Of Forest Fires and Systemic Discrimination: A Review of British Columbia (Public Service Employee Relations Commission) *v.* B.C.G.S.E.U.

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This case comment addresses the recent contributions to human rights law developed in the Supreme Court of Canada's decision *British Columbia (Public Service Employee Relations Commission)* v. *B.C.G.S.E.U.* The Court held that the aerobic standard for evaluating the fitness of forest firefighters was discriminatory towards women. The Court ordered the reinstatement of Tawney Meiorin, a female forest firefighter who had lost her employment by reason of failing the mandatory provincial fitness testing. The author maintains that the Court significantly advances human rights analysis by articulating a unified approach to human rights defences that is not premised on any preliminary classification of the discrimination as either direct or adverse effect. The Court also highlights the importance of an employer's duty to accommodate as an integral dimension of equality. The author suggests, nonetheless, that further elaboration of certain aspects of discrimination law will be required in future cases. More specifically, the concept of adverse effect discrimination should be retained and clarified to ensure that hidden and institutionalized forms of inequality are identified and remedied. Furthermore, there remains a need to ensure that discriminatory standards, rules, or policies are fully scrutinized and potentially revised before assessing individual accommodation strategies. Finally, the approach to health and safety risks in the context of human rights adjudication deserves further discussion.

Cette chronique aborde les contributions récentes aux droits de la personne élaborées par la Cour suprême du Canada dans la décision *Colombie-Britannique (Public Service Employee Relations Commission)* c. *B.C.G.S.E.U.* La Cour a conclu qu'une des normes minimales de condition physique établies par le gouvernement pour ses pompiers forestiers était discriminatoire à l'égard des femmes. Elle a par conséquent ordonné la réintégration de Tawney Meiorin, une pompière forestière qui avait été congédiée après avoir échoué le test obligatoire. L'auteure soutient que la Cour a apporté une contribution significative au développement de l'analyse des droits de la personne en adoptant une approche unifiée qui n'est pas basée sur une classification de la discrimination dans la catégorie de la discrimination «directe» ou dans celle de la discrimination «par suite d'un effet préjudiciable». La Cour insiste également sur l'importance de l'obligation d'accommoder de l'employeur en tant que partie intégrante du droit à l'égalité. L'auteure suggère toutefois qu'il sera nécessaire, dans des décisions futures, d'élaborer davantage certains concepts du droit relatif à la discrimination ; notamment, la notion de discrimination par suite d'un effet préjudiciable devrait être retenue et clarifiée pour permettre d'identifier et d'éliminer des formes cachées et institutionnalisées d'inégalité. Il faut également s'assurer que les standards, règles ou politiques discriminatoires soient minutieusement analysés et éventuellement révisés avant que la pertinence de stratégies d'accommodement individuelles ne soit évaluée. Par ailleurs, l'approche réservée aux risques de santé et de sécurité dans le contexte des décisions de droit de la personne appelle une discussion plus approfondie.

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Introduction

The case of *British Columbia (Public Service Employee Relations Commission)* v. *British Columbia Government and Services Employees' Union (B.C.G.S.E.U.)*[1] involved allegations of gender discrimination against women working in a domain traditionally occupied by men, forest firefighting. Tawney Meiorin challenged the validity of an employment fitness test on the grounds that it resulted in sex discrimination. In exploring the issues of systemic discrimination raised in this case, forest firefighting can provide some insights. Forest firefighters know that addressing a problem while it is small is fundamental to success, that vigilance is critical, that fighting fires cannot be done alone, and that seemingly small human errors can cause unthinkable harm and damage. Systemic discrimination—pervasive and embedded in institutional practices and policies—represents the forest fire that has not been prevented. And yet, while we all recognize the urgency of stopping forest fires, there is no similar urgent call to quell systemic inequality. It seems apt therefore that the Supreme Court of Canada should elaborate some critical ideas about systemic discrimination and human rights law in the context of forest firefighting.

In this case comment I review the significant and positive contributions to human rights law developed in the *Meiorin* case. The most notable contribution that the case makes to human rights law is the articulation of a unified approach to human rights defences which applies regardless of whether the discrimination is direct or indirect. The Court effectively eliminates the confusion and unfairness that sometimes resulted from the previous bifurcated approach. While *Meiorin* is to be applauded for integrating the law of human rights defences, it raises new concerns that deserve consideration. I highlight three aspects of the judgment that remain in need of further elaboration or clarification. First, I consider the continuing relevance of adverse effect discrimination, despite the Court's rejection of the relevance of classifying discrimination for the purpose of deciding which human rights defences and remedies are available. Second, I examine the interplay between individual accommodation and a transformative and substantive approach to equality. It is important to ensure that the institutional change the Court endorses in *Meiorin* is not inadvertently overlooked in the subsequent application of its new integrated test. Third, I discuss the appropriate standard for assessing health and safety risks. A review of the Court's application of the integrated test in its subsequent decision, *British Columbia (Superintendent of Motor Vehicles)* v. *British Columbia (Council of Human Rights)*,[2] reveals that the issue of risk remains complex and unresolved. It also raises questions about the clarity of the

[1] [1999] 3 S.C.R. 3, 176 D.L.R. (4th) 1 [hereinafter *Meiorin* cited to S.C.R.].

[2] [1999] 3 S.C.R. 868, 181 D.L.R. (4th) 385 [hereinafter *Grismer* cited to S.C.R.].

new test itself in terms of whether the more expansive applicability of the duty to accommodate actually promotes a more substantive and transformative approach.

I. Facts and Judgments

Tawney Meiorin was employed by the Province of British Columbia as part of an Initial Attack Forest Fighting Crew. The crew's responsibility was to suppress forest fires while they were still small and relatively easy to contain. Ms. Meiorin worked on the crew for three years and had received positive job evaluations. As a result of a coroner's report, the province decided to introduce a series of fitness tests for forest firefighters in 1993. The fitness tests included a running test, an upright rowing exercise, and a pump carrying/hose dragging exercise. Each test was to be completed within a stipulated time. As part of the mandatory fitness testing, Ms. Meiorin was required to run 2.5 kilometres in eleven minutes. She failed to do so despite four attempts. The running test was designed to measure aerobic capacity.[3]

As a result of her failure to succeed in the fitness tests, Ms. Meiorin lost her employment. Her union then filed a grievance on her behalf claiming discrimination on the basis of sex.[4] The union argued in particular that the aerobic standard constituted a form of adverse effect discrimination. The union suggested that women should be tested according to a lower aerobic standard. The union also maintained that even though Ms. Meiorin did not pass the running test, given her positive work appraisals, her experience on the job, and the fact that she almost met the required standard she should be accommodated and reinstated to a firefighting position, or alternatively, relocated to some other job within the ministry.[5]

Deciding in Ms. Meiorin's favour, the arbitrator concluded that the aerobic standard resulted in adverse effect discrimination because of its disproportionately negative effect on women. He also held that the Province of British Columbia had failed to prove that accommodating Ms. Meiorin by continuing her employment would pose a safety risk to herself, her co-workers, or the public. The employer, therefore, had not satisfied its duty to accommodate Ms. Meiorin, and the arbitrator ruled that she should be reinstated.[6]

The B.C. Court of Appeal quashed the arbitrator's award and concluded that the province had not discriminated against Ms. Meiorin. The court maintained that the arbitrator had concluded that the running test was necessary to the safe and efficient

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[3] *Meiorin, supra* note 1. See review of the facts at paras. 4-12.

[4] See *British Columbia (Public Service Employee Relations Commission) and B.C.G.S.E.U. (Meiorin)* (1996), 58 L.A.C. (4th) 159 (B.C.), Chertkow.

[5] For a summary of the union's arguments, see *ibid.* at 161.

[6] *Ibid.* at 208.

performance of the work. The court also concluded that Ms. Meiorin had been accommodated because she had received individualized testing. Finally, the court noted that to lower the aerobic standard for women ouly would result in reverse discrimination against male employees.[7]

The Supreme Court of Canada unanimously allowed the appeal, concluding that the aerobic standard was discriminatory and that the government had failed to prove that it was necessary to ensure the safe performance of the work. The Court therefore ordered the reinstatement of Ms. Meiorin with compensation for lost wages and benefits.[8] In making its decision, the Supreme Court took the opportunity to reassess its previous approach to the key concepts of human rights defences, most specifically the bona fide occupational requirement and the duty to accommodate. It is in its elaboration of these two concepts that the judgment makes its most significant contribution to human rights law.

II. A Unified Approach and an Extended Duty to Accommodate

Prior to *Meiorin*, the Court had articulated separate human rights defences depending on whether the alleged discrimination was direct or adverse effect. For cases involving direct discrimination, the applicable human rights defence was the bona fide occupational requirement or qualification ("BFOR" or "BFOQ").[9] Pursuant to the Supreme Court's earlier jurisprudence,

> To be a *bona fide* occupational qualification and requirement a limitation ... must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved [the subjective element] ... In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public [the objective element].[10]

In applying this test the Court had also found that where individualized testing was feasible, employers should not rely on general standards to exclude categories of

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[7] *British Columbia (Public Service Employee Relations Commission)* v. *B.C.G.S.E.U.* (1997), 149 D.L.R. (4th) 261, 37 B.C.L.R. (3d) 317 (C.A.).

[8] *Meiorin, supra* note 1.

[9] The emergence of a bifurcated approach can be traced to Wilson J.'s decision in *Central Alberta Dairy Pool* v. *Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489, 72 D.L.R. (4th) 417 [hereinafter *Alberta Dairy Pool* cited to S.C.R.].

[10] *Ontario (Human Rights Commission)* v. *Etobicoke (Borough of)*, [1982] 1 S.C.R. 202 at 208, 132 D.L.R. (3d) 14 [hereinafter *Etobicoke* cited to S.C.R.].

workers.[11] Of note is the absence of any duty to accommodate individual employees pursuant to the BFOQ test.[12]

In cases of adverse effect discrimination, the BFOQ defence was held not to apply. Instead, an employer was required to show "(1) that there is a rational connection between the job and the particular standard, and (2) that it cannot further accommodate the claimant without incurring undue hardship."[13] Wilson J. suggests in *Alberta Dairy Pool* that, in most adverse effect discrimination cases, the neutral standard should remain in place and individual employees adversely affected by the standard should be accorded special accommodation.[14]

Numerous critiques were made of this bifurcated or conventional approach. McLachlin J. (as she then was) reviews these critiques in outlining what she refers to as "seven difficulties with the conventional approach."[15] One of the most fundamental components of McLachlin J.'s analysis is her critique of the malleability of the direct versus adverse effect discrimination distinction. In many cases it is possible to conceptualize a problem as either direct or indirect discrimination. The example McLachlin J. uses is a mandatory pregnancy test before commencing employment. One could argue that the employment test constitutes a form of direct discrimination against women. Alternatively, one could argue that the employment test "is a neutral rule because it is facially applied to all members of a workforce and its special effects

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[11] See *Saskatchewan (Human Rights Commission)* v. *Saskatoon (City of)*, [1989] 2 S.C.R. 1297 at 1313-14, 65 D.L.R. (4th) 481.

[12] The idea that the duty to accommodate was conceptually inconsistent with the BFOQ emerged in McIntyre J.'s judgment in *Bhinder* v. *Canadian National Railway Co.*, [1985] 2 S.C.R. 561 at 589, 23 D.L.R. (4th) 481 [hereinafter *Bhinder* cited to S.C.R.]:

> [W]here s. 14(*a*) applies, the subsection in the clearest and most precise terms says that where the *bona fide* occupational requirement is established, it is not a discriminatory practice. To conclude then that an otherwise established *bona fide* occupational requirement could have no application to one employee, because of the special characteristics of that employee, is not to give s. 14(*a*) a narrow interpretation; it is simply to ignore its plain langnage.

See also *Large* v. *Stratford (City of)*, [1995] 3 S.C.R. 733, 128 D.L.R. (4th) 193.

[13] *Meiorin*, *supra* note 1 at para. 22.

[14] *Supra* note 9 at 505-506. In some jurisdictions (*e.g.* Ontario, the federal government), an integrated approach was required by legislative reform in the wake of *Bhinder*, *supra* note 12.

[15] *Meiorin*, *supra* note 1 at para. 26. The seven difficulties reviewed in paras. 27-49 are (a) the artificiality of the distinction between direct and adverse effect discrimination; (b) different remedies depending on the method of discrimination; (c) the questionable assumption that the adversely affected group is always a numerical minority; (d) difficulties in the practical application of employers' defences; (e) the legitimation of systemic discrimination; (f) the dissonance between conventional analysis and the express purpose and terms of the human rights code; and (g) the dissonance between human rights analysis and analysis under the *Charter*, *infra* note 22.

on women are only incidental."[16] McLachlin J. proceeds to point out that the malleability of the distinction between direct and adverse effect discrimination is particularly troubling from a human rights perspective because, pursuant to the conventional approach, the initial classification had significant repercussions in terms of the nature of the employer's defences and the kinds of remedies available to the claimant. As noted above, if the discrimination were considered direct, the BFOQ analysis applied and there was no duty to accommodate. If it were adverse effect discrimination, the BFOQ analysis was not applicable and the employer had a duty to accommodate to the point of undue hardship.

Both defences were critiqued by human rights advocates for different reasons. With respect to the BFOQ defence in direct discrimination cases, it was criticized for not imposing on employers any duty to accommodate.[17] An employment policy that overtly excluded individuals from certain groups, therefore, could be upheld provided it passed the subjective and objeetive prongs of the BFOQ test. The employer was not obligated to find creative and accommodating solutions to make the workplace more inclusive for individuals. Accordingly, if, for example, an individual was directly discriminated against on the basis of his or her disability, the employer would be under no obligation to accommodate the individual's needs provided the BFOQ test was satisfied.[18] The accommodation of differences was increasingly recognized as a central component of substantive equality in other contexts, and yet it was not applied to cases of direct discrimination.

The defence set out for adverse effect discrimination was also critiqued for precisely the opposite reason. The focus of the critique was that the preliminary rational connection requirement was too lenient and that the analysis shifted too quickly and exclusively to individual accommodation issues.[19] Earlier jurisprudence appeared to support a presumption that where the discrimination resulted from the adverse effects of a facially neutral policy or practice, in most cases the appropriate response would be to leave the policy or practice in place while providing accommodation to the individual or group affected. The major justification for this presumption was the belief that in most cases the group adversely affected would be a minority group, as demon-

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[16] *Meiorin, ibid.* at para. 27.

[17] See *e.g.* M.F. Yalden, "The Duty to Accommodate—A View from the Canadian Human Rights Commission" (1993) 1 Can. Lab. L.J. 283.

[18] See discussion in A. Molloy, "Disability and the Duty to Accommodate" (1993) 1 Can. Lab. L.J. 23; M. Lynk, "Accommodating Disabilities in the Canadian Workplace" (1999) 7 Can. Lab. L.J. 183.

[19] See *e.g.* M.D. Lepofsky, "The *Charter*'s Guarantee of Equality to People with Disabilities—How Well Is It Working?" (1998) 16 Windsor Y.B. Access Just. 155; S. Day & G. Brodsky, "The Duty to Accommodate: Who Will Benefit?" (1996) 75 Can. Bar Rev. 433; B. Etherington, "*Central Alberta Dairy Pool*: The Supreme Court of Canada's Latest Word on the Duty to Accommodate" (1993) 1 Can. Lab. L.J. 311.

strated in many of the cases involving religious-based discrimination.[20] In addition, it was generally presumed that the policy, rule, or standard should continue to apply to the majority. Thus, in a number of cases, the neutral rule, policy, or practice that caused the adverse effect discrimination was not subject to any real or effective scrutiny. The analysis focussed instead on whether the individual could be accommodated despite the continued applicability of the policy, practice, or standard to others. As McLachlin J. suggests, this tendency in the jurisprudence reinforced the institutional status quo, legitimizing, in effect, the sources of systemic discrimination:

> Under the conventional analysis, if a standard is classified as being "neutral" at the threshold stage of the inquiry, its legitimacy is never questioned. The focus shifts to whether the individual claimant can be accommodated, and the formal standard itself always remains intact. The conventional analysis thus shifts attention away from the substantive norms underlying the standard, to how "different" individuals can fit into the "mainstream", represented by the standard.[21]

While such an approach ensured that accommodation would be considered and required to the point of undue hardship, the defence seemed to presume the validity of the underlying policies, practices, or standards.

Beyond reviewing the inadequacies of each of the tests in terms of substantive human rights law, McLachlin J. also suggests that the tests were manipulated to the point where there was considerable confusion about their proper interpretation and application. Further, she suggests that the equality rights analysis emerging with respect to the *Canadian Charter of Rights and Freedoms*[22] does not rely on a preliminary categorization of the discrimination as either direct or indirect. The focus instead is on the harmful effects of the discriminatory practice or law.

The significant difficulties enumerated by McLachlin J. convinced her of the need to articulate a new integrated test. Accordingly, she sets out a single test that applies to cases of both direct and adverse effect discrimination and that appears to embrace the positive features of both defences. The three-step test requires an employer to prove the following on a balance of probabilities:

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

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[20] See *e.g. Alberta Dairy Pool, supra* note 9; *Commission scolaire régionale de Chambly* v. *Bergevin*, [1994] 2 S.C.R. 525, 115 D.L.R. (4th) 609.

[21] *Meiorin, supra* note 1 at para. 40. McLachlin J. suggests that not scrutinizing a neutral standard, rule, or practice because it likely affects only a minority is neither a convincing nor a principled approach. In addition to being "easily manipulable", it should not justify a lesser level of scrutiny.

[22] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

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

(3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.[23]

One can see in this test the remnants of the *Etobicoke*[24] test supplemented by an integrated duty to accommodate and a preliminary rational purpose test.[25] Accordingly, in cases of either direct or indirect discrimination, employers are required to prove the validity of the standard or policy itself, and in so doing, to show that individual accommodation would impose undue hardship.

III. The Continuing Relevance of Adverse Effect Discrimination

The first concern raised by *Meiorin* is one of potential misinterpretation. The Court emphasizes how it is problematic to premise available human rights defences on the initial classification of discrimination as direct or adverse effect, when the classification itself is malleable. And yet there is a risk that McLachlin J.'s judgment will be interpreted as rejecting the relevance of the conceptual distinction between adverse effect and direct discrimination. This would be a mistake and a step backwards in our understanding of human rights issues. Recognition of adverse effect discrimination represents a powerful and important breakthrough in human rights law, and we should be careful not to jettison the concept too quickly simply because it overlaps with direct discrimination in some contexts.

The potential conclusion that the distinction between direct and adverse effect discrimination is no longer pertinent is reinforced by the Supreme Court's decision in *Grismer*, where McLachlin J. writes, "*Meiorin* announced a unified approach to adjudicating discrimination claims under human rights legislation. The distinction between direct and indirect discrimination has been erased."[26] There is no doubt that the distinction is no longer relevant to the question of which human rights defence is to be applied. But it does not necessarily follow that the distinction is no longer relevant to

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[23] *Meiorin*, *supra* note 1 at para. 54.

[24] *Supra* note 10.

[25] The test set out by McLachlin J. is similar to that suggested by Dickson C.J.C. in his dissenting reasons in *Bhinder*, *supra* note 12. It also resonates with the decision of Beetz J. in *Brossard (Town of)* v. *Quebec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279, 53 D.L.R. (4th) 609. The first prong of the test seems inspired in part by the test set out in *R.* v. *Oakes*, [1986] 1 S.C.R. 103 at 138-40, 26 D.L.R. (4th) 200.

[26] *Supra* note 2 at para. 19.

anti-discrimination law. Indeed, the distinction remains critically important for identifying the adverse effects of apparently neutral policies, practices, and procedures on the socially disadvantaged groups accorded protection against discrimination in human rights documents. Moreover, despite its path-breaking recognition of adverse effect discrimination in *Ontario (Human Rights Commission)* v. *Simpsons Sears*,[27] the Court has not provided any significant elaboration of how to identify adverse effect discrimination in its more recent jurisprudence.[28] Rather than moving away from the albeit challenging task of elaborating on the concept of adverse effect discrimination, more in-depth legal analysis of the concept is needed.

Why is it so critical to expand on our understanding of adverse effect discrimination? If we do not, there is a significant risk that discrimination embedded in apparently neutral institutional policies, rules, or procedures will not be recognized as discriminatory. This risk is accentuated by the necessity in anti-discrimination law to connect the experience of exclusion, harm, prejudice, or disadvantage to a recognized ground of discrimination. Thus, for example, it is not enough to claim that one is excluded because of a height and weight standard; it is necessary to link the apparently neutral standard to the recognized ground of sex or race discrimination.[29] While the analogous grounds in subsection 15(1) of the *Charter* mean that direct discrimination against domestic workers, for example, could be recognized as constituting discrimination against a new analogous ground (that of domestic workers), adverse effect analysis allows us to make the conceptual link between discrimination against domestic workers and sexism and racism.[30] While making that conceptual link may be self-evident in some cases, in others it will be invisible and unacknowledged, especially for those who do not experience the disadvantage. We need a sophisticated and coherent theory of adverse effect discrimination to assist claimants, lawyers, and adjudicators with the complexities of the manifestations of systemic discrimination. While I do not endeavour here to articulate a complete theory of adverse effect discrimination, I offer a few preliminary ideas about potential avenues for clarification.

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[27] [1985] 2 S.C.R. 536, 23 D.L.R. (4th) 321 [hereinafter *O'Malley*].

[28] See D. Pothier, "M'Aider, Mayday: Section 15 of the *Charter* in Distress" (1996) 6 N.J.C.L. 295. Nor has the U.S. Supreme Court provided significant guidance on how to identify disparate impact discrimination. See *e.g.* J.D. Cummins, "Refashioning the Disparate Treatment and Disparate Impact Doctrines in Theory and in Practice" (1998) 41 How. L.J. 455; R. Belton, "The Dismantling of the *Griggs* Disparate Impact Theory and the Future of Title VII: The Need for a Third Reconstruction" (1990) 8 Yale L. & Pol'y Rev. 223; C. Sheppard, "Equality in Context: Judicial Approaches in Canada and the United States" (1990) 39 U.N.B.L.J. 111.

[29] See *e.g.* discussion of *Re Complaint of Ann J. Colfer* (12 January 1979) (Ont.) in B. Vizkelcty, *Proving Discrimination in Canada* (Toronto: Carswell, 1987) at 47-48.

[30] See discussion in *Egan* v. *Canada*, [1995] 2 S.C.R. 513 at para. 78, 124 D.L.R. (4th) 609, L'Heureux-Dubé J. See also discussion, below.

A. Eliminating Intent from Discrimination Analysis

First, it is necessary to dispense with the intent problem. When anti-discrimination laws first emerged, the general understanding was that discrimination was rooted in the intentional exclusion or mistreatment of individuals on the basis of their group membership. Indeed, early forays into the legal prohibition of discrimination relied on a criminal law model, including the requirement of a *mens rea* or a discriminatory intent.[31] This approach to anti-discrimination law was premised on deeply rooted ideas in criminal law and tort law that individuals should only be held legally accountable if they are at fault or if they intentionally cause harm to others. When the concept of adverse effect discrimination first emerged, it ushered in a growing recognition of the possibility of legal accountability based on the victim's experience of harm even in the absence of any intent to discriminate. Human rights law was to be a remedial law that compensated victims of discrimination. Its focus diverged from its criminal law antecedents and shifted away from the earlier perpetrator perspective. As Dickson C.J.C. notes in *Action travail des femmes,* "The purpose of the [Canadian Human Rights] Act is not to punish wrongdoing but to prevent discrimination."[32]

Adverse effect discrimination, as an emerging category of discrimination, was understood as the dichotomous opposite of direct discrimination. Direct discrimination involved differential treatment. Adverse effect discrimination resulted in unequal effects in the wake of similar or facially neutral treatment. Intent was explicitly eliminated as a component of adverse effect discrimination. By default, intent appeared to be a necessary component of direct discrimination. Surely, so the argument went, if individuals were being treated differently based on their group membership there was an intent to discriminate.

Intent, however, is a problematic concept that is difficult to apply in direct discrimination cases as well. In *Action travail des femmes* Dickson C.J.C. recognizes the analytical quagmire of the intent requirement, observing "a continuing confusion of the notions of 'intent' and 'malice'."[33] Intent was understood in anti-discrimination cases to entail some moral blameworthiness rather than the "simple willing of a consequence."[34] Adverse effect discrimination often arose inadvertently and did not signal moral blameworthiness on the part of the policy-makers who introduced the facially

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[31] See W.S. Tarnopolsky & W. Pentney, *Discrimination and the Law*, looseleaf, vol. 1 (Toronto: Carswell, 1994) at 2-5.

[32] *Canadian National Railway Co.* v. *Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114 at 1134, 40 D.L.R. (4th) 193 [hereinafter *Action travail des femmes* cited to S.C.R.]. See also *Robichaud* v. *Canada (Treasury Board)*, [1987] 2 S.C.R. 84 at 89-90, 40 D.L.R. (4th) 577, La Forest J.

[33] *Ibid.* at 1135.

[34] *Ibid.*

neutral rule.[35] The hard hat policy at issue in *Bhinder*[36] is a good example. It was clearly not introduced to exclude Sikhs, but rather to advance occupational health and safety. Direct discrimination may or may not involve an intent to discriminate. It clearly involves an intent to treat individuals differently based on group membership; however, the differential treatment may not have been designed to cause discriminatory effects. If it does, it should be actionable under human rights laws regardless of whether or not the discriminator realized or had an intent to discriminate. While it may be important to recognize intent to underscore the human agency behind both direct and adverse effect discrimination, or possibly as an element that would justify some aggravated damages for deterrence reasons, intent should not normally be accorded legal significance in either direct or indirect discrimination cases.

McLachlin J. observes that, in the context of equality claims arising under the *Charter*, the Court has expressly rejected any requirement of an intent to discriminate or of a discriminatory legislative purpose. She quotes from Iacobucci J.'s judgment in *Law* v. *Canada (Minister of Employment and Immigration)*,[37] where he states, "What is required is that the claimant establish that *either* the purpose *or* the effect of the legislation infringes s. 15(1), such that the onus may be satisfied by showing only a discriminatory effect."[38] Neither the defences nor the available remedies vary depending on whether the discrimination is "overt or covert".[39] Thus, while there may remain a belief that direct discrimination is usually intentional and therefore "more loathsome" in contrast to the "unwitting, accidental" nature of most adverse effect discrimination,[40] "the fact that a discriminatory effect was unintended is not determinative of its general *Charter* analysis."[41]

B. When Are Disparate Effects Discriminatory?

Second, we need an understanding of when and how adverse effects cause discrimination. Our paradigm for thinking about adverse effect discrimination is religion and employment.[42] Many of the leading cases on adverse effect discrimination involve discrimination against employees of minority religions. In these cases, the adverse effect analysis is relatively straightforward because of the complete (or 100 percent) exclusion or disadvantage that results. That is, everyone in the minority religion is po-

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[35] It is important to recognize that intent can exist despite the facially neutral appearance of the source of discrimination.

[36] *Supra* note 12.

[37] [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1 [hereinafter *Law*].

[38] *Meiorin, supra* note 1 at para. 47, quoting *Law, ibid.* at para. 80 [emphasis in original].

[39] *Meiorin, ibid.* at para. 48.

[40] Day & Brodsky, *supra* note 19 at 457, quoted by McLachlin J. in *Meiorin, ibid.* at para. 49.

[41] *Meiorin, ibid.*

[42] See Day & Brodsky, *supra* note 19 at 465.

tentially affected. The individual litigant provides a living example of the absolute exclusionary effects and harm caused by employment policies, rules, or practices not designed for the minority religion. For example, in *O'Malley*,[43] an employment rule that requires store clerks to work on Saturdays has an absolute exclusionary impact on Seventh Day Adventists who cannot work on their Saturday Sabbath. Disability cases also entail virtually absolute exclusion in their discriminatory effects.

It is in adverse impact cases dealing with race or gender that the disparate effects are often not so straightforward. In this domain, the effects may not be absolute or result in 100 percent exclusion of women or racial minorities. And yet, in many cases the patterns of exclusion and disadvantage can and should be understood to result from sex or race discrimination. The leading decision in the United States, *Griggs* v. *Duke Power Corporation*,[44] involved not an absolute exclusion of black employees from promotions and hiring, but a disproportionate exclusion resulting from a standardized employment test.

Meiorin provides us with an interesting factual basis for understanding adverse effect discrimination that is based predominantly on a statistical disparity. In explaining the gender inequity of the aerobic standard, McLachin J. writes:

> Evidence accepted by the arbitrator demonstrated that, owing to physiological differences, most women have lower aerobic capacity than most men. Even with training, most women cannot increase their aerobic capacity to the level required by the aerobic standard, although training can allow most men to meet it. The arbitrator also heard evidence that 65% to 70% of male applicants pass the Tests on their initial attempts, while only 35% of female applicants have similar success. Of the 800 to 900 Initial Attack Crew members employed by the Government in 1995, only 100 to 150 were female.[45]

Although there was expert evidence put forward by the government that "most women can achieve the aerobic standard with training," McLachlin J. notes that the arbitrator considered this evidence to be "anecdotal" and "not supported by scientific data."[46] McLachlin J. then concludes that Ms. Meiorin had established a prima facie case of discrimination. One finds no discussion in the judgment of the amount of statistical disparity required to satisfy an allegation of sex discrimination. Of note, however, is that 35 percent of women pass the test on their initial attempt. And yet, 65 percent of women fail in contrast to the 30 to 35 percent failure rate for men—a discrepancy that discloses a fairly stark gender-based disparity. It would have been helpful if McLachlin J. had elaborated even slightly on the Court's conclusion that the facts disclosed a prima facie case of discrimination. When does a statistical disparity

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[43] *Supra* note 27.

[44] 401 U.S. 424, 91 S. Ct. 849 (1971).

[45] *Meiorin*, *supra* note 1 at para. 11.

[46] *Ibid.* at para. 69.

reveal discrimination? Is an adverse impact affecting only 51 percent of a disadvantaged group enough to ground a claim of discrimination, or would it be necessary to show a greater disproportionate impact of 55 or 60 percent? In *Meiorin* the Court endorses a finding of prima facie discrimination based on a 65 to 70 percent disparity.[47]

From a statistics perspective, it is generally thought that discrimination can be deduced from a disparate pattern of exclusion or harm that is statistically significant and not simply the result of chance. In her book *Proving Discrimination in Canada*, Beatrice Vizkelety reviews the various approaches to statistical proof of adverse effect discrimination in anti-discrimination law.[48] She highlights both the positive and negative dimensions of reliance on statistics in anti-discrimination cases. In terms of assessing what constitutes a "sufficient disparity to establish discrimination", Vizkelety notes that "the tendency has been to decide intuitively what is significant and what is not."[49] Drawing on the more extensive experience in the United States, Vizkelety points to three approaches to determining a discriminatory statistical disparity. First, there is the .05 level of statistical significance test, which Vizkelety explains means that the "courts regard as significant, values that have only a one-out-of-twenty or five per cent probability of occurring by chance."[50] Second, there is the "two or three standard deviation" approach.[51] Third, she refers to the four-fifths or 80 percent rule which "presumes adverse impact where the disparity is greater than twenty per cent but not otherwise."[52]

While statistical clarity is important, the hidden biases of statistics and the extent to which statistical evidentiary requirements seem to increase the complexities and thus the costs of human rights litigation may make us reluctant to elaborate any fixed quantitative requirements for proving adverse effect discrimination. Moreover, it is often difficult to isolate the quantitative dimensions of discrimination from the larger qualitative aspects of inequality. A lower statistical disparity combined with significant qualitative factors may well substantiate a discrimination claim in some cases.[53]

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[47] Moreover, recall that the Court's approach to discrimination requires the finding of a distinction, followed by a finding that the distinction causes harm, prejudice, or disadvantage.

[48] *Supra* note 29 at 173-92.

[49] *Ibid.* at 190.

[50] *Ibid.* at 191.

[51] *Ibid.* Vizkelety explains that two standard deviations correspond roughly to the .05 standard. Three standard deviations are equivalent to a "one-out-of-a-hundred probability of occurring by chance."

[52] *Ibid.*

[53] See Pothier, *supra* note 28 at 317, emphasizing that adverse effect discrimination virtually always entails both qualitative and quantitative dimensions.

In *Symes* v. *Canada*,[54] one of the few judgments to discuss adverse effect discrimination, Iacobucci J. also raises a causation requirement. The adverse impact must be directly caused or related to the impugned provision and not be due to other factors:

> If the adverse effects analysis is to be coherent, it must not assume that a statutory provision has an effect which is not proved. We must take care to distinguish between effects which are wholly caused, or are contributed to, by an impugned provision, and those social circumstances which exist independently of such a provision.[55]

In *Symes* Iacobucci J. concludes that both parents had an obligation to pay for child care under law and that there was no proof that women assumed a greater proportion of this financial burden. The proof adduced focussed on gender inequalities in the assumption of child care work.

Thus, beyond questions of the degree of disparity, the proof must reveal a causal link or connection between the discriminatory effects and the rule or policy. In *Meiorin* the aerobic standard is directly linked to the gender disparities.[56]

A second issue that Iacobucci J. briefly addresses in *Symes* is the question of those who are adversely affected by a provision, but who do not belong to the group that is most affected by the neutral policy or classification. For example, if we take the seenario in *Thibaudeau* v. *Canada*,[57] while 73.2 percent of custodial parents may be women, 12.3 percent are men.[58] Or in *Meiorin*, while a disproportionate number of women fail the fitness tests, some men fail them as well. Iacobucci J. acknowledges this possibility in *Symes*:

> [T]he important thing to realize is that there is a difference between being able to point to individuals negatively affected by a provision, and being able to prove that a group or subgroup is suffering an adverse effect in law by virtue of an impugned provision ... If a group or subgroup of women could prove the adverse effeet required, the proof would coine in a comparison with the relevant body of men. Accordingly, although individual men might be negatively

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[54] [1993] 4 S.C.R. 695, 110 D.L.R. (4th) 470 [hereinafter *Symes* cited to S.C.R.].

[55] *Ibid.* at 764-65.

[56] *Eldridge* v. *British Columbia (A.G.)*, [1997] 3 S.C.R. 624, 151 D.L.R. (4th) 577, held that pre-existing disadvantages are clearly relevant to an equality analysis and that the state's failure to take them into account can ground a claim of discrimination. Thus, Iacobucci J.'s concerns should be limited to ensuring a causal link between the quantitative and qualitative evidence and the impugned policy, practice, rule, or law.

[57] [1995] 2 S.C.R. 627, 124 D.L.R. (4th) 449 [hereinafter *Thibaudeau*].

[58] These statistics are based on results of 1990 court proceedings. See *ibid.* at para. 211.

> affected by an impugned provision, those men would not belong to a group or subgroup of men able to prove the required adverse effect.[59]

It is important to clarify that the fact that some individual men may be disadvantaged by a facially neutral policy or classification does not render the classification discriminatory vis-à-vis men as a group. Nevertheless, individual men can experience sex discrimination in the same way that women do if their life situation is similar to many women. For example, male nurses may experience gender-based pay inequities related to their situation in a predominantly female job. In other cases, despite the adverse effect, individual men cannot be included in a group deserving of a remedy in a human rights complaint. For example, if some men fail the fitness test their individual failure cannot be connected to the larger problem of the fitness standard's having been shaped in accordance with most men's abilities.

C. *Recognizing Different Types of Adverse Effect Discrimination*

A third, further dimension of our understanding of adverse effect discrimination relates to the need to distinguish between a facially neutral rule or policy applied to everyone and a facially neutral distinction. Some cases involve differential treatment based on a category that does not correspond to any enumerated or recognized analogous ground of discrimination. For example, differential treatment of an employee group (domestic workers) would not directly implicate any of the prohibited grounds of discrimination in human rights laws. It is only once we document the gender and race composition of the classification—domestic workers—that we can identify an apparently neutral employment classification as implicating potential problems of sex and race discrimination.[60] Another example arose in *Thibaudeau*, where it was argued that direct differential treatment of custodial parents, a majority of whom are women, resulted in gender-based discrimination.[61] Again, the category, custodial parent, is linked to sex discrimination through an analysis of the disparate impact of the categorization on women.

While in some cases the overwhelming correspondence between certain categories and the gender or racial composition of the category makes the sex or race discrimination claims relatively easy to substantiate, in other cases the statistical preponderance may be less marked. In such cases it may also be important to consider the qualitative components of the harm that constitutes discrimination. For example, a disproportionate percentage of women immigrants arrive in Canada through the spousal sponsorship program. Nevertheless, a large number of men seek entry to Canada through this program. If we combine a statistical gender disparity with a qualita-

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[59] *Symes*, *supra* note 54 at 770-71.

[60] See *supra* note 30.

[61] See *supra* note 57 and accompanying text.

tive appreciation of how men and women experience the spousal sponsorship program, we can develop a deeper understanding of potential inequalities.[62] The traditional division of labour in the family tends to impose greater domestic work obligations on women and isolates them in the home. Women also tend to be paid lower wages in the workforce and they are at greater risk of domestic violence. These additional gendered realities accentuate the problems women experience under the sponsorship program—a program that reinforces familial dependency. Thus, it is important to be attentive to both the quantitative and larger contextual factors that combine to cause adverse effects.

Adverse effect discrimination that is connected to an apparently neutral classification also gives rise to the issue of discrimination against a subgroup within a larger category. As the above examples illustrate, discrimination against domestic workers, custodial parents, or sponsored wives affects only a subgroup of women. And yet, on numerous occasions the Supreme Court of Canada has reiterated that discrimination against a subgroup represents part of the larger problem of discrimination against the particular group in society. As Iacobucci J. observes in *Symes*, "That an adverse effect felt by a subgroup of women can still constitute sex-based discrimination appears clear to me from a consideration of past decisions."[63]

As noted, the numerous complexities that surround the concept of adverse effect discrimination require more, not less, legal analysis. One starting point for discussing the various components of adverse effect discrimination would be a more precise typology of adverse effect discrimination. It could include the following:

1. *Facially Neutral Policy, Practice, or Standard*: A standard rule, test, practice, or policy that is applied to everyone in the same way. The adverse effects may affect (a) all members of a group protected by human rights law (100 percent exclusion or harm—*e.g.* religion or disability); or (b) a disproportionate number of members of a group protected under human rights law;
2. *Facially Neutral Distinction or Categorization*: Harmful differential treatment, categorization, or direct distinction that corresponds to a prohibited ground of discrimination in human rights law because of the preponderance of individuals from particular social groups affected by the facially neutral distinction or category (*e.g.* domestic workers, immigrant spouses).

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[62] For a fuller discussion of this argument, see C. Sheppard, "Women as Wives: Immigration Law and Domestic Violence" (2000) 26 Queen's L.J. 1 at 32-36.

[63] *Supra* note 54 at 769.

IV. The Duty to Accommodate versus Institutional Change

A second area of concern regarding *Meiorin* is the need to clarify the relationship between individual accommodation and a transformative and substantive approach to equality. One of the key dimensions of *Meiorin* is its conclusion that the duty to accommodate is an integral component of the BFOQ test. In other words, there is a duty to accommodate with respect to all types of discrimination, both direct and adverse effect discrimination. At the same time, McLachlin J. develops an extensive critique of the concept of the duty to accommodate. She suggests that in the past when an initial finding of adverse effect discrimination was made, adjudicators jumped too quickly to the question of individual accommodation without adequately assessing the validity of the institutional policy or procedure. This critique is an important one because it emphasizes the need to change the institutional status quo, rather than simply according special or exceptional treatment to individuals otherwise excluded or disadvantaged by institutional norms, policies, or practices.

In her discussion of the duty to accommodate, McLachlin J. cites with approval the following lengthy passage from an article by Shelagh Day and Gwen Brodsky, where they critique the conventional approach to individual accommodation in human rights law:

> Accommodation ... appears to be rooted in the formal model of equality. As a formula, different treatment for "different" people is merely the flip side of like treatment for likes. Accommodation does not go to the heart of the equality question, to the goal of transformation, to an examination of the way institutions and relations must be changed in order to make them available, accessible, meaningful and rewarding for the many diverse groups of which our society is composed. Accommodation seems to mean that we do not change procedures or services, we simply "accommodate" those who do not quite fit. We make some concessions to those who are "different", rather than abandoning the idea of "normal" and working for genuine inclusiveness.
>
> In this way, accommodation seems to allow formal equality to be the dominant paradigm, as long as some adjustments can be made, sometimes, to deal with unequal effects. Accommodation, conceived of in this way does not challenge deep-seated beliefs about the intrinsic superiority of such characteristics as mobility and sightedness. In short, accommodation is assimilationist. Its goal is to try to make "different" people fit into existing systems.[64]

The inclusion of this citation, which articulates a transformative ideal for equality law, is quite remarkable in a Supreme Court judgment. Indeed, earlier in her judgment McLachlin J. uses the example of women to highlight how "the adverse effect analysis may serve to entrench the male norm as the 'mainstream' into which women must

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[64] Day & Brodsky, *supra* note 19 at 462, cited in *Meiorin*, *supra* note 1 at para. 41.

integrate."[65] In specifically applying her critique to Ms. Meiorin's situation, McLachlin J. emphasizes the importance of "rigorously assessing" the aerobic standard itself, rather than simply assessing "whether the 'mainstream' can afford to confer proper treatment on those adversely affected, within the confines of its existing formal standard."[66] If the law's role is limited to the latter it risks endorsing "the edifice of systemic discrimination."[67]

How, then, are we to understand the apparent contradiction between McLachlin J.'s insistence that the duty to accommodate be extended to direct discrimination cases and her extensive critique of the duty to accommodate? It would seem important to understand this tension as follows. McLachlin J.'s concerns about an exclusive focus on the duty to accommodate individuals reflects her commitment to a more transformative approach to equality rights. It is absolutely critical for McLachlin J. that institutional norms, policies, and practices be scrutinized and revised whenever possible as part of the project of securing greater substantive equality. Nevertheless, individual accommodation remains essential as well. McLachlin J.'s integration of individual accommodation into the BFOQ test reflects its importance as a component of substantive equality. It should not be an excuse to avoid scrutinizing the underlying validity of institutional norms, but rather a mechanism to ensure inclusion when revision of the underlying practices is not possible. Both components are necessary and important.

To understand the interplay between institutional change and individual accommodation, it is important to examine the third part of McLachlin J.'s integrated test more closely. It is at this third stage that the reasonable necessity of exclusionary institutional policies or standards is assessed, and it is also at this stage that the accommodation requirement must be met. As mentioned, pursuant to the third part of the test, an employer must prove that "the standard is reasonably necessary to the accomplishment of a legitimate work-related purpose." In so doing, "it must be demonstrated that it is impossible to accommodate individual employees ... without imposing undue hardship on the employer."[68]

McLachlin J. sets out a series of questions to consider with respect to this third prong of the BFOQ test. They include the following:

> (a) Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?

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[65] *Meoirin, ibid.* at para. 36.
[66] *Ibid.* at para. 42.
[67] *Ibid.*
[68] *Ibid.* at para. 54.

(b) If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?

(c) Is it neeessary to have *all* employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?

(d) Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?

(e) Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?

(f) Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles?[69]

These questions are helpful and reinforce the importance of assessing the validity of the standard itself before exploring individual accommodation or special treatment. They prompt us to consider the extent to which an employer made a significant effort to try to develop alternative non-discriminatory standards and approaches.

There remains, nevertheless, a potential source of confusion aggravated in some ways by integrating a duty to accommodate into the BFOQ defence. The integrated duty to accommodate tends to blend the analysis of the BFOQ and individual accommodation in such a way that one risks jumping to the individual accommodation component of the test rather than beginning by fully assessing the reasonable necessity of the standard, policy, or practice. A comprehensive analysis of the reasonable necessity of an exclusionary practice, standard, or policy entails an assessment of whether the policy or standard is necessary for health and safety, business necessity reasons, or both, and whether a different standard that does not cause adverse effects could be introduced instead (*i.e.* institutional change) without imposing undue hardship. It would only be in the face of the impossibility of a more general policy change that the individual accommodation question would be addressed.

What needs to be clarified, therefore, is the idea that there are in fact two types of accommodation that should perhaps be overtly distinguished—institutional policy change accommodation and individual accommodation. The first type of accommodation entails changing the general policy, standard, or norm for everyone to remove the adverse effects.[70] For example, if an employer has traditionally held staff meetings from 4:00 P.M. to 6:00 P.M., employees with young children who must pick up their

[69] *Ibid.* at para. 65. McLachlin J. is inspired by the insights of David Lepofsky, whose scholarship emphasizes the need to analyze undue hardship from both a procedural and a substantive perspective. See *e.g.* M.D. Lepofsky, "The Duty to Accommodate: A Purposive Approach" (1993) 1 Can. Lab. L.J. 1.

[70] Using the terminology of accommodation may itself be problematic in this context.

children from daycare before 6:00 P.M. are adversely affected by the meeting time. Two strategies of accommodation are possible. First, the meeting time could be changed to an earlier time so that the staff meetings would finish by 5:00 P.M. This is an accommodation that entails institutional transformation. Its feasibility could be assessed in terms of whether the change would impose an undue hardship on the employer. Alternatively, those employees affected could be allowed to leave the staff meeting early. Again the accommodation could be assessed in terms of the various factors of undue hardship. It is apparent, however, that the second strategy is less helpful to those employees with small children. They are allowed to leave early and do not face any disciplinary sanctions for so doing, but they miss part of the meeting, are denied the opportunity to participate fully in staff deliberations, and are thus less likely to be considered for leadership positions within the organization.

Meiorin appears to endorse the institutional change model of accommodation, since McLachlin J. challenges the validity of the aerobic standard itself rather than simply exempting Ms. Meoirin from it while leaving it in place.[71] Moreover, McLachlin J. appears to emphasize that accommodating diversity should be considered at the time institutional policies and practices are set up. Thus, we should be cognizant of the effect of a late meeting time on employees with small children when we decide upon the meeting time. In so doing we avoid the adverse effects in the first place, rather than having to redress them in the wake of a human rights complaint. Greater sensitivity and awareness of the exclusionary effects of institutional policies and practices are best ensured through greater participation of individuals from groups historically excluded in the processes of institutional policy-making.[72]

V. Assessing Health and Safety Risks in Human Rights Cases

A third concern not fully resolved in *Meiorin* is the issue of health and safety risks in human rights cases. On first blush, one might have thought that questions of risk and safety would be most pertinent to the third part of the integrated BFOQ test proposed by McLachlin J. It is at this stage that the employer must prove that the "standard is reasonably necessary" to the accomplishment of a legitimate work-related purpose. In so doing, the employer must demonstrate that "it is impossible to

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[71] In contrast to the Supreme Court of Canada, the arbitrator in *Meiorin* did not rigorously scrutinize the validity of the aerobic standard. He simply assessed whether it was rationally connected to forest firefighting and then proceeded to consider whether individual accommodation could be made. See *supra* note 4.

[72] See C. Sheppard & S. Westphal, "Equity and the University: Learning from Women's Experience" (1992) 5 C.J.W.L. 5 at 28-34. See also M.J. Matsuda, "Looking to the Bottom: Critical Legal Studies and Reparations" (1987) 22 Harv. C.R.-C.L. L. Rev. 323.

accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer."[73]

Prior jurisprudence had addressed risk issues in the earlier equivalents to the third prong of the *Meiorin* test. For example, in *Etobicoke*,[74] which set out the old BFOQ test, a standard had to be "reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public."[75] In assessing a mandatory retirement age for firefighting in that case, the Court writes:

> In an occupation where, as in the case at bar, the employer seeks to justify the retirement in the interests of public safety, to decide whether a *bona fide* occupational qualification and requirement has been shown the board of inquiry and the court must consider whether the evidence adduced justifies the conclusion that there is *sufficient risk* of employee failure in those over the mandatory retirement age to warrant the early retirement in the interests of safety of the employee, his fellow employees and the public at large.[76]

The test for assessing risk, therefore, was framed in terms of "sufficient risk" and the burden of proof was on the employer. In *Etobicoke* itself the Court concludes that the employer had not satisfied the burden of proof, relying on what was called "impressionistic" evidence and general assertions that "firefighting was a 'young man's game'."[77] Accordingly, in that case the mandatory retirement rule was not accepted as a BFOQ.

The safety risk issue was also addressed in *Alberta Dairy Pool* in the context of factors to consider in assessing undue hardship and the duty to accommodate. Wilson J. notes that "[w]here safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations."[78] The facts of that case, which involved accommodating an individual employee who wanted to take Easter Monday off for religious reasons, did not require any further analysis of risk as a component of undue hardship.

In the wake of *Etobicoke* and *Alberta Dairy Pool*, some lower courts were confronted with cases where health and safety risks were prominent. The case law reveals a lack of consensus, with one strand of jurisprudence equating "sufficient risk" with any increase in health and safety risks in the workplace—including minimal risks—

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[73] *Meiorin*, *supra* note 1 at para. 54.
[74] *Supra* note 10.
[75] *Ibid.* at 208.
[76] *Ibid.* at 209-10 [emphasis added].
[77] *Ibid.* at 210.
[78] *Supra* note 9 at 521.

and another strand of jurisprudence articulating a higher standard of risk necessary to justify exclusion from the workplace.[79]

In light of the facts in *Meiorin*, which directly raised health and safety concerns, one might have anticipated some resolution of the diverging strands of jurisprudence on the question of safety risks, the BFOQ, and the duty to accommodate. McLachlin J. says very little, however, about adjudicating safety risks in her decision. She does impugn the validity of the research methods used to establish the aerobic standard, concluding that they reveal methodological flaws that result in gender bias. She further accepts the arbitrator's conclusion that "the employer has presented no cogent evidence ... to support its position that it cannot accommodate Ms. Meiorin because of safety risks."[80] To decide the case, however, she does not find it necessary to resolve the lingering jurisprudential uncertainties about the meaning of "sufficient risk".

Of further concern is the Court's treatment of the risk issue in *Grismer*, which like *Meiorin*, raised safety issues.[81] Terry Grismer alleged discrimination when his driver's licence was cancelled by the British Columbia superintendent of motor vehicles because of his limited peripheral vision. In deciding the case, the Supreme Court applied its new unified test set out in *Meiorin*.

In so doing, McLachlin J. states at the outset that it is necessary to begin the BFOQ analysis by identifying the superintendent's purpose or goal in setting the peripheral vision standard.[82] This appears to be an additional step not directly enumerated in *Meiorin*. What is surprising in *Grismer* is the discussion of risk in McLachlin J.'s preliminary assessment of the B.C. government's goal or purpose in setting vision standards for licensing:

> The Superintendent's goal in this case was to maintain highway safety. But what kind of safety? What degree of risk would be tolerated? Where did the Superintendent draw the line between the need to maintain highway safety and the desirability of permitting a broad range of people to drive? The possibilities range from absolute safety, to a total lack of concern for safety, in which case everyone, regardless of their lack of ability, would be allowed to drive. Between

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[79] For a discussion of the conflicting case law, see *Canada (A.G.)* v. *Rosin*, [1991] 1 F.C. 391, 131 N.R. 295 (C.A.). See also *Canada (Human Rights Commission)* v. *Canada (Armed Forces)*, [1994] 3 F.C. 188, 114 D.L.R. (4th) 721 (C.A.); *Canadian Pacific* v. *Canada (Human Rights Commission)*, [1988] 1 F.C. 209, 40 D.L.R. (4th) 586 (C.A.).

[80] *Meiorin*, *supra* note 1 at para. 79. As in *Etobicoke*, *supra* note 10, McLachlin J. finds that the employer has failed to satisfy its burden of proving any increased risk to health and safety.

[81] See *Grismer*, *supra* note 2.

[82] "Whether a goal is 'rationally connected' to a function, and whether a standard is 'made in good faith' and 'reasonably necessary' can only be assessed in relation to a defined goal" (*ibid.* at para. 24).

> these two extremes lies the more moderate view that reasonable safety suffices.[83]

McLachlin J. then proceeds to conclude that the superintendent adopted a reasonable safety standard:

> The Superintendent thus recognized that removing someone's licence may impose significant hardship. Striking a balance between the need for people to be licensed to drive and the need for safety of the public on the roads, he adopted a standard that tolerated a moderate degree of risk.[84]

It is following her discussion of the superintendent's reasonable safety purpose that McLachlin J. then turns to her three-part test.

With respect to the first prong of the test, the rational connection between the purpose and the driver's licensing function, McLachlin J. concludes, "Highway safety is indubitably connected to the licensing of drivers."[85] Arguably, McLachlin J. could have readily reached this conclusion without having to assess the level of risk, since maintaining safety generally would be rationally connected to licensing responsibilities. Second, McLachlin J. concludes that the superintendent of motor vehicles clearly adopted the peripheral vision standard in good faith.[86] It is with respect to the third prong of the BFOQ test that the Court's reasoning is more extensive.

Pursuant to the third part of the unified test, the superintendent is required to prove that the peripheral vision standard is reasonably necessary. Integral to this inquiry is the need to show that it is impossible to accommodate individuals without undue hardship being imposed upon the employer. The Court begins its analysis of this part of the test in a curious way. McLachlin J. writes:

> Risk has a limited role in this analysis. It is clear from *Meiorin* that the old notion that "sufficient risk" could justify a discriminatory standard is no longer applicable. Risk can still be considered under the guise of hardship, but not as an independent justification of discrimination.[87]

While it is no doubt true that proof of "sufficient risk" is not the end of the inquiry and that the question of individual accommodation is critical, it is still of fundamental importance that the validity of the standard itself be assessed from a risk perspective before turning to the individual accommodation option. If "sufficient risk" cannot be shown, the policy or practice cannot be justified. If the standard can be changed for everyone so as to eliminate its adverse effects, surely this is a better solution that ad-

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[83] *Ibid.* at para. 25.
[84] *Ibid.* at para. 27.
[85] *Ibid.* at para. 28.
[86] *Ibid.* at para. 29.
[87] *Ibid.* at para. 30.

vances institutional transformation and substantive equality. Thus, risk analysis does not have a limited role; in cases where health and safety are at issue, it has a central role.

Consider the example of exposure to lead in a workplace. Occupational health and safety standards set a maximum exposure level for lead in the workplace. Research on occupational health hazards facing pregnant women reveals that the maximum lead exposure level for pregnant women is lower than the general workplace standard. Thus, pregnant women may well get screened out of occupations where they would be exposed to unsafe levels of lead.[88] The ideal solution would be to lower acceptable lead levels for all employees to a level that would be safe for everyone, including pregnant employees. It is ouly after an assessment of the validity of the general standard that questions of individual accommodation in the face of an otherwise exclusionary standard should arise. Thus, pregnant women working in situations where they could be exposed to unhealthy lead levels should be relocated for the duration of the pregnancy. This accommodation strategy, however, should only be applied once it has been shown that the standard is necessary and that a lower standard for everyone would impose an undue hardship on the employer.

In *Grismer*, however, McLachlin J. does not assess the peripheral vision standard itself in any depth. There is little discussion of whether the peripheral vision standard was reasonably necessary to ensure health and safety. Instead the validity of the standard is presumed and the focus of the analysis is on whether additional individual testing of *Grismer* should have been done and on why Mr. Grismer should be potentially accorded a driver's licence if he can prove that he compensates adequately for his lack of peripheral vision in other ways. Thus, the Court appears to focus on the question of individual accommodation rather than on scrutinizing the validity of the general standard itself. A more transformative outcome for Mr. Grismer and for others with peripheral vision problems would have been a revised standard for everyone, if justifiable from a safety perspective. Risk analysis is central to this inquiry, as is an elaboration of the meaning of "sufficient risk" in human rights law. Taking into account both the magnitude and likelihood of harm in framing a notion of "significant risk" would help to give direction to the growing number of cases implicating health, safety, and human rights.[89]

What *Grismer* and *Meiorin* leave us with is a sense that the Court is in favour of balancing human rights and safety concerns, that the employer or service provider

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[88] See discussion in K. Swinton, "Regulating Reproductive Hazards in the Workplace: Balancing Equality and Health" (1983) 33 U.T.L.J. 45.

[89] For a discussion of the need to articulate a significant risk standard in Canadian human rights law, see D.J. Jones & N.C. Sheppard, "AIDS and Disability Employment Discrimination in and beyond the Classroom" (1989) 12 Dal. L.J. 103 at 120-23.

must prove its defence with cogent evidence, and that the level of risk that is acceptable is not minimal risk, but some higher level of risk that assures not absolute but reasonable safety. What *Grismer* fails to emphasize, however, is that it is critically important to analyze whether the standard or policy itself is necessary to ensure reasonable safety. If it is not, the most inclusive and transformative remedy remains eliminating or changing the standard across the board, rather than providing individual accommodation while leaving the standard in place. In *Grismer* McLachlin J. appears to have forgotten the forceful critique she articulated in *Meiorin* about how individual accommodation can reinforce or leave in place standards of systemic exclusion. That is precisely the outcome in *Grismer*. Moreover, if risk analysis should be central to the third prong of the integrated test in cases where safety and human rights interface, it would have made more sense in *Grismer* to consider the appropriate level of safety or risk at this stage rather than as a component of the preliminary inquiry into the purpose or goal being pursued. McLachlin J.'s treatment of the risk issue in *Grismer* thus raises a concern about whether an integrated duty to accommodate will promote transformative equality or rather reduce scrutiny of institutional norms and standards.

Conclusion

Meiorin provides an important contribution to our understanding of legal equality. The decision reinforces the importance of redressing systemic inequalities that result in exclusion and prejudice through institutional transformation and not merely by individual special treatment. Recognizing how inequality is embedded in apparently neutral rules and standards is the first step to developing a more transformative and substantive vision of equality. McLachlin J. expressly endorses such a vision and thereby encourages us to use law to challenge institutionalized inequities. McLachlin J. is also to be applauded for endeavouring to simplify the morass of legal tests and defences in the domain of statutory human rights law by articulating an integrated approach to human rights defences. Human rights law should not be plagued by inaccessible distinctions and categories.

Despite its strengths, however, *Meiorin* does not resolve some of the human rights issues that it raises. The Court does not elaborate on its conclusion that a prima facie case of discrimination had been proved on the basis of gender-based statistical disparities. Further elaboration of the meaning and continued relevance of adverse effects analysis awaits future cases. Second, the Court does not discuss the level of health and safety risk required to justify exclusion from the workplace. Nor does the subsequent *Grismer* case provide any further clarification on risk analysis. In *Grismer* the Court does endorse a reasonable risk level, rejecting absolute safety as an appropriate standard; however, it does not review the risk issue in a comprehensive way. Finally, while endorsing institutional change as the most inclusive strategy for remedying systemic inequality, the Court fails to distinguish clearly in *Grismer* between institutional change and individual accommodation.

Beyond its jurisprudential contributions, *Meiorin* leaves us with the forest fire metaphor. If we understand the harm of systemic discrimination through the metaphor

of the forest fire, perhaps its destructive power and the damage it causes will be understood. So too might we better appreciate that in both firefighting and equality advocacy, prevention remains the most critical strategy.