

# A Proposal for Legislative Intervention in Canadian Human Rights Law

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## I. INTRODUCTION

THIS ARTICLE ADVANCES THE proposition that, while the judicial development of human rights law in Canada has attempted to meet rapidly changing social needs and conditions, recent Supreme Court of Canada decisions herald an urgent need for legislative intervention. Legislation should clarify the concept of "adverse effect" discrimination and its relationship with bona fide occupational requirements,<sup>1</sup> rendered somewhat cryptic by the split in the Court's reasoning in the *Central Alberta Dairy Pool v. Alberta Human Rights Commission*<sup>2</sup> case. Legislation must also revise procedures for and the substance of remedies for discrimination to reflect the collective nature of discrimination. It is proposed that employers be required to implement proactive "human rights" plans, akin to the approach in the Ontario and Manitoba pay equity legislation.<sup>3</sup> Such plans would be negotiated with unions, or with groups of employees where no union exists. Human rights commissions should be available to assist in the negotiation of human rights plans and to impose a plan if no agreement takes place within a particular time frame.

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<sup>1</sup> The Supreme Court of Canada has ruled equivalent to the term bona fide occupational qualification. See *Ontario Human Rights Commission v. Etobicoke (Borough of)*, [1982] 1 S.C.R. 203 [hereinafter *Etobicoke*]. In this article BFOR and BFOQ are used interchangeably to denote these terms.

<sup>2</sup> [1990] 2 S.C.R. 489, 12 C.H.R.R. D/417 [hereinafter *Central Alberta Dairy Pool* cited to S.C.R.].

<sup>3</sup> *Pay Equity Act*, S.O. 1987, c. 34; *The Pay Equity Act*, S.M. 1985-86, c. 21.

## II. JUDICIAL DEVELOPMENT OF "ADVERSE EFFECT" DISCRIMINATION

LIKE BRITAIN, THE CANADIAN federal and provincial jurisdictions borrowed from the United States<sup>4</sup> the concept of "indirect" or "adverse effect" discrimination; whereby an employment rule, policy or practice, may be unlawful if it has a disproportionate adverse impact on members of a category protected by the anti-discrimination law.<sup>5</sup> While Britain introduced the new concept through legislation, "adverse impact discrimination" found its way into Canadian law almost entirely by the innovative interpretation of existing legislation by adjudicative tribunals<sup>6</sup> and judges.

At the outset, Canadian human rights commissions<sup>7</sup> and adjudicative tribunals interpreted the federal and respective provincial human rights statutes as giving rise to unlawful discrimination only if there was proof of an intention to discriminate by virtue of an individual's (presumed) membership in one of the protected categories.<sup>8</sup> For example, in *Ryan v. Chief of Police, Town of North Sydney*,<sup>9</sup> the tribunal rejected a claim that a minimum height requirement for entry into the police force was unlawful discrimination. The tribunal stated that an "intention to discriminate was necessary for unlawful discrimination,"

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<sup>4</sup> *Griggs v. Duke Power Corporation*, 401 U.S. 424 (1971).

<sup>5</sup> E.g., *The Individual's Rights Protection Act*, R.S.A. 1980 c. I-2 as amended prohibits discrimination on grounds of race, creed, colour, gender, physical and mental disability, age, marital status, ancestry or place of origin. Some other Canadian jurisdictions include political belief, family status, pardoned conviction, sexual orientation, source of income.

<sup>6</sup> In most Canadian jurisdictions, adjudicative tribunals are called "boards of inquiry."

<sup>7</sup> Commissions have exclusive authority to investigate complaints and to determine whether an unresolved complaint should be carried to a tribunal. The case of *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879, (1990) 11 C.H.R.R. D/1 gives the Canadian Human Rights Commission substantial discretion in this area by its characterization of the decision whether or not to carry a complaint as "administrative" rather than "judicial." The resulting lower standard of judicial review is curious in light of the purported importance of human rights.

<sup>8</sup> Or some other person's (presumed) membership in one of the protected classes. *Supra*, note 5.

<sup>9</sup> (December 1975) [Unreported] (Nova Scotia Human Rights Commission Board of Inquiry). This came to be known as "direct" discrimination.

the approach followed by tribunals across Canada<sup>10</sup> until the case of *Singh v. Security Systems Ltd.*,<sup>11</sup> where an employer was held to have discriminated "because of" the complainant's religion when it required a Sikh job applicant to conform to the company's uniform dress regulations, applicable to all its security guards. The applicant's religion prevented his wearing the uniform cap and shaving his beard off and the tribunal found this discriminatory, notwithstanding the absence of an intention to discriminate, because the requirement had a disproportionate adverse impact on Sikhs because of their religion. Furthermore, the employer was unable to justify the discriminatory effect as necessary for the safe and efficient conduct of its business.

The importation of "adverse effect" discrimination was finally confirmed by the Supreme Court of Canada in the twin cases of *O'Malley v. Simpson Sears*<sup>12</sup> and *Bhinder v. Canadian National Railway*.<sup>13</sup>

A potential advantage of judicial activism in human rights is that it may permit legal development in a field where there is typically little political urgency or pressure for legislative action. Nevertheless, the ad hoc nature of judicial law making introduces with it a number of dangers. One is that tribunals and judges, confined by the peculiar facts of the cases which come their way, are usually unable to shape the law with the same measure of reflection, cogency and universality practised by legislatures. Accordingly, judge-made law may be influenced unduly by the idiosyncratic difficulties inherent in the cases which come the judiciary's way. A second danger is that politicians may become too comfortable in their own passivity and become more and more poorly equipped to develop the law to meet changing social values and conditions. Indeed, the piecemeal intervention of tribunals and judges may act as a conservative force, sufficient to prevent a build up of pressure for political change, but insufficient to keep the law in reasonable harmony with social values and power relations.

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<sup>10</sup> E.g., *Mitchell v. O'Brien* (14 June 1968) [Unreported] (Ontario Human Rights Commission Board of Inquiry) [hereinafter Ont. Bd. of Inquiry]; *Simms v. Ford* (25 February 1970) [Unreported] (Ont. Bd. of Inquiry).

<sup>11</sup> (31 May 1977) [Unreported] (Ont. Bd. of Inquiry). While this case appears to be the first "human rights" case in Canada in which "adverse effect discrimination" was recognized, recognition of "unintended" discrimination occurred in the equal pay for substantially equal work case of *Alberta (A.G.) v. Gares* (1976), 67 D.L.R. (3d) 635 (S.C.T.D.).

<sup>12</sup> [1985] 2 S.C.R. 536 [hereinafter *O'Malley*].

<sup>13</sup> [1985] 2 S.C.R. 561 [hereinafter *Bhinder*].

There is evidence to suggest that both dangers have materialized in Canada, with respect to the judicial development of "adverse effect" discrimination. The first sign of potential difficulty in integrating "adverse effect" discrimination into Canadian human rights law was apparent in the twin cases of *Colfer*<sup>14</sup> and *Adler*,<sup>15</sup> decided by an Ontario Board of Inquiry. In the former, the City of Ottawa Police Commission was held to have sexually discriminated against a female applicant by requiring the minimum height of 5 ft. 10 in., which applied uniformly to all applicants, male or female. There was evidence of a significantly disproportionate adverse impact on female applicants and the employer was unable to justify the minimum height requirement as necessary for the safe or efficient conduct of its business. In order to avoid unlawful (adverse effect) discrimination, the employer was required by the tribunal to establish different minimum height requirements for male and female applicants.

Differential height requirements were the subject of the *Adler* case, where a male applicant of five feet six inches complained of sex discrimination by the Metropolitan Toronto Police Commission because it applied to male applicants a minimum height requirement of 5 ft. 8 in. and one of 5 ft. 4 in. to female applicants. The tribunal held that the differential minimum height requirement was not in breach of the legislation. It reasoned that, because male and female applicants were considered according to the statistical average height of the respective sexes, they were being treated *equally* on the basis of sex, not unequally. Mr. Adler's complaint was rejected.

One can sympathize with the tribunal's dilemma. Having found the Ottawa Police Commission's uniform minimum height requirement to discriminate against women, it could scarcely fault the Toronto Police Commission for taking steps to apply differential height requirements according to the average height of the respective sexes. Yet, in attempting to remedy the "adverse effect" discrimination of *Colfer*, the tribunal unwittingly condoned unlawful "direct" discrimination. The *Ontario Human Rights Code* provided:

No person shall ... establish or maintain any employment classification or category that, by its description or operation, excludes any person from employment or continued employment ... because of ... sex.<sup>16</sup>

<sup>14</sup> (12 January 1979) [Unreported] (Ont. Bd. of Inquiry).

<sup>15</sup> *Adler* was decided with *Colfer*.

<sup>16</sup> R.S.O. 1970 c. 318, s. 4(1)(e).

The differential minimum height requirements approved by the tribunal in *Adler*, and ordered as a remedy for adverse effect discrimination in *Colfer*, were employment classifications based on sex, the result of which was the exclusion of a male applicant because of his sex. In attempting to accommodate the new concept of "adverse effect" discrimination, the tribunal failed to uphold the statutory injunction against direct discrimination. Had the tribunal better understood the relationship between the two concepts of discrimination, it would have permitted employers to establish a single minimum height for male and female applicants, say, 5 ft. 4 in., and used the BFOR defence to justify such requirement. This would have avoided both forms of discrimination.

The confusion accompanying the judicial grafting of "adverse effect" discrimination onto the existing concept of direct discrimination in Canada continued when the Supreme Court of Canada was called upon to ratify the new concept in the twin cases of *O'Malley* and *Bhinder*. The difficulty is centred on the application of BFOR or BFOQ to the new concept of "adverse effect" discrimination.

The human rights legislation of each jurisdiction in Canada provides an exception to unlawful discrimination where an employer demonstrates that the act, policy or practice giving rise to prima facie discrimination is a BFOR. Until *O'Malley* and *Bhinder*, the Supreme Court had encountered BFORs only in the context of direct discrimination. In *Etobicoke*, the Court considered whether a policy of mandatory retirement of firefighters at age sixty was unlawful discrimination on grounds of age. McIntyre J. characterized the issue as follows:

To be a BFOQ ... a limitation, such as mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interest of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition, it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.<sup>17</sup>

The Supreme Court acknowledged the principle that a mandatory retirement age of sixty for fire fighters could be a BFOQ on grounds of public safety but it rejected the employer's defence in *Etobicoke* as lacking sufficient evidence that the requirement was a BFOQ.

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<sup>17</sup> *Supra*, note 1 at 208.

Difficulties arose when the Court sought to apply the *Etobicoke* approach to BFOQ to cases of "adverse effect" discrimination in *O'Malley* and *Bhinder*. In the former the appellant, a full-time employee of the respondent, became a member of the Seventh Day Adventist Church, which recognizes a Saturday sabbath. The tenets of faith prohibit work from sundown Friday to sundown Saturday and the employer refused Mrs. O'Malley leave to continue as a full-time employee, unless she agreed to work Saturdays. She refused and her full-time employment was terminated.

At the time of the *O'Malley* case, the *Ontario Human Rights Code* contained no BFOQ exception to religious discrimination, and McIntyre J. recognized that if the employer had applied a rule such as "no Catholics," such prima facie direct discrimination would have been in clear contravention of the law.

Justice McIntyre noted that in *Etobicoke* (a case of direct discrimination), the employer's failure to establish mandatory retirement as a BFOQ meant that the discriminatory rule had to be struck down.<sup>18</sup> He reasoned that a different approach had to be taken with respect to the "adverse effect" discrimination that occurred in *O'Malley*, where discrimination on the basis of creed resulted from the effect of a condition or rule rationally related to the performance of the job and not on its face discriminatory. In McIntyre J's view, such a rule is not to be struck down, but an employer is required by law to accommodate the individual(s) against whom the rule discriminates. If the employer demonstrates that no accommodation is possible without undue hardship to the employer, no unlawful discrimination takes place, notwithstanding the prima facie discriminatory effect of the rule or condition.<sup>19</sup>

In *O'Malley*, the employer adduced no evidence of an attempt to accommodate the complainant's religious needs and the Supreme Court upheld the tribunal's finding of unlawful discrimination. No human rights statute in Canada refers to a "duty to accommodate": it was introduced by the Supreme Court as part of the baggage of the concept of "adverse effect" discrimination borrowed from the United States. It must be remembered that in *O'Malley*, the Court was not called upon to determine whether a BFOQ existed because the statute provided no such defence in respect of religious discrimination.

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<sup>18</sup> *Supra*, note 12 at 552.

<sup>19</sup> *Ibid.* at 555-556.

The *Bhinder* case arose under the *Canadian Human Rights Act*<sup>20</sup> and confronted directly the issue of BFORs and “adverse effect” discrimination. This not only split the Court but gave rise to complexity and confusion that persists today. The employer had a rule which required the wearing of a hard hat on the job site where the complainant worked as a maintenance electrician. As a practising Sikh, the appellant was forbidden to wear any head covering but a turban. The employer argued that the hard hat rule was BFOR.

The majority of the Supreme Court took the view that the term “BFOR” precluded consideration of the impact of the requirement, condition, rule, etc. to individuals. McIntyre J. distinguished between a requirement related to the “occupation” and one related to the individual, stating:

The words of the statute speak of an “occupational requirement.” This must refer to a requirement for the occupation not a requirement limited to an individual. It must apply to all members of the employee group concerned because it is a requirement of general application concerning the safety of employees. The employee must meet the requirement in order to hold the employment. It is by its nature not susceptible to individual application.

... a condition of employment does not lose its character as a bona fide occupational requirement because it may be discriminatory. Rather, if a working condition is established as a bona fide occupational requirement, the consequential discrimination, if any, is permitted ...<sup>21</sup>

McIntyre J. reasoned that if a BFOR were applied to each individual with varying results depending on individual circumstances, it would be robbed of its character as an “occupational” requirement. This, he contended, would render meaningless the clear provisions of s.14(a) of the *Canadian Human Rights Act*.

Applying the foregoing reasoning to the facts of *Bhinder*, the majority noted that the adjudicative tribunal had found the employer’s “hard hat rule” to have been adopted for genuine business reasons, with no intention to discriminate on religious grounds, and to be useful and reasonable in the promotion of workplace safety. The majority of the Court concluded:

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<sup>20</sup> R.S.C. 1985, c. H-6.

<sup>21</sup> *Supra*, note 13 at 588.

the only conclusion that can be drawn from the reasons for decisions is that, but for its special application for *Bhinder*, the hard hat rule was found (by the tribunal) to be a bona fide occupational requirement.<sup>22</sup>

The majority found the prima facie "adverse effect" discrimination to be justified and that there was, therefore, no duty to accommodate the complainant.

The reasoning of the majority in *Bhinder* was the subject of substantial criticism. In dissent, Dickson C.J. agreed with the adjudicative tribunal's reasons and decision that the hard hat rule was not a BFOR, stating:

The words "occupational requirement" mean that the requirement must be manifestly related to the occupation in which the individual complainant is engaged. Once it is established that the requirement is "occupational" however, it must further be established that it is "bona fide." A requirement which is prima facie discriminatory against an individual, even if it is, in fact, "occupational," is not bona fide for purposes of s.14(a) if its application to the individual is not reasonably necessary in the sense that undue hardship on the part of the employer would result, if an exception or substitution for the requirement were allowed in the case of the individual. In short, while it is true the words "occupational requirement" refer to a requirement manifest to the occupation as a whole, the qualifying words "bona fide" require the employer to justify the imposition of an occupational requirement on a particular individual when such imposition has discriminatory effects on the individual.<sup>23</sup>

Dickson C.J. noted the Supreme Court's decision in *Etobicoke* that a BFOR had to be "reasonable necessary" for the efficient, economical and safe performance of the job. He noted that the *Etobicoke* decision left open the question of whether reasonable necessity is to be considered in respect of the necessity of the general requirement of the necessity of applying the general requirement to an individual upon whom it will have a discriminatory effect. The Chief Justice approved of the tribunal's approach in *Bhinder* that application of an occupational requirement to an individual who suffers discrimination as a result of such application must be "reasonable necessary," before it qualifies as a "bona fide occupational requirement." The term "reasonably necessary" bears the sense that the only alternative to applying the rule to the individual discriminated against would be undue hardship for the employer. Dickson C.J. viewed this as consistent with the test of BFOR in the direct discrimination case of *Etobicoke*.

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<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.* at 571.



A further attack on the majority decision in *Bhinder* came from the Canadian Human Rights Commission in *Effects of the Bhinder Decision on the Canadian Human Rights Commission: a Special Report to Parliament*. Concerned about the decision's potential impact on the fulfilment of its statutory mandate, the Commission stated:<sup>24</sup>

The effect of the *Bhinder* decision is to ... put the Commission's ability to achieve its legislatively-defined objectives in doubt. This can mean, for example, that workplaces may not have to be modified to enable disabled individuals to earn a livelihood; women who become pregnant and who require temporary modification of their duties may be forced from their jobs; persons who for religious reasons can not work regular hours may have difficulty finding employment.

The Commission's fear was that if an employer (as in *Bhinder*) could establish a BFOR without reference to accommodating its discriminatory impact on an individual in a protected category, the protection against "adverse impact" discrimination, developed in a line of tribunal decisions prior to *Bhinder*, would be a hollow shell. This fear was articulated by L. Lustgarten<sup>25</sup> with respect to the comparable concept of "indirect" discrimination embodied in the British *Race Relations Act 1976*.<sup>26</sup> He observed that the entire indirect discrimination provisions would be undermined if tribunals displayed undue deference toward prevailing business practice.

The Supreme Court was presented with an opportunity to eradicate the problems created by *Bhinder* in the *Central Alberta Dairy Pool* case. The complainant, Christie, was an employee of the Dairy Pool when he became a member of the World Wide Church of God, which recognizes a Saturday sabbath and ten other holy days. One of these was Easter Monday, but the employer refused to grant the employee leave because Mondays were a particularly busy day. When the employee absented himself, he was fired. The adjudicative tribunal upheld Christie's claim of religious discrimination, arising from the adverse effect of the employment attendance rule. The tribunal found no BFOQ because the employer provided no evidence of reasonable attempts to accommodate the complainant. The Court of Queen's Bench and the Court of Appeal overturned the tribunal's decision. Relying on the approach of the majority in *Bhinder*, the judges decided

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<sup>24</sup> (Ottawa: The Canadian Human Rights Commission, 1986) at 4.

<sup>25</sup> *The Legal Control of Racial Discrimination*, (London: MacMillan, 1980) at 64.

<sup>26</sup> (U.K.), 1976, c. 74 [hereinafter *Race Relations Act 1976*].

that regular attendance at work was a BFOR and that, consequently, the employer had no duty to accommodate the employee.

A unanimous Supreme Court restored the decision of the tribunal, and in doing so a majority of the court repudiated in part the *Bhinder* judgment. The majority held that contrary to *Bhinder*, the BFOR defence must be approached differently, according to whether the alleged discrimination is "direct" or "adverse effect." For the former (e.g. mandatory retirement on the basis of age), the court ruled that where the work rule or condition is found to be a BFOR, the employer is under no duty to accommodate an employee. Where a rule or condition discriminatory on its face is found not to be a BFOR, it is struck down in its entirety as the discrimination is unlawful.<sup>27</sup>

The majority in *Central Alberta Dairy Pool* found, however, that where an employment rule has an adverse discriminatory effect on an individual on one of the protected grounds and the rule is a BFOR, the employer has a duty to accommodate the individual to the point of undue hardship. The BFOR is not struck down in its entirety, the employer is simply obliged to take reasonable steps to accommodate, avoid or mitigate the discriminatory effect on the individual.<sup>28</sup>

The majority also found that the work attendance rule was a BFOR, which had an adverse impact on the employee because of his religion. Accordingly, the employer was obliged to take reasonable steps to accommodate the complainant, evidence of which the employer failed to provide. The majority made it clear that the "attendance on Mondays" rule was a BFOR which remained generally intact, provided reasonable accommodation was made. If the employer demonstrated that no reasonable accommodation was possible, the attendance requirement would not be unlawful discrimination, notwithstanding its adverse effect on religious grounds.<sup>29</sup>

The minority of the Supreme Court advanced different reasons for upholding the tribunal's decision in *Central Alberta Dairy Pool* and rejecting entirely the reasoning in *Bhinder*. For the minority, Sopinka J. reasoned that the duty to accommodate must be dealt with during the process of determining whether a BFOR exists to justify prima facie discrimination whether "direct" or "adverse effect."<sup>30</sup> In the minority view, to use the BFOR defence successfully, an employer

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<sup>27</sup> *Supra*, note 2 at 516-517, Wilson J.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.* at 521.

<sup>30</sup> *Ibid.* at 527-528, Sopinka J.

must demonstrate that there is no reasonable alternative to the impugned rule or condition which would not cause the employer undue hardship. An employer failing to establish why individual accommodation could not be accomplished without undue hardship would ordinarily be found not to have discharged the duty to accommodate and therefore would have failed to establish a BFOR. Applying this reasoning in the *Central Alberta Dairy Pool* case, the minority accepted the tribunal's finding that the employer made no significant effort to accommodate the employee's request. This was fatal to the establishment of a BFOR and so the complaint of religious discrimination was upheld.

### III. ASSESSMENT OF THE JUDICIAL LAW MAKING

THE EVENTS SURROUNDING THE integration of "adverse effect" discrimination into Canadian human rights law illustrate the perils of judicial law making. The *O'Malley* and *Bhinder* cases were unsuitable cases on which to fashion the law of "adverse effect" discrimination. *O'Malley* was unsuitable because it presented the Supreme Court with circumstances in which the existence of a BFOQ was not at issue. Accordingly, it was not open to the court to consider "reasonable accommodation" as part of process of determining whether a BFOQ existed. The peculiar facts and law in *O'Malley* were such that any consideration of reasonable accommodation had to be done independently of establishing a BFOQ.

The issues of "reasonable accommodation" and BFOQ having been separated in *O'Malley*, it was perhaps natural for the majority of the Supreme Court in *Bhinder* to follow the same course. Having found a BFOR, the majority was confronted with the peculiar language of the *Canadian Human Rights Act*, which stated that the finding of a BFOR meant that there was no discrimination at all. Accordingly, the issue of "reasonable accommodation" did not arise and the majority gave the matter no consideration.

The curious feature of the Supreme Court's findings in *O'Malley* and *Bhinder* is that, in the former, "reasonable accommodation" had to be considered without reference to a BFOQ while, in *Bhinder*, the BFOQ issue had to be determined without reference to reasonable accommodation. The unsatisfactory outcome of those cases is scarcely surprising.

It is submitted that the minority approach in *Central Alberta Dairy Pool* is preferable to that of the majority. As Sopinka J. observed, the majority approach requires a rewriting of the statute, which makes no

distinction between "direct" and "adverse effect" discrimination. The majority's distinction could give rise to unnecessary complexities and potential unfairness. For example, a mandatory retirement policy on grounds of age might be challenged as direct age discrimination and justified as a BFOR. The law as characterized by the majority in *Central Alberta Dairy Pool* is that as a BFOR, the policy would be upheld in its entirety.

The same mandatory retirement policy might be challenged as causing adverse effect discrimination against women. Typically, women's continuous attachment to the labour force is less than that of men. Also women have a higher life expectancy than men. Accordingly, mandatory retirement at a particular age may impose a greater burden on women. According to the majority in *Central Alberta Dairy Pool*, the employer would be required to accommodate female employees to the point of unreasonable hardship on the part of the employer. Such accommodation might take the form of individual exceptions from the rule, the reorganization of the work force to avoid the assignment of unduly arduous duties to older individuals, the introduction of labour saving technology, and so on.

The problem is that if the rule were challenged on grounds of discrimination against female employees, the employer's duty to accommodate would not extend to male employees, some of whom might experience hardship similar to that experienced by a (greater) number of women. For example, a man entering the company's pension plan late in life might find that mandatory retirement would create hardship for him similar to that experienced by the women who lodged the complaint of sex discrimination. This anomaly would be avoided by adopting the approach of the minority in *Central Alberta Dairy Pool* and weighing the issue of reasonable accommodation as a factor in determining whether a BFOQ exists in cases of both direct and adverse effect discrimination.

#### IV. RECOMMENDATIONS FOR CHANGE

WHILE THE MINORITY'S APPROACH is to be preferred, it remains unduly complex, inviting further judicial intervention to define legal terminology in an area that is better left to factual determinations by expert tribunals, in the absence of negotiated settlement by the parties themselves. It is proposed that human rights legislation in Canada drop the traditional language of BFOQ and define discrimination as follows:

An employer discriminates against a person when, by its act or omission, it causes an individual disadvantages or detriment because of race, sex, age ... etc. with respect to the individual's access to employment or continued employment or with respect to any term condition or benefit of employment. It is not unlawful discrimination if an employer can demonstrate that there are no reasonable steps the employer can take to avoid, mitigate or accommodate the disadvantage or detriment without undue hardship to the conduct of its business.

Canadian human rights legislation should be further amended to provide:

It is evidence of discrimination that the disadvantage or detriment caused to the complainant is actually or potentially experienced by a significantly greater proportion of persons in the group to which the complainant belongs than of persons not belonging to the protected group to the protected group.<sup>31</sup>

These proposals enunciate the principle that any act of discrimination, intentional or unintentional, is unlawful unless the employer can show that it would confer an undue hardship on the conduct of the business to take steps to avoid, mitigate or accommodate the disadvantage or detriment to the complainant.

It is suggested that when adjudicative tribunals apply the proposed statutory rule to a case of alleged discrimination, they apply the following test. Firstly, "Was there a danger of discrimination against the complainant that the respondent ought reasonable to have foreseen?" If there was not, the case should fail. If there was, the tribunal should ask the second question, "Was there a remedy open to the respondent to prevent or avoid the harm to the respondent?" If there was not, the claim should fail. If there was, the third question should be asked: "In light of the magnitude of the danger of discrimination was the remedy open to the respondent too onerous?" If it was, the claim should fail. If it was not, the claim should succeed. This is essentially the test for applied by the courts in the tort of negligence<sup>32</sup> and it is submitted that it embodies what Canadian tribunals and courts have been hitherto stumbling toward, with unnecessary and damaging complexity. The advantage of the proposed test is that it is well understood in Canadian law and involves determinations of fact suitable for resolution by tribunals, avoiding the legal complexities of *O'Malley*, *Bhinder*, etc.

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<sup>31</sup> This is similar to the definition of "indirect" discrimination in the *Race Relations Act 1976*, s. 1(1)(b).

<sup>32</sup> See the principles of the standard of care in M. Brazier, ed., *Street on Torts*, 8th ed. (London: Butterworths, 1988) c. 13.

If one of the functions of judges is to give clear direction to society as to their legal obligations, the Supreme Court has demonstrated in the *O'Malley*, *Bhinder* and *Central Alberta Dairy Pool* cases that it is not well seated to do so. These cases proclaim the inherent inadequacies of the individual complaint, reactive basis of present human rights legislation in Canada. The purportedly high priority issue of human rights has been reduced to a battle of legal technicalities and complexities, the resolution of which is judicial formulae which can have little meaning to employers and employees. Such cases are scant return for the resources spent by human rights commissions, already ill-funded to meet the demands placed on them.

It is proposed that human rights legislation be amended to acknowledge the collective nature of discrimination, the need for a proactive rather than a reactive approach to remedies and more explicit legal obligations on employers and employees or their unions to fashion programs to avoid or remedy adverse effect discrimination.

Some jurisdictions in Canada have already blazed such a trail in the area of pay equity. For example, Ontario requires employers to negotiate pay equity plans with their unions, or directly with their employees if no union exists, for the purpose of proactive prevention of pay inequity.<sup>33</sup> This approach has proved substantially more successful than the reactive, complaint-based approach of the *Canadian Human Rights Act*, s. 11.<sup>34</sup>

It is recommended that all Canadian jurisdictions alter the basic approach of their respective human rights legislation and require employers and unions (or groups of employees) to devise "employment equity" plans designed to remove the systemic discrimination inherent in most recruitment, selection, classification, promotion, work scheduling, etc. practices.

Human Rights commissions in such a scheme would take on a role similar to that of the pay equity commission in Ontario,<sup>35</sup> giving

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<sup>33</sup> *Supra*, note 3. See s. 14 for organizations with unions and s. 15 for those without unions.

<sup>34</sup> The Public Service Alliance is presently conducting a campaign to speed up pay equity settlements with the Government of Canada.

<sup>35</sup> *Supra*, note 3. See parts IV and V of the Act. The Commission has investigatory, conciliatory and adjudicative functions. In *Action Travail des Femmes v. C.N.R.* [1987] 1 S.C.R. 1114, (1988) 40 D.L.R. (4th) 193, the Supreme Court of Canada upheld the tribunal's decision requiring affirmative action by the employer to increase the representation of women in non-traditional occupations. While this goes some way to a proactive approach, it relies on a successful individual complaint of discrimination. Also, it is not

technical advice, mediating disputes, ensuring compliance with the substance and the timetable of the law. While individual remedies would remain available, they would be significantly less relevant as sources of law to shape employment policies.

Human Rights commissions would be empowered to investigate the practices and policies of employers that failed to implement an "employment equity" plan and, if necessary, to impose a plan on a recalcitrant employer. The Commission for Racial Equity in Britain has such powers, though they have been rarely used and are hedged by time-consuming appeals to the courts.<sup>36</sup>

A further area of potential progress lies in collective bargaining. Many collective agreements prohibit discrimination on the grounds proscribed by human rights legislation and some arbitrators have interpreted the duties of employers and unions to evolve in accordance with the evolving legal environment. In *Re B.C. Telephone Co. and T.W.U.*, the board stated:<sup>37</sup>

We think the company can be expected to keep a watchful eye on its published policies to ensure an absence of systemic discrimination on the basis of sex — *i.e.*, consistent with the evolving legal environment.

The board considered management and the union to have a shared responsibility to avoid systemic discrimination and collective bargaining clearly offers the best opportunity for proactive policies.

The evidence of the *O'Malley*, *Bhinder*, and *Central Alberta Dairy Pool* cases is that Canadian human rights law is mired in legal complexities and largely irrelevant to what goes on in the workplace. The proposed scheme is proactive,<sup>38</sup> involves the parties, directly recognizes the collective nature of human rights, and is based on an approach that has been relatively successful in the pay equity field in Ontario and Manitoba.

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clear that tribunals in other Canadian jurisdictions have the scope of remedial powers available under s. 41(2)(d) of the *Canadian Human Rights Act*.

<sup>36</sup> A notable investigation by the Commission for Racial Equality is *London Drivers Supplied Services Ltd*, Formal Investigation of C.R.E. (Nov. 1980).

<sup>37</sup> (1990), 15 L.A.C. (4th) 146 at 152.

<sup>38</sup> The proposed scheme bears some resemblance to the philosophy of the federal *Employment Equity Act*, R.S.C. 1985 (2nd Supp.) c. 23, but that legislation imposes no substantive or enforceable obligations on employers and gives unions and employees no legally refined role in developing plans of action. See ss 4–6 for employers' limited duties.