NOVA SCOTIA COURT OF APPEAL

Citation: *International Association of Fire Fighters, Local 268 v. Adekayode*, 2016 NSCA 6

Date: 20160210
Docket: CA 438510
Registry: Halifax

Between:

International Association of Fire Fighters, Local 268

Appellant

v.

Ray Adekayode, Nova Scotia Human Rights Commission, Nova Scotia Human Rights Commission Board of Inquiry, Attorney General of Nova Scotia, and Halifax Regional Municipality

Respondents

Judge:	The Honourable Justice Joel E. Fichaud
Appeal Heard:	November 17, 2015, in Halifax, Nova Scotia
Subject:	*Human Rights Act* – discrimination – ameliorative program or activity
Summary:	Mr. Adekayode's collective agreement topped up the federal Employment Insurance benefits that are paid to adoptive parents on leave, but not those of birth parents. Mr. Adekayode, a birth parent, claimed that the collective agreement discriminated against him based on "family status", contrary to s. 5(1)(r) of Nova Scotia's *Human Rights Act*. A Human Rights Board of Inquiry agreed, and ordered a remedy against Mr. Adekayode's union and employer who signed the collective agreement. The union, Local 268, appealed. The employer, Halifax Regional Municipality, supported the union's appeal.
Issues:	Did the Board offend the appellate standard of review (1) by ruling that collective agreement "discriminated" based on

	family status contrary to s. 5(1)(r) of the *Human Rights Act*, or (2) by ruling that the top-up was not saved as a "program or activity that has as its object the amelioration of conditions of disadvantaged individuals or classes of individuals" – namely adoptive parents – within s. 6 (i) of the *Act*?
Result:	The Board correctly ruled that the collective agreement discriminated within the meaning of "discrimination" in s. 4 of the *Human Rights Act*. But the Board committed an appealable error, under either standard of review, by applying the wrong tests to determine whether the top up was excepted by s. 6(i) of the *Human Rights Act*. The Court of Appeal allowed the appeal in part, overturned the Board of Inquiry's order, ruled that the top up was saved by s. 6(i), and dismissed Mr. Adekayode's complaint under the *Human Rights Act*.

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Appellant

-and-

Ray Adekayode, Nova Scotia Human Rights Commission, Nova Scotia Human Rights Commission Board of Inquiry, Attorney General of Nova Scotia, and Halifax Regional Municipality

Respondents

Judges:	Fichaud, Saunders and Scanlan, JJ.A.
Appeal Heard:	November 17, 2015, in Halifax, Nova Scotia
Held:	Appeal allowed in part without costs per reasons for judgment of Fichaud, J.A.; Saunders and Scanlan JJ.A. concurring
Counsel:	Gordon N. Forsyth, Q.C. for the Appellant Ann E. Smith, Q.C. and Jason Cooke for the Respondent Nova Scotia Human Rights Commission Martin Ward, Q.C. and Tara Gault for the Respondent Halifax Regional Municipality The Respondent Ray Adekayode, appearing but not making submissions Edward A. Gores, Q.C. for the Respondent Attorney General of Nova Scotia, not appearing The Respondent Nova Scotia Human Rights Commission Board of Inquiry, not appearing

Reasons for judgment:

[1] Mr. Adekayode's collective agreement topped up the federal Employment Insurance benefits that are paid to adoptive parents who take parental leave, but not those of birth parents on parental leave. Mr. Adekayode, a birth parent, claimed that the collective agreement discriminated against him based on family status, contrary to Nova Scotia's *Human Rights Act*. A Human Rights Board of Inquiry agreed, and ordered a remedy against Mr. Adekayode's union and employer who signed the collective agreement. Mr. Adekayode's union appeals. His employer endorses the union's appeal.

[2] The submissions to this Court focused on (1) whether the collective agreement's top-up "discriminated" within s. 5(1)(r) of the *Human Rights Act* and, if so, (2) whether the top-up is saved by s. 6(i) of the *Act* as a "program or activity that has as its object the amelioration of conditions of disadvantaged individuals or classes of individuals" – namely adoptive parents. These are statutory terms. Yet the bulk of argument addressed how the principles under s. 15 of the *Charter of Rights and Freedoms* govern the interpretation of the *Human Rights Act*.

1. Background

[3] Since 2004, the Respondent Ray Adekayode has been a firefighter employed by the Respondent Halifax Regional Municipality ("HRM"). He is subject to a collective agreement dated June 1, 2004 ("Collective Agreement") between HRM and the Appellant International Association of Firefighters, Local 268 ("Local 268").

[4] Firefighters who become parents may access pregnancy or maternity benefits and parental benefits prescribed by the *Labour Standards Code*, R.S.N.S. 1989, c. 246, as amended, by the Employment Insurance ("EI") program under the *Employment Insurance Act*, S.C. 1996, c. 23 and the *Employment Insurance Regulations*, SOR 96/332, as amended, and by the Collective Agreement. The *Labour Standards Code* is not involved in this case.

[5] The Collective Agreement integrates its benefits with those under the federal EI program for (1) pregnancy or maternity leave and (2) parental leave.

[6] The EI program provides, after a two week waiting period, up to 15 weeks of pregnancy or maternity benefits to biological mothers who cannot work because of pregnancy or recent birth.

[7] Article 29.01 of the Collective Agreement complements the EI program by providing to pregnant employees 17 weeks of leave during which certain employment benefits are continued. The 17 weeks conform to the waiting and pregnancy or maternity periods under the EI program. Article 29.01.10 provides a Pregnancy Leave Allowance of 75% earnings for the two week EI waiting period, then tops up the EI benefit to 93% earnings for the further 15 weeks.

[8] The EI program also extends up to 35 weeks per couple of parental leave benefits to parents who are caring for their newborn biological child or their newly adopted child. The couple may split the 35 weeks. Biological parents may take the 35 weeks in addition to the mother's 15 weeks of maternity benefits.

[9] The EI benefit for both pregnancy/maternity leave and for parental leave is capped at 55% of the employee's average insurable weekly earnings, to a maximum set by the federal government.

[10] This case focuses on the Collective Agreement's provisions for parental leave benefits.

[11] Before 2004, the earlier collective agreement for Local 268's firefighters did not provide a supplementary benefit to top up EI benefits during either pregnancy/maternity leave or parental leave.

[12] In 2004, during negotiations for a new collective agreement, Local 268 proposed a top-up of pregnancy and parental EI benefits to 93% of earnings for all employees in the unit who were on either pregnancy/maternity leave or parental leave. HRM disagreed, citing cost. After discussion, Local 268 and HRM settled on a top-up of EI benefits for (1) expectant mothers on pregnancy/maternity leave and (2) adoptive parents taking parental leave. There was no top-up for biological parents taking parental leave. Local 268's lead negotiator in 2004, Chief Philip McNulty, testified how this compromise occurred:

> … So the tone at the table relative to the parental leave was there's only one pot of money. And there's phrases like that's going to have a cost to it.
>
> …

> I didn't need them to tell me that it could be a significant cost. We … I, the union had done their homework and they had laid on enough hints that it would be of significant cost. … That we took what we got, it was much better than what we had previously.
>
> …
>
> …[T]he union started down a path of achieving parental leave top up for all employees … And settled for top up leave and getting the top up not just for adoptive parents but also for biological moms … because it didn't exist previous to that … So you know we saw that in combination with other gains as something that was much enhanced versus what we had previous.

[13] The resulting Collective Agreement of 2004 included the following provisions, article 29.02.8 being pivotal to this case:

> **29.01 PREGNANCY LEAVE**
>
> **29.01.1** Pregnancy leave shall be considered as a right for all employees. Employees shall be granted pregnancy leave in accordance with the provisions of this collective agreement unless increased or better leave or benefits are provided by the provisions [of] the *Labour Standards Code* of Nova Scotia.
>
> …
>
> **29.01.3** Upon the request of the employee and presentation of a certificate by the employee's legally qualified medical doctor stating that the employee is pregnant and specifying the date upon which delivery is expected, the employee may, at her option, commence pregnancy leave at any time during a period which commences sixteen (16) weeks before the expected date of delivery and which ends on the actual date of delivery. …
>
> …
>
> **29.01.10** Pregnancy Leave Allowance
>
> (i) An employee entitled to pregnancy leave under the provisions of this collective agreement and who provides the Employer with proof that she has applied for and is entitled to receive Employment Insurance benefits pursuant to the Employment Insurance Act, shall be paid an allowance in accordance with the Supplementary Unemployment Benefit (SUB) provisions of the Act and the following subsections:
>
> (ii) With respect to the period of pregnancy leave, payments made in accordance with the SUB Plan will consist of the following:
>
> (1) Where the employee is subject to a waiting period of two (2) weeks before receiving EI benefits, payments equivalent to

seventy-five percent (75%) of her weekly rate of pay, less applicable deductions, for each week of the two (2) week waiting period, less any other earnings received by the employee during the benefit period.

(2) Up to a maximum of fifteen (15) additional weeks, payments equivalent to the difference between the weekly EI benefit the employee is eligible to receive and ninety-three percent (93%) of her weekly rate of pay, less applicable deductions, less any other earnings received by the employee during the benefit period which may result in a decrease in the EI benefits to which an employee would have been eligible if no other earnings had been received during the period.

…

29.02 PARENTAL LEAVE

29.02.1 Parental leave shall be considered as a right for all employees. Employees shall be granted parental leave in accordance with the provisions of this collective agreement unless increased or better leave or benefits are provided by the provisions of the *Labour Standards Code* of the Province of Nova Scotia.

…

29.02.3 An employee who becomes a parent through the birth of a child or the placement of a child in the care of the employee for the purpose of adoption pursuant to the laws of the province or through guardianship is entitled to an unpaid leave of absence of, at the employee's choice, up to thirty-five (35) weeks or, in the case of adoption, any longer period required by the adoption agency or the province. …

…

29.02.8 ***Leave for Adoption Allowance***

(i) ***An employee entitled to leave under this Agreement by becoming a parent through the placement of a child in the care of the employee for the purpose of adoption*** pursuant to the laws of the province, who provides the Employer with proof that she/he has applied for, and is eligible to receive employment EI benefits pursuant to the Employment Insurance Act ***shall be paid an allowance*** in accordance with the Supplementary Unemployment Benefits (S.U.B.) Plan and the following subsections:

(ii) With respect to the period of adoption leave, payments made according to the SUB Plan will consist of the following:

(1) Where the employee is subject to a waiting period of two (2) weeks before receiving EI benefits, payments equivalent to

> seventy-five percent (75%) of her/his weekly rate of pay, less applicable deductions for each week of the two (2) week waiting period, less any other earnings received by the employee during the benefit period.
>
> (2) Up to a maximum of ten (10) additional weeks, payments equivalent to the difference between the weekly EI benefit the employee is eligible to receive and ninety-three per cent (93%) of her weekly rate of pay, less applicable deductions, less any other earnings received by the employee during the benefit period which may result in a decrease in the EI benefits to which the employee would have been eligible if no other earnings had been received during the period.
>
> …
>
> [emphasis added]

[14] The Collective Agreement's term is June 1, 2004 to May 31, 2016, subject to mid-term "reopeners". The relevant provisions were unchanged by the reopener negotiations in 2007. They were in force in January 2010 when Mr. Adekayode filed his human rights complaint.

[15] During the 2014 reopener negotiations, HRM requested the elimination of the "Leave for Adoption Allowance" (article 29.02.8). Local 268 agreed in exchange for a benefit to firefighters injured on duty. Under the amended language, no firefighter will receive a top-up of EI parental benefits. These amendments occurred after the dates that govern this proceeding. The Collective Agreement's language pertaining to this case is quoted above.

[16] Mr. Adekayode and his wife Colleen have three biological children. Their second and third children were born while Mr. Adekayode was a firefighter under the Collective Agreement.

[17] The Adekayodes' second child was born in January 2008. Ms. Adekayode took a year of pregnancy leave from her job at Capital Health.

[18] When Ms. Adekayode returned to Capital Health in January 2009, she was pregnant with their third child. The Adekayodes decided that Ms. Adekayode would return to work, and the couple would split their available parental leave. After inquiring with Local 268 in early 2009, Mr. Adekayode was told that the Collective Agreement entitled him to 35 weeks parental leave, but not to a top-up of EI parental leave benefits.

[19] Absent a top-up, Mr. Adekayode decided not to take the parental leave. He said he did not apply for leave "because it meant it was a sacrifice to my family economically". As he was not on leave, he did not apply for EI parental leave benefits.

[20] On January 19, 2010, Mr. Adekayode filed a complaint under the *Human Rights Act*, R.S.N.S. 1989, c. 214, against Local 268 and HRM. He claimed that the denial of the top-up discriminated against him based on his family status as a biological parent.

[21] A Human Rights Board of Inquiry ("Board") heard Mr. Adekayode's complaint from November 17 to 21, 2014. Mr. Donald C. Murray, Q.C. chaired the Board.

[22] On March 18, 2015, the Board issued a written decision (Case Number 42000-30-H099-0078). The decision upheld Mr. Adekayode's complaint of discrimination based on family status.

[23] Section 5(1)(r) of the *Human Rights Act* prohibits discrimination based on "family status". Section 4 defines "discrimination". The Board (paras. 21-22) found that the Collective Agreement's differentiation between biological and adoptive parents, for the top-up of EI benefits, drew a distinction based on "how the parent/child relationship was created" which discriminated based on family status.

[24] Section 6(i) of the *Human Rights Act* says that s. 5 does not apply "to preclude a law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or classes of individuals …". Local 268 and HRM had urged that the Collective Agreement's top-up of EI benefits for adoptive parents had an ameliorative object to address the bonding challenges that face adoptive parents. The Board disagreed, and held that s. 6(i) did not save the discriminatory top-up provision.

[25] The Board ordered that Mr. Adekayode be given 12 weeks leave to be paid as if he were on parental leave and in receipt of EI benefits plus the Collective Agreement's top-up allowance. The Board ordered that HRM and Local 268 share the cost.

[26] Later I will discuss the Board's reasons.

[27] On April 23, 2015, Local 268 appealed to the Court of Appeal. HRM has not appealed, but supports Local 268's submissions. Mr. Adekayode has not actively participated in the appeal, but the Board's ruling is supported by the Commission's counsel.

2. Issues

[28] The parties have addressed several issues that I will consolidate into two. Did the Board's ruling offend the appellate standard of review either by:

1. concluding that the Collective Agreement discriminated within s. 5(1)(r) of the *Human Rights Act*, or
2. ruling that the Collective Agreement's top-up provision was not saved by s. 6(i)?

3. Standard of Review

[29] Local 268 appeals under s. 36(1) of the *Human Rights Act*. Section 36(1) permits an appeal "on a question of law". The issues of law involve the interpretation of provisions in the *Human Rights Act* and how the construction of similar wording in s. 15 of the *Charter* affects the interpretation of the *Act*.

[30] Nova Scotia's *Human Rights Act*, s. 34A, says that the Board of Inquiry's decision is "final", but the *Act* contains no other privative directive. Before *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, most issues of law under the *Human Rights Act* were reviewed for correctness: *Nova Scotia (Human Rights Commission) v. Dural* (2003), 219 N.S.R. (2d) 91 (C.A.), at paras. 20-21; *Nova Scotia (Human Rights Commission) v. Play It Again Sports Ltd.*, 2004 NSCA 132, para. 47.

[31] Recently, this Court has said that a Human Rights Board of Inquiry's interpretation of the *Human Rights Act* attracts a standard of reasonableness: *Izaac Walton Killam Health Centre v. Nova Scotia (Human Rights Commission)*, 2014 NSCA 18, paras 12-15; *Tri-County Regional School Board v. Nova Scotia (Human Rights Board of Inquiry)*, 2015 NSCA 2, paras. 12-13; *Foster v. Nova Scotia (Human Rights Commission)*, 2015 NSCA 66, para. 16. See also *Nova Scotia (Environment) v. Wakeham*, 2015 NSCA 114, paras. 14-15, 21-22, 52-53. These authorities follow the Supreme Court of Canada's direction that an administrative tribunal's interpretation of its home statute presumptively is reviewed for

reasonableness: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association,* [2011] 3 S.C.R. 654, para. 39.

[32] The issues in this appeal turn on the usage or transference of principles from the *Charter of Rights and Freedoms* to interpret the same terms in the *Human Rights Act*: namely (1) "discriminate" under s. 5(1) of the *Act* and "discrimination" s. 15(1) of the *Charter*, and (2) "law, program or activity", "has as its object the amelioration" and "disadvantaged" under s. 6(i) of the *Act* and s. 15(2) of the *Charter*. The application or transference of constitutional principles was not an issue in the decisions of this Court, cited in the preceding paragraph, that applied the reasonableness standard.

[33] In *Johnstone v. Canada (Border Services),* 2014 FCA 110 Justice Mainville for the Court explained why, in his view, the presumption of reasonableness was rebutted and the standard of correctness applied to quasi-constitutional issues under human rights legislation:

> 45 First, the Supreme Court of Canada has consistently held that fundamental rights set out in the human rights legislation, such as the *Canadian Human Rights Act*, are "quasi-constitutional" rights [citations omitted]
>
> 46 As noted in *Dunsmuir* at paragraph 58, and for obvious reasons, constitutional issues are necessarily subject to review on a correctness standard. In my view, this approach extends as well to quasi-constitutional issues involving fundamental human rights set out in *Canadian Human Rights Act* and provincial human rights legislation.
>
> 47 Second, a multiplicity of courts and tribunals are called upon to interpret and apply human rights legislation, including the *Canadian Human Rights Act*. As this appeal illustrates, labour arbitration boards, labour relations boards and superior courts throughout Canada are regularly called upon to adjudicate with respect to the fundamental human rights described in the *Canadian Human Rights Act* and other human rights legislation. As a result, courts have been called upon in the past and will be called upon in the future to examine the same legal issues the Tribunal is required to address in these proceedings.

[34] Justice Mainville concluded:

> 51 The two principal legal issues raised in this appeal concern questions of fundamental rights and principles in a human rights context. These are not issues about questions of proof or mere procedure, or about the remedial authority of a human rights tribunal or commission. As such, for the sake of consistency between the various human rights statutes in force across the country, the meaning and scope of family status and the legal test to find *prima facie*

> discrimination on that prohibited ground are issues of central importance to the legal system, and beyond the Tribunal's expertise, which attracts a standard of correctness on judicial review: *Dunsmuir* at para. 60.

[35] To similar effect: *Canadian National Railway Co. v. Seeley*, 2014 FCA 111, para. 36; *Stewart v. Elk Valley Coal Corp.*, 2015 ABCA 225, paras. 47, 50 and 55 (application for leave filed with S.C.C.).

[36] Before *Dunsmuir*, the Supreme Court of Canada had held that human rights tribunals may receive less judicial deference than some other tribunals, such as labour boards, on general issues of law. The rationale was that "in order for the interpretation of human rights legislation to be purposive, differences in wording among various provinces should not be permitted to frustrate the similar purpose underlying these provisions". *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571, paras. 47-48. *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353, paras. 26, 32.

[37] In *Dunsmuir*, Justices Bastarache and LeBel said:

> 60 As mentioned earlier, courts must also continue to substitute their own view of the correct answer where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" (*Toronto (City) v. C.U.P.E., [2003] 3 S.C.R. 77*, at para. 62, *per* LeBel, J.). Because of their impact on the administration of justice as a whole, such questions require uniform and consistent answers. …

[38] In *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] 1 S.C.R. 467, Justice Rothstein for the Court (para. 61) said that correctness governed constitutional principles that were before the human rights tribunal under the *Saskatchewan Human Rights Code*. Justice Rothstein (paras. 30, 55-59) prescribed the definition of "hatred" to be applied by the tribunal under the *Code*. In doing so, he adopted, with some modifications, the earlier definition prescribed in a *Charter* ruling by *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892. Justice Rothstein (paras. 178-81, 186,) accepted that the tribunal was to apply the judicially prescribed principles that defined "hatred" in the *Code*, but (para. 168) held that "otherwise" the issues were not of central importance to the legal system, meaning that reasonableness would govern the tribunal's application of the principles.

[39] In *Mouvement laïque québécois v. Saguenay (City)*, [2015] 2 S.C.R. 3, at paras. 47-49, Justice Gascon for the majority held that correctness applied to the Quebec Human Rights Tribunal's assessment of the scope of religious freedom, as a question of general legal importance. But he noted that correctness on one issue is not all-subsuming, and reasonableness would govern other points. To similar effect, and cited by Justice Gascon: *McLean v. British Columbia (Securities Commission)*, [2013] 3 S.C.R. 895, para. 27 and *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] 3 S.C.R. 471, at paras. 21-24. Similarly, to promote consistency, when the same general legal issues that arise before a tribunal may also be expected to arise in a court through an alternative route, correctness may be appropriate: *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, [2012] 2 S.C.R. 283, paras. 13-15, per Rothstein, J. for the majority.

[40] Based on these authorities, my views on the standard of review for questions of law in Mr. Adekayode's appeal are:

(1) Correctness governs the interpretation of constitutional principles under s. 15 of the *Charter* and the transference or usage of s. 15 principles and authorities to construe the same terms in the *Human Rights Act*. In this appeal, much argument focused on (1) whether the meaning of "discrimination" under s. 15(1) of the *Charter* should drive the interpretation of "discriminate" in s. 5(1) of the *Human Rights Act*, and (2) whether the meaning of "law, program or activity", "has as its object the amelioration" and "disadvantaged" under s. 15(2) of the *Charter* should determine the meaning of the identical words in s. 6(i) of the *Human Rights Code*. The response to these arguments includes a discussion of constitutional or quasi-constitutional issues of central importance to the legal system for which the Board has no greater expertise than does this Court.

(2) Other aspects of the Board's interpretation and application of its home legislation attract reasonableness.

[41] As I will explain later (para. 158), this appeal does not turn on the standard of review. I would reach the same conclusion using the reasonableness standard throughout.

[42] This appeal also challenges the Board's findings of fact. Where, as here, the statutory right of appeal is limited to an issue of law, the Court may review a finding of fact only if there is *no* supporting evidence from which the finding may be made or the inference reasonably drawn. That is because a finding based on no evidence is arbitrary, and a tribunal errs in law by acting arbitrarily in any aspect of its process, including fact-finding. The standard of review would be reasonableness (*Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, paras. 34, 38-9, 42), though it is difficult to conceive how an arbitrary finding could be reasonable. Alternatively, if there is *some* evidence, then the tribunal's factual findings and inferences are not appealable under the statute, nor are assessments of credibility, meaning the standard of review is not an issue. *Fashoranti v. College of Physicians and Surgeons of Nova Scotia*, 2015 NSCA 25, paras. 20-21, leave denied Sept. 3, 2015 (S.C.C.); *Fadelle v. Nova Scotia College of Pharmacists*, 2013 NSCA 26, paras. 12-17, and authorities there cited. See also *Nova Scotia v. Play it Again Sports Ltd.*, para. 50.

4. First Issue - Discrimination under s. 5(1)(r)

[43] I will track the Board's reasons for ruling that the Collective Agreement discriminated against Mr. Adekayode based on family status. The Board (para. 8) began by citing the *Human Rights Act*'s definition of "discrimination". Section 4 says:

> **Meaning of discrimination**
>
> 4. For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.

The Board noted (para. 9) that s. 4 requires both a distinction on a listed ground and a deleterious effect.

[44] In a passage that is pivotal to Local 268's grounds of appeal, the Board continued:

> 10. There is no legislative requirement in Nova Scotia, nor in any other jurisdiction in Canada, requiring a human rights claimant to establish some *historical disadvantage* or *stereotyping* as a precondition to a legitimate claim of

discrimination. While an historical disadvantage or stereotyping may inform our current understanding about whether there is an *effect* from the making of a distinction, or the significance of such an effect, proof of an historical disadvantage is not a pre-condition to a successful claim under the Nova Scotia *Act.* [Board's italics]

11. It was suggested in the course of these proceedings that the Section 15 *Canadian Charter of Rights and Freedoms* jurisprudence has constitutionalized an element of *historical disadvantage*, and that human rights legislation should be interpreted in a way that is consistent with that constitutional interpretation. This was a prelude to suggesting that biological parents such as Mr. Adekayode have not suffered an identifiable historical disadvantage, and therefore could not be discriminated against by a financial benefit payable to adoptive parents. Reference was made to the decision in *Ontario Secondary School Teachers' Federation v. Upper Canada District School Board* (2005), 203 O.A.C. 98 (Div. Ct.).

12. I disagree with the premise of that argument. While the *Charter*'s Section 15 may be employed to not only redress discriminatory behaviour, it can also be employed to invalidate legislation, which was the request made in *Withler* [*Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396], *supra*. … There are many reasons for an enhanced level of contextual scrutiny where the constitutionality of legislation is in issue rather than the evaluation of the effect of a private agreement of limited application. …

14. Our provincial *Human Rights Act* has an important but less encompassing mandate than s. 15 of the *Charter*. The provincial *Act* only authorizes us to evaluate and, where necessary, to redress discriminatory behaviours of individuals, groups, and agencies. Unlike the Ontario *Human Rights Code*, and the *Charter* itself, the Nova Scotia *Act* specifically defines what discrimination is for the purposes of our *Act*. Our *Act* does not explicitly mandate us to look for and find historical disadvantage or even stereotype. What our *Act* does require (and there is nothing new about this) is that the effect of differential treatment engage a component or aspect of the complainant's human dignity. That is consistent, in my view, with the kind of analysis described and approved of in both *Law v. Canada* [*Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497] and the *Ontario Secondary Schools Teachers' Federation* case, but still respectful of the difference in our legislation.

[45] Subsections 5(1)(d) and (r) of Nova Scotia's *Human Rights Act* say:

Prohibition of discrimination

5(1) No person shall in respect of

…

(d) employment;

…

discriminate against an individual or class of individuals on account of

…

(r) family status; ...

Section 3(h) defines “family status”:

Interpretation

3 In this Act,

…

(h) “family status” means the status of being in a parent-child relationship; …

[46] The Board (para. 17) held that “family status” in s. 3(h) “includes the way the parent and child came to be in their relationship: whether by birth, adoption placement, ….” According to the Board:

> 22. Therefore, it is my view that the Nova Scotia *Human Rights Act* prohibits discrimination (distinctions that have the effect of creating burdens or denying access to benefits) on the basis of a person’s parent/child relationships. That prohibition includes a prohibition on distinctions based on how the parent/child relationship was created, as well as distinctions based on the care obligations created by a person’s parent/child relationships.

[47] From this, the Board concluded that article 29.02.8 of the Collective Agreement made a distinction based on family status with the effect of denying Mr. Adekayode a benefit given to adoptive parents:

> 26. The collective agreement did not provide for any pay or top-up to biological or “guardianship” parents during any parental leave. An employee would be restricted during that time to anything that he or she might be entitled to as employment insurance. However, the collective agreement made different provision for adoptive parents. …
>
> 27. A plain reading of these provisions demonstrates that there is a distinction being made between adoptive parents and other new parents. The adoptive parents get an advantage (top-up of employment insurance benefits for 10 weeks after 2 waiting weeks at 75% pay) that biological parents do not. …

[48] The Board found that this distinction implicated Mr. Adekayode’s human dignity:

> 39. What the evidence demonstrated to me was that the lack of access to employment insurance top-up benefits materially affected Ray Adekayode's choices about how to manage the integration of a new infant into his family. The lack of access to employment insurance top-up benefits materially affected his participation in the initial care relationship and care responsibilities involving his son …. The effect of the lack of access to advantages available to other individuals here affects a recognized aspect of Mr. Adekayode's legitimate sense of human dignity: his ability to create and manage the integration of a new human being into his family.

[49] These three findings – distinction on a listed ground, deleterious effect and engagement of human dignity – satisfied the Board's interpretation of the requirements for *prima facie* discrimination under s. 4 of the *Human Rights Act*. The Board held that the Collective Agreement discriminated based on family status contrary to s. 5(1)(r).

[50] Local 268 and HRM challenge the Board's reasons with the following submissions:

> (a) The meaning of discrimination in the *Human Rights Act* is driven by the meaning of discrimination under s. 15(1) of the *Charter of Rights*.
>
> (b) The *Charter* authorities require the claimant to prove arbitrary treatment, historical prejudice or stereotyping as an element of discrimination. Birth parents have not suffered those societal afflictions.
>
> (c) The principle of substantive equality, as defined in the *Charter* authorities, requires that the claimant prove "something more" than just the conditions of discrimination stated by s. 4 of the *Human Rights Act*. That additional condition, whatever its composition, does not exist for birth parents.
>
> (d) In any case, the Board's approach – to inquire whether the differential engaged the complainant's human dignity – was "misdirected".
>
> (e) The facts upon which the Board relied were "entirely unsupported by any evidence".

[51] My views on these points are:

(a) Does the *Charter* Case Law Govern?

[52] Local 268 says that the case law under s. 15 of the *Charter* determines the meaning of "discrimination" in the *Human Rights Act*, and those principles require Mr. Adekayode to prove historical prejudice or stereotyping. Local 268's factum puts it this way:

> 82. Accordingly, the appellant submits that it was an error of law for the Chair to refuse to apply *Charter* jurisprudence in interpreting the meaning of discrimination under the *Act*.
>
> …
>
> 86. The appellant respectfully submits that the Chair's conclusions about the test for *prima facie* discrimination constitute an error of law. To establish *prima facie* discrimination, the Chair was required to make a finding that the distinction applied to Mr. Adekayode was arbitrary, in that it perpetuated prejudice or stereotyping.
>
> …
>
> 97. Instead of focusing on the perpetuation of prejudice or stereotyping, the Chair held that in order to establish *prima facie* discrimination, Mr. Adekayode was only required to demonstrate that "the effect of differential treatment engage[d] a component or aspect of [his] human dignity". …

[53] Though Local 268's factum quotes s. 4 in an appendix, the body of its submission does not discuss it. The argument leapfrogs the *Act*'s definition to reach the *Charter* cases.

[54] I respectfully disagree with that approach.

[55] The *Human Rights Act* defines "discrimination". Section 4 is prefaced by the words "Meaning of discrimination". Section 4 opens with "For the purpose of this Act, a person discriminates where …". Section 4's elements are not just examples that are included in an unscripted broader definition. The Legislature designated s. 4 as the point of departure for any interpretation of "discrimination" in a human rights complaint under the *Human Rights Act*.

[56] At the appeal hearing, counsel for HRM, who supported Local 268's submission, was asked what hypothetical statutory wording could enable the Legislature, if it wished, to enact conditions for "discrimination" that differ from

the conditions under s. 15 of the *Charter*. He replied that the Legislature simply could not do so in any statute titled the "*Human Rights Act*".

[57] I do not accept that proposition.

[58] Mr. Adekayode did not bring a s. 15 challenge. He filed a statutory complaint under the *Human Rights Act*. Neither Local 268 nor HRM have challenged the constitutional validity of any provision in the *Act.* In *Vriend v. Alberta*, [1998] 1 S.C.R. 493, para. 106, Justices Cory and Iacobucci for the majority said:

> It is true that if the appellants' position is accepted, the result might be that the omission of one of the enumerated or analogous grounds from key provisions in comprehensive human rights legislation would always be vulnerable to constitutional challenge. It is not necessary to deal with the question since it is simply not true that human rights legislation will be forced to "mirror" the *Charter* in all cases.

[59] Of course, human rights legislation is quasi-constitutional, and its precepts should, within the principles of statutory construction, conform to *Charter* values: *University of British Columbia v. Berg*, para. 26; *Carrigan v. Nova Scotia (Department of Community Services)*, 1997 NSCA 19, para. 6.

[60] But Mr. Adekayode's complaint initiated a statutory exercise, meaning "the object is to seek the intent of [the Legislature] by reading the words of the provision in their entire context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of [the Legislature]": *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] 3 S.C.R. 471, para. 33. The starting point is the definition of discrimination in s. 4 of the *Act.*

[61] The Board interpreted s. 4 to require a distinction on a basis listed in s. 5(1), namely family status, that affected Mr. Adekayode by imposing a burden, or denying a benefit given to others. That is what ss. 4 and 5(1) say. The Board's view was consistent with Justice Abella's summary, for the Court, of the equivalent provisions in British Columbia's *Human Rights Code*, in *Moore v. British Columbia (Education)*, [2012] 3 S.C.R. 360:

> 33 As the Tribunal properly recognized, to demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse

> impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.

(b) Is Historical Prejudice or Stereotyping Required?

[62] Local 268's submission has another problem. It assumes that, to establish discrimination under s. 15(1), a *Charter* plaintiff must prove historical prejudice or stereotyping. Local 268 then says this requirement infuses the *Human Rights Act.*

[63] Some years ago, historical prejudice or stereotyping was required by s. 15(1): *e.g. R. v. Kapp*, [2008] 2 S.C.R. 483, para. 17, and *Ermineskin Indian Band and Nation v. Canada*, [2009] 1 S.C.R. 222, para. 202. But to assess Local 268's assumption today, one must examine the Supreme Court of Canada's recent rulings under s. 15(1).

[64] In *Quebec (Attorney General) v. A*, [2013] 1 S.C.R. 61, an authority missing from Local 268's factum, Justice Abella, speaking for five justices on the meaning of discrimination in s. 15(1) of the *Charter*, said:

> 324 *Kapp*, and later *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396, restated these principles as follows: (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? (*Kapp*, at para. 17; *Withler*, at para. 30). As the Court said in *Withler*:
>
> > The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group. [para. 39]
>
> 325 In referencing prejudice and stereotyping in the second step of the *Kapp* reformulation of the *Andrews* test, the Court was not purporting to create a new s. 15 test. *Withler* is clear that **"[a]t the end of the day there is *only one question*: Does the challenged law violate the norm of substantive equality in s. 15(1) of the *Charter*?"** (para. 2 [italics in *Quebec v. A*]). **Prejudice and stereotyping are two of the indicia that may help answer that question; they are not discrete elements of the test which the claimant is obliged to demonstrate**, as Professor Sophia Moreau explains:
>
> > Such a narrow interpretation will likely have the unfortunate effect of blinding us to other ways in which individuals and groups, that have

> suffered serious and long-standing disadvantages, can be discriminated against. This would include cases, for instance, that do not involve either overt prejudice or false stereotyping, but do involve oppression or unfair dominance of one group by another, or involve a denial to one group of goods that seem basic or necessary for full participation in Canadian society.
>
> ("*R. v. Kapp*: New Directions for Section 15" (2008-2009), 40 *Ottawa L. Rev*. 283, at p. 292)

326 Prejudice is the holding of pejorative attitudes based on strongly held views about the appropriate capacities or limits of individuals or the groups of which they are a member. Stereotyping, like prejudice, is a disadvantaging attitude, but one that attributes characteristics to members of a group regardless of their actual capacities. Attitudes of prejudice and stereotyping can undoubtedly lead to discriminatory conduct, and discriminatory conduct in turn can reinforce these negative attitudes, since "the very exclusion of the disadvantaged group … fosters the belief, both within and outside the group, that the exclusion is the result of 'natural' forces, for example, that women 'just can't do the job'" (*Action Travail* [*Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114], at p. 1139). …

327 **We must be careful not to treat *Kapp* and *Withler* as establishing an additional requirement on s. 15 claimants to prove that a distinction will perpetuate prejudicial or stereotypical attitudes towards them.** Such an approach improperly focuses attention on whether a discriminatory *attitude* [italics in *Quebec v. A*] exists, not a discriminatory impact, contrary to *Andrews* [*Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143], *Kapp* and *Withler*. …

329 … **prejudice and stereotyping are neither separate elements of the *Andrews* test, nor categories into which a claim for discrimination must fit.** A claimant need not prove that a law promotes negative *attitudes*, [italics in *Quebec v. A*] a largely unquantifiable burden.

[Bolding added]

[65] In *Kahkewistahaw First Nation v. Taypotat*, [2015] 2 S.C.R. 548, paras. 16-22, Justice Abella for the Court applied the formulation from her reasons in *Quebec v. A* to govern the meaning of discrimination in s. 15(1) of the *Charter*, and said:

> 21 To establish a *prima facie* violation of s. 15(1), the claimant must therefore demonstrate that the law at issue has a disproportionate effect on the claimant based on his or her membership in an enumerated or analogous group. At the second stage of the analysis, **the specific evidence required will vary depending on the context of the claim**, **but "evidence that goes to establishing a**

> **claimant's historical position of disadvantage" will be relevant**: *Whitler*, at para. 38; *Quebec v. A*, at para. 327. [Bolding added]

[66] Clearly historical prejudice and stereotyping are relevant to whether there is discrimination under s. 15. But those criteria are no longer legally essential to an infringement of s. 15. Rather, the "disproportionate effect" on the plaintiff may be established by other evidence that "will vary depending on the context of the claim". The "one question" under s. 15(1) is – "Does the challenged law violate the norm of substantive equality in s. 15(1) of the *Charter*?"

[67] In Mr. Adekayode's case, the Board's reasons say:

> 10. There is no legislative requirement in Nova Scotia, nor in any other jurisdiction in Canada, requiring a human rights claimant to establish some *historical disadvantage* or *stereotyping* as a precondition to a legitimate claim of discrimination. While an historical disadvantage or stereotyping may inform our current understanding about whether there is an *effect* from the making of a distinction, or the significance of such an effect, proof of an historical disadvantage is not a pre-condition to a successful claim under the Nova Scotia *Act*. [Board's italics]

[68] The Board's passage correctly interprets Nova Scotia's *Human Rights Act*. Though the Board was not attempting to recite *Charter* principles, the passage also fairly encapsulates the place of historical disadvantage and stereotyping in s. 15(1) discrimination since *Quebec v. A.*

[69] To assess the "disproportionate effect" under Nova Scotia's *Human Rights Act*, the Board added a qualitative factor – that the adverse differential impact should implicate the claimant's human dignity. I will return to that point later (paras. 79-97).

(c) Does Substantive Equality Require "Something More"?

[70] HRM's submission picks up the argument with *Quebec v. A*'s "one question" under s. 15(1) – Does the challenged law [or, in this case, Collective Agreement] violate the norm of substantive equality? HRM says the answer is no, and the Board erred by failing to dismiss Mr. Adekayode's complaint on that basis.

[71] The presentations in this Court freely dispensed the phrase "substantive equality", but offered little to define it. HRM's counsel said it means that discrimination requires "something more" than just a violation of the conditions of "discrimination" defined by s. 4 of the *Human Rights Act*. The only concrete

examples of additional criteria cited by Local 268 or HRM were arbitrary conduct, meaning historical prejudice or stereotyping.

[72] HRM's factum summarizes its point:

> 20. Substantive equality, as opposed to formal equality, is an essential feature of all human rights legislation whether it be the *Charter*, the *Canadian Human Rights Act*, or the various provincial human rights statutes. Formal equality requires the equal treatment of individuals and groups irrespective of the impact on the individuals or groups concerned. Substantive equality recognizes that every difference in treatment of individuals will not necessarily result in inequality and like treatment of individuals may result in substantial inequality. As such, substantive equality requires a contextual analysis of the impact of the law or conduct involved on the individual or group concerned.
>
> …
>
> 30. It is submitted that the Board erred in concluding that discrimination in the legislation did not require more than a distinction based on an enumerated ground which had a negative effect; that is, did not require that the disadvantage be arbitrary or perpetuate prejudice or stereotyping.

[73] To address this submission, it helps to first attribute some meaning and lineage to the phrase "substantive equality".

[74] Substantive equality aims to capture the discriminatory effects of a facially neutral law or a formally well-meaning program. It is about substance over form. Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2007), loose-leaf 5th ed. supplemented, vol. 2, explains:

> **55.6(e) Formal and substantive equality**
>
> The most common criticism of the similarly-situated definition of equality (and of the Aristotelian definition of equality) is not that it provides too little guidance to a reviewing court (or is "empty"), but that it can mask discrimination that occurs indirectly rather than directly. An apparently neutral law may have a disproportionate effect on a particular group, which, as a consequence, is being treated unequally. … A theory that only covers the direct case is often described as "formal equality" …. But, as Wintemute acknowledges, formal equality is not enough. It is also necessary to guarantee "substantive equality", meaning by that term a theory of equality that will capture indirect as well as direct discrimination.
> …
>
> **55.11(a) Substantive equality**
>
> A law may be discriminatory *on its face*. A law that expressly excluded women from admission to the police force would be discriminatory on its face. We have

> already noticed this is an example of "direct" discrimination. And we have also noticed that the term "formal equality" is normally used to indicate a theory of equality that covers only direct discrimination. Section 15 includes direct discrimination (obviously), and this leads to the invalidity of a law that is discriminatory on its face.
>
> A law may be discriminatory *in its effect*. A law that imposed height or weight qualifications for admission to the police force would be discriminatory in its effect if the effect of the law (whether intended or not) was to disqualify a disproportionate number of women. We have already noticed that this is an example of "indirect" discrimination. … The term "substantive equality" is normally used to indicate a theory of equality that covers indirect as well as direct discrimination. Because s. 15 includes substantive equality, it leads to invalidity of a law that is discriminatory in its effect.
>
> Finally, a law may be discriminatory *in its application*. A law that prescribed no discriminatory qualifications for admission to the police force would be discriminatory in its application if police recruitment procedures led to the rejection of a disproportionate number of female applicants. This is another kind of indirect discrimination, and it is also a breach of substantive equality and of s. 15. Where a law is discriminatory only in its application, s. 15 will not lead to the invalidity of the law itself. Section 15 will deny validity to past applications of the law, and will require (in the police example) that gender-neutral procedures be established for its future administration.
>
> …
>
> … Substantive equality allows a court to drill beneath the surface of the facially neutral law and identify adverse effects on a class of persons distinguished by a listed or analogous personal characteristic. …

[75] Substantive equality has long been the basis of human rights analysis, and was adopted into the *Charter* at the outset of s. 15 jurisprudence. In *Andrews v. Law Society of British Columbia,* [1989] 1 S.C.R. 143, paras. 37-38, Justice McIntyre incorporated the concept from human rights authorities.

[76] In the several years after *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, a mechanical process of mirror comparison constrained the application of substantive equality under s. 15. Examples are *Hodge v. Canada (Minister of Human Resources Development),* [2004] 3 S.C.R. 357 and *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657. In *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396, the reasons of the Chief Justice and Justice Abella, and in *Quebec v. A* (2013), those of Justice Abella, loosened the vise of mirror comparison to re-animate substantive equality analysis under s. 15(1). See the discussion of *Withler* and

Quebec v. A in *Muggah v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2015 NSCA 63, paras. 39-40, 43-45, 51-60. The point was not to add "something more", as HRM submits, to the list of elements that a plaintiff must prove under s. 15(1).

[77] Seen through the lens of substantive equality, the principle is as stated in *Quebec v. A*: historical prejudice and stereotyping are relevant, but not essential, to determine whether the distinction has the effect of exacerbating or perpetuating disadvantage. That was the Board's approach to Mr. Adekayode's complaint (Decision, para. 10).

[78] The Board was not obligated to dismiss Mr. Adekayode's complaint just because birth parents had not suffered historical prejudice and stereotyping.

(d) Was the Board's Reference to Human Dignity Misdirected?

[79] In *Quebec v. A*, para. 325, Justice Abella approved a passage from an article by Professor Sophia Moreau. Professor Moreau pointed out that a focus on prejudice or stereotyping would wrongly omit consideration of other discriminatory activity, such as "unfair" group dominance or a denial of resources that are "basic or necessary for full participation in Canadian society". HRM submits that the Supreme Court's endorsement of this passage embodies a qualitative criterion for discrimination beyond mere differential treatment having an adverse impact.

[80] I reiterate this is a human rights complaint, not a *Charter* challenge. The starting point is the statute.

[81] In Mr. Adekayode's case, the Board interpreted "discrimination" in the *Human Rights Act* to be "consistent" with the *Charter*'s values while being "respectful of the difference in our legislation". The Board (paras. 12 and 14) achieved that accommodation by saying that discrimination under the *Human Rights Act* must "engage a component or aspect of the complainant's human dignity".

[82] Did the Board's approach properly blend *Charter* values into the interpretation of the *Human Rights Act*? The answer should account for the distinctions between the *Human Rights Act* and the *Charter*.

[83] In *Andrews*, paras. 38-39, Justice McIntyre pointed out significant differences between the reach of s. 15 and human rights statutes.

[84] First, s. 15 may invalidate legislation. This means a court that hears the challenge scans the full legal, social and political context of the impugned statute. A human rights inquiry has a narrower field of vision. This case turns on Mr. Adekayode's domestic circumstances. The pursuit of substantive equality in the human rights context follows a more attenuated inquiry than in a constitutional challenge to legislation.

[85] Second, the *Human Rights Act* has its own legislated structure comprising prescribed purposes that include human "dignity", a statutory definition of "discrimination", listed grounds that expressly include "family status", a *prima facie* case, a number of "exceptions" that include ameliorative activity on the listed ground of "family status", burdens of proof that accompany these features, but no overarching "demonstrable justification". These elements are not fully congruent with the *Charter*'s structure. Professor Wayne MacKay makes the point:

> *Introduction: From Enrichment to Contamination*
>
> Like many marriages, the equality provisions of the *Charter of Rights and Freedoms* and Canada's human rights codes began with the hope and expectation that the experiences of each one would enrich the other. …
>
> Unfortunately as with too many marriages, the union of *Charter* equality and human rights codes has not always been a positive one and the *Charter* has become more of a burden than a benefit to its statutory partner. Indeed, many now argue that the importation of *Charter* equality concepts into the interpretation of human rights codes has limited the goal of substantive equality and reduced access to justice for front line victims of discrimination. As Professor Leslie Reaume rightly argues, the nature of the *Charter* should be a source of enrichment for human rights codes and not a source of contamination.
>
> [B]orrowing from the *Charter* context to the statutory context is appropriate so long as the exercise enriches the substantive equality analysis, is consistent with the limits of statutory interpretation, and advances the purpose and quasi-constitutional status of the enabling statute. The objection raised in this paper is not to the interplay but to the manner in which *Charter* principles, specifically those articulated in the decision in the *Charter*, are imported and then allowed to dominate an analysis which should be driven first by the principles of statutory interpretation, and second by the jurisprudence which has developed specifically in the regulatory context.

> [Professor A. Wayne MacKay, *The Marriage of Human Rights Codes and Section 15 of the Charter in Pursuit of Equality: A Case for Greater Separation in both Theory and Practice*, (2013) 64 U.N.B.L.J. 54, page 55]

[86] In *Ontario (Director, Disability Support Programs) v. Tranchemontagne*, 2010 ONCA 593, paras. 82-86, the Ontario Court of Appeal held that Ontario's *Human Rights Code* should incorporate the meaning of discrimination from the case law under s. 15, which at that time required the plaintiff to prove historical prejudice or stereotyping. In this appeal, Local 268 and HRM rely on *Tranchemontagne*. Professor MacKay's article comments on *Tranchemontagne*:

- The structure of the OHRC [Ontario's *Human Rights Code*] makes clear that the legislature has taken great pains to balance the right to equal treatment and the legitimate interests of respondents. If its complex structure achieves that balance fairly through the interplay of factual prima facie case and variously tailored exemptions, there is no reason to tamper with it. The significance of the spheres included in the codes, together with creating exceptions wherever fairness requires, seals the argument that narrowing the scope of discrimination by increasing the threshold at the prima facie stage is an unworthy interpretation of the codes. It is precisely the significance of the spheres in this balance that the Court of Appeal seems not to appreciate in *Tranchemontagne*. [U.N.B.L.J., pages 59-60]

- In *Tranchemontagne*, the Court of Appeal for Ontario furthered the conflation of HR jurisprudence and the *Charter* by deciding that discrimination should have the same meaning in the Ontario *Human Rights Code* as the *Charter*. In particular, in both realms a person claiming discrimination must now demonstrate a distinction based on a prohibited ground that creates a disadvantage by perpetuating prejudice or stereotyping.

  The apparent appeal of uniformity can be misleading in this context. Rather than improve the law, uniformity here smooths away important distinctions, with significant implications for those who seek meaningful enforcement of their human rights.

  …

  Making stereotyping effectively part of the definition of discrimination under section 15 places the burden on the claimant to prove that the legislation does indulge in stereotyping, whereas under the conventional approach to human rights adjudication under the codes, the burden falls on the respondents to prove that their generalizations are accurate.

  [U.N.B.L.J., pages 74-75]

[87] *Tranchemontagne* and Professor MacKay's article preceded *Quebec v. A*, which held that historical prejudice and stereotyping, though relevant, are not essential to discrimination under s. 15(1).

[88] In my view, given that the *Human Rights Act* expressly defines "discrimination", the meaning of discrimination under the *Act* need not stride in lockstep with every modulation in the term's constitutional usage under s. 15(1). Rather, human rights "discrimination" should remain true to the statutory definition while being consistent with the *Charter*'s rooted values.

[89] The Board folded the *Charter*'s values into the interpretation of the *Human Rights Act* by saying the differential treatment must engage Mr. Adekayode's "human dignity".

[90] Local 268's factum (para. 98) faults the Board for invoking the "misdirected concept" of human dignity.

[91] Nova Scotia's *Human Rights Act* identifies human dignity as the Legislature's first objective:

> **Purpose of Act**
>
> 2 The purpose of this Act is to
>
> (a) recognize the inherent dignity and the equal and inalienable rights of all members of the human family; …

[92] Local 268 neither addresses s. 2(a) nor explains how the Board misdirected itself by drawing guidance from the statute's primary purpose.

[93] Human dignity was an underlying *Charter* value from the outset: *R. v. Oakes*, [1986] 1 S.C.R. 103, para. 64. It became a discrete legal criterion of discrimination under s. 15(1) with the Supreme Court's decision in *Law v. Canada*, (1999), para. 88.

[94] In *R. v. Kapp*, [2008] 2 S.C.R. 483, paras. 23-24, the Chief Justice and Justice Abella observed that a decade of field experience had shown that, as a free-standing criterion, human dignity was vague, confusing and its use had the unintended effect of imposing an additional burden on equality claimants. But the Chief Justice and Justice Abella reiterated the place of human dignity as an underlying *Charter* value:

> 21 … There can be no doubt that human dignity is an essential value underlying the s. 15 equality guarantee. In fact, the protection of all of the rights guaranteed by the *Charter* has as its lodestar the promotion of human dignity.

[95] In this case, the Board did not apply the factor as a confusing hurdle to substantive equality, the concern voiced in *Kapp*. With human dignity as a broad purposive guide, the Board undertook a straightforward analysis of substantive equality in Mr. Adekayode's household.

[96] The Board (para. 39) focused on Mr. Adekayode's "ability to create and manage the integration of a new human being into his family". Whether this vital family dynamic is termed an aspect of human dignity or as "basic … for full participation in Canadian society" (Professor Moreau's phrase, cited by HRM), is etymology that doesn't change this outcome.

[97] The Board's reference to human dignity, in Mr. Adekayode's case, was not misdirected.

(e) Was There Supporting Evidence?

[98] Local 268's factum (para. 98) says that the Board's findings about Mr. Adekayode's choices and home circumstances were "entirely unsupported by any evidence".

[99] As noted earlier, this appeal is limited to issues of law, and a finding of fact is not appealable unless it was made arbitrarily, meaning it was not supported by any evidence.

[100] The Board found (para. 39) that the impugned provision "materially affected Ray Adekayode's choices about how to manage the integration of a new infant into his family" and "his participation in the initial care relationship and care responsibilities involving his son". Consequently "the lack of access to advantages available to other individuals here affects a recognized aspect of Mr. Adekayode's legitimate sense of human dignity".

[101] Mr. Adekayode's transcript of testimony to the Board, and that of his wife Colleen, are in the record. Not every finding must be transposed from direct evidence. The Board was entitled to draw reasonable inferences. The Board's findings and inferences are well supported by the testimony of Mr. and Mrs. Adekayode.

(f) Summary – s. 5(1)(r)

[102] I would dismiss the grounds of appeal that challenge the Board's finding of *prima facie* discrimination under s. 5(1)(r) of the *Human Rights Act*.

5. Second Issue – Ameliorative Program or Activity under s. 6(i)

[103] Section 6(i) of the *Human Rights Act* says:

> **Exceptions**
>
> 6 Subsection (1) of Section 5 does not apply
>
> …
>
> (i) to preclude a law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or classes of individuals including those who are disadvantaged because of a characteristic referred to in clauses (h) to (v) of subsection (1) of Section 5.

[104] I will address the Board's conclusions on the elements of s. 6(i).

(a) Are Adoptive Parents Disadvantaged?

[105] At the Board's hearing, Local 268 and HRM presented evidence that adopted children have special needs, and adoptive parents have particular challenges to integrate and bond with their new arrival. Local 268 and HRM submitted that adoptive parents were disadvantaged in this respect, the top-up for adoptive parents in article 29.02.8 had an object of ameliorating the disadvantage, and s. 6(i) excepted article 29.02.8 from s. 5(1)(r) of the *Human Rights Act*.

[106] This evidence comprised the expert opinions by Dr. Nina Woulff and Dr. Kristen McLeod and the factual testimony by Captain Paul Boyle. Mr. Adekayode and the Commission adduced no evidence on the circumstances of adoptive parents. The un-contradicted evidence before the Board was that adoptive parents face significant challenges not encountered by birth parents, particularly:

- A heavy majority of adopted children have special needs, not so for birth children.
- Adoptive families often struggle with bonding that is natural to the birth relationship.
- Adoptive parents are particularly stressed during the six month probationary period after the placement, when the adoption is at risk.
- The post-placement infrastructure for adoptive parents is less supportive than for natural parents.

[107] With apologies to the reader for the block quotations, it is worth supplementing this sterile summary with extracts from the sometimes poignant evidence. The evidence will feature in my discussion of the "rational contribution" test later.

[108] Dr. Woulff has a Ph.D. in clinical psychology and over 40 years' experience. She was qualified to testify on clinical and family therapy and the evaluation of biological and adoptive parents. She filed a report, testified and was cross-examined. Her Report included:

> In Nova Scotia the majority of adoptions are done through agencies and a smaller percentage is done through international adoption. Of these adopted children, very few are under one year of age. Healthy infant adoption has become a rarity.
>
> The majority of children placed through child welfare agencies have at least one (usually more than one) special need.
>
> …
>
> Evidence clearly supports that children adopted from agencies have a significantly greater number of special needs than children born to birth families.
>
> …
>
> Adoptive parents go through experiences that are quite different from those of birth parents. Adoptive parents are more likely than birth families to have experienced and struggled with infertility which is financially, physically and emotionally draining. They are required to navigate the bureaucratic system of adoption, deal with negative social stigma of adoption as "second best" and go through a home study. Even after being approved as prospective adoptive parents they wait with an uncertain timeline, as to when they may become parents.
>
> …
>
> Adoptions are not finalized until the child has been with the adoptive couple or single parent for at least 6 months. As mentioned above, most couples feel

anxious during this period and the expectation by social services is that both parents are held to a very high standard of parenting ability. Both adoptive mothers and fathers often experience this anxiety. The post-placement follow-up meetings evaluate the coping of both the adoptive mother and the adoptive father.

Birth parents do not usually worry that their child will be removed from their custody if they are less than perfect parents. Although caring for a newborn birth child can be physically tiresome (especially if the child has colic or difficulty sleeping), such difficulties can often be managed with medication and documented strategies. Birth parents can easily access resources for such normative difficulties in newborns. If the birth child is breast feed [*sic*], the feeding of the child is usually the domain of the mother.

With adoptive children the child is likely to present unpredictable and profoundly perplexing problems that do not have easy solutions. Such difficulties may present significant financial and time demands on both parents.

Parents of birth children generally assume that their children will bond with them whereas adoptive parents do not assume that this will occur without huge investments of time, patience and attention with their children.

…

However, parents who adopt children through agencies or internationally, face almost 100% probability that their child will have at least temporary if not lifelong difficulties. The multitude of extraordinary pre and post adoption stressors and challenges that almost all adoptive parents face are not shared by the majority of birth parents. …

[109] Dr. Woulff's testimony elaborated on the situation of adoptive parents:

… the profile of a typically adoptive child has changed radically in the last 50 years, and the idea that even as recently as, I'd say, 25 years ago people in this province were – and I'd say in all of North America – were often – I don't know if it's the right – but it was possible – it was certainly possible to adopt a healthy infant.

And by "infant" I mean a child that was often as young as 16 days old, which would be the youngest point at which you could adopt a child or within a few months old. Even as recently as 25 years ago that wasn't terribly uncommon. Today, 2014, and I'd say in the last 10 years or even 15 years, that's become such a rarity that it may not even be statistically significant.

So, what that means is that – but there are adoptable children, but these adoptable children almost always have some degree of special needs, and certainly it's been my obviously [*sic*] that a lot of the children adopted have more than one special need, so you have not simply, let's say, ADHD.

…

Adoptive parents, with their children, they don't have that ease of access of support and information, so most adoptive parents that I've ever encountered put in enormous energy in trying to understand and learn about these children. There's one very, very critical difference along with all this – you know, what I'm talking about is, yes, so you have a special needs child and it's demanding and you have to learn how to cope, okay.

…

Can you imagine having a child placed in your arms – I think some of you must have had children – and then be told immediately by the doctor, "You take very good care of that child, because we're going to be checking up on you, and that child, although you birthed it or your wife birthed it and you biologically parented it, will not be yours to keep unless you can demonstrate in the next six months, or longer if we deem you need a bit more time, that you can adequately cope."

This, in essence, is what adoptive parents go through. To me that is such a difference. It's not even on a continuum, it's apples and oranges, that they are held sort of in limbo for six months.

…

It means that the parents put everything else on the back burner, that all of their available time and energy is devoted to being attentive to the child, responding to the child. And remember these are older children, so they're sleeping not as – they're awake more than would be an infant.

THE CHAIR: Um-hmm.

THE WITNESS: Average infants – I think they average about 12 hours of sleep in the first three to four months, and then it slowly goes down. So, these are older children, they're awake more, the parents, often on their own initiative, try to investigate what – and understand better what the child's background is.

There's a lot of – you know, the issue of bonding is not taken for granted. It's like – in fact, I think most adoptive parents are told, "You have to work at getting the child connected to you," and work means not just, you know, this notion we've heard about in recent years – or – I don't know – about qualitative parenting.

…

THE WITNESS: How long does it take? I'd say certainly for the first year there's this kind of intense involvement, and I think my colleague perhaps will speak more in terms of, you know, children with clear attachment disorders. It's certainly more than a year, the process.

THE CHAIR: Um-hmm. Okay.

THE WITNESS: But, again, the first six months, I'd say, are very critical, but it's longer than the first six months.

[110] Dr. McLeod holds a Ph.D. in clinical psychology and specializes in children's development with emphasis on adoptive placements. She was qualified to express opinions on the needs of parents and children in adoptive and biological families. She filed a written opinion, testified and was cross-examined. Her report included:

> …I noted there were three areas of special consideration for adoptive parents that are not present in biological fathers. These three areas are in addition to those concerns already highlighted by Dr. Woulff. The first critical difference is in understanding the development of the attachment relationship and the increasing understanding in the research of the importance of the quality of the early attachment relationship in shaping the development in the child. We know that infants are biologically prepared at birth to be dependent on an adult caregiver for all needs – especially basic survival needs and management of hormonal responses. We further know that this early attachment process begins at infancy and is well in place by 7 months of age. Furthermore, research has now demonstrated that it is the quality of the early first relationships that shapes the future health of the child. This is particularly relevant in terms of how children learn to manage stress and engage in future relationships. What research is now demonstrating is that impairments in the early relationships damage the natural biological preparedness of infants to depend and attach such that, by as young as 18 months of age, toddlers exposed to trauma, neglect, or inconsistent parenting do not naturally seek support from adult caregivers when distressed or hurt. Rather, they develop maladaptive strategies for stress management that typically push the caregiver away rather than seek nurturance and protection at such times. …
>
> Related to this rational concern, the second issue that warrants highlighting is that neuroscience has begun to demonstrate the possible extent of neurological impairment that can occur when early stressful experiences overwhelm the natural neurobiological development of the infant. For example, neurological areas related to functioning successfully in school and relationships have been shown to be generally smaller in children exposed to early neglect, trauma, and significant attachment disruption. The developmental disability is an unseen disorder, but is extremely common to children placed for adoption currently in Nova Scotia. …
>
> Finally, my third concern is that of a practical and clinical one. As a practitioner who regularly works with adoptive families, it is a common concern that the support new adoptive parents seek is not effective in dealing with the attachment and developmental concerns present in their adoptive children. …
>
> As highlighted in the report prepared by Dr. Nina Woulff, there are many stressors facing adoptive parents. Not the least of these stressors, in my opinion, is the challenge parents face in naturally bonding and attaching to their children. This is not the case for many biological families, who often begin the bonding process prior to the birth and who can generally anticipate a natural progression

through the early neurological and attachment development period. The stress of knowing how to bond with a child who does not easily attach due to early loss or neurological delays is further compounded by the stress of the isolation created by well-intended but often unhelpful professional support. This is contrasted to the well-researched and readily available post-natal support for biological families. Very quickly adoptive parents can find themselves overwhelmed, exhausted, and at a loss to know how to move forward. This, combined with the lack of natural connection to the child, creates an extremely stressful environment that is beyond that experienced by most biological families.

[111] Dr. McLeod's testimony elaborated:

Okay. In the attachment process infants are biologically prepared through a series of – through everything from the facial expression to hormones that go through the body, through hormones that are typically shared with the mother who carries the child, they are biologically prepared to attach to a primary caregiver. …

So, if they've spent that first bit of their infant period with a non-primary caregiver – and that is the norm these days in adoption – then what we're seeing is that biological preparedness gets severely neglected or can get severely impacted by the, (a), attachment loss, (b), the lack of attachment at the beginning, or, (c), environmental concerns that can exist in either the prenatal or the post-natal environment.

…

The probationary period is a highly stressful period in my experience of working with families, but it's highly stressful for so many reasons. One, it's the time where the child is often showing a huge number of behavioural concerns.

… Two, they are feeling like incredibly ineffective parents, and, three –

Q. Why would they feel like –

A. Because every bit of advice they've been given has not worked, and so it's a natural process when we begin to feel like we're ineffective, that things aren't working, to begin to blame ourselves, and that's what happens, we start to blame ourselves. We also – and I haven't touched on this – there's high, high rates of what we refer to as vicarious trauma in adoptive parents, which is they begin to carry the traumatic behaviours.

We see things like poor performance at work, marital difficulties, physical health concerns. There's a lot of things that go on as vicarious trauma. And then the other reason it's stressful is because DCS [Department of Community Services] is literally watching you, and that's what it feels like, right, is that the Department is watching this. So, for example, I – you know, I gave that example of the parent that asked for respite and the worker said, "If you need a babysitter then maybe you're not ready for this child."

> That would never happen in a biological family. No one would ever say that, that if you need a babysitter you're an unfit parent. And those comments informally get made all the time during that six-month probationary period that creates a lot of stress.
>
> …
>
> So, that idea of in that initial period I have fathers that, in order to try and support the high level of challenges, are using their vacation time, their sick time and any lieu time they have to try and support the new family unit. And I often joke that it's a really terrible way to spend your vacation, is to come home to try and deal with a child that acts like they don't want to be with you a lot of the time.
>
> And so in my personal opinion the need for that recognition that the needs are high, that the stress is high and that the financial support is needed because the other supports, the free supports for infants, don't exist for the adoptive parents, so they are inevitably paying out-of-pocket for early support and care that's going to be effective.
>
> …
>
> In my experience and that's what I can speak to and today you're seeing Janet and she can give you the numbers of who's coming I would say 100 percent of them would be more at risk for developing problems than you would see in certainly birth children.
>
> …
>
> The challenges though as I mentioned yesterday is that we know what leads to poor outcomes in adoptive families we are increasingly aware of this. And we know that leads to challenges both neurologically and emotionally with the child.
>
> And that is related again to the highly impactive stress response system. So what is needed in those early days is not making things worse as opposed to making necessarily things better.
>
> It's a fallacy to think that you can make things – you can fix it all in ten weeks but you can sure make it worse. And so the idea of having the additional time and support and money would be to try and eliminate the risk factors for making the problems worse during that time.

[112] Captain Boyle was a firefighter with HRM for 36 years until his retirement in 2014. He and his wife adopted a daughter in 1981. He testified to the stresses of adoption:

> So for six months you're sort of sitting around saying well I can't have a dirty dish in the sink, I got to make sure the vacuuming's done, all that kind of stuff.
>
> So you're under almost constant stress of trying to live up to the expectations that you feel the Social Worker is looking for.

> And then if you don't live up to those expectations there's a possibility that you will lose your child.

[113] The Board accepted that adoptive families have special needs:

> 33. … More to the point in terms of establishing a unique need on the part of adoptive parents post-placement was Dr Woulff's evidence about the very practical fact that any adoptive placement will likely present more than one developmental or integrative kind of challenge to the adoptive parents. Some of Dr Woulff's evidence compared the risk of developmental problems in an adoptive child at 100% and suggested that the risk of such a developmental challenge for a birthed child might be as low as 4%. I thought that Dr. Woulff's comparison was somewhat exaggerated, but I am willing to understand that the modern expectation is that a child adopted through a public agency is likely to have at least one, and perhaps more than one, identifiable special need.
>
> 34. … Based on the evidence before me, I can understand how the fostering of a close bond may be perceived as harder and perhaps riskier for many adoptive parents and their adoptive children, than it is for those connected by biology. …
>
> 35. I fully appreciate that where contact prior to birth or within the first several months of life has been limited or non-existent, the development of a parent-child bond may be extremely challenging for adoptive parents. The bonds of relationship may be very fragile even after 35 weeks. The attachment process may be challenged more deeply if the adoptee has had a difficult pre-natal history (such as biological parent substance abuse), and suffered post-natal neglect, or has had what Dr McLeod described as a "trauma-impacted" pre-adoption experience. Dr McLeod made the point that these kinds of challenges have observable and corresponding burdens on the relationships between adoptive parents. Adoption leave support therefore serves to reduce stress in the early stages of placement by allowing parents to be present together with the adoptee, reduce the financial stress of being away from work, and provide some extra time to secure an attachment.

[114] The Board nonetheless held that s. 6(i) did not apply. The Board's reasoning turned on the Board's formulation of the test, a legal issue.

(b) Did the Board Apply the "Rational Contribution" Test?

[115] The terms of s. 6(i) – "law, program or activity", "has as its object the amelioration", and "disadvantaged" – reproduce wording in s. 15(2) of the *Charter*:

> 15(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups

> including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[116] Section 6(i) was enacted by S.N.S. 1991, c. 12, s. 1. It didn't materialize as a singularity. Clearly the legislators had an eye to s. 15(2) of the *Charter*. Unlike "discrimination" in s. 5(1) of the *Act*, the terms of s. 6(i) are not defined by the *Human Rights Act*. So the authorities under s. 15(2) directly pertain to the interpretation of s. 6(i).

[117] The leading authorities on s. 15(2) are *R. v. Kapp*, *supra*, and *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, [2011] 2 S.C.R. 670.

[118] In *Kapp*, the Chief Justice and Justice Abella, for the majority, set out the test:

> 49 Analysing the means employed by the government can easily turn into assessing the *effect* [S.C.C.'s italics] of the program. As a result, to preserve an intent-based analysis, **courts could be encouraged to frame the analysis as follows**: **Was it rational for the state to conclude that the means chosen to reach its ameliorative goal would contribute to that purpose?** For the distinction to be rational, there must be a correlation between the program and the disadvantage suffered by the target group. Such a standard permits significant deference to the legislature but allows judicial review where a program nominally seeks to serve the disadvantaged but in practice serves other non-remedial objectives. [bolding added]

[119] In *Cunningham*, the Chief Justice, for the Court, elaborated:

> B. The Steps Under Section 15(2)
>
> [42] This Court in *Kapp* set out the basic framework for cases where the government relies on s. 15(2).
>
> [44] … the government must show that the program is a genuinely ameliorative program directed at improving the situation of a group that is in need of ameliorative assistance **in order to enhance substantive equality**. *Kapp*, at para. 41. There must be a correlation between the program and the disadvantage suffered by the target group, *Kapp*, at para. 49. Courts must examine the program to determine whether, on the evidence, the declared purpose is genuine; a naked declaration of an ameliorative purpose will not attract s. 15(2) protection against a claim of discrimination. *Kapp*, at para. 49.
>
> [45] If these conditions are met, s. 15(2) protects all distinctions drawn on enumerated or analogous grounds that "serve and are necessary to" the

> ameliorative purpose: *Kapp*, at para. 52. In this phrase, **"necessary" should not be understood as requiring proof that the exclusion is essential to realizing the object of the ameliorative program. What is required is that the impugned distinction in a general sense serves or advances the object of the program, thus supporting the overall s. 15 goal of substantive equality. A purposive approach to s. 15(2) focussed on substantive equality** suggests that distinctions that might otherwise be claimed to be discriminatory are permitted, to the extent that they go no further than is justified by the object of the ameliorative program. To be protected, the distinction must in a real sense serve or advance the ameliorative goal, consistent with s. 15's purpose of promoting substantive equality.
>
> [46] The fundamental question is this: up to what point does s. 15(2) protect against a claim of discrimination? The tentative answer suggested by *Kapp*, as discussed above, is that **the distinction must serve or advance the ameliorative goal.** This will not be the case, for instance, if the state chooses irrational means to pursue its ameliorative goal. ...
>
> …
>
> 3. Does the Distinction Serve or Advance the Object of the Ameliorative Program?
>
> …
>
> [74] … the chambers judge concluded that exclusion of status Indians from membership in the Peavine Métis Settlement furthered the object of enhancing Métis culture, identity and governance. The Court of Appeal, while accepting that the *MSA* was a genuinely ameliorative program, overturned this finding on the basis there was "no evidence" that the exclusion would enhance those goals. In my view, **the Court of Appeal erred in demanding positive proof** that **an impugned distinction will in the future have a particular impact**. As *Kapp* makes clear, **all the government need show is that it was "rational for the state to conclude** that the means chosen to reach its ameliorative goal **would contribute** to [its ameliorative] purpose": *Kapp*, at para. 49. [bolding added]

[120] In Mr. Adekayode's case, the Board's reasons did not mention *Kapp* or *Cunningham*. The Board's test differs materially from the *Kapp*/*Cunningham* principles.

[121] The Board said:

> 40. Section 6(i) of the *Human Rights Act* can exempt a "program or activity" from the discrimination provisions of s. 5. Even if I were prepared to assume that adoptive parents are currently disadvantaged individuals or a disadvantaged class of individuals because they face challenges at the beginning of parenting that biological parents do not share, I still cannot characterize Article 29.02.8 of the

> collective agreement as a program or activity that has as its object the amelioration of the conditions of those disadvantaged individuals. As Dr McLeod pointed out in response to a question from Mr Adekayode, having primary care relationship with a child **does not necessarily equate** to the child making that person their primary attachment. In addition, even in the adoptive context **quantity of time is not the equivalent of the quality of time**. More specifically, a firefighter **is not obligated by the collective agreement to take adoption leave** in any specific quantity, or at all. **There is thus no "program or activity"** that is articulated with defined strategies, components, and outcomes – except the monetary top-up of employment insurance benefits. So there is no "program or activity" of which the top-up forms a part. … [bolding added]

[122] There are several difficulties with the Board's bolded conclusions. They stem from the Board's failure to apply the *Kapp/Cunningham* test.

[123] **First:** From *Kapp* and *Cunningham*, the following principles emerge. The approach is "purposive". The question is whether the program is "directed to improving the situation of a group that is in need of ameliorative assistance in order to enhance substantive equality". "What is required is that the impugned distinction in a general sense serves or advances the object of the program, thus supporting the overall s. 15 goal of substantive equality". In other words "the distinction must in a real sense serve or advance the ameliorative goal". Both *Kapp* and *Cunningham* said that it need only be shown that it was "rational" to expect that the means would "contribute" to the goal. In *Cunningham*, the Supreme Court overturned the Court of Appeal's application of a stricter standard.

[124] The Board, in Mr. Adekayode's case, discounted s. 6(i) because "having primary care relationship with a child does not necessarily equate to the child making that person their primary attachment". To require proof of a "necessary" and "primary" attachment mistakes the "rational contribution" test.

[125] **Second:** The Board noted as significant that "even in the adoptive context quantity of time is not the equivalent of the quality of time". Contrast this to the Board's treatment of Mr. Adekayode's circumstances (see above, para. 48):

> 39 … The effect of the lack of access to advantages available to other individuals here affects a recognized aspect of Mr. Adekayode's legitimate sense of human dignity: his ability to create and manage the integration of a new human being into his family.

[126] As the top-up would allow Mr. Adekayode to have more time with his child, the Board said this sufficed to assist the integration of the child into Mr.

Adekayode's family. Yet for adoptive parents, the Board applied the stricter standard. As quantity of time "is not the equivalent of" quality time, adoptive parents would have the further burden to prove that a top-up necessarily will generate "quality time". The Board intensified the rational contribution test.

[127] *Kapp* and *Cunningham* make it clear that the principles of substantive equality apply to both the discrimination and the ameliorative program. The question is whether it is "rational" to expect that the additional child-rearing time, enabled by the top-up, would "contribute" to the ameliorative goal. The Board incorrectly formulated a stricter test for ameliorative programs and adoptive parents.

[128] Had the Board applied the correct test, the answer would have been - Yes. It is just as rational to conclude, for an adoptive family as for Mr. Adekayode's family, that additional time with the child would contribute to the integration of the new arrival into the family. Drs. Woulff and McLeod gave un-contradicted evidence to that effect. The Board (para. 35) accepted that "[a]doption leave support serves to … provide some extra time to secure the attachment".

[129] **Third:** The Board said that, because "a firefighter is not obligated by the collective agreement to take adoption leave in any specific quantity, or at all …" there is no "program or activity".

[130] Nothing in s. 6(i) or the authorities requires that the program or activity "obligate" the disadvantaged person to be ameliorated. Rather, according to *Kapp* and *Cunningham*, the question should be whether the program or activity would rationally be expected to contribute to the ameliorative goal. The Board's additional criterion skewed the test.

(c) Is this a Program or Activity?

[131] The Board said:

> 40. … There is thus no "program or activity" that is articulated with defined strategies, components, and outcomes – **except the monetary top-up of employment insurance benefits**. So there is no "program or activity" of which the top-up forms a part. [bolding added]

[132] Article 29.02.8(i) of the Collective Agreement says that someone who "is eligible to receive employment EI benefits pursuant to the Employment Insurance Act shall be paid an allowance in accordance with the Supplementary

Unemployment Benefit (S.U.B.) Plan and the following subsections: …" The same reference is in article 29.01.10 for pregnancy leave allowance. Both articles refer to "Supplementary Unemployment Benefit Plans" that are described in the *Employment Insurance Regulations*, S.O.R. 96-332 under the *Employment Insurance Act*, and referenced by ss. 22 and 23 of the *Employment Insurance Act*. Regulation 37 sets out nine conditions for a Supplementary Unemployment Benefit Plan. Article 29.02.8(ii) of the Collective Agreement added further criteria.

[133] The Collective Agreement's adoption leave allowance was designed to integrate with the legislated *program or activity* of benefits under the *Employment Insurance Act*. Had the EI legislation directly prescribed this adoption top-up allowance, undoubtedly the top-up would belong to a "program or activity". From the purposive perspective of substantive equality, it does not matter that, instead, the adoption top-up is a supplementary benefit sourced in the Collective Agreement which fills a gap in the EI legislation.

[134] The Board's conclusion – that "there is no 'program or activity' of which the top-up forms a part" - is incorrect.

[135] The Board's analysis neither addressed these legislated criteria, nor cited any authority for its conclusion that some further "strategies, components, and outcomes" were required for a "program or activity" under s. 6(i).

[136] At the hearing in this Court, when asked, counsel for the Commission could cite no basis for the view that s. 6(i) requires particular minimum strategies, components or outcomes.

[137] Nothing in the *Human Rights Act* prescribes a discrete level of strategies, components or outcomes for a "program or activity" under s. 6(i). Rather the status of the program or activity is governed by the functional principles set out in *Kapp* and *Cunningham*. In *Cunningham*, the Chief Justice said:

> 59 To qualify as a genuinely ameliorative program, the program must be directed at improving the situation of a group that is in need of ameliorative assistance: *Kapp*, at para. 41. There must be a correlation between the program and the disadvantage suffered by the target group: *Kapp*, at para. 49. …

[138] To establish that correlation, the "program or activity" must have the wherewithal to answer *Kapp*/*Cunningham*'s ultimate question – Is it rational to conclude that the means chosen to reach the ameliorative goal would contribute to

the ameliorative purpose? That may include strategies, components or outcomes. But in Mr. Adekayode's case, the Board did not pose the question.

[139] Once the question is asked - given the terms of the Collective Agreement and the EI legislation into which those terms fold, and given un-contradicted evidence of Drs. Woulff and McLeod - clearly it is rational to conclude that the features of this top-up allowance would contribute to the integration of the adopted child into the family.

(d) May There be a Distinction Between Protected Sub-classes?

[140] After summarizing the expert evidence on the challenges facing adoptive parents, the Board's decision noted that the special challenges facing adoptive parents did not justify a distinction that was itself based on "family status". The Board rejected the principle of any preferential treatment of one sub-class over another sub-class within a protected category:

> 34. … Based on the evidence before me, I can understand how the fostering of a close bond may be perceived as harder and perhaps riskier for many adoptive parents and their adoptive children, than it is for those connected by biology. HRM particularly argued that this more difficult care obligation experience for adoptive parents justified different treatment. My difficulty with that submission is that the making of a distinction based on care obligation duties of a parent, or the care obligation needs of a child, constitutes a distinction grounded on something that is within the definition of "family status" in the Nova Scotia *Human Rights Act*.
>
> …
>
> 43. … I was told that the attitude among the IAFF bargaining committee was essentially that something was better than nothing. The difficulty with that is that the negotiating teams for the IAFF and HRM have never been exempt from the *Human Rights Act*. Benefits cannot be portioned out at the bargaining table, and agreements cannot be made at the bargaining table, which create distinctions with effects based on family status, any more than they could make pay or vacation distinctions based on sex or race or creed. …

[141] Section 6(i) describes the disadvantaged individuals as "including those who are disadvantaged because of a characteristic referred to in clauses (h) to (v) of subsection (1) of Section 5". It contemplates amelioration of a sub-group of individuals who are distinguished by "family status" in s. 5(1)(r). As the Board determined (quoted above, paras. 46-47), adoptive parents are such a group.

[142] In *Cunningham*, the Chief Justice addressed this point, in the context of s. 15(2) of the *Charter*:

> [40] … s. 15(2) is aimed at permitting governments to *improve* [S.C.C.'s italics] the situation of members of disadvantaged groups that have suffered discrimination in the past, in order to enhance substantive equality. It does this by affirming the validity of ameliorative programs that target particular disadvantaged groups, which might otherwise run afoul of s. 15(1) by excluding other groups. **It is unavoidable that ameliorative programs, in seeking to help one group, necessarily exclude others.**
>
> [41] The purpose of s. 15(2) is to save ameliorative programs from the charge of "reverse discrimination". … Section 15(2) affirms that governments may not be able to help all members of a disadvantaged group at the same time, and should be permitted to set priorities. If governments are obliged to benefit all disadvantaged people (or all subsets of disadvantaged people) equally, they may be precluded from using targeted programs to achieve specific goals relating to specific groups. The cost of identical treatment for all would be loss of real opportunities to lessen disadvantage and prejudice.
>
> …
>
> [49] Section 15(2), understood in this way, **permits governments to assist one group without being paralyzed by the necessity to assist all**, and to tailor programs in way that will enhance the benefits they confer while ensuring that the protection that s. 15(2) provides against the charge of discrimination is not abused for purposes unrelated to an ameliorative program's object and the goal of substantive equality.
>
> …
>
> [53] … Ameliorative programs, by their nature, confer benefits on one group that are not conferred on others. **These distinctions are generally protected** if they serve or advance the object of the program, thus promoting substantive equality. This is so even where the included and excluded groups are aboriginals who share a similar history of disadvantage and marginalization: [authority omitted]
>
> [bolding added]

[143] It is to be expected that an ameliorative program or activity under s. 6(i) will distinguish between sub-classes of the protected category by preferring one over the other. If that was a barrier, s. 6(i) would be impotent. The Board, in Mr. Adekayode's case, incorrectly treated that distinction as a legal obstacle to the ameliorative program.

(e) Must There be Proof of Effects After 2004?

[144] The Board said:

> 37. The evidence as a whole failed to persuade me that the needs of adoptive parents as a group differed in nature or quality from the needs of parents who birthed their own children. **While there may be a difference in frequency or risk of difficulties with many adoptive children than with birthed children, those differences were not proven to exist in the ten years of the IAFF adoption experience.** Therefore, with respect to the HRM/IAFF collective agreement, I do not believe that there was even an accidental "ameliorative purpose" achieved by the adoption leave "top-up" provision - let alone a planned scheme to address a real and identified difficulty being experienced by employees seeking to become adoptive parents. In those respects, the evidence and context of this case differs from the evidentiary context of the *Ontario School Teachers' Federation* case, *supra.* … [bolding added]

[145] In *Kapp*, the Chief Justice and Justice Abella discussed the relevance of effects:

> (a) "Has as Its Object"
>
> 43 In interpreting this phrase, two issues arise. The first is whether courts should look to the *purpose* or to the *effect* of legislation [S.C.C.'s italics]. The second is whether, in order to qualify for s. 15(2) protection, a program must have an ameliorative purpose as its sole object, or whether having such a goal as one of several objectives is sufficient.
>
> 44 The language of s. 15(2) suggests that legislative goal rather than actual effect is the paramount consideration in determining whether or not a program qualifies for s. 15(2) protection. …
>
> 48 Given the language of the provision and its goal of enabling governments to pro-actively combat discrimination, we believe the "purpose"-based approach is more appropriate than the "effect"-based approach: where the law, program or activity creates a distinction based on an enumerated or analogous ground, was the government's goal in creating that distinction to improve the conditions of a group that is disadvantaged? …

[146] The un-contradicted evidence of Drs. Woulff and McLeod, on the special challenges facing adoptive parents, clearly encompassed the present day. The Board accepted their conclusions (above, para. 113). After acknowledging that adoptive parents had additional challenges of "frequency and risk", the Board rejected the application of s. 6(i) because "those differences were not proven to exist in the ten years of the IAFF adoption experience". According to *Kapp*, the

proof of effect – *i.e.* the actual adoption experience in this bargaining unit in the ten years after 2004 - is not required.

[147] The Board incorrectly adopted an effects test.

(f) Was the Object to Ameliorate?

[148] The Board said:

> 41. … Paul Boyle was on the IAFF bargaining committee in 2004 and 2007. He said, and I accept, that adoption leave top-up was something that the Union agreed to take in 2004 rather than get nothing – it was something that they didn't have before. The initial bargaining position had been that the top-up be given for all parental leave. That initial position was given up – he assumed – because full parental leave would be expensive and adoption was "relatively rare in our workplace". However his testimony was that the bargaining committee was never told in 2004 that parental leave top-up for all was too expensive. In addition, there was no deep discussion at the bargaining table, or in committee, of the special needs of adoptive parents compared with the needs of other kinds of parents. …
>
> 43. … Parental leave top-up was asked for in 2004, and adoption leave was the compromise reached. I was told that the attitude among the IAFF bargaining committee was essentially that something was better than nothing. …

The Board (para. 37) said there was no "planned scheme to address a real and identified difficulty being experienced by employees seeking to become adoptive parents". Though the decision did not state this conclusion, apparently the Board held the view that, given the top-up's genealogy during the 2004 negotiations, Article 29.02.8 did not "have as its object the amelioration" of adoptive parents under s. 6(i).

[149] In *Cunningham*, the Chief Justice described the approach to determining the program's object:

> [61] The object of an ameliorative program must be determined as a matter of statutory interpretation, having regard to the words of the enactment, expressions of legislative intent, the legislative history, and the history and social situation of the affected groups. Defining the objective of the ameliorative program too broadly or too narrowly will skew the analysis.

[150] *Cunningham* considered a challenge to legislation under the *Charter*. Here we have a term in a collective agreement.

[151] Contractual interpretation has its own objective approach to determining the parties' mutual intent. In *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129, Justice Iacobucci for the Court said:

> …The contractual intent of the parties is to be read … in light of the surrounding circumstances which were prevalent at the time. Evidence of one party's subjective intention has no independent place in this determination.

In *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 S.C.R. 633, Justice Rothstein said:

> [57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement [citation omitted]. The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in in the words of the contract. …

[152] It doesn't matter that negotiating parties approach the table with differing goals, then bargain to a compromise. In *Kapp*, the Chief Justice and Justice Abella said:

> 50 The next issue is whether the program's ameliorative purpose needs to be its exclusive objective. Programs frequently serve more than one purpose or attempt to meet more than one goal. Must the ameliorative object be the sole object, or may it be one of several?
>
> 51 We can find little justification for requiring the ameliorative purpose to be the sole object of a program. It seems unlikely that a single purpose will motivate any particular program; any number of goals are likely to be subsumed within a single scheme. To prevent such programs from earning s. 15(2) protection on the grounds that they contain other objectives seems to undermine the goal of s. 15(2).

[153] Under s. 6(i), *Kapp*, paras. 46-47, and *Cunningham*, para. 44, the contract's expression of mutual intent must be "genuine". It may not recite a "naked declaration as a shield to protect an activity or program" with an ulterior discriminatory purpose (*Kapp*, para. 46).

[154] The Board's findings establish that Local 268 and HRM entered the 2004 negotiations with divergent objectives. Local 268 wanted a top-up for all parents in the unit taking pregnancy leave or parental leave. HRM didn't want to pay for it. After discussion, they settled on a less expensive top-up for a smaller constituency – *i.e.* expectant mothers on pregnancy leave and adoptive parents on parental leave.

This is standard fare for collective bargaining. It is the process of dispute-resolution endorsed by the *Trade Union Act*, R.S.N.S. 1989, c. 475. That Article 29.02.8 followed a compromise at the table, instead of being a "planned scheme" from the outset, doesn't eliminate it from consideration under s. 6(i).

[155] Article 29.02.8 was the objective manifestation of the compromised mutual intent of HRM and Local 268. It was down-scaled from Local 268's opening proposal. But this doesn't mean the article colourably shielded an ulterior discriminatory objective. Nobody questions that Article 29.02.8 genuinely recited the mutually agreed goal of HRM and Local 268, at the conclusion of negotiations, to provide a benefit for adoptive parents. Under the purposive approach to substantive equality, this establishes the "object" to ameliorate the condition of adoptive parents.

[156] The Board misconceived the test of whether there is an "object" to ameliorate under s. 6(i).

(g) Summary – s. 6(i)

[157] In my view, the Board erred in law in its interpretation and application of s. 6(i) of the *Human Rights Act*.

[158] Had the standard of review been reasonableness, I would have concluded that the Board's ruling under s. 6(i) was unreasonable. In *McLean v. British Columbis (Securities Commission)*, [2013] 3 S.C.R. 895, Justice Moldaver for the majority said:

> [38] … Where the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable – no degree of deference can justify its acceptance…

Kapp and *Cunningham* applied the tools of interpretation to the wording in s. 15(2) of the *Charter*. Section 6(i) of the *Human Rights Act* has identical words, with no statutory definitions to channel their interpretation. Given the Board's failure to apply, distinguish, or acknowledge *Kapp* and *Cunningham*, the Board's marked departure from the *Kapp*/*Cunningham* interpretation of those words lies outside the range of permissible outcomes. (*e.g.*, see *Saskatchewan v. Whatcott*, para. 201)

6. Conclusion

[159] I would dismiss the grounds of appeal that relate to s. 5(1) of the *Human Rights Act.*

[160] I would allow the ground of appeal respecting s. 6(i) of the *Human Rights Act*. Section 6(i) excepts the adoption leave top-up from s. 5(1)(r) of the *Act*. On that basis, I would overturn the Board's order and dismiss Mr. Adekayode's complaint under the *Act*.

[161] The parties should bear their own costs.

Fichaud, J.A.

Concurred:

Saunders, J.A.

Scanlan, J.A.