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# **Freedom of Religion in the Workplace: Legislative Protection**

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# Contents

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Executive Summary .....	v
Introduction .....	1
Human Rights Legislation .....	1
Other Relevant Legislation .....	5
The Charter and Human Rights Legislation .....	5
Meaning of 'Religion' and 'Creed' .....	7
Jurisprudence on the Definition of Religion .....	8
A Religious Objection .....	9
Jurisprudence Under Human Rights Legislation and Collective Agreements.....	11
Adverse Effect Discrimination .....	11
Bona Fide Occupational Qualification (BFOQ) .....	11
Reasonable Accommodation .....	12
The BFOQ Defense under <i>Bhinder</i> .....	13
<i>Central Alberta</i> Decision.....	14
Reasonable Accommodation and Undue Hardship .....	15
The Special Case of Religious Institutions .....	17
The Duty of Unions to Accommodate .....	18
The Relationship Between Arbitration and Human Rights .....	20
An Empirical Look at Religious Discrimination Cases .....	22
Location and Date .....	22
Length of Time to a Decision .....	22
Lost Jobs .....	23

Fact Situations .....	24
Decisions .....	24
The Use of Human Rights Legislation in Arbitration Cases .....	25
Union Involvement in Human Rights Cases .....	25
Conclusion .....	27
References .....	28
List of Cases .....	29
Appendix I Time Line of Human Rights Cases .....	32
Appendix II Fact Situations in Human Rights Cases .....	33
Appendix III Decisions in Human Rights Cases .....	34
Appendix IV Union Involvement in Human Rights Cases .....	35
Appendix V Time Line of Labour Arbitration Cases .....	35
Appendix VI Fact Situations in Labour Arbitration Cases .....	36
Appendix VII Decisions in Labour Arbitration Cases .....	37

## Executive Summary

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This paper assesses the legislative protection of freedom of religion in the workplace.

- Anti-discrimination did not become common and effective until after World War II, when Ontario introduced the first human rights statute, called the Racial Discrimination Act.
- In 1962, the Ontario Human Rights Code was passed prohibiting discrimination based on race, creed, colour, national/ethnic ancestry, place of origin, and, for rates of pay, sex. Other jurisdictions enacted similar legislation over the next fifteen years.
- Section 5 of the Ontario Code specifically refers to the prohibited grounds of discrimination in employment, one of which is 'creed.' 'Creed' and 'religion' have been taken as synonymous.
- 'Constructive discrimination,' introduced to the Code in 1981, is discrimination which is not intentional but has the effect of discriminating. The majority of cases that go to adjudication involve unintentional discrimination.
- In 1986, the Code was amended to include a 'reasonable accommodation' provision. Section 11 provides that discrimination may be justified if the requirement that is discriminatory is reasonable and bona fide and cannot be accommodated without undue hardship.
- The Canadian Charter of Rights and Freedoms, enacted in 1982, is limited to discrimination arising from the application or operation of the law.
- It was initially thought that when a rule was a bona fide occupational requirement, the employer would be justified in discriminating on that basis. However, jurisprudence has indicated that reasonable accommodation must be made by the employer, but not to the point of undue hardship. The employee must also make reasonable accommodation.
- Jurisprudence has also indicated that unions have a similar duty to accommodate. In a unionized environment, it may be necessary for the employer and the union to cooperate to accommodate the employee.
- Almost all complaints taken to the Human Rights Commissions have taken over a year to be decided. Grievances taken to arbitration have taken between ten and eleven months between incident and decision.
- In the Human Rights cases, the employee's right to be reinstated is often too difficult to exercise because, in the interim between incident and decision, the complainant has had to find other employment.
- The religions represented in both Human Rights and arbitration cases are widespread.
- A survey of the cases to date indicates that the legislation and the jurisprudence is being used; however, the effectiveness of the protection is compromised by the process. Because of the time lapse between the incident and the decision, the legislation compensates after the fact and does little to keep a worker employed.

## Introduction

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Current Human Rights legislation protects workers from discrimination on a number of grounds including religion. This paper looks at the history of legislation prohibiting discrimination and reviews current legislation to determine how freedom of religion is protected in the workplace. Precedents from discrimination cases are outlined to give an indication of how cases are currently being settled. Finally, the paper looks at cases concerning freedom of religion in the workplace over the last fifteen years to assess whether the legislation is in use and is effective.

### Human Rights Legislation

The Constitution Act (1867) did not provide any direct constitutional guarantee from discrimination. It was not until the 1930s that anti-discrimination legislation was introduced and not until after World War 11 that the legislation became common and effective.

In 1944, Ontario introduced the first human rights statute of the contemporary era. The Racial Discrimination Act, S.O. 1944, c.51, was, however, brief and limited in scope. From s.1 of the Act, its purpose was to prohibit the publication or display of signs, symbols or other representations which expressed racial or religious discrimination on lands or premises or in a newspaper, through a radio broadcasting station or by means of any other medium. These actions were deemed illegal and were punishable by fines making the legislation quasi-criminal.

*Ontario was first to introduce human rights legislation, Saskatchewan was first to introduce a Bill of Rights.*

Saskatchewan was the first province to introduce a Bill of Rights. The Saskatchewan Bill of Rights Act, S.S. 1947, c.35, was a more detailed statute than Ontario's Racial Discrimination Act and covered political freedoms including the freedom of religion. The main thrust of the Act was to prohibit discrimination on the basis of race, creed, religion, colour or ethnic origin with respect to accommodation, employment, occupational associations, land transactions, education, business and enterprises. A contravention of the Act was punishable by a fine and imprisonment. It was also possible to seek an injunction under the Act. But, like the Ontario Act, this Act was quasi-criminal leaving the administration to the police and courts.

In 1951, Ontario passed the first Fair Employment Practices Act (S.O. 1951, c.24). This Act attempted to solve the problems by instituting procedures for filing complaints followed by procedures for investigation, conciliation and settlement or adjudication. The Act was similar to the Saskatchewan Bill of Rights in that it prohibited discrimination on certain specified grounds in various areas of employment (Patmore 1990, 32).

Other provinces followed Ontario's lead throughout the 1950s. Manitoba enacted fair employment legislation in 1953 (S.M. 1953, c.18) as did the federal government (S.C. 1952-53, c.19). Nova Scotia followed in 1955 (S.N.S. 1955, c.5). In 1956, three provinces enacted similar Acts, New Brunswick (S.N.B. 1956, c.9), British Columbia (S.B.C. 1956, c.16), and Saskatchewan (S.S. 1956, c.69). Quebec followed much later, in 1964 (s.Q. 1964, c.46) (Tarnopolsky and Pentney 1985, 2-6).

*The burden was on the person to know about the legislation and initiate a complaint.*

Although administrative procedures were put in place with these Acts, the burden was still on the person to know about the Acts and initiate a complaint. As a result there were few complaints and little enforcement (Patmore 1990, 32).

One exception to this was in the federal jurisdiction. The Canadian Fair Employment Practices Act was supplemented by regulations under the Fair Wages and Hours of Labour Acts which were later incorporated into the Canada Labour Code (S.C. 1966-67, c.62). Section 3 of these regulations stated that the Fair Employment Practices Act applied to every contract made with the Government of Canada. It was also required (by s. 9) that these contracts include a provision that there be no discrimination in hiring and employment of workers on the grounds of race, national origin, colour, religion, age, sex, or marital status. Failure to comply with these regulations was a breach of the contract and, therefore, proved to be an incentive for companies to comply. (Tarnopolsky and Pentney 1985, 2-12) This incentive to comply allowed the federal legislation to have an impact and experience some success.

In 1962, the first Human Rights Code was introduced in Ontario (S.O. 1961-62, c.93). This piece of legislation consolidated many of the anti-discrimination provisions contained in other legislation. The Code provided for a full-time staff to administer it under the Ontario Human Rights Commission that had been established in 1961. This Commission was set up as an independent body although it was ultimately responsible to the minister of the Crown. The role of the Commission was set out in section 8 of the Code:

8. The Commission has power to administer this Act and, without limiting the generality of the foregoing, it is the function of the Commission,
- (a) to forward the principle that every person is free and equal in dignity and rights without regard to race, creed, colour, nationality, ancestry or place of origin;
  - (b) to promote an understanding of, acceptance of and compliance with this Act;
  - (c) to develop and conduct educational programmes designed to eliminate discriminatory practices related to race, creed, colour, nationality, ancestry or place of origin.

Ontario's Code prohibited discrimination in employment as well as in accommodation, public services, trade union membership, and on public notices. The prohibited grounds of discrimination were race, creed, colour, national or ethnic ancestry or place of origin, and with respect to rates of pay, on the basis of sex.

This piece of legislation was an improvement over the previous fair employment statutes in two respects. First, the approach of the legislation was to address the issues as an overall problem, not just discrimination in one area such as employment. Second, the Code

*The approach of Ontario's first Human Rights Code was to address discrimination as a broader problem.*

also provided for a Commission that had the sole purpose of enforcing and administering the Code. These two features made the Ontario Code more effective.

All of the other provinces and the federal government enacted their own Human Rights Acts over the next fifteen years. In 1963, Nova Scotia introduced a Human Rights Act (S.N.S. 1963, c.5) but did not provide for a full-time director until 1967 which delayed the effectiveness of the Act. Alberta acted in a similar fashion by introducing legislation in 1966 (S.A. 1966, c.39) and waiting until 1972 to provide the Administrator with any additional staff. New Brunswick followed the next year (S.N.B. 1967, c.13), British Columbia two years later (S.B.C. 1969, c.10), and Manitoba three years later (S.M. 1970, c.104), all with a Commission provided for to administer the Acts. Prince Edward Island and Newfoundland enacted human rights legislation in 1968 and 1969 respectively (S.P.E.I. 1968, c.24 and S.Nfld. 1969, No.75) but did not provide for a Commission until 1975 and 1974 respectively. Again, the delay in appointing a Commission delayed the effect of the legislation. In 1972, Saskatchewan appointed a Commission (S.S. 1972, c.108) to administer the various human rights statutes but did not consolidate them into a Code until 1978. Quebec enacted the Charter of Human Rights and Freedoms in 1975 (S.Q. 1975, c.6) which includes anti-discriminatory clauses.

Finally, the Canadian government introduced human rights legislation in 1977 (S.C. 1976-77, c.33). The legislation was to be administered by a federal Commission and applied to all federal government departments, agencies, Crown corporations, and to businesses and industry under federal jurisdiction such as banks, airlines and railway companies. This legislation, and the provinces' Acts have a significant impact on the population in Canada and seem to be in use frequently.

By 1981, the Ontario Code appeared quite different from the one introduced in 1962. The functions of the Commission had been expanded from investigating complaints and educating the public to include recommending special plans, examining any statute or regulation, and initiating investigations (s.28). Amendments had also increased the protection through extending both the areas in which discrimination is forbidden and the number of prohibited grounds of discrimination. In fact, by 1986, the number of prohibited grounds had grown from the original six to fourteen and included age, handicap and sex. The areas of activity in which discrimination is forbidden was also extended to include such areas as contracts and occupational associations.

Section 5 (R.S.O. 1990, c.H.19) of the Code specifically refers to the prohibited grounds of discrimination in employment:

5.(1) Every 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, sexual orientation, age, record of offences, marital status, family status or handicap.

(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by an-



other employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status or handicap.

Creed in Ontario's Code has essentially the same meaning as religion.

In 1981, 'constructive discrimination' was introduced into the Code. This is a form of discrimination which is not intentional but has the effect of discriminating. For example, a policy of men being clean shaven would discriminate against Sikhs who, according to their religion, cannot shave their beards. In 1986, the definition of constructive discrimination and the exception for bona fide and reasonable requirements were amended to include a reasonable accommodation provision. Section 11 contains this amendment as it pertains to employment:

*Constructive discrimination' was introduced into the Ontario Code in 1981.*

11. (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction 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,

- (a) the requirement, qualification or factor is reasonable and bona fide in the circumstances; or
- (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.

(2) 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.

(3) The Commission, a board of inquiry or a court shall consider any standards prescribed by the regulation for assessing what is undue hardship.

This section provides for an exception to the finding of discrimination under section 5. The discrimination may be justified under section 11 if the requirement that is discriminatory is reasonable and bona fide and cannot be accommodated without undue hardship. This idea will be explored in more depth later in the paper.

Section 24 provides an additional exception to the equality rights provided under section 5. The relevant part for religion is:

24 (1) The right under section 5 to equal treatment with respect to employment is not infringed where,  
(a) a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by their ... creed ... employs only, or gives preference in employment to,

persons similarly identified if the qualification is a reasonable and bona fide qualification because of the nature of the employment;

An example of this situation would be a requirement for Catholic teachers in Catholic schools. This would be justified because the inculcation of faith in students is an important part of the duty of teachers in religious schools. The requirement of being of the same religion may not be able to be justified, however, if the employee's essential duties are not teaching or counselling. Examples of the use and interpretation of these sections of the Code will be looked at through cases.

### **Other Relevant Legislation**

Various other statutes also protect workers against discrimination. Under section 13 of the Ontario Labour Relations Act (R.S.O. 1980, c.228), certification of a trade union is prohibited if the union discriminates against any person based on the prohibited grounds as outlined in the Ontario Human Rights Code. Section 48 of the OLRA also protects workers by providing that a collective agreement is considered void if it discriminates on the grounds in the Code.

The Unemployment Insurance Act (S.C. 1976-1977, c.33, s.68) also contains a no-discrimination clause. The Minister of Employment and Immigration, under this Act, must ensure that the national employment service does not discriminate in referring workers seeking employment (Tamopolsky and Pentney 1985, 2-13).

In 1960, the federal government passed the Canadian Bill of Rights which contains a no-discrimination clause. The application of this piece of legislation is limited to federal legislation in which it is not expressly excluded. The result of this is that it has often been found not to apply (Patmore 1990, 37). Saskatchewan, Alberta, and Quebec also enacted their own Bills of Rights in 1947, 1972 and 1975 respectively.

### **The Charter and Human Rights Legislation**

Perhaps the most important piece of legislation outside of the Human Rights Acts for protecting workers from discrimination is the Canadian Charter of Rights and Freedoms enacted in 1982. This statute forms a part of the Constitution of Canada. Section 15 refers to the protection of grounds including religion:

15. (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.

Section 1 may also affect employment as it imposes a condition of reasonable limits:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

There is a two-way relationship between the Charter and Human Rights legislation as the norms under section 15 of the Charter can be used to interpret the protection of the norms under Human Rights legislation. The norms under Human Rights legislation may also be used under the Charter to enhance the equality guarantee.

There are some key differences between the Charter and Human Rights legislation. First, the Charter is limited to discrimination arising from the application or operation of the law whereas Human Rights Acts also apply to private activities. Secondly, Human Rights Acts have been held to apply only to the grounds of discrimination specified in those Acts. The Charter outlines some of the grounds on which it prohibits discrimination, but has also been held to apply to other grounds. Finally, Human Rights Acts express what actions are forbidden and the exceptions so that the prohibitions in the Acts are absolute unless there is a specific exemption for the action. The Charter, on the other hand, uses section 1 to allow for a reasonable limit and, therefore, requires an extra step to justify discrimination under section 15 because the prohibitions are almost always subject to section 1.

*The Charter is limited to discrimination arising from the application or operation of the law.*

The interaction between the Charter and Human Rights legislation can take many forms. One way they interact is that the meaning given to 'discrimination' by tribunals under Human Rights legislation is subject to judicial review under the Charter as well as at common law. For example, the reach of the Human Rights Acts could be extended through a challenge under the Charter of an exception or exclusion in the Acts or a definition of a ground of discrimination in the Acts.

The two pieces of legislation also interact because the grounds set out under Human Rights legislation that are not specified under the Charter may be used as an interpretive aid to enlarge the application of section 15 of the Charter to include those grounds. The Charter could also be used to extend Human Rights Acts, where government action is involved, if a ground of discrimination is omitted that is analogous to those set out in section 15 of the Charter. This was the case with mental disability in 1985 when section 15 came into force (Patmore 1990, 106).

The effect of the Charter on Human Rights legislation has not been fully realized and may be significant in the ways outlined above. In any case, it is the Human Rights Acts that are most likely to apply and be used because they are not confined to government action and there are Commissions to enforce the Acts but not the Charter.

## Meaning of 'Religion' and 'Creed'

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Before looking at the impact of Human Rights legislation it is necessary to understand the scope of the Acts. Current Human Rights legislation prohibits discrimination on grounds that include religion or creed or both. These terms, 'religion' and 'creed' are not defined by the Acts so the definitions have been left to the administrative tribunals and the courts. Through dictionary definitions and other jurisprudence, the courts have defined 'religion' and 'creed' to enable application of the Human Rights legislation.

*Webster's Third New International Dictionary* lists 'creed' as a synonym to 'religion' and defines 'religion' as:

1. The personal commitment to and service of God or a god with worshipful devotion...
- 3.(a) One of the systems of faith and worship: a religious faith...
4. The profession or practice of religious beliefs; religious observances...
- 6.(a) A personal awareness or conviction of the existence of a supreme being or of supernatural powers or influences controlling one's own, humanity's or all nature's destiny...
7. (a) A cause, principle, system of tenets held with ardor, devotion, consciousness and faith in it a value held to be of supreme importance.  
(b) A quality, condition, custom or thing inspiring zealous devotion, conscious maintenance and cherishing...

Webster's definition of religion is quite broad, especially when compared to the one found in the *Oxford English Dictionary*:

Recognition on the part of man of some higher unseen power as having control of his destiny, as being entitled to obedience, reverence and worship; the general, mental and moral attitude resulting from this belief, with reference to its effect upon the individual or the community; personal or a general acceptance of this feeling as a standard of spiritual and practical life.

Oxford's *Dictionary* defines 'creed' separately from 'religion' as:

An accepted or professed system of religious beliefs: the faith of a community or an individual, especially as expressed or capable of expression in a definite formula.

These definitions are used in court cases to determine whether beliefs classify as 'religions' or 'creeds' for the purposes of Human Rights legislation. For example, in *Singh v. Security and Investigation Services Ltd.* (1977), Chairman Cumming used the Latin derivation of the term 'creed' as well as the definitions outlined above from Oxford's and Webster's dictionaries to conclude that Sikhism is a creed.

There is no court decision in Canada, the United States or the United Kingdom which indicates any difference between the terms 'religion' and 'creed' (Tarnopolsky and Pentney 1985, 6-8). This allows us to take them as synonymous and not differentiate between the Human Rights Acts as to which province uses which term.

### **Jurisprudence on the Definition of Religion**

*Can personal interpretations of a religion be held to be bona fide religious beliefs?*

In 1983, it was pointed out that Ontario had yet to deal with a case involving any religion other than a relatively well-established, deistic religion (Keene 1983, 61). The issue for the future was whether the Human Rights Acts would extend to recently created religions. A similar question to be addressed is just how broad is the definition of religion, ie. can personal interpretations of a religion be held to be bona fide religious beliefs?

The first issue, whether the definition of religion extends to non-traditional religions was addressed in *Re Humber College and Ontario Public Service Employees Union* (1987), 31 L.A.C. (3d) 266 (Swan). Arbitrator Swan concluded that Wicca is a religion with reference to the 'broad, liberal and essentially subjective approach to religious observance set out in the *Forer* case'(p.275). It was stated in *Re Ontario Public Service Employees Union and Forer et al.* (1985), 23 D.L.R. (4th) 97, a Charter case, that:

in the multicultural country which Canada has become there will have to be even greater toleration of a wide variety of religious beliefs and practices than existed before the Charter. Certainly, for the purposes of s.16(2) of the Act, views cannot be described as 'non-religious' because they differ from the religious beliefs of the dominant groups in society. (p.120)

It appears from these two cases that a new religion is likely to be accepted, that the definition is sufficiently broad and liberal.

This also appeared to be the case in *Re Peterborough Civic Hospital and Ontario Nurses' Association* (1981), 3 L.A.C. (3d) 21 (Ellis) when a personal interpretation of a religion was accepted as a bona fide religious belief. In this case, a nurse refused to hang blood for a blood transfusion based on her interpretation of the Bible. Her position differed from that of some other Jehovah's Witnesses.

The approach to incorporating personal beliefs into a definition of religion is indicated at p.28 of the arbitration decision as follows:

Discrimination by reason of a personal religious belief, if it is not discrimination by reason of a creed, must certainly constitute discrimination by reason of a factor not pertinent with respect to employment...

From this it was held that the personal beliefs fell under the no-discrimination clause of the collective agreement as if the clause read '...or personal religious beliefs'(p.28).

The jurisprudence has not, however, been consistent in accepting personal interpretations of religions as being bona fide. Employees seeking a religious exemption from paying

union dues have led to additional jurisprudence on the definition of religion in terms of whether the definition is broad enough to include personal interpretations of religions. The results have been mixed.

In *Freedhoff and the York University Faculty Association and the Board of Governors of York University*, [1982] 1 C.L.R.B.R. 433, Freedhoff interpreted Judaism as being opposed to unions and believed that unionization was bad for the university. The Board accepted that the objection to strikes where innocent third parties (the students) would be injured was religious in nature but did not agree that Freedhoff's other views of unions were religious based. On that basis the request for a religious exemption from paying union dues was denied.

A four fold test was established in *Automobile Carriers Limited and Richard Barker and Teamsters Union, Local 938*, [1987] 13 C.L.R.B.R. 28 to assess an application for a religious exemption from paying union dues. The applicant must oppose all unions, the opposition need not be founded on tenets of a known religion, the convictions must be religious and related to the Divine, and the Board must be convinced that the applicant is sincere and the religious objection is not concealing resistance of another nature. This test was used to find that the applicant in this case had a sincere belief that God opposes labour relations based on an adversarial approach. The applicant was not following his church because his Seventh Day Adventists church did not prohibit union membership and financial support, but, rather, left it up to each member. This case indicates that personal interpretations of religions are acceptable as legitimate religious beliefs. This runs counter to *Freedhoff*, however, leaving doubt as to just how liberally and broadly beliefs will be taken to fit the definition of religion.

## **A Religious Objection**

*Discrimination may result because of what religion a person is or what religion a person is not. It may be intentional or unintentional.*

The next thing to look at is exactly what constitutes a religious objection. The cases show that discrimination may be because of what religion the person is and the conflict they encounter practising that religion, or what religion a person is not and the discrimination they face as a result. The discrimination may also be direct and intentional or 'adverse impact' where a rule or practice exists which has the effect of discriminating but the discrimination is unintentional.

To take the Ontario Human Rights Code as an example, section 5(1) refers to direct discrimination. A religious objection may fall under this category if a person is refused employment or fired because of his/her religion. Section 5(2) of the Code covers harassment on prohibited grounds. Harassment at work over religion or religious practices would lead to a religious objection under this section. There are few cases that have been adjudicated under these two sections. This is likely because awareness has been heightened to the point that employers do not openly discriminate.

Most cases of religious discrimination are of the 'adverse impact' type. Section 11 of the Code covers this area of discrimination. This arises when there is a requirement such as

*Cases arise because the employer does not know the practice is discriminatory.*

working Saturdays that is not intended to discriminate on the basis of religion but does in fact discriminate against those who cannot work Saturdays for religious reasons. As will be discussed later, in these cases accommodation is required. Most of the cases arise in this area because the employer does not know the practice is discriminatory or the possible accommodation is called into question.

A final area of religious objections arises from the ability of a religious institution to restrict employment to people of that religion in certain circumstances (section 24(1)(a) of the Code). An example is a Catholic school hiring only Catholics to teach. The objections may be of those not hired or those fired for being of a different religion or not following the religion in question. These objections may also include what appear to be marital status complaints because they are religion-based — for example, a teacher being fired from a Catholic school for living common-law.

It is clear that religious objections cannot be neatly classified. They arise in a variety of circumstances and are handled in different ways by the legislation. It is useful at this point to look at the precedents under the sections of the Code mentioned above.

## Jurisprudence Under Human Rights Legislation and Collective Agreements

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In order to understand how the cases are currently being settled by the boards of inquiry and by the courts, the precedents that have been set need to be examined. These precedents are cited in discrimination cases and are followed to decide cases that arise in the area of discrimination, including religious discrimination.

### Adverse Effect Discrimination

*The O'Malley case entrenched the concept of adverse effect discrimination.*

Cases involving direct discrimination are now extremely rare. Unfortunately, this does not mean that discrimination is rare. In *Re Ontario Human Rights Commission et al. and Simpsons-Sears Ltd.* (1985), 23 D.L.R. (4th) 321 (hereafter *O'Malley*), McIntyre J. acknowledged that a broader view of discrimination was needed because:

To take the narrower view and hold that intent is a required element of discrimination under the Code would seem to me to place a virtually insuperable barrier in the way of a complainant seeking a remedy. (p.331)

This case entrenched the idea of adverse effect discrimination in Canadian jurisprudence and it is this area that cases usually fall under and can be difficult to assess.

Adverse effect discrimination was defined by McIntyre J. in *O'Malley*:

It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force. (p.332)

The majority of cases which go to adjudication occur in this type of situation, where there is no intent to discriminate, but, the employer is acting in what appears to be a neutral way for business reasons and the result is discriminatory for a group, eg. a religion. For example, in the *O'Malley* case, the complainant was a Seventh Day Adventist whose religious observance prevented her from working Saturday shifts. The requirement to work Saturdays was, on its face, neutral but had an adverse impact on the complainant by limiting her possibilities for employment.

### Bona Fide Occupational Qualification (BFOQ)

As will be seen, it was initially thought that, if a rule was a bona fide occupational requirement (BFOR), the employer would invariably be justified in discriminating on that basis. That is, adverse effect discrimination would be justified whenever discriminatory rules were bona fide occupational requirements of employment. For instance, if the job required employees to work on Saturdays, this discrimination against Seventh Day Adventists would be justified as long as the requirement was bona fide.



A test for a BFOQ was introduced in *Ontario Human Rights Commission et al. v. Borough of Etobicoke* (1982), 132 D.L.R. (3d) 14:

To be a bona fide occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public. (pp.19-20)

This test is still in use in adverse effect discrimination cases to assess the rule that has been found to be discriminatory. The question that arises now is whether, given that the rule is bona fide, the employer has any duty to accommodate.

### **Reasonable Accommodation**

In *O'Malley*, McIntyre J. found it was necessary for some accommodation to be made by the employer in order for the legislation to be given effect (p.333). He went on to outline the duty to accommodate and what limit would be required on this duty:

Accepting the proposition that there is a duty to accommodate imposed on the employer, it becomes necessary to put some realistic limit upon it. 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. (p.335)

This introduction of a reasonable limit to accommodation, the point of undue hardship, made it clear that there would be cases where accommodation would not be required of the employer because of the adverse effect it would have on the business.

It was found that the onus is on the employer to show undue hardship when arguing that a particular level of accommodation should not be required. Given that full accommodation may not be possible by the employer, McIntyre J. noted that the employee is also responsible for accommodation at a reasonable level:

The employer must take reasonable steps towards that end which may or may not result in full accommodation. Where such reasonable steps, however, do not fully reach the desired end, the complainant, in the absence of some accommodating steps on his own part such as an acceptance in this

*The onus is on the employer to show undue hardship.*

case of part-time work, must either sacrifice his religious principles or his employment. (*O'Malley*, p.335)

This recognizes the fact that not only the employer has the responsibility to make accommodations in a case of indirect discrimination. Once the employer has taken action up to the point of undue hardship to accommodate the employee, it is up to the employee to accommodate the employer or sacrifice either his/her religion or job.

### **The BFOQ Defense under *Bhinder***

*There is no duty to accommodate an individual if a bona fide occupational requirement has been established.*

In *Re Bhinder et al. and Canadian National Railway Co.* (1985), 23 D.L.R. (4th) 481, the requirement of wearing a hard hat in a railway yard was questioned as a 'bona fide occupational requirement.' Mr. Bhinder, following the Sikh religion, could not remove his turban and wear the hard hat. The decision by the majority in *Bhinder* indicates that individual accommodation is not necessary once an occupational requirement has been shown to be bona fide. As stated by McIntyre J.:

We must consider then whether such an individual application of a bona fide occupational requirement is permissible or possible. The words of the statute speak of an 'occupational requirement.' This must refer to a requirement for the occupation, not a requirement limited to an individual. It 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. (p.500)

This indicates that once an occupational requirement is established, the employer need not modify it to meet the needs of particular individuals. In this case, then, if the hard hat rule was an occupational requirement, there could be no exception for Mr. Bhinder.

Following from the idea that an 'occupational requirement' refers to the occupation and not the individual, the majority held that there was no duty to accommodate an individual if a bona fide occupational requirement had been established:

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. (p.501)

This limits the duty of accommodation from *O'Malley* to cases where a BFOR defence is not proven under section 14(a) of the Federal Act. The wording of the Federal Act,

which *Bhinder* fell under, differed from that of the Ontario Code at the time *O'Malley* fell under it, by containing section 14(a), the BFOR defence. The above passage shows that this section was essential to the *Bhinder* decision.

Dickson C.J.C., in the dissent in *Bhinder*, takes a very different approach from that of the majority. He agrees that the words 'occupational requirement' refer to the entire occupation but interprets 'bona fide' to include the requirement being applied to the individual in such a way as to take accommodation into account:

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. (pp.487-8)

This approach of individualizing the occupational requirement appears to be consistent with the test in *Etobicoke* and the accommodation outlined in *O'Malley*.

### **Central Alberta Decision**

*Human rights legislation is in place to attack such generalizations as occupational requirements.*

The *Bhinder* decision was abandoned by the Supreme Court of Canada in *Alberta Human Rights Commission v. Central Alberta Dairy Pool et al.* (1990), 72 D.L.R. (4th) 417. Wilson J. indicated that there were two reasons why the *Bhinder* decision was incorrect. First, the employer rule, according to *Etobicoke*, needed to be 'reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public' and the failure of Mr. Bhinder to wear a hard hat would not have affected his ability to work nor would it have posed a threat to co-workers or to the public. Second, the ability to use a BFOR defence in adverse effect discrimination cases would defeat the purpose of human rights legislation. The legislation is in place to attack such generalizations as occupational requirements. As Wilson J. stated:

The essence of direct discrimination in employment is the making of a rule that generalizes about a person's ability to perform a job based on membership in a group sharing a common personal attribute such as age, sex, religion, etc. The ideal of human rights legislation is that each person be accorded equal treatment as an individual taking into account those attributes. Thus, justification of a rule manifesting a group stereotype depends on the validity of the generalization and/or the impossibility of making individualized assessments. (p.433)

*Rules should be rationally related to the performance of the employment.*

This indicates that an individual approach, similar to that taken in the dissent in *Bhinder*, is the approach that is required for adverse effect discrimination cases.

*Central Alberta* clarified the law on adverse effect discrimination and reasonable accommodation. First, *Central Alberta* clarified the defenses available to an employer in cases of adverse effect discrimination. In overturning *Bhinder*, the Supreme Court stated that the BFOQ defence should not be applied in cases of adverse effect discrimination. Instead, we are returned to the words of *Etobicoke* that refer to rules that are rationally related to the performance of the employment. *Central Alberta* indicates that an employer is now required to establish that a rule is rationally connected to the performance of the job and that an individual could not be accommodated without undue hardship. This 'business rationality' test is lower than a BFOR, and most employment rules could be expected to meet it (Tarnopolsky and Pentney 1990, 35).

Second, *Central Alberta* clarified the elements of the BFOQ defence. A BFOQ defence is still possible but, to establish it, an employer must demonstrate that the rule takes account of individual circumstances or must justify its not doing so by the nature of the rule (Tarnopolsky and Pentney 1990, 36). For example, it may be a justifiable BFOR to be available to work seven days a week in the army, the nature of the requirement being such as to exclude any need for accommodation of individual circumstances.

### **Reasonable Accommodation and Undue Hardship**

Given that *Central Alberta* requires the employer to accommodate individuals up to the point of undue hardship for rational business rules, it is necessary to look at what 'accommodation' and 'undue hardship' mean.

The Ontario Human Rights Commission, in 1989, published *Guidelines for Assessing Accommodation Requirements for Persons With Disabilities*, setting out the Commission's interpretation of what is meant by accommodation. These guidelines state that the needs of each group protected by the Code must be accommodated unless the accommodation would create undue hardship (p.1). The approach to accommodation is outlined in the *Guidelines* as:

The first step in the accommodation is to determine what is 'essential' and what is not. The person must be accommodated with respect to non-essential duties if necessary by having those duties reassigned or by the person responsible for accommodation using an alternate method for having those duties fulfilled. Then, if the person cannot perform the essential duties, accommodation is to be explored that will enable the person to perform those essential duties. (p.3)

This accommodation is, of course, limited by undue hardship.

Wilson J. addressed the question of what undue hardship means in *Central Alberta*:

*Financial cost, morale, ease of change, and safety are taken into account to determine undue hardship.*

I do not find it necessary to provide a comprehensive definition of what constitutes undue hardship but I believe it may be helpful to list some of the factors that may be relevant to such an appraisal. I begin by adopting those identified by the board of inquiry in the case at bar — financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. The size of the employer's operation may influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities can be adapted to the circumstances. Where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations. This list is not intended to be exhaustive and the results which will obtain from a balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case. (p.439)

This list indicates some of the factors that will be taken into account to determine undue hardship. These include financial cost, the effect on other employees' morale, the ease with which the work environment can be changed, and safety considerations.

The *Guidelines* of the Ontario Human Rights Commission expand on some of the factors that constitute undue hardship. The types of financial costs that the Commission would look at are: capital and operating costs, costs for additional staff time and other quantifiable and related costs. The Commission also looks at how these costs would affect the viability of the business and any sources of funding the business may have to cover these costs.

The Commission also defines the health and safety component of undue hardship:

Undue hardship will be shown to exist where a person responsible for accommodation is subject to or has established a bona fide health or safety requirement and the person has attempted to maximize the health and safety protection through alternate means which are consistent with the accommodation required, but the degree of risk which remains after the accommodation has been made outweighs the benefits of enhancing equality for disabled persons. (p.12)

This definition applies to disabled persons but is equally applicable to religion cases. For example, the risk of not wearing a hard hat would be weighed against the benefits of not discriminating against Sikhs. The Commission also looks at the degree of risk to others, to the individual, and whether the individual is willing to assume the personal risk.

The current jurisprudence, therefore, indicates that the BFOQ defence is limited and takes account of individuals. In addition, the Ontario Human Rights Commission's *Guidelines*, although not legally binding, aid in the interpretation of accommodation and undue hardship. In adverse effect discrimination cases, the defence to claims of discrimination relies on the 'business rationality' test, and requires reasonable accommodation to the point of incurring undue hardship.

## The Special Case of Religious Institutions

This situation is only slightly different under the special employment area of religious institutions such as under section 24 of the Ontario Human Rights Code. Under section 24 of the Code, a religious school has the right to employ only people of that religion. This creates a unique situation of conflicting rights of an individual to employment and an institution to retain its religious nature. This was pointed out in *Caldwell v. St. Thomas Aquinas High School* (1985), 6 C.H.R.R. D/2643 (Supreme Court of Canada) by McIntyre J.:

A broader issue may be said to arise concerning a conflict between two legally established rights, that of the individual to freedom from discrimination in employment, and that of a religious group to carry on its activities in the operation of its denominational school according to its religious beliefs and practices. (p.D/2643)

It was found in this case that the relationship between a teacher and a student is such that a teacher can form the mind and attitudes of the student, making it necessary that the teacher conform to the religion in question.

This requirement to conform was indicated in *Caldwell*:

*Being of a particular religion can be a BFOQ.*

It is my opinion that objectively viewed, having in mind the special nature and objectives of the school, the requirement of religious conformance including the acceptance and observance of the Church's rules regarding marriage is reasonably necessary to assure the achievement of the objects of the school. It is my view that the *Etobicoke* test is thus met and that the requirement of conformance constitutes a bona fide qualification in respect of the occupation of a Catholic teacher employed in a Catholic school, the absence of which will deprive her of the protection of s. 8 of the Human Rights Code. It will be only in rare circumstances that such a factor as religious conformance can pass the test of bona fide qualification. In the case at bar, the special nature of the school and the unique role played by the teachers in the attaining of the school's legitimate objects are essential to the finding that religious conformance is a bona fide qualification. (p.D/2649)

This indicates that being of a particular religion can be established as a BFOQ and, therefore, not subject to individual accommodation.

*Caldwell* involved a Catholic school, but the denominational cause BFOQ that was recognized in *Caldwell* has since been held in *Garrod v. Rhema Christian School et al.* (October 14, 1991) Ontario Board of Inquiry, an unreported case, to apply to a so-called non-denominational Christian school.

Another unreported case, *Parks v. Christian Horizons* (December 2, 1991) Ontario Board of Inquiry, dealing with a religious group home, outlines clearly the required elements of a section 24 defence:

- 1) A religious, philanthropic, educational, fraternal or social institution or organisation;
- 2) that is primarily engaged in the serving the interests of persons identified by ...creed...;
- 3) employs only or gives preference in employment to persons similarly identified;
- 4) if the qualification is a reasonable and bona fide qualification because of the nature of the employment. (pp.28-9)

In this case the denominational cause BFOQ was not found to be an adequate defence for two reasons. First, the hiring procedure did not make it clear that only those with lifestyles compatible with the Evangelical Christian doctrinal principles would be acceptable. Second, it was not clear that the principal function of the group homes was to promote the religious environment in question.

Section 24 provides a powerful defence to religious discrimination through establishing a BFOQ, but the jurisprudence shows that the section has a strict test to be met. The job in question must be found to be one in which the employee could have a significant impact on the students or clients. In addition, the institution must prove that it is religious and has a primary purpose of promoting that religion.

### **The Duty of Unions to Accommodate**

*Unions, as well as employers, have a duty to accommodate.*

Jurisprudence has also arisen in another relevant area, that of the duty of unions to accommodate as well as employers. In an unionized environment, it is possible that an employer may find it more difficult or more costly to accommodate an employee without the cooperation of the union. This was the situation in *Irene Gohm v. Domtar Inc. and The Office and Professional Employees International Union, Local 267* (1990), 12 C.H.R.R. D/161. Ms. Gohm wanted to work on Sunday instead of Saturday for religious reasons. The collective agreement indicated that this time would have to be at the overtime rate applicable on Sundays but, the company was only willing to pay straight time (the rate applicable on Saturdays) to Ms. Gohm. Straight time pay for Sunday work would have been acceptable to Ms. Gohm, but the union would not allow it.

The employer was found to have not accommodated Ms. Gohm:

I find that the company had an obligation under the Ontario Human Rights Code to make serious efforts to reasonably accommodate the complainant, and that this duty entailed more than merely indicating that it would be prepared to consider or discuss a reasonable accommodation if the union would consent to it. The failure of the company specifically to offer to permit this change, or to promise to make its best efforts to secure it, is sufficient in my view to find that it failed to reasonably accommodate the complainant. (p.D/178)

For the first time, a union was held liable for adverse effect discrimination when the union in *Gohm* was also found to be guilty of failing to accommodate Ms. Gohm:

Like the company, I find that the union did not fulfil its responsibility to reasonably accommodate the complainant because it did not specifically offer to negotiate with the company in regard to the changes in the collective agreement which it said were required, nor did it ever specifically offer to agree to these changes in its communications with the complainant or the company. I should add that I realize that neither the company nor the union could unilaterally modify the collective agreement, and so their actions here must be judged according to what action they actually took, what they said or promised to the complainant, and what they discussed as between themselves. (p. D/178)

In the appeal, *Office and Professional Employees International Union, Local 267 v. Domtar Inc.* (1992) Ontario Divisional Court (not yet reported), the union argued that it is only responsible for a role in accommodation if the employer cannot accommodate the employee without undue hardship.

The majority upheld the original decision that there was joint responsibility:

Discrimination in the work place is everybody's business. There can be no hierarchy of responsibility. There are no primary and secondary obligations to avoid discrimination and adverse effect discrimination; Companies, Unions and persons are all in a primary and equal position in a single line of defence against all types of discrimination. To conclude otherwise would fail to afford to the Human Rights Code the broad purposive intent that is mandated. ...The discrimination barrier created in the collective agreement slammed the door on continued employment in the face of a Seventh Day Adventist. The Union aided the Company in the creation and erection of that barrier. It owed an equal duty with the Company to dismantle that road-block. (pp.9-10)

This rejected the argument of the union that the employer had primary responsibility. That argument was accepted, however, by Campbell J. in the dissent.

Campbell J. found that the company could have accommodated Ms. Gohm in two ways without incurring undue hardship and without needing to consult or involve the union. First, the company could have paid her the overtime rate. Second, it could have arranged for a schedule adjustment or a shift swap. For these reasons, and the fact that the union is not in a position to influence the way a company manages its workplace, Campbell J. found the union not liable for discrimination:

The company, although it could manage the workplace unilaterally without discrimination, told the union in effect that the company would discriminate against Ms. Gohm unless the union gave up its bargained overtime rights. The



company, by taking that untenable position, cannot make the union guilty of discrimination. The union is not obliged to surrender bargained rights to prevent the company from discriminating in its unilateral management of the workplace. (p.12)

This dissent leaves doubt as to what the union's role is in accommodation. It is clear that there is some duty but less clear whether the duty exists only after the company has exhausted other possible routes of accommodation.

### **The Relationship Between Arbitration and Human Rights**

Before turning to the cases that have arisen in the area of religious discrimination in the workplace, the workplace first needs to be separated into two areas: the unionized environment covered by collective agreements and the non-unionized environment. The legislation used to protect the workers in these two settings may be different because there is the human rights legislation available and, potentially, a collective agreement. The interaction that is possible between these two legal regimes has been examined in various arbitration and human rights cases.

*An employee covered by a collective agreement may grieve under it or may use the human rights process.*

The first issue is which route employees should take with their complaints. If they are not covered by a collective agreement then the only option is through human rights. But, if a collective agreement is in place, they may grieve under it or go to the human rights process. Section 33(1)(a) of the Ontario Code allows for the Commission to decide not to deal with the complaint if it 'could or should be more appropriately dealt with under an Act other than' the Code. This is not to say, however, that the Commission does not deal with cases where a collective agreement is in place. In fact, the arbitral jurisprudence supports a grievor utilizing both routes, arbitration and human rights.

In *Re Canadian Timken Ltd. and United Steelworkers of America, Local 4906* (1987), 31 L.A.C. (3d) 365, the grievor also filed a complaint with the Ontario Human Rights Commission and the complaint had not yet been disposed of by the Commission. It was ruled that the grievor had rights under the Code and the collective agreement, and that these were 'separate and distinct rights' (p. 366).

The different routes were also referred to in *Dennis v. Family and Children's Services of London and Middlesex* (1990), 12 C.H.R.R. D/285 where it was stated that 'the systems differ dramatically in their function, purpose, and process. A ruling in one should not preclude or bar a proceeding in the other' (p. D/288). This was supported by arbitrator Welling in *Re Quality Inn (Altadore) Woodstock and United Food and Commercial Workers, Local 175* (1990), 14 L.A.C. (4th) 414 when he dismissed an objection of the company to proceeding with the case because a proceeding had been commenced in the human rights forum. Welling viewed the fact as having 'nothing to do with' his role which was to determine violations of the collective agreement (p.415). These cases indicate that the grievor can openly exercise both routes without suffering any adverse impact as a result.

The second issue is whether arbitrators can apply the human rights legislation. In *McLeod et al. v. Egan et al.*, [1975] 46 D.L.R. (3d) 150, arbitrators were held to have the power to apply statutes. As Laskin, C.J.C. states at p.151:

Where a statute of general public effect has been enacted which affects the labour relations between an employer and its employees, it is the duty of an arbitrator in determining a grievance under a collective agreement to construe and apply the statute to the terms of the collective agreement...

In this case, the statute prohibited something that was permitted in the collective agreement. So, while this case indicates that arbitrators have not only the power to apply Human Rights Acts, but also the duty, this power may be limited to conflicts between the statutes and the collective agreement.

This was addressed further in *Re Rothmans, Benson and Hedges Inc. and Bakery, Confectionary and Tobacco Workers' Union* (1990), 10 L.A.C. (4th) 18 where arbitrator R.M. Brown applied the Ontario Human Rights Code. Brown indicated that there are two situations an arbitrator could face and the appropriate action for each. First, if the collective agreement says anything about a statutory right, then the arbitrator should take the jurisdiction to enforce the statute regardless of whether the language in the collective agreement is consistent or not with the statute (p.34). This broadens the *McLeod v. Egan* decision. Second, if the collective agreement does not say anything about the statute or right in question, the arbitrator lacks the jurisdiction to enforce the statute (p.35).

*Rothmans* was referred to and dismissed by arbitrator Palmer in *Re Peerless-Cascade Plastics Ltd. and Canadian Auto Workers, Local 195* (1992), 20 L.A.C. (4th):

Starting from the view that this is an arbitration under the collective agreement, it seems clear that I do not have jurisdiction to make findings of breaches of the Human Rights Code, 1981, notwithstanding some comments made in the cases cited by the union. In my opinion this conclusion is so clear no authority is needed to support it. (p.268)

Although Palmer, in the statement above, dismissed *Rothmans* and the power of an arbitrator to apply the Human Rights Code, he did go on to use the Code to help define 'fairness' of the exercise of the company's management rights (p.268).

It is not clear what impact such awards as those in *Rothmans* and *Peerless-Cascade* will have on arbitrators' actions in applying human rights legislation. It has, however, been noted that 'recent authorities indicate a fairly strong trend toward the enforcement by arbitrators of the anti-discrimination provisions of human rights legislation, even where those provisions are not replicated in the collective agreement' (Adell 1991, 184).

## An Empirical Look at Religious Discrimination Cases

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From the 1950s (before the Human Rights Acts were introduced) until 1978, there were only six cases reported across Canada that dealt with freedom of religion in employment (Tarnopolsky and Pentney 1985, 50-11 to 50-22). Starting in 1980, cases arising under Human Rights Acts were reported in the *Canadian Human Rights Reporter*. Since 1980, there have been twenty-seven such cases reported that dealt with freedom of religion in the workplace (1 C.H.R.R. to 14 C.H.R.R.). In addition, there have been two unreported cases involving religion in the workplace under the Human Rights Acts. Since *McLeod v. Egan*, there have been fifteen arbitration cases in the *Labour Arbitration Cases* that have dealt with freedom of religion in unionized workplaces (1 L.A.C. (2d) to 21 L.A.C. (4th)). These Human Rights cases and the *Labour Arbitration Cases* have had key points summarized from them in the seven appendices. This information allows for comments on the use of the legislation and the effectiveness of it as well as some comments on the types of cases and the role of unions in the process. Full case citations are provided in the references.

### Location and Date

Both the Human Rights cases and the arbitration cases are spread over the years in question although there were a number of cases in both forums from 1985 to 1988 (Appendices I and V). Most of the arbitration cases arose in Ontario, with only two of the fifteen not in Ontario. The Human Rights cases have been spread more evenly throughout Canada, with less than half being from Ontario.

### Length of Time to a Decision

Calculating the time a Human Rights case took before a final decision was reached is a process plagued with problems. Human Rights cases can be appealed from the Board of Inquiry to the regular courts, and potentially as far as the Supreme Court of Canada. This obviously lengthens the process substantially. From Appendix I, the four decisions that were appealed up to the Supreme Court took six to seven years from the date of the incident to the decision by the Supreme Court. Even an appeal to the first level of the regular courts will lengthen the time a case takes by a year or more.

In an attempt to be fair to the Human Rights Commissions and to be able to draw comparisons with the arbitration cases, the time has been calculated from the date of the incident to the date of the Board of Inquiry decision. Even this calculation has problems. It is often the case that the complainant does not file a complaint with the Human Rights Commission for a few months after the incident. Keeping this in mind, Appendix I shows that only two of the twenty-nine cases were decided by the Board of Inquiry in less than a year after the incident. A time was not calculated for a few of the cases because the incident was spread out over time, making a specific date of the incident difficult to determine.

*Human rights cases took much longer than arbitration cases to be decided.*

The fact that almost all the cases took over a year to be decided, and many over two years, reflects two things. The first, as mentioned earlier, is that the complaint is often not filed immediately. The second is the number of cases before the Human Rights Commissions. A case, once it goes before the Board of Inquiry, only takes, on average, a few weeks to decide, but there is a delay before the case reaches the Board of Inquiry. The result of these two factors is that there is a substantial span of time from the date of the incident to the date of a decision by the Board of Inquiry.

In contrast, the arbitration cases (from Appendix V) took, on average, between ten and eleven months between incident and decision. In fact, only four of the fifteen took over a year for an arbitration decision. The difference in time for decisions under the two groups of cases is largely due to the delay in the filing of complaints and the appointing of a Board of Inquiry under the Human Rights route. Grievances are usually filed within a few days, pursuant to short time limits in the collective agreement, and the process begins at that point. As noted above, complaints are not usually filed with the Human Rights Commissions as quickly. It appears that it also takes longer for the initial decision from the Board of Inquiry than it does for an arbitration decision. This is not due to the length of the Board of Inquiry proceedings but to the length of time before that stage of the proceedings takes place.

### **Lost Jobs**

The idea behind protecting freedom of religion in the workplace is to allow an individual to work free of discrimination. To this end, both Human Rights legislation and arbitration allow for reinstatement if the employee has been dismissed and the employer was found to be discriminating. The failure to protect the employee from losing the job is a serious problem, however, particularly in Human Rights cases. As shown in Appendix III, only four of the twenty-nine Human Rights cases did not involve the complainant having lost or having been refused employment. In theory this should not be a problem, because the Human Rights Acts allow for the employee to be reinstated. Unfortunately, it is often too difficult to exercise this right because, with the amount of time that passes, the complainant has likely been forced to find new employment. For example, Mrs. O'Malley quit her job while her complaint was going through the process, because it was too difficult for her to remain at her place of employment, and her case took seven years before being decided at the Supreme Court of Canada.

The existence of a union and a collective agreement appears to overcome this problem to some extent by making employees more willing and able to proceed with grievances while still on the job. In only seven of the fifteen arbitration cases had the employee lost his/her job (Appendix VII) and in three of those seven cases the person was re-instated. Two reasons for this difference from Human Rights cases are the speed of the decisions and the existence of the union to protect the worker. Both of these make re-instatement more attractive and feasible for the worker.

*The religions represented in the cases are widespread.*

## **Fact Situations**

The religions represented in both the Human Rights cases and the arbitration cases are fairly widespread. The Human Rights cases included seven complaints by Sikhs, four by Seventh Day Adventists, five by members of the World Wide Church of God, and four by Catholics or non-Catholics interested in employment in a Catholic setting. The other religions represented in Human Rights cases were: Pentecostal, Jewish, Baptist, United, and Anglican (Appendix II). The arbitration cases had a similar spread of religions with two complaints by Sikhs, three by Seventh Day Adventists, two by members of the World Wide Church of God, and other religions including Serbian Orthodox, Jewish, Jehovah's Witness, Mennonite, and Wicca (Appendix VI).

Many of the Human Rights cases dealt with the requirement to work on one of the complainant's holy days. As can be seen in Appendix II, this occurred in twelve of the twenty-nine cases. Four Human Rights cases involved Catholic schools and the complainants not meeting the requirements for the job by not being Catholic or by living contrary to the Catholic lifestyle. Two additional cases had similar complaints to the one above but arose in Christian schools. Problems that Sikhs encountered with employer concerns for safety or appearance due to wearing turbans or kirpans or having a beard were the subject of five cases. The other nine cases included: not being hired for reasons alleged to be direct discrimination, harassment, refusal to sell tickets to a social event at which alcohol would be served, and a request for union dues to be paid to the complainant's church.

Similar situations arose in the arbitration cases (Appendix VI). Six of the fifteen cases dealt with unauthorized absences because of the employees refusing to work as required on their holy days. In addition, four cases resulted from the refusal of the company to grant a leave of absence for religious observances. Two cases involved problems encountered by Sikhs — one was required to shave his beard and the other to wear a hard hat. An additional two cases involved an employee being denied a job posting based on being unavailable to work on Saturdays. The other case was based on a nurse's refusal to perform part of the blood transfusion procedure as required.

## **Decisions**

Seven of the fifteen arbitration cases were dismissed (Appendix VII). In four of these cases, it was held that accommodation of the employee would have resulted in undue hardship for the employer. The other three cases were dismissed because it was held to be a legitimate safety requirement to wear a hard hat, because the denial of a leave of absence was reasonable and because the complainant was found to not be available for any of the possible jobs.

A similar proportion of the Human Rights cases, sixteen of twenty-nine, were dismissed (Appendix III). Of these sixteen cases, accommodation was found to result in undue

hardship, or otherwise not be required, in twelve. It was decided in the other four cases that no discrimination had occurred.

Of the eight arbitration complaints that were allowed, three involved remedies that included reinstatement. The complainants had not lost their jobs in the other five cases. In those five cases, the complainants received lost wages, were granted the leave of absence, and, in one case, had a warning letter removed from the file.

As expected, only one of the Human Rights cases, *Rand*, involved reinstatement. The awards in the Human Rights cases included lost wages in five cases and damages for mental anguish in one of those five cases, as well as in three other cases. The results of the remaining Human Rights cases were to require the employer to cease the discriminatory practice, and, perhaps surprisingly, only one case required the employer to post a notice to the effect that discrimination had occurred.

### **The Use of Human Rights Legislation in Arbitration Cases**

*The impact of human rights legislation is growing in the unionized environment.*

It is interesting to note that out of the fifteen arbitration cases, only three relied on Human Rights legislation to decide the case (Appendix VII). The impact of Human Rights legislation is growing in the unionized environment, however, through clauses in the collective agreements. An additional eight arbitration cases were decided based on a no-discrimination clause in the collective agreement similar to those in Human Rights legislation and used similar precedents, if not actual Human Rights precedents. Of the remaining four cases, three relied on clauses in the collective agreement requiring that leaves of absence not be unreasonably denied and one case, *Canadian Timken*, relied on a discharge clause. Even in these cases that did not rely on no-discrimination clauses adopted from Human Rights legislation, it appears that there is an influence from Human Rights law in deciding the case through looking at accommodation and defining what is 'reasonable.'

### **Union Involvement in Human Rights Cases**

Not only does Human Rights legislation influence the unionized environment through collective agreements and arbitration, but unions are often involved in cases before Human Rights Commissions. Seven of the twenty-nine Human Rights cases involved unions (Appendix IV). In one case, *Rand*, the union supported the complainant, and it was the one case in which reinstatement was awarded. This may support the idea that reinstatement is not realistic or desirable for Human Rights complainants, partly due to the absence of union protection.

The other six times a union was involved, the complaint was filed against the union in addition to the employer. In one of those cases, *Israeli*, the union posted the advertisement for the job. In this case, no discrimination was found against either the union or the employer. Four of the cases were complaints that the employer and union had failed to accommodate the employee. Only one of these cases (*Gohm*) succeeded and the

claimant was awarded wages and interest to be paid jointly by the company and the union. The final case against a union as well as the company (*Kurvits*) was one in which the complainant wished to have his union dues paid to his church rather than to the union. This had not occurred because the church was not a registered charity as the collective agreement required. The decision ordered amendment of the collective agreement and the union and the company were to pay jointly \$1,000 in damages to the complainant. This confirms the duty of the union as well as the employer to accommodate employees.

## Conclusion

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Looking at the cases that have arisen over religious discrimination in the workplace shows that the legislation and the jurisprudence is being used, but also invites reservations about the effectiveness of the protection.

The legislative protection is solidly in place. Human rights legislation has come a long way, and the Charter may also protect religious freedom in the workplace. The broad definitions of 'religion' and 'creed' indicate that current as well as new religions are likely to be protected and, in some cases, individual interpretations of the dictates of a religion.

*The time lapse between the complaint and the board of inquiry appointment lessens the effectiveness of the legislation.*

The jurisprudence on discrimination is also promising. In adverse effect discrimination cases, accommodation is required to the point where the employer faces undue hardship. In addition, unions have a duty to accommodate, although the extent of this duty is still unclear.

The major concerns that emerge are with the process for dealing with human rights complaints. There is a considerable time lapse between the complaint and the board of inquiry appointment. This lessens the effectiveness of the legislation by making it a less attractive option. Human rights legislation should, ideally, attend to discrimination when it occurs in the workplace. In reality, it only compensates after the fact and does little to keep a worker employed. Almost all of the complaints are filed after the complainant has lost his/her job or has been turned down when applying for the job. Compensating at that point does nothing to enable the worker to be employed free of discrimination. For human rights legislation to be truly effective it needs to deal with discrimination before the worker becomes unemployed.



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**Appendix I Time Line of Human Rights Cases**

<i>Case</i>	<i>Jurisdiction</i>	<i>Date of Event</i> (mon/yr)	<i>Date of Decision</i> (mon/yr)	<i>Time Lapse</i> (months)	<i>Date of Last Appeal</i> (mon/yr)
<i>Bhinder</i>	Federal	12/1978	8/1981	32	12/1985 (S.C.C.)
<i>Blatt</i>	Ontario	11/1977	11/1979	24	
<i>Boogaars</i>	BC	9/1986	4/1989	31	
<i>C. Alberta</i>	Alberta	4/1983	9/1984	17	9/1990 (S.C.C.)
<i>Caldwell</i>	BC	4/1978	7/1979	15	12/1984 (S.C.C.)
<i>Casagrand</i>	Alberta	9/1985			4/1987 (Prov.)
<i>Dufour</i>	Ontario	1982-83	2/1989		
<i>Ekco</i>	Quebec	1978	10/1983		
<i>Garrod</i>	Ontario	10/1986	10/1991	60	
<i>Gohm</i>	Ontario	11/1981	5/1990	102	4/1992 (Appeal)
<i>Grewal</i>	Alberta	1/1987	1/1988	12	
<i>Israeli</i>	Federal	1/1979	7/1983	54	4/1984 (Review)
<i>Khalsa</i>	Ontario	1/1980	5/1980	4	
<i>Kurvits</i>	Federal	2/1986	5/1991	63	
<i>Lothian</i>	Ontario	4/1983	11/1986	43	
<i>Morra</i>	Ontario	8/1980	10/1981	14	
<i>O'Malley</i>	Ontario	10/1978	4/1980	18	12/1985 (S.C.C.)
<i>Osborne</i>	Manitoba	8/1982	8/1983	12	12/1984 (C.A.)
<i>Pandori</i>	Ontario	1/1988	7/1990		4/1991 (Appeal)
<i>Pannu</i>	Alberta	3/1985	12/1985	9	9/1986 (C.A.)
<i>Parks</i>	Ontario	10/1988	10/1991	36	
<i>Pederson</i>	Federal	12/1985	2/1989	38	
<i>Rand</i>	Ontario	2/1981	6/1982	16	
<i>Renaud</i>	BC	6/1985	6/1987	24	8/1989 (on Appeal)
<i>Roosma</i>	Ontario	8/1985	11/1987	27	(on Appeal)
<i>Ryder</i>	BC	1/1989	8/1990	19	
<i>Sidhu</i>	BC	2/1982	3/1985	37	
<i>Toor</i>	BC	1/1978	12/1984	83	
<i>Warford</i>	NFLD	6/1985	2/1988	32	

## Appendix II Fact Situations in Human Rights Cases

<i>Case</i>	<i>Religion</i>	<i>Situation</i>
<i>Bhinder</i>	Sikh	Refusal to wear a hard hat
<i>Blatt</i>		Living in conflict with Catholic life
<i>Boogaars</i>	World Wide Church of God	Required to work Saturdays
<i>C. Alberta</i>	World Wide Church of God	Unauthorized absence — holy day
<i>Caldwell</i>	Catholic	Not married in the Catholic Church
<i>Casagrand</i>		Lifestyle contrary to Catholic Church
<i>Dufour</i>		Harassment, not 'Born Again Christian'
<i>Ekco</i>	World Wide Church of God	Required to work Friday evening
<i>Garrod</i>	United	Living Common-Law, not Christian life
<i>Gohm</i>	Seventh Day Adventist	Refusal to work Saturdays
<i>Grewal</i>	Sikh	Not follow policy of re-applying
<i>Israeli</i>	Jewish	Not hired, alleged direct discrimination
<i>Khalsa</i>	Sikh	Refusal to cut hair, beard
<i>Kurvits</i>	Baptist	Request to pay union dues to Church
<i>Lothian</i>	Anglican	Denied leave of absence
<i>Morra</i>	Catholic	Not paying taxes to support Catholic school
<i>O'Malley</i>	Seventh Day Adventist	Refusal to work Friday evening & Saturday
<i>Osborne</i>	Seventh Day Adventist	Unauthorized absences Friday evening
<i>Pandori</i>	Sikh	Wearing of Kirpans prohibited
<i>Pannu</i>	Sikh	Not hired, alleged indirect discrimination
<i>Parks</i>		Living contrary to Evangelical Christian
<i>Pederson</i>	World Wide Church of God	Refusal to work on a holy day
<i>Rand</i>	Jewish	Required to take training on Saturday
<i>Renaud</i>	Seventh Day Adventist	Could not work regular shift on Friday
<i>Roosma</i>	World Wide Church of God	Refusal to work Fridays
<i>Ryder</i>	Ev angelical Tabernacle	Refusal to work on Sundays
<i>Sidhu</i>	Sikh	Refused re-employment, alleged direct discrimination
<i>Toor</i>	Sikh	Refusal to wear hard hat
<i>Warford</i>	Pentecostal	Refusal to sell tickets to a hospital social

### Appendix III Decisions in Human Rights Cases

<i>Case</i>	<i>Lost Jobs</i>	<i>Decision of Highest Court to Hear Case</i>
<i>Bhinder</i>	Yes	Dismissed, BFOR, no duty to accommodate
<i>Blatt</i>	Yes	Dismissed, lifestyle in conflict with Church
<i>Boogaars</i>	Yes	Dismissed, made reasonable effort to accommodate
<i>C. Alberta</i>	Yes	Accommodation possible, lost wages \$8000
<i>Caldwell</i>	Yes	Dismissed, BFOQ to respect Catholic religion
<i>Casagrand</i>	Yes	Dismissed, BFOR that follow Catholic Church
<i>Dufour</i>	Yes	1— Dismissed, 2— \$1000 compensation, no lost wages
<i>Ekco</i>	Yes	Dismissed, no duty to accommodate under Quebec Charter
<i>Garrod</i>	Yes	Dismissed, S.23(A) applies to Christian schools, lifestyle BFOQ
<i>Gohm</i>	Yes	Company and union jointly pay \$74,000 wages and interest
<i>Grewal</i>	Yes	Dismissed, not follow policy (re-apply)
<i>Israeli</i>	Yes	Dismissed, no discrimination
<i>Khalsa</i>	Yes	Constructive discrimination, notice posted, apology
<i>Kurvits</i>	No	Amend collective agreement, \$1,000 damages (jointly paid)
<i>Lothian</i>	Yes	Dismissed, leave of absence not economically feasible
<i>Marra</i>	Yes	Dismissed, motive economic not religious
<i>O'Malley</i>	No	Accommodation possible, lost wages (full/part time cliff.)
<i>Osborne</i>	Yes	Dismissed, accommodation = undue hardship
<i>Pandori</i>	Yes	Discrimination, changed rule
<i>Pannu</i>	Yes	Consider application, if reject explain
<i>Parks</i>	Yes	Failed to apply BFOQ test consistently, discrimination
<i>Pederson</i>	Yes	Dismissed, BFOR, not look at duty to accommodate
<i>Rand</i>	Yes	Intent to discriminate, reinstate, damages \$1,500
<i>Renaud</i>	Yes	Dismissed, BFOQ, not consider individual
<i>Roosma</i>	N/A	Decision on preliminary issues, not facts
<i>Ryder</i>	No	Lost wages, \$300 anguish
<i>Sidhu</i>	Yes	Dismissed, no vacant positions, not discrimination
<i>Toor</i>	Yes	Dismissed, no accommodation possible for safety
<i>Warford</i>	No	Discrimination, lost wages, expenses \$250

#### Appendix IV Union Involvement in Human Rights Cases

<i>Case</i>	<i>Union Involvement</i>
<i>Boogaars</i>	Complaint also against union for inaction
<i>Gohm</i>	Complaint also against union for not accommodating
<i>Israeli</i>	Complaint also against PSC, PSC advertised position
<i>Kurvits</i>	Complaint also against union for inaction
<i>Rand</i>	Supported by union against company
<i>Renaud</i>	Complaint also against union for not accommodating
<i>Roosma</i>	Complaint also against union for not accommodating

#### Appendix V Time Line of Labour Arbitration Cases

<i>Case</i>	<i>Jurisdiction</i>	<i>Date of Incident</i> (mon/yr)	<i>Date of Arbitration Decision</i> (mon/yr)	<i>Time Lapse</i> (months)
<i>ACLO Compounders</i>	Ontario	6/1979	2/1980	8
<i>Arvin Automobile</i>	Ontario	6/1978	11/1978	5
<i>Canada Valve</i>	Ontario	1/1975	7/1975	6
<i>Canadian Timken</i>	Ontario	6/1987	11/1987	5
<i>Chrysler Canada</i>	Ontario	4/1985	2/1986	10
<i>Holland Hitch</i>	Ontario	4/1985	11/1986	19
<i>Humber College</i>	Ontario	1/1987	12/1987	11
<i>Nova Scotia Civil Service Commission</i>	Nova Scotia	9/1988	8/1989	11
<i>OPSEU</i>	Ontario	7/1990	10/1991	15
<i>Peterborough Civic Hospital</i>	Ontario	4/1980	12/1981	20
<i>Singh and Crown</i>	Ontario	3/1978	11/1980	20
<i>Stelco Wire</i>	Ontario	7/1985	6/1986	11
<i>Varta Batteries</i>	Ontario	11/1986	2/1987	3
<i>Varta Batteries</i>	Ontario	7/1989	2/1990	7
<i>Wheeler</i>	Federal	6/1979	3/1980	9



## Appendix VI Fact Situations in Labour Arbitration Cases

<i>Case</i>	<i>Religion</i>	<i>Situation</i>
<i>ACLO Compounders</i>	Sikh	Refusal to wear a hard hat
<i>Arvin Automobile</i>	Jewish	Refusal to work Saturdays
<i>Canada Valve</i>	Serbian Orthodox	Unauthorized absence for Christmas on January 7
<i>Canadian Timken</i>	World Wide Church of God	Unauthorized absence
<i>Chrysler Canada</i>	Seventh Day Adventist	Unauthorized absences on Friday evenings and Saturdays
<i>Holland Hitch</i>	Mennonite	Denied leave of absence
<i>Humber College</i>	Wicca	Denied leave of absence with pay
<i>Nova Scotia Civil Service Commission</i>	Jewish	Denied special leave with pay
<i>OPSEU</i>	Jewish	Denied leave for holiday with pay
<i>Peterborough Civic Hospital</i>	Jehovah's Witness	Nurse's refusal to perform part of blood transfusion procedure
<i>Singh and Crown</i>	Sikh	Refusal to shave beard to wear face mask
<i>Stelco Wire</i>	Seventh Day Adventist	Unauthorized absences on Friday evenings
<i>Varta Batteries</i>	World Wide Church of God	Denied job posting — unable to work Saturdays
<i>Varta Batteries</i>	No reference	Denied job posting — unable to work Friday evening and Saturday
<i>Wheeler</i>	Seventh Day Adventist	Unauthorized absence — scheduled Friday evenings

## Appendix VII Decisions in Labour Arbitration Cases

<i>Case</i>	<i>Lost Job</i>	<i>Decision</i>	<i>Basis of Decision</i>
<i>ACLO Compounders</i>	Yes	Hard hat safety requirement, no discrimination, dismissed	Collective agreement no discrimination clause
<i>Arvin Automobile</i>	Yes	Accommodation = undue hardship, dismissed	Collective agreement no discrimination clause
<i>Canada Valve</i>	No	Able to accommodate, warning letter removed	Collective agreement - leave of absence clause, legitimate reason
<i>Canadian Timken</i>	Yes	Not available to do any of the jobs, dismissed	Collective agreement discharge clause, cause
<i>Chrysler Canada</i>	Yes	Accommodation, reinstated, no compensation	Human rights legislation
<i>Holland Hitch</i>	No	Leave of absence reasonable	Collective agreement - leave of absence clause, legitimate reason
<i>Humber College</i>	No	Denial of leave of absence unreasonable, lost pay	Collective agreement - leave of absence clause, legitimate reason
<i>Nova Scotia Civil Service Commission</i>	No	Leave of absence without pay reasonable, dismissed	Collective agreement - no discrimination clause
<i>OPSEU</i>	No	Accommodation possible, compensation = 2 days pay	Collective agreement - no discrimination clause, leave of absence clause
<i>Peterborough Civic Hospital</i>	Yes	Accommodation, reinstated, half of lost wages,	Collective agreement no discrimination clause
<i>Singh and Crown</i>	No	Accommodation possible, back pay	Human rights legislation
<i>Stelco Wire</i>	Yes	Accommodation, reinstated, no compensation	Collective agreement no discrimination clause
<i>Varta Batteries</i>	No	Accommodation = undue hardship, dismissed	Collective agreement no discrimination clause
<i>Varta Batteries</i>	No	Accommodation = undue hardship, dismissed	Collective agreement no discrimination clause
<i>Wheeler</i>	Yes	Accommodation = undue hardship, dismissed	Human rights legislation



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