COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Lavender Co-Operative Housing Association v. Ford,* 2011 BCCA 114

Date: 20110314
Docket: CA037648

Between:

Lavender Housing Cooperative doing business as Lavender Co-Operative Housing Association

Respondent
(Petitioner)

And

Roberta Ford

Appellant
(Respondent)

And

British Columbia Human Rights Tribunal

Respondent
(Respondent)

Before: The Honourable Chief Justice Finch
The Honourable Mr. Justice Frankel
The Honourable Madam Justice Neilson

On appeal from: Supreme Court of British Columbia, October 21, 2009
(*Lavender Co-Operative Housing Association v. Ford*, 2009 BCSC 1437, Victoria Registry No. 09 1295)

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Place and Dates of Hearing:	Vancouver, British Columbia September 16 and 17, 2010
Written Submissions Received:	January 18 and February 9, 2011

Place and Date of Judgment: Vancouver, British Columbia
March 14, 2011

Written Reasons by:
The Honourable Chief Justice Finch and The Honourable Mr. Justice Frankel

Concurred in by:
The Honourable Madam Justice Neilson

Reasons for Judgment of the Honourable Chief Justice Finch and the Honourable Mr. Justice Frankel:

Introduction

[1] For 23 years Roberta Ford resided with her husband, Gerald Ford, in a unit belonging to the Lavender Co-Operative Housing Association (the "Co-op"), in Victoria, British Columbia. Under the Co-op's "One-Member Rule", there can only be one Co-op member per unit. Mr. Ford was that member. When Mr. Ford died, Mrs. Ford applied for membership so that she could continue to reside in the unit. The Co-op's directors denied that application. Mrs. Ford filed a complaint against the Co-op with the British Columbia Human Rights Tribunal. Tribunal Member Tyshynski upheld that complaint on the ground that the One-Member Rule discriminates against Mrs. Ford on the basis of marital status.

[2] The Co-op sought judicial review of the Tribunal's decision in the Supreme Court of British Columbia. That application succeeded before Madam Justice Gray, who quashed the Tribunal's decision. In reaching her decision, the chambers judge held, following this Court's judgment in *British Columbia v. Bolster*, 2007 BCCA 65, 63 B.C.L.R. (4th) 263, leave ref'd, [2007] 3 S.C.R. xiv, that the correctness standard of review applied to the Tribunal's decision by reason of s. 59 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*].

[3] Mrs. Ford now appeals to this Court. She contends that the chambers judge erred in not applying the reasonableness standard of review to the Tribunal's decision. She further contends that the judge erred in finding that the One-Member Rule does not discriminate on the basis of marital status. The Tribunal supports Mrs. Ford's position with respect to the standard of review. The Co-op submits that the chambers judge properly applied the correctness standard of review and properly found that the One-Member Rule does not discriminate on the basis of marital status.

[4] We would dismiss this appeal. For the reasons that follow, we agree with the chambers judge that the correctness standard of review applies and that the One-Member Rule does not discriminate on the basis of marital status.

Factual Background

[5] This matter proceeded on an agreed statement of facts.

[6] The Co-op is a non-profit housing association that was incorporated in 1983 and occupied its premises in 1984. It presently operates under the *Cooperative Association Act*, S.B.C. 1999, c. 28.

[7] Mr. Ford became a regular member of the Co-op in January, 1984. As a result of that membership, he was entitled to occupy one of the Co-op's units. He and Mrs. Ford moved into a unit in April 1984. Mrs. Ford was not a party to the occupancy agreement with the Co-op. At that time, the Co-op's rules provided for both regular and associate members. An associate member was a person who ordinarily resided in a unit with a regular member but did not have an independent right to occupy that unit. An associate member had the right to vote at a general meeting only if the regular member was absent. Mrs. Ford became an associate member in November 1987.

[8] As a result of legislative changes in 1999, all Co-op members became entitled to vote. This led the Co-operative Housing Federation of British Columbia to recommend several changes to the manner in which housing cooperatives govern themselves. Acting on one of those recommendations, in 2005 the Co-op adopted new rules and a new occupancy agreement. The new rules eliminated the category of associate member and adopted what became known as the One-Member Rule. The effect of those changes is that each unit only has one member and one vote.

[9] Mrs. Ford surrendered her associate membership. She was not a party to the new occupancy agreement and was only entitled to occupy a unit as the spouse of a member.

[10] Mr. Ford died on May 4, 2007. Under the Co-op's rules, Mr. Ford was deemed to have given notice of withdrawal of his membership upon his death, and his membership ceased 60 days later. On May 25, 2007, Mrs. Ford applied to have her husband's Co-op shares transferred to her.

[11] On May 31, 2007, the Co-op's board of directors advised Mrs. Ford that she was not entitled to a transfer of her husband's shares but must, in accordance with the Co-op's rules, apply for membership.

[12] Mrs. Ford applied for membership. On June 13, 2007, the board denied Mrs. Ford's application because "it concluded that she was not suitable to be a member, and that her membership would not be in the best interests of the Co-op".

Relevant Co-op Rules and Legislation

[13] Co-op Rules:

> 2.1 Membership
>
> A person who is at least 19 years old may be admitted as a member by submitting a written application, a subscription for the purchase of shares of the Co-op (which must not be less than one share), and any required payment for shares, each as set by the Directors from time to time.
>
> 2.2 One member per Unit
>
> There shall be only one member per Unit.
>
> 2.3 Approval by the Directors
>
> The Directors may, in their discretion, approve or refuse any application for membership or may postpone making a decision about any application for membership.
>
> 2.4 Eligibility for Membership
>
> Subject to these Rules, eligibility for membership in the Co-operative is open in a non-discriminatory manner to individuals that are able to fulfill the responsibilities and conditions of membership.
>
> ...
>
> 2.7 Membership limited to occupants
>
> Membership in the Co-op is limited to persons who live in the Unit in the Co-op on a full-time basis as their principal residence, however, the Directors

may exempt, in their discretion and upon the terms they see fit, an existing member from the application of this Rule.

...

11.(1) Procedure on death of a member

The person entitled to the shares of a deceased member, on providing proof satisfactory to the Directors of the death of the member and the person's entitlement, may:

[a] if the person is not a member but is residing in the Unit as their principal residence on a full-time basis, apply under Rule 2 for membership in the Co-op; or

[b] apply to the Directors to redeem the shares.

[Emphasis added.]

[14] *Human Rights Code*, R.S.B.C. 1996, c. 210:

1 "discrimination" includes the conduct described in section 7, 8(1)(a), 9(a) or (b), 10(1)(a), 11, 13(1)(a) or (2), 14(a) or (b) or 43;

...

10(1) A person must not

(a) deny to a person or class of persons the right to occupy, as a tenant, space that is represented as being available for occupancy by a tenant, ...

because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation, age or lawful source of income of that person or class of persons, or of any other person or class of persons.

...

32 Sections 1, 4 to 10, 17, 29, 30, 34 (3) and (4), 45, 46, 46.1 (3) to (9), 48 to 50, 55 to 57, 59 and 61 of the *Administrative Tribunals Act* apply to the tribunal.

[Emphasis added.]

[15] *ATA*:

1 "tribunal" means a tribunal to which some or all of the provisions of this Act are made applicable under the tribunal's enabling Act;

> "tribunal's enabling Act" means the Act under which the tribunal is established or continued.
>
> ...
>
> 59(1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.
>
> (2) A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise unreasonable.
>
> (3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.
>
> (4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion
>
> (a) is exercised arbitrarily or in bad faith,
>
> (b) is exercised for an improper purpose,
>
> (c) is based entirely or predominantly on irrelevant factors, or
>
> (d) fails to take statutory requirements into account.
>
> (5) Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.
>
> [Emphasis added.]

Tribunal's Decision
(*Ford v. Lavender Co-operative (No. 3)*, 2009 BCHRT 38)

[16] In her complaint to the Tribunal, Mrs. Ford alleged that the Co-op had contravened s. 10(1)(a) of the *Human Rights Code* by discriminating against her on the basis of marital and / or family status. That complaint was upheld solely on the basis of marital-status discrimination.

[17] The Tribunal first applied the traditional analysis set out in *Ontario Human Rights Commission v. Simpson Sears*, [1985] 2 S.C.R. 536 [*O'Malley*]. Under that analysis, three things are required to establish *prima facie* discrimination: (a) the person is covered by a protected ground; (b) the person was treated adversely; and (c) there is evidence upon which it is reasonable to infer that the prohibited ground

was a factor in the adverse treatment. In finding Mrs. Ford had satisfied that test, the Tribunal stated:

> [51] The Co-op Rules create uncertainty for persons in spousal relationships. One of the spouses is at risk of having to vacate their home at the discretion of the board serving at the time of death of the member spouse. The surviving spouse is deprived of the safeguard enjoyed by singles that once he or she is accepted as a member by the current board and has established residency only a breach of the Co-op Rules could result in an eviction.
>
> [52] The Agreed Facts provide that Ms. Ford was only entitled to reside in the family home as the spouse of Mr. Ford. When he died, and her marital status changed to widow, Ms. Ford lost the entitlement to occupy her home.
>
> [53] I find that it is reasonable to infer that Ms. Ford's marital status was a factor in the adverse treatment. First, the Co-op Rules made it impossible for both people in a spousal relationship to achieve security of tenure in their family home. Second, a change in Ms. Ford's marital status triggered the operation of the Co-op Rules putting her continued residency at stake after 23 years of residence and, as a result of the process in place, she was evicted from her home. This impact of the One Member Rule on Ms. Ford related to the change in her spousal status. The same cannot be said for a single person who must apply for membership after their roommate's death.

[18] The Tribunal went on, in the alternative, to employ a comparator-group analysis, i.e., the framework used in determining whether there has been a violation of the equality rights provision (s. 15(1)) of the *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. It found that the appropriate comparator group was "single persons who sought ... to establish a home in a Co-op unit, and who took the steps required of them by the Co-op", i.e., single occupants of units: paras. 58, 59. Having done so, the Tribunal again found that denying Mrs. Ford the opportunity to obtain the right to secure housing because of her marital status amounted to discrimination:

> [61] I find that the Agreed Facts and documentary evidence establish that, when she began to live at the Co-op, as one member of a couple, Ms. Ford, unlike her single counter-parts, was not afforded the opportunity of achieving security of tenure due to the One Member Rule and as a result was vulnerable to eviction after 23 years of residence, a vulnerability not faced by singles. I find this distinction discriminatory.

[19] The Tribunal found there was no *bona fide* reasonable justification for the One-Member Rule. It should be noted that only the Co-operative Housing Federation of British Columbia, which participated as an intervenor before the Tribunal, made submissions in that regard. In completing its analysis, the Tribunal stated:

> [81] There was no evidence entered that a finding in Ms. Ford's favour would introduce a risk of litigation or that it would be an undue hardship to the Co-op.
>
> [82] There was no evidence that the striking of the One Member Rule would in any way interfere with the Board's exercise of discretion respecting the persons it approves for membership in the Co-op.
>
> [83] The Co-op has failed to establish that it could not accommodate Ms. Ford or persons of a like marital status without incurring undue hardship. The Co-op has not established a [*bona fide* reasonable justification] for the One Member Rule. Therefore, Ms. Ford's complaint of discrimination is justified.

[20] Turning to the question of remedy, the Tribunal drew the inference that the board of directors' denial of Mrs. Ford's application for membership was based on impermissible discrimination:

> [94] The evidence before me is that the 2007 Board rejected Ms. Ford's application for membership because it concluded that she was not suitable to be a member, and that her membership would not be in the best interests of the Co-op. The Board provided its conclusions; no reasons were given.
>
> [95] In summary, I draw the inference that Ms. Ford would have been accepted as a member and thus obtained a right of occupancy in her family home, but for the discrimination, on the basis that she resided in the Co-op for 23 years; she was found suitable enough to be approved for associate membership in 1987; there is no evidence that her conduct has ever resulted in being expelled from the Co-op; and there is no evidence entered respecting the 2007 Board's reasons to refuse Ms. Ford's membership application.

[21] The Tribunal ordered the Co-op to refrain from discriminating on the basis of marital status and to amend its rules accordingly. It further ordered the Co-op to provide Mrs. Ford with membership and residence in the unit in which she had been living or, if that unit was occupied, the next available comparable unit.

Chambers Judge's Decision
(2009 BCSC 1437)

[22] The Co-op applied to review the Tribunal's decision pursuant to the provisions of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241. That application raised two issues: (a) the appropriate standard of review under s. 59 of the *ATA*; and (b) applying that standard of review, should all or part of the Tribunal's decision be quashed.

[23] With respect to the first issue, the chambers judge held that the correctness standard applied, as what was being reviewed was a decision on a question of mixed fact and law. In this regard, the judge applied this Court's decision in *Bolster*, and rejected a submission that it could no longer be considered good law, in part, because of the subsequent decisions of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339. She summarized her conclusions as follows:

> [70] The issue of the appropriate standard of review is an issue of statutory interpretation. A statutory analysis was undertaken in *Bolster*, which held that the *ATA* prescribes a standard of review of correctness for questions of mixed fact and law.
>
> [71] This analysis remains intact following *Dunsmuir* and *Khosa*. There is no gap in the statute which can be filled by resort to the common law. The common law informs the interpretation of the statute, but recent case law affects only the content of legislated standards, and does not affect the choice of standard of review prescribed by the *ATA*.
>
> [72] The standard of review for questions of mixed fact and law on judicial review of a decision of the BCHRT is correctness, pursuant to s. 59 of the *ATA*.

[24] The chambers judge found that on either the traditional analysis or the comparator-group analysis, the Tribunal's finding of discrimination was incorrect.

[25] With respect to the traditional analysis, the chambers judge stated:

> [83] In order to be discriminatory, the effect of the action complained of must be "to impose on one person or group of persons obligations, penalties,

> or restrictive conditions not imposed on other members of the community": *O'Malley*, at 547.
>
> [84] Ms. Ford did not suffer "obligations, penalties, or restrictive conditions" because of her marital status, or any change in her marital status, but because she was a non-member.
>
> [85] The One-Member Rule provides that there shall be one member per unit. Ms. Ford's loss of the right to occupy the unit was not triggered by Ms. Ford's change in marital status, but by the death of Mr. Ford, who was the member for their unit. There is nothing in the Co-op's rules that would have prevented Ms. Ford from being their unit's representative member during Mr. Ford's life. Had Ms. Ford been the member for the unit, her change in marital status on the death of Mr. Ford would not have affected her right to occupy the unit.
>
> [86] The Co-op's rules provide that any non-member residing with a member is required to apply for membership on the member's death. No distinction is made between a surviving spouse and any other applicant. A non-member single person living together in a unit with another single person would not experience a change in marital status on the death of the unit's member, but would still be required to apply for membership if he or she wished to continue to live in the Co-op.
>
> [87] The One-Member Rule has unfortunate consequences for Ms. Ford. However, those consequences would be equally unfortunate for any non-member living in a unit when the member passed away. Ms. Ford has not suffered discrimination because of her marital status. The [Tribunal's] analysis is incorrect. Its finding of discrimination is a conclusion on a question of mixed fact and law, and s. 59 of the *ATA* provides that the standard of review is correctness.

[26] Turning to the comparator-group analysis, the chambers judge, citing *Hodge v. Canada (Minister of Human Resources Development)*, 2004 SCC 65, [2004] 3 S.C.R. 357, stated:

> [91] The comparator group should mirror the characteristics of the claimant relevant to the benefit or advantage sought, except for the personal characteristic related to the ground raised as the basis for the discrimination: at para. 23. The comparator must align with both the benefit and the "universe of people potentially entitled to equal treatment in relation to [it]": at para. 25.

[27] The chambers judge found that it was "unclear" that security of tenure was the benefit being sought, as even members are not guaranteed such security; the board of directors having discretion to terminate membership in certain circumstances. In her view, the actual benefit being sought was the opportunity to

apply for membership, an opportunity that had been available to Mrs. Ford in 1984 and was again available to her in 2007, when she did apply and was refused: paras. 92, 93.

[28] In any event, assuming that the benefit sought was the opportunity to achieve security of tenure, the chambers judge concluded that the proper comparator group is single non-members. Such persons mirror Mrs. Ford's characteristics except in relation to marital status: para. 95. Using this comparator group, the chambers judge found no discrimination:

> [96] If the analysis is conducted with the appropriate comparator group, it is apparent that Ms. Ford suffered no discrimination. Like any other non-member, Ms. Ford's ability to occupy the unit derived from the fact that she lived with a member. Non-members, whether single or married, are required to apply for membership when the persons from whom they derive their right of occupancy pass away.
>
> [97] The Co-op's One-Member Rule makes no distinction between married and unmarried persons and is not discriminatory on the basis of marital status. The [Tribunal's] analysis is incorrect. Whether characterized as a question of mixed fact and law or as simply a question of law, the standard of review under s. 59 of the *ATA* is correctness.

[29] In the result, the chambers judge quashed the Tribunal's decision.

Positions of the Parties

[30] In her factum, Mrs. Ford submits that the chambers judge erred as follows:

> A. By failing to recognize that adverse effect discrimination is a breach of the *Code*;
>
> B. By ignoring the fundamental nature of spousal status when determining whether Mrs. Ford's status as a spouse was a factor in the adverse treatment she experienced;
>
> C. By failing to recognize that Mrs. Ford was a member of a protected group due to her marital status, while other non-member occupants of the Co-op were not;
>
> D. By narrowing her focus to the One Member Rule's effect *after* Mr. Ford's death, while ignoring its effect during his lifetime; and
>
> E. By applying a comparator analysis where to do so was unnecessary and inappropriate, or in the alternative, by incorrectly formulating the comparator analysis.

[31] With respect to the standard of review, Mrs. Ford argues that as much deference as possible should be given to the Tribunal's decision. She says that the Tribunal's decision should stand whether that standard is reasonableness or correctness.

[32] The Tribunal's position is that the reasonableness standard of review applies in this case. As it did before the chambers judge, it argues that *Bolster*, and the correctness standard, do not apply when the facts and law are intertwined.

[33] The Co-op supports the chambers judge's decision both with respect to the applicable standard of review and the result. In addition, it says that there is a *bona fide* reasonable justification for the One-Member Rule. Based on earlier human rights decisions, the Co-op accepts that Mrs. Ford is a "tenant" for the purposes of s. 10(1)(a) of the *Human Rights Code*: *Emard v. Synala Housing Co-operative*, [1993] B.C.C.H.R.D. No. 39 at paras. 99-102.

[34] After the hearing, the Tribunal requested and was granted permission to file supplemental submissions regarding the standard of review issue, based on the Supreme Court of Canada's recent judgment in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council,* 2010 SCC 43, [2010] 2 S.C.R. 650; a case involving a review of a decision by the British Columbia Utilities Commission. The Tribunal submits that the reasoning in *Rio Tinto* leads to the conclusion that the reasonableness standard applies to the review of questions of mixed fact and law decided by tribunals to which s. 59 of the *ATA* has been made applicable.

[35] In its supplemental submissions the Co-op takes the position that *Rio Tinto* is inapplicable to the present case for a number of reasons. Amongst other things, it points to the fact that *Rio Tinto* is concerned with s. 58, not s. 59, of the *ATA.*

[36] Mrs. Ford did not provide any supplemental submissions.

Analysis

Standard of Review

[37] The common law for determining standard of review in judicial review of administrative tribunals has undergone a significant evolution in recent years: see *Dunsmuir* and *Khosa*.

[38] British Columbia, unlike other provinces, introduced statutory provisions governing the issue in 2004 with the *ATA*. In this province, therefore, there is both a statutory and a common law regime governing the standard of review issue.

[39] In every case, the first step is to determine whether there are any applicable legislative provisions: *Khosa* at para. 18. The legislation to be examined includes both the *ATA*, and the enabling legislation of the administrative tribunal whose decision is being reviewed.

[40] Under the *ATA*, "tribunal" is defined as "a tribunal to which some or all of the provisions of this Act are made applicable under the tribunal's enabling Act". Thus, the *ATA* only applies to the extent an enabling act provides. Sections 58 and 59 of the *ATA* deal with standards of review. If by the enabling legislation one of these sections is said to apply, then that section governs standard of review rather than the common law. In this case, s. 32 of the *Human Rights Code*, provides that s. 59 of the *ATA* applies to the Tribunal.

[41] Section 59 is comprehensive and describes the standard of review for all questions that may arise. The exercise of discretion, findings of fact and applications of the rules of natural justice and procedural fairness have specifically stated standards of review. Sub-section (1) provides a catch-all standard of correctness for all other questions.

[42] Section 58 of the *ATA* similarly provides a complete code of standards of review for tribunals to which it applies. It also includes, in s. 58(2)(c), a catch-all standard of correctness for all matters not identified in s. 58(2)(a) and (b).

[43] Thus the process for determining the appropriate standard of review under the *ATA* should be straightforward. The reviewing judge must:

1. determine which legislative provisions, if any, apply;

2. if s. 58 or 59 of the *ATA* apply, determine which type of question is at issue; and

3. apply the mandated standard of review.

[44] While the common law standard of review analysis discussed in *Dunsmuir* and *Khosa* remains relevant in contexts where s. 58 or 59 do not apply, developments in the common law cannot overrule the clear statutory direction contained in the *ATA*.

[45] It was held by the chambers judge, and is not disputed by the parties on appeal, that the type of question in this case is one of mixed fact and law. Prior decisions of this Court hold that questions of mixed fact and law attract a standard of correctness under s. 59 of the *ATA*. Questions of mixed fact and law are not excepted from the catch-all correctness standard articulated in s. 59(1). Madam Justice Levine said the following in *Bolster*:

> [119] ... I cannot find in the words or the context of the [*ATA*] any indication that the Legislature intended that questions of mixed fact and law be treated as “findings of fact” or excluded from the general rule of s. 59(1).
>
> ...
>
> [124] I conclude that under s. 59 of the [*ATA*] the standard of review on a question of mixed fact and law is reviewable on the standard of correctness.

[46] That decision was recently affirmed by Mr. Justice Tysoe in *Coast Mountain Bus Company Ltd. v. National Automobile, Aerospace, Transportation and* General *Workers of Canada (CAW-Canada), Local 111*, 2010 BCCA 447, 10 B.C.L.R. (5th) 65. At paras. 50-56, Tysoe J.A. rejected arguments of the Tribunal that *Bolster* was distinguishable, that the conclusion in *Bolster* was affected by *Dunsmuir* and *Khosa*, and that the standard of correctness only applied to questions of law that could be extricated from a question of mixed fact and law.

[47] It is therefore clear that questions of mixed fact and law, such as the one at issue in this case, attract a correctness standard of review under s. 59 of the *ATA*.

[48] The Tribunal argues in this case that the above conclusion is altered by *Rio Tinto* and the subsequent discussion of that case in *Kerton v. Workers' Compensation Appeal Tribunal*, 2011 BCCA 7.

[49] *Rio Tinto* involved review of a decision of the Utilities Commission. Paragraphs 27 and 78 of *Rio Tinto* are relevant and the Tribunal relies in particular on para. 78:

> [27] Together, ss. 79 and 105 of the *Utilities Commission Act* constitute a "privative clause" as defined in s. 1 of the British Columbia *Administrative Tribunals Act*, S.B.C. 2004, c. 45. Under s. 58 of the *Administrative Tribunals Act*, this privative clause attracts a "patently unreasonable" standard of judicial review to "a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause"; a standard of correctness is to be applied in the review of "all [other] matters".
>
> ...
>
> [78] ... The *Utilities Commission Act* provides that the Commission's findings of fact are "binding and conclusive", attracting a patently unreasonable standard under the *Administrative Tribunals Act.* Questions of law must be correctly decided. The question before us is a question of mixed fact and law. It falls between the legislated standards and thus attracts the common law standard of "reasonableness" as set out in *Haida Nation* and *Dunsmuir...*

[50] The Tribunal argues that for a question that "falls between legislated standards" the common law standard of review analysis should be utilized, which, it is argued, would result in a standard of reasonableness rather than correctness in this case. The Tribunal goes on to cite *Kerton* as supporting this approach.

[51] With respect to the Supreme Court of Canada, and without questioning the ultimate result in *Rio Tinto*, the two paragraphs quoted above appear to contain three errors. First, s. 58 of the *ATA* does not apply to the Utilities Commission. The *Utilities Commission Act*, R.S.B.C. 1996, c. 473, lists the provisions of the *ATA* that apply to it and s. 58 is not one of them. Section 2(4) reads in part as follows:

> Sections 1 to 13, 15, 18 to 21, 28 to 30, 32, 34 (3) and (4), 35 to 42, 44, 46.3, 48, 49, 54, 56, 60 (a) and (b) and 61 of the *Administrative Tribunals Act* apply to the commission...

[52] The second error is the statement that questions of law must be correctly decided. The standard of review under s. 58 depends on the scope of the privative clause in a tribunal's enabling act. The patently unreasonable standard applies to a "finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause". The determining factor then is whether a matter is one over which a tribunal has exclusive jurisdiction under a privative clause. This will potentially include some questions of law but not others. The *Utilities Commission Act*, in addition to providing that findings of fact are binding and conclusive in s. 79, also provides in s. 105 that the commission "has exclusive jurisdiction in all cases and for all matters in which jurisdiction is conferred on it by this or any other Act". It is therefore incorrect to say generally that questions of law must be correctly decided.

[53] The third error appears in the statement that a question of mixed fact and law "falls between the legislated standards and thus attracts the common law standard of 'reasonableness' as set out in *Haida Nation* and *Dunsmuir*". As discussed above at paras. 41 and 42, there is no such gap between the legislated standards of the *ATA* in either s. 58 or 59. Both provisions contain a catch-all standard of correctness for all questions which do not have a specifically articulated standard of review. To reiterate what was said above, without any gaps in the legislated standards of review, the analysis is simple. The reviewing judge must identify the question at issue and apply the legislated standard of review. In this case the question is one of mixed fact and law and a correctness standard must be applied. Nothing in *Rio Tinto* affects that result.

[54] In its submissions the Tribunal also misstates the decision in *Kerton*. That case dealt with a review of the Workers' Compensation Appeal Tribunal, whose enabling statute contains a privative clause and also makes applicable s. 58 of the *ATA*. Under s. 58, all matters over which a tribunal has exclusive jurisdiction under a

privative clause attract a standard of patent unreasonableness. Previous authority from this Court, *United Brotherhood of Carpenters and Joiners of America, Local 527 v. British Columbia Labour Relations Board*, 2006 BCCA 364, 55 B.C.L.R. (4th) 325, said that the pragmatic and functional approach should be applied to determine whether the matter falls within a tribunal's "exclusive jurisdiction under a privative clause".

[55] This Court in *Kerton* held that another approach should be applied to determine whether a matter was within a tribunal's exclusive jurisdiction and relied on *Rio Tinto*. The important passage of *Kerton* is at para. 28:

> While the reasoning of the [Supreme Court of Canada] is not entirely explicit, it would appear that the Court simply considered the language of the applicable privative clause to determine whether the "matters" addressed by the tribunal were within its exclusive jurisdiction.

This proposition, that reviewing courts should consider the language of the applicable privative clause rather than the pragmatic and functional approach, is the extent to which *Kerton* relied on *Rio Tinto*. Importantly, *Kerton* did not involve a question of mixed fact and law and did not suggest the existence of any legislative gaps in the *ATA*. The decision in *Kerton* mistakenly repeats the above mentioned error from *Rio Tinto* that s. 58 of the *ATA* applied to the Utilities Commission. This in no way affected the legal reasoning or ultimate conclusion of *Kerton*.

[56] The end result for the present case is that *Bolster* remains good law and, for questions of mixed fact and law under s. 59 of the *ATA*, that case requires a standard of correctness to be applied. While *Rio Tinto* and *Kerton* may have led to some confusion, nothing in those cases affects this result.

[57] To summarize then on the standard of review:

1. Legislative provisions are paramount and must be examined first. A tribunal's enabling act specifies which provisions of the *ATA* apply.
2. If s. 58 or 59 of the *ATA* is applicable that section represents a complete code of the possible standards of review.

3. If s. 58 or 59 apply, then the next step is to identify the type of question at issue.
4. Once the type of question has been identified the reviewing judge must apply the mandated standard of review.
5. If by the enabling statute neither s. 58 nor 59 is applicable, then the court must apply the common law jurisprudence, as described in *Dunsmuir* (see paras. 47, 49 and 50).

[58] The standard of review in this case is correctness. The Human *Rights Code* makes s. 59 of the *ATA* applicable. The decision of the Tribunal under review is one of mixed fact and law. Under the catch-all provision of s. 59(1) of the *ATA* the applicable standard of review is correctness.

Discrimination on the Basis of Marital Status

Traditional Analysis

[59] Mrs. Ford's position is that even though the One-Member Rule appears neutral on its face, it has an adverse effect on those who choose to live together as spouses and, therefore, discriminates on the basis of marital status. She says that since only one of two spouses residing in a unit can be a member of the Co-op, the other is denied security of tenure on the death of the member-spouse.

[60] In advancing this argument, Mrs. Ford stresses that co-habitation is generally a significant aspect of a spousal relationship. She submits that the chambers judge ignored this "fundamental nature of spousal status". In describing, in part, how the One-Member Rule discriminates, Mrs. Ford states as follows in her factum:

> 30. The One Member Rule has a significant adverse consequence for spouses. In order for them to cohabit as spouses at the Co-op, both partners must accept the uncertainty of knowing that one of them (in this case Mrs. Ford) has a lack of independent housing security. Conversely, if both people in a spousal relationship wished to achieve Co-op membership and security of tenure, they would have to actually change the nature of their marital status, and live separately, in order to do so.

[61] We do not accept Mrs. Ford's submission. Like the chambers judge, we cannot find that Mrs. Ford suffered any adverse treatment because of her marital

status. Both before and after her husband's death, Mrs. Ford was treated in the same manner as any other non-member living in the Co-op.

[62] Many people other than spouses live together for a variety of reasons, including familial ties and financial circumstances, e.g., parent and child, siblings, non-related roommates. Whatever their relationship, those who live in a unit at the Co-op do so as a matter of choice. The fact that Mrs. Ford did not acquire security of tenure during her husband's lifetime was in no way related to her marital status. Indeed, as the chambers judge observed, prior to Mr. Ford's death, nothing prevented Mrs. Ford from applying to be their unit's member.

[63] As for the board of directors having denied Mrs. Ford's application for membership after her husband died, there is no evidence that her marital status was a factor in that decision. The board's decision is set out as follows in the agreed statement of facts:

> 35. Pursuant to the Co-op's Rules, an application in these circumstances is treated in the same manner as any other application for membership.
>
> 36. Under Rule 2.3 of the Co-op's Rules, the Directors, in their discretion, may approve [or] refuse any application for membership.
>
> 37. On June 13, the Board of Directors denied Ms. Ford's application for membership because it concluded that she was not suitable to be a member, and that her membership would not be in the best interests of the Co-op. The Board notified Ms. Ford that she had to vacate the unit by August 31, 2007.

[64] The Tribunal, referring to the fact that the agreed statement of facts did not provide the specific reasons why Mrs. Ford's application was refused, drew an inference that she would have been accepted but for the discrimination on the basis of marital status given that she had lived in the Co-op for 23 years, had previously been an associate member, and had never been expelled: para. 95. In our view, the Tribunal erred in two respects by drawing that inference.

[65] The first reason is that we are unable to read the admissions other than as a statement that Mrs. Ford's application was considered on its own merits. It is pure speculation to infer that the board decided against Mrs. Ford because of her marital

status or, to be more accurate, the change in her marital status. That Mrs. Ford had lived in the Co-op for many years does not support the inference that she was, at the time her application was considered, suitable to become a member in her own right.

[66] The second is that the reason why Mrs. Ford's application was turned down was not relevant to the issue before the Tribunal. As evinced by the Tribunal's two preliminary decisions in this matter, what came forward for determination was not whether the board had discriminated against Mrs. Ford in dealing with her application, but whether she had been discriminated against earlier because the One-Member Rule had precluded her and Mr. Ford from being members at the same time.

[67] The first decision, *Ford v. Lavender Co-operative*, 2008 BCHRT 98, involved an application by the Co-op, pursuant to s. 27(1)(b) of the *Human Rights Code*, for summary dismissal of Mrs. Ford's compliant. At that time, Mrs. Ford was alleging not only discrimination on the basis of marital and / or family status but also, as a result of an amendment to the original complaint, that the Co-op was guilty of retaliation. The retaliation was said to have been the issuance of a notice to all Co-op residents about the feeding of feral cats. Mrs. Ford contended that notice was directed against her in particular.

[68] The Co-op's application came before Tribunal Member Humpreys, who dismissed only the retaliation claim. With respect to the discrimination claims, she noted that it was the Co-op's position that it had refused Mrs. Ford's application based solely on an individual assessment of her personal characteristics: para. 9.

[69] In allowing the discrimination claims to proceed, Member Humpreys stated that there was an issue, which she described as "primarily a legal, rather than an evidentiary [one]", with respect to the possible adverse discriminatory impact of the One-Member Rule: para. 26. In reaching this conclusion, she stated:

> [24] While the Co-op treated Ms. Ford's application for membership in the same manner that it would treat any such application, what the Co-op did not address is whether Rule 2.2 of the Rules of the Co-op – that there can be

> only one member per unit – had an adverse effect on Ms. Ford due to her marital and family status. In other words, in comparison to occupants who live alone, are occupants who live with a member spouse or family member adversely affected because of their marital or familial relationships, which generally have a degree of permanence and dependence, by a Rule which requires the remaining spouse or family member to apply for membership in the Co-op.

[70] The second decision is *Ford v. Lavender Co-operative (No. 2)*, 2008 BCHRT 239, in which Member Humpreys granted intervenor status to the Co-operative Housing Federation of British Columbia. In the course of doing so, she stated:

> 16. As stated in [the previous *Ford* decision], the fact that the Co-op considered information before it about Ms. Ford is not a basis for the complaint. Rather, the issue before the Tribunal is whether the Rule had an adverse effect on Ms. Ford because of her marital and/or family status. (paras. 23 and 24)

[71] It is apparent from those decisions that what was in issue at the hearing on the merits was whether the rule, of itself, was discriminatory. Indeed, at the end of the agreed statement of facts, the parties state that, “The issue to be answered is a narrow one”. Following this, para. 24 from the first *Ford* decision and para. 16 from *Ford (No. 2)* are set out. In light of all of this, there was no need to set out the board’s specific reasons for denying Mrs. Ford’s application in the agreed statement of facts.

[72] In summary, on the basis of the *O’Malley* test, Mrs. Ford did not establish *prima facie* discrimination on the basis of marital status.

Comparator-Group Analysis

[73] Mrs. Ford’s position is that there is no need for a formal comparator-group analysis in this case as “it has no governmental overtones and it does not engage significant public policy considerations”. She says that such an analysis is of no assistance in determining her complaint, and that the chambers judge erred in using one. In the alternative, Mrs. Ford says that the judge’s analysis was flawed.

[74] For its part, the Co-op says that a comparator-group analysis "might not have been necessary", but that the chambers judge did not err in doing so. It further says that, if such an analysis is required, then the judge did not err. The Tribunal takes no position on this question.

[75] It is apparent from the Tribunal's reasons that a comparator-group analysis was undertaken because doing one had been advocated by both Mrs. Ford and the Co-op: paras. 28, 58. It is also apparent that the Tribunal responded to those submissions, even though it thought it unnecessary: paras. 29-32.

[76] As for the judicial review application, it is clear that the Co-op argued before the chambers judge that the Tribunal's comparator-group analysis was flawed: paras. 75, 89, 95. Although the judge did not articulate the position taken by Mrs. Ford on this point, we can only assume she sought to uphold the Tribunal's decision in her favour. Had Mrs. Ford's position been that a comparator-analysis was not required, then we would have expected the judge to have said so.

[77] Whatever the positions previously taken, Mrs. Ford does not now rely on a comparator-group analysis in support of her discrimination claim. Accordingly, there is no need to perform one. Having said that, it is to be noted that in *Kemess Mines Ltd. v. International Union of Operating Engineers, Local 115*, 2006 BCCA 58, 54 B.C.L.R. (4th) 252, a case involving a claim of employment-discrimination under s. 13(1)(a) of the *Human Rights Code*, Chief Justice Finch opined that a determination of *prima facie* discrimination is made by considering whether the conduct complained of is that which the *Code* has, by definition, prohibited, and not on a "comparative analysis": para. 30.

Conclusion

[78] We would dismiss this appeal.

"The Honourable Chief Justice Finch"

"The Honourable Mr. Justice Frankel"

I agree:

"The Honourable Madam Justice Neilson"