

SCC File No.: 36636

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

BRENT BISH on behalf of IAN STEWART

APPELLANT

(Appellant on Appeal and Respondent on Cross-Appeal)

AND

ELK VALLEY COAL CORPORATION, CARDINAL RIVER OPERATIONS

RESPONDENT

(Respondent on Appeal and Appellant on Cross Appeal)

AND

THE ALBERTA HUMAN RIGHTS COMMISSION (TRIBUNAL)

RESPONDENT

(Respondent by Order)

FACTUM OF THE RESPONDENT,
THE ALBERTA HUMAN RIGHTS COMMISSION (TRIBUNAL)
(Pursuant to Rule 42 of *Rules of the Supreme Court of Canada*)

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TABLE OF CONTENTS

	<u>PAGE</u>
PART I. OVERVIEW AND STATEMENT OF FACTS.....	1
PART II. QUESTIONS IN ISSUE	1
PART III. STATEMENT OF ARGUMENT	2
A. Structure of the <i>Alberta Human Rights Act</i>	2
B. Standard of Review - Administrative law principles apply	3
C. The Presumed Standard of Reasonableness Pursuant to <i>Dunsmuir</i> and its Progeny.....	3
D. Contextual Analysis	7
i. Nature of Questions.....	7
ii. The Tribunal has Presumed Institutional Expertise Reinforced Legislatively	8
iii. Existence or Absence of a Privative Clause.....	9
iv. Purpose of <i>AHR Act</i>	9
E. Conclusion.....	10
PART IV. SUBMISSIONS ON COSTS	10
PART V. NO ORDER SOUGHT	10
PART VI. TABLE OF AUTHORITIES.....	11
PART VII. STATUTORY PROVISIONS.....	12

PART I. OVERVIEW AND STATEMENT OF FACTS

1. This appeal arises from a decision by the Alberta Human Rights Commission (the Tribunal),¹ which decision was ultimately upheld by the Alberta Court of Appeal.² The Tribunal limits its submissions to standard of review only.³
2. The standard of review for the issues raised by the Appellant is as follows:
 - Correctness as to the identification of the constituent elements of a prima facie case of discrimination;
 - Reasonableness as to the application of the law to the facts, including findings about whether there was prima facie discrimination and whether there was accommodation to the point of undue hardship;
 - Reasonableness with respect to factual findings.
3. The Tribunal has no position regarding the statement of facts by the Appellant.

PART II. QUESTIONS IN ISSUE

4. What is the appropriate standard of review pertaining to the findings of the Tribunal with respect to the issues on this appeal?
5. The Tribunal agrees with the Appellant's position that the standard of review with respect to foundational legal tests in the human rights sphere, including the legal test for "prima facie discrimination", is correctness.
6. However, the Tribunal disagrees that issues on appeal related to findings of mixed fact and law including the application of the legal test for prima facie discrimination, and the application of the defence of accommodation to the point of undue hardship are subject to correctness review. These questions are mixed fact and law, well within the expertise of the

¹ *Alberta Human Rights Act*, R.S.A. 2000 C., A-25.5 (*AHR Act*), ss 15, 27, 32. It is the Tribunal of the Alberta Human Rights Commission that was added by Order: **Appellant's Record**, Order, **Vol. 1 Tab 14**. Under the *AHR Act*, the Alberta Human Rights Commission includes both the Director's area of the Commission, which involves initial complaint processing and advocacy, and the Tribunal. The Tribunal is, however, independent from the Director, and its only role is to hear and decide human rights complaints. The Director of the Commission initially dismissed this matter and was no longer involved in any subsequent proceedings.

² **Appellant's Record**, Court of Appeal Reasons, **Vol. 1 Tab 5**.

³ In the recent decision of *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 S.C.R. 147 at paras 52-57, **Tribunal Book of Authorities (TBA) Tab 9**, the role of the tribunal or decision-maker on judicial review or appeal was held to be in the discretion of the Court, flexible and in accordance with the particular circumstances and the relevant administrative or statutory regime.

Tribunal and subject to the reasonableness standard. These questions are not, as the Applicant submits, “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”.

PART III. STATEMENT OF ARGUMENT

A. Structure of the *Alberta Human Rights Act*

7. The home statute of the Tribunal is the *Alberta Human Rights Act*. Section 7 protects individuals from discrimination in the area of employment practices on the grounds of physical disability and mental disability:

7(1) No employer shall

- (a) refuse to employ or refuse to continue to employ any person, or
- (b) discriminate against any person with regard to employment or any term or condition of employment,

because of the race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or of any other person.⁴

8. Relevant defences are set out under sections 7 and 11 of the *AHR Act*:

7(3) Subsection (1) does not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

...

11 A contravention of this Act shall be deemed not to have occurred if the person who is alleged to have contravened the Act shows that the alleged contravention was reasonable and justifiable in the circumstances.

...

9. Section 37 provides a right of appeal to the parties from a decision of the Tribunal:

37(1) A party to a proceeding before a human rights tribunal may appeal an order of the tribunal to the Court of Queen’s Bench by application filed with the clerk of the Court at the judicial centre closest to the place where the proceeding was held.

...

37(4) The Court may

- (a) confirm, reverse or vary the order of the human rights tribunal and make

⁴ Gender identity and gender expression were added as explicit protected grounds through the *Alberta Human Rights Amendment Act*, 2015, S.A. 2015, c. 18.

any order that the tribunal may make under section 32, or
 (b) remit the matter back to the tribunal with directions.

B. Standard of Review - Administrative law principles apply

10. This Court has directed that the *Dunsmuir* principles apply whether the matter is reviewed by way of judicial review or statutory appeal.⁵

C. The Presumed Standard of Reasonableness Pursuant to *Dunsmuir* and its Progeny

11. This Court has created, through *Dunsmuir* and its progeny, a “presumed standard of reasonableness” to be applied to decisions where the specialized administrative tribunal is interpreting and applying its enabling statute.⁶ This presumption is rebuttable only through a contextual analysis which yields narrow exceptions.⁷

12. In *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*⁸ the Court rejected a “carve out” exception to the reasonableness standard simply because the issue involved quasi constitutional human rights. This Court acknowledged that human rights tribunals face questions of great import but confirmed the *Dunsmuir* principles, and applied the standard of review of reasonableness to a decision of the Canadian Human Rights Tribunal to award legal costs pursuant to its home statute.

⁵ *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3 (*Saguenay*), **TBA Tab 7** at paras 38 and 44.

⁶ *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (*Dunsmuir*) at para 54, **TBA Tab 4**, *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 6, [2011] 3 S.C.R. 654 (*Alberta Information and Privacy*) at para 30, **TBA Tab 1** and *McLean v. British Columbia (Securities Commission)* SCC 67, [2013] 3 SCR 895 (*McLean*) at para 21, **TBA Tab 6**.

⁷ While the list is non-exhaustive, exceptions enunciated by the SCC to date include: “true” jurisdictional issues, constitutional issues, questions of law of central importance to the legal system as a whole and outside the expertise of the decision-maker, and determinations of jurisdictional lines between competing, specialized tribunals: *Dunsmuir*, *supra* at paras 57-61 **TBA Tab 4** and *Alberta Information and Privacy Commissioner v. Alberta Teachers' Association*, *supra* at para 30, **TBA Tab 1**. The presumption may also be rebutted where the legislature ‘clearly intended’ not to protect the tribunal’s jurisdiction on certain matters such as where the Courts and the administrative tribunal share concurrent jurisdiction at first instance: *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161 (*Tervita*) at paras 22, 35, 39, **TBA Tab 13** and *Saguenay*, *supra*, **TBA Tab 7** at para 51.

⁸ 2011 SCC 53, [2011] 3 SCR 471 (*Mowat*) at paras 21, 23 and 24 **TBA Tab 3**.

13. More recently, in *Saguenay*,⁹ this Court applied the reasonableness standard to a determination by the Quebec Human Rights Tribunal as to whether there had been discrimination, when a regular attendee at City council meetings was subjected to an opening prayer by the Mayor. The questions before the Tribunal involved the interpretation of the state’s duty of religious neutrality in the context of the Quebec Charter and the Canadian Charter (subject to correctness oversight), as well as whether or not the prayer was discriminatory (subject to reasonableness oversight). This Court emphasized:

- the applicable standard of review depended primarily on the nature of the question being raised;
- that deference was required when the tribunal acts within its area of expertise, interprets its enabling legislation and applies that legislation to the facts to determine whether discrimination exists (citing *Saskatchewan (Human Rights Commission) v. Whatcott*,¹⁰ and *Mowat*¹¹);
- the scope of the state’s duty of religious neutrality attracted the correctness standard as it was important to decide the issue in a manner consistent with “the principles that have been developed in relation to the application of the Canadian Charter...” (para 68). Further, the jurisdiction the legislature conferred on the Quebec Human Rights Tribunal was intended to be non-exclusive and exercised concurrently at first instance with that of the ordinary courts;¹²

⁹ *Supra*, at paras 45-50, **TBA Tab 7**.

¹⁰ 2013 SCC 11, [2013] 1 SCR 467 (*Whatcott*) at paras 166-168, **TBA Tab 12**.

¹¹ *Mowat, supra*, at para 27, **TBA Tab 3**.

¹² The Alberta Court of Queen’s Bench has stated that it does not have jurisdiction at first instance to decide discrimination complaints: *Hamilton v. Rocky View School Division No. 41*, 2009 ABQB 225, 2010 ABCA 217, [2010] A.J. No. 748 (QL) at paras 23, 24, leave to appeal to SCC refused, [2011] S.C.C.A. No. 104 (QL) **TBA Tab 5**, citing *Board of Governors of Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 SCR 181, 124 D.L.R. (3d) 193, pp. 194, 195, **TBA Tab 2**. Section 6 of the *AHR Act* does appear to allow some sharing of jurisdiction at first instance in actions regarding pay equity. However, with respect, that does not equate to having shared primary jurisdiction as contemplated by this Court in *Rogers Communications Inc. v Society of Composers, Authors and Music Publishers of Canada*, [2012] 2 SCR 283, 2012 SCC 35, at paras 15-18 **TBA Tab 11**, and *McLean supra* at para 24 **TBA Tab 6**, such that mixed questions of fact and law would be subject to a correctness standard. To the extent that the Alberta Court of Appeal relied upon any finding of shared primary jurisdiction to rebut the reasonableness standard on questions of mixed fact and law, this rationale is not consistent with Supreme Court jurisprudence. Even in *Saguenay*, where the Courts and the Tribunal clearly share first instance jurisdiction on discrimination complaints, this Court found, at para 50, that the question of “whether there was discrimination” was subject to the reasonableness standard.

- notwithstanding concurrency of jurisdiction, the question of whether the religious prayer was discriminatory, should not have been assessed according to the correctness standard:

[50] However, it was not open to the Court of Appeal to apply that standard to the entire appeal and to disregard those of the Tribunals' determinations that require deference and are therefore subject to the reasonableness standard. For example, the question whether the prayer was religious in nature, the extent to which the prayer interfered with the complainant's freedom and determination of whether it was discriminatory fall squarely within the Tribunal's area of expertise (emphasis added)...

14. The decision in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc., (Bombardier Aerospace Training Center)*,¹³ confirms that foundational legal tests and standards of proof are reviewable on a correctness standard but that findings related to the constituent elements of the legal test, within a particular administrative context, are subject to reasonableness:

[69] We wish to be clear that the application of a given legal test must be based on the same elements and the same degree of proof in every case. This is necessary in order to maintain the uniformity, integrity and predictability of the law. We therefore fail to see how the flexibility that the Commission says must characterize the prima facie discrimination test can affect the process aside from making it possible to take the circumstances of each case, and in particular the ground of discrimination being alleged, into account. Thus, although the nature of the evidence that is presented may vary from case to case, the "legal test" does not change. What can vary are the circumstances that might make it possible to meet the requirements of the various elements of the analysis, and the courts must adopt an approach that takes the context into account.

15. In *Whatcott*,¹⁴ this Court applied the standard of review of correctness regarding whether Saskatchewan's human rights legislation dealing with hate speech was constitutional, but reasonableness to the decision of the tribunal on whether or not the impugned flyers contravened the legislation. The reviewing courts below had noted the importance of the issues, the lack of expertise in the tribunal, and the lack of a privative clause and had applied the correctness standard.

16. However, this Court reaffirmed its commitment to the presumption of reasonableness applying it in a broader human rights context than as set out in *Mowat*, noting that the decision

¹³ 2015 SCC 39, [2015] 2 S.C.R. 789 at para 69 (*Bombardier*), **TBA Tab 10**.

¹⁴ *Supra* at paras 166-168, **TBA Tab 12**.

was within the expertise of the tribunal “interpreting its home statute and applying the facts before it.”¹⁵

[168] In this case, the decision was well within the expertise of the Tribunal, interpreting its home statute and applying it to the facts before it. The decision followed the Taylor precedent and otherwise did not involve questions of law that are of central importance to the legal system outside its expertise. The standard of review must be reasonableness.

17. It is hard to envision a more difficult and important human rights statutory interpretation issue than that which was before this Court in *Whatcott*. The matter involved a balancing of equality and free speech rights, yet the Court applied the normal presumption of reasonableness review where a home statute is being interpreted.

18. The type of free speech/human rights issues at play in *Whatcott*, could also arise in other contexts, such as an employee facing discipline for distributing homophobic or racist publications in the workplace, necessitating an interpretation and application, in other forums, of hate speech provisions. Yet, the Court did not identify the concern for consistency as between tribunals on these important issues as a reason to rebut the reasonableness standard.

19. The Alberta Court of Appeal in *Stewart*, consistent with the Supreme Court’s approach in *Saguenay*, directed correctness oversight to the enunciation of the foundational legal test for discrimination:

[47] In our respectful view, the standard of review as to the extricable questions of law respecting the scope in law of the definition of discrimination set out in Moore and the definition of bona fide occupational requirement/ accommodation set out in Meiorin must be correctness. These definitions are questions of law of fundamental significance to the Canadian legal system. They are concepts for which first instance assessment and application directly occurs in various tribunals and in proceedings before judges of superior courts.¹⁶

20. This decision also confirmed that correctness would not apply to the underlying fact findings related to the specific work environment, relevant occupational requirements, credibility of witnesses or the value of expert witnesses.¹⁷

21. It is unclear whether the Court of Appeal in *Stewart* applied reasonableness to the Tribunal’s findings related to whether there was prima facie discrimination. However, the

¹⁵ *Whatcott supra* at paras 166-168, **TBA Tab 12**.

¹⁶ **Appellant’s Record**, Court of Appeal Reasons **Vol. 1, Tab 5** at para 47.

¹⁷ **Appellant’s Record**, Court of Appeal Reasons **Vol. 1, Tab 5** at para 58.

Court did indicate that it could not say that “*the Tribunal reached an unreasonable conclusion...*” (emphasis added) as to whether Elk Valley had accommodated to the point of undue hardship.¹⁸

D. Contextual Analysis

22. A nuanced application of the *Dunsmuir* factors, as expanded upon in *Saguenay*, most importantly the nature of the question,¹⁹ and the presumed institutionalized expertise of an administrative decision-maker interpreting and applying its own statute, point to the reasonableness standard for most of the issues on this appeal.

i Nature of Questions

23. With respect to the legal test for prima facie discrimination, the Tribunal submits that this is an extricable question of law that is of central importance to the legal system within a quasi-constitutional context, and must be interpreted consistently and with uniformity.²⁰ The reasonableness presumption is rebutted in this instance.

24. With respect to the application of the prima facie test for discrimination to the facts, specifically whether Stewart had a disability, whether he was adversely affected and whether his disability was a factor in the adverse effect, these are questions of mixed fact and law and the Tribunal should be afforded deference with respect to those findings. As directed in *Dunsmuir*:

[53] Where the question is one of fact, discretion or policy, deference will usually apply automatically (*Mossop*, at pp. 599-600; *Dr. Q*, at para. 29; *Suresh*, at paras. 29-30). We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.²¹

25. More specifically, in *Saguenay*,²² this Court has stated that the question of “whether there was discrimination” is contextually based, and will be subject to reasonableness.

26. The Appellant further alleges the Tribunal erred in law by making unreasonable findings and inferences of fact. Again, as these issues all involve questions of assessment of the evidence

¹⁸ **Appellant’s Record**, Court of Appeal Reasons **Vol. 1, Tab 5** at para 90.

¹⁹ *Supra* at para 45 **TBA Tab 7**.

²⁰ *Bombardier supra* at para, 69 **TBA Tab 10**.

²¹ *Supra* at para 53, **TBA 4**.

²² *Supra* at para 50, **TBA Tab 7**.

and fact finding, areas within the Tribunal's core expertise and subject to deference, reasonableness applies.

27. While assessments of previous jurisprudence, and the nature of the questions in this appeal, are likely determinative on the standard of review, the Tribunal will, for completeness, review the other contextual factors pursuant to *Dunsmuir*.

ii. The Tribunal has Presumed Institutional Expertise Reinforced Legislatively

28. As Rothstein J noted in *Alberta Information and Privacy Commissioner*,²³ when the Court stated that the reasonableness standard would not apply to general issues of law of paramount importance to the legal system outside of the expertise of the decision-maker, it was specifically speaking conjunctively:

[46]...In other words, since *Dunsmuir*, for the correctness standard to apply, the question has to not only be one of central importance to the legal system but also outside the adjudicator's specialized area of expertise.

29. Rothstein J also stated in *Alberta Information and Privacy Commissioner* that tribunals are presumed to have institutional expertise:

[1] Through the creation of administrative tribunals, legislatures confer decision-making authority on certain matters to decision-makers who are assumed to have specialized expertise with the assigned subject matter. Courts owe deference to administrative decisions within the area of decision-making authority conferred to such tribunals....

30. In *Nor-Man Regional Health Authority v. Manitoba Association of Health Care Professionals*,²⁴ Abella J references *Dunsmuir* with respect to this same principle:

[53] ...*Dunsmuir* makes clear that, “at an institutional level, adjudicators...can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions” (para. 68 (emphasis added)).

31. Pursuant to section 15 of the *AHR Act*, the members of the Commission form a standing tribunal appointed by the Lieutenant Governor in Council. Bylaws passed December 7, 2012,²⁵ codify the qualifications of tribunal members and indicate that all members must possess a law degree, and experience, knowledge or training in human rights or administrative law.

²³ *Supra*, **TBA Tab 1**.

²⁴ 2011 SCC 59, [2011] 3 SCR 616, **TBA Tab 8**.

²⁵ *Alberta Human Rights Act Bylaws*, Bylaw 13(3) pursuant to section 17 of the *AHR Act*.

32. Pursuant to the Supreme Court of Canada’s direction, the Tribunal is presumed to have institutional expertise in interpreting and applying the *AHR Act*, which should be afforded deference. More recently, the Tribunal is required to possess specific legislated qualifications that reinforce human rights expertise.

33. While the Alberta Court of Appeal in *Stewart* indicated that the Tribunal’s expertise was relatively no greater than the Courts,²⁶ the Tribunal submits that this was in regard to expertise surrounding foundational legal tests as enunciated in *Moore v. British Columbia (Education)*²⁷ and *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees Union (Meiorin Grievance)*.²⁸

iii. Existence or Absence of a Privative Clause

34. There is a full right of appeal under the *AHR Act*, and no privative clause. However, the lack of a privative clause is not determinative: *Dunsmuir*.²⁹

iv. Purpose of *AHR Act*

35. The purpose of human rights legislation is to promote equality and provide redress to victims of discrimination, through the resolution and adjudication of human rights complaints. Human rights’ protections involve the interpretation and application of quasi constitutional legislation, resulting in an understandable inclination of reviewing courts to ensure that all facets of human rights decisions are correct. However, this Court, in its recent jurisprudence has not endorsed any kind of “carve out” exception because of the important nature of the rights.

36. On balance, applying the *Dunsmuir* factors, the issues on appeal (with the exception of the foundational test for prima facie discrimination) support a standard of review of reasonableness.

²⁶ **Appellant’s Record**, Court of Appeal Reasons **Vol. 1, Tab 5.** at para 55.

²⁷ 2012 SCC 61, **Appellant’s BA** at para 33 **Tab 39.**

²⁸ [1999] 3 SCR 3 **Appellant’s BA** at para 54 **Tab 6.**

²⁹ *Supra* at para 52, **TBA Tab 4.**

G. Conclusion

37. The provincial legislature delegated primary responsibility over human rights to the Tribunal. This appeal does not involve, other than the test for prima facie discrimination, issues of general law that are of paramount importance to the legal system outside of the expertise of the Tribunal. The standard of reasonableness applies to all issues, except the enunciated test for prima facie discrimination.

PART IV. SUBMISSIONS ON COSTS

38. No costs requested.

PART V. NO ORDER SOUGHT

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 10th day of August, 2016.



Janice Ashcroft, QC
Senior Legal Counsel for the Tribunal
Alberta Human Rights Commission

Counsel for the Tribunal will speak for approximately 10 minutes.

PART VI. TABLE OF AUTHORITIES

No.	Authority	Paragraphs
1.	<i>Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association</i> , 2011 SCC 6, [2011] 3 S.C.R. 654	11, 28, 29
2.	<i>Board of Governors of Seneca College of Applied Arts and Technology v. Bhadauria</i> , [1981] 2 SCR 181, 124 D.L.R. (3d) 193	13
	<i>British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees Union (Meiorin Grievance)</i> , [1999] 3 SCR 3	33
3.	<i>Canada (Canadian Human Rights Commission) v. Canada (Attorney General)</i> , 2011 SCC 53, [2011] 3 SCR 471	12, 13, 16
4.	<i>Dunsmuir v. New Brunswick</i> , 2008 SCC 9, [2008] 1 S.C.R. 190	10, 11, 12, 22, 24, 27, 28, 30, 34, 36
5.	<i>Hamilton v. Rocky View School Division No. 41</i> , 2009 ABQB 225, [2009] A.J. No. 449 (QL) affirmed, 2010 ABCA 217, [2010] A.J. No. 748 (QL), leave to appeal to SCC refused, [2011] S.C.C.A. No. 104 (QL)	13
6.	<i>McLean v. British Columbia (Securities Commission)</i> , 2013 SCC 67, [2013] 3 SCR 895	11, 13
	<i>Moore v. British Columbia (Education)</i> , 2012 SCC 61	33
7.	<i>Mouvement laïque quebécois v. Saguenay (City)</i> , 2015 SCC 16, [2015] 2 S.C.R. 3	10, 11, 13, 19, 22, 25
8.	<i>Nor-Man Regional Health Authority v. Manitoba Association of Health Care Professionals</i> , 2011 SCC 59, [2011] 3 SCR 616	30
9.	<i>Ontario (Energy Board) v. Ontario Power Generation Inc.</i> , 2015 SCC 44, [2015] 3 S.C.R. 147	1
10.	<i>Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc., (Bombardier Aerospace Training Center)</i> , 2015 SCC 39, [2015] 2 S.C.R. 789	14, 23
11.	<i>Rogers Communications Inc. v Society of Composers, Authors and Music Publishers of Canada</i> , [2012] 2 SCR 283, 2012 SCC 35	13
12.	<i>Saskatchewan (Human Rights Commission) v. Whatcott</i> , 2013 SCC 11, [2013] 1 SCR 467	13, 15, 18
13.	<i>Tervita Corp. v. Canada (Commissioner of Competition)</i> , 2015 SCC 3, [2015] 1 S.C.R. 161	11

PART VII. STATUTORY PROVISIONS

Alberta Human Rights Act Bylaws, Bylaw 13(3)

Alberta Human Rights Act, RSA 2000, c A-25.5, Sections 6, 7, 11, 15, 17, 27, 32, 37, 44

Alberta Human Rights Amendment Act, 2015, S.A. 2015, c. 18

Alberta Human Rights Act Bylaws, Bylaw 13(3)

13(3) All members of the Commission appointed under section 15 of the Act must possess a law degree, and experience, knowledge or training in human rights or administrative law.

Alberta Human Rights Act, RSA 2000, c A-25.5, Sections 6, 7, 11, 15, 17, 27, 32, 37, 44

Equal pay

6(1) Where employees of both sexes perform the same or substantially similar work for an employer in an establishment the employer shall pay the employees at the same rate of pay.

(2) No employer shall reduce the rate of pay of an employee in order to comply with this section.

(3) When an employee is paid less than the rate of pay to which the employee is entitled under this section, the employee is entitled to recover from the employer by action the difference between the amount paid and the amount to which the employee was entitled, together with costs, but

- (a) the action must be commenced within 12 months from the date on which the cause of action arose and not afterwards,
- (b) the action applies only to the wages of an employee during the 12-month period immediately preceding the termination of the employee's services or the commencement of the action, whichever occurs first,
- (c) the action may not be commenced or proceeded with when the employee has made a complaint to the Commission in respect of the contravention of this section, and
- (d) no complaint by the employee in respect of the contravention shall be acted on by the Commission when an action has been commenced by the employee under this section.

Discrimination re employment practices

7(1) No employer shall

- (a) refuse to employ or refuse to continue to employ any person, or
- (b) discriminate against any person with regard to employment or any term or condition of employment,

because of the race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or of any other person.

(2) Subsection (1) as it relates to age and marital status does not affect the operation of any bona fide retirement or pension plan or the terms or conditions of any bona fide group or employee insurance plan.

(3) Subsection (1) does not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

Reasonable and justifiable contravention

11 A contravention of this Act shall be deemed not to have occurred if the person who is alleged to have contravened the Act shows that the alleged contravention was reasonable and justifiable in the circumstances.

Commission continued

15(1) The Alberta Human Rights and Citizenship Commission is continued under the name “Alberta Human Rights Commission” and consists of the members appointed by the Lieutenant Governor in Council.

(2) The Lieutenant Governor in Council may designate one of the members as Chief of the Commission and Tribunals.

(3) The Minister may designate one of the members of the Commission as Acting Chief of the Commission and Tribunals, and the Acting Chief so designated has, during the absence of the Chief of the Commission and Tribunals, the powers and duties of the Chief of the Commission and Tribunals.

(4) The Chief of the Commission and Tribunals and other members of the Commission shall receive remuneration and expenses for their services as prescribed by the Minister.

Bylaws

17(1) The Commission may make bylaws respecting

- (a) the carrying out of its powers, duties and functions under this Act, and
- (b) procedural matters related to the handling of complaints under this Act, including procedural matters related to the proceedings before human rights tribunals.

(2) The Regulations Act does not apply to bylaws of the Commission.

(3) Bylaws of the Commission are not effective until they have been approved by the Minister.

Referral to human rights tribunal

27(1) The Chief of the Commission and Tribunals shall appoint a human rights tribunal to deal with a complaint in the following circumstances:

- (a) where the Chief of the Commission and Tribunals receives a report from the director that the parties are unable to settle the complaint;
- (b) where the Chief of the Commission and Tribunals or another member of the Commission decides under section 26(3) that the complaint should not have been dismissed or that the proposed settlement was not fair and reasonable;

(2) A human rights tribunal shall consist of one or more members of the Commission, one of whom may be the Chief of the Commission and Tribunals.

(3) Where the Chief of the Commission and Tribunals or another member of the Commission has conducted a review under section 26(3) in respect of a complaint, the Chief of the Commission and Tribunals or the other member, as the case may be, is not eligible to sit as a member of a human rights tribunal dealing with that complaint.

(4) A human rights tribunal and each member of the tribunal have all the powers of a commissioner under the *Public Inquiries Act*.

(5) If a human rights tribunal consists of more than one member, the decision of the majority is the decision of the Tribunal.

Powers of tribunal

32(1) A human rights tribunal

- (a) shall, if it finds that a complaint is without merit, order that the complaint be dismissed, and
 - (b) may, if it finds that a complaint has merit in whole or in part, order the person against whom the finding was made to do any or all of the following:
 - (i) to cease the contravention complained of;
 - (ii) to refrain in the future from committing the same or any similar contravention;
 - (iii) to make available to the person dealt with contrary to this Act the rights, opportunities or privileges that person was denied contrary to this Act;
 - (iv) to compensate the person dealt with contrary to this Act for all or any part of any wages or income lost or expenses incurred by reason of the contravention of this Act;
 - (v) to take any other action the tribunal considers proper to place the person dealt with contrary to this Act in the position the person would have been in but for the contravention of this Act.
- (2) A human rights tribunal may make any order as to costs that it considers appropriate.
- (3) A human rights tribunal shall serve a copy of its decision, including the findings of fact on which the decision was based and the reasons for the decision, on the parties to the proceeding.

Appeal

37(1) A party to a proceeding before a human rights tribunal may appeal an order of the tribunal to the Court of Queen's Bench by application filed with the clerk of the Court at the judicial centre closest to the place where the proceeding was held.

(2) The application under subsection (1) shall be filed with the clerk and served on the Commission and the other parties within 30 days after the date the appellant receives a copy of the order of the human rights tribunal.

(3) Forthwith after being served with an application under subsection (2), the Commission shall file the following with the clerk of the Court:

- (a) the order of the human rights tribunal, together with reasons;
- (b) the complaint;
- (c) the evidence taken at the hearing and all exhibits filed.

(4) The Court may

- (a) confirm, reverse or vary the order of the human rights tribunal and make any order that the tribunal may make under [section 32](#), or
- (b) remit the matter back to the tribunal with directions.

(5) Commencement of an appeal under this section does not operate as a stay of proceedings under the order of the human rights tribunal unless the Court so orders.

Interpretation

44(1) In this Act,

- (a) “age” means 18 years of age or older;
- (b) “commercial unit” means a building or other structure or part of it that is used or occupied or is intended, arranged or designed to be used or occupied for the manufacture, sale, resale, processing, reprocessing, displaying, storing, handling, garaging or distribution of personal property, or a space that is used or occupied or is intended, arranged or designed to be used or occupied as a separate business or professional unit or office in a building or other structure or in a part of it;
- (c) “Commission” means the Alberta Human Rights Commission;
- (d) “employers’ organization” means an organization of employers formed for purposes that include the regulation of relations between employers and employees;
- (e) “employment agency” includes a person who undertakes with or without compensation to procure employees for employers and a person who undertakes with or without compensation to procure employment for persons;
- (f) “family status” means the status of being related to another person by blood, marriage or adoption;
- (g) “marital status” means the state of being married, single, widowed, divorced, separated or living with a person in a conjugal relationship outside marriage;
- (h) “mental disability” means any mental disorder, developmental disorder or learning disorder, regardless of the cause or duration of the disorder;
- (i) “Minister” means the Minister determined under [section 16](#) of the [Government Organization Act](#) as the Minister responsible for this Act;

- (j) “occupational association” means an organization other than a trade union or employers’ organization in which membership is a prerequisite to carrying on any trade, occupation or profession;
 - (k) “person”, in addition to the extended meaning given it by the [Interpretation Act](#), includes an employment agency, an employers’ organization, an occupational association and a trade union;
 - (l) “physical disability” means any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes epilepsy, paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, and physical reliance on a guide dog, service dog, wheelchair or other remedial appliance or device;
 - (m) “religious beliefs” includes native spirituality;
 - (n) “source of income” means lawful source of income;
 - (o) “trade union” means an organization of employees formed for purposes that include the regulation of relations between employees and employers.
- (2) Whenever this Act protects a person from being adversely dealt with on the basis of gender, the protection includes, without limitation, protection of a female from being adversely dealt with on the basis of pregnancy.