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Canadian Labour Law at the Millennium:

The Growing Influence of Human Rights Requirements

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Executive Summary

Human rights laws are now the most dynamic force shaping the Canadian labour law system. The growing pre-eminence of human rights laws has strengthened the legal claims of individual employees while encroaching upon both managerial prerogatives and workplace norms established by collective agreements. This paper identifies some of the more important changes that have been brought about by the growing impact of human rights laws.

- The Charter has been held to apply directly to all collective agreements to which government is a party. Even collective agreement provisions negotiated for the benefit of unions will be subject to the Charter so long as the employer is considered to be an agency of government.

- The Charter also has had a significant indirect impact on both private employers, and public employers not considered as government, because of its application to both federal and provincial human rights legislation. These human rights statutes have been amended through judicial interpretation to conform with the Charter—a process that has had the effect of making Charter principles applicable to all workplaces.

- Human rights statutes, even in the absence of Charter principles, have been given an expansive interpretation by the courts. The recognition by the courts of the doctrine of constructive discrimination has placed a new obligation on both employers and unions to accommodate individual employees up to the point of undue hardship. Even though there may be no actual intent to discriminate, a workplace rule or practice may still be considered to be unlawful discrimination because of its disproportionate impact on an individual falling within the protections of human rights legislation.

- The Supreme Court of Canada has now eliminated any practical distinction between direct discrimination and constructive discrimination. Regardless of what form workplace discrimination takes, the only defence now available is to establish that a workplace rule or practice is a BFOR. This defence requires the presence of three essential conditions: that the rule or practice has a purpose rationally connected to the per-

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About the Author

Donald D. Carter is a member of the Queen's University Faculty of Law. From 1993 to 1998 he served as Dean of Law at Queen's and from 1985 to 1990 was Director of the Queen's Industrial Relations Centre/ School of Industrial Relations. He has also served as President of the Canadian Industrial Relations Association (1991–92) and as Chair of the Ontario Labour Relations Board (1976–79). He is the co-author of ***Collective Bargaining for University Faculty in Canada*** and the author of numerous articles and monographs relating to labour law and industrial relations in Canada. As well he is a contributor to ***The International Encyclopedia for Labour Law and Industrial Relation***s, to the casebook, ***Labour and Employment Law***, and to ***Labour Årbitration Cases***. He is also active as both an arbitrator and mediator.

formance of the job; that the rule or practice was adopted in an honest and good faith belief that it had a legitimate work-related purpose; and that in the application of the rule or practice it was impossible to accommodate protected individuals without undue hardship. The practical effect of this test is to require employers and unions both to re-examine current workplace practices and to revise them to ensure that they provide accommodation to individuals protected by human rights legislation.

- Many collective agreement provisions, and many administrative practices, now have the potential to be considered as forms of constructive discrimination. Deemed termination provisions, the interruption of seniority because of illness, and the denial of promotion because of absenteeism have each been held to be improper discrimination against disabled employees. On matters of compensation, however, it is less clear as to what constitutes improper discrimination against disabled employees.

- In its role as bargaining agent the union has a duty to accommodate equally as onerous as that imposed on the employer. Unions can be held responsible for improper discrimination against an individual employee where the union is party to a discriminatory rule in the collective agreement or where it impedes the employer's efforts to accommodate in the administration of the collective agreement. The accommodation of an individual employee, however, does not require other employees in the bargaining unit to suffer a clear disadvantage.

- Grievance arbitrators are playing an increasingly important role in interpreting and applying human rights legislation. This new role, however, detracts from their traditional role of simply applying the internal value system negotiated by the parties. The internal value system of the collective agreement is increasingly being eroded by the external value system imposed by our human rights laws. Arbitrators have become a party to this process of erosion because of their legal responsibility to apply external legislation.

Introduction

As we enter a new millennium it is human rights laws, and not collective bargaining laws, that have emerged as the most dynamic force within our Canadian labour law system. In the non-union sector the application of human rights laws has encroached upon managerial prerogatives while in the unionized sector these laws have begun to erode the collective values articulated in the collective agreement. The growing preeminence of human rights laws in Canada has profound implications for both our established labour relations institutions and the administration of the workplace itself.

This ascendancy of human rights laws reflects an increasingly diverse Canadian society that finds greater comfort in the protection of individual rights than in the preservation of collective values. This shift of emphasis to individual rights has not been an overnight development, but has been evolving over the last twenty years as the reach of human rights laws has expanded to reflect the changing conditions of Canadian society. The reality is that Canadian society is now much more diverse than it was even twenty years ago and the Canadian legal system has evolved to reflect that diversity.

The most important milestone in this evolution was the entrenchment of a bill of rights in the Canadian constitution in 1982. Canadians, by embracing the ***Charter of Rights and Freedoms,*** elevated to constitutional status the claims of the individual citizen. Now the collective public will, as expressed in federal and provincial legislation, must be consistent with the fundamental values articulated in the Charter—values designed to protect the individual from government action. The effect of this far-reaching constitutional change has been to enhance the power of the courts at the expense of our elected legislatures by giving to the courts the responsibility to interpret and apply the Charter. In doing so the courts have placed emphasis on individual rights and now the onus is clearly on those who seek to justify a governmental intrusion upon individual rights as a reasonable and justifiable limit.

The Charter, therefore, has given fresh impetus to the legal recognition of individual rights. What this means is that the growing societal emphasis on individual rights has become rooted, not just in human rights legislation, but in the constitution itself. This development has made its mark on Canada's labour law system. Women, religious minorities, older workers, gays and lesbians, and the disabled now possess a complete set of legal tools to challenge the established workplace order. The Charter and human rights codes have become pre-eminent, overriding other statutes, collective agreement terms, and long established workplace practices. Human rights values are now ‘trump' and these values will continue to reshape our industrial relations institutions as long established workplace practices give way to these new imperatives.

The growing societal emphasis on Individual rights has become rooted not just in human rights legislation, but in the constitution itself.

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Direct Application of the Charter to the Workplace

Perhaps the most important guarantee found in the Charter is the guarantee of equality of treatment under the law. Section 15 explicitly provides that ‘every individual is equal before and under the law and has the right to 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.' The Supreme Court of Canada has made it clear that this guarantee is directed at conduct that distinguishes on the basis of personal characteristics so as to place an individual or group

at a disadvantage relative to other members of society.[1] The list of personal characteristics expressly set out in s.15, moreover, is by no means comprehensive and the Supreme Court of Canada has already expanded the reach of the Charter's guarantee of equal treatment beyond this list.[2]

The impact of these provisions is only tempered by the fact that the direct reach of the Charter is limited to ***government activity***. Let me emphasize that, in defining government activity, the courts do not draw a line between the private and public sector as those terms are commonly understood in the labour relations community. Rather, the line is drawn through the public sector between agencies considered to be government and those that are merely public agencies by virtue of the fact that a significant portion of their funding comes from the public purse. In 1992 the Supreme Court of Canada (in four cases all dealing with the constitutionality of mandatory retirement) drew a clear distinction between the situation where a public agency is subject to close governmental control over its operations and the situation where the public agency is merely the beneficiary of public funding.[3] What is important to understand is that it is only this former situation that brings into play the direct application of the Charter.

Drawing this line, however, is not an easy task, as can be seen in these four compulsory retirement cases. Here the Supreme Court of Canada concluded that the Vancouver General Hospital, the University of British Columbia and Guelph University were public agencies that could not be considered to be government for the purposes of the Charter. On the other hand, Douglas College, a British Columbia community college, was considered to be a 'government agency' because the provincial government could appoint and remove the college's board of governors and had the statutory authority to oversee the college's operations. In the case of Douglas college the court found a sufficient degree of control being exercised by the provincial government to attract the direct application of the Charter to the mandatory retirement policy set out in the collective agreement between the college and its union.

The most important point to be drawn from the ***Douglas College*** case, however, concerns the reach of the Charter once a public agency is considered to be a part of government. At this point any collective agreement to which that agency is a party is directly regulated by the Charter's guarantees and, in particular, the broad guarantee of equality of treatment set out in section 15 of the Charter. This result is somewhat surprising, since it can be argued that these collective agreements are just as much the creation of the union as of government. Nevertheless, even where a union security provision is included in a collective agreement at the urging of a union, the Supreme Court of Canada has been prepared to find sufficient government action to justify the direct application of the Charter as long as a government agency is party to that agreement.[4]

The internal value systems of these workplaces must be measured against the open-ended values set out in the Charter.

This conclusion has profound implications for any government employer and its union. Now the internal value systems of these workplaces must be measured against the open-ended values, such as equality of treatment under the law, that are set out in the Charter. In taking the measure of these workplace rules, however, Charter values may not always

1 ***Andrews*** v. ***Law Society of British Columbia***, [1989] 1 S.C.R. 143.

2 See ***Egan and Nesbit*** v. ***The Queen in Right of Canada*** (1995), 95 C.L.L.C. para. 210,025 (S.C.C.); see also ***Vogel*** v. ***Manitoba*** (1995), 95 C.L.L.C. para. 230,034 (Man.C.A.).

3 ***Connell*** v. ***University of British Columbia*** (1991), 91 C.L.L.C. para. 17,001; ***Douglas College*** v. ***Douglas/Kwantlen Faculty Association*** (1991), 91 C.L.L.C. para. 17,002; ***Vancouver General Hospital*** v. ***Stoffman*** (1991), 91 C.L.L.C. para. 17,003; ***McKinney*** v. ***University of Guelph*** (1991), 91 C.L.L.C. para. 17,004.

4 ***Lavigne*** v. ***Ontario Public Service Employees Union*** (1991), 91 C.L.L.C. para. 14, 029 (S.C.C.).

prevail since it may be possible to establish that these rules are reasonable limits upon the more broadly articulated values set out in the Charter. Nevertheless, the onus will be upon those who argue that a particular workplace rule can be justified as a reasonable limit and this onus may be particularly difficult to meet where the Charter's guarantee of equality of treatment is at issue.

Indirect Application of the Charter to the Workplace

Any public employer falling outside the government sector escapes the direct application of the Charter as do all private employers. These employers, however, have no cause to be complacent. Their workplaces are still regulated by human rights laws and these statutes are themselves subject to the Charter. Even though the Charter may be one step removed, it still may have an indirect effect on these workplaces through its application to human rights legislation at either the provincial or federal level.

The possibilities of expanding the reach of the Charter in this way first became apparent in a 1992 case involving gay and lesbian rights. This case involved complaints made by former members of the Canadian Armed Forces that they had been the victims of employment discrimination because of their sexual orientation.[5] Sexual orientation at that time was not expressly spelled out as a prohibited ground of discrimination in the ***Canadian Human Rights Act***, so that it was argued that the Charter's requirements of equal treatment under the law nevertheless meant that sexual orientation should be read into the Act as a further prohibited ground in the human rights legislation.

The federal government conceded that sexual orientation, although not expressly mentioned in s.15 of the Charter, by analogy fell within the scope of this section's guarantee of equal treatment under the law. From this starting point, the Ontario Court of Appeal had no difficulty in finding that the failure of the ***Canadian Human Rights Act*** to include sexual orientation as a prohibited ground of discrimination was inconsistent with the Charter's guarantee of equality of treatment for gays and lesbians. The appropriate remedy, according to the Ontario Court of Appeal, was to 'read into' the ***Canadian Human Rights Act*** such a prohibition by simply interpreting and applying their statute as though it contained sexual orientation as an expressly prohibited ground of discrimination.

By taking this approach the court effectively amended the human rights legislation through judicial decision making. The legitimacy of this type of judicial amendment to legislation has now been confirmed by the Supreme Court of Canada in the ***Vriend*** case.[6] Delwin Vriend, an employee of King's College in Edmonton, had been dismissed from his employment because he was gay. Alberta's human rights statute did not expressly protect individuals from discrimination based on sexual orientation, but the Alberta Court of Queen's Bench was prepared to 'read into' the human rights legislation a prohibition against discrimination in employment based on sexual orientation. The justification for amending the legislation in this manner was that, because homosexuals were entitled to equal treatment under the Charter, it was necessary to bring Alberta's human rights legislation in line with the Charter's equality guarantee in order to eliminate the discriminatory effect of the human rights legislation. This decision was overturned by a split decision of the Alberta Court of Appeal but then restored by the Supreme Court of Canada.

Courts have been prepared to read into the human rights legislation a prohibition against discrimination in employment based on sexual orientation.

5 ***Haig*** v. ***The Queen*** (1992), 92 C.L.L.C. para. 17,034 (Ont. C.A.); see also ***Douglas*** v. ***The Queen*** (1993), 93 C.L.L.C. para. 17,004 (Fed. Ct. T.D.).

6 ***Vriend*** v. ***Attorney General (Alta)*** (1994), 94 C.L.L.C. para. 17,025 (Alta. Q.B.); reversed by (1996), 96 C.L.L.C. para. 230,113 (Alta. C.A.); and now upheld by the Supreme Court of Canada by (1998), 98 C.L.L.C. para. 230-021.

The Charter is now having a substantial indirect impact on the workplace.

What is interesting about the Supreme Court of Canada's decision is that the majority chose to cure the defective human rights legislation by 'reading into' it an additional ground of prohibited discrimination rather than striking down the impugned provisions in their entirety and leaving it to the Alberta legislature to enact new legislation. The effect of the Supreme Court of Canada's decision was to amend the Alberta human rights statute immediately, Canada's it in line with human rights legislation in almost all other Canadian jurisdictions where discrimination based on sexual orientation is expressly prohibited. This approach clearly demonstrates the substantial indirect impact that the Charter is now having on the workplace as human rights legislation is amended by the courts to conform with the Charter.

What are the full implications for the workplace now that protection from discrimination based on sexual orientation has been recognized as a fundamental right? Clearly this protection extends to prevent improper interference with gays and lesbians in the workplace, but does it also create an entitlement to certain employment benefits that in the past had been reserved for employees in traditional spousal relationships? Up until now there had been a reluctance by our politicians to go one step further by enacting legislation that would expressly recognize gay and lesbian couples as constituting a family. The political difficulty in enacting such legislation means that this issue has been litigated by reference to the Charter's guarantee of equality of treatment rather than being resolved in the political arena.

An example of such litigation is a 1994 arbitration award involving Bell Canada and one of its unions.[7] The employer had provided certain employment benefits to heterosexual couples (including common law couples) but had refused these same benefits to same sex couples. The collective agreement itself expressly prohibited 'unlawful' discrimination based on sexual orientation. The arbitrator held that, because the effect of the Charter was to have sexual orientation 'read into' the ***Canadian Human Rights Act*** as a prohibited ground of discrimination, the employer's refusal to extend benefits to same sex couples amounted to 'unlawful' discrimination contrary to the terms of the collective agreement.

A variation of this approach of using the Charter to expand human rights legislation can be seen in a 1992 decision of a Board of Inquiry appointed under the Ontario ***Human Rights Code***.[8] The complainant, an employee of the Ontario government, alleged discrimination based on sexual orientation because of a failure to provide family benefits to his partner with whom he had lived for some ten years. Before the hearing commenced, however, the Ontario government had changed its policy by extending family benefits to same sex couples with the one important exception of survivor benefits under the Ontario government pension plan. The apparent reason for this exception was that the federal ***Income Tax Act*** expressly confined spousal benefits in pension plans to opposite sex couples. This restriction itself has recently been held by the Ontario Court of Appeal to be in conflict with the Charter,[9] but at the time the Ontario government's policy on survivor benefits was being challenged no direct challenge had been made to the federal ***Income Tax Act.***

The Board found that, even though the Ontario ***Human Rights Code*** expressly prohibited discrimination based on sexual orientation, the Code's own definition of 'marital status' contemplated only a conjugal relationship involving two persons of the opposite sex. Furthermore, the Code also contained a specific provision to the effect that pension plans

7 ***Bell Canada*** (1995), 43 L.A.C. (4th) 172 (MacDowell); see also ***Canadian Broadcasting Corp.*** (1995), 45 L.A.C. (4th) 353 (Munroe).

8 ***Leshner*** v. ***The Queen in Right of Ontario*** (1992), 92 C.L.L.C. para. 17,035 (Ontario Human Rights Board of Inquiry).

9 ***Rosenberg*** v. ***Canada (Attorney General)*** (1998), 38 O.R. (3d) 577 (Ont. C.A.).

conforming to the requirements of the ***Employment Standards Act*** were not considered to infringe the right to be protected from discrimination based on marital status. This specific provision, although in conflict with the Code's more general prohibition of discrimination based on sexual orientation was considered, as a matter of statute interpretation, to be overriding. As a result, a majority of the Board of Inquiry concluded that the complainant could not base his claim on the ***Human Rights Code*** standing alone.[10]

At this point, however, the Board of Inquiry looked to the Charter and held that, because the effect of the ***Human Rights Code*** was to discriminate on the basis of sexual orientation by permitting the denial of pension benefits to same sex couples, the Code itself was inconsistent with the Charter's guarantee of equal treatment under the law and could not be justified as a reasonable limit, since there was no sound policy justification for this difference of treatment. The Board then directed that the definition of 'marital status' in the Code be ***read down*** by omitting the words of 'opposite sex' so that it would simply be read as including the status of living with a person in a conjugal relationship outside marriage. By broadening the definition of 'marital status' in this way, the denial of spousal pension benefits to same sex partners could then only be characterized as unlawful discrimination based on sexual orientation, rather than as discrimination based on marital status which was permitted by the Code.

As a remedy the Board of Inquiry directed that the employer create a funded, or unfunded, arrangement outside of the registered pension plan to provide survivor benefits and pension eligibility to same sex partners at a level equivalent to that already enjoyed by unmarried heterosexual partners. The Board further provided that, if the ***Income Tax Act*** were to be amended to allow survivor benefits in the case of a same sex conjugal relationship, the employer was required to amend its plan accordingly. If such amendments to the ***Income Tax Act*** did not materialize within three years, however, then the employer was required to provide a funded pension arrangement for same sex conjugal relationships.

In these cases we see how the Charter has been used to amend legislation. In the first three cases the scope of the ***Canadian Human Rights Act*** was expanded by the court reading in 'sexual orientation' to the prohibited grounds of discrimination. In the last case a specific restriction in the Ontario ***Human Rights Code*** was eliminated by a Board of Inquiry ***reading down*** the express statutory definition of 'marital status.' In each case the Charter was used to amend a human rights statute to allow a minority to gain rights through litigation that they were not able to obtain through the political and legislative process.

The significance of these cases for gays and lesbians has become even greater now that the Supreme Court of Canada has expressly recognized that the Charter's guarantee of equal treatment does embrace sexual orientation. In the ***Egan and Nesbit*** case[11] the Supreme Court of Canada faced squarely the issue of whether same sex couples were entitled to the benefit of equal treatment under the law provided by s.15 of the ***Canadian Charter of Rights and Freedoms.*** Egan and Nesbit had lived together as a same sex couple since 1948 in a relationship that had the degree of commitment and interdependence that one would find in a traditional heterosexual marriage. Nevertheless Nesbit was denied the spousal allowance under the federal ***Old Age Security Act*** because his relationship with Egan did not fit within the definition of spouse set out in that statute. That definition had been amended to include persons living in a common law relationship but the amended

10 The Supreme Court of Canada, as well, has made it clear that the prohibition of discrimination based on 'family status' found in the ***Canadian Human Rights Act*** does not embrace same sex couples. See ***Attorney General (Can.)*** v. ***Mossop*** (1993), 93 C.L.L.C. para. 17,006.

11 ***Egan and Nesbit*** v. ***The Queen in Right of Canada*** (1995), 95 C.L.L.C. para. 210,025 (S.C.C.); ***Vogel*** v. ***Manitoba*** (1995), 95 C.L.L.C. para. 230, 034.

definition expressly referred to such persons as being of the opposite sex—the clear effect being to provide less advantageous treatment for same sex couples.

Egan and Nesbit were not successful in asserting their particular claim but they did succeed in obtaining Charter protection for same sex relationships. Five of the nine justices of the Supreme Court of Canada were prepared to find that the definition of spouse set out in the ***Old Age Security Act*** was inconsistent with the Charter's guarantee of equal treatment. One of these justices, however, did hold that the definition, at least at the time of the decision, constituted a reasonable limit under s.1 of the Charter since it was intended to provide financial assistance to those in greatest need, namely women in heterosexual relationships. This latter finding was fatal to the particular claim before the Court since the four remaining justices were not prepared to find any infringement of the Charter's guarantee of equality, viewing preferred treatment for heterosexual couples as relevant given what they considered to be the much larger role that such couples play in child rearing.

Despite the failure of Egan and Nesbit's particular claim, the fact remains that a majority of the Court was still prepared to find that sexual orientation was a personal characteristic that brought same sex relationships under the umbrella of the Charter's guarantee of equality of treatment. This finding that the prohibition against discrimination based on sexual orientation has constitutional status has important implications for other claims from same sex couples asking to be treated in the same way as heterosexual couples in similar circumstances. These claims, because of their constitutional status, override statutory language that confines family status to opposite sex couples, leaving the way open to a continuing expansion of the entitlement of same sex couples to employment benefits. Recognizing this judicial reality, Ontario has now amended both its ***Human Rights Code,*** and the benefit plan provisions in the ***Employment Standards Act,*** to include same sex partnership status as a prohibited ground of discrimination. Same sex partnership status is defined in these amendments as 'the status of living with a person of the same sex in a conjugal relationship outside marriage.' These most recent amendments are clearly a response to a judicial trend that has seen our courts extend the reach of human rights values through the application of the Charter.

Our courts have extended the reach of human rights values through the application of the Charter.

The Increasing Responsibility to Accommodate the Claims of Individual Employees

The Charter, however, has not been the only influence favouring individual rights. The courts had already expanded the reach of human rights laws even before the Charter had begun to make its impact felt upon the workplace. One of the most important developments in the evolution of human rights laws has been the judicial recognition of a concept of 'constructive discrimination' or 'adverse effect discrimination.' This concept was first given legitimacy by the Supreme Court of Canada in the landmark decision of ***O'Malley*** v. ***Simpsons-Sears Ltd.*** in 1986.[12] This case involved a complainant who was employed by one of Canada's best known retailers as a full-time sales clerk. During her employment the complainant joined the Seventh-Day Adventist Church at which point her work schedule became a problem because she refused to work on her Sabbath which extended from sundown Friday to sundown Saturday. As a consequence, the complainant was demoted to a part-time job. This demotion gave rise to a complaint under Ontario's ***Human Rights Code*** that the employer had improperly discriminated on the basis of the

12 ***Ontario Human Rights Commission and O'Malley*** v. ***Simpsons-Sears Ltd***. (1986), 86 C.L.L.C. para. 17,002 (S.C.C.).

complainant's creed. Initially the complaint was dismissed by a Board of Inquiry on the grounds that there had been no actual intention to discriminate. This decision was appealed and the case ultimately ended up before the Supreme Court of Canada.

In this ground-breaking decision the Supreme Court of Canada held that actual intent to discriminate was not a necessary element of illegal discrimination under Ontario's ***Human Rights Code***. Instead, the Court made it clear that workplace rules, even those honestly made for good business reasons, could still amount to improper discrimination because of their adverse effect on an individual or a particular group of individuals. This concept of constructive discrimination contemplates that employment rules and practices, while apparently neutral on their face, can still have a disproportionately negative impact on those groups that are protected by human rights legislation. It is this disproportionate impact on such protected groups that is the essence of this form of wrongful discrimination.

A 1994 decision of the Supreme Court of Canada gives some indication of how far the concept of constructive discrimination can reach.[13] In this case three Jewish teachers took the position that they were entitled to be paid when they were absent from work to observe Yom Kippur. The court found that, since the majority of employees had their religious holy days recognized as paid holidays from work, the school calendar did have an adverse impact on the three Jewish teachers. Moreover, the collective agreement itself provided for payment if teachers were absent for a valid reason. In these circumstances the Court held that the employer had not established that there would be undue hardship for the employer to pay the three teachers while they were absent to observe Yom Kippur.

Particularly vulnerable to claims of constructive discrimination will be long established collective agreement provisions.

The full impact of the doctrine of constructive discrimination has yet to be felt. Particularly vulnerable to claims of constructive discrimination will be long established collective agreement provisions. If one looks closely at most collective agreements, it is easy to identify provisions that have the potential for constructive discrimination. Seniority clauses, work scheduling provisions, deemed termination provisions, holiday provisions, and Sunday premium provisions come quickly to mind.

This concept of constructive discrimination has cast a long shadow over the management of the workplace. The exact length of that shadow has now been made clearer by the Supreme Court of Canada in an appeal from a decision of the British Columbia Court of Appeal.[14] The issue in this case was whether a fitness test for firefighters constructively discriminated against women by effectively excluding them from what had been an area of non-traditional work for women.

The decision of the British Columbia Court of Appeal set aside an arbitration award that had found that a fitness test for firefighters, which resulted in a pass rate of 35 percent for women and almost twice that rate for men, improperly discriminated on the basis of sex.[15] The arbitrator had found that the fitness test constituted a form of adverse effect discrimination and that the employer had not established that accommodation of the grievor, Tawney Meiorin, would cause it undue hardship. Meiorin had worked as a firefighter for three years before she was dismissed because she was unable to meet the aerobic standard of running 2.5 km. in less than 11 minutes 49 seconds. The arbitrator held that her failure to meet this standard did not pose a serious safety risk to herself, her fellow workers, or to the public and directed that she be reinstated as a firefighter and be compensated for all lost wages and benefits.

13 ***Syndical de l'Enseignment de Champlain*** v. ***Commission Scolaire Regionale de Chambly*** (1994), 94 C.L.L.C. para. 17,023 (S.C.C.).

14 ***British Columbia (Public Service Employee Relations Commission)*** v. ***British Columbia Government and Service Employees' Union,*** [1999] S.C.J. No. 46, overruling (1997), 97 C.L.L.C. para. 230-037 (B.C.C.A.).

15 ***Province of British Columbia*** (1997), 58 L.A.C. (4th) 159 (Chertkow).

Our highest court has eliminated any practical distinction between direct discrimination or constructive discrimination in the workplace.

The British Columbia Court of Appeal, however, took a different view of this test and set aside the arbitrator's award. The Court considered the essence of constructive discrimination to be the application of a general rule without regard to individual circumstances, such as where retirement is mandated at a certain age without regard to whether an employee is still quite capable of performing the job. Individual testing, as occurred in this case, was much different according to the Court. The Court of Appeal viewed the test itself as a valid measure of the physical fitness required for the job and concluded that the application of this test to the individual employee could not be considered as an improper form of discrimination. The Court of Appeal also expressed concern that accommodating women by lowering this standard for women only would improperly discriminate against those men who had failed the test but who could have met the lower standard. On the basis of this reasoning the British Columbia Court of Appeal concluded that the requirement that all firefighters successfully complete the fitness test did not discriminate on the basis of sex.

The Supreme Court of Canada, in no uncertain terms, has reversed this decision and reinstated the award of the arbitrator. In doing so our highest court has eliminated any practical distinction between direct discrimination or constructive discrimination in the workplace by establishing a uniform test that clearly defines the limits of liability for either form of improper discrimination. Regardless of what form workplace discrimination takes, the only defense now available to employers is to establish that the workplace rule or practice is a BFOR. To do so employers must now establish on the balance of probabilities the presence of three essential conditions:

1 that the employer adopted the standard for a purpose rationally connected to the performance of the job;

2 that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose;

3 that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose by demonstrating that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

It is clear that the practical effect of this test is to require employers both to re-examine many of their current workplace practices and to revise them in order to ensure that they accommodate the groups protected by human rights legislation. In the words of Madam Justice McLachlin who authored the unanimous judgment of the Court:

> Employers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals. They must build conceptions of equality into workplace standards. By enacting human rights statutes and providing that they are applicable to the workplace, the legislatures have determined that the standards governing the performance of work should be designed to reflect all members in society, in so far as this is reasonably possible. Courts and tribunals must bear this in mind when confronted with a claim of employment-related discrimination. To the extent that a standard unnecessarily fails to reflect the differences among individuals, it runs afoul of the prohibitions contained in the various human rights statutes and must be replaced. . . .16

16 ***British Columbia (Public Service Employee Relations Commission)*** v. ***British Columbia Government and Service Employees' Union***, [1999] S.C.J. No. 46 para. 68.

This decision, in my view, represents a further extension of human rights laws into the workplace. Previously, although employers had a duty to apply established workplace rules and practices in a manner that accommodated those individuals protected by human rights legislation, there was no obligation to rewrite these rules and practices so that the rules and practices in themselves reflected the duty to accommodate. Now employers are required to formulate standards that are intrinsically free of any form of improper discrimination, including improper adverse effect discrimination.

The emphasis now appears to have shifted from the application of standards to the formulation of standards. This shift in emphasis can be seen in Meiorin's case where the Supreme Court of Canada held that the employer had failed to establish that the aerobic standard constituted the minimum standard required to perform the job safely and efficiently. Because the employer had not established the standard as a BFOR, it could not then rely upon it to justify Meiorin's dismissal.

The related concepts of constructive discrimination and the duty to accommodate are now the dominant principles underlying our human rights legislation. Their effect is to require employers and unions not only to establish a good business or industrial relations reason for a workplace rule, but also to establish that the rule could not be formulated to accommodate protected individuals and groups without undue hardship. The concept of undue hardship is clearly a concept that takes meaning from the context of the workplace itself. In practice, large organizations, with access to substantial resources, are likely to have a more difficult task in establishing that the accommodation of an individual claim would cause them undue hardship.

The cases that follow illustrate the growing impact of the related concepts of constructive discrimination and the duty to accommodate on the administration of the collective agreement.

The Employer's Duty to Accommodate

Human rights legislation has had a serious impact on the exercise of management rights under a collective agreement.

It is quite clear that human rights legislation has had a serious impact on the exercise of management rights under a collective agreement. The first casualty appears to be the deemed termination provision. Let me provide some examples of this important development.

In a 1991 case an arbitrator was faced with a clause that clearly provided that seniority would cease and employment would be terminated where an employee was absent from work for a period of 18 months because of sickness or injury for which that employee was receiving workers' compensation benefits.[17] The grievor suffered a back and leg injury at work and, as a result, was continuously absent for more than 18 months.

The arbitrator held that the provision in the Ontario ***Human Rights Code*** prohibiting discrimination because of disability took precedence over the automatic termination clause that was clearly spelled out in the collective agreement. The effect of the automatic termination clause was to preclude disabled employees from challenging their termination on the basis of just cause, as could other employees, breaching the requirement of equal treatment under the ***Human Rights Code***. The arbitrator ordered that the grievor be reinstated without loss of seniority and that he be compensated for any loss of benefits that he would have received as an employee. This case clearly illustrates how human rights legislation will 'trump' even the clearest language of the collective agreement.

This approach was confirmed by a 1993 decision of the Ontario Divisional Court.[18] Again the facts involved an employee absent from work for an extended period because

17 ***Corporation of the City of Stratford*** (1991), 13 L.A.C. (4th) 1 (Marszewski).

18 ***Re Ontario Nurses' Association and Etobicoke General Hospital*** (1993), 14 O.R. (3d) 40 (Ont. Div. Ct.).

of a compensable disability and again the collective agreement provided for automatic termination of employment where an employee 'is absent from work due to illness or disability for more than twenty-four months.' On these facts the court concluded that such a clause could be considered direct discrimination against the disabled and, at the very least, constructive discrimination. Such a clause bmonths.' could not justify the termination and so it was necessary for the employer to establish that the employee was incapable of performing the essential duties of the job and that reasonable accommodation would impose an undue hardship on management. The court not only quashed the arbitration award dismissing the grievance, but then reinstated the grievor with full compensation. What this case tells us is that courts are just as likely to be sympathetic to human rights arguments as are arbitrators or human rights boards of inquiry.

Equally vulnerable to a human rights challenge are collective agreement provisions that contemplate the interruption of seniority because of an absence from work because of illness or accident.

Equally vulnerable to a human rights challenge are collective agreement provisions that contemplate the interruption of seniority because of an absence from work because of illness or accident. In one recent case an employee lost out on a job posting because her seniority had been interrupted by operation of this type of provision.[19] A Board of Inquiry appointed under the ***Human Rights Code*** found this to be discrimination on the basis of disability and directed the employer to compensate the grievor for monetary losses.

A similar approach was taken in a 1994 arbitration award.[20] In this case the collective agreement provided for an interruption of seniority in the case of unpaid leaves of absence in excess of thirty days. The grievor's absence on workers' compensation was treated as an unpaid leave of absence and his seniority date adjusted by 38 days. A majority of the arbitration board found that, even though all unpaid absences were treated 'in the same way, this reduction of seniority was inconsistent with the ***Human Rights Code*** because the grievor was treated differently from other members of the bargaining unit as the direct result of his absence from work due to a compensable injury. According to this reasoning, discrimination is defined not by reference to whether the disabled employee was in a disadvantageous position relative to other employees on unpaid leave, but by reference to whether the disabled worker was placed in a disadvantageous position relative to all those members of the bargaining unit who continued to work.

This broad concept of discrimination has implications that extend beyond the accrual of seniority. Ontario's Grievance Settlement Board has held that a grievor could not be denied a promotion because of an absenteeism record that included absences on workers' compensation.[21] Even though the employer had treated all other employees with records of absenteeism in the same manner, the application of this policy to the grievor amounted to constructive discrimination because it did not take account of the fact that a significant portion of his absences arose from his work injury.

A 1994 arbitration award, however, has given a more limited scope to the employer's duty to accommodate the disabled employee.[22] In this case the union argued that, despite clear wording in the collective agreement to the contrary, the employer was obliged to pay the cost of benefits for employees on long-term disability because it amounted to improper discrimination to have disabled employees pay more for the cost of health and welfare benefits than those employees actively on the job. The arbitrator, however, took the view that the appropriate comparison was not with active employees but with other employees

19 ***Thorne*** v. ***Emerson Electric Canada Ltd. and United Electrical Radio and Machine Workers of Canada, Local 522***, summarized in Lancaster Labour Law Reports, Charter Cases/Human Rights Reporter (1993), Vol.9, No.11, p.5.

20 ***Board of Governors of the Riverdale Hospital (***1994), 39 L.A.C. (4th) 63 (Stewart).

21 ***Ministry of Health (Martin)*** (1993), 31 L.A.C. (4th) 129 (Dissanayake).

22 ***Versa Services Ltd.*** (1994), 39 L.A.C. (4th) 196 (R. Brown).

who were absent from work for a similar length of time but who were not disabled. Equal treatment, according to the arbitrator, has a different meaning for the application of compensation than it does for participation in the workforce. While an employer might be obligated to take special measures to accommodate the disabled employee as a member of its workforce, the employer was not required to provide this employee with preferred treatment with respect to compensation. In this case, since no other employees had benefits provided by the employer during prolonged absences, those employees on long-term disability could not complain of improper discrimination when they received similar treatment in their compensation.

This more narrow approach to defining improper discrimination was followed in another arbitration case dealing with the accumulation of seniority during an absence on workers' compensation.[23] At issue was a collective agreement provision that placed a one year ceiling on the accrual of seniority in such circumstances. In this case the majority of the board of arbitration compared the treatment of the grievor to that of other employees in 'equivalent non-working circumstances,' rather than looking to active employees. Since employees absent on workers' compensation actually enjoyed greater accrual of seniority than employees absent for other reasons, the majority held that the provision of the collective agreement was not inconsistent with human rights legislation.

This more narrow approach to defining improper discrimination, however, is by no means the prevailing approach, as there appears to be no clear consensus among adjudicators as to what is the appropriate comparator when determining improper discrimination. A decision of an Ontario Human Rights Board of Inquiry has taken a broader view of improper discrimination.[24] In this particular case the collective agreement expressly provided that vacation with pay was to be pro-rated in the case of absences other than vacation or paid leave of absence. The Board held that the application of this provision to an employee absent on workers' compensation amounted to constructive discrimination since that employee was treated differently than those employees who remained actively at work. What is interesting about this decision is that the Board chose as the comparator all active employees rather than just those employees who were absent from work for reasons other than a work injury. Clearly the choice of comparator is crucial when defining the extent of improper discrimination.

Some arbitral jurisprudence suggests that the choice of a narrow notion of equal treatment or a broad notion of equal treatment will depend on the nature of the claim being asserted.[25] If the claim relates to a matter of compensation, then arbitrators are more likely to adopt a narrow notion of equal treatment, comparing the treatment of disabled employees with the treatment of only those employees absent from work for reasons other than disability. If this narrow notion of equal treatment is applied, then it can be argued that there is no discrimination even though disabled employees receive less favourable treatment with respect to compensation than those employees who are actively employed. On the other hand, if the claim relates to exclusion from work opportunities rather than

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23 ***Metropolitan General Hospital*** (1995), 48 L.A.C. (4th) 291 (Kennedy). In ***Cariboo Memorial Hospital*** (1997), 61 L.A.C. (4th) 391 (Kinzie), however, it was held that employees on long-term disability should be given credit for severance pay during their absence where other employees absent from work on compensable injury were entitled to such credit. This latter decision turns on the fact that employees absent by reason of disability were treated less generously than other employees absent for comparable reasons.

24 ***Thomson*** v. ***Fleetwood Ambulance Service*** (1996), 96 C.L.L.C. para. 230,007; see also ***Clarendon Foundation*** (1997), 58 L.A.C. (4th) 270 (Craven).

25 ***Golden Manor Home for the Aged*** (1996), 53 L.A.C. (4th) 353 (Davie).

to compensation, arbitrators are more likely to apply a broad notion of equal treatment, comparing the treatment of disabled employees to the treatment of those employees actively working. Using this broader notion of what constitutes equal treatment, disabled employees may actually receive better treatment when it comes to the calculation of seniority than employees absent from work for reasons other than disability.[26]

The difficult issue now facing arbitrators is whether this distinction between grievances relating to compensation and grievances relating to exclusion from work opportunities can be maintained. An Ontario arbitrator has rejected the idea that there can be different notions of equality depending on the nature of the grievance.[27] He held that, when it comes to the provision of employment benefits, Ontario's ***Human Rights Code*** requires that disabled employees are to be treated in the same manner as employees who are actively working. Taking this approach, he concluded that it was improper discrimination for an employer to discontinue payment of the grievor's health care and insurance benefits when she was absent from work because of a work injury which was compensable under the ***Workers' Compensation Act***, leaving the employer with the sole defense that the continuation of these payments would cause it undue hardship. This latter matter was left to be dealt with at a subsequent hearing, but my guess is that the employer will have some difficulty in meeting the onus of establishing undue hardship.

The problem with the undue hardship defence is that it places a price tag on basic human rights.

I say this because, in my opinion, undue hardship is a difficult argument for employers to make. Not only do they bear the onus of persuasion, but it is very difficult for employers to meet this onus by simply arguing that it would be too expensive to accommodate the individual employee. The problem with the undue hardship defense is that it places a price tag on basic human rights. Given the present emphasis on human rights, few adjudicators are likely to be swayed by arguments based on financial considerations alone, especially when made by large organizations with access to extensive financial resources.

The difficulty that employers face in establishing undue hardship in these cases has meant that many of these cases involving claims to compensation by employees absent from work are being met with the threshold argument that the difference in treatment from those employees in active employment does not in fact amount to improper discrimination. This type of argument met with success in a recent British Columbia arbitration.[28] Here the issue was whether employees on maternity leave were entitled to the accrual of sick leave credits while absent on leave. The union argued that the denial of sick leave accrual during maternity leaves amounted to improper discrimination based on sex since benefits continued to accrue for employees actively working as well as for employees on union leave and paid leave. The arbitrator held that

> the loss of a service-driven benefit that is available to all employees on the basis of hours worked, by reason of absence from work for whatever reason, including pregnancy, does not constitute a 'penalty or restrictive condition' on an individual or group of individuals within the meaning of adverse effect discrimination' . .29

This conclusion was premised on what the arbitrator considered to be a general understanding that wages and other service-driven monetary benefits are only payable where employees are actively working. Whether other adjudicators will give the same weight to

26 ***Porcupine and District Children's Aid Society*** (1996), 56 L.A.C. (4th) 116 (F. Brown); see also ***Victorian Order of Nurses (Algoma Branch)*** (1996), 56 L.A.C. (4th) 235 (Low).

27 ***Pano Cap (Canada) Ltd.*** (1998), 67 L.A.C. (4th) 176 (Surdykowski).

28 ***Vancouver School Board*** (1998), 72 L.A.C. (4th) 192 (Munroe).

29 ***Vancouver School Board***, at 226.

this understanding remains to be seen. It is quite likely that we will see extensive litigation before there is a final determination of what constitutes equal treatment in matters of compensation.

It is quite likely that we will see extensive litigation before there is a final determination of what constitutes equal treatment in matters of compensation.

The most recent analysis of this difficult issue of whether disabled employees are entitled to service-driven benefits can be found in the decision of the Ontario Court of Appeal in the ***Soldiers Memorial Hospital*** case.[30] A central issue in this case was whether the prohibition against discrimination because of handicap in Ontario's human rights legislation overruled a provision in a collective agreement limiting the employer's obligation to pay benefit plan premiums for disabled employees to a maximum of thirty months from the time the absence commenced.

The arbitrator in this case, relying upon previous arbitral jurisprudence, held that the failure to continue to pay benefit premiums for disabled employees after thirty months, since it concerned a matter relating to compensation, was not inconsistent with human rights legislation.[31] Matters of compensation, according to this line of jurisprudence, are subject to a less stringent test of equal treatment than are matters such as seniority, since the latter type of issue relates to a disabled employee's right to participate in an employer's workforce. This less stringent test to be applied to compensation issues only requires that equal treatment be determined by reference to the treatment of employees absent from work for reasons other than disability and not to the treatment of employees actively working who would be receiving full pay and benefits.

A different approach to service-driven benefits, however, was taken by the Ontario Court of Appeal when dealing with the appeal of this case. It took the position that the failure to compensate disabled employees by discontinuing the payment of their benefit premiums amounted to constructive discrimination under Ontario's human rights legislation, even where the employer's policy was to pay coverage for only those employees actively working. Although disabled employees under such a policy were treated no differently than employees absent for reasons other than disability, the Court considered that this application of the policy still amounted to constructive discrimination because of its adverse effect on disabled employees.

The Court of Appeal, however, went on to find that requiring work for compensation was a reasonable and bona fide requirement and, just as important, that the duty to accommodate only required the employer to modify the workplace up to the point of undue hardship so as to provide the disabled employee with the opportunity to perform work. In this case, since their was no evidence that the employer could do anything more to provide the disabled employees with the opportunity to work, the employer had no obligation to continue to pay benefit premiums to those employees who were no longer working.

This analysis by the Ontario Court of Appeal makes it clear that human rights laws do not require employers to continue to pay indefinitely those employees who are absent from work because of illness. What it appears to say is that human rights laws only require that disabled employees be given equal access to work opportunities. If disabled employees are unable to work, there is no obligation to pay for benefits that are only provided to those employees who are actively working. The Supreme Court of Canada has dismissed an application for leave to appeal from this decision, suggesting that this analysis is now likely to find favour with other courts and adjudicators.

30 [1999] O.J. No. 44 Docket no. C28133.

31 ***Soldiers Memorial Hospital*** (1997), 58 L.A.C. (4th) 72 (Mitchnik).

When it comes to the application of a collective agreement to an individual employee the union has a joint responsibility with the employer to provide accommodation to those protected by human rights legislation.

The Duty of Unions to Accommodate

The growing prominence of human rights laws has equally important implications for trade unions. Collective agreements cover over 40 percent of Canada's workforce. The employment rules and practices that arise from these collective agreements define the employment situation of the individual employee. Yet, as we know, it is the union as the bargaining agent that has exclusive responsibility for the negotiation and administration of any matters arising from the collective agreement. Canadian courts have now sent a clear signal that when it comes to the application of a collective agreement to an individual employee the union has a joint responsibility with the employer to provide accommodation to those protected by human rights legislation.

The key case is a 1992 decision of the Supreme Court of Canada. In this case it was quite evident that the collective agreement itself constructively discriminated against a religious minority.[32] The work schedule, which formed part of the collective agreement, included a Friday evening shift. The complainant, who was a Seventh-Day Adventist, was bound by this schedule as a member of the bargaining unit, but at the same time his religion prevented his working on his Sabbath from sundown Friday to sundown Saturday. Apparently the only practical accommodation involved the creation of a Sunday to Thursday shift for the complainant, but the union refused to allow this exception to the collective agreement and threatened to launch a policy grievance if it were implemented. As a result, the shift schedule established by the collective agreement remained without exception and the complainant was eventually discharged for refusing to complete his regular Friday shift.

This matter found its way to the Supreme Court of Canada where the court found both the employer and the union liable for failing to accommodate the complainant. In the eyes of the Court both the union and the employer had a part in establishing the work schedule in the collective agreement and both were responsible for remedying the adverse effects on the complainant. The union contributed to the continuation of the discrimination by refusing the accommodation suggested by the employer, but the employer also contributed by giving in to the union and not implementing the accommodation in the face of the union's opposition.

The Supreme Court of Canada clearly indicated that a union could be a party to discrimination in two ways. The first way is where it has participated in the formulation of a work rule that has a discriminatory effect. According to the court, it should be assumed that all provisions in the collective agreement are formulated jointly even though some of these provisions may be of particular benefit to only one of the parties. Even where the union does not participate in the formulation or application of a discriminatory rule, however, it could still be liable for a failure to accommodate where it impedes the reasonable efforts of the employer to accommodate, if reasonable accommodation is only possible with the union's cooperation. Here the union is a party to the discrimination simply by resisting management's attempts to accommodate through exercising its managerial rights.

The court also made it clear that the duty to accommodate may require a union to agree to measures inconsistent with the collective agreement even though the employer has not exhausted all reasonable measures of accommodation. This approach suggests that, in some cases, the union may bear a heavier responsibility to accommodate minority employees than does the employer. This responsibility to accommodate substantially erodes the principle of majoritarianism which has been a longstanding cornerstone of our

32 ***Central Okanagan School District No. 32*** v. ***Renaud*** (1992), 92 C.L.L.C. para. 17,032 (S.C.C.).

collective bargaining system. No longer can the union insist on the maintenance of the integrity of the collective agreement simply because it reflects the wishes of the majority as human rights laws now clearly require accommodation of minority interests.

How far will the duty to accommodate erode existing rights under the collective agreement. The Supreme Court of Canada did at least suggest that the duty to accommodate does not extend so far as to 'substitute discrimination against other employees for the discrimination suffered by the complainant.' In other words accommodation of a minority employee cannot be at the direct expense of some other employee. This point is of particular importance when dealing with accommodation for those employees who are disabled. The requirement to accommodate the disabled employee, if one follows this reasoning, does not necessarily dictate that the able bodied employee be placed in a less advantageous position. At this time, however, it is difficult to predict exactly how adjudicators will balance the rights of competing employees.

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One arbitration award suggests that the duty to accommodate will be relevant when jobs are being posted.[33] In this case there was a non-competitive seniority clause giving the senior employee a preference if that person had the required ability and qualifications to perform the job. The position, however, was awarded to an injured employee with less seniority than the grievor, even though it was clear that the grievor had the ability and qualifications to perform the work. The arbitrator dismissed the grievance, holding that the seniority provisions of the collective agreement were qualified by the duty of reasonable accommodation set out in the applicable human rights legislation. This case clearly illustrates that the duty to accommodate disabled employees may override collective agreement rights as significant as seniority, or even cut across the bargaining unit boundaries created by collective agreements.

The issue of whether the duty to accommodate requires a union to accommodate a disabled employee from another bargaining unit in its own unit was faced directly in a recent arbitration case, ***Queen's Regional Health Authority***.[34] In this case the disabled employee was awarded a part-time position posted in another bargaining unit. The employer acknowledged that in doing so it had breached the collective agreement, but argued that the requirement of human rights legislation to accommodate the disabled employee justified this breach. The arbitrator held that the duty to accommodate could extend beyond the boundaries established by bargaining units, but that he 'should be slow to conclude in any particular case that the duty prevails across bargaining unit lines.' In his view, the duty to accommodate should prevail over collective agreement rights only where 'the need to accommodate is clear, in that the claim of the person to be accommodated obviously outweighs the claims of those whose rights are displaced and where there is no other reasonable way to fulfil it.' On the evidence he concluded that he was not satisfied that the employer had explored the possibility of restructuring jobs in the employee's own bargaining unit before appointing her to a position in a different unit. In particular the arbitrator observed that in this case accommodation would only require a restructuring that would create enough work to provide part-time employment in the employee's own bargaining unit.

This decision is interesting because it clearly places a heavier onus to accommodate on the employer than upon the union in cases where the employee is not a member of the union's own bargaining unit. Indeed, in this type of situation, the employer has to at least consider the possibility of creating a position for the employee in the home bargaining unit before looking to another bargaining unit to satisfy the requirement of accommoda-

33 ***Union Carbide Canada Ltd.*** (1991), 21 L.A.C. (4th) 261 (Hinnegan).

34 (1999), 78 L.A.C. (4th) 269 (Christie)

tion. Placing the duty of accommodation primarily on the employer in these situations contrasts markedly with those cases where the union appears to have a much heavier burden to facilitate accommodation.

The full extent of a union's burden to accommodate can be seen in another case.[35] Again, this case involved an employee who was practising Seventh-Day Adventist. The collective agreement provided that the normal work schedule was to be Monday to Friday, but recognized that Saturday work would be performed in the Technical Services Department. At the time of her employment the complainant was advised by the employer that she would have to work one Saturday every six weeks. The employer, however, was prepared to allow the complainant to perform the Saturday work on Sunday at straight time, but the union insisted that the employer pay her the Sunday premium of time and one half. The difference between the two positions was $160 per year.

A majority of the Ontario Court, General Division, held that the collective agreement, because it contemplated Saturday work, constructively discriminated against the complainant. Since the union was a party to that provision, it was under an obligation to alleviate its disproportionate effect on the individual employee and, in these circumstances, the employer and the union were jointly liable. The union was liable for resisting the employer's attempt at accommodation and the employer was liable for giving in to the union's recalcitrance.

The dissent in this case took a different tack. According to the dissenting judge, the employer could have accommodated the complainant either by not scheduling her on Saturday or by paying the Sunday premium. Neither the collective agreement nor the union prevented the employer from accommodating the complainant in this manner and, therefore, liability should rest on the employer alone, since it was the employer that had the authority to manage the workplace and the obligation to manage it without discrimination. In the eyes of the dissenting judge, the union was not obligated to surrender its rights under the collective agreement to make it easier for the employer to adhere to its obligations to manage the workplace in a non-discriminatory manner. The dissent clearly contemplates that, since managerial power rests with the employer, so does the duty to accommodate.

Unions can no longer insist on maintaining the complete integrity of their collective agreements.

The prevailing view, however, places a heavier onus on the union, holding the union jointly responsible with the employer to accommodate the individual employee in the course of administering the collective agreement. The majority view assumes that unions do have a strong voice in the running of the workplace and, as exclusive bargaining agent, have a responsibility under human rights law, to accommodate the claims of minority employees. Even more important, in complying with this duty unions can no longer insist on maintaining the complete integrity of their collective agreements.

The Role of Arbitrators in Applying Human Rights Legislation

Human rights case law arises from three distinct sources—the courts; human rights boards of inquiry; and grievance arbitrators. What is perhaps most remarkable is the extent to which grievance arbitrators are playing an active role in shaping the human rights jurisprudence. This new role stands in sharp contrast to the traditional role of arbitrators. At its inception grievance arbitration was an integral component of a system of private ordering. The collective agreement, reflecting the internal value system of the parties

35 ***Office and Professional Employees Union, Local 267*** v. ***Domtar Inc.*** (1992), 92 C.L.L.C. para 17,015 (Ont. Ct., Gen. Div.).

to that agreement, formed the foundation of that system of private ordering. Grievance arbitration, while required by legislation, was still expected to stay within certain boundaries. The role of the arbitrator was to resolve differences arising from the collective agreement in a manner consistent with the internal value system of the parties, either as expressly articulated in the collective agreement or revealed through the established practices of the parties in administering the collective agreement.

By the mid 1970s, however, the Supreme Court of Canada had made it clear that arbitrators had an additional responsibility to take into account external legislation when that legislation was in direct conflict with the terms of the collective agreement.[36] At the time, because human rights legislation was at an early stage in its development, the significance of this decision was not fully appreciated. With the expansion of human rights laws in the 1980s and 1990s, and the development of the concept of constructive discrimination, however, the potential for conflict between human rights legislation and the terms of the collective agreement expanded exponentially.

Today we increasingly see arbitrators across Canada no longer confining themselves to their traditional role of interpreting the language of collective agreements, but now giving precedence to the provision of human rights codes. Ontario, in its 1993 amendments to its ***Labour Relations Act***, expressly recognized that arbitrators had an overriding responsibility to apply relevant external employment legislation when dealing with disputes arising from the collective agreement. The effect, of course, was to give precedence to the external values contained in that legislation at the expense of the internal values formulated by the parties themselves.

The Ontario ***Labour Relations Act***, even after the 1995 amendments, still expressly provides grievance arbitrators with a power 'to interpret and apply the requirements of human rights and other employment-related statutes.'[37] It is here that we see in stark relief the encroachment of human rights laws upon the established institutions of collective bargaining, continuing the trend that was dominant in the 1980s. Admittedly, in the absence of this express statutory provision, arbitrators could not ignore human rights legislation where it came into direct conflict with the terms of the collective agreement. Nevertheless, this express statutory authority suggests that arbitrators are now to take a more active role in the application of legislation, especially human rights legislation. Indeed the present delays associated with the adjudication of human rights complaints could make arbitration the preferred forum for the resolution of these complaints, in essence privatizing human rights adjudication.

What are the implications of this developing tendency of arbitrators to look beyond the collective agreement to legislation? I would suggest that what it means is that the internal values established through the collective agreement will be increasingly influenced, modified, and in some cases eroded by the web of legislation that now surrounds our collective bargaining system. For the parties, this development means that it is even more important to be aware of the constantly changing legislative environment that surrounds the collective bargaining relationship. As for the grievance arbitration process, it means that arbitration is likely to become even more of a lawyer's game than it is now as increasing reference is made to human rights legislation to resolve collective agreement disputes.

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A 1994 arbitration award illustrates just how far arbitrators are prepared to go beyond the confines of a collective agreement once human rights legislation comes into play.[38] In

36 ***McLeod*** v. ***Egan*** (1974), 46 D.L.R. (3d) 150 (S.C.C.).

37 ***Labour Relations Act***, 1995, S.O. 1995, c.1, s.48(12)(j).

38 ***Municipality of Metropolitan Toronto and Canadian Union of Public Employees, Local 79*** (1994), 35 L.A.C. (4th) 357 (Fisher).

this case the grievor suffered from a chronic back problem that was not work-related and not covered by workers' compensation. The grievor, while absent from his job, received disability payments under the collective agreement until it was determined that he could perform other work. At this point the grievor applied for a job outside of the bargaining unit and, even though the grievor was qualified for the job, the employer gave the job to another employee who had been on layoff. The arbitrator held in a preliminary ruling that the power to interpret and apply human rights legislation once provided by Ontario's ***Labour Relations Act*** meant that 'in the appropriate circumstances' an arbitrator could direct that a disabled grievor be awarded an excluded position or order compensation for the failure to accommodate the grievor in that position.

An interesting question is whether the provisions of the collective agreement might still apply to an employee who is accommodated by a transfer from the bargaining unit to an excluded position. One arbitrator has held that he had no jurisdiction to deal with the removal of such an employee from a position outside the bargaining unit.[39] To apply the just cause standard of the collective agreement in such a case, according to the arbitrator, would provide the disabled employee with greater rights than those enjoyed by other employees both inside and outside the bargaining unit. In another case,[40] the arbitration board, while recognizing that the duty to accommodate did not have the effect of extending the terms of the collective agreement to a disabled employee placed in an excluded position, still found that it did require the union and employer to agree that any transfer of a disabled employee to a position outside the bargaining unit would result in no loss of seniority, service, or benefits under the collective agreement.

Conclusion

Both employers and unions now face a new burden to accommodate the human rights claims of individual employees.

The expanding influence of human rights legislation has important implications for Canadian labour relations in the years ahead. Both employers and unions now face a new burden to accommodate the human rights claims of individual employees. This new burden will undoubtedly affect the administration of the collective agreement in the unionized workplace and, for the non-unionized workplace, could alter many well established employer practices.

Collective agreements will be particularly vulnerable as many existing collective agreement provisions have the potential to be regarded as a form of constructive discrimination. Seniority clauses, provisions protecting work jurisdiction at the expense of other employees, deemed termination provisions, holiday provisions, and Sunday premium provisions are likely to be given much closer scrutiny by human rights tribunals, courts and arbitrators. It is just as likely that unions will bear as much responsibility for these provisions and their administration as will employers. Clearly both employers and unions must quickly learn to adapt to a new legal environment where human rights laws have become pre-eminent.

39 ***Interlink Freight Services*** (1996), 55 L.A.C. (4th) 289 (M. Picher).

40 ***West Park Hospital*** (1996), 55 L.A.C. (4th) 79 (Emrich).