

## LEGAL RIGHTS FOR PERSONS WITH DISABILITIES IN CANADA: CAN THE IMPASSE BE RESOLVED?

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*The author examines the claim by authors such as Jerome Bickenbach that there is presently an "impasse in disablement policy in Canada", with respect to the conferment of legal rights on persons with disabilities. Focussing on the "duty to accommodate" embodied in federal and provincial human rights legislation, the Ontario Workers Compensation Act and section 15 of the Charter of Rights and Freedoms, the author contends that the impact of such law in delivering legal rights to persons with disabilities has been limited substantially by the continuing dominance of the traditional biomedical model of disablement. The result has been that courts, tribunals and bureaucracies responsible for applying and interpreting the scope of the legal duty to accommodate continue to act on the basis of a needs or charity-based paradigm of disablement, rather than a rights-based one.*

*The author argues that many employers are aware that the rights-based concept of disablement underpinning the legal duty to accommodate challenges fundamentally the doctrine of management rights and actively resist the onset of the legal rights for persons with disabilities embodied in the duty of accommodation. This resistance is evident, too, in the delivery of services to the public.*

*The author illustrates how the continuing power of the traditional management rights and freedom of contract doctrines combine to thwart the delivery of legal rights to persons with disabilities. Recommendations for change are offered.*

*L'auteur examine les assertions d'auteurs tels que Jerome Bickenbach selon lesquels « la politique canadienne relative à l'invalidité est actuellement dans une impasse », en ce qui concerne l'attribution de garanties juridiques aux personnes handicapées. Tout en mettant l'accent sur « l'obligation d'accommodement » qui est incluse dans la législation fédérale et provinciale relative aux droits de la personne, la Loi sur les accidents du travail de l'Ontario et l'article 15 de la Charte des droits et libertés, l'auteur soutient que ces lois ont eu un effet très limité sur l'attribution de garanties juridiques aux personnes handicapées, en raison de la prédominance continue du modèle biomédical traditionnel de l'invalidité. En conséquence, les tribunaux et les bureaucraties responsables de l'application et de l'interprétation de l'obligation légale d'accommodement s'appuient toujours sur un paradigme axé sur les besoins ou la charité au lieu de s'appuyer sur un paradigme axé sur les droits.*

*L'auteur soutient que de nombreux employeurs sont conscients que le concept d'invalidité centré sur les droits qui sous-tend l'obligation légale d'accommodement remet fondamentalement en question la doctrine des droits de la direction et ils s'opposent activement à l'inclusion de garanties juridiques pour les personnes handicapées dans l'obligation d'accommodement. Cette résistance se manifeste également dans le domaine de la fourniture de services au public.*

*L'auteur illustre comment le pouvoir persistant des doctrines des droits de la direction et de la liberté contractuelle a pour effet d'entraver l'attribution de garanties juridiques aux personnes handicapées. Puis il fait des recommandations pour la réalisation de changements.*

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I. LEGAL RIGHTS FOR PERSONS WITH DISABILITIES  
IN CANADA: CAN THE IMPASSE BE RESOLVED?

A. *Introduction*

Since the United Nations Year of Disabled Persons in 1981, social policy on disablement in Canada appears, on the surface, to have developed some momentum and focus on the experience and disadvantage of the approximately 15 percent of Canadian people who have disabilities.<sup>1</sup> A 1992 Roeher Institute study<sup>2</sup> acknowledged that, since 1981, some progress had been made in Canada in government awareness of disability as a high-priority issue, in the development of community agencies controlled by persons with disabilities and committed to increasing the participation of such persons in the labour market, and in the development of constitutional, human rights and employment equity protection for persons with disabilities.

The foregoing legislative and policy developments and other initiatives inspired by the International Decade of Disabled Persons<sup>3</sup> appear to reflect what Jerome Bickenbach describes as a three-phase model of social policy development:

- (a) a public recognition of a cultural or political commitment to, and consensus about, general goals that guide policy formation and provide the mandate and motivation for reform;
- (b) the identification of objectives for social planning in light of the goals and actual social conditions;
- (c) the proposal of concrete policy solutions in furtherance of the general goals.<sup>4</sup>

While the array of federal and provincial programs such as unemployment insurance, the Canada Pension Plan, workers' compensation and human rights statutes, suggest that Canada has proceeded through the three phases of Bickenbach's model, there is substantial evidence to the contrary. The House of Commons Standing Committee on Human Rights and the Status of Disabled Persons has observed "a gap between expectation and action and an apparent lack of political will to put on firmer footing all policy pertaining to persons with disabilities."<sup>5</sup> Such opinion is supported by a recent public statement of Federal Human Resources Minister Douglas Young, that

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<sup>1</sup> The success of the International Year of Disabled Persons led to the International Decade of Disabled Persons from 1983 to 1993.

<sup>2</sup> *On Target? Canada's Employment Related Programs for Persons with Disabilities* (North York: Roeher Institute, 1992) at ix.

<sup>3</sup> *Supra* note 1.

<sup>4</sup> J. E. Bickenbach, *Physical Disability and Social Policy* (Toronto: University of Toronto Press, 1993) at 4 [hereinafter Bickenbach]. Bickenbach follows the characterization of policy analysis of D. A. Stone, *Policy Paradoxes and Political Reason* (Glenview, Ill.: Scott, Foresman and Company, 1988). I rely, too, on the analysis of S. Wendell, "Toward a Feminist Theory of Disability" in H. Bequaert Holmes and L. M. Purdy, eds., *Feminist Perspectives in Medical Ethics* (Bloomington: Indiana University Press, 1992) at 63-81 [hereinafter Wendell]. For another feminist analysis of disability, see M. Lloyd, "Does She Boil Eggs? Towards a feminist model of disability" (1992) 7 *Disability, Handicaps and Society* 207-222.

<sup>5</sup> House of Commons Standing Committee on Human Rights and the Status of Disabled Persons *A Consensus for Action: The Economic Integration of Disabled Persons*, (Ottawa: Queen's Printer: June 1990) (Chair: B. Haliday, M.P.).

the federal government would pull out of disabilities programming.<sup>6</sup> Furthermore, the Roeher Institute has stated that "...people with disabilities are excluded from the labour market because of barriers that result from public policy and program arrangements, and because an accumulation of other barriers go unaddressed by public policy"<sup>7</sup>. Such a view is supported by the Canadian Council on Rehabilitation and Work's analysis<sup>8</sup> of the Statistics Canada Health and Activity Limitation Survey (HALS).<sup>9</sup>

There is evidence that, despite the range of policies and programs in Canada, persons with disabilities remain largely supplicant, substantially under-represented in the workforce, frequently marginalized and isolated and significantly poorer than other Canadians.<sup>10</sup> Bickenbach refers to the continuing disadvantage of, and barriers experienced by, persons with disabilities as an "impasse in disablement policy",<sup>11</sup> attributable to the traditional dominance of the "biomedical" and "economic" models of disablement.<sup>12</sup> Bickenbach observes that those models underpin the traditional approaches of disablement policy and legislation in Canada, such as workers' compensation, unemployment insurance and the Canada Pension Plan, as well as the work of a broad array of charitable organizations. The biomedical and economic models locate the problem of disablement exclusively within the domain of the "disabled" person who, due to some physical or mental defect or impairment, performs at a level significantly below the "normal range" for a relevant activity in the workplace or other social milieu.

Excluded from the traditional biomedical and economic models of disablement is any reference to the significant role played by society in the construction of workplaces and other environments that serve to handicap persons with certain physical or mental impairments or defects. It is Bickenbach's contention that the impasse in Canadian disablement policy can be resolved only if appropriate weight is given to this new socio-political model of disablement that recognizes society's pivotal role in the construction of environments that handicap a significant portion of the Canadian population. Bickenbach observes that this socio-political perspective underpins the duty of

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<sup>6</sup> This statement created a storm among certain government Members of Parliament and led to the creation of a task force chaired by Andrew Scott, M.P. See "Disabled fear they'll be beggars" *The Globe and Mail*, (1997) September 6 at A8. Regardless of the political storm within the ruling Liberal Party, the remarks are consistent with Federal Government fiscal and economic policies to download responsibility for many of its programs.

<sup>7</sup> *Supra* note 2 at xii. See also Chapter 1.

<sup>8</sup> G. Annable, *Perspectives on the Journey: The Qualifications and Experience of Canadian Job Seekers with Disabilities* (Winnipeg: Canadian Council on Rehabilitation and Work, Winnipeg, 1993) at 9-24. The study also embodies focus group data confirming barriers to persons with disabilities.

<sup>9</sup> Conducted by Statistics Canada in 1986 and 1987.

<sup>10</sup> For statistical profiles of persons with disabilities, see (Ottawa: Queen's Printer, 1994) *Profile on Persons with Disabilities in Alberta*. The position of persons with disabilities is not uniform across Canada but, typically, persons with disabilities are significantly disadvantaged economically compared with the "able-bodied" population: see M. Davis & C. Marshall, "Female and Disabled: Challenged Women in Education" (1987) 5 *National Women's Studies Association Perspectives* at 39-41 [hereinafter Davis]; M. Fine & A. Asch, eds., *Women with disabilities: Essays in Psychology Culture and Politics*, (Philadelphia: University Press, 1988) [hereinafter Asch].

<sup>11</sup> *Supra* note 4 at 7.

<sup>12</sup> *Ibid.* at 13.

accommodation embodied in federal and provincial human rights legislation (and, arguably, the *Charter of Rights and Freedoms*<sup>13</sup>) and contends that the impasse in Canadian disablement policy is to be resolved by a synthesis of the traditional biomedical and economic models and the new social-political model of disablement.<sup>14</sup>

The primary objective of this article is to identify the main factors responsible for the impasse in Canadian disablement policy and to suggest policy measures that will contribute to a resolution of the impasse and to the effective delivery of rights for persons with disabilities. It is argued that Bickenbach's call for a synthesis of the new social-political with the traditional biomedical/economic model of disablement is appropriate. However, the necessary synthesis is impeded by an insufficient understanding of, and consensus about, the social-political causes of disablement. In effect, the legal duty to accommodate persons with disabilities in Canada, corresponding to phase three of Bickenbach's model of social policy development emerged prematurely with insufficient ground work in the first and second phases. It is contended that, if the duty to accommodate is to deliver legal rights and social benefits to persons with disabilities, the priority of policy makers must be to promote and develop an understanding of, and consensus about, the social-political causes of disablement. Such an initiative should target administrators, courts and adjudicators responsible for implementing human rights legislation and the employers, unions, workers and entrepreneurs bound by the statutory duty to accommodate, but largely ignorant of the social-political conception of disablement underpinning such legal obligations.

It is further contended that the impasse in disablement policy is attributable, in part, to a fourth phase of social policy development not recognized in Bickenbach's three-stage model, namely, resistance to the concrete policy solutions by those interests that see them as a threat. For instance, it is argued that employer resistance is founded on the recognition that the statutory duty to accommodate persons with disabilities strikes at the very heart of the traditional management rights doctrine and at the privileges long legitimated by that doctrine and protected by the common law of employment. The article will also explain the pro-active and the systemic aspects of employer resistance to the new human rights duty to accommodate and suggest measures to thwart such resistance.

Finally, it is submitted that an essential step in clearing the impasse is to focus policy development on increasing the political power of persons with disabilities. An important aspect of this step is to redefine the concept of disablement in a manner that promotes an understanding of the community of interest between the "disabled" and the "able-bodied" populations in challenging the oppressive systems of that organize workplaces, social activities, and institutions.

The paper is structured as follows. The first section addresses the different models of disablement that influence contemporary Canadian social policy. It is contended that the new social-political model of disablement advanced by writers such as Bickenbach must be better understood both in popular culture and by courts, tribunals, administrators and others responsible for implementing human rights policy, if Canada is to make a successful transition from a charity-based to a rights-based approach to persons with disabilities heralded by politicians and demanded by the *Charter* as well

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<sup>13</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>14</sup> *Supra* note 4 at Chapter 7.

as by federal and provincial human rights legislation.

The second section of the paper introduces the duty to accommodate persons with disabilities embodied explicitly in federal and provincial human rights legislation and indirectly in a variety of other statutes regulating workplace relations. Section three discusses the progress made in the delivery of disablement rights. The fourth section focuses on the resistance to the duty to accommodate by employers and providers of services to the public who perceive their traditional privileges threatened by the new duty and its underpinning model of disablement. This section demonstrates that such resistance has been facilitated by an apparent lack of understanding of, or commitment to, a rights-based approach to disablement on the part of Canadian courts, human rights tribunals and a variety of other adjudicative and administrative bodies. Such bodies appear to be locked in the psychic prison of a charity or needs-based perception of disablement, rooted in the dominant biomedical model, and too often fail to embrace a rights-based perspective, with its social-political roots, as demanded by the *Charter* and by human rights legislation. The final section offers a variety of policy measures designed to promote the quasi-constitutional demands of human rights legislation and to assist in unblocking the impasse in disablement policy.

Sections three and four provide the reader with a variety of non-atypical cases in which, analysis indicates, courts and tribunals have adopted a perspective of, and approach to, disablement similar to that identified in the more atypical cases selected for more detailed discussion. The need for detailed examination of cases involving persons with disabilities arises from the particular importance of the special and individual circumstances and context confronting a person with a disability<sup>15</sup>. This is recognized by Sopinka J. in *Eaton v. Brant County Board of Education*, where he states:

“(It) follows that disability, as a protected ground, differs from other enumerated grounds such as race or sex because there is individual variation with respect to these grounds. However, with respect to disability, this ground means vastly different things depending on the individual and the context”.<sup>16</sup>

## B. *Definitions, Perceptions and Models of Disablement*

### 1. *Matters of Definition*

Would your decision to buy a particular brand of beer be influenced by whether its name was "Moosehead" or "Bunnytail"?<sup>17</sup> The multi-billion dollar marketing industry certainly thinks so, illustrating that language *does* matter in the business of shaping or influencing the ideas, and thereby the conduct, of members of society. In its publication, "Perspectives on the Journey", the Canadian Council for Disabilities distinguishes

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<sup>15</sup> It is one of the ironies of western industrial societies that, the supposed value placed on "individualism" appears to be so difficult to uphold in the scientifically managed workplace and in the mass consumption marketplace. In a society ostensibly founded on the values of individualism and difference, one might expect the accommodation of disablement and other individual difference to be rather less of a problem for employers and the providers of services to the public than it appears to be.

<sup>16</sup> [1997] 1 S.C.R. 241, (1997) 142 D.L.R. (4th) 385, 406 [hereinafter cited to D.L.R.].

<sup>17</sup> A feminist writer is to be thanked for this portrayal of the power of language. Alas I have no record of its source.

between politically correct terminology, such as "persons with disabilities", and the politically incorrect term "disabled persons." The Council's preference for the former term is based on the view that it gives primacy to the individual's personal identity rather than to his or her disability. On the other hand, the latter terminology is viewed as giving precedence to the disabled condition of the individual.<sup>18</sup> Such a distinction might seem pedantic. Indeed, for certain purposes, the Council, itself is prepared to relax its insistence on the politically correct terminology.<sup>19</sup> However, in some contexts, the power of language lies not only in reflecting or describing human ideas but also in shaping them.

A similar issue arises with respect to the choice of the term "disability" and "handicap". In their human rights statutes, the majority of Canadian jurisdictions use the term "disability"<sup>20</sup> while Ontario and Prince Edward Island employ the term "handicap".<sup>21</sup> Whether the statutory term used is "disability" or "handicap", the respective definitions are fairly similar, focusing almost exclusively on impairments of function located within the person.<sup>22</sup> Accordingly, for purposes of defining the scope of the respective statutes, the choice of the term "handicap" or "disability" is a matter of indifference. However, when one's purpose is to analyze the concept of disablement as a basis for the development of effective legal and social policy, the distinction between the terms "disability" and "handicap" becomes a matter of some importance.

## 2. *The Models of Disablement*

### (a) *The Biomedical Model*

Bickenbach observes that the concept of disablement inherent in traditional social policy in Canada is rooted firmly in a biomedical model, the pre-eminence of which concerns him greatly. It should be emphasized that Bickenbach's concern is not with the recognition of the biomedical dimension of disablement but with its *predominance* as a perspective that he considers both incomplete and distorted. The author states:

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<sup>18</sup> *Supra* note 8 at 5.

<sup>19</sup> Perhaps fear of being viewed as pedantic explains the Council's preference for the politically incorrect terminology in the statistical tables in Chapter 1 of its publication (*ibid.* note 8). The author wishes to make it clear that reference to the term politically correct in this paragraph, in no way indicates support for the pejorative use of the term adopted by those who seek to belittle or discredit social equality seekers.

<sup>20</sup> See *Canadian Human Rights Act*, R.S.C. 1985, c.H-6, s.3(1); *Fair Practices Act*, R.S.N.W.T. 1988, c. F-2, s.3(1); *Human Rights Act*, S.B.C. 1996, c. 210, s.8(1); *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 1980, c. H-11.7, s.38(1)(e.1) and (i); *Human Rights Code*, C.C.S.M. c. C-10, s.10; *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12, s.10; *Human Rights Code*, R.S.N.B. 1973, c.H-11, s.2; *Human Rights Act*, R.S.N.S. 1989, c.214 s.5(1); *Human Rights Code*, R.S.N. 1990, C.h-14, s.6(1); *Human Rights Code* S.S. 1979 c. S-24.1.

<sup>21</sup> *Human Rights Code*, R.S.O. 1990, c. H.-19 ss.1, 2(1); *Human Rights Act*, R.S.P.E.I. 1988, c. H-12, s.1(1)(l).

<sup>22</sup> In legislation founded on the biomedical perception of disablement, it is not of great significance whether the term "disability" or "handicap" is used to describe the population to whom the legislation applies. However, once we recognize the social-political nature of disablement, it is crucial to employ language that reflects this perspective.

[I]f accommodation is the primary social goal, and if it is given a biomedical gloss, then disablement policy must highlight the ways in which people with disabilities are different from others...When understood biomedically the needs that are to be accommodated are precisely the needs that set people with disabilities apart from others.<sup>23</sup>

In other words, there is an inherent contradiction in a social policy designed to accommodate persons with disabilities, but rooted in a predominantly biomedical model of disablement. The accommodation of persons with disabilities and their integration into society require recognition of the abilities of persons identified as having disabilities. That is, there must be recognition of the similarities among the disabled and non-disabled populations. Yet, the traditional predominance of the biomedical model of disablement produces an exclusive and distorted focus on the differences between persons with disabilities and others in society labelled as non-disabled.

Bickenbach observes further:

The biomedical perspective, and the model of disablement it creates, focus our attention on impairments. Since impairment is a genuine and intrinsic dimension of disablement, the bio-medical approach provides a perfectly valid perspective on disablement. This is why the biomedical model strikes us as intuitively obvious, at least at first glance. Closer inspection indicates, though, that the model produces a distortion of disablement that has had its effects on the nuts and bolts of disablement policy. The biomedical model, in a word, has contributed to the general impasse in disablement policy.<sup>24</sup>

(b) *The Economic Model*

Bickenbach observes that the biomedical perspective underpins a second model of disablement, the "economic" model.<sup>25</sup> The economic model has dominated disablement policy in Canada throughout this century and focuses on disability and work. This perspective underlies the workers' compensation, social security, retraining and rehabilitation programs that are pillars of contemporary Canadian disablement policy. These programs focus on the economic efficiency of assisting persons with impairments and disabilities to make the adjustments necessary to allow them to participate in the labour force, and in social life as a whole, notwithstanding their impairments and disabilities. Driven by considerations of economic efficiency, the economic model shares the biomedical model's focus on the physical or mental condition of the impaired or disabled individual.

As Bickenbach observes, both the biomedical and economic models of disablement are incomplete and distorted. With respect to the former, the popular concept of disablement locates the problem firmly in the person who is, in some way, defective, different and incapable, in relation to the medically defined norms upon which the biomedical model of disablement is built. Intuitively, if the problem of disablement is exclusively medical, we tend to be predisposed to seeking solutions in medical care, cure or palliation, rather than in altering the social relations and the environment in which the

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<sup>23</sup> Bickenbach, *supra* note 4 at 90.

<sup>24</sup> *Ibid* at 92.

<sup>25</sup> *Ibid*. See in particular, Chapter 4.

disabled individual is required to operate. As Bickenbach concludes, "[o]n its own...the biomedical model tends to suggest a charity or needs-based normative basis for disablement theory."<sup>26</sup> A recent example of the charity or needs-based model is found in the *Eaton* case cited above and discussed in more detail below.<sup>27</sup>

(c) *The Social-Political Model*

It was suggested above that the biomedical and economic models of disablement are incomplete and distorted because they ignore the role of society in constructing an environment in which persons with certain impairments or disabilities are disadvantaged or handicapped. As Susan Wendell observes:

Much of the world is structured as though everyone is physically strong, as though all bodies are "ideally shaped", as though every-one can walk, hear, and see well, as though everyone can work and play at a pace that is not compatible with any kind of illness or pain, as though no one is ever dizzy or incontinent or simply needs to sit or lie down.....Not only the architecture, but the entire physical and social world organization of life, assumes that we are either strong and healthy and able to do what the average able-bodied person can do, or that we are completely disabled, unable to participate in life.<sup>28</sup>

The social-political model of disability described by both Bickenbach and Wendell shifts the focus of disablement policy from the condition of the impaired or disabled to the significant role of the social environment in "handicapping" such individuals.

The socially constructed elements of disablement are recognized by the following definitions employed by the United Nations:

***Impairment:*** Any loss or abnormality of psychological, physiological, or anatomical structure or function.

***Disability:*** Any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being.

***Handicap:*** A disadvantage for a given individual, resulting from an impairment or disability, that limits or prevents the fulfilment of a role that is normal, depending on age, sex, social and cultural factors, for that individual.<sup>29</sup>

Handicap is therefore a function of the relationship between disabled persons and their environment. It occurs when they encounter cultural, physical or social barriers which prevent their access to the various systems of society that are available to other citizens. Thus, handicap is the loss or limitation of opportunities to take part in the life of the

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<sup>26</sup> *Supra* note 4 at 96.

<sup>27</sup> *Supra* note 16.

<sup>28</sup> Wendell, *supra* note 4 at 69.

<sup>29</sup> United Nations, "Decade of Disabled Persons 1983-1992; World program of action concerning disabled persons", (New York: U.N., 1983) at I.c. 6-7.

community on an equal level with others. While the United Nations definitions are open to criticism,<sup>30</sup> they have the advantage of recognizing that handicap (in the sense used by the United Nations) is not only a product of biological or anatomical factors but is also a social construction. As Wendell observes, from the standpoint of a disabled person, society could minimize the disadvantages of most disabilities and, in some instances, turn them into advantages.<sup>31</sup>

For some impairments, Canadian society has made accommodation and there is relatively little social disadvantage for individuals with such impairments. For example, the development of optometry is such that most people with impaired eyesight can function efficiently in most occupations and have reasonable access to public services and recreation. In the language of the United Nations, such impaired eyesight is usually neither a significant disability nor handicap<sup>32</sup> because societal accommodation typically allows the person with the impairment to fulfill most, if not all, of the tasks and roles undertaken by persons without impaired eyesight.<sup>33</sup> However, for many persons, society does not accommodate their impairments or disabilities and it is then that they become handicaps. While the traditional biomedical model of disablement locates the cause of a handicap in the existence of an impairment, the social-political model acknowledges that a significant cause of handicap is the nature of the environment in which a person with certain impairments or disabilities is required to function. It is the combined effect of an individual's impairment or disability and the environment constructed by society that determines whether such an individual experiences a handicap. In Canada, the environment constructed for many persons with impairments or disabilities has contributed to their being handicapped to such a degree that they frequently live lives of unemployment, under-employment, poverty, loneliness, isolation, lack of education,<sup>34</sup> and exposure to ridicule, avoidance, pity, stereotyping and patronization by those who view themselves as persons without impairments or disabilities.

(d) *The Social-Political Model and the Legal Duty to Accommodate*

The key contribution of the social-political analysis of disablement is that it focuses not on remedies designed to assist impaired or disabled individuals in adjusting to the disadvantages or constraints imposed by their social environment, but on removing the

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<sup>30</sup> Wendell, *supra* note 4 at 65. See also Bickenbach, *supra* note 4 at 48-52, where that author voices criticism of the UN definition of "handicap".

<sup>31</sup> Wendell, *supra* note 4 at 68 cites the example of physicist Stephen Hawking who has had Amyotrophic Lateral Sclerosis for many years and, with the combination of social and technological support and his own courage and talent, has become one of the foremost theoretical physicists of our time. Hawking, himself, considers his severe limitation of muscular movement has given him the advantage of more time to think.

<sup>32</sup> Of course the mere technical availability of eyeglasses etc. does not amount to automatic or complete accommodation of those with impaired eyesight. For example, some jobs, *e.g.* in the military, require a level of uncorrected vision. Furthermore, lack of income or resources may exclude certain individuals from access to such "accommodation" of their substandard eyesight.

<sup>33</sup> In this paper, I use the term disability to capture the meaning of handicap as the product of an impairment and the extent of societal accommodation of such impairment.

<sup>34</sup> See Davis, *supra* note 10 at 39-41; See also Asch. Data from the 1991 Canada Census confirms the substantially lesser incomes of persons with disabilities in comparison with the non-disabled population.

handicaps imposed by the social environment and harmonizing it with the abilities of individuals. It is Bickenbach's view that resolution of the impasse in Canadian disablement policy requires a synthesis of the three different models of disablement discussed above. The importance of such a synthesis is that the social-political perception of disablement underpins the human rights duty to accommodate persons with disabilities and enables us to address the fundamental question: "What does society owe people with disabilities?"<sup>35</sup>. Key aspects of the legal duty to accommodate are discussed in the following section.

## II. HUMAN RIGHTS LAW AND THE DUTY TO ACCOMMODATE PERSONS WITH DISABILITIES

### A. Introduction

Prior to the enactment of provincial and federal human rights legislation, Canada conferred legal rights on persons with disabilities by means of workers' compensation, unemployment insurance, and the Canada Pension Plan. Federal and provincial legislation also confers such rights in the areas of health care and medical treatment. In spite of such legal rights, persons with disabilities in Canada continue to experience greater poverty, isolation and unemployment than the rest of the population.

Canada's political commitment to the establishment of legal rights of accommodation for persons with disabilities has been influenced greatly by the United Nations Declaration of Human Rights (1948)<sup>36</sup> and various other United Nations treaties to which Canada is a signatory. While such treaties are not legally binding in Canadian law, they have inspired federal and provincial laws designed to further the principles embodied in them and some Canadian courts and tribunals employ the principles enshrined in the treaties as an aid to the interpretation of the domestic human rights legislation.<sup>37</sup>

### B. Human Rights Legislation

Each Canadian jurisdiction has human rights or anti-discrimination statutes that specify persons with disabilities (physical or mental) as a protected group<sup>38</sup> which provides that, *prima facie*, a person discriminates unlawfully<sup>39</sup> if his act serves to exclude a disproportionate number of persons in a group or class protected by the

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<sup>35</sup> Bickenbach, *supra* note 4 at 11.

<sup>36</sup> *Universal Declaration of Human Rights*, UN Doc. A/810 (1948).

<sup>37</sup> See e.g. *Québec (Commission des droits de la personne) v. Brzowski* (1996), 25 C.H.R.R. D/52.

<sup>38</sup> See B. Adell, "The Rights of Disabled Workers at Arbitration and under Human Rights Legislation", (1991) 1 *Labour Arbitration Yearbook* 167 at 169. See also A.M. Molloy, "Disability and the Duty to Accommodate", (1992) 1 *Canadian Labour Law Journal* 23 at 24 [hereinafter Molloy].

<sup>39</sup> In each jurisdiction, the law applies to employment, the provision of accommodation and the provision of services to the public.

legislation,<sup>40</sup> whether or not such effect is intended. *Prima facie* discrimination also occurs if a person intentionally excludes or disadvantages a person explicitly because of his or her disability.

Discrimination in human rights legislation is defined in the following words by McIntyre J. of the Supreme Court of Canada:

...I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed on others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.<sup>41</sup>

The Supreme Court of Canada has further stated that:

[H]uman rights legislation is amongst the most pre-eminent category of legislation. It has been described as having a "special nature, not quite constitutional but certainly more than ordinary".....One of the reasons such legislation has been so described is that it is often the final refuge of the disadvantaged and the disenfranchised. As the last protection of the most vulnerable members of society, exceptions to such legislation should be narrowly construed...<sup>42</sup>

Statutory definitions of disability are typically quite broad and include mental and physical disability. Case law suggests that disability can include conditions that are neither chronic nor severe<sup>43</sup> and, include such conditions as depression and alcoholism. While there seems to be no judicial or adjudicative authority with respect to disability, it would seem that, in principle, an employer's duty not to discriminate is not confined to an employee's own disability but can extend to a disability of an immediate family member that might prevent an employee from working certain shifts or meeting the employer's "normal" attendance requirements.<sup>44</sup> Unlike some jurisdictions in Canada, Alberta's human rights legislation is explicit in prohibiting discrimination against a person because of his or her disability or "the disability of another person or class of persons."<sup>45</sup>

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<sup>40</sup> This is referred to by a variety of terms in the literature and case law, including "indirect", "adverse impact", and "constructive" discrimination. This is distinguished, for various legal purposes, from the intentional or "direct" discrimination referred to below.

<sup>41</sup> *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143 at 174; (1989) 56 D.L.R. (4<sup>th</sup>) 1 [hereinafter cited to S.C.R.].

<sup>42</sup> *Zurich Insurance Co. v. Ontario Human Rights Commission* [1992] 2 S.C.R. 321 at 339; (1992) 93 D.L.R. (4<sup>th</sup>) 346.

<sup>43</sup> *Zaryski v. Loftsgar and Percival Mercury Sales Ltd.* (Jan. 30, 1995) 95 CLLC para. 230008, (Sask. Human Rights Board of Inquiry).

<sup>44</sup> There are various obiter dicta to the effect that the concept of racial or other discrimination under human rights legislation embodies the concept of discrimination on the ground of the racial or other characteristics of another person. Such reasoning presumably applies to disability and is consistent with the broad policy of human rights legislation. Although the human rights legislation of Saskatchewan, Nova Scotia, Newfoundland and British Columbia define the grounds of discrimination in terms of the employee's own attributes (*e.g.* race, sex, disability), it is difficult to believe that such a limitation would withstand a Charter challenge.

<sup>45</sup> *Supra* note 20, ss. 3, 4, and 7.

*Prima facie* discrimination may be justified, and therefore not unlawful, if the discriminator demonstrates, on a balance of probabilities, that the discriminatory act is necessary for the safe or efficient operation of the enterprise or organization. In the employment context, this is the establishment of a "*bona fide* occupational requirement or qualification" (BFOR or BFOQ).<sup>46</sup> If the person fails to establish a BFOR the discrimination is unlawful and the victim(s) may obtain a remedy. If a BFOR is established, the legal consequences depend on the type of discrimination. If the discrimination is direct, the establishment of a BFOR by the respondent determines that there is no unlawful discrimination. However, in the case of indirect discrimination, the establishment of a BFOR does not render the discrimination lawful unless the respondent demonstrates that he cannot take reasonable steps to accommodate those affected by the act of discrimination.<sup>47</sup>

### C. *Scope of the Duty of Reasonable Accommodation*

It is established in the case law that reasonable accommodation requires the respondent to take steps to avoid the discriminatory impact of his or her conduct short of undue hardship to the respondent<sup>48</sup>. While some jurisdictions have a statutory duty to accommodate,<sup>49</sup> Molloy persuasively argues that the *Charter* embodies a duty to accommodate to the point of undue hardship and that no jurisdiction's human rights statute could be interpreted as precluding such a duty.<sup>50</sup> Furthermore, in keeping with the Supreme Court of Canada's description of human rights legislation as quasi-constitutional,<sup>51</sup> defences to *prima facie* discrimination ought to be narrowly construed.

It appears that judicial authority restricts the duty of reasonable accommodation to indirect discrimination and does not apply to direct discrimination.<sup>52</sup> D'Andrea, Cory and Forester conclude from a wealth of often contradictory Supreme Court dicta that, in the case of direct discrimination, "there is no requirement to accommodate persons

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<sup>46</sup> The classic statement of the BFOQ or BFOR is found in *Ontario (Human Rights Commission) v. Etobicoke (Borough)* [1982] 1 S.C.R. 202; (1982) 132 D.L.R. (3d) 14.

<sup>47</sup> See *Central Alberta Dairy Pool v. Alberta Human Rights Commission* [1990] 2 S.C.R. 489, (1990) 72 D.L.R. (4th) 417 [hereinafter *Central Alberta* cited to S.C.R.]. For a review of the different legislative provisions in Canada pertaining to the duty to accommodate, see M. Gunderson, D. Hyatt and D. Law, "Reasonable Accommodation Requirements under Workers' Compensation in Ontario" *Canadian Journal of Industrial Relations/Relations Industrielles*, Laval University 1995, vol. 50 no.2, 341 at 343-344.

<sup>48</sup> For a review of Canadian jurisprudence, see W. Winkler and P. Thorup, "The Duty of Accommodation and its Implications for the Employer" (1992) 1 *Can. Lab. L. J.* 209-237.

<sup>49</sup> Ontario (R.S.O. 1990, c.H.19, s.17(1) and (2)); Manitoba (S.M. 1987-88, c.45, ss.9(1) and 12; and Yukon (R.S.Y. 1986 Supp., c.11, ss.8(b), 6(h)). Saskatchewan does not have a statutory duty to accommodate, as such, but does empower boards of inquiry to recommend that employers accommodate persons excluded, to the point of undue hardship; (S.S.1979, c.S-24.1, s.31(9),(9.1) (re-en. 1989-90, c.23, s. 19(2)); Also, Regulations under the Human Rights Code, Mar. 1, 1991, Sask. Reg. 9/91, s.3.

<sup>50</sup> Molloy, *supra* note 38 at 44-45.

<sup>51</sup> *Supra* note 42.

<sup>52</sup> *Central Alberta supra* note 47 (the decision of the majority); and *Large v. Stratford (City)*, [1995] 3 S.C.R. 733; (1992), 92 D.L.R. (4th) 565 [hereinafter cited to D.L.R.].

who are discriminated against because of a BFOR."<sup>53</sup> The authors contend that any other interpretation of the law would strip the BFOR concept of any meaning.

The foregoing claim is rather surprising in light of Lepofsky's observation that since the 1986 amendments to the *Ontario Human Rights Code*, that province requires employers who raise the defence of BFOR to establish that it could not otherwise accommodate those excluded by the BFOR, short of undue hardship.<sup>54</sup> In cases where an employer wishes to show that a person's differential treatment on account of disability is justified because the handicap precludes effective performance of the job's essential duties, the Ontario Act now specifically requires that the abilities of the handicapped person be assessed in light of accommodations which could be provided to him or her without undue hardship.<sup>55</sup> While this statutory requirement to accommodate may stretch the meaning of the term BFOR, it scarcely does violence to the intent of anti-discrimination legislation. Indeed, as Lepofsky illustrates,<sup>56</sup> judicial attempts to differentiate between direct and indirect discrimination for purposes of the duty to accommodate verge on the absurd.<sup>57</sup> Furthermore, as D'Andrea *et al* observe, even if the duty to accommodate does not strictly apply to a BFOR that discriminates directly, the employer must still demonstrate that there is no reasonable alternative to the job requirement—a duty likely to be as onerous as that imposed by the duty to accommodate in cases of indirect discrimination.<sup>58</sup>

Because of the individual nature of disability, the particular evidence and circumstances of each case are decisive as to the bounds of undue hardship but it is apparent that tribunals in Canada have departed from the *de minimis* obligations typically placed on employers in the United States prior to passage of *The Americans With Disabilities Act*.<sup>59</sup> In the case *Re AirBC Ltd. and C.A.L.D.A.*<sup>60</sup> arbitrator McPhillips reviewed Canadian judicial and adjudicative authority and identified the following

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<sup>53</sup> *Illness and Disability in the Workplace - How to Navigate Through the Legal Minefield*, (Aurora, Ont: Canada Law Book, 1995) 4:4900 at p. 4-58.6 (April 1996). The authors rely on dicta in *Large*, *supra* note 52.

<sup>54</sup> M. D. Lepofsky, "The Duty to Accommodate: A Purposive Approach" Vol. 1, Can. Lab. Law J. 1 [hereinafter Lepofsky].

<sup>55</sup> *Human Rights Code* R.S.O. 1990, c. H. 19, s.17(2).

<sup>56</sup> *Supra* note 54 at 18.

<sup>57</sup> In addition to Lepofsky's example, we may observe that mandatory retirement at a particular age is not only, *prima facie*, direct discrimination on grounds of age but, *prima facie*, indirect discrimination on grounds of sex or national origin. It is scarcely consistent with the broad remedial purposes of human rights legislation to apply a duty to accommodate to the latter but not to the former.

<sup>58</sup> Molloy, *supra* note 38 at 45-46, suggests that, in cases of disability, given the individualized nature of disability, the distinction between direct and indirect discrimination, with respect to an employer's duty to accommodate, is likely to be even less detectable. It is argued below that this sort of legalism and confusion is a boost to those who resist the duty to accommodate and is inherent in the complaint-based model apparently favoured by legislators.

<sup>59</sup> *The Americans With Disabilities Act* 1990, 42 USC, (P.L. 101-336). Title I of the Act applies to employment and came into effect on July 26, 1992 for employers with 25 or more employees and on July 26, 1994 for employers with 15 or more employees. The duty of accommodation of local and state governments is defined in Title II; Title III defines the duties of private enterprises providing services to the public; Title IV governs telecommunications and Title V depicts the relationship of the Act with other legislation.

<sup>60</sup> (1996) 50 L.A.C. (4th) at 117.

factors as relevant to the determination of undue hardship in the accommodation of persons with disabilities as well as any other group protected by human rights legislation:

- (1) interchangeability of the workforce and facilities;
- (2) whether the employee's job itself exacerbates the disability;
- (3) the extent of the disruption of a collective agreement;
- (4) the effect on the rights of other employees;
- (5) the effect on the morale of other employees;
- (6) costs to the employer of the proposed accommodation including impact on efficiency, wage increases and other direct financial costs to be incurred (*e.g.* renovations) and
- (7) the impact on the safety of the individual, other employees or the general public.<sup>61</sup>

McPhillips notes further, that the duty to accommodate requires employers to consider carefully all other jobs in the bargaining unit and whether jobs could be modified. The employer may also be required to alter its normal method of carrying on its operations, provided such changes do not impose undue hardship.<sup>62</sup> While disruption of a collective agreement may impose undue hardship, it is clear from the authorities that the mere fact that a collective agreement constrains or prohibits certain action on the employer's part is not determinative of whether certain accommodation would impose undue hardship.<sup>63</sup> There is also authority for the proposition that an employer should consider jobs outside the employee's own bargaining unit whether they are excluded positions or positions in other bargaining units.<sup>64</sup> Undue hardship has been held to mean severe suffering or privation that is excessive and disproportionate to the objective of the accommodation.<sup>65</sup> Arguably, this means that, in determining whether hardship is "undue", courts and tribunals must weigh the cost of accommodation to the employer against the benefit to the person accommodated and to society at large, including the employer.

The courts have endorsed the principle that the onus rests with the respondent to demonstrate, on a balance of probabilities, that the accommodation of a person discriminated against would cause undue hardship. There is, however, a duty on the employee to inform his or her employer of the problems associated with the disability

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<sup>61</sup> *Ibid.* at 117-118. The authorities reviewed by the arbitrator were: *Central Alberta*, *supra* note 52; *Central Okanagan School District No. 23 v. Renaud* (1992) 95 D.L.R. (4th) 577; *Ontario (Human Rights Commission) v. Simpson Sears Ltd.* [1985] 2 S.C.R. 536; (1985) 23 D.L.R. (4th) 321.

<sup>62</sup> See *Re Boise Cascade Canada Ltd. and U.P.I.U., Local 1330* (1994) 41 L.A.C. (4th) 291 (Palmer); *Re Calgary District Hospital Group and U.N.A. Local 121-R* (1994) 41 L.A.C. (4th) 319 (Ponak); and *Re Pharma Plus Drugmart Ltd. and U.F.C.W.* (1993) 33 L.A.C. (4th) 1 (Mitchnik).

<sup>63</sup> See, for example, *Renaud*, *supra* note 61 which makes it clear that the union and the employer must accommodate up to the point of undue hardship.

<sup>64</sup> *Re Metropolitan Toronto (Municipality) and C.U.P.E. Local 79* (1993) 35 L.A.C. (4th) 35 (Fisher).

<sup>65</sup> *Jansen v. Ontario Milk Marketing Board* (1991) 13 C.H.R.R. D/391 (Ont. Bd. of Inq.). Note, however, that the value of the object of the accommodation is not referred to specifically in human rights legislation; see *supra* note 49.

and to facilitate the search for a reasonable accommodation. Finally, in determining whether accommodation amounts to undue hardship, the respondent must take into account the social value that flows from enhancing the access of persons with disabilities to employment and services available to the public.

#### D. *Extended Impact of Human Rights Law*

While human rights statutes have their own procedures of complaint, investigation and remedy, the principles outlined above have an effect on the application of other legislation. An arbitrator of a dispute arising under a collective agreement is required to interpret the collective agreement in a manner consistent with the relevant human rights legislation.<sup>66</sup> There is evidence that an employer's legal duty to re-employ an injured worker under the *Ontario Workers' Compensation Act*<sup>67</sup> is greatly influenced by the duty to accommodate required by the *Ontario Human Rights Code* which has primacy over other legislation unless such legislation expressly overrides the Code.<sup>68</sup> The introduction of a duty to accommodate into Ontario's *Workers' Compensation Act* is especially significant because it invokes the social-political model of disablement into a program rooted strongly in the traditional biomedical and economic models of disablement.

The *Saskatchewan Labour Standards Act*<sup>69</sup> limits an employer's right to terminate an employee for illness or injury. In the case of serious illness or injury, the maximum period of absence protected by this legislation is twelve weeks in a period of fifty-two weeks or twenty-six weeks, if the employee is in receipt of compensation pursuant to the *Workers' Compensation Act*. The *Saskatchewan Labour Standards Act* also requires that where an employee becomes disabled to an extent that interferes with the performance of her duties, an employer shall modify the duties or reassign the employee, where it is reasonably practicable to do so.<sup>70</sup> The onus is on the employer to prove that it is not reasonably practicable to accommodate the employee and the *Saskatchewan Labour Code* will apply the undue hardship test enunciated by the Supreme Court of Canada in *O'Malley v. Central Alberta Dairy Pool*. Such standards are minimal and the

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<sup>66</sup> See *Renaud*, *supra* note 61.

<sup>67</sup> *Ontario Workers' Compensation Act* s. 54(4-6). For a discussion, see Gunderson, *supra* note 47. Alberta's Workers' Compensation system has a voluntary "Post Injury Loss Reduction" (PILR) program in which employers may choose to re-engage an injured worker in modified employment in order to save on workers compensation premiums. While the PILR program is not mandatory under the Alberta Workers' Compensation Act, it is arguable that an employer's refusal to re-engage an injured worker under the PILR program could infringe its duty to accommodate a person with a disability under the Alberta Human Rights, Citizenship and Multiculturalism Act, particularly if such a program would be of some financial advantage to the employer and, presumably, not an "undue hardship". Such an action would have to be brought under the human rights, rather than the workers' compensation, legislation.

<sup>68</sup> *Ibid.* In addition to the special status accorded human rights legislation by the Supreme Court of Canada, the human rights statutes of Alberta, Manitoba, Ontario, Quebec, Saskatchewan and Yukon contain provisions that they have paramountcy over other legislation unless the latter expressly override the former.

<sup>69</sup> R.S.S. 1978 c. L-1 (as amended), s.44.2. Violation of the law can lead to prosecution and reinstatement and compensation of the employee.

<sup>70</sup> *Ibid.* at s.44.3.

primacy of the *Saskatchewan Human Rights Code*<sup>71</sup> over other legislation means that an employer may have greater legal obligations to an employee with disabilities than those imposed by the *Labour Standards Act*.<sup>72</sup> For example, it may not be undue hardship under the *Human Rights Code* for an employer to keep an employee's job open during an absence longer than the twelve weeks minimum of the labour standards legislation.

A further extended influence of human rights legislation flows from the duty not to discriminate on any of the prohibited grounds placed on those who provide services to the public. Accordingly, one presumes that an administrator, tribunal, or court whose service to the public includes the interpretation of legislation within their jurisdiction must undertake such duty in a manner consistent with the human rights legislation which has primacy, unless the relevant statute expressly overrides such primacy.<sup>73</sup> While it is not in the jurisdiction of such persons to hear complaints and provide remedies under human rights legislation, they would presumably be in potential breach of the human rights legislation if they interpreted their own statute in a manner that permitted or condoned an infringement of human rights legislation in the provision of a relevant service to the public. For example, an administrator or tribunal exercising a power under the *Workers' Compensation Act* must presumably do so in a manner that does not infringe, or allow another person to infringe, the relevant human rights legislation. Failure to do so might leave the administrator or tribunal open to a complaint of unlawful discrimination in the provision of services to the public.

#### E. Conclusion

The legislation outlined above is consistent with the existence of a political consensus in Canada, with roots in a broader international consensus, on the principle that persons with disabilities are to be protected against discrimination on grounds of their disabilities. In the majority of jurisdictions the protection appears to extend to persons discriminated against by reason of the care they provide to dependants or close family members with disabilities. Such apparent consensus has resulted in concrete

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<sup>71</sup> *Saskatchewan Human Rights Code*, c. S-24.1.

<sup>72</sup> One aspect of the *Saskatchewan Labour Standards Act* provision that appears to exceed the obligations of the *Human Rights Code* is the restriction of the employer's right to terminate an employee for absence due to the illness of, or injury to, a member of the employee's immediate family. The *Saskatchewan Human Rights Code* confines protection to discrimination on grounds of a person's own disability, race.... etc. Newfoundland, Nova Scotia and British Columbia have similar provisions limiting the scope of discriminatory conduct to the characteristics of the individual himself or herself. It is interesting to speculate whether such restrictions would withstand a challenge under of s.15 of the *Charter*. Not all human rights legislation in Canada is restricted in this way. The respective statutes of Yukon, Northwest Territories, Ontario, Quebec, Prince Edward Island, New Brunswick, Alberta, Manitoba and the federal jurisdiction do not restrict the basis of discrimination to the characteristics of the individual employee etc. It seems likely that, if an individual were fired for absence necessary to attend to an immediate family member with a disability, the employer would have to demonstrate that it would be an undue hardship to accommodate the employee.

<sup>73</sup> Even in jurisdictions where the primacy of human rights legislation is not explicit, s.15 of the *Charter* is likely to render such primacy implicit. See, for example, the dicta of McIntyre J., *supra* note 41 and Sopinka J., *supra* note 42 and the arguments of Molloy *supra* note 38 at 44-45.

measures designed to confer legal rights on persons with disabilities and correlative duties on employers, trade unions and the providers of services to the public to accommodate persons with disabilities. In the following section we shall see that there is some evidence that the rights promised in human rights legislation have been delivered in practice. However, as we shall see in part 4 of this article, the impact of such legal rights upon persons with disabilities has been muted considerably by fairly widespread and effective resistance.

### III. THE DELIVERY OF DISABLEMENT RIGHTS IN PRACTICE— SOME PROGRESS

#### A. *Introduction*

The previous section identified some of the concrete legislative measures taken to establish legal rights for persons with disabilities, arising from an apparent consensus in Canadian society sufficient for the enactment of such legislation. On the surface, it would seem that there ought to be clear signs that access of persons with disabilities to employment and public services is improving. This section focuses on the evidence that some courts and tribunals are committed to the effective implementation of the rights embodied in the human rights legislation. However, there has also been substantial resistance by employers, entrepreneurs, tribunals, courts, legislators, and popular culture, to the recognition and implementation of such rights in practice. Such resistance is significant because, for law to be effective, there must be a substantial measure of voluntary compliance by those on whom the legal obligations are imposed, as well as commitment to the underlying policy or values embodied in a particular law by those responsible for its application and enforcement.<sup>74</sup>

#### B. *Evidence of the Application of Disablement Rights in Practice*

A significant number of judicial and administrative decisions reveal some measure of commitment to implementing the concrete measures designed to establish rights for persons with disabilities, even where there is a conflict with the traditional doctrines of management rights and freedom of contract.<sup>75</sup> With respect to access to public services, in *Howard v. University of British Columbia*,<sup>76</sup> the complainant was deaf and filed a complaint that the University failed to provide him with money for a full-time interpreter. The total cost of an interpreter was estimated at \$160,000. The tribunal found that such accommodation would not constitute "undue hardship", even though the added cost would have an economic impact, such as an increase in student fees of about

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<sup>74</sup> For a discussion of the importance of the "habit of obedience" to the concept of law, see H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961) at 60.

<sup>75</sup> For a discussion of case law, see Lepofsky, *supra* note 54; see also Molloy, *supra* note 38.

<sup>76</sup> (1993), 18 C.H.R.R. D/353 (B.C.H.R.C.) [hereinafter *Howard*]. This decision was facilitated by the Supreme Court of Canada's expansive construction of the term "services to the public" in *University of British Columbia v. Berg* [1993] 2 S.C.R. 353; 102 D.L.R. (4<sup>th</sup>) 665, another case involving the duty to accommodate a student with a disability.

one dollar per student, or a reduction in some other programs or services to students.<sup>77</sup>

The approach in *Howard* underpinned the Supreme Court of Canada's recent decision in *Eldridge v. British Columbia (Attorney General)*<sup>78</sup>. The Court held that the failure of the British Columbia Medical Services Commission and of hospitals in the province to provide sign language interpretation, where it was necessary for effective communication, adversely discriminated against deaf patients and violated their rights under section 15(1) of the *Charter of Rights and Freedoms*. The Supreme Court held that the respondents had not reasonably accommodated the patients' disabilities to the point of undue hardship.<sup>79</sup>

The case of *Quesnel v. Eidt*<sup>80</sup> demonstrates further a tribunal's willingness to challenge the traditional entrepreneurial freedom to conduct a business as one deems fit, without reference to the negative impact on persons with disabilities. The complainant, Tanys Quesnel, has had a condition since birth known as muscular atrophy and uses a wheelchair continuously. The complainant made an appointment with a chiropractor, whose office was located in a building owned by the respondent, Robert Eidt, and was not wheelchair accessible. The Board of Inquiry found a *prima facie* case of discrimination on the grounds of the complainant's disability. The respondent contended that the *prima facie* discrimination was not unlawful because he had offered the complainant two forms of reasonable accommodation: physical lifting of the complainant into the office when access was required; or off-site treatment either in the complainant's home or in another chiropractor's office that was wheelchair accessible. In rejecting the respondent's suggested accommodation, the Board referred to case law that the respondent who discriminates on a prohibited ground must take reasonable steps

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<sup>77</sup> For other examples of the duty to accommodate persons with disabilities in the provision of services, see *De Souza v. Ontario (Liquor Control Board)* (1993), 23 C.H.R.R. D/401 (Ont. Bd. of Inquiry). The respondent was denied service because he suffered from a disability which caused him to limp and slur his speech. In finding unlawful discrimination, the tribunal held that the Liquor Control Board was required to prepare a training manual and educate its staff with respect to persons with disabilities. This decision illustrates the primacy of the *Human Rights Code*, *supra* notes 41, 42 and 73, with respect to the Board's exercise of its statutory powers. Arguably the Board would be in breach of the *Code* if it condoned unlawful discrimination by restaurants or bars to whom the Board issued or renewed liquor licences under the *Liquor Control Act*, R.S.O. 1990, c. L.18.

<sup>78</sup> October 9, 1997 (24896) S.C.C. [1997] S.C.J. No. 86 (QL) [hereinafter *Eldridge*].

<sup>79</sup> Hospital services in B.C. are funded by the Government under the *Hospital Insurance Act*, R.S.B.C. 1996, c. 204. Funding for medically required services delivered by health care practitioners is provided by the province's Medical Services plan, pursuant to the *Medicare Protection Act*, R.S.B.C. 1996, c. 286. The failure of the respective legislation to expressly provide for SLI was not, in itself, found to violate s. 15 of the *Charter*. The violation was the failure of the Medical Service Commission and the hospitals to provide SLI where it was necessary for effective communication. An important dimension of this case is that the Supreme Court gave notice to governments that they could not avoid their obligations under the *Charter* by merely privatizing or contracting out services that are essentially "public" in nature.

<sup>80</sup> *Tanys Quesnel and Ontario Human Rights Commission and London Educational Health Centre and Robert Brent Eidt* (1995) (Unreported Ont. Bd. of Inquiry, Decision no. 95-021). For another example of entrepreneurial resistance to accommodating persons with disabilities, see also *Ripplinger v. Saskatchewan Human Rights Commission* (1996), 131 D.L.R. (4th) 697, (*Saskatchewan Human Rights Commission v. Ripplinger*) 24 C.H.R.R. D/435 (C.A.), *rev'g (sub nom. Ryan v. Ripplinger)* (1993) 20 C.H.R.R. D/427 (Sask. Bd. Inq.).

to accommodate the complainant up to the point beyond which the respondent would experience undue hardship.<sup>81</sup> The Board held that the building of a wheelchair ramp by the respondent at a cost of \$20,000 was an appropriate remedy to prevent future discrimination and was not an undue hardship. In addition to ordering the construction of a wheelchair ramp, the Board required the respondent to pay the complainant \$500 dollars in general damages.<sup>82</sup>

In the employment field, in *Canadian Union of Postal Workers v. Canada Post*,<sup>83</sup> involved the grievor, Sherry Brooks, who injured her back on the job in 1988 and again in 1989. After the second injury, the grievor was off work for almost a year, while undergoing tests and was diagnosed as having spondylosis, a degenerative condition that involves a slackening of spinal ligaments. Initially, the grievor was assigned to light duties involving the lifting of no more than ten pounds. However, following a reduction in the number of staff hours available at the North Battleford post office, management fired the grievor, apparently to clear the way to hire a person capable of doing heavy lifting duties as well as light duties. This option was viewed by the employer as essential for efficiency because it was cheaper to employ a person capable of performing both heavy and light duties. Arbitrator Norman upheld the grievor's claim of unjust dismissal, holding that the employer had failed in its duty to accommodate the grievor. The arbitrator held that it would not be an undue hardship even if the employer incurred increased annual costs of \$10,000 to \$12,000 in order to accommodate the grievor. The grievor was ultimately successful in her claim for reinstatement with an arbitral order for lifting restrictions of ten pounds on any work to be performed by her.<sup>84</sup>

The foregoing decisions have in common a commitment by the respective tribunals to the social-political model of disablement. In each case, the tribunal recognized, at least implicitly, that an important cause of the discrimination against the complainant was the environment that the respondent had chosen to construct, and could choose to alter. Each tribunal weighed the potential costs of accommodation for the respondent against the potential consequences for the complainant if the respondent was not required to remove the handicap it had created. In this weighing process, consideration was given also not only to the costs and inconvenience of accommodation to the respondent but the impact of non-accommodation on the complainant. Such costs included not only financial hardship for the complainant but, also, as in the *Quesnel* case, potential affronts to the complainant's dignity. The board of inquiry rejected accommodation proposed by the respondent such as special arrangements to have the complainant lifted into the chiropractor's office. While such an arrangement would have met the complainant's need for access to the premises, the tribunal considered it a

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<sup>81</sup> The Board cited *Simpson Sears*, *supra* note 61.

<sup>82</sup> See Ripplinger, *supra* note 80 for another example of judicial recognition of a significant duty to accommodate persons with disabilities. In this case, the respondent's compliance with planning legislation was not sufficient to free him from the duty to accommodate those excluded from the premises duty to their reliance on a wheelchair.

<sup>83</sup> (22 December 1992), 706-88-00029 (K. Norman). See discussion in R. Murdock, "Employers Fired Up Over Their Duty to Accommodate", (1996) 26 *Abilities* at 44-46.

<sup>84</sup> This ruling is consistent with case law which recognizes that, while employers and unions are not required to take steps involving undue hardship, they can be expected to experience inconvenience, disruption, expense and even some hardship: see *Jansen supra* note 59 and *Gohm v. Domtar Inc. (No.4)* (1990), 12 C.H.R.R. D/161 (*sub nom. Gohm v. Domtar Inc.*) 90 C.L.L.C. 16, 268 (Ont.Bd. of Inquiry) 89 D.L.R. (4<sup>th</sup>) 305. *Renaud*, *supra* note 61.

potential affront to her dignity that she would have to rely on the charity, goodwill or forbearance of others in order to obtain the level of access to facilities that is available to other persons as a matter of right.<sup>85</sup>

From one perspective, the foregoing cases represent successful outcomes for persons with disabilities. Ms. Brooks was reinstated to her job, received compensation for lost earnings and the employer was required to adhere to the lifting restrictions found to be necessary to accommodate the employee. The case may also be viewed as a victory for legal rights for persons with disabilities because it endorses the principle that an employer with substantial resources is required to take more than *de minimis* steps to reorganize its workplace in order to accommodate a person with disabilities. Arguably, therefore, the case enhances the three aspirations of persons with disabilities identified in the 1990 Standing Committee on Human Rights and the Status of Disabled Persons: accommodation, participation and respect.<sup>86</sup> The award required the employer to accommodate the grievor, even if it involved some increased costs for the employer. Furthermore, the grievor participated in the arrangements to accommodate her. The element of respect is evident in the tribunal's recognition of both the grievor's abilities and the hardship that would befall her if she were terminated from her employment.

Likewise, the tribunal in the *Quesnel* case required the provider of a public service to undertake significant expenditures to accommodate the complainant and other users of wheelchairs who might wish access to his premises. The tribunal proceedings enabled the complainant to participate in determining the appropriate accommodation and in allowing her to choose the appropriate form of accommodation, the tribunal did respect the grievor's need to avoid a sense of being an object of charity. This is also evident in the *Howard* case where the tribunal imposed a not insignificant cost on the University to accommodate the complainant with a hearing impairment and recognized the hardship the complainant would face if no accommodation were made.

The outcome of the cases discussed is not unexpected, considering repeated dicta from members of the Supreme Court of Canada to the effect that "human rights legislation has a quasi-constitutional status, that is, not quite constitutional, but of greater weight and importance than ordinary legislation."<sup>87</sup> The human rights statutes of a majority of Canadian jurisdictions state explicitly that such (Human Rights) legislation has primacy over other legislation, unless the latter provides expressly that it operates, notwithstanding the respective human rights statute. The primacy of human rights protections is buttressed by the section 15 rights entrenched in the *Charter*. Anne Molloy argues persuasively that such Charter rights require liberal interpretation of provincial and federal human rights legislation to fulfill the human rights purposes of the Canadian Constitution.<sup>88</sup>

In spite of a measure of social consensus sufficient to permit the enactment of legal rights for persons with disabilities, the level of resistance suggests a measure of consensus that falls short of that required to translate the de jure rights of persons with

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<sup>85</sup> Further examples of tribunals requiring significant measures of accommodation by employers include: *Re Marianhill v. C.U.P.E. Local 2764* (1990), 10 L.A.C. (4th) 201 (Brown R.M.) at 212-213; *Re Calgary District Hospital Group v. U.N.A. Local 121-R* (1994), 41 L.A.C. (4th) 319 (Ponak).

<sup>86</sup> *Supra* note 5.

<sup>87</sup> *Supra* notes 41 and 42.

<sup>88</sup> Molloy *supra* note 38 at 44-45. *Eldridge*, *supra* note 78 confirms Molloy's arguments.

disabilities to de facto ones. Such resistance is discussed in the following section.

#### IV. RESISTANCE TO DISABLEMENT RIGHTS

##### A. *Introduction*

In spite of the foregoing evidence of some legislative, judicial and academic support for the primacy of legal rights for disadvantaged groups such as persons with disabilities, there continues to be significant resistance to the duty to accommodate persons with disabilities (and others protected by human rights legislation). Such resistance is not accounted for in Bickenbach's three-step model of social policy development despite the evidence of its presence. This resistance takes a variety of forms. One is the overt unwillingness of legislatures, courts and tribunals to pose the challenge to the doctrines of management rights and freedom of contract demanded by the logic and purpose of the purportedly quasi-constitutional provisions of federal and provincial human rights legislation. A second form of resistance arises from the systemic bias of the law in favour of the traditional doctrines of management rights and freedom of contract. A third form of resistance operates in, and through, popular culture, where traditional distorted ideas of disablement and unexamined assumptions about the nature and social utility of the management rights and freedom of contract doctrines continue to dominate the social discourse. These factors combine to facilitate, encourage and legitimate employer and entrepreneurial resistance to the legal rights for persons with disabilities promised by human rights legislation and, arguably, by the *Charter*.

##### B. *Legislative Resistance: Human Rights Legislation*

It may seem paradoxical to advance an argument suggesting legislative resistance to rights for persons with disabilities in light of the existence of the human rights legislation and case law discussed in this article. Yet, as observed by Catherine Frazee, former chair of the Ontario Human Rights Commission and one of many like-minded commentators, the complaint-based nature of human rights legislation in Canada undermines its potential effectiveness.<sup>89</sup> Frazee notes further that "human rights commissions, charged with the enforcement responsibility of these laws, are, without exception, under-resourced to handle the ever-growing number of complaints in their case load."<sup>90</sup> The problem of inadequate resources is exacerbated by the broad spectrum of prohibited grounds of discrimination embodied in human rights legislation in Canadian jurisdictions, a point raised two decades ago in a publication of the Ontario Human Rights Commission<sup>91</sup> and by Galen Martin of the Kentucky Human Rights Commission.<sup>92</sup>

<sup>89</sup> "Speaking Out on Human Rights" (1994) 18 *Abilities* at 40.

<sup>90</sup> *Ibid.* at 40. The Human Rights Commissioner in Alberta has stated publicly that lack of funding has cast into chaos human rights enforcement in British Columbia and Saskatchewan (but not, of course, Alberta).

<sup>91</sup> *Life Together: A Report on Human Rights in Ontario* (Toronto: Ontario Human Rights Commission, 1977) at 55-56, 89-90.

<sup>92</sup> "New Civil Rights and Coverages, Progress or Racism" (1975) 4 *The Journal of Intergroup Relations* at 1. That author's concerns and those of the Ontario Commission are not about expanded grounds of human rights protection as such, but with the ability of typically cash-

The reality is that complaint-based systems pose little threat to those engaged in systemic discrimination because so much depends on the courage and tenacity of individuals to pursue the matter on their own behalf. The *Quesnel* case, for example, took around seven years to produce a Board of Inquiry decision and longer to have it implemented. Unequal power, fear of reprisals in the workplace, the frequent specificity of remedies to the circumstances of individual complainants and the general ineffectiveness of courts and human rights commissions in monitoring awards and guarding against reprisals are among the factors that render complaint-based human rights legislation notoriously impotent in challenging the systemic discrimination perpetrated by employers and the providers of services to the public.

Even when a complainant is successful before a human rights tribunal, the remedies awarded tend to focus on the specific injury caused to the complainant rather than on the systemic discrimination experienced by others in the legally protected category. The *Action Travail*<sup>93</sup> case is a notable exception but such broad remedies have been applied rarely in subsequent cases under the *Canadian Human Rights Act* and analogous provincial legislation.

Legislators are well aware of the inherent shortcomings of complaint-based models for dealing with systemic discrimination but, with some exceptions, have been remarkably inert in fashioning systemic remedies to deal with systemic discrimination. Such inactivity can be traced to the manner of the introduction of the concept of indirect (systemic) discrimination into Canada's human rights laws through the recognition of the approach adopted by the United States Supreme Court in *Griggs v. Duke Power Corp.*<sup>94</sup> Instead of drafting legislation to define the nature and scope of, and fashion remedies for, systemic discrimination, federal and provincial legislators in Canada stood idly by while human rights boards of inquiry<sup>95</sup> and then the courts, engaged in the creative interpretation of statutory language that was never intended to deal with the sophisticated concept of systemic discrimination. The result of ad hoc, piecemeal judicial development of the concept of indirect discrimination was delay and confusion that could have been avoided if Parliament and the provincial legislatures had enacted

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strapped human rights commissions to deal with escalating case loads of complaint-based systems.

<sup>93</sup> *Canadian National Railway Co. v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114, 8 C.H.R.R. D/4210 (1987) [hereinafter *Action Travail*.]

<sup>94</sup> 401 US, 424 (1971).

<sup>95</sup> The first impact of the *Griggs* approach was felt in Canada in "equal pay for equal work" cases: see *re Alberta (A.G.) and Gares et al* (1976), 67 D.L.R. (3d) 635 (Alta. S.C. T.D.), 76 C.L.L.C. 14,016. For a while, it seemed as if "equal pay" cases would be treated as an exception in Canada but, in the cases *Singh v. Security and Investigation Services Ltd.* (May 1977), (Ont. Bd. Of Inquiry) [unreported] and *Colfer v. Ottawa Board of Commissioners of Police* (Jan. 1979), (Ont. Bd. of Inquiry), the language of the Ontario *Human Rights Code* was held to embody indirect or systemic discrimination. This approach was finally endorsed by the Supreme Court of Canada in *Ontario Human Rights Commission and O'Malley v. Simpson Sears Ltd.*, [1985] 2 S.C.R. 536, 52 O.R. (2d) 799 [hereinafter *O'Malley* cited to S.C.R.] but not before the delay and uncertainty of the judgements of the Ontario Divisional Court (1982), 36 O.R. (2d) 59, 133 D.L.R. (3d) 611 and the Ontario Court of Appeal (1982), 38 O.R. (2d) 423, 138 D.L.R. (3d) 133, which rejected the argument that the legislation embodied the concept of indirect, or systemic, discrimination.

legislation to prevent and remedy systemic discrimination.<sup>96</sup>

It is true that following the *Abella Report*<sup>97</sup>, which identified the shortcomings of complaint-based remedies and the recognized need for pro-active legislation, the federal jurisdiction and Ontario enacted pro-active employment equity legislation. However, the original federal *Employment Equity Act*<sup>98</sup> had little impact on the representation of persons with disabilities in the workplace, largely because it imposed no legally enforceable timetable or obligations on employers with respect to the actual representation of persons with disabilities.<sup>99</sup> The 1995 Federal Act embodies measures that may improve the compliance of employers in the implementation of the employment equity plans demanded by the statute. It is too early to make an informed judgement of the impact of the ostensibly beefed-up enforcement mechanisms of the new Act.<sup>100</sup>

Nevertheless, the greater efficacy of pro-active over complaint-based legislation is illustrated by the impact of the *Official Languages Act*<sup>101</sup> in raising the representation of francophones in the federal public service to a figure corresponding to their representation in the Canadian population.<sup>102</sup> The pro-active approach of the pay equity legislation of Ontario and Manitoba has also had an impact on the relative earnings of women that would not have been achieved by complaint-based legislation of the human rights model.<sup>103</sup> Accordingly, the absence in Canada of proactive employment equity legislation with legally enforceable obligations to accommodate persons with disabilities raises a serious doubt about the commitment of legislators to legal rights for persons with disabilities in the workplace.

Another flaw in the individual complaint-based nature of most of Canadian human rights legislation is that it reinforces the super-ordinate position of the traditional biomedical model of disablement, in which the problem is defined and located in the

<sup>96</sup> The *British Race Relations Act 1976* amended the 1968 Act with the introduction of a statutory definition of the new concept of indirect (systemic) discrimination and special remedies to deal with it (formal investigations). While it is admitted that formal investigations have proved inadequate, in practice, they do indicate legislative recognition of the quite different character of direct and indirect (systemic) discrimination and the need for different remedies and procedures.

<sup>97</sup> R.S. Abella, *Report of the Commission on Equality in Employment* (Ottawa: Minister of Supply and Services, 1984) especially chapter 6, [hereinafter *Abella Report*].

<sup>98</sup> *Employment Equity Act*, 1985 c.23 as rep. by *Employment Equity Act* S.C. 1995, c. 44. See also *Employment Equity Act*, R.S.O. 1993, c. 35 (effective Sept. 1, 1994), as rep. by *Job Quotas Repeal Act*, R.S.O. 1995, c. 4 (effective Dec. 14, 1995).

<sup>99</sup> The Ontario *Employment Equity Act*, *ibid*, did impose enforceable timetables prior to its repeal.

<sup>100</sup> Section 12 of the 1995 federal *Employment Equity Act*, *supra* note 98, does require an employee to make "all reasonable efforts" to implement its statutorily mandated employment equity plan and, to undertake regular monitoring of it. The *Act* also provides enforcement procedures for the implementation of an employer's plan. As always, the success of enforcement will depend largely upon the resources allocated by the government and incentives for compliance. While experience under the *Official Languages Act*, *infra* note 101, may be a cause for optimism it must be tempered by the federal government's clear policy in recent years to off-load its traditional political and fiscal responsibilities onto the provinces and ultimately to cash-strapped local authorities.

<sup>101</sup> *Official Languages Act*, R.S.C. 1985, c. 41 (4th Supp.).

<sup>102</sup> *Public Service Commission of Canada, Annual Report, 1982* (Ottawa, 1983). See also *Abella Report*, *supra* note 94 at p.199.

<sup>103</sup> *Pay Equity Act*, S.O. 1987, c.34; and S.M. 1985-86, c.21.

impaired individual who does not fit in to the workplace or other aspect of the social environment. In human rights proceedings, the discourse treats the workplace or other social environment as given and the individual complainant as one who seeks special treatment to compensate or make allowances for his or her inadequacy. This format relegates to relative insignificance the social-political model of disability that the construction of the environment is central to the creation of handicap.

Furthermore, the complaint-based format diverts attention from the (potential) handicapping effect of the particular working or social environment on persons other than the complainant.<sup>104</sup> Such disadvantageous effects may be experienced not only by those defined as disabled but by some of the able-bodied— a fact over-looked when disablement is viewed exclusively from the biomedical and economic perspectives without reference to the handicapping effect of the workplace and other social environments.

Finally, the complaint-based system invites what a team of authors has termed the "legal minefield"<sup>105</sup> of case law and legalism that has been created by the individual complaint system and has served as an effective device for employers and the providers of services to the public to resist to the establishment of disablement rights. This is illustrated amply by the Supreme Court of Canada's decision in *Bhinder v. Canadian National Railway Co.*<sup>106</sup> described by Molloy and other commentators as "disastrous from the perspective of persons with disabilities".<sup>107</sup> One of the results of the *Bhinder* judgement has been more than a decade of legalism and confusion over whether a duty to accommodate applies to a BFOR in the case of direct discrimination or merely in the case of indirect discrimination. The resulting complexity of the law has become such that, several years after the Supreme Court's ruling in *O'Malley*, an employer saw fit to advance the argument before an Ontario board of inquiry that no statutory duty to accommodate existed at all in that province.<sup>108</sup>

To summarize, the notorious shortcomings of the complaint-based model of human

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<sup>104</sup> This legal format also reinforces the false dichotomy between the able-bodied and the "disabled" population. The reality of workplaces and other social environments is that they "handicap" along a spectrum, not on an all or nothing basis. The physical demands of twelve-hour shifts on workers may handicap workers with certain physical conditions so that they cannot meet the employer's standards of performance and attendance, either absolutely or with significant damage to their health. In such cases, the employer is required to demonstrate that it would be an undue hardship for it to accommodate the "disabled" worker(s) by altering attendance requirements or the job duties. What is missed from such discourse is that negative effects of the twelve-hour shifts are not confined exclusively to the "disabled" but are experienced also by the "able-bodied". The difference is that, for the former, the combined effect of the work environment and an impairment prevents his or her meeting the employer's performance or attendance requirements. While the latter may be able to meet the employer's minimum performance or attendance requirements, the working environment may have negative effects on their health, performance and attendance. In such a case, the employer is under no legal duty to accommodate the worker because he or she is not "disabled". Nevertheless, the "handicapping" effect of the work environment is just as real for such "able-bodied" worker even if its effect on his or her performance, attendance and health is less severe than for the "disabled" person.

<sup>105</sup> D'Andrea et al., *supra* note 53.

<sup>106</sup> [1985] 2 S.C.R. 561, 23 D.L.R. (4<sup>th</sup>) 481 [hereinafter *Bhinder*].

<sup>107</sup> Molloy, *supra* note 38 at 33.

<sup>108</sup> *Roosma v. Ford Motor Co. of Canada* (1996) 53 D.L.R. (4<sup>th</sup>) 90, 26 C.H.R.R. D/89 (Mercer) [hereinafter *Roosma*].

rights legislation and the meticulous avoidance by all legislatures in Canada of effective pro-active employment equity models, contribute to the suspicion that governments in Canada have little commitment to establishing effective rights for persons with disabilities.<sup>109</sup>

### C. *Judicial and Adjudicative Resistance*

#### 1. *Overt Resistance*

There is evidence, too, of resistance to legal rights for persons with disabilities by both courts and adjudicative tribunals. While a number of judicial and tribunal decisions have advanced the interests of persons with disabilities within the confines of the complaint-based structure imposed by legislatures (as discussed in part 3 above), some Canadian courts have accorded undue deference to the management rights and freedom of contract doctrines. Such deference has impeded the enforcement of the supposedly quasi-constitutional legal rights for persons with disabilities. The *Bhinder* case illustrates the judicial deference to the management rights doctrine of such a magnitude that the decision threatened to destroy the entire legal concept of accommodation by employers. The duty to accommodate was salvaged only by a combination of statutory intervention and an unconvincing and unsatisfactory distinguishing of cases by the Supreme Court in the *Central Alberta Dairy Pool* case and in a subsequent line of authority.

While it may be argued that much of the damage wreaked by *Bhinder* has been repaired by such devices, its message of deference to the management rights doctrine has not gone unheeded by some lower courts and human rights tribunals. For example, in *Woolworth Canada Inc. v. Human Rights Commission Newfoundland*,<sup>110</sup> Orsborn J. considered whether a board of inquiry under the *Newfoundland Human Rights Code* had jurisdiction to hear a complaint of alleged discrimination by an employee who was dismissed because he could not perform all the requirements of his job. Orsborn J. reasoned that it [performing ones duties] is a "fundamental obligation of the employee in an employment relationship"<sup>111</sup> and posed the question: "if a person *absolutely incapable of* doing a particular job due to a physical disability seeks to be employed to do that job, could it be suggested that the refusal of the employer contravenes the *Code*, in the sense of adverse effect discrimination, and that the employer therefore has a duty to accommodate the individual, up to a point of undue hardship?"<sup>112</sup> In answering "no", Orsborn J. held that "actions taken because of a person's *complete inability* [emphasis

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<sup>109</sup> This author has already advanced this argument in I.B. McKenna, "A Proposal for Legislative Intervention in Canadian Human Rights Law" (1992) 21:2 Man. L.J. 325. While a compliance monitored approach, such as that of the federal *Employment Equity Act*, *supra* note 98, may avoid the worst deficiencies of complaint-based models, the former does not automatically break down the cultural commitment to the biomedical perspective in which the "disabled persons" are viewed as the problem. Rather, it is the continuing commitment to the biomedical perspective which has rendered the employment equity approach largely ineffective to date.

<sup>110</sup> (1994), 114 Nfld. & P.E.I.R. 317, N.J. No. 25 (S.C.T.D.) [hereinafter *Woolworth* cited to Nfld & P.E.I.R.].

<sup>111</sup> *Ibid.* at 330.

<sup>112</sup> *Ibid.*

added] to do his or her job are not within the ambit of the *Code* and do not engage the adjudicative and remedial authority of a board of inquiry."<sup>113</sup> In essence, the judge's reasoning was that since the employee was dismissed because of his inability to perform all the tasks of the job, he was not discriminated against because of his physical disability per se. Accordingly, there could be no breach of section 9 of the *Code* which applies only to discrimination because of disability or some other prohibited ground.

It is difficult to find any redeeming features in the *Woolworth* judgement. Orsborn J. had the benefit of the Supreme Court's decision in *Central Alberta Dairy Pool* in which Madam Justice Wilson for the majority clearly defined the legal duty of employers to accommodate an employee where a neutral BFOR impacts an employee adversely on a prohibited ground of discrimination.<sup>114</sup> Presumably, Orsborn J. was also aware of the wealth of Supreme Court dicta which asserts that human rights legislation has a quasi-constitutional nature and is to be interpreted broadly to achieve its goal of protecting the disadvantaged in society. Therefore, it is curious that the Newfoundland court should explicitly reject the argument that the employer applied to the complainant a work rule applied uniformly to all employees, that all the stated job duties had to be performed and that such work rule, neutral on its face, had a discriminatory effect on the complainant because of his physical disability. Such an approach would have required the board of inquiry to determine whether the employer demonstrated that it could not accommodate the employee, without incurring undue hardship for example by altering or dropping some of the job requirements. Instead, Orsborn J. removed the matter from the tribunal's jurisdiction, rendering the employer's work rule incapable of legal challenge on human rights grounds.<sup>115</sup>

An insight into the policy approach taken by the respective bodies in the Newfoundland cases of *Woolworth* and *Barnes* and in the Ontario cases of *Bonner* and *Chamberlain* is provided by a passage from the decision in *Bonner*:

...that which must be accommodated if reasonably possible is the handicap, not the inability. It is the employee who must be reasonably assisted to satisfy the requirements of the work, rather than the work that must be modified to satisfy the requirements of the employee...there is no requirement imposed on employers either to hire or to retain employees who, because of handicap, are in fact incapable of doing the work, simply because they have the resources to tolerate actually deficient work.<sup>116</sup>

This statement indicates that the tribunal was prepared to recognize a legal duty on the part of management to accommodate a disabled employee by assisting her to meet the requirements of the job but not to change the requirements of the job. While it is true that job analysis and the design organization of the workplace have been traditionally in the virtually exclusive domain of managerial discretion, there is nothing in the

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<sup>113</sup> *Ibid.*

<sup>114</sup> *Supra* note 47.

<sup>115</sup> The *Woolworth* judgement was applied in *Barnes v. Canada Life Assurance Co.* (1994), 24 C.H.R.R. D/409 [hereinafter *Barnes*], where the Board of Inquiry considered itself bound by the court's ruling. Orsborne J. adopted with approval the reasoning of the Ontario board of inquiry in *Bonner v. Ontario (Ministry of Health)* (1992), 16 C.H.R.R. D/485, 92 C.L.L.C. 17,019 [hereinafter *Bonner*]. Similar reasoning was adopted by the Ontario board of inquiry in *Chamberlain v. 599273 Ontario Ltd.* (1989), 11 C.H.R.R. D/110 [hereinafter *Chamberlain*].

<sup>116</sup> *Bonner, Ibid.* para. 83.

language or policy of human rights legislation to justify continuing judicial deference to those traditional managerial privileges. On the contrary, the quasi-constitutional character of human rights legislation demands surely that such discretion be fettered by a broad judicial construction of the obligations imposed by such legislation.<sup>117</sup>

The board of inquiry's statement in *Bonner* also illustrates the impact of the incomplete and distortive traditional biomedical/economic model of disablement. It is evident from the foregoing quotation, and from the decision as a whole, that the board considers "handicap" (the term used in the *Ontario Human Rights Act*) as exclusively a product of the employee's impairment and resulting inability to perform the tasks demanded of him. In *Woolworth*, Justice Orsborn states: "[a]ctions taken by a person's complete inability to do his or her job are not within the ambit of the Code and do not engage the adjudicative and remedial authority of a board of inquiry."<sup>118</sup> As in *Bonner*, such an approach lacks the perception that "handicap", as defined by the United Nations<sup>119</sup>, is induced in substantial measure by the workplace or other social environment that is constructed and in which persons with certain impairments are expected to operate.

It is significant that in failing to recognize the social-political dimension of handicap, the board in *Bonner*, and the other tribunals identified above, could make no sense of a duty to accommodate that included a removal of handicaps created by the very fabric of the workplace environment constructed by employers. When the social construction of handicap is understood, one can understand more readily why the duty to accommodate must address the very structures that have contributed to the creation of a handicap.<sup>120</sup>

## 2. Systemic Resistance—Two Case Studies

The foregoing cases represent overt judicial and adjudicative resistance to the duty to accommodate. In this subsection, we shall discuss two cases in which the respective tribunals' resistance to the human rights duty to accommodate is rooted in systemic factors. This resistance is more subtle and, arguably, more potent.

### (a) *The AirBC Case*

In the *AirBC*<sup>121</sup> case the employer dismissed the grievor, Lynne Brown, for non-culpable absenteeism. The grievor's union, C.A.L.D.A., argued that the dismissal was in breach of the collective agreement. One ground of the union's argument was that the employer discriminated against the grievor on grounds of her disability, which required her to be absent from work frequently, unexpectedly and, at times, for substantial periods. In her five and one-half years of employment with the respondent the grievor had missed over two years, approximately 35%, of her scheduled time. The union

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<sup>117</sup> Molloy, *supra* note 38 at 43-44.

<sup>118</sup> *Supra* note 110.

<sup>119</sup> *Supra* note 29.

<sup>120</sup> Such lack of understanding seems to be present in the discussion of *Bonner* and in Michael LeFrancois, "The Scope of the Duty to Accommodate in the Large Employment Setting" (1996) 5:1 C.L.E.L.J. 1.

<sup>121</sup> *Supra* note 60.

contended that the dismissal was unfair because human rights legislation had eliminated an employer's right to terminate for non-culpable absenteeism. In the alternative, the union argued that, even if the employer were entitled to dismiss for non-culpable absenteeism, the employer failed to take steps to accommodate the grievor to the point of undue hardship. Arbitrator McPhillips found that it was an undue hardship for the employer to accommodate the grievor and that the dismissal was justified.

*Prima facie*, the case appears to represent an objective weighing of the competing interests of management rights and the interests of the grievor and other persons with disabilities. The arbitration board adopted a two-step process whereby it determined first, from the facts of the case and arbitral jurisprudence, whether the employer had any basis for dismissing the grievor for non-culpable absenteeism. Having decided this question in the affirmative, the board considered the second question, whether the dismissal infringed human rights legislation, in particular, the duty to accommodate persons with disabilities. The board acknowledged the legal authorities that imposed a duty to accommodate to the point of undue hardship on both the employer and the union.

While the two-step process may appear to represent an objective weighing of the competing claims of traditional management rights as endorsed by the collective agreement and the statutory duty to accommodate persons with disabilities, we shall observe, below, its inherent bias in favour of the traditional management rights doctrine. Notwithstanding the fundamental rights for persons with disabilities that the human rights legislation purports to confer,<sup>122</sup> the two-step process relegates the human rights obligations to the status of a side show instead of the central role it is supposed to perform.

Adopting the two-step approach, the board first invoked arbitrator Paul Weiler's rationale for the right of the employer to require attendance by an employee stated in *Re U.A.W. and Massey Ferguson Ltd.*:

...arbitrators have agreed that, in certain very serious situations, extremely *excessive* [emphasis added] absenteeism may warrant termination of the employment relationship, thus discharge in a non-punitive sense. *Because the relationship is contractual* [emphasis added], and the employer should have the right to the performance he is paying for, the employer should have the power to replace an employee on a job, notwithstanding the blamelessness of the latter. If an employee cannot report to work for reasons which are not his fault, he imposes losses on an employer who is also not at fault. To a certain extent, these kind of losses due to innocent absenteeism must be borne by the employer. However, after a certain stage is reached, the accommodation of the legitimate interests of both employer and employee requires a power of justifiable termination in the former.<sup>123</sup>

The board in the *AirBC* case also relied on the pronouncements of arbitrator Owen Shime in *Re U.A.W., Loc. 458 and Massey-Ferguson Industries Ltd.*:

I conclude from the cases that in order to justify a discharge the company must establish: (a) *undue* [emphasis added] absenteeism in the grievor's past record, and, (b)

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<sup>122</sup> This is a contemporary example of the ideological role of legal process and reasoning under the guise of objective neutrality discussed by the Critical Legal Studies School. For example, see David Kairys, "Legal Reasoning" in D. Kairys, ed., *The Politics of Law: A Progressive Critique*, (New York: Pantheon Books, 1982) at pp.11-17.

<sup>123</sup> (1969), 20 L.A.C. 370 at 371.

that the grievor is incapable of regular attendance into the future. I am also satisfied that the company may look at the past attendance record as well as other factors for the purpose of drawing inferences or concluding that the grievor is not capable of regular attendance into the future. I also conclude that in those cases where there was no expectation that the attendance would improve the discharges were upheld, whereas in those cases where there was some evidence of a foreseeable likelihood of change into the future the employee was reinstated subject to certain terms.<sup>124</sup>

The board in *AirBC* concluded from the authorities that the first test is for the employer to establish *excessive absenteeism*<sup>125</sup> on the part of the employee. Upon reviewing Ms. Brown's record, the board found that her length of time away from work "far exceeds that of any other employee in the S.O.C.C. (Systems Operation Control Centre) and is excessive by any reasonable standard."<sup>126</sup> The board judged from the grievor's record of "excessive" absenteeism that the employer met the first test justifying non-culpable dismissal. The second test requires the conclusion from the evidence that the grievor is incapable of regular attendance in the foreseeable future<sup>127</sup>. The board concluded from the grievor's absence record and the medical evidence of her existing condition that her unsatisfactory pattern of absences would continue.

It was the board's conclusion that the employer had established a basis for discharging the grievor for non-culpable absenteeism based on the tests set out in the arbitral jurisprudence. The board considered that "the next issue is the application of human rights legislation to this situation. "As we shall contend below, by adopting this approach, the board discounted the authority of human rights legislation in two respects. First, the board was able to ignore entirely the role that the employer's construction and organization of the work environment played in the creation of the grievor's disability.<sup>128</sup> The board focussed entirely on the grievor's medical condition and her record of absences compared with the "norm" and gave no consideration to the extent to which the organization of shifts, job duties, standards of performance and the physical environment of the workplace contributed to the grievor's medical condition and her ability to contribute to the employer's operation in a manner deemed satisfactory.

The board's two-step approach treated as "given" management's *a priori* right to organize the work environment in a manner that was inherently disadvantageous or handicapping to the grievor. This had the effect of shielding from the scrutiny of the human rights legislation the very managerial activities that created the *prima facie* systemic discrimination against the grievor. Accordingly, at no time in the board's proceedings was management called upon to demonstrate that, in its initial construction of the physical work environment, it would have been an undue hardship to have

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<sup>124</sup> (1972), 24 L.A.C. 344 at 348.

<sup>125</sup> *Ibid.*

<sup>126</sup> *Supra* note 60 at 118.

<sup>127</sup> *Ibid.* The board relied on several authorities including: *Re Niagara Structural Steel Ltd. and U.S.W. Local 7012* (1978), 18 L.A.C. (2d) 385 [hereinafter *Re Niagara*] and *Re Canada Post Corp. and C.U.P.W.* (1982), 6 L.A.C. (3d) 385 [hereinafter *Re Canada Post*]. *Re Niagara* represents a line of authority that places the burden of proof on the employee to demonstrate that the absentee record is likely to improve to a satisfactory level in the foreseeable future. *Re Canada Post* represents a line of authority placing the onus of proof on the employer to demonstrate that the unsatisfactory attendance is likely to continue.

<sup>128</sup> "Handicap" in the language of the United Nations and of Bickenbach as discussed in part 1.

established, *ab initio*, such work arrangements as flexible shifts, rotation of duties, flexible attendance, leave-of-absence policies, job sharing, casual relief workers or other arrangements capable of accommodating such foreseeable circumstances as befell the grievor.

The decision in *AirBC* illustrates the continuing barriers confronting the entrenchment of legal rights for persons with disabilities, notwithstanding the quasi-constitutional nature of human rights legislation. It is notable that the arbitration board chose to recognize that the employer had a basis for discharging the grievor for non-culpable absenteeism on the strength of a long line of arbitral jurisprudence developed prior to legislative and judicial recognition of the duty to accommodate those subject to indirect discrimination. Arbitrator Weiler in *Re U.A.W. and Massey-Ferguson Ltd.* states "extremely excessive absenteeism may warrant termination of the employment relationship" and "[b]ecause the relationship is contractual, and the employer should have the right to the performance he is paying for, the employer should have the power to replace an employee on a job, notwithstanding the blamelessness of the latter."<sup>129</sup>

It is clear that the board in the *AirBC* case judged the grievor's absenteeism to be excessive largely on the basis of the average absence record of the rest of the employer's workforce, comprising persons without disabilities. Furthermore, the board relied on Weiler's implication that the contract of employment entitles the employer to expect from an employee a record of absenteeism that does not fall substantially below that of other employees. Yet, these legal opinions were formed before the application of human rights legislation and the legal duty (unrecognized at common law) not to discriminate on grounds of disability. It is surely contrary to current human rights legislation for an employer or an arbitration board to judge as excessive the attendance record of an employee with disabilities by comparing such record to that of employees without disabilities. The fact that such comparison was permitted by arbitrators in the era prior to human rights legislation is not only irrelevant but, arguably, the very mischief that the human rights legislation sought to address.

As for the contractual performance that an employer is paying for, it must be assumed that the parties intended contractual performance consistent with the rights and duties imposed by human rights legislation, including the duty not to discriminate on grounds of disability. Accordingly, it is submitted that an employer's contractual right can no longer be assumed to embody an expectation that the attendance record of an employee with a disability will not fall substantially below that of employees without a disability. Instead, an employer's and employee's contractual expectations must now be assumed to embody an implied duty on the part of the former to accommodate the employee who has a disability up to the point of undue hardship. It is contended that such accommodation should be sought by such measures as reorganizing the workplace, reorganizing shifts, providing special facilities, technology or other arrangements, modifying hours or duties etc., up to the point where the employer can demonstrate that the potential accommodation would impose an undue hardship on the employer. In the assessment of undue hardship, the employer ought to weigh not only the potential costs to be incurred but the potential benefit to the persons with disabilities and to society at large.

It is clear from the *AirBC* case that neither the employer nor the arbitration board assessed the contractual obligations of the employer in light of a liberal interpretation

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<sup>129</sup> *Supra* note 123.

of the broad purposes of the human rights legislation. Instead, priority was given to the weight of precedent accumulated from arbitral awards handed down in an era when there existed no statutory duty to accommodate persons with disabilities. Such appeal to precedent is an inherently conservative force in the law and, in the *AirBC* case, caused a significant bias in the application of the human rights legislation to the collective agreement.

A second bias inherent in the two-step approach is that it predisposed the arbitration board to apply a less rigorous test to the employer's conduct than that imposed by the human rights statute. This is illustrated by the board's observation that "there is no basis at all in the evidence to conclude that the grievor's attendance would improve if a different job was tried and/or a reduced schedule was implemented."<sup>130</sup> Furthermore, it is submitted that in asking itself "was what management did reasonable in light of the grievor's excessive absenteeism?", the board posed the wrong question. In light of the obligations of the human rights statute, the board ought to have asked: "would the employer experience undue hardship, if it sought to accommodate the grievor by offering her a new job with a reduced work schedule, or some other form of accommodation, even if the grievor's attendance record was not an improvement on the past?" Due to its improper concern with the grievor's so-called "excessive" absenteeism (that is compared with the norm for able-bodied employees), the board asked itself the wrong question and applied an inappropriate test.

The evidence presented by the employer in the *AirBC* case suggests that much of the hardship it suffered from the grievor's absences was due to the particular difficulties involved in scheduling work for her job as a flight dispatcher in the physical environment created by the employer at the outset of the grievor's employment, without reference to the employer's legal duty to accommodate any worker who might foreseeably have a future disability. Furthermore, there is no evidence referred to in the board's decision that the employer weighed the potential costs, benefits or hardship that would flow from accommodating the grievor in another job, including one outside the bargaining unit. While such forms of accommodation might impose significant cost on the employer, it must be noted that the legal test of accommodation is one of undue hardship. In determining whether the hardship of accommodating a person with a disability is undue, arbitration boards and human rights tribunals should perhaps place more weight than they have, hitherto, on the fact that much of the hardship on employers is self-inflicted and due, in large measure, to their own culpability in constructing workplaces that systemically handicap a significant proportion of the population.

A final bias in the board's two-step approach in *AirBC* arose from its incomplete assessment of undue hardship in the accommodation of persons with disabilities. The assessment of whether hardship is "undue" should take account not only of the negative impact of the accommodation on the employer but its positive impact on the person with a disability.<sup>131</sup> Yet, in the *AirBC* case, the board considered no evidence of the potential benefit of accommodation to the grievor. Indeed, in its consideration of the employer's offer of casual employment to the grievor, the board voiced no concern that such an arrangement would cut the grievor off from the significant pay and benefits available for regular employees. The board did weigh evidence that the grievor's physical and

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<sup>130</sup> *Supra* note 60 at 118.

<sup>131</sup> This is entailed by the quasi-constitutional status of human rights legislation and has been recognized explicitly in the *Jansen* case, *supra* note 65.

mental condition had actually deteriorated during times of unemployment, due to her condition, but this evidence was used only to support the employer's case for *not* accommodating her in spite of its relevance to the impact of accommodation on the grievor. While there is no indication that the grievor's counsel advanced such an argument, it is important to bear in mind the Supreme Court's characterization of human rights legislation as "the final refuge of the disadvantaged and the disenfranchised."<sup>132</sup> With this in mind, the arbitration board in *AirBC* can be justly criticized for failing to take the initiative to hear evidence and argument on this issue.

The *AirBC* case illustrates Bickenbach's observation of the distortive effect of the biomedical and economic models of disablement and the need for their synthesis with the social-political model. The evidence in the case focussed exclusively on the biomedical issues associated with the diagnosis and prognosis of the employee's condition and on the economic costs incurred by the employer by virtue of the grievor's attendance record and the costs likely to be incurred by the employer in any future accommodation of the grievor. Had the social-political model exerted any influence on the proceedings, the arbitration board would have heard and weighed evidence and argument on the impact of the working environment in handicapping the grievor. Furthermore, the burden on the employer would have been weighed against the potential benefits of accommodation to the grievor, whose exclusion from the workplace would have imposed substantial hardship on her. Had the social-political model exerted appropriate influence, the tribunal would have been called upon to weigh the competing interests and ethical claims of the employer and the grievor. Instead, constrained by the biomedical/economic perspective of disablement and an uncritical acceptance of the management rights doctrine, the tribunal failed to address the ethical and policy questions demanded by human rights legislation and the duty to accommodate.

It is evident in the *AirBC* case that, in spite of the Supreme Court of Canada's instructions, the arbitration board relied on "impressionistic and speculative views"<sup>133</sup> of the hardship that would be encountered by the employer in removing the very handicaps that the employer had constructed for the grievor in its organization of the workplace. The *AirBC* case illustrates that the so-called quasi-constitutional principles of human rights legislation were substantially watered down in practice by the undue deference of the arbitration board to the management rights doctrine.

(b) *The Roosma Case*

Deference to the management rights doctrine has not been confined to arbitration tribunals, which might be suspected as unduly susceptible to the management rights doctrine that has dominated both the common law of employment and Canadian

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<sup>132</sup> *Supra* note 42 per Sopinka J. at 339.

<sup>133</sup> The Roeher Institute in, *On Target? Canada's Employment Related Programs for Persons with Disabilities* (Toronto: Roeher Institute, 1992) at 36, notes that in practice the objective test is ignored by boards and tribunals and impressionistic evidence does serve as the sole basis of establishing a BFOR, and the related "undue hardship" issue. For example, in *Lee v. British Columbia Maritime Employers Association* (1989), 10 C.H.R.R. D/6526, the board relied on a supervisor's testimony that a worker was not sufficiently co-ordinated to do the job, even though the worker had passed the mandatory medical examination and had worked successfully on the docks for 418 days over a five year period.

collective bargaining law since its inception. An approach similar to that in *AirBC* was adopted by the human rights board of inquiry in *Roosma v. Ford Motor Co. of Canada*.<sup>134</sup> While the latter case involved alleged discrimination on grounds of religion, it illustrates both the vehement resistance of an employer to the encroachment of human rights legislation on management rights and the tribunal's deference to that doctrine, in spite of the quasi-constitutional status of human rights legislation. *Roosma* also provides an important insight into the systemic difficulties facing persons with disabilities in a scientifically managed workplace.

The vehemence of the employer's resistance is illustrated by its legal challenge to the very existence of a statutory duty to accommodate, notwithstanding the overwhelming judicial authority and plain statutory language that such a duty exists. Indeed, it is an ominous sign that the employer's resistance to the very existence of a statutory duty of accommodation was supported by the union, which was joined as a party to the case. While this was a case of alleged religious discrimination, it is clear from the union's evidence that its objection to the principle of a duty to accommodate was founded on a fear that the seniority rights negotiated in the collective agreement would be undermined not only by the accommodation of persons on religious grounds but by a flood of demands by workers with disabilities to be accommodated.<sup>135</sup> This matter will be discussed further below.

The complainants were fired by the Company because they did not comply with the work rule that they work a night shift every second Friday. The employees' refusal was based on their religious belief and, although there was a *prima facie* case of indirect discrimination, the employer satisfied the board that the attendance requirement was a *bona fide* occupational requirement and that it would be an undue hardship for the employer to be required to accommodate the complainants to allow them every Friday night free from work. Accordingly, the dismissals were upheld as justified.

The crucial factor in the outcome of the *Roosma* case was the evidence that the Friday evening shift was one of particularly high absenteeism, which the leading union witness attributed to a reaction by many workers to stress and overwork.<sup>136</sup> The problems created by absenteeism were compounded by the fact that, in its budgetary calculations, Ford's head office in Detroit made virtually no provision to meet the costs of absenteeism. Every possible method of accommodating the claimants was rejected by the employer, the union, or both, because any accommodation would have deprived an existing employee of a more favourable job, jealously protected on the basis of seniority. Indeed, it was the union's fear that, if the complainants were accommodated by transfer to a more favourable job or shift, without regard for their seniority, there would be a flood of similar requests for non-seniority based accommodation from many of the approximately one thousand workers in the plant listed as having some medical

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<sup>134</sup> *Supra* note 108.

<sup>135</sup> *Ibid.* at D/91-94.

<sup>136</sup> Absenteeism at the Oakville plant was at a rate of around 8-9%, compared with a rate of around 1.5% in Atlanta. The claims of employee overwork are supported by a recent study of nine Ford plants in Canada conducted by the Department of Work Organization and Training of the Canadian Auto Workers' Union, in conjunction with the Labour Studies Program at McMaster University by W. Lewchuk *et al.*, "Benchmarking Auto-Assembly Plants" (May 1996). Also see *Workplace News*, July 1996, Vol. 2, Issue 7 at 1 where the authors state, "A picture emerged of over-worked workers, unable to fully participate in family life and facing high levels of health and safety risks. There was also evidence that conditions were becoming worse."

restriction. The union stated that the importance of seniority was that as workers aged, they had increasing difficulty coping with the rigours of assembly line jobs. Seniority gave such older workers a chance to transfer to a more manageable job in the few years before retirement.<sup>137</sup>

A second factor weighed by the tribunal was the estimated cost of accommodating the complainants. Ford calculated the annual cost of accommodating one complainant as over seven and a half thousand dollars, while an expert witness for the Human Rights Commission put the figure at less than one tenth of the employer's estimate. Furthermore, the expert witness expressed the opinion that even if the employer's estimate were accepted, it was a negligible financial impact for Ford. A final factor relied on by the tribunal was Ford's assertion that its inability to accommodate the claimants was due to the company's business strategy of a "commitment to quality." The tribunal chairman noted that this is a legitimate business strategy and stated: "it is not up to me to determine whether I think that emphasis is warranted."<sup>138</sup>

The *Roosma* case exemplifies the substantial inadequacy of the complaint-based human rights legislation in dealing with the systemic discrimination caused by the entire philosophy and structures of scientific management, particularly when the board of inquiry is at great pains to avoid any serious challenge to the doctrine of management rights. The board accepted *prima facie* the employer's admittedly rough estimate of the financial costs of accommodation, and rejected the substantially lower estimate of the independent expert witness. Yet, to rule that a few thousand dollars was an undue hardship to a vast organization such as Ford stretches credibility, particularly in light of the costs of accommodation acknowledged as reasonable in such cases as *C.U.P.W. and Quesnel* discussed above.

The board of inquiry justified its decision by the assertion that it needed to accept, without question, Ford's emphasis on its "commitment to quality" policy. It reasoned further that, if it imposed the estimated costs of accommodation on the employer, the board would be straying illegitimately into passing judgement on the Company's business strategy. This is a patent "straw man" fallacy. It is uncontroversial that it is not for a board of inquiry to pass judgement on the efficacy, ethics, social utility etc. of a company's business strategy or marketing slogans. However, that was not at issue in the *Roosma* case. The employer's argument was that, the estimated costs of accommodation would be detrimental to its "commitment to quality" strategy. It was the legal duty of the board to determine whether the employer's conduct in pursuit of its business strategies or goals infringed human rights legislation and, in particular, whether the cost of accommodation imposed an undue hardship. The legal concept of "undue hardship" requires employers and boards of inquiry to weigh the countervailing costs and the benefits of a discriminatory work requirement and the costs of accommodation against the valid business objectives of the employer. When a board of inquiry decides that the costs of accommodation are not an undue hardship, it is not passing judgement on the wisdom or the validity of the employer's business strategy but on whether the conduct demanded by such strategy is unlawful discrimination.

Even if the board had not committed the straw man fallacy, one must also take issue with its assumption that it is not empowered to question or pass judgement on an employer's or entrepreneur's business policy or strategy. On the contrary, if a business

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<sup>137</sup> *Supra* note 108 at D/124-125.

<sup>138</sup> *Supra* note 108 at 131 and 142.

or employment policy or strategy is deemed to be a cause of unlawful discrimination, it is the duty of a board of inquiry to question it. Not to do so is to defer to the management rights and freedom of contract doctrines in precisely the manner that serves to undermine the new quasi-constitutional obligations of human rights legislation.

The board in *Roosma* cited the inordinately high absenteeism rate in the plant as a barrier to accommodating the claimants. The accommodation, it reasoned, would add to the already unacceptably high costs of absenteeism, a category of cost that the company had not budgeted for in the first place. Yet, the board's treatment of the claimants' absences as absenteeism begs the very question at issue. W.F. Cascio notes that, from a business standpoint, "absenteeism is any failure of an employee to report for or to remain at work as scheduled, regardless of reason."<sup>139</sup> That author emphasizes the significance of the phrase 'as scheduled': "for this automatically excludes vacations, holidays, jury duty and the like."<sup>140</sup> To refer to accommodation of the employees under the human rights legislation as simply another form of absenteeism is questionable. If an employer is legally bound to accommodate a worker's religious beliefs by granting time off, such time off is not unscheduled and does not fall under the rubric of absenteeism. Instead, it must be treated like scheduled absences from work, such as holidays and vacations which are also required by law.

There is, of course, some intuitive attraction in the argument that an employer should not be asked to condone more absenteeism by accommodating religious beliefs when it is already experiencing what it considers to be unacceptably high levels of absenteeism. Indeed the intuitive attraction of such logic tempts one to foreclose consideration of the question that tribunals are required to address when applying the human rights duty to accommodate. That is precisely what happened in the *Roosma* case, where the board of inquiry simply ignored the salient question: has the employer demonstrated that it would be an undue hardship for it to accommodate the claimants by scheduling their work to provide the time off sought for religious reasons?

There is evidence in *Roosma* that the particularly high level of absenteeism on Friday evenings was due to high levels of physical and mental stress among production line workers. A further result of high stress levels was an unyielding commitment of the union to seniority as the basis of allocating lighter day shift jobs when they became available. The union and older workers viewed such lighter work as often the only way workers would be able to fulfill their employment obligations until normal retirement age. A variety of strategies to reduce the adverse effects absenteeism at the Oakville plant had been considered by the employer and the union but all had been rejected as unacceptable to one or both of the parties. Yet, at no time was either the employer or the union called upon by the board to demonstrate that any of the potential strategies would impose undue hardship on the parties. A possible strategy raised by the employer in negotiations was to impose more rigorous disciplinary penalties on absent workers. This proposal was rejected by the union. For its part, the employer's head office in Detroit provided no money in the plant's operating budget to hire replacement workers to fill in for absent workers.

The board of inquiry reasoned that in light of the existing problem of absenteeism on Friday's, neither the employer nor the union could accommodate the claimants

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<sup>139</sup> W. F. Cascio, *Managing Human Resources: Productivity, Quality of Work Life, Profits* (New York: McGraw-Hill, 1992).

<sup>140</sup> *Ibid.* at 592-593.

without undue hardship. In effect, the board took the view that absenteeism at such a high level was an inevitable reality, beyond the influence of the employer or the union. As noted by Cascio,<sup>141</sup> there is substantial evidence that much of the cost of absenteeism is controllable by effective managerial intervention. Indeed, this is supported by the evidence presented to the board that absenteeism levels were significantly lower at Ford's plants in Atlanta and St.Louis. The study by Lewchuk *et al.* suggests that production processes in Canadian car plants give rise to levels of worker fatigue and stress capable of causing high levels of absenteeism.<sup>142</sup> The Union's evidence to the board of inquiry in *Roosma* supported this view.<sup>143</sup>

It is not contended here that the high levels of Friday absenteeism of the employer in *Roosma* were due conclusively to deficiencies in management practices but there is *prima facie* evidence that this was the case. In spite of this, the board of inquiry simply accepted the high absenteeism as a fact of life for the employer and the union and failed to impose the statutory obligation on the parties to demonstrate that it would be an undue hardship for either or both of them to take steps, or agree to measures, that would both mitigate the absenteeism problem and accommodate the claimants. If the owner of a Ford vehicle were injured in a crash caused by the vehicle's defective steering, it would scarcely be valid for the company to cite high absenteeism rates and related production deficiencies as a defence to absolve it from its legal duties to the owner or third parties injured in the crash. Yet, this is precisely the type of defence accepted, at face value, by the board of inquiry in its endorsement of the employer's claim that its high rate of absenteeism was a bar to its compliance with its legal duty not to discriminate on grounds of religion.

It must be acknowledged that the board of inquiry in *Roosma* was handicapped by the inherent shortcomings of the complaint-based model as a means of attempting to remedy systemic discrimination. The *prima facie* discrimination arose from the highly complex systemic issues of technology, staffing levels, shifts, job duties and other working conditions that were causing acute health and morale problems for many workers and resulting in high absenteeism. The historic bargaining relationship and the controversy attached to such proposed solutions as providing exceptions to seniority rights, allocating money to hire replacements for absent workers, and tightening discipline of absent workers added to the difficulty for an ad hoc tribunal to fashion a remedy for the complainants.

However, complexity alone cannot excuse the board's undue deference to the management rights doctrine in the *Roosma* case. When a party engages in unlawful discrimination, the Ontario Human Rights Code gives boards broad remedial power to:

direct the party to do anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices.<sup>144</sup>

It was open to the board in *Roosma* to direct the parties to fashion a remedy consistent with their human rights obligations, while recognizing their historic bargaining

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<sup>141</sup> *Supra* note 139 at 592-593.

<sup>142</sup> *Supra* note 136: see in particular pp. 24-25 and 38.

<sup>143</sup> For the Union's evidence, see *Roosma*, *supra* note 108 at 124-127.

<sup>144</sup> R.S.O. 1990, c. H-19, s.41(1)(a).

relationship. Such an order could have included a time limit for such a negotiated settlement with a reserved power for the board to impose its own judgement if the parties failed to agree. Such an approach would have been appropriate in view of the evidence before the board that absenteeism in the plant already posed a potential problem for the accommodation of persons with disabilities, a group protected by the legislation.

If the power of the biomedical and needs-based perspectives of disablement to resist legal rights for persons with disabilities is alive and well in the workplace, the Supreme Court of Canada's decision in the case *Eaton v. Brant County Board of Education* tells a similar story for the delivery of public services to persons with disabilities. Emily Eaton, a child with cerebral palsy, had been placed for three years in a regular classroom in the local public school. The school board requested that the child be placed in a segregated, "special education" class because her "needs" were not being met in the regular classroom. In spite of the objection of the child's parents, a placement committee, the Special Education Appeal Board and the Special Education Tribunal<sup>145</sup> each decided that the child should be removed from the regular class and placed in a segregated classroom. As noted by the Ontario Court of Appeal, these decisions were taken apparently without evidence that the segregated classroom would meet the child's "needs" any better than the regular class.<sup>146</sup>

The Ontario Court of Appeal unanimously struck down the decision of the tribunal on grounds that the *Education Act* violated s. 15 of the *Charter* by allowing the placement committee and the various appeal bodies the discretion to violate the constitutional equality rights of persons with disabilities. In overruling the Court of Appeal, the Supreme Court endorsed the Tribunal's approach that the principal question was whether Emily Eaton's special needs could be met best in a regular class or in a special class. The Tribunal was influenced primarily by evidence that the child's intellectual, academic, communication, emotional, social, physical and safety needs were not being adequately met in a regular class. The Tribunal concluded that her needs would be better met in a segregated class.

In deferring to the "expert" tribunal's assessment of the child's needs, the Supreme Court avoided any consideration of her equality rights under the *Charter*. Sopinka J. observed

There is general agreement that before a violation of s. 15 can be found, the claimant must establish that the impugned provision creates a distinction on a prohibited... ground *which withholds an advantage or benefit from, or imposes a disadvantage or burden on the claimant*". (Emphasis added).<sup>147</sup>

On the basis of the Tribunal's assessment of the child's needs, the Court concluded that her segregation was not a disadvantage, burden or denial of a benefit and could therefore not be viewed as unlawful discrimination on grounds of disability.

In so doing, the Supreme Court avoided any presumption that segregation is discriminatory and any consideration of whether accommodation of the child in some less segregated environment would constitute undue hardship to the education authority.

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<sup>145</sup> Required by the *Education Act*, R.S.O. 1990, c. E.2, s. 35.

<sup>146</sup> *Supra* note 16.

<sup>147</sup> *Ibid.* at 404.

The Supreme Court, locked in the psychic prison of an exclusively needs-based perception of disablement, undermined the very point of s. 15 of the *Charter*: to confer legal "rights" on persons with disabilities.

To conclude this subsection, the *Roosma* and the *AirBC* judgements illustrate the systemic resistance to accommodating persons with disabilities and other groups protected by human rights legislation. While some of the impediment reflects the fundamental weakness of complaint-based proceedings in challenging systemic discrimination, the cases also reveal that much of the resistance is due to the failure of the tribunals to challenge the traditional deference to the management rights doctrine. Without such a challenge, the concept of a legal duty to accommodate is stripped of meaning and incapable of delivering the promised rights and benefits to persons with disabilities.<sup>148</sup>

#### D. The Ontario Workers' Compensation Act

The duty to accommodate injured workers embodied in the *Ontario Workers' Compensation Act* is a further illustration of *de jure* statutory recognition of a duty to accommodate persons with disabilities accompanied by legislative, administrative and adjudicative resistance to the realization of such obligations. Section 54 of the Act provides in part:

(4) Upon receiving notice from the Board that a worker is able to perform the essential duties of the worker's pre-injury employment, the employer shall offer to reinstate the worker in the position the worker held on the date of injury or offer to provide the worker with alternative employment of a nature and at earnings comparable to the worker's employment on that date.

(5) Upon receiving notice from the Board that a worker, although unable to perform the essential duties of the worker's pre-injury employment, is medically able to perform suitable work, the employer shall offer the worker the first opportunity to accept suitable employment that may become available with the employer...

(6) In order to fulfill the employer's obligations under this section, the employer shall accommodate the work or the workplace to the needs of a worker who is impaired as a result of the injury to the extent that the accommodation does not cause the employer undue hardship.<sup>149</sup>

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<sup>148</sup> While this paper has confined detailed discussion to a few illustrative cases, the weight of evidence from the case law reveals a prevailing lack of understanding, or lack of acceptance, by tribunals, employers and even some unions, of the social-political model of disablement. Such a model underpinning of the duty to accommodate poses a fundamental challenge to the doctrine of management rights that few tribunals and commentators seem able to understand or willing to accept. For example see Bonner, *supra* note 115; *Canadian Pacific Ltd. v. Mahon*, [1988] 1 F.C. 209 (C.A.), 40 D.L.R. (4th) 580, leave to appeal to the S.C.C. refused, (1987), 86 N.R. (S.C.C.) 263; *Re Better Beef Ltd. and U.F.C.W., Region 18* (1994), 42 L.A.C. (4th) 244; *Re Canada Post Corporation and C.U.P.W. (Godhout)* (1993), 32 L.A.C. (4th) 289; *Canada (Attorney General) v. Robinson*, [1994] 3 F.C. 228 (C.A.).

<sup>149</sup> R.S.O. 1990 c.W-11, s. 54 [hereinafter *Compensation Act*].

While the existence of a statutory duty to accommodate is to be commended,<sup>150</sup> a significant limitation of the program is the absence of an enforceable duty to rehire the injured worker. Gunderson *et al.* note the criticism of the s.54 penalties that they are "little more than a licensing fee to refuse to employ"<sup>151</sup> and some critics view this as undue deference by policy makers to the management rights doctrine.<sup>152</sup> In effect, the maximum penalty that can be imposed by the Board is one year's wages of the injured worker and, as Gunderson *et al.* observe, if an employer is faced with an accommodation cost that it judges to exceed the value of one year of the worker's wages, it may simply decide not to re-employ.<sup>153</sup> The authors also note that the lack of the Board's power to order reinstatement limits its power to negotiate accommodation settlements with employers. Furthermore, the lack of an enforceable duty to accommodate appears to send a signal to employers that such a duty possesses something less than the quasi-constitutional status suggested by the Supreme Court of Canada.

It is beyond the scope of this article to assess the impact of these statutory duties on employers' practices but decisions of the Workers' Compensation Appeal Tribunal (WCAT) suggest some employer resistance to the duty to accommodate. In WCAT Decision 968/90,<sup>154</sup> the employer refused to reinstate an injured worker who could have performed the essential duties of his pre-injury job of loading and unloading rail cars and truck tankers with the provision of a chair to enable him to relieve his back pain by performing his work sitting for ten minutes in every hour. The employer refused to employ the worker with such accommodation in spite of the practice engaged in by other workers of using overturned buckets to perform the work in a sitting position. There was no evidence that such practice reduced productivity or safety standards. While it is unclear whether such a case is typical of employers' responses to the legal duty to accommodate, the unwillingness of the employer to take even *de minimis* steps in this case is ominous.

A positive aspect of the foregoing decision was the WCAT's endorsement of the principle that the determination of a worker's ability to perform the essential duties of pre-injury or alternative or suitable alternative employment or must be done after accommodation of the work or the workplace is determined under s.54(6) of the Act Gunderson *et al.* suggest that the Board's policy-making board of directors (with the endorsement of the WCAT) "have not followed the approach suggested by a literal reading of section 54 but instead have taken a page from the Ontario Human Rights Code... which states that a person cannot be considered incapable of a BFOQ unless

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<sup>150</sup> Other jurisdictions have incentives to accommodate injured workers. For example, under the Alberta *Workers' Compensation Act*, S.A. 1981 c. W-16, the Board administers a Post Injury Loss Reduction Program, which has financial incentives for employers to re-hire an injured worker rather than pay higher premiums. See "Post Injury Loss Reduction: Elements of a Claims Management Program" (W.C.B., Alberta).

<sup>151</sup> Gunderson, *supra* note 47 at 350.

<sup>152</sup> See also D. Baker and G. Sones, "Employer Obligations to Reinstatement Injured Workers" (1990) 6 J.L. & Social Pol'y 30 at 45, 52 and 53. The authors identify the importance of recognizing that systemic discrimination must be tackled by the avoidance of exclusionary policies and practices, at the outset, rather than trying to dismantle discriminatory policies and practices once they are in place.

<sup>153</sup> Gunderson, *supra* note 47, pp.354-355.

<sup>154</sup> (1991) 17 W.C.A.T. 968/90.

accommodating the person in the job would be an undue hardship".<sup>155</sup> The authors observe that such a "non-literal" interpretation of s.54(6) avoids the *Bhinder* approach whereby accommodation is considered only after the determination of the worker's ability to perform the essential duties of the job.<sup>156</sup> In effect, accommodation requirements must be considered before a ruling made on the capacity of the worker to perform the "essential" duties of the job and become an integral part of the "medical" assessment of whether and how a person can return to work.<sup>157</sup>

While the duty of accommodation under the *Compensation Act* has been spared the worst excesses of the deference to the management rights doctrine displayed by the Supreme Court of Canada in *Bhinder*, it is arguable that the Board and the Appeals Tribunal have displayed unwarranted deference to the traditional management right to organize the workplace. As Gunderson *et al.* observe, a reinstatement officer has ruled that incorporating an accommodation into the determination of medical ability does not mean that the Board can require an employer to remove the "essential duties" of a job.<sup>158</sup> The officer ruled that, if an essential task is modified by an employer but the worker is still unable to perform it, this is not merely the modification of an existing job; rather, it is the creation of a new job, which the statute does not require.

The officer's approach was followed by the WCAT.<sup>159</sup> An employee had been an oiler for the employer when reorganization caused the job to disappear. The worker had a non-compensable injury, which the employer accommodated by transferring him to touch up painting duties. When the worker was injured in the latter job and had been absent from work due to the injury, the employer delayed his recall to work nearly six months beyond the date of his recovery to his pre-accident physical condition. The Workers' Compensation Board's Reinstatement Officer held that the employer had breached its obligation to re-employ the worker and imposed a penalty. Overturning that decision, the WCAT held that prior to the worker's recall there existed no available position that he was capable of filling to which laid-off workers with less seniority had

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<sup>155</sup> The authors are referring to section 17(2) of the Ontario *Human Rights Code*.

<sup>156</sup> Gunderson, *supra* note 47 at 351. It is curious that the authors consider that a literal interpretation of section 54(6) leads to a *Bhinder* approach to accommodation. It seems to me that, while section 54(6) of the *Workers' Compensation Act* might be phrased more elegantly, it is quite unambiguous, when read with section 54(4), in calling for the approach embodied in section 17(2) of the *Human Rights Code* and adopted by the Workers' Compensation Board. Section 56(4) clearly contemplates two circumstances, one in which the worker can perform the essential duties of the pre-injury employment without the need for accommodation on the part of the employer, the other where the worker can perform a job "of a nature...comparable to the worker's employment on [the date of the injury]." In providing such alternative comparable employment, the employer must, by virtue of section 54(6), "accommodate the work or the workplace to the needs of a worker". It does not seem controversial on a literal interpretation of sections 54(4) and (6) that, in the provision of alternative comparable employment, the employer must change "the essential duties of the worker's pre-injury employment", provided such "accommodation of the work" does not cause undue hardship for the employer.

<sup>157</sup> See Workers Compensation Board Policy Documents 07-05-07; 07-05-08; and 07-05-10. This policy has been followed by a reinstatement officer in Decision 2/90, a decision upheld by the Workers' Compensation Appeals Tribunal in ruling 968/90, *supra* note 151 (Feb. 20, 1991). The term "medical" ability reflects the biomedical underpinnings of the traditional conception of disablement embodied in the *Workers' Compensation Act*.

<sup>158</sup> *Supra* note 47 at 352. See also Board Decision R.B. 76/92.

<sup>159</sup> Decision No. 974/94.

been assigned in preference to the worker. The WCAT considered this important because the collective agreement entitled the worker to recall only if an employee junior to him had been recalled ahead of him to "a job" which the worker was qualified to perform. The WCAT also laid emphasis on the evidence that while some touch-up work had been done in the plant prior to the worker's eventual recall, the level of production was such that it was performed by workers performing multiple job assignments. Some aspects of those job assignments were beyond the worker's capabilities due to his "non-compensable" disability. It is evident that the WCAT did not entertain the possibility that "the duty of accommodation" under the *Compensation Act* should be interpreted consistently with the *Human Rights Code* (which has primacy). Had it done so, the WCAT would surely have ruled that an employer's duty of accommodation under the *Compensation Act* should include a duty to construct or alter the "essential duties" of a job, provided that doing so would not impose an undue hardship on the employer.

The WCAT further narrowed the scope of the employer's duty to accommodate by ruling that the duty to accommodate in s.54(6) applies only to a worker who is impaired "as a result of the injury that gave rise to his loss of employment". The Tribunal found that s.54(6) did not apply to this worker because he had recovered fully from his compensable injury and the duty to accommodate in that section applies only to a worker "who is impaired as a result of the injury." The WCAT's reasoning was that the worker's "impairment" was due to his previous injury and the resulting disability not to the compensable injury which was the subject of the appeal. Accordingly, the employer had no duty to accommodate the worker to the point of undue hardship.

The WCAT's approach in this case raises a number of concerns, particularly in light of the quasi-constitutional nature of the *Ontario Human Rights Code*, which imposes a duty on employers to accommodate disabled workers to the point just short of undue hardship. The *Code* applies not only to employers but requires persons not to discriminate on grounds of disability in the provision of services to the public. Such a duty clearly applies to the WCAT in the exercise of its functions under the *Compensation Act*, including the interpretation of that Act. Section 54(4) of the *Act* requires an employer to re-employ a worker in his pre-injury employment or a comparable alternative and the WCAT interpreted s.54(6) as imposing a duty to accommodate only with respect to those injured workers who have not recovered fully from the injury giving rise to the claim. While this is a plausible interpretation of s.54(6),<sup>160</sup> it is scarcely consistent with the quasi-constitutional status of the *Human Rights Code*. In interpreting the s.54(4) duty to re-employ under the *Compensation Act*, it is surely incumbent upon the WCAT to do so in light of the employer's duty to accommodate under the *Human Rights Code*. Instead, the employer's approach was to interpret s.54(6) in a restrictive manner, thus subverting its obligations under the *Human Rights Code*. The WCAT recognized in its decision, that its jurisdiction is not to enforce the *Code* but "to interpret the *Workers' Compensation Act* in a manner consistent with the obligations imposed by the *Code*".<sup>161</sup> It is clear that the WCAT failed to do this in the instant case. In arriving at its decision, the Tribunal accorded rather more weight to the collective agreement than it did to the *Code*. Furthermore, in its interpretation of the collective agreement, the Tribunal failed to recognize that such agreement must be

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<sup>160</sup> Arguably, such interpretation adheres to the maxim "*expressio unius, exclusio alterius est*".

<sup>161</sup> *Supra* note 159.

consistent with the requirements of the *Human Rights Code*, including the duty of accommodation to the point of undue hardship.

The foregoing arguments advanced with respect to the primacy of the *Human Rights Code* over the *Compensation Act* apply, *a fortiori*, to the s. 15 of the *Charter* which imposes a duty on provincial governments and legislators not to discriminate on grounds of disability in the delivery of their services.

The foregoing criticisms of the interpretation of the *Compensation Act* may be met with the argument that the Ontario legislature was under no legal or constitutional duty to include a duty to accommodate injured workers in its legislation. Indeed the Ontario *Act* imposes a legal duty to accommodate in excess of that in other jurisdictions. However, once the decision was made to introduce a statutory duty to accommodate injured workers, it is difficult to see how such a duty can be interpreted as anything less than that required by the *Human Rights Code*, which has primacy, and the *Charter*, which has supremacy, unless the Workers' Compensation Act makes specific provision for a lower duty than that demanded by the Code and contains a "notwithstanding clause" provided for by s. 33 of the *Charter*. It seems clear, therefore, that the Workers' Compensation Board and other adjudicative tribunals require clarification of their duties under the *Act*, the *Human Rights Code* and the *Charter*—duties which demand that they challenge, not defend, the traditional doctrine of management rights where it infringes the equality rights of persons with disabilities.<sup>162</sup>

## E. *Resistance in Popular Culture*

### 1. *Introduction*

Thus far we have focused on the resistance to the duty to accommodate persons with disabilities on the actions and attitudes of employers, providers of public services and various participants in the legal system. This section deals with resistance in popular culture. This is important because the dominant ideas of popular culture not only shape and influence managerial and legal policy, they may subvert certain managerial and legal policy initiatives. An example of the latter is the attempt by the leadership of some organizations to respond to the competitive pressures of globalization by downsizing and moving from a traditional paternalistic culture, with norms of loyalty and obedience among middle management, to a process of participatory management—a process with a culture of openness, sharing of information and ideas, and teamwork. Heckscher observes, in his study of eight large industrial companies, that many of these initiatives failed due to cultural resistance by middle management.<sup>163</sup> Similar difficulties have attended attempts by management to introduce worker participation programs in the workplace. While there are a variety of factors explaining the lack of success of many such initiatives, cultural resistance can be a serious impediment.

The attempt by Canadian legislators to impose on employers and entrepreneurs a duty to accommodate persons with disabilities has to contend with resistance from a

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<sup>162</sup> The *Charter* argument is strengthened significantly by the judgement of the Supreme Court of Canada in *Eldridge*, *supra* note 78.

<sup>163</sup> C. Heckscher, *White Collar Blues - Management Loyalties in an Age of Corporate Restructuring* (New York: Basic Books, 1995). In particular see chapter 5: "The Failure of Participatory Management."

popular culture with deep-rooted attachment to the values, assumptions, structures and relationships inherent in the doctrines of management rights and freedom of contract. Moreover, the legal duty to accommodate challenges a perception of disablement dominant and deeply-rooted in popular culture, referred to above as the biomedical/economic model of disablement. While law and other social policy can influence the maintenance or reshaping of popular culture,<sup>164</sup> legal policy that challenges the dominant norms of popular culture is likely to prove difficult to implement.<sup>165</sup>

The deep-rooted power of the management rights doctrine in Canadian culture is illustrated by the following advice of Dave Cockton, a contributor to a study by the Canadian Council on Rehabilitation and Work and a working person with a disability. Addressing persons with disabilities seeking employment, Mr. Cockton commented:

Where I think you go wrong is going into an employer on your first day of work and saying 'this type of desk doesn't work for me, I need this other kind of desk'. What you should do is prop the desk up and let your employer decide when to buy you a new desk.<sup>166</sup>

However expedient such advice may be for keeping one's job, it is scarcely consistent with the presumed attempt by public policy to establish legal rights in the workplace for persons with disabilities.<sup>167</sup> The appeal to the "natural order of things", with its implicit assumption of management's greater expertise or legitimacy in determining a disabled worker's needs, is rooted in a culture that conflicts with the underlying policy of the new legal duty to accommodate. The latter requires an environment in which there is negotiation and debate on the necessary trade-offs and compromises among management, the worker who has a disability, and fellow workers who may be called upon to accommodate the worker with the disability. The following discussion suggests that popular culture appears to be some distance away from embracing the values and assumptions of the new culture embodied in human rights legislation and the challenge it poses to the traditional doctrines of management rights and freedom of contract. The arguments used to legitimate these traditional doctrines are highly specious and it is necessary to expose their invalidity as one step in challenging the cultural resistance to the legal duty to accommodate persons with disabilities.

A second dimension of popular cultural resistance lies in the low value placed by society on persons with disabilities. Some writers explain this in terms of the idealisation of the body in terms of strength, energy and beauty— an idealisation

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<sup>164</sup> Arguably, tougher laws on drunk driving, domestic violence, and smoking in public buildings in Canada have helped to foster a culture that has become less tolerant of such conduct.

<sup>165</sup> The Indian Mutiny might have been avoided had the British Imperial authorities been more sensitive to popular attitudes toward the greasing of ammunition with pork fat.

<sup>166</sup> G. Annable and R. McInnes, *Tried and True* (Winnipeg: Canadian Council on Rehabilitation and Work, 1995) at 14.

<sup>167</sup> Furthermore, such advice is inconsistent with the legal responsibility of persons with disabilities who seek accommodation by employers to bring the problem to the employer's attention: see *Tweedie v. Hendrie and Company Ltd.* (1994) 94 C.L.L.C., para. 17,010 (Canadian Human Rights Tribunal); *Drager v. I.A.M. & A.W. Lodge 1857* (1994), 20 C.H.R.R. D/119 at D136 (B.C. Human Rights Commission); *Re Babcock & Wilcox Inds. Ltd. and U.S.W.A. Local 2859* (1994), 42 L.A.C. (4th) 209 at 222-223.

reinforced daily by the bombardment of media images of the idealised body for the purpose of selling consumer goods and services.<sup>168</sup> For some theorists fear is the key to the negative cultural perceptions of disablement, a fear of the able-bodied of the vulnerability of their bodies. As with all dominant ideologies, such negative perceptions are accepted not only by the oppressors but by the oppressed and there is a wealth of literature identifying the low self-esteem of persons with disabilities.<sup>169</sup>

An illustration of the low value placed on persons with disabilities came to light in class discussion during a Human Resources Management class at the University of Lethbridge. A student recounted a difficulty she had experienced as supervisor of a clerical/secretarial employee in the course of her employment. The supervisor perceived that her subordinate was burdened with too many unskilled tasks to allow her to undertake the more challenging potential dimensions of the job. Budgetary constraints ruled out the employment of a regular assistant but the supervisor arranged, through a special agency, for a "disabled" person to perform some of the more menial tasks of the clerk/secretary's job on a casual basis, at less than the regular rate of pay. The supervisor expected her subordinate's response to be one of gratitude but was met, instead, with recrimination, fueled by the latter's sense of betrayal by a supervisor who valued her so little that she considered a "disabled" person could perform some of the tasks of her job.

## 2. Rationalization of the Traditional Doctrines in Action — A Case Study

The deep-rooted appeal of the "free market" doctrine in popular Canadian culture matches that of management rights. Much of the success of these doctrines in popular culture lies in their intuitive appeal and the role of such appeal in avoiding and foreclosing debate on the underlying assumptions and values inherent in both the doctrines themselves, and the social and legal policies that flow from them. It is important to examine carefully the assumptions and arguments of the defenders of those doctrines and, with their inadequacies exposed, to confront rather than conceal the key questions of social policy and ethics raised by the legal duty to accommodate persons with disabilities.

An opportunity to do this is provided by Karen Selick in her criticism of the decision in the *Quesnel* case.<sup>170</sup> Selick's approach is a classic illustration of the ideological defence of privilege and a style of argument designed to avoid rather than address the key ethical and policy questions raised by the conflicting interests served, by the free market and the human rights doctrines respectively. Selick's approach also illustrates the popular perception of disablement rooted exclusively in the biomedical model and a devaluation of a person with disabilities. This detailed discussion is warranted because while Selick's approach fails to stand the test of even superficial academic scrutiny, its power in popular culture rests in its unexamined intuitive appeal.

Selick's criticisms of the *Quesnel* decision centre on three themes that she gleans from the judgement. The first allegedly "recurrent" theme of the judgement is that the disabled "are seen both by themselves and by society as not the same as everyone

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<sup>168</sup> See S. Wendell *supra* note 4 at 70.

<sup>169</sup> For example, see S. Hannaford, *Living Outside Inside: A Disabled Woman's Experience - Towards a Social and Political Perspective*, (Berkeley: Canterbury Press, 1985).

<sup>170</sup> K. Selick, "The Ramp to Hell" Canadian Lawyer Sept. 1995 at 46 and Fraser Forum, December, 1995 at 27 [hereinafter *Selick*].

else."<sup>171</sup> It is Selick's observation that installing wheelchair ramps won't change this. People in wheelchairs will still be unmistakably different. They'll be the ones wheeling up the ramp while other people will be walking. To make their differences genuinely unobservable, we'd have to pass a law compelling everyone to use wheelchairs.<sup>172</sup> Here Selick clouds the issue for the reader by providing, out-of-context, only a snippet of Dr. Woodill's evidence, the full context of which is:

People are marked as different and they are seen both by themselves and society as not the same as everyone else...it can be experienced as a form of oppression, being hidden away, being not allowed to come out...making comments and so on and running into things like lack of stairs... [I]t is another way of reinforcing to the person that they are not treated the same as everyone else.<sup>173</sup>

By pulling Woodill's remarks out of context, Selick is able to present the reader with the classic *non sequitur* fallacy. Selick's argument is in essence as follows: (a) the purpose of the wheelchair ramp is to eliminate differences between the disabled and the non-disabled; (b) the ramp will not eliminate the visible differences because the disabled person will still be in a wheelchair; (c) the wheelchair ramp does not fulfill its objective of eliminating differences and is, therefore, unjustified.

The nature and superficial appeal of such a fallacious mode of argument is discussed by Govier who observes:

It might seem amazing that *non sequiturs* exist. Yet they are relatively common, and unwary audiences are often deceived by them. Just why this should happen is not fully understood but one explanation may have to do with the character of the irrelevant premises. Often they are clearly true, and they may be among few points of clear agreement between the arguer and the audience. In contexts of controversy, such agreement can seem so important that an audience may forget to ask just how the uncontroversial points are really related to the topic at hand. Another fact is that irrelevant premises may be very interesting in themselves or they may be easier or more pleasant to think about than the actual problem.<sup>174</sup>

When Woodill's remarks are read in the context of his evidence as a whole, it is evident that, contrary to Selick's contention, neither he nor the Board of Inquiry was suggesting that a wheelchair ramp would extinguish all differences between those who do, and those who do not, have mobility disabilities. Instead, Woodill and the Board viewed the ramp as eliminating, or at least mitigating, some of the physical and psychological barriers that confront persons with disabilities when they are denied access to facilities and services that are routinely available to non-disabled persons. It is the elimination of this difference, that is, "access to services", that was clearly in the minds of the Board and Dr. Woodill.

This point is illustrated an analogy to people with inferior eyesight. When they

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<sup>171</sup> Here Selick quotes part of the testimony of Dr. Gary Woodill contained in the report of the *Quesnel* case. Dr. Woodill was an expert witness in the field of the psychology of disability. *Supra* note 80 at 11.

<sup>172</sup> *Ibid.* at 46.

<sup>173</sup> *Ibid.* at 8.

<sup>174</sup> T. Govier, *A Practical Study of Argument*, 2d ed., (Belmont: Wadsworth Publishing, 1988) at 102-103.

obtain eyeglasses, such persons remain unmistakably different from those who do not require glasses. Indeed, the social visibility of their defective eyesight is even greater than it was when they did not wear glasses. Nevertheless, more important differences are eliminated by their access to glasses, because the wearer can now, in largely the same manner as the fully-sighted person, obtain a driver's licence and with the related independence, engage in a range of occupations that would be otherwise unavailable and capture the full visual beauty of their surroundings. Of course, none of this alters the fact that those who wear glass are noticeably different from those without defective eyesight. Yet, if we applied to eyeglasses Selick's argument with respect to the wheelchair ramp, we would have to reject the social utility of the eyeglasses because they failed to eliminate the visible differences between the fully sighted and those with defective eyesight. Happily, we can reject Selick's argument on her first theme as both fallacious and irrelevant.

Selick's second theme, divined from her reading of the Board's decision in *Quesnel* is that "the disabled don't want charity or pity: they don't want to be dependent on others." While approving of the desire to avoid dependency, Selick continues:

[t]o pretend that this decision or indeed, any application of the Human Rights Code makes disabled people any less recipients of charity or any more independent, requires a prodigious feat of self-delusion. They may not be dependent on someone else to carry them up the stairs, but they are still dependent on someone else to build them a ramp.<sup>175</sup>

Selick asserts that, if the complainant had wanted to demonstrate true independence, she would have adopted a course other than one which burdened a stranger with a twenty thousand dollar expense (the cost of building the ramp). It is Selick's contention that the complainant's "using the coercive power of a state agency to appropriate *someone else's assets* for her benefit underscores the very dependency she is attempting to deny".<sup>176</sup>

By pulling Woodill's remarks out of context, particularly his use of the term "dependency", Selick commits the fallacies of ambiguity, straw man and false dichotomy.<sup>177</sup> There is nothing in the Board's judgement to suggest that the building of a wheelchair ramp is intended to remove all dependency of the complainant on other members in society. This comes scarcely as a surprise because, by its nature and purpose, society involves a host of interdependent relationships among its members. In arguing that a wheelchair ramp will not end the complainant's dependence on others, Selick is advancing a classic straw man fallacy.

Selick's removal of the term "independence" from its context also produces the fallacy of ambiguity. It is evident from Dr. Woodill's expert testimony that he used the term "independence" to illustrate his support for a rights-based rather than a charity-based approach to the disabled in our society. Woodill noted that, in the traditional charity-based approach, dating from the Elizabethan Poor Laws, the disabled were

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<sup>175</sup> Selick's words in her article "The Ramp to Hell" are her paraphrase of Dr. Woodill's evidence quoted at page 8 of the *Quesnel* case, *supra* note 80 at 8.

<sup>176</sup> Selick, *Ibid.* (Emphasis added). The issue of "someone else's assets" will be discussed below.

<sup>177</sup> See Govier, *supra* note 174 chapters 3 and 7 (fallacy of ambiguity); chapter 6 (straw man fallacy); and chapters 8 and 9 (fallacy of false dichotomy). For a summary of these, and other, fallacies, see 328-330.

called upon to engage in the vocation of begging for charity to relieve them from their poverty.<sup>178</sup> Woodill notes that a modern variation of the charity-based approach is the "professional" one, exemplified by the Canadian National Institute for the Blind. Through special drives and appeals, such organizations motivate the public to give money to the disabled. While the professional approach relieves the disabled person of the personal responsibility for begging, she remains largely dependent on the charity of others.

A review of the *Quesnel* case makes it abundantly clear that, in upholding a rights-based approach to disability, the Board sought not to eliminate the dependence of disabled people on others but to eliminate their dependence on the charity of others. The difference between a rights-based and a charity-based approach to disability is illustrated by a homeowner's legal right to the quiet enjoyment of his or her property. Such a right means that the home owner can depend on the coercive power of the state to protect her interest in the home against trespassers, burglars or persons causing damage or nuisance. Generally, in Canadian society, a home-owner will not have to invoke the law to protect such rights as the majority of the population will respect them. However, with the protection of legal rights, the home-owner is not entirely dependent on the goodwill of others. Of course, the home-owner remains dependent on those responsible for law of enforcement, but this is quite different from a dependence on the goodwill or charity of others not to undermine the enjoyment of her home.<sup>179</sup>

Likewise, the creation of legal rights for the disabled does not eliminate all dependence. Indeed, as with homeownership, one comes to depend upon the enforceability of such legal rights. However, when one acquires an enforceable legal right, one ceases to be dependent on the charity of others, a point ignored entirely by Selick. The "fallacy of false dichotomy" is evident in Selick's portrayal of the issue as one of being either dependent or not dependent on others. As the foregoing example illustrates, dependency is not all or nothing but moves along a spectrum of greater or lesser dependence within a rich diversity of social, including legal, relationships. Above all, the example illustrates the quite different nature of, and power associated with, a person's dependence on the enforcement of a legal right and dependence on the goodwill and charity of others. Selick's discussion entirely obliterates entirely any consideration for this crucial difference.

The final theme raised by Selick is the "dignity" of the disabled. The author suggests that it would have been much more "dignified" for the complainant to have accepted one of the compromises proposed by the respondent rather than insist on the construction of a wheelchair ramp. Selick maintains that such insistence "was not dignity but bullying."<sup>180</sup> Here, Selick presents a classic *ad hominem* argument. Instead of considering the merits of the complainant's case, Selick seeks to discredit her by assigning negative characteristics to the complainant, namely that she is unreasonable

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<sup>178</sup> The origin of the term "handicap" (cap-in-hand) is in the 18th Century laws that permitted disabled war veterans to beg on street corners with their caps in hand. See C. H. Cohen and D. A. Ravensdale *Discovering Abilities* (Yukon Public Service Commission, Employment Equity Branch, 1990) at 2.

<sup>179</sup> Legal rights and duties under the law of contract provide a further example. While a party to a contract is dependent on the other's performance of the contract, her reliance is not entirely on the charity or goodwill of the other party.

<sup>180</sup> *Supra* note 170.

and bullying. This is a particularly pernicious *ad hominem* fallacy because it is abundantly clear from the case report that the complainant did make compromises in the negotiation of an appropriate remedy.<sup>181</sup> The Board stated that the best form of accommodation would have been an elevator, but that the complainant agreed that this option would be too much of a burden for the respondent. Contrary to Selick's allegation, the option of the wheelchair ramp was not at the unyielding insistence of the complainant but the result of a compromise.

A further feature of Selick's third theme is her vague and ambiguous use of the term "dignity" to build a fallacious "straw man" argument. In the *Quesnel* case the Board found a fairly routine case of *prima facie* systemic discrimination. The complainant sought a remedy potentially available under the law, while the respondent argued that such a remedy was too onerous. A negotiated compromise proved unattainable and the Board of Inquiry imposed a binding settlement. Such are the routine events of human rights cases as in the legal system, in general, and it is curious that Selick, a practicing lawyer, should view such matters as an "affront to the dignity"<sup>182</sup> of the parties engaged in them.

As with her other "themes", Selick has pulled the word "dignity" out of the context in which it is used by the Board of Inquiry. The Board makes it clear<sup>183</sup> that the issue of "dignity" under the *Ontario Human Rights Code* pertains to the negative impact on those with disabilities of the daily barriers encountered in their attempts to access services, employment and recreational facilities, routinely available to those without disabilities. The evidence of expert witnesses before the Board was that such barriers produce a vicious circle by segregating the disabled from the non-disabled population, thereby promoting the very attitudes that erect and perpetuate the barriers that confront persons with disabilities. It is clear from the Board's judgement that the "dignity" of the disabled is viewed could be enhanced by the elimination or the reduction of the barriers that typically deny the disabled access to services available to, and taken for granted by, the non-disabled population. In seeking access to services and social interaction, the disabled population is hardly seeking privileged treatment, but merely access to the facilities available to the non-disabled, provided that the removal of barriers to access do not impose undue hardship on another.

The *Quesnel* case undoubtedly raises the fundamental issue of the balance to be struck between the traditional claims of entrepreneurs (and of management in employment cases) and the more recently legislated claims of persons with disabilities. In the spirit of *laissez-faire* and freedom of contract, the law has traditionally conferred relatively unfettered discretion on entrepreneurs to conduct "their" businesses and organize "their" workplaces. Recent human rights policy challenges the old values, assumptions and interests and requires society and its legal institutions to mediate and adjudicate the conflicting claims of entrepreneurs and persons with disabilities.

Notable in Selick's treatment of the *Quesnel* case is her complete failure to address, any of the fundamental ethical and social policy conflicts and dilemmas. Instead, Selick assumes, in the name of the free market, and without evidence or argument, that there is an inherent public interest in maximizing the unfettered discretion of entrepreneurs and management, regardless of its impact on persons with disabilities. This assumption

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<sup>181</sup> *Supra* note 80 at 12.

<sup>182</sup> *Supra* note 170.

<sup>183</sup> *Ibid.* at 8.

of popular culture also underpins academic discussion, thereby reinforcing the presumed legitimacy of the assumptions. LeFrancois expresses the opinion that the duty to accommodate "should not entail the creation of a new position" by an employer.<sup>184</sup> The author continues: "[p]roductivity must always be the central factor in appraising undue hardship".<sup>185</sup> It is difficult to understand such a conclusion because the quasi-constitutional nature of human rights legislation must put the interests of persons with disabilities (and other protected groups) at least on a par with those of the employer. Yet, once more, we encounter the management rights and freedom of contract doctrines as articles of faith, apparently to be ascribed greater weight than human rights. The cultural supremacy of the doctrines remains the chief barrier to the implementation of human rights in the Canadian workplace and in the provision of services to the public.

E. P. Thompson observes that much of the ideological power of the free market doctrine resides in its scientific air of empirical validation, that it is "the way things work" to the advantage of everyone, or would work if the state did not interfere.<sup>186</sup> The author contends that, for all its air of empirical validation, free market ideology rarely garners support from the working of actual markets. Indeed, the position of persons with disabilities in the labour market is, itself, evidence to the contrary. A second aspect of the ideological power of the free market doctrine (as illustrated by Selick's essay) is that, by means of its illusion of value-free, scientific inevitability, it diverts attention from the fundamental ethical question for disablement law and policy in Canada, namely: "what ought to be our reciprocal duties with respect to the accommodation of persons with disabilities, present and future?"<sup>187</sup>

#### F. *Concluding Thoughts*

This section has identified a dimension of the development of social policy not considered by Bickenbach: resistance to concrete policy initiatives to confer legal rights on persons with disabilities. Whether the resistance is located in legislatures, courts, tribunals, board rooms or popular culture, it has its roots in the unquestioned assumption of the legitimacy of the doctrines of management rights and freedom of contract. Yet, the new, quasi-constitutional concept of reasonable accommodation poses to the traditional doctrines a challenge that demands scrutiny, debate and reconciliation of the competing assumptions, values and societal interests inherent in the respective doctrines. In the various judicial and adjudicative decisions discussed in this section and in Selick's critique of the *Quesnel* decision, the ethical and policy choices have been suppressed rather than articulated. In the final section of this article, I shall suggest a number of ways in which the resistance to legal rights for persons with disabilities can be challenged.

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<sup>184</sup> *Supra* note 120 at 42.

<sup>185</sup> *Ibid.* at 43.

<sup>186</sup> E.P. Thompson, *Customs in Common* (London: The Merlin Press, 1991) at 203ff.

<sup>187</sup> The management rights doctrine is rooted in the ideology of "scientific management". See F. W. Taylor *Principles of Scientific Management* (New York: Harper & Bros., 1911). For a critique of "Taylorism" see H. Braverman *Labour and Monopoly Capital* (New York: Monthly Review Press, 1974).

## V. COUNTERING THE RESISTANCE — SOME PRIORITIES

### A. *Introduction*

It has been suggested that resistance by employers and entrepreneurs, legitimated by the management rights and freedom of contract doctrines, is a key element of the impasse in disablement policy in Canada. Policy measures to counter such resistance are justified by the paramouncy applied to disablement rights by the *Charter* and by the quasi-constitutional provincial and federal human rights statutes. Yet, the justification for countering the resistance goes beyond issues of human rights and fairness. The systemic handicapping of a significant segment of the Canadian population is detrimental to the self-interest of the population at large in two respects. Firstly, systemic discrimination denies Canadian society the benefit of the talents and contributions of a significant proportion of the population. Secondly, it is in the interest of members of the able-bodied population to promote the construction of workplaces and other social arrangements in a manner that will accommodate each of them in the event that they become disabled in their later lives. It is curious that the latter events are extensively provided for in state and private insurance schemes but scantily provided for in the construction and organization of workplaces. The final section of this paper suggests the need to Canadian disablement policy on enhancing the power of persons with disabilities in countering the resistance to human rights policy and in promoting the synthesis of the models of disablement advocated by Bickenbach.

### B. *Able-bodied and Disabled — The Detrimental Dichotomy*

There are clearly positive aspects to the dichotomy between able-bodied and disabled individuals in society. For matters of compensation or rehabilitation of persons with impairments or disabilities, it would appear to be important to identify the salient differences between an able-bodied and a disabled individual. No doubt, it is to the latter's advantage to be deemed eligible, rather than ineligible, for the benefits available under the traditional biomedical/economic approach to workplace disablement.

However, when society's task is viewed, from the social-political perspective, as the need to construct workplaces and other social arrangements that avoid the systemic handicapping and exclusion of a significant proportion of the population, the dichotomy between able-bodied and disabled is counter-productive. Instead of focussing on differences, policy makers must identify the similarities and community of interest between the able-bodied and the disabled. The dichotomy between the able-bodied and the "disabled" contributes to society's general failure to recognize that individuals have a variety of abilities and disabilities and that the automatic exclusion of a person because of her disabilities denies society the benefit of her abilities. This is illustrated spectacularly by such celebrities as Stephen Hawking, whose abilities as a contemporary, world-renowned physicist would have been lost to the international community but for the accommodation of his serious disabilities in speech and muscle movement. If employers are locked into the psychic prison of scientific management that workers must adjust to the imperatives of technology, they will lose the potential benefits available from constructing and adjusting the requirements of the job, often

with the assistance of technology, in a manner that taps into the abilities of individuals who might not conform to the imperatives of scientific management. There is a growing body of literature that highlights the success stories for employers and workers with the accommodation of disabilities.<sup>188</sup> Yet such benefits are available only if there is recognition that the world comprises people with a range and variety of abilities and disabilities and that the environment can be, and ought to be, constructed in harmony, not discord, with such diversity.

The institutionalisation of the able-bodied/disabled dichotomy is further harmful because it reinforces the low measure of esteem with which society has traditionally regarded the disabled. Indeed, the disabled, themselves, are frequently unable to accept and value their defective bodies. Wendell notes the supporting role played by the idealization of the human body, reinforced daily in popular culture by a bombardment of consumer advertising for products and services designed to achieve the ideals of strength, energy and control of the body.<sup>189</sup> Scientific management itself further reinforces a norm, if not an ideal, of physical conditioning by insisting that each worker conform to a preordained standard of physical prowess. Susan Hannaford contends that the disabled are devalued for their devalued bodies,<sup>190</sup> while Jill Lessing suggests that they are constant reminders to the able-bodied of "the negative body", that is, of what "the able-bodied are trying to avoid, forget and ignore".<sup>191</sup> Susan Griffin writes of the roots of the devaluation and the avoidance of persons with disabilities in the fear of the able-bodied to confront the fragility of their own bodies and a resulting inability to identify with the "other", disabled people.<sup>192</sup>

By suspending the able-bodied/disabled dichotomy, policy makers are in a position to identify the community of interest between the two socially constructed groups. The *Roosma* case provides evidence that scientifically managed production processes not only prevented the employer from accommodating substantial numbers of existing workers with disabilities but were a significant factor in the creation of disabilities in the employer's workforce. This is supported by the study of automotive plants in Ontario, *The CAW Working Conditions Study: Benchmarking Auto Assembly Plants*<sup>193</sup>, in which high proportions of workers reported "excessive" workloads and a high incidence of "stress related health risks". The phased disablement of workers in Canada,

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<sup>188</sup> See G. Annable, *Working Solutions: Job Accommodations for People with Disabilities*, (Canadian Council on Rehabilitation and Work: Winnipeg, 1994). The services of the organization JANCANA are offered by the Canadian Council on Rehabilitation and Work which has documented a substantial pool of stories of successful accommodation of persons with disabilities. See also 17 *Abilities* 56. The magazine *Abilities* publishes regular stories of successful accommodation of persons with disabilities. JANCANA is the Canadian arm of the Job Accommodation Network, which is based in the University of West Virginia. Its mission is to assist in the hiring, retraining, retention or advancement of persons with disabilities by providing them with accommodation information.

<sup>189</sup> *Supra* note 4 at 70.

<sup>190</sup> S. Hannaford, "What's happening" in S. Hannaford, ed., *Living Outside Inside: A Disabled Woman's Experience: Towards a Social and Political Perspective* (Berkeley: Canterbury Press, 1985) at 13.

<sup>191</sup> J. Lessing, "Denial and Disability", (1981) *Off Our Backs*, Vol. 11(5):21.

<sup>192</sup> S. Griffin, "The Way of All Ideology", (1982) 7 *Signs: Journal of Women in Culture and Society* 641 at 644 and 648-9.

<sup>193</sup> *Supra* note 135.

and other industrialized countries, is prominently reported in the literature. The Canadian Institute of Stress reported a decade ago that stress in the workplace cost Canadian business nearly nine billion dollars in absenteeism and lost productivity alone.<sup>194</sup> More recent results from the Health Promotion Survey<sup>195</sup> indicate that Canadians' stress levels are on the rise. In 1985, 48% of Canadians surveyed described their lives as "very or somewhat stressful", while the comparable figure in 1990 was 60%.<sup>196</sup> In 1994, the Conference Board of Canada estimated that stress-related problems cost Canadian businesses 12 billion dollars a year<sup>197</sup>. Within the last year, various newspaper headlines have corroborated this picture of stressed-out Canadians at work. Excerpts from some stories include:<sup>198</sup>

The study (conducted by the University of Quebec in Montreal, the University of Sherbrooke and the Quebec Federation of Labour) found that 56% of the women and 42% of the men suffer "a high level of psychological distress," a sense of being overworked, of irritability and of extreme fatigue.<sup>199</sup>

Like some odorless toxic gas, excessive stress can build up, unrecognized, until it fells its unsuspecting victims.<sup>200</sup>

...as the global economy grows in complexity, the stress facing key decision-makers will only increase.<sup>201</sup>

The phenomenon of the phased disablement of workers was also observed by the City of Lethbridge in the administration of its voluntary employee health support program. Much of the incentive for such a program is to save on Workers Compensation premiums by accommodating injured workers through modified work. An administrator of the City's program noted that employers are finding it prudent and cost effective to intervene with job modifications before workers reach the level of disablement at which they become eligible for Workers Compensation payments.<sup>202</sup> The advantage of viewing disablement in terms of a continuum rather than a dichotomy is that it enhances the recognition of the community of interest between the disabled and able-bodied in challenging the progressively disabling impact of the traditional scientifically managed workplace. If special arrangements are made to accommodate workers legally defined as disabled for purposes of compensation or rehabilitation services but no action is taken

<sup>194</sup> B. Gates, "Employee stress: How to spot the early signs", *The Financial Post* (30 August 1986) 1.

<sup>195</sup> (Health and Welfare Canada), T. Stephen and D. Graham, Eds. March 1993.

<sup>196</sup> *Supra* note 195 at 12.

<sup>197</sup> D. Fischer, "Accommodating family needs boosts bottom line" *Calgary Herald* (23 March 1994) E3.

<sup>198</sup> I have to thank my colleague Dr. Bob Boudreau for drawing my attention to these headlines and to the substantial international literature on workplace stress and burnout, to which he is an eminent contributor.

<sup>199</sup> Canadian Press, "Workers Struggle for Balance in Jobs, Child Care at Big Firms" *The Globe and Mail* (30 November 1995) A10.

<sup>200</sup> P. Chisholm, "Coping with Stress" *MacLean's* (8 January 1996) 32.

<sup>201</sup> M. Sterne, "The Downside of Being on Top" (31 July 1996) A16.

<sup>202</sup> See City of Lethbridge, *Employee Health Support - Progress Report to April 30, 1996*. The author interviewed program administrator, Lavirna Elliott on September 25th, 1996.

to accommodate the needs of those not (yet) defined as disabled, it is not surprising that there is worker resistance to the catering to the special interests of those defined as disabled. However, if workplace disablement is perceived to operate along a continuum, the duty to accommodate comes to be seen as involving ergonomic, job design and organization-of-work issues of relevance to both the "able-bodied", who are at risk of becoming disabled and the "disabled", who are excluded or handicapped by the structure of the workplace.

When workplace or other social disablement is viewed as phased and risk-based, one can discard Selick's view of workplace or other social accommodation as the granting of special privileges to special interests, namely persons with disabilities. Instead, workplace accommodation and other social arrangements can be recognized as beneficial to not only those for whom disablement has materialized but to all persons, who are at risk of becoming disabled. As the costs of insuring against such potential disablement continue to escalate, the need for accommodating workplaces becomes more urgent. In addressing this question, it may be useful to apply Rawls' analysis.<sup>203</sup> The non-disabled person in the "original position" and under the "veil of ignorance" is aware that there is a risk that she may become disabled in future but is unaware of the precise risk to herself. However, she can assess the minimum social position that she would consider acceptable for her if the risk did materialize. It is difficult to believe that any member of Canadian society would condone the levels of poverty, marginalization, and isolation experienced by most seriously disabled individuals for whom the risk does materialize.

When we look at "phased disablement" through the lens of the social-political model and the handicapping caused by scientifically managed workplaces, persons with disabilities cease to be conceptually marginalised from the able-bodied. The community of interest of all workers in the creation of accommodating workplaces and other social arrangements comes into sharper focus. The social value of accommodation extends far beyond persons actually or potentially disabled. The unaccommodating rigours of scientifically managed workplaces impose substantial burdens on workers with particular family responsibilities, such as the care of young children, elderly parents or dependants with disabilities. Persons with special religious needs or customs often find scientifically managed workplaces unaccommodating.

Yet, while there is a broad community of interest among workers in the construction of accommodating workplaces, the *Roosma* case amply illustrates legal and labour relations processes which pitted one group of workers against another. In that case, even the Union argued against accommodating their members with special religious needs because the limited accommodation available in the scientifically managed workplaces had to be reserved for more senior workers in order to shield them from the phased disablement inherent in their workplace.

It is vital that unions and other representatives of workers' interests abandon the conceptual dichotomy between disabled and able-bodied and focus their energy and bargaining capital on the construction of workplaces that serve the interest of all workers in reducing "phased disablement" and other damaging effects of scientific management. It is a tall order to expect workers to abandon paradigms and mind sets

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<sup>203</sup> Social policy on the risk and accommodation of disablement lends itself well to Rawlsian analysis. See J. Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971). See particularly Chapter III.

that have been rooted for generations in Canadian culture. In her ethnography of an injured workers association, Ann Moritz observes that, in forming their group identity, the members of the association distinguished "us", injured workers with a client relationship with the Workers' Compensation Board, and other physically injured workers, whom the group viewed as "not us".<sup>204</sup> Moritz also notes the strong influence of the Workers' Compensation Board bureaucracy in shaping the perception of self identity of the injured workers studied.<sup>205</sup> Nevertheless, while dominant cultural belief systems change slowly, they do change and unions and other representatives of workers, whether disabled or able-bodied, can perform a key leadership role in identifying and promoting the community of interest among workers in the construction of accommodating workplaces.

### C. *The Role of Government*

It is not suggested that the impasse in disablement policy can be resolved by government action alone. Nevertheless, provincial and federal governments in Canada have a key leadership role to play in facilitating an end to the impasse in disablement policy. Indeed, in spite of the repeated rhetoric of governments across Canada,<sup>206</sup> a strong case can be made that the current fiscal, human rights and employment policies of provincial and federal governments in Canada are calculated to perpetuate, rather than resolve, the impasse in disablement policy. The following priorities for government policy are suggested.

On the fiscal front, Canadian governments remain committed to economic policies designed to promote the international movement of capital and other perceived interests of the international corporate elite, at the expense of higher levels of domestic economic growth, employment, community development and public spending. Accordingly, public and private sector organizations struggling for short-run survival can scarcely be faulted for placing the accommodation of persons with disabilities low on their list of organizational priorities. If governments are serious about resolving the impasse in disablement policy, with its attendant economic and social costs, they must pursue economic and fiscal policies that will encourage public and private sector organizations to invest in the necessary restructuring of workplaces to accommodate workers who experience the risk or reality of "phased disablement". The longer run gains in organizational productivity and the ethical imperatives of a just society justify such an investment.

With respect to human rights policy, it remains unacceptable that so-called fundamental issues of human rights in the workplace and in access to public services remain largely in the provincial jurisdiction. Uneven duties of accommodation in the human rights legislation of the Canadian jurisdictions are inconsistent with the demands of section 15 of the *Charter* and produce unfairness, uncertainty and legalism.<sup>207</sup> There is a compelling case for Canada to follow the approach in the United States and entrench

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<sup>204</sup> A. L. Moritz, *Uncertain Resistance: An Ethnography of an Injured Workers Association and Its Relationship with the Workers' Compensation Board*, (Master of Arts Thesis, University of Lethbridge, Alberta, 1996) [unpublished] at 151-152.

<sup>205</sup> *Supra* note 204 at 153.

<sup>206</sup> See, e.g. Prime Minister Jean Chretien "Word from the Top" in 17 Abilities 16.

<sup>207</sup> The fiasco surrounding the *Bhinder* case illustrates this amply; *Supra* note 106.

collective bargaining law in the federal jurisdiction. If this is politically unfeasible, at least a uniform floor of fundamental human rights in employment should apply to all Canadian jurisdictions.

It is also unacceptable that the duty to accommodate persons subject to systemic discrimination remains enforceable in all Canadian jurisdictions primarily by means of individual complaint. The inefficacy of such systems is sufficiently notorious that it is difficult to draw any conclusion other than that it is a deliberate policy of provincial and federal governments in Canada to preserve human rights laws in a form that fails to make any significant impact on systemic discrimination. As the *Abella Report* emphasized, systemic problems require systemic remedies and these are conspicuously absent in Canadian human rights legislation.<sup>208</sup> If Canadian governments are serious about accommodating persons with disabilities, they must introduce legislation with systemic remedies for the accommodation of workplace disablement. Sadly, the experience with the *Ontario Employment Equity Act* illustrates that the trend is in the opposite direction. The 1995 federal *Employment Equity Act* offers hope with its inclusion of procedures to enforce employers' equity plans but much will depend on the government's commitment of resources to investigation, negotiation and enforcement of the plans. Furthermore, by exempting seniority clauses as a basis for lay-off, the *Act* ignores a powerful barrier to equality in an extended period of organizational downsizing.

Finally, there is the issue of employment law. As Paul Weiler argues, the contemporary weakness of traditional collective bargaining has created a vacuum in the representation of worker interests in corporate structures.<sup>209</sup> While Weiler focuses on the private sector in the United States, his conclusions are relevant to the public and private sectors in contemporary Canada. The traditional supremacy of the management rights doctrine, virtually absolute in non-unionized employment settings, has also insulated employers, even in unionized settings, from any real restraints on their discretion to organize the workplace as they see fit. Yet, inherent in the whole concept of a duty to accommodate persons with disabilities, or at risk of becoming disabled in the workplace, is the need for employers to hear and respond to the voices of the workers who bear the risk or reality of disablement. The Canadian Council on Rehabilitation and Work's "model job accommodation plan" contains this advice to employers:

The employee or candidate with a disability...should be your first and primary source of information regarding job accommodations for him or her. Never plan or implement accommodations for that person without his or her full involvement and cooperation.<sup>210</sup>

It is evident that such an approach would involve a level of power sharing by management in areas of traditional managerial prerogative that explains much of the

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<sup>208</sup> See *supra* note 97. The original Canadian *Employment Equity Act* had no legally enforceable targets with respect to the accommodation of persons with disabilities and other designated groups. The 1995 Act does have enforcement mechanisms for the implementation of employment equity plans; the Ontario *Employment Equity Act* did introduce enforceable targets but has been dismantled by the Harris Government.

<sup>209</sup> P.C. Weiler *Governing the Workplace* (Cambridge, Mass: Harvard University Press, 1990).

<sup>210</sup> Annable, *supra* note 188 at 4.

resistance by employers to the human rights duty to accommodate persons with disabilities. The addition of employers to the traditional management rights doctrine is particularly entrenched in the public service in virtually all Canadian jurisdictions, where collective bargaining legislation excludes the rights of workers to negotiate contractual restrictions on the discretion of management to organize the workplace as it sees fit.<sup>211</sup> Cases such as *Roosma* illustrate that management in the private sector, too, is resistant to workers' attempts to fetter discretion in areas traditionally considered to be in the exclusive domain of management.

The Canadian Council on Rehabilitation and Work has demonstrated the successful use of job restructuring, modified work schedules and the hiring of support persons for employees with a variety of disabilities.<sup>212</sup> Many accommodations are of low cost and employers in Canada have access to the expertise of JANCANA to assist them in the process of accommodation.<sup>213</sup> A significant number of employers across Canada have become aware of the savings on sickness and disability insurance premiums available through investment in the accommodation of workers disabled by their jobs or at risk of future disablement.

As discussed above, Ontario's *Workers' Compensation Act* has taken a tiny step in the right direction by pro-active accommodation of injured workers. The scheme is flawed by a lack of specific enforcement measures the accommodation and the narrow interpretation given to the law. Nevertheless, the Ontario legislation and the informal programs of such jurisdictions as Alberta point the way to legislation that requires employers to negotiate with their workers, whether unionized or not, regarding the organization of workplaces that will effectively deal with the epidemic problem of "phased disablement".

In enacting such legislation, governments in Canada will have to challenge the traditional doctrine of management rights that has been protected by historically weak public and private sector collective bargaining legislation. While it may be argued that the instinctively pro-business governments typically elected in Canada are unlikely to contemplate such an encroachment on the traditional bastion of managerial privilege, the following should be borne in mind. The damaging and costly effects of the unfettered management rights doctrine and its related workplace structures and practices in Canada and other industrialized countries have long been recognized.<sup>214</sup> For example,

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<sup>211</sup> See e.g., Alberta's *Public Service Employee Relations Act*, R.S.A. 1980, Ch.P-33 (as amended), s.48 (2), which, in conjunction with the *Public Service Act*, effectively excludes workers and their unions from influence on the construction and organization of the workplace. See Kenneth P. Swan, "Safety Belt or Strait-jacket? Restrictions on the Scope of Public Sector Bargaining", in *Essays in Collective Bargaining and Industrial Democracy* (Lethbridge: CCH, 1983) at 21-41.

<sup>212</sup> *Supra* note 188; the publication focuses on practical examples of the successful accommodation of workers with developmental, hearing, visual, learning, physical and psychological disabilities.

<sup>213</sup> *Ibid.*

<sup>214</sup> Sir William Osler (1849-1919) wrote about the problems facing physicians and equated stress and strain with hard work and worry; "The Lumleian Lectures on Angina Pectoris in the *Lancet*" (1910) vol. 1, 698. Breay (1913) article wrote of "overstrain" of nurses of that period. For both references, see C. Spielberger, *Understanding Stress and Anxiety* (New York: Harper & Row, 1979) at 7. In the modern era, there is a rich literature of and research in "occupational stress and burnout" across national boundaries in the industrialized world. These include: C.L.

Golembiewski *et al.* conclude that in contemporary North America and in other industrialized nations, "burnout seems epidemic, at least".<sup>215</sup> While burnout and stress have a variety of causes and contexts, the evidence is overwhelming that the scientifically managed workplace has to be replaced by structures and a culture that is less hostile to the health of workers and management alike. Under the regime of existing legislative policy in Canada, employers, arbitration tribunals, human rights tribunals, courts and even some trade unions have remained curiously resistant to making the conceptual shift necessary to implement the required workplace policies, processes and practices necessary to reduce phased disablement for the mutual benefit of investors, management, workers and society at large. Governments should play a leadership role in encouraging such change.

## VI. CONCLUSION

The impasse in social policy on legal rights for persons with disabilities is attributable significantly to resistance from those with a vested interest in preserving the traditional discretion and privileges of management and entrepreneurship. Such interests are supported and legitimated by both the law and the ideological power of the doctrines of management rights and freedom of contract. Human rights legislation designed to establish rights for, *inter alia*, persons with disabilities is perceived by some as a threat to traditional vested interests and has produced resistance as outlined in the discussion of Selick's criticisms of the *Quesnel* decision and the *AirBC* case. The nature of such resistance illustrates Heather Menzies' observation that much of the power of those with a vested interest in the *status quo* rests in their control over which questions are addressed and which are not addressed in the social discourse.<sup>216</sup>

The entrenched dominant position of management rights and freedom of contract ideologies in Canadian law and social discourse have served to shield those ideologies from critical scrutiny and from effective challenge by competing values, such as those embodied in the duty of accommodation of the purportedly quasi-constitutional human rights legislation of each jurisdiction in Canada. This is illustrated by the *AirBC* case where the arbitration board made a significant social policy choice on the basis of instinctive and uncritical adherence to the management rights and freedom of contract doctrines rather than a comprehensive evaluation of the competing societal interests served by such doctrines and, on the one hand, by the formal establishment of legal rights for persons with disabilities on the other. The result was the reinforcement and continued legitimation of an established power structure and interests through a process, ostensibly neutral, but actually biased toward the established interests. A social policy truly dedicated to establishing rights for persons with disabilities must expose the bias

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Cooper and Smith eds., *Job Stress and Blue Collar Work*, (Chichester: John Wiley and Sons, 1985); T. Newton, J. Handy & S. Fineman, *Managing Stress: Subjectivity and Power in the Workplace*, (London: Thousand Oaks, 1995); J.C. Quick, L.R. Murphy & J.J. Hurrell Jr. eds., *Stress and Well-being at Work*, (Washington D.C: American Psychological Association, 1992) - see, in particular, P. Carayon, "A Longitudinal Study of Job Design and Worker Strain: Preliminary Results"; in R.T.Golembiewski *et al.*, *Global Burnout: A Worldwide Pandemic Explored by the Phase Model*, (Greenwich, Ct.: JAI Press, 1996).

<sup>215</sup> *Supra* note 214 at 163.

<sup>216</sup> H. Menzies, *Whose Brave New World? - The Information Highway and the New Economy*, (Toronto: Between the Lines, 1996) at 45-47.

inherent in the interpretation and application of such rights. Only when such bias is exposed and removed can the impasses in disablement policy be removed.

The ideological power of management rights and freedom of contract is not the only barrier to the effective establishment of legal rights for persons with disabilities. A further, but related, barrier is the defective concept of disablement that informs social discourse and disablement policy in Canada. The dominant biomedical/economic perspective of disablement has three harmful effects on the discourse and policy. One effect is the location of disability exclusively in the impaired person and the diversion of attention from the central role played by employers and their scientifically managed workplaces in handicapping persons who fail to meet imposed standards of normality. Social policies such as workers' compensation legislation and workplace sickness and disability insurance, while ostensibly designed for the disabled serve the purpose of reinforcing a perception of disablement located in the "substandard" individual rather than in the debilitating and handicapping effects of scientifically managed workplaces. A second damaging effect of the dominant ideology is that it perpetuates the charity or needs-based perception of disability that continues to obstruct the path toward a rights-based approach to disablement policy. A further damaging effect of the dominant biomedical/economic perception of disablement and its derivative policies such as workers' compensation is the creation and maintenance of a dichotomy between the able-bodied and the disabled. Overlooked in this dichotomy is the strong community of interest shared by all workers in workplaces and work practices to reduce the risk of worker disablement and accommodate workers more readily when the risk of disablement materializes. The value of the human rights duty to accommodate and its underpinning social-political conception of disablement is that it challenges the largely unquestioned assumptions of the doctrines of management rights and freedom of contract. While the new conception has faced significant resistance from traditional vested interests, it offers the principle source of hope for an effective challenge to the devastating and costly toll on human beings and productivity of more than a century of scientifically managed workplaces.

As always, government has a role to play in effecting social change. A move toward enforceable pro-active legislation aimed at the private sector, such as the defunct *Ontario Employment Equity Act* would be helpful. Enforceable duties of accommodation under workers' compensation legislation are also a promising approach. In each case, the government should build in financial grants and incentives to encourage employer action. After all, since it is in the public interest to accommodate persons with disabilities, the public purse should contribute to such accommodation. However, a key role of government is not merely to pass and enforce laws but also to influence popular culture to reduce the ideological resistance to change. In this respect government, as well as employers and unions, must promote new paradigms of disablement in which the abilities of persons with disabilities are emphasized and the connections and common interests, rather than the differences, between the disabled and the able-bodied become the basis of law and social policy.

