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PROVING DISCRIMINATION IN CANADA

by

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ABSTRACT

Experience has shown that proving discrimination is not an easy task and, as a result, the issues related to proof of discrimination offer a wide array of topics well-suited to a thesis on Discrimination Law. Briefly stated, the purpose of Part I is to examine the scope of the difficulties associated with proof of discrimination and also to discover possible solutions to them. It was felt that this purpose could best be achieved by drawing upon material available not only in Canada but also in Great Britain and the United States and, as a result, a comparative approach has been adopted in some chapters.

The definition of discrimination, and the question as to whether or not it includes an intent requirement, is one of the leading issues being debated in this area today. The outcome of this debate will not only have important repercussions on proof of discrimination, but it will also affect the effectiveness of anti-discrimination legislation in general. As this study demonstrates, discrimination can exist irrespective of intent and to persist with an intent requirement in discrimination cases is to narrow considerably the field in which discrimination is "provable" and, therefore, subject to sanctions.

A second issue, which is of concern in the area of discrimination, is the allocation of the parties' burdens of proof. This study concludes that where it is necessary to prove another person's state of mind - and this can arise in cases

involving prejudice, stereotypes, and the like -, policy and fairness considerations require that the person who has knowledge of such facts be the one to carry the burden of proving them. Thus, this study proposes changes in the traditional allocation of the parties' burdens of proof in order to meet these needs.

The reader will note that a dual approach has been adopted throughout Part I of this study as it winds its way through the elements of proof, the means of proof, the relevant defences and the burdens of proof. This approach distinguishes between direct or intentional forms of discrimination, on the one hand, and systemic forms of discrimination, on the other, (both of which are defined in Chapter 1), and has the advantage of providing added insight into the issues related to proof of discrimination in Canada.

Part II of this study contains a descriptive analysis of some of the important rules of evidence and procedure which apply to human rights boards. It begins by examining the influence of Administrative Law, particularly the rules of natural justice, on the procedures followed by these boards. The subsequent chapters seek to present a structured and informative view of the manner in which human rights boards conduct their hearings, the manner in which evidence is adduced, and the type of evidence which is admissible at these hearings.

LIST OF ABBREVIATIONS

Law Reports

A.C.	The Law Reports, Appeal Cases (U.K.)
ALL E.R.	All England Law Reports (U.K.)
B.C.L.R.	British Columbia Law Reports (Can.)
C.A.	Recueils de Jurisprudence de Québec, Cour d'appel (Can.)
C.A.S.	Commission des Affaires Sociales (Can.)
C.H.R.R.*	Canadian Human Rights Reporter (Can.)
C.L.L.C.	Canadian Labour Law Cases (Can.)
D.L.R.	Dominion Law Reports (Can.).
F.C.	Canada Federal Court Reports (Can.)
F.E.P.	Fair Employment Practices (U.S.)
F. Supp.	Federal Supplement (U.S.)
F. 2d	Federal Reporter, 2d Series (U.S.)
I.C.R.	Industrial Cases Reports (U.K.)
I.R.L.R.	Indutrial Relations Law Report (U.K.)
L.A.C.	Labour Arbitration Cases (Can.)
N.R.	National Reporter (Can.)
O.L.R.	Ontario Law Reports (Can.)
O.R.	Ontario Reports (Can.)
R.P.	Rapports de Pratique de Québec (Can.)
S.C.	Recueils de Jurisprudence de Québec, Cour Supérieure (Can.)
S.C.R.	Canada Supreme Court Reports (Can.)
S. Ct.	Supreme Court Reporter (U.S.)
W.W.R.	Western Weekly Report (Can.)
U.S.	United States Reports (U.S.)

* The C.H.R.R. began publication in 1980 and human rights board decisions handed down prior to that year are unpublished. References to these decisions contain the jurisdiction and the date. Example: (Ont., 1970).

Law Reviews

Can. Bar Rev.	Canadian Bar Review (Can.)
C. de D.	Cahiers de Droit (Can.)
Cornell Law Rev.	Cornell Law Review (U.S.)
Harv. Law Rev.	Harvard Law Review (U.S.)
Law Soc. Gaz.	Law Society Gazette (U.K.)
Mich. Law Rev.	Michigan Law Review (U.S.)
R. du B.	Revue du Barreau (Can.)
R.D.U.S.	Revue de droit, Université de Sherbrooke (Can.)
Sask. Law Rev.	Saskatchewan Law Review (Can.)
Stan. Law Rev.	Stanford Law Review (U.S.)
U.B.C. Law Rev.	University of British Columbia Law Review (Can.)
U. Chi. Law Rev.	University of Chicago Law Review (U.S.)
U. of W. Ont. Law Rev.	University of Western Ontario Law Review (Can.)
Vanderbilt Law Rev.	Vanderbilt Law Review (U.S.)

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INTRODUCTION

In 1968 a well-known authority on anti-discrimination legislation wrote that "it must not be forgotten that human rights legislation prohibits acts which depend upon the fact of the existence of a certain motive. This is a matter peculiarly within the mind of the respondent. [He] can give many different reasons why he denied a certain person an hotel, an apartment or a job. The person who has been denied access is faced with an almost impossible task of disproving the reasons given to him" (1).

The latin maxim Idem est non esse aut non probari sums up the principle that where there is no proof, there is no right. Or, stated otherwise, "he who is unable to prove his right, that is to convince the judge of its existence, is unable to enforce his right" (translation) (2).

Had the application of discrimination laws remained static in the fifteen years since Tarnopolsky's statement, and had proof of discrimination remained dependent upon the complainant's (3) ability to show - on a balance of propabilities - that

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1. Walter S. Tarnopolsky, "The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada" (1968), 46 Can. Bar Rev. 565, at p. 574.

2. Léo Ducharme, Précis de la preuve, 2nd ed., Éditions de l'Université d'Ottawa, Ottawa, 1982, at p. 1: "Celui qui est dans l'impossibilité de prouver son droit, c'est-à-dire de convaincre le juge de son existence ne pourra donc pas l'obtenir."

3. For the purpose of consistency I will use the terms "complainant" and "respondent" to identify the principal parties in discrimination cases. In Quebec where, in first instance discrimination actions are taken before the ordinary courts rather than administrative tribunals , the terms are interchangeable with plaintiff and defendant, respectively.

the respondent's acts were motivated by an illegal, i.e. discriminatory, state of mind, one could predict that the effective enforcement of these laws was doomed to failure (4). What has happened, however, is that a new trend started to develop, identifying discrimination not through intent but by its resultant

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4. Tarnopolsky is not the only one to have commented on the difficulties of proving intent. He is supported in this criticism by a long list of distinguished authors and commentators. In Canada: William Black, "From Intent to Effect: New Standards in Human Rights" (1980), 1 C.H.R.R. C/1, at p. 1; Daniel Proulx, "Egalité et discrimination dans la Charte des droits et libertés de la personne: étude comparative" (1980), 10 R.D.U.S. 381, at p. 466. La Commission des droits de la personne du Québec, La preuve, Cahier 5, 1982, at pp. 13 ff. In the United States: Note, "An American Legal Dilemma Proof of Discrimination" (1949), 17 U. Chi. Law Rev. 107; Michael A. Bamburger and Nathan Lewin, "The Right to Equal Treatment: Enforcement of Anti-discrimination Legislation" (1961), 74 Harv. Law Rev. 520, at p. 552-553; Alfred W. Blumrosen, "Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination" (1972), 71 Mich. L. Rev. 59, at p. 68; Joel William Friedman, "The Burger Court and the Prima Facie Case in Employment Discrimination Legislation: A Critique "(1979), 65 Cornell Law Rev. 1; Walter Heiser, "Intent v. Impact: The Standard of Proof Necessary to Establish a Prima Facie Case of Race Discrimination Under 42 U.S.C. # 1981" (1979), 16 San Diego Law Rev. 207, at p. 209, note 2; Miguel Angel Méndez, "Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases" (1980), 32 Stan. Law Rev. 1129; Robert Belton, "Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice" (1981), 34 Vanderbilt Law Rev. 1204. In the United Kingdom: Laurence Lustgarten, Legal Control of Racial Discrimination, The MacMillan Press, London, 1980; Geoffrey Bindman, "Proving Discrimination: Is the Burden too Heavy?", [1980] Law Soc. Gaz. 1270 (December 17); David Pannick, "The Burden of Proof in Discrimination Cases" [1981] New Law Journal 895 (August 27); Christopher McCrudden, "Institutional Discrimination" (1982), 2 Oxford Journal of Legal Studies 303, at p. 336, note 177.

effects (5). This trend is flourishing in the United States and the United Kingdom and was thought to have made important progress in Canada (6). However, the trend seems to have been neutralized in this country, following two important court decisions (7) in Ontario Human Rights Commission and O'Malley (Vincent) v. Simpsons-Sears Limited (8) and Canadian National Railway Company v. Canadian Human Rights Commission and Bhinder (9). Vigourously rejecting the extended definition of discrimination which had slowly been developed and nurtured by the tribunals for almost five years, the courts reversed the tide and,

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5. Early examples of Canadian cases which adopted the effects concept of discrimination were the following: Attorney-General for Alberta v. Gares (1976), 67 D.L.R. (3d) 635 (Alta. S.C.); Singh v. Security and Investigation Services Ltd., (Ont., 1977); Foster v. B.C. Forests' Products Ltd., (B.C., 1979); Colfer v. Ottawa Board of Commissioners of Police, (Ont., 1979); Bone v. Hamilton Tiger-Cats Football Club, (Ont., 1979); Singh v. Workmen's Compensation Board Hospital and Rehabilitation Centre (1981), 2 C.H.R.R. D/459; O'Malley (Vincent) v. Simpsons-Sears Limited (1981), 2 C.H.R.R. D/267; however, rev'd on appeal by (1982), 3 C.H.R.R. D/796 (Ont. S.C., Div. Ct.) and (1982) 3 C.H.R.R. D/1071 (Ont. S.C., Appeal Div.); Canadian Human Rights Commission and Bhinder v. Canadian National Railway Company (1981), 2 C.H.R.R. D/546; however, rev'd on Review by (1983), 4 C.H.R.R. D/1404 (Fed. C.A.).

6. Black, supra note 4; Proulx, supra, note 4, at p. 465.

7. A third decision, which implicitly rejects the effects concept, has been handed down recently in Quebec in Commission des droits de la personne du Québec v. Ekco Canada Inc., as yet unreported, (S.C.M. 500-05-001001-807), October 27, 1983. The facts of the Ekco case are discussed, infra, in note 231a.

8. Supra note 5 ((1982), 3 C.H.R.R. D/796 and D/1071). The facts of the O'Malley case are described, infra, at pp. 67 ff.

9. Supra note 5 ((1983), 4 C.H.R.R. D/1404). The facts of the Bhinder case are discussed, infra, at pp. 68 ff.

today, it appears that intent has once more become - for the time being at least - an essential element of proof of discrimination in certain jurisdictions (10).

It is worthwhile to note the opinion expressed by Mr. Justice Southey of the Divisional Court in O'Malley regarding proof of intent:

> The wide powers given to the Commissioner under s. 16 of the Code to enter private premises, seize documents, and question persons in the course of inquiries into complaints make it difficult in my view, for an employer to conceal successfully an intention to discriminate on prohibited grounds from boards of inquiry. I do not think the achievement of the purposes of the statute would be materially hampered if it was interpreted as requiring proof of a discriminatory intent as part of a contravention (11).

Insofar as the difficulties of proving intent to discriminate are concerned (12), this opinion is in marked

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10. Tribunals appointed under the old Ontario Human Rights Code, S.O. 1961-62, c. 93, or the Canadian Human Rights Act, S.C. 1976-77, c. 33, are bound by these Court decisions: see, for example, Rand et al v. Sealy Eastern Limited Upholstery Division (1982), 3 C.H.R.R. D/938 (Ont.); Bezeau v. Ontario Institute for Studies in Education (1982), 3 C.H.R.R. D/874 (Ont.). Boards in other provinces have followed these precedents as well: e.g. Waplington v. Maloney Steel Ltd. (1983), 4 C.H.R.R. D/1262 (Alta.).

11. Supra note 8, at p. 800.

12. Although Mr. Justice Southey is quite right in pointing out that the Commission's investigation powers and, by extension, proper discovery procedures are an important means of establishing and proving discrimination (on this point see, for example, comments in Texas Department of Community Affairs v. Burdine, 101 S. Ct. 1089 (1981), at p. 1096, and (contd.)

contrast to those expressed by leading experts not only in Canada, but also in the United States and Great Britain (13). Still, the statement raises an important point when it concludes that the "achievement of the purpose of the statute is not materially hampered" by the intent requirement.

Perhaps the upset created by the O'Malley and Bhinder decisions is the occasion to reflect upon and to assess the trends which were taking place in Canada until then; now is the time to examine whether the move towards an extended definition of discrimination was a necessary and an appropriate initiative in the drive to render human rights legislations more effective and to reduce problems of proof in this area. I suggest that any attempt to deal with these issues must begin by asking two questions: first, is the removal of the intent requirement a necessary step to overcoming difficulties of proof in discrimination, and secondly, is the removal of the intent requirement the sole remedy needed to achieve this purpose and to render anti-discrimination laws more effective? The purpose of the first part of this study is to answer these two questions.

Oxford v. Department of Health and Social Security, [1977] I.R.L.R. 225, and also the discussion below regarding the importance of allowing commissions to obtain discovery of certain "confidential" information: infra, Part II, at pp. 412-422), these mechanisms have not been considered sufficient to deal with the difficulties of proving intent. According to Bindman, supra, note 4, at p. 1270, "where direct discrimination is alleged, gaining access to documents and to factual information does not solve all the complainant's problems."

13. See supra, note 4.

In the first chapter, I will trace the evolution of the various concepts of discrimination from the intent to the effects concepts. The shift from the intent-based approach with its emphasis on the subjective cause of certain acts to the effects-oriented approach with its focus on the objective consequences of acts, has been regarded by many as a breakthrough in the field of discrimination. Not only did it ease the difficulties of proving the elusive intent, but it also provided a basis for dealing with contemporary social and economic realities which gave rise to new forms of discrimination in which intent was altogether absent and therefore not "provable".

The effects concept has been in existence since the late 1960s when the United States Supreme Court handed down its landmark decision in Griggs v. Duke Power Co. (14); now it constitutes an integral part of American and also of British discrimination law. As for Canada, the question is whether or not the forces which pressed the United States and the United Kingdom to adopt this new concept are also present in this country. The answer will determine whether the reversed trend created by the O'Malley and Bhinder decisions will be able to continue and whether Canada will be able to ignore the developments established elsewhere.

The legal status of the effects concept in Canada may be ambiguous and uncertain today, but in the five or more years during which it was thriving it had ample time to make its way

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14. 401 U.S. 424 (1971); 3 FEP 175.

into our legal consciousness. The terminology associated with the effects concept, including such expressions as "disparate impact" and "business necessity", have crept into our vocabulary. Similarly, the intent concept has specific terms related to it: "disparate treatment", "legitimate, non-discriminatory reason", and "bona fide occupational qualification". Occasionally the terminology and the notions applicable to one concept are loosely attributed to the other. Since each of these terms has a particular significance insofar as matters of proof are concerned, such questionable exchanges can, in my view, only lead to a muddled understanding of the manner in which proof of discrimination is to be approached at any of its various stages including the elements of proof, the means of proof, defences and the burdens of proof (15). I will use these various stages as a backdrop to the following study. But, in addition, it will soon become apparent to the reader that fundamental differences in the intent and effects concepts justify - indeed necessitate - a separate analysis and discussion at each of these stages and, for this reason, they will be treated under separate headings throughout (16).

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15. This method of analysis, which I have adapted only slightly by adding the defence stage, was used in Note, "An American legal Dilemma", supra note 4.

16. The practice of dealing with proof of direct and indirect discrimination under separate headings is common among authors in the field: e.g. Lustgarten, supra note 4, chapter 11; Barbara Lindemann Schlei and Paul Grossman, Employment Discrimination Law, The Bureau of National Affairs Inc., Washington, 1976, and Supplement 1979, chapter 36.

By the end of the first chapter the concepts and the different meanings of discrimination should be clear and this will help determine, in chapter two, the essential elements of proof required to make out a case of discrimination.

The third chapter will be the occasion to examine the means of proof relevant to each concept and to note the heavy reliance on indirect or circumstantial evidence in intent cases, in contrast to the extensive use of direct evidence and statistics in effect cases. It will be followed by a chapter on the relevant defences.

These chapters, and particularly chapter three, will serve to highlight the disadvantages which persist in cases requiring proof of intent. By this point it will also have become evident that the conceptual developments which embraced the effects approach did little to migitate the difficulties of proof associated with intent cases. Indeed, it is well recognized that the advent of the effects approach did not signify the disappearance of prejudice, paternalism, or stereotypes, and these factors continue to act as obstacles to equal opportunity for protected groups. Not only do these forms of discrimination require effective legal sanctions, but Human Rights Commissions have a duty to investigate all serious intent cases complained of (17), to pursue them before a board of inquiry when

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17. Commissions must investigate complaints which fall within their jurisdiction: Re Canadian Football League and Canadian Human Rights Commission et al. (1980), 109 D.L.R. (3d) 397; (1980), 1 C.H.R.R. D/45; Re Attorney-General of Canada and Cumming et al. (1979), 103 D.L.R. (3d) 151; and Re Civil Service Association of Alberta, Branch 45 and Alberta Human Rights Commission et al. (1976), 62 D.L.R. (3d) 531, at p. 536 (Alta. S.C.).

circumstances warrant it (18) and, yes, to prove them. Here, the existence of the effects concept seems irrelevant, and problems associated with proof of intent have persisted.

In chapter five I will look at the attempts which have been made to tackle this problem. The emphasis here has been on a procedural, as opposed to a conceptual, approach which explains the proliferation of procedural terms in discrimination law such as the "prima facie case", "inferences", "presumptions", and "shifting burdens of proof". These devices were meant to ease the complainant's burden in proving intent and they were thought to have succeeded in this purpose, until recently. Contrary to common belief and expectation, the United States has not brought about substantial reform in this area. Following the United States Supreme Court decision in McDonnell Douglas Corp. v. Green (19), many imagined that the principle of a reversed burden of proof had been recognized but, in fact, this breakthrough did not occur. The decision merely plunged lower courts into a state of confusion and sparked a series of contradictory decisions. The myth which grew out of the McDonnell Douglas case was finally put to rest by the U.S. Supreme Court itself with a series of decisions (20) culminating in that of Texas Department of Community Affairs v. Burdine (21).

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18. The decision to take a matter before a board of inquiry is however discretionary. See Part II, infra, at p. 304.

19. 411 U.S. 792 (1973).

20. Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978); Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978).

21. 101 S. Ct. 1089 (1981).

As a result of these decisions it is safe to say that in cases of disparate treatment, that is intentional discrimination cases, the position in the United States is that the complainant carries the ultimate burden of proving intent and that, in other words, no shift or reversal in the burden of proof occurs. This position is not very different from that which exists both in Great Britain and in Canada. The question, therefore, is whether these attempts at procedural reform were vital and necessary for the effective enforcement of intentional discrimination provisions, or whether they represented a tempest in a tea-pot, a frenzied flurry of activity the passing of which should remain undisturbed. The debate is in fact a long-standing one which revolves around the merits of a reversed burden of proof. In this study I will explore whether such a so-called shift in the burden of proof is justified and, if so, the means by which this can be achieved.

As this last chapter will show, the controversy relating to burdens of proof primarily concerns intentional discrimination cases (22). In effects cases the allocation of the parties'

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22. The allocation of the burden of proof regarding "reasonable accommodation" has also been the source of particular controversy in Canada. It is not within the purview of this study to examine this question in detail; suffice it to say that some tribunals have held that the respondent has the burden of proving reasonable accommodation: Singh v. Security and Investigation Services Ltd., supra note 5; Rand et al., v. Sealy Eastern Limited, Upholstery Division (1982), 3 C.H.R.R. D/988 (Ont.); Bhinder v. C.N.R., supra note 5 ((1981), 2 C.H.R.R. D/546). Others have held that the complainant must show that some form of reasonable accommodation was possible: O'Malley (Vincent) v. Simpsons-Sears Limited, supra note 5 ((1981), 2 C.H.R.R. D/267). In other (contd.)

burdens of proof appears, for the most part, to be settled.

In addition to Canadian law, I have chosen in this study to examine also developments which have occurred in the United States and in the United Kingdom. With this enlarged perspective I believe that one can achieve a clearer understanding of the issues which have arisen in the past few years, particularly with respect to the concepts of discrimination (chapter 1) and the thorny matter of burdens of proof (chapter 5).

Although neither American nor British decisions are binding on Canadian Courts, it is worthwhile to remember that anti-discrimination laws have a common place of origin which is the United States. For this reason American (and sometimes British) developments, be they of a conceptual, statutory or judicial nature, can indirectly influence the interpretation of existing laws in Canada (23); they also continue to shape new anti-discrimination legislation and amendments (24).

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instances still courts have held that there is no duty to accommodate: O'Malley (Vincent) v. Simpsons-Sears Limited, supra note 8; Bhinder v. C.N.R., supra note 9, and Commission des droits de la personne du Québec v. Ekco Canada Ltd., supra note 7.

23. For examples of cases which have referred to American decisions on discrimination, see Ontario Human Rights Commission et al. v. Borough of Etobicoke, [1982] 1 S.C.R. 202, (1982), 3 C.H.R.R. D/781, and also the dissenting judgement of Mr. Justice Le Dain in Canadian National Railway Co. v. Bhinder et al., supra note 9.

24. For example, recent amendments to the Ontario Human Rights Code S.O. 1981, c. 53, expressly adopt the effects concept of discrimination (s. 10), which was judicially developed in the United States in the Griggs case, supra note 13. Similarly, the Quebec Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12, was recently amended (Bill 86 assented (contd.)

This common background and the common difficulties experienced in the area of proof, which Part I of this study will show, make a comparative analysis of these three countries useful in identifying the scope of the problems involved in proving discrimination as well as in finding the appropriate remedies.

In contrast to Part I, the second part of this study will contain a descriptive analysis of some of the important rules of evidence and procedure which apply to human rights boards of inquiry. Part II of this study, which will be of lesser interest to Quebec where discrimination cases are heard by the ordinary courts (24a), will begin by examining the influence of Administrative Law, and of the rules of natural justice in particular, on the procedures followed by human rights boards. The subsequent chapters will attempt to present a structured and informative view of the manner in which human rights boards conduct their hearings, the manner in which evidence is adduced, and the type of evidence which is admissible at these hearings (24b).

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to by the National Assembly on December 18, 1982) to include affirmative action programmes (ss. 86.1 ff.), which were also developed in the U.S. as a result of "contract compliance" clauses contained in Presidential Executive Orders. (For a discussion regarding the origin of Affirmative Action see Walter S. Tarnopolsky, Discrimination and the Law in Canada, Richard De Boo Limited, Toronto, 1982, at pp. 122 ff.)

24a. See, infra, Part II, Chapter 1, at p. 275.

24b. I am greatly indebted to the approach developed in D.J.M. Brown and D.M. Beatty, Canadian Labour Arbitration, Canada Law Book Limited, Agincourt, 1977, and particularly that used in chapter 3, which inspired the method of analysis used in Chapters 2, 3 and 4 of Part II of this study.

PART I

CHAPTER 1: THE CONCEPTS OF DISCRIMINATION

Human Rights legislation, as we know it today, first came into existence in the 1940s during the post-World War II period (25). The fact that most anti-discrimination laws, particularly in the United States and Canada (26), did not contain definitions of discrimination opened the door to a flood of judicial decisions, commentaries, and academic research papers on the topic.

For many years the discussion focused on issues such as the negative as opposed to the positive connotations of discrimination (27), the duty to show the adverse consequences of an

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25. In Canada, anti-discrimination provisions existed prior to the 1940s, but it was in this decade only that legislation dealing specifically with discrimination was enacted. See Tarnopolsky, ibid., at pp. 25-37.

    For the United States, see Blumrosen, supra note 4, at pp. 66 ff., and also for a list of American anti-discrimination legislation in the late 1940s, see Note, "An American Legal Dilemma - Proof of Discrimination", supra note 4, at p. 107, note 1.

26. In Canada, to this day, only the Quebec Charter contains a definition of discrimination at s. 10. Contrary to most Canadian and American human rights acts, British anti-discrimination laws have included a definition of discrimination. For a discussion concerning definitions of discrimination in the United States, Great Britain and Canada, see Tarnopolsky, ibid., at pp. 86 ff.

27. E.g. Walter S. Tarnopolsky, "Le contrôle de la discrimination raciale au Canada" (1977), 18 C. de D. 663 at pp. 678 ff.

act (28), and the role of prejudice, malice or evil motive as an element of proof (29). But early interpretations of the law never strayed from the original premise that the definition of discrimination was founded upon an element of intent.

One can theorize at length as to the reasons for which the intent factor occupied such a dominant position in discrimination law for so long, especially since it is nowhere to be found as an express requirement (30). The most probable answer, however, is that anti-discrimination legislation was originally based on a quasi-criminal approach (31). Commenting not only on the early anti-discrimination legislation of Great Britain, but also upon those of the United States, Canada, and other countries, Professor Lustgarten remarked as follows:

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28. E.g. Proulx, supra note 4, at pp. 423 ff.; I.A. Hunter, "Human Rights Legislation in Canada: Its Origin, Development and Interpretation" (1976), 15 U. of W. Ont. Law Rev. 21, at p. 33.

29. Hunter, ibid; Note, "An American Legal Dilemma - Proof of Discrimination", supra note 4, at p. 109.

30. In Canada, Black, supra note 4, commented at p. 2:
> Other cases can also be cited that apparently assumed without discussion that intent was a necessary element. The reasons for this assumption are not entirely clear since the wording of the various statutes does not expressly deal with the point.

In the United States, Belton, supra note 4, remarked this at p. 1226:
> Congress could have expressed the prohibition in terms of motive or intent, or it could have defined discrimination solely in terms of effect. Unfortunately, the statutory language that Congress chose did not identify clearly which of these concepts is necessary for a finding of unlawful discrimination.

31. Black, ibid. As for a description of the quasi-criminal approach, see Tarnopolsky, supra note 1, at pp. 568-9, and Tarnopolsky, supra note 27, at pp. 672 ff.

> Historically, direct discrimination has been the dominant conception, remaining virtually unchallenged until the late 1960s, and is the form that in its initial stages of optimism and inexperience anti-discrimination law has taken wherever it has been enacted. The unadorned moral repugnance of deliberate racist behaviour, unredeemed by any social value, perhaps explains its pre-eminence, but it was also linked to the initial method of enforcement. Intent is an essential element in the great majority of criminal offences, and criminal sanctions were often the only means of enforcing the earliest anti-discrimination laws (as remains true in France today). Indeed the criminal law approach moulded the Government's proposals for the first British legislation in 1965; only after an intensive lobbying campaign which disseminated persuasive evidence from various American states of the ineffectiveness of reliance upon criminal penalties was it rejected at the last moment. (32)

It was not until the late 1960s, some twenty years after human rights legislation was first enacted, that the intent requirement was challenged. Two principal reasons have been identified (33) to explain this strong opposition: first, the difficulties involved in proving intent were assuming important proportions and they were showing no signs of relenting with time, and secondly, the intent-based definition no longer seemed to satisfy contemporary social and economic realities nor to recognize new forms of discrimination which existed irrespective of intent.

These two factors were instrumental in bringing about a new concept and eventually a new legal definition of discrimination both in the United States and in Great Britain. The

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32. Lustgarten, supra note 4, at p. 7.

33. This two-fold explanation is given in a comprehensive analysis which compares the development of the effects concept in the United States with that in Great Britain: McCrudden, supra note 4.

concept was known as the "discriminatory effect" concept (34).

The evolution of the definition of discrimination in these two countries will be examined first, followed by a study of developments in Canada.

A. United States

During the 1940s and the 1950s the definition of discrimination did not undergo important developments. The reason proffered by Blumrosen to explain this inactivity was that the enforcement of anti-discrimination legislation relied heavily on the mediation or conciliation approach as opposed to a definite law enforcement approach (35). The need for a revitalized definition of discrimination was, therefore, not evident.

Throughout these years the intent element was to monopolize the attention of those working in the field and, while it was recognized that illegal discrimination could exist independently of malice or prejudice (36), the basic principle stated as follows remained unchanged: "the essential element of discrimination in its legal context is the mental process of the alleged discriminator" (37).

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34. The concept is known as "indirect discrimination" in the United Kingdom. In the U.S., it is also alluded to under a variety of other names such as "systemic discrimination", "adverse impact", and "disparate impact".

35. Blumrosen, supra note 4, at p. 66.

36. Note, "An American Legal Dilemma - Proof of Discrimination", supra note 4, at p. 109.

37. Ibid.; Blumrosen, supra note 4, at p. 67, note 35.

It took little time for experts to discover the stark truth: the task of proving the "mental process" of the alleged discriminator created more problems than it resolved. By 1949 numerous obstacles had already been identified: unless the discrimination was express, apparent or admitted - and this was rare - discrimination could only be proved by circumstantial or indirect evidence (38); particular difficulties arose from having to prove individual cases of discrimination for, at that time, comparison with other instances was regarded as irrelevant to the specific case at hand (39); often, the only method of proof was by way of inferences (40); it was considered virtually impossible for the complainant to prove discrimination with precision and certainty because the reasons for the respondent's actions were known only to the latter (41).

It would seem that time and experience could not in themselves remedy these difficulties. Commenting some thirteen years later on the wastefulness and the futility of the time spent in the search for circumstantial evidence, Professor Blumrosen remarked:

> This [intent] concept produced a series of almost insuperable difficulties, as individual cases became bogged down in the vagaries of fact-finding. The potential law enforcement

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38. Note, "An American Legal Dilemma - Proof of Discrimination", ibid., at p. 111.

39. Ibid., at p. 110.

40. Ibid., at p. 118.

41. Ibid., at p. 123.

thrust of the statute was lost in the search for circumstantial evidence that would reveal the employer's state of mind. (42)

Still today criticism and dissatisfaction persist: inferences, on which so many cases of intentional discrimination must rely, are said to lead to "unpredictable and widely divergent results" (43); also, no effective remedy has yet been found to ease the complainant's burden of proof even though it is widely recognized that he cannot be expected to know nor to prove facts which are peculiarly within the knowledge and control of the defendant (44).

In a limited attempt to make their way out of the maze created by the requirement to prove intent, state agencies responsible for the enforcement of anti-discrimination legislation began, in the 1940s and 1950s, to apply the "equal protection" concept of discrimination (45). According to this concept the unequal treatment of members of a protected class provided the basis from which the discriminatory intent could be inferred (46).

Despite certain limitations, this concept of discrimination provided the basis for a comparative approach to proving

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42. Blumrosen, supra note 4, at p. 68.

43. Belton, supra note 4, at p. 1284.

44. Ibid., at pp. 1257 ff.

45. Blumrosen, supra note 4, at pp. 68-69.

46. According to M. Sovern, Legal Restraints on Racial Discrimination in Employment, 61-102 (1966), at pp. 70-73, as quoted in Blumrosen, ibid.: "discrimination required a purpose or motive to harm an individual because of his race, which purpose could be inferred from certain conduct, mainly of denying equal treatment to minorities."

discrimination. No longer restricted to showing the respondent's behaviour and mental process in an isolated instance, the complainant could now compare the treatment accorded to him - and to other members of his protected class - with that accorded to members of the majority, and, proof of differential treatment was considered strong evidence of discrimination. In sum, the equal treatment approach extended the boundaries of relevance in discrimination cases and allowed a departure from the excessive - and one might say self-defeating - focus on the individual fact situation.

On the other hand, the differential treatment approach had important failings. First, as was to be expected, the bases for comparison, and therefore the essential elements of proof, were not always available. A complainant could not always find a member of the majority who was similary situated and who had equal or comparable qualifications to whom he could compare himself in order to show unequal treatment (47).

In addition, there was an inherent flaw in the concept itself for although it was assumed that differential treatment constituted strong evidence of discrimination, the reverse proposition that equal treatment was evidence of an absence of

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47. For instance, the facts of the McDonnell Douglas case discussed infra at p. 222 did not contain the necessary elements to show differential treatment. The standard for making out a prima facie case of intentional discrimination, as it was developed in this landmark decision, does not depend upon the existence of comparative evidence.

discrimination was not necessarily true (48). Indeed, it was later observed that all effects cases involve neutral requirements which apply equally to both minority and majority members and, in retrospect, it is evident that none of these cases would have violated the equal-treatment concept of discrimination (49).

It was, as was already mentioned, in the late 1960s that the intent concept of discrimination suffered its most serious criticism and that its prominence in the field was at long last challenged. Not only were the difficulties of proof pushing complainants to the outer limits of their patience, but experts in the social sciences and economics fields were noticing that minorities, and Blacks in particular, were persistently being excluded from an equal participation in the economy to such a degree that it was questioned whether prejudice alone could account for this exclusion.

Studies revealed that twenty years after the enactment of anti-discrimination legislation, the economic status of

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48. An interesting case on point is that of Lau v. Nichols, 414 U.S. 563 (1973): The petitioners, non-English-speaking Chinese students, brought a class action suit against officials of a public educational programme because they refused to establish a school curriculum which would take into account the petitioners' language difficulties. The latter argued that the all-English programme effectively deprived them of an equal opportunity in education in violation of s. 601 of the Civil Rights Act of 1964. The Court agreed. Mr. Justice Douglas declared at p. 566 that "[u]nder these State-imposed standards there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education."

49. Blumrosen, supra note 4, at p. 70.

minorities had barely improved. New methods of labour-market analysis enabled experts to identify and describe more clearly the extent of the inequalities suffered by minorities. One such study relied on the dual-market hypothesis developed by Doeringer and Piore. McCrudden described this method of analysis, which divided the market into primary and secondary sectors, and summarized the results of the study in this way:

> Primary sector jobs have high wages, good working conditions, stability, and opportunity for advancement, while secondary jobs have low wages, poor working conditions, little security or possibility of advancement. Movement from the secondary to the primary sector was restricted due to a number of threshold barriers such as union membership, educational qualifications, etc. Blacks tended to be restricted to secondary sector jobs (50).

Thus, the employment situation of Blacks appeared quite bleak and it was difficult to dissociate such study results from questions regarding the effectiveness of anti-discrimination legislation. Blumrosen expressed his scepticism concerning the latter when he concluded that "[h]ence, under [the] older concepts [of intent and differential treatment], minorities remained at the bottom of seniority lists and at the top of unemployment statistics" (51).

As for the causes of the continued social and economic subjugation of minorities, experts began to suspect that there were factors other than prejudice which were at work. With the

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50. McCrudden, supra note 4, at p. 306.

51. Blumrosen, supra note 4, at p. 70.

growth of enterprises and with developments in the industrial relations field, individual and subjective criteria began to occupy less prominent positions in hiring, wages, promotions and advancement than before. Decisions of this nature were increasingly determined by company or personnel department policies or by collective agreements. Not surprisingly, these policies and systems were usually neutral on their face, as traces of discriminatory practices were meticulously erased in order to avoid blatant conflict with anti-discrimination laws.

The changes caused experts to think in terms of structures and systems. Referring to the new approach in the area of race relations, McCrudden noted the following:

> By the late 1960s ... the predominant approach in the United States changed to one which emphasized institutional and structural reasons for the exclusion in addition to 'prejudiced discrimination'. Adjectival use of 'institutional' or 'structural' before 'discrimination' or 'racism' became common to describe the exclusion of blacks from housing and employment for whatever reason. In 1968, Leon Mayhew used the term 'structural discrimination' to describe such exclusion (52).

The courts endorsed this new approach toward discrimination and in the case of Franks v. Bowman Transport Co. it was remarked that "employment discrimination as viewed today is a ... complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of 'systems', and 'effects' rather than simply intentional wrongs"(53).

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52. Supra note 4, at pp. 305-306.

53. 424 U.S. 747 (1976), at pp. 764-765.

Far from reducing the discriminatory impact on minorities, structures and systems seemed to reinforce practices of this kind. Defining institutional discrimination, Knowles and Prewitt referred to it as any situation where "behaviour has become so well institutionalized that the individual generally does not have to exercise the choices to operate in a racist manner. The rules and procedures of the large organization have already prestructured the choice. The individual only has to conform to the operating norms of the organization and the institution will do the discriminating for him" (54).

Whether the neutral policies were unwittingly used to perpetuate discrimination or whether the practices grew out of a conscious determination to circumvent the effects of anti-discrimination legislation may be regarded as irrelevant, since the ultimate outcome is the same. Nevertheless, it is worthwhile to note certain comments that have been made by experts on this point. On a rather disquieting note, Blumrosen gave this assessment of the trends which appeared at this time:

> In enacting the 1964 Civil Rights Act, Congress provided a one-year delay in the effective date to give labor and management an opportunity to comply voluntarily with the Act's provisions, and to allow the EEOC and the Department of Justice to 'tool up' for the enforcement of the Act. Neither of these events occurred. During this one-year moratorium, southern industry engaged in a flurry of activity that sometimes involved genuine changes in industrial-

54. L. Knowles and K. Prewitt, Institutional Racism in America (Prentice Hall, 1969), 143, as quoted in McCrudden, supra note 4, at p. 306.

> relations systems, but more often produced only a 'cosmetic change'; many employers adopted seemingly neutral personnel policies, which, in fact, perpetuated the subordinate position of black workers. Tests and educational requirements were adopted extensively in the 1960's to achieve this result. The tests could be justified as 'sound' personnel practices and would also permit an employer to continue the subordination of minorities (55).

Sovern is equally critical of the practices which occurred following the enactment of the Civil Rights Act of 1964 (56). Commenting on the 1970 case of Hicks v. Crown Zellerbach Corp. (57) in which Crown Zellerbach's battery of written personnel tests were attacked for their discriminatory impact, Sovern remarked as follows:

> It is difficult to imagine a clearer example of the imposition of a racially discriminatory term of employment. If the company had said in April, 1964, that henceforth any present Negro employee wishing to get a top-level job would have to pass a special test but that present white employees were exempted from the test, we would have had rank and open discrimination. The company has not done that. Rather it has defined a class which just happens to consist essentially of Negro employees as of April, 1964, and has set up a special test for them alone. The effect is to erect a subtle special test barrier as a substitute for the naked racial barrier that prevented Negroes from moving to the better progression lines until April, 1964. As a result of this test barrier only one Negro who was employed as of April,

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55. Blumrosen, supra note 4, at p. 64.

56. 42 U.S.C., §2000e.

57. 319 F.Supp. 314 (1970).

> 1964 when the tests for transfers were instituted has been able to transfer to a white job in the following three years (58).

He then continued with this additional example:

> This tactic of replacing naked discrimination with more subtle discriminatory barriers which purport to be color blind has obvious parallels in other civil rights contexts. A recent example of this tactic in the voting rights area was described in United States v. Dogan, 314 F.2d 767 (5th Cir. 1963). The defendant, a sheriff, issued instructions that any person coming in to pay a poll tax for the first time, 'black or white,' be required to see him personally. The court found that substantially all of the eligible whites had previously been permitted to pay the poll tax and that not one of the eligible Negroes had done so, and drew this conclusion:
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> > 'Obviously a blanket requirement that all persons who have never paid the poll tax before, that being a relatively small percentage of white people and all Negroes, who now desire to pay their poll taxes for the first time must see the Sheriff personally operates unequally and discriminatorily against the Negroes' (59).

Whatever the origin and the cause of this form of discrimination it had become evident that strong economic inequalities were persisting. Moreover, under the early legal definitions of discrimination employers could exclude minorities from their work force and still avoid liability as long as the immediate cause of the exclusion appeared to be a neutral policy which applied equally to all employees.

As a result of these failings in the law the legal community came under strong pressure to adjust itself and the

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58. Michael I. Sovern, Cases and Materials on Racial Discrimination in Employment, West Publishing Co., St. Paul, Minn., 1969, at p. 447.

59. Ibid.

enforcement of anti-discrimination legislation to contemporary social and economic realities.

Insofar as proof of intent was concerned, the difficulties had by now become insurmountable. While proof of hidden prejudices had been a demanding task, complainants were now faced with the untenable duty of having to prove an element which, in some cases, simply did not exist. As structures and systems gained pre-eminence, the intent to discriminate, where it existed, was pushed into the background until in the end "the institution could do the discriminating [for the employers]"(60).

A combination of all these factors provided the necessary impetus for the development of the third legal concept of discrimination, known as the effects concept. But the transition was not immediate and, at first, the courts had to stretch the definition of discrimination to deal with certain effects cases brought before them. The facts of some of these cases serve to illustrate the many aspects of systemic discrimination.

The discriminatory effects of an apparently neutral word-of-mouth recruitment policy were considered in the case of Parham v. Southwestern Bell Telephone (61). In 1964, the defendant company decided to change its employment policies which, until then, had shown clear bias against Blacks. Despite these changes, the proportion of black employees in the company's work force did not improve, and for more than two years, until the

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60. Knowles and Prewitt, supra note 54.

61. 433 F.2d 421 (8th Cir. 1970); 2 FEP 1017.

beginning of 1967, it hovered around 1.8% of the total work force. At the same time statistics showed that Blacks represented 21.9% of the general population of the State of Arkansas, where the defendant operated its business. The company's recruitment policy, it was learnt, relied heavily on an employee referral or word-of-mouth system. Considering the fact that over 98% of the work force was composed of Whites, and that it could be assumed, in general, that persons of the same race tend to associate more frequently and more closely with one another, it was found that the recruitment practices favoured Whites and were, therefore, discriminatory. In concluding, the Court held that it was empowered "to prohibit or change policies which [were] racially neutral on their face but [which built] upon pre-Title VII bias that produce[d] present discrimination" (62).

Another case, that of Gregory v. Litton Systems, Inc. (63), demonstrated the manner in which an apparently neutral policy could extend the effects of "societal discrimination" (64) into the work place. A company policy, which refused to hire individuals with a record of arrests, was found to have a discriminatory impact on Blacks. Studies showed that Blacks were arrested substantially more often than Whites in proportion to their numbers; evidence to this effect was "overwhelming": although Blacks comprised 11% of the population, they accounted for

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62. Ibid., at p. 1022.

63. 316 F.Supp. 401 (C.D. Cal. 1970); 2 FEP 842.

64. This term is used by McCrudden, supra note 4, at p. 308, to describe discrimination in the larger society as opposed to the immediate work environment.

27% of the arrests and 45% of these were reported as "suspicion arrests" (65).

In this particular instance plaintiff had applied for employment as a sheet mechanic in the defendant Company's Data System Division. He received a job offer but then was asked to fill out a "Preliminary Security Information" form, which required candidates to list all their arrests other than those involving minor traffic offences. He had been arrested on fourteen occasions - thirteen of which had occurred more than ten years earlier - but he had never been convicted of any of the offences. The Court found that the recruitment policy in question had the foreseeable effect of denying black applicants an equal opportunity for employment, even if the policy was neutral on its face. Good faith was not a defence, the Court said, and proof of intent was not required as long as the act was not accidental or inadvertent. It concluded that the practice was interdicted by law, unless the defendant company was able to show business necessity, i.e. that the practice was essential to the safe and efficient operation of the business (66).

During this same period it also became apparent that certain seniority systems, although neutral on their face, had the effect of perpetuating past discrimination (67). Even though

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65. Ibid., at p. 843.

66. Ibid.

67. This practice eventually came to be regarded as a distinct category of discrimination known as "present effects of past discrimination", falling within the broader effects category: Schlei and Grossman, supra note 16, chapter 3.

seniority systems were originally established for the purpose of ensuring greater fairness towards employees in general, it was observed that in some instances they served as a device for perpetuating the subordination of minorities. By reducing their chances for promotion and for transfers into more attractive positions, seniority systems could prevent minorities from altering their inferior working conditions which resulted from earlier overt discrimination.

One case on point was that of Local 189, United Papermakers and Paperworkers, AFL-CIO, CLC et al. v. Unites States (68). The evidence showed that until May 1964 the defendant company had had racially segregated lines of progression and that the lowest paying jobs for Whites paid more than the highest paying jobs for Blacks. In 1964, there was a merger of the two lines of progression on the basis of existing pay rates, in other words tacking the formerly black jobs at the bottom of the formerly white jobs, and new seniorities were determined accordingly. The promotion system adopted by the company was based on job seniority which, in the circumstances, strongly disfavoured the black employees. The Court held this to be illegal, stating that a system which carried forward the incidents of discrimination into the present constituted on-going discrimination (69). The treatment of certain black employees, the Court maintained, had to be called the "result" of the company's earlier intentional

68. 416 F.2d 980 (5th Cir. 1969); 1 FEP 875.

69. Ibid., at p. 994.

discrimination (70). It was also held that the key to concluding that there was discrimination was that the practice was not accidental, inadvertent or heedless, and that the policy was not required for the safe and efficient operation and the business (71).

The other case which addressed the issue of the discriminatory effects of certain seniority systems was that of Quarles v. Philip Morris, Inc. (72). The facts of this case revealed that the defendant tobacco company had discriminated in the past particularly by maintaining racially segregated departments. The policy of segregation was abolished; however, the company maintained a system of departmental seniority. Consequently Blacks who wished to enter formerly white departments - where, not surprisingly, the more attractive jobs were to be found - were less eligible for promotions in comparison to the white employees, often their junior (in terms of company seniority), who were already in the departments; moreover, once they found themselves in the formerly white departments they automatically acquired the lowest seniority, again behind white employees who were junior to them, and in this way they ran the risk of being among the first to go in the event of transfers or lay-offs within the department. The Court held that, in the circumstances, the departmental seniority system had a discriminatory effect against the black employees. "It is apparent", the Court declared in words that

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70. Ibid., at p. 996.

71. Ibid.

72. 279 F.Supp. 505 (E.D. Virginia 1968); 1 FEP 260.

have since become famous, "that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act" (73). The Court also remarked that "a departmental seniority system that has its genesis in racial discrimination is not a bona fide seniority system" (74).

It was yet another type of neutral employment policy - personnel tests and educational qualifications - that was the object of scrutiny in the important Supreme Court decision in Griggs v. Duke Power Co. (75). In this matter a class action was brought by Griggs, one of fourteen black employees working at the petitioner's Dan River Steam Station, a power generating facility located in North Carolina. It was found that prior to 1964 the company had openly discriminated against Blacks by employing them in only one of its four departments, that is in the labour department. Over the years the company instituted policies requiring a high school education for initial assignment or transfer into most departments, except the labour department. Subsequently, it added a further requirement both for new employees and for those seeking transfers into all but the labour department, making it necessary for the applicants to register satisfactory scores on two aptitude tests, the Wonderlic Personnel Test and the Bennett Mechanical Aptitude Test. Neither, it was learnt,

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73. Ibid., at p. 269.

74. Ibid., at p. 271.

75. Supra note 14.

was directed or intended to measure the ability to learn or to perform a particular job or category of jobs. Moreover, it was also noted, that certain white employees hired before these requirements were imposed continued to perform their jobs satisfactorily and to achieve promotions within their departments.

In 1964, the segregated departmental system was abolished. However, in order to transfer into the formerly white departments the company required that the black employees have a high school education and that they pass the aptitude tests. On their chances of success in comparison to white candidates, statistics showed that while 34% of white males had completed high school, only 12% of black males had done so; similarly, with respect to the standardized tests, statistics showed that within the company itself, 58% of the white applicants had successfully passed the tests as compared to 6% of the black applicants. This imbalance was attributed to the inferior education offered to Blacks by the segregated school system which had been in effect in the State of North Carolina for many years (76).

The Supreme Court came to the conclusion that these requirements had a discriminatory impact on Blacks. Furthermore, the evidence did not demonstrate that these same requirements were in any way justified by business necessity and it was consequently held that they violated Title VII of the Civil Rights Act of 1964. It was in this case that the Supreme Court officially recognized the effects concept of discrimination and that it

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76. Ibid., at pp. 176-177.

"redefine[d] discrimination in terms of consequence rather than motive, effect rather than purpose" (77).

There is no doubt that in doing away with the intent requirement as an element of proof, the Court succeeded in improving the effectiveness of anti-discrimination laws. Perhaps the best evidence of this can be found in a review of the effectiveness of the legal process throughout each of the various stages of the Griggs case, so aptly summarized by Blumrosen:

> At this point, a review of the effect of the legal process on the situation at Duke Power Company is in order. The statute's passage, without the invocation of any formal procedures, led to a change in the entry level and transfer standards, but no black workers were hired, promoted, or transferred into the more desirable departments or positions. Once the EEOC complaint had been filed, the company upgraded one black worker who had a high school diploma. After the district court proceedings had been commenced, the remaining two black workers with high school diplomas were promoted. The district court therefore concluded that its concept of discrimination (evil-motive) had not been proven.
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> The court of appeals ordered priority for promotion and transfer of the six black workers who had been hired before 1955 [so that they would benefit from acquired rights in the same way as white co-employees hired prior to 1955]. That much was required by its equal-treatment concept of discrimination. The Supreme Court decision extended that priority to all of the remaining black employees, and struck down the high school and test requirements as applied to minority applicants (78).

B. United Kingdom

There existed in Great Britain certain distinctive

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77. Blumrosen, supra note 4, at p. 62.

78. Ibid., at pp. 80-81.

characteristics which, at first glance, would have made one suspect that the concept of discrimination would not, in the 1970s, undergo the same drastic developments as those observed in the United States: first, Great Britain's multi-cultural and multi-racial society was largely due to recent immigration flows which had occurred in the last twenty years (79), and this hardly seemed long enough for the phenomenon of institutional discrimination to take root; secondly, early anti-discrimination legislation (80) in Britain contained a definition of discrimination which clearly adopted the differential treatment test (81) (and implicitly the intentional discrimination concept), and so, there was little opportunity, nor indeed the incentive, to redefine discrimination during the lifetime of the legislation.

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79. McCrudden, supra note 4, at p. 309. See also D.J. Smith, Racial Disadvantage in Britain, Penguin, Middlesex, 1977.

80. The first Race Relations Act of 1965 was a quasi-criminal legislation, which prohibited incitement to racial hatred, the practice of discrimination in places of public resort and discriminatory restrictions on the disposal of tenancies. In 1968, the Act was amended and for the first time in British history employment discrimination became unlawful: Lustgarten, supra note 4, Introduction. On the history of anti-discrimination legislation in Great Britain, see also Anthony Lester and Geoffrey Bindman, Race and Law, Longmans, London, 1972, ch. 3.

81. The Race Relations Act of 1968 contained the following definition in section 1:

> 1(1) For the purposes of this Act a person discriminates against another if on the ground of colour, race or ethnic or national origins he treats that other, ... less favourably than he treats or would treat other persons, and in this Act references to discrimination are references to discrimination on any of those grounds.
>
> (2) It is hereby declared that for those purposes segregating a person from other persons on any of those grounds is treating him less favourably than they are treated.

Beneath the surface, however, there lay common problems, common social and economic patterns and the forces which had provided the impetus for the development of a new definition of discrimination in the United States also appeared in Britain. In his article entitled "Institutional Discrimination", Christopher McCrudden drew this parallel between the two countries:

> There was a growing awareness of the limited coverage of this definition of discrimination [based on intent] coinciding with an increased awareness of the problems of immigrant disadvantage, urban deprivation, and in particular with the development in Britain of the idea of institutional discrimination. This definition was regarded as limited for several reasons similar to those which encouraged the 'effects test' in the United States. Firstly, it was difficult to establish that it had been breached because it required proving that a person had a discriminatory intention. Secondly, this concept of discrimination had little effect on the use of criteria which had the effect of excluding disproportionate numbers of minority groups irrespective of intention. It was limited, for example, in looking at what happened after a black worker came to a factory looking for a job, but ignoring the fact that even if his racial origin was not directly taken into account at the time he applied there was a greater chance that he would lack those attributes which went to make a successful applicant (82).

As one may well suspect, there were - and still are - many similarities in the difficulties of proof which confronted both Great Britain and the United States. Legal experts, academics, and lawyers in Britain set themselves to the task of identifying the problems related to proof of intent and of searching for the appropriate remedies to this problem, in much the same way as their American counterparts had done before them. Studies

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82. McCrudden, supra note 4, at p. 336.

and commentaries focussed on such issues as the subjective - and therefore precarious - nature of the evidence used to show intent; the inherent difficulties involved in trying to prove discrimination on the basis of individual as opposed to group treatment, and lastly, the excessive burden placed upon the complainant who had to prove that the other party was acting with an illegal, i.e. discriminatory, intent or state of mind.

Regarding the hazards of building a discrimination case strictly on subjective evidence, in other words on the conflicting versions of the two parties, Lustgarten commented as follows:

> The employer's response to most claims of discrimination generally consists of denial of the complainant's statement of the facts, presentation of his own version, and/or assertion that a better qualified person was found for the job. The key question for the tribunal then becomes one of credibility. Usually the evidence is sharply conflicting, with neither side obviously engaged in fabrication. The witnesses normally are interested parties - the complainant and those who dealt with him: disinterested observers do not exist. In these circumstances relatively minor inconsistencies in the complainant's story have weighed heavily against a finding of discrimination, as credibility is translated into a fine balance of probabilities (83).

This approach to proving discrimination was not only extremely subjective, and therefore fragile, but also individualistic; as such, it was inattentive to certain fundamental characteristics of discriminatory behaviour. Such behaviour manifests itself through unequal treatment, and this requires proof by way

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83. Lustgarten, supra note 4, at p. 207.

of comparison; in other instances, it implies patterns and group-oriented behaviour, and this calls for proof by way of statistics and similar acts evidence (84). Summing it up, Lustgarten expressed the view that "the lawyer's concern is with specificity and individuality to a degree that a social scientist would find quixotic" (85).

The concern that a traditional legal approach, usually highly individualistic, would severely limit the effectiveness of anti-discrimination legislation was not altogether ill-founded as two English cases showed. In an Employment Appeal Tribunal (EAT) decision, Jalota v. Imperial Metal Industry (Kynoch) Ltd. (86), Mr. Justice Talbot held that a comparison between the composition of the employer's work force and the number of black employees working for him, was entirely irrelevant to a claim of racial discrimination (87). In the second case of Science Research Council v. Nassé (88), Lord Denning M.R. of the Court of Appeal

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84. In order to draw away from the subjective and individualistic approach to proving direct, i.e. intentional, discrimination, Lustgarten recommended the use of testing results, similar acts evidence, evidence concerning the composition of the empoyer's work force, statistics, etc.: ibid., at pp. 207-211. Such evidence, in effect, represents different forms of circumstantial evidence from which intent may be inferred: see, infra, Chapter 3.

85. Ibid., at p. 208.

86. [1979] I.R.L.R. 313.

87. Ibid., at p. 314. In fact, this type of evidence may be relevant to proving intent by way of circumstantial evidence: see discussion, infra, Chapter 3.

88. [1978] 3 All E.R. 1196, rev'd by the House of Lords, [1979] 3 All E.R. 673.

denied the complainant's right to disclosure of the other employees' personnel files, effectively preventing him from making out a case of differential treatment (89). Fortunately, the House of Lords reversed this decision, holding that disclosure is indeed required where the evidence is "necessary for disposing fairly of the proceedings" (90).

Other difficulties remained unresolved. In addition to the above problems of proof, it was also considered that the complainant's burden of having to prove the other party's state of mind was simply excessive. This led some authors to question the effectiveness of the provisions regarding direct discrimination. For his part, Lustgarten described the situation with a great deal of pessimism:

> [T]he difficulties of proof confronting individual complainants are at present so great that the effectiveness of the statute is at risk. In effect the complainant in a discrimination case is compelled to prove a negative: that the employer did not have a legitimate reason for denying him what he sought (91).

Although the difficulties of proving intent began when the Race Relations Act was first enacted in 1968, the courts and tribunals did but rarely direct their attention to this problem. In 1977, the EAT in Oxford v. Department of Health and Social

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89. For a further discussion regarding the issue of disclosure and problems raised by the confidentiality of personnel files see, infra, Part II, at pp. 412-422.

90. Ibid., at p. 680.

91. Lustgarten, supra note 4, at p. 206.

Security (92), expressly recognized the difficulties inherent in proving a discriminatory intent. But, although it conceded that "the evidential burden may easily shift to the respondent", the Tribunal concluded that "the formal burden of proof [lay] upon the [complainant]" (93). This decision did little to ease the complainant's heavy burden (94). Furthermore, subsequent decisions did not stray far from this position (95) and criticisms regarding this onus have continued (96).

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92. [1977] I.R.L.R. 225.

93. Ibid., at p. 226.

94. For further discussion on the issue of burdens of proof see, infra, Chapter 5.

95. But, see Wallace v. South Eastern Education and Library Board, [1980] I.R.L.R. 193, and Fair Employment Agency v. Craigavon Borough Council [1980] I.R.L.R. 316. These cases further require that the respondent answer the complainant's prima facie case of discrimination by giving a "plausible" and "credible" explanation for his actions.

96. See David Pannick, "The Burden of Proof in Discrimination Cases", supra note 4, at p. 896:

> Moreover, the recent decisions suggest that the respondent can rebut an inference of discrimination merely by articulating a lawful reason for his impugned decision.

Also, Geoffrey Bindman, "Proving Discrimination: Is the Burden too Heavy?", supra note 4, at p. 1271. In support of his criticism Bindman points out the low success rate of cases heard by tribunals in recent years:

> The very low success rate in industrial tribunal applications under the Race Relations Act and the Sex Discrimination Act suggests that the difficulties faced by [complainants in the cases just described] are common to many applicants. In 1978 only 20 out of 298 applications heard by tribunals under the Race Relations Act were successful; and in 1979, only 20 out of 366. Under the Sex Discrimination Act, less than 16 out of 81 applications succeeded in 1978 and less than 15 out of 60 in 1979. The small number of successful applications (and indeed of any applications) contrasts with survey results which indicate discrimination against West Indians, Indians and Pakistanis in between 23% and 27% of all job applications.

In sum, the evidentiary problems linked with the intent element of discrimination caused as many problems in Great Britain in the 1970s as they had in the United States in the 1960s.

In 1974, the government of Great Britain put forth proposals for a new Sex Discrimination Act (97), and there was also talk of amending the Race Relations Act of 1968. Inevitably this caused a flurry of activity as White Papers, private studies and commentaries abounded. It was the ideal occasion to assess the effectiveness of past anti-discrimination Acts and to determine the needs respecting future legislation in this area. Ultimately, most of these studies called for the adoption of an expanded definition of discrimination in both the areas of sex and race discrimination and they rejected the restrictive intent-oriented definition as simply inadequate (98). Problems of proof, recent interest in the concept of institutionalized discrimination and the increased awareness that prejudice was not the sole cause of discrimination, all contributed to this thrust.

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97. McCrudden, supra note 4, at p. 337.

98. For a detailed discussion concerning the studies and recommendations which surrounded the enactment of the Sex Discrimination Act of 1975 and the amended Race Relations Act of 1976, see McCrudden, supra note 4, at pp. 336 ff. It would appear that the visit to the United States of Mr. Roy Jenkins, then Home Secretary, was an important factor in the ultimate decision to incorporate a wider definition of discrimination in the legislations. On this, see McCrudden, ibid., at p. 338, and Lustgarten, supra note 4, in the Introduction.

At first, the concept of institutionalized discrimination appeared inappropriate in Britain, but eventually studies indicated that prejudice alone could not explain the inequalities observed in that country. The term "institutional discrimination" found its way into British literature. McCrudden described the progression in this way:

> The discrimination which has resulted from the immigration has also had much less time to become institutionalized in Britain in the way it has in the United States. The position of minorities in Britain thus seems considerably more fluid than in the United States. The late 1960s saw increasingly expressed fears, however, that discrimination in Britain might become combined with the inequalities between majority and minority groups to produce a form of institutionalized discrimination more similar to that in the United States than discrimination in Britain had previously been thought to be. And this fear has increased since then because of a greater awareness of the reality of exclusion and of the effects of such exclusion on public order.
>
> ...
>
> By the late 1960s there was thus developing a concern that the demonstrably unequal position of the 'immigrant', particularly in the labour market, could not entirely be explained by the largely immigrant status of the minority worker or by 'prejudiced' discrimination. In particular, concern over the status of the 'second generation' stimulated this re-examination. Studies began to turn up examples where neither prejudiced discrimination nor immigrant disadvantage contributed at all (or only in part) to the disadvantaged status of minority groups. In Britain too 'institutional racism' became a term used to describe such inequalities. As in the Unites States one example of such discrimination was seen to be the direct effects in the present of past discrimination, leading to minority group workers not even applying for housing or for work at a particular plant. Wright, for example, noted that in certain instances, factors such as discrimination in housing and accommodation contributed to black

> concentration in particular areas which in turn led to limitations on the range of jobs available to coloured workers to those within reasonable travelling distances of the 'coloured quarter'.
>
> Situations in addition to those in which discrimination in the past contributed to present disadvantages also became apparent. Knowledge by employers of immigrant disadvantages such as lack of facility in English was seen as leading to a situation where an easily observed characteristic such as race was coming to be used as a relatively cheap 'screening device' by employers ... (99).

Whereas in the 1960s it was thought that the problems experienced by immigrants belonging to racial minorities were due only to cultural differences and to the immediate economic hardships resulting from the arrival into a new country, studies showed that the inequalities persisted into the 1970s and that there was cause for concern (100). It appeared that earlier explanations for these disparities, which had relied only on prejudice or, in the alternative, only on the fact that the immigrants were recent arrivals, were no longer satisfactory.

The White Paper on Racial Discrimination published in 1975 reflected on the problem in this way:

> [E]merging evidence [indicates that] problems with which we have to deal if we are to see genuine equality of opportunity for the coloured youngsters (born and educated) in this country may be larger in scale and more complex than had been initially supposed (101).

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99. McCrudden, ibid., at pp. 310-311.

100. Ibid., at p. 341.

101. As quoted in McCrudden, supra note 4, at p. 342.

The potential discrimination facing immigrants belonging to racial minorities proved to be a revealing example of discrimination which was not founded on a single cause (e.g. prejudice), but on an amalgam of causes. The White Paper faced the issue squarely describing both the causes and the potential scope of the discrimination suffered by these groups:

> [T]hat there is at work in this country, as elsewhere in the world, the familiar cycle of cumulative disadvantage by which relatively low-paid or low status jobs for the first generation of immigrants go hand in hand with poor and overcrowded living conditions, and a depressed environment. If, for example, job opportunities, educational facilities, housing and environmental conditions are all poor, the next generation will grow up less well-equipped to deal with the difficulties facing them. The wheel then comes full circle as the second generation find themselves trapped in poor jobs and poor housing. If at each stage of this process an element of racial discrimination enters in then an entire group of people are launched on a vicious downward spiral of deprivation. They may share each of the disadvantages with some other deprived group in society; but few other groups in society display all their accumulated disadvantages.
>
> ...
>
> There still remain a set of problems which arise because we are dealing with newcomers. It is not to be assumed that these problems will disappear without residue simply with the passage of time, for some of the problems which coloured immigrants faced as immigrants, for example, linguistic problems, have created handicaps for the second generation (West Indian as well as Asian) which will continue to require attention and resources for some time to come. Beyond the problem of cultural alienness, there are the problems of the low status, of material and environmental deprivation which coloured immigrants and, increasingly, their children experience. To the extent that they share all or some of these problems with other groups in society, a general attack on deprivation will be relevant to their problems. But

> there may be a special dimension to their problems to the extent that the factor of racial discrimination multiplies and accentuates the disadvantages which are shared in part with others. Finally, the problems of racial disadvantage can be seen to occur typically in the context of an urban problem whose nature is only imperfectly understood (102).

The message was clear. The restrictive direct discrimination provisions which had been part of the Race Relations Act of 1968 and which regarded prejudice in its diverse forms as the sole cause of discrimination, could not be expected to deal with social and economic realities exposed by the White Paper and other studies, the broader concept of discrimination was called for. When the Act was amended in 1976 it defined discrimination not only in terms of direct discrimination but also in terms of indirect discrimination (103), thus incorporating the effects

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102. Ibid.

103. The Race Relations Act of 1976 defines both "direct" and "indirect discrimination" as follows:

> 1.(1) A person discriminates against another in any circumstances relevant for the purposes of any provision of this Act if -
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> (a) on racial grounds he treats that other less favourably than he treats or would treat other persons; or
>
> (b) he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same racial group as that other but -
>
> (i) which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it; and
>
> (ii) which he cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied; and
>
> (iii) which is to the detriment of that other because he cannot comply with it.

concept into the law. In this, it followed the example set by the Sex Discrimination Act of 1975 (SDA) which had been enacted one year earlier (104).

Some of the cases which have since gone before British tribunals serve to illustrate the type of requirements or conditions which are regarded as having a discriminatory effect. In one instance a tribunal held that a requirement that a person have a diploma from the British Isles in order to qualify for a shorter professional course at the Bar, was in violation of the Race Relations Act (R.R.A.) (105). In another matter it was held that an age restriction requiring employment candidates to be between the ages of 17½ and 28 was discriminatory against women because a large proportion of them marry and bear children during their twenties (106). In yet another instance it was found that a requirement that telex operators should, within six months and without training, become proficient in the use of a particular - and outdated - machine and also that they become fully conversant in British Railway geography, had a discriminatory effect against those who were not born in England and was, therefore, in violation of the R.R.A. (107). It had also been held in one case that

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104. The definitions of direct and indirect discrimination in the SDA are identical to those found in the Race Relations Act of 1976.

105. Bohon-Mitchell v. Common Professional Examination Board and Council of Legal Education, [1978] I.R.L.R. 525.

106. BM Price v. The Civil Service Commission and the Society of Civil and Public Servants, [1977] I.R.L.R. 291; [1978] 1 All E.R. 1228.

107. Bayoomi v. The British Railways Board, [1981] I.R.L.R. 431.

the refusal to hire youths from a predominantly black inner-city area to work in a shop was contrary to the R.R.A. (108). Lastly, in a fairly recent and crucial decision, the House of Lords decided that the refusal to admit a young Sikh boy as a pupil unless he removed his turban and cut his hair to conform to school rules was discriminatory and in violation of the R.R.A. (109).

Each of these cases represent situations in which discrimination against women, or ethnic and racial minorities, was practised in a subtle but nonetheless real and important manner. Had the British legislature opted for a restrictive, intent-oriented definition of discrimination, practices such as the ones just described would have fallen outside the ambit of anti-discrimination laws because, the crucial element of intent having been absent from those practices, it would have been absolutely impossible to meet all the requirements of proof.

C. Canada

In 1982 and 1983, at a time when the effects concept of discrimination had become an integral part of American and British discrimination law, and it was thought that Canada had

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108. Hussein v. Saints Complete House Furnishers, [1979] I.R.L.R. 343.

109. Mandla et al. v. Dowell Lee et al., [1983] 1 All E.R. 1062. The exclusion of Sikhs because of a prohibition against beards was examined in two other cases. However, the tribunals ruled that the employment conditions were not illegal because "justifiable" on grounds of hygiene: Singh v. Rowntree Mackintosh, [1979] I.R.L.R. 199, and Panesar v. Nestlé Co. Ltd., [1980] I.C.R. 144.

followed suit (110), a sudden reversal occurred in this country. Canadian courts established new precedents which, binding as they are on lower courts and tribunals, were sure to send tribunals stumbling back to the traditional concept of discrimination founded on intent (111).

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110. See supra, note 5 and note 6.

111. Certain statutes in which the effects concept is expressly recognized will, of course, continue with the broader definition of discrimination. This is the case of the new Ontario Human Rights Code, S.O. 1981, c. 53, which provides the following at s. 10:

> A right of a person under Part I is infringed where a requirement, qualification or consideration is imposed that is not discrimination on a prohibited ground but that would result in the exclusion, qualification or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
>
> (a) the requirement, qualification or consideration is a reasonable and bona fide one in the circumstances; or
>
> (b) it is declared in this Act that to discriminate because of such ground is not an infringement of a right.

It would appear that the Quebec Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12 also defines discrimination as including the effects concept. The second paragraph of article 10 reads as follows:

> Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such rights.

But see, contra, a recent decision of the Superior Court of Quebec in Commission des droits de la personne du Québec v. Ekco Canada Inc., supra note 7.

Insofar as the Canadian Human Rights Act, S.C. 1976-77, c. 33, is concerned, it might be worth noting the wording of the section that the federal Human Rights Commission relied upon in order to fight effects cases until the Federal Court ruling in Bhinder:

> 10. It is a discriminatory for an employer or an employee organization
>
> (a) to establish or pursue a policy or practice, or
>
> (b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprentice-

(contd.)

The prospect that the reversed trend initiated by the O'Malley (112) and Bhinder (113) decisions may determine the direction and the scope of Canadian discrimination law for some time to come raises speculation as to whether the forces which pressed the United States and Great Britain to recognize the effects concept are absent in this country or whether, in the alternative, they are present but the courts and the policy-makers have chosen to ignore them. If the first explanation applies then there is no reason to modify the status quo; if, on the other hand, the latter hypothesis proves to be true, then the situation in Canada today is that of the United States in the late 1960s and that of Great Britain in the mid 1970s, and it is crying for urgent reform. The answer depends, first, on whether or not proof of intent has been regarded as problematic and, second, on whether social and economic realities in Canada point to the existence of "institutional discrimination", that is, to a form of discrimination from which intent is absent.

As elsewhere, early interpretations of anti-discrimination legislation in Canada unanimously saw intent as an essential component of the definition of discrimination and, consequently,

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ship, transfer or any other matter relating to employment or prospective employment,

that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

112. Supra note 8.

113. Supra note 9.

as a sine qua non element of proof (114).

However, with the passage of time and increased public awareness of the fact that discrimination was no longer socially or legally acceptable, overt manifestations of it became less frequent; discrimination moved underground, so to speak, to continue its work in a subtle and covert fashion. In a short but highly informative booklet entitled Human Rights in Canada: A Focus on Racism, Dr. Daniel Hill traced the history of anti-discrimination legislation and remarked on the inverse social responses that accompanied its evolution:

> By the end of the Second World War, however, the nature of racism and discrimination in Canada had changed - softened in some ways and become more subtle in others. Legislation against discrimination was passed and, over the years, gradually strengthened. Discrimination lost its public respectability. But it certainly did not disappear (115).

Rather than correct past ills, anti-discrimination legislation merely seemed to transfer the problem from the community into the court room, still leaving victims of discrimination at a great disadvantage where proof was concerned. The fact that a respondent could conceal his discriminatory intent, and was indeed encouraged to do so as a means of evading the law, painted a grim picture for the complainant who was required to prove - on a balance of probabilities - that the respondent had an illegal

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114. E.g. Britnell v. Michael Brent Personal Placement Services, (Ont., 1968); MacBean v. Village of Plaster Rock, (N.B., 1975); Ryan v. Chief of Police, Town of North Sydney, (N.B., 1976).

115. Daniel G. Hill, Human Rights in Canada: A Focus on Racism, Canadian Labour Congress, at pp. 10-11.

intent.

The task of uncovering and directly exposing the respondent's discriminatory intent could in itself cause insuperable difficulties, but, even proof by way of indirect and circumstantial evidence (for example, disproving the explanations introduced by the respondent) was raising serious obstacles. This was what was described as the complainant's "almost impossible task" (116). The focus on the mental process as the primary means of proving discrimination hardly posed a threat to the ill-intentioned violator of human rights legislation. Not only could he conceal his state of mind and discriminatory intent but he could also, with a minimum degree of astuteness, fabricate a "legal motive" to explain his acts and create the circumstances to support this explanation. Black highlighted just such difficulties when he remarked:

> Such a [discriminatory] motive often cannot be inferred from the conduct of the alleged violator because the conduct is often consistent with a variety of motives ...

And,

> there is usually some factor other than prejudice that might arguably explain the animosity, and it takes little sophistication to avoid creating any direct evidence of discrimination (117).

The following statements found in two cases successfully demonstrate the dilemma caused by the duty to prove intent. A British Columbia board of inquiry observed the difficulty of

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116. See, supra, note 1 and accompanying text.

117. Black, supra note 4, at p. 1.

"probing into the mind of a person against whom the complaint is made" (118), while a Saskatchewan court admitted that discrimination could be "of an insidious and concealed nature but nonetheless real" (119).

Attempts were made to ease the complainant's burden. For instance, many human rights boards looked to circumstantial evidence in response to the fact that direct evidence of discrimination was often simply not available (120); noting that intent was an element within the knowledge of the respondent, some boards drew on experiences in labour law and unfair dismissal cases as a basis for shifting to the respondent the burden of explaining the reasons for his actions (121); yet other boards recognized that proof of differential treatment constituted relevant and important evidence from which intent could be inferred (122).

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118. Borho v. Nelson (B.C., 1976) (decision for the complainant rev'd by [1976] 1 B.C.L.R. 212 (B.C.S.C.) as quoted by Black, ibid.

119. Re Turner and Prince Albert Pulp Co. (1974), 50 D.L.R. (3d) 230, at 238 (Sask. Q.B.) as quoted by Black, ibid.

120. Bremer v. Board of School Trustees, School District No. 62 (Sooke) et al., (B.C., 1977), at p. 37; Kennedy v. Board of Governors of Mohawk College of Applied Arts and Technology, (Ont., 1974), at pp. 4-5; Williams v. Ouellette, (Ont., 1973); Harris v. Bouzide, (Ont., 1971), at pp. 16-17; Britnell v. Brent Personnel Placement Services, supra note 114. See also Walter S. Tarnopolsky, supra note 24, at p. 466.

121. Ruest v. International Brotherhood of Electrical Workers and Nicholls, (Ont., 1968).

122. See Tarnopolsky, supra note 24, at pp. 110-113, and cases discussed. See also discussion regarding differential treatment as a means of proof, infra, in chapter 3.

Varied as they were, the efforts to render the task of proving intent more bearable seemed to meet with continued obstacles (123) until, at long last, the intent factor itself was challenged. According to leading experts from across the country the element of intent constituted a prime obstacle to the effective enforcement of human rights legislation. In the preface to a study entitled La preuve (124), the President of the Quebec Human Rights Commission remarked as follows:

> Or, une des difficultés majeures auxquelles sont confrontés actuellement l'évolution et le développement positifs des droits et libertés de la personne et le mécanisme de leur protection ... est celle de prouver qu'un acte est fondé sur un motif illicite de discrimination, étant donné que le geste posé est le plus souvent subtil et voilé (125).

In British Columbia, Black also stated that a continued adherence to the intent concept of discrimination severely hampered the effectiveness of human rights laws:

> I believe that the relative ineffectiveness of the legislation and the criticism expressed by advantaged groups have, in part, a common cause and that human rights agencies can be more effective while attracting less animosity. The cause, I believe, is the assumption that human rights laws are violated only if there is a conscious intent to discriminate against the protected group. While this assumption may once have been valid, it no longer is so.

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123. The weaknesses of circumstantial evidence and of the legal requirements regarding burden of proof are discussed, infra, in Chapter 5.

124. La Commission des droits de la personne du Québec, La preuve, supra note 4.

125. Ibid., at p. 3.

> If an intent to discriminate must be proved, the requirement is a substantial hindrance to the enforcement of human rights legislation (126).

Similarly, in Singh v. Security and Investigation Services Limited (127), one of the leading cases on discriminatory effect in Canada, the board chairman took the occasion to comment upon the drawbacks of having to prove malice or intent to discriminate:

> The effect of reading a requirement of malice as a prerequisite into s. 4(1)(a) of The Ontario Human Rights Code would also be to permit discrimination against persons who hold certain religious beliefs. For example, Moslems and Orthodox Jews would not be able to work in supermarket chains that require all employees to work on Saturdays. Without a duty placed on the employer to try to accommodate employees' religious practices so far as reasonably possible, there could be no inquiry as to the necessity of such a stipulation as to work hours. Thus, an employer could devise schemes to disqualify persons of certain minority groups by attaching extraneous conditions to the contract of employment which those minority group persons could not satisfy without breaching their religious precepts. If proof of deliberate intent to discriminate were required, biased persons could fairly easily cloak their bias to come within the 'no intent to discriminate' standard and to evade the law (128).

To these and other experts familiar with the area of discrimination, the most relevant and appropriate remedy to these problems of proof lay in the expanded definition of discrimination which included both the intent and the effects concepts of discrimination.

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126. Black, supra note 4, at p. 1.

127. Supra note 5.

128. Ibid., at p. 20.

Thus, the Quebec Commission concluded the following as a result of its study on proof of discrimination:

> La présente étude nous permet de voir, entre autres, que les tribunaux canadiens et américains ont abandonné le critère de l'intention de l'auteur de l'acte pour n'en retenir que l'effet ou les conséquences discriminatoires, sur un droit reconnu d'une personne (129).

And according to Black:

> The approach of the recent cases is consistent with the purposes of human rights legislation. The aim is to create equality of opportunity and to eliminate barriers that have hindered disadvantaged groups. It makes sense, then, to judge conduct on the basis of its effect rather than its motive, for a discriminatory policy is no less harmful because the effect was unintended.
>
> The newer approach should make it easier to effectively enforce the legislation because it no longer will be necessary in many cases to probe into the mind of the respondent in order to prove his or her motives (130).

In sum, problems of proof were not only a vague source of concern when human rights tribunals began their move toward the effects concept in the second half of the 1970s, they were, in fact, one of the immediate causes of the shift from intent to effect.

Moreover, by this time, factors other than problems of proof seemed to call for changes in the traditional approach to discrimination.

According to statistics, certain protected classes continued to suffer economic inequalities despite the fact that

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129. La Preuve, supra note 4, at p. 3.

130. Black, supra note 4, at p. 1.

all ten provinces and the federal government possessed anti-discrimination legislation. Commenting on figures compiled by Information Canada, in Income Distribution by Size in Canada, Black remarked as follows:

> There is no evidence that as a whole, the economic status of women or native people has changed at all. Indeed, what evidence exists suggests that the gap between the income of these groups and of advantaged groups may be widening (131).

In their book entitled The Double Ghetto (132), Pat and Hugh Armstrong examined the status of women in the workplace and concluded that "[w]ithin the industrial unit, women are still concentrated in the low-skilled, low-paid, unattractive jobs where productivity tends to be low" (133).

Studies in criminology demonstrated that "disadvantaged" members of society were more likely to get caught in the prison system than those who were "advantaged" and that, in turn, this contact with the penal system had a negative impact on the employment opportunities of certain minority groups. Describing the results of their study entitled Les coûts sociaux du système pénal (134) and relying on Piore's dual market analysis, a team of criminologists from the University of Montreal made these

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131. Ibid.

132. Pat Armstrong and Hugh Armstrong, The Double Ghetto, Canadian Women and Their Segregated Work, McClelland and Stewart, Toronto, 1978.

133. Ibid., at p. 179.

134. Pierre Landreville, Victor Blankevoort and Alvaro P. Pires, Les coûts sociaux du système pénal, unpublished study prepared at École de Criminologie, Université de Montréal, Montreal, June 1980.

remarks:

> Il est encore plus évident que les auteurs de comportements pénalisables qui sont sanctionnés ne le sont pas 'avec les mêmes conséquences'. En pratique, comme le souligne la Commission de réforme du droit, 'la peine se fonde souvent non pas sur la nature de l'infraction mais sur la qualité de la personne qui la commet'. C'est un fait que nous avons malheureusement amplement eu l'occasion de constater. Les peines d'amendes, d'incarcération, ou d'incarcération à défaut de payer l'amende sont proportionnellement plus sévères pour les infractions mineures que pour les infractions 'graves'. La population des prisons est surtout composée de défavorisés, de pauvres, d'amérindiens accusés de petits délits contre la propriété, ou incarcérés parce qu'ils n'ont pu payer une amende (135).

And,

> En outre, nous avons mentionné qu'en plus de bloquer l'accès au marché primaire [caractérisé par des emplois stables, bien rémunérés, où il y a de bonnes conditions de travail et des possibilités de promotion (Piore, 1970)] un contact avec le système pénal pourra renvoyer vers le marché secondaire les ouvriers et employés qui sont déjà sur un marché primaire. Un contact avec le système pénal offrira un motif de discrimination supplémentaire et pourra créer un empêchement définitif pour l'obtention de certains permis de travail, des emplois stables dans les fonctions publiques ou para-publiques et les grosses compagnies. Les risques d'exclusion seront probablement d'autant plus grands qu'il s'agit d'une part d'emplois dans des organisations fortement bureaucratisées où les procédures de sélection et d'embauche sont très formalisées (formulaires, tests, entretiens) et que d'autre part, la conjoncture économique permet aux employeurs de faire une forte sélection des candidats.
>
> Le problème est d'envergure et dépend de causes structurelles, de préjugés largement partagés dans notre société et de certains lois qui concrétisent ces facteurs (136).

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135. Ibid., at p. 262.

136. Ibid., at p. 278.

Results of a study such as this indicated that economic inqualities and discriminatory consequences were caused not simply by prejudice (137), but by a multitude of factors not the least important of which were structures themselves which often tend to favour and to cater to the "norm" in society.

Indeed, studies related to the idea of "institutional" or "structural discrimination" eventually began to crop up in Canada - in much the same way as they had in the United States and the United Kingdom - as social scientists came to recognize the fact that prejudice could no longer, by itself, explain the discriminatory exclusion of minorities. This was the view expressed by Hughes and Kallen in The Anatomy of Racism: Canadian Dimensions (138) when they remarked:

> [P]rejudice could be (suddenly) totally eliminated from the system, the structured inequalities rooted in the everyday impersonal (that is, non-intentional) operation of the ethnic hierarchy would continue to exclude

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137. According to these authors, the inequalities were largely caused by the strong prejudice - often reinforced by laws - that society harbours against individuals with criminal records. This may be regarded as a form of direct or intentional discrimination prohibited by some statutes: The Canadian Human Rights Act, S.C. 1976-77, c. 33, s. 3 (conviction for which a pardon has been granted); the Quebec Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12, as amended by Bill 86, assented to on December 18, 1982, s. 18.2 (criminal conviction); the British Columbia Human Rights Code, R.S.B.C. 1979, s. 8(2)(d) (a conviction for a criminal or summary conviction charge shall not constitute reasonable cause under the Code). But, it also adds another cause to the discrimination suffered by certain minorities such as natives who may already be victims of racial prejudice.

138. David R. Hughes and Evelyn Kallen, The Anatomy of Racism: Canadian Dimensions, Harvest House, Montreal, 1974.

> substantial portions of members of some ethnic minorities from full participation in the major institutions of society at large (139).

In a study entitled Dealing With Interracial Conflict: Policy Alternatives (140), Dhiru Patel also rejected the prejudice-oriented analysis as being too restrictive:

> However, the validity of [certain Canadian] studies is being increasingly challenged on the grounds that they do not adequately explain the persistence, pervasiveness, and subtlety of racist beliefs and practices ... Wellman (1977), for example, argues that sociologists have assumed that racist sentiments are expressed as prejudice, which is usually described as overt hostility towards and faulty generalizations about groups. But this limits racism to the obvious hostilities expressed by bigots and it is found only among lower - and working-class people; the more subtle, elusive, and widespread type is completely overlooked and ignored.
>
> A more comprehensive and valid approach, proposed by Wellman (1977), would see racist beliefs as culturally sanctioned, rational responses to struggles over scarce resources, and as sentiments that, regardless of intentions, defend the advantages whites have because of the subordinated position of racial minorities. This approach is more useful because it goes beyond the limited perspective of seeing racist attitudes as a psychological problem and places them in the broader social contexts and organizations. It views racial division as a form of stratification built into the structure of society; the roots of this division are located in the structure of the division of labour or in the organization of political power. Thus the crucial features of race relations are not the ideas that whites have about others, but their own superior position vis-à-vis non-whites, the benefits following from their position, and the institutions that maintain this relationship. When

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139. Ibid., at p. 107.

140. Dhiru Patel, Dealing with Interracial Conflict: Policy Alternatives, The Institute for Research on Public Policy, Montreal, 1980.

> non-whites demand institutional or structural changes, which would give them better access to resources, at least some groups of whites stand to lose certain advantages. And as Wellman, (1977) demonstrates, such losses may be suffered not only by prejudiced bigots, but also by people with unprejudiced, tolerant world views who justify or explain their opposition to change towards racial equality on ostensibly non-racial grounds, such as shortcomings in the culture of non-whites.
>
> Such an approach would thus include the entire area of institutional and structural racism, which may be overt or covert, intentional or unintentional (141).

Patel concluded that in dealing with interracial conflict "[t]he importance of institutional discrimination cannot be under-estimated and, unless it is dealt with seriously, discrimination will not be eliminated" (142).

The pervasiveness of institutional discrimination in Canada was also commented upon by Hill in this manner:

> There is probably no more subtle form of discrimination, none more pervasive, none more difficult to combat than institutional discrimination. With its roots buried deep in Canadian social history, it makes many of our major institutions - notably our business and schools - operate to the detriment or exclusion of racial minorities. Meanwhile, many of the people involved in the life of these institutions are unaware that their operating techniques and criteria for judgment are racist in character and functionally discriminatory. In short, what they do is not motivated by racism, but it has the same effect (143).

The Ontario Human Rights Commission echoed these views regarding the importance of institutional discrimination in its

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141. Ibid., at p. 14.

142. Ibid., at p. 38.

143. Supra note 115, at p. 15.

report entitled Life Together: A Report on Human Rights in Ontario (144) when it said:

> But the Commission's experience in administering the Code during the last fifteen years demonstrates that the most pervasive discrimination today often results from unconscious and seemingly neutral practices which may, nonetheless, be as detrimental to human rights as the more overt and intentional kind of discrimination. These practices perpetuate the discriminatory effects of past discrimination, even when overt acts of discrimination have ceased (145).

Numerous examples of institutional discrimination in Canada can be found both in studies and in cases brought before human rights tribunals and the courts. Since they serve to illustrate further the scope of discriminatory practices it is worthwhile to repeat and to describe some of these examples here.

For instance, a Canadian Civil Liberties Association (CCLA) survey of Toronto fire stations disclosed the fact that of 1,200 employees, only two were not white. The method of recruitment, it was learned, involved interviewing those applicants who were on file the longest. Because there was a small turnover in personnel and lengthy lists of applicants, the recruitment policy, although neutral on its face, had the effect of excluding the City's substantial non-white population, a large portion of which is composed of recent immigrants (146).

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144. Ontario Human Rights Commission, Life Together: A Report on Human Rights in Ontario, Queen's Printer for Ontario, 1977.

145. Ibid., at p. 33.

146. Results of this survey are described in Life Together, ibid., at pp. 33-44, and also in Patel, supra note 140, at p. 66.

Another survey conducted by the CCLA revealed that employers were attempting to circumvent anti-discrimination legislation by requiring that applicants have "Canadian experience" (147).

Hughes and Kallen provide yet another example of institutional discrimination when they describe the manner in which the French-speaking Quebecers were prevented in the early 1960s from acceding to executive positions in English-dominated industries:

> This dichotomy between public and private spheres of social interaction serves to limit opportunities for economic mobility of members of ethnic minorities, by maintaining a high level of social distance between the categories. For example, Keyfitz (1968, pp. 172-173), writing about relations between English- and French-speaking Quebecers in the early 1960's, points out that the co-operative structure of the work situation in the higher levels of English-speaking industry in Quebec operated, at this time, to inhibit entry of all those whose command of the English language was less than 'perfect'. Because co-operative activities between fellow members of the 'management team' extended far beyond the work situation into the private sphere of family life and social gatherings, criteria for selection of team-mates approximated those used in selecting close friends. For example, the senior employee was expected not only to speak English perfectly, but also to play a good game of golf. Similarly, his wife was expected to have the 'appropriate' (i.e. English) linguistic skills and social graces which would enable her to "fit into" the circle of executive wives. Keyfitz argues, from the viewpoint of the link between language and culture, that disparities between languages reflect parallel disparities between values and life styles. This 'bundle' of disparities served, in the 1960's, to prevent non- or poor English-speakers, and French-speaking Canadians in particular, from gaining the social

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147. As described in Hill, supra note 115, at p. 11.

acceptance required in order to penetrate the higher ranks of English-speaking industry in Quebec (148).

The first court decision to deal with the discriminatory effect issue was Re Attorney General for Alberta and Gares et al. (149) in which Mr. Justice McDonald of the Alberta Supreme Court concluded that the hospital charged with discrimination had violated the Alberta Individual's Rights Protection Act (s. 5(1)) because it had negotiated higher wages for male orderlies than for female nurses' aides even though the work done by the two groups was substantially the same. It was argued by the respondent hospital that the differential in wages was due not to a discriminatory intent but to the negotiation process and to the fact that the two groups of employees were represented by separate bargaining units, and had been for many years. In his now-famous words, Mr. Justice McDonald stated that this was not a defence, "[i]t is" he said, "the discriminatory result which is prohibited and not a discriminatory intent" (150).

This case has often been distinguished because it deals with the equal pay provisions of the statute and not with discrimination in the broader sense (151). Be that as it may, the

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148. Hughes and Kallen, supra, note 130, at p. 132.

149. (1976), 67 D.L.R. (3d) 635 (Alta. S.C., T.D.).

150. Ibid., at p. 695.

151. In this respect see Tarnopolsky, supra note 24, at p. 113: "... the 'equal pay' provisions seem more obviously concerned with 'effects', than do other provisions ..."; and also the dissenting judgement of Mr. Justice Le Dain in Canadian National Railway Company v. Bhinder et al., supra note 9, at pp. 1411-1412.

facts of this case are nonetheless interesting for purposes of an effects analysis because, in fact, they strongly resemble the circumstances of present-effects-of-past-discrimination cases which appeared in the United States in the late 1960s (152). Indeed the facts of the case, as described by Mr. Justice McDonald, showed that in the past there had been a clear desire to pay women less than men, for reasons which were entirely unrelated to the work itself:

> In bargaining for the wages of nursing orderlies at the Royal Alexandra Hospital and in other Alberta hospitals, the union representatives used arguments during the 1960s that the man being the 'bread winner' being 'physically superior' to the female certified nursing aides, and being 'able to do duties not acceptable to women' was entitled to a greater salary than that paid to certified nursing aides (153).

In other words, although the separate bargaining units were cloaked in 1976 in a mantle of neutrality, one may surmise that, in reality, they perpetuated earlier biases.

One year later, in 1977, the complaint of Singh v. Security and Investigation Services Limited (154) was presented to an Ontario board of inquiry. The facts of the case were straightforward. Mr. Singh, the complainant, 52 years of age, was born in India and had resided in Canada for six years. A practising member of the Sikh faith from birth, Mr. Singh was a Minister of divinity of Sikhism, registered with the government

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152. Two such cases are discussed, supra, at pp. 29-30

153. Supra note 149, at p. 647.

154. Supra note 5.

of Ontario to celebrate marriages; he had studied the Sikh religion in school and through the temples and was permitted to conduct religious services. On December 5, 1975, in response to a newspaper ad, the complainant applied for a position as a security guard with the respondent company. Mr. Singh was advised, however, that the respondent's policy was to hire only clean-shaven persons and those who could comply with the uniform requirement, which necessitated the wearing of a hat. Mr. Singh responded that it was impossible for a Sikh, because of his creed, to shave or cut his hair and dispense with his turban. The respondent's recruitment officer stated that the company's policy was firm on this point and that, consequently, Mr. Singh could not be considered for the job (155).

In deciding whether the respondent's policy and the rejection of the complainant's application were discriminatory, Chairman Cumming paid particular attention to the effect of the company's policy on Sikhs in general. He said:

> Many religions require adherence to codes of dress and grooming. Ontario, as a society, encourages every person to practice the faith of his or her choice. To truly respect and value different faiths is also to respect the different codes of dress and grooming dictated by those faiths. We cannot profess to encourage religious freedom, yet, at the same time, refuse employment to persons who are exercising their religious freedom simply because they are exercising that freedom. If we allow Sikhs to worship as they wish because we respect their rights to have religious beliefs which differ from those held by

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155. Ibid., at pp. 1-2.

> the majority of people in our society, and yet place Sikhs in a disadvantageous position by not employing them simply because their beliefs require them to have beards and wear turbans, we are being hypocritical.
>
> Thus, even though Security bears no ill will towards the Sikh religion, its refusal to offer employment to Mr. Singh because of Sikh dress and grooming practices has the effect of denying Mr. Singh his right to practice the religion of his choice. Discrimination in fact exists even though Security did not intend to discriminate... (156).

In sum, although there was no proof of malice nor of any intent to discriminate, Chairman Cumming noted that the policy had the effect of excluding Sikhs from the position of security guards. Since the respondent was unable to show that it could not reasonably accommodate such a religious practice without undue hardship, the board Chairman concluded that the policy was in violation of the Ontario Human Rights Code (157).

In 1979, a board of inquiry was asked to decide whether or not the use of a minimum 5'10" height requirement in the recruitment of police officers was discriminatory against women. In deciding the case of Colfer v. Ottawa Board of Commissioners of Police (158), Chairman Cumming once more noted that the evidence showed no intention on the respondent's part to discriminate nor did it show any malice; however, statistics indicated that less than 5% of women are 5'10", or taller, while a near majority

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156. Ibid., at pp. 18-19.

157. Ibid., at p. 34-35.

158. Supra note 5.

of men are at least that height (159). Consequently, the board Chairman concluded that the recruitment policy, although neutral on its face, had the effect of discriminating against women. Since the respondent was unable to show that the employment regulation was "reasonably necessary to [its] business operations" (160), the Chairman was of the view that it violated the provisions of the Ontario Code. He concluded by saying that "the intention to discriminate, or lack therefore, is of no import. The discriminatory result of the minimum height and weight requirements, which was either known or at the very least should have been known, is sufficient to result in a contravention of the Code" (161).

These have been examples of cases in which the effects concept was deemed applicable to discriminatory situations arising in Canada. But the progress of the effects definition of discrimination eventually met with serious obstacles in this country, following the two court decisions in Ontario Human Rights Commission and O'Malley (Vincent) v. Simpson-Sears Limited (162), and in Canadian National Railway Company v. Canadian Human Rights Commission and Bhinder (163). The facts of these cases again serve to illustrate the scope of the effects concept of

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159. Ibid., at p. 19.

160. Ibid., at p. 37.

161. Ibid., at p. 85.

162. Supra note 8.

163. Supra note 9.

discrimination.

In the O'Malley case, the complainant had worked as a sales clerk for Simpsons-Sears, a job that required all full-time personnel to work two Saturdays in a row (one off, and then two on again). The complainant was converted to the Seventh Day Adventist Faith, which required members to observe the Sabbath from the setting of the sun on Fridays to sunset on Saturdays. When she requested this time off from her job, the personnel manager refused, and offered the complainant a part-time position. Although she accepted this offer, she also lodged a complaint with the Ontario Human Rights Commission alleging discrimination based on religion.

The board of inquiry (164) was prepared to recognize the effects concept of discrimination and to dispense with the requirement that complainant prove malice or intent, but it dismissed the complaint on another ground (165). On appeal, Mr. Justice Southey of the Supreme Court of Ontario (Divisional Court) upheld the board's decision, but in doing so he also rejected outright the extended effects-oriented definition of discrimination. Speaking for the majority, Mr. Justice Southey held that the Ontario Human Rights Code (before it was amended) required proof of intent:

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164. Supra note 5 ((1981), 2 C.H.R.R. D/267).

165. Chairman Ratushny held that the complainant had failed to show that the respondent had acted unreasonably in its attempts to accommodate her situation.

> Although the language of s. 4(1)(g) is logically susceptible of the interpretation given to it by the learned Chairman, the construction of the words in their ordinary and natural meaning, in my judgment, results in an interpretation in which the intention to discriminate on a prohibited ground is essential to a contravention. The relevant portions of s. 4(1)(g) of the Code provide that no one shall discriminate against any employee with regard to any term or condition of employment because of creed (emphasis added). In my judgment, the words 'because of' refer to the reason or reasons why the employer imposed the term or condition of employment that is in question (166).

The approach adopted by the Federal Court of Appeal in Bhinder was not so different from that of the Divisional Court in the O'Malley case, even though the wording of the Ontario and the Federal statutes were not the same. The facts of the Bhinder case were summarized by Mr. Justice Le Dain (167). Bhinder, a Sikh, began his employment with CN in April, 1974, and after a period of probation worked for more than four years as a maintenance electrician. In November 1978, CN announced that effective December 1, 1978, all employees working in the yard where the complainant worked would have to wear a hard hat for safety reasons. Bhinder informed his foreman that he could not do so because his religion required him to wear a turban and nothing else on his head. He subsequently received a letter from the General Foreman informing him that there would be no exceptions to the hard-hat requirement. Since there were no positions where

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166. Supra note 8, at p. 799. The Court of Appeal, with Lacourcière, J.A., speaking for the Court, basically agreed with the position and arguments set forth by Southey, J.

167. Supra note 9, at p. 1408.

an electrician could work without a hard hat, complainant's employment with CN effectively came to an end upon his refusal to wear such a hat.

The human rights tribunal composed of three members (168), adopted the effects definition of discrimination and concluded that Bhinder's termination violated the Canadian Human Rights Act. On review, the majority of the Federal Court of Appeal disagreed with the tribunal's interpretation of the Act and held that the definition of discrimination required proof of intent. On this point, Mr. Justice Heald remarked that "[he attached] significance to the absence of the words 'or adversely affect' in the Canadian legislation and because of their absence, the Griggs case ... [lost] its persuasive value" (169).

In both the O'Malley and the Bhinder cases, the majority adopted a literal and restrictive interpretation of the anti-discrimination statutes to conclude in favour of the narrow intent-oriented definition of discrimination.

This is in sharp contrast to the liberal interpretation given to the statutes by the dissenting judges who, for their part, were willing to recognize that the definition of discrimination could include both the intent and the effects concepts. Seeing the marked difference in the two approaches, it is worth repeating certain parts of these dissenting judgments. Thus in the O'Malley case, Smith, J. of the Divisional Court made these

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168. Supra note 5 ((1981), 2 C.H. R.R. D/546).

169. Supra note 9, at p. 1405.

remarks:

> A discriminatory result, in my view, that will in certain circumstances be found to offend the provisions of the Code, can exist without any ill-will or even knowledge on the part of the employer.
> ...
> If the courts become overly preoccupied with intent or with causation, where the word 'because' appears in the legislation being construed, the desirable aims of the legislation may be thwarted, the beneficial effects intended will be reduced, and more importantly, the legislative intent contained in the preamble may not be given effect to.
> ...
> It is common knowledge that there are not only various forms of discrimination, there are also varying degrees, as the chairman's first question impliedly recognizes. And civil rights legislation, for that very reason, cannot be confined in its application to cases where the discriminator bears ill-will to the class protected. The Ontario Code is surely inviting the courts to apply the provisions fairly and liberally and give the words their plain and natural meaning in order to ferret out discrimination where it is found to exist in fact, whether the discriminator intended to discriminate or merely intended the very act or practice which had a discriminating effect, whether the effect is known or unknown to him.
> ...
> A reading of [certain cases], fail to convince me that when discrimination occurs, even unwittingly or absent ill-will, the victim has no recourse and that he or she must live with impaired opportunities in the field of work, play, accommodation or in any of the other areas of human activity under review.
> ...
> I am of the view that it was intended that indirect discrimination should be eradicated as much as the more direct form of it and the only way in which that object could be accomplished in this case was to approach the matter of indirect discrimination as the learned chairman found it to exist, in the manner in which he did (170).

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170. Supra note 8, at pp. 801-803.

In very much the same manner, Mr. Justice Le Dain's dissenting judgment in the Bhinder case seemed much more concerned with the purpose of the anti-discrimination legislation than with a narrow focus on terminology. He commented on the issues in this manner:

> The issue, as I see it, is not so much whether a discriminatory intention or motivation is required for the discriminatory practices defined by sections 7 and 10 of the Canadian Human Rights Act, as whether they include indirect as well as direct discrimination. Quite clearly the Act is concerned with discriminatory effects, and in a case of differential treatment, such as unequal pay, it is the objective fact of discrimination rather than intention that matters. The distinction is between differential treatment, which may or may not be accompanied by a discriminatory motivation or animus, but which will generally be intended, and what is on its face equal treatment but nevertheless has a discriminatory effect on a particular person by reason of a prohibited ground or basis of discrimination.
>
> Section 10, on the other hand, would appear to be sufficiently comprehensive to include the effect of indirect discrimination. Such an effect is covered in my opinion by the words 'that deprive or tends to deprive' and particularly by the words 'tends to deprive'. Essentially the same words were in section 703(a)(2) of the United States Civil Rights Act of 1964, which was the statutory basis for application of the adverse effect concept of discrimination in Griggs. It is true that the words 'or otherwise adversely effect' were also in that provision, and commentators have attached particular significance to them as a basis for the decision (see Blumrosen, op. cit., 74; Tarnopolsky, op. cit., 89), but they do not in my opinion add anything for purposes of this issue to what is already conveyed by the words 'that deprives or tends to deprive'. I note also that the words 'because of' were in section 703(a)(2), but they did not prevent the Court from concluding that the section permitted the application of the

> adverse effect concept. I am of the same view concerning the words 'on a prohibited ground' in section 10 which, in relation to effect, should be understood as meaning by reason of a prohibited ground of discrimination (171).

It should be noted that both the O'Malley and Bhinder decisions are on appeal. It is possible that the Supreme Court of Canada will reverse these decisions and decide that discrimination should be defined in sufficiently broad terms to include the effects concept. A liberal interpretation of present anti-discrimination statutes and due regard for the fact that their purpose is to combat all forms of discrimination and not merely some limited discriminatory practices are two factors which would justify the recognition of an extended definition of discrimination within the existing legislation across Canada. This interpretation is all the more valid in view of the fact that the intent requirement is nowhere expressly required by statute (172).

Conclusion

The purpose of this chapter has been not so much to argue the interpretation of the definition of discrimination within existing legislation in Canada as to demonstrate, first, the difficulties inherent in proving the intent to discriminate and, second, that discrimination manifests itself in more ways than has traditionally been thought. Thus, whereas prejudice is

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171. Supra note 9, at pp. 1412-1413.

172. See comments by Black, supra note 30.

an important source of discrimination it is not the only one and, by now, it is clear that discrimination may exist even as a result of apparently neutral policies and practices from which prejudice or the intent to discriminate is altogether absent.

The causes of discrimination, of racism, of sexism, etc. are particularly complex and can provide material for lengthy studies, but Hill wisely points out that "when it comes down to taking action, it is less important that we know why racism exists than how discrimination is practised" (173). The effective enforcement of anti-discrimination legislation depends on the willingness to recognize the ways in which discrimination manifests itself: on the one hand, it may result from prejudice and it is important in these instances to realize that these prejudices are often camouflaged to avoid legal and social sanctions; on the other hand, it may result from apparently neutral practices or policies irrespective of intent.

These findings concerning the situation in Canada indicate that the difficulties associated with proof of intent to discriminate are not dissimilar from those experienced in the United States and in the United Kingdom; on the contrary, the patterns appear to be the same. For this reason the developments which occurred in these countries regarding the legal definition of discrimination and the decisions to adopt the effects concept are relevant examples for Canada to follow.

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173. Hill, supra, note 115, at p. 13.

The findings of this chapter also reveal two important facts: in cases involving discrimination based on prejudice, the burden of proving intent presents the complainant with the extremely difficult task of proving another's mental process and this has already been identified as an "almost impossible" task; in cases involving institutional or systemic discrimination based on apparently neutral practices, the burden of proving an element which may be altogether absent, in effect, presents the complainant with an "absolutely impossible" task. Consequently, the answer to the first of the two questions asked at the beginning of this study is that the removal of the intent requirement is indeed necessary to meet the purpose of anti-discrimination legislation since, presumably, the purpose is to combat the results and not only the direct expression of discrimination. The existence of institutional discrimination in Canada warrants such a conclusion.

CHAPTER 2: THE ELEMENTS OF PROOF

From the preceding chapter it is apparent that there exist two basic concepts of discrimination (174), the intent and the effects concepts. The principal element which distinguishes the two is that one implies the presence of intent while the other does not.

This distinctive element is of such fundamental importance that it determines not only the elements of proof, but also the means of proof, the relevant defences and the burdens of proof, each of which will be the topics of analysis in subsequent chapters. From this point onward it will, therefore, be necessary to treat each concept separately.

A. Intent

The essential element of intentional discrimination is the alleged violator's state of mind, in other words his

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174. Some authors have identifed "differential treatment" as a third concept of discrimination: Tarnopolsky, supra, note 24, at pp. 108 ff., and Blumrosen, supra, note 4, at pp. 67-69. This approach has a great deal of merit from a practical point of view considering the fact that tribunals and courts have regarded proof of differential treatment, by itself, as direct and conclusive evidence of discrimination: e.g. Desilu et Chéry v. Café Tropicana Inc. (1980), 1 C.H.R.R. D/89 (Que. Prov. Ct.) and Doherty and Meehan v. Lodger's International Ltd. (1982), 3 C.H.R.R. D/628 (N.B.).

However, strictly speaking, the differential treatment concept, in effect, falls under the broader intent concept; as Blumrosen himself admitted, at p. 69, "it might be viewed simply as a method of proving the evil motive required under the earlier [intent] concept." Differential treatment is discussed further as a means of proving intent, infra, at pp. 119 ff.

"intention to discriminate" (175). The term intention gives rise to more difficulties than may appear at first glance, most probably because of the ambiguity of the word itself. Does intention, in general, signify a desire to cause harm? Is it merely the intent to carry out a given act that counts? Or, does intent imply conscious knowledge of the consequences of the act? In determining the meaning of "intention to discriminate" the following questions similarly arise: is proof of prejudice or malice required, that is, must there be proof of a desire to cause harm? Is it sufficient merely to have intended the act complained of (e.g. the dismissal, refusal to hire, etc.)? Or, is it necessary for the respondent to have had conscious knowledge of the consequences of the act, that is of the discriminatory treatment resulting from the act?

The law of torts distinguishes between motive, intent respecting the act itself and intent respecting the consequences of an act (176). Wherever the term "intent" is used in tort law

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175. Britnell v. Brent Personnel Place Services, (Ont., 1968), at pp. 3-4: "... discrimination whether it be with respect to employment or accommodation, cannot be ascertained from the mere act of denial; there must also be the fact of intention or motive."
It may be worthwhile to note that the Britnell case, which is often alluded to as a basis for requiring proof of intent in discrimination cases, was decided before the American courts developed the effects concept.

176. Examples of each of these three concepts are provided by Cecil A. Wright and Allen M. Linden, Canadian Tort Law, 7th ed., Butterworths, Toronto, 1980, at pp. 2-1 ff.
Regarding motive or desire to cause harm, the case of Garratt v. Dailey (1955), 46 Wash. 2d 197 is described and quoted from at p. 2-F:

(contd.)

the meaning is limited to the third option, that is to knowledge of the consequences of the act (177).

In Quebec the principle is the same in that motive is not considered an essential element in proving delictual liability (178).

It was alleged that the defendant, aged 5 years, 9 months, pulled a lawn chair out from under the plaintiff as she was about to sit down on it. The trial judge dismissed the case, and the plaintiff appealed.

Hill J.: A battery would be established if it was proved that, when Brian moved the chair, he knew with substantial certainty that the plaintiff would attempt to sit down where the chair had been .... The mere absence of any intent to injure the plaintiff or to play a prank on her or to embarrass her, or to commit an assault and battery on her would not absolve him from liability if in fact he had such knowledge. [Case remanded for clarification].

As for the other two concepts they are described at p. 2-2 as follows:

'Intent', as it is used throughout the Restatement of Torts, has reference to the consequences of an act rather than the act itself. When an actor fires a gun in the midst of the Mojave Desert, he intends to pull the trigger; but when the bullet hits a person who is present in the desert without the actor's knowledge, he does not intend that result. 'Intent' is limited, wherever it is used, to the consequences of the act.

177. Wright and Linden, ibid., at p. 2-4: "Motive [the reason why an actor acts] is seldom important in tort law." And, in Restatement of Torts, Second (8A) at p. 2-2: "The word 'intent' is used throughout the Restatement of this subject to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it."

178. Jean-Louis Baudouin, La responsabilité civile délictuelle, Les Presses de l'Université de Montréal, Montréal, 1973, at p. 4:

Sur le plan de la responsabilité civile [...], puisqu'il ne s'agit ni de blâmer ni de punir, mais de compenser, peu importe théoriquement que l'on caractérise le fait qui a causé de dommage comme un délit (acte volontaire) ou un quasi-délit (acte involontaire). L'intention de nuire, la volonté de causer un dommage n'est pas nécessaire à la mise en oeuvre de la responsabilité civile.

The distinctions between motive and intent (179) and, further, between intent in respect to the act itself and intent regarding the consequences of an act, are useful in identifying the legal meaning of "intentional discrimination". In fact, the meaning attributed to "intentional discrimination" has evolved - though not without some struggle - to a level at which it can be said to reflect the meaning of "intent" in tort law: in discrimination law the evil-motive criterion has been discarded as too narrow and sometimes irrelevant; the intent to act option has also been rejected as too broad; it is the "knowledge of the consequences of the act" criterion which has been retained as the basis for showing an "intent to discriminate".

Each of these possible interpretations of the meaning of intent to discriminate will be examined; the second option, being the least likely in discrimination cases, will be discussed first.

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179. Dictionary definitions of the terms "motive" and "intention" may also be useful in making the necessary distinction. The Short Oxford English Dictionary, 3rd ed., Clarendon Press, Oxford, 1970, defines "motive" as:

> ...2. that which moves or induces a person to act in a certain way; a desire, fear, reason, etc., which influences a person's volition; also often applied to a result or object which is desired. ... (emphasis is mine).

"Intention" is defined as follows:

> General senses: 1. The action of straining or directing the mind or attention to something - 1749. 2. The action or faculty of understanding; way of understanding (something); notion. ... 4. The action of intending; volition; purpose. 5. That which is intended, a purpose, a design ....

1. Intent respecting the act itself

Consider the following hypothetical examples: after only six months of service a black employee is dismissed from his job as a result of a personality conflict with his boss and, by all accounts, the decision is unfair; in another instance, a woman who has shown a great deal of promise in her work is passed up for a promotion, and the evidence indicates that the decision was motivated by malice, the result of a negative recommendation by a jealous and vengeful supervisor. Is the evidence provided in these two examples sufficient to show intent to discriminate? Under the present criterion, that is intent respecting the act itself, the complainant would merely be required to show that the respondent was conscious of the act of dismissal or of the refusal to promote and any additional evidence regarding the unfairness or the malicious nature of the act would simply reinforce its illegality.

Because of the difficulties of proving the respondent's discriminatory state of mind, complainants have on occasion argued that the fact that they are members of a protected group, combined with proof of unfair behaviour towards them, should lead to a conclusion of discriminatory treatment (180). But more often than not human rights boards have rejected this

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180. Such facts may, in fact, provide the basis for a prima facie case of intentional discrimination. See, infra, chapter 5.

argument (181) probably acting on the premise set out in the Britnell case that discrimination "cannot be ascertained from the mere act of denial" and "there must also be the fact of intention or motive" (182). Thus, boards have held that conduct which is based on mistaken judgement, error, unfairness or even malice is not prohibited by anti-discrimination legislation, nor does it alone provide sufficient proof of the intent to discriminate.

In one instance, the complainant alleged that she had been discriminated against because of her name and her husband's highly publicised dispute with the provincial government (183). The Board concluded that there were two major reasons for the rejection of the complainant's application as a primary-school teacher. The first was the fact that the respondent had a personal bias against the person who most strongly recommended and supported the complainant's application, and the second was the fact that respondent had formed a judgment concerning the

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181. In addition to the cases discussed below, see also cases cited in Tarnopolsky, supra note 24, at p. 395: Amad et al. v. City of Toronto, (Ont., 1971), and Seaward et al. v. Iron Ore Company of Canada, (Nfld., 1976).

A similar position appears to have been adopted in the United States. According to Belton, supra note 4, at p. 1225, "lenient proof requirements may result in a finding of discrimination when the defendant's conduct is legitimate, arbitrary or simply unreasonable." And further, in note 85, he quotes the case of Powell v. Syracuse University, 580 F.2d 1150 at pp. 1156-57: "[t]he law does not require, in the first instance, that employment be rational, wise, or well-considerd - only that it be non-discriminatory."

182. Supra note 175.

183. Bremer v. Board of School Trustees, School District No. 62 (Sooke) et al., supra note 120.

complainant's personality as being too forceful for the job and potentially disruptive. The Board held that neither of these factors were prohibited by the British Columbia Human Rights Code. Furthermore, the Board refused to consider proof of unfairness in the respondent's conduct as sufficient evidence that the Code's anti-discrimination provisions had been breached (184).

In another instance (185), the complainant who was black, alleged that he and his wife had been dismissed from their jobs as superintendents of a building belonging to the respondent because of colour, in violation of the Ontario Human Rights Code. The evidence presented at the hearing led the board chairman to conclude that the most plausible explanations for the respondent's acts were, first, the hostile personal relationship that existed between one of the respondent's representatives and the complainant's wife and, second, the fact of a "quick, crude and harsh ... business decision" (186). According to Chairman Ratushny, this type of evidence left proof of discrimination in the realm of conjecture and, as such, it was insufficient to prove discrimination.

In reaching his conclusions, the Chairman showed that he was not insensitive to the difficulties of proving intent and to the role played by inferences in this respect:

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184. Ibid., at pp. 42-45. In doing so the Board indicated that it was rejecting the authority of a previous Board decision in Lopeterone et al. and Harrison et al., (B.C., 1976).

185. Cooper v. Belmont Property Management, (Ont., 1973).

186. Ibid., at p. 13.

> No direct evidence of discrimination emerged during the course of the inquiry. That is not unusual since very often those who practice discrimination do not do so openly. Often it can only be proven by a pattern and coincidence of events coupled with the hollowness of explanations offered. It is, therefore, necessary to examine the evidence carefully to determine whether there is a pattern pointing to discrimination or whether another explanation of the facts is more plausible.
> ...
> [In the circumstances and in view of the plausible explanation for the respondent's acts], [t]o conclude that the termination of the employment of the Coopers was based on discrimination would be to abandon the process of drawing inferences from the facts in order to support a suspicion by speculation (187).

The conclusions arrived at in each of these cases (188) make it important to insert a word of caution at this point and to stress the distinction between cases, such as the above, in which the evidence establishes the presence of a non-discriminatory reason for the act complained of and those cases in which the explanations provided during the hearing are neither credible nor plausible or, worse yet, simply not forthcoming. In these instances, there might be ample ground for an inference of discriminatory intent, as certain decisions have shown (189).

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187. Ibid.

188. See also Kennedy v. Mohawk College, (Ont., 1973), at pp. 29-33. In this case, the respondents' conduct was found to have been irresponsible and reprehensible. The complainant, a black woman, was dismissed because of her boss' "inability to understand and cope with [complainant] by whom he felt challenged" but, according to the board, this was only further support for the conclusion that she was not dismissed because of race or colour but for other reasons.

189. See discussion concerning the "absence of explanations" and "pretexts", infra, Chapter 3, pp. 135-139.

Nevertheless it is evident from the preceding discussion that proof that the act of denial was intended or that the act of denial was unjust, is not of itself sufficient to show intent to discriminate. Must one therefore prove prejudice or evil-motive, or, does intent to discriminate have yet another meaning?

2. Malice, evil-motive, and prejudice

It is perhaps not surprising that discrimination should often be associated with prejudice, this being one of the most blatant sources of discrimination but, in fact, the two terms are not synonymous (190).

Unfortunately, as a result of the confusion between prejudice and discrimination, some courts and tribunals have dismissed complaints because proof of ill-will, malice or prejudice was absent and, in other words, they have accepted defences based on good faith. For instance, in cases of sex discrimination defences based on "chivalry" and "gentlemanly behaviour" have from time to time been accepted as valid, as the discussion below will soon show.

Thus, one board of inquiry held that a Calgary hotel did not violate the law by imposing a cover charge on men but not on

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190. According to Hill, supra note 115, at p. 2:

> Prejudice is a state of mind, a set of negative attitudes held by one person or group about another, tending to cast the other in an inferior light, despite the absence of legitimate evidence. Racial discrimination is generally an overt or covert act, such as denying an individual employment, housing, accommodation or other services in the public or private sector.

women because "[t]here [was] no evidence or suggestion that there was any ulterior motive or any intention of the hotel or its employees to offend the males by charging them an admission price or in fact to discourage them from entering the premises" (191).

In another instance (192), the complainant alleged that the respondent, a municipality, had refused to consider her application for a job as dispatcher in the police department because she was a woman. The chief of police explained that the job involved night shifts, and contact with "undesirable" elements of society and was, therefore, not safe nor appropriate for a woman. The court refused to award exemplary or general damages (193) and appeared to find that the defendant's explanations, which showed good faith, mitigated the illegal nature of the act complained of. Mr. Justice Savoie stated that:

> [I]l devient [...] difficile de leur imputer mauvaise foi, ou même l'intention détournée de contrevenir à ses dispositions et le geste qu'elles ont posé paraît davantage empreint

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191. Payne v. Sheraton Summit Hotels, (Alta., 1975), at p. 2 and also at pp. 3-4:

> The mischief which the legislature is seeking to remedy ... is the affront to human dignity, the insult to or the wounding of the spirit of the individual by the use of derogatory or offensive exclusions or restrictions or other morally discreditable acts based on race or religion or other factors mentioned in the Act.

Similary, see Schmidt v. Calgary Board of Education, (Alta., (1975), rev'd. (1975), 57 D.L.R. (3d) 746 (Alta. S.C.-T.D.), also rev'd (1976), 72 D.L.R. (3d) 330 (S.C. App. Div.), as described and cited by Black, supra, note 4, at p. 3.

192. La Commission des droits de la personne du Québec v. La Cité de Magog (1983), 4 C.H.R.R. D/1369 (Que. S. Ct.).

193. It should be noted that while the court action was pending the complainant obtained the job and was compensated for the loss in wages following an arbitration award.

> d'un souci de bienveillance et de protection envers la jeune femme que d'atteinte illicite à ses droits (194).

This case is strongly reminiscent of a decision of the British Court of Appeal in Peake v. Automotive Products Ltd. (195), in which a male employee complained of a company policy which allowed women to leave work at 4:25 p.m. while the men were required to work five minutes longer until 4:30 p.m. The Court dismissed the complaint and held that this policy was not in violation of the law. Lord Denning commented upon the matter in these memorable words:

> Although the 1975 Act applies equally to men as to women, I must say that it would be very wrong to my mind if this Act were thought to obliterate the differences between men and women or to do away with the chivalry and courtesy which we expect mankind to give womankind. The natural differences of sex must be regarded even in the interpretation of an Act of Parliament ... (196).

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194. Ibid., at p. 1372. A Quebec court in La Commission des Droits de la Personne du Québec v. Le Collège d'Enseignement Général et Professionnel St-Jean-sur-Richelieu (1980), 1 C.H.R.R. D/85 (Que. S. Ct.), also held that complainant had the burden of proving an evil motive:
> De plus, comme la C.D.P.Q. prête au Collège une intention discriminatoire, suggérant une mauvaise foi de sa part, elle doit la prouver.
Moreover, Mr. Justice Jules Beauregard added at p. 86 that good faith is presumed under the Civil Code of Quebec (2202 C.C.) and that he who alleges bad faith carries the added burden of proving it. (The Superior Court's decision was recently upheld on appeal (February 29, 1984); however, the Quebec Court of Appeal did not clarify its view on the role of evil motive in discrimination cases.)

195. [1978] 1 All E.R. 106.

196. Ibid., at p. 108.

Despite these cases, the assumption that proof of discrimination must be based upon an evil motive and, more particularly, upon prejudice is, as was mentioned above, a faulty one (197). The distinction in a legal context has been described as follows:

> [I]t becomes necessary to distinguish discrimination from prejudice. Although there can be no doubt that discrimination and prejudice are sociologically interrelated, as matters of legal proof they are conceptually separable. Individual prejudice is a mental attitude, the probable but not the necessary consequence of which is social action. Discrimination, on the other hand, is in itself a social act, motivated in some cases by the actor's prejudices, but in other cases by different considerations. This is to say that proof of prejudice alone is neither sufficient nor necessary in order to prove discrimination (198).

Further in this same article examples are given to illustrate the legal distinction between prejudice and discrimination, and to support the statement that "prejudice alone is neither sufficient nor necessary in order to prove discrimination":

> [A]n employer may be violently anti-Semitic and nevertheless keep his business affairs free from his personal prejudices. In setting up his hiring policies he will conscientiously make certain that only objective criteria are used.

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197. The above cases do, however, raise a valid question as to what is to be done in instances where the complaint is perhaps frivolous or the harm de minimis? Although it is not within the scope of this study to analyze this matter in depth, it seems that, in law, such considerations should not prevent a court or tribunal from concluding discrimination. These factors could more appropriately be dealt with in assessing damages or even costs.

198. Note, "An American Legal Dilemma - Proof of Discrimination," supra note 4, at p. 109.

> Proof of the employer's anti-Semitism by a rejected Jewish job applicant is material to the issue of discrimination only if the causal relation between the prejudice and the refusal to hire the applicant can be demonstrated. On the other hand, an employer who fires all Negroes because of a threatened strike has discriminated although he may be free of any personal prejudice. The New York Anti-Discrimination Commission, hereinafter referred to as SCAD, has held that an employee's refusal to obey the Anti-Discrimination Law by threatening to strike or quit if Negroes are employed can be brought before the commission by the employer as a violation of the Anti-Discrimination Law (199).

Canadian courts and human rights tribunals have, in the majority of instances, dissociated proof of discrimination from proof of evil motive and prejudice and, therefore, the decisions which have been described as requiring proof of malice do not represent the prevailing view in this country. Thus, on the one hand, proof of prejudice alone has in some instances been deemed insufficient as proof of discrimination, while on the other, proof of well-intentioned and even laudable motives have not constituted a bar to findings of discrimination.

Proof of prejudice may be deemed insufficient proof that a discriminatory act has been committed (200) when the causal relationship (201) between the two is absent or inadequately proved.

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199. Ibid.

200. E.g. Bill v. Young, (B.C., 1979); Simms v. Ford of Canada Ltd., (Ont., 1970). See also the British case of Seide v. Gillette Industries Inc., [1980] I.R.L.R. 427.

201. Causation is a central notion in the area of tort law. See Wright and Linden, supra, note 176, chapter 8, and for Quebec, Baudouin, supra note 178, chapter IV.

Causation has been described by Hart and Honoré in the following manner: "the cause though not a literal intervention, is a difference to the normal course which accounts for the difference in the outcome" (202). In Quebec, Baudouin has commented upon the causation principle in the following manner: "[c]e n'est ... pas toute condition sine qua non qui peut et doit être retenue, mais seulement celles qui, par leur existence, ont rendu objectivement possible la réalisation du préjudice" (203).

Thus one may conclude that if the expression of prejudice is completely unrelated - in the sense of cause and effect - to the act complained of (e.g. dismissal, refusal to hire, etc.), it does not directly establish the existence of a discriminatory act (204).

On the other hand, a British tribunal found that the causal link was sufficient to allow it to conclude that there had been discrimination where the complainant, a white waitress, had been dismissed from her job because she refused to obey her employer's directive to not serve black customers (205).

Just as prejudice may exist independently of discrimination so, too, discrimination may exist in the absence of prejudice, even in intent cases. Many cases have held that proof

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202. H.L.A. Hart and A.M. Honoré, Causation in the Law, Clarendon Press, Oxford, 1959, at p. 27.

203. Supra note 178, at p. 149.

204. This does not preclude the use of such evidence as part of circumstantial evidence from which the intent to discriminate may be inferred. See discussion concerning means of proof, infra, Chapter 3.

205. Zarczynska v. Levy, [1978] I.R.L.R. 532.

of motive is unnecessary or irrelevant to a finding of discrimination (206), while others have been more specific still by finding discrimination despite proof of well-intentioned or neutral motives such as the desire to avoid economic loss (207), the wish to avoid discontent by co-employees (208); the design to fulfill allegedly neutral marketing aims (209), the presence of genuine solicitude towards a group - misplaced or paternalistic though it may be - (210) and even the demonstration of a purely

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206. Hayes v. Central Hydraulic Manufacturing Co., (Alta., 1973) at pp. 5-6, as quoted in Hunter, supra note 28, at p. 33:

> In my view, the motivating factor leading to the discrimination is irrelevant. The object of provincial human rights legislation is to protect members of minority groups from conduct which detracts from the dignity and worth of the individual. It is the victim who is of the utmost concern and not the wrongdoer's state of mind.
>
> ... the law prohibits discrimination because of race, religion, colour, ancestry or place of origin, without more and is unconcerned with what motivates the discrimination except to the extent that motivation may be revelant in mitigation of any penalty that might be imposed.

See also Commission des droits de la personne du Québec v. L'homme, [1981] D.L.R. 124; (1982), 3 C.H.R.R. D/849 and Commisssion des droits de la personne du Québec v. Collège de Sherbrooke, [1981] C.S. 1083.

207. Jones v. Huber and Huber, (Ont., 1976) at pp. 4-5; see also Hunter, ibid., at pp. 32-33.

208. Hendry v. Ontario Liquor Control Board (1980), 1 C.H.R.R. D/160.

209. Shandrowski v. Alberta Motor Association Insurance Ltd. (Alta., 1978) as discussed and quoted in Black, supra, note 4, at p. 3.

210. Robertson v. Metropolitan Investigation Security (Canada) Ltd., (Ont., 1979), at p. 38; Hall and Gray v. International Firefighters Association, Local 1137 and Borough of Etobicoke Fire Dept., (Ont., 1977); Ontario Human Rights Commission v. The Borough of Etobicoke, supra note 23; Hadley v. Mississauga, (Ont., 1976); Shack v. London Drive-Ur-Self, (Ont., 1974).

laudable motive with a "high public purpose in mind" (211).

Accordingly, motive is neither necessary nor is it relevant to proving intentional discrimination (212). Having eliminated this option as well as the first one, that is, intent respecting the act itself, there remains the third option which is intent regarding the consequence of the act, with which I now intend to deal.

3. Intent regarding the consequences of the act

Since motive for the act is irrelevant and knowledge of the act itself is insufficient, then the appropriate basis for determining intention to discriminate must lie somewhere between the two. The cases examined under the preceding heading implicitly point to the "knowledge of the consequences of the act" criterion.

According to this criterion, intentional discrimination denotes either that the respondent desires to cause a disadvantage to a protected group, or that he believes that such consequences are likely to result from his act (213). This meaning is

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211. B.C. Human Rights Commission v. College of Physicians and Surgeons, (B.C., 1976), at p. 8.

212. Note: In England, the view expounded in the Peake case, supra note 195, has been set aside and proof of motive is no longer considered a necessary element in direct discrimination cases: Ministry of Defence v. Jeremiah, [1979] 3 All E.R. 883, and Grieg v. Community Industry et al., [1979] I.C.R. 356. For a commentary on this issue, see H. Carty, "The Question of Motive in Discrimination", (1980), 130 New Law Journal 563.

213. See the connotation of "intent" in tort law, supra note 177.

therefore sufficiently broad to include both discrimination based on malice or prejudice and discriminatory acts which are motivated by neutral and even positive considerations, but where the respondent knowingly causes a disadvantage to a protected class.

For example, in Ontario Human Rights Commission v. The Borough of Etobicoke, the Supreme Court of Canada held that the provisions of a collective agreement concerning compulsory retirement for firemen at the age of sixty, consciously discriminated against certain employees on the basis of age even though "there was no evidence to indicate that the motives of the employer were other than honest and in good faith" (214).

In Robertson v. Metropolitain Investigation Security (Canada) Ltd (215), the board of inquiry found that the conscious exclusion of women from certain jobs as security guards was in violation of the Ontario Human Rights Code, even though the respondent's motivation was well-meaning and genuine in wanting to protect women from high-risk situations (216).

In yet another case (217), a board of inquiry held that the respondent discriminated against immigrant doctors by requiring them and not others to practice in "under-doctored"

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214. Supra note 23, at p. 209. In the same vein, see Hadley v. Mississauga, supra note 210.

215. Supra note 210.

216. Ibid., at pp 29-30.

217. B.C. Human Rights Commisssion v. The College of Physicians and Surgeons, supra note 211.

areas of the province, even though it found that the principal motivation of the respondent, which was to improve the level of medical care in these areas, was a wholly laudable one (218).

Conversely, if it is shown that there has been refusal to lease an apartment (the act) but it is also shown that the landlord did not know that the prospective tenant was black (i.e. the knowledge that he was causing a disadvantage to a protected class), then it cannot be said that the landlord consciously caused a disadvantage to a protected group (219).

In conclusion, under the intent to discriminate concept, it is not only the malicious act that is prohibited; in Black's words, "any act that consciously causes a disadvantage to a protected group is prohibited ..." (220).

The fact that intentional discrimination requires proof that the respondent knew or should have known the consequences of his act, in other words that he consciously caused a disadvantage to a protected group, might explain the reason why the effects test cannot reasonably be brought within the meaning of intentional discrimination, unless the discriminatory consequences of a

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218. Ibid., at p.8.

219. This defence was argued by the respondent in Harris v. Bouzide, (Ont. 1971) although without success since the Board found that the respondent did in fact know that the complainant was black.

220. Supra note 4, at p. 3.

neutral policy are foreseeable (221). In order to prove this form of discrimination, particularly where the discriminatory effects are not foreseeable, it is necessary, in my view, to dispense with the intent element altogether.

B. Discriminatory Effect

1. The Griggs definition of discriminatory effect

> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude negroes cannot be shown to be related to job performance, the practice is prohibited (222).

It is fitting to begin this section on discriminatory effect with the original definition which was formulated by the U.S Supreme Court in Griggs v. Duke Power Co.. With these words the Court inaugurated a new era in discrimination law which was to have a rippling effect beyond the boundaries of American law, extending into the British and Canadian legal systems.

Although the latter countries eventually adapted - or

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221. The foreseeability criterion is raised incidentally by Black, supra, note 4, at p. 4:
> Another open question is whether it is necessary that the discriminatory effects have been reasonably foreseeable. It seems clear that the existing cases have moved at least as far as abandoning intent in favour of a requirement of negligence, or something close to it. It is not clear whether businesses will be held strictly liable for practices that have discriminatory effects that were unforeseeable at the time. Perhaps this question is of little more than academic interest since in most cases the discriminatory effect is fairly obvious, and a failure to take account of it would clearly be negligent.

222. Griggs v. Duke Power Co., supra note 14, at p. 431.

began adapting - their definitions to meet their own particular needs and characteristics, the essential elements found in the Griggs definition (223) have consistently reappeared. These elements succintly stated are the following: i) discriminatory effect may exist irrespective of intent; ii) a practice or policy which may be neutral or fair in form is shown to have a disproportionate impact on a protected class; and iii) the practice or policy is prohibited unless justified by business necessity.

It should be noted in passing that while the second element forms part of a plaintiff's prima facie case, the burden for showing the last element falls upon the defendant (224).

2. Discriminatory effect in Canada

In Canada, definitions of discriminatory effect have appeared in certain statutes and also in some board decisions. Unfortunately, the basic elements required to prove discriminatory effect in Canada are not as clear as one would wish them to

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223. The definition provided by Robert Belton, supra note 4, at p. 1209 note 14, contains each of these elements and is worth repeating here:

> The disparate impact theory of discrimination provides that facially neutral practices which have an adverse impact on the opportunities of members of a protected class are illegal irrespective of any specific intent to create that impact, unless the practice is mandated by business necessity or has a manifest relationship to some legitimate interest of the defendant.

For a definition of discriminatory effect see also: Blumrosen, supra note 4, at p. 67.

224. "More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question": Griggs v. Duke Power Co., supra note 14, at p. 432.

be, even in those provinces in which the concept has been expressly recognized. This is probably due to the fact that the concept is still quite recent in this country and that only a small number of cases have dealt with it so far. A short review of the statutes and cases which refer to the definition and to the elements of discriminatory effect will illustrate some of the ambiguities which would require clarification.

The Ontario Human Rights Code, which was recently amended (225), specifically prohibits practices which have a discriminatory effect. Section 10 of the Code reads as follows:

> "A right of a person under Part 1 is infringed where a requirement, qualification or consideration is imposed that is not discrimination on a prohibited ground but that would result in the exclusion, qualification or preference of a group of persons who are identified by a prohibited group of discrimination and of whom the person is a member, except where,
>
> (a) the requirement, qualification or consideration is a reasonable and bona fide one in the circumstances; or
>
> (b) it is declared in this Act that to discriminate because of such ground is not an infringement of a right.

This definiton contains the three essential elements of Griggs albeit in slightly modified form: i) it dispenses with the intent requirement; ii) it refers to a requirement which must result in the exclusion, qualification or preference of a protected class; and iii) it declares that such an exclusion, etc., is

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225. S.O. 1981, c. 53.

deemed illegal unless it is, in the circumstances, a reasonable and bona fide one.

Although the interpretation of this definition has not yet been tested, it is interesting to note two particular aspects of it. First, the definition does not refer to a discriminatory or disproportionate impact but rather to "the exclusion, qualification or preference of a group ...". The use of such absolute terminology is surprising, for rarely do discriminatory effect cases imply the exclusion of all members of the protected class (226). The mere fact that there is a disproportionate impact has generally been considered discriminatory and illegal (227). Hopefully this section will be interpreted according to the spirit of the law and not in an absolute sense which, it should be noted, would be an unprecedented definition of discriminatory effect.

Secondly, in a rather novel manner the legislation has substituted "Reasonable and bona fide in the circumstances" for

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226. Consider for example the case of Colfer v. The Ottawa Board of Commissioners of Police et al., supra note 5, in which a height requirement (5'10") in the recruitment of police officers was held to be discriminatory against women because it excluded 95% - not 100% - of the Canadian female population.

227. The degree of disproportion required to make a practice illegal has rarely been defined. The United States appears to have approached the issue on a case by case basis: Schlei and Grossman, supra note 16, at pp. 1166 ff. This seems to be the situation in Great Britain as well where the law requires that the "proportion [of members of a protected class] who can comply [be] considerably smaller than the proportion of [majority members] who can comply ....": the Sex Discrimination Act of 1975, s. 1(1)(b)(i) and the Race Relations Act of 1976, s. 1(1)(b)(i) (emphasis is mine).

the business necessity term (228). It is difficult to foretell how the defence will be interpreted by the courts and by boards of inquiry. Nonetheless it is worth noting that the terms "reasonable" and "in the circumstances" appear rather ambiguous and this might invite subjective and unpredictable decisions. Unless the courts and tribunals agree to establish objective standards as a basis for evaluating these elements, the terms may prove to be a great failing in the law.

As for the use of "bona fide", it appears even more unfortunate. Experience with the "bona fide occupational qualification" (B.F.O.Q.) defence has shown that the term spawns confusion because, all too often, it injects a subjective consideration and a focus on motive when these are not at all relevant to the debate (229). Hopefully, the emphasis on the objective approach, inherent to the effects concept, will help steer the boards and judges away from this pitfall.

In contrast to the Ontario Code, the Quebec Charter (230) refers to the notion of "effect" in the definition of discrimination (231), but does not articulate the various elements of which it is composed.

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228. Compare this with the expression "justifiable" found in British legislation. The meaning of this term is discussed, infra, in Chapter 4 on defences.

229. See discussion regarding the B.F.O.Q. defence, infra, Chapter 4.

230. R.S.Q. 1977, c. C- 12.

231. See, supra note 111.

To date one of the few interpretations (231a) regarding the effects concept under the Charter can be found in the Quebec Court of Appeal decision in Commission des Droits de la personne du Québec et al. v. L'homme (232), which confirms the first element of the effects concept, i.e. that proof of intent is not required. Mr. Justice Turgeon stated that:

> Il y a discrimination lorsqu'il existe une distinction, exclusion ou préférence qui a pour effet de détruire ou de compromettre la pleine égalité que préconise la Charte. Il n'est donc pas nécessaire de prouver l'intention de poser un acte discriminatoire. L'intention en effet n'est pas exigée. C'est l'effet de l'acte posé qui doit être examiné, c'est-à-dire l'effet discriminatoire de l'acte posé (233).

231a. It should be noted that the recent decision in Ekco Canada Inc., supra note 7, implicitly rejects the effects definition of discrimination under the Quebec Charter. In this case, the complainants were members of the Universal Church of God and their religion prevented them from working during the Sabbath, i.e. from sun-down on Fridays to sun-down on Saturdays. Dismissed for refusing to follow the normal work schedule which was from 8:30 to 17:00, Mondays to Fridays (the complainants were unable to work after 16:00 on Fridays during the Winter season), they lodged a complaint of discrimination based on religion and contested the employer's refusal to provide them with a reasonable accommodation. Mr. Justice Benoit of the Superior Court concluded that the Charter imposed no duty to accommodate and for this reason dismissed the complaints of discrimination. But, in doing so, the judge also stated - more often than once - that there could be no discrimination unless the dismissals resulted from a distinction based on religion whereas, in the present instance, the dismissals had resulted, according to the judge, from the complainants' own refusal to work the normal schedule. (As has already been noted, this case is now on appeal.)

232. Supra note 206.

233. Ibid., at p. 850.

In addition to the above, the elements of the effects concept have been referred to in certain board of inquiry decisions. Perhaps one of the most explicit decisions on this point is that of Colfer v. Ottawa Board of Commissioners of Police et al. (234). Chairman Cumming addressed the issue of discriminatory effect and its component elements thus:

> Intent to discriminate is not a prerequisite to establishing a contravention of The Ontario Human Rights Code, ... there can be discrimination within the meaning of the statute if the result of applying employment regulations is to exclude women.
>
> [A]n employment regulation neutral on the face of it, i.e. one that applies to all prospective employees equally but has the effect of excluding women, is valid if it is shown that the regulation is in good faith and is reasonably necessary to the employer's business operations (235).

This passage recognizes the three elements of the Griggs definition with but one modification in that the business necessity defence is described as a practice which is "in good faith and is reasonably necessary to the employer's business operations". These terms are, perhaps not coincidentally, similar to those which were eventually included in the amendments to the Ontario Human Rights Code discussed above.

The preceding discussion indicates quite clearly that the elements required to prove discriminatory effect in Canada

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234. Supra note 5. See also Singh v. Security and Investigation Services Ltd., supra note 5, at p. 16; Bone v. Hamilton Tiger-Cats Football Club, supra note 5, at p. 13; Canadian Human Rights Commission and Bhinder v. Canadian National Railway Company, supra note 5 ((1981), 2 C.H.R.R. D/546), at pp. 558-561.

235. The Colfer case, ibid., at pp. 36-37.

have been influenced by the Griggs case. Some differences in terminology have, however, appeared both in legislative provisions and in case law. Unfortunately, the meaning and the scope of some of the new terms remain ambiguous and they invite both subjectivity and unpredictability in the interpretation of the respondent's defence in effects cases. It would be in the interest of sound law for the courts and tribunals to clarify these ambiguities as soon as possible, and also to articulate objective standards which will help determine the parties' respective burdens.

CHAPTER 3: THE MEANS OF PROOF

The elements of proof discussed in the preceding chapter determine the facts in issue (236) insofar as proof of discrimination is concerned. Discriminatory intent requires proof of the respondent's state of mind or his mental process in carrying out a given act, in other words it requires proof of a fact which is essentially subjective in nature. On the other hand, systemic discrimination calls for proof of the disparate consequences or effects of a given act (without it being necessary to show that such effect was consciously caused) and this usually implies proof of an objective fact.

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236. Of course a party's case is composed of many elements which are material to the case and, for example, if a discriminatory dismissal is alleged then the complainant must show not only a discriminatory intent but the fact of the dismissal as well. The respondent must similarly prove all the elements which are material to his defence and, for example, if an exemption is alleged he must show that he falls under the exemption. In any event, it is the substantive law that determines what elements are material to a case and parties should always refer to it in deciding their objectives of proof.

This process was aptly described in Edward W. Cleary, "Presuming and Pleading: An Essay on Juristic Immaturity," (1959) 12 Stanford Law Review 5, at p. 6:

> So in any given situation, the law recognizes certain elements as material to the case, and the presence or absence of each of them is properly to be considered in deciding the case. Or, to rephrase in somewhat more involved language, rules of substantive law are 'statements of the specific factual conditions upon which specific legal consequences depend. ... Rules of substantive law are conditional imperatives, having the form: If such and such and so and so, etc. is the case, and unless such and such or unless so and so, etc. is the case, then the defendant is liable ....

See also the definition of "facts in issue", infra, at p. 104, note 240.

In this chapter I will examine the means by which either form of discrimination may be established, looking first at proof of intentional discrimination and, afterwards, at systemic discrimination.

A. Intent

It has already been demonstrated that "intent to discriminate" means consciously to cause a disadvantge to a protected group (236a). The term denotes either that the respondent desired to cause a disadvantage to a protected group or that he believed that such consequences were likely to result from his act. In either instance, it is the respondent's subjective state of mind which must be shown to have been illegal, that is discriminatory.

Needless to say, a respondent will not always openly show or admit his discriminatory intent; on the contrary, he might go to great lengths to hide it, particularly if he can avoid liability by doing so.

For example, instead of admitting the fact that he refuses to promote Blacks or women to management positions, because he does not think that as a group either can handle such responsibilities, a respondent might offer a variety of excuses for such refusals. He might pretend, for instance, that the candidates lack the necessary educational qualifications or experience for the job, that the candidates show signs of having a

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236a. See, supra, Chapter 2, at pp. 90-93.

difficult personality and an inability to get along with colleagues or that the individuals lack other personality traits required for the job such as assertiveness, initiative, or enthusiasm. The possible excuses are, in fact, endless. The question that remains is how does one prove the respondent's true intent?

1. Direct and indirect, or circumstantial, evidence: introduction

It has been said that "[i]t is common knowledge that the thought of man shall not be tried, for the Devil himself knoweth not the thought of man" (237). Although this statement does not do away with the complainant's duty to prove the respondent's discriminatory "thoughts", it offers a vivid description of the difficulties inherent in proving intent. For this reason the law recognizes that, failing admissions, illegal intent may be proved by a process of deduction (238). Thus, in discrimination law, as in other areas, proof of intent to discriminate may be made in one of two ways, either directly or indirectly.

The choice between direct and indirect evidence (239) in

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237. This statement was made centuries ago by Brian, C.J. as quoted in Wright and Linden, supra note 176, at pp. 2-1.

238. Wright and Linden, ibid: "... in law what a man thinks must be deduced from what he says and does."

239. In Sir Rupert Cross, Evidence, 5th edition, Butterworths, London, 1979, at pp. 10-11, the terms direct and indirect evidence are defined as follows:

> [D]irect evidence means a witness's statement that he perceived a fact in issue with one of his five senses ...

Whereas,

> Circumstantial evidence has already been defined as a fact from which the judge or jury may infer the existence of a fact in issue.

proving a fact in issue (240) (e.g. intent to discriminate) depends, essentially, on whether or not direct evidence is available. It is when such evidence is unavailable that the parties may proceed by way of circumstantial evidence. The distinction between these two means of proof and the purpose of each has been described as follows:

> A fact in issue cannot always be proved by direct evidence. A witness cannot always be called to prove the facts from personal observation nor can a document always be introduced which directly establishes the fact. The facts in issue must in many cases, be established by proof of other facts. If sufficient other facts are proved, the court may 'from the circumstances' infer that the fact in issue exists or does not exist. In such a case proof is made by circumstantial evidence (241).

These alternative means of proof are available in Quebec as well. According to Baudouin (242) the courts do not always require that the causal relationship be proved by direct evidence; proof by "elimination", or by deduction, is also recognized:

> Les tribunaux n'exigent pas que le demandeur établisse un lien causal au-dessus de tout soupçon et d'une manière certaine. Il suffit que la preuve rapportée rende probable l'existence d'un lien direct. La preuve par présomption est donc ouverte et devant l'impossibilité

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240. "The facts in issue are those facts which the plaintiff must establish in order to succeed together with any fact that the defendant must prove in order to make out his defence": John Sopinka and Sidney N. Lederman, The Law of Evidence in Civil Cases, Butterworths, Toronto, 1974, at p. 14.

241. Ibid., at p. 31.

242. Supra note 178.

> d'une preuve directe, on admettra le réclamant à procéder par élimination. Ce genre de preuve consiste à démontrer que parmi toutes les causes possibles du dommage, seule l'une d'elles qui le relie au défendeur est probable. Il doit s'agir cependant de probabilité et non pas de simples conjectures et hypothèses lointaines (243).

And what of the degree of proof required to make the inference? Does proving a fact in issue by indirect means alter the usual standard of proof, does it render it less demanding, or does it on the contrary make it more stringent? According to Sopinka and Lederman it is the usual civil standard that applies: "an inference may be drawn if it is a reasonable deduction from the circumstances, and the court must act on a reasonable balance of probabilities" (244). Therefore, this burden of proof is neither so lenient as to allow inferences based on mere possibilities or conjecture, nor is it the stringent criminal standard which requires proof beyond a reasonable doubt.

The standard of proof demanded in circumstantial evidence cases has been the source of some confusion in general (245)

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243. Ibid., at p. 155.

244. Sopinka and Lederman, supra note 240, at pp. 31-32. In Quebec the same rule applies: see Baudouin, ibid. See also Carrier v. Roy, [1970] R.L. 385, at p. 394:
> Considérant que, dans les cas où les faits rapportés contradictoirement par les témoins s'avèrent équivoques, complexes ou subtils, le tribunal est quand même tenu d'en décider après avoir décélé la preuve prépondérante; qu'à cet effet, il lui suffit de découvrir, parmi toutes les hypothèses, que peuvent offrir les diverses versions proposées, celle qui s'avère la plus probable, eu égard à toutes les circonstances.

245. Sopinka and Lederman, supra note 240, at pp. 31 ff.

and it appears that elements of this confusion have trickled into discrimination cases. The confusion probably arises from the fact that definitions of circumstantial evidence have mostly appeared in criminal cases; these are bound by the rule that "the circumstances must be consistent with the conclusion that the act was committed by the accused and inconsistent with any other rational conclusion" (emphasis is mine) (246). In civil cases, however, this rule does not apply (247).

The standard enunciated in an oft-quoted discrimination case seems to reflect the requirement of the Hodge's Case rule rather than the balance of probabilities standard relevant to civil cases. Thus, in Kennedy v. Mohawk College (248) the Board made the folowing statement:

> [The] conduct to be found discriminatory must be consistent with the allegation of discrimination and inconsistent with any other rational explanation (249). (emphasis mine)

It is suggested that the Kennedy standard is too rigid because it reflects a criminal as opposed to a civil standard of proof. In my view, this standard is inappropriate, and the standard applicable in civil cases should be substituted for it. On the basis of the test articulated by Sopinka and

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246. Hodge's Case (1838), 2 Lewin 227, 168 E.R. 1136, as described in Sopinka and Lederman, supra note 240, at pp. 31-32.

247. Sopinka and Lederman, ibid., at p. 32.

248. (Ont., 1973).

249. Ibid., at p. 5.

Lederman (250), one way of formulating the appropriate standard for discrimination cases would be as follows: an inference of discrimination may be drawn if the circumstances render such a conclusion reasonably probable.

Presently, each of the two means of proof will be examined in the context of discrimination law in Canada.

2. Direct evidence of intent to discriminate - admissions:

a) Overt expressions of prejudice

"We have never had Chinese [tenants] and we won't ... if I take [one] everyone would move out". This was the response given to a young Chinese student who had called to enquire about accommodations (251). In another instance the following sign appeared in Kingston, Ontario in 1976: "To let, 2-bedroom apartment ... Aryan Caucasian Adults Only" (252). These are examples of overt discrimination from which direct evidence of intent to discriminate may be obtained. They constitute admissions, which represent the principal, if not the only, means of proving intent directly; otherwise, intent can only be proved indirectly by a process of deduction (253).

In considering admissions it would be a mistake to confine one's attention to admissions which are made during the

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250. See, supra, note 244 and accompanying text.

251. Fong v. Taylor (1982), 3 C.H.R.R. D/636.

252. Hill, supra, note 115, at p. 13.

253. See discussion, supra, note 238.

proceedings, for admissions made outside the proceedings in front of a witness may also be introduced into evidence. These are commonly referred to as "admissions against interest" and they may be brought into evidence by the witness who heard the statement, under an exception to the Hearsay Rule (254). Thus, in the example of the Fong case given above, the complainant could be called as a witness to testify that the respondent had stated by telephone that she would not rent to Chinese people, and this would then constitute an admission by the respondent of an intent to discriminate.

Outright and unmitigated manifestations of bigotry such as this are, of course, quite rare. There are, however, other categories of admissions which are somewhat more frequent in discrimination cases. They are cases in which the respondents admit that their hiring or rental criteria are based on colour, sex, age, handicap, etc. adding, however, that the criteria are motivated by neutral and sometimes positive considerations and, therefore, justified.

Examples of these types of admissions abound and are usually found in the following categories: refusals based on paternalism toward certain protected groups; refusals based on stereotyped opinions regarding the abilities or habits of members of certain protected groups; the exclusion of members of certain

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254. For a discussion regarding admissions against interest see, infra, Part II, at pp. 392-394.
Quebec similarly recognizes such admissions (referred to as "aveux extrajudiciaires") as an exception to the Hearsay Rule: Ducharme, supra note 2, at pp. 204-205.

protected groups based on the desire to avoid economic loss (often unsubstantiated) or to avoid employee disgruntlement; or, where denials or distinctions are made with respect to certain groups for some "other" allegedly neutral and even positive purpose. The following cases illustrate the various categories of intentional discrimination which may be proved by direct evidence.

b) Paternalism

Paternalism is deciding for another what is or is not in that person's interest (255). Under the guise of solicitude, which is often misplaced and objectively not necessary, respondents sometimes admit that they refused to hire members of a particular group but "for their own good". Thus, in one instance a woman was refused certain assignments as a security officer because the respondent wished to protect women against high risk security jobs (256). In another case a woman was refused a job as a doorman because the respondent wanted to protect the "fair sex" (i.e. women) from what he regarded as an unpleasant job (257). Similarly, a respondent attempted to justify a compulsory

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255. The Oxford American Dictionary, Oxford University Press, New York/Oxford, 1980, defines paternalism as follows:
> The policy of governing or controlling people in a paternal way, providing for their needs but giving them no responsibility.

256. Robertson v. Metropolitan Investigation Security (Canada Ltd., supra note 210.

257. Bulger v. Branch No. 4 Royal Canadian Legion, (N.B., 1978).

retirement policy for firefighters who had reached the age of sixty on the basis that at that age the job became too dangerous for them to handle (258). In all these instances the decision to exclude members of certain groups was held to be discriminatory despite the well-intentioned motives and the protective attitude on the part of the respondents.

c) Stereotypes

The refusal to hire, to rent, to provide public services, etc. because of false assumptions regarding the abilities or habits of members of certain protected groups, is a refusal based on stereotypes (259) and one which is deemed discriminatory. Thus, a compulsory retirement policy for firefighters who have reached the age of sixty, which is founded on the impression that firefighting is a "young men's game" (260), is a policy which is based on a stereotype that does not take into account the abilities of the individual sixty-year-old person. Other examples of decisions based on stereotypes are: the refusal to hire a woman as a cost-account trainee because, in the

258. Hadley v. Mississauga, (Ont., 1976).

259. The Oxford American Dictionary, supra note 255, defines "stereotypes" as:
... 2. An idea or character etc. that is standardized in a conventional form without individuality.

260. Ontario Human Rights Commission v. Borough of Etobicoke, supra note 23. See also O'Brien v. Ontario Hydro (1981), 2 C.H.R.R. D/504, at p. 517: the employer "considered that age had significance in determining whether a person might adapt to certain job conditions - for example, certain menial tasks, minimal responsibility, low pay, shiftwork, relocation, ease in returning to classroom study ...".

respondent's opinion, this would entail a "loss of femininity" (261); the refusal to hire a man to help install and arrange drapes for customers because, according to the respondent, women have a greater sense of taste for decoration (262); the decision not to hire a man as personnel manager because, in the respondent's view, it is "a known fact from sixteen years in business that a female would not come to a male personnel manager with personal problems" (263).

A last example of a decision based on stereotype can be found in a British case in which the respondent maintained that a woman suffers less than a man from a dismissal because she is not the "breadwinner" (264).

d) **Exclusions related to supposed economic loss or employee disgruntlement**

The presumed objections of clients or employees are sometimes used by respondents to try to justify decisions based on a prohibited ground, but such decisions have usually been judged to be illegal. The following are added examples of direct evidence of an intent to discriminate: the refusal to hire a man on the basis that female employees and clients would object to the presence of a male in the respondent's hairdressing establishment (265); in another case the respondent admitted that he

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261. Stairs v. Maritime Co-operative Services Ltd., (N.B., 1975).

262. Boyd v. Mar-Su Interior Decorators Ltd., (Ont., 1978).

263. Seagrave v. Zeller's Ltd., (Ont., 1975).

264. Coleman v. Skyrail Oceanic Ltd., [1981] I.R.L.R. 399.

265. Imberto v. Vic & Tony Coiffure et al. (1981), 2 C.H.R.R. D/392.

refused to rent to a black person saying that he had "nothing personal against Blacks, but if he rented an apartment to [the complainant] his tenants would leave the building" (266).

In yet another example, the last one on this topic, the respondent explained that the complainant had been terminated because "although an energetic and diligent worker, [she was] bossy and aggressive, [she] questioned authority and upset fellow employees" (267). The Board noted, however, that this employee disgruntlement was itself based on stereotypes:

> Counsel for Ms. Hendry pointed out that those qualities attributed to Ms. Hendry by the respondent may be viewed in a rather different light: what may be seen as aggressiveness in a woman might be seen as energy and ambition in a man. In other words, attributes considered in a pejorative light in a woman may be thought of as desirable in a man, according to traditional male-female stereotypes. In this view, had Ms. Hendry been a man these attributes would have been looked upon with less criticism and hostility.
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> There is one substantial piece of evidence to support this submission. Two members of the permanent staff in store No. 351, [...] had health problems which legitimately entitled them to be placed on "light duty", that is, they were excused from lifting and moving heavy cases, a rather important part of the work of a typical LCBO clerk. Apparently on more than one occasion, when these two men were visible to the public and seen not to be doing any work in particular, Ms. Hendry was seen to be lifting and moving a heavy case of liquor. Now, we are aware that the traditional view in our society is for men, not women, to be seen doing the heavy work. Accordingly, a customer or customers commented on Ms. Hendry doing heavy

266. Jones v. Huber and Huber, (Ont, 1976).

267. Hendry v. Ontario Liquor Control Board (1980), 1 C.H.R.R. D/160, at p. 161.

> work with the men standing around. Implicit in a comment of this type is more criticism of the men than praise of the woman. And the men did not like it. Their reaction was natural enough in our society: they were not well but did not go about announcing their poor health; yet they were being criticized by the public for apparent laziness. Of course, if it had merely been another man moving the cases, no comment would likely have been made. But here it was a woman, who was the cause of the comments, a part-time woman and one who was rather aggressive and bossy at that. Some hostility was understandable in these circumstances, though of course, it was not caused by Ms. Hendry. The LCBO can hardly be responsible for the comments of customers or for the upset caused to employees on light duty. Should the burden then fall on Ms. Hendry who was simply doing her job?
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> In my opinion that cannot be so, for we should then reinforce the status quo and remove responsibility from an employer, in this case a public employer, for acting to avoid the ill effects of discrimination. In helping to change traditional views of roles for men and women, employers - especially large institutional employers - must bear the main burden of change: the burden should not be allowed to fall on those who would otherwise suffer the harms of discrimination. Therefore, the burden of resolving the conflict between those workers on light duty and Ms. Hendry was that of the LCBO. It could not get rid of its problem simply by dismissing Ms. Hendry and returning to the peace and comfort of an all-male 'happy family' that [the respondent] wished for (268).

e) Exclusions or distinctions based on "other" neutral purposes

Distinctions based on a prohibited ground are not any less discriminatory because based on a neutral or even laudable social purpose. On the contrary they may provide added examples in which discrimination can be considered to have been

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268. Ibid., at pp. 161-162.

established directly.

In one instance, (269) the facts showed that the respondent had instituted a study programme for women who had been off the labour market and away from studies for an extended period of time. In hiring, the respondent sought to have both male and female teachers so as to avoid creating a "ghetto" composed entirely of females; in other words, the respondent wanted to ensure that the students would have contact with teachers of both genders. This led to the refusal to hire the complainant, a woman, because the other candidates already hired were also women. The respondent's avowed hiring policy made a clear distinction based on gender, thus providing direct evidence of discrimination.

Other examples falling within this category of cases are: where respondent admitted that it imposed higher insurance fees on young male drivers in order to fulfill neutral marketing aims (270); where the respondent adopted a written policy according to which (a) the Canadian doctor could become a fully registered member of the College of Physicians whereas the non-Canadian could not, and b) the Canadian could exercise a free choice as to where, in the province, he or she would practise, whereas the non-Canadian could not (271), even though the purpose

269. Commission des droits de la personne du Québec v. Collège de Sherbrooke, supra note 206.

270. Shandrowski v. Alberta Motor Association Insurance Ltd., supra note 209.

271. B.C. Human Rights Commission v. College of Physicians and Surgeons, supra note 211, at p. 5.

of the policy was quite laudable in that it sought to provide doctors in under-serviced regions and thus to improve the standard of medical care in those areas.

The above-mentioned cases represent specific examples of direct evidence of discrimination. Before proceeding to the next section a distinction should, however, be drawn between these cases and others in which the respondent admits to a discriminatory attitude but denies that it had anything to do with the act complained of. In such instances the causal relationship between the "attitude" and the "act" is absent in the admission and the evidence may therefore be insufficient to prove that there was an intent to discriminate in the case at hand (272).

Proof of such a discriminatory attitude could, however, be relevant as part of a circumstantial evidence case leading to an inference of the intent to discriminate. For example, in Bird v. Gabel et al. (273), the complainant, an Amerindian, alleged that he had been discriminated against when he tried to rent a motel room from the respondent. The evidence showed that the respondent's son had once remarked that "they'd had trouble before with Indians, things had been broken". This statement, coupled with the facts that the respondent had not given an acceptable explanation for the refusal to rent to the

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272. For a discussion concerning the causation principle see supra, Chapter 2, at pp. 87-88.

273. (Sask., 1974).

complainant, led the Board to infer that the refusal was based upon an intent to discriminate (274).

Similarly, in the case of MacBean v. Village of Plaster Rock (275), at least two members of the selection committee stated during the hearing that they had previously believed that the job of clerk-treasurer was a man's job. This, combined with other factors, led the tribunal to conclude that these individuals still held this opinion when they refused to consider the (female) complainant's application for the job.

Lastly, in Morgan v. Toronto General Hospital (276) the respondent's personnel director admitted during the hearing that, in his view, the "work habits" of certain people from developing countries were inadequate for a position as Food Service Supervisor at the hospital. This evidence of a discriminatory attitude together with the fact that all the explanations given for the refusal to hire the complainant - a woman from the Caribbean region - proved to be pretextual, led the Board to infer that the refusal to hire the complainant was based on an intent to discriminate.

By way of conclusion on this section, the intent to discriminate may be proved by direct evidence where the respondent admits that the act of denial was based on or associated

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274. Ibid., at p. 4

275. (N.B., 975).

276. (Ont., 1977).

with one of the protected grounds such as colour, sex, religion, etc.

It would be foolish, however, to expect such direct evidence to appear frequently. It may in fact be suggested that the frequency of such admissions is inversely proportionate to the degree with which respondents are familiar with anti-discrimination laws. It is, therefore, necessary to consider the other means by which a complainant may prove the intent to discriminate and to examine proof by way of circumstantial evidence.

3. Circumstantial evidence

In the vast majority of cases discriminatory intent is not admitted and in these instances proof must be made indirectly, that is by means of circumstantial evidence (277).

According to this means of proof, the fact that the respondent intended to discriminate, that is that he desired to cause disadvantage to a protected group or that he had knowledge of the fact that such consequences would result from his act, is inferred from other facts. Circumstantial evidence usually depends on a body of facts (the circumstances), each of which would by itself be insufficient to permit an inference of intent to discriminate but which, when combined, may justify such an

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277. Circumstantial evidence has been recognized as a means of proof in a number of discrimination cases: see the cases listed, supra, in Chapter 1, at p. 51, note 120.

inference (278).

It should be noted in passing that circumstantial evidence may be comprised of evidence presented by both the complainant and the respondent (279).

Inevitably, the indirect method of proof has the effect of extending the usual boundaries of relevance since it may be necessary to prove facts which, at first glance, may appear remote and irrelevant to the particular case at hand. For example, in discrimination cases, it may be necessary to have the tribunal examine the qualifications and the files of the complainant's co-employees in order to show differential treatment; in another instance, similar fact evidence may be called for to show a discriminatory pattern or practice on the part of the respondent. In such instances courts and tribunals may be asked to admit

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278. For general information on the topic of circumstantial evidence, see Sopinka and Lederman, supra, note 240, at pp. 31 ff. and in particular at p. 34; see also Cross on Evidence, supra note 239, at p. 11, note 3, quoting Pollock C.B., in R. v. Exall (1866), 4 F. & F. 922, p. 929:

> It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link break, the chain would fall. It is more like the case of a rope comprised of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence - there may be a combination of circumstances, no one of which could raise a reasonable conviction or more than a mere suspicion; but the three taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit of.

279. See the discussion, infra, in Part II under the heading "Motions for a non-suit", at pp. 340 ff.

evidence which exceeds the facts of the particular incident complained of, but this approach is vital; otherwise if an excessively narrow approach were to be taken, it might be impossible to determine whether or not there was discrimination (280). Broadening the sphere of relevance is, in fact, a particularity of circumstantial evidence under the ordinary rules of evidence as well (281).

Although the circumstances of each case may vary, it is nevertheless possible to identify certain categories of circumstantial evidence which are especiallly relevant in proving discriminatory intent. These categories are as follows: a) differential treatment; b) testing; c) discriminatory patterns and practices; d) adverse or disproprotionate impact, and e) failure to explain an act where an explanation is called for, and pretexts (282).

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280. In this vein Lustgarten, supra note 4, remarked the following at p. 207:
> It is essential that tribunals not take an unduly narrow approach to their task of adjudication. Although the question they ultimately must determine is whether a specific act of discrimination against the particular complainant occurred, it does not follow that they are limited to consideration only of the facts of the particular incident.

281. According to Sopinka and Lederman, supra, note 240, at p. 34: "A trial judge must be careful not to exclude individual pieces of evidence if there is an undertaking that the evidence is part of a larger combination."

282. This is a slight variation on the type of evidence suggested by certain American authors. According to Méndez, supra note 4, at p. 1130:
> They [employees] typically must rely on circumstantial evidence, such as differential treatment, inconsistent

(cont'd.)

a) Differential treatment

Where an employer allows his black employees to be subjected to racial slurs, verbal abuse and harassment by co-employees, while white employees are not victims of such treatment (283); where a club refuses to allow black male patrons to enter unless accompanied and it is shown that such a requirement does not apply to white males (284), or, where a respondent's practice is to reassign white workers whose job performance is unsatisfactory but to dismiss black employees whose work records are similarly mediocre (285), all represent examples of differential treatment.

Short of admissions regarding the intent to discriminate, this is probably one of the most probative types of evidence which can be produced in matters of intentional

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records, or statistical evidence of discrimination, to create an inference of impermissible motive in any one case;

And, in Note "An American Legal Dilemma - Proof of Discrimination", supra note 4, at p. 120:

Generally the evidence tending to establish that an employer has discriminated against an individual can be divided into three categories (1) evidence of general discriminatory employment patterns and practices in the plant; (2) evidence that the complainant is qualified for the job in question; (3) evidence showing that the reasons given by the employer for his actions are unsubstantial or are mere pretext.

283. Simms v. Ford Canada Ltd., supra note 200. (This hypothesis was raised by the Board as an example of differential treatment, but the facts of the case did not show that the complainant had been harassed as such).

284. Desilu et Chéry v. Café Tropicana Inc., supra note 174.

285. Mitchell v. Nobilium Products Limited (1982), 3 C.H.R.R. D/641 (Ont.).

discrimination. The strength of such evidence is so great that while certain tribunals continue to regard it as circumstantial evidence from which intent may be inferred, others appear to consider this type of evidence sufficient to, by itself, constitute proof of discrimination and, in other words, to regard it as direct evidence of discrimination.

Examples of the first approach may be found in the cases of MacBean v. Village of Plaster Rock (286) and Mitchell v. Nobilium Products Limited (287). In both instances the Boards took into account not only the fact that there was proof of differential treatment, but also the fact that the respondents had failed to provide a credible explanation for this differential treatment. These two facts combined provided the basis upon which the Boards concluded, by way of inference, that there had been intent to discriminate.

On the other hand, in cases such as Désilu et al. v. Café Tropicana Inc. (288) and Doherty and Meehan v. Lodger's International Ltd. (289), both courts and tribunals were prepared to regard differential treatment by itself as sufficient evidence of illegal discrimination (290). The importance that is

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286. Supra note 275.

287. Supra note 285.

288. Supra note 174.

289. (1982), 3 C.H.R.R. D/628.

290. Note, however, that proof of "equal treatment" does not necessarily mean that discrimination has not occurred: Tharp v. Lornex Mining Corporation Ltd., (B.C., 1975).

attributed to this type of evidence is understandable considering the fact that discrimination is frequently defined in terms of "differential" or "unequal treatment" (291). In this respect it is worth repeating Chairman Krever's comments in Simms v. Ford of Canada Ltd. (292) regarding the meaning of the word "discriminate":

> In my opinion the word "discriminate" in the context of the Code means to treat differently or, in the particular context of section 4(1), to make an exmployee's working conditions different (usually, in the sense of less favourable) from those under which all other employees are employed. Thus, to permit, even passively, a black employee in a plant where the majority of employees are white to be humiliated repeatedly by insulting language relating to his colour by other employees, even, I would go so far as to say, by non-supervisory employees, would be to require the black employee to work under unfavourable working conditions which do not apply to white employees. In such circumstances the employer has an obligation, imposed by section 4(1), to remove the cause of the discriminatory working conditions and police the prohibition against the humiliating conduct or language (293).
> (emphasis is mine)

From a strictly theoretical point of view, differential treatment constitutes an indirect means of proving the intent to

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291. See supra, note 174, at p. 75. In fact, the ordinary meaning of the term discrimination easily permits such a definition. For example, the Shorter Oxford English Dictionary, 3rd ed., Clarendon Press, Oxford, 1970, defines "discrimination" as:
    1. the action of discriminating or distinguishing; a distinction (made with the mind or in action) ... (emphasis is mine).

292. Supra note 200.

293. Ibid., at p. 18.

discriminate since this latter element is not admitted and must therefore be inferred. However, there is in practice a strong trend to regard such evidence as direct proof of discrimination, an approach which seems quite justified under an "unequal treatment" definition of discrimination. Either way, this type of evidence has consistently been regarded as highly probative in matters of discrimination.

Evidence of differential treatment must be drawn from an appropriate basis of comparison which, unfortunately, is not always available. Testing provides one means by which this deficiency may be countered.

b) Testing

Testing is a technique which may be used by a Human Rights Commission to verify whether or not discrimination is being practised by a party who is suspected of such activities (294). Hill described testing in the following manner:

> Testing can be considered as a controlled experiment. For example, if an employer is suspected of discrimination, two black persons might be assigned to apply for the job advertised. If the blacks are told the job has been taken, two white persons would be sent immediately to make application. If all relevant factors - such as qualifications, dress, manner, age, etc. - are uniform among blacks and whites but only a white is hired or allowed to file an application, it is clear that a legitimate complaint exists.

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294. For cases in which testing has been used see, for example, Doucette v. Aberdeen Motel (1980), 1 C.H.R.R. D/13, and Harris v. Bouzide, supra note 120.

> However, as easy as it is to describe, testing is not easy to do. It requires careful planning, timing, documentation and an ability on the part of the testers to adapt to the unexpected (295).

If they appear to confirm the existence of discrimination, testing results may be used to show differential treatment.

For this reason it is important that the circumstances of the "control" be similar - if not identical - in every respect except for the factor which is being tested. It was in this respect that Hill indicated that "[i]f all relevant factors - such as qualifications, dress, manner, age, etc. are uniform" then evidence of differential treatment after testing might constitute proof of discrimination. If these precautionary measures are not taken then the respondent might be able to explain the differential treatment on the basis of another non-prohibited ground as, for example, a difference in behaviour or appearance between the two candidates.

Testing may be particularly useful in cases where one can expect to find little, if any, objective or corroborative evidence in the form of business records, witnesses, patterns, etc., which is characteristic of cases involving services offered to the public, housing, or hiring by small businesses whose operations are particularly small and informal.

This method of proof is not, however, without its critics who perceive testing as a form of entrapment. But, along

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295. Hill, supra note 115, at p. 34.

with other supporters of testing (296), Tarnopolsky has defended this means of proof and disagreed with its critics as the following passage shows:

> In many cases proof can be obtained if a person who is not a member of the group discriminated against is willing to testify and can, immediately after the victim's discrimination, obtain access to the same accommodation or employment. Finally, although test cases may involve deception to the extent that the person attempting to obtain the evidence may not want the accommodation or the employment which he asks for, the deception does not diminish the veracity of the fact of discrimination. 'The proponents of test cases are not trouble-makers. They are trouble finders.' If the trouble were not there in the form of a discriminatory act, they would not find it (297).

Be this as it may, testing is often eyed with misgivings (298) and this might severely dampen a Commission's desire to resort to it.

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296. On this issue Hill, ibid., made these comments:
> Why is testing so controversial? Its opponents say it is covert, clandestine, less than gentlemanly. But it is the nature of discrimination - a practice usually covert and clandestine - that requires the techniques of testing. And if governments can test elevators, hospitals and restaurants for safety and cleanliness, surely tests can also be conducted to protect the human rights of citizens.

In the same vein, see also Lustgarten, supra, note 4, at pp. 207-208 and note 18.

297. Tarnopolsky, supra note 1, at p. 574, quoting Borovoy, Human Rights and Racial Equality - Tactics of Combat (1962), p. 14.

298. One Board Chairman remarked that although he did not believe testing to be entrapment it nevertheless left a "cloud" hanging over the complainant: Doucette v. Aberdeen Motel, supra note 294, at p. 13. It should be noted that in this instance, one of the "testers" became the complainant. It is quite possible that the Board would not have had such misgivings had there also been a "genuine victim".

A more serious limitation to the use of testing is that it is often simply not feasible as a method of proof. This occurs, for example, where the act complained of involves a complex system of hiring (interviews, medical examinations, etc.), where the respondent has already received notice of the complaint, or where the job or accommodations are no longer available (299).

c) Discriminatory patterns and practices and other similar acts evidence

As discrimination is generally aimed at a group rather than at an individual it may be revealing, in a case where discriminatory treatment is alleged, to examine the manner in which the respondent has acted towards other members of the same group. If such an analysis points to a pattern or practice of discrimination, then evidence of such systematic conduct may be relevant to proving indirectly that the respondent discriminated against the particular complainant. In other words, "evidence of general discriminatory ... patterns and practices ... is ... evidence of discrimination against a group used to establish the probability of discrimination against the individual complainant" (300).

In Canada, the traditional rules of evidence recognize the admissibility of similar acts evidence in specific

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299. This last obstacle has been raised by Black, supra note 4, at p. 1.

300. Note, "An American Legal Dilemma - Proof of Discrimination", supra note 4, at p. 120.

circumstances and for specific purposes, as this study will show. Moreover, it is suggested that the use of similar acts evidence may be quite relevant in discrimination law even though the number of cases which have actually relied on similar acts evidence in this area are few.

At the outset, it is important to identify certain fundamental principles regarding the use of similar acts evidence in civil law. According to the ordinary rules of evidence, similar acts cannot be used as evidence of a party's "bad character"; such evidence may, however, be admissible either for the purpose of showing that the party is engaged in a systematic course of conduct or in order to demonstrate that a party acted with an illegal intent or animus (301).

The first rule, therefore, is that similar acts cannot be used as "bad character" evidence. Proof of a party's past misconduct is inadmissible to show that he probably also acted illegally in the specific case at hand. In other words in civil law, just as in criminal law, proof of a party's good or bad character is deemed irrelevant in determining whether or not the individual acted illegally on a given occasion (302). One rationale for this rule, according to Sopinka and Lederman, is that while it may be presumed that "the condition of places and things remain static and that they are the same today

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301. Generally on the topic of similar acts evidence in civil law, see Sopinka and Lederman, supra note 240, at pp. 19 ff.

302. Sopinka and Lederman, ibid., at p. 288.

as they were yesterday ... [this] is not, however, true of persons and for this reason evidence of human disposition to act in a certain manner is not admissible" (303).

Although the general rule is that similar acts evidence is irrelevant (304), there are exceptions to this rule and, in particular, such evidence is admissible (a) "to prove a fact in issue where conduct is alleged to be part of a scheme or one of a class" (305), and (b) "to explain the animus, purpose or object of the act in question" (306).

In the first category, that is where conduct is alleged to be part of a scheme, pattern, or system, similar acts evidence is used to prove that the respondent committed the principal act itself (307). Although this element (e.g. the dismissal, refusal to hire, etc.) can usually be proved by other means and is

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303. Ibid., at p. 23.

304. Ibid., at p. 19:
> Evidence of similar acts is considered collateral, and therefore irrelevant, unless some special nexus between the fact in issue and the evidence tendered is shown, which creates a relationship beyond mere similarity.

305. Ibid., at p. 20. See also R. Eggleston, Evidence, Proof and Probability, Weidenfeld and Nicholson, at p. 45:
> Where, however, the behaviour of a person on other occasions throws light on his behaviour on the occasion in question, otherwise than by showing that he is the sort of person who would be likely to behave in that way, for example, if evidence is available to show that the defendant is engaged in a systematic course of conduct, evidence of similar facts is admissible.

306. Sopinka and Lederman, ibid.

307. Ibid.

often admitted, there are occasions when similar acts evidence may be particularly helpful in proving the principal act (308).

It should be noted that this type of evidence is not available unless a systematic conduct on the part of the defendant is alleged (309); moreover, no system can be established on the evidence of an isolated act (310).

By contrast, where similar acts evidence is used to show animus or illegal intent, the purpose of this evidence is not to prove that the defendant committed the principal act but rather "to prove or rebut a defence, which can reasonably be anticipated, such as ignorance, accident, mistake or some innocent motive or intention" (311).

In the area of discrimination law, proof of patterns and practices has been regarded favourably as a means of proof because it represents an improvement over the exceedingly narrow

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308. For instance, in cases involving sexual harassment, the principal act or acts (e.g. the harassment) may be denied by the respondent and it is often difficult to prove the occurrence of such acts because they are usually carried out when no witnesses are present. For an example of a sexual harassment case where the admissibility of similar acts evidence was considered as a means of proving a pattern or system of conduct toward female employees, see Olarte et al. v. Commodore Business Machines Ltd. et al. (1983), 4 C.H.R.R. D/1399 (Ont.).

309. Sopinka and Lederman, supra note 240, at pp. 20-21.

310. Ibid.

311. Ibid.

individualized approach (312), and also because it provides a means of obtaining objective evidence which might be more helpful in deciding a matter than subjective evidence based on the conflicting versions of the two parties (313).

The admissibility of similar acts evidence was raised as an issue (314) in Olarte et al. v. Commodore Business Machines Ltd. et al. (315). After a fairly comprehensive study of the rules of evidence applicable in this area, the Board Chairman concluded that most (316) of the similar acts evidence that the complainants wished to introduce was admissible for the purpose of showing, first, that the respondent company had knowledge (animus) of the acts complained of and, second, that the individual respondent's acts formed part of a pattern or system (317).

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312. Note, "An American Legal Dilemma - Proof of Discrimination", supra note 4, at pp. 111 ff. and particularly at pp. 114-115, note 28; Blumrosen, supra note 4, at p. 68.

313. Lustgarten, supra note 4, at pp. 207 ff.

314. See also discussion concerning the admissibility of similar acts evidence in Hughes & White v. Dollar Snack Bar et al. (1982), 3 C.H.R.R. D/1014.
In this matter, two complaints were lodged against the respondent alleging sexual harassment. The board chairman stated that one complaint could not be used as similar acts evidence in the other complaint because of the possibility of collusion between the complainants. He did not, however, refuse to consider other similar acts evidence which might be presented.

315. Supra note 308.

316. The Chairman did not admit all the similar acts evidence proposed by the complainants. In particular, he rejected evidence concerning the conduct of a person who was not party to the action: ibid., at p. 1403.

317. Ibid.

In deciding to admit such similar acts evidence the Chairman noted specifically that "the positive value of allowing the evidence ... far outweigh[ed] any possible prejudicial (in the sense of unfairness) impact [on the respondent]" (318).

For an interesting illustration of the relevance that similar acts evidence might have in discrimination cases, it is worth noting the obiter dictum of Madam Justice Colas in the matter of Thomas v. Robin Hood Multifoods Ltd. (319). The issue involved unjust dismissal rather than discrimination as such, but the judge's comments are nevertheless of interest here:

> Les motifs du congédiement invoqués par la défense ou par le seul témoin de la défenderesse ... n'ont pas été soutenus par la prépondérance de la preuve. Le Tribunal a eu la forte impression que [le directeur] a voulu se défaire des quelques employés de race noire qui travaillaient dans le secteur du demandeur. Même [s'il] se défend d'être raciste, il est étrange de constater que tous les employés de race noire ont été remplacés par des blancs peu après son entrée en fonction (320).

So far, similar acts evidence has been discussed as part of a complainant's case. It should be noted, however, that a respondent may also rely on this type of evidence to show a pattern or practice of non discrimination (321). But a word of

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318. Ibid.

319. Unreported judgment, C.S.M. 500-05-015467-79.

320. Ibid., at p. 5.

321. For example, see Legge v. Princess Auto Machinery Ltd. (1983), 4 C.H.R.R. D/1339, at p. 1346. (This case involved a complaint by a person who had asthma and was dismissed because she refused to work in an area that was dusty. It (contd.)

caution may be necessary against defences that point toward "tokenism" in the respondent's activities. In other words, where a respondent relies on an isolated example to contradict what appears to be a discriminatory practice or treatment on his part, such an example should be given little probative value as a defence. In this respect it is worth quoting the following passage from Johnson v. Timber Tailors (Midlands) Ltd. (322):

> We realise as a Tribunal, that we have to seek comparative evidence and that such is good evidence. One of the ways in which we can direct ourselves, or any Tribunal can direct itself, to the balance of probabilities is comparative evidence. The employment of one West Indian and two Asians in a concern is not in our opinion sufficiently comparative in this context; otherwise to take an extreme case, any concern could employ say one West Indian or one Jew or one Chinaman and then discriminate against all others of similar race, religion or colour with impunity. This cannot be sustained (323).

Further on the issue of defences, where it has been shown that the respondent engaged in past discriminatory

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is, in fact, surprising that the Board Chairman should have accepted a defence based on the fact that the respondent retained in its employment employees who suffer "various disabilities". The relevance of such a broad category to the complainant's specific situation appears, in my view, doubtful.) In Skeete and Samuel v. Jolyn Jewelry Limited (1980), 1 C.H.R.R. D/167, at p. 171, the Board accepted evidence showing that the employer had "employed a very high percentage of immigrant workers from many parts of the world of various colour and racial origin". For another example in which such a defence was deemed relevant (in the U.S.), see Furnco Construction Corp. v. Waters, supra note 20.

The validity of this defence was also noted in Lustgarten, supra note 4, at p. 208.

322. [1978] I.R.L.R. 146.

323. Ibid., at p. 149.

practices, the latter may counter this evidence by showing that he has since altered his discriminatory policies or practices (324).

In concluding, it should be added that there is authority for allowing similar acts evidence which extends beyond the present to past practices (325). Thus, where the numbers involved are too small to reveal a pattern of discrimination - or non-discrimination - the evidence may include past as well as present practices.

d) Proof of disparate impact or result

Although proof of disparate impact or of a discriminatory result cannot alone constitute proof of discriminatory

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324. Note, "An American Legal Dilemma - Proof of Discrimination", supra note 4, at p. 114, note 28:
> In some cases a school board may admit discrimination in the past but allege that the policy has been changed .... In such a case, of course, if the school board can prove a change of policy, evidence of the past wage rates could not be used in making the desired induction.

But in Hendry v. Ontario Liquor Control Board, supra note 267, at p. 165, the Board found that there was evidence of past discriminatory practices and the respondent's failure to take active steps to change these discriminatory practices made it liable under the Ontario Code. In the same vein, see Schlei and Grossman, supra note 16, Supplement, at p. 301, note 15.

325. Olarte et al. v. Commodore Business Machines Ltd. et al., supra, note 308, at p. 1403:
> All six complainants ... are alleging a pattern or system of conduct toward female employees, on the part of the same individual within the same factory of the same employer. The difference in time frames of employment by some witnesses is ... an irrelevant factor for the most part.

In the same vein, see Note, "An American Legal Dilemma - Proof of Discrimination", supra note 4, at p. 113.

treatment, as it does in effects cases, it is not totally irrelevant in intent cases (326). Thus, proof of a discriminatory result combined with other facts, such as the absence of a satisfactory explanation for the respondent's acts, can indeed provide the evidence from which discriminatory intent may be inferred.

This approach was favourably commented upon by Chairman Ratushny in Bezeau v. Ontario Institute for Studies in Education (327):

> Even though such [discriminatory] intention must now be proven by the Commission [following the O'Malley decision], it will seldom be overt. In most cases, it will have to be inferred from all of the circumstances of the case. In some cases, mere proof of a discriminatory result, in the absence of a reasonable explanation may lead to the inference of an intention to discriminate (328).

A discriminatory result in effects cases is usually established through the use of statistics (329); it follows that

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326. In the leading case of Washington v. Davis, 426 U.S. 229 (1976), the United States Supreme Court held that intent was a necessary element in proving discrimination in violation of the Constitution. Nevertheless, the court declared, at p. 242, that "[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution." To the same effect, see Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1976). In the United Kingdom, Lustgarten, supra note 4, at p. 209, has pointed out that "the Northern Ireland Commissioner of Complaints in investigations of cases of religious discrimination, has used statistical data [showing disparate impact] to support a finding of discrimination in the absence of convincing contrary evidence."

327. (1982), 3 C.H.H.R. D/874.

328. Ibid., at p. 877.

329. See, infra, at pp. 138-139.

it may also prove to be an important means by which to demonstrate a discriminatory result in intent cases (329a).

e) Failure to explain an act where an explanation is called for, and pretexts

In accordance with the ordinary rules of evidence (330), an inference of the intent to discriminate may be drawn where the respondent fails to explain a situation which requires an explanation.

The "duty to explain" arises once the complainant has established a prima facie case (331) and the burden of proof has

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329a. See Castaneda v. Partida, 97 S. Ct. 1272 (1977) for an interesting example of a case in which statistics and probability studies were used to show a disproportionate impact as the basis for a prima facie case of intentional discrimination.

330. Sopinka and Lederman, supra note 240, at p. 37:

> The absence of action, no less than positive acts, can be the basis for an inference as to the existence or non-existence of a fact in issue. The lack of remedial action by the owner of a house which burns may raise an inference of arson. The failure of a party or witness to testify may give rise to the inference that the evidence, if given, would have been adverse. The want of an explanation in circumstances that demand it is frequently the basis for an adverse inference.

331. Harris v. Bouzide, supra note 120; Bremer v. Board of School Trustees, School District No. 62 et al., supra note 120; Ruest v. Int. Bros. of Electrical Workers et al., supra note 121; MacBean v. Village of Plaster Rock, supra note 275.

For the U.K., see also: Oxford v. Department of Health and Social Security, [1977] I.R.L.R. 224, and Moberley v. Commonwealth Hall, [1977] I.R.L.R. 176; Wallace v. South Eastern Education and Library Board, [1980] I.R.L.R. 193, and Fair Employment Agency v. Craigavon Borough Council, [1980] I.R.L.R. 316.

shifted to the respondent (332).

As an example, in the case of MacBean v. Village of Plaster Rock (333), the complainant alleged that the respondent municipality had refused to consider her application for a job as clerk-treasurer because she was a woman. The evidence showed that of the ten applicants, four were women, and, although two of these - including the complainant - were as well or better qualified on paper than the male applicants, no woman was interviewed for the job. The Board was of the opinion that these factors were sufficient to allow an inference of discrimination and that, as such, they called for an explanation. The fact that no such explanation was forthcoming reinforced the complainant's case. The Board commented on the matter in this way:

> [T]he Board is left without any clear alternative explanation of how the Council's decision, which was sexually discriminatory in effect, was reached. Only in the case of ... was a clear explanation given of how the councillor's decision was reached without regard to the sex of the applicants. Thus, the Board would still find that there was sex discrimination on the basis that the Council's decision raised an inference of such discrimination sufficient to call for an explanation which was not forthcoming from the party within whose knowledge this matter particularly fell (334).

It may be interesting to note, in closing, that in Northern Ireland the Court of Appeal reversed a lower court

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332. The scope of the prima facie case and the standard of proof required to meet the burden which has shifted to the respondent, are two important issues which are discussed in greater detail, infra, in Chapter 5.

333. Ibid.

334. Ibid., at p. 10.

decision which refused to find in complainant's favour despite the fact that he had succeeded in making out a prima facie case of discrimination and despite the fact that the respondent failed to produce any rebuttal evidence whatsoever. The Court of Appeal held that, in the circumstances, the County Court's conclusions constituted an error in law (335).

Furthermore, "it is not sufficient to rebut an inference of discrimination that the respondent is able to suggest just any rational alternative explanation. The respondent must offer an explanation which is credible on all the evidence" (336). The corollary of this is that proof that the respondent's explanation is a pretext, a mere cover-up, also constitutes an important means of proving, indirectly, the existence of an intent to discriminate.

In fact, in the United States it is thought that a very high proportion of disparate treatment (intentional discrimination) cases are decided on the issue of pretext. Schlei and Grossman have explained the importance given to the issue of pretext in this manner:

> [P]laintiff has frequently found the burden of establishing a prima facie case relatively easy. Similarly, defendants can normally 'articulate some legitimate, nondiscriminatory reason' for the action they have taken, even where such reason is arguably subjective. Thus, the great majority of disparate treat-

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335. Fair Employment Agency v. Craigavon Borough Council, supra note 331.

336. Mitchell v. Nobilium Products Limited, supra note 285, at p. 642.

> ment cases appear to be resolved on the issue of whether the plaintiff has shown that the defendant's apparently valid reason was a pretext (337).

The manner in which pretext can be shown will, of course, vary according to the specific circumstances. However, certain fact patterns are strongly indicative of pretexts on the part of a respondent (338): Such is the case where the respondent's explanation is based on a policy or practice that is inconsistently applied (339), where the respondent's explanation is a recent fabrication (340), or where contradictory explanations have been given (341).

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337. Schlei and Grossman, supra note 16, at pp. 1155-1156. The importance given to proof of pretext assumes that the complainant retains the ultimate burden of proving intent. If the courts or the law-makers were to recognize that once a prima facie case has been made out the respondent would be the one to carry the burden of proving, on a balance of probabilities, that he acted for a legitimate reason, then the pretext stage would become an inherent part of the respondent's proof and therefore unnecesary as an additional stage: Belton, supra note 4, at pp. 1273-1274.

338. See cases listed in Schlei and Grossman, ibid., in note 31.

339. E.g. Mitchell v. Nobilium Products Limited, supra note 285, at p. 643: Black employee dismissed because of poor job performance, while white employees with poor work habits were merely transferred; Carson et al. v. Air Canada (1982), 3 C.H.R.R. D/818 (Can.), at p. 821: More flying experience required of complainant who applied for a job as a pilot, than flying experience of some pilots who were already working for the respondent. (This case offers a vast array of examples of pretexts, all of which were sytematically rejected by the Board Chairman.).

340. E.g. Naugler v. The New Brunswick Liquor Corp., (N.B., 1976), rev'd on other grounds by (1976), 15 N.B.R. (2d) 324 (S.C.).

341. Ibid.

In conclusion, circumstantial evidence remains an important means of proving discriminatory intent failing an admission on the part of the respondent. The preceding categories of proof serve to illustrate relevant types of evidence which may be used to piece together a case from which the intent to discriminate may then be inferred.

The inference process itself may present certain problems as chapter 5 will show, however, circumstantial evidence is advantageous as a means of proof in that it allows the parties to move beyond the stage of subjective evidence and the conflicting versions of the two parties toward objective evidence, which is probably more useful in determining whether or not the respondent acted on the basis of a discriminatory intent (342).

B. Discriminatory Effect

In chapter 2 it was shown that effects cases do not require proof of intent: it is the consequences of the act that must be shown to be discriminatory. The shift in emphasis from the subjective purpose of the discriminatory act to the objective consequences of the act has, as one might well suspect, important implications insofar as the means of proof are concerned. Thus, whereas proof of intentional discrimination relies heavily on circumstantial evidence, a prima facie effects case can, in most

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342. The desirability of moving from subjective to objective evidence was underlined by Lustgarten: see, supra, notes 83 and 84 and accompanying texts.

instances, be established through direct evidence (343). Moreover, in the United States and in the United Kingdom, where the experience in dealing with effects cases is more extensive than in Canada, statistical evidence has assumed a particularly high profile as one of the principal means of proof in discriminatory effect cases (344).

The use of statistics raises innumerable questions regarding issues such as the admissibility of statistical evidence; the type of statistical data which is most suited to proving - or disproving - discriminatory impact; the degree of disparity that must be shown to make out a prima facie case of disproportionate impact and, of course, the availability of such data.

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343. Lustgarten, supra note 4, at p. 212:
In [indirect discrimination], statistics demonstrating disparity are themselves the direct evidence of what the statute proscribes.

344. Schlei and Grossman, supra note 16, at p. 1161:
Perhaps the most significant development in employment discrimination law has been the dominant role that statistics have come to play in the trial of virtually all class actions. In some cases statistical evidence alone has been found sufficient to establish the prima facie case.

Lustgarten, supra note 4, at pp. 211-212:
Since the question to be determined is the adverse racial effect of an employment criterion or policy which on its face is racially neutral, statistical data become the primary if not indeed the sole kind of relevant evidence.

McCrudden, supra note 4, at p 349:
Because the problem is one relating to groups rather than one involving an individual dispute as in the traditional model, statistics of group pattern are even more relevant. In the United States the approach to establishing a prima facie case of indirect discrimination is heavily dominated by the use of statistical evidence to establish that the use of a criterion has had an adverse impact on a minority group.

1. The admissibility of statistics

A well-known dictum in American discrimination law, concerning the admissibility and the relevance of statistics, is that "statistics often tell much, and Courts listen" (345).

So far, Canadian discrimination cases have not made extensive use of statistical data, but this is probably due to the small number of effects cases taken before boards of inquiry and also to the nature of those which have actually been heard (346).

There is little doubt, however, that Canadian courts and tribunals are prepared, like their American and British (347)

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345. Alabama v. United States, 305 F. 2d 583 (1962), at p. 586 (5th Circuit) aff'd per curiam, 371 U.S. 37 (1962).

346. For example, many of the leading effects cases such as O'Malley, supra note 5, Singh v. Security and Investigation Services Ltd., supra note 5, and Bhinder, supra note 5, dealt with employment requirements which had the obvious effect of excluding all members of the relevant protected group, and therefore extensive statistical data was not required to show this exclusionary effect.
In addition, relevant statistical data is not always available nor is it always sufficient to support a showing of disparate impact: see discussion, infra, regarding the availability of statistics, at pp. 147-148.

347. See, for example, Meeks v. National Union of Agricultural and Allied Workers, [1976] I.R.L.R. 198. This case involved the complaint of a part-time female employee who earned 91 p per hour as opposed to 110 p per hour, the amount paid to full-time employees. The complainant sought to show that such a difference in pay rates had a discriminatory impact on women since, according to statistics, many more women than men worked part-time. Statistics showed that in the English working population 99% of men were in full-time employment but only 68% of women employees were in such employment. The tribunal eventually dismissed the complaint on other grounds, but regarding the admissibility of statistics Chairman Hepple remarked the following at p. 201:

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counterparts, to regard statistics as admissible evidence. To this effect, the Supreme Court of Canada has stated that it would

> This production of statistical evidence raises a number of issues. First as to admissibility. This Tribunal is entitled to rely on any evidence which is logically probative provided that the other party has had a fair opportunity to comment on it and to contradict it (see T.A. Miller Ltd. v. Minister of Housing (1968) 2 All E.R. 633, 634).
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> It must be remembered that the concept of indirect discrimination in s. 1(1)(b) bears a strong family likeness to the judicial interpretation which the United States Supreme Court has placed upon the anti-discrimination provisions of Title VII of the Civil Rights Act of 1964, 78 Stat. 253 as amended by the Equal Employment Opportunity Act 1972, 86 Stat. 102 (Griggs v. Duke Power Co., 411 U.S. 424 (1971): Mcdonnell Douglas Corp. v. Green, 411 U.S. 792; Albermarle Paper Co. v. Moody, 45 L Ed 2 d 280 (1975). Although anti-discrimination legislation in the USA is different in many important respects from the Sex Discrimination Act, the concept of indirect discrimination and the methods used to prove such discrimination are comparable in principle.
>
> It is therefore interesting to note that in the USA elementary statistical evidence has been admitted as proof of indirect discrimination. The first step is to determine a disparity between the particular group's presence in a relevant population and that group's representation in the occupational position under scrutiny. The mere demonstration of a percentage difference is sufficient to constitute a prima facie violation of Title VII, subject to justification by the employer in terms of differing job-related ability. The plaintiff's case can be made on percentages alone.

Another example of a case in which statistics were used to show a discriminatory impact is BM Price v. The Civil Service Commission and the Society of Civil and Public Servants, [1977] I.R.L.R. 291; [1978] 1 All E.R. 1228. In this case the EAT held that an age restriction requiring that candidates be between 17½ and 28 years of age had a discriminatory impact on women since statistical evidence showed "that the economic activity of women with at least one 'A' Level falls off markedly about the age of 23, reaching a bottom at about the age of 33 when it climbs gradually to a plateau of about 45" (p. 293). In sum, it was shown that, by contrast to men, a large proportion of women leave the labour market during their twenties to marry and bear children.

indeed welcome such evidence. In Ontario Human Rights Commission v. Borough of Etobicoke (348), Mr. Justice McIntyre remarked as follows:

> It seems to me, however, that in cases such as this, statistical and medical evidence based upon observation and research on the question of aging, if not in all cases absolutely necessary, will certainly be more persuasive than the testimony of persons ... (349).

In closing, it is worth noting that since the analysis of statistical data may involve opinion evidence, it may be necessary to introduce such evidence through an expert witness (350).

2. Relevant types of statistical data

Experience in the use of statistics has enabled experts in the United States to identify three main types of statistics which may be relevant as evidence of discriminatory impact: 1) pass/fail rates of actual applicants; 2) pass/fail rates of potential applicants; and 3) population/work force comparisons (351).

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348. Supra note 23.

349. Ibid., at p. 212.

350. Lustgarten, supra note 4, at p. 212; Note, "An American Legal Dilemma - Proof of Discrimination", supra note 4, at pp. 113-114, note 28.
For a further discussion concerning opinion evidence and expert witnesses see, infra, Part II, at pp. 422-424.

351. Schlei and Grossman, supra note 16, at pp. 1162-1163.

For purposes of clarification it is worth giving a hypothetical example of each (352):

1° Pass/fail rates of actual applicants:

An employer has a dress requirement which forces all male employees to wear a regulation cap. If a male Sikh applicant were refused a job because of this requirement, he could make out a prima facie case of discrimination by showing the percentage (353) of actual Sikh

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352. Examples of each of these types of statistics as found in American discrimination law are described in Schlei and Grossman, ibid., at pp. 1162-1163:

> First, plaintiffs offer statistical evidence broken down by race, sex, or national origin comparing the pass/fail rates of actual applicants for the job or the pass/fail rates of persons in general population, i.e., potential applicants for the job. For example, in Albemarle Paper Co. v. Moody, the plaintiffs made their prima facie case primarily by showing a substantial disparity between the percentage of actual black applicants who successfully passed the scored test in question and the percentage of actual white applicants who successfully passed that test. In Griggs v. Duke Power Co., the plaintiffs made their prima facie case by showing a substantial disparity between the percentage of black males in North Carolina - i.e., potential applicants for the job - who had a high school diploma (12 percent) and the percentage of white males in North Carolina who had a high school diploma (34 percent).
>
> Second, in addition to or frequently in lieu of such pass/fail rate comparisons, plaintiffs have frequently offered statistical evidence comparing the race/sex/ethnic percentage of the general population in the area with the race/sex/ethnic percentage of the employer's work force. For example, in United States v. Hayes International Corp., the court found the prima facie case to be made by evidence that 30 percent of the general population in Birmingham was black and yet only six of the employer's 924 office and technical employees (0.65 percent) were black.

353. According to Schlei and Grossman, ibid., at p. 1162, note 66:

> [I]n any proper statistical comparison, there is an ultimate comparison of percentages. In calculating each of the percentages, there are two factors, and thus a total of four factors in the ultimate equation. For

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applicants who have successfully met the dress requirement (probaby zero), and comparing this to the percentage of actual non-Sikh applicants who have successfully met the same requirement (possibly as high as 100%). The comparison would show a substantial disparity, and therefore a discriminatory impact, between the percentage of applicants from the two groups who actually met the requirement (354).

2° Pass/fail rates of potential applicants:

An employer has a height requirement (5'10") which applies equally to all candidates applying for a job as police officer. The complainant, a woman whose height is 5'8", has not been considered for an opening in the police force precisely because of the requirement in question. In such a case, the complainant could make out a prima facie case of discrimination by showing that the percentage of potential female applicants in Canada (less than 5%) is considerably less than the percentage of potential male applicants across the country (approx. 70%)(355).

3° Population/work force comparison:

The complainant, an Amerindian living in Saskatchewan, applies on numerous occasions for a job with the respondent company whose business operations are located in the same province; however, his applications are systematically refused while Whites with similar qualifications are hired. The complainant alleges discrimination and attempts to make out a prima facie case of discrimination by showing the disparity between the percentage

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example, in comparing pass/fail rates of actual black applicants to those of actual white applicants, the ultimate comparison would be as follows:

$$\frac{\text{total number of successful black applicants}}{\text{total number of black applicants}} \text{ compared to } \frac{\text{total number of successful white applicants}}{\text{total number of white applicants}}$$

354. In the absence of actual applications by Sikhs, a pass/fail comparison of the potential applicants for the job the second type of statistics would be equally appropriate in demonstrating a discriminatory impact in this example.

355. For such an approach see Colfer v. Metropolitan Board of Commissioners of Police et al., supra note 5.

of Amerindians in the respondent's workforce (0.5%) and the percentage of Amerindians within the working age population of Saskatchewan (11.5%) (355a).

3. The degree of disparity required to show a discriminatory impact and the proper use of statistics

As such, the degree of disparity required to make out a prima facie case of discriminatory impact has not been defined in either the United States or the United Kingdom and, as a result, the sufficiency of the disparity appears to be decided on a case by case basis (356).

The flexibility of this approach has not prevented the courts, particularly in the United States, from regarding some statistics as more probative than others and, according to Schlei and Grossman, American courts "appear to require a far greater disparity in population/work force than in pass/fail rates to establish a prima facie case" (357).

As for the proper use of statistics, this issue has also given rise to an impressive body of case law in the United States as courts have addressed such matters as the proper weight to be

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355a. This figure is drawn from statistics contained in an application to the Saskatchewan Human Rights Commission for approval of an Affirmative Action Program: Saskatchewan Oil and Gas Corp. (1982), 3 C.H.R.R. D/932.

356. For the United States, see the cases discussed in Schlei and Grossman, supra note 16, at pp. 1184 ff., under the heading "Substantial Disparity".
As for Great Britain, the law requires that the proportion of protected class members who can comply with the requirement be "considerably smaller" than the proportion of majority members who can comply with it: Sex Discrimination Act of 1975 (s. 1(1)(b)(i)), and the Race Relations Act of 1976 (s. 1(1)(b)(i)).

357. Ibid., at p. 1188.

given statistical proof, the proper source of statistics, the proper geographic scope of statistics, the proper time frame for statistics, the meaning of substantial disparity, and the problem of conflicting statistical conclusions (358).

Courts and tribunals in Canada have not yet embarked on such intricate analyses regarding the degree of disparity required or the proper use of statistics in disparate impact cases, nor is this approach necessarily desirable. It appears from the above that disparate impact cases in the United States have become an important battleground for statisticians. Such a deviation seems not only to detract from the main issue of discrimination but it is probably very costly as well, as most battles between expert witnesses are bound to be. Moreover, a case by case approach also has the disadvantage of creating unpredictability (359) and therefore uncertainty in the law.

4. Availability of statistics

"To say that a complainant may use statistics as evidence entails two presuppositions: that they exist, and can be obtained. Yet both are likely to be false" (360).

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358. See Schlei and Grossman, ibid., at pp. 1161-1193.

359. For example, the U.S. Supreme Court created some confusion by refusing to accept population/work force statistics in New York City Transit Authority v. Beazer, 440 U.S. 568 (1979) rev'g 558 F. 2d 97 (1977), which aff'd 399 F. Supp. 1032 (1975). This decision has been criticized because the Court failed to explain its criteria in refusing to accept statistics which had been recognized in earlier cases: Friedman, supra note 4, at pp. 48 ff.

360. Lustgarten, supra note 4, at p. 213.

The statement is only partially true in Canada. The Canadian Census, which is carried out every ten years, takes into account many of the grounds referred to in anti-discrimination laws such as religion, citizenship, ethnic origin, marital status, language (mother tongue), gender, etc. (361). However, insofar as colour is concerned, statistics in Canada are as silent as they are in Great Britain. For instance, whereas the United States requires employers who hold federal contracts to keep and file records regarding the racial composition of their work force (362), no such requirement exists in Canada. In addition, statistics regarding the educational qualifications of racial minorities - which have proved to be of such importance in the United States (363) - are not compiled by the Canadian Government.

It is not within the purview of this study to examine the adequacy of statistics in Canada, however, since they do constitute an important means of proving systemic discrimination, it is suggested that Human Rights Commissions and private interest groups might find it worthwhile to make an inventory of the statistics available in their region and also to identify those areas in which relevant data is lacking with a view to having such omissions corrected.

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361. 1981 Census Dictionary, Minister of Supply and Services, Ottawa, 1982.

362. Lustgarten, supra note 4, at p. 214.

363. The case of Griggs v. Duke Power Co., supra note 14, rested on statistics of this nature.

Conclusion

Canada has not yet developed extensive expertise in the use of statistics where proof of systemic discrimination is concerned, and it is normal that it should look to its southern neighbour for direction in this respect. However, while it might be useful to draw upon American experience in some areas, for instance in identifying the types of statistics which are relevant to proving a discriminatory impact, others should be approached with caution. In particular, Canada would be wise, in my opinion, to avoid the "battle-of-statisticians" approach to resolving discriminatory impact cases and perhaps one means of achieving this aim would be for tribunals to establish certain objective standards for evaluating the degree of disparity required to show a discriminatory impact and the proper use of statistics (364).

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364. These thoughts were raised by Mr. Geoffrey Bindman, barrister and expert in British Discrimination Law, during an interview, 28 June, 1983.

CHAPTER 4: DEFENCES

So far, this study has primarily dealt with the complainant's case. But the defendant's case and the criteria for making out a valid defence are equally important in the overall assessment of a case of discrimination (365).

An attempt to identify the relevant defences in discrimination cases raises the following questions:

Are there exemptions that a respondent can plead before answering a prima facie case of discrimination? On the other hand, once a prima facie case has been made out and no exemptions are available, is a subjective defence based on good faith sufficient? Is a showing of solicitude towards members of a protected group relevant? Is a defence based on customer preference acceptable? If the respondent were to demonstrate that he would be inconvenienced if required to change a certain discriminatory policy, or, if he were to establish that the policy exists in many major, well-known companies, would these constitute valid defences to a prima facie showing of discrimination? Further still, where the security of the public and the safety of co-employees and of the complainant himself are at stake, is the respondent's burden a lesser one than when safety considerations are not in issue, and if yes, what is this burden? Lastly, do the relevant defences to a prima facie case of intentional

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365. See statement by Cleary, supra note 236, at p. 101.

discrimination vary to any substantial degree from the defences which are appropriate and relevant to a prima facie case of discriminatory effect? The purpose of this chapter is to deal with just such questions.

Before proceeding with this analysis it might be worthwhile to make some brief remarks concerning the principal defences to each of the two types of discrimination, that is intentional discrimination, on one hand, and discriminatory effect, on the other. These comments will provide a partial answer to the last of the string of questions just raised.

Throughout this study, the need to have a separate analysis for the two types of discrimination has consistently been maintained. The principle is no less applicable in this chapter and there is, indeed, reason to reemphasize it here since there has been a particularly strong tendency to borrow the defence applicable to one form of discrimination - and this is especially true of the bona fide occupational qualification (B.F.O.Q.) (366) defence - and to apply it to the other form of discrimination.

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366. For the purposes of this study B.F.O.Q. will be used to denote both "bona fide occupational qualification" and "bona fide occupational requirement" defences. The terms vary from statute to statute across the country; for its part, Quebec has shed the expression bona fide (good faith) altogether as a result of amendments to article 20 of the Charter: see Bill 86, assented to December 16, 1982 and proclaimed effective October 1, 1983.
For a discussion of the case law concerning the application of the B.F.O.Q. defence in matters dealing with "age", "sex" and "handicap", see Tarnopolsky, supra note 24, at pp. 239-55, pp. 284-94, and pp. 305-12, respectively.

Strictly speaking, the B.F.O.Q. defence applies in intent cases where direct discrimination has been established, whereas the "business necessity" defence applies in matters where an apparently neutral policy is shown to have a discriminatory effect. This distinction was made by Tarnopolsky as he discussed American authority on the issue of B.F.O.Q. in sex discrimination cases:

> [I]t is important to note that a distinction which should be made, but often is not, is that between the defence of B.F.O.Q. and that of 'business necessity'. The former arises only where the exclusion is admittedly based upon sex, while the latter comes into play where there is a neutral requirement which is claimed to have a disparate impact in response to which the employer can prove that the requirement is reasonably necessary to performing the work (367).

The distinction between the two defences appears to have been made in Great Britain as well. Thus, section 7 of the Sex Discrimination Act of 1975 provides for a defence based on a "genuine occupational qualification", which seems to be the equivalent of the B.F.O.Q. defence, while section 1(1)(b)(ii) of the Act, which deals with indirect discrimination, provides for a specific defence based on "justifiability".

In Canada, the distinction regarding appropriate defences appears to have been blurred to the extent that the

367. Ibid., at p. 289. In some rare cases a B.F.O.Q. defence may be considered after the "business necessity" defence has been pleaded and rejected. This was the approach adopted in the case of Dothard v. Rawlinson, 433 U.S. 321 (1977), but this type of analysis seems rather exceptional. According to Schlei and Grossman, supra note 16, at p. 293, it is "imperative not to confuse the two defences".

practice of relying upon the B.F.O.Q. defence in discriminatory effect cases seems to have been incorporated into legislation. Thus, section 10(a) of the new Ontario Human Rights Code, S.O. 1981, c. 53 (368), appears to have taken the B.F.O.Q. defence and adapted it to effects cases. It also appears, perhaps not surprisingly, that the existing precedent regarding the B.F.O.Q. defence under the old Code is being relied upon to help interpret the meaning of "reasonable and bona fide requirements qualification or consideration" under section 10(a) of the new Code (369).

Of itself, this approach is not neccessarily harmful. However, depending on the legislation and also on the understanding that the parties have of discrimination law, failure to make the appropriate distinction may lead to confusion in the presentation of the respondent's case.

Where legislation is concerned, a perusal of the various anti-discrimination laws across the country will show that in some cases the B.F.O.Q. defences are restricted to such grounds as age, marital status, sex, physical handicap, etc. (370); this means that they are inapplicable, by law, to such other grounds

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368. See, supra note 111. Section 10(a) refers to a "reasonable and bona fide requirement, qualification or consideration", which may be compared with s. 23 (b) of the same Code which also refers to a "reasonable and bona fide qualification".

369. See, for example, Judith Keene, "Toward a definition of Discrimination - Exemptions under the New Ontario Human Rights Code" (1982), 3 Advocates' Quarterly 265, at pp. 294-306.

370. For example section 6(6) of the Manitoba Human Rights Act, C.C.S.M. H 175, reads as follows:

The provisions of this section relating to any

(contd.)

as race, colour, nationality, ethnic origin or religion. Where the B.F.O.Q. defences are so restricted, they seem to represent an inadequate substitute for the "business necessity" defence in cases involving, for instance, a discriminatory effect upon Amerindians, Blacks or members of a religious minority (371).

In passing, it might be worthwhile to point out that in the United States the "business necessity" defence was judicially developed in the Griggs case (372) and it has remained as such. Elsewhere, as for instance in Great Britain (373) and in Ontario (374), the "business necessity" defence, or variations of

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discrimination, limitation, specification or preference for a position or employment based on sex, age, marital status, physical or mental handicap, or political belief do not apply where (a) sex, marital status, or political belief is a reasonable occupational qualification; or (b) physical or mental handicap is a reasonable disqualification.

See also for example, the Saskachewan Human Rights Code, R.S.S. 1978, c. S. 24.1 (1979), at s. 16(7).

On the other hand, the Alberta (s.6 (3)), the Federal (s. 14 (a)), the Newfoundland (s. 9 (1)), and the Quebec (s. 20) anti-discrimination statutes provide a B.F.O.Q. defence for all prohibited grounds.

371. Mr. Justice Le Dain incidentally addressed this issue in the Bhinder case, supra note 9, at p. 1412:

> The conclusion of the Divisional Court and the Court of Appeal [in Ontario Human Rights Commission v. Simpsons-Sears Ltd] ... was ... clearly influenced by the absence of a 'saving provision' offering the employer an exception or defence based on business necessity or reasonable accommodation.

372. See discussion, supra, at pp. 94-95.

373. The Sex Discrimination Act of 1975, at s. 1 (1) (b) (ii) and the Race Relations Act of 1976, s. 1 (1) (b) (ii).

374. S. 10 (a), supra note 111. At the Federal level, s. 14(a) of the Canadian Human Rights Act, S.C. 1976-1977, c. 33, has been relied upon as a defence applicable to effects cases: see discussion, infra, at pp. 203-205.

it, have been incorporated into the statutes themselves.

The second reason for which failure to distinguish between the B.F.O.Q. and the "business necessity" defences might cause some confusion is related to the purpose of each of the two defences. Thus, whereas the purpose of a B.F.O.Q. defence is to justify a discriminatory distinction which is directly based upon a probihited ground, the purpose of the "business necessity" defence is to justify an apparently neutral practice or policy (the effect of which is discriminatory), rather than the discrimination itself (374a).

For these reasons, it is preferable, in my view, to maintain a distinction between these two principal defences and such will be the approach adopted in this chapter. These and other relevant defences will now be examined in further detail.

A. Intent

There are basically three types of defences available to a respondent in a case of intentional discrimination: 1) proof that the case falls within one of the legislative exceptions (other than that of B.F.O.Q.) or exemptions; 2) Proof that the act complained of was based on a legitimate, non-discriminatory reason, or 3) proof that the case falls within the B.F.O.Q. exception.

374a. See, supra, note 367 and accompanying text.

1. Exceptions and exemptions

Human rights legislation usually contain some exceptions and exemptions which render the anti-discrimination provisions inapplicable to certain situations.

One such major exemption applies to non-profit organization which have, for instance, a religious, philanthropic, or educational purpose. An example (375) of this type of exemption can be found in s. 6(7) of the Manitoba Human Rights Act (375a), which reads as follows:

> The provisions of this section relating to a limitation or preference in employment do not apply to an exclusively religious, philanthropic, educational, fraternal or social organization that is not operated for private profit and is operated primarily to foster the welfare of a group or class of persons characterized by a common race, nationality, religion, colour, sex, age, marital status, family status, physical or mental handicap, ethnic or national origin, where, in any such case, one or more of the above enumerated criteria is a bona fide occupational qualification and requirement.

Another exemption can sometimes be found in the case of domestic workers employed in private or single-family homes. Thus, for instance (376), the Nova Scotia Act provides the

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375. See also the Newfoundland Human Rights Act, R.S.Nfld. 1970, c. 262 as amended by S.Nfld. 1974, No. 114, s. 9(6)(a), the Nova Scotia Human Rights Act, S.N.S., c. 11, s. 8(4)(b); the Ontario Human Rights Code, S.O. 1981, c. 53, s. 17; The Quebec Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12, s. 20; the Prince Edward Island Human Rights Act, R.S.P.E.I., c. H 12.2, s. 6(4)(b), and the Saskatchewan Human Rights Code, R.S.S. 1978, c. S-24.1 (1979), ss. 13(2) and 16(5).

375a. C.C.S.M. H 175.

376. See also the Alberta Individual's Rights Protection Act, R.S.A. 1980, c. I-2, ss. 9(a) and (b); Nfld., s. 9(6)(b); P.E.I., s. 6(4)(a), and Sask., s. 2(e).

following at section 8(4)(a):

> This Section [Discrimination in employment] does not apply to
>
> (a) a domestic employed and living in a single family home; ...

Exceptions regarding bona fide occupational qualifications (B.F.O.Q.) for an employment - to be discussed below - are also frequent, as are exemptions concerning bona fide employment retirement, pension, or insurance plans.

Since the wording of exceptions and exemptions do vary considerably from one jurisdiction to another, one should refer to the relevant statute for the purpose of establishing the exact scope of such provisions (377).

Before closing, it might be worthwhile to recall that "under [the statute] non-discrimination is the rule of general application and discrimination, where permitted, is the exception" (378). The burden of proof lies upon the party, i.e. the respondent, who wishes to rely on the exception, and the proof must be made according to the ordinary civil standard, that is on a balance of probabilities (379).

2. Legitimate, non-discriminatory reason

Perhaps the most relevant means by which to rebut a

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377. For an analysis of the rather lengthy list of exceptions and exemptions which have been incorporated into the new Ontario Human Rights Code, see Keene, supra note 369, at pp. 273 ff.
On the topic of exceptions and exemptions in general, see Tarnopolsky, supra note 24, at pp. 397 ff.

378. Ontario Human Rights Commission et al. v. The Borough of Etobicoke, supra note 23, at p. 783

379. Ibid.

prima facie showing of intentional discrimination is for the respondent to demonstrate that he acted not with a discriminatory purpose but for a legitimate, non-discriminatory reason.

Thus, in one instance a respondent was successful in rebutting the prima facie case of discrimination against him after having convinced the judge that he had refused to rent a flat to the complainant, not because she was unmarried, but because of economic considerations and the fact that she had no personal source of income (380).

In another matter, the respondent successfully defended his case by showing that the complainant and his wife, who had been employed as superintendents, were dismissed from their jobs not for reason of colour but because of serious personality conflicts (381).

Needless to say, such defences should fail where it is shown that they are but pretexts, mere cover-ups to hide the real discriminatory reason for the act complained of (382).

If the respondent should succeed in showing that the discriminatory reason was but one of a number of reasons for the

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380. La Commission des droits de la personne du Quebec v. Boily (1982), 3 C.H.R.R. D/852 (Que. Prov. Ct.). It is interesting to note, however, that Mr. Justice Savard, who presided in this case, was also of the opinion that the commission had the burden of proving that marital status was the only reason for the refusal to rent. This approach is contrary to that of a long line of cases on the issue of "multiple causes", discussed, infra, in this section, at pp. 158-160.

381. Cooper v. Belmont Property Management, supra note 186.

382. For a discussion regarding pretexts see, supra, Chapter 3, at pp. 135-138.

refusal - the others being legitimate and non-discriminatory - would the complaint of discrimination fail? There exists in discrimination law extensive authority to the effect that a complaint would not fail in such circumstances. Indeed, boards of inquiry have consistently held that discrimination need not be the sole reason for the refusal, it must only be shown to have been one of the reasons affecting the decision, to have been a proximate cause of it (383). An oft quoted statement on this point can be found in the case of Macbean v. Village of Plaster Rock:

> Since one possible finding is that more than one reason existed for the decision respecting the complainant, one question which arises in this case is whether, for there to be a violation of

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383. This line of authority is based on the case of R. v. Bushnell Communications Ltd. (1974), 47 D.L.R. (3d) 668, 4 O.R. (2d) 288 (Ont., C.A.), and includes the following decisions: Suchit v. Sisters of St. Joseph's for the Diocese of Toronto in Upper Canada (1983), 4 C.H.R.R. D/1329, at p. 1331 (Ont.); Iancu v. Simcoe County Board of Education (1983), 4 C.H.R.R. D/1203, at pp. 1204-1207 (with a discussion of other cases on the topic) (Ont.); Anderson v. Atlantic Pilotage Authority (1982), 3 C.H.R.R. D/966, at p. 968 (Can.); Doherty and Meehan v. Lodgers's International Ltd. (1982), 3 C.H.R.R. D/628, at pp. 634-635 (N.B.); O'Brien v. Ontario Hydro (1981), 2 C.H.R.R. D/504, at pp. 506-508 (Ont.); Hendry v. Ontario Liquor Control Board (1980), 1 C.H.R.R. D/160, at p. 162(Ont.); Bone v. Hamilton Tiger Cats Football Club Ltd. (Ont; 1979), at pp. 15-16; Bremer v. Board of School Trustees, School District No 62 et. al., (B.C., 1977), at pp. 13-14; Hawkes v. Brown's Ornamental Iron Works of Belleville Ltd., (Ont., 1977); Jones v. Huber et al. (Ont., 1976), at p. 4; Naugler v. New Brunswick Liquor Corp. (N.B., 1976), Rev'd on other grounds by (1976), 15 N.B.R. (2d) 324; Macbean v. Village of Plaster Rock (N.B., 1975), at pp. 5-6; Shack v. London Drive Ur - Self Ltd. (Ont., 1974), at p. 12.

See also Tarnopolsky, supra note 24, at pp. 277 ff.; Hunter, supra note 28, at p. 32; Commission des droits de la personne du Quebec, La preuve, supra note 4, at p. 31; Proulx, supra note 4, at pp. 468 and 480, and Keene, supra note 369 at p. 279.

> the Human Rights Code, a reason prohibited by that statute must be the sole, or at least the primary reason for the decision. A review of the purpose and provisions of the Human Rights Code compels the conclusion that it is sufficient to constitute a violation of the Code that a prohibited reason was one of the reasons for the decision.
>
> The purpose of the Code, as indicated by the Preamble and the substantive provisions, is to eliminate from consideration in decisions affecting employment, and in other matters covered by the Code, those factors such as race and sex which are listed in the Code. It is made a governing principle 'that all persons are equal in dignity and human rights without regard to race, colour, religion, national origin, ancestry, place of origin, age, marital status or sex' (emphasis added). This purpose would not be served if these factors can validly be considered merely because they are considered in conjunction with other legitimate factors.
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> Practical considerations reinforce this conclusion. In order to determine whether a prohibited reason was the sole or primary reason for a decision, it would be necessary for the Board to assume the place of the employer making the decision and analyse in full the process, mental and otherwise, which led to his decision. Such an extensive interference with the appropriate internal management functions of an employer cannot have been intended by the legislature, particularly when the declared purpose of the Act can be better accomplished by the much less involved method of determining merely whether a prohibited reason formed part of the reasons for the decision.
>
> At the same time, for there to be a violation of the Code, a prohibited reason must actually have affected the decision. If it did not, it is simply not a reason for the decision (384).

This approach regarding multiple-cause actions appears to be the prevailing view in Canada.

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384. Ibid.

3. Bona fide occupational qualification (B.F.O.Q.)

a) General

Perhaps the most important defence in employment matters is the bona fide occupational qualification (B.F.O.Q.) defence, which every anti-discrimination statute provides for, albeit in different forms (385).

By contrast to the preceding defence, the purpose of which is to rebut a prima facie case of discrimination by showing a legitimate reason for the refusal, the purpose of the B.F.O.Q. defence is to try to justify an act which is admittedly discriminatory. So it is that the B.F.O.Q. defence is regarded as the second of a two-step determination in establishing whether the law has been violated. This is apparent from the following statement made by the Board of Inquiry in Manitoba Food and Commercial Workers Union v. Canada Safeway Ltd (386).

> Employment discrimination actions under Title VII [Civil Rights Acts of 1964] require a two-step determination, similar to our Human Rights Act. It must first be determined that discrimination on the basis of sex has occurred. Second, if discrimination is found, the burden is on the employer to show that the discrimination was necessary as a bona fide occupational qualification (387).

In sum, a determination regarding the existence of discrimination should be made first, followed by a determination as to whether or not the discrimination is legally justified on

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385. See, supra notes 367 and 371.

386. (1983), 4 C.H.R.R. D/1495 (Man.).

387. Ibid., at p. 1498.

the basis of a B.F.O.Q.

It follows that to allow a B.F.O.Q. defence is to allow a form of discrimination to subsist. Needless to say, such occurrences can only be permitted in exceptional and limited circumstances and it is a well-acknowledged principle that the exception is not intended to "swallow the rule" (388). On this very issue, the Supreme Court of Canada remarked that "under the [Ontario] Code non-discrimination is the rule of general application and discrimination, where permitted, is the exception" (389).

Since Etobicoke, the proper allocation and the standard of the burden of proof regarding such exceptions leave little room for doubt: the employer carries the burden of proving that the exception applies and, in doing so, he must meet the ordinary civil standard of proof. It is worth repeating Mr. Justice McIntyre's words to this effect:

> The only justification which can avail the employer in the case at bar is the proof, the burden of which lies upon him, that such compulsory retirement is a bona fide occupational qualification and requirement for the employment concerned. The proof, in my view, must be made according to the ordinary civil

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388. Phillips v. Martin Marietta Corp. (1971), 3 FEP 40 (U.S Supreme Court). See also, for example, Beattie et al. v. Governors of Acadia University et al. (1976), 72 D.L.R. (3d) 718; Robertson v. Metropolitain Investigation Security (Canada) Ltd., supra note 210, at p. 48; Shack v. London Drive - Ur-Self Ltd., supra note 382, at p. 19; Boyd v. Mar-Su Interior Decoration Ltd., supra note 262; Hadley v. Mississauga, supra note 258, at p. 6. In Quebec, see also L'association A.D.G.Q. v. La Commission des Ecoles Catholiques de Montreal, [1980] S.C. 93, at p. 94.

389. In Borough of Etobicoke, supra note 23, at p. 783.

> standard of proof, that is upon a balance of probabilities (390).

In addition to clarifying the issues related to the burdens of proof, the Supreme Court in Etobicoke set out important guidelines for the interpretion of the B.F.O.Q. defence. It is therefore worth taking a closer look at the test which was formulated by the Supreme Court and to examine it in light of other cases which have also dealt with the issue of B.F.O.Q.

b) The Etobicoke test

Before presenting the test, it would be worthwhile to take a brief look at the background of the Etobicoke case. The facts of the case were fairly straightforward. Harold Hall and Vincent Gray had been employed as firefighters with the respondent municipality for a number of years. When they reached the age of sixty, however, the municipality abruptly brought their contracts to an end, invoking for this purpose a compulsory retirement clause contained in the firefighters' collective agreement. The two individuals filed a complaint with the Ontario Human Rights Commission alleging that their termination

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390. Ibid. Note that the Court did not regard the respondent's burden as one which resulted from a "shift" in the burden of proof, as in B.C. Timber Ltd. (Skeena Pulp Division) v. Pulp, Paper and Woodworkers of Canada local No. 4 (1983), 4 C.H.R.R. D/1556, at p. 1565 (B.C. Labour Arbitration Decision). The burden of proving this defence is with the respondent from the outset; on this, see Sopinka and Lederman, supra note 240, at p. 397:

> In one sense it may be said that the burden of proof shifts to the defendent, but in fact the onus for excusing the [act] is always on the defendant.

was discriminatory on the basis of age and, therefore, in violation of s. 4(1)(b) of the Ontario Code.

A Board was appointed to enquire into the complaints, with Chairman Bruce Dunlop presiding. After the hearing the Board concluded that the forced retirements were, in fact, discriminatory and that the municipality had failed to show that the discrimination was justified on the basis of a B.F.O.Q. (391). On appeal, the Board's decision was reversed by the Divisional Court (392), and this decision was, in turn, confirmed by the Ontario Court of Appeal (393). The Supreme Court of Canada gave leave to appeal, however, and it eventually reversed the two lower court rulings with a decision to reinstate the order of the Board of Inquiry. This order called for the following: first, it ordered the reinstatement of the two individuals in question provided that they continued to possess the requisite physical and mental capacities to carry out their jobs; secondly, it ordered compensation for loss of earnings from the date of the retirement to the date of the reinstatement.

Speaking for the Supreme Court of Canada, Mr. Justice McIntyre noted that the employer's defence was based on general assertions by witnesses - some with an admittedly long experience in firefighting - to the effect that firefighting was a "young

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391. Ont., 1977.

392. (1980), 26 O.R. (2d) 308; 104 D.L.R. (3d) 674.

393. (1980), 29 O.R. (2d) 499; 112 D.L.R. (3d) 192.

man's game" (394); agreeing with the Board's assessment of the facts, the Court concluded that the employer's evidence was largely "impressionistic" and that, as such, it was insufficient to discharge the burden of proof resting upon him (395).

In reaching its conclusion the Supreme Court formulated this important test regarding the interpretation of the B.F.O.Q. defence:

> To be a bona fide occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public (396).

According to this test, the respondent must prove the following elements when pleading a B.F.O.Q. defence: i) that the requirement was imposed in good faith; ii) that the condition is objectively related to the position in question; iii) that it is reasonably necessary for the efficient and economical performance of the job, and iv) if safety is in issue, that it is reasonably necessary for the security of the general public, of fellow

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394. Supra note 23, at p. 784.

395. Ibid.

396. Ibid., at p. 783.

employees, and of the complainant himself.

i) Requirement imposed in good faith

The use of the term bona fide inevitably raises the question whether motive, that is proof of good or bad faith, suddenly becomes relevant under a B.F.O.Q. defence despite the growing consensus in Canada that motive is not a prerequisite to proving discrimination (397). In other words, can motive - otherwise considered irrelevant - now be brought in through a back-door left ajar by the B.F.O.Q. defence? The answer is a cautious and mitigated, no.

The term bona fide is itself subject to two interpretations. The first is a subjective one which requires that the respondent demonstrate that the requirement has been imposed "honestly" and in "good faith" (398); the second, a more objective one, requires that the employment condition be shown to be "true, real, genuine and substantial" (399).

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397. See discussion, supra, at pp. 83-90.

398. Cosgrove v. The Corporation for the City of North Bay, (Ont., 1976) (aff'd by (1976), 21 O.R. (2d) 607), at p. 12: "'Bona fide' is the key word. Reputable dictionaries ... regularly define the expression in one or several of the following terms, viz., honestly, in good faith, sincere, without fraud or deceit, unfeigned, without simulation or pretense, genuine. These terms connote motive and a subjective standard."

399. Ward v. Canadian National Express (1982), 3 C.H.R.R. D/689 Can.), at 698: "It is not the employer's belief as to the job requirement that must be bona fide, but the job requirement itself". In Hall v. International Firefighters Ass. et al., supra note 391, at page 5, Chairman Dunlop (contd.)

Under the Etobicoke test, the Supreme Court opted for a two-fold approach which included both a subjective and an objective element and, to this end, it accepted the subjective interpretation of bona fide as requiring proof that the employment condition was imposed honestly and in good faith. Mr. Justice McIntyre remarked upon this issue as follows: "In my opinion, there is no significant difference in the approaches taken [by the Boards in the Hall and Cosgrove cases] in this matter and I do not find any serious objection to their characterization of the subjective element of the test to be applied in answering the first question" (400).

But, in view of the objective aspect of the test - also regarded as essential by the Supreme Court - the ultimate role of the subjective element of the test is somewhat perplexing.

This doubt as to the usefulness of the subjective criterion arises from the fact that its ability to determine the outcome of the case is not very convincing: on the one hand, should the answer regarding the subjective element be negative (i.e. proof of bad faith) but the answer to the objective element be positive, it seems that - aside from being a rare occurrence - a court or tribunal would probably dismiss the complaint of discrimination on the basis that the respondent has demonstrated that

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remarked as follows: "The meaning of 'bona fide' that seems most consistent with this objective would be 'real' or 'genuine', i.e. that there is a sound reason for imposing an age limitation ...".

400. Supra note 23, at p. 783.

the requirement was objectively justified; on the other hand, should the answer to the subjective element be positive (i.e. proof of good faith), but the answer to the objective element be negative, it would probably still be the latter criterion which would govern the outcome of the case, as it clearly did in the Etobicoke case.

It appears from the above that the objective criterion is the predominant one of the two. Under the Etobicoke test, taken in its entirety, the subjective element seems to play but a nominal role in the overall assessment of the B.F.O.Q. defence.

Unfortunately, there is the danger that some courts and tribunals might undertake to isolate the subjective element and they might fail to give due regard to its proper position in relation to the objective part of the test; this might then result in the subjective element being given far greater weight than it deserves. The words of Mr. Justice Melançon in La Commission des droits de la personne du Québec v. La Cité de Côte St. Luc et al. (401) are particularly relevant in this respect:

> La défenderesse a, à mon avis, bien établi le caractère de bonne foi d'une telle exigence et la demanderesse n'a établi aucune mauvaise foi de sa part. J'ajouterai enfin que si la défenderesse avait un certain fardeau de preuve pour démontrer le caractère de bonne foi de cette exigence, la demanderesse si elle voulait prétendre à la mauvaise foi, avait le fardeau normal de la démontrer (402).

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401. (1983), 4 C.H.R.R. D/1287 (Que. S. Ct.) (on appeal).

402. Ibid., at p. 1290.

One wonders, in view of the preceding discussion, whether it would not have been preferable for the Supreme Court to restrict the role of the subjective element to deciding the issue of penalty alone (403).

ii) The requirement is objectively related to the position

Were it not for the objective element in the Etobicoke test, an employer could base a B.F.O.Q. defence strictly on subjective considerations and so defeat one of the important aims of anti-discrimination legislation which is to combat subjective decisions based on prejudice, faulty generalizations and stereotypes. The objective aspect of the test is therefore crucial.

According to the objective standard set out by the test, the employer cannot meet his burden under the B.F.O.Q. defence if his evidence consists of subjective impressions and explanations - well motivated as they may be - to justify the exclusion; he must present evidence to show that the exclusion is justified on a factual basis, that his reasons for excluding members of a protected group are supported either by scientific evidence, or by some other objective data, depending upon the circumstances of the case. Such were the proof requirements established by the Supreme Court of Canada in Etobicoke: the Court rejected the employer's defence which was largely based upon the testimony of

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403. This was the approach in Hayes v. Central Hydraulic Manufacturing Co., supra note 206; to this effect, see also Hunter, supra note 28, at p. 33.

a number of witnesses who stated that in their opinion - founded on extensive personal experience - firefighting was a "young man's game"; it held that scientific or medical evidence would have been more persuasive in this instance and that the "impressionistic" evidence which was presented by the employer simply did not carry sufficient weight to discharge the burden imposed by the B.F.O.Q. defence. In Mr. Justice McIntyre's words:

> The employer argued that firefighting was a dangerous occupation which required physical strength, stamina and alertness beyond most other occupations. It contended that there were such dangers and hazards that young and fit men were required, and that the adequate performance of all members of a firefighting unit was essential to preserve public safety and that of the employees themselves. The arbitrary retirement age was therefore justified as a reasonable measure to assure the maintenance of adequate fire protection in the municipality and, at the same time, to avoid the dangers which could result from keeping all members employed until age sixty-five.
>
> In dealing with the evidence Professor Dunlop remarked that it was largely 'impressionistic'. He considered that something more was required to discharge the burden of proof and noted the insufficiency of general assertions and expressions of witnesses, some with long experience in firefighting, to the effect that firefighting was a 'young man's game'. He remarked upon the absence of any scientific evidence to support the employer's position and concluded against the employer ...
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> ...
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> I am by no means entirely certain what may be characterized as 'scientific evidence'. I am far from saying that in all cases some 'scientific evidence' will be necessary. It seems to me, however, that in cases such as this statistical and medical evidence based upon observation and research on the question of aging, if not in all cases absolutely necessary, will certainly be more persuasive than the testimony of persons, albeit with great experience in firefighting, to the effect that firefighting is

> a 'young man's game'. My review of the evidence leads me to agree with the board of inquiry. While the evidence given and the views expressed were, I am sure, honestly advanced, they were, in my view, properly described as 'impressionistic' and were of insufficient weight (404).

The position adopted by the Supreme Court of Canada with respect to the objective element of the test is consistent with other decisions which also rejected subjective defences based, for their part, upon stereotyped or paternalistic views regarding members of a protected class.

There are frequent examples of cases in which employers unsuccessfully argued the B.F.O.Q. defence by relying upon stereotyped or paternalistic views, particularly in matters involving discrimination based on age, sex or physical handicap.

Thus, for example, in Hadley v. Mississauga (405), another case dealing with a compulsory retirement policy for firemen at the age of sixty, Chairman Lederman remarked as follows:

> It is not sufficient to bring an employer within the saving statutory provision merely by the labelling of the job as 'strenuous'. ... A claim for differentiation should not be permitted on the basis of an employer's assumption that every employee over a certain age becomes physically or mentally unable to perform the duties of a job (406).

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404. Supra note 23, at p. 784. For examples of cases in which the employer succeeded in demonstrating that the requirement was objectively justified, see: Manitoba Human Rights Commission and Finlayson v. The City of Winnipeg (1983), 4 C.H.R.R. D/1255 (Man. C.A.); Canadian Human Rights Commission v. Voyageur Colonial Ltd. (1980), 1 C.H.R.R. D/139 (Can.), and Little v. Saint John Shipbuilding and Drydock Co. Ltd. (1980), 1 C.H.R.R. D/1 (N.B.).

405. Supra note 258.

406. Ibid., at p. 11.

Similarly in Hawkes v. Brown's Ornamental Iron Works of Belleville Ltd. (407), Chairman Soberman said this:

> ... the [B.F.O.Q.] subsection may only be used to justify discrimination based on age when the respondent has satisfied the Board that there are sound reasons for the qualification .... [There was no] evidence presented to provide a sound basis for classifying men or women over the age of fifty as being disqualified for the [welding] job (408).

In matters dealing with sex discrimination, Boards have not been willing to accept defences based on paternalistic views regarding women nor on the need to protect them from strenuous or dangerous jobs (409). In one of these cases, that of Shack v. London Drive-Ur-Self Ltd. (410), Chairman Lederman commented upon the role of paternalistic views in B.F.O.Q. defences and, to this end, he quoted the following passage from the American case of Weeks v. Southern Bell Telephone and Telegraph Co. (410a):

> Title 7 rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic

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407. Supra note 383.

408. Ibid., at pp. 18-19.

409. E.g., Bulger v. Branch No. 4 Royal Canadian Legion, supra note 257 (desire to protect the "fair sex" from an unpleasant job as doorman); Robertson v. Metropolitan Investigation Security (Canada) Ltd., supra note 210 (protecting women from certain hazardous security jobs); Shack v. London Drive-Ur-Self Ltd., supra note 383 (concern for the personal safety of complainant who, had she been hired, would have been left alone in the office at night with the office being subject to crimes such as robbery).

410. Ibid.

410 a. 408 F. 2d 228 (1969).

> tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title 7 is that women are now to be on equal footing. We cannot conclude that by including the bona fide occupational qualification exception Congress intended to renege on that promise (411).

In a similar vein, it is worth quoting yet another decision from the United States (412) in which the Court warned against "attempts to raise a commonly accepted characterization of women as the 'weaker sex' to the level of a BFOQ" (413). The Court added the following:

> We have considered the meaning which appellants would ascribe to BFOQ, as provided for in the Act. We conclude, however, that the Commission is correct in determining that BFOQ establishes a narrow exception inapplicable where, as here, employment opportunities are denied on the basis of characterizations of the physical capabilities and endurance of women, even when those characteristics are recognized in state legislation (414).

False assumptions regarding the abilities of handicapped persons have been at the root of numerous cases of discrimination based on handicap. Here too, Boards have refused to accept generalizations and subjective impressions as the bases for B.F.O.Q. defences. For example, in Ward v. Canadian National

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411. Ibid., at p. 22.

412. Rosenfeld v. Southern Pacific Company, 444 F. 2d 1219 (1971). See also the discussion regarding this case in Tarnopolsky, supra note 24, at p. 286.

413. Ibid., at p. 1224.

414. Ibid., at p. 1227.

Express (415), the complainant was refused a job as a warehouseman because he lacked the fingers and thumb on his right hand. The Board concluded that the employer did not succeed in meeting his burden under the B.F.O.Q. defence, saying:

> The required standard must be directly related to the needs of the job, and there should be some evidence that the handicapped applicant, by failing to meet the minimum physical requirement, is therefore unable to perform the job as well as a non-handicapped employee. Anything less would have the result of allowing employers to assume that an employee, by virtue of having a handicap, is unable to do a particular job, perhaps based on nothing other than the employer's prejudiced or outdated attitudes as to what the handicapped can or cannot do (416).

And continuing further, the Board added that:

> [T]he burden is on the employer to show that its physical requirement is rationally based and is not founded on unwarranted assumptions or stereotypes, i.e. that 'it is supported in fact and reason'. I have concluded that the employer assumed that applicants lacking digits on a hand would be unable to perform the job, and that this policy does not take into account the exceptional individual, such as Michael Ward, who has demonstrated that he can do the job despite his disability. Based on the evidence, I am unable to conclude that if Mr. Ward were given the job at CN Express, that he would prove a safety risk to his fellow employees (417).

In closing on this topic, a few words regarding reliance on medical expertise might be appropriate. In the case of

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415. Supra note 399.

416. Ibid., at p. 697.

417. Ibid., at p. 700.

Andruchiw v. Corporation of the District of Burnaby (418), which involved the refusal to hire the complainant as a fireman because of spondylolysis, a congenital malformation in the spinal column, the Board accepted the evidence showing that the back defect was of no significance in terms of the complainant's ability to be a firefighter. Nevertheless, Chairman Peck dismissed the complaint of discrimination because it was shown that the employer did not act alone in refusing the complainant; rather, it relied on the advice of a qualified medical practitioner (419). This decision was subsequently upheld by the B.C. Supreme Court (420).

This approach has not, however, met with unanimous approval. Relying on the test established in Etobicoke, the Board in Cook v. Noble et al. (421) refused to follow the precedent set out by the Andruchiw case. Madam Chairman Smith criticized this precedent by pointing out the following:

> [W]e must ask whether the physical capabilities sought by the respondents here were related in an objective sense to the performance of the job; were they reasonably necessary to assure the efficient and economical performance of the job without endangering [the complainant], his

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418. (1982), 3 C.H.R.R. D/663 (B.C.).

419. Ibid., at p. 667.

420. (1983), 4 C.H.R.R. D/1182 (B.C. S. Ct.).

421. (1983), 4 C.H.R.R. D/1510 (B.C.). This case involved the refusal to hire the complainant as a child-care worker because he suffered from cerebral palsy which caused him some weakness in his left hand and leg. The Board ultimately concluded that the employer had succeeded in making out a defence based on B.F.O.Q.

> co-workers or the residents? I think that asking the question in this way makes the best [sic] for reasonable cause a more objective one than it was in either the Jefferson or Andruchiw case, where a great deal seems to turn on whether the decision was a reasonable one in the light of the criteria used by the employer rather than on whether the criteria themselves were reasonably based (422). (emphasis is mine)

In a highly interesting analysis of the value of expert testimony with respect to B.F.O.Q. defences in handicap cases (423), Professor William Black maintains that there is a "real danger of succumbing to a tyranny of experts in assessing the effects of physical and mental conditions". He adds that "one cannot, do away with expert testimony. Such testimony often is of considerable value. But it is important not to be lulled into assuming that 'experts' always are right" (424). Professor Black then proceeds to enumerate certain factors which may indeed weaken the value of certain medical expertise: a) often the medical opinion is provided by a doctor who has an ongoing relationship with an employer and, unavoidably, the interests of the firm will be preferred to those of the job applicants, particularly in close cases; b) the doctors conducting medical examinations usually try to determine which are the least risk applicants or the best ones, as opposed to which can simply do the job required of them; c) doctors are not likely to have specialized knowledge

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422. Ibid., at p. 1518.

423. William Black, "Bona Fide Occupational Requirements and Physical and Mental Conditions", Speech prepared for the 1983 CASHRA Annual Conference, Saskatoon, May 29 to June 1, 1983.

424. Ibid., at p. 5.

of all the conditions that may crop up and the temptation to rely on inadequate or outdated medical information may be great, and lastly, d) the doctors do not always have a detailed knowledge of the duties required by the job and they may make unwarranted assumptions about the duties of, for instance, a firefighter or bus driver, therefore making inaccurate assessments as to the capability of the applicant to handle the job at hand (425).

This commentary suggests a few reasons for which defences based upon the fact that medical advice has been obtained should be subject to the same scrutiny as any other defence.

Indeed, in these and other situations, it is for the courts to ensure that the refusal is not based on subjective or "impressionistic" considerations - be they formulated by medical experts or otherwise - and the courts must be the ones to decide whether the employment requirement is objectively founded.

iii) The requirement is reasonably necessary

By using the expression "reasonably necessary", the Supreme Court of Canada required the application of a necessity test and not one of business convenience (426).

The necessity criterion has been interpreted in other cases as requiring that the employer demonstrate that the essence of his business would be undermined if the discriminatory requirement were to be removed (427).

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425. Ibid., at p. 7.

426. Carson et al. v. Air Canada, supra note 339, at p. 828.

427. Carson, ibid; Segrave v. Zeller's Ltd., supra note 263, at p. 13.

A leading American case on the issue of necessity is that of Diaz v. Pan American World Airways (428). In this matter, the Fifth Circuit Court of Appeals was asked to decide whether the employer's policy of hiring only women as flight cabin personnel was justified. The court rejected the employer's defence based on B.F.O.Q. and, in doing so, it made the following remarks:

> [T]he basis of exclusion is the ability to perform non-mechanical functions which we find to be tangential to what is 'reasonably necessary' for the business involved, the exclusion of all males because this is the best way to select the kind of personnel Pan Am desires simply cannot be justified. Before sex discrimination can be practiced, it must not only be shown that it is impracticable to find the men that possess the abilities that most women possess, but that the abilities are necessary to the business, not merely tangential.
>
> Similarly, we do not feel that the fact that Pan Am's passengers prefer female stewardesses should alter our judgement. On this subject, EEOC guidelines state that a BFOQ ought not be based on the 'refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers'.
>
> ... While we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome. Thus, we feel that customer preference may be taken into account only when it is based on the company's inability to perform the primary function or service it offers.
>
> Of course, Pan Am argues that the customers' preferences are not based on 'stereotyped thinking', but the ability of women stewardesses to

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428. 442 F. 2d. 385 (1971).

> better provide the non-mechanical aspects of the job. Again, as stated above, since these aspects are tangential to the business, the fact that customers prefer them cannot justify sex discrimination (429).

In addition to making a distinction between that which is "necessary" and that which is "tangential" to a business, the Court of Appeals in Diaz also dealt with the issue of customer preference in relation to the standards of the B.F.O.Q. defence and it ultimately held that such a factor could not justify a discriminatory practice.

Defences based on customer preference have similarly been eyed with misgivings by human rights boards in this country (430). The opinion of one Board in this respect is especially worth repeating here. In Manitoba Food and Commercial Workers Union v. Canada Safeway Ltd (431), the Board examined the legality of a no-beard policy for male employees working as food and service clerks in the retail food stores belonging to the respondent. Madam Chairman Steel made these remarks regarding customer preference:

> As has already been pointed out, although in this case there is evidence to establish that the customers of Canada Safeway Limited might discontinue their patronage if bearded male

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429. Ibid., at pp. 389-390.

430. E.g. Imberto v. Vic and Tony Coiffure et al., supra note 265, at pp. 397-8 (co-worker preference) and at pp. 398-9 (customer preference); Ballantyne v. Molly 'N' Me Tavern (1983), 4 C.H.R.R. D/1191 (Ont.), at p. 1196:
> [A] mere statement of the commercial desirability of a discriminatory job category would not itself establish a bfoq.
> Berry v. The Manor Inn (1980), 1 C.H.R.R. D/152 (N.S.), at p. 153. See also Hunter, supra, note 28, at pp. 32-33.

431. Supra note 386.

> employees were allowed, I do not believe that this would then make consumer preference a reasonable occupational qualification. To allow consumer preference to justify discriminatory conduct negates the whole concept of Human Rights Legislation. It would be inconsistent to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid when to a great extent it was these very prejudices the Act was meant to overcome (432).

The objections against a defence based on customer preference were also highlighted in the Singh case (433) where, quoting Lester and Bindman in Race and Law (434), Chairman Cumming concluded the following:

> Nor can the possibility that any of Security's clients might prefer not to have a Sikh as a security guard avail security:
>
> > 'Nor would it be consistent with the idea of equality to accept the prejudices of others as a relevant reason for according differential treatment to members of a particular racial group. If Jones, a black worker, is otherwise qualified for a job, it is as irrelevant a reason for rejecting him that his colour is objected to by other workers as that it offends the employer himself. In both cases, the alleged 'reason' for his exclusion is his colour; in both cases, it is not a relevant reason for exclusion consistent with the idea of equality' (435).

In this and the preceding section, the B.F.O.Q. defence has been analyzed within the context of the objective requirements imposed by the Etobicoke test. At this point, it might be

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432. Ibid., at p. 1507.

433. Supra note 5.

434. Supra note 80.

435. Supra note 5, at pp. 34-35.

worth, by way of recapitulation, to refer to guidelies which have been issued regarding the meaning of the B.F.O.Q. defence. Perhaps the most interesting ones are the American EEOC Guidelines, the Regulations under the Saskatchewan Human Rights Code, R.S.S. 1978, c. S-24.1 (1979), and the Bona Fide Occupational Requirements Guidelines (1981), under the Canadian Human Rights Act, S.C. 1976-77, c. 33.

Thus, s. 1604.2(a) of the EEOC guidelines reads as follows:

> The Commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly. Labels - "men's jobs" and "women's jobs" - tend to deny employment opportunities unnecessarily to one sex or the other.
>
> (1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:
>
> (i) The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.
>
> (ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.
>
> (iii) The refusal to hire an individual because of the preferences of co-workers, the employer, clients or customers except as covered specifically in subparagraph (2) of this paragraph.

In Saskatchewan, s. 1(b) of Regulation 216/79 provides this definition of "reasonable occupational qualification":

> 1.(b) "reasonable occupational qualification" means, inter alia, a qualification:
>
> (i) that renders it necessary to hire members of one sex, one age group or of a certain physical ability exclusively in order that the essence of the business operation is not undermined; or
>
> (ii) that is essential or an overriding, legitimate business purpose; or
>
> (iii) that renders it necessary to hire members of one sex, one age group or of a certain physical ability exclusively in order that the duties of a job involved acn be performed safely; but does not include, inter alia, a qualification:
>
> (iv) based on assumptions of the comparative employment characteristics of that sex, age group or state of physical disability in general;
>
> (v) based on stereotyped characterizations of the sex, age group or physical disability;
>
> (vi) based on the preferences of co-workers, the employer, clients or customers, except that, where it is necessary for the purpose of authenticity or genuineness, sex shall be a reasonable occupational qualification;
>
> (vii) that distinguishes between "light" and "heavy" jobs which operate in a disguised form of classification by sex and which creates unreasonable obstacles to the advancement by females into jobs which females could reasonably be expected to perform.

The Federal Guidelines (1981) establish, for example, the following criteria for the purpose of section 14(a) of the Canadian Human Rights Act:

...

3. Paragraph 14(a) of the Act applies in any case where an employer establishes that a specific ability is necessary for the safe and adequate performance of a job.

4. For the purposes of paragraph 14(a) of the Act, the following employment practices are not based on a bona fide occupational requirement:

   (a) the eligibility of an individual to participate in an employer's group insurance, pension or other benefit plan;

   (b) an assessment of an individual's ability to perform the job that is based on that individual's membership in a class or group of individuals that is protected from discriminatory practices referred to in sections 5 to 13 of the Act rather than on the individual's own merit and ability;

   (c) a requirement based on co-worker or customer preference not related to an individual's ability to perform the job; or

   (d) a requirement that the job be performed only in a certain way where reasonable alternative ways may be found.

5. Where an employer devises methods of testing an individual's performance of a job, he or she shall proceed as follows to establish bona fide occupational requirements.

   (a) identify the essential tasks that make up the requirements of the job;

   (b) identify the skills and capabilities required to perform the essential tasks of the job;

   (c) use methods that evaluate the ability of the individual to carry out by any reasonable method the essential tasks of the job;

   (d) set standards that do not exceed the minimum requirements of the job.

6. For the purposes of paragraph 14(a) of the Act, where an employer offers an employment opportunity to a handicapped person,

   (a) the requirement that the handicapped person pass tests that would not be required of him if he or she were not a handicapped person is not a bona fide occupational requirement; and

(b) a handicapped person shall not be presumed to be unable to perform the job unless testing shows that the person cannot actually perform one or more of the essential tasks of that job.

In sum, a court or tribunal should always ensure that a B.F.O.Q. defence, when it is pleaded, is based not only upon evidence of subjective good faith, but also on objective facts which support the exclusion and on proof that the exclusion is specifically necessary and justified by the requirements of the job in question.

In light of the criteria discussed above and, more particularly, in view of the interpretation given by the Supreme Court of Canada in Etobicoke, it is astonishing to find that some courts and tribunals have held that proof that an exclusion is practised by large and important businesses and organizations elsewhere, can constitute a valid part of the B.F.O.Q. defence (436).

In closing on this section, it might be worthwhile to point out that the inconsistent application of a requirement may lead a court or tribunal to conclude that the respondent has not shown that the requirement is, indeed, a necessary one (437).

iv) Safety

In Etobicoke, the Supreme Court of Canada did not state

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436. Commission des droits de la personne du Québec v. Cité de Côte St. Luc, supra note 401, at p. 1290, and Andruchiw v. The Corporation of the District of Burnaby, supra note 420 at p. 1185.

437. Hadley v. Mississauga, supra note 210, at p. 12; see also, in the United States Hannan v. Chrysler Motors Corp. (1978), 433 F. Supp. 802 as described in O'Brien v. Ontario Hydro, supra note 260, at p. 511.

that the employer's burden in establishing a BFOQ defence is lessened where matters of safety are concerned. It did, however, indicate that safety consitutes a distinct element within the BFOQ defence to which due regard must be given. Mr. Justice McIntyre declared that where the issue of safety is involved "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" (438). Mindful of the risks involved where safety is concerned, some boards of inquiry have held that in such circumstances the employer's burden is, indeed, a lighter one (439).

Where the employer articulates concerns for safety, such is not sufficient, of itself, to meet the burden of proof established under Etobicoke. Indeed, one cannot exempt respondents from the duty to show that there is a factual basis for their concerns regarding safety hazards, nor can one relieve respondents of the duty to show a relationship between the exclusionary requirement and the increased safety hazards. This view seems

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438. Supra note 23, at p. 784.

439. Cook v. Noble et al., supra note 421, at p. 1518; Brideau v. Air Canada (1983), 4 C.H.R.R. D/1314 (Can.), at p. 1317; Canadian Human Rights Commission and Bhinder v. Canadian National, supra note 5 ((1981), 2 C.H.R.R. D/546), at p. 565; Canadian Human Rights Commission v. Voyageur Colonial Limited (1980), 1 C.H.R.R. D/239 (Can.), at p. 244; Little v. Saint John Building & Drydock Co. Ltd. (1980), 1 C.H.R.R. D/1 (N.B.), at p. 5.

For a discussion of some of the cases and the issue of safety, see Tarnopolsky, supra note 24, at pp. 252 ff.

consistent with the Supreme Court decision in Etobicoke. In this case, even though the relevance of safety concerns to fire-fighting is evident to all, the Court ultimately arrived at the conclusion that the evidence - largely "impressionistic" - was simply not sufficient to discharge the employer's burden under the BFOQ defence. In the Court's words:

> Where a limitation upon continued employment must depend for its validity on proof of a danger to public safety by the continuation in employment of people over a certain age, it would appear to be necessary in order to discharge the burden of proof resting upon the employer to adduce evidence upon this subject (440).

In a similar vein, a B.C. Labour Arbitration Board in B.C. Timber Ltd. (Skeena Pulp Division) v. Pulp, Paper and Woodworkers of Canada, Local No. 4 (441) held that the employer did not go "far enough afield in investigating the safety questions which concerned them" (442). This case involved the refusal by the employer to promote the complainant to a position as machine tender because he lacked his right arm. Although the employer sought to justify this refusal on the basis of safety concerns, it brought no evidence to support these concerns. The Board rejected the employer's defence because of the lack of evidence after having set out the following proof requirements:

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440. Supra note 23, at p. 784. For another example in which the Board found that the employer's defence based on safety concerns was not founded, see Carson et al. v. Air Canada, supra note 339.

441. (1983), 4 C.H.R.R. D/1557.

442. Ibid., at p. 1566.

> [O]ne would in the ordinary course of events regard as relevant factors at the very least evidence pertaining to the 'normal' risks of injury associated with the position of Machine Tender, the nature of the grievor's disability and the extent to which that disability enhances the risk of personal injury to [the grievor] (443).

The Board then went on to discuss the employer's duty to make an individual assessment rather than rely on pre-conceived feelings as to the abilities of the individual. On this point the Board made this statement:

> An assessment of [the grievor] as an individual was called for, and this was not done .... Admittedly the exercise of managerial discretion in a case such as this is no easy task, for the obligation imposed by law to have regard to the safety of employees is an onerous one. Nevertheless it is their legal responsibility to make these safety decisions, and 'simply because it might be difficult for management to make these kinds of enquiries and assess individual cases, does not in itself mean that management should be absolved from this duty': Re Prince Rupert Fisherman's Co-operative Association et al. [(1978) 19 L.A.C. (2d) 308] (444).

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443. Ibid., at p. 1565.

444. Ibid., at p. 1567. To the same effect regarding the duty to make an individual assessment see Ward v. Canadian National Express, supra note 399, at p. 700. According to Black, supra note 423, at p. 1, the BFOQ defence is subject to two approaches: the first requires the employer "to make an individual assessment of the employee" while the second seems to "allow exclusions based on membership in a class or group in special circumstances". He adds, at p. 2, that "[s]ince individual assessment is the principle on which human rights legislation is based, an employer should be permitted to omit such assessment only where there are compelling grounds to do so."

There is a particularly revealing analysis of American developments on this issue in Brian J. Linn, "Disability and the Law - the Inapplicabiilty of the B.F.O.Q. Doctrine to Disability Employment Discrimination Cases in the United States", Speech presented at the 1983 CASHRA Annual Conference, Saskatoon, May 29 to June 1, 1983. At pp. 11-12, Mr. (contd.)

In light of the above it is possible to summarize the relevant elements of the employer's burden where a justification based on safety is involved, in this manner: first, there must be some evidence of the risks of injury associated with the job; second,[19] there must be evidence regarding the nature of the complainant's disability or limitations and, third, there must be evidence showing a relationship between the first two elements,

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[19] Linn suggests that in disability cases the trend is toward an individualized assessment of each complainant's situation. Explaining the reasons which make an individualized determination appropriate, Mr. Linn also suggests - not illogically - that this approach is ultimately contrary to the B.F.O.Q. Doctrine. Thus, at pp. 16-17, he says this:

> When viewed as a whole, the individual determination cases recognize that a B.F.O.Q. Doctrine which pertains to people with disabilities simply will not work. Unlike B.F.O.Q. concepts in areas of race and sex discrimination, the handicapped population is simply too diverse. With respect to disabilities such as low-back abnormalities and epilepsy, as to which there is a substantial body of case law, the courts and administrative enforcement agencies tend to recognize that no two individuals with these disabilities are the same. There are different symptoms with each disabled person and a different pattern to the disability itself. Some disabilities, such as total blindness, might be seen as more homogenious. However, this simply is not true factually. Some totally blind individuals utilize braille, others utilize tapes. An individual's ability to adapt to his or her particular business will, to a great extent, vary with such factors as: the individual's age; the age at which the individual became blind; other disabilities which the individual may or may not have; the educational background of the individual; the social experiences and background of the individual; and, the extent to which the individual's other senses have been developed. It is in recognition of this substantial variance among individuals with the same disability that the courts have continued to enforce the concept of an individualized determination. That concept is contrary to the B.F.O.Q. Doctrine.

In sum, Mr. Linn argues that in the U.S. the trend has been to prohibit the utilization of B.F.O.Q. standards in cases involving discrimination against the disabled (p. 22).

that is that the limitation in question enhances the risk of injury. Moreover, an individualized determination is preferable, wherever possible (445).

In closing, it might be worth noting that the Supreme Court of Canada has confirmed that anti-discrimiation laws are a matter of public order and that parties are not entitled to contract out of them (446).

B. DISCRIMINATORY EFFECT

1. Exceptions and exemptions

Just as cases of intentional discrimination are subject to exceptions and exemptions, so too, are cases of discriminatory effect subject to such restrictions. For example, s. 10(b) of the new Ontario Human Rights Code, S.O. 1981, c. 53, specifically states that there is no violation of the law where "it is declared in [the] Act that to discriminate because of [a] ground is not an infringement of a right."

As a result, the comments which were made concerning exceptions and exemptions in intentional discrimination cases (447) apply to this section as well.

2. Business necessity

Originally conceived as part of the legal definition of

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445. Black, ibid., at p. 2; Linn, ibid., at pp. 15-16.

446. The case of Etobicoke, supra note 23, at pp. 784-785.

447. Supra, at pp. 156-157.

the discriminatory effects concept (448), "business necessity" - or some variation of it - represents the principal defence in effects cases.

By providing such a defence the law recognizes that in certain circumstances an employment policy which has a discriminatory impact may nevertheless be legitimate. Black gives this example of just such a requirement:

> Of course, some requirements will have the effect of excluding disproportionate numbers of certain groups but at the same time will be essential to adequate performance of the required duties. The majority of medical doctors are white males, but it hardly seems right to require hospitals to abandon the requirement that doctors have a medical degree because of its discriminatory effect (449).

The purpose of this defence, therefore, is to give the respondent an opportunity to demonstrate that the business practice which has been shown to have a discriminatory impact upon a protected group is nevertheless necessary to his business operations and that, as such, it is justified and legitimate. As a corollary, the respondent has no duty to make out a business necessity defence where the complainant has failed to establish a *prima facie* case of discriminatory impact to begin with (450).

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448. See the *Griggs* definition discussed, *supra*, at p. 93.

449. Black, *supra* note 4, at p. 4.

450. According to Schlei and Grossman, *supra* note 16, at p. 133:
> No showing of business necessity in any form is required unless and until there has been a proper showing of substantial adverse impact.

As for the burden of proof, there is little controversy on this point. From the outset, the Griggs case placed the burden of proving business necessity squarely upon the defendant (451). Where the effects concept has been expressly incorporated into legislation, a similar allocation in the burden of proof usually seems to appear (452).

Thus, for instance, it will be noted that section 10(a) of the new Ontario Human Rights Code, S.O. 1981, c. 53, describes the defence as an exemption. In Etobicoke, the Supreme Court held that the respondent had the burden of proving his defence on a balance of probabilities precisely because it was an exception (453). It is suggested that this reasoning can also be applied, by way of analogy, in determining the proper allocation of the burden of proof under s. 10(a) of the new Ontario Code.

The meaning of the term "business necessity" - and variants of it - is much less clear. The principal question which arises in this respect is whether this defence implies a subjective and/or an objective test. In order to answer the question a short comparative analysis between the United States, the United Kingdom and Canada once more seems appropriate.

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451. See, supra, note 224.

452. In Great Britain the employer has the burden of showing that the requirement was "justifiable": The Race Relations Act of 1976, s. 1(1)(b)(ii), supra note 103, and also the Sex Discrimination Act of 1975, s. 1(1)(b)(ii).

453. See, supra, at pp. 162-163.

a) United States

When the United States Supreme Court decided, in Griggs, to recognize the effects concept of discrimination, it incorporated a defence based on business necessity into the definition of discriminatory effect itself. So it was that the Court declared that "[t]he Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in effect. The touchstone is business necessity. If an employment practice which operates to exclude negroes cannot be shown to be related to job performance the practice is prohibited" (454).

By adopting a job-relatedness criterion the Court chose to base the business necessity defence upon an objective test without adding a subjective element to it. Indeed, to this day, a subjective element does not appear to have ever been regarded as part of the discriminatory effect/business necessity analysis in the United States (455).

Before discussing the scope of the objective element of the business necessity defence, it should be noted that where

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454. See, supra note 222 and accompanying text. In Griggs it was shown that the use of certain education standards and scored tests had a discriminatory impact on Blacks (The facts of the Griggs case are discussed, supra, at pp. 31-32). But, of course, these are not the only practices or "objective criteria" to have cropped up in effects cases. Others which have proved to be quite common in the U.S. are "specific education, license, performance or experience requirements; arrests; convictions; and garnishments and other financial criteria ....": Schlei and Grossman, supra note 16, at p. 132.

455. For example, in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), the Supreme Court confirmed that proof of malice was unnecessary in discriminatory effects cases.

scored tests are concerned, as was the case in Griggs, an important part of the employer's business necessity defence may be the validation of these tests, or proof of their prior validation. Tests which have not been validated may be inadequate as a means of assessing the candidates' ability to perform the jobs for which they have applied and, more importantly, they may also have the effect of excluding unduly certain minority groups. The consequences of using unvalidated tests were described by McCrudden in this way:

> It is a basic principle of psychological employment testing that before any ratings or tests are used as a basis for making decisions about actual people who apply for specific jobs these ratings and tests should be evaluated according to their effectiveness by some form of systematic research. Psychological tests used to screen white middle class applicants may not be effective in predicting the job capacity of a ghetto black. Without validating the test as to its predictability with ghetto blacks any comparison of scores between ghetto applicants and middle class white applicants may be inappropriate. So too the usefulness of a test in one type of employment does not guarantee similar validity in another. [J.J. Kirkpatrick, R.B. Eiven, R.S. Barrett and R.S. Katzell, Testing and Fair Employment: Fairness and Validity of Personnel Tests for Different Ethnic Groups (N.Y.U. Press 1968), R.M. Guion, 5 Industrial Relations 20 (1966).] The Kerner Commission emphasized in 1968 that such '(a)rtificial barriers to employment and promotion' would have to be removed by both public agencies and private employers, before blacks could compete effectively in the labour market (456).

As for the criteria which are applicable to the business necessity defence, perhaps the most important and the most evident factor is that it involves a necessity test, as opposed to

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456. Supra note 4, at p. 309.

one of convenience. Commenting upon the Supreme Court's approach in Griggs, Blumrosen said this:

> The EEOC interpretation of the testing proviso was designed to deal inter alia with the employer defense that tests measuring 'general abilities and aptitudes' that are not related to the particular job or group of jobs for which the minority applicant is being considered may be used, even after title VII's enactment. Griggs, however, by upholding the EEOC's conclusion that tests must bear a more intimate relation to the necessities of the work than that provided under the rubric of 'general abilities and aptitudes', adequately disposed of this argument. This argument by the employer that a standard of business convenience should govern was too close to the proposition that wrongdoers should be permitted to establish their own standards of conduct, an argument long rejected by the common law of negligence. It is now clear that the standards of necessity under title VII are to be judicially established, after a careful scrutiny of the situation, so that conduct having an adverse effect on minorities will not be permitted simply because it would be more convenient for the employer. Often, it was business convenience that created the practices that proved harmful to minorities in the first place. It would be a meaningless gesture to characterize such practices as discrimination and then to permit them to be continued under the business necessity privilege. To implement the concept that discrimination consists of conduct adversely affecting minorities, it is essential for courts to fashion a narrow and carefully limited test of business necessity (457). (emphasis is mine)

The necessity criterion was again emphasized in a leading case regarding the scope of the business necessity defence, that of Robinson v. Lorillard Corp. (458). In this case

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457. Supra note 4, at pp. 81-82.

458. 444 F. 2d 791 (4th Circuit).

Mr. Justice Sobeloff emphasized the need to establish a standard of defence which was sufficiently rigorous to "override" the discriminatory impact of the business policy, and to set a standard which was commensurate with the negative impact created by the policy in question (459). He also included the absence of an acceptable alternative as part of the business necessity defence. Mr. Justice Sobeloff's remarks on the topic were the following:

> [T]he applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact. (emphasis is mine)(460).

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459. This balancing test can also be found in Local 189, United Papermakers and Paperworkers v. United States, supra note 68, at p. 989:

> When an employer or union has discriminated in the past and when its present policies renew or exaggerate discriminatory effects, those policies must yield, unless there is an overriding, legitimate, non-racial business purpose. Secretaries must be able to type. There is no way round that necessity. A nepotism rule on the other hand while not unrelated to the training of craftsmen is not essential to that end. To be sure skilled workers may gain substantial benefits from having grown up in the home of the member of the trade. It is clear nonetheless that the benefits secured by nepotism must give way because of its effective continuation and renewal of racial exclusion.

460. Ibid., at p. 798.

Although the Robinson decision may still be considered a "leading statement of the doctrine [of business necessity]"(461), there is a competing view which reduces somewhat the scope of the defence, particularly insofar as the defendant's duty to show the absence of an acceptable alternative is concerned. The leading case in support of the latter view is that of Albemarle Paper Co. v. Moody (462), in which a class action was brought by Blacks alleging that the defendant company had discriminated against them through its employment seniority system, its employment testing programme and its back-pay provisions. The court stated that job relatedness could not be proved through vague and unsubstantial hearsay, however, it went on to say that if the defendant succeeded in showing job relatedness, the complainant was entitled afterwards to show that there would have been another test or selection device which was available to the employer and which did not have the same racial effect (463).

In conclusion, the American business necessity test is an objective one which does not include a subjective element. Furthermore, the objective element requires proof that the discriminatory policy is necessary for the safe and efficient

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461. Belton, supra note 4, refers to this case as such, at p. 1232, note 114.

462. Supra, note 455.

463. It has been argued that the third step, i.e. the pretextual stage of the Albermarle case, should be abolished since "any contention that the asserted defence was not pretextual or manufactured is inherent in the defendant's proof [under the business necessity defence]": Belton, supra note 4, at p. 1274.

operation of the business and, this necessity standard must be weighed against the discriminatory impact created by the policy. As for the duty to show the absence of an acceptable, less-discriminatory alternative, there are two schools of thought on the topic: one regards this duty as inherent to the employer's business necessity defence, while the other sees this as part of the plaintiff's burden in the third of a three-step approach.

b) United Kingdom

The equivalent of the business necessity defence in indirect discrimination cases in the United Kingdom is the "justifiability" defence which is provided for in both the Race Relations Act of 1976 (464) and the Sex Discrimination Act of 1975 (465).

At the outset, the term "justifiable" was meant to have an objective connotation which was sufficiently broad, however, to allow a justification based on something other than that of a business necessity as, for example, one which was based on social grounds. Describing the debate regarding the use of term "justifiable" which arose in a Standing Committee before the enactment of the Race Relations Act of 1976, Lustgarten (466) made these remarks:

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464. Section 1(1)(b)(ii).

465. Section 1(1)(b)(ii).

466. Laurence Lustgarten, "Justification by Faith? - I", (1983) 133 New Law Journal 1057.

> The point was raised in Standing Committee when an amendment was moved to replace 'justifiable' with 'necessary'. The Minister resisted, in part on the grounds that giving favourable treatment to disadvantaged groups - he instanced concessionary fares on public transport for old people - could not be said to be necessary, but would be justifiable on social grounds. He also thought that justifiable connoted a more objective test - a view that would place special responsibility on the courts to develop carefully detailed criteria by which to evaluate the purported justification, and further suggests that a deferential approach to review of the employer's decision is particularly inappropriate. It may also be concluded that the Minister did not see a significant difference between the two terms, since his definition of 'justifiable' involved the word 'necessary' (467).

Although early decisions endorsed the objective connotation of the term "justifiable", this meaning was slowly eroded as a subjective element gradually crept into the interpretation of this term and, in some instances, effectively became the dominant factor.

One of the earliest interpretations of the "justifiable" criterion is to be found in Steel v. Union of Post office Workers (468). Mr. Justice Phillips of the Employment Appeal Tribunal decided to weigh the employer's need to use the business requirement against the discriminatory effect demonstrated by the complainant's prima facie case and, in order to apply this balancing test, the Tribunal resorted to a "necessity" test, as

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467. Ibid., at p. 1058.

468. [1978] 2 All E.R. 504.

opposed to one of "convenience"; it also looked at whether the employer could find some non-discriminatory alternative. To this effect, the Tribunal said this:

> [I]t is right to distinguish between a requirement or condition which is necessary and one which is merely convenient, and for this purpose it is relevant to consider whether the employer can find some other and non-discriminatory method of achieving the object (469).

A subsequent decision introduced a different interpretation of the term "justifiable". In Singh v. Rowntreee Mackintosh Ltd. (470), the E.A.T. stated that what was "reasonably necessary in all the circumstances" was sufficient to meet the justifiable standard. This case involved a no-beard policy for the employees working in the respondent's chocolate factory, a requirement which had the effect of excluding practising Sikhs. The Tribunal concluded that the policy was justified for reasons of hygiene. Lustgarten comments upon these conclusions, however, by stating that "[n]o attempt was made to look at the feasibility of less discriminatory alternatives, such as permitting the employee to wear a hair covering, [and the] fact that the company did not operate the rule in six of its eight plants throughout the country was given little consideration" (471). According to the

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469. Ibid., at p. . See also Bohon-Mitchell v. Common Professional Examination Board and Council of Legal Education, supra note 105. (The requirement was not justifiable in that there was another way of achieving the respondent's objective.)

470. Supra note 109.

471. Supra note 466, at p. 1058.

author, this and another similar decision (472) represented part of an "increasingly hasty retreat from the Steel test" (473).

The most subjective interpretation as to what constitutes "justifiable" can be found in Ojutiku v. Manpower Services Commission (474), in which Eveleigh L.J. of the Court of Appeal said that "if a person produces reasons for doing something, which would be acceptable to right-thinking people as sound and tolerable reasons for so doing, then he has justified his conduct" (475). In Lustgarten's view "since most respondents can produce some less than silly reasons in support of their practices", the Court of Appeal's approach "amounted to reading the prohibition of indirect discrimination out of existence" (476).

Indeed, in a consultative document issued July 18, 1983 (477), the Commission for Racial Equality proposed an amendment to the Race Relations Act of 1976 which would replace "justifiable" by "strictly justifiable". At p. II of the document the following comments appear:

> [T]he sort of reasons which can 'justify' a practice having adverse effects on minority groups should be strictly limited. Most practices will have some plausible reason

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472. Panesar v. The Nestlé Co. Ltd., supra note 109.

473. Supra note 466, at p. 1058.

474 [1982] I.C.R. 661; [1982] I.R.L.R. 418.

475. Ibid., at p. 668.

476. Laurence Lustgarten, "Justification by Faith? - II" (1984), 134 New Law Journal 9, at p. 9.

477. Commission for Racial Equality, Review of the Race Relations Act of 1976 - Consultative Document, July 8, 1983.

> underlying them but if all sorts of reasons are acceptable to the courts as justifying discriminatory practices, in effect the status quo will be preserved. It is the job of the tribunals and courts to strike down practices with adverse impact unless they really are justifiable. We think this means holding a proper balance and that this idea might be better expressed if the statute used words such as 'strictly justifiable' (478).

In conclusion, the "justifiable" defence, originally intended as an objective test, has been given a largely subjective connotation by the courts and tribunals. This seems to have seriously weakened the effectiveness of the relevant anti-discrimination provisions and to have given rise to a proposal for legislative reform in order to strengthen the legal protection against indirect discrimination.

c) Canada

Although the scope and the meaning of the Canadian equivalent of the business necessity defence have not yet been clearly articulated, a look at the terminology used to define the defence should provide some indication as to whether it should be given an objective and/or a subjective connotation in this country.

At the outset, one will note that the terms used to identify the business necessity defence have varied over the years, and also from one jurisdiction to another. Probably the earliest reference to this defence can be found in Colfer v.

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478. Ibid., at p. II.

Ottawa Board of Commissiners et al. (479) in which Chairman Cumming said that "an employment regulation neutral on the face of it, i.e. one that applies to all prospective employees equally, but has the effect of excluding women, is valid if it is shown that the regulation is in good faith and is reasonably necessary to the employer's business operations" (480). It may be noted that the very same expression was used to describe the defence in Singh v. Security and Investigation Services Ltd. (481). As to the meaning ascribed to this defence, Chairman Cumming, who also presided in the Singh case, said this in Colfer:

> In my opinion, the words bona fide do not simply mean 'good faith' or 'honest intention' but require also that the employer show that the minimum height standard ... is reasonably necessary to the employer's operations as a police force (482).

Chairman Cumming's words suggest a dual approach to the defence in effects cases, one which contains both a subjective and an objective element.

The legislative changes that were brought to the Ontario Human Rights Code in 1981 introduced a slight modification in the terminology used to describe the defence in effects cases. Thus, s. 10(a) of the new Ontario Human Rights Code, S.O. 1981, s. 53, uses the expression "reasonable and bona fide ... in the

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479. Supra note 5.

480. Ibid., at p. 37; see also, supra, note 235 and accompanying text.

481. Supra note 5, at p. 16.

482. Supra note 5, at p. 71.

circumstances". In my view this expression is heavily burdened with a subjective connotation (483): in itself, the term "reasonable" - much like the term "justifiable" in the United Kingdom - invites a subjective assessment both on the part of the employer and on the part of the fact-finder; as for bona fide, many courts and tribunals have interpreted the terms as including a subjective element (484) as well as an objective one. Hopefully, the courts and tribunals will also ascribe an objective connotation to the expression found in s. 10(a) of the new Ontario Code. Such an interpretation would be in keeping with the traditional interpretation of the term bona fide (485) and also, of course, with the purpose of the law which is to provide an effective bar against discriminatory effect practices.

In addition to the approaches just discussed, it is worth referring to that adopted by the Tribunal and Mr. Justice Le Dain in the Bhinder case. In this instance, it was the interpretation of the Canadian Human Rights Act, S.C. 1976-77, c. 33, which was in issue. The Tribunal simply relied upon s. 14(a) of the Act as the basis for the employer's defence (486). This section reads as follows:

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483. See comments to this effect in Chapter 2, supra, at pp. 96-97.

484. See discussion regarding the term bona fide, supra, at pp. 166-167.

485. See discussion, supra, at pp. 169 ff.

486. Supra note 5 ((1981), 2 C.H.R.R. D/546), at pp. 561 ff.

s. 14. It is not a discriminatory practice if

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

The Tribunal then went on to apply the Etobicoke test to this defence. The scope of the test has already been analyzed in this chapter (487) and suffice it to say that, in doing so, the Tribunal in Bhinder adopted the dual approach to the defence in effects cases, that is one which contains both a subjective and an objective element (488).

The majority of the Federal Court of Appeal in Bhinder (489) did not, of course, examine the scope of the defence since it concluded that the Act did not prohibit discriminatory effect practices in the first place. In his dissenting judgment Mr. Justice Le Dain did, however, endorse the Tribunal's approach regarding the interpretation of the defence (490).

As to whether or not the Etobicoke test can so be transposed and applied to effects cases, it should be remembered that Etobicoke dealt with a distinction which was admittedly based on

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487. See discussion, supra, at pp. 163 ff.

488. Ibid., at p. 581: "A bona fide occupational requirement implies both a subjective and objective element".

489. Supra note 9.

490. Ibid., at pp. 1413 ff. It is interesting to note that in his judgment, at p. 1414, Mr. Justice Le Dain refers to the "justifiable" criterion used in the United Kingdom. In light of the interpretation that this term has received in recent years (see discussion, supra, at pp. 197 ff.) it is suggested that the term "justifiable" has a more subjective connotation than the term bona fide under the Etobicoke test and that, as such, it should be referred to with caution in this country.

age; it was therefore a case of direct or intentional discrimination (491). It is true that the criteria on which the test is based are relevant to the effects cases, particularly insofar as the objective element of the test is concerned (492); nevertheless, it will be interesting to have the Supreme Court articulate its test specifically within a context involving the discriminatory effect principle (493).

In conclusion, it has been shown that while American Courts have eschewed the subjective approach in applying the business necessity defence, the courts and tribunals in the United Kingdom have gradually moved in the opposite direction giving the term "justifiable" a highly subjective connotation which, according to some, might endanger the effectiveness of the indirect discrimination provisions. For its part, Canada seems - for reasons which are not altogether clear - to have adopted a dual approach which contains both a subjective and an objective element. It is still early to assess which of the two elements will become dominant in the long run but it would be wise for us to avoid the difficulties experienced in the United Kingdom as a result of an excessive emphasis on the subjective element.

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491. See comments regarding the distinction between the B.F.O.Q. and the business necessity defences, supra, at pp. 151-155.

492. Since the usefulness of the subjective element of the Etobicoke test was questioned in relation to intentional discrimination cases (see, supra, at pp. 167-169), its usefulness in effects cases, which do not in the least require proof of intent, appears even less convincing.

493. It should be noted that the Etobicoke test and the B.F.O.Q. defence might not so easily be applied to effects cases in those provinces in which the BFOQ defence is limitative: see comments, supra, at pp. 153-154.

CHAPTER 5: THE BURDENS OF PROOF (494)

At the very beginning of this study, the close relationship between a right and proof of the existence of that right was pointed out (495); it was shown that the enforcement of a substantive right depends on the party's ability to meet certain standards established by the rules of evidence.

The purpose of this chapter is to examine the relevance of procedural mechanisms to discrimination law, to take a close look at the manner in which rules of procedure have sometimes hindered the effective enforcement of anti-discrimination laws and to examine how they can be used to enhance their effectiveness. The following analysis will concentrate on intent cases - by far the more contentious area where procedural issues are concerned - to be followed by a brief discussion regarding the burdens of proof in effect cases.

A. Intent

In tracing the evolution of the concepts of discrimination from intent to effect in Chapter 1, it was pointed out that an important cause of this evolution was the difficulty involved in proving the element of intent. Thus, it has been shown that

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494. The term "burdens of proof" refers either to the "allocation" of proof or to the "standard" of proof. In this chapter it is the former that is about to be studied; the rules pertaining to the standard of proof in discrimination law are discussed, infra, in part II, at pp. 337-340.

495. Supra, note 2 and accompanying text.

the effects concept was initially regarded as a means of circumventing these problems of proof. In bypassing this element of proof, however, the effects concept did little to resolve the myriad of problems inherent in proving the intent factor itself. Moreover, cases based on prejudice, paternalism, stereotypes, etc., still required proof of the respondent's illegal state of mind, and, since the effects concept was irrelevant to these forms of discrimination, the problems related to proof of intent remained intact as far as those cases were concerned.

Courts and tribunals noted the fact that complainants bore a particularly heavy burden in having to prove the other party's state of mind, and a series of procedural devices were drawn upon for the ostensible purpose of easing this burden (496). Over the years, terms such as the "prima facie case", "presumptions" and "shifting burdens of proof" filtered into intentional discrimination cases and, with time, these notions assumed key positions in the assessment of these cases. So it was that an oft-repeated principle became incorporated into discrimination law. This principle, succinctly stated, holds that once the

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496. Many of the cases that deal with procedural issues have directly alluded to the difficulties raised by the duty to prove intent. For example, in the U.S. see: McDonnell Douglas Corp. v. Green, supra note 19; Texas Department of Community Affairs v. Burdine, supra note 20, at p. 1096. In the U.K. see: Oxford v. Department of Health and Social Security, [1977] I.R.L.R. 225, at p. 226; Wallace v. South Eastern Education and Library Board, [1980] I.R.L.R. 193, at p. 195, and in Canada see: Bremer v. Board of School Trustees, School District No. 62 (Sooke) et al., supra note 120, at p. 31-32, and Ruest v. International Brotherhood of Electrical Workers and Nicholls, supra note 121, at p. 2.

complainant has made out a prima facie case of discrimination, the burden then shifts to the respondent to show a legitimate, non- discriminatory reason for his actions (497).

At first glance, this principle appears to achieve the purpose for which it was developed, that is to alleviate the complainant's burden in having to prove the respondent's allegedly illegal intent. But upon scrunity it becomes evident that the rule raises more issues than it resolves: first, what is the scope of the complainant's prima facie case? Secondly, what is the weight of this prima facie case and, thirdly, what are the nature and the extent of the respondent's burden of proof following the so-called shift? Perhaps the most important question is one which combines all of the above concerns: in sum, who has the ultimate burden of proving the respondent's intent in cases of intentional discrimination?

In the past two or three years the complainant's burden in intent cases has been the subject of intense debate, particularly in the United States and in the United Kingdom (498). To

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497. This principle was formulated by the U.S. Supreme Court in McDonnell Douglas Corp. v. Green, ibid. Principles resembling this one have been adopted both in the United Kingdom and in Canada although the meaning and the implications vary from country to country as this chapter will show.

498. Articles on procedure have become quite common in these countries. See, for example, in the United States: Joel William Friedman," The Burger Court and the Prima Facie Case in Employment Discrimination Legislation", supra note 4; Miguel Angel Méndez, "Presumptions of Discriminatory Motive in Title VII Disparate Treatment Case, supra note 4; Robert Belton, "Burdens of Pleading and Proof in Discrimination Cases: Toward a theory of Procedural Justice", (contd.)

date, this debate does not seem to have aroused much attention in Canada. Perhaps the explanation for this apparent disinterest in procedural reform lies in the fact that the majority of discrimination cases are heard by specialized administrative tribunals whose hallmark is to conduct hearings informally without much emphasis on procedure (499).

However it would be regrettable if this "disinterest" were to persist, for the scope of the problem - and the need to firmly deal with the issues raised by proof of intent - seem too great to allow informal procedures to dissimulate them. Moreover, if a coherent procedural framework is the answer to these problems of proof, it should be developed in such a way as to meet the standards applicable to both the courts and the

supra note 4. In the United Kingdom see, in particular, Geoffrey Bindman, "Proving Discrimination: Is the burden too heavy?", supra note 4, and David Pannick, "The Burden of Proof in Discrimination Cases", supra note 4.

499. For a discussion regarding the rules of evidence applicable to human rights boards see, infra, Part II, Chapter 1. A vivid example of the informality which characterizes these tribunals is the approach towards the allocaton of burdens of proof as described in Patrice Garant, "La preuve devant les tribunaux administratifs et quasi-judiciares" (1980), 21 C. de D. 825, at p. 843:

> Devant les tribunaux d'arbitrage en droit du travail en matière disciplinaire notamment, le fardeau de la preuve est renversé et repose non pas sur le requérant, mais sur l'intimé, c'est-à-dire l'employeur, suivant une pratique consacrée par la jurisprudence. La cour d'appel a statué que l'imposition du fardeau de la preuve revient au tribunal:
>
> > It (arbitre) is free to determine its procedure and modes of proof in respect of the issues before it and no doubt the imposition of the burden of the proof upon the petitioners was within the limits of its competence as a matter of procedure.

tribunals in order to ensure a uniform approach from jurisdiction to jurisdiction (500).

The purpose of this section, therefore, is it to examine the scope, the weight and the nature of the parties' respective burdens of proof. Once these have been identified, this study will assess whether the present allocation in the burdens of proof is adequate in view of the difficulties involved in proving intent and, if not, what type of reform would seem desirable for the purpose of overcoming these difficulties. Once more, a comparative analysis between the United States, the United Kingdom and Canada seems quite appropriate as a means by which to highlight the many dimensions of the issues which are at play in the allocation of the burden of proof in intentional discrimination cases.

Before proceeding with this analysis, it might be worthwhile to examine the meaning of certain terms upon which the discussion will eventually focus. This clarification might help not only to dispell possible confusion in the discussion which is to follow, but it might also provide clues to understanding the reasons for which this aspect of discrimination law has suffered from some degree of incoherence. Indeed, a major source of

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500. With the exception of Quebec, all jurisdictions provide for hearings before a board of inquiry: see, infra, Part II, at pp. 274-275. However, in some instances questions of law may also be examined by the ordinary courts on appeal. Thus, the Alberta Individual's Rights Protection Act, R.S.A. 1980, c. I-2 (s. 23), the Manitoba Human Rights Act, C.C.S.M. H 175 (s. 31), the Newfoundland Human Rights Code, R.S.Nfld. 1970, c. 262 as amended by S.Nfld. 1974, No. 114 (s. 32), and the Ontario Human Rights Code, S.O. 1981, c. 53 (s. 41(3)), each provide for a right of appeal to the courts on questions of law or fact, or both.

confusion has been the fact that terms such as "prima facie" and "burden of proof" have a two-fold meaning ; also, the effect of a "presumption" on the opposing party's burden of proof has been the source of much disagreement not only in discrimination law but also under the traditional laws of evidence.

Lastly, some differences between the rules of evidence applicable in the common law jurisdictions and those which are applicable in Quebec will also be examined in this part.

1. Terminology

a) Common law jurisdictions

i) Prima Facie evidence

Prima Facie evidence represents degrees of cogency in evidence (501). According to Cross the term has two senses(502): in the first sense, prima facie evidence means that a party's case has been taken out of the realm of conjecture and that his "evidence in support of an issue is sufficiently weighty to entitle a reasonable man to decide the issue in his favour, although, as a matter of common sense he is not obliged to do so" (503); in

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501. At pp. 27-29, Cross, supra note 239, identified the various degrees of cogency as follows: i) insufficient evidence; ii) prima facie evidence (in the first sense); iii) prima facie evidence (in the second sense); iv) conclusive evidence, and v) presumptions.

502. In the United States, prima facie has two senses as well. According to J. Wigmore, A Treatise on the Anglo-American System of Evidence, Vol. IX, Third Edition, Little, Brown and Co., Boston, 1940, No. 2494, at pp. 293 ff., the term "prima facie" may mean evidence that is sufficient to get to the fact-finder, or it may mean evidence that is sufficient to shift the burden of producing evidence.

503. Cross, supra note 239, at p. 28.

the second sense, prima facie evidence represents the next degree of cogency "where a party's evidence in support of an issue is so weighty that no reasonable man could help deciding the issue in his favour in the absence of further evidence" (504). On this second meaning Cross further notes that "it would be convenient to describe evidence of this degree of cogency as 'presumptive', but it is usually said to be prima facie" (505).

ii) Motions for non-suit

The plaintiff who has failed at the close of his case to make out a prima facie case - presumably prima facie in the first sense (506) - may have his action dismissed following a non-suit motion by the defendant (507).

iii) Burdens of Proof

There are two principal burdens of proof, the first is

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504. Ibid.

505. Ibid. Cross continues by quoting Stratford, J.A, in R. v. Jacobson and Levy, [1931] App. D. 466 at p. 478:
> 'Prima facie evidence' in its usual sense is used to mean prima facie proof of an issue, the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the prima facie proof becomes conclusive proof and the party giving it discharges his onus.

506. On the topic of non-suit motions, Sopinka and Lederman, supra note 240, say this at p. 521:
> The judge in performing his function, ...has to decide whether there is enough evidence, if left uncontradicted, to satisfy a reasonable man.

507. Motions for non-suit are also discussed, infra, in Part II, Chapter 2, at pp. 340 ff. For a definition of the word "non-suit" see, infra, at p. 340, note 200.

known as the "ultimate" or "legal" burden, while the second - sometimes called the secondary burden - is otherwise known as the "evidential burden" (508). All too often, the distinction between these two meanings of the term "burden of proof" is ignored, hence the confusion that frequently results.

The legal burden of proof

This burden may be described as the duty of the party "who has the risk of any given proposition on which parties are at issue [and] who will lose the case if he does not make this proposition out, when all has been said and done" (509).

It should be noted that the onus of proving the whole case is not always on the plaintiff; the onus of proof with respect to a particular defence may lie with the defendant. This does not constitute a shift in the burden of proof, in the strictest sense, because the onus of proving the given defence is always with the defendant (510).

As for the allocation of the legal burden of proof it is determined by the substantive law "upon broad reasons of

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508. Sopinka and Lederman, ibid., at pp. 395-398. The different types of burdens of proof are also discussed in Cross on Evidence, supra note 239, at pp. 85 ff.
In the United States, the corresponding burdens are the burdens of non-persuasian (legal burden) and the burden of production (the evidential burden): J. Wigmore, supra note 503, nos. 2485-2489 at pp. 270-286. For a comparison between the American and British systems, see Cross on Evidence, at pp. 85 ff.

509. J.B. Thayer, Preliminary Treatise on Evidence at the Common law., at p. 355, as quoted by Cross, ibid, at p. 85.

510. Sopinka and Lederman, supra note 240, at pp. 395-396:

expedience and fairness" (511). The basic premises underlying the allocation are also worth noting:

> (1) the onus is always on a person who asserts a proposition or fact which is not self-evident; and
>
> (2) ... where the subject matter of the allegation lies particularly within the knowledge of one of the parties, that party must prove it, whether it be of an affirmative or negative character (512).

The Evidential Burden

During a trial or a hearing either party may have the burden of "going forward" with some evidence. This is called the evidential burden. According to Sopinka and Lederman the purpose of this burden may be described as follows:

> There is a secondary burden which arises, not by the operation of the substantive law nor by the nature of the cause of action and the state of the pleadings, but by what transpires at the trial. If one party has led evidence or is aided by a presumption which entitles the judge or jury to find in favour of that party, then it may be said that a secondary burden rests on the opposite party of 'going forward' with some evidence to overcome the effect of the evidence or of the presumption (513).

By contrast to the legal burden, the evidential burden does not necessarily imply the risk of a judgment against the

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511. 9 Wigmore on Evidence, s. 2486, at p. 278 as quoted in Sopinka and Lederman, ibid.

512. Sopinka and Lederman, ibid.

513. Ibid., at p. 397.

party who fails to adduce evidence to meet this secondary burden (514).

iv) Shifting burdens of proof

Throughout the trial of a given case the legal burden never changes from one party to the other. In contrast to this principle, the evidential burden, or the burden of going forward, may shift from time to time during the trial (515).

v) Res Ipsa Loquitor

The Res Ipsa Loquitor doctrine applies in the following circumstances:

(1) The thing which inflicted the damage was under the sole management and control of the defendant or of someone for whom he is responsible or whom he has a right to control.

(2) The occurrence is such that it would not have happened without negligence (516).

It is interesting to note that the effect of Res Ipsa Loquitur on the burden of proof has been the subject of much debate: according to one school of thought the defendant is, in such cirumstances, under a legal necessity to adduce evidence, and if he does not, judgement must go against him; the other school holds that such proof is merely a piece of circumstantial

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514. Ibid., at p. 398.

515. Thayer in his Preliminary Treatise on Evidence as explained by Harrison J. in Re Barter, Corbett v. Wall, [1939] 2 D.L.R. 201, at p. 307, as quoted in Sopinka and Lederman, ibid., at p. 397.

516. Sopinka and Lederman, ibid., at p. 398.

evidence from which the trier of fact may, but need not, infer negligence (517). "The former view," according to Sopinka and Lederman, "which has the effect of shifting the burden of proof to the defendant is not, it is suggested, the law in Canada"(518).

vi) Presumptions

As a rule there exist three types of presumptions: a) presumptions of fact, b) rebuttable presumptions of law and c) conclusive presumptions of law (519). Only the first two are relevant to the present discussion since conclusive presumptions of law exist only in exceptional circumstances and would probably not become part of discrimination law.

Presumptions of fact (520)

A presumption of fact is "an inference which the mind naturally and logically draws from given facts irrespective of

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517. Sopinka and Lederman, ibid., at p. 399.

518. Ibid. In this sense the authors suggest, at p. 378, that Res Ipsa Loquitur may be treated as a presumption of fact.

519. For a general discussion on presumptions, see Sopinka and Lederman, ibid., at pp. 375ff.

520. In a highly interesting study on the meaning of presumptions in the Unites States Méndez, supra note 4, stresses the two-fold effect of presumptions. He explains at pp. 1142-1148:

> Establishing the basic fact or set of facts - called the 'prima facie case' - triggers special procedural consequences with respect to proof of the second fact. When the party in whose favour the presumptions would operate proves the prima facie case under the requisite standard of proof, the presumption can both relieve that party of (contd.)

their legal effect" (521).

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some or all of its burdens of proof as to the issue on which the presumption operates and impose additional burdens on the adverse party. The effect of a presumption on the party in whose favour it operates is relatively clear, but the effect of a presumption on the adverse party's case has been the subject of considerable controversy. [emphasis is mine].

One effect of a presumption, then, is to excuse the party relying on it from producing direct evidence of the presumed fact in his case-in-chief. The result is that the opposing party's motion for a directed evidence [motion for no-suit], based on the absence of such evidence, must be denied, for in ruling on the motion the court must assume the existence of the presumed fact.

The effect of the presumption on the opposing party's burden of proof has generated much controversy among courts, legislatures, and commentators. While presumptions are often said to shift to the opposing party the burden of rebutting the presumed fact, that phrase covers a range of possible obligations. A presumption may merely shift the burden of producing evidence that rebuts the presumed fact. Or it may shift the burden of persuasion, that is, impose upon the opposing party the risk of persuading the jury of the nonexistence of the presumed fact by a preponderance of evidence ....

The controversy regarding the effect of a presumption on the adverse party is epitomized in the opposing views of presumptions advanced by two eminent evidence scholars, Professors Thayer and Morgan. Under Professor Thayer's view, a presumption merely shifts to the opposing party the burden of producing evidence to rebut the fact to be presumed... According to Professor Morgan, a presumption should shift to the opposing party the risk of nonpersuasion on the nonexistence of the presumed fact, as well as the burden of producing evidence of its nonexistence. [In enacting Rule 301 of the Federal Rules of Evidence] congress opted for Professor Thayer's view of presumptions. [It] states that, unless otherwise provided by an act of congress, a presumption in a civil action governed by federal law does not shift the risk of nonpersuasion to the opposing party.

521. Sopinka and Lederman, supra note 240, at pp. 375-376 quoting Re McVaught v. McKenzie (Re Claresholm Provincial Election) (1912), 8 D.L.R. 58, at p. 63. Also, at p. 377, the authors say this:

(contd.)

Facts which give rise to such a presumption may lead to a permissive inference, in other words the fact-finder is not obliged to draw any given inference (522). Thus, it should come as no surprise that the term "presumption of fact" is "used in many instances in which it is desired merely to shift the secondary burden to a particular party" (523).

Rebuttable presumptions of law

On the other hand, a presumption of law shifts the burden of proof (524). The party against whom this type of presumption operates must disprove the presumed fact, generally on a balance of probabilities (525).

The principles just discussed apply to common law jurisdictions. These differ considerably from certain rules of evidence which exist under Quebec law. The discussion which is to follow will be confined to those rules in which divergencies with common law rules are the most apparent and also the most note-worthy for the purposes of this study.

> [O]ne may well wonder why certain facts or a combination thereof should be accorded special treatment [i.e. the status of a presumption]. The most plausible explanation is that there are certain circumstances or combinations of facts which recur frequently. It has been found that whenever these circumstances or facts are present, it can safely be assumed that a certain other fact exists.

522. Sopinka and Lederman, ibid., at p. 377.

523. Ibid., at p. 378.

524. Ibid., at p. 377.

525. Ibid.

b) Quebec

i) Presumptions

In Quebec, as in the common law provinces, there exist three types of presumptions: a) presumptions of fact; b) relative or rebuttable presumptions of law, and c) absolute or irrebuttable presumptions of law (526). Once more, only the first two types of presumptions are of specific interest here.

Presumptions of fact

At the outset, it is worthwhile to note that in Quebec presumptions are regarded as a specific means of proof along with documentary, testimonial and real evidence, and also with admissions (527). Thus, article 1205 of the Civil Code reads as follows:

> Art. 1205. Proof may be made by writings, by testimony, by presumptions, by the confession of the party or by his oath, according to the rules declared in this chapter and in the manner provided in the Code of Civil Procedure. (emphasis is mine)

Although presumptions are regarded as an "indirect" means of establishing a fact in issue, this type of evidence is not any less probative than direct evidence (528).

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526. André Nadeau and Leo Ducharme, Traité de Droit Civil du Québec, vol. 9, Wilson et Lafleur (Limitée), Montréal, 1965, at pp. 435 ff; Ducharme, supra note 2, at pp. 91 ff; Barreau du Québec, La procédure et la preuve, Les Éditions Yvon Blais Inc., Cowansville, 1982, at pp. 295 ff.

527. La procédure et la preuve, ibid., at p. 212: "Le plaideur dispose donc de trois modes directs de preuve - preuve écrite, testimoniale et matérielle - et de deux modes indirects de preuve - l'aveu et la présomption."

528. See Nadeau and Ducharme, supra note 526 at p. 490: "Il ne faudrait pas se figurer que les présomptions de fait constituent une preuve de seconde zone."

The criteria for establishing presumptions of fact are as straightforward as they are demanding. A presumption arises where the facts are "serious, precise and concordant" (529).

Although the trial judge may exercise his discretion in assessing the probative value of the presumption (530), his assessment is subject to review by higher courts on appeal (531).

More importantly, in Quebec law, a presumption of fact seems to have the effect of shifting the burden of proof to the other party (532).

Rebuttable Presumptions of Law

The facts which form the basis of legal presumptions are determined by law (533). Once these facts have been established, the trial judge must find in favour of the party who

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529. "[L]es faits doivent être graves, précis et concordants ...": Ducharme, supra note 2, at p. 102.

530. Article 1242 C.C.: "Presumptions not established by law are left to the discretion and judgment of the court."

531. Ducharme, ibid.

532. See on this point La procédure et la preuve, supra note 526, at pp. 216-217 and the case of Leblond v. Leblond, [1978] C.A. 506, discussed therein.
Circumstantial evidence may also have such an effect on the burden of proof. At p. 300, the following remarks appear: "Cette preuve circonstantielle, selon son poids, peut opérer, à l'instar de la présomption légale, un renversement du fardeau de preuve."

533. Article 1239 C.C.: "Legal presumptions are those which are specially attached by law to certain facts. They exempt from making other proof those in whose favor they exist; certain of them may be contradicted by other proof; others are presumptions juris et de jure and cannot be contradicted."

benefits from the presumption, unless the opposing party rebuts it (534).

As in common law jurisdictions, a rebuttable presumption of law has the effect of shifting the burden of proof to the other party and the latter bears the risk of non persuasion(535). According to Nadeau and Ducharme:

> "Celui qui bénéficie d'une présomption légale se trouve nettement avantagé au départ; il appartiendra à celui qui l'attaque de rapporter la preuve contraire et si l'enquête laisse subsister un doute sérieux, il s'intreprètera en faveur du bénéficiaire de la présomption"(536).

ii) Res Ipsa Loquitur

The operation of the Res Ipsa Loquitur doctrine is nothing other than an application of the presumption of fact concept (537).

For Res Ipsa Loquitur to apply it is necessary for the facts to indicate an event, or series of events, which would not have occurred in the usual and normal course of events (538); hence the presumption of negligence.

534. Nadeau and Ducharme, supra note 526, at p. 442.

535. La procédure et la preuve, supra note 526, at pp. 215-216.

536. Nadeau and Ducharme, supra note 526, at p. 441

537. Nadeau et Ducharme, ibid., at p. 496; La procédure et la preuve, supra note 527, at p. 300.

538. "Encore faut-il que l'évènement ne doive pas se produire dans le cours normal des choses": La procédure et la preuve, ibid., at p. 301.

2. The allocation of the parties' burden of proof

a) United States

It can be said that the decision in McDonnell Douglas Corp v. Green (539) is to disparate treatment cases what Griggs is to disparate impact cases. It was there that the U.S Supreme Court first articulated the standard for the prima facie case in matters involving disparate treatment, and that it established the principle that once such a prima facie case was made out the burden of proof shifted to the defendant to show a legitimate, non-discriminatory reason for his act. The precise meaning of this principle proved to be unclear and this led lower courts to interpret it in a variety of ways, which were often contradictory. Pressed to clarify the position that it had adopted in McDonnell Douglas, the Supreme Court readdressed the issue in Furnco Construction Corp. v. Waters (540) and in Keene State College v. Sweeney (541), but these decisions still left some questions unanswered. It was not until the decision in Texas Department of Community Affairs v. Burdine (542) that the Supreme Court handed down a ruling which swept away all doubt as to the true meaning and implications of the McDonnell Douglas principle. Together, these cases provide a comprehensive view of the elements which make up the principle.

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539. Supra note 19.

540. Supra note 20.

541. Supra note 20.

542. Supra note 21.

i) McDonnell Douglas Corp. v. Green

The facts of this case were as follows (543): the petitioner company was an aerospace and aircraft manufacturer, headquartered in St. Louis, Missouri, where it employed over 30,000 employees. The respondent, a black citizen of St. Louis, worked for the petitioner as a mechanic and lab technician from 1956 until August 1964 when he was laid off in the course of a general reduction in the petitioner's work force. The respondent, a long-time activist, protested that his discharge and the general hiring practices of the petitioner were racially motivated. As part of his protest the respondent and other members of the Congress on Racial Equality illegally stalled their cars on the main road leading to the petitioner's plant for the purpose of blocking access to it during the morning shift change. Some time later jobs for qualified mechanics were publicly advertised and the respondent applied. His application was promptly refused by the company because of the respondent's participation in the "stall-in" and in a subsequent "lock-in" as well. The respondent reacted by lodging a complaint with the Equal Employment Opportunity Commission (EEOC), alleging that the refusal to hire him was based on his race and persistent involvement in the Civil Rights movement. In approaching the matter the Supreme Court formulated a three-staged test regarding the parties' burdens of

543. Supra note 19, at pp. 794-796.

proof: first, the complainant carries the initial burden of establishing a prima facie case of discrimination (544); second, if the complainant succeeds in this initial burden, then the burden shifts to the employer to "articulate" some legitimate, non-discriminatory reason for the rejection (545), and third, if the employer successfully meets this burden the complainant is to be afforded a fair opportunity to show that the employer's stated reason is a pretext (546).

Insofar as the scope of the prima facie case was concerned the Court established a clear guideline. In the particular instance, a prima facie case of discrimination could be made out by showing the following:

i) that the complainant belonged to a racial minority;

ii) that he applied and was qualified for a job for which the employer was seeking applicants;

iii) that despite his qualifications, he was rejected; and

iv) that, after this rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications (547).

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544. Ibid., at p. 802.

545. Ibid.

546. Ibid., at p. 804. In the case at hand, the Court concluded that the employer had met his burden by showing a non-discriminatory reason for rejecting the complainant's application, i.e. the latter's participation in the illegal "stall-in"; furthermore, the complainant did not succeed in showing that this reason was a pretext.

547. Ibid., at p. 802.

The criteria which were thus established were not meant to create an inflexible rule as the Court recognized that the contents of the prima facie case could vary from case to case: "The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations" (548).

The other aspects of the test, however, were marked with ambiguity: what was the weight of the prima facie case? What were the nature and the extent of the employer's burden once it had shifted; in other words, did the duty to "articulate" a non-discriminatory reason merely impose upon the employer the duty of going forward with evidence, or, did it mean that the employer now carried the burden of non-persuasion?

These questions were left open by the McDonnell Douglas decision as a result of which, in the years that followed, lower courts applied their own interpretation of the rule and their interpretations were indeed wide-ranging. The confusion which ensued from the McDonnell Douglas rule has been described by Méndez in this way:

> In conclusion, in the years following McDonnell Douglas, lower courts produced at least four separate interpretations of what is supposed to happen when a plaintiff in a disparate treatment action makes out a prima facie case of discrimination: (1) the full burden of persuasion as to nondiscrimination shifts to the defendant, (2) the burden of persuasion as to some issues shifts

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548. Ibid., at p. 802, note 13.

> to defendant, (3) the burden to come forward with some evidence on some issues shifts to defendant, and (4) nothing at all happens unless the evidence produced by plaintiff convinces the court that there could have been illegal discrimination (549).

Sensing the need to dispell the growing confusion caused by the formula enunciated in McDonnell Douglas, the Supreme Court granted certiorari in the Furnco and Sweeney cases in order to clarify the issues at hand.

ii) Furnco Construction Corp. v. Waters

The facts of this case were not seriously in dispute (550). The petitioner specialized in refractory installations in steel mills and, more particularly, in the rehabilitation or relining of blast furnaces with "firebrick". It did not maintain a permanent work force, rather it hired a superintendent for a specific job and delegated to him the task of securing a competent force of bricklayers. In this instance, involving a contract with Interlake, the superintendent did not accept applications at the job site, but instead hired only persons whom he knew to be experienced and competent in this type of work or persons who had been recommended to him as skilled. The respondents were three black bricklayers who sought employment on the Interlake job. Two of the three were never offered employment although they were fully qualified; the third was employed but

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549. Supra note 4, at pp. 1137-1138.

550. Supra note 20, at pp. 569-571.

only long after he initially applied. All had attempted to secure employment by appearing at the job-site gate; the third had also worked for the superintendent previously. At trial, the evidence indicated that 13.3% of the man-days on the Interlake job were worked by black bricklayers, which represented a climb from earlier statistics which showed that between 1969 and 1973 only 5.7% of the bricklayers in the relevant labour force had been minority group members. The petitioner alleged that the superintendent of the Interlake job had been instructed to employ, as far as possible, at least 16% black bricklayers in accordance with the company's self-imposed affirmative action plan.

The District Court held that the respondents had not proved a claim under the disparate treatment theory of McDonnell Douglas (nor under the disparate impact theory of Griggs) (551). However, for its part, the Court of Appeals for the Seventh Circuit concluded that the respondents had made out a prima facie case under McDonnell Douglas and that this had not effectively been rebutted (552).

Reversing the Court of Appeals decision in part, the Supreme Court set out to clarify "the exact scope of the prima facie case under McDonnell Douglas and the nature of the evidence necessary to rebut such a case" (553).

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551. As described by the Supreme Court, ibid., at p. 572.

552. 551 F. 2d 1085.

553. Supra note 20, at p. 569.

Insofar as the prima facie case was concerned, the Court found that the respondents had succeeded in meeting their initial burden. In dealing with this point, the Court took the occasion to further elucidate the rationale behind the prima facie case principle:

> A prima facie case under McDonnell Douglas raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. ... And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting (554).

The Court then addressed the issue of the employer's burden of proof and described it as follows:

> When the prima facie case is understood in the light of the opinion of McDonnell Douglas, it is apparent that the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race .... To dispel the adverse inference from a prima facie showing under McDonnell Douglas, the employer need only 'articulate some legitimate nondiscriminatory reason for the employee's rejection' (555).

On this basis the Supreme Court concluded that the Court of Appeals had imposed an excessive burden upon the employer by requiring that he prove "that he pursued the course which would

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554. Ibid., at p. 577.

555. Ibid., at pp. 577-578.

both enable him to achieve his own business goal and allow him to consider the most employment applications" (556). In other words, the Supreme Court maintained that the law "does not impose [upon employers] a duty to adopt a hiring procedure that maximizes hiring of minority employees" (557).

Following Furnco it was found, however, that the nature and the extent of the employer's burden was still unclear. The ambiguities of the case were summed up by Schlei and Grossman in this way: "McDonnell Douglas spoke in terms of the defendant's [redacted] to 'articulate some legitimate nondiscriminatory reason for the employee's rejection'. That phraseology was repeated in Furnco, but only after references to the defendant's burden to 'prove' a legitimate reason for its actions" (558).

iii) Keene State College v. Sweeney

The decision in Sweeney was a short one, but it was quite clear that by now the Supreme Court had noticed the confusion arising out of the McDonnell Douglas and Furnco decisions and it once more set out - not without some impatience - to clarify its position:

> While words such as 'articulate, 'show', and 'prove', may have more or less similar meanings depending upon the context in which they are used, we think that there is a significant distinction between merely 'articulat[ing] some legitimate, nondiscriminatory reason'

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556. Ibid., at p. 577.

557. Ibid., at pp. 577-578.

558. Schlei and Grossman, supra note 16, (Supplement 1979), at p. 314; see also Belton, supra note 4, at p. 1238.

> and 'prov[ing] absence of discriminatory motive.' By reaffirming and emphasizing the McDonnell Douglas analysis in Furnco Construction Co. v. Waters, we made it clear that the former will suffice to meet the [plaintiff's] prima facie case of discrimination .... The Court of Appeals appears to have imposed a heavier burden on the [defendant] than Furnco warrants ..." (559).

In this case the Supreme Court held that the employer need only articulate a legitimate, non-discriminatory reason and that he need not prove the absence of a discriminatory motive (560).

iv) Texas Department of Community Affairs v. Burdine

In this case (561), the petitioner, the Texas Department of Community Affairs (TDCA) hired the respondent, a female, in January, 1972, for the position of accounting clerk in its Public Service Careers Division (PSC). This Division provided training and employment opportunities in the public sector for unskilled workers. When hired, the respondent already possessed several years' experience in employment training and she was promoted to Field Services Coordinator in July 1972. Her supervisor resigned in November of that same year, and the respondent was assigned additional duties. She applied for her supervisor's position as Project Director, but the position remained vacant for six months. Eventually, a male from another Division was hired for the job. As a result of a reduction in the PSC staff, the

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559. Supra note 20, at p. 25.

560. Schlei and Grossman, supra note 16, (Supplement 1979), at p. 314.

561. Supra note 21, at p. 1092.

respondent was fired along with two other employees; one male was retained as the only professional employee in the Division. The petitioner maintained that the three individuals were fired because they did not work well together; it was also noted by the employer that the respondent was later rehired and assigned to another Division of the Agency at a salary comparable to what she would have earned had she been appointed Project Director.

The District Court dismissed the respondent's action (562) but the Court of Appeals for the Fifth Circuit reversed the decision in part (563). It agreed with the lower court's view that the respondent had not been discriminated against when she was refused the promotion, but the Court of Appeals disagreed with the District Court's findings regarding the decision to terminate on the basis that the employer had not met the burden of proof necessary to rebut a prima facie case of discrimination. Relying on the reasoning set forth in Turner v. Texas Instruments, the Court of Appeals placed the burden of persuasion on the employer because "[i]f an employer need only articulate - not prove - a legitimate, nondiscriminatory reason for his action ... he may compose fictitious, but legitimate, reasons for his actions" (564).

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562. As described by the Supreme Court, ibid.

563. 608 F. 2d 563.

564. Turner v. Texas Instruments Inc., 555 F. 2d 1251, at p. 1255, as quoted by the Supreme Court, supra note 21, at p. 1096.

The U.S. Supreme Court reversed the Court of Appeals decision on precisely this point. Reaffirming the three-stepped allocation in the burdens of proof that it had formulated in McDonnell Douglas, the Court went on to say this:

> The nature of the burden that shifts to the defendant should be understood in light of the plaintiff's ultimate and intermediate burdens. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff (565).

The Court reiterated the rule concerning the scope of the prima facie case in these words:

> The burden of establishing a prima facie case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination. The prima facie case serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection (566).

Further detailing the meaning of the rule, the Court said this regarding the weight of the prima facie case:

> Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believed the plaintiff's evidence and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case (567).

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565. Supra note 21, at p. 1093.

566. Ibid., at p. 1094.

567. Ibid.

Then, as to the nature and the extent of the employer's burden, which had apparently remained unclear until then, the Court set down these guidelines:

> The burden that shifts to the defendant ... is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected or someone else was preferred for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons .... It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff .... If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specifity (568). (emphasis is mine)

And regarding the plaintiff's burden to show pretext, the last of the three stages, the Court said the following:

> The plaintiff retains the burden of persuasion. She must now have the opportunity to demonstrate that the proferred reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence (569).

On the basis of the four decisions just discussed, the present position of the Supreme Court may be summarized in this way:

> (1) the scope of the McDonnell Douglas prima facie case is such that the plaintiff is not required, at this

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568. Ibid., at pp. 1094-1095; at p. 1096 the Court added that "the defendant's explanation of its legitimate reasons must be clear and reasonably specific".

569. Ibid., at p. 1095.

initial stage, to prove the element of intent to discriminate (570);

(2) the weight of this prima facie case or presumption is such that in the absence of any rebuttal evidence the court must find in favour of the complainant;

(3) in order to rebut the prima facie case the defendant has the burden of producing evidence or of going forward with it; he does not have the burden of persuading the court that he acted for a legitimate, non-discriminatory reason;

and,

(4) if the prima facie case has been rebutted successfully by the employer, the plaintiff has the burden of showing pretext (571).

In sum, according to the U.S. Supreme Court, the plaintiff carries the ultimate burden of proving - on a balance of probabilities - the defendant's intent to discriminate.

b) United Kingdom

A procedural framework for direct discrimination cases has gradually unfolded in the United Kingdom as well. Thus in Moberley v. Commonwealth Hall (572) guidelines regarding the scope of the prima facie case were laid out. Then, in

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570. This is in fact one of the functions of presumptions as described by Méndez, supra note 4, at p. 1142: "... the presumption can relieve ... [a] party of some or all its burdens of proof as to the issue on which the presumption operates ...."

571. Because the plaintiff's burden in proving a prima facie case is relatively light as is, the defendant's burden at the rebuttal stage, intentional discrimination cases are often determined at this last, pretext stage: Schlei and Grossman, supra note 16, at pp. 1155-1156; see also, supra note 337 and accompanying text.

572. [1977] I.R.L.R. 176.

Khanna (573), Wallace (574) and Craigavon Borough (575) the courts identified the weight of the prima facie case of discrimination. The Khanna case also defined, to some degree, the extent of the respondent's burden of proof once a prima facie case of discrimination was made out. In this, it built upon the rule concerning the nature of the respondent's burden of proof which had been established some years earlier in Oxford v. Department of Health and Social Security (576). Each of these cases and the principles developed therein will now be examined.

i) Moberley v. Commonwealth Hall

According to the facts of this case Miss Moberley, a full-time student, was hired as a part-time relief porter in one of the Halls at the University of London. She alleged that she had been discriminated against in her working conditions because she was a woman. The Industrial Tribunal dismissed the complaint and the decision was, in turn, upheld by the Employment Appeal Tribunal (EAT). In doing so the EAT did, however, recognize that a prima facie showing of discrimination shifted the burden of proof to the respondent. It described the scope of the prima facie case in this way:

> [W]here there has been established an act of discrimination and where it has been established that one party to the act of discrimination is a

573. [1981] I.C.R. 653.

574. Supra note 95.

575. Supra note 95.

576. Supra note 92.

male and the other party is a female, prima facie that raises a case which calls for an answer" (577).

Thus, under Moberley, the scope of the prima facie case is such that the complainant must at this initial stage show "differential treatment" (578); once he has succeeded in doing this, the burden shifts to the respondent to answer this prima facie case.

It was left to subsequent cases to elucidate further the meaning of the prima facie case and, in particular, to describe its weight.

ii) Wallace v. South Eastern Education and Library Board

This case involved the complaint of one Mrs. Wallace who had worked as a part-time, audio-visual-aids technician for the respondent Board. When a full-time employment to this job became available the complainant applied for it. She was interviewed for the position along with three male candidates; one of the three was eventually appointed to the new full-time post, while

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577. Supra note 572, at p. 177.

578. "[A]n act of discrimination" as referred to in Moberley, has been interpreted as meaning proof of differential treatment: Geoffrey Bindman, "Proving Discrimination: The Importance of Discovery", [1980] Law Soc. Gaz., 316 (March 26), at p. 316, and Lustgarten, supra note 4, at p. 206.
The Moberley standard appears more demanding than that established in the United States under McDonnell Douglas in that under the latter test the plaintiff is not required to show either intent to discriminate or differential treatment when making out a prima facie case of discrimination: see discussion, supra, at pp. 224-225. The distinction between the scope of the complainant's prima facie case in the U.K. and that of his counterpart in the U.S. was discussed in Pannick, supra note 4.

the complainant was placed in the runner-up position. The Industrial Tribunal found that the evidence showed that the complainant's qualifications were superior to those of the successful candidate; moreover, it was unable to accept the reasons given by the respondent for its decision. Nevertheless, the Tribunal decided to dismiss the complainant's case. On appeal to the Court of Appeal for Northern Ireland, it was held that the Tribunal had erred 1) in deciding that there was no evidence of discrimination, and 2) by misapplying the law as to the respondent's burden of proof.

In arriving at this decision Lord Lowry, L.C.J., stated that the complainant had succeeded in making out a prima facie case under Moberley, and the effect of this was to shift the evidential burden to the respondent. If the latter failed to advance any evidence, as in the case at hand, then it failed to meet its burden of proof and the Tribunal was, therefore, wrong in coming to the conclusion which it had reached. Commenting further upon these issues, Lord Lowry said this:

> Only rarely in cases under the Order will direct evidence be available of discrimination on the grounds of sex; one is more often left to infer discrimination from the circumstances. If this could not be done the object of the legislation would be largely defeated, so long as the authority alleged to be guilty of discrimination made no expressly discriminatory statements and did not attempt to justify its actions by evidence.
>
> This court is not entitled to substitute its own view for a finding of the Tribunal ... which has evidence to support it, but, once the evidential burden has shifted, as it clearly did in this case, the question then is whether there is any evidence to justify the conclusion that the evidential burden has been discharged by the respondent.

> ...
> One of the significant points here is that neither the respondent before the Tribunal nor the Tribunal in its case stated, although each had an interest to justify its own decision, advanced any reason, in the one case, for appointing [the successful candidate] in preference to the better qualified Mrs. Wallace or, in the other, for deciding that there was no evidence of discrimination on the ground of sex (579).

The court therefore reversed the lower court decision because, in its view, the weight of a prima facie case was such that in the absence of rebuttal evidence the court was obliged to find in favour of the complainant.

iii) Fair Employment Agency v. Craigavon Borough Council

In this second Northern Ireland case, the Court of Appeal once more reversed a lower court decision which failed to find for the complainant despite the fact that a prima facie case of discrimination had been made out and that no rebuttal evidence whatsoever had been called.

In this matter the complainant had applied for employment with respondent as recreation officer but his application was refused. The complainant alleged that he was refused on the ground of religious beliefs or political opinion (580). Examining the facts, the Court of Appeal noted the following: 1) the complainant's qualifications were undoubtedly superior to those of the successful candidate; 2) both his qualifications and his practical experience were much more closely aligned with the

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579. Supra note 95, at p. 195.

580. Supra note 95, at p. 318.

requirements of the main part of the job as advertised and specified in the job description than those of the successful candidate; 3) the complainant had already been employed by the Council as a Recreation Officer, whereas most of the successful applicant's experience had been as a gardener and landscape supervisor, and 4) the complainant was a Roman Catholic while the successful applicant was a Protestant. This, the Court found, "was quite enough to constitute a strong prima facie case" (581). Moreover, no evidence had been called by the respondent in answer to this prima facie case. The Court concluded that the County Court judge had erred by refusing to find for the complainant in that: (1) the judge was not guided by the Wallace presumption; (2) even without the aid of this presumption, the complainant's prima facie case was in this instance incapable of rebuttal without rebutting evidence, and (3) the true and only reasonable conclusion from the facts which had been proved contradicted the determination (582).

This case therefore confirmed the position adopted in Wallace to the effect that a court must find in favour of a complainant in face of an unrebutted prima facie case of discrimination (583).

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581. Ibid., at p. 319.

582. Ibid., at p. 321.

583. In fact, this approach seems to reflect the usual weight given to a prima facie case (in the second sense) under the ordinary rules of evidence: see Cross and Evidence, supra note 504 and accompanying passage.

Although these decisions are helpful in describing the weight of a prima facie case in the absence of any rebuttal evidence, situations such as these are rather rare. Usually, the respondent will present some rebuttal evidence and in such instances it is useful to be able to identify both the nature and the extent of the respondent's burden of proof on rebuttal. The following cases addressed these issues.

iv) Oxford v. Department of Health and Social Security

In this matter Mr. Oxford had made an application for employment with the Department of Health and Social Security as a clerical officer. The office in question employed mainly, though not exclusively, women and its employees were required to do clerical work of a fairly simple character and of a routine nature. The complainant was refused a job for "personality reasons". His case was dismissed in first instance and the decision was upheld by the Employment Appeal Tribunal where Mr. Justice Phillips made this remark upon the parties' burdens of proof:

> The ... matter that Mr. Oxford raises is, he says that the onus of proof is - or, if it is not, ought to be - upon the respondents, because the applicant cannot know all the facts and it is difficult for him to make his case. We recognise the difficulties, but there is no doubt that, although the act is silent upon the burden of proof, the formal burden of proof lies upon the applicant. That having been said, it should be recognised that in the course of the case the evidential burden may easily shift to the Respondents... (584).

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584. Supra note 92, at p. 226.

The principle which was set out in 1977 in the Oxford case, and which seems to apply still today, can be summed up as follows: in the course of the proceedings the evidential burden may shift to the respondent but, in all instances, the complainant retains the legal burden of proof, that is he retains the ultimate burden of proving his case of discrimination.

The decision in Khanna, the last case to be discussed in this section, nevertheless sets a minimum standard insofar as the respondent's burden of proof is concerned.

v) Khanna v. Ministry of Defence

According to this case the respondent must not only offer "some" rebuttal evidence in answer to a prima facie case of discrimination, he must provide the court or tribunal with a "plausible" non-discriminatory reason for his actions.

The facts of the case showed that Mr. Khanna, of Indian origin, had worked for the respondent company as a senior photographer for quite a few years. He made some twenty-two applications for an appointment to the post of principal photographer, all of which had been unsuccessful.

Commenting upon the complainant's failure to obtain a promotion on the occasion which led to the complaint of discrimination, the Industrial Tribunal in first instance said this:

> The successful candidate could no doubt pick up the necessary skill in time, but it seems to the tribunal that the man who had the skills already, and who had actually carried out the job successfully, and was the sitting tenant, was such an obvious choice that there

> is an unavoidable inference. The obvious candidate was coloured and the successful candidate was white. The inference is that there was racial discrimination (585).

The tribunal was therefore of the opinion that a prima facie case of discrimination had been made out. On rebuttal, the respondent explained that the successful candidate had been chosen because he showed "greater potential" than the complainant.

The Tribunal did not know whether or not to believe this explanation and, in fact, expressed doubt as to its validity. In the end it found the evidence evenly balanced on both sides, and basing itself on the principle that the complainant carries the ultimate burden of proving the discrimination, it concluded that the complainant was the one who had to bear the consequences of the fact that neither case outweighed the other (586).

However, on appeal, the EAT held that the tribunal had to decide whether or not it believed the respondent's rebuttal that the refusal had not been racially motivated. According to the EAT the complainant's prima facie case led to the unavoidable inference that the refusal was racially motivated and, in order to rebut this inference, it was not sufficient for the respondent to articulate some non-discriminatory reason for the refusal: it was necessary for him to provide a "plausible" reason for the refusal. The case was therefore remitted to the Industrial Tribunal for a decision regarding the credibility of the

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585. As quoted in Bindman, supra note 4, at p. 1270.

586. Ibid.

respondent's explanation (587).

In view of the above, the procedural framework which seems to apply to discrimination cases in the United Kingdom may be summed up as follows:

(1) With respect to the scope of the prima facie case the Moberly test seems to require that the complainant show differential treatment at this stage of the proceedings;

(2) the weight of the prima facie case is such that in the absence of rebuttal evidence, the court or tribunal must find in favour of the complainant;

(3) once the complainant has succeeded in making out a prima facie case of discrimination, the evidential burden of proof shifts to the respondent; however, the complainant retains the ultimate burden of proving the case;

(4) in order to answer a prima facie case of discrimination, the respondent must nevertheless meet the following minimum standard of proof: he cannot merely articulate an explanation for his acts, he must provide the court or tribunal with an explanation which is a plausible one in the circumstances.

c) Canada

As was mentioned earlier, the debate over the scope of the prima facie case and the precise nature of the respondent's burden of proof in cases of intentional discrimination has not been a particularly strong one in Canada; as a result of this, it is difficult to describe with any degree of precision or certainty the procedural framework which has been adopted in this country. Nevertheless, a few of the decisions which have addressed

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587. Supra note 573, at pp. 659-660.

these issues make it possible to identify some of the tendencies which have been developing in this area.

One case which seems to tackle the relevant issues, particularly that of the scope of the prima facie case, is Bremer v. Board of School Trustees, District 62 (588). As for the nature and the extent of the respondent's burden of proof there appear to be two approaches to these issues. According to one view, the complainant retains the ultimate burden of proof but, in the course of the proceedings, the evidential burden may shift to the respondent who is required to give a "credible" or "plausible" explanation for this actions. The decision of the Board in Mitchell v. Nobilium Products Limited (589) reflects this first view, as does a fairly recent Alberta Court decision in Base-Fort Patrol Ltd. v. Alberta Human Rights Commission (590). The second school holds that once the plaintiff has established a prima facie case of discrimination the respondent has the onus of proving the reason for his actions. This view is illustrated by the case of Ruest v. International Brotherhood of Electrical Workers and Nicholls (591). Each of these cases will now be examined in turn.

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588. Supra note 120.

589. Supra note 285.

590. (1983), 4 C.H.R.R. D/1200 (Alta. Ct. Q.B.).

591. Supra note 121.

i) Bremer v. Board of School Trustees, District 62

The facts of this case, recounted in some detail elsewhere (592), involved a complaint lodged by Mrs. Bremer in which she alleged that the respondent school board had refused to hire her for a teaching position because of her husband's name and his well-publicised dispute with the British Columbia government. According to the complainant the reasons for the refusal were discriminatory and in violation of the B.C. Human Rights Code. At the close of the complainant's case, the respondent presented the Board with a motion for non-suit. In rejecting the motion, the Board also examined the scope of the prima facie case of discrimination. The Board said the following regarding the issues at hand:

> The motion was denied. At the point in the proceedings at which the motion was made, the onus of proving the cause for the rejection of Mrs. Bremer's application as well as the reasonableness of that cause had shifted to the respondents. The rationale for and the basis upon which a respondent may acquire this onus are articulated in the GATE case:
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> > Once a denial or a discrimination with respect to a service or facility customarily made available to the public is established the onus rests upon the respondent to satisfy the Board of Inquiry that reasonable cause existed for the refusal and/or discrimination. Were it otherwise a complainant would be required to establish a cause for the denial or discrimination which would be a difficult if not impossible enterprise under those circumstances where a respondent has denied a service without giving reasons. Requiring the complainant to both establish the cause for the denial or discrimination as well as the lack of reasonableness of same would in such circumstances enable the respondent to avoid responsibility

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592. See, infra, Part II, Chapter I, at pp. 293 ff.

> for what would otherwise be a discriminatory act, by simply remaining silent. The very expression 'reasonable cause' impels one to the conclusion that no cause at all would, prima facie, be unreasonable. Accordingly a respondent faced with proof of a denial of a service or discrimination in respect thereof must of necessity establish two things if he is to avoid the consequences of a finding that the allegation is justified under Section 17(2) of the Code. He must first establish the cause of the discrimination and secondly he must satisfy the Board of Inquiry that the cause was a reasonable one.

In this case, the elements necessary to shift the onus to the respondents were clearly present in the evidence adduced on behalf of the complainant. The elements to which we refer and which represent a parallel to the elements referred to in the GATE decision in respect to a Section 3 complaint are the following:

> First, there was a vacant position at the time Mrs. Bremer made her application;
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> Second, Mrs. Bremer was qualified to fill that position; and
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> Third, Mrs. Bremer's application was rejected.

Counsel for the respondents did not suggest that there was no evidence for any of these elements. Rather, the gist of counsel's arguments was that there was no evidence of the alleged prohibited consideration which is not an element necessary to establish a prima facie case for the complainant. Since there was evidence of the elements necessary to shift the onus to the respondents, the burden was then on the respondents and thus the motion for a directed dismissal of the complaint failed (593). (emphasis is mine)

In short, the Bremer case recognized the following principles in relation to the scope and the weight of the prima facie case: 1) the alleged prohibition, that is the intent to discriminate, is not a necessary element of the complainant's prima facie

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593. Supra note 120, at pp. 31-32.

case (594), and 2) the prima facie case, if left unexplained, leads to a conclusion of unreasonableness, that is of discrimination.

With respect to the respondent's burden of proof, the Board in Bremer held that a prima facie case had the effect of shifting the burden to the respondent, as the following passage shows:

> The onus which then rested on the respondents is neither complicated nor unduly burdensome. The respondents, on the authority of the GATE decision, were merely required to lead evidence to show the reason for the rejection of Mrs. Bremer's application and to satisfy the Board that that reason constituted reasonable cause within the meaning of the Code. To establish the latter, the respondents were required to show that the rejection was not affected by any prohibited consideration either set out expressly in subsection 2 of Section 8 or inherent in the reasonable cause concept (595).

The Board thus supported the idea of a shift in the burden of proof; it did not specify, however, whether the respondent then had the legal burden of proving the reasons for the refusal or whether he had only the burden of going forward with such evidence; indeed, on these issues the Canadian position seems to be divided, as the following cases show.

ii) Base-Fort Patrol Ltd. v. Alberta Human Rights Commission

In this instance a Board of Inquiry, appointed to hear a

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594. To this effect, see also the Ruest case, supra note 121, at p. 3.

595. Supra note 120, at pp. 32-33.

complaint lodged by one Ms. Bueckert who alleged that she had been dismissed from her employment because of her sex, concluded as follows:

> I find some evidence that the sex of the complainant was likely part of the consideration to terminate her. Having so decided, the onus then shifts to the employer to prove a legitimate non-discriminatory basis for the dismissal.
>
> ...
>
> I have already dealt with [an inspector of the employer's] alleged gounds for dismissal and I am not satisfied that he had any legitimate basis to dismiss the complainant (596).

The employer appealed this decision alleging that the Board had erred in law in holding that the employer had the onus of proving that the dismissal was based upon a legitimate, non-discriminatory reason. The Court of Queen's Bench agreed. Quoting extensively from the Burdine case in the United States, the Court held that although a secondary or evidential burden may be placed upon the employer at some stage of the proceedings, the Alberta Individual's Rights Protection Act (596a), does not impose a legal burden upon the employer to prove that his conduct was non-discriminatory. In Mr. Justice McDonald's words:

> [I]f what Powell J. [in McDonnell Douglas] meant was that the legal burden of proof passed to the employer, I respectfully hold that such a view ought not to be and is not the law of Alberta.
> ...

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596. As quoted by Mr. Justice McDonald, supra note 590, at p. 1200.

596a. R.S.A. 1980, c. I-2.

> That is a very different thing from saying that, given proof of certain acts by the employee, there is, in some secondary or evidential sense, a burden placed upon the employer - a burden of coming forward with some evidence if the employer is going to avoid the risk of a finding being made against him.
>
> ...
>
> I find nothing in the statute or in the policy of the legislation which demands that the legal burden should be on the employer in any circumstances to prove that his conduct was non-discriminatory" (597).

Mr. Justice McDonald emphatically stated, therefore, that the employer does not carry a legal burden of proof and that, at most, he carries a secondary or evidential burden.

Nothing further was said regarding the respondent's burden but this issue was dealt with in an earlier Board decision in the Mitchell case.

iii) Mitchell v. Nobilium Products Limited

In deciding this matter, which involved a complaint of racial discrimination in employment, Chairman Kerr relied upon the rules pertaining to circumstantial evidence. Although the Chairman did not directly address the issue of the allocation of the burdens of proof, the approach that he adopted implicitly assumed that the complainant carried the ultimate burden of proof. Indeed, the rules relating to circumstantial evidence do not imply a departure from the ordinary rules regarding the allocation in the burdens of proof. Under these rules the respondent

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597. Ibid., at pp. 1200-1201.

may be required to explain his actions at some stage of the proceedings, and failure to do so may lead to a negative inference against him (598), but this is quite different from placing upon the respondent the burden of proving that his conduct was not discriminatory.

The Mitchell decision is nevertheless interesting in that Chairman Kerr identified the minimum standard of proof required of the respondent to rebut the complainant's prima facie case of discrimination. On this point the Chairman said this:

> As I noted in Fuller v. Candur Plastics Limited (Ontario Board of Inquiry, Kerr, 1981), at 8-9, it is not sufficient to rebut an inference of discrimination that the respondent is able to suggest just any rational alternative explanation. The respondent must offer an explanation which is credible on all the evidence (599). (emphasis is mine)

Thus, under the Mitchell case, if the facts are sufficient to raise an inference of discrimination, the respondent has the duty to offer not only some explanation for his conduct but one which is credible and rational in the circumstances.

The two cases which have just been discussed assume that the complainant carries the ultimate burden of proving that the respondent's conduct was based upon a discriminatory reason. However, there is a second view according to which the respondent is the one to carry the burden of proving that the reasons for his conduct were not discriminatory. This view was upheld in the Ruest case.

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598. See, supra, note 330 and accompanying text.

599. Supra note 285, at p. 642.

iv) Ruest v. International Brotherhood of Electrical Workers, Local 120 et al.

In this case Mr. Maurice Ruest of French-Canadian origin, alleged that the respondent union had caused him to be dismissed from his job for discriminatory reasons based on his ancestry or place of origin.

Conscious of the difficulties associated with proving the intent to discriminate, the Board of Inquiry followed an approach which, in effect, displaced the burden of proving the reasons for the dismissal from the complainant to the respondent. Chairman Arthurs commented upon the matter in this way:

> I must make a preliminary observation about the difficulty of proving motive in connection with an alleged act of discrimination. Seldom will those who act for motives which are forbidden by the law and held in disrepute by the community announce in clear and unmistakeable terms that they are acting for illicit motives. As experience under The Labour Relations Act has indicated, much depends upon the ability of a tribunal to draw inferences from conduct which (at least in the eyes of a person familiar with employment relations) are reasonable if not compelling. Once these inferences are raised by the conduct of the respondent, an onus shifts to him of explaining to the tribunal that his motives were other than what they appeared to be. The Ontario Labour Relations Board, a body which encounters these problems frequently, articulated this approach in Metropolitan Meat Packers Ltd., (1962) C.C.H. L.L.R., p. 16, 230:
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> > ... It should be borne in mind that the facts as to the real reasons for discharge often lie peculiarly and necessarily within the knowledge of the respondent .... (I)n an action for wrongful dismissal at common law ... 'it was only necessary for the plaintiff to establish that he was employed for an indefinite time and that he was dismissed without notice. The onus then shifted to the defendant to prove that such dismissal was justified'. ...

> This approach, developed by the common law courts and adapted to the context of administrative proceedings in an analogous field of regulatory activity, has obvious relevance for a board of inquiry under the Ontario Human Rights Code. Applying this approach to the instant proceedings, the facts recited above clearly do cast an onus of explanation upon the respondents (560).

Thus, the Board in Ruest held 1) that the complainant did not have the duty to prove the reasons for his dismissal when making out his (prima facie) case (601), and 2) that, once a prima facie case was made out, the respondent had the onus of proving that the reasons for the dismissal were legitimate and non-discriminatory.

The Board's approach was not a new one for it was clearly infuenced by the rules which govern wrongful dismissal cases where the employer, being the one to have peculiar knowlege of the reasons for the dismissal, is known to carry the burden of proving these reasons (602).

By contrast with the United States and the United Kingdom, it is impossible to describe with any degree of

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600. Supra note 121, at pp. 2-3.

601. According to the Board in Ruest the following facts were sufficient to constitute the complainant's prima facie case and to trigger a "shift" in the burden of proof to the respondent: the complainant demonstrated that he had been dismissed, that the respondent was responsible for his dismissal, that his level of competence was acceptable to the employer and that, had it not been for the union, he would have maintained his job: ibid., at pp. 1-2.

602. This is so both in common law and in labour arbitration law: see, respectively, Sopinka and Lederman, supra note 240, at p. 406 and Brown and Beatty, supra note 24b, at para. 3:2411.

precision the procedural framework within which a case of intentional discrimination is to be made out today in Canada. Indeed, two very distinct approaches seem to emerge. According to one view, reflected by the Base-Fort Patrol case, the complainant has the ultimate burden of proving the discriminatory act while the respondent may carry, at the most, the evidential burden of going forward with some evidence at some stage of the proceedings. The second approach, represented by the Ruest case, (and perhaps by the Bremer case as well) is that the complainant need not prove the element of discrimination and that, once a prima facie case has been made out (603), the respondent has the onus of proving the reasons for his refusal.

Conclusion: In assessing whether or not the complainant's burden in discrimination cases has in any way been eased, one need only examine whether there has been a departure from the traditional rule according to which the complainant has the ultimate burden of proving - on a balance of probabilities - that the respondent acted for a discriminatory reason.

The American position, after years of ambiguity, uncertainty and illusions, is today clear: a presumption of fact operates once a prima facie case of discrimination under McDonnell Douglas has been made out; this presumption has the effect of relieving the plaintiff of the duty of proving - at

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603. The criteria for making out a prima facie case under Ruest seem to resemble those set out in McDonnell Douglas in that neither requires evidence of a discriminatory reason.

this initial stage - the defendant's discriminatory animus and, if left completely unanswered, this presumption will act in the plaintiff's favour; insofar as its effect on the defendant's burden of proof is concerned, this presumption merely places upon the latter the burden of going forward with the evidence and, most importantly, the legal burden of proving that the defendant's conduct was discriminatory always remains with the plaintiff (604).

The net value of this procedural framework may be summed up in this way. First, the McDonnell Douglas test articulates an objective standard on which to base a presumption regarding the existence of discrimination in the workplace. This has the advantage of recognizing the distinctive manner in which employers function, on the one hand, and the manner in which discrimination operates, on the other; it, therefore, sets a useful standard for those who have a limited experience in these areas.

However, aside from providing these helpful guidelines, the American position offers little in the way of a reduction in the plaintiff's burden of proof. It promises the latter success if the prima facie case is left completely unanswered but, since such apathy on the part of a defendant is not likely, this rule is of little consequence.

One other result of the American formula is to preclude the possibility of success on a motion for a non-suit at the

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604. The effect given to a presumption in discrimination cases appears to adhere to the ordinary rules of evidence relating to presumptions of fact as described, supra, in note 520, at pp. 216-217.

close of the plaintiff's case, on the basis that he or she has failed to prove the existence of a discriminatory animus during the case-in-chief (605). Although this principle is an advantageous one, it should be noted that the same effect regarding motions for non-suit has been achieved both in the United Kingdom and in Canada without reliance on the presumption mechanism (606).

In view of the above and since it is now clear that the plaintiff retains the ultimate burden of proving - on a balance of probabilities - that the respondent acted for a discriminatory reason, it is safe to conclude that, ultimately, the American position does not in any way alleviate the plaintiff's burden of proof in disparate treatment cases.

For its part, the United Kingdom has adopted this procedural framework: as part of his prima facie case of discrimination the complainant must show, among other elements, the existence of a discriminatory act; once this has been done the respondent has the duty of providing a "plausible" reason for his

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605. According to Méndez, supra note 4, at p. 1143: "One effect of the presumption, then, is to excuse the party relying on it from producing direct evidence of the presumed fact in his case-in-chief. The result is that the opposing party's motion for a directed verdict, based on the absence of such evidence, must be denied, for in ruling on the motion the court must assume the existence of the presumed fact." And further, at pp. 1150-1151: "At a minimum, then, proof of the McDonnell Douglas prima facie case excuses the plaintiff from producing evidence of discriminatory motive in his case-in-chief and protects him from an adverse directed verdict based on the absence of such evidence."

606. See discussion regarding motions for a non-suit, infra, Part II, Chapter 2, at pp. 340 ff.

conduct.

At first glance, the burden which is so placed upon the respondent seems to ease somewhat the complainant's burden. However, it should be remembered that, at the outset, the complainant is expected to prove all the essential elements of his case, including the existence of a discriminatory act (607); in the circumstances it seems only normal to require that the respondent provide evidence which is sufficient to tip the scales of probabilities back in his favour.

In sum, there is no reason to conclude that the complainant's burden in this country has been lessened.

As was mentioned earlier, a single position on the issue of the allocation of the burdens of proof does not yet seem to have emerged in Canada. While two distinct approaches have at times been followed - one which ultimately requires that the complaint prove the discriminatory reasons for the denial and another which requires that the respondent prove that the reason for the denial was not discriminatory - the number of cases which have directly addressed the issue of the allocation of the burdens of proof is too few to determine which of the two approaches is the dominant one in this country.

The matter remains unresolved and for courts and tribunals to decide what is to be the appropriate procedural

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607. The standard for the prima facie case seems no different from the usual standard for the prima facie case (in the second sense) as described in Cross on Evidence: see, supra, notes 504 and 505 and accompanying passage.

framework for cases involving intentional discrimination. It might be worthwhile, in view of this indecision, to make some brief comments upon some of the issues underlying the question of the allocation of the burdens of proof in intentional discrimination cases.

3. The allocation of the burdens of proof in intentional discrimination cases: a commentary

In the preceding section it was shown that in many instances courts and tribunals have held that the complainant carries the ultimate burden of proving that the respondent's conduct was discriminatory. Indeed, with the exception of Canada where the matter appears undecided for the time being, the countries being studied seem to have settled, after some debate, upon this approach. The significance of this is two-fold: first, it means that the complainant has the duty of proving another's state of mind (608), a fact which lies essentially within the knowledge and the control of that other party; secondly, since direct evidence is very often unavailable and the discriminatory animus must be proved indirectly by way of circumstantial evidence (609), inferences play a crucial role in this area.

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608. This is especially true where there is no admission on the part of the respondent and also, to some extent, where there is no evidence of differential treatment. On this latter point see the discussion regarding the use of differential treatment as direct evidence of discrimination, supra, at pp. 120-121.

609. See discussion in Chapter 3, supra, at p. 117.

These two factors, and particularly the first one, have been at the root of criticism regarding the present allocation in the burdens of proof and, indeed, experts from both the United States (610) and the United Kingdom (611) have been calling for reform in this area. Interestingly enough, the tenor of the reform proposed by these experts on the opposite sides of the Atlantic has been subtantially the same: it has been proposed that once the complainant has made out a prima facie case of discrimination (612), the respondent should have the legal burden, and not only the secondary or evidential burden, of proving that he acted for a legitimate, non-discriminatory reason.

It is not difficult to appreciate the reasoning behind these reform proposals. From the beginning, the complainants in discrimination cases have borne an unusually heavy burden in having to prove another's state of mind. Such an allocation in the burdens of proof has been regarded as unfair, as leading to uncertainty and as causing a lack of precision in the evidence. On the other hand, having the respondent bear the burden of proving his reasons for his conduct has been regarded by these authors as a reasonable means of overcoming the drawbacks of the present system.

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610. Belton, supra note 4, at pp. 1266 ff.; Méndez, supra note 4, at p. 1160.

611. Bindman, supra note 4; Lustgarten, supra note 4, at p. 106, and Pannick, supra note 4.

612. In the United Kingdom, the heavy standard set for making out a prima facie case has also come under criticism: Pannick, ibid.

The fact that the respondent is the party to have access to this information seems to be a key justification for the proposed reform. Indeed, this argument was raised many years ago, long before contemporary critics seized upon it. In 1949, a commentary on the issue of proof in discrimination contained these remarks regarding the desirability of having the respondent prove the reasons for his conduct:

> [W]hile precision and certainty in proof of discrimination may be impossible for the complainant, proof that an action was in fact not based on an outlawed standard does not in many cases present such difficulty to the accused. This is true because the reasons for a person's actions lie primarily within his own knowledge. If there has been no discrimination, the defendant can show that there were good reasons for his actions (613).

Today, in the context of an in-depth study on the allocation of the burdens of proof, Belton has also focussed upon the accessibility criterion:

> Courts have long acknowledged the policy that the burden of proof should be placed upon the party who presumably has the peculiar means of access to the evidence necessary to prove a disputed fact. A defendant who relies upon a statutory defence or a judicially created defence is certainly in a better position to disclose the motivation guiding his decision than a plaintiff who has suffered the effect of that decision (614).

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613. Note, "An American Legal Dilemma - Proof of Discrimination", supra note 4, at p. 123.

614. Belton, supra note 4, at p. 1284.

Méndez has, for his part, also suggested that the defendant have the burden of proving the reasons for his actions based on the accessibility of information criterion and also upon policy and fairness considerations:

> They [lower federal courts] recognize that the 'national policy of eliminating discrimination' should affect the proper allocation of the persuasion burden. The Fifth Circuit in Sweeney noted that access to evidence of intent should be a factor in allocating the burden of persuasion on this issue. Though the court ultimately held that the plaintiff bore this burden, it found nothing wrong in placing this burden squarely on the party with the greater access to such evidence.
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> ...
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> Considerations of probability, policy, fairness, and access to relevant evidence all may justify allocating to one party the burden of persuasion as to the non-existence of a fact even if the adversary had the obligation to plead that fact (615).

In Canada, the argument regarding access to relevant evidence has already been used as a basis for having the respondent prove the reasons for his conduct (616). More importantly, in common law, this factor has been recognized as one of the two basic premises underlying the allocation in the burden of proof:

> "[W]here the project matter of the allegation lies particularly within the knowledge of one of the parties, that party must prove it, ... (617).

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615. Méndez, supra, note 4, at pp. 1159-1160.

616. Bremer v. Board of School Trustees, District No. 62, supra note 120, and Ruest v. Int. Bros. of Electrical Workers and Nicholls, supra note 121.

617. Sopinka and Lederman, supra note 512.

In sum, it is argued that the respondent should be the one to ultimately prove the reasons for his conduct: this is not only a matter of fairness to the complainant but, if the respondent acted for a legitimate reason, then he should have no difficulty in demonstrating this fact. At worst, in the event of such a reallocation in the parties' burdens of proof, a "more stringent test of this kind would encourage employers to take much more care than they now do to ensure that ... minority workers are recruited and promoted on merit" (618). In view of the public considerations which are at the basis of anti-discrimination laws, surely, such an impact cannot be deemed unfair.

The second important drawback to the present allocation in the burdens of proof is the fact that it leads to a heavy reliance on the inference process. Unable to prove the respondent's illegal state of mind through direct evidence, the complainant is often pressed to rely on indirect evidence and to ask the fact-finder to infer discrimination from such evidence (691).

By definition, the inference process involves a

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618. Bindman, supra note 4, at p. 1270.

619. In describing the distinction between direct and indirect evidence, Sopinka and Lederman, supra note 240, say this at p. 525:

> The former directly establishes the fact in issue whereas the latter consists of facts, which, though not comprising the very facts in issue, form a base upon which an inference may be drawn that the very fact in issue exists or does not exist.

discretionary element on the part of the fact-finder (620). Also, a great deal seems dependent upon the fact-finder's knowledge and understanding of the manner in which discrimination operates and also of the manner in which certain activities, such as rentals, businesses, etc. are normally conducted. Indeed, according to Wills "[t]he results of experience are, expressly or impliedly, assumed as the standards of credibility in all questions dependent upon moral evidence" (621).

As a result of these factors, there is reason to conclude that the inference mechanism injects a considerable amount of uncertainty (622) and unpredictability into the

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620. According to Cross on Evidence, supra note 240, at p. 10, "'Circumstantial evidence' has already been defined as a fact from which the judge or jury may infer the existence of a fact in issue". (emphasis is mine)

621. William Wills, The Principles of Circumstantial Evidence, Butterworth & Co., London, 1912, at p. 12. (Note: Wills uses the term "moral evidence" in opposition to "evidence of demonstration" to which a mathematical or scientific reasoning can be applied).
Also, S.M. Phillips, Famous Cases of Circumstantial Evidence, Estees & Lauriat, Boston, 1874, at p. ix: "... we may safely infer that the principles for our believing or disbelieving any fact, are rather governed by the manners and habits of society than by any positive rule".
To illustrate the relevance of experience to the inference process, both these authors (at p. 13 and at p. ix, respectively) tell the story of the King of Siam who believed everything that the Dutch ambassador told him regarding the circumstances and condition of Europe. However, when the latter told the King that in his country the rivers and sea were occasionally made so hard by the cold that people could walk upon them, the King totally disbelieved and rejected this story as contrary to everything which he had ever seen or heard.

622. According to Sopinka and Lederman, supra note 240, at p. 525: "It may be suggested that direct evidence is more reliable than circumstantial evidence because the only

(contd.)

decision-making process in discrimination cases (623).

Aside from the ability to draw the proper inferences, there may also be reasons for which a fact-finder might in effect wish to avoid an inference of discriminatory behaviour on the part of a respondent unless there be some direct evidence to this effect. Such reasons have been suggested by two authors, one American and the other Canadian.

In his article on burdens of proof, Belton directly addressed the difficulties associated with the inference process:

> The cases suggest that under a 'prima facie-inference-articulate' analysis, judges are reluctant to intrude into the realm of business, administrative, or other decision-making processes. Thus, courts deliberately have avoided rigorous scrutiny of the motivations that prompt these decisions; at the same time, however, they have recognized that the decision-making process itself, however, may in reality be a 'ready mechanism' for masking a discriminatory purpose.
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> The difficulties and uncertainty surrounding an intent element are functions of the inferential mode of proof, as well as of the judicial reluctance to infer intent once faced with the issue. The evidentiary burden imposed upon a plaintiff by the 'prima facie inference-articulate' approach cannot be met if the evidence of defendants' intent betrays no pattern or practice with recognized discriminatory effects. When the discrimination is perpetrated by systemic and subtle practices that are embedded in institutional and organizational structures, the unlawful intent is carefully camouflaged by

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potential source of error is the testimonial trustworthiness of the witness. Circumstantial evidence, on the other hand, suffers from not only this frailty but from the ambiguity of the inference to be drawn from it."

623. Belton, supra note 4, at p. 1284; see also supra note 43.

> numerous purportedly objective variables. As one commentator has noted, '(I)t is difficult enough to infer motive from an ambiguous act; it is harder still to infer it from a failure to act' (624).

For his part, Black discussed the fear that judges might have of perhaps unjustly stigmatizing a respondent:

> Equating human rights violations with conscious bigotry may also influence the judiciary and lead to extremely narrow interpretations of human rights legislation.
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> Recently, a judge of the British Columbia Supreme Court held that an employer is not vicariously liable for discriminatory acts of an employee. In explaining the conclusion, Taylor J. said, 'it would, surely, be the ultimate irony that a statute against discrimination should require that a person be stigmatized for bigotry, or breach of human rights, by association only' (625).

Although Black was not specifically addressing the problem of inferences in this article, his comments are nevertheless relevant to the issue at hand.

The difficulties caused by the inference process in Discrimination Law provide an added argument in support of a reallocation in the parties' burdens of proof. In view of the preceding discussion it is suggested that there are valid reasons for requiring that the respondent have the burden of proving - on a balance of probabilities - the reasons for his conduct. Such a reallocation in the burdens of proof would not only help to

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624. Belton, ibid., at pp. 1281-1282.

625. Black, supra note 4, at p. 2.

render the rules relating to the production of evidence more simple and fair than at present, but it would also make the assessment of the evidence more objective and predictable.

Conclusion: Problems of proof in intentional discrimination cases remained unabated despite the advent of the effects concept of discrimination and, because of this, courts and tribunals made a move towards resolving these problems through procedural means. Or so it seemed. Various procedural mechanisms such as the "prima facie case", "presumptions" and "shifting burdens of proof" were incorporated into Discrimination Law for the ostensible purpose of alleviating the complainant's burden of proof in intent cases. But the use of these procedural devices have not had the effect of easing the complainant's burden.

In the United States the courts are willing to relieve plaintiffs of the burden of proving discrimination in their case in chief, but this respite is only temporary as the plaintiffs still carry the ultimate burden of proving that the defendant acted for a discriminatory reason. In the United Kingdom, the discriminatory act is part of their prima facie case (626).

In Canada, the matter seems to be undecided for the time being but, although it would be rash to presume that our courts

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626. If there is an undertaking to prove discrimination by way of circumstantial evidence, the respondent has the duty to explain his conduct even though the complainant has not proved the discriminatory act in his case-in-chief. But here also the complainant always carries the legal burden of proving the discriminatory act: the Oxford case, supra note 92.

and tribunals might easily accept to relieve the complainant of the burden of proving that the respondent acted for a discriminatory reason (627), there are strong reasons which favour an approach whereby the respondent, rather than the complainant, would have the burden of proving - on a balance of probabilities - the reason for the refusal. First, as a matter of fairness, it would be more appropriate for the respondent to carry the burden or proving a fact which is peculiarly within his knowledge. Secondly, by having the respondent carry the burden of proving the reasons for his refusal, courts and tribunals would need to resort to the inference process less frequently, thereby reducing the incidence of unpredictable and inconsistent decisions.

In order to bring about such a reallocation in the burdens of proof, common law jurisdictions could adopt one of two approaches. The first would be to resort to the principles of the common law which place the onus of proof on the party who has peculiar knowledge of a fact. Indeed, there exists strong precedent for such an approach in the area of wrongful dismissals; it was upon such precedent that the Board in Ruest decided to reverse the burden of proof. In the alternative, the reform could be achieved by amending existing legislation to include a rebuttable presumption of law (628).

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627. As was shown by the decision in Base-Fort Patrol Ltd. v. Alberta Human Rights Commissions, supra note 590.

628. The elements of rebuttable presumptions of law are discussed in Sopinka and Lederman, supra note 239, at pp. 376-377.

On the other hand, presumptions of fact and the Res Ipsa Loquitur doctrine would appear to be inadequate to deal with the problems at hand. The former has the disadvantage of being discretionary, much like the inference process; moreover, presumptions of fact do not have the effect of reversing the burden of proof: the complainant retains the ultimate burden of proving each element of his case. As for the Res Ipsa Loquitur doctrine it presupposes proof of negligence and, as such, it sets a standard which a complainant in an intentional discrimination case could usually not meet, particularly if one considers the scope of the prima facie case under McDonnell Douglas or under Ruest. In addition, this doctrine also fails to shift any part of the legal burden to the defendant.

In Quebec, the situation is slightly different. In order to achieve a reallocation in the burden of proof, the following options may be considered: presumptions of fact, the Res Ipsa Loquitur doctrine or rebuttable presumptions of law. Here again, the first two options seem inappropriate means for resolving difficulties of proof in intentional discrimination cases. Although, under Quebec law, presumptions of fact seem to have the effect of shifting the burden of proof to the defendant, the standard needed to create the presumption in the first place is extremely high (629). Moreover, judges have a discretion in assessing the probative value of a presumption. As for the Res

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629. The facts must be "serious, precise and concordant": see discussion, supra, at p. 219-220.

Ipsa Loquitur doctrine, it is regarded as an application of the presumption of fact concept, and for this reason it is also an unsuitable remedy for the problem at hand. It is, therefore, safe to conclude that under Quebec law the only means of achieving an effective reversal in the burden of proof in intent cases is through legislative change which would create a rebuttable presumption of law (630).

In closing, it is suggested that where intentional discrimination cases are concerned a reallocation in the parties' burdens of proof is indeed necessary for the purpose of improving the effectiveness of anti-discrimination legislation in Canada.

B. Discriminatory Effect

The question of the allocation of the burdens of proof in effects cases does not seem to have raised great controversy and, therefore, the discussion on this topic will be short.

At the outset, the complainant carries the burden of proving, prima facie, the existence of a discriminatory impact resulting from an apparently neutral business policy and, once

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630. An example for such a rebuttable presumption of law can be found in the Quebec Labour Code, R.S.Q. 1977, c. C-27, regarding the employer's burden in cases involving dismissal for trade union activities. Thus, s. 16 of the Act reads as follows:

> Art. 16. If it is shown to the satisfaction of the Board that the employee exercised a right accorded to him by this code, there shall be a presumption in his favour that he was dismissed, suspended or transferred because he exercised such right, and the burden of proof that the employee was dismissed, suspended or transferred for another good and sufficient reason shall be upon the employer.

the complainant has met this burden, the respondent has the burden of proving, on a balance of probabilities, that the policy is justified by business necessity. This allocation in the burdens of proof has been recognized in the United States (631) and in the United Kingdom (632).

In Canada, tribunals which have recognized the effects concept have also decided upon a similar allocation in the burdens of proof: the complainant carries the burden of making out a prima facie case to show the discriminatory impact of the policy or practice after which the respondent carries the burden of proving that the policy is reasonably necessary (633).

Black made these remarks concerning this allocation in the burdens of proof:

> The 'business necessity' defence could have presented a substantial obstacle to the complainants even if intent no longer had to be proved. Establishing that a policy did not constitute a business necessity would have required a complainant to prove a negative proposition, which is always difficult, and would often have also required the complainant to present evidence on technical matters known to few people outside of the business carried on by the respondent. Fortunately, the cases have generally held that once the basic elements of the case

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631. See, supra, note 451.

632. See, supra, note 452.

633. Singh v. Security and Investigation Services Ltd., supra note 5, at p. 33; Colfer v. Ottawa Board of Commissioners of Police, supra note 5, at p. 20, and Bone v. Hamilton Tiger Cats Football Club, supra note 5, at p. 13; Bhinder v. Canadian National Railway Company, supra note 5, at pp. 561-562 and 580.

have been proved by the complainant, the onus shifts to the respondent on the issue of business necessity (634).

Lastly, s. 10(a) of the new Ontario Human Rights Code, (634a), may also be interpreted as placing the onus of proving the business necessity defence upon the respondent (635).

CONCLUSION

This study has shown that the enforcement of anti-discrimination legislation in Canada has been plagued by difficulties resulting from the duty to prove intent. Such difficulties of proof have not been specific to Canada and, on the contrary, they have long troubled experts in the United States and the United Kingdom as well. These common difficulties have made a comparative study of discrimination law in Canada, the United States and the United Kingdom a worthwhile undertaking, shedding added light on the appropriate remedies to these problems of proof.

In attempting to solve these very problems it appeared necessary to begin by examining the ways in which discrimination manifests itself. Traditional forms of discrimination are well-known to our society and they include different acts of bigotry, prejudice, stereotyping, and paternalism. However, it now appears evident that these are not the only the ways in which discrimination expresses itself. Socio-economic studies have

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634. Supra note 4, at p. 4.

634a. S.O. 1981, c. 53.

635. See, supra, at p. 191.

convinced observers that there exists yet another form of discrimination, one which is woven into the fabrics of which our many structures and institutions have been formed. Having thus become an integral part of these systems, the discrimination thrives through them and perpetuates itself, irrespective of intent. This is what is known as institutional or systemic discrimination.

It is possible, therefore, to identify two main streams of discriminatory action: one is carried out by individuals, or groups of individuals, who can be said to consciously cause a disadvantage to a protected group; the other involves institutionalized policies and practices, which are neutral on their face and devoid of an intent to discriminate but which nevertheless operate in such a manner as to exclude protected group members, thus causing a discriminatory effect.

An understanding of the manner in which discrimination manifests itself brings us a step closer to resolving the problems associated with proof of discrimination. Thus, since it has become quite clear that discrimination can exist irrespective of intent, the effective enforcement of anti-discrimination legislation depends upon the recognition of an extended definition of discrimination from which the intent requirement has been eliminated. Failing this, it would seem that victims of systemic or institutional discrimination might be condemned to proving the unprovable.

A decision to suppress the intent requirement would not, however, solve all problems of proof in discrimination law. This

solution is necessary to deal with systemic discrimination but it does not grapple with the difficulties of proof involved in the other form of discrimination discussed above, that in which individuals are thought to have consciously caused a disadvantage to a protected group.

This direct form of discrimination necessarily involves proof of the respondent's state of mind, that is, proof of the true reasons for which the complainant has suffered a refusal in employment, housing, etc. The requirement that the complainant prove the respondent's state of mind is not only unfair but it is also unrealistic and, consequently, a serious obstacle to the effective enforcement of anti-discrimination legislation. Moreover, direct evidence of another's state of mind is rarely available and, as a result, the fact-finder must regularly turn to the inference process in order to determine whether or not discrimination has occurred. In my view, a heavy reliance on inferences can only result in uncertain and unpredictable decisions in this area. Consequently, fairness and policy considerations argue in favour of a reallocation in the parties' burdens of proof in matters involving direct discrimination. Under this new allocation of the burdens of proof, the complainant would be required to make out a prima facie case of discrimination according to the test established in McDonnell Douglas or Ruest, which relieves complainants of the duty to prove intent or the discriminatory act itself. Once the complainant has met this burden, the respondent would be called upon to prove, on a balance of probabilities, the real reason for the refusal.

As for the means by which to achieve this reallocation in the parties' burden of proof, common law jurisdictions and Quebec must look at their receptive rules of evidence before deciding upon the appropriate mechanism to follow.

In sum, an attempt to solve the difficulties of proof associated with discrimination cases should take into account the two forms of discrimination as they are practised in society. This dual analysis is indeed useful in the overall approach to proving discrimination as one examines the elements of proof, the means of proof, the relevant defences, and the burdens of proof. Although it is true that, in practice, the two forms of discrimination are sometimes enmeshed and that, at times, it may be difficult to draw a clear distinction between the two (635), this study has nevertheless confirmed the need to maintain a separate approach when dealing with direct or intentional forms of discrimination, on the one hand, and systemic forms of discrimination, on the other. It is hoped that a dual analysis of this sort can provide some added insight into the issues related to proof of discrimination in Canada.

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635. Méndez, supra note 4, at p. 1129: "since discriminatory intent may be inferred from disparate impact ... the distinction between disparate 'treatment' and 'effect' cases is not as clear as it might seem."

PART II

CHAPTER I: THE RULES OF EVIDENCE APPLICABLE TO ADMINISTRATIVE TRIBUNALS

In enacting human rights codes (1), legislators had the choice (2) either of allowing individuals to take civil actions

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1. Alta.: Alberta Human Rights Act, S.A. 1966, c. 39, revised to become the Alberta Individual Rights Protection Act, S.A. 1972, c. 2; B.C.: British Columbia Human Rights Act, S.B.C. 1969, c. 10, revised into the British Columbia Human Rights Code, S.B.C. 1973, (second session), c. 119; Man.: the Manitoba Human Rights Act, S.M. 1970, c. 104, revised as S.M. 1974, c. 65; N.B.: the New Brunswick Human Rights Act, S.N.B. 1967 c. 13, revised as S.N.B. 1971, C.B., as amended by S.N.B. 1973, c. 45; Nfld.: Newfoundland Human Rights Code, S. Nfld. 1969, No. 75 as amended by S. Nfld. 1974, No. 114; N.S.: the Nova Scotia Human Rights Act, S.N.S. 1963, c. 5, revised and re-enacted as S.N.S. 1969, c. 11; Ont.: the Ontario Human Rights Code, S.O. 1961-62, c. 93, revised and re-enacted as S.O. 1972, c. 7, and recently revised and re-enacted as S.O. 1981, c. 53, (proclaimed in force on June 15, 1982); P.E.I.: the Prince Edward Island Human Rights Act, S.P.E.I. 1968, c. 24, as amended by S.P.E.I. 1975, c. 72; Que.: the Quebec Charter of Human Rights and Freedoms, S.Q. 1975, c. 6, revised as R.S.Q. 1977, c. C-12 and recently amended by Bill 86 assented to by the National Assembly December 16, 1982 and proclaimed effective October 1, 1983; Sask.: the Saskatchewan Human Rights Commission Act, S.S. 1972, c. 108, and the Saskatchewan Human Rights Code, R.S.S. 1978, c. S-24.1 (1979), and, Fed.: the Canadian Human Rights Act, S.C. 1976-77, c. 33; N.W.T.: the Northwest Tewrritories Fair Practices Ordinance, R.O.N.W.T. 1974, c. F-2 as amended; Yukon: the Yukon Territory Fair Practices Ordinance, O. Yukon Terr., 1963 (2nd), c. 3, s. 1.

   For a historical study of anti-discrimination legislation in Canada, see Walter Surma Tarnopolsky, Discrimination and the Law in Canada, Richard De Boo Limited, Toronto, 1982, at pp. 25 ff.

2. Earlier anti-discrimination statutes adopted a quasi-criminal approach for the enforcement of the legislation, but this means of dealing with discrimination has become less popular in recent years even if some statutes still include penal provisions as a possible sanction for discriminatory acts. For comments on the topic, see Walter S. Tarnopolsky, "The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada" (1968), 46 Can. Bar Rev. 565, at pp. 567 ff. and 585 ff.

based on discrimination before the ordinary courts, or of creating an administrative machinery endowed with judicial powers to hold hearings, to compel the attendance of witnesses, to order the production of documents and to make enforceable orders (3). In most instances the legislators decided that the enforcement of anti-discrimination legislation was to be placed primarily in the hands of administrative boards (4). There is one exception to

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3. The Supreme Court of Canada has held that the administrative enforcement procedures established by the Ontario Human Rights Code foreclose any civil action based directly on a breach of the Code: The Board of Governors of the Seneca College of Applied Arts and Technology v. Pushpa Bhaduria, 124 D.L.R. (3d) 193; (1981), 2 C.H.R.R. D/468.

4. For the appointment of boards see discussion, infra, at p. 302. Regarding the power to issue orders see the following legislative provisions: Alta.: the Alberta Individual's Protection Act, R.S.A. 1980, c. I-2, s. 22 (Board); B.C.: the British Columbia Human Rights Code, R.S.B.C. 1979, s. 17(2) (Board); Man.: the Manitoba Human Rights Act, C.C.S.M.: H 175, s. 28(2) (Board); N.B.: the New Brunswick Human Rights Act, R.S.N.B. 1973, c. H-11, s. 20(4) (Board has power to make recommendations only), s. 22 (the Commission has the power to issue orders); Nfld.: the Newfoundland Human Rights Code, R.S. Nfld. 1970, c. 262 as amended by S. Nfld. 1974, No. 114, s. 18 (the Commission has the power to recommend), and s. 21(1) (the Minister of Labour has the power to issue orders); N.S.: the Nova Scotia Human Rights Act, S.N.S., c. 11, s. 26A(8) (Board); Ont.: the Ontario Human Rights Code, S.O. 1981, c. 53, s. 40 (Board); P.E.I.: the Prince Edward Island Human Rights Act, R.S.P.e.I., c. H-12.2, ss. 25(3) and 26(3) (the Board and the Commission may make recommendations), s. 27(1) (the Minister charged with the administration of the Act may issue an order)); Sask.: the Saskatchewan Human Rights Code, R.S.S. 1978, c. S-24.1 (1979), ss. 31(7)(8)(9) (Board); Can.: the Canadian Human Rights Act, S.C. 1976-77, c. 33, s. 41(2) (Tribunal); in the N.W.T. and the Yukon the Commissioner may issue an order upon recommendation of the officer appointed to investigate a complaint: s. 7(6) and s. 6(6), respectively.

For the enforcement of orders see: Alta., s. 22.2; B.C., s. 17(4); Man., ss. 29(1) and 32; N.B., ss. 21(2) and 23; Nfld., ss. 21(1) and 23(1); N.S., s. 28 and 29; Ont., the Statutory Powers Procedure Act, R.S.O. 1980, c. 484, s. 19; P.E.I., ss. 27(2) and 28; Sask., s. 33; Can., s. 43(1)(2); N.W.T., ss. 7(7) and 9(1); Yukon, ss. 7(4) and 8(1).

this pattern, in that Quebec preferred to rely on the ordinary courts for the enforcement of the Quebec Charter of Human Rights and Freedoms (5).

The following discussion will address issues related to the rules of evidence which apply to human rights boards which are empowered by legislation to exercise judicial or quasi-judicial powers. These rules can be summed up as follows: on the one hand, these administrative tribunals enjoy the advantage of being flexible in their proceedings because they are not bound by the ordinary rules of evidence, and they are considered masters of their own procedures; on the other hand, they have the duty to follow the rules of natural justice and also to base their decisions on evidence which has cogency at law. Each of these powers and obligations will now be examined under separate headings.

A. "Not Bound by the Strict Rules of Evidence"

There is a well-known rule in Adminstrative Law according to which administrative tribunals are not bound by the strict rules of evidence applied by the courts. The rule has in fact become so widely recognized that it is now taken for granted, so

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5. R.S.Q. 1977, c. C-12, s. 82 (the commission may make recommendations), and s. 83 (when there is non-compliance with the recommendations, the Commission may apply to the Courts to obtain an injunction and/or damages against the person in default).
The court's role is not merely to homologate but to decide on the evidence and arguments presented to it: Les Ateliers d'Ingéniérie Dominion Ltée v. La Commission des droits de la personne du Québec et al., [1978] S.C. 370, at p. 374. La Commission des droits de la personne du Québec, La Preuve, Cahier 5, 1982, at p. 13.

much so that one court was content to remark that it was "common knowledge" that a statutory tribunal was "not held to the observance of the rules of evidence applied in courts" (6). It is reasonable to assume that this principle is intimately related to the purpose for which administrative tribunals have been created, which is to provide for a more accessible system of justice (7), one that is less formal, more expedient and ultimately less costly than ordinary court proceedings (8). The rule also serves to facilitate the task of administrative tribunals in their fact-finding mission. It appears to have been with this objective in

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6. Seaside Real Estate Ltd. v. Halifax Dartmouth Real Estate Board (1964), 44 D.L.R. (2d) 248 (N.S.C.A.). According to Kavanagh, it is a "common law rule that a tribunal is not bound by the legal rules of evidence": John A. Kavanagh, A Guide to Judicial Review, The Carswell Company Limited, Toronto, 1978, at p. 18.

7. Re Whitelaw and Board of Police Commissioners of the City of Vancouver (1973), 35 D.L.R. (3d) 466 (B.C.C.A.), aff'g (1973), 29 D.L.R. (3d) 781, in which Justice Gould, at p. 784, remarked as follows:

> From that quotation it is clear that the strict rules of evidence are not intended to apply in a hearing before the Chief Constable. The transcript of this particular hearing is 169 pages in length. In a hearing conducted exclusively by laymen one cannot expect, rhetorically speaking, 10 pages of transcript to be free of technical evidentiary defects in the sense that a Court of law applies the rules of evidence. I have perused the transcript and, other than technical defects, of which there are several, find no breach of natural justice in the procedure. It was fairly conducted and there was ample evidence to support the verdict of guilty on each of the four charges.

8. René Dussault, Traité de Droit Administratif Canadien et Québécois, Vols. 1 and 2, Les Presses de l'Université Laval, Québec, 1974, at pp. 682-683: "... cette justice administrative répond à des besoins d'ordre concret et pratique: elle est expéditive, d'un fonctionnement souple et peu coûteux ...."

mind that the McRuer Report on the Inquiry into Civil Rights (1968) recommended that "a tribunal should have a discretion to ascertain relevant facts by such standards of proof commonly relied on by reasonably prudent men in the conduct of their own affairs", and that "[t]he nature of proof should go to the weight of the evidence not to the admissibility" (9).

Whatever its origin or its purpose, there can be no doubt that human rights boards are also exempt from the duty to apply the ordinary rules of evidence, especially those relating to the admissibility of evidence (10). One need not search extensively to find authority for this proposition: the legislators have expressed the rule in terms that are clear and consistent with the usual practice in this area(11). As an indication of the words used to achieve this purpose, some samples of the provisions which incorporate this principle into the various human rights acts have

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9. Royal Commission Inquiry into Civil Rights, Vol. 1, Queen's Printer, Toronto, 1968, at p. 216. "The purpose of this recommendation", it continues, "is to permit wider latitude in the admission of evidence than is the case in ordinary court procedure. The strict hearsay rules of evidence as applied by the courts have been under severe criticism by legal scholars in Canada and other countries in recent years. Obviously strict adherence to the exclusionary hearsay rules of evidence would unduly restrict and hamper the functions of many tribunals".

10. There is an exception to this rule in that priviledged communications are not admissible. For a discussion on this topic see discussion, infra, at pp. 393 ff. See also Tarnopolsky, supra note 1, at pp. 467-468.

11. Alta., Adminstrative Procedures Act, R.S.A. 1980, c. A-2, s. 9; B.C., s. 16(5) and Reg. 151/75, s. 6; Man., s. 25(2); N.B., the Industrial Relations Act, R.S.N.B. 1973, c. I-4, s. 67(3); Nfld., s. 16A(5); N.S., the Public Inquiries Act, (contd.)

been chosen. Thus, s. 40(3) (c) of the Canadian Act reads as follows:

> The Tribunal may ... receive and accept such evidence and other information, whether on oath or by affidavit or otherwise, as [it] sees fit, whether or not such evidence or information is or would be admissible in a court of law.

In Manitoba, s. 25(2) of the Act states that:

> The Board of adjudication may receive and accept, on oath, affidavit, or otherwise, such evidence or information as it, in its discretion, considers necessary and appropriate, whether or not such evidence or information would be admissible in a court of law.

In Newfoundland, s. 16A(5) of the Act provides the following:

> "Every commission ... may receive and accept such evidence and information on oath, affidavit or otherwise, as in its discretion it considers fit."

The Saskatchewan Code, at s. 31 (1), states that:

> "... a board of inquiry ... may receive and accept any evidence and information on oath, affidavit or otherwise that in its discretion it considers fit and proper, whether admissible as evidence in a court of law or not ..."

Whereas, in Ontario, s. 15(1) of the Statutory Powers Procedure Act provides that:

> "... a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court, any ... [oral testimony and document or other thing], relevant to the subject matter of the proceedings and may act on such evidence ..."

R.S.N.S. 1967, c. 250, s. 3 (here the terms are perhaps less clear than elsewhere); Ont., the Statutory Powers Procedure Act, R.S.O. 1980, c. 484, s. 15(1); Sask., s. 31(1) and Reg. 216/79, s. 19(2); and Can., s. 40(3) (c).

Regardless of the terminology used, these provisions have the effect of freeing human rights tribunals from the constraints imposed by the ordinary laws of evidence, some of which, it may be noted, have been the subject of mounting criticism for their anachronistic requirements (12). The tribunals are thus given an advantage which, in theory, should facilitate their access to the relevant evidence and reduce the obstacles in the truth-finding process.

Now to take a brief look at another principle which characterizes the activities of administrative tribunals. This principle, succinctly stated, is that such tribunals are masters of their own procedures.

B. Master of Its Own Procedures

It is another well-known principle that administrative tribunals have the authority to determine their own procedures unless, of course, their conduct is specifically dictated by statute. Human rights statutes are not quite as explicit on this point as they are regarding the admissibility of evidence and, in fact, only a few specifically allude to it (13). The fact that certain governing statutes are silent on the matter does not, however, reduce the impact of the rule. It is an integral aspect

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12. This criticism applies particularly to the Hearsay Rules: John Sopinka and Sidney N. Lederman, The Law of Evidence in Civil Cases, Butterworths, Toronto, 1974, at p. 9; McRuer Report, supra, note 9.

13. B.C., Reg. 151/75, ss. 15, 18(1), 19; Nfld., s. 16A(5); Sask., s. 31(1) and Reg. 216/79, s. 19(3).

of any administrative tribunal's functions that it have control over its own procedures; this is an implicit power which belongs to all tribunals, and the courts have not hesitated to recognize its existence. In a leading decision on this point, Mr. Justice Pigeon of the Supreme Court of Canada expressed the following opinion:

> Tout en maintenant le principe que les règles fondamentales de justice doivent êtres respectées, il faut se garder d'imposer un code de procédure à un organisme que la loi a voulu rendre maître de sa procédure (14).

The Ontario Divisional Court has approved the principle specifically in relation to a human rights board of inquiry established under the Ontario Code (15). Justice Labrosse, speaking for the Court, held that the Board had the discretion to adjourn a hearing in order to provide one of the parties with the opportunity to examine documents that had just come to its attention. Confirming that, in this respect, the Board's decision was not subject to review, Labrosse, J., said this:

> [I]n respect of the adjournment granted to counsel for the board, to permit him to examine the records this was purely a matter of discretion. The Board has exclusive jurisdiction over the conduct of its procedure and the exercise of its discretion to grant the adjournment is not reviewable by this court, provided that the board has not violated recognized principles of fairness or conducted itself in such a way as to amount to a refusal of jurisdiction, which is not the case here (16).

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14. Komo Construction Inc. et al. v. Commission des Relations de travail du Quebec, [1968] S.C.R. 172, at p. 176.

15. Re Metropolitain Toronto Board of Commissioners of Police et al. v. Ontario Human Rights Commission et al. (1980), 27 O.R. (2d) 48 (Ont. Div. Ct.).

16. Ibid., at p. 53.

Moreover, this discretionary power is not confined to adjournments; it is a power that enables boards to deal with any one of a multitude of procedural questions which may arise at the hearing, and to dispose of such issues in a manner which may take into account the interests of the parties and also concerns regarding the sound and efficient administration of justice. Thus, human rights boards have relied upon this implicit authority to confer intervenor status upon the Commission in the absence of express statutory language (17), to split a hearing between merits and remedy (18), and to allow the joinder of actions and to hear them together (19).

Certain human rights statutes presribe procedures that boards may be required to follow before, during and after a hearing (20). In these instances, the boards must follow the procedures that the law establishes and, indeed, a board's failure

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17. Doherty and Meehan v. Lodger's International Ltd. (1982), 3 C.H.R.R. D/628 (N.B.).

18. Hyman v. Southam Murray Printing et al. (1982), 3 C.H.R.R. D/680 (Ont.).

19. Hyman v. Southam Murray Printing and International Brotherhood of Teamsters, local 419 (1982), 3 C.H.R.R. D/617 (Ont.). See also Commission des droits de la personne du Québec v. La societé d'Énergie de la Baie James et al. (1982), 3 C.H.R.R. D/657 (Que. C.A.): an investigator who has the powers of a Public Enquiry Commissioner is not bound by any specific procedures in recording testimony and he has the power to tape such testimony, if he so decides.

20. See discussion on procedure and evidence by Tarnopolsky, supra note 1, at pp. 464 ff. See also discussion, infra, for a description of board procedures, at pp. 304 ff.

to do so may result in review proceedings against it (21).

In closing, it should be emphasized that the board's discretion with respect to procedure is one which ought to be exercised in accordance with the rules of natural justice (22).

C. The Rules of Natural Justice

The overriding principle which determines the activities of administrative tribunals is that they must conduct their hearings in accordance with the the fundamental rules of natural justice. Thus, the void left by the exclusion of the ordinary rules of evidence and of a fixed code of procedure has been filled

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21. In such instances, debates are likely to arise over the "mandatory" or the "directory" nature of the statutory provision concerning procedure, and also as to whether the procedural rules are exhaustive or to be supplemented by the common law; David J. Mullan, Administrative Law, The Carswell Company Ltd., Toronto, 1979, at p. 8-127. But, it should be noted that most human rights acts state that proceedings under them shall not be deemed invalid by reason of any defect in form or any technical irregularity: Alta., s. 26(2); B.C., Reg. 151/75, ss. 13 and 19; Man., s. 33(6); Nfld., s. 27; N.S., s. 30(2); P.E.I., s. 29(1); Sask., Reg. 216/79, s. 47.

22. Kavanagh, supra note 6, at p. 18: "A tribunal also normally has some discretion as to the conduct of its proceedings but not in breach of natural justice." Also, R.F. Reid and H. David, Administrative Law and Practice, 2nd. ed.; Butterworths, Toronto, 1978, at p. 96: "Thus, it may be a failure to act judicially to hear one side in the absence of other where a statute required a reasonable opportunity to be heard, notwithstanding that the tribunal had freedom to determine its own procedure." And lastly, according to Mullan, ibid., at p. 3-127: "While reluctant to interfere with the exercise of such a discretionary power, the courts are nevertheless prepared to intervene where the procedure as fixed does not afford interested parties a fair hearing."

by a new set of rules governed by the concept of fairness (23). Natural justice has been criticized as being ill-defined and "so vague as to be practically meaningless" (24), but the weakness of this view is that it is "tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist." (25) In the twenty years since Lord Reid made this remark, the meaning of natural justice has become clearer still, for as courts have exercised their superintending powers over administrative tribunals, they have also given shape to this concept. Indeed, these decisions have created a code of conduct - if not a code of procedure (26)- which is binding on administrative tribunals; although these tribunals

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23. Patrice Garant, "La preuve devant les tribunaux administratifs et quasi-judiciaires" (1980), 21 C. de D. 825, at p. 828. Also Kavahagh, supra note 6 at p. 18: "With the discretion as to the admission of evidence and the conduct of its proceedings must be reconciled the right of a party to a fair opportunity of speaking to and contradicting information prejudicial to his case."

24. Ridge v. Baldwin, [1964] A.C. 40, 64-65, per Lord Reid. His Lordship went on to compare the concept of natural justice with that of negligence: "The idea of negligence is equally insusceptible of exact definition, but what a reasonable man would regard as fair procedure in particular circumstances and what he would regard as negligence in particular circumstances are equally capable of serving as tests in law, and natural justice as it has been interpreted in the courts is much more definite than that."

25. Ibid.

26. Gilles Pépin and Yves Ouellette, Principes de Contentieux administratifs, les éditions Yvon Blias Inc., Montreal, 1979, at p. 186: "En somme, par le biais de ces règles [de justice naturelle], les juges ont élaboré une sorte de code jurisprudentiel de procédure administrative dont la violation peut conduire à l'invalidité (ultra vires) d'une décision."

are not to conduct their proceedings as if they were trials (27), they must respect the standards that have thus been established.

Before examining the contents of the rules of natural justice it may be worthwhile to specify that human rights boards are indeed subject to these rules (28). Moreover, the close connection between human rights legislation and the area of civil liberties makes it seem especially appropriate that human rights tribunals should be required to respect the rules of natural justice. On this point, Tarnopolsky has stated that "... since Human Rights legislation is a part of the whole field of civil liberties, it is important that other aspects of civil liberties be observed while furthering the purposes of human rights" (29).

The purpose of the natural justice rules is to ensure that these two principles are adhered to:

1) the parties are to be given the right to be heard (audi alteram partem), and

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27. Lord Loreburn's dicta in Board of Education v. Rice, [1911] A.C. 179 at p. 182, still hold true today:" ... they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial ..."

28. Tarnopolsky, supra note 1, at pp. 454 ff. Furthermore, it is a well-established fact that human rights boards are subject to review by the courts if they do not respect their jurisdiction and other duties: Re McGavin Toastmaster Ltd et al. v. Powlowski et al. (1973), 37 D.L.R. (3d) 100 (Man. C.A.), and Bell v. The Ontario Human Rights Commissions, [1971] S.C.R. 756.

29. Tarnopolsky, supra note 2, at p. 582. Regarding the desired standard of natural justice for such boards to follow, see further at pp. 580-581.

2) the adjudicator must be disinterested in the proceedings and decide without bias (nemo judex in causa sua) (30).

Since the purpose of this study is to examine evidentiary issues, the first principle seems more relevant than the issue related to bias, and so the discussion will be restricted to the former.

The audi alteram partem rule can best be described by the proposition that no person can " ... incur the loss of liberty or property for an offence by a judicial proceeding until he has had a fair opportunity of answering the case against him" (31).

Closely related to moral principles, the rule has an ancestry which is as varied as it is impressive, for the principle "[t]hat no man is to be judged unheard was a precept known to the Greeks, inscribed in ancient times upon images in places where justice was administered, proclaimed in Seneca's Medea, enshrined in the scriptures, mentioned by St. Augustine, embodied in Germanic, as well as African proverbs, ascribed in the Year Books of the law of nature, asserted by Coke to be a principle of divine justice, and traced by an eighteenth century judge to the events

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30. S.A. de Smith, Judicial Review of Administrative Action, 4th ed., Stevens & Sons Limited, London, 1980, at p. 156; Dussault, supra note 8, at p. 1340; Mullan, supra note 21, at p. 3-110; Pépin and Ouellette, supra note 26, at p. 186, and H.W.R. Wade, Administrative Law, 3rd ed., Clarendon Press, Oxford, 1971, at p. 175.

31. Hawkins, Pleas of the Crown, i, 420, as quoted by de Smith, ibid., at p. 158.

in the garden of Eden" (32).

Recognizing the fundamental character of the audi alteram partem rule, most legislatures have expressly incorporated it into their respective human rights statutes. Although the terminology may vary slightly, one can find specific mention of the right to be heard in the legislation of Alberta (33), British Columbia (34), Manitoba (35), New Brunswick (36), Newfoundland (37), Nova scotia (38), Ontario (39), Prince Edward Island (40), Saskachewan (41), the Canadian Act (42) and also of the Yukon (43) and of the

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32. De Smith, ibid., at pp. 157-158.

33. The Administrative Procedures Act, R.S.A. 1980, c. A-2, s. 4.

34. S. 16 (4) ("... opportunity to be represented by counsel, to present relevant evidence, to cross-examine witnesses and to make submissions.")

35. S. 25 (5) ("... full opportunity to be represented by counsel, to present evidence, and to make submissions.")

36. S.20 (4) ("... full opportunity to present evidence and to make submissions...")

37. S. 18 (1) ("... give full opportunity to all parties to present evidence and to make representations.")

38. S. 26A(3) ("... full opportunity to all parties to present evidence and to make representations.")

39. The Statutory Powers and Procedure Act, R.S.O. 1980, c. 484, s. 10.

40. S. 25(1) and the Public Inquiries Act, R.S.P.E.I., c. P-30, s. 7.

41. S. 31(5).

42. S. 40(1).

43. S. 6(2).

Northwest Territories (44).

Complications set in when one attempts to understand the exact contents of the rule, or to determine which duties result from it as far as a particular tribunal is concerned. Mullan suggests that the minimum content of the rule entails the obligation to give sufficient notice of the hearing and of the scope of hearing "as will allow persons entitled to the benefit of the rule to take full advantage of their right to be heard" (45). Also, "... it involve(s) a duty to give persons affected such knowledge of the arguments and evidence presented against their interest as will make their participation in the decision-making process meaningful." (46)

Human rights statutes are of course bound to the minimum content of the rule, but it should be noted that in most, if not all cases, they also contain a statutory duty to give notice (47). Furthermore, in practice, the hearings of most human rights tribunals seem to comply with other duties which may not be part of the minimum content of the audi alteram partem principle but which are nevertheless essential components of it: in particular, the parties have a right to public hearings, the right to be

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44. S. 7(2).

45. Mullan, supra note 21, at p. 9-111.

46. Ibid.

47. See section on notice, infra, at pp. 313 ff.

represented by counsel, and the right to cross-examine witnesses (48).

The practical implications of the audi alteram partem rule appear to be endless as any study of the area reveals (49). The following cases have been chosen to illustrate the ways in which the rule may affect a hearing.

A board must ensure that all parties are given an equal opportunity to be heard (50). Mandamus may issue against a board of inquiry which refuses to summon witnesses requested by a party (51) unless, of course, the evidence that is sought is completely irrelevant (52). It has been held that there is a breach of natural justice where a Board refuses to hear evidence claiming,

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48. Regarding each of these topics, see the relevant sections discussed, infra, at pp. 320-321, pp. 326-327, and pp. 358-361, respectively.

49. See for instance, Mullan, ibid,. at pp. 3-128, and Reid, supra note 22, at pp. 70ff.

50. A.G. Manitoba et al. v. National Energy Board et al., [1974] 2 F.C. 502; Scott et al. v. Rent Review Commission (1977), 23 N.S.R. (2d) 504 (C.A.). But also, "it may be permissible to differentiate in the content of procedure as between persons of different classes, as for instance between parties and persons granted intervenor status at the discretion of the tribunal": Mullan, ibid., at p. 3-125, note 47: S.I.U. v. C.N.R. and Canadian Pacific Ltd. v. C.N.R., [1976] 2 F.C. 369 (C.A.).

51. Furniture and Bedding Workers Union Local 33 et al. v. Board of Industrial Relations et al. (1969), 69 W.W.R. 266.

52. Re Koressis (1968), 63 W.W.R. 566; see also Mullan, supra note 21, at p. 3-124.

incorrectly, that it lacks jurisdiction to hear it (53). It may also be a denial of natural justice to refuse to adjourn in order to allow a party to call rebuttal evidence (54) or to refuse to call an adjournment when one of the parties is taken by surprise (55). But there is no denial of the right to be heard where numerous adjournments were granted over the extended period of one year (56). Nor is a party entitled to dictate the terms under which he is prepared to appear before the Board (57).

In order to ensure that parties have a full opportunity to answer the case against them, it has been held that a board of inquiry has a duty to disclose the contents of reports that have come to its attention outside the hearing (58). It may also be a

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53. Toronto Newspaper Guild v. Globe Printing, [1953] 2 S.C.R. 18, [1953] 3 D.L.R. 561; but see Reid, supra note 22, at p. 77 and in particular note 185: "Where there is no allegation of a refusal to exercise jurisdiction, a discretion over the admission of evidence will not lightly be interfered with: Parton v. R (1968), 62 W.W.R. 188 (Sask.)".

54. Saskatchewan Teachers' Federation v. De Moissac (1973), 38 D.L.R. (3d) 296 (Sask. C.A.).

55. Re Gasparetto et al. and Cité of Sault Ste-Marie, [1973] 2 O.R. 847 (D.C.); Re Mady and Royal College of Dental Surgeons (1974), 5 O.R. (2d) 414 (D.C.); see also Mullan, supra note 21, at p. 3-114.

56. Re Iwasyk v. Saskachewan Human Rights Commission (1978), 87 D.L.R. (3d) 289 (Sask. C.A.); see also Pierre v. Minister of Manpower and Immigration, [1978] 2 F.C. 849 (C.A.).

57. Crux v. Leoville Hospital Board, [1973] 3 W.W.R. 568, 35 D.L.R. (3d) 619 (Sask. C.A.); see Kavanagh, supra note 6, at p. 18.

58. Magnasonic Canada Limited v. Anti-Dumping Tribunal [1972] F.C. 1239 (C.A.); Sarco Canada Limited v. Anti-Dumping Tribunal (1978), 22 N.R. 255 (C.A.); see also Mullan, supra note 21, at p. 3-118, and Garant, supra note 23, at pp. 849-850.

breach of natural justice to accept evidence after the hearing (59), and a board cannot act without evidence or upon evidence not presented at the hearing (60).

Finally, it is worth noting that courts are prepared to find that there has been a waiver of the benefits of the audi alteram partem (61), unless the affected party is without counsel (62).

In conclusion, human rights tribunals, like other administrative bodies which are required to act judicially, cannot function in an arbitrary manner. Rather, they are subject to a set of rules which are based on the idea of fairness; these rules may determine the manner in which boards conduct their hearings and they also may limit the discretionary powers that the boards otherwise enjoy.

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59. Volkswagen Northern Ltd. v. Board of Industrial Relations (1964), 49 W.W.R. 574 (Alta.).

60. Re Robertson and B.C. Securities Commission et al. (1974), 42 D.L.R. (3d) 135 (B.C.C.A.).

61. Iwasyk v. Saskachewan Human Rights Commission, supra note 56; R v. Schiff: Ex Parte Ottawa Civic Hospital Trustees, [1970] 3 O.R. 476 (C.A.); Strathcona v. Maclab Enterprises Ltd., [1971] 3 W.W.R. 461 (Alta. C.A.). Also Mullan, supra note 21, at p. 3-126 and cases cited; but, "[t]here is authority for the proposition that certain breaches are so serious as to nullify the whole proceedings, in which case waiver cannot be pleaded": Mullan, at p. 3-126 and cases cited in note 54.

62. "... courts will be reluctant to find waiver in situations where the persons affected are without counsel and are not really in a position to be aware of their rights": Mullan, ibid., (Knight v. Yorkton School Board, [1973] 1 W.W.R. 385 (Sask. C.A.))

D. Board Decisions and "Illegal Evidence"

If it is true that human rights boards are not bound by the strict rules of evidence, it is also true that their decisions cannot be based on evidence which does not have cogency in law, as for instance hearsay or irrelevant evidence, nor can their decisions rest on a complete absence of evidence, as this section will show.

This rule forces administrative boards to strike a balance between two competing values: on the one hand, the desirability of preserving an informal approach and, on the other, the duty to ensure that all parties are treated fairly. Reid and David deal with this two-fold concern in the following manner:

> This is a reflection in the sphere of evidence of the court's general attitude to tribunal procedure, i.e., to avoid the strictness and formality of court procedures but ensure a basic standard of fairness. The mere violation of an evidential rule may be nothing as such. It is not the error of form but the error of substance that counts. Thus where a tribunal has acted on inadmissible evidence and the remaining evidence was insufficient to support its decision, its order ... was set aside ... It follows that an improper admission or rejection of evidence is not a ground for certioari or prohibition unless it constitutes a violation of a fundamental principle of justice or a denial of natural justice or a loss of jurisdiction (63).

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63. Supra note 22, at p. 75.

1. Hearsay

Insofar as hearsay evidence is concerned (64), human rights tribunals may admit such evidence (65), but it is now a widely recognized principle that the tribunal should not decide a central issue on the basis of evidence of this nature (66).

In a few instances, human rights tribunals have directly addressed the issue of hearsay evidence and its use. Their approach takes into account the two competing values discussed earlier, that is the need to admit evidence informally, on the one hand, and the duty to act with fairness, on the other. Their decisions also seem to have a distinctive feature in that they

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64. For a discussion regarding the Hearsay Rule see, infra, at pp. 389 ff.

65. In the words of Lord Denning, "[h]earsay is clearly admissible before a tribunal. No doubt in admitting it, the tribunal must observe the rules of natural justice...": T.A. Miller Ltd. v. Minister of Housing and local government et al., (1968) 1.W.L.R. 992, p. 995. Also Gagnon v. Commission des Affaires Sociales, [1978] C.A.S. 191, at 192:"... La Commission ... a entière autonomie sur la façon de procéder ainsi que le genre de preuve qu'elle peut accepter..."

66. Tarnopolsky, supra note 1, at p. 467; see also Reid and David supra note 22, at p. 3-123, and in the area of Labour Relations, D.J. Brown and D.M. Beatty, Canadian Labour Arbitration, Canada Law Book Ltd., Agincourt, 1977, at p. 122, para. 3:4310: "... [arbitrators] retain the discretion as to whether to admit such [hearsay] evidence, and if admitted to ascribe to it whatever weight they believe is proper, subject to the caveat that it cannot be the sole basis for a finding of fact."
See also the landmark decision of R v. Barber Ex Parte Warehousemen & Miscellaneous Driver's Union, Local 419, [1968] 2 O.R. 245 (C.A.), aff'g [1967] 2.O.R. 541 and Re Girvin et al. and Consumers' Gas Co. (1974), 40 D.L.R. (3d) 509 (Ont. Div. Ct.).

stress the inherent difficulties involved in proving discrimination and the desirability, therefore, of keeping the door open, within legal limits to all relevant evidence.

The first case is that of Bremer v. Board of School Trustees, District No. 62. (67), in which Mrs. Bremer lodged a complaint against the respondents alleging that they had refused to hire her for a teaching position because of the public controversy surrounding her husband's dismissal from the senior government position of Commissioner of Education for the province of British Columbia. Mrs. Bremer alleged that she had been discriminated against because of her name and also because of her husband's dispute with the government. For their part, the respondents argued that Mrs. Bremer was not hired because she lacked the necessary experience. During her testimony, Mrs. Bremer stated that an employee of the School Board had told her that there might be problems with her job application because of her name, that there was a lot of talk at the Department of Education, that the pending litigation between her husband and the government could affect her application, and also that those responsible for hiring were looking for excuses not to appoint her. The employee who was alleged to have made these remarks was called by the respondent to the witness stand, where he denied having made such statements altogether. Moreover, there was no other evidence to corroborate the hearsay testimony given by the complainant.

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67. B.C., 1976.

The Board, composed of three members, first looked at the weight that should be given to hearsay evidence specifically in the context of discrimination cases, and it then proceeded with its analysis in these terms:

> As to the hearsay quality of Mrs. Bremer's testimony there is ... reason why that testimony does not constitute some evidence. This Board is not prepared to incorporate into Human Rights Boards of Inquiry proceedings without reservation the evidentiary principles of formal court proceedings. Specifically in this instance, the Board is not prepared to adopt the authorities referred to by counsel for the respondents ... for the proposition that hearsay statements subsequently contradicted constitute no evidence ... The Board's reasons for not following these authorities are rooted in the nature of human rights complaints and the inherently subtle character of the evidence which may establish a contravention of the Code. It was because of this reason that section 16(5) was enacted.
> ...
> ... Boards of Inquiry will frequently be required to make conclusions of fact based upon circumstantial evidence and perhaps, with the assistance of evidence which may be inadmissible in a superior court. At the heart of a contravention of the Code is the determination of whether the respondent's conduct was motivated by a consideration which constitutes the absence of reasonable cause; the factual issue of motivation will in most cases not be a matter about which there exists any direct evidence.
>
> For these reasons this Board is of the opinion that it would represent an unwarranted and potentially restrictive limitation on Boards of Inquiry if we were to determine that hearsay evidence subsequently contradicted will in all circumstances constitute no evidence. (68)

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68. Ibid., at pp. 36-37

But, the Board went on to say that "the use of hearsay evidence must be approached with great caution" and, quoting with approval the case of Board of School Trustees of School District No. 68 (Nanaimo) and CUPE, Local No. 606, (B.C.L.R.B. 68/76, Oct. 7, 1976), it set out these two rules for guidance in the use of hearsay:

> (a) uncorroborated hearsay evidence should not be preferred to direct sworn testimony;
>
> (b) hearsay evidence alone should not be admitted to establish the crucial and central question (69).

Looking at the facts of the Bremer case, the Board noted that the hearsay evidence dealt with a central issue, it was unsupported by independent evidence, and it was contradicted by direct evidence. In the circumstances, the Board preferred not to rely on the hearsay evidence and it ultimately dismissed the complaint.

Another British Columbia Board faced the issue of hearsay in the matter of Warren v. Becket et al. (70). In this instance, the complainant alleged that she had been discriminated against in respect of her employment because she was a woman, contrary to section 6 of the B.C. Human Rights Code, and that she had been dismissed without reasonable cause in breach of section 8 of the Code. During her testimony the complainant testified that one of her superiors had told her that there existed a policy of paying

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69. Ibid., at p. 38.

70. B.C., 1976.

married men with family responsiblities at a higher rate than others. She also stated that this same superior told her that "she hadn't a hope in hell of getting anywhere with the organization because of the fact that she was a woman".

The majority of the Board members accepted this hearsay evidence, but they emphasized two important reasons for doing so. First, the statements in issue were attributed to the complainant's superior, an officer of the company, and not merely to a co-worker, who would have had little to do with company policy. Secondly, the complainant's testimony was clearly prejudicial to the respondent's case, and yet, the latter failed to rebut this evidence by producing as a witness the superior in question. The respondent's failure to adduce such evidence led the Board to infer that the complainant's statements were true (71).

As for the reasons for which a human rights tribunal might find hearsay evidence useful and relevant, it is worth repeating the following remarks made by the majority of the Board in the Warren case:

> The operation of larger enterprises is such that instructions or remarks from different persons in management are mostly passed on by word of

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71. Ibid., at pp. 12-13. There is indeed support for the view that inferences may be drawn from failure to provide certain evidence, as the following statement indicates: "... where the failure to produce the witness is not explained, the inference may be drawn that the unproduced evidence would be contrary to the party's case or at least would not support it.": Murray v. Saskatoon, [1952] 2 D.L.R. 499, at p. 506 (Sask. C.A.). See E.E. Palmer, Collective Arbitration in Canada, Butterworths, Toronto, 1978, at p. 61, and Brown and Beatty, supra note 66, at p. 136. See also Sopinka and Lederman, supra note 12, at p. 535.

> mouth rather than written memos, and it is reasonable ... to give some credence to this type of hearsay evidence than would normally be the case. (72)

In conclusion, boards are entitled to admit hearsay, but they are advised to act cautiously with respect to such evidence (73) and to refrain from basing their decisions on evidence of that nature.

2. Irrelevant evidence

In most respects, the rules that have just been discussed under the heading of hearsay, also apply to the admissibility and use of irrelevant evidence. In other words, irrelevant evidence is admissible before an administrative tribunal but it should not determine the outcome of a case (74).

At the same time, the trend concerning the admissibility of irrelevant - or seemingly irrelevant - evidence differs from the approach towards hearsay evidence in at least one respect. Indeed, it would seem that administrative tribunals are encouraged to admit evidence which may appear irrelevant when first

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72. Ibid., at p. 12.

73. See Garant, supra note 23, at pp. 844-845. It should be noted that a tribunal may follow up on hearsay evidence by verifying whether it stands up to scrutiny. In Gagnon v. Commission des Affaires Sociales, [1978] C.A.S. 191, at p. 192, the Commission said the following:
La Commission ne s'est pas contentée d'une preuve de ouï-dire, même si elle pouvait le faire, car elle est allée elle-même vérifier le bien-fondé de certaines déclarations sur lesquelles elle a appuyé sa décision.

74. R v. Barber, supra note 66; also Kavanagh, supra note 6, at p. 53: "It has been held that a Board exceeds its jurisdiction where it uses irrelevant evidence to reach its decision but not otherwise."

presented (75), in order to avoid the premature rejection of potentially relevant evidence and the possibility of depriving a party of the right to be heard. Moreover, a decision to reject potentially relevant evidence may be subject to review as a breach of the audi alteram partem rule (76).

Thus, for example, the courts have found that the refusal to hear witnesses on an allegation that a hiring procedure was biased (77), and the refusal to accept expert testimony (78), because it was presumed in both instances that the evidence was irrelevant, amounted to denials of the right to be heard in breach of natural justice.

There are, however, limits to the extent to which Boards need accept evidence which borders on the irrelevant, limits which arise from a fear that hearings will become endless and uncontrollable (79). Consequently, it is reasonable to state that

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75. Garant, supra note 23, at pp. 839-841, and in particular at p. 840:
> Un tribunal doit toutefois être prudent car il est beaucoup plus grave de refuser une preuve pertinente que d'admettre une preuvre non pertinente, laquelle pourra être rejetée ultérieurement dans la décision finale.

76. Ibid., at p. 839.

77. Nanda v. Commission de la Fonction Publique, [1972] F.C. 277 (Appeal Division); and also R v. Alberta Board of Industrial Relations et al., (1969), 6 D.L.R. (3d) 83, at p. 87 (Alta. S.C.): as discussed by Garant, ibid., at p. 840.

78. Fleming v. Comité d'appel de la Commission de la Fonction Publique, F.C.A., no. A-294-76, Nov. 17th 1976, as quoted by Garant, ibid.

79. Law Reform Commission of Canada, Independent Administrative Agencies, Working paper 25, Ottawa, 1980, at p. 132:
> [P]roceedings should at all times be governed with an eye to both efficacy and fairness. The major problem here is

(contd.)

an administrative tribunal need not, and indeed should not, hear evidence which is "patently irrelevant".

Again, tribunals are faced with competing interests between which they must strike a balance: on the one hand, they must ensure that the parties have the right to be heard, and on the other, they should avoid endless hearings which are time-consuming and costly. The rule that they should follow in regard to this issue may be summed up as follows: "the tribunal ought to hear all evidence other than that which is patently irrelevant or improper, and leave its decision as to what evidence is inadmissible until after all the evidence is in and argument has been presented on the question" (80).

Useful guidance was provided in this area by Chief Justice Jackett of the Federal Court of Appeal in Re McKendry and Deputy Minister of Department of Regional Economic Expansion: (81)

> Whether that evidence should be admitted depends, as I understand the basic requirements of a proper hearing, upon whether it is relevant

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> not that agencies exercise arbitrary powers with respect to the conduct of a hearing but that they too frequently exercise too little control. In such circumstances, hearings can drag on with rambling irrelevant or repetitive evidence being led, with the agency panel listening politely while time and money are being wasted. Firm chairmanship can expedite most proceedings without curtailing anyone's rights in any significant way.

80. Reid and David, supra note 22, at p 76; also, according to Mullan, supra note 21, at p. 3-124:
> This [right to present proof] is, however, limited to evidence and submissions that are relevant and is also subject to the consideration that hearings, whether oral or written, cannot be interminable and the decision-maker has authority within the context of the particular decision-making power to limit further presentation of proofs and arguments.

81. [1973] F.C. 126; 35 D.L.R. (3d) 305 (C.A.).

> to any issue of fact that arises in the hearing of the applicant's grievance.
>
> One of the basic difficulties in appreciating what is involved is the difficulty of ascertaining what substantive law is to be applied by the Adjudicator to decide whether the applicant is to succeed on his grievance. The applicant puts forward one submission as to what that law is and the employer puts forward quite a different view as to what it is. If the applicant is correct in his view as to the law to be applied, the Adjudicator has to make a finding of certain facts. If the employer is correct as to the law that applies, certain other issues of fact arise for determination. In my view, in an informal hearing such as one under section 96 of the Public Service Staff Relations Act, it is the hearing officer's duty to accept evidence that is relevant to any issue of fact that must be determined on a reasonably arguable view of the case put forward by either of the parties. It is not the Adjudicator's duty to come to a conclusion as to the law that applies to determine the matter before him until after all the evidence is in and he has heard argument on it. What he has to decide when objection is taken to evidence is whether that evidence is relevant to one of the issues of fact that has to be determined on a possible view of the substantive law upon which one of the parties relies. In this case, as I understand him, this is what the Adjudicator has done and, in my view, his decision was correct (82). (emphasis is mine).

Thus, a board should admit all such evidence which is relevant to any one of the issues of fact raised by the parties, as long as the issues are based on a reasonaby arguable view of the case (83). A board should exercise caution in deciding an

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82. Ibid., at pp. 130-131.

83. See, for example, Manitoba Food and Commercial Workers Union v. Canada Safety Ltd. (1983), 4 C.H.R.R. D/1495 (Man.): The Board dismissed an objection raised by the Commission's counsel who wished to have evidence regarding customer preference excluded on the basis that such evidence was not a valid defence in Discrimination Law. The Board eventually agreed that customer preference was not a valid defence here, but it nevertheless accepted to hear the evidence presented by the employer on this topic.

objection concerning irrelevancy, and, when in doubt, it should take the objection under advisement (84).

3 . "No Evidence"

It is one thing to declare that human rights/tribunals are not bound by the strict rules of evidence, but quite another to pretend that they are free to render arbitrary decisions based on no evidence at all (85).

Such a proposition would not only offend the most elementary notions of justice but it is also one that the courts would be most inclined to resist. It is, according to Wade, "an abuse of power which judges are naturally loathe to tolerate" (86).

So, although human rights tribunals are entitled to exercise their discretion in admitting and assessing evidence, there nevertheless exists a standard which requires that they act on the basis of evidence having some probative force (87). Wade, for his

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84. Garant, supra note 23, at p. 840.

85. Young v. Johnson (1961), 34 W.W.R. 385, at 391:"... counsel for the Commitee submitted and the Chairman ruled, that the Committee was not bound by the ordinary rules of evidence. That is quite a different thing to saying that the Committee does not require proof or evidence of any kind"; see also David W. Elliott" 'No Evidence': A ground of Judicial Review in Canadian Administrative Law?" [1972] Sask. Law Rev. 48.

86. Wade, supra note 30, at p. 99.

87. Mr. Justice Procter of the Saskachewan Court of Appeal elaborated on this standard in Re Sisters of Charity and Saskachewan Labour Relations Board et al. [1951] 3 D.L.R. 735, at p. 754:

> What is put before the Board must even under this section still be 'evidence' having some probative force. Wigmore (contd.)

for his part, also notes this requirement by stating that "[t]he question is whether the evidence, taken as a whole, is reasonably capable of supporting the finding." (88) Lastly, perhaps the most colourful description of the duty which is imposed upon tribunals in this respect, is the one articulated by Diplock, L.J. of the English Court of Appeal in R. v. Deputy Industrial Injuries Commissioner Ex Parte Moore:

> 'Evidence' is not restricted to evidence which would be inadmissible in a court of law... The requirement that a person exercising quasi-judicial functions must base his decision upon evidence means no more than [sic] it must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer, but that he must take into account any material which, as a matter of reason, has some probative value in the sense mentioned above (89).

Should a tribunal fail to apply this principle and decide a matter without any evidence to support its conclusions, the decision may be subject to review. In closing, it might be worth

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on Evidence, 3rd ed. Vol. 1. pp 1-3, gives many definitions of 'evidence' and distinguishes between evidence acceptable in judicial proceedings and what may be called evidence for the purpose of demonstrating an asserted fact. One of the clearest definitions of evidence is that in Blackstone's Commentaries, Vol. III, p. 367: 'Evidence signifies that which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or on the other'.

88. Wade, supra note 30, at p. 100.

89. [1965], 1 Q.B. 456, at p. 458, as quoted by Elliott, supra note 85, at p. 69.

noting, however, that there is with respect to such authority to review, an important distinction which should be made between the "sufficiency" of the evidence and "no evidence". Courts may intervene in order to review a decision which has no evidence to support it (90): they are not authorized to question the sufficiency of the evidence (91).

90. Mullan, supra note 21, at p. 3-159; Wade, supra note 30, at p. 100; Kavanagh, supra note 6, at p. 53, and Dussault, supra note 8, at p. 1330:

> Le critère de l'absence de preuve, par lequel les tribunaux judiciaires, tout en reconnaissant qu'ils ne peuvent s'enquérir de la suffisance de la preuve établie devant un tribunal inférieur ou administratif, vérifient s'il existe une preuve quelconque sur laquelle ce tribunal pourrait fonder sa décision, reçoit une assez large application en droit administratif canadien et québécois.

Also, according to Reid and David, supra note 22, at p. 78, "[e]vidence or absence of evidence ... has been held to be a question of law: sufficiency or weight was not."

91. Elliott, supra note 85, at pp. 70-71; Dussault, ibid., at pp. 1327-1329; Mullan, ibid., at p. 3-175.

CHAPTER 2: THE HEARING: SOME PRELIMINARY ASPECTS

A. Appointment of the Tribunal

As parties approach the hearing stage after the investigation and after attempts at settlement have failed, the first thing that they are likely to discover is that the decision to appoint a Board is a matter of discretion which rests either with the Commission or with the Minister charged with the administration of the Act (92). Consequently, it has already been held that a complainant, dissatisfied with a decision to close her file, was not entitled to obtain a court order demanding the appointment of a Board (93).

More often than not, boards of inquiry are composed of one member. However, in some instances more members may be present,

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92. Alta., s. 18(1); B.C., s. 16(1); Man., s. 21(2); N.B., s. 20(1); Nfld., s. 16A(1); N.S., s. 25(1); Ont., s. 37(1); P.E.I., s. 24(1); Sask., s. 29; Can., s. 39(1). Depending on the statute, the discretion may rest with the Commission and not with the Minister, sometimes the reverse applies, and yet at other times, a discretion simply exists at both levels. Thus, in Manitoba the Commission "may" request the Minister to appoint a Board and the latter "shall" do so within a reasonable time; but in British Columbia the Director "shall" make a report to the Minister (of Labour) and the latter "may" refer the case to a Board; whereas in New Brunswick the Minister "may" appoint a Board upon the (discretionary) recommendation of the Commission. Under the Canadian Act, the Commission exercises this discretion alone and it may appoint a tribunal at any time after the complaint has been filed. See also, Tarnopolsky, supra note 1, at p. 453.

93. Re Dagg and Ontario Human Rights Commission et al. (1979), 102 D.L.R. (3d) 155 (Ont. Div. Ct.) (leave to appeal refused).

in which case one will act as chairman (94).

B. The Parties

Parties involved in discrimination proceedings have an active role at hearings which, essentially, are patterned on the adversary system. One will also recall that, according to the rules of natural justice, parties enjoy certain rights and, in particular, they are to be given a full opportunity to be heard. Because of this principle, parties are entitled to receive proper notice of the hearing, to be present throughout the proceedings, to bring evidence and to make submissions. Before continuing any further, it may therefore be appropriate to determine who, in fact, should act as a party before a human rights tribunal.

1. Statutory description

Some of the human rights statutes are more informative than others on this point. Six of these establish who should act as parties (95), usually including at least the following in the list: the Commission, the complainant and the respondent (96).

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94. For example, the Canadian Act provides for up to three members (ss. 39(2) and (6)). It is also to be noted that two statutes expressly provide that the members of the Board or Tribunal are to be selected from a pre-constituted panel: Ont., ss. 34(1) and 37(1), and Can., s. 39(5). For comments on the independence and impartiality of Boards, see Tarnopolsky, supra note 1, pp. 456-457.

95. For Alta., s. 29(1); B.C., s. 16(3); Man., s. 26; N.S., s. 26; Ont., s. 38(2), and Sask., s. 30(1).

96. See comments by Tarnopolsky, supra note 1, at pp. 457-458.

According to these six Statutes the Commission usually has a special role to play and, with but one exception (97), it is said to have the carriage of the case. Moreover, the Commission is not merely the alter ego of the complainant; its role is not only to defend the individual complainant but also to promote the public interest. In this respect, the Canadian Human Rights Act specifically requires the Commission to "... adopt such positions as, in its opinion, is in the public interest having regard to the nature of the complaint being inquired to" (98). It has also been said that the presence of the Commission at a hearing is more than a mere formality, more than of mere symbolic value (99).

Another party to the proceedings is, of course, the complainant. One might hastily come to the conclusion that this refers strictly to the aggrieved person, that is, the victim. But some Legislatures have extended the meaning of the term to include other individuals, or groups, who may allege discrimination without being the aggrieved party. Whether the term "complainant" carries this extended meaning depends on the wording of the statute both with respect to parties and to complaints (100).

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97. British Columbia.

98. S. 40(2).

99. Fleming and Baptiste v. Byron Jackson Division, Borg - Warner (Canada) Limited (1982), 3 C.H.R.R. D/765 (Ont.); Amber and Amber v. Leder and Leder, (Ont., 1970).

100. For example, the Canadian Act allows for complaints by individuals, or groups of individuals, other than the alleged victims (ss. 32(1) and (2)), whereas, the P.E.I. Act only recognizes complaints lodged by aggrieved persons (s. 21).

Where a statute does not confer party status upon groups or individuals who are not themselves aggrieved but who have some interest in the proceedings, they may still request the right to intervene at a hearing; however, in such instances, the board of inquiry has complete discretion to accept or to refuse the request (101).

2. In the absence of a statutory provision

By contrast to the above, some statutes fail to give clear direction as to who should act as a party at hearings. Confronted with this silence, human rights boards have concluded that the complainant (102) and the respondent are the main parties (103). At the same time, they have also shown a willingness to grant the Commission equal status with those considered to be the official parties. Thus it has been held that, unless there is a valid reason to exclude it, a Commission should be given the opportunity of making submissions "the same as a party" (104).

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101. See section on intervenants, infra, at p. 312.

102. Comments in the preceding section concerning complainants apply here as well: see, supra, note 100.

103. Doherty and Meehan v. Lodger's International Ltd. (1982), 3 C.H.R.R. D/628 (N.B.); Bulger v. Branch No. 4, Royal Canadian Legion, (N.B., 1978); Belliveau v. District No. 13 School Board (1981), 2 C.H.R.R. D/263 (N.B.).

104. Bulger v. Branch No. 4, Royal Canadian, ibid.; Doherty and Meehan v. Lodger's International Ltd., ibid. But, in Belliveau v. District No. 13 School Board, ibid, it was held that the Commission's role should be to make representations limited to questions of jurisdiction, to the interpretation of the statute and to recommendations which the Board could make to the Commission.

3. Joinder of parties

So far, who should act as a party has been established; following closely is the question whether a Board is permitted to add any other parties either as complainants, respondents, or otherwise, once the hearing has begun.

Boards have concluded that they are empowered to amend a complaint so as to join an additional complainant (105). However, in doing so, the board of inquiry must assure itself before proceeding that the rules of natural justice have been respected and that the respondent has received adequate notice and has had the opportunity to prepare his case (106). To this end the Board might consider adjourning the hearing where circumstances warrant it.

The same applies where a new respondent is concerned. The board of inquiry may add a respondent as a party (107), but again it must make sure that the latter has received adequate notice in order to prepare his case (108).

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105. Tabar and Lee v. Scott and West End Construction Limited (1982), 3 C.H.R.R. D/1073 (Ont); Cooper v. Belmont Property Management, (Ont., 1973).

106. See discussion regarding the rules of natural justice, supra, at pp. 282 ff.

107. Tabar and Lee v. Scott and West End Construction Limited, ibid.; Cooper v. Belmont Property Management, ibid.; Finlayson v. City of Winnipeg Police Department et al. (1981), 2 C.H.R.R. D/429 (Man.) (Respondent may be added even after limitations period has passed). See also, Matthew v. Seven City Development Company Limited, (Ont., 1973), and Nawagesic v. Rauman and Rauman, (Ont., 1978), as cited in the Tabar case. Also, for further comments on the topic see Tarnopolsky, supra note 1, at p. 458.

108. In Saskatchewan the Board must follow the procedure set out in Reg. 216/79 (s. 18(5)), which provides the possibility of an adjournment, the service of a new notice and the amendment of the complaint.

Particular attention must be paid to cases in which a complaint has been lodged against a body that is not a "person" nor otherwise deemed a "legal entity" under the relevant Act. On at least two occasions, the Courts have declared that such errors are matters of substance and not merely "defects in form" (109), and that errors of such gravity should lead to the dismissal of a complaint.

Where class actions are concerned (110) it has been held that a board of inquiry may add an individual to a class action complaint (111); however, a board of inquiry may refuse to add a

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109. Re Burns and United Association of Journeymen of the Plumbing and Pipefitting Industry, Local 170 et al. (1978), 82 D.L.R. (3d) 488 (B.C. S.Ct.), at p. 492: "The naming of the proper party to the proceeding is one of substance not form. I am not referring to a misdescription of a party or the misspelling of a name, which, I consider, would be within the meaning of the words 'defect in form', but to the designation in the complaint of the person alleged to have been in contravention of the Code."
See also Re Cummings and Ontario Minor Hockey Association (1980), 26 O.R. (2d) 7 (Ont. C.A.). The Ontario Minor Hockey Association, an unincorporated body, was not a "person" within the meaning of the Code. At p. 14, Wilson, J.A., remarked as follows: "The complaint in this case should have been laid against named officers or directors of the respondent association. The Court cannot add or substitute such persons as parties in a proceeding which has been a nullity from its inception because of the respondent's immunity from suit: Hay v. Local Union No. 25 Ontario Bricklayers & Masons Int'l Union (1929), 63 O.L.R. 448, [1929] 2 D.L.R. 336."
But, to the effect that reference to a trade name should be taken to be a sufficient reference to the entity carrying on business under that name, see: Rawala and Sousa v. De Vry Institute of Technology (1982), 3 C.H.R.R. D/1057 (Ont.) and Ballantyne v. Molly 'N' Me Tavern (1983), 4 C.H.R.R. D/1191.

110. On class actions in general see Tarnopolsky, supra note 1, at p. 441.

111. Tabar and Lee v. Scott and West End Construction Limited, supra note 105.

class to an individual complaint once the hearing has begun or is about to begin. Thus, in the case of Kovacs v. Horne & Pitfield Foods Ltd. (112) the Board denied an amendment requested by the Commission that the complaint, brought by an individual, be converted into a class action.

4. Misnomer

Sometimes an error appears in the name of a respondent; for instance, it is a common mistake to insert or to omit, erroneously, such words as "company" or "limited" in a respondent's name. In this respect it is generally agreed that a board of inquiry may correct this type of error in a name (113), especially when the respondent has suffered no particular prejudice from the misnomer. Such a correction represents a simple amendment by which the description of a party is altered: it is not regarded as the addition of a new party (114).

5. Third parties

In certain circumstances rights of a third party may be

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112. (1982), 3 C.H.R.R. D/894.

113. Tabar and Lee v. Scott and West End Construction Limited, supra note 105; Matthew v. Seven City Development Company Limited, supra note 107; Pratt v. H.A. Robert Gallery of Homes Ltd., (Alta., 1978); Rawala and Souza v. De Vry Institute of Technology, supra note 109, (when companies amalgamate).

114. Rawala and Souza v. De Vry Institute of Technology, ibid.

affected by the board of inquiry's decision (115). In light of the Supreme Court of Canada decision in the Hoogendoorn case (116), a board of inquiry should allow such a third party, if it so wishes, to make submissions at the hearing (117).

The question then arises as to whether such a third party should be permitted to bring evidence and to make representations throughout the hearing, or, whether his participation should not rather be restricted to such aspects of the case as directly concern him and to the remedy, in particular. The latter option seems preferable. Common sense dictates that, unless a third party is directly involved in the decision which is alleged to be discriminatory (e.g. where the third party was in direct competition with the complainant for a promotion), then his evidence and the representations should be limited to issues relating to

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115. Certain human rights statutes preclude this possibility and specifically state that the rights of innocent third parties shall not be affected by an order of the Board: Canadian Act, s. 42(2), and Sask., s. 31(10).

116. Hoogendoorn v. Greening Metal Products & Screening Equipment Co. et al., [1968] S.C.R. 30. The Supreme Court of Canada held that an employee whose status was being affected by a hearing at which the union and the employer were acting as parties, was entitled to be represented in his own right as distinct from being represented by the union, if the interests of the latter were not the same as those of the employee. In this instance, the arbitrator was in breach of the rules of natural justice when he proceeded with the hearing in the employee's absence. The arbitrator's award was therefore quashed.

117. Note that s. 16(3)(d) of the British Columbia Human Rights Code reads as follows: "... the persons who are entitled to be parties to a proceeding before the board of inquiry are ... (d) any other person who, in the opinion of the board of inquiry, would be directly affected by an order made by it".

remedy. Otherwise the following undesirable situation might present itself: a third party hired only sometime after the discriminatory act occurred would be expected to present evidence to the same extent as the main parties. The former, fearing that his silence might somehow operate against him and determined to keep his job, would set out to participate actively in the debate being litigated only to find himself in the questionable predicament of having to defend the actions of the respondent - with which he had nothing to do in the first place - against the complainant. It is suggested that such situations should be avoided and that a third party's participation, if at all necessary, should be restricted to questions of remedy or other matters directly involving him.

6. Intervenants

A human rights board has the inherent power to decide whether, in its discretion, it will allow an individual, a group of individuals or an organization to intervene and to make submissions at the hearing (118).

Once such an intervention is accepted it has, however, been held that the Board is not obliged to give the intervenant equal status with the parties (119).

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118. Doherty and Meehan v. Lodger's International Ltd., supra note 104; Bulger v. Branch No. 4, Royal Canadian Legion, supra note 104, and Belliveau v. District No. 13 School Board, supra note 104. Note that in Saskatchewan this possibility is specifically provided for in Reg. 216/79 at s. 15(1).

119. Canadian Pacific Ltd. et al. v. C.N.R., [1976] 2 F.C. 369 (C.A.); see also Mullan, supra note 21, at p. 3-125.

C. Joinder of Actions

It is also part of a board of inquiry's inherent power to allow the joinder of two or more actions (120). Thus, where it is found that two or more complaints deal with substantially the same issues of fact and law, it may be more convenient and more efficient for all concerned, including witnesses, to have the board of inquiry hear the matters at the same time.

Of course in exercising its discretion a board of inquiry may take into account the inconvenience that such a joinder might cause to a party. In the Hyman case, Chairman McCamus gave this issue due consideration when he said that "[w]ith respect to the question of whether or not complaints should be heard together, the element of fairness would require a balancing of any prejudice sustained or potentially sustained by any of the parties against the public interest in avoiding a multiplicity of proceedings" (121).

D. Notice

1. In general

It is an elementary rule of natural justice that the

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120. Morgan v. Toronto General Hospital, (Ont., 1977); Hughes and White v. Dollar Snack Bar et al. (1982), 3 C.H.R.R. D/1014 (Ont.); Hyman v. Southam Murray Printing and International Brotherhood of Teamsters, Local 419 (1982), 3 C.H.R.R. D/617 (Ont.). Note that certain statutes specifically provide for the joinder of actions: see B.C., Reg. 151/75, s. 12; Ont., s. 31(3), and Can., s. 32(4).

121. Ibid., at p. 626. This case dealt with two complaints against an employer and a union, respectively. Interestingly, the employer was the only one to object to the joinder, while the Commission, the complainant and the union were favourable to it.

parties be given adequate notice of the hearing so that they may present their case (122), and most of the human rights statutes expressly make mention of this duty (123). Such notice usually includes the date, time and place of the hearing. It should also contain basic information concerning the alleged contraventions to the statute so as to enable the respondent to know the case that is to be met by him.

Often, such notice is given by attaching a copy of the complaint. Therefore, the complaint should contain sufficient information to allow a respondent to properly present his case; otherwise, a board of inquiry may find that the requirements of natural justice have not been met and that the complaint should be dismissed. This was the conclusion arrived at by the Board in The Canadian Human Rights Commission v. Bell Canada (124) where the complaint, which also served as notice, lacked such basic information as the identity of the complainant, the time of the alleged violation, and the exact grounds on which the complaint was based (125).

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122. Mullan, supra note 21, at p. 3-111; see also Tarnopolsky, supra note 2, at pp. 580-581.

123. For Alta., see The Administrative Procedures Act, R.S.A. 1980, c. A-2, ss. 3 and 4(b); B.C., Reg. 151/75, s. 4; Man., s. 25(4); N.S., ss. 25(3) and 26A(2); Ont., The Statutory Powers and Procedure Act (S.P.P.A.), R.S.O. 1980, c. 484, s. 6; Sask., s. 30(2), and Reg. 216/79, ss. 14(4) and (5); Can., s. 40(1).

124. (1981), 2 C.H.R.R. D/265 (Can.).

125. On the other hand, failure to give adequate notice may also be "cured" by an adjournment: Mullan, supra note 21, at p. 3-114.

2. Particulars

Closely related to the issue of notice is the recurring question of particulars, which deals with the adequacy of the notice and the amount of detail that one should expect to find in such notices (126).

There is only one statutory provision which seems to deal with the matter of sufficiency of notice; it is s. 8 of the Ontario Statutory Powers Procedure Act (127) which reads as follows:

> Where the good character, propriety of conduct or competence of a party is an issue in any proceedings, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto.

There has never been any doubt that this section applies to discrimination cases. However, what constitutes "reasonable information of any allegations" has required deeper analysis.

In the case of Walbar Machine Products of Canada Limited v. The Ontario Human Rights Commission (128), Chairman Gorsky

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126. On this topic see Tarnopolsky, supra note 1, at pp. 467 ff.; see also, infra, section on the production of documents and the right to disclosure, at pp. 367 ff.
As for the purpose of particulars it may be described as follows:
"Particulars are ordered for several purposes:
1) to define the issue;
2) to prevent surprise;
3) to enable the parties to prepare for trial;
4) to facilitate the hearing."
From Fairbairn v. Sage (1925), 56 O.L.R. 462, at p. 470, as quoted in Joseph v. North York General Hosptial and College of Nurses of Ontario (1982), 3 C.H.R.R. D/854.

127. R.S.O. 1980, c. 484.

128. (1980), 1 C.H.R.R. D/228 (Ont.).

undertook a comprehensive study of the question of particulars and the interpretation of s. 8 of the Statutory Powers Procedure Act. He began by describing the purpose of this section and by giving some practical examples of the meaning of "reasonable information of any allegations". On these matters he said this:

> [I]ts [s. 8] purpose is to define the issues and thereby prevent surprise by enabling the party against whom the allegations are made to prepare for the hearing. At the very least, s. 8 of the Act in order to fulfill this purpose would require that [the respondent] be furnished with a written statement of the material facts upon which the Commission intends to rely in support of the allegations with respect to the issues involving [the respondent's] good character or the propriety of its conduct. Such material facts should include when and where the alleged acts, which raised the issues, occurred, as well as, the names of such persons who are referred to in the allegations [if this forms a substantial part of the facts material to the issues and is reasonably necessary in order that respondent have sufficient information about the allegations and the case to be met] (129).

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129. Ibid., at p. 229. But see Joseph v. North York General Hospital et al., supra note 126, involving allegations of racially-motivated harassment, in which Chairman Hunter held, at p. 855, that there was no need for particulars even where the respondent alleged that "(a) 'examples' only, rather than a comprehensive catalogue of the 'campaign of harassment' [were] cited; (b) some of the specific incidents alleged in the 'campaign of harassment' [did] not mention the particular hospital employee allegedly involved; (3) to the extent that specific incidents [were] particularized, in some cases dates [were] absent and, in other cases, the specific impropriety alleged against the hospital [was] not sufficiently detailed." Similarly, in the case of Bezeau v. Ontario Institute for Studies in Education (1982), 3 C.H.R.R. D/874 (Ont.), Chairman Ratushny rejected a motion for particulars. At p. 877, he said: "The allegation of the Complainant is straightforward. It amounts to the assertion that he was denied tenure in favour of less-qualified applicants and that the only logical inference is that the denial was the result of discrimination." (Note that the Commission had indicated that certain details were simply not available to it.)

In assessing the type of information that a respondent is entitled to receive by way of particulars, it may be helpful to bear in mind the distinction between disclosure of facts material to the issue and disclosure of the evidence in support of these facts. The respondent is entitled to the former in order to know the case that he will eventually have to meet, but he is not entitled to the latter (130). Further emphasizing the distinction between these two categories of information, Chairman Gorsky made the following remarks in the Walbar case:

> My interpretation of s. 8 is that it is concerned with the furnishing of 'reasonable information of ... allegations ...' and not with the means whereby those allegations will be proved. It is concerned with particulars to know a case and not with evidence as to how the case will be proved. It is concerned with the case intended to be made and not with the information allegedly favourable or unfavourable to the case. Furthermore, it is not concerned with the facts which might assist the party, against whom the claim is being made, to discover evidence in support of its defence, as contrasted with information of the case to be met ... (131).

This statement leaves little ambiguity as to the kind of information that a respondent is justified in obtaining under s. 8 of the Ontario Statutory Powers Procedure Act. Moreover, there seems to be no reason why the above comments should not act as

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130. In the Walbar case, supra note 128, at p. 229, the Chairman referred to the decision in Cook v. Cook, [1947] O.R. 287, at p. 291, in these terms: "... in distinguishing questions relating to eliciting facts from those seeking evidence, [Gale, J.] concluded that a party was not entitled to discover how his opponent proposed to prove his case." See also Joseph v. North York General Hospital et al., ibid.

131. Ibid., at p. 230.

guidelines on the issue of particulars in other jurisdictions as well.

In closing on the question of particulars, it may be worthwhile to note that a Board can always adjourn in order to avoid a potential prejudice to the respondent should the Commission, or the complainant, introduce new issues which could not have been reasonably anticipated (132).

From all the above, one may conclude that the notice should contain the essential allegations and sufficient information to allow the respondent to identify the alleged contravention; in other words, it must contain the facts material to the issue. On the whole, boards of inquiry are reluctant to engage in elaborate procedures and to order lengthy exchanges of preliminary information (133); they will do so only where the complaint is inadequate and insufficient to allow the respondent to know the case that must be met.

3. Serving the notice

The manner in which notice is given may vary: it may take the form of delivery by registered mail, of personal service by a staff member of the Commission, of personal service by way of subpoena, and so on. There appears to be no set rule that binds

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132. Bezeau v. Ontario Institute for Studies in Education, supra note 129, at p. 877 and Walbar Machine Products of Canada Limited v. The Ontario Human Rights Commission, ibid., at p. 229.

133. To this effect see the comments by Chairman Hunter in Joseph v. North York General Hospital, supra note 126, at p. 857. Note, however, that this does not prevent a voluntary exchange of information between the parties.

all jurisdictions and the means by which notice is served simply depends on a Commission's practice and, if applicable, on the requirements established by statute or regulation. Also, boards of inquiry have not hesitated in using less common modes of service - such as placing notices in local newspapers - where recalcitrant respondents were thought to be avoiding service purposely (134).

E. Ex Parte

In exceptional circumstances and where the board of inquiry is convinced that the respondent is voluntarily refusing to attend the hearing, it may proceed ex parte (135). However, where boards of inquiry have been faced with this prospect, they have exercised great caution and have increased their efforts to ensure that the respondent received proper notice, even if this could only be achieved by publishing a public notice in the local newspaper.

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134. William v. Ouellette (Ont., 1973); Simmonds v. McKenna (1982), 3 C.H.R.R. D/995. Note: s. 24 of the Statutory Powers Procedure Act, R.S.O. 1980, c. 484 provides that where it is impracticable for a tribunal to give notice of the hearing to one or more of the parties individually, it may cause reasonable notice to be given "by public advertisement or otherwise as the tribunal may direct".

135. William v. Ouellette, ibid; Simmonds v. McKenna, ibid; and Hughes and White v. Dollar Snack Bar, supra note 120: in this case the Commission's counsel was advised by telephone that the respondent would not attend the hearing. Note that certain statutes expressly allow a board to proceed ex parte: B.C., s. 11 of Reg. 151/75, and Ont., s. 7 of the S.P.P.A.

It is worthwhile to note that a decision to proceed ex parte may involve considerations that go beyond the interests of the particular case at hand. In the Simmonds case (136), the Board felt compelled to proceed because of the educational value of showing that discriminatory acts contrary to statute were not to be tolerated and, also, because a respondent could not be permitted to frustrate the effects of the statute by evading service (137).

F. Public Hearings

As a rule, hearings into discrimination cases are held in public. This is a practice that seems to be common to all human rights tribunals and it rests either upon express statutory requirements (138) or, in their absence, upon an implicit duty to adhere to a rule which is considered fundamental in our system of justice (139).

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136. Ibid.

137. Such was also the opinion expressed in the McRuer report in which the Commission stated that "if such opportunity [to attend a hearing and be heard] is given and a party fails to avail himself of its provision, the tribunal should have a discretion to proceed with the hearing in the absence of that party. The latter provision is necessary to permit efficient operation of tribunals": Royal Commission of Inquiry into Civil Rights, supra note 9, at p. 213.

138. In B.C., s. 16 of Reg. 151/75; Man., s. 25(1); N.S., s. 26A(1); Ont. S.P.P.A., s. 9; P.E.I., s. 25(1); Sask, s. 24 of Reg. 216/79, and, Can., s. 40(6).

139. According to Tarnopolsky, hearings should also be held in public because "one of the purposes of the enforcement function is public education ...": supra note 1, at p. 462.

The importance of this rule in relation to administrative tribunals, and human rights tribunals in particular, was underlined by Laskin, J.A., as he then was, when he remarked that "[i]f there is any general rule applicable where the statute is silent, it is that the proceeding of a statutory tribunal should be conducted in public unless there is good reason to hold them in camera" (140).

G. In Camera

The rule concerning public hearings is not an absolute one and it is generally accepted that, where circumstances warrant it, a hearing, or part of a hearing, may be held in camera (141). As is usually the case with exceptions in law, it is only in exceptional circumstances that the public should be excluded from hearings, and boards of inquiry should exercise this discretion in a judicious manner.

Matters of public interest, of public security and even personal matters may justify a decision to hold a hearing behind closed doors; however, the specific interests so invoked should outweigh the general interests which are at the basis of the principle that hearings be held in public. There are no set rules as

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140. Regina v. Tarnopolsky, ex parte Bell (1969), 11 D.L.R. (3d) 658, at 666, (Ont., C.A.), as quoted by Tarnopolsky, ibid.

141. Some statutes specifically refer to the board's power to proceed in camera: B.C., s. 16 of the Regulation 151/75; Ont., s. 9 of the S.P.P.A.; and Can., s. 40(6). See also Tarnopolsky, ibid., at pp. 462 ff.
Where a statute is silent on this matter, the board may take the decision to proceed in camera on the basis of its authority to determine its own procedure: Naugler v. The New Brunswick Liquor Corporation, (N.B., 1976), at p. 4.

to what matters should properly be heard in camera; however, the criteria set out in the Ontario Statutory Powers Procedure Act (142) are helpful in assessing the competing interests that should be taken into consideration. The Act thus permits a board to hold hearings in camera where it is of the opinion either that "matters involving public security may be disclosed" (143) or that:

> [I]ntimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public (144).

Although, strictly speaking, this section applies only to Ontario, it seems sufficiently detailed and explicit to serve as a general guideline for other tribunals having to decide whether or not to proceed in camera.

By way of illustration it might be worthwhile to mention some specific board decisions on the topic. It has been held, for instance, that in camera proceedings are not justified where a respondent alleges that a public hearing would be "bad for business" (145). If, on the other hand, a respondent were to argue that public disclosure of confidential policy decisions, or of other confidential business documents, might give an undue

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142. R.S.O. 1980, s. 484, s. 9(1).

143. Ibid., s. 9(1)(a).

144. Ibid., s. 9(1)(b).

145. Naugler v. The New Brunswick Liquor Corporation, supra note 141, and Clarke v. Camelot Steak House and Tavern, (Ont., 1971).

advantage to a competitor, then a Board could receive evidence on these documents in camera (146).

Objections relating to the confidential character of documents may also involve questions of privilege causing a party to argue that certain evidence should not be heard at all. The two issues are closely interwoven as will later be seen (147), but in any event a board of inquiry should decide the matter of privilege before considering the manner in which it will hear the confidential evidence. A case on point is the decision rendered in Bezeau v. Ontario Institute for Studies in Education (148), in which the complainant, a teacher, alleged that he had been denied tenure because he was a Canadian and that preference had been given to non-Canadians. At the beginning of the hearing, the respondent raised a preliminary objection alleging that letters from referees or appraisers were subject to the privilege of confidentiality and that, therefore, they could not be introduced into evidence. In an interesting decision, Chairman Ratushny rejected the arguments (149) concerning privilege. However, he retained the respondent's arguments concerning the confidential nature of the letters and found that these were appropriate circumstances to resort to in camera proceedings as provided for by

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146. In this respect, see Magnasonic Can. Ltd. v. Anti-Dumping Tribunal, [1972] F.C. 1239 (C.A.), and Sarco Can. Ltd. v. Anti-Dumping Tribunal (1978), 22 N.R. 255 (C.A.).

147. See the section on privilege, infra, at pp. 394 ff.

148. Supra note 129.

149. For further discussion regarding this case see, infra, at pp. 416 ff.

s. 9(1)(b) of the Statutory Powers Procedure Act (150). It appears that this is an appropriate way in which to strike a balance between competing interests: the procedure respects the confidentiality of the documents, but does not deprive the complainant of essential evidence without which his recourse might become illusory.

On two other occasions the complainants were the ones to request that the hearings be closed because of the personal nature of the matters involved and the adverse effect that a public hearing might have on their personal lives (151) or careers (152). In both cases, the board of inquiry acceded to the requests that the hearings be held in camera.

H. Splitting the Hearing Between Merits and Remedy

In certain circumstances a board of inquiry might wish to consider splitting the hearing between merits and remedy especially where the evidence relating to remedy promises to be complex

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150. Ibid., at p. 881. See also Mullan, supra note 21, at p. 3-110: "Use of closed or in camera hearings may be one way of protecting the confidentiality of information or sources of information where that is a legitimate concern."

151. H.W. v. Kroff and Riviera Reservations of Canada Ltd., (B.C., 1976) (the complainant alleged that her dismissal was due to her pregnancy), as cited in Tarnopolsky, supra note 1, at p. 463.

152. D.D. v. The Queen in Rights of the Province of British Columbia, (B.C., 1976) (the complainant alleged that he was refused a job because of his criminal record), as cited in Tarnopolsky, ibid.

and time consuming (153). This is again seen as part of a board of inquiry's "inherent power to organize its proceedings ..."(154).

This position was adopted by the presiding Chairman in the Hyman case with the following remarks:

> Bifurcation of the proceedings will ensure that the original hearings are less costly to the parties and, indeed, where the complaint is held to be unfounded, the entire process will be less burdensome to the parties. Moreover, even in a case where the complaint is justified, it may often be the case that the parties will be able to agree to the appropriate level of compensation for injuries sustained and further hearings may therefore be unnecessary (155).

These, however, are not the only relevant factors to be considered by a board of inquiry. Indeed, it must also take into account the inconvenience that a split hearing might cause to either of the parties. It is evident from the following statement that the Chairman in the Hyman case was attentive to this point as well. He said: "[i]n determining whether to accede to a motion to bifurcate proceedings, it is appropriate ... for a Board of Inquiry to balance the risk of possible delay against the convenience to the parties of dividing the proceedings" (156).

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153. This seems to be a common practice in labour arbitration hearings. In this respect, see Brown and Beatty, supra note 66, para. 3:2620.

154. Hyman v. Southam Murray Printing et al. (1982), 3 C.H.R.R. D/680 (Ont.), at p. 682.

155. Ibid., at p. 681.

156. Ibid., at p. 682.

I. Right to Counsel

By now, it is common practice for administrative boards to allow parties to be represented by counsel (157). This is particularly true where human rights tribunals are concerned for, although such a right is not absolutely required by the rules of natural justice (158), the close connection with the area of civil liberties dictates that such practice be followed (159). In some cases the right to counsel is specifically provided for by statute (160).

This is not to say that boards of inquiry must submit to a party's capricious behaviour or to a party's dilatory tactics in

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157. Reid and David, supra note 22, at p. 99: "Over the years the tendency has been to extend, rather than restrict, the right to counsel." Long gone are the days when such a right was denied by Lord Terterden C.J. in Collier v. Hicks (1831), 2 B. & Ad. 663, 109 E.R. 1290, in the following disparaging terms as quoted in Reid and David, at p. 99: "My own opinion is, that, in general, the ends of justice will be sufficiently well attained in these summary proceedings by hearing only the parties themselves and their evidence, without that nicety of discussion, and subtlety of argument, which are likely to be introduced by persons more accustomed to legal questions."

158. Mullan, supra note 21, at p. 3-111: the right to representation by counsel is not part of the minimum content of the audi alteram partem rule. But, see also p. 3-116: "... [At times, circumstances may] lead the courts to say that denial of a right to representation results in inadequate opportunity for being heard."

159. Tarnopolsky, supra note 2, at p. 580.

160. B.C., s. 16(4); Man., s. 25(5); Ont., s. 10(a) of the S.P.P.A.; Sask., s. 31(5), and ss. 18(1)(2) of Reg. 216/79. But contra, see Alta., s. 6(b) of the Administrative Procedure Act, R.S.A. 1980, c. A-2: the Act does not require the administrative authority to afford an opportunity to the parties to be represented by counsel.

the name of the right to counsel. Thus, in the Torres case (161) the Board Chairman noted that the respondent had been given ample notice of the hearing with sufficient time to seek representation by counsel, and he concluded that the request to adjourn at the beginning of the hearing in order to bring in counsel was dilatory in purpose and, therefore, to be dismissed (162).

In the same way, a board of inquiry composed of three members refused to grant an adjournment to the respondent's newly retained counsel seeing that the hearing had already been scheduled and rescheduled four times and always with appropriate notice to all parties(163).

On the other hand, if a respondent brings in counsel mid-way through the hearing, an adjournment may be appropriate to enable counsel to review the transcripts of the evidence presented up until his appearance (164).

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161. Torres v. Royalty Kitchenware Limited and Guercio (1982), 3 C.H.R.R. D/858.

162. Ibid., at p. 859. Similarly, Cinkus v. Diamond Restaurant and Tavern et al. (1981), 2 C.H.R.R. D/339. See also Finlayson et al. v. E.B. Misty Inc., (B.C., 1979), cited in the Torres case at p. 859: if a Board is entitled to award costs it may take into account a party's failure initially to appear with counsel, in deciding the costs.

163. Warren v. Becket et al., (B.C., 1976), at p. 2.

164. Torres v. Royal Kitchenware Limited and Guercio, supra note 161, at p. 859. See also case of Rigg v. Duldouras, (Ont., 1968), discussed in Tarnopolsky, supra note 1, at p. 461. In this case the Board granted an adjournment "in view of the serious nature of the complaints, as well as the fact that the respondent's command of English was limited and that he appeared to have had difficulty understanding and following the proceedings".

J. Adjournments

At the hearing, requests for adjournments may be submitted to the tribunal and the latter may exercise its discretion (165) in deciding to grant such requests or to refuse them (166). Requests for adjournments are not restricted to the parties, and boards of inquiry may adjourn of their own initiative where, for instance, a respondent is absent (167).

Although adjournments are by no means unusual, they are regarded as the exception rather than the rule. Consequently, parties would be well advised to avoid requests that are frivolous or intended as a stalling mechanism because a board of inquiry will not hesitate to proceed with the hearing where it believes that the motion is being made to buy time, that it is being submitted in bad faith, or that it is otherwise unwarranted (168).

On the other hand, a board should adjourn where a party's

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165. Peterson and Carter v. Canadian Rubber Dealers and Brokers Ltd. (1981), 2 C.H.R.R. D/257, at p. 258: "The granting of an adjournment is at the discretion of the Board, a discretion not to be exercised arbitrarily, but fairly and equitably, having regard to the balance of convenience to both parties." See also Re Metropolitan Toronto Boards of Commissioners of Police et al. v. Ontario Human Rights Commission et al. (1980), 27 O.R. (2d) 48, at p. 53, and discussion, supra, at p. 280.

166. On the topic of adjournments, see Tarnopolsky, supra note 1, at pp. 460-462. Note that in some provinces the board's right to order adjournments is specifically mentioned: B.C., s. 15 of Reg. 151/75; Ont., s. 21 of the S.P.P.A., and Sask., s. 21 of Reg. 216/79.

167. Simmonds v. McKenna, supra note 134.

168. Torres v. Royalty Kitchenware Limited and Guercio, supra note 161.

right to a full and fair hearing is at stake (169).

Examples of cases in which boards of inquiry have entertained requests for adjournments have already been discussed elsewhere. To recapitulate, the question of adjournments is likely to arise in the following situations: where there has been failure to give a party adequate notice of hearing (170), where a respondent is absent and ex parte proceedings are being considered (171), where a Board decides to add a party, be it a complainant or a respondent (172), where a party's right to representation by counsel becomes an issue (173), where evidence presented at the hearing takes a party by surprise or, generally, where a refusal to grant an adjournment might constitute a breach of the audi

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169. Mullan, supra note 21, at p. 3-124: "On the other hand, ... considerations of administrative efficiency will not prevail over the right of a person to an adjournment or postponement in cases of legitimate inability of either the person himself or a witness to attend and, within reason, the counsel of his choice, particularly where there is a right to be represented by counsel. What is legitimate includes matters such as illness or an unforeseeable change in the schedule for the hearing."

170. See, supra, section on notice.

171. See, supra, section on ex parte hearings. But where one of two complainants is absent, see Peterson and Carter v. Canadian Rubber Dealers and Brokers Ltd., supra note 165: the complainant did not respond to notice of hearing nor to any other means (i.e. letters, telephone calls, and a telegram) used in an attempt to contact her. The Board concluded that there was a manifest lack of interest on the complainant's part, that an adjournment would inconvenience the respondent, that it was not empowered to redress this inconvenience by way of costs (seeing the absence of statutory authority to do so), and that, therefore, counsel's motion for an adjournment should be dismissed.

172. See, supra, section on parties.

173. See, supra, section on right to counsel.

alteram partem rule (174).

In addition to these, a board of inquiry may consider adjourning where it has allowed an amendment to the complaint which involves the addition of a new ground (175) and where, as a result, the respondent requires further time to prepare his case.

K. Prior Arbitration Decisions and Collective Agreements

From time to time it is inevitable that the areas of Human Rights and Labour relations should cross paths. This is all the more likely to happen as an increasing number of collective agreements are negotiated so as to include anti-discrimination clauses which resemble the statutory provisions. An overlap is also foreseeable between, on the one hand, complaints alleging dismissal due to discrimination, and, on the other hand, grievances alleging dismissal "without cause" or "without just cause". So one may anticipate that a considerable number of complaints which are lodged by unionized employees and which deal with matters such as promotions, discriminatory working conditions, unequal pay and dismissals, will also be, or have been, the subject of grievances procedures and eventually of arbitration decisions.

The overlap may cause parties to raise questions regarding

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174. See discussion regarding the rules of natural justice, supra, at pp. 282 ff.; see also, supra, section on particulars, at pp. 315 ff.

175. Cousens v. The Canadian Nurses Association (1981), 2 C.H.R.R. D/365 (Ont.); Bremer v. Board of School Trustees School District, No. 62 et al., (B.C., 1976); Tabar & Lee v. Scott and West End Construction Limited, supra note 105, at pp. 1083-5.

the respective jurisdictions of arbitration and human rights boards. This is particularly so in instances where an arbitration decision has been rendered prior to a board hearing and where this decision is favourable to the respondent (176). The latter, faced with the prospect of multiple proceedings and also with the possibility of conflicting decisions, may attempt to challenge the board's right to hear the complaint. At the heart of the challenge there then lies the issue of res judicata (177). Stated otherwise the respondent may question the legality of a hearing which, according to him, intends to deal with a matter that has already been decided, in a binding fashion, by another tribunal.

At the outset it might be worthwhile to review the Common Law position as to the constituent elements of the res judicata rule. These may be reduced to the three following requirements: first, that there be a final judicial decision pronounced by a court of competent jurisdiction (decision is here understood to include that of an arbitrator or other inferior tribunal); secondly, that there be identity of action or issue, and lastly, that

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176. If favourable to the complainant, that usually settles the matter.

177. On the topic of res judicata see Sopinka and Lederman, supra note 12, at pp. 365 ff. The Common Law rule of res judicata was described in the case of Re Ontario Sugar Co.; McKinnon's Case (1910), 22 O.L.R. 621, at p. 626, as quoted in Sopinka and Lederman at p. 365:

> No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

there be identity of parties and their privies (178). Should any of these essential elements be absent, then the rule of res judicata will not apply and the second hearing will be entitled to proceed unhindered.

Issues relating to res judicata have cropped up in cases before human rights tribunals (179) and, indeed, the decisions that deal with this particular controversy are as abundant in number as they are detailed in their reasoning (180). The

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178. Sopinka and Lederman, ibid., at p. 366.

179. For detailed discussion on the topic, see Tarnopolsky, supra note 1, at pp. 472-475.

180. Manitoba Food and Commercial Workers Union v. Canada Safeway Ltd. (1983), 4 C.H.R.R. D/1495 (Man.); City of Moose Jaw v. Holizki, Board of Inquiry et al. (1983), 4 C.H.R.R. D/1260 (Sask. Ct. Queen's B.); Hyman v. Southam Murray Printing and International Brotherhood of Teamsters, Local 419, supra note 120; Fleming and Baptiste v. Byron Jackson Division, Borg - Warner (Canada) Limited, supra note 99; Avtar Singh v. Domglas Limited (1981), 2 C.H.H.R. D/285; Abihsira v. Arvin Automotive of Canada Ltd. et al. (1981), 2 C.H.H.R. D/271; Derkson v. Flyer Industries Limited, (Man., 1977); see also cases in which boards decided to proceed even though the collective agreement provided for the arbitration of grievances: Hadley v. Mississauga, (Ont., 1976), and Hall and Gray v. International Firefighters' Association, Local 1137 et al., (Ont., 1977). In Mitton v. Parent, Trudel et la Commission de la Fonction Publique (1981), 2 C.H.R.R. D/334 (Can.), the tribunal declared that, seeing ss. 32 and 33 of the Canadian Act, it was not barred from hearing a complaint where the complainant had exhausted his other recourses, nor was there res judicata as a result of an appeal decision of the Public Service Commission.

In Quebec, the Courts have held that the Commission has the jurisdiction to investigate complaints of discrimination even where the employee has launched grievance proceedings: Quebec Poultry v. Commission des droits de la personne du Québec, [1979] C.A. 148; Charpentes de l'Est Canton Ltée v. Commission des droits de la personne et al., [1978] S.C. 836; and Ateliers d'Ingéniérie Dominion Ltée v. Commission des droits de la personne du Québec, [1980] R.P. 209, in

(contd.)

overwhelming majority of these decisions have held that a prior arbitration decision does not constitute res judicata even if the facts before the human rights boards are substantially the same, or the same, as those dealt with by the arbitrator (181). Although a multitude of reasons have been offered in support of this majority position (182), one in particular stands out as the most fatal argument against res judicata: it is the fact that the parties involved in the two processes are not identical. Thus, in grievance proceedings unions have a central role to play, they determine whether a grievance should be pursued or not, and they act as parties at arbitration. On the other hand, once a discrimination complaint has been filed, the Commission has a role

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which Mr. Justice Jacques stressed the fact that the rights protected by the Charter are a matter of public policy. He said: "Je ne crois pas que l'on puisse retirer à un citoyen un droit dit 'intrinsèque' (Préambule de la Charte) à l'occasion d'une convention collective, négociation qui est en soi une série d'accommodements et de compromis économiques. Les droits reconnus dans la Charte sont plus que des 'conditions de travail', ils sont des conditions de vie en société."

181. Contra: Bouten v. Mynarski Park School District 5012 (1982), 3 C.H.R.R. D/1050 (Alta. Ct. Queen's B.) and also the Avtar Singh case, ibid. Note, however, that the board of inquiry in this latter case decided ultimately to proceed with its hearing because discrimination had not been in issue at the arbitration. Moreover, two boards of inquiry have expressly rejected the approach adopted in the Avtar Singh case: see the Hyman case, ibid., and the Fleming case, ibid.

182. E.g. the parties are not the same; the remedies are not the same; the Commissions have particular expertise in dealing with human rights disputes; human rights statutes cannot be less accessible to trade union members than to other members of society; public interest considerations are involved that make a matter stand apart from the immediate interests of the individual complainant. For a comprehensive discussion of each of these points, see the Hyman case, ibid.

in deciding whether or not to pursue the complaint, and its decisions are influenced by considerations that may differ substantially from those of the union when it deals with its grievances. Moreover, the Commission regularly acts as a party at a hearing and it has been held that its involvement is more than of mere formality and more than of mere symbolic value (183).

From the above, it is clear that the majority position has taken into account the Common Law requirements of the rule discussed earlier (184).

What of the possibility of conflicting decisions? In the Abihsira case, Chairman Hunter offered these comments on the matter:

> It may be ... that precisely the same facts and the same issues will emerge at the Board of Inquiry as were before the arbitration board; if that happens, the unfortunate possibility exists of different findings and inconsistent decisions .... But that would not affect the jurisdiction of (either) .... Even if the facts relating to the grievance and the complaint were in all respects identical, in my opinion both tribunals would have jurisdiction since they exist for different purposes and they derive their authority under different statutes and can order different remedies (185).

Consequently, although the possibility of conflicting decisions is foreseeable, this is not sufficient to deprive either of the two tribunals of their respective jurisdictions.

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183. Fleming and Baptiste v. Byron Jackson Division Borg - Warner (Canada) Limited, supra note 99; Hyman v. Southam Murray Printing et al., supra note 120; Abihsira v. Arvin Automative of Canada Ltd. et al., supra note 180; Derkson v. Flyer Industries Limited, supra note 180.

184. Supra, at pp. 331-332.

185. Ibid., at p. 272.

There are two additional questions which may arise in conjunction with prior arbitration decisions and collective agreements. The first is whether an arbitrator's decision is admissible as evidence by the board of inquiry and, if so, what weight should be given to such a decision. In the Fleming case (186), the parties raised these specific issues, to which Chairman Zemans responded that although the arbitration decision might be regarded as hearsay, he was not bound by the strict rules of evidence. He stated that, moreover, the decision in question was potentially relevant to the hearing. For these two reasons, the Chairman ruled that the arbitrator's decision was admissible as evidence before him.

In determining the weight that should be given to the arbitration decision, Chairman Zemans considered the criteria set out in the American decision of Alexander v. Gardner - Denver Ltd. (187). This ultimately led him to conclude that the decision carried little weight since transcripts of the arbitration hearing were not available and this made it impossible to determine its procedural fairness or even to identify the specific issues dealt with at arbitration (188).

Another related point is whether parties may contract out of the provisions of human rights statutes through clauses contained in collective agreements. For instance, a collective

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186. Supra note 99, at p. 769.

187. 415 U.S. 36 (1974).

188. Supra note 99, at p. 769.

agreement may contain a clause agreeing upon the confidential nature of certain documents and to their non-disclosure (189). Barring questions of privilege, does such a clause render these documents inadmissible before a human rights board? Another example is this: a clause provides for the mandatory retirement of employees who have reached the age of sixty (190); does this part of the collective agreement mean that the board of inquiry must abstain from hearing evidence as to the discriminatory character of such a retirement policy? Such contracting-out provisions have been firmly rejected both by the courts and by human rights boards, on the basis that the provisions of human rights statutes are matters of public policy.

In the decision of the Supreme Court of Canada in The Ontario Human Rights Commission et al. v. The Borough of Etobicoke, Mr. Justice McIntyre made the following statement:

> Although the Code contains no explicit restriction on such contracting out, it is nevertheless a public policy in Ontario as appears from a reading of the statute itself and as declared in the preamble. It is clear from the authorities, both in Canada and in England, that parties are not competent to contract themselves out of the provisions of such enactments and that contracts having such effect are void, as contrary to public policy (191).

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189. Bezeau v. Ontario Institute for Studies in Education, supra note 129.

190. The Ontario Human Rights Commission et al. v. The Borough of Etobicoke, [1982] 1 S.C.R. 202; (1981), 3 C.H.R.R. D/781.

191. Ibid., at p. 785.

There can be no doubt, therefore, that parties are not permitted to contract out of the provisions of human rights statutes since they are a matter of public policy.

L. Burden of Proof (192)

By now it is well, if not unanimously, recognized that the standard of proof before a human rights tribunal is the civil standard which requires that a matter be established by a preponderance of evidence or on a balance of probabilities (193). Lord

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192. The term "burden of proof" is often used to describe two distinct concepts which are 1) the standard of proof and 2) the allocation of proof. Sopinka and Lederman, supra note 12 present each of these two concepts in the following terms:

> "The standard of proof determines the degree of probability that must be established by the evidence to entitle the party having the burden of proof to succeed in proving either his case or an issue in the case." (at p. 384) (Emphasis is mine.)

Whereas,

> The 'ultimate' or 'legal' burden of proof is the burden that is assigned by the substantive law to the parties in a case, with respect to the various issues disclosed by the pleading. (at p. 395) (Emphasis is mine.)

193. Tarnopolsky, supra note 1, at p. 476. Some statutes specifically describe the standard of proof: N.S., s. 30(3); P.E.I., s. 25(3), and Sask., s. 31(7). Decisions: Henry and Black v. Rajewski, (Ont., 1969); Penniecook v. Kilu and Kilu, (Ont., 1970); Cooper v. Belmont Property Management, supra note 105; Bird v. Gabel et al., (Sask., 1974); MacBean v. Village of Plaster Rock, (N.B., 1975); Re Lavallee and Lloyd Realty Development Limited et al., (1977) Sask. Q.B.C. (Queen's Bench Court); Bremer v. Board of School Trustees District 62, supra note 175; O'Malley (Vincent) v. Simpson-Sears Limited (1981), 2 C.H.R.R. D/267; Pritam Singh v. Workmen's Compensation Board Hospital and Rehabilitation Centre (1981), 2 C.H.R.R. D/459; Bhinder v. Canadian National Railways (1981), 2 C.H.R.R. D/546. Also, Rasheed v. Bramhill (1981), 2 C.H.R.R. D/249; and Richards v. The National Harbours Board (1981), 2 C.H.R.R. D/407.

See, in addition, Patrice Garant, supra note 23, at pp. 846-847 and Kavanagh, supra note 6, at p. 58.

Denning defined this standard in simple terms when he said:

> The degree is well settled. It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'we think it more probable than not', the burden is discharged, but if the probabilities are equal it is not (194).

The standard applies not only with respect to the complainant, or the Commission, but also to the respondent when the burden is assigned to him. For example, if a respondent relies upon a bona fide occupational qualification defence, he carries the burden of proving this allegation. The respondent must, furthermore, discharge this burden on a balance of probabilities (195). Here again the Supreme Court of Canada has given a clear direction on the matter:

> Once a complainant has established before a board of inquiry a prima facie case of discrimination, in this case proof of a mandatory retirement at age sixty as a condition of employment, he is entitled to relief in the absence of justification by the employer. The only justification which can avail the employer in the case at bar, is the proof, the burden of which lies upon him, that such compulsory retirement is a bona fide occupational qualification and requirement for the employment concerned. The proof, in my view, must be made according to the ordinary civil standard of proof, that is upon a balance of probabilities (196).

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194. Miller v. Minister of Pensions, [1947] 2 All E.R. 372, at p. 374 (K.B.), as cited in Sopinka and Lederman, supra note 12, at p. 385.

195. The Ontario Human Rights Commission et al. v. The Borough of Etobicoke, supra note 189; Richards v. The National Harbour Board, ibid.; Foreman et al. v. Via Rail Canada Inc. (1980), 1 C.H.R.R. D/111 (Can.); Colfer v. Ottawa Board of Commissioners of Police, (Ont., 1979).

196. The Ontario Human Rights Commission et al. v. The Borough of Etobicoke, ibid., at p. 783.

The standard of proof required of respondents alleging a bona fide occupational qualification defence is, therefore, subject to a "balance of probabilities" test. There is one interesting decision that appears, however, to press slightly further when it speaks of a "high degree of balance of probability" standard. The case in question involved the refusal to hire three complainants as waiters and porters because they lacked vision in one eye; the respondent raised a bona fide occupational qualification argument in his defence. The tribunal ultimately rejected this defence and, commenting upon the respondent's burden of proof in this remarked as follows: "[the] onus is not a criminal onus but should represent a high degree of balance of probability due to the fact that if invoked, it deprives an individual of his or her right to work" (197).

This approach seems similar to the position adopted by some arbitrators in dismissal cases, where a more stringent degree of proof than the "balance of probabilities" standard has been applied (198).

So far, the discussion has been confined to the standard of proof required in discrimination cases, and this, as was pointed out earlier, is but one aspect of the broader question of the burdens of proof. The second aspect, which is the allocation of proof, has proved to be complex and sometimes controversial in the area of discrimination law and, therefore, has been dealt with

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197. Foreman et al. v. Via Rail Canada Inc., supra note 194, at p. 114.

198. Brown and Beatty, supra note 66, para. 3:2500.

in a separate chapter (199).

M. Motions for a Non-Suit

Motions for a non-suit are quite likely to arise in discrimination cases, and yet they are usually inappropriate as a means of dealing with this subject matter. This assessment of the role of non-suit motions is especially true where the intent to discriminate is in issue, as the following will show.

What is the purpose and the usual role of a non-suit motion? In a civil action, if the plaintiff's evidence is insufficient to allow a reasonable person to infer in his favour, then, at the close of plaintiff's case, the defendant may elect to call no further evidence and he may make a motion for a non-suit requesting the court to dismiss the action because of the insufficiency of the evidence against him (200).

The non-suit defence is also available to the respondent pleading before a human rights tribunal, theoretically at least. In practice most, if not all, motions of this nature have failed (201). It is the particularities of discrimination cases

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199. See, supra, Part I, Chapter 5.

200. Sopinka and Lederman, supra note 12, at pp. 521 ff. and at p. 521 note 1: "the word 'non-suit' is ... used ... in relation to the motion by defendant for a final judgment on the ground that the plaintiff has made out no case against him".

201. Harris v. Bouzide, (Ont., 1977); Bremer v. Board of School Trustees, School District No. 62 et al., supra note 175. In Great Britain: Oxford v. Department of Health and Social Security, [1977] I.R.L.R. 224, [1977] I.C.R. 884; Owen & Briggs v. James, [1981] I.C.R. 377.

which have caused non-suit motions to meet with such disfavour.

It is indeed rare to find a case of intentional discrimination based on direct evidence and, by now, it is generally admitted that such cases must rely heavily on indirect or circumstantial evidence. This means that the final picture which will reveal whether or not there has been discrimination can only be obtained by piecing together a number of elements, much like a jigsaw puzzle. Moreover, to continue the metaphor, the complainant holds some of the pieces to the puzzle while the respondent has the others, and, the final picture can only emerge once the two parties have contributed their share.

At the outset it is incumbent upon the complainant, or the Commission, to demonstrate that there has been a denial of employment, accommodation or services. Often the complainant does not have evidence of the reason for the denial, perhaps simply because no reason was given at the time of the refusal, or else, because the reason given seems to be a pretext while the real motive behind the refusal remains hidden. Since one cannot demand the impossible of the complainant, it is up to the respondent to provide the tribunal with an explanation for the refusal. If the respondent is able to show a non-discriminatory reason for his actions and if the explanation is credible and able to stand up to scrutiny, then the complainant's case fails. If, on the other hand, the complainant is able to establish that the respondent's explanation consists of reasons that are contradictory, that the reasons were applied differently to other applicants or that the reasons are otherwise invalid, then such evidence forms an

essential part of the complainant's case. Furthermore, the cross-examination of the respondent's witnesses, or of the respondent himself, may help to uncover the real reason behind the refusal. Signs of prejudice or of stereotyped attitudes may combine with other factors to lead the tribunal to infer that the refusal was, in effect, discriminatory.

To illustrate the importance of obtaining the respondent's version before assessing the complainant's case, consider the following example. The complainant, a black woman, applies for a job as Food Service Supervisor with the respondent hospital. She has learnt of the opening through a newspaper ad which has run off and on for a period of almost a full year. At first, the complainant leaves an application form with the receptionist at the personnel department but receipt of her form is not officially acknowledged by personnel. Sometime later the complainant renews her application and this time she insists upon a response, to which she receives a standard-form letter of rejection. The complainant maintains that the personnel department has not adequately considered her job application. This is the gist of the Commission's case. It may appear slim as far as a prima facie case of discrimination is concerned. It is indeed meagre. However, it does not take the extensive experience of a human rights officer to appreciate the fact that the vast majority of intentional, as opposed to systemic, discrimination cases do not offer much more in terms of direct evidence of discrimination whether based on race, colour, national origin, sex, political convictions, sexual orientation or otherwise.

Returning to the example, the respondent in this case explains the refusal to hire the complainant by relying upon a number of reasons, none of which prove to be valid. In particular, the respondent suggests that the complainant's experience is inadequate, but it is shown that she does in fact have relevant experience and, also, that candidates hired for the job have much less experience than she does. Lastly, during the cross-examination of one of the respondent's witnesses, the personnel supervisor, it is discovered that the complainant, who is originally from the Caribbean region, has not been hired because the supervisor in question does not have confidence in the "work habits" of individuals coming from developing countries.

The example that has just been given closely resembles the evidence presented to the Human Rights Board in a 1977 case in Ontario (202). The Board Chairman eventually concluded that the hospital representatives did not have a valid reason to refuse the complainant's application. He was also persuaded that the refusal was based on prejudice towards individuals from developing countries. A motion for non-suit was not, in fact, submitted during these hearings but this example has been chosen nevertheless because it exemplifies the type of evidence that is all too often the only one available to the complainant in cases of intentional discrimination. The outcome of the case, which was largely based on evidence obtained through the respondent, is also a good indication of the reason for which it is ill-advised to receive non-

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202. Morgan v. Toronto General Hospital, (Ont., 1977).

suit motions at the close of complainant's case no matter how weak the evidence appears to be at that stage of the proceedings (203).

Now to turn to cases that have specifically dealt with non-suit motions. First, there is the case of Harris v. Bouzide (204). In this matter the respondent presented a motion for non-suit at the close of the Commission's case, but he withdrew the motion and decided to proceed with his case when the Board made it clear that it could enforce the attendance and examination of those alleged to have committed the offence, i.e. the respondent, and that, in addition, the Commission would be permitted to complete its case by calling the respondent as a witness. This case demonstrates the fact that boards of inquiry may be inclined to seek the respondent's version before deciding on the complaint.

In British Columbia, a board of inquiry dismissed the respondent's motion for non-suit on the basis that the complainant had established a prima facie case, the effect of which was to shift the burden of proof upon the respondent (205). In the circumstances, it was held that the non-suit motion was no longer appropriate.

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203. As part of the prima facie case the complainant should, however, be required to prove the following minimum elements of his case: that he was denied a job, housing, etc., and that he belongs to a protected group under the anti-discrimination legislation. On the topic of the prima facie case in discrimination law see also discussion, supra, Part I, chapter 5.

204. Supra note 200.

205. Bremer v. Board of School Trustees, District 62, supra note 175.

The Board, which was composed of three members, explained its position in the following manner:

> The motion was, in effect, a no-evidence motion.
>
> The motion was denied. At the point in the proceedings at which the motion was made, the onus of proving the cause for the rejection of (complainant's) application as well as the reasonableness of that cause had shifted to the respondents. The rationale for and the basis upon which a respondent may acquire this onus are articulated in the GATE case:
>
> > Once a denial or a discrimination with respect to a service or facility customarily made available to the public is established the onus rests upon the respondent to satisfy the Board of Inquiry that reasonable cause existed for the refusal and/or discrimination. Were it otherwise a complainant would be required to establish a cause for the denial or discrimination which would be a difficult if not impossible enterprise under those circumstances where a respondent has denied a service without giving reasons. Requiring the complainant to both establish the cause for the denial or discrimination as well as the lack of reasonableness of same would in such circumstances enable the respondent to avoid responsibility for what would otherwise be a discriminatory act, by simply remaining silent. The very expression 'reasonable cause' impels one to the conclusion that no cause at all would, prima facie, be unreasonable. Accordingly a respondent faced with proof of a denial of a service or discrimination in respect thereof must of necessity establish two things if he is to avoid the consequences of a finding that the allegation is justified under Section 17(2) of the Code. He must first establish the cause of the discrimination and secondly, he must satisfy the Board of Inquiry that the cause was a reasonable one.
>
> In this case, the elements necessary to shift the onus to the respondents were clearly present in the evidence adduced on behalf of the complainant. The elements to which we refer and which represent

a parallel to the elements referred to in the GATE decision in respect of a Section 3 complaint are the following:

> First, there was a vacant position at the time [the complainant] made her application;
>
> Second, [the complainant] was qualified to fill that position; and
>
> Third, [the complainant's] application was rejected.
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> ...
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> Since there was evidence of the elements necessary to shift the onus to the respondents, the burden was then on the respondents and thus the motion for a directed dismissal of the complaint failed (206).

In Great Britain a slightly different approach has led the Courts to the same conclusions. Upholding the decision of an Industrial Tribunal, the Employment Appeal Tribunal (207) has stated that once the applicant has presented his case the evidential burden shifts to the repondent, and it is only in exceptional or frivolous cases that the latter will not have a case to meet. The comments made by both Tribunals demonstrate a keen understanding of the difficulties inherent in proving discrimination and they are well worth repeating:

> [T]here is no doubt that, although the [S.D.A.] is silent upon the burden of proof, the formal burden of proof lies upon the applicant. That having been said, it should be recognized that in the course of the case the evidential burden may easily shift to the respondents and we draw attention to, and would wish to commend, the attitude adopted by the Industrial Tribunal in this case. In para. 5 they said:

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206. Ibid., at pp. 31-32.

207. Oxford v. Department of Health and Social Security, supra note 201.

> At the conclusion of the applicant's case, we were inclined to reject his claim on the basis that no case against the respondents had been established. Nevertheless, bearing in mind the difficulties the applicant faced, we decided to hear evidence from the respondents and to give the applicant every opportunity to examine their witnesses and question them on matters he considered relevant.
>
> It seems to us that that was a very proper course to have adopted, and would recommend it as being the course which in most circumstances is the right course to adopt. It further seems to us that, while the burden of proof lies upon the applicant, it would only be in exceptional or frivolous cases that it would be right for the Industrial Tribunal to find at the end of the applicant's case that there was no case to answer and that it was not necessary to hear what the respondents have to say about it (208).

Regardless of the approach that is adopted, it is clear that once a complainant has shown denial of employment opportunity, of accommodation, etc., the respondent has the duty to explain the refusal. In closing, it is also suggested that failure to so provide an explanation may lead to an inference, in support of the complainant's case, that there is no valid explanation for the denial (209).

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208. Ibid.

209. See Sopinka and Lederman, supra note 12, at p. 535: "... [there] is a well-recognized rule that the failure of a party or a witness to give evidence, which it was in the power of the party or witness to give and by which the facts might have been elucidated, justifies the court in drawing the inference that the evidence of the party or witness would have been unfavourable to the party to whom the failure was attributed." See also discussion regarding circumstantial evidence, supra, Part I, Chapter 3, at pp. 135 ff.

CHAPTER 3: ADDUCING EVIDENCE

The order in which evidence is called before a human rights tribunal is similar to that followed in ordinary civil proceedings. The complainant is the one alleging that the law has been violated and therefore it is for him to lead off and to present the main facts of the case. The respondent then follows with his evidence, after which the complainant may call reply or rebuttal evidence (210). Arguments are then submitted by both parties in the same order as the one in which evidence has been presented.

Evidence may be produced in any of the following ways: (1) oral or testimonial evidence, (2) real evidence, and (3) documents (211). In addition, many of the statutes specifically allow

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210. Sopinka and Lederman, ibid., at pp. 517-519: The purpose of rebuttal evidence is "... to contradict or qualify new facts or issues raised in defence". The facts that are subject to rebuttal may have been brought out in direct or in cross-examination. And at p. 517, quoting from 6 Wigmore on Evidence, s. 1873, p. 511: "As a general rule, however, matters which might properly be considered to form part of the plaintiff's case in chief are to be excluded. A plaintiff is therefore precluded from dividing his evidence between his case in chief and reply, for two very practical reasons: '... first, the possible unfairness of (sic) an opponent who has justly supposed that the case in chief was the entire case which he had to meet, and, secondly, the interminable confusion that would be created by an unending alternation of successive fragments of each case which could have been put in at once in the beginning." But trial judges have the discretion to admit evidence that is not the proper subject matter of reply (p. 518). This discretion applies, a fortiori, to boards of inquiry because their procedures are less formal than trials.

211. Sopinka and Lederman, ibid., at p. 11.

human rights boards to receive evidence by way of affidavit. The terminology most frequently used to describe the type of evidence that a human board rights may receive and accept is evidence "on oath, by affidavit, or otherwise" (212).

It is worthwhile to take a brief look at each of these categories of evidence to see what each entails and the manner in which they complement each other.

Oral or testimonial evidence may include sworn or unsworn statements. One example of unsworn statements admissible even in a court of law are statements made extra-judicially (213), either orally or in writing, which are admissible as an exception to the Hearsay Rule. Such statements are, however, only admissible when introduced through the sworn statement of a witness (214).

Real evidence (or things) includes not only the production of articles before the tribunal, but the observation of the demeanor of a witness who is testifying, the viewing of a film and taking a view.

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212. B.C., s. 16(5) and Reg. 151/75, s. 6; Man., s. 25(2); N.B., s. 20 which refers to the Industrial Relations Act, R.S.N.B. 1973, c. I-4, s. 67(3); Nfld., s. 16A(5); Sask., s. 31(1), and Reg. 216/79, s. 28; Can. Act, s. 40(3)(c). In Ontario, s. 15(1) of the Statutory Powers Procedure Act, R.S.O. 1980, c. 484, provides that any oral testimony and any document or other thing, whether or not given or proven under oath or affirmation or admissible as evidence in a court, is admissible before a tribunal.

213. For example, an admission made by a respondent during the investigation may represent a statement made extra-judicially. See, infra, section on admissions against interest, at pp. 392 ff.

214. Sopinka and Lederman, supra note 12, at pp. 11-12.

Real evidence cannot be produced before a tribunal without prior testimonial evidence or at least an admission in order to establish the identity of the thing (215).

Documents may be introduced into evidence merely to prove their existence, in which case they fall into the category of things or real evidence. They may also be introduced to prove their contents, such as the case of a photograph or of a contract, in which case they are considered original evidence. As with real evidence, documents should be preceded by some other evidence in order to identify them (216).

Affidavits. As was noted above, certain statutes specifically allow human rights boards to receive evidence by affidavit. But it is said that "[t]he frailty of this form of evidence is that the opposite party has no opportunity to cross-examine" (217). Therefore, before receiving evidence by affidavit, a board of inquiry should assess whether the denial of the right to cross-examine will cause serious prejudice to a party and in any way limit its right to be heard. If so, then the board of inquiry may still admit the affidavit into evidence but it should exercise caution in deciding what weight to give to it. In the alternative, it might be preferable to have the evidence introduced in some other way, if such is possible.

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215. Ibid.

216. Ibid., at p. 13.

217. Ibid., at p. 466.

Some of the practical aspects involved in the production of evidence will now be examined, and for these purposes the following headings will be used: i) witnesses, ii) documents, iii) taking a view, and iv) judicial notice.

A. Witnesses

The parties are entitled to bring with them or to summon witnesses whose testimony may be relevant to their case. The right to present evidence in this manner is an important aspect of the rules of natural justice. Indeed the right to be heard and to present one's case entails the right to call and to examine witnesses and also the right to cross-examine for a full and fair disclosure of the facts on which a witness has testified.

The side that has called the witness proceeds first with the examination-in-chief, after which the opposing party may cross-examine the witness. Each of these topics will be looked at separately, but first it is necessary to address the question of compellability.

1. Compellability

A compellable witness may be defined as "one who may be forced by means of a subpoena to give evidence ... under the threat of contempt proceedings should he refuse to comply" (218). In most cases, human rights tribunals are specifically given the

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218. Ibid., at p. 457.

power to issue subpoenas (219).

Their power to compel the attendance of witnesses includes the power to call either party to testify on his own behalf, or otherwise (220). Also, a party may call a representative, an employee or member of the opposite side with a view to proving an element of his case (221).

There are some exceptions to the rule concerning the compellability of witnesses and, for instance, the conciliator who has been appointed by the Commission to settle a complaint is not compellable at the hearing (222).

2. Power to enforce the attendance of witnesses and to issue contempt citations

If a witness neglects or refuses to respond to a subpoena,

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219. Alta., s. 19(1), and the Public Inquiry Act, R.S.A. 1980, c. P-29, s. 3; B.C. Reg. 151/75, s. 20; N.B., s. 20(3), and the Industrial Relations Act, R.S.N.B. 1973, c. I-4, s. 67(1); Nfld., s. 17(1); N.S., s. 26A(1), and the Public Inquiries Act, R.S.N.S. 1967, c. 250, s. 3; Ont., the Statutory Powers Procedure Act, R.S.O. 1980, c. 484, s. 12(1); Sask. Reg. 216/79, s. 27(1), and Can. Act, s. 40(3)(a).

220. Institut Albert-Prévost v. Bourdhouxe (1973), 74 C.L.L.C. 14, 204 (Que. S.C.), aff'd 14, 212 (Que. C.A.). But a witness has a right not to have self-incriminating evidence used against him in subsequent proceedings: see the Canadian Charter of Rights and Freedoms (s. 13), and also, for example, the Ontario Statutory Powers Procedure Act, R.S.O. 1980, c. 484, s. 14.

221. Harris v. Bouzide, supra note 200, at p. 4; O'Malley (Vincent) v. Simpson-Sears Limited (1981), 2 C.H.H.R. D/267, at p. 270.

222. See, infra, discussion on privileges, at pp. 394 ff; and also the section on communications in furtherance of settlement, at pp. 401ff.

then he may be subject to a warrant enforcing his attendance and also to contempt charges. The power to issue such warrants and to hear contempt charges is sometimes given specifically to judges or to the courts (223), but in other instances the tribunals have the power to "enforce the attendance of witnesses" and to "compel them to give evidence" (224). Although none of the statutes expressly provide the tribunals with the power to issue contempt citations, and while few, if any, human rights tribunals would be inclined to impose such punishment, it has been held that the power of committal for contempt "in the face" (225) of a tribunal is one which is inherent or implied in its power to compel the attendance of witnesses (226).

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223. See, for example, the Ontario Statutory Powers Procedure Act, R.S.O. 1980, c. 484, ss. 12(3) and 13.

224. E.g. N.B., the Industrial Relations Act, R.S.N.B. 1973, c. I-4, s. 67(2), and N.S., the Public Inquiries Act, R.S.N.S. 1967, s. 250, s. 4. In Alberta, the Public Inquiries Act, R.S.A. 1980, c. P-29, gives the board of inquiry the power to enforce the attendance of witnesses and to compel them to give evidence (s. 4), but only a judge of the Court of Queen's Bench has the power of committal for contempt (s. 5).

225. Only a Superior Court has the inherent jurisdiction to deal with contempt not in the face of the court: Reid and David, supra note 22, at p. 103. Also, Canadian Broadcasting Corporation et al. v. Cordeau et al. (1979), 101 D.L.R. (3d) 24.

226. Re Hawkins and Halifax City Residential Tenancies Board (1974), 47 D.L.R. (3d) 117; Ball v. Commission de Police du Québec, S.C. Montréal, No. 05-007361-173, June 13, 1973, as cited by Raymonde Crête, "L'enquête publique et le pouvoir de condamnation pour outrage au tribunal" (1978), 19 C. de D. 859, at p. 865. This same author is also of the opinion that inferior tribunals should be able to sanction contempt only as a coercive measure and not as a means of punishment (p. 874).

3. Direct examination

Leading questions - Direct examinations, or examinations-in-chief, as they are also called, are subject to a variety of rules but the cardinal rule is that "a party calling a witness ought not to ask leading questions" (227). This is slowly and painfully learned by most novice lawyers during their first years of practice: then again it is one that some lawyers never learn.

Unfortunately breaches to this rule can lead to awkward situations, and questions such as "is it not true that you spoke to the respondent candidly about your criminal record during the job interview?", are best avoided. However, learning how to check the tendency to ask leading questions can be a difficult task indeed as the following remarks so vividly show:

> After a few weeks studying trial skills, you will believe that every question is leading, every answer hearsay. You will be tempted to call a witness to the stand, close your eyes and say 'go ahead' quickly adding 'but, only if you want to'.
>
> Alas, you have gone from the pan to the fire. Pathological fear of asking leading questions causes many beginners to ask extremely vague questions. In doing so, they forfeit control over the objections ....
>
> Phrasing questions on direct is difficult. You must walk the line between leading questions ("Now isn't it true that after you arrived at the scene of the accident the plaintiff staggered over to you reeking of booze, and slurred 'I'll never try driving from the backseat again'?") and vague questions ("Tell us what happened on the day in question.") Asking vague and leading questions will bring forth a

227. Sopinka and Lederman, supra note 12, at p. 481.

> lot of silly objections from your opponent. These will likely cause you a great deal of consternation and embarrassment (228).

The most common form of a leading question is one which suggests the answer; another is one which assumes a fact or state of fact which is in dispute (229). Apart from the embarrassment that it may cause, there is the added danger that leading questions will undermine the witness's credibility, and so, it is preferable to "allow him to tell his story rather than to simply sit there occasionally grunting a 'yes' or 'no' to [counsel's] statements" (230).

Refreshing a witness' memory. It is permitted for a witness to refresh his memory from notes or other writings previously made. This procedure is particularly relevant in discrimination cases because hearings are usually preceded by an investigation, during which statements made by witnesses and other observations are taken down in writing for purposes of a report. Chances are that the investigation will have taken place while events are still fresh in the minds of witnesses, whereas the hearing may be held only a year or so after the incidents complained of occurred. Such delays render the possibility of referring to earlier notes particularly appealing. Also, the usefulness that such notes may eventually acquire during the hearing is a fact that underscores

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228. Kenney F. Hegland, Trial and Practice Skills in a Nutshell, West Publishing Co., St. Paul, Minn., 1978, at p. 25.

229. Sopinka and Lederman, supra note 12, at p. 481.

230. Hegland, supra note 227, at p. 26.

the need to prepare the notes with care and precision and to preserve them in a safe place.

As the following statement indicates, there are essentially two kinds of writings which may serve to help refresh a witness's memory:

> A witness may refresh his memory for the purpose of testifying at a trial from:
>
> (1) A writing made by the witness at or near the time of the occurrence of the event or matter recorded;
>
> (2) A writing made by a person other than the witness, recording events or matters observed or heard by the witness, which the witness verified as an accurate account when the facts were fresh in the memory of the witness (231).

This means that an investigator may refer to his or her own notes while testifying. It also means that the witness who made a previous statement to an investigator may similarly refer to the investigator's notes in order to refresh his memory. Of course, the rule is not limited to investigators' notes and a witness for either side may also rely on books, records, ledgers or even his own personal notes in order to refresh his memory.

Before a witness is allowed to rely on any such writings to refresh his memory, it must be shown that the notes or writings were prepared while the matter recorded was still fresh in the witness's mind (232). On the other hand, it is not necessary for

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231. Sopinka and Lederman, supra note 12, at p. 489.

232. Ibid., at p. 490. Because of this rule it is best for the investigator to conduct a speedy investigation and to write up his notes as soon as possible.

the witness to have an independent recollection of the events recorded when he is testifying (233).

It is best to keep the original of the record and to refresh one's memory from this. If a copy is made which includes changes or is a summary of the original, it may still be used if the witness had a fresh recollection of the matters recorded at the time that the changes were made (234).

One of the circumstances in which the use of earlier notes becomes crucial is where an investigator is called to testify with respect to inconsistent statements made by one of the respondent's witnesses (235), or concerning an admission made by the respondent himself durng the investation (236). If, for instance, a foreman working for the respondent is called by the latter and testifies at the hearing that the complainant was a "poor worker who was always late", then the Commission may call the investigator in rebuttal to testify to the fact that during the investigation the same foreman spontaneously stated that the complainant was "efficient and reliable". This would show that the respondent's witness made an earlier inconsistent statement and that he is not

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233. Ibid., at p. 491.

234. Ibid., at p. 493.

235. See also, infra, the section on inconsistent statements, at pp. 360-361.

236. See also, infra, the section on admissions against interest, at p. 392 ff.

credible (237).

As a closing remark, it is worth noting that some boards of inquiry have found that the use of clear and coherent notes enhances the credibility of witneses (238).

4. Cross-examination

Purpose: The cross-examination of witnesses represents an essential ingredient of the adversary system. Also it has been suggested that a hearing is not a "real hearing" unless the parties are entitled to cross-examination (239). So, although few of the statutes expressly refer to the parties' right to cross-examine (240), in practice human rights tribunals usually seem to

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237. This is one of the reasons for which lawyers recommend that investigators take down a witness's statement in narrative form and in the first person singular using the "I" and, also, that they have the witness read the statement once it is written and have him sign it: Training Conference for Human Rights Officers, Winnipeg, Oct. 3-8, 1982.

238. Segrave v. Zeller's Ltd., (Ont., 1975), at pp. 4-5: the complainant testified with the help of notes while the respondent's witness could barely identify the complainant at the hearing. Shack v. London Drive-Ur-Self Limited et al., (Ont., 1974), at pp. 6 ff.: the testimony of the major witnesses called by the respondents was "riddled with inconsistencies and contradictions"; the investigator, on the other hand, took notes during the investigation and relied upon those notes as the basis of his testimony.

239. Reid and David, supra note 22, at p. 83: "when a 'hearing' is stipulated by statute. ... cross-examination may be held to be an essential component of it. It may be said that nothing less could be called a 'real hearing'."

240. Alta., the Administrative Procedures Act, R.S.A. 1980, c. A-2, s. 5; B.C., s. 16(4); Ont., the Statutory Powers Procedure Act, R.S.O. 1980, c. 484, ss. 10(c) and 23(2), and Sask., s. 31(4) and ss. 18(1)(2) of Regulation 216/79.

(contd.)

permit it.

The purpose of cross-examination is both to strengthen a party's own case and to impair or destroy the opponent's case (241). The use one makes of cross-examination depends on the particular facts of a case: for example, cross-examination may be used by either side to reveal inconsistencies or contradictions in the opponent's case; in cases where intention to discriminate is being alleged, it may also be used by the complainant or the Commission to bring out stereotyped attitudes on the part of a respondent (242).

A respondent's case can also be felled with one pointed question on cross-examination. For example: "Now, Mr. X, is it not true that you dismissed Mr. Y because you preferred a female

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However, the right to cross-examination is not necessarily limitless. Boards of inquiry may use their discretion to restrict it to relevant evidence; or, as is expressly provided in Ontario, they may limit the cross-examination of a witness once they are satisfied that there has been full and fair disclosure of the facts on which the witness has testified. Section 23(2) of the Ontario S.P.P.A. provides as follows:

> A tribunal may reasonably limit further cross-examination of a witness where it is satisfied that the cross-examination of the witness has been sufficient to disclose fully and fairly the facts in relation to which he has given evidence.

241. See also Sopinka and Lederman, supra note 12, at p. 496:

> Three purposes are generally attributed to cross-examination:
> (1) to weaken, qualify or destroy the opponent's case;
> (2) to support the party's own case through the testimony of the opponent's witnesses;
> (3) to discredit the witness.

242. Note that such line of questioning may be irrelevant if the complainant's case is strictly one of systemic discrimination: see, supra, Part I, Chapter 2, on the elements of proof in discrimination cases.

secretary to a young male secretary?" With a nod and a shrug the respondent looks at the judge with a detectable air of complicity and says "Well ... now ... your Lordship ... what would you have done in my place?" Of course, admissions of this kind are rare and they are more often found in romanticized descriptions of cross-examination than in reality, but the example serves to point out an important rule concerning cross-examination which is "to know when to stop"; otherwise, the witness may attempt to explain and to neutralize the effects of his statement. In the example just given, there would be no need to question the respondent any further.

Previous inconsistent statements. One of the principal objectives of a cross-examination is to discredit the witness who has just given a glowing testimony in favour of the opposite side. One way, and indeed "the most common" way, "of impeaching the credit of an opponent's witness is that of self-contradiction by means of a prior inconsistent statement written or uttered by the witness" (243).

A statement given by a witness to an investigator may constitute such a "prior inconsistent statement", and it may then be introduced to discredit the witness with an aim to neutralizing his testimony.

It appears that in civil courts, proof of inconsistent statements only goes to show that the witness is not credible. If he denies having made the prior inconsistent statement, or denies

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243. Sopinka and Lederman, ibid., at p. 505.

that the contents of the previous statement were true, then the statement is not considered evidence of the truth of the facts contained therein. The refusal to use the impeaching statement as substantive evidence has been brought into serious question both in Canada and in England: the Law Reform Commission of Canada has recommended that the obstacles to such a use be lifted, while reform along these lines has already been implemented in England since 1968 (244).

There is, however, a vital distinction to be made between inconsistent statements ascribed to regular witnesses and those ascribed to one of the parties. In the latter case the "prior statement would be accepted as substantive evidence on the ground that it constitutes an admission" (245).

Before one can lead evidence of a previous inconsistent statement, the following procedure should be followed: if contained in a document, then the witness's attention should be drawn to its contradicting parts; if the prior statement was made orally, then counsel must relate to the witness the circumstances in which the statement was made, and the witness must be expressly asked whether or not he did make the statement (246).

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244. Ibid., at pp. 507-509.

245. Ibid.; see also, infra, the section on admissions against interest, at pp. 392 ff.

246. Ibid., at pp. 505-506.

5. Re-examination

The purpose of re-examination is to enable a witness to explain and clarify relevant testimony that may have been weakened or obscured during his cross-examination by the other side (247). Ordinarily, re-examination is to be confined to those matters which arose out of cross-examination, it is not the time to introduce new facts which should have been presented during the direct examination. However, trial judges have the discretion to permit re-examination on new facts which were omitted because of an oversight. Such discretion also belongs, a fortiori, to boards of inquiry whose procedures are less formal than those used at trials.

6. Exclusion of witnesses

A party may request the exclusion of witnesses and the board of inquiry will usually grant an order to this effect (248). The advantages of such a request have been described in the following manner:

> The purpose of excluding witnesses is to preserve a witness' testimony in its original state. A witness listening to the evidence given by another may be influenced by the latter's testimony, and accordingly change his evidence to conform with it. Also, by being present in the courtroom and listening to testimony prior to giving his evidence, he may

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247. Ibid., at pp. 516-517.

248. This is expressly provided for in Saskatchewan. According to s. 23 of Regulation 216/79, "[t]he Board may ..., at its discretion, exclude from the hearing room, a witness who has not yet testified, other than a party". As for the parties themselves, they have the right to be present throughout the hearing, whether or not they are called as witnesses.

> be able to anticipate, and thereby reduce the effectiveness of the cross-examination that he will ultimately face. An order excluding witnesses seeks to eliminate these abuses. Moreover, the exclusion of witnesses may reveal that at some earlier time they had colluded, and had compared and memorized the stories that each has given in the witness box which may be exposed by the similarity of language and phrases used (249).

7. Interpreters

Formerly, the common law rule regarding the use of interpreters to translate the evidence of a witness or a party was to consider this a matter within the discretion of the trial judge (250). However, the Canadian Charter of Rights and Freedoms alters this rule by recognizing that parties and witnesses to a proceeding do in fact have a right to an interpreter. Section 14 of the Charter declares that:

> A party or a witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Human rights tribunals must be particularly sensitive to requests for an interpreter (251) not only because of their close association with Civil Rights but also as a result of the very

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249. Sopinka and Lederman, supra note 12, at p. 461.

250. Ibid., at p. 477

251. The only provision that specifically deals with interpreters is found in Saskatchewan. Section 29 of Regulation 216/79 reads as follows:

> The Board shall, on application, engage the services of an interpreter. Costs of the interpreter will be borne by the Board.

nature of the cases that they deal with, i.e. equal opportunity for members of minority groups.

B. Documents

Documents may be used to prove a fact within a party's case in either one of the two following ways: either by using the document as proof of its existence or by using the document as proof of its contents (252). As an illustration, a job-application form which has been duly completed by the complainant may be filed into evidence to prove its existence and to show that, therefore, the complainant applied for a given job. On the other hand, the contents of a document may be introduced into evidence to establish the truth of the matters stated therein and, for example, a letter which contains a dismissal notice may thus be used to prove that the complainant was dismissed as opposed to the fact that she may have resigned.

In either event, not only must the document be filed with the tribunal, but a witness must also be called to identify it (253). This means that it is necessary to call a witness who has knowledge of the document and who can testify that it is what it purports to be.

It should be noted that the contents of a document may not be the best evidence of the truth of the facts stated therein if

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252. See discussion supra, at p. 350.

253. See, supra, note 216 and accompanying text.

some rule of evidence is being violated. For instance, a letter may contain self-serving (254) evidence or it may contain hearsay (255). In such cases the tribunal may receive the evidence since it is not bound by the strict rules of evidence, but it may limit the weight given to the evidence (256).

Boards of inquiry are not bound by the best evidence rule which requires a party to produce the original of a document before it can be introduced into evidence: copies of documents are allowed (257). However, a witness must be called to prove that the copy is a reproduction of the original. Moreover, proving that the document is a copy of an original does not free the party who wishes to introduce the document into evidence from the duty of identifying the document (258), as in the case of original documents discussed above.

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254. Sopinka and Lederman, ibid., at pp. 264 ff., and at p. 264:
> There is a general exclusionary rule against the admission of self-serving evidence. Although contradictory statements may be used against a witness,'You are not entitled to give evidence of statements on other occasions by the witness in confirmation of the testimony.'
> ...
> The rationale for the rule most commonly relied on is that, due to the risk of fabrication, no person should be allowed to create evidence for himself.

255. See, infra, section on hearsay, at pp. 389 ff.

256. See, supra, Chapter 1 on the rules of evidence applicable to administrative tribunals.

257. See for instance the Ontario Statutory Powers Procedure Act, R.S.O. 1980, c. 484, ss. 15(4)(5). See also Patrice Garant, supra note 23, at pp. 843-844.

258. Sopinka and Lederman, supra note 12, at p. 285.

So far, this study has described the purpose of documents as a means of proof and also the manner in which documents must be introduced into evidence in order to satisfy proof requirements. But a party does not always have possession of those documents which will help to prove his case. Such documents may be in the possession of the opposite side, or they may be in the hands of a third party. When faced with this situation the party may request the production of the documents in question by way of a subpoena duces tecum.

Human rights tribunals have the power to order the production of documents and to issue such subpoenas (259). Although this power rests with the tribunals and not with the parties, tribunals will not, as a rule, oppose requests for the production of documents which are relevant (260). On the other hand, they may refuse to order the production of documents when the party's

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259. In Alta, s. 3 of the Public Inquiries Act, R.S.A. 1980, c. P-29; B.C., s. 20 of Reg. 151/75; N.B., s. 67(1) of the Industrial-Relations Act, R.S.N.B. 1973, c. I-4; Nfld., s. 17(1); N.S., s. 3 of the Public Inquiries Act, R.S.N.S. 1967, c. 250; Ont., s. 12(1) of the Statutory Powers Procedure Act, R.S.O. 1980, c. 484; Sask., s. 27(1) of Reg. 216/79; Can. Act, s. 40(3)(a).
It has been held that the power to issue a subpoena duces tecum is implied where the tribunal has the power to issue a subpoena requiring a person to give evidence: Re International Union of Operating Engineers, Local 955 and Hunuset Bros. Ltd. (1975), 49 D.L.R. (3d) 288 (Alta. S.C.T.D.), at pp. 291-2, as quoted in Guru v. McMaster University (1981), 2 C.H.R.R. D/253, at p. 254.

260. Reid and David, supra note 22, at p. 80:
> The fact that the parties have no power to compel the summoning of witnesses does not relieve the tribunal of an obligation to observe the rules of natural justice in that regard. [But the] obligation extends only to enable the calling of relevant testimony .....

request exceeds the purpose of the subpoena duces tecum or where the subpoena does not meet the necessary form requirements.

Essentially, the purpose of the subpoena duces tecum is to obtain the production of a document so that it may be introduced in evidence at the hearing. There have been some attempts to extend the purpose of these subpoenas by using them as a device for obtaining discovery - sometimes referred to as "fishing expeditions" - or as a means by which to examine the other side's evidence to better prepare one's case. However, for the most part, these attempts have been unsuccessful as boards of inquiry have put an abrupt halt to such misuses of the subpoena duces tecum, as will be seen below.

In addition, there are certain form requirements that parties must follow when requesting the production of documents, the most important one being that such subpoenas meet the "reasonable distinctiveness" criterion. The meaning of this term will also be examined below.

1. Discovery of documents

The appropriate time for the Commission to ascertain whether there is any evidence of discrimination is during the investigation. Once it has reached the hearing stage it might be too late to request documents merely for the purpose of consulting them and deciding whether they represent useful evidence. Some boards of inquiry have been especially firm in pointing out that the occasion for the inspection and examination of documents is at

the investigation stage, and that "... [the] power to issue a subpoena duces tecum does not provide an alternative method of securing this purpose [of obtaining production and discovery]" (261). The boards of inquiry which have refused to allow discoveries at the hearing stage have relied heavily on the fact that the statutes give the Commissions wide powers of investigation with the means of securing the production of documents even from recalcitrant respondents who refuse disclosure.

Boards have, therefore, interpreted their power to issue a subpoena duces tecum restrictively, as excluding the right to order the disclosure of documents. In doing so, they have relied on the principle that such subpoenas are not to be used for the purposes of a "fishing expedition". The following passages describe the principle with great clarity:

> 'A subpoena duces tecum or an application in the nature of such a subpoena ... may be set aside or refused where it appears that the request is irrelevant, fishing, speculative or oppressive.' The Supreme Court Practice, 1979, Part I, at p. 606 referring to Senior v. Holdsworth,

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261. Guru v. McMaster University, supra note 258, at p. 254; similarly, Joseph v. North York General Hospital et al., supra note 126. But see: Kovacs v. Horne & Pitfield Foods Ltd., supra note 112: the Commission's request might be seen as a "fishing expedition" but this alone is not a ground for refusing to order the production of documents although it may be a consideration in awarding costs against the Commission. Here the Commission's request for the production of documents was refused for other reasons. Note that boards of inquiry have also refused to order the disclosure of the contents of the Commission's file when it has been requested by respondents: Nembhard v. Caneurop Manufacturing Limited (Ont., 1978); Linton v. Nabob Foods Ltd. (B.C., 1977); Stairs v. Maritime Coop. (N.B., 1975), and Perry v. Robert Simpson Company Limited (N.S., 1976). See also on this topic, Tarnopolsky, supra note 1, at p. 467 ff.

ex parte Independent Television News Ltd., (1976) Q.B. 23 at p. 35, per Lord Denning:

> The Court should exercise this power only where it is likely that the [document] will have a direct and important place in the determination of the issues before the Court. The mere assertion that the document may have some bearing will not be enough. If the judge considers that the request is ... fishing or speculative ... the judge should refuse it (262).

But there are reasons other than those related to the purpose of the subpoena duces tecum which have impelled boards of inquiry to refuse disclosure. In particular, it is agreed (263) that there is no common law right to discovery and that administrative tribunals are not empowered to order the production of documents for discovery prior to hearings, unless there is specific statutory language to the contrary. The authority that has been the most frequently referred to in this respect is Reid and David, Administrative Law and Practice:

> [T]here is no common-law right to discovery, unless a right is conferred by the relevant legislation, none exists" (264).

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262. As quoted in both of the following cases: Joseph v. North York General Hospital et al., ibid., and Guru v. McMaster University, ibid.

263. Nembhard v. Caneurop Manufacturing Limited, supra note 260, at p. 21; Guru v. McMaster University, supra note 258, at p. 253; Walbar Machine Products of Canada Limited v. The Ontario Human Rights Commission, supra note 128, at p. 230: "discovery of documents is not an inherent right"; Niedzwiecki v. Beneficial Finance Systems, (Ont., 1981), and Bezeau v. Ontario Institute for Studies in Education, supra note 129, at p. 877.

264. Supra note 22, at pp. 92-93.

In Ontario it has also been held that s. 8 of the Statutory Powers Procedure Act (265) does not entitle a party to the discovery of documents. In the words of Chairman Lederman, "this section does not ... refer to advance notice of documentary evidence but merely to reasonable particularity of allegations"(266).

The best way to unravel the confusion between the procedures that have just been discussed, that is the production of documents by subpoena, the production of documents for discovery, and the right to particulars, is simply to keep in mind the purpose of each. Chairman Lederman's comments, above, give an inkling as to the difference between discovery and particulars (267).

In the Walbar case, Chairman Gorsky explained still further the distinction between those two procedures and their purposes:

> Hearings before the Board of Inquiry, under the Code, are adversarial in nature. Each party remains responsible for the preparation of its case and, as is the case of an action brought in the Supreme Court, each party cannot be compelled to disclose the evidence which it may use at the hearing on the merits in support of a claim or defence. I would repeat my earlier

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265. R.S.O. 1980, c. 484. Section 8 refers to the duty to provide "reasonable information of any allegations."

266. Nembhard v. Caneurop Manufacturing Limited, supra note 260, p. 22. See also Walbar Machine Products of Canada Limited v. The Ontario Human Rights Commission, supra note 128, at p. 230. Indeed there tends to be a confusion between questions relating to discovery and those dealing with particulars; the right to particulars does not confer upon a party the right to discovery.

267. For detailed comments regarding the purpose of particular, see supra, the section on particulars, at pp. 315-318.

> conclusion that such a radical change in the previous law would only be effected by more specific language.
>
> Even if s. 8 of the Act could be interpreted as encompassing documents and statements of evidence within the meaning of 'reasonable information' the furnishing of such information would only be necessary where it was required by a party, to either know the issues or to be able to prepare its answer to the allegations. That is, unlike discovery in the Supreme Court, the information does not include facts or documents which may assist a party in leading to a train of inquiry which might, in turn, result in the obtaining of evidence which could assist in making the party's case (268).

In an earlier decision, in the Guru case, Chairman Gorsky pointed out the distinction between the purpose of a subpoena, on the one hand, and the purpose of discovery, on the other:

> [T]he language of [s. 12(1)(b) of the S.P.P.A.] emphasizes the fact that production of a document is for the purpose of producing it in evidence at the hearing and not for the mere purpose of obtaining discovery. There is a vital difference between the procedure permitting discovery of documents generally or specifically and those permitting the subpoenaing of a document at a hearing.
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> ...
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> As the purpose for the subpoenas in this case is to enable an examination of the documents to ascertain whether they, in some way, support the complaint or a defence to the complaint, this does not appear to be the case where the subpoenas should be permitted to stand (269).

In sum, the purpose of the subpoena duces tecum is to obtain production of documents in view of producing them in

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268. Walbar Machine Products of Canada Limited v. The Ontario Human Rights Commission, ibid., at p. 230.

269. Guru v. McMaster University, supra note 258, at p. 253.

evidence, while the purpose of a motion for particulars is to allow the respondent to obtain sufficient information of the case to be met. On the other hand, the purpose of discovery, or disclosure as it is sometimes called, is to obtain evidence that may help a party in preparing his case. So far, boards of inquiry have held unequivocally that the right to obtain documents by way of subpoena and the right to particulars do not entitle parties to discovery.

This having been said, it is worthwhile to point out that a number of Board Chairmen have expressed regret at the fact that there is no pre-hearing procedure which allows the parties to inform one another of the documents that they intend to introduce into evidence (270). The inconveniences resulting from the "cat-and-mouse" games that might ensue, were most vividly described by Chairman Ratushny in the Niedzwiecki case:

> The difficulty which this Board faces is in attempting to conduct a full and fair hearing in relation to the complaint in question without the benefit of an adequate discovery procedure which would allow all documents to be produced prior to the hearing. In the course of the hearing, counsel might find it necessary to ask witnesses whether certain documents exist. A witness might well respond by saying that he is not aware of any such documents but that it is within his power to determine with certainty whether such documents exist and he has not done so. In such circumstances, a board of inquiry

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270. Niedzwiecki v. Beneficial Finance System, supra note 262; Joseph v. North York General Hospital et al., supra note 126; Bezeau v. Ontario Institute for Studies in Education, supra note 129.

> would have to give serious consideration to a request for an adjournment or leave to recall the witness in order that the question might be answered in a meaningful way. Further adjournments might be required to permit counsel to examine documents produced for the first time at the hearing.
>
> It would be far preferable for both counsel to have made full and frank voluntary disclosure prior to the hearing. The prospect of a possible 'cat-and-mouse' game throughout the course of the hearing is not in the best interests of the administration of justice nor, in the long run, will it be in the best interests of the parties. All of this is not to suggest that the motion under consideration is inappropriate. It has a sound basis in law and in fairness to the prospective witness (271).

For the time being it appears that there are no provisions allowing for pre-hearing conferences or disclosure, and boards of inquiry are likely to grant adjournments in order to protect the interests of parties taken by surprise (272).

2. Subpoenas and the "reasonable distinctiveness" standard

Subpoenas that are vague or too broad in scope may be set aside by the board of inquiry. The key principle regarding the description of documents in a subpoena is that "... it must

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271. Ibid., at p.

272. Guru v. McMaster University, supra note 167, at p. 254: "... [I]t may be necessary to grant an adjournment ... in order to do substantial justice to the parties, where they are genuinely surprised by the presentation of evidence which they could not have reasonably been aware of."; Walbar Machine Products of Canada Limited v. The Ontario Human Rights Commission, supra note 128, and Bezeau v. Ontario Institute for Studies in Education, supra note 129. See also Tarnopolsky, supra note 1, at pp. 467 and 470.

specify, with as much precision as is fair and feasible the particular documents desired" (273). The desirable standard has also been described as one of "reasonable distinctiveness" (274).

Faced with motions to set aside subpoenas that were deficient in scope and indefinite in their description, certain tribunals relied upon the criteria set out in the case of Re Dalgleish and Basu (275) to help them determine whether the contents of a subpoena were "fair and feasible and reasonably distinctive". The four factors to be considered are the following:

1) The description must be fair to the witness, and, it is to be borne in mind that a subpoena by its nature asks a witness for production only of documents and that it is not a demand to make a discovery of documents;

2) A less detailed description of the documents will be tolerated where the party issuing the subpoena has had the occasion to familiarize himself with the documents in question where there is no prior compulsory discovery and where voluntary disclosure has been refused;

3) Where the witness is either a party or an agent of a party and can be taken to know the issues reasonably well, a more general description of the documents will be acceptable; and

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273. Wigmore as quoted by Mr. Justice Bayda in the case of Re Dalgleish and Basu (1975), 51 D.L.R. (3d) 309.

274. Terms used by Lord Denning, M.R., in Soul v. Inland Revenue Com'rs, [1963] 1 W.L.R. 112, at p. 114, as quoted in the Re Dalgeish case, ibid., at p. 312.

275. See Niedzwiecki v. Beneficial Financial System, supra note 260; Joseph v. North York General Hospital et al., supra note 126, and Bezeau v. Ontario Institute for Studies in Education, supra note 129.

4) It is imporant to consider the scope of the investigation. The greater the scope, the greater should be the permissible breadth of a subpoena duces tecum (276).

Examples of subpoenas

(1) In the Joseph case (277), the respondent requested that the following subpoena duces tecum be set aside:

> [P]atient records from June 1, 1978 to June 18, 1980, including care plans and charts, notes of clinical conferences, medication charts, and all notes, memoranda and records of all patient care, medication errors and incident reports, complaints and the Staff Communication Book for nurses on the seventh floor, in the possession of North York General Hospital, its servants or agents, maintained for the following patients cared for by the complainant" [there follow sixty-three named former hospital patients, and seventeen additional patients identified only by a stated code number.]

In answer to an objection to the form and contents of this subpoena, the Chairman of the Board set the subpoena aside on the basis that it was "deficient in both scope and volume, and suggestive of a fishing expedition rather than an attempt to obtain relevant exhibits for introduction at a hearing" (278).

(2) In the Niedzwiecki case (279), the respondent contested the validity of the subpoena requesting the production of the following documents:

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276. Re Dalgleish and Basu, supra note 273, at p. 312.

277. Supra note 126.

278. Ibid., at p. 857.

279. Supra note 261.

(1) All documents, records, notes and/or writings pertaining to the matter to the complaint of Helen Niedzwiecki against the Beneficial Finance System ....

(2) Records reflecting the number, sex and marital status of cashiers, customer representatives, loan officers and assistant managers of the respondent from 1979 to the present.

(3) All records reflecting the hiring policy and the formulation of the hiring policy of the respondent, including transferability, from 1979 to the present.

(4) The originals of all documents previously given to the Commission.

In this case the Board Chairman was of the opinion that the request for the first set of documents was for the purpose of discovery rather than for production into evidence and, therefore, not valid. The description and the scope of the second and third set of documents were seen to meet the criteria established by the "Rayda" test. The last group of documents struck the Board Chairman as being too general but he added that this deficiency could be corrected if the specific documents were listed (280).

(3) In the Bezeau case (281), the respondent disputed the legality of the summons in the form of a subpoena duces tecum on the basis than it was merely an attempt on the part of the Commission to obtain discovery. The request for the production of documents included the following:

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280. Ibid., at p.

281. Supra note 129.

1. The complete tenure review files pertaining to [the complainant] for the years 1977-78 and 1978-79 including, without limiting the generality of the foregoing, all existing documents, correspondence, references, reasons for decisions and minutes of meetings of departmental tenure committees, 'DPAC Faculty' and the Board of Governors of O.I.S.E.

[Paragraph two is identical except that it relates to the files of "all other candidates for tenure in the Department of Educational Administration" and adds the years 1979-80.]

3. All statements of Procedure, Statements of Interpretation, Policy Statements, the 'Institute of Policy Book' and all other documents and materials relating to the tenure review process at O.I.S.E.

4. The service lists of O.I.S.E. faculty members maintained by the Board of Governors of O.I.S.E. since 1977 pursuant to its Collective Agreement with the O.I.S.E. Faculty Association.

5. Lists of O.I.S.E. faculty members in the University of Toronto Graduate faculty from 1977 to the present.

In this particular instance the Board rejected the respondent's arguments, stating that all of the requests, with the exception of the first paragraph, were made for the purpose of producing the documents into evidence and not for the purpose of discovery. Nor could they be said to be "irrelevant, fishing, speculative or oppressive" (282).

As for the first paragraph, the Board Chairman found that the term "any and all documents relating to the matters in issue" did not meet the "reasonable distinctiveness" criterion, and that in addition it was "suggestive of speculative discovery". This part of the subpoena was, therefore, set aside (283).

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282. Ibid., at p. 878.

283. Ibid.

C. Taking a View

In some instances a Board might wish to supplement the evidence presented at the hearing by taking a view.

The question as to whether boards of inquiry have the inherent power to take a view has been the subject of some debate, as has the use or the function of the information so obtained.

In the case of Avtar Singh v. Domglas Limited (284), Chairman Kerr concluded that the wording of the Ontario Statutory Powers Procedure Act (285), precluded the Board from taking a view. On the other hand, the Board Chairman in Ingram v. Natural Footwear Limited (286) acceded to the request of one of the parties that the Board take a view and, in doing so, stated that such did not appear to be beyond the powers conferred upon the Board by the Ontario Human Rights Code, R.S.O. 1980, c. 340 (287).

As far as Ontario is concerned, this debate has become irrelevant following the recent amendments to the Human Rights Code (288) and the insertion of s. 38(5), which expressly permits a board of inquiry to take a view. In the absence of such express

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284. Avtar Singh v. Domglas Limited (1981), 2 C.H.R.R. D/285.

285. In particular ss. 12(1) and 15(1).

286. (1980), 1 C.H.R.R. D/59. In this case the respondent was the one to propose the taking of a view; counsel for the Commission objected only on the basis that such displacement might be a waste of the Board's time. He did not argue that the proposed view would be prejudicial to his case, nor that it was beyond the power of the Board to do so.

287. Ibid., at p. 62.

288. S.O. 1981, c. 53 (proclaimed in force on June 15, 1982).

statutory language (289), questions may still linger in other jurisdictions as to the powers of a board of inquiry to take a view. It is, however, doubtful that a board of inquiry would have the power to view a respondent's premises without the latter's consent. The power to enter premises against the wishes of a proprietor cannot be considered implicit in the power to obtain evidence by subpoena (290), it must expressly be provided for by statute. On the other hand, if all parties agree to have the board of inquiry take a view, then there is nothing to prevent it from such an undertaking (291).

What is, then, the value of the information acquired by viewing premises? Does this information constitute evidence, or is the purpose merely to assist the board of inquiry in understanding other evidence, oral or documentary, adduced at the hearing? There has been substantial debate over this issue in judicial circles and, as yet, the matter is not fully resolved.

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289. Aside from Ontario, the following provinces also confer this power on Boards: New Brunswick, Industrial Relations Act, R.S.N.B. 1973, c. I-4, s. 67(4); Nfld., s. 17(2), and in Alberta, the Public Inquiries Act, R.S.A. 19808, c. P-29, s. 6.

290. Avtar Singh v. Domglas Limited, supra note 284. But such a refusal on the part of a respondent may have some negative side effects according to the views expressed by the Board Chairman in the Singh case, at p. 287:

> [A] board might properly draw inferences from the refusal of a party to consent to a view if this was necessary to offset the inability of the other party to obtain production of evidence because of such refusal. This would seem to fall within the range of the general principle that a party bears the burden of proof with respect to evidence within its control.

291. Avtar Singh, ibid.

While there is agreement as to the effect of viewing that takes place at the hearing, controversy abounds concerning the effect of viewing which takes place outside the hearing. In the former case things, or even persons, observed and examined by the judge are considered "real evidence" and "the judge is allowed to apply his faculties to draw his own conclusions" (292). In this latter instance, where the things have been examined outside the court room, it has been held that the tribunal may rely on the viewing solely for the purpose of understanding the evidence presented at the hearing (293). This was the position adopted by the Board in the Ingram case (294). However, there has been a growing trend in support of the opposite position which holds that a view does constitute evidence (295). In the Avtar Singh case, Chairman Kerr opted for this latter position: he was of the opinion that under s. 15(1) of the Statutory Powers Procedure Act the effect of a view, if taken, would be to provide evidence (296).

Regardless of the value given to viewing, it has been suggested that this power should be exercised sparingly and, when necessary, by following certain essential procedures. The following remarks of one arbitrator (297) on the topic should also be of

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292. Sopinka and Lederman, supra note 12, at p. 383.

293. Chambers v. Murphy, [1953] 2 D.L.R. 705 (Ont. C.A.).

294. Supra note 286.

295. Sopinka and Lederman, supra note 12, at p. 384.

296. Supra note 284, at p. 287.

297. International Nickel Co. of Canada Ltd. (1968), 20 L.A.C. 21.

interest to human rights tribunals:

> There is no doubt that the board has the power to take a view, pursuant to s. 34(7)(d) of the Labour Relations Act, R.S.O. 1960, c. 202. It is, in our opinion, a power which should be used sparingly, and on grounds similar to those on which a Court would adopt such a procedure, that is, where it appears to be necessary to a proper understanding of the evidence. This is a matter which must be determined on the facts of each case in which the suggestion to take a view might be made. Many more complicated mechanisms than the one involved here may be satisfactorily put before a tribunal by means of evidence adduced in the usual way. It is in general after the relevant evidence has been presented that the tribunal may determine whether it has adequately understood it; at that time it may determine to take a view or not, having regard to the nature of the matter in issue, the relative importance of the evidence, the degree of inconvenience involved and the effect upon the employer's operations, and the likelihood that the procedure would be helpful. If a view is taken, those in the viewing party should be limited to the members of the board, counsel, and a representative of each party, knowledgeable as to the equipment or premises to be examined. Counsel may properly point out the material features of what is observed, but this is to be done in the presence of the opposing party. It must be remembered, however, that industrial working areas vary greatly, and the degree of formality with which the view is conducted must of necessity be affected by the prevailing circumstances and conditions. At least where a view is taken in the course of a labour arbitration, the good faith and common sense of the parties must in some cases be relied upon (297a).

In closing, it should be noted that the tribunal should proceed with a view only after it has informed all parties of its intention to do so, so that they may be given full opportunity of being present at the time of the view (298).

297a. Ibid., at pp. 21-22.

298. R. v. Fine, ex parte Sheraton Ltd. (1968), 69 D.L.R. (2d) 625.

D. Judicial Notice

Considered as a means of "dispensing with or facilitating proof" (299), judicial notice may sometimes serve as a useful device in proving discrimination. Tribunals (300), like courts, may take judicial or official notice of notorious facts regarding such matters as local conditions, geographical facts, human behaviour, business and trade practices. It may also do so with respect to facts capable of immediate and accurate demonstrations, such as historical facts, measures and weights and scientific facts (301).

In England, one can find examples of cases in which judicial notice has served as a means of establishing certain essential facts which might otherwise have been impossible to prove, or which might have involved extensive and time-consuming proof. In

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299. Sopinka and Lederman, supra note 12, at pp. 357 ff. Also at p. 357: "Facts which are (a) so notorious as not to be the subject of dispute among reasonable men, or (b) capable of immediate and accurate demonstrations by resorting to readily accessible sources of indisputable accuracy, may be noticed by the court without proof thereof." See also Sir Rupert Cross, Evidence, 5th ed., Butterworths, London, 1979, pp. 153-162.

300. The Ontario Statutory Powers Procedure Act, R.S.O. 1980, c. 484 provides at s. 16 that "[a] tribunal may ... a) take notice of facts that may be judicially noticed; and b) take notice of any generally recognized scientific or technical facts, information, or opinions within its scientific or specialized knowledge."
In the absence of specific statutory authority to take judicial notice, administrative tribunals have the implicit power to do so: see Mullan, supra note 21, at p. 3-122; Reid and David, supra note 22, at p. 78; Kavanagh, supra note 6, at p. 20, and Garant, supra note 23, at p. 851.

301. Sopinka and Lederman, supra note 12, at pp. 359 ff.

his book entitled Legal Control of Racial Discrimination (302), Professor Lustgarten described these cases and the role played by judicial notice:

> Not every relevant fact will require formal proof. In Price, for example, the EAT (Employment Appeal Tribunal) relied on 'knowledge and experience' to conclude that women in their mid-twenties to mid-thirties are active in birthing and minding children, and that many among them therefore cannot work. Doubtless the complainant could have produced some statistics on this point, though it would merely have been a time-consuming irritant to require her to do so. But many matters of common observation may be impossible to prove. For example, the practice of word-of-mouth hiring puts non-whites at a serious disadvantage in finding employment, since persons of the same race tend to associate more commonly and closely with one another. Data about marriage apart, the racial pattern of association is probably impossible to prove, but as a matter of 'knowledge and experience' it seems an uncontroversial conclusion which indeed has been readily reached by American courts. In technical terms it is to be accepted as a matter of judicial notice. No radical extension of the doctrine is required: the role of women in child-rearing or the racial pattern of friendship is as readily apparent as the fact that the streets of London are crowded and dangerous; that boys are naturally reckless and mischievous; or that people who go to hotels do not like their nights disturbed, all of which have been judicially noticed as 'notorious facts'. Judicial notice is a matter of particular importance in discrimination cases, which are acted out against the back-cloth of established patterns of social behaviour. This is not to say that the complainant may rely on judicial notice alone to establish discrimination. The line is between what may be called general social facts, and facts specifically related to the acts or practices of the parties to the case, or which - as with differential rates of

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302. Laurence Lustgarten, Legal Control of Racial Discrimination, The MacMillan Press Ltd., London, 1980.

compliance - that statute itself specifically requires the complainant to prove (303).

Administrative tribunals may take judicial notice not only of facts that are generally known but also of facts which are of a technical or specialized nature and which are within their sphere of expertise. This specialized knowledge is in fact considered to be one of the advantages that administrative boards possess over the ordinary courts.

In the area of Labour Relations, one commentator has remarked as follows: "Thus, it would seem the concept of administrative notice is somewhat broader than that of judicial notice. It must extend to those things of which persons knowledgeable in the area of industrial relations are aware, e.g., prevailing views towards discipline, normal wage rates and so on" (304). Similarly, in cases involving discrimination, tribunals which have acquired experience in this area may be more knowledgeable than others about certain social patterns of behaviour, about stereotyped attitudes, etc.

In concluding, it should be noted that although a tribunal may, of its own initiative, verify certain facts for the purpose of taking judicial notice (305), it should inform the parties of

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303. Ibid., at p. 213. See also Laurence Lustgarten, "The New Meaning of Discrimination", [1978] Public Law 178, at p. 189.

304. Palmer, supra note 71, at p. 57.

305. R. v. Schiff et al., [1970] 3 O.R. 476 (C.A.).

such facts in order to give them the opportunity to respond (306).

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306. Pfizer Co. v. Deputy M.N.R., [1977] 1 S.C.R. 456. Also according to Kavanagh, supra note 6, at p. 21: "... this rule of disclosure [referring to the Pfizer case] should also apply to generally recognized facts and information of which a tribunal may take official notice ... Though officially noticed matters are described in s. 16 of the Statutory Powers and Procedure Act as generarlly recognized they may not, like judicially noticed facts, be indisputable and parties should normally be given an opportunity to speak to them."

CHAPTER 4: THE ADMISSIBILITY OF EVIDENCE

It has been shown that human rights boards are not bound by the strict rules of evidence and that evidence which is inadmissible in a court of law may be admitted by a board (307). Nevertheless, boards should exercise caution when evidence of this nature is admitted and they should refrain from basing their decisions on evidence that has no cogency at law (308). For this reason it is still useful to be able to identify evidence which might be subject to an exclusionary rule under the ordinary laws of evidence. In this reaction it is intended to describe some of those which are most likely to crop up during hearings. The discussion will touch upon the Best Evidence Rule, the issue of Relevance, the Hearsay Rule and some of its exceptions.

The subject of Privilege, which will also be dealt with below, is of great importance because it represents an exception to the principle that administrative tribunals are not bound by the strict rules of evidence. Certain privileged information cannot be heard by tribunals; it is inadmissible and the tribunal has no power to compel a witness to divulge this kind of information. This topic will lead us to examine the conciliator's privilege in furtherance of settlement, Crown or State privilege, and the controversial issue of Confidentiality.

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307. See discussion, supra, at pp. 275 ff.

308. See discussion, supra, at pp. 291 ff.

As a closing note on this section, the topic of Opinion and Expert Evidence will also be touched upon briefly.

A. Best Evidence

Regarded in the eighteenth century as the single most important rule in the area of evidence (309), the Best Evidence Rule has since been relegated to a less conspicuous, although by no means irrelevant, role (310). As far as administrative tribunals are concerned, this rule has been diluted still further. Thus, boards have the power, for instance, to accept copies of documents into evidence, and to admit hearsay evidence. On the other hand, they also have the power and the discretion to require that parties present the best evidence available (311).

B. Relevance

Human rights tribunals have the power to confine the evidence presented at the hearing to material which is relevant to

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309. Cross on Evidence, supra note 298, at p. 15; Sopinka and Lederman, supra note 12, at pp. 278 ff.

310. "[B]y far the most conspicuous feature of the modern law of evidence has been its persistent rescission (sic) from the 'best evidence' principle" ...: from Phipson's Law of Evidence (12th edition), at p. 56, as quoted by Cross, ibid., at p. 16.

311. Perry v. Robert Simpson Company Limited, (N.S., 1976). In this case the Board refused to issue a subpoena for the production of certain documents in the possession of the Commission on the basis that the best evidence, i.e. the individuals themselves, was available.

the facts in issue (312). The purpose of this rule is to prevent hearings from becoming interminable and to discourage parties from presenting extensive evidence on matters which are of no use in deciding the issues, and which may on the contrary have the effect of blurring the main issues at hand.

But there is an overriding rule which is based on the parties' right to be heard, and this rule requires boards to admit any evidence which is arguably relevant (313). Human rights tribunals tend to allow parties to present a full picture of their situation (314) especially where they are not in a position to determine ahead of time the relevance of the evidence being presented.

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312. Section 15 of the Statutory Powers Procedure Act, R.S.O. 1980, c. 484 specifically refers to relevance as a criterion for the admissibility of evidence. On this issue, it is important to remember that in deciding what is relevant, boards must take into account the particularities involved in proving discrimination. Thus, depending on the case, it might be necesary to extend the evidence to matters concerning other employees, or to examine past practices and policies of a respondent, in short, to go beyond the incident and the events complained of. In this way the board of inquiry will be able to determine whether, for instance, there is evidence of a pattern of discrimination or evidence of unequal treatment in comparison with other individuals. See also Niedzwiecki v. Beneficial Finance Systems (Ont., 1981) concerning relevance in relation to remedies; at pp. 5-6 the Board Chairman said this: "... it is open to the Commission to present evidence of past and present policies in relation to hirings and transferability .... Possible patterns of discrimination may be relevant not only to whether or not discrimination has occurred but also to any order which might ultimately be made."

313. In Re McKendry (1973), 35 D.L.R. (3d) 305, [1973] F.C. 126. See also discussion, supra, at pp. 297 ff.

314. Kennedy v. Mohawk College (Ont., 1973), at p. 3; Morgan v. Toronto General Hospital, (Ont., 1977), at p. 15.

The following comments describe the approach adopted by arbitration boards when faced with questions of relevance:

> As a general and overriding principle, where the evidence tendered is relevant to a matter in dispute it ought to be admitted or received into evidence by the arbitrator. Although whether any particular piece of evidence is relevant is a matter for the arbitrator to decide, generally, where the evidence is arguably relevant and where it is not otherwise prejudicial or its admission will not be unduly time consuming, arbitrators are usually reluctant to exclude it on the ground of irrelevancy alone. Rather, where the evidence is arguably relevant the usual approach is for the arbitrator to receive the evidence, and if it subsequently turns out to be not relevant then to disregard it (315).

There is reason to believe that the manner in which human rights tribunals approach the issue of relevance closely resembles this description.

C. The Hearsay Rule

Of all the exclusionary rules in the area of evidence the Hearsay Rule is the one that is perhaps the best known and the most frequently referred to. In a court of law, hearsay evidence is excluded unless it falls under one of the many exceptions to the rule; before human rights tribunals, which are not bound by the normal rules of evidence, hearsay is admissible but the evidence may carry less weight than otherwise and, more importantly, hearsay evidence should not be relied upon as the basis for a

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315. Brown and Beatty, supra note 66, at p. 121.

decision (316).

Because of the limited value that is thus given to hearsay evidence, parties must be able to identify hearsay accurately and also to recognize the exceptions to the Hearsay Rule.

1. Definition

> Written or oral statements, or communicative conduct made by persons who are not testifying are inadmissible if such statements or conduct are tendered either as proof of their truth or as proof of assertions implicit therein (317).

The key to understanding the Hearsay Rule is to remember that the evidence must be tendered as "proof of the truth of the statements contained therein", otherwise it is not hearsay. Thus, if a witness is called to testify that he heard the owner of certain premises state that he does not regard people on welfare as reliable tenants, this is hearsay because the purpose of the evidence is to try to prove the truth of the statement, i.e. that the said owner does not regard welfare recipients as suitable tenants. However, if a witness is called to say that he heard the owner of certain premises tell the complainant that he could not rent to him because no flats were available, then this evidence can be used to establish that there was a refusal to rent. The

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316. Bremer v. Board of School Trustees, School District No. 62 et al., (B.C., 1976); R. v. Barber ex parte Warehousemen and Miscellaneous Drivers' Union, Local 419 (1968), 68 D.L.R. (2d) 682. The admissibility and the use of hearsay evidence are discussed in Chapter 1, supra, at pp. 275 ff. and at pp. 292 ff.

317. Sopinka and Lederman, supra note 12, at pp. 39-40.

purpose of the evidence is to prove the refusal, it is not to prove the truth of the statement, i.e. that the owner really was unable to rent to the complainant because there were no vacancies.

2. Exceptions to the Hearsay Rule

The Hearsay Rule is riddled with exceptions which have been developed by the courts "to circumvent the rigidity of the ... Rule in particular instances" (318). The effect of these exceptions is to render certain hearsay evidence fully admissible.

Business and medical records. A number of provinces have legislation which provide for the admission of medical reports and hospital and business records (319). For example, s. 52 of the Ontario Evidence Act, R.S.O. 1980, c. 145, which is typical, provides as follows:

> Any medical report obtained by or prepared for a party to an action and signed by a legally qualified medical practitioner licensed to practice in any part of Canada is, with the leave of the court and after at least seven days notice has been given to all parties, admissible in evidence in the action.

With respect to business, section 35(2) of the same Act requires that the following conditions be met to make such records admissible:

> Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual

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318. Ibid., at p. 49.

319. Ibid., at pp. 442 ff.

> and ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.

Records such as these may therefore be introduced into evidence in the same manner as other documents. In order to prove the records, the usual procedure is to call as a witness a person who has a personal knowledge of the business in question and also of the circumstances surrounding the preparation of the record (320). For instance, in the case of seniority lists and absenteeism records, a representative of the personnel department can be called to identify the records and to establish that the records are what they purport to be.

Human rights boards are not bound to follow the specific requirements of the rules and procedures that have just been described. However, documents which have been introduced into evidence and which do meet these statutory standards may be given the same weight as any other document considered admissible under the ordinary laws of evidence.

Admissions against interest. One of the exceptions to the Hearsay Rule is that admissions made by a party prior to and outside the hearings constitute admissible evidence against him(321). The rationale behind this exception has been described by Morgan in the following manner:

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320. Ibid., at p. 445.

321. Ibid., at pp. 139 ff.

> The admissibility of an admission made by the party himself rests not upon any notion that the circumstances in which it was made furnish the trier means of evaluating it fairly, but upon the adversary theory of litigation. A party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under the sanction of an oath (322).

So, if the respondent was heard to say that he would not promote women, this statement may be introduced into evidence by the person who heard it, and the evidence is then accepted as an "admission against interest" made by the respondent. Similarly, if the respondent tells the investigator during a telephone conversation that the complainant was very competent but the opposite is pleaded at the hearing, then the investigator may be called to testify as to this admission. It goes without saying that this rule applies equally to both sides and a respondent may also call evidence on "admissions against interest" made by the complainant.

Before a party decides to introduce admissions into evidence, he must take into account an important qualification which is that "the whole of a statement alleged to be an admission must be put into evidence" (323). A party cannot choose to introduce into evidence only those statements which are favourable to his case; if the admission also contains damaging statements then these cannot be ignored, they must be presented into evidence as well. As a result, before a party decides to tender an admission as evidence, he must consider its full contents and assess whether

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322. Morgan, Basic Problems of Evidence, (1962) at p. 266, as quoted by Sopinka and Lederman, ibid., at p. 140.

323. Sopinka and Lederman, ibid., at p. 141.

the parts that are favourable to his case outweight the harmful parts. If not, it may be better to put the evidence aside.

Lastly, it should be noted that the law also recognizes vicarious admissions. Thus, if an agent or representative of one of the parties makes a statement which is within the scope of his authority, such a statement may constitute an admission against the party in question (324).

D. Privilege

A board's discretion with respect to the admissibility of evidence is not absolute. Certain evidence falling under the category of privileged information is not available to boards of inquiry, and witnesses cannot be compelled to divulge such information.

The laws regarding privilege have led to the development of a number of exclusionary rules, all of which are founded, as will soon be seen, on matters of public policy (325). Nonetheless, the rules concerning the exclusion of privileged information represent a departure from the fundamental maxim that the public has a right to every man's evidence (326). These rules must,

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324. Ibid., at pp. 145 ff.

325. W.M. Best, The Principles of the Law of Evidence, 8th edition, Sweet and Maxwell Limited, London, 1893, at p. 529.

326. These famous words were sanctioned by Lord Harwicke during a Parliamentary debate in 1742 over a Bill to pardon in advance such witnesses as should criminate themselves in testifying to the frauds of a certain Sir Robert Walpole: Wigmore on Evidence, 3rd edition, Vol. 8, Little, Brown and Company, Boston, 1940, at p. 64.

therefore, be regarded as "exceptional" because they constitute a derogation from the general principle of the duty to give testimony. Wigmore is unequivocal on this matter when he says, "[w]hen we come to examine the various claims of exemption, we start with the primary assumptions that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule" (327).

Cross also considers the search for truth in the administration of justice as the basic principle to which exceptions should be allowed only for "good cause". Endorsing Wigmore's position, he remarks as follows: "... [one] observation concerns the effect of upholding a claim to privilege. This involves withholding important information from the court at the expense of what may be abstract justice to one of the parties. It follows that there should be good cause, plainly shown, for the existence of any privilege ..." (328).

Lastly, commenting on the development of the law regarding privilege, Sopinka and Lederman give us this assessment: "The extension of the doctrine of privilege consequentially obstructs the truth-finding process, and, accordingly, the law has been reluctant to proliferate the areas of privilege unless an external social policy is demonstrated to be of such unequivocal importance

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327. Ibid.

328. Cross on Evidence, supra note 298, at p. 274.

that it demands protection" (329).

As firmly established as this rule may have appeared to be, Wigmore nevertheless found it necessary to warn against unintentional deviations which might pose a threat to the general principle. He expressed his concerns in this manner:

> It follows that all privileges of exemption from this duty are exceptional, and are therefore to be discountenanced. There must be good reason, plainly shown, for their existence. In the interest of developing scientifically the details of the various recognized privileges, judges and lawyers are apt to forget this exceptional nature. The presumption against their extension is not observed in spirit. The trend of the day is to expand them as if they were large and fundamental principles, worthy of pursuit into the remotest analogies. This attitude is an unwholesome one. The investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of these privileges. They should be recognized only within the narrowest limits required by principle. Every step beyond these limits helps to provide, without any real necessity, an obstacle to the administration of justice (330).

The criteria for applying a privilege will soon be examined but, first, it might be worthwhile to look briefly at the principles which are at the heart of the duty to testify. Wigmore sees this in terms of a "duty", or sacrifice, which is due from each member of the community with a corresponding "right" which belongs to society as a whole. He describes the implications of the duty in these terms:

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329. Supra note 12, at p. 157.

330. Wigmore, supra note 326, at p. 67.

> [One of the] sacrifice[s] may be of his privacy, of the knowledge which he would preferably keep to himself because of the disagreeable consequences of disclosure. This inconvenience which he may suffer, in consequence of his testimony, by way of enmity of disgrace or ridicule or other disfavoring action of fellow-members of the community, is also a contribution which he makes in payment of his dues to society in its function of executing justice (331).

As for the rights of the community, the author provides us with the following perspective:

> From the point of view of society's right to our testimony, it is to be remembered that the demand comes, not from any one person or set of person, but from the community as a whole, - from justice as an institution, and from law and order as indispensable elements of civilized life. ... The whole life of the community, the regularity and continuity of its relations, depend upon the coming of the witness. Whether the achievements of the past shall be preserved, the energy of the present kept alive, and the ambitions of the future be realized, depends upon whether the daily business of regulating rights and redressing wrongs shall continue without a moment's abatement, or shall suffer a fatal cessation. The business of the particular cause is petty and personal; but the results that hang upon it are universal. All society, potentially, is involved in each individual case; because the process itself is one of vitality. Each verdict upon each cause, and each witness to that verdict, is a pulse of air in the breathing organs of the community. The vital process of justice must continue unceasingly; a single cessation typifies the prostration of society; a series would involve its dissolution. The pettiness and personality of the individual trial disappear when we reflect that our duty to bear testimony runs not to the parties in that present cause, but to the community at large and forever (332).

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331. Ibid., at pp. 66-67.

332. Ibid. A similar point of view was expressed by Caton, C.J. in the American case of Bennett v. Walker, 23 Ill. 97, at p. 101, as quoted in Wigmore at pp. 65-66:

(contd.)

The general rule, therefore, is that there is a duty to testify. Now to examine the conditions which might justify exceptions to this rule. The criteria proposed by Wigmore have been recognized by our courts, including the Supreme Court of Canada (333), and they have also been applied by human rights boards (334), as will be seen below. The conditions are considered fundamental and each is necessary to the establishment of a privilege against the disclosure of any given communication. They are as follows:

(1) The communication must originate in a confidence that they will not be disclosed.

(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

(3) The relation must be one which in the opinion of the community ought to be sedulously fostered; and

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> What right have the courts to compel any one to quit his own affairs no matter how pressing they may be, and attend as a witness or juror in litigation between strangers? This duty to assist others who stand in need of our assistance for the maintenance of their rights necessarily flows from the relation we bear each other as members of the same community we being mutually dependent upon each other for security and protection.

333. Slavutych v. Baker (1975), 55 D.L.R. (3d) 224; The Solicitor General of Canada et al. v. The Royal Commission of Inquiry into Confidentiality of Health Records in Ontario et al., [1981] 2 S.C.R. 494, see dissenting judgment of Laskin, C.J.

334. Bezeau v. Ontario Institute for Studies in Education, supra note 129; Kovacs v. Horne and Pitfield Foods Ltd., supra note 112; Alberta Human Rights Commission v. Alberta Blue Cross Plan (1982), 3 C.H.R.R. D/1017, rev'd in part by (1983), 4 C.H.R.R. D/1661.

(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation (335).

Applying these four conditions the common law recognizes as privileged, communications between husband and wife, between solicitor and client (336), and those made in furtherance of settlement. Matters affecting the public interest are also protected under the heading of Crown Privilege.

As mentioned earlier, the courts have, as a rule, been reluctant to extend the categories of information considered privileged, although it appears that, unlike the situation in Canada, the English courts now possess a broad discretion to keep out confidential communications (337) if a judge concludes that "more harm than good would result from compelling a disclosure or punishing a refusal to answer" (338).

In Canada, there is no discretion of this kind (339) and our courts are not entitled to exclude evidence which is highly

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335. Wigmore, supra note 325, p. 531.

336. For an interesting discussion on this topic see the recent decision rendered by the Supreme Court of Canada in Descôteaux et Centre Communautaire juridique de Montréal v. Mierzwinski et al., [1982] 1 S.C.R. 860.

337. Sopinka and Lederman, supra note 12, at pp. 217-218.

338. Per Donovan L.J. in A.G. v. Mulholland, [1963] 1 All E.R. 767, 773, as quoted by Sopinka and Lederman, ibid.

339. See the decision of the Supreme Court of Canada in R v. Wray, [1971] S.C.R. 272: There is no judicial authority in this country which supports the proposition that a trial judge has a discretion to exclude admissible evidence because, in his opinion, its admission would bring the administration of justice into disrepute; the test is whether the evidence is relevant to the matters in issue.

probative and relevant (340).

It has been urged that the introduction of such a discretionary power on the part of the judges would bring much uncertainty to the relevant laws of evidence. This concern is explained in the following passage:

> The rationale of the English cases and in particular the Attorney-General v. Clough, appears to be that existing privileges against disclosure may be inadequate and that it is necessary on occasion to have 'a judge-made privilege' with respect to certain types of communication for which public policy demands protection. Where privilege exists, its foundation is to encourage communication by removing the fear of subsequent disclosure. The same rationale would not appear to apply to 'judge-made privileges'. How is one to know that the privilege will attach? The circumstances under which the judicial discretion will be exercised cannot be forecast with any precision. It is therefore submitted that the English cases ought not to be followed.
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> Insofar as such a discretion is justifiable as an instrument in dealing with the problems depicted by the English cases, the same object can be achieved by recognition of the fact that a judge is not compelled to commit for contempt even when there is a refusal. To introduce a wide ranging judicial discretion to exclude relevant evidence appears to be an expensive price to pay to accomplish this limited object. The price is the introduction of a great deal of uncertainty into the rules of evidence .... Apart from the uncertainty it creates there are other difficulties with the latter approach. If a privilege exists, it is the privilege of the parties and may be waived if both parties desire the evidence to be admitted. A judicial discretion on the other hand, based on public policy, is not subservient to the wishes of the parties but to that of the public. Th s an instrument designed to overcome the inadequacies of privilege may result in the exclusion of evidence which both parties want (341).

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340. Sopinka and Lederman, supra note 12, at p. 218.

341. Ibid., at p. 219.

The following specific topics will now be discussed: Communications in furtherance of settlement, Crown privilege and Confidential communications.

1. Communications in furtherance of settlement

In common law it has long been held that attempts at conciliation or the settlement of private disputes without recourse to litigation is in the public interest and that it is therefore contrary to public policy to admit into evidence communications made in the course of such attempts. The rationale behind the exclusion of such information is the belief that "[i]n the absence of such protection, few parties would initiate settlement negotiations for fear that any concession that they would be prepared to offer could be used to their detriment if no settlement agreement was forthcoming" (342).

This exclusionary rule also applies to human rights tribunals. It is, moreover, a rule that these tribunals and Commission representatives must be prepared to observe scrupulously because of the significance of conciliation in the overall process of dealing with complaints of discrimination.

Anti-discrimination laws have traditionally placed a great deal of emphasis on the conciliation process as a means of settling complaints of discrimination in the belief that an amicable approach is more suitable than the litigation process in

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342. Ibid., at p. 197.

combatting discrimination. Although the favour and optimism with which amicable settlements used to be regarded has diminished in recent years, the conciliation stage remains important, and most cases undergo settlement attempts before it is decided to strike a board. Clearly, the conciliation process would suffer considerably if parties thought that statements made during these discussions could later be used against them at the hearing.

The exclusionary rule applies to all human rights tribunals even though only two statutes expressly make mention of it (343). The fact that information obtained through conciliation is privileged has led commentators to recommend that the investigation and the settlement processes be kept completely separate (344). Indeed, boards have refused to hear Commission staff members testify on any information obtained while attempts at settlements were in effect (345). For this reason it is essential either to have the two functions, i.e. investigation and settlement, conducted by separate individuals or, in the alternative, if the same person is to carry out both tasks then he must at the very least ensure that they are kept separate and that the parties

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343. Can. ss. 37(3) and 40(5); Sask. Reg. 216/79, ss. 10 and 19(6).

344. Tarnopolsky, supra note 1, at pp. 445-466; W.S. Tarnopolsky, "Le contrôle de la discrimination raciale au Canda" (1977), 18 C. de D. 663, at p. 683.

345. Naugler v. New Brunswick Liquor Control Corporation, (N.B., 1976): It would be preferable to sever the roles of the investigator and the conciliator, because the former can be an invaluable witness while the latter is bound by privilege. See also Stairs v. Maritime Cooperative, (N.B., 1975) and Morgan v. Toronto General Hospital, (Ont., 1977).

are clearly made aware of the different stages.

2. Crown privilege

There was a time when the Crown, by virtue of its prerogative rights, could not be held liable in torts and could not be found in breach of a statutory duty. The maxim that "the king can do no wrong" (346) and the resulting immunity from civil actions, failed to take into account the fact that "the king has a personal as well as a politic capacity", and that "in his personal capacity he is just as capable of acting illegally as is any one else" (347).

This lacuna has long since been filled and it is now recognized that the Crown can be bound by statute, either expressly or by necessary implication (348), and that it may also be subject to the same liabilities as a private person when bound in this manner (349).

As far as anti-discrimination statutes are concerned, each and every one expressly declares that the Crown is bound by

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346. Strictly speaking the maxim means that the king has no legal power to do wrong but it has also led to the rule that the king could not be sued in tort: Wade, supra note 30, at p. 277.

347. Ibid.

348. For a detailed study of this topic see René Dussault and Gaston Pelletier, "Le professionel-fonctionnaire face aux mécanismes d'inspection professionnelle et de discipline institués par le Code des professions" (1977), 37 R. du B. 2.

349. Wade, supra note 30, at p. 283.

it (350). A provision which states that the Act is binding on the Crown does not, however, set aside the evidentiary rules concerning Crown Privilege. Indeed, the Crown has a special privilege which allows it to prevent evidence from being given in court if its disclosure would be contrary to the public interest (351). This privilege, and the "public interest" upon which it is based, should not be invoked unless it is absolutely necessary to do so because it constitutes a derogation from the general principle of the duty to testify and an obstruction to the truth-finding process. According to Sopinka and Lederman "... this privilege, like the others, impedes the court's ability to search for the truth, and more importantly, the party's presentation of relevant facts" and, therefore, "the privilege should not be invoked unless clearly warranted by the circumstances" (352).

But the desire to see the Crown privilege invoked only where circumstances warrant it, leads to the following important question: who will determine whether the Crown is justified in claiming the privilege and whether the public interest would really be at stake if certain information were to be divulged?

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350. Alta., s. 12; B.C., s. 25; Man., s. 35; N.B., s. 9; Nfld., s. 3; N.S., s. 15; Ont., s. 46(1); P.E.I., s. 33; Sask., s. 43; Can. Act, s. 63; Que., s. 54.

351. Wade, supra note 30, at pp. 293 and 306; Also, Sopinka and Lederman, supra note 12, at pp. 238-239: "The protection of the public interest is paramount and must, therefore, override any right to production or disclosure."

352. Ibid., at pp. 239-240.

Since the middle of the century and the landmark decision of the House of Lords in Duncan v. Cammell Laird & Co. Ltd. (353), the question has plagued both English and Canadian courts. As a result, two distinct doctrines have developed over the years: the first, which may be qualified as the absolute immunity doctrine, recognizes that the state is the sole authority for deciding what information should be withheld for reasons of public interest; the second, which may be referred to as the relative immunity doctrine, allows the courts to scrutinize the state's claim for privilege and to determine, after inspection of the relevant documents, whether the public interest would truly be threatened if the information were to be divulged.

The first principle gained prominence following the House of Lords decision in the Duncan case which was understood as denying the courts the right to question any claim of Crown Privilege regardless of the nature of the document involved. In the years that followed, this rule was given broad support which led to extreme and abusive situations. Almost thirty years later, in reaction to the negative results that the Duncan case had given rise to, the House of Lords reversed its position and laid the foundations for a new trend favourable to the relative immunity principle (354). The decision dwelt on the fact that there were, in effect, two kinds of public interest involved and that the claim for Crown Privilege might in some circumstances have to give

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353. [1942] 1 All E.R. 587.

354. Conway v. Rimmer, [1968] A.C. 910, [1968] 1 All E.R. 874.

way to a higher public interest, i.e. the sound and due administration of justice.

There is wisdom in an approach which recognizes the need to weigh and balance the two competing interests, and which refuses to attribute an absolute quality to either. The following remarks expressed by Lord Reid in Conway v. Rimmer demonstrate this:

> It is universally recognised that there are two kinds of public interest which may clash. There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done. There are many cases where the nature of the injury which would or might be done to the nation or the public service is of so grave a character that no other interest, public or private, can be allowed to prevail over it. With regard to such cases it would be proper to say, as Lord Simon did, that to order production of the document in question would put the interest of the state in jeopardy. But there are many other cases where the possible injury to the public service is much less and there one would think that it would be proper to balance the public interests involved. I do not believe that Lord Simon really meant that the smallest probability of injury to the public service must always outweigh the gravest frustration of the administration of justice (355).

The Duncan and the Conway cases serve to illustrate the two principal doctrines which arose in the last decades in relation to Crown Privilege. From a hands-off policy the Courts moved towards a slightly more interventionist position, acting as

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355. Ibid., (A.C.) at p. 940.

guardians of the sound administration of justice against possible abuses executed in the name of state interest. But, throughout these years, the constant tug between the two doctrines has made the courts' task a difficult one.

In Canada, the debate lost its momentum when Parliament and certain provincial legislatures decided to step in and settle the matter. The result appears to be a combination of the two doctrines: in most of the Common Law provinces the legislatures have made the Crown, or the state, subject to the inspection and discovery of documents, but if the Crown invokes "public interest" then the absolute immunity doctrine applies to the documents on which the privilege is claimed and the courts are not empowered to question the state's claim (356); on the other hand, the relative immunity doctrine has been retained by the Federal and the Quebec jurisdictions (357).

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356. The Alberta Proceedings Against the Crown Act, R.S.A. 1970, c. 285, s. 11; The Manitoba Proceedings Against the Crown Act, R.S.M. 1970, c. P-140, s. 12; The New Brunswick Proceedings Against the Crown Act, R.S.N.B. 1973, c. 176, s. 10; The Nova Scotia Proceedings Against the Crown Act, R.S.N.S. 1967, s. 239, s. 10; The Ontario Proceedings Against the Crown Act, R.S.O. 1970, c. 365, s. 12; The Saskatchewan Proceedings Against the Crown Act, R.S.S. 1965, c. 87, s. 13; on this topic see also Dussault and Pelletier, supra note 347, at p. 65. In general, see Sopinka and Lederman, supra note 12, at pp. 237 ff.

357. Section 41 of the Federal Court Act, R.S.C. 1970, 2nd Supplement, c. 10, reads as follows:

> (1) Subject to the provisions of any other Act and to subsection (2), when a Minister of the Crown certifies to any court by affidavit that a document belongs to a class or contains information which on grounds of a public interest specified in the affidavit should be withheld from production and discovery, the court may (contd.)

Human rights tribunals are bound by the legislative provisions concerning Crown or State Privilege which are applicable in their jurisdictions. Where the absolute immunity principles are recognized, the Crown may claim privilege on the basis of public interest although, again, this privilege should not be invoked without good cause. If public interest is not invoked then the Crown is subject to disclosure to the same extent as a private person.

At the federal level and in Quebec, the courts (358) may

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examine the document and order its production and discovery to the parties, subject to such restrictions or conditions as it deems appropriate, if it concludes in the circumstances of the case that the public interest in the proper administration of justice outweighs in importance the public interest specified in the affidavit.

(2) When a Minister of the Crown certifies to any court by affidavit that the production or discovery of a document or its contents would be injurious to international relations, national defence or security, or to federal-provincial relations, or that it would disclose a confidence of the Queen's Privy Council for Canada discovery and production shall be refused without any examination of the document by the Court.

Article 308 of the Quebec Code of Civil Procedure reads as follows:

Similarly, government officials cannot be obliged to divulge what has been revealed to them in the exercise of their functions provided that the judge is of the opinion, for reasons set out in the affidavit of the Minister or deputy-minister to whom the witness is answerable, that the disclosure would be contrary to public order.

358. Where there is relative Crown immunity an interesting question arises as to which body has the jurisdiction to examine the state's affidavit and its claim for privilege. At the federal level the answer is clear. Section 44 of the Canadian Human Rights Act recognizes that the Federal Court of Canada has jurisdiction on such matters. In Quebec the answer is less clear. In the matter of Att. Gen. of Quebec and Keable v. Att. Gen. of Canada et al. (1979), 90 D.L.R. (3d) 161, Mr. Justice Pigeon stated at p. 186 that "any

(contd.)

examine the documents on which a privilege is claimed and they may determine whether the request is justified (359).

As for the manner in which the courts should exercise this discretion, a detailed study of this question would be too ambitious for the purposes of this study. Suffice it to repeat the comments which have been made by two authors who have extensively studied the subject. In an article concerning "the elusive public interest" (360) Professor Lederman offered the following conclusions:

> The scales of the two public interests are not to be calibrated evenly. The presumption should be in favour of disclosure so as not to frustrate the administration of justice. It should be rebuttable, however, if the Crown can overwhelmingly demonstrate that the particular

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jurisdiction for entertaining such attack can only be found in a Superior Court. The Commissioner [Keable] is bound to accept the affidavit as submitted unless it is set aside by a competent court". But, in an interesting decision handed down by Mr. Justice Dugas of the Quebec Superior Court, the Supreme Court of Canada decision was distinguished. In CAE Electronics Ltd. v. L'Association des ingénieurs et scientifiques de la CAE et al., [1980] C.S. 1116, the learned judge held that a quasi-judicial tribunal [an arbitration board] had the power to examine an affidavit submitted to it according to art. 308 C.P.C., and that this was not a power which belonged exclusively to the courts.

359. Note that in cases where a Federal Minister claims that the "production or discovery of a document would be injurious to international relations, national defence or security, or that it would disclose a confidence of the Queen's Privy Council for Canada", s. 44(5) of the Federal Court Act provides for an absolute immunity on such documents.

360. Sidney N. Lederman, "The Crown's Right to Suppress Information Sought in the Litigation Process: The Elusive Public Interest" (1973), 8 U.B.C. Law Rev. 272.

> source of information is essential and of such character that it will virtually disappear if disclosure is ordered. A mere demonstration that production will result in information which is less than full and frank should not suffice. Not only will the interests of litigants thereby be promoted, but governmental agencies will be prevented from using a blanket claim of privilege as a means of concealing possible abuses from the public (361).

Bushnell, writing on the topic of "Crown Privilege" (362), closed with this statement:

> If the need of the litigant is reasonable and the national security is not involved, the tendency should be toward disclosure. The administration of justice needs facts (363).

Cases involving human rights tribunals and the issue of Crown Privilege have been rare. The only case to reach the Supreme Court of Canada on this specific issue is that of La Commission des droits de la personne du Québec v. P.G. du Canada et al. (364).

In addition to questions relating to Crown Privilege this case also dealt with a problem of overlap between the Federal and Quebec jurisdictions. The case originated with complaints lodged by Sylvie Roche and Cathy Curtain, two women who were dismissed from jobs they had obtained for the duration of the 1976 Olympics in Montreal. One had been hired as a telephone operator for the

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361. Ibid., at p. 308.

362. S.I. Bushnell, "Crown Privilege" (1973), 51 Can. Bar Rev. 551.

363. Ibid., at p. 582.

364. [1982] 1 S.C.R. 215.

Olymic organizing committee (COJO), while the other had been taken on as a waitress for one of the restaurants holding a concession. Dismissed prematurely, the two women requested an investigation by the Quebec Human Rights Commission alleging discrimination based on political convictions. The information gathered in the course of this investigation all pointed to a report prepared by the R.C.M.P. which was apparently unfavourable to the two women and was the cause of their dismissal. The Commission issued subpoenas requesting the production of the R.C.M.P. reports but the Honourable Francis Fox, then Solicitor General of Canada, opposed the request with an affidavit certifying that the production of these documents would be injurious to the national security of Canada. Writ of Evocation (the equivalent of certiorari) proceedings were taken to prevent the Commission from pursuing its investigation. All three courts, the Superior Court, the Court of Appeal, and the Supreme Court of Canada upheld the Solicitor General's affidavit on the basis that the Commission was bound by s. 44(2) of the Federal Court Act and that it did not have the power to question the affidavit (365).

This case is a good illustration of the absolute immunity doctrine because, in effect, no court would have been empowered to question the Solicitor General's affidavit to ensure that matters

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365. See also Att. Gen. of Quebec and Keable v. Att. Gen. of Canada et al., supra note 358, at p. 182: "Provincial legislation cannot proprio vigore take away or abridge any privilege of the Crown in right of the Dominion."

of national security were truly in jeopardy.

3. Confidential communications

Recently, the courts have rendered a few decisions allowing for a privilege founded only in confidence. Although they are not great in number, the implications of these decisions are nevertheless disquieting, and this, for two reasons. They appear to be straying a considerable distance from the fundamental principle, which is that privileges are an exception to the public's right to everyone's evidence. Secondly, they have already had the effect of reducing an important portion of the evidence available in discrimination cases.

Let us consider this last point for a moment. It is known that discrimination, and intentional discrimination in particular, can rarely be proved by direct evidence. Parties must rely on indirect or circumstantial evidence in order to show, for example, unequal treatment, arbitrary behaviour, or patterns of discrimination. Moreover, discrimination often implies comparison. Although it is not always possible to find a good basis of comparison in order to show discrimination, when such evidence is available it can be crucial to the case. Because the main areas of discrimination are in employment and in housing, the source of comparison usually involves information concerning the other candidates for a job or the other applicants for a vacancy, or, information concerning co-employees, their qualifications, evaluation sheets, salaries, or personnel files in general. A substantial part of this type of information is usally considered

confidential and not available for the world to see. But should the veil of secrecy be preserved where the information may be relevant to a hearing into a complaint of discrimination? To accept this proposition is, in my view, to seriously reduce the chances of success in the fight against discrimination.

Now to examine the decisions which have dealt with the issue. The first one to capture one's attention is the decision handed down by the Alberta Court of Queen's Bench in Alberta Human Rights Commission v. Alberta Blue Cross Plan (366). In this case the Commission, pursuing an investigation, made an application for the production of the personnel files for all persons employed by Alberta Blue Cross Plan between 1977 and 1980, and a record of persons terminated between the same dates. The investigation was being carried out to examine the complainant's allegation that her employment with the Alberta Blue Cross Plan had been terminated because she was pregnant. The reason given by the respondent for the dismissal was absenteeism.

Mr. Justice Smith dismissed the Commission's application on the basis that the personnel records were confidential and, therefore, privileged. To arrive at this conclusion, Mr. Justice Smith relied on the four conditions established by Wigmore (366a) and sanctioned by the Supreme Court of Canada in Slavutych v. Baker (367). With respect to the last condition which requires courts to weigh the injury that would result from disclosure

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366. (1982), 3 C.H.R.R. D/1017 (Alta. Ct. Q.B.).

366a. See discussion, supra, at pp. 398-399.

367. (1975), 55 D.L.R. (3d) 224.

against the public interest in the correct disposal of litigation, the Court remarked as follows:

> The potential injury by disclosure has already been alluded to, being a severe strain upon the harmony and efficiency of labour relations. This injury must be contrasted with the benefit gained by disclosure for the correct disposal of the particular type of litigation involved under the Act. One can assume that the legislature enacted such legislation out of concern with a perceived problem of unjustifiable discrimination in Alberta. The Act, including the discovery sections in issue, was enacted to provide procedures by which such discrimination might be eliminated. Disclosure of the employment file must be necessary to render those procedures effective in the case at bar, but not at the expense of privilege to those other person's files. This requirement of privilege has been met in the present case. While the enactment of the legislation in question could be seen as underlining the importance of the correct disposal of the litigation thereunder any statute could be seen as a legislative statement of the importance of the subject matter dealt with therein. The injury to another important goal of the legislature, labour relations, would be great if disclosure is ordered. It seems that clearer words in the legislation would be required to support the proposition that the Act necessitates the dispensation with common law privilege in this case having regard to the fourth requirement of such privilege (368).

Fortunately this decision was reversed, at least in part, on appeal (369). The Court suggested that "the respondent must be more specific in his objection and the chambers judge must then deal with the objection. There is no blanket confidentiality

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368. Supra note 366 , at p. 1020.

369. (1983), 4 C.H.R.R. D/1661 (Alta. Ct. App.).

which necessarily applies to everything in a personnel file ..." (370). The court further remarked that the specific documents which were alleged to be confidential had to be identified before a judge could decide to suppress the information. It also suggested that information or evidence which was itself illegal and in contravention to the Act could not be suppressed under the cover of a confidential communication:

> Further, it is ony when he has a specific document in front of him which is both relevant and the subject of a confidence that the chambers judge can fairly balance the issue as required by the fourth part of the rule in Slavutych.
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> ...
>
> None of this has yet arisen. The chambers judge knew neither the injury that might come nor the benefit that might be gained. Because he had not yet reviewed a specific document sought to be suppressed, he did not know what were the contents of the document, who would be harmed, and how much harm would come by publication. On the other hand, and for the same reason, he did not know how significant the contents of the document would be in determining the complaint before the Commission. One can readily speculate that great numbers of documents in these files might well be confidential and might well be suppressed. But one can as well imagine a document in which some supervisor suggests that some pretext should be found for the dismissal of this pregnant employee. It would probably not be suppressed even if the first three grounds of the test in Slavutych were made out, and the supervisor's report adjudged a confidential communication which ought to be protected (371).

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370. Ibid., at p. 1664.

371. Ibid.

As a result of the decision in first instance in the Alberta Blue Cross case, a board of inquiry in the matter of Kovacs v. Horne & Pitfield Foods Ltd. (372) also refused to order the production of employee application forms requested by the Commission. Chairman Sims stated that he "appreciate[d] the restraint the Commission may feel this places on their activities", but that he was nevertheless bound by Mr. Justice Smith's ruling that documents of this nature, whilst potentially relevant, were as an overriding consideration privileged. It should be noted, in passing, that the Kovacs case did not proceed beyond this preliminary ruling because the Commission subsequently indicated that it would call no evidence on the complaint.

There is, furthermore, authority for the proposition that personnel files, evaluations and references, are not privileged documents or communications, even though they may otherwise be considered confidential.

In Bezeau v. Ontario Institute for Studies in Education (373), the complainant, Lawrence Bezeau, alleged that he was denied tenure because he was a Canadian and that preference had been given to non-Canadians. In a preliminary motion presented to the Board, the respondent objected to the production of all letters from referees and appraisers on the basis that these documents were subject to the privilege of confidentiality.

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372. Supra note 112.

373. Supra note 129.

In his decision Chairman Ratushny reviewed some of the recent cases that dealt with the issue of privilege in relation to confidentiality. Commenting on the Slavutych case (374) he pointed out that the Supreme Court decision did not turn on the question of privilege but on another very important issue, i.e. the equitable principle of breach of confidence (375).

The Chairman also examined the Ontario High Court decision in Re University of Guelph and Canadian Association of University Teachers et al. (376). He noted that in applying the fourth

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374. The facts of the Slavutych case were basically the following: Mr. Slavutych, an associate professor in the Department of Slavic languages at the University of Alberta, had been invited to give a confidential assessment of a colleague for the purpose of determining whether the latter should be granted tenure. Upon receipt of the assessment the University felt that Mr. Slavutych had made serious and unsubstantiated charges against the colleague. Subsequently, the University, which was the very party who instigated the communication in confidence and stressed its confidentiality, sought to rely on the same communication as a basis for a charge of misconduct justifying the dismissal of Mr. Slavutych. The Supreme Court of Canada held that the University was not justified in using this communication against Mr. Slavutych.

375. Supra note 129, at p. 880; see also the Slavutych case: supra note 336, at pp. 230-231.

376. (1981), 29 O.R. (2d) 312. In this case, Dr. William Boyd, an associate professor in the Department of Biomedical Sciences at the University of Guelph was denied promotion to the full rank of professor. He filed a grievance alleging that he had not been treated equitably in comparison with his colleagues. Dr. Boyd's grievance went to consensual arbitration and at the hearing he sought access to the material considered by the departmental promotion and tenure committee. The University contested this request on the ground that the information given to the committee and its proceedings were confidential in nature. The Ontario High Court eventually upheld the University's claim for privilege based on confidentiality.

condition proposed by Wigmore, the Guelph University case concluded that, on balance, confidentiality should be given preference over disclosure (377). This, the Chairman seemed to suggest, differed from Wigmore's own position which was unequivocal in treating disclosure rather than privilege of confidentiality as the general rule (378).

In the Bezeau case the objection regarding confidentiality was ultimately rejected by the Board. In addition to the above comments, Chairman Ratushny distinguished the Guelph University case by emphasizing the fact that the Human Rights Code involves matters of public policy. On this, he remarked as follows:

> In the case at hand, the public interest in the peer evaluation process must be weighed not only against considerations of fairness to the individual affected but also against the public policy expressed in the Ontario Human Rights Code (379).

Before leaving this case, it may be worthwhile to refer to comments made by the Board regarding the possible abuses that might result if academic institutions (or any other institution or employer, for that matter) were entitled, under the cover of privilege, to withhold information relied upon in deciding an individual's career. In this respect the Chairman made the following statement:

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377. Bezeau case, supra note 129, at p. 880.

378. Ibid.

379. Ibid.

> In the Guelph University decision, there is little discussion of the importance to the individual being assessed of knowing the evidence which has been considered in making decisions which may have adversely affected an important area of his life, namely, his career. There is a danger that peer evaluation may, from time to time, drift into a highly subjective and, indeed, arbitrary exercise. The application of the administrative law principle of fairness to many aspects of these decisions could be largely emasculated in this area of decision-making through reliance upon the concept of privilege. Members of the academic community should not necessarily be considered to be above carelessly critical comments, petty jealousness and other human weaknesses. Consider, for example, the assessment which had been given in the Slavutych case and assume that it was totally untrue. A professor who had been denied promotion by a committee which had relied upon such an assessment might never know the injustice which had been done to him (380).

A similar debate took place in the United States (381), when a University professor refused, in the course of discovery, to divulge how he voted on the application of one Maija Blaubergs. The latter had brought a suit against the Board of Regents of the Univeristy of Georgia and others, alleging that her application for promotion to the rank of associate professor was denied for reasons of discrimination. The Court of Appeal, Fifth Circuit, rejected the professor's claim for privilege which was based on the contention that he was sheltered by an "academic freedom privilege" and also by a common law, secret-ballot privilege. After reviewing the principles enunciated by Wigmore, Mr. Justice Clark, speaking for the Court, went on to say:

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380. Ibid.

381. In Re Dinnan, Blaubergs v. Board of Regents of the University Sytem of Georgia, 661 F. 2d 426 (5th Circuit, 1981).

> Explicitly addressing the issue of the establishment of new privileges, the Supreme Court has stated that 'exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth'. Thus, where there is no compelling justification for a new privilege, the vital truth-seeking function of our justice system must carry the day.
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> ...
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> The appellant argues that the new privilege is necessary to protect two important societal interests, 'academic freedom' and the 'secret ballot'. We find neither argument to be even slightly persuasive" ... (382).

Continuing further, the learned Judge remarked:

> Though we recognize the importance of academic freedom, we must also recognize its limits. The public policy of the United States prohibits discrimination; Professor Dinnan and the University of Georgia are not above that policy. To rule otherwise would mean that the concept of academic freedom would give any institution of higher learning a carte blanche to practice discrimination of all types (383).

The question of confidentiality was also raised in England in the matter of Science Research Council v. Nasse (384). The House of Lords indicated that the Courts may be impressed with the need to preserve confidentiality and they will consider whether the necessary information has been or can be obtained by other means not involving a breach of confidence. However, if "discovery is necessary for disposing fairly of the proceedings",

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382. Ibid., at p. 430.

383. Ibid.

384. [1979] 3 All E.R. 673; see also Geoffrey Bindman, "Proving Discrimination: The Importance of Discovery", [1980] Law Soc. Gaz. 316, (March 26).

then "discovery must be ordered notwithstanding confidentiality" (385). This principle was similarly expressed by Lord Salmon in these terms:

> If the tribunal is satisfied that it is necessary to order certain documents to be disclosed and inspected in order fairly to dispose of the proceedings, then, ... the law requires that such an order should be made; and the fact that the documents are confidential is irrelevant (386).

Lastly, as a closing remark on the question of confidentiality it may be worth mentioning another English case, that of Rogers v. Secretary of State (387) in which Lord Simon challenged the concept of the privilege founded only in confidence, saying:

> In addition to claiming that the documents were inadmissible because their production would be against the public interest ('Crown privilege'), the board claimed that they were privileged from production because the information contained therein was imparted in confidence. I am not, for myself, convinced that there is any general privilege protecting communications given in confidence ... though, no doubt, the circumstances may be such that certain confidential commmunications will be privileged - for example, communications for the purpose of marriage conciliation ... where the law may itself infer confidentiality (388).

In conclusion, there is strong authority for the proposition that a privilege cannot be founded only in confidence, and

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385. See speech by Lord Wilberforce, ibid., at p. 680.

386. Ibid., at p. 684.

387. [1972] 2 All E.R. 1057; [1972] 3 W.L.R. 279.

388. Ibid., (W.L.R.), at pp. 290-291.

courts should be extremely cautious in creating a new exception to the general principle that the public has a right to everyone's evidence. As regards human rights commissions and tribunals, they are dealing with matters of public policy and this must prevail against claims of privilege founded on the confidential nature of communications. The admissibility of evidence should be based, rather, on the criterion of relevance (389).

In closing, it should be noted that concerns regarding confidentiality may justify a request to have part of the hearing held in camera, as was suggested in the Bezeau case (390). Also, reports can avoid necessary revelations about individuals by having them denominated by letter or number (391).

E. Opinion and expert evidence

In common law, the rule regarding opinion evidence is basically that laymen, as opposed to experts, should testify only as to facts on which they have first-hand knowledge; they should not express opinions concerning these facts nor should they state the inferences to be drawn from them (392). However, a witness may state an inference with respect to perceived facts whenever it would be extremely difficult or too absurd for him to distinguish

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389. Lustgarten, supra note 302, at pp. 220-221.

390. Supra note 129, at p. 881.

391. Supra note 302, at pp. 220-221.

392. Sopinka and Lederman, supra note 12, pp. 297 ff.

inference from fact. For example: "he was an old man"; "he could not lift his arm above his shoulder", or "the car was going fast" (393).

In addition, the layman may express an opinion on matters which are of common experience, if he possesses personal knowledge of the facts upon which the opinion is based (394). A list of topics on which a lay witness may state his opinion was given by Lord MacDermott in Sherrard v. Jacob:

> I do not think the subjects on which the non-expert witness will be allowed to give inferential evidence can be stated exhaustively .... But, if only to confirm that this category exists ... the following established examples may be mentioned: (1) the identification of handwriting, persons and things; (2) apparent age; (3) the bodily plight or condition or a person, including death and illness; (4) the emotional state of a person - e.g., whether distressed, angry, aggressive, affectionate or depressed; (5) the condition of things - e.g., worn, shabby, used or new; (6) certain questions of value; and (7) estimates of speed and distance (395).

In sum, there are certain circumstances in which a layman may state his opinion. However, these are always confined to non-technical matters. Where technical questions are in dispute only testimony by experts would be of assitance to the tribunals (396).

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393. Ibid., at p. 300.

394. Ibid., at p. 301.

395. [1965] N.I. 151, as quoted by Sopinka and Lederman, ibid.

396. Sopinka and Lederman, ibid.

Before giving evidence, an expert witness must satisfy the tribunal that he has the necessary experience to express an opinion on the subject-matter at issue. Expert witnesses have been called in numerous instances to assist human rights tribunals on technical matters, and the issues on which they have been asked to testify vary greatly. For instance, an expert anthropologist was called to describe stereotypes linked to the word "Sambo" (397). An expert holding a doctorate in applied social psychology, specializing in the criminal justice system, was asked to inform a tribunal of the conclusions of a study on the "capabilities of female police officers" (398). A doctor with expertise in the areas of ophthalmology and depth perception testified that individuals who have adapted to a monocular vision situation have essentially as good depth perception as individuals with binocular vision (399).

Lastly, it is worth noting that expert witnesses should have an important role to play in presenting and explaining statistics which are particularly relevant in cases of systemic discrimination (400).

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397. Singer v. Iwasyk and Pennywise Foods Ltd. (Sask., 1976).

398. Colfer v. Ottawa Board of Commission of Police et al., (Ont., 1979): The witness expressed the opinion that 1) women can perform the job of police officers as well as men, and (2) a minimum height requirement is not a meaningful requirement in assessing applicants for a position as police officer.

399. Foreman et al. v. Via Rail Canada Inc. (1980), 1 C.H.R.R. D/233.

400. Lustgarten, supra note 302, at p. 212, and discussion concerning Price v. The Civil Service Commission, [1977] I.R.L.R. 291; [1978] I.R.L.R. 3.

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