TD 4/ 88 Decision rendered March 11, 1988

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

In the Matter of a Hearing before a Human Rights Tribunal Appointed pursuant to Section 39 of the Act.

BETWEEN: JOHN F. SCHAAP AND PAUL M. LAGACÉ Complainants - AND CANADIAN ARMED FORCES Respondent

TRIBUNAL: JOHN R. A. DOUGLAS

DECISION OF TRIBUNAL

APPEARANCES: JAMES HENDRY, Counsel for the Complainants and the Canadian Human Rights Commission;

BRIAN SAUNDERS, Counsel for the Respondent;

DATES OF HEARING: March 9 and 10, 1987 >

INTRODUCTION

Mr. John F. Schaap filed a complaint dated the 15th day of August, 1980, with the Canadian Human Rights Commission. In that complaint, he alleged that the Department of National Defence was engaging or had engaged in a discriminatory practice on or about the 1st day of August, 1980, on the basis of marital status, in that he allegedly had not been provided private married quarters because he was living "common law". This complaint was clarified by a letter dated the 20th day of August, 1980, addressed to the Director General, Personnel Co- ordination, Department of National Defence, setting forth that the complaint was pursuant to Section 6 of the Canadian Human Rights Act, S. C. 1976- 77, C. 33.

The other complainant, Paul M. Lagace, in a complaint to the Commission dated July 16, 1984, alleged that the Department of National Defence was engaging or had engaged in a discriminatory practice on or about June, 1982 and continuing, because of marital status and family status. Mr. Lagace alleged that his application for private married quarters was rejected because he was

not legally married. He contended that the Department of National Defence differentiated adversely in relation to him on the basis of marital status and family status, contrary to Section 7(b) of the Canadian Human Rights Act, S. C. 1976- 77, C. 33 as amended by An Act to Amend the Canadian Human Rights Act and to Amend Certain other Acts in Consequence Thereof, S. C. 1980- 81- 82- 83, C. 143, and that the Respondent’s practice regarding allocation of living quarters deprived him, as an individual and also as a class of individuals i. e. those living in a common law relationship, of employment benefits on the basis of marital status and family status contrary to S. 10(a) of the Act.

On the 7th day of August, 1986, this Tribunal was appointed pursuant to S. 39(1) of the Canadian Human Rights Act, supra, to inquire into the complaint of John F. Schapp and to determine whether the action complained of constituted a discriminatory practice in the provision of services on the ground of marital status. On the 2nd day of March, 1987, the Tribunal was appointed to inquire into the complaint of Paul M. Legace and to determine whether the action complained of in that complaint constituted

> - 2 a discriminatory practice in employment on the grounds of family status and marital status under Sections 7(b) and 10(a) of the Canadian Human Rights Act, supra.

The jurisdiction of this Tribunal is grounded in the provisions of the Canadian Human Rights Act S. C. 1976- 77, C. 33 as amended. Under Section 39.1 the Human Rights Commission may, at any stage after the filing of a complaint, request the President of the Human Rights Tribunal Panel to appoint a Human Rights Tribunal to inquire into the complaint. Section 40(1), sets out the duties of the Tribunal and states that a Tribunal shall inquire into the complaint giving all parties to whom notice has been given, full and ample opportunity of appearing, presenting evidence and making representations.

The Sections upon which the complaints are founded are as follows: The Canadian Human Rights Act, S. C. 1976- 77, C. 33, S. 6:

"It is a discriminatory practice in the provision of commercial premises or residential accomodation

(a) to deny occupancy of such premises or accomodation to any individual, or

(b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination."

The Canadian Human Rights Act, supra, as amended by An Act to Amend the Canadian Human Rights Act and to Amend Certain Other Acts in Consequence Thereof, S. C. 1980- 81- 82- 83, C. 143:

"S. 7. It is discriminatory practice, directly or indirectly (b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrminiation."

> - 3 "S. 10. It is a discriminatory practice for an employer, employee, organization or organization of employers

(a) To establish or pursue a policy or practice, ... that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination."

It is important to note at the outset, that the Canadian Human Rights Act was amended subsequent to the filing of the Schaap complaint and prior to the filing of the Legace complaint. The major importance to this case, of the amendment, is the fact that "family status" was added

as a prohibited ground of discrimination in the 1983 amendment and was therefore unavailable as a ground of complaint for Mr. Schaap. A further difference to note is the fact that Section 14(a) of the Act is not available as a defence in respect to the Legace complaint due to the fact that it is brought under Section 7 and 10 and it is not available in respect to the Schaap complaint in that 14(g) was not in the Act at the time.

PRELIMINARY OBJECTION BY RESPONDENT Brian Saunders, counsel for the Respondent, raised a preliminary objection to the jurisdiction of the Tribunal, arguing that the allegations contained in the complaints did not fall within the scope of the protection provided by the Canadian Human Rights Act. Mr. Saunders suggested that on the face of the complaints, the Complainants alleged that they were precluded from a certain entitlement from the Canadian Armed Forces by virtue of the fact that they were involved in a "common law relationship". The Respondent's position was that neither marital status nor family status, the two proscribed grounds of discrimination involved in the complaints, encompassed or provided any protection to a "common law relationship".

> - 4 The Respondent submitted that it was a matter of law whether or not marital status or family status encompassed such a relationship. If it did not, then the Tribunal would have no jurisdiction to delve into the question whether or not there had been a discriminatory act committed by the Respondent. For that reason the Respondent argued that this question concerning the jurisdiction of the Tribunal should be heard properly at the outset rather than at the end of the inquiry.

In support of his argument, Mr. Saunders referred the Tribunal to the case of Bell v. Ontario Human Rights Commission (1971), 18 D. L. R. (3d) 1 (S. C. C.). That case involved an issue as to whether or not an allegation made to the Ontario Human Rights Commission was within the jurisdiction of that Tribunal to entertain. The Respondent had sought prohibition from the Courts to terminate proceedings before the Board of Inquiry. The Respondent referred to me a statement of Mr. Justice Martland at p. 19 where it was stated:

"The powers given to a board of inquiry are to enable it to determine whether or not there has been discrimination in respect of matters within the scope of the Act. It has no power to deal with alleged discrimination in matters not within the purview of the Act or to make

recommendations with respect thereto." Mr. Saunders then went on to argue that if the Tribunal has no jurisdiction to inquire into the complaint, then surely it should not hear evidence on the complaints.

In the Bell case, the Supreme Court of Canada granted an order of prohibition, concluding that the Board would not have jurisdiction to inquire into the complaint and that the Appellant should not be compelled to await the decision of the Board on that issue before seeking to have it determined in a Court of law by an application for prohibition. This is not the same thing as stating that a Board of Inquiry cannot hear any evidence prior to making the decision on its jurisdiction. In many cases it will be essential for an inquiry to hear the facts before it is in a position to determine whether or not the complaint falls within its jurisdiction.

> - 5 A further case referred to by the Respondent in its preliminary objection was the case of Attorney General of Canada v. Peter Cumming as a member of the Human Rights Tribunal [1980] 2 F. C. 122 (F. C. A.). In that case, a Writ of Prohibition was sought to prevent a Human Rights Tribunal from inquiring into complaints made to the Human Rights Commission. In the Cumming case, the Court refused to grant the Writ in that it was not clear that the Tribunal was without jurisdiction to deal with the matter before it. Mr. Justice Thurlow stated as follows at p. 130 of the decision:

"If, as I think, the constitution of the Tribunal was within the authority of the Commission, the effect of Sections 40 and 41 was to confer on the Tribunal the authority to hold an inquiry and at its conclusion to determine the whole question whether or not any of the discriminatory practices alleged in the complaints had been established, including any question that might be involved therein as to whether or not the conduct complained of and established was capable in law of being discrimination prohibited by the Act."

Justice Thurlow did state that the Court was undoubtedly entitled, when the Jurisdiction of an inferior tribunal turns on a clear and severable question of law arising on undisputed facts, to decide that point of law and, if the conclusion from it is that the Tribunal does not have jurisdiction, to prohibit the Tribunal from proceeding. It did not state that a Tribunal should not embark upon a hearing of the facts prior to determining all questions of jurisdiction.

As stated in the Attorney General of Canada v. Cumming, supra, Sections 40 and 41 of the Canadian Human Rights Act confer on the Tribunal the authority to hold an inquiry and, at its conclusion, to determine the whole question of whether there have been discriminatory practices, including the question of whether or not the conduct complained of and established was capable in law of being discrimination prohibited by the Act. In this case I concluded that it was appropriate for the Tribunal to proceed to hear the evidence prior to ruling on the Respondent's objection to the Tribunal's jurisdiction.

> - 6 FACTS

A.) JOHN SCHAAP John Schaap commenced a relationship with Francine LeMoine in or about the month of May, 1979, when they started to live together, sharing an apartment with another couple. Mr. Schaap was subsequently transferred to or stationed in Cyprus, during which time Ms. LeMoine continued to occupy their apartment. In or about the month of April, 1980, Mr. Schaap returned to Canada and was transferred to C. F. B. Gagetown.

In the month of July or August, 1980, he commenced proceedings to request private married quarters for himself and Ms. Lemoine. Attempts were made by Mr. Schaap to obtain the necessary application form, however he was advised by his Troop Sergeant and later, his Troop Officer that he shouldn't bother trying in that he was living "common law". When he advised that he wished to commence redress proceedings, it was suggested to him that this could hurt his career. He then went to the Canadian Human Rights Commission and subsequently laid the complaint presently being heard by this Tribunal.

Mr. Schaap indicated that since May of 1979, he was living in the same residence as his common law wife, sharing bills and duties and going to social gatherings as a couple, rather than as two separate individuals. Mr. Schaap subsequently married Ms. LeMoine in May of 1984 and obtained private married quarters in August of that year. Mr. Schaap stated that there was no change in their relationship after the marriage ceremony. As a result of the denial of private married quarters, Mr. Schaap incurred increased living expenses than that which he would have incurred had he been offered accommodations when he originally applied.

B.) PAUL LEGACE Mr. Legace commenced co- habitation with Amy Sam in or about the month of January, 1980. Ms. Sam had a son named Kenneth, the son of a prior marriage, who has resided with Mr. Legace since that date. In the month

> - 7 of March, 1982, Mr. Legace was advised that he was being transferred to North Bay, Ontario. At that time he explained to his supervisor that he would need married quarters and a message was sent to the North Bay base requesting that Mr. Legace be put on a waiting list. Mr. Legace was subsequently told that he couldn't be accepted on the list in that he was not considered married. He was also told that unless he legally adopted Kenneth, he would not qualify to be placed on the waiting list on the basis of having a family. Mr. Legace was told that he was being treated as a single individual and that the Canadian Armed Forces did not recognize common law marriages.

In respect to his relationship with Ms. Sam, Mr. Legace indicated that in the month of December, 1979, a commitment was made to her. Ms. Sam did not want a legal marriage because at that time, marriage would have affected her status as an Indian. He indicates however, that from that point on, Ms. Sam was introduced as his wife and he as her husband. He indicates that he recognized an obligation to both Amy Sam and Kenneth from December, 1979 on. Mr. Legace also gave evidence that Kenneth has been claimed by him as a dependent for income tax purposes from the year 1983 to present.

As a result of the denial of private married quarters, Mr. Legace was forced to find off base accommodations for himself, Amy Sam and Kenneth. These

accommodations cost considerably more than the private married quarters would have, had they been made available to him.

POLICY OF THE RESPONDENT In respect to both complaints, the evidence is clear that the complainants were denied access to private married quarters in that the common law marriage status claimed by both complainants, was not recognized by the Department of National Defence, and because the Department did not recognize Mr. Legace as having a family. This fact was not denied by counsel for the Respondent. Counsel for the complainants introduced into evidence an application form for married quarters which specifically stated the following as a condition of occupancy: "No common law marriages."

> - 8 Counsel also introduced correspondence relating to the complainants, clearly referring to a policy of the Respondent denying married quarters to applicants involved in a common- law

relationship where no children are involved who are related to the applicant by blood, marriage or adoption and who are claimed as a dependent for income tax purposes.

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 R. S., C 184. Article 1.075 provides:

"For the purposes of Volumes I and III of Q. R. & O., an 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:

a) accomodation is available; b) the officer or man is married, or is not married but has a

dependent child related by blood, marriage or adoption who is claimed as a dependent for income tax purposes, provided tire wife or dependent 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.

> - 9 JURISDICTION

As referred to earlier, the Respondent made an initial objection to the jurisdiction of this Tribunal contending that the allegations contained in the complaints in question do not fall within any of the proscribed grounds of discrimination under the Canadian Human Rights Act, supra. The Supreme

Court of Canada in Bell v. Ontario Human Rights Commission, supra, made a clear statement on the power of a Tribunal at p. 19 of the decision:

"The powers given to a Board of Inquiry are to enable it to determine whether or not there has been discrimination in respect of matters within the scope of the Act. It has not power to deal with alleged discrimination in matters not within the purview of the Act or to make recommendations with respect thereto."

The basic question for this Tribunal is whether or not the complaints being considered fall within the proscribed grounds of discrimination claimed in the complaints.

The fundamental issue in this case which I must first decide was concisely stated in argument by counsel for the Respondent as follows:

"Are common law relationships included within the term of marital status: If they are not, are they included within the term family status?"

Unfortunately, neither term - marital status or family status, is defined in the Canadian Human Rights Act. In view of the significance of each term in the operation of the legislation and the jurisdiction of a Tribunal, and in light of the absence of any definitive statement on their meaning, the absence of a definition appears to me to be a serious deficiency in the legislation.

> - 10 A.) PRINCIPLES OF STATUTORY INTERPRETATION Mr. Justice McIntyre, speaking for the Supreme Court of Canada in Ontario Human Rights Commission and Theresa O'Malley v. Simpsons- Sears Limited et al. [1985] 2 S. C. R. 536 (S. C. C.), in addressing the nature and purpose of Human Rights Legislation in general and the preamble to the Ontario Human Rights Code in particular, stated:

"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] 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." (pp. 546- 547)

The Simpsons- Sears case was dealing with the Ontario Human Rights Code but the same reasoning was used subsequently by the same court in the case of K. S. Bhinder and the Canadian Human Rights Commission v. Canadian National Railway Company [1985] 2 S. C. R. 561, a case involving the Canadian Human Rights Act.

The Supreme Court of Canada has issued a clear signal that human rights legislation is "of a special nature" and that the Courts and Tribunals must "seek out its purpose and give it effect". This is a fundamental principle of statutory interpretation.

In order to determine the purpose of the Canadian Human Rights Act and the mischief it seeks to prevent, we must turn to the preamble which states:

> - 11 "PURPOSE OF ACT 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 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."

I have quoted here from the Act following amendment which is slightly different from the earlier one. The purpose in both however, is the same. Under the Interpretation Act, R. S. C., 1970, every Act is deemed to be remedial and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

Counsel for the Respondent correctly pointed out in his submissions that the Supreme Court of Canada in the O'Malley v. Simpsons- Sears, supra, stated that 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. The Supreme Court of Canada was not saving that the usual rules of statutory interpretation were inapplicable in respect to such Legislation.

In the case of the Canadian Human Rights Commission v. Canadian Pacific Airlines Limited, a Tribunal decision under the Canadian Human Rights Act recorded at (1983) 4 C. H. R. R. D/ 1392, at paragraph 12016 the Tribunal made the following statement on statutory interpretation:

"A Tribunal should, in interpreting these procedural parts of the Act, draw upon its reservoir of common sense in giving effect to Parliament's intention by carefully considering the words chosen and the

> - 12 context of those words within their respective sections juxtaposition other sections and the statute as a whole. This, it seems to me, can be accomplished without either dismissing an otherwise valid complaint because of imperfect procedural compliance, yet without stretching the meaning of statutory words and phrases like some giant bandage to cover whatever practice might be subjectively viewed as discriminatory."

In the case of Blatt v. Catholic Childrens Aid Society, (1980) 1 C. H. R. R.

D/ 72, the Tribunal in that case was careful not to "legislate in an area the Legislature has left open." In the case of Bosi v. Township of Michipicoten and K. P. Zurby, (1983) 4 C. H. R. R. D/ 250, a Tribuanl was dealing with the problem of whether or not marital status would include the issue of hiring of relatives. In that case the Tribunal stated at paragraph 10916:

"If this is so, should this Board extend the meaning of marital status beyond its clear and natural meaning? I do not think the Board should do so. To paraphrase Lord Reid in Shaw v. D. P. P. [1962] A. C. 220, this Board should not rush in where the legislature fears to tread."

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. Parliament has chosen to specify certain grounds of discrimination in Sections 2 and 3. It has not however defined each of those grounds.

B.) MARITAL STATUS The term "marital status" is not defined under the Canadian Human Rights Act. The term is, however, used in some of the provincial human rights

> - 13 codes and some federal statutes, not always with the same meaning. Clearly there is no definitive definition from either Parliament or the provincial legislatures.

Use of the terms "marital status" and "family status" as prohibited grounds of discrimination in human rights legislation is reviewed by Professor Walter Tarnopolsky at Chapter 9 in his text Discrimination in Law (1985) where at p. 9- 1 he states as follows:

"In 1971 Alberta was the first jurisdiction in Canada to have added "marital status" as a prohibited ground of discrimination to its human rights legislation (S. A. 1971, C. 48). By 1975 all other jurisdictions except for Quebec, Manitoba, Canada and Saskatchewan had followed suit. In 1975, when Quebec enacted its Charter (S. Q. 1975, C. 6), one of the prohibited grounds of discrimination was "civil status". The following year, (by S. M. 1976, C. 48), Manitoba added both "marital status" and "family status". When the Canadian Human Rights Act was enacted in July, 1977, the terms "marital status" in English and "situation de famille" in French were included (S. C. 1976- 77, C. 33). Amendments to the Federal Act passed in 1983 clarify this somewhat by substituting "l'état matrimonial" for the term "situation de famille", and by adding "family status" (" situation de famille" in the French version) to the list of proscribed grounds of discrimination (S. C. 1980- 81- 82- 83, C. 143, S. 2). In 1979 Saskatchewan became the last jurisdiction to add "marital status" to its code (S. S. 1979, C. S- 24.1). These guarantees have been continued in recent revisions of the statutes. The Ontario Code which was proclaimed in force in 1982 includes both "marital status" and "family status", while the B. C. Act, enacted in 1984, includes "marital status".

The only jurisdictions in Canada to define "marital status" are Saskatchewan and Ontario. In Section 9(g) of the Ontario Human Rights Code, the following definition is set out:

> - 14 ""' Marital status" means the status of being married, single, widowed, divorced, or separated and includes the status of living with a person of the opposite sex in a conjugal relationship outside marriage".

The Saskatchewan definition contained in Section 1(a) of the Regulations to their Act provides as follows:

""' Marital status" means that state of being engaged to be married, married, single, separated, divorced, widowed or living in a common law relationship, but discrimination on the basis of a relationship with a particular person is not discrimination on the basis of marital status."

No other jurisdiction provides any definition of marital status in their human rights legislation.

One of the few cases dealing with the question of whether or not a common law relationship falls within the meaning of marital status, is that of Bailey et al. v. Her Majesty the Queen in Right of Canada (1980), 1 C. H. R. R. D/ 193. In that case, two complainants who were not legally married, but who had lived together for some five years, laid a complaint against the Minister of National Revenue, alleging that they had been discriminated against on the basis of marital status. The complainant Bailey had supported the other complainant, Carson, and in her income tax return for the year 1977 claimed a "married status" deduction in respect of him (Income Tax

Act Section 109(i)(a)). This case was heard by a one member Tribunal appointed under the Canadian Human Rights Act.

The Tribunal Chairman, Mr. Cumming addressed the meaning of marital status within Section 3 of the. Canadian Human Rights Act at paragraphs 1735 through 1739 of his decision. It should be noted that at this time family status was not a prohibited ground under the Act. Chairman Cumming held that differential treatment because of the fact of living in a common law relationship raised questions of discrimination on the basis of marital status.

> - 15 In reaching his decision, the learned Chairman relied upon the cases of Blatt v. The Catholic Childrens Aid Society of Metropolitan Toronto (1980), 1 C. H. R. R. D/ 72, and Kerry v. Zellers Limited, a decision of an Ontario Board of Inquiry. Chairman Cumming at paragraph 1739 stated as follows:

"One can say, to use Prof. Dunlop's words (the chairman in Blatt v. The Catholic Childrens Aid Society of Metropolitan Toronto case), that Ms. Bailey and Mr. Carson are "living as though married without being married", and that describes their marital status. Thus they seek the deduction extended by paragraph 109(1)(a) of the I. T. A. which has the purpose of exempting some additional income of the married taxpayer from tax because of his or her marital status, i. e. having a spouse to

support during the year. Ms. Bailey seeks the deduction because she fits the situation and meets all the criteria except that Mr. Carson is not her spouse by marriage. Notwithstanding being in the same factual situation (except for marriage), as a married taxpayer supporting a spouse, Ms. Bailey's different marital status is fatal. Thus, the Bailey/ Carson complaints are properly framed in referring to the prohibited ground of "marital status"."

A further case dealing with "marital status" was Air Canada v. Bain (1982) 3 C. F. R. R. D/ 682 (F. C. A.) where the Federal Court of Appeal reversed a Canadian Human Rights Tribunal decision and ruled that an Air Canada family fare plan did not discriminate on the basis of marital status. At the material time of that case, family status was not a proscribed ground of discrimination. Ms. Bain was single and intended to travel on Air Canada with a friend. She was told that she could not take advantage of the family fare because she was not related to her travel companion. Mr. Justice Pratte, speaking for the Federal Court of Appeal, sent the matter back to the Tribunal on the basis that the provisions of Air Canada family fare plan were not discriminatory on the basis of marital status.

Mr. Justice Pratte concluded that the family fare in question was a fare for families or couples travelling together and that, as a consequence,

> - 16 the marital status that was material to determine its discriminatory character was the status of the couple travelling together and not the status of each one of the two persons of whom that couple was composed. He went on to state that even if the discriminatory character of the family fare plan had to be assessed in that manner, the plan could not be said to discriminate on the basis of marital status, the plan not only being available to married persons travelling together;

but also available to persons who, while unmarried, live together more or less permanently and, for that reason, constitute a "de facto" family.

The meaning of marital status was considered in the case of Canadian Human Rights Commission v. Canadian Pacific Airlines Limited (1983), 4 C. H. R. P. D/ 1392. This case involved a complaint that the policy of Canadian Pacific Airlines to give preference to children of employees for summer employment violated Section 10 of the Canadian Human Rights Act. The Tribunal ruled that discrimination on the grounds of marital status is prohibited but that prohibition cannot be extended to protect family members. It is important to keep in mind that this case dealt with the 1977 version of the Act which included the term "situation de famille" in the French version and did not include the term "family status".

The Tribunal decision considered the discrepancy between the English and French versions of the Act and concluded at paragraph 12026 that marital status, by all its dictionary definitions, pertains to the relationship of a husband and wife in matrimony and could not under any stretch, include a practice of giving preference to children upon hiring. The Tribunal stated that to literally interpret the French version, i. e. "Situation de famille", would include children and if there were discrimination on the basis of their situation in the family then that would amount to a prohibited practice. The Tribunal resolved the difficulty by concluding that since "marital status" and "situation de famille" mean the same thing in the Act, a restrictive meaning to the French version must be given which would not include children.

Recently, the scope of the term "marital status" in Section 3(1) of the Canadian Human Rights Act was considered by a review tribunal in Rosann

> - 17 Cashin v. Canadian Broadcasting Corporation, in an unreported decision rendered January 29, 1987. The complainant in that case, was prevented from continuing in her position as a writer/ broadcaster with the C. B. C. in Newfoundland because her husband was a prominent public figure. At page 5 of their decision, the Review Tribunal reviewed a line of cases which they felt adopted a narrow interpretation of marital status, including Blatt v. Catholic Children's Aid Society, supra; Bosi v. Township of Michipicoten, supra; St. Paul's Roman Catholic Separate School District No. 20 v. Canadian Union of Public Employees (1982), 3 C. H. R. R. D/ 915.

The issue in that case, however, was not whether common law relationships are included in the definition, but rather with the question of spousal identity as it relates to marital status. Although Bailey v. Minister of National Revenue, supra was referred to, no comment was made on the reasoning therein as it dealt with a different issue.

In Blatt v. Catholic Children's Aid Society, supra, Mr. Blatt was discharge from his employment because he lived with his fiancee in what was referred to as a "common law" relationship. The Board of Inquiry hearing this complaint held that the issue was one of "life style or sexual morality, not an issue of marital status".

St. Paul's Roman Catholic Separate School District No. 20 v. Canadian Union of Public Employees, supra, was a similar case where the Saskatchewan Court of Queen's Bench dealt

with the issue of whether the term "marital status" included common law relationships in a collective agreement. In Saskatchewan, their Human Rights Code had a definition of marital status which included common law. The Court held that the Code had no application in the interpretation of the Collective Bargaining Agreement. The Court, after looking to the dictionary meaning of the terms "marital" and "status", went on to state at paragraph 8125:

"Based on both the definition of the phrase "marital status", The Marriage Act and a marriage under the common law, it appears to me that the respondent has

> - 18 in law no "marital status", as such cannot be established out of a man and woman living together in a common law relationship without having gone through a ceremony recognized in law."

In the case of Vogel v. The Government of Manitoba (1983), 4 C. H. R. R. D/ 320, the Board of Adjudication dealt with a complaint by Vogel under the Manitoba Human Rights Act that he was discriminated against on the basis of sex and marital status in that he had been refused coverage under his dental plan for his homosexual partner which other employees receive for their heterosexual partners. Marital status is not defined under the Manitoba Act. In that case, the dental plan specifically included common 'Law spouses. The Board of Adjudication referred to Discrimination and the Law where at p. 295 Tarnopolsky concluded that "marital status" is confined to the spousal

relationship and to issues concerning whether one is married or not. The Board also looked to dictionary and Court definitions of the term "spouse" and applying the term's ordinary meaning, concluded that the word only referred to a relationship between a man and a woman and that "the simple assertion that two males are spouses or that they have a "marital status" does not make it so".

A definitional source referred to in a number of the cases was tire dictionary. The Oxford Dictionary of Current English (Oxford University Press, 1984), defines "marital" as follows:

"Of marriage; of or between husband and wife;" Marriage is defined as:

"Condition of man and woman legally united for purpose of living together and usu. procreating lawful offspring; act or ceremony, etc. establishing this condition; particular matrimonial union (by a previous marriage);"

Black's Law Dictionary (1979 Edition) defines marital as follows: > - 19 "Relating to, or connected with, the status of marriage; pertaining to

a husband; incident to a husband." One must also look at the word "status". Black's Law Dictionary defines status as follows:

"Standing; state or condition; social position. The legal relation of individual to rest of the community. The rights, duties, capacities and incapacities which determine a person to a given

class. A legal personal relationship, not temporary in its nature nor terminable at the mere will of the parties with which third persons and the state are concerned."

Looking to the definition of marital status used in other statutes does not provide a lot of help due to the divergence of such definitions. Under the Saskatchewan human rights legislation, marital status does include a common law relationship. However, common law relationship is not a defined term in that act or its regulations. In the Ontario Legislation marital status is defined as including the status of living with a person of the opposite sex in a conjugal relationship outside of marriage.

Under pension legislation, definitions of "spouse" and "widow" clearly suggest a legislative intent to treat a married individual in a different fashion than one involved in a common law relationship. Under the Canadian Human Rights Benefit Regulations, S. O. R./ 80- 68 as amended, "spouse" is defined to include a common law spouse if there has been continuous cohabitation for a specified period of time. In the case of a legal marriage, there is no such time stipulation.

In the Public Service Superannuation Act, R. S. C. 1970, C. P- 36 and the Canada Pension Plan Act, R. S. C. 1970, C. C- 5 a person can be deemed to be a "surviving spouse" or "widow" if they establish to the satisfaction of the Minister that for a "number of years" before the death of a contributor, he/ she had been residing, maintained and publicly represented

> - 20 by the contributor as his/ her spouse, factors that are necessary for a legally married claimant.

Under the Ontario Family Law Act, S. O. 1986 C. 4, "spouse" is defined as including a man and a woman who are not married, but who have cohabited continuously for a period of not less than three years or in a relationship of permanence if they are the natural or adoptive parents of a child. In that Act as well, provisions are made for cohabitation agreements for people who are cohabiting unmarried and for marriage contracts in. the case of a man and woman who are married or intend to marry. Clearly this Act does not look upon a common law union as being the same as one where the parties have gone through a ceremony of marriage.

Under the Child and Family Services and Family Relations Act, S. N. B. 1980, C. 2.1 the definition of spouse does not include the common law situation, however where a man and wife not being married have cohabited for a certain period of time, certain obligations are set out.

Professor Dunlop, in his decision in the case of Blatt v. Catholic Children's Aid Society, supra, struggles with the term "marital status" and "common law marriage" and he analyses the question in paragraph 569 as follows:

"Marital status is not more fully defined in the code, nor in any other statute, nor the common law. A dictionary adds little to one's understanding since "marital" means "of, or pertaining to marriage" (O. E. D.) and status means, among other things, "legal standing or position" and "condition in respect e. g. of marriage or celibacy". (O. E. D.), but one may say until recent years, at least, the law in this jurisdiction has recognized only two conditions in respect of

marriage. One either was married or one was not; though which category one fell into could sometimes be a tricky question. One could even believe one was married, and not be, and vice versa. The expression "common law marriage" at least in this jurisdiction was a euphemism for "living as though married without being married", the pejorative expression was "living in sin". Recently the Family Law Reform Act 1978 (Ont. C. 2), without using the term "marriage" has moved to give rights

> - 21 inter se to parties to such relationships that they hitherto have not possessed. It recognizes that cohabitation without marriage should in certain circumstances lead to rights of support because, in fact, it leads to dependency. Does the Act thereby create a new form of marriage? Or, alternatively, does it create a third status between married and single that must be referred to as a marital status? It appears to the board that the language of the statute carefully avoids either result."

Resort to the definition of marriage and common law relationships in Family Law Legislation is unhelpful and confusing. The use of these terms in Family Law Legislation is designed for completely different social and legislative purposes. Accordingly, within the Family Law Act of Ontario, a "spouse" has a variety of definitions in the same Act; see for example the definition of

spouse in Part I, Section 1 and in Part III, Section 29. The former is clearly restricted to married persons or persons who entered into a marriage that is voidable or void; the latter is expanded to include persons not married but who have cohabited continuously for a period of not less than three years or alternatively, in a relationship of some permanence where they are the natural or adoptive parents of a child. The rationale for the broader definition in Part III is because that part addresses support obligations by spouses to one another and to their children. Part I on the other hand addresses the family property situation. It appears that the difference in definition reflects a difference in social policy objectives.

C.) FAMILY STATUS There are even fewer cases that deal with the term "family status" which applies to the Paul Legace complaint. Only the human rights legislation in Ontario and Manitoba have defined the term "family status" and each definition is significantly different from the other.

In the Manitoba Human Rights Act S. M. 1974, Ch- 175, Section 1(d. 1), "family status" is defined as follows:

> - 22 "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, dependents, or members of the family of a person."

In the Ontario Human Rights Code, 1981 S. O. 1981, C 53 they use the following definition:

"Family status means the status of being in a parent and child relationship."

Professor Tarnopolsky in his text Discrimination and the Law, supra, makes the following comments concerning the word "family" at page 9.3:

"As to the word "family", however, common law authorities agree that "it has various meanings", "is used to designate many relations", "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 hand, 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.

Clearly and it will be seen that the very few human rights cases on point bear this out, the term "marital status", confined as it is to the spousal relationship and to issues concerning whether one is married or not, is much narrower than the term "family status" which includes many relationships beyond the spousal and the fact of being married or not. In this respect the Ontario definition of "family status" is surprising, for it considerably narrows the meaning of this term."

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- 23 One of the few cases referred to me dealing with the definition of family status was the case of Monk v. C. D. E. Holdings Ltd. et al. (1983), 4 C. H. R. R. D/ 1381. In the Monk case, the complainant was dismissed from her employment 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 Board of Adjudication appointed under the Manitoba Human Rights Act found that the complainant had been terminated because she was related by marriage to the shareholder involved in the dispute. The board in considering the term "family status" gave the following definition at paragraph 11904:

"It is clear that the Manitoba Act prohibits discrimination in employment due simply to the fact that an individual is married, has children, a mother, a father, aunts, uncles, etc. It would also appear that from the definition of "family status" in the Act and from the various authorities and learned writers cited to me, that discrimination based upon individualizing those various statuses - for example, that a specific person is the individual's spouse, child, etc., is also prohibited unless such individualization were to fall within the exceptions of Sections 6(6) or 6(7)".

Two other authorities dealing with the definition of "family status" are Moxen, et al. v. Samax, et al. (1985), 6 C. H. R. R. D/ 2835 and Fast v. Hanvold Expediting B. C. Ltd. (1985), 6 C. H. R. R. D/ 2507. In the Moxen case a board of adjudication under the Manitoba Human Rights Act was considering a complaint that the complainants were refused apartments because they had children. The Board of Adjudication appears to approve the comments of Professor Tarnopolsky previously referred to and at page D/ 2839 of its decision, states as follows:

"It seems clear to me that the expression "family status" in the Manitoba Human Rights Act must include the status of having children. The definition provides that "family status" ... includes the status of (1) ... parent, ... or the status of the children, dependents, or members of the family of a person". Surely the status of being

> - 24 a parent is in itself a matter of "family status." Each of the complainants was discriminated against in his or her application for housing simply because of the fact that each of them was a parent whose children lived with them."

Fast v. Hanvold Expediting B. C. Ltd.,, supra, dealt with the Northwest Territories Fair Practices Ordinance which stated that no employer shall refuse to employ ... a person or adversely discriminate in any term or condition of employment ... because of the ... family of that person ..." The term "family" was not defined in the ordinance. In that case, the complainant's employment was terminated because his father had caused proceedings for payment of back wages to be brought against a company which hired the respondent as a contractor. The inquiry after looking at the definition of "family" in the Oxford English dictionary concluded that the complainant's discharge from employment was because of a prohibited ground of discrimination namely "family".

In the Oxford Dictionary of Current English, supra, "family" is defined as

follows: "Set of parents and children or of relatives; person's children; members of household; all descendants of one lineage, group of kindred peoples, related objects ...".

In Black's Law Dictionary, 1979, "family" is defined as follows: "The meaning of the word "family" necessarily depends on field or law in which word is used, purpose intended to be accomplished by its use, and facts and circumstances of each case... The word conveys the notion of some relationship, blood or otherwise."

D.) CONCLUSION Both Mr. Schaap and Legace have complained that they have been discriminated against because of marital status in that private married quarters were

> - 25 denied to them because of their living under "common law". In Mr. Legace's complaint, he also claims under the ground of family status. Counsel for the Respondent suggested that if I were to hold that a common law relationship is included in the term marital status or family status, I must then define or explain what is meant by a common law relationship. I feel the issue here is, however, not to define a common law relationship, but rather to give definition to the terms "marital status" and "family status" and to then determine whether the kind of relationship which was the subject of the complaints, falls within the definition. Some provincial legislatures have chosen to given specific definitions to the terms. This has not been done in the statute with which we are dealing.

I am satisfied, without trying to present an exhaustive definition of a common law relationship, that both complainants were involved in such a relationship. I am also satisfied that the Respondent had a policy of denying married quarters to applicants involved in common law relationships unless such applicant had a child living with him or her, related by blood, marriage or adoption and who are claimed as a dependent for income tax purposes. I am further satisfied that both complainants were denied private married quarters because they were not considered "married" and in Mr. Legace's case, because he was not considered to be a "family". I am satisfied that both complainants have been discriminated against because they were living "common law" rather than "legally married".

The Canadian Human Rights Act does not prevent discrimination or adverse treatment per se, but rather discrimination or adverse treatment on the grounds set forth in Section 2 and Section 3 of the Act. I accept the principles of statutory interpretation that say I must look to the purpose of the statute and give effect to it, giving the statute a liberal interpretation. I look to the purpose of the Canadian Human Rights Act as set out in Section 2 and see that its purpose is stated to be, not the prevention of discriminatory practices, but rather the prevention of discriminatory practices based on certain proscribed grounds.

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The two proscribed grounds with which we are dealing, have not been defined in the Act, notwithstanding their vagueness. Little judicial authority exists to remove this vagueness. In addition, there has not been any widely accepted consistent use of the terms which would include common law relationships. As already seen, case authority is not consistent and legislatures have chosen to deal with the terms in different ways. Many legislatures have deemed it necessary in their legislation in order to include common law relationships, to specifically define what the term is to include and there is no uniformity in how they have handled it.

Parliament has chosen not to define marital status or family status in a way to include common law relationships as was done in Ontario and Saskatchewan. They have not chosen to include provisions to recognize certain common law situations as they have done in other of their legislation such as in the field of pensions.

In looking for the purpose of the legislation and seeking to give it effect, I must not legislate in an area the legislature has chosen to leave open. I cannot stretch the words beyond their ordinary and natural meaning.

The term "marital status" under the Canadian Human Rights Act, I feel is restricted to relationships involving a legal form of marriage. The federal legislation unlike the Ontario legislation for example does not make provision for anything more. I find as a matter of fact that the relationships enjoyed by Mr. Schaap and Mr. Legace are absent of a legal form of marriage and cannot be characterized as a status that is marital. The ordinary and natural meaning of the term marital status pertains to a legal marriage and cannot be stretched to include the common law relationship. I therefore find that both complaints of discrimination based on the prohibited ground of "marital status" are without foundation.

The natural and ordinary meaning of the word "family status" I believe would include the inter-relationship that arises from bonds of marriage, consanguinity, legal adoption and including to use the words of Professor

> - 27 Tarnopolsky, the ancestoral 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 Legace under the prohibited ground of "family status" is also without foundation.

I therefore dismiss both complaints. DATED this 29th day of February, 1988.

TRIBUNAL