# SURVEY OF ANTI-DISCRIMINATION LAW*

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** Canadian Human Rights Commission.

## I. INTRODUCTION

This survey is intended to keep practitioners abreast of significant developments in anti-discrimination law. It covers the period from 15 November 1981 to 31 December 1983. The commencement date may appear arbitrary, but it has been selected because a comprehensive text in the area by Professor Walter Tarnopolsky[1] (now Mr. Justice Tarnopolsky of the Ontario Court of Appeal) was published in 1982 and covers the law up to that date.

The term "anti-discrimination law" has been used despite the fact that most of the relevant statutes are called "Human Rights Acts". These statutes are so named because for the most part they simply provide protection to the individual from discrimination on certain enumerated grounds and do not address human rights in a wider context.[2]

Finally, it should be noted that the survey does not attempt to cover all decisions rendered during the period. Rather, it seeks to identify and comment only on those cases which are noteworthy because they consolidate, expand, or depart from existing case law. Indeed it would be difficult to comment on all cases because of the explosive development in anti-discrimination law. In 1972 there were only seven Boards of Inquiry held in all of Canada. Ten years later, in the year 1982 alone, there were one hundred and fourteen reported cases in the Canadian Human Rights Reporter.[3] The expansion of human rights legislation in terms of both its subject-matter and prohibited grounds, as well as the entrenchment of section 15 of the Charter of Rights,[4] will ensure that this trend continues.

Therefore, instead of simply building the survey up from individual cases, an attempt has been made to analyze issues and trends in the subjects listed in the index. In addition the reader is cautioned that, while there is a considerable sharing of jurisprudence, there are thirteen[5] different jurisdictions in Canada, each with its own governing human rights legislation.

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[1] W. TARNOPOLSKY, DISCRIMINATION AND THE LAW IN CANADA (1982).

[2] However The Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1 contains a Bill of Rights and Quebec's Charte des droits et libertés de la personne, L.R.Q. 1977, c. C-12 *as amended by* L.Q. 1982, c. 61 guarantees certain fundamental rights and freedoms.

[3] C.H.R.R. which began publication in 1980.

[4] Canadian Charter of Rights and Freedoms, Constitution Act, 1982, Part I, *enacted by* Canada Act, 1982, U.K. 1982, c. 11.

[5] Each of the provinces as well as the federal government has a statute, and each territory has a Fair Practices Ordinance.

## II. Issues and Trends

### A. *Primacy of Human Rights Legislation*

The traditional reluctance of Canadian courts to accord the Canadian Bill of Rights[6] primacy over other legislation is well known. A current issue in human rights law however is to what extent this policy of judicial restraint will be applied to human rights legislation. Five provinces have included express primacy clauses in their statutes[7] but the effect that will be given to them and the status of human rights legislation not possessing such clauses is the subject of ongoing debate,[8] a debate far from resolved by the recent decision of the Supreme Court of Canada in *Insurance Corp. of B.C. v. Heerspink*.[9]

The *Heerspink* case was brought under the Human Rights Code of British Columbia, a statute not possessing a primacy clause. On 24 April 1975, the Victoria *Columnist* reported that Robert Heerspink had been committed for trial on a charge of trafficking in marijuana in Sydney, British Columbia. Mr. Heerspink owned two houses, both of which were insured by the Insurance Corporation of British Columbia. The company cancelled Mr. Heerspink's insurance policy without giving him any reasons, although in fact the ground for cancellation was that he had been charged with trafficking in marijuana. The decision to cancel the insurance policy was taken on the grounds of "moral hazard".

Statutory Condition 5(1) which, pursuant to section 220 of the Insurance Act of British Columbia,[10] formed part of every fire insurance contract in force in British Columbia read as follows:

> This contract may be terminated:
> (a) by the insurer giving to the insured 15 days' notice of termination by registered mail, or five days' written notice of termination personally delivered; or
> (b) by the insured anytime on request.

Thirteen years after the enactment of that condition, the Human Rights Code of British Columbia[11] was enacted, subsection 3(1) of which provided that:

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[6] S.C. 1960, c. C-44.

[7] Individual's Rights Protection Act, R.S.A. 1980, c. I-2, s. 1; The Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1, s. 44; Human Rights Code, 1981, S.O. 1981, c. 53, sub. 46(2); Charte des droits et libertés de la personne, L.R.Q. 1977, c. C-12, s. 52, *as amended by* L.Q. 1982, c. 61, s. 16; Human Rights Act, S.P.E.I. 1975, c. 72, sub. 1(2).

[8] As discussed below, the issue will continue to be of importance even after s. 15 of the Charter of Rights comes into effect in April, 1985.

[9] [1982] 2 S.C.R. 145, 3 C.H.R.R. 1163.

[10] R.S.B.C. 1979, c. 200.

[11] R.S.B.C. 1979, c. 186.

> No person shall
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> (a) deny to any person or class of persons any accommodation, service, or facility customarily available to the public; or
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> (b) discriminate against any person or class of persons with respect to any accommodation, service, or facility customarily available to the public,
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> unless reasonable cause exists for such denial or discrimination.

Mr. Heerspink filed a complaint with the British Columbia Human Rights Commission alleging that the Insurance Corporation had refused him coverage without reasonable cause, and thereby violated section 3 of the Human Rights Code. The Board of Inquiry found that insurance was a service customarily available to the public, a finding affirmed by the British Columbia Supreme Court[12] and the Court of Appeal.[13] The complaint was then referred back to the Board and was substantiated. The matter was once again appealed, this time on the primacy issue.

Mr. Justice Munroe of the Supreme Court of British Columbia allowed the appeal (by way of stated case), reasoning that the Insurance Act took precedence over the Human Rights Code in that it was particular and specific legislation while the Code was not only enacted later, but was general legislation.[14]

The British Columbia Court of Appeal[15] restored the decision of the Board of Inquiry on the basis that a court faced with inconsistent statutory provisions must first determine if both provisions can be read so as to stand together. It is only to the extent of an irreconcilable repugnancy between the two that a general Act is inoperative. In the view of the Court of Appeal these two provisions could stand together.

That decision was affirmed on appeal to the Supreme Court of Canada.[16] Mr. Justice Ritchie[17] dealt with the matter on the same basis as the Court of Appeal. In summing up he said:

> I agree with Mr. Justice Hinkson that in the present case the two statutory enactments under review can stand together as there is no direct conflict between them. The position is that the insurer's right to terminate its contract is unaffected by the provisions of s. 3 of the *Human Rights Code* wherever "reasonable cause exists" for such termination. This might be termed a modification of the Statutory Condition but it certainly does not in my view constitute repugnancies so as to alter the fact that "reasonable cause" is the touchstone in the construction of the two provisions here at issue.[18]

Thus His Lordship upheld the Board by applying one of the traditional canons of construction.

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[12] Insurance Corp. of B.C. v. Heerspink, [1977] 6 W.W.R. 286, 79 D.L.R. (3d) 638 (B.C.S.C.).

[13] [1978] 6 W.W.R. 702, 91 D.L.R. (3d) 520 (B.C.C.A.).

[14] 18 B.C.L.R. 91, 108 D.L.R. (3d) 123 (S.C. 1979).

[15] 27 B.C.L.R. 1, 121 D.L.R. (3d) 464 (C.A. 1981).

[16] *Supra* note 9.

[17] Laskin C.J.C. and Dickson J. (as he then was) concurring.

[18] *Supra* note 9, at 153, 3 C.H.R.R. at 1166.

Mr. Justice Martland,[19] however, in a dissenting judgment, would have allowed the appeal on the basis that the termination of Heerspink's policy did not constitute denial of a service but rather the exercise of a contractual right. In his view, Heerspink had never been denied a service. The Insurance Corporation customarily made available to the public the service of providing fire insurance policies. On that basis it issued a policy to Heerspink who accepted it and agreed that it would be subject to the terms of Statutory Condition 5. Martland J. said: "[T]he respondent was not denied the service customarily available by an insurer to the public. He got his policy."[20] The power to interfere with contractual rights would require very clear words which subsection 3(1) lacked.

Both judgments make clear that the courts will go to great lengths to avoid finding that statutes are in irreconcilable conflict with human rights legislation. Surely there was obvious conflict here. The Insurance Act gave the insurer the unqualified right to terminate. The Human Rights Code took away that unqualified right. The solution adopted by Ritchie J. effectively granted primacy to the Human Rights Code. Unless there is a middle ground that would constitute "reasonable cause" yet not entitle repudiation under contract law, the insurer is reduced to the same situation as if the Code had rendered the statutory provision inoperative. Even if such a middle ground exists, the majority judgment gives the Code full and unrestricted application and the Insurance Act diminished application.

On the other hand, the judgment of Martland J. must be seen as a resolution of the conflict between the statutes in favour of the Insurance Act. By interpreting "service" in subsection 3(1), narrowly so as to apply only to the initial provision of the service and not to its continuation, he gave the Statutory Condition a full and unrestricted meaning and greatly reduced the application of the Human Rights Act. He had interpreted the word "service" equally narrowly on an earlier occasion. In *Gay Alliance Toward Equality v. Vancouver Sun*,[21] a case in which the Supreme Court of Canada found that the *Sun*'s refusal to accept a classified advertisement from a gay magazine did not contravene the British Columbia Human Rights Code, Martland J. found that the Act did not "purport to dictate the nature and scope of a service which must be offered to the public".[22] The service the newspaper offered to the public was that of accepting advertising *subject* to editorial control. This service had been offered to the gay magazine.

The most interesting judgment in *Heerspink* was written by Mr. Justice Lamer,[23] who, while concurring with the reasons of Ritchie J.,

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[19] Beetz and Chouinard JJ. concurring.
[20] *Supra* note 9, at 157, 3 C.H.R.R. at 1168.
[21] [1979] 2 S.C.R. 435, 97 D.L.R. (3d) 577.
[22] *Id.* at 456, 97 D.L.R. (3d) at 591.
[23] Estey and McIntyre JJ. concurring.

suggested that a new canon of construction should be applied to the interpretation of human rights legislation. In answer to Mr. Justice Martland, he said:

> A termination clause is a mechanism for denying the continuation of services the provision of which had been agreed to at the beginning. Once exercised, the right to terminate results in a denial of services not differing from the denial, had there been one, at the outset. Therefore the reasons for a denial of services through the operation of a termination clause should be no more but also no less subject to s. 3 of the Code than when denied initially.[24]

Moreover, in accordance with the view expressed in *Ontario Human Rights Commission v. Borough of Etobicoke*[25] that one cannot contract out of the protection of human rights legislation, Lamer J. stated that conditions included in insurance contracts by statute were "as regards the Code, in no better position than if they had been included in the contract solely through the will of the parties".[26] He continued:

> When the subject matter of the law is said to be the comprehensive statement of the "human rights" of the people living in the jurisdiction, then there is no doubt in my mind that the people of that jurisdiction have through their legislature clearly indicated that they consider that law, and the values it endeavours to buttress and protect, are, save their constitutional laws, more important than all others. Therefore, short of that legislature speaking to the contrary in express and unequivocal language in the Code or in some other enactment, it is intended that the Code supersede all other laws when conflict arises.
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> As a result, the legal proposition *generalia specialibus non derogant* cannot be applied to such a code. Indeed the *Human Rights Code*, when in conflict with "particular and specific legislation", is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law.
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> Furthermore, as it is a public and fundamental law, no one, unless clearly authorized by law to do so, may contractually agree to suspend its operation and thereby put oneself beyond the reach of its protection.[27]

Mr. Justice Lamer's judgment was discussed by the Federal Court of Appeal in *Bhinder v. C.N.R.*,[28] a case which involved a potential conflict between the safety provisions of the Canada Labour Code[29] and its regulations and the Canadian Human Rights Act.[30] Mr. Justice LeDain, dissenting, cited Lamer J.'s opinion and stated that "federal legislation and regulations must be construed and applied as subject to the provisions of the *Canadian Human Rights Act*".[31] Mr. Justice Kelly

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[24] *Supra* note 9, at 160, 3 C.H.R.R. at 1167.

[25] [1982] 1 S.C.R. 202, 3 C.H.R.R. 781.

[26] *Supra* note 9, at 159, 3 C.H.R.R. at 1167.

[27] *Id.* at 157-58, 3 C.H.R.R. at 1166.

[28] 48 N.R. 81, 4 C.H.R.R. 1404 (F.C. App. D. 1983), discussed further at notes 76-84 and accompanying text.

[29] R.S.C. 1979, c. L-1.

[30] S.C. 1976-77, c. 33, *as amended by* S.C. 1977-78, c. 22, S.C. 1980-81, c. 54, S.C. 1980-81-82, c. 111, S.C. 1980-81-82-83, c. 143.

[31] *Supra* note 28, at 100, 4 C.H.R.R. at 1415.

however said: "It would appear that if safety of the employee, fellow employees and the public is a consideration . . . there can be no paramountcy with respect to Human Rights."[32]

It should be noted that in 1981, despite the absence of a primacy clause, the Manitoba Court of Appeal in *Newport v. Government of Manitoba*[33] unanimously found that the Manitoba Human Rights Act[34] impliedly repealed section 54 of the Civil Service Superannuation Act[35] which required retirement at age 65. It did so on the basis that the Human Rights Act was passed later and contained a provision binding the Crown, which was evidence of the Legislature's intention that it should prevail.

### B. *Bona Fide Occupational Requirement*

Without doubt the major statutory exceptions to anti-discrimination legislation in the employment context are those policies, practices, limitations, or refusals of employment which are "bona fide occupational requirements or qualifications".[36] These terms are not defined in the codes and there has been and continues to be uncertainty about their application. For several years the test proposed by Chairman McKay of the Ontario Board of Inquiry in *Ontario Human Rights Commission v. City of North Bay* was widely quoted: To be a "bona fide occupational requirement" a limitation must be "supported in fact and reason based on the practical reality of the work a day world and of life".[37] Though this phrase proved useful when a court wanted to buttress a conclusion in a particular case, it gave little guidance on how to handle future ones.

The Supreme Court of Canada had its first look at the meaning of "bona fide occupational requirement" in *Ontario Human Rights Commission v. Borough of Etobicoke*,[38] a unanimous decision written by Mr. Justice McIntyre.

Certain firefighters alleged age discrimination because they were subject to mandatory retirement at the age of sixty. The employer contended that retirement at sixty was a "bona fide occupational requirement" in the interest of the safety of the public, co-workers and the firefighters themselves.

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[32] *Id.* at 87, 4 C.H.R.R. at 1408.

[33] 12 Man. R. (2d) 443, 2 C.H.R.R. 528 (C.A. 1981).

[34] S.M. 1974, c. 65.

[35] R.S.M. 1970, c. C120, *as amended by* S.M. 1973, c. 29.

[36] In British Columbia the exception is notably different; the prohibition is against discrimination "unless reasonable cause exists". *See* Human Rights Code of British Columbia, R.S.B.C. 1979, c. 186, s. 8.

[37] (Unreported, Ont. Human Rights Code Bd. of Inquiry, 19 Feb. 1977), *aff'd* 17 O.R. (2d) 712, 81 D.L.R. (3d) 273 (Div'l Ct. 1977), *appeal denied* 21 O.R. (2d) 607, 92 D.L.R. (3d) 544 (C.A. 1977).

[38] *Supra* note 25.

The Supreme Court of Canada began by confirming that the burden of establishing a "bona fide occupational requirement" was on the employer and that the burden of proof was the ordinary civil standard, based on a balance of probabilities.[39]

The Court stated that a "bona fide occupational requirement" had both a subjective and an objective element. The subjective element was satisfied if the "bona fide occupational requirement" was

> imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives that could defeat the purpose of the Code.[40]

In addition, a "bona fide occupational requirement" "must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees, and the general public".[41]

Mr. Justice McIntyre then distinguished two situations. In the first, which he regarded as the general rule, the capacity and ability of all employees would have to be individually assessed.

> [Where] the circumstances of employment require no special skills that may diminish significantly with aging, or involve [no] unusual dangers to employees or the public that may be compounded by aging, it may be difficult, if not impossible, to demonstrate that a mandatory retirement at a fixed age, without regard to individual capacity, may be validly imposed under the Code. In such employment, as capacity fails, and as such failure becomes evident, individuals may be discharged or retired for cause.[42]

In the second situation whole groups could be excluded in the interest of safety. A person would be excluded without an assessment of his individual capacity, solely because of membership in the group:

> On the other hand [the employer] may, in certain types of employment, particularly in those affecting public safety such as that of airline pilots, train and bus drivers, police and firemen, consider that the risk of unpredictable individual human failure involved in continuing all employees to age sixty-five may be such that an arbitrary retirement age may be justified for application to all employees.[43]

The Court went on to discuss the evidence necessary to establish a "bona fide occupational requirement". It was essential that "the evidence should cover the detailed nature of the duties to be performed, the conditions existing in the workplace, and the effect of such conditions upon employees, particularly upon those at or near the

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[39] *Id.* at 208, 3 C.H.R.R. at 783.
[40] *Id.*
[41] *Id.*
[42] *Id.* at 209, 3 C.H.R.R. at 783.
[43] *Id.* at 210, 3 C.H.R.R. at 783-84.

retirement age sought to be supported''.[44] Evidence of the state-of-the-art knowledge of the medical profession ''would appear to be necessary in order to discharge the burden of proof resting upon the employer . . .''.[45] Statistical and medical evidence based on observation and research while ''not in all cases absolutely necessary, will certainly be more persuasive than the testimony of persons, albeit with great experience in firefighting, to the effect that firefighting is 'a young man's game' ''.[46]

The Supreme Court agreed with the Board's characterization of the evidence tendered by the employer as ''impressionistic'' and upheld the finding that the sixty-year-old firefighters had been discriminated against.

With this decision the Supreme Court of Canada has provided invaluable insight into the meaning of a ''bona fide occupational requirement''. Its findings on the burden of proof, the nature of evidence, and the bearing of evidence, have settled several outstanding questions. However, the Court offered little guidance as to when and how an employer can justify excluding whole groups of persons from employment by the application of general standards. The Court merely said that such exclusions may be permissible, ''in certain types of employment, particularly in those affecting public safety''[47] and that a court must consider in each case whether the evidence justifies the exclusion.

The Human Rights Tribunal in *Carson v. Air Canada*[48] and a Review Tribunal, confirming that decision[49] have considered these issues. Both referred to the American case of *Smallwood v. United Airlines Inc.*[50] That case held that in order to justify a class-based exclusion the employer must:

> 1. Show that the *bona fide* occupational requirement which it seeks to invoke is reasonably necessary to the essence of its business; and
> 2. Show a factual basis for believing that all or substantially all persons within the class would be unable to perform the job safely and efficiently, or that it is impossible or impractical to test persons individually.

In applying this standard the Review Tribunal stated that: ''This test is substantially similar to the one set forth in *Etobicoke* by the Supreme Court of Canada.''[51] While perhaps substantively similar, it represents a significant clarification of that case.

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[44] *Id.* at 212, 3 C.H.R.R. at 784.
[45] *Id.*
[46] *Id.*
[47] *Id.* at 209, 3 C.H.R.R. at 783.
[48] 3 C.H.R.R. 818 (Can. Human Rights Comm'n Tribunal 1982).
[49] (Unreported, Can. Human Rights Comm'n Review Tribunal, 26 Oct. 1983).
[50] 661 F.2d 303 (4th Cir. 1981), *cert. denied* 456 U.S. 1007 (1982).
[51] *Supra* note 49, at 57.

C. *Intent to Discriminate and the Duty to Accommodate*

The most important events in human rights law in the period under survey have been the decision of the Ontario Court of Appeal in the case of *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*[52] (hereafter referred to as *O'Malley*) and the decision of the Federal Court of Appeal in *Bhinder v. C.N.R.*[53] These decisions have, in effect, arrested the evolution of the concept of discrimination in employment law. It would be useful to review that evolution before discussing the cases.

Discrimination was originally understood to require an intentional act motivated by prejudice or bias against an individual or group. Proof of intention to discriminate was therefore necessary. Because of the difficulty involved in proving motive, boards of inquiry gradually adopted a second notion of discrimination: discrimination was a matter of treating people in the same position differently. Intention, while still theoretically required, could be simply inferred from evidence of different treatment. Still, it became obvious that much conduct that had an adverse effect on a certain group remained outside the ambit of this concept. Institutionalized norms and practices often resulted in the exclusion of some groups disproportionately, even though those norms and practices may have been established and carried out without intent to harm and applied equally to all individuals. For example, a requirement of grade twelve education for work in the bush would exclude native Canadians disproportionately. If this requirement were not found to be a *bona fide* occupational qualification (*i.e.*, reasonably necessary for the performance of the job) it would be discriminatory and would have to be abandoned even though it had been adopted and applied without intent to discriminate.

This notion of "adverse effect" discrimination was born in *Griggs v. Duke Power Co.*,[54] a decision of the United States Supreme Court which some analysts consider to be as important to civil rights law as *Brown v. Board of Education of Topeka*.[55] In *Griggs*, employment requirements (high school certificate and aptitude tests) were applied equally to all applicants, but had the effect of disqualifying blacks disproportionately. The Supreme Court found the requirements to be discriminatory when the employer was unable to show that they were related to ability to perform the jobs in question.

The concept was introduced into Canada by the Ontario Board of Inquiry in *Singh v. S.I.S. Security*.[56] In that case the complainant had

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[52] 38 O.R. (2d) 423, 3 C.H.R.R. 1071 (1982), *aff'g* 36 O.R. (2d) 59, 3 C.H.R.R. 796 (Div'l Ct. 1982), *aff'g* O'Malley v. Simpsons-Sears Ltd., 2 C.H.R.R. 267 (Ont. Human Rights Code Bd. of Inquiry 1980). *Leave to appeal to the S.C.C. granted* 45 N.R. 270n (1982).

[53] *Supra* note 28.

[54] 401 U.S. 424 (1971).

[55] 347 U.S. 483 (1954).

[56] (Unreported, Ont. Human Rights Code Bd. of Inquiry, 31 May 1977).

been denied a job as a security agent because of his refusal to comply with a uniform requirement that he wear a special cap and have a clean-shaven face. This refusal was due to the fact that his religion, Sikhism, stipulated that he not cut his hair or shave, and wear only a turban. The Board found that although S.I.S. Security bore no ill will towards the complainant, and although it applied its criteria to all candidates equally, its policies had the effect of denying Sikhs employment and the burden fell on it therefore to show that its requirements were job related. As the employer could not show that uniform requirements were essential to the performance of the duties of a security agent, the complaint was substantiated.

Following that decision the concept of "indirect" or "adverse effect" discrimination was applied by Canadian boards and tribunals routinely and a substantial body of human rights jurisprudence was built up. Commissions began to concentrate their energies on such "systematic discrimination". However, none of their decisions were reviewed by the superior courts until the Ontario Divisional Court decision in *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*[57]

It is fitting that the complaint there was one of religious discrimination. The law regarding religious discrimination has always been somewhat unsettled. This is because under the "evil motive" and "disparate treatment" concepts of discrimination the problem is not one of religious discrimination, but rather the lack of religious accommodation. For example, a Jewish individual who loses an employment opportunity not because of the employer's antipathy towards Jews but because of the individual's inability to work on Saturdays is not discriminated against under the "evil motive" and "disparate treatment" concepts.

In the United States the Equal Employment Opportunities Commission sought to overcome this problem in 1966 by issuing guidelines requiring an employer not only to refrain from religious discrimination but also to take affirmative steps to accommodate the religious needs of employees. In 1967 those guidelines were amended to require an employer "to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business".[58]

In 1970 the United States Court of Appeal, in the case of *Dewey v. Reynolds Metal Company*[59] stated that the E.E.O.C.'s authority to impose such a duty on an employer lacked any statutory basis. An equally divided United States Supreme Court affirmed the decision in 1971 without resolving the matter.[60]

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[57] *Supra* note 52 (Div'l Ct.).
[58] 2 C.F.R. para. 1605.1(b) (1967).
[59] 429 F.2d 324 (6th Cir. 1970).
[60] 402 U.S. 689 (1971).

In 1972 Congress responded by amending Title VII of the Civil Rights Act[61] to include a definition of "religion". That definition provides:

> The term "religion" includes all aspects of religious observance practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

In the interim the United States Supreme Court had decided the *Griggs*[62] case in 1971. However, the *Griggs* principle has never been applied to a religious discrimination case in the United States, such application having been rendered unnecessary by the express language of subsection 701(j).

In Canada, there is no statutory duty to accommodate the religious needs of an employee or prospective employee. However, Chairman Cumming in *Singh v. S.I.S. Security*,[63] after using an adverse effect analysis to establish a *prima facie* case of discrimination, found that the employer in question had a duty to accommodate the complainant. He reviewed the American law both before and after the 1971 amendment, but cited a Canadian labour relations case[64] as his authority for finding that such a duty existed. In that case, a much respected arbitrator, Mr. A.B. Shime, had said that the company should have been prepared to make some accommodation in order to satisfy the employee "who had requested leave for religious reasons".[65] Nevertheless, perhaps because of his thorough canvassing of American law, it came to be commonly accepted that Chairman Cumming had imported the duty to accommodate from the United States.

The duty to accommodate, like the adverse effect concept, thereafter came to be routinely applied by Canadian boards and tribunals. Thus the decision of the Ontario Divisional Court in *O'Malley*[66] struck like a thunderbolt.

Theresa O'Malley was employed as a full-time sales clerk and had to work two Saturdays in a row before receiving a Saturday off. In October 1978 she joined the Seventh Day Adventist Church which required its members to observe the Sabbath by not working from sunset on Friday evening till sunset on Saturday. She was no longer able to keep her employment therefore unless her employer accommodated her. The employer offered her a part-time position which she accepted, but the position had neither the pay nor the benefits of full-time employment.

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[61] Equal Employment Opportunity Act of 1972, 42 U.S.C.S. para. 2000e(j).

[62] *Supra* note 54.

[63] *Supra* note 56.

[64] *Re* Canada Valve Ltd. and Int'l Molders Local 279, 9 L.A.C. (2d) 414 (Ont. L.R.B. 1975).

[65] *Id.* at 416.

[66] *Supra* note 52 (Div'l Ct.).

When her complaint of religious discrimination came before him, Chairman Ratushny followed the established Board of Inquiry case law and used an adverse effect analysis to find a *prima facie* case of discrimination on the basis that the requirement of working Saturdays had the effect of excluding Adventists from employment. He also found that the employer had a duty to accommodate, but broke new ground by placing the onus of proving that accommodation was possible on the Commission as part of the general onus on it to establish a contravention of the Code. He commented:

> Quite frankly, I have reservations about attempting to impose an onus of proof upon an employer to meet a specific standard of undue hardship in the absence of any specific legislative basis. It is one thing to conclude that the total framework of the Code warrants a broad interpretation of what might constitute discrimination under that statute. It is another, in effect, to adopt and read into the Code the specific legislative provision of another jurisdiction.[67]

As we have seen this is incorrect. Chairman Cumming borrowed the concept from Canadian labour arbitration jurisprudence. In any event the complaint was dismissed.

The Ontario Human Rights Commission appealed to the Divisional Court,[68] contending that the onus should have been placed on the employer and that had the onus been so placed, the Board would have substantiated the complaint. The thunderbolt struck. The Court[69] found that there must be an intention to discriminate on a prohibited ground in order to contravene paragraph 4(1)(g) of the Ontario Human Rights Code.[70] Since the Board found that Simpsons-Sears had no intention to discriminate against O'Malley, the complaint was properly dismissed.

It is not clear from this judgment whether Southey J. intended to reject the *Griggs* principle completely and it may be that he did not fully appreciate it. He said:

> For the reasons I have given, I cannot hold that the legislature intended the Code as now worded to mean that an employer acting *for legitimate business reasons* and with no thought of discriminating on a prohibited ground, as in the case at bar, is guilty of a contravention of s. [*sic*] 4(1)(g).[71]

In the *Griggs* case the United States Supreme Court had said "[t]he touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[72] It was essential to Southey's reasoning that the exception in subsection 4(6) of a "*bona fide*

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[67] *Id.* at 269 (Ont. Human Rights Code Bd. of Inquiry).

[68] *Id.* (Div'l Ct.).

[69] Southey and Gray JJ. concurring, Smith J. dissenting.

[70] R.S.O. 1980, c. 340, *replaced by* Human Rights Code, 1981, S.O. 1981, c. 53.

[71] *Supra* note 52, at 66, 3 C.H.R.R. at 800 (Div'l Ct.) (emphasis added).

[72] *Supra* note 54, at 431.

occupational requirement'' was available where the ground of discrimination was age, sex or marital status, but not where it was creed. However, as the *Griggs* case makes clear, since the concept of adverse effect discrimination has the consideration of business necessity built into it, the existence of a statutory defence was not necessary. Smith J. in his dissent addressed this point, noting that the courts have repeatedly warned of the danger of using the maxim *expressio unius est exclusio alterius* as a guide to interpretation. In his view, subsection 4(6) did not exhaust the defences available.

The majority of the Ontario Divisional Court also found that the Code could not be interpreted so as to impose a duty to accommodate which it regarded as an American statutory provision.

The Court of Appeal ruled unanimously that there could be no violation of the Ontario Human Rights Code unless the employer intended to discriminate. Lacourcière J.A., noting that the 1982 amendment to the Ontario Human Rights Code[73] contained in section 10 a provision for constructive discrimination, stated the opinion of the Court that ''[w]here an employment limitation does not fall squarely within one of the protected classifications of rights (race, age, creed), as in this case, there can be no offence unless the employer intended to discriminate on a prohibited ground''.[74] He also found the use of the words ''because of'' in paragraph 4(1)(g) particularly persuasive. These words ''clearly refer to the employer's motivation''.[75] The issue of reasonable accommodation was not addressed.

In *Bhinder v. C.N.R.*[76] a three person Human Rights Tribunal substantiated a complaint of religious discrimination by K.S. Bhinder. Mr. Bhinder was a Sikh and the tenets of his religion prevented him from wearing anything except a turban on his head. He had been employed as a maintenance electrician for four and one-half years in the Spadina coach yard of C.N.R. when in 1978 C.N.R. enacted a policy that required all employees at the coach yard to wear hard hats. Because he could not comply Mr. Bhinder lost his job.

The Tribunal found that although C.N.R. did not intend to discriminate against Mr. Bhinder, its policy had the effect of denying him employment. It found that, on the evidence, his lack of a hard hat created no risk to other employees or to the public and only a slightly greater risk to Mr. Bhinder himself. The Tribunal ruled that the employer had failed to establish that the hard hat was a *bona fide* requirement of Mr. Bhinder's occupation and held that the employer could have accommodated him by exempting him from the hard hat policy. The Federal Court of Appeal reversed the Tribunal.[77]

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[73] S.O. 1981, c. 53 (proclaimed 15 Jun. 1982).

[74] *Supra* note 52, at 425, 3 C.H.R.R. at 1072 (C.A.).

[75] *Id.* at 424, 3 C.H.R.R. at 1071.

[76] 2 C.H.R.R. 546 (Can. Human Rights Comm'n Tribunal 1981).

[77] *Supra* note 28, Kelly D.J. and Heald J. concurring, LeDain J. dissenting.

Mr. Justice LeDain, dissenting, reviewed the *O'Malley* case and said:

> The issue, as I see it, is not so much whether a discriminatory intention or motivation is required for the discriminatory practices defined by sections 7 and 10 of the *Canadian Human Rights Act*, as whether they include indirect as well as direct discrimination. [Editor's note — in Britain adverse effect discrimination is known as "indirect discrimination" and British authors and the provisions of the *Race Relations Act* had been cited to the Court.] Quite clearly the Act is concerned with discriminatory effects, and in a case of differential treatment, such as unequal pay, it is the objective fact of discrimination rather than intention that matters. The distinction is between differential treatment, which may or may not be accompanied by a discriminatory motivation or animus, but which will generally be intended, and what is on its face equal treatment but nevertheless has a discriminatory effect on a particular person by reason of a prohibited ground or basis of discrimination.[78]

He found that section 7 of the Act did not encompass adverse effect discrimination but that section 10 did. Section 10 provides:

> It is a discriminatory practice for an employer, employee organization or organization of employers
>
> (a) to establish or pursue a policy or practice, or
>
> (b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,
>
> that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.[79]

LeDain J. was of the view that the words "that deprive or tends to deprive" covered indirect or adverse effect discrimination.

Heald J., writing for the majority, ruled that section 10 was not sufficiently comprehensive to include adverse effect discrimination. He placed particular importance on the words "or otherwise adversely affect" which appeared in paragraph 703(a)(2) of the 1964 United States Civil Rights Act, which provided that:

> It shall be an unlawful employment practice for an employer
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> . . . .
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> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, colour, religion, sex or national origin. . . .[80]

The words "or otherwise adversely affect" did not appear in section 10 of the Canadian Human Rights Act and absent those words, section 10

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[78] *Id.* at 96, 4 C.H.R.R. at 1412-13.

[79] Canadian Human Rights Act, S.C. 1976-77, c. 33, s. 10.

[80] 42 U.S.C.S. para. 2000e-2(a)(2).

was not "capable of the same construction as subsection [*sic*] 703(a)(2) [of the Civil Rights Act]".[81]

Heald J., however, agreed with LeDain J.'s conclusion that "section 7 of the *Canadian Human Rights Act* contemplates only direct discrimination and does not extend to discrimination in which there is neither a discriminatory intention or motivation or differential treatment".[82]

The Federal Court of Appeal did not go so far in *Bhinder* as the Ontario Court of Appeal had in *O'Malley*. In *O'Malley* intention was required for a breach of the code, whereas in *Bhinder* intention was not required where there was differential treatment. Thus, the Ontario Code was confined to covering only the first concept of discrimination, *i.e.*, intentional discrimination, whereas the Canadian Human Rights Act covered the second concept of discrimination, *i.e.*, differential treatment, as well.

Kelly D.J. and Heald J. also found that the Canadian Human Rights Act imposed no duty to accommodate. Heald J. said: "Had Parliament intended to impose such an additional obligation, it could and would have done so in clear and unmistakable language."[83] LeDain J., however, stated that the principle of accommodation involved what were "essentially questions of fact, and to some extent, questions of human rights policy".[84] He added that "the Court should not lightly interfere with what is essentially a question of human rights policy in the application of the principles or criteria which human rights tribunals have developed as a distinct body of jurisprudence in what is a relatively new field".[85]

Both cases are on appeal to the Supreme Court of Canada which is expected to hear them together.

### D. *Section 96 of the Constitution Act*

An exceedingly interesting and indeed crucial issue for the administration of human rights legislation[86] has now been dealt with by the Saskatchewan Court of Appeal and is pending before the Supreme Court of Canada. Briefly, the issue is whether human rights boards of inquiry exercise judicial powers and functions analogous to those performed by judges of superior, district or county courts at the time of Confederation. If so, their members must be appointed by the Governor

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[81] *Supra* note 28, at 83, 4 C.H.R.R. at 1405.
[82] *Id.* at 82, 4 C.H.R.R. at 1405.
[83] *Id.* at 86, 4 C.H.R.R. at 1407.
[84] *Id.* at 98, 4 C.H.R.R. at 1414.
[85] *Id.* at 98-99, 4 C.H.R.R. at 1414.
[86] It is interesting to note that this issue was treated as arcane and academic only five years ago.

General pursuant to section 96 of the Constitution Act, 1867 and any appointment by the provinces is *ultra vires*.

In *Re Residential Tenancies Act, 1979*[87] the Supreme Court of Canada suggested a three-step test for determining whether a conferred power or jurisdiction was compatible with section 96 of the Constitution Act, 1867.[88] The three-step test was summarized by Laskin C.J.C. in *Massey-Ferguson v. Saskatchewan*[89] as follows:

> (1) Does the challenged power or jurisdiction broadly conform to the power or jurisdiction exercised by Superior, District or County Courts at the time of Confederation?
> (2) Is the function of the provincial tribunal within its institutional setting a judicial function, considered from the point of view of the nature of the question which the tribunal is called upon to decide or, to put it in other words, is the tribunal concerned with a private dispute which it is called upon to adjudicate through the application of a recognized body of rules and in a manner consistent with fairness and impartiality?
> (3) If the power or jurisdiction of the provincial tribunal is exercised in a judicial manner, does its function as a whole in its entire institutional context violate s. 96?[90]

Even a cursory look at boards of inquiry is enough to show that there may be a problem. They are established to inquire into and adjudicate upon complaints of discrimination. They summon and enforce the attendance of witnesses and the production of evidence in much the same manner and to much the same extent as do superior courts. They determine issues on the balance of probabilities, and have the power to order compensation, to issue injunctions in the form of cease-discriminating orders, and to issue mandatory injunctions.[91] In some jurisdictions the board's order may even be filed with a superior court and enforced as a judgment of that court.[92]

Labour relations boards which exercise similar powers have been held not to be invalidated by section 96.[93] However, such labour relations boards exercise their judicial functions as part of their more general administrative role in pursuit of policy considerations. In the human rights arena, administrative and judicial functions are divided between two separate entities. The administrative functions, such as education and research are performed by human rights commissions and the judicial functions are performed by boards of inquiry. The independence of those

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[87] [1981] 1 S.C.R. 714, 123 D.L.R. (3d) 544.

[88] Constitution Act, 1867, c. 3, s. 96.

[89] [1981] 2 S.C.R. 413, 127 D.L.R. (3d) 513.

[90] *Id.* at 429, 127 D.L.R. (3d) at 526.

[91] These take the form of directions to a party to do something so as to comply with the Act and to prevent a breach in the future.

[92] *See* Canadian Human Rights Act, S.C. 1976-77, c. 33, s. 43 and The Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1, s. 38.

[93] *E.g.*, Tomko v. Labour Rel. Bd. (N.S.), [1977] 1 S.C.R. 112, 69 D.L.R. (3d) 250; Labour Rel. Bd. of Sask. v. John East Iron Works Ltd., [1949] A.C. 134, [1948] 4 D.L.R. 673 (P.C. 1948).

two bodies is highlighted by the fact that commissions appear before the boards as parties. The boards perform no administrative functions whatsoever. Laskin C.J.C. in *Massey-Ferguson v. Saskatchewan* stated that to be valid the "challenged authority or function [must be] so integrated with the valid regulatory regime as to take on an altered character".[94]

The section 96 argument would be applicable to federal human rights tribunals as well as to provincial boards.[95]

Thus far the boards and courts of first instance have refused the section 96 argument on every occasion it has been raised. In *Prior v. C.N.R.* the federal Human Rights Tribunal[96] and the Review Tribunal[97] both refused to disqualify themselves.

In *Lodger's International Ltd. v. O'Brien*[98] Mr. Justice Stevenson rejected the section 96 argument on the basis that the courts did not exercise any power or jurisdiction relating to discrimination at the time of Confederation; and that therefore boards of inquiry do not exercise functions performed by superior courts at Confederation. Though the judgment did not cite *Bhadauria v. Board of Governors of Seneca College of Applied Arts and Technology*,[99] the case might be taken to support this view. There, the Supreme Court of Canada decided that no civil action lay for discrimination. Since there is no common law remedy for discrimination, it must follow that the courts did not deal with the issue at the time of Confederation. However, the weakness in this line of reasoning is that the *Bhadauria* case dealt with an allegedly discriminatory refusal to hire. A discriminatory termination of employment on the other hand deals with the same subject matter as an action for damages for wrongful dismissal, something the courts have always dealt with.

The fact that *Bhadauria* does not determine the issue is illustrated by *Glendinning v. Attorney General for Saskatchewan*,[100] a decision of the Saskatchewan Court of Appeal. A complaint was filed with the Saskatchewan Human Rights Commission alleging that several native persons, while moose hunting, were accosted and harassed by R.C.M.P. officers in contravention of section 7 of The Saskatchewan Human Rights Code.

The Commission appointed a Board of Inquiry to inquire into the complaints. Mr. Justice Maher of the Court of Queen's Bench granted a

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[94] *Supra* note 89, at 426, 127 D.L.R. (3d) at 523-24.

[95] The decision of the Supreme Court of Canada in McEvoy v. Attorney General of New Brunswick, 46 N.B.R. (2d) 219, 148 D.L.R. (3d) 25 (1983) indicates that s. 96 prevents the Parliament of Canada, as well as the provinces, from conferring s. 96 powers on a body not appointed in accordance with s. 96.

[96] 3 C.H.R.R. 1092 (Can. Human Rights Comm'n Tribunal 1982).

[97] 4 C.H.R.R. 1319 (Can. Human Rights Comm'n Review Tribunal 1983).

[98] 3 C.H.R.R. 1154, 141 D.L.R. (3d) 743 (N.B.Q.B. 1982), *rev'd on other grounds* 45 N.B.R. (2d) 342, 4 C.H.R.R. 1349 (C.A. 1983).

[99] [1981] 2 S.C.R. 181, 124 D.L.R. (3d) 193.

[100] 23 Sask. R. 16, 4 C.H.R.R. 1355 (C.A. 1983).

writ of prohibition to prevent the Board from proceeding on the basis that the Board had no jurisdiction to inquire into the administration and management of the Royal Canadian Mounted Police, a federal agency. In doing so, he followed the Supreme Court of Canada decision in *Attorney General for Alberta v. Putnam*.[101] In that case an individual alleged harassment on the part of the R.C.M.P. officers during a narcotics investigation. No discrimination was alleged. The Assistant Commissioner for the R.C.M.P. for Alberta found that the complaint was not justified. The individual appealed to the Law Enforcement Appeal Board established under the Alberta Police Act.[102] The Law Enforcement Appeal Board was authorized to hear appeals from decisions of Chiefs of Police regarding complaints of police misconduct in Alberta. The Board purported to entertain the appeal and the police officer and the R.C.M.P. successfully applied for prohibition. The matter was appealed and the Supreme Court of Canada, in a decision written by the Chief Justice, held that "[I]t was beyond the competence of a province to authorize a provincial board of inquiry, concerned with looking into allegations of illegal or reprehensible acts by various police forces, including the R.C.M.P., to extend its inquiry into the administration or management of that police force."[103]

In *Glendinning* the Saskatchewan Court of Appeal[104] reversed Maher J.'s decision and ruled that R.C.M.P. officers were not immune to provincial law. While a provincially constituted board of inquiry did not have the jurisdiction to inquire into the internal management or administration of the Royal Canadian Mounted Police, it could deal with complaints alleging that individual R.C.M.P. officers had contravened provincial law such as the Human Rights Code.[105] Employment by the federal government does not in itself place the individual officer outside the ambit of a provincial statute. The identity and occupation of the alleged offender is not a bar to an inquiry under the Code so long as the inquiry is conducted within proper bounds.[106]

The Court of Appeal also dealt with the argument that the Board was purporting to exercise section 96 powers. That argument was rejected on the basis of affirmative answers to questions 2 and 3 in the Supreme Court of Canada test. In the Court's analysis the Board of Inquiry was intertwined with the Commission, the administration of the Human Rights Code and a broad social policy framework. Therefore the Court decided that in its institutional setting the Board did not operate like a section 96 court. As noted earlier, in the writer's opinion, this is incorrect. The Board of Inquiry must be seen as separate from and independent of the Human Rights Commission.

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[101] [1981] 2 S.C.R. 267, 123 D.L.R. (3d) 257.
[102] R.S.A. 1980, c. P-12.
[103] *Supra* note 101, at 272, 123 D.L.R. (3d) at 260.
[104] *Supra* note 100.
[105] The Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1.
[106] *Supra* note 100.

There is another consideration, however, which lends strength to the argument for the constitutional validity of human rights boards. In its most recent decisions the Supreme Court of Canada seems to be placing less emphasis on its own three-step test and placing more emphasis on whether or not the impugned body's decisions are shielded from judicial review. In *Crevier v. Attorney General for Quebec*,[107] Laskin C.J.C. said:

> In my opinion, where a provincial legislature purports to insulate one of its statutory tribunals from any curial review of its adjudicative functions, the insulation encompassing jurisdiction, such provincial legislation must be struck down as unconstitutional by reason of having the effect of constituting the tribunal a s. 96 court.[108]

Laskin C.J.C. also commented in *McEvoy v. Attorney General of New Brunswick*[109] that the purported grant of an unreviewable authority might contravene section 96. And in *Attorney General for Quebec. v. Grondin*[110] the Supreme Court of Canada found it pertinent that the decisions of the Régie du logement were not protected by a privative clause excluding superintending and reforming power of the superior courts as in *Crevier*. Human rights boards and tribunals are subject to the superintendence of the superior courts either by appeal or through judicial review. No Canadian human rights statute contains a privative clause. It may well be that this characteristic has become a determining factor in section 96 cases and boards of inquiry will be found to be valid for that reason.

### E. *Mandatory Retirement*

The status of mandatory retirement in Canada varies from jurisdiction to jurisdiction because of differences in legislation.

In those provinces where protection from age discrimination is limited to those under sixty-five,[111] mandatory retirement at sixty-five is not discrimination under the law since those sixty-five and over are simply not protected by the legislation. Termination of employment at a younger age would be discriminatory unless the employer could show a *bona fide* occupational requirement. In other provinces, such as

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[107] [1981] 2 S.C.R. 220, 127 D.L.R. (3d) 1.

[108] *Id.* at 234, 127 D.L.R. (3d) at 12.

[109] *Supra* note 95, at 227, 148 D.L.R. (3d) at 35.

[110] 50 N.R. 50 (S.C.C. 1983).

[111] In Alberta and British Columbia age is defined as 45 or more and less than 65: Individual's Rights Protection Act, R.S.A. 1980, c. I-2, s. 38; Human Rights Code of British Columbia, R.S.B.C. 1979, c. 186, s. 1. Saskatchewan, Ontario and Prince Edward Island define age as 18 or more and less than 65: The Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1, s. 2; Human Rights Code, 1981, S.O. 1981, c. 53, s. 9; Human Rights Act, S.P.E.I. 1975, c. 72, s. 11. Newfoundland defines age as 19 or more and less than 65: Newfoundland Human Rights Code (Amendment) Act, 1974, S.N. 1974, No. 114, s. 9.

Manitoba[112] and Quebec[113] there is no statutory definition of age and in New Brunswick[114] age is defined as nineteen and over. In those provinces a termination of employment at sixty-five would be age discrimination unless a *bona fide* occupational requirement could be shown. The federal Act has no definition of age but contains exceptions relating to retirement which will be discussed below.

Retirement may be compelled by collective agreement, statute, or mere employer policy. In *McIntire v. University of Manitoba*[115] the Manitoba Court of Appeal considered the effect of the Human Rights Act[116] on a collective agreement which established a compulsory retirement age of sixty-five. Imogene McIntire, a professor of education, reached sixty-five and applied for a declaration that the age limitation was illegal or void as being contrary to the Human Rights Act. The Manitoba Human Rights Act, as we have seen, has no definition of age. Huband J.A.[117] was of the view that "Where there is [a] term in a contract, including a collective agreement, which collides with a statute which is intended to protect the public, the contract, or the specific term thereof, is to that extent invalid."[118] Therefore the applicant was entitled to a declaration that the University of Manitoba could not refuse to employ or continue to employ her because of her age.

Monnin J.A., dissenting, was of the view that there was no discrimination in the compulsory retirement provision as it treated all employees alike in that they all had to retire upon reaching sixty-five. He held that if the legislature "wished to establish such a clear and drastic change from past policy, it should in no uncertain terms have stated that hereinafter no fixed compulsory retirement age can be set either by the employer or by a collective bargaining agreement . . .".[119]

Hall J.A. also dissented on the basis that the applicant was not entitled to declaratory relief and that it was the "express will of the legislature that alleged violations of human rights be dealt with as in the statute provided".[120]

In *Newport v. Government of Manitoba*,[121] a Board of Adjudication was faced with a situation where mandatory retirement was required by statute. Mr. Newport was employed by the Manitoba Civil Service Commission. Section 54 of the Civil Service Superannuation Act

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[112] The Human Rights Act, S.M. 1974, c. 65.

[113] Charte des droits et libertés de la personne, L.R.Q. 1977, c. C-12, *as amended by* L.Q. 1982, c. 61.

[114] Human Rights Act, R.S.N.B. 1973, c. H-11, s. 2.

[115] [1981] 1 W.W.R. 696, 2 C.H.R.R. 310 (Man. C.A.).

[116] S.M. 1974, c. 65.

[117] Freedman C.J.M. and Matas J.A. concurring, Hall and Monnin JJ.A. dissenting.

[118] *Supra* note 115, at 702, 2 C.H.R.R. at 311.

[119] *Id.* at 711, 2 C.H.R.R. at 317.

[120] *Id.* at 711, 2 C.H.R.R. at 318.

[121] 2 C.H.R.R. 323 (Man. Human Rights Bd. of Adjudication 1980).

provided: "Every employee shall be retired from the Civil Service on the last day in the month in which he reaches the age of 65 years."[122] The Board found that the termination did not contravene the Manitoba Human Rights Act[123] in view of the clear language of section 54. The Board was reversed by the Court of Queen's Bench[124] and a further appeal to the Manitoba Court of Appeal was dismissed unanimously.[125] The conflict between the two statutes was resolved because:

> [T]he Human Rights Act was passed later in time, and in view of the fact that it contains a specific provision declaring the Crown to be bound, — thereby necessarily making it applicable to members of the civil service, — this is a case where the later enactment prevails over the earlier one.[126]

The situation where retirement is merely a matter of employer policy was considered by the Manitoba Court of Appeal in *Finlayson v. City of Winnipeg*.[127] The issue was simply whether or not the employer had established a *bona fide* occupational requirement for the termination of employment. It was determined by the Court that the mandatory retirement of a Staff Inspector by the Police Department was justified because the job required attendance at emergencies and a high standard of performance in order to protect the safety of the public and of fellow officers.

In the federal jurisdiction the Canadian Human Rights Act[128] exempts mandatory retirement from the definition of age discrimination pursuant to statute. Section 14 provides:

> It is not a discriminatory practice if
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> . . . .
>
> (b) employment of an individual is refused or terminated because that individual
>
> (i) has not reached the minimum age, or
>
> (ii) has reached the maximum age
>
> that applies to that employment by law or under regulations, which may be made by the Governor in Council for the purposes of this paragraph.[129]

This would permit mandatory retirement from the public service of Canada and many federally appointed positions.

Retirement in the federally regulated private sector is governed by subsection 14(c):

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[122] R.S.M. 1970, c. C120, s. 54, *as amended by* S.M. 1973, c. 29.

[123] S.M. 1974, c. 65.

[124] 12 Man. R. (2d) 443, 2 C.H.R.R. 528 (Q.B. 1981).

[125] 13 Man. R. (2d) 292, 3 C.H.R.R. 721 (C.A. 1982).

[126] *Id.* at 297, 3 C.H.R.R. at 722.

[127] [1983] 3 W.W.R. 117, 4 C.H.R.R. 1255 (Man. C.A.).

[128] S.C. 1976-77, c. 33, *as amended by* S.C. 1977-78, c. 22, S.C. 1980-81, c. 54, S.C. 1980-81-82, c. 111, S.C. 1980-81-82-83, c. 143.

[129] S. 14.

> It is not a discriminatory practice if
>
> . . . .
>
> (c) an individual's employment is terminated because that individual has reached the normal age of retirement for employees working in positions similar to the position of that individual.[130]

In *Campbell v. Air Canada*,[131] Douglas Campbell was a flight attendant who was mandatorily retired at the age of sixty in accordance with company policy. The tribunal determined that the phrase "in positions similar to the position of that individual" referred to more than those of the company itself, but rejected the argument that one could look to the global experience. Chairman Jones, Q.C. said that the proper measure was the Canadian setting. Since some 80% of flight attendants in Canada retire at the age of sixty this was taken to be the normal age of retirement.

In *C.N.R. v. Prior*[132] a Review Tribunal had before it a situation in which 60% of cargo checkers retired at the age of sixty-five. While it had difficulty in picking a percentage that would satisfy the test of "normal age of retirement" the Review Tribunal said that 60% was a sufficient number to be considered normal. In its view, "normal means conforming to the standard of the common type, usual or regular, or not abnormal".[133] The Review Tribunal observed that subsection 14(c) of the Act would probably be rendered of no force and effect by subsection 15(1) of the Charter when it comes into effect on 17 April 1985. Subsection 14(c) and similar provisions in other human rights legislation were laws that failed to accord those who attained the age of sixty-five or the normal age of retirement equal protection and benefit of the law. Therefore they would be rendered of no force and effect by sections 15 and 52 of the Charter.[134]

This argument employing the Bill of Rights in lieu of the Charter was used in the Federal Court of Appeal in the case of *Stevenson v. Air Canada*.[135] Captain Ross Stevenson, a pilot with Air Canada, was retired at the age of sixty and filed complaints of age discrimination against both his employer and his union, the Canadian Air Line Pilots Association which had agreed to Air Canada's policy of mandatory retirement. His complaints were dismissed by the Canadian Human Rights Commission on the basis that his employment was terminated at the "normal age of retirement". He argued that subsection 14(c) of the Canadian Human Rights Act was not consistent with the guarantee of "equality before the law" contained in the Canadian Bill of Rights. The Court was unanimous

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[130] Sub. 14(c).

[131] 2 C.H.R.R. 602 (Can. Human Rights Comm'n Tribunal 1981).

[132] 4 C.H.R.R. 1319 (Can. Human Rights Comm'n Review Tribunal 1983).

[133] *Id.* at 1324.

[134] Constitution Act, 1982, Part I, ss. 15, 52, *enacted by* Canada Act, 1982, U.K. 1982, c. 11.

[135] 4 C.H.R.R. 1665, 150 D.L.R. (3d) 385 (F.C. App. D. 1983).

that subsection 14(c) was consistent with the Canadian Bill of Rights guarantee of equality before the law because a provision for a "normal age of retirement" was a valid federal objective. McQuaid D.J. described that valid federal objective as

> both reasonable and relevant and . . . within the contemporary social context, both necessary and reasonable to attain a desirable social objective, that is, the orderly retirement from the work force, with dignity and some degree of financial security, of those who have devoted the best of their working years to the establishment of the way of life of which we are all beneficiaries while, at the same time, providing the opportunity for those of that other group, who have not yet reached the normal age of retirement, to progress upward in their respective field of employment and to enable them to make their own contribution to the enhancement of that way of life. There can be no question that the attainment of this end is a valid federal objective. That being the case, it cannot be argued that section 14(c) is incompatible with the Bill of Rights . . . .[136]

The *Stevenson* case is on appeal to the Supreme Court of Canada.

### F. *Burden of Proof*

It is not unusual for the development of Canadian human rights law to be heavily influenced by American law. The fascination that tribunals and boards have for American law has been criticized by the courts.[137] It is worthy of note therefore when the Canadian courts themselves adopt United States decisions in the human rights context. This they have done in allocating proof in the area of employment discrimination cases based on differential treatment. As we have seen in differential treatment cases "intent", while nominally required, can be inferred from evidence of differential treatment. In *MacDonnell Douglas Corp. v. Green*,[138] the United States Supreme Court established the degree of evidence of differential treatment from which the required intention could be inferred. Once the complainant had adduced sufficient evidence to establish a *prima facie* case of discrimination, the burden shifted to the respondent. A *prima facie* case could be made by the complainant showing:

> (i) that he belongs to a racial minority;
> (ii) that he applied and was qualified for a job for which the employer was seeking applicants;

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[136] *Id.* at 1676, 150 D.L.R. (3d) at 411.

[137] In Bhinder v. C.N.R., *supra* note 28, at 86, 4 C.H.R.R. at 1407, Heald J. remarked that "the duty to accommodate [had] been borrowed from American law [and] the Tribunal was in error in reading into Canadian legislation a provision which is clearly and patently not there". In Ontario Human Rights Comm'n v. Simpsons-Sears Ltd., *supra* note 52, at 425, 3 C.H.R.R. at 1072 (C.A.), Lacourcière J.A. remarked that post-1972 American jurisprudence "was of no assistance in the interpretation of the Ontario Human Rights Code".

[138] 411 U.S. 792 (1973).

(iii) that, despite his qualifications, he was rejected; and
(iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of the complainant's qualifications.[139]

Once a *prima facie* case was proven "the burden then must shift to the employer to articulate some legitimate, non-discriminatory reason for the respondent's rejection".[140] In *MacDonnell Douglas Corp. v. Green* this was done by showing that the complainant had taken part in unlawful activity against the respondent prior to his application and was for that reason seen as an undesirable employee. The *MacDonnell Douglas Corp.* case came to be generally accepted as authority for the proposition that once a *prima facie* case was established the burden of proof shifted to the respondent to prove that it had not discriminated.

While boards of inquiry had applied it earlier, the first Canadian court to apply the *MacDonnell Douglas Corp.* decision was the Court of Queen's Bench of Alberta. In *Gadowsky v. School Committee of the County of Two Hills*,[141] an age discrimination case, a Board of Education, faced with declining enrolment and an inflexible budget, assigned an elderly teacher to an inconvenient location. The Board of Inquiry and the Court were asked to infer that Gadowsky was chosen for the reassignment because she was likely to choose early retirement instead. In the course of his decision, Mr. Justice Cawsey said, after analyzing the *MacDonnell Douglas* case: "Therefore, with respect to onus, I find that the complainant has the initial burden of establishing a *prima facie* case, and once this is done then the evidentiary burden must be taken up by the employer who must then show a legitimate non-discriminatory reason for his actions."[142]

The United States Supreme Court significantly clarified the *MacDonnell Douglas Corp.* decision in *Texas Dept. of Community Affairs v. Burdine*.[143] In that case the complainant, a woman, alleged that the respondent had failed to promote her and had subsequently discharged her because of sex discrimination. The Court of Appeals had determined the complaint in the woman's favour on the basis that she had established a *prima facie* case which the respondent had failed to rebut. Justice Powell, on behalf of the Supreme Court, stated clearly, however, that the ultimate burden of proof never shifted but always stayed with the complainant. It is the complainant who must persuade the court that the respondent discriminated. The establishing of a *prima facie* case merely creates a presumption of unlawful discrimination which will carry the day if the respondent remains silent. The burden that shifts to the respondent, therefore, is not the burden of proof, but merely the burden

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[139] *Id.* at 803.
[140] *Id.*
[141] 1 C.H.R.R. 184, 120 D.L.R. (3d) 516 (Alta. Q.B. 1980).
[142] *Id.* at 186, 120 D.L.R. (3d) at 523.
[143] 450 U.S. 248 (1981).

of adducing evidence and of "articulating" a reason for the court's action or decision. The complainant retains the burden of persuading the court that the respondent's explanation ought not to be believed.

It is not clear whether Cawsey J. in the *Gadowsky* case appreciated this distinction when he spoke of the "evidentiary burden" shifting, since he also said that the employer "must then show a legitimate non-discriminatory reason for its actions". Any ambiguity was clarified however by the Court of Queen's Bench of Alberta in *Base-Fort Patrol Ltd. v. Alberta Human Rights Commission*.[144] A Board of Inquiry had found that the discharge of Marylou Bueckert was sexually discriminatory. In the course of its reasoning the Board stated that once the complainant establishes a *prima facie* case "the onus then shifts to the employer to prove a legitimate non-discriminatory basis for the dismissal".[145] Mr. Justice MacDonald reversed the decision, expressly subscribing to the analysis in *Texas Dept. of Community Affairs v. Burdine*.[146]

Whether or not the burden of proof in human rights cases in Canada will be determined on the basis of *Burdine* will have to be decided ultimately by the Supreme Court of Canada. There are two Supreme Court of Canada decisions that may indicate a heavier onus on the respondent. In *Gay Alliance Toward Equality v. Vancouver Sun*,[147] Dickson J., dissenting, said of the "without reasonable cause" phrase in section 3 of the British Columbia Human Rights Code that ". . . the word 'unless' in the phrase 'unless reasonable cause exists' places the onus of establishing reasonable cause upon the person against whom the complaint is brought . . .".[148] The majority did not comment on the question of onus.

In *Ontario Human Rights Commission v. Borough of Etobicoke*[149] McIntyre J., writing for a unanimous Court, said of the *bona fide* occupational requirement exception of the Ontario Code:

> Once a complainant has established before a Board of Inquiry a *prima facie* case of discrimination, in this case proof of a mandatory retirement at age 60 as a condition of employment, he is entitled to relief in the absence of justification by the employer. The only justification which can avail the employer in the case at bar, is the proof, *the burden of which lies upon him*, that such compulsory retirement is a *bona fide* occupational qualification and requirement for the employment concerned. The proof, in my view, must be made according to the ordinary civil standards of proof, that is upon a balance of probabilities.[150]

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[144] 41 A.R. 528, 4 C.H.R.R. 1200 (Q.B. 1983).
[145] *Id.* at 532, 4 C.H.R.R. at 1202.
[146] *Id.*
[147] *Supra* note 21.
[148] *Id.* at 461, 97 D.L.R. (3d) at 596.
[149] *Supra* note 25.
[150] *Id.* at 204, 3 C.H.R.R. at 783 (emphasis added).

Both the *Gay Alliance* case and the *Borough of Etobicoke* case, however, dealt with statutory exceptions and it is a traditional canon of construction that the onus of proving that an exception applies lies on the person seeking to benefit from it.

The most recent discussion of burden of proof occurred in *Dhaliwal v. B.C. Timber Ltd.*[151] where a Board of Inquiry rejected the views of Dickson J. in the *Gay Alliance* case. The Board said:

> Reading the section as a whole, the better opinion appears to me to be that the legal burden of proof remains throughout upon the complainant. Had the legislature intended otherwise I would have expected an express reversal of onus as in the Labour Code provisions dealing with dismissals contrary to s. 3 of the Act. The preferable view, in my opinion, is that the provisions of s. 8(1) have to be read as a whole, and I would not read the words "unless reasonable cause" as importing a switch in the legal burden. The section contains, in essence, a prohibition against discrimination without reasonable cause. The onus of establishing that rests on the complainant. He or she carries the burden of persuasion to the end. However, bearing in mind the difficulties a complainant faces it may be relative [*sic*] easy to persuade a board that the employer's actions warrant explanation. If the complainant can establish a *prima facie* case then, in effect, a presumption of unlawful discrimination is raised and if the employer wishes to avoid the risk of a decision against him he must seek to rebut it by adducing credible evidence that the applicant was rejected or someone else preferred for a legitimate reason.[152]

It is interesting to note that the Board made no reference to the American authorities.

### G. *Powers of Investigation*

Canadian human rights statutes generally have provisions that authorize investigators to enter premises at reasonable times, that permit them to carry out such inquiries as are reasonably necessary, and that require a respondent to produce any documents relevant to the investigation.[153] These are delineated in *Discrimination and the Law in Canada*[154] where Tarnopolsky comments that apart from *Nembhard v. Caneurop Manufacturing Ltd.*[155] there are no cases dealing with these provisions. Since then the Alberta Court of Appeal has provided valuable guidance to their interpretation in *Alberta Human Rights Commission v. Alberta Blue Cross*.[156] A woman employed by the Alberta Blue Cross Plan became pregnant and approached her supervisor to discuss a leave of absence. Shortly afterwards her employment was terminated. She filed a

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[151] 4 C.H.R.R. 1520 (B.C. Human Rights Code Bd. of Inquiry 1983).
[152] *Id.* at 1546-47.
[153] Canadian Human Rights Act, S.C. 1976-77, c. 33, sub. 35(2).
[154] *Supra* note 2, at 448-50.
[155] (Unreported, Ont. Human Rights Code Bd. of Inquiry 1976).
[156] 48 A.R. 192, 4 C.H.R.R. 1661 (C.A. 1983).

complaint of sex discrimination with the Alberta Human Rights Commission. The Commission demanded production of:

> 1. Personnel files of all employees during the three year period prior to the filing of the complaint;
> 2. Records which would indicate the names of all employees whose employment was terminated for any reason, voluntary or involuntary, during that same three year period.

The respondent produced the complainant's own personnel file but refused access to files of all other employees on the ground that they contained confidential information pertaining to third parties. The Commission argued that it had to compare the complainant's treatment to that accorded others with histories of absenteeism and compare as well the records of other pregnant employees to other employees generally. Without doing so it could not determine whether or not discrimination had been practised.

The Court of Appeal first considered whether the investigative powers of the Human Rights Commission violated the guarantee contained in section 8 of the Charter of Rights[157] that: "Everyone has the right to be secure against unreasonable search or seizure." The Court determined that a "forced production of documents in a civil proceeding, or during an administrative inquiry, is a seizure".[158] However it considered the protections built into the exercise of the investigative power, including the availability of judicial review and the fact that no sanctions could be imposed before there was an independent inquiry into the validity of the complaint and concluded that there was no breach of section 8 of the Charter.

The Court of Appeal then went on to find that "[t]here is no blanket confidentiality which necessarily applies to everything in a personnel file . . .".[159] The respondent's wish to protect confidentiality could not be granted in the abstract. The Supreme Court of Canada in *Slavutych v. Baker*[160] had prescribed a balancing of the two opposing considerations: a document will be suppressed only if the injury from disclosure would be greater than the benefit gained thereby. The Court of Appeal noted that such a judgment could not be made unless there was a specific document before the Court. The Court would have to know who could be harmed and how much harm would result from production. It also needed to determine how significant the contents of such a document would be to the investigation. Any objections, therefore, had to be made specifically to the production of particular documents.

The Court did not, however, go on to simply order that all the files should be produced (subject to the specific objections which might be

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[157] Constitution Act, 1982, Part I, s. 8, *enacted by* Canada Act, 1982, U.K. 1982, c. 11.

[158] *Supra* note 156, at 196, 4 C.H.R.R. at 1663.

[159] *Id.* at 197, 4 C.H.R.R. at 1664.

[160] [1976] 1 S.C.R. 254, [1975] 4 W.W.R. 620 (1975).

made). Rather, it observed that an investigation must proceed in stages. The Commission should review the most probative evidence first and assess it before deciding that the investigation must continue and that further information is necessary. In this case the applicant deserved an order of production of the complainant's own file and of the personnel records of all pregnant employees. The contents of those files would then enable the Commission to decide whether it needed to seek absentee records for non-pregnant employees. But the Commission also required assurance that it had indeed received the files of all pregnant employees. An examination of all personnel records was one method of providing that assurance, and the Court seemed ready to order production on that basis. However, the Commission was content to receive a complete list of employees from which it could do its own checking. The question of producing all files for that reason was therefore referred back to the Chambers Judge.

The Chambers Judge had previously decided that the absenteeism records were not relevant. However, if pregnant employees are treated differently from others with records of absenteeism, there may be sex discrimination. The Court of Appeal saw the absenteeism records as relevant if the Commission determined that further inquiry was justified after a study of the pregnant employees' files. However, a demand for absenteeism records at this point was premature. The Commission was at liberty to reapply for them after examining the files of the pregnant workers.

What is notable is that with such an approach a court can more or less supervise the Commission's investigation. It can determine the course of an investigation by deciding what evidence should be obtained and in what order. At any stage the court can scrutinize the evidence in hand and decide that certain inquiries will not be permitted, effectively ending the investigation.

The ramifications of this case may be especially important in the area of federal juridisction, where common law rights to confidence have been extended by the Protection of Privacy Act,[161] which accords a right of confidence to all personal information.

## H. *Pregnancy*

In *Bliss v. Attorney General for Canada*,[162] the Supreme Court of Canada rejected a challenge to the special maternity leave benefits of the Unemployment Insurance Act[163] that was based on the "equality before the law" guarantee of subsection 1(b) of the Canadian Bill of Rights.[164]

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[161] S.C. 1973-74, c. 50, s. 2.
[162] [1979] 1 S.C.R. 183, 92 D.L.R. (3d) 417.
[163] S.C. 1970-71-72, c. 48, s. 46.
[164] S.C. 1960, c. C-44.

In a memorable phrase Ritchie J. said, "Any inequality in this situation is created not by legislation but by nature."[165]

Human rights commissions have attempted to distinguish the *Bliss* decision primarily on the basis that it was decided under the Bill of Rights and not pursuant to human rights legislation. The case has also prompted the amendment of three acts, which now expressly provide that pregnancy discrimination is sex discrimination.[166]

In *Treasury Board v. Tellier-Cohen*,[167] a federal Tribunal ruled that pregnancy discrimination constituted sex discrimination under the Canadian Human Rights Act. The Tribunal treated the *Bliss* decision as deciding only that Stella Bliss had not been deprived of "the right to equality before the law".[168] It had not decided that Bliss had not been the victim of sex discrimination. It quoted the Supreme Court judgment which had said: "The question to be determined in this case is therefore, not whether the respondent had been the victim of discrimination by way of sex but whether she had been deprived of 'the right to equality before the law' declared by section 1(b) of the Canadian Bill of Rights."[169] The Tribunal characterized as *obiter* the following passage from the reasons for judgment of Mr. Justice Pratte in the Federal Court of Appeal which was expressly adopted by Mr. Justice Ritchie in the Supreme Court:

> Assuming the respondent to have been "discriminated against", it would not have been by reason of her sex. Section 46 applies to women, it has no application to women who are not pregnant, and it has no application, of course, to men. If section 46 treats unemployed pregnant women differently from other unemployed persons, be they male or female, it is, it seems to me, because they are pregnant and not because they are women.[170]

The Tribunal, in the course of finding that pregnancy discrimination was sex discrimination said: "Only women can become pregnant and this is the major difference between men and women."[171] On appeal, a Review Tribunal dismissed the *Bliss* argument in an almost cavalier manner:

> This is an interesting opinion, we agree, but we cannot accept it for the purposes of our judgment because the *Bliss* decision refers to the Bill of Rights and to the principle of "equality before the law" and not to the Act which governs us and under which the complaint by Lorraine Tellier-Cohen was filed.[172]

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[165] *Supra* note 162, at 190, 92 D.L.R. (3d) at 422.

[166] Canadian Human Rights Act, S.C. 1976-77, c. 33, *as amended by* S.C. 1980-81-82-83, c. 143, sub. 3(2); Charte des droits et libertés de la personne, L.R.Q. 1977, c. C-12, s. 10, *as amended by* L.Q. 1982, c. 61; The Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1, sub. 2(o).

[167] 3 C.H.R.R. 792 (Can. Human Rights Comm'n Tribunal 1982).

[168] *Id.* at 794.

[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] 4 C.H.R.R. 1169 (Can. Human Rights Comm'n Review Tribunal 1983).

That brief statement was the sum of the Review Tribunal's discussion of *Bliss*.

A Board of Inquiry under the Human Rights Code of British Columbia[173] in *Holloway v. Clair MacDonald*[174] also stated that the *Bliss* decision is not to be taken as determining a sex discrimination issue under human rights legislation. The Board decided that pregnancy discrimination was sex discrimination. This may be regarded as *obiter* however because it was not strictly necessary for the Board to make that finding. In British Columbia pregnancy discrimination would be covered by the prohibition against "discrimination without reasonable cause",[175] therefore it was unnecessary to hold that it also constituted sex discrimination.

The courts, however, have taken an entirely different view. In *Breton v. La Société Canadienne des Métaux Reynolds Ltée.*,[176] the respondent had refused to hire the complainant because she was pregnant. A Provincial Court judge, in dismissing the complaint, said:

> Faire de la discrimination fondée sur le sexe, c'est favoriser un sexe au détriment de l'autre, et ceci dans les deux sens. Le législateur a voulu interdire la discrimination entre le sexe masculin et le sexe féminin, il n'a pas aboli le droit de choisir entre personnes d'un même sexe.[177]

In *Nye v. Burke*[178] a Provincial Court judge dealt with a complainant who alleged that her contract of employment was terminated earlier than it would otherwise have been because she became pregnant. The judge rejected the complaint without referring to the *Breton* decision which was rendered about the same time. He said:

> La demanderesse voudrait y voir une discrimination basée sur le sexe parce que la grossesse est un attribut inhérent au sexe féminin.
>
> De l'avis du Tribunal ce n'est pas le sens qui doit être donné au terme sexe employé dans cet article 10.
>
> L'exclusion ou la préférence fondée sur le sexe que défend cet article 10 l'est par rapport au sexe masculin vis-à-vis le sexe féminin et vice versa.[179]

In *La Commission des Droits de la Personne du Québec c. L'Équipe du Formulaire L.T. Inc.*[180] a new argument was tried. A complainant who was fired because she was pregnant alleged discrimination on the basis of "social condition" which was a ground of discrimination under section 10 of the Quebec Charter.[181] Judge Paul decided that the words

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[173] R.S.B.C. 1979, c. 186.

[174] 4 C.H.R.R. 1454 (B.C. Human Rights Code Bd. of Inquiry 1983).

[175] R.S.B.C. 1979, c. 186, s. 8.

[176] 2 C.H.R.R. 532 (Que. Prov. Ct. 1981).

[177] *Id.* at 533.

[178] 3 C.H.R.R. 538 (Que. Prov. Ct. 1981).

[179] *Id.* at 539.

[180] 3 C.H.R.R. 1141 (Que. Prov. Ct. 1982).

[181] Charte des droits et libertés de la personne, L.R.Q. 1977, c. C-12, s. 10, *as amended by* L.Q. 1982, c. 61.

"social condition" must be understood according to their ordinary and usual meaning. He said:

> En conformité avec les Règles d'interprétation, il faut donc donner aux mots "condition sociale" leur sens ordinaire que l'on retrouve dans tous les dictionnaires qui définissent le condition sociale d'un individu comme étant "le rang, la place, la position où la classe qu'il occupe dans la société tel que détermine par sa naissance, son éducation, son revenu, son occupation ou dans certains cas par sa productivité". Si l'on tient compte de cette définition la femme enceinte n'est donc pas dans une condition sociale particulière mais plutôt dans une situation temporaire. L'état de femme enceinte en tant que tel n'est donc pas discriminatoire au sens de l'article 10 de la Charte.[182]

In *Wong v. Hughes Petroleum Ltd.*[183] an Alberta Board of Review, in the course of hearing a complaint from a woman who alleged that her employment was terminated because she became pregnant, referred certain questions of law to the Court of Queen's Bench. One question was whether a dismissal based on an employee's pregnancy constituted "discrimination because of sex" within the meaning of the Individual's Rights Protection Act[184] of Alberta. Mr. Justice Miller agreed that the suggestion in *Bliss* that there was no sex discrimination was *obiter* but decided that he was bound by it nevertheless. He concluded: "If it is the intention of our legislators [*sic*] to cover this situation, it will have to do so specifically in its legislation, as has been done by the Province of Saskatchewan."[185]

The only comment by a court of appeal on the issue of pregnancy was in *Alberta Human Rights Commission v. Alberta Blue Cross*,[186] where the Alberta Court of Appeal suggested that the *Bliss* decision and the *Wong* situation must be "distinguished from those arising under an 'equal protection' or 'equal benefit' clause. The test in those cases is whether the discrimination is invidious and against the named class. This raises the spectre of excessive subtlety and semantic confusion and invites a clearer expression of legislative intent."[187] The Court went on to determine that the issue was not before them in that case.

The issue will have to be considered as open until decided by the Supreme Court of Canada. The highest court to consider it to date, the Alberta Court of Appeal, failed to decide the question. In *Bliss* the Supreme Court of Canada had before it a statutory provision which formed part of a major social program. It might embark on a different analysis if it had before it the case of a woman who was denied a job or whose employment was terminated by private action solely on the basis of her pregnancy.

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[182] *Supra* note 180, at 1147.
[183] 46 A.R. 276, 4 C.H.R.R. 1488 (Q.B. 1983).
[184] R.S.A. 1980, c. I-2.
[185] *Supra* note 183, at 283, 4 C.H.R.R. at 1492.
[186] *Supra* note 156.
[187] *Id.* at 195, 4 C.H.R.R. at 1662.

The *Bliss* decision has been followed twice by the Federal Court of Appeal in other challenges under the Bill of Rights to the same section of the Unemployment Insurance Act,[188] but neither case considered whether the Unemployment Insurance Act discriminated on the basis of sex. Finally, it must be noted that the Unemployment Insurance Act has been amended so that it no longer discriminates against pregnant women.[189]

## I. *Harassment*

Without doubt the most active area of human rights law, and one which has developed almost entirely during the period being surveyed, is that of harassment, both racial and sexual. The fact that our society finds the obtaining of sexual favours by coercion unacceptable is not in itself new. Section 154 of the Criminal Code,[190] originally enacted in 1872, prohibits a male person, "being the owner or master of, or employed on board a vessel", from having illicit sexual intercourse with a female passenger "by threats or by the exercise of his authority".

Section 153 of the Criminal Code,[191] enacted in 1890, prohibits a male person from having sexual intercourse with a female person under twenty-one years of age and of previously chaste character who "is in his employment" or "is in a common . . . employment" and who is "under or in any way subject to his control or direction".

Anti-discrimination legislation is intended to provide equal employment opportunities and to remove those arbitrary and artificial barriers to employment that some individuals face because of discrimination on prohibited grounds. To the extent that sexual harassment is an artificial barrier that women face in obtaining, keeping and succeeding in employment, it is legitimately the focus of the attention of Human Rights Commissions. I say "women" intentionally. Though men can be victims of sexual harassment, the pervasive social problem is the one encountered by women and not by men.

The first sexual harassment case was decided in Canada in 1980 and since then a significant body of jurisprudence has been developed by boards and tribunals. Remarkably, however, there is not yet a single court decision on harassment in Canada.

While many unsettled questions remain about the kind of conduct that constitutes sexual harassment and the extent of an employer's liability for it, certain propositions can now be stated.

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[188] S.C. 1970-71-72, c. 48, s. 46. *See* Stevenson v. Attorney General for Canada, 47 N.R. 161, 145 D.L.R. (3d) 149 (F.C. App. D. 1983) and Stuart v. Attorney General for Canada, 44 N.R. 320, 137 D.L.R. (3d) 740 (F.C. App. D. 1982).

[189] Unemployment Insurance Amendment Act (No. 3), S.C. 1980-81-82-83, c. 150, s. 10.

[190] R.S.C. 1970, c. C-34, s. 154.

[191] R.S.C. 1970, c. C-34, s. 153.

*Proposition 1*: There are two different categories of harassment.

The jurisprudence clearly recognizes two different types of sexual harassment. The first type is *quid pro quo* harassment in which job security, benefits, or promotion are offered in exchange for sexual favours. In effect, compliance becomes a term of employment. This is clearly differential-treatment discrimination in that such compliance is not a term of employment imposed on co-workers of the opposite sex. One commentator has explained the theory this way:

> Whether or not the attention is directed solely at one individual, so long as it is sex based, it is discriminatory. Womanhood is the *sine qua non* of the sexual harassment. But for her femaleness, the victim of sexual harassment would not have been propositioned; she would not have been requested to participate in sexual activity if she were a man.[192]

The second type of sexual harassment is "poisoned environment" harassment. While submission to conduct of a sexual nature is not explicitly or implicitly made a term of a woman's employment, she is subjected to a working environment that is intimidating, hostile or offensive. Again, this is clearly differential-treatment discrimination since male employees would not be subjected to the same working environment. Since it is reasonable to expect that an intimidating, hostile or offensive working environment would substantially interfere with a woman's work performance or cause her to leave her job, it is apparent that such women are denied equal employment opportunity.

Racial harassment cases are generally "poisoned environment" cases. An employee is subjected to name calling and abuse and is thereby placed in a different working environment than co-workers. A number of cases involving this type of discrimination were decided in the period under survey.[193]

*Proposition 2*: The test of whether conduct constitutes harassment is an objective one. Both the harasser's and the harassee's perception must be reasonable.

The problem in using a subjective test to determine what attentions are unwelcome or unwanted is illustrated by the testimony of the complainant in *Cox v. Jagbritte*:[194] "Well he had this attitude that when a girl said no, she meant yes; that every girl that said no meant yes and when she said yes, she meant yes, so you couldn't win either way."[195] Or

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[192] Backhouse, Comment, 19 *Western Ont. L. Rev.* 141, at 143 (1981).

[193] Dhillon v. F.W. Woolworth Co., 3 C.H.R.R. 743 (Ont. Human Rights Code Bd. of Inquiry 1982); Aragona v. Elegant Lamp Co., (unreported, Ont. Human Rights Code Bd. of Inquiry, 6 Aug. 1982); Bell v. Ladas, 27 L.A.C. (2d) 227, 1 C.H.R.R. 155 (Ont. Human Rights Code Bd. of Inquiry 1980); Simms v. Ford Motor Co. of Canada, (unreported, Ont. Human Rights Code Bd. of Inquiry, 4 Jun. 1970); Kotyk v. Canadian Employment & Immigration Comm'n, 4 C.H.R.R. 1416 (Can. Human Rights Comm'n Tribunal 1983).

[194] 3 C.H.R.R. 609 (Ont. Human Rights Code Bd. of Inquiry 1981).

[195] *Id.* at 614.

in *McPherson v. Mary's Donuts*, where the complainant testified: "He kissed me and I became upset and told him, 'When I tell my fiancé, he'll be very angry.' He said; 'That's what all the girls say . . .'."[196]

*Bell v. Ladas*,[197] by using the word "reasonably" in formulating the test, recognized that it must be an objective one:

> The forms of prohibited conduct that, in my view, are discriminatory run the gamut from overt gender-based activity, such as coerced intercourse, to unsolicited physical contact, to persistent propositions, to more subtle conduct such as gender-based insults and taunting, which may reasonably be perceived to create a negative psychological and emotional work environment.[198]

The decision also speaks of "adverse and gender-directed conduct emanating from a management hierarchy [which] may reasonably be construed to be a condition of employment".[199]

In *Deisting v. Dollar Pizza (1978) Ltd.*,[200] the Board applied to the issue of sexual harassment the following passage from an earlier case which did not concern harassment: "The Board must review the conduct complained of in an objective manner and not from the subjective viewpoint of the person alleging discrimination whose interpretation of the impugned conduct may well be distorted because of innate personality characteristics such as a high degree of sensitivity or defensiveness".[201]

In *Aragona v. Elegant Lamp* it was said:

> It is noted that where the conduct is of a more subtle nature, the issue is how it "may reasonably be perceived". In other words, the conduct in question cannot be assessed only by the effect which it has upon a particular complainant. . . . The objective standard must be met.[202]

In *Hufnagel v. Osama Enterprises Ltd.*,[203] it was also stated that the test must be objective. The Board said: "The complainant must have an honest and reasonable apprehension that a refusal to participate, acquiesce or endure such conduct may affect the existence of the employment relationship itself or any benefits or conditions arising from the relationship."[204]

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[196] 3 C.H.R.R. 961 (Ont. Human Rights Code Bd. of Inquiry 1982).

[197] *Supra* note 193.

[198] *Id.* at 229, 1 C.H.R.R. at 156.

[199] *Id.*

[200] 3 C.H.R.R. 898 (Alta. Individual's Rights Protection Act Bd. of Inquiry 1982).

[201] *Id.* at 900.

[202] *Supra* note 193.

[203] 3 C.H.R.R. 922 (Man. Human Rights Act Bd. of Adjudication 1982).

[204] *Id.* at 925.

The Review Tribunal in *Robichaud v. Brennan*[205] noted, as was conceded by all parties at the hearing, "that the test to be applied must be an objective one".[206]

In the *Kotyk*[207] inquiry it was stated that: "The test of whether the advances are unsolicited or unwelcome is objective in the sense that it depends upon the reasonable and usual limits of social interaction in the circumstances of the case."[208]

It is suggested here, without authority, that the test is not that of the "reasonable man" but rather that of the "reasonable person". That is, the test must incorporate both male and female perceptions of social interaction and must take into consideration, for example, non-verbal ways in which a woman may indicate that physical closeness is unwelcome.

*Proposition 3*: A complainant need not demonstrate that her employment has been tangibly affected by the action of which she has complained.

Early American decisions[209] suggested that there was no breach of Title VII of the Civil Rights Act unless the complainant suffered an employment-related consequence. To constitute harassment, appointment, promotion or dismissal had to depend on the bestowing of sexual favours.

In *Bundy v. Jackson*[210] the Court of Appeals held that harassment was sex discrimination where an employer "created or condoned a substantially discriminatory work environment regardless of whether the complaining employees lost any tangible job benefits as a result of the discrimination".[211] The Court suggested that the employer should inform all employees that sexual harassment is contrary to law, should establish and publicize a scheme whereby harassed employees might complain immediately and confidentially, and should take all necessary steps to investigate and correct promptly any harassment, including issuance of warnings and appropriate discipline.[212]

In *Coutroubis v. Sklavos Printing*[213] it was argued that two female complainants who had left their employment because of sexual harassment had been "constructively dismissed". Chairman Ratushny, while finding this argument reasonable under paragraph 4(1)(b) of the Ontario Code, which provided that "no person shall dismiss or refuse to employ

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[205] 4 C.H.R.R. 1272 (Can. Human Rights Comm'n Review Tribunal 1983).
[206] *Id.*
[207] *Supra* note 193.
[208] *Id.* at 1430.
[209] Griggs v. Duke Power Co., *supra* note 54.
[210] 641 F.2d 934 (D. Ct. 1981).
[211] *Id.* at 943-44.
[212] *Id.* at 947.
[213] 2 C.H.R.R. 457 (Ont. Human Rights Code Bd. of Inquiry 1981).

or to continue to employ any person; because of . . . sex'',[214] found it unnecessary to decide the question on that basis as in his view paragraph 4(1)(g) was sufficient to establish a contravention of the Code without evidence of dismissal. Paragraph 4(1)(g) provided that ''[n]o person shall, discriminate against any employee with regard to any term or condition of employment because of . . . [the] sex . . . of such person''.[215]

In *Deisting v. Dollar Pizza (1978) Ltd.*[216] the Board found that the complainant was not constructively dismissed from her employment and in fact found that ''[t]here is no evidence to show that the reasons [*sic*] she quit her employment was due to the continued harassment.''[217] Nevertheless the Board substantiated the complaint because the complainant had been subjected to touching and sexual advances in the course of her employment. This was sufficient to constitute differential treatment based on sex.

*Proposition 4*: It is not necessary to the complainant's case that she prove she resisted the sexual conduct.

In *Bundy v. Jackson*[218] the Court held that it was not necessary to the complainant's case to prove that she resisted the conduct. To hold otherwise would place women in a ''cruel trilemma''. The Court said:

> So long as the employer never literally forces sexual relations on the employee, ''resistance'' may be a meaningless alternative for her. If the employer demands no response to his verbal or physical gestures other than good-natured tolerance, the woman has no means of communicating her rejection. She neither accepts nor rejects the advances; she simply endures them. She might be able to contrive proof of her rejection by objecting to the employer's advances in some very visible and dramatic way, but she would do so only at the risk of making her life on the job even more miserable. It hardly helps that the remote prospect of legal relief . . . remains available if she objects so powerfully that she provokes the employer into firing her.
>
> The employer can thus implicitly and effectively make the employee's endurance of sexual intimidation a ''condition'' of her employment. The woman then faces a ''cruel trilemma''. She can endure the harassment. She can attempt to oppose it, with little hope of success, either legal or practical, but with every prospect of making the job even less tolerable for her. Or she can leave her job, with little hope of legal relief and the likely prospect of another job where she will face harassment anew.[219]

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[214] Ontario Human Rights Code, R.S.O. 1980, c. 340, *replaced by* Human Rights Code, 1981, S.O. 1981, c. 53.

[215] Ontario Human Rights Code, R.S.O. 1980, c. 340, *replaced by* Human Rights Code, 1981, S.O. 1981, c. 53.

[216] *Supra* note 200.

[217] *Id.* at 900.

[218] *Supra* note 210.

[219] *Id.* at 946.

In the *Kotyk*[220] inquiry it was said that:

> The complainant should not need to prove an active resistance or other explicit reaction to the activity complained of, other than a refusal or denial, unless such might reasonably be necessary to make the perpetrator aware that the activity was in fact unwelcome or exceeded the bounds of usual social interaction.[221]

Theoretically, a woman should not have to protest in order to be protected from sexual harassment. In no other context must a person first protest in order to invoke the protection of human rights legislation. For example, a woman who is given a small, damp, poorly lighted and ventilated office instead of the kind of spacious, comfortable office given to male co-workers, need not protest before having the right to file a complaint of discrimination. No one would suggest that an individual who has been refused accommodation or employment because of discrimination must first protest before being able to rely on human rights legislation. The same principle should apply in harassment cases.

However, a protest, or the lack of one, may be relevant to the issue of whether a reasonable person would have known the conduct was unwelcome. In the *Aragona*[222] case, a male flirted and joked with all the women in the workplace. The atmosphere was generally pleasant and cheerful. One female witness "smiled broadly and with a twinkle in her eye related how he would joke and how she would good-naturedly 'put him down'." Another woman, the complainant, took offense but didn't protest before filing a complaint.

The complaint was dismissed because the conduct would not reasonably be regarded as objectionable since it was freely accepted and enjoyed by the other employees. The Board said:

> Where there is general acceptance but where an individual employee does not care to participate, that feeling should be expressed directly and unambiguously. The objective standard could then be applied *to that individual* in light of the *additional fact* of expressed disapproval.[223]

Other issues remain unsettled. Must there be a course of conduct to constitute harassment? Clearly one incident or action can constitute *quid pro quo* harassment. One invitation issued in a manner which an objective viewer would regard as making it a term of employment, obviously amounts to harassment. In *Mitchell v. Traveller Inn (Sudbury) Ltd.*[224] the complainant reported for her first day at work at a motel and was invited into a back room by her employer. The request had a sexual connotation. She declined the invitation and was told that if she did not go to the back room she would not have a job. That one incident was held to be sufficient to substantiate the complaint of harassment.

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[220] *Supra* note 193.
[221] *Id.* at 1430.
[222] *Supra* note 193.
[223] *Id.*
[224] 2 C.H.R.R. 590 (Ont. Human Rights Code Bd. of Inquiry 1981).

What is not clear is whether one incident can constitute "poisoned environment" harassment. In *Fuller v. Candur Plastics Ltd.*,[225] a racial harassment case, the Board of Inquiry stated that an "isolated offensive outburst" did not constitute discrimination.[226] In an earlier case, *Simms v. Ford of Canada*,[227] the Board had found that the use of "racially abusive language" on an "isolated occasion" was not an offence under the Ontario Human Rights Code. "It is quite otherwise, of course, if that abuse is repeated and becomes a course of conduct."[228] The *Kotyk* Tribunal suggested:

> It is likely that a single unrepeated act is not harassment unless it results in the denial or removal of a tangible benefit available or offered to other persons in similar circumstances, or unless it amounts to an assault, or is a proposition of such gross or obscene nature that it could reasonably be considered to have created a negative or unpleasant emotional or psychological work environment.[229]

Without doubt the major remaining unsettled issue is the extent of an employer's liability for harassment. In almost all the provincial cases the individual named in the complaint as the harasser has also happened to be the owner and an officer of the respondent because most respondents were small businesses, restaurants and other sole proprietorships. However, in *Bell v. Ladas*[230] the Board had stated:

> The law is quite clear that companies are liable where members of management, no matter what their rank, engage in other forms of discriminatory activity. . . . Thus, I would have no hesitation in finding the corporate respondent liable for a violation of the Code if one of its officers engaged in prohibited conduct, and, indeed, the same liability would attach if the violator had a lower rank on the management team.[231]

However, as the complaint was dismissed in that case, these comments must be seen as *obiter*. In any event, no authority was offered in their support.

In *Deisting v. Dollar Pizza (1978) Ltd.*[232] the Board made an award jointly and severally against both the individual respondents and the corporate respondent saying: "The award should be made against the corporate Respondent on the basis that the Respondent is responsible for the actions of its employees. As earlier stated, the individual Respondents held dual positions as being both owner and employees of the corporate Respondent."[233]

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[225] 2 C.H.R.R. 419 (Ont. Human Rights Code Bd. of Inquiry 1981).
[226] *Id.* at 420.
[227] *Supra* note 193.
[228] *Id.* at 15.
[229] *Supra* note 193, at 1430.
[230] *Id.*
[231] *Id.* at 230, 1 C.H.R.R. at 156.
[232] *Supra* note 200.
[233] *Id.* at 901.

The Federal Review Tribunal in *Robichaud v. Brennan*[234] suggested that "the liability of the employer for its supervisory personnel is a strict liability."[235] That determination has been appealed to the Federal Court of Appeal.

The Federal Tribunal in *Kotyk* found that the word "indirectly" in section 7 of the Canadian Human Rights Act provided a sufficient basis for imposing vicarious liability. Subsection 7(b) states that "[i]t is a discriminatory practice, directly or indirectly, in the course of employment, to differentiate adversely in relation to an employee on a prohibited ground of discrimination."[236] The Tribunal said: "The intention of Parliament to attach employer liability for the discriminatory acts of their supervisors can be read into section 7 of the Act, without having to indulge in a torturous interpretation process, although there are no clear precedents."[237] The Tribunal went on to attach personal liability to the employer for failing to provide a workplace free from harassment. The fact that the employer had no policy dealing with sexual harassment, that it took no steps to inform its employees or senior staff that harassment was prohibited conduct, that the collective attitude of its management was directed toward protecting the respondent manager rather than toward dealing with his offending behaviour, that the management failed to afford protection from reprisals, and most important, the fact that the management had decided not to investigate the complaints constituted evidence of the employer's failure to provide a workplace free from harassment. The *Kotyk* case is also now before the Federal Court of Appeal.

The most thorough review of vicarious liability in a sexual harassment case is to be found in the case of *Olarte v. Commodore Business Machines*.[238] There a Board of Inquiry found that the corporate respondent could not be held vicariously liable for the sexual harassment of female employees by a male foreman. However, it went on to impose personal liability on the respondent corporation on the basis that it was personally in breach of the Ontario Human Rights Code since the individual harasser "provided a function of management as a foreman of the Warden Avenue Plant, and therefore, he was part of Commodore's 'directing mind' such that his intent and acts of sexual harassment became those of the corporation".[239] The harasser had the general power to hire and fire and discipline employees. He was in effect plant manager for one shift during which he was the senior employee at the plant in charge of its operations there. The case is noteworthy since the Board

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[234] *Supra* note 205.

[235] *Id.* at 1274.

[236] Canadian Human Rights Act, S.C. 1976-77, c. 33, *as amended by* S.C. 1980-81-82-83, c. 143.

[237] *Supra* note 193, at 1429.

[238] (Unreported, Ont. Human Rights Code Bd. of Inquiry, 11 Oct. 1983).

[239] *Id.* at 113.

found as a fact that senior management did not have actual or constructive knowledge of the sexual harassment and did not condone it in any way.

### J. *Harassment Legislation*

There is a current trend in human rights law toward codifying the common law on harassment. The new Ontario Human Rights Code,[240] the amendments to the Canadian Human Rights Act[241] proclaimed on 1 July 1983, and the amendments to the Quebec Charter[242] proclaimed on 1 October 1983 deal with harassment expressly.

Subsection 4(2) of the Ontario Human Rights Code deals with harassment on all grounds other than sex and provides:

> Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status or handicap.[243]

Section 6 deals with sexual harassment and sexual solicitation:

> (1) Every person who occupies accommodation has a right to freedom from harassment because of sex by the landlord or agent of the landlord or by an occupant of the same building.
>
> (2) Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.
>
> (3) Every person has a right to be free from,
>
> (a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or
>
> (b) a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.[244]

Harassment is defined in subsection 9(f) as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome".[245]

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[240] S.O. 1981, c. 53.

[241] An Act to amend the Canadian Human Rights Act and to amend certain other Acts in consequence thereof, S.C. 1980-81-82-83, c. 143, *amending* S.C. 1976-77, c. 33.

[242] Loi modifiant la Charte des droits et libertés de la personne, L.Q. 1982, c. 61, *amending* L.R.Q. 1977, c. C-12.

[243] S.O. 1981, c. 53, sub. 4(2).

[244] S. 6.

[245] Sub. 9(f).

Though this definition deals with a "*course* of vexatious comment or conduct" its application is limited to subsections 4(2), 6(1) and 6(2), all of which deal with harassment. Therefore, subsection 6(3), dealing with sexual solicitation or sexual advances, would seem to apply only to single incidents. The ambit of subsection 6(3) should also be noted: it would seem wide enough to apply to either a professor or a welfare worker for example.

Subsection 44(1) makes an employer vicariously liable for the acts of its employees in the course of employment. It provides:

> For the purposes of this Act, except subsection 2(2), subsection 4(2), section 6 and subsection 43(1), any act or thing done or omitted to be done in the course of his or her employment by an officer, official, employee or agent of a corporation, trade union, trade or occupational association, unincorporated association or employers' organization shall be deemed to be an act or thing done or omitted to be done by the corporation, trade union, trade or occupational association, unincorporated association or employers' organization.[246]

Subsection 40(4) would allow a Board of Inquiry, upon a repetition of harassment, to order an employer to take whatever steps and to impose whatever sanctions were necessary to prevent further harassment. It provides:

> (4) Where a Board makes a finding under subsection (1) that a right is infringed on the ground of harassment under subsection 2(2) or subsection 4(2) or conduct under section 6, and the Board finds that a person who is a party to the proceeding,
>
> (a) knew or was in possession of knowledge from which he ought to have known of the infringement; and
>
> (b) had the authority by reasonably available means to penalize or prevent the conduct and failed to use it,
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> the Board shall remain seized of the matter and upon complaint of a continuation or repetition of the infringement of the right the Commission may investigate the complaint and, subject to subsection 35(2), request the Board to reconvene and if the Board finds that a person who is a party to the proceeding,
>
> (c) knew or was in possession of knowledge from which he or she ought to have known of the repetition of infringement; and
>
> (d) had the authority by reasonably available means to penalize or prevent the continuation or repetition of the conduct and failed to use it,
>
> the Board may make an order requiring the person to take whatever sanctions or steps are reasonably available to prevent any further continuation or repetition of the infringement of the right.[247]

The jurisdiction of the Board to order "sanctions" obviously encompasses an order to an employer to take disciplinary action, especially in light of the word "penalize" in paragraph 40(4)(d). This is a marked

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[246] Sub. 44(1).
[247] Sub. 40(4).

departure from previous human rights law which was always conciliatory and restorative, rather than retributive.

As mentioned, the Canadian Human Rights Act has also been amended to deal expressly with sexual harassment.[248] Section 13.1 provides:

> (1) It is a discriminatory practice,
> (a) in the provision of goods, services, facilities or accommodation customarily available to the general public,
> (b) in the provision of commercial premises or residential accommodation, or
> (c) in matters related to employment,
> to harass an individual on a prohibited ground of discrimination.
> (2) Without limiting the generality of subsection (1), sexual harassment shall, for the purposes of that subsection, be deemed to be harassment on a prohibited ground of discrimination.[249]

Harassment is not defined in the federal Act.

Subsection 48(5), however, provides for vicarious liability of employers in the following terms:

> Subject to subsection (6) any act or omission committed by an officer, a director, an employee or an agent of any person, association or organization in the course of the employment of the officer, director, employee or agent shall, for the purposes of this Act, be deemed to be an act or omission committed by that person, association or organization.[250]

Subsection (6) protects the employer from vicarious liability in some situations:

> An act or omission shall not, by virtue of subsection (5), be deemed to be an act or omission committed by a person, association or organization if it is established that the person, association or organization did not consent to the commission of the act or omission and exercised all due diligence to prevent the act or omission from being committed and, subsequently, to mitigate or void the effect thereof.[251]

The Ontario Human Rights Code does not contain such a saving provision.

Subsection 10(1) of the Quebec Charter merely provides: "No one may harass a person on the basis of any ground mentioned in section 10."[252]

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[248] S.C. 1980-81-82-83, c. 143, *amending* S.C. 1976-77, c. 33.
[249] S. 13.1.
[250] Sub. 48(5).
[251] Sub. 48(6).
[252] Charte des droits et libertés de la personne, L.R.Q. 1977, c. C-12, *as amended by* L.Q. 1982, c. 61.

K. *Affirmative Action*

Affirmative action in Canada is moving from the stage of discussion and experimentation to the stage of implementation. In 1980 the federal government instituted pilot projects in three departments.[253] In June 1983 the Treasury Board announced that it was satisfied with the results of these projects and that it would be implementing affirmative action for women, indigenous people, and handicapped persons throughout the entire public service.[254] The programs thereafter established are mandatory in that their implementation "will be considered a priority item in evaluating the performance of deputy heads".[255]

Subsection 86(7) of the Quebec Charter,[256] proclaimed on 1 October 1983, provides: "The Government must require its departments and agencies to implement affirmative action programs in such time as it may fix."

Otherwise in Canada thus far, affirmative action has been entirely voluntary and has had minimal impact. A recent study concluded that relatively small numbers of women, native peoples, and the handicapped have been affected by the voluntary affirmative action programs to date.[257] That study reported that since 1979 the Canada Employment and Immigration Commission has assumed responsibility for providing consulting and technical services for the development and implementation of voluntary affirmative action programs in the private sector and in Crown corporations. Despite contacting some 900 companies, C.E.I.C. has been able to negotiate agreements with only thirty-four of them. In Nova Scotia, much of its activity has been focused on securing entry level positions for blacks whose percentage of the total population is not reflected in the labour force there. In Saskatchewan, affirmative action is designed to benefit mainly native peoples, who have a history of high unemployment. Federally and in the other provinces such action tends to be designed to benefit women. In Quebec, the government passed an act prescribing special job programs for the handicapped.[258] Although no exact percentage of reserved jobs is mentioned, the Commission des droits de la personne has expressed a goal of 2%. In Ontario a handicapped employment program has succeeded in placing several hundred people with significant disabilities. But another study has found

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[253] Secretary of State, Treasury Board of Canada and Employment & Immigration Canada.

[254] News Release, Treasury Bd. of Canada (27 Jun. 1983).

[255] *Id.*

[256] Charte des droits et libertés de la personne, L.R.Q. 1977, c. C-12, *as amended by* L.Q. 1982, c. 61, sub. 86(7).

[257] L. Cohen, *Affirmative Action in Canada Ten Years After* (unpublished study prepared for the Human Rights Directorate of the Secretary of State).

[258] Loi assurant l'exercise des droits des personnes handicapées, L.Q. 1978, c. 7, s. 61, *amending* L.R.Q. 1977, c. E-20.1.

that affirmative action simply does not exist at the corporate level nor does it appear likely to occur on a voluntary basis in the near future.[259]

The question of whether an affirmative action program constitutes discrimination and violation of an equal employment statute has arisen three times in Canada. In *Bloedel v. Board of Governors of the University of Calgary*,[260] University College of the University of Calgary had two avenues of admission for mature non-matriculated students. The majority of these applicants applied to the associate provost of the university. A minority, however, were processed by the college's "Native Students Admissions Panel", which admitted native students with inferior academic standing but provided them with "special support services" in the form of tutor counselling to make up for their deficiencies. The complainant was a mature, non-matriculated non-native applicant. She was refused for consideration for admission by the "Native Students Admissions Panel" and consequently could not gain access to the special support services. The Board, in a 2 to 1 decision, found that the University had discriminated against non-natives and thereby violated the Individual's Rights Protection Act[261] of Alberta. It is ironic that the complainant stopped the operation of a special program for natives while not objecting to a special program for the "mature" from which she herself sought to benefit.

In *Pelletier v. Ministère de l'Environment*,[262] two male Quebec civil servants were successful in obtaining an injunction against the operation of an affirmative action program in the Department of the Environment. The program was designed to provide bursaries to female employees for full or part-time studies to enable them to qualify for advancement within the civil service.

The issue of affirmative action was considered by the Supreme Court of Canada in *The Athabasca Tribal Council v. Amoco Canada Petroleum Co.*[263] The Energy Resources Conservation Board had been holding hearings into the Alsands Project, a proposal to manufacture synthetic crude oil from the tar sands located in north-eastern Alberta. The Athabasca Tribal Council, with the assistance and support of the federal Department of Indian Affairs and Northern Development, intervened in the hearings, asking that terms and conditions be imposed requiring the consortium to provide job training and employment opportunities for local native people. The Court was asked to consider whether the Board had the authority to prescribe such programs as conditions to the approval of the construction project and whether the

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[259] Montreal Ass'n of Women and the Law, Affirmative Action for Women in Canada (1982).

[260] 1 C.H.R.R. 25 (Alta. Individual's Rights Protection Act Bd. of Inquiry 1980).

[261] R.S.A. 1980, c. I-2.

[262] (Unreported, La Commission des droits de la personne du Québec, 4 May 1982).

[263] [1981] 1 S.C.R. 699, 2 C.H.R.R. 437 (1980).

programs would offend the Individual's Rights Protection Act[264] of Alberta by discriminating against those who were excluded.

The Supreme Court of Canada was unanimous in concluding that the Energy Resources Conservation Board was governed by legislation concerned with the natural resources of the province and not with the social welfare of its people. It was therefore beyond the jurisdiction of the Board to prescribe the implementation of an affirmative action program as a condition to the approval of the Tar Sands Project. However, four members of the Court,[265] went on to say that there was no conflict between the Individual's Rights Protection Act and the proposed affirmative action program. Ritchie J., writing for the four, said:

> In the present case, what is involved is a proposal designed to improve the lot of the native peoples with a view to enabling them to compete as nearly as possible on equal terms with other members of the community who are seeking employment in the Tar Sands plant. With all respect, I can see no reason why the measures of the lot of the native peoples in the area in question should be construed as "discriminating against" other inhabitants. The purpose of the plan as I understand it is not to displace non-Indians from their employment, but rather to advance the lot of the Indians so that they may be in a competitive position to obtain employment without regard to the handicaps which their race has inherited.[266]

The other five judges expressed no opinion on the matter.

Eleven of the thirteen jurisdictions in Canada now have legislative provisions which expressly allow affirmative action programs.[267] Only Newfoundland and the Yukon Territory do not.

Those various provisions are worthy of closer scrutiny. It should be noted at the outset that they are not likely to be subject to attack, for two reasons. First, they will not be rendered inoperative by subsection 15(1) of the Charter as they are expressly allowed by subsection 15(2) which provides:

> Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups

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[264] R.S.A. 1980, c. I-2.

[265] Ritchie J. with Laskin C.J.C., Dickson J. (as he then was) and McIntyre J. concurring.

[266] *Supra* note 263, at 711, 2 C.H.R.R. at 441.

[267] Individual's Rights Protection Act, R.S.A. 1980, c. I-2, s. 7; Human Rights Code of British Columbia, R.S.B.C. 1979, c. 186, s. 11; Canadian Human Rights Act, S.C. 1976-77, c. 33, *as amended by* S.C. 1980-81-82-83, c. 143, s. 15; The Human Rights Act, S.M. 1974, c. 65, s. 9; Human Rights Act, R.S.N.B. 1973, c. H-11, s. 13; Human Rights Act, S.N.S. 1969, c. 11, s. 19; Human Rights Code, 1981, S.O. 1981, c. 53, s. 13; Human Rights Act, S.P.E.I. 1975, c. 72, s. 19; Charte des droits et libertés de la personne, L.R.Q. 1977, c. C-12, *as amended by* L.Q. 1982, c. 61, s. 86.1; The Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1, s. 47; Fair Practices Ordinance, R.O.N.W.T. 1974, c. F-2, s. 14, *as amended by* O.N.W.T. 1980, c. 12, s. 13.

> including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[268]

The test under the Charter seems to be subjective. The law, program or activity may be improperly designed and may not work as intended, but if its object was the amelioration of conditions of disadvantaged groups then subsection 15(2) protects it.

Second, it must be remembered that before the enactment of human rights legislation there was nothing in Canada's judicial history making discrimination, "reverse" or any other kind, illegal. This has been confirmed by the Supreme Court of Canada in *Bhadauria v. Board of Governors of Seneca College of Applied Arts and Technology*,[269] which decided that there was no action for "discrimination".

Therefore, if a program or activity fits within a statutory exception for special programs, it will be invulnerable to attack as "reverse discrimination". These provisions are thought to permit "affirmative action" though that term is not used in any of them. The words "special program", "plan", or "arrangement" are wide enough to apply to any activity which might be described as "affirmative action", if the activity falls within the ambit of the section as a whole. In my view, it is arguable that some of the statutory exceptions are not as broad as is commonly thought.

In my view, the legislative exceptions, unlike that contained in the Charter, prescribe an objective test. Any program must be actually "designed" to relieve disadvantage, and not merely have such relief as its object. The word "designed" appears in all the exceptions thus empowering a court to scrutinize the "design" of a special program. Special programs will have to meet certain design criteria which may well come to be imposed by the courts.

Subsection 13(1) of the Ontario Human Rights Code provides:

> A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I.[270]

It would seem necessary to prove that "hardship" or "economic disadvantage" exists or that the beneficiaries of a program are "disadvantaged persons". These terms are not defined and again therefore judicial interpretation must be awaited. Moreover, the subsection does not mention any grounds of discrimination. This may be crucial because Part I of the Code guarantees *equal treatment* on prohibited grounds. The subsection does not expressly negate those guarantees in

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[268] Constitution Act, 1982, Part I, sub. 15(2), *enacted by* Canada Act, 1982, U.K. 1982, c. 11.

[269] *Supra* note 99.

[270] S.O. 1981, c. 53, sub. 13(1).

any of its three components. The phrase "elimination of the infringement of rights under Part I" means only that the program can redress those who are not being treated equally as guaranteed by Part I. Assisting disadvantaged persons to "achieve equal opportunity" does not conflict with Part I nor does it permit the type of "affirmative action" that gives preference to certain individuals or groups. Relieving "hardship or economic disadvantage" without reference to prohibited grounds is far from a licence to prefer an individual identified by a prohibited ground in a job selection decision which would otherwise be contrary to Part I. However, subsection 13(1) speaks of "disadvantaged groups" as well as "disadvantaged persons". It could be argued therefore that it was necessary to grant preferences to individuals in order to provide equal opportunity to the group to which they belong.

Subsection 15(1) of the Canadian Human Rights Act is worded a little more clearly. It provides:

> It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any groups of individuals when those disadvantages would be or are based on or related to race, national or ethnic origin, colour, religion, age, sex, marital status, family status or disability of members of that group, by improving opportunities respecting goods, services, facilities, accommodations, or employment in relation to that group.[271]

This subsection also prescribes an objective test. A court therefore will have to scrutinize the design of a program. Proof of actual disadvantage would not seem necessary, however, as the subsection speaks not only of "disadvantages that are suffered" but also of disadvantages that are "likely to be suffered". Unlike the Ontario provision, those disadvantages are specifically tied to enumerated grounds. The subsection states that opportunities for groups may be "improved" and makes no use of the word "equal".

Saskatchewan's provision[272] regarding special programs also speaks of disadvantages that are based on a prohibited ground of discrimination and Manitoba's statute[273] allows programs that promote the "socio-economic welfare and equality in status of a disadvantaged class" as defined by grounds of discrimination. The statutory provisions in British Columbia, New Brunswick, Nova Scotia, Prince Edward Island and the Northwest Territories permit programs that are designed to promote the welfare of any class of persons.[274]

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[271] S.C. 1976-77, c. 33, sub. 15(1), *as amended by* S.C. 1980-81-82-83, c. 143, s. 8.

[272] The Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1, s. 47.

[273] The Human Rights Act, S.M. 1974, c. 65, s. 9.

[274] Human Rights Code of British Columbia, R.S.B.C. 1979, c. 186, s. 11; Human Rights Act, R.S.N.B. 1973, c. H-11, s. 13; Human Rights Act, S.N.S. 1969, c. 11, s. 19; Human Rights Act, S.P.E.I. 1975, c. 72, s. 19; Fair Practices Ordinance, R.O.N.W.T. 1974, c. F-2, s. 14, *as amended by* O.N.W.T. 1980, c. 12, s. 13.

Human rights commissions in Prince Edward Island, Nova Scotia, British Columbia and the Northwest Territories are restricted to "approving" special programs.[275] Those in Ontario, Saskatchewan and New Brunswick may approve programs either on application or on their own initiative, and in addition have the power both to vary the program by imposing conditions and to suspend or withdraw approval of it.[276] The Ontario Human Rights Commission may in addition act on a complaint of reverse discrimination.[277] In Manitoba the Commission may approve a plan, impose conditions or limitations on it, and revoke or suspend it, but has no power to act on its own initiative.[278]

The federal Commission has no jurisdiction to approve a special program, but is restricted to "on application, giving advice or assistance". Subsection 13(1) of the Alberta statute[279] requires the approval of the Lieutenant Governor in Council in the form of a regulation for the undertaking of programs "[t]hat, in the absence of the authorization, would contravene this Act". Subsection 13(2) permits delegation of the Lieutenant Governor's powers to the Commission.[280] This has not been done, nor have any such programs been authorized.

In perhaps as many as four jurisdictions affirmative action may be ordered. In Saskatchewan and Canada the matter is clear. Section 47 of the Saskatchewan Human Rights Code provides:

> On the application of any person or on *its own initiative* the Commission may approve *or order* any program to be undertaken by any person. . . .[281]

Paragraph 41(2)(a) of the federal Act provides:

> If . . . a Tribunal finds that the complaint . . . is substantiated . . . it may make an order. . . .
>
> (a) that such person cease such discriminatory practice and, in consultation with the Commission on the general purpose thereof, take measures, *including the adoption of a special program, plan or arrangement referred to in subsection 15(1)*, to prevent the same or a similar practice occurring in the future.[282]

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[275] Human Rights Act, S.P.E.I. 1975, c. 72, s. 19; Human Rights Act, S.N.S. 1969, c. 11, s. 19; Human Rights Code of British Columbia, R.S.B.C. 1979, c. 186, s. 11; Fair Practices Ordinance, R.O.N.W.T. 1974, c. F-2, s. 14, *as amended by* O.N.W.T. 1980, c. 12, s. 13.

[276] Human Rights Code, 1981, S.O. 1981, c. 53, s. 13; The Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1, s. 47; Human Rights Act, R.S.N.B. 1973, c. H-11, s. 13.

[277] Human Rights Code, 1981, S.O. 1981, c. 53, s. 13.

[278] The Human Rights Act, S.M. 1974, c. 65, s. 9.

[279] Individual's Rights Protection Act, R.S.A. 1980, c. I-2, sub. 13(1).

[280] Sub. 13(2).

[281] The Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1, s. 47 (emphasis added).

[282] Canadian Human Rights Act, S.C. 1976-77, c. 33, para. 41(2)(a) (emphasis added).

It is arguable that the New Brunswick Human Rights Commission and perhaps an Ontario Board of Inquiry may also order the adoption of an affirmative action program. Paragraph 21(1)(c) of the New Brunswick Human Rights Act provides:

> Upon receipt of the recommendations of the Board of Inquiry the Commission. . . .
>
> (c) may issue whatever order it deems necessary to carry into effect the recommendation of the Board.[283]

In *Naugler v. New Brunswick Liquor Corp.*[284] the Commission ordered that the respondent outline a program "to eliminate its discriminatory work assignment practices and any related discriminatory practices" and then undertake to implement that program in cooperation with the Commission.[285] The program was described in the Commission's order. That part of the order was quashed on *certiorari* by the Supreme Court of New Brunswick,[286] but in his decision Barry J. said:

> It would appear to me that it was never anticipated that the Commission would infringe on the general managerial policies of the employer without at least giving proper notice of such intentions and providing an opportunity for investigation and correction prior to taking any action. The statute seems to provide for such a procedure. I do not find that the Commission could not issue orders similar to those contained in paragraphs 6, 7 and 8. I simply express my opinion that strict procedures must be followed before so doing.[287]

Thus the Court did not reject the argument that the New Brunswick Commission could order the respondent to take steps beyond merely ceasing the discrimination, even though the program at issue in the case fell far short of granting preferences in selection decisions.

Subsection 14(c) of the old Ontario Human Rights Code provided:

> The Board after hearing a complaint . . . may order any party who has contravened this Act to do any act or thing that, in the opinion of the Board, constitutes full compliance with such provision and to rectify any injury caused to any person or to make compensation therefor.[288]

Paragraph 40(1)(a) of the new Ontario Human Rights Code[289] gives the Board even more power. It provides that the Board may, by order, "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".

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[283] Human Rights Act, R.S.N.B. 1973, c. H-11, para. 21(1)(c).

[284] (Unreported, N.B. Human Rights Act Bd. of Inquiry, 25 May 1976).

[285] *Id.*, order dated 7 Jun. 1976.

[286] *Re* Naugler and New Brunswick Liquor Corp., 15 N.B.R. (2d) 324 (S.C. 1976).

[287] *Id.* at 332-33.

[288] R.S.O. 1980, c. 340, sub. 14(c), *replaced by* Human Rights Code, 1981, S.O. 1981, c. 53.

[289] S.O. 1981, c. 53, para. 40(1)(a).

In *Hendry v. Liquor Control Board of Ontario*[290] the Ontario Board of Inquiry, acting under the old Code, ordered the respondent to undertake affirmative action in the following terms: "It is ordered that the respondent co-operate with the Human Rights Commission and the Women's Bureau of the Ministry of Labour in designing a program to take such steps as are appropriate to reduce the imbalance between men and women employed by the respondent."[291]

If the old subsection 14(c) gave the Board authority to make such an order, it is likely that the present paragraph 40(1)(a) does so also. Thus it seems arguable that in New Brunswick and Ontario a Board of Inquiry can order a respondent to adopt an affirmative action program.

The federal Commission has asked the federal Human Rights Tribunal to order the respondent to implement an affirmative action program for women in *Action Travail des Femmes v. C.N.R.*[292] That decision has been reserved.

## L. *Physical Handicaps and Access to Services*

A major trend in human rights today is one toward a strengthening of the protection accorded to the physically handicapped. When physical handicap was first added to the various codes as a ground of discrimination, it was recognized that the cost of retrofitting buildings and public facilities in order to make them accessible would be expensive. The codes either contained major exceptions or limited their coverage to matters related to employment and refrained from requiring access to services and facilities. The Individual's Rights Protection Act[293] of Alberta, for example, while prohibiting discrimination against the physically handicapped in the provision of access to services and facilities, exempts[294] any building that complies with the Alberta Uniform Building Standards Act.[295]

Moreover, although some of the provincial commissions purport to deal with complaints regarding accessibility, their efforts have not had great impact because of the lack of a clear enforcement mechanism. For example, in *Canadian Odeon Theatres Ltd. v. Saskatchewan Human Rights Commission*,[296] the Saskatchewan Queen's Bench overruled a Board of Inquiry finding that a cinema had provided inadequate access to those in wheelchairs. The Court found that the provisions of The Saskatchewan Human Rights Code[297] did not require those who provide

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[290] 1 C.H.R.R. 160 (Ont. Human Rights Code Bd. of Inquiry 1980).
[291] *Id.* at 166.
[292] (Reserved, Can. Human Rights Comm'n Tribunal, 1983).
[293] R.S.A. 1980, c. I-2, ss. 3, 4.
[294] S. 5.
[295] R.S.A. 1980, c. U-4.
[296] [1982] 5 W.W.R. 420, 3 C.H.R.R. 985 (Sask. Q.B.).
[297] S.S. 1979, c. S-24.1.

services to adapt their facilities to accommodate disabled persons. All that the Code required was "that the physically disabled be offered the same facilities as are offered to the public, no more and no less".[298]

Even the new Ontario Human Rights Code contains the following provision:

> 16.(1) A right of a person under this Act is not infringed for the reason only,
> (a) that the person does not have access to premises, services, goods, facilities or accommodation because of handicap, or that the premises, services, goods, facilities or accommodation lack the amenities that are appropriate for the person because of handicap.[299]

However, significant amendments to the Canadian Human Rights Act, proclaimed on 1 July 1983, ban discrimination against the handicapped in the provision of *access* to goods, services, facilities and accommodation.[300] The Statute establishes a transitional period. A tribunal can make recommendations but cannot order that premises be adapted until 17 April 1985.[301] The Governor in Council can by regulation set standards for access to services, facilities and premises.[302] In addition, employers and those who offer services and facilities can have any plans for the adapting of their services and facilities to the needs of the disabled approved by the Commission.[303] If regulations or approved plans are complied with, there can be no basis for any complaint. The regulations and plans might deal with such matters as low counters for wheelchairs in banks, and the assistance provided to the disabled in boarding or disembarking from a train or interprovincial bus.

These amendments constitute a major step toward full integration of the handicapped into the mainstream of society.

### M. *Equal Pay*

There were no significant developments in the law relating to equal pay during the period surveyed. The continuing problem, with the exception of federal and Quebec legislation,[304] is that the statutes require that male and female employees who are compared be performing the

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[298] *Supra* note 296, at 427, 3 C.H.R.R. at 987.

[299] S.O. 1981, c. 53, sub. 16(1).

[300] An Act to amend the Canadian Human Rights Act and to amend certain other Acts in consequence thereof, S.C. 1980-81-82-83, c. 143, *amending* S.C. 1976-77, c. 33.

[301] Canadian Human Rights Act, S.C. 1976-77, c. 33, s. 65.1, *as amended by* S.C. 1977-78, c. 22, S.C. 1980-81, c. 54, S.C. 1980-81-82, c. 111, S.C. 1980-81-82-83, c. 143.

[302] S. 19.1.

[303] S. 15.1.

[304] Canadian Human Rights Act, S.C. 1976-77, c. 33, *as amended by* S.C. 1977-78, c. 22, S.C. 1980-81, c. 54, S.C. 1980-81-82, c. 111, S.C. 1980-81-82-83, c. 143; Charte des droits et libertés de la personne, L.R.Q. 1977, c. C-12, *as amended by* L.Q. 1982, c. 61.

same, similar or substantially similar jobs. The decision of the Saskatchewan Human Rights Commission in *Bublish v. Saskatchewan Union of Nurses*[305] is illustrative. That case found that the positions of female and male employment relations officers were not sufficiently similar to substantiate a complaint. Subsection 11(1) of the Canadian Human Rights Act[306] provides for "equal pay for work of equal value" but this provision has not been the subject of litigation, although a human rights tribunal is currently inquiring into the complaint of the Energy & Chemical Workers Union, Local 916 against Atomic Energy of Canada Ltd.[307] However, two major settlements were negotiated in 1982 under section 11. The first, involving the Public Service Alliance of Canada and the Treasury Board, benefited some 3000 women in the General Services group to the extent of some $17 million in back pay and a total annual salary increase of $12 million. The other settlement, involving librarians and the Treasury Board, benefited some 200 people to the extent of more than $280,000 in back pay and an approximate total annual salary increase of $150,000.

Acceptance by the courts of the methodology of compensation practice and the results of job evaluation studies is crucial to the future effectiveness of "equal pay for work of equal value" legislation. However, in a recent case, *Harmatiuk v. Pasqua Hospital*,[308] the Saskatchewan Human Rights Commission rejected the results of a job evaluation saying:

> The Act contains its own definition of equal work which is independent of any classification system. Thus, although the point values allocated to 2 jobs may add up to unequal totals, it does not necessarily follow that the work being performed in such jobs is inequal [*sic*] when the statutory tests of the equal pay standard are applied.[309]

Thus, although a wage study evaluated the female jobs as being less valuable than the male jobs, the Tribunal substantiated the complaint. The study in question was performed by the Canadian Union of Public Employees, the Saskatchewan Employees' International Union, the Saskatchewan Department of Health and the hospitals in the province of Saskatchewan acting in concert. Caretakers received a point value of 285 while housekeepers received a point value of 265. The housekeepers appealed the assessment to the Central Evaluations Committee, which was composed of two management and two union representatives, and which unanimously dismissed their appeal.

While the Tribunal's decision was supportive of the women in this particular case, in the long run it may be unfortunate that the results of the job evaluation studies were not accorded more weight.

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[305] 4 C.H.R.R. 1269 (Sask. Human Rights Comm'n 1983).
[306] S.C. 1976-77, c. 33, sub. 11(1).
[307] Hearing commenced 11-12 Jan. 1984.
[308] 4 C.H.R.R. 1177 (Sask. Human Rights Comm'n 1983).
[309] *Id.* at 1181.

N. *British Columbia*

On 8 July 1983 the Human Rights Commission and the Director and staff of the Human Rights Branch were dismissed by the British Columbia government. In addition, legislation was passed repealing the Human Rights Code of British Columbia[310] and enacting a new Human Rights Act.[311]

While the events in British Columbia are essentially political and beyond the scope of this survey, they are worthy of note with reference to the Supreme Court of Canada decision in *Bhadauria v. Board of Governors of Seneca College of Applied Arts and Technology*.[312] It is clear that the late Chief Justice Laskin, writing for the Court, came to the conclusion that no tort of discrimination existed. It is obvious that in doing so, he was heavily influenced by the existence of available statutory machinery. He commented on the "comprehensiveness of the Code in its administrative and adjudicative features, the latter including a wide right of appeal to the courts on both fact and law"[313] and held:

> [n]ot only does the Code foreclose any civil action based directly upon a breach thereof but it also excludes any common law action based on an invocation of the public policy expressed in the Code. The Code itself has laid out the procedures for vindication of that public policy, procedures which the plaintiff and respondent did not see fit to use.[314]

For a time in British Columbia, the British Columbia Human Rights Code continues in effect but without the support of staff, until the new legislation is proclaimed.

One wonders whether the Supreme Court decision in *Bhadauria*, that there is no common law remedy for discrimination, would have been different had it been rendered after the events in British Columbia.

## III. Conclusion

A survey such as this is soon out of date. After the period under survey and before publication there have been several significant decisions. First, a recent decision of the Manitoba Court of Queen's Bench did not follow *O'Malley* and *Bhinder*, and found that "intent" is not required under Manitoba's The Human Rights Act.[315] Second, the Federal Court of Appeal suggested that a complainant who lost employment had the right to an oral hearing and an opportunity to

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[310] R.S.B.C. 1979, c. 186.
[311] Bill 27, 33rd Leg. B.C., 1st sess., 1983 (not yet proclaimed in force).
[312] *Supra* note 99.
[313] *Id.* at 183, 124 D.L.R. (3d) at 195.
[314] *Id.* at 195, 124 D.L.R. (3d) at 203.
[315] Canada Safeway Ltd. v. Steel, (unreported, Man. Q.B., 28 Mar. 1984).

cross-examine before his or her complaint was dismissed.[316] This would increase the number of tribunal and board hearings more than tenfold. Finally, a Federal Court, Trial Division judge commented that a reasonable person might perceive unfairness in a procedure where tribunal members were selected by the Canadian Human Rights Commission which then appeared at the tribunal in support of the complainant.[317] Those comments may be relevant to provincial procedures where a minister often appoints the board on the recommendation of the Commission. A wholesale revision of human rights procedures may be necessary. Ultimately we may see permanent administrative tribunals which would hear all human rights cases rather than being selected to sit on particular cases on a part-time basis.

Anti-discrimination law is a young and active area. As such, significant developments and changes in the legal interpretation of relevant statutes are to be expected. Only after numerous cases have been decided by the courts, tribunals and boards of inquiry will a clear and concise statement of the law emerge.

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[316] Cashin v. Canadian Broadcasting Corp., (unreported, F.C. App. D., 30 Apr. 1984).

[317] McBain v. Potapczyk, (unreported, F.C. Trial D., 9 May 1984) (Wright J.).