T. D. 6/ 89 Decision rendered April 13, 1989

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

BRIAN MOSSOP Complainant - and

DEPARTMENT OF SECRETARY OF STATE, TREASURY BOARD OF CANADA, CANADIAN UNION OF PROFESSIONAL AND TECHNICAL EMPLOYEES Respondents - and

CANADIAN HUMAN RIGHTS COMMISSION Commission

TRIBUNAL: M. ELIZABETH ATCHESON

DECISION OF TRIBUNAL

APPEARANCES:
JAMES HENDRY AND ANNE TROTIER Counsel for the Canadian Human Rights Commission
ROBERT COUSINEAU Counsel for the Department of Secretary of State and Treasury Board
MICHEL ROY Counsel for the Canadian Union of Professional and Technical Employees

DATE AND LOCATION October 5, 1987 OF HEARING: Toronto, Ontario

> - 2 1. INTRODUCTION 1.1 On August 14, 1985, Mr. Brian Mossop (the Complainant) laid a

complaint under the Canadian Human Rights Act (the Act, then S. C. 1976- 77, c. 33, as amended, now R. S. C. 1985, c. H- 6) against the Department of Secretary of State of Canada (the DSS) alleging that the DSS had committed a discriminatory practice on the prohibited ground of family status in a matter related to employment under sections 7(b) and 10(b) of the Act.

1.2 On August 19, 1985, the Complainant laid a second complaint under the Act against the Canadian Union of Professional and Technical Employees (CUPTE) alleging that CUPTE had committed a discriminatory practice on the prohibited ground of family status in a matter related to employment under sections 9(1)(c)(ii) and 10(b) of the Act. (The complaint actually referred to section 9(c)(ii) which is taken to be a typographical error).

1.3 On May 12, 1987, 1 was appointed by the President of the Human Rights Tribunal Panel as a Human Rights Tribunal under the Act (the Tribunal) in respect of each complaint. Counsel to the Complainant and to the DSS agreed that the complaints would be heard concurrently. The hearing was held on October 5, 1987. At the commencement of the hearing, it was agreed by the

parties and accepted by the Tribunal that the complaint against the DSS be amended to include the Treasury Board of Canada (the Treasury Board) and thus the Treasury Board was added as a party to the hearing.

1.4 The Tribunal herein states its reasons for decision and its decision with respect to each complaint.

> - 3 - 2. CIRCUMSTANCES GIVING RISE TO COMPLAINTS 2.1 The complaints are based on events which occurred in May and June

of 1985. At that time and at the time of the hearing, the Complainant was employed by the Treasury Board in the Toronto, Ontario office of the translation branch of the DSS. As such, he was covered by an agreement pertaining to the Translation Group between the Treasury Board and CUPTE, which agreement was produced as Exhibit HR- 3 at the hearing (the Collective Agreement).

2.2 The Collective Agreement became effective on January 7, 1982, and, on its terms, was to expire on September 18, 1983. It was stated in evidence that the term of the Collective Agreement was extended until a new agreement was signed in August of 1985. The Collective Agreement was administered by the DSS in respect of the Complainant.

2.3 On June 3, 1985, the Complainant attended the funeral of the father of the man whom the Complainant described as his lover. On June 4, 1985, the Complainant applied in writing, to "his section chief" (Transcript, at 10) for the day of June 3, 1985, as bereavement leave under the Collective Agreement. He stated in the Application for Leave (Exhibit HR- 4) that the deceased was "the father of my lover (male) of ten years, with whom I reside".

2.4 The relevant provisions of the Collective Agreement with respect to bereavement leave provide as follows:

ARTICLE 19 SPECIAL LEAVE

... Bereavement Leave 19.02 For the purpose of this clause, immediate family is defined as father, mother, brother, sister, spouse (including common- law spouse resident with the employee), child (including child of common- law spouse), or ward of the employee, father- in-law, mother- in- law, and in addition a relative who permanently resides in the employee's household or with whom the employee permanently resides.

(a) Where a member of his immediate family dies, an employee shall be granted bereavement leave for a period of up to four (4) consecutive days and not extending beyond the day following the funeral. During such period he shall be granted special leave with pay for those days which would have been regularly scheduled working days. In addition, he may be granted up to three (3) days' special leave with pay for the purpose of travel to and from the place of the funeral.

> - 4 (b) In special circumstances and at the request of the

employee, bereavement leave may be extended beyond the day following the day of the funeral but the total number of days granted must be consecutive and not greater in number than those provided above, and must include the day of the funeral.

(c) An employee shall be granted special leave with pay up to a maximum of one day, in the event of the death of the employee's grand- parent, son- in- law, daughter- in law, brother- in-law, sister- in- law or grandchild.

(d) It is recognized by the parties that the circumstances which call for leave in respect of bereavement are based on individual circumstances. On request, the Deputy Head of a department may, after considering the particular circumstances involved, grant leave with pay for a period greater than that provided for in clause 19.02(a) and (c).

2.01 For the purposes of this Agreement, ... (s) a "common- law spouse" relationship is said to exist

when, for a continuous period of at least one year, an employee has lived with a person of the opposite sex, publicly represented that person to be his/ her spouse, and lives and intends to continue to live with that person as if that person were his/ her spouse.

2.5 The application of the Complainant for bereavement leave was denied. The DSS offered a day of "special leave" (probably under section 20.11 of the Collective Agreement) which was declined by the Complainant.

2.6 On June 10, 1985, the Complainant applied for one day of vacation leave in respect of June 3, 1985. His Application for Leave stated: "This application is submitted pending resolution of a grievance and a complaint to the CHRC (Canadian Human Rights Commission) concerning refusal of an application for 1 day of bereavement leave." This application was granted by the DSS.

2.7 The Collective Agreement includes a grievance procedure (Article 28). The Complainant made a Grievance Presentation (Exhibit HR- 6) in which he stated, in part:

On 3 June 1985 I attended the funeral of the father of my lover (male), with whom I have lived for a continuous period of nine years, whom I have publicly represented to be my lover, and with whom I intend to continue living. My relationship is thus identical to that described in section 2.01(s) of the collective agreement except that my lover is not of the opposite sex. On this basis, I was denied 1 day bereavement leave and I applied for it on 4 June.

> - 5 The Complainant sought the one day of bereavement leave, and a credit for one day of vacation leave.

2.8 In accordance with the requirements of the Collective Agreement, the grievance was approved by CUPTE. CUPTE represented the Complainant at the grievance hearing. It was held in Ottawa, Ontario on July 25, 1985. The Complainant attended the hearing and made a statement (Exhibit HR- 9). The Complainant's expenses were paid by CUPTE.

2.9 In a letter dated August 7, 1985, the Complainant was notified by Mr. Marc Rochon (Assistant Under Secretary of State, Regional Operations, DSS) that the grievance was rejected as the denial of bereavement leave was in accordance with the terms of the Collective Agreement (Exhibit HR- 8).

2.10 As noted in paragraphs 1.1 and 1.2, the Complainant laid complaints under the Act. In both complaints (Exhibit HR- 1 in respect of the Treasury Board and the DSS, and HR- 2 in respect of CUPTE), the Complainant stated, citing the denial by the DSS of the requested bereavement leave under section 19.02 of the Collective Agreement, that the Collective Agreement discriminated against him, contrary to the Act, because of his family status.

2.11 The Complainant testified that CUPTE had " completely supported" (Transcript, at 24) his position in the presentation of the grievance and the laying of the complaints. Mr. Michel Dubois, the President of the Groupe des traducteurs, interprètes et terminologues (the Translation Group) and a member of the Executive of CUPTE, gave evidence with respect to certain of the

positions taken on behalf of the Translation Group in the negotiations with the Treasury Board preceding the signing of the Collective Agreement on January 7, 1982. The actual amendments proposed by the Translation Group were introduced (Exhibit S- 1).

2.12 Mr. Dubois confirmed that, in that round of negotiations (and in subsequent rounds), the Translation Group proposed, inter alia, an amendment to section 2.01(s) of the Collective Agreement which would have removed the words "of the opposite sex" from the definition of "common- law spouse". Mr. Dubois stated that the official position of CUPTE relating to the subject matter of these complaints is as follows (Transcript, at 55- 6).

La position officielle du Syndicat, c’est que quel que soit le sexe de la personne, la définition de ’conjoint’ devrait être la même. Donc pour nous, il est important que les expressions "personne du sexe opposé" etc. soient supprimées de la convention et que en fait, la définition actuelle d’un conjoint de droit commun reconnu[e] dans les diverses provinces, soit appliqué[e] autant au couple homosexuel masculin et féminin- qu’au couple [hét] érosexuel.

> - 6 2.13 The Complainant testified in some detail about how the conduct of his life was inter- related with that of his lover. They have known each other since 1974, and resided together since 1976, at the time of the hearing in a jointly- owned and maintained home. It was clear that they share the day- to- day developments in their lives. They maintain a sexual relationship. They are known to their families and friends as lovers. Each has made the other the beneficiary of his will. The Complainant intended to continue this relationship for the foreseeable future.

2.14 The Complainant described the significance of the denial of bereavement leave to him (Transcript, at 16):

... this is just another case of me being treated differently because I am gay. And every gay person, including me, has a long history of constantly being treated differently and in particular being treated as if our feelings or relationships don’t count somehow. Getting a day of leave

means something because it’s a sort of official thing, it means that you’re recognized as a unit in society.

> - 7 3. RELEVANT PROVISIONS OF THE ACT 3.1 By way of introduction, it should be noted that all statutory

references to the Act in this decision are to the Act as it read when the events giving rise to the complaints occurred. The provisions cited in this decision have not been amended in substance since that time, although the internal numbering of the provisions has changed as a result of consolidation in the

Revised Statutes of Canada 1985 which came into force on December 12, 1988.

3.2 The Act sets out certain "discriminatory practices" which may be the subject of complaint and provides that, if anyone is found to be engaging or to have engaged in such a practice, then such person may be subject to an order under the Act (section 4). The Complainant laid a complaint against each of the DSS (the Treasury Board being added subsequently) and CUPTE, and each complaint cited two discriminatory practices.

3.3 The Complainant alleged that the Treasury Board and the DSS had committed a discriminatory practice under section 7(b) which reads as follows:

7. It is a discriminatory practice, directly or indirectly, ... (b) in the course of employment, to differentiate adversely in

relation to an employee, on a prohibited ground of discrimination.

The Complainant alleged that CUPTE had committed a discriminatory practice under section 9(1)(c)(ii) which reads as follows:

9.(1) It is a discriminatory practice for an employee organization on a prohibited ground of discrimination ...

(c) to limit, segregate, classify or otherwise act in relation to an individual in a way that would ...

(ii) limit employment opportunities, or otherwise adversely affect the status of the individual,

where the individual is a member of the organization or where any of the obligations of the organization pursuant to a collective agreement relate to the individual.

The Complainant alleged that each of the Treasury Board, the DSS and CUPTE had committed a discriminatory practice under section 10(b) which reads as follows:

10. It is discriminatory practice for an employer, employee organization or organization of employees ...

> - 8 (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.

3.4 The Act prescribes the following as prohibited grounds of discrimination (section 3(1)): race, national or ethnic origin, colour, religion, age, sex, marital status, family status,

disability and conviction of an offence for which a pardon has been granted. The Complainant cited the proscribed ground of "family status" in both complaints. "Family status" was added to the Act by S. C. 1980- 81- 82- 83, C. 143 and the relevant provisions came into force on July 1, 1983.

3.5 "Family status" is not defined in the Act, nor has the Commission, by order, issued a guideline under section 22(2) of the Act "setting out the extent to which and the manner in which, in the opinion of the Commission, any provision of this Act applies in a particular case or in a class of cases...."

3.6 It should be noted that "employee organization" is defined in section 9(3) of the Act. The issue of whether CUPTE meets the definition was not raised at the hearing by CUPTE or any other party. The Tribunal finds CUPTE to be an "employee organization" for purposes of the Act.

3.7 By virtue of section 41, the Tribunal must determine whether each complaint is "substantiated". If not, the complaint is to be dismissed. If it is determined to be substantiated, then the Tribunal may make an order in accordance with sections 41(2) and (3) of the Act.

> - 9 4. MEANING OF FAMILY STATUS 4.1 At the hearing, neither Counsel for the Treasury Board and DSS,

Mr. Cousineau, nor Counsel for CUPTE, Mr. Roy, challenged the evidence of the Complainant with respect to the relevant provisions of the Collective Agreement or what had occurred in response to the application by the Complainant for bereavement leave under section 19.02 of the Collective Agreement. Neither Respondent offered a defence. Most of the evidence and argument addressed the fundamental question of whether the denial of bereavement leave in accordance with the Collective Agreement was based on family status, the prohibited ground of discrimination cited by the Complainant. The meaning of family status as used in the Act was put directly in issue.

4.2 The arguments of the Complainant with respect to the meaning of "family" were based on his position that homosexual couples can constitute a family. Counsel for the Canadian Human Rights Commission (the Commission), Mr. Hendry, introduced evidence to establish that, and argued that, the relationship between the Complainant and his lover was that of a family, and that the Collective Agreement did not accord the same treatment to all families (Transcript, at 60). Mr. Cousineau argued that the Complainant’s lover fell within the definition of "common law

spouse" found in section 2.01(s) of the Collective Agreement except that the lover was not a person "of the opposite sex" and therefore the denial of bereavement leave was based not on the nature of the relationship between the Complainant and his lover, but on the sexual orientation of the Complainant (Transcript, at 105). Mr. Roy made no submissions on the meaning of "family status", apart from stating its support for the position of the Complainant (Transcript, at 7).

4.3 Mr. Cousineau noted, quite rightly, that sexual orientation was not a prohibited ground of discrimination under the Act at the time the complaints were made (nor has it been added to date). In his view, reliance on the ground of family status in this case would constitute a subterfuge for incorporating sexual orientation in the Act as a prohibited ground of discrimination (Transcript, at 105- 06). Mr. Cousineau, however, did not challenge the jurisdiction of this Tribunal to interpret family status in the first instance. The Tribunal notes the decision in Canadian Pacific Air Lines, Limited v. Bryan Williams ([1982] 1 F. C. 214 (F. C. A.)) where Thurlow, C. J., at 215, states that a Tribunal "... has jurisdiction to determine whether what is alleged by the Complainant is capable of being discrimination and, if so, whether discrimination has been established."

Evidence of Dr. Margrit Eichler 4.4 Counsel for the Commission produced Dr. Margrit Eichler as a

witness at the hearing and requested that she be accepted as an expert witness in the area of sociology and family policy. As

> - 10 her lengthy curriculum vitae (Exhibit HR- 10) established, Dr. Eichler holds a doctorate in sociology. At the time of the hearing, she was a full professor in the Department of Sociology of the Ontario Institute for Studies and Education, as well as being cross- appointed to both the Department of Educational Theory and the Department of Sociology at the University of Toronto. She has received numerous research and development grants, given many scientific papers and published extensively. Dr. Eichler stated that family issues have been one of the three major areas of her work since 1975. At the time of the hearing, Dr. Eichler had written the only text book in Canada on families -- Canadian Families Today, Recent Changes and Their Policy Consequences -- which is used widely in Canadian universities. Dr. Eichler has provided consulting services in her areas of expertise to, amongst others, C. D. Howe Institute, Statistics Canada, Status of Women Canada, Canadian Advisory Council on the Status of Women, Economic Council of Canada and Health and Welfare Canada. On the basis of her qualifications and given that the other parties did not raise any objections, the Tribunal qualified Dr. Eichler as an expert witness in the area of sociology and family policy.

4.5 Dr. Eichler stated that the term "family" does not have one definition for all purposes in Canada, although there are standard definitions that are useful for certain purposes (Transcript, at 34- 5). Further Dr. Eichler was of the view that the term is not as clear as people tend to consider it to be (Transcript, at 41,43). Mr. Hendry questioned Dr. Eichler specifically with respect to employment benefits as follows (Transcript, at 35- 6, emphasis added):

Q. Well, you’ve had a considerable amount of policy experience, policy dealing with families, is there a sociological approach for dealing with the issue of family

membership in the matter of employment benefit policy? A. I would look at familial relationships rather than judging in advance what type of formal compositions make a difference and so I would look at it in terms of various dimensions of familial interaction and see whether that suggests that a given relationship is the family- like relationship.

She subsequently stated that she preferred the term "familial relationship" to "family- like relationship" because inherent in the latter term is an implication that a family- like relationship is different from a family. Dr. Eichler observed that, just as families are evolving, so is the language by which families are described (Transcript, at 38- 9).

4.6 Dr. Eichler emphasized the importance of looking at "relationships as they are" (Transcript, at 36). By way of comparison, Dr. Eichler noted the problems which may arise in

> - 11 determining the ethnic origin of a child whose natural parents or step- parents may be of different ethnic origins and speak different languages even than their children. Dr. Eichler noted that Statistics Canada has adopted a definition for ethnic origin that considers a number of factors, including: background of the mother and father, language spoken at home and the actual identification of the child (Transcript, at 43- 4).

4.7 In Dr. Eichler's view, corollary to the lack of a standard definition is a lack of consensus with respect to the definition of family (Transcript, at 46):

There are significant segments of the population which will accept homosexual relationships as family relationships, as couple relationships; there are homosexual couples which have children both male and female, and they are accepted as families, but not by everybody. There are also other families which would conform to very standard definitions which are not accepted by everybody. And then you have families which look very traditional in terms of their composition but where you find incest and where you find spousal abuse... So, there is no clear cut agreement, there is no clear cut consensus. What I can give you I think is an overview of the range of attitudes and there would be a segment of the population that would look at homosexual unions as being comparable to other couple relationships.

4.8 Dr. Eichler was asked to give her view of the relationship of the Complainant with his lover and she opined that it was a familial relationship for the following reasons (Transcript, at 38);

From what I've heard this is a relationship of some standing in terms of time with the expectation of continuance. So it's not a relationship that is defined in terms of time. You have economic union in many ways as expressed by the fact that the house is jointly owned, that life insurance --

the people, the two (2) partners are beneficiaries -- that there's joint financing, it's a sexual relationship, housework is shared and it's an emotional relationship which is a very important aspect of familial relationships.

Dr. Eichler confirmed that she had not compiled a standard list of factors against which to compare a relationship for purposes of determining whether it is familial because no single indicator is always present in a familial relationship (Transcript, at 50- 1).

Argument of the Commission 4.9 Mr. Hendry described the evidence of Dr. Eichler as > - 12 establishing a "functional approach" which the Tribunal could

adopt (Transcript, at 65- 6) and summarized her evidence as follows:

In her opinion she said there was a familial relationship between Mr. Mossop and Mr. [Popert]. I offered the term 'family- like' and she said that she preferred 'familial relationship, ' because it's not simply family- like, rather it is a family. It's not an artificial thing. It's not a comparison with another kind of family. This is a familial relationship in and of itself ...

Now, it was suggested in the cross- examination of Mr. Cousineau ... what end would there be to the family if you didn't have something more defined. And she said there was a practicability. And perhaps that's the underlying basis of her testimony -- is a matter of practicability, a matter of the function of the family and where the function is present, then the needs to perform those functions should be recognized.

4.10 Mr. Hendry stated that, at the time of the hearing, the issue of "whether or not a homosexual family comes within the definition of family status" had not been determined by a Canadian court or tribunal (Transcript, at 66- 7). He therefore cited a number of cases which he argued established: 1) the general principles of interpretation to be applied to anti- discrimination statutes; and, 2) the acceptance by earlier courts and tribunals of a functional approach to interpretation and application of legal terms.

4.11 Mr. Hendry reviewed four decisions of the Supreme Court of Canada, three of which pertained to the Act. The first case is Bhinder v. C. N. R., [1985] 2 S. C. R. 561. Bhinder, a Sikh, refused to comply with a rule of the employer that all employees wear a hard hat at a particular work site because his religion did not allow any head gear other than a turban to be worn. Upon refusing other work, the employment of Mr. Bhinder was terminated and he complained under the Act that the C. N. R. had engaged in a discriminatory practice.

4.12 The Court was asked to rule, first, on whether sections 7 and 10 of the Act prohibit adverse effect and unintentional discrimination, and, second, on whether a duty to accommodate is part of a bona fide occupational requirement.

4.13 The Court unanimously held that the Act did prohibit adverse effect and unintentional discrimination. The Court in Bhinder adopted its own reasoning in another case released concurrently which considered the same question with respect to the Ontario Human Rights Code, Ontario Human Rights Commission and O'Malley v. Simpsons - Sears Ltd., [1985] 2 S. C. R. 536 (Bhinder, at 586, per McIntyre, J. and at 566- 67, per Dickson, C. J.).

> - 13 4.14 In O'Malley (and therefore as adopted by Bhinder) the starting point for interpretation of the Ontario Human Rights Code was its preamble (section 2 of the Act, to be cited below, is analogous to the preamble). McIntyre, J. stated (at 546- 47):

There we find enunciated the broad policy of the Code and it is this policy which should have effect. It is not, in my view, a sound approach to say that according to established rules of construction no broader meaning can be given to the Code than the narrowest interpretation of the words employed. The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment (see Lamer J. in Insurance Corporation of British Columbia v. Heerspink, [1982] 2 S. C. R. 145, at pp. 157- 58), and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary - and it is for the courts to seek out its purpose and give it effect. The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory.

4.15 The second issue in Bhinder (the bona fide occupational requirement) does not arise in the complaints which are before this Tribunal. It may be useful to note, however, that the Court agreed with the tribunal which originally heard the matter that "a liberal interpretation should be applied to the provisions prohibiting discrimination and a narrow interpretation to the exceptions." (Bhinder, at 589, per McIntyre, J.).

4.16 In Action Travail des Femmes v. Canadian National Railway Company et al., (1987), 76 N. R. 161, the Court considered whether there was jurisdiction under the Act to order the employer to implement a regime for hiring a certain number of women in non- professional jobs. The Court refused to apply a "strict grammatical

construction" to the Act. One of the reasons for so refusing was the Court's view that it could not focus solely on the provision in question because to do so would ignore the "dominant purpose" of the Act as stated in section 2 of the Act. Chief Justice Dickson stated (at 182- 83):

> - 14 Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact. Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal Interpretation Act which asserts that statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained. See s. 11 of the Interpretation Act, R. S. C. 1970, c. I- 23, as amended. As E. A. Driedger, Construction of Statutes (2nd ed. 1983), p. 87 has written:

'Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. '

The purposes of the Act would appear to be patently obvious, in light of the powerful language of s. 2. In order to promote the goal of equal opportunity for each individual to achieve "the life that he or she is able and wishes to have", the Act seeks to prevent all 'discriminatory practices' based, inter alia, on sex. It is the practice itself which is sought to be precluded.

4.17 In Robichaud v. Canada (Treasury Board), [1987] 2 S. C. R. 84, the Court considered whether employers are liable, under the Act, for the discriminatory acts of their employees. The Court emphasized the central purpose of the Act, which is to "[redress] socially undesirable conditions quite apart from the reasons for their existence" (at 90). Given the nature of discriminatory practices in employment, only the employer can remedy those conditions through providing "a healthy work environment" (at 94). Therefore, unless the central purpose of the Act is to be thwarted, the employee must be liable under the Act.

4.18 Mr. Hendry cited five cases which, in his view, supported the adoption of a functional approach to the definition of family status.

4.19 The first case in Bailey v. Minister of National Revenue (1981), 1 C. H. R. R. D/ 193. The tribunal considered a number of complaints under the Act arising from the administration and enforcement of provisions of the Income Tax Act (Canada). The facts of the relevant complaint are given in the headnote to the reported decision:

The first Complainant, Roberta Agnes Bailey, filed a Complaint on the basis that she had claimed a 'married status' deduction in respect of William Carson in filing her income tax return for 1977, which deduction is provided for in paragraph 109 (1)(a) of the Income Tax Act, (hereafter the ITA) S. C. 1970- 71- 72, c. 63, as amended, but the deduction was not permitted by the Minister of National Revenue because she was not married to William Carson. That is, William Carson was not considered to be her "spouse" within the meaning of paragraph 109(1)(a) of the ITA. The married status deduction is available only to a 'married person who supported his (or her) spouse'. Ms. Bailey and Mr. Carson had lived together for some five years and she had supported him in 1977.

The Tribunal noted that "marital status" was more difficult to define than most prohibited grounds of discrimination -- the majority of which are immutable -- but found that the complaint was properly framed (at D/ 195), implying that common law spouses were entitled, prima facie, to claim the assistance of the Act. For reasons unrelated to the definition of marital status, the complaint was dismissed (at D/ 222).

4.20 The second case is Air Canada v. Bain (1982), 3 C. H. R. R. D/ 682 (F. C. A.). Bain alleged that Air Canada had engaged in a discriminatory practice contrary to the Act when it refused to allow two unrelated adults to travel on a reduced fare available to married couples. The case was

cited not because the decision is relevant, but because of an observation made by Pratte, J. (at D/ 684):

The Plan is not only available to married persons travelling together; it is also available to persons who, while unmarried, live together more or less permanently and, for that reason, constitute a ’de facto’ family.

4.21 The third case arose under The Manitoba Human Rights Act (now The Human Rights Code, C. C. S. M., c. H175) which prohibits discrimination because of family status and, at the time the events leading to the case occurred, defined family status. In Moxon et al. v. Samax Investments Ltd. et al. (1985), 5 C. H. R. R. D/ 2835, a board of adjudication decided that the respondent has discriminated against the complainants, each of whom had children, by refusing to rent apartments to them. It may be helpful to note the provisions of The Manitoba Human Rights Act which were in issue (at D/ 2838):

> - 16 The [relevant] Section prohibits denial of housing

accommodation to any person unless reasonable cause exists for the denial or discrimination. Section 4(2) provides that ’family status’ does not constitute reasonable cause. Family status is defined in Section 1 (d. 1) of the Act as:

’family status’ for the purpose of this Act includes the status of an unmarried person or parent, a widow or widower or that of a person who is divorced or separated or the status of the children, dependants or members of the family of a person;....

4.22 In reaching the decision that family status included the status of having children (and substantiating the complaint, on the facts), the board of adjudication observed, quoting the relevant passage in full (at D/ 2839):

Professor Walter Tarnopolsky has commented upon the concept in his book Discrimination and the Law in Canada, at page 295:

’No other jurisdiction proved any definition of marital status, just as Quebec does not define ’civil status’ and the Canadian Human Rights Act neither defines the terms used i. e. ’marital status’ and ’situation de famille’, nor attempts to reconcile any differences there might be between the two terms’.

’References to dictionaries support the definitions above and also show that there is less difficulty with trying to define ’marital status’ than there is with ’family status’ or ’situation de famille’. Thus, both the Oxford English Dictionary and Webster’s Third International Dictionary give very similar definitions to the word ’marital’. The former defines it as ’of or pertaining to marriage; matrimonial, connubial’, and the latter as ’of or relating to marriage or the marriage state: conjugal’. As to the word ’family’, however common law authorities agree that ’it has various meanings’, ’is used to designate many relationships’, ’can mean many things according to its context’ or, of course, may be determined by the statute in which it is found. On the other had, it is fair to say that these authorities all agree that, although in a particular case a more

limited meaning must be given, the word has always included the inter- relationship that arises from bonds of marriage, consanguinity or legal adoption, including of course, the ancestral relationship, whether legitimate, illegitimate or by adoption, as well as the relationships between spouses, siblings, in- laws, uncles or aunts and nephews or nieces, cousins, etc. '

> - 17 Bearing these comments in mind it seems to me that the expression 'family status' in the Act is intended to have a broad application. It would appear, from the wording of the definition that at least two forms of 'family status' are contemplated. In this regard, it must be noted as well that the definition is not an exhaustive one, as the language

provides that family status 'includes' certain categories. Consequently the concept of family status may in fact be broader than two categories which appear within the definition itself.

The first of the two categories appears in the language in the definition up to and including the word 'separated'. It seems to me that portion of the definition is directed towards the status or civil status of categories of persons or relationships which would not perhaps be captured by the term 'marital status', for example, single parents, persons who are separated, divorced or widowed and non- marital relationships, both heterosexual and homosexual. The latter portion of the definition, seems to disclose a broader notion of family status by providing that it includes 'the status of the children, dependants, or members of the family of a person'. This portion of the definition appears to contemplate discrimination on the basis of the relationship on the basis of the relationship of a person to a particular individual, whether that relationship is based upon blood, marriage, or some other form of relationship.

4.23 The final two cases cited by Mr. Hendry involved statutes other than the Act or analogous provincial statutes. One involved the interpretation of "child" in a family law statute (Re Macdonald and Macdonald (1979), 24 O. R. (2d) 84 (Ont. Co. Ct.)). The other involved whether a group home for handicapped individuals was allowed in an area zoned by city by- law for one- family or two family dwellings (Charlottetown v. Charlottetown Association for Residential Services (1979), 9 M. P. L. R. 91 (P. E. I. S. Ct.)). Again, it is useful to quote at length from the decision in the matter (at 100, per McQuaid, J.):

Satisfied, therefore, that the house is used 'exclusively for residence purposes' the next question is whether or not it is occupied 'by not more than one family'. Can these seven residents be properly classified as 'one family'?

Definition of terms is one of the essentials of a properly draft by- law. Unfortunately the word 'family' is not defined in the city by- law, as it is in many of the zoning by- laws I have examined in other cities and towns. The absence of a definition makes a proper interpretation much more difficult. As was pointed out by the British Columbia Court of Appeal in N. Amer. Life v. Gold, [1917] 2 W. W. R. 613, 24 B. C. R. 50, 34 D. L. R. 735 (C. A.) the word 'family' is

> - 18 an elastic term, having various meanings in varying circumstances and must be considered in relation to the particular subject matter. In Dodge v. Boston & Providence Railroad Corpn. (1891), 154 Mass. 299, the Court said:

’The word ’family’ has several meanings. Its primary meaning is the collective body of persons who live in one house under one head or management. Its secondary meaning is those who are of the same lineage or descend

from one common progenitor. Unless the context manifests a different intention, the word ’family’ is usually construed in its primary sense. ’ [The italics are mine.]

In commenting on this rule, Harvey C. J. of the Appellate Division of the Supreme Court of Alberta in Re Ramsay, (1939) I W. W. R. 725 remarked that it ’seems to be reasonable and deserving of being adopted’. I am also prepared to adopt this rule and, in the absence of anything specifically to the contrary in the by- law presently under consideration, I am of the opinion that the primary meaning of the word should be adopted. If the City had intended the secondary meaning, it could have defined ’family’ as a ’group of two or more persons living together and inter- related by bonds of consanguinity, marriage or legal adoption’.

Argument of the Treasury Board and DSS 4.24 Mr. Cousineau presented certain principles (in addition to the

warning stated in paragraph 4.2) by which the Tribunal should be guided, although generally he did not cite any authorities establishing these principles.

4.25 The first principle was that the Tribunal should confine itself to the plain meaning of family. He relied on the approach taken by the Court of Queen’s Bench of Saskatchewan in Re Board of Governors at the University of Saskatchewan et al and the Saskatchewan Human Rights Commission (1976), 66 D. L. R. (3d) 561. An employee of the University had been suspended from certain of his employment functions upon publication of his support for gay rights. The employee alleged discrimination on the basis of sex under the relevant legislation and the University applied to the Court for an order prohibiting the Saskatchewan Human Rights Commission from proceeding with an inquiry. Although Mr. Cousineau did not quote from the case, he would appear to have relied on the following portion (at 564, per Johnson, J.):

While resort to dictionaries is permissible to assist in ascertaining ordinary meanings of words, it may not be necessary to so resort if their meaning, as they would have been generally understood the day after the statute was passed, is clear. In the Fair Employment Practices Act,

> - 19 provision for prohibiting employment discrimination against any person on the basis of his sex would generally be considered to be on the basis of whether or not that person was a man or a woman, not on his sexual orientation, sexual proclivity, or sexual activity. In other words, sex as used in Section 3 would generally and popularly be regarded as referring to the gender of the employee or prospective employee and not to the sexual activities or propensities of that person. It should be noted that the section in question prohibits discrimination on the basis of his race, his religion, his sex, etc. and not on the basis of his sexual activity, his sexual propensity or his sexual

orientation. 4.26 Mr. Cousineau argued that if the Tribunal should not give the

narrowest meaning to the term family status as used in the Act, neither should it give the broadest meaning. The Tribunal must be guided by the intent of the legislation and the Tribunal should not consider a sociological approach to meaning, but only the plain meaning itself (Transcript, at 109). 4.27 With respect to the plain meaning of family status, Mr. Cousineau

suggest (at 106- 7): Family in our day- to- day life and in the context of the collective agreement implies certain traditional values and one common denominator and that was used in Dr. Eichler's evidence, one common denominator seems to be children. In all of her evidence, in anything she has said about family, she always has referred to children -- children of divorced couples, children of unwed mothers -- always bringing it back to the notion of children.

I think that is not surprising because in our, the general public, understanding of family, children are an important common denominator. There is no need to argue that there will be no children in the type of relationship between Mr. Mossop and his lover.

In Mr. Cousineau's view, the relationship of the Complainant and his lover does not fall within the plain meaning of "family".

4.28 Mr. Cousineau suggested that the recognition of "common- law" spouses is acceptable because there is "legislated recognition" of that type of relationship. In his view, it follows that there is a legal relationship between one common law spouse and the family members of the other common law spouse , e. g., a common law spouse may have, at law, a father- in- law because common law spouses are recognized at law (Transcript, at 107- 8). As homosexual spouses are not recognized at law, one member of a homosexual couple cannot be "related" to the family of his or her companion in this way.

> - 20 Argument of the Complainant 4.29 The Complainant, a translator by profession, argued that

dictionary definitions of words must be approached with caution for three reasons. The first is that dictionary definitions are based on the usage of a word at a given point in time. For that reason, a dictionary does not reflect current usage.

4.30 The second is that there is a dynamic relationship between a word and its in day to day usage which must be considered (Transcript, at 111- 2):

The meaning of words in language [is] not unrelated to what goes on in every day life, it's not a completely separate little sphere where there may be confusion in life but absolute clarity when it comes to language. People use

words in different ways. There's no single meaning of the word family in the English language. It isn't just that the sociological facts differ about different types of living relationships but the word family has different meanings.

4.31 Finally, the Complainant noted that it was not considered in evidence (either through examination in chief or cross examination of Dr. Eichler) whether heterosexual common law

couples (or the Tribunal would add, for that matter, heterosexual married couples) are considered to be families. In the Complainant's view, there probably was an assumption that heterosexual married couples) are considered to be families. In the Complainant's view, there probably was an assumption that heterosexual couples are considered to be families and that this kind of "common wisdom ... amounts to a bias in favour of heterosexual people" ((Transcript, at 114).

Parliamentary Record 4.32 As noted in paragraph 3.4, family status was added to the Act as

a prohibited ground of discrimination effective July 1, 1983. This amendment was included in the first after its passage. Counsel for the Commission noted that it was introduced to resolve a discrepancy between the original English version of the Act -- which included only "marital status" -- and the French version -- which included only "situation de famille".

4.33 Following second reading without debate, Bill C- 131, which contained the amendments to the Act, was sent to the Standing Committee on Justice and Legal Affairs (the Committee) for consideration (House of Commons Debates, Volume XIX, 1982, at 21743). The then Minister of Justice, the Honourable Mark MacGuigan, appeared before the Committee, as did the then Chief Commissioner under the Act, Mr. Gordon Fairweather.

4.34 The Minister made it clear that, to harmonize the English and French versions of the Act, both marital status and family status

> - 21 were to be prohibited grounds (Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs, Issue No. 114, December 20, 1982, at 114: 10). Members of the Committee questioned the Minister on the new ground of family status, and he stated (Minutes, at 114: 17):

... this concept prohibits discrimination on the basis of relationships arising from marriage, consanguinity or legal adoption. It could include ancestral relationships, whether legitimate, illegitimate or by adoption, as well as relationships between spouses, siblings, in- laws, uncles or aunts, nephews or nieces, cousin, etc. It will be up to the Commission, the tribunals it appoints, and in the final cases, the courts, to ascertain in a given case the meaning to be given to these concepts.

In simple terms, it means you cannot have guilt by association or failure to employ somebody by association

because someone else in his family has a weakness of some kind, whatever it may be. You cannot use this as a reason to deny this person employment. Each person is to be judged on his or her own merits and abilities, not on family status.

4.35 The Minister was questioned as to whether family status includes the "non- traditional family relationships, such as common- law marriages" (Minutes, Issue No. 115, December 21, 1982, at 115: 71). The Minister noted that the ground of marital status had been held to include common law marriages (presumably relying on Bailey, paragraph 4.19 above, in which this

conclusion may not have been part of the final decision in the case). The questioning continued as follows (Minutes, 115: 71):

Mr. Hnatyshyn: What about persons living together and sharing economic and other responsibilities? Would that be included in family status?

Mr. MacGuigan: That is what I was describing as a common law relationship. No, that would not be included in family status as best we can see a judicial interpretation of it.

Mr. Hnatyshyn: Two widows or two brothers or two friends living together.

Mr. MacGuigan: Well, that is not a relationship of marriage consanguinity or legal adoption. I would not see any family relationship there.

Mr. Hnatyshyn: Have you considered putting in that definition that you refer to in the text of the act itself?

Mr. MacGuigan: The definition of family? I am not sure that it is necessary to put it in. I think that 'family'

> - 22 implies relationships on those bases. The reason why I say that illegitimate children could be included is precisely because there is a relationship of consanguinity. But in mere occasional relationships that are not marriage consanguinity or legal adoption, I do not think the court could interpret that as a family status relationship.

Mr. Hnatyshyn: Would you have any objection to including that in the act?

Mr. MacGuigan: I certainly would have objection to building it in a clause like that which is a general objective. In fact, the concept has already been in the act in that it has been there in the French interpretation. The problem here is that the French phrase was already there, and we are adding the phrase in English when it is already there in French.

In French, the phrase l'état matrimonial was not there. So it has been there. It has not caused any problem of

interpretation. The Commission issues guidelines defining such words. That has been the history of the other grounds here, so it is not usual to proceed by way of definition of these things.

. . . . Mr. Hnatyshyn: ... I am just trying to think, if the Minister is quite certain as to the extent to which this term refers, why he is reluctant to have that clearly defined in the bill, so there would be clear guidance in the terms of legislation for the courts. It seems to me it would minimize disputes and clarify the situation quite clearly, rather than relying on judicial interpretation of as yet, an undefined or imprecise reference.

You talk about marital status and family status. I think marital status is easily definable. In the common- law context, I would think family status would be subject to interpretation and would very much depend on the court and on the courts.

So I am just asking the question rhetorically, I guess. But I am interested as to why there is a reluctance to include more precision so there is more guidance to the courts.

Mr. MacGuigan: The reasons for my reluctance to have such definitions included Mr. Chairman, is that it is not in accord with the scheme of the bill. These words are being interpreted by the Canadian Human Rights Commission. We trust them to interpret and issue regulations.

It is true, of course, that a court can always pronounce on > - 23 the validity of this; but in most cases, the action of the

Commission is accepted. Generally speaking, we think that is a better way to proceed.

4.36 The Minister was questioned as to why the Government of Canada had not chosen to respond to the recommendations of the Commission and include political belief and sexual orientation as prohibited grounds of discrimination and the Minister referred to national security considerations and "concern as to whether there is sufficient social consensus in this area for these grounds to be broadly accepted "(Minutes, 114: 19- 20). Mr. Fairweather observed that, with respect to Minister's view that social consensus might not exist, the Commission "found otherwise" (Minutes, 115: 45).

Additional Relevant Cases 4.37 The following provincial and territorial jurisdictions also

prohibit discrimination on the basis of family status: Manitoba, Ontario and the Northwest Territories. In Quebec, the term "civil status" is used which, in some circumstances, may be analogous to family status. The term was defined more broadly in the Manitoba statute (see paragraph 4.21) than in the Ontario

statute, these being the only jurisdictions which have attempted a definition. The Human Rights Code, 1981 (S. O. 1981, C. 53, as amended) defines family status to mean (section 9(1)(d)): "the status of being in a parent and child relationship". As a result, cases relying on the prohibited ground of family status under the Ontario statute are not helpful in deciding the matters before this Tribunal.

4.38 It would appear that complaints similar to the ones before the Tribunal have not been decided under The Human Rights Code of Manitoba, or its predecessor, although such a possibility has been raised. In Vogel v. The Government of Manitoba (1983), 4 C. H. R. R. D/ 1654, a board of adjudication considered the allegation that the Government had discriminated against Vogel because he was refused certain coverage under the dental plan for his homosexual partner which other employees were entitled to receive for their heterosexual partners. The complaint alleged discrimination on the basis of sex and marital status. The board held (at D/ 1657) that sex refers to gender and not to sexual preference, and that marital status refers to heterosexual relationships. The board commented (at D/ 1658):

... during the course of counsels' submissions I asked whether the ground of 'family status' might be relevant in this case. Counsel for the Commission did not rely on 'family status' and I refer to it only briefly to say that I am not aware that the type of relationship between Mr. Vogel and Mr. North is one which has been judicially recognized as creating any type of 'family status'.

> - 24 ... To hold that the Manitoba Human Rights Act covers homosexuality or sexual orientation would be to legislate in an area the legislature did not intend. In my view it is not for a board of adjudication to so legislate.

As a result, the complaint was dismissed. 4.39 In Thistle v. The Inuvik Housing Association (1986), 8 C. H. R. R.

D/ 3930, a Fair Practices Officer found that the common law spouse of the complainant was a member of the family of the complainant (at D/ 3931), and substantiated the complaint that the Inuvik Housing Association had discriminated contrary to the Northwest Territories Fair Practices Act (R. S. N. W. T. 1974, c. F2, as amended) when it refused to pay a housing benefit to Thistle because his common law spouse was receiving one.

4.40 The Tribunal has had an opportunity to consider the decision, rendered in 1988, of another tribunal appointed under the Act which considers, inter alia, the meaning of family status. In Schaap et al. v. Canada (Department of National Defence) (1988), 9 C. H. R. R. D/ 4890, a tribunal considered whether one of the complainants, Schaap, had been discriminated against on the basis of marital status when he was refused accommodation in married quarters because he was in a common law relationship. The second

complainant, Lagacé, also was in a common law relationship with a woman who had a son from a prior marriage, and the three lived together. He also was refused accommodation in married quarters and based his complaint on marital status and family status. Counsel for the Department of National Defence (DND) argued that the two grounds of discrimination relied upon in the complaints could not be extended to protect common law relationships. The tribunal concluded that it was appropriate to hear evidence prior to ruling on the scope of the jurisdiction of the tribunal.

4.41 The rules established by DND were as follows (at D/ 4895- 96): The policy was set out in the Queen's Regulations and Orders for the Canadian Forces, (Q. R. & O.) passed pursuant to the National Defence Act S. R. C. 1970, c. N- 4, Article 1.075 provides:

For the purpose of Volumes I and III of Q. R. & O. and officer or man is deemed to be married if he has gone through a form of marriage ...

Article 28.06 sets out entitlement to occupy married quarters as follows:

Except as provided in (2) of this article, an officer or man and his family are entitled to occupy married quarters when:

> - 25 a) accommodation is available: b) the officer or man is married, or is not married but

has a dependant child related by blood, marriage or adoption who is claimed as a dependent for income tax purposes, provided the wife or dependant child, as applicable, normally resides with the officer or man ...

Under Q. R. & O., Article 209.80 and C. F. A. O. 28- 3, the term "family" is defined for the purposes of allotment of quarters as the occupant's dependents, defined as being his legal spouse or a relative by blood, marriage or adoption who is normally resident with him and for whom he is eligible to claim a personal exemption under the Income Tax Act, together with some other individuals who are not relevant to this case.

4.42 The tribunal considered what rules of statutory interpretation were relevant, and concluded (at D/ 4898- 9):

In interpreting what is meant by 'family status' and 'marital status' I accept the principles of statutory interpretation which state that you must recognize the special purpose and nature of human rights legislation, seeking out and giving effect to its purpose. I do not feel this means, however, that I can stretch words and go beyond their ordinary and natural meaning. It is not open for me

to legislate in areas left open by Parliament. The human rights legislation before me prohibits some discrimination but not all discrimination.

4.43 In reaching its decision with respect to the meaning of family status, the tribunal considered the following:

. the definitions included in the Manitoba and Ontario anti discrimination codes;

. the Manitoba case of Monk v. C. D. E. Holdings Ltd. (1983), 4 C. H. R. R. D/ 1381 in which the complainant was found to have been dismissed from her employment on the prohibited ground of family status because her husband was a shareholder in the business where she was employed and her husband and other shareholders had become involved in a dispute with the respondent;

. the Manitoba case of Moxon et al. v. Samax Investments Ltd. et al. (see paragraph 4.21 above);

. the Northwest Territory case of Fast v. Hanvold Expediting B. C. Ltd. in which the relationship of father and son was found to fall within the term family; and,

> - 26 . two dictionary definitions. 4.44 The tribunal emphasized that Parliament has not chosen to define

either marital status or family status in the Act as it has done in other legislative schemes, e. g. pensions (at D/ 4909). It also observed that "there has not been any widely accepted consistent

use of the terms which would include common- law relationships" (at D/ 4909). The tribunal concluded, with respect to family status (at D/ 4910):

The natural and ordinary meaning of the word 'family status' I believe would include the inter-relationships that arise from bonds of marriage, consanguinity, legal adoption and including the use the words of Professor Tarnopolsky, the ancestral relationship whether legitimate, illegitimate or by adoption as well as the relationships between spouses, siblings, in- laws, uncles or aunts and nephews or nieces, cousins, etc. I have not found any authority which would extend the meaning of 'family' beyond the above described types of relationships. I therefore find that the complaint of Paul Lagacé under the prohibited ground of 'family status' is also without foundation.

4.45 The decision of the tribunal was appealed to the Federal Court of Appeal, which released its decision on December 20, 1988 (unreported). In the result, the appeal was allowed (Marceau, J., dissenting), the decision of the tribunal was set aside and the matter remitted to the tribunal on the basis that the discrimination which the tribunal found to have occurred was on the ground of marital status. The approach which the Court took to the definitional problem, however, is relevant to this

decision. In the view of the majority, relying on the decision in Cashin v. Canadian Broadcasting Corporation et al., 86 N. F. 24, at 30 (S. C. C.), marital status means status in the sense of married or not married (per Hugessen, J., at 4). Marceau, J., dissenting, was of the view that status (and therefore protection under the Act) can be based only on the positive condition of being married, not on the condition of not being married (at 4). The majority next considered whether a discriminatory practice had occurred by comparing the policy of DND and the purposes sought to be achieved by the Act. With respect to the former, Hugessen, J. stated (at 5-6):

Where employees are required to work in remote locations, or in places far away from their place of origin, or to change location frequently, an employer's interest in providing such quarters is obvious. I would have thought it was equally obvious that the employer's interest would only extend to those relationships which had a high degree of permanency or stability ...

Does the employer's interest ... extend to requiring that there be a marriage bond? I think not. Marriage is after all a matter of status while the employer's interest is

> - 27 limited to what is simply a situation of fact ...

[T] he test for those qualities [permanence, stability] must be based on factors which actually indicate their existence ...

Hugessen, J. noted that factual tests are not "very difficult to devise" (at 6). In terms of the policy of the Act, he concluded that the Act cannot be taken to favour any particular status and that decisions are to be made on the basis of "individual worth or qualities" and not "group stereotypes" (at 5). He observed that the rules established by DND reflect and perpetuate a

stereotype, i. e., "that a relationship between a man and a woman has a lesser social value if it does not have the status of marriage" (at 6).

Decision of the Tribunal 4.46 In the view of the Tribunal, the interpretation of the term

family status as used in the Act must be governed by the principles of interpretation of human rights codes in general, and the Act in particular, enunciated by the Supreme Court of Canada in O'Malley, Bhinder, Action Travail des Femmes and Robichaud. This is not simply a mechanical exercise because the principles of interpretation are themselves expressed in broad terms.

4.47 The Court, in the decision in Action Travail des Femmes (at 182) adopts the general approach to statutory interpretation enunciated by E. A. Driedger in Construction of Statutes (2d ed., 1983). Driedger has outlined the steps as follows (at 105):

1. The Act as a whole is to be read in its entire context so as to ascertain the words), the object of the Act (the ends sought to be achieved), and the scheme of the Act (the relation between the individual provisions of the Act).

2. The words of the individual provisions to be applied to the particular case under consideration are then to be read in their grammatical and ordinary sense in the light of the intention of Parliament embodied in the Act as a whole, the object of the Act and the scheme of the Act, and if they are clear and unambiguous and in harmony with that intention, object and scheme and with the general body of the law, that is the end.

3. If the words are apparently obscure or ambiguous, then a meaning that best accords with the intention of Parliament, the object of the Act and the scheme of the Act, but one that the words are reasonably capable of bearing, is to be given them.

> - 28 4. If, notwithstanding that the words are clear and

unambiguous when read in their grammatical and ordinary sense, there is disharmony within the statute, statutes in pari materia, or the general law, then an unordinary meaning that will produce harmony is to be given the words, if they are reasonably capable of bearing that meaning.

5. If obscurity, ambiguity or disharmony cannot be resolved objectively by reference to the intention of Parliament, the object of the Act or the scheme of the Act, then a meaning that appears to be the most reasonable may be selected.

This approach recognizes the dynamic relationship between specific words and the context in which they are used. In this principle, the regulator of the dynamic forces is the requirement that there be harmony between the words and their context. Driedger's approach has been quoted at length to support the observation of McIntyre, J. in O'Malley that "the accepted rules of construction are flexible enough to recognize in the construction of a human rights code the special nature and purpose of the enactment" (see paragraph 4.14, emphasis added).

4.48 A fundamental question in statutory interpretation is the extent to which one is confined to the words of the enactment and when, and to what extent, one may consider matters beyond the words of the enactment. Driedger (at 146) has put the law succinctly:

What is known as the intention of Parliament is contained in the words of the Act; it is there for all to see. The scheme of the Act and the relationship between its various provisions are also contained in the words of the Act. The object of the Act, however, unless stated in a preamble or

in a substantive provision is not there; it must be deduced. 4.49 The Supreme Court of Canada has forcefully stated its view of the

context of human rights code generally, the object of such codes and what flows therefrom. Codes, based on their broad purposes relating to "individual rights of vital importance" (Action Travail des Femmes, at 182), are legislation of "a special nature" (O'Malley, at 546). The Court has noted that the broad purposes of the Act are not obscure, but are "patently obvious" in section 2 of the Act and has emphasized, drawing upon section 2, that the goal is that of equal opportunity for each individual to achieve "the life that he or she is able and wishes to have" (Action Travail des Femmes, at 182). Section 2 provides in full as follows:

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 principle that every individual should have an

> - 29 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, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

4.50 In O'Malley, the Court rejected the notion that "no broader meaning can be given to the Code than the narrowest interpretation of the words employed" (at 546). In Action Travail des Femmes, as already quoted above, Chief Justice Dickson stated (at 182, emphasis added):

I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways to minimize those rights and to enfeeble their proper impact.

4.51 Just as the Supreme Court of Canada is taking a purposive approach to the interpretation of the Canadian Charter of Rights and Freedoms which is, of course, a part of the Constitution of Canada, so too is the Supreme Court of Canada, in the view of the Tribunal, taking a purposive approach to the interpretation of human rights codes based on their special nature.

4.52 The Tribunal notes that the cases in which the Supreme Court of Canada enunciated these principles did not involve the interpretation of a prohibited ground of discrimination. In the view of the Tribunal, the Court has not suggested in its decisions that these principles of interpretation

might vary according to the type of interpretive problem raised. In fact, the reliance placed by the Court on advancing and effecting the

broad purposes of the Act suggests that the Court has enunciated a truly general principle of interpretation.

4.53 A further comment should be made with respect to the role of the intention of Parliament. The general, long- established, rule is that debates or documents before Parliament are not permissible to show Parliamentary intent (Driedger, at 156). A possible exception to that rule, however, may be that such materials are admissible to show "the evil or defect" the provision was designed to remedy (Driedger, at 156).

4.54 In the matters at hand, the Parliamentary record clearly indicates the reason for the explicit addition of family status to the English version of the Act. Viewed narrowly it may have been to repair the incongruity between the French version of the Act which used the phrase "situation de famille" also an undefined term) and the English version which used "marital

> - 30 status". Viewed more broadly, it may have been to ensure that discrimination of the types described by the then Minister of Justice - and no others - were to be proscribed (see paragraph 4.34 - 4.35)

4.55 The broad view, even if it were to be taken, is of limited assistance in determining the intended meaning of family status. The testimony of the Minister before the Standing Committee on Justice and Legal Affairs clearly established that the Minister was of the view that the term family status must be interpreted by the Commission (if the Commission chose to issue guidelines under the Act, which it has not done in this case) or by the courts. The Minister did not suggest that his view of term should be treated as exclusive of all others and, in fact, the Minister referred to the "implied" meaning of family status. Mr. Hnatyshyn described family status as "an undefined or imprecise reference".

4.56 To a considerable extent, the Minister was expressing an opinion on what it should mean, or might mean, as opposed to what it did mean. The Parliamentary record itself does not establish the meaning of the term. In any event, the Tribunal cannot adopt the opinion of the Minister as determinative of the intention of Parliament with respect to the meaning of family status because to do so would circumvent the principle that the intention must be based on the Act, read in its entire context. It may well be that the defect to be repaired was to extend the provisions of the Act to those discriminated against on the basis of the types of relationships named by the Minister, but it must still be determined whether, on a proper reading of the Act, other types of relationships than those listed by the Minister may be included in the term family status.

4.57 Mr. Cousineau was of the view that the meaning of family "generally understood", using a term drawn from in Re Board of Governors at the University of Saskatchewan et al. (see paragraph 4.25). He referred to "certain traditional values" and relied on the evidence of Dr. Eichler which in his view established that a

factor common to all families is the existence of children. Counsel seemed to imply, further, that the children must be the natural product of the union of adults of the opposite sex because Counsel made reference to the fact that "there will be no children" in the relationship of the Complainant and his lover (Transcript, at 106- 7).

4.58 With respect, the Tribunal concludes that Counsel did not follow the evidence of Dr. Eichler who stated that, in her experience, no single indicator was common to all families. A very clear inference which can be drawn from her evidence is that couples (whether heterosexual or homosexual) alone can constitute families, and homosexual couples, with their children, can constitute families. As a result, Counsel is left with the legal arguments that the definition family is "generally understood"

> - 31 and is in accord with "certain traditional values". 4.59 The Tribunal notes that evidence was not adduced on behalf of the

Treasury Board and the DSS to support the argument that the definition of the term family is "generally understood". In addition, the Tribunal approaches this proposed test with some caution. It imports a notion that what must be considered and measured is public opinion. As noted by the Complainant, common wisdom may reflect bias or prejudice and there is bias or prejudice against homosexuals in Canada. This also is apparent from a series of questions (quoted in part in paragraph 4.7) put to Dr. Eichler by Mr. Cousineau which is quoted in its entirety because these questions and answers illustrate the problem (Transcript, at 45- 7):

Q. Would you say at this point in time sexual orientation or males living together or females living together are more or less accepted as forming a family or are into a familial relationship or are they not?

A. By whom? Q. By society. A. What I'm trying to say is that there is no consensus...

What I can give you I think is an overview over the range of attitudes and there would be a segment of the population that would look at attitudes and there would be a segment of the population that would look at homosexual unions as being comparable to other couple relationships.

Q. A segment would consider it that way? A. Yes. Q. Okay. But would you say that the majority of society

in Canada would look at it that way? A. There is no study that I'm aware of. Also I would

think it's quite irrelevant because... > - 32 Q. It might be for my case. But you can't answer that?

A. Well, I could argue with you because I think it would be a very weak ground to stand on....

4.60 The difficulty with the approach advocated can be illustrated by referring to Counsel's own arguments. Assuming with Mr. Cousineau, for purposes of pursuing the argument, that only parents and children can constitute a family, is it "generally understood" that the parents must be

the natural parents of the children, or could a family be comprised of children who are legally adopted, or children to which the parents stand only in loco parentis (and are unrelated by consanguinity or adoption)? The possibilities inherent in the term family are many, and complex. This has been recognized in legal analysis (apart and in addition to sociology or public policy), and special which the word is used (see the quote from Professor Tarnopolsky in Moxon, also quoted by the tribunal in Schaap, and Charlottetown v. Charlottetown Association for Residential Services). In the Tribunal's views, the test of "general understanding" must be rejected, quite apart from its majoritarian aspects, because it cannot be ascertained with any degree of confidence.

4.61 Mr. Cousineau noted that there were statutes in Canada which recognized common law spouses of the opposite sex, although there was no legislative recognition of homosexual spouses. He appeared to be arguing that such recognition could be construed as a general recognition, for all legal purposes, of common law spouses of the opposite sex which thereby established, at law, their relationship with the relatives of their spouses (see paragraph 4.28). The Tribunal does not find this to be sound legal reasoning. Legislative schemes differ significantly in their purposes and their scope. Even if some schemes recognize the relationship between a common law spouse and the relatives of the other spouse (the "in- law" relationships), it does not follow that the "in- law" relationships of common law spouses of the opposite sex are established in law for all purposes and that homosexual couples cannot have "in- law" relationships because homosexual couples are not recognized in legislative schemes. Also, the relevance of the statutes recognizing common law spouses of the opposite sex to this inquiry cannot be assumed by this Tribunal.

4.62 In the view of the Tribunal, the threshold test, as stated by Driedger, must be whether the term used in the Act is clear and unambiguous.

4.63 The Tribunal has concluded that the term "family status" as used in the Act is not clear and unambiguous. Although dictionary definitions of "family" are reasonably consistent in that they are broad in scope, all of them contemplate relationships which are defined in several ways which may include: blood (or consanguinity), kinship (which may or may not be as narrowly

> - 33 - defined as consanguinity), marriage or adoption; and finally, through ties forged on some other basis such as natural liking, common interests or goals, or household arrangements. The Tribunal does not wish to detract from the undeniably common features, allowing for differences in expression, of these definitions (a point well made by Professor Tarnopolsky as quoted in Moxon and Schapp), but stresses the variety of relationships which generally fall within the term which is reflected in dictionary definitions.

4.64 The Tribunal recalls the carefully chosen words of then Professor Tarnopolsky quoted in Moxon (see paragraph 4.22) where he noted that the word family has "always included" certain relationships but recognized that it is difficult of definition.

4.65 The evidence of Dr. Eichler was that the term does not have one definition for all purposes. Sociology and law appear to be similar in this regard. The definitions of family status included in

the two human rights codes -- Manitoba, in a version now repealed, and Ontario - differ markedly and illustrated the precise problem. The former was broad, the latter is narrow.

4.66 Quite apart from taking the position that one definition does not exist, Dr. Eichler was not a proponent of adopting one definition. However one may view her functional approach (for instance Mr. Cousineau was concerned about its practicability), her identification of the difficulties which arise from application of the term must be separated from her solution to these difficulties.

4.67 In applying the principles of interpretation, the task of the Tribunal is to select a meaning which the term "family status" is reasonably capable of bearing, and that best accords with the intention of Parliament, the object of the Act and the scheme of the Act. The Tribunal rejects the view that it must select an exhaustive or all- inclusive meaning. The Act will be invoked in many different sets of circumstances and the term family status inherently has some scope as it cannot be said to refer to an immutable characteristic, apart perhaps from consanguinity which may itself be uncertain. The question for the Tribunal, then, is not what is the reasonable meaning, but what is a reasonable meaning, which best accords with the Act.

4.68 The Tribunal is mindful of the approach taken to the context and object of the Act by the Supreme Court of Canada as set forth in paragraph 4.49 and 4.50. The Tribunal, giving the term "family status" a reasonable meaning which is neither the narrowest meaning of the term nor a minimizing of rights under the Act, holds that, prima facie, homosexuals in a relationship are not excluded from relying on that prohibited ground of discrimination.

4.69 It must be remembered that to exclude any person from invoking a prohibited ground of discrimination bars any further consideration of the matter under the Act, with potentially serious consequences for individuals. In the view of this Tribunal, such an approach to definition does not give effect to, or advance, the special purpose of the Act as stated in section 2.

4.70 "Reasonable" is a term that is notoriously difficult of interpretation, and "reasonability" is impossible of measurement. The dictionary approach itself reflects the nub of the problem, that is, that families can be defined by considering certain formal relationships as well as by considering relationships based on other factors (which dictionaries have difficulty expressing). As a practical matter, the Tribunal agrees with the Complainant that terms should not be confined to their historical roots, but must be tested in today's world, against and understanding of how people are living and how language reflects reality. Dr. Eichler's evidence, as well as that of the Complainant, was helpful in making these assessments. Value judgments should play no part in this process because they may operate to favour a view of the world as it might be preferred over the world as it is. The Tribunal notes the conclusion reached by Hugessen, J. in Schapp that the Act does not promote certain types of status over others and that the Act is intended to address group stereotypes. For these reasons, the Tribunal finds that it is reasonable to conclude that homosexual couples may constitute a family.

4.71 This Tribunal is of the view that to decide otherwise would, in the words of Chief Justice Dickson in Action Travail des Femmes considering the rights of individuals under the Act, "enfeeble their proper impact".

> - 35 5. HAVE THE RESPONDENTS COMMITTED DISCRIMINATORY PRACTICES? 5.1 It will be clear from the summary, provided in Chapter 2 of this

decision, of the circumstances giving rise to the complaints, that the facts were not in dispute. Neither of the Respondents offered a defence to the complaints. CUPTE explained its position. Counsel for the Treasury Board and the DSS put forward legal arguments.

5.2 There are two principal questions flowing from the facts and the complaints. Did each of the Treasury Board and CUPTE commit a discriminatory practice under the Act by entering into the Collective Agreement dated January 2, 1982 which, for purposes of bereavement leave, excludes from the definition of "immediate family" a person of the same sex as the employee who, except for the sex of that person would otherwise meet the definition of "common law spouse"? Did the DSS commit a discriminatory practice under the Act by denying the application for bereavement leave of the Complainant?

Collective Agreement

5.3 The Tribunal notes that the complaints relied upon sections 7(b) and 10(b), in the case of the Treasury Board and the DSS, and sections 9(1)(c)(ii) and 10(b) in the case of CUPTE. The Tribunal has concluded that, with respect to the terms of the Collective Agreement, the more apt course is to consider whether the Treasury Board and CUPTE are in breach of section 10(b). There can be no doubt that the Collective Agreement is the type of agreement subject to section 10(b). This approach recognizes the reality that the negotiation and resolution of a collective agreement are a joint effort and that both parties, as signatories to the Collective Agreement, are legally bound by the final product of that effort (whether or not, as CUPTE noted, it is morally acceptable to one or the other). The Tribunal does not consider it useful to attempt to determine (on incomplete evidence in this case, at least from the point of view of the Treasury Board), whether the positions which the parties brought "to the table" in the bargaining constituted discriminatory practices under sections 7(b) and 9(1)(c)(ii) of the Act. The fact is that both parties, for whatever reasons, opted to sign the Collective Agreement as opposed to pursuing whatever other avenues were open.

5.4 This approach is in accord with the principle adopted by the Supreme Court of Canada in O'Malley and Bhinder that the intentions of those alleged to have committed discriminatory practices are irrelevant. Further, from a more technical point of view, it can be questioned whether the events prior to the signing of a collective agreement can constitute a discriminatory practice in respect of an employee under section 7(b) or an individual under section 9(1)(c)(ii) because a final decision has not been taken. Finally, it could be argued that if the entering

> - 36 into a collective agreement is found to be a discriminatory practice under section 10(b), then it automatically follows that the parties, by virtue of accepting the terms of the collective agreement, are also in breach of sections 7(b) and 9(1)(c)(ii).

5.5 It may be that, in some jurisdictions and in some cases, it has been in issue whether a provision in a human rights code can apply to (and, if necessary, override) a provision in a collective agreement. (Given the combined effect of section 10(b) and section 41 of the Act, the reach of the Act into the Collective Agreement would appear to be beyond doubt quite apart from the decided cases cited by Counsel for the Commission, Ms. Trotier, which give primacy to human rights codes (Ontario Human Rights Commission v. Borough of Etobicoke, [1982] 1 S. C. R. 202 and Winnipeg School Division No. 1 v. Craton, [1985] 2 S. C. R. 150).

5.6 The leave sought by the Complainant was bereavement leave, a type of special leave provided under Article 19 the Collective Agreement, quoted above. In the view of the Tribunal, bereavement leave is an "employment opportunity" as that term is used in section 10(b) of the Act. Bereavement leave appears to be designed to meet the particular needs of family members at a difficult time. Some evidence was given as to why the

Complainant wished to attend the funeral; of the father of his lover. The Tribunal rejects any notion that it should be concerned about the objectives of the Complainant in seeking leave, apart perhaps from determining, as in this case, that the complaint is bona fide. The objectives will vary widely from employee to employee, family to family. The Tribunal notes that, in Schaap, the Federal Court of Appeal took the approach that, given the purpose of the benefit in that case (relating to housing), the formal status of the parties was not as relevant as whether persons in other types of relationships functionally had the same characteristics which the employer should recognize.

5.7 Bereavement leave is, by its terms, available to an employee upon the death of members of his "immediate family" which includes not only some of those with whom the employee has what could be called a direct relationship (e. g. by blood, marriage, wardship or shared permanent residence), but also some of those with whom an employee has an indirect relationship through his or her spouse, whether by marriage or at common law. Only those common law relationships with the following characteristics are included:

. the person with whom the employee has a relationship must be of the opposite sex;

. the employee must be living with the person at the time;

> - 37 . the relationship must have continued for at least one

year prior to the time; . the employee must publicly have represented that person

to be his/ her spouse; and, . the employee must continue to live with that person as

a spouse. 5.8 The existing definition of immediate family in sections 19.02 and

2.01(s) could be described, using Dr. Eichler’s terminology, as based on the identification of certain familial relationships which the parties have agreed to recognize, as opposed to some general definition of family. It includes common law spouses and children who are not children of the employee (but who are children of a common law spouse or wards) and it excludes

relatives of any type not named unless they share a permanent residence with the employee. The existing definition, therefore, already incorporates a functional approach to the type of relationships for which bereavement leave is appropriate. Looking again to the decision of the Federal Court of Appeal in Schaap, the definition is partly based on formal legal relationships, and partly based on relationships defined by factual considerations such as stability, permanence and shared residence. It will be noted that it excludes a person of the same sex who, but for gender, would otherwise be included as a common law spouse, as well as excluding those related to that person who would otherwise be included.

5.9 The definition of immediate family includes some familial relationships, and excludes other. The Collective Agreement therefore treats some types of familial relationships differently than others. In particular, it excludes from the benefit of bereavement leave an employee who is in a permanent and public relationship with a person of the same sex. Having determined that persons of the same sex prima facie may have the status of a family under the Act, and having determined that the family of the Complainant is treated differently under the Act than other families, including but not limited to families which are very similar in their characteristics to that of the Complainant, this Tribunal therefore finds that the Collective Agreement deprived the Complainant of the employment opportunity of bereavement leave on a prohibited ground of discrimination, and that therefore each of the Treasury Board and CUPTE have committed a discriminatory practice under section 10(b) of the Act. The complaints against the Treasury Board and CUPTE under section 10(b) of the Act therefore are substantiated.

Denial of Leave Pursuant to Collective Agreement > - 38 5.10 The remaining question is whether the DSS, as administrator of

the Collective Agreement in respect of the Complainant, committed a discriminatory practice under section 7(b) of the Act when it denied bereavement leave to the Complainant (both at the supervisory level and in response to the grievance presented by the Complainant).

5.11 In the view of the Tribunal, the DSS did, in the course of the employment of the Complainant, "differentiate adversely in relation to an employee, on a prohibited ground of discrimination". The DSS, however, was acting in accordance with Article 19 of the Collective Agreement which is very clear on its face. Applied to the relevant facts, it could only result in the denial of leave unless the DSS chose to disregard the Collective Agreement. The DSS did not take any steps in addition to the denial of bereavement leave which went beyond the necessary result of the application of Article 19 (in fact, although it is irrelevant, the DSS did offer the Complainant a day of special leave).

5.12 In the view of the Tribunal, the refusal of the DSS to grant bereavement leave flows so directly from the Collective Agreement, which the Tribunal has found to have breached section 10(b) of the Act, that the complaint against the DSS should be dismissed.

> - 39 6. ORDER OF THE TRIBUNAL In accordance with the powers given to it under the Act based upon its decision that the Treasury Board and CUPTE have

committed a discriminatory practice under section 10(b) of the Act, the Tribunal hereby orders that:

1. The Treasury Board designate, or cause to be designated, the day of Vacation Leave taken by Mr. Mossop on June 3, 1985 as a day of Bereavement Leave.

2. The Treasury Board credit, or cause to be credited, to Mr. Mossop one day of Vacation Leave, unless Mr. Mossop is not an employee of the Treasury Board at the date of this Order or thereafter, in which case Mr. Mossop shall be paid in lieu of a day of Vacation Leave at the rate of pay applicable to him on June 3, 1985.

3. The Treasury Board pay to Mr. Mossop compensation for what he has suffered in respect of feelings and self respect as a result of the discriminatory practice the amount of Two Hundred and Fifty Dollars ($ 250.00);

4. The Canadian Union of Professional and Technical Employees pay to Mr. Mossop compensation for what he has suffered in respect of feelings and self- respect as a result of the discriminatory practice the amount of Two Hundred and Fifty Dollars ($ 250.00);

5. The Treasury Board and the Canadian Union of Professional and Technical Employees cease to apply sections 19.02 and 2.01(s) of the Collective Agreement which became effective on January 7, 1982, or the relevant provisions of its applicable successor, insofar as they do not allow Bereavement Leave in situations where a person of the same sex as the employee covered by the Collective Agreement would otherwise meet the definition of "common law spouse", which term is included in the definition of the "immediate family" of the employee, except for the sex of that person.

6. The Treasury Board and the Canadian Union of Professional and Technical Employees amend the Collective Agreement which became effective on January 7, 1982, or the relevant provisions of its applicable successor, to provide that a person of the same sex as an employee who would otherwise meet the definition of "common law spouse" of that employee except for the sex of that person, is included in the definition of "common law spouse" and hence in the definition of "immediate family" for all purposes of the provision(s)

> - 40 pertaining to Bereavement Leave, or such other amendments as would meet the required result.

DATED this 5th day of April, 1989.

M. Elizabeth Atcheson