TD-6/83
Decision rendered on April 8, 1983

THE CANADIAN HUMAN RIGHTS ACT
HUMAN RIGHTS TRIBUNAL

BETWEEN:
THE CANADIAN HUMAN RIGHTS COMMISSION
COMPLAINANT
AND:
CANADIAN PACIFIC AIRLINES LIMITED
RESPONDENT

DECISION OF THE TRIBUNAL
BEFORE: BRYAN WILLIAMS, Q.C.
Appearances:
Hélène LeBel Counsel for the Canadian
Human Rights Commission

Norman D. Mullins, Q.C. Counsel for Canadian
Pacific Airlines Limited

Dates of Hearing: January 12, 1982 and
September 30, 1982

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AWARD
Introduction:
I was appointed under the Canadian Human Rights Act, s.39, as a Human Rights Tribunal to inquire into a complaint of the Canadian Human Rights Commission against Canadian Pacific Airlines Limited and to determine whether the actions complained of constituted a discriminatory practice under s.10 of the Canadian Human Rights Act.

Following my appointment on the 17th of April, 1980, (c.1), a resolution was signed June 18, 1980, recording the existence of a meeting which took place on the 18th/19th of March, 1980. That resolution recites the fact that neither the Complainant, who had

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filed a complaint on behalf of another wishing to remain anonymous, nor the anonymous victim were interested in pursuing the claim. It was therefore resolved by the Commission that it would itself initiate a complaint that Canadian Pacific Airlines Limited by hiring the children of employees for summer work in preference over others was engaging in a discriminatory practice on the basis of "situation de famille" contrary to ss.7 and 10 of the Canadian Human Rights Act.

A complaint form dated April 17, 1980, and apparently signed by Gordon Fairweather as Complainant states "preference is given for summer employment to children of Canadian Pacific Airlines Limited

employees". It alleged that Canadian Pacific Airlines Limited "is engaged or has been engaged in a discriminatory practice on or about April 17, 1980". Exhibit C-4 which bears the date July 27, 1981, says "that Canadian Pacific Airlines Limited gives preference to relatives of the Company's employees when hiring for summer employment" on or about April 17, 1980.

Canadian Pacific challenged my jurisdiction to hear the complaint of the Human Rights Commission through an application to the Federal Court, under s.18 of the Federal Court Act.

That motion was dismissed by the Court on September 8, 1980. The Judgment of the Trial Division was upheld by the Federal Court of Appeal in a Judgment, June 11, 1981.

Preliminary Objections
The first day of hearings before me took place on the 12th of January, 1982, at which time Mr. Mullins on behalf of Canadian Pacific Airlines Limited raised a number of preliminary objections.

The first objection was that the letter of appointment is deficient in English. Mr. Mullins concedes that it is perfectly valid in the French version but not in the English version because the words "Human Rights Tribunal" had been left out.

I saw no merit in the objection and dismissed it on the basis that the statute, read in both language versions and taken as a whole, left little doubt of the legislative intent. My appointment was valid as a Human Rights Tribunal.

The second objection was that the Act does not give the Commission specific authority to hire counsel from private practice to act for it on enquiries. Mr. Mullins conceded they could have in-house counsel but not counsel from private practice, unless specifically authorized by the Act.

I saw even less merit in this objection than the first and therefore dismissed it, also.

Thirdly, Mr. Mullins objected to my jurisdiction on the grounds that Exhibit C-4 dated July, 1980, was a complaint filed by Gordon Fairweather after my appointment in April of that same year. This was not in keeping with the words of s.39(1):

The Commission may at any stage after the filing of a complaint appoint a Human Rights Tribunal...

Accordingly, since no reappointment was made after the July complaint, Mr. Mullins agrued that I have no jurisdiction to investigate that complaint at all. And as a corollary to the third objection, Mr. Mullen raises a fourth objection, which is that the

notice required pursuant to s.40 of the Act from the Tribunal deals only with the April complaint and not the July complaint. Ms. LeBel argues that c.4 is nothing more than an amendment to the original complaint and that she so advised Mr. Mullins in September, 1980. Mr. Mullins replied that the amendments were not consistent with the Resolution.

My jurisdiction was challenged in yet another objection by Mr. Mullins on the ground that my investigation is limited to s.10, which reads as follows:

It is a discriminatory practice for an employer or an employee organization

(a) to establish or pursue a policy or practice, or
(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or
any other matter relating to employment or prospective employment,

that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

And under s.32(5):
No complaint in relation to a discriminatory practice may be dealt with by the Commission under this Part unless the act or omission that constitutes the practice

(a) occurred in Canada and the victim of the practice was at the time of such act or omission either lawfully present in Canada or, if temporarily absent from Canada, entitled to return to Canada;

(b) occurred outside Canada and the victim of the practice was at the time of such act or omission a Canadian citizen or an individual admitted to Canada for permanent residence; or

(c) occurred in Canada and was a discriminatory practice within the meaning of section 8, 12 or 13 in respect of which no particular individual is identifiable as the victim.

Mr. Mullins says that since 10 is not one of the enumerated paragraphs in (c) and because there is no evidence this took place outside of Canada, we are left with (a), involving a victim. Because the actual "victim" wished to remain anonymous and filed through a complainant, and because the complainant did not wish to proceed then no victim exists under (a) and accordingly, the Commission could not even deal with the complaint.

In addition, Mr. Mullins raises the issue of status and argues no determination has been made as to whether or not the matter occurred in Canada.

In the light of these objections, the hearing was adjourned sine die, to be reconvened when counsel for the Commission had had an opportunity to reconsider on what basis, if any, the Commission would be proceeding.

The matter came on again for hearing on September 30, 1982. Ms. LeBel, on behalf of the Commission, advised that she would not be proceeding on Exhibit C-4 but rather on C-3, the April complaint. That left for determination only the issues (a) that this complaint was not one with which the Commission could deal because it did not fit within any of the categories of s.32. Firstly, that there was no identified victim, secondly, s.10 was not one of the sections mentioned in s.32; and (b) that there was no proof that the matter had taken place in Canada.

By agreement of counsel, my ruling on these questions was reserved until after all evidence was called.

FACTS
Exhibit C-6, which was filed on September 30 and signed by both Counsel, reads as follows:

Canadian Pacific Air Lines, Ltd. admits for the purposes of the enquiry into the complaint (Ex. C-3) that on or about April 17, 1980, preference was given for summer employment to children of C.P. Air Ltd. employees.

Exhibit C-7, the C.P. Air application for employment says, about half way down p.1:

Relatives in the employ of CP organization
Names - Department - Relationship

Exhibits 8 and 9 were both objected to by Mr. Mullins on the grounds that their dates (April 3 and May 29, 1979, respectively) put them outside the period of time when the complaint alleges that C.P. Air exercised its policy of preferential treatment for children of C.P. Air employees. These documents may not constitute conclusive evidence of the Company's policy in April of 1980 but they do, as argued by Ms. LeBel, shed some light on the Company's past practice and, coupled with other evidence, may well be relevant to the issue before me. I accordingly rule that these two letters (Exhibits C-8 and C-9) which were admittedly written by the Company, were relevant and therefore, admissable. The relevant portion of C-8 reads as follows:

Normally, we have very few summer positions available and our Company follows a practice of giving preference to

the sons and daughters of employees, particularly where such assistance is required to enable them to further their education.... Under these circumstances it is difficult for us to be encouraging about the possibility of placement and we believe that you would prefer to know at this time in order that you may plan accordingly.

C-9, addressed to one Postlethwaite, is similar. It says:
... applicants are considered for vacancies in the following order:

(a) applicants who have previously worked for C.P. Air and whose services were satisfactory,

(b) sons and daughters of employees attending university,

(c) sons and daughters of employees who have graduated from high school,

(d) sons and daughters of employees who are attending high school... other applicants... believe that you would prefer to know the actual situation so that you can adjust your plans accordingly.

It was the evidence of Martha Hynna, Secretary-General of the Human Rights Commission, that as of 1980, there were no victims who were actually identified in respect of the C.P. Air policy.

POSITION OF THE PARTIES

A. On Preliminary Matters

In brief, it is the position of the Company that the Canadian Human Rights Act is one which purports to take away the rights of Canadian companies and individuals by new and specific prohibitions upon their conduct and practices. The sanctions provided for in the statute can result in serious consequences upon those who are found to have contravened the statute. Under these circumstances, it is the Company's contention that the statute is penal or quasi-penal in nature and must, accordingly, be strictly interpreted. Imperfect compliance by the Commission is to be treated in the same sense as imperfect compliance by the Crown under the Criminal Code and must, therefore, result in a complaint dismissal unless all procedural sections of the Act have been strictly complied with, and the discrimination is one which falls squarely within the prohibited grounds.

The Commission contends - again, in brief summary - that the Human Rights Tribunal is essentially an administrative tribunal though performing a quasi-judicial function. Its powers are analogous to those of a labour relations board, charged with the responsibility of inquiring into a complaint. And that, far from a strict interpretation, the Tribunal should give a broad and liberal interpretation to the statute. The purposes of

the Act can only be achieved by taking the broad rather than narrow approach in interpretation.

B. On The Merits

Since there is no issue on the facts, and it is clear that C.P. air gave summer employment preference to the children of its employees, the only question is whether that practice amounts to discrimination based on "marital status" (English version) or "la situation de famille" (French version).

Ms. LeBel, on behalf of the Commission, advanced an able argument predicated in part upon her view that the statute must not be interpreted restrictively but that, in keeping with the spirit of the Act, undesirable discriminatory practices which are arguably within the prohibited grounds, should be so found.

The Commission argues that the use of the words "situation de famille" evidences an intention of Parliament to prohibit discrimination based upon an individual's status as a member of the family. Were this not the case, she argues that the phrase in the New Brunswick Act "état matrimonial" would surely have been used.

The Commission recites the provisions of the Official Languages Act. ss.8(1) and 8(2) (See Appendix) to the effect that equal status and equal rights and privileges must be accorded Canada's two official languages.

The Commission further analyzes the specific provisions of the various Human Rights statutes across Canada and argues (though in my view not persuasively) that the results of that analysis support the Commission's position that the broader French version should be applied over the narrower English one.

Ms. LeBel cites, inter alia, the case, La Commission des Droites de la Personne du Québec c. Les Biscuits Associés du Canada Ltée., et sa Division Biscuits David et Fernande Martel, (1979) C.S. 532, applying the phrase in the Quebec statute "civil status". This case involves the question of whether a sister was within the Quebec Charter of Human Rights and Freedoms within the phrase "civil status" (English version), "l'état civil" (French version). In arriving at its conclusion, the Court reviewed a number of authorities to the effect that civil status is "the legal personality of an individual, i.e. which determine an individual's social position within the family and with society". This broad interpretation obviously includes position within the family and the phrase there used is "situation de famille" as one included within that definition. Finally, Ms. LeBel relies heavily on Arsenault et al v International Longshoremens' Association Local 375 and Maritime Employers' Association, July 19, 1982, a decision of the Canada Labour Relations Board (Claude H. Foisy, Paul-Emile Chaisson and Nicole Kean). In that case, the Longshoremens' Union which, on the findings of the Board, controlled employment on the waterfront passed a resolution to the effect that membership in the Union (and therefore, access to employment in that trade) would be

given in preference to certain relatives of members in good standing.

While the Board was dealing with specific provisions of the Canada Labour Code, it did decide that, in interpreting the Human Rights Code, the French version "la situation de famille" should be preferred over the English ("marital status") in determining what the head of discrimination really was.

The Company argues that the narrower interpretation should be adopted in respect of what is and what is not included within the prohibited grounds and that the narrower of the two, "marital status", should be viewed with greater force.

Mr. Mullins agreed with Ms. LeBel that both versions must be looked at with equal weight in determining Parliament's intention but he contends that when that exercise is done, it will be seen that the only sensible interpretation would be to construe "la situation de famille" to mean, as it is defined in Collins-Robert French/English Dictionary, 1978, marital status. The quote from that Dictionary

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is as follows:
Situation (emplacement) situation, position, location,...de famille - marital status (p.623)

marital adj. (a) problems matrimonial; ... status - situation de famille

He argues further that, in a number of cases, St. Paul's Roman Catholic Separate School District No. 20, (1982) 131 D.L.R., p.739, Re Caldwell & Stewart, (1982) 132 D.L.R., p.79 (B.C.C.A.) and Air Canada v Bane, (1982) 40 N.R. 481 (Federal Court of Appeal), the effect is to clearly demonstrate that marital status is not extended beyond the dictionary definition which I shall summarize as "of or pertaining to marriage". He argues further that the word "famille", as defined by the French dictionaries, is open to

numerous interpretations, one of which includes the servants and another, the animals in a household.

Finally, and most persuasively, the Company argues on the basis of Food Machinery Corp. v Registrar of Trademarks, (1946) 2 D.L.R. 258 (Thorson, P.), R. v O'Donnell, (1979) 1 W.W.R. 385 (B.C.C.A.) and The King v DuBois, (1935) S.C.R. 378 and Reg. v Govedarov, (1974) 3 O.R. 23 (O.C. of A.) and Cardinal v The Queen, (1981) F.C. 149 (Federal Court) that that interpretation which gives common meaning in each language should be preferred over the interpretation which does not.

On the 28th of January, 1983, after arguments had been submitted but before this decision, Mr. Mullins wrote to advise me that certain amendments had been proposed in the House of Commons, Bill C-141, to amend the Canadian Human Rights Act in several respects

which bear upon the issues I am called upon to decide. Those are set forth in his letter and they deal with amendments to the French version ("la situation de famille") and the expansion of the grounds of discrimination. Ms. LeBel, in a letter to me of February 3, expressed her astonishment and disapproval of Mr. Mullins' tactics in forwarding such a letter after argument had closed but then went on to describe how those proposed amendments supported the contention of the Commission.

I do not consider it improper for Mr. Mullins to have advised me of the proposed amendments, but I concur with the first submission of Ms. LeBel, in her letter of February 3, that they are completely extraneous and irrelevant in this case. I am called upon to determine whether or not the statute as it existed in April of 1980, when the violation was said to have occurred, did or did not prohibit the C.P. Air practice.

Accordingly I have taken no cognizance of the contents of either letter as it pertains to the application of the proposed amendments.

DECISION

I shall first deal with the remaining preliminary objections which were earlier reserved, that the Commission did not have the power to deal with the complaint on the basis that it did not come within the confines of s.32(5). Mr. Mullins says that it cannot come within subsection (a) since there is no identified victim, it cannot come within subsection (b) since the evidence does not establish that it occurred outside Canada, and it cannot come within subsection (c) since s.10, the section which I am operating under pursuant to my appointment (Exhibit C-1), is not an included section under subsection (c). Finally, that there was no proof "within Canada".

In approaching the task of interpreting the Human Rights Act, Ms. LeBel has provided me with a generous supply of authorities on point.

In the case of Bahjat Tabar and Chong Man Lee v West End Construction Limited et al, August 13, 1982, Peter Cumming, Board of Enquiry under the Ontario Human Rights Act, said:

> I have characterized the proceedings before a Board of Enquiry as an "administrative proceeding" rather than a "civil proceeding". I take this view because in my opinion there is a fundamental distinction between a Board of Enquiry, which to my mind is clearly an administrative tribunal, and a court of law. It is only a court of law before which there can be civil proceedings. It is true that a Board of Enquiry can make an order that

includes compensation to an aggrieved complainant and this aspect of an order is analogous to an award given by a court in civil proceedings. But nevertheless, there is a fundamental distinction between the intrinsic nature of the bodies under consideration, and I have no doubt, given the Code and the Statutory Powers Procedure Act, that a Board of Enquiry is an administrative tribunal and the proceeding before it is, therefore, in the nature of an administrative proceeding.

Professor Cumming says further:
It was with reluctance that I dealt with these procedural issues at such length. The purpose of having Human Rights cases adjudicated by Boards of Enquiry rather than by courts is to avoid strict court rules of procedure.

In Re Attorney General of Canada and Cumming et al, Federal Court, (1979) 103 D.L.R. (3d) 151, Thurlow, A.C.J. had this to say about the Canadian Human Rights Act:

With respect to the first of the questions, which appears to me to be one that goes to the jurisdiction of the Tribunal, I am not prepared to accept the broad proposition that in assessing taxes under the Income Tax Act the Department of National Revenue is not engaging in the provision of services within the meaning of section 5 of the Canadian Human Rights Act. The statute is cast in wide terms and both its subject matter and its stated purpose suggest that it is not to be interpreted narrowly or restrictively....

I needn’t add further ammunition to either side in the interpretation war between the "strictists" and the "liberalists". Suffice it to say that, in my view, it would be inappropriate to approach an interpretation, particularly in the procedural sections of the Human Rights Act, as narrowly and strictly as Mr. Mullins has argued. A Tribunal should, in interpreting these procedural parts of the Act, draw upon its reservoir of common sense in giving effect to Parliament’s intention by carefully considering the words chosen and the context of those words within their respective sections juxtaposition other sections and the statute as a whole. This, it seems to me, can be accomplished without either dismissing an otherwise valid complaint because of imperfect procedural compliance, yet without stretching the meaning of statutory words and phrases like some giant bandage to cover whatever practice might be subjectively viewed as discriminatory.

Discrimination, as a statutory violation, is a new concept in our law and one which the Tribunal has no business expanding beyond its intended scope. Within that scope, however, the Canadian Human Rights Act reflects the public interest and a civilized feeling that socially undesirable and prejudicial practices against certain classes of people should be prohibited. The Tribunal, as a matter

of general principle, operating within the intended scope should not indulge in a narrow, restrictive approach, nor should it allow procedural imperfections to impede a proper consideration on the merits.

The Canadian Human Rights Act is divided into several parts. Part 1 is labelled "Proscribed Discrimination" and under that Part, s.10 set forth in Appendix "A", appropriately covers the facts of this case. It was earlier contended that s.7 should also be considered by me, since it appeared in the Resolution C2. It did not appear in Exhibit 1, which appointed me to conduct an inquiry under s.10, In the light of my decision, it would make no difference whether I proceeded under one or both of these sections.

Part Il constitutes the Commission and Part III is labelled "Discriminatory Practices and General Provisions". After defining discriminatory practice in s.31, s.32(1) (which is made subject to s.32(5)) provides the authority for an individual or a group to file the complaint. Subsection (3) authorizes the Commission itself to initiate a complaint. Subsection (5), though set forth in the Appendix "A", is repeated:

No complaint in relation to a discriminatory practice may be dealt with by the Commission under this Part unless the act or omission - that constitutes the practice

(a) occurred in Canada and the victim of the practice was at the time of such act or omission either lawfully present in Canada or, if temporarily absent from Canada, entitled to return to Canada;

(b) occurred outside Canada....
(c) occurred in Canada and was a discriminatory practice within the meaning of section 8, 12 or 13 in respect of which no particular individual is identifiable as the victim.

No victim was identified in this case, though originally, there was an alleged victim acting through a complainant. Since that complaint was dropped, the Commission quite properly, under s.3, decided to initiate a complaint itself. The question is whether under subsection (5) that complaint may be dealt with further. There is no ambiguity in the language of subsection (5) and I am unable to see, on any interpretation, how the words "no complaint may be dealt with by the Commission" could be overcome unless the complaint somehow falls within one of the three categories under s.5. It was not argued that it should fall under subsection (b) and Ms. LeBel wisely conceded that it could not fall under subsection (c), since s.10 is not one of the enumerated sections thereunder. Ms. LeBel rests her case on the matter coming within subsection (a). But subsection (a) could only apply to a situation where there was a victim and where that victim was present in Canada or lawfully entitled to return. I would be prepared to hold, and do hold, that there is no merit in Mr. Mullins’ objection

that the Commission has failed to prove that the alleged offence occurred in Canada. I find that the practice of C.P. Air in favouring its employees' children for employment did occur in Canada. However, I am concerned as to whether subsection 5(a) applies on the facts of this case at all. The Commission is certainly entitled to initiate the complaint and they did so. In

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dealing with that complaint, it wouldn't matter, in my view, whether it was initiated by a complainant or Commission, so long as there was a victim (the sense of subsection (a)). No evidence was called by the Commission to establish that there ever was a victim, only that there was a practice. Where the Commission decides to proceed on the basis that there was a practice and offers no evidence that a victim was involved, it seems to me they must come under subsection (c) and Parliament, for whatever reason, has excluded both ss.10 and 7 from subsection (c).

I am unable to see, even with a "well-stretched bandage", how the complaint in this case could be brought within subsection 5 and, accordingly, it would seem to me that the Commission had no authority to deal with it at all. In short, even with the liberal interpretation advocated by Ms. LeBel, a complaint cannot be dealt with unless the Commission has jurisdiction and that jurisdiction is found in s.32(5). This complaint cannot be brought (or even squeezed) under that subsection.

On the basis of the above findings, I have no alternative but to dismiss the complaint.

A very large amount of time, money and energy has been expended on this case, both before and after the complaint came before me. Lest I should be held by a higher authority to be incorrect in my interpretation of s.32(5), I have decided to deal with the merits of the complaint to avoid the possibility of a reference back at some future date.

On the merits, I am asked to decide whether the practice of C.P. Air amounts to discrimination based upon marital status (English version) or la situation de famille (French version).

"Only in Canada" may be appropriate in describing a certain brand of tea, but even more appropriate in describing our national exercise of bilingually interpreting statutes. Our cherished bilingual and bicultural heritage brings not a double standard in statutory interpretation, but a single standard from a double language. Those charged with the difficult task of attaching a meaning to the words and phrases of Canadian statutes must look to both the French and English version with equal curiosity and even-tempered judgment. The Official Languages Act could not be clearer. Both languages must be given equal consideration and, if there be an irreconcilable difference, then "preference shall be given to the version thereof that, according to the true spirit, intent and meaning of the enactment, best ensures the attainment of its objects".

Ms. LeBel did not endeavour to argue that the English version alone would be broad enough to cover the practice alleged against C.P. Air. Marital status, by all its dictionary definitions which needn't be repeated here, pertains to the

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relationship of a husband and wife in matrimony. It does not, and could not under any stretch, include a practice of giving preference to children upon hiring. On the other hand, were I to literally interpret the French version, situation de famille, "famille" includes children and if there is discrimination on the basis of their situation in the family, then that amounts to a prohibited practice.

This, of course, is not the first time in Canadian history that a tribunal has been faced with the problem of interpreting a statute where the English and French versions are not completely ad idem. In the case of Food Machinery Corp. v Registrar of Trademarks, (1946) 2 D.L.R. 258, Thorsson, P. at p.263, had this to say:

> Quite frequently the French and English texts of a statute are compared with one another with a view to clarifying its meaning, for Parliament speaks in two languages each entitled to equal respect.... if there is any ambiguity it is because of the divergence between the two texts, and it seems to me that the Court should deal with the matter as it would deal with any other question of ambiguity, namely, to seek to ascertain the true intent of Parliament, following the guidance of canons of construction recognized as applicable in such cases. Under the circumstances, it would, I think, be sound to hold that where two constructions are advanced for either the French or English text of a statute, one subject to objection and the other free from it, that construction which is free from objection, according to the recognized canons of construction, should be adopted, even although the language of the other text is at variance with it and in accord with the objectionable construction; the objectionable construction is not rendered free from objection by reason of such accord and is not entitled to any support from it.

The President of the Court went on to find:
> that the grammatical meaning of the French text appeared to be clear whereas the English text was capable of two constructions.

His finding, then, favoured on those facts the French version. In R v O'Donnell, (1979) 1 W.W.R. 385 at 388, the Court of Appeal of British Columbia held:

Both English words have a clear and unambiguous meaning. The French versions of both words have several meanings. The words in both version, of necessity, must be

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construed with the same meaning. So, if one version is clear and unambiguous and the other version has the same meaning as well as others, its follows that, when construing, the common meaning must be accepted.

In The King v Dubois [1935] S.C.R. 378, without quoting therefrom is to the same effect, as is the case of Reg. v Govedarov (1974) 3 O.R. (2d) 23, where the Ontario Court of Appeal held that the word "effraction" in the French version of the Criminal Code must prevail over the word "burglary" in the English version in limiting the offence to a dwelling-house. And again, in the Federal Court, Mahoney, J. Cardinal v The Queen, [1980] 1 F.C. 149:

> In this instance, recourse to the French version disposes entirely of any question of ambiguity in the statute and it is unnecessary to deal with the plaintiffs' arguments to the contrary, persuasive as they might be if the English version stood alone.

As earlier pointed out, s.8(2)(d) of the Official Languages Act, R.S.C. 1970, obliges the statutory interpreter where the two versions are not compatible to give preference to the version which, in spirit and intent, best meets the objects of the enactment. The words "marital status" and "situation de famille", in at least one interpretation of the French version, would not mean the same thing, and would not be, for that reason, compatible. I must, therefore, endeavour to ascertain the true spirit and intent of the Canadian Human Rights Act in reference to the C.P.A. practice.

The Canadian Human Rights Act, like Provincial Human Rights legislation, was brought about as s.2 sets forth to offer equal opportunity to all Canadians to make for themselves a life consistent with their duties and obligations as members of society without hindrance by certain discriminatory practices. The statute was certainly designed to eradicate prejudice, bigotry and oppression, and to limit discrimination in respect of certain practices commonly recognized as unfair or undesirable.

Few Canadians would be heard to argue against the proposition that discrimination should be prohibited in respect of race, national or ethnic origin, colour, religion, age, sex or marital status. The question before me is whether the preference of employees' children would fit within that same category. The average fair-minded Canadian would consider it quite unfair to refuse a job on the basis that the applicant was black, Baptist, of Russian origin, or female. Would the same fair-minded Canadian feel that it is unfair for a bakery to give preference to the owner's son over other applicants? Was there, at the time of the enactment of the Canadian Human Rights Act the same kind of clamor to prohibit

preferential hiring of children of employees over other children for summer employment as there was, say, preferential hiring of men over women? It is true, of course, that the coin has two sides and

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that, by preferring the children of employees, all other children as a class may be said to be discriminated against. But rather than dealing with the effect, I am here looking at the spirit and intent of the statute and am not certain that the Parliamentary mind was directed to the question before me. It is true, also, that nepotism, as it is sometimes called, was a practice which trade unions were concerned about when dealing with the children of owners, but to the extent that the same was covered by a collective agreement, that practice fell to the more powerful personality of the seniority provision. That same nepotism, however, is sometimes favoured by the Union when it benefits the children of Union members, either in employment or in admission to the trade union. The latter issue was dealt with by the Canada Labour Relations Board in the Arsenault case, which I will refer to later.

If one considers the history of business development and employment relationships in Canada, it will be seen that it is almost a tradition among small employers who own their own business to favour their children by bringing them into the business as employees in preference over others. This, of course, was to provide what the patron of the family felt was a continuing family involvement for the development of the business. Indeed, many of the businesses of Canada were built on this footing and, in very many cases, when the small business became a large one with more complicated employment policies, continued to provide to the employees of the company, as a fringe benefit, employment for their children during summer vacations.

I am not aware of any severe criticism of that practice though, as earlier pointed out, it had the obvious effect of discriminating against persons who were not children of the employees of that particular employer. Neither am I completely convinced that the practice is socially undesirable or prejudicial in the same sense as race, colour, religion, sex, etc. Does it seem likely that Parliament intended to eradicate this practice as such? I would have to conclude that since the Canadian fabric, like other Western nations, in part, at least, had its employment origins on the development of family companies, it is not likely that the prohibition of preferential summer employment standards in favour of children of existing employees was intended to be prohibited. The question on the other side of that coin is, of course, more difficult; an employer who has a practice of not hiring the children of employees. That is a more "direct hit", but again, it is not clear that Parliament, through the present wording

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of the statute, intended to provide that as a prohibited discriminatory practice, either.

It must always be remembered that the Canadian Human Rights Act does not prohibit discrimination - it only limits it, or prohibits certain forms of it. Discrimination for employment on the basis of a High School diploma, a University degree, aptitude or physical strength are natural and permissive grounds of discrimination. It is only those which have been prohibited and those which may be said to logically fall within the prohibited grounds that are covered by the statute.

I have not found the statutes of the Provinces to be overly helpful in determining the issue before me, but would make note of the fact that, in New Brunswick, the Legislature there chose to use the phrase "état matrimonial" as the equivalent of marital status. In the Province of Quebec, the phrase used in both languages is "civil status," "l'état civil" in French, and that, according to at least one decision, would include "situation de famille".

There are two decisions which I will refer to which have dealt with the phrase "marital status". The first of these is Air Canada v Bain, (1982) 40 N.R. 481, a decision of the Federal Court of Appeal, where Mr. Justice Pratte said:

> In my view, it cannot be said, in the circumstances, that Miss Bain was the victim of discrimination by reason of her marital status or, to put it more generally, that Air Canada Family Fare Plan discriminated between travellers on the basis of their marital status. Miss Bain was single and intended to travel with a friend. The reason why she could not take advantage of the family fair was that she was not related to her travel companion so that the two of them could be said to form a family; that reason was not that she was single. Married or not, a person who travels with a friend is not entitled to the family fare.

The Bain case, of course, did not deal directly with the question of "situation de famille" but the Court, in that case, assumed that there was nothing wrong with a reduced rate based on a family situation. It favours the children of travellers and the travellers but, according to that case, was not offensive and did not have anything to do with marital status.

A case more directly on point is the earlier mentioned decision of Arsenault et al v The International Longshoremens' Association Local 375, (1982) C.L.L.R., p.17018. In that case, a resolution of the Union was adopted giving preference to children, brothers, (sisters) and sons-in-law (daughters-in-law) of active members of the Union. A provision of the Canada Labour Code, s.185(f), read as follows:

> No trade union and no person acting on behalf of a trade

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union shall:

(f) expel or suspend an employee from membership in the trade union or deny membership in the trade union to an employee by applying to him in a discriminatory manner the membership rules of the trade union.

The complaint also allegedly violated s.161.1, which deals with the referral of persons to employment through a union hiring hall. The decision explains that employment on the waterfront was virtually controlled by the Longshoremens' Union and that those who were not in the Union would have little hope of obtaining work in that trade.

The Canada Board arrived at the conclusion that the resolution granting preference contravened the provisions of s.185(f) of the Canada Labour Code and must, therefore, be struck down.

The fact that the decision was based on s.185(f), and that 185(f) prohibited discrimination (without reference to limiting heads) may well be sufficient to distinguish this case from the facts before me. I must, however, address directly the Board's conclusion which specifically dealt with the French and English version, "marital status" and "situation de famille".

The Board quite properly, in my view, determines that the word "discrimination" as it appears in the Code, could not mean all discrimination but that discrimination which is either illegal, arbitrary or unreasonable. I am, of course, to determine only whether the discrimination is illegal as contravening the Human Rights Act. At one point, the Board states, p.19:

At issue here is whether this selection standard is discriminatory or, in other words, whether it contravenes any of the provisions prohibiting discrimination set out by the various Canadian Human Rights and Freedoms Charters and Acts as subsidiarily, if it does not, whether the standard is arbitrary or unreasonable.

On p.24 of the Reasons for Judgment after an analysis of the history of Human Rights legislation, and excerpts from the excellent text by Mr. W.S. Tarnopolsky "Discrimination and The Law", Toronto, R. DeBoo, 1982, the Board take a different approach than Professor Tarnapolski, and says:

We must therefore conclude that the expression "marital status" has a much narrower meaning that "situation de

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famille" and, furthermore that the latter encompasses the former. These expressions certainly do not differ in meaning, but if such were the case, the conflict between the French and English terms should be resolved by reference to section 8.1 and 8.2.

With the greatest of respect for the Board and the distinguished Tribunal chaired by Mr. Claud Foisey, I do not, and cannot, agree that, in establishing the objectives of the statute, one automatically assumes, as the Board apparently does, that preference must be given to the wider version. It may well be that Parliament intended to be very restrictive in the grounds of discrimination and that the narrower version should be preferred. On the basis of the Board's conclusion, giving the broadest scope, it is arguable that grand-parents, grand-children, aunts, uncles and second cousins (servants) should be included, since they may broadly be considered family.

There is a second ground for my respectful disagreement with the conclusion reached by the Canada Labour Relations Board and that is that they have opted for the French version "situation de famille" because it includes marital status. That, in my view, ignores the time-honoured authorities set forth earlier, where the proper approach to bilingual statutory interpretation is to ascertain whether in the case where one version has two possible alternate meanings that one of those meanings is in accord with the meaning in the other language, and if so, that is, as President Thorson has said, the unobjectionable one. The Board did not follow that test and, when one considers the dictionary definitions set forth in Collins, it will be seen that "situation de famille", at least in that well-known dictionary, means marital status, and "marital status" is defined as "situation de famille". "Situation de famille", in its other interpretation, would include children. Is it possible, looking at marital status, that that phrase could include children? Clearly not. I have also considered whether it would not have been more appropriate, had Parliament intended to include children, for them to have simply used the phrase "family status" in the English version.

I have carefully considered the compelling provisions of the Official Languages Act and the canons of construction for tribunals when interpreting statutes. I have endeavoured, by use of the various dictionary definitions and translations in both languages, to establish whether a common ground does exist between the two versions and further, have endeavoured as set forth, to ascertain the probable intent of the Parliament of Canada in enacting this legislation as to whether or not the preferential summer hiring of children of employees was within the true spirit and intent of the enactment.

For the reasons set forth above, I have concluded that it is more likely Parliament did not intend to include the impugned

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practice than that it did and that, since "marital status" and "situation de famille" mean the same thing when "situation de famille" is given its restrictive meaning and different things when it is not, that I should favour, in this case, the restrictive meaning that "la situation de famille" (marital status) would not include children. I have therefore concluded that the complaint against C.P. Air, that it gave preference to the children of its

employees, is not one within the prohibited grounds of the Canadian Human Rights Act.

The complaint is dismissed on the merits.

Bryan Williams, Q.C. March 31, 1983
Human Rights Tribunal

APPENDIX "A"
PART I

RELEVANT SECTIONS OF THE CANADIAN HUMAN RIGHTS ACT

2. The purpose of this Act is to extend the present laws in Canada to give effect, within the purview of matters coming within the legislative authority of the Parliament of Canada, to the following principles:

(a) every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex or marital status, or conviction for an offence for which a pardon has been granted or by discriminatory employment practices based on physical handicap; and

(b) the privacy of individuals and their right of access to records containing personal information concerning them for any purpose including the purpose of ensuring accuracy and completeness should be protected to the greatest extent consistent with the public interest.

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3. For all purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, conviction for which a pardon has been granted and, in matters related to employment, physical handicap, are prohibited grounds of discrimination.

4. A discriminatory practice, as described in sections 5 to 13, may be the subject of a complaint under Part III and anyone found to be engaging or to have engaged in a discriminatory practice may be made subject to an order as provided in sections 41 and 42.

7. It is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ an individual, or

(b) in the course of employment, to differentiate adversely in relation to an employee,

on a prohibited ground of discrimination.

10. It is a discriminatory practice for an employer or an employee organization

(a) to establish or pursue a policy or practice, or
(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,

that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

31. For the purposes of this Part, a "discriminatory practice" means any practice that is a discriminatory practice within the meaning of sections 5 to 13.

32. (1) Subject to subsections (5) and (6), any individual or group of individuals having reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice may file with the Commission a complaint in a form acceptable to the Commission.

(2) If a complaint is made by someone other than the individual who is alleged to be the victim of the discriminatory practice to which the complaint relates, the Commission may refuse to deal with the complaint unless the alleged victim consents thereto.

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(3) Where the Commission has reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice, the Commission may initiate a complaint.

(4) Where complaints are filed jointly or separately by more than one individual or group alleging that a particular person is engaging or has engaged in a discriminatory practice or a series of similar discriminatory practices and the Commission is satisfied that the complaints involve substantially the same issues of fact and law, it may deal with such complaints together under this Part and may appoint a single Human Rights Tribunal pursuant to subsection 39(1) to inquire into such complaints.

(5) No complaint in relation to a discriminatory practice may be dealt with by the Commission under this Part unless the act or omission that constitutes the practice

(a) occurred in Canada and the victim of the practice was at the time of such act or omission either lawfully present in Canada or, if temporarily absent from Canada, entitled to return to Canada;

(b) occurred outside Canada and the victim of the practice was at the time of such act omission a Canadian citizen or an individual admitted to Canada for permanent residence; or

(c) occurred in Canada and was a discriminatory practice within the meaning of section 8, 12 or 13 in respect of which no particular individual is identifiable as the victim.

(6) Where a question arises under subsection (5) as to the status of an individual in relation to a complaint, the Commission shall refer the question of status to the appropriate Minister in the Government of Canada and shall not proceed with the complaint unless the question of status is resolved thereby in favour of the complainant.

(7) No complaint may be dealt with by the Commission pursuant to subsection (1) that relates to the terms and conditions of a superannuation or pension fund or plan, if the relief sought would require action to be taken that would deprive any contributor to,

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participant in or member of, such fund or plan of any rights acquired under the fund or plan before the commencement of this Part or of any pension or other benefits accrued under such fund or plan to that time, including

(a) any rights and benefits based on a particular age of retirement; and

(b) any accrued survivor’s benefits.

40. (1) A Tribunal shall, after due notice to the Commission, the complainant, the person against whom the complaint was made and, at the discretion of the Tribunal, any other interested party, inquire into the complaint in respect of which it was appointed and shall give all parties to whom notice has been given a full and ample opportunity, in person or through counsel, of appearing before the Tribunal, presenting evidence and making representations to it.

(2) The Commission, in appearing before a Tribunal, presenting evidence and making representations to it, shall adopt such position as, in its opinion, is in the public interest having regard to the nature of the complaint being inquired into.

(3) In relation to a hearing under this Part, a Tribunal may

(a) in the same manner and to the same extent as a superior court of record, summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce such documents and things as the Tribunal deems requisite to the full hearing and consideration of the complaint;

(b) administer oaths; and

(c) receive and accept such evidence and other information, whether on oath or by affidavit or otherwise, as the Tribunal sees fit, whether or not such evidence or information is or would be admissable in a court of law.

(4) Notwithstanding paragraph (3)(c), a tribunal may not receive or accept as evidence anything that would be inadmissible in a court by reason of any privilege under the law of evidence.

(5) Notwithstanding subsection (2), a conciliator

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appointed to settle a complaint is not a competent or compellable witness at a hearing of the Tribunal appointed to inquire into the complaint.

(6) A hearing of a Tribunal shall be public, but a Tribunal may exclude members of the public during the whole or any part of a hearing if it considers such exclusion to be in the public interest.

(7) Any person summoned to attend a hearing pursuant to this section is entitled in the discretion of the Tribunal to receive the like fees and allowances for so doing as if summoned to attend before the Federal Court of Canada.

41. (1) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is not substantiated, it shall dismiss the complaint.

(2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry

relates is substantiated, subject to subsection (4) and section 42, it may make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in such order any of the following terms that it considers appropriate:

(a) that such person cease such discriminatory practice and, in consultation with the Commission on the general purposes thereof, take measures, including adoption of a special program, plan or arrangement referred to in subsection 15(1), to prevent the same or a similar practice occurring in the future;

(b) that such person make available to the victim of the discriminatory practice on the first reasonable occasion such rights, opportunities or privileges as, in the opinion of the Tribunal, are being or were denied the victim as a result of the practice;

(c) that such person compensate the victim, as the Tribunal may consider proper, for any or all of the wages that the victim was deprived of and any expenses incurred by the victim as a result of the discriminatory practice; and

(d) that such person compensate the victim, as the Tribunal may consider proper, for any or all additional cost of obtaining alternative goods, services, facilities or accommodation and any expenses incurred by the victim as a result of the

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discriminatory practice.

(3) In addition to any order that the Tribunal may make pursuant to subsection (2), if the Tribunal finds that

(a) a person is engaging or has engaged in a discriminatory practice willfully or recklessly, or

(b) the victim of the discriminatory practice has suffered in respect of feelings or self-respect as a result of the practice,

the Tribunal may order the person to pay such compensation to the victim, not exceeding five thousand dollars, as the Tribunal may determine.

(4) If, at the conclusion of its inquiry into a complaint regarding discrimination in employment that is based on a physical handicap of the victim, the Tribunal finds that the complaint is substantiated but that the premises or facilities of the person found to be engaging

or to have engaged in the discriminatory practice impede physical access thereto by, or lack proper amenities for, persons suffering from the physical handicap of the victim, the Tribunal shall, by order, so indicate and shall include in such order any recommendations that it considers appropriate
but the Tribunal may not make an order under subsection (2) or (3).

APPENDIX "A"
PART Il

RELEVANT SECTIONS OF THE OFFICIAL LANGUAGES ACT
2. The English and French languages are the official languages of Canada for all purposes of the Parliament and government of Canada, and possess and enjoy quality of status and equal rights and privileges as to their use in all the institutions of the Parliament and government of Canada.

8(1) In construing an enactment, both its versions in the official languages are equally authentic.

8(2) In applying subsection (1) to the construction of an

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enactment,
(a) where it is alleged or appears that the two versions of the enactment differ in their meaning, regard shall be had to both its versions so that, subject to paragraph (c), the like effect is given to the enactment in every part of Canada in which the enactment is intended to apply, unless a contrary intent is explicitly or implicitly evident;

(b) subject to paragraph (c), where in the enactment there is a reference shall, in its expression in each version of the enactment, be construed as a reference to the concept, matter or thing to which in its expression in both versions of the enactment the reference is apt;

(c) where a concept, matter or thing in its expression in one version of the enactment is incompatible with the legal system or institutions of a part of Canada in which the enactment is intended to apply but in its expression in the other version of the enactment is compatible therewith, a reference in the enactment to the concept, matter or thing shall,

as the enactment applies to that part of Canada, be construed as a reference to the concept, matter or

thing in its expression in that version of the enactment that is compatible therewith;

and

(d) if the two versions of the enactment differ in a manner not coming within paragraph (c), preference shall be given to the version thereof that, according to the true spirit, intent and meaning of the enactment, best ensures the attainment of its objects.