C.A. No. 118649

NOVA SCOTIA COURT OF APPEAL

Cite as: O'Quinn v. Nova Scotia (Workers' Compensation Board), 1995 NSCA 216
Roscoe, Matthews and Flinn, JJ.A.

BETWEEN:

THE WORKERS' COMPENSATION BOARD OF NOVA SCOTIA Appellant - and - HELENE O'QUINN, the NOVA SCOTIA HUMAN RIGHTS COMMISSION and SUSAN M. ASHLEY, a Board of Inquiry appointed pursuant to Section 31A(1) of the *Human Rights Act* Respondent	David P.S. Farrar for the Appellant Valerie A. MacKenzie for the Respondent Nova Scotia Human Rights Commission Appeal Heard: December 5, 1995 Judgment Delivered: December 20, 1995

THE COURT: Appeal dismissed per reasons for judgment of Flinn, J.A.; Matthews and Roscoe, JJ.A. concurring.

FLINN, J.A.:

In this appeal the Court is being asked to pre-empt a board of inquiry, established pursuant to the provisions of the **Human Rights Act**, R.S.N.S. 1989, c. 214, amended 1991, c. 12, in the conduct of the hearing of a complaint, on the basis that the board of inquiry has no jurisdiction to hear that complaint.

The respondent, Helene O'Quinn, is a resident of Stephenville, Newfoundland. In 1980 her common law husband accidentally drowned during the course of his employment in Nova Scotia. Pursuant to the provisions of the **Workers' Compensation Act**, R.S.N.S. 1989, c. 508, amended 1992, c. 35, Mrs. O'Quinn was paid benefits for herself, as widow, and for her son.

In 1986 Mrs. O'Quinn remarried. Section 61 of the **Workers' Compensation Act**, which was in force at that time, provided that Mrs. O'Quinn's benefits, as a dependent widow, "shall cease" if she marries. At that time discrimination on account of "marital status" was not prohibited in the Nova Scotia **Human Rights Act**. Other than one lump sum payment, made in accordance with s. 61, Mrs. O'Quinn received no further benefits.

In 1991 the **Human Rights Act** was amended. One of the amendments was that discrimination on account of "marital status" was now prohibited.

In 1992 the **Workers' Compensation Act** was amended. Included in the amendments was the repeal of s. 61. As a result of this repeal, the Workers' Compensation Board could no longer cease to pay widows benefits upon the marriage of the widow.

Mrs. O'Quinn requested the Workers' Compensation Board to reinstate her benefits effective on the date of the repeal of s. 61. That request was refused.

Mrs. O'Quinn filed a complaint with the Nova Scotia Human Rights Commission alleging that she is being discriminated against on the basis of her marital status. She states in her written complaint:

> "I believe that I should not be treated differently than other persons who became widowed since October 1992 [the date of the repeal of s. 61]."

Pursuant to the provisions of the **Human Rights Act**, the Human Rights Commission appointed a board of inquiry to inquire into the complaint.

Section 34(1) of the **Human Rights Act** provides as follows:

> "34 (1) A board of inquiry shall conduct a public hearing and has all the powers and privileges of a commissioner under the *Public Inquiries Act*." {Emphasis added}

On the date set for the hearing of the complaint, counsel for the Workers' Compensation Board made a submission to the board of inquiry that the board of inquiry did not have jurisdiction to hear the complaint. The board of inquiry, in a written decision, decided that it had jurisdiction to hear the complaint.

The Workers' Compensation Board appeals that decision.

The appellant raises several grounds of appeal. However, there is only one ground of appeal which raises a clear point of law, not depending on particular facts, upon the determination of which the jurisdiction of the board of inquiry depends. In such a case it would be appropriate for the Court to deal with that issue at this stage. (**Bell v. The Ontario Human Rights Commission**, [1971] S.C.R. 756; 18 D.L.R. (3d) 1)

In dealing with claims for benefits, is the Workers' Compensation Board providing a "service" within the meaning of s. 5(1)(a) of the Human Rights Act?

The issue raised by this ground of appeal is whether or not workers' compensation benefits are "services" within the meaning of s. 5(1)(a) of the **Human Rights Act**.

The relevant provision of s. 5 reads as follows:

> "5(1) No person shall in respect of
>
> > (a) the provision of or access to services or facilities;
>
> .....

> discriminate against an individual or class of individual on account of
>
> .....
>
> (s) marital status." (Emphasis added)

Obviously, if in dealing with claims for benefits the Workers' Compensation Board is not providing a "service" within the meaning of s. 5(1)(a) of the **Human Rights Act**, then the board of inquiry would have no jurisdiction to proceed with a hearing of Mrs. O'Quinn's complaint.

The board of inquiry decided that the word "services" includes workers' compensation benefits, interpreting the word "services" with a broad, liberal and purposive approach.

Counsel for the appellant relies on **Jenkins v. Workers' Compensation Board of Prince Edward Island** (1986), 31 D.L.R. (4th) 536 (P.E.I.S.C. in banco). In that case the court decided that workers' compensation benefits were not "services and facilities to which members of the public have access" as those words appear in the Prince Edward Island **Human Rights Act**.

Counsel for the Nova Scotia Human Rights Commission submits that the underlying basis for the decision in **Jenkins** is no longer valid in view of the decision of the Supreme Court of Canada in **University of British Columbia v. Berg**, [1993] 2 S.C.R. 353; 102 D.L.R. (4th) 665. It is, therefore, important to examine the reasoning underlying the decision in **Jenkins**.

In **Jenkins**, the court initially decided what was meant by the word "services". McQuaid J. said at p. 545:

"Counsel have referred to me numerous cases touching the matter of discrimination in the relatively new field of human rights. Of these I find the most pertinent with respect to what constitutes "services" to be *Gay Alliance Toward Equality v. Vancouver Sun; B.C. Human Rights Com'n v. Vancouver Sun* (1973), 97 D.L.R. (3d) 577, [1979] 2 S.C.R. 435, 10 B.C.L.R. 257, a case under the *Human Rights Code of British Columbia* (1973). This Code contains a provision to all intents and purposes identical to our s. 2(1). At p. 590, Martland J., speaking for the majority, wrote:

> "Section 3 of the Act refers, in paras. (a) and (b), to 'service . . . customarily available to the public'. It forbids the denial of such a service to any person or class of persons and it forbids discrimination against any person or class of persons with respect to such a service, unless reasonable cause exists for such denial or discrimination.
>
> In my opinion the general purpose of s. 3 was to prevent discrimination against individuals or groups of individuals in respect of the provision of certain things available generally to the public. The items dealt with are similar to those covered by legislation in the United States, both federal and state. 'Accommodation' refers to such matters as accommodation in hotels, inns and motels. 'Service' refers to such matters as restaurants, bars, taverns, service stations, public transportation and public utilities. 'Facility' refers to such matters as public parks and recreational facilities. These are all items 'customarily available to the public'. It is matters such as these which have been dealt with in American case law on the subject of civil rights."

Certainly within this context it cannot be argued that the compensation scheme established by the Legislature of this province is a 'service' within the parameters of s. 2(1) of our *Human Rights Act*."

Further, in **Jenkins**, the court decided that even if the compensation scheme was a service (which the court concluded it was not) it was not a service to which members of the public have access, because it was available only to the worker or his dependants. The court said that it must be a service which can be taken advantage of by the public at large, and each and every member thereof.

Two points must, immediately, be made with respect to the Prince Edward Island Court's interpretation of the phrase "to which members of the public have access" which limits the word "services".

Firstly, the interpretation of "to which members of the public have access" in **Jenkins**, was rejected by the Supreme Court of Canada in **Berg**. Chief Justice Lamer said at p. 383 [S.C.R.], referring specifically to **Jenkins**:

> ".....Such an absolute position, requiring the 'public' to include every member of a 'community' cannot be maintained if human rights legislation is to have any impact."

Secondly, the word "services", in the Nova Scotia **Human Rights Act**, is not limited by any phrase similar to the phrase "generally available to the public" as it is in the Prince Edward Island legislation.

This was not always the case. Prior to the Nova Scotia **Human Rights Act** amendment in 1991, ss. 3 and 4 of the **Human Rights Act**, R.S.N.S. 1989, c. 214 provided as follows:

> "3 Every individual and every class of individuals has the right to
>
> (a) obtain admission to and enjoyment of accommodations, services and facilities customarily provided to members of the public;
>
> (b) acquire and hold any interest in property;
>
> (c) opportunities available for employment; and
>
> (d) full membership privileges in any employees' organization, employers' organization, professional association or business or trade association,
>
> regardless of the race, religion, creed, colour or ethnic or national origin of the individual or class of individuals.
>
> 4 No person shall
>
> (a) deny to any individual or class of individuals enjoyment of accommodation, services and facilities to which members of the public have access; or
>
> (b) discriminate with respect to the manner in which accommodations, services and facilities, to which members of the public have access, are provided to any individual or class of individuals,

> because of the race, religion, creed, colour or ethnic or national origin of the individual or class of individuals." {Emphasis added}

This was the situation at the time of the events which gave rise to the decision of this Court in **Human Rights Commission (N.S.) and Slipp v. Canada Life Assurance Co.** (1992), 109 N.S.R. (2d) 40. In this case an insurer refused to insure a borrower under a bank's group life and disability insurance plan because the borrower was a diabetic and had polymyositis, with a resulting probability of death 2.5 times greater than a healthy person his age. The borrower complained under the **Human Rights Act** that the insurer discriminated against him on the basis of his disability. The board of inquiry dismissed the complaint.

Hallett J.A., writing for the Court, left open the question of whether or not banking or insurance services are within the meaning of "services" as contained in the **Human Rights Act**. He made reference to the decision of Lamer J. (as he then was) in **Insurance Corp. of British Columbia v. Heerspink et al**, [1982] 2 S.C.R. 145; 137 D.L.R. (3d) 219 which had been advanced to support counsel's argument that the provision of insurance services was intended by the Legislature to be within the meaning of the term "services" as used in the British Columbia **Human Rights Code**. In **Heerspink** Lamer J. said at p. 159:

> "As I have already said, nowhere in the laws of British Columbia is it stated that insurance policies should enjoy any special treatment under the Code and I can see no reason why insurance was not intended by the Legislature to be a 'service' in the sense in which the word is used in s. 3 of the **Code**."

With respect to this, Hallett J.A. said at p. 44:

> "Although Mr. Justice Lamer's opinion concurred with the majority decision written by Ritchie J., in the **Heerspink** case, it was not the majority opinion but, more importantly, the issue of whether insurance services were the type of services encompassed by the use of that word in the B.C. legislation was not the critical issue in the case."

Hallett J.A. upheld the dismissal of the complaint because "there was no discrimination on the facts of this case". However, in the course of his judgment, he concluded that the particular insurance that was available to qualified customers of the bank was "not a service customarily provided to the public; it was a special service offered by the bank to those mortgagors who could qualify for coverage".

Since the events which gave rise to the decision in **Slipp**, the Nova Scotia **Human Rights Act** was amended (S.N.S. 1991, c. 12). Included in these amendments was the removal of all reference to "customarily available to the public" and "to which members of the public have access" as phrases limiting the word "services". As a result of these amendments the Nova Scotia **Human Rights Act** is quite different from most other human rights legislation which continues to contain phrases limiting the word "services". This was pointed out by Chief Justice Lamer in **Berg** at p. 371-372 [S.C.R.] as follows:

> "Most, but not all, human rights Acts contain similar limiting provisions. The *Canadian Human Rights Act*, R.S.C. , 1985, c. H-6, s. 5, provides that discrimination on prohibited grounds in the 'provision of goods, services, facilities or accommodation customarily available to the general public' is prohibited. Some statutes prohibit discrimination in the same field as the British Columbia Act's 'customarily available to the public' (see Alberta's *Individual's Rights Protection Act*, R.S.A. 1980, c. I-2, s. 3). New Brunswick's *Human Rights Act*, R.S.N.B. 1973, c. H-11, s. 5(1), refers more broadly to services, etc., 'available to the public'; Quebec's *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, s. 12, refers to goods and services 'ordinarily offered to the public', and the Yukon Territory's *Human Rights Act*, R.S.Y. 1986, c. 11 (Supp.), s. 8, applies to any person 'offering or providing services, goods, or facilities to the public'.
>
> Other statutes phrase the limitation in more spatial terms: see Newfoundland's *Human Rights Code*, R.S.N. 1990, c. H-14, s. 6(1) ('to which members of the public customarily have access or which are customarily offered to the public'); *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, s. 12(1) ('to which the public is customarily admitted or which are offered to the public'); the Northwest Territories' *Fair Practices Act*, R.S.N.W.T. 1988, c. F-2,

> s. 4(1) ('available in any place to which the public is customarily admitted'), and Prince Edward Island's *Human Rights Act*, R.S.P.E.I. 1988, c. H-12, s. 2(1) ('to which members of the public have access').
>
> Some legislatures have addressed the issues in these appeals directly. In Manitoba, *The Human Rights Code*, S.M. 1987-88, c. 45, C.C.S.M. c. H175, s. 13(1), prohibits discrimination in the provision of a list of services 'available or accessible to the public or to a section of the public', and Nova Scotia's *Human Rights Act*, R.S.N.S. 1989, c. 214, s. 4, defines discrimination in terms of the denial of 'opportunities, benefits and advantages available to other individuals or classes of individuals in society'. (Emphasis added.)
>
> The human rights legislation of Ontario (*Human Rights Code*, R.S.O. 1990, c. H.19) contains no such limiting words. This was not always the case in Ontario, where the former wording of the Code resulted in decisions from the Ontario Court of Appeal severely restricting the application of the legislation. It has been suggested that these decisions of the Ontario Court of Appeal were the catalyst for the amendment (see Judith Keene, *Human Rights in Ontario* (1983), at p. 14)."

The question then becomes: how does the Court interpret the word "services", without any limiting phrases attached to it, as that word is used in s. 5(1)(a) of the Nova Scotia **Human Rights Act**? Is the proper approach that used in **Jenkins**, i.e., to interpret the word "services" by reference to the list of items enumerated by Martland J. in **Gay Alliance**; or must the statute be interpreted with a broader and more liberal approach? The recent authorities dictate that the latter approach is the correct one.

Berg v. University of British Columbia

Berg is the most recent of a series of decisions of the Supreme Court of Canada dealing with the interpretation of human rights legislation in Canada. In this particular case it was the phrase "service or facility customarily available to the public" as those words appear in the British Columbia **Human Rights Act**.

Ms. Berg was a graduate student at the University of British Columbia (the

University) in the School of Family and Nutritional Sciences (the School). She complained to the British Columbia Human Rights Council that the University had discriminated against her with respect to a service customarily available to the public because of a mental disability contrary to s. 3 of the **Human Rights Act** of British Columbia. The relevant part of s. 3 of the British Columbia **Act** is as follows:

> "3. No person shall
>
> (a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or
>
> (b) discriminate against a person or class of persons with respect to any accommodation, service or facility customarily available to the public,
>
> because of the race, colour, ancestry, place of origin, religion, marital status, physical or mental disability or sex ....."

In order for a student of the School to be considered for a Canadian Dietetic Association hospital internship, the School was required to submit a rating sheet completed by faculty members. Because of some problems Ms. Berg had with depression, one of her professors, who was to complete the rating sheet, refused to do so. The Director of the School testified that he had never heard of a student, other than Ms. Berg, being denied a rating sheet. Further, graduate students were granted keys to facilitate their after hours building access. Ms. Berg had a key to the School's old building, however, when the School moved to a new location Ms. Berg was denied a key although other graduate students were provided with one.

The British Columbia Human Rights Council found that Ms. Berg had been discriminated against, both with respect to the failure to provide her with the rating sheet and with respect to the matter involving the key, both due to her mental disability. The Council found that she had been discriminated against with respect

to a service customarily available to the public, contrary to s. 3 of the British Columbia **Human Rights Act**.

On appeal to the British Columbia Supreme Court (1988), 10 C.H.R.R. D/6612 Lander J. reversed the finding, relying on **Gay Alliance**. After referring to the passage from the judgment of Martland J. in **Gay Alliance**, which is the same passage referred to in **Jenkins** and set out earlier in this opinion, Lander J. said:

> "I am of the view that the interpretation of Mr. Justice Martland in the *Gay Alliance* case still obtains in this jurisdiction today."

The British Columbia Court of Appeal (1991), 81 D.L.R. (4th) 497 dismissed the appeal but for different reasons. Legg J.A., writing for the Court, said at p. 504:

> "I think that the word 'service' should be interpreted broadly. I do not think that Martland J. in *Gay Alliance Toward Equity v. Vancouver Sun* (1979), 97 D.L.R. (3d) 577 at p. 590, [1979] 2 S.C.R. 435, [1979] 4 W.W.R. 118, intended to set out a complete list of examples of service in that passage of his judgment. I am unable, however, to agree with the submission by each counsel for the appellants that the 'accommodation, service or facility' (the providing of a rating sheet or a key) were a service 'customarily available to the public' within the meaning of those words in s. 3 of the Act."

He said further at p. 508:

> "In my opinion, s. 3 of the Act has no application to the facilities or services of the type under consideration here which were available only to students who were registered at the University and who were enrolled as students at the School. Human rights legislation obviously applies to members of the public seeking admission or entrance to the University from outside the University. The legislation may also have a place within the University setting. It does not apply, however, to the type of service under consideration here which was only available to students with particular qualifications who were enrolled in courses at the School."

Chief Justice Lamer wrote the decision of the Supreme Court of Canada. Seven other judges concurred with his judgment. Major J. wrote a dissenting opinion.

The relevant issues were described by Lamer C.J. as follows at p. 368 [S.C.R.]:

> (1) Do services or facilities offered by a university to a student already enroled in the university come within the protection afforded by s. 3 of the Act against discrimination in the provision of 'accommodations, services or facilities customarily available to the public'?
>
> (2) Does the element of discretion or personal evaluation in the providing of a service or facility affect the applicability of the protection afforded in s. 3 of the Act against discrimination in the provision of such a service or facility?

The first issue was answered in the affirmative. The second issue was answered in the negative. The Supreme Court reversed the decision of the British Columbia Court of Appeal and restored the finding of the British Columbia Human Rights Council. The Court found that Ms. Berg was discriminated against with respect to a service customarily available to the public because of a mental disability.

In addressing the issue of the interpretation of the British Columbia **Human Rights Act**, Lamer C.J. made reference to the recent decisions of the Supreme Court, which set out quite a different approach to interpretation than the approach that was used in **Jenkins**. He said at p. 370:

> "In my reasons in *Heerspink*, I commented on the unique nature of human rights legislation (at pp. 157-58):
>
> > When the subject matter of a law is said to be the comprehensive statement of the 'human rights' of the people living in that jurisdiction, then there is no doubt in my mind that the people of that jurisdiction have through their legislature clearly indicated that they consider that law, and the values it endeavours to buttress and protect, are, save their constitutional laws, more important than all others.
>
> Following *Heerspink*, this Court has had many occasions to comment on the privileged status of human rights legislation. In *Ontario Human Rights Commission v. Simpson-Sears Ltd., supra,* McIntyre J. observed (at p. 547) that '[l]egislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary - and it is for the courts to seek out its purpose and give it effect.' This Court has repeatedly stressed that a broad, liberal and purposive approach is appropriate to human rights legislation, and that such legislation, according to La Forest J. in *Robichaud*, at p. 89, 'must be so interpreted as to advance the broad policy considerations underlying it'."

The case references in this passage are to the cases of: **Insurance Corp. of British Columbia v. Heerspink et al**, [1982] 2 S.C.R. 145; **Ontario Human Rights Commission v. Simpson-Sears**, [1985] 2 S.C.R. 536; **Robichaud v. Canada (Treasury Board)**, [1987] 2 S.C.R. 84.

Gay Alliance v. Vancouver Sun

I wish to make some detailed reference here to **Gay Alliance** because the Prince Edward Island Supreme Court, in banco, relied on it, in **Jenkins**, in determining that Workers' Compensation benefits were not "services" within the meaning of the Prince Edward Island **Human Rights Act**.

The complaint in **Gay Alliance** was that the Vancouver Sun had refused to publish an advertisement promoting the sale of subscriptions to Gay Tide in the classified section of its newspaper. Gay Tide was a publication which promoted recognition for the thesis that homosexuality is a valid and legitimate form of human sexual and emotional expression. A board of inquiry found that there had been a violation of s. 3 of the British Columbia **Human Rights Act**. The Supreme Court of Canada upheld the British Columbia Court of Appeal which had reversed the board of inquiry.

Section 3(1) of the British Columbia **Human Rights Act**, as it existed at that time, provided as follows:

> "3. (1) No person shall
>
> (a) deny to any person or class of persons any accommodation, service or facility customarily available to the public; or
>
> (b) discriminate against any person or class of persons with respect to any accommodation, service, or facility customarily available to the public,
>
> unless reasonable cause exists for such denial or discrimination."

Of particular note, here, is the phrase "unless reasonable cause exists for such

denial or discrimination".

Martland J. wrote the decision for the majority. In the course of his judgment he made the comments which I have fully quoted previously in this opinion as they were referred to in **Jenkins**. Martland J. made reference to a list of items covered by Legislation in the United States on the subject of civil rights. I repeat the reference in that passage to "service" at p. 455 [S.C.R.]:

> "'Service' refers to such matters as restaurants, bars, taverns, service stations, public transportation and public utilities."

Martland J. did not conclude, by reference to this passage, that classified advertising was not a "service customarily available to the public" within the meaning of the British Columbia **Human Rights Act**. The contrary is true. He considered that classified advertising was a "service" customarily available to the public. However, he justified the discrimination in this case on the basis of the competing interest of freedom of the press, and in view of the limiting words of the British Columbia legislation, namely, "unless reasonable cause exists for such denial or discrimination". Martland J. made reference to the recognition which the law has given to freedom of the press as a competing interest which must be recognized. He then said at p. 455 [S.C.R.]:

> "In my opinion the service which is customarily available to the public in the case of a newspaper which accepts advertising is a service subject to the right of the newspaper to control the content of such advertising."

He said further at p. 456 [S.C.R.]:

> "Section 3 of the Act does not purport to dictate the nature and scope of a service which must be offered to the public. In the case of a newspaper, the nature and scope of the service which it offers, including advertising service, is determined by the newspaper itself. What s. 3 does is to provide that a service which is offered to the public is to be available to all persons seeking to use it and the newspaper cannot deny the service which it offers to any particular member of the public unless reasonable cause exists for so doing."

It seems obvious that if Martland J. had considered his list of items (similar to those covered by Legislation in the United States) as an important guide to determining what was meant by the word "service" in the British Columbia **Human Rights Act**, he would not have considered that classified advertising in the Vancouver Sun was a "service".

Returning to **Berg**, Chief Justice Lamer, in **Berg**, recognized the limited scope of **Gay Alliance**. He said at p. 375 [S.C.R.]:

> "Certain decisions of other courts and boards have sought to limit *Gay Alliance's* influence. One of the most articulate and considered of such decisions is the dissent of Wilson J.A. in *Ontario Rural Softball Association* [**Re Ontario Human Rights Commission and Ontario Rural Softball Association** (1979), 26 O.R. (2d) 134 (C.A.)]. Wilson J.A. noted that the issue with respect to Martland J.'s reasons in *Gay Alliance* was whether the examples he provided were intended to be an exhaustive list, or whether they were merely illustrative of the intended general objects of human rights legislation. She concluded (at p. 142):
>
> > .....while the illustrations given by the learned Justice are the accommodation, services and facilities which the anti-discrimination legislation was initially designed to ensure would be available to all, the case itself illustrates a totally different kind of service, namely, classified advertising in a newspaper, which was found to be within the scope of s. 3 of the British Columbia Code as a service 'customarily available to the public.' I do not think therefore that it would be appropriate to refine too much on Mr. Justice Martland's illustrations. I think the learned Justice refers to them because of their historic significance in the development of the law in this area. I do not think he should be taken to have suggested that the categories of accommodation, services and facilities covered by the British Columbia section are closed."

Lamer C.J. then said at p. 377:

> "What is most often criticized about the decision in *Gay Alliance* is the fact that the limiting words of the Act were interpreted to allow the discriminatory exercise of the newspaper's discretion, even though the Act had prohibited discrimination at the 'threshold' to the service or facility. That is, the newspaper could not discriminate in soliciting advertisements, but could discriminate in deciding which advertisements it would accept."

After referring to some of the criticism with respect to this approach, Lamer C.J. said at p. 379:

> "I agree, and would limit the holding in *Gay Alliance* on two bases: (i) the respondent's competing interest in the freedom of the press was used to limit the complainant's right to freedom from discrimination in that decision, and (ii) the reasoning of Martland J. leads to an artificial and unacceptable distinction between the rights a person has at the threshold of admission to an accommodation, service or facility, and the rights he or she has once admitted to the accommodation, service or facility."

It was on the latter basis that Lamer C.J. refused to follow a previous decision of this Court in the case of **Beattie v. Governor of Acadia University** (1976), 72 D.L.R. (3d) 718.

Major J. dissented in **Berg**. He was not prepared to extend the scope of the phrase "services customarily available to the public" to encompass all aspects of day-to-day internal conduct within public institutions such as universities. He was, nevertheless, prepared to agree that universities were not immune from the operation of the **Human Rights Act**. He said at p. 395:

> "It is clear that universities and other public institutions are not immune from the operation of the *Human Rights Act*. The Act would apply to services provided to members of the public seeking admission to the university, and to those services within the university that are customarily available to members of the public. It would not apply to the internal operations of a university regarding services not customarily available to members of the public."

In **Attorney General of Canada v. Druken**, [1989] 2 F.C. 24 the Federal Court of Appeal dismissed an appeal from a tribunal's decision that the refusal of unemployment insurance benefits was found to have been a denial of a "service customarily available to the public" as those words appear in the Canadian **Human Rights Act**. In this case the arguments, in the factum of the Attorney General, that unemployment insurance benefits were not a service customarily available to the public, were not pursued. The decision of the Federal Court of Appeal concentrates on the conflict between the provisions of the **Unemployment Insurance Act**, R.S.C. 1985, c. U-1 (which effectively denied benefits to

persons employed by their spouse) and the provisions of the Canadian **Human Rights Act** (proscribing discrimination on the basis of marital status).

In **Board of Education v. Human Rights Board of Inquiry (N.B.)** (1990), 100 N.B.R. 181 the New Brunswick Court of Appeal decided that education, in that Province's public school system, was "a service available to the public" as that phrase is used in the New Brunswick **Human Rights Act**. Stratton C.J.N.B., writing for the Court, said the following, at p. 200-201, after a brief reference to **Gay Alliance**:

> "In the current decade, the Supreme Court of Canada has consistently adopted an expansive interpretive approach to human rights Codes and Acts. In **Insurance Corporation of British Columbia v. Heerspink**, [1982] 2 S.C.R. 145; 43 N.R. 168, at p. 158 [S.C.R.], Lamer, J., characterized a human rights code as 'a fundamental law'. In **Ontario Human Rights Commission v. Simpson-Sears Ltd.**, [1985] 2 S.C.R. 536; 64 N.R. 161, McIntyre, J., set forth the governing principles in the interpretation of human rights statutes as follows, at pp. 546-547 [S.C.R.]:
>
> > 'It is not ....a sound approach to say that according to established rules of construction no broader meaning can be given to the **Code** than the narrowest interpretation of the words employed. The accepted rules of construction are flexible enough to enable the court to recognize in the construction of a human rights code the special nature and purpose of the enactment . . ., and give it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary -- and it is for the courts to seek out its purpose and give it effect. The **Code** aims at the removal of discrimination.'
>
> The purposive approach in construing human rights statutes has been followed by the Supreme Court of Canada in **Canadian National Railway Co. v. Bhinder**, [1985] 2 S.C.R. 561; 63 N.R. 185; **Action Travail des Femmes v. Canadian National Railway Co.**, [1987] 1 S.C.R. 1114; 76 N.R. 161, and **Brennan v. Canada and Robichaud**, [1987] 2 S.C.R. 84; 75 N.R. 303. In **Brennan**, La Forest, J., declared at p. 89 [S.C.R.]:
>
> > '...[T]he **Act** must be so interpreted as to advance the broad policy considerations underlying it. That task should not be approached in a niggardly fashion but in a manner befitting the special nature of the legislation. . . .'"

In **Saskatchewan Human Rights Commission v. Saskatchewan (Dept. of Social Services)** (1989), 52 D.L.R. (4th) 253 the Saskatchewan Court of Appeal, using the same broad, purposive approach, concluded that social services benefits were "services to which the public is customarily admitted, or which are offered to the public" as those words appear in the Saskatchewan **Human Rights Code**. The court dealt with the fact that there were eligibility requirements for social assistance as follows at p. 268:

> "...The fact that a service is offered to the public does not mean that it must be offered to all members of the public. The government can impose eligibility requirements to ensure that the programme or services reaches the intended client group. The only restriction is that the government cannot discriminate among the client group, that is, the elderly, the poor or others, on the basis of the enumerated characteristics set out in the Code."

From my review of these cases, I have come to the following conclusions:

(i) with respect to **Jenkins**, McQuaid J. acknowledged that he was dealing with legislation "in the relatively new field of human rights"; and much has happened in the field of human rights since **Gay Alliance**, upon which the decision in **Jenkins** was partly based;

(ii) with respect to **Gay Alliance**, the Supreme Court of Canada (notwithstanding several opportunities) has never used the list of items referred to by Martland J. in that case as a guide to interpreting the meaning of the word "services" in Canadian human rights legislation, and rightly so;

(iii) with respect to the manner in which I should interpret the meaning of the word "services" in s. 5(1)(a) of the Nova Scotia **Human Rights Act**, it is clear, from the decisions of the Supreme Court of Canada since **Gay Alliance,** that I must take a broad, liberal and purposive approach, in a manner befitting the special nature of this legislation.

The Purpose of the Nova Scotia Human Rights Act

When the Nova Scotia **Human Rights Act** was amended in 1991, what had, essentially, been the preamble to the previous legislation became embodied in the amended legislation as its stated purpose. Section 2 of the Nova Scotia **Human Rights Act** sets out the purpose of the legislation in terms of broad social goals, as follows:

> 2 The purpose of this Act is to
>
> (a) recognize the inherent dignity and the equal and inalienable rights of all members of the human family;
>
> (b) proclaim a common standard for achievement of basic human rights by all Nova Scotians;
>
> (c) recognize that human rights must be protected by the rule of law;
>
> (d) affirm the principle that every person is free and equal in dignity and rights;
>
> (e) recognize that all the government, all public agencies and all persons in the Province have the responsibility to ensure that every individual in the Province is afforded an equal opportunity to enjoy a full and productive life and that failure to provide equality of opportunity threatens the status of all persons; and
>
> (f) extend the statute law relating to human rights and to provide for its effective administration."

Workers' Compensation

All of the provinces in Canada have provision for workers' compensation. It is, essentially, a system of social insurance. It is established in Nova Scotia under the **Workers' Compensation Act**, (R.S.N.S. 1989, c. 508). Its purpose is to provide compensation on a no-fault basis to workers (and their dependents) who are injured on the job, and who are covered by the **Act**. The compensation is designed to replace lost earnings or compensate for lost earning capacity. The cost of the benefits is met from levies charged by a statutory corporation called the Workers' Compensation Board (the Board) against employers in the

industries governed by the **Act**, and based upon payrolls. The Board administers the entire scheme. (See **Hayden v. Workers' Compensation Appeal Board** (1990), 96 N.S.R. (2d) 108; **Workers' Compensation Board of Nova Scotia v. Langley** (1995), 142 N.S.R. (2d) 302; **Workers' Compensation in Canada**, Ison, 2nd ed., 1989). Pursuant to the **Workers' Compensation Act**, all members of the Board are appointed by the Governor-in-Council (s. 138(2)). The Board is required to make an annual report to the Minister of Labour of Nova Scotia (s. 167). Any member of the Board, the Chief Executive Officer and all employees of the Board are deemed to be employed in the Public Service of Nova Scotia (s. 163(1)).

Conclusion

In coming to my conclusion, and in summary, I have considered the following:

1. the method which I must employ in interpreting the provisions of the Nova Scotia **Human Rights Act**, namely; a broad, liberal and purposive approach in a manner befitting the special nature of human rights legislation;
2. the stated purpose of the Nova Scotia **Human Rights Act**, particularly s. 2(e) which recognizes the responsibility which the government, all public agencies, and all persons in the province have to ensure equal opportunity for all individuals, and that the failure to provide equal opportunity threatens the status of all persons;
3. the cases referred to in this opinion, and the lengths to which the courts have gone, in recent years, to advance the broad policy considerations which underlie human rights legislation;
4. the recent amendments to the Nova Scotia **Human Rights Act**, which broaden the scope of the word "services" by the deletion of limiting

phrases such as "customarily provided to members of the public" and "to which members of the public have access"; and

5. the nature and purpose of workers' compensation.

With these considerations in mind, it is my opinion that, in administering the compensation scheme under the **Workers' Compensation Act**, the Workers' Compensation Board is providing a "service" within the meaning of s. 5(1)(a) of the Nova Scotia **Human Rights Act**.

I would, therefore, dismiss this ground of appeal.

Other Grounds of Appeal

With respect to the other issues raised by the appellant, it is my opinion, that none of these issues raise a clear point of law, not depending on particular facts, upon the determination of which the jurisdiction of the board of inquiry depends. It is, therefore, not appropriate for this Court to deal with these issues at this time.

These other issues relate more to the question of whether or not the complaint of Mrs. O'Quinn can be sustained, and that is a matter for the board of inquiry at this stage. We have nothing before us, for example, to determine the precise basis upon which Mrs. O'Quinn's benefits were terminated in 1986. We do not know the basis upon which she applied to have one of those benefits reinstated, if she did, in fact, apply; and we do not know the basis upon which the Workers' Compensation Board refused to re-instate those benefits.

The subject-matter of the complaint of Mrs. O'Quinn is a matter over which the board of inquiry has jurisdiction. Therefore, the board of inquiry should not be pre-empted from carrying out its inquiry, as that is mandated in the **Human Rights Act**. This course was adopted in the following cases: (**Re Workers' Compensation Board v. British Columbia Council of Human Rights**, (1990), 70 D.L.R. (4th) 720; 47 B.C.L.R. (2d) 119 (C.A.); **The**

Canadian Football League v. Canadian Human Rights Commission [1980] 2 F.C. 329; 109 D.L.R. (3d) 397 (F.Ct. T.D.) **CIP Paper Products Ltd. and Saskatchewan Human Rights Commission** (1978), 87 D.L.R. (3d) 609 (Sask. C.A.)).

If, in carrying out its mandate, the board of inquiry exceeds its jurisdiction, or makes errors of law (which is, essentially, the concern of the appellant), then the appeal provisions of the legislation provide a vehicle to deal with that. I would also note here that the board of inquiry may not sustain Mrs. O'Quinn's complaint, in which case the concerns of the appellant would be academic.

Therefore, with respect to the other issues raised by the appellant, on which I express no opinion, the appeal is premature.

I would, therefore, dismiss the appeal. Under the circumstances, including the fact that both parties were anxious to have a decision from this Court on the issue dealt with in this opinion, and including the fact that this is a tribunal appeal, I would make no order as to costs.

Flinn, J.A.

Concurred in:

Matthews, J.A.

Roscoe, J.A.

C.A. No. 118649

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

THE WORKERS COMPENSATION BOARD OF NOVA SCOTIA Appellant	)	
- and -	)	REASONS FOR
	)	JUDGMENT
BY:	)	

HELENE O'QUINN, the NOVA SCOTIA HUMAN RIGHTS COMMISSION and SUSAN M. ASHLEY, a Board of Inquiry pursuant to Section 31A(1) of the *Human Rights Act*

Respondent

FLINN, J.A.