Canadian human rights commission | Commission canadienne des droits de la personne

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November 7, 2016

Roger Bilodeau, Q.C.
Registrar
SUPREME COURT OF CANADA
301 Wellington Street
Ottawa, Ontario
K1A 0J1

Liliane Bantourakis &
Josef Rosenthal
Department of Justice Canada
900 – 840 Howe Street
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Dear Registrar and Counsel:

Re: Canadian Human Rights Commission v. Attorney General of Canada (37208)
Application for Leave to Appeal ~ Letter Reply of the Commission

Further to Rule 28(2) of the *Rules of the Supreme Court of Canada*, we ask that the Court please accept this letter for filing as the Applicant Canadian Human Rights Commission's reply to the Respondent Attorney General of Canada's Memorandum of Argument in response to the application for leave to appeal.

The Commission argues that leave to appeal is warranted, in part, because this Court's guidance is needed to reconcile different approaches taken across jurisdictions on an important question – namely, whether government actors provide "services" when carrying out steps required by legislation governing access to benefits.

In paragraph 42 of its Memorandum, the Respondent denies that different jurisdictions have reached different results that call out for this Court's consideration. The Commission has two brief points to make in reply.

First, in its footnote 43, the Respondent suggests that because *Canada (Attorney General) v. Druken*[1] is no longer good law at the federal level, a series of provincial cases that have cited *Druken* "...should similarly not be considered good law." The Commission does not agree that these provincial authorities are now bad law, simply because one of the non-binding federal cases they cited has been overturned. To the contrary, to the Commission's knowledge, all these provincial decisions remain good law in their respective jurisdictions. They continue to

[1] *Canada (Attorney General) v. Druken*, [1989] 2 FC 24 (C.A.) (Tab 7 in the Commission's Book of Authorities).

demonstrate the contrasting approaches across jurisdictions that the Commission respectfully asks this Court to reconcile.

Second, in its footnote 44, the Respondent cites *Mishibinijima v. Canada (Attorney General)*[2], and suggests that Ontario human rights cases are distinguishable, because the Ontario *Human Rights Code* contains an express primacy provision, while the *Canadian Human Rights Act* ("*CHRA*") does not. However, where they exist, express primacy provisions are best understood as confirming, rather than creating, the primacy of human rights statutes.

This is evident from the fact that when this Court first declared the presumed primacy of human rights laws – in *Heerspink* and *Craton* – it did so in the context of human rights statutes that did not contain primacy provisions at the material times.[3] It is also evident from the fact that the *CHRA* contains no express privacy provision, but has still been recognized by this Court as a quasi-constitutional enactment that prevails over other legislation, in the absence of a clear legislative statement to the contrary.[4]

Indeed, the decisions below in this matter -- the Tribunal, Federal Court and Federal Court of Appeal -- have all accepted that the *CHRA* does have primacy, and can prevail over inconsistent legislation, where the underlying complaint properly relates to a discriminatory practice under the *Code*.[5] They have all done so, despite the absence of an express primacy clause.

Bearing all this in mind, contrary to the *obiter* suggestions in *Mishibinijima*, the absence of a primacy clause does not provide a compelling basis for distinguishing Ontario cases that have reached different results on the "services" question than the decision-makers below. This Court's guidance is still needed to reconcile the conflicting approaches.

For these and all the other reasons identified in its Application materials, the Commission respectfully asks that this Court grant its application for leave to appeal.

Yours truly,

Brian Smith
Counsel

cc. Christopher Rupar (Agent for the Respondent Attorney General of Canada, by fax)

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[2] *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

[3] See the Commission's Memorandum of Argument at para. 37 and footnote 55 (AR, Tab 6, p. 211), referring to *Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145 (re British Columbia); and *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150 (re Manitoba) (Tabs 23 and 41, respectively, in the Commission's Book of Authorities).

[4] See the Commission's Memorandum of Argument at para. 37 and footnote 54 (AR, Tab 6, p. 211), citing, among other things, *C.N.R. v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114; and *Canada (House of Commons) v. Vaid*, 2005 SCC 30 (Tabs 14 and 12 in the Commission's Book of Authorities).

[5] See paras. 19 and 24 of the Commission's Memorandum of Argument, summarizing the findings in the decisions below (AR, Tab 6, pp. 6 and 9).