T-744-95

OTTAWA, ONTARIO, THE 6th DAY OF JUNE 1997.

PRESENT: THE HONOURABLE MR. JUSTICE NOËL

BETWEEN:

MARIA GONZALEZ,

Complainant,

and

CANADIAN HUMAN RIGHTS COMMISSION,

Commission,

and

CANADA EMPLOYMENT AND IMMIGRATION COMMISSION,

Respondent,

and

HUMAN RIGHTS TRIBUNAL,

Tribunal.

O R D E R

The answer to the question asked in the reference is yes. Subsection 11(7) is a discriminatory practice since it discriminates on the prohibited ground of family status in the provision of services, contrary to the *Canadian Human Rights Act*, by denying extended benefits to parents of children who require extended care because of their health, solely on the ground that they enter the home before reaching the age of six months.

The operation of this order is suspended for a period of one year from today to allow Parliament to remedy the discriminatory treatment by such method as it may choose. If Parliament should fail to act within the time allowed, the respondent shall then cease to apply paragraph 11(7)(*a*) as a prerequisite for the fifteen weeks of extended benefits, and the Tribunal hearing Ms. Gonzalez's complaint shall dispose of it on the assumption that paragraph 11(7)(*a*) of the *Unemployment Insurance Act* is contrary to the *Canadian Human Rights Act*.

Marc Noël

Judge

Certified true translation

C. Delon, LL.L.

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REASONS FOR ORDER

NOËL J.

This is a reference at the request of the Attorney General of Canada on a question relating to the constitutional validity, applicability or operability of subsection 11(7) of the *Unemployment Insurance Act*.[1] More specifically, the issue is whether that subsection is contrary to the *Canadian Human Rights Act*[2]

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[1]R.S.C. 1985, c. U-1, hereinafter the "U.I. Act". Pursuant to a recent legislative reorganization, subsection 11(7) of the U.I. Act is now subsection 12(7) of the *Employment Insurance Act*, S.C. 1996, c. 23, and the Canada Employment Insurance Commission has assumed the rights and obligations of the Canada Employment and Immigration Commission as respondent under section 41 of the *Department of Human Resources Development Act*, S.C. 1996, c. 11.

[2]R.S.C. 1985, c. H-6, hereinafter the "CHRA".

in that it is a discriminatory practice based on family status in the provision of services.

I THE FACTS

The facts, which are not in issue, are set out in the parties' Case:

[TRANSLATION] On or about December 3, 1992, Maria Gonzalez adopted her son Marc-Antoine Lessard, who was born in Mexico on September 19, 1992. On or about December 6, 1992, Maria Gonzalez brought her son home from Mexico.

On or about December 11, 1992, Maria Gonzalez made a claim for benefit under the *Unemployment Insurance Act*, and received ten weeks of parental benefits, as provided for caring for the child placed with her for the purpose of adoption.

On or about February 10, 1993, the Canada Employment and Immigration Commission refused to give Ms. Gonzalez the five weeks of additional benefits she was claiming under subsection 11(7) of the *Unemployment Insurance Act* because one of the requirements in that subsection had not been met, namely that the child in question must be six months of age or older at the time of placement for the purpose of adoption.

As section 79 of the *Unemployment Insurance Act* allowed her to do, Ms. Gonzalez appealed that decision to the board of referees, which heard the case and dismissed the appeal on April 6, 1993, for the same reason.

On or about April 7, 1993, Ms. Gonzalez was informed of her right to appeal the decision of the board of referees to the umpire.

On or about August 27, 1993, Ms. Gonzalez filed a complaint with the Canadian Human Rights Commission alleging that the Canada Employment and Immigration Commission had engaged in discriminatory practices based on family status in the provision of services by denying her benefits under subsection 11(7) of the *Unemployment Insurance Act*, contrary to section 5 of the *Canadian Human Rights Act*.

On or about June 3, 1994, the complaint to the Canadian Human Rights Commission was amended to add a second ground for the complaint, namely age.

Under subsection 49(1.1) of the *Canadian Human Rights Act*, the Canadian Human Rights Commission referred the complaint to a Human Rights Tribunal for inquiry solely on the ground of family status; a Tribunal was established on January 18, 1995 and replaced on March 25, 1995.

On or about April 13, 1995, under subsection 18.3(2) of the *Federal Court Act*, the Attorney General of Canada referred the question of the constitutional validity, applicability and operability of

subsection 11(7) of the *Unemployment Insurance Act* to the Federal Court — Trial Division for hearing and determination.[3]

[3]Agreed Statement of Facts, Case, vol. II, p. 412.

I would add that the notices provided for in section 57 of the *Federal Court Act* were served on the Attorney General of each of the provinces and that none of them chose to intervene. The Canadian Human Rights Commission (the "Commission") did join these proceedings as a party in accordance with Rule 1502 of the Federal Court Rules. This reference was made subject to the procedure governing applications for judicial review, pursuant to the directions issued by Pinard J. on May 18, 1995. In those directions, Pinard J. also ordered the Tribunal hearing Ms. Gonzalez's complaint to refrain from considering the question that was the subject of the reference before the Court had disposed of it.

II HISTORY OF SUBSECTION 11(7) OF THE U.I. ACT

On January 1, 1984, when Bill C-156 was enacted, Parliament for the first time provided for the payment of benefits to either parent for a maximum of fifteen

weeks when an adopted child entered the home.[4] These benefits were referred to as "parental" benefits and were available only to adoptive parents.

[4]Case, vol. I, pp. 58-59, 76-103.

In the report that it published on October 23, 1987, the Commission recommended that the U.I. Act be amended to provide fifteen additional weeks of parental benefits to natural parents, either of whom would be able to claim them, as in the case of the benefits provided to adoptive parents.[5] In the same breath, the Commission confirmed that "maternity" benefits were by nature intended to

[5]Case, vol. I, p. 62.

provide for the needs of the natural mother during the period surrounding her pregnancy and confinement and should be preserved.[6]

[6]Case, vol. II, p. 295.

On June 7, 1988, the Federal Court — Trial Division heard an application by a natural father who was claiming benefits to care for his newborn child, on the same basis as adoptive parents, when his wife returned to work.[7] After acknowledging the distinct nature of maternity benefits, Strayer J. held that the provisions of the U.I. Act that denied parental benefits to natural fathers caring for infant children so that the mothers could return to paid employment, even though adoptive parents received such benefits, were discriminatory. The essence of the opinion stated by Strayer J. on this question was as follows:

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[7] *Schachter v. Canada*, [1988] 3 F.C. 515.

> In the light of the evidence I am satisfied that the distinction which excludes natural parents from the opportunity of receiving unemployment insurance benefits in respect of a period for child-care of an infant is pejorative or of negative effect. Further, it is a substantial disadvantage which the natural parents suffer in this way. This meets the test for infringement of subsection 15(1) of the Charter in accordance with jurisprudence such as the *Smith, Kline & French* case which is binding on me. Because of the tenuous nature of the jurisprudence on this subject, however, and the impending decision of the Supreme Court of Canada in the *Andrews* case where a more stringent test was applied to establish infringement of subsection 15(1), I will make a finding also that the distinctions in question here constitute discrimination even when measured by those more rigorous tests. The *Andrews* line of cases requires that for there to be infringement of subsection 15(1) the distinction in question must be "unreasonable or unfair". As I have already indicated, on the face of it this distinction between adoptive and natural parents has nothing to commend it. While the evidence does suggest that section 32 is inclusive of situations which are not comparable to those of natural parents, I am satisfied that there is still a substantial area of comparability where benefits are significantly different. Such distinctions as may exist between natural and adoptive parents can be accommodated within the test that benefits are payable where it is "reasonable" for the parent to stay home with the child. I find the failure to make benefits on this basis available to one group and not the other is unreasonable and unfair.[8]

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[8] *Schachter*, *supra* note 7, pp. 542-543.

As a result of this decision, Bill C-21 was introduced in the House of Commons for first reading on June 1, 1989. It provided, *inter alia*, for payment of a total of ten weeks of parental benefits to both natural and adoptive parents, and to either parent.[9]

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[9]Subclauses 14(1) and (2) of Bill C-21 as it was tabled for first reading, Case, vol. II, p. 351.

On September 28, 1989, the legislative committee responsible for examining the Bill heard submissions from the Open Door Society,[10] a group of adoptive parents, urging that Bill C-21 be amended.[11] On that date, the

[10]Open Door Society Inc., an organization sponsored by the Children's Aid Society of Ottawa-Carleton.

[11]Case, vol. I, p. 65 and vol. II, pp. 365-386.

representatives of that group, Ms. Atkins and Ms. Umbach, appeared before the parliamentary committee examining the Bill and stated the following:

Ms Umbach: The government made no mention of the special needs of many of the infants and older children adopted today. Are you aware that many of the babies placed today come from difficult backgrounds including serious mental illness, drug and alcohol addiction, and the increasing possibility of AIDS? Are you also aware that most of the children over the age of six months come from backgrounds of serious trauma, including physical or sexual abuse, emotional and physical deprivation, and neglect?

The government presented such an incomplete and inadequate case that the federal court judge had no choice but to find section 32 inequitable. Adoptive parents should not be punished because the government presented a poor defence.

Ms Atkins: My role is to set the stage for the solution. We think the government can borrow from the federal court decision in a way that is virtually costless and does not punish adoptive parents. Our proposed solution is costless, just, and Charter-proof.

Let me start by explaining the cost. There are 140,000 to 150,000 natural-mother claimants and less than 2,000 adoptive claimants per year through the U.I. system. Clearly, we must avoid providing equivalent benefits for natural and adoptive parents. In other words, 15 weeks parental benefits instead of the 10 proposed might cost an additional $150 million if it were extended to all natural parents claiming benefits. So we must define the solution in a way that is not automatically extended to natural parents, but ensures that the inequity is addressed.

Ms Umbach: We propose that you add a provision to the parental benefits clause. It should provide an extra 10 weeks or 15 weeks child care leave where children, for example, six months or older, are placed or received in the home for the first time. Require certification from the provincial welfare agency that the child in question has an emotional or physical history such that it is reasonable that the extra weeks be granted, over and above the 10-week parental benefit. This solution would cover close to 80% of adoptive children.

Since it would not exclude natural parents, for example, in the case of an infant hospitalized for its first six months of life, it would respect the Charter's interpretation. Yet it would cost very little. Except in very rare cases, only adoptive parents would qualify — fewer than 3,000 cases per year.

Honourable members, adoptive parents and their children should not be punished or put at risk. But if the adoption benefits provisions of proposed Bill C-21 stay as they are, we feel this is exactly what will happen.

The child-care provision we have proposed, which would theoretically be available to natural parents as well, is a concrete way to rectify this inadvertent injustice. We do feel that Justice Strayer erred in his decision. Adoptive parenthood is not comparable in many aspects to natural parenthood. Ideally, all adoptive parents would qualify for greater parental benefits, and this is less than a perfect solution.[12]

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[12]Case, vol. II, pp. 367-368.

After considering the various briefs, the government then went back to the House and proposed an amendment to Bill C-21:

Mr. William Kempling (Parliamentary Secretary to Minister of Employment and Immigration): Mr. Speaker, I want to deal particularly with amendment No. 6 as listed in *Votes and Proceedings*, because several members have dealt with this matter of adoptive benefits. Indeed, we had several briefs that addressed this matter when the legislative committee was travelling, and the minister with this amendment is endeavouring to answer the requests of the various people who have appeared before the committee on it.

On behalf of the Minister of Employment and Immigration I am pleased to discuss this amendment to clause 9 of Bill C-21. It provides for an additional five weeks of parental benefits, fifteen weeks rather than ten, in cases where a child six months of age or older enters the home for the first time. To be eligible for this added benefit the claimant will have to submit a certificate from a medical practitioner or the agency which places the child with the parents. This certificate will confirm that the child suffers from a physical, psychological or emotional condition requiring an additional period of parental care.

This amendment addresses the special circumstances parents face when an infant has been institutionalized or otherwise prevented from going home for an extended period after birth. It will also be relevant in adoption cases where the children are six months of age or older. It is estimated that this covers approximately 90 per cent of the adoptions in Canada. When a child six months of age or older is entering a home for the first time, regardless of the

reasons, it makes sense that a parent needs an extended period of time to welcome that child, establish daily routines, and develop a secure parent-child relationship.[13]

[13]Extract from the Debates of the House of Commons, October 16, 1989, Case, vol. II, p. 392.

On October 4, 1989, the government amended Bill C-21 to extend parental leave by five weeks for both adoptive parents and natural parents, based on the two requirements found in subsection 11(7) of the Act: that the child arrives at the home after reaching the age of six months and that a certificate is issued stating that an additional period of care is required.[14] Bill C-21 was passed by the House of Commons on November 6, 1989.

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[14]Clause 9 of Bill C-21, Case, vol. I, pp. 399-400.

Thus, the U.I. Act provides at present that parental benefits may be divided between the two parents, up to a maximum of ten weeks, and that a five-week extension may be given where the two prerequisites in subsection 11(7), set out *supra*, are met.

III QUESTION BEFORE THE COURT

In the reference by the Attorney General of Canada, the following question was submitted:

[TRANSLATION] Is subsection 11(7) of the *Unemployment Insurance Act*, R.S.C. 1985, c. U-1, contrary to the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, in that it is a discriminatory practice based on family status in the provision of services?

IV RELEVANT STATUTORY PROVISIONS

(A) *Canadian Human Rights Act*

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

3.(1) For all purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon has been granted are prohibited grounds of discrimination.

(2) Where the ground of discrimination is pregnancy or child-birth, the discrimination shall be deemed to be on the ground of sex.

5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public

(*a*) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or

(*b*) to differentiate adversely in relation to any individual,

on a prohibited ground of discrimination.

15. It is not a discriminatory practice if

(*g*) in the circumstances described in section 5 or 6, an individual is denied any goods, services, facilities or accommodation or access thereto or occupancy of any commercial premises or residential accommodation or is a victim of any adverse differentiation and there is *bona fide* justification for that denial or differentiation.

(B) ***Unemployment Insurance Act***

11.(3) Subject to subsection (7), the maximum number of weeks for which benefit may be paid in a benefit period

(*a*) for the reason of pregnancy is fifteen;

(*b*) for the reason of caring for one or more new-born children of the claimant or one or more children placed with the claimant for the purpose of adoption is ten; and

(*c*) for the reason of prescribed illness, injury or quarantine is fifteen.

(4) Subject to subsection (7), the maximum number of weeks for which benefit may be paid

(*a*) in respect of a single pregnancy is fifteen; and

(*b*) in respect of caring for one or more new-born or adopted children as a result of a single pregnancy or placement is ten.

(7) The maximum number of ten weeks specified in paragraphs (3)(*b*) and 4(*b*) is extended to fifteen weeks where

(*a*) a child referred to in paragraph (3)(*b*) or (4)(*b*) is six months of age or older at the time of the child's arrival at the claimant's home or actual placement with the claimant for the purpose of adoption; and

(*b*) a medical practitioner or the agency that placed the child certifies that the child suffers from a physical, psychological or emotional condition that requires an additional period of parental care.

20.(1) Notwithstanding section 14, but subject to this section, benefit is payable to a major attachment claimant to remain at home to care for one or more new-born children of that claimant or one or more children placed with that claimant for the purpose of adoption pursuant to the laws governing adoption in the province in which that claimant resides.

(2) Subject to section 11, benefit under this section is payable for each week of unemployment in the period

(*a*) that begins with the week in which the new-born child or children arrive at the claimant's home or the child or children are actually placed with the claimant for the purpose of adoption; and

(*b*) that ends fifty-two weeks after the week in which the new-born child or children arrive at the claimant's home or the child or children are actually placed with the claimant for the purpose of adoption.

V POSITION OF THE PARTIES

The Commission argues that subsection 11(7) of the U.I. Act discriminates on the prohibited ground of family status in the provision of services, contrary to section 5 of the CHRA. More specifically, the Commission argues that the effect of this discrimination is to deny additional benefits to adoptive and natural parents of children even when the children need parental care in accordance with the criteria set out in the Act, solely on the ground that they are less than six months of age when they arrive at the home. According to the Commission, that criterion is arbitrary and irrelevant and has a discriminatory effect on families which happen to receive their children in the home before they reach the age of six months.

The Attorney General of Canada, on behalf of himself and the respondent, argues that subsection 11(7) of the U.I. Act is not contrary to section 5 of the CHRA because it is not a discriminatory practice in the provision of services based on family status. According to the Attorney General, subsection 11(7) does not discriminate on the prohibited ground of family status since it treats biological and adoptive families in exactly the same manner. He added that the impugned distinction is based on the age of the child and that this is a personal characteristic of the child, not of the child's parents or family. According to the Attorney General, the child's age cannot be cited as a ground of discrimination based on family status.

If subsection 11(7) does differentiate adversely in relation to access to benefits on a prohibited ground of discrimination, the Attorney General argues that Parliament had a *bona fide* justification for doing so within the meaning of section 15 of the CHRA and accordingly that subsection 11(7) is not a discriminatory practice. The Attorney General submits that Bill C-21 was introduced in a context of budget cuts. At that time, Parliament had to make choices, and one of those choices was to set the number of weeks of parental benefits that could be granted at ten. The exceptional five-week extension added to the Bill was intended only for parents who met the two requirements imposed. According to the Attorney General, this was a free and informed choice, stemming from budget constraints. As such, that choice should not be subject to review by the Court.

VI ANALYSIS AND DECISION

Before addressing the essence of this matter, it would be wise to recall that Bill C-21, as it was introduced in the House of Commons for the first time on June 1, 1989, gave full effect to the judgment in *Schachter*. In that case, Strayer J. had ordered that natural parents be allowed to claim benefits equal to those paid to adoptive parents. However, he had left it to Parliament to determine how that objective should be achieved:

> Instead I consider it appropriate and just to . . . leave it to Parliament to remedy the situation in accordance with the Charter, either by extending similar benefits to natural parents, or by eliminating the benefits given to adoptive parents, or by some provision of more limited benefits on an equal basis to both adoptive and natural parents in respect of child-care. I am not in effect telling Parliament that it must follow one route or the other: all I am determining is that if it is going to provide such benefits it must provide them on a non-discriminatory basis. I am prepared to assume at this stage that Parliament will take the necessary action to render equal a system of benefits found by this Court to be unequal.[15]

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[15] *Schachter*, *supra* note 7, p. 544.

In response to that decision, Parliament could have saved public funds by reducing benefits to ten weeks for everyone; added to its expenditures by increasing benefits to fifteen weeks for everyone; or neutralized the monetary effect of the decision by reducing benefits to the level required for that purpose and treating both classes of parents identically. The initial effect of Bill C-21 was to provide benefits to both groups of parents for a ten-week period.[16]

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[16]The evidence was that the costs associated with this amendment amounted to $340 million and that it would have cost $150 million more to extend the benefit period to fifteen weeks for both classes of parents. Case, vol. I, p. 65.

Here I would note, in passing, that Strayer J. had also given his judgment immediate effect by ordering that, in the interim,[17] natural parents would be entitled to the same benefits as those accorded to adoptive parents.[18] This approach was

[17]During the period in which the section that had been found unconstitutional remained in effect.

[18]See the text of the order reproduced as an appendix to the judgment of the Federal Court of Appeal, [1990] 2 F.C. 129, p. 166.

challenged by the Attorney General, acting for the government and the Canada Employment and Immigration Commission.[19] The Federal Court of Appeal dismissed the appeal,[20] but the Supreme Court allowed it.[21] According to the

[19]The appellants had conceded that the decision of Strayer J. was otherwise correct.

[20] *Schachter v. Canada*, [1990] 2 F.C. 129.

[21] *Schachter v. Canada*, [1992] 2 S.C.R. 679.

Supreme Court, Strayer J. was wrong to give immediate effect to his judgment. Lamer C.J., stating the unanimous opinion of the Court on this point, set aside the trial judgment as follows:

> The benefit with which we are concerned here is a monetary benefit for parents under the *Unemployment Insurance Act, 1971*, not one which Parliament is constitutionally obliged to provide to the included group or the excluded group. What Parliament is obliged to do, by virtue of the conceded s. 15 violation, is equalize the provision of that benefit. The benefit itself is not constitutionally prohibited; it is simply underinclusive. Thus striking down the provision immediately would be inappropriate as such a course of action would deprive eligible persons of a benefit without providing any relief to the respondent. Such a situation demands, at the very least, that the operation of any declaration of invalidity be suspended to allow Parliament time to bring the provision into line with constitutional requirements. All of the intervening Attorneys General agreed with this proposition, although, for the most part, they intervened on behalf of the appellants.[22]

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[22] *Schachter, supra* note 21, pp. 721-722.

The disposition in the judgment of the Supreme Court reads as follows:

> . . . the appeal is allowed and the judgment of the trial judge set aside. Normally, I would order that s. 32 of the *Unemployment Insurance Act, 1971* (subsequently s. 20 of the *Unemployment Insurance Act, 1985*) be struck down pursuant to s. 52 and be declared to be of no force or effect, and I would further suspend the operation of this declaration to allow Parliament to amend the legislation to bring it into line with its constitutional obligations. There is, however, no need for a declaration of invalidity or a suspension thereof at this stage of the matter given the November 1990 repeal and replacement of the impugned provision.[23]

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[23] *Schachter*, supra note 21, p. 725.

The last sentence must be read in conjunction with a comment made earlier by Lamer C.J., as follows:

> It should be noted that the impugned provision has since been amended by Parliament to extend parental benefits to natural parents on the same footing as they are provided to adoptive parents for a period totalling 10 weeks rather than the original 15.[24]

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[24] *Schachter, supra* note 21, p. 690. This passage is the only indication of the Court's understanding of the effect of Bill C-21 in the form in which it was enacted.

Thus, the Supreme Court based its decision on the assumption that Parliament had met its constitutional obligations by providing for equal entitlement to benefits on the part of both classes of parents, in accordance with the judgment of the Federal Court.

In response to representations by the group of adoptive parents, the right to an extended five-week period was added to the Bill. In its original form, the Bill provided for ten weeks, on identical terms and conditions for both groups of parents. That group, which was not satisfied with the original proposal, made submissions to the parliamentary committee asserting that the *Schachter* case had been badly argued and suggested that the Court would not have found that adoptive parents were treated unequally if their views had been presented better. The representatives of that group came up with and proposed an amendment that met the requirements of the *Canadian Charter of Rights and Freedoms* on paper but in fact preserved the unequal treatment of the two groups of parents.

In suggesting that only parents of children who were six months of age or older when they arrived home be entitled to additional benefits, this group asserted

that 80 per cent of adoptive children[25] would qualify, while natural children would for all practical purposes be excluded.[26] This solution was presented to the

[25]90 per cent, according to the statement in the House, Case, vol. II, p. 392.

[26]"Except in very rare cases, only adoptive parents would qualify." Presentation of the Open Door Society to the parliamentary committee, Case, vol. II, pp. 367-368, *supra* note 11.

parliamentary committee as one that "would cost nothing" since, appearances notwithstanding, its effect was to preserve the advantageous treatment that the former Act had accorded to adoptive parents and the disadvantageous treatment accorded to natural parents.

As we know, Parliament decided to enact the amendment proposed by this group of parents and adopted the criterion of age at the time of arrival at the home to circumscribe entitlement to the additional five weeks of benefits provided for in subsection 11(7) of the U.I. Act.

From this brief review of the context in which subsection 11(7) was enacted, we can get a better idea of the reason behind the distinction that is now made between parents of children who arrive home after the age of six months and those who arrive before reaching that age, from the standpoint of the people who proposed it.

However, in analysing the purpose of the distinction in the context of this reference, I must assume that Parliament acted in accordance with the law. As the Supreme Court pointed out in *Schachter*, Parliament was obliged, as a result of the Federal Court's decision, to equalize the benefits that adoptive parents and

natural parents may claim.[27] Since the principle of equality between adoptive and natural parents with respect to parental benefits was laid down in a final decision based on the Charter, everyone, including our elected representatives, was obliged to act in accordance with it. In fact, Parliament's stated purpose in enacting the

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[27] *Schachter*, *supra* note 21, pp. 721-722.

amendments to section 11 of the U.I. Act brought about by Bill C-21 was to comply with the Charter by giving effect to the Court's decision in *Schachter*.[28]

[28]"What had been driving that provision was the need to treat natural and adoptive parents alike, in order to ensure conformity with the equality provisions of the Charter of Rights and Freedoms." Statement in the House by the Parliamentary Secretary to the Minister responsible, Case, vol. II, p. 392.

Thus, in analysing the reason behind the distinction made by Parliament in enacting subsection 11(7), I cannot ascribe to it the reason for exclusion that motivated the group of adoptive parents who suggested it, since that group's objective in inserting the age requirement was precisely to preserve the inequality between natural and adoptive parents under the aegis of a provision that appeared to treat both groups of parents equally. On the contrary, I must assume that in enacting subsection 11(7) Parliament intended to act in accordance with the principle of the equality of adoptive and natural parents with respect to parental benefits. On its face, subsection 11(7) complies with that principle, and since Parliament was obliged to act in accordance with it, I assume that it did so. Moreover, counsel for the Attorney General and the respondent expressed agreement on this point at the hearing.

With this in mind, we may now inquire into the purpose of the age requirement in subsection 11(7) of the Act, and in particular the question of whether this distinction is such that subsection 11(7) amounts to a discriminatory practice. When the amendment was introduced in the House of Commons, the Parliamentary Secretary to the Minister responsible described its purpose as follows:

> This amendment addresses the special circumstances parents face when an infant has been institutionalized or otherwise prevented from going home for an extended period after birth. . . . When a child six months of age or older is entering a home for the first time, regardless of the reasons, it makes sense that a parent needs an extended period of time to welcome that child, establish daily routines, and develop a secure parent-child relationship.[29]

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[29]Extract from the Debates of the House of Commons, October 16, 1989, Case, vol. II, p. 392.

According to the Commission, the reasoning behind according parents whose children arrive at their home after the age of six months different treatment from parents who happen to receive their children earlier has no rational basis and discriminates against parents in the latter class. The Commission proposes the following definition as the basis of its position:

> . . . discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.[30]

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[30] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, p. 174.

> I begin my analysis by stating that Parliament is constantly called upon to make choices, and that the mere existence of a distinction is not evocative of discrimination. Only where a distinction is made on a prohibited ground of discrimination within the meaning of section 5 of the CHRA can it give rise to discriminatory treatment. Keeping in mind the tests applied by the Supreme Court under section 15 of the Charter,[31] a distinction may amount to discrimination if there is no reason for it in a particular legislative context; although the converse is

[31]In general, the principles applied to matters involving discrimination within the meaning of subsection 15(1) of the Charter are equally applicable to human rights legislation, and *vice versa*. *Andrews*, *supra* note 30, p. 175.

not necessarily true, an irrelevant or arbitrary distinction does suggest the existence of a discriminatory distinction.[32]

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[32]*Miron v. Trudel*, [1995] 2 S.C.R. 418, p. 492.

What then are the virtues of the age requirement found in subsection 11(7) of the U.I. Act? Before endeavouring to answer that question, it is worthwhile examining the other requirement found in that subsection namely the certification by a medical practitioner or the agency that placed the child that the child in question suffers from a physical, psychological or emotional condition that requires an additional period of parental care. This second requirement unequivocally indicates that the purpose of the additional benefits is to enable parents to tend to children who, because of their condition, are in need of parental care for an extended period. Thus, the purpose of the legislation is the welfare of the child, and the means used to achieve that objective is to allow one of the parents to stay home to care for the child for the extended period by providing that parent with an alternative means of support.[33]

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[33]Subsection 20(2) of the U.I. Act further provides that no benefit may be paid beyond the year after the child arrives at the home or is placed in the adoptive home. Thus, there is a time limit on the extended benefit period: Parliament is prepared to offer fifteen weeks of benefits to parents of children whose condition requires extended care, as long as that period falls within the year following the child's arrival at the home.

Based on this, it may be seen that any relationship that there may be between the age of the child at the time of arrival at the home and the legislative objective is not apparent. A child who, because of his or her emotional, physical or psychological condition, needs extended care when he or she arrives home at the age of six months is no less in need of that care if he or she arrives home earlier. Ms. Gonzalez's case illustrates this in an adoption context,[34] and it is also

[34]The complainant's child suffered from malnutrition and his condition required extended care, as attested by the medical certificate she filed. Case, vol. I, p. 42.

true in the case of a natural child. In fact, there is no rational connection between the six month age demanded by subsection 11(7) and the child's condition. The need for care of a child who suffers from an illness can in no way be measured by reference to the age at which he or she entered the home. Moreover, it can easily be imagined that the more ill the child, the more he or she will need to enter the home speedily, in order to benefit from parental contact. The argument that a sick child who needs extended care, according to a medical certificate, and who enters the home at the age of six months is more in need of extended care than a child who is also sick and for whom the same certificate is provided, and who enters the home earlier, is totally devoid of any rational basis. In the statutory context, the age of the child is just as arbitrary a condition as, for example, a requirement relating to the length or colour of the child's hair at the time he or she enters the home.

If a distinction which forms the basis for the grant of a right or privilege is devoid of any rational connection with the legislative objective, it is in the result unreasonable. Denying a person a right or privilege which, according to the purpose of the legislation, is intended for him or her, on a ground that is totally devoid of reason amounts to denying that person the right or privilege for no reason. I can find no virtue in this age requirement. All I see here is that it has no

relevance in the legislative context and that it excludes parents of children in need of extended care on a purely arbitrary basis, solely on the ground that the children entered the home before reaching the age of six months.[35]

[35]Ultimately, it is plain that the only "virtue" of the age requirement in this legislative context is to systematically deny natural parents extended benefits; it is common ground that this is something Parliament cannot have intended or wished to do.

I therefore conclude that the distinction in respect of age is discriminatory within the meaning of section 5 of the CHRA.

However, the Attorney General contends that the distinction in respect of age cannot be cited as a ground based on family status. In his view, the age at which a child enters the home is a personal characteristic of the child, and not of the claimant as an adoptive or natural parent of the child or as the person responsible for the family. I do not share that opinion. The age at which a child enters the home is a characteristic of the family that receives the child, since its effect, as between children who have the same needs, is to entitle or disentitle the family to extended benefits based on the age at which the child enters the home.

The Attorney General also argues that the refusal to pay benefits results from the operation of the Act and that the denial alleged is not the result of the actions of the respondent as a provider of services within the meaning of section 5 of the CHRA. It seems to me that this issue was rightly conceded by the Attorney General in *Druken*.[36] One of the issues raised in that case was precisely the

[36] *Canada (Attorney General) v. Druken*, [1989] 2 F.C. 24.

question of whether the provision of unemployment insurance benefits was a service customarily available to the general public within the meaning of section 5 of the CHRA:

> While they were raised in the Attorney General's factum, arguments that the provision of unemployment insurance benefits is not a service customarily available to the general public and that its denial, by virtue of paragraphs 3(2)(*c*) of the U.I. Act and 14(*a*) [as am. by SOR/78-710, s. 1] of the U.I. Regulations, is based on marital and/or family status, were not pursued. The latter proposition seems so self-evident as not to call for comment. As to the former, the applicant appears to have found persuasive the dictum expressed in *Singh (Re)*, [1989] 1 F.C. 430 (C.A.) in which it was said by Hugessen J., delivering the judgment of this Court, at page 440:

> It is indeed arguable that the qualifying words of section 5
> 5. . . . provision of . . . services . . . customarily available to the general public
>
> can only serve a limiting role in the context of services rendered by private persons or bodies; that, by definition, services rendered by public servants at public expense are services to the public and therefore fall within the ambit of section 5. It is not, however, necessary to make any final determination on the point at this stage and it is enough to state that it is not by any means clear to me that the services rendered, both in Canada and abroad, by the officers charged with the administration of the *Immigration Act, 1976* are not services customarily available to the general public.[37]

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[37] *Druken*, *supra* note 36, p. 28. Mahoney J.A. wrote the opinion of the Court.

Despite the fact that the Attorney General made no concession on this point in the instant reference, it seems plain to me that the unemployment insurance system is a service customarily available to the general public, and my attention was not drawn to any reason that would allow me to find that this service falls outside the ambit of section 5 on the ground that it is provided by the government.

In any event, the Attorney General, relying on the decision of the Supreme Court in *Berg*,[38] contends that the complainant is excepted from the group of people for whom the service is intended. According to the Attorney General, each service is directed to its own public, and the CHRA prohibits the making of distinctions only within the eligibility criteria defined by the provider of those services. That is no doubt true, but in this instance the impugned distinction is

[38] *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353.

found precisely within the group of people for whom the service is intended.[39] On this point, it is usefull to note the *caveat* that Lamer C.J. clearly stated in *Berg*:

[39]That is, natural or adoptive parents whose children are in need of extended care at the time they enter the home and who, with the assistance the U.I. Act provides to them, are able to stay home to look after those children.

> Eligibility criteria, as long as they are non-discriminatory, are a necessary part of most services, in that they ensure that the service reaches only its intended beneficiaries, its "public", thereby avoiding overuse and unnecessary depletion of scarce resources.[40] (Emphasis added.)

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[40] *Berg*, *supra* note 38, p. 384.

Lastly, the Attorney General contends that if, by enacting subsection 11(7), Parliament engaged in a discriminatory practice, it was justified in doing so. He cited section 15 of the CHRA, which provides that if an individual is denied any services or is a victim of adverse differentiation on a prohibited ground of discrimination, it is not a discriminatory practice if the provider of the services had *bona fide* justification for the denial or differentiation.

According to the Attorney General, Bill C-21 was enacted by the House of Commons in a context of budget cuts.[41] Parliament made choices and decided to reduce the number of weeks of parental benefits that could be granted from fifteen to ten. The exceptional five-week extension that was added to Bill C-21 on October 4, 1989 was intended only for parents who met the two requirements

[41]Overall, the effect of Bill C-21 was to save the government $1.29 billion by tightening the eligibility criteria for benefits.

provided. According to the Attorney General, Parliament was justified in discriminating on this prohibited ground in order to control its expenditures.[42]

[42]Paragraph 52 of the Memorandum of the Attorney General and the respondent.

I could perhaps see how such an argument might be sound if the only method available to Parliament for controlling its expenditures had been to enact a provision that discriminated on a prohibited ground. However, that is not the case. Pursuant to the decision in *Schachter*, Parliament still had the most absolute discretion as to how it would comply with that judgment. As I noted earlier, it was open to Parliament to increase, reduce or neutralize eligibility for benefits, but there was nothing that obliged it to discriminate on a prohibited ground in order to do so.

Moreover, it is worth noting that the effect of adding subsection 11(7) to Bill C-21 on October 4, 1989 was to increase government expenditures, since in its original form the Bill provided only for ten weeks of parental benefits. We must therefore recognize that by creating entitlement to extended benefits, Parliament was prepared to allocate additional funding to assist parents of children in need of extended care.[43] On the other hand, there was nothing to compel Parliament to

[43]Unfortunately, no evidence was adduced as to the cost associated with the extended benefits under subsection 11(7).

discriminate on a prohibited ground in order to make up this budget envelope. Parliament was entirely at liberty to reduce the amount of the benefits or the benefit period in order to make the measure acceptable for the purposes of its budget. Accordingly, the Attorney General cannot justify the discrimination on the ground of budget constraints.

I therefore find that subsection 11(7) of the U.I. Act is discriminatory in that it incorporates a prohibited ground of discrimination the effect of which is to exclude parents of children who need extended care from receiving extended benefits, solely on the ground that those children enter the home before reaching the age of six months.

One of the heads of the relief sought by the Commission is that paragraph 11(7)(*a*) of the U.I. Act be declared unlawful, thereby leaving the requirement set out in paragraph 11(7)(*b*)[44] as the only criterion for access to the

[44]The certificate concerning the need for extended care.

extended benefit period. This is one way of eliminating the unequal treatment that is the result of subsection 11(7), but it is not the only way. As Strayer J. said in *Schachter*, it is up to Parliament to choose the method of ensuring equal treatment. The evidence before me shows that it would cost an additional $16 million if the extended benefits were preserved and the age requirement eliminated.[45] At the other extreme, some unidentified savings would be realized if the extended benefits were simply abolished. Somewhere between these two extremes, Parliament could neutralize the budgetary effect of the remedial measure by reducing the period of extended benefits or the value of the benefits to a level that would coincide, in terms of costs, with the present level of the program.

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[45]Case, vol. II, pp. 410-411.

> Moreover, as the Supreme Court of Canada said, we are not dealing here with a benefit that Parliament is required to pay to either of the two groups in question. The benefit is one that Parliament is entitled to accord to the people who have access to it at present; the only issue is the discriminatory condition. As the Supreme Court said in *Schachter*:
>
> . . . striking down the provision immediately would be inappropriate as such a course of action would deprive eligible persons of a benefit without providing any relief to the respondent.[46]

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[46] *Schachter, supra* note 22.

Having regard to the foregoing, the answer to the question submitted in this reference is yes, and an order will issue declaring that subsection 11(7) of the U.I. Act is discriminatory since it discriminates on the prohibited ground of family status in the provision of services, contrary to section 5 of the CHRA, by denying extended benefits to parents of children who require extended care because of their health, solely on the ground that those children enter the home before reaching the age of six months. The declaration will be suspended for a period of twelve months from the date of the order to allow Parliament to remedy the discriminatory treatment by such method as it may choose. If Parliament should fail to act within the time allowed, the respondent shall then cease to apply paragraph 11(7)(*a*) of the U.I. Act, and the Tribunal hearing Ms. Gonzalez's complaint shall dispose of it on the assumption that paragraph 11(7)(*a*) of the U.I. Act is contrary to the CHRA.

Marc Noël

Judge

Ottawa, Ontario

June 6, 1997

Certified true translation

C. Delon, LL.L.

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT NO.:	T-744-95
STYLE OF CAUSE:	Maria Gonzalez, Complainant, and Canadian Human Rights Commission, Commission, and Canada Employment and Immigration Commission, Respondent, and Human Rights Tribunal, Tribunal.
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	May 27, 1997
REASONS FOR ORDER BY:	THE HONOURABLE MR. JUSTICE NOËL
DATED:	June 6, 1997

APPEARANCES:

François Lumbu Odette Lalumière	CANADIAN HUMAN RIGHTS COMMISSION
Carole Bureau Paul Deschêne	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Canadian Human Rights Commission Ottawa, Ontario	CANADIAN HUMAN RIGHTS COMMISSION
George Thomson Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT