif sur une question de droit, et ce, que la décision de ce dernier soit ultimement susceptible de contrôle judiciaire selon la norme de la décision correcte ou celle de la décision raisonnable.

Étant donné l'étendue du pouvoir discrétionnaire dont jouit la Commission et le caractère préliminaire de sa décision de renvoi, le tribunal de révision ne doit intervenir que lorsque ni la loi ni la preuve n'offrent de fondement raisonnable à la décision. La norme de contrôle garantit que le tribunal de révision fait preuve de la déférence voulue envers la décision et la procédure administratives. Quel que soit le sort réservé ultimement aux plaintes, les données dont disposait la Commission offraient un fondement raisonnable à sa décision de renvoyer les allégations à la fois complexes et nouvelles à une commission d'enquête. Étant donné le rapport de l'enquêteur de la Commission et les circonstances de l'affaire, la loi et la preuve offraient un fondement raisonnable à la décision de la Commission, et cette dernière n'a pas commis d'erreur susceptible de contrôle judiciaire.

Jurisprudence

Arrêt rejeté : *Bell c. Ontario Human Rights Commission*, [1971] R.C.S. 756, inf. *R. c. Tarnopolsky, Ex parte Bell*, [1970] 2 O.R. 672; **arrêts mentionnés :** *Cowan c. Aylward*, 2002 NSCA 76, 205 N.S.R. (2d) 324; *Green c. Human Rights Commission (N.S.)*, 2011 NSCA 47, 303 N.S.R. (2d) 211; *Cooper c. Canada (Commission des droits de la personne)*, [1996] 3 R.C.S. 854; *Zündel c. Canada (Procureur général)*, [1999] 4 C.F. 289, conf. par 2000 CanLII 16731; *Bell Canada c. Syndicat canadien des communications, de l'énergie et du papier*, [1999] 1 C.F. 113; *Syndicat des employés de production du Québec et de l'Acadie c. Canada (Commission canadienne des droits de la personne)*, [1989] 2 R.C.S. 879; *Losenno c. Ontario Human Rights Commission* (2005), 78 O.R. (3d) 161; *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S.

Tribunal, Ex parte Northfield (Highgate) Ltd., [1957] 1 Q.B. 103; *R. v. Bernard*, [1988] 2 S.C.R. 833; *R. v. Chaulk*, [1990] 3 S.C.R. 1303; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048; *C.B. Powell Limited v. Canada (Border Services Agency)*, 2010 FCA 61, [2011] 2 F.C.R. 332; *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536; *Irvine v. Canada (Restrictive Trade Practices Commission)*, [1987] 1 S.C.R. 181; *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Violette v. New Brunswick Dental Society*, 2004 NBCA 1, 267 N.B.R. (2d) 205; *Air Canada v. Lorenz*, [2000] 1 F.C. 494; *Szczecka v. Canada (Minister of Employment and Immigration)* (1993), 170 N.R. 58; *Psychologist Y v. Board of Examiners in Psychology*, 2005 NSCA 116, 236 N.S.R. (2d) 273; *Potter v. Nova Scotia Securities Commission*, 2006 NSCA 45, 246 N.S.R. (2d) 1; *Vancouver (City) v. British Columbia (Assessment Appeal Board)* (1996), 135 D.L.R. (4th) 48; *Mondesir v. Manitoba Assn. of Optometrists* (1998), 163 D.L.R. (4th) 703; *U.F.C.W., Local 1400 v. Wal-Mart Canada Corp.*, 2010 SKCA 89, 321 D.L.R. (4th) 397; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5; *Canada (National Research Council) v. Zhou*, 2009 FC 164 (CanLII).

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Randolph Kinghorne and *Karen L. Brown*, for the appellant.

John P. Merrick, *Q.C.*, and *Kelly L. Buffett*, for the respondent the Nova Scotia Human Rights Commission.

Michel Doucet, *Mark C. Power* and *Jean-Pierre Hachey*, for the respondent Lucien Comeau.

Edward A. Gores, *Q.C.*, for the respondent Her Majesty the Queen in Right of the Province of Nova Scotia.

No one appeared for the respondent Lynn Connors.

Philippe Dufresne, for the intervener the Canadian Human Rights Commission.

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POURVOI contre un arrêt de la Cour d'appel de la Nouvelle-Écosse (le juge en chef MacDonald et les juges Oland et Hamilton), 2010 NSCA 8, 287 N.S.R. (2d) 329, 912 A.P.R. 329, 66 M.P.L.R. (4th) 19, 8 Admin. L.R. (5th) 274, [2010] N.S.J. No. 54 (QL), 2010 CarswellNS 75, qui a infirmé une décision du juge Boudreau, 2009 NSSC 12, 273 N.S.R. (2d) 258, 872 A.P.R. 258, 184 C.R.R. (2d) 295, 55 M.P.L.R. (4th) 69, 66 C.H.R.R. D/1, [2009] N.S.J. No. 13 (QL), 2009 CarswellNS 13. Pourvoi rejeté.

Randolph Kinghorne et *Karen L. Brown*, pour l'appelante.

John P. Merrick, *c.r.*, et *Kelly L. Buffett*, pour l'intimée Nova Scotia Human Rights Commission.

Michel Doucet, *Mark C. Power* et *Jean-Pierre Hachey*, pour l'intimé Lucien Comeau.

Edward A. Gores, *c.r.*, pour l'intimée Sa Majesté la Reine du chef de la province de la Nouvelle-Écosse.

Personne n'a comparu pour l'intimée Lynn Connors.

Philippe Dufresne, pour l'intervenante la Commission canadienne des droits de la personne.

The judgment of the Court was delivered by

CROMWELL J. —

I. Introduction

[1] The Nova Scotia Human Rights Commission (the "Commission") enforces and administers the *Human Rights Act*, R.S.N.S. 1989, c. 214 (the "Act"), and the Act gives the Commission considerable discretion as to how it carries out that mandate. When there is a complaint that the Act has been violated and the Commission is satisfied that an inquiry is warranted in all of the circumstances, it may set up a board of inquiry to look into the matter. When the Commission sets up a board of inquiry, what is the role of a court that is asked to review that decision?

[2] This question arises out of the Commission's decision to refer Lucien Comeau's complaints of discrimination to a board of inquiry. On judicial review, a Nova Scotia Supreme Court judge set aside that decision and prohibited the board from proceeding (2009 NSSC 12, 273 N.S.R. (2d) 258). The Nova Scotia Court of Appeal reversed and cleared the way for the board of inquiry to go ahead (2010 NSCA 8, 287 N.S.R. (2d) 329). The difference between the two courts concerned the proper scope of judicial review of the Commission's decision. The appeal to this Court raises two main questions.

[3] The first concerns the standard of judicial review of the Commission's decision to refer the complaint to a board of inquiry. My view is that, given the breadth of the Commission's discretion and the preliminary nature of its decision, a reviewing court should intervene only if there is no reasonable basis in law or on the evidence to support the Commission's decision. The second question is whether, applying that standard of judicial review, the Commission made any reviewable error in appointing the board of inquiry. In my opinion,

Version française du jugement de la Cour rendu par

LE JUGE CROMWELL —

I. Introduction

[1] La Nova Scotia Human Rights Commission (la « Commission ») a pour mandat d'appliquer et de faire respecter la *Human Rights Act*, R.S.N.S. 1989, ch. 214 (la « Loi »), et le législateur lui confère une grande latitude à cet égard. Lorsqu'elle est saisie d'une allégation de violation de la Loi et que, compte tenu de l'ensemble des circonstances, elle est convaincue de la justification d'un examen, la Commission peut mettre sur pied une commission d'enquête pour examiner la plainte. Quelle doit alors être la démarche du tribunal de révision appelé à contrôler cette décision de la Commission?

[2] Le litige fait suite à la décision de la Commission de renvoyer à une commission d'enquête les allégations de discrimination formulées par Lucien Comeau. Saisi d'une demande de contrôle judiciaire, un juge de la Cour suprême de la Nouvelle-Écosse a annulé la décision de la Commission et interdit à la commission d'enquête d'aller de l'avant (2009 NSSC 12, 273 N.S.R. (2d) 258). La Cour d'appel de la Nouvelle-Écosse a infirmé ce jugement et donné le feu vert à la commission d'enquête (2010 NSCA 8, 287 N.S.R. (2d) 329). Les deux juridictions divergent d'opinion sur la juste portée du contrôle judiciaire auquel est soumise la décision de la Commission. Le pourvoi formé devant notre Cour soulève principalement deux questions.

[3] Premièrement, quelle norme de contrôle judiciaire s'applique à la décision de la Commission de renvoyer la plainte à une commission d'enquête? À mon avis, étant donné l'étendue du pouvoir discrétionnaire dont jouit la Commission et le caractère préliminaire de sa décision, le tribunal de révision ne doit intervenir que lorsque ni la loi ni la preuve n'offrent de fondement raisonnable à la décision de la Commission. Deuxièmement, au regard de cette norme, la Commission a-t-elle commis une erreur susceptible de contrôle judiciaire en nommant la

there was a reasonable basis in law and on the evidence for the Commission's decision here and it made no reviewable error.

[4] I therefore agree with the Court of Appeal that the Commission's decision should be upheld and I would dismiss the appeal.

II. Overview of Facts and Proceedings

A. *Facts*

[5] Lucien Comeau complained to the Nova Scotia Human Rights Commission that the funding arrangements for the French-first-language schools in Halifax discriminated against him and his children on the basis of their Acadian ethnic origin. In order to understand the complaint, some background about school funding in Nova Scotia is required.

[6] In the mid-1990s, Nova Scotia created the Halifax Regional Municipality ("Halifax") by amalgamating the cities of Halifax and Dartmouth, the Town of Bedford and the County of Halifax: the *Halifax Regional Municipality Act*, S.N.S. 1995, c. 3, repealed by the *Municipal Government Act*, S.N.S. 1998, c. 18, s. 560 ("*MGA*"). Later, their school boards were similarly amalgamated, forming the Halifax Regional School Board: the *Establishment of the Halifax Regional School Board*, N.S. Reg. 40/2005. Before amalgamation, the cities of Halifax and Dartmouth provided supplementary funding to their respective school boards. (Provincial law allowed other municipalities to do the same, but no others did.) After amalgamation, Halifax was required by statute to maintain supplementary funding to the schools that had received funding from the former cities of Halifax and Dartmouth: the *Halifax Regional Municipality Act*, s. 84, and, after its repeal, the *MGA*, s. 530. Halifax raised this supplementary funding through taxation and then provided the funds to the relevant school boards — the Halifax and Dartmouth District School Boards at first, and then the Halifax

commission d'enquête? Selon moi, la loi et la preuve offraient en l'espèce un fondement raisonnable à la décision, et la Commission n'a pas commis d'erreur susceptible de contrôle judiciaire.

[4] Je conviens donc avec la Cour d'appel que la décision de la Commission doit être confirmée, et je suis d'avis de rejeter le pourvoi.

II. Rappel des faits et jugements dont appel

A. *Les faits*

[5] Lucien Comeau a saisi la Commission des droits de la personne de la Nouvelle-Écosse d'une plainte. Il tenait pour discriminatoires sur le fondement de son origine ethnique et de celle de ses enfants — ils sont Acadiens — les modalités de financement des établissements d'enseignement en français langue première de Halifax. Quelques précisions s'imposent sur le financement des écoles en Nouvelle-Écosse pour bien situer la plainte dans son contexte.

[6] Au milieu des années 1990, la Nouvelle-Écosse a créé la Municipalité régionale de Halifax (« Halifax ») par la fusion des villes de Halifax, de Dartmouth et de Bedford et du comté de Halifax (*Halifax Regional Municipality Act*, S.N.S. 1995, ch. 3, abrogée par la *Municipal Government Act*, S.N.S. 1998, ch. 18, art. 560 (« *MGA* »)). Les conseils scolaires de ces villes et de ce comté ont par la suite fusionné eux aussi pour former le Halifax Regional School Board : *Establishment of the Halifax Regional School Board*, règl. 40/2005 N.-É. Avant la fusion, les villes de Halifax et de Dartmouth offraient un financement supplémentaire à leurs conseils scolaires respectifs (la législation provinciale permettait aux autres municipalités de les imiter, mais aucune ne le faisait). Après la fusion, Halifax était légalement tenue de continuer d'offrir un financement supplémentaire aux écoles auxquelles les anciennes villes de Halifax et de Dartmouth versaient auparavant des fonds (*Halifax Regional Municipality Act*, art. 84; après son abrogation, *MGA*, art. 530). Halifax prélevait ces fonds supplémentaires par voie de taxation puis les versait aux conseils scolaires en cause — d'abord aux

Regional School Board after the school boards' amalgamation. (Some additional funds were also raised and distributed in parts of Halifax other than in the former cities.)

[7] At around the same time as the amalgamation, the Province created the *Conseil scolaire acadien provincial* ("Conseil"), a province-wide public school board that administers French-first-language schools: the *Education Act*, S.N.S. 1995-96, c. 1; the *Establishment of Conseil scolaire acadien provincial*, N.S. Reg. 38/2005. The Conseil's funding came entirely from the Province and, in this respect, it differed from other Nova Scotia school boards, which also receive funding from the municipalities they serve.

[8] Conseil schools did not receive the supplemental funding from Halifax that was given to other public schools in the two former cities. Mr. Comeau took exception to this state of affairs. He is a francophone Acadian parent who had children enrolled in l'École Bois-Joli, one of the three Conseil schools in the former cities. He filed a complaint against Halifax with the Commission in June 2003, and a similar complaint against the Province (specifically, against Service Nova Scotia and Municipal Relations and the Department of Education) in July 2004. (The Province made it clear in oral argument that it does not seek reversal of the Court of Appeal's decision, meaning that the complaint against it is therefore no longer in issue.)

[9] In his complaints, Mr. Comeau relied on ss. 5(1)(a) and (q) of the Act to allege discrimination in respect of the provision of a service or facilities on the basis of ethnic origin. He also alleged violation of his rights under s. 15 of the *Canadian Charter of Rights and Freedoms*. The Commission appointed an investigator, who filed three similar but separate reports on the complaints. In these reports, the investigator suggested that Mr. Comeau's complaints "would appear to establish a *prima facie* case of discrimination" (A.R., at p. 136). It is worth noting that while the *MGA* did not provide for

conseils des villes de Halifax et de Dartmouth, puis au conseil régional de Halifax après la fusion des conseils scolaires. (Des fonds supplémentaires ont également été prélevés puis distribués par Halifax sur les territoires des autres parties à la fusion.)

[7] Presque simultanément à la fusion, la province a créé le Conseil scolaire acadien provincial (le « Conseil »), un conseil scolaire public chargé de l'administration des établissements d'enseignement en français langue première à la grandeur de la province : *Education Act*, S.N.S. 1995-96, ch. 1; *Establishment of Conseil scolaire acadien provincial*, règl. 38/2005 N.-É. Entièrement financé par la province, le Conseil différait sur ce point des autres conseils scolaires de la Nouvelle-Écosse, qui recevaient en sus des fonds des municipalités qu'ils desservaient.

[8] Les écoles régies par le Conseil ne bénéficiaient pas du financement supplémentaire consenti par Halifax aux autres écoles publiques des deux anciennes villes, ce dont s'est indigné M. Comeau, un Acadien francophone, père d'enfants inscrits à l'École Bois-Joli, l'une des trois écoles administrées par le Conseil et situées sur le territoire des anciennes villes. En juin 2003, M. Comeau a porté plainte à la Commission contre Halifax puis, en juillet 2004, contre la province (plus précisément contre Services Nouvelle-Écosse et Relations avec les municipalités et le ministère de l'Éducation de la Nouvelle-Écosse). (À l'audience, la province a clairement renoncé à obtenir l'infirmation de la décision de la Cour d'appel, de sorte que la plainte portée contre elle n'est plus visée par le pourvoi.)

[9] À l'appui de ses allégations, M. Comeau invoque les al. 5(1)a) et q) de la Loi et se prétend victime de discrimination fondée sur l'origine ethnique dans la prestation de services ou la fourniture d'installations. Il allègue en outre la violation des droits que lui garantit l'art. 15 de la *Charte canadienne des droits et libertés*. La Commission a nommé un enquêteur, et selon les trois rapports semblables mais distincts que ce dernier a rédigés, les plaintes de M. Comeau [TRADUCTION] « établiraient à première vue l'existence d'une discrimination » (d.a., p. 136). Il vaut la peine de signaler que

supplementary funding to Conseil schools, Halifax received a legal opinion that s. 76 of the *Education Act* would allow it to provide such funding should it wish to do so.

même si la *MGA* ne prévoit pas le financement supplémentaire des écoles régies par le Conseil, selon un avis juridique obtenu par Halifax, l'art. 76 de l'*Education Act* lui permettrait d'assurer à son gré ce financement.

[10] The complaints were put on hold for a time as a result of other litigation raising similar issues. In August 2004, five parents of children in Conseil schools launched proceedings in the Supreme Court of Nova Scotia. These parents contended that the funding scheme in s. 530 of the *MGA* violated the *Charter*, and asked for various constitutional remedies. The Commission decided to defer Mr. Comeau's two complaints pending resolution of this *Charter* challenge. The *Charter* challenge, though, was itself adjourned pending negotiations and proposed legislative amendment. The Commission therefore reactivated the complaints process, and, on November 3, 2006, requested the appointment of a board of inquiry to deal with Mr. Comeau's complaints. At the Commission's request, the Chief Judge of the Nova Scotia Provincial Court appointed such a board on November 9, 2006.

[10] L'examen des plaintes a été suspendu pendant un certain temps parce qu'un autre litige soulevait des points semblables. En août 2004, cinq parents d'enfants fréquentant des écoles régies par le Conseil ont en effet intenté une poursuite devant la Cour suprême de la Nouvelle-Écosse. Ils soutenaient que le système de financement prévu à l'art. 530 de la *MGA* portait atteinte aux droits conférés par la *Charte* et ils réclamaient diverses réparations constitutionnelles. La Commission a décidé de surseoir à l'examen des deux plaintes de M. Comeau jusqu'à ce qu'il soit statué sur la question constitutionnelle. Or, l'examen de celle-ci a lui aussi été suspendu le temps que les parties négocient et que la modification législative proposée soit apportée. La Commission a donc réactivé le dossier. Le 3 novembre 2006, elle a demandé la nomination d'une commission d'enquête chargée de l'examen des plaintes de M. Comeau, et le 9 novembre 2006, le juge en chef de la Cour provinciale de la Nouvelle-Écosse a accédé à sa demande.

[11] Not long after, on November 23, 2006, an amendment to the *MGA* received Royal Assent. This amendment provided for supplementary funding for Conseil schools in Halifax, retroactive to April 1, 2006 (*An Act to Amend Chapter 18 of the Acts of 1998, the Municipal Government Act*, S.N.S. 2006, c. 38, ss. 1 and 2). As a consequence of this, the parties to the *Charter* challenge settled the matter and signed a consent order dismissing the action.

[11] Peu de temps après, le 23 novembre 2006, la modification de la *MGA* a obtenu la sanction royale. Dès lors, les écoles de Halifax régies par le Conseil bénéficiaient du financement supplémentaire avec effet rétroactif au 1er avril 2006 (*An Act to Amend Chapter 18 of the Acts of 1998, the Municipal Government Act*, S.N.S. 2006, ch. 38, art. 1 et 2). Un règlement est donc intervenu dans l'instance fondée sur la *Charte*, et l'action a été rejetée sur consentement.

B. *Proceedings*

(1) Supreme Court of Nova Scotia, 2009 NSSC 12, 273 N.S.R. (2d) 258 (Boudreau J.)

B. *Jugements dont appel*

(1) Cour suprême de la Nouvelle-Écosse, 2009 NSSC 12, 273 N.S.R. (2d) 258 (le juge Boudreau)

[12] Halifax applied to the Supreme Court of Nova Scotia for orders quashing the Commission's decision to refer Mr. Comeau's complaint against

[12] Halifax a demandé à la Cour suprême de la Nouvelle-Écosse d'annuler la décision de la Commission de renvoyer à une commission

it to a board of inquiry and prohibiting the board from proceeding. The application was granted. The chambers judge was of the view that, through the referral decision, the Commission had decided that the complaint fell under the Act. This determination was, in his view, one of jurisdiction subject to correctness review. The judge concluded that the absence of jurisdiction was clear and there would be no benefit from a fuller inquiry by the board. The judge considered but rejected the Commission's submission that the board of inquiry had the capacity to consider a jurisdictional challenge and that the court should not intervene until the board of inquiry had ruled on the question. Relying in part on this Court's decision in *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756 ("*Bell* (1971)"), he decided that it was appropriate to intervene at this early stage and to prohibit the board from embarking on a potentially long but ultimately fruitless proceeding.

d'enquête la plainte déposée contre elle par M. Comeau et d'interdire à cette commission d'aller de l'avant. La demande a été accueillie. Le juge en cabinet a opiné qu'en décidant du renvoi, la Commission avait conclu que la plainte tombait sous le coup de la Loi, une conclusion qui, selon lui, portait sur la compétence et appelait l'application de la norme de la décision correcte. Il a estimé que le défaut de compétence était patent et que la tenue d'une enquête complète n'aurait aucune utilité. Il a rejeté après examen la prétention de la Commission selon laquelle la commission d'enquête avait le pouvoir de se pencher sur une contestation de compétence et une cour de justice ne devait intervenir qu'une fois que la commission d'enquête avait statué sur la question. Se fondant en partie sur l'arrêt *Bell c. Ontario Human Rights Commission*, [1971] R.C.S. 756 (« *Bell* (1971) »), le juge a statué qu'il y avait lieu d'intervenir à ce stade préliminaire et d'empêcher la commission d'entreprendre une enquête susceptible d'être longue et de se révéler infructueuse au final.

(2) Nova Scotia Court of Appeal, 2010 NSCA 8, 287 N.S.R. (2d) 329 (MacDonald C.J.N.S. (Oland and Hamilton JJ.A. concurring))

(2) Cour d'appel de la Nouvelle-Écosse, 2010 NSCA 8, 287 N.S.R. (2d) 329 (le juge en chef MacDonald, avec l'appui des juges Oland et Hamilton)

[13] The Commission and Mr. Comeau successfully appealed to the Nova Scotia Court of Appeal.

[13] La Cour d'appel de la Nouvelle-Écosse a accueilli l'appel interjeté par la Commission et M. Comeau.

[14] The Court of Appeal considered the appropriateness of a superior court intervening "to stifle a Board of Inquiry even before it begins" (para. 16). The court accepted that, in appropriate circumstances, the courts have discretion to prohibit the work of administrative bodies in mid-stream. However, the Court of Appeal referred to cases commenting that this Court's decision in *Bell* (1971) is of doubtful ongoing authority and should not be applied too widely. The Court of Appeal noted that *Bell* (1971) represents a "high watermark when it comes to pre-emptively curtailing administrative decisions" (para. 18). When courts are asked to prohibit the ongoing work of administrative bodies, they should exercise restraint. The appropriate test for judicial intervention at

[14] La Cour d'appel s'interroge sur l'opportunité de l'immixtion d'une cour supérieure [TRADUCTION] « pour tuer dans l'œuf une commission d'enquête » (par. 16). Elle reconnaît que, dans certaines circonstances, une cour de justice a le pouvoir discrétionnaire d'interdire à un organisme administratif de poursuivre ses travaux. Elle renvoie cependant à des décisions dans lesquelles on se demande si l'arrêt *Bell* (1971) de notre Cour a toujours valeur de précédent et on conclut qu'il ne doit pas être appliqué trop largement. Elle fait observer que *Bell* (1971) représente [TRADUCTION] « un sommet pour ce qui est de couper l'herbe sous le pied d'un tribunal administratif » (par. 18). La cour de justice à qui l'on demande d'interdire à un organisme administratif de poursuivre ses activités doit faire preuve

this early stage of the process is that the tribunal's lack of jurisdiction to deal with the matter is "clear and beyond doubt" (para. 22). This judicial reluctance to interfere while the administrative process is unfolding is the result of "significant deference" to the Commission's broad mandate to investigate complaints and to the Commission's broad discretion to request the appointment of a board of inquiry (paras. 24-29). Applying this approach, the Court of Appeal found that the chambers judge had made two errors.

[15] First, he had erroneously characterized Mr. Comeau's complaints as seeking only legislative reform. In fact, Mr. Comeau had asked for, and the Commission had pointed to the possibility of, other remedies which were not clearly and beyond doubt outside the Commission's mandate (paras. 32-33). Second, the chambers judge had misapprehended the nature of the Commission's decision. All the Commission had done was to refer the complaint to a board of inquiry; the Commission had not decided any issue on its merits. These remained for the board of inquiry to address. Both of these errors represented "palpable and overriding errors of fact" on the part of the chambers judge, while his failure to accord deference to the Commission's decision represented an error of law (paras. 33 and 36 (emphasis deleted); see also para. 37).

[16] In the Court of Appeal's view, it was not clear and beyond doubt that the complaint was outside the board's jurisdiction and the chambers judge had consequently been wrong to intervene. The court allowed the appeal and reinstated the appointment of the board of inquiry.

III. Analysis

A. *The Applicable Standard of Review*

[17] The resolution of two issues separated the chambers judge and the Court of Appeal in their

de retenue. Le critère à appliquer pour déterminer si son intervention est justifiée à ce stade initial de la procédure consiste à se demander si le défaut de compétence du tribunal administratif pour examiner l'affaire est [TRADUCTION] « clair et indubitable » (par. 22). Cette réticence judiciaire à intervenir pendant le déroulement de la procédure administrative s'explique en l'occurrence par [TRADUCTION] « la grande déférence » dont une cour de justice doit faire preuve à l'égard du grand pouvoir discrétionnaire de la Commission en matière d'examen des plaintes et vis-à-vis de son grand pouvoir discrétionnaire de demander la nomination d'une commission d'enquête (par. 24-29). Au terme de ce raisonnement, la Cour d'appel conclut que le juge en cabinet a commis deux erreurs.

[15] Premièrement, il a mal qualifié les plaintes en considérant que M. Comeau demandait uniquement une modification législative. En effet, M. Comeau réclamait — et la Commission avait évoqué la possibilité — d'autres réparations qui n'échappaient pas clairement et indubitablement au mandat de la Commission (par. 32-33). En second lieu, le juge a mal défini la nature de la décision. La seule mesure prise par la Commission avait été de renvoyer la plainte à une commission d'enquête. Elle n'avait tranché aucune question sur le fond. Il appartenait à la commission d'enquête de le faire. Il s'agit de deux [TRADUCTION] « erreurs de fait manifestes et dominantes », et l'omission du juge de déférer à la décision de la Commission équivaut à une erreur de droit (par. 33 et 36 (italiques supprimés); voir également par. 37).

[16] Pour la Cour d'appel, il n'est pas clair et indubitable que la plainte échappait à la compétence de la commission d'enquête, et c'est donc à tort que le juge est intervenu. Elle accueille l'appel et rétablit la nomination de la commission d'enquête.

III. Analyse

A. *La norme de contrôle applicable*

[17] Leurs réponses à deux des questions en litige montrent que le juge en cabinet et la Cour

understanding of the role of the reviewing court in this case. The first relates to the applicable standard of judicial review. This turns mainly on the nature of the Commission's decision. My view is that the Commission's decision was not a determination of its jurisdiction but rather a discretionary decision that an inquiry was warranted in all of the circumstances. That discretionary decision should be reviewed for reasonableness. The second issue raises the related question of when judicial intervention is justified at this preliminary stage of the Commission's work. This turns mainly on the ongoing authority of this Court's decision in *Bell* (1971). In my view, *Bell* (1971) should no longer be followed and courts should exercise great restraint in intervening at this early stage of the process. Further, the reasonableness standard of review, applied in the context of proposed judicial intervention at this preliminary stage of the Commission's work, may be expressed as follows: is there a reasonable basis in law or on the evidence for the Commission's conclusion that an inquiry is warranted? Applying that test here, the Commission's decision should have been allowed to stand.

(1) The Nature of the Commission's Decision

[18] The chambers judge applied the correctness standard of review because he thought that the Commission had made a determination that "the complaint fell under the [Act] and therefore under its jurisdiction" (para. 53). The Court of Appeal disagreed with this characterization of the Commission's decision. Rather than making a decision about its jurisdiction, the Commission had "simply decided to advance the complaint to the next level by establishing an independent Board of Inquiry" (para. 35).

[19] I respectfully agree with the Court of Appeal. The Commission's decision to refer a complaint to a board of inquiry is not a determination of whether the complaint falls within the Act. Rather, within

d'appel conçoivent différemment le rôle du tribunal de révision en l'espèce. La première question est celle de la norme de contrôle applicable, ce qui tient en grande partie à la nature de la décision de la Commission. J'estime que la Commission n'a pas statué sur sa compétence, mais qu'elle a plutôt décidé, dans l'exercice de son pouvoir discrétionnaire, qu'une enquête était justifiée dans les circonstances. Sa décision discrétionnaire est assujettie à la norme de la décision raisonnable. La seconde question — connexe à la première — est celle de savoir dans quels cas une cour de justice est justifiée d'intervenir à cette étape préliminaire de la procédure de la Commission. La réponse dépend essentiellement de ce que l'arrêt *Bell* (1971) a toujours valeur de précédent ou non. À mon avis, cet arrêt de notre Cour ne devrait plus être suivi, et les cours de justice devraient faire preuve de grande retenue lorsqu'elles sont appelées à intervenir à cette étape initiale du processus. De plus, dans le contexte d'une intervention judiciaire envisagée à ce stade préliminaire de la procédure administrative, la norme de contrôle de la décision raisonnable peut être formulée comme suit : la loi ou la preuve offre-t-elle un fondement raisonnable à la conclusion de la Commission selon laquelle la tenue d'une enquête est justifiée? Au regard de ce critère, force est de conclure que la décision de la Commission aurait dû être confirmée.

(1) Nature de la décision de la Commission

[18] Le juge en cabinet applique la norme de la décision correcte parce que, selon lui, la Commission a conclu que [TRADUCTION] « la plainte tombait sous le coup de la [Loi] et relevait donc de sa compétence » (par. 53). La Cour d'appel exprime son désaccord et estime que la Commission ne s'est pas prononcée sur sa compétence, mais a [TRADUCTION] « simplement décidé de faire passer la plainte à l'étape suivante en mettant sur pied une commission d'enquête indépendante » (par. 35).

[19] J'abonde pour ma part dans le sens de la Cour d'appel. Lorsqu'elle décide de confier l'examen d'une plainte à une commission d'enquête, la Commission ne conclut pas que la plainte tombe

the scheme of the Act, the Commission plays an initial screening and administrative role; it may, for example, decide to refer a complaint to a board of inquiry so that the board can resolve a jurisdictional matter.

[20] The Act sets up a complete regime for the resolution of human rights complaints. Within this regime, the Commission performs a number of functions related to the enforcement and promotion of human rights. With regard to complaints, it acts as a kind of gatekeeper and administrator. Under s. 29 as it read at the relevant time, the Commission was required to "instruct the Director [of Human Rights] or some other officer to inquire into and endeavour to effect a settlement" of a complaint, provided that the complaint is in writing in the prescribed form or that the Commission "has reasonable grounds for believing that a complaint exists".

[21] Where a complaint is not settled or otherwise determined, the Commission may appoint a board of inquiry to inquire into it (s. 32A(1)). The Commission has a broad discretion as to whether or not to take this step. The Commission may do so if it "is satisfied that, having regard to all circumstances of the complaint, an inquiry thereinto is warranted" (*Boards of Inquiry Regulations*, N.S. Reg. 221/91, s. 1). There is no legislative requirement that the Commission determine that the matter is within its jurisdiction or that it passes some merit threshold before appointing a board of inquiry; the Commission must simply be "satisfied" having regard to all the circumstances of the complaint that an inquiry is warranted.

[22] Once appointed, a board of inquiry conducts a public hearing into the complaint and decides the matter. The board of inquiry has the authority to determine any question of fact or law required to make a determination on whether there has been a contravention of the Act, and has the power to remedy such contravention (ss. 34(1), (7) and (8)).

sous le coup de la Loi. Suivant le régime législatif, la Commission est plutôt appelée à exercer des fonctions d'examen préalable et d'administration. Elle peut notamment renvoyer la plainte à une commission d'enquête pour que cette dernière tranche une question de compétence.

[20] La Loi établit, pour le règlement des plaintes relatives aux droits de la personne, un régime complet dans le cadre duquel la Commission accomplit un certain nombre de fonctions dans le but de faire respecter et de promouvoir les droits de la personne. Pour ce qui est des plaintes, elle joue en quelque sorte un rôle de gardien et d'administrateur. Suivant l'art. 29 en vigueur au moment considéré en l'espèce, lorsque la plainte était présentée par écrit dans la forme prescrite ou que la Commission a [TRADUCTION] « des motifs raisonnables de croire qu'une plainte existe », la Commission devait « charge[r] le directeur [des droits de la personne] ou un autre fonctionnaire d'étudier et de s'efforcer de régler toute plainte ».

[21] Lorsque la plainte ne fait l'objet d'aucune décision, y compris un règlement, la Commission peut nommer une commission d'enquête pour l'examiner (par. 32A(1)). Elle jouit d'un grand pouvoir discrétionnaire lorsqu'il s'agit de prendre ou non cette mesure. Elle peut opter pour cette avenue lorsqu'elle est [TRADUCTION] « convaincue, compte tenu des circonstances relatives à la plainte, que l'examen de celle-ci est justifié » (*Boards of Inquiry Regulations*, règl. 221/91 N.-É., art. 1). Elle n'est pas légalement tenue de conclure que l'affaire relève de sa compétence ou que la plainte a un minimum de fondement avant de nommer une commission d'enquête; il lui suffit d'être « convaincue », compte tenu des circonstances relatives à la plainte, que l'examen de celle-ci est justifié.

[22] Une fois nommée, la commission d'enquête tient une audience publique à l'issue de laquelle elle statue sur la plainte. Elle a le pouvoir de trancher toute question de fait ou de droit lorsque cela est nécessaire pour déterminer s'il y a eu contravention à la Loi; elle possède aussi le pouvoir d'ordonner réparation lorsqu'il y a eu contravention (par. 34(1),

There is an appeal to the Court of Appeal from a decision of the board of inquiry on questions of law (s. 36).

[23] What is important here is that a decision to refer a complaint to a board of inquiry is not a determination that the complaint is well founded or even within the purview of the Act. Those determinations may be made by the board of inquiry. In deciding to refer a complaint to a board of inquiry, the Commission's function is one of screening and administration, not of adjudication.

[24] The nature of this role has been recognized in the Nova Scotia case law and in the case law which has developed in relation to the similarly worded provisions of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6: see *Cowan v. Aylward*, 2002 NSCA 76, 205 N.S.R. (2d) 324, at para. 40; *Green v. Human Rights Commission (N.S.)*, 2011 NSCA 47, 303 N.S.R. (2d) 211, at paras. 35-36; *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, at para. 53; *Zündel v. Canada (Attorney General)*, [1999] 4 F.C. 289 (T.D.), at para. 20 ("*Zündel* (1999)"), aff'd (2000), 195 D.L.R. (4th) 394 (F.C.A.) ("*Zündel* (2000)"); and *Bell Canada v. Communications, Energy and Paperworkers Union of Canada*, [1999] 1 F.C. 113 ("*Bell* (1999)"), at paras. 35-37. While there is some limited assessment of the merits inherent in this screening and administrative role, the Commission is not making any final determination about the complaint's ultimate success or failure: see, e.g., *Cooper*, at para. 53; and *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879, at p. 899.

[25] Moreover, the Commission's referral decision is a discretionary one. Subsection 32A(1) of the Act provides that the Commission "may" appoint a board. Section 1 of the *Boards of Inquiry Regulations* expands on this permissive language, stating that the Commission "may" appoint a board "if the Commission is satisfied that, having regard

(7) et (8)). Sa décision sur toute question de droit est susceptible d'appel devant la Cour d'appel (art. 36).

[23] Il importe de souligner en l'espèce que même si la Commission décide du renvoi à une commission d'enquête, elle ne conclut pas pour autant que la plainte est fondée ni même qu'elle tombe sous le coup de la Loi, des conclusions qui ressortissent plutôt à la commission d'enquête. Lorsqu'elle confie l'examen d'une plainte à une commission d'enquête, la Commission exerce une fonction d'examen préalable et d'administration; elle ne statue pas au fond.

[24] La nature de ce rôle est reconnue dans la jurisprudence de la Nouvelle-Écosse et dans celle issue de l'application des dispositions analogues de la *Loi canadienne sur les droits de la personne*, L.R.C. 1985, ch. H-6 : voir *Cowan c. Aylward*, 2002 NSCA 76, 205 N.S.R. (2d) 324, par. 40; *Green c. Human Rights Commission (N.S.)*, 2011 NSCA 47, 303 N.S.R. (2d) 211, par. 35-36; *Cooper c. Canada (Commission des droits de la personne)*, [1996] 3 R.C.S. 854, par. 53; *Zündel c. Canada (Procureur général)*, [1999] 4 C.F. 289 (1re inst.), par. 20 (« *Zündel* (1999) »), conf. par 2000 CanLII 16731 (C.A.F.) (« *Zündel* (2000) »); *Bell Canada c. Syndicat canadien des communications, de l'énergie et du papier*, [1999] 1 C.F. 113 (« *Bell* (1999) »), par. 35-37. Bien que cette fonction d'examen préalable et d'administration suppose nécessairement un minimum d'appréciation du bien-fondé de la plainte, la Commission, lorsqu'elle l'exerce, ne rend aucune décision définitive sur l'issue de la plainte : voir, p. ex., les arrêts *Cooper*, par. 53, et *Syndicat des employés de production du Québec et de l'Acadie c. Canada (Commission canadienne des droits de la personne)*, [1989] 2 R.C.S. 879, p. 899.

[25] De plus, la décision de la Commission de renvoyer la plainte est de nature discrétionnaire. Le paragraphe 32A(1) de la Loi dispose que la Commission [TRADUCTION] « peut » nommer une commission d'enquête. L'article premier du *Boards of Inquiry Regulations* confirme cette faculté en précisant que la Commission « peut » s'en prévaloir

to all circumstances of the complaint, an inquiry thereinto is warranted" (see *Green*, at para. 5). It is up to the Commission to perform an initial investigation of a complaint and decide whether or not an inquiry is warranted in all of the circumstances.

[26] Having regard to the statutory scheme and the Commission's role in it, I agree with the Court of Appeal that the chambers judge erred in his characterization of the decision to appoint a board of inquiry. The Commission's referral decision did not involve the sort of determinations that the chambers judge thought it did. Instead, the Commission's function was simply one of exercising its statutory discretion to decide whether it was satisfied that, having regard to all of the circumstances of the complaint, an inquiry by a board of inquiry was warranted, a function "more administrative than judicial in nature": *Losenno v. Ontario Human Rights Commission* (2005), 78 O.R. (3d) 161 (C.A.), at para. 15.

[27] Discretionary decisions by administrative tribunals, such as the Commission's referral decision in issue here, are normally subject to judicial review on a reasonableness standard: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 53. Halifax, however, relies on the decision of this Court in *Bell* (1971) for the proposition that neat and discrete points of law on which referral decisions rely are reviewed for correctness by the courts and that such review may occur before the administrative tribunal itself has addressed the issue. The continuing authority of *Bell* (1971) was the second point on which the chambers judge and the Court of Appeal disagreed and I turn to it now.

(2) *Bell* (1971)

[28] In *Bell* (1971), Mr. McKay, a black man from Jamaica, complained to the Ontario Human Rights Commission alleging discrimination on the basis of race, colour and place of origin by being refused rental of living accommodations contrary to the *Ontario Human Rights Code, 1961-62*, S.O.

« lorsqu'elle est convaincue, compte tenu des circonstances relatives à la plainte, que l'examen de celle-ci est justifié » (voir *Green*, par. 5). C'est à la Commission qu'il incombe d'examiner la plainte au préalable et de décider si une enquête est justifiée, compte tenu de l'ensemble des circonstances.

[26] Eu égard au régime législatif et au rôle confié à la Commission, je conviens avec la Cour d'appel que le juge en cabinet a qualifié erronément la décision de nommer une commission d'enquête. En renvoyant la plainte à une commission d'enquête, la Commission n'a pas tiré de conclusions du type invoqué par le juge en cabinet. Elle s'est plutôt contentée d'exercer le pouvoir discrétionnaire que lui conférait la Loi de décider si elle était convaincue, compte tenu des circonstances relatives à la plainte, que l'examen de celle-ci par une commission d'enquête était justifié. Il s'agit d'une fonction [TRADUCTION] « de nature davantage administrative que judiciaire » : *Losenno c. Ontario Human Rights Commission* (2005), 78 O.R. (3d) 161 (C.A.), par. 15.

[27] La décision discrétionnaire d'un tribunal administratif, tel le renvoi de la plainte en l'espèce, est normalement susceptible de contrôle judiciaire au regard de la norme de la décision raisonnable (*Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, par. 53). Halifax invoque cependant l'arrêt *Bell* (1971) pour soutenir que les points de droit clairs et nets qui sous-tendent une décision de renvoi commandent la norme de la décision correcte et que le contrôle judiciaire peut intervenir avant que le tribunal administratif ne se prononce lui-même. Le second point qui oppose le juge en cabinet et la Cour d'appel est celui de savoir si l'arrêt *Bell* (1971) a toujours valeur de précédent. Je l'examine ci-après.

(2) *Bell* (1971)

[28] Dans l'affaire *Bell* (1971), M. McKay, un homme de race noire originaire de Jamaïque, avait porté plainte à la Commission des droits de la personne de l'Ontario, alléguant qu'on avait refusé de lui louer un logement à cause de sa race, de sa couleur et de son lieu d'origine, des motifs de

1961-62, c. 93, s. 3, as amended by S.O. 1967, c. 66, s. 1. The *Code* contained anti-discrimination provisions with respect to refusal of "occupancy of any . . . self-contained dwelling unit" (s. 3). The Commission referred the complaint to a board of inquiry whose role was to investigate the matter, determine whether it was supported by the evidence and, if so, recommend a course of action to the Commission. At the outset of the hearing before the board of inquiry, the respondent to the complaint asked that it be dismissed for lack of jurisdiction, contending that the accommodation in question was not a "self-contained dwelling unit" and thus did not fall within the purview of the *Code*. The board refused to make the finding that the premises were not a self-contained dwelling unit because, at that stage of the proceedings, there was no way of knowing whether they were or not.

[29] The respondent then applied to the Supreme Court of Ontario for an order prohibiting the board from proceeding and filed affidavit evidence supporting his contention that the premises were not self-contained. The judge hearing the application found that the premises were not a self-contained dwelling unit and prohibited the board from proceeding with the inquiry. The Court of Appeal reversed on the ground that the judicial intervention by way of prohibition had been premature. As Laskin J.A., as he then was, put it on behalf of a unanimous five-member panel of the Court of Appeal, "if no objection can be taken to the establishment or constitution of the board of inquiry it is premature to seek to stall its proceedings at their inception on the ground of an apprehended error of law . . . which it is assumed the board will make": *sub nom. R. v. Tarnopolsky, Ex parte Bell*, [1970] 2 O.R. 672, at p. 679. On the further appeal to this Court, the question was whether the respondent, who was convinced that the complaint did not relate to a matter within the purview of the *Code*, was precluded from having that issue determined by a court until the board had done so (p. 769).

[30] A majority of this Court answered the question in the negative and restored the order of the

distinction illicites suivant l'*Ontario Human Rights Code, 1961-62*, S.O. 1961-62, ch. 93, art. 3, mod. par S.O. 1967, ch. 66, art. 1. Le *Code* renfermait des dispositions qui interdisaient de se fonder sur un motif discriminatoire pour [TRADUCTION] « refuser de louer . . . un logement indépendant » à une personne (art. 3). La Commission a renvoyé la plainte à un comité qui avait pour mandat de faire enquête, de déterminer si les allégations étaient étayées par la preuve et, dans l'affirmative, de recommander une mesure. Au début de l'audience, le défendeur a demandé au comité de se déclarer incompétent du fait que le logement en question n'était pas un [TRADUCTION] « logement indépendant » et échappait donc à l'application du *Code*. Le comité d'enquête a refusé de conclure que le logement n'était pas indépendant parce qu'il lui paraissait impossible à ce stade de la procédure de déterminer s'il l'était ou non.

[29] Le défendeur a ensuite demandé à la Cour suprême de l'Ontario d'interdire au comité d'enquête de poursuivre son examen. Il a déposé un affidavit à l'appui de sa prétention selon laquelle le logement n'était pas indépendant. Le juge saisi de la demande a conclu que le logement en question n'était pas indépendant et il a interdit au comité de poursuivre son enquête. La Cour d'appel a infirmé cette décision au motif que l'intervention judiciaire par voie d'interdiction était prématurée. Comme l'a dit le juge Laskin (plus tard juge puis Juge en chef de la Cour) au nom d'une formation unanime de cinq juges de la Cour d'appel, [TRADUCTION] « s'il ne peut être soulevé d'objection à l'établissement ou à la constitution du comité d'enquête, il est prématuré de chercher à en bloquer les procédures dès leur début dans l'appréhension d'une erreur de droit . . . que l'on présume que le comité fera » : *sub nom. R. c. Tarnopolsky, Ex parte Bell*, [1970] 2 O.R. 672, p. 679. Notre Cour a ensuite été appelée à décider si le défendeur, qui se disait convaincu que la plainte alléguait une discrimination dans un domaine non visé par le *Code*, était irrecevable à saisir une cour de justice avant même que le comité d'enquête ne se prononce (p. 769).

[30] Les juges majoritaires ont répondu par la négative et rétabli l'ordonnance par laquelle le

judge at first instance prohibiting the board from continuing with the inquiry. On the subject of prematurity, Martland J., writing for the majority, quoted with approval from *R. v. Tottenham and District Rent Tribunal, Ex parte Northfield (Highgate) Ltd.*, [1957] 1 Q.B. 103. There, Lord Goddard C.J. had addressed the question of when it was appropriate for a court to grant prohibition in an ongoing administrative proceeding on the basis of a point the tribunal had not yet considered. He stated that

> it would be impossible and not at all desirable to lay down any definite rule as to when a person is to go to the tribunal or come here for prohibition where the objection is that the tribunal has no jurisdiction. . . . For myself, I would say that where there is a clear question of law not depending upon particular facts . . . there is no reason why the applicants should not come direct to this court for prohibition rather than wait to see if the decision goes against them . . . . [Emphasis added; p. 108.]

[31] Relying on this passage, the Court rejected the position adopted by the Court of Appeal that the application for prohibition had been premature. Martland J. noted that the facts about the nature of the premises related only to the structure of the building and did not involve choosing between the conflicting testimonies of witnesses. He took the view that the judge to whom the application for prohibition was made had discretion to grant it or not. However, he had not erred in intervening in this case. The board of inquiry had "no power to deal with alleged discrimination in matters not within the purview of the Act" and the respondent "was not compelled to await the decision of the board on that issue before seeking to have it determined in a court of law. . ." (p. 775). (I should add that the Court was concerned that there might not be any effective judicial review after the board completed its work: see p. 769.)

[32] In the case before us, the chambers judge relied on *Bell* (1971) in deciding that it was appropriate to deal with "the question of the Commission's

juge de première instance avait interdit au comité de poursuivre son enquête. Au sujet du caractère prématuré, le juge Martland, s'exprimant au nom de la majorité, a cité en l'approuvant l'arrêt *R. c. Tottenham and District Rent Tribunal, Ex parte Northfield (Highgate) Ltd.*, [1957] 1 Q.B. 103, où le lord juge en chef Goddard avait dit ce qui suit sur les cas dans lesquels il convenait qu'une cour de justice interdise sur demande la poursuite d'une procédure administrative pour un motif non encore examiné par le tribunal administratif :

> [TRADUCTION] . . . il serait impossible et tout à fait inopportun d'établir une règle précise pour déterminer dans quels cas la personne qui conteste la compétence d'un tribunal administratif doit s'adresser à celui-ci et dans quels cas elle doit plutôt saisir notre cour d'une demande d'ordonnance d'interdiction . . . Pour ma part, je dirais que lorsque se pose une question de droit manifeste dont le règlement ne dépend pas de faits particuliers . . . rien n'empêche le demandeur de s'adresser directement à notre cour pour obtenir une ordonnance d'interdiction plutôt que d'attendre de voir si la décision lui sera défavorable . . . [Je souligne; p. 108.]

[31] S'appuyant sur ce passage, notre Cour a écarté le point de vue de la Cour d'appel, à savoir qu'il avait été prématuré de demander une ordonnance d'interdiction. Le juge Martland a fait observer que les faits relatifs à la nature des lieux avaient trait uniquement à la structure de l'immeuble et n'obligeaient pas à départager des témoignages contradictoires. Il estimait que le juge avait le pouvoir discrétionnaire de faire droit ou non à la demande d'ordonnance d'interdiction. Selon lui, le juge n'avait cependant pas eu tort d'intervenir. Le comité d'enquête n'avait pas « le pouvoir de se prononcer lorsque la discrimination dont on se plaint tomb[ait] dans un domaine non prévu par la Loi », et le défendeur « n'était pas tenu d'attendre la décision du comité d'enquête sur ce point avant de chercher . . . à le faire [trancher] par une cour de justice » (p. 775). (Il convient de signaler que la Cour craignait qu'il ne puisse y avoir de véritable contrôle judiciaire une fois l'enquête terminée : voir p. 769.)

[32] Dans la présente affaire, le juge en cabinet s'appuie sur l'arrêt *Bell* (1971) pour conclure qu'il convient de statuer préalablement

jurisdiction" at a preliminary stage — indeed, before there had been any determination of whether the complaints fell within the purview of the Act (para. 48). He was of the view that there would be no benefit obtained from "a fuller or expanded factual background . . . in order to adjudicate and decide the application and issues" raised in the prohibition proceedings (para. 48). The Court of Appeal, for its part, noted that courts should take a restrained approach to "pre-emptively curtailing" administrative decisions (para. 18). After referring to cases that cautioned against giving *Bell* (1971) too broad a reading and even questioning its ongoing authority, the Court of Appeal stated that "a tribunal's work should not be prohibited unless its lack of jurisdiction is 'clear and beyond doubt'" (para. 22). Applying that test, the Court of Appeal concluded that the board's lack of jurisdiction was not "clear and beyond doubt" and that the chambers judge should not have prohibited it from conducting its inquiry (para. 34).

[33] I accept *Bell* (1971) to the extent that it stands for the proposition that referral decisions such as the one at issue in this case are subject to judicial review. However, I consider that, beyond that, *Bell* (1971) should no longer be relied on. Subsequent developments in Canadian administrative law have undermined the validity of this precedent to the point that there are compelling reasons for no longer following it: see *R. v. Bernard*, [1988] 2 S.C.R. 833, at pp. 849-50 and 855-58; *R. v. Chaulk*, [1990] 3 S.C.R. 1303, at p. 1353.

[34] There are two aspects of *Bell* (1971) to be considered. One is its holding that whether the premises were "self-contained" was a preliminary jurisdictional question on which the courts owed no deference to the views of the tribunal and with respect to which there was no point in waiting for the tribunal's decision. Martland J. noted that whether the dwelling was self-contained concerned "an issue of law respecting the scope of the operation of the Act, and on the answer to that question depends the authority of the board to inquire into the complaint of discrimination at all . . . and a wrong decision on

sur [TRADUCTION] « la compétence de la Commission » — avant, donc, qu'il n'y ait de décision quant à savoir si les plaintes tombent sous le coup de la Loi (par. 48). Il estime qu'il n'y aurait aucun avantage à disposer « de données factuelles complètes ou plus détaillées . . . pour statuer sur la demande et trancher les questions » soulevées par les défendeurs (par. 48). Pour sa part, la Cour d'appel fait observer qu'une cour de justice doit faire preuve de modération lorsqu'il s'agit de [TRADUCTION] « couper l'herbe sous le pied » d'un tribunal administratif (par. 18). Après avoir cité des décisions qui mettent en garde contre l'interprétation trop large de l'arrêt *Bell* (1971) et qui jettent même le doute sur sa valeur de précédent, la Cour d'appel déclare qu'« on ne saurait interdire à un tribunal administratif de mener ses travaux que si son défaut de compétence est "clair et indubitable" » (par. 22). Suivant ce critère, elle conclut que le défaut de compétence de la commission d'enquête n'est pas « clair et indubitable » et que le juge en cabinet n'aurait pas dû lui interdire d'examiner la plainte (par. 34).

[33] Je reconnais valeur de précédent à l'arrêt *Bell* (1971) en ce que la Cour y affirme que la décision de renvoyer une plainte, comme celle visée en l'espèce, est susceptible de contrôle judiciaire. J'estime toutefois qu'il n'y a par ailleurs plus lieu de le suivre. L'évolution du droit administratif canadien a affaibli sa valeur de précédent au point où il existe de sérieux motifs de l'écarter : voir *R. c. Bernard*, [1988] 2 R.C.S. 833, p. 849-850 et 855-858; *R. c. Chaulk*, [1990] 3 R.C.S. 1303, p. 1353.

[34] Deux éléments de l'arrêt *Bell* (1971) valent d'être pris en compte. Premièrement, la Cour y conclut que la question de savoir si le logement en cause était « indépendant » constituait une question préliminaire de compétence qui ne commandait aucune déférence judiciaire et qu'il n'y avait pas lieu d'attendre que le tribunal administratif se prononce d'abord. Le juge Martland fait observer que ce point soulevait « une question de droit relativement au champ d'application de la Loi [et que] de la réponse à cette question dépend toute l'autorité du comité d'enquêter sur la plainte déclarant

it would not enable the board to proceed further" (p. 775 (emphasis added)). However, under the contemporary Canadian law of judicial review, the question of whether a residence is "self-contained" would not be so quickly labelled as a jurisdictional question on which the courts are entitled to substitute their opinion for that of the board of inquiry: see *Zündel* (1999), at paras. 44-45; and, more generally, *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, at p. 233; *Dunsmuir*, at para. 59; and *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at para. 18. Moreover, the whole notion of "preliminary questions", which permeates the reasoning in *Bell* (1971), has long since been abandoned: see, e.g., *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at pp. 1083-90; *Dunsmuir*, at paras. 35-36 and 59; *C.B. Powell Limited v. Canada (Border Services Agency)*, 2010 FCA 61, [2011] 2 F.C.R. 332, at paras. 39-45; D. J. M. Brown and J. M. Evans, with the assistance of C. E. Deacon, *Judicial Review of Administrative Action in Canada* (loose-leaf), at para. 3:4400; and D. J. Mullan, *Administrative Law* (2001), at pp. 57-58 and 61-65. Even more fundamentally, contemporary courts would not so quickly accept that the question of whether a property is "self-contained" could be answered by the abstract interpretive exercise undertaken in *Bell* (1971), conducted without regard to the provision's context within a specialized, quasi-constitutional human rights regime: *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, at pp. 546-47; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, at para. 33; and Mullan (2001), at p. 58.

qu'il y a eu de la discrimination [et qu']une décision erronée sur ce point ne permettrait pas [au comité] de poursuivre l'enquête » (p. 775 (je souligne)). Toutefois, suivant les règles actuelles du droit canadien en matière de contrôle judiciaire, la question de savoir si un logement est « indépendant » ne serait pas aussi spontanément qualifiée de question de compétence sur laquelle une cour de justice pourrait substituer son opinion à celle d'un organisme d'enquête : voir *Zündel* (1999), par. 44-45, et de façon plus générale, les arrêts *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227, p. 233; *Dunsmuir*, par. 59, et *Canada (Commission canadienne des droits de la personne) c. Canada (Procureur général)*, 2011 CSC 53, [2011] 3 R.C.S. 471, par. 18. Par ailleurs, la notion même de « questions préliminaires », qui imprègne le raisonnement de la Cour dans l'arrêt *Bell* (1971), a depuis longtemps été abandonnée : voir, p. ex., les arrêts *U.E.S., local 298 c. Bibeault*, [1988] 2 R.C.S. 1048, p. 1083-1090; *Dunsmuir*, par. 35-36 et 59; *C.B. Powell Limited c. Canada (Agence des services frontaliers)*, 2010 CAF 61, [2011] 2 R.C.F. 332, par. 39-45, ainsi que D. J. M. Brown et J. M. Evans, avec le concours de C. E. Deacon, *Judicial Review of Administrative Action in Canada* (feuilles mobiles), par. 3:4400, et D. J. Mullan, *Administrative Law* (2001), p. 57-58 et 61-65. Mais plus fondamentalement encore, de nos jours, une cour de justice ne serait pas aussi encline à convenir que l'on peut déterminer si un logement est « indépendant » en recourant, comme la Cour dans *Bell* (1971), à une interprétation abstraite, sans égard au contexte de la disposition en cause au sein d'un régime de droits de la personne à la fois spécialisé et quasi constitutionnel : *Commission ontarienne des droits de la personne c. Simpsons-Sears Ltd.*, [1985] 2 R.C.S. 536, p. 546-547; *Canada (Commission canadienne des droits de la personne) c. Canada (Procureur général)*, par. 33; Mullan (2001), p. 58.

[35] The second aspect of *Bell* (1971) is its approach to judicial intervention on grounds which have not been considered by the tribunal or before an administrative process has run its course. Since *Bell* (1971), courts, while recognizing that they

[35] Le second élément à retenir de l'arrêt *Bell* (1971) est l'approche préconisée à l'égard d'une intervention judiciaire avant l'achèvement du processus administratif ou pour un motif que n'a pas examiné le tribunal administratif. À partir de cet

have a discretion to intervene, have shown restraint in doing so: see, e.g., the authorities reviewed in *C.B. Powell*, at paras. 30-33; *Irvine v. Canada (Restrictive Trade Practices Commission)*, [1987] 1 S.C.R. 181, at p. 235; *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440, at paras. 60 and 72; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 51; *Violette v. New Brunswick Dental Society*, 2004 NBCA 1, 267 N.B.R. (2d) 205, at para. 14; and *Air Canada v. Lorenz*, [2000] 1 F.C. 494 (T.D.), at paras. 13-15.

[36] While such intervention may sometimes be appropriate, there are sound practical and theoretical reasons for restraint: D. J. Mullan, *Administrative Law* (3rd ed. 1996), at §540; P. Lemieux, *Droit administratif: Doctrine et jurisprudence* (5th ed. 2011), at pp. 371-72. Early judicial intervention risks depriving the reviewing court of a full record bearing on the issue; allows for judicial imposition of a "correctness" standard with respect to legal questions that, had they been decided by the tribunal, might be entitled to deference; encourages an inefficient multiplicity of proceedings in tribunals and courts; and may compromise carefully crafted, comprehensive legislative regimes: see, e.g., *Szczecka v. Canada (Minister of Employment and Immigration)* (1993), 170 N.R. 58 (F.C.A.), at paras. 3-4; *Ziindel* (1999), at para. 45; *Psychologist Y v. Board of Examiners in Psychology*, 2005 NSCA 116, 236 N.S.R. (2d) 273, at paras. 23-25; *Potter v. Nova Scotia Securities Commission*, 2006 NSCA 45, 246 N.S.R. (2d) 1, at paras. 16 and 36-37; *Vancouver (City) v. British Columbia (Assessment Appeal Board)* (1996), 135 D.L.R. (4th) 48 (B.C.C.A.), at paras. 26-27; *Mondesir v. Manitoba Assn. of Optometrists* (1998), 163 D.L.R. (4th) 703 (Man. C.A.), at paras. 34-36; *U.F.C.W., Local 1400 v. Wal-Mart Canada Corp.*, 2010 SKCA 89, 321 D.L.R. (4th) 397, at paras. 20-23; Mullan (2001), at p. 58; Brown and Evans, at paras. 1:2240, 3:4100 and 3:4400. Thus, reviewing courts now show more restraint in short-circuiting the decision-making role of the tribunal,

arrêt, même si elles se reconnaissaient un pouvoir discrétionnaire d'intervention, les cours de justice l'ont exercé avec retenue (voir, p. ex., la jurisprudence examinée dans l'arrêt *C.B. Powell*, par. 30-33; *Irvine c. Canada (Commission sur les pratiques restrictives du commerce)*, [1987] 1 R.C.S. 181, p. 235; *Canada (Procureur général) c. Canada (Commission d'enquête sur le système d'approvisionnement en sang au Canada)*, [1997] 3 R.C.S. 440, par. 60 et 72; *Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339, par. 51; *Violette c. New Brunswick Dental Society*, 2004 NBCA 1, 267 R.N.-B. (2e) 205, par. 14; *Air Canada c. Lorenz*, [2000] 1 C.F. 494 (1re inst.), par. 13-15.

[36] Même si une telle intervention peut parfois être indiquée, la retenue se justifie sur les plans pratique et théorique : D. J. Mullan, *Administrative Law* (3e éd. 1996), §540; P. Lemieux, *Droit administratif : Doctrine et jurisprudence* (5e éd. 2011), p. 371-372. Une intervention judiciaire hâtive risque de priver le tribunal de révision d'un dossier complet sur la question en litige, elle ouvre la porte à l'assujettissement à la norme de la « décision correcte » de questions de droit qui, si elles avaient été tranchées par le tribunal administratif, auraient pu commander la déférence judiciaire, elle nuit à l'efficacité des recours par la multiplication des procédures administratives et judiciaires et elle risque de compromettre un régime législatif complet que le législateur a soigneusement conçu : voir, p. ex., *Szczecka c. Ministre de l'Emploi et de l'Immigration* (1993), 170 N.R. 58 (C.A.F.), par. 3-4; *Ziindel* (1999), par. 45; *Psychologist Y c. Board of Examiners in Psychology*, 2005 NSCA 116, 236 N.S.R. (2d) 273, par. 23-25; *Potter c. Nova Scotia Securities Commission*, 2006 NSCA 45, 246 N.S.R. (2d) 1, par. 16 et 36-37; *Vancouver (City) c. British Columbia (Assessment Appeal Board)* (1996), 135 D.L.R. (4th) 48 (C.A.C.-B.), par. 26-27; *Mondesir c. Manitoba Assn. of Optometrists* (1998), 163 D.L.R. (4th) 703 (C.A. Man.), par. 34-36; *U.F.C.W., Local 1400 c. Wal-Mart Canada Corp.*, 2010 SKCA 89, 321 D.L.R. (4th) 397, par. 20-23; Mullan (2001), p. 58; Brown et Evans, par. 1:2240, 3:4100 et 3:4400. Les tribunaux de révision manifestent donc de nos jours une retenue accrue

particularly when asked to review a preliminary screening decision such as that at issue in *Bell* (1971).

[37] Moreover, contemporary administrative law accords more value to the considered opinion of the tribunal on legal questions, whether the tribunal's ruling is ultimately reviewable in the courts for correctness or reasonableness: *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, at para. 89; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 25; *C.B. Powell*, at para. 32; and Brown and Evans, at para. 3:4400.

[38] For these reasons, *Bell* (1971) should no longer be followed in relation to its approach to preliminary jurisdictional questions or when judicial intervention is justified in an ongoing administrative process.

[39] How, then, should the chambers judge have approached Halifax's application for prohibition?

[40] First, he ought to have applied the standard of reasonableness to the Commission's decision to refer the complaint to a board of inquiry. He should not have asked whether the Commission had correctly determined that the complaint was within the purview of the Act, but whether the Commission had reasonably concluded that, having regard to all the circumstances, an inquiry was warranted.

[41] Second, the chambers judge should have exercised restraint in intervening to prohibit a determination by the board of inquiry as to whether the complaints fell within the purview of the Act. With the benefit of hindsight, we can see that the risks of this course of action resulting in an inefficient multiplicity of proceedings and delay materialized

lorsqu'il s'agit de court-circuiter le rôle décisionnel du tribunal administratif, spécialement lorsqu'on leur demande de réviser une décision rendue à l'issue d'un examen préalable comme celle en cause dans l'affaire *Bell* (1971).

[37] Qui plus est, le droit administratif contemporain reconnaît une valeur accrue à l'opinion réfléchie d'un tribunal administratif sur une question de droit, et ce, que la décision de ce dernier soit ultimement susceptible de contrôle judiciaire selon la norme de la décision correcte ou celle de la décision raisonnable : *Conseil des Canadiens avec déficiences c. VIA Rail Canada Inc.*, 2007 CSC 15, [2007] 1 R.C.S. 650, par. 89; *Alberta (Information and Privacy Commissioner) c. Alberta Teachers' Association*, 2011 CSC 61, [2011] 3 R.C.S. 654, par. 25; *C.B. Powell*, par. 32; Brown et Evans, par. 3:4400.

[38] C'est pourquoi l'arrêt *Bell* (1971) ne devrait plus être suivi pour ce qui est du sort réservé aux questions préliminaires de compétence et des conditions auxquelles une cour de justice est admise à intervenir dans un processus administratif en cours.

[39] Quelle aurait donc dû être la démarche du juge en cabinet vis-à-vis de la demande d'ordonnance d'interdiction présentée par Halifax?

[40] En premier lieu, il aurait dû appliquer la norme de la décision raisonnable au renvoi de la plainte à une commission d'enquête, et non se demander si la Commission avait correctement conclu que la plainte tombait sous le coup de la Loi. Il aurait plutôt fallu qu'il détermine si la Commission avait raisonnablement conclu, compte tenu de l'ensemble des circonstances, que la tenue d'une enquête était justifiée.

[41] En second lieu, appelé à interdire à la commission d'enquête de décider si les plaintes tombaient sous le coup de la Loi, le juge en cabinet aurait dû faire preuve de retenue. Avec le recul, force est de constater que les risques inhérents à la démarche adoptée en l'espèce, à savoir la prolongation indue de l'instance et la multiplication

here — and in a dramatic fashion. Nearly nine years and three levels of court proceedings after Mr. Comeau filed his complaints, this proceeding has only reached the end of the beginning. Only now can the board of inquiry appointed in November 2006 finally begin to address the substance of Mr. Comeau's complaints and the objections by Halifax and the province to them.

inutile des procédures, se sont matérialisés, et pas qu'un peu. En effet, alors que près de neuf années se sont écoulées depuis le dépôt des plaintes par M. Comeau et que trois juridictions de degrés différents se sont penchées sur la question, le dénouement de l'affaire n'est toujours pas en vue. Ce n'est qu'aujourd'hui que la commission d'enquête nommée en novembre 2006 pourra enfin commencer à examiner sur le fond les plaintes de M. Comeau et les objections formulées par Halifax et par la province.

(3) Applying the Standard of Review to the Commission's Screening Decision

[42] As we have seen, there are two aspects of the jurisprudence about judicial review of screening decisions sought in the midst of an ongoing administrative tribunal process. The first relates to the applicable standard of review and is concerned mainly with the outcome of the decision-making process. The standard of review ensures that the reviewing court gives due deference to the administrative decision maker. The second relates to the risks of premature intervention. The focus here is mainly on the process and the concern for efficiency, the minimization of costs and the preservation of the administrative scheme's integrity. Of course, this second aspect also resembles the first in its desire that courts should enjoy the benefit of considered administrative decisions, and should pay deference to those decisions where appropriate.

[43] While these two aspects are well entrenched in the jurisprudence, it is artificial to separate the analysis in this way in the context of judicial review of a preliminary screening decision such as the one in issue here. Where, as here, reasonableness is the applicable standard of review, a more straightforward approach is to bring these two aspects together in the application of the standard of review. The reviewing court's approach must reflect the appropriate level of judicial deference both to the substance of the administrative tribunal's decision and to its ongoing process.

(3) Application de la norme de contrôle à la décision préalable de la Commission

[42] Nous avons vu qu'il y a deux aspects à la jurisprudence relative au contrôle judiciaire d'une décision rendue à l'issue d'un examen préalable lorsque ce contrôle est demandé pendant le déroulement d'une procédure devant un tribunal administratif. Le premier concerne la norme de contrôle applicable et s'intéresse surtout à l'issue du processus décisionnel. La norme de contrôle garantit que le tribunal de révision fait preuve de la déférence voulue envers le décideur administratif. Le second a trait aux risques que présente l'intervention judiciaire prématurée. Il s'attache surtout au processus, et un souci d'efficacité, de diminution des coûts et d'intégrité du régime administratif le sous-tend. Évidemment, ce second aspect s'apparente au premier en ce qu'il formule le vœu que les cours de justice bénéficient de décisions administratives réfléchies et défèrent, s'il y a lieu, à ces décisions.

[43] Ces deux aspects sont bien enracinés dans la jurisprudence, mais il est artificiel de scinder l'analyse ainsi lorsqu'il s'agit de contrôler la décision préliminaire rendue à l'issue d'un examen préalable, telle la décision considérée en l'espèce. Lorsque, comme dans la présente affaire, la norme de contrôle est celle de la décision raisonnable, la fusion des deux aspects simplifie son application. Le tribunal de révision doit, dans sa démarche, manifester le degré de déférence voulu envers le tribunal administratif tant à l'égard de la décision au fond que de la procédure en cours.

[44] Reasonableness as a standard of review reflects the appropriate deference to the administrative decision maker. It recognizes that certain questions that come before administrative tribunals do not lend themselves to a single result; administrative decision makers have "a margin of appreciation within the range of acceptable and rational solutions": *Dunsmuir*, at para. 47 (emphasis added). Reasonableness is a concept that must be applied in the particular context under review. The range of acceptable and rational solutions depends on the context of the particular type of decision making involved and all relevant factors: *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at paras. 17-18 and 23. As was said in *Khosa*, reasonableness is a single concept that "takes its colour" from the particular context (para. 59). In this case, both the nature of the Commission's role in deciding to move to a board of inquiry and the place of that decision in the Commission's process are important aspects of that context and must be taken into account in applying the reasonableness standard.

[44] La norme de contrôle de la décision raisonnable traduit la déférence qui s'impose envers le décideur administratif. Elle reconnaît que certaines questions soumises aux tribunaux administratifs n'appellent pas une seule solution précise et qu'« [i]l est loisible au [décideur] administratif d'opter pour l'une ou l'autre des différentes solutions rationnelles acceptables » : *Dunsmuir*, par. 47 (je souligne). Le caractère raisonnable s'apprécie en fonction du contexte particulier considéré. Les différentes solutions rationnelles acceptables varient selon le contexte du type particulier de décision et de tous les facteurs pertinents (*Catalyst Paper Corp. c. North Cowichan (District)*, 2012 CSC 2, [2012] 1 R.C.S. 5, par. 17-18 et 23). Comme le dit la Cour dans l'arrêt *Khosa*, la raisonnabilité constitue une notion unique qui « s'adapte » au contexte particulier (par. 59). En l'espèce, tant la nature de la fonction exercée par la Commission en décidant de nommer une commission d'enquête que le stade auquel intervient cette décision dans la procédure administrative constituent des éléments contextuels importants dont il faut tenir compte pour appliquer la norme de la décision raisonnable.

[45] In my view, the reviewing court should ask whether there was any reasonable basis on the law or the evidence for the Commission's decision to refer the complaint to a board of inquiry. This formulation seems to me to bring together the two aspects of the jurisprudence to ensure that both the decision and the process are treated with appropriate judicial deference.

[45] À mon avis, le tribunal de révision doit se demander si la loi ou la preuve offrait un fondement raisonnable à la décision de la Commission de renvoyer la plainte à une commission d'enquête. Cette démarche me paraît concilier les deux aspects de la jurisprudence de sorte que la décision et le processus fassent l'objet de la déférence judiciaire voulue.

[46] There is precedent for taking this approach. Particularly helpful is the decision of Evans J. (as he then was) in *Zündel* (1999). While this is a pre-*Dunsmuir* decision, the approach is completely consistent with that set out by the Court in that case. *Zündel* (1999) concerned an application for judicial review of the Canadian Human Rights Commission's decision to request the appointment of a Human Rights Tribunal to inquire into certain complaints made to the Commission. While the legislative scheme in issue in *Zündel* (1999) was not identical to that in the Nova Scotia Act, the power of the Canadian Human Rights Commission to request the appointment of a Tribunal is conferred

[46] Il existe des précédents à l'appui de cette approche. Dans l'affaire *Zündel* (1999), la décision est particulièrement instructive et la démarche s'accorde tout à fait avec celle établie postérieurement par notre Cour dans l'arrêt *Dunsmuir*. Le juge Evans (plus tard juge à la Cour d'appel fédérale) était saisi d'une demande de contrôle judiciaire visant la décision de la Commission canadienne des droits de la personne de demander la désignation d'un tribunal des droits de la personne pour enquêter sur certaines plaintes. Même si le régime législatif en cause dans cette affaire différait de celui considéré en l'espèce, le pouvoir de la Commission canadienne des droits de la personne

in words virtually identical to those in the Nova Scotia *Boards of Inquiry Regulations*. The federal Commission, at any stage after the filing of a complaint, "may request the Chairperson of the Tribunal to institute an inquiry into the complaint if the Commission is satisfied that, having regard to all the circumstances of the complaint, an inquiry is warranted" (s. 49(1) of the *Canadian Human Rights Act*, as amended by S.C. 1998, c. 9, s. 27). Evans J. held that he should only intervene to prohibit continuation of the inquiry if satisfied that "there [was] no rational basis in law or on the evidence to support the Commission's decision that an inquiry by a Tribunal is warranted in all the circumstances of the complaints" (para. 49).

de demander la désignation d'un tribunal était conféré par un libellé presque identique à celui du *Boards of Inquiry Regulations* de la Nouvelle-Écosse. La commission fédérale pouvait, à toute étape postérieure au dépôt de la plainte, « demander au président du Tribunal de désigner un membre pour instruire la plainte, si elle est convaincue, compte tenu des circonstances relatives à celle-ci, que l'instruction est justifiée » (par. 49(1) de la *Loi canadienne sur les droits de la personne*, mod. par L.C. 1998, ch. 9, art. 27). Le juge Evans a estimé qu'il ne pouvait faire cesser l'instruction que s'il était convaincu « que la Commission ne pouvait s'appuyer sur aucun motif rationnel en droit, ni sur aucune preuve pour décider qu'une instruction par un Tribunal est justifiée compte tenu de toutes les circonstances » (par. 49).

[47] While I would use the word "reasonable" rather than "rational", I do not think there is any difference in substance between the two formulations. As the Court said in *Dunsmuir*, a result reached by an administrative tribunal is reasonable where it can be "rationally supported" (para. 41).

[47] Même si je préfère le terme « raisonnable » à celui de « rationnel », je ne crois pas qu'il existe une différence véritable entre les deux. Comme le dit la Cour dans l'arrêt *Dunsmuir*, la décision du tribunal administratif est raisonnable dès lors qu'elle a « un fondement rationnel » (par. 41).

[48] In my view, this formulation is an appropriate way to reflect, in the context of the Nova Scotia statutory scheme, both the appropriate standard of review and the judicial reluctance to intervene in relation to the Commission's decision to refer a complaint to a board of inquiry. I reach this conclusion for several reasons.

[48] À mon avis, cette formulation du critère applicable tient dûment compte, dans le contexte du régime législatif néo-écossais, à la fois de la norme de contrôle qui convient et de la réticence judiciaire à réformer la décision de la Commission de renvoyer une plainte à une commission d'enquête. J'arrive à cette conclusion pour plusieurs raisons.

[49] First, this threshold for judicial intervention is firmly tied to the reasonableness standard of judicial review. In the context of the broad discretion given to the Commission to refer a complaint for inquiry, reasonableness review must focus primarily on whether there is any basis in reason for such an inquiry. The test of any reasonable basis on the law or the evidence seems to me to appropriately reflect this requirement.

[49] Premièrement, cette condition minimale de l'intervention judiciaire est bien arrimée à la norme de la décision raisonnable. Vu le grand pouvoir discrétionnaire de la Commission de renvoyer une plainte à une commission d'enquête, le contrôle au regard de la norme de la décision raisonnable doit essentiellement s'attacher à la question de savoir si quelque élément fondé sur la raison justifiait la tenue d'une enquête. Le critère voulant que la loi ou la preuve doive offrir un fondement raisonnable paraît bien satisfaire à cette exigence.

[50] Second, this formulation, in my view, is well adapted to the particular role which the legislation gives to the Commission, a role which has been

[50] Deuxièmement, le critère que je formule convient bien, selon moi, aux fonctions particulières « d'administration et d'examen préalable »

described by this Court as "an administrative and screening" role (*Cooper*, at p. 893). While no doubt the Commission, in deciding to refer for inquiry, has some quite limited role to screen the merits of the complaint, its task is not to decide the issues which underlie its decision to proceed to the next stage; these are left to the board of inquiry (*Zündel* (2000), at para. 4). By not focussing solely on the merits of the complaint, the formulation I propose recognizes that the Commission might decide to appoint a board of inquiry in order to allow the board, after a full hearing, to decide a jurisdictional or other important legal point. This would provide a reasonable basis for the Commission's decision.

[51] Third, this formulation reflects the appropriate deference to the Commission's process. Just as reasonableness requires appropriate deference to a tribunal's decision, it also implies appropriate deference to its processes of decision-making. The proposed formulation makes it clear that reviewing courts should be reluctant to intervene before a board of inquiry has addressed the substance of the points with respect to which the application for judicial review is brought. A reviewing court should take into account the benefit of having the board's considered view of the point raised on review as well as the risks of an unnecessary multiplication of issues and delay as was caused by premature judicial intervention in this case. Only where there is no reasonable basis in law or on the evidence to support the Commission's decision that an inquiry by a board of inquiry is warranted in all the circumstances would it be appropriate to overcome judicial reluctance to intervene.

[52] Finally, this approach is consistent not only with case law on judicial review of decisions to refer complaints for adjudication, but also with the modern law concerning the discretion in relation to intervening by way of judicial review in ongoing administrative proceedings. As to the former, I refer for example not only to *Zündel* (1999), but also

que la loi attribue à la Commission (*Cooper*, p. 893). Certes, la Commission soupèse quelque peu la plainte pour décider si les allégations justifient la tenue d'une enquête, mais il ne lui appartient pas de statuer sur les points qui sous-tendent sa décision de passer à l'étape suivante; cette tâche incombe à la commission nommée (*Zündel* (2000), par. 4). Comme il ne s'attache pas uniquement au bien-fondé de la plainte, le critère que je formule reconnaît à la Commission la faculté de décider de nommer une commission d'enquête afin que cette dernière puisse, au terme d'une audition complète, trancher toute question de droit importante, y compris une question de compétence. Dès lors, la décision de la Commission en l'espèce aurait un fondement raisonnable.

[51] Troisièmement, le critère préconisé traduit la déférence dont il convient de faire preuve envers la procédure de la Commission. La norme de la décision raisonnable commande une juste déférence envers non seulement la décision d'un tribunal administratif, mais également son processus décisionnel. Il découle clairement du critère que le tribunal de révision doit hésiter à intervenir avant que la commission d'enquête n'ait examiné au fond les points qui sous-tendent la demande de contrôle judiciaire. Aussi, le tribunal de révision doit tenir compte de l'avantage qu'il y aurait à disposer de l'opinion réfléchie de la commission d'enquête et demeurer consciente du risque que l'affaire se prolonge indûment et que les questions à débattre se multiplient inutilement comme en l'espèce à cause d'une intervention judiciaire prématurée. Le tribunal de révision ne devrait surmonter sa réticence à intervenir que lorsque la loi ou la preuve n'offre aucun fondement raisonnable à la décision de la Commission selon laquelle, compte tenu de l'ensemble des circonstances, il est justifié de nommer une commission d'enquête.

[52] Enfin, cette approche se concilie non seulement avec la jurisprudence relative au contrôle judiciaire de la décision de renvoyer une plainte à un organisme décisionnel, mais aussi avec l'état du droit actuel en ce qui concerne le pouvoir discrétionnaire d'intervenir par voie de contrôle judiciaire dans une procédure administrative en cours.

to other cases in the federal courts in relation to the similarly worded powers of the Canadian Human Rights Commission to request referral of complaints to the Human Rights Tribunal: see, e.g., *Bell* (1999); and *Canada (National Research Council) v. Zhou*, 2009 FC 164 (CanLII). As to the latter, I refer to decisions such as *Lorenz*, *Psychologist Y*, *C.B. Powell*, and the other cases and texts to which I referred earlier in my reasons on this point.

[53] I conclude that in reviewing the Commission's decision to request appointment of a board of inquiry to inquire into these complaints, the reviewing court should ask itself whether there is any reasonable basis in law or on the evidence to support that decision.

B. *Did the Commission Make a Reviewable Error?*

[54] I agree with the Court of Appeal that the Commission's referral decision should not be disturbed. While Mr. Comeau's complaint faces some challenging legal hurdles, my view is that there was a reasonable basis, provided primarily by the novelty and complexity of the complaints, for the Commission to be satisfied that an inquiry was warranted in all of the circumstances. It is not our role to opine on the merits or otherwise of the complaint, but I will briefly explain why I think that the Commission's referral decision meets this standard.

[55] Mr. Comeau alleged that Halifax had "treated, and continue[d] to treat, [him] and [his] children differentially on account of [their] ethnic origin (Acadian) by levying the supplementary tax . . . and by not providing any of the funds generated by the supplementary tax to the [Conseil]" (A.R., at p. 119). Mr. Comeau contended that this differential treatment violated ss. 5(1)(a) and (q) of

Pour le premier élément, je pense notamment au jugement *Zündel* (1999), mais aussi à d'autres décisions des cours fédérales portant sur le pouvoir conféré à la Commission canadienne des droits de la personne, par un libellé semblable, de renvoyer une plainte à un tribunal des droits de la personne : voir, p. ex., *Bell* (1999); *Conseil national de recherches du Canada c. Zhou*, 2009 CF 164 (CanLII). Pour ce qui est du second élément, je me réfère entre autres aux arrêts *Lorenz*, *Psychologist Y* et *C.B. Powell*, ainsi qu'aux autres décisions et aux ouvrages dont je fais précédemment mention sur ce point.

[53] Je conclus que le tribunal de révision qui contrôle la décision de la Commission de demander la nomination d'une commission chargée d'enquêter sur une plainte doit se demander si la loi ou la preuve offre un fondement raisonnable à cette décision.

B. *La Commission a-t-elle commis une erreur susceptible de contrôle judiciaire?*

[54] Je conviens avec la Cour d'appel qu'il n'y a pas lieu d'intervenir relativement à la décision de la Commission de renvoyer la plainte à une commission d'enquête. Le recours de M. Comeau devra encore franchir d'importants obstacles juridiques, mais j'estime, étant donné surtout la nouveauté et la complexité des plaintes, que la Commission pouvait raisonnablement se dire convaincue, au vu de l'ensemble des circonstances, que la tenue d'une enquête était justifiée. Il ne nous appartient pas de nous prononcer sur la plainte, en particulier sur son bien-fondé. Cependant, je juge néanmoins opportun d'expliquer brièvement en quoi le renvoi de la plainte par la Commission satisfait selon moi à ce critère.

[55] M. Comeau a allégué que Halifax [TRADUCTION] « [les] a[vait] traités et continu[ait] de [les] traiter différemment, [ses] enfants et [lui], du fait de [leur] origine ethnique (acadienne), en les assujettissant à une taxe supplémentaire . . . sans verser au [Conseil] une partie des fonds ainsi prélevés » (d.a., p. 119). Il a soutenu que cette différence de traitement allait à l'encontre des al. 5(1)a) et q) de

the Act. (He also contended that it violated his s. 15 *Charter* rights, but the Commission has made clear that it does not intend to pursue this aspect of his claim.)

[56] In this appeal, Halifax presents a number of arguments as to why the Commission erred in deciding to refer Mr. Comeau's complaint to a board of inquiry. It argues that the funding regime was not arbitrary or discriminatory; that at the relevant time Nova Scotia municipal bodies lacked the statutory authority to provide supplementary funding to the Conseil; that the amendments to the *MGA* have rendered Mr. Comeau's complaint moot or *res judicata*; that language is not a protected characteristic under the Act because it does not fall under s. 5(1)(q)'s reference to ethnic origin; and that s. 6(a) of the Act, which shields "the provision of or access to services or facilities [and] the conferring of a benefit on or the providing of a protection to youth or senior citizens" from scrutiny under the Act, exempts school funding from the Act's purview.

[57] The Commission's investigator addressed many of these points in his reports. He was of the view that the funding situation might have constituted differential treatment on the basis of ethnic origin, and that this differential treatment might have prevented Conseil schools from providing some services. On the basis of a legal opinion drafted by Halifax's municipal solicitor, the investigator also thought that Halifax might have had the legal authority to correct the situation by providing supplementary funding to Conseil schools (A.R., at pp. 130, 134 and 136). He considered that a possible remedy could be requiring Halifax to provide such funding, perhaps retroactively (A.R., at p. 133). (It is worth noting in this regard that Mr. Comeau's complaint covers a period that begins before the period covered by the retroactive amendments to the *MGA*.) Moreover, the investigator was of the view that the intent of s. 6(a) was to protect programs for youth and seniors from complaints of age discrimination; the provision, interpreted in this

la Loi. (Il a ajouté qu'elle violait les droits que lui garantit l'art. 15 de la *Charte*, mais la Commission a bien précisé qu'elle n'entendait pas présenter ce volet de la plainte à la commission d'enquête.)

[56] Dans le présent pourvoi, Halifax fait valoir un certain nombre de raisons pour lesquelles la Commission aurait eu tort de renvoyer la plainte de M. Comeau à une commission d'enquête. Elle soutient que le régime de financement n'était ni arbitraire ni discriminatoire, qu'au moment considéré les conseils municipaux de la Nouvelle-Écosse n'avaient pas le pouvoir légal de verser des fonds supplémentaires au Conseil, que les modifications apportées à la *MGA* ont fait en sorte que la plainte de M. Comeau devienne théorique ou qu'il y ait chose jugée, que la langue n'est pas une caractéristique protégée par la Loi en ce qu'elle ne participe pas de l'« origine ethnique » visée à l'al. 5(1)q) et que l'al. 6a) de la Loi, qui écarte tout examen fondé sur la Loi [TRADUCTION] « en matière de prestation de services, de fourniture d'installations ou d'accès à ces services et installations, lorsqu'il s'agit d'accorder un avantage ou une protection à des jeunes ou à des personnes âgées », soustrait le financement des écoles à l'application de la Loi.

[57] L'enquêteur de la Commission aborde bon nombre de ces points dans ses rapports. Il se dit d'avis que les modalités de financement pourraient équivaloir à une différence de traitement fondée sur l'origine ethnique et que cette différence de traitement pourrait empêcher les écoles régies par le Conseil d'offrir certains services. Sur la foi de l'avis juridique du procureur de la municipalité, l'enquêteur estime également que Halifax pourrait avoir le pouvoir légal de corriger la situation en versant des fonds supplémentaires aux écoles du Conseil (d.a., p. 130, 134 et 136). Il affirme qu'une réparation possible pourrait consister à obliger Halifax à verser les fonds en question, peut-être avec effet rétroactif (d.a., p. 133). (Il vaut la peine de signaler à ce propos que la période visée par la plainte de M. Comeau débute avant celle à laquelle s'appliquent les modifications rétroactives apportées à la *MGA*.) De plus, l'enquêteur opine que l'al. 6a) a pour objet de protéger les programmes destinés aux jeunes et aux personnes âgées contre

way, would not shield programs that benefit some young people and not others in a discriminatory way (A.R., at p. 133).

[58] With respect, Halifax's submissions on Mr. Comeau's complaint, whatever their ultimate validity, are largely beside the point in a judicial review of a referral decision such as the one before the Court in this appeal. It is not this Court's role to assess the complaint. This Court's role is limited to assessing the Commission's decision to refer the complaint to a board of inquiry. In making its referral decision, the Commission had the investigator's reports before it. Without expressing any opinion on the merits of Mr. Comeau's complaint, I am of the view that these reports, along with the surrounding circumstances, provided a reasonable basis for the Commission to refer Mr. Comeau's novel and complex complaints to a board of inquiry which, of course, would be entitled, among other things, to enter into a detailed consideration of the merits of Halifax's objections.

[59] I conclude that, whatever the ultimate merit of Mr. Comeau's novel and complex complaints might be, the Commission had a reasonable basis for concluding that an inquiry before a board of inquiry was warranted in all of the circumstances.

IV. Disposition

[60] I would dismiss the appeal, with costs to both the Commission and Mr. Comeau.

Appeal dismissed with costs.

Solicitor for the appellant: Halifax Regional Municipality, Halifax.

Solicitors for the respondent the Nova Scotia Human Rights Commission: Merrick Jamieson Sterns Washington & Mahody, Halifax.

Solicitor for the respondent Lucien Comeau: Université de Moncton, Moncton.

les allégations de discrimination fondée sur l'âge. Dans cette optique, l'alinéa ne protégerait pas les programmes dont seuls certains jeunes bénéficient pour des motifs discriminatoires (d.a., p. 133).

[58] À mon humble avis, même si elles se révélaient valables au final, les prétentions de Halifax concernant la plainte de M. Comeau sont en grande partie dénuées de pertinence dans le cadre du contrôle judiciaire d'une décision comme celle qui est contestée en l'espèce. Il n'appartient pas à notre Cour d'apprécier la plainte. Son rôle se borne à évaluer la décision de la Commission de renvoyer la plainte à une commission d'enquête, décision pour laquelle la Commission disposait des rapports de l'enquêteur. Sans exprimer quelque opinion que ce soit sur le bien-fondé de la plainte de M. Comeau, j'estime que ces rapports et les circonstances de l'espèce offraient un fondement raisonnable à la décision de la Commission de renvoyer les allégations à la fois complexes et nouvelles formulées par M. Comeau à une commission d'enquête qui serait évidemment admise, entre autres, à examiner en détail l'assise des objections de Halifax.

[59] Quel que soit le sort réservé ultimement aux allégations nouvelles et complexes de M. Comeau, je conclus qu'il y avait un fondement raisonnable à la conclusion de la Commission suivant laquelle, compte tenu de l'ensemble des circonstances, la tenue d'une enquête par une commission d'enquête était justifiée.

IV. Dispositif

[60] Je suis d'avis de rejeter le pourvoi et d'adjuger les dépens à la Commission et à M. Comeau.

Pourvoi rejeté avec dépens.

Procureur de l'appelante : Halifax Regional Municipality, Halifax.

Procureurs de l'intimée Nova Scotia Human Rights Commission : Merrick Jamieson Sterns Washington & Mahody, Halifax.

Procureur de l'intimé Lucien Comeau : Université de Moncton, Moncton.

Solicitor for the respondent Her Majesty the Queen in Right of the Province of Nova Scotia: Attorney General of Nova Scotia, Halifax.

Solicitor for the intervener the Canadian Human Rights Commission: Canadian Human Rights Commission, Ottawa.

Procureur de l'intimée Sa Majesté la Reine du chef de la province de la Nouvelle-Écosse : Procureur général de la Nouvelle-Écosse, Halifax.

Procureur de l'intervenante la Commission canadienne des droits de la personne : Commission canadienne des droits de la personne, Ottawa.