2013 CarswellOnt 7881, 2013 ONCA 396, 228 A.C.W.S. (3d) 204, 116 O.R. (3d) 81, 306 O.A.C. 314, 9 C.C.E.L. (4th) 233, 363 D.L.R. (4th) 598

Pieters v. Peel Law Assn.

Peel Law Association and Melissa Firth Applicants (Respondents) and Selwyn Pieters and Brian Noble Respondents (Appellants)

Ontario Court of Appeal

E.A. Cronk, R.G. Juriansz, S.E. Pepall JJ.A.

Heard: December 18-19, 2012
Judgment: June 13, 2013
Docket: CA C55734

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Proceedings: reversing *Pieters v. Peel Law Assn.* (2012), 2012 CarswellOnt 2026, 2012 ONSC 1048, 288 O.A.C. 185 (Ont. Div. Ct.)**Proceedings: affirming *Pieters v. Peel Law Assn.* (2010), 2010 CarswellOnt 9354, 2010 HRTO 2411 (Ont. Human Rights Trib.)**

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Anthony Griffin, Sunil Gurmukh, for Intervener, Ontario Human Rights Commission

Anita Bromberg, Marvin Kurz, for Intervener, League of Human Rights for B'nai Brith Canada

Margaret Leighton, Andrea A. Cole, for Intervener, Human Rights Tribunal of Ontario

Subject: Constitutional; Employment; Civil Practice and Procedure

Human rights --- Practice and procedure — Judicial review — Grounds — Error of law

Respondents were lawyers involved in proceeding at courthouse but were not gowned —

Respondents were black — During break, they went to lawyer's lounge which was operated by applicant — Only lawyers and law students were permitted to use lounge — Applicant's librarian approached respondents and asked them to produce identification to show they were lawyers but did not ask to see identification of anyone else in lounge — Human Rights Tribunal of Ontario found applicants had discriminated against respondents in provision of services, goods and facilities on basis of race and colour, contrary to s.1 of Human Rights Code — Applicants successfully brought application for judicial review — Respondents appealed — Appeal allowed — Divisional Court erred in law by applying incorrect and stricter test of discrimination in deciding this case, which necessarily affected its analysis of whether evidence could have reasonably satisfied test for discrimination — It was not acceptable to attach modifier "causal" to "nexus"in test for discrimination — Divisional Court erred in law in finding tribunal reversed burden of proof.

Human rights --- Practice and procedure — Judicial review — Grounds — General principles

Respondents were lawyers involved in proceeding at courthouse but were not gowned — Respondents were black — During break, they went to lawyer's lounge which was operated by applicant — Only lawyers and law students were permitted to use lounge — Applicant's librarian approached respondents and asked them to produce identification to show they were lawyers but did not ask to see identification of anyone else in lounge — Human Rights Tribunal of Ontario found applicants had discriminated against respondents in provision of services, goods and facilities on basis of race and colour, contrary to s.1 of Human Rights Code — Applicants successfully brought application for judicial review — Respondents appealed — Appeal allowed — Divisional Court erred in law in finding tribunal reversed burden of proof — Divisional Court erred in law by applying incorrect and stricter test of discrimination in deciding this case, which necessarily affected its analysis of whether evidence could have reasonably satisfied test for discrimination — Divisional Court lost sight of distinction between burden of proof and evidential burden — Divisional Court erred in concluding that decision did not fall within range of reasonable outcomes — Only issue on judicial review was whether tribunal's decision fell within range of reasonable outcomes and whether vice-chair could have reasonably arrived at decision he did.

Human rights --- What constitutes discrimination — Race, ancestry or place of origin — Denial of public services or facilities

Respondents were lawyers involved in proceeding at courthouse but were not gowned — Respondents were black — During break, they went to lawyer's lounge which was operated by applicant — Only lawyers and law students were permitted to use lounge — Applicant's librarian approached respondents and asked them to produce identification to show they were lawyers but did not ask to see identification of anyone else in lounge — Human Rights Tribunal of Ontario found applicants had discriminated against respondents in provision of services, goods and facilities on basis of race and colour, contrary to s.1 of Human Rights Code — Applicants successfully brought application for judicial review — Respondents appealed — Appeal allowed — Divisional Court erred in concluding that tribunal's decision did not fall within range of reasonable outcomes — To find discrimination, tribunal had to have been satisfied, after considering all evidence, that respondents were subjected to adverse

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treatment and that their race and colour were factors in adverse treatment — Evidence relied upon by tribunal provided ample basis to support inference that respondents' race and colour were factors in librarian's questioning.

Human rights --- Remedies — Miscellaneous

Respondents were lawyers involved in proceeding at courthouse but were not gowned — Respondents were black — During break, they went to lawyer's lounge which was operated by applicant — Only lawyers and law students were permitted to use lounge — Applicant's librarian approached respondents and asked them to produce identification to show they were lawyers but did not ask to see identification of anyone else in lounge — Human Rights Tribunal of Ontario found applicants had discriminated against respondents in provision of services, goods and facilities on basis of race and colour, contrary to s.1 of Human Rights Code — Applicants successfully brought application for judicial review — Respondents appealed — Appeal allowed — Divisional Court erred in concluding that tribunal's decision did not fall within range of reasonable outcomes — To find discrimination, tribunal had to have been satisfied, after considering all evidence, that respondents were subjected to adverse treatment and that their race and colour were factors in adverse treatment — Evidence relied upon by tribunal provided ample basis to support inference that respondents' race and colour were factors in librarian's questioning.

Cases considered by *R.G. Juriansz J.A.*:

Moore v. British Columbia (Ministry of Education) (2012), 38 B.C.L.R. (5th) 1, 2012 SCC 61, 2012 CarswellBC 3446, 2012 CarswellBC 3447, 351 D.L.R. (4th) 451, [2012] 12 W.W.R. 637, 436 N.R. 152, (sub nom. *British Columbia (Ministry of Education) v. Moore)* 328 B.C.A.C. 1, (sub nom. *British Columbia (Ministry of Education) v. Moore)* 558 W.A.C. 1 (S.C.C.) — considered

Nassiah v. Peel (Regional Municipality) Police Services Board (2007), 2007 CarswellOnt 9327, 2007 HRTO 14, 61 C.H.R.R. D/88 (Ont. Human Rights Trib.) — considered

O'Malley v. Simpsons-Sears Ltd. (1985), (sub nom. *Ontario Human Rights Commission v. Simpsons-Sears Ltd.)* [1985] 2 S.C.R. 536, [1986] D.L.Q. 89 (note), 23 D.L.R. (4th) 321, 64 N.R. 161, 12 O.A.C. 241, 17 Admin. L.R. 89, (sub nom. *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.)* 9 C.C.E.L. 185, 86 C.L.L.C. 17,002, 7 C.H.R.R. D/3102, 52 O.R. (2d) 799 (note), 1985 CarswellOnt 887, 1985 CarswellOnt 946 (S.C.C.) — considered

Ontario (Director of Disability Support Program) v. Tranchemontagne (2010), (sub nom. *Ontario (Disability Support Program) v. Tranchemontagne)* 71 C.H.R.R. D/1, 222 C.R.R. (2d) 144, 2010 ONCA 593, 2010 CarswellOnt 6821, 12 Admin. L.R. (5th) 179, 102 O.R. (3d) 97, 324 D.L.R. (4th) 87, (sub nom. *Tranchemontagne v. Disability Support Program (Ont.))* 269 O.A.C. 137 (Ont. C.A.) — considered

Ontario (Human Rights Commission) v. Etobicoke (Borough) (1982), 1982 CarswellOnt 730, [1982] 1 S.C.R. 202, 40 N.R. 159, 82 C.L.L.C. 17,005, 132 D.L.R. (3d) 14, 3 C.H.R.R. D/781, 1982 CarswellOnt 730F (S.C.C.) — considered

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Phipps v. Toronto Police Services Board (2009), 2009 HRTO 877 (Ont. Human Rights Trib.) — considered

R. v. Parks (1993), 1993 CarswellOnt 119, 24 C.R. (4th) 81, 65 O.A.C. 122, 15 O.R. (3d) 324, 84 C.C.C. (3d) 353 (Ont. C.A.) — considered

R. v. S. (R.D.) (1997), 161 N.S.R. (2d) 241, 477 A.P.R. 241, 151 D.L.R. (4th) 193, 118 C.C.C. (3d) 353, 1997 CarswellNS 301, 1997 CarswellNS 302, 10 C.R. (5th) 1, 218 N.R. 1, 1 Admin. L.R. (3d) 74, [1997] 3 S.C.R. 484 (S.C.C.) — considered

Radek v. Henderson Development (Canada) Ltd. (2005), 52 C.H.R.R. D/430, 2005 BCHRT 302 (B.C. Human Rights Trib.) — considered

Snell v. Farrell (1990), 110 N.R. 200, 1990 CarswellNB 218, 1990 CarswellNB 82, [1990] 2 S.C.R. 311, 72 D.L.R. (4th) 289, 107 N.B.R. (2d) 94, 267 A.P.R. 94, 4 C.C.L.T. (2d) 229, (sub nom. *Farrell c. Snell)* [1990] R.R.A. 660 (S.C.C.) — considered

Toronto Police Services Board v. Phipps (2012), (sub nom. *Shaw v. Shipps)* 347 D.L.R. (4th) 616, 2012 ONCA 155, 2012 CarswellOnt 3992, 35 Admin. L.R. (5th) 167, (sub nom. *Shaw v. Phipps)* 289 O.A.C. 163 (Ont. C.A.) — considered

APPEAL by respondents from decision *Pieters v. Peel Law Assn.* (2012), 2012 CarswellOnt 2026, 2012 ONSC 1048, 288 O.A.C. 185 (Ont. Div. Ct.), quashing decision of Human Rights Tribunal.

***R.G. Juriansz J.A.*:**

A. Facts

1 This is an appeal from an order of the Divisional Court quashing a decision of the Human Rights Tribunal of Ontario ("HRTO").

2 On May 16, 2008, the appellants, Mr. Pieters and Mr. Noble (the "first appellant" and the "second appellant") were counsel in a proceeding at the Brampton Courthouse. They were not gowned. Both of the appellants, and the articling student who was accompanying them, are black. Both the first appellant and the articling student have dreadlocked hair.

3 During a break, they went to the lawyer's lounge operated by the respondent, Peel Law Association ("PLA"), with some of the other lawyers involved in the proceeding. According to PLA policy, only lawyers and law students are permitted to use the lounge, robing room, and library. Signs toindicate that are posted. The personal respondent, Ms. Firth, is the library's administrator (the "librarian") with primary responsibility for enforcing this policy. She approached the appellants and the articling student and asked them to produce identification to show they were lawyers or law students. She did not ask to see the identification of anyone else in the lounge.

4 The appellants brought applications[FN1] to the HRTO alleging an infringement of their rights under s. 1 of the *Human Rights Code*, R.S.O. 1990, c. H.19 (the "Code") to equal

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treatment with respect to services, goods and facilities without discrimination because of race and colour. Vice-Chair Whist was appointed to hear the case. The Vice-Chair found their rights had been infringed and awarded each appellant $2000 for injury to his dignity.[FN2]

5 The Divisional Court allowed the respondents' application for judicial review and quashed the Vice-Chair's decision.

6 The appellants were granted leave to appeal to this court.

B. Decisions Below

(1) Decision of the Vice-Chair of the Human Rights Tribunal of Ontario

7 The Vice-Chair recognized that the issue he had to decide was whether there was "a sufficient basis to conclude the applicants' race and colour was a factor in the personal respondent's decision to approach and question the applicants in the manner that she did".

8 In setting the context, the Vice-Chair found that "controlling access to the library and lounge was an ongoing organizational concern for the PLA." He was satisfied that PLA staff, especially the librarian, "regularly asked persons to confirm whether they were lawyers, articling students or students of law in order to determine whether they were admissible to the lounge and library." He was further satisfied "that the personal respondent routinely carried out this function and that this was a function clearly mandated to her as Librarian/ Administrator under the PLA's Policy."

9 On the morning of May 16, one of the library's employees noticed that the furniture just outside the library door had been rearranged and had seen the furniture occupied by five or six people. The librarian asked the employee to advise her if she saw these people again.

10 At about 11 o'clock a second library employee observed a female in the robing room she did not recognize and "asked the personal respondent to check the identification of this woman." As well, the first employee advised the librarian "that she believed that she recognized the persons who had moved the furniture from earlier that morning and that they were sitting in the lounge area just outside the library doors."

11 The librarian's route to the robing room to check the identification of the woman there took her through the lounge. Upon entering the lounge she stopped to question the appellants and the articling student, leading to the encounter that is the subject of the appellants' human rights application.

12 The librarian testified that she did not ask the first appellant for identification. She said that she did not speak directly to the first appellant because she recognized him. She said she questioned only the two persons with him. Based on this testimony, the respondents argued before the Vice-Chair that her questioning only two of the men showed the questioning could not have been racially motivated.

13 The Vice-Chair, after a careful review of the testimony of witnesses including other lawyers who witnessed the encounter, found that the librarian initially engaged the first

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appellant. He found that after the first appellant produced his identification, the librarian then turned to the second appellant and the articling student and asked for their identification. The first appellant identified them as his staff and the librarian stated she would check their identification nonetheless. The Vice-Chair held that the librarian's testimony on this point undermined the credibility of her explanations generally.

14 The Vice-Chair found as a fact that "the manner in which the personal respondent asked her questions and interacted with the applicants was aggressive and demanding." He noted that, without introducing herself, she interrupted the first appellant while he was on the telephone. While noting that her requests of individuals to produce identification in the past had "included instances in which there had been difficulties", he concluded from the evidence of "how she generally carried out this function", including her own evidence, that "the way in which the personal respondent approached the applicants and the blunt and demanding manner in which she asked her questions was not how she would approach and question persons that she imagined were lawyers and had a right to be in the lounge".

15 The Vice-Chair found that when asked why she was not checking the identification of other people in the room she claimed she knew everyone else in the lounge was a lawyer. In fact, the evidence established that there were two other people in the lounge who had never been there before and who the librarian did not know. One was not a lawyer.

16 The Vice-Chair concluded that there were sufficient facts to support a *prima facie* case of discrimination and required the respondents to provide a valid explanation that showed that the appellants' race and colour were not factors in the librarian's questioning them. He found that the only explanation provided had been proven false. He remarked that "the respondents have failed to provide a credible and rational explanation for why the personal respondent stopped to question the applicants when she did" and drew the inference that the decision to question them "was, in some measure, because of their race and colour".

17 The Vice-Chair went on and drew the additional inference that the manner in which the respondent questioned the appellants was also tainted by their race and colour.

18 As mentioned, the Vice-Chair found the appellants' rights under the Code had been infringed and awarded each of them $2000 compensation for the injury to their dignity.

(2) Decision of the Divisional Court

19 The Divisional Court concluded that the Vice-Chair made two main errors that warranted quashing his decision:

> i) finding that a *prima facie* case of discrimination had been made out when there was an insufficient evidentiary basis to do so; and
>
> ii) improperly reversing the burden of proof, placing an impossible onus on the respondents to disprove discrimination.

20 The Divisional Court recognized that the highest degree of deference should be

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awarded to the Vice-Chair in respect of determinations of fact and the interpretation of human rights law.

21 The Court relied on this court's decision in *Ontario (Director of Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593, 102 O.R. (3d) 97 (Ont. C.A.), for the proposition that "a *prima facie* case test involves establishing substantive discrimination and...demonstrating a distinction that creates a disadvantage by perpetuating prejudice or stereotyping".

22 The Court then stated that "[i]f [the applicant] establishes a distinction, he or she must then establish that there is a causal link or nexus between the distinction that imposes a disadvantage and a prohibited ground." The Court set out the following elements an applicant is required to prove to establish a *prima facie* case of discrimination:

a) a distinction or differential treatment;

b) arbitrariness based on a prohibited ground;

c) a disadvantage; and

d) a causal nexus between the arbitrary distinction based on a prohibited ground and the disadvantage suffered.

23 The Divisional Court observed that it is only after a *prima facie* case is made out that the onus shifts to the respondent to provide a non-discriminatory explanation for the conduct in question. The Divisional Court reasoned that the Vice-Chair had made findings of fact that were inconsistent with his conclusion that a *prima facie* case had been established. Consideration of all the evidence showed there was an insufficient basis to conclude a *prima facie* case had been made out.

24 First, the Court observed that it was a fact that the appellants were seated closest to the door through which the librarian entered and this was "clear evidence...as to why [the librarian] approached the complainants for identification rather than anyone else". The Court reasoned, "Accordingly, they were the first persons she would have encountered when she stopped in the lounge on her way to the robing room."

25 Second, the Vice-Chair's finding that the personal respondent's focus was on the first appellant during the encounter "was a credible explanation for the fact that she did not check the identification of other persons in the lounge."

26 Third, the Vice-Chair made a mistake by relying on the fact that the librarian interrupted her trip to the robing room. It was a mistake because the Vice-Chair had accepted evidence that she regularly checked both areas. The librarian's duty to enforce the policy in both areas had to be kept in mind when evaluating her actions. Therefore, stopping on the way to the robing room to question the appellants could not support an inference of differential treatment.

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27 Fourth, there was conflicting evidence as to whether the librarian's demeanour was aggressive at the time. Even if it was, this does not establish differential treatment as the Vice-Chair had found that her identification requests of others had at times led to difficulties. That this incident was contentious was not enough to establish differential treatment.

28 Fifth, the Divisional Court concluded that the finding that a *prima facie* case existed without a proper evidentiary foundation had the effect of reversing the burden of proof by calling upon the respondents to prove there was no discrimination. This placed the librarian in the difficult position of trying to prove a negative, that she was not motivated by the appellants' race and colour.

29 Sixth, the Divisional Court found that the Vice-Chair's reliance on police profiling cases to infer a nexus between the appellants' race and colour and their treatment was misconceived.

30 Finally, the Divisional Court observed that the Vice-Chair had failed to resolve important issues of credibility. Given that the Vice-Chair had made a negative finding about the librarian's credibility, he should also have resolved the credibility issues related to the first appellant's conduct and whether the appellants were aware of PLA's policy restricting the lounge to lawyers.

31 The Divisional Court concluded that the evidence did not even meet the threshold of differential treatment and quashed the Vice-Chair's order without remitting the matter. The Court awarded the respondents $20,000 in costs.

C. Positions of the Parties

(1) The Appellants

32 The appellants argue that the Divisional Court departed from its proper role on judicial review and in effect applied a *de facto* correctness standard of review. The Divisional Court, the appellants submit, disregarded the findings of fact and determinations of credibility of the Vice-Chair and engaged in a whole scale reassessment of the evidence before the Vice-Chair. They also relied on explanations for the personal respondent's conduct that were not advanced at the hearing. Although the Divisional Court correctly identified the standard of review as "reasonableness", it did not apply it. The legislature intended that decisions of the HRTO should be accorded the highest degree of deference. Section 45.8 of the Code provides:

> Subject to section 45.7 of this Act, section 21.1 of the *Statutory Powers Procedure Act* and the Tribunal rules, a decision of the Tribunal is final and not subject to appeal and shall not be altered or set aside in an application for judicial review or in any other proceeding unless the decision is patently unreasonable.

33 The appellants submit that the Divisional Court applied an incorrect test for determining discrimination, one which is contrary to well-established human rights jurisprudence and to this Court's decision in *Toronto Police Services Board v. Phipps*, 2012 ONCA 155, 289 O.A.C. 163 (Ont. C.A.).

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34 The appellants also submit that the Divisional Court erred by finding the Vice-Chair had reversed the burden of proof. Once the applicant establishes discrimination on a balance of probabilities in accordance with the proper *prima facie* test, the evidentiary burden, not the burden of proof, shifts to the respondent to provide a rational and credible non-discriminatory reason for its action. This is not a reversal of the legal onus to prove discrimination, which always rests with the applicant.

35 The appellants advance the argument, in the alternative, that the Divisional Court should have declined to hear the respondents' application for judicial review because it was premature. The respondents failed to apply to the HRTO under s. 45.6(7) of the Code for a reconsideration of the Vice-Chair's decision.

(2) The Respondents

36 The respondents recognize the high degree of deference to be accorded to a human rights tribunal generally. However, they submit that in this case the Divisional Court properly interfered with the Vice-Chair's conclusion because the Vice-Chair erred both in finding the appellants had established a *prima facie* case and in finding that there was a nexus between the respondents' conduct and the appellants' race and colour. Both of these errors were largely due to the Vice-Chair's compartmentalized analysis of the evidence. This led the Vice-Chair to make illogical findings of fact that were not supported by the entire body of evidence.

37 The respondents submit that this court made clear in its decision in *Shaw* that the concept of a *prima facie* case was not intended to introduce a compartmentalized analysis of the evidence. They submit that this Court's decision in *Shaw* means that the Vice-Chair must consider all the evidence at every stage of his analysis. Here, they argue, the Vice-Chair refused to consider the respondents' evidence in determining whether there was a *prima facie* case. Then, when considering whether the *prima facie* case was rebutted, the Vice-Chair refused to consider any explanation that was not advanced by the personal respondent herself.

38 They submit that evidence led by the appellants and by witnesses other than the librarian disclosed non-discriminatory reasons for the librarian selecting the appellants for questioning. Specifically, the Vice-Chair failed to consider the fact that the appellants were seated closest to the door from which the librarian entered the lounge. This fact provides an explanation why she approached them for identification. As well, the Vice-Chair did not consider the evidence that a library staff member had told the librarian that she believed that the persons who had moved the furniture earlier that morning were sitting in the lounge area just outside the library doors. The Vice-Chair did not consider this as an explanation because, as the respondents' counsel put it, it did not "come out of the mouth of" the librarian.

39 Second, the respondents submit that the evidence does not support a finding of a nexus to the appellants' race and colour. They submit that the Vice-Chair's finding of a nexus to race and colour in this case was based solely on the Vice-Chair's resort to social science evidence introduced in another case involving racial profiling by a police officer.

40 The respondents argue that the Vice-Chair's use of social science not in evidence before him made the proceeding improper and unfair.

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41 The respondents submit that these several errors by the Vice-Chair provided the Divisional Court with an ample basis to interfere. The appeal should be dismissed.

D. Interverners' Positions

(1) Human Rights Tribunal of Ontario ("HRTO")

42 The HRTO, quite properly, takes no position on the factual findings in this case. The HRTO points out that the Divisional Court in this case did not have the benefit of this court's decision in *Shaw*. In *Shaw*, the court determined that a Vice-Chair of the HRTO must be accorded the highest degree of deference with respect to determinations of fact and the interpretation and application of human rights law. A reviewing court must defer to the Vice-Chair "unless the decision is not rationally supported".

43 The Divisional Court in this case failed to apply that degree of deference.

(2) The South Asian Legal Clinic of Ontario ("SALCO")

44 The intervener SALCO asks this court to clarify a human rights tribunal's ability to use social framework evidence. SALCO submits that the Divisional Court's rejection of the Vice-Chair's reliance on social science evidence could be read to require that social framework evidence be proven by expert evidence in every case.

(3) Ontario Human Rights Commission (the "OHRC")

45 The OHRC submits that the Divisional Court applied an incorrect test for proving discrimination. The traditional and correct test, the OHRC submits, is stated in the Supreme Court's decision in *Moore v. British Columbia (Ministry of Education)*, 2012 SCC 61, 351 D.L.R. (4th) 451 (S.C.C.), and this court's decision in *Shaw*.

46 The OHRC also submits that circumstantial evidence and the drawing of reasonable inferences are often required in racial discrimination cases and such inferences directly engage the tribunal's specialized expertise. Deference is owed by reviewing courts not only to findings of fact made by the tribunal, but also to inferences drawn from facts. The Divisional Court failed to accord such deference in this case.

(4) Just Society Group

47 The intervener Just Society Group points out that two of the three black persons approached by the respondent wore their hair in dreadlocks. Just Society submits that people with dreadlocked hair experience much discrimination. Just Society seems to suggest the Code should be amended to include "hairstyle" as a prohibited ground of discrimination.

(5) The League for Human Rights of B'nai Brith Canada

48 B'nai Brith makes two submissions motivated by a concern that public support for the Code will be substantially diminished "if the public perceives that a finger has been placed on the scales of justice in human rights tribunal cases".

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49 To guard against this eventuality, the standard of review should not be so high as to immunize a decision of a human rights tribunal from supervision by the courts. They argue that a high standard of review will allow a decision of the tribunal to stand, even if it is unreasonable.

50 Public support for the Code will be eroded if "complainants are allowed a shortcut around the need to provide evidence of a nexus of discrimination between a complainant's membership in a protected group and an unwelcome outcome." Discrimination should be founded not on inferences or an assumption of discrimination, but on proof.

E. Issues

51 This is not the case to consider the appellants' argument that the respondents' judicial review application was premature. When the Code was amended in 2006, s. 45.6(7) was added allowing a party to request that the Tribunal reconsider its decision. Whether as a matter of general practice, given this new provision, a party should request a reconsideration of the Tribunal's decision before bringing an application for judicial review in the Divisional Court is an important one. However, the appellants do not seem to have strenuously pressed the issue below. In this court it was but a diversion. I would leave the question to another day.

52 I will not discuss issues raised by the interveners that are not directly pertinent to the appeal of the decision of the Divisional Court. The appeal raises the following issues:

1) Did the Divisional Court apply the correct test for discrimination?

2) Did the Divisional Court err by finding the Vice-Chair reversed the burden of proof?

3) Did the Vice-Chair err by analyzing the evidence in a compartmentalized fashion?

4) Did the Divisional Court err by finding the Vice-Chair disregarded evidence?

5) Did the Vice-Chair err by referring to social science not in evidence before him?

F. Analysis

(1) Did the Divisional Court Apply the Correct Test for Discrimination?

53 The Divisional Court set out the following test for discrimination. The Court said:

> In order to prove a *prima facie* case of discrimination, there must be evidence to support the following findings:
>
> a. a distinction or differential treatment;
>
> b. arbitrariness based on a prohibited ground;
>
> c. a disadvantage; and

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d. a causal nexus between the arbitrary distinction based on a prohibited ground and the disadvantage suffered.

54 The Court did not indicate from where it derived this test. The term "causal nexus" does not appear in *Tranchemontagne*, which the Divisional Court cited before setting out this test. The test is not one that human rights tribunals have traditionally applied.

55 The traditional definition was applied in *Moore*, where Abella J. said at para. 33:

> As the Tribunal properly recognized, to demonstrate *prima facie* discrimination, applicants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.

56 Lang J.A., in this court's decision in *Shaw*, at para. 14, said the following three elements were required to establish a *prima facie* case:

1. That he or she is a member of a group protected by the Code;

2. That he or she was subjected to adverse treatment; and

3. That his or her gender, race, colour or ancestry was a factor in the alleged adverse treatment.

57 Lang J.A. drew this formulation from the decision of the Divisional Court majority in *Shaw*, which was cited by the Divisional Court in this case.

58 Neither the *Moore* nor *Shaw* statements of the test use the word "nexus". In fact, Abella J. does not use the word "nexus" at all in her reasons in *Moore*. In *Shaw*, in discussing her articulation of the test, Lang J.A. uses the terms "nexus", "connection" and "factor" interchangeably.

59 While the word "nexus" is perfectly acceptable, I think it preferable to continue to use the terms more commonly used in the jurisprudence developed under the Code. All that is required is that there be a "connection" between the adverse treatment and the ground of discrimination. The ground of discrimination must somehow be a "factor" in the adverse treatment.

60 I do not think it acceptable, however, to attach the modifier "causal" to "nexus". Doing so seems to me to elevate the test beyond what the law requires. The Divisional Court's requirement of a "causal nexus" or a "causal link" between the adverse treatment and a prohibited ground seems counter to the evolution of human rights jurisprudence, which focuses on the discriminatory effects of conduct, rather than on intention and direct cause.

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61 I conclude that the Divisional Court erred in law by applying an incorrect and stricter test of discrimination in deciding this case. This error necessarily affected the Divisional Court's analysis of whether the evidence could reasonably satisfy the test for discrimination.

62 The Divisional Court's error, however, does not put an end to the respondents' arguments. Respondents' counsel, in advancing his oral argument that the evidence in this case did not support a "nexus", was circumspect in not using the modifier "causal".

(2) Did the Divisional Court Err By Finding the Vice-Chair Reversed the Burden of Proof?

63 The Divisional Court found that the Vice-Chair reversed the onus of proof in finding that the facts were "sufficient to require the respondents to provide an explanation for their actions to support their position that the decision to question the applicants was not tainted by race or color".

64 Early in its decision, the Divisional Court referred to the definition of a *prima facie* case stated by the Supreme Court of Canada in *O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 (S.C.C.): "a prima facie case of discrimination 'is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the applicant's favour in the absence of an answer from the respondent.'"

65 As respondents' counsel submitted, the *prima facie* case test defines what is necessary to establish substantive discrimination. It is no different than in every other evidentiary context. Since a *prima facie* case involves evidence that, if believed, would establish the claim, a respondent faced with a *prima facie* case at the end of the claimant's case must call evidence to avoid an adverse finding.

66 A respondent may avoid an adverse finding by calling evidence to show its action is not discriminatory or by establishing a statutory defense that justifies the discrimination.

67 In a case in which the respondent's "answer" is reliance on a statutory defense, the Supreme Court, in *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202 (S.C.C.), has made clear that the burden of proof does indeed shift to the respondent.

68 In a case in which the respondent's "answer" is to lead further evidence to rebut the inference that its action was discriminatory, only the evidential burden shifts.

69 *Shaw* is an example of such a case. *Shaw* involved allegations similar to those in this case. In responding to the applicant's evidence, the respondent did not seek to invoke a statutory exception but merely sought to lead evidence to persuade the Vice-Chair his conduct was not discriminatory. Lang J.A. said at para. 12, "This means that the onus lies on the complainant to establish discrimination on the balance of probabilities and that, if the complainant does so, *the evidentiary burden* shifts to the respondent" (emphasis added).

70 The shifting of the evidential burden, as opposed to the burden of proof, is common in innumerable other legal contexts. For example, in criminal law, which is fastidious in

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maintaining the legal burden of proof on the Crown, accused confronted with evidence that they are in recent possession of stolen goods face the prospect of an inference of theft unless they explain how they came into possession of the goods. Only the evidential burden has shifted. The accused maintains the unquestioned right to remain silent. However, the accused faces the tactical choice of explaining or risking being found guilty.

71 Sopinka J. explained the difference between the burden of proof and the evidential burden in *Snell v. Farrell*, [1990] 2 S.C.R. 311 (S.C.C.), a medical malpractice case. Medical malpractice cases are an apt comparison to discrimination cases because as Sopinka observed at p. 322, "The physician is usually in a better position to know the cause of an injury than the patient". At pp. 328-329 he said that in medical malpractice cases because "the facts lie particularly within the knowledge of the defendant...very little affirmative evidence on the part of the plaintiff will justify the drawing of an inference of causation in the absence of evidence to the contrary". He recognized that "[t]his has been expressed in terms of shifting the burden of proof" and went on to explain why that is not correct. At pp. 329-330 he said:

> ...It is not strictly accurate to speak of the burden shifting to the defendant when what is meant is that evidence adduced by the plaintiff may result in an inference being drawn adverse to the defendant. Whether an inference is or is not drawn is a matter of weighing evidence. The defendant runs the risk of an adverse inference in the absence of evidence to the contrary. This is sometimes referred to as imposing on the defendant a provisional or tactical burden. In my opinion, this is not a true burden of proof, and use of an additional label to describe what is an ordinary step in the fact-finding process is unwarranted. [Citations omitted].

72 And so it is in discrimination cases. The question whether a prohibited ground is a factor in the adverse treatment is a difficult one for the applicant. Respondents are uniquely positioned to know why they refused an application for a job or asked a person for identification. In race cases especially, the outcome depends on the respondents' state of mind, which cannot be directly observed and must almost always be inferred from circumstantial evidence. The respondents' evidence is often essential to accurately determining what happened and what the reasons for a decision or action were.

73 In discrimination cases as in medical malpractice cases, the law, while maintaining the burden of proof on the applicant, provides respondents with good reason to call evidence. Relatively "little affirmative evidence" is required before the inference of discrimination is permitted. And the standard of proof requires only that the inference be more probable than not. Once there is evidence to support a *prima facie* case, the respondent faces the tactical choice: explain or risk losing.

74 If the respondent does call evidence providing an explanation, the burden of proof remains on the applicant to establish that the respondent's evidence is false or a pretext.

75 Turning to this case, the Divisional Court's reasoning that the Vice-Chair reversed the burden of proof contains two errors.

76 First, the Divisional Court lost sight of the distinction between the burden of proof and

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the evidential burden. The Vice-Chair having found a *prima facie* case existed properly looked to the respondent to provide an explanation.

77 Second, the Divisional Court went on to state that "by improperly reversing the burden of proof, the Tribunal placed [the librarian] in the difficult position of trying to prove a negative, namely, that her conduct in the performance of her routine duties was not motivated by race or colour." The shifting of the evidential burden does not put the respondents in the position of having to prove a negative. Rather, it puts them in the position of having to call affirmative evidence on matters they know much better than anyone else — namely, why they made a particular decision or took a particular action.

78 I conclude that the Divisional Court erred in law in finding the Vice-Chair reversed the burden of proof.

79 As with the error with the test for discrimination, this error does not dispose of the respondents' argument. The respondents accepted the "*prima facie* case" framework in which there is a shifting of the evidential burden and advanced the argument dealt with in the next section.

(3) Did the Vice-Chair Err By Analyzing the Evidence in a Compartmentalized Fashion?

80 Respondents' counsel submitted that the *prima facie* case framework "was not intended to introduce a compartmentalized notion of evidence" that approaches a case of discrimination "like a board game". In this "board game" approach, the tribunal considers the evidence called only by the applicant to determine whether a *prima facie* case has been established and then turns to consider only the evidence called by the respondent to determine if the inference of discrimination has been refuted. Instead, he submits that atribunal must consider all the evidence before it at every stage of its analysis.

81 Respondents' counsel argues that this compartmentalized approach led the Vice-Chair in this case to disregard two important items of evidence in the record. These are the fact that the appellants were seated near the doors of the library and the fact that a library employee had mentioned to the librarian that she suspected the people who had moved the furniture earlier that morning had returned to the library and were seated just outside the library doors.

82 I agree with the first part of respondents' counsel's submissions. A *prima facie* case framework in the discrimination context is no different than that used in many other contexts. Its function is to allocate the legal burden of proof and the tactical obligation to adduce evidence. It governs the outcome in a case where the respondent declines to call evidence in response to the application.

83 On the other hand, in a case where the respondent calls evidence in response to the application, the *prima facie* case framework no longer serves that function. After a fully contested case, the task of the tribunal is to decide the ultimate issue whether the respondent discriminated against the applicant. After the case is over, whether the applicant has established a *prima facie* case, an interim question, no longer matters. The question to be decided is whether the applicant has satisfied the legal burden of proof of establishing on a

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balance of probabilities that the discrimination has occurred.

84 Nevertheless, in cases that have been fully contested some human rights tribunals still employ the *prima facie* case framework as an analytical tool to structure and order their consideration of the evidence. Their analysis follows the order in which evidence is called even though all the evidence is in. Tribunals that use such an approach find it useful first to satisfy themselves that the record contains sufficient evidence to support a finding of discrimination before turning to consider evidence that might counter the inference of discrimination or establish a statutory defense.

85 Respondents' counsel submits that it is an error for a tribunal to analyse the evidence in this fashion. He relies on this court's decision in *Shaw*. He says that this court decided in *Shaw* that a tribunal could consider evidence called by the respondent in deciding whether a *prima facie* case has been established. Hence, he reasons, it follows that a tribunal, when determining whether there is a *prima facie* case, must consider evidence that would establish a non-discriminatory basis for the respondent's action even if it is introduced by the applicant or some other witness.

86 First, I do not agree with counsel's reading of *Shaw*. In *Shaw* this court did not purport to regulate how a tribunal should proceed with its analysis of the evidence. How a tribunal should conduct its analysis at the end of a fully contested case was not an issue in *Shaw*. In *Shaw*, the court rejected the respondent's contention that the tribunal was obliged to declare whether the *prima facie* test was met at the end of the applicant's case and before the respondent presented his case. Lang J.A. rejected that contention saying at para. 28 "Where, as here, the person alleged to have discriminated chooses to give evidence, the Adjudicator must decide the case based on all the evidence."

87 I would leave to tribunals how they structure their analysis of the evidence. No matter how a particular tribunal conducts its analysis, at the end of the day, the tribunal must consider all the evidence that both supports and undermines the application in determining whether discrimination has occurred.

88 The approach respondents' counsel advocates would make the question whether there is sufficient evidence to support a *prima facie* case indistinguishable from the ultimate question whether, at the end of the day, discrimination has been established. Both analyses would be identical because both would consider all the evidence in the record. Instead of conducting the analysis twice, it would make better sense for the tribunal to proceed directly to the ultimate question whether, on the whole of the evidence, there is discrimination.

89 Moreover, it seems to me that respondents' counse lattaches too much consequence to a tribunal concluding that a *prima facie* case has been established. A *prima facie* case, by definition, is capable of being answered. If a tribunal using the *prima facie* case framework as an analytical tool has only considered the evidence supporting the application at that stage, it must consider all the evidence supporting a non-discriminatory basis for the respondents' action in the next stage of its analysis. The only thing that matters is that at the end of the day, the tribunal must take into consideration all the evidence.

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90 The question in this case, it seems to me, is not whether the Vice-Chair disregarded evidence at a particular stage of its analysis, but whether the Vice-Chair disregarded evidence before reaching his final conclusion. I turn to a discussion of the two items of evidence that the respondents argue the Vice-Chair disregarded.

(4) Did the Divisional Court Err By Finding that the Vice-Chair Disregarded Evidence?

(i) The fact that the appellants were seated near the door to the library

91 The fact that the appellants were seated near the door to the library was a fact in evidence before the Vice-Chair. However, neither the librarian nor any other witness suggested that the location of the appellants near the door of the library explained why the librarian selected them for questioning. In fact, before the Vice-Chair, the respondents did not even argue that where the appellants were seated was a non-discriminatory explanation for why the librarian selected them for questioning.

92 On judicial review, the respondents argued the Vice-Chair was obligated to consider the appellant's location as an explanation even if the respondents had not asked him to do so. The Vice-Chair should have inferred that the librarian naturally would have questioned the appellants first because she encountered them first on her way to the robing room. Therefore, the Vice-Chair had no basis for finding there was differential treatment of the appellants. The effect of the argument is to require the elimination of every conceivable possibility before an inference of discrimination may be made.

93 The Divisional Court entertained the argument even though it had not been advanced before the Vice-Chair. Accepting the argument, the Court said:

> Firstly, there was clear evidence, which the Vice-Chair accepted, as to why [the librarian] approached the applicants for identification rather than anyone else. In particular, that they were situated nearest to the door from which she entered the lounge. Accordingly, they were the first persons she would have encountered when she stopped in the lounge on her way to the robing room.

94 Perhaps this passage is carelessly worded. For the Court to conclude that the appellants' location was"why" the librarian approached the appellants would be nothing short of fact finding. Respondents' counsel did not go so far. He did not seek this court's affirmation that the appellants' location was why the librarian approached the appellants but merely that it could have been. He recognized it was the Vice-Chair's role to weigh the evidence and draw inferences from it. He argued that the Vice-Chair committed reversible error by failing to consider and discuss material evidence that might provide a non-discriminatory explanation why the librarian questioned the appellants.

95 I do not accept that the Vice-Chair failed to consider the location where the appellants were seated. The Vice-Chair included in his reasons the fact that the appellants were seated in an area of the lounge just outside the doors to the library. Pointedly, he found as a fact "that the personal respondent did not intend to generally check identifications in the room". This finding of fact forecloses the inference that the librarian questioned the appellants first simply

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because she encountered them first.

96 The Divisional Court attached significance to the Vice-Chair's finding that the librarian's focus was on the first appellant during the encounter. The Court said her focus on the first appellant provides "a credible explanation for the fact that she did not check the identification of other persons in the lounge". This factual observation is contrary to the Vice-Chair's finding she had no intention of doing so. The Vice-Chair found her focus on the first appellant explained only why she did not look at the identification of three other lawyers who had proffered theirs. This finding is in no way inconsistent with the Vice-Chair's more general finding that the librarian did not intend to "generally check identifications in the room".

97 It is beyond doubt that the Vice-Chair considered the appellants' location as a potential explanation because he commented on it specifically. He observed that the librarian "could not generate a credible non-discriminatory reason for why she was questioning the applicants, for example...that she was in the process of questioning everyone in the lounge she did not know and was beginning with the applicants". On my reading of his reasons, the Vice-Chair eliminated the appellants' location as a non-discriminatory justification because he regarded it as an explanation that could have been very easily given. The fact it was not given led him to discount it. This reasoning was open to him.

(ii) The moving of the furniture

98 The respondents submit that the Vice-Chair disregarded the fact that the librarian was told by another library employee that she suspected the persons who had moved the furniture earlier in the morning had returned and were seated outside the library doors. Respondents' counsel argues the Vice-Chair did not consider this fact as a potential explanation because "it did not come out of the mouth of the librarian". Had the Vice-Chair considered this fact, he argues, the Vice-Chair may well have decided not to infer that the librarian's selection of the appellants for questioning was discriminatory.

99 The Divisional Court did not discuss the moving of the furniture in any detail. The Court did allude to it by observing that the actions of the librarian had to be viewed in the context of her responsibility to enforce the PLA policy, her established practice to ask for identification, the incident that had occurred earlier that day and the fact that the applicants were the first people she encountered upon entering the library.

100 The Vice-Chair took all these matters into account. The Vice-Chair emphasized the larger context of the incident. He set out at some length that controlling access to the library and lounge was an ongoing organizational concern for the PLA and that the librarian routinely asked persons for identification in carrying out the duties of her position.

101 The Vice-Chair also considered and discussed the moving of the furniture earlier that morning. He observed that the librarian never said a reason she questioned the appellants was because of a concern that they may have been the persons who re-arranged the furniture. As I noted above, he attached much weight to the librarian's inability to offer any credible reason for questioning the appellants and he was entitled to do so.

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102 The Vice-Chair's analysis, however, was more nuanced than that. Improperly moving furniture and entering the lounge without entitlement are two different matters. Lawyers entitled to use the lounge can improperly move furniture. The Vice-Chair made the point that a suspicion the appellants moved the furniture does not explain why the librarian challenged their entitlement to be in the lounge. He noted the librarian never said she had to "address the issue of rearranged furniture with them" and added "I heard no evidence that the personal respondent suggested to the applicants that this was a reason she was asking them for their identification".

103 The Vice-Chair's reasoning on this point should be placed in the context of the overall encounter. At no point in the encounter in the lounge itself or when she walked with the first appellant to the library to retrieve her business card or when she accompanied the first appellant to the courtroom to retrieve his business card, did the librarian make any reference to the furniture as "a reason" she questioned the appellants. Rather, the Vice-Chair found that "the personal respondent was questioning all three men as to their right to be in the lounge".

104 I see no error in the Vice-Chair's reasoning.

(iii) The false explanation

105 The Vice-Chair's rejection of both the appellants' location and the moving of the furniture as potential explanations should be considered in the context of his reasons as a whole. At the time, the librarian had falsely claimed that the reason she singled the appellants out was that she knew everyone else in the lounge. A false or shifting explanation for the impugned conduct can be used to support the inference of discrimination. It was open to the Vice-Chair to draw an adverse inference from this false claim. On my reading he did so.

106 The Vice-Chair considered, hypothetically, whether the librarian may have made the false claim "in the heat of the moment, not knowing what to say when challenged by the applicants to explain her decision to question them". He went on,

> But even if I accept that the applicant relied on this comment in the heat of the moment, it is nonetheless revealing that the personal respondent could not generate a credible non-discriminatory reason for why she was questioning the applicants, for example that she had to resolve the issue of who re-arranged the furniture or that she was in the process of questioning everyone in the lounge she did not know and was beginning with the applicants.

107 Later in his reasons he said:

> I find the personal respondent's account of what took place during her interactions with the applicants not to be credible and I do not accept that the non-discriminatory reasons she gives account for why she chose to ask the applicants for their identification when she did. The inference I draw is that the applicants' race and colour was a factor which led to the personal respondent's decision to question them and affected the manner in which she questioned and interacted with them.

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108 The Vice-Chair was entitled to place great weight on the false explanation given at the time, and the librarian's inability to articulate any other reason for questioning the appellants. He was entitled to reason that if the location or the furniture had been what prompted the appellants' questioning, it would have been easy enough to say so.

(5) Did the Vice-Chair Err By Referring to Social Science Not In Evidence Before Him?

109 The Divisional Court found the Vice-Chair's resort to earlier tribunal decisions to infer a nexus between the appellants' race and colour and their treatment was "misconceived" because they involved racial profiling by police officers. The Court said "there is a significant difference between what occurred here and a police investigation".

110 The respondents mount a broader attack, arguing that it was improper for the Vice-Chair to resort to social science not in evidence before him. The respondents argue that the social science he referred to was the sole basis upon which he found the necessary nexus between the adverse treatment and the appellants' race and colour.

111 At the outset of his analysis, the Vice-Chair referred to *Radek v. Henderson Development (Canada) Ltd.* (2005), 52 C.H.R.R. D/430, 2005 BCHRT 302 (B.C. Human Rights Trib.), and *Phipps v. Toronto Police Services Board*, 2009 HRTO 877 (Ont. Human Rights Trib.) (CanLII) for the following propositions:

> 1) the prohibited ground or grounds of discrimination need not be the sole or the major factor leading to the discriminatory conduct; it is sufficient if they are a factor;
>
> 2) there is no need to establish an intention or motivation to discriminate; the focus of the enquiry is on the effect of the respondent's actions on the complainant;
>
> 3) the prohibited ground or grounds need not be the cause of the respondent's discriminatory conduct; it is sufficient if they are a factor or operative element;
>
> 4) there need be no direct evidence of discrimination; discrimination will more often be proven by circumstantial evidence and inference; and
>
> 5) racial stereotyping will usually be the result of subtle unconscious beliefs, biases and prejudices.

112 The first four of these are long established propositions of law. The Vice-Chair did not refer to *Radek* and *Phipps* as sources of authority for these propositions but because they provided a convenient summary of them. I see no relevance to the fact that *Radek* involved security guards and *Phipps* involved a police officer.

113 This court has repeatedly recognized the fifth proposition as a sociological fact. For example, Doherty J.A. has said in *R. v. Parks* (1993), 15 O.R. (3d) 324, 84 C.C.C. (3d) 353 (Ont. C.A.), at para. 54:

> Racism, and in particular anti-black racism, is a part of our community's psyche. A significant segment of our community holds overtly racist views. A much larger segment

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subconsciously operates on the basis of negative racial stereotypes.

114 The Supreme Court of Canada has also endorsed the proposition. For example L'Heureux-Dubé J. and McLachlin J. writing in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 (S.C.C.), at para. 46, cited Doherty J.A.'s statement with approval.

115 The Vice-Chair's reference to *Radek* and *Phipps* was not misconceived.

116 Later in his reasons the Vice-Chair did refer to expert social science evidence introduced and discussed in *Nassiah v. Peel (Regional Municipality) Police Services Board*, 2007 HRTO 14 (Ont. Human Rights Trib.) (CanLII), another case involving a police officer.

117 It is instructive to examine for what purpose and at what stage of his reasoning the Vice-Chair referred to *Nassiah*. Before he referred to *Nassiah*, the Vice-Chair had already found the appellants' race and colour were factors in their selection for questioning. In para. 84, he had drawn the inference that the librarian's "decision" to stop and question the appellants was "in some measure" because of their race and colour. At the end of para. 90, the Vice-Chair repeated "the personal respondent's decision to question the applicants was indeed tainted by considerations of their race and colour."

118 After making this finding, the Vice-Chair, in para. 91, quoted a passage from *Nassiah* discussing the social science evidence led in that case:

> ... racial profiling social science evidence is relevant because it speaks to, not just the initial decision to stop, detain, pursue an investigation, but also supports the general phenomenon that the *scrutiny applied to the subsequent investigation* is different, more heightened, more suspicious, if the suspect is Black. The stereotyping phenomenon is the same, whether it manifests itself in the discretion to stop/arrest/detain a person in part because they are Black, or whether it manifests itself in the form of greater suspicion, scrutiny, investigation in whole or part because a suspect is Black. [Emphasis in original.]

119 After quoting this passage, the Vice-Chair drew a second inference, that "the way in which [the librarian] interacted with the applicants was tainted by consideration of their race and colour". His reference to *Nassiah* related to this second inference about the manner of the appellants' questioning. It did not relate to his earlier inference about their selection for questioning.

120 I accept the respondents' contention that a tribunal needs to exercise care in taking judicial notice of social science not introduced in evidence before it. The parties do not have the opportunity to challenge the matter judicially noticed and it may be wrong. At the same time, social science can deepen the understanding of interactions between individuals generally, thus assisting the adjudication of a particular case. Balance and judgment is necessary to ensure that judicial notice of social science not in evidence does not result in unfairness.

121 In this case, I am not persuaded that any unfairness resulted from the Vice-Chair's reference to *Nassiah*. The reference did not affect his disposition of what I regard to be the

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main issue in the case — whether the appellants' race and colour were factors in their selection for questioning. At most they played a minor role in his finding that their race and colour were factors in the manner in which they were questioned. After referring to *Nassiah*, the Vice-Chair was careful to point out he had "already" made findings about the manner in which the librarian had questioned the appellants. The librarian had "interrupted [the first appellant] while he was on the telephone and, it appears, did not introduce herself to the applicants and [the articling student]". Furthermore, "[f]rom all the evidence, including the personal respondent's testimony of how she generally carried out this function", the Vice-Chair concluded that "the blunt and demanding manner in which she asked her questions was not how she would approach and question persons that she imagined were lawyers and had a right to be in the lounge". These findings of fact relate to the particular encounter in this case; they are not based on generalizations drawn from social science.

122 Setting aside the fact the social science was not in evidence, the Divisional Court should have deferred to the Vice-Chair's greater expertise in assessing whether the "difference between what occurred here and a police investigation" was so significant that *Nassiah* was unhelpful. The Vice-Chair, no doubt, had read the entire review of the expert evidence in *Nassiah*. The expert testified at paras. 127 and 129 that:

> 127 Some police officers, *like some members of the general public* have specific racial prejudices and deliberately single out and treat some members of racial minorities more harshly than others.
>
> . . . . .
>
> 129 The third potential cause of racial profiling is that police officers, *like all members of society*, develop unconscious stereotypes about racial groups and subconsciously act on those stereotypes during routine police investigations. [Emphasis added].

123 Finally on this point, I note that neither the Divisional Court nor the respondents expressed any issue with the actual proposition the Vice-Chair drew from *Nassiah*. The proposition that implicit stereotyping can affect the manner in which individuals continue to deal with others after an encounter begins does not seem to me to be a matter that would provoke much controversy.

124 While I accept that a tribunal must exercise care and caution in taking judicial notice of social science evidence introduced in another case, there was no unfairness done in this case. The Vice-Chair's resort to *Nassiah* was of no material consequence to his decision.

125 I would not give effect to this ground of appeal.

G. Summing Up

126 To find discrimination, the Vice-Chair had to be satisfied, after considering all the evidence, that the appellants were members of a group protected by the Code, that they were subjected to adverse treatment, and that their race and colour were factors in the adverse treatment.

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127 The first two elements are not at issue in this case. The ultimate question disputed before the Vice-Chair was whether the appellants' race and colourwere factors in their questioning.

128 The following evidence, relied upon by the Vice-Chair, provided an ample basis to support the inference that the appellants' race and colour were factors in the librarian's questioning of them:

- that she only challenged the right of the three black men to be in the lounge;
- that she had no intention of challenging any of the other persons in the lounge;
- that she interrupted her planned trip to the robing room to stop and question the appellants;
- that she approached them in an aggressive and challenging manner, not identifying herself and interrupting the first appellant on the phone;
- that "the blunt and demanding manner" in which she questioned the appellants was not consistent with how she generally carried out her function;
- that she falsely claimed, at the time, that she had singled them out because she knew everyone else in the lounge to be a lawyer;
- that she denied having made that claim;
- that she was completely unable to offer a credible non-discriminatory explanation for her decision to challenge the appellants; and
- that her version of the encounter, including her denial of asking the first appellant for identification, was largely rejected.

129 Moreover, many of his findings were supported by the evidence of an independent witness whom the Vice-Chair had found to be credible.

130 The Divisional Court did not indicate and the respondents did not argue that these facts, if considered in isolation, would be insufficient to support the inferences the Vice-Chair made. The Divisional Court's view and the respondents' argument is that the Vice-Chair unreasonably rejected or disregarded other material facts that would exclude his inferences.

131 My review of the Vice-Chair's reasons demonstrates that he discussed the very evidence he is said to have disregarded. The Vice-Chair carried out his statutory task of sifting through all the evidence and arriving at a difficult decision. He provided clear, intelligible reasons justifying his conclusions.

132 The only issue on judicial review was whether the Vice-Chair's decision fell within the range of reasonable outcomes. On judicial review it is not enough that the reviewing court be persuaded that one could arrive at a different decision based on the same evidentiary

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record. To succeed on judicial review in this case, it was necessary to show the tribunal could not reasonably arrive at the decision it did.

133 I am satisfied the Vice-Chair could reasonably arrive at the decision he did. His decision fell well within the range of reasonable outcomes. The Divisional Court erred in concluding that it did not.

134 I need not deal in any detail with the Divisional Court's other criticisms of the Vice-Chair's reasons. Whether the appellants saw the posted signs indicating the lounge was reserved for lawyers and whether the first appellant reacted heatedly to what he perceived to be racial profiling are not material facts. While they could possibly have some bearing on credibility, credibility is very much the province of the decision-maker. The Vice-Chair found it unnecessary to resolve these questions to arrive at his decision. He committed no error.

135 Finally, I will comment about respondents' counsel's complaint that there was no record of the proceedings before the Vice-Chair. We were advised that the HRTO does not normally record or transcribe its proceedings. This is difficult to understand given the availability of modern and simple to operate digital recording equipment. It seems to me that the advantages of recording the proceedings to the parties, the reviewing courts and to the tribunal itself outweigh any perceived difficulties. Certainly equipment problems can arise, but the impossibility of guaranteeing a reliable, quality recording is hardly a good reason for not recording at all.

H. Conclusion

136 I would allow the appeal, set aside the decision of the Divisional Court and reinstate the decision of the Vice-Chair. I would fix the appellants' costs of the judicial review application in the Divisional Court, and of the leave application and appeal in this court in the total amount of $30,000 inclusive of disbursements and HST.

***E.A. Cronk J.A.*:**

I agree

***S.E. Pepall J.A.*:**

I agree

Appeal allowed.

FN1 Section 34 of the Code, as amended by S.O. 2006, c. 30, s. 5, permits a person who believes that any of his or her rights have been infringed "to apply" to the HRTO for a remedial order. The terms "complaint" and "complainant", which are not used in the amended *Code* except in the transitional provisions, have given way to "applicant" and "application".

FN2 There was before the Vice-Chair a second issue whether the applicants' race and colour

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were factors in the respondents' action subsequent to the incident. He found they were not. No appeal is taken from that decision. That aspect of the decision is not pertinent to this appeal.

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