RECENT DEVELOPMENTS IN CANADIAN LAW: ANTI-DISCRIMINATION LAW PART I

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I. INTRODUCTION

In the introduction to the previous *Survey*[1] I illustrated the explosive growth of anti-discrimination law in Canada by observing that in all of Canada there were seven cases decided under human rights codes in 1972, whereas in 1982 there were 114 such cases. This growth has continued. In 1986 there were 191 cases reported in the *Canadian Human Rights Reporter*. In addition to the increasing number of cases, the scope of the area continues to broaden. The passage of the federal *Employment Equity Act*[2] and Manitoba's *Pay Equity Act*[3] are examples of new legislative initiatives. However, without any doubt, the most significant expansion of Canadian anti-discrimination law was the coming into force on April 17, 1985 of a constitutional guarantee against discrimination. Discussion of section 15 of the *Charter of Rights and Freedoms*[4] and its relationship to the human rights codes has made this survey lengthy. Therefore the survey will be published in two parts. Part I will consider

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[1] R. Juriansz, *Survey of Anti-Discrimination Law* (1984) 16 OTTAWA L. REV. 117 [hereinafter *Survey*].

[2] S.C. 1986, c. 31.

[3] S.M. 1985-86, c. 21, C.C.S.M. P13.

[4] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11, s. 15 [hereinafter *Charter*].

the effect of the Supreme Court of Canada's decisions in *O'Malley*[5] and *Bhinder*[6] on future cases, recognizing that both the *Ontario Human Rights Code*[7] and the *Canadian Human Rights Act*[8] have been amended; consider some practical issues that stem from the Supreme Court of Canada's ruling in *Craton*[9] that human rights legislation is to be accorded primacy over other conflicting legislation; discuss the relationships between subsections 15(1) and (2) of the *Charter* and human rights legislation; discuss procedural fairness in human rights proceedings, including the application of sections 11 and 7 of the *Charter*; and review recent developments in the jurisprudence relating to sexual harassment.

Part II will appear in the next issue and will deal with developments in the jurisprudence under human rights legislation.

II. THE BHINDER AND O'MALLEY DECISIONS

A. *Introduction*

In December, 1985 the Supreme Court of Canada rendered its long awaited judgments in the cases of *O'Malley*[10] and *Bhinder*.[11] These cases raised issues which were fundamentally important to the law of discrimination: whether "intention" was an essential component of discrimination, whether "adverse effect" discrimination was within the ambit of Canadian human rights legislation and whether there existed a duty to reasonably accommodate the special needs of protected groups.

It will be assumed that readers are familiar with these decisions. The background of the cases and an analysis of the lower courts' decisions, as well as an outline of the evolution of the concept of "discrimination" may be found in the last *Survey*. Following a brief summary of the facts, what is offered here is commentary and analysis with particular reference to changes in the legislation. The *Ontario Human Rights Code*[12] was completely rewritten after the date of O'Malley's complaint and the federal Act[13] was amended after the date of Bhinder's complaint.

Mrs. O'Malley was one of three full-time sales clerks in the ladies' wear section of Simpsons-Sears in Kingston, Ontario. It was a condition

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[5] *Ontario Human Rights Comm'n & O'Malley* v. *Simpsons-Sears Ltd.* (1985), [1985] 2 S.C.R. 536, 23 D.L.R. (4th) 321 [hereinafter *O'Malley*].

[6] *Bhinder* v. *CNR* (1985), [1985] 2 S.C.R. 561, 23 D.L.R. (4th) 481 [hereinafter *Bhinder*].

[7] R.S.O. 1980, c. 340, *as rep. Human Rights Code, 1981*, S.O. 1981, c. 53.

[8] S.C. 1976-77, c. 33, *as am.* S.C. 1980-81-82-83, c. 143.

[9] *Winnipeg School Div. No. 1* v. *Craton* (1985), [1985] 2 S.C.R. 150, 21 D.L.R. (4th) 1 [hereinafter *Craton*].

[10] *Supra*, note 5.

[11] *Supra*, note 6.

[12] R.S.O. 1980, c. 340, *as rep. Human Rights Code, 1981*, S.O. 1981, c. 53.

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

of employment that sales clerks in the department worked Friday evenings and Saturdays on a rotating basis. Mrs. O'Malley converted to the Seventh Day Adventist Church. One tenet of her new religion was the strict observance of its Sabbath Day which extends from sundown Friday to sundown Saturday. Adventists may not perform work during this period. Mrs. O'Malley could no longer work Friday night or Saturday and she was removed from full-time status. She filed a complaint under paragraph 4(1)(g) of the *Ontario Human Rights Code* which provided that "[n]o person shall . . . discriminate against any employee with regard to any term or condition of employment, because of race, creed, colour, age, sex, marital status, nationality, ancestry or place of origin of such person or employee".

The employer was not motivated by prejudice, malice or bias towards the complainant. The Court was faced with a situation where the employer had no intention to discriminate, but merely imposed on its employees a requirement, on its face neutral, which applied equally to all employees, but which had the effect of making it impossible for Mrs. O'Malley to work in that position because of her religion. Nevertheless the Supreme Court of Canada unanimously allowed Mrs. O'Malley's appeal and awarded her lost wages.

In order to do so it was necessary for the Court to adopt the same "purposive" approach to interpreting the Code which it has adopted in interpreting the *Charter*. In fact, Mr. Justice McIntyre compared human rights legislation to the Constitution by stating:

> The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment . . . and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary — and it is for the courts to seek out its purpose and give it effect.[14]

Thereupon the Court reasoned that intention is not a necessary element of discrimination. However, this was not sufficient to find in Mrs. O'Malley's favour, as not only did the employer not intend to discriminate against her, but also it treated her no differently from its other employees. Therefore the Court had to consider the concept of "adverse effect" discrimination. Noting that the concept was "without express statutory support in Ontario"[15] the Court found that "[a]n employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply".[16] Therefore a *prima facie* case of discrimination was made out.

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[14] *O'Malley*, *supra*, note 5 at 547, 23 D.L.R. (4th) at 329.
[15] *Ibid.* at 550, 23 D.L.R. (4th) at 329.
[16] *Ibid.* at 551, 23 D.L.R. (4th) at 332.

It must be pointed out that the *bona fide* occupational qualification provision in the former *Ontario Human Rights Code* applied only on the grounds of age, sex and marital status. One might well think that being available during "the time for selling" would be a *bona fide* occupational qualification for the job of retail sales clerk. However, the *bona fide* occupational qualification provision did not apply to religion. That there was no saving provision in the Code was relied on by the Court of Appeal for the finding that the Code applied only to intentional discrimination. Yet again, without any express statutory support, the Supreme Court of Canada found that the Code in the case of adverse effect discrimination imposed on the employer a duty to reasonably accommodate the employee that was affected by the work rule. The basis for this finding was the stated purpose of the *Ontario Human Rights Code* and its general provisions which accorded the right to be free from discrimination in employment. The Court reasoned that the existence and recognition of the right had a natural corollary: "[T]he social acceptance of a general duty to respect and to act within reason to protect it."[17] The content of the duty was stated as follows:

> The duty in a case of adverse effect discrimination on the basis of religion or creed is to take reasonable steps to accommodate the complainant, short of undue hardship: in other words, to take such steps as may be reasonable to accommodate without undue interference in the operation of the employer's business and without undue expense to the employer.[18]

The Court went further and placed on the employer the onus of establishing that reasonable accommodation was not possible. The Court reasoned that the employer would be in possession of the necessary information to show undue hardship whereas the employee will seldom be in a position to show its absence.

Before embarking on an analysis of this and the *Bhinder* decision it is worthwhile to note the pronounced differences between the evolution of American and Canadian anti-discrimination law.

B. *United States Jurisprudence: A Comparison*

The concept of "adverse effect" discrimination in the United States is traced to the decision of the United States Supreme Court in *Griggs* v. *Duke Power Co.*[19] In that case the Court found that employment requirements (high school certificate and aptitude test), which were applied equally to all applicants and had the effect of disqualifying blacks disproportionately, were discriminatory when the employer was unable to show that they were related to the ability to perform the jobs in question. The important observation is that the high school certificate and aptitude

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[17] *Ibid.* at 554, 23 D.L.R. (4th) at 334-35.
[18] *Ibid.* at 555, 23 D.L.R. (4th) at 335.
[19] 401 U.S. 424 (1971) [hereinafter *Griggs*].

tests were quite unnecessary for the performance of the labouring jobs. The employer was unable to show that individuals who had high school certificates or performed well on the aptitude tests would make better employees. In fact the evidence was to the contrary.

In the United States a neutral rule that has a disproportionate impact is discriminatory only when it cannot be shown to be job-related or necessary from a business point of view. A rule that has disproportionate impact, which is imposed for sound economic or business reasons, is not discriminatory unless the complainant demonstrates that the employer refuses to use an alternative selection method with a lesser discriminatory impact. In *Griggs* the Court said:

> What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.
> . . . .
> The 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. On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used.[20]

By contrast, the Supreme Court of Canada went much further in holding that the neutral rule is discriminatory where it has a disproportionate effect on one group *even if* it is imposed for genuine business reasons. In *O'Malley* the Court said that "[a]n employment rule *honestly made for sound economic or business reasons*, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply."[21]

There was a finding of fact that the period from Thursday evening, through Friday evening and Saturday was considered the busy time and the "time for selling".[22] A requirement to work during this period was certainly "job related" and necessary for the business. In fact, the Court stated that the rule was "rationally connected to the performance of the job".[23] Yet the Supreme Court of Canada found that the rule's effect on Seventh Day Adventists constituted a *prima facie* case of discrimination. The notion of adverse effect discrimination in Canada is clearly different to that in the United States.

A second difference is that in *O'Malley* the Court blended together what are, in the United States, two entirely separate concepts: adverse effect discrimination and the duty to accommodate. As we have seen, in the United States adverse effect discrimination is limited to those em-

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[20] *Ibid.* at 431.
[21] *Supra*, note 5 at 551, 23 D.L.R. (4th) at 332 (emphasis added).
[22] *Ibid.* at 539, 23 D.L.R. (4th) at 323.
[23] *Ibid.* at 558, 23 D.L.R. (4th) at 338.

ployment rules which cannot be rationalized by sound economic or business reasons. Thus when the neutral rule is found to be discriminatory, the respondent can no longer impose it on any employee. In *Griggs*, the Duke Power Company had to refrain from requiring high school certificates from *all* applicants, not only blacks.

In the United States the duty to accommodate relates only to the grounds of religion and handicap. The duty is said to be based on express statutory provisions and it is true that the *Civil Rights Act of 1964*[24] was amended in 1972 expressly to impose upon employers the duty to accommodate the religious needs of employees and prospective employees. However, in 1966 the Equal Employment Opportunity Commission (EEOC) issued guidelines interpreting the prohibition of discrimination on the basis of religion as implying a duty to accommodate the religious needs of an employee. In 1970 the United States Court of Appeal in *Dewey* v. *Reynolds Metals Co.*[25] stated that the EEOC's authority to impose such a duty on an employer lacked any statutory basis. The Court of Appeal decision stood because the United States Supreme Court was equally divided on the matter in 1971. In 1972 Congress responded with the statutory amendment. The United States Supreme Court decision in *Trans World Airlines, Inc.* v. *Hardison*[26] is well known for the Court's determination to define what constitutes "undue hardship". What is often forgotten is that while decided in 1977, the case was based on pre-1972 facts. In the *Hardison* case the Court confirmed that the duty to accommodate was imposed by the pre-1972 statute which contained a simple prohibition of discrimination and no express requirement of accommodation. The Court said of the EEOC guideline:

> [T]he guideline is entitled to some deference, at least sufficient in this case to warrant our accepting the guideline as a defensible construction of the pre-1972 statute, *i.e.*, as imposing on TWA the duty of "reasonable accommodation" in the absence of "undue hardship". We thus need not consider whether §701(j) must be applied retroactively to the facts of this litigation.[27]

In the United States the failure to accommodate constitutes discrimination in and of itself. In *O'Malley* the Canadian Supreme Court's analysis of the duty to accommodate is a saving provision after a *prima facie* case of discrimination is made out on the adverse effect theory. The Court said:

> Where adverse effect discrimination on the basis of creed is shown and the offending rule is rationally connected to the performance of the job, as in

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[24] 42 U.S.C. §2000e(j) (1982).

[25] 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided Court* 402 U.S. 689 (1971).

[26] 432 U.S. 63 (1977) [hereinafter *Hardison*].

[27] *Ibid.* at 76, n. 11.

> the case at bar, the employer is not required to justify it but rather to show that he has taken such reasonable steps toward accommodation of the employee's position as are open to him without undue hardship.[28]

Applying the United States law to the *O'Malley* case we would conclude that the rule requiring the employee to work on Saturday would not sustain a case of adverse effect discrimination because the rule was rationally connected to the employment. However, the failure of the employer to reasonably accommodate the employee's religious needs would in and of itself constitute discrimination if accommodation were possible without undue hardship.

The Supreme Court of Canada heard the *Bhinder* case[29] at the same time as it heard *O'Malley* and rendered both decisions on the same day. Mr. Bhinder commenced employment with Canadian National Railways in April of 1974. He worked for four and a half years as a maintenance electrician in the Toronto coach yard, servicing the turbo-train which travelled between Toronto and Montreal. On November 30, 1978 CN announced that commencing December 1, 1978 all employees would be required to wear a hard hat while at work. Mr. Bhinder was a Sikh and his religion forbids its adherents from wearing anything on their heads except a turban. Accordingly, he refused to wear the hard hat and was not permitted to work after December 6, 1978. He filed a complaint of religious discrimination with the Canadian Human Rights Commission. The Human Rights Tribunal substantiated his complaint on the basis that the hard hat rule had a discriminatory effect on Bhinder even though CN was acting in good faith, and that CN should have accommodated Bhinder by excusing him from the general application of the rule.[30] The Federal Court of Appeal reversed the decision, the majority holding that the *Canadian Human Rights Act* applied only to intentional discrimination and that the Act did not require reasonable accommodation.[31] Mr. Justice Le Dain dissented.

The Supreme Court of Canada found that intention was not a necessary element of discrimination and that the *Canadian Human Rights Act* did apply to adverse effect discrimination.[32] The Court adopted its reasoning in *O'Malley*, but went on to rule that the existence of the *bona fide* occupational requirement provision in the *Canadian Human Rights Act*[33] foreclosed any duty to accommodate.[34] The *bona fide* occupational requirement refers to the requirement for the occupation and not a re-

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[28] *Supra*, note 5 at 558-59, 23 D.L.R. (4th) at 338.

[29] *Supra*, note 6.

[30] *Bhinder* v. *CNR* (1981), 2 C.H.R.R. D/546 (Can. H.R. Trib.), *rev'd* (*sub nom. CNR* v. *Canadian Human Rights Comm'n*) (1983), [1983] 2 F.C. 531, 147 D.L.R. (3d) 312 (A.D.) [hereinafter *CNR*], *aff'd*, *see supra*, note 6.

[31] *CNR*, *ibid.*

[32] *Bhinder*, *supra*, note 6 at 589, 23 D.L.R. (4th) at 501.

[33] S.C. 1976-77, c. 33, s. 14(a).

[34] *Bhinder*, *supra*, note 6 at 590, 23 D.L.R. (4th) at 501.

quirement with reference to a particular individual. It must be understood in its general application. Since the requirement of wearing a hard hat was job-related and was found to be a *bona fide* occupational requirement, it was carved out of what might otherwise be discriminatory because of the specific wording of section 14 of the Act. Mr. Justice McIntyre stated: "A condition of employment does not lose its character as a *bona fide* occupational requirement because it may be discriminatory."[35]

Madame Justice Wilson and Chief Justice Dickson wrote separate judgments. While the Chief Justice dissented, Madame Justice Wilson, concurring with the majority, emphasized that the *bona fide* occupational requirement provision of the Act did not create an exception or defence, but rather was definitional. Practices which are *bona fide* occupational requirements are not discriminatory by definition.[36] This is an extremely important point. If it were an exception or a defence, the provision would be construed narrowly. However, as it is part of the definition of what is discrimination, it will receive the same large and liberal interpretation as the rest of the statute.

C. *Ontario Human Rights Legislation*

I move on now, to a discussion of the influence these two decisions will have on future cases. The most important observation about the Ontario decision is that the *Ontario Human Rights Code*[37] was completely rewritten after O'Malley filed her complaint. The present Code[38] is so fundamentally different in character from its predecessor that the Supreme Court of Canada's reasoning in *O'Malley* can no longer be applied in Ontario.

The new Code does not prohibit discrimination but rather creates rights to equal *treatment* and prohibits the infringement of those rights. For example, in the context of employment, subsection 4(1) of the new Code provides that "[e]very person has a right to equal *treatment* with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, age, record of offences, marital status or handicap" (emphasis added). The old Code had provided in paragraph 4(1)(g) that "[n]o person shall . . . discriminate against any employee with regard to any term or condition of employment, because of race, creed, colour, age, sex, marital status, nationality, ancestry or place of origin".

In the *O'Malley* decision the Supreme Court of Canada had endorsed the concept of adverse effect discrimination by saying that "[a]n employment rule honestly made for sound economic or business reasons, equally applicable to all or to whom it is intended to apply, may yet be

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[35] *Ibid.* at 588-89, 23 D.L.R. (4th) at 500.
[36] *Ibid.* at 580, 23 D.L.R. (4th) at 503.
[37] R.S.O. 1980, c. 340.
[38] *Human Rights Code, 1981*, S.O. 1981, c. 53.

discriminatory if it *affects* a person or group of persons differently from others to whom it may apply".[39]

It is clear that the Court's reasoning on "adverse effect" discrimination cannot apply under the new Code. Adverse effect discrimination means the discrimination that results from treating people equally, yet the new Code grants nothing more than the right to equal treatment. Therefore, the Supreme Court of Canada's reasoning that the general prohibitions of "discrimination" include the adverse effects that flow from equal treatment cannot apply to the provisions of the new Ontario Code. The new Code, however, has a clause that expressly deals with adverse effect discrimination. Section 10 reads:

> A right of a person under Part I is infringed where a requirement, qualification or consideration is imposed *that is not discrimination* on a prohibited ground but that would result in the exclusion, qualification or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
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> (a) the requirement, qualification or consideration is a reasonable and *bona fide* one in the circumstances; or
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> (b) it is declared in this Act that to discriminate because of such ground is not an infringement of a right. (emphasis added)

Any flexibility in the interpretation of the general provisions of the new Code is taken away by the language of section 10 which confirms that a requirement, qualification or consideration that merely results in the exclusion, qualification or preference of a group on a prohibited ground does not constitute discrimination. Section 10 deems what is not discrimination under the general provisions of Part I to be discrimination. I conclude that adverse effect discrimination under the new Code may be dealt with only under section 10 and not under the general provisions. The ambit and characteristics of adverse effect discrimination in Ontario will be determined by the express language of section 10 rather than by what has been judicially developed. This leads to some potential problems.

The Court's reasoning in *O'Malley*, that intention is not a necessary element of discrimination, would of course apply to an infringement of the right to equal treatment under the new Ontario Code. However, the duty to accommodate *always* involves *not* treating people strictly equally. Excusing an employee such as Mrs. O'Malley from working on Friday nights and Saturdays, a requirement imposed on all other employees, is in fact treating her specially — not equally. Therefore the Supreme Court of Canada's reasoning on the duty to accommodate requires closer scrutiny under the new Code.

In *O'Malley* the Supreme Court of Canada recognized that "[t]here is no express statutory base" for the duty to accommodate.[40] However,

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[39] *Supra*, note 5 at 551, 23 D.L.R. (4th) at 332 (emphasis added).

[40] *Ibid.* at 553, 23 D.L.R. (4th) at 334.

the Court reasoned that "if the purpose of the *Ontario Human Rights Code* is to be given effect some accommodation must be required from the employer for the benefit of the complainant".[41] The Court reasoned that "[t]he Code accords the right to be free from discrimination in employment. While no right can be regarded as absolute, a natural corollary to the recognition of a right must be the social acceptance of a general duty to respect and to act within reason to protect it."[42] Therefore, the duty to accommodate was based on the *Ontario Human Rights Code*, its purpose and its general provisions.

The preamble to the new Code states:

> [I]t is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination . . . [and states as its aim] the creation of a climate of understanding and mutual respect . . . so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province. . . .

Given this statement of purpose, and considering the purposive rule of construction adopted by the Court in *O'Malley*, it can be expected that the Court will wish to find that a duty to accommodate exists and that some individuals need unequal treatment to achieve equal opportunity under the new Ontario Code.

However, there are two problems, the first one being that the new Code guarantees only a "right to equal treatment".[43] In *O'Malley* the duty to accommodate was a corollary of the "right to be free from discrimination". The second problem, which relates only to adverse effect discrimination, may be more serious. Section 10 of the new Code deems a requirement that results in the exclusion on a prohibited ground to be discriminatory "except where . . . the requirement, qualification or consideration is a reasonable and *bona fide* one in the circumstances".

Keeping this in mind we look at the Court's explanation of why the duty to accommodate existed in *O'Malley* but not in *Bhinder*. The Court in *Bhinder* said:

> I cannot, however, leave this case, without further reference to the case of *O'Malley*. On facts for all purposes identical to those at bar, Mrs. O'Malley has received protection fom the religious discrimination against which she complained and Bhinder has not. The difference in the two cases results from the difference in the two statutes. The *Ontario Human Rights Code* in force in the *O'Malley* case prohibited religious discrimination but contained no *bona fide* occupational requirement for the employer. The *Canadian Human Rights Act* contains a similar prohibition, but in s. 14(a) is set out in the clearest terms the *bona fide* occupational requirement defence. As I have already said, no exercise in construction can get around the

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[41] *Ibid.* at 552, 23 D.L.R. (4th) at 333.
[42] *Ibid.* at 554, 23 D.L.R. (4th) at 334-35.
[43] S. 4(1).

> intractable words of s. 14(a) and Bhinder's appeal must accordingly fail. It follows as well from the foregoing that there cannot be any consideration in this case of the duty to accommodate referred to in *O'Malley* and contended for by the appellants. The duty to accommodate will arise in such a case as *O'Malley*, where there is adverse effect discrimination on the basis of religion and where there is no *bona fide* occupational requirement defence. The duty to accommodate is a duty imposed on the employer to take reasonable steps short of undue hardship to accommodate the religious practices of the employee when the employee has suffered or will suffer discrimination from a working rule or condition. The *bona fide* occupational requirement defence set out in s. 14(a) leaves no room for any such duty for, by its clear terms where the *bona fide* occupational requirement exists, no discriminatory practice has occurred. As framed in the *Canadian Human Rights Act*, the *bona fide* occupational requirement defence when established forecloses any duty to accommodate.[44]

Section 10 of the new Code, the only basis for "adverse effect" discrimination in that Code, has a built in saving provision of *bona fide* reasonable qualifications.

According to the reasoning in *Bhinder*, where the requirement is a reasonable and *bona fide* one in the circumstances there is no constructive discrimination within the meaning of section 10. The result that there is no duty to accommodate in cases of adverse effect discrimination under the new Code can be avoided only if the words "in the circumstances" in subsection 10(a) are interpreted to refer to the individual complainant's circumstances and not simply the circumstances of the job or service. Is this possible?

In *Bhinder* the Court was clear in holding that an individual application of *bona fide* occupational requirement was neither permissible nor possible. The Court stated that "[i]t must apply to all members of the employee group concerned because it is a requirement of general application concerning the safety of employees. The employee must meet the requirement in order to hold the employment. It is, by its nature, *not susceptible to individual application.*"[45]

However, the language of section 10 in the Ontario Code does not refer to an "occupational" requirement. Perhaps it is arguable that the reasonableness and *bona fides* of the requirement need not be determined with reference to the occupation alone. However, to decide that a requirement cannot be reasonable because it *results* in discrimination is circular. The Court rejected this circular reasoning in the *Bhinder* decision where it said:

> The Tribunal sought to show that the requirement must be reasonable, and no objection would be taken to that, but it went on to conclude that no requirement which had the effect of discriminating on the basis of religion could be reasonable. This, in effect, was to say that the hard hat rule could not be a *bona fide* occupational requirement because it discriminated. This,

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[44] *Supra*, note 6 at 590, 23 D.L.R. (4th) at 501.
[45] *Ibid.* at 588, 23 D.L.R. (4th) at 500 (emphasis added).

> in my view, is not an acceptable conclusion. A condition of employment does not lose its character as a *bona fide* occupational requirement because it may be discriminatory. Rather, if a working condition is established as a *bona fide* occupational requirement, the consequential discrimination, if any, is permitted — or, probably more accurately — is not considered under s. 14(a) as being discriminatory.[46]

In *Re Chrysler Canada Ltd. and U.A.W., Local 444*[47] a Labour Arbitration Board noted that section 10 of the new Ontario Code contained a saving provision and that therefore the Supreme Court of Canada's decision in *O'Malley* did not apply. The Board said:

> On this arbitration it is, therefore, necessary to focus on the particular language of the saving provision contained in s. 10 of the *Human Rights Code, 1981*. That language states that the requirement, qualification or consideration must be a reasonable and *bona fide* one in the circumstances. I think it is significant that that section has not used the language of the *Canadian Human Rights Act* . . . which makes reference to a *bona fide* occupational requirement. The inclusion of a test of reasonableness and of a direction to look at all of the circumstances creates a much wider area of review before the particular requirement, qualification or consideration can be considered to come within the saving provision. In determining whether any requirement, qualification or consideration is a reasonable and *bona fide* one in the circumstances, reference must be made to the same standards as are set out by the Supreme Court of Canada in the [*O'Malley*] decision once the adverse effect discrimination has been established. In other words, a requirement could not be reasonable and *bona fide* in the circumstances where an employer could take reasonable steps to accommodate the employee without undue interference in the operation of the business and without undue expense to the employer.[48]

To interpret the phrase "in the circumstances" in subsection 10(a) of the new Ontario Code to contemplate individual circumstances results in the circularity identified by Madame Justice Wilson. Subsection 10(a) removes from the definition of "constructive discrimination" those discriminatory results which are reasonable and *bona fide* in the circumstances. If a requirement cannot be reasonable and *bona fide* in the circumstances simply because it has a discriminatory effect in relation to a particular individual, then subsection 10(a) is redundant. Madame Justice Wilson emphasized this point in her concurring reasons. In dealing with the argument that the *bona fides* of an occupational requirement must be assessed in relation to each employee she said:

> The same occupational requirement might be *bona fide* vis-a-vis X but not vis-a-vis Y. By taking this approach the same result can, of course, be reached as if the section were not in the Act at all since, absent the section, the employer is obliged to accommodate the individual employee up to the

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[46] *Ibid.* at 588-89, 23 D.L.R. (4th) at 500.
[47] (1986), 23 L.A.C. (3d) 366 (Ont. L.R. Bd.).
[48] *Ibid.* at 376.

> point of undue hardship even if the requirement is a *bona fide* occupational one: see [*O'Malley*].[49]

The same analysis may be applied to section 10 of the Ontario Code. Absent subsection 10(a), the employer would still be obliged to accommodate an employee to the point of undue hardship even if the requirement were *bona fide* and reasonable in the circumstances.

Other features of the text of the Ontario Code indicate that it likely does not impose a general duty to accommodate on all grounds. Subsection 40(2) allows a board of inquiry after finding there has been discrimination in the provision of services because of handicap, to order, "unless the costs occasioned thereby would cause undue hardship", that "the [respondent] . . . take such measures as will make such provision for access or amenities". Subsection 40(3) permits a board of inquiry upon finding there has been discrimiation because of handicap in employment to order, "unless the costs occasioned thereby would cause undue hardship" that "the [respondent] . . . take such measures to adapt the equipment or duties as will meet [the complainant's] . . . needs". These provisions would be redundant if there were a general duty to accommodate under section 10 of the Code.

Subsection 10(2) was added to the Code by S.O. 1986, chapter 64, and provides as follows:

> The Commission, a board of inquiry or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

At the date of publication this subsection had not been proclaimed in force. If section 10 as it presently exists already imposes the duty to accommodate then the amendment must be for the purpose of clarifying the existing law. However, the legislation which makes the amendment is entitled *An Act to amend certain Ontario Statutes to conform to section 15 of the Canadian Charter of Rights and Freedoms*. It must be that the amendment altered the substantive law to conform with the *Charter*. The same statute also repealed subsections 40(2) and 40(3) which became redundant with the addition of a general duty to accommodate. The amendment was necessary to ensure that the Code conformed with the *Charter* as it imposed the duty to accommodate only on the ground of handicap, thus not providing other grounds with the equal benefit and equal protection of the law.

The alternative argument that would understand subsection 10(a) as being the "undue hardship" component of the duty to accommodate is

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[49] *Bhinder*, *supra*, note 6 at 579, 23 D.L.R. (4th) at 502.

attractive. That is, that a requirement is a reasonable one within the meaning of subsection 10(a) where not allowing the employer to impose it would result in undue hardship. Section 10 deems discriminatory results to offend the Code except where to do so would cause the employer undue hardship and therefore be "unreasonable". (Arguably, the phrase "reasonable accommodation without undue hardship" is redundant. If an accommodation causes undue hardship it cannot be reasonable. If it is reasonable it does not cause undue hardship.) This interpretation is more in accord with the purpose of the Code and gives a reasonable meaning to all the words in the section. It is the approach that the Chief Justice used in his dissent in *Bhinder*:

> Once it is established that a requirement is "occupational", however, it must further be established that it is "*bona fide*". A requirement which is *prima facie* discriminatory against an individual, even if it is in fact "occupational", is not *bona fide* for the purpose of s. 14(a) if its application to the individual is not reasonably necessary in the sense that undue hardship on the part of the employer would result if an exception or substitution for the requirement were allowed in the case of the individual. In short, while it is true the words "occupational requirement" refer to a requirement manifest to the occupation as a whole, the qualifying words "*bona fide*" require an employer to justify the imposition of an occupational requirement on a particular individual when such imposition has discriminatory effects on the individual.[50]

While this approach is also attractive, only Mr. Justice Lamer concurred with the Chief Justice.

I conclude that the majority's reasoning is not easily applied to the provisions of the new Ontario Code and that the existence of the duty to accommodate in a case of adverse effect discrimination under the new Code will have to be re-argued before the Supreme Court of Canada.

D. *Federal Human Rights Legislation*

I turn now to the implications of the *O'Malley* and *Bhinder* decisions for the future interpretation of the *Canadian Human Rights Act*.[51] In *Bhinder* the Court adopted its reasoning on adverse effect discrimination in *O'Malley*. The application of the *Canadian Human Rights Act* to adverse effect discrimination is not limited to section 10 which applies to a policy or practice which "deprives or tends to deprive an individual or class of individuals of any employment opportunities". The Court found that adverse effect discrimination was also within the ambit of section 7 and by extension, to sections 5, 6 and 9 of the Act. The Court's conclusion that the duty to accommodate is foreclosed by subsection 14(a) of the Act is strongly supported by the French version of subsection

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[50] *Ibid.* at 571, 23 D.L.R. (4th) at 487-88.
[51] S.C. 1976-77, c. 33.

14(a) which referred to "exigences professionnelles *normales*"(emphasis added). Subsection 14(a) provided:

> Ne constituent pas des actes discriminatoires
>
> (a) les refus, exclusions, expulsions, suspensions, restrictions, conditions ou préférences de l'employeur qui démontre qu'ils sont fondés sur des exigences professionnelles normales. . . .

Le Petit Robert defines "normale" as follows: "Qui sert de règle. . . . Qui est dépourvu de tout caractère exceptionnel; qui est conforme au type le plus fréquent."[52] Although the French text is not discussed in the reasons, it may well have influenced the Court's interpretation.

The *Canadian Human Rights Act* was amended in several particulars on July 1, 1983.[53] Whether the Court's finding that the Act does not impose a duty to accommodate applies only to the version of the Act in force prior to July 1, 1983 requires careful consideration of the amended provisions.

In July of 1983 subsection 14(g) was added to the Act, providing that,

> It is not a discriminatory practice if. . .
>
> (g) in the circumstances described in section 5 or 6, an individual is denied any goods, services, facilities or accommodation or access thereto or occupancy of any commercial premises or residential accommodation or is a victim of any adverse differentiation and there is a *bona fide* justification for that denial or differentiation.

Subsection 14(g), for the provision of goods, services and facilities, is equivalent to subsection 14(a)'s *bona fide* occupational requirement for employment. However, subsection 14(g) states that there must be a *bona fide* justification "for *that* denial or differentiation" (emphasis added). The use of the modifier "that" implies an individual application to the particular circumstances of the denial or differentiation which is the subject of the complaint. Subsection 14(g), unlike subsection 14(a), refers to an "individual". The saving provision of subsection 14(a) must be "justified" not merely "required". These features might be taken as indications that the approach the Supreme Court of Canada used in interpreting subsection 14(a) could not be applied to subsection 14(g). Other amendments might be taken to indicate that even subsection 14(a) must not be interpreted differently.

The French subsection 14(a) was amended in July, 1983 to change the term "exigences professionnelles normales" to "exigences professionnelles justifiées". This amendment must have changed the meaning of subsection 14(a), or why was it made? What is the difference between

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[52] A. Rey & J. Rey-Debove, eds., LE PETIT ROBERT (Paris: Société du nouveau Littré, 1977) at 1280.

[53] S.C. 1980-81-82-83, c. 143, *amending* S.C. 1976-77, c. 33.

a standard that is "justified" and one that is merely "normally required"? A strong argument can be made that a denial cannot be justified unless accommodating the complainant would result in undue hardship to the respondent.

Also in July of 1983, subsection 41(4) of the Act was amended to limit the jurisdiction of a tribunal, upon finding that a complaint based on disability is substantiated, to make an order that facilities or premises be "adapted". The new subsection 41(4) provides as follows:

> If, at the conclusion of its inquiry into a complaint regarding discrimination based on a disability, the Tribunal finds that the complaint is substantiated but that the premises or facilities of the person found to be engaging or to have engaged in the discriminatory practice require adaptation to meet the needs of a person arising from such a disability,
>
> (a) the Tribunal shall make such order pursuant to this section for that adaptation as it considers appropriate and as it is satisfied will not occasion costs or business inconvenience constituting undue hardship, or
>
> (b) if the Tribunal considers that no such order can be made, it shall make such recommendations as it considers appropriate,
>
> and, in the event of such finding, the Tribunal shall not make an order unless required by this subsection.

Limitation of the amount of adaptation the Tribunal may order to what will not occasion "undue hardship" strongly implies, if not confirms that the Tribunal could order "adaptation" short of that standard. "Adaptation" is in effect "accommodation" and this subsection seems to indicate that failure to adapt or accommodate could lead to liability under the Act.

At the same time, section 15.1 was enacted, providing a scheme whereby a person who has an adaptation plan approved by the commission may be granted immunity from complaints. Such immunity would not be necessary unless a complaint regarding the failure to make the adaptations could be dealt with by the commission. Again this implies a duty to adapt or accommodate imposed by the statute.

Can all of the foregoing amendments be the basis of inferring that a general duty to accommodate on all grounds and in all contexts was added to the *Canadian Human Rights Act* on July 1, 1983, and that the Supreme Court of Canada's decision in *Bhinder* is no longer applicable?

Subsection 41(4) applies only to the adaptation of "premises or facilities" and the ground of "disability". If there is a general duty to accommodate, why is the tribunal's jurisdiction limited to "undue hardship" only in the context of "premises or facilities" and the ground of "disability"? Also puzzling is that section 15.1 speaks of adapating any "services, facilities, premises, equipment or operations". The word for "operations" in the French version of the Act is "activités". This list would seem to encompass adaptation of all physical as well as operational aspects of a business undertaking. Section 15.1, however, also refers only to the ground of "disability". Is the "adaptation" envisaged by section 15.1 wider than that envisaged by subsection 41(4) in that it speaks of

services, equipment and operations, as well as premises and facilities? Leaving aside for the moment the question of extent, sections 15.1 and 41(4) assume that failure to adapt would lead to liability under the *Canadian Human Rights Act*, at least on the ground of disability, without, however, indicating the source of this liability.

In the Court's reasoning in *Bhinder* and *O'Malley* the duty to accommodate springs from the purpose of the Act and the prohibition of discrimination generally. The question is whether that duty to accommodate is foreclosed by excepting provisions such as subsection 14(a) in the *Bhinder* case. Sections 15.1 and 41(4) assume a duty to adapt or accommodate. Perhaps it is only subsection 14(g) that does not foreclose the duty to accommodate? Subsection 14(g) is limited in its application to section 5 and 6 complaints and has no application to employment complaints. If so, the Act would place a duty to accommodate on those who provide services and facilities, but not on employers. This undesirable and unlikely result is not indicated by the legislative history of the Act.

The version of subsection 41(4) which was repealed in July of 1983 specifically applied only to "employment" complaints. Prior to July 1983, complaints about services and facilities based on physical handicap were not possible as the prohibited ground was "physical handicap in matters relating to employment". The ground was broadened in July 1983 to apply to the provision of services and facilities as well. Subsection 41(4) was amended to reflect this broadened coverage and the express reference to "employment" was dropped. This would indicate that the present subsection 41(4) applies to services in addition to employment. It limits the amount of adaptation a tribunal can order for both employment and services complaints. Similarly, a large and liberal interpretation of the Act and Parliament's failure to make a distinction must mean that section 15.1 applies to employers as well as to those who merely provide services to the public.

Since subsection 14(g) only applies to services, facilities and accommodation complaints, it is not a satisfactory explanation for the assumption implicit in section 15.1 and subsection 41(4) that there is a duty to adapt or accommodate imposed upon employers as well. It must be that subsection 14(a), as amended, no longer forecloses the existence of the duty to accommodate. The addition of the word "justifiées" in the new subsection 14(a) should be taken as an indication of Parliamentary intent that the refusal or exclusion must be justified, as described by the Chief Justice in his dissent. The Chief Justice, in reasoning that subsection 14(a) should be applied to an individual's special circumstances, said that "the qualifying words *bona fide* require an employer to justify the imposition of an occupational requirement on a particular individual".[54] The majority view that an occupational requirement may be an inflexible and normally applied rule will require re-examination.

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[54] *Bhinder, supra*, note 6 at 571, 23 D.L.R. (4th) at 488.

Therefore I conclude that the existence of a duty to accommodate will have to be re-litigated under both Ontario's and Canada's Human Rights legislation. The Canadian Human Rights Commission, despite its request for an amendment in a special report to Parliament, continues to assert that the Act as presently worded implies a general duty to accommodate.

III. PRIMACY

The Supreme Court of Canada has for all practical purposes decided that human rights legislation is to be accorded primacy over other conflicting legislation. At the time of the last *Survey*[55] a minority of the Court had expressed this view in the case of *Insurance Corp. of British Columbia* v. *Heerspink*.[56] Mr. Justice Lamer, Justices McIntyre and Estey concurring, wrote:

> When the subject matter of a law is said to be the comprehensive statement of the "human rights" of the people living in that 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.
>
> 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.
>
> 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.[57]

A. *The Craton Case*

In a decision rendered September 18, 1985 the Supreme Court of Canada endorsed the passage reproduced above. In *Craton*[58] the Court decided that the mandatory retirement of a teacher at age sixty-five, in

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[55] *Supra*, note 1.
[56] (1982), [1982] 2 S.C.R. 145, 137 D.L.R. (3d) at 219.
[57] *Ibid.* at 157-58, 137 D.L.R. (3d) at 229.
[58] *Supra*, note 9.

compliance with *The Public Schools Act*,[59] contravened *The Human Rights Act*.[60] Mr. Justice McIntyre, writing for the unanimous Court, said:

> In any event, I am in agreement with Monnin C.J.M. where he said:
>
> > Human rights legislation is public and fundamental law of general application. If there is a conflict between this fundamental law and other specific legislation, unless an exception is created, the human rights legislation must govern.
>
> This is in accordance with the views expressed by Lamer J. in *Insurance Corporation of British Columbia v. Heerspink*. . . . Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement. To adopt and apply any theory of implied repeal by later statutory enactment to legislation of this kind would be to rob it of its special nature and give scant protection to the rights it proclaims.[61]

It may be noted, however, that this passage is *obiter dicta*. Subsection 39(2), the relevant provision of *The Public Schools Act*, was originally enacted *prior* to *The Human Rights Act*, but was repealed and re-enacted as section 50 without change as part of a general revision and consolidation of the Manitoba Statutes in 1980, six years *after* the passage of *The Human Rights Act*. To apply the usual rules of resolving repugnancy between statutes, it was necessary to decide which was the earlier enactment. The Court found that section 50 of *The Public Schools Act* of 1980 could not be considered a later enactment:

> Had it not been for the 1980 consolidation, which included section 50, no question would have arisen as to which provision would govern. Section 6(1) of *The Human Rights Act*, enacted in 1974, was clearly a subsequent enactment and an express prohibition against discrimination in employment on the basis of age and, even setting aside the notion of any primacy for human rights legislation, it would have prevailed and repealed section 39(2) by implication.[62]

Therefore the case was decided according to the usual rules.

Mr. Justice McIntyre then went on to make the observation, quoted above, that human rights legislation should be accorded primacy. This passage must be seen to be *obiter*. However, the unanimous *obiter* of the Supreme Court of Canada must be taken to resolve this issue.

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[59] S.M. 1980, c. 33, C.C.S.M. P250.
[60] S.M. 1974, c. 65, C.C.S.M. H175.
[61] *Supra*, note 9 at 156, 21 D.L.R. (4th) at 5-6.
[62] *Ibid.* at 155, 21 D.L.R. (4th) at 5.

There has been relevant comment from the Supreme Court of Canada in other cases as well. In *Bhinder*[63] Chief Justice Dickson, Mr. Justice Lamer concurring, dissented from the Court's finding that subsection 14(a) of the *Canadian Human Rights Act* foreclosed the existence of a duty to accommodate. Therefore it was necessary for him to consider the effect of the statutory obligations (under the *Canada Labour Code* [64] and regulations issued thereunder) of the employer to operate its business in a manner that would not endanger the safety of any person employed thereupon. After citing the *Craton* decision, he said:

> In the present appeal, the provisions of the *Canada Labour Code* and Regulations thereunder do not create an exception to the provisions of the *Canadian Human Rights Act*. The wearing of safety helmets by Sikhs, a requirement which has a *prima facie* discriminatory effect, is a matter governed by the *Canadian Human Rights Act*, not the *Canada Labour Code*, where the requirements of the two Acts conflict. Thus, even if the safety helmet policy is necessary under the *Canada Labour Code* and Regulations, it does not follow that the policy is *ipso facto* a *bona fide* occupational requirement for the purpose of the *Canadian Human Rights Act*.[65]

B. *Practical Considerations: Remedial Powers of Boards and Tribunals*

The primacy issue has to a great extent been overshadowed by the coming into force on April 17, 1985 of section 15 of the *Charter*. There is no doubt that legislation is of no force or effect if it is discriminatory under the *Charter*. However, the enumerated grounds of discrimination in human rights legislation generally exceed those expressly enumerated in the *Charter*. Therefore the issue continues to be important. Discussed here are some practical considerations that flow from the notion that human rights legislation must be accorded primacy over other legislation with which it is in irreconcilable conflict.

The first practical consideration is that the boards and tribunals which decide cases under human rights legislation cannot issue judgments that render conflicting provisions of other statutes inoperative. Boards of inquiry and human rights tribunals can exercise only the powers granted by their governing statutes. Thus, they can find that an act is discriminatory, issue orders granting compensation and direct that a respondent cease discrimination. The statutory mandate of these boards is to determine a complaint of discrimination on its merits. Whether another statute is rendered inoperative by human rights legislation is a question a board may well have to consider in arriving at a decision on the complaint before it, but the board is not authorized by statute to decide the conflicting statute is inoperative and its opinion on the point renders nothing *res*

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[63] *Supra*, note 6.
[64] R.S.C. 1970, c. L-1.
[65] *Supra*, note 6 at 575, 23 D.L.R. (4th) at 490-91.

judicata and binds no one. The board must form an opinion on the question and act accordingly in determining the merits of the issue of discrimination before it and in fashioning the appropriate remedy. Professor Peter Cumming, sitting as a federal tribunal in an early case involving primacy in 1979, stated that "the most in effect that a Tribunal can do is declare that a statutory provision *should be* rendered inoperative".[66]

The second practical consideration is whether the administrative boards are able to grant a remedy even when it is clear another statute discriminates. A statute may be discriminatory and hence conflict with human rights legislation (or section 15 of the *Charter*) in different ways. Sometimes a statute places a special liability on a particular group. For example in the *Drybones*[67] case section 94 of the *Indian Act*[68] made it an offence for an Indian to be intoxicated off a reserve. By declaring that section 94 of the *Indian Act* was rendered inoperative the Court was able to ensure that the law applied equally to Indians and non-Indians.

Another way statutes discriminate is when they contain exceptions that disqualify a particular class from getting what is available to all others. For example, section 46 of the *Unemployment Insurance Act, 1971* provided that pregnant women could not apply for regular benefits.[69] In all of these cases a finding that the offending sections were rendered inoperative would end the discrimination.

In most situations, however, discrimination under the law is not due to a severable exception, disqualification of a particular class, or the imposition of a burden on a particular class. Rather, the legislative scheme as a whole discriminates, a positive benefit is granted only to a class, or different positive benefits are granted to different classes. For example, the *War Veteran's Allowance Act* provides that a pension is payable to a male veteran at age sixty, and in a separate sub-clause, that penson is payable to a widow or female veteran at age fifty-five.[70] In such cases there exists no severable provision which can be rendered inoperative thus ending the discrimination. Rendering inoperative the granting provisions would take away the benefits from those that receive them rather

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[66] *Bailey* v. *R.* (1980), 1 C.H.R.R. D/193 at D/223 (Ont. Bd. of Inquiry) [hereinafter *Bailey*].

[67] *R.* v. *Drybones* (1969), [1970] S.C.R. 282, 9 D.L.R. (3d) 473 [hereinafter *Drybones*].

[68] R.S.C. 1952, c. 149, s. 94, *re-enacted as* s. 95 by R.S.C. 1970, c. I-6, s. 95, *as rep.* S.C. 1985, c. 27, s. 17.

[69] S.C. 1970-71-72, c. 48, s. 46, *as rep.* S.C. 1980-81-82-83, c. 150, s. 7. *See also Gryba* v. *Grandview Returning Officer* (1986), 44 Man. R. (2d) 284, 8 C.H.R.R. D/3674 (Q.B.) where Darichuk J. found that *The Municipal Act*, S.M. 1970, c. 100, C.C.S.M., c. M225, s. 47(i), which barred an undischarged bankrupt from standing for election, was invalid because it conflicted with *The Human Rights Act*, S.M. 1974, c. 65, C.C.S.M. H175.

[70] R.S.C. 1970, c. W-5, s. 3(1).

than make them available to those that do not. Professor Cumming in the *Bailey* case was faced with such a situation and concluded by stating:

> [I]n my opinion this result — providing a tax deduction where it was not intended by Parliament — would have the effect also of *amending* the tax legislation, which this Tribunal cannot do. It is only Parliament that has the competence to amend legislation. . . . The bottom line is that any actual relief for the Complainants must come through legislative change, whether or not they were successful before this Tribunal. Only Parliament has the competence to pass, amend, alter or withdraw statutes, but a provision can be declared inoperative by virtue of the *Canadian Bill of Rights*, as evidenced by the *Drybones* case.[71]

A tribunal or board cannot order a government department to pay statutory benefits or to grant statutory allowances to a complainant when these are paid or granted to other classes by the statute. The opinion of the tribunal that the statute discriminates and is considered inoperative is of little use to the complainant.

However, it is suggested that boards and tribunals may be able to make a financial award under their unquestioned jurisdiction to grant compensation for losses due to discrimination. Thus, a tribunal may be able to award an equivalent amount of money, not *qua* benefits or allowances, but as compensation for the denial thereof. What situations could be redressed in this fashion can only be decided by reference to the statutory remedial powers of the tribunals.

An Ontario board of inquiry derives its remedial power from subsection 40(1) of the *Human Rights Code, 1981* which provides:

> Where the board of inquiry, after a hearing, finds that a right of the complainant under Part I has been infringed and that the infringement is a contravention of section 8 by a party to the proceeding, the board may, by order,
> (a) 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; and
> (b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding $10,000, for mental anguish.[72]

Under paragraph 40(1)(b) the respondent could be ordered to compensate the complainant for "loss". Where the complainant has incurred out-of-pocket costs, perhaps paying taxes or licence fees not imposed on others, the board would likely be able to order a remedy. But if the complainant had been denied a benefit or grant, it is doubtful that paragraph 40(1)(b) gives the board jurisdiction to order that equivalent compensation be paid. Social legislation that discriminates usually does

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[71] *Supra*, note 66 at D/224.
[72] S.O. 1981, c. 53, s. 40(1).

not inflict out-of-pocket loss, but rather denies positive benefits. Paragraph 40(1)(a) allows the board to order the respondent to make payments to the complainant for the loss of the opportunity to receive a positive benefit, for example wages. However the complainant cannot have lost the opportunity to obtain what can only be provided by legislation when such legislation does not exist. There will be many cases where the board could not provide a remedy even though the Code superceded and rendered inoperative another conflicting statute.

The authority of a federal tribunal is set out in paragraph 41(2)(b) of the *Canadian Human Rights Act* which provides:

> If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, subject to subsection (4) and section 42, it may make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in such order any of the following terms that it considers appropriate:
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> . . . .
>
> (b) that such person make available to the victim of the discriminatory practice on the first reasonable occasion such rights, opportunities or privileges as, in the opinion of the Tribunal, are being or were denied the victim as a result of the practice.

However, this paragraph would not authorize a tribunal to order that rights, opportunities or privileges be made available to the complainant which require legislation to authorize them. Paragraphs (c) and (d) allow the tribunal to order compensation. These paragraphs provide:

> (c) that such person compensate the victim, as the Tribunal may consider proper, for any or all of the wages that the victim was deprived of and any expenses incurred by the victim as a result of the discriminatory practice;
>
> (d) that such person compensate the victim, as the Tribunal may consider proper, for any or all additional cost of obtaining alternative goods, services, facilities or accommodation and any expenses incurred by the victim as a result of the discriminatory practice.

These paragraphs indicate that the tribunal's jurisdiction is limited.[73] The denial of a benefit is not a wage lost, nor an expense incurred by the victim, nor is it likely that the victim has had an additional cost of obtaining alternative goods, services, facilities or accommodation because there is usually no alternative to statutory benefits. I conclude that a federal tribunal's jurisdiction is limited and such a tribunal would also not be able to provide a remedy in many cases. In other provinces it

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[73] The recent decision in *Druken* v. *Canada Employment and Immigration Comm'n* (21 July 1987), TD787 (Can. H.R. Trib.) *pending appeal* (F.C.A.D.) suggests that my view may be unduly narrow. In this case the Tribunal ordered that unemployment insurance benefits be paid to the complainant where the complainant would have been entitled to those benefits had the statute not discriminated.

would be necessary to consult the applicable statute, but for the most part the same problem would arise.

A court acting under sections 15 and 24 of the *Charter* would face the same conundrum. The law that does not provide for equality without discrimination may not contain a discrete and severable section which can be rendered inoperative, thus ending the discrimination. The Ontario Court of Appeal has examined the matter under section 7. In *R.* v. *Varga*[74] the accused challenged the constitutionality of sections 562 and 563 of the *Criminal Code*, which gave him four peremptory challenges to prospective jury members, while giving the Crown four peremptory challenges and the right to stand by forty-eight others. It was argued that these sections offended the principles of fundamental justice and the right to a fair hearing by an independent and impartial tribunal under section 7 and subsection 11(d) of the *Charter*. The County Court judge purported to act under section 24 of the *Charter*, ordering an appropriate and just remedy that both Crown and defence be allowed four peremptory challenges and twelve stand-asides. Associate Chief Justice MacKinnon, writing for the Ontario Court of Appeal, said: "I do not believe that section 24(1) was intended to grant to a court the power to amend legislation or introduce new legislation at its discretion and, in effect, rewrite the section. That is still, surely, Parliament's function."[75] Resorting to section 52 to render the legislation of no force and effect would simply remove benefits rather than extend them to those who allege discrimination.

IV. Section 15 of the Charter and Human Rights Legislation

A. *Ambit of Section 15*

Undoubtedly the most significant event in Canadian anti-discrimination law in the period surveyed has been the coming into force of section 15 of the *Charter* on April 17, 1985. Section 15 provides:

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The interpretation of section 15 of the *Charter* raises many questions. They are discussed only in so far as they are relevant to a survey of the

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[74] (1985), 18 C.C.C. (3d) 281, 13 C.R.R. 351 (Ont. C.A.).
[75] *Supra*, note 74 at 285, 13 C.R.R. at 354.

law under human rights legislation. The most obvious question is the extent to which section 15 may displace human rights legislation.

The issue of whether the *Charter* applies to private activity has been resolved by the Supreme Court of Canada in *Retail, Wholesale, & Dep't Store Union, Local 580* v. *Dolphin Delivery Ltd.*[76] The Court ruled that there must be an exercise of, or reliance upon, governmental action before the *Charter* may be invoked. Mr. Justice McIntyre gave an example: "Where, however, a private party 'A' sues private party 'B' relying on the common law and where no act of government is relied upon to support the action, the *Charter* will not apply."[77]

The *Charter*, being a constitutional document, is concerned with defining the limitations of governmental power. Therefore individuals who suffer discrimination by private act of another person cannot rely on section 15 of the *Charter*. Section 15 even more than the rest of the *Charter* seems to require government action. It is equality before and under *the law* and the equal benefit and protection of *the law* that is guaranteed without discrimination. The *Charter* does not prohibit discrimination that is unconnected to "law" in these ways. Individuals who feel they have suffered discrimination in not being selected for a job or promotion by a private employer or in being denied accommodation by a private landlord must continue to file complaints with human rights commissions, which, notwithstanding the *Charter*, continue to have exclusive jurisdiction over such matters.

The more pertinent question is what is the ambit of the word "law" in section 15. Mr. Justice McIntyre said in the *Dolphin Delivery* case that the *Charter* "would apply to many forms of delegated legislation, regulations, orders in council, possibly municipal by-laws, and by-laws and regulations of other creatures of Parliament and the Legislatures".[78] Given the "equal benefit" phrase section 15 may apply to activities that are merely funded by governments, as such funding may be traced ultimately to an appropriations statute. Conceivably, it might apply to private entities that act as agents of government in collecting or withholding income tax, insurance premiums and retail sales taxes.

The *Charter*'s coverage, however, does overlap with that of human rights legislation, as we have seen in the section on primacy. Human rights legislation applies to administrative acts of government to the extent that they constitute "services or facilities" available to the public. It may well be that anything done by a public servant in the course of his or her duties is a "service to the public". In *Bailey*, Associate Chief Justice Thurlow (as he then was) wrote that:

> I am not prepared to accept the board [*sic*] proposition that in assessing taxes under the *Income Tax Act* the Department of National Revenue is not

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[76] (1986), [1986] 2 S.C.R. 573, 38 C.C.L.T. 184 [hereinafter *Dolphin Delivery*].
[77] *Ibid.* at 603, 38 C.C.L.T. 214.
[78] *Ibid.* at 602, 38 C.C.L.T. 214.

> engaged in the provision of services within the meaning of section 5 of the *Canadian Human Rights Act*. The statute is cast in wide terms and both its subject matter and its stated purpose suggest that it is not to be interpreted narrowly or restrictively.[79]

Ontario's *Human Rights Code, 1981*,[80] for example, expressly applies to administrative acts. Subsection 46(2) of the Code provides:

> Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or regulation specifically provides that it is to apply notwithstanding this Act.

The *Charter* will apply to administrative acts required or authorized by law as well.

Human rights legislation, because it applies to adverse effect discrimination, will apply to the discriminatory effects of legislation if such effects result from the exercise of administrative discretion. While there is no authority on the point, the writer believes that human rights legislation will not apply to adverse effect discrimination under a statute where such discrimination is not a result of the exercise of administrative discretion, but merely an ancillary effect of the statute itself. A statute must discriminate on its face before human rights legislation may render it inoperative.

An example of a law neutral on its face but devastating in its effect on a particular group distinguished by race and colour is the 1811 statute of Nova Scotia, *An Act to Establish Grammar Schools in Several Counties and Districts of This Province*.[81] The Act provided that only after the trustees or directors of a particular district had obtained a building suitable for a school and hired a teacher and operated the school for six months, would the school become eligible for provincial support. The runaway slave communities that grew up around Halifax could not fulfill these pre-conditions and the effect of the legislation was that children in these communities did not receive an education. Human rights legislation does not likely apply to such ancillary discrimination by a statute.

The writer believes that section 15 of the *Charter* will apply to adverse effect discrimination under a statute, both where the discrimination results from the exercise of administrative discretion which the statute grants, and where it is facially neutral but simply has the effect of operating to the disadvantage of a protected class.

The Supreme Court of Canada made its first comment on this important subject in *Hunter* v. *Southam Inc.* Chief Justice Dickson, writing for the unanimous Court, said:

> This leads, in my view, to the further conclusion that an assessment of the constitutionality of a search and seizure, or of a statute authorizing a search

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[79] *Supra*, note 66 at D/194-95.
[80] S.O. 1981, c. 53.
[81] S.N.S. 1811, 51 Geo. 3, c. 9, *expired* 1825.

> or seizure, must focus on its "reasonable" or "unreasonable" impact on the subject of the search or the seizure, and not simply on its rationality in furthering some valid government objective.[82]

Then, in *R.* v. *Big M Drug Mart Ltd.*[83] all six judges stated that the *Charter* is concerned with "effects". Five judges said the initial test of constitutionality was whether the purpose of the legislation was valid and that the legislation's effects need only be considered when the law under review had passed the "purpose" test.[84] The sixth judge, Madame Justice Wilson, was of the opinion that the *Charter* is first and foremost an "effects" document.[85]

Although the *Big M* case involved section 2 of the *Charter*, it is almost certain that the Supreme Court of Canada will use the same reasoning when applying section 15. The wording of section 15, even more than that of section 2, implies that an effects analysis is appropriate. The words "based on" instead of "because of" in subsection 15(1) preclude the inference of purposiveness. A "base" is not that which motivates. It is that on which something rests or by which it is supported. The words "because of" are used in subsection 15(2), indicating that the words "based on" in subsection 15(1) were carefully chosen. These words indicate that subsection 15(1) applies not only to "laws" that intend to discriminate, but also to those that do so in operation.

The fourth equality clause, "the right to the . . . equal benefit of the law", is especially susceptible to an interpretation that would require a consideration of the effects of legislation. In fact it is difficult to interpret this phrase so as to exclude a consideration of effects. The benefit to an individual is the resulting good, advantage or profit to him or her. The benefit of a law can only be determined by scrutinizing the law in operation.

It is significant that the word "object" appears in subsection 15(2) of the *Charter*. Subsection 15(2) expressly provides that a determination of whether a law fits within its ambit depends on that law's "object". That subsection 15(1) does not mention "objects" may be taken as a further indication that subsection 15(1) applies to the discriminatory effects of neutral laws.

Further support for the effects analysis can be found in some of the *Canadian Bill of Rights*[86] jurisprudence. In dealing with freedom of religion under the *Bill of Rights*, Mr. Justice Ritchie, speaking for the majority in *Robertson* v. *R.*, stated: "My own view is that the *effect* of the *Lord's day Act* rather than its *purpose* must be looked to in order to

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[82] (1984), [1984] 2 S.C.R. 145 at 157, 11 D.L.R. (4th) 641 at 650.

[83] (1985), [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321 [hereinafter *Big M*].

[84] *Ibid.* at 334, 18 D.L.R. (4th) at 351-52.

[85] *Ibid.* at 358-61, 18 D.L.R. (4th) at 370-73.

[86] S.C. 1960, c. 44, *reprinted in* R.S.C. 1970, App. III [hereinafter *Bill of Rights*].

determine whether its application involves the abrogation, abridgment or infringement of religious freedom."[87]

In *R.* v. *Hayden*,[88] another *Bill of Rights* case, the Manitoba Court of Appeal used the "effects" approach to "discrimination" in invalidating a section of the *Criminal Code*. Subsection 97(b) of the *Indian Act*[89] provided that a *person* who is found intoxicated on a reserve was guilty of an offence. It is important to note the difference between this and section 94 of the *Indian Act*[90] which was rendered inoperative in the *Drybones* case.[91] Section 94 provided that an Indian who was intoxicated off a reserve was guilty of an offence. Section 94 was rendered inoperative because on its face it applied to Indians off a reserve but not others. On the other hand, in *Hayden*, the Manitoa Court of Appeal had before it a section that applied, on its face, to *everybody* on a reserve, irrespective of race. The Court noted that the legislation would apply primarily to Indians. Mr. Justice Hall, writing for the Court, said:

> The mere fact that the impugned law applies to every person does not save it, for it is obvious that the predominant group on the reservation are Indian people whereas off the reservation the predominant people are of non-native origin. In other words there is inequality before the law.[92]

This is a classic example of the "effects" analysis. I conclude that it is fairly certain that effect of impugned laws must be considered under section 15.

A necessary corollary of this analysis is that section 15 of the *Charter* also applies to the administration of statutes. It applies not only to the express provisions of laws but to the operation of laws and the exercise of administrative discretion granted to government officials by statutes. Discretion granted by a statute must be exercised in accordance with the standards enunciated in section 15.

B. *Courts of Competent Jurisdiction Under the Charter*

An extremely important question is whether human rights tribunals and boards of inquiry are courts of competent jurisdiction under the *Charter*.

The French section 24 refers to a "tribunal compétent" which would indicate that administrative tribunals may be courts of competent juris-

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[87] (1963), [1963] S.C.R. 651 at 657, 41 D.L.R. (2d) 485 at 494.

[88] (1983), 23 Man. R. (2d) 315, 3 D.L.R. (4th) 361 (C.A.), *leave to appeal denied* (1983), 26 Man. R. (2d) 318, 3 D.L.R. (4th) 361n (S.C.C.).

[89] R.S.C. 1970, c. I-6, s. 97(6), *as rep.* S.C. 1985, c. 27, s. 17.

[90] R.S.C. 1952, c. 149, s. 94, *re-enacted as* s. 95 by R.S.C. 1970, c. I-6, s. 95, *as rep.* S.C. 1985, c. 27, s. 17.

[91] *Supra*, note 67.

[92] *Supra*, note 88 at 317-18, 3 D.L.R. (4th) at 364.

diction. There is case law to that effect. In *Nash* v. *R.* a Newfoundland Provincial Court Judge said:

> The French and English versions of the *Charter* are equally authoritative according to section 56 of the *Constitution Act, 1982*.
>
> It should be noted that in the French text the term "un tribunal" is used. "Un tribunal" has a much broader meaning than a court. "Tribunal" is clearly broad enough to encompass the disciplinary panel or any other similar body. Thus, I hold that the application was properly brought before the police disciplinary panel.[93]

The Supreme Court of Canada has not considered these questions in the administrative law context but has commented on them in the criminal context. The case *Mills* v. *R.* involved the issue of whether a judge or justice presiding at a preliminary inquiry was a court of competent jurisdiction. Mr. Justice McIntyre, writing for himself and Messrs. Justices Beetz and Chouinard, said of summary conviction courts: "These courts will be courts of competent jurisdiction, where they have jurisdiction conferred by statute over the offences and persons and power to make the orders sought."[94]

The preliminary inquiry Magistrate did not constitute a court of competent jurisdiction because his powers, conferred by the *Criminal Code*, were limited to committing the accused for trial or discharging the accused. He had no jurisdiction to acquit or convict, nor to impose a penalty, nor to give a remedy.

Mr. Justice La Forest concurred, adding:

> I am sympathetic to the view that *Charter* remedies should, in general, be accorded within the normal procedural context in which an issue arises. I do not believe s. 24 of the *Charter* requires the wholesale invention of a parallel system for the administration of *Charter* rights over and above the machinery already available for the administration of justice.[95]

Mr. Justice Lamer, with whom Chief Justice Dickson concurred, dissented, but agreed that a preliminary inquiry magistrate was not a court of competent jurisdiction under subsection 24(1), except for the purposes of excluding evidence. "A court of competent jurisdiction is a court that has jurisdiction over the person and the subject matter, as well as the jurisdiction to order, under the criminal or penal law, the remedy sought pursuant to the *Charter*."[96] Madame Justice Wilson, who wrote a separate judgement, agreed with Mr. Justice Lamer's treatment of jurisdictional issues.

This case indicates that human rights tribunals and boards of inquiry will be courts of competent jurisdiction where they have statutory juris-

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[93] (1982), 70 C.C.C. (2d) 490 at 494 (Nfld. Prov. Ct.).
[94] (1986), [1986] 1 S.C.R. 863 at 955, 52 C.R. (3d) 1 at 19.
[95] *Ibid.* at 971, 52 C.R. (3d) at 94.
[96] *Ibid.* at 903-04, 52 C.R. (3d) at 53.

diction over the subject-matter, the persons and the remedy sought. It has been established that tribunals and boards do not have jurisdiction to declare legislation null and void. However, it would seem that they are competent, and even required, to rule on constitutional issues which will determine the disposition of the complaint before them. There is ample authority on this point.

In *Séminaire de Chicoutimi* c. *Cité de Chicoutimi*[97] the seminary was attacking a municipal by-law on the basis that it was *ultra vires* the city. Section 411 of the *Cities and Towns Act*[98] purported to transfer to the Provincial Court from the Superior Court the jurisdiction to quash municipal by-laws. Therefore the seminary brought its application in the Provincial Court. The City moved the Provincial Court Judge to find that the statutory provisions that gave him jurisdiction were unconstitutional and that therefore he had no jurisdiction to quash the by-law. The Judge considered that the Provincial Court did not have authority to decide a constitutional question, and he went on to deal with the application on its merits and quashed the by-law. When the matter reached the Supreme Court of Canada, the unanimous Court expressed its view that the Provincial Court Judge should have ruled on the constitutional point:

> Because, since the want of jurisdiction by reason of the subject matter was raised *in limine litis* and throughout the whole contestation by the City, as it could moreover be raised by the court of its own motion by virtue of what is implied in art. 164 of the *Code of Civil Procedure*, I do not really see how the Provincial Court could in the circumstances ascertain, as it was bound to do, that it had jurisdiction by reason of the subject matter, and so dispose of the City's objection, without ruling on the constitutionality of the Act conferring that jurisdiction on it. These two questions are inextricably bound up in the present instance, since the court's jurisdiction was necessarily dependent on the constitutionality of the legislative provisions purporting to confer such jurisdiction on it.[99]

In *Chabot* c. *Commission de la santé*,[100] the appellant was the victim of an industrial accident. In determining the allowance to which he was entitled, La Commission de la santé et de la sécurité du travail applied a regulation which established a scale of compensation. On appeal, La Commission des affaires sociales decided that the regulation which had been applied was not valid. On further appeal the Quebec Court of Appeal stated:

> Il me paraît élémentaire qu'un tribunal inférieur appelé à apprécier le quantum d'une compensation commence d'abord par rechercher celles des dispositions de la loi ou des règlements qu'il doit appliquer au cas qui lui est soumis.

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[97] (1972), [1973] S.C.R. 681, 27 D.L.R. (3d) 356.

[98] R.S.Q. 1977, c. C-19, s. 411, *as rep. An Act respecting land use planning and development*, S.Q. 1979, c. 51, s. 260.

[99] *Supra*, note 97 at 685-86, 27 D.L.R. (3d) at 359.

[100] (1986), [1986] R.J.Q. 1167 (C.A.).

> Dans cette recherche, lorsqu'il existe un doute sur l'existence même des dispositions prétendument pertinentes, il est normal que le tribunal inférieur s'interroge et exprime son opinion.
>
> Autrement il faudrait reconnaître qu'un tribunal inférieur a l'obligation d'appliquer aveuglément des lois ou des règlements qu'il considère abrogés dès qu'on plaide devant lui leur existence légale et leur pertinence.
>
> Je ne puis concevoir qu'on ait pu vouloir ainsi dépouiller les tribunaux inférieurs de cette faculté de discernement nécessaire à l'exercise de leur juridiction.
>
> À la question que je posais précédemment je réponds donc qu'en concluant à l'inexistence du règlement nº 59 la C.A.S. n'a pas commis d'excès de juridiction ni agi sans juridiction. . . . Les questions préliminaires non seulement peuvent mais doivent être décidées par les tribunaux administratifs quand les questions sont de leur compétence.[101]

In *Potapczyk* v. *MacBain* the Canadian Human Rights Tribunal stated: "[I]f in the process of hearing the merits of the complaint, there appears to be an infringement of the Charter, then the Tribunal is a court of competent jurisdiction to consider and deal with the question."[102]

The Federal Court of Appeal has also considered the question in *Law* v. *Solicitor Gen. of Canada*.[103] The facts were that in the course of an appeal before the Immigration Appeal Board against a removal order, the Minister filed a certificate under section 83 of the *Immigration Act, 1976*.[104] The legislation provided that upon the filing of such certificate the Board must dismiss the appeal. The plaintiff sought declaratory relief in the Trial Division that section 83 was contrary to the provisions of section 7 of the *Charter*. The trial judge struck out the plaintiff's Statement of Claim on the basis that the Immigration Appeal Board was a court of competent jurisdiction and had exclusive jurisdiction to decide the question.

The Court of Appeal agreed that the Board could decide the *Charter* question. Mr. Justice Stone, with whom Mr. Justice Ryan concurred, said:

> It seems to me, therefore, that the Board could decide in the pending appeal whether the provisions of section 83 of the Act are, in fact, inconsistent with the provisions of section 7 of the Charter. If it concluded that they are, then subsection 52(1) of the Charter would render section 83, to the extent of the inconsistency, of "no force or effect". In consequence, the

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[101] *Ibid.* at 1176.

[102] (1984) 5 C.H.R.R. D/2302 at D/2303 (Can. H.R. Trib.), *rev'd on other grounds* (*sub nom. MacBain* v. *Lederman*) (1985), [1985] 1 F.C. 856, 6 C.H.R.R. D/3064 (A.D.) [hereinafter *MacBain*].

[103] (1984), [1985] 1 F.C. 62, 11 D.L.R. (4th) 608 (A.D.) [hereinafter *Law*].

[104] S.C. 1976-77, c. 52, s. 83, *as am. Canadian Security Intelligence Service Act*, S.C. 1984, c. 21, s. 84.

> certificate issued pursuant to its provisions would likewise lack effect and the Board could not act upon it. In arriving at such a conclusion, the Board would need to consider the possible bearing upon the question of other provisions of the Charter including whether section 83 is to be seen as constituting a reasonable limit, under section 1, of the rights and freedoms otherwise guaranteed.[105]

The Court of Appeal reversed the finding that the Board's jurisdiction was not exclusive and that the Trial Division had jurisdiction to entertain the action. However, the Court of Appeal stayed the action in the Trial Division since the Immigration Appeal Board was already seized of the matter. This, in effect, confirmed that the Immigration Appeal Board could be a court of competent jurisdiction to consider the *Charter* argument and determine it. I am aware of no law to the contrary.

In *Moore* v. *R.*[106] the Supreme Court of British Columbia reasoned that section 24 of the *Charter* does not grant jurisdiction, but rather presupposes jurisdiction. Since the British Columbia *Labour Code*[107] vested exclusive jurisdiction over all matters concerning collective agreements in the Labour Relations Board, the Board and not the Court was a court of competent jurisdiction to determine whether an employee was entitled to reinstatement under a collective agreement where she alleged her dismissal contravened her rights under the *Charter*.

Therefore it seems that human rights tribunals and boards of inquiry are competent to determine *Charter* questions which must be decided in order to resolve the issues before them. If this view is incorrect it is clear that such boards and tribunals must at least take a view on *Charter* questions which are raised in proceedings before them. In *Big M*[108] the *Charter* argument was heard first by the Provincial Court, before which the prosecution under the *Lord's Day Act*[109] was initiated. Chief Justice Dickson said that:

> The respondent Big M was commanded by Her Majesty The Queen to face prosecution for a violation of an Act of Parliament. It came to court, not for the purpose of having the Act declared unconstitutional, but in order to secure a dismissal of the charges against it. The Provincial Court Judge was not called upon to make either a prerogative declaration or a s. 24(1) order. He simply was asked to prevent a violation of the fundamental principle of constitutional law embodied in s. 52(1) by dismissing the charges.[110]

In the *Law* case, Mr. Justice Hugessen had agreed that the Immigration Appeal Board was competent to deal with questions relating to the validity of a section 83 certificate under the *Charter*. However, he

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[105] *Supra*, note 103 at 69, 11 D.L.R. (4th) at 613.
[106] (1986), 4 B.C.L.R. (2d) 247, 24 C.R.R. 136 (S.C.).
[107] R.S.B.C. 1979, c. 212.
[108] *Supra*, note 83.
[109] R.S.C. 1970, c. L-13.
[110] *Supra*, note 83 at 316, 18 D.L.R. (4th) at 338.

added: "This is not to say that the Board could give a formal declaration of invalidity. . . . It does, however, have the power to deal with and dispose of the grounds asserted in support of the action."[111]

Chief Justice Laskin in *McLeod* v. *Egan* commented on the duty of a labour arbitrator to construe and apply a general public enactment. He said:

> No doubt, a statute like a collective agreement or any other document may present difficulties of construction, may be ambiguous and may lend itself to two different constructions neither of which may be thought to be unreasonable. If that be the case, it nonetheless lies with the Court, and ultimately with this Court, to determine what meaning the statute should bear. That is not to say that an arbitrator in the course of his duty, should refrain from construing a statute which is involved in the issues that have been brought before him. In my opinion, he must construe, but at the risk of having his construction set aside by a Court as being wrong.[112]

I conclude that *Charter* issues may be raised before human rights tribunals and boards of inquiry.

C. *Overlapping Jurisdictions of Human Rights Legislation and the Charter*

Section 15 of the *Charter* and human rights legislation have overlapping coverage. As we have seen in the section on primacy, the Supreme Court of Canada has indicated that human rights legislation will render conflicting legislation inoperative. As well, since it seems that the *Charter* will apply to effects discrimination, it will have within its ambit not only the express terms of laws but also the administrative acts performed pursuant to laws. These are expressly covered by some human rights legislation.[113] The Canadian Human Rights Commission takes the position that anything done by a public servant is a "service to the public" and therefore within section 5 of the *Canadian Human Rights Act*.[114] Therefore both the *Charter* and human rights legislation seem to apply to the express terms of statutes as well as to the administration of statutes.

Because of the overlap between the *Charter* and human rights statutes, it would seem that an individual will often have a choice between using the *Charter* or filing a complaint with a human rights commission. Influencing this choice will be a number of factors:

1. There are time limitations under human rights legislation, for example,six months under the Ontario Code and one year under the Canadian Act, neither of which would apply to proceedings under the *Charter*.

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[111] *Supra*, note 103 at 67, 11 D.L.R. (4th) at 611.
[112] (1974), [1975] 1 S.C.R. 517 at 519, 46 D.L.R. (3d) 150 at 152.
[113] *See, e.g., Human Rights Code, 1981*, S.O. 1981, c. 53, s. 46(2).
[114] S.C. 1976-77, c. 33.

2. An individual would incur no costs in filing a complaint with a human rights commission but would incur legal fees in proceeding in the courts under the *Charter*. However, there are interest groups that sponsor individual cases, and agencies that fund constitutional challenges under the *Charter*. Worthy of mention are the Legal Education and Action Fund (LEAF) and the Court Challenges Program of the Department of Justice.
3. Proceedings under human rights legislation are controlled by the Human Rights Commission, whereas an individual who wished to personally control his or her action might choose to proceed in the courts.
4. The broad authority of human rights commissions to investigate might be of advantage in gathering the evidence necessary to win a case. This is especially true if the case turns on the application of section 1 of the *Charter*. The courts have indicated they wish to have substantial sociological evidence before them when considering section 1.
5. The relief sought may not come within the strict terms of a tribunal's or board's jurisdiction to make an order, whereas a court under the *Charter* has jurisdiction to grant a remedy that is appropriate and just in the circumstances.[115]

D. *The Charter Applies to Human Rights Legislation*

Human rights legislation, as law, must meet the standards imposed by section 15 of the *Charter*. Existing statutes contain exceptions which may well be rendered null and void by the *Charter*. One instance of this is subsection 19(2)[116] of the *Human Rights Code, 1981*, which permits athletic activities segregated by sex. The Ontario Court of Appeal, in *Re Blainey and Ontario Hockey Ass'n*,[117] ruled that subsection 19(2) of the Code was inconsistent with subsection 15(1) of the *Charter* and should be declared of no force and effect.

Another example is subsections 4(1) and 9(a) of the Ontario Code, which prohibit age discrimination in employment between the ages of eighteen and sixty-four. Thus termination of employment, that is, mandatory retirement at age sixty-five, is permissible under the Code. The *Canadian Human Rights Act* also prohibits age discrimination in employment but has two exceptions[118] that allow mandatory retirement. One permits termination of an individual's employment at the "maximum age prescribed by law" and the second allows termination at the "normal

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[115] *See* text, *supra*, at 472-77.

[116] *As rep. Equality Rights Statute Law Amendment Act, 1986*, S.O. 1986, c. 64, s. 18(12).

[117] (1986), 54 O.R. (2d) 513, 21 C.R.R. 44 (C.A.), *leave to appeal denied* (1986), 72 N.R. 76, 3 S.C.C.R.S. (Current Service) 6612.

[118] S. 14(b)(ii); ss. 9(2), 14(c).

age of retirement". It may be argued that the *Human Rights Code, 1981* and the *Canadian Human Rights Act* are laws that protect individuals from discrimination on the basis of age generally, but do not guarantee those of retirement age the same or equal protection. The exceptions which permit termination of employment at retirement age breach the *Charter* and may be rendered null and void. Mandatory retirement, if it is to survive this argument, must be seen to be demonstrably justifiable within the meaning of section 1 of the *Charter*.[119]

Thus, while the *Charter* does not apply directly to private acts of discrimination, it may make such acts illegal under human rights legislation by voiding statutory exceptions.

E. *Affirmative Action under the Charter and Human Rights Legislation*

The legality of affirmative action in Canada must be considered not only under subsection 15(2) of the *Charter*, but also under human rights legislation. A particular affirmative action program may be constitutional but nevertheless illegal under human rights legislation, because subsection 15(2) does not authorize affirmative action in Canada, it simply provides that affirmative action will not be subject to attack under subsection 15(1) of the *Charter*. Subsection 15(2) begins: "[s]ubsection (1) does not preclude". It is clear that subsection 15(2) is but an exception to subsection 15(1), and will not render inoperative mere statutes that prohibit discrimination generally, including affirmative action. Since all human rights legislation prohibits discrimination generally, the statutory provisions they contain that permit affirmative action require close scrutiny. As well, subsection 15(2) will have no application to affirmative action voluntarily undertaken by private employers and institutions. Subsection 15(2) excuses breaches of subsection 15(1) and the latter has no application to private relationships which continue to be governed by human rights legislation. Therefore a comparison of subsection 15(2) and existing human rights legislation is pertinent.

Twelve of the thirteen jurisdictions in Canada now have legislative provisions which expressly allow affirmative action programs. Only the Yukon Territory does not. Though these legislative exceptions vary a great deal, they are, in my view, more narrow than subsection 15(2) of the *Charter*. Subsection 15(2) 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 including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

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[119] In *McKinney* v. *University of Guelph* (1986), 57 O.R. (2d) 1, 32 D.L.R. (4th) 65 (H.C.), Mr. Justice Gray of the Ontario Supreme Court found that the mandatory retirement of university professors was demonstrably justified in the context of the contractual relationships of the case. *Case heard* 13 May 1986, *judgment reserved.*

The use of the phrase "that has as its object" indicates that the test under subsection 15(2) is subjective. The law, program or activity may be improperly designed and may not in fact assist groups as intended, but if its object was the amelioration of conditions of disadvantaged individuals or groups, then it is within the exception provided by subsection 15(2).

A purely subjective test may be too wide and the courts can be expected to narrow the exception by requiring objective evidence that the individuals or groups are "disadvantaged". In addition, the courts will find noteworthy the use in subsection 15(2) of the words "because of" preceding the various grounds. In subsection 15(1) the words used are "based on". The French uses "du fait de" in subsection 15(2) and "fonde sur" in subsection 15(1). "Based on" does not imply causality but merely association. A base is that which supports, or upon which something rests. "Because of" implies that the disadvantages are caused by the grounds listed. Requiring evidence that the "conditions of disadvantage" are *because of* the grounds named would greatly narrow the ambit of subsection 15(2).

Thus while the test of the content of the law, program or activity is subjective, the existence of conditions of disadvantage, and the connection between the disadvantage and the named grounds, must have an objective existence.

However, it must be remembered that subsection 15(2), like subsection 15(1), is not confined to the grounds noted. Subsection 15(2) applies to disadvantaged individuals and groups *including* those disadvantaged because of the listed grounds. Where it could not be proved that a group was disadvantaged "because of" a listed ground, it could still be argued that the group was disadvantaged on some other basis.

The Manitoba Court of Queen's Bench considered this aspect of subsection 15(2) of the *Charter* in *Manitoba Rice Farmers Ass'n* v. *Human Rights Comm'n.*[120] The Manitoba Human Rights Commission had approved an affirmative action program of the Department of Natural Resources of the Government of Manitoba which favoured Indian bands, Treaty Indians and persons of native ancestry, over all other persons in the granting of licences to produce and harvest wild rice. In the absence of the program all other citizens of Manitoba would have qualified to apply and receive equal consideration for the licences. The Manitoba Rice Farmers Association brought a motion in the Court of Queen's Bench to quash the Human Rights Commission's approval of the program. Part of the basis on which the motion was brought was that the approval of the plan contravened the *Charter*. Mr. Justice Jewers found that on its face the plan was inconsistent with subsection 15(1) of the *Charter* in that the Manitoba government, acting through the Human Rights Commission, had authorized another branch of government, namely the

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[120] (1985), 27 Man. R. 50 (Q.B.).

Department of Natural Resources, to treat people differently by favouring Indians. He found that "[c]learly, the plan offends s. 15(1) of the *Charter*".[121]

In keeping with jurisprudence relating to other sections of the *Charter*, which place the onus of proving that restrictions of rights are demonstrably justifiable on those defending the restrictions, Mr. Justice Jewers placed the onus upon the Human Rights Commission to demonstrate that the affirmative action plan which it approved was within the ambit of subsection 15(2) of the *Charter*. He confirmed that the test was subjective by saying that "the Commission must prove that the plan is indeed *intended* to promote the amelioration of conditions of disadvantaged individuals".[122]

The Court also confirmed that the conditions of being "disadvantaged" must be objective. Mr. Justice Jewers found as a fact that the object of the plan was the amelioration of conditions of Indian bands, treaty Indians and persons of native ancestry. However, he asserted that he did not have enough evidence to determine whether the beneficiaries of the plan were disadvantaged individuals, and directed a trial of that issue. He also directed a trial of the second issue, namely, if the affirmative action plan does not comply with subsection 15(2) of the *Charter*, is section 9 of *The Human Rights Act*,[123] which allows the Commission to approve such a plan (thereby granting the plan immunity from complaint under the Act), nevertheless a reasonable limit within the meaning of section 1 of the *Charter*? How is this possible?

Section 9 of *The Human Rights Act* allows the Human Rights Commission to approve a special plan or program "designed to promote the socio-economic welfare and equality in status of a disadvantaged class of persons defined by [list of grounds]". The only outstanding issue in the case under the *Charter* was whether the beneficiaries of the program were "disadvantaged". But the Act requires a "disadvantaged class" as well. If the beneficiaries were not considered disadvantaged for the purposes of the *Charter*, one might wonder how they could be considered disadvantaged for the purposes of human rights legislation. The only difference is that the *Charter* uses the words "disadvantaged because of" while the provincial statute says "defined by". But for that the *Charter*'s exception is generally wider than the exceptions allowed by human rights legislation, and any program that failed the *Charter* test could be expected to fail the test of the human rights legislation. The possibility of affirmative action legislation failing to meet subsection 15(2), and yet being held constitutional under section 1 is, consequently, of small practical significance.

Another instance of the more restrictive provincial approach to affirmative action legislation is the use of the word "designed" in most

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[121] *Ibid.* at 55.
[122] *Ibid.* at 56 (emphasis added).
[123] S.M. 1974, c. 65, *as am.* S.M. 1982, c. 23, s. 22, *C.C.S.M.* H175.

of the exception provisions (except Alberta's). While "design is susceptible to an interpretation indicating "purpose", in my view it empowers a court to scrutinize the "design" in the sense of "structure" of a special program. Certainly "design" can refer to the state of mind of the actor, the person who has "designs". It is capable of meaning a calculated intent. But it can also be a blueprint, a structure, something that has been formed or fashioned into a material existence. The balance is tipped in favour of an objective interpretation because the word "designed" refers not to the person implementing the special program, whose intent might be at issue, but to the program itself. For example, subsection 15(1) of the *Canadian Human Rights Act*[124] 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." Subsection 13(1) of Ontario's *Human Rights Code, 1981* provides: "A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage."

There is another reason for preferring the objective interpretation of "designed". The major feature of human rights jurisprudence in the last decade has been the shift of judicial attention from the intent of the actor to the effect of his or her actions. Theoretical consistency requires that special programs too must be scrutinized in terms of their actual effect in operation rather than on the basis of the good intentions of those who implement them.

It has been noted that "destiné" appears in the French in both subsection 15(2) of the *Charter* and subsection 15(1) of the *Canadian Human Rights Act*. However, "destiné" is an extremely flexible word and affords no reason for changing the above analysis. "Destiné" will likely take its meaning from the English in both contexts. Accordingly, I conclude that under human rights legislation any program must be actually "designed" to relieve disadvantage and not merely have such relief as its object. Special programs will have to meet design criteria which will be imposed by the courts. Undoubtedly the American experience will be relevant.

An analysis of subsection 13(1) of Ontario's *Human Rights Code, 1981* will illustrate that it is susceptible of a narrower interpretation than subsection 15(2) of the *Charter* in other ways as well. Subsection 13(1) of the 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.

As is the case under the *Charter* it would be necessary to prove that "hardship" or "economic disadvantage" exists or that the benefi-

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

ciaries of a program are "disadvantaged persons" or members of "disadvantaged groups". Again, as with the *Charter*, these terms are not defined. The subsection does not mention any grounds of discrimination and Part I of the Code guarantees equal treatment without discrimination *because of the grounds*. The subsection does not expressly negate those guarantees of equal treatment of groups identifiable by the listed grounds. However, the better interpretation would be that section 13 programs are not limited to the grounds in Part I. Of course a program for the benefit of an individual not identifiable on a ground would not breach Part I of the Code. The phrase "elimination of the infringement of rights under Part I" means only that the program can end unequal treatment. Assisting disadvantaged persons to "achieve or attempt to achieve equal opportunity" does not provide an exception from Part I. It does not clearly permit the type of "affirmative action" that gives preference to certain individuals in the allocation of opportunities. Relieving "hardship or economic disadvantage" without reference to prohibited grounds may not permit the preferring of individuals indentified by a prohibited ground in a selection decision which would otherwise be contrary to Part I.

On the other hand, subsection 13(1) speaks of "disadvantaged groups" as well as "disadvantaged persons". It will be argued that it is necessary to grant preferences to individuals in order to provide equal opportunity to, or to assist, the group to which they belong. This reasoning would not require evidence that the individual beneficiary of a preference in, say, a job selection decision, was himself or herself disadvantaged. It would be enough to prove that he or she was a member of a group that was "disadvantaged".

I conclude that the coming into force of subsection 15(2) of the *Charter* will not make possible unrestricted affirmative action programs in Canada. While the courts will not be able to review the content of government programs under the *Charter*, they will be able to review both the content of, and the pre-conditions for, all programs under existing human rights legislation.

V. Procedural Fairness in Human Rights Proceedings

The period under survey saw a great deal of development in the application of procedural fairness to the practice and procedure of human rights commissions, boards of inquiry and tribunals. Important challenges to the practice and procedure of commissions and boards were brought using the *Charter*, the *Bill of Rights* and the common law doctrine of procedural fairness.

A. *The Charter*

Section 11 of the *Charter* sets out several guarantees, such as the right to a "fair and public hearing by an independent and impartial Tribunal" (subsection (d)) and to "be tried within a reasonable time" (subsection (b)). However, section 11 applies to "any person charged

with an offence". Are respondents under human rights legislation "persons charged with an offence"? In *Re Commodore Business Machs. Ltd. and Minister of Labour for Ontario* the Divisional Court of Ontario said:

> While the Charter should be given a broad and liberal interpretation, we are not convinced that a decision of the Board under s. 19 of the Act that finds a contravention of the Act and awards compensation, falls within s. 11(d) of the Charter which relates to being charged with an offence.[125]

In *Mehta* v. *MacKinnon*[126] the Nova Scotia Supreme Court, Trial Division had held that the *Charter*'s guarantee of the presumption of innocence did not apply to a hearing under that province's *Human Rights Act*[127] because subsection 11(d) of the *Charter* was restricted to criminal, provincial and quasi-criminal offences, and that the *Human Rights Act* was compensatory in nature, not penal. Mr. Justice Jones, writing for the Supreme Court, Appeal Division stated simply: "Upon careful examination of the record I am unable to find that the trial Judge erred."[128]

Two federal human rights tribunal decisions have said that subsection 11(d) of the *Charter* did not apply to proceedings before them: *Kotyk* v. *Chuba*[129] and *MacBain*.[130] As well, the Trial Division of the Federal Court in considering an application to prohibit the Tribunal from proceeding in the *MacBain* case, noted that the Act, in paragraph 41(3)(a) provided for the assessment of punitive damages against a person who has engaged in a discriminatory practice. Nevertheless the Judge said: "But I do not think the result is penal in nature, so as to bring the person against whom a complaint is made and substantiated, into the category of a 'person charged with an offence'."[131] The Court of Appeal dealt with the matter under the *Canadian Bill of Rights* and did not consider the applicability of the *Charter*.[132]

The Saskatachewan Court of Queen's Bench has also ruled on the matter. In *Kodellas* v. *Saskatchewan Human Rights Comm'n*, Mr. Justice McLellan said: "In my opinion proceedings under the Code to determine whether a complaint can be substantiated do not constitute charging the

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[125] (1984), 14 D.L.R. (4th) 118 at 123, 13 C.R.R. 338 at 339 (Ont. Div. Ct.) [hereinafter *Re Commodore*].

[126] (1985), 67 N.S.R. (2d) 112, 6 C.H.R.R. D/2634 (S.C.T.D.), *aff'd on other grounds* (1985), 67 N.S.R. (2d) 429, 19 D.L.R. (4th) 148 (S.C.A.D.), *leave to appeal denied* (1985), [1985] 2 S.C.R. ix, 64 N.R. 240.

[127] S.N.S. 1969, c. 11.

[128] *Supra*, note 126 at 434, 19 D.L.R. (4th) at 152 (S.C.A.D.).

[129] (1983), 4 C.H.R.R. D/1416 (Can. H.R. Trib.), *aff'd* (1984), 5 C.H.R.R. D/1895 (Rev. Trib.).

[130] *Supra*, note 102 (Can. H.R. Trib.).

[131] *MacBain* v. *Canadian Human Rights Comm'n* (1984), [1984] 1 F.C. 696 at 711, 5 C.H.R.R. D/2214 at D/2219, Collier J. (T.D.).

[132] *Supra*, note 102 (A.D.).

respondent to the complaint with an offence within the meaning of s. 11 of the Charter. The proceedings are not criminal or penal in nature."[133]

This line of cases is in accord with the characterization of human rights legislation by the Supreme Court of Canada. In *O'Malley*, Mr. Justice McIntyre said: "Futhermore, as I have endeavoured to show, we are dealing here with consequences of conduct rather than with punishment for misbehaviour. In other words, we are considering what are essentially civil remedies."[134] He had earlier observed: "The [Ontario] Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination."[135]

On the other hand, it would seem that section 7 of the *Charter* may well apply to proceedings before human rights commissions in some circumstances. Section 7 provides: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

The Ontario Divisional Court has left open the applicability of section 7 to human rights proceedings. In *Re Commodore*[136] it had been argued that the legal rights of the respondents to the human rights complaints had been denied under section 7 of the *Charter*. The Court was of the view that since it found there had been no denial of natural justice, then there could have been no breach of section 7. In disposing of the matter in this fashion it did not decide whether section 7 was applicable. This would seem very much to depend on the particular circumstances of the human rights complaint, the issues that it raised and the remedy being sought.

For example, a complaint under section 13 of the *Canadian Human Rights Act*, which prohibits communicating telephonic messages which may expose persons to hatred or contempt, may lead to a cease and desist order. This involves the respondent's freedom of expression which is certainly a component of his or her liberty. On the other hand other human rights complaints may subject the respondent to merely making a payment of compensation to the complainant. Therefore a closer examination of the meaning of "life, liberty and security of the person" is necessary. The Supreme Court of Canada has not yet dealt with the meaning of this phrase definitively.

However, in *Reference Re Section 94(2) of the Motor Vehicle Act*,[137] Mr. Justice Lamer provided an analysis of section 7. He stated that section 7 protects the life, liberty and security of the person. "The principles of fundamental justice, on the other hand, are not a protected interest, but

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[133] (1987), [1987] 2 W.W.R. 195 at 208, 52 Sask. R. 139 at 149 (Q.B.) [hereinafter *Kodellas*].

[134] *Supra*, note 5 at 549, 23 D.L.R. (4th) at 331.

[135] *Ibid.* at 547, 23 D.L.R. (4th) at 329.

[136] *Supra*, note 125.

[137] (1985), [1985] 2 S.C.R. 486, 24 D.L.R. (4th) at 536.

rather a qualifier of the right not to be deprived of life, liberty and security of the person."[138] Therefore the applicant must first demonstrate that there has been an interference with his or her right to life, liberty or security, and then it must be determined if the deprivation was in accordance with the principles of fundamental justice.

Mr. Justice Lamer also stated that sections 8 to 14 of the *Charter* are illustrative of deprivations of the right to life, liberty and security of the person in breach of the principles of fundamental justice. He stated that sections 7 to 14:

> could have been fused into one section, with inserted between the words of s. 7 and the rest of those sections the oft utilised provision in our statutes, "and, without limiting the generality of the foregoing (s. 7) the following shall be deemed to be in violation of a person's rights under this section".[139]

In the *Kodellas* case, Mr. Justice McLellan, after reviewing the jurisprudence, held: "In light of those decisions I conclude that being subject to a monetary penalty and allegations which would adversely affect personal and business opportunities and enjoyment are not rights protected by s. 7."[140]

In *MacBain*[141] the Trial Division of the Federal Court was considering whether it should grant a Writ of Prohibition against a Tribunal that was proceeding to inquire into a complaint of sexual harassment against MacBain. It was argued that loss of good name, reputation, honour or integrity fell within the constitutional protection of liberty. Mr. Justice Collier said: "I am not persuaded the right to 'life, liberty and security of the person' includes interference with one's good name, reputation, or integrity."[142] The matter was not pressed before the Court of Appeal,[143] which expressly stated that it was not dealing with the applicability of the *Charter*.

In *Mehta* v. *MacKinnon*,[144] another sexual harassment case involving the reputation of the respondent, the Trial Division of the Nova Scotia Supreme Court seemed to be satisfied that section 7 of the *Charter* applied. The Court said that the public hearing under the human right legislation "would have to be conducted in accordance with the principles of fundamental justice: otherwise its findings could be set aside".[145] However, the Trial Judge was unwilling to presume, before the inquiry commenced, that there would be unfairness to Dr. Mehta. The Trial Judge held that the requirement that a public hearing be held and public notice be given

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[138] *Ibid.* at 501, 24 D.L.R. (4th) at 548.
[139] *Ibid.* at 502-03, 24 D.L.R. (4th) at 549.
[140] *Supra*, note 133 at 151, [1987] 2 W.W.R. at 211.
[141] *Supra*, note 131 (T.D.).
[142] *Ibid.* at 710, 5 C.H.R.R. at D/2219.
[143] *Supra*, note 102 (A.D.).
[144] *Supra*, note 126 (S.C.).
[145] *Ibid.* at 124, 6 C.H.R.R. at D/2640.

did not in itself infringe section 7 rights. He, however, cited with approval the finding of Mr. Justice Collier in the *MacBain* case.

In *Kodellas*[146] the subject matter of the human rights complaint was again sexual harassment. Two complaints had been filed against Kodellas and his corporate employer, one in 1982, and the other in 1983. The Saskatchewan Human Rights Commission decided to appoint a Board of Inquiry in 1985. The respondents applied to the Court of Queen's Bench for prohibition on the basis that the unreasonable delay in the proceedings was not in accordance with the principles of fundamental justice. Mr. Justice McLellan noted that anxiety and stress are necessary ingredients of any court proceeding, civil or criminal, and could not, in themselves, ordinarily give rise to an infringement of the rights guaranteed by section 7. However, he examined the particular complaints of sexual harassment and concluded that they contained allegations that Kodellas committed or attempted to commit sexual assaults on the complainants. The Judge noted:

> If the Board finds that the complaints are substantiated, on only a balance of probabilities, he will stand convicted in the eyes of the community. In other words he is, in effect, being accused and tried publicly without the safeguards that would be afforded to him if he were charged with sexual assault under the Criminal Code.[147]

He concluded that the individual applicant's security would be deprived if the Board proceeded to a hearing. He then turned his mind to whether the delay was so unreasonable as to breach fundamental justice. Here, he cited *Mills* v. *R.*, where Lamer J. said:

> the concept of security of the person is not restricted to physical integrity; rather, it encompasses protection against "overlong subjection to the vexations and vicissitudes of a pending criminal accusation" (citations omitted). These include stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction. These forms of prejudice cannot be disregarded nor minimized when assessing the reasonableness of delay.[148]

Mr. Justice McLellan added that these rights have a greater need for protection in the human rights process because of the lack of safeguards available in criminal proceedings, such as the presumption of innocence and proof beyond a reasonable doubt, and the fact that a human rights board could accept evidence that it considers fit and proper, whether admissible in a court of law or not. Therefore the Judge issued an order preventing the Board from inquiring into the matters complained of. The

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[146] *Supra*, note 133.
[147] *Ibid.* at 152, [1987] 2 W.W.R. at 212.
[148] *Supra*, note 94 at 919-20, 52 C.R. (3d) at 65.

order applied also to the corporate applicant because a proceeding against the corporation would invovle the rights of the individual.

These cases indicate that it would be difficult to make general propositions regarding the application of section 7 to human rights proceedings. The facts and circumstances of each case must be individually examined in deciding whether section 7 may apply. Section 7, unlike section 11, is capable of having application and it should be considered in each case.

B. *Canadian Bill of Rights*

Quite apart from the *Charter*, there have been developments in the jurisprudence relating to proceedings before human rights commissions. In the federal jurisdiction, the *Bill of Rights*[149] certainly applies to proceedings under human rights legislation. Subsection 2(e) of the *Bill of Rights* provides that no law of Canada shall be construed or applied to: "deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations". Since the *Singh* decision of the Supreme Court of Canada,[150] subsection 2(e) of the *Bill of Rights* may be used to render legislation which breaches its terms inoperative.

In *MacBain*[151] the Federal Court of Appeal held that certain provisions of the *Canadian Human Rights Act* were rendered inoperative by subsection 2(e) of the *Bill of Rights*. Under the *Canadian Human Rights Act* the Human Rights Commission received reports from investigators and determined whether the complaint was "substantiated". Otherwise the complaint would be dismissed. The Commission could appoint a conciliator to attempt to bring about a settlement; the normal course; and thereafter could appoint a human rights tribunal to hold a judicial hearing into the complaint. The Federal Court of Appeal found that the respondent to the complaint would have a reasonable apprehension of bias because the Commission first investigated the complaint and found it to be "substantiated", then selected and appointed the three members of the Tribunal, and appeared before the Tribunal to "prosecute" the complaint. Basing itself on subsection 2(e) of the *Bill of Rights*, the Court granted a declaration that subsections 39(1) and 39(5) of the *Canadian Human Rights Act* (which provided for this procedure) were inoperative "insofar as the particular complaint filed against the Appellant/Applicant was concerned".

This left open the question of the status of the other tribunals that were in progress, which had been appointed under the same statutory scheme. It is important to note that the apprehension of bias was based

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[149] S.C. 1960, c. 44, s. 2(e), *reprinted in* R.S.C. 1970, App. III.

[150] *Singh* v. *Minister of Employment and Immigration* (1985), [1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422.

[151] *Supra*, note 102 (A.D.).

on facts which flowed from the statutory provisions themselves. The Human Rights Tribunal appointed to inquire into the complaint of the Energy and Chemical Workers Union against Atomic Energy of Canada Limited referred a question of law to the Federal Court of Appeal:

> Does this Human Rights Tribunal, having been constituted in the same manner, by the same process, and pursuant to the same statutory scheme as that described in the case of *MacBain* v. *The Canadian Human Rights Commission* . . . have jurisdiction to continue its inquiry?[152]

On this occasion the Court of Appeal found that the respondent, by participating in the proceedings before the Tribunal, had waived any right to object later. This somewhat surprising result, that bias inherent in a statutory scheme may be waived, is based on the reasoning that the *Bill of Rights* did not grant new procedural rights but merely enshrined already existing common law standards, and prevented their erosion by federal statute. Since apprehension of bias could be waived at common law, so could it be under the *Bill of Rights*. Mr. Justice MacGuigan speaking for the majority summarized his reasoning as follows:

> Taken against the background of the law as a whole, the *MacBain* decision can therefore be put in context in three simple propositions:
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> 1. had it not been for the *Bill of Rights*, the legislative scheme alone would have been a complete answer to the allegation of reasonable apprehension of bias;
> 2. the *Bill of Rights* applies to nullify such a legislative infringement of rights to the extent that the rights have been invoked in time; and,
> 3. because the *Bill of Rights* here acts only negatively, by preventing deprival of rights, it affords no protection to those who even impliedly waive their rights. In the result, the reasoning of the *MacBain* decision, based as it is on the effect of the *Canadian Bill of Rights*, cannot apply to AECL, which until now has never claimed its fundamental right to be free from a reasonable apprehension of bias.[153]

In short, the respondent in the *Atomic Energy* case had not been deprived of its right to a fair hearing. It had had the right to object but had not done so.

C. *Common Law Duty of Fairness*

Given the Supreme Court of Canada's decision in *Board of Governors of Seneca College* v. *Bhadauria*[154] that the only recourse for a victim of discrimination is to use the machinery under human rights

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[152] *Re Human Rights Tribunal and Atomic Energy Canada Ltd.* (1985), [1986] 1 F.C. 103 at 112, 7 C.H.R.R. D/3232 at D/3232 (A.D.) [hereinafter *Atomic Energy*].

[153] *Ibid.* at 119, 7 C.H.R.R. at D/3235.

[154] (1981), [1981] 2 S.C.R. 181, 124 D.L.R. (3d) 193.

legislation, complainants who face the prospect of having a commission deciding not to deal with, or dismissing, their complaints often demand the right to a full oral hearing before the commission. The courts invariably have held that such a right does not exist. In *Re Downing and Graydon*,[155] the Ontario Court of Appeal held that employment standards officers acting under the *Employment Standards Act*,[156] inquiring into complaints of less than equal pay for equal work, may comply with the *audi alteram partem* rule by disclosing the results of their inquiries to complainants before making their decisions. The disclosure must be complete enough for the complainants to understand the reasons for the conclusions reached by the officers, and complainants must be given a fair opportunity to consider and reply to those findings.

In *Re Dagg and Ontario Human Rights Comm'n*,[157] the Ontario Divisional Court found that the Ontario Human Rights Commission, in deciding whether or not to recommend the appointment of a board of inquiry, was acting administratively. However, the Court continued:

> But even assuming that the Commission and the Minister were under a duty in exercising their administrative functions to be "fair" as has been suggested in some of the cases, it is our view that that duty only required the Commission and/or the Minister to receive the representations of the applicant and to give to the applicant the substance of the information upon which the Commission and Minister relied in arriving at their respective decisions.[158]

In spite of the substantial development of the law relating to the duty to act fairly the standards set by the courts in this regard seem not to have changed.

In *Radulesco* v. *Canadian Human Rights Comm'n*[159] the Supreme Court of Canada agreed that procedural fairness required that the Canadian Human Rights Commission disclose the substance of the case against the complainant and provide to the complainant an opportunity to make submissions, at least in writing, before any action was taken on the basis of the investigator's report. A hearing is not necessarily required. However, Mr. Justice Lamer, writing for the Court, indicated that this was a minimum standard that must be met in all cases. This left room for others to argue that in the particular circumstances of their case a hearing ought to be granted.

The matter was stated clearly by the Trial Division of the Federal Court, ruling on Dan McKenzie M.P.'s application for prohibition to prevent the Canadian Human Rights Commission from dealing with his

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[155] (1978), 21 O.R. (2d) 292, 92 D.L.R. (3d) 355 (C.A.).
[156] R.S.O. 1980, c. 137.
[157] (1979), 26 O.R. (2d) 100, 102 D.L.R. (3d) 155 (Div. Ct.).
[158] *Ibid.* at 104, 102 D.L.R. (3d) at 159.
[159] (1984), [1984] 2 S.C.R. 407, 14 D.L.R. (4th) 78 [hereinafter *Radulesco*].

complaint without furnishing him with the opportunity to argue his case orally before it. The Court said:

> The question of whether an oral, public hearing must be given by a statutory body has to be determined by reference to the statute which creates it. There is nothing in the relevant provisions of the *Canadian Human Rights Act* which requires such a hearing at this stage of events. Nor do the principles of natural justice require the Commission to hold an oral, public hearing before determining the merits of the investigation of the complaint. In my opinion, it is sufficient that the complainant be given the substance of the case against him and be afforded the fair opportunity of answering it by written submissions.[160]

In an unreported case, *Brouillette* v. *Canadian Human Rights Comm'n*,[161] the Federal Court of Appeal stated that the basic procedural standard was that the Commission must permit a complainant to make submissions before rejecting his or her complaint. In order for the submissions to be informed, the Commission must disclose to the complainant, and other interested parties, the substance of the evidence obtained by the investigator and make verbal or written representations.

In Ontario, the Divisional Court has recently expressed its views that:

> in entertaining the submissions of the intervenors, in the absence of any representative of the Company, and in not fully acquainting the Company of the facts and arguments propounded to it by the intervenors, prior to both decisions, the Commission lapsed in its observance of procedural fairness.[162]

This case is especially noteworthy because the Divisional Court applied this standard, not to a commission decision to dismiss a complaint, but to decisions not to approve a settlement arrived at by the parties.

However, in the case *Centre Hospitalier Régina Limitée* c. *Commission des Droits de la Personne du Québec*,[163] the Superior Court of Quebec granted an order of *mandamus* requiring that the Commission hold an oral hearing because the applicants could not present their position adequately in written form. The Court issued an order that the Commission permit the complainants to file any evidence they wished in support of their complaints before it took any decision. As well the Court ordered the Commission to provide reasons for the decision it would make after the hearing. The Court reasoned that while there was no absolute right to an oral hearing, and while the Court should not generally impose a

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[160] *McKenzie* v. *Canadian Human Rights Comm'n* (1985), 6 C.H.R.R. D/2929 at D/2934, 85 C.L.L.C. ¶16,144 at ¶16,151.

[161] (12 June 1986), Ottawa A-761-85 (F.C.A.D.), *leave to appeal denied* 7 October 1986 (S.C.C.) [hereinafter *Brouillette*].

[162] *Consumers' Distributing Co.* v. *Persaud* (9 February 1987), 508/86 (Ont. Div. Ct.) at 11.

[163] (1986), 7 C.H.R.R. D/3359 (Que. Sup. Ct.).

procedure upon administrative tribunals whom the law gives the right to determine their own procedures, nevertheless the circumstances of each case must be considered in deciding whether or not an oral hearing should be granted. One of the circumstances to be considered is whether the parties can adequately present their case by means of written argument. In this case the Court decided that the Commission ought to have granted an oral hearing as the complainants could not adequately present their case without one.

It seems that the issue is not finally closed. In any event, the courts are building on the proposition that generally a hearing is not necessary, by beginning to define how much disclosure is adequate. This process began in *Labelle* v. *R.*[164] where the complainant was given the investigator's report prior to having her complaint dismissed. She was not given a copy of the investigator's notes of the interviews he had conducted, nor of witnesses' statements he had obtained. His report merely contained summaries of these. The Federal Court of Appeal first held that no hearing was required (while again noting that natural justice may on occasion require a hearing). Second, the Court held that the disclosure that had been made was adequate. The investigator's report fairly summarized the evidence and the witnesses' statements. Mr. Justice Mahoney said: "The failure to make available to a complainant those notes and statements is an undesirable practice but it is not necessarily a denial of natural justice."[165] It seems to the writer that the practice is not only undesirable, but unnecessary as well. It would be a simple matter for an investigator to make his or her complete file available for inspection by the parties when they request it.

In *Syndicat des Employés de Production du Québec* c. *Commission Canadienne des Droits de la Personne*[166] as well, the Federal Court of Appeal ruled that there was no requirement for a hearing. Marceau J. said:

> Ce qui est requis est que le plaignant et toutes les parties intéressés aient été adéquatement informés de la substance de la preuve recueillie par l'enquêteur et du contenu de son rapport et qu'ils aient eu la possibilité de faire verbalement ou par écrit toutes les représentations pertinentes qu'ils jugeaient à propos. Il est loin d'être question d'audition formelle et publique. . . .[167]

The complaint alleged that make up and costume workers were not paid equally to set constructors for work of equal value. The Court ruled that disclosure of the results of the job evaluation carried out by the Commission was sufficient. It was unnecessary to disclose, in addition, the

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[164] (27 March 1987), Ottawa A-149-86 (F.C.A.D.) [hereinafter *Labelle*].
[165] *Ibid.* at 9.
[166] (7 November 1986), Montreal A-634-85 (F.C.A.D.) [hereinafter *S.E.P.Q.A.*].
[167] *Ibid.* at 9-10.

work sheets of the job evaluators. These were "de simples outils d'experts".[168]

Another right sometimes demanded by parties is the right to cross-examine individuals interviewed by the investigator. One would have thought that the demand for such a right would not be successful, especially considering cases such as *Guay* v. *Lafleur*[169] and *University of Ceylon* v. *Fernando*.[170] However, the Federal Court of Appeal in *Cashin* v. *CBC*, speaking through Mr. Justice Mahoney, said: "I do not see how the applicant could be given a fair opportunity to meet the case against her without being given an opportunity to confront directly particular evidence against her and to test the credibility of its proponents."[171] Mr. Justice Thurlow said:

> First, while there is no general rule that in order to observe the principles of natural justice an oral hearing must be held and an opportunity to examine every document and to cross-examine witnesses must be afforded to a person whose rights may be adversely affected by the decision of an administrative authority, the nature of what had to be decided in this instance, that is, whether the action by the CBC in refusing to renew the applicant's contract was indeed because of the *bona fide* occupational requirement that the applicant be publicly perceived to be objective in carrying out her duties, coupled with the fact that it rested on the CBC to establish what motivated its decision, appear to me to present a situation which cried out for an opportunity for the applicant to test by cross-examination what the CBC alleged to have been the reasons for its decision.[172]

He continued that, in deciding whether to dismiss the complainant's case the Commission was performing a "purely judicial function, one that was not susceptible of being carried out adequately without following a procedure in which the version of one party would not be preferred as the truth without affording to the adverse party an opportunity to subject that version to what has been referred to as the 'purifying' effect of cross-examination".[173]

The Supreme Court of Canada had before it the *Cashin* case which was decided April 30, 1984, when it issued its judgment in *Radulesco* [174] on November 22, 1984. Even though it did not express any view as to the correctness of the *Cashin* decision, the fact that a different and lesser standard is set out in *Radulesco* may be taken as a tacit disapproval of the *Cashin* reasoning. This seems to be the view of the Federal Court of Appeal itself for in the later *Brouillette*[175] decision dated October 7,

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[168] *Ibid.* at 11.

[169] (1964), [1965] S.C.R. 12, 47 D.L.R. (2d) 226.

[170] (1960), [1960] 1 W.L.R. 223, [1960] 1 All E.R. 631 (P.C.).

[171] (1984), [1984] 2 F.C. 209 at 215, 8 D.L.R. (4th) 622 at 627 (A.D.) [hereinafter *Cashin*].

[172] *Ibid.* at 211, 8 D.L.R. (4th) at 623-24.

[173] *Ibid.* at 211, 8 D.L.R. (4th) at 624.

[174] *Supra*, note 159.

[175] *Supra*, note 161.

1986, the Court of Appeal, although differently constituted, reviewed the *Radulesco* standard and noted that it was a minimum standard. The Court opined that there might be special cases where additional obligations must be met and doubted that, among these additional measures, there would ever be the right for an open investigation in which there would be a right to cross-examine witnesses formally. A differently constituted court followed the *Brouillette* decision in *S.E.P.Q.A.* [176] and in *Labelle*.[177]

VI. Sexual Harassment

The first Canadian case of sexual harassment was decided as recently as 1980, yet in the period under survey complaints of sexual harassment became matters of routine for tribunals and boards of inquiry. Jurisprudence at the administrative level moved from rationalizing that harassment constituted sex discrimination and defining what harassment is to drawing the limits of harassment. As well, harassment was considered by several superior courts and there were significant amendments to the *Canada Labour Code*.[178]

Superior courts, with the exception of one Court of Appeal, have found that sexual harassment is within the ambit of the general prohibition of sex discrimination. The Ontario Divisional Court in *Re Commodore* [179] dismissed an appeal from a decision of an Ontario Board of Inquiry which substantiated a complaint of sexual harassment under paragraph 4(1)(g) of the old *Ontario Human Rights Code*. The Divisional Court noted the Board's finding of fact that there were tangible employment consequences from the complainants' refusal to comply with sexual advances by a foreman. The foreman had terminated the employment of three women because he wanted to spite them for rejecting him. Two others were found to have been constructively terminated after they quit. A sixth woman left because of illness but the foreman had refused to assist her to claim sickness benefits. The Court found that these consequences constituted "discrimination with regard to terms and conditions of employment because of sex" within the meaning of paragraph 4(1)(g) of the Code, thereby confirming that *quid pro quo* harassment is discrimination. The Court considered, but found it unnecessary to decide, whether "poisoned environment" harassment with tangible employment consequences constituted discrimination.

Then in *Mehta* v. *MacKinnon* the Nova Scotia Supreme Court, Appeal Division considered whether a Board of Inquiry ought to be prohibited from proceeding to a hearing on the ground, among others, that sexual harassment was not sex discrimination. Mr. Justice Jones, writing for the unanimous Court, said: "A review of the decisions, in-

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[176] *Supra*, note 166.
[177] *Supra*, note 164.
[178] S.C. 1984, c. 39.
[179] *Supra*, note 125.

cluding the American authorities, leads me to the conclusion that sexual harassment as a term or condition of employment is prohibited by s. 11(A)(i) of the *Nova Scotia Human Rights Act*."[180]

In *Brennan* v. *R.* the Federal Court of Appeal unanimously found that both *quid pro quo* and environmental harassment were prohibited by section 7 of the *Canadian Human Rights Act*. Chief Justice Thurlow wrote:

> The language of s. 7 of the Act, though broad, does not lend itself easily to embrace a situation of this kind and I do not think it is desirable or appropriate to endeavour to define its limits. It is sufficient for the purposes of this case to say that I think the language is broad enough to cover the situation in the present case of a superior in the workplace exercising his position and authority over a subordinate of the other sex, who was in a vulnerable position, to intimidate her and secure participation in his sexual overtures and conduct.[181]

and:

> I also think, as did the Review Tribunal, that Brennan's objectionable conduct can be regarded as having destroyed or damaged the normal workplace relationship that otherwise would have continued between Brennan and Mrs. Robichaud and thus made her working conditions worse for her because she was a woman.[182]

In *Foisy* v. *Bell Canada*[183] the Superior Court of Quebec found that sexual harassment was covered by the *Quebec Charter*,[184] prior to the addition of section 10.1 which provides: "No one may harass a person on the basis of any ground mentioned in section 10", including sexual harassment.

However, the Manitoba Court of Appeal in *Janzen* v. *Platy Enterprises Ltd.* was emphatic in coming to the opposite conclusion. Mr. Justice Huband began the reasons for his judgment by saying: "I am amazed to think that sexual harassment has been equated with discrimination on the basis of sex. I think they are entirely different concepts. But adjudicators under human rights legislation, legal scholars and writers, and jurists have said that the one is included in the other."[185]

The facts of the case were that two waitresses at Pharos Restaurant in Winnipeg filed separate complaints that one Tommy Grammas, the cook, had harassed them by touching their bodies while they were work-

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[180] *Supra*, note 126 at 158, 6 C.H.R.R. at D/2865 (S.C.A.D.).

[181] (1985), 57 N.R. 116 at 128, 85 C.L.L.C. ¶17,006 (F.C.A.D.) [hereinafter *Brennan*].

[182] *Ibid.* at 128.

[183] (1984), 18 D.L.R. (4th) 222, 6 C.H.R.R. D/2817 (Que. Sup. Ct.).

[184] *Charte des Droits et Libertés de la Personne*, R.S.Q. 1977, c. 12, *as am.* S.Q. 1982, c. 61.

[185] (1986), 43 Man. R. (2d) 293 at 295, [1987] 1 W.W.R. 385 at 390 (C.A.) [hereinafter *Janzen*].

ing. The complainant Janzen quit her employment, while the employment of the complainant Govereau was terminated. The complaints proceeded under subsection 6(1) of *The Human Rights Act*[186] which provided:

> Every person has the right of equality of opportunity based upon bona fide qualifications in respect of his occupation or employment . . . and, without limiting the generality of the foregoing
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> (a) no employer or person acting on behalf of an employer, shall refuse to employ, or to continue to employ . . . or to advance or promote that person, or discriminate against that person in respect of employment or any term or condition of employment . . . because of . . . sex. . . .

Mr. Justice Huband reasoned that this section was "aimed at discrimination in a generic sense; blacks as a group, Jehovah's Witnesses as a group, or women as a group". After looking at the Act as a whole, he concluded that "sexual discrimination is something entirely different from, and does not include, sexual harassment".[187]

The writer submits that Mr. Justice Huband erred by seeing harassment as simply the sexual conduct and not including the acts which inflict employment consequences after a refusal to comply with the sexual advance. Mr. Justice Huband compared harassment to a school boy stealing kisses from a female classmate and said: "Sexual harassment involves vexing or troubling a person with respect to sexual matters such as repeatedly touching or making suggestions or threats."[188]

In his further finding that the restaurant was not vicariously liable for the actions of the cook (this finding is discussed later), he said: "But what has patting the buttocks of a waitress to do with fulfilling the responsibilities as a cook?"[189] Yet the finding of fact which he recited at page three was that after she refused to allow herself to be touched in this way "[t]hereafter he began to make life difficult for her — as a cook can do with a waitress who depends upon him to provide the orders on a timely basis".[190] It is submitted that Mr. Justice Huband erred in considering only the "patting of the buttocks" and not the "making life difficult" thereafter to be harassment.

In his reasons Mr. Justice Twaddle was only slightly less equivocal. In his view the question was one of fact. Sex in *The Human Rights Act* had the sense of "gender". He recognized that the gender of a woman was unquestionably a factor in sexual harassment in that if she were not a woman the harassment would not have occurred. However, he concluded that if the woman were chosen because of particular characteristics, namely, her attractiveness to the harasser, then it is not sex discrimination.

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[186] S.M. 1974, c. 65, C.C.S.M. H175.
[187] *Supra*, note 185 at 301, [1987] 1 W.W.R. at 398-99.
[188] *Ibid.* at 299, [1987] 1 W.W.R. at 395.
[189] *Ibid.* at 311, [1987] 1 W.W.R. at 411.
[190] *Ibid.* at 296, [1987] 1 W.W.R. at 390.

Harassment would be discrimination only where the harasser wished to discourage women generally from seeking or continuing in a position of employment by using harassment, or by a contempt for women generally. If a man harassed only those women whom he found attractive the effective basis of his actions would be their attractiveness, not their sex.

This line of reasoning had been considered and rejected by a Review Tribunal under the *Canadian Human Rights Act*. In *Kotyk* v. *Chuba* the Review Tribunal said:

> Nor is it an answer by an employer to argue that a manager is discriminating against a woman not because of her sex but because he finds her sexually attractive and consequently, is not harassing all women in his employment but merely this particular woman. In *Bundy* v. *Jackson* . . . at page 942, the Court indicated that "sex discrimination . . . is not limited to disparate treatment founded solely or categorically on gender. Rather discrimination is sex discrimination whenever sex is for no legitimate reason a substantial factor in the discrimination." [191]

Accordingly, the crux of the matter is whether the basis for the specific discrimination was sex related. If so, there is discrimination by reason of sex even though other employees of the same gender are not subjected to such conduct. One commentator put the principle aptly as follows:

> 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 Review Tribunal's finding was in accordance with the commonly accepted principle in human rights jurisprudence that a ground of discrimination is established even if it is only one of several reasons for the act.

This principle is derived from labour jurisprudence in the Ontario Court of Appeal and the Federal Court of Appeal. In *R.* v. *Bushnell Communications Ltd.* [193] the Ontario Court of Appeal said, in considering whether an employer had discriminated against an employee because of a union membership contrary to subsection 110(3) of the *Canada Labour Code*:[194] "union membership must be a proximate cause for dismissal, but it may be present with other proximate causes".[195]

In *Sheehan* v. *Upper Lakes Shipping Ltd.* [196] the Federal Court of Appeal had to consider whether there was an unfair labour practice

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[191] *Supra*, note 129 at D/1901 (Rev. Trib.).

[192] C. Backhouse, *Case Comment on Bell v. The Flaming Steer Steak House Tavern: Canada's First Sexual Harassment Decision* (1981) 19 U.W.O.L. REV. 141.

[193] (1974), [1975] 4 O.R. 288, 47 D.L.R. (3d) 668 (C.A.).

[194] R.S.C. 1970, c. L-1.

[195] *Supra*, note 193 at 290, 47 D.L.R. (3d) at 670.

[196] (1977), [1978] 1 F.C. 836, 81 D.L.R. (3d) 208 (A.D.), *rev'd* (1979), [1979] 1 S.C.R. 902, 95 D.L.R. (3d) 25.

committed under subparagraph 184(3)(a)(ii) of the *Canada Labour Code*. The section provided:

> No employer and no person acting on behalf of an employer shall refuse to employ or continue to employ . . . or otherwise discriminate against any person in regard to employment, pay or any other term or condition of employment . . . because the person has been expelled or suspended from membership in a trade union. . . .[197]

The Court said:

> It is very clear from the evidence in this case that *one of* the factors taken into account by the officers of the Company in refusing to employ the applicant was the expulsion of the applicant from the S.I.U. and later from the C.M.U. The expulsions were proximate causes of the refusal to employ.[198]

The Court continued:

> Since these facts reveal that one of the motivating factors in the refusal of the Company to employ the applicant was his expulsion from the S.I.U. and later from the C.M.U. this motivating factor must be deemed to have been established and the Company was thus guilty of an unfair labour practice under section 184(3)(a)(ii).[199]

A proximate cause for a man harassing a woman whom he finds particularly attractive is her gender as well as her attractiveness, and therefore a ground of discrimination is established. The Manitoba Court of Appeal was incorrect in determining otherwise.

Another important issue is whether an employer is liable for harassment by its exployees, especially managerial employees. It seems this very much depends on the legislation under which the complaint is laid and the jurisdiction in which it is proceeding. Subsection 44(1) of the *Human Rights Code, 1981* and subsection 48(5) of the *Canadian Human Rights Act* provide for the vicarious liability of employers for acts done by their employees and agents in the course of their employment.

The Federal Court of Appeal in the *Brennan*[200] case has determined that an employer is *not* liable for the discriminatory acts of its employees, absent subsection 48(5). The employer will not be liable unless it "authorized or even knowingly overlooked, condoned, adopted, or ratified Brennan's actions".[201] The decision is before the Supreme Court of Canada which has granted leave to appeal. (In the Ontario case the Board found that the assistant manager's conduct was "undoubtedly unwise". However, it did not go beyond a reasonable social involvement.)

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[197] R.S.C. 1970, c. L-1, *re-enacted* 1972, c. 18, s. 1.
[198] *Supra*, note 196 at 844, 81 D.L.R. (3d) at 214 (A.D.).
[199] *Ibid.* at 846, 81 D.L.R. (3d) at 215.
[200] *Supra*, note 181.
[201] *Ibid.* at 132.

In *Re Commodore*[202] the Divisional Court decision did not consider whether the employer was responsible for the harassment by its foreman. The Board had found that the employer was personally liable because the foreman was part of the directing mind of the corporation, on the basis that he had the power to hire, fire and discipline employees. While the appellant seems not to have raised the issue, neither did the Court, and to that extent the Court's affirmation of the Board decision may be viewed as tacit approval of the Board's reasoning on the point.

In Alberta, British Columbia, New Brunswick, Newfoundland, Manitoba and Saskatchewan the human rights legislation makes employers liable for the acts of "employers or persons acting on behalf of an employer". In Nova Scotia, Prince Edward Island and Quebec the statutes are silent. The issue has been considered only in Quebec.

The employer's liability for the harassment of one employee by another was carefully considered by the Manitoba Court of Appeal in *Janzen*.[203] Paragraph 6(1)(a) of *The Human Rights Act* referred to discrimination by an "employer or person acting on behalf of an employer". As already noted similar language appears in the legislation of Alberta, British Columbia, New Brunswick, Newfoundland and Saskatchewan.

Mr. Justice Huband could not see how it could be argued that Tommy, the cook, was "acting on behalf of" the corporation "when he engaged in his strange amorous pursuits".[204] He reviewed the *Brennan* decision of the Federal Court of Appeal and stated: "Not surprisingly, it was decided that Queen Elizabeth was not responsible."[205] Vicarious liability would require a specific statutory foundation, especially considering that the Board was authorized to impose a penalty or grant exemplary damages. It is a general principle that punitive damages should not be awarded against one who has been guilty of no fault and is not deserving of punishment.

Mr. Justice Huband went on to observe that even if the statute did contemplate vicarious liability it would only arise where the employer was acting within the terms of his "actual, implied or ostensible authority, and that the act complained of occurred in the course of employment".[206] Tommy, the cook's unseemly activities were not performed during the course of his employment because "patting the buttocks of a waitress is dehors his job as a cook".[207]

The Board of Adjudication had found that the employer was also personally liable for the harassment because Tommy, the cook, was a

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[202] *Supra*, note 125.
[203] *Supra*, note 185.
[204] *Ibid.* at 306, [1987] 1 W.W.R. at 405.
[205] *Ibid.* at 307, [1987] 1 W.W.R. at 406.
[206] *Ibid.* at 309, [1987] 1 W.W.R. at 408.
[207] *Ibid.* at 309, [1987] 1 W.W.R. at 408.

directing mind of the corporation. Mr. Justice Huband disagreed with that finding for two reasons:

1. The cook was not a directing mind in that he was not an officer, director, or a person in a senior management position. He exercised no managerial responsibilities other than allowing waitresses to leave early on slow nights. He had no authority to discipline, or hire or fire, though the Board found as a fact that the employer deliberately gave the waitressing staff the impression that he did have these powers.
2. In addition, the cook was not acting in the course of his employment when he sexually harassed the two co-employees because, as we have already noted, patting the buttocks of a waitress is "dehors his job as a cook".

Mr. Justice Huband's reasoning on this point is difficult to understand as he himself had recited the Board's finding of fact that the cook made life difficult for the complainants, after being rejected by them, by being slow to fill their orders and matters of that sort. It would seem manifestly obvious that the manner of filling orders from waitresses is within the course of employment of a cook. Mr. Justice Huband's reasoning makes even less sense because he seemed to grant that a cook who caused a gas explosion in the kitchen while smoking on the job would be acting in the course of his employment. How is smoking within the course of the employment of a cook, whereas being slow to fill orders from a waitress is not? However, Mr. Justice Huband granted that "[w]here a corporation adopts or approves the wrongful acts of it servant, then those acts become the acts of the corporation itself".[208] There was no adoption or approval of the actions of the cook in this case.

Mr. Justice Twaddle did not consider the issue as completely, but seemed to go even further than Mr. Justice Huband in restricting the employer's liability. He held that even where the employer condones the conduct it will not be responsible. He said:

> The board held that the employer condoned the cook's conduct. That is not, in my view, enough. Adoption of his conduct by the employer, not forgiveness, would be required at the very least to bring the cook's conduct within the meaning of the words "on behalf of the employer".[209]

The reasoning of the Manitoba Court of Appeal has immense implications, not only for the provinces whose legislation contains the phrase "acting on behalf of an employer" but also for the Ontario's *Human Rights Code, 1981* and the *Canadian Human Rights Act* which have express provisions providing for vicarious liability of employers. Both these statutes were amended after the British Columbia Court of Appeal

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[208] *Ibid.* at 309, [1987] 1 W.W.R. at 409.
[209] *Ibid.* at 321, [1987] 1 W.W.R. at 426.

decision in *Nelson* v. *Byron Price & Assoc.*[210] Subsection 48(5) of the *Canadian Human Rights Act* provides that:

> [A]ny 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.[211]

The scope of this section will be exceedingly restricted by the Manitoba Court of Appeal's interpretation of "in the course of the employment".

Ontario's Code also has a section that expressly deals with employer liability. Subsection 44(1) provides:

> For the purposes of this Act, except subsection 2(2), subsection 4(2), section 6 and subsection 43(2), 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.[212]

Section 44 of the Code will also be affected by a restrictive interpretation of the words "in the course of his or her employment", however *not* in the context of sexual harassment. The excepting of subsections 2(2) and 4(2), and section 6 from its application implies that employers are not intended to be liable for harassment and sexual solicitation by their employees. Under subsection 40(1) of the Code a board of inquiry may issue a remedial order against a party who has contravened the Code. Under subsection 40(4) a board can issue an order in a harassment or solicitation case against a person who knew of a repeated contravention and had the authority to penalize or prevent its repetition, and failed to use it. However, such an order may only require the person to take whatever sanctions or steps are reasonably available to prevent further repetition of the infringement. It would seem that no order could be made against the employer to compensate the complainant in a harassment complaint.

In Canada there are now three Court of Appeal decisions that conclude that employers are not vicariously liable for discrimination by employees. Two of these decisions related to sexual harassment specifically. This is to be contrasted with the approach taken by American courts of appeal which in the past have imposed strict liability on the employer, based on the doctrine of *respondeat superior*. For example,

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[210] (1981), 27 B.C.L.R. 284, 122 D.L.R. (3d) 340 (C.A.).

[211] S.C. 1976-77, c. 33, s. 48, *as am.* S.C. 1980-81-82-83, c. 143, s. 23 (emphasis added).

[212] *Human Rights Code, 1981*, S.O. 1981, c. 53, s. 44(1).

in *Miller* v. *Bank of America* the United States Court of Appeals, Ninth Circuit stated that the *Civil Rights Act* defined

> wrongs that are a type of tort, for which an employer may be liable. There is nothing in either act which even hints at a congressional intention that the employer is not to be liable if one of its employees, acting in the course of his employment, commits the tort. Such a rule would create an enormous loophole in the statutes. Most employers today are corporate bodies or quasi-corporate ones such as partnerships. None of any size, including sole proprietorships, can function without employees. The usual rule, that an employer is liable for the torts of its employees, acting in the course of their employment, seems to us to be just as appropriate here as in other cases, at least where, as here, the actor is the supervisor of the wronged employee.[213]

It is interesting that the American Court looked for congressional intention that the employer "is not" liable under the statute whereas in Canada the courts of appeal have looked for legislative intention that the employer is so liable. In the *Miller* case the Court referred to an example of a taxi company being responsible even where the employee driver becomes enraged at a jay-walking pedestrian and intentionally runs him down. More recently, in *Horn* v. *Duke Homes* the United States Court of Appeals, Seventh Circuit noted that "[e]very circuit that has reached the issue has adopted the EEOC's rule imposing strict liability on employers for the acts of sexual harassment committed by their supervisory employees".[214]

In *Horn* the Court considered the argument accepted by the Manitoba Court of Appeal, that sexual harassment is an intentional act done for the private gratification of the harassing employee who is not authorized to discriminate on the basis of sex. Because the employee's sexual proclivities are wholly unconnected to the well-being of the employer, he is acting outside the scope of his employment. The Court dismissed this argument on the basis that the harassment is caused by the exercise of power which is delegated to the harassing employee by the employer. The Court enunciated the policy basis for its position. It said:

> sex discrimination can best be eradicated by enforcing a strict liability rule that ensures compensation for victims and creates an incentive for the employer to take the strongest possible affirmative measures to prevent the hiring and retention of sexist supervisors. . . . (goods produced by entrepreneurs who do not assume the costs of remedying a tort (in this case sexism) are artificially cheap; forcing them to internalize the costs of the tort regardless of fault eliminates incentives to be sexist and ensures proper allocation of societal resources).[215]

As well, according to the risk allocation theory "[t]he employer, not the innocent plaintiff, should bear the cost of the torts of its employees as

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[213] 600 F.2d 211 at 213 (9th Cir. 1979) [hereinafter *Miller*].
[214] 755 F.2d 599 at 604 (7th Cir. 1985) [hereinafter *Horn*].
[215] *Ibid.* at 605.

a required cost of doing business, insofar as such torts are reasonably foreseeable and the employer is a more efficient cost avoider than the injured plaintiff".[216] The Court observed that: "[R]eification of the 'company' invites an ill-advised descent into the world of legal fiction. The 'company' is a legal form; it can 'act' only through its duly-appointed agents."[217] The situation both in Canada and the United States will have to be decided by the supreme courts. In Canada the issue is before the Court in *Brennan*[218] and leave to appeal is being sought in *Janzen*. In the United States the Supreme Court expressly declined to issue a definite rule on employer liability in the one sexual harassment case to reach that Court: *Meritor Savings Bank* v. *Vinson*.[219] However, the Court did say that "Congress wanted courts to look to agency principles for guidance in this area."[220] The Supreme Court concluded "that the Court of Appeals was wrong to entirely disregard agency principles and impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case".[221] On the other hand and "[f]or the same reason, absence of notice to an employer does not necessarily insulate that employer from liability".[222]

The amendments to the *Canada Labour Code* provide that "[e]very employee is entitled to employment free from sexual harassment" and obligate every employer to "make every reasonable effort to ensure that no employee is subjected to sexual harassment". Sexual harassment is defined in section 61.7:

> Any conduct, comment, gesture or contact of a sexual nature
> (a) that is likely to cause offence or humiliation to any employee; or
> (b) that might, on reasonable grounds, be perceived by that employee as placing a condition of a sexual nature on employment or on any opportunity for training or promotion.[223]

While paragraph (b) of section 61.7 is equivalent to the *quid pro quo* harassment developed by jurisprudence, subparagraph (a) is much wider than the "poisoned environment" type of harassment recognized by the cases.

The limits of the poisoned environment type of harassment are illustrated by *Watt* v. *Regional Municipality of Niagara*.[224] The complainant, along with another woman, was a member of a predominantly male road crew and alleged discrimination with respect to the terms and conditions of her employment, and that she was subjected to an "abusive

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[216] *Ibid.*
[217] *Ibid.* at 604-05.
[218] *Supra*, note 181.
[219] 91 L. Ed.2d 49 (1986).
[220] *Ibid.* at 63.
[221] *Ibid.*
[222] *Ibid.*
[223] R.S.C. 1970, c. L-1, *as am.* S.C. 1984, c. 39, s. 12.
[224] 1984), 5 C.H.R.R. D/2453 (Ont. Bd. of Inquiry) [hereinafter *Watt*].

working atmosphere". The evidence established that her supervisor held sexist attitudes. He had stated in his testimony that he "didn't think actually that women were ever put on this earth to do the work of men". The Board found that the supervisor held biases against women; he made remarks, both to the complainant and to third parties, in which he expressed his prejudice that women did not belong in this type of work. However, the Board found that he did not act on his prejudices and that the complainant's adverse treatment at the job was due to "performance or attitudinal problems of the Complainant". The Board took pains to note that the other female worker encountered no problems whatsoever.

The complainant's second allegation, that she had been subjected to an abusive working environment, was based on two "jocular remarks" which the Board found were offensive. It is necessary to set out these remarks to properly illustrate the limits of harassment. The first was the most offensive:

> There was a very unpleasant odour in the yard as someone had apparently left a dead animal in one of the trucks. The complainant asked what the cause of the aroma was and Mr. Brady, who was nearby, is alleged by the complainant to have come over to her and pulled apart her legs, insinuating that she was the source of the unpleasant odour.[225]

In the second, the complainant's supervisor in describing to her his heart pills said "[w]atch out for that one, that's a passion pill, if you take it you'll run into the woods and take your pants off".[226] The Board found: "The two 'jokes' in question are, of course, quite offensive but they do appear to be isolated incidents rather than part of a continuing pattern of verbal harassment through the use of profane humour."[227]

The Board set out a two-branch test of environmental harassment:

> [I]nsults or taunting of this kind must, through a combination of offensiveness and frequency, reach a level at which the victimised employee reasonably believes that continued exposure to such conduct is a condition of the job and it must also be the case, of course, that other employees are not subject to the same condition.[228]

The Board was influenced by the "general roughness and profanity of the working environment"[229] and that the evidence suggested that male employees were often the butt of similar humour. The case was decided under paragraph 4(1)(g) of the old *Ontario Human Rights Code* which prohibited discrimination "against any employee with regard to any term or condition of employment because of . . . sex". The Board's emphasis that men were subjected to the same type of humour is understandable

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[225] *Ibid.* at D/2465.
[226] *Ibid.* at D/2466.
[227] *Ibid.* at D/2467.
[228] *Ibid.*
[229] *Ibid.*

under this section, but what about the new subsection 6(2) which provides: "Every person who is an employee has a right to freedom from harassment in the workplace because of sex." The Board's logic would seem to continue to apply in that under the former section 4 the discrimination had to be "because of sex" whereas under the new section 6 the *harassment* must be "because of sex".

However, the *Canada Labour Code* goes much further than this and prohibits "any conduct, comment, gesture or contact of a sexual nature".

As well, the Board's requirement that there be a continuing pattern of behaviour would continue to apply under Ontario's *Human Rights Code, 1981*. Subsection 9(f) defines "harassment" as "engaging in a *course* of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome"(emphasis added). Thus, except for *quid pro quo* harassment, an isolated incident could not establish environmental harassment under the Code. (However, I suggest that a course of conduct is a lower standard than a term or condition of employment.) It is noteworthy that under the *Canada Labour Code* even one gesture of a sexual nature that is likely to cause offence or humiliation to any employee is within the meaning of sexual harassment.

The *Canada Labour Code* goes further and requires every employer to issue a policy statement concerning harassment that defines harassment, announces that every employee is entitled to employment free of harassment, commits the employer to make every reasonable effort to ensure that no employee is subjected to harassment, announces that the employer will take disciplinary measures against persons who harass, explains procedures by which the employer will deal with complaints of harassment and assures complainants of confidentiality.

Whereas the *Watt* case illustrates the limits of environmental harassment, *Fullerton* v. *Davey C's*[230] illustrates the limits of *quid pro quo* harassment. Both these cases indicate the Board's reluctance to interfere with normal relationships at the workplace. Mr. Shime in *Bell* v. *Ladas* had said:

> One must be cautious that the law not inhibit normal social contact between management and employees or normal discussion between management and employees. It is not abnormal, nor should it be prohibited, activity for a supervisor to become socially involved with an employee. *An invitation to dinner is not an invitation to a complaint.*[231]

In the *Fullerton* case the complainant was hired as a waitress by a restaurant at which the individual Relph was an assistant manager. They spent a social Friday evening together. The complainant testified that the assistant manager picked her up at her home and they had dinner, listened to jazz and then went dancing. The assistant manager denied picking her

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[230] (1983), 4 C.H.R.R. D/1626 (Ont. Bd. of Inquiry) [hereinafter *Fullerton*].
[231] (1980), 1 C.H.R.R. D/155 at D/156 (Ont. Bd. of Inquiry).

up and did not remember going dancing afterwards. The assistant manager paid the bill. Subsequently the complainant testified that the assistant manager proceeded to attempt to establish a personal relationship with her, calling her at home three or four times and attempted to touch and kiss her at work. The Board summarized the evidence as follows:

> I do not think Mr. Relph's actions can be interpreted as being overt sexual contact. The alleged touching and kissing took place in restaurant areas where other employees had full access and were or could have been present. I accept Mr. Relph's evidence that he was treating Ms. Fullerton in a similar fashion to the other employees of Davey C's. I am however sympathetic with Ms. Fullerton's position that she was both embarrassed and intimidated by this contact. She was a newcomer at Davey C's and found herself befriended by one of the managers who took her out for an evening and subsequently seemed to be touching her in a way which made her anxious. It is my opinion that Ms. Fullerton may have overreacted. In light of her anxiety stemming from previous experiences in the restaurant industry, and her belief that Glen Relph was the management person to whom she was responsible, her concern and tension are understandable.[232]

Subsequently the assistant manager invited the complainant down to his office for a couple of hours when she was not very busy. He did not deny this remark but testified such a remark would have been a joke as sexual liaison during working hours could not have been taken seriously in that it would have been quite impossible. In any event two weeks later the complainant was told by the assistant manager that her employment was terminated. The complaint was dismissed by the Board essentially because the manager, not the assistant manager, made the decision to end her employment for reasons unconnected to her relationship to the assistant manager.

VII. Conclusion

This survey will be continued in the next issue.

Part II will discuss mandatory affirmative action in light of employment equity legislation and the Supreme Court of Canada's decision in *Action des Femmes* v. *C.N.R.*[233] As well it will review important legislative initiatives in the area of equal pay, and the jurisprudence relating to the application of the *bona fide* occupational requirement hate propaganda, pregnancy discrimination, matters of practice and procedure and the use of statistics to prove discrimination.

VIII. Addendum

The Supreme Court of Canada's judgment in *Robichaud*[234] was rendered on July 29, 1987, just before this work went to press. The

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[232] *Supra*, note 230 at D/1629.

[233] *Action Travail des Femmes* v. *C.N.R.* (25 June 1987), 19499 and 19500 (S.C.C.).

[234] *Robichaud* v. *R.* (29 July 1987) 19326 (S.C.C.) [hereinafter *Robichaud*].

unanimous judgment, written by Mr. Justice La Forest, decided that the *Canadian Human Rights Act*, as it existed prior to 1983, imposed absolute liability on employers for the discriminatory acts, including harassment, of their employees. The employer's due diligence in responding quickly and effectively to a complaint goes to remedy, not liability. This conclusion is based on the remedial nature of human rights legislation, the central purpose of which is to eradicate anti-social conditions without regard to the fault, motive or intention of those who cause them. Only the employer was able to provide the remedies contemplated by the Act.

The amendments to the *Canadian Human Rights Act* in 1983[235] that now provide for employer liability expressly impose merely strict liability on employers. Subsection 48(6) allows employers the defence of due diligence.

While the *Robichaud* case was based on facts that occurred in 1978 and 1979, its primary significance extends to the proper interpretation of 1983 amendments. Subsection 48(5) of the Act now imposes liablity on employers for the acts of its employees done "in the course of employment". The respondent's main argument in the Supreme Court of Canada was that acts of harassment are outside the scope of an employee's job. Mr. Justice La Forest noted that sexual harassment is not really referable to what the employee was employed to do. However he said that the phrase "in the course of employment" is not to be interpreted in the same way it is in the law of torts. Rather, in human rights jurisprudence it meant "work or job-related"[236] and as being "in some way related or associated with the employment".[237] The phrase, as it appears in subsection 48(5) of the Act, will undoubtedly be interpreted in the same way.

The phrase is also used in section 44 of Ontario's *Human Rights Code, 1981* which imposes absolute liability on employers for acts of employees done "in the course of his or her employment". There is no defence of due diligence under the Ontario Code. Subsection 44(2) merely places the duty on a board of inquiry to make known its opinion as to whether an act of an employee was done with or without the acquiescence of the employer. However, it must be remembered that subsection 44(1) of the Ontario Code does not apply to harassment and sexual solicitation which are expressly exempted from its application.

The short concurring reasons of Mr. Justice Le Dain in *Robichaud* are particularly pertinent to the interpretation of the Ontario Code. Since under subsection 41 the board of inquiry may make an order only against the party who contravened the Code, and since subsection 44(1) does not apply to harassment and sexual solicitation, it would seem that remedial orders cannot be made against an employer for harassment by an employee. Mr. Justice Le Dain went further than concluding an employer

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[235] S.C. 1980-81-82-83, c. 143. *See also supra*, text accompanying footnote 53.
[236] *Supra*, note 234 at 7.
[237] *Ibid.* at 11.

is liable for a discriminatory practice by an employee. He ruled also that a discriminatory practice by an employee is considered to be a discriminatory practice by the employer. Thus while the rest of the Court imputed to the employer the liability for the employee's discrimination, Mr. Justice Le Dain would impute to the employer the discriminatory act of the employee. If so a board of inquiry can make an order against an employer under subsection 40(1) of the Ontario Code for the harassment done by an employee because it is the harassment and not merely the liability therefor that is imputed to the employer. The employer becomes a party that has contravened the Code. However, for the reasons discussed earlier in this survey,[238] I do not believe that the Ontario Code read as a whole is susceptible of this interpretation. Such a reading would make subsection 44(1) redundant and its express excepting of harassment and sexual solicitation meaningless.

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[238] *See supra*, text at 504.

DOCTORAL RESEARCH ON CANADA AND CANADIANS. By Jesse J. Dossick. Ministry of Supply and Services Canada, 1986. Pp. xv, 559. ($38.75).

THESES IN CANADA: A BIBLIOGRAPHIC GUIDE. By Denis Robitaille and Joan Waiser. Ministry of Supply and Services Canada, 1986. Pp. xi, 72. ($8.50)

DOSSIER 3: LEGAL RESEARCH ACTIVITY IN CANADA. Edited by Catherine M. Parker. Canadian Law Information Council, 1986. Pp. vi, 169. ($20.00)

> We cannot afford to live with a legal system which has not been at least reconsidered, and perhaps dramatically reconstituted, in the light of changes in Canada's economy, demography, political culture, technology, international relations, social organization, physical environment and ethical sensibilities.[1]

And so in its survey of the state of legal research in Canada, the Consultative Group on Research and Education in Law urged an increased emphasis on all types of legal research; and, in particular, it called upon the legal research community to take fundamental research "on" law much more seriously.[2] One new publication, a second edition of an existing publication and a relatively recently established third publication can all assist in meeting this challenge of the ARTHURS REPORT.

DOCTORAL RESEARCH ON CANADA AND CANADIANS is the result of a more than decade long project aimed at bringing together in one source every doctoral dissertation about Canada and Canadians. While not without its faults, this impressive volume is an indispensible source to any researcher interested in virtually any aspect of Canadian history and society. The book contains bibliographic mention of more than 12,000 dissertations written about Canada and Canadians between 1884 and the spring of 1983 at universities in Canada, the United States, the United Kingdom and, to a more limited extent, Ireland, Western Europe and Australia. An author index at the end of the book provides microfiche numbers of dissertations for which the National Library of Canada holds microform copies available for purchase and inter-library loan.

Under twenty-nine main subject headings, from Agriculture to Scientific Studies, this well-organized and cross-referenced book gives the author's name, title and institution and the date of dissertations falling within the specific subject classifications. Under Law, for example, entry items include: early Canadian law, administrative law, air and space law,

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[1] REPORT TO THE SOCIAL SCIENCES AND HUMANITIES RESEARCH COUNCIL OF CANADA BY THE CONSULTATIVE GROUP ON RESEARCH AND EDUCATION IN LAW (Ottawa: Ministry of Supply and Services, 1984) at 71 [hereinafter ARTHURS REPORT].

[2] ARTHURS REPORT, *ibid.* at 66. The Report describes fundamental research on law as "research designed to secure a deeper understanding of law as a social phenomenon, including research on the historical, philosophical, linguistic, economic, social or political implications of law".

canon law, civil law, commercial law, common law, comparative law, constitutional law, criminal law and procedure, courts, immigration and alien law, international law, labour law, maritime law, provincial law and tax law. Taken together, these sub-categories do not, obviously, encompass the whole of the field of law. They do, however, provide convenient headings with which to look for topics of particular interest. The cross-indexing will do the rest, although this is not the most significant contribution that the compilation makes to inter-disciplinary research on law.

Indeed, doctoral dissertations in law and law-related subjects comprise an easily ascertainable collection of primary research: approximately one hundred dissertations "in" law are listed in this book. More useful, however, to research on law, are the dissertations listed elsewhere in the guide, a few of which are cross-referenced to law. For it is these other subject categories, such as Communications, Economics, Education, History and Health Sciences, to name just a few, which offer great promise to the legal researcher seeking to inform his or her work through giving it a wider context than that of just a study of the law or of a given legal institution. The book, therefore, is a source of great potential to any researcher seeking to discover what primary doctoral work has already been completed on a subject, which may impinge on a given legal investigation. At the same time, it notifies the research community of research lacunae remaining to be filled. DOCTORAL RESEARCH ON CANADA AND CANADIANS is, in brief, an important starting point for investigation into existing primary doctoral research on subjects which will assist research on law. While not yet decided, there is some hope and great expectation that supplementary volumes will be issued on a regular basis.

THESES IN CANADA: A BIBLIOGRAPHIC GUIDE covers much wider ground than just doctoral dissertations on Canada and Canadians. In short, it leads researchers to sources (in print and on-line) of Canadian theses, meaning theses completed in Canada. Some of these theses will have Canadian content, others will not. Currently, the National Library of Canada holds some 67,000 Canadian theses on microform; representing approximately seventy percent of all theses submitted to Canada's universities. While DOCTORAL RESEARCH ON CANADA AND CANADIANS performs a signal service in its compilation of doctoral dissertations, it ignores the huge and significant scholarship produced at the master's level. THESES IN CANADA (which is a revised and more extensive second edition) gathers together existing published sources of this research. Both general and specific subject bibliographies are described and, depending on the topic, recourse may be made to both. For example, THESES IN CANADA includes bibliographic reference to general lists of Canadian theses, such as CANADIAN THESES (MICROFICHE) which lists all Canadian theses, including law theses, as well as lists of specific and specialized theses bibliographies, including for example, seven such guides to theses completed on the subject of Africa. To the researcher surveying the field

the most useful bibliographic source cited in this publication is CANADIAN THESES (MICROFICHE).[3]

CANADIAN THESES (MICROFICHE) is the most comprehensive and current source of information pertaining to completed graduate research. Produced twice a year on fiche, it includes both masters and doctoral, theses produced in Canada. This bibliography provides access, by broad Dewey decimal number, author, title and keyword index, to this huge body of Canadian research. In addition it provides access to some foreign theses with Canadian content. (Canadian theses submitted to the National Library prior to 1980 are identified in CANADIAN THESES, a predecessor printed publication.[4]) Information on theses is also available through two on-line databases: DOBIS, the National Library's bibliographic system and CAN/OLE, the National Research Council's information retrieval system.[5]

While CANADIAN THESES (MICROFICHE) is up-dated bi-annually, it is not as satisfactory a research tool as DOCTORAL RESEARCH ON CANADA AND CANADIANS. Without a specific subject heading, search and discovery of relevant primary work is a much more difficult task. The existence of specialized bibliographies for particular disciplines will only partially assist in surmounting this problem. These deficiencies are clearly real ones, for it is indisputable that theses and dissertations are essential to research and as such must be brought to the attention of researchers in a meaningful way. Changes are obviously required to make CANADIAN THESES (MICROFICHE) a more useful research source. What would be most helpful would be to merge it with DOCTORAL RESEARCH ON CANADA AND CANADIANS and produce annually two new comprehensive source books about graduate research: the first relating to graduate work on Canada and Canadians, the second about graduate work conducted in Canada. The benefits to the research community speak for themselves. Funding is, of course, another matter.

Unlike either of the previously described publications, DOSSIER: LEGAL RESEARCH ACTIVITY IN CANADA is not a guide to existing primary research in Canada. It is instead, comparable to a register of dissertations providing a means of informing the academic community about research currently being undertaken, in law and on law, in Canada. The first issue appeared in 1984 and two other issues have appeared since, providing a window on legal research currently being undertaken in Canada.

Entries are arranged by subject, ranging from the Administration of Justice to Women and the Law, with more than sixty other areas of

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[3] CANADIAN THESES, Microfiche Collection (Ottawa: National Library of Canada, 1984-).

[4] CANADIAN THESES (Ottawa: National Library of Canada, 1947-83).

[5] *Dissertations Abstracts Online*, a data base established by University Microfilms International, provides on-line access to a number of American dissertation sources. It also provides access to approximately 35,000 Canadian theses but unlike the two Canadian on-line sources, allows this group of theses to be searched under subject headings.

law in between. Information provided includes the title, the research workers, the organization(s) responsible for the research, the beginning and projected completion dates of the research, funding sources and project summary. A principal author index provides another means of locating research work when the author is known. As well, the projects may, where appropriate, be listed in more than one subject area.

If DOSSIER has one failing it is that it relies on faculties and individuals researching the law to provide it with information about their work. Certainly, the DOSSIER project information solicitation form reaches all Canadian law faculties, law reform commissions and probably relevant government departments. But does it reach the graduate students in faculties other than law, amateur historians, lawyers and other legal workers interested in legal research? As a primary source of information about current research in and on law DOSSIER deserves to be much better known and well supported.

That DOSSIER has received significant support is evident by the most recent volume (1986), which is rich with information about current legal research in Canada. There is a great deal of activity currently underway and, indeed, much of it appears to be research on rather than in law. Reading DOSSIER is a crucial means of keeping abreast of what work is being done. DOSSIER, along with DOCTORAL RESEARCH ON CANADA AND CANADIANS and THESES IN CANADA are all useful tools in alerting the academic community to what work is being done, what work has been done and what work remains to be done. Scholars interested in imparting an inter-disciplinary perspective to their legal research have in these three publications a key to that still somewhat elusive door.

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THE LAW AND MEDICINE IN CANADA (2d ed.). Gilbert Sharpe. Butterworths, 1987. Pp. xxxiii, 642. ($85.00)

Gilbert Sharpe and Glenn Sawyer's DOCTORS AND THE LAW[1] was written as a practical legal guide for Canadian physicians. Now, working alone, Sharpe offers a re-titled second edition with footnotes, extensive appendices and entirely new sections. Unlike the first edition, this book is aimed at lawyers and legal academics as well as health care professionals. Besides offering some critical comment on this volume, I will compare it with the competition, namely Ellen Picard's LEGAL LIABILITY OF DOCTORS AND HOSPITALS IN CANADA and David Marshall's THE PHYSICIAN AND CANADIAN LAW.[2]

All three volumes share common traits and objectives. Each is generally uncritical of medical or legal privilege. Each is primarily "black letter" law with little reference to empirical research on law and medicine or to theoretical perspectives. Each is written by a person firmly fixed in the medico-legal establishment. Each volume employs sexist terms and is almost totally insensitive to the power politics inherent in the use of words like "doctor" and "patient".[3] Each volume reports caselaw tolerably well but errors and omissions emerge when the authors stray from a narrow legal analysis. Marshall, for example, erroneously claims that malpractice damage awards are rising "precipitously [and] they actually treble yearly".[4] Picard provides some statistics including the average awards received by medical plaintiffs in the relevant years and no trebling is noted.[5] Except for 1976 and 1977, no real increase (correcting for inflation) is apparent. Marshall makes the least factual errors because he strays least from the narrow perspective. Picard also avoids problematic policy areas except for her chapter on compensation and the litigation "crisis" which is short but competent. Sharpe ranges more broadly than the others and, partly as a result, makes more errors.

Marshall's book is the least valuable for legal purposes. Case citation is brief and except for a section on the "Coroners' System" (Marshall is a coroner) the same material is better covered in the other two volumes. Picard's focus on medical liability leaves out much of what Sharpe covers under the wider heading of "Law and Medicine" including such issues as medical licensing, abortion, law and psychiatry, organ transplants, determination of death and hospital staff privileges. Picard's case analysis on the standard liability issues is more comprehensive. She cites more

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[1] G. Sharpe & G. Sawyer, DOCTORS AND THE LAW (Toronto: Butterworths, 1978).

[2] E.I. Picard, LEGAL LIABILITY OF DOCTORS AND HOSPITALS IN CANADA (Toronto: Carswell, 1984); T.D. Marshall, THE PHYSICIAN AND CANADIAN LAW (Toronto: Carswell, 1979).

[3] *Compare* J.G. Haber, *Patients, Agents, and Informed Consent* (1985-86) 1 J.L. & HEALTH 43.

[4] Marshall, *supra*, note 2 at vii.

[5] Picard, *supra*, note 2 at 347.

cases and touches upon areas, such as tort actions against psychiatrists for false imprisonment, that Sharpe does not mention. Picard's appendix of case summaries and index of cases by medical procedure are useful and not duplicated by Sharpe. On the other hand, Sharpe offers surveys of medically relevant federal and provincial statutes, codes of medical ethics, government reports on artificial reproduction and the Health Disciplines Board, and a model Consent Act. In large measure, Sharpe's book complements rather than substitutes for Picard's work.

The sections and subjects added by Sharpe for 1987 are also worthy of positive comment. Compared to the older sections, the new chapters on experimentation, seat belt legislation, abortion and so forth cite comparative material, law review articles and empirical research. On abortion, for example, Sharpe does not merely begin and end with case and statute analysis as he tends to in the older sections. Instead, he provides figures on the practice and availability of abortion, he refers to surveys of public and medical opinion, he mentions the legal status of abortion in other countries and he provides some reliable medical data on the health aspects of abortion. The entire book would be improved if all the old sections could be brought up to the quality of the new chapters.

Academically, the book would also be much improved if Sharpe abandoned his uncritical and unscientific deification of physicians. At times the book reads like propaganda for the medical cause. Sharpe claims that modern medicine has made "tremendous advances" including the virtual elimination of major infectious illnesses.[6] No evidence is offered to prove this assertion. In fact, scientific literature indicates that physicians had very little to do with the decline in mortality from typhoid, influenza, tuberculosis and the rest.[7] Sharpe refers to antibiotic "wonder drugs" and other "new powerful agents" like Valium but fails to mention the widely documented misuse and abuse of antibiotics by physicians nor does he cite a single experiment to demonstrate the health promoting effects of prescription psychoactives.[8] Sharpe does not question or explain physicians' legal monopoly over hundreds of drugs nor does he offer evidence about the effect on health of mandatory prescription.[9] Instead, the reader is given the standard "Whig history" whereby physicians stand "in the forefront of the unprecedented advances" making us healthier day by day.[10] Sharpe neglects to mention the rise in iatrogenic disease,

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[6] P. v.

[7] *See* J.H. Knowles, *The Responsibility of the Individual* in J.H. Knowles, ed., DOING BETTER AND FEELING WORSE (New York: W.W. Norton, 1977) 57; A. Wildavsky, *Doing Better and Feeling Worse: The Political Pathology of Health Policy* in J.H. Knowles, ed., DOING BETTER AND FEELING WORSE (New York: W.W. Norton, 1977) 105; M. Silverman & P.R. Lee, PILLS, PROFITS AND POLITICS (Los Angeles: University of California Press, 1974).

[8] Pp. 3-4.

[9] *See* C.N. Mitchell, *Deregulating Mandatory Prescription* (1987) 12 AM. J.L. & MED. (forthcoming).

[10] P. 11.

the lack of significant increase in adult longevity or experiments that show worsening health after increases in client access to physicians and hospitals.[11] On the vast literature critical of modern medicine, Sharpe is silent. The only discouraging word he mentions is a study which compared law and medical students and concluded that medical students demonstrated more duplicity and bad faith.[12] Despite this evidence, Sharpe then claims without a shred of proof that medical school is better than law school at equiping students to handle clients. As a lawyer, he also asserts that physicians work in an atmosphere of truthseeking and cooperation, in contrast to lawyers who wallow in conflict, seek only to win and "cling to ancient precedents" while physicians "seek out new truths".[13] Sharpe does not mention that physicians prescribe drugs and perform surgery strongly influenced by medical fashion or custom, that many hospital procedures vary arbitrarily from institution to institution or that physicians generally are not well equipped to perform scientific studies.[14]

On specific legal-medical issues Sharpe frequently interjects an uninformed opinion where no opinion is required of him. Take home births and midwives as an example. Sharpe warns physicians to be wary of acceding to client requests for risky procedures. Home birth is given as an instance of a high risk process that physicians properly avoid to reduce their liability.[15] No evidence is presented to substantiate the claim that hospital birth is safer. No reference is made to surveys which suggest the superiority of midwives and home births.[16] Sharpe leaves out the matter of the Ontario Medical Association ordering its members to avoid attending home births for first-time mothers but he mentions with seeming approval the dismissal from a London, Ontario hospital of Wendy Savage, a British obstetrician, for "incompetence" after she refused to stop attending home births. Later, under the guise of professional ethics, Sharpe again asserts without any scientific basis that allowing midwives to practice is "questionable".[17]

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[11] *See* P.K. Diehr *et al.*, *Increased Access to Medical Care: The Impact on Health* 17 MED. CARE 989. *See generally* I. Illich *et al.*, DISABLING PROFESSIONS (London: Marion Boyars, 1977); R.S. Mendelsohn, CONFESSIONS OF A MEDICAL HERETIC (Chicago: Contemporary Books, 1979); J.H. Knowles, ed., *supra*, note 7; D. Danon, N.W. Schock & M. Marois, eds., AGING: A CHALLENGE TO SCIENCE AND SOCIETY (Oxford: Oxford University Press, 1981).

[12] P. 447.

[13] P. 448.

[14] *See* C.H. Baron, *Licensure of Health Care Professionals: The Consumer's Case for Abolition* (1983) 9 AM. J.L. & MED. 334; A. Allentuck, THE CRISIS IN CANADIAN HEALTH CARE: WHO SPEAKS FOR THE PATIENT (Don Mills: Burns & MacEachern, 1978).

[15] P. 24.

[16] *See* G. Corea, THE HIDDEN MALPRACTICE: HOW AMERICAN MEDICINE TREATS WOMEN AS PATIENTS AND PROFESSIONALS (New York: William & Morrow, 1977); R.S. Mendelsohn, MALEPRACTICE (Chicago: Contemporary Books, 1980); C. Dreifus, SEIZING OUR BODIES: THE POLITICS OF WOMEN'S HEALTH (New York: Vintage Books, 1978).

[17] P. 239.

Sharpe's bias throughout the book is strongly pro-physician and anti-client, pro-profession and anti-layman, pro-men and anti-women. These biases lead to significant errors and omissions in his analysis of legal developments. He claims that physicians erected barriers to entry, lobbied for licensing restrictions and formed the Canadian Medical Protective Association (C.M.P.A.) all for the public good.[18] Picard makes the similarly uncritical statement that lawyers and physicians share a common goal of "providing the best possible lifestyle for each member of our society".[19] Apparently, these professional are somehow immune from the standard human desire to promote their own pay, power and prestige. There is, therefore, no need on Sharpe's part to review antitrust suits against medical and legal associations in the United States or to consider the cost to the public of medical ethics forbidding advertising, competition or the dissemination of data on quality of service.[20] Supposedly the C.M.P.A. was not designed to deny justice to medical plaintiffs; no, its primary concern was "the professional integrity of its members".[21] Hamowy's excellent study of how Canadian physicians and their legislative allies made it virtually impossible to sue in malpractice by 1910 is not cited.[22]

Sharpe's analysis of legal liability labours under an air of unreality. His discussion is almost entirely anecdotal; the usual recital of new and familiar cases. Medical practitioners learn what might happen but not how often it does happen. In any given year, a physician's chance of losing a case in court (if a member of the C.M.P.A.) is about 0.025 percent and of settling about 0.4 percent.[23] Faced with surgical mortality risk of the same magnitude, surgeons assure prospective clients that the operation is "safer than driving a car". Only in connection with liability for "good Samaritan" acts does Sharpe cite evidence indicating that physicians' fear of malpractice is unrealistic: by 1968 of 40,000 American incidents of emergency aid only two cases resulted in dispute and settlement (both out of court and both under $500).[24] The critical legal question is why Canadian physicians are so insulated from tort liability and political accountability.

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[18] Pp. 1, 10.

[19] Picard, *supra*, note 2 at 351.

[20] *See* M.J. Trebilcock, *Regulating Service Quality in Professional Markets* in D.N. Dewees, ed., THE REGULATION OF QUALITY: PRODUCTS, SERVICES, WORKPLACES AND THE ENVIRONMENT (Toronto: Butterworths, 1983) 83; A.K. Dolan, *Antitrust Law and Physician Dominance of Other Health Practitioners* (1980) 4 J. HEALTH POL., POL'Y & L. 675. Gross also demonstrates in a thorough literature review that existing research in economics, sociology, political science and public health is unanimously critical of current medical licensing laws. *See* Stanley J. Gross, OF FOXES AND HEN HOUSES: LICENSING AND THE HEALTH PROFESSIONS (Westport, Conn.: Quorum Books, 1984).

[21] P. 10.

[22] R. Hamowy, CANADIAN MEDICINE: A STUDY IN RESTRICTED ENTRY (Toronto: Fraser Institute, 1982).

[23] Picard, *supra*, note 2 at 347.

[24] P. 279.

Sharpe and the others all dutifully advise physicians that they are legally obliged to inform clients about inherent and potential hazards. None of them, however, even hint at the possibility that physicians routinely flout the law on informed consent. No evidence is provided about how physicians normally behave with clients. Instead, the reader is simply expected to accept on faith that physicians are "interested first and foremost in the patient's well-being".[25] Having failed to prove that physicians seriously concern themselves with the remote threat of law suits, Sharpe offers a cliched defence of restrictive limitation periods. Physicians, as defendants, deserve legislative protection against "stale actions", otherwise they might be forced "to live under the lingering threat of being dragged into court by persons they may not have seen in years".[26] By Sharpe's account physicians are frail and vulnerable creatures sensitive to "social . . . pressures". They dislike testifying in malpractice actions because the adversarial methods and cross-examination make them uncomfortable.[27] They worry that if a fellow physician is found liable "adverse public sentiment" will be sparked and this will lead to "unreasonable controls" being placed on the profession.[28] Yet in the midst of their anxiety physicians do not lose sight of their higher purpose. Law suits are bad because they are a barrier to "the trust . . . so often essential to establish a favourable chance of recovery".[29] Similarly, physicians should have near absolute control of their client's file to ensure the "trust" so "essential for the caring process".[30] As usual, Sharpe fails to offer any evidence whatsoever that "trust" is "essential" to recovery. Indeed, many conditions are self-repairing, so people recover regardless of what treatment is applied and regardless of their relationship with their physician.[31]

In conclusion, Sharpe's book evidences certain technical merits and collects some useful information about medical law in Canada. Due to its broad survey nature certain of the book's chapters are necessarily superficial. A good example is the long chapter on "Law and Psychiatry" which is quite thin in content, except for the section on guardianship. The more fundamental problem though is the covert ideological and political stance Sharpe takes. More than a practical legal guide for phy-

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[25] P. 82.
[26] P. 95.
[27] P. 131.
[28] *Ibid.*
[29] *Ibid.*
[30] P. 207.
[31] A. Malleson, NEED YOUR DOCTOR BE SO USELESS (London: George Allen & Unwin, 1973).

sicians and litigation lawyers, this book is an advertisement for orthodox, licensed physicians.

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WITHHOLDING TREATMENT FROM DEFECTIVE NEWBORN CHILDREN. Joseph E. Magnet and Eike-Henner W. Kluge. Brown Legal Publications, 1985. Pp. 306. ($19.95)

This sometimes impressive book by J.E. Magnet, law professor, and E.-H.W. Kluge, philosopher, ambitiously combines in one volume a description of "Canadian neonatal practice", an analysis of the relevant legal aspects, an ethical analysis and finally a policy proposal entitled "giving the hemlock".

It proposes to amend the *Criminal Code*[1] to allow the active or passive termination of the lives of infants by doctors at the request of parents or guardians, specifically those infants who display "no reasonable prognosis for cognitive, sapient existence, or no reasonable potential for development to an existence of acceptable quality, according to the standards of a person of due discernment".[2]

In my more pessimistic or realistic moments I wonder whether legal and philosophical arguments about morally troublesome issues ever really convince anyone to recant, see the light and switch sides. As one who works on these matters from both ethical and legal perspectives I shall probably be drummed out of both areas lest such musings become contagious!

The legal and ethical analyses are generally thorough, the argumentation for the most part is logical, the credentials of the authors are impeccable and they have even referred to some of my own work on the subject. However, I remain convinced that killing infants is immoral and should remain a serious crime for two reasons.

In the first place there is more to moral persuasion than logical argument and accurate data alone. Those of *any* strong persuasion on this issue are unlikely to capitulate in the face of tidy syllogisms and ringing declarations that "their arguments fail". There is, after all, more than logical argument alone invested in this subject of euthanasia, whatever side one is on: realities such as belief, conviction, commitment, intuition, emotion, psychology and passion. That these considerations are largely missing in a legal and philosophical analysis is neither surprising nor a defect.

But at times the authors too quickly dismiss appeals to such factors as being mere "flawed reasoning". Consider, for example, their reply to the view that active euthanasia is unethical because forbidden by the code of ethics of the medical profession:

> This reasoning . . . is flawed. What is presented as a code of ethics is not really a code of ethics, but a statement of ethos: a statement of the beliefs and opinions subscribed to by the majority of the profession. While it may

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[1] *Criminal Code*, R.S.C. 1970, c. C-34.
[2] Pp. 232-33.

> have sociological, cultural and even legal significance, it does not guarantee the ethical correctness of its injunctions.[3]

Perhaps not, but a "statement of the beliefs and opinions of the majority of the profession", persisting as it has for many generations, may well reflect an enduring commitment of greater weight and influence than unflawed reasoning alone.

Second, the arguments of the authors may not always be as logical, the analyses as comprehensive or the data as compelling as claimed. Firm, unequivocal and generalized descriptions of attitudes and practices are of course only as reliable as the data upon which they are based. In describing the decision-making attitudes and practices of doctors in the neonatal context the authors may have claimed more certainty and consensus than their data and research methodology can reasonably support. Given the severe indictment they make of doctors generally, this point merits some attention here.

We are told that the empirical research was based upon interviews, using the technique of investigative journalism, the intention being "to paint a detailed picture of what really goes on inside . . . to ask questions calling for a descriptive answer . . . to put interviewees on the spot . . . to elicit reactions and responses that would give the feel of actual intensive care practice".[4]

So far so good. Investigative journalism by means of interviews is an acceptable manner of getting information, and it can indeed add colour and immediacy. A good interview by an informed and experienced questioner can provide a reliable picture, at least of the individual instance. The limitation of the technique is that the information may be more or less anecdotal and not accurately generalizable. Only a rigorously designed sample survey would seem capable of supporting, for example, this categorical and generalized description:

> The reality in neonatal units is that doctors retain ultimate decisional authority when withholding treatment is perceived as medically indicated. Doctors do not inform parents of all treatment alternatives. Parents are not consulted about decisions to initiate or discontinue life saving ventilation. Doctors refuse to operate in the face of some parental requests. Selective, biased presentation of medical information is used to control parental choice.[5]

How many interviews were done? Were the same questions asked in each case? In how many units and institutions were interviews actually done? Were the interviewers provided sufficient access and time to probe beneath the surface and study the unique and complex decision-making and interactions of the neonatal unit? The authors did not apparently use the research technique of participant observation; many feel that some

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[3] Pp. 227-28.
[4] Pp. 6-7.
[5] P. 81.

version of that approach is the only fair and accurate way of determining attitudes and practices in such locales.

Anyone familiar with the neonatal and pediatric context will of course and regrettably have seen examples of all or most of the attitudes and actions of doctors which the authors listed in the excerpt above. But that is far from the whole story. There is another side as well. I and many of my colleagues know of doctors who go to great pains to carefully and honestly inform, consult and fully involve parents in these often tragic decisions. Surprisingly the interviews quoted and the descriptions provided do not reflect that side of the story at all.

In my view, the strongest part of the book is its second chapter containing the analysis and application of Canadian law regarding euthanasia and related issues. The chapter is articulate, thorough and helpful, and contains a great deal of information and exploration not readily found elsewhere.

One could take issue with the authors on several points in that chapter, but I will confine myself to the matter of lethal drugs. The authors argue that the administration of drugs to relieve pain, when it is known that death will thereby be hastened, is always murder according to the present *Criminal Code*.[6] This is not necessarily so. Of course it would be murder to give dosages of pain control drugs clearly excessive for the relief of pain in the particular circumstances of an individual patient. In such cases it would be difficult indeed to convince a court that the required *mens rea* or intent to kill was absent. But if the pain control drugs are used *appropriately* in that patient's circumstances, even if the secondary and known effect is to hasten death, it is doubtful indeed that a court would or could construe the presence of the required *mens rea* for murder.

In practice the issue would surely turn on the matter of whether or not the dosage was appropriate, not on whether the hastened death could be predicted. Furthermore, it is erroneous to imply, as do the authors, that doctors always know when drugs will hasten and cause death, and that consequently a risk/benefit calculus cannot apply here. In fact, careful pain control can sometimes prolong life and contribute to improving health, rather than necessarily shorten life; which outcome cannot always be known in advance.

There is much of interest in chapter three containing the book's ethical analysis of the issues. The writing is crisp, the reasoning generally logical and much ethical wisdom is conveyed. On the matter of the never ending debate as to whether there exists a moral distinction between active and passive euthanasia, the authors add little that is new. Since everything that can possibly be said on that subject has already been said, they can hardly be faulted for that. One observation may nevertheless be in order about their position that there is no morally relevant distinction to be made.

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[6] Pp. 135-36.

First of all, they equate *acting* (active euthanasia) and *refraining* from acting (passive euthanasia) because the intent (death) is supposedly always the same in both cases; as well, they equate *knowing* with *intending*.

But knowing or being aware that death will result by my inactivity, that is cessation or non-initiation of treatment, is simply not in itself morally equivalent to intending that death. Surely the morally, and legally, relevant distinction, one not examined by the authors, is that of whether or not there is a *duty* to act in that particular case. If I have a duty to act, for instance because treatment is medically indicated, and I know that my inactivity will result in the patient's death, then of course acting and refraining would be morally equivalent; refraining would be killing. However, if I have no such duty, for instance because further treatment would be therapeutically useless, then knowing that death will result is not in itself equivalent to intending death. Surely the two cases cannot be collapsed into the single category of "deliberate death" as the authors have done. In the absence of a duty to continue or to initiate treatment, the common perception and explanation of doctors that it was the overmastering disease, not their omission, which killed the patient, is ethically sound.

Chapter four contains the authors' policy proposal, outlined at the beginning of this review, and the arguments offered in its support. That policy proposal, to enable both active and passive neonatal euthanasia, is based in part on the autonomy and equality of the neonate.

> If the radically defective neonate is a person in the full sense of the term, then the ethics of decision-making require that all options open to others be open to him, administered by his proxy. Any unjustified infringement is a violation of autonomy. . . . Thus, we advocate explicit legalization of passive *and* active euthanasia as a matter of ethical consistency. If suicide is open to the competent individual, as it is, that right should equally be available to the incompetent. This implies that the surrogate have access to suicide as an option: suicide by agent. Without this, the rights of the incompetent are less than those of the competent. . . .[7]

It is interesting to note, in passing, that Magnet and Kluge base their appeal for infanticide on the *full personhood* of the neonate, whereas Kuhse and Singer in their book, SHOULD THE BABY LIVE?,[8] based their case for infanticide in large part on the neonate's *lack* of full personhood.

But is the competent person's "right" to suicide an appropriate basis for the neonate's right to active euthanasia or "suicide by agent"? Not necessarily. In the first place the authors' appeal to the repeal in 1972 of section 225 of the *Criminal Code*, attempted suicide, hardly strengthens their case. The repeal of that offence was not necessarily equivalent to

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[7] Pp. 198-99.

[8] H. Kuhse & P. Singer, SHOULD THE BABY LIVE?: THE PROBLEM OF HANDICAPPED INFANTS (Oxford: Oxford University Press, 1985).

granting a legal right to suicide to the competent. It may in practice come to that, but in fact the repeal simply *decriminalized* the offence of attempted suicide.

Second, a more apt comparison may be that between *aiding* the suicide of a competent person who is physically unable to manage it, and the active euthanasia or "agent suicide" of the neonate. But in fact aiding suicide is *not* presently available for the competent in that it remains a criminal offence.[9] That being so, it is arguable that the neonate is not in reality being discriminated against..

There is a more troublesome case and argument advanced by Magnet and Kluge in support of the active termination of the lives of some very seriously disabled infants. They refer to those infants who have disabilities "so severe that continuation of life would be an assault on the dignity of the person and yet *the defect itself may not be inherently fatal. . . .* Statutory recognition of palliative care only is therefore quite correct. But cases like these do not fall under that rubric".[10] If there is a case to be made for the active termination of the lives of some seriously handicapped infants, these are undoubtedly the cases which would give most urgency and respectability to such a policy. Various forms of palliative and chronic care are more effective and more available to these infants than many realize. Fears that such infants are presently being dehydrated or starved to death in agony and isolation are to my knowledge greatly exaggerated. Nevertheless, there is no denying that there are and will undoubtedly remain some infants and children whose condition and prospects are so horrendous and intractable that they may, and even should be allowed to die, but they will not die unaided.

But to acknowledge this tragic reality does not make a policy of active euthanasia ethically inevitable. Their individual suffering and discomfort would of course be ended by killing them, and doing so would at least be consistent with one central virtue and impulse: mercy and compassion for the individual. But on the other side of the moral equation must be weighed the possible violence done to other intuitions, commitments, beliefs and relationships. Ultimately many other individuals not in this category could be at increased risk because we may not be able to control and limit a killing policy once unleashed. Such considerations and fears will not of course persuade some, but they continue to persuade many.

In the final analysis, the very mandate of the enterprise of medicine itself is implicated in the choice for or against a policy of active euthanasia of some seriously handicapped infants. Many continue to believe that medicine and doctors have no mandate to cure all ills, to alleviate all

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[9] *Criminal Code*, R.S.C. 1970, c. C-34, s. 224.

[10] P. 209 (emphasis added).

suffering, at any moral cost and no matter what the dangers. Medicine does, after all, have its limits.

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CROSS-BORDER LITIGATION: ENVIRONMENTAL RIGHTS IN THE GREAT LAKES ECOSYSTEM. By Paul R. Muldoon (with David A. Scriven and James M. Olson). Carswell, 1986. Pp. xxxv, 410. ($75.00)

CROSS-BORDER LITIGATION: ENVIRONMENTAL RIGHTS IN THE GREAT LAKES ECOSYSTEM is a project of the Canadian Environmental Law Research Foundation. It is in fact the first in a planned series of examinations of "ways to overcome jurisdictional diversity and implement the ecosystem approach in the Great Lakes Basin".[1] This fact may signal the reformist approach of the book, but CROSS-BORDER LITIGATION acts as more than simply an argument for change; it also serves primarily as a useful information source for anyone contemplating either litigating a transboundary environmental issue or participating in environmental proceedings in another jurisdiction within the Great Lakes ecosystem.

Two comments about the book's scope and approach should be made at the outset. First, the use of the term "litigation" in the title is somewhat misleading, although its sense is clarified in the text. What is contemplated here is not only the pursuit in a court of law of private remedies for actual or threatened environmental harm, but also participation in "proceedings before administrative tribunals, boards and agencies".[2] Second, the scope of application of the book is expressly restricted to the Great Lakes ecosystem,[3] which approach reflects the book's underlying thesis of the value of the "ecosystem approach" in environmental management. The detailed review of environmental legislation *is* limited to the Great Lakes Basin jurisdictions but the principles discussed in chapter two regarding common law barriers to transboundary actions are of general application, as are the principles underlying the reforms advocated. More importantly, however, there is a fundamental conceptual flaw, it seems, in this insistence on the so-called ecosystem approach in general and its application here to the Great Lakes Basin. While environmental problems originating in the hydrosphere will generally be contained within the drainage basin, in the case of atmospheric pollution, the bounds of impact are not so easily defined. In that sphere, as we are unfortunately discovering, the entire planet could be seen as the relevant ecosystem. Thus, the drainage basin is, in principle, a fairly meaningless spatial context for an examination of environmental rights with respect to an entire sphere of environmental degradation — the atmosphere.[4] The truism underlying the advocacy of the ecosystem approach that environ-

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[1] P. x.

[2] P. 7.

[3] The Great Lakes ecosystem is equated with the Great Lakes Basin in the book, and jurisdictionally, it comprises the eight riparian states, Ontario, Quebec and the Canadian and U.S. federal governments.

[4] In fact, in the case of the Great Lakes, there *is* a certain spatial coincidence between the basin area and the area containing the major sources and impact points of air pollution. But generally, such is not necessarily the case.

mental harm does not respect political boundaries is of course applicable to air pollution too. Therefore, the *principles* advocated in this book are no less germane; it is only the restricted *scope* of their application which is questioned.

While problems of transboundary environmental injury are not new, the heightened sense of awareness and urgency about them is. CROSS-BORDER LITIGATION contributes to this awareness, describes in detail the courses of action, both remedial and preventive, that may be taken, and identifies the barriers that may be encountered.

Chapter two deals with the barriers, and lack thereof, to remedial civil actions. It discusses the range of private international law considerations inherent in any transboundary action, including issues of access, jurisdiction (both personal and subject matter) and choice of law; as well, it covers the participatory issues of standing, intervention and the maintenance of class actions.

The much lengthier third chapter laboriously canvasses the litigious environmental and related rights found in the legislation of each jurisdiction under a four-part categorization of proceedings: administrative hearings (environmental assessment, permit and standard-setting hearings); administrative review and remedies (any kind of review by an *administrative* agency, as well as complaint procedures); judicial review proceedings; and public enforcement rights (generally the "citizen suit" in the United States and private prosecution in Canada). While the object of this chapter is to identify the participatory rights under the various pieces of legislation, the extent to which those rights are available to non-residents and the extent to which extraterritorial environmental effects are within the scope of the tribunal's jurisdiction to consider, it consequently provides a useful general survey and summary of the environmental legislative regimes of each of the Great Lakes jurisdictions. In so doing, it also furnishes an interesting comparison between the American and the Canadian jurisdictions which clearly indicates the vastly more extensive participatory rights that generally exist south of the border. This perspective in itself invites consideration of avenues of reform for Canadian jurisdictions. To mention just a few of these rights that are discussed in the book, in Indiana, persons actually have the right to propose environmental standards and regulations and, generally, to have those proposals considered by way of a hearing.[5] In Minnesota, a petition of more than twenty-five individuals can require the preparation of an environmental assessment worksheet by the responsible government agency, where one is not required by regulation.[6] This step is preliminary to and may perhaps preclude an environmental impact statement. In New York, the regulations that authorize water discharge permits specifically grant notice and participatory rights to out-of-state governments, including

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[5] IND. CODE ANN. § 13-7-7-3 (Burns 1981).

[6] MINN. STAT. ANN. § 116D.04(2a)(d) (West 1986).

Canadian governments, with respect to permit hearings.[7] Ironically, some of the jurisdictions with the most liberal range of litigious rights, such as Minnesota, are the least generous in extending their rights to non-residents.

The fourth and final chapter purports, in the first place, to summarize the state of environmental rights in the Great Lakes ecosystem. The analysis is meagre and at times even inaccurate, due presumably to careless proofing,[8] but it concludes, interestingly, that "a considerable measure of equality already exists thoughout the ecosystem".[9] Second, the chapter pulls together the previously recommended reforms to remove barriers to equal litigious rights and also proposes as an alternative an "Ecosystem Rights Act".

While they do not derogate from the overall contribution made by this book, several weaknesses on various levels emerge and should be mentioned. As far as the book's perspective is concerned, the author does admit that cross-border litigation is but one approach to the settlement of transboundary environmental disputes, but he dismisses, in only two sentences, the viability of other mechanisms such as mediation, arbitration and international adjudication.[10] Further, although the approach of the book is, in part, comparative as *within* the Great Lakes ecosystem, more than a passing glance at the approaches adopted in other parts of the world that are grappling with similar problems of transboundary environmental injury would have been enlightening.[11]

Other weaknesses in content or analysis include a failure to highlight the distinction between place-of-injury litigation and place-of-origin of environmental harm litigation. The discussion concentrates largely, though not exclusively, on the latter, but express and separate recognition of the possibilities for the former and a weighing of the very different considerations and hurdles involved with each would have had practical value. Also, consistent use of some representative hypothetical cases might have made the inevitably dry discussions of conflict of laws rules easier to digest.

Gaps in accuracy and authority do present themselves in CROSS-BORDER LITIGATION. Some are fairly inconsequential, but others are more serious, such as the inclusion of Missouri in the list of non-Great Lakes states that have enacted their version of the *Uniform Transboundary Pollution Reciprocal Access Act*.[12] There has been some confusion in the literature over which states have in fact adopted this legislation, but

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[7] 6 NYCRR pt. 753.4(c), as cited at p. 262, n. 698.

[8] P. 353. The state of Ohio is substituted for what apparently should read "the province of Quebec" in a statement identifying those jurisdictions with no territorial limitations in their legislation.

[9] P. 348.

[10] P. 5.

[11] *See, e.g., Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden*, 19 February 1974, 13 INT'L LEGAL MATERIALS 591.

[12] 9A U.L.A. 516 (1986 Supp.).

according to the National Conference of Commissioners on Uniform State Laws, the Act has only been adopted by New Jersey, Colorado, Montana and Wisconsin.

Apart from several errors in production or proofing, the other criticism to be made in this regard is the often very thin or non-existent citation of authority for many assertions which either are at least disputable or simply demand a reference, such as the statement that the *Michigan Environmental Protection Act* "has been *held by the courts* to remove traditional standing requirements".[13] Further, a quick check of some caselaw indicated that the assertion that most of the United States federal environmental citizen suit provisions "do not have standing requirements"[14] is inaccurate.[15]

Structurally, it is difficult to find one's way around in the book. The index adds little to the table of contents and a table of statutes might have been useful. Despite the extensive use of subheadings to organize the mass of material, their effectiveness is diminished by often visually or conceptually inappropriate typeface and numbering.

In spite of these criticisms, the book unquestionably fulfills its prime objective of being a useful source of information that would otherwise be awkward to obtain. Its effectiveness in achieving its other aim of initiating reform remains to be seen. It has at least created an awareness of just what some of those options for reform are.

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[13] P. 217 (emphasis added).

[14] P. 183-84, *see also* p. 84.

[15] The United States District Court, District of Columbia, in *New York* v. *Thomas*, 613 F. Supp. 1472 (1985), held that a litigant suing under a statutorily created right of action, such as the citizen suit provision in s. 304 of the *Clean Air Act* (42 U.S.C.A. § 7604) must still meet the constitutional case or controversy requirement (Art. III) to obtain standing. In that case, it was stated that the complaint of one of the plaintiffs, a member of Congress suing as such, "is merely a generalised grievance shared equally with all citizens" and he was therefore denied standing in principle (at 1480). *See also Sierra Club* v. *SCM Corp.*, 747 F.2d 99 (1984).

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