IN THE MATTER OF an adjudication pursuant to
section 46 of the *Human Rights Act*, S.N.W.T. 2002, c. 18 as amended

AND IN THE MATTER OF a complaint filed by Philip Mercer against
the Workers' Compensation Board of the Northwest Territories and Nunavut

INTRODUCTION

This is an adjudication following a complaint filed by Philip Mercer ("Mercer") against the Workers' Compensation Board of the Northwest Territories and Nunavut ("the WCB").

The complaint was filed on October 13, 2005, and in it, Mercer alleges that the WCB denied him services that are customarily available to the public on the basis of his social condition and contrary to sections 5 and 11 of the Northwest Territories Human Rights Act (the "Act"). By letter dated May 9, 2006, the Director of Human Rights (the "Director") referred the complaint to the Northwest Territories Human Rights Adjudication Panel pursuant to section 46 of the Act.

This matter was heard in Yellowknife, Northwest Territories, on January 30th and 31st, 2007. The Northwest Territories Human Rights Commission (the "Commission") and the WCB were both represented by legal counsel at the hearing. Mercer represented himself, and did not appear in person at the hearing. Rather, he appeared by videoconferencing technology by agreement of the parties. He was physically present in Newfoundland during the hearing.

LEGISLATIVE SCHEME

The Act is intended to deter and eradicate unlawful discrimination in the workplace; in the provision of goods and services; and in the provision of accommodations.

The Act establishes the Commission, which has the role of promoting human rights throughout the Northwest Territories; developing educational materials on the issue of human rights; developing human rights policies; and creating the office of the Director.

Section 46 of the Act requires that the Director refer a complaint to the Adjudication Panel for adjudication if the Director is of the opinion that the parties to the complaint are unable to settle the complaint, and the complaint should not be deferred (s. 43) or dismissed (s. 44).

Section 62 of the Act sets out the decision making power of the adjudicator after the completion of a hearing. If the adjudicator finds the complaint is without merit, the complaint shall be dismissed [s. 62(2)]. If the adjudicator finds that the complaint has merit, the Act provides for a variety of remedies [s. 62(3)]. A decision of an adjudicator can be filed with the Clerk of the Supreme Court [s. 64(1)] and can be enforced in the same manner as an order of the Supreme Court [s. 64(2)].

BACKGROUND

Many of the facts in this case are not in dispute. The basic, undisputed facts are as follows:

- Mercer is a seasonal worker who resides in Spaniards Bay, Newfoundland. He came to Yellowknife, Northwest Territories, in January, 2001, to work as a truck driver to transport materials and goods on the ice road to Diavik and Ekati.

- On February 18, 2001, Mercer was injured at work. He broke his hip and required surgery.

- Mercer applied for and received total disability from WCB as a result of the injury.

- Mercer appealed the amount of his compensation from WCB on the basis that the WCB did not include his employment insurance ("EI") in the calculation of his remuneration. A claimant's remuneration is an important figure in determining the amount of the compensation payable.

- Shortly after Mercer launched his appeal, WCB changed its policy 2.05 to make it clear that EI was not included in the definition of "remuneration" for the purposes of determining the benefit payable.

- The WCB Appeals Tribunal ruled that Mercer's EI benefits should be included on a one-time only basis to calculate the remuneration upon which his WCB benefit would be based.

- Mercer filed a complaint with the Commission claiming that by excluding EI benefits in the calculation of his remuneration, the WCB discriminated against him. More specifically, he complained that being a seasonal worker from Newfoundland, with a limited education and limited job opportunities, WCB's calculation of his remuneration was discriminatory against him in the provision of a service based on the prohibited ground of social condition.

ANALYSIS

In their written submissions, counsel for the Commission and WCB raised numerous points for argument. However, at the hearing, counsel agreed that certain points would not be argued. In particular:

- It was agreed that the WCB is the proper Respondent in this case.

- It was agreed that it would not be argued that the complaint was moot because of the WCB Appeal Tribunal's decision to include Mercer's EI benefits as remuneration on a one-time only basis.

- It was agreed that it would not be argued that WCB compensation is not a "service customarily available to the public".

- It was agreed that the defence of justification would not be advanced.

This greatly narrows and clarifies the points on which I need to rule. It really narrows the issues to the following:

1. Is Mercer a member of a socially identifiable group that is protected by social condition as a prohibited ground of discrimination?

2. If Mercer is part of a part of a socially identifiable group that is protected, did the WCB discriminate against him with respect to services customarily available to the public?

Is Mercer a member of a socially identifiable group that is protected by social condition as a prohibited ground of discrimination?

Section 1 of the Act defines "social condition" as follows:

> ""social condition", in respect of an individual, means the condition of inclusion of the individual, other than on a temporary basis, in a socially identifiable group that suffers from social or economic disadvantage resulting from poverty, source of income, illiteracy, level of education, or any other similar circumstance."

There is very little jurisprudence on the issue of social condition. In large part, this is because the class of "social condition" as a prohibited ground of discrimination is a relatively new concept. This must be kept in mind when dealing with this issue. The New Brunswick Human Rights Commission produced a document in 2005 entitled "Guideline on Social Condition". In that document, the writers noted that the prohibited ground of social condition "contains a subjective and objective element". That is, part of the concept may be more tangible, such as occupation, source of income, and level of education. But there is also the subjective part of this concept, that is, society's perception of these objective facts. The objective and subjective elements must also be kept in mind when dealing with this issue.

I found the breakdown put forward by counsel for the Commission to be helpful in dealing with the issue of social condition. In order to fall within the definition of social condition in section 1 of the Act, an individual must be included in:

1. a socially identifiable group

2. on other than a temporary basis

3. the group must suffer from either
   (a) social disadvantage, or
   (b) economic disadvantage

4. resulting from one or more of the following:
   (a) poverty
   (b) source of income
   (c) illiteracy
   (d) level of education, or
   (e) any other similar circumstances

Socially Identifiable Group

Counsel for the Commission argues that Mercer belongs to a socially identifiable group of people. Counsel states that the "group" is composed of seasonal workers who live in areas of high unemployment; are required to work away from home, and often outside their home province; they earn less than the national and provincial average salaries; and they have lower education levels with fewer job opportunities. Further, because of the seasonal nature of their employment, they return home for the rest of the year and are eligible for EI.

Counsel for the Commission and the WCB provided me with a great deal of information on this subject, including materials from various government agencies and reports following various studies on the issue of seasonal employment. I also had the benefit of hearing Mercer's testimony. Having reviewed the materials and evidence extensively, I find that:

- Newfoundland has arguably the most depressed economy in Canada. It has the lowest median after tax income in the country; the highest unemployment rate in the country; and one of the highest poverty rates in the country.

- The Atlantic provinces, including Newfoundland, have the greatest percentage of seasonal workers in Canada. Newfoundland has two times the national average of seasonal workers. Mercer himself gave testimony regarding his employment history, and that his employment was often time limited or job specific. Even if Mercer had not been injured, his latest employment would have only lasted for a couple more months.

- Seasonal workers tend to have low education levels, often less than high school graduation. Mercer himself has only a Grade 10 education.

- Seasonal workers tend, on average, to have lower wages and fewer benefits than other workers. Mercer himself made less than the median after tax income for Newfoundland immediately before his injury, even including his EI benefits.
- There are individuals who tend to rely on EI as part of their income. In fact, repeated use of EI is more prominent in Atlantic Canada and

Quebec. Mercer himself gave evidence of his own pattern of seasonal employment followed by returning to Newfoundland in off season and collecting EI.

- There is no indication that Mercer was unable or unwilling to work before his injury. Rather, Mercer gave evidence that his employment was typically seasonal in nature (ie. driving trucks on an ice road).

Based on all of the above, I am satisfied that Mercer does belong to a socially identifiable group as suggested by counsel for the Commission. The materials clearly paint a picture of this group.

Other Than On A Temporary Basis

The evidence shows that Mercer's history was that he fluctuated between periods of employment and unemployment over a number of years. This is, in fact, one of the characteristics of the group as a whole. As such, I find that his inclusion in the group was other than on a temporary basis.

Group Suffers From Either Social Disadvantage or Economic Disadvantage

Under section 1 of the Act, it is only necessary to show that the group suffers from social disadvantage **or** economic disadvantage. In my view, and again having reviewed the materials and evidence before me, it is clear that the group suffers from both.

The group is clearly marginalized and stereotyped. The group is given little status or social value, and is often seen as "lazy". This point was highlighted in a document entitled "OECD Economic Survey of Canada 2004: Employment Insurance", which was provided to me. Paragraphs 2 and 3 of that document state, in part:

> "...Nevertheless, the programme continues to contain some rules that discourage seasonal and intermittent workers in the high-unemployment areas from working more steadily through the year. ...
>
> ... This suggests that in some areas, high unemployment may to some extent be self-perpetuating and may need to be addressed via a combination of more vigourous case management and job activation measures ... and revised benefit rules that provide stronger incentives for job search and acceptance of work offers."

The writers of this report clearly suggest that seasonal workers are taking advantage of the system and not using sufficient efforts to find ongoing employment. Other materials provided by counsel have the same slant, including statements such as “Get off the Dole”, and that “EI has become a way of life” where people “may simply not think of themselves as available for work when they’re collecting EI”. This mentality highlights the social disadvantage faced by the group.

The economic disadvantage may be more tangible. As members of the group have lower education levels, they have less job opportunities available to them. As seasonal employees, they tend to work from job to job without the comfort and assurance of ongoing employment. While it may be true that no person’s job is totally secure, permanent employees tend not have the constant worry of ongoing employment. Further, the jobs that group members do obtain tend not to have the benefits associated with ongoing employment, and this again puts them at an economic disadvantage.

As already indicated, it is only necessary to show that either a condition of social disadvantage or economic disadvantage exists amongst the group. In my view, both exist, but as long as one exists, this criterion is satisfied. In my view, there is enough material and evidence to satisfy this part of section 1 of the Act.

Resulting From Poverty, Source of Income, Illiteracy, Level of Education, or Any Other Similar Circumstances

The social disadvantage or economic disadvantage need only result from one of the above factors.

In this case, the evidence did not indicate to me that the group or Mercer is in poverty. Rather, the group does have a low income level. Further, the evidence did not indicate that Mercer or the group as a whole suffers from illiteracy. However, the low education level and source of income were direct factors contributing to the group’s social disadvantage and economic disadvantage. The group, and Mercer in particular, have lower education levels, resulting in fewer job opportunities and lower incomes. This certainly results in an economic disadvantage. The group, and Mercer in particular, must often leave their home to find seasonal work and must supplement this with EI in off season. This results in the social disadvantage to which I have already referred.

In many respects, it is difficult in this case to separate out the social disadvantage from the economic disadvantage. They are closely tied. Further, there is a circular effect between the factors, such as level of education, and the resultant disadvantage created by these factors.

Based on all of the above, I am satisfied that Mercer is a member of a socially identifiable group that is protected by "social condition" as a prohibited ground of discrimination.

Before moving on, it is important that I comment on some other issues raised by counsel:

- Counsel for the WCB argued that it is questionable whether Parliament intended EI benefits to be an integral aspect of a person's income. Regardless of whether that was the intention of Parliament, persons such as Mercer certainly appear to qualify under the system. Further, I was provided with a great deal of material in regard to EI usage, and it is clear from those materials, including some from the Government of Canada, that federal officials are well aware of the concept of seasonal workers and their eligibility for EI.

- Counsel for the WCB brought to my attention the Quebec Guidelines on social condition as a reference point on when to accept complaints based on the prohibited ground of social condition. In part, those Guidelines state:

  > "... In general, before a complaint based on the attribution of social condition by reason of freelance, on-call or seasonal employment can be deemed receivable, two conditions will have to be present: 1) the employment status must refer to instability; and 2) the occupation held must refer to a low-income social condition. ... In other words, only instability together with low-income employment is apt to be considered the equivalent of a poor economic condition"

  Counsel argued that Mercer does not fit within those Guidelines. In particular, counsel argued that Mercer did not show instability coupled with low-income employment. With respect, the evidence showed seasonal employment to be unstable, and although Mercer

may make a decent wage during periods of employment, it is coupled with periods of unemployment, resulting in an overall low yearly wage.

- In coming to the conclusion that Mercer does fit within a socially identifiable group that is protected under social condition as a prohibited ground of discrimination, I am keenly aware that I am taking a broad perspective on the interpretation of "social condition" in the Act. In cases such as *Quebec (Commission des droits de la personne et des droits de la jeunesse)* v. *Boisbriand (City)*, [2000] S.C.J. No. 24 (QL) and *Gould* v. *Yukon Order of Pioneers*, [1996] 1 S.C.R., the Supreme Court of Canada has made it clear that human rights legislation is to be given a liberal and purposive interpretation, keeping in mind that one of the central purposes of such legislation is to advance human rights. One must also look at the words of each particular piece of legislation. In regard to the case at hand, the Legislative Assembly of the Northwest Territories chose to include "social condition" as a prohibited ground of discrimination. Further, in the "Report on Bill 1: Human Rights Act" prepared by the Standing Committee on Social Programs, it is clear that the Committee made a conscious decision that social condition should be included as a prohibited ground of discrimination. At page 9 of that report it states:

> "The Committee agrees that "social condition" is an imprecise term that will, over time, become unambiguous through interpretation by adjudicators and court. However, the uncertainty created by its inclusion is far outweighed by the potential that the ground of social condition had to advance equality rights in our territory. The Committee believes that other terms, such as "source of income" or "receipt of social assistance", do not sufficiently protect residents from discrimination that is based on the complex socio-economic factors encompassed by the term social condition."

In an article published in the Saskatchewan Law Review in 2006, Murray Wesson argued for a definition of "social condition" that refers to poverty or reliance on welfare for the basic necessities of life. Based on the definition of "social condition" in the Act alone, it is clear that the legislators intended to expand the term beyond this narrow and limiting concept.

- Another issue is whether a member of the group, such as Mercer, should be required to move in an attempt to improve their social condition. In my view, the answer is no. We all choose to live in places for a variety of reasons. In this case, Mercer's family and support network is in Newfoundland. He should not be required to sacrifice those benefits. Further, to require members of the group to move would further marginalize them by taking away their ability to choose where to live.

Did the WCB Discriminate Against Mercer with respect to services customarily available to the public?

Sections 1 and 11 of the Act state:

> "1. "discrimination" includes the conduct described in subsections 7(1) and (2), 8(1), 9(1), 10(1), 11(1), 12(1)and sections 13 and 14.
>
> 11. (1) No person shall, on the basis of a prohibited ground of discrimination and without a *bona fide* and reasonable justification,
>
> (1) deny to any individual or class of individuals any goods, services, accommodation or facilities that are customarily available to the public; or
>
> (2) discriminate against any individual or class of individuals with respect to any goods, services, accommodation or facilities that are customarily available to the public."

Having determined that Mercer is a member of a socially identifiable group that is protected by social condition as a prohibited ground of discrimination, I must then consider what "discrimination" means in the context of this case. Counsel agreed that "just cause" would not be raised as a defence in this case, and that an argument would not be made that WCB compensation is not a "service customarily available to the public". As such I will concern myself with section 11(b) of the Act in this analysis.

Prior to the case of *Law* v. *Canada (Minister of Employment and Immigration)* (1999), 170 D.L.R. (4^{th}) 1 (SCC), there was a generally accepted test for determining a prima facie case of discrimination. The case of *Moore* v. *British Columbia (Ministry of Education)*, [2005] B.C.H.R. T.D. No. 580 (QL) sets out that test, in which the complainant must prove, on a balance of probabilities, that:

i) there is a service or facility generally available to the public;

ii) he is a member of a disadvantaged group or groups protected from discrimination under the Code;

iii) he was denied the service, or was discriminated against with respect to it; and

iv) membership in the protected group was a factor in the denial or discrimination.

Then, the *Law* case called this analysis into question. The *Law* case was a section 15 Charter case, and the Supreme Court of Canada found that, as part of proving its prima facie case, the complainant must also show that there has been injury to his or her dignity. Neither counsel for the WCB or the Commission argued strenuously that the *Law* analysis should be applied to this case. In fact, counsel seem to agree that the applicability of the *Law* analysis in this case is debatable. I agree, and I find that the *Law* analysis is not applicable in this case for a number of reasons:

- After the *Law* case, the Supreme Court of Canada ruled on several other cases without referencing the *Law* analysis (i.e. *British Columbia (Superintendent of Motor Vehicles)* v. *British Columbia (Council of Human Rights)* (1999) 181 D.L.R. (4th) 385 (S.C.C.) and *British Columbia (Public Service Employee Relations Commission* v. *BCGSEU* (1999) 176 D.L.R. (4th) 1 S.C.C..

- Leave to appeal to Supreme Court of Canada was denied in the case of *Vancouver Rape Relief Society* v. *Nixon* (2005), 262, D.L.R. (4th) 360, and 2007 CanLII 2772 (S.C.C.), a case in which the *Law* analysis was applied. Unfortunately, this continues the ambiguity in this area of the law.

- Many tribunals and legal theorists have questioned the applicability of the *Law* analysis in the area of human rights. As already indicated, human rights legislation is to be given a broad and purposive interpretation. Anything that narrows the interpretation of human rights legislation, and imposes additional requirements on complainants, will serve to limit its effectiveness in protecting and preserving human rights. The *Law* analysis is inconsistent with the intentions of the Act.

For all of these reasons, I find that the *Law* analysis is not applicable to this case.

This takes us back to test set out in *Moore*, and whether Mercer and the Commission have established a prima facie case of discrimination:

There is a Facility or Service Generally Available to the Public

As already indicated, counsel have agreed that WCB compensation is a service generally available to the public.

The Complainant is a Member of a Disadvantaged Group or Groups Protected From Discrimination Under the Code

I have already determined that Mercer is a member of a disadvantaged group that is protected under the Act under social condition as a prohibited ground of discrimination.

The Complainant Was Denied the Service, or was Discriminated Against With Respect to It

Clearly, Mercer was not denied a service from WCB. He was, in fact, provided compensation. However, his EI benefits were not included in the calculation of his remuneration for the purposes of determining his compensation. The fact that Mercer was not denied services does not end the issue. The question then becomes whether or not he was discriminated against in the provision of those services.

In determining whether discrimination exists, it is helpful to look at the first part of the *Law* test. That is:

> "...First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?"
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> *Law* v. *Canada (Ministry of Employment and Immigration)* (1999), 170 D.L.R. (4th) 1 (SCC)

This is where it is important to determine what the comparator group should be in this case. Counsel for the Commission argues that the correct comparator group would be all workers who are not members of the Group to which Mercer belongs. In other words, they are workers who are not compelled due to the same reasons to

work far from their families for part of a year, and do not receive EI benefits. Counsel for the WCB argues that the correct comparator group would be all injured workers who received EI benefits in the year prior to their injury. Counsel for the WCB argues that if one looks at this comparator group, it is difficult to say that Mercer was discriminated against - all workers who were injured in the course of the same year were all treated the same. With respect, this is too narrow a view. In the case of *Auton (Guardian ad litem)* v. *British Columbia (Attorney General)* (2004), 245 D.L.R. (4th) 1 (SCC), Justice McLachlin stated:

> "... The comparators, as noted, must be like the claimants in all ways save for characteristics relating to the alleged ground of discrimination."

I have already stated that the Group Mercer belongs to is composed of seasonal workers who live in high areas of unemployment; are required to work away from home, and often outside their province; earn less than national and provincial average salaries; have lower education levels and fewer job opportunities; and rely on EI to supplement their income. Therefore, the correct comparator group, that is, the group that does not have these characteristics, would be those workers who are employed on a permanent basis within jurisdictions with higher employment levels; are better educated and earn a salary more in keeping with the average salary of Canadians or better; and have more job opportunities. They are, in fact, the typical worker. When one looks at this as being the correct comparator group, it is clear that Mercer has been subject to a policy that fails to take into account the Group's already disadvantaged position within Canadian society (part 1(b) of the Law test).

In the case of *Eldridge* v. *British Columbia (Attorney General)* , [1997] 3 S.C.R. 624, the Supreme Court of Canada clearly recognized that identical treatment of groups may result in inequality by a failure to recognize a group's already disadvantaged position within Canadian society. La Forest, J. stated:

> "... every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality ...
>
> ... the main consideration must be the impact of the law on the individual or group concerned..."

This adverse effect discrimination has long been recognized by the Supreme Court of Canada, starting with the case of *Ontario (Human Rights Commission)* v. *Simpson- Sears Ltd.* (1985), 23 D.L.R. (4th).

In this case, the WCB policy in question:

- fails to recognize that members of the Group, such as Mercer, are reliant on EI as part of their yearly income

- fails to recognize that there is already a maximum weekly ceiling on EI benefits, which already has a negative economic effect on members of the Group. The failure to take EI benefits into account when calculating WCB compensation results in further economic disadvantage.

- reinforces the stereotype that members of the Group receive EI by choice, and not by circumstance, which further lowers self-esteem and results in further social disadvantage.

As such, I find that Mercer was subjected to adverse effect discrimination through the application of the WCB policy.

Based on Membership in the Protected Group

It goes without saying that, based on the above analysis, the discrimination (or differential treatment) was based on membership in the protected group.

DECISION

Based on all of the above, I find that Mercer was discriminated against by the WCB in obtaining services that are customarily available to the public on the basis of his social condition and contrary to sections 5 and 11 of the Act.

REMEDY

Section 62(3) of the Act outlines the powers of an adjudicator where a complaint is found to have merit. Section 62(3) states, in part:

> 62. (3) If the adjudicator finds, under subsection (1), that a complaint has merit in whole or in part, the adjudicator
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> (11) may order a party against whom a finding was made to do one or more of the following:
>
> (1) to cease the contravention complained of,

(2) to refrain in the future from committing the same or any similar contravention,

(3) to make available to any party dealt with contrary to this Act the rights, opportunities or privileges that the person was denied contrary to this Act,

(4) to compensate any party dealt with contrary to this Act for all or any part of any wages or income lost or expenses incurred by reason of the contravention of this Act,

(5) to pay to any party dealt with contrary to this Act an amount that the adjudicator considers appropriate to compensate that party for injury to dignity, feelings, and self respect,

(6) to reinstate in employment any party dealt with contrary to this Act,

(7) where the adjudicator finds that the party acted wilfully or maliciously, or has repeatedly contravened this Act, to pay to any party dealt with contrary to this Act an amount not exceeding $10,000.00 as exemplary or punitive damages,

(8) to take any other action that the adjudicator considers proper to place any party dealt with contrary to this Act in the position the person would have been in but for the contravention of this Act; and

(12) may make a declaratory order that the conduct complained of, or similar conduct, is discrimination contrary to this Act."

First, I make a declaratory order that the conduct complained of is discriminatory under the Act.

Second, I am making an order that the WCB refrain from committing the same contravention in the future, and take all necessary steps to amend its policies to avoid the discriminatory effect of the current policy.

Third, I order that the WCB take steps to put Mercer in the position he would have been in but for the contravention of the Act. That is, I order that the WCB pay Mercer an amount that equals the difference between what he received as compensation and what he would have received if EI had been included in his "remuneration" for the purposes of determining his compensation.

Dated this _____ day of August, 2007.

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Shannon R. W. Gullberg
Human Rights Adjudication Panel Member