IN FACT AND IN LAW

Labour Law

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The Ville de Montréal *case*

The Supreme Court examines the notion of handicap

By Guy Lemay and Yann Bernard

On May 3, 2000, the Supreme Court rendered a decision for the first time on the interpretation to be given to the term "handicap" contained in section 10 of the Quebec *Charter of human rights and freedoms*, which prohibits discrimination.

In rendering its decision[1], the Court had to decide on three related cases:

- *Ville de Montréal* v. *Commission des droits de la personne et de la jeunesse*;
- *Ville de Boisbriand* v. *Commission des droits de la personne et de la jeunesse*;
- *Communauté urbaine de Montréal* v. *Commission des droits de la personne et de la jeunesse*.

Facts

In *Ville de Montréal*, a gardener was not hired due to a minor scoliosis which did not cause any functional disability but which, according to the City's medical experts, made the gardener unable to perform her duties due to the limitations caused by her ailment.

In *Ville de Boisbriand*, the complainant was a police officer with Crohn's disease (a chronic inflammation of the intestine which, for unknown reasons, can affect certain parts of the digestive tract) who

suffered no disability or limitation of his activities. As Crohn's disease is recurrent and often stress-related, the City of Broisbriand decided not to offer the complainant permanent employment because of the risk of future disability and the substantial costs which could result therefrom.

And finally, in *Communauté urbaine de Montréal*, the petitioner, who was applying for a position as a police officer, had a minor anomaly in his spinal column (a grade 1 spondylolisthesis), which caused him no discomfort or disability but which could be a potential risk when performing physically demanding work such as that of a police officer. The anomaly in question, although asymptomatic at the time, made the complainant more likely to develop incapacitating and recurrent lower back pain.

In all three cases, the complainants were not treated by the employers as they thought they should have been so they filed a complaint with the *Commission des droits de la personne et de la jeunesse du Québec*, which took up their cause and instituted proceedings before the *Tribunal des droits de la personne* [Human Rights Tribunal].

Trial Decision

In the first two cases, Justice Simon Brossard of the *Tribunal des droits de la personne* dismissed the complaints, essentially holding that the complainants could not claim to be the victims of discrimination based on a handicap since the physical ailments with which they were afflicted did not result in any functional limitations, and therefore could not be qualified as a handicap[2].

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[1] 2000 S.C.C. 27

[2] The *Ville de Montréal* decision was reported in D.T.E. 95T-478 (T.D.P.Q.).

Yann Bernard has been a member of the Bar of Québec since 1994 and specializes in labour law

However, in *Communauté urbaine de Montréal*[3], Justice Rivet, also from the *Tribunal des droits de la personne*, contrary to her colleague Brossard, held that in order to invoke a handicap, it did not have to be actual—it was sufficient if the employer believed that the person had a handicap. Justice Rivet also felt that the handicap in question did not have to be actual; it could be future or hypothetical, as in the case before her.

Court of Appeal Decision

The Québec Court of Appeal examined the three files and adopted the position developed by Justice Rivet in *Communauté urbaine de Montréal*, deciding against the three employers[4]. The Court stated that the protection against discrimination based on a handicap contemplated in section 10 of the Charter applies even in the case of ailments which do not cause any functional disability. Writing for the Court, Justice Philippon avoided giving a definition of "handicap", but added that he was unable to rule out health from the notion of handicap, thereby suggesting a broader definition of the term than that previously found in Quebec case law.

Supreme Court Decision

The Supreme Court of Canada, having agreed to hear the appeal at the request of the three employers, had two particular issues to decide on: first, the question of whether the term "handicap" in section 10 of the Quebec *Charter of human rights and freedoms* includes a physical or mental ailment which does not involve a functional disability and, second, given the decision rendered by the Court of Appeal, whether health was included in the notion of handicap and therefore constituted grounds for discrimination which was prohibited under the Charter.

In its decision rendered on May 3, 2000, the Supreme Court dismissed the three appeals and held that the three complainants were effectively handicapped within the meaning of the *Charter*.

In a unanimous decision written by Madame Justice Claire L'Heureux-Dubé, the Court set forth the following guidelines:

- To be considered a handicap, an ailment does not necessarily have to lead to functional limitations or disabilities. Rather, the issue is whether it entails for the individual loss of opportunities to take part in the life of the community on an equal level with others.
- To constitute a handicap, an ailment does not have to be actual; it can be non-existent and nonetheless be invoked by a complainant if it is proven that the person carrying out the discrimination believed in its existence. The Court thus confirmed the doctrine to the effect that the *subjective* perception of a handicap is sufficient to invoke the protection of the Charter.
- In the same manner, an actual or perceived ailment does not necessarily have to be "handicapping" for it to be invoked by the complainant, who only has to prove that it was perceived as being «handicapping» by the person accused of discrimination.
- Without defining what a handicap is, the Court stated that "…a 'handicap' may be the result of a physical limitation, an ailment, a social construct, a perceived limitation or a combination of all of these factors. Indeed, it is the combined effect of all these circumstances that determines whether the individual has a 'handicap' for the purposes of the *Charter*."
- The *Charter* also prohibits discrimination based on the actual or perceived possibility that an individual may develop a handicap in the future.

[3] Reported in (1996) 26 C.H.R.R.D./466 (T.D.P.Q.).
[4] The Court of Appeal decision was published in [1998] R.J.Q. 688 (C.A.).

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- A person's health may constitute a handicap and thus *a priori* constitute a prohibited ground of discrimination if a negative bias as to the individual's abilities results.

The Supreme Court therefore considers that one must go beyond strictly biomedical considerations to determine whether a person is handicapped, and that socio-political factors must also be taken into consideration. The courts will therefore have to consider not only an individual's biomedical condition, but also the circumstances in which a distinction is made, in order to decide whether that person has been discriminated against based on a handicap. The cause or origin of an actual or perceived handicap is therefore now immaterial, since the emphasis is on the effects of the distinction, exclusion or preference of which a person has been the subject.

A little bit of everything will therefore likely be considered a handicap in the future, since handicap is defined by the prejudicial effect of an actual or perceived ailment in a given environment.

The Court mentions, however, that these guidelines are not without limits. The legislator did not want to include personal characteristics in the definition of handicap (such as eye colour) or so-called "normal" ailments (a cold, for example). In other words, incidents which do not result in prejudice or undue stereotyping are excluded.

It should be noted that, from the *Tribunal des droits de la personne* to the Supreme Court, the existence of a handicap was the only issue covered by these decisions. Once it had been decided that an employer had based its decision on a prohibited ground such as handicap, the employer could still avoid liability by proving to the satisfaction of the court that the distinction made was justified by the job requirements and that it had taken all reasonable steps to attempt to accommodate the individual, i.e. to ensure that the handicap did not prevent him from being hired for the job he applied for.

Since this aspect of the cases has not yet been decided in first instance, the files have been referred to the *Tribunal des droits de la personne* for a decision on these issues.

This decision is of major importance in the area of discrimination based on handicap, especially in the area of employment, where employers are faced with tremendous costs associated with disabilities suffered by their employees.

It will very likely be applied in such a way that many of the grounds on which employers have always based their business decisions and economic choices will have to be re-examined and reviewed.

If any ailment or characteristic, even one which is not incapacitating, is to be considered a handicap as soon as it constitutes a source of prejudice or even an obstacle to the hiring of an applicant in a given environment, it becomes necessary for employers to review their hiring criteria as well as many of their employment policies (such as work assignment and attendance) in order to ensure that they comply with the new requirements of the *Charter of human rights and freedoms* as sanctioned by the Supreme Court.

The future is sure to bring new challenges…

Guy Lemay
Yann Bernard

You can contact any of the following members of the Labour Law group in relation to this bulletin.

at our Montréal office

Jacques Audette
Pierre L. Baribeau
Jean Beauregard
Yann Bernard
Anne Boyer
Monique Brassard
Denis Charest
Alexis-François Charette
François Charette
Pierre Daviault
Jocelyne Forget
Philippe Frère
Alain Gascon
Michel Gélinas
Isabelle Gosselin
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Guy Lemay
Carl Lessard
Dominique L. L'Heureux
Catherine Maheu
Véronique Morin
Gilles Paquette
René Paquette
Marie-Claude Perreault
Jean Pomminville
Érik Sabbatini

at our Québec City office

Pierre Beaudoin
Danielle Côté
Christian R. Drolet
Pierre-C. Gagnon
François Houde
Bernard Jacob
Claude Larose

Montréal
Suite 4000
1 Place Ville Marie
Montréal, Quebec
H3B 4M4

Telephone:
(514) 871-1522
Fax:
(514) 871-8977

Québec City
Suite 500
925 chemin Saint-Louis
Québec, Quebec
G1S 1C1

Telephone:
(418) 688-5000
Fax:
(418) 688-3458

Laval
Suite 500
3080 boul. Le Carrefour
Laval, Quebec
H7T 2R5

Telephone:
(450) 978-8100
Fax:
(450) 978-8111

Ottawa
Suite 1810
360 Albert Street
Ottawa, Ontario
K1R 7X7

Telephone:
(613) 594-4936
Fax:
(613) 594-8783

Associated Firm
Blake, Cassels &
Graydon LLP
Toronto
Calgary
Vancouver
London (England)
Beijing

Web Site
www.laverydebilly.com

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