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**SENIORITY AND EMPLOYMENT EQUITY FOR WOMEN**

by Louise Dulude

Thesis submitted to  
the School of Graduate Studies and Research  
in fulfilment of the requirements  
for the LL.D. degree in Law

University of Ottawa

September 1993



Louise Dulude, Ottawa, Canada, 1993



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**TABLE OF CONTENTS**

	<u>Page</u>
<b>Abstract</b> .....	vi
<b>Introduction</b> .....	1
<b>Chapter I - Background Information on Seniority Rights</b> .....	6
A. Definition of Seniority and Seniority Rights.....	6
B. The Nature and Enforceability of Seniority Rights...	7
C. Coverage by Seniority Provisions.....	8
D. Seniority Rights in Practice.....	12
(1) Uses or Applications of Seniority.....	14
(2) Absolute (Strict) or Qualified Seniority.....	15
(3) Seniority Units.....	19
a) Types of Seniority Units.....	19
b) Factors Determining Types of Seniority Units Used	21
i. Seniority Units for Purposes of Benefits....	25
ii. Seniority Units for Layoffs and Bumping.....	26
iii. Seniority Units for Recalls to Work.....	28
iv. Seniority Units for Promotions and Transfers	29
(4) Other Relevant Seniority Practices.....	31
a) Measurement of Seniority.....	32
b) Preferential Seniority ("Superseniority").....	33
c) Retroactive and Constructive Seniority.....	34
d) Reverse Seniority.....	35
e) Seniority and Part-Time or Casual Work.....	35
E. Rationale For and Arguments Against Seniority Rights	39
<b>Chapter II - Assessment of the Impact of Seniority on Women.</b>	46
A. Meaning of Equality of Treatment for Women in the Workforce.....	46
B. Overt Unequal Impact of Seniority on Women.....	50
C. Indirect Unequal Impact of Seniority on Women.....	52
(1) Evidence That Women Have Less Seniority Than Men..	53
(2) Effects of Women Having Less Seniority Than Men...	64
(3) Evidence of Women's Segregation in Inferior Jobs..	66

(4) Effects of Women's Segregation in Inferior Jobs....	72
a) Layoffs, Recalls and Bumping.....	73
b) Promotions and Transfers.....	77
i. Seniority Units Trap Women in Their Inferior Jobs.....	77
ii. Configurations of Seniority Units Can Harm Women.....	80
c) Benefits.....	87
D. Overall Assessment of the Impact of Seniority Rights on Women.....	88
<b>Chapter III - Seniority and the Law in the United States.....</b>	<b>95</b>
<b>Chapter IV - Seniority and the Law in Canada.....</b>	<b>115</b>
A. Laws That Might Be Invoked Against Seniority Systems Which Treat Women Unequally.....	115
B. Rationale For the Rights of Employers and Labour Unions and Equality Rights Laws.....	116
(1) Rationale for the Rights of Employers.....	116
(2) Rationale for the Rights of Unions.....	118
(3) Equality Rights Laws in Canada.....	121
C. Women and Seniority Under the Duty of Fair Representation.....	124
(1) Description of the Duty of Fair Representation.....	125
(2) Direct Discrimination Under the Duty of Fair Representation.....	126
(3) Indirect Discrimination Under the Duty of Fair Representation.....	127
D. Women and Seniority Under Human Rights and Employment Standards Legislation.....	132
(1) Description of Human Rights and Employment Standard Laws.....	133
(2) Direct Discrimination Under Human Rights Laws.....	135

(3) Indirect Discrimination Under Human Rights Laws....	138
a) Evidence of Indirect or Adverse Effect Discrimination in the Treatment of Women Under Seniority Systems.....	139
b) Defence Against Complaints of Indirect Discrimination on the Basis of Sex Due to Seniority Practices	146
c) Determination of Whether Seniority Practices Which Harm Women Can Be Exonerated Under the Defence of Accommodation.....	148
i. Rational Connection to the Performance of the Job.....	150
ii. Duty of Accommodation to the Point of Undue Hardship.....	157
d) Legal Remedies in Findings of Indirect Discrimination by Seniority Systems.....	166
i. General Approach to Remedies in Seniority Cases.....	166
ii. Remedial Powers Under Human Rights Laws.....	168
iii. Retroactive Seniority Under Canadian Law.....	170
E. Women and Seniority Under Employment Equity Acts and Contractors Programs.....	174
(1) Federal Employment Equity Act.....	174
(2) Federal and Quebec Contractors Programs.....	175
(3) Ontario Employment Equity Act.....	177
F. Women and Seniority Under the Canadian Charter of Rights and Freedoms.....	178
Step 1: Section 15(1).....	180
Step 2: Section 1.....	181
Step 3: Remedies.....	192
G. Enforcement of Laws Which Might Be Invoked Against Seniority Systems Which Treat Women Unequally.....	193

<b>Chapter V - Modifications and Alternatives to Seniority Rules to Accommodate Women Who Are Adversely Affected..</b>	<b>198</b>
A. General Objectives of Seniority Reforms.....	198
B. General Modifications to Seniority to Correct Discrimination.....	199
(1) General Suspension of Seniority Rules.....	200
(2) Attribution of Constructive Seniority.....	201
(3) Special Adjustments for Group Particularities.....	203
(4) Prospective Adjustments to Seniority.....	204
C. Modifications to Seniority to Correct Discrimination in Promotions, Transfers and Training.....	205
(1) Suspension of Seniority Rules.....	206
(2) Attribution of Constructive Seniority.....	207
(3) Change-Over to Plant-Wide Seniority.....	207
(4) Dismantling of Discriminatory Seniority Units and Barriers.....	210
(5) The U.S. Steel Industry Example.....	212
(6) A Canadian Example.....	217
D. Modifications and Alternatives to Seniority to Correct Discrimination in Layoffs, Bumping and Recalls	219
(1) Alternatives to Layoffs.....	219
a) Changes in Job Structures and Hiring to Maintain Current Jobs.....	220
b) Voluntary Layoffs by Inverse Seniority.....	221
c) Work Sharing.....	223
(2) Modifications to the LIFO Rule and to Bumping.....	225
a) Suspension of the LIFO and Bumping Rules.....	226
b) Attribution of Constructive Seniority.....	227
c) Plant-Wide Seniority With Broad Bumping Zones.....	228

d) Proportional Layoffs.....	229
(3) Modifications to Recall Rules.....	232
E. Changes to Seniority to Correct Discrimination in Benefits.....	233
F. Government Intervention to Reduce Layoffs and the Adverse Impact of Seniority on Women.....	235
<b>Conclusion.....</b>	<b>238</b>
1. Seniority Rules Discriminate Against Women.....	238
2. Seniority Rules Constitute Unjustified Adverse Impact Discrimination Under Canadian Law.....	240
3. Laws Prohibiting Adverse Impact Discrimination by Seniority Rules Are Not Being Enforced in Canada.....	243
4. Many Measures Could Be Taken to Reduce the Negative Impact of Seniority Systems While Retaining the Seniority Principle.....	244
<b>Selected Bibliography.....</b>	<b>248</b>
<b>Canadian Legislation Cited.....</b>	<b>263</b>
<b>Cases Cited - Canada.....</b>	<b>265</b>
<b>Cases Cited - United Kingdom.....</b>	<b>268</b>
<b>Cases Cited - United States.....</b>	<b>268</b>

ABSTRACT

Conflicts between seniority and employment equity became evident after the United States adopted laws in the 1960s prohibiting discrimination in employment. Seniority rights sometimes slowed down or prevented the integration of Blacks and women in the workplace; in times of layoffs, they insured that recently-hired employees from these groups were the first to go. This led to innumerable law suits culminating in a series of U.S. Supreme Court decisions in the late 1970s and early 1980s.

The potential for similar conflicts is even greater under Canadian anti-discrimination provisions because Canadian laws contain no counterpart of the general seniority exemption which is included in U.S. law. In spite of this, not a single case concerning indirect discrimination by seniority systems has been reported in this country. The few reported cases involving seniority and discrimination dealt with crude questions such as separate seniority units for women and men.

The main elements demonstrated in this thesis are: 1) that seniority rules have harmful effects on Canadian women; 2) that these harmful rules constitute unjustified adverse impact discrimination under Canadian law; 3) that laws prohibiting adverse impact discrimination by seniority rules are not enforced in Canada; and 4) that many measures could be taken to reduce the negative impact of seniority systems on women while

retaining the beneficial effects of the seniority principle.

These points are developed in five chapters. Chapter I provides background information on the nature and coverage of seniority rights, the arguments for and against them and the way in which they are applied. Seniority systems vary enormously, with three main variables which produce a huge number of combinations: (1) what uses or applications are made of seniority, including benefits, promotions, layoffs, etc.; (2) whether seniority rights are absolute or qualified (subject to ability, for example); and (3) within what seniority unit these rights are exercised. Seniority units tend to be broad for benefits (plant-wide or company-wide) and narrow for promotions (departmental or occupational), but they can also be irrational divisions reflecting historical mergers or discrimination.

Chapter II assesses the impact of seniority on women. Two special characteristics of women cause them to be adversely affected when unmodified seniority is used: (1) women have less seniority than men because their family caregiving roles force them to adopt much less continuous work patterns than those of men; (2) female workers tend to be ghettoized in inferior positions; seniority traps them in these ghettos and prevents those who escape from gaining secure holds in better positions. Overall, however, women's best interest lies in supporting the maintenance of the seniority principle, but in a modified form

to correct its unjust effects on them.

Chapter III reviews the legal history of the conflict between seniority and equality rights in the United States. Much of this history is relevant because American seniority systems are almost identical to ours, and because many of the legal concepts discussed in U.S. cases are also found in Canadian law.

In Chapter IV, we consider whether unmodified seniority rules constitute unjustified adverse impact discrimination under the following Canadian laws: (1) laws on the duty of fair representation of labour unions; (2) human rights acts; and (3) the Canadian Charter of Rights and Freedoms. The definition of adverse effect discrimination under all three types of laws is broad enough to include all the instances of harm to women by seniority rules we identified, but each of these laws has different rules for determining whether these adverse effects are justified or not.

Because of the great deference shown to the results of the collective bargaining process under the duty of fair representation, these laws would likely prohibit only the grossest forms of adverse effect discrimination due to seniority, such as unnecessary seniority units and barriers between units which clearly perpetuate segregation. Complaints under human rights

acts and the Charter of Rights would also almost certainly result in such gross practices being struck down.

The fate of straightforward applications of the seniority principle, such as seniority-based promotions and layoffs, is less predictable. It depends on future Supreme Court elaborations of the duty to accommodate of employers and labour unions (under human rights acts), and on the extent of that court's reluctance to intervene in complex socio-economic issues in the context of Charter challenges. It may also be possible to use the Charter to strike down seniority provisions in other laws, such as for example the exemption for layoffs and recalls contained in Ontario's proposed Employment Equity Act.

At the end of Chapter IV, and in Chapter V, we describe changes which could be made to correct present injustices. Some, like the adoption of proactive employment equity laws with vigorous sanctions and powerful implementing agencies, aim at correcting the lack of enforcement. Other proposed changes involve a broad range of modifications to seniority systems to reduce or eliminate their negative impact on women, as well as alternatives to seniority-based layoffs.

Our conclusion is that if such changes were made, the seniority principle could at last become the essential protector of vulnerable workers it was originally meant to be.

## INTRODUCTION

It is possible in today's climate to be a proponent of individual employee rights without being hostile to collective bargaining.

Bora Laskin, 1963<sup>1</sup>

Ever since the Canadian Charter of Rights and Freedoms was adopted in 1982, labour law experts have been worried that its equality rights section would be used to undermine collective bargaining<sup>2</sup>, while feminist experts have been concerned that its equality provisions would be reduced to sterile abstract concepts which would destroy their capacity to effect social change.<sup>3</sup> One of the main areas in which the battle between these two groups' visions was expected to be fought was seniority.

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<sup>1</sup> B. Laskin, "Collective Bargaining and Individual Rights" (1963) 6 Can. Bar J. 278 at 278.

<sup>2</sup> D.D. Carter, "Canadian Industrial Relations and the Charter - The Emerging Issues" in M. Thompson, ed., Is There A New Canadian Industrial Relations? - Proceedings of the 23rd Annual Meeting of the Canadian Industrial Relations Association (Winnipeg: C.I.R.A., 1986) 263; T. Christian, "The Charter of Rights and Labour Law" in I. McKenna, ed., Labour Relations Into the 1990s (Don Mills, Ont.: CCH Canadian, 1989) 185; R.L. Heenan, "Effect of the Charter on Employment" in Meredith Memorial Lectures - 1988: New Developments in Employment Law (Montreal: Faculty of Law, McGill University, 1989) 23; P.C. Weiler, "The Charter At Work: Reflections on the Constitutionalizing of Labour and Employment Law" (1990) 40 U.T.L.J. 117.

<sup>3</sup> G. Brodsky & S. Day, Canadian Charter Equality Rights for Women: One Step Forward Or Two Steps Back? (Ottawa: Canadian Advisory Council on the Status of Women, 1989); M. Eberts, "Sex-Based Discrimination and the Charter" in A.F. Bayefsky & M. Eberts, eds., Equality Rights and the Canadian Charter of Rights and Freedoms (Toronto: Carswell, 1985) 183; C.A. MacKinnon, "Making Sex Equality Real" in L. Smith et al., eds., Righting the Balance: Canada's New Equality Rights (Saskatoon: Canadian Human Rights Reporter, 1986) 37; N.C. Sheppard, "Equality, Ideology and Oppression: Women and the Canadian Charter of Rights and Freedoms" (1986) 10 Dalhousie L.J. 195; C.L. Smith, "Judicial Interpretation of Equality Rights Under the Canadian Charter of Rights and Freedoms: Some Clear and Present Dangers" (1988) 23 U.B.C. L. Rev. 65.

This was an entirely realistic expectation given the fact that collective bargaining and equality rights had clashed over the seniority issue in the years which followed the adoption of Title VII of the Civil Rights Act of 1964, prohibiting discrimination in employment in the United States.<sup>4</sup> But what happened on the seniority front in Canada between the time the equality provisions of the Charter of Rights came into force in 1985 and now was... nothing. Not a single case of direct challenge to seniority systems under the Charter of Rights has yet been reported. For that matter, the only cases concerning seniority and discrimination that have ever been reported in Canada are crude ones, dealing with questions such as separate seniority units for women and men.

Why have more complex cases involving seniority and equality rights not been launched in Canada? If women initiated them, what arguments could they invoke? What would be the likelihood that these arguments would succeed? What are women's best interests with regard to the seniority issue? These are the questions which served as the foundation for this thesis. The main elements we will demonstrate in the thesis are:

1. That seniority rules, which are alleged to be advantageous to all employees, are harmful to women and reinforce their inferior position in the labour force.

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<sup>4</sup> These U.S. developments are described below in chapter III.

2. That these harmful seniority rules constitute unjustified adverse impact discrimination under Canadian human rights laws.
3. That there has been no enforcement whatsoever of these laws against adverse impact discrimination by seniority systems, with the result that extremely few Canadian employers and unions have paid any attention to this issue.
4. That many measures could and should be taken to neutralize the negative impact of seniority systems on women while retaining the beneficial effects of seniority rights in the workplace.

These points will be developed in five chapters. Chapter I will provide the basic information on seniority which is needed to understand the arguments presented in the rest of the thesis. It will contain a definition of seniority, an examination of the nature of seniority rights and the employees they cover, very practical explanations of the ways in which seniority is applied in different workplaces, and a review of the arguments for and against seniority rights.

In Chapter II, we will assess the impact of seniority on women. This will involve defining what we mean by equal treatment of women in the workforce, examining in detail the situations in which seniority has a detrimental effect on women, ending with an assessment of the general impact of seniority on

women and of the attitude women should adopt toward seniority rights.

Chapter III will review the legal history of the conflict between seniority and equality rights in the United States, much of which is directly relevant to the legal status of seniority in Canada, which will be examined in detail in Chapter IV. In this chapter, we will probe the rationale for the rights of employers, labour unions and women, describe the laws that could be invoked against seniority systems which discriminate against women, and apply these laws to the discriminatory seniority rules and practices described in Chapter II. We will also discuss the reasons why these laws have not been enforced.

Finally, we will explore in Chapter V the modifications and alternatives to seniority rules which could be adopted to accommodate women who are adversely affected, while maintaining the benefits of the seniority principle. This will set out the objectives we believe reforms to seniority systems should pursue, as well as very practical recommendations which are suitable to Canadian workplaces. Canadian examples will be used whenever any are available.

Overall, a great deal of the contents of this thesis is new. As the bulk of American cases involving discrimination by seniority systems dealt with its effects on Blacks, no extensive

analysis of its impact on women has ever been produced. The most comprehensive part of the thesis, which examines seniority rules and practices in the light of Canadian law, has also never been done, nor has such an exhaustive review and analysis of possible remedies been presented before.

We hope this thesis will stimulate interest in the subject, and will make it clear that labour and women's interests need not be inimical, but can on the contrary be reconciled to create fairer workplaces for everyone.

## CHAPTER I - BACKGROUND INFORMATION ON SENIORITY RIGHTS

The purpose of this chapter is to provide information on seniority. This will include a definition of seniority rights as well as descriptions of their nature, their enforceability, their coverage of the Canadian labour force, the ways in which seniority rights are applied, and the rationale for and arguments against such rights. This information will provide the necessary background to understand the arguments presented in subsequent chapters, particularly in Chapter II, where we will analyze the impact of seniority provisions on women, and Chapter V, which will deal with specific possible modifications to seniority rules.

### A. Definition of Seniority and Seniority Rights

For general purposes, seniority is most simply defined as an employee's length of service with the company for which he or she works.<sup>5</sup> Seniority rights and the seniority principle rest on the assumption that the individuals with the greatest length of service within the company should be given preference in employment.<sup>6</sup>

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<sup>5</sup> S.H. Slichter, J.J. Healy & E.R. Livernash, The Impact of Collective Bargaining on Management (Washington, D.C.: Brookings Institution, 1960) at 104 [hereinafter Slichter et al.].

<sup>6</sup> H.S. Roberts, Roberts' Dictionary of Industrial Relations, 3d ed. (Washington, D.C.: Bureau of National Affairs, 1986) at 656.

## B. The Nature and Enforceability of Seniority Rights

The function of seniority rights is to allocate employment claims and to establish priorities between conflicting claims. The essential meaning of seniority claims is the "expression of a property-like relation of the worker to a definable set of work opportunities".<sup>7</sup>

Seniority is not unique in conferring such a property-like relationship to work opportunities. Other practices such as the closed shop and work sharing also create such property-like relationships to work.<sup>8</sup> In addition, many other methods can be used to allocate work and to establish priorities between conflicting claims to work, such as for example objective tests of skill and efficiency or subjective determinations by foremen or other responsible people.<sup>9</sup>

Seniority rights are created when unionized employees choose seniority over other methods of allocating work, and implicitly or explicitly direct their labour unions to demand seniority rights in the process of collective bargaining. Although it is not unusual for employers in non-unionized

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<sup>7</sup> F. Meyers, "The Analytic Meaning of Seniority" in W. Fogel, ed., Job Equity and Other Studies in Industrial Relations: Essays in Honor of Frederic Meyers (Los Angeles: Institute of Industrial Relations, University of California, 1982) 35 at 48.

<sup>8</sup> Ibid. at 40-46.

<sup>9</sup> Ibid. at 37.

workplaces to observe seniority in employment choices, these arrangements are almost always informal and discretionary and do not grant enforceable rights to the workers involved.<sup>10</sup> Enforceable seniority rights are a product of collective bargaining, as judged by labour arbitrator Bora Laskin in 1960:

Seniority...is a collective bargaining concept. There is no such thing as seniority in any enforceable sense under individual bargaining; and certainly not in a case where an employer has undisputed legal control over the arrangement and disposition of his working force, unless as a matter of grace.<sup>11</sup>

The scope and definition of seniority rights are determined by the wording of each collective agreement.<sup>12</sup> Seniority rights are never absolute; they give individuals relative claims to whatever work or benefits are available in the enterprise;<sup>13</sup> they can also be changed as agreed by the parties to the collective agreement.<sup>14</sup>

### C. Coverage by Seniority Provisions

According to December 1992 data provided by Labour Canada for this thesis, the most common seniority provisions contained

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<sup>10</sup> I. Christie, Employment Law in Canada (Toronto: Butterworths, 1980) at 244.

<sup>11</sup> Federal Wire & Cable Co. Ltd. (1960), 3 Steelworkers Arbitration Cases 276 at 278.

<sup>12</sup> D.J.M. Brown & D.M. Beatty, Canadian Labour Arbitration, 3d ed. (Aurora, Ont.: Canada Law Book, 1988) at 6-1.

<sup>13</sup> J.P. Begin & E.F. Beal, The Practice of Collective Bargaining, 8th ed. (Boston: Irwin, 1989) at 331.

<sup>14</sup> Hémond v. Coopérative fédérée du Québec, [1989] 2 S.C.R. 962, 103 N.R. 193, 89 C.L.L.C. 14,047.

in collective agreements covering 500 or more employees (excluding construction industries) deal with layoff and recall after layoff: more than 80% of agreements had such clauses, covering 77% and 76% of all employees respectively.<sup>15</sup> In addition, 55% of workers had seniority provisions relating to promotions and transfers, and 54% had provisions on bumping (Note: "bumping" refers to the displacement of an employee by another with more seniority who would otherwise be laid off).

Table 1 (on the next page) presents information on the actual and estimated seniority coverage of Canadian workers. The first column of figures, presenting the proportion of employees under major collective agreements in each industry who were covered by seniority clauses on layoff, shows significantly greater coverage in manufacturing industries (99% of workers) than in non-manufacturing ones (74%).<sup>16</sup>

In non-manufacturing industries, where about 90% of employed women are found,<sup>17</sup> seniority coverage was strongest in forestry/mining and in wholesale trade, with all workers under major collective agreements in these industries having seniority

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<sup>15</sup> Special tabulations from the Bureau of Labour Information, Labour Canada, Hull, Quebec, performed in December 1992. The Bureau's computerized data do not include information on seniority clauses relating to benefits.

<sup>16</sup> Ibid.

<sup>17</sup> Calculated from: Statistics Canada, The Labour Force - July 1993, Catalogue No. 71-001 (Ottawa: Minister of Industry, Science and Technology, 1993) at B-25. Construction workers were excluded.

**Table 1 - Actual and Estimated Seniority Coverage in the Event of Layoff, by Industry and by Sex, Canada, 1992\***

<u>Industry</u>	<u>% of Workers Under Major Collective Agreements Who Had Seniority Clauses*</u>	<u>Estimate of Maximum Possible % Of All Workers Who Had Seniority Clauses*</u>
<b><u>Manufacturing</u></b>		
Food & Beverage	100%	52%
Tobacco	100%	46%
Rubber & Plastic	100%	25%
Leather	100%	34%
Textile & Clothing	100%	32%
Wood	100%	35%
Paper & Allied	100%	65%
Printing/Publishing	71%	15%
Primary Metal	100%	52%
Metal Fabricating	100%	30%
Machinery	100%	34%
Transportation Equip.	99%	45%
Electrical Products	100%	25%
Nonmetal Mineral Prod.	100%	45%
Petroleum & Coal	100%	31%
Chemical	100%	19%
Total Manufacturing	99%	37%
<b><u>Non-Manufacturing</u></b>		
Forestry & Mining	100%	35%
Transportation	86%	46%
Communications	45%	27%
Electricity, Gas & Water	77%	40%
Wholesale Trade	100%	11%
Retail Trade	82%	10%
Finance, Insurance & Real Estate	93%	4%
Education	73%	56%
Health & Soc. Svces	98%	50%
Accommodation & Food	98%	9%
Federal Administration	0%	0%
Provincial & Local Administration	84%	68%
Total Non-Manufacturing	74%	24%
<b>ALL INDUSTRIES</b>	<b>77%</b>	<b>27%</b>

\* Sources for this table are given in footnotes 15, 16 and 19 and accompanying text.

clauses for layoff. At the other extreme, fewer than half of workers were covered in the communications industry, and none at all in the federal public service, where seniority is regarded as a non-negotiable issue.<sup>18</sup>

The right-hand column of Table 1 provides an estimate of the maximum possible proportion of all Canadian employees of each industry who could have been covered by seniority clauses in 1992.<sup>19</sup> Although these figures probably overestimate actual coverage, they are nevertheless useful because they give an idea of the global importance of seniority in each industry and in the Canadian labour market.

These estimates show that the overall coverage of the Canadian labour force by seniority provisions is very low, at a maximum of 27% of all workers. The difference in coverage between manufacturing and non-manufacturing industries is still significant, at 37% for the former and 24% for the latter. In the non-manufacturing industries, which interest us most because they include most women, coverage is highest in the public and

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<sup>18</sup> P. Malles, Canadian Labour Standards in Law, Agreement, and Practice (Ottawa: Economic Council of Canada, 1976) at 49.

<sup>19</sup> This was calculated by combining the unionization rates for employed workers in each industry with the seniority coverage shown in the first column for employees under major collective agreements. The result probably exceeds actual coverage, as employees from smaller firms tend to have weaker bargaining power and are thus less likely to obtain seniority clauses. Unionization rates are from: Statistics Canada, Annual Report of the Minister of Industry, Science and Technology Under the Corporations and Labour Unions Returns Act, Part II - Labour Unions 1990, Catalogue No. 70-202 (Ottawa: Minister of Industry, Science and Technology, 1993) at 27.

para-public sectors (provincial and local administration, education, health and social services) and lowest in finance, trade, and accommodation and food.

Overall, the information contained in Table 1 allows us to conclude that: 1) seniority is used to a greater or lesser extent in all Canadian industries except the federal public service; 2) seniority is extremely important in some workplaces, especially in large manufacturing firms and in the public and para-public sectors; 3) mostly due to the low rate of unionization of Canadian workers, enforceable seniority rights are the exception in this country rather than the rule.

#### D. Seniority Rights in Practice

It has been said that seniority is deceptively simple, because although the basic idea of seniority is easy to grasp, the application of seniority rights in the workplace is often extraordinarily complex.<sup>20</sup> This is partly because seniority systems are compromises between the conflicting interests of employers, unions and different groups of workers, and partly because seniority systems are tailor-made to allow for differences in size of plant and scale of operations, differences in

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<sup>20</sup> A. Giles & H.C. Jain, "The Collective Agreement" in J.C. Anderson, M. Gunderson & A. Ponak, eds., Union-Management Relations in Canada, 2d ed. (Don Mills, Ont.: Addison-Wesley, 1989) 317 at 338.

skill and experience requirements, diversity of processes and ease of interchangeability of types or classes of work.<sup>21</sup>

As a result, simple and straightforward seniority clauses are unusual; they generally occur only in small firms where all employees have similar skills. In practice, "seniority provisions assume an almost infinite variety and are constantly being altered and reinterpreted to meet changing or unforeseen situations".<sup>22</sup>

In spite of this complexity, the practice of seniority can be understood relatively easily because the basic questions which those who design seniority systems must address are the same. These questions concern: (1) the uses or applications of seniority; (2) whether seniority rights will be absolute or qualified for any given application; and (3) within what seniority unit these absolute or qualified seniority rights will be exercised for each application. Other relevant aspects of seniority will be explored in section (4).

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<sup>21</sup> U.S. Department of Labor, Bureau of Labor Statistics, Collective Bargaining Provisions: Seniority, Bulletin No. 908-11 (Washington, D.C.: U.S. Government Printing Office, 1949) at 14.

<sup>22</sup> B. Aaron, "Reflections on the Legal Nature and Enforceability of Seniority Rights" (1962) 75 Harv. L. Rev. 1532 at 1534.

(1) Uses or Applications of Seniority

The possible uses or applications of seniority include practically all aspects of the employment relationship and have been divided into two categories.<sup>23</sup> The first is competitive seniority, in which seniority establishes an employee's rights relative to those of other employees in situations where their interests come into competition. The second is benefit seniority, which grants benefits, rights or privileges to an employee by virtue of the fact that she or he has accumulated so many years of service.<sup>24</sup>

Competitive seniority has been applied to: layoffs and recalls to work, the displacement of an employee by another who would otherwise be laid off (called "bumping", as we saw above), promotions, demotions, transfers, job or work assignments (including choice of machine, runs or flights), shift preference, selection of days off, distribution of overtime work, training opportunities, choice of vacation time, parking privileges and access to company housing.<sup>25</sup>

Benefit seniority has been used to determine: the length of vacations, eligibility for and entitlements under pension,

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<sup>23</sup> Slichter et al., supra note 5 at 106.

<sup>24</sup> Ibid. at 114.

<sup>25</sup> Ibid. at 106-13.

disability and other insurance plans, paid holidays, eligibility for and amount of severance pay, sick leave and maternity leave, profit sharing benefits and bonuses, supplementary unemployment benefits (SUBs), guaranteed annual employment or wage plans, automatic wage increases and long-service wage adjustments and rewards.<sup>26</sup>

It is unlikely that any single Canadian collective agreement contains all these seniority provisions, but probable that many contracts include a substantial number. Some agreements may also use seniority for purposes other than the ones we mentioned.

## (2) Absolute (Strict) or Qualified Seniority

One of the complicating factors in trying to understand the impact of seniority provisions is that some seniority clauses are so diluted, or "qualified", that they might as well not exist at all. To illustrate this, here are four sample seniority clauses ranging from absolute (or strict) seniority to seniority that is very qualified:<sup>27</sup>

- "Promotions will be made solely on the basis of seniority". Seniority is at its strongest in this absolute (or strict) seniority clause.

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<sup>26</sup> Ibid.

<sup>27</sup> These examples are based on: D.A. Peach & D. Kuechle, The Practice of Industrial Relations, 2d ed. (Toronto: McGraw-Hill Ryerson, 1985) at 257.

- "The most senior applicant shall be promoted, provided he or she has sufficient ability to do the job". This slightly qualified seniority clause sets a minimum standard which the senior applicant must meet. If that standard is met, the senior applicant is automatically promoted regardless of the qualifications of other candidates.
- "Where skill, ability and physical fitness are relatively equal, seniority shall govern in making promotions." Under this type of moderately qualified seniority clause, candidates are compared and junior applicants with substantially better qualifications get the promotion.
- "Promotions shall be made on the basis of skill, ability, physical fitness and seniority, to be determined by the employer." The seniority criterion is so strongly qualified in this clause, and the employer's discretion so broad, that seniority can easily be ignored.

In practice, the degree of qualification of seniority varies greatly with its use or application. Strict seniority is the general rule in cases of benefit seniority where workers are not in competition,<sup>28</sup> but as Table 2 (on the next page) indicates, competitive uses such as layoff, promotion and recall follow different patterns.

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<sup>28</sup> J. Sack & E. Poskanzer, Contract Clauses: Collective Agreement Language in Canada, 2d ed. (Toronto: Lancaster House, 1985) at 179.

**Table 2**  
**Workers Covered by Different Types of Seniority Clauses in**  
**Collective Agreements for 500 or More Employees, Canada, 1985<sup>29</sup>**

<u>Type of clause:</u>	<u>Promotions -</u> Distribution of Workers With Such Clauses	<u>Layoffs -</u> Distribution of Workers With Such Clauses	<u>Recalls -</u> Distribution of Workers With Such Clauses
Strict seniority	-*	24%	20%
Strict seniority if other factors are equivalent or sufficient	52%	21%	21%
Seniority and other factors	48%	55%	59%
<b>TOTAL</b>	100%	100%	100%

\* Less than 1%

First of all, Table 2 shows that in the vast majority of cases, competitive seniority clauses call for a qualified form of seniority. In particular, strict seniority is almost never used in promotions (less than 1% of workers with seniority clauses), which is understandable because employers are very concerned about the drop in efficiency which would result from promoting incompetent employees. Most seniority clauses involving promotions (52% of workers with seniority provisions)

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<sup>29</sup> Calculated from: Labour Canada, Provisions in Major Collective Agreements in Canada Covering 500 and More Employees (Ottawa: Supply and Services Canada, 1985) at 11-12, 21.

were of the intermediate type, in which the senior's ability must be sufficient to do the job, or equivalent to that of candidates with less seniority.

The table also shows that as far as competitive seniority is concerned, strict seniority is most often found in layoff situations (24% of workers, compared with less than 1% in promotions and 20% for recalls). For both layoffs and recalls, however, the most common type of seniority was "seniority and other factors" (55% of workers with seniority provisions in the case of layoffs and 59% for recalls), which were described above as the weakest among qualified seniority clauses. How weak they actually were depended on the wording of each collective agreement.

The fact that strict seniority is uncommon does not necessarily mean that this type of seniority is becoming less important. On the contrary, surveys indicate that the proportion of workers covered by strict seniority upon layoff doubled in major collective agreements between 1974 and 1985, with a less dramatic but also substantial increase in the case of recalls.<sup>30</sup> This expansion is likely to plateau at a low level, however, because strict seniority is almost totally restricted to industries with relatively unskilled employees, or with large

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<sup>30</sup> Data for 1974 from Malles, supra note 18 at 120, 124; data for 1985 from Labour Canada, supra note 29 at 12, 21.

blocks of workers having roughly equal technical skills (such as transportation and utilities).<sup>31</sup>

### (3) Seniority Units

A seniority unit is the zone within which particular seniority rights are exercised. Very practically, "the seniority unit usually consists of a list of employees' names ranked in order of their seniority".<sup>32</sup> The crucial element here is "the size of the list or lists in relation to the total work force".<sup>33</sup> To understand the role and effects of seniority units, we will first describe the most common types of seniority units, and then examine the factors which determine the use of different types of seniority units in different situations.

#### a) Types of Seniority Units

The two main categories of seniority units are those which are based on skill and those which are based on working area.<sup>34</sup> The first type can, for example, have a seniority unit for each occupation or job classification in a company, or units that include several related occupations; it can also have separate seniority units for skilled, semi-skilled and unskilled employees. The second type of seniority unit can be sectional,

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<sup>31</sup> Calculated from Labour Canada, ibid. at 12, 21.

<sup>32</sup> Begin & Beal, supra note 13 at 331.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

departmental, divisional, plant-wide, company-wide or even industry-wide, spanning many companies. (The U.S. steel industry created a seniority pool which cut across company lines.)<sup>35</sup>

In practice, combinations of the two types in the same workplace are frequent, with craft or other specialized workers being found in seniority units based on skill, while other employees are in units based on working area.<sup>36</sup> Similarly, although a seniority unit can theoretically include a whole bargaining unit, or even several bargaining units if desired, it is much more common for a bargaining unit to be divided into many different units for seniority purposes.<sup>37</sup>

A third type of arrangement, mostly found in factory settings, is line of progression seniority.<sup>38</sup> Under such a system, all jobs within a bargaining unit are grouped into various progression ladders, with hiring from outside being limited to the bottom rungs. Entry-level positions are also sometimes grouped into a general labour pool, from which workers

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<sup>35</sup> ibid.

<sup>36</sup> S. Cohen, Labor in the United States, 4th ed. (Columbus, Ohio: Charles E. Merrill, 1979) at 167; A.C. Cryslor, Handbook of Employer-Employee Relations in Canada (Don Mills, Ont.: CCH Canadian, 1969) at 73.

<sup>37</sup> D. Gagliardo, Introduction to Collective Bargaining (New York: Harper & Brothers, 1953) at 296.

<sup>38</sup> G.-P. Hardy, Analyse de l'évolution des clauses d'ancienneté dans quelques grands établissements manufacturiers québécois (Thesis for Master's Degree in Social Sciences - Industrial Relations, Laval University, 1965) at 83.

are drawn in order of seniority as vacancies occur in the bottom levels of the lines of progression.<sup>39</sup>

**b) Factors Determining the Types of Seniority Units Used**

Like everything else in collective bargaining, the choice of seniority units reflects the interests and the bargaining strength of the parties involved. Generally speaking, employers support the narrowest units possible because they find them less disruptive, cheaper and more efficient.<sup>40</sup> When access to jobs is restricted to those who do the same or similar work, for example, it costs less for training, job interviews and paperwork, and there is a greater guarantee that successful candidates will be competent.<sup>41</sup> Narrow units are sometimes essential when some employees have very specialized skills; mechanical engineers, for example, cannot be replaced by workers from another occupational group.

Labour unions, on the other hand, usually favour the broadest possible seniority units because these are to the advantage of their senior members.<sup>42</sup> Exceptions to this general rule of unions supporting broad seniority units are not infre-

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<sup>39</sup> F. Kehoe & M. Archer, Canadian Industrial Relations, 2d ed. (Oakville, Ont.: Twentieth Century Labour, 1980) at 17.4.

<sup>40</sup> Begin & Beal, supra note 13 at 419-20.

<sup>41</sup> Slichter et al., supra note 5 at 193.

<sup>42</sup> Begin & Beal, supra note 13 at 419.

quent, however, including situations where powerful groups of skilled workers want to protect themselves against encroachment by other employees, or where younger workers successfully fight for smaller units, or where the majority of workers support the discriminatory segregation of certain groups.<sup>43</sup> As a result of these internal divisions, unions tend to resist any changes to established seniority rules for fear of triggering disputes among their members.

On the subject of discriminatory segregation, both the United States and Canada have had long traditions of maintaining separate seniority units by race and by sex.<sup>44</sup> The most recent general information we have on this in Canada is from a Quebec Human Rights Commission study which revealed that at least fifteen collective agreements entered into in that province in 1980 still provided for separate seniority units for male and female workers.<sup>45</sup> Cases involving violations of human rights acts through the use of segregated seniority lists for women and men were heard by Quebec and Ontario courts in 1982 and 1983.<sup>46</sup>

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<sup>43</sup> Aaron, supra note 22 at 1535; L.R. Sayles, "Seniority: An Internal Union Problem" in G.P. Schultz & J.R. Coleman, eds., Labor Problems: Cases and Readings (New York: McGraw-Hill, 1953) 179 at 180-85; J.A. Craft, "Equal Opportunity and Seniority: Trends and Manpower Implications" (1975) 26 Lab. L.J. 750 at 751.

<sup>44</sup> J.A. Lapp, How to Handle Problems of Seniority (New York: National Foremen's Institute, 1946) at 208-10, 213-17; Chrysler, supra note 36 at 71.

<sup>45</sup> Calculated from: M. Garon, Les conventions collectives: Une piste pour l'analyse de la discrimination en milieu de travail (Cowansville, Que.: Yvon Blais, 1989) at 84.

<sup>46</sup> Senay v. Aliments Ault Ltée (1982), 4 C.H.R.R. D/1296 (C.S.P. Que.); Brass Craft Canada Ltd v. I.A.M., Local 2446 (1983), 11 L.A.C. (3d) 236, 5 C.H.R.R. D/1964 (Ont.).

The bias of unions against changes in the seniority status quo can have the effect of maintaining complicated and irrational seniority units which were never thought out but were simply the result of haphazard historical developments. This is most strikingly illustrated by this example relating to the American steel industry:

Many steel mills started as very small shops which performed but one or a few of the numerous processes involved in steel making... the basic work unit was a crew or small functional department. These crew and departmental traditions became the basis of seniority practices in steel mills... As steel making grew in magnitude and complexity, new jobs or machines or buildings or processes would often become new and separate seniority units.

Meanwhile, at the corporate level a somewhat parallel development was in progress. The small, localized, experimental operations which began at the turn of the century grew rapidly through the purchase, amalgamation, merger and consolidation of all kinds of other processes, operations, factories, mines and complexes... each new addition bringing different and invariably narrow seniority units.

...by the time collective bargaining began in the latter part of the 1930s and early 1940s, the narrow seniority systems in steel mills had been long established and, indeed, had become part of the tradition of steel making...

Because of this and the fact that seniority had been and continued until 1962 to be entirely a matter of local autonomy in collective bargaining negotiations, the seniority programs had developed without any plan or order or consistency. Different plants almost invariably had different seniority systems, and it was not unusual to find many entirely disparate systems within the same plant or department. Virtually every seniority mechanism that the mind of man could conceive was operative. If there was any pattern, it was

that the seniority units were generally restrictive and inflexible.<sup>47</sup>

As we will see in a later chapter, both the steelworkers' union and employers strongly resisted changes in these flawed traditional seniority practices. Because of that resistance, it took more than a decade of conflicts involving a number of civil rights lawsuits in the 1960s and 1970s to finally achieve broader, more rational seniority units in the U.S. steel industry.

No comparable account exists concerning the history of seniority units in Canada. Similar stories could probably be unearthed, however, as Guy-Paul Hardy's study of seniority provisions in Quebec between 1945 and 1965 concluded that Canadian seniority systems developed along very similar lines to those of their American counterparts.<sup>48</sup> Canadian unionist Ed Finn provided confirmation of this similarity when he deplored the fact that some Canadian industries have a dozen or more arbitrary and superfluous seniority units, which segregate workers in small groups which make no particular sense and do

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<sup>47</sup> B. Kleiman & C.B. Frankel, "Seniority Remedies Under Title VII: The Steel Consent Decree - A Union Perspective" in R. Adelman, ed., Proceedings of New York University 28th Annual Conference on Labor (New York: Matthew Bender, 1976) 177 at 180-82.

<sup>48</sup> Hardy, supra note 38 at 82.

not reflect differences in the skills required to perform the segregated jobs.<sup>49</sup>

Finally, the complexities involved in studying seniority units are multiplied a hundredfold by the fact that it is very common for one employee to have different concurrent seniority units for different purposes. One can, for example, be on an occupational seniority list for promotions, a departmental seniority list for choosing vacation time, and a plant-wide seniority list for layoffs.<sup>50</sup> We will now see which seniority units are most commonly used for different purposes.

**i. Seniority Units for Purposes of Benefits**

We saw earlier that benefit seniority does not involve competition between employees, but simply grants benefits, rights or privileges to an employee by virtue of the fact that she or he has accumulated so many years of service. As this type of seniority does not generally cause disputes between workers and is not perceived as reducing a firm's efficiency, there is little controversy over the choice of unit. This is reflected in Canadian collective agreements, most of which

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<sup>49</sup> E. Finn, "Seniority, Promotions, Layoffs and Discrimination - A Union Perspective" in H.C. Jain & D. Carroll, eds., Race and Sex Equality in the Workplace: A Challenge and an Opportunity (Ottawa: Women's Bureau, Labour Canada, 1979) 129 at 130.

<sup>50</sup> Peach & Kuechle, supra note 27 at 258-59; Sack & Poskanzer, supra note 28 at 179.

provide that for purposes of determining benefit entitlement, the seniority unit is the whole bargaining unit or the plant.<sup>51</sup>

ii. Seniority Units for Layoffs and Bumping

Along with most aspects of seniority, the application of the ostensibly simple rule of "last in, first out" (LIFO) can be very complex. The complicating factor is bumping which, under a system of plant-wide seniority for layoffs, can create a long chain of displacements in which the senior employee whose job disappears bumps the one below on the seniority list, who in turn bumps the next, etc.. to the end of the line. The bumper may then also be bumped in his or her turn, precipitating another series of demotions, and so on. One early case is reported where the laying off of five men resulted in the displacement of 500 workers!<sup>52</sup>

This is obviously resented by employers and also by many employees. It is only tolerable in small firms with fully interchangeable employees, or in industries with very formal lines of progression (such as railroads) where everyone once occupied the lower ranks and such mass demotions are expected because they occur on a regular basis. At the other extreme, narrow departmental or occupational seniority with no bumping

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<sup>51</sup> Sack & Poskanzer, ibid.

<sup>52</sup> R.C. Smyth & M.J. Murphy, Bargaining With Organized Labor (New York: Funk & Wagnalls, 1948) at 214.

rights outside the unit are generally considered very unfair because they can result in long-service employees being laid off while thousands of other employees with shorter service are retained.<sup>53</sup>

Examples of common compromises include the following:<sup>54</sup>

- A plant-wide seniority unit for layoffs with bumping restricted to specified related groups of occupations, or bumping limited to jobs the employee has held before; or
- A basic system of departmental seniority units for layoffs, with the proviso that workers with five to ten years' service with the firm who are affected by a departmental layoff can bump within the division, while those with more than ten years' service can bump anywhere in the plant; or
- Different seniority units for different types of layoffs, for example a departmental unit for seasonal or temporary layoffs and a plant-wide or company-wide unit for permanent job losses caused by technological change.

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<sup>53</sup> D.Q. Mills, Labor-Management Relations, 4th ed. (New York: McGraw-Hill, 1989) at 455; Slichter et al., supra note 5 at 160.

<sup>54</sup> These and other examples are in: Begin & Beal, supra note 13 at 421-422; Chrysler, supra note 36 at 73; F. Elkouri & E.A. Elkouri, How Arbitration Works, 4th ed. (Washington, D.C.: Bureau of National Affairs, 1985) at 599; Slichter et al., supra note 5 at 157-59; A.A. Sloane & F. Witney, Labor Relations, 6th ed. (Englewood Cliffs, N.J.: Prentice-Hall, 1988) at 448.

As these examples demonstrate, the possibilities are practically endless. According to Guy-Paul Hardy's study of such clauses in seven major Quebec manufacturing firms from 1945 to 1965, seniority units became increasingly balkanized during that period as a result of pressure by employers who wanted to avoid the disruption caused by the expansion of bumping rights.<sup>55</sup> On the other hand, Labour Canada reported that as well as there being a continuing increase in the number of clauses granting bumping rights between 1978 and 1985, there was also a significant expansion of the units within which these rights could be exercised.<sup>56</sup>

### **iii. Seniority Units for Recalls to Work**

Recalls are also more complex than the simple rule of "last out, first in" would indicate. Business recovery and rehiring do not necessarily occur in the same order as business slowdowns and workforce reductions. As a result, most recall clauses are qualified by a requirement of ability (as we saw in Table 2), in addition to which recall units are often created by providing that this right can only be exercised within particular skill groups.<sup>57</sup>

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<sup>55</sup> Hardy, supra note 38 at 82.

<sup>56</sup> Labour Canada, supra note 29 at xxiv.

<sup>57</sup> J.A. Willes, Contemporary Canadian Labour Relations (Toronto: McGraw-Hill Ryerson, 1984) at 286.

#### iv. Seniority Units for Promotions and Transfers

For our purposes, let us assume that promotions are permanent moves to better-paying positions, and that transfers are lateral moves to equivalent jobs. Fundamental to the application of seniority in promotions and transfers is the principle that persons within the seniority unit will be given first consideration for advancement to vacancies before outsiders are chosen. This is not a guarantee that openings will be filled by workers from the unit, but an assurance that these employees will be advised of openings - through job posting or other means - and will have priority in bidding for them.

In the case of promotions, and particularly promotions to supervisory positions, management is generally adamant that the main criterion in selection be candidates' skills and ability.<sup>58</sup> This means, as we saw in Table 2, that the seniority criterion used in the selection is invariably qualified. It also means that management strongly insists on the smallest possible seniority unit, in part because candidates from the same section or department are more likely to be familiar with the work to be performed, and in part because the narrower the unit, the easier

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<sup>58</sup> F.H. Harbison, The Seniority Principle in Union-Management Relations (Princeton, N.J.: Industrial Relations Section, Princeton University, 1939) at 19.

it is for the person in charge of assessing candidates to know both the candidates and the work to be done.<sup>59</sup>

The other reason why seniority units have tended to be much smaller in the case of promotions and transfers than in layoffs is that unions have been much less concerned about pressing for broader units for promotion and transfer purposes. This has been attributed in part to the fact that the job security motivation is much weaker in these situations than in layoffs, and also because many employees share management's view that members of the "family" should be considered first.<sup>60</sup>

Narrow seniority units - occupational or departmental, for example - for purposes of promotions and transfers can have drastic consequences for "outsiders" who are promoted or who transfer from one seniority unit to another. Unless specified otherwise in the collective agreement, workers who thus move from one unit to another lose all their accumulated seniority and are forced to start again at the bottom of their new unit's seniority list. Needless to say, this type of system does not encourage interdepartmental moves.

When employees take new jobs which involve a move to a different bargaining unit, seniority rights generally disappear

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<sup>59</sup> Slichter et al., supra note 5 at 193.

<sup>60</sup> Ibid. at 194-95.

unless the two bargaining units have a reciprocity arrangement. This is unusual, and is particularly unlikely when the bargaining units are represented by rival unions. The Canadian Broadcasting Corporation (CBC) presents a good example of this problem:

...today's complex union structure [at the CBC] is the result of 50 years of frequently illogical, case-by-case certification. There are now 27 different collective agreements with the CBC...

Over time, this plethora of contracts provided nearly as much frustration as protection for CBC employees... A person who wants to move to another jurisdiction, say from news reporter to current affairs producer, faces loss of seniority and changes to or loss of insurance and retirement benefits. Virtually every CBC veteran can tell stories of not being allowed to do something...

After 10 years of hearings, it [the Canada Labour Relations Board] has boiled 27 contractual groups down to four "units"...<sup>61</sup>

Finally on promotions, elaborate rules were devised to protect the seniority rights upon layoff of employees who move out of the bargaining unit to take non-unionized supervisory positions.<sup>62</sup>

#### **(4) Other Relevant Seniority Practices**

Other aspects of seniority which have some relevance to employment equity concern: a) the measurement of seniority; b) preferential seniority ("superseniority"); c) retroactive and

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<sup>61</sup> M. O'Neill, "CBC's Union Shuffle" CAJ Bulletin (March/April 1993) 18.

<sup>62</sup> Sloane & Witney, supra note 54 at 451-52.

constructive seniority; d) reverse seniority; and e) seniority and part-time or casual work.

a) Measurement of Seniority

Seniority is normally counted from the day a person is hired or starts work. If there is a probation period, employees usually have no seniority rights until it ends, but seniority is then counted retroactively starting on the day they were hired or started work.<sup>63</sup>

Most labour arbitrators agree that unless a collective agreement specifies otherwise, seniority continues to accumulate throughout the employment relationship, whether the employee is actually working or not. This includes periods of vacation, illness, maternity leave and lay-off, at least for a temporary period.<sup>64</sup> It even includes periods when an employee is on a legal strike.<sup>65</sup>

In practice, however, most collective agreements provide that seniority will not accumulate during periods when employees are not working.<sup>66</sup> The exceptions are maternity and adoption

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<sup>63</sup> Begin & Beal, supra note 13 at 418-19.

<sup>64</sup> Brown & Beatty, supra note 12 at 6-3.

<sup>65</sup> Ibid.

<sup>66</sup> Labour Canada data for December 1992 (see supra note 15) show that most collective agreements call for the "retention" of seniority during lay-off, not its continuing accumulation. Labour Canada data for 1985 (supra note 29 at 15-16) also described seniority "retention" clauses for periods of illness.

leaves: in 1992, approximately half of workers whose collective agreements covered 500 or more employees had clauses specifying that seniority would continue to accumulate during all or part of these leaves.<sup>67</sup> This is because the accumulation of seniority rights during maternity and adoption leaves is mandatory under the Canada Labour Code and the labour standards acts of some provinces.<sup>68</sup>

**b) Preferential Seniority ("Superseniority")**

Preferential seniority, also called "special seniority" or "superseniority", consists of giving some employees a higher position in the seniority lists than they are entitled to through their length of service. In 1992, 11% of unionized workers in large firms had collective agreements with such clauses for their union officers; 5% had similar clauses for employees with special, indispensable skills.<sup>69</sup>

The purpose of superseniority is to prevent these employees from being laid off in cases of workforce reductions. Superseniority for union officers and special workers therefore usually applies only to layoffs, and in some occasions to the

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<sup>67</sup> Labour Canada, supra note 15.

<sup>68</sup> Canada Labour Code, R.S.C. 1985, c. L-2, s. 209.2(1); Employment Standards Act, S.N.B. 1982, c. E-7.2, s. 44.04(2)(b), as am. by S.N.B. 1988, c. 59, s. 18; Employment Standards Act, R.S.O. 1990, c. E.14, s. 42(4); Regulation Respecting Labour Standards, R.R.Q. 1981, c. N-1.1, r. 3, s. 31.

<sup>69</sup> Labour Canada, supra note 15.

choice of shift (for shop stewards who need to transact union business with other employees, for example).<sup>70</sup>

The 1985 Labour Canada survey of major collective agreements also found that seven agreements, all in the manufacturing sector, had special seniority rights for older and/or handicapped workers for purposes of layoffs and recall.<sup>71</sup> In a comparable study done in 1992, however, Labour Canada reported no such provisions.<sup>72</sup>

**c) Retroactive and Constructive Seniority**

Retroactive seniority and constructive seniority (which are also sometimes called "remedial" seniority) resemble preferential seniority in the sense that they also consist of giving seniority rights to people who have not become entitled to them through their length of service.<sup>73</sup> The purpose in this case, however, is to compensate individuals or groups for the effects of discrimination in the workplace. When retroactive seniority is granted to people who have personally been denied jobs for discriminatory reasons, it is usually calculated from the date

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<sup>70</sup> Slichter et al., supra note 5 at 128-30; E.E. Palmer, Collective Agreement Arbitration in Canada (Toronto: Butterworths, 1983) at 750-53.

<sup>71</sup> Labour Canada, supra note 29 at 155-56.

<sup>72</sup> Labour Canada, supra note 15.

<sup>73</sup> H. Elkiss, "Modifying Seniority Systems Which Perpetuate Past Discrimination" (1980) 31 Lab. L.J. 37 at 39-40.

they would have been hired if they had not been discriminated against.<sup>74</sup>

d) Reverse Seniority

It is not unusual for seniority to be used in reverse. This is often done in the assignment of unpopular tasks or shifts where the number of volunteers is insufficient. The expression "reverse seniority", also called "inverse seniority", does not refer to this practice, however, but to special measures intended to encourage older workers to voluntarily go on temporary layoffs or take early retirement, thereby providing more job security to young employees.<sup>75</sup> Union-management agreements to encourage early retirement have become more frequent in recent decades, especially in cases of technological change.

e) Seniority and Part-Time or Casual Work

Part-time workers are defined by Statistics Canada as people who usually work less than 30 hours per week.<sup>76</sup> Seniority clauses for part-time employees most commonly provide that they will acquire seniority on a pro-rata basis in accord-

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<sup>74</sup> Ibid.

<sup>75</sup> R.T. Lund, D.C. Bumstead & S. Friedman, "Inverse Seniority: Timely Answer to the Layoff Dilemma?" (1975) 53 Harv. Bus. Rev. 65; G. Vallée, "La convention collective et les arrangements négociés au Québec" (1989) 41 Travail et emploi 50 at 52-53.

<sup>76</sup> Statistics Canada, Labour Force Annual Averages - 1992, Catalogue No. 71-220 (Ottawa: Minister of Industry, Science and Technology, 1993) at B-46.

ance with the proportion of full-time hours they have worked.<sup>77</sup> However, the seniority rights which are granted to part-time workers are sometimes inferior to those of full-time employees. For example, some collective agreements provide that in case of layoffs, part-time employees will go first.<sup>78</sup>

Another means of excluding part-time workers from normal seniority rights is to group them into separate bargaining units.<sup>79</sup> This was the policy followed by the labour relations board of Ontario until January 1, 1993; its rationale was that full- and part-time workers didn't share the same "community of interest".<sup>80</sup> In practice, this means that part-time workers can almost never accumulate any seniority for purposes of competing for full-time positions, regardless of their length of time on the job. It also means that part-time employees can be laid off first without the need of having an overt policy to that effect.

Table 3 on the next page gives an indication of the difference in seniority coverage of full-time and part-time

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<sup>77</sup> Sack & Poskanzer, supra note 28 at 181.

<sup>78</sup> J. White, Women and Part-Time Work (Ottawa: Canadian Advisory Council on the Status of Women, 1983) at 70; J. Wallace, Part-Time Work in Canada: Report of the Commission of Inquiry Into Part-Time Work (Ottawa: Supply and Services Canada, 1983) at 98.

<sup>79</sup> R. Davis, The OLRB Policy on Bargaining Units for Part-Time Workers: A Critique (Kingston, Ont.: Industrial Relations Centre, Queen's University, 1991).

<sup>80</sup> Ontario, Ministry of Labour, "Highlights - Labour Relations Act Reform - An Outline of the Original Proposals, the Impact of Consultation, and the Government's Changes" [undated] at 9; G.W. Adams, Canadian Labour Law: A Comprehensive Text (Aurora, Ont.: Canada Law Book, 1985) at 348.

unionized workers under major collective agreements in 1984 and 1985. It shows that only 5% of the part-time workers were covered by seniority clauses in case of layoff, compared with 74% of all workers. For promotions, only 1% of part-time workers were covered, compared with 64% coverage for all employees. These figures underestimate the problem because they do not distinguish between part-time employees who were in the same bargaining units as full-time workers and those who were in separate units.

**Table 3**  
**Seniority Coverage of All Workers and of Part-Time Workers**  
**Under Major Collective Agreements, Canada, 1984 and 1985**

	% of All Paid Workers Under Major Agreements, 1985 <sup>81</sup>	% of Part-Time Paid Workers Under Major Agreements, 1984 <sup>82</sup>
Seniority clauses in case of layoff	74%	5%
Seniority clauses in case of promotion	64%	1%

The most radical means of preventing part-time employees from acquiring seniority and other rights is to keep them out of

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<sup>81</sup> Calculated from: Labour Canada, supra note 29 at 11-12.

<sup>82</sup> M.L. Coates, Part-Time Employment: Labour Market Flexibility and Equity Issues (Kingston, Ont.: Industrial Relations Centre, Queen's University, 1988) at 79.

labour unions.<sup>83</sup> In 1987, only 21% of part-time paid employees were unionized, compared with 37% of full-time ones.<sup>84</sup> When we combine these very low unionization rates for part-time workers with the tiny percentages of seniority coverage for those who are unionized - as shown above in Table 3 - we cannot fail to conclude that extremely few part-time workers are covered by effective seniority provisions in Canada.

"Casual work" is a residual category which includes many people who do not fit the traditional employment mold. According to Geoffrey England, the main characteristic of casual workers is that the duration of their employment is shorter than that of "traditional" employees.<sup>85</sup> "Casuals" can work on a full-time or a part-time basis. Some are hired to meet a short-term seasonal or business demand for more labour. Many are under fixed-term contracts which expire after a certain period or when a project is completed. Others work through temporary employment agencies and move from one employer to another.

Little is known about casual workers because Statistics Canada's regular labour force surveys do not distinguish between

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<sup>83</sup> Giles & Jain, supra note 20 at 324-25. They report that "[u]nions prefer to see the creation of full-time jobs, and so they have traditionally been content to ignore part-time employees."

<sup>84</sup> Women's Bureau, Labour Canada, Women in the Labour Force, 1990-91 ed. (Ottawa: Supply and Services Canada, 1990) at 118.

<sup>85</sup> G. England, Part-Time, Casual and Other Atypical Workers: A Legal View (Kingston, Ont.: Industrial Relations Centre, Queen's University, 1987) at 1.

casuals and other employees. Census data provide some (very imperfect) indication of its importance by showing that among Canadians aged 25 and over who worked for pay in 1990, 70% were employed full-time during 40 or more weeks, 8% were employed part-time during 40 or more weeks, leaving 22% who worked on either a full- or part-time basis for less than 40 weeks.<sup>86</sup>

Reports on casual workers invariably mention that their employment benefits are inferior to those of regular part-time workers.<sup>87</sup> In cases where casuals are covered by seniority clauses, they usually lose their seniority rights when their temporary employment terminates, so that they must constantly begin to requalify from scratch.<sup>88</sup>

#### E. Rationale For and Arguments Against Seniority Rights

Although the principle that length of service entitles individuals to certain employment privileges is universal and as old as the employer-employee relationship,<sup>89</sup> legally-enforceable seniority rights in competitive situations such as promotions,

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<sup>86</sup> Calculated from: Statistics Canada, Labour Force Activity: The Nation - 91 Census, Catalogue No. 93-324 (Ottawa: Minister of Industry, Science and Technology, 1993) at 62-63. Workers under age 25 were excluded to avoid skewing due to students. The 22% is a very imperfect estimate of casual work: it contains regular full-time workers who were laid off for part of the year, but excludes casual workers whose short-term jobs added up to forty or more weeks.

<sup>87</sup> J. Wallace, supra note 78 at 126; England, supra note 85 at 15-33.

<sup>88</sup> England, ibid. at 18.

<sup>89</sup> C. Gersuny, "Employment Seniority: Cases From Iago to Weber" (1982) 3 J. Lab. Res. 111 at 113; Lapp, supra note 44 at 2.

layoffs and recalls are almost unique to the United States and Canada.<sup>90</sup> They were the product of particular historical developments which we will briefly review. This will be followed by a summary of the arguments for and against the validity of seniority rights today.

The first private sector seniority rules were established in the U.S. railroad industry in the middle of the nineteenth century.<sup>91</sup> Because of the enormous growth rate of railroads, of the vastness and complexity of their operations and of absentee ownership, corruption, nepotism and job-selling were rife.<sup>92</sup> Seniority was introduced to curb these abuses and to establish quasi-military lines of advancement to regulate career progression.<sup>93</sup> When U.S. railway unions spread throughout Canada in the 1860s and 1870s, one of the main inducements they used to displace their Canadian competitors was seniority.<sup>94</sup>

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<sup>90</sup> See international comparisons of laws and other provisions relating to layoffs and employment terminations in B. Aaron & D.F. Farwell, eds., Reports and Proceedings, 10th International Congress of the International Society for Labor Law and Social Security, vol. 2, Employment Terminations (Washington, D.C.: Bureau of National Affairs, 1984); B. Hepple, "Security of Employment" in R. Blanpain, ed., Comparative Labour Law and Industrial Relations, 3d ed. (Deventer, Netherlands: Kluwer, 1987) 475; R. Blanpain, ed., Bulletin of Comparative Labour Relations, Bulletin 11, Job Security and Industrial Relations (Deventer, Netherlands: Kluwer, 1980).

<sup>91</sup> C. Gersuny, "Origins of Seniority Provisions in Collective Bargaining" (1982) 33 Lab. L.J. 518 at 521; Lapp, supra note 44 at 170.

<sup>92</sup> Note, "Seniority Rights in Labor Relations" (1937) 47:50 Yale L.J. 73 at 74.

<sup>93</sup> Lapp, supra note 44 at 7-8, 77.

<sup>94</sup> G.R. Carroll, Railway Unions in Canada (Ottawa: Department of Labour, 1953) [unpublished] at 3.

Promotion continued to be the main application of seniority until the 1930s, and very few unions except in the railroads and other transportation industries and in the printing trades demonstrated much interest in seniority until that time.<sup>95</sup> At least part of the reason for this lack of interest was that almost all unionized workers were skilled craftsmen until the 1930s, and many skilled workers rejected the regimentation seniority implied, preferring instead the extra benefits they could earn through their special skills.<sup>96</sup>

The three factors which transformed the situation in both Canada and the United States were mass industrialization, the Depression and legislation to facilitate unionization. When millions of factory workers were thrown out of their jobs almost overnight as a result of the Depression, a revolution in thinking took place and security, through seniority clauses and other measures, became the main goal of workers and their unions.<sup>97</sup> This was reinforced by the fact that many employers used the Depression to "weed out dead timber", which led to the wholesale firing of workers over the age of fifty.<sup>98</sup>

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<sup>95</sup> Lapp, supra note 44 at 7, 77, 94.

<sup>96</sup> Slichter et al., supra note 5 at 152.

<sup>97</sup> Lapp, supra note 44 at 94-95.

<sup>98</sup> D. Montgomery, Workers' Control in America: Studies in the History of Work, Technology, and Labor Struggles (New York: Cambridge University Press, 1979) at 141; G.F. Wadsworth, Seniority vs. Merit (San Francisco: California Personnel Management Association, 1949) [unpublished] at 4.

When the passage of the pro-labour Wagner Act<sup>99</sup> in the United States in 1935 led to collective bargaining on a large scale, one of the main demands of the newly-organized, mostly industrial workers was seniority.<sup>100</sup> The same thing happened after comparable legislation was adopted in Canada in 1944.<sup>101</sup> By the middle of the 1940s, most collective agreements contained seniority provisions for layoffs and recalls.<sup>102</sup>

In the following decades, American and Canadian seniority clauses grew to invade practically all aspects of employment.<sup>103</sup> Most new post-war employee benefit programs were also geared to seniority, thus making them more acceptable to management by restricting the number of workers entitled to the new benefits.<sup>104</sup> In 1964, a Canadian labour arbitrator wrote that:

Seniority is one of the most important and far-reaching benefits which the trade union movement has been able to secure for its members by virtue of the collective bargaining process. An employee's seniority under the terms of a collective agreement gives rise to such important requirements as relief from layoff, right to recall to employment, vacations

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<sup>99</sup> National Labor Relations Act, 49 Stat. 499 (1935).

<sup>100</sup> Lapp, supra note 44 at 94-95.

<sup>101</sup> National War Labour Order, P.C. 1003, Feb. 1944.

<sup>102</sup> Lapp, supra note 44 at x.

<sup>103</sup> U.S. Department of Labor, Bureau of Labor Statistics, Major Collective Bargaining Agreements: Administration of Seniority, Bulletin No. 1425-14 (Washington, D.C.: U.S. Government Printing Office, 1972) at 2; Hardy, supra note 38 at 84-87.

<sup>104</sup> Sloane & Witney, supra note 54 at 446; Slichter et al., supra note 5 at 105.

and vacation pay, and pension rights, to name only a few. It follows ... that an employee's seniority should only be affected by very clear language in the collective agreement with the utmost strictness wherever it is contended that an employee's seniority has been forfeited, truncated or abridged under the relevant sections of the collective agreement.<sup>105</sup>

By the 1980s, seniority was being called the "soul" of a collective bargaining agreement.<sup>106</sup>

Modern arguments in favour of seniority rights include: seniority rights are fair because employees who have given many years of their lives to an enterprise deserve greater security and superior benefits,<sup>107</sup> and because workers who are at the bottom of their seniority lists today will get their chance tomorrow;<sup>108</sup> seniority rights are necessary because in the absence of reliable measures of ability, they are the only objective workable means of resolving competition between employees and of preventing employers from treating vulnerable employees arbitrarily;<sup>109</sup> seniority is efficient because it is

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<sup>105</sup> U.E., Local 512 v. Tunq-Sol of Canada Ltd. (1964), 15 L.A.C. 161 at 162 (Ont.) (Reville).

<sup>106</sup> J.G. Getman & J.D. Blackburn, Labor Relations: Law, Practice and Policy, 2d ed. (Mineola, N.Y.: Foundation Press, 1983) at 236.

<sup>107</sup> Gersuny, supra note 91 at 520; Slichter et al., supra note 5 at 104.

<sup>108</sup> K. Swinton, "Restraints on Government Efforts to Promote Equality in Employment: Labour Relations and Constitutional Considerations" in Research Studies of the Commission on Equality in Employment (Ottawa: Supply and Services Canada, 1985) 273 at 289.

<sup>109</sup> A. Rees, The Economics of Trade Unions, 3d ed. (Chicago: University of Chicago Press, 1989) at 143; B. Fischer, "Seniority is Healthy" (1976) 27 Lab. L.J. 497 at 498.

easy to administer, tends to reflect experience, reduces the costly turnover of employees, improves workers' morale by making them more secure, and diminishes labour strife caused by perceptions of management arbitrariness and favouritism.<sup>110</sup>

The main arguments against seniority are: seniority rights are inefficient because they reduce rewards for merit, prevent management from promoting better qualified workers and retaining them on layoffs, discourage workforce mobility and flexibility, cause able ambitious young workers to leave or avoid jobs, result in a workforce which is older, less dynamic and more resistant to technological change, and cause disruptions in business operations and training costs when bumping is used;<sup>111</sup> seniority rights are also unfair because they reward the "ins" at the expense of the "outs": the more security employees with seniority acquire, the more vulnerable and disadvantaged those with little or no seniority become, with those most affected

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<sup>110</sup> C.W. Summers & M.C. Love, "Work Sharing as an Alternative to Layoffs by Seniority: Title VII Remedies in Recession" (1976) 24 U. Pa. L. Rev. 893 at 901; Mills, supra note 53 at 457; Slichter et al., supra note 5 at 104; Begin & Beal, supra note 13 at 438.

<sup>111</sup> Gagliardo, supra note 37 at 305-306; J.W. McCaffrey, "Development and Administration of Seniority Provisions" in E. Stein, ed., Proceedings of New York University Second Annual Conference on Labor: Trends in Collective Bargaining and Labor Law (New York: Matthew Bender, 1949) at 132; Mills, supra note 53 at 458; S.G. Peitchinis, The Canadian Labour Market (Toronto: Oxford University Press, 1975) at 129-31; Economic Council of Canada, Transitions for the 90s: Twenty-Seventh Annual Review (Ottawa: Supply and Services Canada, 1990) at 53; Rees, supra note 104 at 145.

being the young, women and other groups which have traditionally been discriminated against.<sup>112</sup>

In Chapter II, we will examine the impact of seniority rights on women.

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<sup>112</sup> Slichter, supra note 5 at 139; D.M. Beatty, "Ideology, Politics and Unionism" in K.P. Swan & K. Swinton, eds., Studies in Labour Law (Toronto: Butterworths, 1983) 299 at 314-15.

## CHAPTER II - ASSESSMENT OF THE IMPACT OF SENIORITY ON WOMEN

The purpose of this chapter is to assess the adverse effects of seniority on women in the workplace. To do this, we will first examine what it means to treat women equally, after which we will consider overt as well as indirect ways in which the use of seniority rights results in the unequal treatment of women. We will conclude this chapter by weighing the disadvantages seniority presents for women against the arguments in favour of seniority rights which were described at the end of Chapter I.

### A. Meaning of Equality of Treatment for Women in the Workforce

The concept of equality of treatment as a moral and social ideal can be traced as far back as the Bible<sup>113</sup> and Aristotle,<sup>114</sup> but it did not gain wide currency until the seventeenth century, when the egalitarian writings of John Locke<sup>115</sup> and Jean-Jacques Rousseau<sup>116</sup> inspired the supporters of the French and American Revolutions. Both the French Declaration of the Rights of Man<sup>117</sup> and the American Declaration of Independence<sup>118</sup> were

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<sup>113</sup> Lev. 24:22. "You shall have one law for the stranger and citizen alike."

<sup>114</sup> Aristotle's Politics (New York: Modern Library, 1943) at Book III, c. 12, para 1282b. See infra text accompanying note 120.

<sup>115</sup> Two Treatises of Government, 2d ed. (Cambridge: University Press, 1967).

<sup>116</sup> Du contrat social (Paris: Editions sociales, 1968).

<sup>117</sup> In W. Laqueur & B. Rubin, The Human Rights Reader, rev. ed. (Toronto: New American Library, 1990) at 118-20.

<sup>118</sup> Ibid. at 106-109.

filled with egalitarian concepts, and after the Civil War and the abolition of slavery the United States adopted a constitutional equal protection clause providing that "No State shall... deny to any persons within its jurisdiction the equal protection of the laws."<sup>119</sup>

The vision of equality which emerged from this background was that of equality of process or equality of opportunity or formal equality. Aristotle had defined this as consisting "of treating equals equally and unequals unequally."<sup>120</sup> Under this approach, the focus is on the individual. Equality consists of assessing each person on the basis of her or his own personal merits, regardless of the real or assumed characteristics of the group to which she or he belongs.<sup>121</sup> This means that if a job requires a tall person, it is discriminatory to exclude all female applicants because some women are tall.

This approach has been criticized for only helping people who are already equal. This is because it defines equality as a question of comparison, of establishing sameness and difference.<sup>122</sup> In the employment context, for example, an equality

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<sup>119</sup> U.S. Const. amend. XIV, s.1.

<sup>120</sup> Supra note 114.

<sup>121</sup> O. M. Fiss, "A Theory of Fair Employment Laws" (1971) 38 U. Chi. L. Rev. 235 at 240-44.

<sup>122</sup> MacKinnon, supra note 3 at 38; Brodsky & Day, supra note 3 at 148-49.

of opportunity rule can be used to help women whose qualifications are equal or superior to those of the men they are competing with for the same jobs, or to help women who are doing the same work as men for lesser benefits. It can do nothing for the vast majority of women, who are segregated in inferior "female" jobs where there are no men.

The other problem with the equality of opportunity approach is that it does not challenge the discriminatory nature of many job requirements.<sup>123</sup> To give an (only slightly exaggerated) example, let us say that a rule of equality of opportunity would entitle a qualified single-parent female lawyer with young children to be hired to work in a law firm from seven in the morning until nine at night, six days a week, with possible access to a partnership after ten years of full-time consecutive service, on the same basis as the men. (Similarly, a rule of equality of opportunity for the disabled would entitle a qualified female wheelchair-bound applicant to be hired to work on the tenth floor of a building with no elevator.)

As white able-bodied men have always controlled the labour market, most current workplace practices accept male standards, lifestyles and values as the norm. The result, according to Gwen Brodsky and Shelagh Day, is that "our society is a very

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<sup>123</sup> I.M. Young, "Polity and Group Difference: A Critique of the Ideal of Universal Citizenship" in C.R. Sunstein, ed., Feminism & Political Theory (Chicago: University of Chicago Press, 1990) 117 at 134-35.

well designed, finely tuned affirmative action program for white, temporarily able-bodied men."<sup>124</sup> In such a context, the effect of an equality of opportunity rule is not to treat women equally, but to give women permission to enter men's world on men's terms.<sup>125</sup> When women insist that adjustments be made to workplaces to accommodate their own lifestyles and values, these are rejected under the equality of opportunity approach as "reverse discrimination".<sup>126</sup>

These inadequacies of the equality of opportunity concept led to the development of the concept of **substantive equality based on results**.<sup>127</sup> Supporters of this approach agree that individuals should not be judged on the basis of the real or assumed characteristics of the groups to which they belong. In addition, they also recognize that members of groups tend to share certain characteristics - such as child-bearing and the assumption of child-care responsibilities in the case of women - which affect their work patterns and capacities, and that to

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<sup>124</sup> Supra note 3 at 149.

<sup>125</sup> Note, "Toward a Redefinition of Sexual Equality" (1981) 95 Harv. L. Rev. 487 at 487, 499.

<sup>126</sup> R. Dworkin, Taking Rights Seriously (Cambridge, Mass.: Harvard University Press, 1978) at c. 9.

<sup>127</sup> Fiss, supra note 121 at 244ff; Eberts, supra note 3 at 188-93; MacKinnon, supra note 3 at 41; Sheppard, supra note 3 at 215-16.

ignore these group characteristics also produces unjust results.<sup>128</sup>

To determine whether any work rule or measure discriminates against women under the substantive equality approach, the focus is not on the rule or measure itself, but on its effects.<sup>129</sup> In the context of the law firm we described above, for example, it is obvious that many women's chances of being hired and promoted are severely curtailed as a result of their child-rearing role. Correcting this discrimination necessitates positive steps to make work schedules more flexible (for example, to introduce a choice of working half-time with proportional pay), and to base eligibility for advancement on truly neutral requirements (such as basing eligibility for a partnership on a test which objectively assesses knowledge and experience).

#### **B. Overt Unequal Impact of Seniority on Women**

As mentioned in Chapter I, before human rights legislation was implemented it was not unusual for Canadian and American seniority systems to contain overtly discriminatory provisions, mainly involving different and inferior coverage for Blacks and for women.<sup>130</sup> The most recent Canadian study on this found that

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<sup>128</sup> R. Gold, "From Right to Remedy: Putting Equality to Work" (1989) 14 Queen's L.J. 213 at 217.

<sup>129</sup> Ibid.

<sup>130</sup> Lapp, supra note 44; Chrysler, supra note 36 at 71.

at least fifteen collective agreements still provided for separate seniority units for male and female workers in Quebec in 1980.<sup>131</sup>

That Quebec study did not present a global picture of the province's collective agreements because its analysis was restricted to a selection of agreements which had previously been identified as containing "suspect" clauses.<sup>132</sup> The features the study found in workplaces with overtly sex-based seniority units included the following:

- Two types of sex-based seniority lists: some where women and men with the same job titles were divided by sex for purposes of pay, seniority, etc.; and some where women and men had different titles but were doing the same or similar work.<sup>133</sup>
- Separate seniority-based wage progression lines for women starting at lower rates, or providing no wage progression at all, or slower progression, or progression ending at a lower level.<sup>134</sup>

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<sup>131</sup> Calculated from: Garon, supra note 45 at 84.

<sup>132</sup> Ibid. at 11-12.

<sup>133</sup> Ibid. at 37-39, 40-41.

<sup>134</sup> Ibid. at 51.

- Arbitrary exclusion of women's job classifications from general progression lines, or specification that some jobs in the line of progression (the least skilled) were open to both sexes, with no such specification for specialized occupations.<sup>135</sup>
- Gerrymandering of departments and seniority units to exclude women from promotions; for example, one collective agreement from the entertainment sector provided that Department A would consist of male ushers, directors, door-keepers and takers, while Department B would contain only female ushers; as the agreement also provided that seniority would be calculated on a departmental basis for purposes of promotion, female ushers were effectively prevented from competing for directors' jobs.<sup>136</sup>

As these examples demonstrate, seniority provisions are so complicated that even overt discrimination can sometimes be buried in neutral-seeming clauses.

### C. Indirect Unequal Impact of Seniority on Women

Indirect discrimination by seniority systems is much more pervasive than its overt forms. It mainly results from two differences between women and men in the labour force: (1) as a

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<sup>135</sup> Ibid. at 52.

<sup>136</sup> Ibid. at 54-55.

group, women accumulate substantially less seniority than men; and (2) large proportions of female workers are segregated in the least desirable jobs. In the rest of this section, we will provide evidence of these two differences, and demonstrate the ways in which they combine with seniority rules to produce effects which are detrimental to women.

**(1) Evidence That Women Have Less Seniority Than Men**

No studies have been done to determine the average seniority of women and men. The general impression one receives from Statistics Canada's publications, however, is that both the labour force participation and the length of service of women have tremendously increased in recent decades, to the point where it has become reasonable to expect that the employment patterns of women and men will converge before long. If such is the case, it is not surprising that at least one Canadian defender of traditional seniority rights believes that groups such as women, which are currently disadvantaged by seniority, "will, in time, also welcome its protection".<sup>137</sup>

One recent example of such Statistics Canada publications contains the following statements:

One of the most dramatic trends in Canadian society has been the growing involvement of women in the workplace. In 1991, 53% of all women aged 15 years

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<sup>137</sup> K. Swinton, "Accommodating Women in the Workplace: Reproductive Hazards and Seniority Systems" (1992) 1 Can. Lab. L.J. 125 at 139.

and over were employed, up from 41% in 1975. In contrast, male employment declined over the same period, falling from 74% to 67%...

There has also been very rapid growth in the employment of women with children. In 1991, 63% of mothers with children less than age 16 were employed, versus 50% in 1981... There has been particularly dramatic growth in the employment of women with pre-school-aged children. By 1991, 57% of mothers with children under age 6 were in the workforce, up from 42% in 1981.<sup>138</sup>

Another Statistics Canada study contained a similar message on job tenure, which is the length of time Canadian workers have been with their current employers. This is not the same as seniority which, as we saw in Chapter I, only exists in unionized settings, varies greatly for full and part-time workers, and often starts again at zero when employees move from one job or department to another. Still, seniority and length of time on the job are undeniably linked, so that data on job tenure is relevant. The study stated that:

From 1977 to 1991, average (job) tenure rose for both sexes. This increase, however, was more marked among women, whose average tenure increased by 26% (5.1 to 6.5 years), than among men (up 7%, from 8.1 to 8.6 years)...

While it is still higher among men than women, the gap between the sexes has decreased. It appears that, for men and women, job tenure is converging over time, as are other aspects of employment.<sup>139</sup>

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<sup>138</sup> N.Z. Ghulam, Women in the Workplace, 2d ed., Statistics Canada Catalogue No. 71-534 (Ottawa: Minister of Industry, Science and Technology, 1993) at 9, 11.

<sup>139</sup> A. Belkhodja, "Staying Put: Job Tenure Among Paid Workers" Perspectives, Statistics Canada Catalogue No. 75-001 (Winter 1992) 20 at 21-22.

Why, with such a flurry of supporting evidence, should anyone doubt that the labour force participation of women is catching up with that of men, and that women's seniority is increasing to the point where they will soon take their place alongside men at the top of the seniority rolls? First, because all these statements are based on data from Statistics Canada's Labour Force Annual Averages,<sup>140</sup> whose figures are invalid as we will demonstrate. Secondly, because all data on labour force participation which do not specify if that participation was full-time and if it lasted all year seriously misrepresent the true situation of women in Canada today.

To understand the problem with Statistics Canada's ubiquitous Labour Force Annual Averages, it is necessary to know that these averages are arrived at by adding up the results of twelve separate monthly surveys which question participants about their employment in the preceding week; no two of these surveys use the same sample of people.<sup>141</sup> The result, for example, is that if twelve women are each employed on a full-time basis during only one week in the course of a year, with the week each woman has worked corresponding with a different week for which the survey is taken, the twelve women will

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<sup>140</sup> Statistics Canada, Labour Force Annual Averages - 1992, Catalogue No. 71-220 (Ottawa: Minister of Industry, Science and Technology, 1993).

<sup>141</sup> Statistics Canada, Methodology of the Canadian Labour Force Survey, Catalogue No. 71-526 (Ottawa: Minister of Industry, Science and Technology, 1990).

collectively appear in the Labour Force Annual Averages as one full-time worker.

The effect, which the several Statistics Canada officers whom the author has discussed this with all recognize, is that the Annual Averages underestimate the proportion of people who held some type of job during the year, while giving an inflated impression of the proportion of people who actually worked full-time all year. As women's employment is less regular than men's, the distortion is much greater in their case.

To verify this, we compared data on the employment of mothers from the 1987 Labour Force Annual Averages<sup>142</sup> with unpublished data derived from the more reliable annual Statistics Canada Survey of Consumer Finances for the same year<sup>143</sup> (the most recent available to the author). The children's ages were not exactly the same in both surveys, but close enough to allow comparison. The results, which appear in Table 4 on the next page, substantiate our criticism of the Annual Averages.

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<sup>142</sup> Statistics Canada, Labour Force Annual Averages - 1981-1988, Catalogue No. 71-529 (Ottawa: Supply and Services Canada, 1989) at 132-133 [hereinafter Annual Averages].

<sup>143</sup> Data on economic families from Statistics Canada, Survey of Consumer Finances, 1988 (Income 1987 - Economic Families) - Public Use Tape. These computer runs were performed for the author in 1989 for a study prepared for the National Council of Welfare, Health and Welfare Canada, Ottawa. They were done in part by the Analytical Services Division, Policy, Planning and Information Branch, Health and Welfare Canada, Ottawa, and in part by the Income and Housing Surveys section, Household Surveys Division, Statistics Canada, Ottawa.

**Table 4**  
**Comparison of Employment Rates For Mothers In 1987**  
**Labour Force Annual Averages and Survey of Consumer Finances**

1) Labour Force Survey Annual Averages<sup>144</sup>

<u>Child Status</u>	<u>% of Mothers Who Were Employed</u>	<u>% of Mothers Who Were Employed Full-Time</u>
. With child(ren) under age 6	53%	36%
. Without children under 6 but at least one child age 6-15	64%	48%
Total with at least one child under 16	58%	42%

2) Survey of Consumer Finances<sup>145</sup>

<u>Child Status</u>	<u>% of Mothers Employed At Some Point During the Year</u>	<u>% of Mothers Who Were Employed Full-Time All Year</u>
. With child(ren) under age 7	69%	29%
. Without children under 7 but at least one child age 7-17	74%	39%
Total with at least one child under 18	71%	34%

On the subject of women's total employment, as Table 4 shows, the more accurate Survey of Consumer Finances (SCF) indicated that almost three-quarters of mothers of children under age 18 (71%) held a paid job at some point in 1987. This

<sup>144</sup> Calculated from Statistics Canada, supra note 142.

<sup>145</sup> Calculated from Statistics Canada, supra note 143.

was substantially higher than the figure produced by the Annual Averages for mothers of children under age 16, which was 58%. On the question of how many women had full and continuous employment, however, which is the crucial question as far as seniority coverage is concerned, the SCF produced considerably lower results.

According to the SCF, only 34% of Canadian women with children under the age of 18 were employed full-time all year in 1987. The difference between women with and without pre-school-age children was surprisingly small: 29% of those who had such children were employed full-time all year, compared with 39% for women whose children were all between ages 7 and 17. As a point of comparison, we verified the employment status of women who never had children; among women aged 25 to 44 who had never married, 71% were in full-time positions all year in 1987, with an additional 23% holding less continuous jobs. These single women's work patterns were almost identical to men's.<sup>146</sup>

The full-time employment rate of mothers has changed very little since 1987.<sup>147</sup> We can therefore conclude that the labour force attachment of Canadian mothers, who make up two-thirds of

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<sup>146</sup> From Statistics Canada, supra note 143.

<sup>147</sup> Even the inflated Annual Averages show only an increase of 3% in the full-time employment rate of mothers between 1987 and 1992. This was calculated from Table 4 and from Statistics Canada, supra note 140 at B18.

Canadian women between the ages of 25 and 45,<sup>148</sup> is much weaker and much less continuous than that of men, with a much greater proportion of the mothers being outside the labour force or employed on a part-time or casual basis. As we saw in Chapter I, extremely few part-time or casual workers are covered by seniority provisions.

The picture we have just seen remains incomplete because children are not the only family members who depend on the services of women. The second largest group which relies on them are elderly parents, whose burden is becoming increasingly heavy as their care is being distributed over a dwindling number of children. Demographers predict that with longer life expectancy and delayed childbearing, a growing proportion of women will have to simultaneously provide care to both their children and their elderly parents.<sup>149</sup> Other women are barred from full employment because they are caring for ailing spouses. Their share of the female population is also likely to rise as our population continues to age.

Detailed information on the effect of elderly and other relatives on the employment of women is not available, but we

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<sup>148</sup> Calculated from: Statistics Canada, Labour Force Activity of Women By Presence of Children: The Nation - 91 Census, Catalogue No. 93-325 (Ottawa: Minister of Industry, Science and Technology, 1990) at 1.

<sup>149</sup> R. Stone, G.L. Cafferata and J. Sangl, "Caregivers of the Frail Elderly: A National Profile" (1987) 27 *The Gerontologist* 616 at 625.

can estimate the impact of all the major impediments to women's full labour force participation by comparing the workplace attachment of all women to that of all men for the prime working age of 25 to 54. The most reliable and comprehensive source of information on this is the Census of Canada, last conducted in 1991 to collect data from 1990. Some of its results appear in Table 5, which shows the proportion of women and men aged 25 to 54 in each of a range of types of labour force commitment, starting with the strongest commitment (employed mostly full time 49-52 weeks) and ending with the weakest (not employed).

**Table 5**  
**Workforce Attachment of Women and Men Aged 25 to 54, 1990**<sup>150</sup>

<u>Employment Status in 1990</u>	<u>Women</u> %	<u>Men</u> %
Mostly full time 49-52 weeks	41%	63%
Mostly full time 40-48 weeks	7%	11%
Mostly full time 27-39 weeks	4%	6%
Mostly full time 1-26 weeks	8%	9%
Mostly part time 40-52 weeks	11%	2%
Mostly part time 1-40 weeks	8%	2%
Not employed in 1990	21%	7%
<b>TOTAL</b>	<b>100%</b>	<b>100%</b>

<sup>150</sup> Calculated from Statistics Canada, supra note 86 at 62-63.

Table 5 shows that the 1990 employment patterns of prime-working-age Canadian women and men were very different. Three-quarters of the men (74%) had the type of work which is most compatible with the accumulation of seniority, that is full-time employment for forty weeks or more, while fewer than half (48%) of the women had that type of employment. Women were much more likely to work part-time (19% vs. 4%) or to have no paid employment at all (21% vs. 7%). As more men than women are unionized (see Table 6 below), unemployed or partially unemployed men were also more likely to be on temporary lay-off, and therefore still covered by seniority provisions.

These figures further confirm that women's labour force participation continues to be crippled by their caregiving roles. This is not so surprising considering the results of a 1984 longitudinal survey which found that in spite of the tremendous rise in women's overall employment figures in the previous decades, there was little difference in the rate of lifetime work interruptions of women who were in their thirties and in their fifties in 1984. Two-thirds of both groups reported that they had dropped out of their paid jobs for one year or more,<sup>151</sup> mostly after the birth of a child, after which

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<sup>151</sup> T.K. Burch, Family History Survey: Preliminary Findings, Statistics Canada Catalogue No. 99-955 (Ottawa: Supply and Services Canada, 1985) at 26-37.

close to 40% of both groups had returned to work by taking part-time jobs.<sup>152</sup>

The analysts who studied these longitudinal data warned that the much higher presence of women in the labour market - as indicated by monthly and annual surveys - should not be interpreted to mean that there is greater continuity in women's paid work to the point where their employment patterns were becoming similar to men's.<sup>153</sup> Instead, they concluded, these increases in the statistics reflect the facts that women are much more likely than before to be employed before they marry, to stay employed after they marry and to return to work after they drop out to have and rear their children, but the majority still interrupt their paid work for relatively long periods and a substantial proportion still take part-time or casual positions while their children are young.<sup>154</sup>

These Canadian studies are not unique. They reflect an increasing international realization that women's labour force

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<sup>152</sup> P. Robinson, Women's Work Interruptions: Results From the 1984 Family History Survey, Statistics Canada Catalogue No. 99-962 (Ottawa: Supply and Services Canada, 1985) at 20-21.

<sup>153</sup> C. Le Bourdais & H. Desrosiers, Trajectoires démographiques et professionnelles: Une analyse longitudinale des processus et des déterminants (Ottawa: Demographic Review Project, Health and Welfare Canada, 1988) at 24-28, 172. See also M. Kempeneers, Femmes et mouvements du travail. Pour un élargissement de l'analyse démographique de l'activité salariée et de l'activité maternelle des femmes (Doctoral Thesis in Demography, University of Montreal, 1987).

<sup>154</sup> Ibid.

participation is not what superficial employment rates indicate. After long focusing on the fact that 80% or more of Swedish women work outside the home, for example, more recent analyses concentrate on the reasons why more than 40% of employed Swedish women work part-time.<sup>155</sup> A British study on the effect of children on women's occupational mobility concluded that:

There is evidence that many women experience severe occupational downgrading during their working lives and that such downward occupational mobility is associated with a period of family formation... Women who have had children do not, on average, regain their occupational status prior to childbirth... Remarkably, it has been shown that, for women who have had children, the proportion of employed women in their late thirties in 1980 who were working part time in occupations with below-average earnings is, at 40 percent, virtually identical to the proportion of women who were in the same age group twenty years earlier.<sup>156</sup>

The obvious conclusion to be drawn from all these facts on the labour force participation of women and men is that most Canadian women still have, and will continue to have in the foreseeable future, much less continuous work patterns than those of Canadian men. The other inescapable conclusion is that as a result of these differences, women have, and will likely continue for a very long time to have, substantially less seniority in their paid jobs than their male counterparts.

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<sup>155</sup> M.G. Rosenthal, "Sweden: Promise and Paradox" in G.S. Goldberg & E. Kremen, eds., The Feminization of Poverty: Only in America? (New York: Greenwood Press, 1990) 129 at 133-35.

<sup>156</sup> P. Elias, "Family Formation, Occupational Mobility and Part-Time Work" in A. Hunt, ed., Women and Paid Work: Issues of Equality (London: Macmillan Press, 1988) 83 at 101.

(2) Effects of Women Having Less Seniority Than Men

Let us first consider the effect of women's lesser seniority in situations involving competitive seniority. In such cases, which as we saw in Chapter I include layoffs, promotions, transfers, choice of work assignments, etc., employees are in competition and seniority is used to rank each worker's claim relative to that of the others. In such circumstances, it is inevitable that if one group of workers, namely women, has significantly less seniority than another group of workers, namely men, the first group is going to be systematically and disproportionately ranked lower than the second.

The result is that in most situations where female and male workers are in competition, the men enjoy an automatic advantage: they are less likely to be laid off, have a greater chance of obtaining promotions, and generally have greater access than women to all employment choices. The effect is that even in the most egalitarian workplaces, where affirmative action measures have been taken to try to ensure that the proportion of women at all levels is commensurate with the proportion of qualified and available women in the labour market, female workers will inevitably fall behind their male colleagues because they will be handicapped by their lesser seniority.

Seen in this light, it is obvious that seniority is an employment practice which violates the concept of substantive

equality for women in the labour force which we described at the beginning of this chapter. The only way female workers can remain equal under an unmodified seniority system is if they stop having children and end their practice of dropping out of the labour force on a full- or part-time basis to care for their children and other family members. In other words, women will not be harmed by the use of seniority if they pattern their behaviour on that of men.

The situation with regard to benefit seniority is similar. In this case, as we saw in Chapter I, all kinds of advantages such as automatic wage increases, amounts payable under insurance plans, etc. are awarded on the basis of employees having attained a given period of seniority. Although no direct competition between workers is involved, the effect is that employees with greater seniority, meaning men, are receiving more remuneration for the same or equivalent work.

This inferior treatment of women systematically undermines their efforts to gain financial independence. It also ensures the perpetuation of the vicious circle in which it is almost always women, and not men, who reduce their labour force participation to care for children and other family members, because the men's greater incomes and other employment benefits make this pattern the most rational economic choice.

### (3) Evidence of Women's Segregation in Inferior Jobs

In this section, we will demonstrate that women occupy a segregated position in the Canadian labour market. In this context, the word "segregate" does not simply mean that women and men do different types of work, but also that female workers are set apart from the main body of the labour force and relegated to a small number of less desirable, less well-paid occupations. Men, as we will see, are much better distributed across the range of industries and occupations and hold the best positions in almost all workplaces, even in fields that are traditionally female ones.

Table 6, on the next page, illustrates women's concentration in a few industries. The first column of figures shows that the majority of female workers (52.6%) are found in only four industries: health and social services (18%), retail trade (16%), education (10%) and finance and real estate (8.6%). When we add the two other female-dominated categories of accommodation and food (8.2%) and "other services" (6.6%), the total accounts for more than two-thirds (67.4%) of all women in the labour force. By contrast, only a third of male workers work in these same six industries. Men are much more evenly spread out and are overrepresented (relative to their share of the labour market) in 22 of the 30 listed industries.

**Table 6**  
**Distribution of Paid Workers and Unionization Rate**  
**By Industry and Sex, 1990\***

<u>Industry</u>	<u>Distribution</u>		<u>% of Workers</u>	<u>Unionization Rate</u>		
	<u>of Workers</u>			<u>Who are Women</u>	<u>Women</u>	<u>Men</u>
	<u>Women</u>	<u>Men</u>			<u>%</u>	<u>%</u>
	<u>%</u>	<u>%</u>	<u>%</u>	<u>%</u>	<u>%</u>	
<b><u>Manufacturing</u></b>						
Food & Beverage	1.5	2.5	34	42	57	
Tobacco	-	0.1	20	94	34	
Rubber & Plastic	0.5	1.0	28	17	28	
Leather	0.2	0.1	68	27	48	
Textile & Clothing	2.0	1.0	63	33	31	
Wood	0.4	1.4	17	15	39	
Furniture	0.3	0.6	31	14	20	
Paper & Allied	0.4	1.8	16	31	72	
Printing/Publishing	1.2	1.4	42	11	27	
Primary Metal	0.2	1.7	8	31	54	
Metal Fabricating	0.5	2.1	15	17	33	
Machinery	0.2	0.9	18	19	37	
Transport Equip.	0.9	3.2	19	36	47	
Electrical Prod.	1.1	1.8	34	23	26	
Nonmetal Mineral	0.2	0.7	20	24	50	
Petroleum & Coal	0.1	0.3	12	14	33	
Chemical & Misc.	1.2	1.9	35	11	24	
<b>Total Manufact.</b>	<b>10.9</b>	<b>22.5</b>	<b>29</b>	<b>26</b>	<b>41</b>	
<b><u>Non-Manufacturing</u></b>						
Farm, Forest & Mine	1.6	4.9	21	6	26	
Construction	0.2	8.1	13	5	68	
Transportation	1.7	6.0	19	41	55	
Communications	2.3	2.7	42	60	60	
Electricity, Gas	0.8	2.0	25	43	55	
Wholesale Trade	2.8	5.8	29	7	13	
Retail Trade	16.0	13.0	52	10	13	
Finance & Real Est.	8.6	4.9	60	4	3	
Business Services	5.4	5.5	46	4	2	
Education	10.0	5.3	62	74	89	
Health & Soc. Svces	18.0	3.2	83	50	55	
Accomm. & Food	8.2	4.7	60	8	11	
Other Services	6.6	4.0	59	11	21	
Public Admin.	6.9	7.4	44	78	83	
<b>Total Non-Manuf.</b>	<b>89.1</b>	<b>77.5</b>	<b>50</b>	<b>31</b>	<b>38</b>	
<b>ALL INDUSTRIES</b>	<b>100.0%</b>	<b>100.0%</b>	<b>46%</b>	<b>30%</b>	<b>39%</b>	

\* Source of Table 6: Statistics Canada, supra note 19 at 27.

The overrepresentation of men is greatest in the manufacturing sector, where workers are 71% male (as indicated a contrario in the third column) while men only make up 54% of the whole labour force. Segregation is also evident within manufacturing: more than half of all women in that sector are concentrated into the four industries of food and beverage, textile and clothing, printing and publishing, and electrical products.

Further evidence of women's segregation is found in the important differences in unionization rates for women and men working in the same industries, as shown in the last two columns of Table 6. The much lower rates for female workers in almost all industries indicate that even when women are present, they are not working alongside the men at the same jobs. Instead, many of the women occupy separate and different positions from the men, in fields or departments which are not unionized. As unionized employees generally earn more than non-unionized ones,<sup>157</sup> this demonstrates that the women's jobs are inferior ones.

Although a lower rate of unionization proves that female workers are not doing the same work as the men, the reverse is not true; the fact that female and male workers have the same unionization rate in an industry does not mean that they are doing the same work. Taking the communications industry as an

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<sup>157</sup> Women's Bureau, Labour Canada, supra note 84 at 116.

example, Table 6 shows the same unionization rate of 60% for both sexes. This industry includes large blocks of employees who are telephone operators and almost all female, and other blocks of telephone repairpeople who are almost exclusively male, but this sex segregation is not reflected in unionization rates as both the operators and the repairpeople are unionized.

The other, complementary set of statistics which tell us most about women's position in the labour market concern the actual jobs or occupations of female and male workers. This is shown in Table 7 on the next page, which ranks occupations in order of their average earnings (first column of figures). The next two columns indicate the distribution of female and male workers among all occupations, and the last column the proportion of women in each occupation.

The most striking revelation of Table 7 is that the majority of female workers (53%) are in the seven least well-paid occupations, while only a third of the men (33%) are in these same jobs. As in the case of industries, two-thirds of the women (65%) are segregated in a very small number of positions, including clerical (31%), service (16%), sales (9%) and health (9%) jobs. Men are much better distributed in all occupations, with the largest group being in managerial and administrative jobs (13%). They are grossly overrepresented in

the top-paid mining and science positions as well as in all blue-collar occupations.

**Table 7**  
**Occupations and Earnings of Canadian Women and Men, 1990**<sup>158</sup>

<u>Occupations</u>	<u>Average Full-Time, Full-Year Earnings</u> \$	<u>Distribution of Paid Workers</u>		<u>% of Paid Workers Who are Women</u> %
		<u>Women</u> %	<u>Men</u> %	
Mining	\$ 45,367	*	1	3
Social sciences	44,958	3	2	62
Managerial, admin.	44,879	10	13	38
Natural sciences, engineering, math	43,210	2	6	20
Teaching	42,361	6	3	64
Medicine & health	39,544	9	2	79
Construction	35,101	*	10	3
Forestry, logging	34,790	*	1	9
Transport operation	33,084	1	6	9
Machining	32,826	*	3	6
Art, recreation	32,654	2	2	45
Sales	31,822	9	9	47
Processing	31,360	2	4	27
Product fabrication	29,987	3	9	23
Material handling	28,655	1	2	24
Fishing, trapping	28,586	*	1	14
Religion	25,652	*	*	22
Clerical	25,087	31	7	79
Service	24,462	16	10	57
Farming	19,019	2	4	26
Other	-	3	5	22
<b>ALL OCCUPATIONS</b>	<b>\$ 33,714</b>	<b>100%</b>	<b>100%</b>	<b>46%</b>

\* Less than 1%.

<sup>158</sup> This table was calculated from: Statistics Canada, Employment Income by Occupation: The Nation - 91 Census, Catalogue No. 93-332 (Ottawa: Minister of Industry, Science and Technology, 1993) at 6-38. Figures in the last two columns are for all paid workers, including part-time and part-year ones.

Women's segregation is in fact much worse than appears in Table 7 because they also hold the least prestigious and well-paid jobs within each occupational group.<sup>159</sup> In teaching, for example, men are disproportionately in high schools and higher levels and women in elementary grades and kindergartens. In medicine and health, most doctors are male and almost all nurses are female. In the social sciences, men are mostly in law and women in social work. In managerial positions, almost all the general managers and senior executives are men while the women are financial officers. In services, the bulk of the men are police officers, soldiers, firemen and security guards; most of the women are waitresses, hairdressers and domestics.

This intra-occupational segregation is reflected in the huge gender salary differences shown in Table 8 on the next page for selected occupations. These include all the occupations in which women are overrepresented relative to their share of the labour force, as well as the managerial and administrative category in which an important proportion of both sexes work (see Table 7 above).

Table 8 shows that women receive much lower full-time earnings than men in all categories, ranging from a female-to-male earnings ratio of only 51% in medicine and health to a high of 78% in teaching. This confirms that unless the concept of

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<sup>159</sup> Ibid.

equal pay is meaningless in Canada, many men in these occupational groups hold different and better positions than their female counterparts.

**Table 8**  
**Full-Time, Full-Year Earnings in Selected Occupations, 1991**<sup>160</sup>

<u>Selected Occupations</u>	<u>Average Full-Time, Full-Year Earnings</u>		<u>Women's Earnings As a % of Men's</u>
	<u>Women</u>	<u>Men</u>	
Social sciences	\$ 32,817	\$ 59,003	56%
Managerial & administrative	32,700	51,258	64%
Teaching	37,804	48,279	78%
Medicine & health	31,557	62,026	51%
Sales	23,328	36,436	64%
Clerical	23,258	30,829	75%
Service	17,231	30,498	56%
<b>ALL OCCUPATIONS</b> (including those not listed here)	<b>\$ 26,033</b>	<b>\$ 38,648</b>	<b>67%</b>

Given all the facts we have just seen, there is no doubt that most women and men do not do the same work in the Canadian labour market, and that the majority of female workers are segregated into the least good, least well-paying jobs.

#### **(4) Effects of Women's Segregation in Inferior Jobs**

The Quebec Human Rights Commission study we mentioned earlier, which was the sole - and very modest - empirical analysis ever done on the effects of seniority on female workers

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<sup>160</sup> Ibid.

in Canada, concluded that the most pernicious and pervasive forms of discrimination due to seniority were those which resulted from the subtle combination of unofficial job ghettos and ostensibly neutral seniority rules.<sup>161</sup> As these discriminatory effects differ depending on the application which is made of seniority, we will consider the following separately: a) layoffs, recalls and bumping; b) promotions and transfers; and c) benefits.

#### a) Layoffs, Recalls and Bumping

Most of the numerous studies and commentaries done in the last fifteen years on the discriminatory impact of seniority have been American and have dealt with layoffs.<sup>162</sup> The problem

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<sup>161</sup> Garon, supra note 45 at 56.

<sup>162</sup> The main ones are: I.A. Burke & O.G. Chase, "Resolving the Seniority/Minority Layoffs Conflict: An Employer-Targeted Approach" (1978) 13 Harv. C.R.-C.L. L. Rev. 81; C.H. Fishman, "Retroactive Seniority in Layoff Cases: Problems of Timeliness and Entitlement to Relief" (1977) 45 Geo. Wash. L. Rev. 783; A.V. Friedman & A.M. Katz, "Retroactive Seniority for the Identifiable Victim Under Title VII - Must Last Hired, First Fired Give Way" in R. Adelman, ed., supra note 47, 263; P.M. Hamburger, "Alternatives to Seniority-Based Layoffs: Reconciling Teamsters, Weber, and the Goal of Equal Employment Opportunity" (1982) 15 U. Mich. J.L. Rev. 523; E.R. Joseph, "Last Hired, First Fired - Seniority, Layoffs, and Title VII: Questions of Liability and Remedy: (1975) 2 Colum. J.L. & Soc. Probs. 343; R.T. Lund, D.C. Bumstead & S. Friedman, "Inverse Seniority: Timely Answer to the Layoff Dilemma?" (1975) 53 Harv. Bus. Rev. 65; Note, "Last Hired, First Fired: Layoffs and Title VII" (1975) 88 Harv. L. Rev. 1544; B.J. Offerman, "Seniority Systems and Affirmative Action: Are They Legally Compatible in a Slack Economy?" (1982) 7 Lab. Stud. J. 99; C. Poplin, "Fair Employment in a Depressed Economy: The Layoff Problem" (1975) 23 UCLA L. Rev. 177; S. Ross, "Reconciling Plant Seniority With Affirmative Action and Anti-Discrimination" in R. Adelman, ed., supra note 47, 231; D.R. Stacy, "Title VII Seniority Remedies in a Time of Economic Downturn" (1975) 28 Vand. L. Rev. 487; Summers & Love, supra note 110; U.S. Commission on Civil Rights, Last Hired, First Fired - Layoffs and Civil Rights (Washington, D.C.: U.S. Government Printing Office, 1972); W. Wines, "Seniority, Recession and Affirmative Action: the Challenge for Collective Bargaining" (1982-83) Am. Bus. L.J. 37; J.E. Youngdahl, "How Can Seniority, Anti-Discrimination and Affirmative Action Be Reconciled in a Layoff Economy: The Union Viewpoint" in R. Adelman, ed., supra note 47, 297. For Canada, see: P. Bosset, M. Coutu & M. Drapeau, Accès à l'égalité, ancienneté et discrimination (Montreal: Quebec Human Rights Commis-

they analyzed is straightforward: when a firm which previously denied Blacks, or women, or other groups, access to certain jobs starts to hire them in these positions and then suffers an economic downturn causing it to lay off employees, the effect of the LIFO (last in, first out) seniority rule is that the recently-hired employees from these groups are the first to go.

It can be argued that in Canada, at least, discriminatory seniority rules concerning promotions and transfers affect many more women and are much more important for them in the long run than the LIFO provisions. In 1990, for example, approximately one million women were in jobs covered by collective agreements with seniority clauses relating to promotions, a much greater number than that of newly-hired unionized women who are likely to be threatened with layoff.<sup>163</sup>

On the other hand, it is understandable that layoffs should receive more attention because the effect of the LIFO rule on people who were recently hired as a result of anti-discrimination laws and affirmative action programs is so much more

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sion, 1993); C. Sheppard, "Affirmative Action in Times of Recession: The Dilemma of Seniority-Based Layoffs" (1984) 42 U.T. Fac. L. Rev. 1; K. MacLeod, The Seniority Principle: Is It Discriminatory? (Master's thesis in Industrial Relations, Queen's University, 1986).

<sup>163</sup> Calculated by combining the following: in Canada in 1990, about 5,800,000 women were employed - Statistics Canada, The Labour Force - June 1990, Catalogue No. 17-001 (Ottawa: Supply and Services Canada, 1990) at B-2; in 1990, 30% of employed Canadian women belonged to a union (supra Table 6); and in 1992, 55% of workers under major collective agreements were covered by seniority clauses relating to promotion (supra note 15).

visible and radical. Compared with invisible gender-neutral seniority rules which restrict women's promotions, for example, the laying off of 200 new female blue-collar employees at a Stelco plant in Ontario in 1981, leaving only a handful of women who had been hired earlier, had much more immediate and drastic consequences.<sup>164</sup>

Another related but less well known issue concerns the relationship between affirmative action and recalls. This is illustrated by the Action Travail des Femmes v. Canadian National Railway case,<sup>165</sup> in which the Supreme Court found in 1987 that C.N. had engaged in a pattern of systemic discrimination against women and ordered it to implement an affirmative action program with specific short- and long-term hiring goals. This order did not supersede the company's long recall lists, however, and as C.N.'s workforce has been decreasing gradually since the 1950s, new hiring has been minimal.<sup>166</sup> As a result, a C.N. spokesperson declared in 1992 that although the company was meeting and even exceeding its hiring goals for women, their

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<sup>164</sup> D. Field, "Rosie the Riveter Meets the Sexual Division of Labour" in M. Fitzgerald, C. Guberman & M. Wolfe, eds., Still Ain't Satisfied: Canadian Feminism Today (Toronto: Women's Press, 1982) at 221, note 8.

<sup>165</sup> (1987) 40 D.L.R. (4th) 193, 8 C.H.R.R. D/4210 (sub nom. Canadian National Railway v. Canada (Human Rights Commission)) [1987] 1 S.C.R. 1114 [hereinafter Action Travail cited to S.C.R].

<sup>166</sup> M. Tellier, Asst. Vice-President, Canadian National Railway, presentation to House of Commons Special Committee on the Review of the Employment Equity Act, Minutes of Proceedings and Evidence, No. 9 (24 February 1992) at 9:12.

representation had not significantly increased and was not expected to do so in the near future.<sup>167</sup>

A third layoff question which has a greater impact on female workers than male ones stems from the fact that groups which have traditionally been segregated in inferior jobs typically have the narrowest possible seniority units, meaning units which include fewer different occupations. This has many implications which we will discuss further in the context of promotions and transfers, but in layoff situations it has the effect of making these segregated workers more vulnerable because they have less room to manoeuvre when staff is reduced.

For example, in the case of overt discrimination we described earlier where a Quebec firm had separate departmental seniority units for male and female ushers, if all ushers were laid off the men would have some chance of getting another position by either filling a vacant post in the other occupations included in their departmental seniority unit, or by bumping an employee with less seniority in those occupations. The female ushers, who are alone in their departmental unit, would have little alternative but to go. Similar cases can be imagined without the overtly discriminatory element.

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<sup>167</sup> Ibid. at 9:9.

**b) Promotions and Transfers**

The key to understanding the impact of seniority on the chances of advancement of female employees is the fact that the ordinary, run-of-the-mill operation of apparently neutral seniority systems has the effect of perpetuating and reinforcing the inequalities created by discriminatory hiring practices and job assignments. This is achieved in two ways: i) through barriers between seniority units which trap women in their inferior positions; and ii) through configurations of seniority units which benefit male employees at the expense of women.

**i. Seniority Units Trap Women in Their Inferior Jobs**

Unless promotions and transfers are done on the basis of company or enterprise seniority, which is extremely rare, seniority units automatically create barriers between different types of jobs. This is because seniority units are defined by their barriers, in the same way rooms are defined by their walls. These barriers are the reverse side of the preferences and advantages which members of each seniority unit enjoy over outside employees.

The easiest way to explain this reverse effect is by describing a famous case of discrimination by seniority units which was argued before American courts. It involved a tobacco company which had long operated departments segregated by race - with "black departments" containing the worst jobs, of course -

but had finally desegregated its plants a few years before. Its seniority rules, which were ostensibly neutral, prohibited transfers between departments and used departmental seniority units for promotion purposes. The effect was that black employees could not accept a promotion in the better-paid "white" departments without losing all their accumulated seniority and starting again in entry-level positions, often with a reduction in pay.<sup>168</sup>

The result, not surprisingly, was that few if any senior Blacks applied for such moves, so that except for a few token Blacks hired from outside to work in the better departments, the plant remained almost totally segregated. If such a system were allowed to continue, the court judged, it would "freeze an entire generation" of minority employees into discriminatory patterns.<sup>169</sup> In a similar case, another court held that "by carrying forward the effects of former discriminatory practices the system resulted in present and future discrimination."<sup>170</sup>

U.S. government agencies and courts analyzed many other different types of discriminatory barriers between seniority units in transfers and promotions. These included for example

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<sup>168</sup> Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 1 F.E.P. 260 (E.D. Va 1968) [hereinafter Quarles cited to F. Supp.].

<sup>169</sup> Ibid. at 516.

<sup>170</sup> Papermakers, Local 189 v. United States, 416 F.2d 980 at 982-83, 1 F.E.P. 875 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970) [hereinafter Papermakers cited to F.2d].

the practice of limiting entry into a seniority unit to its bottom level, or of requiring that candidates for some jobs have occupied the lower rungs in the lines of progression.<sup>171</sup> Unless it can be demonstrated that the skills acquired in these lower positions are necessary to become qualified for the higher levels, such requirements are unjustified. Similar questions were raised concerning the relevance of tests or experience requirements which prevented employees from disadvantaged groups from moving to better seniority units.<sup>172</sup>

Although no complaints against discriminatory barriers between seniority units have yet reached Canadian tribunals or courts, for reasons which we will discuss at the end of Chapter IV, Canadian Human Rights Commission officers report that they regularly encounter instances of seniority unit barriers which trap women in inferior jobs. Details of these practices cannot be released at this point because they are part of ongoing investigations.<sup>173</sup>

Justice Rosalie Abella addressed this issue in the report of her Royal Commission on Equality in Employment, where she wrote that:

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<sup>171</sup> A.W. Blumrosen, Black Employment and the Law (New Brunswick, N.J.: Rutgers University Press, 1971) at 190-91.

<sup>172</sup> Ibid. at 192.

<sup>173</sup> The author interviewed investigators of the Employment Equity Section of the Canadian Human Rights Commission in Ottawa in the context of a report on seniority she prepared for the Commission in 1992.

...the requirement under employment equity that corporations re-examine their practices and job requirements may illuminate some of the needless barriers seniority systems can erect. The loss of seniority in moving from one classification or department to another can inhibit an employee who may wish to change jobs but not at the expense of years of accumulated benefits. For employees in job ghettos, it may be a prohibitive restriction, permanently circumscribing their economic options, regardless of their abilities or qualifications. As such, it could be held by the Canadian Human Rights Commission to be systemic discrimination.<sup>174</sup>

ii. Configurations of Seniority Units Can Harm Women

As we saw in Chapter I when we looked at the development of seniority in the U.S. steel industry, it is not unusual for seniority units to be quite irrational. Companies may have some seniority units along departmental lines and others which assemble people from related occupations across departments, some units having many unrelated occupations and others containing only one or two jobs, along with as many as three or more units for different aspects or levels of the same occupation.

Some of these illogical-seeming patterns are the result of past or present discriminatory practices, which carved out separate units for closely-related jobs or created deliberately short units to leave some groups out of lines of promotion. Sometimes these patterns originated in historical events such as

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<sup>174</sup> Report of the Commission on Equality in Employment (Ottawa: Supply and Services Canada, 1984) at 222.

representation by different unions, or mergers of companies while retaining old seniority units or lines of progression.

The effect of unnecessary or illogical seniority units is to turn workplaces into impassable and unjust obstacle courses. This limits the movements of almost all employees, but the adverse impact is much greater on people from disadvantaged groups. This is in part because the units to which these employees are initially assigned - and where they are often imprisoned by the types of barriers we saw above in (i) - tend to be the shortest, dead-end ones with the worst jobs, and also because being in the lowest units, they have more fences to jump to get anywhere near the top.

Canadian unionist Ed Finn recognized this problem and described it as follows:

In some industries, for example, instead of one or two broad seniority groups, there are a dozen or more, with different classifications of workers, each segregated in its own enclave. There may be some justification for this, in cases where jobs differ radically in the skills required and where there would be little or no transfers between them, anyway. But in other cases the fragmentation seems to be arbitrary, and has the effect of restricting access to the better-paid jobs.

Such compartmentalization of jobs also makes it easier for employers to discriminate against women and minorities, by confining them in job ghettos that the seniority system then prevents them from escaping.<sup>175</sup>

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<sup>175</sup> supra note 49 at 130.

The only published study which gives concrete examples of these problems is an American analysis of the seniority system of an electrical products plant whose employment practices were all ostensibly neutral.<sup>176</sup> This study is particularly interesting for its demonstration of the way in which a seniority system can be taken apart and scrutinized.

The first step in the study was an analysis of the company's employees - including black workers and white ones, women and men - which concluded that their educational levels were more or less equal and that most skills were learned on the job.<sup>177</sup> The second step was an examination of the collective agreement and seniority structure. This revealed that promotions were on the basis of company-wide seniority, but that this seniority was exercised within 28 seniority units, with anyone entering a new unit having to start at the lowest-level job.<sup>178</sup>

Thirdly, the study's author drew a diagram of the plant's 28 seniority units as shown in Table 9 on the next page. Each rectangle represents a seniority unit, with the bottom line of the rectangle indicating the unit's bottom wage level (and labour grade) and its top line the highest wage (and labour

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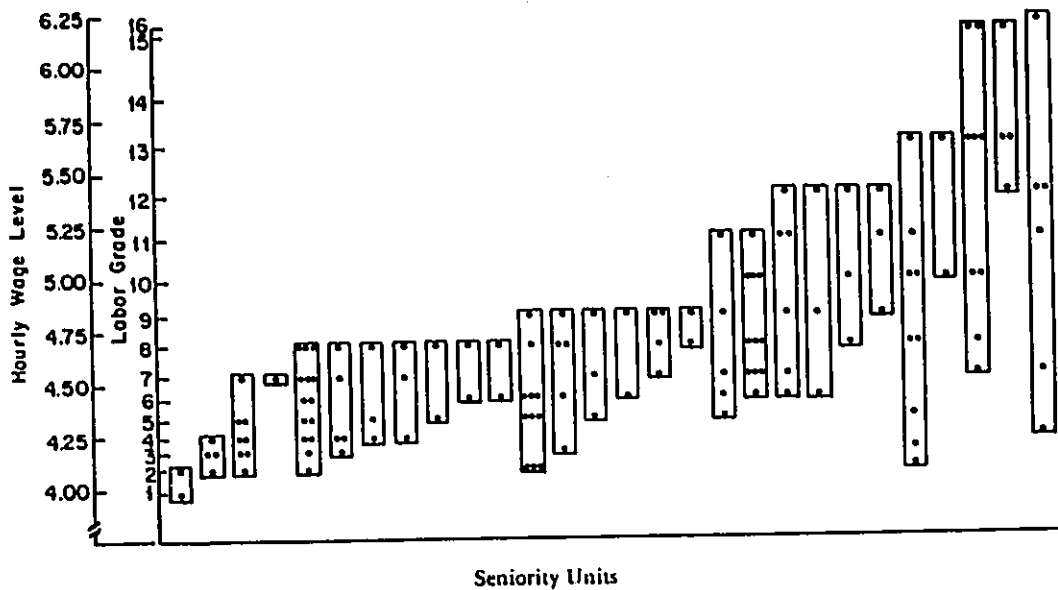
<sup>176</sup> M.R. Kelley, "Discrimination in Seniority Systems: A Case Study" (1982) 36 Ind. & Lab. Rel. Rev. 40.

<sup>177</sup> Ibid. at 49.

<sup>178</sup> Ibid. at 47.

grade) it reaches. Dots within units indicate jobs, but not the number of people doing each of these jobs.

**Table 9**  
**Seniority Units With Their Constituent Jobs,**  
**By Labour Grade and Wage Level**<sup>179</sup>



The first thing one notices upon looking at this diagram is that the seniority units show enormous variation. The first one on the left, for example, starts at the lowest wage in the plant and only goes up one step, while the one on the far right also starts at a low level but reaches all the way up to the top. The fourth seniority unit on the left includes only one job. Upon further investigation to establish whether these differ-

<sup>179</sup> ibid. at 48.

ences were necessary for efficiency reasons, the study's author found that for the most part, this was not the case at all.<sup>180</sup>

Assuming for our purposes that all the seniority units on the diagram are unnecessary, we can see how such units can produce unfair advantages and disadvantages. For example, the lowest level of the second seniority unit from the left is almost even with the lowest level of the fifth unit from the right, which is much taller and includes more jobs. If each of these two units provides the necessary training to rise from its bottom to its top, it is obvious that people who are hired in the lowest job of the unit on the right have much greater career opportunities: they are exposed and have priority access to many more positions reaching much higher salary levels. They may even have had the chance of occupying the positions above their own on an acting basis during others' absences.

If there is no good reason, such as specialized skills, to keep these two seniority units separate instead of combining them, the advantages enjoyed by the employees in the taller unit are unjustified. And if the employees in the taller unit are disproportionately white and male, the configuration of these seniority units also discriminates by race and by sex.

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<sup>180</sup> Ibid. at 49.

The other significant factor Kelley identified was the number of employees in each seniority unit compared to the number of employees in other units. This is important because even if two units have the same entry-level wage and are of the same height, the chances of promotions of employees in denser units are fewer because there are more of them vying for advancement.<sup>181</sup> If the employees who suffer "crowding" in denser units are disproportionately female or members of a racial minority, the result is discrimination.

Overall, Kelley concluded, the most fortunate employees were those who had been hired at higher entry-level wages in less dense units which reached a higher level.<sup>182</sup> She was probably not surprised to find that the workers who met these criteria in her study were disproportionately white men.

Another problem relating to seniority units and promotions which we touched upon in Chapter I stems from the fact that seniority rights rarely extend across bargaining units, so that having more than one in a workplace almost automatically limits employees' movements and chances of promotion. In describing the situation at the CBC, we found that bargaining units can be as irrational or discriminatory as seniority units because they are the end product of similar historical developments.

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<sup>181</sup> Ibid. at 41, 48.

<sup>182</sup> Ibid. at 48.

In addition, as also mentioned in Chapter I, it was not unusual until very recently to establish separate bargaining units for part-time workers, the vast majority of whom are women.<sup>183</sup> It is still common to set up different bargaining units for white-collar and technical employees, or for a manufacturing firm's office employees and those of its plant.<sup>184</sup> These practices very often result in the discriminatory segregation of female workers.

Some of the problems we saw in this section have been the subject of recent legal complaints. In 1992, the Canadian Union of Public Employees (CUPE) filed a complaint of sex discrimination with the Quebec Human Rights Commission in an attempt to convince Hydro-Quebec to get rid of its system of regional seniority.<sup>185</sup> Although the seniority of Hydro-Quebec's employees is calculated on a company-wide basis, it is exercised within regional units. The effect is that the bulk of female employees, who are concentrated in a single central administrative unit, are unable to gain access to the better-paid regional inspectors' jobs because regional employees with less seniority have priority in bidding for them.

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<sup>183</sup> In 1990, 67% of paid workers who worked mostly part time were women: calculated from Statistics Canada, supra note 86.

<sup>184</sup> Adams, supra note 80 at 346-48, 351.

<sup>185</sup> Information on this case was obtained in an interview with Carole Robertson, Quebec equal opportunities coordinator for CUPE.

The other complaint is similar and also involves CUPE, but in this case the female employees of the City of Toronto who filed a complaint with the Ontario Human Rights Commission did so without their union's support.<sup>186</sup> Here also seniority is calculated on a city-wide basis but exercised within separate units. The result is that the complainants, who are long-service city employees who took "bridging" training in blue-collar work to escape their traditionally female jobs (in CUPE Local 79), found that they could not bid for the more desirable male-dominated "outside" occupations (in CUPE Local 43, which is a separate bargaining unit as well as a separate seniority unit) because all members of the "outside" unit, including those with very little seniority, have priority access to them.

### c) Benefits

There are two types of discrimination related to seniority and benefits. One occurs when some groups of employees receive different seniority-based rewards than other groups of workers with the same length of service. The most common situation consists of having more steps in women's than in men's salary groups:

The more steps there are in a salary group, the longer it takes to reach the maximum salary for that group, which in fact means that length of service with the employer is not equally compensated. If predominantly

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<sup>186</sup> Information on this case was obtained in interviews with Anne Dubas, President of CUPE Local 79 at the City of Toronto, and Mary Dauphinee, Director of the Equal Opportunities Division at the City of Toronto.

female jobs have more steps in their salary scales than predominantly male jobs, this will be a factor of discrimination.<sup>187</sup>

Other similar situations can be imagined, for example if employees in a predominantly male occupation receive greater increases in vacation length, or in supplementary unemployment benefits, or in severance pay, than employees in an equivalent predominantly female occupation for the same length of service.

In the second type of discrimination involving seniority and benefits, seniority itself is the benefit and it is attributed in a way that unfairly excludes or favours some groups of employees. One example is a provision which would guarantee the retention of seniority rights during absences from work due to illness, but would exclude pregnancy-related illnesses from this protection. In another case mentioned in a American 1960 study, a collective agreement granted superseniority to the company's (presumably all-male) basketball team!<sup>188</sup>

#### **D. Overall Assessment of the Impact of Seniority Rights On Women**

The facts we have seen so far in this chapter make it clear that seniority rights increase the financial vulnerability of

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<sup>187</sup> J. Cleveland, "Implementation of Affirmative Action Programs in the Current Workplace Context" in Research Studies of the Commission on Equality in Employment (Ottawa: Supply and Services Canada, 1985) 367 at 374.

<sup>188</sup> Slichter et al., supra note 5 at 130, note 7.

women, place them at a disadvantage relative to their male co-workers and reinforce the inferior position of female workers in the labour force. This contradicts the claim of at least one seniority advocate<sup>189</sup> to the effect that seniority is fair because it eventually gives everyone their chance at the top.

On the contrary, as we demonstrated, women's lifestyles and their segregated position in the labour market ensure that in workplaces where both women and men are present, most of the women never reach the top of seniority lists for the more desirable jobs. If fairness were the only relevant factor to be considered, women would therefore be justified in demanding that seniority rights be abolished from the workplace.

Other relevant factors must also be assessed, however, including the arguments we saw at the end of Chapter I to the effect that seniority must be retained because it is efficient and because it is necessary in the absence of reliable measures of ability. On the subject of efficiency, modern human rights theorists like John Rawls reject the notion that fundamental rights such as the right to equality should be subordinated to such crass considerations.<sup>190</sup> In any case, efficiency is not by itself a very solid argument in favour of seniority rights

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<sup>189</sup> Swinton, supra notes 108 and 137.

<sup>190</sup> A Theory of Justice (Cambridge, Mass.: Belknap Press of Harvard University Press, 1971) at 302.

given the fact, which we also saw in Chapter I, that it is counterbalanced by numerous employer criticisms of seniority on the grounds that it is inefficient.

Much more compelling is the argument on the necessity for seniority rights in the absence of any other reliable criterion to allocate claims and establish priorities in the workplace. Even right-wing opponents of seniority concede that it would be very difficult to abolish it in the absence of a workable alternative. The fact is that in most cases "the seniority system did not replace selection by measured ability... it replaced a system of subjective selection that had important elements of favouritism and guessing."<sup>191</sup>

Most relevant for women, the other common feature of non-seniority workplaces is widespread discrimination. As a result, at least some U.S. civil rights activists have supported seniority:

...Bayard Rustin, the organizer of the 1964 March on Washington for the Civil Rights Act, has repeatedly come out in favour of seniority. Indeed, if blacks and whites had the same seniority one might argue that strict seniority rules provide the greatest protection against discrimination possible, as they remove any possibility for biased employer treatment of workers...<sup>192</sup>

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<sup>191</sup> Rees, supra note 109 at 143.

<sup>192</sup> R.B. Freeman & J.L. Medoff, What Do Unions Do? (New York: Basic Books, 1984) at 134-35.

In Canada, feminist unionist Laurell Ritchie defended seniority rights for similar reasons:

Workers have been able, through seniority rights, to achieve some limitations on decision-making in the key areas of job security and job opportunity... It is... a constant battle to uphold seniority rights over favouritism and discrimination...

When an employer is involved in an attack on seniority rights, it is not with the intention of giving jobs to women or minorities... Employers normally want to retain workers they view as "skilled workers" (read "men" in most cases) no matter where they fit in on the seniority list...

If women were to ignore the defense of seniority rights and pursue only the Affirmative Action route, they would do so at their own peril.<sup>193</sup>

While Ritchie makes a convincing case for women's interest in retaining seniority rights, her position appears to be an all-or-nothing one in which any modification of traditional seniority systems is seen as abhorrent because it threatens the seniority system itself and, by extension, the very existence of unions. Many unionists share that point of view,<sup>194</sup> but others hold more flexible positions. Among the latter is Fred Gaboury, who deplored U.S. court decisions which severely restricted the recourses of American workers victimized by seniority rules.<sup>195</sup> In 1977, Gaboury wrote in Labor Today that:

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<sup>193</sup> L. Ritchie, "Affirmative Action Versus Union Security" in M. Lord & J. Wylie, eds., Proceedings of the 19th Annual Meeting of the Canadian Industrial Relations Association, vol. 2 (Ottawa: C.I.R.A., 1982) 402 at 410.

<sup>194</sup> See M. Lynk & R. Ellis, "Unions and the Duty to Accommodate" (1992) 1 Can. Lab. L.J. 238 at 271-72; Fischer, supra note 109 at 499, 503; Youngdahl, supra note 162 at 305.

<sup>195</sup> These decisions will be described below in Chapter III.

Over the past two or three years, white workers have been flooded with a torrent of warnings about the need to "protect seniority". They have been swamped with half-truths and distortions aimed at blinding them to the difference between the principle of seniority and a system of seniority...

The principle of seniority - that all workers be treated on an equal basis subject to collectively agreed upon standards and that workers have a vested interest in their jobs in direct proportion to their years in a given shop or industry - is a basic building block of class-struggle trade unionism...

But workers and their friends in the community - and this is especially true of white male trade unionists - must be clear on another question: There are discriminatory seniority systems... It is the responsibility of every worker - Black, Brown, Yellow, Red and White - to fight to change these systems by any means possible... No seniority clause is the result of divine inspiration; any can be changed. It is not un-American nor anti-union to advocate modification of seniority systems so that special steps may be taken to protect the hard-won gains toward fair employment practices...<sup>196</sup>

Gaboury's position would probably be endorsed by former steelworker Debbie Field, who was active in the "Women Back Into Stelco Campaign" seeking to prevent the layoff of most female blue-collar employees of that company in Hamilton, Ontario, in 1981 (as seen earlier in this chapter). According to Field:

Those who argue in favour of [preferential seniority] point out that without [it] any attempt to get women into non-traditional jobs is erased when the first round of layoffs wipes out all the women who have recently won access... [S]upporters of preferential seniority argue that since seniority is an acquisition of the union movement, it can be modified by the unions. For example, after World War II, thousands of women with three or four years seniority were bumped by male soldiers returning from the war. At that time

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<sup>196</sup> (July-August 1977) at 1, 6.

the union movement believed that it was in the interests of the entire society that men be given these jobs. There was little resistance from the unions to tampering with the seniority system then!<sup>197</sup>

Indeed, as Susan Ross of the American Civil Liberties Union reported, when the U.S. Congress passed a law giving returning American servicemen the right to take their old jobs back regardless of seniority and with constructive seniority for the time they had been away, the courts interpreted it very liberally and unions and the public supported it because they felt that it reflected a valid social policy.<sup>198</sup> "Just as fictional seniority was acceptable in service of that social policy," Ross argues, "it should be equally acceptable in service of the broad social policy... that minority and women workers participate in the economic mainstream and not be forced to 'the end of the line'."<sup>199</sup>

In light of all these arguments, it appears to us that the modified seniority position supported by Gaboury, Field and Ross is the one which best represents the interests of women. As a result, we recommend that women support the retention of the seniority principle, but with the proviso that seniority systems

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<sup>197</sup> Field, supra note 164 at 217.

<sup>198</sup> Ross, supra note 162 at 250-51. See also Lapp, supra note 44 at ix, 218ff. In Ford Motor Co. v. Huffman, the U.S. Supreme Court upheld a provision negotiated by Ford and the United Auto Workers which gave constructive seniority for military service in World War II to employees who had not worked for Ford before the war: 345 U.S. 330, 73 S. Ct. 681, 97 L.Ed. 1048 (1953)[cited to U.S.].

<sup>199</sup> Ross, ibid. at 251.

must be modified to correct their discriminatory impact on female workers. Prof. Colleen Sheppard took a similar position when she recommended that in cases of layoffs involving women in non-traditional occupations, the seniority system itself should not be challenged, but solutions such as preferential seniority or other compromises should be considered.<sup>200</sup>

In the following chapters, we will analyze the recourses women might have against discrimination due to unmodified seniority systems under the laws of the United States and Canada.

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<sup>200</sup> Sheppard, supra note 162 at 22.

**CHAPTER III - SENIORITY AND THE LAW IN THE UNITED STATES**

The purpose of this chapter is to review the legal developments relating to seniority and discrimination which took place in the United States over the last thirty years. This is very relevant to our study because American seniority systems are almost identical to ours and because many of the legal concepts discussed in the series of U.S. cases we will describe are also found in Canadian law.

The other, main reason why U.S. cases on discrimination due to seniority are important to our study is that they produced a body of knowledge which has no counterpart in Canada. Dozens of major complaints on this subject were heard in the United States, compared to none in this country. The main cause of this disparity is that American efforts to eradicate discrimination started earlier and were much more vigorous. As a result, conflicts between affirmative action programs and seniority which have not yet come to a head in Canada reached their highest point in the United States in the late 1970s.

One of the main differences between the American and Canadian legal treatments of seniority is the fact that 90% of labour relations in the United States come under central jurisdiction, while the reverse is true in Canada, with 90% of

labour relations being regulated by the provinces.<sup>201</sup> Almost all the major U.S. seniority cases of the last decades were brought under Title VII of the federal Civil Rights Act of 1964.<sup>202</sup> The Civil Rights Act has been called the most important civil rights legislation of the century, and Title VII, its anti-discrimination in employment provision, its most important section.<sup>203</sup>

Section 703(a)(1) of Title VII prohibits discrimination in all aspects of employment on the basis of race, colour, religion, sex or national origin. In the case of corporations which receive federal government contracts or sub-contracts, Title VII works in tandem with Executive Order 11,246, adopted in 1964-65, which requires these contractors to take affirmative action to correct the underutilization of disadvantaged groups in their workforce. Because of E.O. 11,246, and because compliance with Title VII itself often involves specific affirmative action plans to remedy the effects of past discrimination, the Equal Employment Opportunity Commission (EEOC, which administers Title VII) has been successful in convincing many employers to

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<sup>201</sup> Adams, supra note 80 at 9-10.

<sup>202</sup> 42 U.S.C. ss. 2000e-2000e-17 (1982). The effective date of Title VII was July 2, 1965.

<sup>203</sup> B.E. Hernandez, "Title VII v. Seniority: the Supreme Court Giveth and the Supreme Court Taketh Away" (1986) 35 Am. U. L. Rev. 339 at 344.

implement voluntary affirmative action plans.<sup>204</sup>

Title VII contains a so-called "seniority defence", section 703(h), which reads as follows:

Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority or merit system ... provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin.

As its wording indicates, section 703(h) does not shelter overtly discriminatory seniority systems which maintain separate lists for women and men, or for black and white employees. Nor does section 703(h) protect slightly disguised forms of discrimination, such as seniority systems that divide the sexes by maintaining separate units for "light" and "heavy" jobs.<sup>205</sup>

The bulk of Title VII litigation on seniority dealt with two main points: the scope of the 703(h) seniority defence, and the extent to which discrimination could be remedied by measures such as retroactive or constructive seniority (also called "fictional" or "remedial" seniority), which affect the established rights of incumbent white male employees. The following

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<sup>204</sup> B.G. Cebulski, Affirmative Action Versus Seniority - Is Conflict Inevitable? (Berkeley: Institute of Industrial Relations, University of California, 1977) at 4; Note, "Voluntary Public Employer Affirmative Action: Reconciling Title VII Consent Decrees With the Equal Protection Claims of Majority Employees" (1987) 28 Boston C. L. Rev. 1007 at 1007.

<sup>205</sup> Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969).

is a brief review of the main cases which established the law on these questions.

The first phase started in 1968 with the landmark Quarles v. Philip Morris<sup>206</sup> case, whose facts were described above in Chapter II. It dealt with a tobacco plant where the seniority units had been desegregated, but where black employees were locked into the worst jobs by a departmental seniority system under which a change of unit entailed the loss of all accumulated seniority.

When a complaint of discrimination was lodged against Philip Morris' seniority system, the district court developed the category of discrimination known as "perpetuation in the present of the effects of past discrimination", holding that seniority systems which locked members of previously discriminated-against groups into inferior positions were not "bona fide" and constituted present discrimination in violation of Title VII. Noting that "Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act",<sup>207</sup> the judge ordered that Blacks hired before a particular date be allowed to fill vacancies in more desirable "white" departments on the basis of their full employment seniority.

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<sup>206</sup> Supra note 168 and accompanying text.

<sup>207</sup> Ibid. at 516.

In 1969, in Papermakers, Local 189 v. United States,<sup>208</sup> a Court of Appeals agreed with Quarles that section 703(h) did not protect facially neutral systems that perpetuated the effects of past discrimination. In this case, segregated progression lines had been merged on the basis of pay, with the result that almost all Blacks found themselves at the bottom of the new lines, behind many whites with less plant seniority. Promotions were made step by step on the basis of seniority in each job.

The court examined different approaches to seniority reform which had been described in a Harvard Law Review Note.<sup>209</sup> These approaches included: the "freedom now" theory, which would immediately give Blacks with more plant-wide seniority the jobs of whites with less plant seniority; the "rightful place" theory, under which incumbent white employees would not be displaced, but Blacks would be able to use their plant-wide seniority in bidding for future vacancies; and the "status quo" theory, which merely required ending all overt discrimination.

The appeals court rejected the "freedom now" and "status quo" theories and opted for the "rightful place" solution. In addition, the court opposed the granting of "fictional" seniority to newly-hired minority workers because it would not

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<sup>208</sup> Supra note 170.

<sup>209</sup> "Title VII, Seniority Discrimination and the Incumbent Negro" (1967) 80 Harv. L. Rev. 1260. This seminal Note had also inspired the court's reasoning in Quarles.

necessarily help the actual victims of the previous discrimination, and would benefit other employees who had not personally suffered from discrimination. Such a result, the court found, would not constitute remedial treatment, but preferential treatment on the basis of race, which was against the law.

The second phase in seniority decisions peaked - not at all accidentally - right after the U.S. recession of the early seventies. It included notable judgments from three appeals courts on clashes between seniority and affirmative action in cases of layoffs. All three courts held that the application of the LIFO rules in plant-wide seniority systems, even if it resulted in the layoff of most or all black and/or female employees recently hired under affirmative action programs, was lawful and not in violation of Title VII. In spite of this general agreement, we will see below that these cases presented interesting differences.

The first, Waters v. Wisconsin Steel Works,<sup>210</sup> in 1974, involved a plant that hired its first black bricklayers in 1964. These included Waters, who had been turned down earlier because of his race. The next year, more than thirty bricklayers were laid off, including all five Blacks. The district court found that the seniority system, which was plant-wide, violated Title

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<sup>210</sup> 502 F.2d 1309, 8 F.E.P. 577 (7th Cir. 1974), cert. denied, 425 U.S. 997 (1976) [hereinafter Waters cited to F.2d].

VII by perpetuating past discrimination. The Court of Appeals reversed this, distinguishing between plant-wide and job/depart-  
mental seniority:

An employment [i.e. plant-wide] seniority system is properly distinguished from job or department seniority systems for purposes of Title VII. Under the latter, continuing restrictions on transfer and promotion create unearned or artificial expectations of preference in favor of white workers when compared with black incumbents having an equal or greater length of service. Under the employment seniority system there is equal recognition of employment seniority which preserves only the earned expectations of long-service employees...

An employment seniority system embodying the "last hired, first fired" principle does not of itself perpetuate past discrimination. To hold otherwise would be tantamount to shackling white employees with a burden of a past discrimination created not by them but by their employer. Title VII was not designed to nurture such reverse discriminatory preferences...<sup>211</sup>

The appeals court cited Papermakers in support of its rejection of "fictional" seniority to correct the adverse impact of the LIFO rule. It did not distinguish between Waters, who had suffered personal discrimination in hiring, and the other black ex-employees.

In Jersey Central Power & Light Co. v. I.B.E.W. Local Unions,<sup>212</sup> in 1975, there was an apparent conflict between the collective agreement and the conciliation agreement the company

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<sup>211</sup> Ibid. at 1320.

<sup>212</sup> 508 F.2d 687 (3d Cir. 1975), vacating and remanding 8 F.E.P. 690 (D.N.J. 1974), vacated and remanded, 425 U.S. 998 (1976), on remand, 542 F.2d 8 (3d Cir. 1976) [hereinafter Jersey Central cited to F.2d].

had entered into with the EEOC. The first provided that layoffs would be done according to the LIFO rule, while the second committed the company to a five-year affirmative action hiring program to increase the representation of minorities and women in the company's workforce.

The district court judged that the EEOC agreement should prevail. To implement this, it issued an order barring white male employees from bumping less senior minority and female employees if their percentages of the company's workforce fell 15% below the goal of the affirmative action program. The union appealed, arguing that preferential layoffs constituted reverse discrimination.

The Court of Appeals reversed the district court's decision. There was no conflict between the collective agreement and the conciliation agreement, it held, because the latter applied only to hiring. On the question of whether the Jersey Central seniority system and its LIFO rule violated Title VII, the court decided that plant-wide seniority systems were sheltered, even when they perpetuated past discrimination:

Congress, while recognizing that a bona fide seniority system might well perpetuate past discriminatory practices, nevertheless chose between upsetting all collective bargaining agreements with such provisions and permitting them despite the perpetuating effect that they might have. We believe that Congress intended a plant-wide seniority system, facially neutral but having a disproportionate impact on female and minority group workers, to be a bona fide

seniority system within the meaning of section 703(h) of the Act.<sup>213</sup>

The third and most unusual case was Watkins v. United Steelworkers, Local 2369.<sup>214</sup> also in 1975. It dealt with a Louisiana plant of the Continental Can Company where, with the exception of two Blacks hired during World War II, only whites were hired until 1965. In 1971, cutbacks led to the layoff through the LIFO rule of all Blacks except the two hired in the 1940s, and of other employees hired as early as 1951. Because the Blacks were far down on the recall list, it was clear that this company, which admitted to having discriminated until the sixties, would not hire Blacks again for years to come.

The district court judge found that the seniority system was not sheltered by section 703(h) even though it was plant-wide, because employment preferences could not be allocated on the basis of length of service where Blacks had been, because of prior discrimination, prevented from accumulating relevant seniority. He ordered the reinstatement of enough black employees to achieve the same black-white ratio as before the 1971 layoffs, and the payment of back pay to these employees for the period they had been unemployed. He did not distinguish between

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<sup>213</sup> Ibid. at 706.

<sup>214</sup> 516 F.2d 41, 10 F.E.P. 1297 (5th Cir. 1975), rev'g 369 F. Supp. 1221 (E.D. La. 1974) [hereinafter Watkins cited to F.2d].

black employees who had personally suffered discrimination in hiring and those who had not.

In addition, the district judge ordered that no incumbent white workers be laid off nor anyone's pay reduced, but that the available work be shared by all until normal expansion and attrition should bring the size of the workforce to the most efficient level. In the event of future layoffs, the 1971 ratio was to be maintained, and future recalls were to be done on a one-white-one-black basis until all Blacks had been recalled.

The Appeals Court unanimously reversed this judgment, holding that the seniority system was "bona fide" and did not discriminate against the black employees involved because they had not personally suffered from discrimination in hiring:

[R]egardless of an earlier history of employment discrimination, when present hiring practices are nondiscriminatory and have been for over ten years, an employer's use of a long-established seniority system for determining who will be laid-off, and who will be rehired, adopted without intent to discriminate, is not a violation of Title VII..., even though the use of the seniority system results in the discharge of more blacks than whites to the point of eliminating blacks from the work force, where the individual employees who suffer layoff under the system have not themselves been the subject of prior employment discrimination.<sup>215</sup>

The court specifically noted that it had not decided the rights of a laid-off employee who could prove that if he had not

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<sup>215</sup> Ibid. at 44-45.

been unfairly discriminated against in hiring earlier, he would have sufficient seniority to be insulated against layoff.

Meanwhile, in the same year, in Meadows v. Ford Motor Co.,<sup>216</sup> yet another Court of Appeals held that Title VII allowed, in the case of Dolores Marie Meadows and other people who had personally suffered from discrimination in hiring, the granting of retroactive seniority to the date they would have been hired if they had not been discriminated against, in addition to an order that they be hired with back pay and compensation for fringe benefits.

In 1976, in Franks v. Bowman Transportation Co.,<sup>217</sup> the Supreme Court of the United States turned its attention to seniority for the first time and resolved the differences between these Courts of Appeals. Bowman, an Atlanta-based interstate trucking company, had refused to hire Blacks as long-distance over-the-road (OTR) drivers, also known as line drivers, until 1972. As a result, it was being sued under Title VII for race discrimination.

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<sup>216</sup> 510 F.2d 939, 9 F.E.P. 180 (6th Cir. 1975), cert. denied, 425 U.S. 998 (1976).

<sup>217</sup> 424 U.S. 747, 96 S. Ct. 1251, 47 L. Ed. 2d 444 (1976) [hereinafter Franks cited to S. Ct.]. For comments on Franks and retroactive seniority in general, see: D. Carpenter, "Bumping the Status Quo: Actual Relief for Actual Victims Under Title VII" (1991) 58 U. Chi. L. Rev. 703; Fishman, supra note 162; Friedman & Katz, supra note 162; D. Ziskind, "Retroactive Seniority: A Remedy for Hiring Discrimination" (1976) 27 Lab. L.J. 480.

Looking only at the issue of retroactive seniority, the Supreme Court ruled that it was an appropriate - though not mandatory - remedy to order along with instatement in cases involving people who had actually been victims of discrimination in hiring. It noted that the question of whether the Bowman seniority system was "bona fide" or not was irrelevant in this case, because it was the Bowman hiring system, not its seniority system, which was accused of discrimination, and that those seeking retroactive seniority did "not ask for modification or elimination of the existing seniority system, but only an award of the seniority status they would have individually enjoyed under the present system but for the illegal discriminatory refusal to hire."<sup>218</sup>

The granting of retroactive seniority, added the U.S. Supreme Court, was necessary to fully compensate victims of discrimination in hiring and thus make them "whole":

... one of the central purposes of Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination" ... adequate relief may well be denied in the absence of a seniority remedy slotting the victim in that position in the seniority system that would have been his had he been hired at the time of his application. It can hardly be questioned that ordinarily such a relief will be necessary to achieve the 'make whole' purposes of the act.<sup>219</sup>

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<sup>218</sup> Ibid. at 1261.

<sup>219</sup> Ibid. at 1264-65.

In answer to the argument that granting retroactive seniority would punish innocent workers, the Supreme Court held that such reasoning could not be retained because it would have the effect of gutting the law:

...we find untenable the conclusion that this form of relief may be denied merely because the interests of other employees may thereby be affected. "If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed."<sup>220</sup>

The next phase in the legal treatment of seniority started with the 1977 Supreme Court judgment in International Brotherhood of Teamsters v. United States.<sup>221</sup> As the Franks decision had seemed generous toward victims of discrimination, this regressive decision had the effect of a thunderbolt. The facts in the Teamsters case were similar to those of Franks. One of the points at issue was the legality of a seniority system which, through past discrimination in hiring, narrow departmental seniority units and a no-transfer policy between units, prevented Blacks and Hispanics from having access to the firm's more desirable jobs.

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<sup>220</sup> Ibid. at 1269. The quotation within the quotation is from United States v. Bethlehem Steel Corp., 446 F.2d 652 at 663, 3 F.E.P. 589 (2d Cir. 1971) [hereinafter Bethlehem Steel].

<sup>221</sup> 431 U.S. 324, 97 S. Ct. 1843, 52 L.Ed.2d 396 (1977) [hereinafter Teamsters cited to U.S.].

Reversing Quarles and over 30 cases from six courts of appeals concerning the scope of title VII,<sup>222</sup> the Supreme Court held that all seniority systems which were ostensibly neutral and which had not been created with discriminatory intent were immune under section 703(h), even if their operation had the effect of perpetuating past discrimination. The court made no distinction between plant-wide and departmental seniority. It found that:

Were it not for Section 703(h), the seniority system in this case would seem to fall under the Griggs rationale [concerning adverse effects discrimination]. The heart of the system is its allocation of the choicest jobs, the greatest protection against layoffs and other advantages to those employees who have been line-drivers for the longest time. Where because of the employer's prior intentional discrimination, the line-drivers with the longest tenure are without exception white, the advantages of the seniority system flow disproportionately to them and away from Negro and Spanish-surnamed employees who might by now have enjoyed those advantages had not the employer discriminated before the passage of [Title VII]. This disproportionate discrimination of advantages does in a very real sense 'operate to freeze' the status quo of prior discriminatory employment practices.<sup>223</sup>

On the subject of retroactive seniority, Teamsters did not reverse Franks, but restricted it by holding that such seniority could not be awarded to employees who had been victims of pre-Title VII discrimination. In United Air Lines Inc. v. Evans,<sup>224</sup> handed down at the same time as Teamsters, the Supreme Court

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<sup>222</sup> Ibid., at 378-80 (Marshall J., dissenting).

<sup>223</sup> Ibid. at 349-50.

<sup>224</sup> 431 U.S. 533, 97 S. Ct. 1885, 52 L.Ed.2d 571 (1977) [hereinafter Evans].

further specified that plaintiffs who had not filed "timely" charges after the alleged acts of discrimination lost their right to retroactive seniority, even if these discriminatory acts had occurred after the effective date of Title VII.

In 1984, in Memphis Fire Department v. Stotts,<sup>225</sup> the Supreme Court went even further in reducing the seniority remedies of female and minority employees. In that case the city of Memphis, which had discriminated until recently against women and minorities, started to hire black firefighters under a consent decree with the EEOC. The decree also gave the district court jurisdiction to issue orders to implement its goals. Soon afterwards, when the city announced that layoffs were about to take place under the LIFO rule, black firefighters applied for and obtained a court order against the use of the seniority system in determining who would be let go. As a result, white employees with more seniority were laid off.

The Court of Appeals maintained the order, but the Supreme Court reversed it, holding that the modification of seniority ordered by the court was unjustified because the original consent decree did not address layoffs. More importantly, the Supreme Court held:

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<sup>225</sup> 467 U.S. 561, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1984) [hereinafter Stotts]. For comments on Stotts, see: M.C. Daly, "Stotts' Denial of Hiring and Promotion Preferences for Non-Victims: Draining the 'Spirit' From Title VII" (1986) 14 Fordham Urb. L.J. 17; R.H. Fallon, Jr. & P.C. Weiler, "Firefighters v. Stotts: Conflicting Models of Racial Justice" [1984] Sup. Ct. Rev. 1.

- that courts did not have the power to alter bona fide seniority systems, except to remedy the wrongs done to actual proven victims of discrimination; and
- that even if some women and/or minorities had personally been victims, and were therefore entitled to retroactive seniority, they could not use this seniority to avoid being laid off instead of white male employees, or to be placed at the top of a recall list, because this would amount to illegal displacement; if there was a recall list of white males, courts should balance the rights of both groups.

Teamsters, Evans and Stotts were part of a wave of backlash cases in which the Supreme Court "shifted away from its early active protection of minority rights toward a zealous protection of nonminorities' rights, focusing on their 'vested' seniority rights."<sup>226</sup> A partial counterpoint to these backlash decisions was provided by United Steelworkers of America v. Weber<sup>227</sup> in 1979. It involved a collective agreement containing a voluntary affirmative action plan under which admission to a training program was to be partially based on race, with the result that

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<sup>226</sup> Hernandez, supra note 203 at 378. These backlash cases also included American Tobacco Co. v. Patterson, 456 U.S. 63, 102 S. Ct. 1534, 71 L.Ed.2d 748 (1982); Pullman-Standard v. Swint, 456 U.S. 273, 102 S. Ct. 1781, 72 L.Ed.2d 66 (1982); Transworld Airlines, Inc. v. Hardison, 432 U.S. 63, 97 S. Ct. 2264, 14 F.E.P. 1697 (1977).

<sup>227</sup> 443 U.S. 193, 99 S. Ct. 2721, 61 L.Ed.2d 480 (1979) [hereinafter Weber]. See comments on Weber and its relevance to Canada in W.S. Tarnopolsky & W.F. Pentney, Discrimination and the Law with Seventh Cumulative Supplement (Don Mills, Ont.: Richard de Boo, 1985 & 1991) at 4-74 to 4-80 (text) and 38-41 (supplement). For pre-Stotts comments on seniority and affirmative action in the United States, see Offerman, supra note 162, and Wines, supra note 162.

the most junior black trainee had less seniority than several white workers who were not accepted. Brian Weber, a white male, challenged the plan.

Weber was successful at both the district and appeals levels, but the Supreme Court upheld the plan by finding that while section 703(j) of Title VII did not require preferential treatment, it did not prohibit it either. The Court further stated that the voluntary affirmative action measures in Weber were not illegal because (1) they were remedial and aimed at correcting a conspicuous imbalance in the workforce; (2) they were reasonably related to the remedial goal; (3) they did not unduly trammel the existing rights of white male employees, in the sense that they did not require the discharge of white employees to create vacancies for minority applicants; and (4) they were limited in time.

A Court of Appeals used the Weber test to uphold a voluntary preferential layoff system in Tangren v. Wackenhut Services, Inc.<sup>228</sup> In this case, after being found in violation of federal contract compliance rules, the company had hired a number of minority and female security guards, but these new employees were soon laid off. To counteract this, WSI and its union had included a seniority override in their collective agreement providing that the least senior non-minority males

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<sup>228</sup> 480 F. Supp. 539 (D. Nev. 1979), aff'd 658 F.2d 705, 26 F.E.P. 1647 (9th cir. 1981), cert. denied, 456 U.S. 916 (1982) [hereinafter Tangren].

would be laid off before a certain percentage of female and minority employees. But the Tangren decision is generally considered to be exceptional.<sup>229</sup>

The reverse discrimination argument was also used in cases of affirmative action programs initiated by public employers. In those situations, the programs can be challenged under the constitutional equal protection clause we saw at the beginning of Chapter II.<sup>230</sup> In such a challenge under the equal protection clause, in Wygant v. Jackson Board of Education<sup>231</sup> in 1986, the Supreme Court examined a voluntary proportional layoff provision in a collective agreement to the effect that the percentage of minority teachers who were laid off could not exceed their percentage of the teaching staff.

In striking down the provision, the Supreme Court seemed to equate the use of proportional layoffs to the practice - which it had proscribed in Weber - of discharging white employees to hire black workers. It noted that the use of racially-based layoffs imposed the entire burden of achieving racial equality on particular individuals, and held that such a burden could not be imposed on non-minority employees in this case because (1) it

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<sup>229</sup> B.L. Schlei & P. Grossman, Employment Discrimination Law, 2d ed. (Washington, D.C.: Bureau of National Affairs, 1983) at 860.

<sup>230</sup> See supra note 119 and accompanying text.

<sup>231</sup> 476 U.S. 267, 106 S. Ct. 1842, 90 L.Ed.2d 260 (1986) [hereinafter Wygant].

had not been demonstrated that the Board of Education had been guilty of prior discrimination; and (2) less intrusive means of accomplishing similar purposes, such as hiring goals, could be used instead.

Although the Wygant Court emphasized that it was not ruling on whether private employers would be permitted by Title VII to use such a proportional layoff system, some experts believe that a Title VII challenge would yield similar results.<sup>232</sup> This is suggested by Johnson v. Transportation Agency, Santa Clara County, California,<sup>233</sup> a 1987 Title VII case in which the Supreme Court upheld a voluntary affirmative action plan which had the effect of promoting a female employee ahead of a man who alleged that he had superior qualifications. The man's rights were not unduly trammled, the court found, because:

...denial of the promotion unsettled no legitimate, firmly rooted expectation on the part of the petitioner. Furthermore, while petitioner in this case was denied a promotion, he retained his employment at the Agency, at the same salary and with the same seniority, and remained eligible for other promotions.<sup>234</sup>

The implication, according to Prof. Mack Player, "is that had the plan called for the plaintiff's discharge, it would have

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<sup>232</sup> M.A. Player, Employment Discrimination Law (St. Paul, Minn.: West Publishing, 1988) at 324; Hamburger, supra note 162 at 538-40.

<sup>233</sup> 480 U.S. 616, 107 S. Ct. 1442, 94 L.Ed.2d 615 (1987) [cited to S. Ct.].

<sup>234</sup> Ibid. at 1455.

unduly trammelled his rights and thus would have been illegal."<sup>235</sup>

To sum up this chapter, the U.S. experience with using statutory anti-discrimination provisions to combat discrimination by seniority systems included four main phases: first, a very active one in the late 1960s and early 1970s when numerous courts creatively modified seniority provisions to prevent them from perpetuating past discrimination; second, a period of partial retrenchment from 1974 to 1977, during which appeals courts found that plant-wide seniority systems were sheltered by section 703(h) even if they perpetuated past discrimination; third, a rout in 1977 and subsequent years when the Supreme Court put the lid on almost all group-based seniority complaints and whittled away at the retroactive seniority rights of individuals who had personally suffered from hiring discrimination; and fourth, the current period, where anti-discrimination laws are mainly used to set limits on voluntary efforts to correct the discriminatory effects of seniority provisions.

After Teamsters and the swarm of "white male rights" decisions which followed, the spirit of Quarles is truly dead.

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<sup>235</sup> Player, supra note 232.

## CHAPTER IV - SENIORITY AND THE LAW IN CANADA

In this chapter, we will determine whether the unequal treatment of women by seniority systems which was described in Chapter II violates Canadian law. To do this, we will first look at the Canadian laws which appear to be relevant and discuss their general rationale. This will be followed by a detailed analysis of these laws' provisions and interpretations as they relate to women and seniority, ending with a discussion on the enforcement of these laws.

### A. Laws That Might Be Invoked Against Seniority Systems Which Treat Women Unequally

As mentioned in Chapter III, the bulk of Canadian labour relations comes under the jurisdiction of the provinces. As a result, our discussion of seniority and the law in Canada must consider provincial as well as federal legislation.

There are two main types of Canadian laws which might possibly be invoked to challenge discrimination by seniority provisions. The first type includes federal and provincial collective bargaining laws which impose a duty of fair representation upon labour unions. The second are laws protecting human rights and forbidding discrimination against women; these include: 1) federal and provincial human rights and employment standards legislation; 2) Employment Equity Acts and Contractors Programs; and 3) the Canadian Charter of Rights and Freedoms.

## **B. Rationale For the Rights of Employers and Labour Unions and Equality Rights Laws**

Three separate sets of rights come into competition in disputes concerning the harmful effects of seniority systems on women: the rights of employers, those of unions and those of female employees. The legal claims of each of these groups are rooted in different philosophical foundations.

### **(1) Rationale for the Rights of Employers**

With respect to seniority, the general goal of employers is to maximize their management prerogative, that is their freedom to run their businesses as they see fit without interference from anyone. The legal philosophy which best reflects this objective is classical liberalism, also called utilitarianism and libertarianism, which almost totally dominated in Canada from the middle of the nineteenth century until World War II.

The British reformers who founded classical liberalism were mainly interested in property rights and individual liberty. They believed that governments should interfere as little as possible with the business of the people, and should only pass laws which the majority of citizens felt to have "utility" for themselves (hence "utilitarian"). Underlying this majority rule was the conviction that "the greatest happiness of the greatest

number is the measure of right and wrong".<sup>236</sup>

In economic matters, Utilitarians supported the theory of "laissez-faire", according to which the most efficient way of helping the economic system is to leave it alone.<sup>237</sup> This led them to oppose collective bargaining because it disturbed market forces by interfering with the individual "free" employment contract.<sup>238</sup> On human rights, Utilitarians, who were reacting against the excesses of the rights-based French Revolution, believed that the notion of people having natural rights beyond those granted to them by the positive law was not only "non-sense", but "nonsense upon stilts".<sup>239</sup> They disapproved of the state imposing codes of conduct on anyone except the minimum necessary to protect personal security, dignity and property.<sup>240</sup>

As we will see in this chapter, it can be argued that utilitarianism still dominates Canadian law today. This is partly because Canadian courts have interpreted human rights acts as containing utilitarian or efficiency elements, and

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<sup>236</sup> J. Bentham, The Fragment on Government, as cited in H.L.A. Hart, Essays in Jurisprudence and Philosophy (Oxford: Clarendon Press, 1983) at 146.

<sup>237</sup> L.T. Hobhouse, Liberalism (New York: Oxford University Press, 1964) at 44-50.

<sup>238</sup> Ibid.

<sup>239</sup> J. Bentham, Anarchical Fallacies, as cited in Hart, supra note 239, at 182.

<sup>240</sup> R.J. Sharpe, "New Ways of Thinking - Liberalism" in F.E. McArdle, ed. The Cambridge Lectures 1991 (Cowansville, Que.: Yvon Blais, 1993) 265 at 266.

partly because of overtly utilitarian provisions embedded in these laws.

**(2) Rationale for the Rights of Unions**

As we saw at the end of Chapter I, Canadian laws to facilitate and regulate collective bargaining were first adopted in the 1940s. Along with these new union rights there gradually developed a concomitant responsibility to represent employees fairly, called the duty of fair representation.<sup>241</sup>

In addition to the hope that the first collective bargaining laws in the United States in 1935 would mitigate the effects of the Depression, the main reasons underlying these laws were: 1) the recognition by modern liberals that freedom of contract was meaningless where bargaining power was unequal, so that the legislative protection of collective bargaining would generate far more freedom for workers than it took away;<sup>242</sup> and 2) the acceptance of the originally socialist idea that "we must have democracy in industry as well as in government".<sup>243</sup>

In the decades following World War II, the principle of industrial democracy increasingly gave way to the theory of

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<sup>241</sup> Adams, supra note 80 at 710-11.

<sup>242</sup> Hobhouse, supra note 240 at 46-47.

<sup>243</sup> C.W. Summers, "Industrial Democracy: America's Unfulfilled Promise" (1979) 28-29 Clev. St. L. Rev. 29 at 34. Also see S. Webb & B. Webb, Industrial Democracy (New York: Augustus M. Kelley, 1965).

pluralism, according to which modern societies are composed of numerous interest groups whose "countervailing power" balance each others', with the State acting as a more or less impartial guardian of the public interest.<sup>244</sup> In the industrial relations context, this meant that collective bargaining was seen as "a power-oriented process with few generally accepted principles"<sup>245</sup> in which disputes are best resolved by the parties themselves with a minimum of interference by outside tribunals and outside rules.

As a result, most mainstream labour theorists are not enthusiastic (to say the least) about human rights laws which give individual union members, or minority groups within unions, the right to challenge unions' positions and actions on the basis of "vague notions".<sup>246</sup> Some consider these laws as throwbacks to classical liberalism, under which anti-labour forces traditionally used the vocabulary of rights - such as the "right to work" to oppose mandatory union membership, and the "freedom

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<sup>244</sup> R. Hyman, "Pluralism, Procedural Consensus and Collective Bargaining" (1978) 16 Brit. J. Ind. Rel. 16 at 19. Also see H. Arthurs, "Understanding Labour Law: The Debate Over 'Industrial Pluralism'" (1985) 38 Curr. Legal Probs. 83.

<sup>245</sup> B. Adell, "Perspectives of Power and Perspectives of Principle in Canadian Labour Law Scholarship", in Labour Relations Into the 1990s, I. McKenna, ed. (Don Mills, Ont.: CCH Canadian, 1989) 27 at 33.

<sup>246</sup> J.M. Weiler, "The Regulation of Strikes and Picketing Under the Charter" in J.M. Weiler & R.M. Elliott, eds., Litigating the Values of a Nation (Toronto: Carswell, 1986) 211 at 226.

of contract" we saw above - as a spurious disguise to maintain their economic privileges.<sup>247</sup>

Many labour theorists also present human rights controversies as pitting the "collective rights" of trade unions against the "individual rights" of those who challenge union rules.<sup>248</sup> This is problematic in the anti-discrimination context because it raises the issue of whether it makes sense for collective entities (such as the state, or "society", or unions) to have moral rights against their members.<sup>249</sup> It is also confusing because employment equity presupposes that victims of discrimination are considered as a group. As Lester Thurow put it,

Discrimination affects individuals, but it can only be identified at the level of the group... In the economic area no one can say that any individual has been subject to systematic discrimination as opposed to random bad luck. This is a judgement that can only be made at the level of the group.<sup>250</sup>

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<sup>247</sup> B. Adell, "Collective Agreements and Individual Rights: A Note on the Duty of Fair Representation" (1986) 11 Queen's L.J. 251 at 251. In 1973, Bora Laskin wrote that "[t]wenty years ago, the phrase 'individual rights' was a slogan symbolizing resistance to compulsory collective bargaining" (supra note 1 at 278).

<sup>248</sup> Adell, Ibid.; D.D. Carter, supra note 2 at 267; Lynk & Ellis, supra note 194 at 240.

<sup>249</sup> M. Hartney, "Some Confusions Concerning Collective Rights" (1991) 4 Can. J. Law & Jur. 293 at 307.

<sup>250</sup> "A Theory of Groups and Economic Redistribution" (1979) 9 Philosophy and Public Affairs 25 at 29, 28.

A more accurate depiction of the situation would be to say that women and other disadvantaged groups need effective human rights laws for the same reason that unorganized workers needed collective bargaining laws: to overcome their weak bargaining power and give them a fair chance at having their interests adequately defended in labour market negotiations.

### (3) Equality Rights Laws in Canada

Although the concept of equal rights is as old as western civilization, as we saw at the beginning of Chapter II, Canada's first human rights laws were not adopted until the 1940s.<sup>251</sup> One of the main reasons they were then adopted was that Canada participated in the worldwide surge in interest in human rights which occurred in reaction to Nazism and the horrors of World War II.<sup>252</sup>

Starting in the 1960s, the new anti-discrimination provisions were strengthened and consolidated into human rights codes, to be administered by human rights commissions.<sup>253</sup> The Canadian Bill of Rights,<sup>254</sup> adopted in 1960, also forbade discrimination. For the reasons we described at the beginning

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<sup>251</sup> W.S. Tarnopolsky, Discrimination and the Law (Don Mills, Ont.: Richard De Boo, 1987) at 26ff.

<sup>252</sup> M. Cranston, "What Are Human Rights?" in Laqueur and Rubin, supra note 117 at 19.

<sup>253</sup> Tarnopolsky, supra note 251 at 30-31.

<sup>254</sup> S.C. 1960, c. 44., reprinted in R.S.C. 1985, App. III.

of Chapter II, these early equality of opportunity laws had very little impact.

The first substantive equality laws, adopted in the mid-1970s, required equal pay for (different) work of equal value.<sup>255</sup> More important, in the 1980s the Supreme Court of Canada issued a series of judgments interpreting the equality guarantees of human rights statutes in a substantive, results-based way.<sup>256</sup> These developments culminated in 1989, when the Supreme Court also gave a strong, purposive interpretation of the equality provisions of the new Canadian Charter of Rights and Freedoms.<sup>257</sup>

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<sup>255</sup> Charter of Human Rights and Freedoms, S.Q. 1975, c. 6, s. 19; Canadian Human Rights Act, S.C. 1976-77, c. 33, s. 11.

<sup>256</sup> Ontario (Human Rights Commission) and O'Malley v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536, 23 D.L.R. (4th) 321, 7 C.H.R.R. D/3102 [hereinafter O'Malley cited to S.C.R.]; Action Travail, *supra* note 165; Brooks v. Canada Safeway Ltd., [1989] 1 S.C.R. 1219, 59 D.L.R. (4th) 321, 10 C.H.R.R. D/6183 [hereinafter Brooks cited to S.C.R.]; Janzen v. Platy Enterprises Ltd., [1989] 1 S.C.R. 1252, 59 D.L.R. (4th) 352, 10 C.H.R.R. D/6205 [hereinafter Janzen cited to S.C.R.].

<sup>257</sup> The Charter is Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11. The 1989 case referred to is: Andrews v. Law Society (British Columbia), [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1, 10 C.H.R.R. D/5719 [hereinafter Andrews cited to S.C.R.]. For comments on Andrews, see W. Black & L. Smith, Case Comment on Andrews v. Law Society of British Columbia (1989) 68 Can. Bar Rev. 591; M. Eaton, Case Comment on Andrews v. Law Society of British Columbia (1990) 4 C.J.W.L. 276; M. Gold, "Case Comment: Andrews v. Law Society of British Columbia" (1989) 34 McGill L.J. 1063; K.E. Mahoney, "The Constitutional Law of Equality in Canada" (1992) 44 Me. L. Rev. 229; D. Majury, "Equality and Discrimination According to the Supreme Court of Canada" (1990-91) 4 C.J.W.L. 407; R. Moon, "A Discrete and Insular Right to Equality: Comment on Andrews v. Law Society of British Columbia" (1989) 21 Ottawa L. Rev. 563; N.C. Sheppard, "Recognition of the Disadvantaging of Women: The Promise of Andrews v. Law Society of British Columbia" (1989) 35 McGill L.J. 207; C.L. Smith "Adding A Third Dimension: The Canadian Approach to Constitutional Equality Guarantees" (1992) 55:1 Law & Contemp. Probs. 211.

Other judgments have inspired concerns among women and other vulnerable groups.<sup>258</sup> The main worry relates to the steps which must be taken under human rights acts to correct discriminatory practices that are facially neutral. There is cause to fear, as we will explain later in this chapter, that in some cases employers and unions could be forgiven from doing anything to correct their harmful actions because it might cause them (or white male employees) "undue hardship" to do so.<sup>259</sup>

A parallel situation exists under the Charter of Rights. Some analysts believe that the second stage in equality rights cases, in which the offending party must discharge the burden of demonstrating that the unequal treatment of a disadvantaged group was justified, has now been relaxed to the point where justification has become too easy to provide.<sup>260</sup>

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<sup>258</sup> Bhinder v. Canadian National Railway, [1985] 2 S.C.R. 561, 23 D.L.R. (4th) 481, 7 C.H.R.R. D/3093 [hereinafter Bhinder]; Central Alberta Dairy Pool v. Alberta (Human Rights Commission), [1990] 2 S.C.R. 489, 72 D.L.R. (4th) 417, 12 C.H.R.R. D/417 [hereinafter Dairy Pool, cited to S.C.R.]; Renaud v. Central Okanagan School District No. 23, [1992] 2 S.C.R. 970, 95 D.L.R. (4th) 577, 92 C.L.L.C. 17,032 [hereinafter Renaud cited to S.C.R.].

<sup>259</sup> D. Baker, "Alberta Human Rights Commission v. Central Alberta Dairy Pool" (1991) 36 McGill L.J. 1450; B. Etherington, "Central Alberta Dairy Pool: The Supreme Court of Canada's Latest Word on the Duty to Accommodate" (1992) 1 Can. Lab. L.J. 311; S. Price, "Accommodating Women in Employment: The Limitations of a Traditional Approach" (1992) 1 Can. Lab. L.J. 140; B. Vizkelety, "Reasonable Accommodation Revisited: Alberta Human Rights Commission v. Central Alberta Dairy Pool" (1991) 70 Can. Bar Rev. 335.

<sup>260</sup> M.D. Lepovsky, "The Canadian Judicial Approach to Equality Rights: Freedom Ride or Roller Coaster?" (1992) 55 Law & Contemp. Probs. 168; G. Campeau, "McKinney et ses conséquences pour les groupes défavorisés" (1992) 8 J.L. & Social Pol'y 229.

The problem is that the Supreme Court has adopted a less onerous justification test for cases involving socio-economic rights. This could mean that the Court agrees with the views of some contemporary conservatives and libertarians who have argued that in comparison with traditional civil and political rights to life, liberty and property, economic and social rights are inferior and not truly human rights.<sup>261</sup> We will return to this point when we discuss the possible repercussions this might have for women and seniority.

As these comments indicate, Canada's human rights law is still in the process of being formed. The indications so far show that after a burst of inspiration during which it produced the most progressive definition of equality in the world, the Supreme Court has retrenched behind a flurry of utilitarian arguments. But the Supreme Court has yet to hear a Charter case in which a socio-economic measure discriminates on the basis of sex, so that the weight the Court would give to women's equality rights in such a context is still unknown.

### **C. Women and Seniority Under the Duty of Fair Representation**

In this section we will describe the duty of fair representation and try to determine whether the unequal treatment of women under seniority systems we saw in Chapter II could be

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<sup>261</sup> J. Donnelly, Universal Human Rights in Theory & Practice (Ithaca, N.Y.: Cornell University Press, 1989) at 31.

prohibited as direct or indirect discrimination under these laws.

**(1) Description of the Duty of Fair Representation**

The Canada Labour Code and the labour relations laws of seven provinces forbid labour unions from acting in a manner that is "arbitrary, discriminatory or in bad faith" in representing employees.<sup>262</sup> Although these laws are widely referred to as imposing a "duty of fair representation" (DFR), they do not in fact impose a positive obligation on unions to meet certain standards of representation, but simply require that some types of conduct be avoided.

Only the laws of British Columbia, Ontario and Quebec apply to all types of union representations vis-a-vis employers, including both the negotiation and the administration of collective agreements.<sup>263</sup> The Canada Labour Code and the rest of the provincial laws are narrower and deal only with contract administration, but employees who come under them can still invoke the duty of fair representation in negotiations because the Supreme Court ruled that the duty of fair representation

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<sup>262</sup> Canada Labour Code, supra note 68 at s. 37; Labour Relations Code, S.B.C. 1992, c. 82, s. 12(1)(a); Labour Relations Code, S.A. 1988, c. L-1.2, s. 151(1); Trade Union Act, R.S.S. 1978, c. T-17, s. 25.1, as am. by S.S. 1983, c. 81, s. 8; Labour Relations Act, C.C.S.M. c. L10, s. 20; Labour Relations Act, R.S.O. 1990, c. L.2, s. 69; Labour Code, R.S.Q. c. C-27, s. 47.2; Labour Relations Act, R.S.N. 1990, c. L-1, s. 130. The expression "arbitrary, discriminatory or in bad faith" is from Vaca v. Sipes, 386 U.S. 171, 64 L.R.R.M. 2369 (1967).

<sup>263</sup> Labour Relations Code, S.B.C., Ibid.; Labour Relations Act, R.S.O. Ibid.; Labour Code, R.S.Q. Ibid.

does not depend on the existence of a statute, but "arises out of the exclusive power given to a union to act as spokesman for the employees in a bargaining unit".<sup>264</sup>

**(2) Direct Discrimination Under Duty of Fair Representation**

There have been no reported cases in Canada in which women or other members of disadvantaged groups challenged their unions' seniority policies under the duty of fair representation. Still, there is little doubt that if a labour union negotiated a collective agreement specifically setting out distinct and inferior seniority rights based on race or sex, for example, it would be found to be in violation. The 1944 American case in which the duty of fair representation was first formulated, and on which all such subsequent cases are based, dealt with the failure of a railroad union to protect the seniority rights of black employees.<sup>265</sup>

The fact that such actions would be found unacceptable is confirmed by a 1983 comment by the Ontario Labour Relations Board:

The requirement that a trade union not act in a discriminatory manner protects against the making of distinctions between employees and groups of employees

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<sup>264</sup> Canadian Merchant Service Guild v. Gagnon, [1984] 1 S.C.R. 509 at 526, 9 D.L.R. (4th) 641, 53 N.R. 100.

<sup>265</sup> Steele v. Louisville and Nashville Railroad Co., 323 U.S. 192, 65 S. Ct. 226, 89 L.Ed. 173 (1944).

on bases which have no relevance to legitimate collective bargaining concerns.<sup>266</sup>

On the other hand, distinctions which have "relevance to legitimate collective bargaining concerns" were found to include special measures in favour of disadvantaged groups. In cases where employees accused their unions of discrimination for adopting policies granting employment preferences to disabled workers, for example, the Ontario Board found that these affirmative action measures were "perfectly reasonable" and even "laudable" and did not constitute "invidious discrimination".<sup>267</sup>

This seems to indicate that preferential seniority measures for disadvantaged groups, such as for example special exemptions from the "last in, first out" (LIFO) rule for employees from underrepresented groups, would not be found discriminatory under the duty of fair representation.

### **(3) Indirect Discrimination Under Duty of Fair Representation**

As seniority systems which are indirectly discriminatory are seldom adopted in order to harm any particular person or group, one possible barrier to recourse under the duty of fair representation would be a requirement that the discrimination be intentional. Since the mid-1980s, however, it has been estab-

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<sup>266</sup> Bartlett v. A.C.T.W.U., Local 307, [1983] O.L.R.B. Rep. 2067 at 2076.

<sup>267</sup> Cyr v. Mine Mill Union, Local 598, [1983] O.L.R.B. Rep. 1303, 83 C.L.L.C. 16,058; Humphreys v. S.E.I.U., Local 204, [1983] O.L.R.B. Rep. 530, 2 C.L.R.B.R. (N.S.) 350.

lished that unfair representation prohibits the same types of discrimination as human rights act, which include unintentional or systemic discrimination.<sup>268</sup>

The other, and greater, difficulty in cases of indirect discrimination due to seniority is that the very nature of collective bargaining necessarily implies compromises between the interests of different groups of employees.<sup>269</sup> As a result, labour relations boards have been extremely reluctant to intervene to substitute their own second guess to unions' judgments of the proper balance to be achieved between the competing interests of the employees.<sup>270</sup> Differences which favour one group over another are maintained as long as there is "reasonable and objective justification" for the unions' choices.<sup>271</sup>

In disputes concerning competitive seniority and other critical job interests affecting employees' capacity to earn a living, however, it has long been held that the issues involved

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<sup>268</sup> Douglas Aircraft Co., [1976] O.L.R.B. Rep. 779; Brinovec v. S.M.W., Local 575, [1986] O.L.R.B. Rep. 585; Lawrence v. I.B.E.W., Local 120, [1986] O.L.R.B. Rep. 1241, 14 C.L.R.B.R. (N.S.) 77.

<sup>269</sup> Ford Motor Co. v. Huffmann, *supra* note 198 at 338; Lazenkas v. U.F.C.W., Local 1000 A, [1983] O.L.R.B. Rep. 72 at 76.

<sup>270</sup> G. Adams, *supra* note 80 at 753-56; K.J. Bentham, The Duty of Fair Representation in the Negotiation of Collective Agreements (Kingston, Ont.: Industrial Relations Centre, Queen's University, 1991) at 20-22.

<sup>271</sup> R.W.D.S.U. v. Cuddy Food Products Ltd., [1988] O.L.R.B. Rep. 1211, 1 C.L.R.B.R. (2d) 1, 89 C.L.L.C. 16,017, application for reconsideration denied [1989] O.L.R.B. Rep. 126.

are so important that a considerably greater degree of scrutiny was required. More specifically, labour boards have judged that union actions which alter or abrogate employees' acquired competitive seniority rights require justification on their own merits before they can be legally sustained.<sup>272</sup>

This "close scrutiny" rule is not helpful to women who wish to challenge the discriminatory impact of seniority provisions. On the contrary, its effect is to entrench the discriminatory status quo by creating a presumption that acquired seniority provisions are automatically fair, so that any derogation from them requires specially compelling justification. This decision to so entrench seniority rights is typical of the pluralist attitude we saw earlier in this chapter, according to which the product of the collective bargaining process must never be tampered with.

A similar attitude of deference toward seniority is evident in the study of employment equity and labour relations which Katherine Swinton prepared for the Abella Commission.<sup>273</sup> At the start of her essay, Swinton indicates a clear awareness that the rights gained through collective bargaining are neither just nor unjust in themselves: she describes them as the result of "a

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<sup>272</sup> Seagrams Employees v. Distillery, Brewery, Winery, Soft Drink, and Allied Workers Union, Local 604, [1978] 1 Can. L.R.B.R. 375 (B.C.) [hereinafter Seagrams Employees]; Bentham, supra note 271 at 32-33.

<sup>273</sup> Swinton, supra note 108.

political exercise" involving "constant tradeoffs".<sup>274</sup> In this context, she writes, the capacity of any groups to obtain favourable terms, including the removal of discriminatory barriers, depends largely on "the political strength of these groups in the unit", so that "there are serious drawbacks in looking only to collective bargaining to promote equality within the organized workplace."<sup>275</sup>

When it comes to discussing affirmative action in promotions for members of groups which have traditionally been discriminated against, however, Swinton decides that acquired seniority rights should not be disturbed because this "would be unjust to the senior employee...".<sup>276</sup> In saying this, Swinton assumes that acquired seniority rights are "just" and forgets that she has herself described them as the morally neutral outcome of a power struggle which is often unfair toward minority groups. Furthermore, she chooses to ignore the fact that under both human rights laws and the duty of fair representation, women and other disadvantaged workers have defensible rights which should also be given consideration.

Reasoning such as Swinton's subverts the spirit of the duty of fair representation by setting up the past decisions of the

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<sup>274</sup> Ibid. at 277.

<sup>275</sup> Ibid. at 278.

<sup>276</sup> Ibid. at 291.

majority of the employees as basic standards, when the point of the duty of fair representation is precisely to protect vulnerable minorities against the discriminatory decisions of the majority. This has been recognized by labour boards, which have ruled that support by the majority of workers "will neither rebut nor substantiate a duty of fair representation."<sup>277</sup> If this were not the case, and the rights acquired by the majority through its greater bargaining strength were treated with deference and given priority, the duty of representation would be meaningless.

Our conclusion on this discussion is that it would be difficult but not impossible to successfully challenge indirect or systemic discrimination against women under a seniority system if the adverse impact was obvious enough. This might, for example, include cases where seniority structures undeniably have the effect of imprisoning female employees in subordinate jobs. This view is shared by some U.S. labour law experts, who wrote in 1987 that:

Since the doctrine of fair representation is independent of Title VII, litigation under this theory would not be foreclosed by the recent seniority decisions... If a union refuses to renegotiate or reconsider a seniority provision containing a non-transfer lock-in [which would have the effect of confining employees from disadvantaged groups in inferior positions]...

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<sup>277</sup> Seagrams Employees, supra note 273 at 384. Also see Morin v. C.A.W., [1988] O.L.R.B. Rep. 506; Bentham, supra note 271 at 27.

it might be subject to a suit by minority employees for breach of the duty of fair representation.<sup>278</sup>

American analyst Paul Hamburger goes much further, suggesting that a union violates its duty of fair representation if it does nothing to protect the interests of female and minority employees against disproportionate layoffs:

Unions often represent conflicting groups, some of which may be affected adversely by particular collectively bargained decisions. The duty of fair representation is the quid pro quo for minorities and women bound by those decisions... The duty of fair representation suggests unions should seek to eliminate the adverse impact on minorities and women by pursuing alternatives to seniority-based layoffs. A union which negligently abides by majority will and fails to pursue the interests of minority and female members has breached its duty of fair representation.<sup>279</sup>

We personally agree with him, but given the very restricted interpretations of the duty of fair representation we saw above, it is unlikely that any Canadian labour board or court would feel able to reach such a conclusion.

#### **D. Women and Seniority Under Human Rights and Employment Standards Legislation**

This part will include a brief description of human rights and employment standards laws as well as an analysis of whether

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<sup>278</sup> E.E. Herman, A. Kuhn & R.L. Seeber, Collective Bargaining & Labor Relations (Englewood Cliffs, N.J.: Prentice Hall, 1987) at 93.

<sup>279</sup> Hamburger, supra note 162 at 531. Also see: Note, "Seniority Systems and the Duty of Fair Representation: Union Liability in the Teamsters Context" (1979) 14 Harv. C.R.-C.L. L. Rev. 711.

or not the unequal treatment of women under seniority systems constitutes direct or indirect discrimination under these laws.

**(1) Description of Human Rights and Employment Standards Laws**

All provinces, as well as the federal level, have human rights laws prohibiting discrimination on the ground of sex by employers and trade unions in all aspects of employment.<sup>280</sup> In addition, five provinces have employment standards laws providing for the same pay to be given to men and women doing the same or similar work;<sup>281</sup> the Canada Labour Code (as well as the federal Human Rights Act and the Quebec Charter of Rights) requires the same wages for men and women performing work of equal value;<sup>282</sup> and five provinces have equal pay acts - applicable only in the public sector, except in Ontario - which

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<sup>280</sup> Canadian Human Rights Act, R.S.C. 1985, c. H-6, ss. 3, 7, 9-10 [hereinafter C.H.R.A.]; Human Rights Act, S.B.C. 1984, c. 22, ss. 8-9, as am. by S.B.C. 1992, c. 43, ss. 6-7 [hereinafter B.C.H.R.A.]; Individual's Rights Protection Act, R.S.A. 1980, c. I-2, ss. 7, 10, as am. by S.A. 1990, c. 23, ss. 2-4 [hereinafter I.R.P.A.]; Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1, ss. 16, 18 [hereinafter S.H.R.C.]; Human Rights Code, C.C.S.M. c. H175, ss. 14(1), (6) [hereinafter M.H.R.C.]; Human Rights Code, R.S.O. 1990, c. H.19, ss. 5-6 [hereinafter O.H.R.C.]; Charter of Human Rights and Freedoms, R.S.Q., c. C-12, ss. 16-17 [hereinafter Q.C.H.R.]; Human Rights Act, R.S.N.B. 1973, c. H-11, s. 3(1), (3), as am. by S.N.B. 1985, c. 30, s. 5 & by S.N.B. 1992, c. 30, s. 3 [hereinafter N.B.H.R.A.]; Human Rights Act, R.S.N.S. 1989, c. 214, s. 5(1) [hereinafter N.S.H.R.A.]; Human Rights Act, R.S.P.E.I. 1988, c. H-12, ss. 6, 8 [hereinafter P.E.I.H.R.A.]; Human Rights Code, R.S.N. 1990, c. H-14, s. 9(1), (3) [hereinafter N.H.R.C.].

<sup>281</sup> Labour Standards Act, R.S.S. 1978, c. L-1, s. 17(1) [hereinafter Sask. Labour Standards]; Employment Standards Act, C.C.S.M. c. E110, s. 45(1) [hereinafter Man. Empl. Standards]; Employment Standards Act, R.S.O. 1990, c. E.14, s. 32(1) [hereinafter Ont. Empl. Standards]; Employment Standards Act, S.N.B. 1982, c. E-7.2, s. 37.1(1)(a)-(d), as am. by S.N.B. 1986, c. 32, s. 4 [hereinafter N.B. Empl. Standards]; Labour Standards Code, R.S.N.S. 1989, c. 246, s. 57(1), as am. by S.N.S. 1991, c. 14, s. 18(1) [hereinafter N.S. Labour Code].

<sup>282</sup> Canada Labour Code, supra note 68 at s. 182; C.H.R.A., supra note 280 at s. 11; Q.C.H.R., supra note 280 at s. 19.

impose a positive obligation on employers to take measures to ensure that they give the same pay to men and women doing work of equal or comparative value.<sup>283</sup>

Most Canadian provisions relating to equal pay, whether they are in human rights or employment standards or equal pay acts, specify that differences in pay or wages between male and female employees which are based on seniority are not illegal.<sup>284</sup> For these purposes, the definition of "pay" or "wages" is very broad, extending to all types of employment-related benefits.<sup>285</sup> Other laws exempt differences in pay based on "any factor other than sex which normally justifies a difference".<sup>286</sup> "Any factor" would almost certainly be found to include seniority, which is common enough to be considered "normal" in Canada.

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<sup>283</sup> Pay Equity Act, C.C.S.M., c. P13, ss. 1, 2-3, 6; Pay Equity Act, R.S.O. 1990, c. P.7, ss. 1, 3, 4-5 [hereinafter Ont. Pay Equity]; Pay Equity Act, S.N.B. 1989, c. P-5.01, ss. 1, 3 [hereinafter N.B. Pay Equity]; Pay Equity Act, R.S.N.S. 1989, c. 337, ss. 2-4 [hereinafter N.S. Pay Equity]; Pay Equity Act, R.S.P.E.I. 1988, c. P-2, ss. 1-2 [hereinafter P.E.I. Pay Equity].

<sup>284</sup> See supra note 280 for the following: C.H.R.A. Equal Wages Guidelines, 1986, SOR/86-1082, s. 16(b); Q.C.H.R. at s. 19, para 2. See supra note 281 for the following: Sask. Labour Standards at s. 17(1); Ont. Empl. Standards at s. 32(1)(a); N.B. Empl. Standards at s. 37.1(1)(e); N.S. Labour Code at s. 57(2)(a). See supra note 283 for the following: Ont. Pay Equity at s. 8(1)(a); N.B. Pay Equity at s. 4(a); N.S. Pay Equity at s. 13(4)(a); P.E.I. Pay Equity at s. 8(1)(b).

<sup>285</sup> For example, the C.H.R.A., supra note 280 at s. 11(7), defines wages as follows: "wages" means any form of remuneration payable for work performed by an individual and includes (a) salaries, commissions, vacation pay, dismissal wages and bonuses; (b) reasonable value for board, rent, housing and lodging; (c) payments in kind; (d) employer contributions to pension funds or plans, long-term disability plans and all forms of health insurance plans; and (e) any other advantage received directly or indirectly from the individual's employer."

<sup>286</sup> I.R.P.A., supra note 280 at s. 6(1)(4); Man. Empl. Standards, supra note 281 at s. 45(3).

The Human Rights Act of British Columbia and the Human Rights Code of Saskatchewan contain an additional specific exemption concerning seniority. Each provides that the law's prohibition of discriminatory employment practices does not apply as it relates to age, "to any bona fide scheme based on seniority."<sup>287</sup> The purpose of these provisions is to prevent seniority provisions from being attacked because they discriminate on the basis of age. The definition of "age" under the B.C. Act includes the years from 19 to 65; the Saskatchewan Code covers the years from 18 to 65.<sup>288</sup>

The sum total of these provisions is that contrary to the United States, where section 703(h) of Title VII of the Civil Rights Act of 1964 contains a blanket "seniority defence" which shelters bona fide seniority systems, Canada's anti-discrimination laws only shield seniority-based pay and benefits and, in B.C. and Saskatchewan, seniority as it relates to age. Apart from that, discrimination by seniority systems can be challenged under all of Canada's human rights laws.

## **(2) Direct Discrimination Under Human Rights Laws**

The Supreme Court of Canada has ruled that for purposes of human rights acts, "Direct discrimination... occurs where an

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<sup>287</sup> B.C.H.R.A., supra note 280 at s. 8(3)(a); S.H.R.C., supra note 280 at s. 16(4).

<sup>288</sup> B.C.H.R.A., supra note 280 at s. 1; S.H.R.C., supra note 280 at s. 2(1)(a).

employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, 'No Catholics or no women or no blacks employed here.'<sup>289</sup> Three cases have been reported in which direct discrimination by seniority systems was challenged under human rights acts:

Senay v. Aliments Ault Ltée,<sup>290</sup> where the collective agreement of a food plant provided for separate seniority lists for women and men, and the female complainant had been laid off while many men with less seniority were retained. The clause setting up separate seniority lists by sex was declared null and void because it was contrary to the Quebec Charter of Rights.

Brass Craft Canada Ltd. v. I.A.M., Local 2446<sup>291</sup> also involved segregated seniority and recall lists for women and men, but the grievance was initiated on behalf of laid-off men who were seeking recall into the "female" jobs. The discriminatory recall procedure was found unenforceable as contrary to the Ontario Human Rights Code.

Dalton v. Canadian Human Rights Commission<sup>292</sup> concerned a clause in a CP Air collective agreement providing that when employees' seniority started on the same date, the older employee would be

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<sup>289</sup> O'Malley, supra note 256 at 551.

<sup>290</sup> supra note 46.

<sup>291</sup> supra note 46.

<sup>292</sup> [1986] 2 F.C. 141, 25 D.L.R. (4th) 260, 7 C.H.R.R. D/3189 (C.A.), leave to appeal to S.C.C. refused (1986), 67 N.R. 158 (note).

considered senior. This was found to violate the age discrimination provisions of the Canadian Human Rights Act, with the result that the agreement was amended to specify that in such cases the senior would be chosen by random selection.

The main defence against a complaint of direct discrimination in employment under human rights acts is that the allegedly discriminatory rule or practice is a "bona fide" occupational requirement or qualification (BFOR or BFOQ). The dual test a rule or practice must meet to be accepted as a BFOQ is: (1) it was imposed in the sincere belief that it would contribute to the good performance of the work, with no ulterior motives; (2) it is objectively related to the performance of the work, meaning that the rule or practice is reasonably necessary to the efficient, safe and economical performance of the job, and that there are no reasonable alternative means of achieving the same objective without discrimination.<sup>293</sup>

It is difficult to imagine practical examples of seniority provisions which overtly discriminate on a prohibited ground but are still able to pass the BFOQ test - separate seniority units for female attendants in women's locker rooms and male attend-

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<sup>293</sup> This was established or confirmed in: Ontario (Human Rights Commission) v. Etobicoke (Borough), [1982] 1 S.C.R. 202, 132 D.L.R. (3d) 14, 3 C.H.R.R. D/781; Brossard (Town) v. Quebec (Commission des droits de la personne), [1988] 2 S.C.R. 279, 53 D.L.R. (4th) 609, 10 C.H.R.R. D/5515; Saskatchewan (Human Rights Commission) v. Saskatoon (City), [1989] 2 S.C.R. 1297, 65 D.L.R. (4th) 481, 11 C.H.R.R. D/204; Dairy Pool, *supra* note 258; but see Dickason v. University of Alberta (1993), 95 D.L.R. (4th) 439, 17 C.H.R.R. D/87, 92 C.L.L.C. 17,033 (S.C.C.).

ants in male locker rooms might perhaps qualify as being necessary for reasons of public decency.<sup>294</sup>

If a legitimate practice meeting the BFOQ test did exist, it would be found legal under our human rights laws and no modifications to the seniority system or provision would be required. If the BFOQ defence failed, however, the discriminatory provisions would be invalidated for everyone. In the locker room situation, for example, the separate seniority units for female and male attendants would be abolished, to be automatically replaced by a combined seniority list for both sexes.

### (3) Indirect Discrimination Under Human Rights Laws

In O'Malley v. Simpsons-Sears Ltd.<sup>295</sup> in 1985, the Supreme Court of Canada established that discrimination does not have to be either intentional or direct to be illegal under human rights legislation. Indirect (or adverse effect) discrimination is also prohibited under these laws, the Court ruled, whether or not their texts specifically says so.

No cases have yet been reported in Canada involving complaints of indirect discrimination due to seniority under

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<sup>294</sup> McKale v. Lamont Auxiliary Hospital (1986), 8 C.H.R.R. D/3659 (Alta. Bd. of Inquiry), aff'd (1987) 8 C.H.R.R. D/4038, 37 D.L.R. (4th) 47, 87 C.L.L.C. 17,028 (Q.B.); Reynolds v. B.C. Mental Health Society (1992), 16 C.H.R.R. D/499 (B.C.C.H.R.).

<sup>295</sup> supra note 256 at 549-50.

human rights laws.<sup>296</sup> If and when complaints are laid on the basis of the adverse impact of seniority on women, the legal questions which would arise would be the following:

- What is indirect or adverse effect discrimination, and does the unequal treatment of women by seniority systems constitute indirect or adverse effect discrimination on the basis of sex?
- If seniority practices do constitute indirect discrimination on the basis of sex, what defences can be presented against such complaints?
- Do seniority practices which discriminate against women qualify under those defences? and
- If all or some of these seniority practices amount to illegal discrimination, what legal remedies are possible?

These are the issues we will be dealing with in the rest of this section.

a) **Evidence of Indirect or Adverse Effect Discrimination in the Treatment of Women Under Seniority Systems**

In O'Malley, the Supreme Court described indirect or adverse effect discrimination as follows:

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<sup>296</sup> The Renaud case (supra note 258) has seniority incidences which we will examine later in this chapter in the context of the duty of accommodation.

[Indirect or adverse effect discrimination] arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the workforce.<sup>297</sup>

Although this description focusses on employers, we saw earlier that unions can also be held liable under human rights legislation.<sup>298</sup> As discrimination due to the nature of seniority provisions generally has its origin in collective agreements, complaints would likely be filed against unions as well as employers in most instances.

The O'Malley definition requires that women who file complaints to the effect that seniority discriminates against them in indirect ways demonstrate two things. First, they must show that they have a "special characteristic" which causes seemingly neutral seniority practices to have adverse effects on them. Secondly, they must prove that these adverse effects occur "upon a prohibited ground", meaning that the women are experiencing them because of their sex.

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<sup>297</sup> Supra note 256 at 551.

<sup>298</sup> See supra note 281 and accompanying text. On the extent of unions' responsibility, see Renaud, supra note 258; Gohn v. Domtar Inc. (1990), 12 C.H.R.R. D/161, 90 C.L.L.C. 17,027 (Ont. Bd. of Inquiry) aff'd (1992), 89 D.L.R. (4th) 305, (sub nom. O.P.E.I.U., Local 267 v. Domtar Inc.) 16 C.H.R.R. D/479, 92 C.L.L.C. 17,015 (Ont. Div. Ct.). Also see Lynk & Ellis, supra note 194.

The prototype for the "special characteristic" argument was the U.S. case of Griggs v. Duke Power Co.,<sup>299</sup> in which this principle was initially developed. In Griggs, it was found that requiring a high school diploma and the successful completion of specific intelligence and mechanical aptitude tests to gain access to some jobs was discriminatory because it excluded a disproportionate number of black candidates. The "special characteristics" of Blacks which caused these results were that they were less likely to have a high school diploma and tended to do significantly less well on these particular tests.

In our case, there are two special characteristics which cause women to be adversely affected when unmodified seniority is used for promotions, transfers, benefits, layoffs and recalls: 1) women have less seniority than men; they are therefore automatically disadvantaged by its use; and 2) female workers tend to be ghettoized in inferior positions; seniority traps them in these ghettos and prevents those who escape from gaining secure holds in better positions. The overall result, as we saw in Chapter II, is that current seniority practices undermine women's efforts to gain financial independence and reinforce their inferior position in the labour market.

Demonstrating that the adverse effects women suffer because of seniority are "upon a prohibited ground", which is sex,

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<sup>299</sup> 401 U.S. 424, 91 S. Ct. 849, 28 L.Ed.2d 158 (1971) [hereinafter Griggs].

appears upon first consideration to be an easy task. The statistics we examined in Chapter II clearly proved that it is women, and not men, who drop out of the labour market to care for children and other family members, thereby forfeiting their seniority rights; that it is women, and not men, who are segregated into the worst positions, as a result of which they are most susceptible to being trapped in inferior positions by narrow seniority units and to being laid off from "male" occupations in which they accumulated little seniority because they could not enter them until recently.

Before 1989, these facts would not have sufficed to establish discrimination on the ground of sex. Until then, the ruling decision on the subject was Bliss v. Canada (Attorney General),<sup>300</sup> a case brought under the Canadian Bill of Rights of 1960 in which the Supreme Court found that discrimination based on pregnancy was not discrimination by reason of sex. Part of the Court's tortuous reasoning - which was a classic example of the failings of the formal equality rule - was that as not all women get pregnant, this was not discrimination between women and men but between pregnant and non-pregnant women. As not all women are harmed by seniority provisions - we saw in Chapter I that only a minority of Canadian workers of either sex are covered by seniority clauses - a Bliss-like test

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<sup>300</sup> [1979] 1 S.C.R. 183, 92 D.L.R. (3d) 417, 23 N.R. 527 [hereinafter Bliss].

would have made it impossible to establish that discrimination due to seniority was discrimination on the basis of sex.

Bliss was overturned in 1989 by Brooks v. Canada Safeway Ltd.,<sup>301</sup> which concerned a complaint under the Human Rights Act of Manitoba. Abandoning the abstract and formalistic attitude it had taken in Bliss, the Supreme Court adopted a concrete, common sense approach in Brooks, asking:

In retrospect, one can only ask - how could pregnancy discrimination be anything other than sex discrimination? The disfavoured treatment... flowed entirely from their state of pregnancy, a condition unique to woman. They were pregnant because of their sex. Discrimination on the basis of pregnancy is a form of sex discrimination because of the basic biological fact that only women have the capacity to become pregnant.<sup>302</sup>

In addition to making the point that not all women had to be affected, the Brooks decision rejected the contention that differences of treatment based on pregnancy were not discrimination because pregnancy was a voluntary state which should not entitle one to employment-related benefits. The Court denied this in strong terms:

It is to state the obvious to say that pregnancy is of fundamental importance in our society... If the medical condition associated with procreation does not provide a legitimate reason for absence from the workplace, it is hard to imagine what would provide such a reason...

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<sup>301</sup> Supra note 256.

<sup>302</sup> Ibid. at 1242.

Furthermore, to not view pregnancy in this way goes against one of the purposes of anti-discrimination legislation. This purpose... is the removal of unfair disadvantages which have been imposed on individuals or groups in society. Such an unfair disadvantage may result when the costs of an activity from which all of society benefits are placed upon a single group of persons...<sup>303</sup>

Much of the same could be said for women's absences from their paid jobs to care for children and other family members. A British employment appeal tribunal rejected the "voluntary withdrawal" argument in judging that a rule which limited entry to an occupation to workers aged less than 28 discriminated against women because their absences to give birth and care for their children did not leave them enough time to qualify for the jobs.<sup>304</sup> The same U.K. tribunal also upheld the discrimination claim of a woman against an employment contract requiring everyone to work full-time, which prevented her from combining her paid work and her child-rearing responsibilities.<sup>305</sup>

The one remaining question which Brooks did not settle was whether an employment rule or practice could amount to discrimination by reason of sex if the group which was adversely affected included men as well as women. This is important in the case of seniority because some men, for example stay-at-home

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<sup>303</sup> Ibid. at 1237-38.

<sup>304</sup> Price v. Civil Service Commission, [1978] 1 All E.R. 1228 (Employment Appeal Trib.).

<sup>305</sup> Home Office v. Holmes, [1984] 3 All E.R. 549 (Employment Appeal Trib.).

fathers and native men who leave their "official" jobs on a seasonal basis to carry on traditional activities such as hunting, fishing and trapping, also suffer negative effects because of seniority.

This issue was clarified in Janzen v. Platy Enterprises Ltd.,<sup>306</sup> which the Supreme Court released at the same time as Brooks. The approach taken by the Court in Janzen was a very broad one which considered the social context of the discriminatory practice (sexual harassment) and sought to determine whether it was part of the system which maintains the power imbalance between the sexes in our society. Having established that "in the present sex stratified labour market, those with the power to harass sexually will predominantly be male and those facing the greatest risk of harassment will tend to be female",<sup>307</sup> the Court concluded that sexual harassment was discrimination on the basis of sex in spite of the fact that not all female employees had been harassed and that men could also be harassed sexually.

Under such a broad approach, which is called "purposive" because it interprets equality provisions in a concrete manner which seeks to achieve the purpose of the law instead of looking for ways to minimize its impact, and which is also described as

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<sup>306</sup> Supra note 256.

<sup>307</sup> Ibid. at 1284.

"contextual" because it places the parties in the global social and political context in which they experience disadvantages, there is little doubt that the discrimination women suffer because of seniority provisions would qualify as discrimination by reason of sex.

Once it has been demonstrated that seniority provisions constitute discrimination on the basis of sex, the onus is on the employer (and the union) to show that the practices which have an adverse impact on women are justified under the law.

b) Defence Against Complaints of Indirect Discrimination On the Basis of Sex Due to Seniority Practices

The legal justifications of discriminatory employment practices were the subject of two major Supreme Court judgments in recent years. In Bhinder v. Canadian National Railway,<sup>308</sup> decided at the same time as O'Malley in 1985, the Supreme Court set out similar rules for indirect discrimination to those we saw above for direct discrimination: if the practices met the bona fide occupational qualification (BFOQ) test, they would be deemed to be non-discriminatory and no modifications would be required.

This decision, which would have made it impossible to obtain judicial modifications to seniority systems in favour of

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<sup>308</sup> Supra note 258.

women if these systems were found to be legitimate job requirements, was reversed by the 1991 Supreme Court judgment in Central Alberta Dairy Pool v. Alberta (Human Rights Commission).<sup>309</sup> In cases of indirect or adverse effect discrimination, the Court ruled in Dairy Pool, the test to be applied is not the BFOQ defence, but a double-barrelled "defence of accommodation" which requires:

- First, that the employment practice or rule be rationally connected to the performance of the job, meaning that it must be "honestly made for sound economic or business reasons (and) equally applicable to all to whom it is intended to apply";<sup>310</sup>
- Second, that the employer must have accommodated the affected employee(s) to the point of undue hardship by taking reasonable steps to diminish or prevent the harmful effects of the practice or rule.<sup>311</sup> This includes that the impact of the practice or rule on those it harms must have been considered, and that there was no reasonable alternative to it.<sup>312</sup>

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<sup>309</sup> Supra note 258.

<sup>310</sup> O'Malley, supra note 256 at 551; reiterated in Dairy Pool, supra note 258 at 520.

<sup>311</sup> O'Malley, ibid. at 555; Dairy Pool, ibid. at 515, 519-21.

<sup>312</sup> Dairy Pool, ibid. at 528 (Sopinka J. minority judgement); reiterated in Renaud, supra note 258 at 981 (Sopinka J. for the unanimous court).

c) Determination of Whether Seniority Practices Which Harm Women Can Be Exonerated Under the Defence of Accommodation

Our next step consists of determining whether the discriminatory seniority practices we described in Chapter II (except for those relating to seniority-based pay and benefits, which are exempted by law) can be justified under the "defence of accommodation", that is whether 1) these practices are rationally connected to the performance of the job, and 2) employers have fulfilled their duty to accommodate employees who are adversely affected. For this purpose, we will separate these harmful practices into two groups which we will treat differently.

The first group includes all the most basic uses of the seniority principle in a competitive context: promotions, demotions and transfers, layoffs, bumping and recalls to work, job or work assignments, shift preference, selection of days off, distribution of overtime work and training opportunities, choice of vacation time, parking privileges, access to company housing and so on... Because we concluded, at the end of Chapter II, that we would not seek to invalidate the seniority principle itself because it is still better for women than its alternative, we will not challenge these practices under the "rational connection" rule, but will consider them only in the context of the duty to accommodate, to determine whether

modifications could be made to the seniority principle itself to correct its adverse effects on women.

(In any event, the Supreme Court decision in McKinney v. University of Guelph<sup>313</sup> strongly suggests that it would find the seniority principle itself - though not necessarily specific seniority practices - to be rationally connected to the performance of the job. In McKinney, to which we will return later in this chapter, the Court wrote that mandatory retirement "has become part of the very fabric of the organization of the labour market in this country",<sup>314</sup> a fabric which also included deferred compensation, pension plans and other benefits, and seniority. Some of the advantages of such a system, according to the Court, were periodic instead of continuous reviews of performance, the possibility of long-term planning by both employer and employees, and "a 'due process' scheme achieved through seniority rules".<sup>315</sup> [emphasis added])

The second group of harmful practices consists of subsidiary seniority practices which could be abolished without affecting the basic seniority principle. These include unjustified barriers between seniority units which prevent women from

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<sup>313</sup> [1990] 3 S.C.R. 229, 76 D.L.R. (4th) 545, 13 C.H.R.R. D/171 [hereinafter McKinney cited to S.C.R.].

<sup>314</sup> Ibid. at 295; see also at 302, 306-307.

<sup>315</sup> Ibid. at 314.

gaining access to better positions; unnecessarily small or irrational seniority units which also trap female workers in inferior jobs; and seniority-related benefits which give inferior rewards to women for the same length of service. We will first examine these practices to find out whether they are "rationally connected to the performance of the job".

i. Rational Connection to the Performance of the Job

As mentioned earlier, a practice or rule is rationally connected to the performance of the job if it is honestly made for sound economic or business reasons, and if it is equally applicable to all to whom it is intended to apply. Before applying the "rational connection" test, it is important to know that the consequences of failing that test are presently unclear.

The problem, as Beatrice Vizkelety pointed out,<sup>316</sup> is that the wording of Justice Wilson's majority decision in Dairy Pool is so ambiguous that it may have robbed the "rational connection" test of any significance. Wilson stated that:

...the appropriate remedy depends upon the type of discrimination involved... where a rule has an adverse discriminatory effect, the appropriate response is to uphold the rule in its general application and consider whether the employer could have

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<sup>316</sup> vizkelety, supra note 259 at 349.

accommodated the employee adversely affected without undue hardship.<sup>317</sup>

Should this be interpreted to mean that in cases of adverse effect discrimination the contested rule is always upheld and the only remedy is accommodation of individual employees, Vizkelety notes, "remedies would become unduly restricted and inefficient in discrimination law"<sup>318</sup> and leading cases such as Action Travail<sup>319</sup> and Griggs<sup>320</sup> in which discriminatory aptitude tests were struck down, would have had little or no significance. As such an interpretation of "rationally connected" would rob it of all meaning, however, it must be assumed that practices or rules which fail to pass this test would at the very least become invalid for those for whom they have adverse consequences.

The seniority features which are least likely to pass the rational connection test, because they were not adopted honestly or for sound economic or business reasons, are those which find their genesis in past discrimination and were never meant to serve a legitimate business purpose. This would include, for example: undesirable seniority units - short and containing few jobs and job levels - originally created with the specific

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<sup>317</sup> Dairy Pool, supra note 258 at 515, 517.

<sup>318</sup> Vizkelety, supra note 259 at 349.

<sup>319</sup> supra note 165.

<sup>320</sup> supra note 299.

intention of keeping "female", or "native", or "black" jobs out of normal lines of promotion; separate seniority units for similar or closely related occupations which were specifically segregated in order to give greater benefits to white male employees; and barriers to moves between seniority units such as the loss of all previous seniority, or tests, or requirements of starting in the bottom job, that had no relation to the work but were meant to maintain some groups in an inferior position.

Even if it could not be proven that the seniority features described above were adopted in bad faith with an intent to discriminate, they could still be found illegal - and be invalidated for those on whom they have adverse effects - on the sole ground that they do not serve sound business purposes. The "sound business reasons" test could also be used to invalidate clearly unnecessary seniority units or barriers between units which were not adopted for discriminatory motives but which nevertheless prevent female and other employees from disadvantaged groups from gaining access to better jobs. We saw in Chapters I and II that these types of seniority obstacles, which were most often the outcome of historical events such as union or company mergers, are still common today.

In all cases where seniority units are smaller than is actually required by genuine differences in job qualifications, employers might argue that they serve a sound economic reason

because, as we saw in Chapter I, smaller units tend to cost less in training, job interviews and paperwork, and to provide a greater guarantee that candidates for jobs will be competent. Similarly, employers could say that smaller bumping zones are good business because they entail less disruption of operations and also give a greater guarantee of competence.

The first flaw in these arguments is that they only present one side of the story. The other side, as we saw in Chapter I, is that unions deny that small seniority units and bumping zones are more efficient. Such practices may save money in the short term, they concede, but are inefficient in the longer term because they discourage worker flexibility and the development of new skills.

Secondly, the facts that small units and zones may entail less disruption and lower costs have no specific relation to the work itself, and are therefore not rationally connected to the performance of the job. If such extrinsic arguments were acceptable as a defence, even obviously discriminatory means of keeping women segregated, such as the spurious aptitude tests struck down in Action Travail,<sup>321</sup> would be acceptable if they resulted in the maintenance of smaller seniority units and zones (or if they kept women out of the firm altogether, as some women will get pregnant and maternity is costly and disruptive).

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<sup>321</sup> Supra note 165.

Finally, the division of employees into irrational or unnecessarily small units and zones was not done through an orderly process according to rules which were "equally applicable to all" employees. On the contrary, as we saw, it usually happened as a result of historical accidents so that the divisions were done in a haphazard manner. The only consistency there seems to have been was in producing smaller and less advantageous seniority units for jobs occupied by women and other disadvantaged groups.

Other seniority features which are not "equally applicable to all" are seniority-based benefits which give different rewards to comparable groups of employees for the same length of service. The most common instance of this, as we saw in Chapter II, involves having more steps in salary scales for predominantly female jobs than for comparable predominantly male jobs, with the result that it takes women longer than men to reach the maximum salary for their group.

This must be distinguished from situations where all employees in comparable jobs receive the same pay or benefit increments for the same length of service. Women still benefit less, because they have less seniority, but the cause of their disadvantage is the equal application of the seniority principle itself, not the unequal application of a seniority rule. As we

saw earlier, bona fide seniority-based pay and benefits are specifically exempted under human rights and equal pay laws.

In spite of the important difference between these two types of systems, the Ontario Pay Equity Commission issued a statement in 1988 to the effect that it would not consider different pay scales for male and female jobs to be discriminatory "when the maximum salary of the female job class is equal to the maximum salary of the male comparator",<sup>322</sup> even if the minimum salaries for the women's jobs were lower and women had to go through more salary steps to get to the maximum. We agree with Carl Cuneo that the Commission was wrong in judging that such salary schemes were bona fide and "gender-neutral".<sup>323</sup>

Another example of a seniority rule which is not "equally applicable to all" is a provision which protects seniority rights during absences from work due to illness, but excludes absences related to pregnancy. As this practice resembles the facts in Brooks,<sup>324</sup> in which the Supreme Court held that a disability plan denying benefits to pregnant employees was illegal because it discriminated on the basis of sex, it would be unlikely to pass the "rational connection" test at this time.

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<sup>322</sup> Cited in C.J. Cuneo, Pay Equity - The Labour-Feminist Challenge (Toronto: Oxford University Press, 1990) at 176.

<sup>323</sup> Ibid.

<sup>324</sup> Supra note 256.

On the other hand, the "rational connection test" is not strong enough to filter out more legitimate practices which also have the effect of keeping women in segregated seniority units or zones. One example experienced at Bell Canada, to which we will return in Chapter V, is the requirement of having a community college diploma in electronics to qualify for positions as technicians. The effect of this requirement is to create an almost impassable barrier between the seniority unit of telephone operators and clerks, who are mainly female, and the seniority unit of the better-paid, mostly male technicians.

Our conclusion on this section is that the "rational connection" test should have the effect of filtering out most illegitimate seniority practices which have adverse effects on women, while leaving intact bona fide applications of the seniority rule. In cases involving illegitimate seniority units which perpetuated past discrimination that were dealt with by American courts in the 1960s and 1970s, the usual outcome was an order forcing the use of plant-wide seniority in all competitions involving affected employees from disadvantaged groups who were applying for a job in a more desirable "white" or "male" department.<sup>325</sup> In competitions involving only white males, the old seniority units would continue to be used unless they were changed in subsequent collective agreements.

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<sup>325</sup> Quarles, supra note 168; Papermakers, supra note 170.

ii. Duty of Accommodation to the Point of Undue Hardship

Once a seniority rule or practice has been found to be rationally connected to the performance of the job, the employer must still demonstrate that it has fulfilled its duty to accommodate, meaning that it has considered the impact of the practice on those whom it affects adversely and taken reasonable steps, to the point of undue hardship, to diminish or prevent these harmful effects, including establishing that no reasonable alternative exists. In this section, we will analyze the nature and extent of the duty to accommodate to find out whether it could be used to obtain modifications to seniority systems to mitigate its effects on women.

Although the duty to accommodate can theoretically arise in all situations of adverse effect discrimination, most of the cases involving accommodation which have been heard so far in Canada have dealt with the problem of employees whose work schedules conflicted with their religious beliefs. O'Malley<sup>326</sup> was such a case. After ruling (as we saw earlier) that people had the right to be freed of adverse effects caused by discrimination, the O'Malley Court went on to recognize the necessity of a corresponding obligation:

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<sup>326</sup> O'Malley, supra note 256. For background on the duty to accommodate, see I.F. Ivankovich, "The 'Religious' Employee and Reasonable Accommodation Requirements" (1987-88) 13 Can. Bus. L.J. 313; Gohm, supra note 298 at Board of Inquiry.

...a natural corollary to the recognition of a right must be the social acceptance of a general duty to respect and to act within reason to protect it... In this case... the employee's right requires reasonable steps towards an accommodation by the employer...

Accepting the proposition that there is a duty to accommodate imposed on the employer, it becomes necessary to put some realistic limit upon it. The duty... is to take reasonable steps to accommodate the complainant, short of undue hardship: in other words, to take such steps as may be reasonable to accommodate without undue interference in the operation of the employer's business and without undue expense to the employer.<sup>327</sup>

This left important issues unclear: What factors should be considered in measuring "undue interference" and "undue expense"? How much hardship were employers expected to bear? Did the duty to accommodate apply to labour unions? Justice Bertha Wilson, writing for the majority of the Supreme Court in Dairy Pool partly answered as follows:

I do not find it necessary to provide a comprehensive definition of what constitutes undue hardship but I believe it may be helpful to list some of the factors that may be relevant to such an appraisal... financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. The size of the employer's operation may influence the assessment... Where safety is at issue both the magnitude of the risk and the identity of those that bear it are relevant considerations.<sup>328</sup>

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<sup>327</sup> Ibid. at 554-55.

<sup>328</sup> Supra note 258 at 520-21. For comments on Dairy Pool, see Baker, supra note 259; J.A. Mooney, "L'obligation d'accommodement de l'employeur dans les cas de discrimination suite à l'arrêt Central Alberta Dairy Pool" (1991) 51 R. du B. 661; Vizkelety, supra note 259.

While this was helpful to some degree, it raised a new set of questions: Could this mean that collective agreements were inviolate, even if they contained provisions which constituted adverse effect discrimination? What about low employee morale caused by discriminatory attitudes or the desire to keep the benefits acquired through discrimination? With such a bald list of factors, and no clear indication of their meaning or of the weight to be attributed to them, predictions on the outcome of any particular case remained impossible.

Many of these remaining points were finally tackled by the Supreme Court in 1992 in Renaud v. Central Okanagan School District No. 23,<sup>329</sup> a case referred to as "the first Canadian human rights award to have considered a seniority system in the context of a discrimination complaint".<sup>330</sup> It involved the right of Larry S. Renaud, a school custodian who is a Seventh-day Adventist, to be given a work schedule which did not conflict with his religious beliefs, even if this required an exception to the collective agreement because it meant transferring him to a position which he did not have enough seniority to secure.

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<sup>329</sup> supra note 258.

<sup>330</sup> Lynk & Ellis, supra note 194 at 272.

The unanimous decision, written by Justice John Sopinka, in which the Supreme Court held that neither the employer nor the union had discharged its duty to accommodate, included the following important clarifications:

- The issue of accommodation is to be approached in a "purposive manner, attempting to provide equal access to the workforce to people who would otherwise encounter serious barriers to entry".<sup>331</sup>
- Such a commitment implies that "[m]ore than mere negligible effort" is required to satisfy the duty to accommodate.<sup>332</sup> "Undue hardship" infers that some hardship is acceptable, but "measures that occasion undue interference with the employer's business or undue expense are not required".<sup>333</sup>
- The inclusion of the adverse effects discrimination in the provisions of a collective agreement does not relieve the employer or the union of the duty to accommodate. However, "Substantial departure from the normal operation of the conditions and terms of employment in the collective agreement may constitute undue interference in the operation of the employer's business".<sup>334</sup> [emphasis added]

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<sup>331</sup> Renaud, supra note 258 at 983.

<sup>332</sup> Ibid. at 984.

<sup>333</sup> Ibid. at 982.

<sup>334</sup> Ibid. at 987.

- Unions have a duty to accommodate if they are a party to discrimination. They are assumed to be such a party, and to be equally responsible, when the discriminatory rule is a provision in the collective agreement.<sup>335</sup>
- Employees' objections "must be considered" in assessing the employer's duty to accommodate if they are "based on well-grounded concerns that their rights will be affected" in a substantial way. They are not relevant if they are based "on attitudes inconsistent with human rights", such as "the view that the integrity of a collective agreement is to be preserved irrespective of its discriminatory effect".<sup>336</sup>  
[emphasis added]
- The effect on other employees is the primary factor in assessing a union's duty to accommodate:

The duty to accommodate should not substitute discrimination against other employees for the discrimination suffered by the complainant. Any significant interference with the rights of others will ordinarily justify the union in refusing to consent to a measure which would have this effect. Although the test of undue hardship applies to a union, it will often be met by a showing of prejudice to other employees if proposed accommodating measures are adopted... this test is grounded on the reasonableness of the measures to remove discrimination which are taken or proposed.<sup>337</sup> [emphasis added]

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<sup>335</sup> Ibid. at 990.

<sup>336</sup> Ibid. at 988.

<sup>337</sup> Ibid. at 991-92.

The general thrust of these clarifications bodes well for women's chances of obtaining modifications to seniority systems which discriminate against them. Positive signs include the court's intention to take a "purposive" approach to trying to provide equal access, as well as the findings that a significant effort and some hardship is expected of employers and that neither employee objections nor collective agreements are absolute bars to accommodation. Most positive of all is the fact that Renaud did modify the terms of a seniority system so that it would no longer discriminate against an employee.

In spite of this, it is still difficult if not impossible to predict the outcome of a case involving changes to seniority systems so that they would no longer discriminate against women. This is because cases involving women and seniority would often involve a large number of actual or potential plaintiffs, so that the impact in terms of costs and interference with normal procedures would be substantially greater. Even more important, a complaint involving women would pose a much more dangerous threat to the seniority rights of other, male employees, giving rise to "well-grounded concerns that their rights will be affected" in a substantial way.

As we saw above, such concerns "must be considered" in assessing the employer's duty to accommodate and will "ordinarily" justify a union's refusal to go along with the requested

accommodation. The real issue behind those words, of course, is the choice the court must make between women's right to modified seniority systems which do not discriminate against them, and the right of their male co-workers to maintain their established seniority entitlements.

In examining this issue, George Cooper and Richard Sobol started with the reasons why organized labour was so insistent on seniority systems.<sup>338</sup> Their oft-cited three main reasons for this were: 1) seniority reduces managerial arbitrariness in allocating work; 2) seniority provides unions with an instrument for determining its position in case of disputes among its members, thereby avoiding internal conflicts and accusations of union arbitrariness; and 3) seniority allows employees to predict their future employment position.<sup>339</sup>

Cooper and Sobol then pointed out that neither of the first two considerations were affected by modifications to seniority practices to eliminate their prejudicial impact on some groups of workers. The only effect was on the third consideration, which was upset because the accrued seniority expectations of incumbent white male employees would be disturbed.

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<sup>338</sup> G. Cooper & R.B. Sobol, "Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion" (1969) 82 Harv. L. Rev. 1598.

<sup>339</sup> Ibid. at 1604.

According to Cooper and Sobol, these expectancy interests did not adequately justify the prejudicial impact of seniority on the workers who were discriminated against because: seniority "expectations" are merely a hope, the realization of which can be delayed or prevented by many variables; seniority rights are not vested property rights, but can be altered by agreement between the company and the union; in discriminatory seniority systems, the expectancies of incumbent white male employees are expectancies of future additional benefits from the past discrimination, to which they may have contributed through their union's bargaining of discriminatory seniority arrangements; even where workers have had no part in the discrimination, their accumulated expectancies are to some extent illegitimate because they are tainted by past discrimination.<sup>340</sup>

We agree with these arguments, as well as with Cooper and Sobol's conclusion that as long as the labour market is such that the number of jobs available does not increase much or at all, implementing human rights legislation necessarily involves the restriction of the employment opportunities of white male workers to the advantage of those who have been discriminated against.<sup>341</sup> This same realization led the U.S. Supreme Court to quote the following approvingly:

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<sup>340</sup> Ibid. at 1605-1606.

<sup>341</sup> Ibid. at 1606.

If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed.<sup>342</sup>

It was the same preoccupation which led the Quebec Human Rights Commission, in June 1993, to adopt a position paper concluding that in spite of the great importance of seniority, when seniority conflicts with measures to correct discrimination the "priority of priorities" should be given to the anti-discrimination measures, otherwise remedies against systemic discrimination will have little value:

...toute intervention au niveau de l'ancienneté est délicate, puisqu'il s'agit d'un véritable système emportant des droits de priorités qui peuvent se répercuter par l'enclenchement d'un processus de supplantation. Par contre, comme le propre des mesures préférentielles de redressement des programmes d'accès à l'égalité est aussi de conférer des droits prioritaires afin de corriger les effets de la discrimination passée, ceux-ci ne peuvent avoir d'effets que s'ils prévalent sur l'ancienneté. Il en va de l'efficacité des solutions à la discrimination systémique: en cas de conflit, la priorité des priorités devrait revenir aux mesures de redressement de la discrimination sur l'ancienneté; c'est justement par l'effet de la discrimination passée que les membres des groupes-cibles ont été privés de la possibilité d'accumuler ce temps de service attributif de droits de préséance.<sup>343</sup>

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<sup>342</sup> From Bethlehem Steel, supra note 220; cited by the Supreme Court in Franks, supra note 217 at 1269.

<sup>343</sup> Bosset, Coutu & Drapeau, supra note 162 at 29.

d) Legal Remedies in Findings of Indirect Discrimination by Seniority Systems

The purpose of this section is to discuss legal considerations concerning the remedies which tribunals or courts could impose when they find that a seniority practice is rationally connected to the job, but that the employer has failed in its duty to accommodate the affected employees. These considerations will include the general way in which tribunals or courts should approach these remedies, the powers conferred by human rights laws with regard to remedies, and the state of Canadian law on the subject of retroactive seniority. Practical remedies for particular types of seniority discrimination will be the subject of Chapter V.

i. General Approach to Remedies in Seniority Cases

The advice of those who have tried to design remedies to correct discrimination by seniority systems is to remember that in seniority - as in taxes - details are everything, so that remedies must be specific and practical:

Because of the complexity of labor markets, it seems clear that remedies [in seniority cases] cannot be general. Rather, they must take account of many variables, such as the number of minorities or women affected, the number of white [male] incumbents, the age of the affected persons, economics of the industry, availability of alternatives, tradition, technology, availability of SUB [supplementary employment benefits] plans, degree of product mix, job skills, method of wage payment, wage structure considerations, and geographic proximity of plants (if there are more than one). In sum, the remedy must be concerned with

the facts and the actual problems involved in individual cases.<sup>344</sup>

Experts have also asserted that by far the best remedies in seniority matters are voluntary ones tailored by unions and management, "the two parties most familiar with all the variables that need consideration".<sup>345</sup> In their decades of experience with such cases, U.S. courts have learned the importance of "relying whenever possible on remedial plans proposed by the parties themselves, especially after negotiation".<sup>346</sup>

On the other hand, according to Alfred W. Blumrosen, a former official of the U.S. Equal Employment Opportunity Commission (EEOC), the courts' role should consist of much more than simply approving whatever the employers and unions are willing to do:

Whether equal opportunity is afforded in any given situation is a question of law. It cannot be delegated to the very parties - labor and management - who have imposed racist [and sexist] restraints on promotional opportunities in the past.<sup>347</sup>

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<sup>344</sup> S. Behman, "The Affirmative Action Position", (1976) 27 Lab. L.J. 490 at 495.

<sup>345</sup> Ibid. at 496.

<sup>346</sup> Joseph, supra note 162 at 398.

<sup>347</sup> Blumrosen, supra note 171 at 181.

ii. Remedial Powers Under Human Rights Laws

All of Canada's human rights laws specifically empower human rights tribunals or courts to issue orders against those who are engaging in or have engaged in a discriminatory practice to ensure that the discriminatory practice ceases, that the victim is given access to the opportunities that were illegally denied to her or him, and that the victim is compensated for the losses and expenses she or he has suffered as a result of the discriminatory practice.<sup>348</sup>

These powers were mainly designed to correct discriminatory practices in isolated cases where individual victims are clearly identifiable. In many instances, however, as we saw in Part II, discriminatory seniority structures are only one component of systemic discrimination patterns involving workplaces rife with unofficial job ghettos reflecting current or past discrimination against women as a group in hiring and promotion practices. The failure to take account of women's inferior capacity to accumulate seniority, which leads to their being chronically disadvantaged in competitive seniority situations, is also a systemic group problem and not an individual one.

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<sup>348</sup> See supra note 280 for the following: C.H.R.A. at s. 53(2); B.C.H.R.A. at s. 17(2), as am. by S.B.C. 1992, c. 43, s. 11(a); I.R.P.A. at s. 31, as am. by S.A. 1990, c. 23, s. 12; S.H.R.C. at s. 31(7); M.H.R.C. at s. 43(2); O.H.R.C. at s. 41; Q.C.H.R. at ss. 79-82; N.B.H.R.A. at s. 20(6.2), as am. by S.N.B. 1985, c. 30, s. 13; N.S.H.R.A. at s. 34(8); P.E.I.H.R.A. at ss. 27(3), 28(1); N.H.R.C. at s. 28(b).

The only way to break entrenched patterns of segregation is through the adoption of employment equity (or affirmative action) programs which impose on employers a positive duty to achieve a reasonable representation of women at all levels of their workplaces within a specific period of time; this involves setting numerical targets for underrepresented groups which are to be met according to specific timetables. Compensating women for having less seniority than men requires positive adjustments for an indefinite period.

The Supreme Court of Canada approved a human rights tribunal for ordering an employment equity program in Action Travail because "[t]he prevention of systemic discrimination will reasonably be thought to require systemic remedies."<sup>349</sup> Also, according to the Court,

An employment equity program... is designed to break a continuing cycle of systemic discrimination. The goal is not to compensate past victims or even to provide new opportunities for specific individuals who have been unfairly refused jobs or promotion in the past, although some such individuals may be beneficiaries of an employment equity scheme. Rather, an employment equity program is an attempt to ensure that future applicants and workers from the affected group will not face the same insidious barriers that blocked their forebears.<sup>350</sup>

The federal human rights act, as well as the acts of all provinces, contain sections which permit employment equity or

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<sup>349</sup> Supra note 165 at 1145 (citing MacGuigan J.).

<sup>350</sup> Ibid. at 1143.

affirmative action programs.<sup>351</sup> These were meant to ensure that voluntary programs would not be struck down as constituting reverse discrimination. In addition, the federal, British Columbia, Saskatchewan, Manitoba and Quebec acts specifically empower tribunals or courts to order employment equity programs in appropriate circumstances, and the laws of all the other provinces except Alberta are worded so broadly that they are also compatible with the ordering of such programs.<sup>352</sup>

### iii. Retroactive Seniority Under Canadian Law

In Chapter III, dealing with seniority and the law in the United States, we saw that the main U.S. case relating to retroactive or constructive seniority was Franks v. Bowman Transportation Co.<sup>353</sup> In that decision, the Supreme Court ruled that those who had personally suffered discrimination in hiring were entitled to reinstatement with retroactive seniority from the time they would have been hired if they had not been discrimi-

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<sup>351</sup> See supra note 280 for the following: C.H.R.A. at s. 16; B.C.H.R.A. at s. 19(2), 19.1, as am. by S.B.C. 1992, c. 43, s. 12; I.R.P.A. at s. 11.1, as am. by S.A. 1985, c. 33, s. 5; S.H.R.C. at s. 47; M.H.R.C. at s. 11; O.H.R.C. at s. 14; Q.C.H.R. at s. 86; N.B.H.R.A. at s. 13(1); N.S.H.R.A. at ss. 6(i), 25, as am. by S.N.S. 1991, c. 14, s. 1; P.E.I.H.R.A. at s. 20; N.H.R.C. at s. 19.

<sup>352</sup> See supra note 280 for the following. Specific provisions on ordering employment equity programs are found in: C.H.R.A. at s. 53(2)(a); B.C.H.R.A. at s. 17(2)(c), as am. by S.B.C. 1992, c. 43, s. 11; S.H.R.C. at s. 31(7)(a); M.H.R.C. at s. 43(2)(e); Q.C.H.R. at s. 88. General provisions which would allow the ordering of such programs, such as for example sections empowering tribunals or courts to "direct the party which contravened the Act to do anything that it ought to do to achieve compliance with the Act", are found in: O.H.R.C. at s. 41(1); N.B.H.R.A. at s. 20(6.2), as am. by S.N.E. 1985, c. 30, s. 13; N.S.H.R.A. at s. 34(8); P.E.I.H.R.A. at ss. 27(3), 28(1); N.H.R.C. at s. 28(v).

<sup>353</sup> supra note 217.

nated against. The Court reasoned that this remedy was necessary to fully compensate these victims and make them "whole".

This question is also settled in Canada. Many decisions rendered here awarded retroactive seniority to actual victims of discrimination.<sup>354</sup> In 1992, in Chapdelaine v. Air Canada<sup>355</sup> a Canadian Human Rights Review Tribunal reviewed these past decisions and overturned a lower-level tribunal's ruling to the effect that retroactive seniority should not be granted because it would affect the rights of third parties. A 1988 Quebec Human Rights Commission study went further, concluding that under that province's act, a tribunal has no choice but to order retroactive seniority once proof of lost seniority due to discrimination has been presented.<sup>356</sup>

The one encroachment on the "make whole" character of retroactive seniority which is found in some human rights acts (federal, Saskatchewan and Manitoba) is a prohibition from making orders "requiring the removal of an individual from a

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<sup>354</sup> Under the Canadian Human Rights Act: Erickson v. Canadian Pacific Express and Transport Ltd. (1986), 8 C.H.R.R. D/3942, 87 C.L.L.C. 17,005 (Cdn. Human Rights Trib.); Bhinder, *supra* note 258; under provincial human rights acts: Hamlyn v. Cominco Ltd. (1989), 11 C.H.R.R. D/333 (B.C. Human Rights Council); Dhaliwal v. British Columbia Timber Ltd. (1983), 4 C.H.R.R. D/1520 (B.C. Bd. of Inquiry); Rand v. Sealy Eastern Ltd. Upholstery Division (1982), 3 C.H.R.R. D/938 (Ont. Bd. of Inquiry).

<sup>355</sup> 15 C.H.R.R. D/22 (Cdn. Human Rights Review Trib.) [hereinafter Chapdelaine].

<sup>356</sup> P. Bosset, Possibilité d'accorder une ancienneté à titre rétroactif à des personnes victimes de discrimination dans l'embauche (art. 49 de la Charte) (Montreal: Commission des droits de la personne, 1988) at 8.

position if that individual accepted employment in that position in good faith."<sup>357</sup> In Chapdelaine, this was interpreted to mean that applicants who had been unfairly denied jobs could use their retroactive seniority to be placed at the top of recall lists, but that they could not bump current employees from their jobs.<sup>358</sup>

We disagree with such a general no-bumping rule because we believe that in situations involving persons who have personally been victims of discrimination, the "make whole" relief should always be complete. When exceptions are made, they leave the door open to flagrant injustices such as the one which occurred in the United States in Stotts.<sup>359</sup> In that case, as we saw in Chapter III, the U.S. Supreme Court held that when employees were threatened with layoffs, those who were entitled to retroactive seniority because they had personally been victims of discrimination could not use this seniority to avoid being laid off instead of white male employees, or even to be placed at the top of recall lists, because this would amount to illegal removal or displacement.

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<sup>357</sup> C.H.R.A., supra note 280 at s. 54(2)(a); S.H.R.C., supra note 280 at s. 31(10)(a); M.H.R.C., supra note 280 at s. 44(a).

<sup>358</sup> Chapdelaine, supra note 355 at D/49.

<sup>359</sup> Supra note 225. For more recent developments on retroactive seniority rights in the United States, see Carpenter, supra note 217.

The effect of that decision was to make a mockery of the "make whole" principle which the Supreme Court had declared in Franks<sup>360</sup> to be essential to the implementation of anti-discrimination laws. Even the United Steelworkers of America, which was a respondent in Franks, had strongly supported the "make whole" position as follows:

The only way a discriminatee [meaning an identifiable victim] can be made whole is to give him the seniority date he would have had but for the refusal to hire him... Unions and employees have favored seniority as the determinant of employee competition because it furnishes an objective and equitable basis for allocating employment opportunities. But the system remains equitable only if all employees are given their proper seniority measure. Equity does not exist if some employees have had their seniority artificially reduced by the employer's discriminatory behavior... When employees are discharged in violation of contract, unions invariably demand that they be reinstated without interruption of seniority, and arbitrators invariably grant that remedy...<sup>361</sup>

If situations resembling the facts in Stotts come before Canadian courts, we hope they will prove to be more consistent and more concerned with the rights of disadvantaged workers than their American counterparts.

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<sup>360</sup> Supra note 220.

<sup>361</sup> From the United Steelworkers of America's brief to the Supreme Court in Franks (supra note 217), as cited in G. Leshin, Equal Employment Opportunity and Affirmative Action in Labor-Management Relations: A Primer (Los Angeles: Institute of Industrial Relations, 1982) at A-21 and A-22.

**E. Women and Seniority Under Employment Equity Acts and Contractors Programs**

The federal Employment Equity Act<sup>362</sup> and the Federal Contractors Program have been in force since 1986, and the Quebec Contractors Program since 1989. Ontario's proposed Employment Equity Act, 1992<sup>363</sup> received Second Reading in June of 1993 and has a projected effective date of January 1, 1994.

**(1) Federal Employment Equity Act**

The federal Employment Equity Act applies to federal Crown corporations and to large employers (100 or more employees) within federal jurisdiction. It does not apply to the Public Service. The stated purpose of the Act is "to achieve equality in the work place" for women, aboriginal peoples, persons with disabilities and members of visible minorities.<sup>364</sup>

To achieve this, the Act provides that employers shall: 1) eliminate practices that constitute barriers for these groups; 2) institute positive policies and practices and make reasonable accommodation to ensure that persons from these groups achieve a just representation in all positions; 3) prepare employment equity plans with goals and timetables; and 4) submit each year

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<sup>362</sup> s.c. 1986, c. 31.

<sup>363</sup> Bill 79, An Act to Provide for Employment Equity for Aboriginal People, People With Disabilities, Members of Racial Minorities and Women, 2d Sess., 35th Leg., Ontario, 1992.

<sup>364</sup> supra note 362, s. 2.

detailed reports indicating the representation of the target groups in their companies.<sup>365</sup>

In spite of these ambitious terms, the Employment Equity Act is not likely to be used to combat discrimination due to seniority because its sole enforcement section provides for fines only if employers do not file the detailed reports mentioned in (4).<sup>366</sup> This lack of enforcement does not make the Employment Equity Act totally useless, however, because the information contained in these reports could serve as evidence in cases where seniority systems are suspected of violating the Canadian Human Rights Act.

## **(2) Federal and Quebec Contractors Programs**

The federal and Quebec Contractors Programs require employers who want to receive government contracts to prepare and implement employment equity plans. The programs apply to employers with more than 100 employees bidding for contracts in excess of certain amounts (\$200,000 for the federal and \$100,000 for Quebec). Quebec's program also applies to recipients of government grants of more than \$100,000. The failure to fulfil the programs' requirements can theoretically lead to businesses being barred from doing business with the government.

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<sup>365</sup> Ibid., ss. 4-6.

<sup>366</sup> Ibid., s 7. For a criticism of the federal Employment Equity Act, see P.-J. Poole & J. Rebeck, "Not Another Hundred Years: The Failure of the Federal Employment Equity Act" (1993) 1 Can. Lab. L.J. 341.

In practice, however, administrators from both programs describe their role as being largely an advisory one, with the content of the employment equity plans being left up to employers, who also decide whether or not their plans remain confidential.<sup>367</sup> Federal administrators, who are within the Employment Department, feel it is not up to them to put pressure on employers to change discriminatory practices; Quebec administrators, who are with the Quebec Human Rights Commission, are less tolerant but will not recommend that firms be barred from contracts or subsidies unless their infringements are numerous and they are unwilling to even consider changes to their discriminatory practices.

On seniority, neither program specifically requests details on employers' seniority plans. In addition, seniority is seldom relevant because only a small proportion of covered contractors have unionized workforces (about 15% at the federal level).<sup>368</sup> As a result of all we have seen, Contractors Programs are not likely to be of much use in combatting discrimination by seniority systems.

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<sup>367</sup> Information on the contractors' programs was obtained in July 1993 in interviews with officers of the Federal Contractors Program and of the Quebec Human Rights Commission.

<sup>368</sup> Figure provided by the Federal Contractors Program.

(3) Ontario Employment Equity Act

The Ontario Employment Equity Act is slated to apply to all employers under the province's jurisdiction as well as to employers which enter into contracts with the Ontario government or its agencies. The stated object of the Act is "the amelioration of conditions in employment for Aboriginal people, people with disabilities, members of racial minorities and women in all workplaces in Ontario".<sup>369</sup>

The requirements of the Ontario Act are roughly similar to those of the federal Employment Equity Act. The major difference between the two is at the enforcement level. If Ontario employers refuse to prepare and/or to implement employment equity plans within a specific period of time, the Employment Equity Commission can impose hefty fines<sup>370</sup> and may issue orders "requiring an employer to create an employment equity fund" and "appointing an administrator who, at the expense of the employer, is responsible for developing, implementing, reviewing and revising the employer's employment equity plan."<sup>371</sup>

The result, according to expert Lynn Bevan, is that the Ontario Employment Equity Act does have the potential to produce

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<sup>369</sup> Bill 79, supra note 363, preamble.

<sup>370</sup> Ibid., cl. 38.

<sup>371</sup> Ibid., cl. 33(1), (3), (4).

changes to seniority systems which would reduce or eliminate their discriminatory effects on women.<sup>372</sup> The Employment Equity Commission is directed to "work with employers and bargaining agents to ensure that existing seniority systems will not be a barrier to employment equity."<sup>373</sup> On the other hand, the Act contains a partial seniority exemption, providing that "seniority rights with respect to a layoff or recall to employment... are deemed not to be barriers to the hiring, retention or promotion of members of the designated groups."<sup>374</sup>

**F. Women and Seniority Under the Canadian Charter of Rights and Freedoms**

Section 15(1) of the Canadian Charter of Rights and Freedoms<sup>375</sup> proclaims that:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The Charter does not apply to private disputes. It applies only to "the law", but the definition of "law" for its purposes is very broad and includes the policies of governments and of

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<sup>372</sup> L. Bevan, Employment Equity Manual (Toronto: Carswell, 1993) at 10.13.

<sup>373</sup> Bill 79, supra note 363, cl. 41(1), (5).

<sup>374</sup> Ibid., cl. 5(2).

<sup>375</sup> See supra note 257.

bodies which are judged to be part of the government apparatus.<sup>376</sup> In Douglas/Kwantlen Faculty Association v. Douglas College,<sup>377</sup> in 1990, the Supreme Court found this to include the negotiation and administration of the mandatory retirement clause of a collective agreement entered into by a community college in British Columbia.

As a result, the Charter could be used to challenge discriminatory seniority provisions included in collective agreements signed by governments and bodies judged to be part of government. In addition, Charter challenges are possible in cases where Canadian governments have passed laws which have adverse effects on women by preventing them from pursuing complaints against employers who operate seniority systems which discriminate against them. Such laws include the seniority exemptions in human rights, employment standards and pay equity acts which we saw in this chapter, as well as the prospective Ontario Employment Equity Act's exemption for seniority in situations of layoff and recall.

Many of the concepts used in applying the Canadian Charter are similar to those invoked in the application of the human rights acts, but the specific steps to be followed in Charter

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<sup>376</sup> R.W.D.S.U. v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174, 87 D.L.L.C. 14,002; McKinney, *supra* note 313.

<sup>377</sup> [1990] 3 S.C.R. 570, 77 D.L.R. (4th) 94, 13 C.H.R.R. D/403.

cases are not the same. In Charter equality rights cases, the onus is first on those who challenge a law, rule or practice to show that it violates section 15(1); once this is done, the onus shifts to those who want to uphold the law, rule or practice, who must demonstrate that it should be exempted under section 1 of the Charter as constituting a "reasonable limit" which "can be demonstrably justified in a free and democratic society."

**Step 1: Section 15(1)**

A complainant under section 15(1) must show that her or his right to equality has been denied. This involves demonstrating that the challenged law, rule or practice had a differential impact on her or him because of a personal characteristic, that this difference resulted in "discrimination", and that the personal characteristic in question was within the grounds enumerated in the section or within an analogous ground.<sup>378</sup> As we saw earlier, "sex" is one of the listed grounds.

In Andrews v. Law Society of British Columbia, the Supreme Court held that "equality" under Section 15(1) did not necessarily mean equal treatment because when people with different personal characteristics or situations are treated in the same manner, the results can well be unequal.<sup>379</sup> The "essence of

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<sup>378</sup> R. v. Swain, [1991] 1 S.C.R. 933 at 940-41, 63 C.C.C. (3d) 481, 125 N.R. 1.

<sup>379</sup> Supra note 257 at 164.

true equality", Justice McIntyre wrote, "is the accommodation of differences."<sup>380</sup> The only way to find out whether any particular law, or rule or practice results in inequality, Justice Wilson added in R. v. Turpin, is "to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context."<sup>381</sup>

As we saw earlier in this chapter, the Supreme Court used identical concepts in defining "discrimination on the basis of sex" in Janzen v. Platy Enterprises<sup>382</sup> in the context of a human rights act. As a result, the proof to be made by women who are challenging discriminatory seniority systems under the Charter of Rights and Freedoms is the same as the one they would have to make under human rights laws.

### Step 2: Section 1

To be justified under the "reasonable limit" exemption set out in section 1 of the Charter, a law, rule or practice must meet the test set out in Regina v. Oakes<sup>383</sup> in 1986. This test directs the party raising a Section 1 defence to demonstrate: (i) that the restriction of a right is undertaken in the pursuit

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<sup>380</sup> Ibid. at 169.

<sup>381</sup> [1989] 1 S.C.R. 1296 at 1331, 48 C.C.C. (3d) 8, 96 N.R. 115.

<sup>382</sup> Supra note 256.

<sup>383</sup> [1986] 1 S.C.R. 103 at 138-39, 26 D.L.R. (4th) 200, 65 N.R. 87.

of a pressing and substantial objective; and (ii) that the impugned restrictive measure is proportional to the enacted measure as evidenced by the fact that it (a) is rationally connected to the objective pursued, (b) impairs the right as little as possible and (c) is specifically proportional in that the means do not have effects so severe on individual or group rights that the objective is outweighed.

Analyses of the results of the application of this test to numerous Charter challenges since 1986 reveal the following: challenged measures very rarely fail the "pressing and substantial objective" part of the test, as most of them were adopted for defensible reasons, but the way in which the Court defines the objective can affect the ultimate outcome; the "rational connection" test is generally easy to pass as it is usually sufficient to establish that the measure will contribute to the attainment of the objective; the criterion of impairing the right as little as possible (called the "minimal impairment" criterion) is the crucial one, and its definition has gradually changed to the detriment of women; the "specifically proportional" criterion is generally considered to be redundant and of little use.<sup>384</sup>

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<sup>384</sup> J. Woehrling, "L'article 1 de la Charte canadienne et la problématique des restrictions aux droits et libertés: l'état de la jurisprudence de la Cour Suprême" in Institut canadien d'études juridiques supérieures, ed., Droits de la personne: l'émergence de droits nouveaux (Cowansville, Que.: Yvon Blais, 1993) 3 at 11-32; S.V. Potter, "La preuve requise et sa nature" in Ibid., 35 at 42-59; J. Tait, "Le droit à une société libre et démocratique: l'article premier de la Charte canadienne et le rôle du Procureur général" in Ibid., 75 at 85-93.

Although the "minimal impairment" criterion evolved over many Supreme Court decisions, the case in which the divisions within the Court on this subject erupted was McKinney v. University of Guelph<sup>385</sup> in 1990. In judging that an Ontario Human Rights Act section which only protected people against discrimination in employment between the ages of 18 and 65 was justified under Section 1, Justice Gerard La Forest, writing for the majority, refused to consider the less restrictive means of attaining the objective which were being proposed, holding that "the operative question" for the minimal impairment test was "whether the government had a reasonable basis" for concluding that the law interferes as little as possible with a guaranteed right,<sup>386</sup> and that "the courts should not lightly use the Charter to second-guess legislative judgment".<sup>387</sup> [emphasis added]

In her dissent, Justice Bertha Wilson strongly criticized this attitude of deference toward the legislature, arguing that such a relaxed "minimal impairment" test should only be used when the purpose of the challenged measure is to help vulnerable persons or groups.<sup>388</sup> According to her, those who were defending the Ontario section should have had to demonstrate that it

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<sup>385</sup> Supra note 313.

<sup>386</sup> Ibid. at 305.

<sup>387</sup> Ibid. at 318.

<sup>388</sup> Ibid. at 398-404, 413-14.

was the least drastic means of achieving the purpose.<sup>389</sup> Both Justice Wilson and Justice Claire L'Heureux-Dubé, who also dissented, pointed out that the Ontario law's lack of protection for senior workers could have even worse effects for women because they have either lower or no pension income.<sup>390</sup>

The most objectionable aspect of the deferential "minimal impairment" test is that it is only applied in cases involving social and economic measures, thereby threatening to transform Section 15 rights into second-class rights. The reason for the distinction, Supreme Court justices say, is that socio-economic issues involve "the reconciliation of claims of competing individuals or groups or the distribution of scarce government resources."<sup>391</sup> Part of the problem is that the Justices feel they lack expertise. According to Justice La Forest:

[I]n such matters as criminal law and administrative law, for example, our task is assisted by professional knowledge. But there are areas where the legislative and administrative branches of government have to be given more scope... This is a fortiori the case with complex social and economic schemes. Yet it is our duty to review them critically so that they do not unduly interfere with constitutional rights. But how are we to determine, given our lack of expertise and in the face of conflicting social science research and other evidence, whether a measure enacted to forward

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<sup>389</sup> Ibid.

<sup>390</sup> Ibid. at 415-16, 433-34.

<sup>391</sup> Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927 at 994, 58 D.L.R. (4th) 577, 94 N.R. 167.

an important social objective interferes with guaranteed rights as little as possible? <sup>392</sup>

This partial abdication of responsibility by the Supreme Court delights pluralists like Paul Weiler, who applauded the "pronounced trend" in court decisions about the workplace "to keep the Charter and the judiciary out of the labour and employment field."<sup>393</sup> On McKinney, Weiler didn't think "current [mandatory retirement] arrangements should be considered sacrosanct",<sup>394</sup> and recognized "that the standardized operation of these arrangements causes inequities... for example, married women with children often return to the workforce too late to accumulate the years of service needed for an adequate pension".<sup>395</sup> Nevertheless, he felt that the correction of injustices in the labour field should be left to legislatures and should not be dealt with by the courts.<sup>396</sup>

The Supreme Court's stand on social and economic rights is particularly unfortunate because it harks back to the early days of the drafting of the International Covenants on Human Rights, when it was decided to have two separate covenants because

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<sup>392</sup> Justice G.V. La Forest, "The Balancing of Interests Under the Charter" (1993) 2 N.J.C.L. 133 at 147.

<sup>393</sup> Weiler, supra note 2 at 186.

<sup>394</sup> Ibid. at 176.

<sup>395</sup> Ibid. at 177.

<sup>396</sup> Ibid. at 178. In Fallon & Weiler (supra note 225), it is clear that Weiler's views on seniority and employment equity are very similar to those of the U.S. Supreme Court as expressed in Weber, Stotts and Wygant.

"civil and political rights were enforceable, or justiciable, and immediately applicable, while economic, social and cultural rights were to be progressively implemented" depending on the resources available, and therefore not as important or urgent.<sup>397</sup> More recently, the trend has been against this utilitarian approach and toward the unity of these rights. In 1977, the United Nations Assembly decided that future work on human rights within the UN system should take the following concepts into account:

(a) All human rights and fundamental freedoms are indivisible and interdependent; equal and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights; (b) the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible...<sup>398</sup>

These principles were most recently reiterated at the United Nations' World Conference on Human Rights in Vienna in June of 1993, at which the chairperson of the UN's Committee on economic, social and cultural rights condemned human rights proponents who staunchly defend civil and political rights but completely exclude the chronic neglect of economic, social and cultural rights from their concerns.<sup>399</sup> According to him, "Such

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<sup>397</sup> T.C. Van Boven, "Distinguishing Criteria of Human Rights" in M.L. Berlin & W.F. Pentney, eds., Human Rights and Freedoms in Canada (Toronto: Butterworths, 1987) I-28 at I-29.

<sup>398</sup> Ibid. at I-30.

<sup>399</sup> P. Alston, "Statement on Behalf of the Committee on Economic, Social and Cultural Rights" (Address to the World Conference on Human Rights, 25 June 1993) [unpublished] at 2.

an approach to human rights is inhumane, distorted and incompatible with international standards."<sup>400</sup>

The encouraging aspect of McKinney for our purposes is that the Court's decision to use the more relaxed "minimal impairment" test was not based solely on the fact that it dealt with socio-economic issues. In addition, the Court implied that measures based on age were less "suspect" than others based on grounds such as race, sex or religion, because a link does exist between aging and diminished capacities and because "all of us once were young, and most expect one day to be fairly old".<sup>401</sup>

According to Prof. José Woehrling, the main effect of McKinney was to confirm that the original Oakes test has been superseded by a more flexible "sliding scale" approach under which decisions may vary on the basis of many different factors including the type of measure challenged, the nature of the infringement to rights and liberties, the nature of the interests involved (whether it concerns the State versus an individual or the claims of conflicting groups), the respective expertise of the judge and of the legislators with regard to the social problems raised, etc..<sup>402</sup>

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<sup>400</sup> Ibid.

<sup>401</sup> McKinney, supra note 313 at 297.

<sup>402</sup> Woehrling, supra note 384 at 31.

The main difficulty with this new approach is that it makes decisions extremely difficult to predict. Still, to have a better idea of the way in which the Charter works, we will try to apply it to the unmodified seniority principle itself as well as to provisions which exempt some aspects of seniority from the application of human rights and similar legislation. We are not going to discuss the application of the Charter to practices such as discriminatory or irrational seniority units or barriers between units because we are assuming - perhaps too optimistically - that such obviously unjust practices would be unlikely to survive a Charter scrutiny.

In challenging the unmodified seniority principle, women would demonstrate that the use of unmodified seniority in promotions, transfers, benefits, layoff and recall has adverse effects on them because they have less seniority than men. They would argue that the "pressing and substantial objective" of seniority is to act as a non-subjective and non-discriminatory means of allocating work claims and establishing priorities between conflicting claims, and that this objective would be better served through the use of modified seniority systems and other alternatives to traditional seniority which we will describe in Chapter V.

Those who want unmodified seniority to be upheld, on the other hand, would likely argue that the "pressing and substan-

tial objective" of seniority is the need to maintain harmonious labour relations, and that any significant modifications to the traditional seniority system would fail to meet this objective because they would cause discontent by disturbing crucial acquired rights, and would upset the balance of power between workers and employers by denying unions' right to establish their own internal priorities for negotiation based on the wishes of their members.<sup>403</sup>

As these differing views indicate, the definition of the "pressing and substantial objective" of a law, rule or practice can make an important difference. If courts favoured the women's definition, and used a reasonably strong "minimal impairment" test which took a serious look at less harmful alternatives, the unmodified seniority principle would probably fail to be justified under section 1. But if the courts chose the unions' definition of the "pressing and substantial objective" of seniority and used an ineffectual "minimal impairment" test which refused to "second-guess legislative judgment", the women would not have a chance.

In challenging laws which exempt some aspects of seniority from the application of human rights, employment standards, pay equity and proposed Ontario Employment Equity acts, women can argue that these provisions should be struck down because their

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<sup>403</sup> Lynk & Ellis, supra note 194 at 272-73.

very objective is a discriminatory one. The main precedent for this is Blainey v. Ontario Hockey Association,<sup>404</sup> in which the Ontario Court of Appeal declared unconstitutional a subsection of the Ontario Human Rights Code providing that the Code's guarantee of equal treatment without discrimination in services and facilities was not infringed "where membership in an athletic organization or participation in an athletic activity is restricted to persons of the same sex."<sup>405</sup>

Unlike the situation in McKinney, in which the striking down of an exemption on the basis of age in the Ontario Human Rights Act would have had the effect of endangering mandatory retirement policies (by making them vulnerable to complaints of direct discrimination based on age) the only effect of striking down the seniority exemptions would be to force employers, under the duty to accommodate which arises in cases of indirect discrimination, to take measures to mitigate the harm seniority does to employees who are adversely affected. As a result, the only effect of these provisions today is to prevent women and other affected groups from achieving equality.

Supporters of these provisions would likely counter that the objective of these exempting sections is not to prevent

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<sup>404</sup> (1986), 26 D.L.R. (4th) 728, 7 C.H.R.R. D/3529, 54 O.R. (2d) 513 (Ont. C.A.), leave to appeal to S.C.C. refused [1986] 1 S.C.R. xii.

<sup>405</sup> Human Rights Code, S.O. 1981, c. 53, s. 19(2).

women and others from achieving equality, but to maintain harmonious labour relations. The rest of the arguments would be the same as in the challenge to the unmodified seniority principle we saw above, and the outcome just as unpredictable.

Lastly, Charter challenges involving sex equality must deal with one more uncertain factor. This is section 28 of the Charter, which reads as follows:

Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

One commentator has expressed the view that the combination of sections 15 and 28 has the effect of overriding section 1 as far as differences based on sex are concerned.<sup>406</sup> Another analyst has written that section 28 means and accomplishes nothing.<sup>407</sup> The answer will likely lie somewhere between these two extremes.

For women's sake, we hope the Supreme Court, in interpreting the "reasonable limits" exemption of section 1, will keep in mind the following words of Justice Dickson in Action Travail:

Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the

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<sup>406</sup> K. de Jong, "Sexual Equality: Interpreting Section 28" in Bayefsky and Eberts, eds., supra note 3, 493 at 523-25.

<sup>407</sup> E.A. Driedger, "The Canadian Charter of Rights and Freedoms" (1982) 14 Ottawa L.R. 366 at 373.

final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize these rights and to enfeeble their proper impact. Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal Interpretation Act which asserts that statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained.<sup>408</sup>

### Step 3: Remedies

When courts find that the Charter has been violated, they are empowered to take whatever remedies are "appropriate and just in the circumstances" (section 24 of the Charter), including affirmative action programs, which are protected under section 15(2). In his background study for the Abella Commission, Marc Gold specifically addressed the question of whether modifications to seniority systems introduced to implement employment equity goals, such as adjustments to LIFO rules, would violate section 15 of the Charter. His conclusion was that they would not.<sup>409</sup>

Coming at the question from the opposite perspective, Dale Gibson argued that the guarantee of a positive right to "equal benefit of the law" contained in section 15(1) creates a legal

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<sup>408</sup> Supra note 165 at 1134.

<sup>409</sup> M. Gold, "The Constitutional Dimensions of Promoting Equality in Employment" in Research Studies of the Commission on Equality in Employment (Ottawa: Supply and Services Canada, 1985) 247 at 267.

obligation to establish special measures to correct the historic wrongs done to members of groups that have been disadvantaged due to past discrimination.<sup>410</sup> Even if this argument is not retained, Gibson adds, the correction of disparate impact discrimination necessarily entails a positive obligation to make reasonable accommodations which take the form of affirmative action programs.<sup>411</sup> This resembles Justice MacGuigan's assertion in Action Travail, which as we saw earlier was endorsed by the Supreme Court, that "[t]he prevention of systemic discrimination will reasonably be thought to require systemic remedies."<sup>412</sup>

**G. Enforcement of Laws Which Might Be Invoked Against Seniority Systems Which Treat Women Unequally**

In the spring of 1992, there were 933 major collective agreements with seniority clauses in Canada, covering a total of 1.8 million employees.<sup>413</sup> Only one of these agreements, covering 350 employees, contained an identifiable affirmative action clause which affected seniority rights.<sup>414</sup> Coupled with the fact that not a single case involving indirect discrimina-

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<sup>410</sup> D. Gibson, "Accentuating the Positive and Eliminating the Negative: Remedies for Inequality Under the Canadian Charter" in L. Smith et al., eds. supra note 3, 311 at 332.

<sup>411</sup> Ibid. at 333.

<sup>412</sup> Supra note 165 at 1145.

<sup>413</sup> Provided by the Bureau of Labour Information, Labour Canada, Hull, Quebec, April 1992. "Major" collective agreements cover 500 or more employees.

<sup>414</sup> Ibid.

tion by seniority provisions has been reported in Canada, we can take it that laws prohibiting discrimination by seniority systems are not being enforced in this country.

Why are these laws not being enforced? Partly because of the process and partly because of inadequate resources. The main difficulty with the process is that it is complaints-driven, so that it basically depends on victims or their representatives identifying discriminatory seniority practices and taking steps to file complaints and pursue them with human rights authorities. This is exceedingly unlikely to happen because the vast majority of women have neither the necessary knowledge nor the financial resources (let alone the time and energy) to take such action.

The problem is compounded by the fact that unions, which have taken the initiative for women in other types of cases, are often defendants in seniority complaints. Women also lost an important resource in 1992, when the federal government cancelled its Court Challenges Program because "Charter litigation is no longer needed".<sup>415</sup> The purpose of this program had been to provide grants to disadvantaged groups to help them defend their interests in court cases involving the language and equality provisions of the Charter of Rights. The House of

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<sup>415</sup> House of Commons, Standing Committee on Human Rights and the Status of Disabled Persons, Paying Too Dearly (Ottawa: Queen's Printer, 1992) (Chairperson: B. Halliday) at 5.

Commons Standing Committee on Human Rights, which held hearings on the cancellation of the program, issued a report recommending that it be maintained.<sup>416</sup>

The lack of resources of human rights commissions also ensures that laws against discrimination by seniority systems remain unenforced. At the federal commission, for example, no one is looking at seniority provisions in firms having less than 100 employees. Only the Employment Equity Section has done some work on the subject, and it has a total of eight investigators to examine the reports of the 380 federal companies covered by the Employment Equity Act.<sup>417</sup>

The only hope for the future resides with proactive employment equity acts with vigorous sanctions and powerful implementing bodies, which would force employers to examine all their practices to abolish discrimination, and to file comprehensive reports on the results. This might yet happen at the federal level, where the Special Committee of the House of Commons on the Review of the Employment Equity Act recommended in 1992 that this Act be amended to give it some teeth.<sup>418</sup> It will almost certainly happen very soon in Ontario, but only

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<sup>416</sup> ibid. at 12.

<sup>417</sup> Information obtained from officers of the Canadian Human Rights Commission.

<sup>418</sup> House of Commons, Special Committee on the Review of the Employment Equity Act, A Matter of Fairness (Ottawa: Queen's Printer, 1992) (Chairperson: A. Redway) at 25-29.

partially, as the proposed Ontario Employment Equity Act exempts the use of seniority for purposes of layoff and recall.

Until such changes are made throughout Canada to strengthen the process and establish effective implementing bodies, modifications to seniority systems to correct even the clearest instances of indirect discrimination by seniority systems will remain rare. As Alfred Blumrosen of the U.S. Equal Employment Opportunity Commission reported, the only situation in which significant voluntary changes to seniority systems can be expected to occur is after a few well-targeted lawsuits produce "broadly and soundly written judicial decisions" which clearly delineate the parameters of the law.<sup>419</sup>

Canadian unionist Ed Finn agrees that change is not going to happen without strong outside pressure:

...it is unrealistic to expect industrial unions to act unilaterally to correct the unfair effects on women and minorities of discriminatory employment policies. What is required is affirmative action of some kind, to break down seniority barriers, to give women and minority employees retroactive seniority credit, and even, if necessary, to set firm quotas on the numbers of women and minorities that should be hired for various jobs. The democratic process of trade unionism, based as it is on majority rule, is ill-suited for such drastic remedial measures. The unions' constitutions were not designed for that purpose, and their voting procedures tend to confirm

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<sup>419</sup> Supra note 171 at 216-17. See also: A.W. Blumrosen, "Seniority and Equal Employment Opportunity: A Glimmer of Hope" (1969) 23 Rutgers L. Rev. 268 at 316; W.J. Kilberg, "How to Settle A Discrimination Case" in R. Adelman, ed., supra note 47, 101 at 110.

the status quo, if that is what the majority of members are satisfied with.<sup>420</sup>

Until such strong laws are adopted and enforced, it will remain painfully clear that in spite of our governments' impressive rhetoric on the progress they have made in bringing equality to our workplaces,<sup>421</sup> there is no real political will to correct systemic discrimination in employment against women and other disadvantaged groups in Canada.

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<sup>420</sup> Supra note 49 at 131.

<sup>421</sup> On December 11, 1991, when then-Minister of State for Employment and Immigration Monique Vézina appeared before the House of Commons Special Committee on the Review of the Employment Equity Act, she declared that "This country can... be very proud of the leadership position we've taken on the employment equity issue. We are the only government in Canada and one of the first in the world to use legislation to achieve equality in the labour market." Minutes of Proceedings and Evidence, No. 2 at 2:5.

**CHAPTER V - MODIFICATIONS AND ALTERNATIVES TO SENIORITY RULES  
TO ACCOMMODATE WOMEN WHO ARE ADVERSELY AFFECTED**

As we mentioned in Chapter IV, cases of discrimination by seniority systems involve so many different variables that remedies cannot be general, but must be specifically tailored to each situation. The one exception to this general principle, which we also discussed earlier, concerns cases where members of disadvantaged groups can demonstrate that they have personally been victims of discrimination. In such situations, we believe that the victims should always be granted seniority retroactive to the date on which they should have been hired (or promoted or transferred, if it affects the seniority level), and that this retroactive seniority should be effective for all purposes.

For situations that do not involve actual victims of discrimination in hiring, it can be very useful to consider some examples of concrete solutions which have been or could be used to solve specific problems. This is what we will do in this chapter. To help in assessing these solutions, we will first establish the objectives we seek to achieve through these reforms.

**A. General Objectives of Seniority Reforms**

In the context of Canadian law, it seems that the objectives of reforms to seniority systems should be:

- To rapidly increase women's job opportunities to place them as much as possible where they would have been if they had not been discriminated against.
- To dismantle discriminatory seniority structures and practices which perpetuate past discrimination against women, and put in place mechanisms to prevent their being punished for their lesser ability to accumulate seniority today.
- To protect to some extent the acquired rights of non-disadvantaged employees, and in particular, to prevent their displacement from the jobs they currently occupy.
- To try to keep as many people employed as possible.
- To avoid causing undue hardship to employers, meaning to give due regard to legitimate employer concerns regarding productivity, cost, safety, etc.

**B. General Modifications to Seniority to Correct Discrimination**

The general modifications to seniority we will consider here are not limited to a specific use of seniority (such as promotion, or layoff) but affect seniority rights for all or a great number of purposes. These modifications include: 1) a general suspension of seniority rules for certain groups; 2) the attribution of constructive seniority to some groups; 3) special adjustments to seniority to take account of particularities of

disadvantaged groups; and 4) prospective adjustments to seniority rights.

(1) General Suspension of Seniority Rules

One way to prevent seniority from perpetuating past discrimination and to partly compensate adversely affected groups is by means of a general provision to the effect that seniority rules will not apply to members of those groups. A Canadian example of this is found in a collective agreement between the United Steelworkers of America and Placer Dome Inc., in the context of an affirmative action plan for aboriginal employees in mining operations in the Dona Lake area in north-western Ontario. It provides that:

In all cases of vacancy, promotion, transfer, layoff and recall from layoff, First Nations or native employees shall be entitled to preference provided they have the ability to perform the work, notwithstanding their seniority.<sup>422</sup>

This text does not make it clear whether all seniority rules are suspended for aboriginal employees, as opposed to only those concerning the calculation of seniority. The suspension would be only partial, for example, if positions are still filled internally within various seniority units so that aboriginal workers from other units are prevented from applying.

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<sup>422</sup> Collective Agreement Between Placer Dome Inc. Dona Lake Mine and the United Steelworkers of America, in effect from August 25, 1991 to August 24, 1993, cl. 1.08.

The Steelworkers' union, in sponsoring this and related clauses, declared that it supported them because only extraordinary measures of this type could hope to overturn the effects of the historical discrimination practiced by mining firms in aboriginal areas. A more cynical Globe and Mail reporter wrote that the agreement's clauses on employment equity for native workers were based on a 1987 agreement between Placer Dome and local aboriginal bands which Placer Dome had signed "in exchange for local native groups' dropping a request for an environmental assessment of the Dona Lake gold mine."<sup>423</sup> It is also worth noting that this collective agreement covers only 75 employees.<sup>424</sup>

We will examine the effects of suspending seniority rules later in this chapter in the context of specific employment situations.

## (2) Attribution of Constructive Seniority

"Constructive" seniority is sometimes used to refer to retroactive seniority, but we will use it here to mean seniority attributed on the basis of a defined formula. An example of this is found in an agreement between the Saskatchewan Wheat Pool and the Grain Services Union (GSU) which provides that "for

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<sup>423</sup> v. Galt, "Door to Jobs" [Toronto] Globe and Mail (9 April 1991).

<sup>424</sup> Information provided by the Bureau of Labour Information, Labour Canada, Hull, Quebec, in July 1993.

the purposes of bidding on vacancies and maintenance of employment in cases of lay-off and recall where designated group members are underrepresented within an occupational grouping", these designated employees will be deemed to have the greater of their own seniority or 6.2 years of seniority, which is the average service for the bargaining units involved.<sup>425</sup>

Another type of constructive seniority was proposed in a Harvard Law Review note in the heyday of seniority discrimination cases in the United States.<sup>426</sup> In the case of victims of discrimination by seniority systems who could not personally be identified, the authors suggested, it is appropriate to compare the situation of employees from groups which have been discriminated against to the situation of comparable employees from groups which have not been discriminated against, on the assumption that differences in seniority levels between the two groups are the result of discrimination.

To compensate for these differences generated by discrimination, they proposed that constructive seniority be awarded so that Blacks and women would have seniority equal to the average seniority of white male workers of the same age.<sup>427</sup> The effect,

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<sup>425</sup> Letter of Understanding Between Saskatchewan Wheat Pool and Grain Services Union, (C.L.C.) (26 January 1993) cl. 2, 3.

<sup>426</sup> Note, "Last Hired, First Fired: Layoffs and Title VII", supra note 162.

<sup>427</sup> Ibid. at 1559-60.

for example, is that 50-year-old workers from disadvantaged groups might be attributed a dozen or more years of seniority, while 20-year-olds might get a few years at most.

This could be used in Canada if the age distinction it creates qualified as affirmative action; otherwise it might be struck down as introducing another form of discrimination. The idea of comparing with non-disadvantaged workers may also have inspired the Saskatchewan Wheat Board's system of constructive seniority. To better reflect the comparison concept, however, the Saskatchewan formula would have to be changed to attribute to underrepresented groups the average seniority of the overrepresented groups for the bargaining units involved. This would substantially raise the level of the constructive seniority as it would no longer be dragged down by the low seniority levels of the workers from disadvantaged groups.

Constructive seniority will be discussed later in this chapter in the context of particular employment situations.

### **(3) Special Adjustments for Group Particularities**

Another type of general modification to seniority systems consists of adjusting seniority to take account of the particular characteristics of groups which are adversely affected. One example is a clause of the Placer Dome agreement which provides that aboriginal employees can take leaves of absence of as much

as three months a year, with accumulating seniority, "for the purpose of engaging in traditional economic activities such as hunting, wild rice harvesting and trapping."<sup>428</sup>

The counterpart for women are provisions to the effect that seniority will continue to accumulate during all or part of maternity/parental and adoption leaves. As we saw in Chapter I, about half of Canadian workers in large unionized workplaces had such clauses in their collective agreements in 1992, reflecting the fact that the accumulation of seniority during these leaves is mandatory under federal labour standards laws as well as those of Ontario, Quebec and New Brunswick.<sup>429</sup>

This type of well-targeted remedy does not correct past discrimination or its perpetuation, but it goes some way to prevent women falling further behind because of their caregiving role. We will return to this subject in Part F when we discuss measures taken by governments.

#### **(4) Prospective Adjustments to Seniority**

One of the suggestions included in a recent position paper on seniority and discrimination approved by the Quebec Human Rights Commission was a change to the collective agreement providing that members of underrepresented groups would hence-

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<sup>428</sup> Supra note 422 cl. 1.10.

<sup>429</sup> See supra note 68.

forth have preferential seniority over other employees hired after the date of the change.<sup>430</sup> For example, if such an agreement was signed on June 1, following which a non-minority man was hired on June 5th and a woman six months later, the woman would be deemed to have more seniority than the man for all purposes until appropriate targets for women's representation had been reached.

Such prospective adjustments have the important advantage of permitting employment equity measures without disturbing employee prospects, because employees hired after the adjustments presumably know and accept them. Their main drawback is that they have no effect at all unless significant hiring is taking place, and very slow impact in the best of circumstances.

**C. Modifications to Seniority to Correct Discrimination in Promotions, Transfers and Training**

The modifications we will consider in cases of promotions, transfers and training are: 1) the suspension of seniority rules for affected employees; 2) the attribution of constructive seniority; 3) a change-over to plant-wide seniority; and 4) the dismantling of discriminatory seniority units and barriers. We will also examine two concrete examples of modifications: the U.S. Steel Industry Consent Decree and a much more modest "bridging program" at Bell Canada.

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<sup>430</sup> Bosset, Coutu & Drapeau, supra note 162 at 25.

(1) Suspension of Seniority Rules

In firms where women are present in significant numbers, but are imprisoned in inferior occupations which constitute female job ghettos, the priority should as much as possible be on promotion from within. This is most effectively done through a temporary suspension of all seniority rules for female employees in promotions, transfers and training until employment equity targets have been reached. Such a suspension allows the women to compete for any jobs in any of the more desirable seniority units where their ability can carry them.

Such preferential treatment might be resented by other employees. From women's point of view, however, this way of proceeding is a compromise: it prevents the perpetuation of past discrimination and compensates women for their lesser capacity to accumulate seniority today, but it does not fully compensate them for past discrimination. To "make women whole" would require much more drastic measures, including displacing many senior non-minority men from the jobs they currently occupy.

Partial suspension is another possibility. As we saw in Part B, it could consist of promoting women regardless of their actual level of seniority, but within the framework of existing seniority units. This would lead to much slower progress; for example, if a manager's job were being filled in a male-dominated departmental seniority unit, all the employees of that

unit would have priority over a woman who was a manager in another, female-dominated department.

## (2) Attribution of Constructive Seniority

As we defined it earlier, constructive seniority consists of increasing the level of seniority of members of underrepresented groups according to a defined formula, and maintaining that raised level until employment equity targets have been reached. This compensates women more or less effectively for past discrimination and for their lesser seniority depending upon the formula chosen, and it presents the same problem with seniority units we just saw in the case of women being promoted regardless of their seniority.

## (3) Change-Over to Plant-Wide Seniority

Plant-wide seniority has been the labour unions' method of choice to reform seniority systems.<sup>431</sup> It generally means that instead of being calculated on the basis of the length of time employees have been in a department (departmental seniority) or an occupation (occupational seniority), the seniority of all of a company's employees reflects their entire period of service with the firm (or a location of the firm), with that level of seniority being used for all purposes.

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<sup>431</sup> Canadian Labour Congress, Submission to the Special Committee on the Review of the Employment Equity Act (Ottawa: CLC, 1992) at 14; H. David, Femmes et emploi: le défi de l'égalité (Montreal & Sillery, Que.: IRAT & Presses de l'Université du Québec, 1986) at 217-18, 382-84; H. Elkiss, supra note 73 at 44; W. Wines, supra note 162 at 44-45.

Theoretically speaking, a change-over from departmental (or occupational) to plant-wide seniority is very good for women in firms where they are well represented in segregated departments or occupations where they have accumulated substantial plant-wide seniority. It allows them to bid for jobs in other seniority units containing better occupations without having to give up their accumulated seniority.

As we saw in examining the previous two remedies, however, giving women more seniority - or in this case entitling them to keep it - does not necessarily lead to quick progress as long as seniority units remain in place. This is because the best jobs in each unit are still usually filled by internal competition, so that outsiders from other units can only come in at the bottom rungs. We discussed this problem in Chapter II when we described human rights complaints on behalf of female CUPE members who work for Hydro-Quebec and for the City of Toronto.

An additional problem reported by union equal opportunity officers is that even where seniority units do not act as barriers, the broadening of opportunities for women under plant-wide seniority is often illusory because the women are unable to qualify for the more desirable positions.<sup>432</sup> Sometimes, the difficulty is that fewer women have professional degrees in

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<sup>432</sup> This point was repeatedly made in interviews with Carole Robertson and Sandi Howell, equal opportunities coordinators with CUPE.

technical or scientific areas. More frequently, however, the prerequisite skills have largely been acquired within the firm, but have been inaccessible to women because of the traditional division of the workforce along sex lines, with women being hired in clerical positions and men in technical ones (or women for unskilled jobs and men as apprentices for skilled ones).

In comparable situations, the U.S. Equal Employment Opportunity Commission (E.E.O.C.) used the following remedial strategies:<sup>433</sup>

- declared it a discriminatory practice, in assessing abilities, to "count" experience which only white male employees could have gained;
- required employers to set up carefully supervised probationary training periods for employees from disadvantaged groups who were entitled to upgrading on the basis of their length of service; and
- required employers to make upgrading training available to all employees from disadvantaged groups so that when the time came for them to exercise their rights to promotion, they would be equipped to do so.

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<sup>433</sup> Blumrosen, supra note 171 at 206-208.

The other problematic aspect of plant-wide seniority is that unlike suspending seniority rules for women or (to a lesser extent) constructive seniority, it does nothing to correct the effects of past discrimination or to compensate women's lesser seniority due to their family caregiving role. As a result, women remain at a permanent disadvantage, especially in industries from which they were traditionally excluded.

At worst, plant-wide seniority can be a double-edged sword: in firms where traditionally male occupations are constricting while traditionally female ones are expanding or remaining stable, it can lead to men using their superior seniority to take over women's jobs.

#### **(4) Dismantling of Discriminatory Seniority Units and Barriers**

What we have seen so far in Part C has made it clear that a thorough review of seniority units and barriers between units is a must to prevent the perpetuation of past discrimination against women. This involves: a) merging all seniority units that do not reflect significant differences in employee skills; b) abolishing irrelevant or unnecessary barriers (such as tests or other requirements) preventing free movement between the remaining seniority units, and lines of progression where experience in the lower jobs is not relevant to performance in the higher jobs; c) restructuring seniority configurations to create openings for women who are in dead-end jobs and to give

them equivalent promotional opportunities to those of non-minority male employees with comparable qualifications.

In cases where this examination of seniority practices is not done voluntarily, but in the context of court hearings in which it is judged that a firm's seniority units are discriminatory, we saw in Chapter IV that the offending units would not be struck down, but could be made ineffective for workers who were adversely affected. The result, as evidenced in U.S. cases, is that the old seniority rules would continue to exist for other workers, but that employees from disadvantaged groups could bid for positions in other units on the basis of their own accumulated plant-wide seniority.<sup>434</sup> When necessary to correct the discrimination, U.S. courts also allowed this bidding across bargaining unit lines.<sup>435</sup>

To ensure that workers from disadvantaged groups can benefit from these new opportunities, U.S. experts and courts found that two additional measures are usually needed:<sup>436</sup>

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<sup>434</sup> Quarles, supra note 168; Papermakers, supra note 170.

<sup>435</sup> Bidding across bargaining unit lines was ordered by the district and appeals courts in Teamsters, supra note 221.

<sup>436</sup> Blumrosen, supra note 171 at 199-200; Schlei & Grossman, supra note 229 at 51-57; Bethlehem Steel, supra note 220; United States v. H.K. Porter Co., 296 F. Supp. 40, 7 F.E.P. 1021 (N.D. Ala. 1974), modified, 491 F.2d 1105 (5th Cir. 1974).

- **Rate retention, or "red circling",** to prevent members of disadvantaged groups suffering a drop in salary when they first gain access to new occupations. Such a drop can otherwise occur, for example, if a woman who had reached the top rungs of her "female ghetto" seniority unit moves to the entry level rungs of a superior "male" unit.
- **Carry-over of seniority** to the new unit to protect against layoffs, as well as the right to bump back into the former units if layoffs occur within a specified period.

**(5) The U.S. Steel Industry Example**

Except for the most glaringly discriminatory provisions, the U.S. courts and the E.E.O.C. did not actually change the basic seniority systems of the firms they dealt with. Instead, as we just saw, they superimposed on these systems a new set of rights for members of disadvantaged groups. The advantage of this approach was that it intruded as little as possible in labour-management relations. The drawback is that in the short term at least, the result was sometimes a mess.

The best documented example of this is the experience of the U.S. steel industry, which involved nine major companies and over 350,000 employees (including 40,000 members of minority

groups) in about 250 plants.<sup>437</sup> By the 1970s, as we saw in Chapter I, the steel industry's seniority systems consisted of an enormous maze of tiny seniority units which were still based on the very small shops in which steel making started before the turn of this century. Although overtly discriminatory seniority practices had been abolished, representatives of the United Steelworkers union report that "there was a great deal of ethnic and racial segregation which was the result of discriminatory hiring and assignment practices."<sup>438</sup>

Starting even before Title VII came into force, a number of lawsuits were launched against steel industry employers alleging discrimination due to seniority.<sup>439</sup> These were initially unsuccessful, but in 1971 and 1973 two separate decisions involving different plants of the Bethlehem Steel Corporation ordered the carryover and rate retention remedies we saw above.<sup>440</sup> These were to be made available only to members of the "affected class", meaning only to the black employees who were in the inferior, predominantly black seniority units.

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<sup>437</sup> G.A. Moore, Jr., "How to Settle A Discrimination Case: The Employer Viewpoint - Steel Industry Consent Decrees" in R. Adelman, ed., Proceedings of New York University Twenty-Eighth Annual Conference on Labor (New York: Matthew Bender, 1976) 147 at 166, 172; Kleiman & Frankel, supra note 47 at 214.

<sup>438</sup> Kleiman & Frankel, supra note 47 at 181.

<sup>439</sup> Ibid. at 188-95.

<sup>440</sup> Bethlehem Steel, supra note 220; In the Matter of Bethlehem Steel Corp. (Sparrows Point), Decision of the Secretary of Labor, Dkt. No. 102-68, Jan. 15, 1973; Kleiman & Frankel, Ibid. at 195-98.

The result, according to the United Steelworkers, was "disruption, disorder and disaffection."<sup>441</sup> According to them, giving preferential rights to Blacks from some units increased the polarization of employees along racial lines, and caused "worker opprobrium" which deterred Blacks from exercising "black only" remedies.<sup>442</sup> The decisions had also left many important questions of detail unanswered, and did nothing to resolve the numerous class actions, E.E.O.C. complaints and employee grievances which were still pending.<sup>443</sup>

Meanwhile in 1973, in yet another pending suit involving the U.S. Steel Corporation (called the "Fairfield" case because it dealt with the Fairfield plant), the district court judge examined these problems and ordered the rate retention and seniority carryover sought by the government.<sup>444</sup> In addition, however, he directed that to the extent possible, the seniority system should be designed and administered on an "even-handed" basis, and that there should therefore be "across-the-board, uniform, color-blind modifications in the seniority rules..."<sup>445</sup>

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<sup>441</sup> Kleiman & Frankel, Ibid. at 196.

<sup>442</sup> Ibid. at 197.

<sup>443</sup> G.A. Moore, Jr., supra note 437 at 164-65.

<sup>444</sup> United States v. U.S. Steel Corp. ("Fairfield"), 371 F. Supp. 1045, 7 F.E.P. 322 (N.D. Ala. 1973), rev'd in part 520 F. 2d 1043, 11 F.E.P. 553 (5th Cir. 1975), cert. denied, 429 U.S. 817 (1976).

<sup>445</sup> Ibid. F. Supp. at 1057.

Bethlehem Steel and the Steelworkers both report that this decision was the trigger and the model which led them to negotiate what became the Steel Industry Consent Decree.<sup>446</sup> The Decree's highlights included:<sup>447</sup>

- Seniority would be calculated on a plant-wide basis for all employees for all purposes.
- Existing seniority units and lines of progression would be retained unless they were the product or instrument of discrimination.
- There would be no bumping and the new rules would apply only to future vacancies.
- A vacancy in a unit would be filled internally whenever possible, then the resulting unit vacancy would be filled by means of job posting throughout the department, and finally the departmental vacancy would be filled by candidates from anywhere in the plant.
- All employees would be given the right to rate retention in connection with one transfer to an entry-level job in another unit or line of progression over the course of their employment.

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<sup>446</sup> Moore, supra note 437 at 165-66; Kleiman & Frankel, supra Note 47 at 202. The Steel Consent Decree actually consisted of Consent Decree I, dealing with seniority and other matters under collective bargaining, and Consent Decree II, covering matters such as hiring and other subjects outside the scope of collective bargaining. All references in this report are to Decree I.

<sup>447</sup> Moore, Ibid. at 168-69; Kleiman & Frankel, Ibid. at 202-12.

- Goals and timetables for minorities and/or women were established with respect to trade and craft jobs, with training programs for transferred employees.
- The nine steel companies agreed to a maximum amount of \$30,940,000 to be given in back pay to affected employees, with the union contributing part of the sum.

The Steel Consent Decree was far from perfect, as evidenced by the fact that it was challenged in the courts by some white male employees, by the NAACP Legal Defense Fund and by the National Organization for Women (NOW).<sup>448</sup> In spite of this, it is worth noting that none of these attacks bore on the evenhandedness of the approach taken in both the decision and the decree.<sup>449</sup>

The lessons to be drawn from the steel industry example are: a) that solutions which offer something to everyone, instead of only to members of disadvantaged groups, are easier to implement and should be seriously considered in all cases; b) that extensive consultations with all parties concerned - not

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<sup>448</sup> The action in which the Decree was approved, and in which these groups intervened, was United States v. Allegheny-Ludlum Industries, Inc., 63 F.R.D. 1, 8 F.E.P. 198 (N.D. Ala. 1974), aff'd 517 F.2d 826 (5th Cir. 1975). See also: Kleiman & Frankel, Ibid. at 214-23; R. Belton, "How to Settle a Discrimination Case: An Individual Viewpoint", in R. Adelman, ed., supra note 47 at 117-39. For an evaluation of the impact of the decree four years after its approval, see C. Ichniowski, "Have Angels Done More? The Steel Industry Consent Decree" (1983) 36 Industrial and Labour Relations Review 182.

<sup>449</sup> Kleiman & Frankel, Ibid. at 199.

forgetting the victims of discrimination - are essential to design seniority systems which are both non-discriminatory and workable; and c) that employers, and to some extent unions also, generally require a great deal of outside pressure before they stop defending the status quo and decide to co-operate with anti-discrimination authorities.

**(6) A Canadian Example**

The only known Canadian program involving seniority which specifically targeted promotions was introduced in a 1987 agreement between the Communications and Electrical Workers of Canada (CWC) and Bell Canada.<sup>450</sup> Called "Employment Equity Moves", its purpose was to integrate women from the Operators and Clerical bargaining (and seniority) units into the traditionally male Technicians' unit. There are approximately 5,000 operators, 15,000 clerical employees and 15,000 technicians.

Because Bell Canada uses plant-wide seniority calculations for promotions and transfers, the problem here was not that operators and clerical workers who transferred to technicians' jobs would lose their accumulated seniority. Instead, the barriers were: a) that virtually none of the women from the operators or clerical units could meet the requirement for a

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<sup>450</sup> Currently in: Collective Agreement Between Communications and Electrical Workers of Canada (CWC) and Bell Canada - Craft and Services Employees, Art. 33, in effect from February 11, 1991 to November 30, 1993. All information in this section was provided by Janice McClelland, National Representative of the CWC.

technician's job, which was a community college diploma in electronics; and b) that permanent full-time technicians' jobs were seldom if ever available to people outside the technicians' unit; this was because vacancies were first filled from within the unit, which included many temporary and part-time employees waiting for permanent full-time jobs, as well as many permanent full-time employees wishing transfers to other locations. To overcome this, the program:

- Gave as much as six months of technical training with full pay to women chosen on the basis of seniority from the operators and clerical units. This training replaced the normal requirement of a community college diploma in electronics. By 1991, the success rate of women who entered this program was over 70% - a very high rate considering that these women went from years of sitting in an office to climbing telephone poles.
- Included in the technicians' seniority clause an exception allowing Bell Canada to fill up to approximately 200 permanent job openings a year with either women who completed the training program (first choice) or members of other disadvantaged groups hired from outside.

The number of women placed in technicians' jobs through this program was approximately 100 in 1990, 65 in 1991 and 18 in 1992. The program will probably not be renewed in the next

collective agreement because the number of technicians has been diminishing in recent years due to the economic situation.

**D. Modifications and Alternatives to Seniority to Correct Discrimination in Layoffs, Bumping and Recalls**

As one of the objectives we set out in section A was to keep as many people employed as possible, we will start our examination of seniority and layoffs by looking at the various methods employers could use to avoid laying off their workers. We will then go on to consider possible modifications to the LIFO (last in, first out), bumping and LOFI (last out, first in) rules.

**(1) Alternatives to Layoffs**

In its recent document on seniority, the Quebec Human Rights Commission stated that as far as the LIFO rule is concerned, the first step employers might be asked to take is to explore all possible means of keeping layoffs to a minimum.<sup>451</sup> It is not clear whether the Quebec Commission would like to make this a formal requirement, but if so it would have the effect of making the consideration of alternatives to layoffs a part of the employer's (and the union's) duty to accommodate.<sup>452</sup>

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<sup>451</sup> Bosset, Coutu & Drapeau, supra note 162 at 24.

<sup>452</sup> Note that in Watkins (supra note 214 and accompanying text) the U.S. district court ordered that some Blacks be reinstated but that no white males be laid off as a result, and that all work be shared until normal expansion and attrition solved the problem; in Schaefer v. Tannian, a district court prevented a city administration from laying off female workers because it would have served little financial purpose, as most of their salaries were paid by a federal job creation program: 394 F. Supp. 1136 (E.D. Mich. 1975), vacated and remanded in

The main alternatives to laying off employees are: a) changes in job structure and hiring to maintain current positions; b) voluntary layoffs by inverse seniority; and c) work sharing.

a) Changes in Job Structure and Hiring to Maintain Current Jobs

So many changes of this type have been mentioned in the U.S. literature that a full list would be extremely long.<sup>453</sup> The most frequently mentioned options are: a ceiling on overtime or its elimination in times of layoff; a hiring freeze in which only essential vacancies are filled; the filling of vacancies by training and transferring current employees who would otherwise be laid off, with such training possibly being offered on a preferential basis to employees from disadvantaged groups; restructuring of vacant full-time permanent jobs to transform them into shared or part-time positions; reducing the workforce through normal attrition, temporary transfers, lending of employees and out-placements; advancing vacation times; placing a temporary ban on sub-contracting; and a negotiated lowering of the retirement age.

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part, 538 F.2d 1234, 13 F.E.P. 528 (6th Cir. 1976).

<sup>453</sup> The examples which follow, along with others, appear in D.Q. Mills, supra note 53 at 453-55; B.G. Cebulski, supra note 204 at 47; E.R. Joseph, supra note 162 at 398-99.

b) Voluntary Layoffs by Inverse Seniority

Under inverse seniority, employees with most seniority are given first choice of going on a layoff. This works differently depending on whether the layoff is temporary or permanent.<sup>454</sup>

Until recently, a major incentive to accept temporary voluntary layoffs has been supplementary unemployment benefits (SUB) provided by employers, which can supplement regular unemployment insurance payments up to 95% of regular wages. In Canada in July 1993, 15% of unionized employees in firms with 500 or more workers had collective agreements which included SUB plans.<sup>455</sup> They were most prevalent in the metal and automotive industries and in transportation.

This became less attractive in 1990, when the unemployment insurance program was changed: the penalty for older workers voluntarily leaving their jobs for a temporary period was raised from two to eight weeks without benefits, with payments being reduced from 60% to 50% of previous earnings (up to a ceiling).<sup>456</sup> The final blow was dealt in the spring of 1993, when

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<sup>454</sup> For general information on inverse seniority, see Slichter et al., supra note 5 at 176-77; Lund, Bumstead & Friedman, supra note 162.

<sup>455</sup> Labour Canada, see supra note 424.

<sup>456</sup> Act to Amend the Unemployment Insurance Act and the Employment and Immigration Department and Commission Act, S.C. 1990, c. 40, s. 22, effective November 18, 1990. The amendments imposed a 7-to-12-week penalty on workers who quit their jobs without "just cause" or refused to take new jobs. The 8-week penalty for older workers was the result of an administrative decision. This information was verified in June 1993 with officers of the Benefit Entitlement

the Unemployment Insurance Act was again modified to provide that workers who voluntarily leave their jobs to go on a temporary layoff are no longer eligible to receive any unemployment insurance payments.<sup>457</sup>

In the case of permanent voluntary layoffs, the two important variables are severance pay and unemployment insurance. In July 1993, 43% of unionized workers in firms with more than 500 employees were covered by collective agreements providing severance pay of one week's salary or more for each year of service.<sup>458</sup> In addition, they can also receive regular unemployment insurance benefits after their severance pay runs out if their employer demonstrates that their leaving prevented the permanent layoff of another employee.<sup>459</sup> (Note that for U.I. purposes, severance payments are spread out as if they were regular wages.)

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Directorate, Insurance Policy Branch, Employment and Immigration Canada.

<sup>457</sup> Government Expenditures Restraint Act, S.C. 1993, c. 13, s. 18, 21. This information was verified in June 1993 with officers of the Benefit Entitlement Directorate, Insurance Policy Branch, Employment and Immigration Canada.

<sup>458</sup> Labour Canada, see supra note 424.

<sup>459</sup> This information was verified in June 1993 with officers of the Benefit Entitlement Directorate, Insurance Policy Branch, Employment and Immigration Canada.

c) Work Sharing

Many analysts suggested that work sharing would be the best possible solution to the LIFO-affirmative action conflict.<sup>460</sup> It can consist of either reducing the number of hours each employee works, or reducing the number of full-time positions and rotating the employees through the remaining jobs (producing rotational or alternating layoffs), or shutting down the workplace on a short-term or intermittent basis.

Work sharing used to be the main means of coping with recessions before the introduction of the unemployment insurance program (in 1940 in Canada).<sup>461</sup> Since then, it greatly diminished in importance, except in sectors where it has always been the method of choice, such as the clothing and leather industries, and to a lesser extent in printing/publishing and communications.<sup>462</sup> Unions in most other sectors became opposed to work sharing, which they referred to as "poverty sharing".<sup>463</sup>

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<sup>460</sup> A.W. Blumrosen & R.G. Blumrosen, "The Duty to Plan for Fair Employment Revisited: Work Sharing in Hard Times" (1975) 28 Rutgers L. Rev. 1082; S. Briggs, "Allocating Available Work in A Union Environment: Layoff vs. Worksharing" (1987) 38 Lab. L.J. at 650; D. Williard, R. McCoy & M. Morand, "Short-Time Compensation, Yes; Worksharing, No: Unravelling the Debate" (1985) 9 Lab. Stud. J. 239; Elkiss, supra note 73 at 43; Summers & Love, supra note 110; U.S. Commission on Civil Rights, supra note 162 at 49-54.

<sup>461</sup> Unemployment Insurance Act, S.C. 1940, c. 44, now R.S.C. 1986, c. U-1; Williard, McCoy & Morand, Ibid. at 245.

<sup>462</sup> Labour Canada, supra note 29 at 22.

<sup>463</sup> Youngdahl, supra note 162 at 308.

On the other hand, work sharing got a new lease on life in 1981-82 with the introduction of the federal Work Sharing Program, which comes under the Unemployment Insurance Act.<sup>464</sup> Under the program, if a firm spreads the available work among its employees so that they work fewer than their normally scheduled hours (to a minimum of 2 days a week), the employees are entitled to unemployment insurance benefits amounting to 57% of their foregone earnings (up to the ceiling). The program cannot be used for seasonal layoffs, and employers must produce realistic plans indicating that the reduction in work hours will last at most 26 weeks.<sup>465</sup>

Close to 200,000 Canadian workers participated in the Work Sharing Program in 1991 and 136,000 in 1992.<sup>466</sup> The unions involved have included the Communications and Electrical Workers of Canada, the International Woodworkers of America, the Canadian Auto Workers, the Canadian Brotherhood of Railway, Transport and General Workers, and the International Association of Machinists and Aerospace Workers.<sup>467</sup>

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<sup>464</sup> S. Singh, "A Note on the Work Sharing Program" Perspectives, Statistics Canada Catalogue No. 75-001 (Winter 1991) 56.

<sup>465</sup> These details were provided in June 1993 by officers of the Employer and Community Programs and Services Directorate, Employment Operations Branch, Employment and Immigration Canada.

<sup>466</sup> Ibid.

<sup>467</sup> Ibid.

## (2) Modifications to the LIFO Rule and to Bumping

As we saw in Part C of this chapter, some of the modifications required to correct discrimination in promotions would protect against layoff. In a situation where departmental seniority prevents women or members of minority groups from transferring to better departments without losing their accumulated seniority, for example, the carryover of all seniority to the new department can shelter transferees from layoffs in their new jobs. They can also be allowed to bump back into their former departments during a specified period.

While this may be an adequate solution in some firms with large numbers of female employees who have acquired substantial seniority in lower-rated jobs, it will be ineffective in firms which had long refused to hire women, or refused to hire them in blue-collar jobs, so that they have had little time to accumulate seniority. When an economic downturn causes layoffs within a few months or years of their finally being hired, as we saw in Chapter II, the application of the LIFO rule ensures that the women are the first to go.

The measures most frequently used or proposed to reform layoff and bumping rules are: a) the suspension of the LIFO and bumping rules for employees from underrepresented groups; b) the attribution of constructive seniority; c) plant-wide seniority with broad bumping zones; and d) proportional layoffs.

a) Suspension of the LIFO and Bumping Rules

In firms where the underrepresentation of women is chronic and where little or no new hiring is envisaged in the future, it may be that the only way to implement an employment equity program is to suspend the application of the LIFO and bumping rules as far as women are concerned. In such situations, where hiring targets are meaningless and the only women who succeed in penetrating non-traditional occupations are those who transfer internally through great efforts on their own part and often on their employers' as well (through special training programs, for example), any laying off of women greatly undermines the chances that they will ever gain a significant foothold.

For a concrete example of what this means, we need only consider the case of Canadian National. Although CN stated to the author as far back as 1977 that it had an affirmative action program for women<sup>468</sup> and although the Action Travail<sup>469</sup> case against CN which lasted throughout most of the 1980s ended in a victory for women, the situation of female employees at CN continues to be abysmal. As we saw in Chapter II, a CN spokesperson reported in 1992 that as a result of their continuing workforce reductions, the representation of women and members of other disadvantaged groups had not significantly increased and

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<sup>468</sup> L. Dulude, The Status of Women in Federal Crown Corporations (Ottawa: Canadian Advisory Council on the Status of Women, 1977) at 31.

<sup>469</sup> supra note 165.

was not expected to do so in the foreseeable future.<sup>470</sup> In such a context, any reduction in the representation of women at Canadian National would be unconscionable.

b) Attribution of Constructive Seniority

The strength of the protection constructive seniority would provide women against layoff depends upon the formula which is used to calculate it. Of the three forms we discussed earlier in this chapter, the Saskatchewan Wheat Board formula - which gives women the average seniority for their bargaining unit - would protect women totally until more than half of the employees in the bargaining unit had been laid off (assuming layoff is done on a bargaining unit basis). Past that point, however, all the women might be laid off at the same time.

The Harvard Law Review formula, which would attribute to women the average seniority of non-minority males of the same age, would likely protect older women well and young women hardly at all. As women who enter non-traditional occupations tend to be young, this does not appear to be a good means of keeping them employed.

The third method we saw was a variant of the Saskatchewan Wheat Board formula in which underrepresented groups would be attributed the average seniority of the overrepresented groups

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<sup>470</sup> Tellier, supra note 166 at 9:9.

for the bargaining units involved. This would shelter women up to the point where more than half of all non-minority males had been laid off, making it by far the most effective of these constructive seniority choices.

c) Plant-Wide Seniority With Broad Bumping Zones

We saw in Chapter I that the number of collective agreement clauses granting bumping rights had increased between 1978 and 1985, and that there had also been an expansion of the zones within which bumping rights could be exercised.<sup>471</sup> This has been part of an ongoing labour union effort to increase the job security of their senior members to the point where they could, if they had the minimal qualifications required, displace anyone in the company who had less seniority.

As described in Chapter I, narrow layoff and bumping rights can lead to very unjust situations, with long-service employees being laid off while hundreds or even thousands of other employees with shorter service and similar qualifications are retained. The other side of the story, however, is that every success in strengthening the job security of senior employees has as its counterpart the lessening of the job security of women who were recently hired in non-traditional occupations.

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<sup>471</sup> Labour Canada supra note 29 at xxiv.

The fairest way to resolve this problem would be to continue to expand layoff and bumping rights to the greatest extent possible - meaning short of the point where it would cause employers undue hardship in loss of efficiency, training costs for employees who bump, etc. - and at the same time to adopt specific measures to protect the jobs of women and other workers from underrepresented groups.

d) Proportional Layoffs

Under a system of proportional layoffs, separate seniority lists are maintained for employees from disadvantaged groups, and layoffs are apportioned in such a way that the workforce contains the same percentage of employees from these groups after the layoff as before. We saw in Chapter III that some American district courts ordered this remedy before the whole issue was foreclosed by the U.S. Supreme Court.<sup>472</sup>

One of the attractions of proportional layoffs is that they appear to present a certain symmetry with employment equity principles. If employment equity calls for hiring a given percentage of women and members of other disadvantaged groups, the reasoning probably goes, it makes sense that a percentage

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<sup>472</sup> Watkins, supra note 214. See also Loy v. City of Cleveland, 8 F.E.P. 614 (N.D. Ohio 1974), dismissed as moot, 8 F.E.P. 617 (N.D. Ohio 1974); Chance v. Board of Examiners, 534 F.2d 993, 11 F.E.P. 1450 (2d Cir. 1976), mod. on rehearing, 534 F.2d 1007, 13 F.E.P. 150 (2d Cir. 1976), cert. denied, 431 U.S. 965 (1977); Boston Chapter, NAACP v. Beecher, 679 F.2d 965, 28 F.E.P. 1657 (1st cir. 1982), vacated on other grounds sub nom. Boston Firefighters Union, Local 718 v. Boston Chapter NAACP, 461 U.S. 477, 103 S. Ct. 2076, 31 F.E.P. 1167 (1983); Morgan v. Nucci, 612 F. Supp. 1060, 38 F.E.P. 481 (D. Mass. 1985).

also be used to protect able-bodied white male employees when it comes to layoffs.

The flaw in this reasoning, which is similar to what we saw in the context of suspending the LIFO and bumping rules above, is that proportional layoffs do not complement but instead undermine employment equity goals. If a department consists of one thousand men and ten women, for example, and half of all employees are laid off, under a proportional layoff system five of the women would have to go. In addition to its obviously devastating numerical consequences, this might well destroy the "critical mass" effect which maintains a receptive atmosphere for women, so that the remaining women might soon resign. In Action Travail, the Supreme Court of Canada recognized the importance of efforts to create and maintain such a "critical mass" of women in a workplace.<sup>473</sup>

The other, more important, reason why people such as the authors of the Quebec Human Rights Commission's recent document on seniority recommend proportional layoffs (as a last resort if layoffs cannot be averted) is that they achieve a compromise between the acquired seniority rights of majority workers and the equality rights of women and other groups. Because the effects of layoffs are so drastic, and the argument that current workers' seniority rights are vitiated by past discrimination is

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<sup>473</sup> supra note 165 at 1144-46.

such a difficult one to convey or accept, it may be that a compromise is the best women could achieve in the present economic circumstances.

To avoid the type of devastating effect we have just seen, however, we recommend a two-step process as follows: i) estimating the minimum number of women necessary to establish a "critical mass" for the occupations involved, and suspending the LIFO and bumping rules to the extent that they would reduce the number of women in any given occupation or department below that level; and ii) use proportional layoffs above that level.

To soften the blow for non-minority men who get laid off as a result of such affirmative action measures, the United Auto Workers proposed that these white males should somehow be compensated by their employers.<sup>474</sup> Alfred Blumrosen (then of the EEOC) made similar proposals, arguing that:

The employer has been viewed as a sort of innocent bystander. This analysis is incorrect. No discriminatory seniority system could operate without employer instigation, or active approval. There is no reason to allow the employer to avoid facing his share of the responsibility for the correction of a discriminatory system which he helped to engender.<sup>475</sup>

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<sup>474</sup> Cited in H. Glickstein, "First Fired: Which Should Decide? Seniority or Affirmative Action" in G. Ezorsky, ed., Moral Rights in the Workplace (Albany, N.Y.: State University of New York Press, 1987) 282 at 282.

<sup>475</sup> Blumrosen, supra note 171 at 208-209.

Blumrosen and Howard Glickstein (then with the U.S. Commission on Civil Rights) both suggested the establishment of federally-administered funds to defray these expenditures.<sup>476</sup> They disagreed on who should pay, however: Blumrosen thought employers should be responsible, while Glickstein preferred a program funded by the federal government, because the layoffs were the result of implementing federal affirmative action programs.<sup>477</sup>

Others pointed out that unions and white male employees were not innocent bystanders either, but that "in many cases, white [male] employees, through their unions, have aided and abetted the employer's discrimination and, in some cases, have been the primary force behind discrimination."<sup>478</sup>

### (3) Modifications to Recall Rules

The problem with recall rules is that recall lists composed entirely or almost entirely of non-minority men make it impossible to increase the proportion of women in a firm by hiring them from the outside. As we saw in Chapter II, Canadian National has met its court-ordered obligation to hire one woman

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<sup>476</sup> Ibid. at 208-11; Glickstein, supra note 478 at 282-83.

<sup>477</sup> Blumrosen, Ibid.; Glickstein, Ibid. Note that in Vulcan Pioneers v. New Jersey Department of Civil Service, a U.S. district court ordered that the federal government compensate white male firefighters and policemen who were being laid off as a result of an affirmative action program: 34 F.E.P. 1239, vacated, 588 F. Supp. 732, 35 F.E.P. 24 (D.N.J. 1984).

<sup>478</sup> Friedman & Katz, supra note 162 at 285.

out of every four person in non-traditional jobs, but this has had little if any impact in desegregating those occupations because CN has long recall lists and new hiring has been insignificant.<sup>479</sup> As a result, CN might never be able to achieve the very modest goal of 13% representation of women in non-traditional occupations which was set by the courts.<sup>480</sup>

The modifications we support to correct this discriminatory effect are similar to the two-step process we recommend for layoffs: i) estimating the minimum number of women necessary to establish a "critical mass" that would create a receptive climate for women, and suspending recall rules until that number is reached; for this purpose, first priority would be given to women on the recall list, followed by new female applicants; and ii) once a "critical mass" of women had been established, take on both women and men according to proportional hiring targets set by the firm's employment equity plan.

#### **E. Changes to Seniority to Correct Discrimination in Benefits**

As in the case of promotions, it is important to distinguish between seniority practices relating to benefits which are legitimate ("bona fide") and illegitimate ones. Two examples of illegitimate practices which were discussed in earlier chapters are: a) different salary steps for "male" and "female" jobs in

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<sup>479</sup> Supra notes 166-67.

<sup>480</sup> Supra note 165 at 1141.

which the minimum salaries for the women's jobs are lower and women have to go through more salary steps to get to the maximum; and b) provisions which protect seniority rights during absences from work due to illness, but exclude absences related to pregnancy. Such practices should not be allowed.

Legitimate uses of seniority for benefit purposes include all situations where employees in comparable jobs receive the same pay or benefit increments for the same lengths of service. As we saw in Chapters II and IV, such practices do have a disparate negative impact on women because they have less seniority, but the legitimate use of seniority to set wages and other benefits is specifically exempted and therefore cannot be challenged under Canadian human rights and equal pay acts.

The one possible recourse for women in this case, which we discussed in Chapter IV, is to challenge these exemptions under the Canadian Charter of Rights and Freedoms. If this was successful, these "bona fide" benefit seniority practices would become subject to the duty of accommodation. The most appropriate accommodations in this case would be the attribution of constructive seniority to women and the accumulation of seniority rights during maternity and child-rearing leaves (see below).

**F. Government Interventions to Reduce Layoffs and the Adverse Impact of Seniority on Women**

As we saw in Chapter I and in Part B of this chapter, some governments have already intervened to improve the seniority rights of women through labour standards laws which mandate the accumulation of seniority during maternity or parental or adoption leaves. The rationale for these laws is that parents, meaning women in most cases, should not be penalized for engaging in an activity which benefits all of society.

These provisions are fine as far as they go, and should certainly be adopted in all jurisdictions. On the other hand, the lines drawn by the existing laws - at a maximum of 35 weeks in Ontario, 41 weeks at the federal level and 52 weeks in Quebec - are completely arbitrary and should be reviewed. As the figures on the employment of mothers in Table 4 of Chapter II demonstrated, child rearing hampers the employment of Canadian women for much longer periods: only 29% of mothers with a child or children under the age of 7 were employed full-time on a year-round basis in 1987, and only 39% of those with a child or children between the ages of 7 and 17.

As a result, it would be more logical to have labour standards laws give seniority rights to parents for at least as long as they have pre-school children. A precedent for this already exists under the Canada and Quebec Pension Plans, which

have a so-called "child-rearing drop-out" provision extending pension coverage to people who have little or no earnings during the periods they spend at home caring for a child or children under the age of seven.<sup>481</sup>

The obvious difference between the C/QPP and seniority rights, which would make such protection much less effective in the case of seniority than pensions, is that unlike C/QPP rights seniority is never or almost never transferable from one employer to another (or even between the same employer's various bargaining units, as we saw). Consequently, the only women who would benefit are the (probably) very small proportion who return to the same employer after long child-rearing absences. The impact would dramatically increase if long-standing proposals to make seniority rights transferable throughout industries were implemented,<sup>482</sup> but this is not likely to occur in the foreseeable future.

Finally, Canadian governments could take steps which would have the effect of reducing layoffs or their severity. A 1986 study by the Organisation for Economic Co-operation and Development (OECD) described the main initiatives which the governments

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<sup>481</sup> Canada Pension Plan, R.S.C. 1985, c. C-8, s. 49, para. 4; Quebec Pension Plan Act, R.S.Q. c. R-9, s. 101.

<sup>482</sup> M. Bernard, Réévaluation des clauses d'ancienneté face aux changements industriels (Master's Thesis in Industrial Relations, Laval University, 1970) [unpublished].

of developed countries have taken to achieve these goals.<sup>483</sup> The main areas it identified are requirements of advance notice of dismissals or plant closings, generous severance pay or redundancy payments, and entitlements to compensation in cases of unjust dismissals and bankruptcy.

Comparative studies indicate that most Western European countries have more comprehensive and more interventionist laws than Canada in most of these areas.<sup>484</sup> This, and the fact that most of these countries have either laws or traditions which establish reasonable non-seniority criteria in choosing the employees to be laid off,<sup>485</sup> explains why they do not need to rely on LIFO rules. An examination of the respective merits of these very different Canadian and European approaches to layoffs is beyond the scope of this report. We will therefore limit ourselves to wishing that someone else will make this the subject of a major study in the near future.

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<sup>483</sup> OECD, Flexibility in the Labour Market: The Current Debate (Paris: OECD, 1986, at 93-94.

<sup>484</sup> Ibid. at 95-108.

<sup>485</sup> See Aaron & Farwell, supra note 90; Hepple, supra note 90; Blanpain, supra note 90.

## CONCLUSION

At the beginning of this thesis, we set out to demonstrate that current seniority rules and practices discriminate against women, that this discrimination violates Canadian law, that Canadian laws against adverse impact by seniority systems are not being enforced, and that this adverse impact on women could be corrected while retaining the beneficial effects of seniority in the workplace. In chapters I through V, we showed that all of these were true in whole or in part. The main points of this demonstration were as follows:

### 1. Seniority Rules Discriminate Against Women

Only about a quarter of workers are covered by seniority clauses in Canada, but in workplaces where such clauses exist seniority permeates all aspects of employment. It establishes workers' rights relative to those of other employees in situations where their interests are in competition, and determines their eligibility for and entitlements under benefit programs. As a result, seniority is crucially important for workers where it is used, and differences in the way women and men acquire seniority and are treated under seniority rules have serious consequences.

Seniority rules which openly discriminate on the basis of sex are now very rare. Indirect discrimination by seniority systems is much more pervasive and results from the interaction

of ostensibly neutral seniority rules with two characteristics of women: (1) as a group, women have substantially less seniority than men; and (2) large proportions of female workers are segregated in the least desirable jobs.

Women have substantially less seniority than men because they continue to assume the bulk of the family's caregiving tasks. This forces most of them to drop out of their paid jobs for long periods when they have children, and upon their return to adopt much less continuous work patterns than those of men. The result is that wherever seniority is used, men enjoy an automatic advantage: they are less likely to be laid off, have a greater chance of obtaining promotions and transfers, and receive more rewards for the same or equivalent work.

The combination of seniority and women's segregation in the worst jobs is most damaging in situations where firms which have only recently started to hire women suffer an economic downturn and lay off employees. The effect of the LIFO (last in, first out) rule is that the recently-hired women, who have not had time to accumulate seniority, are the first to go.

Segregation is also perpetuated when firms use seniority units which divide employees in groups based on occupations or working area (departmental, divisional, etc.). Barriers to free movement between these units trap women in their inferior,

segregated jobs. Many seniority units are themselves unjustified barriers because they are not necessitated by differences in the skills required for the jobs or because they are structured in ways which favour white male employees.

In spite of these problems, we believe that women's best interest lies in supporting the maintenance of the seniority principle, but in a modified form to correct its unjust effects on women. Our reason for wanting to keep the seniority principle is that if it were abolished, it would not be replaced by selection on the basis of abilities, but by a system of subjective selection that would almost certainly result in even greater discrimination against women.

On the other hand, we strongly disagree with those who say that modifications to seniority to correct its negative effects on women would lead to the destruction of seniority rights. On the contrary, we feel that modifying seniority systems to accommodate the needs of women and other adversely affected groups is essential to maintain the credibility and long-term viability of the seniority principle.

## **2. Seniority Rules Constitute Unjustified Adverse Impact Discrimination Under Canadian Law**

The main laws we considered to determine whether unmodified seniority rules constitute unjustified adverse impact discrimination in Canada are: a) laws which impose a duty of fair

representation on labour unions; b) human rights acts; and c) the Canadian Charter of Rights and Freedoms.

We found that the definition of adverse effect discrimination is essentially the same under all three types of laws, and that this definition is broad enough to include all the instances of harm to women by seniority rules we had identified. On the other hand, each of these laws has its own rules for determining whether the discriminatory adverse effects are or are not justified.

Under the duty of fair representation (DFR), tribunals have generally shown great deference to the results of the collective bargaining process and strong protectiveness of the established seniority rights of employees. As a result, we conclude that the only types of adverse effect discrimination due to seniority systems which would be likely to be struck down or modified under the DFR are the grossest ones, such as seniority barriers which clearly perpetuate past segregation.

Unlike Title VII in the United States, Canada's human rights laws do not contain blanket exemptions to shelter "bona fide" seniority systems from their application, but only clauses specifying that differences in wages (defined to include all benefits) which are based on legitimate seniority systems are

not illegal. All other types of discrimination due to seniority can therefore be challenged under Canada's human rights laws.

Our examination of these laws leads us to conclude that they would probably have the effect of invalidating most "non bona fide" seniority practices which affect women adversely, such as unnecessary seniority units and barriers between units which perpetuate segregation. As for straightforward applications of the seniority principle such as seniority-based promotions and the LIFO rule, their fate will depend on the Supreme Court's future elaboration of the duty to accommodate of employers and labour unions. Considering the purposive and contextual approach the Court has adopted in most human rights cases so far, we are hopeful that it will choose solutions which establish compromises between established seniority rights and the equality rights of women.

The Canadian Charter of Rights and Freedoms could be used: a) to challenge discriminatory seniority provisions included in collective agreements entered into by governments and bodies judged to be part of government; and b) to challenge seniority exemptions in federal and provincial human rights and equal pay legislation, as well as the exemption for layoffs and recalls included in Ontario's proposed Employment Equity Act.

The main barrier to women finding redress through such challenges is the Supreme Court's reluctance to intervene in complex socio-economic issues which involve reconciling the claims of competing individuals or groups. We argued against this partial abdication of responsibility on the part of the Court, pointing out that it relegates equality rights to second-class status and violates international standards which call for giving as much importance to social and economic rights as to civil and political rights.

**3. Laws Prohibiting Adverse Impact Discrimination by Seniority Rules Are Not Being Enforced in Canada**

Among the hundreds of collective agreements with seniority provisions which are in force in Canada at the present time, fewer than a handful contain provisions intended to modify seniority rules to prevent or correct their adverse effects on women and other workers from disadvantaged groups. Combined with the fact that not a single case of indirect discrimination by seniority provisions has been reported in Canada, there is no doubt that laws prohibiting discrimination by seniority systems are not being enforced in this country.

The only way to correct this problem is to replace our complaints-based human rights process with a proactive one in which employment equity acts would be adopted in all jurisdictions to force employers to identify and eliminate all their discriminatory practices and implement specific employment goals. To be

effective, these employment equity acts must contain vigorous sanctions and be enforced by agencies with sufficient clout and resources. We also recommend that the federal Court Challenges Program be reinstated to help women and other disadvantaged groups defend their interests.

**4. Many Measures Could Be Taken to Reduce the Negative Impact of Seniority Systems While Retaining the Seniority Principle**

In cases of indirect discrimination due to seniority involving members of disadvantaged groups who can demonstrate that they have personally been victims of discrimination, we believe that the only appropriate remedy is to grant seniority retroactive to the date on which these victims should have been hired (or promoted, or transferred, if it affects seniority), and that this retroactive seniority should be effective for all purposes.

In cases where victims are not clearly identifiable and the discriminatory seniority rules or practices are only one component of systemic discrimination patterns, we believe that different remedies are suitable in different circumstances. These remedies should as much as possible be designed by the unions and management involved, after extensive consultations with all parties concerned. As a general rule, the worse the situation of women in a particular workplace, the more radical the solutions required to correct the injustice done to them.

Concerning promotions, transfers and training, the range of solutions we would support include, from the most basic to the most radical:

- Thoroughly reviewing all seniority units and barriers in order to: a) merge all units that do not reflect significant differences in employee skills; b) abolish irrelevant barriers (tests or other requirements) preventing movement between the remaining units, and lines of progression where the skills learned in the lower jobs are not necessary to perform the higher ones; and c) restructure seniority configurations to give women equivalent promotional opportunities to those of men.
- Calculating seniority on a plant-wide basis. This should be accompanied by employer-sponsored training programs ("bridging programs") to enable women to transfer from clerical/office positions to technical/plant ones. Measures should also be taken to prevent men from taking over women's traditional jobs.
- Taking affirmative measures to increase women's seniority, such as attributing constructive seniority to female workers according to a defined formula or, in very female-unfriendly workplaces, suspending all seniority rules for women until employment equity targets for the various occupations have been reached.

To correct discrimination in layoffs and bumping, we first recommend that employers take all possible measures to avoid laying off workers, such as restructuring jobs and workforces, voluntary layoffs by inverse seniority and work sharing. We believe that reviewing all such possibilities should be made a formal part of employers' duty to accommodate. If this proves insufficient, the possible solutions we would support include:

- A two-step system as follows: a) estimating the minimum number of women necessary to establish a "critical mass" to create a receptive climate for female workers, and suspending the LIFO and bumping rules to the extent that they would reduce the number of women below that level; and b) above that level, use proportional layoffs to maintain the same proportion of employees from each sex as before the layoff.
- Calculating seniority on a plant-wide basis with broad bumping zones, with specific measures to protect women's jobs.
- Temporarily suspending seniority rules for women, or attributing to them the average seniority of employees from non-disadvantaged groups.

On recalls, we support a two-step process as follows: a) estimating the minimum number of women necessary to establish a

"critical mass", and suspending recall rules until that number is reached; and b) once this "critical mass" has been established, take on both women and men according to proportional hiring targets set by the firm's employment equity plan.

As far as seniority and benefits is concerned, it is important to distinguish between legitimate (bona fide) and illegitimate seniority practices. Illegitimate ones should be abolished, and legitimate ones should be modified by attributing to women constructive seniority equal to the average seniority of employees from non-disadvantaged groups.

If measures such as these were taken, the seniority principle would lose its current widespread reputation as a rigid and unfair system which rewards the "ins" at the expense of the "outs", and would become instead the essential protector of vulnerable workers it was originally meant to be.

SELECTED BIBLIOGRAPHY

- Aaron, B., "Reflections on the Legal Nature and Enforceability of Seniority Rights" (1962) 75 Harv. L. Rev. 1532-64.
- Aaron, B. and D.F. Farwell, eds., Reports and Proceedings, 10th International Congress of the International Society for Labor Law and Social Security, vol. 2, Employment Terminations (Washington, D.C.: Bureau of National Affairs, 1984).
- Abella, R.S., Report of the Commission on Equality in Employment (Ottawa: Supply and Services Canada, 1984).
- Adams, G.W., Canadian Labour Law: A Comprehensive Text (Aurora, Ont.: Canada Law Book, 1985).
- Adell, B., "Perspectives of Power and Perspectives of Principle in Canadian Labour Law Scholarship" in I. McKenna, ed., Labour Relations Into the 1990s (Don Mills, Ont.: CCH Canadian, 1989) 27-52.
- Adell, B., "Collective Agreements and Individual Rights: A Note on the Duty of Fair Representation" (1986) 11 Queen's L.J. 251-63.
- Alston, P., "Statement on Behalf of the Committee on Economic, Social and Cultural Rights" (Address to the World Conference on Human Rights, 25 June 1993) [unpublished].
- Arthurs, H., "Understanding Labour Law: The Debate Over 'Industrial Pluralism'" (1985) 38 Curr. Legal Probs. 83-116.
- Baker, D., "Alberta Human Rights Commission v. Central Alberta Dairy Pool" (1991) 36 McGill L.J. 1450-71.
- Bayefsky, A.F., "Defining Equality Rights" in A.F. Bayefsky & M. Eberts, eds., Equality Rights and the Canadian Charter of Rights and Freedoms (Toronto: Carswell, 1985) 1-79.
- Beatty, D.M., Putting the Charter to Work: Designing a Constitutional Labour Code (Montreal & Kingston: McGill-Queen's University Press, 1987).
- Beatty, D.M., "Ideology, Politics and Unionism", in K.P. Swan & K. Swinton, eds., Studies in Labour Law (Toronto: Butterworths, 1983) 299-340.
- Begin, P. & E.F. Beal, The Practice of Collective Bargaining, 8th ed. (Boston: Irwin, 1989).

- Behman, S. "The Affirmative Action Position" (1976) 27 Lab. L.J. 490-97.
- Belton, R. "How to Settle a Discrimination Case: An Individual Viewpoint" in R. Adelman, ed., Proceedings of New York University Twenty-Eighth Annual Conference on Labor (New York: Matthew Bender, 1976) 111-46.
- Bentham, K.J., The Duty of Fair Representation in the Negotiation of Collective Agreements (Kingston, Ont.: Industrial Relations Centre, Queen's University, 1991).
- Bernard, M. "Réévaluation des clauses d'ancienneté face aux changements industriels" (Master's Thesis in Industrial Relations, Laval University, 1970) [unpublished].
- Bevan, L., Employment Equity Manual (Toronto: Carswell, 1993).
- Black, W. & L. Smith, Case Comment on Andrews v. Law Society of British Columbia (1989) 68 Can. Bar Rev. 591-615.
- Black, W. & L. Smith, "The Equality Rights" in G.-A. Beaudoin & E. Ratushny, eds., The Canadian Charter of Rights and Freedoms, 2d ed. (Toronto: Carswell, 1989) 557-651.
- Blanpain, R., ed., Bulletin of Comparative Labour Relations, Bulletin 11, Job Security and Industrial Relations (Deventer, Netherlands: Kluwer, 1980).
- Blumrosen, A.W., Black Employment and the Law (New Brunswick, N.J.: Rutgers University Press, 1971).
- Blumrosen, A.W., "Seniority and Equal Employment Opportunity: A Glimmer of Hope" (1969) 23 Rutgers L. Rev. 268-317.
- Blumrosen, A.W. & Blumrosen, R.G., "The Duty to Plan for Fair Employment Revisited: Work Sharing in Hard Times" (1975) 28 Rutgers L. Rev. 1082-1106.
- Bosset, P., M. Coutu & M. Drapeau, Accès à l'égalité, ancienneté et discrimination (Montreal: Quebec Human Rights Commission, 1993).
- Bosset, P. Possibilité d'accorder une ancienneté à titre rétroactif à des personnes victimes de discrimination dans l'embauche (art. 49 de la Charte) (Montreal: Quebec Human Rights Commission, 1988).
- Briggs, S., "Allocating Available Work in a Union Environment: Layoff vs. WorkSharing" (1987) 38 Lab. L.J. 650-57.

- Brodsky, G. & S. Day, Canadian Charter Equality Rights For Women: One Step Forward or Two Steps Back? (Ottawa: Canadian Advisory Council on the Status of Women, 1989).
- Brown, D.J.M. & D.M. Beatty, Canadian Labour Arbitration, 3rd ed. (Aurora, Ont.: Canada Law Book, 1988).
- Burch, T.K., Family History Survey: Preliminary Findings, Statistics Canada Catalogue No. 99-955 (Ottawa: Supply and Services Canada, 1985).
- Burke, I.A. and Chase, O.G., "Resolving the Seniority/Minority Layoffs Conflict: An Employer-Targeted Approach" (1978) 13 Harv. C.R.-C.L. L. Rev. 81-116.
- Campeau, G., "McKinney et ses conséquences pour les groupes défavorisés" (1992) 8 J.L. & Social Pol'y 229-53.
- Canadian Labour Congress, Submission to the Special Committee on the Review of the Employment Equity Act (Ottawa: CLC, 1992).
- Carpenter, D., "Bumping the Status Quo: Actual Relief for Actual Victims Under Title VII" (1991) 58 U. Chi. J. Rev. 703-32.
- Carrothers, A.W.R., E.E. Palmer & W.B. Rayner, Collective Bargaining Law in Canada, 2d ed. (Toronto: Butterworths, 1986).
- Carter, D.D., The Canadian Charter of Rights and Freedoms: Implications for Industrial Relations and Human Resource Practitioners (Kingston, Ont.: Industrial Relations Centre, Queen's University, 1991).
- Carter, D.D., "Canadian Industrial Relations and the Charter - The Emerging Issues" in M. Thompson, ed., Is There a New Canadian Industrial Relations? Proceedings of the 23rd Annual Meeting of the Canadian Industrial Relations Association (Winnipeg: C.I.R.A., 1986) 263-73.
- Cebulski, B.G., Affirmative Action Versus Seniority - Is Conflict Inevitable? (Berkeley: Institute of Industrial Relations, University of California, 1977).
- Christian, T., "The Charter of Rights and Labour Law", in I. McKenna, ed., Labour Relations Into The 1990s (Don Mills, Ont.: CCH Canadian, 1989) 185-224.
- Christie, I., Employment Law in Canada (Toronto: Butterworths, 1980).

- Cleveland, J., "Implementation of Affirmative Action Programs in the Current Workplace Context" in Research Studies of the Commission on Equality in Employment (Ottawa: Supply and Services Canada, 1985) 367-85.
- Coates, M.L., Part-Time Employment: Labour Market Flexibility and Equity Issues (Kingston, Ont.: Industrial Relations Centre, Queen's University, 1988).
- Cohen, S., Labor in the United States, 4th ed. (Columbus, Ohio: Charles E. Merrill, 1979).
- Cooper, G. & R.B. Sobol, "Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion" (1969) 82 Har. L. Rev. 1598-1679.
- Coutu, M., Discrimination indirecte et règles d'ancienneté (Montreal: Quebec Human Rights Commission, 1990).
- Craft, J. A., "Equal Opportunity and Seniority: Trends and Manpower Implications" (1975) 26 Lab. L.J. 750-58.
- Crispo, John, The Canadian Industrial Relations System (Toronto: McGraw-Hill Ryerson, 1978).
- Crysler, A.C., Handbook of Employer-Employee Relations in Canada (Don Mills, Ont.: CCH Canadian, 1969).
- Cuneo, C.J., Pay Equity - The Labour-Feminist Challenge (Toronto: Oxford University Press, 1990).
- Daly, M.C., "Stotts' Denial of Hiring and Promotion Preferences for Non-Victims: Draining the 'Spirit' From Title VII" (1986) 14 Fordham Urb. L.J. 17-102.
- David, H., Femmes et emploi: le défi de l'égalité (Montreal & Sillery, Que.: IRAT & Presses de l'Université du Québec, 1986).
- Davis, R., The OLRB Policy on Bargaining Units for Part-Time Workers: A Critique (Kingston, Ont.: Industrial Relations Centre, Queen's University, 1991).
- de Jong, K. "Sexual Equality: Interpreting Section 28" in A.F. Bayefsky & M. Eberts, eds., Equality Rights and the Canadian Charter of Rights and Freedoms (Toronto: Carswell, 1985) 493-528.
- Driedger, E.A., "The Canadian Charter of Rights and Freedoms" (1982) 14 Ottawa L.R. 366-78.

- Dworkin, R., Taking Rights Seriously (Cambridge, Mass.: Harvard University Press, 1978).
- Eaton, M., Case Comment on Andrews v. Law Society of British Columbia (1990) 4 C.J.W.L. 276-86.
- Eberts, M. "Sex-Based Discrimination and the Charter" in A.F. Bayefsky & M. Eberts, eds., Equality Rights and the Canadian Charter of Rights and Freedoms (Toronto: Carswell, 1985) 183-229.
- Elkiss, H., "Modifying Seniority Systems Which Perpetuate Past Discrimination" (1980) 31 Lab. L.J. 37-45.
- Elkouri, F. & E. A. Elkouri, How Arbitration Works (Washington, D.C.: Bureau of National Affairs, 1985).
- England, G., Part-Time, Casual and Other Atypical Workers: A Legal View (Kingston, Ont.: Industrial Relations Centre, Queen's University, 1987).
- Etherington, B. "Central Alberta Dairy Pool: The Supreme Court of Canada's Latest Word on the Duty to Accommodate" (1992) 1 Can. Lab. L.J. 311-33.
- Fallon, R.H., Jr. & P.C. Weiler, "Firefighters v. Stotts: Conflicting Models of Racial Justice" [1984] Sup. Ct. Rev. 1-68.
- Fasman, Z.D. and M.J. Album, Employment Law Compliance Handbook (New York: Executive Enterprises Publications, 1988).
- Field, D., "Rosie the Riveter Meets the Sexual Division of Labour" in M. Fitzgerald, C. Guberman & M. Wolfe eds., Still Ain't Satisfied: Canadian Feminism Today (Toronto: The Women's Press, 1982) 210-21.
- Finn, E., "Seniority, Promotions, Layoffs and Discrimination - A Union Perspective" in H.C. Jain & D. Carroll, eds., Race and Sex Equality in the Workplace: A Challenge and an Opportunity (Ottawa: Women's Bureau, Labour Canada, 1979) 129-35.
- Fischer, B., "Seniority is Healthy" (1976) 27 Lab. L.J. 497-503.
- Fishman, C.H., "Retroactive Seniority in Layoff Cases: Problems of Timeliness and Entitlement to Relief" (1977) 45 Geo. Wash. L. Rev. 783-811.
- Fiss, O.M., "A Theory of Fair Employment Laws" (1971) 38 U. Chi. L. Rev. 235-314.

- Freeman, R.B. & J.L. Medoff, What Do Unions Do? (New York: Basic Books, 1984).
- Friedman, A.V. and A.M. Katz, "Retroactive Seniority for the Identifiable Victim Under Title VII - Must Last Hired, First Fired Give Way", in R. Adelman, ed., Proceedings of New York University Twenty-Eighth Annual Conference on Labor (New York: Matthew Bender, 1976) 263-96.
- Gaboury, F. "Court Bars Challenge to Racist Seniority" Labor Today (July-August 1977) 1, 6.
- Gagliardo, D., Introduction to Collective Bargaining (New York: Harper & Brothers, 1953).
- Garon, M., Les conventions collectives: une piste pour l'analyse de la discrimination en milieu de travail (Cowansville, Que.: Yvon Blais, 1989).
- Gersuny, C., "Employment Seniority: Cases From Iago to Weber" (1982) 3 J. Lab. Res. 110-19.
- Gersuny, C., "Origins of Seniority Provisions in Collective Bargaining" (1982) 33 Lab. L.J. 518-25.
- Getman, J.G. and J.D. Blackburn, Labor Relations: Law, Practice and Policy, 2d ed. (Mineola, N.Y.: Foundation Press, 1983).
- Ghalam, N. Z., Women in the Workplace, 2d ed., Statistics Canada Catalogue No. 71-534E (Ottawa: Minister of Industry, Science and Technology, 1993).
- Gibson, D., The Law of the Charter: Equality Rights (Toronto: Carswell, 1990).
- Gibson, D., "Accentuating the Positive and Eliminating the Negative: Remedies for Inequality Under the Canadian Charter" in L. Smith et al., eds., Righting the Balance: Canada's New Equality Rights (Saskatoon: Canadian Human Rights Reporter, 1986) 311-41.
- Giles, A. & H.C. Jain, "The Collective Agreement" in J.C. Anderson, M. Gunderson & A. Ponak, eds., Union-Management Relations in Canada, 2d ed. (Don Mills, Ont.: Addison-Wesley, 1989) 317-45.
- Glickstein, H., "First Fired: Which Should Decide? Seniority or Affirmative Action" in G. Ezersky, ed., Moral Rights in the Workplace (Albany, N.Y.: State University of New York Press, 1987) 282-86.

- Gold, M., Case Comment: Andrews v. Law Society of British Columbia, (1989) 34 McGill L.J. 1063-79.
- Gold, M., "The Constitutional Dimensions of Promoting Equality in Employment" in Research Studies of the Commission on Equality in Employment (Ottawa: Supply and Services Canada, 1985) 247-72.
- Gold, R. "From Right to Remedy: Putting Equality to Work" (1989) 14 Queen's L.J. 213-64.
- Hamburger, P.M., "Alternatives to Seniority-Based Layoffs: Reconciling Teamsters, Weber, and the Goal of Equal Employment Opportunity" (1982) 15 U. Mich. J.L. Rev. 523-46.
- Harbison, F.H., The Seniority Principle in Union-Management Relations (Princeton, N.J.: Industrial Relations Section, Princeton University, 1939).
- Hardy, G.-P., Analyse de l'évolution des clauses d'ancienneté dans quelques grands établissements manufacturiers québécois (Thesis for Master's Degree in Social Sciences - Industrial Relations, Laval University, 1965).
- Hart, H.L.A., Essays in Jurisprudence and Philosophy (Oxford: Clarendon Press, 1983).
- Hartney, M., "Some Confusions Concerning Collective Rights" (1991) 4 Can. J. Law & Jur. 293-314.
- Heenan, R.L., "Effect of the Charter on Employment", in Meredith Memorial Lectures 1988 - New Developments in Employment Law (Montreal: Faculty of Law, McGill University, 1989) 23-34.
- Heppele, B., "Security of Employment", in R. Blanpain, ed., Comparative Labour Law and Industrial Relations, 3d ed. (Deventer, Netherlands: Kluwer, 1987) 475-502.
- Herman, E.E., A. Kuhn & R.L. Seeber, Collective Bargaining & Labor Relations (Englewood Cliffs, N.J.: Prentice-Hall, 1987).
- Hernandez, B.E., "Title VII v. Seniority: the Supreme Court Giveth and the Supreme Court Taketh Away" (1986) 35 Am. U. L. Rev. 339-86.
- Hobhouse, L.T., Liberalism (New York: Oxford University Press, 1964).

- House of Commons, Special Committee on the Review of the Employment Equity Act, A Matter of Fairness (Ottawa: Queen's Printer, 1992) (Chairperson: A. Redway).
- House of Commons, Standing Committee on Human Rights and the Status of Disabled Persons, Paying Too Dearly (Ottawa: Queen's Printer, 1992) (Chairperson: B. Halliday).
- Hyman, R., "Pluralism, Procedural Consensus and Collective Bargaining" (1978) 16 Brit. J. Ind. Rel. 16-40.
- Ichniowski, C. "Have Angels Done More? The Steel Industry Consent Decree" (1983) 36 Ind. & Lab. Rel. Rev. 182-98.
- Ivankovich, Ivan F., "The 'Religious' Employee and Reasonable Accommodation Requirements" (1987-88) 13 Can. Bus. L.J. 313-58.
- Joseph, E.R., "Last Hired, First Fired - Seniority, Layoffs, and Title VII: Questions of Liability and Remedy" (1975) 2 Colum. J.L. & Soc. Probs. 343-402.
- Kehoe, F. & M. Archer, Canadian Industrial Relations, 2d ed. (Oakville, Ont.: Twentieth Century Labour, 1980).
- Kelley, M.R., "Discrimination in Seniority Systems: A Case Study" (1982) 36 Ind. & Lab. Rel. Rev. 40-55.
- Kilberg, W.J., "How to Settle A Discrimination Case" in R. Adelman, ed., Proceedings of New York University Twenty-Eighth Conference on Labor (New York: Matthew Bender, 1976, 101-10.
- Kleiman, B. & C. Frankel, "Seniority Remedies Under Title VII: The Steel Consent Decree - A Union Perspective" in R. Adelman, ed., Proceedings of New York University Twenty-Eighth Conference on Labor (New York: Matthew Bender, 1976) 177-230.
- Labour Canada, Labour Data Branch, Collective Bargaining Division, Provisions in Major Collective Agreements in Canada Covering 500 and More Employees (Ottawa: Supply and Services Canada, 1985).
- Labour Canada, Women's Bureau, Women in the Labour Force, 1990-91 ed. (Ottawa: Supply and Services Canada, 1990).
- Labour Law Casebook Group, Labour Law, 4th ed. (Kingston, Ont.: Industrial Relations Centre, Queen's University, 1986).
- La Forest, G. "The Balancing of Interests Under the Charter" (1992-1993) 2 N.J.C.L. 133-62.

- Lapp, J.A., How to Handle Problems of Seniority (New York: National Foremen's Institute, 1946).
- Laqueur, W. & B. Rubin, The Human Rights Reader, rev. ed. (Toronto: New American Library, 1990).
- Larson, Arthur and Lex K. Larson, Employment Discrimination, vol. 1 Sex (New York: Matthew Bender, 1990).
- Laskin, B., "Collective Bargaining and Individual Rights" (1963) 6 Can. Bar J. 278-91.
- Le Bourdais, C. & H. Desrosiers, Trajectoires démographiques et professionnelles: Une analyse longitudinale des processus et des déterminants (Ottawa: Demographic Review Project, Health and Welfare Canada, 1988).
- Lepovsky, M.D., "The Canadian Judicial Approach to Equality Rights: Freedom Ride or Roller Coaster?" (1992) 55 Law & Contemp Probs. 168-99.
- Leshin, G., Equal Employment Opportunity and Affirmative Action in Labor-Management Relations: A Primer (Los Angeles: Institute of Industrial Relations, University of California, 1982).
- Logan, H.A., Trade Unions in Canada: Their Development and Functioning (Toronto: Macmillan of Canada, 1948).
- Lund, R.T., D.C. Bumstead & S. Friedman, "Inverse Seniority: Timely Answer to the Layoff Dilemma?" (1975) 53 Harv. Bus. Rev. 65-72.
- Lynk, M. & R. Ellis, "Unions and the Duty to Accommodate" (1992) 1 Can. Lab. L.J. 238-82.
- MacKinnon, C.A., "Making Sex Equality Real", in L. Smith et al., eds., Righting the Balance: Canada's New Equality Rights (Saskatoon: Canadian Human Rights Reporter, 1986) 37-43.
- MacLeod, K., The Seniority Principle: Is It Discriminatory? (Kingston, Ont.: Industrial Relations Centre, Queen's University, 1987).
- Mahoney, K.E., "The Constitutional Law of Equality in Canada" (1992) 44 Me. L. Rev. 229-59.
- Majury, D., "Equality and Discrimination According to the Supreme Court of Canada" (1990-91) 4 C.J.W.L. 407-39.

- Malles, P., Economic Council of Canada, Canadian Labour Standards in Law, Agreement, and Practice (Ottawa: Supply and Services Canada, 1976).
- McCaffrey, J.W., "Development and Administration of Seniority Provisions", in E. Stein, ed., Collective Bargaining and Labor Law: Proceedings of New York University Second Annual Conference on Labor (New York: Matthew Bender, 1949) 131-54.
- Meyers, F., "The Analytic Meaning of Seniority", in W. Fogel, ed., Job Equity and Other Studies in Industrial Relations: Essays in Honor of Frederic Meyers (Los Angeles: Institute of Industrial Relations, University of California, 1982) 35-49.
- Mills, D. Q., Labor-Management Relations, 4th ed. (New York: McGraw-Hill, 1989).
- Modjeska, L.M., Employment Discrimination Law, 2d ed. (Rochester, N.Y. & San Francisco: Lawyers Co-operative Publishing & Bancroft-Whitney Co., 1988).
- Montgomery, D., Workers' Control in America: Studies in the History of Work, Technology, and Labor Struggles (New York: Cambridge University Press, 1979).
- Moon, R., "A Discrete and Insular Right to Equality: Comment on Andrews v. Law Society of British Columbia (1989) 21 Ottawa L. Rev. 563-83.
- Mooney, J.A., "L'obligation d'accommodement de l'employeur dans les cas de discrimination suite à l'arrêt Central Alberta Dairy Pool" (1991) 51 R. du B. 661-72.
- Moore, G.A. Jr., "How to Settle a Discrimination Case: The Employer Viewpoint - Steel Industry Consent Decrees" in R. Adelman, ed., Proceedings of New York University Twenty-Eighth Annual Conference on Labor (New York: Matthew Bender, 1976) 147-76.
- Note, "Voluntary Public Employer Affirmative Action: Reconciling Title VII Consent Decrees With the Equal Protection Claims of Majority Employees" (1987) 28 Boston C. L. Rev. 1007-44.
- Note, "Seniority Systems and the Duty of Fair Representation: Union Liability in the Teamsters Context" (1979) 14 Harv. C.R.-C.L. L. Rev. 711-82.
- Note, "Toward a Redefinition of Sexual Equality" (1981) 95 Harv. L. Rev. 487-508.

- Note, "Last Hired, First Fired: Layoffs and Title VII" (1975) 88 Harv. L. Rev. 1544-70.
- Note, "Title VII, Seniority Discrimination and the Incumbent Negro" (1967) 80 Harv. L. Rev. 1260-83.
- Note, "Seniority Rights in Labor Relations" (1937) 47:50 Yale L.J. 73-98.
- Offerman, B.J., "Seniority Systems and Affirmative Action: Are They Legally Compatible in a Slack Economy?" (1982) 7 Lab. Stud. J. 99-122.
- Organisation for Economic Co-Operation and Development, Flexibility in the Labour Market: The Current Debate (Paris: OECD, 1986).
- Palmer, E.E., Collective Agreement Arbitration in Canada, 2d ed. (Toronto: Butterworths, 1983).
- Peach, D.A. and D. Kuechle, The Practice of Industrial Relations, 2d ed. (Toronto: McGraw-Hill Ryerson, 1985).
- Player, M.A., Employment Discrimination Law (St. Paul, Minn.: West Publishing, 1988).
- Poole, P.-J. & J. Rebick, "Not Another Hundred Years: The Failure of the Federal Employment Equity Act" (1993) 1 Can. Lab. L.J. 341-67.
- Poplin, C., "Fair Employment in a Depressed Economy: The Layoff Problem" (1975) 23 UCLA L. Rev. 177-234.
- Potter, S.V., "La preuve requise et sa nature" in Institut canadien d'études juridiques supérieures, ed., Droits de la personne: l'émergence de droits nouveaux (Cowansville, Que.: Yvon Blais, 1993) 42-59.
- Price, S., "Accommodating Women in Employment: The Limitations of a Traditional Approach" (1992) 1 Can. Lab. L.J. 140-65.
- Rawls, J., A Theory of Justice (Cambridge, Mass.: Belknap Press of Harvard University Press, 1971).
- Rees, A., The Economics of Trade Unions, 3d ed. (Chicago: University of Chicago Press, 1989).
- Ritchie, L. "Affirmative Action Versus Union Security", in M. Lord & J. Wylie, eds., Proceedings of the 19th Annual Meeting of the Canadian Industrial Relations Association, vol. 2 (Ottawa: CIRA, 1982) 402-15.

- Robinson, P., Women's Work Interruptions: Results From the 1984 Family History Survey, Statistics Canada Catalogue No. 99-962 (Ottawa: Supply and Services Canada, 1985).
- Ross, S.C., "Reconciling Plant Seniority With Affirmative Action and Anti-Discrimination" in R. Adelman, ed., Proceedings of New York University Twenty-Eighth Annual Conference on Labor (New York: Matthew Bender, 1976) 231-61.
- Sack, J. & E. Poskanzer, Contract Clauses, 2d ed. (Toronto: Lancaster House, 1985).
- Sayles, L.R., "Seniority: An Internal Union Problem" in G.P. Shultz & J.R. Coleman, eds., Labor Problems: Cases and Readings (New York: McGraw-Hill, 1953) 179-86.
- Schlei, B.L. & P. Grossman, Employment Discrimination Law, 2d ed. (Washington, D.C.: Bureau of National Affairs, 1983).
- Sharpe, R.J., "New Ways of Thinking - Liberalism" in F.E. McArdle, ed. The Cambridge Lectures 1991 (Cowansville, Que.: Yvon Blais, 1993) 265-71.
- Sheppard, C., "Recognition of the Disadvantaging of Women: The Promise of Andrews v. Law Society of British Columbia" (1989) 35 McGill L.J. 207-34.
- Sheppard, C., "Equality, Ideology and Oppression: Women and the Canadian Charter of Rights and Freedoms" (1986) 10 Dalhousie L.J. 195-223.
- Sheppard, C., "Affirmative Action in Times of Recession: The Dilemma of Seniority-Based Layoffs" (1984) 42 U.T. Fac. L. Rev. 1-25.
- Singh, S., "A Note on the Work Sharing Program", Perspectives Statistics Canada Catalogue No. 75-001 (Winter 1991) 56-59.
- Slichter, S.H., J.J. Healy & E. R. Livernash, The Impact of Collective Bargaining on Management (Washington, D.C.: Brookings Institution, 1960).
- Sloane, A.A. and F. Witney, Labor Relations, 6th ed. (Englewood Cliffs, N.J.: Prentice-Hall, 1988).
- Smith, C.L., "Adding A Third Dimension: The Canadian Approach to Constitutional Equality Guarantees" (1992) 55:1 Law & Contemp. Probs. 211-33.
- Smith, C.L., "Judicial Interpretation of Equality Rights Under the Canadian Charter of Rights and Freedoms: Some Clear and Present Dangers" (1988) 23:1 U.B.C. L. Rev. 65-95.

- Smith, J.C. "Loss of Seniority and the Nature of Seniority Rights" in M.A. Hickling, ed., Grievance Arbitration: A Review of Current Issues (Vancouver: Institute of Industrial Relations, University of British Columbia, 1977) 116-50.
- Smyth, R.C. and M.J. Murphy, Bargaining With Organized Labor (New York: Funk and Wagnalls, 1948).
- Stacy, D.R. "Title VII Seniority Remedies in a Time of Economic Downturn" (1975) 28 Vand. L. Rev. 487-520.
- Statistics Canada, Labour Force Activity: The Nation - 91 Census, Catalogue No. 93-324 (Ottawa: Minister of Industry, Science and Technology, 1993).
- Statistics Canada, Labour Force Activity of Women By Presence of Children: The Nation - 91 Census, Catalogue No. 93-325 (Ottawa: Minister of Industry, Science and Technology, 1993).
- Statistics Canada, Employment Income by Occupation: The Nation - 91 Census, Catalogue No. 93-332 (Ottawa: Minister of Industry, Science and Technology, 1993).
- Statistics Canada, Annual Report of the Minister of Industry, Science and Technology Under the Corporations and Labour Unions Returns Act, Part II - Labour Unions 1990, Catalogue No. 70-202 (Ottawa: Minister of Industry, Science and Technology, 1993).
- Summers, C.W., "Industrial Democracy: America's Unfulfilled Promise" (1979) 28-29 Clev. St. L. Rev. 29-49.
- Summers, C.W. and M.C. Love, "Work Sharing as Alternative to Layoffs by Seniority: Title VII Remedies in Recession" (1976) 24 U. Pa. L. Rev. 893-941.
- Swinton, K., "Accommodating Women in the Workplace: Reproductive Hazards and Seniority Systems" (1992) 1 Can. Lab. L.J. 125-39.
- Swinton, K., "Restraints on Government Efforts to Promote Equality in Employment: Labour Relations and Constitutional Considerations" in Research Studies of the Commission on Equality in Employment (Ottawa: Supply and Services Canada, 1985) 273-96.
- Tait, J., "Le droit à une société libre et démocratique: l'article premier de la Charte canadienne et le rôle du Procureur général" in Institut canadien d'études juridiques supérieures, ed., Droits de la personne: l'émergence de

- droits nouveaux (Cowansville, Que.: Yvon Blais, 1993) 75-93.
- Tarnopolsky, W.S., Discrimination and the Law (Don Mills, Ont.: Richard De Boo, 1987).
- Tarnopolsky, W.S. & W.F. Pentney, Discrimination and the Law with Seventh Cumulative Supplement (Don Mills, Ont.: Richard de Boo, 1985 & 1991).
- Tellier, M., Asst. Vice-President, Canadian National, in House of Commons, Special Committee on the Review of the Employment Equity Act, Minutes of Proceedings and Evidence No. 9 (24 February 1992) 9:4-9:19.
- Thorp, C. D. Jr., "Racial Discrimination and Seniority" (1972) 23 Lab. L.J. 398-413.
- Thurow, L.C., "A Theory of Groups and Economic Redistribution" (1979) 9 Philosophy and Public Affairs 25-41.
- U.S. Commission on Civil Rights, Last Hired, First Fired - Lay-offs and Civil Rights (Washington, D.C.: U.S. Government Printing Office, 1977).
- U.S. Department of Labor, Bureau of Labor Statistics, Major Collective Bargaining Agreements: Administration of Seniority, Bulletin No. 1425-14 (Washington, D.C.: U.S. Government Printing Office, 1972)
- U.S. Department of Labor, Bureau of Labor Statistics, Collective Bargaining Provisions: Seniority, Bulletin No. 908-11 (Washington, D.C.: U.S. Government Printing Office, 1949).
- Vallée, G., "La convention collective et les arrangements négociés au Québec" (1989) 41 Travail et emploi 50-56.
- Van Boven, T.C., "Distinguishing Criteria of Human Rights", in M.L. Berlin & W.F. Pentney, eds., Human Rights and Freedoms in Canada (Toronto: Butterworths, 1987) I-28 to I-36.
- Vizkelety, B., "Reasonable Accommodation Revisited: Alberta Human Rights Commission v. Central Alberta Dairy Pool" (1991) 70 Can. Bar Rev. 335-51.
- Wallace, J., Part-Time Work in Canada: Report of the Commission of Inquiry Into Part-Time Work (Ottawa: Supply and Services Canada, 1983).
- Webb, S. & B. Webb, Industrial Democracy (New York: Augustus M. Kelley, 1965).

- Weiler, P.C., "The Charter At Work: Reflections on the Constitutionalizing of Labour and Employment Law" (1990) 40 U.T.L.J. 117-212.
- White, J. Women and Part-Time Work (Ottawa: Canadian Advisory Council on the Status of Women, 1983).
- Willes, J.A., Contemporary Canadian Labour Relations (Toronto: McGraw-Hill Ryerson, 1984).
- Williard, D., R. McCoy & M. Morand, "Short-Time Compensation, Yes; Worksharing, No: Unraveling the Debate" (1985) 9 Lab. Stud. J. 239-53.
- Wines, W., "Seniority, Recession and Affirmative Action: the Challenge for Collective Bargaining" (1982-83) 20 Am. Bus. L.J. 37-58.
- Woehrling, J., "L'article 1 de la Charte canadienne et la problématique des restrictions aux droits et libertés: l'état de la jurisprudence de la Cour Suprême", in Institut canadien d'études juridiques supérieures, ed., Droits de la personne: l'émergence de droits nouveaux (Cowansville, Que.: Les Editions Yvon Blais, 1993) 3-34.
- Youngdahl, J.E., "How Can Seniority, Anti-Discrimination and Affirmative Action Be Reconciled in a Layoff Economy: The Union Viewpoint", in R. Adelman, ed., Proceedings of New York University Twenty-Eighth Annual Conference on Labor (New York: Matthew Bender, 1976) 297-316.
- Ziskind, D., "Retroactive Seniority: A Remedy for Hiring Discrimination" (1976) 27 Lab. L.J. 480-503.

CANADIAN LEGISLATION CITED1) Constitutional Legislation

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

2) Other Legislation

Bill 79, An Act to Provide for Employment Equity for Aboriginal People, People With Disabilities, Members of Racial Minorities and Women, 2d Sess., 35th Leg., Ontario, 1992.

Canada Labour Code, R.S.C. 1985, c. L-2.

Canada Pension Plan, R.S.C. 1985, c. C-8.

Canadian Bill of Rights, S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III.

Canadian Human Rights Act, R.S.C. 1985, c. H-6.

Charter of Human Rights and Freedoms, R.S.Q. c. C-12.

Employment Equity Act, S.C. 1986, c. 31.

Employment Standards Act, C.C.S.M. c. E110.

Employment Standards Act, R.S.O. 1990, c. E.14.

Employment Standards Act, S.N.B. 1982, c. E-7.2.

Human Rights Act, R.S.N.B. 1973, c. H-11.

Human Rights Act, R.S.N.S. 1989, c. 214.

Human Rights Act, R.S.P.E.I. 1988, c. H-12.

Human Rights Act, S.B.C. 1984, c. 22.

Human Rights Code, C.C.S.M. c. H175.

Human Rights Code, R.S.N. 1990, c. H-14.

Human Rights Code, R.S.O. 1990, c. H.19.

Individual's Rights Protection Act, R.S.A. 1980, c. I-2.

- Labour Code, R.S.Q. c. C-27.
- Labour Relations Act, C.C.S.M. c. L10.
- Labour Relations Act, R.S.N. 1990, c. L-1.
- Labour Relations Act, R.S.O. 1990, c. L.2.
- Labour Relations Code, S.A. 1988, c. L-1.2.
- Labour Relations Code, S.B.C. 1992, c. 82.
- Labour Standards Act, R.S.S. 1978, c. L-1.
- Labour Standards Code, R.S.N.S. 1989, c. 246.
- National War Labour Order, P.C. 1003, Feb. 1944.
- Pay Equity Act, C.C.S.M., c. P13.
- Pay Equity Act, R.S.N.S. 1989, c. 337.
- Pay Equity Act, R.S.O. 1990, c. P.7.
- Pay Equity Act, R.S.P.E.I. 1988, c. P-2.
- Pay Equity Act, S.N.B. 1989, c. P-5.01.
- Quebec Pension Plan, R.S.Q. C. R-9.
- Regulation Respecting Labour Standards, R.R.Q. 1981, c. N-1.1,  
r. 3.
- Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1.
- Trade Union Act, R.S.S. 1978, c. T-17.
- Unemployment Insurance Act, R.S.C. 1985, c. U-1.

CASES CITED - CANADA

- Andrews v. Law Society (British Columbia), [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1, 10 C.H.R.R. D/5719.
- Bartlett v. A.C.T.W.U., Local 307, [1983] O.L.R.B. Rep. 2067.
- Bhinder v. Canadian National Railway, [1985] 2 S.C.R. 561, 23 D.L.R. (4th) 481, 7 C.H.R.R. D/3093.
- Blainey v. Ontario Hockey Assn. (1986), 26 D.L.R. (4th) 728, 7 C.H.R.R. D/3529, 54 O.R. (2d) 513 (Ont. C.A.), leave to appeal to S.C.C. refused [1986] 1 S.C.R. xii.
- Bliss v. Canada (Attorney General), [1979] 1 S.C.R. 183, 92 D.L.R. (3d) 417, 23 N.R. 527.
- Brass Craft Canada Ltd. v. I.A.M., Local 2446 (1983), 11 L.A.C. (3d) 236, 5 C.H.R.R. D/1964 (Ont.).
- Brinovec v. S.M.W., Local 575, [1986] O.L.R.B. Rep. 585.
- Brooks v. Canada Safeway Ltd., [1989] 1 S.C.R. 1219, 59 D.L.R. (4th) 321, 10 C.H.R.R. D/6183.
- Brossard (Town) v. Quebec (Commission des droits de la personne), [1988] 2 S.C.R. 279, 53 D.L.R. (4th) 609, 10 C.H.R.R. D/5515.
- Canadian Merchant Service Guild v. Gagnon, [1984] 1 S.C.R. 509, 9 D.L.R. (4th) 641, 53 N.R. 100.
- Canadian National Railway v. Canada (Human Rights Commission), [1987] 1 S.C.R. 1114, (sub nom. Action Travail des Femmes v. Canadian National Railway) 40 D.L.R. (4th) 193, 8 C.H.R.R. D/4210.
- Central Alberta Dairy Pool v. Alberta (Human Rights Commission), [1990] 2 S.C.R. 489, 72 D.L.R. (4th) 417, 12 C.H.R.R. D/417.
- Chapelaine v. Air Canada (1992), 15 C.H.R.R. D/22 (Cdn. Human Rights Review Trib.).
- Cyr v. Mine Mill Union, Local 598, [1983] O.L.R.B. Rep. 1303, 83 C.L.L.C. 16,058.
- Dalton v. Canada (Human Rights Commission), [1986] 2 F.C. 141, 25 D.L.R. (4th) 260, 7 C.H.R.R. D/3189 (C.A.), leave to appeal to S.C.C. refused (1986), 67 N.R. 158 (note).

- Dhaliwal v. British Columbia Timber Ltd. (1983), 4 C.H.R.R. D/1520 (B.C. Bd. of Inquiry).
- Dickason v. University of Alberta, [1992] 2 S.C.R. 1103, 95 D.L.R. (4th) 439, 17 C.H.R.R. D/87.
- Douglas Aircraft Co., [1976] O.L.R.B. Rep. 779.
- Douglas/Kwantlen Faculty Assn. v. Douglas College, [1990] 3 S.C.R. 570, 77 D.L.R. (4th) 94, 13 C.H.R.R. D/403.
- Erickson v. Canadian Pacific Express and Transport Ltd. (1986), 8 C.H.R.R. D/3942, 87 C.L.L.C. 17,005 (Cdn. Human Rights Trib.).
- Federal Wire & Cable Co. (1960), 3 Steelworkers Arbitration Cases 276 (Laskin).
- Gohm v. Domtar Inc. (1990), 12 C.H.R.R. D/161, 90 C.L.L.C. 17,027 (Ont. Bd. of Inquiry) aff'd (1992), 89 D.L.R. (4th) 305, (sub nom. O.P.E.I.U., Local 267 v. Domtar Inc.) 16 C.H.R.R. D/479, 92 C.L.L.C. 17,015 (Ont. Div. Ct.).
- Hamlyn v. Cominco Ltd. (1989), 11 C.H.R.R. D/333 (B.C. Human Rights Council).
- Hémond v. Coopérative fédérée du Québec, [1989] 2 S.C.R. 962, 103 N.R. 193, 89 C.L.L.C. 14,047.
- Humphreys v. S.E.I.U., Loc. 204, [1983] O.L.R.B. Rep. 530, 2 C.L.R.B.R. (N.S.) 350.
- Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, 94 N.R. 167.
- Janzen v. Platy Enterprises Ltd. [1989] 1 S.C.R. 1252, 59 D.L.R. (4th) 352, 10 C.H.R.R. D/6205.
- Lawrence v. I.B.E.W., Local 120, [1986] O.L.R.B. Rep. 1241, 14 C.L.R.B.R. (N.S.) 77.
- Lazenkas v. U.F.C.W., Local 1000 A, [1983] O.L.R.B. Rep. 72.
- McKale v. Lamont Auxiliary Hospital (1986), 8 C.H.R.R. D/3659 (Alta. Bd. of Inquiry), aff'd (1987) 8 C.H.R.R. D/4038, 37 D.L.R. (4th) 47, 87 C.L.L.C. 17,028 (Q.B.).
- McKinney v. University of Guelph, [1990] 3 S.C.R. 229, 76 D.L.R. (4th) 545, 13 C.H.R.R. D/171.
- Morin v. C.A.W., [1988] O.L.R.B. Rep. 506.

- Ontario (Human Rights Commission) v. Etobicoke (Borough), [1982] 1 S.C.R. 202, 132 D.L.R. (3d) 14, 3 C.H.R.R. D/781.
- Ontario (Human Rights Commission) and O'Malley v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536, 23 D.L.R. (4th) 321, 7 C.H.R.R. D/3102.
- Rand v. Sealy Eastern Ltd. Upholstery Division (1982), 3 C.H.R.R. D/938 (Ont. Bd. of Inquiry).
- R. v. Oakes, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 65 N.R. 87.
- R. v. Swain, [1991] 1 S.C.R. 933, 63 C.C.C. (3d) 481, 125 N.R.1.
- R. v. Turpin, [1989] 1 S.C.R. 1296, 48 C.C.C. (3d) 8, 96 N.R. 115.
- R.W.D.S.U. v. Cuddy Food Products Ltd., [1988] O.L.R.B. Rep. 1211, 1 C.L.R.B.R. (2d) 1, 89 C.L.L.C. 16,017, application for reconsideration denied [1989] O.L.R.B. Rep. 126.
- R.W.D.S.U. v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174, 87 C.L.L.C. 14,002.
- Renaud v. Central Okanagan School District No. 23, [1992] 2 S.C.R. 970, 95 D.L.R. (4th) 577, 16 C.H.R.R. D/425.
- Reynolds v. B.C. Mental Health Society (1992), 16 C.H.R.R. D/499 (B.C.C.H.R.).
- Saskatchewan (Human Rights Commission) v. Saskatoon (City), [1989] 2 S.C.R. 1297, 65 D.L.R. (4th) 481, 11 C.H.R.R. D/204.
- Seagrams Employees v. Distillery, Brewery, Winery, Soft Drink, and Allied Workers Union, Local 604, [1978] 1 Can. L.R.B.R. 375 (B.C.).
- Senay v. Aliments Ault Ltée (1982), 4 C.H.R.R. D/1296 (C.S.P. Que.).
- U.E., Local 512 v. Tung-Sol of Canada Ltd. (1964), 15 L.A.C. 161 (Ont.) (Reville).

CASES CITED - UNITED KINGDOM

- Home Office v. Holmes, [1984] 3 All E.R. 549 (Employment Appeal Trib.).
- Price v. Civil Service Commission, [1978] 1 All E.R. 1228 (Employment Appeal Trib.).

CASES CITED - UNITED STATES

- American Tobacco Co. v. Patterson, 456 U.S. 63, 102 S. Ct. 1534, 71 L.Ed.2d 748 (1982).
- Boston Chapter, NAACP v. Beecher, 679 F.2d 965, 28 F.E.P. 1657 (1st Cir. 1982), vacated on other grounds sub nom. Boston Firefighters Union, Local 718 v. Boston Chapter NAACP, 461 U.S. 477, 103 S. Ct. 2076, 31 F.E.P. 1167 (1983).
- Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969).
- Chance v. Board of Examiners, 534 F.2d 993, 11 F.E.P. 1450 (2d Cir. 1976), mod. on rehearing, 534 F.2d 1007, 13 F.E.P. 150 (2d Cir. 1976), cert. denied, 431 U.S. 965 (1977).
- Ford Motor Co. v. Huffman, 345 U.S. 330, 73 S. Ct. 681, 97 L.Ed. 1048 (1953).
- Franks v. Bowman Transportation Co., 424 U.S. 747, 96 S. Ct. 1251, 47 L.Ed.2d 444 (1976).
- Griggs v. Duke Power Co., 401 U.S. 424, 91 S. Ct. 849, 28 L.Ed.2d 158 (1971).
- International Brotherhood of Teamsters v. United States, 431 U.S. 324, 97 S. Ct. 1843, 52 L.Ed.2d 396 (1977).
- Jersey Central Power & Light Co. v. I.B.E.W. Local Unions, 508 F.2d 687 (3d Cir. 1975), vacating and remanding 8 F.E.P. 690 (D.N.J. 1974), vacated and remanded, 425 U.S. 998 (1976), on remand, 542 F.2d 8 (3d Cir. 1976).
- Johnson v. Transportation Agency, Santa Clara County, California, 480 U.S. 616, 107 S. Ct. 1442, 94 L.Ed.2d 615 (1987).
- Loy v. City of Cleveland, 8 F.E.P. 614 (N.D. Ohio 1974), dismissed as moot, 8 F.E.P. 617 (N.D. Ohio 1974).

- Meadows v. Ford Motor Co., 510 F.2d 939, 9 F.E.P. 180 (6th Cir. 1975), cert. denied, 425 U.S. 998 (1976).
- Memphis Fire Department v. Stotts, 467 U.S. 561, 104 S.Ct. 2576, 81 L.Ed. 2d 483 (1984).
- Morgan v. Nucci, 612 F. Supp. 1060, 38 F.E.P. 481 (D. Mass. 1985).
- Papermakers, Local 189 v. United States, 416 F.2d 980, 1 F.E.P. 875 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970).
- Pullman-Standard v. Swint, 456 U.S. 273, 102 S. Ct. 1781, 72 L.Ed.2d 66 (1982).
- Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 1 F.E.P. 260 (E.D. Va 1968).
- Schaefer v. Tannian, 394 F. Supp. 1136 (E.D. Mich. 1975), vacated and remanded in part, 538 F.2d 1234, 13 F.E.P. 528 (6th Cir. 1976).
- Steele v. Louisville and Nashville Railroad Co., 323 U.S. 192, 65 S. Ct. 226, 89 L.Ed. 173 (1944).
- Tangren v. Wackenhut Services, Inc., 480 F. Supp. 539 (D. Nev. 1979), aff'd 658 F.2d 705, 26 F.E.P. 1647 (9th Cir. 1981), cert. denied, 456 U.S. 916 (1982).
- Transworld Airlines, Inc. v. Hardison, 432 U.S. 63, 97 S. Ct. 2264, 14 F.E.P. 1697 (1977).
- United Air Lines Inc. v. Evans, 431 U.S. 533, 97 S. Ct. 1885, 52 L.Ed.2d 571 (1977).
- United States v. Allegheny-Ludlum Industries, Inc., 63 F.R.D. 1, 8 F.E.P. 198 (N.D. Ala. 1974), aff'd, 517 F.2d 826 (5th Cir. 1975).
- United States v. Bethlehem Steel Corp., 446 F.2d 652, 3 F.E.P. 589 (2d Cir. 1971).
- United States v. H.K. Porter Co., 296 F. Supp. 40, 7 F.E.P. 1021 (N.D. Ala. 1974), modified, 491 F.2d 1105 (5th Cir. 1974).
- United States v. U.S. Steel Corp. "Fairfield", 371 F. Supp. 1045, 7 F.E.P. 322 (N.D. Ala. 1973), rev'd in part, 520 F.2d 1043, 11 F.E.P. 553 (5th Cir. 1975), cert. denied, 429 U.S. 817 (1976).
- United Steelworkers of America v. Weber, 443 U.S. 193, 99 S. Ct. 2721, 61 L.Ed.2d 480 (1979).

Vaca v. Sipes, 386 U.S. 171, 64 L.R.R.M. 2369 (1967).

Vulcan Pioneers v. New Jersey Department of Civil Service, 34 F.E.P. 1239, vacated, 588 F. Supp. 732, 35 F.E.P. 24 (D.N.J. 1984).

Waters v. Wisconsin Steel Works, 502 F.2d 1309, 8 F.E.P. 577 (7th Cir. 1974), cert. denied, 425 U.S. 997 (1976).

Watkins v. United Steelworkers, Local 2369, 516 F.2d 41, 10 F.E.P. 1297 (5th Cir. 1975), rev'g 369 F. Supp. 1221 (E.D. La. 1974).

Wygant v. Jackson Board of Education, 476 U.S. 267, 106 S. Ct. 1842, 90 L.Ed.2d 260 (1986).