

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***HMTQ v. Hutchinson et al,***
2005 BCSC 1421

Date: 20051012
Docket: L041823
Registry: Vancouver

Between:

Her Majesty the Queen

Petitioner

And

**Cheryl Hutchinson, Phillip Hutchinson and
British Columbia Human Rights Tribunal**

Respondents

Before: The Honourable Mr. Justice Cullen

Reasons for Judgment

Counsel for the petitioner

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Rights Tribunal

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Date and Place of Hearing:

January 31,
February 1-2, 2005

Vancouver, B.C.

INTRODUCTION

[1] The fundamental question raised by this judicial review is whether proscriptions contained in sections 8 and 13 of the *Human Rights Code*, R.S.B.C. 1996, c. 210 (the “**Code**”) against discrimination based on physical disability and family status justify a finding that the effect of a particular governmental policy limiting the scope of public funding for health services is discriminatory and, in the circumstances, justifies an award of compensation against the government.

[2] The petitioner, Her Majesty the Queen in Right of B.C., seeks a judicial review of the decision of a member of the Human Rights Tribunal, rendered June 28, 2004 in connection with the complaints of the respondents, Cheryl Hutchinson and her father Phillip Hutchinson, arising out of Ms. Hutchinson’s participation “in a program created in the mid 1990’s by the Ministry of Health (“the Ministry”) called Choices in Support for Independent Living (“CSIL”).” In her decision, the Tribunal Member found the Ministry’s adherence to a policy limiting the scope of funding through the CSIL program discriminated against both respondents, and in the result she made certain orders under s. 37 of the **Code** including, among others, an order that the Ministry cease and desist the discrimination against the respondents, an order that it modify its policy to create exceptions to the scope of public funding and an order to pay compensation to both respondents.

[3] It is the position of the petitioner that the Tribunal Member erred in finding discrimination against the respondents and erred or lacked jurisdiction to make the orders of compensation against the Ministry even if she did not err in finding

discrimination. It is the position of the respondents Cheryl and Phillip Hutchinson that the Tribunal Member neither erred in finding discrimination nor in awarding compensation and did not lack jurisdiction to award compensation against the Ministry.

[4] It was the position of the Tribunal, which limited its submission to the question of its jurisdiction, in the circumstances, to award compensation against the Ministry, that it did not lack jurisdiction to do so.

BACKGROUND

[5] Ms. Hutchinson is a 35 year old woman with physical disabilities. She was born with cerebral palsy, experiencing significant limitations in her childhood and quadriplegia by the time she was an adult. She is, and at all times material to this review, has been considered by the Ministry to be in the category of those with the most severe physical disabilities. She requires significant personal care including bathing, dressing, toileting, transfers, mobility and meal preparation.

[6] When Ms. Hutchinson was 13 years old, in 1983, her mother left the family home. Since then her father, Mr. Hutchinson, has been her primary caregiver foregoing other forms of employment to be so, leaving social assistance as his only source of income.

[7] Despite her obvious limitations, Ms. Hutchinson has, with the contribution of Mr. Hutchinson's care and support, graduated from both high school and university and has become a composer.

[8] The petitioner, through the Ministry, provides continuing care services (formerly known as long term care) to physically disabled British Columbians pursuant to the provisions of the **Continuing Care Act**, R.S.B.C. 1996, c. 70 (“the **Act**”) and the continuing care programs regulation, B.C. Reg. 146/95 (the “**Regulations**”). Under the umbrella of the **Act** and **Regulations**, the Ministry provides residential care services; home support services; adult day services; meal programs; case management services; respite services; short stay assessment and treatment centers; home care nursing and community rehabilitation services.

[9] Since 1997 the Ministry has delegated its continuing care responsibilities under the **Act** and **Regulations** to regional health authorities created pursuant to the **Health Authorities Act**, R.S.B.C. 1996, c. 180. The relevant local authority for Ms. Hutchinson’s continuing care needs is the Vancouver Richmond Health Board (“VRHB”).

[10] The CSIL program was developed in the mid 1990’s as a method of providing continuing care to selected participants in response to an identified demand. Essentially the CSIL program was designed to give a measure of choice and control to people with severe disabilities over the hiring, training, paying and management of their caregivers. All participants selected for the program were severely disabled, but assessed as having the ability to direct their own care. They are paid directly to be able to hire and pay the caregivers of their choice.

[11] There was evidence before the Tribunal Member that the CSIL had a salutary effect on the well being of its participants.

[12] Because the participants were limited to those with severe disabilities who also possess the ability to administer the responsibilities under the program, there are less than 500 people who have been accepted into CSIL.

[13] Ms. Hutchinson applied to participate in the program and, after an assessment, was accepted in 1998. There was evidence before the Tribunal that an underlying precept of the continuing care programs, expressed in policy and otherwise, was to provide assistance to disabled persons to supplement what they could do for themselves or with the help of family, friends or the community.

[14] The policy in question in this case was issued in 1983. It is contained in the Ministry's service provider's handbook: Continuing Care Division Long Term Care Program, in Chapter 8 (Financial Management) Section H (Payment to Families). It reads as follows:

The Continuing Care Program does not provide financial remedies to family members to care for relatives either through direct payment to the individual, payment through a homemaker agency, or payment as an approved service provider (e.g. family care home or licensed facility).

[15] That policy is echoed in the agreements which each CSIL participant including Ms. Hutchinson is required to enter into. It states that the "Ministry of Health does not permit the person hired to be a relative of the client."

[16] The rationale underlying the policy is expressed by the case manager's handbook for long term care programs as follows:

The philosophy of the program emphasized the role of the family and the community by involving the family wherever possible and by

providing services under the program only to the extent that the individual and family were unable to cope within their own resources.

[17] The handbook also notes:

The underlying principle of the program is the belief that individuals are responsible and wish to care for themselves and their families for as long as they are able to do so. The program is therefore supportive in nature and provides service only to the extent that personal and family resources are unable to meet health care needs.

[18] In another manual, the Continuing Care Policy Manual, the underlying concept is expressed thus:

Continuing care services are designed to supplement rather than replace the efforts of individuals to care for themselves with the assistance of family and friends. Thus individuals and their families are expected to do as much as they can for a family member without government assistance.

[19] The CSIL program itself is described in the VRHB case manager's program in the following way:

Although most clients will choose to continue with the traditional method of home support, some clients and their caregivers may wish more choice and control in their lives. The CSIL program, using direct funding for the purchase of home support services, offers eligible clients this greater degree of autonomy.

[20] The CSIL program was regarded by the Ministry as cost neutral in the sense that it cost no more to fund the participant than if the services of home care support agencies were used to provide the same care. There was evidence that the average amount of funding of participants in CSIL was \$4,200 per month.

[21] When Ms. Hutchinson was assessed for suitability for CSIL and to determine the level of support she required, it was her plan and expectation to move out of her father's home and to live independently. She was assessed as requiring sufficient

funding to hire caregivers for 248 hours per month, which amounted to \$6,000 per month. The assessment established that she required the presence of caregivers 24 hours per day, 8 hours of which was to be paid for.

[22] As it turned out, Ms. Hutchinson was involved in a motor vehicle accident and her condition subsequently deteriorated so that she did not move out from her father's home.

[23] Ms. Hutchinson hired a number of caregivers under the CSIL program, but for one reason or another they were not suitable, or in the case of one caregiver, who was suitable, became unavailable. As a result, Mr. Hutchinson continued to be Ms. Hutchinson's primary caregiver throughout her involvement in the CSIL program. Although she remained entitled to the \$6,000 per month to pay for her caregivers, she was unable to use the funds to pay her father for his efforts because of the proscription in the policy and in the CSIL agreement to which she was a party.

[24] Ms. Hutchinson sought an exemption from the policy so that she could use the CSIL funding to pay her father as her primary caregiver on the footing that she considered him the most appropriate in the circumstances. The Ministry declined her request, and in the result, she and Mr. Hutchinson each filed Human Rights complaints alleging that the Ministry policy prohibiting the hiring of family members is discriminatory.

[25] Ms. Hutchinson's and Mr. Hutchinson's complaints came on for hearing before the Tribunal on 18 days between July 3, 2001 and February 28, 2004. As well as the petitioner and respondents, the Deputy Chief Commissioner ("DCC") of

the Human Rights Commission was involved in the hearing and supported the position of the respondents (complainants). The office of the DCC was eliminated on March 31, 2003 pursuant to the *Human Rights Amendment Act*, 2002 S.B.C. 2004, c. 62.

[26] The relevant provisions of the *Human Rights Code* under which the respondents alleged the petitioner's conduct to be discriminatory are sections 8 and 13. The provision governing remedies is s. 37. Section 8 reads as follows:

8 (1) A person must not, without a bona fide and reasonable justification,

(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 regarding any accommodation, service or facility customarily available to the public

because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex or sexual orientation of that person or class of persons.

(2) A person does not contravene this section by discriminating

(a) on the basis of sex, if the discrimination relates to the maintenance of public decency or to the determination of premiums or benefits under contracts of life or health insurance, or

(b) on the basis of physical or mental disability, if the discrimination relates to the determination of premiums or benefits under contracts of life or health insurance.

[27] Section 13 reads as follows:

13 (1) A person must not

(a) refuse to employ or refuse to continue to employ a person, or

(b) discriminate against a person regarding employment or any term or condition of employment

because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

(2) An employment agency must not refuse to refer a person for employment for any reason mentioned in subsection (1).

(3) Subsection (1) does not apply

(a) as it relates to age, to a bona fide scheme based on seniority, or

(b) as it relates to marital status, physical or mental disability, sex or age, to the operation of a bona fide retirement, superannuation or pension plan or to a bona fide group or employee insurance plan.

(4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

[28] Section 37 reads as follows:

37 (1) If the member or panel designated to hear a complaint determines that the complaint is not justified, the member or panel must dismiss the complaint.

(2) If the member or panel determines that the complaint is justified, the member or panel

(a) must order the person that contravened this Code to cease the contravention and to refrain from committing the same or a similar contravention,

(b) may make a declaratory order that the conduct complained of, or similar conduct, is discrimination contrary to this Code,

(c) may order the person that contravened this Code to do one or both of the following:

(i) take steps, specified in the order, to ameliorate the effects of the discriminatory practice;

(ii) adopt and implement an employment equity program or other special program to ameliorate the conditions of disadvantaged individuals or groups if the evidence at the hearing indicates the

person has engaged in a pattern or practice that contravenes this Code, and

(d) if the person discriminated against is a party to the complaint, or is an identifiable member of a group or class on behalf of which a complaint is filed, may order the person that contravened this Code to do one or more of the following:

(i) make available to the person discriminated against the right, opportunity or privilege that, in the opinion of the member or panel, the person was denied contrary to this Code;

(ii) compensate the person discriminated against for all, or a part the member or panel determines, of any wages or salary lost, or expenses incurred, by the contravention;

(iii) pay to the person discriminated against an amount that the member or panel considers appropriate to compensate that person for injury to dignity, feelings and self respect or to any of them.

(3) An order made under subsection (2) may require the person against whom the order is made to provide any person designated in the order with information respecting the implementation of the order.

(4) The member or panel may award costs

(a) against a party to a complaint who has engaged in improper conduct during the course of the complaint, and

(b) without limiting paragraph (a), against a party who contravenes a rule under section 27.3 (2) or an order under section 27.3 (3).

(5) A decision or order of a member or panel is a decision or order of the Tribunal for the purposes of this Code.

(6) The member or panel must inform the parties and any intervenor in writing of the decision made under this section and give reasons for the decision.

[29] The Tribunal Member identified the issues before her as follows:

1. Does the blanket prohibition against the hiring of family members under CSIL which prohibited Cheryl Hutchinson from hiring her father as her caregiver discriminate against her on the basis of her family status and/or disability contrary to s. 8 of the **Code**?

2. Does the blanket prohibition against the hiring of family members under CSIL which prohibits Phillip Hutchinson from being hired as a caregiver for his daughter discriminate against him on the basis of his family status contrary to s. 13 of the **Code**?
3. If a *prima facie* case of discrimination is found, is the blanket prohibition against the hiring of family members justified?
4. If discrimination is found, what is the appropriate remedy?

[30] The Tribunal Member noted that under the **Code** the “initial burden” of proof was on the complainants to establish a *prima facie* case of discrimination, at which point the onus fell on the respondent Ministry to establish a defence to the *prima facie* case. The overall burden on the complainants was to establish the case for discrimination on a balance of probabilities.

[31] Before the Tribunal, the parties disagreed on what “the appropriate analysis of a *prima facie* case” entailed. The complainants and the DCC argued that to meet the initial burden, the complainants need only show adverse treatment based on a prohibited ground of discrimination under the **Code** relying on **Ontario HRC and O’Malley v. Simpson Sears Ltd.**, [1985] 2 S.C.R. 536. The Ministry argued that the analysis required was that established by jurisprudence flowing from alleged breaches of s. 15 of the **Canadian Charter of Rights and Freedoms** involving an assessment whether “the different treatment experienced impacted on their dignity” relying on **Law v. Canada (Minister of Employment and Immigration)**, [1999] 1 S.C.R. 497 [**Law**]; **Vancouver Rape Relief Society v. Nixon et al**, 2003 BCSC 1936 [**Nixon**] and **British Columbia Ministry and Service Employees Union v. British Columbia (Public Service Employee Relations Commission)**, 2002 BCCA 476 [**Reaney**].

[32] After analyzing the separate lines of authority relied on by the parties, the Tribunal Member concluded that establishing a *prima facie* case of discrimination under the **Code** is not affected by the Supreme Court of Canada's decision in **Law** nor the British Columbia Supreme Court's decision in **Nixon**.

[33] Her conclusions are set out in paragraphs 87 and 88 of her Reasons as follows:

I conclude that neither the Supreme Court of Canada's decision in **Law**, nor the B.C. Supreme Court's decision in **Nixon**, has altered the elements of a *prima facie* case which a complainant must establish under the *Code*. In most human rights cases, it will be evident when adverse treatment constitutes discrimination and it will be unnecessary to engage in a full analysis under the **Law** framework. That is, once the complainant demonstrates that he or she has been adversely treated based on a prohibited ground of discrimination under the *Code*, the onus will shift to the Respondent to justify its conduct. Where a purposive approach to the discrimination analysis is taken, a more searching dignity analysis like the one encompassed in the *Law* analytical framework is not necessary, the dignity impact will be implicit, and a finding of discrimination would only be confirmed by such an analysis. In the rare case, where the discriminatory nature of the impugned conduct is in question, the Tribunal may engage in the analysis set out in **Law**, utilizing the principles and contextual factors set out therein, in considering the impact on the complainant's dignity.

My conclusion with respect to what constitutes an appropriate *prima facie* analysis in the human rights context is strengthened by the recent B.C. Court of Appeal decision, *Health Sciences Association v. Campbell River and North Island Transition Society*, 2004 BCCA 260, which was released on May 10, 2004, in which the Court addressed the issue of family status under the *Code* and set out the *prima facie* case analysis with no reference to the **Law** analytical framework.

[34] The Tribunal Member went on to consider whether the policy discriminated against Ms. Hutchinson on the basis of her family status and/or disability contrary to s. 8, noting that she alleged the severity of her disability compounded the

discriminatory effect of being unable to hire her father as the caregiver of her choice and the most appropriate simply because he is her father.

[35] In her analysis, the Tribunal Member concluded that “CSIL provides health care support services that are customarily available to the public” and that conferring benefits in a discriminatory manner would infringe the **Code**. The Tribunal Member accepted that it was necessary for Ms. Hutchinson to establish a *prima facie* case of discrimination to “identify a suitable comparator group in relation to which the treatment she received was adverse”.

[36] It was the Ministry’s contention that the appropriate comparator group was either all disabled people or all clients of CSIL and in comparison to the former, Ms. Hutchinson is advantaged because of her acceptance into CSIL; and in comparison to the latter, she is treated the same, as they too are unable to hire relatives as caregivers.

[37] It was the petitioner’s contention that the appropriate comparator group is either able bodied individuals or CSIL members who can hire the caregiver of their own choice, and that she has adversely treated in relation to each of those groups.

[38] In her analysis, the Tribunal Member found the appropriate comparator group to be “CSIL clients who are not restricted by the blanket prohibition either because they do not wish to or need to hire a family member as a caregiver.” The Tribunal Member reasoned that as Ms. Hutchinson is at the highest level of care need, her choice of caregiver would likely be more crucial than those requiring “less care and care of a less intimate nature.”

[39] In turning to the question whether the prohibition against hiring family members had a discriminatory effect on Ms. Hutchinson because of her disability, the Tribunal Member considered the severity of her disability and the degree of care it required to be significant factors. She concluded, given the intimate care required for Ms. Hutchinson a proscription against hiring her father as her choice of caregiver could have an effect on her dignity and privacy greater than on people suffering from less disability. Accordingly, the Tribunal Member found that Ms. Hutchinson established a *prima facie* case of discrimination based on disability.

[40] On the basis of family status, the Tribunal Member considered the fact that Ms. Hutchinson has only received care from her father since she was 13 years old, made repeated but unsuccessful attempts to find an alternate appropriate care giver and has, accordingly, relied on her father “almost exclusively” for her care although being unable to hire him. In context, the Tribunal Member found Ms. Hutchinson to be left in a “vulnerable and unstable situation” because of the prohibition based on her family status, and accordingly found that she established a *prima facie* case of discrimination on that ground as well.

[41] In relation to Mr. Hutchinson, the Tribunal Member found that the opportunity to be hired under CSIL constitutes employment within the meaning of the **Code** and the absence of a direct employer/employee relationship did not preclude its application. She went on to find that Mr. Hutchinson’s ineligibility for employment as his daughter’s caregiver was determined solely on his family status, without regard for his personal attributes and skills and that accordingly, the *prima facie* case of discrimination was made out.

[42] Both in the case of Ms. Hutchinson and Mr. Hutchinson, the Tribunal Member found that the onus shifted to the Ministry to justify its blanket rule against hiring family members under CSIL; to establish it as a “*bona fide* occupational requirement”.

[43] Despite her finding that **Law** did not alter the test for finding discrimination under the **Code**, the Tribunal Member went on to consider whether the complainants established a *prima facie* case for discrimination in light of the “**Law** analytical framework” with emphasis on the issue whether in context Ms. Hutchinson and Mr. Hutchinson’s dignity was demeaned by the differential treatment.

[44] She noted that, relying on **Law**, the applicable test was a subjective/objective one involving the point of the view of “the reasonable person in circumstances similar to those of the complainant who is informed of and rationally takes into account the various contextual factors relevant to the claim.”

[45] The Tribunal Member noted that in **Law**, the court contemplated claims both where the discrimination would be obvious and where a more refined analysis was necessary to determine whether distinct treatment constituted discrimination by infringing an individual dignity.

[46] In the case of Ms. Hutchinson, the Tribunal Member, after applying the objective/subjective test established in **Law**, concluded that Ms. Hutchinson’s evidence established a *prima facie* case of discrimination. Her conclusions are set out in her reasons at paragraph 139 – 141 as follows:

In the circumstances of this case, I take notice of Ms. Hutchinson's pre-existing disadvantage. She is severely disabled and a member of a group that has historically experienced disadvantage in society (*Eldridge, Auton, and Eaton*). I have found that her choice and autonomy is limited by the Ministry's policy which prohibits her from hiring her father as her caregiver. I have found that this limitation is crucial to Ms. Hutchinson and is not merely an inconsequential preference. I find that the Ministry's policy which provides for a blanket prohibition against the hiring of all family members by a disabled person in Ms. Hutchinson's situation clearly impacts her dignity viewed from the appropriate subjective-objective perspective.

My conclusion is strengthened when the other contextual factors outlined in **Law** are examined. Ms. Hutchinson belongs to a group, the disabled, who have been subject to pre-existing disadvantage, stereotyping and prejudice. Although CSIL has gone some considerable way to afford more choice and autonomy to this group, the blanket prohibition on the hiring of family members does not appear to take into consideration the vulnerability of a subset of this group, being those with the highest care needs. Therefore, although it is the intent of CSIL to have an ameliorative effect for the disabled community, the prohibition fails to take into account the particular needs and circumstances of those like Ms. Hutchinson whose most appropriate caregiver may in fact be a family member. In this case, the nature and scope of the interest affected is one that is paramount to Ms. Hutchinson's physical, emotional, and psychological well being. The blanket prohibition restricts choice and autonomy, without consideration of the individuals' circumstances.

In my view, it is clear that the reasonable person in circumstances similar to those of Ms. Hutchinson, who is informed of, and rationally takes into account, the various contextual factors, including that one of the purposes of CSIL is to facilitate greater autonomy and choice for its clients while adhering to the Ministry's philosophy that family members have the primary responsibility to care for one another, and cognisant of the Ministry's concern with costs, would experience a violation of her dignity when the blanket prohibition against the hiring of family members is applied to her without consideration of her particular circumstances.

[47] The Tribunal Member following Mr. Hutchinson's evidence similarly established a *prima facie* case of discrimination applying the test established in **Law** despite the fact he was not a member of a group with a pre-existing disadvantage.

[48] The Tribunal Member's reasoning leading to that finding is set out in paragraphs 143 – 147 of her decision as follows:

It is clear from the reasoning in *B* that it is sufficient for Mr. Hutchinson to make out a *prima facie* discrimination if he establishes that he was denied an employment opportunity solely on the basis that he is Ms. Hutchinson's father.

When the contextual factors set out in *Law* are examined, in the context of Mr. Hutchinson's case, it only strengthens the conclusion that his dignity has been impacted. There is no evidence before me which suggests that Mr. Hutchinson's family status in relation to Ms. Hutchinson compromises his ability to be an effective caregiver to his daughter. In fact, the reverse is suggested. Although it may be that a significant cost concern would arise if all family members were to be paid for all the services they currently provide for their disabled family members, that is not the issue before me. In Mr. Hutchinson's case, the cost to the Ministry would be the same if Ms. Hutchinson uses the funds she receives from CSIL to pay her father, or if she uses it to pay a non-family member to care for her.

In this case, Mr. Hutchinson is being denied an employment opportunity simply on the basis of this family status. His ability to do the job, and the fact that he has performed the job in question for many years are not even considered. He is being prohibited from being hired by his daughter under CSIL simply because he is her father. Further, when it is considered that the ameliorative purposes of CSIL include the assisting of families to care for each other, and the increase of choice for the disabled, it is clear that the blanket prohibition against the hiring of family members does not further these purposes.

Finally, the nature of the interest affected by this prohibition in Mr. Hutchinson's case is significant. Mr. Hutchinson is being denied an employment opportunity that is of great personal significance to him. It is the one position that he wishes to perform and that he is uniquely qualified for. He was forced to leave the work force many years ago because he is a single parent who had the primary responsibility of looking after his disabled daughter since she was 13 years old. His skills, experience and ability to do the job are never considered. He is excluded by the Ministry's policy from obtaining the position as his daughter's caregiver under CSIL simply because he is a family member.

In my view, it is clear that the reasonable person, in circumstances similar to those of Mr. Hutchinson, who is informed of and rationally

takes into account the various contextual factors relevant to the complaint, including that the purposes of the CSIL program include the assistance of families to care for each other, and to facilitate greater autonomy and choice for its clients while adhering to the Ministry's philosophy that family members have the primary responsibility to care for one another, and cognisant of the Ministry's concern with costs, would experience a violation of his dignity when the blanket prohibition against the hiring of family members is applied to his situation without consideration of his particular circumstances.

[49] Before the Tribunal Member, the Ministry argued justification for the discrimination on the basis that:

1. the CSIL program and its underlying policy do not allow for exceptions;
and
2. the cost of accommodating persons with the characteristics of the Hutchinsons would amount to undue hardship.

[50] The Tribunal Member rejected the justifications advanced by the Ministry finding that the purpose of the policy is "cost containment" and that it would not create undue hardship to tailor exceptions in appropriate cases. The Tribunal Member noted that the Ministry had in fact made exceptions to its policy in certain cases and that other jurisdictions have successfully designed assessments for individual cases allowing for accommodation. The Tribunal Member considered there were options open to the Ministry short of a blanket prohibition which would reasonably allow exceptions and that although the Ministry has made some exceptions, it has made no attempt to "formalize criteria for such exceptions". She found that the Ministry could tailor a rule on a case by case basis for allowing exceptions.

[51] Insofar as costs were concerned, the Tribunal Member did not find on the evidence before her that the Ministry would incur costs resulting in undue hardship by accommodating individuals such as the Hutchinsons.

[52] Accordingly, the Tribunal Member found that Ms. Hutchinson and Mr. Hutchinson each made out their case of discrimination to the extent required to justify a remedy.

REMEDY

[53] Cheryl Hutchinson sought a remedy incorporating two orders:

1. An order that the Ministry's policy expressly allow for exceptions on a case-by-case basis; and
2. An award of \$10,000 for injury to her dignity, feelings and self-respect.

[54] Phillip Hutchinson sought a remedy incorporating four orders:

1. A wage loss award of \$167,864;
2. An award of \$6,000 for injury to his dignity, feelings and self respect;
3. An order that the Ministry's policy expressly allow for exceptions on a case-by-case basis; and
4. The remedy claimed by the DCC.

[55] The DCC sought a remedy incorporating five orders:

1. A cease and desist order under s. 37(1)(a) of the **Code**;
2. The remedy requested by the Complainants, including an order that the Ministry's policy expressly allow for exceptions on a case-by-case basis;
3. With respect to the long term, an order that:
 - a. Within three months of the issuance of the Tribunal's decision, the Ministry, in consultation with the DCC, revise its policy to make provision for care to be provided by relatives;
 - b. In revising the policy, the Ministry will have regard to any operational and implementation concerns raised by regional and local health service providers and shall ensure that funds and training necessary to implement the new policy are available to those service providers; and
 - c. Within six months of the issuance of the Tribunal's decision, the Ministry will implement the policy and ensure that all necessary training and funding to regional and local health service providers has been put in place.
4. Pursuant to s. 37(3), the Tribunal require the Ministry to provide, on or before the end of the fourth month following the Order of the Tribunal, and at three month intervals thereafter, a report summarizing the steps that the Ministry has taken in order to comply with the Tribunal's Order,

until such time as the discrimination identified in the Tribunal's decision has been eliminated; and

5. That the Tribunal retain jurisdiction to hear argument and, if necessary, evidence on the issue of remedy in the event that no agreement has been reached by a date four months from the date of the decision. Further, if agreement is not reached, either the DCC or the Ministry be at liberty to apply to the Tribunal, or on before that date, to seek an appropriate order under s. 37(2)(c).

[56] The Ministry took the position before the Tribunal Member that the Tribunal's jurisdiction to grant the remedy sought was limited. The Ministry relied on the general proposition that the role of tribunals and courts is limited in relation to the role of government. The Ministry argued that the Tribunal did not have "free reign to set standards in health policy, nor to decide which policies might be the most desirable in ameliorating the condition of those with disabilities, as the Tribunal does not have the particular expertise in health policy." The position of the Ministry was, in effect, that in dealing with remedies, the Tribunal should leave it to government to choose between various policy options to rectify the effect of any policy found to be discriminatory in relation to the Hutchinsons.

[57] In her decision, the Tribunal Member concluded that it was not the role of the Tribunal to establish public policy and accordingly, after ordering the Ministry to refrain from discriminating against the petitioners under s.37(2)(a), she ordered under s. 37(2)(c) that the Ministry "allow for exceptions to its policy 8.H as it applies

to CSIL and to develop a set of criteria within nine months of the date of the decision to allow for the hire of family members on a case-by-case basis under CSIL. Such criteria must be made known to the users and potential users of CSIL.”

[58] The Tribunal Member further ordered that the Ministry “allow Mr. Hutchinson the opportunity to be hired as his daughter’s caregiver as of the date of (the) decision ... and ... (when) the Ministry develops criteria in relation to exceptions to policy 8.H as it applies to CSIL, and those criteria (become) generally applicable, those criteria may be applied at that time to the continued employment of Mr. Hutchinson under CSIL.”

[59] Before the Tribunal, the Ministry also took the position that the Tribunal had no jurisdiction to award monetary compensation for what was characterized as past wage loss for Mr. Hutchinson. Following submissions, counsel for the Ministry provided a copy of *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30 [*Communauté urbaine de Montréal*] in support of its position.

[60] The Tribunal Member found the *Communauté urbaine de Montréal* decision to be “fact specific” and “restricted to the Human Rights process that exists in Quebec.” In particular, the Tribunal Member distinguished that decision on the basis that, firstly, it involved the striking down of legislation as constitutionally invalid. The Tribunal Member referred to the court’s statement in *Communauté urbaine de Montréal* at paragraph 19 as follows:

According to a general rule of public law, absent conduct that is clearly wrong, in bad faith, or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional.

[61] Secondly, the Tribunal Member distinguished ***Communaute urbaine de Montreal*** on the basis that in Quebec a determination of “the appropriate remedy pursuant to the Quebec ***Charter*** involved an examination of the interplay between the Quebec civil law, common law, and public law principles”, not applicable under the ***Code*** in British Columbia.

[62] Thirdly, the Tribunal Member noted that in British Columbia the ***Code*** provides the only redress for human rights complaints and it “contains a clear remedial provision which does not make a distinction between government and non-government respondents” and indeed in the past “the Tribunal has awarded damages for monetary compensation and in respect of injury to dignity against government respondents in many cases”.

[63] The Tribunal Member referenced with agreement, a decision of the Tribunal in ***Bolster v. B.C. (Minister of Public Safety and Solicitor General)*** 2004 BCHRT 32 in which it was said:

It would require clear language in the statute to support the conclusion that the Tribunal was prohibited from awarding monetary damages against government respondents.

[64] She noted that there was no such language in the ***Code***. In the result, the Tribunal Member awarded \$8,500 to Ms. Hutchinson to compensate her for injury to her dignity, feelings and self-respect; \$4,000 to Mr. Hutchinson for injury to his

dignity, feelings and self respect; \$105,840 to Mr. Hutchinson to compensate him for his lost wages and interest at the prime rate as set out in the ***Court Order Interest Act*** on that \$105,840.

[65] The Tribunal Member's reasoning in awarding Mr. Hutchinson \$105,840 as compensation for lost wages was set out in paragraphs 260 – 265 of her decision as follows:

Mr. Hutchinson is seeking approximately \$167,864 in lost wages as compensation for the moneys he would have been paid if he were allowed to be hired as his daughter's caregiver under CSIL from May 1998 to June 30, 2001.

Mr. Hutchinson was prohibited by the Ministry's policy from being hired as his daughter's caregiver under CSIL, but he did provide her with the care necessary during the relevant period. The CSIL funds received by Ms. Hutchinson for this period were returned, except for a few hours of respite care.

A complainant in a human rights complaint has the duty to mitigate his losses. The evidence presented by Mr. Hutchinson is, in effect, that he could not seek outside employment as his daughter required his full-time attention. Accordingly, he did not seek other employment but survived on social assistance. It is also noteworthy that at the time of the hearing Mr. Hutchinson was 71 years old with some history of back problems. From 1998 to 2001, the period during which he is required to mitigate the loss claimed, he would have been over 65 years old and suffering from some medical problems. These factors, although not attributable to the Ministry's policy, would have limited Mr. Hutchinson's ability to mitigate the losses being claimed. Given his situation, it is likely, had he engaged in a job search during the relevant period that he would not have been successful. I am satisfied that it was reasonable for Mr. Hutchinson, in the circumstances, not to pursue outside work during the relevant period.

There are other factors which may reduce the losses which Mr. Hutchinson can be awarded. First, as he was never actually employed as his daughter's caregiver, he did not lose his employment but lost the opportunity to be employed in this capacity. In cases where there has been a lost opportunity as opposed to actual lost employment, the Tribunal has examined the circumstances of each case to determine

what, if any, discount should be afforded in the situation: **Hussey** and **Bolster**. In the case of the Hutchinsons, the evidence supports that but for the Ministry's blanket policy, Ms. Hutchinson would have hired her father. Further, Mr. Hutchinson was in fact his daughter's primary, and often, sole caregiver, for the period for which he is claiming compensation. Accordingly, I find that there should be a relatively small discount in these circumstances as there was little chance that Mr. Hutchinson would not have been hired as his daughter's caregiver under CSIL, but for the Ministry's policy.

Second, if Mr. Hutchinson were hired under CSIL as his daughter's caregiver, I must consider what portion of the care he provided to her would be compensated. That is, what portion of care would it be reasonable for him to provide without compensation in these circumstances. It is unlikely that he would have been paid for all the care he provided, as care that can reasonably be provided by a family member is taken into consideration during the assessment phase. Accordingly, Mr. Hutchinson would be required to provide some amount of care to his daughter free of charge. Although it would be unreasonable for Mr. Hutchinson to be expected to provide 24 hour care to his daughter for free, it would be equally unreasonable for him to expect to be paid for all the care he provided.

In all the circumstances, I find that Mr. Hutchinson is entitled to be compensated for part of the wages he lost as a result of the lost opportunity to be hired as his daughter's caregiver under CSIL. I find that \$105,840 is an appropriate award for lost wages in this case. I arrived at this award after the following calculation. From the approximately \$168,000 claimed, I have discounted the amount claimed by 10% to reflect the fact that this was in fact a lost opportunity, not the loss of an actual position, and, a further 30% for the care that he would have provided for free.

[66] The petitioner's position on this application for review was that the Tribunal Member erred in finding discrimination, and, in the alternative, erred or acted without jurisdiction in granting the remedy for monetary compensation or in the further alternative erred in determining the amount. The petitioner did not take any issue with the Tribunal's determination that no justification was established for the discrimination, but limited its attack to the finding of *prima facie* discrimination.

[67] A preliminary issue joined by the parties was what standard of review governs my consideration of this petition. The petitioner contended that the ***Administrative Tribunals Act***, S.B.C. 2004, c. 45 (“ATA”) which came into force on October 15, 2004 applies. It was the petitioner’s position that s. 59 of the Act applied with respect to decisions of the Tribunal. Section 59 reads as follows:

59 (1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.

(2) A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise unreasonable.

(3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.

(4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion

- (a) is exercised arbitrarily or in bad faith,
- (b) is exercised for an improper purpose,
- (c) is based entirely or predominantly on irrelevant factors, or
- (d) fails to take statutory requirements into account.

(5) Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.

[68] It is the petitioner’s submission that as to the principle questions on this review:

1. whether the Tribunal member erred in law in finding discrimination; and
2. whether the Tribunal member erred in law or exceeded her jurisdiction in not finding the principles of Crown immunity

prevented her from ordering a compensatory award against government where issues of law or at most some sub-issues of mixed law and fact and therefore the standard to be applied is correctness.

[69] In its argument, counsel for the Tribunal argued that s. 59 of the ATA does not apply to all Tribunal decisions rendered before October 15, 2004.

[70] It was the Tribunal's position that s. 59 "may be applied to such decisions to the extent that it merely reflects the common law standard of review when the decision was made and the right to judicial review arose", but that otherwise the common law applied. In the Tribunal's submission, questions of law involving a correctness standard of review are the same at common law or under the ATA as are questions of fact involving a standard review of patent unreasonableness, but that questions of mixed law and fact may be different as at common law the standard of reasonableness simpliciter applies whereas under the ATA no mention is made of reasonableness simpliciter. The Tribunal submits that in the present case, reasonableness simpliciter applies and should in any event be applicable under the ATA to questions of mixed law and fact.

[71] Counsel for the Hutchinsons supported the position of the Tribunal with respect to the application of the ATA and the applicable standards of review but submitted in the alternative regardless of the standard of review the petitioner's application for judicial review should be dismissed.

[72] For the purposes of these reasons, I accept that the ATA applies to the decision of the Tribunal and that for questions of law and mixed law and fact, a standard of correctness applies while for a question of fact the standard is one of

patent unreasonableness. See **St. James Community Service Society v. Brent E. Johnston and the British Columbia Rights Tribunal** December 2, 2004 (unreported) Van Reg. L042142 (B.C.S.C.).

ISSUES

[73] The specific substantive issues for resolution raised by this petition are set out in the written argument of the Tribunal thus:

- B. Did the Tribunal err in finding discrimination?
 - i. Did the Tribunal err in its characterization and application of the service customarily available to the public?
 - ii. Did the Tribunal err in its selection of the appropriate comparator group?
 - iii. Did the Tribunal err in not directly applying the **Law** analysis?
 - iv. Did the Tribunal err in its application of the **Law** analysis?
- C. Did the Tribunal err in ordering a compensatory award against the Government in the circumstances?
 - i. Did the Tribunal make a patently unreasonable finding when it determined that there was little chance that Mr. Hutchinson would not have been hired as his daughter's caregiver under CSIL but for the Ministry's policy?
 - ii. Did the Tribunal err when it determined that it has jurisdiction to order monetary compensation against the government?
- D. If the Tribunal did have the jurisdiction to make a monetary remedy against the Government, did it err in determining the amount?
 - i. **Did the Tribunal member err in her characterization and application of the service customarily available to the public?**

[74] The petitioner contends that the Tribunal Member fell into error by not properly applying public law principles in characterizing the nature of the service customarily available to the public in s. 8 of the **Code** and employment in s. 13.

[75] The petitioner rests its submissions in this regard on the principles established by the Supreme Court of Canada in ***Auton (Guardian ad litem of) et al v. British Columbia (Attorney General)***, 2004 SCC 78 [***Auton***]. The petitioner submits that there is an analogy to be drawn between the reasoning in ***Auton***: that services not prescribed by law cannot be made the subject of a finding of discrimination; and, the reasoning that should prevail in the present case: that the service that is actually provided under CSIL (i.e. services to supplement existing care provided by family members) is the context in which the complaint of discrimination must be judged. The petitioner submits that to base a finding of discrimination on services not provided under CSIL is tantamount to dictating the types of health care programs that the Ministry should provide and infringes the reasoning in ***Auton***.

[76] It is the Hutchinson's contention in response that the petitioner's reasoning is tautological; that it attempts to shield the impugned policy from scrutiny by using the limits it imposes on the service provided through the CSIL program as the definition of the service itself. Hence the service, however limited by policy, could never be subject to analysis for discrimination, because it could only be assessed by reference to those whom it does accommodate and not by reference to those it does not. The respondents rely on ***Hodge v. Canada (Minister of Human Resources***

and Development), 2004 SCC 65 in support of its position where the court says at para. 25:

In either case, the universe of people potentially entitled to equal treatment in relation to the subject matter of the claim must be identified. I use the phrase “potentially entitled” because the legislative definition, being the subject matter of the equality rights challenged, is not the last word. Otherwise a survivor’s pension restricted to white protestant males could be defended on the grounds that all surviving white protestant males were being treated equally. The objective of s. 15(1) is not just formal equality but substantive equality.

[77] In the present case, of course, at issue is not a legislative definition limiting the scope of the service provided under CSIL; rather it is a policy by which the petitioner seeks to justify the limitation on access it imposes.

[78] The respondents submit that “the legal consideration of what constitutes the public service must be shared liberally and ... further the purpose of the **Code**. Moreover, the eligibility criteria which define access to the service must be subject to scrutiny under the **Code** for discriminatory content.”

[79] The respondents rely on ***University of British Columbia v. Berg***, [1993] 2 S.C.R. 353 at p. 11 and p. 16 in support of their argument.

[80] The respondents submit ***Auton*** is distinguishable in that what was at issue in that case was a legislative scheme (the health care system) which did not offer a particular benefit (an emerging form of therapy for autistic children) leading to a claim under s. 15(1) of the ***Charter*** that the parents were denied equal benefit of the law in relation to treatment service for their children.

[81] In the present case it was not the provision of a benefit (the choice of caregiver) that was at issue, but rather whether, and on what basis, the policy limiting it to non-family members failed to account for underlying differences between individuals it applied to.

[82] As I see it, **Auton** was a case in which the court was asked to interpret the provisions of s. 15(1) of the **Charter** in a way that compelled government to provide a service not otherwise available. The court rejected this interpretation of s. 15(1) noting that its role was “to ensure that when governments choose to enact benefits or burdens, they do so on a non-discriminatory basis.” In the present case, the question raised before the Tribunal was whether the petitioners (respondents at bar) were seeking non-discriminatory application of an existing benefit or service or, as in **Auton**, the creation of a benefit not otherwise provided for.

[83] In my opinion, on that point, the present case is distinguishable from **Auton**. Here, what is being sought is a determination whether a program explicitly funded to provide qualified disabled individuals with the freedom to hire and direct their own caregivers can be said to be discriminatory by excluding all family members from the potential hiring pool. Thus what is at issue is whether the limitation of the means by which the service and the employment contemplated in sections 8 and 13 respectively may be accessed creates a discriminatory effect by failing to account for underlying differences between individuals affected. To suggest the limitation on access to the service and employment said to be discriminatory provides the definition of the service and employment available so as to prevent any scrutiny for

discrimination or discriminatory effect is a mischaracterization of the reasoning on that point in *Auton*.

[84] In *Auton*, the critical finding by the court was that the particular therapy for autism for which funding was sought was not a benefit provided by law because it was a non-core service left to the provincial government's discretion and not mandated by the *Canada Health Act*, R.S.C. 1985, C-6. The court noted that if the provincial government had exercised its discretion in favour of providing the therapy (service), it would have to be conferred in a non-discriminatory manner.

[85] The means by which the benefit or service is provided or accessed is distinct from the service which is being provided. In the case at bar, the service and employment provided for is funding for particular disabled individuals to enhance their quality of care by being able to hire and direct their own caregivers. That is the nature of the service and corresponding employment provided. The proscription against hiring family members does not limit the nature of the service. It limits the means by which it is conferred.

[86] This is not a case, as *Auton* was, where the complaint concerned a benefit the government declined to confer. Rather, it is a case where a service was made "customarily available to the public" within the meaning of s. 8 of the *Code*, and corresponding employment as contemplated in s. 13 was available.

[87] The issue, therefore, is not whether the service under s. 8 or the employment under s. 13 should be conferred at all; it is, given it is conferred, does the policy at issue restrict it in a way that is discriminatory or has a discriminatory effect? It

follows that I conclude that the Tribunal member did not err in her characterization and application of the service customarily available to the public.

ii. **Did the Tribunal err in its selection of the appropriate comparator group?**

[88] Central to the question of whether the service or employment was conferred in a way that was discriminatory, is the selection of a comparator group. As mentioned, the tribunal member determined the appropriate comparator group to be CSIL clients who are not restricted by the blanket prohibition, either because they do not wish to, or need to hire a family member as a caregiver.

[89] It is the petitioner's contention that in selecting the comparator group the Tribunal Member lost sight of the purpose and effect of the CSIL program which is "To provide persons with disabilities who are living in the community with services to supplement the care provided by their families and others."

[90] The petitioner relied on the Supreme Court's summary of the principles applicable in selecting an appropriate comparator group in **Auton**, *supra*, at paras. 51 – 54 which reads as follows:

First, the choice of the correct comparator is crucial, since the comparison between the claimants and this group permeates every stage of the analysis. "[M]isidentification of the proper comparator group at the outset can doom the outcome of the whole s. 15(1) analysis": **Hodge**, *supra*, at para. 18.

Second, while the starting point is the comparator chosen by the claimants, the Court must ensure that the comparator is appropriate and should substitute an appropriate comparator if the one chosen by the claimants is not appropriate: **Hodge**, *supra*, at para. 20.

Third, the comparator group should mirror the characteristics of the claimant or claimant group relevant to the benefit or advantage sought, except for the personal characteristic related to the enumerated or analogous ground raised as the basis for the discrimination: **Hodge**, at para. 23. The comparator must align with both the benefit and the “universe of people potentially entitled” to it and the alleged ground of discrimination: **Hodge**, at paras. 25-31.

Fourth, a claimant relying on a personal characteristic related to the enumerated ground of disability may invite comparison with the treatment of those suffering a different type of disability, or a disability of greater severity: ...

[91] The plaintiff submits the effect of the Tribunal Member’s selection of a comparator group is to re-define the service being conferred rather than assessing the evenness of its application. The petitioner says the Tribunal Member’s analysis shifts the purpose and function of CSIL from a program that supplements the care provided by an individual’s family to one “that is obliged to accommodate a preference to hire family members.”

[92] The petitioner relies on the court’s articulation of the principle preventing judicial interference with governmental policy in **Auton**, at para. 41:

It is not open to parliament or a legislature to enact the law whose policy objectives and provisions single out a disadvantaged group for inferior treatment ... On the other hand, a legislative choice not to accord a particular benefit absent demonstration of discriminatory purpose, policy or effect, does not offend the principle and does not give rise to s. 15(1) review. This court has repeatedly held that the legislature is under no obligation to create a particular benefit. It is free to target the social programs it wishes to fund as a matter of public policy, provided the benefit itself is not conferred in a discriminatory manner.

[93] It is the petitioner’s position that giving effect to the principles set out above invalidates the Tribunal Member’s determination of the comparator group because it ignores the freedom of the legislature “to target the social programs it wishes” and

instead imposes the Tribunal's view of what benefits should be conferred based on the preferences of CSIL recipients rather than governmental policy.

[94] The petitioner submits that giving effect to the principles elaborated upon in ***Auton*** requires the comparator group to be either "all CSIL recipients or all people with disabilities living in the community." The petitioner contends if the comparator group is all CSIL recipients, Ms. Hutchinson cannot show she is disadvantaged through a greater impact by the prohibition in hiring family members. Her preference to hire her father falls short of establishing that her disability or family status necessitates hiring her father. The petitioner submits Ms. Hutchinson is in an advantageous position with regard to people with disabilities living in the community because she receives CSIL funds while others do not.

[95] The position of the respondents is that the comparator group of all disabled persons living in the community is inappropriate because they have no relationship to the benefit in question as they have no entitlement to the service or benefit at issue and hence do not share relevant circumstances with Ms. Hutchinson. The respondents say this comparator group is simply too broad to permit any meaningful assessment as to whether the prohibition has a discriminatory effect.

[96] The respondents contend that the comparator group of all CSIL recipients is in fact the comparator which the Tribunal Member applied and hence no error occurred. The respondents say the distinction drawn by the petitioners between its position and the determination of the Tribunal Member is essentially the distinction between formal equality and substantive equality: that the fact that all CSIL

recipients are governed by the same prohibition against hiring family members may constitute formal equality but it doesn't amount to substantive equality. The respondents rely on the decision of the court in ***Andrews v. Law Society of British Columbia***, [1989] 1 S.C.R. 43 which rejected the "similarly situated" test, which according to the respondents, the petitioner is implicitly relying on in advancing its position.

[97] The respondents further submit that the petitioner's argument that the respondent's failure to establish a necessity is fatal to their case, is a flawed argument. The respondents contend that there is no requirement to prove necessity to establish *prima facie* discrimination. All that need be shown is "a distinction based on a personal characteristic [resulting in] the denial of a benefit or the imposition of a burden". The respondents say that the primary consideration is the impact of the prohibition on the Hutchinsons and submit that in the case of each of them, the impact is profound. In the case of Ms. Hutchinson, it is on the scope of her choice as to who she can hire to provide her daily intimate care. With respect to Mr. Hutchinson, it is the denial of employment resulting in "poverty, sacrifice and financial distress".

[98] It is clear that the CSIL program represents an attempt by the government acting through the Ministry of Health to improve the lot of those afflicted with significant to severe physical disabilities who are nevertheless able to manage their own care and live in the community. In the furtherance of its objects, CSIL does draw distinctions between those with disabilities qualified to receive funding and those who are not. Those who are assessed as qualified and provided the funding

have the benefit of choice and control over the hiring, training, paying and management of their caregivers with an accompanying enhancement to their well being.

[99] I do not think it can be (or was) seriously argued that the policy proscribing the hiring of family members as caregivers has a discriminatory purpose. The real issue is whether it has, in the context of the CSIL program, a discriminatory effect on the respondents, given their personal characteristics. In posing and considering that question, was the Tribunal Member's choice of comparator appropriate, or was it, as contended by the petitioner, a choice that fore-ordained the result and re-defined the service at issue.

[100] As I see it, the Tribunal Member's choice of comparator group was appropriate. The essence of the CSIL program is to enhance each participant's ability to cope with their disabilities by giving them substantial choice and control over the provision of their care needs. The focus of their program is primarily to promote the recipient's mastery of their care rather than on the care itself. Whether the impugned policy is capable of having a discriminatory effect on a CSIL participant is not something that can possibly be judged except by reference to the unique conditions and objectives of the CSIL program. To use a comparator group where the self-achievement of the disabled person is not the principal focus, is simply to distort the analysis and render it meaningless. Similarly, to use an appropriate comparator group but to make the impact of the policy on the objectives of the program or the individual in it off limits to scrutiny, renders the exercise pointless. The selection of the comparator group must be conducive to a

determination of the potential impact of the impugned policy without a negation of its relevance.

[101] I conclude, therefore, that to select all people with disabilities living in the community as a comparator group would not permit a determination of the impact of the policy on a CSIL member.

[102] I conclude that the Tribunal Member did not err in selecting other CSIL members not restricted by the prohibition because they do not wish to or need to hire a family member as a caregiver. In my opinion, given the focus of CSIL on each recipient's achievement of choice and control, it is only appropriate to assess the impact of the policy by reference to other CSIL recipients from whom the respondents distinguish themselves because of personal characteristics related to their protected grounds (physical disability and family status). That, it seems to me, is the effect of the Supreme Court's summary of the principles conditioning the selection of a comparator group in *Auton, supra*, paras. 51 – 54, and that is, in my opinion, what the Tribunal Member did in her selection of a comparator group in the present case.

iii. The Applicability of the *Law* Analysis

[103] The parties raise the issue before me whether the analysis of the Supreme Court of Canada in *Law, supra*, in determining whether an impugned law infringed s. 15(1) of the *Charter* was applicable in determining whether discrimination is made out under the provisions of the *Code*. As I understand it, this issue has been raised before the Court of Appeal in an appeal taken from *Vancouver Rape Relief Society*

v. *Nixon*, (2003) B.C.S.C. 1936. As of the release of these reasons, the decision of the Court of Appeal has not yet been issued. In *Nixon* (B.C.S.C.), *supra*, Edwards J. concluded as follows at para. 70:

Neither the asserted inconsistency between *Reaney* and *Oak Bay Marina* nor the submission that *Reaney* was distinguishable and ought not to be followed has persuaded me that I may disregard the clear statement in *Reaney* at para. 12 the *Law* analytical framework “must govern” a determination of discrimination under s. 13 of the *Code*.

[104] As did Edwards J., I consider myself bound by *British Columbia Government Service Employees Union v. British Columbia Public Service Employee Relations Commission* [2002] B.C.C.A. 476 (“*Reaney*”) and obliged to apply the *Law* analytical framework to the present case.

iv. Did the Tribunal Err in its Application of the Law Analysis?

[105] The petitioner challenges the Tribunal Member’s application of *Law* to the case at bar firstly on the footing that she did not “directly” apply it, citing her conclusion that neither *Law* nor *Nixon* has altered the elements of a *prima facie* case of discrimination.

[106] As it appears from the Tribunal Member’s reasons, she approached the question of the application of the *Law* analysis in alternative steps. In the first alternative, she concluded that “a full analysis under the *Law* framework” will be unnecessary in most human rights cases when it is evident that adverse treatment constitutes discrimination. It was her expressed view that once adverse treatment based on a prohibited ground of discrimination under the *Code* is established, “the

dignity impact will be implicit” and a “more searching dignity analysis like the one ... in **Law** is not necessary”.

[107] In the second alternative, the Tribunal Member did conduct an analysis of the complaints in light of the **Law** analytical framework concluding in each case that it strengthened her conclusion that a *prima facie* case of discrimination was established.

[108] In my view, the issue for determination is not whether the Tribunal Member applied the **Law** test directly: she did, in the alternative; it is whether she erred in her application of it.

[109] The decision in **Law** involved the Supreme Court’s determination whether the distinction drawn by sections 44(1)(d) and 58 of the **Canada Pension Plan Act** limiting survivor’s pensions infringed s. 15(1) of the **Charter**. The court noted that s. 15(1) was “Perhaps the **Charter**’s most conceptually difficult provision” involving “ideals and aspirations which are ... abstract and subject to differing articulations.” While confirming a “flexible and nuanced analysis” was appropriate in the application of s. 15(1) and a “fixed and limited formula” was not, the court regarded **Law** as an opportunity to set out the basic principles relating to the purpose of s. 15(1) and to “provide a set of guidelines for courts that are called upon to analyze a discrimination claim under the **Charter**” emphasizing that they were “guidelines” not a rigid test to be mechanically applied.

[110] After considering the approach taken in **Andrews** and in subsequent cases which applied it, including **Egan v. Canada**, [1995] 2 S.C.R. 513 and **Miron v.**

Trudell, [1995] 2 S.C.R. 418, the court concluded that in considering a discrimination claim a court should make three broad inquiries:

[111] First, does the impugned law:

- (a) draw a formal distinction between the complainant 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 substantially different treatment between the complainant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of s. 15(1).

Second, was the complainant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? Third, does the differential treatment discriminate in a substantive sense bringing into play the purpose of s. 15(1) of the **Charter** in remedying such ills as prejudice, stereotyping and historical disadvantage? The second and third enquiries are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by s. 15(1).

[112] The court went on to confirm that the purpose of the s. 15(1) guarantee is that set forth by McIntyre J. in **Andrews**: "to promote a society in which all are secure in the knowledge that they are recognized as human beings equally deserving of concern, respect and consideration."

[113] In delivering the court's reasons, Iacobucci J. acknowledged the difficulty of defining the concepts of equality and discrimination but concluded in para. 52:

... in the articulation of the purpose of s. 15(1) just provided on the basis of past cases, a focus is quite properly placed upon the goal of assuring human dignity by the remedying of discriminatory treatment.

[114] As to what constitutes "human dignity" the court explained at para. 53:

There can be different conceptions of what human dignity means. For the purposes of analysis under s. 15(1) of the Charter, however, the jurisprudence of this Court reflects a specific, albeit non-exhaustive, definition. As noted by Lamer C.J. in **Rodriguez v. British Columbia (Attorney General)**, [1993] 3 S.C.R. 519, at p. 554, the equality guarantee in s. 15(1) is concerned with the realization of personal autonomy and self-determination. Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?

[115] After briefly discussing the need for a comparative analysis to take into account the "surrounding context of the claim and claimant", the court went on to examine what factors to consider in determining an infringement of s. 15(1), noting that "each factor may be more or less relevant depending on the circumstances of the case."

[116] The first factor referred to in considering whether the claimant's dignity is demeaned, is "pre-existing disadvantage" which the court described as "the most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory." The court reasoned that "further differential treatment" to those with a pre-existing disadvantage logically "will have a more severe impact upon them, since they are already vulnerable." The court also noted that an infringement "may exist even if there is no one similar to the claimant who is experiencing the same unfair treatment".

[117] The second factor regarded by the court as salient in an examination into whether a complainant's dignity is demeaned is the relationship between the grounds and the claimant's characteristics or circumstances. The court noted that "one of the grounds is disability where the avoidance of discrimination will frequently require distinctions to be made to take into account the actual personal characteristics of disabled persons." The court further observed in paragraph 70:

I mean simply to state that it will be easier to establish discrimination to the extent that impugned legislation fails to take into account a claimant's actual situation, and more difficult to establish discrimination to the extent that legislation properly accommodates the claimant's needs, capacities, and circumstances.

[118] The third contextual factor examined in **Law**, is the ameliorative purpose or effects of impugned legislation or other state action on a more disadvantaged person or group in society.

[119] The fourth contextual factor is the nature and scope of the interest affected, where the "more severe and localized be the ... consequences on the affected

group, the more likely that the distinction responsible for those consequences is discriminatory”

[120] The court made it clear that other factors may condition a determination of a discrimination claim which are in harmony with the general theme that discrimination exists “if it can be demonstrated that, from the prospective of a reasonable person in circumstances similar to those of the claimant who takes into account the contextual factors relevant to the claim, the legislative imposition of differential treatment has the affect of demeaning his or her dignity.”

[121] The court stressed that as a practical matter it may not be necessary to focus the purposive analysis upon one element of the discrimination claim and that in some cases “it will be relatively easy ... to establish a s. 15 infringement ... on the basis of judicial notice and logical reasoning that an impugned law interferes with human dignity ...”

[122] The court in **Law** articulated discrimination as “substantive rather than merely formal inequality ... bringing into play the claimant’s human dignity.”

[123] The essence of the petitioner’s submission is that even though the policy draws a distinction between Mr. Hutchinson and others not related to Ms. Hutchinson on the basis of family status, a protected ground, it is not discriminatory as it does not create inequality in the substantive sense having regard for the contextual factors summarized in the **Law** decision.

[124] In the petitioner's submission, neither the status of being a father nor being a daughter constitutes a pre-existing disadvantage or vulnerability even in the context of Ms. Hutchinson's disability which does include her in a vulnerable group with pre-existing disadvantages.

[125] The petitioner further submits that the correspondence between the distinction and the complainant's characteristics militate against finding discrimination because the purpose of the CSIL program and continuing care services (to provide public funds to persons with disabilities so they might hire persons to supplement existing care provided by family) "is essential to consider in determining whether the claimants have established a prima facie case of discrimination." The petitioners submit in light of the purpose of the CSIL the respondents have not established inequality in the substantive sense.

[126] With regard to the factor of "ameliorative purpose", the petitioner submits "the policy prohibiting payment to family members is inextricably linked to the policy rationale for the establishment of programs that provide public funds to persons with disabilities to supplement the existing care provided by family to allow the person with disabilities to live in their home."

[127] The petitioner submits "as the programs are designed to help families out ... they have an ameliorative purpose" weighing against finding substantive inequality.

[128] Insofar as the nature and scope of the interest affected by the impugned policy is concerned, the petitioner characterized it as "the use of public funds to pay family members to care for other family members" which in light of "the role of family

in our society [and] the purpose of the continuing care programs” points to a lack of discrimination.

[129] The petitioner submits that while a distinction is created on a prohibited ground in the present case, it is not discriminatory as “(a) reasonable person in the place of the complainant who understands the purpose of the CSIL and other programs would not say their dignity was impacted by a failure of the government to use public funds to pay family members to care for other family members.”

[130] Insofar as the disability complaint is concerned, it is the petitioner’s contention that Ms. Hutchinson has not passed the first step in **Law** showing differential treatment between her and others based on disability. The plaintiff submits that to be successful, Ms. Hutchinson must show that her family status or disability “necessitates” that she be cared for by her father, whereas other CSIL recipient’s disabilities would not necessitate care by a family member.

[131] The petitioner submits even if Ms. Hutchinson met the first two steps in the **Law** analysis she has failed to show substantive inequality because “(a) reasonable person in the situation of the claimant informed of the purpose of the CSIL program, the purpose of continuing care services and the reason for the need for the impugned policy would not find it an affront to dignity to refuse payment to family members in a program designed to only pay for services the family members cannot provide.”

[132] In her reasons, the Tribunal Member considered the impact of the policy on each of Ms. Hutchinson’s and Mr. Hutchinson’s dignity in light of the contextual

factors set forth in *Law*, “from the appropriate subjective-objective perspective”, and found in each case that a reasonable person would experience a violation of dignity when the “blanket prohibition against hiring family members is applied.”

[133] In my opinion, whether the standard of review is correctness as asserted by the petitioner or reasonableness simpliciter as asserted by the respondents, the finding of the tribunal member should be sustained. A significant consideration is the nature and purpose of the CSIL program which is itself distinct from other community care or continuing care programs. As I see it, the primary purpose of CSIL is to use public funds (which would otherwise be spent through other programs) in a way that optimizes the autonomy and well-being of seriously disabled but qualified and responsible individuals, by giving them the opportunity to manage their own care. The identifying characteristic of the program is not the provision of care itself, but rather the delegation of the responsibility for and the management of the care to disabled persons who qualify for participation in the program.

[134] Thus, the focus of the program is on enhancing the lives of disadvantaged and vulnerable people by giving them a significant degree of choice and control over the critical issue of their day to day and long term care, commensurate with their capacity to manage.

[135] In such a context, seemingly designed to promote the dignity and autonomy of those engaged in it, an uncalibrated and inflexible restriction on Ms. Hutchinson’s freedom to manage her own care potentially has an adverse impact on her dignity and autonomy. The essence of the impact occurs if her choice is thwarted by a

policy without consideration of her individual circumstances or the consequences that are implicated.

[136] The analysis is similar when applied to Mr. Hutchinson, who has for many years been the single parent of and main caregiver for his severely disabled daughter. The interdiction by policy of his daughter's choice to hire him, without any consideration of the merits of that choice, his circumstances, or the consequences to him, is certainly capable of adversely affecting his dignity by intensifying his existing disadvantage, given Ms. Hutchinson's difficulty in maintaining caregivers other than him.

[137] Mr. Hutchinson, whether or not a member of a distinct or identifiable group, has certainly experienced pre-existing disadvantage as the single father of a severely disabled daughter. The fact that his family status absolutely bars him from being paid and his daughter from paying him with public funds, to ameliorate his ongoing sacrifices made for her care and well-being has an impact on his dignity in the sense contemplated in *Law*, para. 53, having regard to the contextual factors set forth in that decision.

[138] It is the absolute quality of the policy in the specific context of the CSIL program and the particular circumstances of the claimants as found by the Tribunal Member that justifies a finding of discrimination in this case, not its general application in the larger context of continuing care programs. In this specific context I do not see the ameliorative effect of the policy as urged by the petitioner, nor do I accept that "a reasonable person in the place of the claimants who understood the

purpose of CSIL and other programs would not say their dignity was impacted”

As I earlier noted, the purpose of CSIL is different from that of other programs and engages an expectation of some freedom of choice. While clearly choices which involve spending public funds are not without reasonable limitations, the presence of an absolute prohibition based on a protected ground under the **Code**, in such a context without regard to individual circumstances or consequences, cannot be sustained as only formal inequality. I therefore would uphold the Tribunal Member’s determination of *prima facie* discrimination.

v. Did the Tribunal Err in Ordering a Compensatory Award Against the Government in the Circumstances?

[139] The petitioner challenges the monetary awards made by the Tribunal Member on two footings. With regard to the compensatory award of \$105,840 to Mr. Hutchinson for lost opportunity for employment, the petitioner contends in the first place, that it was patently unreasonable for her to conclude that “there was little chance that Mr. Hutchinson would not have been hired as his daughter’s caregiver but for the ministry’s policy.” In the second place, the petitioner takes the position that the Tribunal exceeded its jurisdiction by ordering monetary compensation against the government.

(a) Was the Tribunal Member’s Finding Patently Unreasonable?

[140] The petitioner’s position rests on the ruling of the Tribunal Member that “once the ministry has developed criteria to allow for exceptions to its policy in relation to CSIL, and those criteria have been made generally available to the relevant public, it may apply those criteria to the Hutchinsons.” Counsel for the petitioner submits that

the Tribunal Member's ruling constitutes an implicit acknowledgement that "an exemption based policy could be developed that Mr. Hutchinson might not fall into, and the fact that there is open to government a vast array of options to remedy the discrimination including elimination of the CSIL program altogether."

[141] Counsel for the petitioner concedes the standard of review is patent unreasonableness in connection with this finding of the Tribunal Member. That standard was characterized by Romilly J. in *Waters v. British Columbia (Director of Employment Standards)*, 2004 BCSC 1570 as "a very severe standard of review that accords the highest degree of deference to the decision of the Tribunal." I conclude that applying that standard to the finding of the Tribunal Member on this point does not justify a finding of error. The Tribunal Member had before her a significant body of evidence that Mr. Hutchinson had been Ms. Hutchinson's main care giver since she was thirteen years old. She also had evidence before her that there had been other exceptions made to the policy to allow family members as caregivers and there was no evidence that any particular criteria had been applied in those circumstances. There was simply no evidence before her that would justify a conclusion that Mr. Hutchinson would not have been hired as Ms. Hutchinson's caregiver. In all the circumstances, I do not think it could be said that it was patently unreasonable for the Tribunal Member to conclude as she did.

(b) Did the Tribunal Err When it Determined that it has Jurisdiction to Order Monetary Compensation against the Government?

[142] It is agreed by the parties that the standard of review is correctness with respect to this issue. The essence of the petitioner's position is expressed in its written argument thus:

While government acts in some instances as a private person, it also acts as no private person may. When government acts as no private person may, as for example when performing legislative, quasi judicial or policy functions, the principles of Crown immunity demand that in the absence of bad faith, compensatory awards are not to be made against government. In creating a program designed to supplement the care provided by family members, the province was acting in a "legislative" and not "administrative" manner and absent bad faith, conduct that is clearly wrong, or amounting to an abuse of public office, is immune from a compensatory award.

[143] It is the petitioner's contention that the government's adoption of the policy was a legislative as opposed to an administrative act, hence attracting immunity from awards of monetary compensation.

[144] It is the petitioner's submission that there is a line of authority establishing the principle of governmental immunity when it acts "as no private person may" including ***Welbridge Holdings Ltd. v. Winnipeg (Greater)***, [1971] S.C.R. 957; ***Mackin v. New Brunswick***, [2002] 1 S.C.R. 405 [***Mackin***]; ***Guimond v. Quebec***, [1996] 3 S.C.R. 347 [***Guimond***]; ***Harrington (Guardian ad litem of) v. Pappa Christos*** (1992), 5 Admin L.R. (2d) 130.

[145] The petitioner relies on the court's ruling in ***Welbridge*** as providing a synopsis of governmental liability and immunity at common law quoting from Laskin J. as follows:

The defendant is a municipal corporation with a variety of functions, some legislative, some with also a quasi-judicial component (as the

Wiswell case determined) and some administrative or ministerial, or perhaps better categorized as business powers. In exercising the latter, the defendant may undoubtedly (subject to statutory qualification) incur liabilities in contract and in tort, including liability in negligence. There may, therefore, be an individualization of the responsibility for negligence in the exercise of business powers which does not exist when the defendant acts in a legislative capacity or performs a quasi-judicial duty.

...

A municipality at what may be called the operating level is different in kind from the same municipality at the legislative or quasi-judicial level where it is exercising discretionary statutory authority. In exercising such authority, the municipality (no less than a provincial Legislature or the Parliament of Canada) may act beyond its powers in the ultimate view of the court, albeit it acted on the advice of counsel. It would be incredible to say in such circumstances that it owed a duty of care giving rise to liability and damages for its breach. "Invalidity is not the test of fault and it should not be the test of liability": See *Davis, 3 Administrative Law Treaties*, 1958, at p. 487.

[146] The petitioner cites *S.A.D. Smith*, *Judicial Review of Administrative Action* 5th ed. (London Suite and Maxwell) as a guide in determining whether governmental action is legislative or administrative in nature:

The distinction between legislative and administrative acts is usually expressed as being a distinction between the general and the particular. A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act cannot be exactly defined, but it includes the adoption of a policy, the making and issue of a specific direction, and the application of a general rule to a particular case in accordance with the requirements of policy or expediency or administrative practice.

[147] The petitioner contends that creating continuing care services as supplemental to those which family members provide is "a general rule of conduct" and hence falls into the legislative category as identified in *Smith's* judicial review, quoted above.

[148] The petitioner likens the legislative/administrative dichotomy to the policy/operational one developed by the Supreme Court of Canada to determine whether or not government is liable in tort for its acts or omissions. The petitioner cites ***Just v. British Columbia***, [1989] 2 S.C.R. 1228 and ***Brown v. British Columbia (Minister of Transportation and Highways)***, [1994] 1 S.C.R. 420 in support of its contention.

[149] The petitioner specifically refers to ***Just*** at paragraph 36:

The need for distinguishing between a governmental decision and its operational implementation is thus clear. True policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors. However, the implementation of those decisions may well be subject to claims in tort.

[150] The petitioner submits “the decision to provide continuing care services as a supplement to what family members can provide on their own was a pure policy decision ... based on social, political and economic factors” and should be exempt from liability.

[151] The petitioner also relies upon the authority established in ***Mackin***, and other cases including ***Schachter v. Canada***, [1992] 2 S.C.R. 679 and ***Guimond*** that the principles of Crown immunity do apply to ***Charter*** remedies. It is the petitioner’s position that the analysis developed in relation to ***Charter*** remedies and Crown immunity is particularly appropriate because both the ***Charter*** and the ***Code*** deal with discrimination in the context of governmental action and decisions under the ***Charter*** as with the ***Code*** can have a systemic affect.

[152] The petitioner argues that the remedial powers of a court for **Charter** breaches, to strike down unconstitutional legislation under s. 52 of the **Constitution Act**, 1982 and to provide a remedy under s. 24(1) is similar to the powers conferred under s. 37 of the **Code**. The plaintiff relies on **Schachter**, at para. 92, where the court noted:

An individual remedy under s. 24(1) of the **Charter** will rarely be available in conjunction with action under s. 52 of the **Constitution Act**, 1982. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52 that will be the end of the matter. No retroactive s. 24 remedy will be available. It follows that where the declaration of invalidity is temporarily suspended, a s. 24 remedy will not be available either. To allow for s. 24 remedies during the period of suspension would be tantamount to giving the declaration of validity retroactive effect.

[153] The petitioner also relies on **Mackin** in support of the proposition that although damages may be awarded under s. 24(1) of the **Charter**, the question of their availability must be considered in light of long standing public law principles.

The petitioner points to the judgment of Gonthier J. at para. 79 as follows:

...The limited immunity given to government is specifically a means of creating a balance between the protection of constitutional rights and the need for effective government. In other words, this doctrine makes it possible to determine whether a remedy is appropriate and just in the circumstances. Consequently the reasons that inform the general principle of public law are also relevant in a **Charter** context. Thus the government and its representatives are required to exercise their powers in good faith and to respect the “established and indisputable” laws that define the constitutional rights of individuals. However, if they act in good faith and without abusing their power under prevailing law and only subsequently are their acts found to be unconstitutional, they will not be liable. Otherwise, the effectiveness and efficiency of government action would be excessively constrained. Laws must given their full force and effect so as long as they are not declared invalid. Thus it is only in the event of conduct that is clearly wrong, in bad faith or an abuse of power that damages may be awarded (**Crown**

Trust Co. v. The Queen in Right of Ontario (1986), 26 D.L.R. 4th 41 (Ont. Div Court).

[154] It is the petitioner's submission in effect that the fundamental principle that underlies the limited immunity granted to the Crown is that the government must be protected from compensatory awards arising out of good faith actions where they are committed while governing acts "as no private person may". It is the petitioner's submission that to uphold the compensatory award of the Tribunal in the present case would create a situation in which human rights proceedings could result in compensatory awards when proceedings under the **Charter** would not, because they are subject to the principles of Crown immunity "firmly embedded in public law." The petitioner submits if remedies sought under the **Charter** are subject to the principles of Crown immunity it follows that remedies sought under the **Human Rights Code** should be similarly conditioned.

[155] The petitioner submits that the Supreme Court of Canada's decision in **Communaute urbaine de Montreal** case is particularly apposite to the present case and supports the contention that Crown immunity from compensatory awards apply equally with respect to Human Rights Tribunal awards notwithstanding enabling legislation granting tribunals the authority to make such awards.

[156] In **Communaute urbaine de Montreal** the claimant was denied a position as a police officer because he did not meet the hearing standards provided for in legislation.

[157] After a hearing into his complaint under the relevant human rights legislation, the Quebec Tribunal found discrimination. The issue before the Supreme Court of

Canada was whether the Quebec Tribunal could award compensatory damages in the circumstances. The Quebec legislation provided the authority to grant claimants the right to damages and also provided that it prevailed over all other Quebec legislation unless the statute provided otherwise.

[158] The Supreme Court of Canada held that a remedy in the form of damages either directly or indirectly through a retroactive award compelling the payment of back salary and benefits could not be made by the Quebec Tribunal.

[159] The Supreme court put the issue thus at paragraph 10:

...The dispute is now limited to the nature of the remedy that the Tribunal could grant in the circumstances of this case. As we have seen, this case involves the application of the Quebec Charter to a case of discrimination and refusal to make reasonable accommodation. First of all, the CUM has a duty of reasonable accommodation even though the discriminatory rule originates from an Act or Regulation. Second, all proceedings with a view to invalidating the provincial or municipal hiring regulations were either abandoned or rejected when the case was first brought before the Tribunal and are no longer part of the record submitted to this court. All that remains is the application to have the hearing standards declared inoperative in relation to Mr. Larocque and the form of the remedy to be applied.

[160] In examining the legal framework of remedies under the Quebec Charter the court noted that it “provides for a highly diverse range of regimes and procedural avenues for ensuring compliance with the enforcement of rights recognized under the Quebec Charter.” The exercise of access to the various regimes and procedural avenues is subject to the general principals set forth in s. 80 of the Charter “where consistent with the public interest.” The court noted that in determining the appropriate remedy, it must take into account “the constitutional framework and principles governing the organization and practices of Canada’s public institutions so

that the relationships between various components of the legal hierarchy applicable to the situation under Quebec law are articulated appropriately.”

[161] The court relied on a number of its past observations “concerning the relationship between fundamental rights and the overall make-up of Canada’s constitutional framework” in asserting that Canada’s constitutional regime is the “ultimate source of traditional immunities with respect to the consequences of the invalidity of legislative action.”

[162] Relying on Gonthier J.’s judgment in ***Mackin***, the court concluded that “well established principles of public law rule out the possibility of awarding damages when legislation is declared unconstitutional, be it on the grounds of a violation of the separation of legislative powers within the Canadian federation or of non-compliance with the Canadian Charter.” It was the appellant’s contention in ***Communaute urbaine de Montreal*** that because the Quebec Charter is a source of fundamental law relative to which the ***Civil Code*** of Quebec, S.Q. 1991, c. 64 must be interpreted harmoniously, the traditional rules circumscribing the state’s liability for discharge of its legislative function have been fundamentally altered. The appellant argued that s. 49 of the ***Quebec Charter*** which provides for compensation for moral or material prejudice resulting from any unlawful interference of any right or freedom recognized by this ***Charter***, authorizes damages for any unlawful act “equivalent to a fault as defined in the law of civil liability.” The court, however, concluded that the regime of civil liability under the ***Quebec Charter*** was nevertheless subject to the general principles of public law and in particular, that of Crown immunity, explaining in para. 23:

Recourse to the civil liability regime to punish violations of the **Quebec Charter** does not oust those fundamental rules which serve to safeguard the free and effective discharge of the legislative function, subject to mechanisms currently in place for review in constitutionality. In this respect, immunity implies the necessary distinction between a fault or negligent act and one that is unlawful or invalid because it fails to comply with fundamental, constitutional, or quasi constitutional standards. By analogy, in the law of Crown liability, if upon judicial review an administrative decision is found to be unlawful, it does not necessarily follow that there is fault given rise to recourse in civil liability.

[163] It seems to me that the flaw in the petitioner's argument is in the assertion that the prohibition against hiring family members is legislative as opposed to administrative in nature and hence subject to common law principles of Crown immunity. In the **Communaute urbaine de Montreal** case, the impugned act of the respondent is clearly legislative in the adoption of hearing standards for police officers in regulations made pursuant to regulatory powers delegated to it under its enabling legislation. In the present case, the prohibition against hiring family members is not similarly the product of legislation or regulation; nor does it, in my view, fit comfortably with the identifying characteristic of a legislative act proffered by S.A.D. Smith: "The creation and promulgation of a general rule of conduct without reference to particular cases." In the context of the present case, the general rule of conduct is the finding of necessary health care established through the CSIL program or other continuing care programs. The impugned policy would be meaningless and without effect without the creation and promulgation of such programs. It falls comfortably in S.A.D. Smith's second category of "administrative act", which "includes the adoption of a policy, the making and issuance of a specific direction and the application of a general rule to a particular case in accordance with the requirements of policy or expediency or administrative practice."(underlining

added). In the circumstances, the conditions in the case at bar do not invoke the fundamental rules or traditional principles of immunity required “to safeguard the free and effective discharge of the legislative function” because the adoption of the impugned policy represents an administrative practice rather than the exercise of a legislative function.

[164] Accordingly, a finding that the policy applied unsparingly in the conditions at bar has a discriminatory effect engages the right to redress within the statutory scope of s. 37 of the **Code**, which includes “compensation ... for all or a part ... of any wages or salary lost by the contravention.” In my opinion on that basis the present case is distinguishable from the ***Communaute urbaine de Montreal*** decision.

(c) Did the Tribunal err in determining the amount of the award?

[165] The final argument advanced by the petitioner is that if the Tribunal did have jurisdiction to make a monitory award against the province, the member erred in determining the amount. The petitioner concedes the standard of review is patently unreasonable, but contends that in the circumstances the Tribunal member’s award should be quashed. The petitioner submitted that the funding made available to Ms. Hutchinson was based on her living independently of her father and the fact that she has continued to live with him requires a new assessment of her needs in light of that altered circumstance.

[166] Counsel for the Hutchinsons submitted that the award for loss of opportunity for Mr. Hutchinson was discounted by the Tribunal member to account for the care he could be expected to provide for free as a family member and reducing it further would be inappropriate. The respondents submitted that it should not be required that “an individual give up all employment to support an adult child with a disability who requires 24 hour care.”

[167] I conclude that the Tribunal member’s award was not patently unreasonable in the circumstances. Mr. Hutchinson is the single parent of a severely disabled daughter who had been assessed as in need of 24 hour care. The Tribunal member took into account on a reason basis what notional free care Mr. Hutchinson should be expected to give in the circumstances and as well to reflect the fact that the loss was of an opportunity, not an actual position. It is significant in my opinion that the amount to which the Tribunal member reduced the award for lost opportunity and calculated as Mr. Hutchinson’s remuneration for ongoing care parallels the average payment made to disabled persons under the CISL program to fund their care with the voluntary assistance of family and friends.

[168] I would therefore not give effect to the petitioner’s argument that the Tribunal member’s determination of the amount of compensation was patently unreasonable.

CONCLUSION

[169] As I see it, in this case the fundamental issue is not, as framed by the petitioner, one implicating the proper role of government to determine the nature of healthcare issues and how limited resources are to be allocated.

[170] Rather, the issue is whether an administrative policy utilized in the implementation of health care programs which have been established through the allocation of limited resources, but having a potentially discriminatory effect is justiciable through the application of the **Code**. In this case, the conclusion that the proscription against hiring family members under the CSIL program is justiciable under the **Code** and subject to remedial order is not, of course, tantamount to concluding that such a policy is invalid for all purposes.

[171] Rather, the effect of the Tribunal's finding is that under the CISL program without the ability to provide for exceptions, the policy may have a discriminatory effect in individual cases and must be modified to systematically avoid such an effect. The Tribunal member found that there would not be undue hardship for the ministry to tailor exceptions in appropriate cases. No review was sought of that finding. In the result, the Tribunal member's findings and orders do not assume the proportions of an infringement on the proper role of government as contended by the petitioner. The scope of the ruling is rather to apply the provisions of the **Code** to rectify the discriminatory effect of an administrative policy in an individual case and to require provision for a systematic means of avoiding its discriminatory effect in future individual cases.

[172] Accordingly, I dismiss the petitioner's application for judicial review and order costs to the respondents.

[173] In its submission, counsel for the petitioner requested that the effect of this court's decision be suspended for a period of four months and that the Tribunal

member's order that the Province be given nine months in which to amend its policy be stayed. In my view in the circumstances it is appropriate to make the order sought and I do so.

"A.F. Cullen J."

The Honourable Mr. Justice A.F. Cullen