Alberta Human Rights Commission v. *Central Alberta Dairy Pool*

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After an uncharacteristic pratfall[1] in *Bhinder* v. *Canadian National Railway*,[2] the Supreme Court of Canada, in *Alberta Human Rights Commission* v. *Central Alberta Dairy Pool*,[3] has picked itself back up. Had it survived, the *Bhinder* case would have decided that there is no duty to accommodate the special circumstances of disadvantaged groups in the human rights legislation of most Canadian jurisdictions. Group after group pointed to this potentially disastrous consequence. At one point, it had appeared that the *Bhinder* decision would be reversed legislatively.[4] Before this happened, however, the Supreme Court chose to address the matter itself. *Bhinder* has been overturned, and the Court has resumed the search for a distinctively Canadian theory of equality, based on respect for diversity[5]

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[1]For a discussion of how the Court deviated from a path of its own choice, see D. Baker, "The Changing Norms of Equality in the Supreme Court of Canada" (1987) 9 Sup. Ct. L. Rev. 497 at 544-51.

[2]*Bhinder* v. *Canadian National Railway*, [1985] 2 S.C.R. 561, 23 D.L.R. (4th) 481 [hereinafter *Bhinder* cited to S.C.R.].

[3]*Alberta Human Rights Commission* v. *Central Alberta Dairy Pool*, [1990] 2 S.C.R. 489 at 512, Wilson J., and at 526, Sopinka J., 6 W.W.R. 193 [hereinafter *Alberta Dairy Pool* cited to S.C.R.].

[4]The day following the release of the Supreme Court's judgment in *Bhinder*, the Minister of Justice, John Crosbie, announced in Parliament that he would review the need to amend the *Canadian Human Rights Act*, S.C. 1976-77, c. 33. Repeated calls were made to reverse *Bhinder* legislatively: Canadian Parliamentary Committee on Equality Rights, *Equality For All* (Ottawa: Queen's Printer, 1985) at 130-31; Canadian Human Rights Commission, *Special Report to Parliament on the Effects of the Bhinder Decision on the Canadian Human Rights Commission* (Ottawa: The Commission, 1986); Canada, Department of Justice, *Toward Equality* (Ottawa: Communications and Public Affairs, Dept. of Justice, 1986) at 63. There followed repeated promises of action by successive Justice Ministers but to date, no Bill making the necessary changes has been introduced in Parliament.

[5]The classie Supreme Court statements regarding pluralism are contained in the case of *R.* v. *Big M Drug Mart Ltd.*, [1985] 1 S.C.R 295 at 337, 18 D.L.R. (4th) 321, Dickson J., regarding s. 2 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

> What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The *Charter* safeguards religious minorities from the threat of "the tyranny of the majority."

and the relief of disadvantagement.[6]

This comment will first examine earlier human rights case law in this area and then look in greater detail at the *Alberta Dairy Pool* decision itself.

I. Prior Jurisprudeuce

Over the last ten years, the Supreme Court of Canada has developed a conceptual framework for analyzing issues of discrimination. This framework has proven very useful in reducing to a formula the value-laden assumptions about what equality means in a Canadian context. Each element in the formula has been shaped and re-shaped in successive cases to take into account additional assumptions.

The first major decision in this series was the *Etobicoke Firefighters* case.[7] At issue was whether the "bona fide occupational qualification" (B.F.O.Q.)[8] defence was available to a fire department which sought to justify a policy of mandatory retirement of firefighters at age 60, on the basis that older persons posed a safety hazard. While the employer's motives were acknowledged to be honest and in good faith, the Court held that the evidence adduced did not support a finding that the age criteria were necessary to achieve the safe and efficient performance of the firefighters' duties. The Court established a twofold test for determining whether a distinction drawn on the basis of a protected category constitutes a B.F.O.Q. and therefore is permissible. The test required both a non-discriminatory intent, and that the distinction drawn

> 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.[9]

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and at 347:

> The equality necessary to support religious freedom does not require identical treatment of all religions. In fact, the interests of true equality may well require differentiation in treatment.

[6]See, *e.g.*, *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1, accepting arguments advanced on behalf of the Coalition of Provincial Organizations of the Handicapped (C.O.P.O.H.) and the Women's Legal Education and Action Fund (L.E.A.F.) as intervenors; W. Black & L. Smith, "The Equality Rights" in G.-A. Beaudoin & E. Ratushny, eds, *The Canadian Charter of Rights and Freedoms*, 2nd ed. (Toronto: Carswell, 1989) at 557; J.H. Ely, *Democracy and Distrust* (Cambridge, Mass.: Harvard University Press, 1980); P. Monahan, *The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987).

[7]*Ontario Human Rights Commission* v. *Etobicoke (Borough of)*, [1982] 1 S.C.R. 202, 132 D.L.R. (3d) 14 [hereinafter *Etobicoke Firefighters* cited to S.C.R.].

[8]B.F.O.Q. is a statutorily created defence to a charge of discrimination. It is "equivalent and coextensive" with "*bona fide* occupational requirement" (B.F.O.R.): *Alberta Dairy Pool*, *supra*, note 3 at 502, Wilson J.

[9]*Supra*, note 7 at 208.

Etobicoke Firefighters was followed by *O'Malley*.[10] In the latter case, the complainant was unable to work on Saturdays because her religion prohibited it, which led to her termination by the respondent. The employer's policy, which required its workers to work on Saturdays, was found not to be maliciously motivated, and represented a rational effort to achieve legitimate business objectives. The Ontario *Human Rights Code*[11] at that time contained no B.F.O.Q. defence in cases of religious discrimination. Thus, if the policy was discriminatory, it violated the *Code*. The Supreme Court concluded that "discrimination" included not only "direct discrimination" (*i.e.*, differential treatment based on a ground prohibited by the *Code*), but also adverse effect discrimination (*i.e.*, differential effect because of some special characteristic linked to a prohibited ground).[12] The Court found Mrs. O'Malley had suffered adverse effect discrimination because her employer's policy conflicted with her religious beliefs. The Court went on to say that positive steps must be taken by the employer to avoid such adverse effects, unless making such an "accommodation" would impose an "undue hardship" on the employer. Because the employer in *O'Malley* had chosen not to call any evidence in support of a claim of "undue hardship," the Court was not compelled to precisely define the extent of the duty to accommodate. The employer was required to accommodate Mrs. O'Malley's religious beliefs when scheduling its work week.

Heard and decided together with *O'Malley* was the *Bhinder* case. *Bhinder* was also viewed by the Court as a case of adverse effect discrimination. The complainant, a Sikh who wore a turban as part of his religious observance, was unable to comply with a company policy requiring that hardhats be worn on the job. The Court held that unlike Ms. O'Malley, Mr. Bhinder was not entitled to an accommodation because the *Canadian Human Rights Act*[13] contained a "bona fide occupational requirement" (B.F.O.R.) defence.

> 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 of individual application.[14]

By focusing exclusively on the question of whether the employer's rule was reasonable, the Court ruled that a B.F.O.R. defence precluded any duty to consider whether non-discriminatory alternatives were open to the employer. No balanc-

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[10]*Ontario Human Rights Commission and O'Malley* v. *Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, 23 D.L.R. (4th) 321 [hereinafter *O'Malley* cited to S.C.R.].

[11]Ontario *Human Rights Code*, R.S.O. 1980, c. 340.

[12]*Supra*, note 10 at 551.

[13]*Canadian Human Rights Act*, R.S.C. 1985, c. H-6.

[14]*Supra*, note 2 at 588-89, McIntyre J.

ing was required between the legitimate goals of the employer and those of the employee. As a consequence, virtually the only rule which would not be found to be a B.F.O.R. would be one which was maliciously contrived for the sole purpose of discriminating. The result in *Bhinder* thus conflicted with the objective of removing unintentional discrimination, articulated in the "business necessity" component of the B.F.O.Q. defence in *Etobicoke Firefighters*, and with the desire to prohibit adverse effect discrimination evident in *O'Malley*.

It did not take the Court long to realize it had gone too far. In *Brossard* v. *Quebec Commission des droits de la personne*,[15] an anti-nepotism by-law precluding the simultaneous employment of spouses by a municipality was challenged as being discrimination based on marital status. The Court restated the B.F.O.Q. standard it had established in the *Etobicoke Firefighters* case, but went on to point out that the legitimate societal goal of avoiding discrimination requires that an employer asserting a B.F.O.Q. defence be required to prove the reasonableness, not only of the objective of the rule, but also of the means chosen to accomplish it.[16]

The Court went even further in the *Saskatoon Firefighters* case.[17] The facts differed from those of *Etobicoke Firefighters* only in that the onus of establishing the causal connection between age and safety risk was met by the employer to the Court's satisfaction. The Court outlined when an employer could say it was using reasonable means to achieve reasonable ends:

> While it is not an absolute requirement that employees be individually tested, the employer may not satisfy the burden of proof of establishing the reasonableness of the requirement if he fails to deal satisfactorily with the question as to why it was not possible to deal with employees on an individual basis by, *inter alia*, individual testing. If there is a practical alternative to the adoption of a discriminatory rule, this may lead to a determination that the employer did not act reasonably in not adopting it.[18]

While the circumstances when an employer will be relieved of its responsibility to assess the capacity of its employees on an individualized basis was not

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[15]*Brossard (Ville de)* v. *Quebec Commission des droits de la personne*, [1988] 2 S.C.R. 279, 53 D.L.R. (4th) 609 [hereinafter *Brossard* cited to S.C.R.].

[16]*Ibid.* at 311-12 where the second of the two part test states:

> (2) Is the rule properly designed to ensure that the aptitude of qualification is met without placing an undue burden on those to whom the rule applies? This allows us to inquire into the reasonableness of the means the employer chooses to test for the presence of the requirement for the employment in question.

The language used is remarkably similar to that used to describe the s. 1 test under the *Charter*. See, *e.g.*, *R.* v. *Oakes*, [1986] 1 S.C.R 103, 26 D.L.R. (4th) 200.

[17]*Saskatchewan Human Rights Commission* v. *Saskatoon*, [1989] 2 S.C.R. 1297, 65 D.L.R. (4th) 481 [hereinafter *Saskatoon Firefighters* cited to S.C.R.].

[18]*Ibid.* at 1313-14.

defined with specificity, the Court did make it clear that the employer would be required to bear a heavy onus.

So far so good. Maliciously motivated discrimination is clearly on the run or has at least been driven underground (*Etobicoke Firefighters*). Damaging stereotypes can be challenged by persons who feel their individual abilities are going unrecognized (*Saskatoon Firefighters*). Consequently, differences between people which should be irrelevant and therefore disregarded have been adequately addressed. The Court had even gone a step further in *O'Malley*: it had recognized that superficially neutral practices could be discriminatory. There remained, however, the vexing problem of determining when differences *should* be taken into account in fashioning remedies for discriminatory practices.

II. The Relevance of Difference

In cases where differences are in fact relevant, discrimination results not from overreacting to the difference but from failing to take it into account.

Customs associated with minority religions, such as those of Seventh Day Adventism practised by Mrs. O'Malley, are one example. Examples of differences which may be relevant to decisions about whether discrimination has occurred include mental and physical disabilities; the fact that only women may become pregnant; a history of discrimination, such as the disadvantagement experienced by some ethnic minorities within the education system; or a set of collective values at variance with those of the majority, such as the choice of aboriginal people to engage in self-government or an indigenous economy.

Accepting that such differences exist, and that failing to take them into account can produce disadvantagement, does not answer the vexing question of how to remove these systemic barriers.[19] Attempts to take differences into account risk producing inappropriate responses which compound, rather than remove, these barriers.

Prior to the *Alberta Dairy Pool* case, the Court had only begun to confront this issue. In *O'Malley*, an employee sought an adjustment so that the demands of her work and her religion would be compatible. She did not expect the

[19]Canadians have generally been receptive to systemic remedies to inequality. No serious challenge has been brought to the validity of affirmative action which advances the interests of disadvantaged groups. Even before the enactment of legislative or *Charter* defences to charges of reverse discrimination, the Supreme Court of Canada had recognized its importance in achieving equality. See *Re Athabasca Tribal Council and Amoco Canada Petroleum*, [1981] 1 S.C.R. 699, 6 W.W.R. 342; Canada, Royal Commission on Equality in Employment, *Report of the Commission on Equality in Employment* (Commissioner: R. Abella) (Ottawa: The Commission, 1984); *Action travail des femmes* v. *Canadian National* (1984), 5 C.H.R.R. D/2327 (Cdn. H.R. Trib.); *Employment Equity Act*, R.S.C. 1985, 2nd Supp., c. E-23.

employer to change the days it opened, only the work schedules of its employees. Absent evidence to the contrary, the Supreme Court assumed that this accommodation could be accomplished without undue hardship to the operations of the employer. The employer was therefore required to accommodate the employee by restructuring work schedules to permit her to respect the tenets of her religion.

Similarly in *Bhinder*, there was no suggestion of requiring that the employer restructure its work so that it could be performed in a safer fashion, thereby obviating the need for its employees to wear hardhats. Such a change would have made Mr. Bhinder's turban irrelevant to the employer's legitimate business interests. Instead, the case focused on the marginally greater risk of injury Mr. Bhinder would face if he wore a turban instead of a hardhat.

The Supreme Court refused leave to appeal in two other cases in which the issue of relevant differences arose. Had leave been granted, the Court would have been confronted with the question of what would represent equality in circumstances where such differences exist. In the *Blainey* case,[20] a young girl sought and ultimately won the right to play hockey in a league which had previously been restricted to boys. The Ontario Court of Appeal struck down a provision of the Ontario *Human Rights Code* which exempted organized sports from its provisions. Subsequently, a Board of Inquiry[21] held that the complainant was not different in any relevant way from the boys against whom she sought to compete, overruling in the process the wishes of the majority of women hockey players who wanted to maintain separate leagues. The Ontario Women's Hockey Association wanted the Board to recognize that women were engaged in a distinct game which should be entitled to equal support and recognition. Instead, the Board granted women the right to compete against men. The Board went on to state that women would be permitted to continue to play in a segregated league because the inferior status accorded to the women's game justified its preservation as affirmative action. This result could serve to legitimize and hence perpetuate this inferior status.[22] The *Blainey* case posed two fundamental questions which the Supreme Court, by refusing leave, chose to defer:

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[20]*Re Blainey and Ontario Hockey Association* (1986), 54 O.R. (2d) 513, 26 D.L.R. (4th) 728 (C.A.) [hereinafter *Blainey*]. Leave to appeal to the Supreme Court of Canada was refused.

[21]*Blainey* v. *Ontario Hockey Association* (1987), 9 C.H.R.R. D/4549 (Ont. Bd. of Inquiry) (Chair: I. Springate).

[22]It may at some point be argued that a women's league will be barred from complaining about the superior resources (*i.e.*, ice time, equipment, etc.) allocated to the integrated league because of the wording of a statutory affirmative action or special programs clause such as the Ontario *Human Rights Code, 1981*, S.O. 1981, c. 53, s. 13(1).

1) Was the inequality experienced by female hockey players a product of lack of integration into the men's game, or of the dominant status enjoyed by men's hockey in relation to women's hockey?

2) What role should other members of a disadvantaged group play in defining the goal of equality under consideration in an individual case?

The *Huck* case[23] involved a disabled person who used a wheelchair to enhance his mobility. While he was able to enter the respondent's movie theatre, he was unable to sit with the person who accompanied him. In fact, he was told he would have to suffer the embarrassment and discomfort of being seated alone and in front of the rest of the audience. The Saskatchewan Court of Appeal held that the failure to provide a choice of places from which persons in wheelchairs could view the movie, which was comparable to that offered the ambulatory, was discriminatory. The Court stated:

> The attainment of the objects of the *Code* (*i.e.*, the provision of choices to disabled people comparable to those offered other members of the public) are not impossible; they may be inconvenient, and in some cases expensive, but the result is the one that was intended.[24]

The case remains noteworthy because it demonstrates that equality means more than an inferior right of access (*i.e.*, viewing the movie from a location less desirable than that offered ambulatory persons), and it means more than a limited right of access (*i.e.*, viewing the movie from a single location equal to a seat offered to an ambulatory person, but without extending the choice of viewing locations available to ambulatory persons). The Saskatchewan Court of Appeal held that equality means a right to be included to the extent that this is possible. This result is consistent with the Supreme Court decision in *O'Malley*, in that the duty to accommodate requires the removal of the barrier which is creating the adverse effect upon the member of a disadvantaged group.

The *Huck* case demonstrates the dilemma of difference. Accommodating a person with a disability who is seeking integration into mainstream society is very different from accommodating a person seeking to observe the distinct practices of a minority religion. Clearly, a segregated viewing area for disabled people was not Mr. Huck's goal: he wanted to sit with his ambulatory companion. In contrast, Mrs. O'Malley did not demand that her employer restructure its hours of operation. Her goal was not integration, but the maintenance of "difference" or distinctiveness. By refusing leave to appeal in the *Huck* case, the Supreme Court deferred articulating that the duty to accommodate may involve either integrating people who are different, or alternatively, allowing them to

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[23]*Saskatchewan Human Rights Commission and Huck* v. *Canadian Odeon Theatres*, [1985] 3 W.W.R. 717, 18 D.L.R. (4th) 93 (Sask. C.A.) [hereinafter *Huck* cited to W.W.R.]. Leave to appeal to the Supreme Court of Canada was refused.

[24]*Ibid.* at 744, Vancise J.A.

remain separate. Just as importantly, the Court avoided having to articulate when one as opposed to the other goal of equality will be applied, and who will participate in deciding which goal is desirable in the circumstances.

III. The Substauce of the *Alberta Dairy Pool* Decision

The facts of *Alberta Dairy Pool* are substantially similar to those in *O'Malley*. The complainant, Mr. Christie, was a member of the World Wide Church of God. He requested permission to take unpaid leave on a particular Monday in order to observe one of the church's holy days. Mondays were particularly busy at the milk processing plant where he worked. His request was refused. He did not report for work and was terminated.

It was argued on Mr. Christie's behalf that he had suffered discrimination on the basis of his religion. A Board of Inquiry appointed pursuant to the *Individual's Rights Protection Act*[25] ruled that the employer was under a duty to accommodate him. An appeal to the Alberta Court of Queen's Bench was allowed[26] and affirmed by the Alberta Court of Appeal.[27] The Courts below found that the B.F.O.Q. clause in the *Act* was comparable to the B.F.O.R. clause which the Supreme Court of Canada had held precluded the duty to accommodate in *Bhinder*.

All members of the Supreme Court of Canada agreed that the Court's decision in *Bhinder* should be reversed. In cases of adverse effect discrimination, all seven were of the view that the applicability of a B.F.O.Q. clause does not preclude the duty to accommodate. Unfortunately, this was the only thing about which they were able to agree.

Wilson J., on behalf of the majority, held that the duty to accommodate displaced the B.F.O.Q. defence, but only in cases of adverse effect discrimination. In cases of direct discrimination, a respondent would not be under a duty to accommodate, but would instead have to establish that the rule is a B.F.O.Q.

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[25]R.S.A. 1980, c. I-2. The relevant sections read as follows:

> 7(1) No employer or person acting on behalf of an employer shall
> (a) refuse to employ or refuse to continue to employ any person, or
> (b) discriminate against any person with regard to employment or any term or condition of employment,
> because of the race, religious beliefs, colour, sex, physical characteristics, marital status, age, ancestry or place of origin of that person or of any other person.
> ... (3) Subsection (1) does not apply with respect to a refusal, limitation, specification or preference based on a *bona fide* occupational qualification.

[26](1986), 45 A.R. (2d) 325.

[27][1986] 5 W.W.R. 35.

In contrast, Sopinka J., for the minority, held that the duty to accommodate was an integral part of the B.F.O.Q. defence. Making an accommodation is therefore but one of several ways open to an employer to ensure that a rule does not have a discriminatory effect upon an individual employee. When assessing whether accommodating an individual would impose undue hardship on an employer, the trier of fact should take into account the hardship experienced by the employer in accommodating other employees.

IV. Characterizing Discrimination

Ever since the *O'Malley* case was decided, Canadian courts have recognized two distinct types of discrimination: direct and adverse effect. The majority opinion in *Alberta Dairy Pool* emphasizes the importance of this distinction. This is unfortunate, because it is quite easy to change the same discriminatory standard from one which is directly discriminatory to adverse in effect, or vice versa. Similarly, it may be difficult to characterize a standard which is clearly discriminatory as belonging to one category as opposed to the other.

To illustrate, Sopinka J. stated:

> We have a vague general rule that requires employees to work all working days. There is no evidence of any consideration being given to the religious practices of employees in the adoption of the general rule.[28]

Wilson J., however, went a step further:

> the only way to characterize the respondent's rule would appear to be "mandatory attendance on Mondays except in case of illness or other emergencies, religious obligation not being included as an emergency for this purpose." Stated in the obverse, the rule prohibited Monday absences due to religious obligation.[29]

A well informed employer might have gone the rest of the way and refused to hire observant members of the complainant's religion because they would be unavailable for work on Mondays. In this manner, a clear case of adverse effect discrimination would have been recharacterized as direct discrimination. However, a member of the World Wide Church of God who observed its holy days would experience precisely the same consequences.

Virtually any rule or standard which causes adverse effect discrimination can be recharacterized as direct discrimination. If a blind person applies for a job as a stenographer, for example, an employer could assess all applicants objectively with a typing test. Using a conventional computer, a blind person could not pass the test. The test would therefore adversely affect a blind applicant. Had the computer been fitted by the employer with a voice synthesizer, a blind person could have competed on an equal basis. Alternatively, an employer

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[28] *Supra*, note 3 at 529.
[29] *Ibid.* at 501-02.

might refuse blind persons the opportunity of taking the test altogether, which would constitute direct discrimination. Again, from the perspective of the blind applicant, the result would be the same whether the barrier barring the way to the job was characterized as direct or adverse effect discrimination.

Clearly, the outcome of the case should not hinge on the way discrimination is characterized by the court. According to the majority opinion in *Alberta Dairy Pool*, however, this is precisely what would occur. An employer would not be required to accommodate as long as the discrimination was direct. The minority view eliminates the significance of characterizing discrimination by holding that the duty to accommodate is an integral part of the guarantee of equality contained in human rights legislation.

V. Direct and Adverse Effect Discrimination

Sopinka J. appears to be genuinely perplexed as to why Wilson J. is prepared to do violence to the language of the statute in order to achieve differing results in cases of direct as opposed to adverse effect discrimination.[30] Wilson J.'s reasoning is derived primarily from the writing of William Pentney,[31] which she paraphrases as follows:

> the economic considerations that are factored into the determination of whether accommodation imposes undue hardship will rarely be germane to a B.F.O.Q. defence. Similarly, the good faith of the employer is a central concern where the rule singles out a particular group for adverse treatment. There is less reason to be suspicious of the employer's motives in the case of a rule which is neutral on its face and generally applicable to all employees.[32]

With regard to the first point made by Wilson J., that undue hardship is not relevant to cases of direct discrimination, reference need only be made to *Saskatoon Firefighters*. In that case, the Court required that the employer avoid stereotypes and assess the capacity of each individual to perform the job. The limit on the obligation to individualize was not well defined. In consecutive sentences in the judgment of Sopinka J., the employer's obligation is variously described as being whenever "possible," then whenever "practical." Relevant factors include cost and public safety. While it is too early to say that "undue hardship" and "business necessity" can be used interchangeably, there is no principled reason why an employer should be under any different obligation to stop direct, as opposed to adverse effect, discrimination.

Similarly, the second statement by Wilson J., that good faith is the central concern in cases of direct but not adverse effect discrimination, is not persua-

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[30]*Ibid.* at 526-28.

[31]W.S. Tarnopolsky & W.F. Pentney, *Discrimination and the Law*, Sixth Cumulative Supplement (Don Mills, Ont.: DeBoo, 1989) at 28.

[32]*Supra*, note 3 at 516.

sive. The use of discriminatory stereotypes may be totally innocent and yet have as severe an impact on individuals affected as if discrimination had occurred in bad faith. For example, an employer may have no idea that a voice synthesizer attached to a computer would enable a blind person to be a productive secretary. A decision to refuse a typing test to a blind applicant could thus be made in perfect good faith. More culpable would be a decision to allow blind applicants to take an unmodified test where the potential employer knew that a modification to the computer would enable blind applicants to be competitive with sighted ones.

In the *Action Travail* case,[33] the Supreme Court recognized that employers are becoming more sophisticated and subtle in the distinctions they make with respect to employees. They are responding to efforts to make them equal opportunity employers with discriminatory practices which are difficult to detect but just as harmful in their consequences as their more blatant predecessors.

The motivation of a respondent is relevant in a human rights case because under the rule in *Etobicoke Firefighters*, "bad faith" precludes the employer from relying upon "business necessity" when attempting to establish that a rule is a B.F.O.Q. Wilson J. does not explain why an employer who maliciously engages in adverse effect discrimination should be able to rely upon the defence of "undue hardship," but she does acknowledge that such practices must be "rationally connected" to the employer's business activity.[34]

A third argument relied upon by the majority is that direct differs from adverse effects discrimination in that the former harms more people. Wilson J. points out that rules which directly discriminate impose a burden on all persons who are subject to them.

> This is distinguishable from a rule which is neutral on its face but has an adverse effect on certain members of the group to whom it applies. In such a case the group of people who are adversely affected by it is always smaller than the group to which the rule applies. On the facts of many cases the "group" adversely affected may comprise a minority of one, namely the complainant.[35]

As she did with her first two arguments, Wilson J. is making a generalization, and once again the generalization cannot be substantiated. In order to establish that a rule based upon a stereotype is direct discrimination, it is not necessary to prove that it is discriminatory towards all or even most persons who are sub-

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[33]*Supra*, note 19.

[34]*Supra*, note 3 at 519-20, citing *O'Malley*, *supra*, note 10 at 551, which in turn is derived from the test articulated in *Griggs* v. *Duke Power*, 401 U.S. 424 (1970) at 431-32. The remedy in the *Griggs* case was to strike down the offending portion of an employment test, despite the fact that it was superficially racially neutral, because it had an adverse effect and could not meet the "rational connection" test.

[35]*Alberta Dairy Pool*, *ibid.* note 3 at 514-15.

ject to the rule. According to the reasoning in *Saskatoon Firefighters*, a rule may be justifiable in relation to all others subjected to it, but remains discriminatory if it is not justifiable in the case of an individual complainant.[36]

Conversely, a case of adverse effect discrimination may affect the lives of thousands or tens of thousands of people. The *Huck* case did not hinge upon whether Mr. Huck's preferred location within the particular theatre was wheelchair accessible. It hinged upon whether disabled theatre patrons had the same choices open to them as were open to ambulatory ones. A remedy which granted disabled people a comparable range of choices would benefit all future patrons in wheelchairs. Barriers to equality, whether direct or adverse effect, are thus equally susceptible of causing harm to both an individual or a huge group.

VI. B.F.O.Q. and the Duty to Accommodate

Up to this point, I have attempted to demonstrate that the reasons offered by the majority in *Alberta Dairy Pool* to justify its "either ... or" approach — either B.F.O.Q. or duty to accommodate, based upon how the discrimination is characterized — are not satisfactory. The minority rejected this approach and held that the duty to accommodate is an integral part of the B.F.O.Q. defence. It did not articulate any formula (*i.e.*, whether to use one test before or after the other) for applying its "integrated" approach. Because it leaves so many questions unanswered, it is difficult to assess whether the different approaches articulated by the majority and minority will produce different results.

Taking the case of the blind secretary as an example: it is reasonable to assume that where the allegation of discrimination was based on the failure to provide a voice synthesizer attachment to the computer (*i.e.*, adverse effect discrimination), the employer would be required to accommodate the secretary up to the point of "undue hardship," whichever of the two approaches is used. The only exception might be where the employer's conduct was maliciously motivated. In such a case, the employer might not be able to assert an "undue hardship" defence, because it could not meet the subjective element of the B.F.O.Q. defence. Otherwise, the result would be the same.

Comparisons are more difficult in circumstances where the employer has a rule that a blind person may not apply for a secretarial position (*i.e.*, direct discrimination). I am assuming that the blind secretary cannot perform the duties of the job without the voice synthesizer, but with it would be the most qualified applicant. The question is whether the employer is under a duty to make the accommodation.

When applying the majority's "either ... or" approach, the issue would be whether there could be a complaint based on both direct discrimination (*i.e.*, the

[36]*Supra*, note 17.

rule) and adverse effect discrimination (*i.e.*, no voice synthesizer). Assuming there could be, the only issue would be whether the accommodation would be made before or after the rule was measured against the B.F.O.Q. test. It makes little sense to require an employer to make the accommodation, but to deny the blind secretary the benefit of it.

Under the minority's integrated approach, a complaint alleging adverse effect discrimination would not have to be made. This simplifies the human rights process and minimizes the risk of technical objections and the need to assert facts to which the complainant might not have access. Once a finding of direct discrimination was made, the employer's rule could be struck down and the employer could be found to have failed to accommodate. Again, the only issue would be whether the rule is assessed in isolation from the obligation to accommodate. At this point, it would appear most likely that the rule would be evaluated after the accommodation had been made. I make this assumption because the purpose underlying human rights legislation is to assure members of disadvantaged groups, such as the blind secretary, equality of opportunity.

Thus, when determining whether discrimination has occurred, the contrasting approaches of the majority and the minority in *Alberta Dairy Pool* will likely make little practical difference. There is a real difference between imposing the duty to accommodate and deciding that a rule is not a B.F.O.Q. The former requires that positive steps be taken; the latter that steps being taken be stopped. This is to do no more, however, than to restate the difference between direct and adverse effect discrimination. Because the characterization of discrimination as either direct or adverse effect is problematic,[37] the apparent result in *Alberta Dairy Pool* (*i.e.*, an insignificant distinction being made between the approaches of the majority and the minority) is both the logical and the desirable result.

While such a result may be desirable, it is not a foregone conclusion. The rationale adopted by the majority to justify its approach suggests that future cases may bring new significance to the distinction between direct and adverse effect discrimination.

VII. Undue Hardship

The majority in *Alberta Dairy Pool* justifies making a distinction between direct and adverse effect discrimination for the following reasons:

(i) it will not be necessary to impose financial limits on the obligation to stop direct discrimination, but it will routinely be necessary in cases of adverse effect discrimination.

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[37]See *supra*, Part IV, "Characterizing Discrimination," text accompanying notes 28-30.

(ii) the employer's motives are likely to be more reprehensible in cases of direct discrimination; and

(iii) direct discrimination tends to harm groups of people while adverse effect discrimination affects individuals.[38]

If these reasons could be substantiated, they might serve as a justification for the distinction, and for placing a heavier duty to stop discriminating on employers in cases of direct than adverse effect discrimination. I have attempted to demonstrate that these reasons cannot be substantiated. Even if they could, however, I would argue that there are a number of overriding considerations mitigating against imposing a heavier duty in cases of direct discrimination.

First, the majority took judicial notice of target groups which tended to require accommodation, by quoting from the *Special Report to Parliament on the Effects of the Bhinder Decision on the Canadian Human Rights Commission.*[39] If the result in *Alberta Dairy Pool* will be to place a heavier onus on employers in cases of direct discrimination, the result will be to judicially impose an approach where levels of court scrutiny will vary according to the way in which the discrimination is characterized. Discrimination against groups which typically experience adverse effect discrimination, such as persons with disabilities and members of religious minorities, would be treated differently under human rights legislation than would groups which tend to experience direct discrimination, such as members of visible minorities. While this type of "levels of scrutiny" approach has emerged in constitutional jurisprudence in the United States, one will search in vain for legislative or judicial precedent in Canada to support it. The Joint Committee of the Senate and House of Commons on the Constitution of Canada expressly rejected such an approach when considering the equality clause incorporated into the *Charter of Rights and Freedoms* in s. 15.[40]

Closely linked to the "levels of scrutiny" interpretation favoured by the United States Supreme Court has been a judicial diminution of the duty to accommodate. When assessing the "undue hardship" limit on the duty under American human rights legislation, the United States Supreme Court requires only those accommodations which may be achieved at no more than *de minimis*

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[38]*Supra*, note 3 at 512-16.

[39]*Ibid.* at 512, quoting the Canadian Human Rights Commission Report to Parliament, *supra*, note 4 at 4:

> Currently the Commission is investigating 528 complaints alleging discrimination in employment. Potentially, 33% of the complaints which concern religion or disability and 5% of the complaints dealing with sex discrimination might be affected by the *Bhinder* decision.

[40]*Minutes of Proceedings and Evidence* Issue No. 10 (21 November 1980) at 58-60, see Baker, *supra*, note 1 at 554, n. 270.

cost to the employer.[41] Understandably, this has given the duty to accommodate some bad press. At one point, the duty came to signify an obligation to do nothing more than make *ad hoc*, highly individualized changes. Any equality seeking group worth its salt would feel aggrieved to learn that systemic remedies would be unavailable, displaced by an obligation to make a symbolic gesture towards equality.[42] This restrictive jurisprudence is gradually being overturned by more recent human rights legislation in the United States, such as the *Americans with Disabilities Act*,[43] which clearly mandates a fundamental restructuring of American society. The duty to accommodate has taken on an entirely new meaning in the United States as a consequence of these developments.

While Canadian case law remains sparse, it appears that we have taken a different approach than the Americans. The clearest Canadian statement with respect to the extent of the duty to accommodate is to be found in the *Guidelines for Assessing Accommodation Requirements for Persons with Disabilities*,

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[41]*Transworld Airlines Inc.* v. *Hardison*, 432 U.S. 63 (1977).

[42]See *e.g.* C.A. MacKinnon, "An Overview of Equality Theories" (Address to the National Meeting of Equality Seeking Groups, Ottawa, January 1989) [unpublished].

[43]Pub. L. No. 101-336, 104 Stat. 327 (1990), s. 101: The obligation to accommodate in employment is defined as:

> (9) Reasonable Accommodation. The term "reasonable accommodation" may include:
> (a) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
> (b) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.
> (10) Undue Hardship.
> (a) In General. The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (b).
> (b) Factors to be Considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:
> (i) the nature and cost of the accommodation needed under this Act;
> (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
> (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
> (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

issued by the Ontario Human Rights Commission in 1989.[44] The *Guidelines* make it clear that accommodations for persons with disabilities are to "maximize their integration and ... promote their full participation in society."[45] In other words, the accommodation must involve removing the barrier which causes the adverse effect; an *ad hoc* or symbolic gesture will not be sufficient. Let there be no question of a *de minimis* interpretation of undue hardship here:

> Undue hardship will be shown to exist if the financial costs that are demonstrably attributable to the accommodation of the needs of the individual with a disability, and/or the group of which the person with a disability is a member, would alter the essential nature or would substantially affect the viability of the enterprise responsible for accommodation.[46]

The majority in *Alberta Dairy Pool* lists a number of factors which it states are to be balanced "against the right of the employee to be free from discrimination.[47] Wilson J. suggests that a "balancing of factors" will occur in cases of adverse effect discrimination, which apparently means this will not take place if the discrimination is direct. In contrast, the minority does discuss "balancing interests" when assessing the extent of the duty inherent in the B.F.O.Q., instead making clear that "a[n accommodation] policy may be a reasonable alternative to a practice that entails an *ad hoc* accommodation of individual employees."[48] Whatever else may be said for the minority decision, it is clear that the extent of the duty to accommodate is the same in cases of direct and adverse effect discrimination.

VIII. Resolving the Dilemma of Difference: A Question of Remedies

Finding a solution to the dilemma of difference requires more than a simple finding by a court or tribunal that discrimination has taken place. Often, the greater challenge is fashioning a suitable remedy. Suitability is not an issue of whether the discrimination was direct or adverse effect, but rather, whether the remedy should be individualized or systemic. As I have demonstrated in earlier discussion of *Saskatoon Firefighters*[49] and *Huck*,[50] discrimination may affect a specific individual in direct discrimination cases and be widespread in cases of adverse effect discrimination. In either case, one would normally expect any remedy granted to end the discrimination, unless the full remedy would cause undue hardship, in which case a less complete remedy would be substituted.

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[44]Ontario Human Rights Commission, *Guidelines for Assessing Accommodations Requirements for Persons with Disabilities* (Toronto: Ministry of Citizenship, 1989) [hereinafter *Guidelines*].

[45]*Ibid.* at 5.

[46]*Ibid.* at 8.

[47]*Supra*, note 3 at 520-21.

[48]*Ibid.* at 529.

[49]*Supra*, note 17 and accompanying text.

[50]*Supra*, note 23 and accompanying text.

Presumably, priority would be attached to remedying the circumstances affecting the complainant (or complainants). The typical remedy in cases of direct discrimination is to strike down the employer's rule entirely, which is a systemic remedy. Courts and tribunals assume that the employer will choose to substitute a new non-discriminatory rule for the one found to be discriminatory. The availability of a non-discriminatory alternative may have been fully explored as part of establishing that the original rule was not a B.F.O.Q., nevertheless, the remedy is limited to striking down the original rule.

In cases of adverse effect discrimination, in contrast, the typical remedy involves directing that the employer take some positive action in order to cease discriminating. The action ordered is often specific to the complainant, but may also involve a systemic remedy which benefits a broader class of persons.

The tendency to grant systemic remedies in cases of direct discrimination and individualized ones in cases of adverse effect discrimination has reinforced the mistaken notion that the obligation to avoid discriminating is heavier in the former as compared to the latter. I will conclude this comment by suggesting an alternative approach to remedying cases of discrimination, an approach which does not confuse the complex process of selecting remedies with the extent of the obligation to avoid discriminating.

Except when an employer is acting affirmatively, racial differences between employees should be utterly irrelevant to any decision the employer must make. In cases of racial discrimination, an individualized remedy would thus not be appropriate. A racially based practice or rule which is not affirmative action will deny opportunities to others in similar circumstances and should be struck down entirely. If the discriminatory aspects of a rule are confined to one element, then it is only that element which needs to be struck down. Whether the discrimination is direct or adverse effect does not change what must be the irrelevancy of race to decisions made by the employer. In such cases, whether the discrimination is direct or adverse effect, the irrelevance of the difference makes a systemic remedy essential to the achievement of the broad public policy objective underlying human rights legislation.

In a second group are cases where the enumerated grounds of discrimination prohibited by statute may serve as surrogates for other relevant criteria. Thus, for example, a prohibited ground such as age (or a non-prohibited ground such as years on the job) may serve as a surrogate for another factor which is directly relevant to the actual performance of a job: here for example, the risk of heart failure. Since it can be statistically proven that older people are at greater risk of heart failure, employers may substitute the stereotype for the assessment of the directly relevant factors themselves. Where a surrogate factor is used, it is important to ensure that individuals do not suffer unnecessary discrimination. Conversely, where the direct factor (*i.e.*, risk of heart failure) is

misapplied in circumstances in which it is irrelevant, the result may be adverse effect discrimination against older persons. In such cases, the goal in fashioning a remedy is to establish non-discriminatory criteria, by striking down rules where surrogacy is not necessary and rules based on direct factors which are unnecessarily broad.

Sometimes a discriminatory rule based on a surrogate will be upheld, as it was in *Saskatoon Firefighters*. In such a case, however, it may still be possible to accommodate those who have been or may be hurt by the rule. Thus, it may have been possible in that case to modify the jobs of firefighters over the age of 60 years, by substituting safer tasks for those which involved unacceptable risks, without causing the employer undue hardship.

In cases where the discriminatory categories used are surrogates, remedies requiring the replacement of the surrogate with direct criteria should be explored first. Next, one should consider whether the rule was imposed in good faith, and then whether it is overly broad. Finally, the imposition of the duty to accommodate should be considered, to determine first whether the employee can comply with the rule, and ultimately whether an accommodation can be made to restructure the work so that the rule itself becomes irrelevant.

In cases where the protected category itself appears to be directly relevant to a determination (*e.g.*, a disability case involving visual acuity standards), the same progression should be followed, except for the initial stage of substituting the actual for the surrogate standard.

Unfortunately, finding the appropriate remedy is not always this mechanical. Resolving the dilemma of difference often requires that additional elements be added before a formula can be said to exist for remedying the discrimination.

Most vexing is the problem of divergent opinions within the disadvantaged group. Disagreement may exist among members either about the ultimate goal of equality or the means of achieving it. Martha Minow cites the example of two educators who differ on the value of bilingual education for children who have been raised in a Spanish speaking environment:

> Both ... understood schooling as a process of transferring loyalties and transforming identities. One argues that to do so undermines the self-esteem of the "different" child. The other maintains that to do otherwise risks perpetuating exclusion on the basis of that difference. Acknowledgement of difference can create barriers to important parts of the school experience and delay or derail successful entry into the society that continues to make difference matter. Failure to acknowledge difference can leave the child scarred by silent non recognition and implicit rejection.[51]

[51]M. Minow, *Making All the Difference* (Ithaca, N.Y.: Cornell University Press, 1990) at 28-29.

Both educators were raised in Spanish speaking homes, educated in a unilingual English system and agree that the ultimate objective of the educational system is to enable the child to function effectively in an English speaking environment. Both sides can cite evidence to support their position. Two children sharing the same "difference" could respond very differently to a bilingual, as opposed to a unilingual English education system. Difference poses a dilemma in this case because there is no right or wrong answer for such children. The issue is whether any choices are possible, and who should have the responsibility of making them.

Resolving such disputes involves considering the rights of the individual, the collective rights of the disadvantaged group of which the person is a member and the responsibility of the particular public authority to make choices between a range of alternatives. Thus, even where the school can be proven to have discriminated against a linguistic minority, the choice of remedy may remain a dilemma (*i.e.*, equal unilingual English or equal bilingual Spanish-English). Nonetheless, this is a dilemma which a court may ultimately be required to resolve, as was the United States Supreme Court in *Brown* v. *Board of Education of Topeka*.[52] In that case, the Court selected a sweeping, systemic remedy, which has since been credited with leading the way towards the integration of black and white children in public schools. In circumstances where the evidence is not as determinative, or where no consensus regarding goals exists within the group which has been discriminated against, a court should choose a more individualistic remedy and consider providing the victims with as much choice as possible in its fashioning.

Where a general consensus does exist within a disadvantaged group favouring the ultimate goal of either inclusion (*e.g.*, within the community of disabled persons) or separateness (*e.g.*, an aboriginal right to "self-government"), an *ad hoc* solution will rarely suffice. Even where a person's disability is virtually unique, the preferred remedy would generally be to require that an employer review its practices to minimize barriers to all disabled persons, and establish policies which anticipate the fact that in the future, both incumbents and applicants may require accommodation. Similarly, cases of direct discrimination against aboriginal persons will often require more than simply ordering that direct discrimination cease. The court or tribunal should also consider ordering that positive steps be taken to create an environment where a critical mass exists within which equality can flourish.[53]

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[52]347 U.S. 483 (1954).

[53]An early and rare example of resolving the dilemma of difference is *Canard* v. *A.G. Canada*, [1972] 5 W.W.R. 678, 30 D.L.R. (3d) 9 at 22 (Man. C.A.), Dickson J.A., subsequently overturned in *A.G. Canada* v. *Canard* (1975), [1976] 1 S.C.R. 170, [1975] 3 W.W.R. 1.

Human rights legislation often expressly gives tribunals the authority to fashion remedies which extend beyond the specific act of discrimination which is in dispute between the parties. For example, the *Canadian Human Rights Act*, following a finding of discrimination, gives a Tribunal discretion to order:

> (a) that such person cease such discriminatory practice and, in order to prevent the same or a similar practice from occurring in the future, take measures, including
> (i) adoption of a special program, plan or arrangement referred to in subsection 15(1), or
> (ii) the making of an application for approval and the implementing of a plan pursuant to section 15.1,
>
> in consultation with the Commission on the general purposes of those measures;[54]

Thus, a Tribunal may order that a discriminatory practice cease not only in relation to the particular complainant, but in relation to everyone affected by the policy. This is in fact the typical remedy ordered by human rights tribunals when a rule is found not to be a B.F.O.Q. What is noteworthy about the legislation is that a tribunal has the authority to order an extensive positive remedy, *i.e.*, a special project which will accommodate not only the complainant, but any others in comparable circumstances.

This power to grant broad systemic remedies is the flip side of taking into consideration the existence of systemic policies when assessing undue hardship in the case of an individual complainant. Both Wilson J. and Sopinka J. noted in *Alberta Dairy Pool* the absence of any employer policy to accommodate the practice of a minority religion. Sopinka J. pointed out that the existence of such a policy might serve to justify an otherwise discriminatory failure to accommodate:

> An employer with a large number of employees of many different religions may be able to discharge the duty inherent in the BFOQ by adopting a policy with respect to the accommodation of the religious beliefs of its employees. Such a policy may be a reasonable alternative to a practice that entails an *ad hoc* accommodation of individual employees. This is one of the advantages of dealing with the duty to accommodate in the context of the B.F.O.Q. defence rather than at large. An employer who has not adopted a policy with respect to accommodation and cannot otherwise satisfy the trier of fact that individual accommodation would result in undue hardship will be required to justify his conduct with respect to the individual complainant.[55]

To date, few systemic remedies have been ordered by the courts beyond simply striking down rules which are directly discriminatory. The notable exception has been the *Action Travail* case.[56] Until more employers develop

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[54]*Canadian Human Rights Act*, s. 53(2).
[55]*Supra*, note 3 at 529.
[56]*Supra*, note 19 and accompanying text.

employment equity plans, which will in all likelihood only occur following the enactment of mandatory employment equity legislation, the interrelationship between such plans and human rights legislation will only occur in exceptional circumstances.

Conclusion

This is as far as the existing equality framework contained in human rights legislation and Supreme Court of Canada jurisprudence would appear to extend. The *Alberta Dairy Pool* case makes it clear that a distinctively Canadian approach to equality is continuing to emerge. What is fascinating is how the Court has assumed the leadership role in building this framework. Legislatures have been slow to respond to judicial setbacks in discrimination cases such as *Bhinder*. Only in Ontario can it be said that the legislative branch remains in the forefront of applying equality principles.[57]

The Supreme Court has been eclectic, creative and progressive in its approach. It will require all of these attributes and more as it seeks to deal with new issues on the horizon, such as measuring equality between the non-aboriginal majority and aboriginal people who demand the right to remain separate and to engage in self-government,[58] or establishing benchmarks for equality as women argue for a relational approach which seeks to end male domination of social institutions.[59]

The majority opinion in *Alberta Dairy Pool* attempted to emphasize the real or perceived differences which flow from holding an employer to the B.F.O.Q. standard, as opposed to the accommodation standard. It is unfortunate that the framework selected was not consistent with the goals established by the Court in earlier jurisprudence. As a result, the decision may create hardship at least in the short-term, as accommodations in cases of direct discrimination, and the striking down of discriminatory rules in cases of adverse effect discrimination, may be impeded. As I have demonstrated, this type of result need not follow, but the possibility clearly exists. In any event, unnecessary attention will be paid to the characterization of discrimination as direct or adverse effect. Perhaps most harmful is the suggestion by the majority that the duty to accommodate requires only that *ad hoc*, individualistic action be taken. This is inconsistent with the goal, so clearly identified in the *O'Malley*, *Bhinder* and *Huck*

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[57]For a description of how Ontario has consistently reversed judicial setbacks, see Baker, *supra*, note 1.

[58]Statement of Meeting of Ministers with the Assembly of First Nations (20-21 March 1986, Ottawa) per Chief Joe Mathias (Squamish Nation) and Chief Gary Potts (Teme-Augama Anishnabai).

[59]C. Gilligan, *In a Different Voice* (Cambridge: Harvard University Press, 1982); C.A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987) and *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989).

decisions, of ending generalized employer practices which adversely affect disadvantaged groups.

The minority opinion in *Alberta Dairy Pool* is consistent both with the language of the statute being applied and the framework which has been evolving in successive decisions of the Supreme Court.[60] What it lacks is the adventurous quality of the majority opinion, which, for all its flaws, seeks to unravel the remaining dilemmas of difference.

Canadians have generally been well served by a Supreme Court which has been willing to listen carefully, and think deeply, while fashioning norms of equality which will change the lives of disadvantaged persons for the better. The *Alberta Dairy Pool* case confirms that while that process is far from complete, it is still very much alive.

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[60]An example of the importance of statutory language is the Ontario *Human Rights Code, 1981*, *supra*, note 11, which expressly requires that accommodation be an option in cases of direct discrimination (s. 16) and pointedly omits reference to business inconvenience as a consideration when assessing "undue hardship" (ss 10 and 16). Business inconvenience or "undue interference in the operation of the employer's business" was held in *O'Malley*, *supra*, note 10 at 555, to constitute undue hardship. By removing the reference to "business inconvenience" on Third Reading, the Ontario Legislature clearly intended to impose a heavier duty to accommodate. Ontario, *Hansard*, 2nd Sess., 33d Leg. (9 December 1986) at 4060-64.