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Human Rights Panel Faced with Mandatory Retirement (Again)

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Cases Considered:

Webber v. Canadian Forest Products Ltd. (Alta. H.R.P.; May 30, 2008) (Brenda F. Scragg, Panel Chair)

Although this case deals with a legal issue that is far from new, there are a couple of significant developments regarding mandatory retirement and discrimination. Mr. Webber had worked for Canadian Forest Products Ltd. ("Canfor") in a mill for over 24 years before retiring on October 29, 2004 at age 65, because he was subject to a long-standing mandatory retirement policy. Not wanting to retire, he had requested but been denied an extension. Although Mr. Webber was a member of a union, he did not file a grievance, but instead, on the advice of his union, on October 18, 2004, filed a complaint with the Alberta Human Rights and Citizenship Commission ("Commission") under s. 7(1)(a) of the *Human Rights Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14 ("*HRCMA*") for discrimination in the area of employment on the ground of age. As the matter was not resolved at the Commission, the Chief Commissioner ordered a Human Rights Panel ("Panel") to hear the matter.

The issues addressed by the Panel were:

(a) Did Mr. Webber establish that the mandatory retirement policy amounts to a prima facie case of discrimination under s. 7(1)(a) of the *HRCMA*?

(b) If yes, is the mandatory retirement policy reasonable and justifiable under s. 11 of the *HRCMA*?

(c) If yes, what is the appropriate remedy?

In dealing with whether Mr. Webber had established a *prima facie* case of discrimination, a key issue was: What must be proved in order to establish discrimination? This necessitated that the Panel decide which test of discrimination should be applied in the case. The issue has actually become quite contentious. Most provincial and federal human rights legislation does not define "discrimination". Consequently, human rights commissions turn to definitions established in legal decisions. For many years, Commissions followed the definition in *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, at p. 551. In fact, the Alberta Commission publishes an information sheet that defines discrimination in much the same way as it was defined in the *O'Malley* case:

Discrimination is defined as unjust practice or behaviour, whether intentional or not, based on race, religious beliefs, colour, gender, physical and/or mental disability, marital status, family

status, source of income, age, ancestry, place of origin or sexual orientation and which has a negative effect on any individual or group (Stereotyping, Prejudice and Discrimination).

However, because of a subsequent Supreme Court of Canada decision (*Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 ("*Law* test")) dealing with discrimination under the *Canadian Charter of Rights and Freedoms* ("*Charter*"), s. 15(1), some Commissions and courts have been applying a more complex definition of discrimination, even in the context of human rights decisions. The *Law* test is provided at the end of this post.

Lower courts and human rights commissions across Canada are divided on whether or when the *Law* test should be applied in human rights cases. Several academics and advocates have argued that the *Law* test should not be imported into the statutory human rights context. In addition to being very complex, it is said to undermine a substantive approach to anti-discrimination (see: Karen Schucher and Judith Keene, L.E.A.F., *Statutory Human Rights and Substantive Equality - Why and How to Avoid the Injury of the Law Approach*, March 5, 2007). Schucher and Keene note that although human rights statutes and *Charter* s. 15(1) may share the same goal of eliminating social inequality, "there are significant differences in context, legal principles, legal status and structure between human rights statutes and the Constitution" (at p. 1). On 2 occasions, the Supreme Court of Canada has denied leave to appeal in cases where the Court would have been asked to address the issue of whether the *Law* test should be used in the human rights context. Thus, we are left with an uncertain situation.

In the *Webber* case, the Panel decided that the Law test was not required to determine discrimination (at para. 51). In addition, the Panel held that it was bound by the decision of *Dickason v. Governors of University of Alberta and the Alberta Human Rights Commission*, [1992] 2 S.C.R. 1103, in which it was held at para. 59 that "mandatory retirement constitutes prima facie discrimination."

Having found that Mr. Webber had established a *prima facie* case of age discrimination, the Panel next looked at whether Canfor had any available defence. Unlike in some mandatory retirement cases, Canfor did not use *HRCMA* s. 7(3) to argue that its mandatory retirement policy was a *bona fide* (good faith) occupational requirement. However, Canfor did rely upon *HRCMA* s. 11 to argue that the policy was reasonable and justifiable.

> In view (perhaps ironically) of the above criticism of the use of a *Charter*-based test for discrimination, the *Dickason* case directed that a modified s. 1 *Charter* or *Oakes* test be used to analyze whether s. 11 can be used as a defence. So, for s. 11 to apply, the Panel noted at para. 62 that:
> (1) the restriction of the right must be undertaken in the pursuit of a pressing and substantial objective, and;
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> (2) the impugned restrictive measure must be proportional to the pressing and substantial objective as evidenced by the fact it is:
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> > (a) rationally connected to the objective as stated;
> > (b) when viewed objectively, constitutes a minimal impairment of the right being abridged, and;
> > (c) is proportional in its effects.

With regard to the first requirement, the Panel held that Canfor's objectives of the mandatory retirement policy were to uphold the collective bargaining relationship, scheme and values, and to support the prevailing deferred compensation arrangement and hence the collective agreement itself (at para. 66). The Panel found that these objectives were pressing and substantial.

As to the second requirement, Canfor argued that the mandatory retirement policy was part of a complex and carefully negotiated group of commitments that comprised the final bargain, and that mandatory retirement formed a key element of the compensation package. The Panel found that the mandatory retirement age of 65 was determined by default and that there was no logical or economically-based thought process in deciding to end the contract at age 65. The Panel distinguished the *Dickason* case because its context was the academic university environment, rather than the setting where Mr. Webber worked. In addition, in the time that had elapsed since *Dickason*, legislatures had moved away from mandatory retirement and businesses had continued to thrive (at para. 75). Thus, the Panel found the mandatory retirement policy was not rationally connected to the objectives as stated.

In addition, although it was not necessary, the Panel found that the mandatory retirement policy, viewed objectively, could not be found to constitute only a minimal impairment on the right being abridged. Further, the effects of the mandatory retirement policy, both general and specific, did not support the conclusion that they were proportional to the objectives or the effects of the policy, both deleterious and salutary.

In concluding that Mr. Webber was discriminated against in the application of the mandatory retirement policy, and that Canfor had failed to establish that the policy was reasonable and justifiable under s. 11 of the *HRCMA*, the Panel held that the appropriate remedy would be decided at a future hearing.

This case illustrates that a well-litigated issue can sometimes be dealt with in a new way given the appropriate context. And, as emphasized by many courts, with human rights cases, the decision-maker must always perform a contextual analysis.

> Below are excerpts of the *Law* Test (from para. 88 of that case):
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> General Approach
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> (1) It is inappropriate to attempt to confine analysis under s. 15(1) of the *Charter* to a fixed and limited formula. A purposive and contextual approach to discrimination analysis is to be preferred, in order to permit the realization of the strong remedial purpose of the equality guarantee, and to avoid the pitfalls of a formalistic or mechanical approach.
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> (2) The approach adopted and regularly applied by this Court to the interpretation of s. 15(1) focuses upon three central issues:
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> > (A) whether a law imposes differential treatment between the claimant and others, in purpose or effect;
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> > (B) whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment; and

> (C) whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee.

The first issue is concerned with the question of whether the law causes differential treatment. The second and third issues are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by s. 15(1).

(3) Accordingly, a court that is called upon to determine a discrimination claim under s. 15(1) should make the following three broad inquiries:

> (A) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
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> (B) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds? and
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> (C) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

Purpose

(4) In general terms, the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

(5) The existence of a conflict between the purpose or effect of an impugned law and the purpose of s. 15(1) is essential in order to found a discrimination claim. The determination of whether such a conflict exists is to be made through an analysis of the full context surrounding the claim and the claimant.

Comparative Approach

(6) The equality guarantee is a comparative concept, which ultimately requires a court to establish one or more relevant comparators. The claimant generally chooses the person, group, or groups with whom he or she wishes to be compared for the purpose of the discrimination inquiry. However, where the claimant's

characterization of the comparison is insufficient, a court may, within the scope of the ground or grounds pleaded, refine the comparison presented by the claimant where warranted. Locating the relevant comparison group requires an examination of the subject-matter of the legislation and its effects, as well as a full appreciation of context.

Context

(7) The contextual factors which determine whether legislation has the effect of demeaning a claimant's dignity must be construed and examined from the perspective of the claimant. The focus of the inquiry is both subjective and objective. The relevant point of view is that of the reasonable person, in circumstances similar to those of the claimant, who takes into account the contextual factors relevant to the claim.

(8) There is a variety of factors which may be referred to by a s. 15(1) claimant in order to demonstrate that legislation demeans his or her dignity. The list of factors is not closed. Guidance as to these factors may be found in the jurisprudence of this Court, and by analogy to recognized factors.

(9) Some important contextual factors influencing the determination of whether s. 15(1) has been infringed are, among others:

> (A) Pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue. The effects of a law as they relate to the important purpose of s. 15(1) in protecting individuals or groups who are vulnerable, disadvantaged, or members of "discrete and insular minorities" should always be a central consideration. Although the claimant's association with a historically more advantaged or disadvantaged group or groups is not per se determinative of an infringement, the existence of these pre-existing factors will favour a finding that s. 15(1) has been infringed.
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> (B) The correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others. Although the mere fact that the impugned legislation takes into account the claimant's traits or circumstances will not necessarily be sufficient to defeat a s. 15(1) claim, it will generally be more difficult to establish discrimination to the extent that the law takes into account the claimant's actual situation in a manner that respects his or her value as a human being or member of Canadian society, and less difficult to do so where the law fails to take into account the claimant's actual situation.
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> (C) The ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society. An ameliorative purpose or effect which accords with the purpose of s. 15(1) of the *Charter* will likely not violate the human dignity of more

> advantaged individuals where the exclusion of these more advantaged individuals largely corresponds to the greater need or the different circumstances experienced by the disadvantaged group being targeted by the legislation. This factor is more relevant where the s. 15(1) claim is brought by a more advantaged member of society.
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> and
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> (D) The nature and scope of the interest affected by the impugned law. The more severe and localized the consequences of the legislation for the affected group, the more likely that the differential treatment responsible for these consequences is discriminatory within the meaning of s. 15(1).

(10) Although the s. 15(1) claimant bears the onus of establishing an infringement of his or her equality rights in a purposive sense through reference to one or more contextual factors, it is not necessarily the case that the claimant must adduce evidence in order to show a violation of human dignity or freedom. Frequently, where differential treatment is based on one or more enumerated or analogous grounds, this will be sufficient to found an infringement of s. 15(1) in the sense that it will be evident on the basis of judicial notice and logical reasoning that the distinction is discriminatory within the meaning of the provision.