

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

BETWEEN:

SCOTT WIGNALL

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

DEPARTMENT OF NATIONAL REVENUE (TAXATION)

Respondent

- and -

COUNCIL OF CANADIANS WITH DISABILITIES

Interested Party

REASONS FOR DECISION

T.D. 5/01

2001/06/08

PANEL: Guy A. Chicoine, Chairperson

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I. INTRODUCTION

[1] Scott Wignall was a 22-year-old deaf student attending the University of Manitoba's Social Work Program in the fall term of 1995. The University of Manitoba agreed to provide him with sign language interpreters for classroom lectures during the 1995-96 regular session, free of charge, but also requested that he seek out and exhaust other avenues of funding for these services. Mr. Wignall applied for and received a Special Opportunities Grant for Students with Permanent Disabilities from the Government of Canada in the amount of \$3000.00. These funds were turned over to the University of Manitoba to help defray a portion of the cost of interpreter services. Early in 1996, Mr. Wignall received a T4A Supplementary indicating that he was to include the Special Opportunities Grant on his 1995 income tax return. Mr. Wignall claims that the characterization of this grant by the Respondent, Department of National Revenue (Taxation) (or "Revenue Canada") as a bursary, subject to taxation, is unfair and discriminatory.

II. THE EVIDENCE

A. Background

[2] The factual basis for the claim of discrimination was provided by the Complainant, Scott Wignall, who ably articulated the sequence of events which led to the filing of this complaint. The Council of Canadians with Disabilities was granted Interested Party status and called two witnesses. The first was Frank Thomas Smith who is the National Coordinator of the National Educational Association of Disabled Students (NEADS). This is a consumer organization that represents post-secondary students and graduates with disabilities. The organization conducts research into issues which affect disabled students and graduates and advocates for increased accessibility to post-secondary education in Canada for this group. Mr. Smith provided information about the types of financial assistance available to students with disabilities, the barriers faced by students with disabilities, and the employment prospects for disabled graduates.

[3] The second witness called by the Interested Party was Deborah Stienstra, an Associate Professor in the Department of Political Science at the University of Winnipeg who held the

Royal Bank Research Chair in Disability Studies. She was able to provide expert testimony on the international standards against which the provincial and federal governments in Canada are measured in terms of making education accessible to persons with disabilities.

[4] The Respondent called one witness, Clinton Andrew Rector, a tax policy officer with the Personal Income Tax Division, Tax Policy Branch, in the Department of Finance. Mr. Rector testified about matters pertaining to the Income Tax system in general as well as the specific rules applied in connection with the Special Opportunity Grant in question.

[5] As was stated in the Introduction, Mr. Wignall was a student in the social work program at the University of Manitoba. He was a part-time student as his disability, deafness, made it too difficult to carry a full course load. In the fall of 1995, Mr. Wignall was scheduled to take 4 courses of 3 hours each, which is about 60% of a full course load. Mr. Wignall would require the services of 2 sign language interpreters for all of his classes at a cost of approximately \$35.00 per hour per interpreter. Two interpreters were required because a single interpreter could not work alone for more than 2 hours due to fatigue and occupational stress. The total cost of providing sign language interpreter services for one term would probably exceed \$12,000.00, though the exact amount paid by the University of Manitoba was not put into evidence at the hearing.

[6] The University of Manitoba, through its Disability Services Office, was prepared to provide the services of sign language interpreters to Mr. Wignall at no cost to him. However, as a condition of receiving this service, the University requested Mr. Wignall seek out and exhaust other avenues of funding in order to establish his eligibility for the funding provided by the University.

B. The Grant Application

[7] On May 29, 1995, Mr. Wignall completed an application for a Special Opportunity Grant for Students with Permanent Disabilities on a generic form used for applications under the Canada Student Loan/Manitoba Student Loan programs. Since Mr. Wignall had been out of high school for a minimum of 4 years, he was able to apply as a "Group B" applicant, that is, not dependant on his parents. Mr. Wignall was required to report all sources of income for the pre-study period commencing on May 1, 1995 and the period of study commencing September 1, 1995 to December 31, 1995.

[8] There were a number of declarations at the end of the application form, including one that stated: "I will use any assistance received only for payment of educational and living costs directly related to my course of study; that is, food, shelter, and compulsory costs for tuition, book and supplies. Any assistance is not to be used, for example, to purchase a vehicle or computer or finance a vacation." Another part stated: "I understand that: the first use of any assistance received will be to pay my academic fees."

[9] At the relevant period of time, Human Resources Development Canada (HRDC) advertised that as part of the Canada Student Loan Program, three assistance options were available for

students with permanent disabilities, namely: 1) Canada Student Loan Assistance (for full-time and part-time students); 2) Special Opportunity Grants (for full-time and part-time students); and, 3) Permanent Disability Benefit Loan Forgiveness. The Special Opportunity Grant was a maximum of \$3000.00 per year from the federal government to cover "exceptional education-related costs associated with certain permanent disabilities." The information contained on the HRDC website as at March 1997 (there being no suggestion that Mr. Wignall was aware of this at the time of his application in May of 1995) stated as follows: "To apply for such a grant, you must first complete an application for a full-time or part-time Canada student loan (available from your provincial or territorial authority) to establish your financial needs."

[10] In addition to the above, the HRDC website further stated that the types of disabilities may include deafness and that "exceptional education-related costs" could include the services of a sign interpreter.

[11] Mr. Wignall was awarded the maximum \$3000.00 grant which he promptly transferred to the University of Manitoba to help pay for the costs of classroom sign language interpreting. He did not hold back any portion of these funds for any other purpose and he did not pay the interpreters directly himself as they were paid by the University.

C. Mr. Wignall's Complaint

[12] To his surprise, early in 1996 Mr. Wignall received a T4A - 1995 Supplementary issued by the Government of Manitoba on which was typed: "Manitoba Government Bursary Award" indicating that he had received "other income" of \$3000.00. Mr. Wignall stated that it was only upon completing his 1995 Income Tax Return that he realized the consequence of including the Special Opportunity Grant as personal income. While Mr. Wignall paid no federal or provincial income tax on his 1995 income, the inclusion of the grant reduced a refundable provincial tax credit by the amount of \$25.00.

[13] On March 27, 1996, Mr. Wignall filed a complaint with the Canadian Human Rights Commission claiming that Revenue Canada had discriminated against him in the provision of services because of his disability contrary to section 5 of the *Canadian Human Rights Act*. His complaint form states: "The Respondent has classified this grant as a bursary and, as a consequence, it is taxable. I believe that because this grant merely helps me to deal with my disability, rather than providing me with any actual benefit, subjecting it to taxation is unfair and discriminatory."

[14] Concurrently with the filing of the human rights complaint, Mr. Wignall wrote letters to various people and organizations concerning the tax treatment of the Special Opportunity Grant. He also made a presentation to the Federal Task Force on Disability Issues chaired by Member of Parliament Andy Scott who issued a report on October 21, 1996, entitled "Equal Citizenship for Canadians with Disabilities - The Will to Act" (the Scott Task Force Report). The issue which Mr. Wignall complained of was dealt with directly in the report. Recommendation 41 states that "the Government of Canada should recognize that measures that deal with the costs of

disability need to be separated from measures that provide income to persons with disabilities." It also referred to anomalies in the tax system and suggested certain principles be applied which would recognize the additional costs of disability. Recommendation 50 of the report states: "The Government of Canada should not treat Special Opportunity Grants for students with disabilities under the Canada Student Loan Program as taxable income."

D. Revenue Canada's Response

[15] Revenue Canada addressed the complaint made by Mr. Wignall to the Canadian Human Rights Commission. As far as Revenue Canada was concerned, the Special Opportunity Grant was being treated for tax purposes in the same fashion as any other scholarship or bursary. Interpretation Bulletin IT75R3 dated October 4, 1993, in paragraph 1 states that paragraph 56 (1) (n) of the *Income Tax Act* generally includes in income all but the first \$500.00 of the total of all amounts received in the year as of or on account of a scholarship, fellowship, bursary or prize for achievement in the taxpayer's field of endeavour. Paragraph 5 of the Bulletin defines scholarships and bursaries as amounts paid or benefits given to students to enable them to pursue their education. The bulletin goes on to explain that scholarships and bursaries are normally given at the post-secondary level to assist students pursuing a degree or diploma in any field of study and for which the student is not expected to do any specific work for the payer in exchange for the scholarship or bursary. Paragraph 5 continues:

If a scholarship or bursary program provides allowances or reimbursements to pay for specific educational costs, such as those for lodging, personal travel, tools, books or equipment, those amounts are generally included in income under paragraph 56 (1) (n).

[16] Revenue Canada advised the Canadian Human Rights Commission that the inclusion of the Special Opportunity Grant had no impact on Mr. Wignall's 1995 tax return as he received a full refund of all taxes paid at source. Revenue Canada did acknowledge, however, that the inclusion of \$2500.00 in income from the Special Opportunity Grant did have the effect of reducing Mr. Wignall's provincial tax credit by the amount of \$25.00.

[17] Mr. Wignall was not satisfied with the response received from Revenue Canada. It was not only the fact that he had personally lost \$25.00 of a provincial tax credit that irritated Mr. Wignall. In his view, the Special Opportunity Grant was created to allow students with disabilities to purchase certain services that would assist in making equal access a reality in the classroom. The money had been promptly turned over to the University of Manitoba for the purpose of accommodating his disability and so should never have been considered part of his personal income. He also pointed out that while the impact of the inclusion of the Special Opportunity Grant on himself personally was minimal, the tax policy could have a more significant impact on other disabled students who might have higher incomes.

[18] It should be noted that while Revenue Canada refused to refund the amount of \$25.00 which Mr. Wignall claims he lost as part of a provincial tax credit or to change the policy with regard to

the characterization of the Special Opportunity Grant as a bursary, the Government of Canada did make some changes in respect of both the Special Opportunity Grant and the *Income Tax Act* in the period between the date of Mr. Wignall's complaint and the date of the hearing before this tribunal.

[19] In a letter dated April 18, 1997, Alexander Davidson of the Legal Services Branch of the Department of Justice, writing on behalf of the Respondent to Barbara van Baal with the Compliance Directorate of the Canadian Human Rights Commission, advised the Commission that in the view of Revenue Canada, the tax treatment of the Special Opportunity Grant involved an interpretation of law as the grants were not specifically mentioned in the *Income Tax Act*. The *Income Tax Act* does, however, mention that bursaries are a taxable source of income and it is not within Revenue Canada's discretion to disregard the grants as a source of income.

[20] In his letter, Mr. Davidson informs Ms. Baal that the Minister of Finance and his department have acted upon the recommendations in the Scott Task Force Report and that the budget of February 18, 1997 proposed certain tax measures to reduce the disability-related costs that stand in the way of full participation in society by Canadians with disabilities. One of these measures was to add sign language interpreters' fees to the list of expenses eligible for the medical expense credit. In addition, Mr. Davidson stated that the current disability tax credit reduced federal and provincial tax by about \$1,120.00 in 1997.

[21] On May 9, 1997, the Minister of Finance, The Honourable Paul Martin, wrote directly to Mr. Wignall, apparently in response to a letter which Mr. Wignall sent to Member of Parliament, Reg Alcock, on March 15, 1996. Mr. Martin advised Mr. Wignall about the same provisions of the *Income Tax Act* that Mr. Davidson mentioned in his letter to the Commission and he assured Mr. Wignall that these provisions generally ensure that little or no tax is paid on Special Opportunity Grants. The disability tax credit itself, he stated, was the equivalent of an exemption of \$4,233.00 for those with less than \$29,590.00 in taxable income.

[22] The witness called by the Respondent, Mr. Rector, advised the Tribunal that further changes had been made to the *Income Tax Act* since 1997 for the benefit of all students, including disabled students. In 2000, the amount of the exemption for scholarship and bursaries had been increased from \$500.00 to \$3,000.00. He also stated that the maximum amount of the Special Opportunity Grant, now known as the Canada Study Grant, was \$5000.00 for students with permanent disabilities. The first \$3000.00 of this grant is exempt from taxation assuming the student has no other bursary or scholarship income.

[23] When asked in examination-in-chief why Revenue Canada does not exempt the Special Opportunity Grant from income, Mr. Rector stated that one of the fundamental principles of the income tax system is to take into consideration all sources of income in determining a person's ability to pay. He added: "Removing one particular source of funding or one particular income source would have to be done at least categorically, in this case, scholarships and bursaries as a group. The government has chosen to take all sources of income into account in determining an individual's ability to pay and to provide tax assistance in specific areas through the credit system."⁽¹⁾

[24] The long and the short of it is that Revenue Canada continues to treat the Special Opportunity Grant (or Canada Study Grant) awarded to permanently disabled students as a taxable source of income. The Complainant and the Commission request that this Tribunal find this policy to be discriminatory. They further request that the Tribunal make an order requiring Revenue Canada to cease the discriminatory practice and take measures to redress the practice or to prevent the same or a similar practice from occurring in the future as provided for in Section 53 (2) of the *Canadian Human Rights Act*.

III. LEGAL PRINCIPLES

A. Applicable Provisions of the Act

[25] Mr. Wignall's complaint is brought under Section 5 of the *Canadian Human Rights Act*, which makes it a discriminatory practice in the provision of services customarily available to the general public to differentiate adversely in relation to any individual on a prohibited ground of discrimination.

[26] Disability is a prohibited ground of discrimination.

[27] In cases involving allegations of direct or indirect discrimination, the burden falls firstly on the Complainant to establish a *prima facie* case that he has been discriminated against. If the Complainant succeeds in doing so, the burden then shifts to the Respondent to prove a *bona fide* justification for that differentiation. The evidentiary standard that applies is the one used in civil matters, being on a balance of probabilities. ⁻⁽²⁾

[28] A *prima facie* case is one which covers the allegations made, and which, if believed, is complete and sufficient to justify a verdict in the Complainant's favour in the absence of an answer from the Respondent. ⁻⁽³⁾ The allegations made by the Complainant must be credible in order to support the conclusion that a *prima facie* case has been established. ⁻⁽⁴⁾

[29] In order for the Respondent to have a defence of *bona fide* justification for the denial of a service or for adverse differentiation, subsection 15 (2) of the *Canadian Human Rights Act* requires the Respondent to establish that accommodation of the needs of an individual or a class of individuals would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

B. Method of Analysis

[30] When determining whether a particular set of circumstances or facts constitute discrimination, one must undertake a form of comparative analysis. In this regard, there has been a convergence in the approach taken to define discrimination under human rights legislation and that taken to determine whether there has been a breach of the right to equal protection and equal benefit of the law without discrimination under section 15(1) of the *Canadian Charter of Rights and Freedoms*. Some of the basic principles of *Charter* equality analysis were fleshed out in

Andrews v. The Law Society of British Columbia⁽⁵⁾, a 1989 decision of the Supreme Court of Canada. These principles were restated by Mr. Justice Iacobucci in the 1993 Supreme Court case *Symes v. Canada*⁽⁶⁾ where he states at page 754:

For the purposes of s. 15(1), *Andrews* has rejected that the analysis should be governed by the comparison of similarly situated persons. Section 15(1) guarantees more than formal equality; it guarantees that equality will be mainly concerned with "the impact of the law on the individual or the group concerned": *Andrews*, at page 165. McIntyre stated (at p. 164) that equality

is a comparative concept, the condition of which may only be attained or discerned by the comparison with the condition of others in the social and political setting in which the question arises. It must be recognized at once, however, that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality. [Emphasis added.]

The s. 15(1) challenge, of course is to determine whether a "difference in treatment" between individuals, or an "identical treatment" of individuals, engages the *Charter*. Stated another way, the goal is to ensure that "a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another": *Andrews*, at p. 165. In pursuit of this goal, McIntyre J. in *Andrews* took the comparative analysis a step further and suggested that the *Charter* was not intended to eliminate all distinctions, but, in keeping with the language and purpose of s. 15, only those distinctions which are "discriminatory". Fortunately, in both *Andrews* and the present case, this Court has been able to access a rich jurisprudence associated with human rights legislation. The concept of "discrimination" within s. 15(1) of the *Charter* has been informed by this jurisprudence, and McIntyre J.'s definition of the term in *Andrews* is proof of its utility. McIntyre J. stated (at p. 174):

I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individuals or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

[31] The *Symes* decision is also authority for the proposition that in determining whether there is discrimination on the grounds relating to the personal characteristics of the individual or group, one must not look only at the impugned legislation that has created the distinction that violates the right to equality but also to the larger social, political and legal context. Iacobucci J., adopts the following statement of Wilson J. in *R. v. Turpin*⁽⁷⁾

Accordingly, it is only by examining the larger social context that a court can determine whether differential treatment results in inequality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage. A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged.

[32] Iacobucci J. had an opportunity to further refine the proper approach to analyzing a claim of discrimination under s. 15(1) of the *Charter* in *Law v. Canada (Minister of Employment and Immigration)* ⁽⁸⁾. Following upon the analysis in *Andrews*, and two subsequent Supreme Court decisions, *Egan v. Canada* ⁽⁹⁾ and *Miron v. Trudel* ⁽¹⁰⁾, among other cases, Iacobucci J. summarizes the analysis as follows, at pp. 548-549:

Accordingly, a Court that is called upon to determine a discrimination claim under s. 15(1) should make the following three broad inquiries:

(A) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?

(B) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?

and

(C) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

[33] As stated earlier, the analytical approach used to establish a breach of the equality guarantee under s. 15(1) of the *Charter* is applicable to the analysis of whether a claim of discrimination is established under human rights legislation, both of which involve the establishment of a relevant comparator. In other words, a finding of discrimination based on the imposition of a burden or the withholding of a benefit must be rooted in a comparison of the treatment received by a person with the treatment received by other persons. This was the approach used by the Supreme Court of Canada in *Battlefords and District Co-operative Ltd. v. Gibbs*, ⁽¹¹⁾ a case which involved

the application of the Saskatchewan Human Rights Code to an employer's insurance policy providing benefits to disabled employees.

[34] In the case before this Tribunal, Mr. Wignall claims that Revenue Canada discriminates against him and other permanently disabled persons who apply for the Special Opportunity Grant because the money which they receive to assist them in the accommodation of a disability is deemed to be taxable income. In the words of counsel for the Commission, "they are taxing an accommodation".

[35] The preliminary issues in this case are whether the application of this particular tax policy creates a distinction, on the basis of one or more personal characteristics, between the Complainant and some other person or group of persons, resulting in unequal treatment or discrimination; or whether identical treatment, by the application of this tax policy on all grant and bursary recipients, has the effect of imposing a burden upon the Complainant or withholding a benefit available to others in society. In other words, has the Complainant established a *prima facie* case of discrimination?

IV. ANALYSIS

A. The Burden of a Disability and the Duty to Accommodate

[36] Section 2 of the *Canadian Human Rights Act* states that the purpose of the *Act* is to give effect to the principle that, in matters under federal government authority, all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on specified prohibited grounds, including disability.

[37] Canadian courts and tribunals have recognized that disabled persons have experienced a long history of disadvantages, isolation and barriers to their participation in mainstream society. Mr. Justice La Forest in *Eldridge v. British Columbia*⁽¹²⁾ described the difficulties encountered by persons with disabilities in these terms:

It is an unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization. Persons with disabilities have too often been excluded from the labour force, denied access to opportunities for social interaction and advancement, subjected to invidious stereotyping and relegated to institutions. (...) This historical disadvantage has to a great extent been shaped and perpetuated by the notion that disability is an abnormality or flaw. As a result, disabled persons have not generally been afforded the "equal concern, respect and consideration" that s. 15(1) of the *Charter* demands. Instead they have been subjected to paternalistic attitudes of pity and charity, and their entrance into the social mainstream has been conditional upon their emulation of able-bodied norms. (...) One consequence of these attitudes is the persistent social and

economic disadvantage faced by the disabled. Statistics indicate that persons with disabilities, in comparison to non-disabled persons, have less education, are more likely to be outside of the labour force, face much higher unemployment rates, and are concentrated at the lower end of the pay scale when employed.

[38] The reports presented into evidence at the hearing through Mr. Smith entitled: "Study of Financial Assistance Available To Post-Secondary Students With Disabilities: Accommodating Individual Needs For The Future - Final Report" (NEADS), October, 1993; "Employment Opportunities For Post-Secondary Students and Graduates With Disabilities: A National Study" (NEADS), July, 1996; and "Working Towards a Co-ordinated National Approach to Services, Accommodations and Policies for Post-Secondary Students with Disabilities: Ensuring Access to Higher Education and Career Training" (NEADS), July, 1999, are all consistent in their findings that students with disabilities continue to experience shortfalls in their funding requirements and that their needs are not being met.

[39] The Scott Task Force Report also mentions that living with disabilities almost always entails additional cost. The report states: "These costs, which vary significantly from one individual to another, are currently paid for by the public system, by private insurers, or by the person with the disability."

[40] It is in the context of determining who is responsible to cover these additional costs, which the Scott Task Force termed "the costs of disability" that we must determine whether Revenue Canada in this case has discriminated against Mr. Wignall and any other recipients of Special Opportunity Grants.

[41] It has not been suggested by Mr. Wignall or anyone else that the Government of Canada is obliged to cover all the costs of any permanently disabled student who wishes to attend a post-secondary educational institution. The Government of Canada does provide some financial assistance to permanently disabled students through various means, including the Special Opportunity Grant. Further assistance is given by means of tax measures such as the disability tax credit and the medical expense tax credit. The level of this funding is variable, sometimes calculated according to the financial need of the individual, and at other times determined by the budgetary allocations made by the Government of Canada from one year to the next.

B. Qualifying for the Special Opportunity Grant

[42] There was no question that in order to qualify for the Special Opportunity Grant a person had to be permanently disabled. In addition, the grant was tied to the applicant's personal financial circumstances, evidenced by the requirement that the application be made under the Canada/Manitoba Student Loan program. Mr. Wignall provided details of his earnings for the relevant periods on the application form. There was no evidence led as to the criteria used in determining whether the applicant received the maximum amount of the grant or a lesser amount. There was also no guarantee that the applicant would receive financial assistance merely by the fact of applying. In fact, the HRDC website with information on assistance for students with permanent disabilities includes the following statement: "Since funding is limited, grants

may not be available for all applicants, although attempts will be made to assist as many students as possible. You are therefore encouraged to apply at the earliest opportunity."

[43] The Complainant and the Commission argue that since the Special Opportunity Grant was awarded on the condition that it would be used to cover exceptional education-related costs associated with certain permanent disabilities, such as sign interpreter services, the funds themselves take on the nature of an accommodation for a disability. They then postulate that taxing the disabled person who received the funds or the benefit of the funds is a tax on his disability. The Complainant and the Commission urge this Tribunal to find that the taxation of the Special Opportunity Grant under these circumstances is discriminatory.

C. Choosing the Comparator Group

[44] In accordance with the analytical methodology set out in the *Law* case referred to above, the Tribunal must determine the proper comparator group. Counsel for the Commission proposed in argument that Mr. Wignall has chosen "all other students who receive grants, bursaries, et cetera" as the comparator group of his choice. However, Counsel also suggested that the Tribunal could "refine that based on the facts of the case." This Tribunal is prepared to accept the comparator group chosen by the Complainant.

D. The First Inquiry

[45] The first question to be answered is whether the taxation of the Special Opportunity Grant, in the same manner as any other grant or bursary, "draws a formal distinction between the claimant and others on the basis of one or more personal characteristics." In my view, the answer is that it does not. The Special Opportunity Grant is taxed, according to Mr. Rector, the witness called by Revenue Canada, because one of the fundamental principles of the income tax system is to take into consideration all sources of income in determining a person's ability to pay. Revenue Canada has not given the Special Opportunity Grant any special status, but treats it like any other grant, bursary or scholarship. It should be noted that grants, bursaries and scholarships are given to students based on a myriad of considerations including financial need, academic achievement, association with a particular group, as an attraction to a particular course of study, and even on the basis of gender, race, national or ethnic origin, religion, marital status and age. According to Revenue Canada's policy, all of these grants, bursaries and scholarships must be declared as income whether or not they were awarded based on a personal characteristic of the recipient.

[46] The alternative question is whether the taxation of the Special Opportunity Grant "fails to take into account the claimant's already disadvantaged position within society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics." [Emphasis added.] Counsel for the Commission suggested in argument that because of the fact that the Special Opportunity Grant is only available to disabled persons, it should not be lumped with all other scholarships, fellowships, bursaries, prizes and research grants which "all other students" might receive. I am unable to find, based on the evidence presented at the hearing, that the inclusion of the Special Opportunity Grant in the income of the recipient for taxation purposes results in "substantively differential treatment" based on the

Complainant's personal characteristics. Mr. Wignall did not receive the grant based on his disability only, but also because he was able to meet the means test of the Canada/Manitoba Student Loan program and because he agreed to use the funds to purchase services that would assist him in accommodating his disability in the classroom setting.

[47] Answering the part of the question whether the policy to treat the Special Opportunity Grant like any other grant, bursary or scholarship fails to take into account "the claimant's already disadvantaged position within Canadian society" requires an examination of the larger issue of society's responsibility to assist persons with disabilities generally. The creation of the Special Opportunity Grant in the first place was obviously a recognition by the Government of Canada that students with disabilities were in need of special financial assistance to access education at the post-secondary level. The amount which any particular student would receive was determined, at least to some extent, according to the student's own ability to pay. A student could only access these funds if he met the qualifications of the Canada/Manitoba Student Loan program.

[48] While one may wonder whether the federal treasury would be significantly impacted if these special grants were exempted from taxation, this Tribunal is satisfied that Revenue Canada's policy of characterizing the Special Opportunity Grant like any other grant, bursary or scholarship, given other special provisions in the *Income Tax Act* like the disability tax credit and the medical expense, does not, of and in itself, constitute a failure to take into account the recipient's already disadvantaged position within Canadian society. While social policy is reflected in our taxation scheme, it is the lawmakers who determine the amount of financial assistance to be given to the disabled pursuant to these types of programs. Such assistance should not be dependant on the creation of an exemption from taxation by circuitous application of a discriminatory practice provision of the *Canadian Human Rights Act*. Having given with the one hand, it may seem anomalous that the government should take away a portion with the other. However, this is what the government has decided to do. The Scott Task Force report recommended that the Special Opportunity Grant be exempted from taxation. The federal government's failure to act on the recommendation is presumably based on the premise that funding should be allocated to those most in need. Those persons who are more financially capable may find themselves in the position of paying back part of the grant through taxation. However, based on the fact that a means test forms part of the criteria to obtain the grant in the first place, the effect of taxing the grant will almost always be minimal. Mr. Wignall did not pay any tax on the Special Opportunity Grant he received in 1995. While the inclusion of the grant in his income did result in a \$25.00 decrease in a provincial refundable tax credit, the operation of provincial tax policy was probably as much to blame.

E. The Second Inquiry

[49] The second question is whether the claimant is subject to differential treatment based on one or more enumerated and analogous grounds. Having already decided that Mr. Wignall was not subjected to differential treatment by the inclusion of the Special Opportunity Grant in his income, it does not really matter that the grant was ear-marked for interpreter services in the classroom. Its characterization as income to the recipient did not depend on the personal characteristics of the recipient. Mr. Wignall was not being taxed because he was disabled. He

was taxed because he received a grant given to assist him with some of the exceptional costs he would incur in his pursuit of an education. Whether or not tax would be payable on the amount of the grant depended on numerous other factors, not the least of which was the amount of income which Mr. Wignall received from other sources.

F. The Third Inquiry

[50] The third broad inquiry which a court is to make to determine a discrimination claim, as suggested in *Law*, is whether the differential treatment discriminates, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration.

[51] On the facts of this case, the question becomes: "Does the inclusion of a Special Opportunity Grant as income of the recipient for the purpose of calculating taxable income impose a burden upon or withhold a benefit from a disabled person in a manner that reflects a stereotypical attitude toward persons with disabilities or which would perpetuate the view that a disabled person is less capable or worthy of recognition as a human being or member of society?" In order to answer this question in the affirmative, one would have to conclude that Revenue Canada was obligated to treat the recipient of this particular grant differently from all other recipients of grants, bursaries or scholarships because it was intended to cover certain costs associated with a person's disability. This Tribunal is not prepared to impose upon Revenue Canada the obligation to exempt from taxation all income which might be used to alleviate a person's disability. In fact, Revenue Canada is treating the recipient of this grant like any other recipient of a grant, bursary or scholarship. Disabled persons are not exempted from paying personal income tax. In fact, s. 2 of the *Canadian Human Rights Act* recognizes that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on the enumerated prohibited grounds. The taxation of the Special Opportunity Grant does not, in my view, impose a burden or withhold a benefit in the manner contemplated in the *Law* analysis. In fact, the inclusion of the grant in income is consistent with the duties and obligations of all persons to pay a fair share of tax on income. The burden imposed on Mr. Wignall in this case was minimal. It was not an affront to his dignity as a human being to test his entitlement to the grant against the yardstick of total income from all other sources.

[52] As regards the application of this policy to all other recipients of the Special Opportunity Grant, there was no evidence presented at the hearing which would lead one to the conclusion that the taxation of the Special Opportunity Grant restricts a disabled person from pursuing post-secondary education. As stated previously, since the applicant has to meet a means test, it is unlikely that the tax burden would become such that a person would refrain from applying for the financial assistance afforded by the Special Opportunity Grant. Mr. Wignall's complaint is in large part predicated on the fact that the University of Manitoba was willing to provide him with

interpreter services free of charge. He applied for the Special Opportunity Grant at the request of the University of Manitoba in order to accommodate the University's financial requirements. Because the grant was paid to Mr. Wignall, he received the T4A Supplementary. The net effect was a \$25.00 decrease in the amount of a refundable provincial tax credit. In the words of Commission counsel, "he didn't get the money, but they taxed it as income." This injustice, as the Complainant describes it, is not the result of a discriminatory practice relating to the Complainant's status as a disabled person. The apparent injustice occurred because the University of Manitoba required the user of its disability services to contribute to the cost by means of applying for a grant paid only to individual persons and not otherwise available to institutions. The change in tax policy requested by the Complainant would not be required if the University received the funds directly from the Government of Canada. That is not a remedy within the jurisdiction of this Tribunal to give in the context of the present application.

G. Would a Different Comparator Make a Difference?

[53] The analysis so far has been predicated on the use of "all other grant recipients" as the comparator group against which the differential treatment has been measured. This was the Complainant's comparator group of choice. Would the result be different if one were to use a different comparator group, such as all other recipients of the Special Opportunity Grant? At the relevant time there were two other types of Special Opportunity Grants available, one being assistance for women pursuing doctoral studies and the other being for students with dependants. Neither of these grants were exempt from inclusion in income for tax purposes. Therefore, even when we compare the treatment given to disabled persons who received the Special Opportunity Grant to other Special Opportunity Grant recipients under the auspices of women in doctoral programs and students with dependants, there was no difference in the way the grant was treated for tax purposes. Mr. Wignall did suggest that the grant that he received could only be used for the particular purpose of providing interpreter services. The grants paid to women in doctoral studies or to students with dependants were not subjected to such limited purpose, the recipient having more discretion as to how the funds would be actually spent. He suggests that this indicates the paternalistic type of attitude shown to disabled people in general. I cannot find that this differentiation amounts to discrimination. Women in doctoral studies, for instance, were limited to entering particular fields of study where presumably there was a shortage of women candidates. Students with dependants had to prove need in excess of the regular student loan program. Each type of Special Opportunity Grant had its own set of conditions. Students with disabilities were not subjected to differential treatment based on their personal characteristics any more than women doctoral students or students with dependants. In each case, it was the special needs of the students that were being addressed.

V. CONCLUSION

[54] In the circumstances, this Tribunal is unable to conclude that the Complainant has established a *prima facie* case that he has been discriminated against by Revenue Canada on account of his disability. While the Complainant may have a strong argument that the taxation of the Special Opportunity Grant was unfair, the policy implemented by Revenue Canada cannot be

characterized as a discriminatory practice in the provision of a service. There were other factors which contributed to Mr. Wignall's loss of a portion of the refundable tax credit besides Revenue Canada's policy. Mr. Wignall's complaint could possibly have been directed to the University of Manitoba for requiring him to apply for this taxable grant as a condition of obtaining disability services. Perhaps he could have pursued the Province of Manitoba for re-instatement of his refundable credit. In addition, other federal government departments such as Human Resources Development Canada might have been questioned why funding to accommodate the needs of disabled students was made available by way of a grant that is normally considered taxable income.

[55] Revenue Canada's decision not to suspend its general policy to include all grant receipts as income to accommodate Mr. Wignall was not unreasonable or discriminatory. Equal treatment of the Special Opportunity Grant did not have the effect of imposing on the Complainant a greater burden than would be experienced by other grant recipients, nor did it put him to any measurable disadvantage or withhold or limit any opportunity, benefit or advantage available to other members of society.

VI. ORDER

[56] For the foregoing reasons, this complaint is dismissed.

VII. ADDENDUM

[57] At the commencement of the hearing in this case, Counsel for the Respondent, Department of National Revenue, raised the issue of the jurisdiction of this Tribunal to entertain this complaint, arguing that the matter was in the exclusive jurisdiction of the Tax Court of Canada pursuant to Section 12 of the *Tax Court of Canada Act*, which states:

The [Tax] Court has exclusive original jurisdiction to hear and determine...appeals to the Court on matters arising under...the Income Tax Act...

The matter was reserved to be determined after all of the evidence was introduced and legal arguments made. Given the outcome of the case, the question may now be somewhat moot. However, this Tribunal concludes that the complaint brought by Mr. Wignall was properly within the jurisdiction of the Canadian Human Rights Tribunal. The *Canadian Human Rights Act* being quasi-constitutional in nature, it is only fitting that the provisions of the *Income Tax Act* and the manner of their application to an individual taxpayer might be reviewed through the prism of human rights legislation. While Mr. Wignall might have brought some of the same issues into question by means of a Section 15 *Charter* application in the Tax Court, the remedies available to him would not necessarily have been the same had he succeeded in establishing that discrimination had occurred. The Respondent's application to recuse this Tribunal on the grounds

that the Tax Court of Canada has exclusive jurisdiction in matters arising under the *Income Tax Act* is also dismissed.

Guy A. Chicoine

OTTAWA, Ontario

June 8, 2001

CANADIAN HUMAN RIGHTS TRIBUNAL
COUNSEL OF RECORD

TRIBUNAL FILE NO.: T563/2100

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APPEARANCES:

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Eddie Taylor For the Canadian Human Rights Commission

Tracey Harwood-Jones For the Department of National Revenue

Ena Chadha For the Council of Canadians with Disabilities (Interested Party)

1. Transcript at page 182, lines 7 to 14

2. *Ontario Human Rights Commission v. Etobicoke*, [1982] 1 S.C.R. 202 at 208 and *Ontario Human Rights Commission and O'Malley v. Simpson Sears Limited*, [1985] 2 S.C.R. 536 at 558
3. *O'Malley*, supra, p. 558
4. *Singh v. Statistics Canada*, [1998] C.H.R.D. No. 7, aff'd [2000] F.C.J. No. 417 (T.D.I), and *Dhanjal v. Air Canada*, [1997] F.C.J. No. 1599, (1997) 139 F.T.R. 37
5. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143
6. *Symes v. Canada*, [1993] 4 S.C.R. 695
7. *R. v. Turpin*, [1989] 1 S.C.R. 1296 at pp. 1331-1332
8. *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497
9. *Egan v. Canada*, [1995] 2 S.C.R. 513
10. *Miron v. Trudel*, [1995] 2 S.C.R. 418
11. *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] S.C.J. No.55 at para. 29
12. *Eldridge v. British Columbia*, [1997] 3 S.C.R.624 at page 668