**Carol Nielsen**

(*Appellant*) (*Applicant*)

***v.***

**Canada Employment and Immigration Commission**

**Treasury Board of Canada**

**Public Service Alliance of Canada**

(*Respondents*)

and

**The Canadian Human Rights Commission**

(*Intervenor*)

*Indexed as: Nielsen v. Canada (Employment and Immigration Commission) (C.A.)*

Federal Court, Court of Appeal
Case no. A-573-95
[1997] 3 FC 920; 33 CHRR 75; 131 FTR 80
17 June 1997

*The following are the reasons for judgment rendered in English by*

Marceau J.A.: On November 23, 1993, the Canadian Human Rights Commission issued a decision dismissing a complaint of discrimination lodged by the appellant pursuant to subsection 3(1) of the *Canadian Human Rights Act* [R.S.C., 1985, c. H-6]. The Commission was acting on the authority of subparagraph 44(3)(*b*)(i) [as am. by R.S.C., 1985 (1st Supp.), c. 31, s. 64] of the Act, which allows it to refuse to pursue a complaint if "having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted". The decision was attacked in the Trial Division [ (1995), 97 F.T.R. 282], by way of judicial review, under section 18.1 of the *Federal Court Act* [R.S.C., 1985, c. F-7 (as enacted by S.C. 1990, c. 8, s. 5)]. The application was dismissed and this is an appeal from that dismissal.

The parties raised many issues in advancing their respective arguments. There were lengthy debates on the extent to which deference is due to the decision of the Canadian Human Rights Commission; the nature of its discretion in rejecting a complaint under section 44 of its enabling legislation; the role of the Court in reviewing a decision to that effect; the consequence of a change in the legislation or its interpretation while a case is pending, and especially, as we will see, the effects of judgments dealing with constitutional issues. In fact, however, I now think that the appeal can be disposed of on the basis of a relatively simple analysis.

First, let us quickly review the facts. The appellant filed a complaint with the Canadian Human Rights Commission (the Commission) on September 29, 1989. At the time, she was a federal public servant and her complaint was about the refusal of the government to provide dental care insurance coverage for her same-sex partner and her partner's child. Her claim was that the refusal constituted discrimination pursuant to the *Canadian Human Rights Act* (the Act) on the grounds of sex, marital and family status, to which grounds she later added sexual orientation. The Commission decided to hold the complaint in abeyance pending judicial determination of a case which dealt with similar issues, that of *Canada (Attorney General) v. Mossop*. This was the case of a homosexual couple who contended that they constituted a "family" and were therefore discriminated against on the sole basis of their "family status""a ground of discrimination formally proscribed by section 3 of the Act"when they had been denied benefits accorded to heterosexual couples. A human rights tribunal had accepted the contention and its decision, when the Commission received the appellant's complaint, was under review in the Federal Court of Appeal. On June 29, 1990, the decision of the Federal Court of Appeal refusing to sanction the acceptance by the Commission of Mr. Mossop's contention was released.[1] An appeal to the Supreme Court was immediately launched. The Commission kept the appellant's complaint in abeyance.

The *Mossop* appeal was still pending before the Supreme Court when, on August 6, 1992, in *Haig v. Canada*,[2] the Ontario Court of Appeal, in proceedings brought by two homosexual members of the Armed Forces who had been made the subject of a policy directive denying homosexuals eligibility for promotions, issued a declaration to the effect that "sexual orientation" had to be added to the grounds of discrimination proscribed by section 3 of the Act. Then, on February 25, 1993, the Supreme Court of Canada delivered its judgment in*Mossop* .[3] A majority of the members of the Court were in agreement with the Federal Court of Appeal that the Commission was wrong in applying the "family status" protection to the homosexual couple. Parliament had obviously not intended to include same-sex couples in its definition of "family" under the Act. The Court noted that, in light of the Ontario Court of Appeal decision in *Haig* , *supra*, the constitutionality of section 3 of the Act could have been challenged on the basis of the absence of sexual orientation from the list of prohibited grounds of discrimination, but as the appellant had declined the invitation to do so, the Court could only rule on the argument initially advanced, that of discrimination on the basis of "family status".

The appellant's complaint was now, at last, ready for consideration. The Commission had before it the judgment it had been waiting for, but it also had the *Haig* judgment which it could not ignore. On November 23, 1993, the Commission finally issued its decision, which it simply expressed in the words of the statute: "considering all the circumstances of the complaint, no further proceedings are warranted." In effect,and this is not disputed, the Commission was taking the position that it would not proceed with complaints based *inter alia* on sexual orientation if the alleged discriminating conduct antedated the *Haig* ruling.

The learned Trial Division Judge dismissed the application for review. He disagreed with the contention that the decision in *Haig* had a retroactive effect going back to 1989, the year the complaint was filed. Such a result appeared to him to be contrary to the fundamental, if not absolute, principle of law against retroactivity. From his point of view, sexual orientation became part of section 3 of the Act on the date of the judgment that read the words into it. He rejected the argument that throughout the period from 1989 to the *Haig* decision in 1992, the appellant's complaint was "in the system," so that it should be disposed of on the basis of the law as it existed at the end of the process, as in criminal proceedings. This judicial rule was

applied in criminal proceedings, in his opinion, for reasons that do not extend to civil matters. TheCommission's decision, he said, was purely administrative, and need not have been supported by specific reasons, amongst which could very well have been considerations of administrative efficiency and public policy. On the whole, the decision did not appear to him to be so unreasonable as to allow and require the Court's intervention by way of judicial review.

Such are the main aspects of the decision that is put in question before us and the factual context in which it was rendered. Let us examine its merits.

I said at the outset that, despite the apparent complexity of the case and the number of issues seemingly involved, and long debated by counsel, I was of the view that the appeal could be dealt with on the basis of relatively simple reasoning. This is so for two reasons.

First, the disposition of one of the issues may render moot all the others. A finding that the *Haig* judgment has to be given retroactive effect would indeed be, by itself, decisive of the appeal. The reason is that, if there is such retroactivity, the major, if not the sole, consideration which led the Commission to its conclusion"a fact, I repeat, on which there is agreement"would have been without legal foundation. The Trial Division Judge would then have had no choice but to allow the application for review and send the matter back to the tribunal for reconsideration.[4] The deference due to the Commission on review of a subsection 54(1) decision would obviously have no bearing on the case and, at the same time, the question of whether to apply the "in the system" rule, followed in criminal proceedings with respect to changes in the law introduced before final judgment, would become irrelevant. In fact, this is precisely the situation, since I have come to the conclusion that the *Haig* judgment necessarily has retroactive effect.

The second reason why I now see the case as being more straightforward than it appeared at first is that my conclusion that retroactive effect must be given to a judgment like *Haig* is drawn from a simple analysis of what such a judgment really means and intends to achieve.

It is well known that the Supreme Court, in its landmark decision in *Schachter*,[5] confirmed that the judiciary may resort to four different judicial pronouncements when confronted with a provision of law that appears to be in conflict with the *Canadian Charter of Rights andFreedoms* [being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]]. The first and basic one is the sanction formally required by subsection 52(1) of the *Constitution Act, 1982* [Schedule B,*Canada Act 1982,* 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]], namely, a declaration that the provision is wholly unconstitutional and, therefore, of no force or effect. Another pronouncement, which had been applied in the past and was also provided for in section 52, in view of the use therein of the words "to the extent of the inconsistency," is to sever the part of the provision that is offensiveand declare unconstitutional only that part so as to let the remainder of the provision survive on its own merit. The third remedy, previously devised by the Supreme Court in the *Reference re Manitoba Language Rights*[6] and found to be somehow included in the inherent powers of the judiciary so as to allow it to avoid the disruptive effects of an immediate nullification of a law, is to suspend, for a time, the declaration of invalidity in order to allow the legislature to intervene and take corrective action. And the fourth remedy, a hitherto completely new andunheard of pronouncement, is the adding to the statute of what was improperly excluded from it. Two questions arise as to

the effects of any one of these four different judicial pronouncements: does the judgment speak only to the future or also to the past, and who is bound by it?

The first question is easily answered, I think, by a mere consideration of the meaning and purpose of the particular pronouncement involved. A declaration of invalidity goes undoubtedly, as I see it, to the past since what it says, in effect, is that the law was *ultra vires* the legislatureand, therefore, never acquired legal force and effect. The judgment does not create a new legal situation; it has a date and will be operative in the future, but it simply declares what is and what always has been. It does not mean that all that could have resulted from the application of the invalid law will be affected. The law did not have legal existence, but it nevertheless existed as a fact and the legal system cannot but give effect to that reality if chaos is to be avoided.[7] However, the invalid law may not govern or influence transactions or situations not already closed or spent by the advent of a term of prescription, or the lapse of a limitation period, or the application of the mistake of law doctrine, or the principle of *res judicata*, or otherwise. There is no reason, in that respect, to treat differently a law declared *ultra vires* by reason of the division of powers and one so declared by reason of the requirements of the Charter, although I agree that, in the latter case, some special accommodation may become necessary.

On the other hand, a suspension of the declaration of invalidity in order to give the legislature time to intervene necessarily validates the provision for the past. The suspended declaration of invalidity, if it becomes effective by the failure of the legislative authority to act within the time prescribed, will only look to the future. This is indeed its very purpose.[8] It may be difficult to understand that the judiciary may give temporary effect to a provision of law that the legislature had no power to enact and the resort by the Court to such a pronouncement has often been criticized as leaving the successful litigant with no remedy.[9] But, as regards the absence of special benefit for the litigant, it should be borne in mind that we are dealing here not with the behaviour of the administration but with an enactment of the legislature itself and, as regards the peculiar nature of the assumed judicial power, it could be regarded as an extension of the role and duty of the courts to assure the maintenance of peace and the preservation of the "normative order" and the rule of law.

The two other possible pronouncements defined in *Schachter* ought to be considered together, although, in many aspects, they present themselves as two quite different remedies. One had been resorted to in the past, long before the advent of the Charter; the other had never been heard of before *Schachter*. One has a direct relation to subsection 52(1) of the *Constitution Act, 1982*; the other is completely outside the purview of subsection 52(1). One "re-does" properly what the legislature has already done, albeit improperly; the other adds to what the legislature has done, and even, at times, as in our case, goes against the will of the legislature. However, the two remedies have the same purpose and employ the same judicial technique. They are rightly presented in *Schachter* as being complementary: one corrects "over-inclusiveness" in a provision of law and the other addresses "under-inclusiveness." In both cases, the purpose is the same, i.e., to avoid the sanction of invalidity applicable to the provision or the program as a whole, and in both cases the technique does not vary, as courts simply invoke their duty and power of statutory interpretation. There may be a great deal of fiction in that approach, but here again the interests of stability and continuity have prevailed. In any event, it remains that, in both cases, the basis of the judgment is unequivocally that the provision must be understood, interpreted and read as the legislature would have written it, or rewritten it upon the advent of the Charter, had the legislature then been properly informed as to the limits of its powers. This, it seems to me,

does not allow any other conclusion than that the Court means to go back to the time of enactment or the coming into force of the Charter, in 1982. The Ontario Court of Appeal saw it this way in *Haig* , the reason for its intervention against the suspension order of the Court of first instance being, in large part at least, to ensure that the benefit of the ruling would enure to the two complainants.[10] And, likewise, the Supreme Court saw it this way in the sole "reading in" judgment it has rendered, to my knowledge, that of *Miron v. Trudel* .[11] The end result is somewhat surprising in that the "reading in" technique, which, I agree, is akin to a judicial amendment, is retroactive while an amendment by a legislature is, in principle, prospective only. But the essence of the remedy is to that effect. It may be that one day the courts will feel the need for a new remedy in order to give effect to some new reading of the Charter, responsive to prevailing socio-economic conditions, and will assume the power to validate a law until judgment while adding something to it for the future. This is not what we are dealing with here.

The question of retroactivity of a judgment of the Court dealing with a constitutional challenge can hardly be isolated from the second question respecting the extent of the application of the judgment. Who is bound by the judgment?

The short answer is that this is a judgment on the state of the law; it is in the nature of a judgment *in rem*, the application of which is not limited to the parties in the proceedings as is a judgment *inter partes* rendered to determine the rights of the litigants. There is a problem, however, as to whether the judgment has binding effect on third parties outside the territorial jurisdiction of the tribunal.[12] I do not believe it has, considering the judicial system of the country. It appears inconceivable to me that an unappealed judgment of any provincial court, even a court of first instance presided over by a judge alone, could determine the law of the land for all Canadians. It is the territorial limitations of the reach of the *Haig* declaration, it appears to me, that explains why the Supreme Court of Canada in *Mossop* could render judgment in 1993 by reading section 3 of the *Canadian Human Rights Act* without regard to it. It is the same limitations that also explain why Parliament had to amend section 3 of the *Canadian Human Rights Act* on June 20, 1996 [S.C. 1996, c. 14, s. 2], and formally add "sexual orientation" as a ground of discrimination under the Act so as to make it the law of the land (which it did, incidentally, without even referring in Parliament to the Ontario judgment). But I do not have to decide the point since, in any event, it is against the Commission as a party to the proceedings that the *Haig* ruling was made.

It is my opinion, therefore, that the view of the Commission that the appellant's complaint was not subject to the *Haig* declaration, a view that undoubtedly was at the heart of its decision to reject the complaint, was wrong. The Trial Judge, therefore, had no choice but to set aside the decision of the Commission and refer the matter back to it for reconsideration. The appeal must be allowed, the decision of the Trial Judge set aside and the order that the Trial Judge should have made should issue.

Linden J.A.: I agree.

Robertson J.A.: I agree.

[1] [1991] 1 F.C. 18 (C.A.).

[2] (1992), 9 O.R. (3d) 495 (C.A.).

[3] [1993] 1 S.C.R. 554.

[4] It is true that the application, on its face, sought, in addition to the setting aside of the decision, special relief in the nature of *certiorari* and*mandamus*, but the appellant, before us, withdrew those requests.

[5] ;*Schachter v. Canada*, [1992] 2 S.C.R. 679.

[6] [1985] 1 S.C.R. 721.

[7] Cf. *St. Catharines v. H.E.P. Com'n*, [1930] 1 D.L.R. 409 (P.C.); affg. [1928] 1 D.L.R. 598 (Ont. H.C.).

[8] The conclusions of the Supreme Court in the *Reference re Manitoba Language Rights*, *supra*, at p. 780, where the remedy was first applied, are clear to that effect:

iii) The Acts of the Manitoba Legislature which would currently be in force were it not for their constitutional defect (*i.e.* current Acts) <u>are deemed to have temporary validity and force and effect</u> from the date of this judgment to the expiry of the minimum period required for translation, re-enactment, printing and publishing; [My emphasis.]

[9] See O. Fitzgerald, *Understanding <u>Charter</u> Remedies: A Practitioner's Guide* (Scarborough, Ont.: Carswell, 1994), at pp. 6-17.

[10] See the reasons of Krever J.A., at p. 505.

[11] [1995] 2 S.C.R. 418. See the reasons of McLachlin J., at pp. 509-510.

[12] I am not speaking merely of persuasive influence which, of course, it may have on other courts and tribunals, but of binding legal effect.