

# **The Seniority Principle: Is It Discriminatory?**

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## FOREWORD

The Industrial Relations Centre is pleased to include this study, The Seniority Principle: Is It Discriminatory?, in its publication series School of Industrial Relations Research Essay Series. The series is intended to give wider circulation to selected student research essays, chosen for both their academic merit and their interest to industrial relations practitioners and policy makers.

A substantial research essay is a major requirement of the Master's Program in Industrial Relations at Queen's. The essay may be an evaluation of a policy oriented issue; a limited empirical project; or a critical analysis of theory, policy, or the related literature in a particular area of industrial relations.

The author of the essay, Kathryn MacLeod, graduated from the School of Industrial Relations in September 1986. She is now Manager of Industrial Relations at the Modern Building Cleaning Corporation in Ottawa.

I would like to express my appreciation to the author for granting permission to publish this excellent study.

D.D. Carter, Director  
Industrial Relations Centre  
and School of Industrial Relations  
Queen's University

February, 1987

## **ABSTRACT**

The increasing public awareness of the inequality prevalent in the Canadian workplace has led to a state whereby employees are questioning the effects that employment rules and practices have on them as individuals, as well as members of a group. Seniority systems are one such employment practice which is under examination for a discriminatory effect on women and minorities in the labour force. This paper pursues the questionable effects of seniority systems by examining; the remedial powers at the disposal of each legal forum available to an employee to pursue a discrimination claim, the relevant Canadian jurisprudence on discrimination, and the American experience with discrimination claims based on seniority. The paper concludes with a proposal detailing an outline of an affirmative action plan tailored to fit the Canadian situation as it is exposed by the previous sections of the paper.

## INTRODUCTION

Substantive equality for women and minorities in employment is a concept which is generating increasing support and attention in Canada. In acknowledgement of the public interest in this issue, the Federal government recently commissioned Judge Rosalie Abella to report on the state of equality in employment in Canada. The resulting report, Equality in Employment, recommended that a massive policy response to systemic discrimination be initiated by the government to ensure equality of opportunity, removal of employment barriers, and equality of result for women and minorities, through legal regulation. The Report also suggested that it may be necessary to require employers to implement affirmative action measures, such as goals and timetables, to enforce employment equity.

In her Report Judge Abella defined equality in employment in the following manner:

Equality in employment means that no one is denied opportunities for reasons that have nothing to do with inherent ability. It means equal access free from arbitrary obstructions. Discrimination means that an arbitrary barrier stands between a person's ability and his or her opportunity to demonstrate it. If the access is genuinely available in a way that permits everyone who so wishes the opportunity to fully develop his or her potential, we have achieved a kind of equality. It is equality defined as equal freedom from discrimination.<sup>1</sup>

There are numerous definitions of equality but this paper adopts the above definition primarily because it encompasses the two essential elements necessary if women and minorities are to equally share the labour market: equal access to employment and freedom from arbitrary employment barriers. What Judge Abella's definition of equality does not mention is the means to getting to this state of equality. This paper will examine affirmative action as a possible vehicle to redress employment discrimination.

How to attain the level of employment equality the Abella report advocates has been the subject of considerable controversy by scholars. Three principle models that conceptualize employment equality and the means of achieving it have been identified in recent written works.

The model that is currently in force in Canada is the "equal opportunity" model. It is the most modest of the three models, and the continued existence of inequality has proven it to be largely ineffective.<sup>2</sup> Human rights legislation prohibits discrimination on the grounds of sex and race, however this does not ensure that equality of results derives from the opportunity supposedly guaranteed by this legislation. The equal opportunity model proposes that women and minorities who have the same qualifications as white males should have equal opportunity to gain the same types of employment. This equal access must extend beyond entry-level employment to encompass job-training and promotion. Measures to ensure equality of opportunity focus on the removal of intentional and unintentional attitudinal barriers, such as educational streaming, biased screening measures, and traditional stereotyping, as well as concrete barriers such as the blanket exclusion of certain groups (e.g. women in combat) or "neutral" qualification criteria with a disparate impact on certain groups (e.g. height and weight requirements).

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<sup>1</sup> Judge Rosalie Abella, Equality in Employment: A Royal Commission Report, October 1984, p. 2.

<sup>2</sup> Margit Eicher, "Applying Equality to Employment", in Judge Rosalie Abella, Equality in Employment: A Royal Commission Report, Research Studies, April 1985, p. 209.

The "equal rewards" model conceptualizes equality as the equal rewarding of equivalent employment effort, skill and responsibility. Although this model includes the principle of "pay equity" which would mandate equal wage and fringe benefit compensation for work of equal value, it also seeks equality of access to decision-making positions and to promotions for employees whose duties reflect equivalent functional worth to the employer.<sup>3</sup> The equal rewards model assumes that it is not due to inferior ability that women and minorities are disproportionately employed in low-paying occupations; rather it is because historically these employees had no other employment alternatives. Discrimination limited women's and minorities' access to high paying jobs and since these two groups dominated the lower-paying jobs, the jobs themselves became undervalued. The rationale behind the equal rewards model is that an equalization of rewards and recognition across equivalent job structures would eventually eliminate job segregation and enhance job mobility. This model does not tackle the white male job strongholds directly.

Finally, the "proportionate representative" model states that our society will have attained equality in employment only when the representation of women and minorities in all occupational categories is proportionate to the demographic representation of these groups in the labour force. This is the model that has been adopted by some human rights Commissions since the late 1970's as it would accomplish their goal of eliminating all barriers and practices with either discriminatory motives or impacts on the identified disadvantaged groups. This model credits the underemployment and overemployment of women and minorities in certain occupations to systemic discrimination,<sup>4</sup> which can only be altered by systemic remedies such as affirmative action.

This paper adopts the "proportionate representative" model as the most appropriate and effective means to achieve employment equality. Affirmative action enforced through the establishment of goals and time-tables for hiring and promoting historically under-represented groups is the prime means to acquire a proportionate representation across all occupations. This paper is concerned with a specific aspect of equality in employment: the inequality which is created by the incorporation of the seniority principle into the workplace. Seniority provisions although facially neutral, reproduce the effects of past discrimination. The seniority principle revolves around the "last-in, first-out" rule which governs all layoffs, recalls, transfers, and most promotions. Due to recent inroads of women and minorities in the occupations traditionally held by white males, they are disproportionately adversely affected by seniority-ruled promotions, layoffs and recalls.

Measures to provide equality, predominately through affirmative action programs, pose an obvious threat to seniority rights and thus jeopardize the employment security of the existing workforce. An implementation of the proportionate representative model would entail direct or indirect alteration of white males' seniority rights to accommodate women's and minorities' enhanced access to non-traditional employment through hiring and promotions.

The equal opportunity model and the equal rewards model do not reach the seniority issue. Neither model provides for access to job security and promotional opportunities which depend on the length of service accrued by the woman or minority employee.

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<sup>3</sup> Ibid., at p. 209.

<sup>4</sup> For a definition of systemic discrimination see page 22, *infra*.

In the Canadian context, the legal exploration of the possible discriminatory effects of seniority provisions is at a very early developmental stage. The courts and administrative tribunals have yet to rule on whether seniority provisions illegally discriminate against women and minorities, but the signs are clear that it is an upcoming issue. The effects of the early 1980's recession continue to buffet the labour market, with layoffs and difficult re-entry being characteristic. Simultaneously, women and minorities are continuing to claim their rights to equal treatment in the workplace, and it is these actions that are in direct conflict with traditional employment practices. As Colleen Shepard identifies the conflict:

At stake is the basic economic right to earn one's livelihood and the right to be free from discriminatory treatment. In a world where jobs are becoming increasingly scarce, while women and minority workers continue to press their rightful claims to equal employment opportunities and equality of conditions, issues such as the conflict between seniority-based layoffs and affirmative action cannot be avoided.<sup>5</sup>

It is evident from the major struggles and gains that women and minorities have made in the past 20 to 40 years, that the historic victims of employment discrimination will not be satisfied with half-measures of equality. As the effects of the economic slowdown continue to reverberate throughout the labour market, women and minorities will bring seniority systems before the courts, or administrative tribunals to be judged on the equity of their application. This paper will set the stage for these future actions, anticipating the considerations that the adjudicators will face.

In order to appreciate the full importance of attaining employment equality for women and minorities<sup>6</sup> it should be noted that in Canada's population of approximately 23 million, women, native males, male members of visible minorities and disabled males constitute approximately 60% of the total population.<sup>7</sup> Within the labour force as it is currently composed there are: 5,534,000 women constituting 42.8% of the labour force,<sup>8</sup> 123,000 native people,<sup>9</sup> and 1.7 million working age disabled persons.<sup>10</sup> These statistics tell their own story. A common employment practice such as seniority which may have an adverse impact on over half of Canada's labour force, should not go unexamined.

Considering the current and forecasted future state of Canada's labour market, it is not too presumptuous to propose that young people will become a minority in the workplace. Population growth is slowing, family size is declining, and the average life-span is longer. Canada's population is growing older, and if the abolition of mandatory retirement in the public sector is an indication of an emerging trend, labour force participants may be working longer. The continued use of seniority systems will place young people at the end of an already crowded job queue, where the "last-in, first-out" rule of seniority will affect them disproportionately just as it currently does women and racial minorities.

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<sup>5</sup> Colleen Shepard, "Affirmative Action in times of Recession: The Dilemma of Seniority-based Layoffs", University of Toronto Faculty Law Review, Vol. 42, No. 1, Spring 1984. P. 25.

<sup>6</sup> For the purposes of this paper, young people and disabled individuals shall be considered included under the umbrella term "minorities".

<sup>7</sup> Judge Rosalie Abella, Equality in Employment: A Royal Commission Report, October 1984, p. 17.

<sup>8</sup> Statistics Canada, The Labour Force, April 1986, Catalogue No. 71-001, Table 1., p. 16.

<sup>9</sup> Judge Rosalie Abella, note 7 supra at p. 54.

<sup>10</sup> Ibid.

## SCOPE

The purpose of this paper is to set the stage for the emergence of a social, economic and legal issue before Canadian legal institutions. Rather than examine each facet of this issue in depth, the scope of the paper is broad in order to cover various considerations that will be exposed upon a legal examination of seniority provisions for discriminatory effect.

Three key discrimination cases<sup>11</sup> recently decided by Canadian high courts are analyzed so that the legal principles the courts have established may be extracted and applied to the seniority question. These cases reveal the court's policy direction and indicate the approach that may be taken with seniority-based discrimination cases.

The issue of whether seniority provisions may be discriminatory against women and minorities has been debated before the United States courts since the early 1960's. It is by no means resolved, but there are a series of cases that establish some benchmarks on the seniority question. In light of the substantial differences between the relevant legislation in Canada and the United States, the American jurisprudence is considered only as a conceptual model for an issue that has yet to reach the Canadian judicial system. In addition, the United States case law may suggest remedies Canadian courts might fashion in response to seniority-based discrimination claims.

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<sup>11</sup> See text at p 46 to 75, infra.

## SENIORITY

In an industrial relations context seniority is a system that is used to designate an employee's status in relation to other employees of the same workplace, to determine matters such as layoff and recall ordering, and the awarding of benefits and promotions. Seniority systems can utilize straight seniority which is job security acquired solely through length of service, or qualified seniority which considers other factors such as ability in conjunction with length of service.<sup>12</sup>

Deference to seniors has been a practice that has been ingrained in society since the earliest cultures, and seniority-based job security was adopted by the trade union movement from the time of its inception. Although the seniority principle has existed for generations in employment practices such as apprenticeships, it is known that the United States printing trades debated seniority in the 1890's, while the manufacturing industries began negotiating seniority rights in the 1920's.<sup>13</sup>

Tracing the origins of seniority (sic) provisions in collective agreements leads to the conclusion that seniority (sic) is an industrial adaptation of a hierarchic principle inherent in the human condition - precedence of elders. Today's elders are tomorrow's retirees and descendants whose successors stand behind them in a seniority (sic) queue.<sup>14</sup>

Another view of the origins of employment seniority systems claims that they primarily derive from the collective bargaining process.

Neither by law nor by custom has seniority (sic) become an essential ingredient of the employment relationship. The employer who operates an unorganized plant is free to ignore relative length of service in laying off, recalling, promoting, or assigning his employees, and he usually does so. Yet the seniority (sic) principle is so important that it is embodied in virtually every collective agreement. It is thus the product of collective bargaining; it owes its very existence to the collective agreement.<sup>15</sup>

Whether the labour movement instinctively incorporated a hierarchical principle whose origins reach back into early civilizations, or whether seniority is a product of the collective bargaining process, it cannot be debated that seniority rights represent one of the cornerstones of trade unionism.

With the obvious exception of the public sector,<sup>16</sup> the large majority of labour and management parties to a collective agreement have incorporated the seniority principle into their relationship. Often seniority is a hard won management concession and once the principle is incorporated into the collective agreement, it

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<sup>12</sup> Pradeep Kumar, Canadian Industrial Relations Information; Sources, Technical Notes and Glossary, Industrial Relations Centre, Queen's University, Kingston, Ontario, May 1979.

<sup>13</sup> Carl Gersuny, "Origins of Seniority Provisions in Collective Bargaining", Industrial Relations Research Association, Proceedings of 1982 Spring Meeting, April 28-30, 1982, Milwaukee, Wisconsin, p. 521.

<sup>14</sup> *Ibid.*, at p. 523.

<sup>15</sup> Benjamin Aaron, "Reflections on the Legal Nature and Enforceability of Seniority Rights", (1962) 75 Harvard Law Review 1532 at 1543.

<sup>16</sup> The public sector hires and promotes on the merit principle (see federal and provincial Acts covering the Public Service). However generally speaking, job security in the public service is as secure as that obtained through a system of seniority.

is there to stay as far as the union is concerned. Once seniority becomes accepted, each party perceives certain advantages that seniority systems can provide for it in the collective bargaining relationship.

The union perceives seniority as an objective criterion upon which to base managerial decisions on promotions, layoffs, benefits and so on. It restricts management's discretion and the possible arbitrary treatment of employees with regard to these decisions. A seniority system ultimately provides maximum security and award to those who have rendered the longest service to the organization. It is perceived as a return on employee's investment of time in the company, which pleases the employee who credits the union for attaining this system.

Unions view seniority as a fair and equitable alternative to the competitive and aggressive behaviour that pits workers against one another when competing for jobs and promotions. There is a logical, orderly progression up job ladders so employees are better able to plan their career paths, and are willing to pass on their task-knowledge to those on the job-ladder behind them. The existence of seniority provisions provides a legitimacy and purpose to the existence of the union which monitors the administration of the seniority system. It is typically one of the first rights to be bargained for by a newly certified union.<sup>17</sup>

Seniority systems are quite commonplace in certain industries, while in other industries or individual organizations management insists upon retaining the autonomy of a merit system. However once the concept is accepted, management perceives that certain benefits accrue from seniority systems. Management also desires an objective criterion for decision making regarding the assignment of employees which if conducted in arbitrary fashion, could cause discontent within their labour force.

A management spokesperson has said: 'In the worker's mind, seniority is an impersonal standard which minimizes possible employer discrimination and favouritism in matters affecting the worker's job. For this reason employers' policies regarding the seniority principle represent one of the cornerstones of sound labor-management relations.'<sup>18</sup>

Management is generally concerned with maintaining its credibility with its employees, and seniority is a good means to ensure at least the appearance of fair determination of employee's critical job interests. In industries where seniority systems are the norm, the voluntary quit rate tends to be lower because joining a new organization would require an employee to start at the bottom of a new seniority ladder.<sup>19</sup>

A seniority system governs the allocation of economic benefits to employees within a firm based upon an employee's accumulated years of service with that organization.

It (seniority) has become an integral part of the institutionalized web of rules that affects the administration of human resources in the internal labour market. Specifically, seniority has come to represent an enforceable priority under a collective bargaining agreement which qualifies an

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<sup>17</sup> Carl Gersuny, note 13 supra at p. 520.

<sup>18</sup> P. Selznik, "Law, Society and Industrial Justice", Labour Relations Law Casebook, Queens University, Kingston, Ontario, 1974, p. 273.

<sup>19</sup> Mary Ellen Kelley, "Discrimination in Seniority Systems: A Case Study", Industrial and Labour Relations Review, Vol. 36, No. 1, October 1982, p. 42.

employee for benefits from the employer and provides a common basis for employees to estimate their relative status in terms of job security and opportunities for advancement.<sup>20</sup>

There are two categories of provisions within seniority systems; competitive status provisions govern the use of seniority in employee transfers, promotions, and layoffs, while benefit status provisions allocate economic benefits such as vacations and pensions. There are an infinite variety of seniority systems but individual systems are usually "tailor-made" to the organization, reflecting the needs, desires, and relative power of labour and management.

The two most common forms of seniority provisions are the sufficient ability clause and the competitive clause. When a sufficient ability clause governs promotions, the senior applicant gets the job if he/she is qualified to perform the job. The competitive clause determines that the senior employee, of two relatively equal candidates, is awarded the job. "Relatively equal" in this context means that the two employees can perform equally as well in this job. If there is an obviously superior candidate then ability supersedes seniority and this candidate is given the job.<sup>21</sup>

The structure of the seniority system is a significant factor in determining whether that system will have a disparate impact on women and minorities. A complex seniority system is characterized by an internal labour market with multiple job ladders. Practices that prohibit women and minorities from entering certain high-wage job ladders are one cause of discrimination.<sup>22</sup>

Assignment practices that result in substantially segregated entry level jobs may have consequences beyond the immediate discriminatory effect of reserving certain entry level jobs for white men only. If, in addition, the race and sex segregated job ladders to which women and blacks have been assigned are truncated at the low end of the wage structure, they do not represent the full range of wage possibilities available in the plant. And if promotion practices within the internal labour market also unduly restrict movement across job ladders, then women and blacks may be denied access to the higher wage opportunities available in other promotion ladders in the plant.<sup>23</sup>

The unit of seniority has a disparate impact on women and minority workers if it does not provide equitable access to job opportunities within the workplace. Women and minorities are hired into low paying jobs with ceilings on upward mobility substantially more often than white males. Narrow departmental or job-based seniority systems trap these workers in job ghettos due to a lack of lateral mobility, and restricted upward mobility. In order for a worker to compete for and obtain a job in another seniority unit, he/she may have to forfeit all accumulated seniority rights and start again at the bottom of the new seniority ladder. This system serves to perpetuate the problem that was initiated by discriminatory hiring practices. Thus the question has been posed "whether unequal access across promotion ladders may mean that the seniority system itself is discriminatory."<sup>24</sup>

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<sup>20</sup> James B. Craft, "Equal Opportunity and Seniority: Trends and Manpower Implications", Labor Law Journal, December, 1975, p. 750.

<sup>21</sup> Katherine Swinton, "Restraints on Government Efforts to Promote Equality in Employment: Labour Relations and Constitutional Considerations", in Judge Rosalie Abella, Equality in Employment: A Royal Commission Report, Research Studies, April 1985, p. 288.

<sup>22</sup> Mary Ellen Kelley, note 19 supra at p.40.

<sup>23</sup> Ibid., at p. 41.

<sup>24</sup> Ibid., at p. 42.

**Table 1, Canadian Labour Force by Industry and Sex**

	Both sexes	Female	% female of both sexes	Male	% male of both sexes
TOTAL	12734	5473	42.9	7261	57.0
Agriculture	509	156	30.6	353	69.3
Non-agriculture	12123	5255	43.3	6868	56.6
Other primary industries	337	45	13.3	292	86.6
Manufacturing	2204	640	29.0	1564	71.0
Construction	734	69	9.4	665	90.6
Transportation, communication and other utilities	970	233	24.0	737	75.9
Trade	2282	970	42.5	1313	57.5
Finance, insurance and real estate	671	404	60.2	267	39.8
Service	4079	2548	62.5	1530	37.5
Public administration	846	346	40.9	501	59.2
Unclassified *	101	62	61.4	40	39.6

\*comprises unemployed persons who have never worked before, and those persons who last worked more than five years ago.

Source: Statistics Canada, The Labour Force, Catalogue No 71-001, April 1986, p 42.

**Table 2, Canadian Labour Force by Occupation and Sex**

	both sexes	female	% female of both sexes	male	% male of both sexes
all occupations	12,734	5,473	43.0%	7,261	57.0%
managerial,					
Administrative	1,442	498	34.5	943	65.4
natural sciences	424	67	15.8	357	84.2
social sciences	188	106	56.4	82	43.6
Religion	36	9	25.0	27	75.0
teaching	538	338	62.8	201	37.4
medicine & health	587	461	78.5	126	21.5
artistic & recreational	204	85	41.6	118	57.8
clerical	2,101	1,679	79.9	422	79.9
sales	1,194	516	43.2	678	43.2
service	1,754	999	56.9	756	56.9
agriculture	520	137	26.3	383	26.3
fishing, hunting & trapping	40			37	92.5
forestry & logging	69	5	7.2	64	98.5
mining & quarrying	70			68	97.1
processing	411	92	22.4	319	77.6
machining	255	15	5.8	240	94.1
product fabricating, assembling & repairing	1,076	243	22.6	832	77.3
construction trades	738	13	1.7	725	98.2
transport equipment operation	492	36	7.3	456	92.6
materials handling	316	64	20.2	252	79.7
other crafts and equipment operating	179	44	24.5	134	74.8
unclassified *	101	62	61.4	40	39.6

\* comprises unemployed persons who have never worked before, and those persons who last worked more than five years ago.

Source: Statistics Canada, The Labour Force, Catalogue No. 71-001, April 1986, p. 41.

Job ghettoization occurs by industry as well as by occupation. Although some authorities claim that job ghettos are a problem of the past, 1986 Statistics Canada figures show that males and females are still segregated by industry and by occupation (see Tables 1 and 2). Table 1 shows that there are certain industries that are male-dominated, such as primary industries, construction and agriculture; and that other industries have a predominance of female workers, particularly the sales, service and clerical sectors. These and other segregated areas are the ones that have traditionally been occupied by males or females and it is the socialization process of both employers and employees which distinguishes on the basis of sex rather than actual ability that is primarily to blame. Judge Abella captures the essence of this sex-oriented socialization process that begins during childhood, continues through education, and affects both the woman's choice of occupation as well as how she is treated by men and other women who have been victims of the same misconceptions.

The cultural ambience from which men and women emerge affects what takes place in the workplace. How men and women perceive one another as spouses and how children perceive their parents both determine what happens to women in the workforce. If women are considered economic and social dependents in the home, they will continue to be treated as subservient in the workplace.<sup>25</sup>

A cursory examination of Table 2 would lead one to believe that women fill more occupational categories than they actually do. The percentage breakdown of the managerial, administrative occupational category, however is misleading unless one takes note that women exist only at the low end of the managerial hierarchy. The same misperception is created by lumping together medicine and health without breaking the category into doctors, nurses, nurse's aides, and so forth. The two largest representations of women are in medicine and health, and clerical. These occupations are female ghettos because there is no progression beyond a certain level, i.e. a secretary does not get promoted into a managerial position. In her Report Judge Abella reveals the leading female occupations (Table 3). This Table breaks down some of the broad occupational categories in Table 1 and 2 and indicates that although females are apparently well represented in occupations such as medicine and administration it is primarily in a supportive capacity such as nurses or clerks.

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<sup>25</sup> Judge Rosalie Abella, note 7 *supra* at p. 25. The socialization process also shapes employer and employee attitudes that effect the employment patterns and opportunities of minorities. Statistics Canada does not specify job segregation by race or disability so figures on minority segregation are not available.

**Table 3, Leading Female Occupations (50,000 or more Female Workers), 1981**

	females	males	% male	% increase in female employment 1971 - 81
secretaries & stenographers	368.0	4.0	1.1%	53.5%
bookkeepers & accounting clerks	332.3	73.5	18.1	143.6
tellers and cashiers	229.3	18.2	7.4	121.7
waitresses, hostesses and stewards, food & beverage	200.7	33.5	14.3	90.4
graduate nurses	167.7	8.1	4.6	67.3
elementary & kindergarten teachers	139.6	34.1	19.6	16.2
general office clerks	115.0	27.8	19.5	45.0
typist & clerk typists	103.0	2.2	2.1	21.3
janitors, charworkers & cleaners	96.7	138.2	58.8	76.5
sewing machine operators - textiles & similar materials	93.0	5.1	5.2	62.2
receptionists & information clerks	89.0	5.1	5.4	109.5
chefs & cooks	82.5	75.4	47.8	110.0
supervisors, sales occupations, commodities	81.0	196.0	70.8	92.9
nursing aides and orderlies	67.8	17.9	20.9	28.5
clerical and related occupations	66.1	25.8	28.1	49.9
electronic data processing equipment operators	61.3	15.5	20.2	204.2
secondary school teachers	58.1	79.6	57.8	17.5
barbers, hairdressers & related occupations	50.7	16.6	24.7	42.4

Source: Statistics Canada. 1981 Census. Labour Force - Occupational Trends. Catalogue No. 92-920. In Judge Rosalie Abella, Equality in Employment: Royal Commission Report, October 1984, p. 69.

In addition to the impact of job segregation that affects women and minorities, women suffer further disadvantage due to the discontinuity of their participation in the labour force. Although more women are adopting a traditionally "male" career orientation, attaining a higher level of education and then starting a "career" rather than a "job", and maintaining it despite marriage, it is not as constant a path as the typical male career path. Biology necessitates that the female is the reproductive agent so most working women must take a break from their careers to accommodate this process. If the woman and her partner decide that she should stay with the child for longer than her maternity leave, then she could lose her seniority position within her job queue.<sup>26</sup> Childbirth and childcare are the most predominant reasons that women take career breaks,<sup>27</sup> but not the sole reason. The job turnover of females is higher because traditionally a woman's job was viewed as a secondary source of income and thus the male's career took precedence when the family was faced with a transfer or some similar occurrence.<sup>28</sup>

The unstable nature of many women's careers has a negative effect on their accumulation of seniority. Every career break may result in their going to the end of the seniority queue, thereby lessening their chances for promotion and increasing the possibility of their being laid off.

The "last-hired, first-fired" principle which is the essence of seniority provisions, adversely affects women and minorities due to their past exclusion from seniority lists.<sup>29</sup> The changing composition of the labour force reflects the recent influx of women and minorities into jobs traditionally held by white males. Their fewer years of service result in disproportionate percentages of these newly hired workers being involved in layoffs during economic recessions.

... the gains that women (and minorities) have been making over the last decade in entering non-traditional jobs and workplaces are seriously threatened by layoffs. Increasingly women are the victims of the 'last-hired, first-fired' formula that traditional seniority systems demand. Thus, the longstanding principle of seniority as an objective way to regulate layoffs comes into conflict with the rights of women and minority groups to equal rights in the workplace.<sup>30</sup>

This "layoff effect" co-exists with job-ghettoization as the prime reason for the recent attack on seniority systems, as the frequency of layoffs increases in response to recessionary economic conditions. When the economy goes into a downswing, layoffs become more prevalent, and seniority provisions take effect.

The great majority of those collective agreements which cover 500+ employees in Canada, contain some variance on the seniority clause.<sup>31</sup>

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<sup>26</sup> Most legislation protects a woman's seniority when she takes statutory maternity leave.

<sup>27</sup> Unemployed persons stating the reason for unemployment as "keeping house"; both sexes 132000, males 5000, females 127000. (Statistics Canada, The Labour Force, April 1986, Table 44, P. 71.)

<sup>28</sup> Among the 48000 unemployed persons who stated their reason for leaving last job was "personal responsibilities", 43000 were women and only 5000 were men. (Statistics Canada, The Labour Force, April 1986, Table 45, p. 72.)

<sup>29</sup> Marvin J. Levine, "The Conflict Between Negotiated Seniority Provisions and Title V11 of the Civil Rights Act of 1964; Recent Developments", Labor Law Journal, Vol. 29, June 1978, p. 352.

<sup>30</sup> Colleen Shepard, note 5 supra at p. 1.

<sup>31</sup> As the Labour Canada Study reports, "clauses with seniority as a determining factor in promotion appear in 91 percent of the manufacturing and 67 percent of the non-manufacturing contracts. In the event of a layoff, seniority prevails in 97 percent of the manufacturing and 73 percent of the non-manufacturing agreements. The recall procedure is governed by seniority in 95 percent of the manufacturing and 65 percent of the non-manufacturing

While seniority still remains a core union concept, the rules of application are being challenged on the basis of their inequitable effect on women and minorities. On its face, a seniority system is racially and sexually nondiscriminatory. It applies equally to all workers, allocating jobs and benefits to those with the longest length of service to the organization (usually qualified with some ability/merit factor). However, the seniority principle loses its apparent neutrality upon an examination of the recent operation of the labour market.

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agreements. The consistently lower incidence of seniority provisions in the non-manufacturing sector is due to the agreements in the public sector, which are subject to legislation precluding seniority in favour of the merit principle. (Labour Canada, Provisions in Major Collective Agreements in Canada, Covering 500 and more Employees., July 1985, p. xvii.)

## DISCRIMINATION CHALLENGED BY AFFIRMATIVE ACTION

The emergence of the discriminatory effects of seniority as a public issue is evidence of the fact that what constitutes discrimination alters with time. As society changes and becomes more informed and aware of the fundamental changes that will be required to attain substantive employment equality, then more employment practices will be exposed as discriminatory.<sup>32</sup> Discrimination in employment has been defined as:

..., practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics. What is impeding the full development of the potential is not the individual's capacity but an external barrier that artificially inhibits growth.<sup>33</sup>

The most identifiable form of employment discrimination is that which is intentional. Intentional discrimination arises from an "evil motive" or prejudice of the employer. The act of discrimination is done consciously by the employer and is based on the employee's race, sex, creed, disability, etc. Intentional discrimination may be disguised somewhat when an employer makes an employment decision based on a stereotype that has been until just recently socially accepted. The banking industry traditionally did not train women to become bank managers because a banking career is notorious for frequent transfers and it was accepted that women would not accept a transfer every couple of years due to the demands of their family responsibilities.

Systemic discrimination is a more complex issue because discrimination is not a conscious decision by the employer. The roots of systemic discrimination are deeply embedded in the values, attitudes and traditions of society and the result is practices that have a disparate impact on certain groups.

Many employment practices unwittingly perpetuate past discrimination and operate to freeze the status quo. Women and minorities are frequently screened out not because they lack the essential abilities and skills, but rather because current employment standards reflect the characteristics possessed by those groups who have always filled the positions in the past.<sup>34</sup>

Affirmative action has become the prime vehicle to initiate the process of identifying and rectifying the systemic obstacles to equality within the workplace.

In its full sense, affirmative action is a comprehensive planning process designed to bring about not only equality of opportunity but also equality of results. Its primary objective is to ensure that the Canadian workforce is an accurate reflection of the composition of the Canadian

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<sup>32</sup> Judge Rosalie Abella, note 7 supra at p 1.

<sup>33</sup> Ibid., at p 2.

<sup>34</sup> D. Rhys Phillips, "Equity in the Labour Market: The Potential of Affirmative Action". Equality in Employment: A Royal Commission Report, Research Studies, April 1985, p. 64.

population, given the availability of required skills. This objective is essentially an ethical goal based on the value of ensuring equity.<sup>35</sup>

Affirmative action programs utilize hiring quotas, goals and timetables to make the recruitment, hiring, and promotion practices of designated workplaces more equitable. Affirmative action is a chameleon-like process that cannot be pinned down to one definition. There are a range of concepts regarding the ultimate goals of affirmative action programs. Some proponents view affirmative action as the catalyst to the removal of barriers to equality, while others see the need for a complete review of the entire environment and value system of society and the workplace to accommodate a more heterogeneous workforce.

Affirmative action programs in Canada have been voluntary undertakings except where the adoption has been ordered in response to a finding of employment discrimination by a human rights tribunal or the courts.<sup>36</sup> The adoption of affirmative action programs has not been widespread, and the response to the concept of mandatory affirmative action has been decidedly negative. A common criticism of the current voluntary approach is:

Its clear disadvantage is the historical perception that labour market equity is a social rather than an economic objective, that remedial action will necessarily generate conflict and non-recoverable costs, and that, as a priority, equality must give away to other objectives. The very limited success of past programs is perhaps the most telling criticism of the voluntary approach.<sup>37</sup>

In June 1985, the first modest step towards mandatory affirmative action programs was taken by the tabling of the Employment Equity Bill in the House of Commons by the Minister of Employment and Immigration, the Honourable Flora MacDonald.<sup>38</sup> This Bill followed in the wake of Judge Abella's Royal Commission Report on Equality in Employment. This legislation applies to federally regulated businesses with 100 or more employees, and its goal is to remove employment barriers and promote equality for women, aboriginal peoples, disabled persons and visible minorities. The Bill outlines a mandatory reporting function detailing participation rates and remuneration levels of designated groups within individual businesses. The employment record of each business will be released to the public, and the resulting public pressure is believed to be an adequate enforcement mechanism. The Bill has been criticized for its "lack of teeth" with regard to enforcement mechanisms, as public awareness does not necessarily result in public pressure for change. Another common criticism is that by not including goals, quotas, and timetables to force change, the only accomplishment of the Bill will be data collection.

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<sup>35</sup> *Ibid.*, at p 51.

<sup>36</sup> See Hendry v Liquor Control Board of Ontario (1980) 1 CHRR para 1443.

<sup>37</sup> D. Rhys Phillips, note 34 supra at p 99.

<sup>38</sup> The House of Commons of Canada, Bill C-, First Session, thirty-third Parliament, 33-34 Elizabeth II, 1984-85.

## LEGAL FORUMS FOR PROCESSING DISCRIMINATION COMPLAINTS

Depending upon the circumstances of each individual case, there are five possible forums through which an employment discrimination charge may be pursued. In the organized sector employees may be able to file a complaint under the Canadian Charter of Rights and Freedoms, a human rights code, or utilize the grievance procedure provided for in the collective agreement through to the arbitration stage. Employees of the unorganized sector cannot file a grievance but they can take a private suit to the courts, or file a complaint under the Charter or a human rights code. Although the circumstances of each case will dictate which forum a victim of discrimination must utilize to file a complaint, the choice of forum determines the remedial actions that can be instigated on that individuals behalf. The following section shall describe each of the four forums detailing the governing legislation, or common law, to give the reader an indication of what that particular process can and cannot do for a victim of discrimination.

### The Canadian Charter of Rights and Freedoms

The Charter of Rights and Freedoms is the newest and probably the most powerful of the alternate forums for seeking relief from employment discrimination. Because the equality guarantees of the Charter have only been in effect since 1985 its full powers have not yet been tried and determined. An initial question that the courts and Charter authorities are struggling with concerns the scope of the rights and freedoms protected by the constitution. Section 32(1) of the Charter provides:

This Charter applies

- a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
- b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

On its face section 32(1) appears to confine the application of the Charter to legislative or governmental action. However the degree of government involvement necessary to invoke the Charter has yet to be judicially determined. Therefore the question of the Charter's applicability to crown corporations, government-funded institutions, statutorily regulated bodies and private non-government activities is as yet unresolved.<sup>39</sup>

There has been a substantial amount of academic debate about what activities the Charter was devised to govern. Although there are a variety of positions, two extreme views regarding the Charter's scope are often stated. One argument asserts that the Charter, as the supreme law of Canada governing the basic rights and freedoms of all Canadians, must regulate all relationships even those between private citizens.<sup>40</sup>

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<sup>39</sup> Judge Rosalie Abella, note 7 *supra* at p. 16.

<sup>40</sup> Brain Slattry, "Does The Charter Bind Private Persons", quoted in John D. Whyte, "The Charter of Rights And Discrimination In The Private Sector", a paper prepared for the National Symposium on Equality Rights, January 30 - February 1, 1985, p. 3.

The alternate extreme is that the language of section 32(1) should be narrowly interpreted such that only provincial and federal agencies, legislation, regulations, rules and personnel are subject to the Charter.<sup>41</sup> Although there has been no determination by the Supreme Court on this debate, a generally accepted hypothesis is that the courts will find some middle ground which would look at the amount of government control to determine whether it was a matter "within the authority of Parliament" or "within the authority of the legislature of each province".<sup>42</sup> The application of Charter provisions to the private sector and private actions is theoretically espoused, however few commentators expect this view to prevail.<sup>43</sup>

There are several reasons to support an argument that at least some aspects of collective bargaining and some collective agreement provisions will be subject to the Charter. The protection and promotion of collective bargaining are enshrined as matters of public policy, as is exemplified in the preamble to the Ontario Labour Relations Act. In addition, the process of collective bargaining is regulated by the state and state-appointed tribunals and the majority of unions themselves<sup>44</sup> are certified by labour boards according to legislated rules and regulations. Most jurisdictions labour legislation also prescribes certain mandatory terms in collective agreements, and prohibits the certification of a union which discriminates against current or prospective members.

The section of the Charter most likely to affect seniority rights is section 15 which provides:

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.

However these guarantees of equality are not absolute. Section 1 of the Charter reads:

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.

In addition, section 15 is subject to the legislative override provided by section 33 which allows a legislature to specifically exclude a statute or statutory provisions from Charter guarantees. Although section 15(1) enumerates, nine specifically prohibited grounds of discrimination, its language is inclusive and thereby renders discrimination on any grounds prima facie unconstitutional. This wording suggests that discrimination on the enumerated grounds is more constitutionally suspect than, for instance, discrimination on the basis of marital status, sexual preference or criminal record. It also implies that an agency or legislature defending discriminatory rules or practices will bear a higher onus to establish the

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<sup>41</sup> Katherine Swinton, "Application of the Canadian Charter of Rights and Freedoms (ss. 30,31,32)", in Walter Tarnopolsky and Gerald A. Beaudoin, The Canadian Charter of Rights and Freedoms: commentary Carswell, Toronto, 1982.

<sup>42</sup> John D. Whyte, note 40 supra at p. 39 to 42.

<sup>43</sup> Ibid., at p 8.

<sup>44</sup> Unions which are voluntarily recognized by the employer do not have to be certified by the labour relations board.

reasonableness and demonstrable justifiability of rules or practices which discriminate on the specifically enumerated grounds.

Marc Gold makes the point that one must consider the ramifications of broadening the scope of the Charter to allow more individuals access to this powerful statute.

as the scope of the Charter is broadened, so too does it broaden the range of persons who could use the Charter to assail whatever measures are implemented to promote equality ... one should reflect upon which route to equality is most likely to be effective, legislative measures or Charter litigation.<sup>45</sup>

Section 15(2) does not of itself create an enforceable remedy, but it does ensure that laws, programs, and activities developed to eliminate barriers to equality are not discriminatory by virtue of section 15(1). Section 15(2) permits group actions and remedies in response to systemic discrimination<sup>46</sup> which might otherwise have been perceived as reverse discrimination.<sup>47</sup>

Section 28 provides an additional guarantee of equality, one that cannot be overridden by the legislatures or Parliament:

Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally, to male and female persons.

Arguably the language of section 28 renders sexual equality guarantees absolute and not subject to the "reasonable limits" qualification in section 1. More likely, section 28 will ensure that employment laws, rules or practices which distinguish on the basis of sex must be subject to the strictest judicial scrutiny and will only be upheld if they are shown to be necessary.

If the rights provided for under section 15(1) are infringed upon or denied, and the infringement is not found to be a reasonable limit under the section 1 exemption, then the individual may seek remedy under section 24(1) of the Charter.

Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Section 24(1) appears to have left up to the courts' judgement the determination of an "appropriate" and "just" remedy. There is little doubt that a cloud of controversy will surround whatever remedial actions the courts will order in the pioneer Charter cases. But what other body can we entrust to fashion remedies to give substantive effect to the rights proclaimed in the Charter?

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<sup>45</sup> Marc Gold, "The Constitutional Dimensions of Promoting Equality in Employment", Equality in Employment: A Royal Commission Report, Research Studies, April 1985, p. 252.

<sup>46</sup> Judge Rosalie Abella, note 7 supra at p 13

<sup>47</sup> Opinion letter to clients drafted by Caualluzzo, Hayes and Lennon, "Section 15 and Collective Bargaining", May 1985, p. 6 (on file with author).

While politicians may generally be counted upon to treat minority interests fairly in normal circumstances, they derive their mandate from the majority, and in circumstances where minority rights interfere significantly with perceived majority interest, politicians have a consistent history of abandoning the minorities. In such circumstances the courts may well be the only lawful and effective agency to which minorities may turn for the protection of their constitutional guarantees.<sup>48</sup>

One must stress the importance of the court's remedial determinations for it is the extent of the remedy provided to the victim that is the real measure of the Charter's true power.

Dale Gibson discusses the possible remedial powers of section 24(1) with regard to employment discrimination:

The payment of monetary damages to compensate for lost income might, for example, be the most suitable remedy for discrimination in employment. More elaborate forms of positive relief might sometimes also be called for: an order to provide employment or a denied service to a victim of discrimination, or perhaps an order to carry out an affirmative action program for the benefit of historically disadvantaged groups.<sup>49</sup>

There are five remedial tools that are available to the courts for use in employment discrimination cases under the Charter. The simplest, and perhaps the least effective tool, is a court declaration that Charter rights have been violated. Although there is no action to enforce this declaration, the resulting publicity from the public declaration may lead to the defendant-employer taking voluntary remedial action.<sup>50</sup>

Compensatory damages have already been awarded as a remedy for discrimination under the Charter.<sup>51</sup> It has been argued that section 24 would also allow courts to award punitive or exemplary damages.<sup>52</sup>

The Charter gives courts the authority to strike down or modify laws or rules which violate any Charter guarantees. "Numerous statutory provisions have already been invalidated by reason of conflict with the Charter, and section 15 is likely to provide the basis for many more judicial decisions cleansing the statutes of inequities."<sup>53</sup> An alternative to striking down statutes is the "reading-down" or the "reading-out" of the unconstitutional provision. This remedy narrows the meaning or scope of a provision, or deletes a provision to avoid constitutional conflict. Gibson perceives this "reading-out" technique as a valuable tool to enable the courts to protect the constitutional rights of groups and individuals without going through the time-consuming procedure of awaiting legislated amendments after a provision is voided.

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<sup>48</sup> Dale Gibson, "Remedies And Equality", a paper prepared for The National Symposium on Equality Rights, January 30 to February 1, 1985, p. 6.

<sup>49</sup> Ibid., at p. 11.

<sup>50</sup> Ibid., at p. 13.

<sup>51</sup> Re Germaine (1984), 12 WCB 35 (Alta. Q.B.).

<sup>52</sup> Dale Gibson, note 48 supra at p 15.

<sup>53</sup> Ibid., at p 16.

The court could issue prerogative writs or injunctions, to prohibit conduct that offends the Charter or to order positive conduct. A controversial remedy available to the courts is the ordering of a mandatory affirmative action program. It is clear that section 15(2) recognizes affirmative action and protects it from 15(1), but an argument has been made that "unless one can infer a substantive right to affirmative action from the general language of the equality guarantee, the mere procedural power of the court to grant such a remedy may be meaningless."<sup>54</sup> There is nothing in the Charter that requires government to provide affirmative action.

Those in support of affirmative action remedies claim that the positive rights accorded by 15(1) put a legal obligation on government to ensure that those who do not receive equal treatment get the benefit of special measures to ensure equality.<sup>55</sup> Since the Supreme Court has not yet ordered an affirmative action plan under the authority of the Charter, this debate is ongoing.

## **Human Rights**

The forum that is currently most frequently utilized in discrimination cases is the human rights tribunal. Every province as well as the federal jurisdiction has enacted legislation containing "general prohibitory language, forbidding discrimination in employment on specified grounds, subject to bona fide occupational requirements."<sup>56</sup> The statutes establish an administrative framework to deal with individual instances of discrimination, some of which are isolated events while others are manifestations of a discriminatory policy or rule. The provisions of the Canadian Human Rights Act, relevant to a discussion of discrimination in seniority provisions, are sections 7 and 10 as outlined below.

Section 7: It is a discriminatory practice, directly or indirectly,

- a) to refuse to employ or continue to employ any individual, or
- b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.

Section 10: It is a discriminatory practice for an employer, employee organization or organization of employers

- a) to establish or pursue a policy or practice, or
- b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

The relevant equality provision of the Ontario Human Rights Code is found in section 4:

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<sup>54</sup> Ibid., at p 25.

<sup>55</sup> Ibid., at p 26.

<sup>56</sup> Kenneth P. Swan, and Katherine E. Swinton, "The Interaction Between Human Rights Legislation and Labour Law", Studies in Labour law, Butterworths, Toronto, 1983, p 119.

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, record of offenses, marital status, family status or handicap.

This broad equal treatment guarantee is partially qualified by section 23(b) of the Code which permits unequal treatment on the basis of age, sex, marital status or criminal record, provided such discrimination is a reasonable and bona fide qualification "because of the nature of the employment". No such exemption is codified for unequal treatment based on race, ancestry, place of origin, colour, ethnic origin, citizenship, creed or family status. This double standard in the scope of equal treatment protections arguably violates section 15 of the Charter.

The Ontario Code extends additional protection for individuals against "constructive discrimination" in section 10:

A right of a person under Part 1 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,

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

It is section 10 of the Code that protects individuals against adverse effect discrimination. The structure of section 10 is such that it does not require an intent to discriminate because it focuses on the effect of the discrimination. This provision will provide protection for women or minorities who claim that seniority provisions have an adverse effect on their employment opportunity, unless the employer and/or union establishes that the seniority provision is a bona fide and reasonable requirement or consideration in the particular context of his or her workplace.<sup>57</sup>

The provincial and federal human rights codes are administered by human rights Commissions.

The establishment of both provincial and federal commissions was in response to the lack of an effective enforcement mechanism, a major defect in the earlier attempts to prohibit discrimination. Prior to the establishment of the Commissions, those who were discriminated against had to... initiate court action on their own and had to prove a violation, a difficult and costly process.<sup>58</sup>

Under the current human rights system, a person or group alleging a violation of the Code must file a complaint with the Commission which monitors that jurisdiction. The Commission will initiate a

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<sup>57</sup> There is a further discussion of bona fide occupational requirements and the ramifications of having seniority systems classified as such in the following section.

<sup>58</sup> Carole Geller, "Section 15(2), The Charter of Rights and Freedoms: Affirmative Action and the Judiciary", unpublished paper, available at Osgoode Hall Law School, December 1985.

preliminary investigation into the complaint to determine whether to proceed with the complaint, to refer the complaint to a more appropriate forum (for instance an employment standards agency or a union), or to reject the complaint as untimely, frivolous or in bad faith.<sup>59</sup>

If the Commission decides to pursue the complaint, it will initially attempt an informal settlement that would be acceptable to both parties. If a complainant refuses to accept a reasonable offer of settlement, the Commission has the discretion to abandon the complaint at this point. If the respondent-employer refuses to settle or to offer reasonable redress, the Commission may appoint a formal Board of Inquiry. At each of these stages of processing the complaint the complainant has the right to request the Commission to reconsider its decision,<sup>60</sup> but this route is not often followed because it entails significant financial resources. The scope of the remedies that are within the jurisdiction of a human rights Commission vary according to the wording of the individual legislation. The only access to the courts is by an appeal from a decision of the board of inquiry which is appointed if the Commission fails to effect a settlement. When a complaint is pursued by the Commission, it has ownership of the complaint while the complainant becomes just a party to the proceedings.

The remedial-ordering powers of the board of inquiry under the Ontario Code are typical:

section 40(1)

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 proceedings, 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.

Settlement of an employment discrimination complaint by the Commission or board of inquiry can take the form of; apology, reinstatement of a discharged employee, damages (compensatory, or punitive for humiliation and mental suffering), or agreed upon changes in employer practices.<sup>61</sup>

To date there have been only two instances in which boards of inquiry have ordered an employer to enter into an affirmative action program as remedial action for discriminatory employment practices. In Hetty

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<sup>59</sup> See, e.g., section 33(1) of the Ontario Code: Where it appears to the Commission that,

- a) the complaint is one that could or should be more appropriately dealt with under an Act other than this Act;
- b) the subject-matter of the complaint is trivial, frivolous, vexatious or made in bad faith;
- c) the complaint is not within the jurisdiction of the Commission; or
- d) the facts upon which the complaint is based occurred more than six months before the complaint was filed, unless the Commission is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay, the Commission may, in its discretion, decide to not deal with the complaint.

<sup>60</sup> See, section 36(1) of the Ontario Code.

<sup>61</sup> Swan and Swinton, note 56 supra at p 112.

Hendry v. Liquor Control Board of Ontario<sup>62</sup> the employer was ordered to implement an affirmative action program to promote females, but the program was to be of the employer's own design. In Canadian National v. Action Travail des Femmes and The Canadian Human Rights Commission, the federal Commission ordered an affirmative action program that required hiring goals and timetables, and this order was overturned by the Federal Court of Appeal.<sup>63</sup>

The main drawback to utilizing this forum to pursue a seniority-based discrimination charge is the fact that once the complaint is accepted by the Commission, the claimant has little input into how the case is handled, nor can he/she be assured of a formal inquiry if he/she rejects any settlement deemed satisfactory by the Commission. The settlement process could span several years, especially if the matter must go before a board of inquiry and is then appealed to the courts.

On the other hand, the human rights Commissions are experts in discrimination and as such may be in the best position to determine how a case can be most effectively argued or settled. A tribunal lawyer is provided to represent the complainant and the legal fees are covered by the Commission. Where a complaint is resolved at the informal settlement stage the process is very expeditious.

## **The Courts**

Courts are much less frequently employed to hear discrimination cases than human rights Commissions. An employee in an unorganized workplace can present an employment discrimination charge as an action for wrongful dismissal.<sup>64</sup> Wrongful dismissal encompasses both actual employment termination and constructive discharge. The act complained of would be discrimination on one of the prohibited grounds in human rights codes. A successful action could result in an awarding of compensatory damages for wages lost, the monetary amount being equivalent to the wages that would have been earned during a proper notice period.

The court does not have the power to reinstate an employee upon a finding of discrimination. It is important to note this lack of jurisdiction on the courts part when examining the various forums under which a seniority-based discrimination charge could be laid. A court action would do little to help a laid-off employee get his/her job back. It is also unlikely that courts would find seniority-based discrimination tantamount to constructive dismissal or wrongful dismissal. The two exceptions to this statement would occur if a seniority system was introduced after the employee was hired or if the seniority-based layoff or demotion violated an express or implied term of the plaintiff's employment contract.

An organized employee would file a suit with the courts claiming that a provision of the collective agreement is illegal because of conflict with human rights legislation. The only form of remedy that an employee could receive from this sort of suit is a declaration of an illegal provision.<sup>65</sup>

The courts themselves are extremely slow, and so formal in nature that plaintiffs in wrongful dismissal suits require legal representation. The individual plaintiff must bear his/her own legal expenses which can

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<sup>62</sup> (1980) 1 CHRR D/33.

<sup>63</sup> CHRR Vol VI 1985. D/2908. For full discussion see text at p 69 infra.

<sup>64</sup> Swan and Swinton, note 56 supra at p 125

<sup>65</sup> Ibid., at p 126

quickly accumulate during a drawn-out proceeding. A court does not have the expertise in discrimination issues that human rights Commissions have, nor the specialization in labour relations matters which arbitrators possess.

## Arbitration

The last forum to be considered as a possible route for processing employment discrimination claims is arbitration. This forum is only available to organized employees with access to the grievance process found in every collective agreement. In every province, "arbitration is the statutorily required mechanism for the resolution of disputes relating to the 'interpretation, application, administration or alleged violation' of a collective agreement."<sup>66</sup> If an employee wishes to grieve that the seniority provision has an adverse effect on himself/herself, then he/she must file a grievance within the time limits set out in the collective agreement, and follow it through all the steps to arbitration.

An arbitrator's jurisdiction is founded in the collective agreement and limited by its provisions. The jurisdictional issue is the key bone of contention in cases where arbitrators have been faced with grievances pertaining to employment discrimination. The parameters of the arbitrator's jurisdiction are outlined below.

If a collective agreement incorporates a provision of a statute (for example, a non-discrimination clause referring to a human rights code or incorporating the language of a human rights code), then the arbitrator has clear jurisdiction to interpret the statute in order to resolve the grievance, arising from a practice covered by this clause, or from a conflict between this clause and seniority provisions.

If a statute prohibits certain kinds of contractual terms, the arbitrator can hold a term in the collective agreement which prima facie violates the statute to be void for illegality.<sup>67</sup> In McLeod v. Egan,<sup>68</sup> the Supreme Court of Canada stated that it, "accepts the essence of the argument made by Weiler ... for broad arbitral authority to apply statutes, at least in situations where a negative term in a statute is in conflict with a positive term in a collective agreement."<sup>69</sup> In Re Brass Craft Canada Ltd. and International Association of Machinists and Aerospace Workers, Local 2446,<sup>70</sup> the arbitrator adjudicated a grievance alleging that separate male and female seniority lists used for the purpose of layoff and recall in historically segregated male and female jobs violated the Ontario Human Rights Code. The arbitrator ruled that this seniority provision was unenforceable because it was contrary to public policy regarding equal treatment, as expressed in sections 4(1) and 10 of the Human Rights Code. Brown and Beatty state that, "it is now established that where the provisions of a collective agreement are clearly contrary to a statute, the arbitrator is to treat that portion of the agreement as null and void".<sup>71</sup>

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<sup>66</sup> Ibid., at p 122.

<sup>67</sup> P.C. Weiler, "The Arbitrator, The Collective Agreement and the Law", (1972) Osgoode Hall Law Journal p 141. (1974) 46 DLR (3<sup>rd</sup>) 150 (SCC).

<sup>69</sup> The Labour Law Casebook Group, Labour Law Cases, Materials and Commentary, Draft Fourth Edition, Industrial Relations Centre, Queen's University, Kingston, Ontario. 1984, p 3-527

<sup>70</sup> 11 LAC (3<sup>rd</sup>) 1984 236.

<sup>71</sup> Donald J. Brown, and David M. Beatty, Canadian Labour Arbitration, 2<sup>nd</sup> Ed., Canada Law Book, Aurora, Ontario, 1984, p.79

Where a provision in a collective agreement does not obviously violate a statute, the arbitrator's jurisdiction is not so clearly defined. When a collective agreement contains a general no discrimination clause with language similar to that in a human rights code, the arbitrator arguably may look to the code and relevant caselaw which interprets the code to decide the grievance. Paul Weiler argues that statutes may also guide arbitrators in interpreting any clause in the agreement.

Can an arbitrator look to statutes prohibiting discrimination against women to hold that general company rules against women holding some jobs are invalid? I think there can be no doubt that such a source for arbitral reasoning both should be, and will be legitimate. The arbitrator is enforcing an obligation imposed by the agreement, and is only using the statute as an aid in discovering or crystalizing the meaning of the agreement.<sup>72</sup>

What Weiler is referring to in the above quotation is the jurisdiction of an arbitrator to use a statute as an aid to interpreting vague language in a provision of the collective agreement. Since provisions in collective agreements cannot run counter to statutes, then the arbitrator is only interpreting a vague provision in light of a statutory duty that is already imposed upon all parties in the jurisdiction as a matter of public policy.

An arbitrator may not refer to a statute to read terms into the collective agreement where the agreement is silent on a statutory right. This situation is different because the arbitrator would have to implement positive obligations created by statute, not by the collective agreement.<sup>73</sup> Re Kitchener Beverages Ltd. and United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local 173,<sup>74</sup> dealt with the arbitrability of a grievance where the collective agreement was silent on the subject matter of the grievance. This case concerned a policy grievance in which the union sought a declaration that the company was required to perform a number of obligations allegedly placed on it by the Employment Standards Act. The arbitrator referred back to the McLeod v. Egan requirement that reference to a statute must have its basis in the existence of a dispute to which the collective agreement speaks. Since, in Kitchener Beverages Ltd., the collective agreement was silent on the issues raised in the grievance, then the arbitrator refused jurisdiction to refer to a statute for the purposes of construing rights and obligations arising under a collective agreement.

If a collective agreement is silent on discrimination then the arbitrator may not use a statute as an interpretive guide. In the absence of a no-discrimination clause, an arbitrator would lack jurisdiction to hear a grievance alleging that collectively negotiated seniority provisions discriminate indirectly against women and minorities. Because the arbitrator may only interpret the actual language of the agreement, he/she would lack any reference point for determining the parties' intent in the matter.

The arbitrator has a range of remedial tools at his disposal. To remedy a finding of discrimination, an arbitrator could award compensatory damages in the form of lost wages that include interest but not costs because this might tend to encourage unions to file unnecessary grievances. An arbitrator can provide

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<sup>72</sup> Paul Weiller, note 67 *supra* at p 144.

<sup>73</sup> *Ibid* at p 146.

<sup>74</sup> (1977) 13 LAC (2<sup>nd</sup>) 283.

injunctive or mandatory relief from the discriminatory practice, or declaratory relief. The arbitrator can also reinstate or recall a discharged or laid-off employee.<sup>75</sup>

When considering the appropriateness of the arbitral forum to a pursuit of a seniority-based discrimination claim, it should be noted that the employee filing the grievance does not maintain ownership of the grievance. Once the union has investigated the grievance and has decided to pursue it, the employer and the union become the only parties to the grievance. The union determines how the grievance may be settled in the interests of the bargaining unit as a whole. Although labour legislation in every Canadian jurisdiction imposes on the union a duty of fair representation in handling individual employees' interests, the law permits unions to subordinate individual rights to the collective interests of the membership majority.<sup>76</sup> In the case of grievances claiming a discriminatory impact, it might be expected that unions may elect to not proceed with grievances that challenge such a highly valued provision.

In comparison to the three previously discussed forums, the arbitration process results in quite speedy resolution of complaints. The arbitrator's fees are generally evenly divided between the union and the employer so the grievor does not incur any expense with regard to the proceedings.

As the foregoing discussion outlines, employment discrimination complaints could possibly be pursued through four different forums. Because of the nature of each of these institutions, it is possible to speculate that each might tend to tip the balance in favour of either seniority or equality.

Although the Charter promises a new era in protecting individual and group civil rights, Canadian courts have been historically extremely conservative in advancing equality rights. It would appear that the courts will tend to favour individual over collective rights when faced with a conflict between them.<sup>77</sup> With reference to section 15(2) which refers to group equality rights, courts may be comfortable upholding the collective equality rights of historically disadvantaged groups where the employer and union have voluntarily adopted seniority provisions to redress their disparate impact on women and minorities. However, where courts must balance the conflicting rights of individual junior and senior employees, it is unlikely that courts will strike down such an established system as seniority, or fashion affirmative remedies to supercede contractual arrangements voluntarily negotiated. Furthermore, given how widely institutionalized seniority clauses are in western industrialized nations, I speculate that seniority systems will qualify as a section 1 exemption.

Human rights tribunals have shown their preference in the past and they would lean towards rulings which redress historically discriminatory practices, however widespread. Since human rights legislation was enacted to correct past and prevent future discrimination against groups as well as individuals, it is a

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<sup>75</sup> Swan and Swinton, note 56 supra at p. 124.

<sup>76</sup> The existence of a statutory duty of fair representation on the union means that labour boards constitute yet another legal forum for women and minorities who are union members and who seek to challenge the discriminatory impact of seniority provisions. The probable effect of the duty of fair representation on seniority clauses is beyond the scope of this paper. However, one might speculate that in the absence of a showing by the complainant(s) of intentional discrimination by the union in fashioning a seniority clause, labour boards will not find them in violation of the duty of fair representation in individual cases. To do so could generate a flood of litigation challenging almost every collective agreement in the country.

<sup>77</sup> Lavigne and OPSEU et. al., unreported decision of the Ontario Supreme Court, July 7, 1986.

safe assumption that human rights tribunals may favour equality rights over seniority rights provided seniority is not held to be a bona fide occupational requirement.<sup>78</sup> In the past tribunals have indicated more sensitivity in identifying and remedying constructive discrimination claims than have the courts.<sup>79</sup>

Arbitrators are creatures created by the collective agreement. It is their duty to enforce the terms of the agreement fashioned through bargaining by the parties, and settle any disputes between the parties as to the correct interpretation of the agreement. Because of their specialized knowledge of labour relations and customs, and because seniority has so long been the backbone of trade unionism, I would surmise that arbitrators will not prohibit or limit seniority provisions where such clauses have an unequitable effect on women and minorities. In the absence of a common law right to freedom from discrimination, human rights tribunals will remain the judicially preferred forum for employment discrimination complaints. I speculate that in the absence of a mandatory legislative prohibition of seniority clauses with discriminatory impact on women and minorities, it is improbable that labour boards will undertake to invalidate seniority provisions which are neutral on their face.

Perhaps the following section which discusses several Canadian discrimination cases shall assist the reader in determining which forum shall be most sympathetic to a challenge to seniority systems based upon its discriminatory effect.

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<sup>78</sup> See text infra at p 61.

<sup>79</sup> See discussion of CN infra at p 69.

## THE CANADIAN JURISPRUDENCE

Once the legislation that would apply to an action claiming discrimination in the structure or application of a seniority provision has been laid out, it would be logical then to move to an analysis of Canadian cases which have raised this issue. Unfortunately the Canadian courts have not yet been called upon to rule whether specific seniority provisions are discriminatory in their application to women and minorities. This paper shall analyse several employment discrimination cases that have come before the Canadian courts on grounds other than seniority. These decisions may indicate policy directions or legal reasoning that the courts might adopt when faced with this issue in the near future.

At this point, utilizing Canadian court decisions up until 1985, a distinction can be drawn between disparate impact cases and those cases involving an affirmative action program. A reconciliation of two companion cases, Re Ontario Human Rights Commission et al. And Simpsons-Sears Ltd.<sup>80</sup> and K.S. Bhinder et al. And Canadian National Railway Co.<sup>81</sup>, is necessary to reach an understanding of the court's perception of disparate impact. Canadian National v. Action Travail des Femmes and The Canadian Human Rights Commission, et.al.<sup>82</sup> is the first Canadian appellate ruling on an affirmative action program imposed by a human rights tribunal as a remedy for a finding of discrimination. Any discussion of discrimination cases based on the adverse effect of seniority provisions, should be viewed in light of how these high courts have approached employment discrimination on other prohibited grounds.

### Disparate Impact

In O'Malley<sup>83</sup> the Supreme Court of Canada made several rulings on discrimination in employment which broadened individual employee rights and remedies under the Ontario Human Rights Code. These findings may guide the Canadian courts when they are faced with complaints alleging that seniority provisions are discriminatory.

The O'Malley case concerned a complaint alleging discrimination on the basis of creed, contrary to the Ontario Human Rights Code section 4(1).<sup>84</sup> All full-time sales clerks employed by Simpsons Sears were required to work Friday evenings, on a rotating basis, and two Saturdays out of three. A conflict developed with this job requirement when O'Malley joined the Seventh-Day Adventist Church which required its members to observe the Sabbath from sundown Friday to sundown Saturday. As a result of this conflict, O'Malley had to resign from her full-time position and accept a part-time position with the same employer. She filed a complaint with the Human Rights Commission claiming that the requirement to work Saturdays discriminated against her by requiring that she act contrary to the tenets of her religion.

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<sup>80</sup> (1985) 23 DLR (4th) 321 (S.C.C.). Hereafter referred to as O'Malley. (O'Malley was the original complainant at the Board of Inquiry whose decision was appealed by the employer to the Court of Appeal.)

<sup>81</sup> (1985) 23 DLR (4th) 481 (S.C.C.). Hereafter referred to as Bhinder.

<sup>82</sup> Canadian Human Rights Reporter, Vol VI, 1985, D/2908.

<sup>83</sup> *Supra*, footnote 80.

<sup>84</sup> This section was 4(1)(g) at the time of the initial complaint filing.

In determining whether Simpsons Sears' scheduling rules violated section 4(1)<sup>85</sup> of the Ontario Human Rights Code, the Supreme Court had to consider both intentional and adverse impact discrimination. The Court first looked to the purpose of human rights legislation in general, as illustrated by the preamble to the Ontario Code. The Court emphasized that the nature of these laws is remedial rather than punitive, and thus it is the effect of the action that is significant rather than the act itself.

Mr. Justice McIntyre rejected the approach of the Court of Appeal in interpreting the Code in his statement:

It is not, in my view, a sound approach to say that according to established rules of construction no broader meaning can be given to the Code than the narrowest interpretation of the words employed. 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 purpose.<sup>86</sup>

By referring to "a human rights code", Mr. Justice McIntyre was not limiting this statement to the Ontario Code, but rather referring to this type of legislation in general. This is an indication to the lower courts that it might be appropriate to adopt a broad, purposive approach to all human rights legislation. It could also be said that the interpretive approach the Supreme Court favoured in O'Malley could also hold for discrimination cases brought under section 15(1) of the Charter.

The first issue that the Court dealt with in this case was whether the Ontario Court of Appeal erred in requiring that the complainant prove intentional discrimination on the part of the employer in order to establish a violation of section 4(1) of the Ontario Human Rights Code.<sup>87</sup> The original complaint was filed under the previous Ontario Human Rights Code that was in effect until 1981. (It was repealed and replaced on June 15, 1982.) At the time of the filing of the complaint section 4 was the provision governing employment discrimination.

In the Supreme Court judgement, it was decided that;

The proof of intent, a necessary requirement in our approach to criminal and punitive legislation, should not be a governing factor in construing human rights legislation aimed at the elimination of discrimination. It is my view that the courts below were in error in finding an intent to discriminate to be a necessary element of proof.<sup>88</sup>

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<sup>85</sup> 4(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, record of offences, marital status, family status or handicap.

<sup>86</sup> O'Malley, p. 328.

<sup>87</sup> The claim was filed under the old Ontario Code in which section 4(1)(g) was the equivalent to the current section 4(1). The old section read;

4(1) No person shall

(g) 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.

<sup>88</sup> O'Malley, p. 331.

This principle, that intention to discriminate is not a necessary element of proof of discrimination prohibited by human rights codes, evolved from several cases,<sup>89</sup> one of which was The Ontario Human Rights Commission et al. v. The Borough of Etobicoke.<sup>90</sup> The claim in Etobicoke was discrimination on the basis of age due to a mandatory retirement age of 60 years written into the collective agreement. The two claimants were terminated upon reaching that age and filed a claim under section 4(1) of the Ontario Human Rights Code. The respondent employer defended the retirement clause as a bona fide occupational requirement of the job (BFOR). The Supreme Court held that the mandatory retirement provision agreed upon in the collective agreement was discriminatory even though "there was no evidence to indicate that the motives of the employer were other than honest and in good faith ...".<sup>91</sup> It should be noted that the Etobicoke case concerned a provision that was discriminatory on its face while the employment rule in O'Malley was facially neutral. The principle, that it is not necessary to prove intent, has been adopted by many jurisdictions with regard to their human rights codes,<sup>92</sup> because to require intent would place an almost insurmountable burden of proof on a complainant and would serve to nullify the remedial purpose of the Code.

The Court's second consideration in O'Malley was whether facially neutral employment rules could be held to violate the Code in the absence of intent to discriminate. Because the courts below based their judgements on the necessity of an intention to discriminate, they did not have to consider adverse effect discrimination as a concept distinct from intentional discrimination. The Supreme Court held that adverse effect discrimination 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 workforce.<sup>93</sup>

At the time the O'Malley complaint was filed there was no constructive or adverse discrimination provision<sup>94</sup> in the Ontario Human Rights Code. The Supreme Court ruled in O'Malley that the Code did not limit its jurisdiction to a consideration of intentional discrimination only, but extended its reach to encompass adverse effect discrimination. In reaching this conclusion the Court considered the remedial nature and purpose of human rights statutes, which led it to determine that section 4(1) should be read to prohibit adverse effect discrimination.

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<sup>89</sup> Cited by the Court at pages 329 to 331 of the judgement.

<sup>90</sup> (1982) 1 SCR 202. Hereafter referred to as Etobicoke.

<sup>91</sup> O'Malley, p. 329

<sup>92</sup> The Gay Alliance Towards Equality v. The Vancouver Sun (1979) 2 SCR 435 (Laskin dissent), Re Rocca Group Ltd and Muise, 102 DLR(3<sup>rd</sup>) 529.

<sup>93</sup> O'Malley, p 332.

<sup>94</sup> Section 10

A right of a person under Part 1 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,

1. the requirement, qualification or consideration is a reasonable and bona fide one in the circumstances;...

On the basis of the above reasoning, the Court found that the Saturday scheduling rules did constitute adverse effect discrimination and therefore violated section 4(1) of the Ontario Human Rights Code.

The Court then considered the appropriate remedial action in a case of adverse effect discrimination. In cases of this sort, where the discriminating rule may only affect one employee, the rule or practice is not always struck down, as it is in cases of intentional discrimination. The court addressed the problem of remedy by imposing a duty to accommodate on the employer.

In my view, for this case the answer lies in the Ontario Human Rights Code, its purpose, and its general provisions. The 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.<sup>95</sup>

This duty was limited by the qualifying phrase, "short of undue hardship". This phrase has the effect of obliging the employer, "to take such steps as may be reasonable to accommodate without undue interference in the operation of the employers' business and without undue expense to the employer."<sup>96</sup> As there was no requirement for accommodation in the Code, the Court again looked at the purpose of the Code and the rights it guarantees, to read in the requirement of reasonable steps towards accommodation by the employer.

It was found in Etobicoke<sup>97</sup> that in direct discrimination cases where a complainant has shown prima facie discrimination on prohibited grounds, the onus falls on the employer to justify the discriminatory rule as reasonable and bona fide. A prima facie case of discrimination, "is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer."<sup>98</sup> The Supreme Court applied this same principle to adverse effect discrimination, and ruled in O'Malley that once prima facie proof of a discriminatory effect is established, the onus lies with the employer to show that efforts towards accommodation would result in undue hardship.

The Supreme Court allowed the appeal in O'Malley and awarded monetary compensation to O'Malley equivalent to what her earnings would have been as a fulltime employee from October 23, 1978 to July 6, 1979, when she chose, for reasons other than her religious values, to work only part-time.

Of significance in O'Malley is the rejection of the proof of intention to discriminate as an essential element of a claim under a human rights code. The direction that the Court takes in considering public policy, as expressed in human rights statutes, when ruling on a discrimination case on the basis of creed, gives a fair indication that the court would take a similar stand concerning discrimination arising from the unequitable effect of seniority provisions. This means that a complainant would not have to prove discriminatory intent in the structure or application of a seniority clause to pursue the claim.

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<sup>95</sup> O'Malley, p. 334

<sup>96</sup> O'Malley, p. 335

<sup>97</sup> Supra note 90

<sup>98</sup> O'Malley, p. 338

The fact that the Supreme Court read a constructive discrimination clause into a Human Rights Code which did not have one at the time, is significant to other jurisdictions whose codes lack such a clause.<sup>99</sup> O'Malley established that adverse effect discrimination is prohibited even if there is no constructive discrimination clause specified in the legislation. A prohibition of adverse effect discrimination is crucial to the seniority issue because seniority provisions are not generally intentionally, or on their face discriminatory, but rather have a disparate impact on certain classes of workers.

O'Malley imposed a duty of accommodation, short of undue hardship, on the employer in cases of indirect discrimination on the basis of creed. However, under the pre-1981 Ontario Human Rights Code, which was in force at the time that O'Malley filed her complaint, employment discrimination on the basis of creed was prohibited without qualification. Under section 4(6) of this same Code, workplace rules or practices which discriminate on the basis of sex, age or marital status escaped prohibition if they were a bona fide occupational qualification.<sup>100</sup> The bona fide occupational requirement exemption, of which all provinces have some variant, "refers to a characteristic necessary for the satisfactory performance of the essential functions of the job."<sup>101</sup>

The Canadian Human Rights Commission published guidelines in 1982, defining a bona fide occupational qualification (BFOQ) for employers subject to federal jurisdiction. They are :

1. the requirement must relate to "essential functions" of the job;
2. the requirement must be job related;
3. the employer must be prepared to make reasonable accommodation;
4. "reasonable accommodation" takes into account undue hardship (financial or convenience) to the employer;
5. each applicant must be assessed on an individual basis; and
6. danger to co-workers and public can be considered a BFOQ but it must be an actual, and not speculative risk.<sup>102</sup>

The Saskatchewan Human Rights legislation<sup>103</sup> also defines a "reasonable occupational qualification",<sup>104</sup> which is the Saskatchewan version of a bona fide occupational qualification, but it does not provide for

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<sup>99</sup> Ontario and the Federal Human Rights Codes are the only Codes that have an explicit provision for adverse effect discrimination.

<sup>100</sup> Under section 10 of the current Code, every ground of prohibited discrimination protected by section 1 of the Code is subject to a BFOR exemption.

<sup>101</sup> Patricia Hughes, "Discrimination and Related Concepts; Definitions and Issues", in Judge Rosalie Abella, Equality in Employment: A Royal Commission Report, Research Studies, April 1985, p. 230.

<sup>102</sup> Canadian Human Rights Commission Newsletter, January 1982, p. 7.

<sup>103</sup> Saskatchewan Regulation 216/79, Order in Council 1402/79, dated July 31, 1979.

<sup>104</sup> "reasonable occupational qualification" means, inter alia, a qualification:

1. that renders it necessary to hire members of one sex, one age group, or of a certain physical ability exclusively in order that the essence of the business operation is not undermined; or
2. that is essential or an overriding legitimate business purpose; or

reasonable accommodation by the employer like the federal guidelines do.<sup>105</sup> The test of an employment practice being reasonable and bona fide was laid out by the Supreme Court of Canada in Etobicoke:

To be a bona fide occupational qualification and requirement, a limitation such as mandatory retirement at a fixed age must be imposed honestly, in good faith and in the sincerely held belief that it is imposed in the interests of adequate performance of the job with all reasonable dispatch, safety and economy and not for ulterior or extraneous reasons which are aimed at circumventing the provisions 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.<sup>106</sup>

In Etobicoke the Supreme Court of Canada placed the onus of proof of a bona fide occupational qualification or requirement on the employer.

Once a complainant has established before a board of inquiry a prima facie case of discrimination ... he is entitled to relief in the absence of justification by the employer. The only justification which can avail the employer in the case at bar, is the proof, the burden of which lies upon him, that compulsory retirement is a bona fide occupational qualification and requirement for the employment concerned.<sup>107</sup>

An employer can enforce a bona fide occupational requirement if it is a business necessity, or if nonenforcement of the requirement would endanger the safety of co-workers or the public. Boards and courts have required considerable evidence to substantiate a claim of a bona fide occupational requirement to exempt employers from responsibilities under the Human Rights Code. Concrete evidence rather than impression is required.<sup>108</sup>

A bona fide occupational requirement is a valid claim by an employer as long as it is not used as an indirect means of perpetuating discrimination. Nonetheless, BFOZ's pose a problem for individuals whose employment rights are adversely affected by workplace rules adopted in good faith and for a legitimate reason.

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3. that renders it necessary to hire members of one sex, one age group, or of a certain physical ability exclusively in order that the duties of a job involved can be performed safely; but does not include, inter alia, a qualification;
  4. based on assumptions of the comparative employment characteristics of that sex, age group, or state of physical disability in general;
  5. based on stereotyped characterizations of the sex, age group or physical disability;
  6. based on the preferences of co-workers, the employer, clients or customers, except that, where it is necessary for the purpose of authenticity or genuineness, sex shall be reasonable occupational qualification;
  7. that distinguishes between "light" and "heavy" jobs which operate in a disguised form of classification by sex and which creates unreasonable obstacles to the advancement by females into jobs which females could reasonably be expected to perform; ...

<sup>105</sup> There is no provision for reasonable accommodation in either of the current Ontario Code's bona fide occupational requirement exemptions in sections 10 and 23(b).

<sup>106</sup> Etobicoke, p 19.

<sup>107</sup> Etobicoke, p 19.

<sup>108</sup> Patricia Hughes, note 101 supra at p 235.

Re Bhinder et al. And Canadian National Railway Company<sup>109</sup> reveals the "balance" the Supreme Court has struck between BFOR's and unintentional adverse impact on women and minorities. Bhinder was a companion case that was decided by the Supreme Court on the same day as O'Malley, but which had a substantially different outcome than O'Malley. The Canadian National Railway Company was charged with discriminating against Bhinder on the basis of creed by requiring him to wear a hard hat despite the tenets of his religion, which forbade the wearing of any head apparel except for the turban. Bhinder had been an employee of CN for four years, between 1974 and 1978, before the company enforced a hard hat rule. Bhinder was informed that there would be no exception to this new rule, and noncompliance would result in the termination of his employment. Bhinder's employment at CN ceased the day before the hard hat rule was to commence.

The Supreme Court acknowledged the similarity in the purposes of the Ontario Human Rights Code and the Canadian Human Rights Act, and acknowledged that the facts in the cases were identical in principle. On this basis it adopted the O'Malley reasoning that discriminatory practices encompass adverse effect discrimination. Although both cases concerned the disparate impact of a neutral employment rule on one individual, the differences in the outcomes lay with the governing statutes. As Mr. Justice McIntyre explained the difference in his judgement:

The Ontario Human Rights Code in force in the O'Malley case prohibits 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 defense.<sup>110</sup>

As previously mentioned, the Ontario Human Rights Code under which the O'Malley complaint was filed did not have the bona fide occupational exemption that now exists in section 10(a). The bona fide occupational requirement in section 23(b) did not apply because this provision does not cover discrimination by creed. Thus the requirement for O'Malley to work rotating Saturday shifts was not examined by the courts as a bona fide occupational requirement for employment at Simpsons Sears. The Bhinder claim fell under the Canadian Human Rights Act and thus was subject to the section 14(a) exemption. The Supreme Court found the hard hat rule to be a bona fide occupational requirement, so the consequential de facto discrimination was not considered a discriminatory practice. To reach this conclusion the court applied the Etobicoke test, for a bona fide occupational requirement.<sup>111</sup>

Since the Supreme Court determined that the hard hat rule was a bona fide occupational requirement the case revolved on the consideration of whether there could be individual tests of a bona fide occupational requirement depending on the impact of a rule on an individual employee. On this point the Court found that;

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<sup>109</sup> Supra, footnote 82.

<sup>110</sup> Section 14

It is not a discriminatory practice of

a) any refusal, exclusion, expulsion, suspension, limitation, specification, or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement.

<sup>111</sup> See text at p 55 supra.

To apply a bona fide occupational requirement to each individual with varying results, depending on individual differences, is to rob it of its character as an occupational requirement and to render meaningless the clear provisions of section 14(a).<sup>112</sup>

The Court found that the word "occupational" implied general application rather than individual application. Mr. Justice McIntyre dismissed the principle of employer accommodation successfully considered in O'Malley:

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 defense ... The bona fide occupational requirement defense 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.<sup>113</sup>

This statement is inconsistent with the explicit provision in the Canadian Human Rights Commission's guidelines which places upon an employer a duty to accommodate when claiming a BFOQ. These interpretive guidelines were issued in 1982 after Bhinder had filed his original complaint. Although they have no binding legal force on the court, they were available to the court as an interpretive guide to section 14. A consideration of these guidelines by the court might have justified a broad and purposive reading of the Code which may have lead to an employer duty to accommodate Sikhs like Bhinder. However, the Court did not even mention the existence of these guidelines. Bhinder did not succeed in his discrimination claim because the hard hat rule was deemed by the court to be a bona fide occupational requirement of his job at CN.

When attempting to reconcile O'Malley and Bhinder in terms of the precedent they have set, it is necessary to recall that the Ontario Human Rights Code now has a reasonable and bona fide exemption in section 10. Upon consideration of Bhinder, one could speculate that the courts may well take the following approach to claims of adverse effect discrimination arising from seniority provisions. Where there is a specific bona fide occupational requirement in the Code, but no codified duty to accommodate;

1. a prima facie case of discrimination must be proven by the complainant.
2. the onus of proof then shifts to the employer to establish the rule or requirement under consideration is reasonable and bona fide according to the specific BFOR definition in the legislation, or, absent such a definition , with reference to the test set out in Etobicoke.
3. if the employer has sufficient concrete evidence to prove that the requirement is reasonable and bona fide under the circumstances, then the rule or requirement is not discriminatory, and the complaint fails.
4. if the employer does not satisfy the onus of proof then the court can order a remedy for the discrimination.

If the Canadian Human Rights guidelines regarding the application of bona fide occupational requirements are going to be acknowledged by the courts, then the federal jurisdiction will impose on an employer a duty to accommodate short of undue hardship. Although the Supreme Court imposed this

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<sup>112</sup> Bhinder, p 500

<sup>113</sup> Bhinder, p 501

duty in O'Malley, it was under the old Code, absent a BFOQ. Since there was no codified employer duty of accommodation, the Court read this duty in to maintain consistency with the purposes of the Code.

O'Malley has lost its significance in terms of establishing a principle of employer accommodation in light of the Bhinder decision. Bhinder's bottom line is that when an occupational requirement or qualification is established to be bona fide, then it is a complete defense. There need be no employer accommodation of individuals adversely affected by a bona fide occupational requirement. Where the statutory language suggests the requirement has individual rather than occupational application, a different outcome should prevail.

The O'Malley and Bhinder decisions are in agreement that no intent to discriminate need be proven unless explicitly stated in the statute. The two cases also established that adverse effect discrimination is prohibited by human rights statutes even if there is no codified constructive discrimination clause.

The significance of Bhinder and O'Malley to seniority as a source of discrimination depends on whether seniority can be defended as a bona fide occupational qualification. The Courts have followed the definition of a BFOQ set out in Etobicoke. This definition establishes as a necessary condition of a BFOQ that; ...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.<sup>114</sup> It is certainly not clear that a seniority system is necessary to ensure efficient performance or the safety of employees.

Reasonable arguments could certainly be developed for and against seniority as a BFOQ, but it is uncertain which stance the employer would adopt. Seniority is well established as a determinative factor governing lay-offs, transfers, and promotions in unionized workforces, yet some employers will not concede to the protection of employee seniority rights without a long, hard fight. They perceive seniority as an interference with merit and a threat to optimum productivity. On this view, an employer might perceive a discrimination complaint as a welcome means of eliminating seniority rights.<sup>115</sup> However, more likely the employer will fear that the seniority provision will not be abolished but rather he/she will have to adopt some type of affirmative action or duty of accommodation, and thus he/she may defend the seniority system as a BFOQ.

The seniority principle is so entrenched in trade union movement ideology that it would be a herculean task to challenge it in its entirety. From the unions' viewpoint it would be ideal to have seniority defined by the courts as an "occupational qualification". If seniority was determined by the courts to be a bona fide occupational requirement, then the best means of circumventing this would be to press for an employer duty of accommodation, relying on the Canadian Human Rights Commission's guidelines. Even in light of Bhinder, accommodation may succeed because the alternative, an alteration or nullification of the seniority principle, may be unfeasible. Unions have not historically been strong advocates of affirmative action. However, given a choice of wholesale invalidation of seniority systems that have an

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<sup>114</sup> Etobicoke, p 19.

<sup>115</sup> See examples of employer resistance to seniority in; Canada Trustco Mortgage Company, (1984) OLRB Rep (Oct) 1356 see paragraphs 19 and 20 and T. Eaton Company Limited, (1985) OLRB Rep (March 491 at paragraph 19.

adverse impact on women and minorities or legally mandated accommodation for the victims, the choice appears relatively clear.

The O'Malley and Bhinder decisions gave some clear directional indicators of how the seniority issue will be approached when it is brought before the courts. The common factor between these cases and the seniority issue is that both concern disparate impact. At the very least these cases indicate the Canadian courts' level of understanding of disparate impact and their approach to developing remedial and compensatory measures for discriminatees. These decisions are the forerunners of what challengers to seniority provisions will encounter at the lower levels of Canada's judicial system and thus should not be easily discounted.

## **Affirmative Action**

There is very little caselaw upon which to draw when examining the legality of affirmative action programs. Only two cases have been decided at the appellate level which deal with the complex issues of legally mandated quota systems and reverse discrimination.

In Re Athabasca Tribal Council and Amoco Canada Petroleum Company Ltd. et al.,<sup>116</sup> the Alberta Energy Resources Conservation Board made the implementation of an affirmative action program for the employment of native people a condition of contract approval for Amoco Canada Petroleum Company to develop a tar sands plant. The Athabasca Tribal Council, supported by the Department of Indian Affairs and Northern Development, wanted the Athabasca Project to establish specific goals and mechanisms for recruitment, training and counselling of native people, as well as to provide support for native business development.

The Supreme Court of Canada declared that the Board lacked the jurisdiction to impose such a program as a condition of contract approval. The Board's jurisdiction was limited to the regulation and control of business and safety considerations relevant to the development of energy and energy resources in Alberta. The express statutory powers of the Board were enumerated in the Energy Resources Conservation Act and the Oil and Gas Conservation Act.<sup>117</sup> The court held that provision for the social welfare of the native

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<sup>116</sup> (1981), 124 D.L.R.(3rd)1 (SCC).

<sup>117</sup> Energy Resources Conservation Act, 1971 (Alberta)

The purposes of this Act are

1. to provide for the appraisal of the reserves and productive capacity of energy resources and energy in Alberta
2. to provide for the appraisal of the requirements for energy resources and energy in Alberta and of markets outside Alberta for Alberta energy resources or energy
3. to effect the conservation of, and to prevent the waste of the energy resources of Alberta
4. to control pollution and ensure environment conservation in the exploration for, processing, development, and transportation of energy resources and energy
5. to secure the observance of safe and efficient practices in the exploration for, processing, development, and transportation of energy resources of Alberta
6. to provide for the recording and timely and useful dissemination of information regarding the energy resources of Alberta
7. to provide agencies from which the Lieutenant Governor in Council may receive information, advice and recommendations regarding energy resources and energy.

Oil and Gas Conservation Act

people was beyond the Board's jurisdiction, therefore it could not incorporate a mandatory affirmative action program into a development contract.

More significantly, the Supreme Court held that an affirmative action program giving employment preference to native people did not violate Alberta's Individual's Rights Protection Act.<sup>118</sup> This ruling upheld in principle the legality of the proposed affirmative action program and rejected a claim that it constituted "reverse discrimination" under section 6(1)(b) of the Individual's Rights Protection Act.<sup>119</sup>

Mr. Justice Ritchie answered the reverse discrimination charge in the Athabaskan case as follows:

In the present case what is involved is a proposal designed to improve the lot of the native peoples with a view to enabling them to compete as nearly as possible on equal terms with other members of the community who are seeking employment in the tar sands plant. With all respect, I can see no reason why the measures proposed by the 'affirmative action' programme for the betterment of the lot of the native peoples in the area in question should be construed as 'discriminating against' other inhabitants. The purpose of the plan as I understand it is not to displace non-Indians from their employment, but rather to advance the lot of the Indians so that they may be in a competitive position to obtain employment without regard to the handicaps which their race has inherited.<sup>120</sup>

Mr. Justice Ritchie's broad, purposive approach in defining discrimination in a manner that defended the affirmative action plan against charges of reverse discrimination, is mirrored five years later by Mr. Justice McIntyre in the O'Malley case. Their common approach to interpreting human rights codes is verbalized by Mr. Justice McIntyre in the following statement from the O'Malley decision;

It is not, in my view, a sound approach to say that according to established rules of construction no broader meaning can be given to the Code than the narrowest interpretation of the words

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The purposes of this act are

1. to effect the conservation of, and to prevent the waste of, the oil, gas, and crude bitumen resources of Alberta
2. to secure the observance of safe and efficient practices in the locating, spacing, drilling, equipping, completing, reworking, testing, operating, and abandonment of wells and in operations for the production of oil, gas, and crude bitumen
3. to provide for the economic, orderly, and efficient development in the public interest of the oil, gas, and crude bitumen resources of Alberta
4. to afford each owner the opportunity of obtaining his share of the production of oil or gas from any pool or of crude bitumen from any oil sands deposit
5. to provide for the recording and the timely and useful dissemination of information regarding the oil, gas, and crude bitumen resources of Alberta,
6. to control pollution above, at, or below the surface in the drilling of wells and in operations for the production of oil, gas, and crude bitumen and in other operations over which the Board has jurisdiction

<sup>118</sup> 1972, (Alberta) c. 267

<sup>119</sup> section 6(1) No employer or person acting on behalf of an employer shall

(b) discriminate against any person with regard to employment or any term or condition of employment.

Immediately after the Court of Appeal's decision, the Alberta Legislature acted upon the concerns expressed in this, and the subsequent Supreme Court ruling, and amended the Individual's Rights Protection Act 1980 to include a mechanism authorizing affirmative action programs where required.

<sup>120</sup> Re Athabaskan Tribal Council and Amoco Canada Petroleum Ltd., p. 10.

employed. 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 purpose.<sup>121</sup>

It is this type of attitude of the courts that is conducive to the amelioration of systemic employment discrimination through remedial and compensatory measures.

The controversy that rages around affirmative action programs generally focuses on the use of employment quotas and timetables to guarantee that employers' workforces reflect the makeup of that particular geographic labour force. These programs have frequently resulted in charges of "reverse discrimination", claiming that the extension of "preferential" treatment to women and minorities discriminates against white males. The basic contention of these critics is that "it offends principles of justice to attempt to correct past wrongs by engaging in 'present wrongs'."<sup>122</sup>

There are three main arguments for both sides of the affirmative action debate which shall be briefly outlined below. Geller has effectively summarized the major arguments for those who disagree in principle with affirmative action;

- a) Affirmative action means doing more for one group based on race, sex, etc., than for another group. It therefore, violates the concept of equality and equal opportunity.
- b) Equal protection of the law, must mean that the law treats everyone alike and therefore, is colour blind and gender blind. If race cannot be used against one group, it cannot be used against any other group, even if the purpose for using it, is to assist the first group.
- c) Affirmative action denies the basic premise on which America was founded - individualism. It attempts to provide group rights, and, rights are only individual.<sup>123</sup>

In support of affirmative action is the compensatory justice theory. This theory endorses the awarding of compensation to present members of the discriminated class for past wrongs. The distributive justice theory uses affirmative action as a tool to neutralize the present effects of discrimination by providing the victims with a greater share of community resources.<sup>124</sup> Equal distribution of job and educational opportunities is the core of the social utility theory. Proponents of this theory claim that affirmative action will promote maximum well-being for society.<sup>125</sup>

Although both sides of the affirmative action debate have valid concerns that cannot be easily discounted, in my view, the supporters have a stronger position because it cannot be denied that white males have benefited in the past, and continue to benefit, from racism and sexism. It is when white males no longer receive, conscious or unconscious, "preferential treatment", which is based on systemic discrimination,<sup>126</sup>

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<sup>121</sup> O'Malley, p. 328.

<sup>122</sup> Colleen Shepard, note 5 supra at p 3.

<sup>123</sup> Carole Geller, note 58 supra at p 44.

<sup>124</sup> Ibid, at p 42.

<sup>125</sup> Ibid.

<sup>126</sup> "The impact of behaviour is the essence of 'systemic discrimination. It suggests that the inexorable, cumulative effect on individuals or groups of behaviour that has an arbitrarily negative impact on them is more significant than whether the behaviour flows from insensitivity or intentional discrimination." (Abella note 7 supra p 9.) Systemic discrimination against certain groups of individuals has its' roots entrenched in values and attitudes that are reflected

that they claim reverse discrimination. Whether the individual male has contributed or not, society, through its institutions, has systemically discriminated against women and minorities. This behaviour can only be changed through systemic rather than individualized remedies or affirmative action programs. White males are not being discriminated against by affirmative action, they are just being placed in the employment position they would have occupied had there been no past or present discriminatory treatment of women and minorities.

Systemic discrimination is not just "past wrongs" but current and ongoing discriminatory treatment. Present social attitudes are grounded in these "past wrongs" and as such perpetuate behaviour that is consistent with these attitudes. Once discrimination is systemic rather than intentional, and affecting groups rather than individual victims, actions to correct this discrimination must be remedial as well as preventative.

The effect may be to end the hegemony of one group over the economic spoils, but the end of exclusivity is not reverse discrimination, it is the beginning of equality. The economic advancement of women and minorities is not the granting of a privilege or advantage to them; it is the removal of a bias in favour of white males that has operated at the expense of other groups.<sup>127</sup>

In my view, the two necessary elements of an affirmative action program, prevention and remedy, are inseparable. An affirmative action program cannot prevent the recurrence of discriminatory behaviour unless it reaches to the roots of the attitudes that cause the behaviour and of institutions that reflect and reinforce the behaviour, and forces them to change. When employers are unconscious of the ways in which their traditional recruiting, interviewing, evaluating, and scheduling decision-making processes systemically discriminate against women and minorities, cease and desist orders against "discriminatory" treatment are inadequate prevention or remedy. The most facilitative means of accomplishing this alteration is through remedial measures such as hiring quotas and timetables because employers are required actively to seek out previously ignored applicants and to revise traditional procedures that have unwittingly served as barriers to entry and promotional opportunity. Such measures, de facto, remedy past exclusion and prevent future exclusion simultaneously. This view is not consistent with that recently adopted by the Federal Court of Appeal.

Canadian National v. Action Travail des Femmes and The Canadian Human Rights Commission<sup>128</sup> was a case which concerned a claim by women that CN was discriminating on the basis of sex when hiring for the blue-collar, entry level positions in the St. Lawrence region. The federal Human Rights Tribunal established to hear the complaint found intentional discrimination on the part of CN because CN knowingly perpetuated a variety of hiring practices that were unfair to women. The Tribunal found that CN management had knowledge of these discriminatory hiring practices, for which there was no bona fide occupational requirement, yet made no attempts to eliminate them.

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in our social institutions. Discrimination towards women and minorities is so engrained in society that it is not intentional behaviour on the part of the perpetrators.

<sup>127</sup> Robert Belton, "Discrimination and Affirmative Action : An Analysis of Competing Theories of Equality and Weber", 59 North Carolina Law Review 1981, p. 537.

<sup>128</sup> Vol. V1, 1985. D/2908. Hereafter referred to as CN.

The Tribunal declared that CN's discriminatory practices were in contravention of section 10 of the Canadian Human Rights Act, and split its remedial order into two parts. The first part of the order was entitled "Permanent Measures for Neutralization of Current Policies and Practices", and consisted of specific orders to halt the various discriminatory policies and practices.

The second part of the order, "Special Temporary Measures", was the first quota system ever imposed by a Tribunal.<sup>129</sup> This section read, in condensed form;

1. Within the period of one year and until the percentage of women in non-traditional jobs at CN has reached 13, CN shall undertake an information and publicity campaign inviting women in particular to apply for non-traditional positions.
2. ... Accordingly, Canadian National is ordered to hire at least one woman for every four non-traditional positions filled in the future. This measure shall take effect only when CN employees who have been laid off but who are subject to recall have been recalled by CN, but not before one year has elapsed from the time of this decision, in order to give CN a reasonable length of time to adopt measures to comply with this order
3. Within a period of two months of this decision, CN shall appoint a person responsible with full powers to ensure the application of the special temporary measures and to carry out any other duties assigned to him by CN to implement this decision.<sup>130</sup>

The "Special Temporary Measures" imposition was appealed by CN and taken before the Federal Court of Appeal on July 16, 1985. The Federal Court first looked at the statutory powers the Tribunal had to impose such special measures under section 41(2)(a) of the Canadian Human Rights Act.

#### Section 41

(2) 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;

(a) That such person cease such discriminatory practice and, in consultation with the Commission on the general purposes thereof, take measures, including adoption of a special program, plan or arrangement referred to in subsection 15(1), to prevent the same or a similar practice occurring in the future;

The majority found that section 41(2)(a) only permitted the Tribunal to take measures aimed at preventing any future occurrence of the discrimination by the party/individual engaged in discriminatory practices in the past. Essentially the majority read 41(2)(a) as being solely preventative rather than remedial, relying on the phrase "... to prevent the same or a similar practice occurring in the future."

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<sup>129</sup> In Hendry v. LCBO (1980) 1 CHRR D/33, a Tribunal under the Ontario Human Rights Code made a compulsory affirmative action order, but it required the employer itself to design a specific affirmative action program, subject to the approval of the Commission. In the case discussed herein, the program itself was imposed on the employer.

<sup>130</sup> CN, paragraph 23709

Section 41(2)(a) made reference to the allowance of special programs under section 15(1), which reads:

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

Section 15(1) was deemed by the majority to be a protective clause sheltering existing, voluntarily adopted affirmative action programs from being struck down due to reverse discrimination claims.

In the majority's view, Section 15(1) had two purposes: the prevention of future disadvantages, and the reduction or elimination of present disadvantages by the granting of improved opportunities to the disadvantaged group. Although the majority allowed that section 15(1) was both preventive and remedial in nature, they adopted a narrower reading of 41(2)(a) than of 15(1), and limited section 41 exclusively to prevention of discrimination in the future.

The court also ruled that because section 41(2) does not explicitly provide for restitution for past wrongs, then compensation provided for in 41(b),(c) and (d) "is limited to 'the victim' of the discriminatory practice, which makes it impossible, or in any event inappropriate, to apply it in cases of group or systemic discrimination where, by the nature of things, individual victims are not always readily identifiable."<sup>131</sup>

The majority therefore set aside the second part of the Tribunal's remedy that imposed an affirmative action program of quota hiring. The Court held that this measure was not preventative of future discrimination but was rather a means of catch-up for past discrimination, and thus did not fall within the powers allocated to the Tribunal by section 41(2)(a).

All three ruling judges, Pratte, Hugessen and MacGuigan, made reference in their decisions to the fact that the Tribunal did not explicitly label the measures it imposed as "preventative" measures.

In his judgement Mr. Justice Hugessen considered the possibility of a broader interpretation of section 41, then dismissed this as beyond the jurisdiction of that court.

... Despite this, the order is expressed in terms that are purely remedial, almost as if the Tribunal had deliberately chosen to disregard the words of the statute Perhaps the legislation is defective in this regard and the scope of section 41 should be enlarged to encompass the whole range of affirmative action programs envisaged by section 15. It is not difficult to think of good policy reasons in favour of such action. But they are questions of policy and there are arguments the other way as well. It is not for the Tribunal or for this Court to disregard the text of the statute and to prescribe that which, reasonable or otherwise, the law does not permit.<sup>132</sup>

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<sup>131</sup> CN, paragraph 23682.

<sup>132</sup> CN, paragraph 23695.

It is readily apparent that the Federal Court interpreted the remedial powers of the Human Rights Commission as set out in section 41 quite narrowly. This approach to interpreting human rights codes was rejected by the Supreme Court of Canada in the O'Malley decision. In this judgement, Mr. Justice McIntyre discarded the narrow interpretive approach in favour of a purposive one).<sup>133</sup>

It appears that the Tribunal did not expect such a narrow and literal interpretation of the Act, as they did not explicitly defend their "Special Temporary Measures" as a preventative mechanism. Perhaps the Tribunal felt the preventative aspect of quota hiring and maintenance was self-evident and did not require defense. In his judgement, J. Hugessen acknowledged the feasibility of goal fixing as a means of establishing equality, but still insisted that prevention must be explicitly stated as the purpose of the program.

... I recognize that by its very nature systemic discrimination may require creative and imaginative preventive measures ... It may well be that hiring quotas are a proper way to achieve the desired result. Again, however, one would expect a Tribunal to make clear findings supporting as preventative measures which are in appearance remedial.<sup>134</sup>

Mr. Justice MacGuigan disagreed with the majority of the court and found that the "Special Temporary Measures" should not be construed as nonpreventative. His argument was that the ideal form of prevention would be a change in attitudes and behaviours at CN, but that was difficult to effect and regulate. Since the ideal was unfeasible, systemic discrimination required systemic remedies. In his judgement, Mr. Justice MacGuigan stated that the Tribunal's failure to label or justify its measures as "preventative" should not preclude upholding these measures if in effect they were preventative. MacGuigan found the imposition of these measures to be within the jurisdiction of the Tribunal.

It is hoped that the judicial reasoning will be more enlightening when the pending appeal is heard by the Supreme Court. However, at the Federal Court of Appeal level, the majority has shown a reluctance to approve affirmative action plans with employment goals and timetables.

The decision of the majority of the Federal Court seems to have been based on an issue secondary to the substantive complaint before them. There was a clear-cut, statistically sound, intentional case of employment discrimination proved against CN management. The Court acknowledged the systemic nature of the discrimination, yet would not validate a remedy that would force CN to change their past and existing hiring practices in order to prevent continuation of discrimination of women applicants.

I fail to follow the Court's reasoning in declaring quotas and timetables regulating future hiring as nonpreventative. How can these measures fail to prevent future discriminatory practices? The court's only concern surely could not have been that the Tribunal merely verbalize the preventative aspects of the measures? In my view, the majority's literal reading of section indicates a fundamental lack of under-

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<sup>133</sup> It is not, in my view, a sound approach to say that according to established rules of construction no broader meaning can be given to the Code than the narrowest interpretation of the words employed. 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 purpose (at page 328).

<sup>134</sup> CN, paragraph 23693

standing of the nature of systemic discrimination, and the rationale behind systemic remedies. The narrow approach that the Federal Court has taken with this well-documented case of systemic discrimination does not bode well for the success of future cases that do not have such sound evidence.

In the context of systemic discrimination, a distinction that is drawn between remedial and preventative responses is merely artificial. As stated earlier, one purpose flows from the other. If the courts insist upon affirmative action plans as being solely preventative in nature, then the problem of changing the status quo arises. How is it possible to alter the status quo and prevent future discrimination without remedying past discrimination through measures such as the Tribunal in the CN case proposed? This issue is left unanswered at the Court of Appeal level, but hopefully will be resolved by the Supreme Court of Canada.

An application of the reasoning in this case to the seniority issue could support the argument that tribunals and courts may allow alteration of narrow seniority units on the premise that wider units will prevent future mobility restrictions on women and minorities due to job ghettos created by discriminatory hiring. It can be argued that continued use of gender neutral and colour blind seniority systems will perpetuate existing systemic discrimination and thus some form of affirmative action program or awarding of retroactive seniority should be justifiable as both a remedial and a preventative measure.

There are several issues that the court determined in the CN case that assist in clarifying how a complaint charging discrimination on the basis of seniority would be approached by the courts. Under CN reasoning, where the governing legislation contains a clause similar to section 15 of the Canadian Human Rights Act, preferential seniority protection for women and minorities is protected when the program is adopted voluntarily. CN reasoning restricts the remedial powers of federal Tribunals in that they cannot order changes to seniority systems such as retroactive seniority for the historically disadvantaged, or a two-tiered seniority system, unless the Tribunal specifically spells out how these measures are preventative.

How applicable the CN case will be to a seniority claim will depend upon the working of the governing legislation's remedial provisions. Section 13(1) of the Ontario Human Rights Code for instance, does not specify that an affirmative action program must be preventative, as does the Federal Act. If the Charter is found to govern the collective agreement, then the wording of section 15(2) of the Charter would permit such measures as the Tribunal imposed in CN.

How the courts will treat affirmative action based seniority measures, when balancing equality rights versus the traditional seniority protection sought by the labour movement, will remain unclear until more affirmative action cases have been decided by the courts and the courts have acknowledged the artificial distinction between remedy and prevention.

## THE UNITED STATES EXPERIENCE

The former sections of this paper have been devoted to establishing the seniority/equality conflict as an emerging labour relations issue which should be of concern to Canadians. There is very little Canadian research on this issue so one must turn to an examination of the United States experience in this area. The American courts have been grappling with the seniority versus equality issue since the 1960's and a review of the jurisprudence should indicate the balance that these courts have struck between the two conflicting interests,

This section will briefly identify the relevant American antidiscrimination statutes and then review several benchmark cases that deal with the discriminatory effects of seniority provisions. It must be noted that there are several fundamental differences in Canadian and American anti-discrimination legislation. However the comparison is still valuable since the underlying principles of the conflict are the same in both countries.

The Human Rights Tribunal in Canadian National v. Action Travail des Femmes and the Canadian Human Rights Commission<sup>135</sup> considered United States legislation and the American experience in imposing affirmative action plans, prior to examining the appropriateness of ordering CN to adopt such a plan in retribution for discriminatory hiring practices. In his judgement on CN, Mr. Justice MacGuigan in his minority opinion, relayed the Tribunal's reference to a possible consideration of American jurisprudence, and then approved this consideration in the following statement:

'Since there are hardly any examples in Canadian law of the imposition of an affirmative action program such as that suggested by ATF and the Canadian Human Rights Commission, we think it is important, before considering the appropriateness of ordering CN to adopt such a program, to indicate the legal basis of affirmative action programs and to look at some examples of them. Accordingly, we will draw a comparison between the Canadian Human Rights Act and American legislation and then look at the American experience in imposing such programs.'

Not only was it not improper for the Tribunal to review the wider U.S. experience with affirmative action programs, but it might have been thought to have been delinquent not to do so.<sup>136</sup>

Affirmative action is closely associated with the seniority/equality conflict, as it has been frequently posed as a measure to remedy employment discrimination.<sup>137</sup> Since one can conclude from the above statement that it is appropriate to consider the American experience with affirmative action, then it would only be an extension of this to also appraise how the U.S. courts have handled the seniority issue.

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<sup>135</sup> supra, footnote 128.

<sup>136</sup> Ibid., at paragraph 23711.

<sup>137</sup> See CN, supra footnote 128.

Just as Canada has several forums under which an individual may pursue an employment discrimination claim, so does the United States. Executive Order 11,246 (E.O. 11,246) prohibits federal government contractors and subcontractors from discriminating in employment on grounds of race, colour, religion, sex, or national origin.

The Office of Federal Contract Compliance (OFCCP) has administered E.O. 11,246 since it was issued in 1964. What distinguishes E.O. 11,246 from other anti-discrimination legislation is the additional requirement that large government contractors and subcontractors prepare an affirmative action plan regardless of whether the employer has been found to discriminate.<sup>138</sup> If it is found from a mandatory statistical analysis of the employer's workforce that the representation of women and minorities is deficient, then a specific goal and timetable affirmative action plan must be implemented.

Section 202 of E.O. 11,246 incorporates into the contractor's agreement with the government seven provisions which include; a pledge to not discriminate against any employee or applicant for employment on any prohibited ground and, a requirement to take affirmative action whenever a protected group is underrepresented in comparison to availability in the workforce. The OFCCP can implement any of the following sanctions for non-compliance with this order; a recommendation that an action be brought under Title V11, termination of the current contract, and debarment of the contractor from further contracts with the government.<sup>139</sup>

The Fourteenth Amendment of the United States Constitution<sup>140</sup> also guarantees freedom from discrimination, but this prohibition is limited to state action not to the private sector, just as some authorities feel the Canadian Charter will be.<sup>141</sup>

The most encompassing of the American anti-discrimination statutes is Title V11 of the Civil Rights Act of 1964<sup>142</sup> which covers private employers, state and local governments, as well as educational institutions.<sup>143</sup> This mandate is administered by the Equal Employment Opportunity Commission (EEOC).<sup>144</sup> The EEOC processes a discrimination claim upon failure of a state or local agency to resolve the complaint.<sup>145</sup> If the EEOC's investigation and conciliation of the complaint is unsuccessful, then federal court action may be initiated by either the EEOC or the complainant.<sup>146</sup>

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<sup>138</sup> Lynn Bevan, "Employment Discrimination Laws in the United States; An Overview", in Judge Rosalie Abella, Equality in Employment: A Royal Commission Report, Research Studies, April 1985, p. 457.

<sup>139</sup> Carole Geller, note 58 supra at p. 32.

<sup>140</sup> section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

<sup>141</sup> For example, John Whyte, note 40 supra at p.1 to 3.

<sup>142</sup> 42 U.S.C. para 2000e (1976).

<sup>143</sup> Section 701 of Title V11 defines "employer", subject to Title V11 businesses must: be involved in interstate commerce, and have employed 15 or more employees for at least 20 weeks in the current or preceding year.

<sup>144</sup> Section 705 of Title V11.

<sup>145</sup> Carole Geller, note 58 supra at p. 20.

<sup>146</sup> Lynn Bevan, note 138 supra at p. 449.

The relevant sections of Title V11 to a discussion of affirmative action and seniority are:

section 703(a) It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin; or,

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

One could construe from the wording of section 703(a) that seniority systems, if one could consider them to be employer attempts to "classify his employees", cannot deprive an individual of employment opportunities or adversely affect his status as an employee because of race, colour, religion, sex or national origin. This provision appears directly to address the adverse effect that seniority systems have on women and minorities when seniority rules govern layoffs, recalls and promotions. However this semblance of protection is quickly lost upon a reading of section 703(h), which protects bona fide<sup>147</sup> seniority systems that do not intend to discriminate.

section 703(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority or merit system ... provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin

No such clear protection as that offered by section 703(h) can be found in any Canadian legislation. The closest that Canadian legislation comes to offering comparable protection to seniority systems would be BFOR provisions found in human rights codes. Sections 10 and 23(b) of the Ontario Human Rights Code, for instance, provide a compliance exemption to reasonable and bona fide occupational requirements or qualifications that are considered necessary due to the nature of the business. The Canadian courts have not yet had to determine whether seniority systems qualify for this exemption.

Title VII's section 703(e)(1) is similar to the above mentioned Canadian provisions; it exempts practices that discriminate on grounds of sex, religion or natural origin if they are bona fide occupational requirements by reason of being reasonably necessary to the normal operation of that particular business or educational institution.<sup>148</sup> However the clear protection offered of seniority by 703(h) makes resort to this section unnecessary.

The enactment of Title V11 in 1964 was the catalyst to the emergence of a series of employment discrimination cases, a number of which were based on seniority provisions. The following discussion shall focus on the jurisprudence surrounding Title V11 because the key decisions which determine

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<sup>147</sup> "The prevailing definition of a bona fide occupational qualification is a requirement that is necessary to the satisfactory performance of the job." (Patricia Hughes, note 101 supra p 231)

<sup>148</sup> Lynn Bevan, note 138 supra at p. 449.

whether seniority provisions have discriminatory effects are decided under Title VII. The various remedies that the U.S. Supreme Court has deemed appropriate in the face of employment discrimination arising from a seniority system may indicate the direction that the Canadian courts will head once presented with this issue.

Prior to the passage of Title VII, some employers discriminated against certain employees because of their race or sex by assigning them to relatively inferior employment or by maintaining apparently neutral seniority systems such as departmental seniority systems, which restricted transfer or, where transfers were permitted, resulted in a loss of seniority by those being transferred.<sup>149</sup>

The first case to challenge such above-described, workplace behaviour was Quarles v. Philip Morris, Inc.<sup>150</sup> under the newly passed Civil Rights Act of 1964. Philip Morris Inc.'s segregated departmental seniority system prevented black workers from using their seniority status to compete for higher positions in predominantly white departments, and was found to violate Title VII. The court held that, "a seniority and transfer system constituted present discrimination if it locked protected groups into jobs in which they had been placed as a result of past discrimination."<sup>151</sup> The court rejected the argument that the seniority system was bona fide and thus exempted under section 703(h) because it only had the appearance of neutrality.

In a 1971 case<sup>152</sup> the U.S. Supreme Court devised what is now commonly referred to as the Griggs principle, which stated that employment policies and practices even if neutral in intent, cannot be maintained if they freeze the status quo of prior discriminatory employment practices.

Lower courts had applied the Griggs principle to seniority systems that 'locked' minorities and women into lower paying, less desirable jobs. These systems were declared illegal and ordered revised. Much of industry reformed its seniority systems in favour of 'large unit' or 'plant wide' seniority. This, in turn, enabled those long-service minority and female employees to transfer to better jobs when vacancies arose.<sup>153</sup>

Griggs was the first case in which the U.S. Supreme Court recognized systemic discrimination and approved remedies to redress its impact.

The Griggs and Quarles line of reasoning was followed by the American courts for almost ten years. In the 1977 case, International Brotherhood of Teamsters v. United States<sup>154</sup> the Supreme Court did an about-face and decided that a seniority system could not be discriminatory unless its genesis was an intention to discriminate. The court ruled that discriminatory effect in itself does not preclude the application of seniority systems to protected groups who have not suffered post- Title VII discrimination.

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<sup>149</sup> Lynn Bevan, note 138 *supra* at p. 444.

<sup>150</sup> 279 F. Supp. 503, 1 FEP 260 d. (ED Va 1968).

<sup>151</sup> Lynn Bevan, note 138 *supra* at p. 444.

<sup>152</sup> Griggs v. Duke Power Company 401 US 430, 91 S.Ct. 849 (1971).

<sup>153</sup> Alfred W. Blumrosen, "Improving Equal Employment Opportunity Laws: Lessons From The United States Experience", in Judge Rosalie Abella, Equality in Employment: A Royal Commission Report, Research Studies, April 1985, p. 434.

<sup>154</sup> 431 U.S. 324, 97 S.Ct. 1843 (1977).

Unless an intention to discriminate was established, a bona fide seniority system was exempted under section 703(h) of Title VII, even if it entrenched past discrimination.<sup>155</sup>

The Teamsters case concerned a charge of employment discrimination brought by the United States against the employer, T.I.M.E.-D.C.,INC., and the union, International Brotherhood of Teamsters. The state charged that the employer and union were engaging in discriminatory practices against Negroes and Spanish surnamed persons. The claim was that the seniority system perpetuated the effects of past racial and ethnic discrimination through practices such as requiring city drivers, the majority of whom were minorities, who were transferred to a line driver position, a job predominantly performed by white employees, to forfeit all competitive seniority and start again at the bottom of the seniority ladder.

Teamsters was a benchmark decision as it was the first in a stream of cases<sup>156</sup> which indicated a shift in the courts towards protecting traditional labour interests to the detriment of the equality movement. The result of this judgement is that the complainant has to meet a higher standard of proof by demonstrating intent to discriminate as a prerequisite to a successful claim.

United AirLines, Inc. v. Evans<sup>157</sup> was a Supreme Court decision handed down the same day as the Teamsters decision. This case established that there was no remedy available for victims of pre-Act (Civil Rights Act of 1964) discrimination and also placed non-timely,<sup>158</sup> post-Act claims in the same nonactionable position.

A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequence.<sup>159</sup>

The Teamsters decision also restricted the availability of remedies to victims of discrimination. An earlier case, Franks v. Bowman Transportation Co.<sup>160</sup> held that "plaintiffs (members of a protected group) who had been laid off and who could establish that, without past discrimination, they would have been hired at an earlier date and thus would have had sufficient seniority to escape layoff, are entitled to relief in the form of constructive seniority."<sup>161</sup> The Supreme Court in Teamsters limited the availability of the remedy established by Franks v. Bowman Transportation Co. to post-Act discriminatees only. As well, retroactive seniority which was to be awarded could only be calculated back to the Act's effective date rather than to the date of the individual's job application. Teamsters made retroactive seniority available to all

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<sup>155</sup> Lynn Bevan, note 138 *supra* at p. 444.

<sup>156</sup> American Tobacco v. Patterson 456 U.S. 63, FEP 713 (1982) and Firefighters Local Union No. 1784 v. Stotts et.al., (1984) 52 U.S.L.W. 4767.

<sup>157</sup> 97 SCt 1885 (1977).

<sup>158</sup> Section 706(e) requires a timely charge to be filed within 180 days after the occurrence of the unlawful practice. If there is state or local jurisdiction, then a claim must be filed within 300 days or 30 days of termination of state action.

<sup>159</sup> Wendy Williams, Sex Discrimination and the Law: Causes and Remedies, 1978 Supplement, Babcock, Freedman, Norton and Ross, Little Brown and Company, 1978, p. 136.

<sup>160</sup> 424 U.S. 747 96 S.Ct 1251 12 FEP Cases 549 (USSC 1976)

<sup>161</sup> Lynn Bevan, note 138 *supra* at p 445.

individuals who had not applied for jobs, but who would have except for knowledge of the employer's discriminatory policy or practice. However there is a heavy burden of proof on the claiming party in this instance.

The use of retroactive seniority as a remedy for those individuals who were discriminated against in terms of hiring or promotions is an indication that the American high courts are loath to promote labour unrest by striking down the entire seniority system. Retroactive seniority does not modify the seniority system *per se* rather it places the discriminatee in a position on the seniority ladder where he/she would have been absent the discrimination. Front pay is another such remedy which the lower courts have fashioned that does not affect the system itself or the status quo established by the seniority system. This remedy provides monetary compensation to identifiable victims of employment discrimination, but does not affect their seniority status.

The lower courts have upheld, and in several cases ordered<sup>162</sup> affirmative action programs as a measure to rectify employment discrimination. In United Steelworkers of America v. Weber<sup>163</sup> a white male employee challenged the legality of an on-the-job training plan which enforced a training admittance quota of one-for-one for minority and white employees. The Supreme Court held that the affirmative action plan did not violate Title VII because: Title VII does not prohibit all private, voluntary race-conscious affirmative action plans; the plan was incorporated into the collective agreement; it did not unnecessarily trammel the interests of the white employees; the plan mirrored the purpose of the statute; and it was a temporary measure to eliminate a racial imbalance.

Regents of the University of California v. Bakke<sup>164</sup> established the court's authority to issue a hiring order based on quotas. Although Bakke concerned admittance quotas for a medical school, the comparison can be drawn with hiring quotas. In Bakke the majority of the court held that race-conscious programs could be appropriate even if there had been no finding of intentional discrimination.

In addition to affirmative action for hiring, the U.S. Supreme Court has had to consider whether affirmative action goals must be retained during layoffs that threaten minority representation. In Boston Chapter NAACP v. Beecher<sup>165</sup> the City of Boston's police and fire department had implemented an affirmative action plan to increase the minority representation in their workforce. When the departments were faced with layoffs they altered the layoff provision in their seniority system in order to maintain their minority percentages. The Supreme Court ruled that in the interest of maintaining the status quo, protection for minority workers against layoffs was warranted.

However in Memphis firefighters v. Stotts, a 1984 U.S. Supreme Court case, the Court limited the protection offered to discriminatees by ruling that the seniority system could not be abrogated to benefit individuals who were not proven victims of discrimination.<sup>166</sup>

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<sup>162</sup> Carole Geller, note 58 supra at p 30

<sup>163</sup> 443 US 193, 61 L.Ed. 2<sup>nd</sup>, 480.

<sup>164</sup> 438 US 265, 17 FEP 1000 (1978)

<sup>165</sup> 103 S.Ct. 293 (1982).

<sup>166</sup> Robert Pear, "Affirmative Action Upheld By High Court As A Remedy For Past Job Discrimination", The New York Times, Thursday, July 3, 1986, p. B.8.

This line of reasoning was continued by the Supreme Court in Wygant v. Jackson Board of Education which was decided on May 19, 1986. The Court ruled 5 to 4 that the school board's policy of laying off white school teachers, with more seniority, before minority teachers was unconstitutional. The Court was prepared to extend preference to minorities in hiring but not in layoffs.<sup>167</sup>

From this brief review of the seniority/equality dispute in the United States, one could draw several conclusions which are of consequence to a Canadian consideration of this issue. One can quite obviously derive that the onus of proof in claiming that a U.S. seniority system has an adverse effect on women and minorities, is much higher than the onus in Canada. One of the most significant differences in the American and Canadian legislation is section 703(h) of Title VII which protects bona fide seniority systems that are not intentionally discriminatory. There is no statutory definition of a bona fide seniority system so this has been left up to the interpretation of the courts. Perhaps this lack of legislative guidance led to the complete shift in the Supreme Court's reasoning between Quarles and Teamsters.<sup>168</sup> One of the few aspects of this issue that has been determined by the Supreme Court of Canada is that it is not necessary to prove that an employer intended to discriminate in order to pursue a claim.

The American courts appear to be more receptive than the Canadian courts to affirmative action as a remedy for systemic employment discrimination, perhaps because the U.S. has twenty years experience with affirmative action remedies. On July 2, 1986 the United States Supreme Court ruled on two cases, Local 93 of the International Association of Firefighters v. City of Cleveland and, Local 28 of the Sheet Metal Workers v. Equal Employment Opportunity Commission which further clarify the American position regarding affirmative action as an appropriate remedy for discrimination.<sup>169</sup>

The Cleveland case stemmed from a 1980 suit filed against the City of Cleveland by the Vanguard, an organization of black and Hispanic firefighters, who alleged discrimination in the City's promotion practices. In 1981 the City and the firefighters settled on a voluntary consent decree which detailed a plan that would promote white and minority firefighters on a one-to-one ratio. The union objected to this plan claiming that it was unconstitutional under civil rights law. The Supreme Court ruled 6-3 that the plan was not unconstitutional as it more resembled a voluntarily adopted affirmative action plan, despite being approved by a federal judge.<sup>170</sup>

This Supreme Court ruling rejected the Reagan Administration's policy that relief from discrimination could only be awarded to identifiable victims. The Court stressed that the consent decree was perceived as a voluntary measure, and held that Title VII permits employers and unions to voluntarily make use of reasonable, race-conscious affirmative action.

The Sheet Metal Workers case involved a union with a long history of past infractions with regard to discrimination against minorities. After a series of court rulings, the union was ordered to achieve a goal of 29% minority membership and to set up a fund to train and assist minority workers. The union questioned the constitutionality of an affirmative action plan which may benefit individuals who were not actual victims of the defendant's discriminatory practices. The Court relied on United Steelworkers of

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<sup>167</sup> Ibid

<sup>168</sup> Lynn Bevan, note 138 supra at p 444.

<sup>169</sup> Robert Pear, note 166 supra at p 1.

<sup>170</sup> Ibid.

America v. Weber<sup>171</sup> to uphold their reasoning that voluntary action adopted by employers and unions to eradicate discrimination may include relief to individuals who were not actual victims. The majority of the Court considered that the consent decree entered into by these parties does not bind the union to do anything.

The Court set a high standard for discrimination which can be remedied by a quota-based affirmative action plan. In his decision Justice Brennan described the nature of the discrimination which would be deserving of a quota remedy:

we hold that such relief may be appropriate where an employer or a labor union has engaged in persistent or egregious discrimination, or where necessary to dissipate the lingering effects of pervasive discrimination.<sup>172</sup>

The Court also stressed that rigid quotas would be improper and must not be ordered merely "as a means to achieve racial balance" in the workforce. Although these two decisions do set strict qualifications on the protection they offer to individuals discriminated against in the workplace, they do reaffirm the Supreme Courts support for affirmative action in employment.

Although Canadian legislation, such as the Federal Human Rights Act and the Charter, expressly permit affirmative action, the indication from the Canadian judiciary is that quota hiring and timetables are not the appropriate remedy to prevent future discrimination. This statement should not be interpreted too literally as it is based only on one Federal Court of Appeal judgment<sup>173</sup> interpreting language of a single statute, and has since been appealed to the Supreme Court of Canada.

A final observation about the American experience with attempting to balance the interests of seniority with those of equality is that there is no agreement as to the best means to resolve this conflict. Remedies that are ordered by one court are overturned by another, until the Supreme. Court has the final say. An attempt was made to limit the case discussion to those cases which have been heard by the U.S. Supreme Court for precisely this reason.

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<sup>171</sup> 443 US 193, 20 FEP 1 (1979).

<sup>172</sup> Ibid.

<sup>173</sup> CN supra, footnote 128.

## CONCLUSION

The conflict between the rights to equality guaranteed by Canadian legislation such as human rights codes and the Canadian Charter of Rights and Freedoms and the rights in employment created by seniority systems, is beginning to emerge before the business and labour communities in Canada.

Governments have acknowledged this looming labour relations problem with investigations into the state of equality in Canada's employment market, such as Judge Rosalie Abella's Royal Commission Report, Equality in Employment. This Report and other such investigations have exposed what women's and minority groups have been professing for years, that there is not equality in Canadian employment. What I have examined throughout this paper is how seniority systems contribute to the creation and perpetration of inequality in employment. This paper has supported affirmative action as an appropriate remedy to redress the constructive discrimination created by employment practices such as seniority systems.

The following proposals suggest remedial measures that may be appropriate.

Before one can embark on the development of initiatives that attempt to balance both equality and seniority rights, there must be a socially and judicially accepted foundation upon which to build. There are several indications that courts and tribunals are responding to public policy by establishing such a foundation which promotes equality while still attempts to maintain labour peace.

Recent Supreme Court rulings<sup>174</sup> have recognized and accepted the existence of the disparate impact arising from certain employment practices that appear neutral on their face. This acknowledgement of—disparate impact has greatly expanded the scope of previously held concepts of employment discrimination.

The Supreme Court has also liberated equality guarantees from the confining requirement that intent to discriminate be proven by the complainant. In Bhinder and O'Malley the Supreme Court recognized that to be aware of systemic discrimination, one must look to the effect of the discrimination rather than to the intent behind it.

It has been argued through the course of this paper that seniority systems do have a disparate impact on women and minority labour force participants. Although seniority systems have an adverse impact on women and minorities with regard to hiring and promotion decisions, the effect is intensified during recessionary times when layoffs and recalls also disproportionately affect this group.

Canadian courts and tribunals have accepted that voluntary affirmative action plans are an appropriate remedy for prima facie employment discrimination.<sup>175</sup>

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<sup>174</sup> See Bhinder and O'Malley discussions, *infra*.

<sup>175</sup> See, Re Athabaskan Tribal Council and Amoco Canada Petroleum Company Ltd. et. al. (1981), 124 D.L.R.(3rd.) 1 (SCC). and, Hendry v. LCBO (1980) 1 CHRR D/33. and, section 15(2) of the Canadian Charter of Rights and Freedoms.

If an affirmative action plan designed to correct the disproportionate representation of women or minorities in an employer's workforce is voluntarily initiated or bargained, then courts and tribunals have indicated that they will protect it from "reverse discrimination" charges by white males.

An affirmative action program which was voluntarily adopted or designed by the employer and union would be an ideal way to counter the discriminatory effects of a seniority provision. Such initiative may avoid the time-consuming process of litigation which the American experience has shown to be the result of court-enforced programs, especially in so far as Canadian human rights legislation and the Charter expressly protect affirmative action measures.

Before the parties will initiate a voluntary affirmative action program there must be an awareness that their particular workforce is not representative of the make-up of the available labour pool. A statistical data collection scheme such as that proposed in the Employment Equity Bill could create such an awareness in employers and unions. It would then be up to the two parties to design an affirmative action plan tailored to their particular problem.

The analysis of the American experience exposed several ways in which employment discrimination problems could be addressed. To counter the difficulties that women and minorities experience in gaining access to promotions due to departmental seniority provisions and job ghettoization, plant-wide seniority has been proposed as a modest alteration to seniority systems in order to accommodate women and minorities. Although broadening the seniority base enhances access to other jobs once women and minorities are employed, it does not alter the ordering of the seniority queue.

A somewhat more controversial approach is the awarding of retroactive seniority. An affirmative action plan based on this concept would credit members of the group that has experienced, or is experiencing, employment discrimination with a set number of years of additional seniority. The justification behind this remedy is that women and/or minorities should be put in their "rightful place" in the seniority queue, where they would have been absent the discrimination. This type of plan alters the existing order within the seniority queue by granting discriminatees compensatory seniority and as such may not be looked upon too favourably by the union or the union members. This remedy cannot be limited to identifiable victims of discrimination, but rather must be available to all members of the group which has experienced historical systemic discrimination.

Where there is an underrepresentation or an overrepresentation of women or minorities in any certain industry or occupation, an affirmative action plan must have hiring goals, quotas and timetables based upon the results of a statistical analysis of the available workforce within the potential recruitment pool. Hiring goals should not be set so high that unqualified individuals are hired or promoted, yet not so low that they merely give the illusion of cultivating equality. Hiring goals and quotas should be determined on a workplace by workplace basis in light of the severity of the discrimination involved, and the available labour pool. These goals of attaining equitable levels of female and minority representation must extend to training programs so that the efforts are not limited to entry-level positions in the organization. Where labour and management establish goals for the hiring and training of women and minorities, these targets should be maintained throughout layoffs and recalls. The effects of an affirmative action plan could be wiped out during a layoff governed by straight seniority.

There are numerous other elements that an affirmative action plan could incorporate to make the workplace more equitable, but the above elements are the relevant and necessary ones to address the discriminatory effects of seniority systems in particular.

The above described is simply a sketch of a feasible, yet ambitious solution to the equality/seniority conflict. Unfortunately if one looks at the real world, change that is introduced through voluntary measures does not have a very successful track record. Therefore, in realization that seniority systems must be made more equitable, at least in part through mandatory measures, an examination is undertaken of the previously discussed forums which process discrimination complaints to determine the feasibility of each ordering an affirmative action remedy.

The court has indicated in Canadian National v. Action Travail des Femmes and The Canadian Human Rights Commission that it is not prepared to accept the mandatory imposition of a goal and quota hiring affirmative action plan, even in face of statistically proven intentional employment discrimination. As expressed earlier, the weakness in the court's rejection of the Tribunal-imposed plan which was the court's insistence that the Tribunal explicitly defend the plan as "preventative" in nature when its preventative impact implicitly followed from its design. This case has been appealed to the Supreme Court and it is possible that the Court may not apply such a narrow interpretation of the governing legislation and concede that quotas and timetables are well within the remedial-ordering power of the federal Human Rights Commission. I leave it to the Charter authorities to debate the possibility of discrimination claims under the Charter resulting in the imposition of an affirmative action plan. It is certain that at least section 15(2) of the Charter specifically allows for, and protects existing affirmative action programs to combat employment discrimination. What remains to be seen is whether courts will impose such programs under their remedial authority granted by section 32.

Human rights codes could be amended to include provisions which would expressly legitimize remedies such as quota hiring, and the awarding of retroactive seniority in the face of proven discrimination. If the public policy codified in human rights codes is a commitment to achieve real equality such remedies are necessary to reach the desired result. Furthermore the bolstering of tribunal's remedial powers in this fashion might lead employers and unions voluntarily to tailor egalitarian seniority systems to their particular needs to avoid legally imposed programs, and might discourage litigation challenging tribunal's application of their remedial powers. One could argue that the Employment Equity Bill that has recently been before the federal legislature is an initial step in the direction of a policy that requires the private sector as well as the public sector to account for the disparities in their workforce.

However, a condition precedent to the emergence of a public policy that requires systemic remedies for systemic discrimination is a broader social acceptance of affirmative action itself. There are critics who claim that the social and human costs of programs which provide special treatment to target groups are too high. They claim that society will become less efficient and less productive as more highly qualified candidates for jobs are passed over in favour of a member of a targeted group. It is also argued that the burden of this redistribution of employment is borne by individuals who may not have had any part in past discriminatory behaviour. This paper's examination of job segregation and the barriers to equality that disadvantage women and minorities suggest, however, that until systemic remedies such as affirmative action are adopted voluntarily or imposed legally, the promise of employment equality will remain empty.

Commentators on affirmative action have proposed a wide variety of plans to combat and rectify employment discrimination. The affirmative action plan outlined above borrows ideas from a variety of programs proposed in literature. It is not claimed that the plan proposed is the best route to equality, but it is one that promotes the equality rights of women and minorities while still acknowledging the seniority rights of the existing workforce. It is a plan such as this that must be implemented in order to create a balance between these two conflicting rights without jeopardizing the movement towards equality or labour peace.

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