Supreme Court Judgments

Gould v. Yukon Order of Pioneers

Collection:	Supreme Court Judgments
Date:	1996-03-21
Report:	[1996] 1 SCR 571
Case number:	23584
Judges:	Lamer, Antonio; La Forest, Gérard V.; L'Heureux-Dubé, Claire; Sopinka, John; Gonthier, Charles Doherty; Cory, Peter deCarteret; McLachlin, Beverley; Iacobucci, Frank; Major, John C.
On appeal from:	Yukon
Subjects:	Administrative law Constitutional law
Notes:	SCC Case Information: 23584

Gould *v.* Yukon Order of Pioneers, [1996] 1 S.C.R. 571

Yukon Human Rights Commission and
Madeleine Gould *Appellants*

v.

Yukon Order of Pioneers,
Dawson Lodge Number 1 and Walter Groner *Respondents*

and

Yukon Status of Women Council *Intervener*

Indexed as: Gould *v.* Yukon Order of Pioneers

File No.: 23584.

1995: October 3; 1996: March 21.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for the yukon territory

Civil rights -- Discrimination -- Services to the public -- Woman denied membership in fraternal order because she was female -- Fraternal order collecting and preserving historical materials -- Materials made available to public -- Whether order "offering or providing services . . . to the public" -- Whether membership in order is itself a service offered to public -- Whether refusal of membership to women constitutes prohibited discrimination -- Human Rights Act, R.S.Y. 1986 (Supp.), c. 11, ss. 8(a), (c), 10(1).

Judicial review -- Standard of review -- Human rights tribunal.

G applied for membership in the Yukon Order of Pioneers («Order»), a fraternal order whose primary objectives are social, historical and cultural, with its paramount concern being the welfare and well-being of its members. According to its constitution, the Order is dedicated to the advancement of the Yukon Territory, the mutual protection of its members, the uniting of these members in the strong tie of brotherhood, the preservation of the names of all Yukon Pioneers on its rolls and the collection and the preservation of the literature and incidents of Yukon's history. The historical materials on the Order and its members collected by the Order are made available to the public. G's application for membership was denied on the ground that she was female. She filed a complaint with the Yukon Human Rights Commission. It was not disputed before the Board of Adjudication constituted by the Commission that the Order's action in rejecting the application amounted to discrimination on the basis of sex under s. 6(f) of the Yukon *Human Rights Act*. The Board found that in preserving and collecting the literature and incidents of Yukon's history, the Order was "offering or providing services . . . to the public" and concluded that the discrimination was thus prohibited under s. 8(a) of the Act and that s. 10(1) -- an exemption clause -- did not apply to the Order. The Supreme Court of the Yukon Territory set aside the Board's decision and the Court of Appeal upheld that judgment. Both courts found that G's exclusion from membership in the Order did not amount to prohibited discrimination under s. 8(a).

Held (L'Heureux-Dubé and McLachlin JJ. dissenting): The appeal should be dismissed.

Per Lamer C.J. and Sopinka, Gonthier, Cory, Iacobucci and Major JJ.: For the reasons given by La Forest J., the relevant standard of review in this case is correctness. Further, while courts customarily defer to tribunals, including human rights tribunals, on questions of fact, on the ground that these tribunals are situated and equipped to make such findings, where, as in this case, the issue is not the facts themselves but rather the inferences to be drawn from agreed facts, the policy considerations which ordinarily militate in favour of deference are significantly attenuated.

The need to approach human rights legislation purposively, giving it a fair, large and liberal interpretation with a view to advancing its objects, is well accepted, and it is also well established that the wording of the statute is an important part of this process. A true purposive approach looks at the wording of the statute itself, with a view to discerning and advancing the legislature's intent. Here, while it is evident that the Order's males-only membership policy contravenes s. 6(f) of the Yukon *Human Rights Act*, this discrimination is not prohibited by s. 8. When s. 8 is considered as a whole, it is apparent that the legislature in para. (c) has turned its mind to the question of membership as a category of prohibited discrimination. Membership is dealt with expressly and separately from "services, goods, or facilities" in para. (a). Further, s. 8(c) forbids discrimination "in connection with any aspect of membership" in certain listed types of organizations. These organizations collectively deal with livelihood and economic relationships but not social or cultural ones. There might be a situation in which membership could constitute a service offered to the public, but s. 8(a) should not be read in a way that would deprive s. 8(c) of all meaning. Moreover, although s. 8(c) may itself be subject to a large and liberal interpretation, such that the types of organizations listed might be interpreted generously, it does not extend to the Order. If organizations are conceptualized as ranging across a spectrum from the purely economic to the purely social, the Order is close to the social end of that spectrum. Finally, since in this case the service offered to the public within the meaning of s. 8(a) is neither membership nor the collection process but rather the end product -- namely, historical data or documents produced -- and since this is provided to the public without discrimination, it follows that the appeal must be dismissed. It is unnecessary in this appeal to expand upon the principles set out in *Berg*, to consider the American constitutional jurisprudence, or to discuss s. 10 of the Act.

Per La Forest J.: The question of what constitutes "services . . . to the public" for the purposes of

s. 8(a) of the Yukon *Human Rights Act* is a general question of law, one which an appellate court must review on the basis of correctness. The superior expertise of a human rights tribunal relates to fact-finding and adjudication in a human rights context. It does not extend to general questions of law.

Human rights legislation should be given a broad, liberal and purposive approach to ensure that the underlying objects of the legislation are given full effect. Though the words of the statute must be interpreted generously, this does not permit rewriting the legislation. An interpretation of s. 8(a) should proceed in light of analogous provisions in the various human rights statutes in Canada and should be guided by the similar purpose underlying these provisions. These analogous provisions prohibit discrimination with respect to services that are offered to the public, or to which the public has access or to which it is admitted. To attract the anti-discrimination prohibition, a service must thus create a public relationship between the service provider and the service user. This is consistent with the common purpose that underlies these provisions: the elimination of discrimination in enterprises that serve the public. However, the intention of the enterprise should not be determinative of whether a service offered by the enterprise is in fact offered to the public, and such a determination under s. 8(a) should not be centred upon the nature of the enterprise or the service provider but upon the service being offered. A proper interpretation of s. 8(a) gives rise to a two-part analysis. The first step involves a determination of what constitutes the "service", based on the facts before the court. The second step requires a determination of whether the service creates a public relationship between the service provider and the service user. Inherent in this determination is a decision as to what constitutes "the public" to which the service is being offered, recalling that public is to be defined in relational as opposed to quantitative terms. In ascertaining a "public relationship" arising from a service, criteria including, but not limited to, selectivity in the provision of the service, diversity in the public to whom the service is offered, involvement of non-members in the service, whether the service is of a commercial nature, the intimate nature of the service and the purpose of offering the service will all be relevant. None of these criteria operate determinatively. A public relationship is to be determined by examining the relevant factors in a contextual manner.

In this case, the Order has not engaged in prohibited discrimination within the meaning of s. 8(a) in excluding G and women in general from its membership. The collection and preservation of Yukon history by the Order are not services covered by s. 8(a) because they do not give rise to a public relationship, a conclusion supported by the agreed statement of facts. There is also no evidence that the Order makes its

facilities for collection and recording of Yukon history available to the public. Participation in these services is selective and the preparation of the historical data is purely private. The Order's historian collects and records the historical materials. The public is not involved in any way in the Order's historical research. The only service which implicates the public is the service of providing the historical materials of the Order and its members to the public, but this service does not encompass the collection and recording of those materials. In this appeal, there is no allegation of discrimination in making these materials available to the public. A reading of s. 8(a) which simply requires that the historical service supplied to the public be made freely and equally accessible to every individual without discrimination on the prohibited grounds fully conforms with the stated object of the Act. Further, the legislature had to balance competing rights in determining the scope of prohibited discrimination and s. 8(a) must be read in the context of the statute as a whole. If collection and recording of the history of the Yukon is made subject to s. 8(a), a paralysing effect would be felt upon the rights to freedom of expression and association recognized elsewhere in the Act. To force a private organization to compile history in a particular way would have serious implications for the freedom of association and of expression of those who join a particular group for that purpose. The Order does not purport to provide the definitive history of the Yukon and those who wish to present a different view of history are free to do so. Finally, the facts, as presented to this Court, do not indicate the Order is distorting the general history of the Yukon in its exclusion of women from its membership. The history the Order seeks to collect and preserve is primarily a history of the Order and its members.

In some circumstances, membership as a spectrum of benefits in an organization may constitute a service offered or provided to the public, and thereby require scrutiny of its membership policies under the Act. It is not whether an organization is public that determines whether membership in the organization is a service offered to the public, but rather whether the spectrum of benefits constituting membership is offered to the public. Courts must be willing to look beyond the seemingly private characteristics of an organization, including its membership policies, to discern whether in reality the organization offers services and opportunities to the public. Selectivity in membership will not insulate an organization from anti-discrimination legislation if membership is found to constitute a service offered to the public. Here, on the basis of the agreed facts, membership in the Order does not constitute a service offered or provided to the public within the meaning of s. 8(a). A review of the benefits that adhere to members of the Order reveals that membership does not give rise to a public relationship. The Order membership exists to serve its own members, past and present, and to preserve a Klondike brotherhood, founded upon moral values and male

camaraderie. What the Order offers to its members is an intimate association, an opportunity to socialize in an all male environment intended to enhance the emotional development of its members. The Order does not purport to represent a diverse membership. Its membership policies are selective. Meetings of the members are exclusively attended by members. Moreover, the Order does not, in essence, exist to further commercial or other such public objects. Its foremost concern is with the welfare and well-being of its members. In this respect, the membership offered by the Order more closely resembles membership in a familial relationship than membership that is generally offered or provided to the public.

To conclude that s. 8(a), which deals with the provision of services, goods or facilities to the public, does not apply to membership in an organization because membership in certain associations has been contemplated by the legislature in s. 8(c), is to give a restrictive interpretation to an Act which should be liberally construed. The mention of "membership" in s. 8(c) does not disclose an intention to deal with membership generally. The paragraphs of s. 8 are complementary and supportive of one another and of the goal of prohibiting discrimination. They should not be construed as exclusive logic-tight compartments. Discriminatory conduct that fairly falls within one category cannot be excluded from that category simply because another category deals with other activities that may bear on the same matter. The restrictive approach of confining membership issues to s. 8(c) cannot be significantly expanded by a broad interpretation of the associations there listed. However generously one may interpret the statute, one cannot rewrite it or add to the exhaustive list of groups of associations set forth in s. 8(c) so as to cover situations other than those for which it provides.

With respect to s. 10(1) of the Act, this section was not intended to be used as a broad justificatory shield against allegations of discrimination described in s. 8(a). The exempted discrimination must be of a kind necessary to the furtherance of the fundamental objects of the organization. Section 10(1) was probably intended to do little more than to give expression to our constitutionally guaranteed freedom of association.

Per McLachlin J. (dissenting): The collection and distribution of historical material constitute a service to the public within the meaning of s. 8(a) of the Yukon *Human Rights Act*, but the Order does not discriminate in the provision of this service since it provides its historical research to anyone who seeks it, male or female. The aim of s. 8(a) is essentially to ensure that those who provide services make those

services available to the public generally, without discrimination on the basis of sex or any other prohibited ground.

The Order, however, provides sufficient benefits of a public nature and importance that membership itself constitutes a service offered or provided to the public within the meaning of s. 8(a). Selectivity, purpose, seclusion and smallness are factors to be considered in making this assessment. The Order has a prominent public profile which is inconsistent with a seclusive group. The Order has arrogated to itself a number of public functions and conferred benefits and important public status on its members. The Order is small, but so is the community in which it operates. Moreover, the Order's public purpose and persona is large, extending to all pioneers in the Yukon Territory. Apart from gender, the Order is not particularly selective in choosing members. While close camaraderie may be consistent with privateness, the camaraderie enjoyed by the members of the Order flows from the public purpose of the Order. It is the members' common status and history as pioneers, rather than as men, which forms the common bond between them. Finally, the non-commercial benefits conferred on members of the Order are as worthy of protection as commercial services. In excluding women from membership, the Order therefore discriminates in the provision of this service.

Per L'Heureux-Dubé J. (dissenting): Correctness is not the appropriate standard of review in this case. The Order's challenge to the Board of Adjudication's decision is not based on "general questions of law". The Board's impugned findings are primarily factual in nature. Although the meaning of the phrase "service . . . to the public" is an ordinary question of law on which no deference is warranted, the Board's finding that the Order's activities fell within this definition involves the application of the law to the facts. Moreover, in order to carry out its purpose, the Yukon *Human Rights Act* establishes a specialist tribunal composed of adjudicators having expertise and an acute understanding of human rights issues. The resolution of the factual issues in this case fell squarely within the Board's specialized mandate and, when as here the right to appeal provided by the Act is limited to questions of law, an appellate court has no jurisdiction to overturn the Board's findings of fact unless they are so unreasonable as to amount to an error of law. This Court therefore should show deference to the Board's findings. The standard of review should be most deferential to findings which are purely factual or where the factual and legal elements are inseparable as in the application of the law to the facts. At the same time, some deference must be shown to the Board's findings on legal questions which raise policy concerns within the Board's special mandate.

The interpretation of human rights legislation must, on the one hand, be large and liberal so as to advance the overall purpose of the statute. On the other hand, it must be rationally supportable on the wording of the particular provision and the other admissible evidence of the legislature's purpose in enacting the provision. Here, the Order's policy excluding women from membership is discriminatory and the Board held that this discrimination was prohibited by s. 8(a) of the Act. In reaching this conclusion, the Board did not commit any error that would warrant the intervention of an appellate court. The Board's decision is consistent with the text of the relevant provisions and with the broad policy considerations underlying the Yukon's anti-discrimination statute.

First, the Board found that the Order provides services to the public, by collecting and preserving materials relating to the history of the Yukon and making them available to the public. A broad range of activities may constitute services generally available to the public and the correct approach is to identify the service in question, and then to determine whether that service gives rise to a public relationship between the service provider and the service user. This task, being essentially factual, was within the exclusive purview of the Board and the record supports its finding. On the evidence, the Board could reasonably conclude that the Order's activities involving the collection, preservation and publication of the history of the Yukon represent work done for the benefit of members of the public at large. As well, there is no reason automatically to sever the preparation of a historical record from its communication to the public. On the contrary, it seems logical to treat the Order's historical activities holistically, as a single service. The Board's conclusion cannot therefore be described as unreasonable.

Second, the Board found that discrimination occurred when services were provided to the public, because the exclusion of women from membership had an impact on the quality of the historical record created and maintained by the Order. Although on the broad wording of s. 8(a), it may not be necessary in all cases to show that discrimination had an impact on the quality of the service, there is no error in the proposition that such an impact would create a nexus sufficient to support the conclusion that the discrimination occurred "when offering or providing services . . . to the public". There is also no principle of law requiring the Board to restrict the application of s. 8(a) to situations where the discrimination is directed against potential users of the service. The test applicable is whether the discrimination occurred "when offering or providing services . . . to the public". The Board committed no error in its interpretation of this

test. Its conclusion that the discrimination, consisting of the exclusion of women from membership, occurred when the Order was providing services to the public flows from its finding that the discrimination had an adverse impact on the quality of the services provided by the Order to the public. On the evidence, this finding was reasonably open to the Board.

Accordingly, this Court cannot interfere with the Board's finding that the Order's membership policy violates s. 8(a). It is important to note that the Board's decision does not rest on any finding that the presentation of a distorted historical record, or a record prepared without the input of women, is discrimination against women. The Order discriminates against women by excluding them from membership. The Order's activities, including its activities in producing the historical record, are simply the context in which this discrimination occurs.

Although it is unnecessary to address the alternative argument, it seems that membership in the Order is a service provided to the public. Membership can be a service within the meaning of s. 8(a). What is important is the degree of intimacy of the relationship in which the benefits are provided. A human rights tribunal must thus examine the relationship between the club and its potential members, and characterize the membership relationship as either public or private. In making that determination, factors such as the selectivity, purpose, seclusion and smallness of the group should be considered. In this case, it seems that the Order is not sufficiently intimate that the relationship between the Order and its potential members can be characterized as private. The membership criteria are relatively unselective and the Order has a public image and importance which is inconsistent with a seclusive group. While the membership is quite small, this factor is of lesser importance. Neither the male camaraderie enjoyed by the members of the Order, nor the non-commercial nature of the benefits extended to the Order's members, bring the Order outside the public sphere.

Finally, on the facts before the Board, it was clear that the Order was not an organization entitled to the protection of s. 10(1) of the Act. The record amply supports the Board's conclusion that the Order is not dedicated to promoting the interests of an identifiable group. Instead, the Order exists to serve the interests and welfare of the entire population of the Yukon.

Cases Cited

By Iacobucci J.

Referred to: *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554; *Workmen's Compensation Board v. Greer*, [1975] 1 S.C.R. 347.

By La Forest J.

Considered: *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353; *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537 (1987); *New York State Club Assn. v. New York City*, 487 U.S. 1 (1988); **referred to:** *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554; *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536; *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84; *Canada (Attorney General) v. Rosin*, [1991] 1 F.C. 391; *Gay Alliance Toward Equality v. Vancouver Sun*, [1979] 2 S.C.R. 435; *Anvari v. Canada (Employment and Immigration Commission)* (1991), 14 C.H.R.R. D/292; *Rogers v. Newfoundland (Department of Culture, Recreation and Youth)* (1991), 15 C.H.R.R. D/375; *Singh v. Royal Canadian Legion, Jasper Place (Alta.), Branch No. 255* (1990), 11 C.H.R.R. D/357; *Brossard (Town) v. Quebec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279.

By McLachlin J. (dissenting)

Roberts v. United States Jaycees, 468 U.S. 609 (1984); *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353; *Gay Alliance Toward Equality v. Vancouver Sun*, [1979] 2 S.C.R. 435.

By L'Heureux-Dubé J. (dissenting)

U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048; *Volvo Canada Ltd. v. U.A.W., Local 720*, [1980] 1 S.C.R. 178; *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Canadian Union of Public Employees,*

Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227; *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941; *Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525; *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157; *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983; *Dayco (Canada) Ltd. v. CAW-Canada*, [1993] 2 S.C.R. 230; *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321; *Large v. Stratford (City)*, [1995] 3 S.C.R. 733; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353; *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103; *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181; *Edwards v. Bairstow*, [1956] A.C. 14; *R. v. Lampard*, [1968] 2 O.R. 470; *Workmen's Compensation Board v. Greer*, [1975] 1 S.C.R. 347; *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145; *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114; *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536; *Canada (Attorney General) v. Rosin*, [1991] 1 F.C. 391; *Gay Alliance Toward Equality v. Vancouver Sun*, [1979] 2 S.C.R. 435; *Re Jenkins and Workers' Compensation Board of Prince Edward Island* (1986), 31 D.L.R. (4th) 536; *Re Winnipeg School Division No. 1 and MacArthur* (1982), 133 D.L.R. (3d) 305; *Re Ontario Human Rights Commission and Ontario Rural Softball Association* (1979), 26 O.R. (2d) 134; *Peters v. University Hospital Board* (1983), 23 Sask. R. 123; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537 (1987); *Brossard (Town) v. Quebec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms.

Canadian Human Rights Act, R.S.C., 1985, c. H-6, s. 5.

Charter of Human Rights and Freedoms, R.S.Q., c. C-12, s. 12.

Fair Practices Act, R.S.N.W.T. 1988, c. F-2, s. 4(1) [am. 1995, c. 23, s. 2].

Human Rights Act, R.S.N.B. 1973, c. H-11, s. 5(1) [rep. & sub. 1985, c. 30, s. 7; am. 1992, c. 30, s. 5].

Human Rights Act, R.S.N.S. 1989, c. 214, s. 4 [rep. & sub. 1991, c. 12, s. 1].

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Human Rights Act, R.S.Y. 1986 (Supp.), c. 11, ss. 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 26.

Human Rights Act, S.B.C. 1984, c. 22, s. 3 [rep. & sub. 1992, c. 43, s. 2].

Human Rights Code, R.S.N. 1990, c. H-14, s. 6(1).

Human Rights Code, R.S.O. 1990, c. H.19, s. 1.

Human Rights Code, S.M. 1987-88, c. 45, C.C.S.M., c. H175, s. 13(1).

Individual's Rights Protection Act, R.S.A. 1980, c. I-2, s. 3 [am. 1985, c. 33, s. 2; am. 1990, c. 23, ss. 2, 3].

Interpretation Act, R.S.Y. 1986, c. 93, s. 10.

Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1, s. 12(1) [am. 1989-90, c. 23, s. 8; am. 1993, c. 61, s. 7].

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Yukon Hansard, February 12, 1987, p. 715.

APPEAL from a judgment of the Yukon Court of Appeal (1993), 18 C.H.R.R. D/347, 100 D.L.R. (4th) 596, 79 B.C.L.R. (2d) 14, dismissing the appellants' appeal from a judgment of Wachowich J. (1991), 14 C.H.R.R. D/176, 87 D.L.R. (4th) 618, reversing a decision of a board of adjudication (1989), 10 C.H.R.R. D/5812 constituted under the Yukon *Human Rights Act*. Appeal dismissed, L'Heureux-Dubé and McLachlin JJ. dissenting.

Mary Eberts and *Sharon Greene*, for the appellants.

J. J. Camp, *Q.C.*, and *Richard A. Buchan*, for the respondents.

Gwen Brodsky and *Nitya Iyer*, for the intervener.

The judgment of Lamer C.J. and Sopinka, Gonthier, Cory, Iacobucci and Major JJ. was delivered by

1 IACOBUCCI J. -- I have had the benefit of the reasons of my colleagues La Forest, L'Heureux-Dubé and McLachlin JJ. Although I agree with La Forest J.'s disposition of this appeal and with his reasoning on several points, I do not share his views on the necessity, in this appeal, of expanding upon this Court's decision in *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353, considering the American constitutional jurisprudence, or discussing s. 10 of the Yukon *Human Rights Act*, R.S.Y. 1986 (Supp.), c. 11. My colleague and I are also in disagreement about the relevance and application of s. 8(c) of the Act to the main issue to be resolved.

2 La Forest J. has summarized the facts, decisions below, and submissions of the parties and the intervener, and there is no need for me to repeat or comment on them. As my colleague states, the key issue in this appeal is whether the exclusion of the appellant Gould from membership in the respondent Yukon Order of Pioneers ("Order") on the ground that she is female contravenes s. 8(a) of the Yukon Act, a provision which prohibits discrimination "when offering or providing services, goods or facilities to the public".

3 My colleague has also explained that the relevant standard of review is correctness. I agree with what he has said on this subject, and would only add that the approach taken by the unanimous Court in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, confirms the use of this standard. In *Pezim*, the Court stated (at pp. 590-91):

> Having regard to the large number of factors relevant in determining the applicable standard of review, the courts have developed a spectrum that ranges from the standard of reasonableness to that of correctness. Courts have also enunciated a principle of deference that applies not just to the facts as found by the tribunal, but also to the legal questions before the tribunal in the light of its role and expertise. At the reasonableness end of the spectrum, where deference is at its highest, are those cases where a tribunal protected by a true privative clause, is deciding a matter within its jurisdiction and where there is no statutory right of appeal. See *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.,* [1979] 2 S.C.R. 227; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at p. 1089 (*Bibeault*), and *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756.
>
> At the correctness end of the spectrum, where deference in terms of legal questions is at its lowest, are those cases where the issues concern the interpretation of a provision limiting the tribunal's jurisdiction (jurisdictional error) or where there is a statutory right of appeal which allows the reviewing court to substitute its opinion for that of the tribunal and where the tribunal has no greater expertise than the court on the issue in question, as for example in the area of human rights. See for example *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, and *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353. [Emphasis added.]

4 My colleague L'Heureux-Dubé J. relies heavily upon the fact-finding expertise of the Board of

Adjudication. To the extent that the deference she advocates is predicated on this tribunal's expertise in the circumstances of the case at bar, I would make, in passing, one observation. Courts customarily defer to tribunals, including human rights tribunals, on questions of fact, on the ground that these tribunals are situated and equipped to make such findings: see, e.g., *Berg*, *supra*, and *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554. But in the case at bar, I note that the Board of Adjudication heard no testimony. Apart from two facts which were agreed upon orally at the hearing, all of the evidence was in written form. Moreover, the evidence of the parties was presented entirely by admission and agreement. In these circumstances, where the issue is not the facts themselves but rather the inferences to be drawn from agreed facts, the policy considerations which ordinarily militate in favour of deference are significantly attenuated: see *Workmen's Compensation Board v. Greer*, [1975] 1 S.C.R. 347.

5 On the subject of the appropriate interpretive approach for human rights statutes, the need to approach the legislation purposively, giving it a fair, large and liberal interpretation with a view to advancing its objects, is well accepted. But it is also well established that the wording of the statute is an important part of this process. I do not read my colleagues as disagreeing on this point: see para. 50 of La Forest J.'s reasons and para. 123 of L'Heureux-Dubé J.'s reasons.

6 On the one hand, as the Chief Justice explained in *Berg*, *supra*, at p. 373 (in a passage which is also quoted in part by my colleague La Forest J., for somewhat different purposes),

> [i]f human rights legislation is to be interpreted in a purposive manner, differences in wording between provinces should not obscure the essentially similar purposes of such provisions, unless the wording clearly evinces a different purpose on behalf of a particular provincial legislature.

In *Berg* it was held that the fact that s. 3 of the British Columbia legislation prohibited discrimination with respect to accommodations, services or facilities "customarily available to the public", while other statutes used phrases such as "ordinarily offered to the public" or "available in any place to which the public is customarily admitted", should not result in divergent interpretations, because these provisions are functionally synonymous. However, on the other hand, as the Chief Justice explained, at p. 371,

> [t]his interpretive approach [i.e., a broad, liberal and purposive approach] does not give a board or court license to ignore the words of the Act in order to prevent discrimination wherever it is found. While this may be a laudable goal, the legislature has stated, through the limiting words in s. 3 [i.e., the phrase "customarily available to the public"], that some relationships will not be subject

> to scrutiny under human rights legislation. It is the duty of boards and courts to give s. 3 a liberal and purposive construction, without reading the limiting words out of the Act or otherwise circumventing the intention of the legislature.

7 A true purposive approach looks at the wording of the statute itself, with a view to discerning and advancing the legislature's intent. Our task is to breathe life, and generously so, into the particular statutory provisions that are before us.

8 Applying this approach to the Yukon Act, I note that, like its counterparts in other jurisdictions, it lists as its objects "to further . . . the public policy that every individual is free and equal in dignity and rights"; "to discourage and eliminate discrimination"; and "to promote recognition of the inherent dignity and worth and of the equal and inalienable rights of all members of the human family, these being principles underlying the *Canadian Charter of Rights and Freedoms* and the *Universal Declaration of Human Rights* and other solemn undertakings, international and national, which Canada honours" (s. 1). There is also an interpretive provision relating to the "preservation and enhancement of the multi-cultural heritage of the residents of the Yukon" (s. 2). The "Bill of Rights" portion of the Act affirms, *inter alia* that "[e]very individual and every group shall, in accordance with the law, enjoy the right to freedom of religion, conscience, opinion, and belief" (s. 3); that every individual and group "shall, in accordance with the law, enjoy the right to freedom of expression, including freedom of the press and other media of communication" (s. 4); and that every individual and group "shall, in accordance with the law, enjoy the right to peaceable assembly with others and the right to form with others associations of any character" (s. 5).

9 These objects may sometimes be in tension. Even within the associational right there may be a tension between a group's interest in self-definition and an outsider's interest in joining or associating with the group.

10 The structure of the Act is that once discrimination (as defined in s. 6) is found, one turns to s. 8 to determine whether the discrimination is of a prohibited kind, and if it is one then proceeds to ss. 9 and 10 (and other provisions which are not relevant to this appeal) to determine whether the prohibited discrimination can nevertheless be justified under those provisions.

11 In the case before us, it is evident that the Order's males-only membership policy contravenes s. 6(f) of the Act (discrimination on the basis of sex). Therefore, it is necessary to determine whether this discrimination is prohibited by s. 8 of the Act. That section must be considered as a whole. It appears under the heading "Prohibited discrimination", and reads:

8. No person shall discriminate

(a) when offering or providing services, goods, or facilities to the public,

(b) in connection with any aspect of employment or application for employment,

(c) *in connection with any aspect of membership* in or representation by any trade union, trade association, occupational association, or professional association,

(d) in connection with any aspect of the occupancy, possession, lease, or sale of property offered to the public,

(e) in the negotiation or performance of any contract that is offered to or for which offers are invited from the public. [Italics and underlining added.]

12 It is immediately apparent that the legislature has turned its mind to the question of membership as a category of prohibited discrimination. Membership is dealt with expressly -- and separately from "services, goods, or facilities". Further, s. 8(c) forbids discrimination "in connection with any aspect of membership" in certain listed types of organizations. These organizations collectively deal with livelihood and economic relationships but not social or cultural ones.

13 When I apply a liberal and purposive approach as I have described it above to these provisions, it is clear to me that s. 8(a) cannot bear the interpretation that the intervener and the appellant Gould would ascribe to it.

14 With regard to the intervener's position, I would not rule out the possibility that there might be a situation in which membership could constitute a service offered to the public. But s. 8(c) is suggestive of a legislative intent to treat membership and services separately. Section 8(a) should not be read in a way that would deprive s. 8(c) of all meaning. With respect, it seems to me that this is what my colleague McLachlin J.'s (and, to a lesser extent, my colleague La Forest J.'s) interpretation of s. 8(a) would do. Moreover, although s. 8(c) may itself be subject to a large and liberal interpretation, such that the types of organizations listed might be interpreted generously, it does not extend to the Order. If organizations are conceptualized as ranging across a spectrum from the purely

economic to the purely social, with business, trade, and professional associations near the economic end and religious and cultural groups near the social end, the Order is close to the latter. It may be, by contrast, that other groups could be found, on a liberal and purposive approach, to be closer to the former but I need not discuss that in this case.

15 Before leaving this subject I would note that the fact that an organization labels what it offers as a "membership" rather than a "good or service" is not determinative. The appropriate characterization, and the question of whether s. 8(a) or (c) is engaged, is, as a legal question, one for the relevant decision-making body to determine.

16 With regard to the appellants' position, I would not deny that a collection or creation process could constitute a service offered to the public: this could be so if, for instance, the process itself took place in the context of a public relationship. However, as a reading of the agreed statement of facts confirms, that is not this case. It is evident to me that the service offered to the public in this case is the end product, namely, the historical data or documents produced. And it is clear that the Order provides this product to the public without discrimination.

17 Since in this case the service offered to the public within the meaning of s. 8(a) of the Act is neither membership nor the collection process but rather the end product, and since this is provided to the public without discrimination, it follows that the appeal must be dismissed.

18 Accordingly, I am able to reach these conclusions without taking the further steps that my colleague La Forest J. (and, to a certain extent, my colleagues L'Heureux-Dubé and McLachlin JJ.) has taken. In particular, I find it unnecessary to expand upon the principles or tests set out in *Berg*. My resolution of this appeal is consistent with *Berg* and, in that connection, I have neither derogated from nor added to the principles established in *Berg*. I also find it unnecessary to consider the American constitutional jurisprudence, or to address s. 10 of the Act. Someday it may be helpful or necessary to discuss these matters, but I prefer to wait for a factual and legal context which is conducive to such a discussion.

19 I would dispose of the appeal in the manner proposed by La Forest J.

The following are the reasons delivered by

20 LA FOREST J. -- The principal issue in this appeal is whether, in the circumstances of this case, the exclusion of the appellant Gould from membership in the respondent fraternal order on the ground that she is female amounts to prohibited discrimination under s. 8(a) of the Yukon *Human Rights Act*, R.S.Y. 1986 (Supp.), c. 11. That provision, which appears under the heading "Prohibited discrimination", reads:

> **8.** No person shall discriminate
>
> (a) when offering or providing services, goods, or facilities to the public . . . . [Emphasis added.]

Section 6 defines what amounts to discrimination. It provides that "[i]t is discrimination to treat any individual or group unfavourably" on a number of grounds including ground (f), "sex". Section 11 adds that "[a]ny conduct that results in discrimination is discrimination". The appellant Gould claims that prohibited discrimination resulted from the offering by the respondent Order of historical material to the public since the collection of this material is exclusively assigned to members of the Order, all of whom are male. For convenience, I shall hereafter generally refer to these parties simply as the appellant and the respondent. For its part, the intervener, the Yukon Status of Women Council, contends that in light of the Order's activities and place in the community, membership in the organization is itself a service offered to the public, and consequently refusal of membership to women constitutes prohibited discrimination. In addition to disputing each of these contentions, the respondent also avers that there is no discrimination in this case having regard to the exemption in s. 10(1), which reads as follows:

> **10.** (1) It is not discrimination for a religious, charitable, educational, social, cultural, or athletic organization to give preference to its members or to people the organization exists to serve.

Facts

21 On September 2, 1987, the appellant Madeleine Gould applied for membership in the respondent Yukon Order of Pioneers, Dawson Lodge. Her application was denied on the ground that she was female.

22 The Yukon Order of Pioneers was formed in 1894 by the Forty Mile community which proposed the organization of a moral fraternal order for the purposes of establishing a police force and a fraternal group whose primary concern would be the welfare, security and well-being of its members. Membership was restricted to male persons of integrity and good character who met a ten year residency requirement. By the early 1900s, the policing activities of the Order were no longer required, and since that time the Order's primary objectives have been social, historical and cultural, with its paramount concern being the welfare and well-being of its members. According to the agreed statement of facts (item 8(ix)) submitted by the parties,

> the primary objects and focus of the Order are the mutual protection of its members and the uniting of those members in the strong tie of brotherhood. The Order is dedicated to preserving the history of the Order and of its members. It is equally dedicated to preserving the moral values, male camaraderie and mutual respect, traditions and secret rites that were engendered by and formed the fabric of a Klondike brotherhood of the 1890s;

This is consistent with the purpose of the Order, which is thus set forth in its Constitution:

> Its purpose shall be the advancement of the Yukon Territory, the mutual protection of its members, and to unite these members in the strong tie of brotherhood; and to preserve the names of all Yukon Pioneers on its rolls; to collect and preserve the literature and incidents of Yukon's history.

Pursuant to this clause, the organization collects and preserves certain historical literature and materials and makes them available to the public. To that end, the Order's historian engages in the following activities:

> (a)responds to requests from the public for information on the Order's past members and on the history of the Order;
>
> (b)provides historical data, records and materials on the Order and its members to the Yukon Archives;
>
> (c)solicits information on the history of the Order and its members from members and other individuals and organizations;
>
> (d)collects data, records, photos and other historical material respecting the Order and its members.

(Agreed Statement of Facts, item 8(x).)

I observe that these activities are central to the appellant's claim that the Order is providing a service to the public within the meaning of s. 8 of the Act.

23 On December 8, 1987, the appellant filed a complaint with the Yukon Human Rights

Commission that the Order had contravened ss. 8(a) and 11 of the Act in precluding her from becoming a member. In response to the complaint, the Commission constituted a board of adjudication. The adjudication proceeded on the basis of an agreed statement of facts and documents and other facts admitted by counsel. The Yukon Status of Women Council was granted intervener status and filed a submission to the Board of Adjudication. The Board found that the actions of the Lodge constituted prohibited discrimination pursuant to s. 8(a) of the Act: (1989), 10 C.H.R.R. D/5812. An appeal from the decision of the Board was made to the Supreme Court of the Yukon Territory, which reversed the decision: (1991), 14 C.H.R.R. D/176, 87 D.L.R. (4th) 618. A further appeal to the Court of Appeal of the Yukon Territory was dismissed: (1993), 18 C.H.R.R. D/347, 100 D.L.R. (4th) 596, 79 B.C.L.R. (2d) 14. Leave to appeal was then granted to this Court, [1993] 3 S.C.R. x.

Decisions Below

Board of Adjudication

24 It was not disputed before the Board that the actions of the Order amounted to discrimination against the appellant and women in general under s. 6(f) of the Act. The Board considered whether the discrimination was prohibited under s. 8 and specifically whether there was discrimination in providing a public service. While the Board acknowledged that the public service element of the Order was not the predominant activity of the membership, it concluded that this was not necessary to warrant finding that s. 8(a) applied. In its view, the preservation and collection of the literature and incidents of the Yukon's history constituted an important public service sufficient for this purpose and concluded that the Order was providing or offering "services . . . to the public" within the meaning of s. 8(a).

25 The Order, it continued, was engaging in discrimination prohibited by s. 8(a) in rejecting the appellant's application. The public service of collecting and preserving the Yukon's history could not be performed properly without the active input, through membership in the Order, of female members of the population. From a "common sense standpoint", the Board accepted that history will be distorted in favour of the male role if it is recorded exclusively by men.

26 Finally, the Board found s. 10(1) of the Act inapplicable to the Order, holding that the "people the organization exists to serve" is the whole community, male and female. As no reference was made to s. 9 of the Act (which provides that there is no discrimination where there are factors establishing reasonable cause for discrimination), the Board did not deal with it. The Board ordered that the discrimination complained of cease and that the appellant's application for membership and all other applications for membership be considered without reference to the sex of the applicant.

Supreme Court of the Yukon Territory (1991), 87 D.L.R. (4th) 618

27 On appeal from this decision, Wachowich J. considered whether the exclusion of the appellant Gould from membership because she was female constituted discrimination within the meaning of the Act. He stated that "the conduct complained of must first be `discrimination' as defined by s. 6 or s. 11 of the Act", and that "it is the discriminatory result or effect, not a discriminatory intent which is significant" (p. 646). Nonetheless, he disagreed with the Board that the respondent's conduct "amounts to discrimination, either directly or by adverse effect" (p. 648). In his view, if the conduct of the Order was based upon a personal characteristic of the appellant, it still remained to be decided whether this conduct was a "treating unfavourably" form of discrimination within s. 6 of the Act, or the broader form of discrimination in s. 11 of the Act. By stating that discrimination in the abstract had been established, the Board failed to examine relevant considerations regarding the issue of discrimination and, therefore, erred in law. The Board ought to have applied the particular facts of the case to the legislation in determining the issue of discrimination.

28 Assuming, without deciding, that there was discrimination, Wachowich J. went on to consider whether the discrimination was prohibited by s. 8(a) of the Act. That provision, he held, had to be interpreted in its social, political and legal context and concluded (at p. 652):

> It is largely by reference to this latter perspective that it is possible to conclude that differential treatment (excluding women) in relation to the Pioneers' membership policy is not discriminatory conduct as contemplated by s. 8 of the *Human Rights Act*. This is because the Pioneers, as an organization, do not provide goods, facilities or services of a type which attracts the regulation (and sanctions) of the *Human Rights Act*.

29 In respect of the membership policies of the Order, Wachowich J. undertook a review of

American and English authorities. He noted the difference between the American position and the Canadian position, though he observed that we may benefit from the American experience in the interpretation of our human rights legislation.

30 He concluded from his review of the authorities that it was necessary to balance carefully "fundamental but conflicting rights of human beings in interpreting legislation which is alleged to govern cases such as the one before [him] on appeal" (p. 670).

31 Wachowich J. was of the view that it was insufficient for the Board "to consider the conduct complained of in isolation from the essential balancing of equally important interests" (p. 671). He stated that "legislation aimed at eradicating gender-based discrimination in the interests of equality" was in direct conflict with "interests aimed at recognizing the rights of free citizens to form associations with whomever they might wish and . . . the right to freely express oneself" (p. 671). He concluded (at p. 672):

> The Board failed to address membership policy criteria in light of the stated objectives of the human rights legislation and therefore failed to consider that criteria which might operate to take the Pioneers out of the reach of the *Human Rights Act*.

Thus, membership policy might not be discriminatory within the meaning of the Act, and, if it was discriminatory, it might not be discriminatory activity of the type prohibited by s. 8(a).

32 In Wachowich J.'s view, discrimination relating to membership policies and discrimination relating to the offering of services to the public should be treated separately. He then stated that, on the question of whether "what the Pioneers *do* amounts to prohibited discrimination, activities must be considered together to produce a complete picture of this organization and the conduct of the Pioneers which is alleged to be discriminatory" (p. 673 (emphasis in original)).

33 Wachowich J. then considered the role of the Order in collecting and preserving history and stated that, even if the Order's "collecting and preserving of history amounts to what can be characterized as a `public' service" (pp. 675-76), that finding was irrelevant. There was a distinction to be drawn between a "public service" and "services to the public". The proper question was: "Is the service offered or provided to the public?" If so, in offering or providing the service, did the

Order treat any of the public unfavourably on the enumerated grounds in the Act? If so, there was prohibited discrimination. He concluded that the services were offered to the public without discrimination and, therefore, that the answer was "no". He could not accept that an activity involving individual or collective creation of information and free delivery to the public is the type of conduct caught by the Act. While the Board did not perceive this matter as involving limits on the freedom of expression, he could see it as little else.

34 Wachowich J. continued, however, by stating that if a finding of proscribed discrimination was made by the Board, the next step should have been to consider the defence found in s. 9 of the Act. If no defence was available under s. 9, then the Board should have considered whether they were an exempted group under s. 10 of the Act.

35 In conclusion, Wachowich J. found (at p. 694):

> The finding by the Board that history is distorted in favour of the male role if recorded solely by males led the Board to find prohibited discrimination in the rejection of [the appellant] Gould's application for membership in the Pioneers. Even granting that the Board was entitled to take judicial notice of a distortion of history concept, having regard to the totality of the materials before it and the statutory burden of persuasion to which the Board is held in weighing evidence and applying policy, I am of the firm view that the Board erred in law in reaching the conclusion it did. A misapprehension as to the law of evidence is an error of law.

Court of Appeal (1993), 100 D.L.R. (4th) 596

36 On the appeal to the Court of Appeal, Hinkson J.A., writing for the court, found that the Board had not erred in law in concluding that the appellant had suffered discrimination with respect to her application for membership. This fell within the definition of discrimination in s. 6 of the Act.

37 Hinkson J.A. specified that the appellant's complaint was that "in the collection and preservation of the history of the Yukon by the order there was discrimination against her as a member of the public because the collection and preservation of that history was collected, preserved and recorded solely by males" (p. 604). He stated that the issue for the Board on the interpretation of s. 8(a) of the Act was whether "that provision in the Act had any application to the collection and preservation conducted by the historians of the lodge" (p. 605). The purpose of s. 8(a) of the Act, he stated, "is to proscribe discrimination when offering or providing services to the public" and that to be consistent

with the object set out in the Act "every individual is equally entitled to any services offered or provided to the public" (p. 605).

38 In Hinkson J.A.'s view, "the starting point for the interpretation of s. 8(*a*) of the Act is to consider the service that the lodge is providing to the public" (p. 606). He found that that service was "to make available at the request of any member of the public the results of the collection, research and recording of the history of the Yukon" (p. 606). It was not the collection and preservation of that history that was the service offered to the public, but the fruits of that labour. He concluded that s. 8(a) of the Act "imposes on the lodge the obligation to make such research available to any member of the public without discrimination" (p. 606).

39 To adopt the Board's interpretation of s. 8(a) "would give to the board a right of censorship over any material provided to the public by any individual or group" (p. 607). This was not the intention of the legislature in enacting s. 8(a) of the Act. He then concluded (at p. 607):

> [T]he board fell into error in its interpretation of s. 8(*a*) of the Act when it concluded that within that section the collection and preservation of the history of the Yukon by the lodge, recorded solely by males, constituted discrimination with respect to [the appellant] Gould.
>
> As a result, the board was in error in its interpretation of the provisions of s. 8(*a*) of the Act.

40 Hinkson J.A. found it unnecessary for Wachowich J. to consider ss. 9 and 10 of the Act; this, he thought, "should be left to an appropriate proceeding in which they fall to be determined by a board" (p. 608).

Analysis

The Issues

41 Let me say at the outset that there is no question that there was in this case discrimination as defined in s. 6 of the Act. The appellant was obviously treated unfavourably by the respondent's conduct in refusing her admission to the Order because of her gender. But the Act does not prohibit discrimination in all its forms. This is scarcely surprising. Life in society demands that we

discriminate every day of our lives, and it is only certain forms of discrimination that are prohibited. The prohibited grounds of discrimination under the Yukon *Human Rights Act* are set forth in s. 8.

42 The particular ground on which the appellant relies is s. 8(a) which prohibits any person from discriminating "when offering or providing services, goods, or facilities to the public". The appellant's position, as I understand it, is this. The service of providing historical material to the public involves the collection and recording of the material, so the collection and recording of the material is part of the service to the public. Since, the argument continues, the collection and recording of the material is restricted to members, the appellant is subject to discrimination in the provision of the service by being denied membership on a prohibited ground. This, she adds, results in a distortion of Yukon history by giving it a male bias.

43 The intervener in this appeal relies on the ground that the membership practices of the Order are discriminatory in three respects: (1) women suffer a direct loss of the benefits, opportunities and advantages flowing from membership in the Order; (2) women's perspectives are excluded from the historical account of Yukon pioneering; and (3) rooted in stereotypical assumptions about the role and status of women, the membership practices constitute an affront to the dignity of Yukon women, and deprive them of the social recognition and esteem of being pioneers.

44 There are, as I see it, two primary issues raised by the appellant and the intervener. The first issue arises from the appellant's position that the collection and recording of the material constitutes a service offered or provided to the public by the Order. The second issue relates to the contention of the intervener that the membership policies of the Order constitute discrimination within s. 8(a). The intervener states, in essence, that membership itself is a service offered to the public. The respondent responds by questioning the appellant's interpretive approach and by relying on the exemption provided by s. 10(1) of the Act.

45 The appellant, in support of her position, stated that the Board made a finding that s. 8(a) included not only the provision of the historical material, but its collection and recording as well. That decision, she maintained, falls within the specific expertise of the Board to which a reviewing court should accord deference.

The Standard of Review

46 I shall deal with the issue of deference first. In approaching the issue, it is useful to refer to the position adopted by this Court in *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, where it was stated (at p. 585):

> The superior expertise of a human rights tribunal relates to fact-finding and adjudication in a human rights context. It does not extend to general questions of law such as the one at issue in this case. These are ultimately matters within the province of the judiciary, and involve concepts of statutory interpretation and general legal reasoning which the courts must be supposed competent to perform. The courts cannot abdicate this duty to the tribunal. They must, therefore, review the tribunal's decisions on questions of this kind on the basis of correctness, not on a standard of reasonability.

I note that we are here once again involved in an issue of statutory interpretation and general legal reasoning. On that basis, I would have thought that a reviewing court, and ultimately this Court, has the duty under s. 26(3) of the Act, which provides for an appeal on "questions of law", to consider the correctness of the Board's decision.

47 But there is even more specific authority on the point in *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353. At issue there was the interpretation of s. 3 of the British Columbia *Human Rights Act* which prohibits discrimination "with respect to any . . . service . . . customarily available to the public". Writing for the majority of this Court, Lamer C.J. concluded that the question of what constitutes a "service customarily available to the public" is a general question of law, for which there is no reason to show deference by this Court. In considering the purpose of s. 3 of the British Columbia Act, Lamer C.J. referred to "analogous provisions" found in various human rights statutes, including s. 8 of the Yukon *Human Rights Act*. He found that the legislatures of various jurisdictions in Canada had chosen different means of achieving a common end, and in order for the interpretation of human rights legislation to be purposive, differences in wording among the various provinces should not be permitted to frustrate the similar purpose underlying these provisions. He stated (at p. 373):

> If human rights legislation is to be interpreted in a purposive manner, differences in wording between provinces should not obscure the essentially similar purposes of such provisions, unless the wording clearly evinces a different purpose on behalf of a particular provincial legislature.

48 On the basis of the foregoing, it is quite clear that the question of what constitutes "services to the public" for the purposes of s. 8(a) of the Yukon Act is a general question of law, one which an appellate court must review on the basis of correctness.

Interpretive Approach

49 I turn, then, to the issue of the interpretation that should properly be given to s. 8(a). As a backdrop to her contention that "providing services . . . to the public" should be given an expansive meaning so as to include not only the provision of historical materials but its collection as well, the appellant referred to this Court's admonition that human rights legislation should be given a broad, liberal and purposive approach that recognizes its special nature -- not quite constitutional but more than ordinary; see *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, at p. 547. Similarly, in *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, at p. 89, I stated that such legislation "must be so interpreted as to advance the broad policy considerations underlying it".

50 I have not resiled from that position, but as Lamer C.J. warned, in his reasons in *Berg*, *supra*, at p. 371, "[t]his interpretative approach does not give a board or court license to ignore the words of the Act in order to prevent discrimination wherever it is found." The words of the Act must be interpreted generously, but this does not permit rewriting the Act. This approach must guide an interpretation of s. 8(a) of the Act, so as to ensure that the underlying objects of the Act are given full effect.

51 With this in mind, I shall endeavour to interpret s. 8(a) on the basis of the wording of the provision within the context of the entire Act. As previously stated, this Court in *Berg* noted that s. 8(a) finds analogous provisions in the human rights legislation throughout the country. In keeping with Lamer C.J.'s direction that differences in wording among the various provisions should not obscure the similar purpose of such provisions, it becomes necessary to approach the interpretation of s. 8(a) in light of analogous provisions in other human rights Acts. An interpretation focused solely on the specific wording of s. 8(a) would ignore the "essentially similar" end for which these

provisions are but the means.

52 An interpretation of s. 8(a) should be guided by the similar purpose underlying analogous provisions. In his reasons in *Berg*, Lamer C.J. articulated this purpose by reference to a passage from Linden J.A.'s reasons in the Federal Court of Appeal decision in *Canada (Attorney General) v. Rosin*, [1991] 1 F.C. 391, at p. 398. "The essential aim of the wording", Linden J.A. stated, "is to forbid discrimination by enterprises which purport to serve the public". The critical implication of this passage, in my view, is the assertion that it is not all discrimination that is prohibited, but only discrimination in the context of a public sphere of activity.

53 The analogous provisions of the various Canadian human rights statutes provide an appropriate starting point for an interpretation of s. 8(a). The *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, s. 5, prohibits discrimination in relation to the "provision of goods, services, facilities or accommodation customarily available to the general public". The prohibitions on discrimination in the British Columbia and Alberta Acts echo the language of "customarily available to the public" (see the British Columbia *Human Rights Act*, S.B.C. 1984, c. 22, s. 3; Alberta *Individual's Rights Protection Act*, R.S.A. 1980, c. I-2, s. 3). As noted by Lamer C.J. in *Berg,* the New Brunswick *Human Rights Act*, R.S.N.B. 1973, c. H-11, s. 5(1), makes a broader reference to "accommodation, services or facilities available to the public". The Manitoba *Human Rights Code*, S.M. 1987-88, c. 45, s. 13(1), purports to cast a wider net, prohibiting discrimination with respect to "any service, accommodation, facility, good, right, licence, benefit, program or privilege available . . . to the public". Other statutes speak in terms of access to the public: for example the Prince Edward Island statute (*Human Rights Act*, R.S.P.E.I. 1988, c. H-12, s. 2(1)) uses the language "to which members of the public have access", and Newfoundland (*Human Rights Code*, R.S.N. 1990, c. H-14, s. 6(1)) prohibits discrimination in an accommodation, services, facilities or goods "to which members of the public customarily have access or which are customarily offered to the public" (see also *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, s. 12(1), which is similarly worded, "to which the public is customarily admitted or which are offered to the public"; as is the North West Territories' *Fair Practices Act*, R.S.N.W.T. 1988, c. F-2, s. 4(1), which speaks of "available in any place to which the public is customarily admitted"). Some statutes use the verb "offer" or "provide"; such is the Yukon Act; similarly the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c.

C-12, s. 12, refers to goods and services "ordinarily offered to the public". Finally, Nova Scotia's *Human Rights Act*, R.S.N.S. 1989, c. 214, s. 4, employs a definition of discrimination stated in terms of the denial of "opportunities, benefits and advantages available to other individuals or classes of individuals in society".

54 The Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, s. 1, is anomalous in its less restrictive prohibition on discrimination. The statute prohibits discrimination in respect of services, with no limiting words. I do not intend to deal with the Ontario statute in more depth, and will simply repeat the language employed by Lamer C.J. in *Berg* that "differences in wording . . . should not obscure the essentially similar purposes of such provisions" (p. 373). The Court is not faced with the interpretation of Ontario's statute in this appeal. Such interpretation is appropriately left for another day.

55 What is to be gleaned from these various provisions is that they all prohibit discrimination with respect to services that are offered to the public, or to which the public has access or to which it is admitted. There is, therefore, a requisite public relationship between the service provider and the service receiver, to the extent that the public must be granted access to or admitted to or extended the service by the service provider. There is a transitive connotation from the language employed by the various provisions; it is not until the service, accommodation, facility, etc., passes from the service provider and has been held out to the public that it attracts the anti-discrimination prohibition. (Specifically the Yukon Act speaks of "when" the services, goods or facilities are provided to the public.) I note that my colleague L'Heureux-Dubé J. discusses the French version which employs "*relativement à*" in place of "when" (para. 140). In light of the ambiguity of meaning inherent in that phrase, the clear English version is to be preferred. This is all the more compelling when one recalls the importance of developing an interpretation that is consistent with other Canadian human rights statutes. This is consistent with and reinforced by the common purpose that underlies these provisions: the elimination of discrimination in enterprises that serve the public. In relation to this common purpose, it needs to be said, however, that an enterprise need not purport to serve the public before a service it offers to the public is caught within the scope of s. 8(a), or analogous provisions. For, indeed it would be simple for an enterprise to purport not to serve the public, and then to engage in the provision of services to the public in a discriminatory manner. The intention of

the enterprise should not be determinative of whether a service offered by the enterprise is in fact offered to the public. What is equally important is that a determination under s. 8(a) should not be centred upon the nature of the enterprise or the service provider, but more accurately, upon the service being offered. In this regard, the analysis becomes service-driven.

56 The wording of s. 8(a) and its analogous provisions offers no indication of the types of services that will fall within the scope of the prohibition against discrimination. Consequently, to determine what services are caught by s. 8(a), it is necessary to examine the jurisprudence.

57 In this Court's recent decision in *Berg*, Lamer C.J. developed an approach under s. 3 of the British Columbia Act, the analogous provision to s. 8(a) of the Yukon Act. There a graduate student was denied a key and rating sheet because of her mental disability. The student filed a complaint alleging discrimination by the university in services "customarily available to the public". It was conceded that the key and rating sheet constituted services, so the real issue was whether these services were customarily available to the public. Writing for the majority, Lamer C.J. found that the word "public" should be defined in relational as opposed to quantitative terms. Every service has its own public, to be defined through the use of non-discriminatory eligibility criteria. It is not, however, all of the activities of a service provider that are subject to the prohibition against discrimination. Lamer C.J. stated (at p. 382) the key question as being "Can the legislature have intended that such activity would not be subject to scrutiny under the Act?" He found that a principled approach is to be taken, on the basis of the relationship created by the service provider and the service user; only those activities that create a public relationship between the service provider and the service user are caught by the Act.

58 According to Lamer C.J., "[t]he crux of the determination in these appeals is the nature of the services themselves and the relationship they establish" (p. 387). It is, in my view, essential to such a determination that the nature of the service is the context within which the relationship must be considered. It is important to avoid an analysis that inquires into the nature of the relationship first and in a manner abstracted from the services in question. Such an analysis could lead to a finding that an intimate and apparently private organization maintained only private relationships, when in fact, it did offer some services to the public. Thus, the correct approach is to identify the service in

question, and then to determine whether that service gives rise to a public relationship between the service provider and the service user.

59 In the context of examining what other courts have found to constitute "services", Lamer C.J. in *Berg* reviewed the decision of this Court in *Gay Alliance Toward Equality v. Vancouver Sun*, [1979] 2 S.C.R. 435, in which Martland J. stated, at p. 455, "[s]ervice refers to such matters as restaurants, bars, taverns, service stations, public transportation and public utilities". Decisions of lower courts and tribunals provide further assistance in the task of fleshing out the meaning of "services" within provisions akin to s. 8(a). In *Anvari v. Canada (Employment and Immigration Commission)* (1991), 14 C.H.R.R. D/292 (Can. Rev. Trib.), the consideration of applications for landed immigrant status under a program to assist Iranian nationals in Canada was found to constitute services customarily available to the public within the meaning of s. 5 of the *Canadian Human Rights Act*. In *Rogers v. Newfoundland (Department of Culture, Recreation and Youth)* (1991), 15 C.H.R.R. D/375, the Supreme Court of Newfoundland, Trial Division upheld the decision of an *Ad Hoc* Commission that access to and participation in the big game hunting licence system amounted to a service available in a place to which the public is customarily admitted. What these cases illustrate is the broad range of activities that may constitute services generally available, or offered to the public. What they do not provide is an exhaustive list of activities that may fall within the scope of s. 8(a). Ultimately, the determination must turn on the facts placed before the court in a given case.

60 The major issue left open by the *Berg* decision is precisely how "public relationship" is to be defined. Lamer C.J. did provide some parameters to this expression, though he did so largely implicitly rather than overtly. For example, in finding that the nature of the relationship between the university and its students was "a very public relationship", he observed that the students "have in common only their admission to the School, and they will usually present a microcosm of Canadian society" (p. 387). The lack of a private selectivity process and the diversity of the students inferentially informed his finding that the relationship in question was public. The absence of discretionary personal selection in the provision of a service supported the finding that the service was customarily available to the public, in *Singh v. Royal Canadian Legion, Jasper Place (Alta.), Branch No. 255* (1990), 11 C.H.R.R. D/357 (Alta. Bd. Inq.), a case to which Lamer C.J. referred in *Berg*. These criteria alone, however, are not conclusive of the matter of whether a public relationship

is borne out.

61 For additional guidance on which criteria may be useful in defining a "public relationship", it is instructive to consider the American experience. The American authorities have developed a distinction between private and public associations, in cases involving a conflict between state anti-discrimination legislation and the constitutional freedom of association of members of a "private organization". I note at the outset that the American approach is distinct from that of Canadian courts. The American jurisprudence arises in the context of determining whether an organization is sufficiently private to warrant constitutional protection of its freedom of association against state anti-discrimination legislation. Freedom of association is not expressly guaranteed by the American constitution. Rather, it has been derived from, and receives constitutional protection as a fundamental element of personal liberty. It has also been recognized in the sense of a right to associate for the purpose of advancing other constitutional freedoms, including speech, assembly and religion.

62 It must also be noted in the American cases that undertake the private-public distinction analysis, the United States Supreme Court was considering the distinction in terms of whether the particular club or organization is private or public. If the organization is found to be private, then it warrants constitutional protection from state interference, a protection that recognizes the emotional development and self-realization that is drawn from intimate private associations with others. The focus appears to be on the nature of the organization itself and whether it is private or public, rather than on the particular service provided by the organization. In this respect, the American approach strays some distance from the Canadian approach as enunciated in *Berg*, where it is the relationship created by the service that must be public in order for the human rights legislation to have application. In Canada, the legislatures have preferred to refrain from a distinction between private and public associations for the purpose of determining the applicability of human rights legislation. Further, Canadian legislators have preferred to avoid the classification of an organization or club as "private" thereby immunizing it from such legislation. This difference between the American and Canadian approaches is significant. Where the difference between the American and the Canadian approaches is obscured, however, is in relation to the intervener's argument that membership itself is a service offered to the public, a point to which I shall return.

63 Finally, this Court has been reluctant to wholeheartedly adopt American constitutional jurisprudence. Nonetheless, for the limited purpose of informing our notion of what constitutes a "public relationship" in the area of human rights, it is apposite to consider how the American courts have dealt with the issue of private versus public organizations. Given this limited purpose for which the American authorities are relevant on this appeal, I do not intend to undertake a comprehensive review, but will simply discuss the criteria American courts apply in determining whether an organization is private or public.

64 The leading authority is *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). That case involved a consideration of the Jaycees, a non-profit national membership corporation whose objective was "to pursue such educational and charitable purposes as will promote and foster the growth and development of young men's civic organizations" (p. 612). The Jaycees, after being ordered by the Minnesota Department of Human Rights to accept women as members, argued that the state human rights legislation violated the constitutional rights of their members. In rejecting this argument, the Supreme Court of the United States identified two distinct types of constitutionally protected association -- intimate association and expressive association. It then reviewed the types of relationships that warrant "a substantial measure of sanctuary from unjustified interference by the State" (p. 618). With respect to the right to intimate association, the court held that the "sanctuary" was restricted to highly personal relationships, which were exemplified by marriage and other family relationships. Brennan J., for the court, stated (at pp. 619-20):

> Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. Among other things, therefore, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship.

The judgment makes clear, however, that other associations having attributes of the kind listed in this passage would also warrant constitutional protection. The Jaycees did not fit within this category. Because of the broad range of human relationships, the court reasoned, determining which associations fall within or outside constitutional incursions by the state requires a careful assessment of where a particular relationship's objective characteristics locate it on the spectrum between the polar extremes of family associations and

large commercial enterprises.

65 With these considerations in mind, Brennan J. noted the following features respecting the Jaycees: that it is a large, basically unselective organization and, apart from age and sex, employs no criteria for membership, admits non-members to a significant portion of its activities, and lacks distinctive characteristics. He concluded that these features "clearly place the organization outside of the category of relationships worthy of this kind of constitutional protection" (p. 620). With regard to the right to expressive association, the court concluded that the state had a compelling interest in ensuring that women have equal access to leadership skills, business contacts and employment opportunities offered by the Jaycees. Furthermore, the Court found no evidence that the inclusion of women as members would impede the organization's ability to engage in protected expressive activity.

66 *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537 (1987), confirmed the application of the criteria from *Jaycees* to the determination of whether an organization is sufficiently private to attract constitutional protection. The United States Supreme Court stated that consideration must be given to factors such as size, purpose, selectivity, and participation of strangers in the club's activities. In the more recent decision of the Supreme Court of the United States in *New York State Club Assn. v. New York City*, 487 U.S. 1 (1988), some of the activities of the clubs involved were found to be demonstrative of a "commercial" nature "where business deals are often made and personal contacts valuable for business purposes, employment and professional advancement are formed" (p. 12), thereby removing the clubs from status as private clubs and subjecting them to the state human rights legislation. On the other hand, the court made it clear that benevolent orders organized "solely for the benefit of (their) membership and their beneficiaries" (p. 17) -- what Scalia J. described (at p. 21) as "lodges or fraternal organizations" -- are not "public" organizations.

67 A summary of the factors deemed to be relevant by American courts in determining which organizations are sufficiently private to warrant constitutional protection of their intimate association is as follows: size, selectivity, purpose, involvement of non-members in the activities of the organization, commercial nature and deep attachments and commitments on the part of members to other members of the organization or association. Essentially, the more intimate and personal the

nature of the relationship among the members, the more likely it is that the organization will be characterized as "private". As mentioned earlier, these various factors seem to me to be relevant in the interpretation of Canadian human rights legislation in considering whether membership in an organization or association constitutes a service offered or provided to the public under s. 8(a) of the Act.

68 A proper interpretation of s. 8(a), for the purposes of this appeal, is one which gives rise to a two-part analysis. The first step in the analysis involves a determination of what constitutes the "service", based on the facts before the court. Having determined what the "service" is, the next step requires a determination of whether the service creates a public relationship between the service provider and the service user. Inherent in this determination is a decision as to what constitutes "the public" to which the service is being offered, recalling that public is to be defined in relational as opposed to quantitative terms. In ascertaining a "public relationship" arising from a service, criteria including, but not limited to, selectivity in the provision of the service, diversity in the public to whom the service is offered, involvement of non-members in the service, whether the service is of a commercial nature, the intimate nature of the service and the purpose of offering the service will all be relevant. I would emphasize that none of these criteria operate determinatively; for example, the mere fact that an organization is exclusive with respect to the offering or providing of its service does not necessarily immunize that service from the reach of anti-discrimination legislation. A public relationship is to be determined by examining the relevant factors in a contextual manner.

The Appellant's Position

69 Having determined the appropriate approach to interpreting s. 8(a), I will now deal with the argument of the appellant. As noted in the Court of Appeal, the appellant does not complain that the Order discriminated against her in the course of providing its collection of Yukon history to the public, and no such discrimination is apparent from the agreed statement of facts. The provision of the collection of Yukon history recorded by the Order is available to all members of the public without discrimination. The appellant complains, rather, that she suffered discrimination as a result of the collection and recording of the history by the exclusively male Order. Thus the question before us is whether the collection and preservation of Yukon history by the Order's historians are

services offered or provided to the public. I am prepared to accept that the collection and preservation of Yukon history constitute "services". The real question, then, is whether these services give rise to a public relationship.

70 In my view, the collection and recording of historical material by the Order do not give rise to a public relationship. The agreed statement of facts clearly supports this view. The collection and recording of "the literature and incidents of Yukon's history" are performed by the Order's historian, Mr. Laurent Cyr, who does so voluntarily. There is no evidence that the Order makes its facilities for collection and recording of Yukon history available to the public. In fact, there is no evidence that any one but the Order's historians, and specifically Mr. Cyr, are involved in the collection and recording of the historical record; participation in these services is absolutely selective. As Wachowich J. observed in reviewing this matter (at p. 673):

> There is no evidence that Mr. Cyr or the Pioneers as a group offer this or any similar service to the *public*. What is undertaken by Mr. Cyr is presumably undertaken out of personal interest, as a service *to the Pioneers* in his capacity as their "historian". [Emphasis in original.]

The Order does not provide general research facilities to the public nor does it involve the public in its historical research in any other way; the preparation of its historical data is purely private.

71 A review of the specific activities performed by Mr. Cyr details the nature of the collection and recording of Yukon history undertaken by the Order and affirms the private character of these services. From the agreed statement of facts, Mr. Cyr, we saw, engages in the following activities:

(a) responds to requests from the public for information on the Order's past members and on the history of the Order;

(b) provides historical data, records and materials on the Order and its members to the Yukon Archives;

(c) solicits information on the history of the Order and its members from members and other individuals and organizations;

(d) collects data, records, photos and other historical material respecting the Order and its members.

The only services that implicate the public are those of providing the historical data, records and materials to the public, responding to the public's requests for information and soliciting information from the public. The collection and recording of the history does not engage the public in any way. Section 8(a) does not purport to cover these services.

72 The appellant contends that since the historical record is made available to the public and to the Yukon Archives, the preparation of this historical record constitutes providing a service to the public within the meaning of the Act. Section 8(a), she adds, should encompass discrimination in the process of creating the historical record. Having already found that the collection and recording of the history by the Order is not a service offered to the public, I shall now consider whether the service of providing the historical record to the public encompasses the collection and recording of that record, for the purpose of s. 8(a).

73 I cannot accept the interpretation of provision of services the appellant encourages the Court to adopt. To do so would require reading s. 8(a) along the following lines: "No person shall discriminate in the preparation and collection of services, goods, or facilities provided to the public." Since "goods or facilities" are included in the provision, this would mean that every time some organization offered, say, food or assistance to members of the public, it would have to involve the public in collecting or preparing these services. It seems to me that simply requiring that the historical services supplied to the public be made freely and equally accessible to every individual without discrimination on the prohibited grounds fully conforms with the stated object of the Act "to further in the Yukon the public policy that every individual is free and equal in dignity and rights" (s. 1(1)(a)). And as already noted, there was no allegation raised in this appeal of discrimination in making these services available to the public by the Order.

74 Further considerations support this interpretation. As frequently stated, a provision in a statute must be read in the context of the statute as a whole. Undertaking a contextual look at s. 8(a) of the Act, it is apparent from the stated objects of the Act that the legislature chose to give meaning to and protect the "equal and inalienable rights of all members of the human family". This object is advanced in the "Bill of Rights" portion of the Act, where special recognition is given to the right of every individual and every group to freedom of association, expression and peaceable assembly (ss. 4 and 5 of the Act). What is also apparent is that the legislature chose not to prohibit all forms of discrimination, but only those within the reach of s. 8 of the Act. The legislature had to balance competing rights in determining the scope of prohibited discrimination. In my view, a purposive approach to s. 8(a) is one that seeks to recognize this inherent balancing of rights, while giving effect

to the underlying objects of the Act. Section 8(a) should, therefore, be read harmoniously with the rights recognized elsewhere in the Act. Turning, then, to the contention of the appellant, if collection and recording of the history of the Yukon is made subject to s. 8(a) of the Act, a paralysing effect would be felt upon the rights to freedom of expression and association recognized elsewhere in the Act. Such an interpretation would require, for example, a religious organization that made a publication available to the public to ensure that the preparation of the publication involve all religious faiths, to ensure a multifarious publication. This effect would severely restrict the other freedoms recognized in the Act. Such an effect cannot be taken to have been the purpose of the legislature.

75 The appellant criticized this method of approach, which was adopted by the court below, and contended that the discrimination provisions should be dealt with in isolation from the Bill of Rights provisions. She noted that most human rights statutes in Canada do not contain Bill of Rights provisions. What this argument overlooks, however, is that the courts have always sought to interpret statutes in a manner that does not unduly infringe upon fundamental freedoms. This traditional approach has now been fortified by the enshrinement of these values in the *Canadian Charter of Rights and Freedoms*. Thus a similar result would follow whether or not these values were directly incorporated in the *Human Rights Act*. I note that the courts in the United States have engaged in similar balancing between prohibited discrimination and fundamental rights such as freedom of association and expression. This, however, is more germane to the issue of whether refusal to admit the appellant to membership is itself discriminatory within the meaning of s. 8(a), a matter I shall discuss later.

76 I have found that the only service offered to the public is the offering or providing of the information gathered by the Order. The appellant contends that through the exclusion of women from the Order, the history of the Yukon will consequently be distorted by creating a male bias. To this I reply that forcing a private organization to compile history in a particular way would have serious implications for the freedom of association and of expression of those who join a particular group for that purpose. The very essence of our Canadian society is determined by the diversity which is permitted to flourish. Those who wish to present a different view of history are free to do so. The Order does not purport to provide the definitive history of the Yukon.

77 In furtherance of this last point, I could understand the force of the argument in some contexts, but I do not think the contention squares with the facts agreed upon by the parties. These indicate that the overriding emphasis of the Order in this field is not to provide a general history of the Yukon but rather "preserving the history of the Order and of its members" (item 8(ix)), which it is agreed (item 8(x)), it provides to the public through the Yukon Archives. The Order does collect more general historical items on Yukon history, but the facts do not establish that the exclusion of women from the Order has resulted in a male bias. Two appendices supplied by the respondent Order have led me to this conclusion. Appendix A provides a lengthy bibliography of sources available on women and the history of women in the Yukon. Appendix B is a bibliography of sources made available to the Yukon Archives by the Order. Consistent with the agreed facts, most of the material contained in Appendix B relates to the Order itself. The conclusion I draw from these appendices is as follows: I do not believe the Order is distorting the general history of the Yukon in its exclusion of women from its membership. The facts presented to this Court convince me that the history the Order seeks to collect and preserve is primarily a history of the Order and its members. This again is entirely consistent with the agreed statement of facts.

The Intervener's Position

78 I come now to the intervener's argument that membership in the Order itself constitutes a service offered to the public. That argument, as I understand it, is that the entire spectrum of benefits, opportunities and advantages flowing from membership in the Order constitutes a service offered or provided to the public within the meaning of s. 8(a). I say at the outset that I have no doubt that, in some circumstances, membership as a spectrum of benefits in an organization or club, may constitute a service offered or provided to the public, and thereby require scrutiny of its membership policies under the Act. And this may be so even where the organization is to all appearances private.

79 A determination that membership in a given organization constitutes a service offered or provided to the public must be kept distinct from a determination that the organization itself is public or private; it is not whether the organization is public that determines whether membership in the organization is a service offered to the public, but rather whether the spectrum of benefits constituting

membership is offered to the public. While I have earlier stated that the distinction between a "public" organization and membership that amounts to a service to the public may be obscured in some cases, there are other cases where a seemingly "private" organization offers membership that constitutes a service to the public. Anti-discrimination legislation is intended to ensure equal access to opportunities on the basis of individual merit rather than on the basis of stereotypical assumptions. Courts must be willing to look beyond the seemingly private characteristics of an organization, including its membership policies, to discern whether in reality the organization offers services and opportunities to the public. If an organization's membership does not constitute a service to the public, then it may discriminate on the basis of gender. But once it is determined in light of all the circumstances that membership amounts to a service to the public, discrimination on the basis of gender will fall within the prohibition under the Act. I repeat that selectivity in membership will not insulate an organization from anti-discrimination legislation if membership is found to constitute a service offered to the public.

80 On the facts before me, however, I am of the view that the spectrum of benefits constituting membership in the Order does not amount to a service offered or provided to the public. A review of the benefits that adhere to members in this case reveals that membership does not give rise to a public relationship. I shall now attempt to demonstrate this by reference to the criteria earlier identified as providing assistance in determining whether a public relationship has been established.

81 I first note that since the early 1900s, the primary objects of the Order have been "social, historical and cultural with its paramount concern being the welfare and well being of its members". Its primary objects are said to be "the mutual protection of its members and the uniting of those members in the strong tie of brotherhood". Thus, the primary objects of the membership are to preserve and protect the welfare and well-being of its members. Furthermore, it is agreed that "[t]he Order is dedicated to preserving the history of the Order and of its members", and equally "to preserving the moral values, male camaraderie and mutual respect, traditions and secret rites that were engendered by and formed the fabric of a Klondike brotherhood of the 1890s". What is evidenced by the agreed objects of the Order is that its membership exists to serve its own members, past and present, and to preserve a Klondike brotherhood, founded upon moral values and male camaraderie. That purpose clearly evinces a very private nature. While it may have passed out of

fashion to create and preserve fraternal memberships of this kind, it is quite another thing to prohibit the establishment of gender-based organizations. Borrowing from the language of Brennan J. in *Jaycees*, *supra*, permitting organizations to exercise a degree of discrimination in the selection of their members "reflects the realization that individuals draw much of their emotional enrichment from close ties with others" (p. 619) and recognizes that "certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity" (pp. 618-19).

82 The Order consists of two Lodges, both located in the Yukon Territory. Its membership does not transcend territorial boundaries. Membership policies are selective, in that membership is restricted to men who "have been within the watershed of the Yukon River, and or the Territorial Boundaries of the Yukon Territory within a minimum of twenty accumulative years". There is a genuine selection process set out in the Order's Constitution whereby the name of a person offered for membership must be supported by two members, in writing, at a special meeting called for that purpose, and then be referred to a committee of three Brothers for investigation. The committee submits a written report at the same or at a succeeding meeting, and if the report is favourable, the candidate is initiated.

83 The only activities that involve non-members are the renting out of the Order's premises and the provision of an historical record to the public. Members do participate in two public parades and are involved in the annual "Sourdough Rendezvous", however, these are not activities which the Order organizes and offers to the public, but rather activities which, presumably, are also open to other members of the public. According to the agreed facts, the meetings of the members are exclusively attended by members. During the meetings, members engage in business and rituals of the Order and socialize among themselves in "renewing acquaintances, catching up on news affecting members, social visiting and, in large part, reminiscing about events and members of years gone by". There are two annual social functions for members and their guests.

84 Other benefits, within the spectrum of benefits that accrues to members, are committees established to attend to the welfare and well-being of members. For example, the Sick Committee provides sick visitation, sends cards and flowers, provides information to the membership regarding

the status and progress of members, and attends to the needs of the members and their families. There are also sections of the Dawson City and Whitehorse cemeteries reserved for members and their families, and they are entitled to the Order's special burial ceremonies and rites.

85 The intervener stated that within the spectrum of benefits associated with membership is the public recognition as a "Pioneer" and the inclusion of one's name as a pioneer on important historical records. But what the agreed facts reveal is that one's name as a "Pioneer" is recorded on the Order's roll and that the status as a "Pioneer" that follows the members of the Order is not the status as a pioneer in the generic sense of the word, but is the status associated with the Order itself, as a member of the Yukon Order of Pioneers.

86 The spectrum of benefits associated with membership in the Order does not give rise to a public relationship. What is offered by the Order to its members is an intimate association, an opportunity to socialize in an all male environment and male camaraderie intended to enhance the emotional development of its members. This seems entirely appropriate for a group whose members, as described in the agreed statement of facts, "are gentlemen in the retired and senior citizen age grouping". In contrast to the university in *Berg*, the Order does not purport to represent a diverse membership. Moreover, the Order does not, in essence, exist to further commercial or other such public objects. Quite the opposite, its foremost concern is with the welfare and well-being of its members. In this respect, the membership offered by the Order more closely resembles membership in a familial relationship than membership that is generally offered or provided to the public. The membership offered by the Order is in sharp contrast with services such as restaurants, bars and public utilities, to name a few obvious examples. On the basis of the agreed facts, membership in the Order does not constitute a service offered or provided to the public, within the meaning of s. 8(a).

Section 10(1) of the Act

87 One further point requiring consideration relates to an argument raised by the appellant concerning s. 10(1) of the Act. Section 10(1) provides that "[i]t is not discrimination for a religious, charitable, educational, social, cultural, or athletic organization to give preference to its members or to people the organization exists to serve." Given my finding that the Order is not in breach of s.

8(a), it becomes unnecessary to deal with this provision. Nonetheless, I cannot forbear saying that, given the obvious purposes of the Act, I do not think s. 10(1) was intended to be used as a broad justificatory shield against allegations of discrimination described in s. 8(a). The exempted discrimination I would have thought must be of a kind necessary to the furtherance of the fundamental objects of the organization; see in this context *Brossard (Town) v. Quebec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279. The provision was probably intended to do little more than give expression to our constitutionally guaranteed freedom of association, a freedom that is not to be overlooked in the application of human rights legislation in appeals of this nature.

Section 8(c) of the Act

88 I turn finally to s. 8(c) which, my colleague Justice Iacobucci holds, provides the key to resolving the issue regarding membership. The provision reads:

> **8.** No person shall discriminate
>
> . . .
>
> (c) in connection with any aspect of membership in or representation by any trade union, trade association, occupational association or professional association. . . .

As I understand the argument, s. 8(a), which deals with the provision of services, goods or facilities to the public, does not apply to membership in an organization because that particular issue has been contemplated by the legislature in s. 8(c). This argument was not advanced by counsel either in this Court or the courts below, so we did not have the benefit of their views. At all events, with respect, I cannot accept this argument. Its general effect is to give a restrictive interpretation to an Act which the jurisprudence of this Court tells us should be liberally construed.

89 It seems to me that s. 8 is intended to prohibit any of the forms of discrimination set forth in s. 8, whether in the provision of services (s. 8(a)), in connection with employment (s. 8(b)), membership in certain occupations (s. 8(c)), and so on. The clauses are complementary and supportive of one another and of the goal of prohibiting discrimination. They were never intended to be construed as exclusive logic-tight compartments. There may be overlap, and I cannot see how one can say that discriminatory conduct that fairly falls within one category can be excluded from that category

simply because another category deals with other activities that may bear on the same matter. That, to me, does not accord with the ordinary rules for the interpretation of statutes, let alone a human rights statute which my colleague agrees should be generously interpreted.

90 My colleague Iacobucci J. states that "the legislature has turned its mind to the question of membership as a category of prohibited discrimination" (para. 12 (emphasis in original)). To me, the mention of "membership" in s. 8(c) does not disclose an intention to deal with membership generally. Rather, it covers a narrower category of situations. I agree with my colleague, as is evident from my previous discussion, that, however generously one may interpret the statute, one cannot rewrite it so as to cover situations other than those for which it provides. Now s. 8(c) deals only with a specific group of associations, i.e., trade unions, trade associations, occupational associations and professional associations. One can give a generous interpretation to each of these categories but at the end of the day, s. 8(c) sets forth an exhaustive list to which it is not within the province of the courts to add.

91 There are good reasons to set forth a list such as that which appears in s. 8(c). They comprise organizations which the legislature (quite rightly in my view) perceives to be rendering services to the public, and consequently should be free of discrimination. That is not so of many groups which, like the respondent Order, are of an essentially private character where the choice of members falls within the protection accorded by our freedom of association. Yet, as I have attempted to elucidate earlier, membership in apparently private organizations may, on appropriate facts, constitute a service to the public, and so fall within the compass of s. 8(a). These, it is not possible for the legislature to identify, as it did in the case of the organizations described in s. 8(c). This must necessarily be done by the courts weighing the competing values already identified in the course of ascertaining whether the service provided by the organization is essentially public or private.

92 I have a further concern about my colleague's approach. In attempting to refute the argument that his reliance on s. 8(c) only would exempt all but the enumerated organizations, he contemplates a large and liberal interpretation of s. 8(c) whereby other organizations close to the purely economic end of the spectrum may be caught by this provision. Apart from the fact, as I noted, that s. 8(c) is not so drafted as to permit additions to the listed categories, it is far from clear that s. 8(c) purports to

distinguish between economic and social organizations, and if this were so what criteria would be used to distinguish between them. Furthermore, the spectrum envisioned by Iacobucci J., flowing from the purely economic at one end to the purely social at the other end, is unsatisfactory. Thus I would gather that s. 8(c) would not comprise universities since refusal of admission to universities on the basis of a prohibited ground of discrimination would involve discrimination in rendering the services provided by the university, which, on the basis of the reasoning in *Berg*, *supra*, would appear to be covered by s. 8(a). Other organizations would undoubtedly give rise to similar difficulties. To divorce membership and services in the manner proposed seems to me to be highly artificial.

93 The unsatisfactory character of the distinction between economic and social activities is particularly evident when applied to organizations like the Order. If, for example, membership in the Order conferred services to the public, the organization would still remain essentially social rather than economic in nature and therefore would not be caught by s. 8(c), despite the fact that it offered services to the public. Ultimately, this is too restrictive. It would exclude from the purview of the Act membership in many social, service and even recreational organizations which on close examination really constitutes a service to the public. It is best to consider the relevant service to determine if it is offered to the public, as opposed to the nature of the organization. This focuses debate on the relevant competing values I have already mentioned.

Conclusions and Disposition

94 I conclude that the Order has not engaged in prohibited discrimination within the meaning of s. 8(a) in its exclusion of the appellant and women in general from its membership. The Order's collection and recording of a Yukon history does not constitute services offered or provided to the public. Membership in the Order, as a spectrum of benefits offered to members by the Order, does not give rise to a public relationship and therefore falls outside of the scope of s. 8(a). This is not the factual matrix within which to find that a seemingly private organization offers a service to the public by way of its membership.

95 I would dismiss this appeal with costs.

The following are the reasons delivered by

96 L'HEUREUX-DUBÉ J. (dissenting) -- There are two main points of contention in this appeal. The first of these relates to whether the discrimination practised by the Yukon Order of Pioneers, Dawson Lodge Number 1 (the "Lodge") is prohibited by s. 8(a) of the *Human Rights Act*, R.S.Y. 1986 (Supp.), c. 11 (the "Act"). The second point arises only if s. 8 has been violated, and concerns the interpretation and application of the exemption in s. 10(1) of the Act. The Board of Adjudication (the "Board") decided both points against the Lodge (1989), 10 C.H.R.R. D/5812, and the task of this Court is to determine whether the Board's decision was properly reversed by the Supreme Court of the Yukon Territory (1991), 14 C.H.R.R. D/176, 87 D.L.R. (4th) 618, and the Court of Appeal for the Yukon Territory (1993), 18 C.H.R.R. D/347, 100 D.L.R. (4th) 596, 79 B.C.L.R. (2d) 14.

97 There is no dispute as to the facts, which have been fully recited by my colleague La Forest J. On September 2, 1987, the appellant, Madeleine Gould formally applied for membership in the Lodge. Her application was rejected, and, for the purposes of the litigation, the parties have agreed to assume that Mrs. Gould was refused membership solely because of her sex. Indeed, the Lodge makes no secret of its policy of denying membership to women.

98 Nor has the Lodge attempted to argue before this Court that its policy does not effect "discrimination" within the meaning of s. 6 of the Act. That provision defines discrimination as follows:

> **6.** It is discrimination to treat any individual or group unfavourably on any of the following grounds:
>
> ...
>
> (f) sex, including pregnancy, and pregnancy related conditions. . . .

The Lodge's membership policy clearly accords unfavourable treatment to women on the ground of their sex and, consequently, falls squarely within the definition of discrimination in s. 6 of the Act. Indeed, it is difficult to conceive of a more blatant example of sex-based discrimination.

99 However, the Lodge contends that this discrimination escapes the prohibitions contained in

the Yukon's anti-discrimination statute. In particular, the Lodge disputes the Board's conclusion that the discrimination contravenes s. 8(a) of the Act, which reads as follows:

> **8.** No person shall discriminate
>
> (a) when offering or providing services, goods, or facilities to the public. . . .

100 Central to the Board's conclusion are its findings that the Lodge was involved in the collection, preservation and publication of historical materials relating to the Yukon, that these activities constituted the provision of a service to the public, and that the quality of the service was adversely affected by the exclusion of women from membership in the Lodge. As a result, my colleague La Forest J. approaches this appeal by asking whether the publication of a distorted historical record, or a record created without the input of women, can be discrimination in the provision of a service to the public. He argues that anti-discrimination statutes could not have been intended to require balance in the content of such records, and concludes that the Board's decision was in error.

101 With great respect, I believe that my colleague's argument rests on a mistaken understanding of the Board's approach. It is important to remember that the Board did not find that the publication of a distorted or one-sided historical record was discrimination. Rather, the discrimination consisted of the exclusion of women from membership. The Lodge's historical activities only became relevant when the Board turned its mind to the next question, which was whether this discrimination occurred when the Lodge was providing services to the public. To the Board, since the discrimination had an impact on the historical record created by the Lodge and made available to the public, there was a nexus between the exclusion of women from membership and the provision of services to the public: the discrimination could be said to occur when the Lodge was providing services to the public. In my opinion, this approach is one which the Board was entitled to take and, in consequence, the Board's conclusion that s. 8 was violated cannot be impugned.

102 The respondents also take issue with the Board's determination that the Lodge is not protected by s. 10(1), which provides:

> **10.** (1) It is not discrimination for a religious, charitable, educational, social, cultural, or athletic organization to give preference to its members or to people the organization exists to serve.

In my view, there was no basis on which the learned judge of the Supreme Court of the Yukon Territory could interfere with the Board's interpretation of s. 10(1) or its application of the provision.

103 Before engaging in a more detailed analysis of the Board's interpretation and application of ss. 8 and 10(1) of the Act, it is necessary to address two preliminary matters concerning the approach to be taken in reviewing the findings of the Board. The first is a matter of administrative law, and relates to the standard of review that should have been applied in the courts below. The second matter relates to the rules of statutory construction and, more particularly, to the principles applicable to the interpretation of human rights legislation.

I. Standard of Review

104 It has been a constant in the jurisprudence of this Court, particularly since our decision in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, that where the legislature has conferred a specialized jurisdiction on an administrative tribunal, the expertise of the tribunal or board in question must be respected. This is true even if the board's decisions are not protected by a privative clause: *Volvo Canada Ltd. v. U.A.W., Local 720*, [1980] 1 S.C.R. 178, at p. 214; *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at p. 339, *per* Sopinka J. See also *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at p. 598, *per* L'Heureux-Dubé J. The principle of curial deference to expert administrative tribunals applies not only to findings of fact, but also to findings of law within the tribunal's expertise: *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at p. 590, *per* Iacobucci J.

105 There exists a spectrum of standards of review, and the threshold for intervention ranges from simple error to patent unreasonableness. At its most deferential, the test limits judicial review to excesses of jurisdiction or to errors that are clearly irrational. Dickson J. (as he then was) stated the test as follows, in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, at p. 237:

> Did the Board here so misinterpret the provisions of the Act as to embark on an inquiry or answer a question not remitted to it? Put another way, was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?

In *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, Cory J. stated (at pp. 963-64):

> It is said that it is difficult to know what "patently unreasonable" means. What is patently unreasonable to one judge may be eminently reasonable to another. Yet any test can only be defined by words, the building blocks of all reasons. Obviously, the patently unreasonable test sets a high standard of review. In the Shorter Oxford English Dictionary "patently", an adverb, is defined as "openly, evidently, clearly". "Unreasonable" is defined as "(n)ot having the faculty of reason; irrational. . . . Not acting in accordance with reason or good sense". Thus, based on the dictionary definition of the words "patently unreasonable", it is apparent that if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said that there was a loss of jurisdiction. This is clearly a very strict test.

See also *Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525, at p. 554, *per* L'Heureux-Dubé J.; *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157.

106 It is evident that not every decision of an administrative tribunal is entitled to the same degree of deference. In determining the appropriate standard of review, the essential task is to ascertain the intention of the legislature in conferring jurisdiction on the particular administrative tribunal: *United Brotherhood*, *supra*, at p. 332; *Pezim*, *supra*, at pp. 589-90. To ascertain legislative intent in this context, a pragmatic and functional approach was developed by Beetz J. in *Bibeault*, *supra*. Under this approach, the main considerations are: (1) the wording of the statute; (2) the purpose of the statute and the role of the tribunal in carrying out this purpose; and (3) the nature of the problem before the tribunal.

A. *Wording of the Statute*

107 The words chosen by the legislature can be particularly helpful if the legislature has given an express indication of the intended scope of review. For example, the existence of a privative clause is a clear signal to courts of the legislature's intent that the decisions of the board not be interfered with: see *New Brunswick Liquor Corp.*, *supra*, at p. 235, *per* Dickson J.; *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983, at p. 1003, *per* La Forest J.; *Pezim*, *supra*, at p. 590, *per* Iacobucci J. Depending on the wording of the clause, it may be found to have "less privative effect": *Dayco (Canada) Ltd. v. CAW-Canada*, [1993] 2 S.C.R. 230, at pp. 264-65, *per* La Forest J. At the other end

of the spectrum, if the statute contains a right of appeal and, in addition, invites the appellate court to substitute its opinion for that of the board, a court is much less likely to show deference to the findings of the board. Ontario's human rights legislation, for instance, contains such a provision, with the result that findings of law by an Ontario Board of Inquiry are normally reviewed according to a standard of correctness: *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321; *Large v. Stratford (City)*, [1995] 3 S.C.R. 733.

B. *Purpose of the Statute and Role of the Tribunal*

108 Part of the rationale for curial deference is that, in our society, the legislature relies on the expertise of administrative tribunals to give effect to its policies. In *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, at pp. 1336-37, Wilson J. quoted the following passage from Evans et al., *Administrative Law* (3rd ed. 1989):

> In administrative law, judges have also been increasingly willing to concede that the specialist tribunal to which the legislature entrusted primary responsibility for the administration of a particular programme is often better equipped than a reviewing court to resolve the ambiguities and fill the voids in the statutory language. Interpreting a statute in a way that promotes effective public policy and administration may depend more upon the understanding and insights of the front-line agency than the limited knowledge, detachment, and modes of reasoning typically associated with courts of law. [Emphasis added by Wilson J.]

See also *New Brunswick Liquor Corp.*, *supra*, at p. 236. The more specialized the tribunal, and the more important its expertise to the realization of the legislative purpose, the more deferential should be the court's attitude in reviewing the tribunal's decisions.

C. *Nature of the Question*

109 If the ground on which the tribunal's decision is impugned is an alleged error of fact, a court will usually be very reluctant to interfere with the tribunal's finding: see *Zurich Insurance*, *supra*; *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353; *Stratford*, *supra*, at p. 754, *per* L'Heureux-Dubé J. Similar deference should be shown where it is alleged that an error was committed in the application of the law to the facts. In such cases, it may not be possible to extract a question of law from the facts of the case so as to verify the treatment given to it by the tribunal without interfering with findings of fact: see *Mossop*, *supra*, at p. 577, *per* Lamer C.J., adopting the

comments of Marceau J.A. ([1991] 1 F.C. 18, at pp. 31-32). Moreover, even if a finding of law can be isolated, it should not lightly be overturned if it raises technical or policy questions falling squarely within the tribunal's special expertise: *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103, at p. 1151, *per* L'Heureux-Dubé J. It is only on "general questions of law", which fall outside the area of expertise of the tribunal, that no deference will be warranted: *Berg*, *supra*, at p. 369, *per* Lamer C.J.; *Pezim*, *supra*, at p. 590, *per* Iacobucci J.

D. *Application to the Yukon Act*

110 My colleague La Forest J. is of the view that this appeal involves a "general question of law" and that the standard of review, as it was in *Mossop* and *Berg*, is one of correctness (para. 48). In my opinion, however, the Lodge's challenge to the Board's decision is not based on "general questions of law".

111 On the contrary, the impugned findings are primarily factual in nature. For example, in its analysis under s. 8(a), the Board found that the Lodge's discriminatory membership policy had an impact on the quality of the historical record it created, maintained, and made available to the public. Under s. 10(1), the Board found that the Lodge was not a group devoted to the promotion of the interests and well-being of an identifiable group. These findings must not be overturned unless they are not reasonably supportable on the evidence. Moreover, although the meaning of the phrase "service to the public" is an ordinary question of law on which no deference is warranted (*Berg*), the Board's finding that the Lodge's activities fell within this definition involves the application of the law to the facts. My colleague La Forest J. notes in his reasons that the proper approach to this exercise is "to identify the service in question, and then to determine whether that service gives rise to a public relationship between the service provider and the service user" (para. 58). These are essentially factual inquiries, and my colleague is surely correct in his further observation that "[u]ltimately, the determination must turn on the facts placed before the court in a given case" (para. 59).

112 One might attempt to isolate findings of law on which to challenge the Board's decision. For example, the Board's conclusion on s. 8(a) is based on a particular view of what nexus is sufficient in

order to establish that discrimination occurred "when" services were being provided to the public. It might be alleged that the Board's approach reflects an erroneous construction of s. 8(a). However, to the extent that it is possible to isolate the Board's "finding" on the legal issue of what nexus is sufficient, the issue raises considerations of human rights policy which preclude its classification as a general question of law. I still hold the view, which I first expressed in *Mossop*, *supra*, that a human rights tribunal is generally entitled to curial deference on matters relating to the interpretation of its own statute.

113 Turning to the other elements of the approach set out in *Bibeault*, I observe that human rights legislation has, as one of its main purposes, the creation of a comprehensive scheme for the enforcement of human rights: see *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181, at p. 194, *per* Laskin C.J. for the Court. In order to carry out this purpose, the Act establishes a specialist tribunal whose task it is to adjudicate human rights complaints and interpret the Act. I can do no better than to adopt the words expressed to this effect by the Yukon Minister of Justice, the Honourable Roger Kimmerly:

> The purpose of this legislation is to set up a commission and a board of adjudication that has a specific expertise and interest in human rights. It is in the public interest that that board decides the question. It has long been established that that is a better procedure than the formal courts. [Emphasis added.]

(Yukon Hansard, February 12, 1987, at p. 715.)

114 In *Dickason*, *supra*, I acknowledged that human rights boards are perhaps less specialized than some other administrative tribunals, notably labour relations boards: p. 1148. Nevertheless, it was intended by the legislature that the Board be composed of adjudicators having expertise and an acute understanding of human rights issues. At page 1151 in *Dickason* I wrote:

> The mandate of members of the Human Rights Commission, who preside over hearings, is always the interpretation and application of the [Alberta *Individual's Rights Protection Act*], which necessarily involves the adjudication of policy issues and the consideration of social fact evidence. The findings of the Board on social evidence must be accorded some deference to the extent that they fall within the realm of its specific and primary mandate under the *IRPA*. These findings, not being protected by a privative clause under the *IRPA*, may be afforded less deference than findings of an administrative tribunal which has the protection of a privative clause. This, however, is only an issue of degree.

In my view, the same observations apply to the Board's mandate in relation to the Yukon Act.

115 Finally, I note that there is a statutory right of appeal from a decision of the Board on questions of law. However, this right is expressed in terms more limited than those used in Ontario's human rights legislation, in that the court is not authorized to substitute its opinion for that of the Board. Nor is there any right of appeal on questions of fact.

116 The absence of any right of appeal on questions of fact is of great significance, given the essentially factual nature of the impugned findings of the Board. My colleague Iacobucci J. points out that the Board's factual findings are not based on *viva voce* evidence, and concludes that the deference owed to the Board's findings is "significantly attenuated" (para. 4). In reality, however, where an appeal is limited to questions of law, it is well established that an appellate court has no power to overturn findings of fact unless they are so unreasonable that the Board must have misdirected itself as to the law. This principle applies regardless of whether the findings are based on *viva voce* or documentary evidence. It applies even if the findings are inferred from primary facts not in dispute: *Edwards v. Bairstow*, [1956] A.C. 14 (H.L.), and *R. v. Lampard*, [1968] 2 O.R. 470 (C.A.), at p. 477. The case cited by Iacobucci J. in support of his argument has no application here, since the right of appeal in that case was not restricted to questions of law: *Workmen's Compensation Board v. Greer*, [1975] 1 S.C.R. 347.

117 Many essential facts are in dispute in this case. For instance, the parties' statement does not indicate any consensus on what part of the Lodge's historical activities is included in the services it offers to the public. Nor did the parties agree on the weight to be given to the documentary evidence submitted by the Yukon Status of Women Council. The resolution of these and other factual issues falls squarely within the Board's specialized mandate, and it is clear from the legislation that an appellate court has no jurisdiction to overturn the Board's findings of fact unless they are so unreasonable as to amount to an error of law.

118 For these reasons, I conclude that the Court should show deference to the Board's findings. The standard of review should be most deferential to findings which are purely factual or where the factual and legal elements are inseparable, for example in the application of the law to the facts. At the same time, some deference must be shown to the Board's findings on legal questions which raise

policy concerns within the Board's special mandate. On such questions, if the statute is reasonably capable of supporting the Board's interpretation, this Court should not overturn the Board simply because there is some other reading that this Court prefers.

II. Principles Applicable to the Interpretation of Human Rights Legislation

119 The review of a human rights tribunal's interpretation of anti-discrimination legislation must also be guided by the principles that this Court has developed to take account of the special nature of such legislation. It was the current Chief Justice who first articulated the basic attitude to be taken towards the interpretation of human rights legislation. In *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145, at p. 158, Lamer J. (as he then was) made it clear that a human rights code "is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law".

120 The special nature of human rights legislation has remained axiomatic in this Court's approach to the interpretation of human rights legislation. For example, in *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, at p. 89, La Forest J. explained that, by reason of its quasi-constitutional nature, human rights legislation should be interpreted generously so as to advance its broad purposes:

> As McIntyre J., speaking for this Court, recently explained in *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, the Act must be so interpreted as to advance the broad policy considerations underlying it. That task should not be approached in a niggardly fashion but in a manner befitting the special nature of the legislation, which he described as "not quite constitutional"....

121 There is no doubt as to the broad purposes underlying the Yukon *Human Rights Act*. The legislative objects are made explicit in s. 1(1) of the Act:

> **1.** (1) The objects of this Act are
>
> (a) to further in the Yukon the public policy that every individual is free and equal in dignity and rights,
>
> (b) to discourage and eliminate discrimination,
>
> (c) to promote recognition of the inherent dignity and worth and of the equal and inalienable rights of all members of the human family, these being principles underlying the *Canadian Charter of Rights and Freedoms* and the *Universal Declaration of Human Rights* and other solemn undertakings, international and national, which Canada honours.

According to well-known principles of interpretation, the Act should be given such fair, large and liberal interpretation as will best ensure the attainment of these objects. See *Interpretation Act*, R.S.Y. 1986, c. 93, s. 10; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R.

1114, *per* Dickson C.J.; *Robichaud*, *supra*, at p. 90, *per* La Forest J.; *Berg, supra*, at p. 370, *per* Lamer C.J.; *Zurich Insurance*, *supra*, at p. 339, *per* Sopinka J., and at pp. 358-59, *per* L'Heureux-Dubé J.; *Mossop*, *supra*, at pp. 611-15, *per* L'Heureux-Dubé J.

122 Part and parcel of the purposive method of interpretation of human rights legislation is the rejection of a strict grammatical approach. In *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, McIntyre J. held, on behalf of a unanimous Court (at pp. 546-47):

> It is not, in my view, a sound approach to say that according to established rules of construction no broader meaning can be given to the Code than the narrowest interpretation of the words employed.

Neither human rights tribunals nor the courts should "inspect these statutes with a microscope, but should, as mentioned above, give them a full, large and liberal meaning consistent with their favoured status in the lexicon of Canadian legislation": *Canada (Attorney General) v. Rosin*, [1991] 1 F.C. 391, at p. 401, *per* Linden J.A., quoted with approval by Lamer C.J. in *Berg*, *supra*, at p. 373. See also *Mossop*, *supra*, at pp. 613-14, *per* L'Heureux-Dubé J.

123 I acknowledge, of course, that the words of the statutory provision act as a constraint upon the interpretative exercise. However, since the wording of a particular provision will almost always be susceptible of numerous interpretations, a purely textual analysis will rarely allow the meaning of the provision to be discerned with any useful precision. For example, although it is obvious that s. 8(a) has as its purpose the prohibition of discrimination when goods, services and facilities are being offered or provided to the public, this observation is unhelpful as it is merely a restatement of the text of the provision. We cannot know exactly what the purpose and scope of s. 8(a) are, until we have determined what is meant by "services", "public", and the other terms that appear in the provision. The process of selecting a meaning for these terms must be guided by the overall purpose of the Act and of human rights legislation generally.

124 These are the principles that must govern those who are charged with interpreting and applying human rights legislation in Canada. They also have important implications for courts reviewing the decisions of human rights tribunals. The essential question for a reviewing court is whether the tribunal's decision is based on an interpretation of the relevant provisions that is

defensible in light of the aforementioned principles. The interpretation must, on the one hand, be large and liberal so as to advance the overall purpose of the statute. On the other hand, it must be rationally supportable on the wording of the particular provision and the other admissible evidence of the legislature's purpose in enacting the provision. Where the tribunal's interpretation meets these criteria, the reviewing court should not intervene.

125 Having outlined the basic principles to be applied in reviewing the decision of the Board, I will now turn to the central issue in this appeal, which is whether the Board's decision was rightly overturned by the Territorial Supreme Court and the Court of Appeal. The Board's findings in relation to the prohibition clause (s. 8(a)) and the exemption clause (s. 10(1)) will be discussed in turn.

III. The Prohibition Clause: Section 8(a)

126 I cannot emphasize enough that the Board's decision does not rest on any finding that the presentation of a distorted historical record, or a record prepared without the input of women, is discrimination against women. The Board did not make any such finding. It is plain and obvious that the Lodge discriminates against women — by excluding them from membership. The Lodge's activities, including its activities in producing the historical record, are simply the context in which this discrimination occurs. The question for the Board was whether, in light of the Lodge's activities and the other circumstances, the discrimination could be said to occur when the Lodge was providing services to the public.

127 The Board's resolution of this issue was developed in two parts. First, the Board held that the Lodge provides services to the public, by collecting and preserving materials relating to the history of the Yukon and making them available to the public. Second, the Board found that discrimination occurred when services were provided to the public, because the exclusion of women from membership had an impact on the quality of the historical record created and maintained by the Lodge. The task for this Court is to determine whether the Board's conclusions were open to it.

A. *Providing Services to the Public*

128 As I have observed, the Board's finding that the Lodge provides services to the public, by collecting and preserving the history of the Yukon and making it available to the public, has legal and factual elements. The meaning of the expression "providing services ... to the public", as used in s. 8(a), is a general legal question: *Berg*, *supra*. However, the question whether the Lodge engages in such an activity involves the application of the law to the facts.

1. The Law

129 It has been stated that the purpose of s. 8(a) and analogous provisions in the human rights legislation of other jurisdictions is "to forbid discrimination by enterprises which purport to serve the public": *Rosin*, *supra*, at p. 398. However, as I have explained, this observation does not advance the analysis very much, as it does little more than restate the text of the provision. It does not assist us in interpreting the crucial elements of s. 8(a), including the terms "service" and "public".

130 Dictionary entries, while far from conclusive, may be of some assistance in this regard: the various commonly understood meanings for the words chosen by the legislature can be a starting point for the interpretative analysis. For example, the *Concise Oxford Dictionary* (8th ed. 1990) defines a "service" to include assistance or a benefit given to someone, or the act of helping or doing work for another or for a community. *Le Nouveau Petit Robert* (1993) provides a slightly different definition for "*service*", which encompasses economic activities, other than the supply of tangible property, as well as functions having a "common or public" utility. These definitions suggest that the expression "providing services" has a broad meaning which encompasses activities in which a benefit other than a good is conferred on, or effort expended on behalf of another person or a community.

131 Some courts have attached a restrictive meaning to the word "services", as a result of the comments of Martland J. in *Gay Alliance Toward Equality v. Vancouver Sun*, [1979] 2 S.C.R. 435, at p. 455:

> "Accommodation" refers to such matters as accommodation in hotels, inns and motels. "Service" refers to such matters as restaurants, bars, taverns, service stations, public transportation and public utilities. "Facility" refers to such matters as public parks and recreational facilities. These are all items "customarily available to the public". It is matters such as these which have been dealt with in American case law on the subject of civil rights. [Emphasis added.]

See for example *Re Jenkins and Workers' Compensation Board of Prince Edward Island* (1986), 31 D.L.R. (4th) 536 (P.E.I.S.C., App. Div.), at p. 545; *Re Winnipeg School Division No. 1 and MacArthur* (1982), 133 D.L.R. (3d) 305 (Man. Q.B.), at pp. 310-15; *Re Ontario Human Rights Commission and Ontario Rural Softball Association* (1979), 26 O.R. (2d) 134 (C.A.), at pp. 153-55, *per* Houlden J.A., concurring.

132 However, in light of subsequent decisions of this and other courts, *Gay Alliance* should not be read as requiring "services" to be analogous to those listed in that case. As Wilson J.A. said in *Ontario Rural Softball Association* in dissent (at p. 142):

> I do not think therefore that it would be appropriate to refine too much on Mr. Justice Martland's illustrations. I think the learned Justice refers to them because of their historic significance in the development of the law in this area. I do not think he should be taken to have suggested that the categories of accommodation, services and facilities covered by the British Columbia section are closed.

For example, in *Berg*, *supra*, the Court proceeded on the basis that the provision of a building key and rating sheet to graduate students was a service within the meaning of the B.C. statute. In *Heerspink*, *supra*, at p. 159, Lamer J. said in concurring reasons that insurance is a service. See also *Peters v. University Hospital Board* (1983), 23 Sask. R. 123 (C.A.), at p. 141, *per* Bayda C.J.S.

133 As for the requirement that the service be provided to the public, this Court has adopted a "relational approach", which requires the Court to examine the relationship between the provider and user of the service for the purpose of characterizing it as either public or private. In *Berg*, *supra*, at p. 384, the Court stated:

> [I]n determining which activities of the School are covered by the Act, one must take a principled approach which looks to the relationship created between the service or facility provider and the service or facility user by the particular service or facility. Some services or facilities will create public relationships between the School's representatives and its students, while other services or facilities may establish only private relationships between the same individuals. [Emphasis in original.]

We held in *Berg* that it is not necessary for a service to be available to the public "at large" in order for it to create a public relationship between the provider and users of the service. I hasten to add, however, that if a service is provided to members of the public at large, the relationship between the provider and the users is necessarily public.

134 Ultimately, there is no need to take a parsimonious approach to the interpretation of the notion of "providing services to the public". It is true that discrimination is not prohibited in the Yukon if it does not occur in one of the contexts listed in s. 8. However, in interpreting the terms used in s. 8 and ascribing a purpose to the particular prohibitions listed in that section, it must be remembered that the broad legislative objects of the Act are to eradicate discrimination and further the recognition of the equality and inherent dignity of every human being. I therefore agree with La Forest J. that a "broad range of activities . . . may constitute services generally available, or offered to the public" (para. 59).

2. Application to the Facts

135 My colleague La Forest J. notes that "the correct approach is to identify the service in question, and then to determine whether that service gives rise to a public relationship between the service provider and the service user" (para. 58). I agree, and would add only that this task, being essentially factual, is within the exclusive purview of the Board. In reviewing the Board's conclusions, this Court must not intervene unless the Board's decision is not reasonably supportable on the evidence.

136 The Board concluded that the Lodge's historical activities amounted to providing a service to the public. The record supports this finding, since the Board could reasonably conclude that the Lodge's activities involving the collection, preservation and publication of the history of the Yukon represent work done for the benefit of members of the public at large.

137 My colleagues attempt to divide the Lodge's activities into two services: the distribution of historical data, which does create a public relationship, and its collection or preservation, which does not. However, the Board, as trier of fact, was entitled to adopt a holistic view of the services offered by the Lodge. To the Board, the historical activities undertaken by the Lodge behind the scenes are not separate from the simple act of making the material available to the public. This view has much to recommend it. Since services are by definition intangible, their creation is necessarily part of the service: for example, the creation of financial statements is part of an accounting service, and the drafting of a legal opinion is part of a lawyer's service. Similarly, there is no reason automatically to

sever the preparation of a historical record from its communication to the public. On the contrary, it seems entirely logical to treat the Lodge's historical activities holistically, as a single service.

138 It may be that in describing the service offered by a particular provider, a line must be drawn between activities that are part of the service, and those which are extraneous to it. However, this line-drawing exercise is essentially a determination of fact. Where a right of appeal is restricted to questions of law, as it is in this case, it is clearly established that an appellate court must not interfere with findings of fact unless they are so unreasonable as to amount to an error of law. This is particularly so where the legislature has entrusted the fact-finding exercise to a specialist tribunal with expertise in human rights. In my opinion, the Board's finding that the Lodge provides services to the public, in collecting, preserving and making available to the public a historical record of the Yukon, cannot be described as unreasonable.

B. *Discrimination "When" Providing Services to the Public*

139 Having concluded that the Lodge was engaged in providing services to the public, the Board turned next to the question whether the discrimination it had found -- the exclusion of women from membership in the Lodge -- occurred when the Lodge was so engaged. In other words, the question was whether there was a sufficient nexus between the discriminatory conduct and the provision of services to the public. The Board's determination on this issue should not be overturned unless it was based on a reversible error of law or a patently unreasonable appreciation of the facts.

1. The Law

140 The words selected by the legislature to express the required nexus -- "when", in the English version, and "*relativement à*", in the French version -- do not impose a strict constraint on the Board in terms of the degree of connection that will be necessary before a finding can be made that discrimination has occurred "when offering or providing services . . . to the public". On the contrary, this Court has already had occasion to comment on the extremely broad scope of the expression "*relativement à*". In *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 39, this Court commented that "*relativement à*" was one of four synonymous expressions having the widest scope of any

expression referring to a connection between two subject matters. In response to La Forest J.'s assertion that the French version is ambiguous, I fail to see how it is any less clear than the English version. Both versions, to be sure, are broadly worded. However, breadth should not be mistaken for ambiguity.

141 Moreover, as McLachlin J. suggests, "when" is not confined to a strictly temporal sense (para. 168). The Board, therefore, did not base its decision on any finding that the discrimination and the provision of services to the public occurred at the same moment. Instead, the Board proceeded on the basis that discrimination could be said to occur "when offering or providing services ... to the public" if the discrimination had an impact on the quality of the service. Such an impact would create the required nexus between the discrimination and the provision of services to the public. Because of the broad wording of s. 8(a), I am not persuaded that it should be necessary in all cases to show that discrimination had an impact on the quality of the service. However, I find no error in the proposition that such an impact would create a nexus sufficient to support the conclusion that the discrimination occurred "when offering or providing services ... to the public".

142 It would of course be possible to interpret s. 8(a) as being restricted to situations where there is discrimination as among the potential users of the service. This position is implicit in my colleague La Forest J.'s suggestion (at para. 73) that:

> It seems to me that simply requiring that the historical services supplied to the public be made freely and equally accessible to every individual without discrimination on the prohibited grounds fully conforms with the stated object of the Act "to further in the Yukon the public policy that every individual is free and equal in dignity and rights".

In my view, the purposes of the Act do not mandate such a narrow interpretation of the broad words used in s. 8(a). While La Forest J.'s reading is semantically possible, the Board is justified in favouring a meaning which reflects less, rather than more tolerance for discrimination. The stated purposes of the Act are the advancement of the policy that every individual is free and equal in dignity and in rights, the elimination of discrimination, and the promotion of the recognition of the inherent dignity and equal rights of all human beings. These policy considerations militate in favour of a broader interpretation of s. 8(a) than that proposed by my colleague.

143 La Forest J. suggests that if his interpretation is not adopted, the result would be that "every

time some organization offered, say, food or assistance to members of the public, it would have to involve the public in collecting or preparing these services" (para. 73). I disagree. Nothing in the Board's approach would require any organization to invite the participation of the public. At most, under the Board's approach, an organization might be prevented from engaging in discriminatory conduct in relation to volunteers or suppliers, if such discrimination could be said to occur when the organization is providing services to the public. Such a result would, in my view, be fully consistent with the policy behind the Act.

144 My colleague also argues that the Board's view of s. 8(a) would have a "paralysing effect" on the freedoms of expression and association (at paras. 74 and 76):

> Such an interpretation would require, for example, a religious organization that made a publication available to the public to ensure that the preparation of the publication involve all religious faiths, to ensure a multifarious publication.
>
> ...
>
> [F]orcing a private organization to compile history in a particular way would have serious implications for the freedom of association and of expression of those who join a particular group for that purpose.

Again, I do not agree that the Board's approach would bring about these consequences. In the first place, it must be remembered that nothing in the Board's approach labels as discrimination the dissemination of a publication reflecting a particular point of view. The Lodge's overt policy of excluding women from membership is, in itself, discrimination.

145 In the second place, although prohibiting discrimination will undoubtedly have an effect on the Lodge's expressive activities, religious or expressive conduct can run afoul of s. 8 even under La Forest J.'s approach. For example, a cultural newsletter that chooses to reserve certain kinds of employment to members of the particular cultural community, or a religious organization that offers its worship services only to members of the religion, could be found to engage in discrimination *prima facie* prohibited by s. 8. In short, subject to the exemption and justification provisions, no organization -- whether religious, "private", or other -- that provides services to the public may engage in discriminatory conduct in connection with its service-providing activities. The limitation on freedom entailed by this prohibition is attenuated somewhat by ss. 9 and 10, which, depending on the particular characteristics of the religious or other group, may permit certain discriminatory

practices to be carried out. However, at the end of the day, it is the very nature of an anti-discrimination statute to limit the freedom of those who are in a position to discriminate, in order to protect the equal dignity and rights of potential victims of discrimination.

146 I conclude, therefore, that there is no principle of law requiring the Board to restrict the application of s. 8(a) to situations where the discrimination is directed against potential users of the service. The only test is that articulated in the provision, namely: whether the discrimination occurred "when offering or providing services ... to the public". The Board committed no error, let alone a reversible error, in its interpretation of this test.

2. Application to the Facts

147 The Board's conclusion that the discrimination, consisting of the exclusion of women from membership, occurred when the Lodge was providing services to the public, flows from its finding that the discrimination had an adverse impact on the quality of the services provided by the Lodge to the public. This finding is supportable on the evidence before the Board.

148 The documentary evidence submitted to the Board by the intervener Yukon Status of Women Council suggests that the contribution of women has been neglected in the recording of the history of the Yukon. More significantly, the evidence indicates that women have been left out of the historical record created by the Lodge. For example, a brief to the Board prepared on behalf of the Council describes some of the women whose contributions have been neglected. The brief then continues:

> Today, these women have been all but forgotten, with not even their names recorded. The official Y.O.O.P. historian George Snow must have known many of these women personally, yet never mentions them in accounts of the early years.

The Board acknowledged that this evidence was not entitled to much weight. Nonetheless, applying its common sense to the evidence, the Board inferred that the exclusion of women had an adverse impact on the quality of the services provided by the Lodge. This finding was reasonably open to the Board on the evidence. Moreover, for reasons I have already stated, this was a sufficient basis on which the Board could conclude that the discrimination occurred "when" the Lodge was providing services to the public.

149 My colleague La Forest J. says, in *obiter*, that the "facts do not establish that the exclusion of women from the Order has resulted in a male bias" (para. 77). With respect, it is not the role of this Court to reassess the evidence and substitute its own view of the facts for that of the Board. The evidence before the Board was reasonably capable of supporting the Board's conclusion. Consequently, there is no basis on which this Court can overturn the conclusion.

150 For these reasons, I conclude that this Court cannot interfere with the Board's finding that the Lodge's membership policy violates s. 8(a). The policy is manifestly discriminatory against women, and the Board's finding that this discrimination occurs when the Lodge is providing services to the public is based on a view of the law and the facts which cannot be impeached.

C. *Membership as a Service*

151 An alternative argument, raised by the intervener Council, is that the Lodge is providing services to the public in the form of membership in the Lodge and the privileges attaching to membership. In light of my conclusion on the historical services provided by the Lodge, it is not necessary to address this argument. Moreover, since the Board is charged with the primary responsibility for interpreting and applying the Act, I am reluctant to elaborate a detailed approach to membership policies or to engage in a fact-finding exercise that should more properly be undertaken by the Board. Nevertheless, since my colleagues deal with this issue exhaustively in their reasons, I would make the following general comments.

152 La Forest J. formulates the question as whether the Lodge provides services to the public in the form of the "benefits constituting membership" (para. 79). I agree, of course, that membership can be a service within the meaning of s. 8(a). However, in his review of the "benefits constituting membership", my colleague considers only those which are extrinsic to membership: a visitation service, participation in parades, and special burial privileges. Some of the most significant benefits of membership in the Lodge are therefore excluded from his analysis: public recognition and status as a member of the Yukon Order of Pioneers, and the opportunities to socialize that are available to members. Prestige and opportunities to socialize are intrinsic advantages of membership in an

association and, depending on the characteristics of the association, may be far more valuable than the extrinsic privileges conferred on members. See C. Laframboise and L. West, "The Case of All-Male Clubs: Freedom to Associate or Licence to Discriminate?" (1987-1988), 2 *C.J.W.L.* 335, at p. 337.

153 La Forest J. also argues that the Lodge does not further "commercial or other such public objects" (para. 86). He contrasts membership in the Lodge with the services provided by restaurants, bars and public utilities. However, as I have already stated, s. 8(a) is not limited to commercial services. For example, La Forest J. accepts that the Lodge's gratuitous distribution of its historical materials is a service to the public. In Canada, an immense variety of valuable services is offered to the public, and s. 8(a) is not limited to those which are provided for profit or which are analogous to the services provided by restaurants, bars and public utilities.

154 Instead, what is important is the degree of intimacy of the relationship in which the benefits are provided. In other words, a human rights tribunal must examine the relationship between the club and its potential members, and characterize it as either public or private: see *Berg*, *supra*, at p. 384. The relational approach adopted in *Berg* recognizes the right of individuals to form or maintain private relationships, and to confer benefits on people in the context of such relationships without engaging anti-discrimination laws.

155 In the United States, private relationships are constitutionally protected as a component of liberty:

> The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State.

Roberts v. United States Jaycees, 468 U.S. 609 (1984), at p. 618; see also *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537 (1987), at p. 545. In his opinion on behalf of the Court in *Roberts*, Brennan J. described the kinds of relationships which can be said to be highly personal (at pp. 619-20):

> The personal affiliations that exemplify these considerations, and that therefore suggest some relevant limitations on the relationships that might be entitled to this sort of constitutional protection, are those that attend the creation and sustenance of a family -- marriage, . . . childbirth, . . . the raising and education of children, . . . and cohabitation with one's relatives. . . . Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of

> thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. Among other things, therefore, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship.

It can be seen that very few relationships will be capable of meeting this test of intimacy.

156 It may be tempting to suppose that there are some relationships which are not "public" for the purposes of s. 8(a) even though they are less intimate than the highly personal relationships described in *Roberts*. However, Professor W. P. Marshall, in "Discrimination and the Right of Association" (1986), 81 *N.W.U. L. Rev.* 68, persuasively warns against expanding the notion of private relationships beyond the highly personal affiliations mentioned in *Roberts* (at pp. 82-83):

> The conclusion that a right of intimate association is extremely limited in the context of private organizations is, of course, at odds with occasional suggestions by members of the Court and others that "private" (meaning those not directly serving the general public) organizations are entitled to constitutional protection without further qualification. The "private organization" model, however, is readily dismissible. Although not always articulated as such, its apparent basis rests on a notion of privacy substantially more expansive than the right of intimate association. That expanded notion, however, makes little sense as a method of distinguishing protected from unprotected relationships. For example, if "privacy" is meant in its physical sense, there is certainly nothing private about the Jaycees, Kiwanis, Rotary, or the local country club. Only if the organization were to meet in an individual's home, shielded from public scrutiny, could a true privacy claim be maintained.
>
> A stronger argument might be made in favor of a privacy claim if privacy is understood as meaning autonomy, or the right to make certain important personal choices. Yet from an autonomy standpoint, there is little difference between the desire to join a social group and the desire to select a law or business partner. Even if autonomy is understood as the choice of a personal lifestyle, there is no reason to adopt a general presumption that membership in a private club more clearly reflects this choice than do other unprotected choices.

I respectfully agree with these comments, and conclude that the only affiliations escaping characterization as "public" are highly personal relationships having the features outlined in *Roberts*, *supra*.

157 I am mindful of the fact that, in the United States, certain non-intimate associations may be protected if their purpose is religious or expressive: see *Roberts*, *supra*, at p. 622; *Rotary*, *supra*, at p. 548. Moreover, unlike the American Bill of Rights, both the *Canadian Charter of Rights and Freedoms* and the Yukon Act explicitly recognize the freedom of association. As a result, it may be that some associations which are not so intimate as to be protected as part of individual liberty are nevertheless sheltered in our law from the prohibition against discrimination. However, in

my view, the notion of privacy should not be used as a surrogate for a broader freedom of association: the Act contains other provisions for balancing the right to choose one's associates against the right to be free from discrimination (for example, ss. 9 and 10). Only highly personal relationships of the kind described in *Roberts* should be considered private, for the purposes of s. 8(a).

158 Consequently, in order to determine whether a particular relationship is private, a human rights tribunal should determine whether it has the features outlined in *Roberts*. It should consider factors such as the selectivity, purpose, seclusion and smallness of the group: see *Roberts*, *supra*, at p. 620; *Rotary*, *supra*, at p. 546. Smallness is the least important of the three factors, given this Court's observation in *Berg* that the number of users of a service is a poor indicator of its public or private character (p. 382). By contrast, particular emphasis should be placed on selectivity. The importance of this element was implicitly recognized by this Court in *Berg*, wherein Lamer C.J. pointed out that the relationship between a university and its students did not arise out of a "private selection process" (at p. 387):

> There is nothing in the nature of the student body which suggests that the School and its students have come together as the result of a private selection process based on anything but the admissions criteria, which the School agrees cannot be discriminatory.

159 I wish to emphasize that the expression "private selection process" does not simply refer to eligibility criteria or a discretion on the part of the service-provider. Neither of these elements would remove a relationship from the public sphere: *Berg*, *supra*, at pp. 383 and 390-92. Rather, what is required is a process of personal selection akin to the manner in which one chooses one's friends. Viewed in this way, the sphere of private relationships is very narrow:

> Requiring that certain qualifications or conditions be met does not rob an activity of its public character. The cases have shown that "public" means "that which is not private", leaving outside the scope of the legislation very few activities indeed.

(*Rosin*, *supra*, at p. 398, *per* Linden J.A.)

160 It is with these principles in mind that a human rights tribunal should approach the characterization of a membership relationship as public or private. It seems clear to me that the

Lodge is not sufficiently intimate that the relationship between the Lodge and its potential members can be characterized as private. The membership criteria are relatively unselective and the Lodge has a public image and importance which is inconsistent with a seclusive group. While the membership is quite small, this factor is of lesser importance. Since writing these reasons, I have had the opportunity to read the reasons of my colleague McLachlin J., and I agree with the observations she makes on these points. Moreover, I share my colleague's view that neither the male camaraderie enjoyed by the members of the Lodge, nor the non-commercial nature of the benefits extended to the Lodge's members, bring the Lodge outside of the public sphere. For these reasons, I would be inclined to think that membership in the Lodge is a service provided to the public.

161 However, since the application of the Act is within the jurisdiction and expertise of the Board, I prefer not to decide the appeal on this basis. The Board concluded that s. 8(a) had been violated on the basis that the exclusion of women from membership is discrimination that occurs when the Lodge is providing historical services to the public. As I have already explained, this conclusion was well within the Board's power.

IV. The Exemption Clause: Section 10(1)

162 One further issue remains to be addressed, namely the applicability of s. 10(1) of the Act, which provides:

10. (1) It is not discrimination for a religious, charitable, educational, social, cultural, or athletic organization to give preference to its members or to people the organization exists to serve.

163 In *Brossard (Town) v. Quebec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279, this Court considered the analogous provision of the Quebec *Charter of Human Rights and Freedoms*. On behalf of the Court, Beetz J. described its purpose in the following manner (at p. 335):

As I have said, s. 20 protects the right to associate freely in groups for the purpose of expressing particular views or for engaging in particular pursuits. Section 20 has, however, a limited legislative purpose: it is intended as an answer for "distinctions, exclusions or preferences" which would otherwise be discriminatory under s. 10.

Beetz J. elaborated two criteria that flow from this purpose. First, the group must be one for which the mere fact of associating results in discrimination founded on a prohibited ground. Consequently, the institution

must have, as a primary purpose, the promotion of the interests and welfare of an identifiable group, so as to create a connection between the brand of discrimination practised and the nature of the institution. Second, the distinction, exclusion or preference must be justified in an objective sense by the particular nature of the institution.

164 In the case at bar, the Lodge manifestly fails the first criterion. The record amply supports the Board's conclusion that the Lodge is not dedicated to promoting the interests of an identifiable group. Instead, as the constitutive documents of the Yukon Order of Pioneers declare, the Lodge exists to serve the interests and welfare of the entire population of the Yukon. The Board did not consider the second element of the *Brossard* test, and, indeed, it was not necessary to do so. On the facts before the Board, it was clear that the Lodge was not an organization entitled to the protection of s. 10(1).

V. Conclusions and Disposition

165 The Lodge's policy excluding women from membership is unabashedly discriminatory. The human rights tribunal responsible for interpreting and applying the Act held that this discrimination was prohibited by s. 8(a) of the Act, and that the conduct was not saved by s. 10(1). In reaching these conclusions, the Board did not commit any error that would warrant the intervention of an appellate court. On the contrary, the Board's decision is consistent with the text of the relevant provisions and with the broad policy considerations underlying the Yukon's anti-discrimination statute. Consequently, the Supreme Court of the Yukon Territory and the Yukon Court of Appeal should not have overturned the Board's decision.

166 I would allow the appeal with costs and reinstate the order of the Board of Adjudication.

The following are the reasons delivered by

I. MCLACHLIN J. (dissenting) -- This appeal raises the issue of when clubs or associations may exclude women from membership. The Yukon Order of Pioneers is an all-male association which combines fraternal activities with activities of a more public nature. The issue is whether its

exclusion of women from its membership violates the Yukon *Human Rights Act*, R.S.Y. 1986 (Supp.), c. 11, which precludes discrimination on the basis of sex "when offering or providing services, goods, or facilities to the public": s. 8(a).

II. The first argument is that the Order cannot exclude women from its membership because the Order's collection and distribution of historical material to the public constitutes a service to the public within the meaning of the Act. There is little doubt that the collection and distribution of historical material constitutes a service to the public. The debate rather centers on whether exclusion of women from membership constitutes discrimination in the provision of this service. The Order provides its historical research to anyone who seeks it, male or female. It thus does not discriminate in the provision of this service. The argument thus reduces to the contention that because the Order does not count women among its members when it provides those services, it discriminates on the basis of gender. The issue is this: is "when" in s. 8(a) to be interpreted in the sense of "in the course of" or in a strictly temporal sense? I agree with Justice La Forest that a purely temporal interpretation must be rejected. The aim of the provision is essentially to ensure that those who provide services make those services available to the public generally, without discrimination on the basis of sex or any other prohibited ground.

III. The second argument is that membership itself constitutes a service to the public which s. 8(a) of the Act requires be offered to women as well as men. La Forest J. accepts that membership in an association may constitute a service to the public within s. 8(a), and that this may be so even where the association purports to be private. However, he concludes that the Order of Pioneers has not assumed sufficient public function or character to make membership in it a service provided to the public. With this conclusion I must respectfully differ.

IV. The question, as I see it, is whether the club or association offers its members benefits of such public nature and importance that women as well as men should be eligible to enjoy them. Selectivity, purpose, seclusion and smallness are cited as factors to consider in making this assessment. (See *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and C. Laframboise and L. West, "The Case of All-Male Clubs: Freedom to Associate or Licence to Discriminate?" (1987-1988), 2 *C.J.W.L.* 335.) A very selective or small club, or one that operates in seclusion, is

unlikely to provide any benefit which could be considered public in this sense. Nor is a club or association dedicated to purely private purposes likely to offer a public service. As such, these criteria may usefully serve in determining the ultimate issue of whether the services which the association provides to its members are sufficiently public that women as well as men should be permitted to be members.

V. In my view, membership in the Yukon Order of Pioneers provides sufficient benefits of a public nature and importance that membership itself constitutes a service to the public within the meaning of s. 8(a) of the Act. The Order provides a number of public functions. It collects and preserves the history of the Yukon Territory and its pioneers. It honours those pioneers, in various ways. It endows its members with a special status -- status as themselves being a "modern" pioneer, part of the select society of past pioneers. As Justice L'Heureux-Dubé puts it, "the Lodge has a public image and importance which is inconsistent with a seclusive group" (para. 160). To be a member of the Order is to seek and to gain a respect in the community as a person who may, someday, be counted among the pioneers qualified not only for immediate benefits like participation in documenting pioneer history and public parades, but the ultimate benefit of a special resting place amongst other "pioneers" in the Yukon's public cemeteries. Membership in the Order confers all these public benefits and more. Can it be right then that it is denied to one-half of the Yukon population, its women?

VI. La Forest J. (at para. 85) asserts that the honour and public recognition associated with having one's name on the Order of Pioneers' historical records is not critical to being recognized as a Yukon pioneer, but only to being a member of the Order. With respect, the record suggests otherwise. The Order has assumed an important role in defining the pioneers of the Yukon, and that recognition as a member of the Order and recognition of a person as a Yukon pioneer are largely synonymous in the mind of the public. This is evidenced by the role that the Order of Pioneers has in the public life of the Yukon, representing “pioneers” in general. The Order of Pioneers has reserved burial sites for pioneers in the public cemetery. The Order of Pioneers participates in annual public parades in Whitehorse and Dawson City as the only delegation of pioneers. The Order of Pioneers' Lodge in Dawson City is a tourist attraction because of its historical roots for pioneers. The Order of Pioneers' annual day of celebration, «Discovery Day» was proclaimed a statutory holiday by the territory.

VII. Turning to the criterion of assistance in identifying whether the degree of public function is sufficient to make membership a public service, I acknowledge that the Order is small. But so, it must be remembered, is the community in which it operates. Moreover, the Order's public purpose and persona is large, extending to all pioneers in the Yukon Territory. Apart from gender, the Order is not particularly selective in choosing members. Furthermore, far from operating in private, it has arrogated to itself a prominent public profile. These factors confirm that membership itself may be viewed as a public service.

VIII. My colleague La Forest J. places considerable weight on the male camaraderie and fraternal aspects of the Order. I would not. First, if male camaraderie suffices to render the *Human Rights Act* inapplicable, any organization that excludes women from membership could make a convincing case for the perpetual exclusion of women. Second, in so far as it is asserted that male camaraderie is a sign of privateness, it may be ventured that while close camaraderie may be consistent with privateness, it is hardly its guarantee. Members of public as well as private organizations may enjoy close camaraderie. If the Order were only or even mainly a club devoted to promoting male camaraderie, the *Human Rights Act* could not touch it. It is the fact that the Order has arrogated to itself important public functions and conferred important public status on its members that brings it into the public domain regulated by the Act. In the case at bar, the camaraderie enjoyed by the members flows from the public purpose of the Order. The evidence shows that it is the members' common status and history as pioneers, rather than as men, which forms the common bond between them.

IX. Finally, I must dissociate myself from the suggestion that the non-commercial benefits here at issue are less public or worthy of protection than commercial services, implicit in La Forest J.'s assertion that "[t]he membership offered by the Order is in sharp contrast with services such as restaurants, bars and public utilities, to name a few obvious examples" (para. 86). This Court in *University of British Columbia v. Berg,* [1993] 2 S.C.R. 353, rejected the older *Gay Alliance* jurisprudence which defined "services to the public" in terms of traditionally recognized services such as restaurants, bars or public utilities. We there recognized that discrimination can occur in the provision of a multitude of services, and rejected the notion that the concept should be limited to a few traditionally recognized commercial categories. I would not wish this Court, by use of the old

terminology, to be taken as reneging on the important advance in Canadian human rights law marked by *Berg*.

X. I would allow the appeal and reinstate the order of the Board of Adjudication with costs.

Appeal dismissed with costs, L'HEUREUX-DUBÉ *and* MCLACHLIN JJ. *dissenting.*

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