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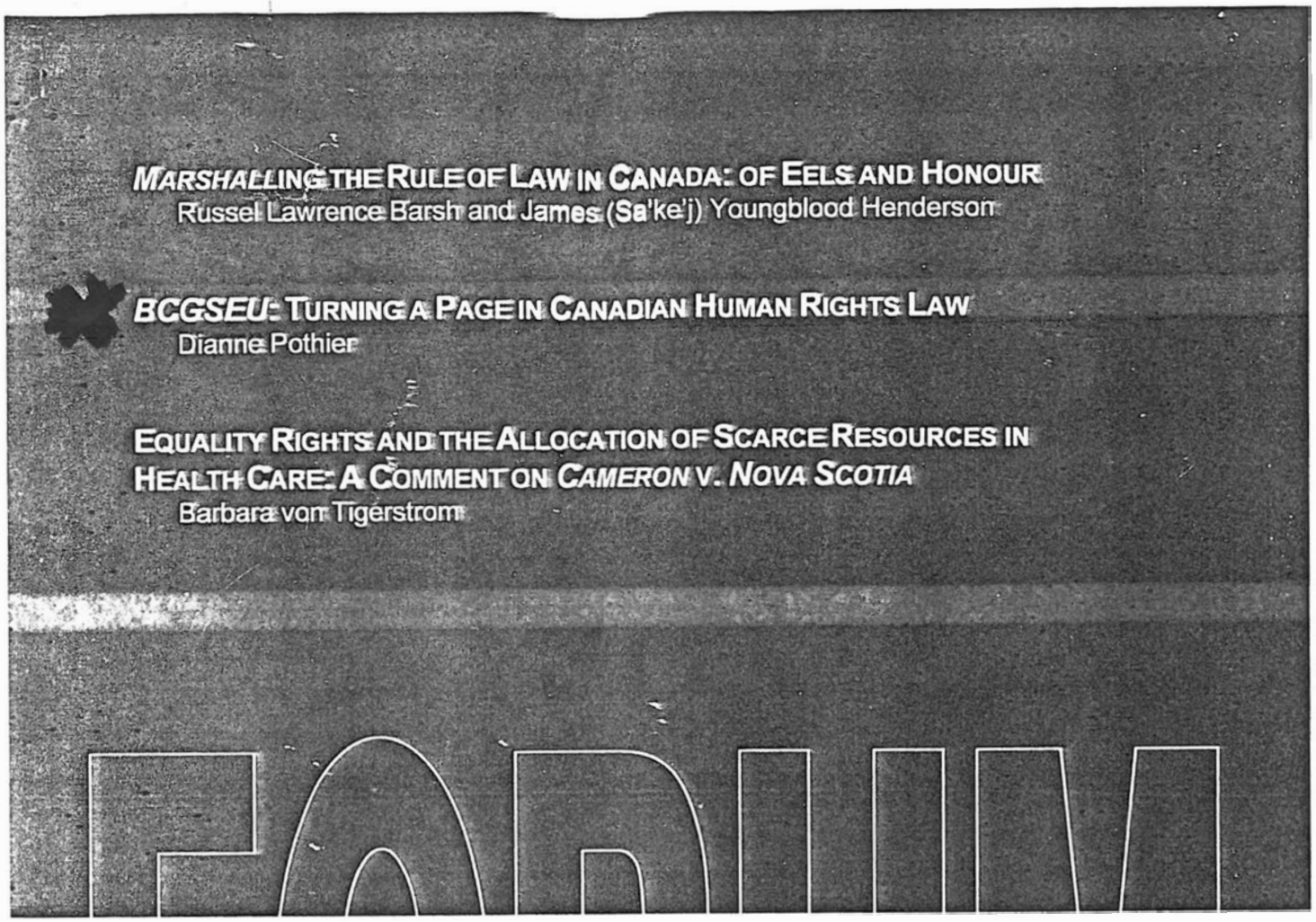

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BCGSEU: Turning a Page in Canadian Human Rights Law

Dianne Pothier

The Supreme Court of Canada's decision in *British Columbia Government and Service Employees' Union (BCGSEU)* v. *British Columbia (Public Service Employee Relations Commission)*[1] starts like a classic Lord Denning judgment. Within the first few lines, without even knowing what the legal issue really is, you know who is going to win because of how that person is presented. Justice McLachlin's judgment, speaking for a unanimous nine-person Court, begins by noting that the grievor, Tawney Meiorin, "did her work well" but nonetheless "lost her job."[2] It was that dissonance that made the facts of the case compelling for reinstatement. But what makes the decision a landmark ruling is how the Court reached that conclusion. The compelling facts helped the Court to focus on some serious conceptual problems in Canadian human rights law. The Court used the occasion to significantly reorient its approach to anti-discrimination law.

Although the case is about the interpretation of human rights legislation, it is not actually a human rights proceeding; the case is an unjust dismissal claim channelled through grievance arbitration under a collective agreement. Yet the relevance of human rights legislation is assumed without question. *BCGSEU* is further affirmation that arbitrators under collective agreements have not only the jurisdiction, but also the obligation, to apply human rights legislation.[3]

Facts and Rulings Below

Tawney Meiorin was first hired as an initial attack forest firefighter in the Golden District in 1992. Because the work is seasonal, she was laid off at the end of the season. She was hired again in 1993 and 1994. It was only starting in 1994 that the initial attack crew firefighters in Golden were required to pass the tests that became the subject of challenge.[4] Failure to pass the tests made the person ineligible to continue as an employee, irrespective of previous satisfactory job performance, which Tawney Meiorin had.[5]

> [T]he Government's "Bona Fide Occupational Fitness Tests and Standards for B.C. Forest Service Wildland Firefighters" ... required that the forest firefighters weigh less than 200 lbs. (with their equipment) and complete a shuttle run, an upright rowing exercise, and a pump carrying/hose dragging exercise within stipulated times. The running test was designed to test the forest firefighters' aerobic fitness and was based on the view that forest firefighters must have a minimum "VO2 max" of 50 ml. kg-1. min-1 (the "aerobic standard"). "VO2 max" measures "maximal oxygen

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1 (1999), 244 N.R. 145 (S.C.C.) [hereinafter *BCGSEU*]. I was a member of the *BCGSEU* subcommittee for the joint intervention in the Supreme Court of Canada of the Women's Legal Education and Action Fund (LEAF), the DisAbled Women's Network (DAWN Canada), and the Canadian Labour Congress (CLC). That involvement arose from my then position on the LEAF National Legal Committee and as a member of the DAWN legal committee.

2 *Ibid.* at 149.

3 The Supreme Court of Canada made it clear in *Ontario Human Rights Commission et al.* v. *The Borough of Etobicoke*, [1982] 1 S.C.R. 202 at 214 [hereinafter *Etobicoke*] that parties to a collective agreement could not contract out of human rights legislation. In *Central Okanagan School District No. 23* v. *Renaud*, [1992] 2 S.C.R. 970 at 984-87 [hereinafter *Renaud*] the Court further stipulated that compliance with a collective agreement was no defence at arbitration if the collective agreement did not conform to human rights legislation, and defending against such a grievance did not constitute undue hardship. In *Douglas/Kwantlen Faculty Assn.* v. *Douglas College*, [1990] 3 S.C.R. 570 and *Weber* v. *Ontario Hydro*, [1995] 2 S.C.R. 929 the Court also affirmed, where the employer is a government actor, the power and duty of arbitrators to apply the *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 [hereinafter *Charter*].

4 Although the letters of appointment in 1992 and 1993 indicated tests would be required, this did not happen in respect of the grievor or anyone else in the Golden Forest District before 1994; *Re British Columbia (Public Service Employee Relations Commission) and BCGSEU (Meiorin)* (1996), 58 L.A.C (4th) 159 at 162 (B.C.).

5 *Supra* note 1 at 151.

> uptake," or the rate at which the body can take in oxygen, transport it to the muscles, and use it to produce energy.

Ms. Meiorin passed all but the aerobic fitness test. After four tries she was unable to complete a 2.5 km run in eleven minutes; she was 49.4 seconds over.[6] She was laid off and her union grieved, claiming unjust dismissal as a result of sex discrimination.

The *prima facie* case of adverse effects discrimination based on sex was made out by evidence before the arbitrator that physiological differences between men and women are such that most men have higher aerobic capacities than most women and that while, with training, most men can pass the aerobic fitness test, most women cannot.[7] The arbitrator made the following further findings of fact:[8]

> I am persuaded the standard and the test itself constitutes a valid measure of physical fitness for Initial Attack Crew forest fire-fighters to perform the requirements of their job. ...
>
> [T]he employer has presented no cogent evidence, in my view, to support its position that it cannot accommodate Ms. Meiorin because of safety risks.
>
> I also think it is important not to lose sight of the fact that the 2.5-km run in 11 minutes or less is but one of the four fitness tests that apply to Initial Attack Crew candidates. Nor ought one to forget that she performed her job as a forest fire-fighter satisfactorily in previous years, without any concerns about her ability to perform her job safely and efficiently. She was considered by her supervisor to be a capable employee whom he did not wish to lose. Simply put, I am not persuaded the inability of Ms. Meiorin to run 2.5 km in less than 11 minutes 49 seconds would pose a serious safety risk to herself, fellow employees or the public at large.

The arbitrator ordered that Ms. Meiorin be reinstated, with backpay, but left unspecified the nature of the accommodation to be afforded her.[9]

The Court of Appeal, relying on the arbitrator's finding that the test was a valid measure of physical fitness for the job, overturned the arbitrator's decision, agreeing with the employer that "if individual testing is carried out, there is no discrimination."[10] The Supreme Court of Canada commented:[11]

> The Court of Appeal (mistakenly) read the arbitrator's reasons as finding that the aerobic standard was necessary to the safe and efficient performance of the work.

In restoring the arbitrator's decision, the Supreme Court of Canada relied instead on the arbitrator's finding that the employer had not shown that Ms. Meiorin was a safety risk. What neither the Court of Appeal nor the Supreme Court of Canada said directly was that the arbitrator had contradicted himself. If the test, which had been rationalized only as a safety measure, was valid, it did not logically follow that Ms. Meiorin was not a safety risk. His ultimate finding that she was not a safety risk undermined the initial assumption that the test was valid. Yet the arbitrator should perhaps be forgiven for this contradiction because the test he was applying, in respect of adverse effects discrimination, from the earlier Supreme Court of Canada jurisprudence, was itself inherently contradictory. The Supreme Court of Canada's failure to highlight the arbitrator's contradictions matched its reluctance to acknowledge its own contradictory analysis. Let me explain.

THE BIFURCATED ANALYSIS

From the earlier jurisprudence, and particularly from Justice Wilson's majority decision in *Central Alberta Dairy Pool*,[12] the Supreme Court of Canada had fashioned a bifurcated analysis that drew a sharp distinction between direct and adverse effects discrimination. For direct discrimination, where the discrimination on the prohibited ground was explicit on

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6 Although it is not mentioned in the Supreme Court of Canada's decision, the 2.5 km run in eleven minutes was an alternate version of the aerobic fitness test. All previous hires had the option of the alternate version. Ms. Meiorin was exempted from the standard version because of knee problems; arbitrator's decision, *supra* note 4 at 163–64.

7 *Ibid.* at 206.

8 *Ibid.* at 202–03, 208.

9 *Ibid.* at 208.

10 *British Columbia (Public Service Employee Relations Commission)* v. *British Columbia Government Service Employees' Union* (1997), 37 B.C.L.R. (3d) 317 at 324 (C.A.).

11 *BCGSEU*, *supra* note 1 at 155.

12 *Central Alberta Dairy Pool* v. *Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489 [hereinafter *Central Alberta Dairy Pool*].

the face of the rule or policy, the two-part *Etobicoke* test (subjective and objective elements) for *bona fide* occupational requirement (*bfor*) applied. To be a *bfor*, the rule:[13]

> (1) must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code; and
>
> (2) it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.

If this statutory justification test was not met, the rule would be struck down. There was no room for individual accommodation, but there was room for reasonable alternative rules.[14]

For adverse effects discrimination, "a rule that is neutral on its face but has an adverse effect on certain members of the group to whom it applies,"[15] a generally applicable *bfor* provision was not engaged. Instead, the *O'Malley*[16] test applied, whereby the employer has a defence if the impugned rule is:

> (1) rationally related to the performance of the job; and
>
> (2) there has been accommodation up to the point of undue hardship.

The first step of the *O'Malley* test is expressly a lower threshold than the *Etobicoke* test, but even the "rationally related" language was given short shrift. In *O'Malley*, Justice McIntyre said that, in cases of adverse effects discrimination, the rule itself "needs no justification."[17] In *Renaud*, the Supreme Court of Canada skipped over the "rationally related" part of the analysis and went straight to accommodation up to the point of undue hardship.[18] In *O'Malley*, the assumption was that the rule "will survive in most cases";[19] by the time of *Central Alberta Dairy Pool*[20] and *Renaud*,[21] the assumption was simply that the general rule would survive in cases of adverse effects discrimination and the only issue was exception by means of accommodation.

There was much criticism of the Supreme Court of Canada's position that there was no individual accommodation in cases of direct discrimination.[22] I have always thought, however, that the more significant flaw in the bifurcated analysis was the assumption that individual accommodation was the only issue in adverse effects discrimination.[23] In my assessment, the fact that the jurisprudence developed in the context of religious discrimination cases gave a distorted and limited perspective on adverse effects discrimination.

The justification given by Justice Wilson for why individual accommodation was not available in direct discrimination cases was that there could be no individual accommodation because any exception would undermine the rationale of the rule.[24] *Etobicoke*, which involved a successful challenge to mandatory retirement for firefighters at age sixty, illustrates the point. A mandatory retirement rule has to be justified in total, or not at all. An early mandatory retirement policy is only valid if it can be established that individual testing *cannot* distinguish between those who are and those who are not competent to continue working. If someone argues that they should not be subject to the rule, they are claiming that individual tests *can* identify

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[13] *Etobicoke*, *supra* note 3 at 208.

[14] *Central Alberta Dairy Pool*, *supra* note 12 at 514, 517–19.

[15] *Ibid.* at 514.

[16] *Ontario Human Rights Commission and O'Malley* v. *Simpsons-Sears Ltd. et. al.*, [1985] 2 S.C.R. 536 [hereinafter *O'Malley*].

[17] *Ibid.* at 555.

[18] *Renaud*, *supra* note 3 at 981.

[19] *O'Malley*, *supra* note 16 at 555.

[20] *Supra* note 12 at 515.

[21] *Supra* note 3 at 918.

[22] B. Etherington, "Central Alberta Dairy Pool: The Supreme Court of Canada's Latest Word on the Duty to Accommodate" (1993) 1 Can. Lab. L.J. 311 at 323–24; M. C. Crane, "Human Rights, *Bona Fide* Occupational Requirements and the Duty to Accommodate: Semantics or Substance?" (1996) 4 C.L.E.L.J. 209; W. Pentney, "Belonging: The Promise of Community — Continuity and Change in Equality Law 1995–96" (1996) 25 C.H.R.R. C/6 at C/11; M. D. Lepofsky, "The Duty to Accommodate: A Purposive Approach" (1993) 1 Can. Lab. L.J. 1; I. B. McKenna, "Legal Rights for Persons with Disabilities in Canada: Can the Impasse Be Resolved?" (1997–98) 29 Ottawa L. Rev. 153 at 168.

[23] See also Etherington, *ibid.* at 324–25.

[24] *Central Alberta Dairy Pool*, *supra* note 12 at 514.

those who are competent; if the argument has validity, it does not justify an exception to the rule but challenges the basis and logic of the rule itself. I agree with Justice Wilson that this is almost always the case in respect of direct discrimination. It can equally be true, however, in cases of adverse effects discrimination.[25] That is what the religion cases obscured.

The religion cases gave a distorted view of adverse effects discrimination precisely because they involved claims that did not challenge the logic of the general rule and were only seeking exceptions for reasons unrelated to the logic of the general rule. In seeking an exemption from Saturday work because of her Seventh Day Adventist religious objections to work on the Sabbath, Theresa O'Malley was not trying to convert anyone else to Seventh Day Adventism. She did not challenge the premise that Simpsons-Sears needed clerks to work on Saturdays, since a lot of customers want to shop on Saturdays. Her argument for a religious exemption could co-exist with a general rule of working on Saturdays because the logic of the rule and logic of the exception had different bases. The same applies to the arguments regarding work scheduling conflicts with religious beliefs in *Central Alberta Dairy Pool* and *Renaud*. Similarly, Bhinder's religion-based argument, as a Sikh, for not wearing a hard hat did not challenge the safety reasons for wearing one; rather, he was arguing that the religious reasons for Sikhs not wearing a hard hat were more important than the safety reasons for wearing one.[26] Again the arguments for and against had different bases.

The religion cases did not involve challenges to the general rules precisely because the claimants were only trying to defend their right to practice their own religion; no one was trying to proselytize their religion and hence no one was trying to challenge secular or other religious norms. But the fact that in these cases the general rules were uncontentious should not have been taken to mean that this was generally the case in adverse effects discrimination. It should not have been assumed that adverse effects discrimination was only concerned with tinkering by means of exceptions rather than challenging discriminatory norms. Yet that is precisely what the Supreme Court of Canada had done.

The religion cases involve claims where all practising members of the faith or faiths with similar beliefs are similarly affected and all other persons are unaffected. In other words, they are categoric exclusions, and in that context an exception to the general rule is the obvious solution. But the disproportionate impact cases such as *BCGSEU* are more complex. Where there is not a perfect correlation between the ground and the persons affected, the real issue is whether the norms themselves are discriminatory.

There were, among cases decided below the Supreme Court of Canada level, early examples of adverse effects discrimination cases based on disproportionate impact rather than categoric exclusion. The classic example is height and weight restrictions for police officers. The fact that men tend to be taller than, and weigh more than, women did not deny that some women could meet the requirements and that some men could not. The height and weight restrictions were still recognized as sex discrimination and held not to be valid job requirements.[27] In this instance the discrimination claim did directly challenge the logic of the job requirement. It was challenging a conception of the job of a police officer as based on male norms, not on what was actually necessary to do the job. The remedy sought and granted was to invalidate the rule, not create exceptions to the rule. To create exceptions to the rule for women would have been illogical because accepting that women of lesser height and weight could do the job was an admission that the higher height and weight stipulations were unnecessary to perform the job.

The Supreme Court of Canada has never denied that adverse effects discrimination covers the disproportionate impact cases. Indeed, in *O'Malley* the Supreme Court of Canada expressly relied on the leading American adverse effects discrimination case, *Griggs* v. *Duke Power Co.*,[28] which is a disproportionate impact case. In *Griggs*, the employment qualification was a high school diploma or equivalent. This was held to constitute race discrimination because blacks were less likely to have completed high school, and a high school education was irrelevant to the actual job requirements.

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[25] Etherington, *supra* note 22 at 324–25.

[26] *Bhinder et. al.* v. *Canadian National Railway Co. et. al.*, [1985] 2 S.C.R. 561. Although the majority of the Supreme Court of Canada found against Bhinder's claim on the basis that the hard hat rule was a *bfor*, i.e. both subjectively and objectively reasonably necessary for the performance of the job, that ruling was effectively overturned in *Central Alberta Dairy Pool*, *supra* note 12, where the majority ruled that the *bfor* analysis did not apply to adverse effects discrimination.

[27] *Coffer* v. *Ottawa Police Commission* (12 January 1979), (Ont. Bd. of Inq.) [unreported].

[28] 401 U.S. 424 (1971), cited with approval in *O'Malley*, *supra* note 16 at 549–50.

In other words, there could still be race discrimination even though some blacks did qualify for the job and some whites did not. Even though not universally true, the case was still based on the white norm of completing high school. And, again, the remedy was to invalidate the rule, not create exceptions to the rule, since the discrimination claim did directly challenge the rationale of requiring a high school education.

If the logic of the rule and the logic of the challenge to the rule directly contradict each other, an exception to the rule makes no sense because any exception undermines the basis of the rule. That was precisely the situation in *BCGSEU*. The employer's rationale for the aerobic fitness test was safety. The basis for the union's challenge to Tawney Meiorin's dismissal was that she could safely perform the job in spite of having failed the aerobic fitness test, i.e. that the test was not an accurate gauge of safety. Moreover, they were challenging the job requirements as based on male norms, reflecting the fact that firefighting has traditionally been a male occupation. The fact that she had satisfactorily performed the job for two years was compelling evidence on her side. Yet the previous Supreme Court of Canada jurisprudence told the arbitrator that, since this was a case of adverse effects discrimination, he was supposed to jump to the consideration of accommodation, i.e. exceptions to the rule, without seriously considering the validity of the rule first. That's how the arbitrator got himself into contradictory findings, by creating an exception that undermined the logic of the rule without a full examination of the rule itself. Although in *BCGSEU* the Supreme Court of Canada reconceptualizes adverse effects discrimination so as to avoid this inherent contradiction, the Court never actually acknowledges that it had created the contradiction in the first place.

Reassessing the Bifurcated Analysis

Justice McLachlin prefaces her analysis in *BCGSEU* with the following:[29]

> Although this case may be resolved on the basis of the conventional bifurcated analysis this court has applied to claims of workplace discrimination under human rights statutes, the parties have invited us to reconsider that approach. Accepting this invitation, I propose a revised approach to what an employer must show to justify a prima facie case of discrimination.

For reasons explained in the previous section, I do not think the case could have been resolved on the basis of the previous bifurcated analysis without conceptual confusion. It is also interesting that the Court attributed the invitation to reconsider to the "parties," whereas the strongest such invitations actually came from the intervention of the British Columbia Human Rights Commission and the joint intervention of the Women's Legal Education and Action Fund (LEAF), the DisAbled Women's Network (DAWN Canada), and the Canadian Labour Congress (CLC).[30]

Justice McLachlin reviewed seven reasons why the bifurcated approach was problematic, and why a new unified approach was warranted, under the following headings:[31]

(a) Artificiality of the Distinction Between Direct and Adverse Effect Discrimination;

(b) Different Remedies Depending on Method of Discrimination;

(c) Questionable Assumption that Adversely Affected Group Always a Numerical Minority;

(d) Difficulties in Practical Application of Employers' Defences;

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[29] *BCGSEU*, *supra* note 1 at 150.

[30] British Columbia Human Rights Commission factum in *BCGSEU* (SCC); LEAF-DAWN-CLC factum in *BCGSEU* (SCC). (As noted above, I was a member of the LEAF-DAWN-CLC subcommittee in *BCGSEU* as a member of both the LEAF and DAWN legal committees.) The Appellant union's factum in *BCGSEU* made arguments about different treatment of accommodation in the context of gender compared to religion, based on challenging male norms, but did not directly challenge the bifurcated approach, at 28–30. The union did, however, argue that: "The standard of justification in a case of adverse effect discrimination must be no lower than if it were a case of direct discrimination, at 30. The Respondent employer's factum suggested a series of alternate approaches, all leading to the same result of validating the standard and the dismissal. The primary submission was that there was no discrimination at all, as held by the Court of Appeal. The secondary submission was a unified approach to direct and adverse effects discrimination that validated these kinds of tests, and the further submissions were more modest reassessments of the bifurcated approach. At the Supreme Court of Canada hearing, counsel for the British Columbia government did not strenuously press its case.

[31] *BCGSEU*, *supra* note 1 at 161–79.

(e) Legitimizing Systemic Discrimination;

(f) Dissonance Between Conventional Analysis and Express Purpose and Terms of *Human Rights Code*; and

(g) Dissonance Between Human Rights Analysis and *Charter* Analysis.

These reasons are substantially interconnected and are variations on the same themes. The key conceptual arguments are: (b) unwarranted differences in remedies and (e) improperly legitimizing systemic discrimination. Reasons (a), (c) and (d) are more geared to practical application and reasons (f) and (g) reinforce the earlier arguments.

The key concept throughout is the significance of challenging norms, as discussed above in my own critique of the bifurcated analysis. Justice McLachlin makes this point most forcefully in her discussion of legitimizing systemic discrimination.[32]

> Under the conventional analysis, if a standard is classified as being "neutral" at the threshold stage of the inquiry, its legitimacy is never questioned. The focus shifts to whether the individual claimant can be accommodated, and the formal standard itself always remains intact. The conventional analysis thus shifts attention away from the substantive norms underlying the standard, to how "different" individuals can fit into the "mainstream," represented by the standard.
>
> Although the practical result of the conventional analysis may be that individual claimants are accommodated and the particular discriminatory effect they experience may be alleviated, the larger import of the analysis cannot be ignored. It bars courts and tribunals from assessing the legitimacy of the standard itself. Referring to the distinction that the conventional analysis draws between the accepted neutral standard and the duty to accommodate those who are adversely affected by it, Day and Brodsky, *supra*, write at p. 462:
>
> The difficulty with this paradigm is that it does not challenge the imbalances of power, or the discourses of dominance, such as racism, able-bodyism and sexism, which result in a society being designed well for some and not for others. It allows those who consider themselves "normal" to continue to construct institutions and relations in their image, as long as others, when they challenge this construction are "accommodated."
>
> Accommodation, conceived this way, appears to be rooted in the formal model of equality. As a formula, different treatment for "different" people is merely the flip side of like treatment for likes. Accommodation does not go to the heart of the equality question, to the goal of transformation, to an examination of the way institutions and relations must be changed in order to make them available, accessible, meaningful and rewarding for the many diverse groups of which our society is composed. Accommodation seems to mean that we do not change procedures or services, we simply "accommodate" those who do not quite fit. We make some concessions to those who are "different," rather than abandoning the idea of "normal" and working for genuine inclusiveness.
>
> In this way, accommodation seems to allow formal equality to be the dominant paradigm, as long as some adjustments can be made, sometimes, to deal with unequal effects. Accommodation, conceived of in this way does not challenge deep-seated beliefs about the intrinsic superiority of such characteristics as mobility and sightedness. In short, accommodation is assimilationist. Its goal is to try to make "different" people fit into existing systems.

I agree with the thrust of these observations. Interpreting human rights legislation primarily in terms of formal equality undermines its promise of substantive equality and prevents

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[32] *Ibid.* at 171-73, citing S. Day and G. Brodsky, "The Duty to Accommodate: Who Will Benefit?" (1996) 75 Can. Bar Rev. 433 and *Canadian National Railway Co.* v. *Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114.

> consideration of the effects of systemic discrimination, as this court acknowledged in *Action Travail*, *supra*.
>
> This case, where Ms. Meiorin seeks to keep her position in a male-dominated occupation, is a good example of how the conventional analysis shields systemic discrimination from scrutiny. This analysis prevents the court from rigorously assessing a standard which, in the course of regulating entry to a male-dominated occupation, adversely affects women as a group. Although the Government may have a duty to accommodate an individual claimant, the practical result of the conventional analysis is that the complex web of seemingly neutral, systemic barriers to traditionally male-dominated occupations remains beyond the direct reach of the law. The right to be free from discrimination is reduced to a question of whether the "mainstream" can afford to confer proper treatment on those adversely affected, within the confines of its existing formal standard. If it cannot, the edifice of systemic discrimination receives the law's approval. This cannot be right.

The link between challenging systemic discrimination and the issue of remedies is clear. If the starting premise is that combating systemic discrimination means questioning dominant norms, the follow-through remedy must involve consideration of invalidating or reassessing general standards, not merely after-the-fact tinkering.

As a sex discrimination case, *BCGSEU* is about challenging male norms, about challenging traditional assumptions about job requirements derived from the job having been a traditional male preserve. As noted in the Day and Brodsky comments approved by Justice McLachlin, that point has application in respect of other grounds of discrimination as well. I recently made the following comments which were critical of an American case in which a black women unsuccessfully argued sex and race discrimination in challenging American Airlines' policy against an all-braided hairstyle.[33]

In rejecting the claim of race and sex discrimination, the Court in *Rogers* rejected the cultural significance of all-braided hair to black women. Because it found no discrimination at all, it gave only passing mention to American's business justification:

> [T]he policy was adopted in order to help American project a conservative business-like image, a consideration recognized as a bona fide business purpose [at 233].

The Court made no effort to look behind this claim. If the discrimination claim is conceptualized as fundamentally challenging norms, how might this be done? I would contend that American's policy really amounts to saying that black women can work for American as long as they act white, i.e. that only a certain amount of difference from the norm will be tolerated. I do not mean to suggest that whoever formulated the policy was actually thinking in those terms. Indeed I would assume they were not. The powerful impact of dominant norms is that they are invisible to those who fit them, because they assume the norms are just universal and totalizing truths.

Challenging able-bodied norms is also critical in dealing with disability discrimination,[34] which is why *BCGSEU* was an important case for DAWN Canada's intervention. Although disability often does require individualized special measures, and it is crucial to meet the individual needs of persons with disabilities,[35] inclusive design from the start can either avoid the problem entirely (e.g. level access) or make individual accommodation easier (e.g. easily conversable formats for printed documents). If taken at face value, Justice McLachlin has moved well beyond the Court's assumption in *Eaton* that all that is required to deal with disability discrimination is to "fine-tune society" through "reasonable accommodation."[36] Yvonne Peters comments:[37]

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[33] D. Pothier, "Connecting Interesting Grounds of Discrimination to Real People's Real Experiences," background paper to a plenary session on "Women at the Intersection: Addressing Compound Discrimination," as part of a conference on "Transforming Women's Equality: Equality Rights in the New Century" sponsored by West Coast LEAF, in Vancouver (4-7 November 1999) commenting on *Rogers et al.* v. *American Airlines Inc.* 527 F.Supp. 229 (1981).

[34] Lepofsky, *supra* note 22; McKenna, *supra* note 22.

[35] Lepofsky, *ibid.*; McKenna, *ibid.*; Crane, *supra* note 22; A. M. Molloy, "Disability and the Duty to Accommodate" (1993) 1 Can. Lab. L.J. 23.

[36] *Eaton* v. *Brant County Board of Education*, [1997] 1 S.C.R. 241 at 272.

[37] Y. Peters, "From Tinkering to Transformation: *Meiorin* Breathes New Hope into Reasonable Accommodation" at 4, part of an unpublished background paper for a workshop

> The Court's analysis in *Meiorin* represents a significant step forward in that it begins to redefine and reformulate the objectives of reasonable accommodation. ... *Meiorin* shifts the emphasis from the individual to the standard.

Yet there is a serious question as to how far Justice McLachlin really follows through on the challenging norms analysis, even in *BCGSEU* itself. To assess this, it is necessary to turn to the new unified approach.

THE NEW UNIFIED APPROACH

Justice McLachlin adopts a three-step test for a *bfor*, applicable to both direct and adverse effects discrimination, that is a "strict approach to exemptions from the duty not to discriminate."[38] The test is designed on the assumption, as is the case in the British Columbia legislation and most other Canadian human rights statutes, of a generally applicable *bfor* provision.[39]

> An employer may justify the impugned standard by establishing on the balance of probabilities:
>
> (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
>
> (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
>
> (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.
>
> This approach is premised on the need to develop standards that accommodate the potential contributions of all employees insofar as this can be done without undue hardship to the employer.

This new test is in fact an amalgam of the two former tests. Step one of the new test is similar to step one from *O'Malley*. Step two of the new test is the same as step one from *Etobicoke*. Step three of the new test is a combination of step two from each of *O'Malley* and *Etobicoke*.

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presented by F. Kelly, Y. Peters and S. O'Donnell on "The Duty to Accommodate: the promise, the reality, the limitations" at a conference on "Transforming Women's Equality: Equality Rights in the New Century" sponsored by West Coast LEAF, in Vancouver (4-7 November 1999).

[38] *BCGSEU*, *supra* note 1 at 179.

[39] *Ibid.* at 181–82. As pointed out by my colleague Peter Pilliounis, Justice McLachlin does not address the situation of how one should deal with a selective *bfor* provision, i.e. one tied to specific grounds or specific contexts. It is not at all clear what happens in circumstances not covered by a *bfor* in the following provisions of the *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1:

> 16(1) No employer shall refuse to employ or continue to employ or otherwise discriminate against any person or class of persons with respect to employment, or any term or condition of employment, because of his or their race, creed, religion, colour, sex, sexual orientation, family status, marital status, disability, age, nationality, ancestry, place of origin or receipt of public assistance. ...
>
> (4) No provision of this section relating to age prohibits the operation of any term of a *bona fide* retirement, superannuation or pension plan, or any terms or conditions of any *bona fide* group or employee insurance plan, or of any *bona fide* scheme based upon seniority.
>
> (5) Nothing in this section deprives a college established pursuant to an Act of the Legislature, a school, board of education, or conseil scolaire of the right to employ persons of a particular religion or religious creed where religious instruction forms or may form the whole or part of the instruction or training provided by the college, school, board of education, or conseil scolaire pursuant to *The Education Act*. ...
>
> (7) The provisions of this section relating to any discrimination, limitation, specification or preference for a position or employment based on sex, disability or age do not apply where sex, ability or age is a reasonable occupational qualification and requirement for the position or employment. ...
>
> (10) This section does not prohibit an exclusively non-profit charitable, philanthropic, fraternal, religious, racial or social organization or corporation that is primarily engaged in serving the interests of persons identified by their race, creed, religion, colour, sex, sexual orientation, family status, marital status, disability, age, nationality, ancestry, place of origin or receipt of public assistance from employing only or giving preference in employment to persons similarly identified if the qualification is a reasonable and *bona fide* qualification because of the nature of the employment.

The real utility of step one of the new test is questionable, since it would seem to be subsumed in step three. The "rationally connected" threshold from step one is lesser than the "reasonably necessary" hurdle of step three. The distinction between steps one and three that Justice McLachlin draws is:[40]

> The focus at the first step is not on the validity of the particular standard that is at issue, but rather on the validity of its more general purpose.

That is how Justice McLachlin is able to say, without contradiction, that an employer can pass step one yet fail step three. This is the conclusion she reaches in *BCGSEU* itself. But it is not clear what is accomplished by isolating general purpose as a separate step. Such an approach was suggested by the Appellant,[41] but that seemed to have more to do with trying to rationalize away a problematic finding of the arbitrator when he was using the old, contradictory, bifurcated approach.

The one conceivable argument that including step one matters would involve a scenario where the employer's only argument was undue hardship because of cost. Consider an example where the premises were not wheelchair accessible but the job itself could readily be performed by someone in a wheelchair. Strictly speaking, one could say there was no rational connection to the performance of the job, so that the employer fails step one, and therefore never gets to step three to be able to argue undue hardship in making the premises accessible or in using alternate premises. Yet, given the global reference to undue hardship made by Justice McLachlin immediately after setting out the three-part test, and the history behind the undue hardship defence, it is highly doubtful that Justice McLachlin meant for step one to be interpreted so as to preclude the raising of an undue hardship defence. Even if it can be said that the undue hardship defence legitimizes systemic discrimination, avoiding the defence of undue hardship seems to be too much to expect.

Step two of the new test, the old step one from *Etobicoke*, is the subjective element, i.e. proof of intention. Step two does relate to the particular standard.[42] Proof of bad intention is fatal, but the absence of proof of bad intention simply moves the analysis to the next step. Given that judicial acceptance of the concept of adverse effects discrimination was in part to overcome problems in proving discriminatory intention,[43] it is not surprising that the subjective element is usually conceded to the employer,[44] as it was in *BCGSEU*. This makes the crucial part of the new test step three.

Step three starts with a "reasonably necessary" criterion for the standard itself. Thus it overcomes the previous problem in adverse effects discrimination that the standard itself was left unscrutinized. Yet the way step three is worded, it also jumps very quickly to the language of individual accommodation. Despite having earlier endorsed Day and Brodsky's critique of the concept of accommodation when conceived only as after-the-fact tinkering, Justice McLachlin discusses accommodation in the context of step three (both in general and as applied to the particular case) in a fairly conventional and uncritical way. Further references to systemic discrimination are conspicuously absent. In setting out the types of questions to ask, she phrases them in vague terms, leaving room for a range of degrees of strictness in interpretation.[45]

> Some of the important questions that may be asked in the course of the analysis include:
>
> (a) Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?
>
> (b) If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?
>
> (c) Is it necessary to have *all* employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?
>
> (d) Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?
>
> (e) Is the standard properly designed to

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[40] *Ibid.* at 184.

[41] Appellant's factum, at 32.

[42] *BCGSEU*, *supra* note 1 at 185.

[43] *O'Malley*, *supra* note 16 at 549.

[44] *Large* v. *Stratford (City)*, [1995] 3 S.C.R. 733.

[45] *BCGSEU*, *supra* note 1 at 187–88.

ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?

(f) Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles? As Sopinka J. noted in *Renaud, supra* at 992–96, the task of determining how to accommodate individual differences may also place burdens on the employee and, if there is a collective agreement, a union.

Her concluding remarks prior to applying the test to the particular case seem to convey mixed messages as to how broadly transforming her analysis is meant to be.[46]

> Employers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals. They must build conceptions of equality into workplace standards. By enacting human rights statutes and providing that they are applicable to the workplace, the legislatures have determined that the standards governing the performance of work should be designed to reflect all members of society, insofar as this is reasonably possible. Courts and tribunals must bear this in mind when confronted with a claim of employment-related discrimination. To the extent that a standard unnecessarily fails to reflect the differences among individuals, it runs afoul of the prohibitions contained in the various human rights statutes and must be replaced. The standard itself is required to provide for individual accommodation, if reasonably possible. A standard that does not allow for such accommodation may be only slightly different from the existing standard but it is a different standard nonetheless.

My concern is not the concept of individual accommodation itself, but the dangers of reaching that stage before a thorough analysis and critique of dominant norms.

Application to the Case on Appeal

The fact that *BCGSEU* involved significant physiological differences between men and women made the *prima facie* case of discrimination easy to prove, and the Supreme Court of Canada does not elaborate on what is necessary to prove disproportionate impact adverse effects discrimination. That issue will have to await future cases.

In terms of the employer's *bfor* defence, the government easily passes steps one and two, but fails step three. Justice McLachlin finds two fatal flaws in the methodology of the experts who developed the tests, flaws that precluded a finding that the aerobic fitness standard as designed was reasonably necessary for the performance of the job.

First, the methodology was primarily descriptive, describing the aerobic capacity of test subjects, who were mostly male firefighters.[47] Thus, this was replicating, rather than scrutinizing, the male norm.

Second, the tests "failed to distinguish the female test subjects from the male test subjects."[48] Justice McLachlin raises, but does not ultimately resolve, the question of whether there should be standards differentiated by gender. Part of the complication is that it was never entirely clear what aerobic capacity is supposed to measure. Unlike some of the other tests, the direct connection to the job is not obvious. If the claim is that a specific aerobic capacity is necessary to be a firefighter, gender differentiated standards would be hard to justify. If, however, the claim is that a general level of fitness is necessary to the job of firefighting, and the same level of fitness was measured by different aerobic capacities between women and men, gender differentiated standards would be required.

In concluding that the government had not met step three of the *bfor* test, Justice McLachlin relied on the arbitrator's findings, expressed in terms of accommodation up to the point of undue hardship. Although his findings were made pursuant to the old bifurcated analysis, she does not suggest they need to be recast to fit the new unified analysis. That contributes to the uncertainty as to how far the new test really goes in challenging dominant norms.

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[46] *Ibid.* at 189. I think the "not" in the last sentence is in error.

[47] *Ibid.* at 192.

[48] *Ibid.* at 192–93.

Since the case arose out of grievance arbitration, the only remedy available was reinstatement, with backpay, of the grievor. Had it been a human rights proceeding, however, it is clear the aerobic fitness standard as framed would have been struck out. That is the most obvious implication of abandoning the bifurcated approach, since on the Supreme Court of Canada's previous adverse effects analysis, such a remedy would not have been available.

Conclusion

BCGSEU marks a significant turning point in Canadian human rights law. In a unanimous nine-person decision, the Supreme Court of Canada extricated itself from the rut it had previously created with the bifurcated approach which distinguished between direct and adverse effects discrimination. Although I think the *BCGSEU* judgment downplayed the difficulties of the prior approach, the Court unequivocally turned a page.

For a Court that usually hesitates to reverse itself, and usually hesitates to acknowledge that it is moving in a new direction, *BCGSEU* is a remarkable judgment. A lot has changed in human rights law over the last fifteen years. In 1985 the Court first embraced adverse effects discrimination in *O'Malley*, but the majority in *Bhinder* limited the significance of that in holding that a *bfor* was not subject to individual accommodation. That barrier was removed in 1990 in *Central Alberta Dairy Pool* when the Court, although somewhat equivocally, walked away from *Bhinder*. That equivocation from the majority in *Central Alberta Dairy Pool* produced the bifurcated approach, which itself has now been abandoned. Although the concepts of direct and adverse effects discrimination are still helpful in understanding the different ways in which discrimination can happen,[49] they have properly been disregarded as mandating differential legal treatment.

The Court accepts in *BCGSEU* that, in all types of discrimination, the analysis has to start with scrutinizing the general rules or standards claimed to be discriminatory. The Court understood that the particular case was about challenging a job definition constructed around traditional male norms, and that had to be directly confronted in order to advance equality for women. Yet there are mixed messages from the judgment as to how far anti-discrimination law can go in challenging dominant norms.

Even if the extent of its reach is not yet clear, a breakthrough is still a breakthrough. And we didn't even have to wait for the new millennium for it to happen.

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A few passages in this article first appeared in an unpublished background paper I prepared for the adverse effects discrimination workshop in Vancouver referred to above.

[49] K. Watkin, "The Justification of Discrimination under Canadian Human Rights Legislation and the *Charter*: Why So Many Tests?" (1992) 2 N.J.C.L. 63 at 87.