SCC File No. 37208

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

B E T W E E N :

CANADIAN HUMAN RIGHTS COMMISSION

Appellant

AND:

ATTORNEY GENERAL OF CANADA

Respondent

AND:

TANIA ZULKOSKEY

Intervener

FACTUM OF THE INTERVENER
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I: OVERVIEW

1. Tania Zulkoskey is the mother of twins who filed a complaint with the Canadian Human Rights Commission [the "CHRC"] claiming that the *Employment Insurance Act* discriminates on family status grounds by limiting the number of EI parental benefits payable to one per birth regardless of the number of children born. Had Ms Zulkoskey's female spouse given birth to one of their two children (her spouse was simultaneously trying to get pregnant), the *EI Act* would have resulted in the payment of two benefits. The "per birth" restriction was written before the prevalence of multiple births and the more complex ways families form and work is then disrupted to care for children.

2. As the *EI Act* is effectively an insurance policy written in legislation, Ms Zulkoskey sees no reason why its placement into statutory form insulates it from review on discrimination grounds pursuant to the *Canadian Human Rights Act* ["*CHRA*"]. The CHRC has placed her complaint in abeyance pending a final decision in the present appeal.

PART II: INTERVENER'S POSITION ON QUESTIONS AT ISSUE

3. Ms Zulkoskey intervenes to make the following arguments:

(a) given the quasi-constitutional nature of the *CHRA*, the Court should be wary of placing too much weight on specific statements made in the 1977 Debates;

(b) that said, what Hansard offers is the clearest commitment to binding all government activity, including legislation, to the *CHRA*. In committing to this, Parliamentarians cited international instruments which state that legislation can be reviewed by courts. And, when government representatives in 1977 narrowly addressed the question as to whether legislation would come under scrutiny, the answer was almost unequivocally that it would. Relatedly, the French version of s. 2 supports a primacy finding; and,

(c) that the *CHRA* offers different substantive discrimination protections than s. 15 of the *Charter* such that denying the *Canadian Human Rights Tribunal* [*"CHRT"*] jurisdiction denies claimants access to a different standard of discrimination altogether.

PART III: STATEMENT OF ARGUMENT

A. Given the Quasi-Constitutional Nature of the *CHRA*, Hansard Debates Should Be Reviewed with Caution

4. The Respondent relies extensively on the 1977 legislative history of the *CHRA*, then Bill C-25. Ms Zulkoskey submits that the Hansard must be viewed with caution given the nature of the *CHRA* as a quasi-constitutional document. An overemphasis on what the drafters originally intended risks giving an originalist interpretation to legislation that should grow organically. The Court has rejected an originalist approach when interpreting the *Charter* because, if one does, "the rights, freedoms and values embodied in the *Charter* in effect become frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing society needs".[1] Justice Lamer in *Re B.C. Motor Vehicle Act* acknowledged that a host of unforeseen new issues and questions can arise and if the "living tree" of the *Charter* is to be honoured, "care must be taken to ensure that historical materials, such as the Minutes of Proceedings and Evidence of the Special Joint Committee, do not stunt its growth".[2]

5. As quasi-constitutional legislation, an originalist interpretation of the *CHRA* risks similar stagnation and irrelevance. Human rights legislation is "often the final refuge of the disadvantaged and the disenfranchised"[3]. It too should evolve to protect vulnerable groups and to adapt to new forms of discrimination, lest the *CHRA* become irrelevant. On this point, Ms Zulkoskey's *EI Act* challenge measures legislative provisions drafted in the 1980s when multiple births were uncommon and same-sex parentage nearly unheard-of and asks that the effects of these provisions be considered against evolving discrimination standards and societal norms.

6. In sum, this Court's understandable reluctance to freeze the *Charter* and similar constitutional instruments to give effect to some sort of original intent is one that should carry over to interpretations of the *CHRA*.

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[1] *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at para. 53; *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, at para. 23.
[2] *Re B.C. Motor Vehicle Act*, *supra* note 1, at para. 53.
[3] *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321, at p. 339.

B. That Said, the Hansard Reveals that Parliament Intended to Bind Itself to Norms of Anti-Discrimination; Moreover, on the Specific Issue Before the Court, Government Representatives Unequivocally Stated that Legislation would be Scrutinized

7. Alternatively, to the extent the Court does turn to the Debates as an interpretative aid, a full review should be relied on. The Hansard excerpts provided by the Respondent fail to capture all that was said about the *CHRA*'s scope. The Debates in fact reveal three inter-related statements of intent. ***First***, they reveal the strongest commitment to human rights norms, a commitment never made conditional by the speakers with words like "except for us", "except for Parliament", or "except for laws", but one made with specific reference to international and domestic human rights instruments that expressly provide that legislation must conform to anti-discrimination norms. ***Second***, the Bill's sponsors addressed the absence of what they called a "paramountcy" clause, stating that one was not necessary given the nature of the *CHRA* and the presence of clause 2 (now s. 2). ***Third,*** with the exception of one passage in Mr. Strayer's speech to the Senate Committee relied on by the Respondent, whenever the Bill's sponsors addressed head-on the question of whether the CHRT could review legislation, the answer was unequivocally "YES". On this point, in the very speech the Respondent selectively relies on, Mr. Strayer repeatedly states that legislation would be so scrutinized, echoing similar comments from the Minister and the main consultant on the legislation, the leading civil rights professor and human rights author Walter Tarnopolosky. In short, the Hansard reveals three learned jurists expressing in unison a positive answer to the question now before the Court.

The French Language Version is Worth Noting

8. The Hansard statements were all made in relation to a Bill that contained the clause 2 language much debated at present. While the current debate has assumed that language of primacy is not found in the *CHRA*, the Court might benefit from considering the French wording of cl. 2 (s. 2). Whereas the English version provides that the *CHRA*'s goal is to vaguely "extend the laws" to give effect to certain principles, the French introduces the goal in more precise and even poetic language: "la présente loi a pour objet de compléter la législation canadienne…".

9. While the French text does not also state as unequivocally as one might like that "this statute takes primacy over other legislation", the fact that "legislation" was expressly cited in s. 2 as the subject of this lovely word or concept of "completion" should not be ignored. As will be

revealed by a review of the Debates, those reviewing the Bill understood that the *CHRA* was meant to be a major change at the very core of government activity, legislation. Section 2 was, in particular, singled out by the key government sponsors as consistent with the *CHRA* taking primacy over other legislation, subjecting the latter to scrutiny by the CHRT.

The Broad Commitments Made During the Debates

10. The adoption of the *CHRA* was an historic moment. The Hansard reflects this. The House Debates are replete with comments from Ministers and Members on both sides exhibiting a deep commitment to the principles, values and sprit espoused in the human rights doctrine.[4] Speakers repeatedly referred to international human rights instruments as inspiration, pointing to the Universal Declaration of Human Rights (1948) and the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, both ratified by Canada in 1976.[5]

11. These principles would be meaningless if they only regulated private behaviour and not government action. Indeed, the Justice Minister stated: "It may surprise hon. members to learn that at present there is no over-all protection of these freedoms at the federal level. There are no comprehensive guarantees against infringement within federal jurisdiction by corporations, citizens or **government** of many basic egalitarian rights Canadians should enjoy."[6]

12. In short, the original intent of the *CHRA* was meant to be both evolutionary and revolutionary – evolving with global human rights standards and revolutionizing the protection, in law, of human rights in Canada. The international human rights documents expressly referred

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[4] See, ex., *House of Commons Debates*, 30th Parl, 2nd Sess, Vol 3, (11 February 1977), at pp. 2976-2978 (Hon. Ron Basford (Minister of Justice)), at p. 2980 (R. Gordon L. Fairweather), at p. 2988 (Claude-André), at p. 3146-3147 (Lincoln M. Alexander) ("This legislation gives us an opportunity to dedicate ourselves as individuals to the basic ideals of respect for people and human rights, which are essential to our way of life and, further to dramatize the practical things which people can do to promote understanding and realization of these ideals at the federal level. … Canadians must stand against prejudice, Canadians must stand for justice, and they must stand for equal opportunity for all."). The Justice Minister re-echoed these comments in the Senate: *Debates of the Senate*, 30th Parl, 2nd Sess, Vol 2, (8 June 1977), at pp. 841-844.

[5] See, ex., House of Commons Debates, 30th Parl, 2nd Sess, Vol III (11 Feb 1977), at pp. 2976-2978, 2988, 3147, 3149. Similar international instruments were cited by the Justice Minister in the Senate: *Debates of the Senate*, 30th Parl, 2nd Sess, Vol 2, (8 June 1977), at pp. 841-844.

[6] House of Commons Debates, *ibid*, at p. 2976 [Emphasis Added]

to as inspiring passage of the *CHRA* all talk directly about the relationship between individuals and the state. Indeed, international human rights hold states as human rights duty bearers and individuals as rights holders. These instruments do, however, require states to regulate third parties to ensure they do not interfere with an individual's enjoyment of their rights, including by discriminating against them. Both Covenants contain express language about the obligations of governments to legislate and uphold rights, and to ensure non-discrimination.[7]

13. In this context, it would have appeared absurd for the many speakers to add to the notion of adopting anti-discrimination norms domestically, norms that were already internationally recognized as norms that govern the state/citizen relationship, with words like "but of course, these do not apply to us" or "to our laws".

There Were Many Specific References in the Debates to the CHRA Having Primacy and to Legislation Coming Under CHRT Review

14. During the discussions on Bill C-25 at the House and Senate committees, the Justice Minister, the main consultant (Prof. Tarnopolsky), and the Deputy Minister (Barry Strayer), commenting on criticisms and in answer to questions, explicitly stated that: (a) cl. 2 was to be considered one from which the entire *CHRA* was to be interpreted; (b) a primacy clause (they called it a "paramountcy" clause) was not necessary as the *CHRA* would clearly take precedence over legislation with or without it; and, (c) legislation could come under CHRT scrutiny.

15. These three points were often made together or in some combination. We have placed the key extracts from the Minutes of both the House Justice and Legal Affairs Committee (May 17, 1977) and the Senate Legal and Constitutional Affairs Committee (June 21, 1977) into the authorities for consideration. While the Respondent has referred to one page of Mr. Strayer's comments at the Senate committee (p. 5:13), the three propositions were made by Mr. Strayer during the same presentation, with Mr. Strayer clarifying, after p. 5:13, that legislation would come under the CHRT's jurisdiction.

[7] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, at art. 2; UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, at arts. 2-3.

16. Point (a), that cl.2 (s. 2) was the key section and meant to be used to interpret the entire *CHRA*, was made by the Minister of Justice in the House: "the purpose behind this bill is clear. It provides protection by giving effect to the … principles explicitly set out in clause 2".[8] The Minister more explicitly at the House Committee added: "Clause 2 is … to aid in [the *CHRA's*] interpretation" and "should serve to ensure that the bill's provisions are interpreted in accordance with this very broad statement of purpose".[9] This Court in *Gibbs* echoed these statements, holding that a human rights statutory Preamble serves as the key interpretive device in reviewing any section in such a statute.[10]

17. After setting out point (a), the Justice Minister then added point (b), that the *CHRA* is meant to be paramount and that no express "paramountcy clause" was required:

> The National Action Committee suggested a paramountcy clause which we feel again is not necessary. It, of course, will be the effect of the legislation unless its application to a subsequent piece of legislation is specifically excluded or limited and this of course would be true of a paramountcy clause. So we would accomplish little by such a clause.[11]

18. Mr. Strayer, before the Senate Committee, echoed these comments more explicitly in a passage found nine pages after the one relied on by the Respondent for the opposite proposition:

> Senator Greene: On the same point, is there any reason why the catch-all phrase in the Bill of Rights, namely, that it takes precedence over any federal legislation unless specifically exempted by Parliament, was omitted? That has been the one useful sledge in the Canadian Bill of Rights to which the courts pay some heed.

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[8] *Supra* fn 4, at p. 2976.

[9] *Minutes of Proceedings of the Standing Committee on Justice and Legal Affairs*, 30th Parl, 2nd Sess, No 11, (17 May 1977) 1976‑1977, pp. 11:28-11:29

[10] *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 SCR 566, at para. 19

[11] *Supra* fn 9, at p. 11:29. See also Minister Beresford's answer to a question about why no such clause was included: "Oh, as really being unnecessary and not adding anything. The legislation as drawn obviously supercedes any previous federal legislation in this area. If you add a primacy clause you can pass another act that is paramount to it. Legally and in terms of Parliament I do not think it adds anything. It is possibly a nice declaration but it does not add anything to the law" [*Ibid*. at p. 11:48].

> Mr. Strayer: The legislation, of course, would have precedence over any prior legislation. I am told that one creates a whole range of new problems if one keeps proliferating that kind of provision in various pieces of legislation, because one does not know what takes precedence over what … This legislation, of course, will override any prior acts. It also means that in future the Parliament of Canada will have to keep this legislation in mind and take deliberate care not to override it.[12]

19. As Mr. Strayer's comments indicate, the Bill's sponsors, in Committee, likewise also set out point (c), that the *CHRA* was intended to override legislation. Mr. Strayer's comment about the paramountcy effect of the *CHRA* was thus made to support point (c). But, point (c) was put forward in other ways. For instance, in his same speech, Mr. Strayer advised that the Department was not aware of any "federal laws" that conflicted with the *CHRA*, while admitting that "[w]e recognize that unforeseen events may take place [and] [t]here may be some sections of some acts which, when considered in the light of this legislation, will be found to be in some way in conflict".[13] Commenting on the CHRC's pro-active power to "review any regulations, rules, orders *etc*." (cl. 22, now s. 27(1)(g) of the *CHRA*), Mr. Strayer added that the Minister might consider a systematic survey of "federal legislation", while reassuring the Senators that, even if it does not, legislation can be attacked by way of complaint:

> It is fair to observe, however, that as soon as this act is passed **all other acts are at the mercy of this act, and if there are things going on under those other acts in contravention of this act, it is open to anyone to bring a complaint to the commission**…[14]

20. Relatedly, after answering a few questions at the House Committee concerning the difference between the *CHRA* and the *Bill of Rights*, Minister Basford turned to Prof. Tarnopolsky. Prof. Tarnopolsky stated that the way to understand the *CHRA* as against the *Bill of Rights* was to observe that: (1) similar "equality" language in the *Bill of Rights* had, by 1977, been interpreted narrowly by the Supreme Court as meaning equality of process before the courts; (2) the *CHRA* was legislating a broader substantive definition of discrimination than this Court had previously outlined; and, therefore, (3) a different and perhaps hoped-for outcome

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12 *Proceedings of the Standing Senate Committee of Legal and Constitutional Affairs,* 30th Parl, 2nd Sess, No. 5 (21 June 1977), 1976‑1977, pp. 5:34-5:35

13 *Ibid.* at p. 5:33

14 *Ibid* at p. 5:35 [Emphasis Added]

consistent with equality norms would result if the *CHRA* were passed.[15] The three cases cited by Prof. Tarnopolsky, *Drybones*, *Lavell*, and *Canard*, were applications to declare legislation inoperative (ironically, the *Indian Act*), with *Drybones* the only successful challenge.[16]

21. All told, insofar as the legislative debates in 1977 shed some light on the question to be decided on the appeal, they: (1) point exclusively to a commitment to the broadest application of human rights norms to public action akin to the scope and reach of the international instruments cited in support; (2) specifically outline that the *CHRA* is to take precedence over all legislation without requiring an explicit "paramountcy clause"; (3) provide that cl. 2 (s. 2) is to be used to interpret the *CHRA*, including in a way as to promote its primacy; and, (4) contain explicit language from three leading jurists that a person can challenge a law on discrimination grounds and that Parliament will in future have to respect the *CHRA* in drafting legislation.

C. Human Rights Tribunals Offer Different Substantive Discrimination Protections

22. While the debate in the case at bar has focused extensively on the different procedural advantages offered by the CHRC/CHRT process (vs. courts), one must not lose sight of the fact that, if the CHRT is denied the ability to scrutinize legislation against *CHRA* standards, complainants will be denied a different substantive test of discrimination. Frankly, attempts to deny the CHRT the power to review legislation against the different *CHRA* discrimination test smack not of some altruistic desire to "get the jurisdiction right" but to convey claimants to courts where a very different, challenging, and (what Ms Zulkoskey will argue) inappropriate non-pluralist standard of discrimination will be employed. Using challenges to the *EI Act* as an example, government has fared quite well on s. 15 challenges to that statute while similar discrimination challenges at the CHRT, employing a different discrimination test, have resulted in findings that this statute discriminates.[17]

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[15] *Supra* fn 9, at pp. 11:34-11:36.

[16] *The Queen v. Drybones*, [1970] S.C.R. 282; *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349; and, *Attorney General of Canada et al. v. Canard*, [1976] 1 S.C.R. 170.

[17] *Cf* failed challenges launched by women in *Canada (Attorney General) v. Lesiuk*, 2003 FCA 3, *Manoli v. Canada (Employment Insurance Commission)*, 2005 FCA 178, and *Perigny v. Canada (Attorney General)*, 2003 FCA 94. Compare *McAllister-Windsor v. Canada (Human Resources Development)*, 2001 CanLII 20691 (CHRT).

23. The *Charter* and the *CHRA* tests for discrimination are fundamentally different and provide avenues for different litigants to bring claims. The *Charter* s. 15(1) test, as elaborated in *Law* and *Kapp*, places a significant onus on a claimant to show that an impugned provision perpetuates prejudice or stereotyping. The *CHRA* test is different in two fundamental respects.[18] First, the onus is on the Respondent to prove that a *prima facie* discriminatory distinction is not discriminatory. Second, while s. 15(1) looks at legislation as a whole to see if it perpetuates negative stereotypes or prejudice, the *CHRA* test (often called the "*Meiorin*" test) asks whether the distinction is necessary or whether the law's purposes can be accomplished, to the point of undue hardship, without utilizing the objectionable marker of discrimination.

24. A complete analysis and demonstration of the distinction between the two tests is contained in an authoritative article written by one of Canada's leading discrimination law scholars, Denise Réaume.[19] In her article, Prof. Réaume surveys the development of the s. 15(1) test, compares it to the *CHRA* test developed by the Supreme Court, and concludes that the two are fundamentally different, for the reasons stated above: overall "the section 15 test … results in a narrower conception of discrimination than the code conception."[20]

25. The differing tests have real impacts on claimants and their ability to bring forward discrimination claims. In the Federal Court of Appeal in *Martin*, which dealt with the constitutionality of the provision of *EI Act* benefits to parents of multiples, the Court found that the differential impact of the impugned provisions was not something that adversely affected a

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[18] See generally *McAllister-Windsor v. Canada (Human Resources Development)*, *supra*.

[19] D. Réaume, "Defending the Human Rights Codes from the Charter", (2012), 9 J.L. & Equality 67. See also J. Koshan, "Under the influence: Discrimination under human rights legislation and section 15 of the Charter" (2014) 3:1 Can J Hum Rights 115 at pp 139-142 and, for a pluralist account of discrimination, see S. Moreau, "The Wrongs of Unequal Treatment", (2004) U.T.L.J. 291, esp. at p. 294.

[20] Réaume, *supra* fn 19 at p.82. Prof. Réaume adds "To the extent that the post-*Kapp* test confines the definition of discrimination to stereotyping, claims may fail even though it was perfectly feasible to do things in a way that would not have excluded the subset of members of the excluded group … The two tests will produce the same end results … only if we think that there are no cases in which a reasonably accurate generalization – accurate enough not to fall under the Court's conception of stereotype – could nevertheless be avoided without undue hardship. **<u>But there are such cases</u>**…". *Ibid.* at p.82-83 [Emphasis Added]."

group that had suffered from historical disadvantage, stereotyping, or prejudice.[21] Further, the Court held that the *EI Act* provisions, with their differential impact, were simply the product of a line-drawing exercise within a complex regulatory regime, not an attempt to perpetuate prejudice. These were key findings in support of a conclusion that s. 15(1) was not violated.

26. Ms Zulkoskey launched her *CHRA* complaint to have the *EI Act* scrutinized against the different discrimination standard she will argue should rightfully be afforded to her and similar rights-seeking claimants. Ms Zulkoskey should be permitted to test the *EI Act* limitations not against the *Charter* section 15 standard, one that focuses on stereotyping and on historical disadvantage, but, as the *CHRA* jurisprudence requires, on impact and opportunity analyses, and on the actual lack of any discernible reason for the arbitrary impact of the *EI Act.*

27. In short, depriving the CHRT of jurisdiction is not simply a matter of denying complainants with access to a second tribunal that would simply apply the same principles of law. Depriving the CHRT of jurisdiction means depriving the laws of Canada a scrutiny that is, in substance, very different from the type of scrutiny called for under s. 15 of the *Charter*.

PART IV: COSTS

28. Ms Zulkoskey does not seek costs and asks that no order as to costs be made against her.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 1st DAY OF OCTOBER, 2017.

Stephen J. Moreau

Nadia Lambek

[21] *Martin v. Canada (Attorney General),* 2013 FCA 15, at para. 116.

PART V: TABLE OF AUTHORITIES

Cases

Description	Paragraph in Factum
Attorney General of Canada et al. v. Canard, [1976] 1 S.C.R. 170	20
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