



SUPREME COURT OF CANADA

CITATION: British Columbia Human Rights
Tribunal v. Schrenk, 2017 SCC 62

APPEAL HEARD: March 28, 2017
JUDGMENT RENDERED: December 15, 2017
DOCKET: 37041

BETWEEN:

British Columbia Human Rights Tribunal
Appellant

and

Edward Schrenk
Respondent

- and -

**Canadian Association of Labour Lawyers, Canadian Construction Association,
Community Legal Assistance Society, West Coast Women’s Legal Education
and Action Fund, Retail Action Network, Alberta Federation of Labour,
International Association of Machinists and Aerospace Workers Local Lodge 99,
Ontario Human Rights Commission and African Canadian Legal Clinic**
Interveners

CORAM: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté,
Brown and Rowe JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 70)

Rowe J. (Moldaver, Karakatsanis, Wagner and Gascon JJ.
concurring)

CONCURRING REASONS:
(paras. 71 to 95)

Abella J.

DISSENTING REASONS:
(paras. 96 to 131)

McLachlin C.J. (Côté and Brown JJ. concurring)

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BCHRT v. SCHRENK

British Columbia Human Rights Tribunal

Appellant

v.

Edward Schrenk

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**Canadian Association of Labour Lawyers,
Canadian Construction Association,
Community Legal Assistance Society,
West Coast Women's Legal Education and Action Fund,
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Indexed as: British Columbia Human Rights Tribunal v. Schrenk

2017 SCC 62

File No.: 37041.

2017: March 28; 2017: December 15.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté,
Brown and Rowe JJ.

Human rights — Human Rights Tribunal — Jurisdiction — Discrimination — Employment — Act prohibiting a “person” from discriminating against someone “regarding employment” — Scope of prohibition — Complaint alleging discrimination at workplace by co-worker — Whether discrimination “regarding employment” can be perpetrated by someone other than complainant’s employer or superior — Whether British Columbia Human Rights Tribunal erred in finding that it had jurisdiction over complaint — Human Rights Code, R.S.B.C. 1996, c. 210, ss. 1 “employment”, “person”, 13(1)(b), 27(1)(a).

S-M worked for Omega and Associates Engineering Ltd. as a civil engineer on a road improvement project. Omega had certain supervisory powers over employees of Clemas Construction Ltd., the primary construction contractor on the project. Clemas employed S as site foreman and superintendent. When S made racist and homophobic statements to S-M on the worksite, S-M raised the comments with Omega. Following further statements by S, Omega asked Clemas to remove S from the site. Clemas did so without delay, but S continued to be involved on the project in some capacity. When the harassment continued, Clemas terminated S’s employment.

S-M filed a complaint before the British Columbia Human Rights Tribunal against S alleging discrimination on the basis of religion, place of origin, and sexual orientation. S applied to dismiss the complaint, arguing that s. 13 of the *Human Rights Code* had no application because S-M was not in an employment

relationship with S. The Tribunal held that it had jurisdiction to deal with the complaint and, accordingly, it denied S's application under s. 27(1)(a) of the Code. The British Columbia Supreme Court dismissed S's application for judicial review, but the Court of Appeal allowed S's appeal and found that the Tribunal erred in law by concluding that it had jurisdiction over the complaint.

Held (McLachlin C.J. and Côté and Brown JJ. dissenting): The appeal should be allowed.

Per Moldaver, Karakatsanis, Wagner, Gascon and Rowe JJ.: Section 13(1)(b) of the Code is not limited to protecting employees solely from discriminatory harassment by their superiors in the workplace. Reading the Code in line with the modern principle of statutory interpretation and the particular rules that apply to the interpretation of human rights legislation, s. 13(1)(b) prohibits discrimination against employees whenever that discrimination has a sufficient nexus with the employment context. This may include discrimination by their co-workers, even when those co-workers have a different employer.

In determining whether discriminatory conduct has a sufficient nexus with the employment context, the Human Rights Tribunal must conduct a contextual analysis that considers all relevant circumstances. Factors which may inform this analysis include: (1) whether the respondent was integral to the complainant's workplace; (2) whether the impugned conduct occurred in the complainant's workplace; and (3) whether the complainant's work performance or work

environment was negatively affected. These factors are not exhaustive and their relative importance will depend on the circumstances. This contextual interpretation furthers the purposes of the Code by recognizing how employee vulnerability stems not only from economic subordination to their employers but also from being a captive audience to other perpetrators of discrimination, such as a harassing co-worker.

This contextual approach to determining whether conduct amounts to discrimination “regarding employment” is supported by the text, the scheme and the purpose of the Code. It is equally supported by the legislative history of the Code and it aligns with the recent jurisprudence.

The text of s. 13(1)(b) prohibits employment discrimination by any “person”. In the context of the Code, the term “person” defines the class of actors against whom the prohibition in s. 13(1)(b) applies. The ordinary meaning of “person” is broad, and encompasses a broader range of actors than merely any person with economic authority over the complainant. The definition of “person” in s. 1 of the Code is not exhaustive and provides additional meanings that supplement its ordinary meaning. Next, the words “regarding employment” are critical because they delineate the kind of discrimination that s. 13(1)(b) prohibits. In this case, they indicate that the discrimination at issue must be related to the employment context in some way without solely prohibiting discrimination within hierarchical workplace relationships. Section 13(1)(b) defines who can suffer workplace discrimination

rather than restricting who can perpetrate discrimination. In this way, it prohibits discriminatory conduct that targets employees so long as that conduct is sufficiently related to the employment context.

The scheme of the Code reinforces this contextual interpretation of s. 13(1)(b). First, the presumption against redundancy in legislative drafting underpins the view that the prohibition against discrimination “regarding employment” applies to more than just employers, who are already subject to a prohibition against discrimination “regarding any term or condition of employment”. Further, where the Code seeks to limit the class of actors against whom a particular prohibition applies, it employs specific language which contrasts with the use of the general term “person”. Finally, the structure of the Code supports an approach that views employment as a context requiring remedy against the exploitation of vulnerability rather than as a relationship needing unidirectional protection.

The modern principle of interpretation requires that courts approach statutory language in the manner that best reflects the underlying aims of the statute. Here, the contextual approach aligns with the remedial purposes set out in s. 3 of the Code as it gives employees a greater scope to obtain remedies before the Tribunal.

Finally, while the legislative history is not determinative, it indicates that the British Columbia Legislature intended to expand the scope of s. 13(1)(b) when it removed the word “employer” and replaced it with the much broader term “person”.

Consequently, applying the correctness standard of review, the Tribunal did not err in concluding that S's conduct was covered by s. 13(1)(b) despite the fact that he was not S-M's employer or superior in the workplace. As the foreman of the worksite, S was an integral and unavoidable part of S-M's work environment. S's discriminatory behaviour had a detrimental impact on the workplace because it forced S-M to contend with repeated affronts to his dignity. This conduct amounted to discrimination regarding employment: it was perpetrated against an employee by someone integral to his employment context. S-M's complaint was consequently within the jurisdiction of the Tribunal pursuant to s. 13(1)(b) of the Code.

Per Abella J.: The issue in this case is whether employment discrimination under the British Columbia *Human Rights Code* can be found where the harasser is not in a position of authority over the complainant. The analysis requires that the meaning of employment discrimination be considered in a way that is consistent with, and emerges from, the Court's well-settled human rights principles, and not just the particular words of the *Code*. Applying these principles leads to the conclusion that an employee is protected from discrimination related to or associated with his or her employment, whether or not he or she occupies a position of authority. The Human Rights Tribunal, as a result, has jurisdiction to hear the complaint.

The starting point for the discrimination analysis is the *prima facie* test for discrimination set out in *Moore v. British Columbia (Education)*, [2012] 3 S.C.R. 360. In the employment context, the complainant must demonstrate that he or she has

a characteristic protected under the *Code*, has experienced an adverse impact “regarding employment”, and that the protected characteristic was a factor in the adverse impact. The question posed by s. 13(1)(b) is whether the complainant has experienced an adverse impact related to or associated with his or her employment. Section 13(1)(b) is meant to protect all employees from the indignity of discriminatory conduct in a workplace, verbal or otherwise. The discrimination inquiry is concerned with the impact on the complainant, not the intention or authority of the person who is said to be engaging in discriminatory conduct. The key is whether that harassment has a detrimental effect on the complainant’s work environment. Discrimination can and does occur in the absence of an economic power imbalance. It cannot depend on technical lines of authority which may end up defeating the goals of human rights legislation. *All* individuals have the right to be protected from discrimination in the workplace, including those in a position of authority. This approach is responsive to the realities of modern workplaces, many of which consist of diverse organizational structures.

While employers have a special duty and capacity to address discrimination, this does not prevent individual harassers from also potentially being held responsible, whether or not they are in authority roles. Prohibiting all “persons” in a workplace from engaging in discrimination recognizes that preventing employment discrimination is a shared responsibility among those who share a workplace. This is especially so where the employer’s best efforts are inadequate to resolve the issue or where, as here, the subject of the assault himself occupies a

position of some authority. The harasser's degree of control and ability to stop the offensive conduct is clearly relevant, but this goes to the factual matrix, not to the jurisdiction of the Tribunal to hear the complaint.

Per McLachlin C.J. and Côté and Brown JJ. (dissenting): The workplace discrimination prohibition in s. 13(1)(b) of the *Human Rights Code* applies only to employer-employee or similar relationships and authorizes claims against those responsible for ensuring that workplaces are free of discrimination. This conclusion is consistent with the text, context and purpose of s. 13(1)(b), as well as with the jurisprudence. Therefore, the Human Rights Tribunal had no jurisdiction over the complaint.

The text of the provision, read as a whole, suggests that the Legislature was targeting discrimination committed directly or through inaction by an employer or a person in an employer-like relationship with the complainant. Section 1 of the Code defines "employment" in terms of the relationship between the complainant and the employer, master or principal which suggests that there is something about the nature or extent of responsibility over work or the workplace that defines who can perpetrate discrimination "regarding employment" for the purpose of s. 13(1)(b). The use of the word "person" at the outset of s. 13(1) neither expands nor limits the ambit of the section because the words controlling the ambit of the protection are "regarding employment".

A contextual reading of s. 13(1) also supports that view. First, s. 14 provides a separate protection against discrimination by unions and associations. If s. 13(1)(b) were interpreted so as to allow claims against anyone in the workplace, most of s. 14 would be redundant. Second, the scheme of the Code suggests that ss. 7 to 14 not intended to govern private acts of discrimination between individuals in a general sense. In provisions where the prohibition initially appears broad enough to catch private communications or interactions between private citizens more generally, specific exclusions are set out. No such exclusions are present in s. 13(1)(b), simply because it was not intended to cover such broad claims. Third, the scheme of the Code also supports the view that the Legislature was concerned with power imbalances — rather than targeting all acts of discrimination, it narrowed its focus to discrimination by those in a position of power over more vulnerable people. Fourth, if s. 13(1)(b) enables a claim based on emails sent after S was removed from the project and workplace, it is not clear how s. 13(1)(b) and s. 7(2) can be reconciled. Under that provision, no complaint can be brought on the basis of a discriminatory, though private, communication between individuals. Finally, s. 44(2) of the Code confirms the Legislature’s intent to target discrimination arising from the employment or equivalent relationship. It makes employers and their equivalents respondents in workplace discrimination claims.

Focussing on those responsible for maintaining a discrimination-free workplace also upholds the Code’s purpose. Where they fail to intervene to prevent or correct discrimination, s. 13(1)(b) is engaged. While this interpretation may preclude

claims under the Code against harassing co-workers, an employee's remedy is to go to the employer or person responsible for providing a discrimination-free workplace. If the employer fails to remedy the discrimination, the employee can bring a claim against the employer under s. 43 of the Code.

Finally, an interpretation of s. 13(1)(b) predicated on the responsibilities of employers and their equivalents is consistent with the jurisprudence, whereas the broad interpretation proposed by the majority would conflict with the jurisprudence in two ways. First, it would narrow the principle that the nature of the relationship between complainant and respondent is dispositive of whether s. 13(1)(b) applies. Second, it is difficult to see how a co-worker like S could ever claim a bona fide occupational requirement as a justification for his conduct.

Cases Cited

By Rowe J.

Considered: *McCormick v. Fasken Martineau DuMoulin LLP*, 2014 SCC 39, [2014] 2 S.C.R. 108; **referred to:** *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114; *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84; *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353; *Janzen v. Platy Enterprises Ltd.*,

[1989] 1 S.C.R. 1252; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61; *Gravel v. City of St-Léonard*, [1978] 1 S.C.R. 660; *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867; *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, 2005 SCC 70, [2005] 3 S.C.R. 425.

By Abella J.

Distinguished: *McCormick v. Fasken Martineau DuMoulin LLP*, 2014 SCC 39, [2014] 2 S.C.R. 108; **referred to:** *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150; *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536; *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84; *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360; *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30, [2017] 1 S.C.R. 591; *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252.

By McLachlin C.J. (dissenting)

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27; *McCormick v. Fasken Martineau DuMoulin LLP*, 2014 SCC 39, [2014] 2 S.C.R. 108; *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, 2008 SCC 45, [2008] 2 S.C.R. 604; *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353; *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84; *Janzen v. Platy*

Enterprises Ltd., [1989] 1 S.C.R. 1252; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3.

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Administrative Tribunals Act, S.B.C. 2004, c. 45, s. 59.

Canadian Human Rights Act, S.C. 1976-77, c. 33, s. 7(b).

Human Rights Act, S.B.C. 1969, c. 10, ss. 2(d) “employer”, 5.

Human Rights Act, S.B.C. 1984, c. 22, s. 8.

Human Rights Act, S.M. 1974, c. 65, s. 6(1)(a).

Human Rights Amendment Act, 1992, S.B.C. 1992, c. 43, s. 6.

Human Rights Code, R.S.B.C. 1996, c. 210, ss. 1 “discrimination”, “employment”, “person”, 3, 7 to 14, 27, 37(2)(a), (b), (c)(i), (d)(iii), 43, 44.

Human Rights Code of British Columbia Act, S.B.C. 1973, c. 119, s. 1.

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APPEAL from a judgment of the British Columbia Court of Appeal (MacKenzie, Willcock and Fenlon JJ.A.), 2016 BCCA 146, 86 B.C.L.R. (5th) 221,

385 B.C.A.C. 185, 665 W.A.C. 185, 2016 CLLC ¶230-025, [2016] 9 W.W.R. 440, 400 D.L.R. (4th) 44, 84 C.H.R.R. D/40, [2016] B.C.J. No. 658 (QL), 2016 CarswellBC 869 (WL Can.), setting aside a decision of Brown J., 2015 BCSC 1342, [2015] B.C.J. No. 1629 (QL), 2015 CarswellBC 2155 (WL Can.), affirming a decision of the British Columbia Human Rights Tribunal, 2015 BCHRT 17, [2015] B.C.H.R.T.D. No. 17 (QL), 2015 CarswellBC 190 (WL Can.). Appeal allowed, McLachlin C.J. and Côté and Brown JJ. dissenting.

Katherine Hardie and Devyn Cousineau, for the appellant.

Mark D. Andrews, Q.C., David G. Wong and Stephanie D. Gutierrez, for the respondent.

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David Outerbridge and Jeremy Opolsky, for the intervener the Canadian Construction Association.

Lindsay M. Lyster and Juliana Dalley, for the intervener the Community Legal Assistance Society.

Clea F. Parfitt and Rajwant Mangat, for the intervener the West Coast Women's Legal Education and Action Fund.

Robin J. Gage, Kate Feeney and Erin Pritchard, for the intervener the Retail Action Network.

Kristan McLeod, for the interveners the Alberta Federation of Labour and the International Association of Machinists and Aerospace Workers Local Lodge 99.

Reema Khawja, for the intervener the Ontario Human Rights Commission.

Faisal Mirza, Danardo Jones and Dena M. Smith, for the intervener the African Canadian Legal Clinic.

The judgment of Moldaver, Karakatsanis, Wagner, Gascon and Rowe JJ. was delivered by

ROWE J. —

I. Introduction

[1] This case is about the scope of the prohibition against discrimination “regarding employment” under s. 13(1)(b) of the British Columbia *Human Rights Code*, R.S.B.C. 1996, c. 210. On April 3, 2014, Mr. Mohammadreza Sheikhzadeh-Mashgoul filed a complaint with the appellant, the British Columbia Human Rights Tribunal, against the respondent, Mr. Edward Schrenk, alleging employment

discrimination based on religion, place of origin, and sexual orientation. Mr. Schrenk responded with an application to dismiss under s. 27(1)(a) of the Code, in which he argued that the alleged conduct was not discrimination “regarding employment” and was consequently beyond the jurisdiction of the Tribunal. The crux of Mr. Schrenk’s argument is simple: as he was not in a position of economic authority over Mr. Sheikhzadeh-Mashgoul — he was neither his employer nor his superior in the workplace — his conduct, however egregious, could not be considered discrimination “regarding employment” within the meaning of the Code.

[2] At issue, then, is the question of whether discrimination “regarding employment” can ever be perpetrated by someone other than the complainant’s employer or superior in the workplace. To be clear, the issue is not whether Mr. Schrenk’s alleged conduct would amount to *discrimination*; no one disputes this. Rather, the question in this appeal is whether such discrimination was “regarding employment”.

[3] I conclude that it was. The scope of s. 13(1)(b) of the Code is not limited to protecting employees solely from discriminatory harassment by their superiors in the workplace. Rather, its protection extends to all employees who suffer discrimination with a sufficient connection to their employment context. This may include discrimination by their co-workers, even when those co-workers have a different employer. Consequently, the Tribunal did not err in concluding that Mr.

Schrenk's conduct was covered by s. 13(1)(b) despite the fact that he was not Mr. Sheikhzadeh-Mashgoul's employer or superior in the workplace.

II. Facts

[4] Mr. Sheikhzadeh-Mashgoul was a civil engineer working for Omega and Associates Engineering Ltd., an engineering firm hired by the municipality of Delta in British Columbia to supervise a road improvement project. In that capacity, he supervised work by Clemas Contracting Ltd., the primary construction contractor hired by Delta to carry out the project.

[5] The contract between Delta and Clemas specified that Omega, acting as consulting engineer, had certain supervisory powers over Clemas employees, including the right to ask for the removal of any Clemas worker who appeared "to be incompetent or to act in a disorderly or intemperate manner".

[6] Work on the project began in August 2013. Clemas employed Mr. Schrenk as site foreman and superintendent. There is nothing to indicate that Mr. Sheikhzadeh-Mashgoul and Mr. Schrenk had met before this.

[7] Mr. Sheikhzadeh-Mashgoul immigrated to Canada from Iran and identifies as Muslim. In his complaint before the Tribunal, he alleges a number of incidents involving Mr. Schrenk. For the purpose of considering the question in this appeal, neither the Tribunal nor this Court make findings of fact nor is there a

disposition on the merits of Mr. Sheikhzadeh-Mashgoul's complaint. Rather the facts as alleged by Mr. Sheikhzadeh-Mashgoul are treated as being accurate.

[8] The first incident occurred in September 2013 when Mr. Schrenk asked Mr. Sheikhzadeh-Mashgoul about his background. Upon learning of Mr. Sheikhzadeh-Mashgoul's origin and religion, Mr. Schrenk asked in front of other employees, "You are not going to blow us up with a suicide bomb, are you?" (2015 BCHRT 17 ("Tribunal decision"), at para. 18 (CanLII)). Another incident occurred in November 2013, when Mr. Schrenk shoved Mr. Sheikhzadeh-Mashgoul and called him a "fucking Muslim piece of shit" (*ibid.*, at para. 20). As Mr. Sheikhzadeh-Mashgoul went to call his supervisor, Mr. Schrenk continued, asking "Are you going to call your gay friend?" (*ibid.*, at para. 23).

[9] Mr. Sheikhzadeh-Mashgoul raised Mr. Schrenk's comments with his employer, Omega. The possibility of removing Mr. Schrenk from the worksite — should his behaviour persist — was discussed at a regularly scheduled meeting between Mr. Schrenk, Mr. Sheikhzadeh-Mashgoul and representatives from Omega, Delta and Clemas.

[10] Mr. Schrenk persisted. On December 13, 2013, he yelled at Mr. Sheikhzadeh-Mashgoul, "Go back to your mosque where you came from" (Tribunal decision, at para. 28). After this incident, both Delta and Omega asked Clemas to remove Mr. Schrenk from the site. Although Clemas did so without delay, Mr.

Schrenk continued to be involved on the project in some capacity until January 2014. For the time being, he remained a Clemas employee on other projects.

[11] Mr. Schrenk's removal from the worksite did not end Mr. Sheikhzadeh-Mashgoul's troubles. In March 2014, Mr. Schrenk sent an unsolicited email to Mr. Sheikhzadeh-Mashgoul in which he made derogatory insinuations about his sexual orientation. Mr. Schrenk copied the email to two Clemas supervisors; Mr. Sheikhzadeh-Mashgoul forwarded it to Omega, which in turn forwarded it to Clemas. Clemas' project superintendent requested that Mr. Schrenk stop sending such emails. Nevertheless, the next day Mr. Schrenk sent another derogatory email of a homophobic nature to Mr. Sheikhzadeh-Mashgoul. That email was also forwarded to Clemas. Following this, Clemas terminated Mr. Schrenk's employment on March 28, 2014.

[12] On April 3, 2014, Mr. Sheikhzadeh-Mashgoul filed a complaint before the Tribunal against Mr. Schrenk, Clemas, and Delta, alleging discrimination on the basis of religion, place of origin, and sexual orientation, all of these being prohibited grounds of discrimination under the Code. He later withdrew the claim against Delta.

[13] Mr. Schrenk and Clemas both applied to dismiss the complaint pursuant to s. 27(1)(a), (b), (c) and (d)(ii) of the Code. Under s. 27(1)(a), they argued that the Tribunal did not have jurisdiction over the complaint because Mr. Sheikhzadeh-Mashgoul was not in an employment relationship with Clemas or Mr.

Schrenk and, hence, s. 13 of the Code had no application. This appeal relates only to Mr. Schrenk's application under s. 27(1)(a).

III. Relevant Statutory Provisions

[14] The relevant portions of the Code read:

1 In this Code:

...

“employment” includes the relationship of master and servant, master and apprentice and principal and agent, if a substantial part of the agent's services relate to the affairs of one principal, and **“employ”** has a corresponding meaning;

...

“person” includes an employer, an employment agency [a person who undertakes, with or without compensation, to procure employees for employers or to procure employment for persons], an employers' organization [an organization of employers formed for purposes that include the regulation of relations between employers and employees], an occupational association [an organization, other than a trade union or employers' organization, in which membership is a prerequisite to carrying on a trade, occupation or profession] and a trade union [an organization of employees formed for purposes that include the regulation of relations between employees and employers];

...

3 The purposes of this Code are as follows:

- (a) to foster a society in British Columbia in which there are no impediments to full and free

participation in the economic, social, political and cultural life of British Columbia;

(b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;

(c) to prevent discrimination prohibited by this Code;

(d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code;

(e) to provide a means of redress for those persons who are discriminated against contrary to this Code.

...
13 (1) A person must not

(a) refuse to employ or refuse to continue to employ a person, or

(b) discriminate against a person regarding employment or any term or condition of employment

because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

...
27 (1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:

(a) the complaint or that part of the complaint is not within the jurisdiction of the tribunal;

(b) the acts or omissions alleged in the complaint or that part of the complaint do not contravene this Code;

(c) there is no reasonable prospect that the complaint will succeed;

(d) proceeding with the complaint or that part of the complaint would not

(i) benefit the person, group or class alleged to have been discriminated against, or

(ii) further the purposes of this Code;

...

44 (1) A proceeding under this Code in respect of a trade union, employers' organization or occupational association may be taken in its name.

(2) An act or thing done or omitted by an employee, officer, director, official or agent of any person within the scope of his or her authority is deemed to be an act or thing done or omitted by that person.

IV. Decisions Below

A. *British Columbia Human Rights Tribunal, 2015 BCHRT 17*

[15] In their application to dismiss, Mr. Schrenk and Clemas both argued that the Tribunal had no jurisdiction under s. 13(1)(b) as neither of them were in an employment relationship with Mr. Sheikhzadeh-Mashgoul. Mr. Schrenk emphasized that he could not discriminate against Mr. Sheikhzadeh-Mashgoul regarding his employment as he had no control over him.

[16] The Tribunal held that it had jurisdiction to deal with the complaint. Accordingly, it denied Mr. Schrenk's and Clemas' applications under s. 27(1)(a). It also denied their application for dismissal of the complaint under other subsections of s. 27. This latter part of the decision is not dealt with in this appeal.

[17] With regard to s. 13(1)(b), the Tribunal found that it prohibits a "person" from discriminating regarding employment and that the Code does not limit "person" to an employer or someone in an employment-like relationship with the complainant. The Tribunal had regard to this Court's statement in *McCormick v. Fasken Martineau DuMoulin LLP*, 2014 SCC 39, [2014] 2 S.C.R. 108, that "quasi-constitutional legislation . . . attracts a generous interpretation to permit the achievement of its broad public purposes" (para. 17). In light of this, the Tribunal held that s. 13 "protects those in an employment context", including a complainant who is an employee "who suffers a disadvantage in his or her employment in whole or in part because of his or her membership in a protected group" (para. 45). The Tribunal further held that protection under s. 13 is "not limited to discrimination by an employer" (para. 46). The Tribunal concluded:

. . . following on the generous interpretation of the *Code* reiterated by the Supreme Court of Canada in *McCormick*, protection of employees on a construction site against other actors on that site falls within the broad public policy purposes of the *Code*. Like employees in a single workplace with one employer, the cohort of employees and dependent contractors on a construction site may work for different employers, but are all engaged in a common enterprise: completing the project whatever it may be. Generally, they work in close proximity to, and interact with, one another. It would be unduly artificial and not in keeping with the broad public policy purposes of the *Code* to exclude employees on a

construction site from the protections mandated by s. 13 simply because the alleged perpetrator of discriminatory behaviour worked for another employer on that site. [para. 50]

[18] With respect to Mr. Schrenk’s application, the Tribunal found that he could be liable under s. 13 given that Mr. Sheikhzadeh-Mashgoul was an employee — although not an employee of Clemas or Mr. Schrenk — who claimed that he had been negatively affected in his employment because of discriminatory harassment by Mr. Schrenk. The Tribunal found that such discrimination could occur even though Mr. Sheikhzadeh-Mashgoul, as supervising engineer, had significant influence over how Clemas and Mr. Schrenk performed their work.

B. *Supreme Court of British Columbia, 2015 BCSC 1342*

[19] Mr. Schrenk sought judicial review of the Tribunal’s decision. As he had before the Tribunal, Mr. Schrenk argued that the complaint did not fall within the scope of s. 13(1)(b) because Mr. Sheikhzadeh-Mashgoul was not in an employment relationship with him or with Clemas, based on the factors set out in *McCormick*.

[20] Brown J. dismissed the petition. Applying the standard of correctness as required by the British Columbia *Administrative Tribunals Act*, S.B.C. 2004, c. 45, she concluded that the Tribunal did not err in its interpretation and application of s. 13(1)(b) to the case. In her view, the issue before the Tribunal was not whether Mr. Sheikhzadeh-Mashgoul was in an employment relationship with either Mr. Schrenk or Clemas but rather whether he had experienced discrimination “regarding

employment”. Justice Brown viewed Mr. Schrenk’s interpretation as unduly narrow. Rather, she concluded that restricting s. 13(1)(b) to claims against one’s employer or against another employee of that same employer would “be contrary to common sense and to current employment circumstances” (para. 9 (CanLII)).

C. *British Columbia Court of Appeal, 2016 BCCA 146, 400 D.L.R. (4th) 44*

[21] The Court of Appeal unanimously allowed Mr. Schrenk’s appeal. Applying the standard of correctness, it found the Tribunal erred in law by concluding that it had jurisdiction to deal with the complaint.

[22] Willcock J.A. stated that the Tribunal had based its finding that it had jurisdiction on three factors: Mr. Sheikhzadeh-Mashgoul “was an ‘employee’ . . . ; the conduct negatively affected him in his employment; and [Mr. Schrenk], the purported source of the discrimination, was a ‘person’” (para. 32). Willcock J.A. viewed the question differently: it was not whether Mr. Schrenk came within the definition of “person” or whether Mr. Sheikhzadeh-Mashgoul was engaged in “employment”, but rather “whether the allegation made by [Mr. Sheikhzadeh-Mashgoul] against [Mr. Schrenk] was a complaint about conduct that might possibly amount to discrimination ‘regarding employment’” (para. 30).

[23] Willcock J.A. concluded that jurisdiction under s. 13(1)(b) was not so wide as to encompass “conduct [by] any person that might be said to have adversely

affected an employee in their employment” (para. 31). He drew the following distinction:

There is a difference between the emotional and psychological burdens imposed upon disadvantaged people as a result of ignorant, malicious, or thoughtless comments made by those they encounter in day-to-day life, and those which amount to discrimination regarding employment. With respect to the former, a human rights tribunal may be able to do nothing. Bigots and xenophobes impose invidious and lasting harms, but they may be avoided on the street without fear of employment-related economic consequences. The subjects of discrimination should not have to bear any economic burden as a result of that discrimination. That is the sphere in which the legislature acted, and that is one of the ills that the *Code* expressly seeks to address. [para. 33]

[24] For Willcock J.A. discrimination “regarding employment” requires the improper exercise of *economic power* in the traditional “master-servant” relationship and this is all that s. 13(1)(b) is intended to guard against (Code, s. 1). Thus, the Tribunal’s jurisdiction is limited to addressing complaints against those who have the power to inflict discriminatory conduct as a condition of employment. On this basis, Willcock J.A. concluded:

Not all insults inflicted upon employees, even in the course of their employment, amount to discrimination regarding employment. Such insults can amount to discrimination regarding employment if the wrongdoer is clothed by the employer with such authority that he or she is able to impose that unwelcome conduct on the complainant as a condition of employment, or if the wrongdoing is tolerated by the employer. If the wrongdoer has no such power or authority, the Tribunal has jurisdiction to consider whether the complainant’s employer played some role in allowing the conduct to occur or continue, in which case the insult is endured as a consequence of employment. But even then, the Tribunal has no jurisdiction over the wrongdoer. [Emphasis deleted; para. 36.]

[25] Applying this to the present case, Willcock J.A. found that the Tribunal did not “have jurisdiction to address a complaint made against one who is rude, insulting or insufferable but who is not in a position to force the complainant to endure that conduct as a condition of his employment” (para. 44). Consequently, the Tribunal did not have jurisdiction over Mr. Schrenk as he was not in a position to impose the discriminatory conduct on Mr. Sheikhzadeh-Mashgoul as a condition of his employment.

[26] The Tribunal appealed the Court of Appeal’s decision to this Court.

V. Issue

[27] Did the Tribunal err in concluding that discriminatory harassment by a co-worker may fall within the scope of the prohibition against discrimination “regarding employment” under s. 13(1)(b) of the Code?

VI. Analysis

[28] The standard of review is correctness by virtue of s. 59 of the *Administrative Tribunals Act*. As this Court stated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 50, “[w]hen applying the correctness standard, a reviewing court will not show deference to the decision maker’s reasoning process; it will rather undertake its own analysis of the question”. Accordingly, it is

necessary to conduct our own analysis as to whether the Tribunal erred in its interpretation of s. 13(1)(b).

[29] I note at the outset that this appeal calls for an exercise in statutory interpretation. The question before this Court is whether the words of s. 13(1)(b) of the Code can encompass discrimination only by an employer or a superior in the workplace. While we disagree in the result, the Chief Justice and I agree that this question requires an interpretation of the words “regarding employment”. For this reason, I respectfully differ from Justice Abella when she suggests that our analysis need not be rooted in “the particular words of British Columbia’s Code” (para. 73). While human rights jurisprudence provides significant guidance regarding the scope of “discrimination” *generally*, our starting point remains the words adopted by the British Columbia Legislature when defining the scope of discrimination “regarding employment” *specifically*.

[30] In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, this Court endorsed the modern principle of statutory interpretation, which must guide our interpretation of the Code in this appeal:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[31] Added to the modern principle are the particular rules that apply to the interpretation of human rights legislation. The protections afforded by human rights legislation are fundamental to our society. For this reason, human rights laws are given broad and liberal interpretations so as better to achieve their goals (*Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, at pp. 546-47; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, at pp. 1133-36; *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, at pp. 89-90). As this Court has affirmed, “[t]he Code is quasi-constitutional legislation that attracts a generous interpretation to permit the achievement of its broad public purposes” (*McCormick*, at para. 17). In light of this, courts must favour interpretations that align with the purposes of human rights laws like the Code rather than adopt narrow or technical constructions that would frustrate those purposes (R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at §§19.3 to 19.7).

[32] That said, “[t]his interpretive 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” (*University of British Columbia v. Berg*, [1993] 2 S.C.R. 353, at p. 371). It is for this reason that our interpretation of s. 13(1)(b) must be grounded in the text and scheme of the statute *and* reflect its broad purposes.

A. *The Text of Section 13(1)(b)*

[33] The language of the Code provides the first indicator that we must adopt the broad interpretation of s. 13(1)(b) favoured by the Tribunal. For convenience, I will set out again s. 13 of the Code:

13 (1) A person must not

(a) refuse to employ or refuse to continue to employ a person, or

(b) discriminate against a person regarding employment or any term or condition of employment

because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

[34] The place to start is with the term “person” in the first line of s. 13(1). In its ordinary meaning, the term “person” generally refers to a human being. In the context of the Code, it also defines the class of actors against whom the prohibition in s. 13(1)(b) applies. The ordinary meaning of “person” is broad; certainly, it encompasses a broader range of actors than merely any person with economic authority over the complainant. It is significant that the Legislature chose to prohibit employment discrimination by any “person”. Had it intended only to prohibit employment discrimination by employers — or some other narrow class of individuals — it could easily have done so by using a narrower term than “person”.

[35] To this end, I note that s. 1 of the Code provides the following inclusive definition:

1 In this Code:

...

“person” includes an employer, an employment agency [a person who undertakes, with or without compensation, to procure employees for employers or to procure employment for persons], an employers’ organization [an organization of employers formed for purposes that include the regulation of relations between employers and employees], an occupational association [an organization, other than a trade union or employers’ organization, in which membership is a prerequisite to carrying on a trade, occupation or profession] and a trade union [an organization of employees formed for purposes that include the regulation of relations between employees and employers];

[36] Although the Code enumerates various individuals and entities who come within the definition of “person”, the definition in s. 1 is not exhaustive. Because the definition “includes” these individuals and entities, it is explicitly not limited to them. In my view, the Code provides *additional* meanings to the word “person” that, for the purposes of the Code’s operation, supplement the ordinary meaning of the word. In this sense, Mr. Schrenk is a “person” within the word’s ordinary meaning; a corporate employer, such as Clemas, is a “person” within the word’s supplemental meaning as clarified by s. 1 of the Code.

[37] Next, the words “regarding employment” are critical because they delineate the kind of discrimination that s. 13(1)(b) prohibits. Initially, I note that “regarding” is a term that broadly connects two ideas. In this case, the discrimination at issue must be “regarding” employment in that it must be *related to* the employment context in some way. This interpretation aligns with earlier decisions of this Court concerning workplace discrimination under various human rights statutes. In *Robichaud*, for example, Justice La Forest defined the terms “in the course of employment” in s. 7(b) of the *Canadian Human Rights Act*, S.C. 1976-77, c. 33, as meaning “work- or job-related” and “as being in some way related or associated with the employment” (pp. 92 and 95). This broad interpretation was also adopted by Chief Justice Dickson in *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, at p. 1293, with regard to the terms “in respect of employment” under s. 6(1)(a) of the *Manitoba Human Rights Act*, S.M. 1974, c. 65. According to Chief Justice Dickson, the difference between the words “in the course of employment” and “in respect of employment” was not significant (p. 1293). Any difference between those words and the words “regarding employment” is equally negligible.

[38] Based on my reading of the Code, the term “regarding employment” does not solely prohibit discrimination within hierarchical workplace relationships. If this were the case, then the words discrimination “regarding employment” would essentially mean discrimination “by employers or workplace superiors”. In my view, s. 13(1)(b) does not restrict who can *perpetrate* discrimination. Rather, it defines who can *suffer* employment discrimination. In this way, it prohibits discriminatory conduct

that targets *employees* so long as that conduct has a sufficient nexus to the employment context. Determining whether conduct falls under this prohibition requires a *contextual* approach that looks to the particular facts of each claim to determine whether there is a sufficient nexus between the discrimination and the employment context. If there is such a nexus, then the perpetrator has committed discrimination “regarding employment” and the complainant can seek a remedy against *that* individual.

[39] By contrast, the Chief Justice proposes that, while s. 13(1)(b) is meant “to cover *all* forms of workplace discrimination,” its scope is limited to targeting “only those responsible for intervening and halting the events in question” (para. 123 (emphasis in original)). She writes that “[t]he ‘employment’ that is the subject of the protection accorded by s. 13(1)(b) is defined in terms of the relationship between the complainant and the employer, master or principal” (para. 109). In this sense, she proposes a narrow *relational* approach to the words “regarding employment,” wherein discrimination, as contemplated by s. 13(1)(b), can only be the responsibility of certain individuals within the employment relationship — namely, employers or workplace superiors.

[40] I would reject this approach for two reasons. First, while I agree that the term “employment” under the Code connotes, *inter alia*, a relationship between an employer and an employee, it does not follow that discrimination “regarding employment” must be perpetrated by someone *within that relationship*. Indeed, it

would be unduly formalistic to assume that the only relationship that can impact our employment is that which we share with our employer. Other workplace relationships — those we share with our colleagues, for example — can be sources of discrimination “regarding employment” despite the fact that it is only our employer who controls our paycheck.

[41] Second, the Chief Justice’s approach to the words “regarding employment” is necessarily premised on a narrow view of how power is exercised in the workplace. The premise, in my view, is the following: as the *only* relationship defined by an imbalance of power is that shared between employer and employee, it is *only* the employer who is in a position to discriminate “regarding employment”. This power is essentially economic in character. As the employer controls the economic benefits and conditions of employment, only the conduct of the employer can constitute discrimination “regarding employment”.

[42] Respectfully, this fails to capture the reality of how power is exercised in the workplace. For one, non-employers can exercise economic power over employees. A regular patron at a restaurant, for example, can exercise *economic* coercion over a server through tips. If the exercise of economic power is central to the concept of discrimination “regarding employment”, then this relationship, too, should fall within its scope.

[43] More importantly, however, economics is only one axis along which power is exercised between individuals. Men can exercise gendered power over

women, and white people can exercise racialized power over people of colour. The exploitation of identity hierarchies to perpetrate discrimination against marginalized groups can be just as harmful to an employee as economic subordination. Indeed, the statutory purposes listed in the Code expressly extend beyond removing barriers to “economic” participation in society and include removing “social, political and cultural” barriers as well (s. 3(a)).

[44] Admittedly, these examples are not limited to the employment context, but they are exacerbated in the employment context where a complainant is particularly vulnerable. This is because employees, in the *context* of their work, are a captive audience to those who seek to discriminate against them. Certain passages of the Court of Appeal’s reasons reflect this point. At para. 33, Willcock J.A. purports to distinguish discrimination “regarding employment” from “thoughtless comments made by those [we] encounter in day-to-day life” on the basis that the latter “may be avoided on the street without fear of employment-related economic consequences”. That may be so, but it only highlights the unique vulnerability of the employment *context*. Whether a server is harassed by the restaurant owner or the bar manager, by a co-worker, or by a regular and valued patron, the server is nonetheless being harassed in a situation from which there is no escape by simply walking further along the street.

B. *The Scheme of the Code*

[45] The requirement to read the legislative text “harmoniously with the scheme of the Act” reinforces the broad interpretation of s. 13(1)(b) I propose (Driedger, at p. 87). Guided by the modern principle, courts must not construe particular provisions in isolation; rather, individual provisions must be considered in light of the act as a whole, with each provision informing the meaning given to the rest (see Sullivan, at §13.3). This rule ensures that statutes are read as coherent legislative pronouncements. In this regard, “[i]t is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain” (*ibid.*, at §8.23).

[46] This presumption must play a role in our interpretation so as to ensure that no provision of the Code is “interpreted so as to render it mere surplusage” (*R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 28). Yet this is precisely the result if we adopt the interpretation proposed by Mr. Schrenk. This is because s. 13(1)(b) contains two disjunctive prohibitions: the first refers to discrimination regarding “employment”; the second refers to discrimination regarding “any term or condition of employment”. In my view, this suggests that the former targets discrimination *against employees generally* whereas the latter targets discrimination *by employers specifically*, given that only employers control the terms and conditions of employment. To limit discrimination “regarding employment” to circumstances where the employer makes enduring discrimination a “condition” of employment — whether through his own action or through his inaction in the face of discrimination by a third party — would arguably render “regarding employment” redundant with

discrimination “regarding any term or condition of employment” contrary to the presumption against redundancy (Code, s.13(1)(b)). Although this conclusion is not decisive in itself, it reinforces the broad reading I propose.

[47] Considering the patterns of expression in the Code further reinforces the interpretation of s. 13(1)(b) as applying beyond the confines of employer-employee relationships. In particular, where the Code seeks to limit the class of actors against whom a particular prohibition applies, it employs specific language rather than barring a “person” from engaging in discriminatory conduct. For example, s. 12 of the Code expressly limits the category of actors who can perpetrate wage discrimination to employer[s]”. Similarly, s. 14 specifically bars “trade union[s], employers’ organization[s] or occupational association[s]” from discriminating in relation to various aspects of union membership. The contrasting use of the general term “person” with these specific terms suggests that the prohibition against discrimination “regarding employment” found in s. 13(1)(b) applies to more than just employers. With respect, I do not share the view of the Chief Justice that the word “person” in s. 13 “neither expands nor limits the ambit of the section” (para. 110). It seems to me irreconcilable with the fact that, when the Legislature sought to limit the applicability of a prohibition to “employers”, it did so explicitly.

[48] Finally, the structure of the Code supports an approach that views employment as a *context* requiring remedy against the exploitation of vulnerability rather than as a *relationship* needing unidirectional protection. According to the Chief

Justice, the scheme of the Code reflects an intent to protect two things: first, specific relationships — namely, those shared by patrons and business owners (s. 8), landlords and tenants (s. 10), and employers and employee (s. 13) — and second, public communications — i.e. discriminatory publication (s. 7) and job postings (s. 11). In my view, however, a contextual lens better captures the scheme of ss. 7 to 14 because it provides a complete explanation for the underlying logic of these sections of the Code. All of these provisions capture *contexts* of vulnerability in which “discrimination” (defined in s. 1 as applying to all of these contexts) may arise. This includes ss. 7 and 11. Discriminatory publications are prohibited by s. 7, not because they are public *per se* but because minority groups are particularly vulnerable to hate speech in the context of publication. The same goes for the context of discriminatory employment advertisements (s. 11), which, too, are publicly disseminated.

[49] By contrast, the Chief Justice says the scheme of ss. 7 to 14 targets two things: certain relationships and public communications. Regarding the latter, she reasons that the Code was “not intended to govern private acts of discrimination between individuals” (para. 117). But this conflicts with the relationships she concedes are targeted by the Code. Interactions in the accommodation (s. 8), property (s. 9), tenancy (s. 10), fair wages (s. 12) and employment (s. 13) contexts are all “private” in that they do not involve the state and can occur inconspicuously. Viewing the Code’s scheme harmoniously, then, requires understanding ss. 7 to 14 as contexts of vulnerability and not as exclusively public acts of discrimination (ss. 7 and 11) when the Code undoubtedly targets private acts as well (ss. 8 to 10, 12 and 13).

C. *The Purposes of the Code*

[50] The modern principle of interpretation requires that courts approach statutory language in the manner that best reflects the underlying aims of the statute. This follows from the obligation to interpret the words of an Act harmoniously with the object of the Act and the intention of Parliament. As Professor Sullivan notes, “[i]n so far as the language of the text permits, interpretations that are consistent with or promote legislative purpose should be adopted, while interpretations that defeat or undermine legislative purpose should be avoided” (Sullivan, at §9.3).

[51] The clear statement of purpose set out in the Code must guide our interpretation of s. 13(1)(b):

3 The purposes of this Code are as follows:

- (a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;
- (b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;
- (c) to prevent discrimination prohibited by this Code;
- (d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code;
- (e) to provide a means of redress for those persons who are discriminated against contrary to this Code.

[52] This sets out an ambitious aim that supports an expansive and *not* a restrictive approach to the terms “regarding employment” in s. 13(1)(b). Indeed, nothing in the stated purposes of the Code suggests limiting the application of s. 13(1)(b) to formal employment relationships or to those analogous to employment by virtue of the economic control and dependency between the parties. Nor do the stated purposes suggest restricting the operation of the legislative scheme to remedying the potential discrimination that can arise via economic power imbalances in the workplace while leaving other types of discriminatory harassment to persist unabated.

[53] A nuanced understanding of discrimination underpins the conclusion that one of the purposes of s. 13(1)(b) is to protect employees from the indignity of discriminatory conduct in the workplace. Admittedly, decisions relating to hiring, promotion, discipline, and termination — should they be based on a *protected characteristic* — are all obvious means by which those with formal authority can discriminate against employees. But it would be superficial to conclude that employers and other superiors are the only ones who can discriminate “regarding employment”. While discrimination by one’s employer is particularly insidious for the reasons identified by the Court of Appeal — in that it exploits an economic power imbalance — other forms of conduct can amount to discrimination “regarding employment” in the absence of such economic power.

[54] I add that the Code is not limited to the purpose of preventing discrimination. It also aims to “promote a climate of understanding and mutual

respect where all are equal in dignity and rights” and to “provide a means of redress for those persons who are discriminated against contrary to this Code” (s. 3(b) and (e)). The Chief Justice’s interpretation of the Code is at odds with these aims because it places responsibility for protecting human rights exclusively on those who wield formal authority in the employment relationship. It also risks leaving the victims of discrimination without a remedy in many situations. Under a narrow approach, the employer would be exclusively responsible for ensuring a discrimination-free workplace. In other words, if you suffer discrimination at the hands of a colleague, your only remedy under the Code would lie against your employer. This would oblige your employer to intervene by disciplining the perpetrator or terminating his or her employment, for example, but it would not allow you to seek a remedy against the perpetrator *directly*.

[55] This narrow reading allegedly follows from the fact that discrimination is only “regarding employment” when it is perpetrated — or, at the very least, tolerated — by the employer. As the employer is the only actor with formal power over the employment relationship, only the employer can be held accountable for its failure to prevent or redress discrimination. This is not a problem for the Chief Justice, who argues that “there will always be an entity in any work context that is responsible for ensuring that workers enjoy a discrimination-free environment” (para. 123). It is for this reason that the Chief Justice concludes that s. 13(1)(b) only “trains its regulatory guns on those responsible for intervening and halting the events in question” (para. 123). Respectfully, this narrow focus misses the mark set by the Code’s remedial

purposes (and, in the context of employment discrimination, ignores how the Code “trains its regulatory guns” on a “person” and not “those responsible for intervening” (s. 13(1)). For instance, what can you do when your employer has no disciplinary authority over the perpetrator? As in this case, what happens when the perpetrator is not employed by the same employer? Based on the narrow reading, the individual perpetrator evades responsibility under s. 13(1)(b) and the complainant is left without a remedy.

[56] In my view, while the person in control of the complainant’s employment may be *primarily* responsible for ensuring a discrimination-free workplace — a responsibility that is recognized in s. 44(2) of the Code — it does not follow that only a person who is in a relationship of control and dependence with the complainant is responsible for achieving the aims of the Code. Rather, the aspirational purposes of the Code require that individual perpetrators of discrimination be held accountable for their actions. This means that, in addition to bringing a claim against their employer, the complainant may also bring a claim against the individual perpetrator. The existence of this additional claim is especially relevant when the discriminatory conduct of a co-worker persists *despite* the employer having taken all possible steps to stop it.

[57] The following example highlights the practical consequences of adopting a narrow approach that focuses solely on discrimination by employers. Consider an employee who endures years of discriminatory harassment at the hands of a co-

worker who commits that harassment covertly, such that the employer is unaware of it despite exercising diligent supervision. Under the narrow approach, this may not be discrimination “regarding employment” as the employer is unaware of the discrimination and thus may not be faulted for not intervening. A perverse consequence flows from this: as long the employer acted with reasonable diligence, the Tribunal may find that the complainant never suffered discrimination “regarding employment” for the period leading up the moment when he or she finally musters the courage to report the years of abuse by their co-worker.

[58] The narrow reading leaves such an employee with limited remedies. Once alerted to the discriminatory conduct, an employer will presumably discipline the co-worker who has harassed the complainant for multiple years and may even terminate their employment. But the Tribunal could go further. The Tribunal can, like the employer, order that the harasser cease his or her discriminatory behaviour (Code, s. 37(2)(a)), but it can also order the harasser to “ameliorate” their discriminatory harm (s. 37(2)(c)(i)); order the harasser to pay compensation to the complainant (s. 37(2)(d)(iii)); and declare the conduct discriminatory, which can have symbolic significance (s. 37(2)(b)). These remedies go beyond those available to the employer and further the purposes of the Code.

[59] In the end, a *relational* approach leaves complainants with access to too few remedies and narrows the range of actors who can be held accountable for their conduct. The unfortunate consequence of this is that individual perpetrators like Mr.

Schrenk may be immunized from liability before the Tribunal simply because they do not share a common employer with the victim of their harassment. The *contextual* approach I propose, by contrast, gives employees greater scope to obtain remedies before the Tribunal. This aligns with the remedial purposes of the Code. Insofar as both the relational and the contextual interpretations of “regarding employment” are plausible, the interpretive approach set out in our jurisprudence relative to human rights laws favours the more generous reading.

D. *The Legislative History of Section 13(1)(b)*

[60] It is well established that the legislative history of statutes can be relied on to guide the interpretation of statutory language (*Gravel v. City of St-Léonard*, [1978] 1 S.C.R. 660; see also *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867, at para. 33). The legislative evolution of an enactment forms part of the “entire context” to be considered as part of the modern approach to statutory interpretation (*Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, 2005 SCC 70, [2005] 3 S.C.R. 425, at para. 28). In this case, the legislative history of s. 13 adds support to the broad interpretation of the scope of s. 13(1)(b).

[61] The legislative history of the Code is particularly instructive because it suggests that the British Columbia Legislature has incrementally extended the range of parties who are prohibited from discriminating regarding employment. In 1969, the proscription against discrimination “in regard to employment” in what was then the

Human Rights Act, S.B.C. 1969, c. 10, applied only to an “employer” (s. 5). The term “employer” was defined as including “every person, firm, corporation, agent, manager, representative, contractor, or sub-contractor having control or direction of, or responsible, directly or indirectly, for, the employment of any employee” (s. 2(d)). In 1973, the definition of employer was removed, and the definition of employment was added (*Human Rights Code of British Columbia Act*, S.B.C. 1973, c. 119, s. 1). At this point, employers remained the only parties who were specifically prohibited from discrimination regarding employment. That changed in 1984 when the scope of the prohibition was expanded to apply to a “person or anyone acting on his behalf” (*Human Rights Act*, S.B.C. 1984, c. 22, s. 8).

[62] A pivotal amendment came in 1992, when the legislation was amended to prohibit a “person” from discriminating against another person “with respect to employment” (*Human Rights Amendment Act, 1992*, S.B.C. 1992, c. 43, s. 6). In 1996, that language was revised to “regarding employment” (s. 13(1)(b)) with the entry into force of the Code, which remains in force to this day. This history shows an expansion of the parties who are subject to the Code’s remedies for discrimination, from “every person . . . having control or direction of . . . the employment of any employee” to a “person”.

[63] While the legislative history of the Code is not determinative, it is highly indicative of the fact the British Columbia Legislature intended to expand the scope of s. 13(1)(b) when it removed the word “employer” and replaced it with the much

broader term “person”. This conclusion is reinforced by the presumption that legislative change is purposeful (Sullivan, at §23.22). The evolution of the language of s. 13(1)(b) indicates an intention to expand, rather than constrain, the responsibility for ensuring a discrimination-free workplace to all who are in a position to discriminate regarding another’s employment.

E. *The Relevance of McCormick*

[64] The interpretation proposed by Mr. Schrenk and adopted by the Court of Appeal states that the words “regarding employment” limit the scope of s. 13(1)(b) to relationships defined by control (on the part of the perpetrator of discrimination) and dependency (on the part of the complainant). In other words, the control of the perpetrator and the correlating dependency of the complainant are necessary to bring the complaint within the ambit of s. 13(1)(b). This limitation, it is argued, flows from the fact that it is only the person who controls the complainant’s employment who is in a position to discriminate with regard to that employment. It follows that remedies under s. 13 exist solely against those in positions of formal or economic power over the complainant, namely their employer or superiors. For this reason, Mr. Schrenk relies on the factors in *McCormick* to determine whether he was in a relationship of control and dependency with Mr. Sheikhzadeh-Mashgoul and thus determine whether their relationship falls under the scope of s. 13(1)(b).

[65] Reliance on *McCormick* in this way is misplaced. The interpretation of “employment relationship” articulated in *McCormick*, at para. 23, was used to

determine whether the person who allegedly suffered discrimination was in an employment relationship for the purpose of the Code. In other words, *McCormick* identified who qualifies for the protection of s. 13 *by virtue of being an employee*. Once it is determined that a complainant is an employee, however, *McCormick* does not address the question of who may perpetrate discrimination regarding employment.

[66] The Chief Justice appears to adopt a similar view as Mr. Schrenk when she states that *McCormick* “confirmed that the nature of the relationship between complainant and respondent is dispositive of whether s. 13(1)(b) applies” (para. 130). With respect, the contextual approach I propose does not disregard that relational inquiry; it simply applies that inquiry in the same manner as the Court did in *McCormick*: to the prospective complainant. *McCormick* does indeed require a relational analysis but only in respect of who can *suffer* employment discrimination and not who can *perpetrate* it. *McCormick*, at paras. 45-46, holds that someone who is not an *employee* under the Code cannot suffer *employment* discrimination. It does not hold that only employers can perpetrate employment discrimination. This follows from the fact that it is the *vulnerability* of being an employee that warrants special legislative protection under the Code. The contextual approach I propose is consistent with *McCormick* in that it limits the protection of s. 13(1)(b) to *employees*.

F. *Conclusion on the Scope of Section 13(1)(b)*

[67] Reading the Code in line with the modern principle of statutory interpretation and the particular rules that apply to the interpretation of human rights legislation, I find that s. 13(1)(b) prohibits discrimination against employees whenever that discrimination has a sufficient nexus with the employment context. In determining whether discriminatory conduct has such a sufficient nexus, the Tribunal must conduct a *contextual* analysis that considers all relevant circumstances. Factors which may inform this analysis include: (1) whether the respondent was integral to the complainant’s workplace; (2) whether the impugned conduct occurred in the complainant’s workplace; and (3) whether the complainant’s work performance or work environment was negatively affected. These factors are not exhaustive and their relative importance will depend on the circumstances. In my view, this contextual interpretation furthers the purposes of the Code by recognizing how employee vulnerability stems not only from economic subordination to their employers but also from being a captive audience to other perpetrators of discrimination, such as a harassing co-worker.

[68] With this in mind, I do not dispute that whether discrimination occurs “in the workplace” or is “related to or associated with [the complainant’s] employment” may be relevant to characterizing that discrimination as being “regarding employment” (Justice Abella’s reasons, at para. 74). But I am of the view that such findings alone — without a sufficient nexus to the employment context — could not constitute employment discrimination.

[69] Applying this contextual approach to the present case, I find that the alleged conduct by Mr. Schrenk would come within the ambit of s. 13(1)(b). As the foreman of the worksite, Mr. Schrenk was an integral and unavoidable part of Mr. Sheikhzadeh-Mashgoul's work environment. By denigrating Mr. Sheikhzadeh-Mashgoul on the basis of religion, place of origin, and sexual orientation, his discriminatory behaviour had a detrimental impact on the workplace because it forced Mr. Sheikhzadeh-Mashgoul to contend with repeated affronts to his dignity. This conduct amounted to discrimination regarding employment: it was perpetrated against an employee by someone integral to his employment context. Mr. Sheikhzadeh-Mashgoul's complaint was consequently within the jurisdiction of the Tribunal pursuant to s. 13(1)(b) of the Code.

VII. Disposition

[70] I would allow the appeal and affirm the Tribunal's decision. As no party sought costs, I would not award costs.

The following are the reasons delivered by

ABELLA J. —

[71] Mohammedreza Sheikhzadeh-Mashgoul is a civil engineer who was subjected to derogatory comments and emails regarding his place of origin, religion,

and sexual orientation from Edward Schrenk, who worked for another employer on the same construction site. Mr. Sheikhzadeh-Mashgoul filed a complaint with the British Columbia Human Rights Tribunal against Mr. Schrenk and his employer, Clemas Contracting Ltd., alleging employment discrimination contrary to s. 13(1)(b) of the *Human Rights Code*, R.S.B.C. 1996, c. 210.

[72] Mr. Schrenk and his employer brought an application to dismiss the complaint under s. 27(1)(a)¹ of the *Code* on the basis that the Tribunal did not have jurisdiction over the claim. They argued that because Mr. Schrenk was not in a position of authority over Mr. Sheikhzadeh-Mashgoul, the conduct could not constitute discrimination “regarding employment” within the meaning of s. 13(1)(b).

[73] The issue in this case is whether employment discrimination under the *Code* can be found where the harasser is not in a position of authority over the complainant. I have had the benefit of reading Justice Rowe’s reasons and agree with his conclusion, but, with respect, would approach it somewhat differently. It seems to me that what the analysis in this case requires is that we consider the meaning of employment discrimination in a way that is consistent with, and emerges from, our well-settled human rights principles, and not just the particular words of British Columbia’s *Code*.

¹ Applications to dismiss were made under s. 27(1)(a), (b), (c) and (d)(ii). Only s. 27(1)(a) is at issue in this appeal. It states:

27 (1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:

- (a) the complaint or that part of the complaint is not within the jurisdiction of the tribunal;

[74] Applying these principles leads, in my view, to the conclusion that an employee is protected from discrimination related to or associated with his or her employment, including humiliating and degrading harassment in the workplace, whether or not he or she occupies a position of authority. The Tribunal, as a result, has jurisdiction to hear the complaint.

Background

[75] Mr. Sheikhzadeh-Mashgoul immigrated to Canada from Iran and is a Muslim. He works for the engineering firm Omega and Associates Engineering Ltd., which was hired by the municipality of Delta to act as consulting engineers on a road improvement project. Mr. Sheikhzadeh-Mashgoul was responsible for supervising the contracting work done by Clemas, which employed Mr. Schrenk as a site foreman.

[76] Mr. Sheikhzadeh-Mashgoul complains of numerous offensive comments made by Mr. Schrenk during the project regarding his place of origin, religion, and sexual orientation. On learning of Mr. Sheikhzadeh-Mashgoul's religion and place of origin, Mr. Schrenk asked "You are not going to blow us up with a suicide bomb, are you?" He shoved Mr. Sheikhzadeh-Mashgoul and called him a "fucking Muslim piece of shit" in the presence of other Clemas employees. When Mr. Sheikhzadeh-Mashgoul went to call his supervisor following a heated exchange with Mr. Schrenk, he was asked, "Are you going to call your gay friend?"

[77] Mr. Sheikhzadeh-Mashgoul met with representatives of Omega, Clemas, and Delta, including Mr. Schrenk, where it was agreed that if the behaviour continued, Mr. Schrenk would be removed from the site. Mr. Schrenk did continue, telling Mr. Sheikhzadeh-Mashgoul in another incident, “Go back to your mosque where you came from.” Even after he was removed from the job site, Mr. Schrenk continued to harass Mr. Sheikhzadeh-Mashgoul by sending derogatory emails. As a result, Clemas decided to terminate Mr. Schrenk’s employment.

[78] Mr. Sheikhzadeh-Mashgoul filed a complaint with the Tribunal against Mr. Schrenk, Clemas, and Delta, alleging employment discrimination. He later withdrew the claim against Delta. Mr. Schrenk and Clemas both applied to dismiss the complaint pursuant to s. 27(1)(a), arguing that the Tribunal lacked jurisdiction.

[79] In a decision by Walter Rilkoff, the Tribunal found that there was jurisdiction over the complaint. In the Tribunal’s view, the prohibition against employment discrimination applies to “persons”, and is not limited to those in a direct employment relationship with or position of control over the complainant.

[80] At the Supreme Court of British Columbia, Brown J. dismissed Mr. Schrenk’s application for judicial review. In her view, the issue was not whether Mr. Sheikhzadeh-Mashgoul was in an employment relationship with Mr. Schrenk and Clemas, but whether he had experienced discrimination regarding his employment. To interpret the *Code* more narrowly would be contrary to common sense and current employment circumstances.

[81] The Court of Appeal for British Columbia unanimously allowed Mr. Schrenk's appeal ((2016), 400 D.L.R. (4th) 44). It disagreed with the Tribunal's analysis, concluding instead that employment discrimination can only occur if someone is in a position of authority and can force the complainant to endure that conduct as a condition of employment. Without that authority, the Tribunal may "consider whether the complainant's employer played some role in allowing the conduct" but has no jurisdiction over the individual wrongdoer.

[82] In my respectful view, there is no requirement that a harasser be in a position of authority before he or she is subject to the jurisdiction of the Tribunal. Mr. Schrenk relies on *McCormick v. Fasken Martineau DuMoulin LLP*, [2014] 2 S.C.R. 108, to argue that a relationship of control and dependency between the complainant and respondent is determinative.

[83] *McCormick* was addressing whether employment discrimination could be found where the claimant himself designed and agreed to the contractual employment term complained of. In the harassment context, the direct analogy would be a harasser claiming to be the victim of a discriminatory workplace where it is his own conduct that has poisoned that workplace. *McCormick* did not purport to limit the jurisdiction of the Tribunal only to situations where there is discriminatory treatment by someone in a position of authority.

[84] I agree with the Tribunal and the Supreme Court of British Columbia that the Tribunal has jurisdiction over the complaint.

Analysis

[85] It is well-established that the *Code* has a quasi-constitutional character and should be interpreted generously to give effect to its broad public purposes (*Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150; *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, at p. 547). These purposes include protecting individuals from adverse treatment based on protected group characteristics; in short, identifying and eliminating discrimination (*Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, at p. 92; *McCormick*, at para. 18). This aspirational goal is set out in s. 3² of the *Code* and enforced in the employment context through s. 13(1), which states:

Discrimination in employment

13(1) A person must not

- (a) refuse to employ or refuse to continue to employ a person, or
- (b) discriminate against a person regarding employment or any term or condition of employment

because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

² **3** The purposes of this Code are as follows: (a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia; (b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights; (c) to prevent discrimination prohibited by this Code; (d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code; (e) to provide a means of redress for those persons who are discriminated against contrary to this Code.

[86] This case engages s. 13(1)(b). The starting point for the discrimination analysis is the *prima facie* test for discrimination set out in *Moore v. British Columbia (Education)*, [2012] 3 S.C.R. 360, a case involving discrimination in the provision of educational services to children with learning disabilities. This test was reaffirmed in the employment context in *Stewart v. Elk Valley Coal Corp.*, [2017] 1 S.C.R. 591. In this appeal, therefore, to establish a *prima facie* case of discrimination, Mr. Sheikhzadeh-Mashgoul must demonstrate that he has a characteristic protected under the *Code*, has experienced an adverse impact “regarding employment”, and that the protected characteristic was a factor in the adverse impact (*Moore*, at para. 33).

[87] The words “regarding employment” have been broadly construed since this Court’s decision in *Robichaud*. There, La Forest J. interpreted the phrase “in the course of employment” under the *Canadian Human Rights Act*, S.C. 1976-77, c. 33, s. 7(b), to mean “work- or job-related”, or “in some way related or associated with the employment” (pp. 92 and 95). The same meaning was given to the words “in respect of employment” in *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, at p. 1293. It applies equally here. The question, then, is whether Mr. Sheikhzadeh-Mashgoul has experienced discrimination, namely an adverse impact related to or associated with his employment.

[88] As is clear from this test, the discrimination inquiry is concerned with the impact on the complainant, not the intention or authority of the person who is said to be engaging in discriminatory conduct. This emphasis on impact, not intention, was

the basis in *Stewart* for McLachlin C.J. declining to add a requirement of stereotypical or arbitrary decision-making to the *prima facie* test (para. 45).

[89] Cases of discrimination involving harassment in the workplace are also informed by this focus on impact. In *Janzen*, sexual harassment was defined non-exhaustively to include “unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment” (p. 1284). The key is whether that harassment has “a detrimental effect on the complainant’s work environment” (Michael Hall, “Racial Harassment in Employment: An Assessment of the Analytical Approaches” (2006-2007), 13 *C.L.E.L.J.* 207, at p. 212).

[90] The purpose of s. 13(1)(b) is to protect employees from the indignity of discriminatory conduct, verbal or otherwise, in a workplace. Discrimination can and does occur in the absence of an economic power imbalance. It cannot depend on technical lines of authority which may end up defeating the goals of human rights legislation. While employment discrimination is often, not surprisingly, focused on the ability of employers to subject complainants to discriminatory conduct as a condition of employment, *all* individuals have the right to be protected from discrimination in the workplace, including those in a position of authority.

[91] This is reflected in how British Columbia’s legislation has expanded liability for employment discrimination beyond simply employers and their agents. Section 13(1)(b), which now prohibits employment discrimination by a “person”, is

the result of a series of legislative amendments. In 1969, only an “employer” was prohibited from employment discrimination (*Human Rights Act*, S.B.C. 1969, c. 10, s. 5). This was extended in 1984 to a “person or anyone acting on his behalf” (*Human Rights Act*, S.B.C. 1984, c. 22, s. 8). In 1992, it was expanded again to prohibit a “person” from engaging in employment discrimination (*Human Rights Amendment Act, 1992*, S.B.C. 1992, c. 43, s. 6). This, it seems to me, is a clear indication that the legislature wanted to prevent employment discrimination not only from “employers”, but from *any* person in the workplace.

[92] This approach is responsive to the realities of modern workplaces, many of which consist of diverse organizational structures which may have different employers and complex work relationships. Prohibiting all “persons” in a workplace from engaging in discrimination recognizes that preventing employment discrimination is a shared responsibility among those who share a workplace.

[93] There is no doubt that employers have a special duty and capacity to address discrimination, but this does not prevent individual perpetrators of discriminatory conduct from also potentially being held responsible, whether or not they are in authority roles. This is especially so where the employer’s best efforts are inadequate to resolve the issue or where, as here, the subject of the assault himself occupies a position of some authority. The harasser’s degree of control and ability to stop the offensive conduct is clearly relevant, but this goes to the factual matrix, not to the jurisdiction of the Tribunal to hear the complaint.

[94] Mr. Sheikhzadeh-Mashgoul has claimed discriminatory harassment based on place of origin, religion, and sexual orientation. The fact that Mr. Schrenk is not in a position of authority over him does not deprive the Tribunal of jurisdiction under s. 13(1)(b) to determine whether, based on the evidence, there has been discrimination.

[95] The appeal is allowed and the conclusion of the Tribunal that it had jurisdiction over the complaint, is restored. The parties have agreed not to seek costs.

The reasons of McLachlin C.J. and Côté and Brown JJ. were delivered by

THE CHIEF JUSTICE —

I. Introduction

[96] The question on this appeal is whether the workplace discrimination prohibition in s. 13 of the British Columbia *Human Rights Code*, R.S.B.C. 1996, c. 210, applies only to employer-employee or similar relationships. The British Columbia Court of Appeal concluded that it did. I agree. Accordingly, I would dismiss the appeal.

[97] Section 13(1) of the Code provides:

13 (1) A person must not

(a) refuse to employ or refuse to continue to employ a person, or

(b) discriminate against a person regarding employment or any term or condition of employment

because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

[98] The complainant, Mr. Sheikhzadeh-Mashgoul, was working on a road improvement project for the Corporation of Delta, a municipality in British Columbia, as the site representative for the consulting engineers (Omega and Associates Engineering Ltd.). The respondent, Mr. Schrenk, worked on the same project as the foreman for the lead contractor (Clemas Contracting Ltd.). They worked on the same job site together, but were employed by different employers. The allegations of discrimination involved racist and homophobic statements made by Mr. Schrenk on the job site. The complainant reported the harassment to his employer, Omega. Omega asked Clemas to remove Mr. Schrenk from the job site, which it did. Soon after, Mr. Schrenk stopped working on the project entirely. However, Mr. Schrenk continued to send the complainant derogatory emails. When Clemas became aware of the emails, it terminated Mr. Schrenk's employment.

[99] The complainant brought his complaint against Mr. Schrenk, Delta and Clemas, however only the complaint against Mr. Schrenk remains relevant. Mr. Schrenk applied to have the complaint dismissed without a hearing under s. 27(1) of the Code, arguing, among other things, that there was no employment relationship

between him and the complainant. The British Columbia Human Rights Tribunal concluded that the scope of s. 13 is broad and is not limited to situations where there is an employment-like relationship, giving it jurisdiction over the complaint: 2015 BCHRT 17. The British Columbia Supreme Court dismissed Mr. Schrenk’s application for judicial review: 2015 BCSC 1342.

[100] The British Columbia Court of Appeal reversed these decisions: 2016 BCCA 146, 400 D.L.R. (4th) 44. It held that the Tribunal had no jurisdiction over the complaint because Mr. Schrenk and the complainant were not in an employment or employment-like relationship. Discrimination “regarding employment” under s. 13(1)(b) requires the wrongdoer against whom the claim is made to have power or authority over the complainant.

[101] I agree. This case turns entirely on the interpretation of s. 13(1)(b) of the Code. I conclude that the protection provided by that provision focusses on the employment relationship — a relationship between employer and employee or similar relationship. Section 13(1)(b) authorizes claims against those who are responsible for ensuring that workplaces are free of discrimination. This conclusion is consistent with the text, context and purpose of s. 13(1)(b), as well as with the jurisprudence.

II. Analysis

[102] The question is whether the Tribunal’s interpretation of s. 13(1) of the Code was correct.

[103] To interpret a statutory provision like s. 13(1), the Court must consider the text or words of the provision; the legislative and social context of the provision; and the purpose of the provision: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27. Prior court decisions on the interpretation of the provision are always helpful. The ultimate goal is to determine what the legislature intended. Human rights legislation should be interpreted broadly in order to facilitate the public-oriented objectives of such statutes: *McCormick v. Fasken Martineau DuMoulin LLP*, 2014 SCC 39, [2014] 2 S.C.R. 108, at para. 17; *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, 2008 SCC 45, [2008] 2 S.C.R. 604, at paras. 65-69. Nevertheless, the interpretation must still be rooted in the words of the relevant provisions: *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353, at p. 371.

A. *Text*

[104] The text of s. 13(1)(b), read as a whole, supports the conclusion that the provision is intended to cover discrimination perpetrated by an employer or a person in an employer-like relationship with the complainant.

[105] Section 13(1)(b) protects against *discrimination by a person against another regarding employment*, on specified protected grounds. The words “regarding employment” and “person” are critical.

[106] Section 1 of the Code defines “employment” and “person”.

“**employment**” includes the relationship of master and servant, master and apprentice and principal and agent, if a substantial part of the agent’s services relate to the affairs of one principal, and “**employ**” has a corresponding meaning;

...

“**person**” includes an employer, an employment agency, an employers’ organization, an occupational association and a trade union;

[107] The phrase in s. 13(1)(b) — discrimination “regarding employment or any term or condition of employment” — is at first blush broad enough to include any conduct relating to employment in the workplace. This said, it is worth noting that the word chosen is not “workplace” but “employment”. The former bears no connotation of a relationship between an employer and employee, but the latter does.

[108] Section 1 of the Code defines “employment” in terms of relationships: “‘employment’ includes the relationship of master and servant, master and apprentice and principal and agent, if a substantial part of the agent’s services relate to the affairs of one principal . . . ”. Moreover, although the definition begins with the term “includes”, which suggests that what follows is not exhaustive, “employment” expressly *does not include* the relationship of a particular principal and agent if a *non*-substantial part of that agent’s services relate to the affairs of that principal. This suggests that there is something about the nature or extent of responsibility over work or the workplace that defines who can perpetrate discrimination “regarding employment” for the purpose of s. 13(1)(b).

[109] Reading the s. 1 definition of “employment” into the phrase “regarding employment” in s. 13(1)(b), we can rephrase it as follows: “regarding activity arising out of a relationship of master and servant, master and apprentice and principal and agent, if a substantial part of the agent’s services relate to the affairs of one principal”. The “employment” that is the subject of the protection accorded by s. 13(1)(b) is defined in terms of the relationship between the complainant and the employer, master or principal. This makes sense. Employers, masters, principals or their equivalents all have power and responsibility over the workplace in which the complainant finds himself. If the provincial Legislature had intended s. 13(1)(b) to allow claims against anyone at a workplace, it is difficult to understand why it went to the trouble of using the word “employment” instead of “workplace”, and then defining “employment” in terms of the relationship between employer and employee, master and apprentice or principal and agent, thereby confining it to situations where the employer or its equivalent has control or power over the employee, apprentice or agent. The separate inclusion of “regarding . . . any term or condition of employment” in s. 13(1)(b) suggests that the Legislature wanted to target both behaviour flowing out of the relationship between a person in authority and his or her employee generally, as well as specific discrimination in the agreement that establishes that relationship.

[110] It is argued that the use of the word “person” at the outset of s. 13(1) (“[a] person must not”) instead of “employer”, “master” or “principal” signals that the Legislature intended the provision to apply to circumstances beyond discrimination

within the power of an employer, master or principal. However, if one accepts that the words controlling the ambit of the protection are “regarding employment” (i.e. regarding a matter arising out of a relationship of or like that of master-servant), this argument loses its force. The term “person” neither expands nor limits the ambit of the section.

[111] In summary, while the text or words of the provision are not entirely clear, read as a whole, they suggest that the Legislature was targeting discrimination committed directly or through inaction by an employer, master, principal or similar against an employee in the course of their relationship.

B. *Context*

[112] A contextual reading of s. 13(1) supports the view that the Legislature was targeting discrimination arising out of an employer-employee or analogous relationship.

[113] In interpreting a statutory provision, one must look at the legislative context — that is, how the provision fits in and functions in the statutory scheme when considered together with other provisions: see R. Sullivan, *Statutory Interpretation*, (3rd ed. 2016), at pp. 173-79. Each provision is presumed to have a role to play in the overall scheme. An interpretation of one provision that makes another redundant or that conflicts with other provisions or the overall terms of the

statute strongly indicates that the legislature intended that the provision be interpreted differently.

[114] The Code covers a number of kinds of discrimination, including discrimination by unions and associations (s. 14); discriminatory publication (s. 7); and discrimination in tenancy premises (s. 10).

[115] The first contextual consideration that presents itself is the separate protection against discrimination by unions and occupational associations in s. 14 of the Code. Discrimination by unions and associations is, by definition, linked to the complainant's work. If s. 13(1)(b) were interpreted so as to allow claims against anyone in the workplace, most of s. 14 would be redundant. Conversely, if s. 13(1)(b) is confined to claims between persons in an employer-employee or similar relationship, the need for s. 14 becomes apparent. It is possible, of course, that the Legislature intended partial or total redundancy, so it included unions in a separate section simply to highlight that particular issue and provide more detail, as it arguably did with wage discrimination in s. 12. However, it is equally, if not more, plausible to conclude that the Legislature did not consider discrimination by unions or similar groups to be covered by s. 13(1)(b), and went on to cover discrimination by those groups in s. 14.

[116] More broadly, the Code makes a clear distinction between private interactions between private individuals, which are generally not covered, and designated classes of relationships, which are covered. The scheme of the Code is to

describe categories of general protections based on relationships and/or activities, and to exclude interactions between private individuals that might otherwise be caught. Thus, under s. 7 (discriminatory publication), no complaint can be brought on the basis of a discriminatory, though private, communication between individuals (s. 7(2)). And under s. 10 (discrimination in tenancy premises), no complaint can be brought with respect to discriminatory conduct by someone choosing roommates (s. 10(2)(a)). Leaving s. 13 aside, the remaining provisions address circumstances where such exceptions are not needed because they are irrelevant: ss. 8 and 9 describe commercial transactions, s. 11 describes communications that are public by nature (job postings), s. 12 describes decisions that can only be taken by employers (wage discrimination), and as noted, s. 14 addresses unions and occupational associations. The scheme of the Code thus suggests that, where a particular species of discrimination could be read to encompass private interactions between private individuals, the drafter chose to include limiting language so as to clearly indicate that the private sphere falls outside the scope of the Code.

[117] From this we can infer a general legislative policy that ss. 7 to 14 of the Code were intended to apply to discrimination arising out of certain classes of relationships or, in the case of ss. 7 and 11 specifically, discriminatory public communications. They were not intended to govern private acts of discrimination between individuals in a general sense — they were intended to address only the specific interactions they describe. This supports the view that s. 13(1)(b) was never intended as a provision that would enable claims against an individual on the basis of

all of his or her workplace interactions, unless those interactions have some bearing on employment (defined as a relationship) rather than simply on work, writ large. In provisions where the prohibition initially appears broad enough to catch private communications or interactions between private citizens more generally (e.g. ss. 7 and 10), specific exclusions are set out. No such exclusions are present in s. 13(1)(b), simply because it was not intended to cover such broad claims.

[118] The scheme of the Code also supports the view that the Legislature was concerned with power imbalances. The target of many of the sections is someone who controls access to a service (s. 8), accommodation (ss. 8 and 10), property and tenancy (ss. 9 and 10), fair wages (s. 12), or membership in an association (s. 14). Rather than targeting all acts of discrimination, the Legislature — when not specifically addressing the harm of discriminatory public communications — narrowed its focus to discrimination by those in a position of power over more vulnerable people. All of these examples reflect different contexts in which discrimination can arise; this is why they are enumerated in the Code. However, the Legislature went further to indicate the types of relationships or communications that are of particular concern in these contexts. These, therefore, inform the nature of claims under the Code.

[119] Another difficulty is that, if s. 13(1)(b) enables a claim against Mr. Schrenk on the basis of the emails he sent after he was removed from the project and workplace, it is not clear how that provision and s. 7(2) can be reconciled. When

does a communication between individuals who no longer work together become private?

[120] Section 44(2) of the Code, which provides that “[a]n act or thing done or omitted by an employee . . . of any person within the scope of his or her authority is deemed to be an act or thing done or omitted by that person”, confirms the Legislature’s intent to target discrimination arising from the employment or equivalent relationship. It makes employers and their equivalents respondents in workplace discrimination claims. This is both consistent with the reading of s. 13(1)(b) I propose and with the Court’s decisions in *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, at pp. 91-96, and *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, at pp. 1292-94, which, with respect, focus solely on the ambit of the employer’s responsibility for the conduct of employees toward others in the workplace. Section 44(2) suggests that concerns about workplace control, systemic remediation, and ultimate responsibility animate such claims.

[121] It is argued that the interpretation of s. 13(1)(b) should be informed by the general backdrop of workplace harassment, which can come not only from employers, but from many sources. While this may be true, the question at issue is whether we can infer that the Legislature intended the provision to capture all claims against any person who engages in workplace discrimination — whether predicated on the existence of a relationship of power imbalance or not. A contextual reading of

the scheme and provisions of the Code suggests the latter was not the Legislature's intention.

C. *Purpose*

[122] Section 3(a) of the Code offers an expansive objective — “to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia”. Paragraph (b) is also broad — “to promote a climate of understanding and mutual respect where all are equal in dignity and rights”. However, the remaining three objectives, which focus on discrimination, inequality and redress, are expressly confined to measures found in the Code. The purpose of the Code, accurately described, is to contribute to the long-term goals set out in paras. (a) and (b) via the specific tools the Code provides for combatting discrimination and inequality.

[123] My reading of s. 13(1)(b) is consistent with this objective. Section 13(1)(b) may be read as targeting workplace discrimination that arises out of the employer-employee relationship or its equivalents. It is meant to cover *all* forms of workplace discrimination to which a worker is susceptible. However, it trains its regulatory guns on those responsible for intervening and halting the events in question. Where those responsible for guaranteeing discrimination-free workplaces fail to intervene to prevent or correct discrimination, s. 13(1)(b) is engaged. Since there will always be an entity in any work context that is responsible for ensuring that

workers enjoy a discrimination-free environment, this reading of s. 13(1)(b) does not thwart the purpose of the Code.

[124] It is argued that this interpretation of s. 13(1)(b) will leave victims of discrimination by their co-workers without a remedy — a result that would be inconsistent with the broad remedial purpose of statutes like the Code. This is not the case. Interpreting s. 13(1)(b) as confined to employer-employee and equivalent relationships may preclude claims under the Code against harassing co-workers. But it does not preclude complaints against the entities responsible for ensuring that the workplace is free of discrimination, like a common employer or other individuals or organizations that bear responsibility for the workplace in question.

[125] An employee for whom leaving work is not an option is not a captive audience for a co-worker's harassment. Her remedy is not to confront her co-worker, but to go to the employer or person responsible for providing a discrimination-free workplace. If the employer fails to remedy the discrimination, the employee can bring a claim against the employer without fear of reprisal (Code, s. 43). Where the employer fails to take appropriate steps to correct the discrimination, the Tribunal may determine that the employer's conduct itself constitutes discrimination, giving the employee access to the full range of remedies provided by the Code.

[126] It is argued that harassment by or to a passer-by on work premises should be covered by s. 13(1)(b). The answer is that the Code does cover this harassment. If discrimination to a worker occurs and the person responsible for protecting that

worker (e.g. the employer) fails to protect the worker, s. 13(1)(b) is engaged. This would also apply to a customer harassing an employee, such as a patron harassing a server at a restaurant. Employers have a duty to intervene, and if they do not, they may be held responsible under s. 13(1)(b). If it is the customer who is harassed, she has recourse under different provisions of the Code: ss. 8(1), 9 and 10(1).

[127] It is also argued in this case that an employment-based conception of s. 13(1)(b) provides Mr. Sheikhzadeh-Mashgoul with no remedy against Mr. Schrenk directly in response to the emails Mr. Schrenk sent after they no longer worked together. However, this result flows from the explicit exclusion from protection of those who receive discriminatory private communications under s. 7(2) of the Code. If a discriminatory email is broadcast publicly, s. 7(1) would be engaged, but if the email remains private, the Code is clear: it provides no remedy. To read s. 13(1)(b) to include such emails when they were private would be to ignore the express language of the Code.

[128] Finally, it is suggested that confining s. 13(1)(b) to employment and employment-like relationships absolves discriminators from direct responsibility for their conduct. This does not mean, however, that discrimination will be allowed to flourish. Instead of casting its net indiscriminately to allow claims against any individual who commits a discriminatory act or utters a discriminatory word at a workplace, the Legislature chose to focus on those responsible for maintaining a

discrimination-free workplace. Far from undermining the Code’s purpose, this choice upholds it.

D. *Jurisprudential Consistency*

[129] An interpretation of s. 13(1)(b) predicated on the responsibilities of employers and their equivalents is consistent with the jurisprudence.

[130] First, the broad interpretation proposed by my colleagues would narrow this Court’s decision in *McCormick*, which confirmed that the nature of the relationship between complainant and respondent is dispositive of whether s. 13(1)(b) applies. If all that is required to link a complainant to a respondent under s. 13(1)(b) is a common work environment or a “sufficient nexus with the employment context” (Justice Rowe’s reasons, at para. 67), it would be unnecessary to consider the relationship between parties, as *McCormick* instructs. Second, it is difficult to see how someone in a co-worker position like Mr. Schrenk could ever claim a *bona fide* occupational requirement as a justification for his conduct, as explained in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3, which provides the governing framework for assessing workplace discrimination claims. On the interpretation I propose, these difficulties do not arise.

III. Conclusion

[131] For these reasons, I conclude that s. 13(1)(b) is limited to claims arising out of employment or equivalent relationships. I would dismiss the appeal.

Appeal allowed, MCLACHLIN C.J. and CÔTÉ and BROWN JJ. dissenting.

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