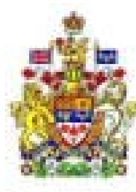
Federal Court of Appeal



Cour d'appel fédérale

Date: 20120418

Docket: A-249-11

Citation: 2012 FCA 117

CORAM: **BLAIS C.J.**
SHARLOW J.A.
MAINVILLE J.A.

BETWEEN:

ARTHUR KEITH

Appellant

and

CORRECTIONAL SERVICE OF CANADA

Respondent

AND BETWEEN:

ARTHUR KEITH

Appellant

and

CANADIAN FORCES

Respondent

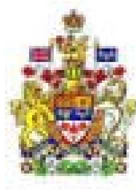
Heard at Toronto, Ontario, on March 13, 2012.

Judgment delivered at Ottawa, Ontario, on April 18, 2012.

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

CONCURRED IN BY: BLAIS C.J.
SHARLOW J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] Dr. Arthur Keith appeals a judgment of O'Reilly J. of the Federal Court ("application judge") cited as 2011 FC 690 ("Reasons") dismissing two consolidated judicial review applications challenging two separate decisions of the Canadian Human Rights Commission ("Commission"). The first decision, dated February 3, 2010, dismissed, pursuant to paragraph 44(3)(*b*) of the *Canadian Human Rights Act*, R.S.C 1985, c. H-6 ("Act"), the appellant's complaint against the Correctional Service of Canada following a refusal to consider him for a senior position which required that the incumbent be a Fellow in psychiatry of the Royal College of Physicians and Surgeons of Canada ("Royal College"). In its second decision, dated July 20, 2010, the Commission refused, pursuant to paragraph 41(1)(*c*) of the Act, to deal with a similar complaint involving the Canadian Forces.

[2] The appellant, who was born and trained in the USA, alleges in his complaints that the requirement of being a Fellow of the Royal College amounts to discrimination on the basis of national origin by excluding from the positions psychiatrists with foreign professional credentials. He adds age as a ground of discrimination in his complaint against the Correctional Service, alleging that an older candidate is less likely to succeed in the Royal College Fellowship accreditation process.

[3] In dismissing the complaint against the Correctional Service, the Commission found that (a) Fellowship in the Royal College was required in order to carry out the duties of the concerned

position, and (b) that the Royal College Fellowship hiring standard did not *prima facie* discriminate on a prohibited ground.

[4] In refusing to deal with the complaint against the Canadian Forces, the Commission found that the substance of the complaint was against the Royal College over which it lacked jurisdiction.

[5] The application judge agreed with the Commission and consequently dismissed both judicial review applications.

Background and context

Recognition of medical specialists

[6] Since the appellant's complaints involve medical professional credentials, it is useful to first set out the information contained in the record explaining the process for the recognition of medical specialists in Ontario.

[7] The College of Physicians and Surgeons of Ontario ("Ontario College") operates in accordance with the *Regulated Health Professions Act*, *1991*, S.O. 1991, c. 18, and the *Medicine Act, 1991*, S.O. 1991, c. 30. It regulates the practice of medicine in Ontario in order to protect and serve the public interest. It issues certificates of registration allowing medical doctors to practise medicine in Ontario; it monitors and maintains standards of practice through peer assessment and remediation; it investigates complaints against medical doctors on behalf of the public; and it disciplines medical doctors who may have committed an act of professional misconduct: see 2007

study by the Office of the Fairness Commissioner of Ontario ("2007 Fairness Study") (Appeal Book at pp. 212-213).

[8] The 2007 Fairness Study indicates that the following requirements have been adopted by the Ontario College in order for a candidate to obtain an independent practice certificate as a medical doctor in Ontario (Appeal Book, pp. 216-217):

> • A medical degree from an accredited Canadian or US medical school or from an acceptable medical school listed in the World Directory of Medical Schools
>
> • A pass standing on Parts 1 and 2 of the Medical Council of Canada Qualifying Examination . . .
>
> • Certification by examination by either the Royal College . . . or the College of Family Physicians of Canada . . .
>
> - To become eligible for [Royal College] certification exams, applicants must first complete a residency program, usually in Canada.
>
> . . .
>
> • Completion in Canada of one year of postgraduate training or active medical practice, or completion of a full clinical clerkship at an accredited Canadian medical school
>
> • Canadian citizenship or permanent resident status or a work visa.

[9] Medical doctors in Ontario who seek recognition from the Ontario College as medical <u>specialists</u> must also be certified as specialists in their field by the Royal College. The Royal College is the national body that certifies specialists across Canada in all branches of medicine and surgery, except family medicine: see the introduction to the Royal College's *General Standards Applicable to All Residency Programs*, Appeal Book at p. 144.

[10] The Royal College has developed a variety of routes to certification so that qualified specialist physicians, including international medical graduates, can attain full Royal College certification. These various routes are described as follows in the 2007 Fairness Study, and they include measures to take into account the international training of international medical graduates (Appeal Book at pp. 220-221):

> - Traditional (i.e. [Royal College] training plus examination).
>
> - Academic certification (in Canada and outside Canada): The academic route to [Royal College] certification helps Canadian faculties of medicine recruit and retain internationally trained specialists as full-time clinical faculty.
>
> - Jurisdiction-approved training (for [international medical graduates]): the [Royal College] has assessed 29 international jurisdictions and deemed them as having met [Royal College] criteria. The [Royal College] will assess the individual training of graduates of these particular jurisdictions to determine the extent to which they have successfully met and completed the [Royal College] training requirements.
>
> - Practice ready assessments for [international medical graduates]: The PRA process . . . is intended for [international medical graduates] in Canada with certification from an international jurisdiction.
>
> - Individual competency assessments for [international medical graduates]: the [Royal College] Credentials Committee has developed a set of criteria for the assessment of [international medical graduates'] individual training.
>
> . . .

[11] Moreover, one of the Royal College's important responsibilities is to accredit residency programs across Canada. Over 700 university-sponsored programs are currently accredited by the Royal College, which has adopted general and specific national standards for these purposes: see the introduction to the Royal College's *General Standards Applicable to All Residency Programs*, Appeal Book at p. 144; see also examples of such standards at pp. 132-161 of the Appeal Book.

[12] However, it is important to note for the purposes of this appeal that the Ontario College has recently adopted a new policy under which physicians who hold an independent practice certificate in Ontario, and who are practicing medicine in a specialty without holding a Royal College certification, may apply for recognition as a non-family medicine specialist. In order to be recognized as a specialist under this new policy, the applicant must satisfactorily complete a practice-based assessment of his or her current practice in Ontario organized by the Ontario College, and complete a one-year cycle of continuing professional development: see Guide Sheet of the Ontario College, Appeal Book at pp. 203-204.

Events leading to the complaints

[13] Dr. Keith was born in 1950 and was educated and trained in the USA as a physician and psychiatrist, and certified as a specialist in psychiatry by the American Board of Psychiatry and Neurology. He eventually moved to Canada and now has dual American and Canadian citizenship. In 1989, when he was aged 39 and still living in Tennessee, he sought recognition from the Royal College as a specialist in psychiatry: see Exhibit D to the affidavit of Luz Sucilan sworn April 5, 2010, Appeal Book at pp. 72-89.

[14] The Royal College reviewed his credentials and recognized most of his American training. Consequently, in order to meet the Royal College requirements, Dr. Keith needed only to take and pass a written examination, complete a six-month residency in child psychiatry, and pass an oral examination in psychiatry: see Exhibit D to the affidavit of Luz Sucilan sworn April 5, 2010, Appeal Book at pp. 72-89.

[15] In 1990, Dr. Keith failed the Royal College written examination. He subsequently succeeded the written portion of the 1992 examination. He also completed six months residency training in child and adolescent psychiatry at the University of Manitoba. See Exhibit D to the affidavit of Luz Sucilan sworn April 5, 2010, Appeal Book at pp. 72-89.

[16] However, in November of 1992, the Royal College's Examination Board in Psychiatry determined that he had failed the oral examination. After a second oral examination in June 1993, the Examination Board again determined that he had failed. Finally, after a third attempt at the oral examination, the Royal College informed Dr. Keith on November 26, 1993 that he had again failed to attain the passing standard, that his eligibility for the examinations had expired, and that he had to apply to the Credentials Committee for a renewal of eligibility. On December 10, 1993, the Royal College indicated that he would be required to provide supplementary information on his training and experience and, if his eligibility were renewed, he would need to repeat the written examination. Dr. Keith chose not to apply for renewed eligibility: see Exhibit D to the affidavit of Luz Sucilan sworn April 5, 2010, Appeal Book at pp. 72-89.

[17] Dr. Keith has practised medicine in Ontario for an undisclosed period of time under an independent practice certificate issued by the Ontario College. Though nominally a general practitioner, he appears to have maintained a practice largely involving psychiatric skills. In 2007, he completed a specialist assessment by the Ontario College pursuant to the newly adopted policy of that College applicable to physicians who hold an independent practice certificate in Ontario and

are practising medicine in a specialty without having Royal College certification. Pursuant to that new policy, he is now recognized by the Ontario College as a specialist in psychiatry. Dr. Keith asserts that his recent certification in Ontario as a specialist under this new policy is the equivalent of Royal College certification and should be recognized as such by his potential employers: see complaint of December 13, 2008, Appeal Book at p. 47.

[18] On April 15, 2008, Dr. Keith contacted Calian – which contracts with the Department of National Defence to supply civilian physicians to the Canadian Forces – concerning openings for civilian psychiatrists on Canadian Forces bases. He applied for the two openings available at that time, one in Cold Lake, Alberta, and the other in Pembroke, Ontario, even though the description of the qualifications for each position included being a Fellow in psychiatry of the Royal College. His applications were processed by Calian subject to verification that his professional credentials would be acceptable to the Department of National Defence: see amended complaint of February 13, 2009, Appeal Book at p. 516.

[19] Furthermore, after reading in the August 5, 2008 issue of *The Medical Post* that the Correctional Service of Canada was seeking a director of psychiatry at its Regional Treatment Centre in Kingston, Ontario, he applied for that position even though the required qualifications included being a Fellow in psychiatry of the Royal College: see complaint of December 13, 2008, Appeal Book at p. 46.

[20] On August 29, 2008, Dr. Keith was informed by Calian that the requirement for Fellowship in the Royal College was being maintained for psychiatric positions on Canadian Forces bases. Dr. Keith filed with the Commission a complaint dated October 20, 2008 against the Department of National Defence alleging that he was being discriminated against on the basis of national origin. This complaint was later amended to reflect the fact that it was made against the Canadian Forces: see amended complaint, Appeal Book at p. 516-517. The conclusions of his amended complaint read as follows:

> The insistence by the Canadian Forces on a Canadian specialty credential is discriminatory. According to Ontario, my professional credentials are equivalent to those of a Fellow of the Royal College. Apparently the only reason my eligibility for civilian Psychiatry positions with the Canadian Forces is being denied is that my certification as a specialist is non-Canadian.
>
> The requirement for Fellowship from the Royal College amounts to unlawful discrimination on the basis of national (non-Canadian) origin, excluding from Canadian Forces positions physicians (including me) with equivalent credentials from other countries. Health care is a provincial (rather than federal) matter. My province recognizes my foreign professional credentials as equivalent to Canadian professional credentials. In these circumstances, the decision that I am ineligible for civilian positions practising military psychiatry amounts to discrimination due to my national (non-Canadian) origin.

[21] On November 6, 2008, Dr. Keith was further informed that the requirement of Fellowship in psychiatry in the Royal College could not be waived by the Correctional Service of Canada, and that he consequently did not qualify for the director of psychiatry position at the Regional Treatment Centre in Kingston. On December 13, 2008, Dr. Keith filed another complaint with the Commission, this time alleging discrimination on the ground of national origin by the Correctional Service: see amended complaint of December 13, 2008, Appeal Book at pp. 46-47.

Proceedings before the Commission and its decisions

Complaint against the Correctional Service of Canada

[22] The complaint against the Correctional Service was dealt with by the Commission under sections 43 and 44 of the Act. Subsections 43(1), 44(1) and 44(3) read as follows:

43. (1) The Commission may designate a person, in this Part referred to as an “investigator”, to investigate a complaint.	**43.** (1) La Commission peut charger une personne, appelée, dans la présente loi, « l’enquêteur », d’enquêter sur une plainte.
44. (1) An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation.	**44.** (1) L’enquêteur présente son rapport à la Commission le plus tôt possible après la fin de l’enquête.
…	[…]
(3) On receipt of a report referred to in subsection (1), the Commission	(3) Sur réception du rapport d’enquête prévu au paragraphe (1), la Commission :
(*a*) may request the Chairperson of the Tribunal to institute an inquiry under section 49 into the complaint to which the report relates if the Commission is satisfied	*a*) peut demander au président du Tribunal de désigner, en application de l’article 49, un membre pour instruire la plainte visée par le rapport, si elle est convaincue :
(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted, and	(i) d’une part, que, compte tenu des circonstances relatives à la plainte, l’examen de celle-ci est justifié,
(ii) that the complaint to which the report relates should not be referred pursuant to subsection (2) or dismissed on any ground	(ii) d’autre part, qu’il n’y a pas lieu de renvoyer la plainte en application du paragraphe (2) ni de la rejeter aux termes des alinéas 41*c*) à

mentioned in paragraphs 41(*c*) to (*e*); or

(*b*) shall dismiss the complaint to which the report relates if it is satisfied

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or

(ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(*c*) to (*e*).

…

e);

b) rejette la plainte, si elle est convaincue :

(i) soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié,

(ii) soit que la plainte doit être rejetée pour l'un des motifs énoncés aux alinéas 41*c*) à *e*).

[…]

[23] An investigation was carried out by a senior member of the Commission's staff, Bonnie Rittersporn, who conducted telephone interviews with (a) Mr. Ron Stolz, Coordinator, Anti-Harassment, Ontario, for the Correctional Service of Canada (June 15, 2009), (b) Ms. Josée Lavergne, Administrative Assistant, Membership Services, at the Royal College (June 15, 2009), (c) Ms. Emily Stevenson, Manager, Credentials, at the Royal College (June 15, 2009) and (d) Dr. Keith (July 13, 2009).

[24] Following these interviews Ms. Rittersporn recommended the dismissal of the complaint pursuant to paragraph 44(3)(*b*) of the Act because "the evidence gathered during this assessment does not support that the complainant was denied a job opportunity because of one or more prohibited grounds of discrimination": Assessment Report of July, 2009, Appeal Book at p. 40.

[25] She concluded in particular that:

a. Royal College Fellowship and Ontario College recognition as a specialist are two different matters, one having to do with national standards, the other with licensing in order to practise in Ontario: Assessment Report at paras. 23, 26, 27, and 34, Appeal Book at pp. 39-40;

b. the Royal College certification process does take into account foreign training and qualifications in recognizing Fellows: Assessment Report at paras. 28, 29, 31, 32, and 35, Appeal Book at pp. 39-40;

c. the director of psychiatry position at the Regional Treatment Centre in Kingston requires Royal College Fellowship credentials in light of the requirements of the medical training program the Centre supports: Assessment Report at paras. 37-38, Appeal Book at p. 40;

d. the Royal College falls under provincial jurisdiction, and since the Commission has no legislative authority over it, the issue of whether or not its certification process is discriminatory will not be examined: Appeal Book at p. 40.

[26] The Assessment Report was submitted to Dr. Keith for comment. Counsel for Dr. Keith forwarded numerous comments alleging various errors in the report, notably challenging the requirement of Royal College Fellowship for the requirements of the medical training program the Centre supports. Dr. Keith also sought to add age as a new ground of discrimination in support of his complaint. Dr. Keith alleged in particular that medical doctors of foreign origin tend to write the

Royal College examinations later in their careers and are therefore older when they take these examinations. It was further alleged that older candidates are more likely to fail an examination than younger colleagues: Complainant's Submissions on the Preliminary Assessment, Appeal Book at pp. 62-71.

[27] In light of these representations, Ms. Rittersporn carried out an additional investigation, resulting in a Supplementary Assessment Report dated October 28, 2009. In that report, she implicitly rejected Dr. Keith's contention that Fellowship was not necessary in order to meet the requirements of the medical training program supported by the Centre: Supplementary Assessment Report at paras. 20-22, Appeal Book at pp. 43-44. As in the first Assessment Report, she also noted that "[a]s the [Royal College] falls under the ambit of provincial jurisdiction and the Commission has no legislative authority over the Royal College, the issue of whether or not its certification process is discriminatory will not be examined in this report": Supplementary Assessment Report at para. 14, Appeal Book at p. 43. Moreover, she also explicitly rejected the allegation of discrimination on the basis of age, finding that no *prima facie* discrimination had been demonstrated (Supplementary Assessment Report at paras. 29-31, Appeal Book at p. 45):

> 29. The complainant initially wrote his exams in 1990 at the age of 40. He passed the written exams in 1992 at the age of 42. Between November 1992 and November 1993, the complainant attempted the oral exams three times but each time, he was unsuccessful. He attributes his failure to pass the tests to the age at which he took the tests. Sixteen years later, in 2008, the complainant applied for a position with the respondent. As one of the requirements of the job was a [Royal College] Fellowship and the complainant did not possess this qualification, he alleges that the test he wrote some 16 years prior, is a discriminatory one and the respondent's reliance on having a Fellowship is also discriminatory.
>
> 30. The respondent has provided legitimate non-discriminatory reasons for requiring [Royal College] Fellowship.

> 31. The complainant's evidence does not link the alleged discriminatory conduct to a prohibited ground and the assessment has not found any such nexus. On the evidence, the fact that the complainant did not receive the job opportunity was not linked to any prohibited ground.

[28] Again, the appellant was given an opportunity to comment on the Supplementary Assessment Report, and he again made submissions through his counsel disputing these findings and recommendations: Complainant's Submissions on the Supplementary Preliminary Assessment, Appeal Book at pp. 99-108.

[29] The Commission reviewed both reports and the extensive submissions of Dr. Keith in response to these reports and decided, pursuant to paragraph 44(3)(*b*) of the Act, to dismiss the complaint because "the evidence gathered during the assessment does not support that the complainant was denied a job opportunity because of one or more prohibited grounds of discrimination": Commission's letter of February 3, 2010, Appeal Book at p. 35.

Complaint against the Canadian Forces

[30] The Commission took a different path in its treatment of the complaint against the Canadian Forces. The Canadian Forces had submitted that the complaint should be against Calian within the framework of a provincial human rights investigation, since Calian was the firm which supplied it with civilian physicians: letter dated May 15, 2009 from National Defence, Appeal Book at pp. 532-535.

[31] Consequently, the Commission did not investigate the complaint under sections 43 and 44 of the Act, but rather proceeded to determine, as a preliminary matter, whether it had jurisdiction to deal with the complaint. Paragraph 41(1)(*c*) of the Act reads as follows:

41. (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that	**41.** (1) Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants :
. . .	[…]
(*c*) the complaint is beyond the jurisdiction of the Commission;	*c*) la plainte n'est pas de sa compétence;

[32] In order to assist it in deciding this preliminary issue, the Commission requested one of its staff members, Mr. Dean Steacy, to prepare a report on the Calian jurisdictional issue. For this purpose, Mr. Steacy requested and received detailed submissions from the parties.

[33] A "Section 40/41 Report" was issued March 31, 2010 in which Mr. Steacy recommended the rejection of the contention that the Canadian Forces were not the employer for the purposes of the complaint under the Act. Consequently, Mr. Steacy concluded that the Commission should exercise its discretion to deal with the complaint under the Act: Section 40/41 Report at para. 28, Appeal Book at p. 512.

[34] Without the benefit of a section 43 investigation, Mr. Steacy proceeded to analyze the complaint on its merits, using for this purpose the submissions received on the Calian jurisdictional issue. He concluded that the Royal College Fellowship requirement appeared to be neutral and that,

consequently, the fact that Dr. Keith had been screened out of the competition had nothing to do with his national origin: Section 40/41 Report at para. 49, Appeal Book at p. 515. Mr. Steacy also reviewed the Royal College Policies and Procedures for Certification and Fellowship and found them not to be *prima facie* discriminatory: Section 40/41 Report at para. 47, Appeal Book at pp. 514-515. As for Dr. Keith's allegation that the Royal College's testing procedures and exams were themselves discriminatory, Mr. Steacy noted that since the Royal College is under provincial jurisdiction, that allegation would be better dealt with through a complaint with a provincial human rights commission: Section 40/41 Report at para. 48, Appeal Book at p. 515.

[35] Following the Section 40/41 Report, the Commission decided, under paragraph 41(1)(*c*) of the Act, not to deal with the complaint, adopting for that purpose the following analysis set out in the report (Appeal Book at pp. 505-506):

> In reviewing the documents provided by the parties, it is clear that the [Canadian Forces have] mandated the employment requirement of [Royal College] Fellowship as a job qualification and requirement for the position of psychiatrist. As well, it is clear that Calian was required to hold all applicants to the same standard, that is, requiring all candidates to be a Fellow of the [Royal College].
> …
> Dr. Keith maintains the position that the [Royal College] testing procedure and the exams themselves discriminate. However, since the [Royal College] falls under provincial jurisdiction and as the [Commission] has no legislative authority over the Royal College, Dr. Keith's allegation that the certification process is discriminatory, would be better dealt `with in a complaint to a provincial human rights commission.
> …
> In reviewing the documents provided by both parties, it appears that the [Canadian Forces] provided Calian with the qualifications and requirements for the position of psychiatrist, which [were] applied to all applicants, and that the job qualification requirement of [Royal College] Fellowship appeared to be neutral. In this regard, while it is correct that foreign educated physicians must have their credentials assessed and certified as equivalent to that of "Fellow" by the [Royal College], so must Canadian physicians who have been educated outside of Canada. Furthermore, any individual, regardless of their national or ethnic origin, educated as a psychiatrist

> in Canada and certified to practice as a psychiatrist in a Province in Canada must also have their education and qualifications assessed and be recognized as a fellow by the [Royal College] in order to be screened in within this competition process. In as much as Calian's decision not to employ Dr. Keith was based on criteria set out by the [Canadian Forces], Dr. Keith's qualifications were subjected to the same scrutiny as were all applicants. The fact that Dr. Keith's application was screened out of the competition had no bearing on Dr. Keith's national or ethnic origin, rather the decision was based on the fact that Dr. Keith did not have the qualification of fellow from the [Royal College].

Reasons of the application judge

[36] The application judge reviewed on a standard of reasonableness the decision of the Commission dismissing the complaint against the Correctional Service pursuant to paragraph 44(3)(*b*) of the Act, while he reviewed on a standard of correctness its decision not to deal with the complaint against the Canadian Forces on jurisdictional grounds pursuant to paragraph 41(1)(*c*) of the Act: Reasons at paras. 16, 19, 23 and 28.

[37] He found that the dismissal of the complaint against the Correctional Service was reasonable since "[i]n the absence of evidence that the standard was discriminatory on its face or that the CSC [Correctional Service] was imposing the standard for a discriminatory purpose, it was clear that Dr. Keith's complaint was really directed at the [Royal College], not CSC. Therefore, the CSC's [*sic*] conclusion that a hearing was not warranted was not unreasonable": Reasons at para. 19.

[38] As for the complaint against the Canadian Forces, the application judge found that the Commission was correct in concluding that Dr. Keith's complaint was really directed against the

Royal College, and that it consequently had no jurisdiction to investigate this complaint: Reasons at para. 29.

[39] The application judge further found that the Commission's investigations related to both complaints had been sufficiently thorough in the circumstances: Reasons at paras. 20-23 and 30-31.

Issues

[40] This appeal raises the following issues:

a. The applicable standard of review.

b. The application of the Act to provincially regulated professional qualifications adopted as hiring standards by a federally regulated employer.

c. Whether the Commission erred in dismissing the complaint against the Correctional Service of Canada pursuant to paragraph 44(3)(*b*) of the Act.

d. Whether the Commission erred in declining to deal with the complaint against the Canadian Forces on jurisdictional grounds pursuant to paragraph 41(1)(*c*) of the Act.

A. Standard of review

[41] On an appeal of a judgment concerning a judicial review application, the role of this Court is to determine whether the application judge identified and applied the correct standard of review, and in the event he did not, to assess the impugned decision in light of the correct standard; the application judge's selection of the appropriate standard of review is itself a question of law subject to review on the standard of correctness: *Dr. Q. v. College of Physicians and Surgeons of British*

Columbia, 2003 SCC 19, [2003] 1 S.C.R. 226 at para. 43; *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100 at para. 35; *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31, [2006] 3 F.C.R. 610 at paras. 13-14; *Yu v. Canada (Attorney General)*, 2011 FCA 42 at para. 19.

Standard of review applicable to the decision to dismiss the complaint against the Correctional Service of Canada pursuant to paragraph 44(3)(*b*) of the Act

[42] After the conclusion of an investigation of a complaint pursuant to subsection 43(1) of the Act, and upon receipt of the investigation report pursuant to subsection 44(1), the Commission must either request that the Chairperson of the Canadian Human Rights Tribunal (“Tribunal”) institute an inquiry into the complaint if it is satisfied, having regard to all the circumstances, that the complaint is warranted, or, alternatively, dismiss the complaint if it is satisfied, having regard to all the circumstances, that such an inquiry into the complaint is not warranted: subsection 44(3) of the Act.

[43] When deciding whether a complaint should proceed or not to an inquiry by the Tribunal, the Commission performs a screening analysis somewhat analogous to that by a judge at a preliminary inquiry in that it must decide if an inquiry by the Tribunal is warranted having regard to all the facts before it. The central component of the Commission’s role is thus assessing the sufficiency of the evidence before it: i.e., it must determine whether there is a reasonable basis in the evidence for proceeding to the next stage. Moreover, the Commission’s decision is a discretionary one: *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10 (“*Halifax*”) at paras. 23 to 25; *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 at para. 53;

Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission), [1989] 2 S.C.R. 879 at pp. 898-899.

[44] It is well settled that a decision of the Commission to refer a complaint to the Tribunal is subject to judicial review on a reasonableness standard: *Halifax* at paras. 27, 40 and 44 to 53; *Bell Canada v. Communications, Energy and Paperworkers Union of Canada*, [1999] 1 F.C. 113 (C.A.) at para. 38. In *Halifax*, Cromwell J. recently considered the standard of review which applies in such circumstances, and he concluded that "the reviewing court should ask itself whether there is any reasonable basis in law or on the evidence to support that decision": *Halifax* at para. 53. Though *Halifax* dealt with the screening functions of the Nova Scotia Human Rights Commission, its conclusions also apply to the screening functions of the Commission: *Halifax* at para. 52.

[45] In this case, we are not reviewing a decision to refer a complaint to the Tribunal. Rather, the Commission's decision was to dismiss the complaint. In my view, where the Commission dismisses a complaint under paragraph 43(3)(*b*) of the Act, a more probing review should be carried out.

[46] Cromwell J. was careful to point out that the conclusion reached in *Halifax* only extends to cases where the complaint is referred for further inquiry. In such cases, any interested party may raise any arguments and submit any appropriate evidence at the second stage of the process; consequently, no final determination of the complaint is reached by referring it to further inquiry. As noted at paragraph 15 of *Halifax*, "[a]ll the Commission had done was to refer the complaint to a board of inquiry; the Commission had not decided any issue on its merits" (see also paras. 23 and 50

of *Halifax*). In the case of a dismissal under paragraph 44(3)(*b*) of the Act, however, any further investigation or inquiry into the complaint by the Commission or the Tribunal is precluded.

[47] The decision of the Commission to dismiss a complaint under paragraph 44(3)(*b*) of the Act is a final decision made at an early stage, but in such case – contrary to a decision refusing to deal with a complaint under section 41 – the decision is made with the benefit and in the light of an investigation pursuant to section 43. Such a decision should be reviewed on a reasonableness standard, but as was said in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paragraph 59, and recently reiterated in *Halifax* at paragraph 44, reasonableness is a single concept that "takes it colour" from the particular context. In this case, the nature of the Commission's role and the place of the paragraph 44(3)(*b*) decision in the process contemplated by the Act are important aspects of that context, and must be taken into account in applying the reasonableness standard.

[48] In my view, a reviewing court should defer to the Commission's findings of fact resulting from the section 43 investigation, and to its findings of law falling within its mandate. Should these findings be found to be reasonable, a reviewing court should then consider whether the dismissal of the complaint at an early stage pursuant to paragraph 44(3)(*b*) of the Act was a reasonable conclusion to draw having regard to these findings and taking into account that the decision to dismiss is a final decision precluding further investigation or inquiry under the Act.

[49] This formulation ensures that both the decision of the Commission and the process contemplated by the Act are treated with appropriate judicial deference having regard to the nature of a dismissal under paragraph 44(3)(*b*). The pre-*Dunsmuir* jurisprudence of this Court dealing with judicial review of Commission decisions dismissing complaints pursuant to paragraph 44(3)(*b*) of the Act supports such a formulation: *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392.

<u>Standard of review applicable to the decision of the Commission declining to deal with the complaint against the Canadian Forces on jurisdictional grounds pursuant to paragraph 41(1)(*c*) of the Act.</u>

[50] The Commission may decline to deal with a complaint under paragraph 41(1)(*c*) of the Act when the complaint is beyond its jurisdiction. Such a decision may be made prior to or after an investigation carried out pursuant to section 43 of the Act. In this case, the Commission reached its decision without the benefit of such an investigation. The jurisprudence of the Federal Court provides that in such circumstances the Commission should only decline to deal with a complaint in plain and obvious cases. This is so since the decision of the Commission pursuant to section 41 is a final decision made at a preliminary stage without the benefit of an investigation under section 43 of the Act: *Canada Post Corp. v. Canadian Human Rights Commission et al.* (1997), 130 F.T.R. 241 at para. 3 (Rothstein J.), conf. 169 F.T.R. 138, affirmed 245 N.R. 397 (F.C.A.); *Michon-Hamelin v. Canada (Attorney General)*, 2007 FC 1258 at para. 16 (Mactavish J., citing Rothstein J. in *Canada Post Corp.*, above); *Hicks v. Canada (Attorney General),* 2008 FC 1059 at para. 22 (Snider J.); *Canada (Attorney General) v. Maracle*, 2012 FC 105 at paras. 39-40 (Bédard J.).

[51] Moreover, since the Commission decided the jurisdictional question without the benefit of a section 43 investigation, the allegations of fact contained in the complaint must be taken as true: *Michon-Hamelin v. Canada (Attorney General)*, above, at paras. 23-24; *Hicks v. Canada (Attorney General)*, above, at para. 6.

[52] The Commission declined to deal with the complaint on the basis that, in pith and substance, it concerned the testing procedure and exams of the Royal College, a matter over which the Commission found it had no authority under the Act and that would be better dealt with in a complaint to a provincial human rights commission.

[53] Questions regarding the division of powers between Parliament and the provinces, as well as other constitutional questions, are necessarily subject to correctness review, as are questions regarding the jurisdictional lines between two or more competing specialized tribunals: *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 at para. 18, citing *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paras. 58 and 61. The decision of the Commission refusing to deal with the complaint against the Canadian Forces falls within these parameters and must therefore be reviewed on a standard of correctness.

B. The application of the Act to provincially regulated professional qualifications adopted as hiring standards by a federally regulated employer

[54] Dr. Keith's complaint pertains to a hiring standard adopted by federally regulated employers based on professional certification by a provincially regulated professional association. The question

which must therefore be first determined is whether the Commission's powers to investigate complaints extend to provincially regulated professional standards.

[55] Once a federally regulated employer adopts a hiring standard, whether that standard is developed by the employer itself or is based, as is the case here, on an external provincially regulated professional qualification, that hiring standard is subject to scrutiny under the Act. A federally regulated employer cannot escape scrutiny by simply adopting a provincially regulated professional qualification as its own hiring standard and then claim immunity from review on constitutional grounds. This does not mean that the review of the hiring standard by the Commission extends beyond the jurisdictional bounds of the Act, since not all hiring standards are subject to scrutiny under the Act, only those that *prima facie* discriminate on the basis of one or more of the prohibited grounds.

[56] However, there are constitutional limits which must be respected. Thus, if a federally regulated employer adopts membership in a provincially regulated professional organization as a hiring standard for a position, the review under the Act will be focused on determining if such membership is a true requirement for the position or rather a means of excluding candidates on prohibited grounds. The Commission may not however use its investigation powers in order to extend its authority over the certification requirements of the professional association itself, since the regulation of professions and trades falls under provincial jurisdiction: Peter W. Hogg, *Constitutional Law of Canada*, v. 1, 5th ed. (Toronto: Carswell, 2007) at sec. 21.7.

[57] Using a hypothetical situation to illustrate the point, if a federally regulated employer adopted membership in a professional association as a hiring standard for computer programmers, and it could be demonstrated *prima facie* that the concerned association chose its membership on the basis of race, there would be a heavy burden on the federally regulated employer to show a *bona fide* occupational requirement. If, on the other hand, there is no *prima facie* evidence of direct or adverse effect discrimination by the association, the matter need not be investigated further.

C. Did the Commission err in dismissing the complaint against the Correctional Service of Canada pursuant to paragraph 44(3)(b) of the Act?

[58] Dr. Keith's contention is that, in light of the specialist recognition he has recently obtained from the Ontario College, the requirement of Royal College Fellowship for the position of director of psychiatry at the Regional Treatment Centre in Kingston is discriminatory because it has the effect of screening out qualified candidates on the prohibited grounds of national origin and age.

[59] In both direct discrimination and adverse effect discrimination complaints concerning an impugned hiring standard, the complainant must first establish that the standard is *prima facie* discriminatory: *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 ("*Meiorin*") at paras. 2, 3 and 13. A *prima facie* case of discrimination "is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer": *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536 at p. 558.

[60] What was at issue in *Meiorin* was the use of physical fitness tests to determine suitability for continued employment as a forest firefighter. The use of such tests had led to the layoff of Ms. Meiorin from her position as a forest firefighter with the British Columbia Ministry of Forests after three years of satisfactory service. The tests were found to be a *prima facie* discriminatory employment standard on the following grounds: (a) evidence demonstrated that, owing to physiological differences, most women have lower aerobic capacity than most men and that, even with training, most women cannot increase their aerobic capacity to the level required by the aerobic standard established by the impugned tests, although training could allow most men to meet it: *Meiorin* at para. 11; and (b) no evidence showed that the prescribed aerobic capacity was necessary for either men or women to perform the work of a forest firefighter safely and efficiently: *Meiorin* at paras. 12 and 18.

[61] Once a hiring standard is found to be *prima facie* discriminatory, an employer must justify the standard by establishing, on a balance of probabilities, that it is a *bona fide* occupational requirement. For this purpose, a three-step test was developed in *Meiorin* at paragraph 54. Under this test, the employer must show:

a. that the standard was adopted for a purpose rationally connected to the performance of the job;
b. that the standard was adopted in an honest and good faith belief that it was necessary for the fulfillment of that legitimate work-related purpose; and
c. that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, the

> employer must demonstrate that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon itself.

[62] In this case, the Commission found, based on the information submitted by Mr. Ron Stolz on behalf of the Correctional Service, that the requirement of Royal College Fellowship was necessary for performing the work related to the position of director of psychiatry at the Regional Treatment Centre in Kingston. The Assessment Report noted the role of the Centre in training medical students (Assessment Report at paras. 37-38, reproduced at p. 40 of the Appeal Book):

> 37. Mr. Stolz explained that without [Royal College] certification and Fellowship, the Director would not be able to carry out the expectations of the position. As an example, Mr. Stolz said that Queens University in Kingston is the educational component and their trainees have co-op placements at the treatment centre. Mr. Stolz said that only [Royal College] programs with [Royal College] accredited components can graduate trainees and the Kingston treatment facility, which has a residence training program, must meet the requirements for the [Royal College] program in order to graduate the trainees. Therefore, its Director must be a [Royal College] Fellow.
>
> 38. He also said that the Director has linkages with community resources and the community hospitals require Fellowship for granting practising privileges for research or training purposes and patient (inmate) care. A Director without [Royal College] certification would not be allowed access to such resources.

The Supplementary Assessment Report confirmed and reiterated these findings of fact in its para. 20, reproduced at p. 43 of the Appeal Book.

[63] The Commission also had access to documentary evidence concerning the Canadian medical training system, including evidence pertaining to the role of the Royal College in this system, notably the Royal College *General Standards Applicable to All Residency Programs*: see affidavit of Luz Sucilan sworn April 5, 2010, at para. 8, reproduced at pp. 49-50 of the Appeal

Book. These *General Standards* provide that there must be an appropriate administrative structure for each residency program, and in particular, "[t]here **must** be a program director, with qualifications that are acceptable to the [Royal] College": Appeal Book at p. 145 (emphasis in original).

[64] Dr. Keith challenged before the Commission the requirement of Royal College Fellowship in order for a person to be able to provide Royal College training programs by referring to a telephone conversation he had with a Royal College official concerning the matter. However, Dr. Keith submitted no evidence as to the requirements for the medical training programs offered in Kingston.

[65] Dr. Keith also alleged before the Commission that there was no general requirement of Fellowship in the Royal College in order for one to obtain hospital privileges, and he gave as an example his own privileges at the North Bay Psychiatric Hospital. However, no evidence was provided by Dr. Keith as to privilege requirements in hospitals linked to universities providing medical training–such as Queen's University–or in hospitals providing Royal College residencies in the Kingston area and linked to the university medical community in that area. Dr. Keith recognized these *lacunae* in his submissions and concluded that a Royal College Fellowship requirement at any hospital would also amount to discrimination [Complainant's Submissions on the Preliminary Assessment, para. 39, Appeal Book at p. 68]:

> Even if [Royal College] Fellowship were a requirement for hospital privileges, a Respondent cannot rely upon the discrimination by others to justify its own discrimination. If the Respondent's requirement of [Royal College] Fellowship is

> *prima facie* discriminatory, any hospital requiring it for privileges is also discriminating and therefore cannot be relied upon as a justification.

[66] The Commission considered Dr. Keith's submissions on these matters, but was obviously not persuaded. It rather found that a Royal College Fellowship was an essential qualification in order to carry out the functions of the position: Supplementary Assessment Report at paras. 20-22, Appeal Book at pp. 43-44.

[67] In light of all the above, the Commission's conclusion that Royal College Fellowship was necessary for performing the work related to the position of director of psychiatry at the Regional Treatment Centre in Kingston was a reasonable conclusion to draw from the evidence before it.

[68] Furthermore, the Commission also found as a matter of fact that the certification process for obtaining Fellowship in psychiatry in the Royal College was not *prima facie* discriminatory on the basis of national origin. The Commission interviewed the personnel of the Royal College responsible for the accreditation process and had access to various documents setting out that process. This allowed the Commission to conclude not only that that process was not *prima facie* discriminatory, but also that it took into account foreign training and qualifications in recognizing Fellows: Assessment Report at paras. 28, 29, 31, 32 and 35, Appeal Book at pp. 39-40.

[69] Dr. Keith failed to submit any evidence to show that the Royal College certification process discriminated on the basis of national origin. The evidence in the record showed that the Royal College had recognized his American training for the purpose of certifying him as a Fellow in

psychiatry. Furthermore, the evidence also showed that Dr. Keith had successfully passed the written examination for Fellowship. However, he thrice failed the oral examination. He now claims, many years after the fact, that his failure to achieve Fellowship must have been due to some adverse effect discrimination resulting from his national origin. Yet no evidence has been submitted to support this allegation. Dr. Keith's submission is rather that his allegation of discrimination on the basis of national origin should be taken at face value. This, however, is not what an investigation under section 43 of the Act is about. The Commission, based on the evidence gathered during its investigation, reached its own conclusion as to the allegation of discrimination on the ground of national origin. The Commission's conclusion derived from that investigation is reasonable in the light of the evidence (or lack thereof) before it.

[70] Dr. Keith did however attempt to provide some evidence of age discrimination by referring the Commission to an American study dating from 1991 which showed that being both younger than 30 years of age and a native English speaker were the strongest factors predicting full pass rates in the 1984 to 1987 Foreign Medical Graduate Examinations in the Medical Sciences administered by the US Educational Commission for Foreign Medical Graduates: Appeal Book at pp. 111 to 124. However that study did not assert, nor did it demonstrate *prima facie*, that such pass rates were the result of discriminatory practices based on age. Nor was any explanation provided by Dr. Keith as to how this study had any direct bearing on the Royal College certification process. Dr. Keith also referred to other foreign studies concerning age and examinations which had similar limitations.

[71] During the hearing of this appeal, Dr. Keith's counsel was asked what evidence existed in the record to support the submission that age discrimination was involved in the Royal College certification process. He acknowledged that no such evidence was to be found in the record, insisting that the allegation was self-evident and based on the common sense proposition that the older an individual is, the more difficult it is for that individual to pass an examination. I cannot accept such a proposition as a substitute for *prima facie* evidence of age discrimination. Such a proposition leads to the absurd conclusion that all school, college, university and professional entrance exams, as well as all ongoing examination processes in such institutions, discriminate on the basis of age. Similar conclusions would need to be drawn concerning all personnel recruitment examinations administered by public sector as well as private sector employers. That is asking this Court to find that the human condition is, in and of itself, a *prima facie* basis for establishing discrimination on the ground of age. I do not believe this is what the Act provides for.

[72] Having found that the Commission's findings of fact and of law were reasonable, I also conclude that the Commission's decision dismissing the complaint pursuant to paragraph 44(3)(*b*) of the Act was a reasonable conclusion to draw having regard to those findings and taking into account that the decision to dismiss is a final decision precluding further investigation or inquiry under the Act.

[73] The Commission found that the Royal College Fellowship requirement is necessary for the performance of the work required of the incumbent in the position. The Commission found that the Regional Treatment Centre in Kingston is part of the Royal College medical training network and

that the director of psychiatry at this Centre should be a Fellow for that and other purposes. Based on the evidence before it, the Commission further found no *prima facie* discrimination in the Royal College Fellowship accreditation process on the ground of either age or national origin. In light of the evidentiary findings of the Commission, Dr. Keith has not established that the impugned hiring standard is *prima facie* discriminatory.

[74] Furthermore, I cannot accept Dr. Keith's submission that the Commission's investigation was not thorough enough. The comments of Nadon J. (as he then was) in *Slattery v. Canada (Human Rights Commission)*, [1994] 2 F.C. 574 at pp. 600-601 are apposite here:

> In contexts where parties have the legal right to make submissions in response to an investigator's report, such as in the case at bar, parties may be able to compensate for more minor omissions by bringing such omissions to the attention of the decision-maker. Therefore, it should be only where complainants are unable to rectify such omissions that judicial review would be warranted. Although this is by no means an exhaustive list, it would seem to me that circumstances where further submissions cannot compensate for an investigator's omissions would include: (1) where the omission is of such a fundamental nature that merely drawing the decision-maker's attention to the omission cannot compensate for it; or (2) where fundamental evidence is inaccessible to the decision-maker by virtue of the protected nature of the information or where the decision-maker explicitly disregards it.

The appellant has not shown that the Commission's investigation was so fundamentally flawed as to warrant intervention by this Court. On the contrary, the investigation was rather thorough: it comprised not just one, but two reports; the appellant had ample opportunity to make all the submissions he wished, and indeed he amply availed himself of his opportunities. The appellant also made reference in his submissions to a large number of documents in order to support his complaint.

[75] Given the finding that Fellowship was required in order to carry out the duties of the director's position and that the Royal College Fellowship accreditation process did not *prima facie* discriminate on a prohibited ground, the only remaining aspect of Dr. Keith's complaint concerns his claim of equivalency between his Ontario College certification and Royal College Fellowship. This last aspect of the complaint has nothing to do with discrimination but has to do rather with professional qualifications equivalence. The Commission has no authority or expertise to perform professional qualifications equivalence assessments, and rightfully declined to do so.

D. Did the Commission err in declining to deal with the complaint against the Canadian Forces on jurisdictional grounds pursuant to paragraph 41(1)(c) of the Act?

[76] The Commission rejected the Canadian Forces' jurisdictional argument concerning Calian. However, instead of proceeding with an investigation under section 43 and issuing a decision pursuant to section 44 of the Act, as would have been the normal course of action in such circumstances, the Commission rather refused to deal with the complaint, finding that it was in pith and substance a challenge to the Royal College Fellowship certification process, a matter over which the Commission found it had no jurisdiction.

[77] Though Dr. Keith's complaint certainly raises issues related to the Royal College certification process, it is nevertheless a complaint directed against the Canadian Forces' use of a hiring standard which is alleged to be discriminatory in its effect. The Commission was bound by the Act to investigate whether the hiring standard adopted by the Canadian Forces, *e.g.* Fellowship

in the Royal College, resulted in discrimination within the Canadian Forces on a ground prohibited by the Act. The Commission was also required to make a decision on this issue pursuant to subsection 44(3) of the Act.

[78] As already noted above, once a federal employer, such as the Canadian Forces, adopts as a hiring standard a provincially regulated professional qualification, that hiring standard is subject to scrutiny under the Act. In this process, the Commission must determine – as it did with Dr. Keith's complaint concerning the Correctional Service – whether a *prima facie* case of discrimination has been established, and if so, whether the concerned hiring standard is a *bona fide* occupational requirement. Though the Commission must not exceed its authority by investigating the provincially regulated professional body, it does have authority to investigate the federal employer which adopted the standard as its own, and in so doing, it may consider how that standard could lead to discrimination under the Act with regard to that federal employer.

[79] In this case, the Canadian Forces have adopted a hiring standard based on Fellowship in the Royal College. The Commission is entitled to review this hiring standard in order to ascertain if it has the effect of excluding candidates on grounds prohibited under the Act. In so doing, the Commission is not assuming jurisdiction over the Royal College, but is rather exercising its jurisdiction over the Canadian Forces. In carrying out its investigation under the Act, the Commission must be careful not to encroach upon the activities of the Royal College itself, which fall outside its jurisdiction.

[80] In this case, the Commission declined jurisdiction without carrying out an investigation into the complaint against the Canadian Forces. This it could not do.

[81] I am however well aware that in light of the findings of the Commission leading to the dismissal of the complaint against the Correctional Service, the investigation of the complaint against the Canadian Forces may be somewhat supererogatory. However, the Commission must be held to its very conscious choice of treating both complaints separately under distinct statutory processes. The Commission was well aware that both complaints were pending before it, but chose to treat them separately. For some unknown reason, it did not rely on the evidence gathered in its investigation of the complaint against the Correctional Service for the purpose of deciding the complaint against the Canadian Forces.

Conclusions

[82] For the reasons set out above, I would (a) dismiss the appeal from the judgment in Federal Court docket T-356-10 which dismissed a judicial review proceeding concerning a decision of the Commission dismissing the appellant's complaint against the Correctional Service of Canada, and (b) allow the appeal from the judgment in Federal Court docket T-1326-10 and return the

appellant’s complaint concerning the Canadian Forces to the Commission for investigation pursuant to section 43, and decision pursuant to section 44, of the Act. In light of the mixed result, I would not award any costs in this appeal.

"Robert M. Mainville"
J.A.

“I agree.
Pierre Blais C.J.”

“I agree.
K. Sharlow J.A.”

SCHEDULE

PERTINENT PROVISIONS OF THE *CANADIAN HUMAN RIGHTS ACT*, R.S.C. 1985, c. H-6

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 all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members 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, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

2. La présente loi a pour objet de compléter la législation canadienne en donnant effet, dans le champ de compétence du Parlement du Canada, au principe suivant : le droit de tous les individus, dans la mesure compatible avec leurs devoirs et obligations au sein de la société, à l'égalité des chances d'épanouissement et à la prise de mesures visant à la satisfaction de leurs besoins, indépendamment des considérations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, la déficience ou l'état de personne graciée.

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

3. (1) Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, l'état de personne graciée ou la déficience.

3.1 For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.

3.1 Il est entendu que les actes discriminatoires comprennent les actes fondés sur un ou plusieurs motifs de distinction illicite ou l'effet combiné de plusieurs motifs.

4. A discriminatory practice, as

4. Les actes discriminatoires prévus aux

described in sections 5 to 14.1, may be the subject of a complaint under Part III and anyone found to be engaging or to have engaged in a discriminatory practice may be made subject to an order as provided in sections 53 and 54.

articles 5 à 14.1 peuvent faire l'objet d'une plainte en vertu de la partie III et toute personne reconnue coupable de ces actes peut faire l'objet des ordonnances prévues aux articles 53 et 54.

7. It is a discriminatory practice, directly or indirectly,

(*a*) to refuse to employ or continue to employ any individual . . .

on a prohibited ground of discrimination.

7. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :

a) de refuser d'employer ou de continuer d'employer un individu;

[…]

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

(*a*) to establish or pursue a policy or practice, or

(*b*) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,

that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

10. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite et s'il est susceptible d'annihiler les chances d'emploi ou d'avancement d'un individu ou d'une catégorie d'individus, le fait, pour l'employeur, l'association patronale ou l'organisation syndicale :

a) de fixer ou d'appliquer des lignes de conduite;

b) de conclure des ententes touchant le recrutement, les mises en rapport, l'engagement, les promotions, la formation, l'apprentissage, les mutations ou tout autre aspect d'un emploi présent ou éventuel.

15. (1) It is not a discriminatory practice if

15. (1) Ne constituent pas des actes discriminatoires :

(*a*) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement;

a) les refus, exclusions, expulsions, suspensions, restrictions, conditions ou préférences de l'employeur qui démontre qu'ils découlent d'exigences professionnelles justifiées;

(2) For any practice mentioned in paragraph (1)(*a*) to be considered to be based on a *bona fide* occupational requirement and for any practice mentioned in paragraph (1)(*g*) to be considered to have a *bona fide* justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

2) Les faits prévus à l'alinéa (1)*a*) sont des exigences professionnelles justifiées ou un motif justifiable, au sens de l'alinéa (1)*g*), s'il est démontré que les mesures destinées à répondre aux besoins d'une personne ou d'une catégorie de personnes visées constituent, pour la personne qui doit les prendre, une contrainte excessive en matière de coûts, de santé et de sécurité.

(8) This section applies in respect of a practice regardless of whether it results in direct discrimination or adverse effect discrimination.

(8) Le présent article s'applique à tout fait, qu'il ait pour résultat la discrimination directe ou la discrimination par suite d'un effet préjudiciable.

39. For the purposes of this Part, a "discriminatory practice" means any practice that is a discriminatory practice within the meaning of sections 5 to 14.1.

39. Pour l'application de la présente partie, « acte discriminatoire » s'entend d'un acte visé aux articles 5 à 14.1.

40. (1) Subject to subsections (5) and (7), any individual or group of individuals having reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice may file with the Commission a complaint in a form acceptable to the Commission.

40. (1) Sous réserve des paragraphes (5) et (7), un individu ou un groupe d'individus ayant des motifs raisonnables de croire qu'une personne a commis un acte discriminatoire peut déposer une plainte devant la Commission en la forme acceptable pour cette dernière.

41. (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that

(*a*) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;

(*b*) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;

(*c*) the complaint is beyond the jurisdiction of the Commission;

(*d*) the complaint is trivial, frivolous, vexatious or made in bad faith; or

(*e*) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.

41. (1) Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants :

a) la victime présumée de l'acte discriminatoire devrait épuiser d'abord les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;

b) la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale;

c) la plainte n'est pas de sa compétence;

d) la plainte est frivole, vexatoire ou entachée de mauvaise foi;

e) la plainte a été déposée après l'expiration d'un délai d'un an après le dernier des faits sur lesquels elle est fondée, ou de tout délai supérieur que la Commission estime indiqué dans les circonstances.

43. (1) The Commission may designate a person, in this Part referred to as an "investigator", to investigate a complaint.

43. (1) La Commission peut charger une personne, appelée, dans la présente loi, « l'enquêteur », d'enquêter sur une plainte.

44. (1) An investigator shall, as soon as

44. (1) L'enquêteur présente son

possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation.

rapport à la Commission le plus tôt possible après la fin de l'enquête.

(2) If, on receipt of a report referred to in subsection (1), the Commission is satisfied

(*a*) that the complainant ought to exhaust grievance or review procedures otherwise reasonably available, or

(*b*) that the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under an Act of Parliament other than this Act,

it shall refer the complainant to the appropriate authority.

(2) La Commission renvoie le plaignant à l'autorité compétente dans les cas où, sur réception du rapport, elle est convaincue, selon le cas :

a) que le plaignant devrait épuiser les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;

b) que la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale.

(3) On receipt of a report referred to in subsection (1), the Commission

(*a*) may request the Chairperson of the Tribunal to institute an inquiry under section 49 into the complaint to which the report relates if the Commission is satisfied

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted, and

(ii) that the complaint to which the report

(3) Sur réception du rapport d'enquête prévu au paragraphe (1), la Commission :

a) peut demander au président du Tribunal de désigner, en application de l'article 49, un membre pour instruire la plainte visée par le rapport, si elle est convaincue :

(i) d'une part, que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci est justifié,

(ii) d'autre part, qu'il n'y a pas lieu de renvoyer

relates should not be referred pursuant to subsection (2) or dismissed on any ground mentioned in paragraphs 41(*c*) to (*e*); or

(*b*) shall dismiss the complaint to which the report relates if it is satisfied

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or

(ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(*c*) to (*e*).

66. (1) This Act is binding on Her Majesty in right of Canada, except in matters respecting the Yukon Government or the Government of the Northwest Territories or Nunavut.

la plainte en application du paragraphe (2) ni de la rejeter aux termes des alinéas 41*c*) à *e*);

b) rejette la plainte, si elle est convaincue :

(i) soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié,

(ii) soit que la plainte doit être rejetée pour l'un des motifs énoncés aux alinéas 41*c*) à *e*).

66. (1) La présente loi lie Sa Majesté du chef du Canada sauf en ce qui concerne les gouvernements du Yukon, des Territoires du Nord-Ouest et du Nunavut.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-249-11

APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE O'REILLY DATED JUNE 14, 2011.

STYLE OF CAUSE:	ARTHUR KEITH v. CORRECTIONAL SERVICE OF CANADA and ARTHUR KEITH v. CANADIAN FORCES
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 13, 2012
REASONS FOR JUDGMENT BY:	MAINVILLE J.A.
CONCURRED IN BY:	BLAIS C.J. SHARLOW J.A.
DATED:	April 18, 2012

APPEARANCES:

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