

**PROVINCE OF PRINCE EDWARD ISLAND
IN THE SUPREME COURT - TRIAL DIVISION**

Citation: Ayangma v French School Brd & ano.2007 PESCTD 12

Date: 20070314

Docket: S1-GS-17005

Registry: Charlottetown

Between:

Noel Ayangma

Plaintiff

And:

French School Board and
Gabriel Arsenault

Defendants

Before: The Honourable Justice Benjamin B. Taylor

Appearances:

Noel Ayangma, self-represented

Christopher Montigny & Erin Mitchell, for the defendants

Place and Date of Hearing

Charlottetown, Prince Edward Island
November 27, 2006

Place and Date of Decision

Charlottetown, Prince Edward Island
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[17 pages]

PRACTICE - Summary Judgment – motion by plaintiff – failure to prove no genuine issue for trial — claim of breach of equality rights under s. 15(1) of the *Charter* – benefit or burden must be one imposed by law

Cases Referred to: *Ayangma v Prince Edward Island Eastern School Board et al*, [2000] PEIJ No. 50 (PESCAD); *Ayangma v Prince Edward Island (Human Rights Commission)* [2004] P.E.I.J. No. 41 (PEISC-TD); *Ayangma v French School Board* [2005] P.E.I. No. 50 (PEISC-AD) *M.F. Schurman Ltd. v. Westland Homes Ltd.*, [1992] P.E.I.J. No. 77; *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225; *Guarantee Co. of North America v Gordon Capital Corp.* (1999), 3 SCR 423; *Hi-Tech Group Inc. v. Sears Canada Inc.*, [2001] O.J. No. 33 (Ont. C.A.); *La Caisse Populaire de La Salle Credit Union Ltd. v. River Ridge Properties Ltd.*, [1997] M.J. No. 88 (Man. C.A.); *Ayangma v. French School Board and Ano.*, [2006] PESCTD 37; *Peirson v Bent* (1993), 130 R (3d) 429 (Gen. Div.); *McKinney v. University of Guelph* (1990), S.C.J. No. 122; *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] S.C.J. No. 71; *Wheatley v. MacLeod*, [1991] P.E.I.J. No. 143 (PEISC-TD); *Ayangma v. NAV Canada*, [2001] P.E.I.J. No. 5 (PEISC-AD); *Smythe v. Waterfall et al*, [2000] O.J. 3494 (Ont. C.A.)

Statutes Referred to: *Human Rights Act*, R.S.P.E.I. 1988, Cap. H-12; the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (U.K.) 1982, c. 11, s. 15*; *Evidence Act* R.S.P.E.I. 1988, Cap E-11

Rules Referred to: *Prince Edward Island Rules of Civil Procedure*, Rules of Court, Supreme Court of Prince Edward Island R. 20.0(1); 20.02, 20.04(1) 20.04(2)(a); R. 39.01(4)

Noel Ayangma, self-represented

Christopher Montigny & Erin Mitchell, for the defendants

Taylor J.:

[1] This is a motion by the plaintiff Noel Ayangma pursuant to Rule 20 of the **Prince Edward Island Rules of Civil Procedure** for summary judgment against the defendants on all of the claims in the statement of claim. For the reasons set out hereunder, the plaintiff's motion is dismissed in its entirety with costs to the defendants.

BACKGROUND

[2] Between 1991 and 1998, Mr. Ayangma applied to the defendant Prince Edward Island French School Board for four school principal positions and a number of part time and full time teaching positions. He was hired for two teaching contracts for 1995-1996 and 1996-1997, but these were part time, fixed term contracts, not full time permanent. Mr. Ayangma was unsuccessful in his applications for the school principal positions, the full time permanent teaching positions, and other part time, fixed term contracts. Mr. Ayangma asserts he was as qualified or more qualified for those positions than the successful candidates. Of the successful candidates, some were males, some female; many had lower level teaching certificates than Mr. Ayangma; most, perhaps all, were younger (Mr. Ayangma was born in 1954); all except one, a Mr. Esseghaier, were white "Caucasian"; some had less teaching experience; and some were hired to work outside of their specialty area, e.g. an elementary school teacher hired to teach at high school. Mr. Ayangma asserts a pattern of discrimination made up of these many refusals to hire him over many years.

[3] Mr. Ayangma asserts the defendants violated his equality rights under s. 15 of the **Canadian Charter of Rights and Freedoms** by engaging in hiring and recruitment practices which discriminated against him on the basis of race, national origin, colour and age. Mr. Ayangma says the defendants did not hire him because he is an older black man from Cameroon, Africa.

[4] Before Mr. Ayangma started this action in 1998, he filed complaints with the Human Rights Commission asserting the defendants' failure to hire him amounted to discrimination which violated the **Human Rights Act**, R.S.P.E.I. 1988, Cap. H-12 ; these complaints were still pending when Mr. Ayangma made his claim in this case. By decision dated April 5, 2000, the Appeal Division ordered "...the actions should not proceed to trial until the complaints [Mr. Ayangma] has already filed with the [Human Rights Commission] relating to the same matters have been dealt with according to the [**Human Rights Act**]" (**Ayangma v Prince Edward Island Eastern School Board et al**, [2000] PEI No. 50 (PESCAD) at para 11. After many procedural battles, the Commission held a hearing. The Commission dismissed Mr. Ayangma's complaint, and the Commission's decision was upheld first by our Supreme Court, Trial Division, **Ayangma v Prince Edward Island (Human Rights Commission)** [2004] P.E.I.J No. 41 (PEISC-TD), and then by the Appeal Division, **Ayangma v French**

School Board [2005] P.E.I. No. 50 (PEISCAD).

SUMMARY JUDGMENT

[5] Rule 20.01(1), 20.02, 20.04(1) and 20.04(2)(a) state:

20.01 (1) A plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the statement of claim.

...

20.02 An affidavit for use on a motion for summary judgment may be made on information and belief as provided in subrule 39.01(4), but on the hearing of the motion an adverse inference may be drawn, if appropriate, from the failure of a party to provide the evidence of persons having personal knowledge of contested facts.

...

20.04 (1) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest on the mere allegations or denials of his or her pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial.

20.04 (2) The court shall grant summary judgment if,

(a) The court is satisfied there is no genuine issue for trial with respect to a claim or defence;

[6] The objective of the summary judgment rule "...is to screen out claims (and defences) that ...ought not to proceed to trial because they cannot survive the 'good hard look'." (*M.F. Schurman Ltd. v. Westland Homes Ltd.*, [1992] P.E.I.J. No. 77; *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225). The rule also provides a quick and less expensive way to dispose of cases which do not merit a trial.

[7] In *Guarantee Co. of North America v Gordon Capital Corp.* (1999), 3 SCR

423, Iacobucci and Bastarache, JJ. stated at paragraph 27:

The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. See *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 15; *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.), at pp. 267-68; *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.), at pp. 550-51. Once the moving party has made this showing, the respondent must then "establish his claim as being one with a real chance of success" (*Hercules*, supra, at para. 15). In *Hi-Tech Group Inc. v. Sears Canada Inc.*, [2001] O.J. No. 33 (Ont. C.A.), Morden, J.A., commented on the **Guarantee Co.** description of the test at paragraph 28, 30 and 31:

[28] ...[T]he test governing a motion for summary judgment set forth in *Guarantee Co. of North America v. Gordon Capital Corporation*, [1999] 3 S.C.R. 423-35, 178 D.L.R. (4th) 1...which is framed as a two-part test, involves the moving party (1) "show[ing] that there is no genuine issue of material fact requiring trial" and "therefore summary judgment is a proper question for consideration" and then (2), if this showing is made, the responding party must then "establish his claim as being one with [a] real chance of success".

...

[30] ...[But]...the legal or persuasive burden is on the moving party to satisfy the court that there is no genuine issue for trial before summary judgment can be granted (this is what rule 20.04(2) says); and (2), by reason of rule 20.04(1), there is an evidential burden, or something akin to an evidential burden (because the motions judge does not find facts), on the responding party to respond with evidence setting out "specific facts showing that there is a genuine issue for trial". Failure of the responding party to tender evidence does not automatically result in summary judgment...

[31] The short point is that the motions judge, having considered **all** of the evidence and the parties' submissions on it, must be satisfied that there is no genuine issue for trial before he or she may grant summary judgment. This is the legal burden resting on the moving party and it never shifts. I do not think that *Guarantee Co. of North America* intended to detract from this. [Emphasis added]

EVIDENCE

Plaintiff's Evidence

[8] The plaintiff must show evidence he suffered discrimination of the kind which breaches s. 15 of the **Charter**. Section 15(1) of the **Charter** provides:

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

[9] According to a resume Mr. Ayangma prepared about 1997 his qualifications were as follows:

1) Academic:

- a) Bachelor of Education in Linguistics, University of Yaoundé, Cameroon, in 1978;
- b) Master of Business Administration, University of Moncton, New Brunswick, in 1987;
- c) PhD in Business Administration, California Coast University, Santa Ana, California, in 1996;
- d) one adult education course, various Government of Canada courses, and computer courses.

2) Languages:

Under "Languages", Mr. Ayangma lists French, English, Spanish, "and many African languages"

3) Teaching experience:

- a) taught French as a second language at a secondary school in Nigeria from 1979 -1985;
- b) taught French immersion and core French and Canadian Law at Three Oaks Senior High, Summerside from 1988 - 1990;
- c) sessional lecturer in French as second language Extension Department, UPEI, 1989 - 1990;
- d) teaching at Veterans Affairs, French as second language, 1991 - 1992;
- e) taught in French via teleconferencing and video conferencing from 1992 - 1995: 1) International Trade and Industrial Relations, and 2) International Management;
- f) taught at L'École François Buote secondary school 1995 - 1997;
- g) Mr. Ayangma holds a Government of Prince Edward Island Teacher's

Certificate. The copy filed by him is dated July 2, 1995 and states he is granted a "Permanent Certificate 6".

4) References and Evaluations

a) Mr. Ayangma filed a "To Whom It May Concern" letter from James MacNeill, principal of Three Oaks, dated April 23, 1991 (one year after Mr. Ayangma ceased teaching there). The letter speaks of Mr. Ayangma's fluency in English and French, his background in Business Administration and his extra curricular soccer, and field trip activities. A copy of the 1989 General Checklist, an annual appraisal completed by Mr. MacNeill on May 8, 1989, is attached to this letter, but it is not clear whether the copy was originally attached to the letter, or whether Mr. Ayangma added it when putting together his Motion Record. Mr. Ayangma's marks in the appraisal are average, and Mr. MacNeill's comments repeatedly state Mr. Ayangma has improved recently. The "Overall General Comments (Principal)" section begins "Three months ago I would not recommend that Mr. Ayangma be rehired for next year...because of his seemingly inflexible teaching approach and insufficient focus on the area of interpersonal relations." Mr. MacNeill then goes on to identify significant improvement and to recommend Mr. Ayangma continue on staff.

b) An Evaluation Report dated June 25, 1997 from Zane Esseghaier is very positive – it recommends Mr. Ayangma for a permanent teaching position. Mr. Esseghaier wrote another positive letter of recommendation dated April 23, 1998, this time in support of Mr. Ayangma's application for a teaching position at Saint Francis Xavier University.

5) Other:

In addition to teaching, Mr. Ayangma worked for the Red Cross and Veterans Affairs. In volunteer work, he was apparently very active in the PEI Multicultural Council 1991 - 1997, the African/African Origin Society of PEI, and in soccer coaching for his community and for Three Oaks High School.

[10] Mr. Ayangma also filed documents intended to show the successful candidates were younger, or less qualified on paper, or white, or born in Canada, or less experienced in teaching, or did not meet all the qualifications for the job.

[11] The school principal competition in which Mr. Ayangma competed and Darlene Arsenault was hired is notable. She did not qualify for the position when she was hired because she did not have a course in school administration. The defendant

Gabriel Arsenault says he spoke to the Union, which is a party to the agreement which established the qualifications, and the Union agreed she could be hired provided she got the course within a certain time frame. I am advised she completed the course before school started that fall. Mr. Ayangma says this was an action taken to further a discriminatory purpose. The defendants say it was standard operating procedure for the School Board to request a waiver of a hiring prerequisite where an otherwise suitable candidate lacked a course and the deficiency could be readily remedied. Mr. Ayangma says the School Board violated the requirements set out in the Collective Agreement, and says the hiring of someone who did not have the necessary qualifications is clear evidence of discrimination.

Defendants' Evidence

[12] The defendants' evidence consists of the affidavit and exhibits of the defendant Gabriel Arsenault, and the affidavit and exhibits of Mr. Zain Esseghaier.

[13] Mr. Arsenault was Superintendent of Education for the French School Board during the years 1991-1998. He says teaching vacancies in a school were filled within the school wherever possible. Resumes were sent to the School Board by candidates seeking to fill vacancies. If a candidate was unsuccessful, the candidate would generally be considered for future positions if the candidate expressed interest in the position.

[14] As to factors considered in hiring, Mr. Arsenault says:

- 1) a higher level teaching certificate signified academic achievement, such as a Master of Education degree, but did not necessarily identify a superior candidate for a position;
- 2) a selection committee of five or six people including Mr. Arsenault and the school principal interviewed candidates using the same pre-set questionnaire for all;
- 3) the members of the selection committee reached a consensus on who was the best candidate and made their recommendation to the School Board;
- 4) the School Board always accepted the recommendation of the selection committee;
- 5) teaching style, teaching experience, credentials, personal style and "fit" with the class to be taught, were among the factors the selection committee considered;

6) race, national or ethnic origin, colour, and age were not factors considered by the selection committee.

[15] At paragraph 30 of his affidavit, Mr. Arsenault states:

30. It is my belief that the position of school principal is one that requires a great deal of experience at teaching including teaching at different grade levels (as L'École François-Buote offers classes from Grade One to Twelve). Additionally, it is my belief that a strong ability to interact with and relate to the community is very important. I feel that the French language community in Prince Edward Island is to be considered a minority group and requires strong leadership; a role that is often assisted by the French language education system. Accordingly I feel that a candidate for a principal position with the French School Board should have strong relations with the community, an ability to lead both amongst educators and the community at large and a strong understanding of the community's needs. I feel that the candidates hired as principal at L'École François-Buote during the period between 1991 and 1998 met these requirements. I do not feel that the Plaintiff met these requirements to the same degree as the candidates who were ultimately successful.

[16] Mr. Arsenault says Mr. Ayangma's performance during the interview process over the years was consistently poor. At paragraphs 35 and 38 he states:

35. The Plaintiff did not present himself well at interviews. He would frequently provide rambling responses to questions asked by selection committee members. He was not a strong communicator, and often came off as being forceful and arrogant, qualities which are not suited for a classroom setting. As such, the various selection committees (of which I was a member) did not feel that the Plaintiff was a strong candidate for the various teaching positions available, notwithstanding his academic qualifications.

...

38. The Plaintiff was granted an interview [in June, 1998]. I was surprised that the Plaintiff attended the interview wearing a pair of sneakers and a track suit. I believe that his outfit was inappropriate for a teaching job interview. Further, the Plaintiff did not appear to be particularly engaging [sic: engaged?] during the interview.

[17] Mr. Esseghaier says he was born in Tunisia in 1956, is of Arab descent, is a practising Muslim, and is a member of a visible minority. In 1994 he was hired by the French School Board to be principal of L'École François Buote, a position for which Mr. Ayangma also competed. Subsequently, Mr. Esseghaier and his vice-principal interviewed Mr. Ayangma for two fixed-term teaching positions, which were not full time, and Mr. Ayangma was hired for these positions. According to Mr. Gabriel

Arsenault's affidavit, the procedure with fixed term contracts was for the principal to make a recommendation to Mr. Arsenault, and the position was generally filled based on the recommendation.

[18] As stated above, on June 25, 1997, Mr. Esseghaier gave Mr. Ayangma a very positive written evaluation and recommended he receive a permanent position. Notwithstanding the positive evaluation, Mr. Esseghaier states:

22. I did not consider the Plaintiff for [a grade five teaching position for which Julie Gagnon was hired in 1997-1998]...notwithstanding his previous experience as a teacher at L'École François-Buote. I did not feel that he was suited to this position given that this Grade Five class required a teacher who could maintain decorum and had appropriate discipline skills for children of that age. I did not believe that the plaintiff had the necessary skill set to teach this Grade Five class. I also had concerns with regards to the Plaintiff's organizational skills and punctuality.

...

24. In or about June 1998, I participated in a number of interviews for two or three job vacancies; two teaching positions were available at L'École François-Buote and one teaching position was being filled at L'École Évangéline, another school under the French Language School Board. Present at the interviews were myself, the Principal of L'École Évangéline, the superintendent of the French Language School Board Gabriel Arsenault, and some School Board trustees.

25. The Plaintiff was granted an interview at this time. I was shocked to see that he came to his interview wearing a pair of sneakers and a sports outfit. I believe that his outfit was inappropriate for a teaching job interview.

26. Regardless of the Plaintiff's attire, I did not rank the Plaintiff as my first choice for the positions at L'École François-Buote...

27. I had an opportunity to speak to the Plaintiff on another date concerning his applications with the French Language School Board generally, and he informed me that he was not interested in a position but had applied simply to bother the officials with the French Language School Board.

28. ... whenever I was present at interviews or in my dealings with the French Language School Board generally, ...there was never any discussion of race, national or ethnic origin, colour, religion, or age.

...

31. I have been informed by reference to documents filed by the

French Language School Board during the Prince Edward Island Human Rights Commission hearings concerning the Plaintiff and do verily believe that the French Language School Board has, from 1991 to 1998, had a range of two to six percent of its teaching staff (of 41 to 48 teachers) as representatives of visible minorities.

32. I am aware through my involvement with the French Language School Board that over the years the School Board has employed several members of visible minorities as teachers or teacher assistants. They are as follows, to the best of my recollection:

- (a) Marie Jacquard-Handy was hired by the French Language School Board in 1990. Ms. Jacquard-Handy is originally from Cameroon, the Plaintiff's country of origin, and is black. Ms. Jacquard-Handy taught with the School Board until the 1992-1993 school year. I am aware that Ms. Jacquard-Handy has recently returned to the province and is again employed by the French Language School Board.
- (b) Jeannette Laham who is from Egypt and is of Arab descent;
- (c) Marco Thorne, a member of a visible minority who until recently was employed as a teacher assistant at L'École Évangéline;
- (d) Aritho Amfoubalela, who is black and whose country of origin is the Republic of Congo;
- (e) two other teachers, whose names escape me, who are black and of African descent one of whom is presently employed at L'École Évangéline and the other at L'École François-Buote;
- (f) a teacher, whose name escapes me, who is of Cambodian descent and who is presently employed at L'École française de Prince-Quest.

Discussion

[19] The plaintiff urged me to make findings of credibility and fact, especially findings different from those made by the Human Rights Commission. A judge on a summary judgment motion does not make findings of fact or credibility except to the extent of recognizing when a claim or defence lacks the ring of truth, an air of reality

(Hi-Tech Group Inc. v. Sears Canada Inc., [2001] O.J. No. 33 (Ont. C.A.) at paragraph 30; *Pizza Pizza Ltd. v. Gillespie*; *M.F. Schurman Ltd. v. Westland Homes Ltd.*; *La Caisse Populaire de La Salle Credit Union Ltd. v. River Ridge Properties Ltd.*, [1997] M.J. No. 88 (Man. C.A.) at paragraphs 11 and 15).

[20] At an earlier stage in this motion, the defendants asserted I should dismiss this motion without the defendants filing evidence. I refused, for reasons set in *Ayangma v. French School Board and ano.*, [2006] PESCTD 37. I have now considered all of the evidence and the parties' submissions; I conclude there are problems with the plaintiff's evidence, but even if there were not, there are at least two genuine issues for trial. My discussion of the evidence problems and of the genuine issues for trial follows.

INADMISSIBLE EVIDENCE

[21] Rules 39.01(4) and 20.02 state:

- 39.01 (4)** An affidavit for use on a motion may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit.
- 20.02** An affidavit for use on a motion for summary judgment may be made on information and belief as provided in subrule 39.01(4), but on the hearing of the motion an adverse inference may be drawn, if appropriate, from the failure of a party to provide the evidence of persons having personal knowledge of contested facts.

[22] The plaintiff has filed hundreds of documents on this motion. A great many of these documents were not created by the plaintiff and it does not appear to me the plaintiff would have personal knowledge of these documents, in particular: 1) correspondence to which the plaintiff was not a party; 2) collective bargaining agreements; and 3) certificates, CV's and university transcripts of record for other people. In his affidavit, the plaintiff does not identify the source of the documents and the fact of the plaintiff's belief in the authenticity of the documents. Even if the plaintiff swore as to information and belief for each of the documents, that would not prove the contents of the documents (*Peirsen v Bent* (1993), 130 R (3d) 429 (Gen. Div.)) Section 32 of the *Evidence Act* R.S.P.E.I. 1988 Cap E-11 deals with admissibility of business records after notice to other parties, and might provide a partial solution to the plaintiff's evidence problems. Some of the documents are letters of reference. Letters of reference are not evidence of character or ability and, as an additional problem, in this case one of the writers is deceased.

[23] The plaintiff's submissions make a great many references to the transcript of the hearing of the Human Rights Commission. At the beginning of this motion, the plaintiff spoke about this transcript — it is nine volumes — and I understood he was concerned about the cost of copying it. On his request, I said I would have reference to the copy of the transcript used by the Trial or Appeal Division on the earlier appeals and the defendants could use the copy they had used before the Trial or Appeal Division. I am concerned Mr. Ayangma may have concluded the transcript was admissible for the truth of its contents. I did not make any such ruling; motions judges do not usually determine admissibility of evidence at trials. If this case goes on to trial, I warn Mr. Ayangma the evidence taken in the previous proceedings before the Human Rights Commission involved different parties, at least one different issue as discussed below, different procedural rules and a different tribunal, and may not be admissible for the truth of its contents.

[24] The plaintiff had many documentary evidence problems on this motion, problems which could have been fatal to the motion in and of themselves even had I not found against him on other grounds.

Section 15 *Charter* Violation

[25] A claim based on discrimination under s. 15 of the ***Charter*** is not identical to a claim of discrimination under the ***Human Rights Act***. Claims under s. 15(1) depend on the plaintiff proving he was discriminated against by a law, either on the face of the law or in its application. The plaintiff in this case must show evidence he did not receive equal protection or benefit of a law, but in this case I have no evidence Mr. Ayangma was refused a job because of: a) a constitution, b) a federal statute, c) a provincial law, d) a federal or provincial regulation, e) a by law, f) a policy, guideline or rule of any government or of any public organization like a university, g) a convention, h) a treaty, i) an agreement by the federal, provincial or municipal government with any one or any body, j) or an agreement of any agency or corporation of any federal, provincial or municipal government with anyone or any body.

[26] So far as I can see, the plaintiff has no evidence of even an unwritten agreement between one or more members of selection committees to discriminate against older black men from Africa, or against persons with one or more of those characteristics. The selection committees were appointed on an ad hoc basis as vacancies arose, and except for Mr. Arsenault, membership on the 5 or 6 person committee varied — the principal(s) of whatever school(s) had the vacancy or vacancies sat on the committee. According to the evidence of Mr. Arsenault and Mr. Esseghaier, the decisions were made by consensus, and the committee members or at least Mr. Esseghaier, did their own ranking of the candidates before the consensus

discussion took place.

[27] In *McKinney v. University of Guelph* (1990), S.C.J. No. 122, the Supreme Court considered the University's policy of mandatory retirement at age 65. The majority held the **Charter** was confined to government action and universities were not part of government, but went on to consider whether the policy would offend the **Charter** if the **Charter** did apply, and found the policy would violate s. 15(1). Seven Supreme Court of Canada judges heard the appeal, they wrote five decisions for a 4-3 result.

[28] The decision of Dickson, CJ, LaForest and Gonthier JJ, states at paras 49-50:

49 For section 15 of the Charter to come into operation, the alleged inequality must be one made by "law". The most obvious form of law for this purpose is, of course, a statute or regulation. It is clear, however, that it would be easy for government to circumvent the Charter if the term law were to be restricted to these formal types of law-making. It seems obvious from what McIntyre J. had to say in the *Dolphin Delivery* case that he intended that exercise by government of a statutory power or discretion would, if exercised in a discriminatory manner prohibited by s. 15, constitute an infringement of that provision. At all events, this Court has not acted on this basis in *Slaight Communications Inc. v. Davidson*, supra; see also the remarks of Linden J. In *Re McCutcheon and City of Toronto*, supra, at p. 202. [Universities]...policies on mandatory retirement would amount to a law for the purposes of s. 15 of the Charter. Indeed, in most of the universities, these policies were adopted by the universities in a formal manner. ...

50 In the case of some of the universities, however, it may not be as clear that one is dealing with university policy as simply an agreement entered into with a view to respond to what is really desired by the employees. Here again, however, I am unwilling to accept that a power by government to contract should include the power to contract in violation of a Charter right. ... One need simply examine s. 15(2) which provides that s. 15(1) "does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups..."(emphasis added), There would be no need to refer to programs and activities if s. 15(1) were confined to legislative activity....

Wilson J, writing in dissent, approved a very broad definition of "law" which would embrace almost any activity, even informal activity. Indeed, her view was that s. 15 would apply "irrespective of the particular form the discrimination takes" (at paragraph 276). Although Cory J. and L'Heureux-Dube J. agreed with parts of the dissent of Wilson J., it does not appear to me they adopted her definition of "law", or

perhaps more correctly, her opinion that no definition of “law” was necessary.

[29] More recently, in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] S.C.J. No. 71, McLachlin C.J. for the Court stated s. 15(1) claims are confined to benefits and burdens imposed by law. At paragraphs 27-29 she stated:

27. In order to succeed, the claimants must show unequal treatment under the law – more specifically that they failed to receive a benefit that the law provided, or was saddled with a burden the law did not impose on someone else. The primary and oft-stated goal of s. 15(1) is to combat discrimination and ameliorate the position of disadvantaged groups within society. Its specific promise, however, is confined to benefits and burdens “of the law”. Combatting discrimination and ameliorating the position of members of disadvantaged groups is a formidable task and demands a multi-pronged response. Section 15(1) is part of that response...

28. The specific role of s. 15(1) in achieving this objective is to ensure that when governments choose to enact benefits or burdens, they do so on a non-discriminatory basis. This confines s. 15(1) claims to benefits and burdens imposed by law...

29. Most s. 15(1) claims relate to a clear statutory benefit or burden. Consequently, the need for the benefit claimed or burden imposed to emanate from law has not been much discussed. Nevertheless, the language of s. 15(1) as well as the jurisprudence demand that it be met before a s. 15(1) claim can succeed. (emphasis added)

[30] The Supreme Court of Canada has not yet defined the limits of the word “law” in s. 15 of the *Charter* but I think it is fair to say that in the recent *Auton* case, McLachlin CJ clearly did not follow the path described in the dissent of Wilson J in *McKinney v Guelph*. In my view, the plaintiff is a long way from demonstrating in fact and law that not hiring the plaintiff on a permanent contract despite many job competitions constitutes a pattern that should cause the Court to infer the hiring committees exercised a policy of discrimination by consensus and thus a law, bringing the behaviour under s. 15 of the *Charter* and requiring the Court to essentially retry the Human Rights case. The onus is on the plaintiff to show this case contains the elements necessary to establish a violation of s. 15 of the *Charter*, and the plaintiff has not addressed this issue at all.

Focus on One Area of Qualification

[31] Mr. Ayangma’s lawsuit is based on his qualifications and his belonging to a visible minority. His evidence of qualifications focusses primarily on his paper qualifications. He asserts he was qualified, on paper, for all these jobs and not hired, while others not members of a visible minority, or at least not the same visible

minority, were hired who were arguably less qualified on paper. He asserts his **Charter** rights were violated.

[32] The Board responds it approved the recommendation of its hiring committees, and in fact hired members of other visible minorities. It points to a) Mr. Esseghaier, a middle aged man born in Tunisia, a Muslim of Arab background and a member of a visible minority, who was hired in one of the competitions Mr. Ayangma was involved in. Mr. Ayangma responds Mr. Esseghaier is not of the same visible minority as he. The Board points to black or visible minority candidates who were hired. Mr. Ayangma responds they were not hired during the time Mr. Ayangma was competing.

[33] Paper qualifications are but one important factor for consideration in the hiring process. The ability to pass a course in teaching does not guarantee ability to teach, and the ability to pass a course in school administration does not guarantee the ability to be an effective administrator. Both achievements carry with them only a low level of assurance the person can actually do what he or she was taught.

[34] Mr. Arsenault described some of the amorphous factors the selection committee might consider; teaching style, personal style, and "fit" with the class to be taught. Although difficult to objectively quantify, these seem to be reasonable considerations.

[35] Both Mr. Arsenault and Mr. Esseghaier spoke of candidates' performance at interviews, and I gather interview results, and committee members' prior knowledge of the candidates, play an important part in deciding whom to hire. A candidate may demonstrate energy, enthusiasm, a likable personality, quick wittedness, the ability to perform under fire, a collegial attitude, or perhaps a deficit in one or more of these traits. As Webber J.A. stated in **Ayangma v French School Board** [2005] P.E.I.J No. 50 at para. 56, "Interviews are usually attempts to discern the qualities and attributes that are difficult to assess from a resumé. This type of choice is not prohibited." The interview is unfortunately a rude test, and I expect there are bound to be times when poor candidates are hired, and good ones are not.

CONCLUSION

[36] After considering all of the evidence, I conclude the plaintiff has failed to satisfy me there is no genuine issue for trial. The plaintiff's evidence is he was qualified and although he has many evidentiary problems there is some evidence he was more qualified in some regards than some candidates. The defendants' evidence is that other candidates were preferred for arguably valid reasons.

[37] Those evidentiary issues including whether there was a pattern, must be

determined at trial. As well, I will not attempt to determine the question of whether an alleged pattern of discrimination satisfies the threshold condition of s. 15 of the **Charter** that an unequal benefit or burden be imposed by law, or whether there is some other basis on which the plaintiffs claim may qualify as a claim under s 15(1) of the Charter. The plaintiff's motion is therefore dismissed in its entirety.

COSTS

[38] Rule 20.06(1) states:

COSTS SANCTIONS FOR IMPROPER USE OF RULE

Where Motion Fails

20.06(1) Where, on a motion for summary judgment, the moving party obtains no relief, the court shall fix the opposite party's costs of the motion on a solicitor and client basis and order the moving party to pay them forthwith unless the court is satisfied that the making of the motion, although unsuccessful, was nevertheless reasonable.

[39] Our Courts have dismissed many summary judgment motions, but so far as I can determine, when the matter of increased costs was raised, the Court found the bringing of the motion was reasonable. (*Wheatley v. MacLeod*, [1991] P.E.I.J. No. 143 (PEISC-TD); *Ayangma v. NAV Canada*, [2001] P.E.I.J. No. 5 (PEISC-AD))

[40] The leading Ontario case is *Smythe v. Waterfall et al*, [2000] O.J. 3494 (Ont. C.A.). In that decision, Borins, J.A. stated at paragraphs 20-23:

[20]...Given that the object of the rule 20.06(1) is to discourage unmeritorious motions, the onus rests on the unsuccessful moving party to establish that its motion was reasonably brought. The inquiry that the court is to make must focus on the time when the motion was brought and whether it would be clear to the moving party, acting reasonably, on the basis of the information that it knew, or reasonably ought to have known, and the authorities which have interpreted Rule 20...that there existed a genuine issue for trial. If it reasonably appeared to the moving party that there was no genuine issue for trial, then the motion was reasonably brought. This inquiry applies to summary judgment motions which, like the motion in this appeal, are fact based...

[21] ...The inquiry [in this case]...is whether on [the date the motion was brought] ...it was clear to the respondent, acting reasonably, on the basis of the information that he knew, or reasonably ought to have known, and on the basis of the authorities that there was a genuine issue for trial respecting when the appellant knew, or ought to have known, the facts on which she

had based her negligence claim. In my view, it should have been abundantly clear that a genuine issue for trial existed and that a motions judge, in the proper exercise of his or her role, would be required to dismiss the motion. It follows that as the respondent should have known that his motion stood a real risk of not succeeding because of the presence of a genuine factual issue, the bringing of the motion was unreasonable.

[22] It is not difficult to assess what was known to the respondent when he made the motion. By then, as the parties had been examined for discovery, the respondent was aware of virtually all of the appellant's evidence that she ultimately included in the affidavits filed in response to the motion...

[23] As it should have been obvious to the respondent when he brought the motion that it stood virtually no chance of success, it was unreasonable for him within the meaning of rule 20.06(1) to have brought the motion. The appellant, therefore, is entitled to her costs of the motion on a solicitor and client basis.

[41] Rule 20.06(1) does not require the motions judge to recall the parties and conduct a reasonableness inquiry after the judge decides the moving party should obtain no relief, and I do not read the *Smythe v Waterfall* decision as necessarily requiring the motions judge to call upon the parties for submissions on what the plaintiff knew when the matter was brought. That may be necessary in some cases, but in this case the parties were well aware of each other's witnesses, the witnesses' evidence, subject to some variation, and the documents.

[42] The plaintiff has already prosecuted a claim of discrimination against the defendants before the Human Rights Commission. It was based on the defendant Board not hiring him, roughly the same fact situation as in this case, except he now sues based on violation of his *Charter* rights. Mr. Ayangma failed to prove discrimination before the Human Rights Commission and the Commission's decision was upheld by our Trial Division and then by our Appeal Division. The evidence now put forward by the plaintiff and the defendants is at least not dissimilar to what was before the Commission; I note the plaintiff apparently intends to seek to have the entire transcript of the Commission hearing entered as evidence.

[43] While I would not go so far as to say if this case goes to trial, the plaintiff should expect the same result as before the Commission, it was not reasonable for the plaintiff to expect success on this motion which depends on showing there is **no** triable issue.

[44] Accordingly, I award the defendants their costs of this motion on a full indemnity basis, payable forthwith. The defendants will have ten days from the date

of this decision to file their submission on costs and the plaintiff will have ten days thereafter to file his response, if any, following which I will fix costs.

March 14, 2007

Taylor J