Unofficial English Translation of the Judgment of the Court

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| Aluminerie de Bécancour inc. c. Commission des droits de la personne et des droits de la jeunesse (Beaudry et autres) | 2021 QCCA 989 |
| COURT OF APPEAL |
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| CANADA |
| PROVINCE OF QUEBEC |
| REGISTRY OF | QUÉBEC |
| No.: | 200-09-009796-183 |
| (400-53-000019-159) |
|  |
| DATE: | June 16, 2021 |
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| CORAM: | THE HONOURABLE | FRANCE THIBAULT, J.A.JACQUES J. LEVESQUE, J.A.MARIE-JOSÉE HOGUE, J.A. |
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| ALUMINERIE DE BÉCANCOUR INC. |
| APPELLANT – Defendant  |
| v. |
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| COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE |
| RESPONDENT – Plaintiff |
| and |
| SYNDICAT DES MÉTALLOS LOCAL 9700(Aluminerie de Bécancour) |
| IMPLEADED PARTY – Complainant  |
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|  |
| JUDGMENT |
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1. The Aluminerie de Bécancour inc. (the “appellant”) appeals from a judgment rendered on May 11, 2018, by the Human Rights Tribunal (the “Tribunal”), District of Trois-Rivières (the Honourable Magali Lewis), granting an action for damages instituted by the Commission des droits de la personne et des droits de la jeunesse (the “respondent”) and condemning the appellant to pay material and moral damages to the victims.[[1]](#footnote-1)
2. The respondent accepted the complaint filed by the Syndicat des Métallos, Local 9700 (the “impleaded party”) and instituted an action for damages before the Tribunal. It alleges that [translation] “students are the lowest paid employees at ABI and that this disadvantage is based on their age and social condition, since they perform the same work as the employees who receive a higher wage”.[[2]](#footnote-2) It asked the Tribunal to order the appellant to reimburse each of the victims the amounts required to compensate the losses suffered as a result of the different wage conditions and to pay them $2,000 in moral damages, as well as interest and the additional indemnity.
3. The Commission’s originating application describes the nature of the infringement suffered by the victims as follows:

[translation]

1.  In Bécancour, since the summer of 2007, the defendant, Aluminerie de Bécancour Inc., has infringed the right to full and equal recognition of the rights and freedoms of the 160 victims, without distinction or exclusion based on their social condition and/or age, by paying them a lower wage than that paid to other employees based on their student status, thereby violating sections  10, 19, and 46 of the *Charter of Human Rights and Freedoms* (CQLR, c. C-12) (hereinafter the “*Charter*”);

2.  In the same circumstances, the defendant also infringed the victims’ right to dignity in a discriminatory manner, in breach of sections 4 and 10 of the *Charter*;

1. The Tribunal held hearings over 16 days, further to which it concluded that there was a distinction based on prohibited grounds – social condition and age – which impaired the victims’ right to equal wages for equivalent work. It dismissed the appellant’s arguments (i) that the student employees did not perform equivalent work to that of regular and casual employees; (ii) that the different wages were based on “years of service”, which it likened to a “fixed-term contract”; and (iii) that the distinction was not based on one of the grounds of discrimination set out in section 10 of the *Charter of Human Rights and Freedoms*[[3]](#footnote-3) (the “*Quebec Charter*”). Accordingly, the appellant was ordered to pay the students the wages and benefits they were deprived of, as well as moral damages.
2. Background
3. The appellant operates an [translation] “aluminum production and processing plant and metal foundry”.[[4]](#footnote-4) It hires students to replace the other employees during their vacation – i.e., during the summer and year-end holidays.[[5]](#footnote-5)
4. Unionized employees who work for the appellant fall into three categories: regular employees (“regulars”), casual employees (“casuals”), and student employees (“students”).[[6]](#footnote-6) Three collective agreements govern the working conditions of the unionized employees: one for the operations and maintenance employees, one for the laboratory and environment sector employees, and one for the office and technical employees. The vast majority of unionized employees are assigned to operations and maintenance.[[7]](#footnote-7) Every position in the plant calls for the performance of different tasks.[[8]](#footnote-8)
5. Before January 1, 1995, students were paid the same wages as the other employees.[[9]](#footnote-9) As of January 1995, students’ wages were reduced to 85% of Index 7,[[10]](#footnote-10) which is the lowest wage index.[[11]](#footnote-11) One of the respondent’s witnesses, Clément Masse, stated that the appellant decided at that time [translation] “to reduce students’ wages through the final offer”.[[12]](#footnote-12) One of the appellant’s witnesses, Pierre Champagne, stated instead that after discussion with the supervisors, they noted that students did 85% of tasks – which explains the appellant’s offer.[[13]](#footnote-13) He does not remember whether he gave the impleaded party that explanation at the time.[[14]](#footnote-14) The Tribunal, however, set aside that justification.[[15]](#footnote-15)
6. In the 2000–2004 collective agreement, students’ wages were maintained at 85% of Index 7.[[16]](#footnote-16) That did not change during the 2004 negotiations.[[17]](#footnote-17) In 2009, a new collective agreement came into force. The wage indexes were reduced from 7 to 5 and were renamed by the letters A to E – Index E being reserved for students.[[18]](#footnote-18) The difference between the students’ wages and that of the other employees was then increased.[[19]](#footnote-19) These categories were maintained in the 2012–2017 collective agreement.[[20]](#footnote-20)
7. The judgment under appeal
8. The Tribunal’s decision is set out in remarkable detail (579 paragraphs spanning 97 pages).
9. After describing the plant, its various sectors, its operations divided into positions that include a certain number of tasks, the training required to perform a task, the existing collective agreements, students’ conditions of employment (paras. 20 to 50), the Tribunal set out in a specific and detailed manner the terms of remuneration paid to employees over the years under the aegis of the various collective agreements and analyzed the situation of each of the plant’s sectors: (1) Carbon,[[21]](#footnote-21) (2) Electrolysis,[[22]](#footnote-22) (3) Foundry,[[23]](#footnote-23) (4) Laboratory,[[24]](#footnote-24) (5) Handling – Transport,[[25]](#footnote-25) (6) Catchment,[[26]](#footnote-26) (7) Engineering,[[27]](#footnote-27) (8) Procurement,[[28]](#footnote-28) and (9) Maintenance[[29]](#footnote-29) to determine whether the students perform work that is equivalent to that of the regular or casual employees (paras. 51 to 215).
10. It explained how the plant functions in fact by describing the tasks performed by the students, casuals, and regular employees, as well as the history of their training (paras. 215 to 307).
11. The Tribunal noted that the difference (which has existed since January 1, 1995) in students’ wages and that of casual and regular employees was not contested and that it is even clearly set out in the collective agreements. It then found that this distinction is based on their social condition or their age[[30]](#footnote-30) (paras. 308 to 351). It concluded that this distinction impaired the students’ right to receive equal wages for equivalent work (paras. 352 to 357).
12. The Tribunal also found that the distinction is not justified within the meaning of section 19 of the *Quebec Charter*. According to its assessment of the evidence, which it set out with precision, students perform work that is equivalent to that of casual and regular employees (paras. 358 to 395). Relying again on its analysis of the evidence, it also rejected the appellant’s argument that the differential treatment arises from the fact that students have a fixed-term contract and that the distinction is therefore based on the exception of “years of service” set out in the second paragraph of section 19 of the *Quebec Charter.* According to the Tribunal, the reasons given by the appellant to justify the distinction are a mere pretext (paras. 358 to 418).
13. The Tribunal found that the distinction infringed the students’ dignity by failing to respect their right to equal wages for equivalent work[[31]](#footnote-31) (paras. 419 to 423).
14. The Tribunal noted that the appellant and the respondent each submitted a table setting out the amounts due to the victims as pecuniary damages in accordance with their respective positions on the issue of prescription[[32]](#footnote-32) and that the appellant agreed to the same moral damages being awarded to the students who did not testify[[33]](#footnote-33) (paras. 424 to 427).
15. It summarized the state of the law on the issue of moral damages for infringement of a right guaranteed by the *Quebec* *Charter*.[[34]](#footnote-34) It recounted the content of the testimony of the seven witnesses heard on this aspect of the case and fixed the indemnity payable to each victim in this regard at $1,000[[35]](#footnote-35) (paras. 428 to 447).
16. The Tribunal dismissed the appellant’s action in warranty against the impleaded party. According to its assessment of the evidence, the impleaded party is not responsible for the discriminatory situation experienced by the students (paras. 448 to 504).
17. It is not necessary to address the portion of the Tribunal’s decision dealing with the prescription of the claim (paras. 505 to 569) because that issue was not challenged on appeal.
18. Issues
19. The appellant was granted leave to appeal the Tribunal’s decision. It submitted several grounds, which may be reformulated as follows:
* Did the Tribunal err in finding that student status is a social condition?
* Did the Tribunal err in finding that there was a distinction based on age?
* Did the Tribunal err in the interpretation and application of the concept of *equivalent work* set out in section 19 of the *Quebec Charter*?
* Did the Tribunal err in the interpretation and application of the concept of *years of service* set out in section 19 of the *Quebec Charter*?
* Did the Tribunal err in awarding moral damages?
* Did the Tribunal err in refusing to recognize the solidary liability of the impleaded party?
1. Analysis

Preliminary observations

1. It is useful here to reproduce the provisions of the *Quebec Charter* relevant to the analysis:[[36]](#footnote-36)

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| **10.**Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, gender identity or expression, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.**19.**  Every employer must, without discrimination, grant equal salary or wages to the members of his personnel who perform equivalent work at the same place.A difference in salary or wages based on experience, seniority, years of service, merit, productivity or overtime is not considered discriminatory if such criteria are common to all members of the personnel. […]  | **10.**Toute personne a droit à la reconnaissance et à l’exercice, en pleine égalité, des droits et libertés de la personne, sans distinction, exclusion ou préférence fondée sur la race, la couleur, le sexe, l’identité ou l’expression de genre, la grossesse, l’orientation sexuelle, l’état civil, l’âge sauf dans la mesure prévue par la loi, la religion, les convictions politiques, la langue, l’origine ethnique ou nationale, la condition sociale, le handicap ou l’utilisation d’un moyen pour pallier ce handicap.Il y a discrimination lorsqu’une telle distinction, exclusion ou préférence a pour effet de détruire ou de compromettre ce droit.**19.**  Tout employeur doit, sans discrimination, accorder un traitement ou un salaire égal aux membres de son personnel qui accomplissent un travail équivalent au même endroit.Il n’y a pas de discrimination si une différence de traitement ou de salaire est fondée sur l’expérience, l’ancienneté, la durée du service, l’évaluation au mérite, la quantité de production ou le temps supplémentaire, si ces critères sont communs à tous les membres du personnel. […] |

[Emphasis added]

1. In *Ford v. Quebec (Attorney General)*,[[37]](#footnote-37) the Supreme Court of Canada set out the conditions that must be met for a finding of discrimination based on section 10 of the *Quebec Charter*:

[…] (1) a "distinction, exclusion or preference", (2) based on one of the grounds listed in the first paragraph, and (3) which "has the effect of nullifying or impairing" the right to full and equal recognition and exercise of a human right or freedom.[[38]](#footnote-38)

1. A complainant wanting to establish such discrimination must prove that there is “*prima facie* discrimination”, as the Supreme Court explained in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*:[[39]](#footnote-39)

[64]    This brief review of the case law shows that the use of the expression “*prima facie* discrimination” can be explained quite simply on the basis of the two‑step test for complaints of discrimination under the *Charter*. This expression concerns only the three elements that must be proven by the plaintiff at the first step. If no justification is established by the defendant, proof of these three elements on a balance of probabilities will be sufficient for the tribunal to find that s. 10 of the *Charter*has been violated. If, on the other hand, the defendant succeeds in justifying his or her decision or conduct, there will have been no violation, not even if *prima facie* discrimination is found to have occurred. In practical terms, this means that the defendant can either present evidence to refute the allegation of *prima facie* discrimination, put forward a defence justifying the discrimination, or do both.[[40]](#footnote-40)

[Emphasis added]

1. In the same case, the Supreme Court specified the nature of the connection necessary between the ground of discrimination and the distinction, exclusion, or preference that the plaintiff complains of:

[50]  It is more appropriate to use the terms “connection” and “factor” in relation to discrimination, especially since the expression “*lien causal*” has a specific meaning in the civil law of Quebec. In civil liability matters, the plaintiff must establish on a balance of probabilities that there is a causal relationship between the defendant’s fault and the injury suffered by the plaintiff […]. The Quebec courts have defined this causal relationship as requiring that the damage be a logical, direct and immediate consequence of the fault. This rule therefore means that the cause must have a [translation] “close” relationship with the injury suffered by the victim […].

[51]  A close relationship is not required in a discrimination case under the *Charter*,however. To hold otherwise would be to disregard the fact that, since there may be many different reasons for a defendant’s acts, proof of such a relationship could impose too heavy a burden on the plaintiff. Some of those reasons may, of course, provide a justification for the defendant’s acts, but the burden is on the defendant to prove this. It is therefore neither appropriate nor accurate to use the expression “causal connection” in the discrimination context.

[52]  In short, as regards the second element of *prima facie* discrimination, the plaintiff has the burden of showing that there is a *connection* between a prohibited ground of discrimination and the distinction, exclusion or preference of which he or she complains or, in other words, that the ground in question was a *factor* in the distinction, exclusion or preference. [...][[41]](#footnote-41)

[Underlining added; italics in original]

1. The right enshrined in section 19 of the *Quebec Charter* [translation] “is part of the battle for equal remuneration at work, which is itself a component of the more general battle for social and economic equality”.[[42]](#footnote-42) The Court teaches that section 19 of the *Quebec Charter* is based on the concept of equivalence:

[translation]

[57]  Section 19 of the *Charter* is based on the concept of equivalence. This concept is broader than the principle of equal wages for equal work because it permits the comparison of jobs that are at first glance different, such as, in this case, those of secretary and general maintenance worker.[[43]](#footnote-43)

[Emphasis added]

1. Most commentary is to the same effect:

**Henri Brun, Guy Tremblay, and Eugénie Brouillet**

[translation]

**XII-7.103 –**Finally, section 19 prohibits discrimination within the meaning of section 10 in the determination of salary or wages. In particular, it requires employers to grant, without discrimination, equal wages to its employees who perform equivalent work at the same place. While the rule applicable to wages is that of equality, the criterion that applies to the point of comparison, work, is that of equivalence only – it need not be the same work or work that is exactly equal. Such equivalence must nevertheless be proved by the complainant: *Commission des droits de la personne c*. *Pavillon St-Charles de* *Limoilou*, [1983] 4 C.H.R.R. 1284 (Sup. Ct.). The criteria for such equivalence are the qualifications required, the effort needed, the responsibilities assumed, and the working conditions. The qualifications are assessed in relation to the work actually performed rather than on their own: *Syndicat des employés du Centre des services sociaux* *Ville-Marie c. Gagnon*, [1987] D.L.Q. 34 (Sup. Ct.). […][[44]](#footnote-44)

[Emphasis added]

**Jean-Yves Brière *et al*.**

[translation]

(vi)  *Remuneration*: The employer must, without discrimination, grant equal remuneration to the members of its personnel who perform equivalent work in the same establishment (s. 19 of the *Charter*). What does equivalent work mean? We could, for example, accept the definition set out in the *Act respecting industrial accidents and occupational diseases* [A.R.I.A.O.D.]: “employment of a similar nature … from the standpoint of vocational qualifications required, wages, social benefits, duration and working conditions”. The comparison must therefore be between two employees with employment having similar characteristics. Section 19 adds a caveat: a difference based on experience, seniority, years of service, merit, productivity, or overtime is not considered discriminatory. Such differential treatment will be considered consistent with section 19 if the criteria on which it is based are common to all employees. Such discretion granted to the employer significantly reduces the scope of section 19 of the *Charter*. […][[45]](#footnote-45)

[Emphasis added]

**Linda Bernier *et al***.

[translation]

**7.3274** – The essential point of the provisions regarding equal wages is similar work, that is, work requiring the same skills and the same experience, not aspects of training or the diplomas obtained.1

1 *Syndicat des employés du Centre des services sociaux Ville-Marie c. Gagnon*, D.T.E. 91T-691 (C.A.).

[…]

**7.3279** – The burden of proof rests on the complainant, who must demonstrate the equivalence between the tasks for which the employer grants different wages on a discriminatory basis. In the absence of such evidence, it cannot be concluded that there is a breach of s. 19 of the *Charter*.1

1 *Commission des droits de la personne c. Pavillon St-Charles de Limoilou*, (1983) 4 C.H.R.R. 1284.[[46]](#footnote-46)

1. Before examining the issues, it is necessary to determine the applicable standard of review. *Vavilov* makes clear that the standard of appellate intervention, as described in *Housen v. Nikolaisen*,[[47]](#footnote-47) applies when the legislature provides for an appeal from an administrative decision.[[48]](#footnote-48) In this case, the *Quebec Charter* provides that “[a]ny final decision of the Tribunal may be appealed from to the Court of Appeal with leave from one of the judges thereof”*.*[[49]](#footnote-49) Accordingly, the standard of review applicable to the Tribunal’s decision is that applicable to an appeal, and thus appellate intervention is permitted only in the event of an error of law or a palpable and overriding error in the assessment of the evidence.

**4.1-** **Is student status included in the concept of social condition within the meaning of section 10 of the *Quebec* *Charter*?**

1. According to the appellant, the Tribunal erred in finding that student status is included in the concept of social condition without conducting a contextual analysis to determine whether the distinction is based on stereotypes in view of their vulnerable situation. It claims that the case law on which the Tribunal relied may be distinguished. It is of the view that the complainants fall within a class of advantaged persons.
2. The respondent favours a large, liberal, and purposive interpretation and argues that the groups protected by the concept of social condition have a condition that leads to discrimination. Social condition has objective and subjective aspects. The objective aspect refers to [translation] “economic class, that is, society as a configuration of hierarchical, distinct, and opposable categories into which individuals are classified based on the market power indicated by their income, occupation, or education”. The subjective aspect refers to the value society places on individuals according to their income, level of education, or occupation. The respondent points out that the courts have previously recognized student status as a component of social condition.
3. The impleaded party submits that the appellant’s arguments distort the teachings of *Law v. Canada*[[50]](#footnote-50)and that its positionwith respect to student status is irrational.
4. The parties’ arguments call for an examination of the following two subjects: the burden of proof required with respect to a challenge based on section 10 of the *Quebec Charter* (4.1.1) and the scope of the concept of social condition set out in said provision (4.1.2).

**4.1.1-** **The burden of proof required with respect to a challenge based on section 10 of the *Quebec Charter***

1. According to the appellant, student status may be included in the concept of social condition if the distinction made by the appellant between its regular and casual employees and the students creates discrimination for the latter as a result of prejudice, stereotypes, or the social context. Because this has not been proved in this case, the appellant concludes that there is no prohibited discrimination. In support of its argument, it cites *R. v. Kapp*,[[51]](#footnote-51) *Quebec (Attorney General) v. A.*,[[52]](#footnote-52) *Université de Sherbrooke c. Commission des droits de la personne et des droits de la jeunesse*[[53]](#footnote-53)and *Quebec (Procureur général) c. Commission des droits de la personne et de la jeunesse*.[[54]](#footnote-54)
2. Evidence of discrimination arising from prejudice, stereotypes, or the social context is not necessary to support an action under section 10 of the *Quebec Charter*. Such evidence may be necessary in an action based on section 15 of the *Canadian Charter of Rights and Freedoms* (the “*Canadian Charter*”),[[55]](#footnote-55) a provision whose purpose is to promote substantive equality and prevent governments from establishing distinctions that have the effect of perpetuating a disadvantage or prejudice or imposing a disadvantage on the basis of stereotyping, according to the terms used by the Supreme Court in *Kapp*, *supra*.[[56]](#footnote-56) More recently, in *Fraser v. Canada (Attorney General)*,[[57]](#footnote-57)the Supreme Court reformulated the requirement by stating that, to establish discrimination prohibited by section 15 of the *Canadian Charter*, the plaintiff must prove, at the first stage, that the law imposes differential treatment based on protected grounds, either explicitly or through adverse impact. At the second stage, the Court must ask whether the law has the effect of reinforcing, perpetuating, or exacerbating a disadvantage.
3. The Supreme Court has developed specific tests for dealing with a challenge to an administrative measure based on section 10 of the *Quebec Charter*. These tests do not require evidence of a disadvantage arising from prejudice or stereotypes. The Supreme Court’s most recent judgment on this issue is *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*.[[58]](#footnote-58) While acknowledging that the interpretation of the *Quebec Charter* must be conducted in light of that of the *Canadian Charter*, the Supreme Court described the evidence necessary to ensure that an action based on section 10 of the *Quebec Charter* is successful. That provision requires that three elements be proved, that is: (1) a “distinction, exclusion or preference”; (2) based on one of the grounds listed in the first paragraph; and (3) which “has the effect of nullifying or impairing” the right to full and equal recognition and exercise of a human right or freedom. It does not require anything else:

[35]  First, s. 10 requires that the plaintiff prove three elements: “(1) a ‘distinction, exclusion or preference’, (2) based on one of the grounds listed in the first paragraph, and (3) which ‘has the effect of nullifying or impairing’ the right to full and equal recognition and exercise of a human right or freedom”.

[36]  If these three elements are established in accordance with the degree of proof we will specify below, there is “*prima facie* discrimination”. This is the first step of the analysis.

[37]  Second, the defendant can then, also in accordance with the degree of proof we will indicate below, justify his or her decision or conduct on the basis of the exemptions provided for in the applicable human rights legislation or those developed by the courts. If the defendant fails to do so, discrimination will then be found to have occurred. This is the second step of the analysis.[[59]](#footnote-59)

[Emphasis added]

1. With respect to the third criterion of the first part of the analysis – having the effect of nullifying or impairing the right to full and equal recognition and exercise of a human right or freedom – the Supreme Court noted that, contrary to the *Canadian Charter*, the *Quebec Charter* does not protect the right to equality, and that the action must necessarily be attached to another human right or freedom recognized by law, the right to receive equal pay for equivalent work in this case:

[53]  Lastly, the plaintiff must show that the distinction, exclusion or preference affects the full and equal exercise of a right or freedom guaranteed to him or her by the *Charter*. The *Charter*, unlike the *Canadian Charter*, does not protect the right to equality *per se*; this right is protected only in the exercise of the other rights and freedoms guaranteed by the *Charter*.

[54]   This means that the right to non‑discrimination cannot serve as a basis for an application on its own and that it must necessarily be attached to another human right or freedom recognized by law. However, this requirement should not be confused with the independent scope of the right to equality; the *Charter* does not require a “double violation” (right to equality and, for example, freedom of religion), which would make s. 10 redundant.[[60]](#footnote-60)

[Emphasis added]

1. Supreme Court jurisprudence applies these tests when dealing with an action based on the *Quebec Charter*. For example, *Mouvement laïque québécois v. Saguenay (City)*[[61]](#footnote-61)contains several passages in which the existence of discrimination is subject to evidence of impairment of another right set out in the *Quebec Charter*,notto the existence of a prejudice, stereotyping, or the perpetuation of a disadvantage.
2. The following excerpt from the 2014 text of authors Brun, Tremblay, and Brouillet indicates that the tests applicable to an action based on section 15 of the *Canadian Charter* (which requires, *inter alia*, evidence of a disadvantage that creates or perpetuates a situation of disadvantage based on prejudice or stereotypes) apply to complaints under section 10 of the *Quebec Charter*:

[translation]

[…] [T]he courts have established a definition of the right to equality under the Quebec Charter modelled on that given by the Supreme Court of Canada to the right to equality under the Canadian Charter: ultimately, the right to equality under section 10 is *the right not to be the subject of distinctions based on an enumerated ground that create or perpetuate a disadvantage based on prejudice or stereotypes*.[[62]](#footnote-62)

[Italics in original.]

1. According to these authors, the tests developed by the Supreme Court regarding complaints under the *Canadian Charter* were reiterated by the Court of Appeal in its interpretation of section 10 of the *Quebec Charter*. Thus, a distinction based on an enumerated ground is discriminatory if it infringes human dignity or results in a disadvantage by perpetuating a prejudice or stereotyping.[[63]](#footnote-63)
2. In light of the Supreme Court’s judgments in *Bombardier*, *Mouvement laïque québécois* and *Fraser*, which were rendered subsequent to authors Brun, Tremblay, and Brouillet’s text, the excerpt reproduced above is no longer relevant.
3. On this issue, Professor Daniel Proulx expressed the following opinion, according to which the constitutional test applicable to an action based on section 15 of the *Canadian Charter* is [translation] “not transposable” to an action based on section 10 of the *Quebec Charter*:

[translation]

Does the constitutional test requiring the perpetuation of a disadvantage or prejudice and stereotyping apply to section 10 of the Quebec Charter? In view of the very marked differences between the two Charters with respect to equality, in particular the fact that the Quebec Charter primarily regulates the private sector, contrary to the Canadian Charter, transposing the section 15 constitutional test to the context of section 10 would be a serious error. […]

Accordingly, the constitutional test requiring the perpetuation of a disadvantage or prejudice and stereotyping applies to section 10 only in a constitutional context, that is, when invoked to challenge a legislative or regulatory measure *per se*. However, when an administrative measure or a private policy is challenged, the four-pronged proof of discrimination (differential treatment, enumerated ground, prejudice (material or moral), and exercise of a right guaranteed by the *Charter*) is required to ensure an effective fight against discrimination. […] The recent Court of Appeal judgments in *Labelle*, *Constables spéciaux* and *Université de Sherbrooke* are therefore incorrect to the extent that they claim, without any reference to the 2006 judgment in *Commission scolaire des Phares* or to the consistent case law of the Supreme Court on section 10 of the Quebec Charter, that the discriminatory nature under section 10 must be established using the same analytical framework and on the basis of the same test as under section 15 of the Canadian Charter, that is, proof of a prejudice or a contemptuous stereotype, considering that no legislative measure was being challenged in those cases. […][[64]](#footnote-64)

[Emphasis added]

1. The Court shares that opinion, subject to further observations regarding judgments of the Court cited and criticized by the author.

**\*\*\*\*\***

1. Before concluding on the issue of the burden of proof required in actions based on section 10 of the *Quebec Charter*, some initial parenthetical remarks are in order with respect to the judgments rendered in *Université de Sherbrooke c. Commission des droits de la personne et des droits de la jeunesse*[[65]](#footnote-65) and *Québec (Procureur general) c. Commission des droits de la personne et des droits de la jeunesse*,[[66]](#footnote-66)cited by the appellant in support of its argument requiring proof of a prejudice, stereotyping or the perpetuation of a disadvantage to ensure the success of an action based on section 10 of the *Quebec Charter*. Those two judgments do not support such an argument.
2. In *Université de Sherbrooke*, the Court confirmed the decision rendered by the Human Rights Tribunal finding that the clause of the collective agreement at issue was discriminatory within the meaning of sections 10, 13, and 16 of the *Quebec Charter*. That case is particular in that the Court was asked to rule on the trial judge’s interpretation of the Supreme Court’s judgment in *Quebec (Attorney General) v. A,* a case dealing with section 15 of the *Canadian Charter*.[[67]](#footnote-67) The trial judge had expressed the opinion that, because of Abella, J.’s remarks in *A*, it was no longer necessary to prove that the alleged distinction perpetuated stereotyping or prejudice. The Court assessed the trial judge’s reasoning in the context of a judicial review applying the standard of reasonableness (the case was decided before *Vavilov*[[68]](#footnote-68)). In the Court’s view, the trial judge’s decision was reasonable because the employees in question had been the victims of discrimination resulting from arbitrary disadvantage caused by the collective agreement to certain employees because of their age. The Court did not transpose the tests for section 15 of the *Canadian Charter* to an action based on section 10 of the *Quebec Charter* but explained the test developed by Abella, J., as the parties had invited it to do. On this specific issue, Bouchard, J.A. stated:[[69]](#footnote-69)

[translation]

[54]   I understand from the reasons of Abella, J. that it is proof of an arbitrary disadvantage that must now serve as the ultimate guide to a finding of *prima facie*discrimination, and that the perpetuation of stereotypes or prejudice constitutes merely a relevant factor for the purposes of the analysis. Professor Christian Brunelle interprets the scope of Abella, J.’s comments in the same way:

[translation]

*[…] Certainly, a person who alleges suffering from discrimination must show that the distinction they have been subjected to creates a prejudice or disadvantage for them. There is no doubt that such evidence will be more convincing if the victim is able to establish that this disadvantage also results from a prejudice or a stereotype, but the state of the law in this regard still needs to be clarified. While some judgments tend to require a strict demonstration that a negative stereotype or prejudice is at the origin of the disadvantage likely to destroy or compromise the right to equality under the Quebec Charter, a recent judgment of the Supreme Court of Canada seems instead to favour the dissociation of the disadvantage and the prejudice/stereotype, such that mere proof of a disadvantage – regardless of its causal connection with a prejudice or stereotype – is sufficient to conclude that there is discrimination. From this point of view, it must be concluded that there is [translation] “prima facie proof of discrimination” once the person subject to the distinction [translation] “establishes a prejudice and connection with the prohibited ground of discrimination”.*

[Emphasis added]

1. *Québec (Procureur général) c. Commission des droits de la personne* *et des droits de la jeunesse*[[70]](#footnote-70) addressed the discriminatory nature of the clauses in the collective agreement of the government’s special constables providing for a reduction in wages for [translation] “casual” constables. The Court reversed the decision of the Human Rights Tribunal and found that there was no discrimination based on age in that case. First, it noted that the action was prescribed.[[71]](#footnote-71) Next, it found that the statistical evidence did not establish that the distinction between permanent and casual constables was the result of a distinction based on age.[[72]](#footnote-72) Finally, the Court found that the evidence of a prejudice suffered by the complainants was not conclusive.[[73]](#footnote-73) Admittedly, the Court did add the following passage after concluding that there was no discrimination, but it should be noted that this comment is merely *obiter dictum* with the reduced weight attached thereto:

[translation]

[84]  In addition, no study or other document directly connected to the complainants’ condition shows that their group is composed of persons who are vulnerable, historically disadvantaged, or likely to be the victims of prejudice or stereotypes. In short, to the extent that a distinction was indeed established, the evidence did not show that it created a disadvantage by perpetuating prejudice or negatively stereotyping.

1. This *obiter dictum* does not impose on a party alleging discrimination the burden of proving that the discriminated group [translation] “is composed of persons who are vulnerable, historically disadvantaged, or likely to be the victims of prejudice or stereotyping”. According to the case law, such a requirement is not an additional criterion to the three-part test reiterated numerous times by the Supreme Court for a complaint based on section 10 of the *Quebec Charter*.[[74]](#footnote-74)

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1. Let us now consider whether student status is included in the ground of discrimination of social condition.

**4.1.2-** **Is student status part of the concept of “social condition” set out in section 10 of the *Quebec Charter?***

1. The appellant does not propose any definition of social condition. It limits itself to stating that students are not included because the respondent did not prove that this group is in a situation that leads to discrimination due to prejudice, stereotypes, or the social context.
2. Yet, according to the case law, social condition is the result of characteristics generally attributed to a person because of socio-economic criteria and the underlying idea that the person occupies a lower position due, in particular, to his or her income, such as those receiving social assistance, students, refugees, etc. Overall, we note that Quebec case law has favoured the protection of various categories of persons who generally – but not always – have as a common denominator a low income or a precarious economic situation.
3. The Tribunal adopted this idea. At paragraph 331 of its judgment, it relied on a decision of the Administrative Tribunal in which Administrative Judges Dominique Bélanger (now of this Court) and Pierre Lanthier expounded on students’ situation of economic vulnerability and the idea in Quebec’s society that they are [translation] “cheap labour”,[[75]](#footnote-75) despite the absence of expert evidence:

[translation]

[331]  Students are generally considered to be a lower class of workers, as appears from the comments of Administrative Judges Dominique Bélanger and Pierre Lanthier:

[translation]

[92]  [...] there is this idea in Québec’s society that student labour is cheap labour. Although Placement Québec seems to convey that student labour is qualified labour, the guideline seems to convey that student labour is cheap labour. The applicant submits that the government, on the pretext of providing students with summer employment, is taking advantage of the situation to obtain the workforce it needs at lesser cost.

[93]  The applicant submits that students’ precarious employment situation and their socio-economic vulnerability should not allow the government to pay them almost half the wages paid to casual employees to perform the same work.

[94]  From this perspective, the question is whether an employer may pay workers belonging to a group in a vulnerable or economically precarious situation a lower salary in relation to another group of workers, to allow them to obtain employment, and if so, to what extent. The Tribunal considers this issue very serious.

[95]  [...] hiring students allows a genuine need for workers to be fulfilled. [...]

1. Returning to the existence of stereotypes, in addition to rejecting the idea that they must be present in every situation of discrimination, it is not necessary to resort to an expert to observe them. Living in society is sufficient. To be convinced of this, one need only refer to the case law of the Supreme Court, in criminal matters for example, which has not hesitated to characterize certain conduct or comments as stereotypes, without recourse to expert evidence.[[76]](#footnote-76) Students are the victims of certain stereotypes: they are young; they do not have many needs, which they can in any event meet with pocket money earned in their spare time, and the rest is generally provided by their parents; therefore, they do not need a significant income. In fact, there is this very stereotypical idea of students, even if they are not considered morally or socially inferior, that (1) because they do not have family or other responsibilities, it is not necessary to pay them as much as “regular” employees; (2) they do not have the same characteristics (skills, seniority, etc.) to do the work as well as the “real” employees (the evidence establishes very clearly that this is not the case at ABI, for all the reasons explained by the Tribunal); and (3) employers are doing them a favour by hiring them, because otherwise, given their limited availability (during the summer and part-time during the rest of the year), nobody would hire them, and lower wages are therefore better than no wages at all.
2. Let us now return to the definition of social condition. The case law of the Court[[77]](#footnote-77) and of the Human Rights Tribunal[[78]](#footnote-78) has on several occasions relied on the definition of social condition proposed by Tôth, J. in a case that dates back to 1978. No court or administrative tribunal has since set aside this definition:

[translation]

The applicant’s learned counsel submitted that in common parlance, “social condition” refers to the rank, place, or position occupied by an individual in society – by birth, income, level of education, or occupation – or to all the circumstances and events that cause a person or group to occupy such a situation or position in society. The Court agrees with this submission.[[79]](#footnote-79)

1. In *Commission des droits de la personne c. Gauthier*,[[80]](#footnote-80)the Human Rights Tribunal first noted that the Court of Appeal endorsed this definition and even added that social condition may be a temporary state.[[81]](#footnote-81) The Tribunal then explained that this definition of social condition has two aspects – objective and subjective – and that it is inappropriate to require complainants to demonstrate both of them. It is enough for complainants to establish that they are part of an identifiable social group and that they suffer discrimination as a result of belonging to this social group:

[translation]

In this context, it appears that social condition may be defined as the situation that a person occupies within a community, in particular because of their origin, level of education, occupation, and income, and by the perceptions and representations attached to these various objective data within that community.

That being so, one must nevertheless acknowledge the variable role, and even the varying effect, that any one of these aspects may have in each case. Moreover, this list is not exhaustive. For example, we can readily admit that the circumstances surrounding the birth of a person who has reached adulthood often have less of an impact on their situation in society than the person’s occupation level in relation to the job market.

Similarly, to establish evidence of discrimination based on social condition, it would be inappropriate to require a complainant to establish that each element of the illustrative definition set out above acts to cause them prejudice. While that requirement need not be met, it is nevertheless necessary for the element(s) invoked in support of the allegation of discrimination based on social condition to substantiate the complainant’s inclusion in a group that is socially identifiable *per se* and that, as a result, is affected by the impugned differential treatment. Like the other prohibited criteria, but even more so because of its intrinsic nature, social condition is indeed relative in nature in that it [translation] “constitutes, concerns, or involves a relationship”. That relationship may be established with other members of the community who share common characteristics and with the other members of the community as a whole.

[Underlining added; citation omitted]

1. Applying the definition set out above, it is apparent that students, people receiving social assistance, refugees, etc. are identifiable social groups in the community. With respect to students in particular, as noted above, education level is one of the parameters of social condition, as set out in the definition proposed by Tôth, J. over 40 years ago and applied ever since in Quebec case law. Yet, students employed by the appellant were deprived of the fundamental right to receive the same wages as the other employees for the same work, due solely to the fact that they belong to this identifiable social group – students.
2. In *Ordre des comptables agréés du Québec c. Québec (Procureur général*),[[82]](#footnote-82) the Court reiterated this definition – which, we repeat, has been unanimously accepted in the case law and according to which the concept of social condition generally refers to the rank and place a person occupies in society – while pointing out that in the context of an allegation of discrimination, this condition has generally (but not always) been applied to disadvantaged or vulnerable persons who endure their social situation rather than benefit from it.

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1. Further parenthetical remarks are in order to address the judgments rendered by the Court in *Lévesque c. Québec (Procureur général)*[[83]](#footnote-83) and *Québec (Procureur général) c. Champagne*[[84]](#footnote-84) because they contain a certain ambiguity – which should be dispelled – regarding the steps to take with respect to discrimination complaints based on the *Quebec Charter*.
2. In *Lévesque,* the Court confirmed the judgment of the Superior Court finding that it was not necessary to review the decision of the Commission des affaires sociales. The Commission had refused to grant social assistance benefits to a single mother because she had returned to school. In addition to arguments related to the reasonableness of the refusal, the Court considered the constitutional validity of section 7 of the *Social Aid Act*,[[85]](#footnote-85) which denied the right to social assistance to “an individual who attends an educational institution at the college or university level as a day student […] except where such aid is necessary to prevent […] a situation which endangers to health”.
3. The Court found that, in the context of that provision, being a student was not a social condition because of the legislative objectives of the *Social Aid* *Act*:

[translation]

But here, we must ask whether, in the context of section 7 of the *Act*, the fact of being a full-time student at the college or university level can constitute a social condition? I answer this question in the negative, relying on the fact that if section 7 of the *Act* exists as drafted in 1981, it is because full-time students at the college or university level are eligible for other social subsidies such as loans and bursaries.[[86]](#footnote-86)

1. This approach was also used by the Administrative Tribunal of Québec in *Champagne*.[[87]](#footnote-87) The Tribunal found that the distinctions made in the *Automobile Insurance Act*[[88]](#footnote-88) between the level of education of automobile accident victims to determine their indemnity were relevant distinctions according to the purpose of the *Act* and, consequently, that level of education was not a social condition in the circumstances.[[89]](#footnote-89) That decision was reversed by the Superior Court,[[90]](#footnote-90) but restored by the Court of Appeal,[[91]](#footnote-91) which did not provide reasons for its decision. Accordingly, it is impossible to identify a *ratio decidendi* that would give it binding authority.
2. While the Court’s conclusions in these cases are well-founded, the method used is inappropriate for two reasons. First, given the subsequent case law of the Supreme Court in matters of rights and freedoms, the *Quebec Charter* must be given a large and liberal interpretation.[[92]](#footnote-92) Second, and this is the fundamental point, these cases unduly introduced the notion of justification at the stage of determining what constitutes *prima facie* discrimination. The underlying purpose of a measure or its justification is certainly a relevant consideration in the overall analysis to determine whether there is discrimination, but according to the Supreme Court, that issue is to be considered at the second stage of the analysis, after considering the issue of *prima facie* discrimination. It must be inferred that had the Supreme Court’s analysis in *Bombardier* been known, the Court should have first found that there was *prima facie* discrimination and then that it was justified by the circumstances of the case.
3. For example, the definitions of “political conviction”, “ethnic origin”, or “gender expression” within the meaning of section 10 of the *Quebec Charter* are not dependent on the justification invoked by a defendant to explain his or her conduct. Similarly, the reasons invoked to justify the distinction established by the *Social Aid Act*[[93]](#footnote-93) between persons who are students and those who are not should not have led the Court to conclude that being a student was not a social condition. These reasons instead show that the distinction, although based on student status, which is included in the concept of social condition, is justified.
4. In this regard, the following remarks of Professor Proulx are accurate. He explains that the justification for a measure is inadmissible at the first stage of the analysis of *prima facie* discrimination where the only relevant issue is whether the prohibited ground was a factor in the impugned decision:

[translation]

That being said, although the reasons invoked in defence to explain or justify discriminatory differential treatment may be legitimate, they remain inadmissible at the first stage of the analysis, i.e., proof of discrimination under section 10. At this stage, the only relevant question is whether civil status (or another enumerated ground) contributed to the exclusion of the complainant or rather, in accordance with the new terminology of the Supreme Court, was a factor in the decision to exclude the complainant. If so, the analysis shifts to the second stage, that of the justification for the discriminatory decision, which falls under other provisions, in particular section 20 in employment matters, and for which the burden of proof rests with the perpetrator of the differential treatment.[[94]](#footnote-94)

[Emphasis added]

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1. Before concluding on the issue of whether student status is included in the ground of social condition, it is useful to address a few more peripheral issues concerning: (i) the idea that student status results from a personal choice made by the persons in question; (ii) that these persons occupy an advantageous place in society; (iii) the relevance of the legislation of the other provinces in the analysis of the concept of social condition; and (iv) the scope of the report of *the Canadian Human Rights Act* Review Panel*.*

***Being a student is the expression of a personal choice that bars discrimination***

1. The idea that student status is the result of a personal choice and cannot therefore support a complaint of discrimination based on the ground of social condition must be rejected.
2. An individual’s decision to pursue an education beyond the mandatory age fixed by law is, to a certain extent, the result of a choice. We must however acknowledge that this choice is not a real decision. Rather, it is imposed insofar as, to develop to one’s fullest and earn a living, every individual must acquire knowledge and skills in connection with their chosen occupation or profession. The means of achieving this require studies of varying length depending on each person’s intended career and their talent.
3. During this period of varying length, students, often young adults, are placed in a vulnerable economic position. Because of their studies, they do not generally hold full‑time jobs, and, to meet their needs, they must rely, for example, on the generosity of their parents, government assistance, loans, and income earned from employment.
4. The idea that the personal choice of a status will prevent a complaint of discrimination results from an erroneous reading of *Ordre des comptables généraux licenciés du Québec c. Québec (Procureur général)*.[[95]](#footnote-95) In that case, the Court found, *inter alia*, that there was no discrimination resulting from section 24 of the *Chartered Accountants Act*.[[96]](#footnote-96) That provision conferred exclusivity to chartered accountants for the preparation of financial statements to the detriment of certified general accountants. The Court found that belonging to a professional order was not a distinction based on social condition:

[translation]

[69]  The first condition is met because section 24 CAA treats those who are CAs differently from those who are not, such as CGAs. However, the appellants are unable to show that the distinction is based on a ground of discrimination related to any of the personal characteristics listed in section 10. The trial judge rightly refused to consider the fact of belonging to the OCA to be a distinction based on “social condition” within the meaning of section 10. We are far removed from the concept of social condition as identified by the case law. The concept generally refers to the rank or place a person occupies in society. In the more specific context of an allegation of discrimination, the concept has been applied to disadvantaged or vulnerable persons who endure their social condition rather than benefit from it. It is most often the result of a situation that the person cannot easily overcome and that is not the consequence of a deliberate choice.

[70]  Deliberately belonging to a profession may certainly influence a person’s social condition, [translation] “but the fact that one is a CGA rather than a CMA or a CA is not a social condition *per se*. Similarly, it cannot be said that all CGAs are part of the same social class” (paragraph 111 of the judgment under appeal).[[97]](#footnote-97)

1. First, it is necessary to note the nuance made by the Court that social condition [translation] “is most often the result of a situation that the person cannot easily overcome and that is not the consequence of a deliberate choice”. Therefore, it is not a conclusive aspect in the determination of what constitutes a social condition within the meaning of the *Quebec Charter*. Moreover, the choice to belong to one professional order rather than another is very far removed from the decision to pursue one’s studies.
2. But there is still more. The Supreme Court has explained on several occasions that the existence and the exercise of a choice are not relevant when ruling on discrimination:

[336]  Moreover, this Court has repeatedly rejected arguments that choice protects a distinction from a finding of discrimination.  In *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219,the employer argued that a different amount of compensation for women who took time off from work while pregnant was not discriminatory because “pregnancy is a voluntary state and, like other forms of voluntary leave, it should not be compensated” (p. 1236).  Dickson C.J. refused to accept that pregnancy was a choice, noting that an emphasis on choice would be “against one of the purposes of anti-discrimination legislation . . . the removal of unfair disadvantages which have been imposed on individuals or groups in society” (p. 1238).  In other words, not only was pregnancy not a “true choice”, but choice was *irrelevant*to the question of discrimination.[[98]](#footnote-98)

1. More recently, in *Fraser v. Canada (Attorney General*),[[99]](#footnote-99) the Supreme Court reiterated its teachings that differential treatment may be discriminatory even if it is based on choices made by the individual or group concerned:

[86]   In relying on Ms. Fraser’s “choice” to job‑share as grounds for dismissing her claim, the Federal Court and Court of Appeal, with respect, misapprehended our s. 15(1) jurisprudence. This Court has consistently held that differential treatment can be discriminatory even if it is based on choices made by the affected individual or group.

[87]  In *Brooks*, for example, Dickson C.J. rejected an employer’s argument that providing unequal benefits to pregnant women is not sex discrimination because pregnancy is “voluntary” (pp. 1237‑38). After *Brooks*, the Court “repeatedly rejected arguments that choice protects a distinction from a finding of discrimination” (*Quebec v*. *A*, at para. 336). In *Lavoie v. Canada*, [2002] 1 S.C.R. 769, for example, the Court held that a statute which gave preferential treatment to Canadian citizens infringed s. 15(1), despite the government’s argument that becoming a Canadian citizen was a choice. Chief Justice McLachlin and Justice L’Heureux‑Dubé, concurring on this issue, made clear that

the fact that a person could avoid discrimination by modifying his or her behaviour does not negate the discriminatory effect. If it were otherwise, an employer who denied women employment in his factory on the ground that he did not wish to establish female changing facilities could contend that the real cause of the discriminatory effect is the woman’s “choice” not to use men’s changing facilities. The very act of forcing some people to make such a choice violates human dignity, and is therefore inherently discriminatory. *The law of discrimination thus far has not required applicants to demonstrate that they could not have avoided the discriminatory effect in order to establish a denial of equality under s. 15(1)*. The Court in *Andrews* was not deterred by such considerations. On the contrary, La Forest J. specifically noted that acquiring Canadian citizenship could in some cases entail the “serious hardship” of losing an existing citizenship. He left no doubt that this hardship was a cost to be considered in favour of the individual affected by the discrimination. [Emphasis added; citation omitted]

***Students working for the appellant have an enviable status***

1. The appellant argues that the students who work for it are not vulnerable persons, and that, on the contrary, they have an enviable status.
2. The students who work for the appellant perform work that is equivalent to that of regular and casual employees. They are paid lower wages for the sole reason that they are pursuing their studies, thereby depriving them of the fundamental right guaranteed by the *Quebec Charter* to receive equal wages for equivalent work despite the fact that this differential treatment is not based on experience, seniority, years of service, merit, productivity, or any other valid grounds. The students feel belittled, like victims of injustice, etc., in a context where the case law recognizes that student status is part of the concept of social condition, a prohibited ground of discrimination.
3. There is no authority supporting the absence of discrimination based on social condition because the wages paid to students by an employer are attractive as compared to those paid by another employer or because the students are seeking to improve their situation through education.
4. The idea that we can “discriminate” against students who work for the appellant because the wages paid to them are advantageous in relation to the minimum wage is not unlike other outdated ideas. Consider, for example, the now rejected idea that women could be paid lower wages because they did not need them, since their wages were used only to supplement the family income. We might also think about the outdated idea that we can pay immigrants lower wages because these wages are better than what they received in their country of origin.
5. Such ideas must be rejected.

***The legislation of the other provinces as an interpretation guide***

1. A review of Canadian legislation concerning discrimination is relevant to the analysis. It is what the Supreme Court did to interpret the concept of *handicap* set out in section 10 of the *Quebec Charter* in *Québec (Commission des droits de la personne et de la jeunesse) v. Montréal (City)*.[[100]](#footnote-100) In that case, three complainants were refused employment due to health conditions that did not, however, cause them any disability or limitations. The Supreme Court reviewed the purpose of the *Quebec Charter*, its legislative history, its other provisions, and the related statutes of the other provinces to then adopt a broad definition of the concept of handicap.
2. Turning to the statutes of other provinces to interpret the concept of social condition in the *Quebec Charter* nevertheless has significant limits. Because most of the statutes refer to “source of income” rather than “social condition”, it must be noted that those provinces chose a more restrictive concept, which cannot have the effect of limiting the concept of social condition set out in the *Quebec Charter* that refers to a concept that is clearly broader.
3. Including students in the ground of social condition is in fact consistent with the statutes that contain the same terms, such as those of the Northwest Territories[[101]](#footnote-101) and New Brunswick.[[102]](#footnote-102) The Manitoba *Human Rights Code* is unique in that it expressly limits discrimination based on the ground of social disadvantage to cases of discrimination based “on a negative bias or stereotype related to that social disadvantage”,[[103]](#footnote-103) which may lead to a different result.

***The report of the Canadian Human Rights Act Review Panel***

1. The purpose of this report, published in 2000, was to recommend to Parliament amendments to the *Canadian Human Rights Act*[[104]](#footnote-104) (the “*Canadian Act*”)on various issues. A reading of the section on social condition reveals that the review panel suggested that Parliament adopt a narrower interpretation of social condition in the *Canadian Act* than that applicable under the *Quebec Charter* and that it limit its application to individuals who are in a situation of poverty that is not temporary.
2. Note that the review panel expressly acknowledged that the concept of social condition in the *Quebec Charter* is broader than the one it recommended Parliament insert in the *Canadian Charter*. The relevant excerpts of the report on this issue read as follows:

We were asked by the Minister of Justice to consider the addition of a ground of “social condition” specifically. To consider this question, we need to determine what this might mean and, if we decide to recommend adding it to the Act, whether there should be a statutory definition.

The Québec experience with this ground provides the most guidance about its meaning. Jurisprudence has developed over time. The Québec courts and Tribunal have clarified the factors that should be considered in determining whether an act is discriminatory on the ground of social condition.

In the case of *Commission des droits de la personne du Québec v. Gauthier* (1993), the Québec Tribunal said:

“[T]he definition of ‘social condition’ contains an *objective* component. A person’s standing in society is often determined by his or her occupation, income or education level, or family background. It also has a *subjective* component, associated with perceptions that are drawn from these various objective points of reference. A plaintiff need not prove that all of these factors influenced the decision to exclude. It will, however, be necessary to show that, as a result of one or more of these factors, the plaintiff can be regarded as part of a socially identifiable group and that it is in this context that the discrimination occurred.”

This language is generally consistent with guidelines concerning the meaning of social condition issued by the Québec Commission in 1994.

[…]

The Panel believes that the ground of social condition should be defined in the Act in a manner similar to the Québec definition, with the addition of a provision limiting it to disadvantaged persons.

[…]

The Panel considered whether the ground should cover only disadvantaged persons or also persons distinguished as a group by their privileged position. In other words, we wondered whether the definition should be a neutral term like race or sex or refer to disadvantage like the ground of disability. There have been cases in Québec where the ground was held to prohibit discrimination against individuals with above average incomes or prestigious occupations. In our view, this is not appropriate for two reasons. First, we feel that the protection here is aimed at those who suffer disadvantage because of their social condition. Second, we do not want to propose a ground that is too broad. The Act could contain a definition similar to a proposed (but defeated) amendment to Bill S-11, which provided that “*social condition* includes characteristics relating to social or economic disadvantage.”

We believe the ground of social condition should be designed to protect persons whose situation of poverty is ongoing rather than persons who may temporarily find themselves in that condition.

 [Emphasis added]

1. Under the *Quebec Charter,* it is not mandatory to be considered an inferior individual for discrimination to be recognized. The subjective aspect of the concept of social condition found in section 10 of the *Quebec Charter* may be a useful indicator to determine whether there is discrimination, but it is not indispensable. As such, the Quebec case law cited in the section of these reasons addressing social condition reflects the teachings of L’Heureux‑Dubé, J. in *Québec (Commission des droits de la personne et de la jeunesse) v. Montréal (City)*,[[105]](#footnote-105) which dealt with the concept of handicap. L’Heureux‑Dubé, J. explained that a handicap may be real or perceived (objective and subjective aspects) and that discrimination on the basis of handicap may exist even without physical limitations or the presence of an ailment. The emphasis must be placed on the effects of the distinction rather than the cause.
2. This appears to be the only way to give the rights recognized by the *Quebec Charter* the broad interpretation advocated by the Supreme Court and based on the purpose of this quasi-constitutional statute, which is to protect individuals from arbitrary decisions based on prohibited grounds of discrimination that deprive them, without valid reason, of the fundamental rights guaranteed by the *Charter* – in this case the right to receive equal wages for equivalent work.
3. Student employment is not about to disappear any time soon because of this as, in most cases, the wage difference will be justified by considerations set out in section 19 of the *Quebec Charter*. To a certain extent, the thoroughness with which the appellant trains and assigns all of its employees, whether regular or casual employees or students, due to the very particular (and truly dangerous) nature of the tasks and the work environment, carries with it the obligation to pay them the same wages. In fact, the appellant did not establish any reason for paying the students who do the same work as their colleagues less. That will not necessarily be the case for most student jobs in Quebec. Accordingly, these reasons are likely to have an effect that is more or less circumscribed by the circumstances, which may certainly be present in other businesses, but which are not universal.
4. The Tribunal did not err in finding that student status is part of the concept of social condition set out in section 10 of the *Quebec Charter* and in finding that the students who worked for the appellant were the victims of prohibited discrimination due to the violation of the right enshrined in the first paragraph of section 19 of the *Quebec Charter*.

**4.2- Did the Tribunal err in finding that there was a distinction based on age?**

1. The Tribunal noted in passing that age was also a factor of discrimination. Considering that social condition was at the heart of its reasoning and its decision, and in view of the Court’s conclusion on that subject, it is not necessary to address this issue.

**4.3- Did the Tribunal err in the interpretation and application of the concept of *equivalent work* set out in section 19 of the *Quebec Charter*?**

1. The appellant submitted that the students were not doing equivalent work to that performed by the regular and casual employees. The Tribunal dismissed that argument. It is alleged that the Tribunal made a palpable and overriding error by analyzing the tasks performed using a method that grouped together all the tasks performed by the students in each sector of the plant rather than conducting an individual analysis of the tasks performed by each of them.
2. The respondent and the impleaded party are of the view that the Tribunal examined each of the positions to which students were assigned, and found, for each specific task, that the work performed by each of them was the same or equivalent to that of the employee the student replaced.
3. Regarding the equivalent nature of the work performed by the students, the Tribunal noted, among other things:

[translation]

[360]  Section 19 of the *Charter* is intended to prevent an employer from paying different wages to employees who perform the same or equivalent work as other of its employees, unless the difference is justified by one of the criteria it lists. A difference in salary or wages based on experience, seniority, years of service, merit, productivity or overtime is not considered discriminatory if such criteria are common to all members of the personnel.

[361]  To answer the question, the Tribunal must determine whether the students perform work that is equivalent to the work performed by casual employees, or when they are not assigned to the same tasks as the students, to the work performed by the regular employees.

[362]  The evidence revealed that the students work in the same dangerous and potentially toxic environment as the regular and casual employees and are assigned to tasks that are just as dangerous as those the regular and casual employees are assigned to. Sometimes, in a given sector, the tasks reserved for students are even more dangerous than those reserved for the regular and casual employees (e.g., draining the containers versus changing the blades).

[363]  The Tribunal further finds that the students are just as competent as the regular or casual employees to perform the tasks they are assigned to. Not only was the opposite argument not raised by either party, but the safety of all and productivity depends on it, in addition to the fact that, on the initiative of their immediate superior and in contravention of an order, students have in the past ensured the supervision of new casual employees

[364]  If there is a difference between the students and the regular or casual employees, it concerns the number of tasks performed.

[365]  The evidence is vague as to the reasons why certain tasks that used to be assigned to students have ceased to be.

[366]  The Tribunal does not accept the simplistic “health and safety” argument systematically put forth by ABI without further explanation to justify the fact that certain tasks were withdrawn from the students. It understands that except for the tasks that were withdrawn from the list of tasks that they may be trained to perform, students are not trained to perform tasks for which the length of the training is such that they could not be assigned to perform these tasks even if they were trained, considering the maximum duration of the employment permitted by the collective agreements, which is 14 weeks.

[367]  In principle, students’ tasks differ from those of the regular and casual employees in that, for the majority of the 22 positions for which students may be trained and assigned to perform tasks, they do not perform all the tasks of the position. The analysis of the evidence reveals, however, that in fact the students’ situation is not different from that of the regular and casual employees who are not systematically trained to perform all the tasks of the position they occupy.

[368]  Similarly, students sometimes perform less, but sometimes more, tasks than casual employees, and in certain cases, they perform all the tasks of a position.

Students performing more tasks than casual employees:

[369]  Students perform more tasks than casual employees in the position of Polyfunctional Operator in the Foundry Sector:

|  |  |  |
| --- | --- | --- |
| **Position – Sector** | **Number of tasks** | **Number of tasks performed by** |
| **Students** | **Casuals** |
| Polyfunctional Saws Operator – Foundry | 9 | Before 2014: 5 out of 9After 2014: 4 out of 9 | 3 of 9 |

[370]  When trained to perform the tasks of the position (five before 2014 and four after 2014), students assume more responsibility than casual employees, who are trained to perform only three of the nine tasks.

Students performing the same number of tasks as casual or regular employees:

[371]  Students perform the same number of tasks as casual employees in two of the positions to which they may be assigned, and the same tasks as regular employees in five positions to which casual employees are not assigned:

|  |  |  |
| --- | --- | --- |
| **Position – Sector** | **Number of tasks** | **Number of tasks performed by** |
| **Students** | **Casuals** |
| Baking Furnace Operator – Carbon | 5 | 4 out of 5 | 4 out of 5 |
| Casting Preparation – Foundry | 5 | 3 out of 5 | 3 out of 5 |
|  |  |  |  |
| Measures Operator – Electrolysis | 1 | 1 | 0 |
| Support Operator – Electrolysis | 1 | 1 | 0 |
| Planning Coordinator – Foundry | 3 | 3 | 0 |
| Washing – Handling – Transp. Op. | 1 | 1 | 0 |
| Casting Outlet Operator | 4 | 4 | 0 |

[…]

[383]  It can only be concluded from the foregoing that students’ wages are not related to the number of tasks they perform in relation to their colleagues, i.e., casual employees when that category of employee is assigned to the same tasks as they are, or regular employees when no casual employees are assigned to the same position.

[…]

[393]  The lower remuneration paid to students cannot be justified either by their lack of experience, because it is only exceptionally that the wage scales set out an increase for the other categories of unionized employees after a few months in a given position.[[106]](#footnote-106) Even in those cases, there are only two levels of remuneration. The general rule is that there is only one hourly rate payable per position, without any gradation related to experience.

[…]

[404]  Finally, the evidence does not support the conclusion that students perform 85% of the tasks of the positions they are assigned to, because:

1. They perform 100% of the tasks of certain positions;
2. Except for certain tasks (e.g., changing the saws, replacing the anodes in the pyramid, cleaning the pots and the shot-blasting machine, and working on the large butts), the evidence is silent in regard to the percentage of time occupied by each task of a position in relation to a normal workday, such that the Tribunal cannot assess whether the students actually perform 85% of the tasks;
3. Apart from the theory that students cannot perform part of a task of a position (e.g., changing the saws, replacing the anodes in the pyramid, cleaning the pots and the shot-blasting machine, and working on the large butts), the evidence did not establish that this part of the task of the position was in fact performed by another employee when a student was assigned to the task;
4. Subject to certain exceptions, students perform 100% of the tasks of the employees they replace;
5. For most positions, the number of tasks that students may perform in relation to the total number of tasks of the position is less than 85% of the tasks of the position, going as low as 22% for the position of Handling – Transport Operator. The evidence did not establish that the number of tasks that students perform represents 85% of the time of a shift worked by regular or casual employees holding the position for which the student has been assigned tasks, and the evidence did not address this point.[[107]](#footnote-107)

[Underlining added; citations omitted; italics in original]

1. To support its argument that the concept of equivalent work must be analyzed from a strictly individual point of view, the appellant relies on *George c. Québec (Procureur général)*.[[108]](#footnote-108) However, that case does not have the scope that the appellant gives it. Mr. Georges sought to be appointed as the representative in a class action where the class was described as follows:

[translation]

Students hired by the departments and bodies of the Government of Quebec during the summer and that were and/or are subject to the directive concerning students hired in the public service during the summer … .[[109]](#footnote-109)

1. The Superior Court judge dismissed the application to institute a class action at the authorization stage for reasons related to the legal framework specific to class actions:

[translation]

[28]  In each case, it would be necessary to conduct a specific and individual analysis to determine whether a class member meets the conditions of admission for the employment category the class member claims to compare themselves to. This would be extremely difficult, if not impossible, to determine.

[29]  In addition, the analysis of the allegation of discrimination requires, *inter alia*, an examination to determine whether it has a discriminatory effect **on an individual or a group of individuals**. That analysis cannot be performed without examining each case individually to understand, in particular, whether each member would have had the opportunity to be hired and would in fact have been hired in the public service in the absence of Directive R-3.

[30]  Moreover, the applicant’s action is based on a very particular situation, especially in that he does not have the same employer as all the members of the class and the fact that he was hired as a student and as a casual employee, which is not the same situation as the members of the class.[[110]](#footnote-110)

[Underlining and bold emphasis added]

1. The Court confirmed the judgment of first instance in the following terms:

[translation]

[41]  In this case, the definition of the class proposed by the appellant before this Court does not correspond to these requirements in that the second part of the definition appears to be subjective and, moreover, based on a criterion that is dependent on the outcome of the dispute on the merits. Indeed, it would be easy for a person to determine if their job was covered by the directive concerning students. However, how could that person know if he or she performed equivalent work to that of a casual employee? Every person that was hired during the summer under that directive would have to ask themselves whether the tasks performed in the context of their employment were equivalent to those performed by a casual employee and warranted the same wages. A similar reflection would be required due to the mere fact **the jobs offered to students during the summer do not correspond to the employment categories and classes existing in the public service for casual employees.**

[42]  The appellant does not deny this situation. He states, however, that the students in fact perform the same tasks. He cites as evidence the contractual situation that he himself experienced. Because he was hired successively as a student and a casual employee, he was placed in a situation that allowed him to compare his tasks in each of his jobs. However, he is unable to say whether others experienced the same situation.[[111]](#footnote-111)

[Underlining and bold emphasis added]

1. That judgment was rendered on the basis of the rules specific to class actions, paying particular attention to the description of the class that Mr. George wanted to represent. It is irrelevant with respect to the analytical method used to determine the equivalence of tasks at ABI.
2. The appellant has not established any palpable and overriding error in the choice of analytical method or the Tribunal’s highly factual conclusion regarding the tasks performed by the students and their equivalence to the tasks performed by regular or casual employees.
3. Authors Brun, Tremblay, and Brouillet note that: [translation] “the criteria of such equivalence are the qualifications needed, the effort required, the responsibilities assumed, and the conditions of employment”.[[112]](#footnote-112) In this case, the Tribunal noted that [translation] “the students’ situation is not different from that of the regular and casual employees who are not systematically trained to perform all the tasks of the position they occupy”.[[113]](#footnote-113) In addition, the uncontradicted evidence established that when they perform the same task, all employees receive the same training; they provide the same effort, assume the same responsibilities, and work in the same conditions.[[114]](#footnote-114)
4. This ground of appeal must be dismissed.

**4.4-** **Did the Tribunal err in the interpretation and application of the concept of *years of service* set out in section 19 of the *Quebec Charter*?**

1. The appellant submits that the nature of the students’ contracts, which are “fixed-term” contracts, falls under the exception set out in the second paragraph of section 19 of the *Quebec Charter*, which provides that a “difference in salary or wages based on experience, seniority, years of service, merit […] is not considered discriminatory”.
2. In the same breath, the appellant submits that all the employees who have a fixed-term contract are treated the same way. It adds that, in concluding that years of service was not the source of the difference in wages between the students and the other employees, the Tribunal made a palpable and overriding error in its assessment of the testimony of Annie Dubois, Human Resources Advisor at ABI. The appellant also argues that the *Pay Equity Act*[[115]](#footnote-115) [translation] “expressly excludes students employed for their vacation period”.
3. According to the respondent, it is incorrect to equate “years of service” with “fixed-term contracts”. It is also of the view that the appellant has not established a palpable and overriding error in the Tribunal’s assessment of all the evidence and, in particular, the testimony of Annie Dubois.
4. The impleaded party notes that the limited period of the students’ contract of employment (the fixed-term contract) should not be confused with the concept of “years of service” because the fixed term of the students’ contract of employment has no impact on their ability and competence to perform the work. It adds that the evidence clearly establishes, as the Tribunal accepted, that the years of service of all the appellant’s employees was never a criterion used to determine the wage rate paid to employees of the plant.
5. The Tribunal rejected the appellant’s argument based on the “years of service” exception in the following terms:

[translation]

[396]  ABI then referred to the concept of “years of service” set out in the second paragraph of section 19 of the *Charter*. This criterion, however, was set aside by Annie Dubois as the source of the lower wages paid to students.

[397]  ABI’s argument that all the employees with a fixed-term contract are treated the same is circular, like the *separate but equal* doctrine rejected by the Supreme Court,[[116]](#footnote-116), because – save for the exceptional circumstances of 2011 – students are the only employees with fixed-term contracts.

[398]  Admittedly, students are hired under contracts for a term determined further to negotiations with the Union, but until December 31, 1994, they earned the same wage as regular employees. The reduction in their remuneration was imposed unilaterally by ABI when it submitted a final offer aiming to conclude the negotiations related to the renewal of the collective agreements, not on the basis of fixed-term contracts, but without reason, or, according to the argument put forward by ABI during the hearing, because the students perform only 85% of the tasks that regular employees perform.

[399]  This last argument is less than convincing, and it is not accepted for several reasons.

[400]  The only witness who alluded to the fact that ABI’s reason for suggesting that the hourly rate paid to students be reduced as of 1995 was the percentage of tasks they performed in relation to the regular employees, confirmed that ABI may not have told the Union its reasoning when it introduced this element into the final negotiation offer.

[401]  For its part, the Union argued that ABI did not inform it of any reason for including the reduction of students’ wages in its final offer.

[402]  The evidence on this point is thus inconclusive and leads the Tribunal to set aside the testimony of the only witness who seems to remember this justification. But there is more.

[403]  If that had been the case, ABI would have certainly requested an analysis of the percentages of tasks that students perform in the positions to which they are assigned. But it does not allege that any such analysis was done. Moreover, it is not unreasonable to think that if such an analysis had been conducted, the Union would have been informed and asked to confirm the data gathered, which was not done.

[404]  Finally, the evidence does not support the conclusion that students perform 85% of the tasks of the positions they are assigned to, because:

1. They perform 100% of the tasks of certain positions;

2. Except for certain tasks (e.g., changing the saws, replacing the anodes in the pyramid, cleaning the pots and the shot-blasting machine, and working on the large butts), the evidence is silent in regard to the percentage of time occupied by each task of a position in relation to a normal workday, such that the Tribunal cannot assess whether the students actually perform 85% of the tasks;

3. Apart from the theory that students cannot perform part of a task of a position (e.g., changing the saws, replacing the anodes in the pyramid, cleaning the pots and the shot-blasting machine, and working on the large butts), the evidence did not establish that this part of the task of the position was in fact performed by another employee when a student was assigned to the task;

4. Subject to certain exceptions, students perform 100% of the tasks of the employees they replace;

5. For most positions, the number of tasks that students may perform in relation to the total number of tasks of the position is less than 85% of the tasks of the position, going as low as 22% for the position of Handling – Transport Operator. The evidence did not establish that the number of tasks that students perform represents 85% of the time of a shift worked by regular or casual employees holding the position for which the student has been assigned tasks, and the evidence did not address this point.

[…]

[412]  The difference in wages is not based on experience (as discussed above), seniority – which refers to the length of employment with the same employer – or merit – as permitted by section 19 of the *Charter* – because as of their first day of work, casual employees earn more than students in their fourth summer employment period who may also have worked just as many year-end holiday employment periods.

[413]  Nor is the difference based on overtime, because when students work overtime, they are paid the same rate as casual employees.

[414]  ABI does not argue that the lower remuneration paid to students is related to their productivity.[[117]](#footnote-117)

[Underlining added; citations omitted]

1. The second paragraph of section 19 of the *Quebec Charter* provides that a difference in wages based years of service (or “*durée de service*” in the French version) is not considered discriminatory. In addition, this criterion must be common to all employees working in the enterprise.
2. All parties seek to benefit from the judgment rendered by the Court of Québec in 1982 in *Ferme de la poulette grise Inc.*[[118]](#footnote-118) In that case, the employer had hired three students for the summer holiday period and paid them lower wages than the other employees, for equivalent work. It argued that the short duration of their employment did not permit students to acquire skills and productivity comparable to that of regular employees.
3. The Tribunal accepted the following from *Ferme de la poulette grise* *Inc*.:

[translation]

[416]  In that case, the Provincial Court found that the students did not perform the same tasks as the regular employees and that the short period during which they worked in the summer did not allow them to acquire skills and productivity comparable to that of regular employees.

[417]  That is not the case at ABI where students are not only exposed to the same risks as casual and regular employees but also perform the same tasks as the employees they replace.[[119]](#footnote-119)

1. The Tribunal’s comment is not strictly accurate because the Court of Québec stated:

[translation]

It appears to the Court, according to the evidence adduced, that the differential treatment is based on years of service, but is this criterion common to all members of the personnel? It is clear that the wages paid to a student, who is hired for a limited time, are not the same as the wages paid to the defendant’s other employees, but it is the same for all the employees who have a contract of limited duration for the lease and hire of work, or at least no evidence to the contrary was presented to the Court. There are different wage rates in the enterprise depending on whether the contract for the lease and hire of work is for a limited duration or not, but there is no discrimination within the meaning of section 19 of the *Charter* if the same wages are paid to all employees whose contracts are for a limited duration and who perform equivalent work.[[120]](#footnote-120)

[Emphasis added]

1. However, this misunderstanding by the Tribunal has no impact on the outcome of the dispute. After analyzing the evidence, the Tribunal noted that the differential treatment in question here is not based on the employees’ experience, seniority, or years of service. Casual employees are paid wages that are higher to those paid to students from their first day of employment, and the wage scales have a single rate that is independent from employees’ years of service. In this regard, the testimony of Annie Dubois reveals that, for all members of the personnel, wages are tied to the position occupied and have no connection to “years of service”.[[121]](#footnote-121)
2. The Tribunal also accepted, from its assessment of Annie Dubois’s testimony as a whole, that it is not due to the criterion of “years of service” that students receive lower wages. Her testimony indicated that students are hired for a fixed period and that they [translation] “have different wages because they are for fixed-term contracts; they do not perform all the tasks of a given position”.[[122]](#footnote-122) Annie Dubois’s testimony, considered as a whole, is ambiguous with respect to the justification for the distinction between the wages paid to students and that paid to regular and casual employees. Accordingly, the Tribunal cannot be criticized for having accepted from the evidence that students were not paid different wages because of their fixed-term contract. In the Tribunal’s view, this is a pretext behind which the appellant takes refuge to justify its decision:

[translation]

[405]  If ABI did not provide any justification when it decided to modify the students’ wage conditions, it cannot establish one after the fact.[[123]](#footnote-123)

1. The appellant submits that the expression “years of service / *durée de service*” refers to the fixed nature of the duration of the contract of employment. The English version of section 19 of the *Quebec Charter* clears up any ambiguity and connects the concept of “years of service” to the worker’s temporal attachment to the enterprise rather than to the nature of the worker’s contract of employment. This interpretation is consistent with the other grounds of justification (experience, seniority, merit, productivity, and overtime), which are related to an employee’s productivity. That is in fact how the exception set out in section 87.2 of the *Act respecting labour standards*,[[124]](#footnote-124) which uses the same terms, is explained in the commentary:

[translation]

Section 87.2 A.L.S. establishes that a condition of employment based on seniority or years of service does not contravene the prohibition set out in section 87.1 of the *Act*. Strictly speaking, it is not an exception or a derogation. Indeed, the prohibition set out in section 87.1 A.L.S. deals with the hiring date as the sole basis of a distinction. Consideration of seniority or years of service, which section 87.2 A.L.S. declares legitimate, takes into account the time elapsed since the hiring date rather than exclusively the hiring date *per se*.[[125]](#footnote-125)

[Emphasis added]

1. The appellant submits that the exclusion of students under s. 8(2) of the *Pay Equity Act*[[126]](#footnote-126)shows the Quebec legislature’s intention to recognize that it is not discriminatory to remunerate students hired during their vacation period at a lower rate. Following this reasoning, it would be necessary to conclude that discrimination is permitted in the case of all the exclusions set out in the *Act*: students, trainees, senior management officers, police officers, fire fighters, independent operators, etc. This reasoning must be rejected. The purpose of the *Act* is to “redress differences in compensation due to the systemic gender discrimination suffered by persons who occupy positions in predominantly female job classes”.[[127]](#footnote-127) The legislature clearly decided not to subject certain categories of employees to the mechanisms set out in the *Act* to redress differences in compensation based on gender discrimination and restore pay equity, but that does not mean that it authorized an employer to impair these persons’ right to obtain equal wages for equivalent work or that it intended to deprive them of the assistance of public order legislation.
2. The appellant did not establish that the Tribunal made a palpable and overriding error in deciding that the evidence did not support the finding that the differential treatment was based on students’ years of service.
3. This ground of appeal must be rejected.

**\*\*\*\*\***

1. In conclusion, on the issues of the existence of a distinction and the justification for the distinction, the Tribunal’s analysis of the evidence is just as thorough as it is irrefutable. It meticulously scrutinized all the facts and established a very strong factual basis for its finding of a distinction, and, moreover, a distinction that is not justified by actual differences between the tasks performed by regular and casual employees and those performed by students, nor by other considerations related to their productivity or to one of the grounds set out in the second paragraph of section 19 of the *Quebec Charter*. These highly factual conclusions cannot be called into question in the absence of any palpable and overriding error.

**4.5- Did the Tribunal err in awarding moral damages?**

1. This ground of appeal is subject to a standard of review of high deference because it rests largely on the assessment of the witnesses’ credibility. The Tribunal acknowledged that the infringement of a right guaranteed by the *Charter* is not sufficient to give rise to compensation, even symbolic, for moral injury. However, it concluded, after analyzing the evidence, of which it cited excerpts, that the discrimination suffered by the students infringed their dignity. They felt like the victims of injustice; they felt demeaned, belittled, etc., which justifies the award of $1,000 in damages to each of them for the moral injury suffered, as the Court recognized in *Université de Sherbrooke c. Commission des droits de la personne et des droits de la jeunesse*.[[128]](#footnote-128)

**4.6- Did the Tribunal err in refusing to recognize the solidary liability of the impleaded party?**

1. The Tribunal made no reviewable error in finding that the impleaded party is not responsible for the discriminatory situation experienced by the students. After an exhaustive review of the evidence about which the appellant failed to establish any palpable and overriding error, the Tribunal concluded:

[translation]

[501]  It appears from the evidence that the Union never wanted a wage difference for the students. The measure was brought to the negotiating table by ABI unilaterally in 1994 as part of a final offer, and since then, and even after the Union filed a complaint with the Commission, ABI has refused to withdraw it from the collective agreements that were subsequently adopted.

**\*\*\*\*\***

**FOR THESE REASONS, THE COURT:**

1. **DISMISSES** the appeal, with legal costs.

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|  | FRANCE THIBAULT, J.A. |
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|  | JACQUES J. LEVESQUE, J.A. |
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|  | MARIE-JOSÉE HOGUE, J.A. |
|  |
| Mtre Louise LaplanteMtre Caroline Jodoin |
| Norton Rose Fulbright Canada |
| Mtre Audrey Boctor |
| IMK  |
| For the appellant |
|  |
| Mtre Stéphanie FournierMtre Christine Campbell |
| Bitzakidis, Clément-Major |
| For the respondent |
|  |
| Mtre Katherine Sarah B. Larouche |
| Philion Leblanc  |
| For the impleaded party |
|  |
| Date of hearing: | December 8, 2020 |

1. *Commission des droits de la personne et des droits de la jeunesse (Beaudry et autres) c. Aluminerie de Bécancour inc.*, 2018 QCTDP 12 [Judgment under appeal]. [↑](#footnote-ref-1)
2. Judgment under appeal, para. 3. [↑](#footnote-ref-2)
3. *Charter of Human Rights and Freedoms*, CQLR c. C-12 [Quebec *Charter*]. [↑](#footnote-ref-3)
4. Judgment under appeal, para. 20. [↑](#footnote-ref-4)
5. Exceptionally, some of them have worked during other periods. Testimony of Annie Dubois, March 20, 2017, p. 122. See also: Exhibit D-9, Letter dated January 31, 2011, from Ms. Bastien to Mr. Masse, in which the appellant asked to have the students work outside of the periods provided for, to which the impleaded party answered, [translation] “every year you make the same request again concerning the use of the students” (Exhibit D-10, Letter dated February 1, 2011, Mr. Masse’s answer to Ms. Bastien, pp. 1–2 of the unpaginated exhibit). [↑](#footnote-ref-5)
6. Testimony of Annie Dubois, March 20, 2017, pp. 60–67. [↑](#footnote-ref-6)
7. Re-amended brief of the defendant Aluminerie Bécancour inc., July 6, 2017, p. 3, para. 17. [↑](#footnote-ref-7)
8. Table D-21B, Amended comparative table of tasks performed by regulars vs. students vs. casuals, p. 1–15; Judgment under appeal, pp. paras. 63–214. [↑](#footnote-ref-8)
9. Testimony of Clément Masse, November 17, 2016, pé 109; Judgment under appeal, paras. 56–57. [↑](#footnote-ref-9)
10. Exhibit D-30, Excerpt from the 1994–2000 Collective Agreement, Letter of Understanding – Students, p. 98. [↑](#footnote-ref-10)
11. Exhibit D-30A, 1994–2000 Collective Agreement (small agreement booklet), Schedule I, pp. 80–81. [↑](#footnote-ref-11)
12. Testimony of Clément Masse, November 17, 2016, pp. 109–110. [↑](#footnote-ref-12)
13. Testimony of Pierre Champagne, April 3, 2017, pp. 17–19. [↑](#footnote-ref-13)
14. *Id*., p. 19. [↑](#footnote-ref-14)
15. Judgment under appeal, para. 402. [↑](#footnote-ref-15)
16. Exhibit D-33, Collective Agreement (2000-2004) (booklet), Letter of Understanding – Students, p. 132. [↑](#footnote-ref-16)
17. Testimony of Clément Masse, November 17, 2016, Submissions, pp. 191–192. [↑](#footnote-ref-17)
18. Judgment under appeal, para. 485; Testimony of Clément Masse, November 17, 2016, Submissions, pp. 197–204; Exhibit IN-3, Collective Labour Agreement between the Aluminerie de Bécancour Inc. and the Syndicat des métallos, Local 9700 – Operations and Maintenance (2009 – 2012), Letter of Understanding, pp. 142–143. [↑](#footnote-ref-18)
19. Judgment under appeal, paras. 58 and 485. [↑](#footnote-ref-19)
20. Exhibit D-36, Collective Labour Agreement – Operations and Maintenance (2012–2017) (big), Schedule I, p. 110. [↑](#footnote-ref-20)
21. Judgment under appeal, paras. 63–90. [↑](#footnote-ref-21)
22. *Id*., paras. 91–125. [↑](#footnote-ref-22)
23. *Id*., paras. 126–163. [↑](#footnote-ref-23)
24. *Id*., paras. 164–179. [↑](#footnote-ref-24)
25. *Id*., paras. 180–188. [↑](#footnote-ref-25)
26. *Id*., paras. 189–194. [↑](#footnote-ref-26)
27. *Id*., paras. 195–199. [↑](#footnote-ref-27)
28. *Id*., paras. 200–204. [↑](#footnote-ref-28)
29. *Id*., paras. 205–214. [↑](#footnote-ref-29)
30. *Id*., para. 331. [↑](#footnote-ref-30)
31. *Id*., para. 423. [↑](#footnote-ref-31)
32. *Id*., paras. 424–426. [↑](#footnote-ref-32)
33. *Id*., para. 427. [↑](#footnote-ref-33)
34. *Id*., paras. 432–437. [↑](#footnote-ref-34)
35. *Id*., para. 445. [↑](#footnote-ref-35)
36. *Quebec Charter*, *supra,* note 3, ss. 10 and 19. [↑](#footnote-ref-36)
37. *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, para. 78, citing *Forget v. Quebec (Attorney General)*, [1988] 2 S.C.R. 90, para. 10. [↑](#footnote-ref-37)
38. *Forget v. Quebec (Attorney General)*, *supra*, note 37, para. 10. [↑](#footnote-ref-38)
39. *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39. [↑](#footnote-ref-39)
40. *Id*., para. 64. [↑](#footnote-ref-40)
41. *Id*., paras. 50–52. [↑](#footnote-ref-41)
42. *Québec (Ville de) c. Commission des droits de la personne du Québec*, [1989] R.J.Q. 831, 1989 CanLII 613 (C.A.). [↑](#footnote-ref-42)
43. *Université Laval c. Commission des droits de la personne et des droits de la jeunesse*, 2005 QCCA 27, para. 57. It should be noted that the university admitted the existence of a discriminatory system of remuneration (para. 24). [↑](#footnote-ref-43)
44. Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel*, 6th ed., Cowansville, Yvon Blais, 2014, no.XII-7.103. [↑](#footnote-ref-44)
45. Jean-Yves Brière *et al*., *Le droit de l’emploi au Québec*, 4th ed., Montreal, Wilson & Lafleur, 2010, no.III‑106. [↑](#footnote-ref-45)
46. Linda Bernier *et al.*, *Les droits de la personne et les relations du travail*,Cowansville, Yvon Blais, 1997, (looseleaf, update no. 46, 2020) nos. 7.3274 and 7.3279. [↑](#footnote-ref-46)
47. *Housen v. Nikolaisen*, 2002 SCC 33. [↑](#footnote-ref-47)
48. *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, para. 37. [↑](#footnote-ref-48)
49. *Charter of Human Rights and Freedoms*, *supra,* note 3, s. 132. [↑](#footnote-ref-49)
50. *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, paras. 65 and 67. [↑](#footnote-ref-50)
51. *R. v. Kapp*, 2008 SCC 41, para. 25. [↑](#footnote-ref-51)
52. *Quebec (Attorney General) v. A.*, 2013 SCC 5. [↑](#footnote-ref-52)
53. *Université de Sherbrooke c. Commission des droits de la personne et des droits de la jeunesse*, 2015 QCCA 1397. [↑](#footnote-ref-53)
54. *Québec (Procureur général) c. Commission des droits de la personne et des droits de la jeunesse*, 2013 QCCA 141. [↑](#footnote-ref-54)
55. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. [↑](#footnote-ref-55)
56. *R. v. Kapp*, *supra,* note 51, para. 25. [↑](#footnote-ref-56)
57. *Fraser v. Canada (Attorney General),* 2020 SCC 28, para. 81. [↑](#footnote-ref-57)
58. *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, *supra,* note 39. [↑](#footnote-ref-58)
59. *Id*., paras. 35–37 [Citations omitted]. [↑](#footnote-ref-59)
60. *Id*., paras. 53–54. [↑](#footnote-ref-60)
61. *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, paras. 64, 83, 86, 120–121. [↑](#footnote-ref-61)
62. Brun, Tremblay and Brouillet, *supra,* note 44, no. XII-7.48. [↑](#footnote-ref-62)
63. *Id.*, no. XII-7.57–7.61. [↑](#footnote-ref-63)
64. Daniel Proulx, “Droit à l’égalité” in *JurisClasseur Québec*, *Droit constitutionnel*, fasc. 9, Montreal, Lexis Nexis, 2018, para. 118. [↑](#footnote-ref-64)
65. *Université de Sherbrooke c. Commission des droits de la personne et des droits de la jeunesse*, *supra,* note 53. [↑](#footnote-ref-65)
66. *Québec (Procureur général) c. Commission des droits de la personne et de la jeunesse*, *supra,* note 54. [↑](#footnote-ref-66)
67. *Quebec (Attorney General) v. A*, *supra,* note 52. [↑](#footnote-ref-67)
68. *Canada (Minister of Citizenship and Immigration) v. Vavilov*, *supra,* note 48. [↑](#footnote-ref-68)
69. *Université de Sherbrooke c. Commission des droits de la personne et des droits de la jeunesse*, *supra,* note 53, para. 54. [↑](#footnote-ref-69)
70. *Québec (Procureur général) c. Commission des droits de la personne et des droits de la jeunesse*, *supra,* note 54. [↑](#footnote-ref-70)
71. *Id*., paras. 30–43. [↑](#footnote-ref-71)
72. *Id*., paras. 61–75. [↑](#footnote-ref-72)
73. *Id*., paras. 77–86. [↑](#footnote-ref-73)
74. *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, *supra,* note 39, paras. 42–43 and 52–53; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, 2000 SCC 27, para. 84; *Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525 at 538; *Forget v. Quebec (Attorney General)*, [1988] 2 S.C.R. 90, para. 10. [↑](#footnote-ref-74)
75. Judgment under appeal, para. 331; *George c. Fonds d’aide aux recours collectifs*, [2002] T.A.Q. 637, 2002 CanLII 55213 (T.A.Q.), para. 92. [↑](#footnote-ref-75)
76. *R. v. Barton*, 2019 SCC 33, paras. 107 and 196–200; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, paras. 82–96 (reasons of L’Heureux-Dubé, J.) and para. 103 (reasons of McLachlin, J.); *R. v. Gladue*, [1999] 1 S.C.R. 688, para. 65; *R. v. Williams*, [1998] 1 S.C.R 1128, para. 54; *R. v. Ipeelee*, 2012 SCC 13, paras. 59–60 and 67. [↑](#footnote-ref-76)
77. *Lévesque c. Québec (Procureur général)*, [1988] R.J.Q. 223, 1987 CanLII 964 (C.A.); *Johnson c. Commission des affaires sociales*, [1984] C.A. 61, AZ-84011055, p. 21. [↑](#footnote-ref-77)
78. *Commission des droits de la personne et des droits de la jeunesse (Mercier et une autre) c. Dion*, 2008 QCTDP 9; *Commission des droits de la personne et des droits de la jeunesse c. Fondation Abbé Charles-Émile Gadbois*, J.E. 2001-1792 (H.R.T.); *D’Aoust c. Vallières*, J.E. 94-85, AZ-94171005 (H.R.T.); *Commission des droits de la personne c. J.M. Brouillette Inc.*, J.E. 94-801, 1994 CanLII 191 (H.R.T.); *Commission des droits de la personne c. Gauthier*, [1994] R.J.Q. 253, 1993 CanLII 8751 (H.R.T.). See also the following administrative decisions: *M.B. c. Québec (Procureur général)*, 2010 QCTAQ 06614; *Aide sociale 134*, [1997] C.A.S. 432, AZ-97051085. [↑](#footnote-ref-78)
79. *Commission des droits de la personne c. Centre hospitalier St-Vincent de Paul de Sherbrooke* (September 7, 1978), St‑François Sup. Ct., 450-05-000856-78, cited in *Lévesque c. Québec (Procureur général)*, [1988] R.J.Q. 223, 1987 CanLII 964 (C.A.). [↑](#footnote-ref-79)
80. *Commission des droits de la personne c. Gauthier*, *supra,* note 78. [↑](#footnote-ref-80)
81. In *Johnson c. Commission des affaires sociales*, *supra,* note 77, pp. 21–22. [↑](#footnote-ref-81)
82. *Ordre des comptables agréés du Québec c. Québec (Procureur général)*, [2004] R.J.Q.1164, 2004 CanLII 20542, para. 69 (C.A.). [↑](#footnote-ref-82)
83. *Lévesque c. Québec (Procureur général)*, *supra,* note 77. [↑](#footnote-ref-83)
84. *Québec (Procureur général) c. Champagne*, [2003] J.Q. no. 13948, 2003 CanLII 72172 (C.A.). [↑](#footnote-ref-84)
85. *Social Aid Act*, R.S.Q., c. A-16. [↑](#footnote-ref-85)
86. *Lévesque c. Québec (Procureur général)*, *supra,* note 77. [↑](#footnote-ref-86)
87. *Affaires sociales — 413*, [2000] T.A.Q. 77. [↑](#footnote-ref-87)
88. *Automobile Insurance Act*, R.S.Q., c. A-25. [↑](#footnote-ref-88)
89. *Affaires sociales — 413*, [2000] T.A.Q. 77, paras. 32–38. [↑](#footnote-ref-89)
90. *Champagne c. Tribunal administratif du Québec*, [2001] R.J.Q. 1788, J.E. 2001-1435 (Sup. Ct.). [↑](#footnote-ref-90)
91. *Québec (Procureur général) c. Champagne*, *supra,* note 84. [↑](#footnote-ref-91)
92. *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.*, [1996] 2 S.C.R. 345, para. 116; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, *supra,* note 74, paras. 28–29. Note that this case concerned the scope of one of the prohibited grounds set out in section 10. The Supreme Court thus expanded the definition of “handicap”, finding that this ground includes a subjective aspect, that is, “the perception of a handicap”. [↑](#footnote-ref-92)
93. *Social Aid Act*, *supra,* note 85. [↑](#footnote-ref-93)
94. Proulx, *supra,* note 64, para. 100. [↑](#footnote-ref-94)
95. *Ordre des comptables généraux licenciés du Québec c. Québec (Procureur général)*, [2004] R.J.Q. 1164, 2004 CanLII 20542, paras 69–70 (C.A.). [↑](#footnote-ref-95)
96. *Chartered Accountants Act*, R.S.Q., c. C-48. [↑](#footnote-ref-96)
97. *Ordre des comptables généraux licenciés du Québec c. Québec (Procureur général)*, *supra,* note 82, paras. 69–70 (C.A.). [↑](#footnote-ref-97)
98. See *Quebec (Attorney General) v. A*, *supra,* note 67, para. 336. [↑](#footnote-ref-98)
99. *Fraser v. Canada (Attorney General*), *supra,* note 57, paras. 86–87. [↑](#footnote-ref-99)
100. *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, *supra,* note 74, paras. 43–52. [↑](#footnote-ref-100)
101. *Human Rights Act*, S.N.W.T. 2002, c. 18, s. 1.

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| **1.**(1)  In this Act,"social condition", in respect of an individual, means the condition of inclusion of the individual, other than on a temporary basis, in a socially identifiable group that suffers from social or economic disadvantage resulting from poverty, source of income, illiteracy, level of education or any other similar circumstance; (condition sociale) | **1.**(1)  Les définitions qui suivent s’appliquent à la présente loi. « condition sociale » Condition d’un individu résultant de son inclusion, autrement que de façon temporaire, au sein d’un groupe social identifiable et socialement ou économiquement défavorisé pour des causes liées à la pauvreté, à la source de revenu, à l’analphabétisme, au niveau d’instruction ou à d’autres circonstances similaires. (social condition) |

 [↑](#footnote-ref-101)
102. *Human Rights Act*, R.S.N.B. 2011, c. 171, s. 2.

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| **2**The following definitions apply in this Act.“social condition”, in respect of an individual, means the condition of inclusion of the individual in a socially identifiable group that suffers from social or economic disadvantage on the basis of his or her source of income, occupation or level of education. (condition sociale) | **2**  Les définitions qui suivent s’appliquent à la présente loi.« condition sociale » La condition d’un individu résultant de son inclusion au sein d’un groupe social identifiable et socialement ou économiquement défavorisé fondée sur sa source de revenu, sa profession ou son niveau d’instruction. (social condition) |

See also New Brunswick Human Rights Commission, *Guideline on Social Condition*, 2019, pp. 4–5, online: https://www2.gnb.ca/content/dam/gnb/Departments/hrc-cdp/PDF/GuidelineonSocialCondition.pdf (page consulted on January 4, 2021). [↑](#footnote-ref-102)
103. *The Human Rights Code*, C.C.S.M., c. H175, s. 9(2.1). [↑](#footnote-ref-103)
104. *Canadian Human Rights Act*, R.S.C. 1985, c. H-6. [↑](#footnote-ref-104)
105. *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, *supra,* note 74, paras. 43–52. [↑](#footnote-ref-105)
106. That is the case for Technicians in the Hygiene and Production Sub-sector of the Laboratory Sector and for Catchment Technicians and Warehouse Clerks in the Procurement Sector. [↑](#footnote-ref-106)
107. Judgment under appeal, paras. 360–371, 383, 393, and 404. [↑](#footnote-ref-107)
108. *George c. Québec (Procureur général)*, 2006 QCCA 1204. [↑](#footnote-ref-108)
109. *George c. Québec (Procureur général)*, J.E. 2004-1425, 2004 CanLII 8979, para. 1 (Sup. Ct.).  [↑](#footnote-ref-109)
110. *George c. Québec (Procureur général)*, *supra,* note 109, paras. 28–30 (Sup. Ct.). [↑](#footnote-ref-110)
111. *George c. Québec (Procureur général)*, *supra,* note 108, paras. 41–42. [↑](#footnote-ref-111)
112. Brun, Tremblay and Brouillet, *supra,* note 44, no. XII-7.103. [↑](#footnote-ref-112)
113. Judgment under appeal, para. 367. [↑](#footnote-ref-113)
114. Judgment under appeal, paras. 361–392. See also, *inter alia*, Testimony of Daniel Sicard, November 14, 2016, p. 210; Testimony of Denis Dallaire, November 15, 2016, p. 121; Testimony of Laurie Pelletier, November 16, 2016, pp. 41–42; Testimony of Maxime Thibeault, November 16, 2016, p. 56; Testimony of David-Vincent Auger, November 16, 2016, pp. 155–156. [↑](#footnote-ref-114)
115. *Pay Equity Act*, CQLR, c. E-12.001, s. 8. [↑](#footnote-ref-115)
116. *Y.Z. v. Canada (Citizenship and Immigration)*, 2015 FC 892 (CanLII); *Hendricks v. Québec (Procureur général)*, 2002 CanLII 23808 (Sup. Ct.). [↑](#footnote-ref-116)
117. Judgment under appeal, paras. 396–404 and 412–414. [↑](#footnote-ref-117)
118. *Commission des droits de la personne du Québec c. Ferme de la poulette grise Inc.*, [1982] C.P. 79, J.E. 82-112. [↑](#footnote-ref-118)
119. Judgment under appeal, paras. 416–417. [↑](#footnote-ref-119)
120. *Commission des droits de la personne du Québec c. Ferme de la poulette grise Inc*, *supra*, note 118 at 10. [↑](#footnote-ref-120)
121. Testimony of Annie Dubois, March 21, 2017, p. 15–16. [↑](#footnote-ref-121)
122. Testimony of Annie Dubois, March 21, 2017, Observations, pp. 119–120. [↑](#footnote-ref-122)
123. Judgment under appeal, para. 405. [↑](#footnote-ref-123)
124. *Act respecting labour standards*, CQLR, c. N -1.1. [↑](#footnote-ref-124)
125. Robert P. Gagnon and Langlois Kronström Desjardins, s.e.n.c.r.l., *Le droit du travail du Québec*, 7th ed., Cowansville, Yvon Blais, 2013, no.699. [↑](#footnote-ref-125)
126. *Pay Equity Act*, *supra,* note 115, s. 8. [↑](#footnote-ref-126)
127. *Id*., s. 1. [↑](#footnote-ref-127)
128. *Université de Sherbrooke c. Commission des droits de la personne et des droits de la jeunesse*, *supra,* note 53, paras. 62 and 63. [↑](#footnote-ref-128)