Dalhousie Law Journal

Volume 2
Issue 3 *NOVA SCOTIA ISSUE*

Article 1

7-1-1976

Sex Discrimination in Employment: The Nova Scotia Human Rights Act

Elizabeth Shilton Lennon

Articles

Elizabeth Shilton Lennon*

Sex Discrimination in Employment: The Nova Scotia Human Rights Act[1]

I. Introduction

Nova Scotia enacted human rights legislation in 1963,[2] but it was not until 1972 that the Act was amended to include sex as one of the prohibited grounds of discrimination.[3] Since 1957 women in Nova Scotia had had equal pay protection,[4] but this brought about no noticeable improvement in the status of women in the labour force. Some commentators have suggested that equal pay laws in fact worsened that status by giving employers economic incentives to maintain and consolidate low-paying all-female job ghettoes to avoid the effects of the legislation.[5] Equal pay legislation could have no application to women who were denied access to jobs and promotions, stratified in "women's" jobs and discriminated against in "conditions of employment" other than pay. It was in response to public pressure for comprehensive anti-discrimination legislation for women[6] to back up equal pay provisions that the 1972 amendments were passed.

The Nova Scotia legislature did not simply add "sex" to the list of prohibited grounds of discrimination throughout the Act. Instead, a separate provision was enacted to deal comprehensively with sex discrimination. The section, as it relates to employment, reads:

> 11A. (1) No person shall deny to, or discriminate against, an individual or class of individuals, because of the sex of the

---

*Elizabeth Shilton Lennon, 2d Year Law Student, Dalhousie University.

1. Human Rights Act, S.N.S. 1969, c.11, as am. by S.N.S. 1972, c.65, s.2.
2. Human Rights Act, S.N.S. 1963, c.5.
3. S.N.S. 1972, c.65, s.2.
4. Equal Pay Act, S.N.S. 1956, c.5, in force January 1, 1957.
5. *E.g.* "Women and Work in Canada: a Study of Legislation" in *Women's Bureau, '74* (Ottawa: Labour Canada, Women's Bureau, 1975) 17 at 27.
6. Women are, of course, the worst victims of sex discrimination, but the legislation is framed in general terms and has the wholly desirable side-effect of giving men access to "women's" jobs and the "protective" employment benefits formerly granted only to women.

> individual or class of individuals, in providing or refusing to provide any of the following:
>
> (d) employment, conditions of employment or continuing employment, or the use of application forms or advertising for employment, unless there is a bona fide occupational qualification based on sex.

Subsection (2) of s.11A deals also with employment rights in that it prohibits employment agencies, employees' associations, professional, business and trade associations, and agencies performing public functions through the use of volunteers from discriminating on the basis of sex. I propose to confine my discussion to the application of s.11A(1) (d) as it relates to "employment, conditions of employment or continuing employment", and to the procedures provided by the Act for implementing its substantive provisions.

If the legislature had intended that people discriminated against on the basis of sex should be given the same protection as those discriminated against on other prohibited bases, the logical course of action would have been simply to incorporate "sex" into the other provisions of the Act; this was the course followed in most other jurisdictions. The fact that this was not done suggests that differences in degree and kind of protection may have been intended, and there are troublesome differences in wording between s.11A and s.8, the general employment section, that may well be interpreted to the disadvantage of people complaining under s.11A. This section is very loosely drafted and not easy to construe, but it seems clear enough, for example, that no one can violate s.11A who is not in a position to "provid[e] or refus[e] to provide . . . employment *etc.* ." This is a considerably narrower class of persons than that contemplated by s.8(1), which prohibits any person from, among other things, discriminating "against an individual *in regard to* employment or any term or condition of employment" (emphasis added).

II. Roberta Ryan's Case

To date there has been only one decision of a Nova Scotia board of inquiry interpreting s.11A as it relates to employment: *Ryan* v. *Town of North Sydney*.[7] The complainant in that case, Roberta Ryan, alleged that she had been refused a job with the North Sydney Police Force because of her sex. She was a trained police officer and

7. (Nova Scotia Board of Inquiry, 1975). These decisions are unreported.

had done summer work with the North Sydney Force while at the Atlantic Police Academy. When she applied for a permanent position she was rejected.

The process of getting a job with the town is quite complicated. The prospective police officer submits an application to the Chief of Police, who assesses these applications and makes recommendations to Council as to who should be hired. Council then votes on the recommendations. In Ms. Ryan's case, the Chief did not recommend to Council that she be hired. Council members were somewhat puzzled as to why her name was not placed before them: she was a trained police officer, a resident of North Sydney and had performed well over the summer. When challenged as to why he did not recommend her, the Chief gave this answer as recorded in the minutes of the meeting:

> Ron Parsons, Chief of Police, explained that we have a Union and he wouldn't feel like putting her on back shift [midnight to 8:00 a.m.] where she would have to work patrol and for that reason he didn't consider her but if she would could [*sic*] be put on days he would certainly have recommended her. He feels that with the Union we will run into problems because some of the men have been on night shift for years and if there is a day shift available they will want it.[8]

The people who were hired would have to be able to work the back shift; no problem, apparently, for any of the male applicants, but impossible, in his view, for Ms. Ryan.

Council was generally unhappy with the Chief's recommendations. He had, contrary to the usual practice, recommended someone from out of town. Furthermore, there was some uncertainty about how many police officers the town really needed to hire. After a great deal of confusion it was decided to postpone the decision until the next meeting of Council. At the next meeting two male applicants were hired, both of whom had been recommended by the Chief at the previous meeting. One of these men had no police training. Roberta Ryan did not get the job.

She took her complaint to the Nova Scotia Human Rights Commission. The Human Rights Act contemplates a three-stage process after the lodging of a complaint (a process I will be dealing with in much greater detail later): (1) investigation (s.23) (2), attempt at settlement (s.23), and (3) public hearing before a board of inquiry (s.25(1)). The Commission investigated her complaint but

8. *Id.* at 5-6.

was unable to effect a settlement. Finally, almost twenty months after the employment decision had been made, her case came before a one-man board of inquiry, Mr. Keith Eaton.

At the board of inquiry the height/weight qualifications for the North Sydney Police Force were raised as a defence. These qualifications were contained in the Police Regulations and printed in the advertisements for police positions. They required prospective police officers to be 5'8" tall and weigh 160 pounds. It is clear that Roberta Ryan, at 5'6½" and 125 pounds, did not meet them. But it is equally clear from the evidence given at the inquiry that, whatever their legal status, these regulations were viewed in the rather casual municipal hiring process as mere guidelines that would not stand in the way of hiring an applicant otherwise acceptable.[9]

Mr. Eaton was somewhat disturbed by the fact that the reason given before the board for refusal to recommend Ms. Ryan differed from the reason recorded in the minutes of the Council meeting. In his decision he analyses these two reasons as

> (1) difficulty in administering shift work consistent with union seniority requirements:[10] and
>
> (2) failure to meet the requirements of the Police Regulations' qualifications, particularly those relating to minimum height and weight.[11]

But having satisfied himself that these two reasons are not "inconsistent", he appears to conclude that Chief Parsons did not discriminate because both reasons were operative at the time the recommendations were made. There is no evidence at all from the decision that he even recognizes reason #1 for what it is: an assumption, based on the kind of sexual stereotyping prohibited by the Act, that a woman either could not or would not want to work night shift.

---

9. See *Transcript of Evidence and Proceedings*, cross-examination of Martin F. Collins, 269-74; testimony of Ron Parsons, 365-6.

10. If this was the embryo of an argument that the Police Chief was not responsible for his actions because they were dictated by a union agreement, the argument would *not* have succeeded. Quite apart from the fact that a contract to violate the Human Rights Act would be void for illegality, s.24(7) of the Trade Union Act, S.N.S. 1972, c.19, provides that a trade union that "discriminates against any person because of sex . . ." shall not be certified "nor shall an agreement entered into between that trade union and that employer be deemed to be a collective agreement."

11. *Ryan, supra*, note 7 at 13.

Mr. Eaton ultimately gives three reasons for finding the complaint unsupported by the evidence: (1) the Chief's failure to recommend was not discriminatory (presumably for the reasons given above); (2) even if it was, mere recommendations are not covered by the Act; and (3) there was no employment decision made by Council at the meeting specified in the complaint (the first meeting) and therefore no violation of the Act.[12] Furthermore, he concludes that there was "no evidence"[13] to show that the actual decision made at the second meeting involved any discrimination against Roberta Ryan.

Roberta Ryan had a strong case. A municipal employee, authorized and instructed to recommend job applicants, had refused to recommend her. The reason he gave for his action was that a woman could not work the same shifts as a man could, a reason prohibited by the Act. Council made a decision consistent with that recommendation. These facts were found insufficient to bring the case within the purview of the Human Rights Act.

This decision sets an unfortunately timid and conservative precedent for sex discrimination cases in Nova Scotia. Some of the fault lies with the legislation: while it is not an inevitable conclusion that s.11A does not cover mere recommendations, it is certainly a possible one. But much of the fault lies with the board of inquiry which failed utterly to grasp the nettle and confront the very complex legal and social issues raised by a charge of sex discrimination in employment. One purpose of this paper is to isolate some of those issues and suggest ways of dealing with them effectively within the framework of human rights legislation.

III. What the Act Prohibits

Section 11A lays down some fairly clear-cut prohibitions. First of all, it is unlawful to refuse or deny someone a job, including a promotion, because of sex. Secondly, it is unlawful to refuse to provide "continuing employment" because of sex. This provision clearly includes firing, but is also broad enough to encompass situations involving lay-off and recall. Thirdly, the Act prohibits

---

12. *Id.* at 18. This third reason seems a very technical peg on which to hang a decision like this. The complaint had already been amended once to change the date after the board's appointment (See *Transcript, supra,* note 9 at 115) and this could easily have been done again.
13. *Ryan, supra,* note 7 at 18.

discrimination in "conditions of employment". It is not easy to define precisely what aspects of the employment relationship are covered by this phrase. The French *conditions de travail,* translated by the Supreme Court of Canada as "conditions of employment",[14] was interpreted in *Syndicat Catholique des Employés de Magasins de Québec* v. *La Compagnie Paquet*[15] as comprehending the whole range of terms possible in an employment contract; where a trade union negotiates a collective agreement covering *conditions de travail,* said the court, "there is no room left for private negotiations between employer and employee."[16]

The scope of the phrase "conditions of employment" is, then, very broad indeed. It would cover remuneration in all forms, including wages, salaries, pensions and insurance plans. It would include seniority systems, access to training programmes, rest breaks, and leave-of-absence policies. It would include all aspects of the physical environment, such as on-site accommodation, rest and recreational facilities.

One aspect of the employment relationship that Human Rights Commissions in at least two provinces[17] believe to be outside the scope of "conditions of employment" and therefore outside their jurisdiction is the matter of dress on the job. They characterize dress as falling within the "discretionary power of employers". This is almost certainly an erroneous conclusion. If the employment relationship is a contractual one there can be no area of "discretionary power" for either party that cannot be encroached upon in the bargaining process. Dress is surely something that *could* be negotiated, even if most employees do not, and if so, it is a "condition of employment".

The phrase in s.8 comparable to s.11A's "conditions of employment" is "terms and conditions of employment". It is this latter phrase or its variant "terms *or* conditions of employment", that is invariably used in Nova Scotia labour legislation to designate the whole range of negotiable items in the employment relationship.[18] Applying the established principle that

---

14. *Syndicat Catholique des Employés de Magasin de Quebec* v. *La Compagnie Paquet,* [1959] S.C.R. 206 at 211; 18 D.L.R. (2d) 346 at 352.
15. *Id.*
16. *Id.* at 212; 18 D.L.R. at 353.
17. See *Ottawa Journal,* March 30, 1974 (Ontario); *Winnipeg Free Press,* October 10, 1974 (Manitoba).
18. *E.g.* Trade Union Act, S.N.S. 1972, c.19, s.1.(e).

> . . . from the general presumption that the same expression is presumed to be used in the same sense throughout an Act or a series of cognate Acts, there follows the further presumption that a change in wording denotes a change in meaning[19]

,it is at least arguable that by excluding the word "terms" the legislature intended to circumscribe the scope of s.11A. An item they may reasonably have intended to exclude is equal pay, since this is generally covered by the Labour Standards Code,[20] a statute passed in the same session of the legislature in which the sex discrimination amendment was passed.

If that was the legislative intent, it is doubtful, in view of the *Paquet* case,[21] that it was achieved. It would be unfortunate if the argument that equal pay is not a "condition of employment" should succeed, since the Human Rights Commission is presently the only recourse professionals and domestic servants, two classes of employees excluded from the protection of the Labour Standards Code,[22] have for equal pay complaints. The Human Rights Commission has certainly conciliated complaints on the basis that it has jurisdiction over discrimination in wage levels.

Whether the complaint involves hiring, firing or "conditions of employment" there must first be denial or discrimination "in providing or refusing to provide" before there is a breach of the Act. A question that may arise preliminary to establishing the jurisdiction of the Commission over the case is: what constitutes a refusal or denial? Need the employer give an outright refusal before the Commission can inquire into his employment practices? In Ontario this question was answered in *Segrave* v. *Zellers*[23], where it was held that in light of the "realities of the relationship that exists between an interviewer and a person seeking employment",[24] an applicant for a job or promotion need only pursue the job as far as it is reasonable to do so before invoking the remedies of the Act. In that case the prospective employee was told by an interviewer that the company did not hire men for the position in question. The company argued at the inquiry that its interviewer might have

---

19. *Maxwell on the Interpretation of Statutes*, ed. P. St. J. Langan (12th. ed. London: Sweet and Maxwell, 1969).
20. S.N.S. 1972, c.10.
21. *Supra*, note 14.
22. *Supra*, note 20. See Reg. 2(1), (2).
23. (Ontario Board of Inquiry, 1975).
24. *Id.* at 3-4.

changed her mind if the applicant had pursued the matter. The board found that this went beyond the degree of persistence that could be reasonably expected of a job applicant: "the words spoken to Mr. Segrave . . . would lead any reasonable man to infer that it was pointless for him to pursue the matter any further".[25] This principle may be important to applicants for jobs in large companies with frequently recurring job vacancies: in those situations the employer could stall indefinitely without making a decision on a particular application. In cases where there is just one job in question, hiring someone other than the person complaining would be sufficient "denial" to invoke the jurisdiction of the Commission.

IV. What the Act Does Not Prohibit

There are, of course, an infinite number of possible defences to a charge of sex discrimination. Three have become fairly standard and are developing a body of law around them defining their scope. These are (1) the statutory defence of "*bona fide* occupational qualification based on sex" (BFOQ); (2) the defence of "no discrimination" based on the application of sex-neutral job qualifications or rules, and (3) the defence of conflicting legislation.

1. BFOQ Based on Sex

Section 11A(1) (d) of the Human Rights Act spells out that employers are *not* prohibited from discriminating on the basis of sex in relation to jobs that require a "*bona fide* occupational qualification based on sex". Clearly, then, the legislature has determined that while there is *never* (except when the employer is an "exclusively religious or ethnic organization" (s.8(4) (b)), a rational basis for discriminating on the grounds of "race, religion, creed, colour or ethnic or national origin", there *may be* such a rational, or at least defensible, basis for discriminating on grounds of sex.

Before dealing with specific situations in which the defence might be available it is necessary to examine the legal nature of the test the employer who raises the defence would have to meet. It is clear that once sex discrimination is established as the basis of the employment decision, the onus shifts to the employer to prove that his case falls within the BFOQ exception.[26] What is not so clear is

25. *Id.* at 4.
26. See *Weeks* v. *Southern Bell Telephone and Telegraph Company* (1969), 408

whether he must meet an objective or subjective test. The expression "*bona fide*" usually signals a subjective test, and a New Brunswick board of inquiry decision suggests that a qualification of sex, established in "good faith", might satisfy the requirements of their similarily-worded Act.[27] In this regard a discrepancy in wording between s.8 and s.11A should once again be noted: s.8 provides a defence for "exclusively religious or ethnic organizations" where there is a "*reasonable* occupational qualification" (emphasis added), clearly an objective test. A number of other jurisdictions require that the occupational qualification be "reasonable" rather than "*bona fide*".[28]

If the test is a subjective one then it is possible that employment practices based on traditional views about the roles and capacities of women may not violate the Act as long as they are held honestly and in good faith. Surely this is not what the legislature intended! Of course, with the increasingly active role being played by women in all areas of the labour force, the good faith with which traditional views are held must become increasingly questionable. In any case, whether the test is objective or subjective, the employer would have to argue that he believed a woman *could not* do the job, not just that he did not want her to do it, before he could hope to succeed with the defence.

The legislature gives no guidelines as to the types of jobs for which a BFOQ based on sex can be said to exist. The agencies administering sex discrimination legislation are all agreed that the exception must be interpreted narrowly to prevent it from completely subverting the Act.[29]

F.2d. 228 at 232 (U.S.C.A. 5th Circ.), adopted in *Shack* v. *London Driv-Ur-Self* (Ontario Board of Inquiry, 1974) at 19.

27.*MacBean* v. *Village of Plaster Rock* (New Brunswick Board of Inquiry, 1975) at 12.

28. *E.g. The Human Rights Act,* S.M. 1974, c.H-175, s.6(6). British Columbia hedges, but applies its "exception" not just to sex: "Every person has the right of equality of opportunity based upon bona fide qualifications . . . unless reasonable cause exists . . . ." (*Human Rights Code of British Columbia,* S.B.C. 1973, c.119, s.8(1)). The American legislation is similarly equivocal: an employer has a defence where sex is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." (*Civil Rights Act,* 1964, Title VII, 78 Stat. 241, s.703 (e)).

29. Conversation with K. Jega Nathan, Chief Investigative Officer of the Nova Scotia Human Rights Commission. See also *Revised Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex,* reprinted in T.H. Oehmke, *Sex Discrimination in Employment* (Detroit: Trends Publishing, 1974) at 101-6. Guideline 1604.2.

The American Equal Employment Opportunities Commission (EEOC), the agency administering American anti-discrimination legislation similar to the Human Rights Act, has issued some fairly stringent guidelines[30] as to what will *not* be considered to establish a BFOQ, although it is understandably reluctant to give concrete examples of what will. The defence will be unacceptable in cases of

> (1) the refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate is higher among women than among men.
>
> (2) The refusal to hire an individual based on stereotyped characteristics of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship . . . .
>
> (3) The refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers . . . .[31]

The EEOC is prepared to concede the existence of a BFOQ where sex is necessary for authenticity or genuineness (*e.g.* actor/actress).[32] It has been suggested that a BFOQ should be recognized when required for "public decency" or sexual privacy (*e.g.* washroom attendants).[33] And of course it goes without saying that sex is a BFOQ where sexual characteristics are indispensable to job performance (*e.g.* wet nurse, sperm donor).[34] But two leading American cases both leave openings for a broader application of the BFOQ exception than the EEOC suggests it should have, although in neither case did the defence prevail on the facts.

In *Weeks* v. *Southern Bell Telephone and Telegraph Company*[35] the Fifth Circuit Court of Appeals held that

> . . . in order to rely on the bona fide occupational qualification exemption the employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing,

---

30. For a discussion of the legal status of these guidelines see *Griggs* v. *Duke Power* (1971), 91 S.C. 849 at 854-5 (U.S.).
31. *Revised EEOC Guidelines,* Oehmke, *supra,* note 29, at 102. Guideline 1604.2.
32. *Id.* at 102.
33. R. L. Epstein, *Sex Discrimination in Hiring Practices of Private Employers: Recent Legal Developments* (1973-4). 48 Tulane L.R. 125 at 141.
34. See *Rosenfeld* v. *Southern Pacific* (1971), 444 F.2d. 1219 (U.S.C.A. 9th Circ.) at 1225.
35. *Supra,* note 26.

> that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.[36]

This tests puts a heavy burden on the employer, one that few would be able to meet. But it does leave open the loophole that, while it prohibits an employer from basing his employment decisions on *assumptions* about comparative employment characteristics, he might be able to base them on concrete comparative data (''a factual basis''). If he could show that ''substantially all women'' would be unable to perform the work he would be under no obligation to consider an individual woman who might be an exception to the rule.

In *Diaz* v. *Pan American World Airlines*[37] the same court, although not rejecting *Weeks,*[38] formulated the test differently:

> [D]iscrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively.[39]

Once again, this is a burdensome test. In the *Diaz* case[40] itself, the airline argued that the essence of its business was pleasing and soothing air passengers, and that women alone were capable of doing that. The court found that the essence of the business was transporting passengers, and that hiring male cabin attendants would not jeopardize that business. Under the *Diaz* test, the employer must show not only that the qualities he is demanding for the job are in fact sex-linked, but also that those qualities are *essential* to job performance, not just tangential to it. Very few jobs would fall into this category, but it might be open to an employer who ran a night club, for example, to argue successfully that the essence of his business was pleasing his customers and that therefore customer preference was a legitimate consideration.

The Canadian position is very uncertain as yet, but there are hopeful signs that Canadian adjudicators will construe the exception at least as narrowly as the American courts have. In *Shack* v. *London Driv-Ur-Self*[41] a BFOQ defence was considered. The board spoke of the American legislation as ''the prototype for the Ontario

---

36. *Id.* at 235.
37. (1971), 442 F.2d. 385.
38. *Supra,* note 26.
39. *Diaz, supra,* note 37.
40. *Id.*
41. (Ontario Board of Inquiry, 1974).

Act''[42] and viewed both the *Weeks*[43] and *Diaz*[44] cases as valuable aids to interpreting the Ontario Act (similar in the relevant provisions to the Nova Scotia Act). The board found that stripping down trucks was not a job that was ''beyond the capabilities of all or substantially all women''[45], and further, that the task was such a small part of the job of a car rental clerk that even if it had been beyond their capabilities it was not such an essential part of the business as to sustain a BFOQ defence.[46]

All Canadian jurisdictions have not been so ready to adopt the American tests. A Saskatchewan board of inquiry also confronted the issue in *Lindsay* v. *Provincial Protection and Security Agency.*[47] There it was found that femaleness was a BFOQ for the job of security guard at Saskatoon airport, where the duties included doing body searches on female passengers. There was no discussion of what form these searches took, or how significant a part of the job they were. The problem is also alluded to in *MacBean* v. *Village of Plaster Rock,*[48] a New Brunswick board of inquiry decision. There was no BFOQ issue in the case, but the board suggested *obiter* that the BFOQ exception might be broad enough to allow for ''consideration of stereotypical differences between the sexes rather than only those differences which are universal.''[49]

The BFOQ issue has not yet arisen before a board of inquiry in Nova Scotia. It is, however, an issue that has come before the Commission, since it has undertaken as part of its administrative functions to ''approve'' BFOQ's on application by employers.[50] The Commission received a number of requests for approvals when the legislation was first passed but most of these were not pursued. At least one such request has been approved: guards for male prisoners at the Halifax County Correctional Centre are required to supervise showers for male prisoners, and this was found sufficient, under the rubric of ''public decency'', to establish a BFOQ.[51]

---

42. *Id.* at 18.
43. *Supra,* note 26.
44. *Supra,* note 37.
45. *Shack, supra,* note 41 at 21.
46. *Id.*
47. (Saskatchewan Board of Inquiry, 1975).
48. *Supra,* note 27.
49. *Id.* at 11.
50. See *Human Rights: A Guide for Employers,* a pamphlet published by the Nova Scotia Human Rights Commission.
51. Conversation with K.Jega Nathan.

This practice of "approving" BFOQ's seems a dubious one, however little it is actually used. The Commission has no statutory authority for interpreting the Act in this way. It could be argued that if there is no authority for the practice it also does no harm, but this is not necessarily so. If the Commission has approved a BFOQ it has in effect prejudged the case, and is likely to dismiss a concrete complaint regarding that job as insubstantial. Furthermore, if the test for BFOQ's is a subjective one, what better evidence of "good faith" could an employer offer than Commission approval of his discriminatory practices? The officers of the Commission themselves are not wholly free of the vice of sexually stereotyped thinking. In a newspaper interview at the time the sex discrimination amendments were passed, the Director of the Commission suggested "high rigger men placing steel" as an example of a job that "by virtue of [its] nature" could only be done by a man.[52] The Human Rights Commission has, no doubt, come a long way since 1972 in its understanding of the nature of a *bona fide* qualification based on sex, but it is surely much better that these things should be decided judicially before a board of inquiry where the parties affected can all be heard.

It is submitted that no matter how narrowly the BFOQ exception is construed, it is a dangerous and unnecessary loophole in the sex discrimination provisions of the Act. It is dangerous because it is an open invitation to employers, administrators and adjudicators alike to bring their preconceptions and stereotypes about women along with them to the interpretation of the Act. It is unnecessary because to the extent that sex is a job-related qualification it is comprehended in the general implied defence that the Act does not require an employer to hire anyone who is not qualified for a job. The complainant in BFOQ cases is never a man wanting a job as a wet nurse, or a woman as a sperm donor. The defence is only litigated in the border areas where the job applicant is confident of his or her ability to do the job, and the employer seeks to refuse the opportunity not on the basis of the applicant's personal qualifications but because of his or her sex. It is submitted that in those cases it is no hardship, and accords with the fundamental goal of the Act that people should be judged by individual rather than class characteristics, that the employer should be asked to show that the individual applicant cannot do the job.

---

52. *The 4th Estate*, June 8, 1972.

2. Sex-Neutral Qualifications and Rules

It is a general principle that anti-discrimination legislation does not force an employer to hire anyone who is not qualified for a job. But it does not follow that an employer who applies objective, sex-neutral job qualifications to all applicants should necessarily be immune to a charge of sex discrimination. It is clear that some sex-neutral job qualifications, such as the height/weight qualifications common to many police departments, may effectively exclude most women from these jobs.

American courts have taken a very hard look at such qualifications. The cases establish that if a complainant can show (1) the existence of an employment policy based on "objective" criteria like height and weight, and (2) that the policy has a disparate effect on the employment opportunities of a class protected by legislation from discrimination (*e.g.* women), then the burden shifts to the employer to show (3) that the qualifications in question are in fact reasonably related to the requirements of the job.[53]

An important case in the area of sex discrimination is *Smith* v. *City of East Cleveland,*[54] in which a black woman successfully challenged the height/weight requirements of the East Cleveland Police Force. She was able to show a consistent policy that applicants who did not meet the 5'8"/150 pound minimums were not admitted for further testing for jobs with the Department. She further put into evidence statistical data showing that these requirements effectively excluded 95% of the female population whereas they excluded only 46% of males.[55] The court found that this disparate effect alone, without proof of discriminatory intent, was sufficient to raise a *prima facie* case which the employer would have to meet by showing that the height/weight requirements were "rationally related to job performace for an East Cleveland Police Officer".[56] After examining the skills and functions of such a police officer, the court concluded that the qualifications were not job-related, and struck them down as sexually discriminatory.

As of yet, Canadian boards have shown little tendency to launch this bold an attack on sex-neutral job qualifications. Similar issues were raised in Nova Scotia in the *Ryan* case,[57] where the defence

53. The leading case is *Griggs* v. *Duke Power, supra,* note 30.
54. (1973), 363 F.Supp. 1131 (U.S.D.C.).
55. *Id.* at 1136.
56. *Id.* at 1138.
57. *Supra,* note 7.

was that Ms. Ryan was not hired because she did not meet the height/weight qualifications. The board of inquiry appeared to view these qualifications as a complete defence. However, it is not clear that the issue was properly placed before it. There was certainly no evidence led that the regulations themselves were discriminatory, and therefore no *prima facie* case for the respondents to meet.

Under the American principle, if the employer cannot show that the qualifications are job-related, they violate the Act even if there was no discriminatory intent; if they are job-related they do not violate the Act even if they have a disparate effect on a protected class. This principle has been used to strike down (although not always in the context of sex discrimination) employer policies of using ability tests, union membership, established seniority systems, and arrest records as criteria for employment decisions, since all of these may have a disparate and usually non-job-related effect on protected groups.[58]

The principle has application not just to qualifications governing access to jobs, but also to rules and regulations governing "conditions of employment". For example, it could have a potentially lethal effect on pension plans and insurance schemes that distribute benefits by criteria that are not explicitly sex-related but nevertheless have a disparate effect on women: pension plans that provide survivors' benefits to families of "principal wage earners" only, or disability insurance schemes that fail to provide for maternity leave.[59]

In the area of job rules or "conditions of employment" Canadian boards *have* picked up the challenge. An interesting application of the principle surfaced in the British Columbia case of *Tharp* v. *Lornex Mining*,[60] which dealt with on-site accommodation provided by the employer. This company had been the subject of an earlier complaint to the Human Rights Commission that the company refused to provide on-site accommodation to its female employees. The company was ordered to provide accommodation, and complied by simply lodging the one female employee rash enough to apply in the bunkhouse with the men, where she had to share their washroom facilities. She lodged a complaint with the Commission,

---

58. J.J. Suich, *Height Standards in Police Employment and the Question of Sex Discrimination* (1974), 47 So. Cal. L.R. 585 at 594-5.
59. See *Revised EEOC Guidelines*, Oehmke, *supra*, note 29 at 105-6. Guideline 1604.9, 1604.10.
60. (British Columbia Board of Inquiry, 1975).

and a board of inquiry found that the denial of sexual privacy to the complainant as a result of the company's action made its compliance with the earlier order a "mockery". The board rejected the argument that "neutral" treatment is necessarily non-discriminatory:

> [I]t was contended that there can be no discrimination where everyone receives equal treatment. We reject that contention. It is a fundamentally important notion that identical treatment does not necessarily mean equal treatment or the absence of discrimination.[61]

If a Canadian board can recognize this principle in the area of "conditions of employment", it is but a short conceptual leap to an application of it to "neutral" job qualifications. Equal opportunity in employment demands equal access to employment as well as equal treatment once employed, and access is not equal if employment criteria are selected which consciously, unconsciously or in the name of administrative convenience weed out the vast majority of members of protected groups. Canadian boards must make that conceptual leap, and it is submitted on the basis of the *Tharp* case[62] that they are ready to do so.

3. Conflicting Legislation

A special problem arises when the non-discrimination provisions of the Human Rights Act conflict with other enactments either requiring or authorizing employers to discriminate on the basis of sex. It is perhaps somewhat misleading to suggest that conflicting legislation furnishes a "standard" defence in Nova Scotia. Legislation of this type is not extensive, and there are no special limitations on hours of work, night work and weight-lifting for women, such as have caused serious problems in other jurisdictions.[63] However, there is conflict, or potential conflict, with respect to three provincial enactments.[64]

---

61. *Id.*
62. *Id.*
63. For a survey of protective legislation for women in Canada see *The Law Relating to Working Women* (Labour Canada, Women's Bureau, 1975) at 22-6.
64. I believe these to be the only three pieces of explicitly discriminatory labour legislation in Nova Scotia but I cannot claim to have done an exhaustive survey of the statutes and regulations. See *The Law Relating to Working Women, supra,* note 63 at 24 and 26.

(a). The Metalliferous Mines and Quarries Regulation Act[65] provides that:

> 4(2) No female person shall be employed at any mine except on the surface in a technical, clerical or domestic capacity or such other capacity as requires the exercise of normal feminine skill or dexterity but does not involve strenuous physical effort.

(b). 1969 Regulations made pursuant to the Industrial Safety Act[66] provide that:

> 182. An employer shall,
> (a) if females are employed, provide a rest room or space affording reasonable privacy together with one or more couches or cots and chairs and satisfactory to an inspector;
> (b) if so directed in writing by the Chief Inspector, provide a competent female employee to have charge of the welfare of female employees, and such person may have other duties that do not prevent her from adequately attending to such welfare.

(c). The Labour Standards Code[67] empowers the Minimum Wage Board to include in its orders wage differentials based on sex (s.48(2) (a)). There are currently no such differential orders.

Legislation of the first two types is "protective":

> Protective labour legislation, where it exists, is designed to protect women from the physical hazards of employment. It is based on two premises: first, that women are more vulnerable to physical injury than are men; and second, that women are open to exploitation.[68]

The Report of the Royal Commission on the Status of Women in Canada[69] states quite succinctly the position of most thoughtful critics of this kind of legislation:

> We are opposed to discrimination in protective measures. If there are hazards in employment, these measures should protect all employees exposed to them. Protective legislation for women has the effect of restricting their job opportunities.[70]

Legislation of the third type appears to be based on no principle more elevated than that the minimum wage should reflect existing inequities in labour market bargaining power; it is clearly inimical

---

65. R.S.N.S. 1967, c.183.
66. R.S.N.S. 1967, c.141.
67. *Supra*, note 20.
68. Provincial Secretary for Social Development, *Equal Opportunity for Women in Ontario: A Plan for Action* (1973) at 5.
69. (Ottawa: Information Canada, 1970).
70. *Id.* at 89.

to the equal pay provisions in the same statute, and may well give way before them.[71]

In a different constitutional context the American EEOC has taken the position that state protective legislation requiring employment practices which are unlawful under federal anti-discrimination legislation is void, and the courts have by and large accepted this position.[72] Not all protective legislation *requires* unlawful employment practices; if a law requires an employer to confer a benefit on female employees (as, for example, Reg. 182 of the Nova Scotia Industrial Safety Regulations does), he can comply with *both* the state law and the anti-discrimination laws by conferring that benefit on employees of both sexes, and he may be required to do so.[73]

It is unlikely that Nova Scotia courts would accept the argument that legislation requiring or authorizing discriminatory employment practices is rendered void by the Human Rights Act. In the absence of any constitutional issues, their only justification for doing so would be to find that the Human Rights Act had repealed by implication the earlier legislation. But

> . . . repeal by implication is not favoured by the courts . . . and if earlier and later statutes can reasonably be construed in such a way that both can be given effect to, this must be done.[74]

Generalis specialibus non derogant: a court would probably find that the legislation requiring discrimination established a statutory BFOQ.

Whether courts would pay the same deference to regulations as they would to statutes is an open question. The Industrial Safety Act[75] does not authorize differential treatment based on sex, and, in the light of the public policy enunciated in the Human Rights Act, a court might well find Reg. 182 to be *ultra vires*.[76] Such a finding

---

71. In light of the equal pay provisions in s.55, s.48(2)(a) may have to be read as authorizing a lower minimum wage for men, but not for women.
72. See T.H. Oehmke, *Sex Discrimination in Employment* (Detroit: Trends Publishing, 1974) at 16-22.
73. *Id.* at 17.
74. *Maxwell on the Interpretation of Statutes, supra,* note 19.
75. *Supra,* note 66.
76. See R. F. Reid, *Administrative Law and Practice* (Toronto: Butterworths, 1971) at 258-63. It should be noted that the Nova Scotia Human Rights Act specifically voids regulations that discriminate on the basis of "race, religion, creed, colour or ethnic or national origin", but makes no reference to sex (s.13).

might nudge the regulation-making authority into passing a similar regulation which protected men and women equally.

It is interesting to note that the Human Rights Commission has already had to deal with a complaint by a male employee that his employer, by providing the kind of rest facilities contemplated by Reg. 182 for his female employees only, was discriminating on the basis of sex. The case was settled at the conciliation stage with the employer agreeing to provide comparable facilities for both sexes.[77]

Some jurisdictions have foreseen conflict between human rights legislation and other legislation and specifically provided for it. Ontario resolves the conflict in favour of the other legislation:

> 17A. Compliance with any provision for the protection or welfare of females contained in *The Industrial Safety Act, 1971, The Employment Standards Act* or *The Mining Act* shall not be deemed to be a contravention of this Act.[78]

Alberta takes the opposite tack:

> 1(1) Unless it is expressly declared by an Act of the Legislature that it operates notwithstanding this Act, every law of Alberta is inoperative to the extent that it authorizes or requires the doing of anything prohibited by this Act.[79]

As far as I could discover, Alberta has not passed any employment legislation to operate "notwithstanding"; it has in fact repealed such discriminatory legislation as was on its books when its Act was passed.[80]

V. Proving Discrimination

Proving discrimination in employment is inherently more difficult than proving assault or breach of contract. The employer makes his employment decisions in a legal context in which an infinite number of reasons for the decision are valid and only a very few are not; the employee must show by relevant evidence that the reason for the decision in question is one of those very few. In cases where employees are not covered by collective agreements (and even in some cases where they are) the employer has a virtually unassailable

---

77. Conversation with K.Jega Nathan.
78. *The Ontario Human Rights Code,* R.S.O. 1970, c.318 as am. by S.O. 1972, c.119, s.13.
79. *The Individual's Rights Protection Act,* S.A. 1972, c.2.
80. *E.g. The Coal Mines Regulation Act,* R.S.A. 1970, c.52 as am. by S.A. 1973, c.61, s.2.

right to be arbitrary in his employment policies, and though he can be required to furnish such information and records as he has to the Commission during an investigation (ss.24, 24A), there is no obligation placed on him to keep the kind of records that would assist a complainant in proving her case.

A further difficulty in meeting legal standards of proof in these cases results from the multiple functions performed by the Human Rights Commission. The only procedure provided by the Act for collecting evidence is the investigation required by s.23 of the Act. But the same officer who is investigating may be simultaneously trying to effect a settlement. Sopinka, in an article entitled *Proving Discrimination in Boards of Inquiry under Ontario Human Rights Code,*[81] identifies the conflict here.

> This dual function of the Commission's investigation creates a dilemma. The fruits of the investigation, which from one point of view should perhaps be privileged, are, from another point of view, essential evidence where settlement is not achieved.[82]

Evidence gathered by the investigating officer is often objected to on grounds of privilege, and the complainant's case is consequently weakened.

Section 26(3) of the Act requires that before a board of inquiry makes recommendations to the Commission, it must find the complaint "supported by a reasonable preponderance of the evidence". This suggests the ordinary civil standard of proof, but the position is not absolutely clear in Nova Scotia. A 1970 Nova Scotia board of inquiry interpreted this to mean

> . . . a degree of evidence, the weight of which is greater than that required to support a finding in a civil case, namely a mere balance of evidence, but less than that required in a criminal proceeding, namely beyond a reasonable doubt.[83]

There is perhaps some support for this interpretation in the fact that the Act requires this same standard of proof for prosecutions (s.30(3)), but it is submitted that "reasonable preponderance of the evidence" means no more and no less than "preponderance of the evidence". To hold otherwise would be to suggest that the ordinary civil standard of proof is unreasonable. Any higher standard puts a burden on a complainant that is excessive for an Act which is, as an

---

81. 12 Human Relations #20 (Feb. 1972) 12.
82. *Id.* at 12.
83. *Pate* v. *Wonnacott* (Nova Scotia Board of Inquiry, 1970) at 3.

Ontario board noted, "a public welfare statute rather than a criminal enactment" designed "to regulate the social order, rather than to single out wrongdoers."[84]

Proving discrimination, then, could be a well-nigh impossible task in a hostile judicial environment. In general, Canadian boards have not been hostile; on the contrary, they have been prepared to interpret the statutes flexibly, adopting principles from other jurisdictions and other areas of the law where necessary, so that the remedial purposes of anti-discrimination legislation can be achieved. This flexible interpretation has taken the form of (1) giving a "broad and generous" interpretation to the operative phrase "discrimination because of sex", and (2) making a realistic assessment of what evidence is needed to raise a *prima facie* case in light of the nature of the employment relationship.

"Discrimination" as prohibited by the Act is an objective act; the motive for that objective act is legally irrelevant. Furthermore, the American cases have made clear that "the only form of 'intent' required under Title VII of the *Civil Rights Act,* 1964 is that the defendant meant to do what he did, that is, his employment practice was not accidental."[85] This is particularly important in attacking practices like sex-neutral qualifications and rules: it would be necessary then to show only that the policy which excluded women existed, and not that the employer had adopted it in order to exclude women or even realized that it had an exclusionary effect on women. There has been no pronouncement yet from a Canadian board of inquiry as to the form of "intent" required by the Act, but it is submitted that the American definition is in accordance with sound "objective" tort principles, is essential to the effective working of the Act, and should be adopted when it becomes necessary.

Canadian boards have consistently refused to interpret "discrimination because of sex" as meaning "discrimination by reason only of sex". They have been prepared to find a violation of the Act wherever sex is a factor in the employment decision:

> A review of the purpose and provisions of the Human Rights Code compels the conclusion that it is sufficient to constitute a violation of the Code that a prohibited reason was one of the reasons for the decision.

---

84. Quoted in R. Kerr, *Legislation Against Discrimination in Canada* (New Brunswick Human Rights Commission, 1969) at 35.
85. *Hicks* v. *Crown Zellerbach* (1970), 319 F.Supp. 314 at 320.

> The purpose of the Code, as indicated by the Preamble and the substantive provisions, is to eliminate from consideration in decisions affecting employment . . . . those factors such as race and sex which are listed in the Code. It is to make the governing principle "that all persons are equal in dignity and human rights *without regard to* . . . sex" (emphasis added). This purpose would not be served if these factors can validly be considered merely because they are considered in conjunction with other legitimate factors.[86]

A similar conclusion was arrived at in *Segrave* v. *Zellers*.[87] There the board cites *R.* v. *Bushnell Communications*[88], a case interpreting s.110(3) of the *Canada Labour Code* [88a]which prohibits an employer from "refus[ing] . . . to continue to employ any person . . . because the person is a member of a trade union." In that case it was held to be sufficient

> . . . that membership in a trade union was present in the mind of the employer in his decision to dismiss, either as a main reason or one incidental to it, or as one of many reasons regardless of priority.[89]

If this principle had been applied in the *Ryan* case[90] it would have been sufficient to support a finding that the Chief of Police, at least, had discriminated on the basis of sex. The board found that the Chief had two reasons for his refusal to recommend Roberta Ryan; one of these reasons was a discriminatory one, since it was based on stereotyped assumptions about the ability of women to work the night shift. Clearly then Ms. Ryan's sex was "present in the mind of" the Chief when he made his recommendations and the fact that he also had another reason for his refusal should have been no defence.

The principle that sex need only be a factor in, and not the principal basis for, an employment decision may have special significance in jurisdictions like Nova Scotia where discrimination on the ground of marital status is not expressly prohibited by the Act. In any case where an employer has different rules for married women than he has for married men, sex would be a factor in the

---

86. *MacBean* v. *Village of Plaster Rock, supra,* note 27 at 5.
87. *Supra,* note 23.
88. (1974), 1 O.R. (2d) 442; 45 D.L.R. (3d) 218 (H.C.), *aff'd* (1974), 4 O.R. (2d) 288; 47 D.L.R. (3d) 668 (C.A.).
88 a. R.S.C. 1970, c.L-1.
89. *Supra,* note 80 at 447; 45 D.L.R. at 223. Quoted in *Segrave* at 8.
90. *Supra,* note 7.

differential treatment and there would be a violation of the general prohibition against discrimination because of sex.

What kind of evidence, and how much, will be necessary to prove discrimination? An American court made this observation:

> It is obvious that in a case of sex discrimination, as in a case of race discrimination, we very seldom find a resolution of a board of directors or a faculty committee agreeing to engage in sex discrimination . . . The existence of such discrimination must therefore be found from circumstantial evidence and inference from circumstances.[91]

American courts have devoted careful consideration to developing a jurisprudence of circumstantial evidence in sex discrimination cases. They are prepared to look at statistical data and probability theory in evaluating employment patterns to see whether these patterns have resulted from discriminatory practices, past or present.

On a less sophisticated but equally clear-sighted level, at least one Canadian board has been prepared to take a realistic approach to the lack of direct evidence in these cases:

> [T]he reasons for any decision on a matter within the ambit of the Human Rights Code are particularly within the knowledge of the deciding party. In such circumstances the decision itself, viewed against such other facts as are available, may raise an inference of unlawful discrimination such as calls for an explanation by the deciding party. If an explanation is not forthcoming, one may conclude that on the balance of probabilities there was unlawful discrimination.[92]

That board was prepared to infer from "a high level of preoccupation with the factor of sex"[93] that a decision had been made on a discriminatory basis.

Linked to the problem of lack of direct evidence in sex discrimination cases is the question of what the complainant needs to prove to raise a *prima facie* case. It may be very important to identify the stage in a case at which the employer is called on for an answer, given the fact that he is very likely the only person with direct knowledge of the reasons for his decision.

The board in *Segrave* v. *Zellers*[94] invoked the assistance of an unfair labour practice case in defining "discrimination because of

---

91. *Johnson* v. *University of Pittsburgh* (1973), 359 F.Supp. 1002 at 1007-8.
92. *MacBean* v. *Village of Plaster Rock, supra,* note 27 at 7.
93. *Id.* at 9.
94. *Supra,* note 23.

sex'', and boards could usefully do the same in defining the parameters of a *prima facie* case. Hughes C.J.N.B., in *R.* v. *St. Stephen Woodworking*[95], said

> Indeed the occasions are rare when an employer admits he has dismissed or is dismissing an employee because he is a member of a trade union, but the law is not so weak that an employer may, by giving no reason or a fictitious one, provide himself with a defence.[96]

He goes on the say: ''the question for determination is whether the evidence is sufficiently cogent to call for an explanation from the defendant.''[97] What is of particular relevance for our purposes is his quotation from an earlier case, *R.* v. *Jenkins*:

> In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular case and the facility that appears to be afforded, either of explanation or contradiction.[98]

Certainly in cases like these where the ''nature of the particular case'' is that the reason for the decision is peculiarly within the knowledge of the deciding party, there is a particularly strong argument for making the burden of raising a *prima facie* case relatively light. Once a complainant proves facts from which an inference of sex discrimination can reasonably be drawn, it is submitted that the burden should shift to the employer to furnish another equally probable reason for his decision.

This may do injustice to those employers who make their decisions, as they are legally entitled to do, for no reason at all. But surely such employers are few and should not be coddled by the law.

R. v. *St. Stephen Woodworking*[99] was an appeal from a judgment that had found ''no evidence'' that the employee in question had been dismissed because of his trade union activities. Hughes C.J.N.B. concludes that while there may have been no *direct* evidence, there was sufficient *circumstantial* evidence to warrant a conviction.[100] It is submitted that this approach could usefully have

---

95. (1972), 30 D.L.R. (3d) 602.
96. *Id.* at 610. Note comments on this case in *R.* v. *Bushnell Communications, supra,* note 88.
97. *Id.*
98. *Id.*
99. *Supra,* note 95.
100. *Id.* at 609-11.

been taken in the *Ryan* case.[101] There too the board found "no evidence" that the Council had discriminated against Roberta Ryan.[102] But surely this is to ignore the inference that arises from the fact that (1) the Chief of Police made recommendations to Council for which he gave a discriminatory reason, whatever may have been in the back of his mind, and (2) Council subsequently made a decision consistent with those recommendations. In those circumstances it could have been no injustice to the Council to have required them to show that they made their decision without reference to the Chief's recommendations, if that was in fact the case.

No hard and fast rules can be laid down for identifying the components of a *prima facie* case; these will differ in each fact situation. But at a minimum it is submitted that the employer should be called on for an answer when the reason given for the decision at the time it was made turns out to be false,[103] when the person who actually got the job is significantly less qualified than the complainant and of the opposite sex, or when the composition of the respondent's work force shows a clear pattern of sex discrimination with which the employment decision in question is consistent.

A special problem of proof arises in cases where the employment decision is made not by one person but collectively. Must the complainant show that all the persons participating in the decision discriminated, or that a majority of them did? The point is dealt with in the *MacBean* case.[104] That case involved a complaint by a woman that she had been refused a job as village Clerk-Treasurer because of her sex. The hiring decision was made by vote of the village Council. The board required the complainant to show that the number of councillors for whom sex was a relevant factor was sufficient to have changed the decision.[105] Presumably this means that in the case of a close vote it might be sufficient to show that one out of a large number took sex into account if that one vote might have changed the decision.

In large business organizations an applicant for a job or promotion might go through several stages before a final decision is

---

101. *Supra*, note 7.
102. *Id.* at 18.
103. See J. Sopinka, *Proving Discrimination in Boards of Inquiry Under Ontario Human Rights Code, supra*, note 81 at 12.
104. *Supra*, note 27.
105. *Id.* at 6.

reached. The initial contact with the company may be someone who hands out application forms; he or she may have no authority whatsoever to make decisions, but may nevertheless effectively exclude an applicant from employment opportunities for reasons prohibited by the Act. The question is whether the actions of such employees come within the scope of the Act. This may depend on whether the discriminating employees are carrying out company policy or merely indulging their own prejudices. As a practical matter the latter situation would be unlikely to come before a board of inquiry; once the matter was brought to the employer's attention he would rectify it. In the former situation there should be no difficulty in finding the employer responsible by analogy to vicarious liability principles. The Nova Scotia Act specifically defines "person" as including an "employer . . . whether acting directly or indirectly, alone or with another, or by the interposition of another" (s.2(k)). In *Segrave* v. *Zellers*[106] the company was found responsible for the actions of a personnel officer who "knew [the company's] policies and was merely the corporate instrument for exercising them."[107]

A combination of the collective decision-making problem and the hierarchical structure problem arose in the *Ryan* case:[108] the decision was made by a vote of Council on recommendations made by the Chief of Police. The complex issues involved were barely touched on in the decision but the board made a clear finding that since the Chief "did not have authority as to 'providing or refusing to provide . . . employment' within the meaning of [s.11A (1) (d)]" his recommendation, even if it was discriminatory, did not fall within the purview of the Act "without any action having been taken pursuant to [it]".[109] It is difficult to take exception to this as stated: recommendations that are ignored would have no adverse effect on the complainant. But for reasons I have already discussed I suggest that the board assumes much too readily that the Chief's recommendations were not acted upon.

VI. Complaints Mechanism

1. Steps in Processing a Complaint

---

106. *Supra*, note 23.
107. *Id.* at 11.
108. *Supra*, note 7.
109. *Id.* at 18.

The Human Rights Act is administered by the Nova Scotia Human Rights Commission (s.17), a body appointed by the Governor in Council (s.16(2)). The actual work of investigation and conciliation is done by a staff of investigative officers working under the Director, himself a full-time civil servant and a member of the Commission (ss.20-1).

The principal method contemplated by the Act for dealing with violations of its provisions is the complaints mechanism administered by the Commission.

> 23. The Commission shall instruct the Director or some other officer to inquire into and endeavour to effect a settlement of an alleged violation of this Act where,
>
> (a) the person aggrieved makes a complaint in writing on a form prescribed by the Director; or
>
> (b) the Commission has reasonable grounds for believing that a complaint exists.

The process can be activated, then, by either an individual complainant or by the Commission. In practice the authority under 23(b) is used in only about 10% of cases.[110] The Commission does very little spot-checking or investigating on its own initiative. In cases where an informal complaint has been made but the complainant does not wish to be identified for fear of reprisals an investigation can be made under s.23(b). Third party complaints could be dealt with in this way as well, although the Nova Scotia Act makes no specific provision for them.[111]

One relatively untested possibility is that class complaints can be initated under s.23. Section 11A specifically prohibits discrimination "because of the sex of the individual or *class* of individuals" (emphasis added); therefore discrimination against a class is a clear violation of the Act. Many instances of institutionalized discrimination could not be effectively tackled on an individual or even on a group basis; a class complaint might result in more sweeping and comprehensive remedies. The possibility has been recently explored by the Nova Scotia Human Rights Commission, although not in the area of sex discrimination or employment. A class complaint was brought by the residents of the North and East Preston school districts against the Halifax County School Board alleging

---

110. Conversation with K.Jega Nathan.

111. Some jurisdictions do: *e.g. The Ontario Human Rights Code*, R.S.O. 1970, c.318, s.13 as am. by S.O. 1971, c.50, s.63.

discrimination in provision of educational facilities and services because of race and colour. The case was settled before it reached the inquiry stage, so the validity of the class complaint was not challenged.[112]

Once the initial step has been taken, the Act imposes on the Commission a duty to see to it that an investigative officer makes an inquiry and "endeavour[s] to effect a settlement" (s.23). Section 24 gives the investigative officer power to examine records, require information and inspect premises. This power may be backed up by court order if necessary (s.24A).

The practice of the Nova Scotia Commission is that if the investigative officer turns up "no probable cause" that a violation of the Act has taken place, the complaint is summarily dismissed.[113] It is questionable whether on a strict interpretation of the Statute it is authorized to dismiss a complaint without attempting conciliation.[114] Section 25(1) provides the only statutory follow-up procedure to s.23: "If the Director or other officer is unable to effect a settlement of the matter complained of, the Commission shall make a report to the Minister".[115]

If "probable cause" is found, the matter then enters a formal conciliation stage, in which the investigative officer attempts to effect settlement. The percentage of cases settled at this stage is remarkably high as compared to the number in which a public inquiry is found necessary.[116] There are powerful pressures on an employer who has in fact discriminated to settle at this point; he may or may not get easier terms, but the most important factor is that he avoids public exposure. There is nothing in the Act that prevents the Commission from publicizing names of respondents

---

112. See *Newsletter*, Nova Scotia Human Rights Commission, 4th quarter, 1975 at 2-3. It is interesting to note in this regard that s.8 does not include the phrase "class of individuals" although s.3, the section relevant to the Preston complaint, does.

113. See Nova Scotia Human Rights Commission, *Summary of Activities '74*, "Steps in Processing Complaints" (no page numbers).

114. Some jurisdictions give their Commissions express authority to dismiss an unmeritorious complaint at any stage of the proceedings: *e.g. The Individual's Rights Protection Act*, S.A. 1972, c.2, s.17(4). The legislative provisions of the various jurisdictions are compared in Canada Department of Labour, *1975 Human Rights in Canada: Legislation and Decisions* (Ottawa: Information Canada, 1974 [*sic*]) at 30-31.

115. At present the Minister responsible for the Human Rights Act is the Attorney-General.

116. 1974 figures for all formal complaints: resolved-60; no probable cause-43;

who have settled and terms of settlement, but as a matter of policy in expediting settlements, this information is treated as confidential.[117]

Typical terms of settlement are similar to typical remedial recommendations from boards of inquiry, and might include: (1) an offer of a job, a promise of the next suitable job that becomes available, or monetary compensation if no job is likely to be available or the complainant is no longer interested in it; (2) an undertaking to the Commission not to discriminate in the future; and (3) an undertaking to post the Human Rights Scroll at the place of business and to advertise in future as an "equal opportunity employer".[118]

As of yet, sums in the nature of general damages for suffering and humiliation are not included in Nova Scotia settlements. Commission officials take the position that these are inappropriate since such awards might antagonize employers and impede the process of settlement. The question of such general damages was considered by a Nova Scotia board in *Pate* v. *Wonnacott*:[119]

> As to monetary compensation for injured feelings and emotional injury . . . I agree with Dean Tarnopolsky that compensation for injury such as this was not contemplated by the Ontario legislature when it passed the Ontario Code, or by our own legislature when it passed the Human Rights Act. The main purposes of the Act are education and the promotion of equality of opportunity for jobs, housing and so on, and not to give a complainant the additional opportunity of compensation in money terms — except possibly where the damages are special, that is, where specific sums can be shown to have been lost by reason of the discriminatory act.[120]

The Ontario legislation has since been amended to give boards more flexibility in ordering remedies, and Ontario boards now take the

---

investigation continuing-9; public inquiry recommended-3; withdrawn-5; total-120. From *Summary of Activities '74, supra,* note 113.

117. Conversation with K.Jega Nathan. This policy appears to be carried out only up to the point where a board of inquiry is appointed. After the appointment is made the terms of any settlement arrived at prior to the hearing must be reported to the Commission by the board (s.26(2)), and "the Commission [will] consider giving up its right to publish the Board of Inquiry's report only in very unusual circumstances." (*Braithwaite* v. *Halifax Developments,* Nova Scotia Board of Inquiry, 1975 at 3).

118. Conversation with K.Jega Nathan.

119. (Nova Scotia Board of Inquiry, 1970).

120. *Id.* at 22.

position that general damages are available.[121] This course is certainly open to Nova Scotia boards as well.

The Commission will, of course, settle for terms less comprehensive than these when necessary. In *Perry* v. *Robert Simpson Eastern*[122] it was prepared to waive the complaint if Simpson's would agree to the implementation of an affirmative action programme.[123] There would have been no personal remedy for the complainant. It seems fair to conclude that the high percentage of settlements reflected in Commission statistics do not necessarily reflect the number of cases in which there has been substantial redress for the individual complainant.

If the investigative officer is unable to effect a settlement, he or she reports to the Commission, who in turn submits a report to the Minister (s.25(1)). In practice the Commission may send the complaint back to the officer to try again for a settlement, and requires a strong case before it will recommend to the Minister that a board of inquiry be appointed. Presumably the offered terms of settlement become increasingly less favourable to the complainant each time the case is sent back, and if the employer continues to be recalcitrant the case may have to be withdrawn for lack of evidence. This reluctance to recommend boards in "doubtful" cases arises in part out of solicitude for employers who will be put to legal expenses which the Act makes no provision for them to recover. Surely this is a questionable factor to consider in administering a remedial statute. A more legitimate concern may be a calculation that the high rate of settlements could not be maintained if the Commission established a losing record at boards of inquiry.

Once this report has been made, the Minister in his *discretion* "may appoint one or more persons to be a board of inquiry to investigate and seek settlement of the complaint" (s.25(1)). The board's statutory duty is similar, then, to the duty of an investigative officer under s.23, but at this point the inquiry becomes public. The board, when appointed, exercises a *quasi*-judicial function:[124]

> 26(1) Upon its appointment a board of inquiry shall conduct a public inquiry into the matter referred to it and shall give full

121. See *Shack* v. *London Driv-Ur-Self* (Ontario Board of Inquiry, 1974) at 23-4.
122. Nova Scotia Board of Inquiry held in January and February, 1976; no decision has been handed down at time of writing.
123. *The Chronicle-Herald*, February 12, 1976.
124. See *Bell* v. *Ontario Human Rights Commission*, [1971] S.C.R. 756; 18 D.L.R. (3d) 1, *rev'g on other grounds (sub nom. R.* v. *Tarnopolsky, Ex parte Bell)* [1970] 2 O.R. 672; 11 D.L.R. (3d) 658.

> opportunity to all parties to present evidence and make representations.

If, after conducting the hearing, the board is unable to effect a settlement and finds the complaint "supported by a reasonable preponderance of the evidence" (s.26(3)), it must make recommendations to the Commission on remedial action. The Commission must in turn make a report to the Minister recommending "any action necessary to give effect to the recommendations of the Board" (s.27(3)). But once again the Minister has a *discretion* as to whether or not he will take action on the recommendations (s.28(1)). If the Minister does make an order under s.28 against the respondent and the respondent does not comply with it, he can, with the consent of the Minister, be prosecuted for failure to comply (s.29). If the prosecution is successful the Minister may apply for an injunction against "continuing the offence" (s.32(1)).

2. Status of the Complainant

The complaints mechanism outlined above is the principal mechanism provided by the Act for vindicating the rights it confers. In light of this it is very important to examine the position of the individual complainant in the administrative process to see how well her rights are protected.

The employer-respondent is often represented by legal counsel throughout the process, and invariably has his own lawyer at boards of inquiry.[125] The Commission takes the position that while the complainant is likewise entitled to independent legal representation, this is usually unnecessary since her interests are represented by the Commission. The practice of having the Commission lawyer represent both Commission and complainant was severely criticized by a Nova Scotia board in *Braithwaite* v. *Halifax Developments*:[126]

> It seems to me that, under the procedure contemplated by the Nova Scotia *Human Rights Act,* there is always the possibility of conflicts of interest arising when the same solicitor or counsel represents both a Complainant and the Commission. I think that it is obvious that many of the problems encountered in this case would not have arisen if the Complainant and the Commission had been separately represented after the board of inquiry was appointed.[127]

---

125. Conversation with K.Jega Nathan.
126. (Nova Scotia Board of Inquiry, 1975).
127. *Id.* at 4.

In practice complainants are unlikely to be able or willing to incur the expense of separate legal representation, although at least one complainant in a sex discrimination case retained her own counsel at the public inquiry stage.[128]

A "person aggrieved" clearly has the right to file a written complaint under s.23(a), and, if my reading of s.23 and s.25(1) as outlined above is correct she ought also to have the right to insist that the complaint be duly processed through conciliation up to the point where the Commission reports to the Minister. But it is not easy to see how, in the face of a Commission decision to dismiss the complaint, this latter right could be enforced or what benefit it would be to the complainant to enforce it. Presumably the usual remedy for enforcing statutory duties would be available: an order of *mandamus*. But the duty stops with the report to the Minister, and a court could not compel the Commission to recommend a board of inquiry in its report. There is, of course, no duty on the Minister to appoint such a board no matter what recommendations the Commission makes to him. Therefore the only force of an order of *mandamus* would be to compel a reluctant Commission to attempt to effect a settlement and to report to the Minister.

The status of the complainant in the formal conciliation stage is extremely ambiguous. The board of inquiry in *Braithwaite* v. *Halifax Developments*[129] found that the "parties" to the complaint referred to in s.25(3) and s.26(1) and (2) were the complainant and the respondent: the Commission itself was not such a party. If this interpretation is correct,[130] the complaint could not be settled by agreement between the Commission and the respondent without the consent of the complainant after the appointment of the board.

This conclusion is further bolstered by the finding of an Ontario board of inquiry in *Amber* v. *Leder*.[131] In that case the respondent had refused to accept terms of settlement proposed by the Commission until after the appointment of a board; it was at that point that the Commission discovered that the terms it was

---

128. *Grandy* v. *Atmus Equipment*, Nova Scotia Board of Inquiry held in November, 1975; no decision has been handed down at time of writing.

129. *Supra*, note 126.

130. In those jurisdictions that spell out who the parties to the action are, the Commission is always included: *e.g. The Ontario Human Rights Code*, R.S.O. 1970, c.318, s.14b(1) as am. by S.O. 1971, c.50, s.63.

131. (Ontario Board of Inquiry, 1970). Some of the information on this case is taken from I.A. Hunter, *The Development of the Ontario Human Rights Code* (1972), 22 U. of Toronto L. J. 237 at 245-8.

proposing were unacceptable to the complainant, who insisted that the inquiry proceed. Dean Walter Tarnopolsky, the one man board in the case, decided that

> [o]nce appointed . . . the Board of Inquiry had a mandatory duty to allow the parties to present evidence unless a settlement satisfactory to all parties had previously been reached.[132]

He found this mandatory duty in statutory language similar to s.26(1) of the Nova Scotia Act which requires that

> [u]pon its appointment a board of inquiry *shall* conduct a public inquiry into the matter referred to it and *shall* give full opportunity to all parties to present evidence and make representations (emphasis added).

It should be noted that subsequent to this case the Ontario Code was amended removing the language Tarnopolsky found to establish a mandatory duty to hear the complaint, and specifically providing that "the Commission . . . shall have the carriage of the complaint" before a board.[133] This would appear to give the Ontario Commission complete authority to settle or withdraw a complaint even after a board had been appointed. The Nova Scotia legislation, however, remains similar to that considered in *Amber* v. *Leder*.[134]

The complainant can, then, probably block an unsatisfactory settlement after the appointment of the board, but it is not so clear that she can do so before. The statutory language speaks of "settlement of the complaint" (s.23, 25(1)) rather than settlement "between the parties" (s.26(2),(3)). The very concept of settlement suggests a negotiated arrangement between the person wronged and the person wronging, mediated by the Commission. But this is not an inevitable conclusion, since the Commission itself has a very legitimate interest in effecting settlements and some of the typical terms of a negotiated settlement discussed above further the long-range goals of the Commission rather than benefiting directly the complainant. The board in *Amber* v. *Leder* however, found that "[r]egardless of how reasonable the terms of settlement may appear to the Commission . . . a settlement cannot be effected unless both

---

132. *Id.* at 247.
133. *The Ontario Human Rights Code*, R.S.O. 1970, c. 318 as am. by S.O. 1971, c.50, s.63.
134. *Supra*, note 131.

parties agree to it'', whether before or after the board's appointment.[135]

But even if ''settlement'' prior to the board's appointment must be read as ''settlement between the parties'' and a complainant could successfully block an unsatisfactory settlement, it would be a somewhat hollow victory. In such a case the Commission would surely view the actions of the complainant as unreasonable and it is extremely unlikely that it would recommend the appointment of a board of inquiry.

Even in a case where the complainant has the willing cooperation of the Commission she is still faced with the twin hurdles of ministerial discretion in the appointment of a board of inquiry (s.25(1)) and in implementing the recommendations of such a board (s.28(1)). By building such discretion into the Act the legislature has manifested its conviction that control over the enforcement of human rights should be retained in the political arm of the government. Such a policy is clearly undesirable and open to abuse. In practice it appears that this ministerial discretion is consistently exercised on the recommendations of the Commission,[136] but this may mean no more than that the Commission itself has never strayed beyond the realm of what is politically acceptable in Nova Scotia.

Of course this discretion does leave an avenue open to a complainant where the Commission has been unable to effect a settlement but for some reason has not recommended the appointment of a board of inquiry under s.25(1). At least in theory such a complainant could appeal directly to the Minister, exerting whatever political pressure she could muster, for the appointment of a board.

This administrative mechanism, which is heavily settlement-oriented and gives the Commission or its equivalent virtually complete control over the extent to which a complaint will be processed, is common to all Canadian jurisdictions. It reflects a legislative commitment to the principle that these matters are better dealt with out of the light of public scrutiny unless the Commission or the Minister decides that it is in the public interest for them to be heard. It also reflects a parternalistic distrust of the good judgment, and perhaps the good faith, of the typical complainant. This has, of

---

135. (Ontario Board of Inquiry, 1970) at 13.
136. Conversation with K.Jega Nathan.

course, historically been the attitude of governments, and society at large, to minority groups and women, but it is ironic that it should be perpetuated in a statute ostensibly designed to help eradicate just those attitudes.

This tight administrative hold on access to remedies is to be contrasted with the situation under Title VII of the *Civil Rights Act,* 1964,[137] the comparable American legislation. That Act establishes an administrative agency, the Equal Employment Opportunities Commission, to deal with complaints, and contemplates that people should first attempt to have their complaints redressed through administrative means before seeking access to the courts. The EEOC investigates the complaint; if it finds "probable cause" it attempts to conciliate. But if it fails in conciliation, or even in cases where it does not conciliate because it does not find "probable cause", the complainant can bring a civil action in federal court.[138] Furthermore, as a response to delays caused by the huge back-log of complaints with which it has to deal, the EEOC was given the power to grant "suit letters" to complainants authorizing them to bring civil action despite the fact that the EEOC had not investigated and conciliated. In all cases, then, the complainant can exercise her own judgement as to whether to expend the time, effort and expense in pursuing her complaint.[139]

VII. Alternative Remedies

A person who feels that she has been discriminated against contrary to the Human Rights Act, but either does not wish to go through or cannot gain effective access to the complaints mechanism, is not entirely without recourse. One alternative remedy expressly provided for in the Act is prosecution:

> 29. Every person who does anything prohibited by this Act . . . is guilty of an offence and is liable on summary conviction,
>
> (a) if an individual, to a fine not exceeding five hundred dollars; and
>
> (b) if a person other than an individual, to a fine not exceeding one thousand dollars.

137. 78 Stat. 241.

138. In some cases the action will be brought by the EEOC or the Attorney-General.

139. Information on Title VII and the EEOC was taken from S. Roberts, *Employment Litigation: A Feminist Viewpoint* (1973), 9 Trial 13, and L.S. Bohnen, *Women Workers in Ontario: A Socio-Legal History* (1973), 31 U. of T. Fac. L.R. 45.

This course of action has at least two serious disadvantages. First of all, the remedies are limited and provide no possibility of individual redress to a person aggrieved by isolated acts of discrimination, although in cases of continuing discrimination an injunction, for which only the Minister can apply (s.32), might be available. Secondly, it is necessary to get ministerial permission to prosecute (s.30(1)). This is unlikely to be forthcoming at the request of an individual. Except in unusual circumstances the Minister is likely to find public policy best served by requiring people to pursue their administrative remedies, and if they have failed to make a case in the complaints procedure, permission to prosecute would smack of double jeopardy. Commission officials feel that the prosecution provision is in the Act to deal with continuing offenders with whom conciliation would be fruitless and who should be prosecuted at the request of the Commission; it is not to allow individuals to circumvent the administrative procedures provided by the Act.[140]

Another possible alternative to the complaints mechanism is to bring a civil action directly in the Supreme Court based on breach of statutory duty.

> When a statute creates a new obligation or makes unlawful that which was lawful before, a corresponding right may thereby be impliedly given, either to the public or to individuals injured by the breach of the enactment.[141]

This tack has already been tried in Nova Scotia in *Beattie* v. *Acadia University*.[142] In that case a group of American basketball players, students at Acadia University, filed a complaint with the Human Rights Commission alleging that Acadia, by complying with CIAU regulations limiting the number of non-Canadian players on any team, was discriminating against them in provision of services and facilities on the basis of national origin. The case went to a board of inquiry, where there was a finding of discrimination, but doubt expressed as to whether membership on a university basketball team was a facility or service within the Act. Because of this doubtful finding, no action was taken against Acadia.

The players then brought an action in Supreme Court for an injunction. The decision to deny the injunction was based squarely on the finding that "the opportunity to play on a varsity basketball

---

140. Conversation with K.Jega Nathan.
141. *Maxwell on the Interpretation of Statutes, supra,* note 19 at 334.
142. Unreported decision of Hart J., Nova Scotia Supreme Court.

team'' does not fall within s.3 of the Act.[143] There was no suggestion whatsoever that the judge would have denied the injunction if he *had* found discrimination within the Act.

In principle this seems an unlikely statute in which to find a civil right actionable in the ordinary courts.

> Where a new obligation not previously existing is created by a statute which at the same time gives a special remedy for enforcing it, the initial general rule is that the obligation cannot be enforced in any other manner . . . . the statute may be intended to be a code complete in itself.[144]

The Human Rights Act provides not one but two ''special'' remedies: the complaints mechanism and prosecution. Furthermore, when the legislature was so careful to put control over access to these remedies in the hands of administrative officials and politicians, it would take a rash court indeed to find a legislative intent to allow an aggrieved person direct access to the courts. But

> the question is . . . one of the true construction of the particular statute concerned, and it may be the intention of the statute, as disclosed by its scope and by its wording, that other remedies should not be excluded . . . .[145]

A court might be persuaded that since these special remedies are not enforceable directly by the aggrived person herself, the legislature did not intend to deny her personal remedies in the courts.

VIII. Conclusion

This paper deals with the Human Rights Act from two perspectives, the substantive and the procedural. There is a certain air of unreality about examining these aspects together, for it is abundantly clear on examining both the Human Rights Commission statistics[146] and the nature of the complaints mechanism, that the substantive provisions are so rarely tested as to be virtually irrelevant.[147]

Why is human rights legislation designed to protect itself from judicial interpretation and public enforcement? All Canadian human rights legislation

---

143. *Id.* at 4.
144. 36 *Halsbury's Laws of England* (3d ed.) at 442, para. 668.
145. *Id.*
146. *Supra*, note 116.
147. So irrelevant are they, in fact, that the Commission invites and feels quite competent to deal with complaints over which it has no jurisdiction: see *How to File a Complaint of Discrimination*, a pamphlet published by the Nova Scotia Human Rights Commission.

> . . . is predicated on the theory that the actions of prejudiced people and their attitudes can be changed and influenced by the process of re-education, discussion and the presentation of socio-scientific materials that are used to challenge the popular myths and stereotypes about people.[148]

Discrimination is seen as caused by subjective factors, by attitudes: attitudes are changed by education. Hence the focus on conciliation and settlement rather than enforcement. Enforcement, in fact is seen as something to be avoided since it may harden attitudes.

This theory has questionable validity in the employment context. Employers give numbers of reasons for their reluctance to give women equal opportunity in the work force: women need protection; women should stay at home; women are incompetent; women are taking jobs away from men who need them to support families. All these reasons reflect stereotyped "attitudes". But what lies behind those attitudes?

Businessmen, in a society geared to profit maximization, rarely allow subjective factors to interfere with their long-range goals. And whatever the *causes* of sex discrimination, it is clear that as an institution it is highly compatible with profit maximization. Unequal pay for equal work means higher profits if productivity is constant. Pension and insurance plans which return less in benefits to women lower the employer's unit costs.[149] Maintenance of female job ghettoes allows employers to pay less for labour time without reference to productivity and thus increases rates of profit.

Is it really conceivable that employers will be persuaded to abandon this rich vein of profitable exploitation because they are told that discrimination against women is "unfair"? The process of conciliation may work well enough when the economic stakes are low: when the issue revolves around putting chairs in the men's washroom or hiring a woman truck driver, it is easier to switch than fight. But what happens when the stakes are higher? How amenable to conciliation will the employer be who is faced with a bill for a million dollars in back pay?

For stubborn cases there is, of course, the public inquiry and prosecution. But the structure is carefully designed to weed out difficult cases, politically sensitive cases, cases that might make

---

148. Quoted from Daniel G. Hill in I.A. Hunter, *The Development of the Ontario Human Rights Code* (1972), 22 U. of Toronto L.J. 237 at 245.

149. See J. Fichaud, *Pensions: A Primer for Lawyers* (1975), 2 Dalhousie L.J. 369 at 381-2.

Nova Scotia an inhospitable environment for industry, long before they get to that stage. Conciliation keeps the law untested, and an untested law enforced at the discretion of a Minister is unlikely to have much effect on the really substantial and deep-rooted patterns of sex discrimination in this province, especially when those patterns are so profitable.

Women themselves certainly do not see their salvation in the Human Rights Commission. There were forty-two sex discrimination complaints lodged in 1973, and a mere twenty-four in 1974;[150] this in a period when government statistics show wage differentials and occupational segregation to be staggeringly pervasive and, in general, on the increase.[151] The reasons why women do not complain about their situation are many and complex, but the fact is that the vast majority of them do not.[152] An individual complaints mechanism can necessarily only scratch the surface of the problem.

Alternatives to the complaints mechanism have been proposed. Some of these have already been implemented in the United States where sex discrimination legislation has a longer history. One such alternative is affirmative action. American affirmative action programmes are designed so that any business wishing to obtain federal government contracts must undertake not to discriminate and to take affirmative action to eliminate the effects of past discrimination,[153] by preferential hiring and quota systems if necessary. The Nova Scotia Human Rights Commission is authorized by s.19 of the Act to negotiate affirmative action programmes and has in fact done so.[154] But the Nova Scotia programmes are strictly voluntary; the Act provides no incentives for employers to enter into them, and no procedures whereby the Commission can enforce compliance by those employers who do enter into them.

A second alternative would be simply to supplement the individual complaints mechanism with a vigorous programme of investigation and initiation of class complaints by the Commission itself. The Nova Scotia Commission presently has the statutory

150. See Nova Scotia Human Rights Commission, *Summary of Activities, '73* and *'74*.

151. See Labour Canada, Women's Bureau, *Women in the Labour Force: Facts and Figures* (Ottawa: Information Canada, 1975), especially 70-1.

152. See Bohnen, *supra,* note 139, and "Equal Pay Programmes in Canada and the United States of America", *Women's Bureau '74, supra,* note 5.

153. Bohnen, *supra,* note 139 at 71-2.

154. Conversation with K.Jega Nathan.

authority to initiate complaints, but uses it rarely, both out of a shortage of resources and an ideological commitment to the individual complaints mechanism.

Either of these changes would help to bring within the ambit of the legislation the more pervasive and subtle forms of institutionalized discrimination that cannot be attacked through the complaints mechanism. They would also short-circuit the individual reluctance to complain. Such changes, along with the elimination of ministerial discretion in enforcement, would go a long way towards strengthening the Act. But if we accept the premise that sex discrimination maximizes profits, any of these changes, to be effective, would have to be accompanied by penalties stiff enough to make discrimination unprofitable. Currently it is much cheaper for an employer to wait for the law to find him out, than it is for him to make the necessary adjustments himself. That situation would have to be reversed before employers could be counted on to bring themselves "voluntarily" into compliance with the law. It is only by attacking sex discrimination at its economic roots that the law can be made, as it needs to be, self-enforcing.