

**Labour Law Term Paper
Business 9329**

**Review of Decisions by Labour Relations Board
and
Newfoundland Board of Inquiry
Under the
Human Rights Code**

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PURPOSE

This paper will review two decisions, which appear to consider similar circumstances yet come to a distinctly different conclusion, with respect to defining "employer." The first decision was rendered by the Newfoundland Labour Relations Board cited as *Newfoundland Association of Public Employees and Irene Gray, Anita Stanford*, [1995] NF., L.R.B. #712:2437 (attached as Appendix A). This was an application for certification by NAPE, which led the Board to determine who the employer was for the purpose of collective bargaining. This decision was subsequently appealed to the Newfoundland Supreme Court, Trial Division, cited as *Gray (Guardian ad litem of) v. Newfoundland Association of Public Employees*, September 16, 1998 (Appendix B). The Board's decision was not amended by the Court. The second decision was rendered by the Newfoundland Board of Inquiry, *Tulk v. Department of Health and Community Services and Rosanne Wellon*, [2001] NF. This matter involved a complaint under the Human Rights Code alleging discrimination based on sex, which led the Board of Inquiry to determine the complainant's employer (Appendix C). The Tulk decision was subsequently appealed to the Newfoundland and Labrador Trial Division with a decision rendered on March 3, 2002 (Appendix D).

The paper will focus on why there were different outcomes in both of these decisions, under a similar set of facts. This paper will not review other aspects of the decisions, which are not related to defining the employer. Lastly, the paper will assess if the decisions fit within the parameters of the respective legislation, and will provide a brief commentary on the appropriateness of each.

DECISIONS

1. *NAPE and Irene Gray, Anita Stanford, [1995] NF., L.R.B. 712:2437*

The following is a brief description of the facts presented in the above-noted case. The applicant, NAPE, submitted an application for certification on January 19, 1993, under the Labour Relations Act (the Act) for

a unit of employees employed by Irene Gray. Subsequently, the application was amended to add Anita Stanford as a respondent and the Department of Social Services (DOSS), Government of Newfoundland and Labrador, was added as an interested party. When the hearing commenced on December 6, 1993, the applicant submitted an application under the Public Service Collective Bargaining Act to name DOSS as the employer.

Both Ms. Gray and Ms. Stanford required total care and support. They previously lived in a group home setting but moved to their own private residence under an Individualized Living Arrangement (ILA) funded by DOSS. The purpose of the ILA was to integrate disabled persons back into the community. The ILA was operated by an Operating Committee, which was comprised of family members, social workers, and behavioral management specialists from DOSS. The purpose of the Operating Committee was to manage the ILA on behalf of Ms. Gray and Ms. Stanford. While the Operating Committee was bound by policies and procedures as established by DOSS, it was intended to act as separate and distinct from DOSS.

DOSS was largely responsible for establishing the ILA, whereby a social worker and behavioral management specialist hired a supervisor and support workers. Salary remuneration for the support workers and live-in supervisor was in accordance with DOSS policies. The social worker engaged a private corporation to provide payroll services on behalf of Ms. Gray and Ms. Stanford. The supervisor submitted the weekly hours of the support workers to the accounting service, and any difficulties or inconsistencies were addressed by the supervisor and/or the DOSS social worker. The social worker conducted a search for an appropriate house for Ms. Gray and Ms. Stanford and arranged to have renovations completed to the house. The lease for the house was signed by the supervisor on behalf of Ms. Gray and Ms. Stanford as tenants, while the monthly rental payment of \$1,800 was paid directly by DOSS to the landlord. As well, DOSS made direct payments on behalf of Ms. Gray and Ms. Stanford to suppliers of goods as well as for

utilities, maintenance, repairs, etc. There was one incident brought to the Board's attention, where a support worker was terminated for suspected theft. The termination decision was made by the social worker, and Ms. Gray's mother was informed after the decision had been made.

In *NAPE, supra*, pg. 5 para. 23, the Board had the following issues to consider relevant to the determination of who the employer was in these circumstances:

1. Is any one of the Respondents the employer of the employees in the proposed bargaining unit?
2. Can the employees in the bargaining unit be employees of the Department of Social Services in the absence of appointment under the Public Service Commission Act and compliance with related legislation?
3. Do Irene Gray or Anita Stanford have the legal capacity to be an employer under the Labour Relations Act?

Framework of Labour Legislation

Prior to reviewing the actual decision of the Board, it is important to consider the purpose behind the Labour Relations Act in the context of the application. The Labour Relations Board was dealing with an application for certification under the Act. The essence of an employee exercising his/her fundamental right to join a union of his/her choice and enter into collective bargaining is the core issue in such an application. Prior to labour legislation being enacted as common law, neither trade unions nor collective agreements had any legal status. Largely based on the Wagner Act in the 1930s, which was passed in the United States, Canada shortly thereafter adopted similar legislation during World War II¹. Some of the key provisions adopted provided employees with a legislative right to freely choose whether to organize into a union, select a representative of their choice, and subsequently obligate the employer to bargain in good

¹ Adams, 2002, pg. 5-1

faith. When introducing this legislation, government clearly indicated that it was going to play a role in the way employers and unions interacted in the workplace. Essentially, through the creation of labour relations boards governments established the framework of administrative law.² I would not think that it was by accident that labour relations boards comprised tri-party membership: one representative from management, one from labour, and one neutral chair. By having both labour and management represented on the panel, both groups were able to maintain a commitment to making the process work.

When governments introduced labour relations boards, it was done with a view to providing a significant degree of deference to the boards. For example, the rule of discretion allows the boards to exercise discretion in certain circumstances to determine, for example, an appropriate bargaining unit or to determine whether an unfair labour complaint will be heard. This discretion allows for practical solutions on a case-by-case basis rather than a fixed solution to each set of problems.³ Labour boards must exercise this discretion with diligence and within the legislative framework. However, the high degree of discretion seems to provide the best mechanism for reviewing applications or situations on a case-by-case basis. One of the primary objectives of a labour relations board is to ensure that the rights provided under legislation for employees to select a union of their choice, in order to engage in collective bargaining, can be exercised.⁴ Simultaneously, the board must be cognizant of promoting harmonious labour relations through the establishment of an appropriate bargaining unit. The decision in *NAPE, supra* will be reviewed against the background of this legislative framework.

² Adams, 2002, pg. 5-1

³ Adams, 2002, pg. 5-3

⁴ Adams, 2002, pg. 7-4

Labour Relations Board Decision - NAPE, supra

At the hearing the representatives argued, on behalf of Ms. Gray and Ms. Stanford, that they were not the employer. As well, NAPE took the position that the true employer was DOSS. Hence, one of the first issues the Board addressed was determining who was the employer. In addressing this matter *Gray, supra, pg. 6, para. 25 and 26*, the Board considered who had fundamental control over the employees. In citing the *York Condominium Corporation and LIUNA, Local 183 [1977] OLRB rep. Oct. 645*, the Board reviewed seven factors to determine this issue. As well, it is worthy to note the Board indicated that each of the seven factors might not necessarily be given the same weight, depending on the context. This comment linked to the rule of discretion provided to the Board as referenced in the previous section. It is interesting that the legislation does not prescribe a certain weight to be placed on each of the seven factors, leaving this to the discretion of the Board. It would seem on the surface that determining fundamental control would be relatively straightforward given that evidence appeared to indicate that neither Ms. Gray nor Ms. Stanford exercised control over the employees directly. In addressing this matter *NAPE, supra, pg. 7, para. 27*, the Board outlined,

“It is necessary for the Board to examine not only the named individual who exercises various aspects of control over the employees, but also to determine on whose behalf the named individual acts.”

The Board then proceeded to review the evidence and noted the following:

1. Both Ms. Gray and Ms. Stanford had been issued employer numbers by Revenue Canada.
2. Employees were paid from funds granted by DOSS.
3. The Board did not accept the argument put forth that because the wage rates were determined by DOSS, then essentially, DOSS was the employer. Rather the Board took the position that it was the responsibility of Ms. Stanford and Ms. Gray to provide wages to the employees; and if they had other

sources of income they would be free to pay over and above the amount provided to them through DOSS, however, recognizing that neither had additional sources of funding.

4. Staff were hired by the Operations Committee, who were acting on behalf of Ms. Gray and Ms. Stanford.
5. When an employee was dismissed for suspected theft the decision was made by the live-in supervisor, based on a recommendation to the social worker. Both the coordinator and social worker were found to be acting on behalf of Ms. Gray and Ms. Stanford.
6. Control of day-to-day activities and supervision of staff was primarily a function of the live-in coordinator acting on behalf of the Operations Committee, and the Operations Committee, as previously determined by the Board, was acting on behalf of Ms. Gray and Ms. Stanford.

Reviewing the factors, the Board concluded that Ms. Gray and Ms. Stanford, or persons acting on their behalf, exercised fundamental control over the employees and therefore Ms. Gray and Ms. Stanford were the employer of the employees. Given this finding, the Board indicated it did not need to address the issue of whether the employees could be employees of DOSS.

While not directly captured in the evidence reported in the decision, it appears that representatives argued on behalf of Ms. Gray and Ms. Stanford that neither had the legal capacity to enter into a contract. The Board addressed this issue in *NAPE, supra*, pg. 8, para. 30, 31 and 35, whereby the Board outlined that many employers seek professional advice in conducting collective bargaining and administering collective agreements. Secondly, there was no evidence presented, which would lead the Board to a conclusion that Ms. Gray and Ms. Stanford lacked the mental capacity to enter into a collective agreement.

Analysis of Labour Relations Board Decision

Given the application for certification before the Board, it was somewhat surprising that the Board did not make reference to Section 2.1(n) of the Labour Relations Act, which defined employer. It seemed that one of the key issues the Board addressed was identifying the employer, yet throughout the decision there was no reference made to the definition of “employer” in the Act. Rather the Board proceeded to a fundamental control test to determine who actually exercised control over the employees. In reviewing this approach, one rationale may be that the Board was attempting to determine the “true” employer. The brief definition contained in 2.1(n) simply identifies an employer as “... a person who employs one or more employees...” without actually considering what it means to actually "employ" someone. However, the definition of employer may well be broad and general to fulfill a legislative purpose. This would seem to fit with the premise that labour relations boards in general attempt to provide a judgment or decision which is applicable to the specific set of circumstances presented. If the definition of employer was detailed and specific in an attempt to cover all possible variations of the meaning of employer, there would still be situations which would not fall within the definition; and the over-rigid definition would restrict the Board’s discretion in determining the true employer.

In this particular application, the Board was addressing the right of seven employees to enter into collective bargaining with an employer. By adopting the fundamental control test, the Board was able to look behind the evidence presented and determine who exercised fundamental control over the employees. Given that the employees would be entering into collective bargaining, there was a need to clearly define the employer; and it did not appear to be the role of the Board to define the "best" employer, but rather the employer. As evidenced in the Trial Division decision, the Court found that the Board was correct in its determination with respect to the issue of Ms. Gray and Ms. Stanford being the employers, or those acting on their behalf. From the union’s perspective, I would suspect it would have been more advantageous to

have the DOSS deemed the employer, given there was a likelihood of greater stability with DOSS, versus a small ILA arrangement which, at any point in time, if funding stopped would cease to exist.

When the Board considered the issue of fundamental control in reviewing the evidence, it seemed to disregard the input of DOSS into the ILA and Operations Committee. I do not find fault with the factors the Board highlighted in determining that those acting on behalf of Ms. Gray and Ms. Stanford exercised fundamental control over the employees. However, without the input of DOSS, there would have been no Operations Committee. For example, the social worker and behavioral management specialist employed by DOSS were predominantly involved in the hiring of all employees as well as securing housing, arranging for renovations of same, engaging a private company to provide payroll services, and ensuring that monies were paid to various suppliers such as rent to the landlord, utility bills, repair costs, etc. It seems that on reviewing the evidence, DOSS was behind all of the events which occurred after the decision was made to establish the ILA. I believe the decision could have gone the other way had NAPE provided evidence with respect to the legal incapacity of Ms. Gray and Ms. Stanford rather than inferring it. The union may have fallen short of the mark by not pursuing this, in that this was a factor that was highlighted in the decision of the Court.

It is possible that if there had been a finding of legal incapacity on the part of Ms. Gray and Ms. Stanford, the union may have been in a stronger position to argue that DOSS was responsible for the control of the ILA and the control of the employees.

In *Machtiger v. HOJ Industries Limited* [1992], 55 D.L.R. (4) 401 an issue of reasonable notice was addressed and, additionally, the Court did make a policy statement with respect to the importance of employment in our society (see Appendix E). With respect to employment standards, the Court indicated

that every act should be deemed to be remedial. Tribunal awards should recognize the purposes of employment legislation, which seeks to remedy situations whereby employees are often in unequal bargaining positions in relation to their employers in both unionized and non-unionized settings. This position further supports the approach of the Board in determining the true employer and certifying the bargaining agent entering into collective bargaining.

2. Newfoundland Supreme Court, Trial Division: (*Guardian ad litem of*) v. Newfoundland Association of Public Employees (NAPE) September 16, 1998

Ms. Gray and Ms. Stanford applied for judicial review of the Board's decision, submitting that the decision was patently unreasonable as they did not have the legal capacity to contract. As well, NAPE sought judicial review, alleging that the Board's decision was patently unreasonable in that Ms. Gray and Ms. Stanford were not capable of negotiating a collective agreement, and the employer should therefore have been deemed to be DOSS, which exercised in NAPE's opinion the greatest control over the caregiver's work. With respect to the issues of concern for this paper, *Gray (Guardian ad litem of)*, *supra*, pg. 8, para. 33, the Court did not find the Board's decision patently unreasonable with respect to its finding that the Operating Committee, and others acting on behalf of Ms. Gray and Ms. Stanford, exercised fundamental control over the employees. With respect to the issue of legal capacity to contract, *Gray (Guardian ad litem of)*, *supra*, pg. 10, para. 44, the Court concluded that it was not properly proven before the Board nor before the Court that Ms. Gray nor Ms. Stanford did not have the legal capacity to contract. The Board was correct in finding that Ms. Gray and Ms. Stanford, or such persons who may act on their behalf, are the employers, as there was no proper proof with respect to their legal incapacity.

SECOND SET OF DECISIONS

3. Newfoundland Board of Inquiry: *Tulk v. Department of Health and Community Services and Roseanne Wellon*, [2001], NF.

The following is a brief description of the facts presented in the above-noted case.

On April 9, 1999, Ms. Gladys Tulk filed a complaint with the Newfoundland Human Rights Commission (the Commission) alleging that both the Department of Health and Community Services (DOHCS) and Ms. Roseanne Wellon had discriminated against her in contravention of the Human Rights Code. Ms. Tulk was hired by Ms. Wellon on November 2, 1998, to provide homecare services. Ms. Wellon suffered from ALS. Upon hiring, Ms. Tulk was provided a list of duties required for the position by Ms. Wellon and by Linda Fancy, who was the previous homecare worker for Ms. Wellon.

On February 14, 1999, Margaret Wellon, mother of Roseanne Wellon, inquired whether Ms. Tulk was pregnant, which was confirmed by Ms. Tulk. Subsequently, after working two additional shifts for Ms. Wellon, Ms. Tulk became aware that on February 19, 1999, Ms. Wellon had scheduled an interview to hire someone for Ms. Tulk's position. On February 20, 1999, Ms. Tulk received a call from Ms. Margaret Wellon advising her that Ms. Roseanne Wellon no longer wanted Ms. Tulk to provide her homecare services. Ms. Tulk on February 22, 1999, visited the DOHCS and advised the social worker assigned to Ms. Wellon that she had been terminated because of her pregnancy. Ms. Penney advised her that the DOHCS did not get involved with labour relations matters but that she could write Ms. Penney's supervisor. After obtaining a medical certificate indicating her fitness for work on February 23, 1999, Ms. Tulk received a phone call from Ms. Margaret Wellon reiterating that her services were no longer required.

The Board of Inquiry received evidence *Tulk, supra*, para. 22-28, pg. 4, outlining that Ms. Wellon was part of the self-managed care system whereby funding was provided through the DOHCS administered through

regional boards. Under this system the client, Ms. Wellon, was deemed the employer and self-managed care was implemented with the aim of having the clients responsible for hiring their own employees with some degree of control. Under a previous model, which had been referred to as an agency system, clients approached an agency (such as a personal care service provider) and paid the agency for the provision of homecare services.

Essentially, the role of the social worker was described as monitoring to ensure that funds were being properly applied to the purpose for which they were approved. The social worker did not generally get involved in any decisions of hiring or firing, although it was acknowledged that the social worker would have the ability to withhold funding to the homecare worker if the client was not being properly cared for and the family was not intervening.

One of the DOHCS policies titled “Relative Care Policy” prohibited the employment of relatives living in the same household as homecare workers. Once an individual was approved for the self-managed care system, a funding agreement would be established between the client and funding agency (DOHCS) outlining the client as employer to the homecare service worker. Under the self-managed care system, it was the responsibility of the client to pay homecare workers directly. Under the previous agency system, a homecare worker was employed and paid through the homecare agency. The funding agreement clearly outlined that the client was the employer.

Clients also had to provide records to Revenue Canada and the Department of Labour. Specifically, *Tulk, supra, pg. 9, para. 65, section 3.1 of the Self-Managed Home Support Services Act, S.N. 1998, ch. S-13.1, subsection 3(1)* provided that “*A person to whom home support services are being provided is considered to be the employer of the person who provides the home support services.*”

The issues before the Board of Inquiry in *Tulk, supra, para. 52, pg. 7*, were:

1. Was the Complainant discriminated against in violation of section 9 of the Code; and
2. If the Complainant had been discriminated against, who is liable for that discrimination pursuant to section 9 of the Code, Roseanne Wellon and/or the Department of Health and Community Services?

Framework of Human Rights Legislation

Prior to enacting human rights legislation in various jurisdictions, the British North America Act did not reference human rights per se and the Judicial Committee of the Privy Council had decided, through various decisions, that discrimination on racial grounds was not a basis to invalidate legislation.⁵ It was evident in *Christie v. York Corporation, [1940] S.C.R. 139 at 141-46*, the Courts were not prepared to interfere with the operations of private enterprise and implement public policy dealing with discrimination. In that case it was held that an employer had the ability to discriminate against a Negro man by refusing service. The Court essentially indicated that it was not prepared to legislate public policy at that time. Early legislation was passed in Ontario to eliminate or reduce discrimination by way of the Insurance Act in 1932.⁶ However one drawback to early anti-discrimination legislation was that individuals had to initiate Court action themselves to prove discrimination. In the early 1960s, human rights codes were introduced across Canada, which essentially represented a compilation of previous statutes dealing with discrimination. Shortly thereafter, human rights commissions were established to administer the acts.⁷ The benefits of this change were substantial in that individuals no longer had to initiate criminal action to establish discrimination, which lessened the financial burden; and the test applied by human rights commissions was not one of beyond a reasonable doubt, as that which was found in the Court setting. A

⁵ Tarnopolsky and Pentney, 2001, pg. 1-6

⁶ Tarnopolsky and Pentney, 2001, pg. 2-3

⁷ Tarnopolsky and Pentney, 2001, pg. 2-11

third benefit was that if there was a finding of discrimination by a human rights commission, it could order damages to benefit someone who had suffered discrimination, whereas under the Court system, a finding of discrimination usually resulted in a fine.

Human rights legislation has been deemed to be different than other forms of labour legislation. The Courts have adopted principles of construction when interpreting human rights legislation. The more prominent principles are as follows⁸:

1. Human rights legislation is fundamental law which declares a public policy. It should only be altered, amended or repealed by the legislature and not the Courts.
2. It is deemed remedial legislation which essentially means human rights legislation was enacted to effect a remedy, in this case, a remedy for those who have been discriminated against by employers. As a result the legislation must be given an interpretation which would best ensure that its objectives are met. The end result is that it "must secure as far as is reasonably possible equality that is to say fairness."
3. It guarantees that all members of society will be assessed as individuals and not on the basis of belonging to a particular group.
4. Rules of statutory interpretation are not necessarily applicable in interpreting human rights provisions. If a strict literal interpretation is applied, this may result in ignoring the dominant purpose of the legislation.
5. If it is found that human rights legislation conflicts with a subsequent piece of legislation, unless this subsequent legislation was clearly stated as creating an exemption to the human rights legislation, it is not to be construed as taking precedence over the human rights legislation.

⁸ Tarnopolsky and Pentney, 2001, pg. 4-102.9-102.11

An interesting note is that very few human rights codes, including the Newfoundland and Labrador Human Rights Code, contain definitions of "employee, employer or employment." Case law has developed with respect to addressing the employer/employee relationship. In *Re: Nelson et al and Gubbins et al. (1979)*, 106 D.L.R. (3d) 486, it was determined that the employer/employee relationship does not depend on the right of the employer to discipline nor payment of wages but rather on the control of the method of doing the work.

As was noted in cases referred to in the *Tulk, supra*, jurisprudence has clearly broadened the definition of employer/employee and employment in accordance with the foundation of the human rights legislation. A similar expansive view was adopted in *Pannu v. Prestige Cab Ltd. (1986)*, 8 C.H.R.R.D/3911.

Review of Board of Inquiry Decision

In *Tulk, supra, para. 57, pg. 8*, the Board found that Ms. Tulk's pregnancy was a contributing factor in Ms. Wellon's decision to terminate her. There was no claim of a bonafide occupational qualification presented by Ms. Wellon, therefore, the Board of Inquiry found Ms. Tulk had been discriminated against.

Having addressed this issue, the Board of Inquiry then proceeded to address the issue of liability for the discrimination. Ms. Tulk argued *Tulk, supra, para. 62, pg. 9*, that the DOHCS was the employer, or was acting on behalf of the employer. The DOHCS argued that it was neither employer nor that it served on behalf of an employer. The evidence revealed that Ms. Wellon received funding in accordance with the Self-Managed Home Care Support Services Program and through this funding Ms. Tulk was paid. The Self-Managed Home Support Services Act *Tulk, supra, para. 65, pg. 9*, expressly outlined that the employer was "the person to whom home support services are provided..."

The Board of Inquiry reviewed the assignment of duties to Ms. Tulk, *Tulk, supra, para. 67-68, pg. 9*, whereby the evidence revealed that Ms. Wellon assigned work to Ms. Tulk; and essentially Ms. Wellon had hired Ms. Tulk and subsequently fired her without consulting with the DOHCS. As well, the Board noted that under the Department of Health and Community Services Notice, the Minister of Health and Community Services was responsible for control and direction of all matters relating to program and residential facilities.

Although the Human Rights Code does not provide a definition of employer, the Board of Inquiry made reference to the Federal Court of Appeal decision, *Canada v. Rosin* for clarification of the term "employer" *Tulk, supra, para. 72, pg. 10*, wherein,

"There is little in the way of specific definitions of employment either in the human rights legislation nor in the cases themselves... What is clear is that courts have interpreted the words broadly, finding employment relationships to exist in this context where in other context they might not have so found. Normally, for employment relations to exist money is paid as wages to someone who works for the person who pays the wages, but in the human rights context the situation is much more flexible (at para. 22, pg. D/449-450)."

Likewise the Board of Inquiry referenced *Pacific v. Canada and Fontaine* (1992, 16 C.H.R.R.D/470) wherein the Court of Appeal found that the complainant was employed by Canadian Pacific even though he was not an employee of Canadian Pacific, but another company contracted to provide food services to railroad gangs. Principles of interpretation of human rights legislation was referenced by the Board of Inquiry in the decision of The Supreme Court of Canada in *Gould v. Yukon Order of Pioneers, Dawson's Lodge, No. 1 et al.*, [1996] 1 S.C.R. 571 whereby the majority stated on page 585,

"On the subject of the appropriate interpretative approach for human rights statutes, the need to approach the legislation purposely, giving it a fair, large and liberal interpretation"

with a view to advancing its objects is well accepted but it is also well established that the wording of a statute is an important part of this process."

In this particular case, it was clear that Ms. Wellon assigned the duties and responsibilities to Ms. Tulk, she as well hired and had the ability to fire Ms. Tulk. These actions were taken without any input from the DOHCS. As well, there was a signed funding agreement which stated that Ms. Wellon was the employer. Specific legislation had been passed namely the Self-Managed Home Support Services Act, which once again stated that Ms. Wellon was the employer.

Subsequently, *Tulk, supra, para. 79, pg.12*, the Board of Inquiry determined that the DOHCS had utilized Ms. Tulk to fulfill its mandate and obligation; and in keeping with a broad and purposive approach, and after careful consideration of the evidence, found that the DOHCS employed or utilized Ms. Tulk such that it fell within the meaning of an employer in the Code.

Based on the history of human rights legislation presented earlier, it is quite clear that the Board of Inquiry adopted an approach similar to that used by other human rights commissions, whereby it applied a liberal interpretation to ensure that the intent of the Human Rights Code was carried out, namely to provide a remedy to those who had suffered discrimination under the Code. Section 5 of the Human Rights Code was enacted to deem legislation such as the Self-Managed Home Support Services Act subordinate. One could have logically assumed that if the legislature had turned its mind to outlining what it viewed to be an appropriate employer, then this would be binding upon the Board of Inquiry, which is obviously not the case. Putting this decision in the context of the purpose of the legislation, along with the jurisprudence to date, which has sought to ensure a remedy is available to those who suffered discrimination, the decision is appropriate. If governments had the ability to pass legislation which would effectively permit discrimination then this would destroy the foundation of the human rights legislation.

4. Newfoundland and Labrador Supreme Court - Trial Division: *Her Majesty the Queen in Right of Newfoundland, as represented by the Minister of Health and Community Services v. Gladys Tulk, Roseanne Wellon and the Human Rights Commission* (2002)

The DOHCS sought judicial review of the Board of Inquiry's finding and specifically requested to have the decision set aside on the basis that the Board of Inquiry disregarded the provisions of the Self-Managed Home Support Services Act (S.M. 1998 c.S-13.1) and erred in determining that the DOHCS was an employer or a person acting on behalf of an employer and therefore was liable pursuant to Section 9 of the Human Rights Code. In reviewing this matter, the Court did not alter the decision of the *Board of Inquiry and in Her Majesty, supra*, para. 27, pg. 25, the Court found,

"I find that for the purposes of identification and classification under S.9(1) of the Human Rights Code, both the applicant and the second respondent (Roseanne Wellon) are parties to a relationship to provide homecare services to Ms. Wellon. As such each is an employer and a person acting on behalf of an employer..."

INCONSISTENCY OR PRACTICALITY?

The author has completed a review of each of the above-noted decisions tracing, to a limited extent, the history of the applicable legislation. Prior to conducting this review it appeared that one of the tribunals must have made some fundamental error in order to have two distinctly different awards from what appeared to be similar circumstances. Are these decisions inconsistent? I would submit that they are not. In the first decision the Labour Relations Board was dealing with an application for certification which was related to the right of a group of employees to be certified and enter into collective bargaining to pursue their interest. The Board adopted a fundamental control test and determined that the employers were both Ms. Gray and Ms. Stanford. The intent of the Labour Relations Act was not to have the Board provide a broad expansive definition of employer but rather to determine the identity of the employer in order to enter

into collective bargaining. Had the Board been charged with determining the "best" employer, the better choice may have been the DOHCS for the reasons stated earlier.

In contrast, the Board of Inquiry was not concerned with who exercised control over the employees but the question phrased for consideration by the Board of Inquiry was "...who was liable for that discrimination....?" Having found that there was discrimination the Board of Inquiry then sought to assign liability. In addressing the liability issue the Board of Inquiry focused on precedent which stressed a flexible definition of "employment" which, as acknowledged by the references cited, was not a traditional definition of employment whereby there actually had to be an employment relationship. From the perspective of assessing liability this approach makes perfect sense.

Given the intent of human rights legislation to effect a remedy and implement a judgment of fairness, how successful would the Board of Inquiry have been in achieving this end if it had solely deemed Ms. Wellon the employer? From a financial perspective, given the remedy ordered, it is questionable at best whether an individual with no other source of income would have been able to continue to pay Ms. Tulk for the period she continued to work after being terminated up to the date of birth of her child. When the author reads the word "flexible" in the cases cited, from a cynical point of view I see the words "ability to pay." I have concluded that the Labour Relations Board was looking at a totally different issue than that which was being addressed by the Board of Inquiry when determining employer.

Additionally, these awards highlight a different role of the legislature with respect to employment law. For example, the legislature amended the Labour Relations Act by recently invoking legislation which eliminated some of the discretion of the Labour Relations Board with respect to determining the appropriate bargaining unit in offshore development. The legislation outlined what the appropriate bargaining unit

would be for the Hibernia development. Traditionally this would have been the function of the Labour Relations Board, however, the legislature decided it was in the best interest to define the appropriate bargaining unit. In comparison, the legislature attempted to define employer through the Self-Managed Home Support Services Act and this was deemed subordinate by the Board of Inquiry given the provisions of Section 5 of the Human Rights Code. This clearly illustrates a difference in the "strength" of each piece of legislation and relates to the intent of the human rights legislation versus the Labour Relations Act.

There are implications for employers, particularly government departments which enter into programs administered by third parties. If government departments take a more active role and counsel employers, such as Ms. Wellon, on appropriate human resources practices, hiring, etc., they run the risk of being caught by the fundamental control test adopted by labour relations boards in issues of certification.

Generally when services are being provided through third parties it is the intent to remain union free, and generally government departments will keep a distance to ensure they are not perceived as being the employer. This decision raises a complex question as to what degree of involvement government departments should have with similar situations as that of Gladys Tulk.

The Human Rights Code and Labour Relations Act per se have distinctly different legislative purposes and frameworks. In the context of both cases presented the Human Rights Code applies to all employees, whereas under the Labour Relations Act certain groups of employees are excluded, such as those occupying supervisory positions and employees involved in confidential labour relations matters. This indicates that it was the legislature's intent that the Human Rights Code have a broader and more purposive application than the Labour Relations Act. Another difference in both pieces of legislation is that the Human Rights Code has openly applied a more liberal expansive definition of "employer" and "employment" whereas no similar pattern has emerged under the Labour Relations Act.

References

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Gray (Guardian ad litem of) v. Newfoundland Association of Public Employees, September 16, 1998 (Appendix B)

Tulk v. Department of Health and Community Services and Rosanne Wellon, [2001] NF. (Appendix C)

Tulk v. Department of Health and Community Services and Rosanne Wellon, [2001] Newfoundland and Labrador Trial Division with a decision rendered March 3, 2002 (Appendix D)