

**Date: 20070108**

**Docket: T-1444-04**

**Citation: 2006 FC 1529**

**OTTAWA, ONTARIO, January 8, 2007**

**PRESENT: The Honourable Mr. Justice von Finckenstein**

**BETWEEN:**

**ROBERT GUILD**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

**AMENDED REASONS FOR ORDER AND ORDER**

(Superseding the Reasons for Order and Order dated December 19, 2006)

[1] In 1973, Robert Guild (the “Applicant”) received a blood transfusion from five different donors during treatment for life threatening injuries sustained in a car accident. Following the blood transfusion, the Applicant suffered from fatigue and other symptoms. He was diagnosed with Hepatitis C in 1993.

[2] In 1998, the governments of Canada, including the Federal Government, settled a negligence class action. The class of members eligible for compensation under the court-approved

litigation settlement were those who were infected with the Hepatitis C virus, either directly or indirectly, through the infusion of blood or blood products received through the Canadian blood system (administered by the Canadian Red Cross Society (the “CRCS”)) between January 1, 1986, and July 1, 1990. The cut off date of January 1, 1986, was chosen for the Federal Government’s Hepatitis C Compensation Plan as no tests for Hepatitis C existed before 1986. Accordingly no one ought to be held responsible prior to that date.

[3] On February 26, 2003, the Applicant wrote letters to the Offices of the Prime Minister and to the then Minister of Health explaining that although the cut off date for Applicants under the Hepatitis C Compensation Plan was January 1, 1986, he contracted Hepatitis C through no fault of his own, and therefore, he wanted the Minister of Health to reconsider its decision to exclude him and other Canadians in the same situation. The Applicant received no response.

[4] On September 12, 2003, the Applicant filed a complaint with the Commission alleging that Health Canada discriminated against him in its provision of services by ruling that he was not entitled to benefits because he contracted Hepatitis C prior to January 1, 1986, and thereby treating him in an adverse and differential manner on the basis of his physical disability as a sufferer of Hepatitis C in contravention of s. 5 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (formerly S.C. 1976-77, c. 33 as amended) (the “CHRA” or “Act”).

[5] The Commission appointed an Investigator to investigate the complaint. During the investigation process, Health Canada submitted that the complaint was not brought in a timely manner, the complaint had alternate redress with a number of ongoing class actions, and the

Commission did not have jurisdiction to hear the complaint. The Investigator concluded in her Report dated April 29, 2004, as follows:

At issue in this complaint is the Respondent's refusal to provide compensation benefits to the complainant because he contracted Hepatitis C prior to 1986. Given these facts, the Commission has no jurisdiction to deal with the complaint because it is not based on a prohibited ground of discrimination. The Respondent is not refusing to provide compensation benefits to the complainant because of his Hepatitis C disability *per se*, but rather because of the timing when he contracted Hepatitis C.

[6] The Canadian Human Rights Commission (the "CHRC") accepted the report and as a result the CHRC informed the Applicant on July 2, 2004:

"[t]he Commission decided, pursuant to paragraph 41(1)(c) of the *Canadian Human Rights Act*, not to deal with the complaint because:

it is not based on a prohibited ground of discrimination identified in section 3 of the Act."

[7] The Applicant is now seeking judicial review of that decision.

### **Issue**

1. Did the Commission correctly find that the complaint was not based on a prohibited ground of discrimination identified in section 3 of the *Act*?

### **Statutory provisions**

[8] The relevant statutory provisions are set out in Annex 1.

### **Standard of review**

[9] The parties agree that based on (*Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392, 263 D.L.R. (4th) 113, the standard of review is reasonableness *simpliciter*.

## Analysis

[10] The Applicant argued three alternative propositions before me, which to the extent I understand them, can be reduced to the following:

1. Hepatitis C is a disability; all Hepatitis C sufferers endure the same medical affliction regardless of when they acquired the disease. Accordingly, any differentiation based on anything other than their medical needs is discrimination. The CHRC should investigate this discrimination.
2. Alternatively, if time makes a difference in the degree of disease the pre-1986 sufferers will have more severe medical problems than the post-1986 sufferers (given that Hepatitis C progressively attacks the liver). Therefore, *a priori*, drawing a differentiation between pre and post-1986 sufferers, favouring the post-1986 sufferers, amounts to discrimination. The CHRC should investigate this discrimination; and
3. By making a settlement with post-1986 sufferers, the Respondent assumed moral and equitable responsibility for Hepatitis C sufferers. Not providing compensation to pre-1986 sufferers means discriminating against them. Again, the CHRC should investigate this discrimination.

[11] Before dealing with these propositions it might be useful to briefly review the statutory jurisdiction of the CHRC. It is succinctly summarized by the Respondent in its factum and I can do no better than reproduce it in abbreviated form.

20. The *Canadian Human rights Act* (“CHRA” or “Act”) identifies specific grounds of discrimination which are prohibited. Among the proscribed forms of discrimination is discrimination based on “disability”.

21. The CHRA lays out a template for identifying discriminatory practices and connects such practices to a foundational ground such as, in this case, disability. The relevant provision is section 5, which provides in part:

“It is a discriminatory practice in the provision of...services...customarily available to the general public

- (a) to deny, or to deny access to, any such...service...to any individual, or
- (b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.”

(underlining added)

22. The *CHRA* mandates that, subject to certain exceptions, the Commission must deal with the complaints that are filed with it:

“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... (c) the complaint is beyond the jurisdiction of the Commission ...” (underlining added)

23. Where the Commission designates a person to investigate a complaint, that investigator must submit a report to the Commission as soon as possible after the investigation has been concluded. Under section 44 of the *CHRA*, the Commission is required to take certain actions upon receipt of the investigator’s report. In the case at bar, the pertinent provision is subparagraph 44(3)(b)(ii):

“On receipt of a report referred to in subsection (1), the Commission...shall dismiss the complaint to which the report relates if it is satisfied ... (ii) that the complaint should be dismissed on any ground mentioned in paragraphs **41(c)** to (e).” (underlining added)

[12] It is well understood that every differentiation or distinction does not amount to discrimination. The Supreme Court of Canada in *Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1 [*Law Society*], recognized this fact when McIntyre J. observed at pages 168-69:

- 31 It is not every distinction or differentiation in treatment at law which will transgress the equality guarantees of s. 15 of the Charter. It is, of course, obvious that legislatures may -- and to govern effectively -- must treat different individuals and groups in different ways. Indeed, such distinctions are one of the main preoccupations of legislatures. The classifying of individuals and groups, the making of different provisions respecting such groups, the application of different rules, regulations, requirements and qualifications to different persons is necessary for the governance of modern society. As noted above, for the accommodation of differences, which is the essence of true equality, it will frequently be necessary to make distinctions.

[13] While the *Law Society* case dealt with discrimination under s. 15 of the *Canadian Charter of Rights and Freedoms* ("Charter") and not with the *CHRA*, the principle is the same. Here the Respondent draws a distinction between pre-1986 Hepatitis C sufferers and post-1986 sufferers. The jurisprudence has clearly established that temporal distinction does not amount to discrimination. (See *Hodge v. Canada (Minister of Human Resources Development)*, 2004 SCC 65, [2004] 3 S.C.R. 357, 244 D.L.R. (4th) 257 and *P.A.M. v. Nova Scotia (Criminal Injuries Compensation board)*, [1992] 112 N.S.R. (2d) 433 (C.A.).)

[14] The following self explanatory quote from *Bauman v. Nova Scotia (Attorney General)*, 2001 NSCA 51, 192 N.S.R. (2d) 236, 197 D.L.R. (4th) 644 at para. 65 explains the issue best:

[65] The distinction in s. 60A between the two groups is based upon the date of remarriage. Both comparator groups are widows who remarried. The fact that they are both members of the same group (remarried widows) does not in itself preclude the finding of discrimination (see *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 and *Martin, supra*). However, the distinction, even if drawn within the same group, must be on an enumerated or analogous ground. Here it is not. The trial judge erred when she accepted the claimants' submission that the distinction is based upon the analogous ground of "marital status". The distinction here is temporal, that is, based upon

the date of remarriage. The inquiry ends at this point. Discrimination can only occur where the differential treatment is based upon an enumerated or analogous ground.

[15] The Applicant relies on *R.R. v Alberta (Child Welfare Appeal Panel)*, 2000 ABQB 1018, [2000] 8 W.W.R. 682, 80 Alta. L.R. (3d) 338 where Nation J. states at para. 38:

38 I have difficulty here on the evidence, and looking at the legislative program, finding that the Applicants have been discriminated against on the basis of an enumerated or analogous ground. The differential treatment is not made against these Applicants because they have a physical disability, as the other children afforded the funding have that characteristic also. If anything, it would appear that it is personal characteristics about each of these children, their specific medical needs and their family situation that results in a different determination by the Appeal Panel.

(underlining added)

[16] From this the Applicant takes away the proposition that in order to avoid discrimination, all persons with a disability have to be treated equally unless their medical condition requires a different treatment.

[17] Unfortunately, the case does not stand for that proposition. Rather it establishes that equal treatment under the law does not always mean equal benefits. As Nation J. in para. 47 observes of the *R.R.* case:

47 Had the decision of the Appeal Panel been to deny benefits on the basis of the illness suffered by these children, that would be a denial based on their physical disability. Here that cannot be said to be so, as other children with the same disability have been extended funding for conductive education. The Applicants have been denied a benefit that is not available to the general public, rather it is available only to those who fit the definition of a "handicapped child". The benefits requested were not denied because of an enumerated or analogous ground. There is no evidence to suggest a stereotypical application of a presumed group of characteristics. It appears that

each decision is made based on the actual needs, capacities and medical status of the child. There is nothing to suggest actual characteristics and their reasonable accommodation in society was not considered by the Appeal Panel. Not every child, by reason of the fact the child has cerebral palsy, is guaranteed the same funding from the Director.

[18] Similarly, here the pre-1986 Hepatitis C sufferers were not denied compensation by reason of their disability but by reason of a temporal distinction, which as outlined above does not constitute discrimination.

[19] The second argument put forward by the Applicant is just a variation on the same theme. Assuming for argument's sake that pre-1986 sufferers are worse off (and no evidence to that effect was produced or even alleged), the key differentiation is still a temporal one. Whether pre or post-1986 sufferers are better or worse off is really not material to the issue of differentiation. The differentiation is drawn on the basis of time not on the basis of the sufferer's medical condition. As stated previously, a purely temporal distinction does not amount to discrimination.

[20] As for the Applicant's third proposition, I find it difficult to accept for the following reasons. First, no authority was cited for this proposition. Second, a settlement at best implies a responsibility for the subject matter of the litigation (although many are made with explicit denial of responsibility), but I know of no theory or logic why it would also entail a responsibility for a wider group not included in the litigation. Such a position flies counter to the whole notion that a settlement puts to rest the issue between the parties at suit. As far as moral responsibility is concerned, that is an issue for the ballot box but not for the courts.

[21] In summary, all three points advanced by the Applicant cannot be sustained. Accordingly, this application cannot succeed.

**ORDER**

**THIS COURT ORDERS** that this application be dismissed.

“Konrad W. von Finckenstein”

Judge

## Annex 1

### Canadian Human Rights Act

#### H-6

##### Prohibited grounds of discrimination

**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.

Idem

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

R.S., 1985, c. H-6, s. 3; 1996, c. 14, s. 2.

##### Multiple grounds of discrimination

**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.

1998, c. 9, s. 11.

##### Orders regarding discriminatory practices

**4.** A discriminatory practice, as 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.

##### Denial of good, service, facility or accommodation

**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.

### Complaints

**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

#### Consent of victim

(2) If a complaint is made by someone other than the individual who is alleged to be the victim of the discriminatory practice to which the complaint relates, the Commission may refuse to deal with the complaint unless the alleged victim consents thereto.

#### Investigation commenced by Commission

(3) Where the Commission has reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice, the Commission may initiate a complaint.

#### Limitation

(3.1) No complaint may be initiated under subsection (3) as a result of information obtained by the Commission in the course of the administration of the *Employment Equity Act*.

#### Complaints may be dealt with together

(4) If complaints are filed jointly or separately by more than one individual or group alleging that a particular person is engaging or has engaged in a discriminatory practice or a series of similar discriminatory practices and the Commission is satisfied that the complaints involve substantially the same issues of fact and law, it may deal with the complaints together under this Part and may request the Chairperson of the Tribunal to institute a single inquiry into the complaints under section 49.

#### No complaints to be considered in certain cases

(5) No complaint in relation to a discriminatory practice may be dealt with by the Commission under this Part unless the act or omission that constitutes the practice

(a) occurred in Canada and the victim of the practice was at the time of the act or omission either lawfully present in Canada or, if temporarily absent from Canada, entitled to return to Canada;

(b) occurred in Canada and was a discriminatory practice within the meaning of section 5, 8, 10, 12 or 13 in respect of which no particular individual is identifiable as the victim; or

(c) occurred outside Canada and the victim of the practice was at the time of the act or omission a Canadian citizen or an individual lawfully admitted to Canada for permanent residence.

#### Determination of status

(6) Where a question arises under subsection (5) as to the status of an individual in relation to a complaint, the Commission shall refer the question of status to the appropriate Minister and shall not proceed with the complaint unless the question of status is resolved thereby in favour of the complainant.

#### No complaints to be dealt with in certain cases

(7) No complaint may be dealt with by the Commission pursuant to subsection (1) that relates to the terms and conditions of a superannuation or pension fund or plan, if the relief sought would require action to be taken that would deprive any contributor to, participant in or member of, the fund or plan of any rights acquired under the fund or plan before March 1, 1978 or of any pension or other benefits accrued under the fund or plan to that date, including

- (a) any rights and benefits based on a particular age of retirement; and
- (b) any accrued survivor's benefits.

#### Commission to deal with complaint

**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.

#### Commission may decline to deal with complaint

(2) The Commission may decline to deal with a complaint referred to in paragraph 10(a) in respect of an employer where it is of the opinion that the matter has been adequately dealt with in

the employer's employment equity plan prepared pursuant to section 10 of the *Employment Equity Act*.

Meaning of "employer"

(3) In this section, "employer" means a person who or organization that discharges the obligations of an employer under the *Employment Equity Act*.

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** T-1444-04

**STYLE OF CAUSE:** Guild v. The Attorney General of Canada

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** December 13, 2006

**AMENDED REASONS FOR  
ORDER AND ORDER:** **von FINCKENSTEIN J.**

(Superseding the Reasons for Order and Order dated December 19, 2006)

**DATED:** January 8, 2007

**APPEARANCES:**

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Ms. Miriam Flynn FOR THE RESPONDENT

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