September 2nd, 2009

Post-Kapp Decision May Indicate the Way Discrimination will be Determined in Human Rights Cases

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Cases Considered:

Van Der Smit v. Alberta (Human Rights and Citizenship Commission), 2009 ABQB 121

In the past few years, the application to human rights legislation of precedents established under *Canadian Charter of Rights and Freedoms* s. 15(1), which set out how a court is to determine whether a claimant has experienced discrimination, was an issue in many Canadian jurisdictions, including Alberta. The issue became more important, when in *R. v. Kapp*, 2008 SCC 41, the Supreme Court of Canada appeared to re-state (and perhaps even re-formulate) the test from *Law v. Canada*, [1999] 1 S.C.R. 497, which had been the precedent courts relied on for several years. There are several posts written by ABlawg contributors about the *Kapp* decision and those which have followed. See, for example: Jonnette Watson Hamilton and Jennifer Koshan, The End of Law: A New Framework for Analyzing Section 15(1) Charter Challenges.

It is important to keep in mind that before *Kapp*, the Alberta Human Rights and Citizenship Commission ("Commission") and Alberta courts in human rights cases had sometimes followed the "*Law* test" and at other times had used a test for discrimination more akin to the one laid down in *Andrews v. Law Society of Alberta*, [1989] 1 S.C.R. 143. For example, in *Gwinner v. Alberta (Human Resources and Employment)* 2002 ABQB 685, affirmed 2004 ABCA 210, Justice Sheila Greckol applied the *Law* test to find that the Alberta *Widow's Pension Act*, R.S.A. 2000, c. W-7 discriminated against divorced, single and separated individuals in the area of services customarily available to the public on the basis of marital status. (The discrimination against single individuals was found to be reasonable and justifiable using a *Charter* s. 1 analysis). In commenting on this decision, some concluded that the *Law* test was appropriate in determining whether government legislation was discriminatory, but that it was not appropriate when dealing with non-government respondents under human rights legislation, such as private individuals and companies. However, there was no definite and predictable choice to apply (or not apply) the *Law* discrimination test in human rights decisions across Canada. See my post Human Rights Panel Faced with Mandatory Retirement (Again).

Now that we may safely conclude that courts have relegated the *Law* test and its focus on human dignity to the back burner, will human rights decision-makers apply the modified or restated test set down in *Kapp*? The decision of the Alberta Court of Queen's Bench in *Van Der Smit v.*

Alberta (Human Rights Commission), 2009 ABQB 121 may provide some indication as to what will occur in Alberta.

Nico van der Smit complained to the Commission against Alberta Milk, alleging that Alberta Milk discriminated against him under the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14 ("*HRCMA*") s. 4(b). According to van der Smit, the discrimination occurred when Alberta Milk required him to allow milk to be picked up from his property on Sundays, which he claimed is contrary to his religious beliefs. The Commission dismissed his complaint, noting that:

- van der Smit was a dairy farmer by choice;
- he knew that there would be Sunday pickup when he purchased the farm;
- milking and feeding cows had to be done on Sundays;
- Alberta Milk had attempted to avoid discrimination and treated all producers on an individual basis;
- different milk pick up schedules in Ontario and British Columbia were based on different geographical and population characteristics; and
- accommodating no Sunday pick up would be forcing his religious principles on others.

The Commission did not outline which test it applied in coming to the conclusion there was no discrimination.

Van der Smit applied to the Alberta Court of Queen's Bench for judicial review. The reviewing justice, Justice Sal J. LoVecchio, held that in determining whether there is *prima facie* discrimination and whether the discrimination is reasonable and justifiable, the appropriate standard of review was correctness. Justice LoVecchio discussed the *Law* test and the *Kapp* case and, appearing to rely more on the latter, determined that the proper process for determining discrimination under human rights cases is (at paras. 55 and 62):

1) Identify an appropriate comparator group;
2) Examine whether there is a distinction based on an enumerated or analogous ground;
3) Determine whether the distinction creates a disadvantage by perpetuating prejudice or stereotyping.

At paras. 63-4, Justice LoVecchio determined that the appropriate comparator group was all dairy farmers who, unlike van der Smit, do not believe their religion prohibits them from having milk picked up from their property on Sundays. In examining whether there was a distinction based on an enumerated or analogous ground, Justice LoVecchio determined that there was a distinction based on religious beliefs. In considering whether the distinction created a disadvantage, Justice LoVecchio concluded that there was a disadvantage to van der Smit as the requirement to choose between a loss of revenue ($60,000 per year if he dumped all milk scheduled for Sunday pickup) and his religious beliefs, imposed a burden on him. Although van der Smit had not shown how the disadvantage related to any prejudice or stereotyping, Justice

LoVecchio held that it was open for the Court to take judicial notice there was discrimination if the distinction is based on an enumerated ground. Thus, he concluded that a *prima facie* case of discrimination had been made out.

In determining whether Alberta Milk had nevertheless shown that the *prima facie* discrimination was reasonable and justifiable in the circumstances, Justice LoVecchio followed the three step test set down in *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union*, [1999] 3 S.C.R. 3 ("*Meiorin*"). The parties agreed that the first two steps in the *Meiorin* test were met. First, the schedule for milk pick up on Sunday was rationally connected to Alberta Milk's mandate and the law that required bulk milk tanks to be emptied every two days. Second, the pick up schedule was adopted in good faith in order to increase the efficiency and decrease costs in Alberta's milk industry. Justice LoVecchio noted that in the third step of the analysis, the respondent must show that accommodation of all individuals sharing the characteristics of the complainant would be impossible without imposing undue hardship on the employer. In this case, there were a total 24 milk producers who had approached Alberta Milk objecting to Sunday pick ups. Evidence provided by Alberta Milk indicated that any alternatives to Sunday pick ups would have significant impacts on milk haulers, processors, other producers in the area, Alberta Milk staff and other producers on "no Sunday" pick up routes. A study conducted by Alberta Milk indicated that the additional costs of accommodation of the 24 producers would be about $8,800 per week. In addition, the Court was presented with evidence that at the time of the hearing, there were 60 producers who would want no Sunday pick up. Further, the solution posed by van der Smit —allowing pick up beyond the two day requirement—would cause unacceptable health and quality concerns.

Thus, Justice LoVecchio concluded that accommodating the "no Sunday" pick up request would cause undue hardship to Alberta Milk. The Court of Queen's Bench agreed with the Commission in the result, but not in its findings regarding discrimination. Of perhaps more interest is the Court's use of the *Kapp* test in its analysis of discrimination. Unfortunately, the Commission did not indicate what test it had used, and, as a result, one cannot conclude that different tests of discrimination were responsible for the differing results on that issue. It will be interesting to see if relying on the *Kapp* test for discrimination will be the norm for all human rights cases.