

## HUMAN RIGHTS ADJUDICATION PANEL

**IN THE MATTER OF:** A complaint by A.B. v. University of Manitoba, alleging a breach of sections 13 and 14 of *The Human Rights Code*;

**AND IN THE MATTER OF:** *The Human Rights Code*, C.C.S.M., Chapter H175, as amended

**BETWEEN:**

**A.B.**

Complainant

-and-

**University of Manitoba**

Respondent

MHRC File No.: 15 EN 030

Appearances: Isha Khan for the Manitoba Human Rights Commission  
Maria Versace and Joel LeBois for the Respondent  
The Complainant, in person

Before: Michael D. Werier, Adjudicator

### I. INTRODUCTION

[1] On March 24, 2015 the Complainant, A.B., filed a complaint of discrimination under *The Human Rights Code of Manitoba* (“Code”) against the University of Manitoba. The allegation was based on discrimination in the provision of a service and in his employment based on his criminal record.

[2] The University has raised a preliminary objection, that being that the Complainant does not have a characteristic protected under the *Code*, and that the complaint should be dismissed.

[3] The Complainant opposes the University’s request.

[4] The parties acknowledge that a criminal record is not specifically set out as a protected characteristic under section 9(2) of the *Code*.

[5] The parties agree that section 9(1)(a) is akin to an analogous grounds test under section 15 of the *Canadian Charter of Rights and Freedoms* and agree that the issue in this case is whether a criminal record is an analogous ground.

[6] The University says the Complainant's specific criminal record is not an analogous ground.

[7] The Commission and the Complainant state that at this stage of the proceedings, the Complainant's particular convictions are not relevant and that a criminal record is an analogous ground.

[8] Therefore the issue is:

(1) Is a criminal record a protected characteristic under the *Code*?

## II. STATUTORY PROVISIONS

[9] The relevant statutory provisions are as follows:

1. *The Human Rights Code*, C.C.S.M., Chapter H175

(a) Preamble:

WHEREAS Manitobans recognize the individual worth and dignity of every member of the human family, and this principle underlies the *Universal Declaration of Human Rights*, the *Canadian Charter of Rights and Freedoms*, and other solemn undertakings, international and domestic, that Canadians honour;

AND WHEREAS Manitobans recognize that

- (a) implicit in the above principle is the right of all individuals to be treated in all matters solely on the basis of their personal merits, and to be accorded equality of opportunity with all other individuals;
- (b) to protect this right it is necessary to restrict unreasonable discrimination against individuals, including discrimination based on stereotypes or generalizations about groups with whom they are or are thought to be associated, and to ensure that reasonable accommodation is made for those with special needs;
- (c) in view of the fact that past discrimination against certain groups has resulted in serious disadvantage to members of those groups, and therefore it is important to provide for affirmative action programs and other special programs designed to overcome this historic disadvantage;
- (d) much discrimination is rooted in ignorance and education is essential to its eradication, and therefore it is important that human rights educational programs assist Manitobans to understand all their fundamental rights and freedoms, as well as their corresponding duties and responsibilities to others; and

(e) these various protections for the human rights of Manitobans are of such fundamental importance that they merit paramount status over all other laws of the province;

(b) Section 9(1):

**"Discrimination" defined**

9(1) In this Code, "**discrimination**" means

- (a) differential treatment of an individual on the basis of the individual's actual or presumed membership in or association with some class or group of persons, rather than on the basis of personal merit; or
- (b) differential treatment of an individual or group on the basis of any characteristic referred to in subsection (2); or
- (c) differential treatment of an individual or group on the basis of the individual's or group's actual or presumed association with another individual or group whose identity or membership is determined by any characteristic referred to in subsection (2); or
- (d) failure to make reasonable accommodation for the special needs of any individual or group, if those special needs are based upon any characteristic referred to in subsection (2).

(c) Section 9(2):

**Applicable characteristics**

9(2) The applicable characteristics for the purposes of clauses (1)(b) to (d) are

- (a) ancestry, including colour and perceived race;
- (b) nationality or national origin;
- (c) ethnic background or origin;
- (d) religion or creed, or religious belief, religious association or religious activity;
- (e) age;
- (f) sex, including sex-determined characteristics or circumstances, such as pregnancy, the possibility of pregnancy, or circumstances related to pregnancy;
- (g) gender identity;
- (h) sexual orientation;
- (i) marital or family status;
- (j) source of income;
- (k) political belief, political association or political activity;
- (l) physical or mental disability or related characteristics or circumstances, including reliance on a service animal, a wheelchair, or any other remedial appliance or device;
- (m) social disadvantage.

## 2. *Canadian Charter of Rights and Freedoms*

### Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

### III. BACKGROUND FACTS

[10] The background facts are not in dispute. In 2007 the Complainant was convicted of touching two children for a sexual purpose and making child pornography under the *Criminal Code*. He received a period of incarceration.

[11] He also was given a lifetime Prohibition Order restricting him from attending public places where children under 14 years of age could reasonably be expected to be present, and from being in contact with children under the age of 14.

[12] He was also prohibited from:

- (a) Attending a public park or public swimming area where persons under the age of 14 years are present or can reasonably be expected to be present, or a daycare centre, school ground, playground, or community centre;
- (a) Seeking, obtaining or continuing any employment whether or not the employment is remunerated, or becoming or being a volunteer in a capacity, that involves being in a position of trust or authority towards persons under the age of 14 years;
- (b) Using a computer system within the meaning of subsection 342.1(2) for the purpose of communicating with a person under the age of 14 years.

[13] The Complainant alleged that:

- a. the Respondent University discriminated against him on the basis of his criminal record, without reasonable cause, by terminating his employment, contrary to section 14; and
- b. the Respondent University discriminated against him on the basis of his criminal record, without reasonable cause, when it imposed conditions on

him that restricted his access to completing his education at the University, contrary to section 13.

[14] As required by the *Code*, the Commission investigated the complaint and on May 16, 2018, determined, pursuant to section 29(1)(c) that there was sufficient evidence to support a contravention of the *Code*, and pursuant to section 29(3)(a), it would further the objectives of the *Code* to have the complaint adjudicated.

[15] Accordingly, on November 22, 2018, the Commission requested that a member of the Adjudication Panel be appointed to make a final decision as to whether the *Code* had been contravened, and if so, to make an appropriate order to remedy the contravention.

[16] Adjudicator Daniel Manning was designated to hear this complaint on December 12, 2018 and on August 9, 2019, the parties were advised that Chief Adjudicator Werier would now adjudicate this complaint.

[17] The parties filed written briefs and presented oral argument at the hearing to deal with the University's preliminary objection.

#### IV. SUBMISSION OF THE UNIVERSITY

[18] The University's submission in support of its application can be summarized as follows.

[19] Firstly, it states the Complainant's criminal record is not an enumerated characteristic under the *Code*. The Complainant therefore has the onus to establish that his record is a protected characteristic under section 9(1)(a) of the *Code*.

[20] The University acknowledged that there are no decisions on the issue of whether a criminal record ought to be protected by section 9(1)(a).

[21] Any policies adopted by the Commission in Manitoba on criminal records are not guidelines, and the *Code* prevails over any policies.

[22] The University referred to a number of authorities, including the following:

- (a) *Siemens v. Manitoba (Attorney General)*, [2000] M.J. No. 417 (MBQB), affirmed [2000] M.J. No. 588 (MBCA), affirmed [2002] S.C.J. No.69 (SCC);
- (b) *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 (SCC);

- (c) *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711 (SCC);
- (d) *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519 (SCC).

[23] The University stated that the approach to applying section 9(1) should be guided by the interpretation of analogous grounds under section 15 of the *Charter* (as confirmed by Mr. Justice Hamilton in *Siemens*, paragraph 66).

[24] The University stated that the Complainant must show that the ground is protected as an analogous characteristic under the *Charter*. The majority Supreme Court reasons in *Corbiere* set out the test.

[25] The University referred to paragraph 13 of the decision where the majority stated:

“What then are the criteria by which we identify a ground of distinction as analogous? The obvious answer is that we look for grounds of distinction that are analogous or like the grounds enumerated in s. 15 -- race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. It seems to us that what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity. This suggests that the thrust of identification of analogous grounds at the second stage of the Law analysis is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law. To put it another way, s. 15 targets the denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion. Other factors identified in the cases as associated with the enumerated and analogous grounds, like the fact that the decision adversely impacts on a discrete and insular minority or a group that has been historically discriminated against, may be seen to flow from the central concept of immutable or constructively immutable personal characteristics, which too often have served as illegitimate and demeaning proxies for merit-based decision making.”

[26] The University maintained that there must first be a finding that the Complainant's specific criminal record is analogous, not simply that he has a criminal record. The Complainant's conviction involves serious criminal offences which are treated in a different manner under the *Criminal Code* and *Criminal Records Act*.

[27] The University stated that they do not take issue with criminal records “per se”, but that they take issue with individuals with criminal records that relate to sexual offenses

against children. This is due to the fact that the University invites thousands of children to its property every day.

[28] The University relied on the *Siemens v. Manitoba* decision, cited above, as legal authority for the distinction between a particular criminal record and simply a criminal record.

[29] In *Siemens*, the plaintiff (who owned a motel in Winkler, Manitoba) challenged provincial legislation ("the *VLT Act*") which allowed municipalities to hold plebiscites to ban VLT's.

[30] There were multiple challenges under the *Charter* including the right to equality under section 15 of the *Charter*, in that residence in a particular town is an analogous ground for discrimination.

[31] The University referred to paragraph 48 of the decision:

"48 Even if I accepted the plaintiffs' arguments that there has been a differentiation based on residency, the plaintiffs have another hurdle. Although some earlier decisions left it open as to whether residence, in appropriate circumstances, could be an analogous ground (see, for example, *R. v. Turpin*, [1989] S.C.J. No. 47), the majority in *Corbière* (supra) emphasized that in finding discrimination in "aboriginality-residence", they were not introducing a ground of residence simpliciter. McLachlin and Bastarache, JJ. said (at para. 9):

... To be sure, *R. v. Turpin*, [1989] 1 S.C.R. 1296, suggested that residence might be an analogous ground in certain contexts. But in view of the synthesis of previous cases suggested in *Law*, supra, it is more likely that today the same result, dismissal of the claim, would be achieved either by finding no analogous ground or no discrimination in fact going to essential human dignity."

[32] The University summarized its position on this point as follows:

A determination on the preliminary objection does not require a decision on whether a criminal record "simpliciter" is analogous.

[33] It only requires a decision on whether the Complainant's specific criminal record is analogous and protected under Section 15 of the *Charter* and therefore section 9(1)(a) of the *Code*.

[34] Aside from this obvious fundamental difference between the parties, the University acknowledged that the test for analogous grounds is set out by the majority of the Supreme Court of Canada in *Corbiere*.

[35] The University stated that the question is whether individuals in the same class as the Complainant (convicted of serious sexual offenses and subject to orders of prohibition) have an immutable or constructively immutable personal characteristic that cannot be changed or that government has no legitimate interest in expecting them to change.

[36] As stated earlier, the University acknowledged that there was no specific case on this point.

[37] However, the University argued that the Supreme Court of Canada decisions in *Chiarelli* and *Sauvé* (minority decision) support that the Complainant's criminal record does not warrant protection under section 15 of the *Charter*.

[38] In *Chiarelli*, the Court confirmed that non-citizens do not have an unqualified right to enter or remain in Canada. The main issue was whether federal law, which set out that certain types of offenses (offenses warranting imprisonment of five years or more) committed by non-citizens resulting in deportation, was not a violation of the *Charter*.

[39] The University noted that Mr. Justice Sopinka, on behalf of the Court in *Chiarelli*, adopted the reasons of Mr. Justice Pratte in the Federal Court of Appeal with respect to whether there was a violation of section 15 of the *Charter*.

[40] In particular, reference was made to the following comments by Justice Pratte:

“ . . . in my view, such a distinction, warranted or not, cannot be said to amount to discrimination within the meaning of section 15. No analogy can be made between the grounds of discrimination mentioned in section 15 and the fact that certain permanent residents have been convicted of serious offenses. Permanent residents who have been convicted of serious criminal offenses do not fall into an analogous category to those specifically enumerated in section 15 . . . ”

[41] In *Sauvé*, the Supreme Court held that prisoners have the right to vote under section 3 of the *Charter*. The majority decision in *Sauvé* did not consider the section 15 arguments which were advanced.

[42] However, the minority decision considered whether prisoner status constituted an analogous ground under section 15 of the *Charter* and determined that it was not an



analogous ground. Reference was made to Justice Gonthier's comments at paragraph 195:

"195 Prisoners do not constitute a group analogous to those enumerated in s. 15(1) because the fact of being incarcerated cannot be said to have arisen because of a stereotypical application of a presumed group characteristic. The status of being a prisoner is brought about by the past commission of serious criminal offences, acts committed by the individual himself or herself. The unifying group characteristic is past criminal behaviour. This was the view of the trial judge in *Jackson, supra*, noted by the trial judge in the case at bar: the differential treatment arises "not from their personal characteristics, but from past courses of conduct" (p. 920). This was also the view of Strayer J. in *Belczowski* at the trial level, *supra*, at p. 162: "I am unable to conclude that a law applied to the plaintiff to his disadvantage by reason of the circumstance that he has committed a crime and is imprisoned under lawful sentence amounts to discrimination on some ground analogous to those specified in subsection 15(1)".

[43] The University noted that this reasoning was applied by the Quebec Court of Appeal in *Association des policiers provinciaux du Québec c. Sûreté du Québec*, [2007] Q.J. No. 8352, leave to appeal refused [2007] S.C.C.A. No. 496.

[44] The Court was determining whether a section of the *Provincial Police Act* requiring automatic dismissal of a police officer convicted of a strictly indictable offence contravened section 15 of the *Charter*.

[45] The Court stated at paragraph 35:

"35 If being convicted and imprisoned is not an analogous ground, then all the more so, being convicted, without reference to or the requirement of imprisonment, for the operation of the Impugned legislation, is not an analogous ground."

[46] In conclusion, the University summarized its position.

[47] Criminal records are not enumerated under the *Code*. Therefore it is necessary to refer to legal authorities. The courts have determined that section 9(1)(a) should be guided by the principles for analogous grounds under section 15(1) of the *Charter*.

[48] The Complainant must prove that he has a personal characteristic that is analogous to the enumerated grounds in the *Charter*.

[49] The section 15(1) analysis must be determined with reference to his convictions for serious offenses. The courts have held that these types of offenses did not constitute analogous grounds.

[50] Based on these decisions, the University submitted that the Complainant's personal characteristic is not analogous to the enumerated grounds and not protected under the *Code*.

[51] Accordingly, the complaint should be dismissed at this preliminary stage of the proceedings.

## V. SUBMISSION OF THE COMMISSION AND THE COMPLAINANT

[52] The Commission referred to the following cases in support of their submission:

- (a) *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 (SCC);
- (b) *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12;
- (c) *Vriend v. Alberta*, 98 CLLC para. 230-021.

[53] Commission counsel stated that this motion is about whether or not A.B. "gets in the door". If the case is allowed to proceed, it will then be determined whether or not he was treated differently as a person with a criminal record and whether or not any barriers or restrictions that were placed on him by the University were reasonable or not.

[54] The Commission stated that the case is not about the Complainant's specific convictions at this stage of the proceedings. While the University spent a great deal of time on the nature of the convictions and the lifetime Prohibition Order, this is not relevant on this application. The Commission submitted that the University was conflating the test in determining analogous grounds.

[55] The Commission emphasized that there is no law which suggests that in determining whether or not a person with a criminal record is a person who can allege discrimination and have that complaint heard, that the specific nature of their criminal conviction ought to be considered.

[56] The Commission stated that *Corbiere* is authority for the contrary position. The Commission argued that *Corbiere* states that in doing a Section 15 analysis, it must be

determined if there is stereotyping at play or prejudice at play that relates to differentiating between two groups of people.

[57] The Commission stated that this distinction is important because of the nature of this tribunal and its role in adjudicating human rights cases. The Commission stressed that in considering the issue in this case, it is necessary to consider that human rights legislation is given special status as quasi constitutional legislation and that it derives its premise from international treaties and agreements in law about the human dignity of every human being.

[58] The Commission pointed out that fundamental principles are set out in the *Code*, including that all members of the human family are free and equal in dignity and rights, and they should not be subjected to negative stereotyping, prejudice or barriers to their equality of opportunity.

[59] The Commission acknowledged that human rights legislation across Canada has similar content and the enumerated grounds are similar (i.e. religion, age, sexual orientation, etc.). A criminal record is not an enumerated ground in Manitoba and therefore must be captured by the wording of section 9(1)(a) of the *Code* (cited above).

[60] However, the Commission noted that criminality, identified as a record of offense, a criminal charge or a conviction, is enumerated as a ground of discrimination in human rights statutes in Ontario, British Columbia, Prince Edward Island, Northwest Territories, Nunavut, Yukon and Canada.

[61] The Commission highlighted that human rights statutes are to be interpreted broadly and purposively and as such, section 9(1)(a) should be interpreted in such a fashion.

[62] The Commission referred to Manitoba Human Rights Commission Board of Commissioners Policy #I-11 which sets out an approach to interpreting section 9(1)(a) as follows:

- (a) Is the group a “discrete and insular minority”, being that its membership is capable of being readily defined and of some permanence?
- (b) Has the group “historically suffered (significant) discrimination and disadvantage”, commonly based on stereotype, prejudice and discrimination (noting that persons with, or perceived to have, a criminal record, have been victims of stereotype and may be eligible for consideration under section 9(1)(a))?

- (c) Is the characteristic one that is not within the control of the individual and will not be alterable by conscious action, or at least either not alterable except on the basis of unacceptable personal cost?

[63] The Commission agreed that section 9(1)(a) of the *Code* is akin to an analogous grounds test and borrows from the language in section 15 of the *Charter*.

[64] The Commission agreed that the Supreme Court of Canada decision in *Corbiere* sets out the test for determining whether there are analogous grounds under section 15 of the *Charter*.

[65] The Commission referred to the Supreme Court's comments on the general purpose of section 15 as being "to prevent the violation of human dignity through the imposition of disadvantage based on stereotyping and social prejudice and to promote a society where all persons are considered worthy of respect and consideration."

[66] The Commission relied on the Supreme Court of Canada decision in *Law* in support of its position that a criminal record constitutes an analogous ground. The Commission argued that in applying the factors set out in *Law*, it is clear that "an individual with a criminal record is a member of a discrete and insular group that can be readily identified. This group has historically been subjected to disadvantage and its members are not able to alter their membership in this group without conscious action."

[67] The Commission referenced the Manitoba Human Rights Commission Board of Commissioners Policy #I-12 made effective August 16, 2002. The policy states that alleged discrimination in employment on the basis of a criminal charge or conviction may constitute the basis of a complaint under section 9(1)(a) of the *Code*.

[68] The Commission argued that the cases relied upon by the University, such as *Siemens*, *Sauvé* and *Chiarelli* are not determinative of the issue and were decided in the context of the facts before them. For example, in *Chiarelli* the Court was making a distinction between permanent residents who have serious convictions and citizens who have serious criminal convictions.

[69] Likewise, the decision in *Sauvé* is irrelevant because there is not a finding with respect to a criminal record being an analogous ground of discrimination. The minority decision, which is relied upon, related to discrimination against a prisoner and therefore not on point.

[70] Further, the decision in *Siemens* was a Section 15 case decided largely about the legislation dealing with Video Lottery Terminals in the province. The Commission submitted that it should not be used to erode the test in *Corbiere*.

[71] In sum, the Commission argued that it is not the fact that there was a serious criminal conviction which means a person doesn't have a right to equality. It is the distinction between two groups which is what differential treatment and discrimination are based upon.

[72] The Commission stated that individuals with criminal records are members of a group that has historically been disadvantaged in Canadian society and has been subjected to stigma and stereotype, in part, because of their membership in that group.

[73] The Commission reiterated that there should be a finding that the Complainant has a characteristic that constitutes analogous grounds under section 9(1)(a) of the Human Rights Code, and that his complaint be allowed to proceed to the next stage to determine the complaint on the merits.

[74] At this next stage, the actual facts of the record, the restrictions on the Complainant, how they were interpreted and assessed and whether the ultimate result was reasonable, can be analyzed.

## VI. ANALYSIS and DECISION

[75] The University submits that the complaint be dismissed at this preliminary stage of the proceedings, and not be allowed to proceed to a fact-specific inquiry of the allegations. The Commission and the Complainant oppose the University's application for dismissal.

[76] The parties agree on a number of issues.

[77] There is agreement that a criminal record is not an enumerated ground under section 9(2) of the *Code*. They agree that section 9(1)(a) does not specifically provide a roadmap for interpreting it, although the Commission argues that the broad language is supportive of their interpretation.

[78] They agree that a section 15 analysis under the *Charter* is to be applied to section 9(1)(a) in determining whether a criminal record is analogous.

[79] The parties however differ on the way the *Code* and *Charter* should be interpreted and applied. They also disagree on the relevance and application of certain court decisions, including those of the Supreme Court of Canada.

[80] The University argues that the Complainant's criminal record is not analogous to the characteristics under the *Charter*.

[81] The Complainant and the Commission maintain that a criminal record is an analogous ground and the Complainant's specific convictions are not germane to the determination of whether it is an analogous ground.

[82] The Commission and the Complainant insisted that the University's interpretation conflates the two issues in that the specifics of the criminal record do not become relevant until the appropriateness of the University's actions are considered at the next stage of the proceedings.

[83] For the reasons that follow, the University's application to dismiss the complaint at this preliminary stage is dismissed.

[84] I have determined that I should not consider the specifics of the Complainant's criminal record for the purposes of determining if there are analogous grounds permitting the complaint to proceed to a hearing on the merits.

[85] I further find that a criminal record in itself is an analogous ground. Therefore the complaint shall be considered under the *Code* at the next stage of the proceedings.

[86] I believe this to be the proper application of the process set out by the majority decision of the Supreme Court of Canada in *Corbiere* at paragraphs 8 – 12. The Court stated:

"8 The same applies to the grounds recognized by the courts as "analogous" to the grounds enumerated in s. 15. To say that a ground of distinction is an analogous ground is merely to identify a type of decision making that is suspect because it often leads to discrimination and denial of substantive equality. Like distinctions made on enumerated grounds, distinctions made on analogous grounds may well not be discriminatory. But this does not mean that they are not analogous grounds or that they are analogous grounds only in some circumstances. Just as we do not speak of enumerated grounds existing in one circumstance and not another, we should not speak of analogous grounds existing in one circumstance and not another. The enumerated and analogous grounds stand as constant markers of suspect decision making or potential discrimination. What varies is whether they amount to discrimination in the particular circumstances of the case.

9 We therefore disagree with the view that a marker of discrimination can change from case to case, depending on the government action challenged. It seems to us that it is not the ground that varies from case to case, but the determination of whether a distinction on the basis of a constitutionally

cognizable ground is discriminatory. Sex will always be a ground, although sex based legislative distinctions may not always be discriminatory. To be sure, *R. v. Turpin*, [1989] 1 S.C.R. 1296, suggested that residence might be an analogous ground in certain contexts. But in view of the synthesis of previous cases suggested in *Law*, supra, it is more likely that today the same result, dismissal of the claim, would be achieved either by finding no analogous ground or no discrimination in fact going to essential human dignity.

10 If it is the intention of L'Heureux-Dubé J.'s reasons to affirm contextual dependency of the enumerated and analogous grounds, we must respectfully disagree. If "Aboriginality-residence" is to be an analogous ground (and we agree with L'Heureux-Dubé J. that it should), then it must always stand as a constant marker of potential legislative discrimination, whether the challenge is to a governmental tax credit, a voting right, or a pension scheme. This established, the analysis moves to the third stage: whether the distinction amounts, in purpose or effect, to discrimination on the facts of the case.

11 Maintaining the distinction in *Law*, supra, between the enumerated or analogous ground analysis and the third-stage contextual discrimination analysis, offers several advantages. Both stages are concerned with discrimination and the violation of the presumption of the equal dignity and worth of every human being. But they approach it from different perspectives. The analogous grounds serve as jurisprudential markers for suspect distinctions. They function conceptually to identify the sorts of claims that properly fall under s. 15. By screening out other cases, they avoid trivializing the s. 15 equality guarantee and promote the efficient use of judicial resources. And they permit the development over time of a conceptual jurisprudence of the sorts of distinctions that fall under the s. 15 guarantee, without foreclosing new cases of discrimination. A distinction on an enumerated or analogous ground established, the contextual and fact-specific inquiry proceeds to whether the distinction amounts to discrimination in the context of the particular case.

12 Our second concern relates to the manner in which a new analogous ground may be identified. In our view, conflation of the second and third stages of the *Law* framework is to be avoided. To be sure, *Law* is meant to provide a set of guidelines and not a formalistic straitjacket, but the second and third stages are unquestionably distinct: the former asks whether the distinction is on the basis of an enumerated or analogous ground, the latter whether that distinction on the facts of the case affronts s. 15. Affirmative

answers to both inquiries are a precondition to establishing a constitutional claim.”

[87] *Corbiere* endorses the steps related to a section 15(1) analysis of the *Charter* set out by the Court in *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497.

[88] The three steps in *Law* are:

- (1) Does the impugned law make a distinction that denies equal benefit or imposes an unequal burden?
- (2) Is the distinction made on the basis of an enumerated ground or a ground analogous to it?
- (3) Does the distinction constitute discrimination?

[89] The majority in *Corbiere* makes it clear that conflation of the second and third stages of the *Law* framework is to be avoided.

[90] I agree with the Commission that such a blending or fusion is present in the University’s argument.

[91] It makes sense to keep the two steps separate. To do otherwise would lead to the requirement to make distinctions on a wide range of fact situations which might vary based on the type of conviction, i.e., offenses of violence, sexual offenses, break and enter offenses, drug offenses, and so on.

[92] *Corbiere* says that the fact-specific and contextual enquiry should be at the next stage of the proceedings and I endorse that approach and apply it here.

[93] Also, I agree with the Commission and the Complainant that the cases relied upon by the University are not determinative and can be distinguished. The University fairly acknowledged there are no cases decided on the specific issue in this application.

[94] *Chiarelli* is authority for the principle that a permanent resident convicted of criminal offences (involves terms of imprisonment of 5 years or more) is not a category of persons analogous to those in 15(1) of the *Charter*.

[95] I acknowledge that the dissenting opinion in *Sauvé* (which was relied upon by the University and particularly paragraphs 200 & 201 of the decision) contains *obiter* comments which put a restrictive interpretation on the concept of analogous grounds. I



further recognize that the Quebec Court of Appeal applied the *Sauvé* dissent in *Sûreté du Québec*. Given that it was a dissenting judgment it is not a binding authority and is not determinative of the proper interpretation of section 9(1)(a) of the *Code*.

[96] Against the backdrop of the above finding, I turn to the overriding issue of whether a criminal record should be a considered or analogous ground under section 9(1)(a).

[97] I am mindful of the guidelines set out in *Corbiere* at paragraph 13 of the majority (cited above at paragraph 25).

[98] I have also taken note of certain other comments made by the Court in *Corbiere*. The Court refers to the development over time of a conceptual jurisprudence of the sorts of distinctions that fall under the section 15 guarantee, without foreclosing new cases of discrimination.

[99] The test for determining whether a ground of distinction is analogous is not one in which the courts or adjudicators apply a strict formula. The drafters of the *Charter* contemplated that there would be grounds added. This has occurred over time.

[100] In the final analysis, as stated, I have determined that the University's application should be dismissed and that the complaint should proceed to the third step in the *Law* test. A determination shall be made whether discrimination exists in the facts of this case.

[101] In addition to the comments set out earlier in the decision portion of this award, my additional reasons for so finding are as follows.

[102] Firstly, it is essential to consider that the intention of human rights legislation (the *Code* and the *Charter*), as confirmed by the Supreme Court in *Corbiere*, is to prevent the violation of human dignity through the imposition of disadvantage based on stereotyping and social prejudice, and to promote a society where all persons are considered worthy of respect and consideration.

[103] Secondly, the inclusion of section 9(1)(a) in the *Code* must be given weight. It is a unique provision. I agree with counsel for the Commission that this is a broad provision that must be interpreted based on the overall aims of human rights legislation. This broad wording of section 9(1)(a) allows for the inclusion of a criminal record as an analogous ground.

[104] Thirdly, while the Manitoba Legislature has not specifically included a criminal record under section 9(2) of the *Code*, certain other provinces have done so with certain conditions or limitations. This cannot be overlooked and it supports the argument that a criminal record is an analogous ground.

[105] Fourthly, the Manitoba Human Rights Commission policy on criminal records must be factored into the analysis. While I agree with both counsel that a Commission policy is overridden by statutory provisions, it is an indicator that a person with a criminal record is considered to be part of a disadvantaged group, subject to stereotyping and who has had barriers to employment and services.

[106] Lastly, I address the argument that a criminal record is not an immutable ground and therefore cannot be considered an analogous ground under the *Charter*. It is argued that people with criminal records do not have characteristics that could not be changed.

[107] I accept that there is a difference between a criminal record and gender (for example) in this context. However a restrictive interpretation overlooks that many individuals in Canada with criminal records are individuals who come from certain backgrounds and/or suffer from addiction or mental disabilities and can be subject to stereotyping and discrimination for the rest of their life. The *Code* and the *Charter* seek to address this stereotyping and discrimination.

[108] I wish to add one final comment. I stress that this application deals with whether the Complainant is allowed to proceed with this complaint. As noted, I have not taken into account the particular circumstances behind his conviction, which will be relevant at the next stage of the proceedings and which will be subject to a full inquiry on the facts.

[109] In sum, the University's application is dismissed.

Dated the 10 day of February, 2020.

  
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Michael D. Werier, Adjudicator