Federal Court  Cour fédérale

Date: 20140822

Docket: T-1223-13

Citation: 2014 FC 819

Ottawa, Ontario, August 22, 2014

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

BEVERLEY SKAALRUD

Respondent

JUDGMENT AND REASONS

[1] This case does not decide whether or not granting death benefits solely to survivors and the children of the deceased soldiers, thus excluding other family members, constitutes discrimination. Rather, the issue to be decided is much narrower. It is whether a case that is very similar to other cases already referred to the Canadian Human Rights Tribunal [the Tribunal] should be excluded even before it reaches the Tribunal for reasons of a jurisdictional nature.

[2] The Attorney General seeks judicial review of the decision of the Canadian Human Rights Commission [the Commission] to refer a matter to the Tribunal for an inquiry into a complaint. The application is made pursuant, presumably, to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

[3] The complainant before the Commission chose not to participate in the judicial review application. As a result, no one appeared in order to argue the other side of the issue raised by the government. I have chosen to deal with this matter as narrowly as can be in those circumstances. For the reasons that follow, the Court concludes that the judicial review application ought to be dismissed.

I. Facts

[4] Braun Scott Woodfield, the son of Beverley Jean Skaalrud, was killed, tragically, in Afghanistan while on active duty. He died on November 24, 2005. He was single at the time of his death and there is no claim that he had posterity.

[5] Parliament passed the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, SC 2005, c 21 [the Act] and it received Royal Assent on May 13, 2005. According to some of its provisions, the Act allows the Minister of Veterans Affairs to pay a death benefit in some circumstances. For our purposes, it suffices to say that:

a) the death benefit follows the death of a member of the Canadian Forces;

b) the death comes as a result of a service-related injury;

c) the death benefit goes to a "survivor" or a dependant child;

(section 57 of the Act).

[6] However, the Act was not proclaimed into force upon Royal Assent (section 6, *Interpretation Act*, RSC, 1985, c I-21). Rather, it came into force by order of the Governor in Council (section 117 of the Act) many months later, on April 1, 2006. There was no retroactive effect of the Act. Accordingly, only those members of the Canadian Forces who would unfortunately pass away after the coming into force of the Act, passed by Parliament close to one year before the executive chose to bring the Act into force, would be covered by the Act. Someone, like Braun Scott Woodfield, who was killed while on active duty after the Act was passed, but before the executive brought the said Act into force, would not be covered by its provisions.

[7] The Act limits the scope of the notion of "survivor" in the definition it gives of the word:

"survivor"	« survivant »
"survivor", in relation to a deceased member or a deceased veteran, means	« survivant » Selon le cas :
(a) their spouse who was, at the time of the member's or veteran's death, residing with the member or veteran; or	a) l'époux qui, au moment du décès du militaire ou vétéran, résidait avec celui-ci;
(b) the person who was, at the time of the member's or veteran's death, the member's or veteran's common-law partner.	b) la personne qui, au moment du décès du militaire ou vétéran, était son conjoint de fait.

The record before this Court shows that the limitation of the death benefit to survivors found in section 57 of the Act has been challenged as discriminatory by family members of deceased Canadian Forces personnel who, by definition, are excluded.

[8] The Report made by the Commission under section 49(1) of the *Canadian Human Rights Act*, RSC, 1985, c H-6 [CHRA] informs the Court that there is a group of complaints arguing that family members excluded by the limitation on who the survivors may be, for the purpose of receiving death benefits under the Act, constitutes prohibited discrimination, and they have already been referred to the Tribunal. However, these complaints are all in relation to cases where the member of the Canadian Forces passed away after the Act was proclaimed into force. Thus, the issue of other family members being excluded from receiving death benefits, in cases where the death occurred after the coming into force of the Act, is already before the Tribunal.

[9] The issue already before the Tribunal can be summarized as whether or not there is discrimination, pursuant to the CHRA, where the death benefit is limited to spouses/common-law partners and dependant children, and not available to other family members.

[10] But this is not the situation of Mrs Skaalrud. Her son did not pass away after the coming into force of the Act. Had that been such, her case would have been considered with that of others already before the Tribunal. Instead, Mrs Skaalrud's son was killed while on duty in the period between the passage of the Act and its coming into force.

[11] For reasons that are not explained in the record before the Court, the government created a program in favour of survivors and dependent children of Canadian Forces personnel who were killed during that interim period of time between the passing of the Act and its coming into force.

[12] The government chose to use the Crown's prerogative power to make *ex gratia* payments to the class of survivors and dependant children of members of the Canadian forces that would otherwise have been covered by the Act if it were not for the fact that the event occurred before the Act was proclaimed into law, but after Parliament had spoken and allowed for a death benefit to be granted. The Report appears to summarize adequately the issue before the Court:

> 31. It is in this context that a group of related complaints have recently been referred to the Tribunal. In the other related complaints, all of the soldiers were killed following the enactment of the NVC. The complainants in those cases are challenging the narrow definition of "survivor" within the NVC. In this complaint, the complainant's son was killed prior to the enactment of the NVC, but within the specified time frame for the *ex gratia* payments. The *ex gratia* payments were made based on the same definition(s) and criteria as found in the NVC.
>
> (NVC refers to New Veterans Charter, the brand given to the Act.)

[13] The Order in Council allowing for payments during the interim period reads as follows:

> Her Excellency the Governor General in Council, on the recommendation of the Minister of Veterans Affairs and the Treasury Board, hereby authorizes the Minister of Veterans Affairs to make *ex gratia* payments in a total amount not exceeding one million dollars to survivors and dependent children of Canadian Forces members whose death is attributable to military service during the period beginning on May 13, 2005 and ending on March 31, 2006.

[14] The payments that can be made in accordance with section 57 of the Act can therefore be made to the same class (spouses/common-law partners and dependant children), except for the fact that the events took place between May 13, 2005 and March 31, 2006. From that date onward, section 57 applies; in the interim period, *ex gratia* payments are made.

[15] In the case at bar, the Commission came to the conclusion that the similarities between the cases already before the Tribunal and the case of someone who died in the interim period, i.e. between the passing of the Act and its coming into force, were sufficient to warrant that the whole issue be referred to the Tribunal. The logic seems to be simple. If the Tribunal can investigate the situation of family members that are excluded from the program created by legislation, what reason can there be to deny investigating what appears to be an extension of the program in cases where the death occurred in the interim period?

[16] Thus, the cases involving military personnel killed after the coming into force of the Act who had family members that are not survivors, as defined under the Act, are before the Tribunal. The government extended benefits for survivors and dependent children by making *ex gratia* payments in cases where the death occurred after the Act was passed, but before it was proclaimed into law. Clearly Mrs Skaalrud could not benefit under the *ex gratia* payments program. But she is refused for the same reason she would have been refused had her son passed away after the Act came into force. As far as Mrs Skaalrud is concerned, the only difference is that her complaint would have been investigated by the Tribunal had the tragic events happened after the coming into force of the Act, together with other complaints that have already been referred to the Tribunal. However, in spite of the fact that the reason for the refusal in the *ex gratia* payments program is exactly the same as the refusal in the death benefit program under the Act, the government claims that the inquiry by the Tribunal is not available with respect to the *ex gratia* payments program.

II. Decision

[17] Given that the circumstances are quite similar, the Commission concluded the matter involving the family of Braun Scott Woodfield ought to be referred to the Tribunal. This was done pursuant to section 49 of the CHRA. It reads:

Inquiries into Complaints	**Instruction des plaintes**
Request for inquiry	**Instruction**
49. (1) At any stage after the filing of a complaint, the Commission may request the Chairperson of the Tribunal to institute an inquiry into the complaint if the Commission is satisfied that, having regard to all the circumstances of the complaint, an inquiry is warranted.	49. (1) La Commission peut, à toute étape postérieure au dépôt de la plainte, demander au président du Tribunal de désigner un membre pour instruire la plainte, si elle est convaincue, compte tenu des circonstances relatives à celle-ci, que l'instruction est justifiée.
Chairperson to institute inquiry	**Formation**
(2) On receipt of a request, the Chairperson shall institute an inquiry by assigning a member of the Tribunal to inquire into the complaint, but the Chairperson may assign a panel of three members if he or she considers that the complexity of the complaint requires the inquiry to be conducted by three members.	(2) Sur réception de la demande, le président désigne un membre pour instruire la plainte. Il peut, s'il estime que la difficulté de l'affaire le justifie, désigner trois membres, auxquels dès lors les articles 50 à 58 s'appliquent.
Chair of panel	**Présidence**
(3) If a panel of three members has been assigned to inquire into the complaint, the Chairperson shall designate one of them to chair the inquiry, but the Chairperson shall chair the inquiry if he or she is a member of the panel.	(3) Le président assume lui-même la présidence de la formation collégiale ou, lorsqu'il n'en fait pas partie, la délègue à l'un des membres instructeurs.

Copy of rules to parties (4) The Chairperson shall make a copy of the rules of procedure available to each party to the complaint.	**Exemplaire aux parties** (4) Le président met à la disposition des parties un exemplaire des règles de pratique.
Qualification of member (5) If the complaint involves a question about whether another Act or a regulation made under another Act is inconsistent with this Act or a regulation made under it, the member assigned to inquire into the complaint or, if three members have been assigned, the member chairing the inquiry, must be a member of the bar of a province or the Chambre des notaires du Québec.	**Avocat ou notaire** (5) Dans le cas où la plainte met en cause la compatibilité d'une disposition d'une autre loi fédérale ou de ses règlements d'application avec la présente loi ou ses règlements d'application, le membre instructeur ou celui qui préside l'instruction, lorsqu'elle est collégiale, doit être membre du barreau d'une province ou de la Chambre des notaires du Québec.
Question raised subsequently (6) If a question as described in subsection (5) arises after a member or panel has been assigned and the requirements of that subsection are not met, the inquiry shall nevertheless proceed with the member or panel as designated.	**Argument présenté en cours d'instruction** (6) Le fait qu'une partie à l'enquête soulève la question de la compatibilité visée au paragraphe (5) en cours d'instruction n'a pas pour effet de dessaisir le ou les membres désignés pour entendre l'affaire et qui ne seraient pas autrement qualifiés pour l'entendre.

[18] In so doing, the Commission examined a number of considerations including of course the similarities between the case at hand and the complaints already referred to the Tribunal. For the purpose of this application, the similarities cannot be disputed and only the considerations concerning legal issues raised by the government to the effect that the Commission may not have jurisdiction to deal with in this case are apposite. These are the issues raised in the judicial review application.

[19] I will deal with the arguments put forth on this application in the Analysis portion of these reasons. It will suffice at this stage to reproduce paragraph 22 of the Report which encapsulates the decision:

> 22. The alleged discrimination in this complaint resulted from an act of ministerial discretion, which appears to be subject to the CHRA. This is because (i) the quasi-constitutional nature of the CHRA, (ii) the Tribunal has decided cases involving an exercise of ministerial discretion, and (iii) there is no exception in the CHRA prohibiting complaints against the exercise of ministerial discretion. However, the extent to which the CHRA applies to challenging an *ex gratia* order in council is a legal issue that ought to be explored more fully at the Tribunal stage.

III. Analysis

[20] The applicant takes the view that the standard of review is reasonableness. It is not a difficult concession for the Court to accept in view of the decision of my colleague O'Keefe J in *Canada (Attorney General) v Emmett*, 2013 FC 610. O'Keefe J found that *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 SCR 364, [*Halifax (Regional Municipality)*], applied given the similarities between the federal and the Nova Scotia regimes. In that case, the Supreme Court concluded that the Nova Scotia Human Rights Commission's decision that an inquiry was warranted in all of the circumstances was reviewable on a standard of reasonableness (para 17). I see no reason to depart from that conclusion.

[21] The applicant contends that the test should be articulated as the Supreme Court did in that case: "[I]s there a reasonable basis in law or on the evidence for the Commission's conclusion that an inquiry is warranted?" (para 17). I would add, that the Court also said at paragraph 17 that

reviewing courts should be reluctant to intervene with respect to decisions that simply refer the matter to an inquiry: "In my view, Bell (1971) should no longer be followed and courts should exercise great restraint in intervening at this early stage of the process." I have reached the conclusion that this is critical in this case.

[22] That is indeed the main thrust in the *Halifax (Regional Municipality)* decision. Referring to *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, the Court notes at paragraph 44 that "reasonableness is a single concept that "takes its colour" from the particular context". Hence, the range of possible, acceptable outcomes will vary with the "context of the particular type of decision making involved and all relevant factors."

[23] Thus, reviewing courts are invited to show a significant degree of deference concerning decisions that are as preliminary as decisions to refer a complaint to the Tribunal in view of the Commission's discretion exercised in order to move the matter to an inquiry. The test has been articulated as requiring only that "there was any reasonable basis on the law or the evidence for the Commission's decision to refer the complaint to a board of inquiry" (para 45, *Halifax (Regional Municipality)*). The broad discretion the Commission has would justify a low threshold like that articulated as "whether there is any basis in reason for such an inquiry" (para 49). Reluctance to intervene should be at the forefront of what a reviewing court should consider its task. Both the decision and the decision-making process are owed deference:

> [51] Third, this formulation reflects the appropriate deference to the Commission's process. Just as reasonableness requires appropriate deference to a tribunal's decision, it also implies appropriate deference to its processes of decision-making. The proposed formulation makes it clear that reviewing courts should be reluctant to intervene before a board of inquiry has addressed

> the substance of the points with respect to which the application for judicial review is brought. A reviewing court should take into account the benefit of having the board's considered view of the point raised on review as well as the risks of an unnecessary multiplication of issues and delay as was caused by premature judicial intervention in this case. Only where there is no reasonable basis in law or on the evidence to support the Commission's decision that an inquiry by a board of inquiry is warranted in all the circumstances would it be appropriate to overcome judicial reluctance to intervene. [My emphasis]

[24] There is no doubt in my view that the test ("any reasonable basis on the law or the evidence for the Commission's decision to refer the complaint to a board of inquiry") articulated in *Halifax (Regional Municipality)* finds application here in view of the broad discretion left with the Commission. I reproduce again for ease of reference subsection 49(1) of the CHRA:

Request for inquiry	**Instruction**
49. (1) At any stage after the filing of a complaint, the Commission may request the Chairperson of the Tribunal to institute an inquiry into the complaint if the Commission is satisfied that, having regard to all the circumstances of the complaint, an inquiry is warranted.	49. (1) La Commission peut, à toute étape postérieure au dépôt de la plainte, demander au président du Tribunal de désigner un membre pour instruire la plainte, si elle est convaincue, compte tenu des circonstances relatives à celle-ci, que l'instruction est justifiée.

[25] The Attorney General has taken issue with the exercise of discretion by the Commission to refer the matter to the Tribunal in spite of the fact similar matters, except for the fact the tragic deaths occurred after the coming into force of the Act, have already found their way before the Tribunal.

[26] As I understand it, the applicant argues that the making of an *ex gratia* payment is outside the scope of the CHRA. Two arguments are made:

a) The Commission's analysis is flawed and incomplete. The applicant seems to take issue with an act of ministerial discretion being the subject of a review by the Tribunal. Noting that the Tribunal has decided, and courts have agreed, that the exercise of discretion is reviewable under the CHRA, the Commission ought to have examined the matter more completely. The applicant seems to fault the Commission for not having made a determination that the *ex gratia* payments made pursuant to the order-in-council do not constitute a practice even though they may result from the exercise of ministerial discretion. If it is not a practice under the CHRA, then it would be outside the scope of the Tribunal to inquire. In that same vein, the Commission, in the view of the applicant, should have considered the nature of an *ex gratia* payment. The mere fact that the analysis is incomplete and flawed would make the decision to refer the matter to the Tribunal unreasonable.

b) The making of *ex gratia* payments does not constitute a discriminatory practice. That is because an *ex gratia* payment is in the nature of a gift, and the provision of a gift is not a practice subject to examination under the CHRA.

[27] Neither one of these arguments satisfies me that the preliminary decision to refer the matter to the Tribunal, having regard to all the circumstances of the complaint, requires this Court's intervention.

[28] As for the first argument, the applicant invites the Court to intervene because the Commission has not conducted the kind of fulsome analysis the Tribunal would be conducting.

Contrary to what the applicant asserts in his factum (para 29), the use of section 49 of the CHRA is not predicated on having "sufficient evidence to justify proceeding to this next stage." Rather, the CHRA provides that at any stage after the complaint has been filed the Commission may refer the matter if an inquiry is warranted. Actually, this would have been the kind of precise analysis that would have been warranted following *Bell v Ontario Human Rights Com'n*, [1971] SCR 756. However, that is the very precedent *Halifax (Regional Municipality)* overturns.

[29] The role of the Commission is very limited and its discretion is quite broad. One has to be careful and come back to what the Commission is actually doing. It merely decides that, "having regard to all the circumstances of a complaint, an inquiry is warranted." The characterization of the decision made by the Commission is important. Once again, *Halifax (Regional Municipality)* is enlightening:

> [19] I respectfully agree with the Court of Appeal. The Commission's decision to refer a complaint to a board of inquiry is not a determination of whether the complaint falls within the Act. Rather, within the scheme of the Act, the Commission plays an initial screening and administrative role; it may, for example, decide to refer a complaint to a board of inquiry so that the board can resolve a jurisdictional matter.

[30] Here the applicant would have wanted the Commission to resolve the jurisdictional matter. The applicant would like to have a full analysis even at a preliminary stage because he wants to argue that the complaint does not fall within the CHRA. That seems to be the very thing the Commission should not do. The policy rationale for avoiding such exercise would appear to be that "contemporary courts would not so quickly accept that the question of whether a property is "self-contained" could be answered by the abstract interpretive exercise undertaken in *Bell* (1971), conducted without regard to the provision's context within a specialized, quasi-

constitutional human rights regime" (para 34, *Halifax (Regional Municipality)*). Asking the Commission to conduct a fulsome analysis of the jurisdiction of the Tribunal to entertain the complaint would take us back to *Bell* (1971), *supra*. The strong urging of the Supreme Court is for reviewing courts to resist.

[31] The second argument put forth by the applicant does not fare any better. The record before the Court is obviously minimal, given that the matter has not progressed before the Tribunal where the facts surrounding the *ex gratia* payments would be presented. At this early stage, it is not completely far-fetched to consider that the *ex gratia* payments were made to survivors and dependant children as if the Act passed on May 13, 2005 had come into effect on that date. Parliament had spoken, yet the program was not put in place such that survivors and dependent children who would have benefited from the program otherwise did not get the benefit of the law. Extending the coverage to the day the law was passed would remedy that apparent unfairness. That appears to be what the Order in Council does. As such, the class of beneficiaries is broadened through the use of the Royal prerogative in the form of *ex gratia* payments.

[32] If it is possible that the Act creates a "practice" that can be investigated by the Tribunal, such that the family members of military personnel who died in action after April 1, 2006 can see their case investigated by the Tribunal, it is difficult to argue that that same "practice" extended by Order in Council to the same class of individuals cannot constitute a practice to the point that the Commission would commit a reviewable error in referring the matter to the Tribunal.

[33] As has already been noted, the situation of family members, other than survivors and dependant children, is already before the Tribunal for those beneficiating from the Act as of the date it was proclaimed into force. The Commission wants to extend the inquiry to the period between May 13, 2005, the day on which the Act was passed, and April 1, 2006, because the class seems to have been extended by executive fiat. Is that unreasonable? Can it be said at this early stage, to paraphrase the Supreme Court, that there is no reasonable basis in law or on the evidence to support the Commission's decision that an inquiry is warranted? I do not think so.

[34] The applicant has insisted that *ex gratia* payments are gifts that cannot be governed by the CHRA. The argument seems to be that gifts are not a practice covered by the Act. That, it seems to me, is something to be determined, not the kind of issue to be decided *ex ante*. On this record, all we know is that the government has chosen to make payments to a class of people remarkably similar to the class that will benefit from the Act. The only difference appears to be that one is a legislated program while the other one is based on the Royal Prerogative. In both cases, public money is taken out of the Consolidated Revenue Fund (see definition in section 2 of the *Financial Administration Act*, RSC, 1985, c F-11), through an appropriation in order to make those payments. And it just happens that the class covers the period between the passage of the Act and its coming into force. This looks like the "infamous duck test". In *Dole v William Enterprises, Inc*, 876 F (2d) 186 (DC Cir 1989), it was dressed up in more appropriate judicial garb:

> WHEREAS it looks like a duck, and WHEREAS it walks like a duck, and WHEREAS it quacks like a duck, WE THEREFORE HOLD that it is a duck."
>
> (See *Hussain v Obama*, 718 F (3d) 964 (DC Cir 2013) for a more recent use of the test.)

If the Tribunal will look into payments made for cases originating after Royal Assent, is it unreasonable to consider payments made before because of an argument that they are not a practice? It is possible to argue that payments made in accordance with the Act do not constitute a discriminatory practice under the CHRA. If such is the case, it would likely follow that the *ex gratia* payments made for events that occurred after the passage of the Act and before Royal Assent are not a discriminatory practice either. However it would be for the Tribunal to investigate and decide, a decision the applicant claims it cannot do because the Commission should have opined is not part of their jurisdiction.

[35] The other part of the argument is that the payments are not subject to the CHRA because they are gifts. The applicant has relied on authorities that state that an *ex gratia* payment is discretionary because the claimant does not have any legal rights to it. But such is not the issue here. As Hogg and Monahan put it in their *Liability of the Crown* (PW Hogg and PJ Monahan, *Liability of the Crown*, 3rd ed (Toronto: Carswell, 2000)):

> There are two types of ex gratia payments. One is an ad hoc response to a need that is unlikely to recur, and is intended to be a singular event, not creating any moral or political obligation for other cases. The other type of payments are those that are administered under a written, published policy. The latter type of payments are discretionary in theory only, as governments cannot easily resile from their announced policy. (under para 6.6(8) Compensation based on risk, footnote 230)

With respect to that second category, the question would be whether a program of compensation not based on legislation but rather on the Royal Prerogative could be treated on a different basis. Would a gift made on the basis of prohibited grounds of discrimination to a class of people be less discriminatory than if provided for in legislation? Here, the government's argument seems to

boil down to saying that as long as it is a gift, it can be a discriminatory practice. I fail to see how the legal nature of a payment can inoculate at such an early stage as the Commission referring a matter against being a discriminatory practice under the CHRA.

[36] To my way of thinking, it would be a live issue to consider the use of *ex gratia* payments as a justification for a discriminatory practice if the Tribunal were to find that the program created under the Act itself is discriminatory under the CHRA. To put it in the converse, if the Act creates a discriminatory program under the CHRA, the fact that that same program is extended by executive fiat (*ex gratia* payments made on the same basis) may not justify that practice on the basis that it is a gift extended to that class of people.

[37] It would be for the Tribunal, on the basis of a much more complete record than the one before this Court, to make that determination. Contrary to what the applicant advanced, it is not unreasonable to have that kind of a case be examined more carefully by the Tribunal. It cannot be said that there is no reasonable basis in law or on the evidence to support the decision that an inquiry is warranted.

[38] At the end of the day, the applicant would want for the Court to do that which reviewing courts are invited to avoid:

> The proposed formulation makes it clear that reviewing courts should be reluctant to intervene before a board of inquiry has addressed the substance of the points with respect to which the application for judicial review is brought. (para 51, *Halifax (Regional Municipality)*)

[39] To summarize, the applicant would have wanted the Commission to conduct a more fulsome review, in spite of the fact that subsection 49(1) of the CHRA does not seem to require it. Had the Commission conducted the review, it would have found, claims the applicant, that the ministerial discretion used to extend the program does not constitute a prohibited practice. The fact that the Commission did not undertake that kind of analysis is seen as flawed and thus unreasonable. In my view, *Halifax (Regional Municipality)* constitutes a complete answer. The initial screening and administrative role of the Commission is not as well adapted as that of the Tribunal. Appropriate deference to the Commission's decision-making process is required. The applicant has not shown that there is no basis in law or on the evidence that an inquiry is not warranted. The other argument posits that *ex gratia* payments cannot be a prohibited practice. This is certainly not something that is readily apparent. It is reasonable to let the Tribunal, on a fuller record, make that determination. It would be for the Tribunal to decide if, through a gift, that is where no legal rights or liability that accompany it, the government can discriminate illegally between classes of people either because *ex gratia* payments are altogether excluded from consideration or they cannot constitute a prohibited practice under the CHRA. It will only be where there is no reasonable basis in law or on the evidence that an inquiry is not warranted that a reviewing court will intervene. The very arguments put forth by the applicant make it imperative that the matter be examined more carefully by the Tribunal.

[40] I finish where I began. This case does not decide whether or not the regime created by Parliament to provide death benefits to survivors and dependant children is discriminatory under the CHRA. This Court does not decide either that a program based on the Royal Prerogative is discriminatory. This Court finds that the Commission did not make a reviewable error by

referring the complaint to the Tribunal as an inquiry is warranted. The applicant's argument that *ex gratia* payments fall outside the scope of the CHRA because they cannot be covered under section 5 of the CHRA is in my view an issue that is worth exploring in an inquiry; that is a reasonable basis in law to send the matter to the Tribunal. The matter is not so clear cut that this inquiry should be stopped before it begins. This is a case where the reviewing judge should show restraint.

[41] The application for judicial review is therefore dismissed. As the application was not opposed, there will not be a cost order.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, without cost.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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