Decision rendered on November 9, 1983
T.D. 12/83

THE CANADIAN HUMAN RIGHTS ACT
(S.C. 1976-77, c.33)

HUMAN RIGHTS REVIEW TRIBUNAL

Re: In the Matter of the appeal filed by the Canadian Human Rights Commission dated July 28, 1982, against the Human Rights Tribunal Decision pronounced on July 26, 1982; Denise Marcotte v. Rio Algom Limited.

DECISION OF THE REVIEW TRIBUNAL
Before: Nicole Duval-Hesler
Jane Banfield Haynes
Susan Mackasey Ashley

Appearances: Simon Noel, D. Marcotte and the Canadian Human Rights Commission
Robert Cosman for Rio Algom Ltd.

Heard: February 24, 1983 - Ottawa, Ontario

French version to be available shortly
Version française à suivre

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BEFORE: Nicole Duval Hesler
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RE: IN THE MATTER of the appeal filed by the Canadian Human Rights Commission, dated July 28, 1982, against the Human Rights Tribunal Decision pronounced on July 26, 1982; Denise Marcotte vs. Rio Algom Limited.

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DECISION
Our appointment as a Review Tribunal pursuant to section 42.1(2) of the Canadian Human Rights Act was made on September 13, 1982 by Mr. Gordon Fairweather, for the purpose of inquiring into an appeal launched by the Canadian Human Rights Commission against a decision of a Canadian Human Rights Tribunal consisting of Mr. André Lacroix, Q.C, in the matter of Denise Marcotte and Rio Algom

Limited, which decision was rendered on July 26, 1982. The Review Tribunal is to determine if the appeal is substantiated on a question of law or fact or mixed fact and law pursuant to sections 42.1(4), (5) and (6) of the Canadian Human Rights Act.

Ms. Marcotte's complaint is that "Rio Algom is discriminating on the grounds of sex in that the job classifications not entitled to housing are mainly occupied by women" (Exhibit C-1), contrary to sections 7 and 10 of the Act. The facts are not in dispute. Denise Marcotte had been an employee of Rio Algom of Elliott Lake since 1977, and since July 1982 was employed as a Department Clerk. She first applied for company-subsidized housing early in her employment and was advised that it was not available to her. She applied again for housing while she was a clerk-typist on or about April 1980, at which time she was advised that her employment classification excluded her from eligibility in the company housing plan, whereupon she filed a complaint under the Act. She has resided in company-subsidized housing since June 1980 due to her husband's independent eligibility.

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The housing policy of Rio Algom is set out in Exhibit C-7 and says, inter alia

"Generally speaking, accomodation will be available for all employees. However, due to the present shortage, priority will be given to certain classifications... Employees who own their own homes or are renting homes in Elliot Lake are not eligible for Rio Accomodation. This restriction also applies to people who live within a forty (40) mile radius of town."

The manual does not state which classifications will receive priority.

In the words of Mr. R.E. Diotte, Manager of Administration for Elliot Lake Operations in a letter dated June 29, 1981 to the Commission (Exhibit C-5):

"... In January 1975, the Company embarked on a major expansion program. The expansion would require the hiring of an additional 2500 employees during the 1975 to 1983 period.

It was not economically possible to provide accomodation for each

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and every new employee to be hired. Therefore, a decision was made to provide accomodation for 80% of all new employees.

We believed the other 20% could be filled by hiring sons, daughters, wives and husbands of employees already housed and thereby, have more than one employee in a house.

We attempted to determine which jobs we could reasonably

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expect to fill by hiring people locally. Knowing if we went outside our area, the person recruited would expect accomodation.

The jobs we picked are either of a clerical nature, or requiring no special skills, i.e. labourer. Basically, our thinking was that we would not require clerks and labourers if we did not hire the miners, mechanics and mill operators."

The effect of this exclusionary policy, as discovered by Ms. Marcotte at the time of her second application for housing in 1980, was that 73% of the employees in the excluded classifications were women. Again quoting from Exhibit C-5, as to non-eligible classifications:

"... The following classification are
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are not eligible for subsidized housing from the Company. Typist, clerk typist, switchboard operator, junior clerk, intermediate clerk, department clerk, keypunch operator, data control clerk, data entry leader, secretary, surface labourer, and mill labourer.

In addition, anyone living within a forty (40) mile radius of Elliot Lake, who has accomodation, is not eligible for Company subsidized units."

And further, on the statistics regarding male and female incumbents for each of these classifications:

Classification Male Female
Typist - 29
Clerk Typist - 26
Switchboard Operator 1 3
Junior Clerk - 2
Intermediate Clerk - -
Department Clerk 1 8
Keypunch Operator - 10
Data control clerk - 2
Data entry leader - 1
Secretary - 14
Surface labourer 26 4
Mill labourer 9 >

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The issues as identified by Mr. Lacroix were: whether the company’s policy of excluding from eligibility for housing those classifications mainly occupied by women was discriminatory, and if so, whether the employer was "justified in implementing the

practice". The Tribunal found that the facts set out discrimination, in that the relevant point was not the intent of

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the practice but the result.
Having found a prima facie case of discrimination, the Tribunal then dealt with whether there was justification for the discriminatory policy, and decided that the policy was reasonably justifiable. This was primarily because the policy was "neutral in character, not related to work performance, to hiring practices, promotions or other working conditions" (page 8, decision); he agreed with the respondent that the basis for the exclusion was one of skills and training, i.e. the excluded categories were comprised largely of unskilled workers, while the eligible classifications involved skilled workers and those required to enrol in a training programme. The Tribunal concluded that the standard for judging what constituted the proper criterion required of an employer in the establishment of policies or practices which might result in discrimination is "'a general standard of reasonableness' both subjective and objective in the circumstances of each case and it falls upon the Courts and Tribunals to establish this standard in each case". (page 11) The Tribunal was mindful of the fact that the alternatives to the policy which were suggested by the Commission did not meet the approval of the company. He concluded that "a

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legitimate business necessity existed requiring the employer to make a selection among employees eligible for Housing Assistance", and that "the policy adopted by the employer to meet this necessity is in our view reasonable, both subjectively and objectively". (at page 12-13)

The decision in the Bhinder case by the Federal Court of Appeal has come to the attention of this Tribunal, although it was not raised by the Appellant, since it was rendered shortly after argument was completed. We are referring more specifically to the case of Canadian National Railway Company v. Canadian Human Rights Commission and K.S. Bhinder (A-543-81, rendered April 13, 1983). The Court dealt with questions directly related to this case and the findings of the Tribunal of first instance, i.e. whether "indirect" or "adverse impact" discrimination is covered by section 7 and/or 10 of the Act, and what constitutes a valid justification for business policies or practices which result in discrimination. We therefore feel compelled to discuss it. It was the opinion of the three judges sitting in that case that section 7 of the Act contemplates only direct discrimination and does not extend to discrimination in which there is no discriminatory intention nor motivation or differential treatment. Further, it was the finding of the majority (LeDain J.A. dissenting in part) that neither did section 10 contemplate indirect discrimination, and in the absence of specific words in the statute providing for prohibition of this type of behaviour, such prohibition should not be implied.

LeDain, J.A. stated the collective opinion of the court with respect to section 7 at page 17

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of his decision:
" In my opinion, section 7 only contemplates direct discrimination -- that is, discrimination in which there is a discriminatory intention or motivation or differential treatment on a prohibited ground, with or without intention. It does not extend to discrimination in which there is neither a discriminatory intention or motivation nor differential treatment."

In the case at hand, there was no suggestion that there was an intention to discriminate against women in the company's housing policy. Nor was there differential treatment on the basis of sex. There was differential treatment, not on the basis of sex, but on the basis of job classification. Both men and women could be, and were, excluded if they held jobs in the excluded categories. Using the test set by the Federal Court in Bhinder, this would not constitute discriminatory treatment under section 7.

With all due respect, this Tribunal is not convinced that the Bhinder decision, which is being appealed, (leave was granted by the Supreme Court of Canada on June 6, 1983) must at this stage be held to constitute the final word on the interpretation of Section 7, nor indeed of Section 10. There is a fairly substantive body of decisions respecting construction of similar legislative language which has tended to favour a more liberal interpretation based on the mischief rule. Many are referred to in Mr. Justice LeDain's partly

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dissenting opinion. Perhaps most worthy of notice is the case of Attorney General for Alberta and Gares (67 D.L.R. 3rd series 635), in which Mr. Justice McDonald, of the Alberta Supreme Court, made the oft quoted statement that:

"... even in the absence of present or past intent to discriminate on the grounds of sex, the complaint is substantiated. It is a discriminatory result which is prohibited and not a discriminatory intent."

William Black has written comments on this question which are published in the Canadian Human Rights Reporter (Volume 1, 1980, C-17) under the title From intent to effect: New Standard in Human Rights. Mr. Black believes that "In the past few years, a clear trend has become apparent first to modify and eventually to eliminate the requirement of intent." After analysing recent jurisprudence, he concludes:

"The approach of the recent cases is consistent with the purposes of human rights legislation. The aim is to create equality of opportunity, and to eliminate barriers that have hindered disadvantaged groups. It makes sense, then, to judge conduct on the basis of its effect rather than its motive, for a discriminatory policy is no less harmful because the effect was unintended."

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Justice Heald, on page 3 of the Bhinder decision, bases his interpretation of Section 10 on a comparison between the latter and Section 703 of Title VII of the American Civil Rights Act of 1964. To paraphrase him, he does not believe that Section 10 can be construed as prohibiting discrimination in the absence of intent because the words "or otherwise adversely affect" are not to be found therein. In the first place, and with all due respect, one may question whether it is a valid construction method to interpret a Canadian Statute in relation to the wording of an American one. Indeed, in the very same Bhinder decision, Mr. Justice Kelly expresses disapproval of the heavy reliance by the tribunal of first instance "upon jurisprudence and practice in jurisdictions other than that of Canada (federally) and in at least some cases without regard to the lack of identity between the legislation prevailing in Canada and that of other jurisdictions" (p.2). Again on page 3, Justice Kelly emphasizes that the tribunal, "in performing a judicial or quasi-judicial function, ... must confine itself to the words used by Parliament and the Commission to express their respective intentions." As a corollary, it seems to us that one must not, for the purpose of interpreting, for instance, Section 10, seek what is missing from it that is found in American legislation and infer from the absence of similar wording in our statute that Parliament must have meant the opposite of what exists in another legal system.

In the second place, this Tribunal fails to see how any connotation of intent can be derived from the words "deprives or tends to deprive" which are contained in Section 10. In our opinion, the word

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"deprive", in itself, connotes an effect, not an intent. On this point, we share the views expressed by Mr. Justice LeDain on page 18 of his dissenting opinion:

" It is true that the words "or otherwise adversely affect" were also in that provision, and commentators have attached particular significance to them as a basis for the decision... but they do not in my opinion add anything for purposes of this issue to what is already conveyed by the words "that deprives or tends to deprive... I am of the same view concerning the words "on a prohibited ground" in section 10 which, in relation to effect, should be understood as meaning by reason of a prohibited ground of discrimination."

We find it appropriate to refer at this stage to S.11 of the Interpretation Act, (R.S.C. 1970, c. I-23):

"Every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

All provisions of the Act must therefore be interpreted in the

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light of its stated purpose as
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exposed in Section 2. That purpose, we respectfully hold, is to give an equal opportunity to individuals and to remove discrimination, whether it be intentional or not. Since good faith is always presumed, the intent to discriminate is an extremely difficult element to prove. The imposition of such a burden on a complainant would in our mind render practically unattainable the stated purpose of the Act.

A well known passage illustrates the workings of the mischief rule:

"All statutes are to be construed by the courts so as to give effect to the intention which is expressed by the words used in the statute. But that is not to be discovered by considering those words in the abstract, but by inquiring what is the intention expressed by those words used in a statute with reference to the subject matter and for the object with which that statute was made; it being a question to be determined by the Court and a very important one, what was the object for which it appears the statute was made."

(Lord Blackburn,in Bradlaugh v. Clark (1883), 8 App. Cas. 354, at p. 372, quoted by Anglin, C.J.C. in Hirsch et al. v. P.S.B. of School Com'rs of

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Montreal et al (1926 2 D.L.R. 8, at p. 23, 1926 S.C.R. 246 at p. 266)

This Tribunal, again with all due respect, finds it difficult to reconcile the Bhinder decision with Section 41(3)(a) of the Act, which provides that the author of the discriminatory practice can be ordered to pay compensation if the practice was wilful. Why would the legislator restrict cases of compensation to those where intent has been demonstrated if intent must be demonstrated in all cases?

It can also be argued that this type of broad "remedy construction" is implied in the decision of the Canada Supreme Court in the case of Ontario Human Rights Commission et al. vs.

Borough of Etobicoke, (132 D.L.R. (3d) 1982, pp. 14 to 24). The Court, in effect, found that an occupational requirement could be discriminatory even if held in the sincere belief that it was legitimate. It decided that the words "bona fide", which are found in Section 14(a) of the Act referred as well to an objective standard, not merely a subjective one, and, by way of consequence, that discrimination can exist without the intent to discriminate. Could not a similar reasoning apply in interpreting Sections 7 and 10?

This Tribunal shares Mr. Black's opinion, cited above, that

Parliament intended to "eliminate barriers that have hindered disadvantaged groups", whether those barriers have been erected for that purpose or any other. Many types of discrimination which exist in the absence of intent but on the basis of

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old-fashioned stereotypes or ingrained misconceptions about the abilities of women or the handicapped, for example, could go unchallenged because of failure to meet the very strict standard set in Bhinder. We are of the opinion that that standard is not what the legislator had in mind.

We have dealt with this issue at lenghth, since we are of the view that if the appeal must be dismissed, it must be made clear that it is not because the Appellant failed to prove intent.

We must now address the question of the employer's justification for its policy in the matter at hand. The Supreme Court of Canada, in the case of Ontario Human Rights Commission et al vs. Borough of Etobicoke previously referred to, outlined the subjective and objective elements of the test. Those were applied in this case by the Tribunal of first instance at page 11 of its decision:

" The decisions quoted in effect point to a 'general standard of reasonableness' both subjective and objective in the circumstances of each case and it falls upon the Courts and Tribunals to establish this standard in each case.

In the case before us the policy or practice adopted by the employer appears reasonable and fair on the

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face of it as it provides employees with a clear statement relative to the employer's housing policy. The employer maintains that the excluded classifications are founded on the degree of skills and training required from employees, and the policy relating to the eligible classifications best answers the needs of the employer in what was recognized as a business

necessity (i.e. housing had to be offered to attract skilled workers).

There is no basis for disagreement with the finding of the Tribunal of first instance on this point and the appeal is therefore dismissed.

October 11, 1983.

Nicole Duval-Hesler

Jane Banfield Haynes
>Concurring
Opinion of S. Ashley

While I agree with the final disposition of the case by the other members of this panel, I do so for different reasons. In summary, it is my opinion that the policy of Rio Algom Limited regarding the allocation of company housing to their employees resulted in discrimination against Denise Marcotte. However, I feel bound by the decision of the Federal Court of Appeal in CN v. Bhinder (supra) which now requires that, to constitute discrimination under section 7 or 10 of the Canadian Human Rights Act, either a discriminatory intent or motivation must be present, or there must be differential treatment on a prohibited ground. Since there was no intent to discriminate and no differential treatment on a prohibited ground, the appeal must fail.

Prior to the Bhinder case, the question of intent was irrelevant, so long as there was a discriminatory result. Support for this contention is set out in the body of this decision, and more cases on this point are canvassed in the Bhinder Tribunal decision. Thus, many practices which were neutral in character but which had an adverse impact on specific groups of people protected under the Act, were defined as discriminatory. In the present case, the Tribunal found that the respondent’s policy was justifiable since the basis for exclusion was one of skills and training, i.e. the excluded categories were comprised largely of unskilled workers, while the eligible classifications involved mainly skilled workers. However, the fact remains that most of those classified as unskilled were women (73%), and most of those classified as skilled were men.

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The Tribunal, having found a prima facie case of discrimination, went on to find that the policy was justified because of a "legitimate business necessity". Respectfully, it is my opinion that the business necessity referred to was ultimately economic, since providing housing to eligible women would not necessarily restrict their stated goal of attracting skilled employees to Elliott Lake. Exhibit C-5 stated that:

"... we believed the other 20% could be filled by hiring sons, daughters, wives and husbands of employees already housed and thereby, have more than one employee in a house..."

This statement seems to be based on the stereotype that the husband is the head of the household, with the wife in a secondary wage-earning position, since there are in fact very few skilled women who are eligible for housing on their own. The respondent was unwilling to rationalize its housing allocations by a distance factor, i.e. anyone living within a certain radius of the work site would be ineligible for housing, or on the basis of need. By assuming that all secretaries, typists, key punch operators and others in excluded classifications are either married to or

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children of someone who is eligible for housing, the respondent has denied the opportunity to women who are not in that position to work at Rio Algom. While the practical reality is that most women will be living in company housing because of their husbands or fathers, it follows that the number of people in excluded categories who would be applying for housing in their own right would be small, and that need or distance might be a more justifiable criterion for determining eligibility for housing.

It is my conclusion, based on the law and the evidence, that the

>justification
by the respondent for its housing policy which had an adverse impact on the complainant, was insufficient. This was a policy which, while neutral in character, resulted in discriminatory treatment of women. However, there was no intent to discriminate, and since the policy was based on whether the employee’s job fell under a certain classification, there was no adverse differentiation on a prohibited ground, despite the fact that the primary impact fell on women, a protected group under the Canadian Human Rights Act.

The Bhinder decision from the Federal Court of Appeal has had the effect of permitting discriminatory conduct unless intent or adverse differentiation on a prohibited ground can be shown. That is, sex-neutral policies which nevertheless result in adverse treatment are no longer prohibited by the Act. I agree wholeheartedly with the statements in the body of this decision at pages 7-13, outlining the problems with the Bhinder decision. However, I feel that we are bound by that decision until such time as it is overturned by the Supreme Court of Canada, should that happen.

In summary, on the basis of the judgement of the Federal Court of Appeal in CN v. Bhinder, I find that there was no discrimination, because of the lact of intent or motive to discriminate, or unequal treatment on the basis of a prohibited ground. I would therefore dismiss the appeal.

Oct. 18, 1983 S. Ashley