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Equality in Employment

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Chapter 13: Equality in Employment

13:100 INTRODUCTION

Labour law has long been grounded in equality considerations; diminishing the inequality of bargaining power between employers and employees requires that employees be allowed to act in concert through trade unions. Today, when we speak of equality rights in the workplace, we are more likely referring to protections against discrimination — to diminishing sexism, racism, and homophobia or to enhancing the ability of persons with disabilities to participate fully in the workforce. In this regard, labour relations are subject to the constraints of equality law, just as other areas of life are. The equality provisions of the *Canadian Charter of Rights and Freedoms* apply to labour and employment legislation and to its application by administrative tribunals, as well as to any employment relationship that has a nexus with government. Human rights legislation applies to employers, unions, and employees in the public and private sectors, and it may take primacy over other legislation. Grievance arbitrators have jurisdiction, to an increasing degree, to apply human rights legislation and the equality provisions of the *Charter*. Other statutes also explicitly promote particular aspects of equality. Pay equity legislation, for example, reflects important policy decisions about equality relationships in the workplace and about the social status of employees.

In this chapter, we address some of the most pressing equality issues involved in labour relations, a few of which were mentioned in earlier chapters. We begin with an overview of the meanings given to equality and the identification of equality-seeking groups. We then discuss specific areas of equality law, such as sexual harassment law, pay equity law, and the employer's duty to accommodate, as they apply in the labour and employment context. Some traditional labour relations principles, such as respect for seniority, must be reconciled with equality requirements. We also discuss the interface between different forums that enforce equality rights in the workplace.

13:200 THE CONCEPT OF EQUALITY

13:210 Theoretical Development of the Concept

Equality is a complex concept. It has evolved in many different arenas, it reflects the contribution of many different disciplines, and it is highly contextual. "Equality and inequality," one writer has said, "are political constructions; both their conditions and their definitions vary across space, time, and philosophical families:" Jane Jenson, "Rethinking Equality and Equity: Canadian Children and the Social Union," in Edward Broadbent, ed., *Democratic Equality: What Went Wrong?* at 111.

Our contemporary understanding of social equality has its roots in a commitment to political and legal equality, which is embodied in principles such as “one person, one vote” and the right to equal treatment before the law. These are examples of formal equality; the capacity to enjoy them and use them effectively is often dependent on social or economic status.

Proponents of formal equality may go no farther than to accept that arbitrary barriers should not be placed in the way of anyone’s *opportunity* to improve his or her condition. Underlying the notion of formal equality is the objective of treating people more or less the same — that is, emphasizing the qualities they have in common and reducing the extent to which they are treated on the basis of irrelevant characteristics. However, if one begins with the assumption that, for example, only males are capable of being lawyers, high school principals, or skilled tradespeople, excluding women (explicitly or in practice) from those lines of work will not be seen as a denial of equality rights. Under this status-based approach to equality rights, anyone who was treated in a manner appropriate to his or her status was seen to be treated equally.

Taking the commitment to equality one step further leads to the idea that people should be judged on their individual merit and not be excluded from pursuing opportunities or receiving benefits because of particular characteristics, such as class, race, sex, religion, or disability. This idea of equality of opportunity represented a step forward from the earlier status-based concept to a liberal concept of equality based on the right of each individual to achieve whatever can be achieved through his or her own efforts. Yet when we look below the surface of this liberal ideal, it becomes obvious that because of their economic status, some people are better placed than others to develop their aptitudes.

The beginnings of anti-discrimination theory are based on the moral equality of human beings, and are found in the idea that no one should be denied opportunities on the basis of characteristics which are unrelated to his or her objectives. Such characteristics tend to be those that are with us from birth, such as race or sex, or those to which our society otherwise gives a high value, such as religion. The domestic development of anti-discrimination theory reflected developments at the international level during the post-World War II period, which saw the enactment of international human rights conventions in response to the egregious treatment of Jews, homosexuals, and other minorities, who had been castigated simply because they were Jews, homosexuals, or members of another minority. It was hoped that strong statements about common humanity would prevent a recurrence of similar events, but that hope has not materialized. As well, both international and domestic human rights theory and practice have been criticized as reflecting a eurocentric bias: because human rights law places so much emphasis on the individual, the argument runs, it fails to reflect communal values that are fundamental to certain cultures.

As noted above, anti-discrimination law initially stressed “sameness,” emphasizing the fact that all human beings share common characteristics simply because they are human beings. Whatever its strengths, that approach overlooked the ways in which people can be treated unequally under a veil of equal treatment. The gradual realization of

this shortcoming in recent decades led to the development of the distinction between direct and indirect discrimination and the duty to accommodate.

The distinction between direct and indirect discrimination was based on the recognition that there can be discrimination without an intention to discriminate. Ostensibly neutral job requirements are often developed without consideration of their impact on members of particular groups. A job requirement that an employee be able to lift heavy weights might have a disparate impact on women or on people with particular disabilities, even if the employer does not actually intend to exclude them from the job. A requirement that employees work on Saturdays may not be intended to discriminate against those whose religion makes Saturday a day of rest, but it nevertheless has a disproportionate impact on them. In such cases, the issue becomes whether it is truly necessary that every employee be able to meet the particular requirement, or whether an accommodation can be reached to allow the job to be filled by someone who cannot meet the requirement because of a protected attribute such as sex or religion. However, the interplay between direct and indirect discrimination on the one hand, and the duty to accommodate on the other, led to the development of complex doctrines that made the law very difficult to apply. In 1999, in the *Meiorin* case, set out below in section 13:222, the Supreme Court of Canada sought to simplify the law. *Meiorin* also reflected the now widely-accepted view that difference should not be measured from a majority-oriented baseline, and that what is sometimes required is not merely the accommodation of individuals but the changing of existing standards to bring them into line with non-majority needs. This is in accord with the perception that individual cases of discrimination do not exist in isolation from broader social conditions.

The evolution in the concept of equality has been accompanied by an evolution in the identification of the groups protected by anti-discrimination law. Initially, a few categories were identified on the basis of seemingly immutable attributes such as race and sex. Today, human rights legislation recognizes a much wider variety of grounds, which may include family status, marital status, and criminal record. Not only changing social mores, but technological advances as well, are having an impact in this regard. For example, genetic testing may indicate that a person has an above-average chance of contracting a particular disease, and someone may now be HIV-positive for many years without developing AIDS. The Report of the Canadian Human Rights Act Review Panel (*Promoting Equality: a New Vision* (2000)) recommended that people in such situations should not be subject to discrimination because of their “predisposition to being disabled.” The situation of transgendered people provides another example: protection from discrimination on the basis of sex and disability does not meet all of the distinctive problems they face, so the Review Panel recommended that gender identity be added as a protected ground.

13:220 Application of the Concept of Equality by the Courts

Although understanding different approaches to the concept of equality requires us to look at a variety of sources — philosophical and political, among others — we also need

to understand how the law sees that concept. The main sources of equality law in the labour relations context are found in section 15 of the *Canadian Charter of Rights and Freedoms* and in human rights statutes, and in the interpretation of those instruments by appellate courts. We may look elsewhere for criticisms of those legally derived meanings, but they are the meanings that will apply when equality issues are raised in the labour context.

Until the enactment of human rights legislation, there was no way to challenge inequality directly where issues such as race or sex were involved. Provincial legislation prohibiting Chinese from working in mines was successfully challenged more than a century ago on division of powers grounds; it was held to trespass on federal authority over “naturalization and aliens” under section 91(25) of the *Constitution Act, 1867*. Not much later, however, a provincial statute prohibiting Chinese employers from hiring white women was held to be within provincial authority because its primary purpose was found to be protective. See *Union Colliery Co. v. Bryden*, [1899] A.C. 580 (P.C.) and *Quong Wing v. The King* (1914), 49 S.C.R. 440, respectively. The first detailed statute codifying equality in employment as a basic human right was the Saskatchewan *Bill of Rights Act*, S.S. 1947, c. 35. It was a quasi-criminal legislation that required proof of an invidious intent: its sanctions were penal, focusing on fines and imprisonment. Attacking discrimination by punishing the perpetrators of discrimination proved ineffective, however, and other provincial legislatures passed statutes designed to give victims compensation and relief. In 1951 Ontario passed the first human rights statute — the *Fair Employment Practices Act*, S.O. 1951, c. 24. Slowly, during the next two decades, the other provinces and the federal government enacted similar legislation. Over the years the prohibited grounds of discrimination under those statutes were expanded, as were the areas of activity to which they applied, the administrative machinery for their enforcement, and the range of remedies available. In *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181, excerpted above in Chapter 2 (section 2:300), Laskin C.J. held that a civil action could not be brought to vindicate equality rights set out in human rights statutes, because those statutes themselves provided a comprehensive administrative and adjudicative regime for the protection of such rights.

Human rights legislation constituted the major source of equality law until section 15 of the *Canadian Charter of Rights and Freedoms* came into force in 1985. When the Supreme Court of Canada decided its first case under section 15 of the *Charter* — *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 — it sought guidance from contemporary jurisprudence under human rights legislation. The idea that intention is not required for a finding of discrimination, the idea that discrimination need not be overt or direct but may result from a disparate impact on a particular group, and the idea that attaining equality may require treating people differently — these were all imported into the interpretation of section 15 of the *Charter* from the Supreme Court of Canada’s human rights jurisprudence.

A number of the leading early human rights cases involved the workplace. For example, in *Ontario (Human Rights Commission) v. Simpsons Sears Ltd.*, [1985] 2 S.C.R. 536 (*O’Malley*), a department store employee objected to working on Friday nights and Sat-

urdays on religious grounds. Although the employer had legitimate reasons for requiring employees to work on Friday night and Saturday and did not intend to discriminate against O'Malley, the Supreme Court of Canada held the requirement to be discriminatory because it had a disparate impact on anyone of her religion. The Court ordered the employer to accommodate O'Malley by scheduling her time differently, as long as the rescheduling did not impose an undue hardship on the employer. Thus, *O'Malley* established that intention was not required for a finding of discrimination, and it also introduced the idea of the duty to accommodate.

Human rights legislation requires accommodation, and (for some prohibited grounds, such as disability) it permits the defence that in the particular circumstances, an otherwise discriminatory requirement is a "bona fide occupational requirement" (BFOR). Accommodation is mandatory if it can be effected without causing what the legislation refers to as "undue hardship" to the employer or to other employees. However, if the employer establishes that no accommodation is possible without undue hardship, then the employer has made out the BFOR defence. Human rights commissions in some jurisdictions (including Ontario) have developed detailed but non-binding guidelines for assessing what constitutes undue hardship.

In 1989, in the *Andrews* case referred to above, the Supreme Court of Canada rejected the formal equality approach that it had developed under the *Canadian Bill of Rights*, which was the non-constitutional predecessor to the Charter. In particular, the Court rejected the "similarly situated" test, under which "things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unalikehood." In holding that section 15 of the *Charter* guaranteed substantive and not merely formal equality, the Court said: "Consideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application."

Andrews established a three-stage test for determining whether there had been a breach of subsection 15(1). To prove a breach, a plaintiff had to show that the impugned legislation or other governmental action did all of the following: that it (1) made a distinction (2) which resulted in a disadvantage (3) on the basis of an enumerated ground set out in section 15(1) or an "analogous" ground — that is, a personal attribute which is immutable (in that it is impossible or very difficult to change) and which is characteristic of a disadvantaged group. In *Andrews*, citizenship, which was a qualification for being called to the Bar of British Columbia, was held to be an analogous ground.

The test for determining whether there has been a breach of section 15 of the Charter has evolved since *Andrews*, although it is still treated as the leading case. The most significant departure came with a 1995 group of cases known as the equality trilogy: *Egan v. Canada*, [1995] 2 S.C.R. 513; *Miron v. Trudel* [1995] 2 S.C.R. 418; and *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627. In those cases, none of which involved employment, a minority of the Court added the requirement that a complainant must show that the distinction being challenged is not relevant to the purpose of the legislation. However, in subsequent decisions (including *Vriend v. Alberta*, set out below), the Court avoided this dispute by saying that it did not matter which approach was used in the particular case.

13:221 Relationship between Legislatures and Courts

Recent developments in equality law, particularly under the *Charter*, have led to debate about the appropriate role of the courts and legislatures in this area. Legislatures must, of course, comply with the *Charter* as interpreted by the courts, unless they are willing to invoke section 33 of the *Charter* (the “notwithstanding” clause). The following excerpt from the *Vriend* case confronts the “division of labour” debate, and provides a further illustration of how the Supreme Court of Canada addresses equality issues under the *Charter* in the employment context.

***Vriend v. Alberta*, [1998] 1 S.C.R. 493**

[Throughout Delwin Vriend’s employment as a laboratory co-ordinator by King’s College in Alberta, his work had been evaluated positively. In 1990, in response to an inquiry by the president of the college, Mr. Vriend disclosed that he was gay. In 1991, after the college’s board of governors adopted a policy disapproving of homosexuality, the college dismissed him. The sole reason given was his non-compliance with the college’s policy. Mr. Vriend tried to file a complaint with the Alberta Human Rights Commission, under the *Individual’s Rights Protection Act* (IRPA) (later renamed the *Human Rights, Citizenship and Multiculturalism Act*), to the effect that his employer had discriminated against him because of his sexual orientation. The Commission advised him that he could not bring such a complaint, because the IRPA did not include sexual orientation as a protected ground. (When Mr. Vriend filed his complaint, the IRPA listed the following prohibited grounds of discrimination: race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, and place of origin. Later, but before the matter was decided by the Supreme Court of Canada, marital status, source of income, and family status had been added.)

Mr. Vriend sued for a declaration that the omission of sexual orientation from the IRPA contravened section 15 of the *Canadian Charter of Rights and Freedoms*. He won at trial, lost in the Alberta Court of Appeal, and appealed to the Supreme Court of Canada. Cory and Iacobucci JJ. wrote a joint judgment for the majority of the Court, Cory J. dealing with the section 15 issue and Iacobucci J. with the section 1 issue and the remedy.]

CORY and IACOBUCCI JJ. (for the majority of the Court):

...

Despite repeated calls for its inclusion sexual orientation has never been included in the list of those groups protected from discrimination. In 1984 and again in 1992, the Alberta Human Rights Commission recommended amending the *IRPA* to include sexual orientation as a prohibited ground of discrimination. In an attempt to effect such an amendment, the opposition introduced several bills; however, none went beyond first reading. Although at least one Minister responsible for the administration of the *IRPA* supported the amendment, the correspondence with a number of Cabinet members and members of the Legislature makes it clear that the omission of sexual orientation from the *IRPA* was deliberate and not the result of an oversight. The reasons given for declining to take this action include the assertions that sexual orientation is a ‘marginal’ ground;

that human rights legislation is powerless to change public attitudes; and that there have only been a few cases of sexual orientation discrimination in employment brought to the attention of the Minister.

In 1992, the Human Rights Commission decided to investigate complaints of discrimination on the basis of sexual orientation. This decision was immediately vetoed by the Government and the Minister directed the Commission not to investigate the complaints.

In 1993, the Government appointed the Alberta Human Rights Review Panel to conduct a public review of the *IRPA* and the Human Rights Commission. When it had completed an extensive review, the Panel issued its report. . . . The report contained a number of recommendations, one of which was that sexual orientation should be included as a prohibited ground of discrimination in the Act. In its response . . . , the Government stated that the recommendation regarding sexual orientation would be dealt with through this case. . . .

...

V. ANALYSIS . . .

B. Application of the *Charter*

I. Application of the *Charter* to a Legislative Omission

Does s. 32 of the *Charter* prohibit consideration of a s. 15 violation when that issue arises from a legislative omission?

...

McClung J.A. in the Alberta Court of Appeal criticized the application of the *Charter* to a legislative omission as an encroachment by the courts on legislative autonomy. He objected to what he saw as judges dictating provincial legislation under the pretext of constitutional scrutiny. In his view, a choice by the legislature not to legislate with respect to a particular matter within its jurisdiction, especially a controversial one, should not be open to review by the judiciary:

When they choose silence provincial legislatures need not march to the *Charter* drum. In a constitutional sense they need not march at all . . . The *Canadian Charter of Rights and Freedoms* was not adopted by the provinces to promote the federal extraction of subsidiary legislation from them but only to police it once it is proclaimed — if it is proclaimed. . . .

There are several answers to this position. The first is that in this case, the constitutional challenge concerns the *IRPA*, legislation that has been proclaimed. The fact that it is the underinclusiveness of the Act which is at issue does not alter the fact that it is the legislative act which is the subject of *Charter* scrutiny in this case. Furthermore, the language of s. 32 does not limit the application of the *Charter* merely to positive actions encroaching on rights or the excessive exercise of authority, as McClung J.A. seems to suggest. . . .

It is suggested that this appeal represents a contest between the power of the democratically elected legislatures to pass the laws they see fit, and the power of the courts to

disallow those laws, or to dictate that certain matters be included in those laws. To put the issue in this way is misleading and erroneous. Quite simply, it is not the courts which limit the legislatures. Rather, it is the Constitution, which must be interpreted by the courts, that limits the legislatures. This is necessarily true of all constitutional democracies. Citizens must have the right to challenge laws which they consider to be beyond the powers of the legislatures. When such a challenge is properly made, the courts must, pursuant to their constitutional duty, rule on the challenge. It is said, however, that this case is different because the challenge centres on the legislature's failure to extend the protection of a law to a particular group of people. This position assumes that it is only a positive act rather than an omission which may be scrutinized under the *Charter*. In my view, for the reasons that will follow, there is no legal basis for drawing such a distinction. In this as in other cases, the courts have a duty to determine whether the challenge is justified. It is not a question, as McClung J.A. suggested, of the courts imposing their view of 'ideal' legislation, but rather of determining whether the challenged legislative act or omission is constitutional or not.

...

The respondents contend that a deliberate choice not to legislate should not be considered government action and thus does not attract *Charter* scrutiny. This submission should not be accepted. They assert that there must be some 'exercise' of 's. 32 authority' to bring the decision of the legislature within the purview of the *Charter*. Yet there is nothing either in the text of s. 32 or in the jurisprudence concerned with the application of the *Charter* which requires such a narrow view of the *Charter's* application.

The relevant subsection, s. 32(1)(b), states that the *Charter* applies to 'the legislature and government of each province in respect of all matters within the authority of the legislature of each province.' There is nothing in that wording to suggest that a positive act encroaching on rights is required; rather the subsection speaks only of *matters within the authority of the legislature*. Dianne Pothier has correctly observed that s. 32 is 'worded broadly enough to cover positive obligations on a legislature such that the *Charter* will be engaged even if the legislature refuses to exercise its authority'...

C. Section 15(1)

1. Approach to Section 15(1)

The rights enshrined in s. 15(1) of the *Charter* are fundamental to Canada. They reflect the fondest dreams, the highest hopes and finest aspirations of Canadian society. When universal suffrage was granted it recognized to some extent the importance of the individual. Canada by the broad scope and fundamental fairness of the provisions of s. 15(1) has taken a further step in the recognition of the fundamental importance and the innate dignity of the individual. . . . In order to achieve equality the intrinsic worthiness and importance of every individual must be recognized regardless of the age, sex, colour, origins, or other characteristics of the person. . . .

It is easy to say that everyone who is just like 'us' is entitled to equality. Everyone finds it more difficult to say that those who are 'different' from us in some way should have the

same equality rights that we enjoy. Yet so soon as we say any enumerated or analogous group is less deserving and unworthy of equal protection and benefit of the law all minorities and all of Canadian society are demeaned. It is so deceptively simple and so devastatingly injurious to say that those who are handicapped or of a different race, or religion, or colour or sexual orientation are less worthy. Yet, if any enumerated or analogous group is denied the equality provided by s. 15 then the equality of every other minority group is threatened. That equality is guaranteed by our Constitution. If equality rights for minorities had been recognized, the all too frequent tragedies of history might have been avoided. It can never be forgotten that discrimination is the antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual.

[Cory J. then reviewed what several Supreme Court of Canada decisions had said about how section 15 should be interpreted. He concluded that “any differences that may exist in the approach to s. 15(1) would not affect the result.”]

The essential requirements of all these cases will be satisfied by enquiring first, whether there is a distinction which results in the denial of equality before or under the law, or of equal protection or benefit of the law; and second, whether this denial constitutes discrimination on the basis of an enumerated or analogous ground.

2. The *IRPA* creates a Distinction Between the Claimant and Others Based on a Personal Characteristic, and Because of That Distinction, It Denies the Claimant Equal Protection or Equal Benefit of the Law

(a) *Does the IRPA Create a Distinction?*

The respondents have argued that because the *IRPA* merely omits any reference to sexual orientation, this ‘neutral silence’ cannot be understood as creating a distinction. They contend that the *IRPA* extends full protection on the grounds contained within it to heterosexuals and homosexuals alike, and therefore there is no distinction and hence no discrimination. It is the respondents’ position that if any distinction is made on the basis of sexual orientation that distinction exists because it is present in society and not because of the *IRPA*.

These arguments cannot be accepted. They are based on that ‘thin and impoverished’ notion of equality referred to in [*Eldridge v. British Columbia (Attorney-General)*]. It has been repeatedly held that identical treatment will not always constitute equal treatment. . . . It is also clear that the way in which an exclusion is worded should not disguise the nature of the exclusion so as to allow differently drafted exclusions to be treated differently. . .

It is clear that the *IRPA*, by reason of its underinclusiveness, does create a distinction. The distinction is simultaneously drawn along two different lines. The first is the distinction between homosexuals, on one hand, and other disadvantaged groups which are protected under the Act, on the other. Gays and lesbians do not even have formal equality with reference to other protected groups, since those other groups are explicitly included and they are not.

The second distinction, and I think, the more fundamental one, is between homosexuals and heterosexuals. This distinction may be more difficult to see because there is, on

the surface, a measure of formal equality: gay or lesbian individuals have the same access as heterosexual individuals to the protection of the *IRPA* in the sense that they could complain to the Commission about an incident of discrimination on the basis of any of the grounds currently included. However, the exclusion of the ground of sexual orientation, considered in the context of the social reality of discrimination against gays and lesbians, clearly has a disproportionate impact on them as opposed to heterosexuals. Therefore the *IRPA* in its underinclusive state denies substantive equality to the former group. . . .

[Cory]. rejected the argument that the distinction is not created by law, but by society, and therefore should not be subject to review under the *Charter*.]

Although the respondents try to distinguish this case from *Bliss v. Attorney General of Canada* . . . , the reasoning they put forward is very much reminiscent of the approach taken in that case. . . . There it was held that a longer qualifying period for unemployment benefits relating to pregnancy was not discriminatory because it applied to all pregnant individuals, and that if this category happened only to include women, that was a distinction created by nature, not by law. This reasoning has since been emphatically rejected. . . .

(b) Denial of Equal Benefit and Protection of the Law

It is apparent that the omission from the *IRPA* creates a distinction. That distinction results in a denial of the equal benefit and equal protection of the law. It is the exclusion of sexual orientation from the list of grounds in the *IRPA* which denies lesbians and gay men the protection and benefit of the Act in two important ways. They are excluded from the government's statement of policy against discrimination, and they are also denied access to the remedial procedures established by the Act.

Therefore, the *IRPA*, by its omission or underinclusiveness, denies gays and lesbians the equal benefit and protection of the law on the basis of a personal characteristic, namely sexual orientation.

3. The Denial of Equal Benefit and Equal Protection Constitutes Discrimination Contrary to Section 15(1)

In [*Egan v. Canada*], it was said that there are two aspects which are relevant in determining whether the distinction created by the law constitutes discrimination. First, 'whether the equality right was denied on the basis of a personal characteristic which is either enumerated in s. 15(1) or which is analogous to those enumerated.' Second, 'whether that distinction has the effect on the claimant of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to benefits or advantages which are available to others'. . . . A discriminatory distinction was also described as one which is 'capable of either promoting or perpetuating the view that the individual adversely affected by this distinction is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration'. . . . It may as well be appropriate to consider whether the unequal treatment is based on 'the stereotypical application of presumed group or personal characteristics'. . . .

(a) The Equality Right is Denied on the Basis of a Personal Characteristic Which Is Analogous to Those Enumerated in Section 15(1)

In *Egan*, it was held, on the basis of 'historical social, political and economic disadvantage suffered by homosexuals' and the emerging consensus among legislatures . . . , as well as previous judicial decisions . . . , that sexual orientation is a ground analogous to those listed in s. 15(1). Sexual orientation is 'a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs'. . . . It is analogous to the other personal characteristics enumerated in s. 15(1); and therefore this step of the test is satisfied. . . .

(b) The Distinction Has the Effect of Imposing a Burden or Disadvantage Not Imposed on Others and Withholds Benefits or Advantages Which Are Available to Others

(i) Discriminatory Purpose

[In response to arguments that the reason the Alberta Government excluded sexual orientation from the legislation was itself discriminatory, Cory J. held that it was not necessary to decide the point since a finding of discrimination does not rely on intention and the discriminatory effects of the omission were sufficient to find discrimination.]

(ii) Discriminatory Effects of the Exclusion

The effects of the exclusion of sexual orientation from the protected grounds listed in the *IRPA* must be understood in the context of the nature and purpose of the legislation. The *IRPA* is a broad, comprehensive scheme for the protection of individuals from discrimination in the private sector. . . .

The commendable goal of the legislation . . . is to affirm and give effect to the principle that all persons are equal in dignity and rights. It prohibits discrimination in a number of areas and with respect to an increasingly expansive list of grounds.

The comprehensive nature of the Act must be taken into account in considering the effect of excluding one ground from its protection. It is not as if the Legislature had merely chosen to deal with one type of discrimination. In such a case it might be permissible to target only that specific type of discrimination and not another. . . . The case at bar presents a very different situation. It is concerned with legislation that purports to provide comprehensive protection from discrimination for all individuals in Alberta. The selective exclusion of one group from that comprehensive protection therefore has a very different effect.

The first and most obvious effect of the exclusion of sexual orientation is that lesbians or gay men who experience discrimination on the basis of their sexual orientation are denied recourse to the mechanisms set up by the *IRPA* to make a formal complaint of discrimination and seek a legal remedy. Thus, the Alberta Human Rights Commission could not hear Vriend's complaint and cannot consider a complaint or take any action on behalf of any person who has suffered discrimination on the ground of sexual orientation. The denial of access to remedial procedures for discrimination on the ground of sexual orientation must have dire and demeaning consequences for those affected. This result is exacerbated both because the option of a civil remedy for discrimination is precluded and by the lack of success that lesbian women and gay men have had in attempting to obtain a remedy for discrimination on the ground of sexual orientation by complaining on other

grounds such as sex or marital status. Persons who are discriminated against on the ground of sexual orientation, unlike others protected by the Act, are left without effective legal recourse for the discrimination they have suffered.

...

Apart from the immediate effect of the denial of recourse in cases of discrimination, there are other effects which, while perhaps less obvious, are at least as harmful. In *Haig*, the Ontario Court of Appeal based its finding of discrimination on both the 'failure to provide an avenue for redress for prejudicial treatment of homosexual members of society' and 'the possible inference from the omission that such treatment is acceptable' (p. 503). It can be reasonably inferred that the absence of any legal recourse for discrimination on the ground of sexual orientation perpetuates and even encourages that kind of discrimination. The respondents contend that it cannot be assumed that the 'silence' of the *IRPA* reinforces or perpetuates discrimination, since governments 'cannot legislate attitudes.' However, this argument seems disingenuous in light of the stated purpose of the *IRPA*, to prevent discrimination. It cannot be claimed that human rights legislation will help to protect individuals from discrimination, and at the same time contend that an exclusion from the legislation will have no effect.

However, let us assume, contrary to all reasonable inferences, that exclusion from the *IRPA*'s protection does not actually contribute to a greater incidence of discrimination on the excluded ground. Nonetheless that exclusion, deliberately chosen in the face of clear findings that discrimination on the ground of sexual orientation does exist in society, sends a strong and sinister message. The very fact that sexual orientation is excluded from the *IRPA*, which is the Government's primary statement of policy against discrimination, certainly suggests that discrimination on the ground of sexual orientation is not as serious or as deserving of condemnation as other forms of discrimination. It could well be said that it is tantamount to condoning or even encouraging discrimination against lesbians and gay men. Thus this exclusion clearly gives rise to an effect which constitutes discrimination.

The exclusion sends a message to all Albertans that it is permissible, and perhaps even acceptable, to discriminate against individuals on the basis of their sexual orientation. The effect of that message on gays and lesbians is one whose significance cannot be underestimated. As a practical matter, it tells them that they have no protection from discrimination on the basis of their sexual orientation. Deprived of any legal redress they must accept and live in constant fear of discrimination. These are burdens which are not imposed on heterosexuals.

Perhaps most important is the psychological harm which may ensue from this state of affairs. Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem. Compounding that effect is the implicit message conveyed by the exclusion, that gays and lesbians, unlike other individuals, are not worthy of protection. . . . The potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination.

Even if the discrimination is experienced at the hands of private individuals, it is the state that denies protection from that discrimination.

...

In excluding sexual orientation from the *IRPA*'s protection, the Government has, in effect, stated that 'all persons are equal in dignity and rights,' except gay men and lesbians. Such a message, even if it is only implicit, must offend s. 15(1), the 'section of the *Charter*, more than any other, which recognizes and cherishes the innate human dignity of every individual'. . . . This effect, together with the denial to individuals of any effective legal recourse in the event they are discriminated against on the ground of sexual orientation, amount to a sufficient basis on which to conclude that the distinction created by the exclusion from the *IRPA* constitutes discrimination.

3. 'Mirror' Argument

[The Government argued that if the complaint succeeded in this case, human rights legislation would always have to include the same protected grounds as the *Charter*, thus restricting legislative choice. Cory J. concluded that it was not necessary to decide the point. Although omissions may be vulnerable to challenge under the *Charter*, he said, "it is simply not true that human rights legislation will be forced to 'mirror' the *Charter* in all cases."]

Whether an omission is unconstitutional must be assessed in each case, taking into account the nature of the exclusion, the type of legislation, and the context in which it was enacted. The determination of whether a particular exclusion complies with s. 15 of the *Charter* would not be made through the mechanical application of any 'mirroring' principle, but rather, as in all other cases, by determining whether the exclusion was proven to be discriminatory in its specific context and whether the discrimination could be justified under s. 1. If a provincial legislature chooses to take legislative measures which do not include all of the enumerated and analogous grounds of the *Charter*, deference may be shown to this choice, so long as the tests for justification under s. 1, including rational connection, are satisfied.

...

[Having concluded that the omission violated section 15, the Court moved to consideration of whether it was justified under section 1. Iacobucci J. held that the Alberta Government had not shown that the omission of sexual orientation as a protected ground under the *IRPA* satisfied the "pressing and substantial objective" part of the *Oakes* test. This was enough to defeat the Government's section 1 argument, but Iacobucci J. went on to apply the other branches of the *Oakes* test. With respect to the requirement that there be a rational connection between the objective and the impugned omission, the Government argued that "a rational connection to the purpose of a statute can be achieved through the use of incremental means which, over time, expand the scope of the legislation to all those whom the legislature determines to be in need of statutory protection." In response to that argument, Iacobucci J. said:

The incrementalism approach was advocated in *Egan* by Sopinka J. in a context very different from that in the case at bar. Firstly, in *Egan*, where the concern was the exclusion

of same-sex couples from the *Old Age Security Act's* definition of the term 'spouse,' the Attorney General took the position that more acceptable arrangements could be worked out over time. In contrast, in the present case, the inclusion of sexual orientation in the *IRPA* has been repeatedly rejected by the Alberta Legislature. Thus, it is difficult to see how any form of 'incrementalism' is being applied with regard to the protection of the rights of gay men and lesbians. Secondly, in *Egan* there was considerable concern regarding the financial impact of extending a benefits scheme to a previously excluded group. Including sexual orientation in the *IRPA* does not give rise to the same concerns. . . .

In addition, in *Egan*, writing on behalf of myself and Cory J., I took the position that the need for governmental incrementalism was an inappropriate justification for *Charter* violations. I remain convinced that this approach is generally not suitable for that purpose, especially where, as here, the statute in issue is a comprehensive code of human rights provisions. In my opinion, groups that have historically been the target of discrimination cannot be expected to wait patiently for the protection of their human dignity and equal rights while governments move toward reform one step at a time. . . .

In the last part of his judgment, Iacobucci J. addressed the question of how the Court should remedy the constitutional defect in the legislation. He concluded that this was an appropriate occasion for the Court to read the words 'sexual orientation' into the relevant sections of the Act.]

* * *

Subsequently, in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, the Supreme Court of Canada sought to reconcile the divergent approaches it had taken to section 15 of the Charter. Subsection 15(1), Iacobucci J. said in *Law*, is designed to

prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and deserving of concern, respect and consideration.

"Human dignity," Iacobucci J. went on, "is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society."

The issue was whether the denial to the plaintiff of survivor benefits under the Canada Pension Plan was discriminatory. She was thirty years old, and the governing statute specified a minimum age of thirty-five for the receipt of survivor benefits by anyone who, like her, had no dependent children and no disability. The Court decided that this minimum age requirement did not contravene section 15, as it did not affect the plaintiff's human dignity. The legislation was designed to assist older surviving spouses, who were less likely than she was to obtain employment. Although the denial of benefits was a disadvantage to her, the Court said, it was not likely to be a substantial disadvantage.

An important element of the section 15 analysis — the meaning of equality in the context of the need for differential treatment — was articulated most fully in *Eaton v.*

Brant County Board of Education, [1997] 1 S.C.R. 241. Although it was not an employment case, Eaton is relevant to the situation of employees with disabilities. It concerned a child with cerebral palsy who could not use any means of communication, had a visual impairment, and used a wheelchair. As it was permitted to do by the governing statute, the Ontario Special Education Tribunal had decided to place the child in a special classroom rather than accede to her parents' wishes that she receive her education in a regular classroom. In deciding that neither the statute nor the tribunal decision violated the child's equality rights under section 15(1) of the *Charter*, Sopinka J., for the majority of the Court, said:

The principles that not every distinction on a prohibited ground will constitute discrimination and that, in general, distinctions based on presumed rather than actual characteristics are the hallmarks of discrimination have particular significance when applied to physical and mental disability. Avoidance of discrimination on this ground will frequently require distinctions to be made taking into account the actual personal characteristics of disabled persons. . . .

The principal object of certain of the prohibited grounds is the elimination of discrimination by the attribution of untrue characteristics based on stereotypical attitudes relating to immutable conditions such as race or sex. In the case of disability, this is one of the objectives. The other equally important objective seeks to take into account the true characteristics of this group which act as headwinds to the enjoyment of society's benefits and to accommodate them. Exclusion from the mainstream of society results from the construction of a society based solely on "mainstream" attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation which results in discrimination against them. The discrimination inquiry which uses the attribution of "stereotypical characteristics" reasoning as commonly understood is simply inappropriate here. It may be seen rather as a case of reverse stereotyping which, by not allowing for the condition of a disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream environment. It is recognition of the actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability.

13:222 The "Unified Approach"

In 1999, in the *Meiorin* case, which involved the interpretation of human rights legislation rather than the *Charter*, the Supreme Court of Canada tried to simplify the relationship between direct and indirect discrimination, BFORs, and the duty to accommodate. In doing so, it articulated a new three-stage test for deciding whether a standard which appears to be discriminatory is in fact a BFOR.

***British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 (the Meiorin case)**

MCLACHLIN J., for the Court:

...

II. FACTS

Ms. Meiorin was employed for three years by the British Columbia Ministry of Forests as a member of a three-person Initial Attack Forest Firefighting Crew in the Golden Forest District. The crew's job was to attack and suppress forest fires while they were small and could be contained. Ms. Meiorin's supervisors found her work to be satisfactory.

Ms. Meiorin was not asked to take a physical fitness test until 1994, when she was required to pass the Government's "Bona Fide Occupational Fitness Tests and Standards for B.C. Forest Service Wildland Firefighters" (the "Tests"). The Tests required that the forest firefighters weigh less than 200 lbs. (with their equipment) and complete a shuttle run, an upright rowing exercise, and a pump carrying/hose dragging exercise within stipulated times. The running test was designed to test the forest firefighters' aerobic fitness and was based on the view that forest firefighters must have a minimum "VO₂ max" of 50 ml.kg⁻¹.min⁻¹ (the "aerobic standard"). "VO₂ max" measures "maximal oxygen uptake," or the rate at which the body can take in oxygen, transport it to the muscles, and use it to produce energy.

The Tests were developed in response to a 1991 Coroner's Inquest Report that recommended that only physically fit employees be assigned as front-line forest firefighters for safety reasons. The Government commissioned a team of researchers from the University of Victoria to undertake a review of its existing fitness standards with a view to protecting the safety of firefighters while meeting human rights norms. The researchers developed the Tests by identifying the essential components of forest firefighting, measuring the physiological demands of those components, selecting fitness tests to measure those demands and, finally, assessing the validity of those tests.

The researchers studied various sample groups. The specific tasks performed by forest firefighters were identified by reviewing amalgamated data collected by the British Columbia Forest Service. The physiological demands of those tasks were then measured by observing test subjects as they performed them in the field. One simulation involved 18 firefighters, another involved 10 firefighters, but it is unclear from the researchers' report whether the subjects at this stage were male or female. The researchers asked a pilot group of 10 university student volunteers (6 females and 4 males) to perform a series of proposed fitness tests and field exercises. After refining the preferred tests, the researchers observed them being performed by a larger sample group composed of 31 forest firefighter trainees and 15 university student volunteers (31 males and 15 females), and correlated their results with the group's performance in the field. Having concluded that the preferred tests were accurate predictors of actual forest firefighting performance — including the running test designed to gauge whether the subject met the aerobic standard — the researchers presented their report to the Government in 1992.

A follow-up study in 1994 of 77 male forest firefighters and 2 female forest firefighters used the same methodology. However, the researchers this time recommended that the Government initiate another study to examine the impact of the Tests on women. There is no evidence before us that the Government has yet responded to this recommendation.

Two aspects of the researchers' methodology are critical to this case. First, it was primarily descriptive, based on measuring the average performance levels of the test subjects and converting this data into minimum performance standards. Second, it did not seem to distinguish between the male and female test subjects.

After four attempts, Ms. Meiorin failed to meet the aerobic standard, running the distance in 11 minutes and 49.4 seconds instead of the required 11 minutes. As a result, she was laid off. Her union subsequently brought a grievance on her behalf. The arbitrator designated to hear the grievance was required to determine whether she had been improperly dismissed.

Evidence accepted by the arbitrator demonstrated that, owing to physiological differences, most women have lower aerobic capacity than most men. Even with training, most women cannot increase their aerobic capacity to the level required by the aerobic standard, although training can allow most men to meet it. The arbitrator also heard evidence that 65 percent to 70 percent of male applicants pass the Tests on their initial attempts, while only 35 percent of female applicants have similar success. Of the 800 to 900 Initial Attack Crew members employed by the Government in 1995, only 100 to 150 were female.

There was no credible evidence showing that the prescribed aerobic capacity was necessary for either men or women to perform the work of a forest firefighter satisfactorily. On the contrary, Ms. Meiorin had in the past performed her work well, without apparent risk to herself, her colleagues or the public.

III. THE RULINGS

The arbitrator found that Ms. Meiorin had established a *prima facie* case of adverse effect discrimination by showing that the aerobic standard has a disproportionately negative effect on women as a group. He further found that the Government had presented no credible evidence that Ms. Meiorin's inability to meet the aerobic standard meant that she constituted a safety risk to herself, her colleagues, or the public, and hence had not discharged its burden of showing that it had accommodated Ms. Meiorin to the point of undue hardship. He ordered that she be reinstated to her former position and compensated for her lost wages and benefits. . . .

The Court of Appeal . . . did not distinguish between direct and adverse effect discrimination. It held that so long as the standard is *necessary* to the safe and efficient performance of the work and is applied through individualized testing, there is no discrimination. The Court of Appeal (mistakenly) read the arbitrator's reasons as finding that the aerobic standard was necessary to the safe and efficient performance of the work. Since Ms. Meiorin had been individually tested against this standard, it allowed the appeal and dismissed her claim. The Court of Appeal commented that to permit Ms. Meiorin to succeed would create "reverse discrimination," i.e., to set a lower standard for women than for

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men would discriminate against those men who failed to meet the men's standard but were nevertheless capable of meeting the women's standard.

IV. STATUTORY PROVISIONS

The following provisions of the British Columbia Human Rights Code, R.S.B.C. 1996, c. 210, are at issue on this appeal:

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 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.

...

- (4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

V. THE ISSUES

The first issue on this appeal is the test applicable to s. 13(1) and (4) of the British Columbia Human Rights Code. The second issue is whether, on this test, Ms. Meiorin has established that the Government violated the Code.

VI. ANALYSIS

As a preliminary matter, I must sort out a characterization issue. The Court of Appeal seems to have understood the arbitrator as having held that the ability to meet the aerobic standard is necessary to the safe and efficient performance of the work of an Initial Attack Crew member. With respect, I cannot agree with this reading of the arbitrator's reasons.

The arbitrator held that the standard was one of the appropriate measurements available to the Government and that there is generally a reasonable relationship between aerobic fitness and the ability to perform the job of an Initial Attack Crew member. This falls short, however, of an affirmative finding that the ability to meet the aerobic standard chosen by the Government is necessary to the safe and efficient performance of the job. To the contrary, that inference is belied by the arbitrator's conclusion that, despite her failure to meet the aerobic standard, Ms. Meiorin did not pose a serious safety risk to herself, her colleagues, or the general public. I therefore proceed on the view that the arbitrator did not find that an applicant's ability to meet the aerobic standard is necessary to his or her ability to perform the tasks of an Initial Attack Crew member safely and efficiently. This leaves us to face squarely the issue of whether the aerobic standard is unjustifiably discriminatory within the meaning of the Code.

A. The Test

1. The Conventional Approach

The conventional approach to applying human rights legislation in the workplace requires the tribunal to decide at the outset into which of two categories the case falls: (1) “direct discrimination,” where the standard is discriminatory on its face, or (2) “adverse effect discrimination,” where the facially neutral standard discriminates in effect: [*O’Malley*, above, section 13:220] at p. 551, per McIntyre J. If a *prima facie* case of either form of discrimination is established, the burden shifts to the employer to justify it.

In the case of direct discrimination, the employer may establish that the standard is a BFOR by showing: (1) that the standard was imposed honestly and in good faith and was not designed to undermine the objectives of the human rights legislation (the subjective element); and (2) that the standard is reasonably necessary to the safe and efficient performance of the work and does not place an unreasonable burden on those to whom it applies (the objective element). [Citations omitted.] It is difficult for an employer to justify a standard as a BFOR where individual testing of the capabilities of the employee or applicant is a reasonable alternative: [citations omitted].

If these criteria are established, the standard is justified as a BFOR. If they are not, the standard itself is struck down: [citations omitted].

A different analysis applies to adverse effect discrimination. The BFOR defence does not apply. *Prima facie* discrimination established, the employer need only show: (1) that there is a rational connection between the job and the particular standard, and (2) that it cannot further accommodate the claimant without incurring undue hardship: [citations omitted]. If the employer cannot discharge this burden, then it has failed to establish a defence to the charge of discrimination. In such a case, the claimant succeeds, but the standard itself always remains intact.

. . . On the conventional analysis, I agree with the arbitrator that a case of *prima facie* adverse effect discrimination was made out and that, on the record before him and before this Court, the Government failed to discharge its burden of showing that it had accommodated Ms. Meiorin to the point of undue hardship.

However, the divergent approaches taken by the arbitrator and the Court of Appeal suggest a more profound difficulty with the conventional test itself. The parties to this appeal have accordingly invited this Court to adopt a new model of analysis that avoids the threshold distinction between direct discrimination and adverse effect discrimination and integrates the concept of accommodation within the BFOR defence.

2. Why is a New Approach Required?

The conventional analysis was helpful in the interpretation of the early human rights statutes, and indeed represented a significant step forward in that it recognized for the first time the harm of adverse effect discrimination. The distinction it drew between the available remedies may also have reflected the apparent differences between direct and adverse effect discrimination. However well this approach may have served us in the past, many commentators have suggested that it ill-serves the purpose of contemporary human rights legislation. I agree. In my view, the complexity and unnecessary artificiality of

aspects of the conventional analysis attest to the desirability of now simplifying the guidelines that structure the interpretation of human rights legislation in Canada.

[McLachlin C.] then discussed several difficulties with the conventional analysis, including this one:]

Under the conventional analysis, if a standard is classified as being “neutral” at the threshold stage of the inquiry, its legitimacy is never questioned. The focus shifts to whether the individual claimant can be accommodated, and the formal standard itself always remains intact. The conventional analysis thus shifts attention away from the substantive norms underlying the standard, to how “different” individuals can fit into the “mainstream,” represented by the standard.

Although the practical result of the conventional analysis may be that individual claimants are accommodated and the particular discriminatory effect they experience may be alleviated, the larger import of the analysis cannot be ignored. It bars courts and tribunals from assessing the legitimacy of the standard itself. . . .

3. Toward a Unified Approach

Whatever may have once been the benefit of the conventional analysis of discrimination claims brought under human rights legislation, the difficulties discussed show that there is much to be said for now adopting a unified approach that (1) avoids the problematic distinction between direct and adverse effect discrimination, (2) requires employers to accommodate as much as reasonably possible the characteristics of individual employees when setting the workplace standard, and (3) takes a strict approach to exemptions from the duty not to discriminate, while permitting exemptions where they are reasonably necessary to the achievement of legitimate work-related objectives.

...

Furthermore, some provinces have revised their human rights statutes so that courts are now required to adopt a unified approach: see s. 24(2) of the Ontario *Human Rights Code*. . . .

...

4. Elements of a Unified Approach

Having considered the various alternatives, I propose the following three-step test for determining whether a *prima facie* discriminatory standard is a BFOR. An employer may justify the impugned standard by establishing on the balance of probabilities:

- (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
- (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
- (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

This approach is premised on the need to develop standards that accommodate the potential contributions of all employees in so far as this can be done without undue hardship to the employer. Standards may adversely affect members of a particular group, to be sure. But as Wilson J. noted in [*Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*], “[i]f a reasonable alternative exists to burdening members of a group with a given rule, that rule will not be [a BFOR].” It follows that a rule or standard must accommodate individual differences to the point of undue hardship if it is to be found reasonably necessary. Unless no further accommodation is possible without imposing undue hardship, the standard is not a BFOR in its existing form and the *prima facie* case of discrimination stands.

Having set out the test, I offer certain elaborations on its application.

Step One

The first step in assessing whether the employer has successfully established a BFOR defence is to identify the general purpose of the impugned standard and determine whether it is rationally connected to the performance of the job. The initial task is to determine what the impugned standard is generally designed to achieve. The ability to work safely and efficiently is the purpose most often mentioned in the cases but there may well be other reasons for imposing particular standards in the workplace. In [*Brossard (Town) v. Quebec (Commission des droits de la personne)*] for example, the general purpose of the town’s anti-nepotism policy was to curb actual and apparent conflicts of interest among public employees. In [*Caldwell v. Stuart*], the Roman Catholic high school sought to maintain the religious integrity of its teaching environment and curriculum. In other circumstances, the employer may seek to ensure that qualified employees are present at certain times. There are innumerable possible reasons that an employer might seek to impose a standard on its employees.

The employer must demonstrate that there is a rational connection between the general purpose for which the impugned standard was introduced and the objective requirements of the job. For example, turning again to *Brossard, supra*, Beetz J. held . . . that because of the special character of public employment, “[i]t is appropriate and indeed necessary to adopt rules of conduct for public servants to inhibit conflicts of interest.” Where the general purpose of the standard is to ensure the safe and efficient performance of the job — essential elements of all occupations — it will likely not be necessary to spend much time at this stage. Where the purpose is narrower, it may well be an important part of the analysis.

The focus at the first step is not on the validity of the particular standard that is at issue, but rather on the validity of its more general purpose. This inquiry is necessarily more general than determining whether there is a rational connection between the performance of the job and the *particular standard* that has been selected, as may have been the case on the conventional approach. The distinction is important. If there is no rational relationship between the general purpose of the standard and the tasks properly required of the employee, then there is of course no need to continue to assess the legitimacy of the particular standard itself. Without a legitimate general purpose underlying it, the standard cannot be a BFOR. In my view, it is helpful to keep the two levels of inquiry distinct.

Step Two

Once the legitimacy of the employer's more general purpose is established, the employer must take the second step of demonstrating that it adopted the particular standard with an honest and good faith belief that it was necessary to the accomplishment of its purpose, with no intention of discriminating against the claimant. This addresses the subjective element of the test which, although not essential to a finding that the standard is not a BFOR, is one basis on which the standard may be struck down. . . . If the imposition of the standard was not thought to be reasonably necessary or was motivated by discriminatory animus, then it cannot be a BFOR.

It is important to note that the analysis shifts at this stage from the general purpose of the standard to the particular standard itself. It is not necessarily so that a particular standard will constitute a BFOR merely because its general purpose is rationally connected to the performance of the job. . . .

Step Three

The employer's third and final hurdle is to demonstrate that the impugned standard is reasonably necessary for the employer to accomplish its purpose, which by this point has been demonstrated to be rationally connected to the performance of the job. The employer must establish that it cannot accommodate the claimant and others adversely affected by the standard without experiencing undue hardship. When referring to the concept of "undue hardship," it is important to recall the words of Sopinka J. who observed in *Central Okanagan School District No. 23 v. Renaud* . . . , that "[t]he use of the term 'undue' infers that some hardship is acceptable; it is only 'undue' hardship that satisfies this test." It may be ideal from the employer's perspective to choose a standard that is uncompromisingly stringent. Yet the standard, if it is to be justified under the human rights legislation, must accommodate factors relating to the unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship.

. . .

Courts and tribunals should be sensitive to the various ways in which individual capabilities may be accommodated. Apart from individual testing to determine whether the person has the aptitude or qualification that is necessary to perform the work, the possibility that there may be different ways to perform the job while still accomplishing the employer's legitimate work-related purpose should be considered in appropriate cases. The skills, capabilities and potential contributions of the individual claimant and others like him or her must be respected as much as possible. Employers, courts and tribunals should be innovative yet practical when considering how this may best be done in particular circumstances.

Some of the important questions that may be asked in the course of the analysis include:

- (a) Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?

- (b) If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?
- (c) Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?
- (d) Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?
- (e) Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?
- (f) Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles? As Sopinka J. noted in *Renaud, supra*, at pp. 992–96, the task of determining how to accommodate individual differences may also place burdens on the employee and, if there is a collective agreement, a union.

Notwithstanding the overlap between the two inquiries, it may often be useful as a practical matter to consider separately, first, the *procedure*, if any, which was adopted to assess the issue of accommodation and, second, the *substantive content* of either a more accommodating standard which was offered or alternatively the employer's reasons for not offering any such standard. . . .

If the *prima facie* discriminatory standard is not reasonably necessary for the employer to accomplish its legitimate purpose or, to put it another way, if individual differences may be accommodated without imposing undue hardship on the employer, then the standard is not a BFOR. . . . Conversely, if the general purpose of the standard is rationally connected to the performance of the particular job, the particular standard was imposed with an honest, good faith belief in its necessity, and its application in its existing form is reasonably necessary for the employer to accomplish its legitimate purpose without experiencing undue hardship, the standard is a BFOR. If all of these criteria are established, the employer has brought itself within an exception to the general prohibition of discrimination.

Employers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals. They must build conceptions of equality into workplace standards. . . . To the extent that a standard unnecessarily fails to reflect the differences among individuals, it runs afoul of the prohibitions contained in the various human rights statutes and must be replaced. The standard itself is required to provide for individual accommodation, if reasonably possible. . . .

B. Application of the Reformed Approach to the Case on Appeal

1. Introduction

Ms. Meiorin has discharged the burden of establishing that, *prima facie*, the aerobic standard discriminates against her as a woman. The arbitrator held that, because of their generally lower aerobic capacity, most women are adversely affected by the high aerobic standard. While the Government's expert witness testified that most women can achieve the aerobic standard with training, the arbitrator rejected this evidence as "anecdotal" and

“not supported by scientific data.” This Court has not been presented with any reason to revisit this characterization. . . .

Ms. Meiorin having established a *prima facie* case of discrimination, the burden shifts to the Government to demonstrate that the aerobic standard is a BFOR. For the reasons below, I conclude that the Government has failed to discharge this burden and therefore cannot rely on the defence provided by s. 13(4) of the Code.

2. Steps One and Two

The first two elements of the proposed BFOR analysis, that is (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job; and (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose, have been fulfilled. The Government’s general purpose in imposing the aerobic standard is not disputed. It is to enable the Government to identify those employees or applicants who are able to perform the job of a forest firefighter safely and efficiently. It is also clear that there is a rational connection between this general characteristic and the performance of the particularly strenuous tasks expected of a forest firefighter. All indications are that the Government acted honestly and in a good faith belief that adopting the particular standard was necessary to the identification of those persons able to perform the job safely and efficiently. It did not intend to discriminate against Ms. Meiorin. To the contrary, one of the reasons the Government retained the researchers from the University of Victoria was that it sought to identify non-discriminatory standards.

3. Step Three

Under the third element of the unified approach, the employer must establish that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer. In the case on appeal, the contentious issue is whether the Government has demonstrated that this particular aerobic standard is reasonably necessary in order to identify those persons who are able to perform the tasks of a forest firefighter safely and efficiently. As noted, the burden is on the government to demonstrate that, in the course of accomplishing this purpose, it cannot accommodate individual or group differences without experiencing undue hardship.

The Government adopted the laudable course of retaining experts to devise a non-discriminatory test. However, because of significant problems with the way the researchers proceeded, passing the resulting aerobic standard has not been shown to be reasonably necessary to the safe and efficient performance of the work of a forest firefighter. The Government has not established that it would experience undue hardship if a different standard were used.

The procedures adopted by the researchers are problematic on two levels. First, their approach seems to have been primarily a descriptive one: test subjects were observed completing the tasks, the aerobic capacity of the test subjects was ascertained, and that

capacity was established as the minimum standard required of every forest firefighter. However, merely describing the characteristics of a test subject does not necessarily allow one to identify the standard *minimally* necessary for the safe and efficient performance of the task. Second, these primarily descriptive studies failed to distinguish the female test subjects from the male test subjects, who constituted the vast majority of the sample groups. The record before this Court therefore does not permit us to say whether men and women require the same minimum level of aerobic capacity to perform safely and efficiently the tasks expected of a forest firefighter.

While the researchers' goal was admirable, their aerobic standard was developed through a process that failed to address the possibility that it may discriminate unnecessarily on one or more prohibited grounds, particularly sex. This phenomenon is not unique to the procedures taken towards identifying occupational qualifications in this case. . . .

The expert who testified before the arbitrator on behalf of the Government defended the original researchers' decision not to analyse separately the aerobic performance of the male and female, experienced and inexperienced, test subjects as an attempt to reflect the actual conditions of firefighting. This misses the point. The polymorphous group's average aerobic performance is irrelevant to the question of whether the aerobic standard constitutes a minimum threshold that cannot be altered without causing undue hardship to the employer. Rather, the goal should have been to measure whether members of all groups require the same minimum aerobic capacity to perform the job safely and efficiently and, if not, to reflect that disparity in the employment qualifications. There is no evidence before us that any action was taken to further this goal before the aerobic standard was adopted.

Neither is there any evidence that the Government embarked upon a study of the discriminatory effects of the aerobic standard when the issue was raised by Ms. Meiorin. In fact, the expert reports filed by the Government in these proceedings content themselves with asserting that the aerobic standard set in 1992 and 1994 is a minimum standard that women can meet with appropriate training. No studies were conducted to substantiate the latter assertion and the arbitrator rejected it as unsupported by the evidence.

Assuming that the Government had properly addressed the question in a procedural sense, its response — that it would experience undue hardship if it had to accommodate Ms. Meiorin — is deficient from a substantive perspective. The Government has presented no evidence as to the cost of accommodation. Its primary argument is that, because the aerobic standard is necessary for the safety of the individual firefighter, the other members of the crew, and the public at large, it would experience undue hardship if compelled to deviate from that standard in any way.

Referring to the Government's arguments on this point, the arbitrator noted that, "other than anecdotal or 'impressionistic' evidence concerning the magnitude of risk involved in accommodating the adverse-effect discrimination suffered by the grievor, the employer has presented no cogent evidence . . . to support its position that it cannot accommodate Ms. Meiorin because of safety risks." The arbitrator held that the evidence fell short of establishing that Ms. Meiorin posed a serious safety risk to herself, her colleagues, or the general public. Accordingly, he held that the Government had failed to

accommodate her to the point of undue hardship. This Court has not been presented with any reason to interfere with his conclusion on this point, and I decline to do so. The Government did not discharge its burden of showing that the purpose for which it introduced the aerobic standard would be compromised to the point of undue hardship if a different standard were used.

This leaves the evidence of the Assistant Director of Protection Programs for the British Columbia Ministry of Forests, who testified that accommodating Ms. Meiorin would undermine the morale of the Initial Attack Crews. Again, this proposition is not supported by evidence. But even if it were, the attitudes of those who seek to maintain a discriminatory practice cannot be reconciled with the Code. These attitudes cannot therefore be determinative of whether the employer has accommodated the claimant to the point of undue hardship. . . . Although serious consideration must of course be taken of the “objection of employees based on well-grounded concerns that their rights will be affected,” discrimination on the basis of a prohibited ground cannot be justified by arguing that abandoning such a practice would threaten the morale of the workforce. . . . If it were possible to perform the tasks of a forest firefighter safely and efficiently without meeting the prescribed aerobic standard (and the Government has not established the contrary), I can see no right of other firefighters that would be affected by allowing Ms. Meiorin to continue performing her job.

The Court of Appeal suggested that accommodating women by permitting them to meet a lower aerobic standard than men would constitute “reverse discrimination.” I respectfully disagree. As this Court has repeatedly held, the essence of equality is to be treated according to one’s own merit, capabilities and circumstances. True equality requires that differences be accommodated. . . . A different aerobic standard capable of identifying women who could perform the job safely and efficiently therefore does not necessarily imply discrimination against men. “Reverse” discrimination would only result if, for example, an aerobic standard representing a minimum threshold for *all* forest firefighters was held to be inapplicable to men simply because they were men.

The Court of Appeal also suggested that the fact that Ms. Meiorin was tested individually immunized the Government from a finding of discrimination. However, individual testing, without more, does not negate discrimination. The individual must be tested against a realistic standard that reflects his or her capacities and potential contributions. Having failed to establish that the aerobic standard constitutes the minimum qualification required to perform the job safely and efficiently, the Government cannot rely on the mere fact of individual testing to rebut Ms. Meiorin’s *prima facie* case of discrimination.

...

[McLachlin C.] concluded that the Government had not shown that the *prima facie* discriminatory aerobic standard was reasonably necessary to identify forest firefighters who could work safely and efficiently, so the Government was not able to rely on the BFOR defence. She therefore restored the order of the arbitrator reinstating Ms. Meiorin to her former position and compensating her for lost wages and benefits.]

* * *

It has been argued that the standard in *Meiorin* focuses the analysis more on the system than on the individual, and that it recognizes the need to restructure organizations: Tamar Witelson, "From Here to Equality: Meiorin, TD Bank, and the Problems with Human Rights Law" (1999), 25 Queen's L.J. 347.

13:300 SOME MAJOR EMPLOYMENT-RELATED EQUALITY ISSUES

13:310 Sex Discrimination

The law's treatment of claims of sex discrimination illustrates how equality claims in the employment context have evolved, and how workplace discrimination issues reflect broader societal concerns.

Understanding the meaning of sex discrimination requires consideration of the societal impact of women's capacity to reproduce and the need to combine family care and work outside the home. In *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183, the Supreme Court of Canada held that discrimination on the basis of pregnancy was not discrimination on the basis of sex. In *Brooks v. Canada Safeway*, [1989] 1 S.C.R. 1219, the Court revisited that question. Canada Safeway's accident and sickness plan excluded pregnant women from benefits during the period prior to the birth and for seventeen weeks afterwards. Applying the test articulated under section 15 of the *Charter* in the *Andrews* case, mentioned above in section 13:220, Dickson C.J. noted that the plan treated pregnant women less favourably than non-pregnant employees, and was thus discriminatory on the basis of pregnancy. Pregnancy itself was not a prohibited ground of discrimination under the applicable human rights statute (the Manitoba *Human Rights Act*), but sex was. Dickson C.J. held that "[d]iscrimination on the basis of pregnancy is a form of sex discrimination because of the basic biological fact that only women have the capacity to become pregnant." He said:

Over ten years have elapsed since the decision in *Bliss*. During that time there have been profound changes in women's labour force participation. With the benefit of a decade of hindsight and ten years of experience with claims of human rights discrimination and jurisprudence arising therefrom, I am prepared to say that *Bliss* was wrongly decided or, in any event, that *Bliss* would not be decided now as it was decided then. Combining paid work with motherhood and accommodating the childbearing needs of working women are ever-increasing imperatives. That those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious. It is only women who bear children; no man can become pregnant. . . . [I]t is unfair to impose all of the costs of pregnancy upon one-half of the population.

. . . The Safeway plan was no doubt developed . . . 'in an earlier era when women openly were presumed to play a minor and temporary role in the labor force' . . .

I am not persuaded by the argument that discrimination on the basis of pregnancy cannot amount to sex discrimination because not all women are pregnant at any one time. While pregnancy-based discrimination only affects parts of an identifiable group, it does not affect anyone who is not a member of the group. Many, if not most, claims of partial

discrimination fit this pattern. As numerous decisions and authors have made clear, this fact does not make the impugned distinction any less discriminating. . . .

Finally, on this point, the respondent referred to *Canada Safeway Ltd. v. Manitoba Food and Commercial Workers Union, Local 832*, . . . in which this Court restored an arbitration award which found Safeway's 'no beards' rule to be a 'reasonable' rule. Safeway argues that, by analogy, this Court has already found that discrimination because of pregnancy is not discrimination because of sex. Reference was also made to *Manitoba Human Rights Commission v. Canada Safeway Ltd.* . . . in which a panel of this Court dismissed the Human Rights Commission's application for leave to appeal the decision that Safeway's 'no beards' rule was not discrimination because of sex. The Manitoba Court of Appeal in a unanimous decision stated that the 'no beards' rule was 'definitely not a matter of sexual discrimination.' It is contended that there is an analogy between that case and the present situation; beards are peculiar to men as pregnancy is peculiar to women; however, not all men grow beards and not all women become pregnant. I do not find these cases helpful; I cannot find any useful analogy between a company rule denying men the right to wear beards and an accident and sickness insurance plan which discriminates against female employees who become pregnant. The attempt to draw an analogy at best trivializes the procreative and socially vital function of women and seeks to elevate the growing of facial hair to a constitutional right. . . .

* * *

Since the *Brooks* case was decided, human rights statutes have been amended to specify that discrimination on the basis of pregnancy is a form of sex discrimination.

From claims based on pregnancy itself have evolved claims based on experiences related to pregnancy. For example, *Carewest v. Health Sciences Association of Alberta* (2001), 93 L.A.C. (4th) 129, an employer's refusal to extend the maternity leave of a woman who wanted to breast feed her baby at home was held by an arbitrator to be sex discrimination. Similarly, sex discrimination claims (including those related to pregnancy) may have to be reconciled with claims based on other grounds. For example, in *Quintette Operating Corp. v. United Steelworkers of America, Local 9113*, [1997] B.C.D.L.A. 500.36.30.30, the union and employer had agreed that temporarily disabled employees would be given preference for light work that was available within their own department. A pregnant employee grieved unsuccessfully that it was discriminatory not to include her in that scheme. The arbitrator held that the scheme was not discriminatory — that the grievor was being treated not as a pregnant woman but as an employee who could do only office work when no such work was available in her department.

13:320 Sexual Harassment

13:321 Sexual Harassment as Sex Discrimination

Workplace harassment on the ground of sex, race, disability, or any other ground specified in human rights legislation is recognized in law as a form of discrimination in employment. Legal recognition that harassment is a form of discrimination was not immediate, particularly in the case of sexual harassment. Some courts and tribunals

considered sexual harassment not to be a form of sex discrimination, because not every woman in a given workplace was subjected to it or because it was considered it to be an expression of personal attraction which with the law should not interfere. The Supreme Court of Canada considered the matter in the following case.

***Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252**

[The two complainants were waitresses at a restaurant. A male co-worker repeatedly kissed and touched them and made sexual advances toward them, despite their objections. When they complained to the manager, the sexual conduct ceased, but they were then subjected to verbal criticism and abuse from the co-worker and the manager. They quit their jobs and filed complaints of sex discrimination with the Manitoba Human Rights Commission. At the time, the Manitoba *Human Rights Act* prohibited sex discrimination but made no mention of sexual harassment.]

The human rights adjudicator and the trial court upheld the complaint. The Manitoba Court of Appeal reversed, finding that the sexual harassment experienced by the complainants was not sex discrimination. They appealed to the Supreme Court of Canada.]

DICKSON C.J. (for the Court):

...

Without seeking to provide an exhaustive definition of the term, I am of the view that sexual harassment in the workplace may be broadly defined as 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. . . . When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being.

...

There appear to be two principal reasons, closely related, for the decision of the Court of Appeal of Manitoba that the sexual harassment to which the appellants were subjected was not sex discrimination. First, the Court of Appeal drew a link between sexual harassment and sexual attraction. Sexual harassment, in the view of the Court, stemmed from personal characteristics of the victim, rather than from the victim's gender. Second, the appellate court was of the view that the prohibition of sex discrimination in s. 6(1) of the Human Rights Act was designed to eradicate only generic or categorical discrimination. On this reasoning, a claim of sex discrimination could not be made out unless all women were subjected to a form of treatment to which all men were not. If only some female employees were sexually harassed in the workplace, the harasser could not be said to be discriminating on the basis of sex. At most the harasser could only be said to be distinguishing on the basis of some other characteristic.

...

The fallacy in the position advanced by the Court of Appeal is the belief that sex discrimination only exists where gender is the sole ingredient in the discriminatory action and where, therefore, all members of the affected gender are mistreated identically. While the concept of discrimination is rooted in the notion of treating an individual as part of a group rather than on the basis of the individual's personal characteristics, discrimination does not require uniform treatment of all members of a particular group. It is sufficient that ascribing to an individual a group characteristic is one factor in the treatment of that individual. If a finding of discrimination required that every individual in the affected group be treated identically, legislative protection against discrimination would be of little or no value. . . .

The argument that discrimination requires identical treatment of all members of the affected group is firmly dismissed by this Court in *Brooks v. Canada Safeway Ltd.* In *Brooks* I stated that pregnancy-related discrimination is sex discrimination. The argument that pregnancy-related discrimination could not be sex discrimination because not all women become pregnant was dismissed for the reason that pregnancy cannot be separated from gender. All pregnant persons are women. Although, in *Brooks*, the impugned benefits plan of the employer, Safeway, did not mention women, it was held to discriminate on the basis of sex because the plan's discriminatory effects fell entirely upon women.

The reasoning in *Brooks* is applicable to the present appeal. Only a woman can become pregnant; only a woman could be subject to sexual harassment by a heterosexual male. . . . That some women do not become pregnant was no defence in *Brooks*, just as it is no defence in this appeal that not all female employees at the restaurant were subject to sexual harassment. The crucial fact is that it was only female employees who ran the risk of sexual harassment. No man would have been subjected to this treatment. . . .

. . . As the LEAF factum puts it, ". . . sexual harassment is a form of sex discrimination because it denies women equality of opportunity in employment because of their sex." It is one of the purposes of anti-discrimination legislation to remove such denials of equality of opportunity.

13:322 Defining Sexual Harassment

Around the time of *Janzen*, some legislatures amended their human rights or labour legislation to make specific reference to sexual harassment. Currently, four provinces (Manitoba, Newfoundland and Labrador, Ontario, and Quebec) and the federal jurisdiction have an explicit legislative prohibition against sexual harassment. The remaining jurisdictions continue to rely on the general prohibition against discrimination in employment. The federal government is the only jurisdiction to refer to sexual harassment in both human rights and labour legislation.

***Shaw v. Levac Supply Ltd.*, (1991), 91 CLLC 17,007 (Ont. Bd. Inq.)**

[Shaw worked for Levac Supply for fourteen years as a bookkeeper. During her employment, she was frequently teased by a male co-worker, Robertson, and her complaints to management went unanswered. The conduct included mimicking her speech, suggest-

ing that she was incompetent, and making derogatory comments about her weight — for example, saying “waddle, waddle” when she walked around the office.]

HUBBARD, Chair: . . . It seems to me incontestable that to express or imply sexual unattractiveness is to make a comment of a sexual nature. Whether the harasser says, “you are attractive and I want to have sex with you,” or says, “you are unattractive and no one is likely to want to have sex with you,” the reference is sexual. It is verbal conduct of a sexual nature, and it is sexual harassment in the workplace if it is repetitive and has the effect of creating an offensive working environment; it is sexual harassment in the form of an inappropriate comment of a sexual nature. . . .

When a man chants “waddle, waddle” within her hearing every time an overweight woman walks about the office, or mimics the swishing sound made by her nylons rubbing together because of her weight, what purpose can he possibly have except to indicate that she is physically unattractive? Why draw attention to her bodily inelegance in such circumstances other than to indicate that she is sexually undesirable? What other way is the victim to take such comments? The respondent was not a disinterested observer simply making an objective comment upon someone’s unfortunate condition. In my opinion, he knew, or ought to have known, that these gibes were . . . a “sexual put-down”. . . .

I turn now to the alternative submission of the Commission that, even if it were found that Mr. Robertson’s conduct did not amount to sexual harassment so as to bring it within the scope of [the provision of the Manitoba Human Rights Code which prohibited sex discrimination and sexual harassment], it was aimed at the complainant because she is a woman, and gender harassment in the workplace is an infringement of that provision. . . .

To begin with, the primary meaning of the word “sex” is the fact or character of being either male or female, “coitus” being a secondary meaning. Unless the context indicates otherwise, the word is to be given its primary meaning. . . . [E]arly decisions in the field of human rights found that sexual harassment was discrimination because of sex (i.e. “gender”) in order to subject that conduct to provisions that prohibited discrimination but did not deal directly with sexual harassment. It would be odd to find that, now that harassment because of sex is dealt with in a separate provision, the word “sex” does not mean gender and that to harass a person non-sexually solely because of his or her gender does not come within the provision.

* * *

Similarly, for example, repeated sabotage by male employees of a female co-worker’s safety equipment, due to resentment of the presence of a woman in the workplace, has been recognized as a form of sexual harassment. In such cases, the complainant must prove a link between the harassing conduct and her sex.

The difficult issues raised by same-sex harassment are discussed by Janine Benedet, “Same-Sex Sexual Harassment” (2000), 26 Queen’s L.J. 101.

13:330 Discrimination on the Basis of Disability

Concern about discrimination on the ground of disability has become much more prominent over the last two decades. This reflects more understanding of different kinds of disabilities, and rising expectations on the part of people with disabilities. On the history of legal protection in this area, see Bernard Adell, "The Rights of Disabled Workers at Arbitration and under Human Rights Legislation," (1991) 1 Lab. Arb. Yrbk. 167. As Adell points out, collective bargaining can offer only a limited response to the problem of disability discrimination, because it focuses on people who are employed and, in the main, on full-time employees. People with disabilities, particularly severe disabilities, have a high rate of unemployment. Those who do have jobs tend to have held them for a relatively short time and to have a less stable connection with the workforce.

Traditionally, an employee with a physical or mental disability bore the entire burden of adapting to the requirements of the workplace, perhaps with the help of medical or vocational rehabilitation services. An employee who could not adapt was out of work. However, since the 1980s, with the rise of the duty to accommodate, adapting has become a two-way street. An employee with a disability must still be able to perform the core features of a job, but the employer must be prepared (to the threshold of undue hardship) to make changes to the workplace to accommodate the employee's particular needs.

Disability (both mental and physical) is now listed among the prohibited grounds of discrimination in human rights legislation across the country, but it has unique features that distinguish it from other prohibited grounds. Those features are discussed in the following excerpt.

Michael Lynk, "Disability and the Duty to Accommodate," [2001–2002] 1 Lab. Arb. Y.B. 51

First, persons with a disability are characterized by greater heterogeneity than virtually any other group covered by the legislation. Even within the same injury, disease or condition, the varieties of disabling experience are extremely wide. Moreover, the social environment has a substantial capacity either to compound or to alleviate a disability. As the late Justice John Sopinka stated in one of his last decisions [*Eaton v. Brant County Board of Education*]:

It follows that disability, as a prohibited ground, differs from other enumerated grounds such as race or sex because there is no individual variation with respect to these grounds. However, with respect to disability, this ground means vastly different things depending upon the individual and the context.

Second, unlike the predominately fixed character of most other protected grounds, such as race or gender, the condition of disability is potentially quite mutable. A person with a disability may recover entirely, the particular condition may stabilize for an extended period of time, or the intervention of modern medicine and technology may permit the employee to work productively with few or no limitations. Conversely, a disability might deteriorate or fluctuate dramatically, both in the short and in the long term, thus rendering an employee's attempt to return to work unsuccessful. Furthermore, anyone —

regardless of her or his present state of health — can potentially acquire a permanent, total or long-lasting disability, and the chances of becoming disabled increase with age.

And third, the modes of accommodation, short of undue hardship, required to extend equality to persons with disabilities, because of the greater heterogeneity of disabling conditions, are invariably broader and more complex than those required by other protected grounds. In the case of most protected grounds, accommodations can be accomplished through a change in policies or programs, together with a campaign to reform social attitudes. The responses necessary to ameliorate the social disadvantages of disablement, however, will frequently be more diverse, more individually tailored, more reliant upon technology, and probably more costly. This will often require more creativity and co-operation, and will likely necessitate a greater number of long-lasting alterations and commitments. [Reprinted by permission of Lancaster House Publishing.]

* * *

Accommodating a disability in the workplace can be a very complex and painstaking process, as the following arbitration award shows.

Shuswap Lake General Hospital v. British Columbia Nurses' Union (Lockie Grievance), [2002] B.C.C.A.A. No. 21 (Gordon)

INTRODUCTION

¶ 1 Ms. Sharon Lockie, the grievor, has been employed as a registered nurse (“RN”) at the Shuswap Lake General Hospital (the “hospital”) since May 1994. In April 1997 she was diagnosed with bi-polar mood disorder (“bmd”). She has experienced several episodes of “mania,” a manifestation of her disorder, since then. One such episode occurred in early April 2000. On that occasion, one of her co-workers noted behavior consistent with mania, and, following an intervention at the workplace, the grievor went off work. There is no dispute the grievor is not fit to practice as a nurse when she is unwell.

¶ 2 The grievor’s psychiatrist, Dr. Keith Gibson, attended her for several weeks following the April 2000 episode. He subsequently confirmed she was fit to return to work effective June 1, 2000. Despite this medical opinion, the Employer was unwilling to allow the grievor to return to work in her position. The Employer encouraged the grievor to apply for long-term disability benefits. She applied for those benefits, but her application was denied due to her doctor’s medical opinion, with which she agreed, that she was fit to return to work as a nurse.

¶ 3 When the grievor then sought to return to her nursing position at the hospital, the Employer refused to permit her to do so absent an assurance she would not relapse, or if she did, her relapse could be accurately predicted. As bmd is a disorder characterized by relapses that cannot be accurately predicted, such an assurance could not be given.

¶ 4 On July 31, 2000 the grievor filed a grievance against the Employer’s refusal to allow her to return to her nursing position at the hospital despite Dr. Gibson’s opinion

that she was medically fit to do so. On August 20, 2000 she filed a complaint with the B.C. Human Rights Commission alleging the Employer's refusal to allow her to return to work constitutes discrimination due to her mental disability. The human rights complaint is being held in abeyance pending the outcome of this proceeding.

¶ 5 The Union's position is that by suspending the grievor from her nursing position due to the possibility of a relapse, the Employer is discriminating against her by reason of her mental disability contrary to Article 31 of the collective agreement, and has not discharged its duty to accommodate the grievor to the point of undue hardship. In Article 31, the parties agree to subscribe to the principles of the British Columbia Human Rights Code, R.S.B.C., c. 210 (the "Code").

¶ 6 The Employer advances a three-fold response to the grievance. It says it: 1) could not continue to accommodate the grievor in her position without incurring undue hardship; 2) canvassed and could not find any nursing position that would not similarly result in undue hardship; and, 3) offered to canvass the possibility of positions in the other two bargaining units in its facility, but the Union and the grievor were "not interested" in doing so pending the outcome of this proceeding.

...

BACKGROUND

¶ 9 The hospital is a small acute care facility with 49 acute care beds and 5 alternative care beds. There are 22 medical/surgical beds on the unit. On day shift, the unit is staffed with an RN team leader, 2 RNs, and 2 licensed practical nurses ("LPNs"). A "float" nurse is scheduled daily at the hospital. When nursing absences are experienced, either the float nurse or a replacement nurse is utilized to fill the absence. Staffing for the evening shift is 2 RNs and 2 LPNs. For the night shift, 2 RNs and 1 LPN are scheduled. Prior to April 2000, the grievor's shift schedule in a five or six-week rotation was typically five, 12-hour day shifts and the remainder 8-hour evening shifts.

...

¶ 12 The work on the unit is typically divided into two teams each consisting of an RN and an LPN. Each team is generally assigned 11 patients. RNs and LPNs meet at the outset of each shift to receive their patient assignments and to hear "report" about the patients from the nurses going off shift. This process takes approximately 30 minutes. The grievor testified that during their shifts, RNs have verbal and visual contact with each other in the hallways and at the medication carts. She said RNs communicate "frequently" about patient care information, and even though RNs may not actually work with LPNs, they have "a fair bit" of contact with each other at the nursing station throughout their shift.

...

Bi-Polar Mood Disorder

¶ 18 Bmd is an incurable relapsing condition. Individuals with this disorder experience changes in mood state from either normality to mania, or normality to “depression.” These changes in mood state are commonly referred to as “decompensations.”

¶ 19 Bmd can be treated and, for many individuals, well managed with appropriate medical and other interventions. Medications such as lithium, anti-convulsants and anti-depressants may be prescribed to stabilize mood. Physicians and psychiatrists also intervene by way of assessment, education and monitoring. Both the patient and his or her family members are educated about the nature of the illness, the ways to manage factors contributing to relapse, the detection of early symptoms of relapse, and support and early warning systems. In terms of monitoring, physicians are able to test blood levels for compliance to medications, side effects, and the need to change medications and/or dosages. Environmental and dietary factors may also be monitored and managed.

¶ 20 Dr. Gibson testified that approximately two-thirds of patients with bmd experience “very significant improvement” in their disorders through treatment, and approximately 50 percent of such patients are employed. He said the duration of episodes of mania can be greatly reduced with medication. Dr. Collins and Dr. Gibson agree that work is therapeutic for individuals with bmd as it provides structure to the day/week/month. In Dr. Gibson’s experience, treated bmd patients in the following occupations have all continued to be employed: specialist physicians (including the Head of Psychiatry at a Calgary-based facility), engineers, lawyers, social workers, nurses, mill workers, taxi drivers, and restaurant workers. In the health care facility where Dr. Gibson works in Alberta, he is aware of two staff members with treated bmd who have direct patient care responsibilities. He said these individuals “function well” in their positions.

...

The History of the Grievor’s Disability and the Events Giving Rise to this Dispute

¶ 35 ... commencing in October 1999, the grievor experienced a number of extra-ordinary circumstances. From October to December 3, 1999 three close family members died. Another three family members died between December 1999 and October 2000. During the grievor’s shift on October 23, 1999, she made several medication errors. The errors involved her failure to administer certain antibiotics. At meetings with management to discuss this situation, the grievor acknowledged the seriousness of the errors. She attributed the errors to fatigue as opposed to any medical or health issue. Consequently, management issued a written warning to her. The Employer does not rely on these errors as part of this case. It simply notes that management was aware of them when the events of December 1999 occurred. In her evidence, Ms. Thompson acknowledged that other nurses make medication errors, but said she has no prior experience with a nurse making as many medication errors during one shift as the grievor made on October 23, 1999.

...

¶ 37 On December 14 the grievor made three medication errors. Ms. Simpson's shift that day overlapped with the grievor's shift by 4 hours that day. At approximately 6:30 pm, near the end of the grievor's shift, Ms. Simpson went into the nursing station and saw the grievor with a number of medication error forms on the desk. Ms. Simpson asked the grievor if she could help, and the grievor explained that she had missed a number of medications. Ms. Simpson inquired whether this was perhaps an indication that the grievor was not feeling well. According to Ms. Simpson, the grievor "became tearful and agreed that someone should be called." Ms. Simpson contacted the manager on call and then tried to support the grievor as best she could. Ms. Simpson estimated that as the replacement RN arrived on the floor that day between 7:30pm and 7:45pm, her (Ms. Simpson's) patients were left unattended from approximately 7:00pm until then. In cross-examination she conceded that although her patients were not attended by her for approximately one hour, she could not say they failed to receive proper care as a result of this situation.

¶ 38 Ms. Thompson's evidence about the December 1999 medication errors was that the grievor "caught" the errors at approximately 7:00pm, administered the missed medications, and noted the errors. Ms. Thompson does not dispute that the grievor took full responsibility for these errors. When Ms. Thompson attempted to give hearsay evidence about the effect of the medication errors on the affected patient, the Union objected. At the outset of the hearing the Union put the Employer on notice that strict proof of any patient safety issues due to these medication errors was required and that hearsay would be objected to. In any event, in her evidence Ms. Thompson could only speculate that the patient "may" have experienced more pain due to the missed medication.

...

¶ 41 The grievor went on sick leave following the mid-December episode. She began attending Dr. Gibson at that time. Dr. Gibson identified the indicators for the grievor's decompensation at that time as: irritability; sleep disturbance; spending money; rapid or pressured speech; and, repeated reference to a particular topic in her conversation. He also determined that the February to May period, when the grievor's husband is often absent due to the pressures of his own career, seems to be a "tough season" for the grievor in terms of her disorder. He decided to increase her dosage of lithium during this season. He prescribed anti-depressants and found that over time he and the grievor were able to determine that her sleep disturbance could be well regulated with the drug clopixol.

[The grievor returned to work in February 2000 in accordance with a return-to-work agreement between the employer and union].

¶ 50 The grievor successfully completed the supernumerary shifts provided for in the return-to-work agreements and subsequently returned to her regular rotation. There were no further episodes at the workplace until April 8, 2000.

...

¶ 53 As the [April 8] shift progressed, a palliative care patient came onto the ward from the emergency room. Ms. Sweeten observed at that time that the grievor became "quite

involved” with the patient’s admitting procedure and bed placement. According to Ms. Sweeten, the grievor “appeared stressed and upset that her patient was in pain and distress, and she [the grievor] appeared agitated.” Ms. Sweeten encouraged the grievor to go for a break, but the grievor stayed on the unit. Ms. Sweeten observed the grievor repetitively paging an admitting doctor for an oral analgesic order for one of her patients. Ms. Sweeten advised the grievor that another patient needed analgesics. The other RN eventually settled that patient. Ms. Sweeten subsequently noted that the grievor “appeared to become more upset” and when she (Ms. Sweeten) suggested they take a break, the grievor “broke down at the desk crying and upset.” The grievor also asked Ms. Sweeten to obtain a specific meal for her and, contrary to accepted practice, asked for a food tray for the new patient’s husband.

...

¶ 58 Ms. Thompson concluded from the nurses’ reports that the grievor did not have good insight into the seriousness of the April episode. She met with the grievor, her shop steward and Mr. Jackson. Ms. Thompson then sent a letter to Dr. Gibson on April 20, 2000 seeking his assurance that if the grievor returned to work, she would “meet her standards of practice on a consistent basis.” Dr. Gibson’s evidence was that, given the nature of bmd, he was puzzled by Ms. Thompson’s use of the term “on a continuous basis.” In his April 26th response to the request he wrote, in part, as follows:

... The big problem I have is in terms of what you mean by on a “continuous basis.” As I am sure you are aware, bi-polar mood disorder is a relapsing/remitting condition. Even with absolute compliance to medications and all other interventions, individuals afflicted with this disorder can have episodes of depression or mania evolve, sometimes quite quickly. It seems Sharon’s struggles over the last four years have been particularly prominent in the spring time (months of April and May). In addition, I believe Sharon has been challenged with more than her usual share of stressors, which has likely contributed to her recent struggles. The best I can do is record once again what I believe I have made Sharon’s employer aware of before, that being during periods of remission I would expect Sharon to be capable of competently completing her work in a manner consistent with the standards of nursing practice and professional behavior. On the other hand, it is impossible to predict when she might have another temporary relapse, beyond observing that April/May tends to be an especially challenging time for Sharon.

...

¶ 61 Mr. Jackson’s evidence was that, after receiving Dr. Gibson’s letter, he decided the Employer could not accommodate the grievor as an RN because “relapses are impossible to predict.” He said all nursing positions in the facility were canvassed to determine if they involved direct patient care and, as they all did, no position was “available for accommodation.”

...

¶ 66 Ms. Thompson agreed that after the April 2000 incident she did not consider the following accommodative measures: a return-to-work program similar to the February protocol; the grievor's provision of daily reports of her symptoms; a contract requiring the grievor's family members and doctors to communicate with her (Ms. Thompson) about the grievor's condition; a requirement that the grievor regularly report to either her or Lisa Wherry for assessment; more frequent blood lithium level reports from the grievor's doctor; or, a requirement that the grievor visit her doctor or her psychiatrist more frequently. She acknowledged that the Employer has not offered the grievor any other specific position as an accommodation. Moreover, she did not dispute that management told the grievor there were "too many problems with the other unions" to look for an accommodation in other bargaining units. Ms. Thompson's evidence in this regard was that "we needed her [the grievor's] ideas before we approached the other unions."

...

ANALYSIS AND DECISION

¶ 136 At issue in this dispute is whether the continued employment of the grievor as a nurse at the hospital would impose undue hardship on the Employer.

¶ 137 I accept the Employer's submission that this case does not involve general policy in health care; rather, it involves this grievor and this facility. I also accept the Employer's contention that it has accommodated the grievor's mental disability in the workplace in several ways since April 1997. The Employer has permitted various absences from work on sick leave ranging in duration from one week to approximately two months, and has replaced the grievor with casual RNs when she has had to go off work during a shift due to decompensation. The Employer designed and implemented a return-to-work plan including two weeks of supernumerary day shifts and certain reporting/monitoring mechanisms, some of which involved the grievor's co-workers. Following the April 2000 episode at work, the Employer sought further medical information to see if it could accommodate the grievor and canvassed all the nursing positions in its facility to see if the grievor could be accommodated in positions that did not entail direct patient care duties. Accordingly, this dispute involves an assessment of whether the Employer has reached the point of undue hardship in its efforts to accommodate the grievor as a nurse at its facility.

¶ 138 Applying the [*Meiorin*] principles to the evidence before me, I have no difficulty finding that a prima facie case of discrimination has been made out. The reason the Employer has refused to continue to employ the grievor as a nurse is her inability to assure management she will be able to accurately predict future relapses. As the inability to accurately predict relapse is a feature of bmd, I find the Employer's refusal to continue to employ the grievor is inextricably linked to her mental disability and is prima facie discriminatory.

¶ 139 The onus therefore shifts to the Employer to establish, on a balance of probabilities, that its standard constitutes a BFOR. The Employer's standard for the purposes of the BFOR analysis was succinctly summarized in Ms. Thompson's evidence. She said she

would only permit a nurse with bmd to return to work in a position involving patient care duties if the nurse was “well controlled and no risk to patient safety and does not require other nurses to monitor [him or her] closely.” In Ms. Thompson’s and Mr. Jackson’s opinion, the grievor did not meet this standard because she could not guarantee she would not relapse and could not assure them that relapse could be accurately predicted.

¶ 140 The Union only challenges the Employer’s standard under the third part of the BFOR test. Thus, the question is whether the Employer has established that its standard is reasonably necessary by demonstrating it is impossible to accommodate the grievor in her nursing position without incurring undue hardship. . . . The facts of this case have been reviewed at some length because I share the view expressed by Arbitrator Munroe in *International Forest Products Ltd.*, . . . , that the answer to this inquiry involves an assessment of all of the particular facts of this case.

¶ 141 In terms of a risk to patient safety, I find the Employer’s standard is effectively one of absolute safety or perfection, not one of reasonable safety. To use the words of the Supreme Court of Canada in PSERC, the Employer’s test of “no” risk to patient safety set an “uncompromisingly stringent standard.” The Employer’s relapse prediction standard effectively negates a fundamental characteristic of the grievor’s mental disability. I accept the Union’s contention that the Employer focused too narrowly on whether relapse could be accurately predicted. Given the medical information relating to the nature of bmd, the Employer ought to have acknowledged the fact that relapse cannot be accurately predicted, and ought to have engaged in a search for reasonable accommodative measures that would reduce any risk to patient safety to an acceptable level and still allow the grievor to work as a nurse.

¶ 142 The Employer’s contention in relation to safety is that the nature of the grievor’s work, disability and insight, and the way in which her disability manifests itself at work, creates a “serious” risk to patient safety that is “too great” to permit her to work in patient care duties. The Employer says that as there is no reasonable way to test the grievor’s safety on a day-to-day basis, obliging management to accommodate her in her nursing position would constitute undue hardship. The Employer must point to evidence establishing, on a balance of probabilities, that a serious or unacceptable risk to patient safety would arise from the grievor’s continued employment as a nurse. . . . If the risk to patient safety is low, the Employer must establish that the loss or injury that may result would be serious. The evidence must clearly identify the risks and demonstrate that it is impossible to reduce those risks to an acceptable level through reasonable accommodative measures. . . .

¶ 143 On the evidence before me, I cannot find the Employer has established either a “serious” or “unacceptable” risk to patient safety, or the “impossibility” of reducing that risk to an acceptable level through reasonable accommodative measures. The identity of those who bear the risk to safety is the patients on the unit. This undoubtedly poses a legitimate concern for the Employer. Patients reasonably expect the Employer to protect their health and safety while they are in hospital. But the evidence fails to establish that the magnitude of the risk to patient safety is serious or unacceptable.

¶ 144 The evidence relating to medication errors establishes that institutionalized care at the hospital carries with it some risk to patient health arising from medication errors. Other nurses make medication errors and the Employer's records contain numerous examples of such errors. I find the risk to patient health from medication errors is slightly higher in relation to the grievor than in relation to other RNs. Ms. Thompson's uncontradicted evidence is that the grievor had made more medication errors on one shift than other RNs. Thus, given the nature of the grievor's work, a risk to patient health exists, and the magnitude of the risk is somewhat higher than it is in respect of other nurses.

¶ 145 However, there is no direct evidence of any specific loss or injury to any patient due to the grievor's medication errors, and no direct evidence relating to the seriousness of the loss or injury that may result. Medication errors were not a feature of the April 2000 episode. Ms. Thompson's hearsay evidence regarding the December 1999 medication errors does not support a finding of a serious or intolerable risk to patient safety. For these reasons, I find the Employer has failed to establish a serious or unacceptable risk to patient safety or, for that matter, to patient discomfort amounting to a safety risk due to medication errors.

¶ 146 In terms of the Employer's concern relating to patient disruption and/or nursing shortages leading to a direct risk to patient safety, I must again find the evidence falls short of establishing the Employer's factual contentions. There is no evidence that patient safety was ever jeopardized due to a shortage of nurses on the unit while nurses were assisting the grievor. Ms. Simpson expressed concern in this regard, but her evidence did not substantiate any direct risk to patient safety.

¶ 147 The evidence pertaining to the absence of nurses from the unit, or nursing shortages, when the grievor has been unwell at work is that Ms. Simpson assisted the grievor briefly at the outset of her shift in August 1999 and assigned an LPN to sit with the grievor for an unspecified amount of time until the social worker arrived. Ms. Simpson said that four years ago it was very difficult to find casual RN replacements, but there is no evidence that a replacement RN was not found on the day in question or on any other occasion when the grievor's illness manifested itself on the unit. Nor is there any evidence that any patient suffered discomfort or disruption due to either Ms. Simpson's or the LPN's absence from the unit. Further, in terms of unusual situations that may affect patient safety on the unit, the evidence as a whole does not persuade me that the unit is regularly short one RN. And, the evidence is that on day shift a "float" nurse, who could conceivably be temporarily utilized on the unit in the event that the staffing department experienced difficulty obtaining a replacement RN, is scheduled daily at the facility.

¶ 148 As to the December 1999 episode, Ms. Simpson's patients were unattended by her for a short time while she assisted the grievor. But Ms. Simpson could not say her patients failed to receive proper care during that time. Ms. Sweeten noted that due to the grievor's undue attention to one of her patients in April 2000, another RN had to attend to the needs of one of the grievor's patients. But again, there is no evidence that, as a result, the particular patient or any other patient suffered either discomfort or discomfort amounting to a risk to patient safety.

¶ 149 There was evidence that certain patients and family members who observed the grievor's behavior as she moved in and out of the palliative care room while awaiting Mr. Byer's arrival asked questions about the grievor's condition. I am prepared to infer that this situation created concern for these individuals in terms of both the grievor's well-being and patients' well-being. Nonetheless, there is no evidence the grievor approached these patients and attempted to provide patient care and no evidence establishing patient discomfort and/or disruption creating a risk to patient health or safety.

¶ 150 I find that any disruption experienced by patients and their families during the April 2000 incident is attributable to two factors: Ms. Sweeten's delayed reporting of the grievor's behavior to the nurse in charge; and the decision to keep the grievor on the unit. . . . I am satisfied that any risk of similar disruptions can be easily and substantially reduced or diminished by providing an educational workshop on bmd to the grievor's co-workers and supervisors as requested by staff in April 2000, and by instructing staff to ensure the grievor is removed from the unit if her behavior displays indicators of relapse.

¶ 151 Moreover, the evidence fails to demonstrate that it is impossible to reduce the identified risks to an acceptable level through reasonable accommodative measures. I find several material facts relating to the nature of the grievor's workplace, her disability and the way it manifests itself in the workplace must be considered.

¶ 152 First, the nature of the workplace provides certain implicit safeguards against any risk to patient health or safety escalating to a serious or unacceptable level. The grievor's duties are performed in a professional and team-based context. Unlike the solitary work of the fishing guide in *Oak Bay Marina Ltd.*, . . . , the grievor can be easily observed by her co-workers for approximately 30 minutes at the outset of each shift during report. The grievor is also in ongoing contact with her professional colleagues throughout a shift at the nursing station, medication carts and in the hallways. Further, by virtue of their professional obligations to observe and report co-worker impairments of all sorts, the grievor's co-workers will not be required to shoulder any significant additional accommodative responsibility or stress over and above that which exists in relation to all other co-workers. On the evidence before me, I accept that it would not be a reasonable accommodative measure to impose on the grievor's co-workers an obligation to closely scrutinize her behavior in a formal monitoring system. RNs and LPNs nonetheless have a professional responsibility to observe and report co-workers' impairments to their supervisors, and I am satisfied the concerns expressed by the grievor's co-workers in this regard can be satisfactorily addressed through the provision of an educational workshop on bmd and clear instructions from management.

¶ 153 Second, the grievor's particular indicators of relapse have, in the past, been readily observed by her co-workers and reported to supervisory or management staff. . . .

¶ 154 Third, supervisory and/or management staff are available for reporting purposes. On day shift, a team leader is on the unit and both Ms. Thompson and Ms. Wherry are scheduled to work. For evening and night shifts, managers are available on an on-call basis.

¶ 155 Fourth, although bmd is characterized by a loss of insight as an episode evolves, the evidence is that when fellow RNs have confronted the grievor with a possibility that she may be unwell, she has accepted their observations and has agreed she needs to be replaced. . . . The point here is that despite the predictable loss of insight as an episode evolves, the grievor is an individual who is receptive to her RN colleagues' observations of her condition at work and amenable to being relieved of her patient care duties.

¶ 156 I am also satisfied that it is possible to reduce the identified risk to an acceptable level by implementing reasonable accommodative measures that do not impose undue hardship on the Employer. . . . [A]ll of the evidence relating to the grievor's illness and possible accommodative measures must be considered and an assessment must be made as to the viability of various relapse-reduction mechanisms and strategies.

¶ 157 . . . Over time, and more specifically since the April 2000 episode, the grievor and Dr. Gibson have become more familiar with the specific features of her disorder. Together, they have developed some very effective approaches to her illness in terms of treatment, monitoring and prevention of episodes of mania. . . .

¶ 158 The grievor stabilizes quickly following an episode of mania, responds very well to treatment, and is entirely compliant to her medications. The medical evidence also establishes that the seasonal character of the grievor's illness is amendable to monitoring and medication. Moreover . . . , she has made significant strides since April 2000 in terms of self-education and self-identification of indicators for relapse. It is true, as the Employer submits, that the grievor's optimism in this regard has not yet been tested at its facility, but a significant fact remains. The grievor has experienced 14 months of relapse-free living during much of which she has been employed as an RN performing direct patient care duties for two different health care employers.

. . .

¶ 161 I find the Employer's willingness to engage in a meaningful search for reasonable accommodative measures enabling the grievor to return to her position as a nurse ceased when Dr. Gibson confirmed the impossibility of accurately predicting relapses. The Employer continued to focus on relapse prediction even after Dr. Gibson outlined various mechanisms that would assist in anticipating the grievor's decompensations. As I have said, the Employer's focus on relapse prediction was too narrow and its standard of "no" risk was too stringent. The evidence of both Dr. Collins and Dr. Gibson is that other nurses and doctors with bmd have returned to work and have performed their patient care duties safely with some workplace accommodations. . . .

. . .

¶ 167 For all of the foregoing reasons, I find the Employer has failed to satisfy the third test outlined in [*Meiorin*].

. . .

¶ 173 In all of the circumstances of this case, I find the grievor should be returned to work as a nurse on the following conditions. The grievor must:

1. continue to regularly attend her psychiatrist and physician and immediately report indicators for relapse to them;
2. continue to comply with her medical caregivers' testing, monitoring, treatment and medication recommendations;
3. continue to regularly use her familial support team to monitor her indicators for relapse;
4. authorize her psychiatrist, physician, and/or husband to contact her manager if any of them identifies indicators for decompensation or has a concern about the grievor's condition;
5. prepare a self-report of indicators of relapse and the need to increase medication and provide a copy of it to her manager, or designate, if and when requested to do so;
6. meet with supervisors or other administrative personnel to monitor her condition, if and when requested to do so;
7. not report for work if she has a suspicion she is not well;
8. agree to work predictable, routine shifts, and no night shifts;
9. agree not to work excessive overtime;
10. advise her co-workers and team leader about her disorder and the indicators for relapse;
11. comply with any reasonable accommodative measures the grievor, her Union representative and her manager negotiate for detecting early warning signs of decompensation in the workplace.

¶ 174 In terms of reasonable accommodative measures, the following will apply:

1. the grievor is to be scheduled for predictable, routine shifts with as few alterations as possible, and no night shifts;
2. the Employer is to provide the grievor's co-workers, supervisors, managers and other personnel such as the Occupational Health and Safety Officer, with an educational workshop on bmd and the detection of indicators for decompensation;
3. the Employer is to provide a facilitated discussion of co-worker concerns relating to the grievor's return to work;
4. in consultation with the grievor, her Union representative and Dr. Gibson, the Employer is to develop a procedure for staff to utilize if they detect signs of relapse at the workplace, and bring that procedure to the attention of the grievor's co-workers and supervisors;
5. the Employer is to permit the grievor to be absent from work if she identifies indicators of relapse;
6. the Employer may implement reasonable reporting mechanisms involving supervisors, other administrative personnel, or the local mental health unit to monitor the grievor's condition.

13:340 Who Is under a Duty to Accommodate?

The employer and the union share the duty to accommodate. According to the Supreme Court of Canada in *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 (excerpted below), the union not only may be liable for failure to accommodate if it has

been involved in developing the relevant rule or practice, but also if it impedes the employer's efforts to accommodate. This view has been criticized because it is premised on an assumption that the employer and the union are equal partners in collective bargaining: see Beth Bilson, "Seniority and the Duty to Accommodate: A Clash of Values — A Neutral's Perspective," (1999–2000) 1 Lab. Arb. Yrbk. 73, 77–79.

***Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970**

SOPINKA J.: The issue raised in this appeal is the scope and content of the duty of an employer to accommodate the religious beliefs of employees and whether and to what extent that duty is shared by a trade union. . . . Is a trade union liable for discrimination if it refuses to relax the provisions of a collective agreement and thereby blocks the employer's attempt to accommodate? Must the employer act unilaterally in these circumstances? These are issues that have serious implications for the unionized workplace.

THE FACTS

The appellant was employed by the Board of School Trustees, School District No. 23 (Central Okanagan) (the 'school board') and was a member of the Canadian Union of Public Employees, Local 523 (the 'union'). He had been employed by the school board since 1981 and in 1984 used his seniority to secure a Monday to Friday job at Spring Valley Elementary School ('SVE'). The gymnasium at SVE was rented out to a community group on Friday evenings and a custodian was required to be present for security and emergency purposes during this time. Pursuant to the employer's work schedule, which was included in the collective agreement, the job at SVE involved an afternoon shift from 3:00 p.m. until 11:00 p.m. during which only one custodian was on duty. As a Seventh-day Adventist, the appellant's religion forbade him from working on the church's Sabbath, which is from sundown Friday until sundown Saturday. The appellant met with a representative of the school board to try to accommodate his inability to work the full Friday shift. The school board representative was agreeable to the request but indicated that the school board required the consent of the union if any accommodation involved an exception to the collective agreement. Many of the alternatives discussed by the representative and the appellant involved transfer to 'prime' positions which the appellant did not have enough seniority to secure. The appellant was reluctant to accept a further alternative, that he work a four-day week, as this would result in a substantial loss in pay. In spite of these possibilities and other alternatives that could perhaps have been implemented without the union's consent, the employer concluded that the only practical alternative was to create a Sunday to Thursday shift for the appellant which did require the consent of the union.

The union had a meeting to discuss making an exception for the appellant but instead passed the following motion:

that the Kelowna sub-local of Local 523 demand that management of SD #23 rescind the proposal of placing any employee on a Sunday-Thursday shift. If, failing this agreement, a Policy Grievance be filed immediately to prevent the implementation of this proposal due to the severe violations of the Collective Agreement.

The appellant was informed of the rejection of the proposed accommodation and the ongoing requirement to work on Friday nights. He was also informed of the intention of the school board to continue to seek a viable accommodation. After further unsuccessful attempts to accommodate, the school board eventually terminated the appellant's employment as a result of his refusal to complete his regular Friday night shift.

The appellant filed a complaint pursuant to s. 8 of the British Columbia *Human Rights Act*, S.B.C. 1984, c. 22 (the Act), against the school board and pursuant to s. 9 against the Union. The proceedings were subsequently amended by the member designate (appointed by the British Columbia Council of Human Rights to investigate the complaints) to include a claim against the union under s. 8 as well.

[The member designate of the British Columbia Council of Human Rights upheld the complaints against both the respondent employer and the respondent union. The B.C. courts reversed that decision, and the complainant appealed to the Supreme Court of Canada.]

LEGISLATION

For convenience, the relevant legislation [the British Columbia *Human Rights Act*] is reproduced below:

8. (1) No person or anyone acting on his behalf shall
- (a) refuse to employ or refuse to continue to employ a person, or
 - (b) discriminate against a person with respect to employment or any term or condition of employment,
because of the . . . religion . . . of that person . . .
- (4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.
9. No trade union, employers' organization or occupational association shall
- (a) exclude any person from membership,
 - (b) expel or suspend any member, or
 - (c) discriminate against any person or member,
because of the . . . religion . . . of that person or member. . . .

THE ISSUES

[The issue before the Supreme Court of Canada was expressed as follows by Sopinka J.:]

Whether an employer or a labour union representing him is under any duty to effect a reasonable accommodation where, for reasons of religious belief, the employee is unable to work a particular shift.

...

Nature and Extent of the Duty to Accommodate

The duty resting on an employer to accommodate the religious beliefs and practices of employees extends to require an employer to take reasonable measures short of undue

hardship. In *O'Malley*, McIntyre J. explained that the words 'short of undue hardship' import a limitation on the employer's obligation so that measures that occasion undue interference with the employer's business or undue expense are not required.

The respondents submitted that we should adopt the definition of undue hardship articulated by the Supreme Court of the United States in *Trans World Airlines, Inc. v. Hardison*. . . . In that case, the court stated . . . :

To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship . . . to require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion. By suggesting that TWA should incur certain costs in order to give Hardison Saturdays off . . . would in effect require TWA to finance an additional Saturday off and then to choose the employee who will enjoy it on the basis of his religious beliefs. While incurring extra costs to secure a replacement for Hardison might remove the necessity of compelling another employee to work involuntarily in Hardison's place, it would not change the fact that the privilege of having Saturdays off would be allocated according to religious beliefs. . . .

This definition is in direct conflict with the explanation of undue hardship in *O'Malley*. This Court reviewed the American authorities in that case and referred specifically to *Hardison* but did not adopt the '*de minimis*' test which it propounded.

Furthermore, there is good reason not to adopt the '*de minimis*' test in Canada. *Hardison* was argued on the basis of the establishment clause of the First Amendment of the U.S. Constitution and its prohibition against the establishment of religion. This aspect of the *Hardison* decision was thus decided within an entirely different legal context. The case law of this Court has approached the issue of accommodation in a more purposive manner, attempting to provide equal access to the workforce to people who would otherwise encounter serious barriers to entry. . . .

The *Hardison de minimis* test virtually removes the duty to accommodate and seems particularly inappropriate in the Canadian context. More than mere negligible effort is required to satisfy the duty to accommodate. The use of the term 'undue' infers that some hardship is acceptable; it is only 'undue' hardship that satisfies this test. The extent to which the discriminator must go to accommodate is limited by the words 'reasonable' and 'short of undue hardship.' These are not independent criteria but are alternate ways of expressing the same concept. What constitutes reasonable measures is a question of fact and will vary with the circumstances of the case. Wilson J., in [*Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*], listed factors that could be relevant to an appraisal of what amount of hardship was undue as . . . :

. . . financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. The size of the employer's operation may influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities can be adapted to the circumstances.

Where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations.

She went on to explain that . . . '[t]his list is not intended to be exhaustive and the results which will obtain from a balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case.'

The concern for the impact on other employees which prompted the court in *Hardison* to adopt the *de minimis* test is a factor to be considered in determining whether the interference with the operation of the employer's business would be undue. However, more than minor inconvenience must be shown before the complainant's right to accommodation can be defeated. The employer must establish that actual interference with the rights of other employees, which is not trivial but substantial, will result from the adoption of the accommodating measures. Minor interference or inconvenience is the price to be paid for religious freedom in a multicultural society.

...

The Threatened Grievance

The member designate refused to give effect to the submission that the economic impact of a grievance threatened by the respondent Union constituted undue hardship. She was of the view that the collective agreement was subject to the *Human Rights Act* and the only economic consequence to the employer would have been the costs of defending the grievance.

The proposition relied on by the member designate is fully supported by the authorities. In *Insurance Corporation of British Columbia v. Heerspink* . . . Lamer J. (as he then was) stated . . . :

Furthermore, as it [the *Human Rights Code*] is a public and fundamental law, no one, unless clearly authorized by law to do so, may contractually agree to suspend its operation and thereby put oneself beyond the reach of its protection.

In [*Ontario Human Rights Commission v. Etobicoke (Borough of)*], this principle was stated to apply to a collective agreement. . . . McIntyre J. stated:

While this submission is that the condition, being in a collective agreement, should be considered a *bona fide* occupational qualification and requirement, in my opinion to give it effect would be to permit the parties to contract out of the provisions of the *Ontario Human Rights Code*.

Although the Code contains no explicit restriction on such contracting out, it is nevertheless a public statute and it constitutes public policy in Ontario as appears from a reading of the statute itself and as declared in the preamble. It is clear from the authorities, both in Canada and in England, that parties are not competent to contract themselves out of the provisions of such enactments and that contracts having such effect are void, as contrary to public policy.

The respondent Board submits, however, that this principle does not apply in the case of adverse effect discrimination. The basis for this submission is that in the case of direct discrimination the offending provision is struck down but that in adverse effect discrim-

ination it is upheld in its general application and the complainant is accommodated so that it does not affect him or her in a discriminatory fashion. I do not accept this submission. Adverse effect discrimination is prohibited by the *Human Rights Act* no less than direct discrimination. In both instances private arrangements, whether by contract or collective agreement, must give way to the requirements of the statute. . . .

While the provisions of a collective agreement cannot absolve the parties from the duty to accommodate, the effect of the agreement is relevant in assessing the degree of hardship occasioned by interference with the terms thereof. Substantial departure from the normal operation of the conditions and terms of employment in the collective agreement may constitute undue interference in the operation of the employer's business.

The member designate did not err in law in concluding that the collective agreement did not relieve the respondent employer of its duty to accommodate. She concluded that the sole impact of the threatened grievance which would have sought to enforce the collective agreement was the cost of defending it and that this did not constitute undue hardship. The only other alleged effect of the proposed accommodation was with respect to the effect on other employees and their reaction which the respondent Board feared would result from unilateral action on the part of the employer without Union approval. It is, therefore, necessary to consider whether the member designate erred in law in respect of this factor.

Effect on Other Employees

The respondent Board submits that the member designate erred in stating that the employer's fear that unilateral action on the part of the employer might bring forth reprisals from other employees was not a justification for refusing to accommodate the appellant. This submission is based on the following statement in the evidence of Harvey Peatman, the secretary-treasurer of the respondent Board:

Q. What would have happened if the school district had moved unilaterally without union approval to accommodate him in some way in your view? What did you think would happen?

A. Well, possible riot by the members of the union but — No, more seriously, very definitely being faced with a grievance which really would have been undefendable.

This statement would justify the conclusion that the alleged fear of employee reprisal was not the real reason for the employer's decision not to create the special shift for the appellant. The real reason was the concern relating to the threatened grievance which was based on a mistake of law. I have explained above that there was no error of law on the part of the member designate in this regard. If this concern played any part in the decision of the employer, it did not constitute justification for the refusal to accommodate the appellant.

The reaction of employees may be a factor in deciding whether accommodating measures would constitute undue interference in the operation of the employer's business. In *Central Alberta Dairy Pool*, Wilson J. referred to employee morale as one of the factors to be taken into account. It is a factor that must be applied with caution. The objection of

employees based on well-grounded concerns that their rights will be affected must be considered. On the other hand, objections based on attitudes inconsistent with human rights are an irrelevant consideration. I would include in this category objections based on the view that the integrity of a collective agreement is to be preserved irrespective of its discriminatory effect on an individual employee on religious grounds. The contrary view would effectively enable an employer to contract out of human rights legislation provided the employees were *ad idem* with their employer. It was in this context that Wilson J. referred to employee morale as a factor in determining what constitutes undue hardship.

There is no evidence in the record before the Court that the rights of other employees would likely have been affected by an accommodation of the appellant. The fact that the appellant would be assigned to a special shift may have required the adjustment of the schedule of some other employee but this might have been done with the consent of the employee or employees affected. The respondents apparently did not canvass this possibility. The union objected to the proposed accommodation on the basis that the integrity of the collective agreement would be compromised and not that any individual employee objected on the basis of interference with his or her right. In my opinion, the member designate came to the right conclusion with respect to this issue.

Union's Duty to Accommodate

The duty to accommodate developed as a means of limiting the liability of an employer who was found to have discriminated by the *bona fide* adoption of a work rule without any intention to discriminate. It enabled the employer to justify adverse effect discrimination and thus avoid absolute liability for consequences that were not intended. Section 8 of the Act, like many other human rights codes, prohibits discrimination against a person with respect to employment or any term or condition of employment without differentiating between direct and adverse effect discrimination. Both are prohibited. Moreover, any person who discriminates is subject to the sanctions which the Act provides. By definition (s. 1) a union is a person. Accordingly, a union which causes or contributes to the discriminatory effect incurs liability. In order to avoid imposing absolute liability, a union must have the same right as an employer to justify the discrimination. In order to do so it must discharge its duty to accommodate.

The respondent union does not contest that it had a duty to accommodate but asserts that the limitations on that duty were not properly applied by the member designate. It submits that the focus must be on interference with the rights of employees rather than on interference with the union's business. It further submits, and is supported in this regard by the Canadian Labour Congress (CLC), that a union cannot be required to adopt measures which conflict with the collective agreement until the employer has exhausted reasonable accommodations that do not affect the collective rights of employees.

These submissions raise for determination the extent of a union's obligation to accommodate and how the discharge of that duty is to be reconciled and harmonized with the employer's duty. These are matters that have not been previously considered in this Court.

As I have previously observed, the duty to accommodate only arises if a union is party to discrimination. It may become a party in two ways.

First, it may cause or contribute to the discrimination in the first instance by participating in the formulation of the work rule that has the discriminatory effect on the complainant. This will generally be the case if the rule is a provision in the collective agreement. It has to be assumed that all provisions are formulated jointly by the parties and that they bear responsibility equally for their effect on employees. I do not find persuasive the submission that the negotiations be re-examined to determine which party pressed for a provision which turns out to be the cause of a discriminatory result. This is especially so when a party has insisted that the provision be enforced. . . .

Second, a union may be liable for failure to accommodate the religious beliefs of an employee notwithstanding that it did not participate in the formulation or application of a discriminatory rule or practice. This may occur if the union impedes the reasonable efforts of an employer to accommodate. In this situation it will be known that some condition of employment is operating in a manner that discriminates on religious grounds against an employee and the employer is seeking to remove or alleviate the discriminatory effect. If reasonable accommodation is only possible with the union's co-operation and the union blocks the employer's efforts to remove or alleviate the discriminatory effect, it becomes a party to the discrimination. In these circumstances, the union, while not initially a party to the discriminatory conduct and having no initial duty to accommodate, incurs a duty not to contribute to the continuation of discrimination. It cannot behave as if it were a bystander asserting that the employee's plight is strictly a matter for the employer to solve. . . .

The timing and manner in which the union's duty is to be discharged depends on whether its duty arises on the first or second basis as outlined above. I agree with the submissions of the respondent union and CLC that the focus of the duty differs from that of the employer in that the representative nature of a union must be considered. The primary concern with respect to the impact of accommodating measures is not, as in the case of the employer, the expense to or disruption of the business of the union but rather the effect on other employees. The duty to accommodate should not substitute discrimination against other employees for the discrimination suffered by the complainant. Any significant interference with the rights of others will ordinarily justify the union in refusing to consent to a measure which would have this effect. Although the test of undue hardship applies to a union, it will often be met by a showing of prejudice to other employees if proposed accommodating measures are adopted. As I stated previously, this test is grounded on the reasonableness of the measures to remove discrimination which are taken or proposed. Given the importance of promoting religious freedom in the workplace, a lower standard cannot be defended.

While the general definition of the duty to accommodate is the same irrespective of which of the two ways it arises, the application of the duty will vary. A union which is liable as a co-discriminator with the employer shares a joint responsibility with the employer to seek to accommodate the employee. If nothing is done both are equally liable. Nevertheless, account must be taken of the fact that ordinarily the employer, who has charge of the workplace, will be in the better position to formulate accommodations. The employer, therefore, can be expected to initiate the process. The employer must take steps

that are reasonable. If the proposed measure is one that is least expensive or disruptive to the employer but disruptive of the collective agreement or otherwise affects the rights of other employees, then this will usually result in a finding that the employer failed to take reasonable measures to accommodate and the union did not act unreasonably in refusing to consent. This assumes, of course, that other reasonable accommodating measures were available which either did not involve the collective agreement or were less disruptive of it. In such circumstances, the union may not be absolved of its duty if it failed to put forward alternative measures that were available which are less onerous from its point of view. I would not be prepared to say that in every instance the employer must exhaust all the avenues which do not involve the collective agreement before involving the union. A proposed measure may be the most sensible one notwithstanding that it requires a change to the agreement and others do not. This does not mean that the union's duty to accommodate does not arise until it is called on by the employer. When it is a co-discriminator with the employer, it shares the obligation to take reasonable steps to remove or alleviate the source of the discriminatory effect.

In the second type of situation in which the union is not initially a contributing cause of the discrimination but by failing to co-operate impedes a reasonable accommodation, the employer must canvass other methods of accommodation before the union can be expected to assist in finding or implementing a solution. The union's duty arises only when its involvement is required to make accommodation possible and no other reasonable alternative resolution of the matter has been found or could reasonably have been found.

The member designate did not, therefore, err in applying the *O'Malley* definition of the duty to accommodate to the respondent union. Moreover, she found that the union was involved in the conduct which resulted in adverse effect discrimination and that its duty to accommodate arose by reason of this fact. The respondent union, therefore, owed a duty to accommodate jointly with the employer. The proposal for accommodation presented to the union was found to be reasonable. While it was submitted that the member designate failed to consider the trespass on the rights of other employees, I am satisfied that the only possible effect was the adjustment to the schedule of one employee to work the Friday afternoon shift in place of the appellant. The respondent union conceded in argument that there is no evidence that employees were canvassed to ascertain whether someone would volunteer to switch with the appellant. If this occurred, no employees' rights would have been adversely affected. The onus of proof with respect to this issue was on the respondent union. I agree with the member designate that it was not discharged.

Finally, in view of the fact that the duty to accommodate of the union was shared jointly with the employer, it was not incumbent on the member designate to determine whether all other reasonable accommodations had been explored by the employer before calling upon the union. Nevertheless, it appears to me that the member designate was of the view that the special shift proposal was not only reasonable but the most reasonable. This view is fully supported by the evidence. Accordingly, the decision of the member designate must be upheld unless the respondents are correct that there was an error in law on her part with respect to the complainant's duty to facilitate accommodation of his religious beliefs.

Duty of Complainant

The search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation. . . .

To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. Thus, in determining whether the duty of accommodation has been fulfilled, the conduct of the complainant must be considered.

This does not mean that, in addition to bringing to the attention of the employer the facts relating to discrimination, the complainant has a duty to originate a solution. While the complainant may be in a position to make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's business. When an employer has initiated a proposal that is reasonable and would, if implemented, fulfil the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre J. in *O'Malley*. The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged.

In my opinion the member designate did not err in this respect. The complainant did everything that was expected of him with respect to the proposal put forward by the employer. It failed because the Union refused consent and the employer refused to proceed unilaterally. The appellant had no obligation to suggest other measures. Moreover, it is not suggested that the appellant turned down any reasonable proposal which was offered to him.

...

* * *

Where the provisions of a collective agreement are found to discriminate against some members of the bargaining unit on a prohibited ground, the union may be held to be in breach of its duty to accommodate even though it had tried (and failed) to persuade the employer to accept non-discriminatory terms: *United Food and Commercial Workers, Local 401 v. Alberta Human Rights and Citizenship Commission*, 2003 ABCA 246 (Alta. C.A.).

13:350 The Interface between the Human Rights Forum and Grievance Arbitration in the Enforcement of Equality Rights

In *Cadillac Fairview Corp. v. Saskatchewan (Human Rights Code Board of Inquiry)* (1999), 173 D.L.R. (4th) 609 (Sask. CA) (leave to appeal to S.C.C. refused), employees of the unionized employer complained to the Saskatchewan Human Rights Commission of sexual harassment and discrimination, in breach of the Saskatchewan *Human Rights Code*. The Commission set up a board of inquiry to hear the matter. The employer

sought to terminate the proceedings on judicial review. It claimed that because the applicable collective agreement prohibited sex discrimination, the principle of pre-eminence of the grievance arbitration forum affirmed by the Supreme Court of Canada in *Weber v. Ontario Hydro* (above, section 9:621 and 9:631) meant that the human rights forum had no authority to deal with the matter. Vancise J.A., for the Saskatchewan Court of Appeal, held as follows:

[27] *Weber*, in my opinion, did not go so far as to state that any rights created by statute that affect employment rights must of necessity arise out of the collective agreement and can only be dealt with by arbitration. . . .

[28] The right which was allegedly violated in this case is a fundamental human right which employees and the union need not bargain and cannot contract out of. . . .

[29] The Supreme Court of Canada has stated that when human rights legislation comes into conflict with other, more specific legislation, the provisions of the Code prevail. Next to constitutional law, human rights provisions are more important than all other laws. They have been defined as basic quasi-constitutional rights and statutes. They are not treated as laws of general application but rather as fundamental laws. Unless the legislature has expressly provided otherwise, the Code takes precedence over all other laws when there is a conflict. . . .

[35] The result in this case is clear. The Board of Inquiry appointed under the provisions of the Code has jurisdiction to hear and determine this matter. . . .

At other points in his judgment, Vancise J. seemed to suggest that the human rights forum not only had the jurisdiction to hear the complaint in question, but may even have had sole jurisdiction to do so, to the exclusion of the arbitral forum. That suggestion has been put to rest by the decision of the Supreme Court of Canada in *Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324*, 2003 SCC 42, set out in section 9:610 above. In the *Parry Sound* case, the Supreme Court held (at para. 14) that “the substantive rights and obligations of the Human Rights Code are incorporated into a collective agreement over which [an arbitrator] has jurisdiction.” Although *Parry Sound* came from Ontario, where the labour relations statute expressly gives arbitrators the authority to apply the human rights statute and other employment-related legislation, the Supreme Court’s judgment seems to make clear that arbitrators can and must apply human rights legislation even where they are not given any specific statutory authority to that effect.

Is there a risk that, despite the fundamental nature of human rights legislation, grievance arbitration will be held to have sole jurisdiction to apply the provisions of that legislation in the unionized context, to the exclusion of the human rights forum? Like the *Cadillac Fairview* decision of the Saskatchewan Court of Appeal excerpted above, the decision of the Ontario Court of Appeal in *Ford Motor Company of Canada Ltd. et al. v. Ontario Human Rights Commission et al.* (2002), 209 D.L.R. (4th) 465, would appear to say no. In the *Ford Motor* case, the employer and union argued, among other things,

that because an arbitration award had been issued on an employee's grievance alleging racial discrimination, a human rights board of inquiry had no jurisdiction to hear a complaint under the human rights statute on the same matter. In rejecting that argument, Abella J.A., for the court, said:

[58] I am . . . of the view that *Weber* does not apply so as to oust the jurisdiction of the [board of inquiry] . . .

[59] The [Ontario Human Rights Commission] now has authority under s. 34(1)(a) of the [*Ontario Human Rights Code*] to decide, in its discretion, not to deal with a complaint where it is of the view that the complaint "could or should be more appropriately dealt with" under another Act. Labour arbitrators now have statutory authority under the *Labour Relations Act, 1995* to apply the Code. Since the Commission has statutory authority under the Code to defer to another forum, the legislative intent has clearly shifted from according exclusive jurisdiction to the Commission for Code violations to offering concurrent jurisdiction to labour arbitrators when complaints arise from disputes under a collective agreement.

[60] The underlying goal of these symmetrical amendments is to avoid the gratuitous bifurcation or proliferation of proceedings, especially when the arbitrable grievance and the human rights complaint emerge seamlessly from the same factual matrix. That goal was also, I think, at the heart of *Weber*. In my view, *Weber* stands for the proposition that when several related issues emanate from a workplace dispute, they should all be heard by one adjudicator to the extent jurisdictionally possible, so that inconsistent results and remedies . . . may be avoided.

[61] On the other hand, there may be circumstances where an individual unionized employee finds the arbitral process foreclosed, since the decision whether to proceed with a grievance is the union's and not the employee's. Moreover, the alleged human rights violation may be against the union, as stipulated in the Code. . . .

[62] In an arbitration under a collective agreement, only the employer and union have party status. The unionized employee's interests are advanced by and through the union, which necessarily decides how the allegations should be represented or defended. Applying *Weber* so as to assign exclusive jurisdiction to labour arbitrators could therefore render chimerical the rights of individual unionized employees. This does not mean, however, that the availability of jurisdictional concurrency should be seen as encouraging "forum" shopping. The jurisdictional outcome will depend upon the circumstances of each case, including the reasonableness of the union's conduct, the nature of the dispute, and the desirability of finality and consistency of result.

* * *

For a more detailed analysis to the same effect, see Brian Etherington, "Promises, Promises: Notes on Diversity and Access to Justice" (2000), 26 *Queen's L.J.* 43.

Whatever risks might be posed by the growth of arbitral jurisdiction over equality issues in the workplace, it has brought those issues to the shop floor in a way that no

other forum could. The following article considers both the complementarity and the tension between seniority rights and equality rights.

M. Kaye Joachim, “Seniority Rights and the Duty to Accommodate” (1998), 24 Queen’s L.J. 131 at 151–63, 178–79, 187

II. SENIORITY

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D. Similarities and Contrasts Between Seniority Systems and the Duty to Accommodate

It is important to recognize that both seniority systems and the duty to accommodate are designed to enhance the employment opportunities of workers. Seniority operates directly, by making length of service a factor in who receives work. Anti-discrimination legislation operates indirectly, by ensuring that certain factors do not determine who gets the work. Since both systems involve competition between workers, some will see their employment opportunities expanded and others will not.

While seniority rules insulate all employees from management discretion, senior workers will gain more than junior workers from the seniority system. Workers accept this as fair because they believe that they will, in time, share in the advantages of the senior worker. . . . Anti-discrimination laws similarly operate to protect all employees from discrimination on prohibited grounds, as all employees have a race or colour, gender, age, marital status and the like. Those individuals or groups who are most often discriminated against by employers will see their opportunities expanded, while those who are seldom discriminated against (young, white, able-bodied male workers), will not. The latter groups may never get their turn to benefit from anti-discrimination laws; they will become older and they may become disabled, but they will never become non-white or female. Similarly, many employees who might wish to have certain accommodations (such as transfer to a preferred shift or assignment) never seek them because they do not see the lack of those accommodations as discriminatory. Although employees commonly perceive as fair the uneven benefits offered by seniority systems, many of them do not see as fair the uneven benefits accorded by anti-discrimination laws.

By contrasting management discretion to act arbitrarily, seniority systems can help prevent direct discrimination. Because seniority is “a neutral system that is colour-blind, gender-blind, and age-blind” it prohibits management from using those factors to the detriment of groups traditionally discriminated against.

A pure seniority system empowers workers to exercise their seniority for opportunities such as training, job shadowing, entering apprenticeship programs and job posting. With a clear seniority list, a worker knows she is eligible for an opportunity. Any intrusion of discriminatory factors into the selection of the worker is quickly revealed and can be handled through the grievance arbitration process. By the same token, however, seniority systems will unavoidably come into conflict with the duty to accommodate. The essence of a seniority system is that the parties agree in advance on the factors to be taken into account (length of service, and to varying degrees, skill and ability). By implication, they

agree that all other factors (such as net productivity of the employee, relationship with the employer, number of dependents and disability-related needs) may not be taken into account. Because relief from the adverse effects of discrimination requires an employer to consider a worker's disability-related needs, conflict is inevitable.

III. CONFLICTS BETWEEN THE ACCOMMODATION OF DISABLED WORKERS AND SENIORITY RIGHTS

Conflicts between seniority systems and the accommodation required by a disabled employee can arise in two ways. First, the seniority provisions of the collective agreement may discriminate (directly or indirectly) against a disabled worker, and the accommodation required by the employee may therefore involve modification to or exception from the collective agreement. The union shares the duty with the employer to find a suitable accommodation. While the employer is not obliged, under anti-discrimination legislation, to select the form of accommodation least disruptive to the collective agreement, the availability of less intrusive forms of accommodation is relevant to determining whether the parties acted reasonably in attempting to accommodate a worker.

Second, although the terms of the collective agreement may not have a discriminatory effect, a worker may need an accommodation that cannot be implemented without violating the seniority provisions. In this case, the employer must canvass other methods of accommodating the employee that do not require the participation of the union, before calling upon the union to grant an exception to or modification of the seniority provisions of the collective agreement. In the next section, I set out a series of scenarios illustrating different ways in which accommodating disabled workers can interfere with the seniority rules in a collective agreement. Some of these scenarios are hypothetical, and others are based on actual cases.

A. Accumulation of Seniority

(i) Competitive Seniority

(a) *Date of Hire Seniority Systems*

In the first scenario, the collective agreement provides that seniority accrues from the date of hire but ceases to accumulate after one year of absence. A disabled worker absent for a year and a half because of disability loses six months of seniority credits. When she applies for a promotion for which she is qualified, she loses out to an employee who moved ahead of her on the seniority list. She grieves, alleging that the loss of six months' competitive seniority is discriminatory. She requests that her lost seniority credits be restored, despite the provisions of the collective agreement.

(b) *Hours Worked Seniority Systems*

The same agreement provides that part-time workers accrue seniority based on hours worked, and that there are to be separate seniority lists for part-time and full-time workers. Because of a disability-related absence, an employee is unable to work her usual hours, and falls behind others on the part-time seniority list. She grieves that she should be credited for competitive seniority while absent due to disability.

(ii) **Benefit Seniority**

In each of the above scenarios, the disabled worker also claims that she should be credited with benefit seniority during the disability-related absence.

B. Application of Seniority

(i) **Impact on Future Working Opportunities**

(a) *Hiring and Promotion Systems*

An employer's workplace is divided into several seniority units, each with its own seniority list. Each seniority unit contains several job classifications, and progress from one classification to another is linear. The only access to the workplace is through entry-level positions at the bottom of each job ladder. Those positions have more arduous physical tasks and less desirable working hours. Progression or promotion to other positions higher on the job ladder is determined by seniority. Suppose an applicant with a hidden disability is offered a position with the employer, but it is subsequently discovered that she is unable to perform the physical tasks of the entry-level positions. Although she can perform the tasks of an upper-level position, the employer rescinds the offer, and the employee files a human rights complaint alleging that the employer's hiring practices discriminate against her because of disability. With respect to the career ladder, she seeks to be placed in one of the upper-level positions that she is physically capable of performing, contrary to the provisions of the collective agreement.

In a related example, a disabled employee wishes to advance in the workplace but is unable to perform the physical tasks of the next position up on the job ladder. She applies for a position even higher on the job ladder, the duties of which she is capable of performing, but is turned down because she has not progressed through the lower position. She also files a complaint alleging that the employer's system of promotion discriminates against her because of disability.

(b) *Shift Selection*

A worker develops a sleep disorder that prevents her from working during the night shift. In her unit, shift preferences are determined strictly by seniority, leaving her far down on the list of employees waiting in line for the day shift. The employer places her in the next available day-shift position, but the union files a grievance on behalf of the more senior employee who was passed over.

(c) *Transfer to a Vacant Position within the Bargaining Unit*

A worker becomes disabled (or a disabled worker becomes further disabled) and is unable to continue performing the functions of her position safely. Attempts to modify her position so that she can perform it safely and productively fail, and she faces the loss of employment or layoff unless an alternative position is provided. There are other positions within the bargaining unit that she could perform, but the agreement requires the employer to post all vacancies, and also provides that where applicants are relatively equal in ability, seniority is to prevail. The employer places the disabled worker in a position she can perform, without posting it, and the union grieves. Her seniority level is too low to allow her to compete successfully for any of the positions she is capable of performing.

(ii) **Impact on Current Working Conditions: Bumping**

A disabled worker cannot be accommodated in her own position, and there are no jobs vacant or likely to become vacant that she can perform. She could, however, perform the work of several employees who are junior to her, and the employer displaces one of them in order to accommodate her. In one situation, the junior worker is transferred to another position. In another example, the junior worker is laid off, with recall rights. In a third variation, no junior employees are doing work that is suitable for the disabled employee, but a senior employee is doing work that she can do. The employer therefore displaces the senior employee and transfers him against his wishes to the disabled employee's position, with a loss of compensation.

(iii) **Impact on Ability to Maintain or Regain Employment Status**

(a) *Protection against Bumping*

The employer reorganizes the workplace and eliminates some positions. A senior worker whose position is eliminated exercises his bumping rights to displace a junior disabled worker. The disabled worker is unable to perform the duties of the positions held by the more junior workers whom she is eligible to bump, and she is laid off. She grieves that her position should have been protected from bumping, since the senior worker could have bumped another junior worker.

(b) *Recall Rights*

Following a layoff, the next two workers in line for recall are a non-disabled worker and then a disabled worker. The employer recalls the disabled worker ahead of the more senior worker, because one of the few positions she is capable of performing becomes available. If she had not been recalled to this position, it is unlikely that a position she was capable of performing would become available for some time. The more senior worker is called to work two weeks later. He grieves the loss of two weeks' compensation, and seeks to be placed in the position given to the disabled worker.

(c) *Transfer of Seniority Credits across Bargaining Units or Seniority Units*

There are no suitable positions for the disabled worker within the bargaining unit. There is work which she could perform in another bargaining unit, but the two units are represented by different trade unions and are covered by different collective agreements that do not provide for inter-unit transfers. The employer transfers the disabled worker into a suitable vacant position in the other bargaining unit, contrary to the posting and seniority provisions. However, the employer declines to recognize her fifteen years of service, so she moves to the bottom of the seniority list in the new unit. The members of that unit grieve the failure to post the vacancy and fill it from within the unit. The disabled worker grieves the loss of her seniority.

IV. RESOLVING THE CONFLICT

A. The Duty to Accommodate and Its Limits

In each of the scenarios outlined above, the accommodation requested by the disabled worker interferes with the seniority provisions of the collective agreement, with varying

impact on other employees. Some effect on other workers is inevitable as human rights legislation expands the work opportunities of groups that have been discriminated against. That legislation is used to rectify a refusal to hire or transfer an employee on a prohibited ground of discrimination, by placing the complainant in the position he or she would have obtained but for the discrimination. This remedy is considered appropriate, regardless of its impact on other workers aspiring to that position. Similarly, in cases of adverse-effect discrimination, the duty to accommodate increases the opportunities of some workers in order to rectify the effect of indirectly discriminatory rules on certain groups. This inevitably limits the work opportunities available to other workers, and in some cases it alters their current working conditions. Can those workers reasonably be expected to accept the consequences of interfering with seniority rules in order to accommodate disabled co-workers?

The right to equal treatment in employment is not absolute, as the Supreme Court of Canada indicated in *O'Malley [Ontario (Human Rights Commission) v. Simpsons Sears Ltd.]*:

The Code must be construed and flexibly applied to protect the right of the employee who is subject to discrimination and also to protect the right of the employer to proceed with the lawful conduct of his business. The Code was not intended to accord rights to one to the exclusion of the rights of the other.

In cases of direct discrimination, the limit of the right to equal treatment is reached where the differential treatment can be justified as a bona fide occupational requirement. In cases of adverse-effect discrimination, the limit on the right to equal treatment is reached where the accommodation required to correct the differential effect would cause undue hardship to the union or the employer. Similarly, there must be limits on the burden the state is willing to impose on co-workers. Where a proposed accommodation significantly or substantially interferes with the rights of other workers, the limit on the right to equal treatment has been reached. . . .

D. Conflicts Revisited

. . .

If the disabled worker were not accommodated in each of these examples, she would not be hired or would lose her employment altogether. In contrast, the burden on the co-workers in each example is that they would be denied the opportunity to use their seniority right to move to a preferred shift or position. In a workplace with regular turnover, that may mean a short delay in obtaining the desired opportunity. In other cases, the lost opportunity may never arise again. In a workplace where shift work is the norm, and jobs that involve straight days are the preferred positions, workers may wait years to accumulate sufficient seniority to entitle them to a day job. The variability between jobs in terms of salary, duties performed, working conditions, geographic location and opportunities for promotion may be enormous. Even minor differences between jobs may have large personal significance for individual workers. A promotion with a small increase in salary may have a significant effect on pension entitlement in later years. Is it justifiable to expect workers to make these sacrifices so that disabled workers can obtain or maintain access to the workplace?

In any situation where there are more candidates than work opportunities, requiring the employer to give an opportunity to one worker inevitably has an impact on other workers. Human rights legislation prohibits an employer from directly discriminating because of race in the assignment of work opportunities, and we do not consider the impact on other employees who might have benefitted from such discrimination in the particular case. Similarly, if an employer intended to modify a work station in order to enable a disabled applicant to do the work, we would not suggest that this accommodation should be discarded merely because another candidate had been hoping for the position and would have received it if the modifications had not been made.

In a non-unionized workplace, if an employer departs from its usual practice of filling middle level positions with internal candidates and hires a disabled external applicant into such a position, this will affect the career aspirations of inside workers. Similarly, if an employer transfers a disabled employee to a vacant shift or position as an accommodation to enable him or her to remain in the workplace, this will affect co-workers who may have aspired to that opening. We would not expect that these workers could block the accommodation by claiming that it would impact unreasonably on them.

In the unionized environment, the difference is that the employer and bargaining agent have agreed in advance that such openings will be posted and filled by bargaining unit members in accordance with seniority. Thus, it has been implicitly agreed that openings will not be used to accommodate disabled workers. This changes mere expectations into collectively bargained rights. Depending on the circumstances of the particular workplace, workers may develop concrete and defined expectations toward preferred positions or shifts. In other workplaces, different variables may not foster such defined expectations. If it is accepted that the existence of a collective agreement, in and of itself, should not bar the accommodation of disabled workers, then it is the actual impact on co-workers that should count. A worker who has taken courses to position himself for a foreseeable and long awaited promotion opportunity may be able to establish that its loss will have a significant impact on him. In other cases, such factors as the unpredictability of turnover, the existence of skill and ability requirements, or the uncertainties of the bumping system will preclude employees from developing concrete expectations with respect to vacancies. In those cases, the loss of the opportunity to bid on a preferred position may be a justifiable burden to impose in order to allow the accommodation of a disabled worker. . . .

CONCLUSION

The workplace poses many unintended barriers to persons whose disabilities impair their capacity to perform ordinary tasks in the same manner, at the same speed or on the same equipment as non-disabled workers. Requiring employers to adapt the workplace to accommodate disability-related needs allows disabled persons the opportunity to gain access to and remain in the workforce. Ideally, disabled workers could be accommodated to enable them to continue to perform the work they were performing before the onset or worsening of their disability. When this is not possible, employers may have to consider the availability of suitable alternative employment. This form of accommodation

inevitably affects the working conditions and opportunities of other workers who may hold or aspire to the position sought by the disabled worker.

In a unionized environment, this conflict between workers is exacerbated by seniority provisions in collective agreements. The essence of these provisions is the agreement between employer and workers that specified work opportunities will be allocated on the basis of length of service, which is perceived as a fair and objective criterion. Conversely, those provisions constitute an agreement in advance that other factors (such as disability-related needs) will not be used to allocate work opportunities.

The credits accumulated under seniority provisions affect workers' economic security, and any interference with the operation of the seniority rules lessens the value of the credits.

The requirement to accommodate disability-related needs and the requirement to comply with seniority provisions both restrict the potential for arbitrary or discriminatory action by employers. When those requirements conflict, should the principle of non-discrimination be followed, or the principle of seniority?

Equality rights are not absolute. The limit of a disabled person's right to equal opportunity is reached when the accommodation required to achieve equality would cause substantial interference with the rights of other workers. However, the fact that a requested accommodation would interfere with the seniority provisions of the collective agreement should not in and of itself bar that accommodation, since it would be contrary to public policy to allow employees and employers to contract out of their obligation to accommodate disabled workers. What really matters is the actual impact of the accommodation on the working conditions and opportunities of other workers. Each departure from the seniority principle must be judged on its unique facts in order to determine whether that impact is substantial.

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13:400 SYSTEMIC DISCRIMINATION

Systemic discrimination is the term used to refer to the operation of a web of factors which lead to the under-representation of particular groups in the workforce, or their over-representation in low-level jobs. As the following excerpt explains, dramatic shifts in the demographic profile of Canadian society have highlighted the degree of stratification in the workforce.

K. Kelly, "Visible Minorities: A Diverse Group" (1995), 37 Canadian Social Trends 2

Recent changes in immigration patterns have increased the size of Canada's visible minority population and have also changed its composition. In 1991, the 1.9 million adults in a visible minority in Canada represented 9% of the population aged 15 and over, doubling the 1981 proportion. More than three-quarters (78%) were immigrants, 15% were born in Canada and the remainder (7%) were non-permanent residents. As was the case during the 1980s, Chinese, Blacks and South Asians accounted for two-thirds of

adults in a visible minority in 1991. During the past decade, however, there have been large increases in some of the smaller visible minority groups such as South East Asians and Latin Americans.

People in a visible minority in Canada have much in common. Most, for example, live and work in Canada's larger cities. Nonetheless, the visible minority population comprises groups which are, in many ways, very diverse. It includes not only recent immigrants, but also those who have lived in Canada for a long time or who were born here. Although some recent immigrants quickly adjust to their new life in this country, others may have a more difficult time accessing services or participating in the labour force because they lack the necessary language skills in English or French.

Visible minority groups also differ in their age structures, levels of educational attainment and the types of jobs they have. For example, South East Asians and Latin Americans, more than half of whom immigrated to Canada during the 1980s, are among the youngest of all visible minorities. They tend to have less formal education and have both the lowest rates of labour force participation and the highest rates of unemployment. In addition, over half of their populations are employed as clerical, service or manual workers. In contrast, those in the Japanese community, two-thirds of whom were born in Canada, are older than members of other visible minority groups. They are also among the most highly educated, have the lowest unemployment rate and are among those most likely to hold professional or managerial positions.

Despite education diversity among the various groups, visible minorities are generally more highly educated than are other adults. And yet, even among those aged 25 to 44 with a university degree, adults in a visible minority are less likely than others to be employed in professional or managerial occupations. Rather, many are concentrated in lower-paying clerical, service and manual labour jobs. . . .

UNDEREMPLOYMENT AMONG VISIBLE MINORITIES WITH POST-SECONDARY EDUCATION

Visible minorities aged 25 to 44 are as likely as other adults that age to have at least some education or training beyond high school. Among adults aged 25 to 44 who worked in the 18 months before the 1991 Census, visible minorities were more likely (25%) to have a university degree than were other adults (17%). They were, however, somewhat less likely to have some other post-secondary education (41% compared with 45%).

Nonetheless, visible minorities with a university education are not as likely as others with the same level of education to be employed in the higher-paying professional or managerial occupations. Among those aged 25 to 44 with a university degree who worked in the 18 months before the 1991 Census, just over one-half of visible minorities had either a professional (39%) or managerial (13%) job, compared with 70% of other adults (52% in professional and 18% in managerial positions). University-educated Japanese aged 25 to 44 were the most likely to be in professional or managerial occupations (65%), followed by Chinese adults in that age group (61%). In contrast, only 27% of university-educated Filipinos aged 25 to 44 were in these occupations, as were 42% of Latin Americans.

Similarly, among those aged 25 to 44 with other types of post-secondary education, 26% of visible minorities were in professional, semi-professional or managerial occupations, compared with 32% of other adults. The proportion in these occupations ranged from highs of 36% among Japanese and 33% among Koreans, to lows of 17% among Latin Americans and 20% among South East Asians and Filipinos.

A disproportionate share of Filipino adults with at least some education beyond high school worked in service jobs in the 18 months before the 1991 Census. Among adults aged 25 to 44 with a university degree, 17% of Filipinos were service workers, compared with 5% of visible minorities overall and 2% of other adults. Similarly, among those aged 25 to 44 with some other post-secondary education, 29% of Filipinos had service jobs, compared with 12% of visible minorities and 8% of other adults.

Manual labour jobs were relatively common among highly-educated South East Asians and Latin Americans who worked in the 18 months before the 1991 Census. Among those aged 25 to 44, about 25% of South East Asians and Latin Americans with some post-secondary education were in manual labour jobs, as were 11% of Latin Americans with a university degree. Overall, 12% of visible minorities aged 25 to 44 with a post-secondary education, and 4% of those with a university degree had such jobs. Among other adults that age, 8% of those with some post-secondary education and 2% of university graduates were manual labourers.

A LOOK TO THE FUTURE — THE VISIBLE MINORITY POPULATION IS EXPECTED TO INCREASE

As was the case during the 1980s, the visible minority population is expected to continue to increase faster than the total population. The number of visible minority adults is projected to triple between now and 2016 to just over six million. Canada's non-visible minority adult population, on the other hand, is projected to increase by about one-quarter. As a result of such different growth rates, adults in a visible minority could account for about 20% of all adults by 2016, more than double the proportion in 1991 (9%).

The number of adults in a visible minority is projected to increase during each of the five-year periods between 1991 and 2016. The growth rate, however, is expected to decline in each successive period, from a high of 42% between 1991 and 1996 to 17% between 2011 and 2016.

Individual visible minority groups are expected to increase at different rates. The West Asian and Arab adult community is expected to be the fastest growing, with the population in 2016 projected to be four times higher than in 1991. The Filipino and other Pacific Islander, Latin American, Chinese and most other Asian communities are expected to more than triple in size over the same period. Growth in the size of the adult populations of Blacks (2.9 times greater in 2016 than in 1991) and South Asians (2.5 times greater) will be somewhat slower. These differences in growth rates among individual groups could contribute to a further diversification of Canada's visible minority population.

[Reproduced by authority of the Ministry of Industry, 1997, Statistics Canada, *Canadian Social Trends*, Catalogue No. 11-008, Summer 1995, Number 37, pages 2–8.]

* * *

The Supreme Court of Canada's approach to equality under section 15 of the *Charter* does not see the protected grounds as including economic grounds. In this regard, the Ontario Court of Appeal has held that section 15 does not require the provincial government to institute employment equity legislation: *Ferrell v. Ontario (Attorney General)* (1998), 42 O.R. (3d) 97 (C.A.) (leave to appeal to S.C.C. refused). Even if the *Charter* did require the government to take proactive measures to combat systemic discrimination in employment, that duty, in the Court of Appeal's view, had been met by the *Ontario Human Rights Code*, notwithstanding that statute's emphasis on individual rather than systemic complaints. The court added, in a dictum, that the *Charter* did not appear to impose a positive obligation on legislatures to enact measures to combat systemic discrimination.

However, section 15(2) of the *Charter* expressly allows laws and practices (in effect, affirmative action) that singles out particular groups in order to help them overcome historic inequities. In the following decision, the Supreme Court of Canada gave an affirmative action remedy for systemic discrimination in employment.

***Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114**

[A human rights tribunal under the *Canadian Human Rights Act* found Canadian National [CN] guilty of discrimination on the basis of sex in its hiring practices for certain unskilled blue-collar jobs. Relying on the predecessor to section 53 of the Act (section 41(2)(a)), the tribunal ordered the company to cease certain discriminatory hiring and employment practices and to alter others, and also ordered that the company set a goal of 13 percent female participation in targeted jobs in its St. Lawrence region. The order established a requirement to hire at least one woman for every four job openings until the goal was reached. Finally, the company was required to file periodic reports with the commission. A majority of the Federal Court of Appeal set aside the measures dealing with hiring. The matter was appealed to the Supreme Court of Canada, which allowed the appeal.]

DICKSON C.J.C.: By the end of 1981, there were only 57 women in 'blue-collar' posts in the St. Lawrence region of CN, being a mere 0.7 percent of the blue-collar labour force in the region. There were 276 women occupying unskilled jobs in all the regions where CN operated, again amounting to only 0.7 percent of the unskilled workforce. By contrast, women represented, in 1981, 40.7 percent of the total Canadian labour force. At the time, women constituted only 6.11 percent of the total workforce of CN. Among blue-collar workers in Canada, 13 percent were women during the period January to May 1982, yet female applicants for blue-collar jobs at CN constituted only 5 percent of the total applicant pool.

The markedly low rate of female participation in so-called 'non-traditional' occupations at Canadian National, namely occupations in which women typically have been significantly under-represented considering their proportion in the workforce as a whole, was not for-

tuitous. The evidence before the Tribunal established clearly that the recruitment, hiring and promotion policies at Canadian National prevented and discouraged women from working on blue-collar jobs. The Tribunal held, a finding not challenged in this Court, that CN had not made any real effort to inform women in general of the possibility of filling non-traditional positions in the company. For example, the evidence indicated that Canadian National's recruitment program with respect to skilled crafts and trades workers was limited largely to sending representatives to technical schools where there were almost no women. When women presented themselves at the personnel office, the interviews had a decidedly 'chilling effect' on female involvement in non-traditional employment; women were expressly encouraged to apply only for secretarial jobs. According to some of the testimony, women applying for employment were never told clearly the qualifications which they needed to fill the blue-collar job openings. Another hurdle placed in the way of some applicants, including those seeking employment as coach cleaners, was to require experience in soldering. Moreover, the personnel office did not itself do any hiring for blue-collar jobs. Instead, it forwarded names to the area foreman, and Canadian National had no means of controlling the decision of the foreman to not to hire a woman. The evidence indicated that the foremen were typically unreceptive to female candidates. . . .

SYSTEMIC DISCRIMINATION AND THE SPECIAL TEMPORARY MEASURES ORDER

A thorough study of 'systemic discrimination' in Canada is to be found in the Abella Report on equality in employment. The terms of reference of the Royal Commission instructed it 'to inquire into the most efficient, effective and equitable means of promoting employment opportunities, eliminating systemic discrimination and assisting individuals to compete for employment opportunities on an equal basis'. . . . Although Judge Abella chose not to offer a precise definition of systemic discrimination, the essentials may be gleaned from the following comments . . . [from] the Abella Report:

Discrimination . . . means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics. . . .

It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory. This is why it is important to look at the results of a system. . . .

In other words, systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of 'natural' forces, for example, that women 'just can't do the job' (see the Abella Report . . .). To combat systemic discrimination, it is essential to create a climate in

which both negative practices and negative attitudes can be challenged and discouraged. The Tribunal sought to accomplish this objective through its 'Special Temporary Measures' Order. Did it have the authority to do so?

Section 41(2) of the *Canadian Human Rights Act* lists the orders that a Tribunal may make if it determines that a person has engaged in a discriminatory practice. Among the potential orders is an order for 'measures' to be taken under s. 41(2)(a) 'including adoption of a special program, plan or arrangement referred to in subsection 15(1), to prevent the same or a similar practice occurring in the future.' The 'program, plan or arrangement' referred to in s. 15(1) is any mechanism 'designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be or are based on or related to,' *inter alia*, sex.

Because of his stated emphasis upon the 'ordinary grammatical construction' of s. 41(2)(a), Hugessen J., for the majority in the Federal Court of Appeal, offered this reading of the paragraph . . . :

Reduced to its essentials, this text permits the Tribunal to order the taking of measures aimed at preventing the future occurrence of a discriminatory practice on the part of a person found to have engaged in such a practice in the past.

He stressed that 'the sole permissible purpose for the order is prevention' and that the text 'does not allow restitution for past wrongs.' Therefore, the 'program, plan or arrangement' authorized by reference to s. 15(1) would necessarily be limited by the language of s. 41(2)(a) to a mechanism designed 'to prevent the same or a similar practice occurring in the future.' Hugessen J. recognized the special difficulties involved in dealing with systemic discrimination . . . :

. . . I recognize that by its very nature systemic discrimination may require creative imaginative preventive measures. Such discrimination has its roots, not in any deliberate desire to exclude from favour, but in attitudes, prejudices, mindsets and habits which may have been acquired over generations. It may well be that hiring quotas are the proper way to achieve the desired result.

Hugessen J. simply did not believe, without some precise factual showing, that specific hiring goals could be related to prevention, and thereby fall within s. 41(2)(a). The 'Special Temporary Measures' ordered by the Tribunal were struck down because the employment objectives imposed in the order were expressed in terms which, in Justice Hugessen's view, indicated that the objective was remedial and not preventive.

To evaluate this argument it is important to remember exactly what was ordered by the Human Rights Tribunal. The impugned section of the Order was headed 'Special Temporary Measures' and the heart of the employment equity programme was contained in paragraph 2:

. . . Canadian National is ordered to hire at least one woman for every four non-traditional positions in the future. . . . When it is in effect, daily adherence to the one-in-four ratio

will not be required in order to give the employer a better choice in the selection of candidates. However, it must be complied with over each quarterly period until the desired objective of having 13% of non-traditional positions filled by women is achieved.

It should be underscored once again that the objective of 13 percent female participation was not arbitrary, for it corresponded to the national average of women involved in the non-traditional occupations.

In his dissenting opinion in the Federal Court of Appeal, MacGuigan J. accepted, as I do, that s. 41(2)(a) was designed to allow human rights tribunals to prevent future discrimination against identifiable protected groups, but he held that 'prevention' is a broad term and that it is often necessary to refer to historical patterns of discrimination in order to design appropriate strategies for the future. He noted the deep roots of discrimination against women at CN. It is an uncontradicted fact that the hiring and promotion policies of CN and the enormous problems faced by the tiny minority of women in the blue-collar workforce amounted to a systematic denial of women's equal employment opportunities.

Justice MacGuigan's point is made abundantly clear when one considers the context in which the challenged order was issued. It bears repeating that the tribunal had found that at the end of 1981 only 0.7 percent of blue-collar jobs in the St. Lawrence Region of Canadian National were held by women. The Tribunal found, furthermore that the small number of women in non-traditional jobs tended to perpetuate exclusion and, in effect, to cause additional discrimination. Moreover, Canadian National knew that its policies and practices, although perhaps not discriminatory in intent, were discriminatory in effect, yet had done nothing substantial to rectify the situation. When confronted with such a case of 'systemic discrimination,' it may be that the type of order issued by the Tribunal is the only means by which the purpose of the Canadian Human Rights Act can be met. In any program of employment equity, there simply cannot be a radical dissociation of 'remedy' and 'prevention.' Indeed there is no prevention without some form of remedy. The point was explained clearly by Professors Greschner and Norman in their Case Comment on the majority judgment of the Federal Court of Appeal in this case. . . . They emphasize that an employment equity program:

. . . tries to break the causal links between past inequalities suffered by a group and future perpetuation of the inequalities. It simultaneously looks to the past and to the future, with no gap between cure and prevention. Any such program will remedy past acts of discrimination against the group and prevent future acts at one and the same time. That is the very point of affirmative action.

This point demands repetition. . . . When a program is said to be aimed at remedying past acts of discrimination, such as by bringing women into blue-collar occupations, it necessarily is preventing future acts of discrimination because the presence of women will help break down generally the notion that such work is man's work and more specifically, will help change the practices within that workplace which resulted in the past discrimination against women. From the other perspective, when a program is said to be aimed at preventing future acts of discrimination (again by bringing women into blue-collar occupa-

tions), it necessarily is also remedying past acts of discrimination because women as a group suffered from the discrimination and are now benefiting from the program.

Unlike the remedies in s. 41(2)(b)–(d), the ‘remedy’ under s. 41(2)(a) is directed towards a group and is therefore not merely compensatory but is itself prospective. The benefit is always designed to improve the situation for the group in the future, so that a successful employment equity programme will render itself otiose.

To see more clearly why the Special Temporary Measures Order is prospective, it would be helpful to review briefly the theoretical underpinnings of employment equity programs. I have already stressed that systemic discrimination is often unintentional. It results from the application of established practices and policies that, in effect, have a negative impact upon the hiring and advancement prospects of a particular group. It is compounded by the attitudes of managers and co-workers who accept stereotyped visions of the skills and ‘proper role’ of the affected group, visions which lead to the firmly held conviction that members of that group are incapable of doing a particular job, even when that conclusion is objectively false. An employment equity program, such as the one ordered by the Tribunal in the present case, is designed to break a continuing cycle of systemic discrimination. The goal is not to compensate past victims or even to provide new opportunities for specific individuals who have been unfairly refused jobs or promotion in the past, although some such individuals may be beneficiaries of an employment equity scheme. Rather, an employment equity program is an attempt to ensure that future applicants and workers from the affected group will not face the same insidious barriers that blocked their forebears.

An employment equity program thus is designed to work in three ways. First, by countering the cumulative effects of systemic discrimination, such a program renders further discrimination pointless. To the extent that some intentional discrimination may be present, for example, in the case of a foreman who controls hiring and who simply does not want women in the unit, a mandatory employment equity scheme places women in the unit despite the discriminatory intent of the foreman. His battle is lost.

Secondly, by placing members of that group that had previously been excluded into the heart of the workplace and by allowing them to prove ability on the job, the employment equity scheme addresses the attitudinal problem of stereotyping. For example, if women are seen to be doing the job of ‘brakeman’ or heavy cleaner or signaler at Canadian National, it is no longer possible to see women as capable of fulfilling only certain traditional occupational roles. It will become more and more difficult to ascribe characteristics to an individual by reference to the stereotypical characteristics ascribed to all women.

Thirdly, an employment equity programme helps to create what has been termed a ‘critical mass’ of the previously excluded group in the work place. This ‘critical mass’ has important effects. The presence of a significant number of individuals from the targeted group eliminates the problems of ‘tokenism’; it is no longer the case that one or two women, for example, will be seen to ‘represent’ all women. . . . Moreover, women will not be so easily placed on the periphery of management concern. The ‘critical mass’ also effectively remedies systemic inequities in the process of hiring:

There is evidence that when sufficient minorities/women are employed in a given establishment, the informal processes of economic life, for example, the tendency to refer friends and relatives for employment, will help to produce a significant minority [or female] applicant flow.

(Alfred W. Blumrosen, 'Quotas, Common Sense and Law in Labour Relations: Three Dimensions of Equal Opportunity' in Walter S. Tarnopolsky, ed., *Some Civil Liberties Issues of the Seventies*. . . .) If increasing numbers of women apply for non-traditional jobs, the desire to work in blue collar occupations will be less stigmatized. Personnel offices will be forced to treat women's applications for non-traditional jobs more seriously. In other words, once a 'critical mass' of the previously excluded group has been created in the workforce, there is a significant chance for the continuing self-correction of the system.

When the theoretical roots of employment equity programs are exposed, it is readily apparent that, in attempting to combat systemic discrimination, it is essential to look to the past patterns of discrimination and to destroy those patterns in order to prevent the same type of discrimination in the future. It is for this reason that the language of the Tribunal's Order for Special Temporary Measures may appear 'remedial.' In any case, as was stressed by MacGuigan J. in his dissent, the important question is not whether the Tribunal's order tracked the precise wording of s. 41(2)(a), but whether the actual measures ordered could be construed fairly to fall within the scope of the section. One should look to the substance of the order and not merely to its wording.

For the sake of convenience, I will summarize my conclusions as to the validity of the employment equity program ordered by the Tribunal. To render future discrimination pointless, to destroy discriminatory stereotyping and to create the required 'critical mass' of target group participation in the workforce, it is essential to combat the effects of past systemic discrimination. In so doing, possibilities are created for the continuing amelioration of employment opportunities for the previously excluded group. The dominant purpose of employment equity programs is always to improve the situation of the target group in the future. MacGuigan J. stressed in his dissent that 'the prevention of systemic discrimination will reasonably be thought to require systemic remedies.' Systemic remedies must be built upon the experience of the past so as to prevent discrimination in the future. Specific hiring goals, as Hugessen J. recognized, are a rational attempt to impose a systemic remedy on a systemic problem. The Special Temporary Measures Order of the Tribunal thus meets the requirements of s. 41(2)(a) of the *Canadian Human Rights Act*. It is a 'special program, plan or arrangement' within the meaning of s. 15(1) and therefore can be ordered under s. 41(2)(a). The employment equity order is rationally designed to combat systemic discrimination in the Canadian National St. Lawrence Region by preventing 'the same or a similar practice occurring in the future.'

A secondary problem must now be addressed, the fact that the Order of the Tribunal was expressed in terms of an employment goal, rather than a hiring goal. This methodology might increase the belief that the Order was remedial and not, properly speaking, preventive. The Tribunal held, however, that the systemic discrimination at CN occurred not only in hiring but once women were on the job as well. The evidence revealed that there

was a high level of publicly expressed male antipathy towards women which contributed to a high turnover rate amongst women in blue-collar jobs. As well, many male workers and supervisors saw any female worker in a non-traditional job as an upsetting phenomenon and as a ‘job thief.’ To the extent that promotion was dependent upon the evaluations of male supervisors, women were at a significant disadvantage. Moreover, because women generally had a low level of seniority, they were more likely to be laid off. For the employment equity program to be effective in creating the ‘critical mass’ and in destroying stereotypes, the goals had to be expressed in terms of actual employment. Otherwise the reasonable objectives of the scheme would have been defeated. The dominant purpose remained to improve the employment situation for women at CN in the future. . . .

13:500 PAY EQUITY

REFERENCES

R. Robb, “Equal Pay for Work of Equal Value: Issues and Policies” (1987) 13 Can. Pub. Pol. 445; Paul Weiler, “The Wages of Sex: The Uses and Limits of Comparable Worth” (1986) 99 Harv. L. Rev. 1728; P. Hughes, “P.S.A.C. v. Canada (Treasury Board): The Long and Winding Road to Equity” (2000), 8 C.L.E.L.J. 55

The existence of a gap between the wages of men and women is well known. Census statistics reveal that the wage gap, measured by taking the average earnings of full-time, year-round workers in each major occupation, declined from 35 percent in 1985 to 28 percent in 1998. See Statistics Canada, *Employment Income by Occupation* (Ottawa: Statistics Canada, 2001). Many factors, including education, age, race, training, labour market experience, length of service, health, marital status, and geographical region, influence the extent of the gap. Identifying the effects of these factors can lead to a better understanding of the causes of the gap and assist in the design of remedies. Of course, many of the gaps in these human capital factors are also influenced by sex discrimination in the labour market or in society at large.

Prior to the earliest pay equity legislation, it was not uncommon for employers to maintain two wage rates for the same position on the basis of sex, based partly on the reasoning that men needed more money because they were the family breadwinners. In the early 1950s, statutes began to address the relatively straightforward problem of unequal pay for equal work, by forbidding employers from paying women less when they did the same work as men.

That legislation did not address a far more significant component of the wage gap: the fact that women were overrepresented in lower-paying jobs. This problem of occupational segregation led to a campaign to go beyond equal pay for the same work and to require equal pay for work of equal *value* — what has come to be known as “pay equity.” Advocates of pay equity legislation theorized that a gender-neutral job evaluation scheme would disclose that many lower-paying jobs done mostly by women required equivalent skills, effort, responsibility and working conditions to higher-paying jobs done mostly by men.

In Canada, such legislation has taken two forms. Originally, guarantees of equal pay for men and women doing the same work formed part of human rights and fair employment statutes. Those statutes require individual workers or groups of workers to file complaints of discrimination against their employer. Such complaints can be costly and time-consuming, and they tend to address the problem in a piecemeal fashion.

As a result, some provinces have enacted legislation that obliges some or all employers to take measures to attain pay equity between male and female job categories. In Quebec, this legislation applies to all employers. In most other provinces, it applies only in the public and quasi-public sector. The legislation requires employers to submit a pay equity plan in accordance with the specified calculation methods. Employees or unions may bring complaints of non-compliance to a specialized administrative tribunal, which will review the employer's actions.

The Conservative government elected in Ontario in 1995 repealed a portion of the *Pay Equity Act* that dealt with broader public sector workplaces, which were mostly female. Implementing pay equity in these workplaces was difficult, since there was no obvious male-dominated job category that could serve as a comparator. The repealed legislative provisions specified that in such cases, the "proxy comparison method" was to be used to calculate whether pay equity adjustments were called for, and almost all female-dominated workplaces in the public sector had been the subject of proxy comparison orders. (The proxy comparison method was never extended to the Ontario private sector.) The 1996 legislative amendment, Schedule J, capped existing proxy pay equity adjustments at 3 percent of the employer's 1993 payroll and prohibited any further use of the proxy comparison method. As a result, the women affected had only 22 percent of their pay differential corrected.

A union representing 5200 Ontario broader public-sector workers argued that Schedule J violated section 15(1) of the *Charter*. Their application for a declaration of invalidity was granted in the following decision.

Service Employees International Union, Local 204 v. Ontario (A.G.) (1997), 35 O.R. (3d) 508 (Gen. Div.)

O'LEARY J.: —

. . . The applicants attack Schedule J as violating ss. 15(1) and 28 of the *Charter*.

The Applicants' argument may be summarized as follows. The *Pay Equity Act*, in both its legislative intent and in its effects, is human rights legislation designed to provide a proactive, systemic remedy for systemic gender discrimination in women's compensation.

Women who work in predominantly female workplaces are particularly vulnerable to sex-based discrimination in compensation because they perform work which is most stereotypically identified as being "women's work" and which, accordingly, is most undervalued in comparison with work performed by men. That portion of the wage gap that is attributable to systemic sex discrimination is widest in predominantly female workplaces, and the women who work in these workplaces are among the most disadvantaged by sex-

based discrimination in compensation, both as compared with men and as compared with other working women.

The *Pay Equity Act* contained as one of its original commitments the development of a pay equity remedy which could redress systemic discrimination in compensation for this most disadvantaged group of women. The proxy comparison method was enacted in 1993, after careful study and consideration, to carry out that commitment embodied in the original Act.

By contrast, the proxy comparison method was removed from the Act without any study as to the efficacy of the proxy remedy, or the impact of the amendment on the women affected.

...

Schedule J denies to a group who previously had a remedy under the *Pay Equity Act* the protection and benefit of the Act. Schedule J singles out one group for differential treatment. It is submitted that Schedule J clearly creates a discriminatory distinction which denies equal protection and equal benefit of the law to that group of women.

That group is the most disadvantaged by systemic discrimination in compensation on the basis of sex of any group of public sector employees in Ontario. In other words, they are among the most in need of pay equity remedies.

The women affected by Schedule J are identified by the fact that they are predominantly women who do “women’s work” in predominantly female workplaces, distinguishing characteristics which are clearly “closely related” to the enumerated ground of sex.

It is submitted, on the basis of this group of characteristics, that Schedule J has a prejudicial effect on the enumerated ground of sex.

...

Section 15(2) Argument of Respondent

The applicants are clearly treated differently to their prejudice by the Pay Equity Act as it now exists as a result of the Schedule J amendment. The respondent argues that the Act is affirmative action legislation having as its objective the elimination of systemic gender pay inequity suffered by women and as such is protected against a s. 15(1) attack by s. 15(2) of the *Charter*. Section 15 of the *Charter* reads as follows:

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

It is submitted that women cannot attack the Act under s. 15(1) of the *Charter* simply because the Act has helped them proportionately less than it has helped other women. It is said that women can attack the Act only if they have been excluded from the benefit of the Act because the Act discriminates against them on one of the prohibited grounds set out in s. 15(1) or on an analogous ground. If the applicants could say they have been discriminated against because they are women, then that would be a basis for invoking s. 15(1) of the *Charter*. Here, the complaint is not that the applicants have been excluded

from the benefit of the Act because they are women. Rather, the complaint is that being women most in need of relief from pay inequity they have been removed from the protection that the Act once gave them. It is said that complaint is barred by s. 15(2).

A literal reading of s. 15(2) of the *Charter* appears to support that argument. However, constitutional law authors and the courts have pointed out that s. 15(2) was placed in the *Charter* to make clear that s. 15(1) does not preclude affirmative action programs in favour of disadvantaged individuals or groups even though such programs inevitably involve some element of reverse discrimination against those not belonging to the disadvantaged group. . . . Section 15(2) does not protect affirmative action legislation from attacks by members of the disadvantaged group it was designed to benefit. In *Lovelace v. Ontario* . . . , the Ontario Court of Appeal stated . . . :

A s. 15(2) program that excludes from its reach disadvantaged individuals or groups that the program was designed to benefit likely infringes s. 15(1). The government would then have to justify the exclusion under s. 1.

There is no doubt that the applicants are members of the disadvantaged group the *Pay Equity Act* was designed to benefit and that they have been excluded from its reach by the Schedule J amendment. Accordingly, their claim of discrimination must succeed unless the government can justify the exclusion under s. 1 of the *Charter*.

WHAT RESPONDENT MUST JUSTIFY UNDER SECTION 1 OF THE *CHARTER*

It must be made clear just what the government of Ontario must justify under s. 1 of the *Charter*. The unfortunate state of women prior to the *Pay Equity Act, 1987* as the objects of systemic gender wage inequity was created by the marketplace and stereotypical attitudes, not by government. It was not because of any action by government that they were in the plight they were in. The *Charter* does not place a positive obligation on government to eliminate such inequity. Rather, the government must not create inequity. As was stated by L'Heureux-Dubé J. in *Thibaudeau v. R.* . . . :

Although s. 15 of the *Charter* does not impose upon governments the obligation to take positive actions to remedy the symptoms of systemic inequality, it does require that the government not be the source of further inequality.

Leaving aside any responsibility of government to eliminate systemic gender wage inequality in its own employees, the government of Ontario was under no obligation to enact the *Pay Equity Act, 1987*. It could likewise have repealed the entire Pay Equity Act in 1996 without giving rise to any claims of discrimination.

Had the government simply repealed the *Pay Equity Act* in 1996, the applicants' position would be the same as that of the applicants in *Ferrel v. Ontario (Attorney General)*, heard by MacPherson J. . . . There, the applicants brought a motion for an interlocutory injunction suspending the operation of Bill 8, also known as the *Job Quotas Repeal Act, 1995*, pending the resolution of an application questioning the validity of Bill 8 as being contrary to s. 15 of the *Charter*. At p. 2 of his reasons, MacPherson J. stated:

The problem with the applicants' position is that Bill 8 is a repealing statute. It repeals a statute, and several provisions in other statutes, enacted by a previous legislature. It does not enact any new substantive provisions that can be measured against the *Charter*, including s. 15. The purpose of the *Charter* is to ensure that governments comply with the *Charter* when they make laws. The *Charter* does not go further and require that governments enact laws to remedy societal problems, including problems of inequality and discrimination. One can hope that governments will regard this as part of their mission; however, the *Charter* does not impose this mission at the high level of constitutional obligation — section 32 of the *Charter* states that the *Charter* applies to governments. Governments speak through laws, regulations and practices. In Ontario, the current legislature has decided not to speak in the domain of employment equity. It has decided to leave this, at least for the time being, to the realm of private activity. Although many people, including the applicants, may regret and oppose this decision, the legislature is entitled to make it. . . .

Here, the government did not repeal the whole *Pay Equity Act*. Rather, it repealed just that part that provided for the proxy method of comparison. It is the removal of the proxy method that resulted in the applicants being treated differently to their prejudice by the *Pay Equity Act*.

Just as the government did not have to enact the *Pay Equity Act*, it likewise did not have to undertake to pay for the elimination of pay inequity amongst employees in the broader public sector. Leaving aside any rights employers in the broader public sector might have acquired against government because of its undertaking to pay the cost of pay equity wage adjustments (something that was not argued before me), the government in 1995 could have cancelled its contribution to the cost of pay equity. Certainly, it does not have to justify capping its contribution at \$500 million per year.

What the government does have to justify is the Schedule J amendment. . . .

Denying proxy sector women 78 percent of the wage increase needed to remedy the systemic wage inequity fixed by their proxy pay equity plans was the method chosen by government to allow it to cap its pay equity costs at \$500 million per year. The government then must justify its action in requiring in effect that 100 percent of the shortfall in funds created by the \$500 million cap be borne by those women who had suffered the most from systemic wage discrimination because they perform traditional women's work in female-dominated sectors of the broader public sector, with no male comparators in their places of employment. It is to be noted that other women working in the broader public sector, many of whom suffered far less from systemic wage discrimination than those in the proxy sector, have had 100 percent of that inequity removed, but were not required to contribute in any way to the shortfall in pay equity funding.

. . .

[O'Leary J.] went on to hold that the Ontario government had failed to provide an adequate section 1 justification for the repeal. Specifically, he rejected the government's expert evidence that the proxy method was not a valid method of quantifying gender-based systemic wage discrimination in the female-dominated broader public sector.

Therefore, the government did not have a pressing and substantial objective in enacting Schedule J. O'Leary J. continued:]

I point out there was no attempt by the respondent to establish that in order to live within the \$500 million cap government placed on pay equity spending, the government had to remove the proxy method and throw the full weight of the funding reduction on those working in the proxy sector. It was not explained why the burden could not have been apportioned equitably amongst all workers in the broader public sector who benefited from the \$380 million still paid annually by government towards the cost of wage adjustments in that sector.

It must also be noted that the Schedule J amendment cannot be justified as an incremental approach to pay equity. It is not a matter of putting off to another day, when the same can be afforded, the correction of the gender-based systemic wage inequity from which women in the proxy sector undoubtedly suffer. Schedule J and the government's position on this application tells proxy sector women they are not and cannot be covered under the *Pay Equity Act* even though other women in the broader public sector have had their systemic gender-based wage inequity 100 percent cured.

CONCLUSION

It is a matter of choice for government as to whether or not it legislates to remove inequity. When, however, government decides to legislate and identifies the disadvantaged group the legislation is intended to benefit, then it must, subject to s. 1 of the *Charter*, make the legislation apply fairly and equally to all within the group or government itself is guilty of discriminating. This is especially so where government itself picks up the cost of removing the inequality that is the focus of the legislation. Where legislation discriminates against a portion of the group the legislation is designed to help, the legislation contravenes s. 15(1) of the *Charter* and so is *ultra vires* unless the discrimination is demonstrably justified under s. 1 of the *Charter*.

The *Pay Equity Act*, because of the 1996 Schedule J amendment, discriminates against proxy sector women by denying them the opportunity of quantifying and correcting the systemic gender-based wage inequity from which they suffer, a benefit the *Act* grants to other women working in the broader public sector.

The discrimination has not been justified under s. 1 of the *Charter*, in that the stated objective of the Schedule J amendment does not warrant overriding the constitutional right of equal benefit of the law. Indeed, the stated objective — the restoring of the *Pay Equity Act* to true pay equity principles — I find to be mistaken. Proxy method was and is an appropriate pay equity tool in keeping with the intent of the *Pay Equity Act* to relieve women, including those working in female-segregated workplaces in the broader public sector, from systemic gender-based wage discrimination.

Since it was the 1996 Schedule J amendment that created the discrimination, I declare that Schedule J of the *Savings and Restructuring Act, 1996*, amending the *Pay Equity Act*, is unconstitutional and of no force and effect.

13:600 THE FUTURE OF EQUALITY

13:610 Economic Inequality

Canadian courts have repeatedly held that equality rights are concerned with the protection of human dignity. However, the courts have frequently excluded economic equality claims, either on the basis that the *Charter* is not a guarantor of economic rights or that such claims engage matters of social and economic policy rather than individual rights. Nor has occupational status or membership in a particular socioeconomic group, such as low income wage earners or welfare recipients, been found to be a ground “analogous” to those listed in section 15 and thus one which can support a *Charter* challenge. See, for example, *Reference re Workers’ Compensation Act, 1983 (Nfld.)*, [1989] 1 S.C.R. 922. In general, unless a legislative or administrative action can be characterized as a denial of equal treatment on the basis of a listed or analogous ground, the fact that it creates, perpetuates or fails to ameliorate an economic disadvantage has so far been held insufficient to bring it within the definition of discrimination.

In *Delisle v. Canada (Deputy Attorney General)* [1999] 2 S.C.R. 989, discussed in Chapter 4 above, the Supreme Court of Canada reiterated its reluctance to consider occupational status as an analogous ground for the purposes of section 15 of the *Charter*. That case involved the statutory exclusion of Royal Canadian Mounted Police officers from eligibility for collective bargaining. In rejecting the argument of the appellant RCMP officers that the exclusion violated their equality rights under section 15, Bastarache J., for the majority of the Court, said (at paragraph 44):

In this case the appellant has not established that the professional status or employment of RCMP members are analogous grounds. It is not a matter of functionally immutable characteristics in a context of labour market flexibility. A distinction based on employment does not identify, here, “a type of decision making that is suspect because it often leads to discrimination and denial of substantive equality” . . . , in view in particular of the status of police officers in society.

In the later case of *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, excerpted above in Chapter 4, it was agricultural workers who had been excluded from collective bargaining by statute, and they were a group that clearly had much lower social status than the RCMP officers in *Delisle*. However, the Supreme Court of Canada did not deal with the claim that their exclusion from collective bargaining violated their equality rights under section 15 of the *Charter*, because the Court held the exclusion to violate their right to freedom of association under section 2(d).

Earlier decisions also show a reluctance on the part of the Supreme Court of Canada to use section 15 of the *Charter* to interfere with the distributive decisions of legislatures, even where there is an arguable connection to a prohibited ground. For example, in *Symes v. Canada* [1993] 4 S.C.R. 695, a female lawyer incurred high childcare costs in order to have the time to practice her profession. The *Income Tax Act* did not allow her to deduct all of those costs as a professional expense, but allowed only the much small-

er childcare deduction. The Supreme Court rejected her section 15 claim that this effectively discriminated against women workers. In the view of the majority of the Court, although it was clear that women disproportionately bore the burden of childcare, it was not established that they disproportionately paid the costs of such care.

In general, claims of economic discrimination fare no better under human rights law than under the *Charter*. Quebec is an exception. Its human rights statute lists “social condition” as a prohibited ground. That term has been held to refer to a combination of objective factors, such as income level or family background, and subjective factors such as unfavourable perceptions held by others. No other jurisdiction includes social condition or the equivalent as a prohibited ground of discrimination, although some prohibit discrimination on the basis of “source of income” or “social origin.” Section 7 of the Alberta *Human Rights, Citizenship and Multiculturalism Act* is an example.

The absence of protection from discrimination on the basis of social condition has been a source of repeated criticism. The Canadian Labour Congress (CLC), in its submissions to the Canadian Human Rights Act Review Panel referred to above, argued that various forms of economic discrimination “in fact impede access to equality of opportunity probably almost as often as any other form of discrimination.” It noted that costs associated with obtaining or maintaining employment (such as paying for tests or buying tools) may serve as barriers to employment for the poor. The CLC recommended that “social condition” be added to the federal Act, with a definition similar to that developed in Quebec. It argued that such an amendment to the federal human rights statute would have the added result of encouraging courts and tribunals to treat social condition as an analogous ground when interpreting section 15 of the *Charter*.

Economic inequality, and the resulting problem of social exclusion, is increasing in Canada and almost everywhere else. Wage rates have fallen in real terms in the last generation, and there is more dispersion, or inequality, of wages. Such changes are often attributed to market forces, the effects of technology and greater communication, or simply to globalization. However, the degree of economic inequality varies considerably among industrialized countries, and there is evidence that it is affected by the extent of collective bargaining and the relative strength of unions: see I. Bakker, “Globalization and Human Development in the Rich Countries: Lessons from Labour Markets and Welfare States,” Background Papers, United Nations Development Programme *Human Development Report 1999*, vol. 2, 29). In turn, collective bargaining coverage and union density are dependent upon the state of labour market rules and institutions.

Laws facilitating collective bargaining rules were originally introduced, in part, to address economic equality. However, as is perhaps clear from Chapters 3 to 6 of this book, it has become clear that under the *Wagner Act* model which prevails across Canada, collective bargaining is not equally available to all workers, or equally advantageous when it is available. This has become all the more true with the proliferation of atypical forms of work in the new economy. Those in “peripheral” rather than “core” labour markets and those engaged in non-standard forms of work typically face greater difficulties achieving certification; where they succeed, they often face poor prospects of gains, if

not imminent decertification. Those same workers also benefit less from statutory protections and employment insurance schemes. As of yet, the *Charter* has not yet been successfully used to force legislatures to address the structural causes of workplace stratification, including those that may relate to labour market institutions. For example, it has been suggested that the fragmentation of bargaining units under Wagnerism creates an unconstitutional barrier to the attainment of workplace equality by women and ethnic or racial minorities, because it precludes them from having effective collective bargaining, or indeed any collective bargaining at all. This phenomenon is discussed in an excerpt by Judy Fudge in Chapter 6 (section 6:140) above. As mentioned in the *Ferrell* decision, section 13:400 above, even where governments have repealed existing legislation designed to ameliorate the position of disadvantaged groups in the workplace, the courts have generally refused to find a breach of s. 15. The only exception is provided by the decision of a trial court in *S.E.I.U. Local 204 v. Ontario*, above. In that case, certain provisions of the *Ontario Pay Equity Act* (the proxy comparison provisions) had made the benefits of that Act accessible to the most economically disadvantaged of the groups of female employees whom the Act was designed to benefit. The repeal of those provisions was held to be a breach of s. 15(1) because it “discriminate[d] against a portion of the group the legislation is designed to help. . . .”

13:620 Gender and Economic Discrimination

It is relatively uncontroversial to assert that labour markets are gendered in their structure and operation. It is one of the few truly universal gender traits that men and women everywhere do different types of work, although the particular roles that they play from society to society vary enormously. See Gillian Hadfield, “A Coordination Model of the Sexual Division of Labor,” (1999) 40 *Journal of Economic Behavior and Organization* 125). It remains a fact that women perform most of the unpaid work, and that the allocation of unpaid work between men and women does not appear to shift appreciably when women enter the labour market. While the vast majority of women, including those with young children, now participate in the paid labour force, they also retain responsibility for domestic obligations and do disproportionate amounts of unpaid work. As described in the United Nations Development Programme, *Human Development Report 1999* (New York: Oxford, 1999), this produces a distinct set of burdens and costs for women.

Labour market regulations have traditionally been directed at regulating the conditions of paid work in core industrial sectors; in addition, their reach is, by definition, limited to the formal rather than the informal sector. The neglect of unpaid work is arguably discriminatory against women, as such work significantly constrains labour market participation. More to the point, however, is the discriminatory potential of workplace rules that do not accommodate or compensate for those non-market obligations, and that directly or indirectly relegate women to lower occupational status and income. The following excerpt deals with the relationship between paid and unpaid work, and with why it can be seen as a labour market issue.

Diane Elson, "Labor Markets as Gendered Institutions: Equality, Efficiency and Empowerment Issues" (1999), 27 World Development 611, at 612

. . . The most fundamental way in which labor markets are gendered institutions is in the way in which they operate at the intersection of ways in which people make a living and care for themselves, their children, their relatives and friends. Activities which make a living are recognized by economists as economic activities which should in principle be counted as part of national production. For brevity, we might call the sum of this largely market-oriented work the "productive economy." But, as feminist economists have pointed out, unpaid, unjacketed caring activities are also critical for the functioning of the "productive economy," since they reproduce, on a daily and intergenerational basis, the labor force which works in the productive economy. Moreover, feminist economists have argued that unpaid caring activities entail work, even though they are not market-oriented. For brevity, we might call the sum of unpaid, caring work, the "reproductive economy."

Labor markets form one of the points of intersection of these two economies. But they operate in ways that fail to acknowledge the contributions of the reproductive economy. Instead they operate in ways that disadvantage those who carry out most of the work in the reproductive economy: women. Labor market institutions are constructed in ways that represent only the costs to employers of the time that employees spend on unpaid caring for others. The benefits are not represented. Thus, for instance, employees' parenting duties are represented as liabilities and not assets to their employers. Labor market institutions are constructed in ways that reflect only the immediate costs of time off from paid work to have and rear children, and care for sick relatives and friends. They are not constructed to reflect the benefits of the reproduction and maintenance of a pool of labor from which employers can select their employees. Nor do they reflect the enhanced interpersonal skills which come from parenting and managing a household. In the language of economics, the reproductive economy produces benefits for the productive economy which are externalities, not reflected in market prices and wages. Or, as feminist economist Nancy Folbre puts it, labor market institutions fail to face up to the problem of "who pays for the kids?"

Of course, the operation of labor market institutions cannot escape the fact that someone has to pay for the kids. (Just as there is no such thing as a free lunch, there is also no such thing as a free replenishment of the pool of labor.) Most labor market institutions are constructed on the basis that the burdens of the reproductive economy will be, and should be, borne largely by women. For instance, arrangements for paternal leave are far less widespread than maternal leave, and where they do exist, there are many barriers to men taking up their entitlements, because promotion often depends upon showing "commitment" to the job, and taking paternal leave may be interpreted as a sign of weak commitment to the job. Domestic responsibilities penalize women in the labor market and are a key factor in women's weak position in terms of earnings and occupations.

LABOR MARKETS AS GENDERED INSTITUTIONS

It is sometimes claimed that labor markets adapt so as to allow women to combine paid work with unpaid work — for example, part-time work and home-based work. But, this

kind of adaptation is generally one-sided — more designed to allow the productive economy access to workers whose entry into the labor market is constrained by domestic responsibilities than to give weight to the contribution that women's unpaid work makes to the productive economy. This is revealed in the way in which these more "informal" types of work typically do not have contracts which give employees any rights to paid time for meeting their responsibilities in the reproductive economy — rights such as maternity leave, and time-off for caring for sick relatives. Nor does such employment cover women's needs when they have retired from paid work, since pension rights are also not covered. Instead, the presumption appears to be that someone else (husband, children) will support such workers in their old age.

Thus labor market institutions are not only bearers of gender, they are also reinforcers of gender inequality. But different institutional configurations give different results: some labor markets are more equal than others. Moreover, improvements can be brought about by public action, i.e. by combined action by the state and by groups of active citizens. Public action can build upon the potential for change in labor market institutions themselves. For such institutions are not like fortresses of stone, rather they are combinations of overlapping and conflicting practices, norms and networks, whose seeming solidity at any moment masks subterranean pressures and fissures.

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For further discussion, see Kerry Rittich, "Feminization and Contingency: Regulating the Stakes of Work for Women," in J.A.F. Conaghan *et al.*, *Labour Law in an Era of Globalization*, Oxford University Press, 2002). To what extent do we already compensate unpaid labour through employment insurance and employment standards? To what extent are labour laws and other protective legislation implicated in the economic disadvantage of women in labour markets? How might existing equality jurisprudence serve as vehicles to ameliorate it? Consider, for example, the application to these issues of the *Vriend* and *Meoirin* cases, set out earlier in this chapter.

13:630 Equality and Human Rights in International Law

Conceptions of human rights at international law are significantly broader than those now reflected in most Canadian human rights legislation. Economic rights form an integral part of international human rights regimes and are incorporated into regional human rights treaties as well. Moreover, workers' rights and interests are central to efforts to promote social and economic rights. For example, article 55 of the *Charter* of the United Nations commits all nations to promote "higher standards of living, full employment, and conditions of economic and social progress and development." Among the rights recognized in the *Universal Declaration of Human Rights (UDHR)* are the right to work, to just and favourable working conditions, to rest and leisure, to reasonable hours of work and to paid holidays. Under the *UDHR*, every worker has the right to sufficient remuneration to support a family at a level worthy of human dignity.

Many of these rights are further elaborated in the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, to which Canada is a signatory. The ICESCR commits signatory states to the “progressive realization” of a broad range of economic rights through legislative measures. Protected rights include the right to fair wages and equal remuneration for work of equal value and the right to just and favourable conditions of work, including a decent living and safe and healthy working conditions. The ICESCR also recognizes the “right to work,” which includes the right to technical and vocational guidance and training. In addition, the conventions of the International Labour Organization (ILO), many of which Canada has ratified, provide an extensive and detailed international code of workplace rights and standards. Some ILO conventions, such as those on the right to equal pay and the rights of migrant workers, attempt to ensure more equality for vulnerable groups at work. Rights set out in international treaties are not understood to be justiciable in the same way as domestic constitutional rights or human rights, but they nonetheless bind signatory countries. Failure to respect them places a state in breach of its international obligations.

In interpreting domestic legislation and the *Canadian Charter of Rights and Freedoms*, the Supreme Court of Canada is increasingly recognizing the value and importance of resort to customary international law, international human rights norms, and international treaty obligations. Sometimes these international norms are highly influential, even dispositive. For example, in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the Supreme Court considered whether the obligation that Canada had assumed to further the “best interests of the child” under the United Nations *Convention on the Rights of the Child* should be given primary importance in the interpretation and application of the humanitarian and compassionate provisions of the *Immigration Act*. The Court held that the values that should inform the interpretation of the Act could be derived from Canada’s international obligations, and that a failure to give enough weight to the best interests of the child would render unreasonable an exercise of the statutory power. In *Slaight Communications Inc. v. Davidson* (1989), 59 D.L.R. (4th) 416 (S.C.C.), excerpted above in Chapter 12, a tribunal’s remedial order had tightly restricted what an employer could say about an unjustly dismissed employee. Dickson C.J. referred to the ICESCR, and particularly to article 6 on the right to work, in support of the conclusion that the restriction, although it violated freedom of expression, was demonstrably justified within the meaning of section 1 of the *Charter*. In *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, excerpted above in Chapter 4, Bastarache J. noted (at paragraph 30) that “international labour jurisprudence . . . recognizes the inevitably collective nature of the freedom to organize.” He used that fact in support of the conclusion (also at paragraph 30) that freedom of association under the *Charter* should be interpreted to include “not only the exercise in association of the constitutional rights and freedoms (such as freedom of assembly) and lawful rights of individuals, but the exercise of certain collective activities, such as making majority representations to one’s employer.” However, it is clear that international norms, like *Charter* rights, are susceptible to being interpreted in a way that limits the collective interests of workers in the name of individual rights. For example, in *R. v. Advance Cutting and Coring Ltd.*, dis-

cussed in Chapter 10 above, the majority of the Supreme Court of Canada held that the ICESCR's guarantee of the right to work supported the view that freedom of association included the right not to associate. The dissenting judges in that case held that it also supported their view that the latter right was infringed by a statute which required every Quebec construction worker, as a condition of employment in the industry, to designate one of a number of named unions as his or her bargaining representative.

The right to freedom of association and collective bargaining, and the right to freedom from discrimination in employment, are among the "core" rights emphasized in the ILO *Declaration on Fundamental Principles and Rights at Work* (86th Session, Geneva, June, 1998). The *International Covenant on Civil and Political Rights* obliges states to protect against discrimination "on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." To what extent could such instruments be invoked in support of a claim that governments must, for example, amend existing statutes to give vulnerable groups more effective access to collective bargaining?

13:640 Procedural Reform

In the early decades after their enactment, human rights statutes generated high expectations. Those expectations were strikingly articulated in *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181, excerpted above in Chapter 2 (section 2:300), where the Supreme Court of Canada held that the Ontario *Human Rights Code* constituted a "complete code" for the protection of the rights set out in it, and thus implicitly precluded recourse to common law court actions for redress against any of the statutorily prohibited forms of discrimination.

However, human rights statutes (or perhaps more precisely, their enforcement processes) are widely considered to have failed to live up to their expectations. The following excerpt, from a background paper to the Report of the Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (2000), describes some of the problems and discusses a range of possible responses. It addresses the federal legislation, but similar issues have arisen under provincial statutes.

Shelagh Day and Gwen Brodsky, "Screening and Carriage: Reconsidering the Commission's Function" (September, 1999)

Human rights commissions have been established in Canada to be stewards of the public interest in the effective enforcement of human rights. Stewardship over this public interest is essential. A human rights commission should be able to ensure that human rights claimants are assisted, and that human rights claims are dealt with in a manner that is appropriate to their importance in the society. It should also be able to nurture the jurisprudence, appearing before tribunals and courts to present arguments that promote the development of the law in ways that will help to eradicate persistent patterns of inequality. It should be able to develop concentrated expertise and to select and develop cases in light of their potentially broad impact on disadvantaged groups.

Commission stewardship over the public interest in human rights enforcement can be provided in different ways, as the options proposed here will illustrate. But changes which would move the human rights system closer to a private dispute resolution model will necessarily raise questions about whether, and how, the public interest can be protected.

In light of the public interest in achieving equality, it is not clear that in Canada we have created mechanisms for enforcing human rights that are adequate to the task and its importance.

At this time, there are major concerns about whether the federal human rights system is functioning adequately. Both human rights claimants and respondents are dissatisfied. Both groups are concerned about delays and inadequate processes. Claimants are also concerned about the small number of cases that are referred to the Canadian Human Rights Tribunal for hearing, and the underdeveloped role of the Commission in addressing systemic discrimination. The question arises: could changes to the statutorily-created relationship among the Commission, complainants and respondents bring improvement?

This paper is about the screening, investigation, and carriage functions of the Commission, that is, it concerns these elements:

- 1) the Commission's power, at a preliminary stage, to dismiss a complaint or decide not to deal with it because:
 - a) it does not fall within the time limits set out in the Act,
 - b) it is not within the jurisdiction of the Act,
 - c) it is "trivial, frivolous, vexatious or made in bad faith" or
 - d) in the Commission's view, the complainant should pursue another avenue of recourse;
- 2) the Commission's power to investigate a complaint and then decide whether to send it to conciliation, to refer it to the Canadian Human Rights Tribunal, or to dismiss it;
- 3) the Commission's power, if the complaint is sent to conciliation, to subsequently dismiss the complaint or to refer it to the Tribunal.

Taken together these are the core elements of the Commission's complaint-handling system.

Under the current statutory regime, there is no independent right of access to a Tribunal hearing. For the person who believes that their rights have been violated, the scheme places the Commission in the position of controlling access to the Tribunal.

CURRENT CONCERNS

The major concerns about the current functioning of the CHRC are these:

1 Delay

Between 1988 and 1997, the Canadian Human Rights Commission took from 23 to 27 months to reach decisions not to deal with a complaint, or to dismiss it or refer it for hearing. If a complaint was sent to conciliation this added additional months. If a complaint was referred to hearing, final resolution could take several more years. Delays in processing complaints now cause serious dissatisfaction among both claimants and respondents, and result in some complaints being dismissed by courts.

2 High Rejection Rate

Of the 6,550 complaints the CHRC received between 1988 and 1997, only 19% of complaints were settled with Commission participation and 6% were referred to the Canadian Human Rights Tribunal for hearing. The Commission decided not to proceed with or to dismiss about two thirds of all complaints. The high rejection rate and very low rate of referral for hearing raises serious questions among stakeholders about the credibility of the system as a mechanism for enforcing the right to equality. It also raises questions about whether the Commission's complaint-processing and decision-making is being driven by its lack of resources and fully-trained staff, and by the administrative need to reduce its backlog and workload, rather than by the central goals of human rights legislation.

3 Commission's Authority to Extinguish Rights

Concern regarding the high rejection rate is intensified by the fact that the only recourse available to a person whose complaint has been dismissed is to make an application in Federal Court for judicial review of the Commission's dismissal decision. Because of the 1981 decision of the Supreme Court of Canada in *Seneca College of Applied Arts and Technology v. Bhadauria* a person who believes that their human rights have been violated cannot go directly to court to seek a remedy.

The Federal Court can review the Commission's decisions to dismiss complaints for correctness on a question of law or jurisdiction, but principally these reviews consider only whether the Commission was procedurally fair in the manner in which it investigated and made its decision to dismiss. A successful outcome on judicial review, which is much less likely than an unsuccessful one, leads to the complaint being referred back to the Commission. Most complainants have their rights conclusively determined by the Commission without an oral hearing.

4 Participation

When a complaint is filed with the Commission, it is taken out of the hands of the complainant. Many complainants become witnesses and bystanders with respect to the framing, investigating, disposition and presentation to the Tribunal of their own complaints. The relationship with the Commission is experienced as disempowering. Further, organizations that have an interest in the outcome of human rights cases because they represent disadvantaged groups and stand to be affected directly or indirectly can only be involved by applying to intervene at the Tribunal stage. No funding is provided to support such interventions and there is no means for a third party to have input at the Commission decision-making stage. These groups are ready to play a larger role, and can make a significant contribution to the development of the law on equality, as they have demonstrated through their interventions in *Charter* cases.

5 Commission's Role in Addressing Systemic Discrimination Underdeveloped

Because the Commission has become bogged down in the process of screening and investigation, it has not fully developed its role as a strategic advocate, carrying forward cases that will have a broad impact on groups that are disadvantaged in Canadian society, and that will clarify and strengthen legal analysis of human rights protections. Given the cur-

rent understanding that past discrimination has created serious disadvantages for major groups protected by human rights legislation, this is an essential role for a modern federal Commission.

OPTIONS

The combination of the Commission's power to extinguish rights and the high rate of rejection of complaints has created a serious sense of unfairness among human rights claimants. In our view, this perceived unfairness must be addressed in this review, as must the delays, the need to develop the Commission's focus on systemic discrimination, and the need for claimants and community organizations representing disadvantaged groups to participate more fully in the development of the law.

There are various possible changes that could be made in the federal human rights system to respond to current concerns. The following models represent a spectrum of possibilities for redesign. Elements of one model could be combined with those of another.

- Model A: Provide Fairer, Faster Screening
 - 1 clarify and narrow the Commission's discretion to decide not to deal with a complaint, and to decide that a Tribunal hearing is not warranted, and
 - 2 impose enforceable time limits on the Commission, and parties, to control delay.
- Model B: Guarantee Access to Tribunal
 - 1 establish an independent right of access to a Tribunal hearing for persons whose complaints the Commission decides not to deal with or not to refer, in addition to clarifying and narrowing the Commission's discretion, and imposing time limits on the Commission and parties (Model A), and
 - 2 give complainants who decide to exercise their right of independent access to the Tribunal full disclosure of the contents of the Commission's investigative file, and
 - 3 provide legal representation for complainants who decide to exercise their right of independent access to the Tribunal, and
 - 4 ensure that the Tribunal has the necessary resources to deal with an increased volume of complaints, and
 - 5 provide intervenor funding for equality-seeking groups.
- Model C: Enhance the Commission's Focus on Systemic Discrimination
 - 1 reduce the number of cases in which the Commission is responsible for investigation and carriage, by permitting the Commission to select the complaints that it will investigate and carry forward on the basis of their potential for broad impact on equality-seeking groups and/or their jurisprudential importance, and
 - 2 explicitly assign to the Commission a mandate to pursue strategic initiatives to address systemic discrimination, and
 - 3 create new standard-setting and audit powers for the Commission to enhance its ability to address systemic discrimination, and
 - 4 establish an independent right of access to a Tribunal hearing for persons whose cases are not selected by the Commission for carriage, and

- 5 impose enforceable time limits on the Commission's opportunity to select a case, and
 - 6 provide legal representation for claimants who appear before the Tribunal without the assistance of the Commission, and
 - 7 ensure that the Tribunal has the necessary powers, procedures, and resources, including disclosure procedures and wide subpoena and summons powers to provide an adequate substitute for Commission investigation, and
 - 8 provide intervenor funding for equality-seeking groups.
- Model D: Permit Complainants to Bypass the Commission (Break *Bhadauria*)
 - 1 remove all responsibility from the Commission for determining whether a complaint should be referred or dismissed, and
 - 2 establish a right for any person who believes their human rights have been violated to take their case before the Tribunal, or
 - 3 establish a right for any person who believes their human rights have been violated to take their case before a court.

Different models vary in their degree of emphasis on Commission responsibility for, and control over, individual complaints. Model A retains a high level of Commission responsibility for screening and carriage, and seeks to overcome unfairness and delay in Commission decision-making through narrowing the Commission's broad discretion and imposing time limits. Model B also retains a high level of Commission responsibility, seeks to overcome unfairness and delay in Commission decision-making, and also does away with the finality of the Commission's decision-making powers by opening up the alternative of independent Tribunal access for complainants whose claims have been rejected by the Commission. Model C combines the features of models A and B, and leaves open the possibility of the Commission advising and assisting people at the complaint-drafting stage, but shifts the purpose of Commission screening away from determining who gets access to the Tribunal to identifying cases for their test-case potential. Model C emphasizes the Commission focus on systemic discrimination and the means necessary to address it, a focus that has been underdeveloped largely due to the burden of screening and investigating a high volume of complaints. Participation for equality-seeking groups could be increased in Models A, B, or C through providing access for intervenors to participate in hearings and intervenor funding. Model D eliminates the screening and complaint carriage function of the Commission entirely, placing human rights complainants on the same footing as plaintiffs in ordinary civil litigation, and leaving open the question of the Commission's future role.

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