T.D. 1/80
THE CANADIAN HUMAN RIGHTS ACT
HUMAN RIGHTS TRIBUNAL

BEFORE: R. DALE GIBSON)
JANE BANFIELD HAYNES)
ROBERT KERR)

BETWEEN:
SHIRLEY COOLIGAN,
MAUREEN MCKENNY,

COMPLAINANTS,
- and -
BRITISH AMERICAN BANK NOTE COMPANY LIMITED,
RESPONDENT,
- and -
CANADIAN HUMAN RIGHTS COMMISSION,
INTERVENANT.

DECISION OF TRIBUNAL
APPEARANCES:
FRANCOIS LEMIEUX: Counsel for the Canadian Human Rights Commission

JOHN D. RICHARD: Counsel for the British American Bank Note Company Limited

DAVID G. CASEY: Counsel for the Bank of Canada
DATES OF HEARING: December 6 and 7, 1979

>INTRODUCTION

We were appointed under the Canadian Human Rights Act (S.C. 1976-7, c.33) as a Human Rights Tribunal to enquire into a complaint against the British American Bank Note Company Limited by Shirley Cooligan and Maureen McKenny (exhibit C-1). Prior to our enquiry into the merits of this complaint, our jurisdiction as a tribunal was challenged by the Respondent, and we accordingly find

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ourselves faced with a difficult preliminary question of constitutional law. This decision relates solely to that preliminary question.

Counsel for the Respondent and for the Canadian Human Rights Commission appeared at the hearing of this preliminary question. The Complainants, though notified of the hearing, did not enter an appearance.

The Respondent company contends that it is not subject to the Canadian Human Rights Act, at least insofar as complaints such as the present one are concerned. This complaint, we understand,

alleges discrimination by the Respondent company contrary to section 11 of the Canadian Human Rights Act, by maintaining differences in wages between male and female employees employed in the same establishment who are performing work of equal value. The Respondent submits that in all matters relating to the wages of its employees it is subject to the relevant laws of the Province of Ontario rather than to legislation of the Parliament of Canada.

For the purpose of informing the Tribunal about the nature of the Respondent's business, counsel for the Respondent and counsel for the Canadian Human Rights Commission jointly submitted an agreed statement of fact (exhibit R-1). This was supplemented by answers provided by counsel for the Respondent to certain questions put by members of the Tribunal, as well as by answers provided by counsel for the Bank of Canada in response to three questions put by counsel for the Commission concerning the relationship between the Respondent and the Bank of Canada. It is on the basis of this information concerning the nature of the Respondent's operation that we have reached our conclusion concerning its constitutional status.

NATURE OF RESPONDENT'S BUSINESS

The Respondent was incorporated as the British American Bank Note Company Limited, a public corporation, by Letters Patent issued in 1909 under the federal Companies Act. Although its objects were stated, as was customary, with sufficient breadth to permit the company to engage in many different types of undertaking, the most important was undoubtedly that which was stated first: "Engraving and printing of banknotes, debentures, bonds, postage, revenue and bill stamps, bills of exchange and other matter". This object still offers a reasonably accurate description of much of the company's modern business. According to the agreed statement of facts (exhibit R-1 - paragraph 7):

"... the Company in Ottawa is now engaged in the printing of such materials as:

banknotes travellers' cheques
postage stamps money orders
revenue stamps dividend cheques
share certificates cash bonus cheques

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warrants gift certificates
bonds and debentures promissory notes
lottery tickets basic personalized cheques".

The Respondent has a production facility located in Ottawa. It is with respect to this facility that the complaints into which we have been asked to enquire were made. There are also subsidiary operations in Toronto, Winnipeg, Calgary, and Vancouver. We were led to understand that these wholly owned subsidiaries are treated by the Respondent as departments of a single operation. There is one important way, however, in which the two Ontario facilities differ from those in other parts of the country: they employ, among

other forms of equipment, steel plate presses which are not in use in the other subsidiary facilities, and which are essential for the printing of banknotes, postage stamps, Canada Savings Bonds, and other high security forms of printing. The work with respect to which the present complaints were launched involves the use of steel plate presses.

The forms of high security printing which require the use of steel plate presses constitute a very significant proportion of the Respondent's business. Most of it is done under contract with the Government of Canada, or with the official issuer of Canadian banknotes - the Bank of Canada. Exhibit R-3 indicates that in 1978 34.4% of the total sales for the Ottawa division of the Respondent involved banknotes. Twelve point nine percent involved postage stamps and other material for the Post Office, and 7.4% consisted of other government documents - Canada Savings Bonds, etc. In total, these three forms of printing amounted to 54.7% of total sales. The equivalent figure for the total company (including subsidiaries) for 1978 was 35.9%. For the first ten months of 1979 the equivalent figures were somewhat reduced, but nevertheless significant: 48.4% for the Ottawa division and 27.8% for the overall operation. We were told that this type of government and Bank of Canada printing is shared almost completely between the Respondent and one other company. The Respondent, for example, prints all of the one dollar and two dollar banknotes annually, and the hundred dollar notes as required. The other company prints the other denominations. The contracts under which the Respondent provides these services are not perpetual, of course. The contract with the Bank of Canada may be terminated by either party on six months notice, for example, and the contract with the Post Office is retendered every three years. Nevertheless, there is no reason to doubt that this type of work is a permanent and substantial part of the company's business; it has always been so, and it is likely to remain so in the future. In fact, it could be described accurately as the core of the Respondents business, at least in the case of its Ottawa operation.

The Respondent also has a wide variety of non-governmental customers. The printing of banking documents such as cheques,

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drafts, money orders, and deposit slips constitutes over 20% of the total sales of the company and its subsidiaries, though a considerably smaller percentage of the Ottawa division sales (Exhibit R-3). The remainder of its business, ranging from share certificates to lottery tickets, involves a large number of leading Canadian and international corporations in many fields of endeavour as well as certain governmental organizations such as the Inter-Provincial Lottery Corporation. In these latter forms of printing, the Respondent does not enjoy the same shared monopoly which it and its chief competitor have in the case of the steel plate press printing of high security government documents; here there are various other competitors in the field. Counsel for the Respondent was unable to indicate the percentage of this overall market which the Respondent has been able to attract, but it is clear that in addition to its

governmental and quasi-governmental work, the Respondent is one of Canada's chief suppliers of high quality commercial documentation to the business community.

The Respondent employs two hundred and fifteen hourly rated employees in its Ottawa printing plant. The wholly owned subsidiaries employ, respectively: one hundred and thirty in Toronto, one hundred and ten in Winnipeg, fifty in Calgary, and fifteen in Vancouver. Employees in the Ottawa plant are represented by several trade unions, each bargaining unit having been certified by the Ontario Labour Relations Board. We are told that no application has ever been made by these employees for certification under federal labour legislation. There seems to have been an assumption on the part of both labour and management that labour-management relations of the company are subject to provincial rather than federal law. Indeed, when the Complainant Shirley Cooligan first raised the human rights issue that we have been asked to adjudicate, she seems to have first approached the Ontario Ministry of Labour, only to be informed that the relevant Ontario legislation offers no relief for claims like hers (Exhibit R-1 - appendix H). The union then agreed with the company to submit the issue of wages paid to persons in the Complainant's position to arbitration under the Ontario Labour Relations Act (Exhibit R-1 - appendix G), which arbitration, we understand, did not result in the wage adjustment sought by the union. It was only after their failure to obtain a satisfactory resolution of their complaint under provincial law that the Complainants invoked the Canadian Human Rights Act.

THE CONSTITUTIONAL QUESTION

The Respondent's position before this Tribunal is that as a printing enterprise operating within the Province of Ontario it is not subject to federal legislation concerning matters of property and civil rights such as its employment, wage payment, and other

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labour relations practices. It relies on section 92(13) of the British North America Act 1867, which places "property and civil rights in the province" within the exclusive domain of the provincial legislatures.

Counsel for the Commission contends that the Respondent is subject to the terms of the Canadian Human Rights Act because it is engaged in an undertaking which involves, to a substantial degree, matters falling within the constitutional jurisdiction of the Parliament of Canada under several heads of section 91 of the British North America Act 1867:

"1A. The public debt and property.
...
5. Postal service.
...
14. Currency and coinage.
15. Banking... and the issue of paper money.
...

18. Bills of exchange and promissory notes.
19. Interest.
20. Legal tender."

Counsel asserts that since these important aspects of the Respondent's business are subject to federal legislation, Parliament's jurisdiction also extends to all aspects of the Respondent's operation which are necessarily incidental to the exercise of these principal powers, including laws affecting its relations with its employees.

The issue is of great importance, since it not only affects the respective rights of the Respondent and the Complainants, but also raises a question as to the constitutional applicability of the Canadian Human Rights Act which could be relevant in many other areas of endeavour as well. Unfortunately, this important question does not admit of an easy answer.

NATURE OF THE LEGISLATION

It would be well to dispose at the outset of a problem that gave us some concern during the hearing. Both counsel appeared to concur in characterising the legislation in question as relating to "labour relations" for the purpose of determining its constitutional import. They then addressed themselves almost exclusively to the question of whether the federal Parliament has the constitutional authority to legislate with respect to the labour relations of an enterprise such as that of the Respondent. Since the Canadian Human Rights Act deals with much more than labour relations, we believe that the question was cast too narrowly. It is true that the Act deals with discrimination in employment, but it also prohibits discrimination in the provision of various goods, services, facilities, or accommodations to the public, as well as discriminatory advertising and "hate messages". Section 2 of the Act states that the purpose of the

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anti-discrimination portions of the Act is to give effect, within the purview of matters coming within the legislative authority of the Parliament of Canada, to the principles that:

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

It will be noted that the only explicit reference to employment in that statement concerns "physical handicap", because that is the only prohibited ground of discrimination which is restricted in its

applicability to employment situations. All other prohibitions under the Act apply to a much wider range of activities. In our view, this is not labour relations legislation; it is human rights legislation.

SCOPE OF THE LEGISLATION

It is important to observe that Parliament has given this legislation a relatively narrow scope - narrower, probably, than its total constitutional jurisdiction to enact human rights legislation. Parliament might have attempted to prohibit the various undesired forms of discrimination in a general way, applicable to all Canadians and to all activities in Canada. It might, for example, have employed its power to legislate on "criminal law", under section 91(27) of the British North America Act, and made it a crime for anyone to carry on these forms of discrimination anywhere in the country. It is clear, however, from an examination of the Act that it does not involve an exercise of the "criminal law" power. The principal enforcement procedures and sanctions are of a civil rather than a criminal nature. It is even possible that the much maligned "peace order and good government" residual power of Parliament under the opening words of section 91 might have been successfully invoked to pass a universally applicable law about the human rights of Canadians; it is a subject that many would regard as possessing a "national dimension", as that notion has been interpreted even in such recent restrictive decisions about the "peace order and good government" power as the Anti-Inflation Case 1 . However, Parliament does not appear in this legislation to have attempted to deal with the problem on a universal national basis.

Section 2 states that the purpose of the legislation 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 principles quoted above. It would be literally possible to interpret these words as manifesting an intention that the provisions of the Act should apply as extensively as Parliament could constitutionally authorize them to apply. It appears, however, that Parliament had a narrower purpose in enacting the statute. Counsel for the Commission conceded during argument that the Act was intended to apply only to enterprises which for some independent reason fall within federal jurisdiction. This interpretation is reinforced by an examination of the debates in Parliament that preceded the enactment of the statute. When the Minister of Justice introduced the legislation he pointed out that the provinces had already enacted laws on the subject within their constitutional domain, and he made it clear that there was no intention to supersede these existing provincial statutes. He stated that: "these prohibitions against discriminatory conduct will apply to all federal departments and agencies and any business or industry under federal jurisdiction" 2 , and when discussing the "equal pay for work of equal value" provision upon which the Complainants are relying in this case, he chose as an illustration the employment practices of "a hypothetical trucking firm engaged in interprovincial or international activities". 3 No one else who spoke in the debates

suggested that the legislation should apply any more broadly than the Minister had indicated. We are, accordingly, of the view that the Act's expressed purpose to "extend the present laws in Canada" within the purview of matters under Parliament's jurisdiction is not an attempt to supplant existing provincial legislation in the field, but rather to supplement it by filling in some of the gaps left by it. While this may in part be an exercise by Parliament of its residual jurisdiction to make laws for the "peace order and good government" of Canada in matters outside provincial jurisdiction, it is clearly not an attempt to claim exclusive jurisdiction over human rights under the "peace order and good government" power, or any other.

We realize that our resort to the Parliamentary debate to support our interpretation of the scope of the legislation is frowned upon by traditional authorities on statutory interpretation. In our view, we are authorized to take such material into account by section 40(3)(c), which empowers a Tribunal to "receive and accept such evidence and other information, ...as the Tribunal sees fit, whether or not such evidence or information is or would be admissable in a court of law". We regard the official debates of Parliament as being "other information", which we may consult. In any event, our interpretation of the scope of the legislation would have been the

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same even if we had not been able to examine the debates; it would be unreasonable to impute to Parliament an intention to take over a large field of law previously administered by the provinces without either stating or necessarily implying such an intention.

To say that the Canadian Human Rights Act applies, in the Minister's words, to "any business of industry under federal jurisdiction" does not solve the problem raised by the Respondent's challenge to our jurisdiction, however. It merely brings us to the threshold of the problem. The fact is that every business or industry is under federal jurisdiction for some purposes - criminal law, for example. What we must determine is whether the Respondent's particular business is under federal jurisdiction with regard to this particular type of law.

BASES OF FEDERAL JURISDICTION

Having ruled out the applicability of both the federal "criminal law" power, and any power Parliament might have to supplant all provincial jurisdiction over human rights by a "national dimensions" exercise of its "peace order and good government" authority, we are left with two possible sources of federal jurisdiction. First, the "peace order and good government" power, which is a residuum of legislative authority under the British North America Act, would permit federal legislation dealing with human rights matters involving enterprises that are not subject to provincial human rights jurisdiction. Second, Parliament may make laws concerning human rights issues which arise as a necessarily incidental feature of its exercise of any of its enumerated heads of legislative jurisdiction. The first question we must ask, therefore, is whether the Respondent's

operation is subject to the Human Rights Act of Ontario. If we find that it is not, we will be forced to conclude that the Respondent is bound by the federal Act. If, on the other hand, we decide that the Ontario Act does apply to the Respondent, we will have to examine a second question: whether Parliament has, as a necessarily incidental part of its jurisdiction over certain aspects of the Respondent's business, the power to add to or override the obligations imposed by provincial law.

APPLICABILITY OF ONTARIO ACT

There can be no doubt that certain laws of the Province of Ontario apply to the Respondent's activities within that province. Just as every enterprise in Canada is subject to some federal laws, so most enterprises, even those engaged in operations primarily under federal control, must abide by certain laws of the provinces in which they are situated. The Judicial Committee of the Privy Council held, as long ago as 1899, that an inter-provincial railway company could be compelled to keep its ditches clean in accordance with a municipal by-law imposing such

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a duty on all occupiers of land within the municipality: C.P.R. v. Notre-Dame de Bonsecours 4 .

The source of provincial jurisdiction in the present case is section 92(13) of the British North America Act; it is clear that protection against discrimination in the employment of workers by a printing enterprise operating in Ontario relates to "property and civil rights in the Province." However, enterprises which are under federal jurisdiction with respect to their primary operational aspects, are immune from provincial laws which go to the heart of their operations. The governing principles were stated as follows by Mr. Justice Beetz in a recent decision of the Supreme Court of Canada concerning the applicability of Quebec minimum wage legislation to the employees of a construction company engaged in the construction of a major airport in that province, Construction Montcalm v. Minimum Wage Commission 5 :

"The issue must be resolved in the light of established principles the first of which is that Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule: Toronto Electric Commissioners v. Snider ([1925] A.C. 396). By way of exception however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject: In re the validity of the Industrial Relations and Disputes Investigation Act ([1955] S.C.R. 529) (the Stevedoring case). It follows that primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence; thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations,

being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune
from the effect of provincial law if the undertaking, service or business is a federal one; In re the application of the Minimum Wage Act of Saskatchewan to an employee of a Revenue Post Office ([1948] S.C.R. 248), (the Revenue Post Office Case); Quebec Minimum Wage Commission v. Bell Telephone Company of Canada ([1966] S.C.R. 767) (the Bell Telephone Minimum Wage case); Letter Carriers' Union of Canada v. Canadian Union of Postal Workers ([1975] S.C.R. 178) (tene Letter Carriers' case). The question whether an undertaking, service or business is a federal one depends on the nature of its operation: Pigeon J. in Canada Labour Relations Board v. City of Yellowknife ([1977] S.C.R. 729) at p. 736. But, in order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of "a going concern" (Martland J, in the Bell Telephone

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Minimum Wage case at p. 772), without regard for exceptional or casual factors: otherwise, the constitution could not be applied with any degree of continuity and regularity; Agence Maritime Inc v. Canada Labour Relations Board ([1969] S.C.R. 851) (the Agence Maritime case); the Letter Carriers' case."

The key question, therefore, is whether jurisdiction over the human rights of the Respondent's employees and customers "is an integral part" of Parliament's "primary competence" over activities in which the Respondent engages. In the Montcalm case, it was held that although federal jurisdiction over aeronautics extends to the location, design, and some aspects of the construction of airports, the question of wage rates to be paid to employees of a company that happens to be engaged in the construction of an airport is a matter for provincial regulation:

"In my opinion what wages shall be paid by an independent contractor like Montcalm to his employees engaged in the construction of runways is a matter so far removed from aerial navigation or from the operation of an airport that it cannot be said that the power to regulate this matter forms and integral part of primary federal competence over aeronatutics...

Building contractors and their employees frequently work successively or simultaneously on several projects which have little or nothing in common. They may be doing construction work on a runway, on a highway, on sidewalks, on a yard, for the public sector, federal or provincial, or for the private sector. One does not say of them that they are in the business of building runways because for a time they happen to be building a runway and they enter into the business of building highways because they thereafter begin to do construction work on a section of a provincial turnpike. Their ordinary business is the business of building. What

they build is accidental. And there is nothing specifically federal about their ordinary business." 6

The Respondent contends that it is in a similar position to that of the construction company in the Montcalm case. It asserts that its ordinary business is printing and that what it prints is "accidental".

Counsel for the Commission submits that the Respondent is in a very different position than the construction company in the Montcalm case. He relies heavily on the 1955 decision of the Supreme Court of Canada in the Stevedoring Reference 7 , in, which it was held that federal rather than provincial labour law applied to the employees of a company, operating entirely within the Province of Ontario, engaged in the loading and unloading of ships involved in extra-provincial carriage. Such carriage is under federal control, and the Supreme Court of Canada held in

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the Stevedoring case (to adopt the wording of Mr. Justice Beetz in the Montcalm case) that federal authority over the labour relations and conditions of employment of the persons who load and unload the ships was "an integral element of such federal competence". Counsel for the Commission contended that the Respondent's situation is much closer to that of the stevedoring company than to that of the construction company, and that federal rather than provincial law is therefore applicable to its operations.

It seems to us that the Respondent's operation falls somewhere between that of the construction company and that of the stevedoring company. Its involvement in matters, such as the printing of paper money, that are under federal jurisdiction is far from "accidental"; it was originally established as a banknote printing company, and it has always been very heavily involved in that and related types of printing work. Whereas Mr. Justice Beetz found in the case of the construction company "nothing specifically federal about their ordinary business" (p. 776), it is clear that a substantial part of the Respondent's ordinary business does involve matters within the federal realm. The Respondent's position is also distinguishable, however, from that of the company involved in the Stevedoring Reference. For one thing, it engages on a regular and substantial basis in types of printing that do not concern the Parliament of Canada, whereas the stevedoring company was exclusively engaged in operations under federal control. While that particular distinction may not be overly significant, because the Supreme Court of Canada has held that operations which include a regular non-federal component can remain under federal jurisdiction (the Letter Carrier's Case 8), there is an even more fundamental distinction between
the Stevedoring case and the present one, which leads us to conclude that the Montcalm precedent is the more relevant.

It is easy to understand why the Supreme Court of Canada found in the Stevedoring case that the labour relations and working conditions of employees engaged in extra-provincial transportation should be subject to federal control. The possibility of a strike by employees in some phase of extra-provincial transportation poses a threat to the overall transportation enterprise, which Parliament might well wish the power to deal with through its own labour laws. On questions equally vital to Parliament's control over the issue of paper money, etc., we have no doubt that exclusive federal competence also exists. The Respondent would probably not, for example, be subject to provincial laws compelling the Respondent to open its doors to provincial safety inspectors if that would jeopardize the security of its banknote printing operation. How can it be said, however, that the ability to control the human rights of the Respondent's employees and customers is an "integral element" of the exercise of Parliament's jurisdiction over the issuing of paper money or any other area of its competence to affect the Respondent's operation? In our view, protection of the human rights of the Respondent's employees and customers is as remote from Parliament's jurisdiction over the issue of paper money, the Postal Service, the public debt, banking, etc. as the

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wage rates of airport construction workers were held to be from aeronautics in the Montcalm case. We conclude, therefore, that since human rights protection is not integral to the exercise of jurisdiction over those aspects of the Respondent's business with respect to which Parliament is competent to legislate, the Respondent is subject to the Ontario Human Rights Act.

FEDERAL INCIDENTAL POWER

This brings us to the final possibility - that although the Ontario statute applies to the Respondent the federal Parliament nevertheless has jurisdiction, as a necessary incident of its control of the issue of paper money and so on, to supplement the provincial legislation, so far as the Respondent's operation is concerned, by adding obligations, or by exercising pre-emptive control in the case of any provisions that are inconsistent with the provincial Act. It is easy to think of situations where although human rights are not so vital to a federal enterprise as to exclude provincial jurisdiction altogether, their protection could legitimately be provided for by Parliament as an incidental aspect of its regulation of the activity in question. There can be little doubt, for example, that the Canadian Human Rights Act applies to federally regulated transportation enterprises so as to prohibit discrimination in their provision of services to the public. If there were inconsistencies between the federal and provincial human rights statutes relating to this question, the federal legislation would be paramount. Mr. Justice Beetz acknowledged in the Montcalm case (p. 779-80) the possibility of such preemptive federal jurisdiction, although he was unable to find any inconsistency between relevant federal laws and the provincial statute in question.

However, we can see no basis for the exercise of even such overlapping federal jurisdiction in this case. We do not believe

that the existence or non-existence of human rights protections for the employees and customers of the Respondent has any significant effect on the efficacy of Canada's Postal Service, arrangements for the issue of paper money, or any other matter under federal jurisdiction which touches the Respondent's business. It is our opinion, therefore, that the enactment of human rights protections affecting the Respondent's business is not necessarily incidental to the exercise by the Parliament of Canada of any jurisdiction Parliament has over the Respondent, other than those general powers which we have already found were not intended to be exercised.

CONCLUSION

We are accordingly driven to the conclusion that the

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provisions of the Canadian Human Rights Act do not apply to the operations of the Respondent, and that we therefore lack jurisdiction to entertain this complaint.

Having to decline jurisdiction is a matter of considerable regret to us. The "equal pay for work of equal value" provisions of the Canadian Human Rights Act appear to us to be a considerable improvement on the sex discrimination laws to be found in most of the provinces, and it is therefore highly desirable that they be applied as extensively as possible. Constitutional constraints cannot be ignored, however. If these exemplary provisions are to be applied to operations like those of the Respondent, it will be necessary that the provincial legislatures adopt the provisions or that Parliament invoke a broader constitutional basis for its legislation than underlies the present statute.

R. Dale Gibson
Jane Banfield Haynes
February 26, 1980

CONCURRING

OPINION OF R.W. KERR

Having had the advantage of reading the decisions of the Chairperson, I find that, although I am in agreement with him as to the result, I cannot fully agree with the reasoning by which he has reached this decision. I am in agreement with the facts as stated by the Chairperson and with his conclusions with respect to the "criminal law" power and "peace order and good government". Where I part company with him is in the analysis of the federal incidental power.

In answering the question as to the source of federal legislative jurisdiction which Parliament was exercising in adopting the Canadian Human Rights Act, I think the answer is obvious. The legislation deals with contractural relationships

between individuals and with relations between individuals involving circumstances in the nature of civil wrongs. It seeks to remedy disputes between individuals in such matters by means familiar to the domain of private law. Similar legislation has been enacted by every province in Canada as an exercise of provincial legislative power over "property and civil rights". I conclude, therefore, that the Canadian Human Rights Act is also in essence "property and civil rights" legislation. It is an exercise of federal power to legislate respecting "property and civil rights" which is recognized to exist, notwithstanding the general assignment of "property and civil rights" to provincial legislative jurisdiction.

Federal legislative power over property and civil rights arises under a variety of heads of power listed in the specific enumerations in section 91 of the British North America Act (including, of course, by virtue of section 91(29) those federal powers listed by way of exceptions to section 92 of the British North America Act). There are two kinds of such federal powers. First, some federal powers are really sub-divisions of "property and civil rights" in the broadest sense of that term. Such matters have been carved out of the provincial domain over "property and civil rights" and assigned to federal legislative jurisdiction. For example, virtually every conceivable exercise of the federal powers over "bills of exchange and promissory notes" or "interest" would be characterized as "property and civil rights" legislation if it were not for the specific allocation of these matters to Parliament and their consequential exclusion from the provincial "property and civil rights" power.

Secondly, because of the practical implications involved in making the exercise of federal powers fully effective, it is recognized that Parliament has incidental powers over "property and civil rights" to assist in implementing its policies on matters within its enumerated powers, even though such legislative provisions have no inherent relation to such enumerated powers. For example, it has been established that Parliament’s power over interprovincial systems of transportation and communication includes power to legislate generally in regard to the property and civil rights of such systems, although in the absence of such legislation these systems are subject to most provincial "property and civil rights" laws: A.-G. Canada v. C.P.R. and C.N.R., [1958] S.C.R. 285, 12 D.L.R. (2d) 625.

The Canadian Human Rights Act can no more be categorized as a direct exercise of one of Parliament’s enumerated "property and civil rights" powers than it can be categorized as an exercise of other federal enumerated powers such as "criminal law". It simply bears no direct relationship to any such federal power. I conclude, therefore, that this is an exercise of Parliament’s incidental power over "property and civil rights".

Before resolving the ultimate question of the constitutional applicability of the Canadian Human Rights Act to specific

probably be intra vires as incidental to the "banking" power. Moreover, it would not necessarily be critical that such provisions are included in the Bank Act, since their express application to banks by itself could establish the necessary constitutional nexus to the "banking" power.

Alternatively, Parliament can enact general "property and civil rights" legislation applying to the variety of cases in which "property and civil rights" are subject to the federal incidental power. Federal labour legislation is the best existing example of such an exercise of federal power. Clearly the Canadian Human Rights Act is legislation of this latter type for, as already stated, it has no direct relationship to any enumerated federal power.

Since federal labour law has been the prime example of such federal legislation in the past, the applicable constitutional principles are to be found in the labour law cases.
The most authoritative recent decision is that in Construction Montcalm v. Minimum Wage Commission, [1979] S.C.R. 754. The Chairperson has quoted extensively from that decision, so I shall not repeat the relevant passages. The ultimate determination as to the applicability of this type of federal legislation to particular activities appears to turn on whether the activities are part of a federal undertaking, service, or business. Some undertakings, services or businesses are so obviously the subject of federal legislative jurisdiction that the answer is easy - for example, interprovincial systems of transportation and communication, or banks. Other undertakings, services and businesses are not so clearly federal, and the question then becomes whether the operation in question is functionally an integral part of some federal undertaking, service or business.

The Respondent is not within the area of clear federal jurisdiction. While it is involved with activities subject to federal control, such as the monetary system, banking and the post office, its involvement is indirect. It is not engaged in the actual issue of money, in the conduct of a banking operation, or in the provision of postal services.

The factors to be considered in assessing whether such an operation is constitutionally within federal jurisdiction under "property and civil rights" legislation of a general character are indicated by Mr. Justice Dickson in Northern Telecom Limited v. Communications Workers of Canada [1979] 28 N.R. 107 (S.C.C.), at 127:

(1) the general nature of Telecom’s operation as a going concern, and in particular, the role of the [activity in question] within that operation;

(2) the nature of the corporate relationship between Telecom and the companies that it serves, notably Bell Canada [a clearly federal undertaking];

(3) the importance of the work done by the [activity in question] of Telecom for Bell Canada as compared with other customer;

(4) the physical and operational connection between the [activity in question] of Telecom and the core federal undertaking within the telephone system and, in particular, the extent of the involvment of the [activity in question] in the operation and institution of the federal undertaking as an operating system."

The activities of the Respondent are not, in my view, functionally an integral part of a federal undertaking or undertakings when viewed on this basis, although it is certainly not a clear-cut case. As a going concern, the Respondent operates independently of those federal operations that it serves. Its relationships with them are governed by detailed arm's length contracts. While this certainly creates ongoing inter-relationships between the Respondent and those federal operations it serves, it cannot fairly be said that they have the general nature of common undertakings between the Respondent and these operations. There is no evidence of a corporate relationship between the Respondent and any federal undertakings. While the services provided by the Respondent are important to those federal operations that it serves, these federal operations have other major sources of supply and the Respondent has other major customers. Consequently, this factor is inconclusive. Actual operational connections between the Respondent and federal undertakings appear quite limited. They fall far short of the degree of functional integration which would support general federal regulation of the "property and civil rights" of the Respondent.

Parliament might by properly framed legislation regulate the "property and civil rights" of the Respondent under its incidental power. To do so, however, it is incumbent upon Parliament to employ legislation which is specific, rather than general, as to its application. Federal legislation of the general type constitutes a significant encroachment upon provincial legislative jurisdiction since general regulation of "property and civil rights" is the essence of the provincial power. The basis of the federal incidental power is that such federal legislation is needed to support the practical implementation of federal policies falling under some specific federal power. Some evidence of a Parliamentary determination that such a need exists is required for such an extended exercise of the federal incidental power. At the very least, this would require clear legislative direction as to the application of federal "property and civil rights" legislation to justify applying it outside the established range of federal undertakings, services, or businesses. It is not appropriate for the judicial system to take the initiative in such an exercise of legislative policy-making.

I am particularly persuaded to resist the conclusion that federal "property and civil rights" legislation of a general nature should be applied more broadly by the uncertainty this would create as to the appropriate law. Those engaged in activities within the potential, but not yet established, range of incidental federal power would have no clear guidance as to their subjection to the federal law.

In the result, I concur with the conclusion that the provisions of the Canadian Human Rights Act do not apply to the operations of the Respondent, and that this Tribunal lacks jurisdiction to entertain this complaint. I also join in the views expressed in the concluding paragraph of the Chairperson's reasons.

R.W. Kerr

NOTES

1. Reference Re Anti-Inflation Act (1976) 68 D.L.R. (3d) 452 (S.C.C.).

2. Debates of the House of Commons, Canada, 30th Parliament, 2nd Session, Vol. III, p. 2976, Feb. 11, 1977, Mr. Basford.

3. Same place, p. 2977

4. [1899] A.C. 367 (P.C.).

5. [1979] S.C.R. 754, at 768-9 (S.C.C.). See also Four B Manufacturing Ltd. United Garment Workers and Brant (Unreported - 1979).

6. Same place, p. 771 and p. 776.

7. In Re Validity of the Industrial Relations and Disputes Investigation Act [1955] S.C.R. 529 (S.C.C.).

8. Letter Carriers Union of Canada v. Canadian Union of Postal Workers, et al [1975] 1S.C.R. 178 (S.C.C.).