

ACCOMMODATING EQUALITY IN THE UNIONIZED WORKPLACE[©]

BY KATHERINE SWINTON*

This article explores the appropriate relationship between human rights and collective bargaining laws through an examination of the Supreme Court of Canada's jurisprudence on the duty to accommodate. While collective bargaining can be an important force to promote equality for disadvantaged groups, resistance to changing the terms of collective agreements to accommodate those groups can arise, especially when other employees' seniority rights are affected. The emerging jurisprudence suggests that seniority rights will be respected in many situations, especially in layoffs, but the article outlines circumstances in which accommodation will be necessary to vindicate equality rights.

Cet article examine la relation appropriée entre les droits humains et les lois concernant les conventions collectives de travail par un examen de la jurisprudence de la Cour suprême du Canada sur l'obligation de l'accommodation. Bien que les négociations pour des conventions collectives de travail puissent être une force importante à promouvoir l'égalité pour les groupes défavorisés, la résistance aux changements dans les termes des conventions pour l'accommodation de ces groupes peut surgir, surtout quand ils influent sur les droits à l'ancienneté des autres employés. La jurisprudence naissante suggère que les droits à l'ancienneté seront respectés dans plusieurs situations, surtout en cas de licenciements, mais cet article décrit des circonstances dans lesquelles l'accommodation sera nécessaire pour revendiquer les droits d'égalité.

I. INTRODUCTION	704
II. THE MEANING OF EQUALITY	706
III. THE SUPREME COURT AND THE DUTY TO ACCOMMODATE	713
IV. UNIONS AND THE DUTY TO ACCOMMODATE	723
V. COLLECTIVE BARGAINING AND EQUALITY	725
VI. THE SIGNIFICANCE OF SENIORITY	731

© 1996, K. Swinton.

* Professor, Faculty of Law, University of Toronto. The financial assistance of the Social Sciences and Humanities Research Council is gratefully acknowledged in the preparation of this article. Part of an earlier draft of this paper was presented to the University of Calgary Arbitration Conference, 9-10 June 1993. I am grateful to Robert Howse and Ken Swan for comments on earlier drafts and to Lise Favreau and Lia Chiarotto for their research assistance.

VII. ACCOMMODATION AND SENIORITY	733
VIII. SENIORITY AS CONSTRUCTIVE DISCRIMINATION	736
IX. IN SEARCH OF SOLUTIONS	739
X. CONCLUSION	746

I. INTRODUCTION

Canadian equality jurisprudence has been dramatically transformed since the mid-1980s through judicial recognition of adverse-effects discrimination and the concomitant duty to accommodate members of groups protected by human rights legislation. While most cases in the employment context have focused on the scope of the employer's obligations, it was inevitable that the impact of the duty on trade unions would arise in organized workplaces, since collective agreement terms can adversely affect protected groups, giving rise to the need to consider potential accommodation, including the waiver or modification of those terms.

This raises the question of the appropriate relationship of collective bargaining and human rights law. Some argue that it is unfair to impose liability on unions who refuse to accept encroachment on a collective agreement, either because its terms are seen as hard fought "rights" bought by workers through concessions in negotiations, or because the responsibility for any discriminatory action should be attributed to management.¹ Others concede the necessity for flexibility in some, but not all, areas of collective agreement application, since agreements tend to reflect the interests of the majority in a bargaining unit and, thus, may not always be sensitive to the needs of groups which are less well represented in the workplace. Therefore, some balancing of the interests of various groups of workers is seen to be in order. Still others, especially advocates for equality-seeking groups, argue that collective agreements deserve no special respect in a regime concerned about individual and group rights—indeed, the rules enshrined in collective agreements often create unfair and arbitrary barriers to the participation of disadvantaged groups.

¹ There is an obvious contradiction between these two positions which will be examined in greater detail *infra* note 62 and accompanying text.

In no way has this debate been more heated than with respect to the benefits and protection flowing from seniority systems. For many, seniority is “the most fundamental right that organized workers have”—and is itself an important method of promoting equality.² Yet from the perspective of many members of disadvantaged groups, seniority is a major barrier in the struggle to achieve a more equal and accessible workplace.³

The appropriate treatment of seniority was an important element in the legislative debate on Ontario’s *Employment Equity Act*.⁴ This statute, a novel and ambitious effort to promote equality in employment for groups disadvantaged by both intentional and systemic discrimination, imposed a positive obligation on affected workplaces to develop an employment equity plan. The Act required employers, in conjunction with bargaining agents in a unionized workplace, to identify and remove barriers to the employment of members of the designated groups—women, people with disabilities, Aboriginal people, and racial minorities—and to set goals and timetables to achieve representation of those groups in the workplace reflective of their representation in the community.⁵ Despite the opposition of many equality-seeking groups, the Act provided that the use of seniority with respect to layoffs and recalls is deemed not to be a barrier, while seniority rights in other contexts, such as hiring and promotion, are deemed not to be barriers unless they are found by a board of inquiry to discriminate under the Ontario *Human Rights Code*.⁶

² P. Nash & L. Gottheil, “Employment Equity: A Union Perspective” (1994) 2 Can. Lab. L.J. 49 at 54.

³ This is implicit, for example, in D. Baker & G. Sones, “Employer Obligations to Reinstatement Injured Workers: Relating Human Rights Legislation to Section 54b of the *Workers’ Compensation Act*, R.S.O. 1980, [c.] 539, as am. by S.O. 1989, c. 47” (1990) 6 J.L. & Social Pol’y 30 at 54 (criticizing the Ontario *Workers’ Compensation Act* R.S.O. 1990, c. W.11, protection of seniority when injured workers seek reinstatement).

⁴ *Employment Equity Act* S.O. 1993, c. 35, as rep. by S.O. 1995, c. 4, effective 14 December 1995 [hereinafter *Employment Equity Act*]. A similar provision was included in the new federal *Employment Equity Act* S.C. 1995, c. 44, s. 8 (not yet proclaimed in force), although with one change in s. 8(3)—even though seniority may be protected by the preceding subsections, parties have a duty to consult if seniority has an adverse impact on employment opportunities for designated groups.

⁵ *Employment Equity Act* supra note 4, ss. 2 and 12.

⁶ *Ibid.* s. 11(3) and (4); and *Human Rights Code* R.S.O. 1990, c. H.19 [hereinafter Ontario *Human Rights Code*]. The provision of the *Employment Equity Act* *ibid.*, regarding layoffs was a part of the bill from the beginning, but the protection for seniority in promotions and hiring was a third reading addition. Indeed, in earlier versions of the bill, seniority systems were identified as a potential barrier: see Bill 79, *An Act to provide for Employment Equity for Aboriginal People, People with Disabilities, Members of Racial Minorities and Women* 2d sess., 35th Leg., Ontario, 1993, cl.

Is this a retrograde decision to be avoided by other jurisdictions seeking to implement employment equity? Or is this simply a proper acknowledgement that seniority is generally consistent with human rights legislation? An answer takes us back to the debate about the relationship between collective bargaining and human rights, requiring an examination of the role of unions in the pursuit of equality and the emerging meaning of equality in human rights jurisprudence.

This article begins with an examination of that jurisprudence, with particular emphasis on adverse-effects discrimination and the duty to accommodate. This is followed by a discussion of the interaction of collective bargaining and equality rights. I argue that unions often play a positive role in promoting equality, despite the obvious constraints deriving from their majoritarian and political nature. But human rights laws are also important to check majoritarianism in some circumstances, as illustrated by the judgment of the Supreme Court of Canada in *Central Okanagan School District No. 23v. Renaud*,⁷ which held that unions, as well as employers, have a legal duty to accommodate. Although that case did not deal directly with seniority, I will go on to discuss the various ways in which seniority systems may come under human rights scrutiny—indirectly, in order to accommodate someone suffering discrimination from another workplace rule, or directly, when the use of seniority in decision making is itself attacked as a form of adverse-effects discrimination. Finally, I will speculate about where boards and courts are likely to require modification of seniority systems, concluding that Ontario's decision in the *Employment Equity Act* with respect to seniority in promotions and hiring was an unfortunate one.

II. THE MEANING OF EQUALITY

Discussions of the meaning of equality often make a sharp distinction between equality of treatment and equality of results, or between direct and indirect discrimination.⁸ Commentators often

41(1), para. 5 (1st reading 25 June 1992).

⁷ [1992] 2 S.C.R. 970 [hereinafter *Renaud*].

⁸ It is trite, but true, to say that equality is a highly contested concept. As a result, the terminology in the literature is by no means consistent. Some speak of formal versus substantive equality: see, for example, C. Sheppard, *Study Paper on Litigating the Relationship Between Equity and Equality* (Toronto: Ontario Law Reform Commission, 1993) at 4-5; others speak of equality of opportunity versus equality of outcome, or equality of process versus equality of results. For useful descriptions of the debate, see K.W. Crenshaw, "Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law" (1988) 101 Harv. L. Rev. 1331; and O.M. Fiss, "Groups and the Equal Protection Clause" (1976) 5 Phil. & Publ. Aff. 107.

emphasize the bright line between the two approaches, arguing that the goal of eradicating direct discrimination is to maximize the liberty of the individual and to make group membership irrelevant, while adverse effects, or indirect, discrimination emphasizes the salience of the group and demands “special treatment” in the form of accommodation for those who have suffered disadvantage because they are “different” from the majority.

In fact, this distinction is too stark, as the following discussion illustrates. With both direct and indirect discrimination, group experience and membership are of fundamental importance because it is the history of particular groups that shapes our equality laws. The policy decision to protect certain characteristics in anti-discrimination law, such as race or religion, but not others, is driven by the experience of those sharing protected traits. It is overwhelmingly women, racial minorities, older workers, or those with disabilities who need protection, not those with green eyes or blonde hair, because characteristics like sex, race, or age have historically resulted in stereotyping and hostile treatment in Canadian society. Moreover, women, racial minorities, and people with disabilities have often been less well represented in the political process or other decision-making institutions, with the result that their interests may have been inadequately considered when rules were established. Therefore, to give such individuals a fair chance—*true* equality of opportunity—the detrimental impact of rules on less powerful groups needs to be considered. As a result, equality law must be concerned with both individuals and groups.

Nevertheless, it is true that the equal treatment model more clearly emphasizes fairness to the individual, since the primary objective is to stop adverse treatment based on the fact of membership in a group identified as warranting protection. Where the motive is antipathy toward that group or stereotypical attitudes about its members’ abilities, anti-discrimination law intervenes to protect the individual against unfair treatment.⁹ However, the law does recognize that there may be circumstances where there is reasonable justification for treating this group differently—for example, because its members do not have the

⁹ See Fiss, *supra* note 8 at 108-28 (describing the anti-discrimination principle and reasonable classification in American law); and R.H. Fallon Jr. & P.C. Weiler, “*Firefighters v. Stotts*: Conflicting Models of Racial Justice” [1984] Sup. Ct. Rev. 1 at 12-18 (describing an individual justice model, again in the American context). For an example of a strong proponent of this model in Canada, see R. Knopff, *Human Rights and Social Technology: The New War on Discrimination* (Ottawa: Carleton University Press, 1989).

ability to perform necessary job requirements.¹⁰ Overall, the goal is to have the individual judged on merit, without being unfairly burdened with the social baggage of assumptions about membership in a particular group.

This concept of equality is a powerful one, as acknowledged even by many who are conscious of its limitations.¹¹ It is illustrated in Canadian human rights law by cases such as *Borough of Etobicoke* which struck down a mandatory retirement rule for firefighters on the basis that the employer had failed to prove that age was a *bona fide* occupational qualification (BFOQ).¹² In this and subsequent cases, the Supreme Court of Canada emphasized that employers should make decisions on the basis of individual merit whenever possible, rather than relying on generalizations about groups identified by characteristics listed in human rights codes, unless such characteristics are proven relevant to job performance or individual testing of qualifications is impossible.¹³

In sharp contrast to the equal treatment model, in much of the literature, is an emphasis on equality of results and/or “substantive

¹⁰ This idea of justifiable differential treatment is caught in the *bona fide* occupational qualification defence found in human rights legislation (for example, Ontario's *Human Rights Code* *supra* note 6, s. 24(1)(a) and (b)), or the concept of reasonable limits, or an absence of a finding of discrimination under the *Canadian Charter of Rights and Freedoms* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, ss. 1 and 15 [hereinafter *Charter*].

¹¹ See, for example, writing about American blacks, Crenshaw, *supra* note 8 at 1366; or F. Michelman, “The Meanings of Legal Equality” in F.E. McArdle, ed., *The Cambridge Lectures 1985* (Montreal: Yvon Blais, 1987) at 85. A good example of the powerful attraction of this view of equality is the claim for recognition of same-sex relationships in *Egan v. Canada*, [1995] 2 S.C.R. 513.

¹² *Ontario (Human Rights Commission) v. Etobicoke (Borough of)* [1982] 1 S.C.R. 202 [hereinafter *Borough of Etobicoke*].

¹³ McIntyre J. for the Court stated, *ibid.* at 208, that the job requirement must be “reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.” Subsequent cases emphasized the need for individual testing and avoidance of overbroad generalizations about certain groups: see, for example, *Saskatchewan (Human Rights Commission) v. Saskatoon (City of)*, [1989] 2 S.C.R. 1297 at 1313-14 [hereinafter *Saskatoon Firefighter*] (dismissing a complaint of age discrimination with respect to mandatory retirement for firefighters, since individual testing was not feasible); and *Brossard (Town of) v. Quebec (Commission des droits de la personne)* [1988] 2 S.C.R. 278 at 317-18 [hereinafter *Brossard*] (striking down a rule preventing the hiring of relatives of town employees and councillors because it was too broad and should be tailored to apply to situations in which there was a potential for conflict of interest if family members were hired).

equality.”¹⁴ These models seem to be more clearly attuned to the needs and interests of groups because of the underlying premise that our laws and institutions often reflect the unstated preferences and values of dominant groups—usually those of white, able-bodied males. When measured against these norms, members of other groups have traditionally been found to be “different” or unqualified and, therefore, undeserving of further concern under the equal treatment model.¹⁵ For example, a health and safety law requiring all employees in underground mines to wear hard hats for safety reasons would be acceptable, even if it would exclude from employment in mines members of certain religions, such as Sikh men whose religion requires them to wear the turban. Similarly, a rule requiring all employees to pass a written test in a fixed period of time might exclude those with certain visual disabilities. Under the equal treatment model, they would be regarded as “different” from others and not qualified.

Substantive equality, in contrast, is concerned about the implications of “difference,” and particularly the impact of existing rules and practices on groups historically disadvantaged in society. Rather than ignore difference in cases like those described above, the concern becomes the alleviation of adverse effects on the disadvantaged group—for example, through exemption from the hard hat rule for Sikhs, or an alternative evaluation method for the person with a visual disability.¹⁶ But this still leaves unanswered the important questions of *when* adverse effects on groups should trigger the attention of the law and *how much* accommodation is required. This, in turn, requires us to reconsider the underlying vision of equality.

¹⁴ These concepts are not necessarily the same, as further discussion will show. Elsewhere in the literature, these concepts may be described as a group parity principle (Michelman, *supra* note 11), or an anti-subordination approach (Fiss, *supra* note 8).

¹⁵ See M. Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (Ithaca: Cornell University Press, 1990) at 16 and 51-52, for a discussion of the “unstated norm.”

¹⁶ See *ibid.* or other feminist writers such as G. Brodsky & S. Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back* (Ottawa: Canadian Advisory Council on the Status of Women, 1989) at 38, who are concerned about differences in power between groups that result in unfavourable norms for the disadvantaged groups. The equal treatment model is described as “assimilationist” because it measures members of all groups against a particular rule: see C. Geller, “Equality in Employment for Women: The Role of Affirmative Action” (1990-91) 4 C.J.W.L. 373 at 389. Although the term “affirmative action” is often used pejoratively, it is important to recognize that the equal treatment model has powerful transformative effects when members of disadvantaged groups win a case that says “[w]e are like you.” Nevertheless, the model does not go far enough to deal with real differences between groups, whether physical or cultural, where accommodation is required to provide fair opportunity.

At its most modest, intervention to remove adverse effects is justified to prevent arbitrary action that aggravates the disadvantage experienced by a group. To the extent that an unnecessary requirement presents a hurdle to an already disadvantaged group, fairness requires that it be removed to provide equal opportunity for all individuals. Think, for example, of a qualification that all police officers be six feet tall. This might not seem much of a problem if one assumes police officers are male. But if one starts with the proposition that police work should be open to men and women and to all races, the height rule seems quite unfair if, on closer examination, it turns out to have a tenuous relationship to the competence of police officers, given the wide variety of tasks that they perform. Thus, in pursuit of equal opportunity for all groups, it seems reasonable to demand the removal of arbitrary job requirements that have an adverse effect on protected groups.¹⁷

But if the concept of equality stopped here, serious obstacles would still stand in the way of many groups seeking to participate in workplaces or to receive other benefits, for employers will often be able to make the argument that the rule or practice under scrutiny is justified and not arbitrary. For example, a hard hat requirement may well protect workers from injury.¹⁸ But if we believe that a truly equal society is one in which there should be a fair chance at participation for women, religious minorities, or persons with disabilities, then equality law demands closer scrutiny of rules and practices to see if it is feasible to provide that opportunity, even when a rule serves some institutional purpose. This will require us to consider the possibility of exemption from a rule that might otherwise seem reasonable, as in the hard hat requirement. At other times, it may require us to think about further changes to institutions and practices—for example, through the creation of another form of evaluation for the person with a visual disability or protective reassignment for the pregnant worker to remove her from exposure to toxic substances.

¹⁷ Early American examples of such cases are *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) [hereinafter *Griggs*] (educational qualifications and testing adversely affecting blacks); and *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (height and weight requirements for prison guards disproportionately affecting women). Language in *Griggs* at 429-30, implies that the failure to remove a rule with a serious disparate impact on a disadvantaged group, when there is little or no justification for it, raises an inference of intentional discrimination against that group. A helpful discussion of “static discrimination” is found in M. Kelman, “Concepts of Discrimination in ‘General Ability’ Job Testing” (1991) 104 Harv. L. Rev. 1157 at 1160-65.

¹⁸ Indeed, even in a case like *Griggs*, *supra* note 17, there is a good argument that an educational qualification is a useful screening device, as argued in Knopff, *supra* note 9 at 103-06.

But the question then becomes how far we must go to accommodate difference and, when competing considerations come in, how far to limit the duty to accommodate? Is the overriding goal to achieve a level of representation for these groups in jobs or educational institutions reflective of their numbers in a broader population—in other words, equality of results?¹⁹ Some advocates place the highest priority on the participation of groups they identify as disadvantaged, and thus they are willing to sacrifice significant elements of merit or accept extensive costs as the price to pay for equality.²⁰ If so, this pushes towards a dramatic transformation of social institutions to remove adverse-effects discrimination—and, in the process, raises very serious questions about the legitimacy and feasibility of achieving such change through adjudication.²¹

Realistically, though, principles dealing with the costs of accommodation and the validity of competing interests will have to be developed, just as they have been with respect to the equal treatment model and defences to direct discrimination.²² Even if one would like a fully representative workforce, that is an unfeasible ideal. Accommodation of some disabilities in a workplace may, for example, entail significant costs, lost productivity, or risk of harm to other workers—and some jobs just cannot be done by persons with some

¹⁹ That seems to be the implication from Sheppard, *supra* note 8 or Geller, *supra* note 16. Sheppard, at 5, writes: “[The concept of substantive equality] demands real, actual equality in the social, political, and economic conditions of different groups in society, as opposed to a formal, abstract, and theoretical ideal of individual equality The legal right to equality, therefore, embodies a right to have one’s group differences acknowledged and accommodated in laws, and social and institutional policies and practices.”

²⁰ Thus, they might argue for affirmative action programmes that give preference to members of target groups in employment or education, as does Geller, *supra* note 16. Note that advocates of this position are often quite suspicious of the concept of “merit” and the discriminatory assumptions it may embody.

²¹ Many commentators ignore this issue, but it is discussed in relation to the interpretation of s. 15 of the *Charter* in R. Moon, “Discrete and Insular Right to Equality: Comment on *Andrewsv. Law Society of British Columbia* (1989) 21 *Ottawa L. Rev.* 563 at 569 and 574-75.

²² For example, Fiss, *supra* note 8 at 148-67, would limit disparate impact analysis (or anti-subordination approaches) to a distinct social group (defined as having a distinct identity and a condition of interdependence among its members) which is in a perpetual position of subordination and lacking in political power. A law should be constitutionally vulnerable only if the status of the disadvantaged group is worsened by its effect. Finally, he concludes that consideration must be given to competing interests, so that a compelling benefit to the legitimate interests of the state could outweigh the disadvantaged group’s claim to protection.

disabilities.²³ Some members of groups suffering ongoing harm due to past discrimination, like blacks in the United States or Aboriginal people in Canada, may be unable to meet the same educational or employment standards as white candidates, again leading to a necessary debate about the importance of merit and productivity versus compensation for past discrimination.

Others argue that proportional representation of groups is neither an achievable nor a desirable goal of equality law.²⁴ Rather, the objective is more modest and more closely linked with the underpinnings of the equal treatment model: the goal is equal opportunity for members of all groups by giving them a fair chance to participate.²⁵ From this perspective, it is unjust to insist on the status quo when it is relatively costless to adopt alternative institutional arrangements that alleviate adverse effects on disadvantaged groups—for example, by rearranging furniture to permit wheelchair access. But, at the same time, it is recognized that accommodation can raise complex and competing considerations. Costs to employers cannot be ignored in any system, especially not in a capitalist one; other individuals and groups may be affected by the accommodation or themselves require another arrangement, and it may be impossible to respond to all the diverse needs and views—even within a group seeking accommodation.²⁶ Thus, while the goal is substantive equality, this approach plays out as an enriched concept of equal opportunity that balances a number of interests in its implementation.²⁷

²³ For example, a person with a serious back injury who could not lift more than five pounds and needed an hourly fifteen-minute rest would attract concerns about productivity and costs of production in most plants where repetitive lifting of packages over ten pounds was the norm. Similarly, a person subject to periodic, serious epileptic seizures might create real risks to himself or herself and others in a plant where heavy machinery was being operated. See, for example, *Re Canada Post and CUPE (Godbout)* (1993), 32 L.A.C. (4th) 289 (Jolliffe) [hereinafter *Canada Post*]; and *Re T.C.C. Bottling Ltd. and RWDSU Local 1065* (1993), 32 L.A.C. (4th) 73 (Christie).

²⁴ For example, McLachlin J., in plurality reasons in *Miron v. Trudel*, [1995] 2 S.C.R. 418 at 487, emphasizes that *Charter* equality rights are aimed at individual protection, not group rights.

²⁵ This is the thrust of *Report of the Commission on Equality in Employment* (Ottawa: Minister of Supply and Services, 1984) (Commissioner: Abella J.) at 4-5 [hereinafter *Abella Report*]. This report led to federal employment equity legislation and has been cited in many court decisions. It is also the theme in M.D. Lepofsky, “Understanding the Concept of Employment Equity: Myths and Misconceptions” (1994) 2 Can. Lab. L.J. 1 at 7-10.

²⁶ For example, a rotating-shift schedule may be a barrier to the participation of some women with small children and no problem to others with different childcare arrangements.

²⁷ See Kelman, *supra* note 17 at 1160 and 1182 (describing “dynamic discrimination”), and at 1161 and 1186-95 (describing “distributive discrimination”).

The following section of this paper shows how the Supreme Court of Canada has embraced substantive equality in the context of employment law, ultimately developing an approach that emphasizes equality of opportunity and removal of barriers, rather than equal results.

III. THE SUPREME COURT AND THE DUTY TO ACCOMMODATE

In a creative exercise of judicial interpretation, the Supreme Court of Canada, in its *O'Malley* decision, first held that the prohibition of discrimination in Canadian human rights codes encompassed indirect, or adverse-effects, discrimination, as well as direct or intentional discrimination.²⁸ Thus, in situations where a rule or practice has an adverse impact on members of a protected group, constituting *prima facie* discrimination, the person responsible for the rule or practice has a duty to take “reasonable steps” to accommodate the protected group up to the point of “undue hardship”—that is, in a case of employment, without undue interference in the operation of a place of business and without undue expense.²⁹ Thus, a substantive model of equality was added to the existing equal treatment jurisprudence.

In *O'Malley*, the claim of religious discrimination arose because a retail clerk, who was a Seventh Day Adventist, refused availability for work from sundown Friday to sundown Saturday in order to observe her Sabbath. The adverse-effects discrimination resulting from the job requirement that she work two out of three Saturdays necessitated some effort at accommodation by the employer. Since there was no evidence of any attempt to accommodate, the employer essentially lost due to its failure to discharge the onus of proof. As a result, the Supreme Court's reasons contained no real discussion of what constitutes undue hardship.

In the *Central Alberta Dairy Pool* case, the Court began to elaborate the duty to accommodate and the meaning of “undue hardship,”³⁰ although in the interim there was much confusion as to whether the duty to accommodate would arise in cases of direct, as well

²⁸ *O'Malley v. Simpson's-Sears Ltd.*, [1985] 2 S.C.R. 536 [hereinafter *O'Malley*]. By the time this decision was handed down, some human rights codes, including Ontario's, already expressly included adverse-effects discrimination.

²⁹ *Ibid.* at 555.

³⁰ *Central Alberta Dairy Pool. Alberta (Human Rights Commission)* [1990] 2 S.C.R. 489 [hereinafter *CADP*].

as indirect, discrimination. In *Bhinder*, a case decided at the same time as *O'Malley*, the Court had held that there was no duty to accommodate under the *Canadian Human Rights Act*³¹ once an employer established that a workplace rule or requirement was a *bona fide* occupational qualification or requirement.³² The employer was found to have a valid defence to a complaint of religious discrimination by an adherent of the Sikh religion, who refused to wear a hard hat while working as a maintenance electrician because his religion required that he wear a turban. Since there were valid safety reasons for the hard hat requirement, the Court held that the employer had no duty to accommodate Bhinder in some way—for example, by exempting him from the rule, while requiring other employees to comply.

The *Bhinder* case was very controversial, since it seemed to provide a defence for many workplace rules that imposed serious burdens on protected groups, especially those with disabilities and religious minorities.³³ Some relief appeared in subsequent cases, such as *S*

askatoon Firefighters and *Brossard*,³⁴ which emphasized that an employer could not satisfy the BFOQ test unless it could be shown that reliance on a suspect criterion (age or civil status in those two cases) was rationally connected to the performance of the particular job at issue and, more importantly, that there was no practical alternative to the use of that criterion—for example, individual testing of capacity or a less restrictive method of reaching the same employment objective. Thus, there was greater potential to call existing workplace structures into question because of their impact on disadvantaged groups,³⁵ but it was unclear whether this raised doubts about the holding in *Bhinder*.

In *CADP*, the Court provided some clarification of these issues, but still left unanswered many questions about the scope of the duty to accommodate. Wilson J., writing for the majority, continued to emphasize the difference between direct and indirect discrimination, insisting that the duty to accommodate only arose in relation to the

³¹ S.C. 1976-77, c. 33 (now R.S.C. 1985, c. H-6).

³² *Re Bhinder and Canadian National Railway Co.* [1985] 2 S.C.R. 561 at 590 and 580 [hereinafter *Bhinder*].

³³ M.F. Yalden, "The Duty to Accommodate: A View from the Canadian Human Rights Commission" (1993) 1 Can. Lab. L.J. 283 at 288-89.

³⁴ *Supra* note 13.

³⁵ The inquiry seems reminiscent of the *Charter* jurisprudence under s. 1 and the test in *R. v. Oakes*, [1986] 1 S.C.R. 103 at 138-40, since a major concern is whether there is a reasonable alternative to the use of the suspect criterion that is less burdensome to that group.

latter.³⁶ However, she held that *Bhinder* had been wrongly decided, because the Court had applied the BFOQ defence in a case of adverse-effects discrimination, while that defence should only be applied with respect to direct discrimination. In her view,

[w]here a rule discriminates on its face on a prohibited ground of discrimination, it follows that it must rely for its justification on the validity of its application to all members of the group affected by it. There can be no duty to accommodate individual members of that group within the justificatory test because, as McIntyre J. pointed out [in *Bhinder*], that would undermine the rationale of the defence. Either it is valid to make a rule that generalizes about members of a group or it is not.³⁷

In cases of adverse-effects discrimination, she stated, the rule itself was not in question, provided that it was rationally connected to the needs of the business operation. However, its application must be modified because of the burdens on members of a particular group, if this accommodation could occur without undue hardship.³⁸

As to what constitutes undue hardship, the Court began to elaborate relevant factors, with Wilson J. stating:

I do not find it necessary to provide a comprehensive definition of what constitutes undue hardship but I believe it may be helpful to list some of the factors that may be relevant to such an appraisal. I begin by adopting those identified by the board of inquiry in the case at bar: financial cost; disruption of a collective agreement; problems of morale of other employees; interchangeability of work force and facilities. The size of the employer's operation may influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities can be adapted in the circumstances. Where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations. This list is not intended to be exhaustive and the results which will obtain from a balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case.³⁹

As in *O'Malley*, the issue was religious discrimination, this time arising from the refusal to give an employee in a milk-processing plant a holy day off, which happened to fall on Easter Monday, to allow him to

³⁶ Direct discrimination, she stated, in *CADP*, *supra* note 30 at 514, was based on a generalization about the capacities of a particular group. A rule that consciously made a distinction on the basis of a suspect ground could stand only if it was justified in application to the group as a whole. But if a rule was suspect because of its *impact* on a protected group, it could continue to stand, except with respect to those adversely affected, who must be accommodated if the employer could do so without undue hardship.

³⁷ *Ibid.* at 514.

³⁸ In contrast, Sopinka J. wrote the dissenting judgment, *ibid.* at 527, La Forest and McLachlin JJ. concurring, in which he stated that the duty to accommodate was an element of the BFOQ defence, which applied to both indirect and direct discrimination. Dickson C.J., L'Heureux-Dubé, and Cory JJ. concurred with Wilson J.

³⁹ *Ibid.* at 520-21.

observe the tenets of the World Wide Church of God. Again, there was little discussion of the duty to accommodate, since the Court quickly concluded that the employer could have accommodated this isolated request for a day off, even though Monday was its busiest production day, since the employer routinely handled employee absences, vacations, and emergencies on Mondays.

The Court's decision generated comment and criticism once again, most particularly in relation to the relevance of factors such as employee morale and the existence of a collective agreement to the duty to accommodate, as well as the continuing insistence that there is no duty to accommodate in relation to direct discrimination.⁴⁰ Some of those criticisms were addressed in *Renaud*, where the Supreme Court of Canada revisited the duty to accommodate, this time in a unionized setting. Sopinka J. for the Court noted that undue hardship went beyond the American *de minimis* standard, since "[m]ore than mere negligible effort is required to satisfy the duty to accommodate."⁴¹ As well, he expressed caution about the criteria of employee morale and disruption of a collective agreement, noting that:

The concern for the impact on other employees ... is a factor to be considered in determining whether the interference with the operation of the employer's business would be undue. However, more than minor inconvenience must be shown before the complainant's right to accommodation can be defeated. The employer must establish that *actual* interference with the rights of other employees, which is not trivial but substantial, will result from the adoption of the accommodating measures. Minor interference or inconvenience is the price to be paid for religious freedom in a multicultural society.⁴²

More importantly, *Renaud* also made clear for the first time that trade unions, as well as employers, were bound by the duty to accommodate, and that a collective agreement could not automatically

⁴⁰ See, for example, D. Baker, "Alberta Human Rights Commission. *Central Alberta Dairy Pool*" (1991) 36 McGill L.J. 1450; B. Etherington, "Central Alberta Dairy Pool: The Supreme Court of Canada's Latest Word on the Duty to Accommodate" (1993) 1 Can. Lab. L.J. 311; and A.M. Molloy, "Disability and the Duty to Accommodate" (1993) 1 Can. Lab. L.J. 23 at 36-37. The Ontario *Human Rights Code* *supra* note 6, makes the duty to accommodate an element in both direct (s. 24(2)) and indirect (ss. 11(2) and 17(2)) discrimination cases.

⁴¹ *Renaud*, *supra* note 7 at 982. Sopinka J. also noted, at 984, that the terms "reasonable measures" and "short of undue hardship" were "alternate ways of expressing the same content" (a position opposed by some human rights advocates who fear that the first phrase is a weaker standard than the second).

⁴² *Ibid.* [emphasis added]. The Court elaborated on the duty in *Commission scolaire régionale de Chambly v. Bergevin* [1994] 2 S.C.R. 525, where it upheld an arbitration award that required a school board to pay Jewish teachers for religious holidays on the basis that to do so would not constitute undue hardship. The factors affecting the duty are discussed at 545-46.

stand in the way of a necessary accommodation. Nevertheless, the Court held that the scope of the union's duty would vary depending on the way in which it became a party to discrimination. On the one hand, a union could be a direct party if it participated in the formulation of a workplace rule that had an adverse impact on a protected group. For example, it would be directly responsible if discrimination resulted from a collective agreement provision, whether or not the clause had come from the union's or the employer's agenda.⁴³ On the other hand, the union could become bound by a duty to accommodate even if discrimination resulted from employer action alone, if the union's cooperation became necessary at some point to facilitate the employer's reasonable efforts to accommodate.⁴⁴

In cases of "co-discrimination," the union would have an immediate duty to accommodate, although the employer might reasonably be expected to initiate proposals for accommodation. In deciding appropriate action, the employer is expected to canvass methods of accommodation that do not disrupt the collective agreement, but the Court refused to hold that the employer must try all methods outside the collective agreement before consulting the union.⁴⁵ By contrast, where the union is not a co-discriminator, the union is not involved unless "no other reasonable alternative resolution of the matter has been found or could reasonably have been found."⁴⁶

The Court was sensitive to the fact that the union has different concerns and functions than the employer in determining whether an accommodation is reasonable, since it is a political institution, obliged to represent and reconcile the interests of a number of employees, who often have different needs and aspirations. According to Sopinka J., this role should be taken into account in determining the scope of the union's duty to accommodate:

⁴³ *Renaud*, *supra* note 7 at 991. The Court rejected the dissenting reasons of Campbell J. in *OPEIU, Local 267 v. Domtar Inc.* (1992), 8 O.R. (3d) 65 at 74 (Div. Ct.) [hereinafter *Gohm*], which had suggested that the union should not be liable for discrimination when the employer fired an employee who could not work Saturdays for religious reasons. *Gohm* is discussed further *infra* note 63.

⁴⁴ *Renaud*, *supra* note 7 at 989-90.

⁴⁵ In the words of Sopinka J., *ibid.* at 992, "[t]he employer must take steps that are reasonable. If the proposed measure is one that is least expensive or disruptive to the employer but disruptive of the collective agreement or otherwise affects the rights of other employees, then this will usually result in a finding that the employer failed to take reasonable measures to accommodate and the union did not act unreasonably in refusing to consent."

⁴⁶ *Ibid.* at 993.

The primary concern with respect to the impact of accommodating measures is not, as in the case of the employer, the expense to or disruption of the business of the union but rather the effect on other employees. The duty to accommodate should not substitute discrimination against other employees for the discrimination suffered by the complainant. *Any significant interference with the rights of others* will ordinarily justify the union in refusing to consent to a measure which would have this effect.⁴⁷

Thus, it is legitimate for unions to be mindful of the impact of possible accommodation on the accrued contractual rights of other members of the bargaining unit and, when there is serious interference with those rights, the union can refuse to waive the collective agreement.⁴⁸

It is far from clear how these principles will play out in many fact situations, since the cases frequently mention that the duty to accommodate is context driven. In this case, a dispute had arisen because the complainant, a Seventh Day Adventist, could not work his regular Friday evening shift as a school custodian due to the religious requirement that he not work between sundown Friday and sundown Saturday. Under the collective agreement, shifts were normally scheduled from Monday to Friday, with only four employees working on weekends. The employer offered to substitute a Sunday to Thursday shift, provided that another employee could be found to work the Friday evening, since Renaud's school was rented out to a community group at that time. This proposal was rejected by the union. Other options, such as moving to a job with straight days, were unavailable because the complainant did not have enough seniority to bid for these hours (regarded as more attractive by many in the bargaining unit).

The Supreme Court of Canada upheld the determination of a member-designate of the British Columbia Human Rights Council that both the employer and the union had violated the duty to accommodate. The Court was especially insistent that the union and employer should have sought a volunteer to work out the accommodation, stating that the union had failed to discharge the onus of proving that there would be undue hardship in the accommodation proposed, since no volunteer had been sought.

The Court went on to comment that the member-designate's decision that the shift change was the most reasonable accommodation

⁴⁷ *Renaud*, *supra* note 7 at 991-92 [emphasis added].

⁴⁸ Earlier he had stated, *ibid.* at 987, that "[w]hile the provisions of a collective agreement cannot absolve the parties from the duty to accommodate, the effect of the agreement is relevant in assessing the degree of hardship occasioned by interference with the terms thereof. Substantial departure from the normal operation of the conditions and terms of employment in the collective agreement may constitute undue interference in the operation of the employer's business."

was supported by the evidence.⁴⁹ Implicit within that determination must be a finding that another employee could be required to trade shifts if no one volunteered. But if the shift change was the most reasonable accommodation and another employee could be compulsorily transferred, it is likely that the latter would be removed from a position for which he or she had bid on the basis of seniority and personal preference, which seems to be an interference with contractual rights.⁵⁰ One can only infer that the proposed rearrangement would not be seen as a *significant* interference with another employee's rights.

Before turning to the implication for seniority rights in other situations, it is worthwhile to expand on the concept of discrimination developing in the Supreme Court's decisions and reactions to it. A close reading of the cases shows that they are still within the liberal tradition that emphasizes equality of opportunity for individuals, rather than equality of results for groups—if by that term we mean the right to a degree of representation. A regular theme throughout the cases is the importance of removing unfair and unnecessary barriers to allow individuals access to the workplace to demonstrate their capacities, and there is a clear sense of the salience of certain characteristics, such as disability, sex or minority status, to one's participation in employment and other institutions.⁵¹

While the jurisprudence is attentive to social context and to the outcomes of various institutional practices, the resulting workplace restructuring will not lead to the elimination of *all* practices which adversely affect protected groups. With respect to both the BFOQ defence and the duty to accommodate, the Court accepts that there are costs associated with many accommodations, as well as competing interests, which can legitimately be taken into account in determining

⁴⁹ *Ibid.* at 988-89.

⁵⁰ The factum of the respondent CUPE local in *Renaud*, *supra* note 7, states that all vacancies were posted under the collective agreement and open to bids by employees on the basis of seniority. Therefore, to require another employee to switch shifts would be a violation of that employee's collective agreement rights. The decision of the member-designate noted that trading the Friday shift for a Sunday shift would involve another employee with greater seniority: see *Renaud v. School District No. 23 (Central Okanagan)* (1987), 8 C.H.R.R. D/4255 at 4256 (B.C.).

⁵¹ This is seen both in passages in *O'Malley*, *supra* note 28, and in the *Charter* equality decision of *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143 at 174-75, where McIntyre J. speaks of treatment on the basis of one's merits and capacities as non-discriminatory. He also states, at 165, that "the *admittedly unattainable ideal* should be that a law expressed to bind all should not because of *irrelevant* personal differences have a more burdensome or less beneficial impact on one than another" [emphasis added].

whether anti-discrimination law has been infringed.⁵² Most importantly, merit continues to be a relevant consideration in the allocation of benefits such as jobs, as is most clearly demonstrated by the BFOQ defence.⁵³

Similarly, judicial decisions acknowledge the reality of limited resources and, therefore, the relevance of cost and efficiency in accommodating difference, whether in the workplace or in society at large. The Ontario Human Rights Commission has suggested that the cost defence should be narrowly tailored so as to permit only “financial costs” that are undue because they are “so substantial that they would alter the essential nature of the enterprise” or “so significant that they would substantially affect the viability of the enterprise.”⁵⁴ However, these guidelines seem much more stringent than the standard adopted by the Supreme Court of Canada, which stresses that attempts at accommodation must be “reasonable.”⁵⁵

The Court has also acknowledged the competing interests of other groups to be deserving of some consideration. Where a proposed

⁵² Note that Ontario’s *Employment Equity Act* *supra* note 4, s. 29(2)(b), recognized the duty to accommodate as a relevant consideration and also included a defence of reasonable efforts.

⁵³ Human rights codes also explicitly recognize the ongoing relevance of merit: see, for example, Ontario *Human Rights Code* *supra* note 6, s. 17, which requires that an individual with a disability be able to perform the “essential duties” of a job (albeit after efforts to accommodate). Overall, the law does not seem to have reached the position described by Kelman, *supra* note 17 at 1161 and 1186, as “distributive discrimination” whereby characteristics affecting productivity are ignored for certain groups in the interest of participation.

⁵⁴ The Ontario *Human Rights Code* *supra* note 6, s. 11(2), states that a requirement, qualification, or factor is not reasonable and *bona fide*, and therefore not a defence to a complaint of constructive discrimination, if the needs of the group members cannot be accommodated without undue hardship “considering the cost, outside sources of funding, if any, and health and safety requirements, if any.” For an interpretation, see Ontario Human Rights Commission, “Guidelines for Assessing Accommodation Requirements for Persons with Disabilities Under the Ontario *Human Rights Code, 1981*, as Amended” (1993) 1 Can. Lab. L.J. 186 at 193-97 [hereinafter Ontario Commission Guidelines]. These guidelines are not binding on adjudicators or the courts, although they are persuasive.

⁵⁵ In *Saskatoon Firefighters* *supra* note 13 at 1311, the Court interpreted Saskatchewan’s regulations defining the *bona fide* occupational requirement as one rendering it “necessary” to treat members of a group in a certain way in order that the “essence of the business” is not undermined as importing a standard of reasonableness with respect to “necessity.” Again, in *Zurich Insurance Co. v. Ontario (Human Rights Commission)* [1992] 2 S.C.R. 321, Sopinka J. for the majority stated that the board of inquiry erred in asking whether the very essence of the business would be undermined if it could not use the discriminatory practice (in that case, car insurance premiums rated on the basis of sex, age, and marital status). That standard was said to be higher than the one required by the defence in s. 21 (now s. 22) of the Ontario *Human Rights Code* *supra* note 6, or that used in employment cases. At 350, he noted, “[a]n alternative may be impractical even though its adoption would not undermine the very essence of a business.”

accommodation would create real health and safety risks for co-workers or the public, the law does not require such action. But *Renaud* goes beyond harm to speak of the need to protect other workers from significant interference with their “rights.” Immediately, the question arises whether it is fair to talk of “rights” in this context. Does the term unfairly tip the balance in an argument about accommodation, suggesting that other employees’ “interests” in preserving the status quo are equivalent in weight to equality seekers’ statutory or constitutional “rights?”⁵⁶ Or is it legitimate to be solicitous of others’ contractual rights—or even some of their interests and preferences—in determining the scope of another individual’s equality rights?

Again, the answer as to whether the Supreme Court’s terminology is appropriate depends on the applicable theory of equality. In many cases, exempting the complainant from a rule or changing a practice to accommodate creates an impact on others. In a case as simple as *O’Malley*, an individual’s exemption from a Saturday shift requires another employee to fill in. Since cost has been accepted as a consideration in limiting accommodation by employers or in determining whether a BFOQ exists, other employees’ contractual rights should be a relevant consideration as well.⁵⁷ Some accommodations, such as restrictions on an employee’s seniority rights, carry quantifiable costs—for example, in the lost wages and benefits that would occur by preferring more junior members of designated groups over more senior employees from another group in a layoff or promotion situation.

More controversial are “costs” for other employees which are less tangible, but nevertheless significant to them. While the member of a religious minority may have cogent reasons for seeking Saturday as a day off work, other employees, too, may have good reasons for wanting that day free—most obviously, a chance to spend it with family.⁵⁸ The Ontario Human Rights Commission seems to dismiss these simply as

⁵⁶ Often the person posing this question reflects the view in human rights jurisprudence that third-party “preferences” do not count as a defence to discrimination: see, for example, Ontario Commission Guidelines, *supra* note 54 at 192.

⁵⁷ *Ibid.* at 192-97. The focus is on the financial costs to the enterprise or employer, expressly rejecting the argument that “third-party preferences” or the terms of a collective agreement can be bars to providing the kind of accommodation sought by a complainant. The wording of the Ontario *Human Rights Code* *supra* note 6 (described *supra* note 54) is awkward with regard to accommodation because it appears not to have contemplated the full range of actors who might be asked to accommodate—most obviously, unions and co-workers, as well as employers. Nevertheless, the words do leave room to consider the range of factors in *Renaud*, *supra* note 7.

⁵⁸ In *R. v. Edwards Books & Art Ltd.*, [1986] 2 S.C.R. 713 at 769-70, a *Charter* case dealing with freedom of religion, Dickson C.J. endorsed the importance of a pause day to allow time with family.

“third party preferences,” a term traditionally used in relation to the desire of individuals not to associate with members of particular groups. But fairness requires that these effects be considered in some cases, for in the fact situations described, it is not just the employer or the abstract “enterprise” being asked to accommodate, but the other employees whose contractual rights and expectations are detrimentally affected.⁵⁹

Underlying the criticism of the rights terminology in *Renaud* is a different concept of equality than that espoused by the courts—one that sees the interests of the disadvantaged groups as trumping those regarded as more advantaged. But while the courts are sympathetic to issues of relative advantage and disadvantage,⁶⁰ they have not indicated that the perspective of the disadvantaged group is the only relevant one. Their concern is to facilitate access and participation for all groups in the workplace—but only to the extent that it is possible to do so in light of others’ valid interests. While it is important to be vigilant lest a presumption operate in favour of the status quo,⁶¹ the case can also be made that arguments about advantage and disadvantage require greater sensitivity, since the groups under discussion are large and composed of members with a wide range of experiences and characteristics. While commentators are often careful to acknowledge the diversity of experience within the disadvantaged groups, especially along racial and gender lines,⁶² they seem to ignore the complexity of the “more advantaged” group when it comes to issues such as ethnicity and class. Even if one accepts the general proposition that men have been more advantaged than women, subsets of men have faced and continue to face serious disadvantage because of class, educational background, geographic location, and other factors not necessarily recognized by our human rights codes. By considering the impact of accommodation on other workers, the Supreme Court, in cases like *Renaud*, allows such complexity to be considered.

⁵⁹ In fact, third-party preferences are not always ignored in human rights jurisprudence: see, for example, the acceptance of privacy concerns justifying sex as a BFOQ for personal care attendants in *Re School District No. 42 and CUPE, Local 703* (1993), 33 L.A.C. (4th) 63 (Munroe); and for guards in an RCMP lockup in *Stanley v. Royal Canadian Mounted Police* (1987), 8 C.H.R.R. D/3799 (C.H.R.T.).

⁶⁰ See, for example, the decision rejecting a *Charter* challenge to searches of male prisoners by female guards in *Conway v. R.*, [1993] 2 S.C.R. 872.

⁶¹ This is Crenshaw’s fear, *supra* note 8 at 1349.

⁶² See, for example, Sheppard, *supra* note 8 at 9-19 and the expanding literature on intersectionality, such as K. Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics” [1989] U. Chi. Legal F. 139.

IV. UNIONS AND THE DUTY TO ACCOMMODATE

While critics argue that the equality rights of disadvantaged groups are not adequately protected by the evolving jurisprudence, others say the Court has gone too far in imposing liability on unions. The thrust of the argument is that *Renaud* and its companion in the Ontario Court of Appeal, *Gohm*,⁶³ improperly attribute joint responsibility to management and unions for collective agreement terms. For example, Lynk and Ellis argue that a union is improperly held liable when it is the employer alone who has the choice of whether or not to enforce the collective agreement provision.⁶⁴ In their view, a union should at least be protected from liability if it has made genuine efforts to remove a discriminatory clause from the collective agreement.⁶⁵ Union liability should arise, they argue, only if there is a “sufficient nexus” between the union and the discriminatory action, and a union should be able to invoke the defence that its actions were based on a cogent industrial relations purpose.⁶⁶ While this recommendation of an “industrial relations purpose” bears some resemblance to the Supreme Court’s reasons in *Renaud*, the nexus criterion is not a concern of the Court.

Brian Etherington, writing after the decision, argues that Sopinka J.’s “co-discrimination” approach is based on “the unrealistic premise of equal responsibility and power on the part of unions to formulate workplace policies and rules.”⁶⁷ In his view, the employer

⁶³ *Supra* note 43, wherein lab technicians were required to work one Saturday in four. Unable to do so for religious reasons, the complainant offered to work Sundays. The union rejected her offer unless she was paid a premium for Sunday work as required by the collective agreement. The employer refused to pay the premium, and ultimately she was discharged, with both the union and the employer held liable for their failure to accommodate.

⁶⁴ M. Lynk & R. Ellis, “Unions and the Duty to Accommodate” (1993) 1 Can. Lab. L.J. 238 at 265. Their view is adopted in the dissenting reasons of Campbell J. in *Gohm*, *supra* note 43 at 74.

⁶⁵ Lynk & Ellis, *supra* note 64 at 268. While this might shield the union in some circumstances, it does not, in fact, do so in cases like *Gohm*, *supra* note 43; and *Renaud*, *supra* note 7. In both cases, the dispute is at least in part about clauses that the union wanted to have enforced: *i.e.*, premium pay for Sunday work in *Gohm*, and protection of seniority in *Renaud*.

⁶⁶ Lynk & Ellis, *supra* note 64 at 281.

⁶⁷ B. Etherington, “The Human Rights Responsibilities of Unions: *Central Okanagan School District No. 23 v. Renaud*” (1994) 2 Can. Lab. L.J. 267 at 276. He also argues, at 279, that the Court’s guidelines for accommodation can be criticized as “furthering romantic illusions proposed by liberal pluralists that collective bargaining has resulted in an equal partnership, or system of co-determination between management and labour ...”

should have to accommodate without disturbing the collective agreement unless there is no reasonable alternative.⁶⁸

Should we be more solicitous of unions, as these commentators suggest? They are right to point out that many collective agreement terms result from management pressure—but others are there because of union insistence, a fact that Etherington, at least, fails to acknowledge. Certainly, in the case of seniority rights, it is the unions who urge greater protection, while premium pay for Sunday work in *Gohm* is not an item that management seeks. Similarly, a mandatory retirement provision may be a management proposal, but it may win union members' support if it is coupled with a pension plan. Rather than try to sort out which clauses come from management and which from the union, the courts have correctly taken the view that the collective agreement is a bargain in which each side wins on some clauses and loses on others (often in order to get something of higher priority). Since it is extremely difficult after the fact to sort out responsibility for different terms, Sopinka J. in *Renaud* refused to do so, holding both employer and union responsible.⁶⁹ At the same time, he recognized that the union may have traded things off to win certain objectives such as wages for greater seniority, or an agreement to work Sundays in return for premium pay. His answer was not to isolate the collective agreement from change, but to encourage employers to look first outside the collective agreement's terms when considering accommodation.

To protect the collective agreement at all costs would undermine important public policy considerations with respect to human rights. In being held jointly liable with the employer in some cases, unions (and their members) are encouraged—like other institutions in society—to think about diversity and the perspective in our norms and institutions discussed earlier. Indeed, in a case like *Gohm*, it is difficult to feel sympathy for the union when it was held liable for refusing to waive premium pay if Gohm worked on Sunday. The premium pay provision was clearly negotiated to penalize the employer and to compensate the employees if required to work Sundays. The unstated norm is that Sunday is a special day, whether for religious or family reasons. While this may be true for the majority in the bargaining unit, it was not true for Gohm, for whom Saturday was a special day. There seems to be no

⁶⁸ *Ibid.* at 280.

⁶⁹ It is still an open question whether a union could escape liability for a discriminatory term if it could demonstrate a bargaining history of employer resistance to a less discriminatory provision. See Lynk & Ellis, *supra* note 64 at 267-69, discussing *Canada (A.G.) v. Mossop*, [1993] 1 S.C.R. 554.

principled reason here, other than a rigid insistence on the inviolability of negotiated terms, why unions should escape the obligation imposed on other institutions to consider the impact of a rule that was made for the majority's benefit on a religious minority.⁷⁰

Lynk and Ellis perceive a conflict between the collective rights focus of labour law and the individual rights focus of human rights law.⁷¹ While it is true that collective bargaining operates on principles of majority rule and exclusivity of representation for the union in bargaining, it is incorrect to portray this as incompatible with the equality objectives of human rights laws. Many unions are committed to the pursuit of social justice, including greater workplace equality, as the following section illustrates. For some unions, the protection of minorities and women is an important objective, even when these groups form only a small part of the bargaining unit.

On the other hand, human rights laws are not incompatible with collective bargaining. True, they are directed toward attaining greater justice for individuals in protected groups, but this check on the will of the majority in the unionized workplace is no different from that imposed on the majority in society at large. Invidious discrimination is forbidden, as is adverse-effects discrimination that can be avoided without undue hardship to others, in pursuit of fairness to disadvantaged groups. This hardly amounts to the pursuit of individual rights above all.

V. COLLECTIVE BARGAINING AND EQUALITY

Collective bargaining is a valued institution for a number of reasons. Most obviously, by providing a greater measure of bargaining power with an employer, it gives workers an opportunity to obtain more favourable terms and conditions of employment than individuals acting alone in most labour markets could hope to attain. The benefit lies not only in the outcomes, but also in a process that gives workers an

⁷⁰ A union official also suggested that Gohm could be exempted from Saturday work: see *Gohm*, *supra* note 43 at 70; and *Gohm v. Domtar Inc.* (1990), 90 C.L.L.C. ¶ 17,027 at 16,289 (Ont. H.R.C.). It seems strange that this is the union position, for this appears to be a greater imposition on other employees' free time than allowing the complainant to work on Sundays at straight time. Inevitably, many accommodation cases can be perceived by others as a form of special treatment for the minority. Letting Gohm work Sundays at straight time seems the best way to avoid that charge.

⁷¹ *Supra* note 64 at 240 and 270. The Supreme Court discusses the relationship between human rights laws, collective bargaining, and the reconciliation of competing employee interests in a bargaining unit when upholding a mandatory retirement scheme in *Dickason v. University of Alberta* [1992] 2 S.C.R. 1103 at 1130-33.

opportunity to participate in workplace governance. Moreover, collective bargaining offers the protection of the “rule of law” in the workplace, since management discretion is circumscribed by rules in the collective agreement and a dispute resolution process—namely, the grievance procedure and arbitration.⁷²

All of these objectives are ones that equality-seekers themselves value,⁷³ yet there are many critiques of collective bargaining as a device for achieving equality. Gillian Lester, for example, argues that the adversarial nature of collective bargaining is incompatible with the moral world view that some feminists ascribe to women, while its political structure often inhibits women’s participation.⁷⁴ Her pessimism seems confirmed by Kumar and Acri in a study of the bargaining record of various Ontario unions on issues related to gender equality. They found variations across unions, plus a very limited degree of success in bargaining on matters such as affirmative action programmes or sexual harassment clauses.⁷⁵ Moreover, in considering the efficacy of collective bargaining, one cannot ignore the limits of union coverage, with approximately 34.9 per cent of the workforce unionized in 1992, and with 31.2 per cent of women organized compared to 38.1 per cent of men. Nevertheless, women constituted approximately 41.3 per cent of union members.⁷⁶

Finally, the democratic nature of the collective bargaining process can sometimes be perceived as a detriment to those concerned about equality issues.⁷⁷ Membership support is necessary to union

⁷² The argument for collective bargaining is made in P. Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (Toronto: Carswell, 1980) at 26-33.

⁷³ See, for example, R. Leah, “Linking the Struggles: Racism, Feminism and the Union Movement” (Kingston: Industrial Relations Centre, Queen’s University, Reprint Series No. 93, 1990). While taking a positive view of what collective bargaining can achieve, especially for women of colour, she also notes where further changes would be beneficial.

⁷⁴ G. Lester, “Toward the Feminization of Collective Bargaining Law” (1991) 36 McGill L.J. 1181.

⁷⁵ P. Kumar & L. Acri, “Unions’ Collective Bargaining Agenda on Women’s Issues: The Ontario Experience” (1992) 47 Rel. Ind. 623. Table 2, at 644, shows that very few of the agreements surveyed in Ontario contained clauses on sexual harassment, childcare, extended parental leave, affirmative action programmes, and special protections related to the use of video-display terminals.

⁷⁶ Statistics Canada, *Annual Report of the Minister of Industry, Science and Technology under the Corporations and Labour Unions Returns Act, Part II—Labour Unions, 1993* (Cat. 71-202, November 1994) at 14, 15, and 20 [hereinafter *CALUR*]. The forecast for 1993 was continued growth of female membership despite declining employment, which was attributed, at 14, to the greater degree of job security in unionized jobs.

⁷⁷ Lynk & Ellis, *supra* note 64 at 240.

leaders seeking election, while the negotiation of collective agreements requires leaders to canvass and pursue members' priorities thoroughly in order to find backing for a strike or ratification of a new agreement. The result may be the trade-off of terms that benefit only a minority of workers during negotiations. This might lead to the sacrifice of increased pensions in a unit with a large number of younger workers who prefer higher current wages, or of a paid maternity leave plan, or of super-seniority for under-represented groups.

If one takes the position that collective bargaining is antithetical to the interests of equality seekers, then further discussion must focus on the fundamental reform of labour relations. But even Lester, who seems most critical of collective bargaining, does not go this far.⁷⁸ More importantly, her argument that collective bargaining is incompatible with women's needs and desires is open to serious question, for this conclusion rests on a very limited sample of case studies and ignores the degree to which women have embraced collective bargaining in its traditional form.⁷⁹ Indeed, the major areas of growth in union membership in the last two decades have been in predominantly female sectors, especially public administration, health, and teaching.⁸⁰

Therefore, it is probably more realistic and fruitful to consider what collective bargaining can do for equality and where its limits lie, rather than to reject it completely.⁸¹ In this vein, it is necessary to put the Kumar and Acri study in perspective. While unions apparently have not had great success in negotiating about the kinds of women's issues identified by the authors, it is important to note the narrow definition of

⁷⁸ Lester, *supra* note 74 at 1212-18, suggests some modest changes to workplace operations and ways to facilitate union organization.

⁷⁹ Lester, *ibid.*, looks at a garment workers' local, a Swedish workplace, and Yale University clerical staff. It is surprising that there is no systematic effort to study major women's unions in Canada, such as the Ontario Nurses Association or the Federation of Women Teachers Associations, or some of the large public sector unions such as the Canadian Union of Public Employees. For a contrasting view on the efficacy of unions, see Leah, *supra* note 73; and Nash & Gottheil, *supra* note 2.

⁸⁰ See, for example, S. Eaton, *Women Workers, Unions and Industrial Sectors in North America* (Geneva: International Labour Organization, 1992, IDP Women/WP 1); and A. Forrest, "Women and Industrial Relations Theory: No Room in the Discourse" (1993) 48 *Rel. Ind.* 409 at 414. For a description of the same trends in the United States, see R. Spalter-Roth, H. Hartmann & N. Collins, "What Do Unions Do for Women?" in S. Friedman *et al.*, eds., *Restoring the Promise of American Labor Law* (Ithaca: ILR, 1994) 193 at 194.

⁸¹ See, for example, J. White, *Women and Unions* (Ottawa: Canadian Advisory Council on the Status of Women, 1980), c. 4. White concludes that women benefit from unionization, although the benefit varies with the union and the employer. See also J. White, *Sisters and Solidarity: Women and Unions in Canada* (Toronto: Thompson, 1993), c. 3.

“women’s issues” employed in their survey. For many women, clauses on paid maternity leave or special leave might be attractive, but other terms may be a greater priority. Often, the most important benefit of collective bargaining is its impact on wages, for example, the reduced wage gap between men and women,⁸² the premium that comes from working in unionized workplaces,⁸³ and the premiums that may be negotiated for shift work.⁸⁴

A second reason for caution in interpreting quantitative data is the fact that unions may choose not to bargain for “equality clauses” where the rules are already part of workplace law due to legislative action. This is certainly one reason for the dearth of sexual harassment clauses or maternity leave provisions incorporated through collective bargaining, since both of these are regulated by statute.⁸⁵

Because there is no empirical study related to race or disability equivalent to that of Kumar and Acri, it is more difficult to determine the frequency with which the unions pursue equality issues of interest to them. Again, there is some evidence that unions act in the interests of these groups. Non-discrimination clauses, often containing a list of prohibited grounds, are found in many collective agreements. A reading of the *Labour Arbitration Cases* shows that a number of collective agreements contain provisions for alternative work for injured workers, although these are usually subject to availability and ability to do the job.⁸⁶ But on a less positive note, collective agreements have also worked against the interests of those with disabilities through provisions for automatic termination following prolonged absence from work. These have been increasingly vulnerable under human rights legislation as a form of adverse-effects discrimination on the basis of disability.⁸⁷

⁸² R.B. Freeman & J.L. Medoff, *What Do Unions Do?*(New York: Basic Books) at 17 and 20. This pattern results partly because unions seek to have earnings less dispersed over the range of jobs and equal pay for workers in the same job.

⁸³ Weiler, *supra* note 72 at 27, observes that this seems to be approximately 10 to 15 per cent.

⁸⁴ For example, the Ontario Nurses Association placed a high priority in negotiations through the 1980s on obtaining shift premiums for hospital nurses.

⁸⁵ In addition, a number of equality initiatives may be found outside the formal collective agreement. Sexual harassment procedures are a common example.

⁸⁶ See, for example, the clause examined in *Canada Post*, *supra* note 23 and accompanying text.

⁸⁷ See, for example, *Re Glengarry Industries/Chromalox Components and SWA Local 6976* (1989), 3 L.A.C. (4th) 326 (Hinnegan); and *ONA v. Etobicoke Gen. Hosp.*(1993), 14 O.R. (3d) 40 (Div. Ct.).

Beyond the actual benefits that can be obtained through collective bargaining, other advantages of unionization cannot be captured by any survey of collective agreement terms. Freeman and Medoff's study of American unions demonstrated a greater degree of job security and tenure in unionized firms, which is important to vulnerable groups.⁸⁸ Moreover, unionized workers concerned with equality rights can also turn to the arbitration process to provide a significant supplement to human rights commissions in enforcing non-discrimination norms, both bargained and statutory.⁸⁹ This can be an important benefit, in light of the lengthy delays in processing complaints through human rights commissions.⁹⁰

Thus, the picture of collective bargaining and equality is much more nuanced than critics of collective bargaining have generally acknowledged. It has its dark sides, but its brighter ones as well, depending on one's perspective, the union under study, and the time-frame chosen for examination.⁹¹ Some unions, such as the Canadian Auto Workers in their negotiations with the large auto manufacturers, have been leaders in bargaining equality issues.⁹² Others have been

⁸⁸ See Freeman & Medoff, *supra* note 82 at 21; and *CALURA*, *supra* note 76.

⁸⁹ This occurs through "just cause" clauses in discipline cases, non-discrimination clauses, and concepts of illegality that allow arbitrators to consider human rights laws. More recently, some jurisdictions specifically allow arbitrators to apply human rights and other employment laws. See *Labour Relations Code* S.B.C. 1992, c. 82, s. 89(g); *Labour Relations Act* S.O. 1995, c. 1, Schedule A, s. 48(12)(j) [hereinafter *OLRA*]; and *Trade Union Act* R.S.N.S. 1989, c. 475, s. 43(1)(e).

⁹⁰ For a review of some of the administrative problems of the Ontario Human Rights Commission, see Ontario Human Rights Code Review Task Force, *Achieving Equality: A Report on Human Rights Reform* (Toronto: Ministry of Citizenship, Policy Services Branch, 1992) (Commissioner: M. Cornish) [hereinafter Cornish Report].

⁹¹ Note that even the dispute settlement mechanism by which collective agreement terms are reached can be important. For example, some unions have been particularly successful in obtaining "equality" clauses through interest arbitration, a process where there is "reasoned" argument to the arbitration board, rather than a demonstration of force through a threatened strike. A good example of union success in this forum is the contract language on health and safety protection for video-display terminal operators and on sexual harassment, obtained by the Ontario Public Service Employees Union in an interest arbitration with the Ontario government. For more detail, see K. Swinton, "Collective Bargaining and the Promotion of Equality: The Canadian Experience" (Report to the International Labour Office, Geneva, 1993) [unpublished].

⁹² For a description of the CAW and Chrysler 1993 agreement, see "Clauses Addressing the Duty to Accommodate" (1992) 16 *Lancaster L.L. Rep.*, 3. Contract Clauses, no. 3, 1 at 2 [hereinafter "Clauses"]. This agreement included provisions on a right to refuse work in the face of serious harassment, a communications programme for members of a new anti-harassment policy, training for local leadership on harassment and employment equity, and an increase in the payment to the union childcare fund.

slower to act, but the changing demography of the workplace has caused many unions to embark on new equality initiatives.⁹³

In judging unions, one cannot ignore the dynamic nature of collective bargaining: unions are institutions that reflect not only their members' hopes, fears, and beliefs, but also those of the broader society. Thus, just as Canadian society is slowly becoming aware of its racial and ethnic diversity, the needs of people with disabilities, and the importance of women's perspectives in the workplace and in politics, so too is the union movement similarly reflecting increasing awareness of these issues. Affirmative action programmes to attract more women and racial minorities into leadership positions were implemented at the federation and union level in the 1980s, education programmes have been undertaken for leaders and members, and bargaining agendas are changing.⁹⁴

Therefore, collective bargaining is an important institution in the pursuit of equality—but like any democratic political institution,⁹⁵ unions tend to reflect the interests of the middle, allowing them sometimes to lose sight of, or sacrifice, the interests of the minority. Collective bargaining legislation has recognized the potential for harmful action by two sorts of measures. First, most labour legislation in Canada contains a duty of fair representation that prevents a union from acting arbitrarily, discriminatorily, or in bad faith in the representation of members of the bargaining unit.⁹⁶ Second, certification can be denied to unions that discriminate on prohibited grounds, while contract terms that violate human rights laws are deemed illegal.⁹⁷

To date, these provisions have had a limited effect on the pursuit of equality. Their main impact has been to restrict direct discrimination

⁹³ See V. Galt, "Steelworkers Combat Attacks on Women" *The [Toronto] Globe & Mail* (28 May 1992) A2; and White, *supra* note 81 (1993), c. 5.

⁹⁴ M.C. Boehm, *Who Makes the Decisions? Women's Participation in Canadian Unions* (Kingston: Industrial Relations Centre, Queen's University, Research Essay Series No. 35, 1991).

⁹⁵ Weiler, *supra* note 72 at 33, states: "There are few institutions as democratic as the typical Canadian union, as accountable to their constituents..."

⁹⁶ See, for example, *OLRA*, *supra* note 89, s. 74. Some jurisdictions only impose the duty of fair representation with respect to contract administration, but not negotiation: see, for example, the federal, Manitoba, Saskatchewan, Alberta, and Newfoundland legislation. For detailed discussion of the duty, see G.W. Adams, *Canadian Labour Law*, 2d ed. (Aurora: Canada Law Book, 1994), c. 13. For an example of application of the duty to prevent sex and age discrimination, see *Re Cameron and Teamsters Local 213* [1982] 2 Can. L.R.B.R. 215 (B.C.).

⁹⁷ *OLRA*, *supra* note 89, s. 15 (union not to be certified if it discriminates on grounds prohibited by Ontario *Human Rights Code* *supra* note 6, or *Charter*, *supra* note 10), and s. 54 (collective agreement must not discriminate in contravention of *Human Rights Code* or *Charter*).

on prohibited grounds by unions, when that action was motivated by animosity towards a protected group.⁹⁸ The number of successful complaints has been small, largely because labour relations boards, in overseeing union activity, allow a wide margin within which unions seek to balance the competing interests of members.⁹⁹ Not surprisingly, then, these sections have not been effective in addressing the richer concept of equality captured in the legal recognition of adverse-effects discrimination described earlier. For that, we need to turn to human rights legislation and the duty to accommodate. When we do so, no issue is more controversial than the fate of seniority systems.

VI. THE SIGNIFICANCE OF SENIORITY

In order to understand the strong feelings of organized workers about the importance of safeguarding seniority rights, it is useful to consider both of the ways in which seniority affects employment practices and the major justifications for its inclusion in collective agreements.

Seniority is of two types: benefits seniority provides greater advantages in accordance with length of service—for example, longer vacations or progress through the increments of a wage grid—while competitive seniority, as its name implies, gives employees an advantage over others as service accumulates. Thus, seniority may affect decisions such as layoff, promotion, transfer, and access to preferred schedules and vacation times, giving the more senior employee an edge over the more junior. In some circumstances, for example, in the choice of shifts, seniority will be the governing factor; in other circumstances, there may be considerations in addition to seniority. For example, promotion may be accorded to the most senior employee, if qualified for the job, or it may be awarded to the more senior employee if two or more employees are “relatively equal” in their qualifications, thus acting as a tiebreaker; or it may be one of several factors to consider. Similarly, on layoffs, the more senior employee may retain employment or bump the more junior, if qualified for the remaining position.

Seniority systems are the product of negotiation between employers and unions and, as such, they vary from one collective agreement to another. Seniority may accumulate and have an impact in

⁹⁸ Adams, *supra* note 96 at 13-16.

⁹⁹ This is especially true when contract negotiations are under scrutiny: *ibid.* at 13-43. See also Lynk & Ellis, *supra* note 64 at 255.

a number of ways: it may be earned by service anywhere with the employer, only in one particular geographic location, in the bargaining unit, or in a particular department or work unit, with the parties' choice of system reflecting various concerns. An employer may prefer to have seniority exercised on layoffs only within a department in order to minimize the disruption from senior employees bumping more junior employees, while a union may refuse to recognize the seniority of employees transferring from another bargaining unit in the same workplace in order to give greater protection to the interests of its members.¹⁰⁰

Regardless of the type, seniority systems all rest on a number of justifications. One major purpose is to further the rule of law in the workplace as described earlier, by curbing employer discretion in allocating benefits under the collective agreement—whether promotions, preferred shifts, or vacation scheduling. Seniority, often coupled with qualification requirements, provides a clear rule for important decisions, thus preventing management from allocating benefits and burdens on the basis of likes and dislikes. Therefore, seniority can be an important safeguard against overt discrimination toward minorities and women.¹⁰¹

For many, using seniority to govern decisions seems fairer than other alternatives. While the result may seem to undermine productivity—in that merit is not the sole basis of decision—champions of seniority fear the potentially subjective and arbitrary nature of merit determinations. Moreover, unlike decisions on the basis of group representation or lottery, reliance on seniority is attractive since it seems to offer everyone an ultimate chance at benefits; if they wait their turn, all members can expect greater job security or better job conditions.

Employers also see benefits in the use of seniority to make decisions. Since the system is easy to administer, grievances are likely to be fewer than in a system where decisions are made on more subjective or contentious bases.

There are also economic rationales for the protection of seniority. A worker's seniority is considered an earned entitlement, part

¹⁰⁰ See K. Swinton, "Restraints on Government Efforts to Promote Equality in Employment: Labour Relations and Constitutional Considerations" in Abella Report, *Research Studies supra* note 25 at 273; and C. Summers & M. C. Love, "Work Sharing as an Alternative to Layoffs by Seniority: Title VII Remedies in Recession" (1976) 124 U. Pa. L. Rev. 893 at 899-906.

¹⁰¹ Nash & Gottheil, *supra* note 2, point this out using examples from the experience of members of the CAW. See also Canadian Union of Public Employees, *Equality in the Workplace—An Affirmative Action Manual* (Ottawa: CUPE Education Department, 1988) at 128.

of the compensation package “purchased” through years of service. According to a deferred-compensation theory of wages, an individual is paid less than his or her productivity in earlier years in return for greater benefits than actual productivity might warrant later.¹⁰² One form of deferred compensation is the greater job security and benefits that come with protection of seniority rights. As a result, both management and labour gain; the employer retains workers by promising them greater benefits with longer service, thereby reducing turnover and consequent training and recruitment costs. In return, the employee has some assurance of better conditions and greater job security as a result of waiting his or her turn.¹⁰³

It is true that seniority is not an inviolable property right. Unions do bargain about seniority systems and change them, sometimes giving greater seniority to union leaders or, more recently, waiving the rules in the interests of equity objectives.¹⁰⁴ But unions do so cautiously, since seniority is highly valued in the unionized workplace.¹⁰⁵

Yet while seniority is prized in the unionized—and, indeed, in non-unionized settings—it clearly can create barriers to the workplace participation of members of some groups protected by human rights legislation, as the following two scenarios illustrate.

VII. ACCOMMODATION AND SENIORITY

The first scenario resembles the fact situation in *Renaud*.¹⁰⁶ Constructive discrimination has occurred against a member of a protected group, and the collective agreement seniority provisions seem to be an obstacle to accommodation. Generally, these cases will involve individuals who are already in the workplace, with the largest number arising when workers are no longer able to do their jobs because of a disability. If such workers could be accommodated in their existing

¹⁰² Fallon & Weiler, *supra* note 9 at 57 make much of this justification.

¹⁰³ Freeman & Medoff, *supra* note 82 at 107, conclude that seniority rules are an important factor explaining the lower labour turnover rate in unionized firms.

¹⁰⁴ Language agreed upon by the Saskatchewan Wheat Pool and the Grain Workers Union would provide for discussions on crediting target group members with the average seniority of those in the bargaining unit. See “Clauses,” *supra* note 92 at 5.

¹⁰⁵ Weiler, *supra* note 72 at 130-32, discusses the protective attitude taken by the B.C. Labour Relations Board, when he was Chair, in complaints of unfair representation when seniority rights were detrimentally affected.

¹⁰⁶ *Supra* note 7.

positions, there would be no problem—and the clear message from *Renaud* is that job adjustment should be the employer's first priority. When job adjustment is impossible, workers may seek other positions that they are capable of filling in the workplace. But what if the job opening must be posted under the collective agreement, with selection turning, at least in part, on seniority? For example, the agreement might state that the most senior employee is entitled to the job if qualified, or the more senior employee gets the position if two candidates are relatively equal. Let us assume that the employee with the disability does not have the necessary seniority for the placement.¹⁰⁷

An important initial question is whether the complainant/grievor can claim another job as a form of accommodation when unable to fulfil the requirements of his or her own.¹⁰⁸ To date, the few cases dealing with this issue have taken different approaches. In *Emrick Plastics*, a pregnant employee successfully claimed the right to be transferred from her work as a painter to an open job as a packer in order to remove a risk to her unborn child.¹⁰⁹ There was no discussion of the right to another position when disabled from doing one's own job, and in this case, the transfer was temporary. In *Calco*, the arbitrator held that the employer should find another job for the grievor, a retail employee who had a mental disability unknown to the employer or the employee at the time of discharge.¹¹⁰ Again, no discussion occurred as to the basis for holding that accommodation extended to the provision of another job. In contrast, some commentators conclude that the right extends only to

¹⁰⁷ Note that the fact situation could easily be adapted to deal with an employee whose religious convictions prevented him or her from staying in a particular job—for example, because of scheduling requirements, as in *Renaud, ibid.*, or because of a safety hazard. An example of the latter is a man, full-bearded because of his religion, who is prevented from working as a correctional officer because the beard impairs the seal of a gas mask that would be necessary safety equipment during any prison riot where tear-gas might be deployed. See *Re Singh and Ontario (Correctional Services)* (1980), 27 L.A.C. (2d) 295 (Ont. G.S.B.).

¹⁰⁸ Sometimes a collective agreement will provide some entitlement to such treatment, at least on a temporary basis. See, for example, *Canada Post, supra* note 23; or the agreement in *Re Metropolitan Toronto (Municipality of) and UPE, Local 79* (1994), 46 L.A.C. (4th) 110 (Fisher).

¹⁰⁹ *Emrick Plastics v. Ontario (Human Rights Commission)* (1992), 90 D.L.R. (4th) 476 (Ont. Div. Ct.). But see *Brown v. MNR* (1993), 93 C.L.L.C. ¶ 17,013 (C.H.R.T.), where it was held that an employer has duty to accommodate woman's request for a transfer from rotating shifts to straight days during pregnancy and after child born.

¹¹⁰ *Re Calgary Co-operative Ass'n and Calco Club* (1992), 24 L.A.C. (4th) 308 (McPetridge) [hereinafter *Calco*]. The grievance succeeded on the ground, at 320, that the employer had disciplined the grievor twice for the same incident, so technically the discussion of transfer was *obiter*. In *Re Union Carbide Canada Ltd. and CWU, Local 593* (1991), 21 L.A.C. (4th) 261 (Ontario) (Hinnegan) [hereinafter *Union Carbide*], there was no discussion of the right of the disabled worker to claim another job; the right was just assumed.

adapting an individual's job and does not require access to another position for which he or she is qualified.¹¹¹

The view that there is *no* right to a different job seems legally correct in light of the language of human rights codes. For example, section 11 of the Ontario *Human Rights Code* provides that an employer must accommodate with respect to the job rule or practice which has been identified as resulting in adverse-effects discrimination, while section 17 stipulates that a person with a disability must be able to perform the essential duties of the job which is to be filled.¹¹² In fact, the statutory right of reinstatement of a disabled worker found in Ontario's *Workers' Compensation Act* specifically gives the disabled employee the right to transfer to *another job* if the worker is unable to return to his or her own, even after attempts at accommodation.¹¹³

For purposes of this discussion, however, let us assume that there is a right to seek another job, which certainly seems like the humane alternative to dismissal or layoff. And even if there is no such right, seniority can still be an issue in accommodation when an individual seeks a job similar to his or her own, as in *Renaud*, but with a different work schedule, location, or mix of duties, if the collective agreement requires posting of vacant positions. Does the disabled employee have a right to claim that the seniority provisions of the collective agreement should be ignored in this situation? Many would argue that they should: when competing interests are balanced, the disabled employee will be facing unemployment if denied the position, while the more senior employee is merely asked to postpone temporarily the move to a more desirable position.¹¹⁴ In some workplaces, this may mean a short delay, although in others, the wait could be lengthy, depending on the size of the

¹¹¹ See M. Ginsburg & C. Bickley, "Accommodating the Disabled: Emerging Issues Under Human Rights Legislation" (1993) 1 Can. Lab. L.J. 72 at 88-98; *Re Royal Alexandra Hospital and Alberta HEU, Local 41* (1992), 29 L.A.C. (4th) 58 (Power) (expressing doubt about the need to provide another job for a hospital porter unable to do her own); and *Canada Post*, *supra* note 23. In *Renaud*, *supra* note 7, a range of jobs was considered by the employer and complainant, although the one decided upon was still a custodian's job.

¹¹² *Supra* note 6. These sections reflect the constructive discrimination cases in the courts, which focus on the impact of a particular practice, as in *CADP*, *supra* note 30.

¹¹³ *Supra* note 3, s. 54.

¹¹⁴ *Union Carbide*, *supra* note 110 at 265, takes this position, holding that the seniority provisions of the collective agreement could not block a more junior, but injured, worker from claiming a job for which he was qualified. This case was decided before *Renaud* and has no discussion of the concerns in that case about the rights of other workers.

operation and the degree of turnover.¹¹⁵ The response of the law will be discussed after a description of the second scenario in which seniority is a potential barrier to equality-seeking employees.

VIII. SENIORITY AS CONSTRUCTIVE DISCRIMINATION

In the above discussion, seniority is not the primary problem; rather, another workplace rule or practice creates discrimination. In other cases, however, the seniority system itself will come under attack as a form of constructive discrimination—most obviously, when layoffs for financial reasons are made according to seniority, and the more junior employees are disproportionately female or members of a racial minority group.¹¹⁶

Members of these groups may also face obstacles at the hiring and promotion stages: women traditionally employed in white-collar jobs may find that they do not have the seniority to bid for desirable openings in a separate bargaining unit of blue-collar or manufacturing jobs, since the collective agreement only allows hiring from outside the unit for entry level positions.¹¹⁷ For people with some disabilities, the effect may be that they can never enter a particular workplace because they cannot meet the essential requirements of the entry level position, despite their ability to do another job in the hierarchy.

An added complication might be faced by individuals—often women—seeking a job in another unit. If seniority accrues only within the new bargaining unit and their past service with the employer will not be recognized, the loss of job security that comes with starting at the

¹¹⁵ J. White, in *Mail and Female: Women and the Canadian Union of Postal Workers* (Toronto: Thompson, 1990) at 89-90, describes the importance of seniority, noting, “[i]n a small office, if someone is one spot ahead of you on the seniority list it means an extra five or six years on midnight shift, or it means another few years with no summer holidays.”

¹¹⁶ See, for example, the descriptions of the fate of women at Stelco in C. Sheppard, “Affirmative Action in Times of Recession: The Dilemma of Seniority-Based Layoffs” (1984) 42 U.T. Fac. L. Rev. 1; and M. Luxton & J. Corman, “Getting to Work: The Challenge of the ‘Women Back Into Stelco’ Campaign” (1991) 28 Labour/Le Travail 149. See also *Australian Iron & Steel Pty. Ltd. v. Banovic* (1989), 89 A.L.R. 1 (H.C.) [hereinafter *Banovic*]; and American cases like *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) [hereinafter *Stotts*].

¹¹⁷ See, for example, Ontario Women’s Directorate, *Equity at Work—Consumer’s Gas Study* (Toronto: Ontario Women’s Directorate, 1990), where the employer’s equity initiative to move women into a non-traditional job in its outside operations was opposed by the union because it gave preference for a desirable job to women, who had less seniority in the bargaining unit. Under the collective agreement, seniority in another unit was not recognized in job competitions, although once an employee entered the outside unit, accrued seniority rights in other units were recognized.

bottom of the seniority list creates a powerful disincentive against moving.¹¹⁸

In each of these examples, from the perspective of the members of the group disadvantaged by the seniority system, a systemic form of discrimination is being practised. The Ontario Human Rights Commission filed a complaint on this issue in 1992 with respect to the treatment of women members of a white-collar, or “inside” bargaining unit with the Municipality of Metropolitan Toronto organized by CUPE Local 79. Their seniority was not being recognized for purposes of bidding for jobs in the outside unit organized by Local 43 of CUPE, with the result that temporary employees in the outside unit blocked the women’s access to the full-time jobs there. The human rights complaint argued that it was a form of sex discrimination to refuse to recognize the seniority of the women employees from the inside unit.¹¹⁹

The first issue in cases like this is to ask whether the seniority system does constitute a form of constructive discrimination. At first glance, the examples seem to show that the weight given to seniority disadvantages certain groups. Certainly, in many bargaining units, those with the greatest seniority will be white males for a variety of reasons: there may have been past discrimination by employers against women or minorities; hostile working environments, including harassment, may cause minorities to leave or discourage them from applying; traditional views about appropriate roles for women may have channelled them into certain jobs, such as clerical work, and away from others; the employment of many women will have been interrupted while they raised children; and some racial minorities may have shorter workplace attachment because they are recent immigrants.

Yet there is good reason to pause here and think about the meaning of constructive discrimination with regard to seniority. While seniority systems in *some* workplaces will favour men over women, or whites over racial minorities, this will not be the case in other situations. In female-dominated job classes, such as nursing or clerical work, respect for seniority will not constitute discrimination against women. In many bargaining units, the seniority list will have a racial and gender

¹¹⁸ See, for example, *Lorance v. AT&T Technologies Inc.*, 490 U.S. 900 (1989) [hereinafter *Lorance*].

¹¹⁹ J. Armstrong, “Seniority Barrier for Women To Be Tested” *The Toronto Star* (21 August 1992) A7. There has been no decision on this complaint at this time.

mix.¹²⁰ Nor does disability automatically equate with shorter service (despite that argument by human rights advocates), since a large number of workers are disabled on the job or as a result of the normal aging process.¹²¹ Therefore, despite the assertion that seniority excludes disadvantaged groups in layoffs, promotions, and hiring, there is counterfactual evidence in many workplaces to support the view that seniority is not a form of adverse-effects discrimination. Indeed, in providing protection against employer discretion, it may provide a safeguard against subtle discrimination directed towards protected groups.

Yet adherence to seniority for promotions, or during layoffs in workplaces where women have been systematically excluded, ensures that longer-service males continue to reap the benefits of past discriminatory activity.¹²² Even here, however, there may be difficult empirical questions as to when the effect of the seniority system constitutes discrimination. Cases like *Brooks v. Canada Safeway Ltd.*¹²³ have just begun to explore the meaning of constructive discrimination in Canada, and there is much to be learned. *Brooks* suggests that a negative impact on a protected group must be significant, and that there is both a quantitative and a qualitative aspect to the inquiry into constructive discrimination, not just a numerical determination that one group suffers a greater burden than another.

The *Banovic* case in the Australian High Court demonstrates the complexity of the empirical inquiry.¹²⁴ There, it was determined that a layoff in accordance with seniority was a form of sex discrimination under human rights legislation because of prior overt discrimination against women that delayed their hiring. Dawson J., in concurring reasons, thoughtfully discussed the importance of comparison methods

¹²⁰ For the different bargaining unit makeup at Canada Post over time, see White, *supra* note 115. Freeman & Medoff, *supra* note 82 at 135, concluded that, in the United States, seniority does not significantly disadvantage racial minorities in general, although that may be the case in particular workplaces.

¹²¹ Baker & Sones, *supra* note 3 at 31, cite figures showing that 23 per cent of those with disabilities in Ontario were injured at work or elsewhere.

¹²² Examples can be found in the fact situations of *Action Travail des Femmes v. Canadian National Railway Co.*, [1987] 1 S.C.R. 1114 [hereinafter *Action Travail*]; or *Lorance*, *supra* note 118.

¹²³ [1989] 1 S.C.R. 1219 [hereinafter *Brooks*], holding that pregnancy discrimination is a form of sex discrimination. One sees the qualitative element in the rejection of the argument that a “no beards” rule could be seen as sex discrimination because of the adverse effect on men. See also the discussion in *Symes v. Canada*, [1993] 4 S.C.R. 695 at 761-71, a *Charter* case about adverse-effects analysis with respect to sex discrimination.

¹²⁴ *Supra* note 116.

in determining the impact of the layoff on men and women, ultimately concluding that it would be improper to look simply at the impact of the layoff on men and women within the aggregate workforce, since there is bound to be a disparate impact unless the workforce starts out evenly balanced.¹²⁵ Instead, the issue should be the proportion of men and women in similar circumstances who can comply with the seniority rule—here, those who applied for work around the same date.¹²⁶ On the facts, because of prior discrimination, women had less seniority because of the delays in hiring them. The implication was that there would be no problem with the seniority system absent prior discrimination, since men and women in the same pool would have similar experiences in a layoff.

As seniority systems come under scrutiny by Canadian adjudicators, similar difficult questions about the meaning of adverse-effects discrimination will have to be confronted. Do we look at the impact of seniority on those who applied around the same time? Or do we focus on the proportion of women and minorities laid off, in contrast to white males, and find discrimination if there is a significant difference in compliance? The latter approach seems most consistent with developing principles of equality in light of the barriers to participation described earlier. After all, if a seniority rule, rather than some other basis for decision-making, excludes women or racial minorities, it seems to fall within the concept of adverse-effects discrimination and require justification.

IX. IN SEARCH OF SOLUTIONS

Let us assume that an adjudicator does conclude that there is constructive discrimination in the uses of seniority described above. This leads to the issue of justification: is it reasonable to rely on length of service to allocate benefits and burdens; and is there a reasonable method of accommodation to redress the disadvantage caused by its use without, in turn, causing undue hardship?

In answer to the first question, courts and boards are unlikely to accept that seniority is an unreasonable factor in layoffs or promotion cases, given its long use, its utility as a way to circumscribe management discretion, its importance to unionized workers, and its contractual

¹²⁵ In fact, as the dissenting reasons of Brennan J., *ibid.* at 4, point out, the proportion of men and women who retained employment despite the layoff was about the same: 94 per cent.

¹²⁶ *Ibid.* at 15-19.

basis.¹²⁷ But is there any accommodation that can reduce the burden of the seniority system without undue hardship—that is, without significant interference with the rights of others?¹²⁸ In the case of layoffs, alternatives such as job-sharing are sometimes suggested, but this will not be feasible when a major restructuring is occurring.¹²⁹ Aside from this, or early retirement incentives, accommodation would require some modification of seniority rights. For example, one might consider employer-wide seniority in a case like the Metro Toronto inside/outside hiring described in Part VIII, above. Another possibility would be special seniority provisions that allocate a form of extra or super-seniority for target groups, while still another might be separate seniority lists, with layoffs and promotions made according to a principle that ensures some degree of ongoing representation of the target groups throughout various classifications.¹³⁰

Renaud implies that unions and employers do not have to encroach on the seniority system when to do so constitutes a serious interference with the rights of other employees. Changing the weight accorded to seniority in layoffs would impose real and quantifiable

¹²⁷ T. Hervey, *Justifications for Sex Discrimination in Employment* (London: Butterworths, 1993) at 189-94, describes the general success of employers in preserving seniority systems in the U.K., while the Abella Report, *supra* note 25 at 220 recommended a “presumption” in favour of *bona fide* seniority systems.

¹²⁸ American case law is of little assistance when thinking about these cases, since the *Civil Rights Act*, Title VII 42 U.S.C. § 2000e-2(h), s. 703(h) (1989) exempts *bona fide* seniority systems from a finding of disparate-impact discrimination. For cases examining this section, see *Teamsters v. United States* 431 U.S. 324 (1977); and *Stotts*, *supra* note 116.

¹²⁹ This suggestion is found in Fallon & Weiler, *supra* note 9; Sheppard, *supra* note 116; and Summers & Love, *supra* note 100 at 917ff.

¹³⁰ See H. Jain, *Anti-Discrimination Staffing Policies: Implications of Human Rights Legislation for Employers and Trade Union* (Ottawa: Secretary of State, 1985) at 66-67. Jain recommends that unions negotiate to have layoffs occur in proportion to the representation of racial groups and men and women in the workplace, or on the basis of reverse seniority, with the most senior employee laid off first. Obviously, the impact on various groups of workers varies with the approach. Layoffs on the basis of reverse seniority put the greatest burden on older workers, often but not necessarily white males. Layoffs in proportion to workplace representation (*e.g.*, if women are 20 per cent of the workforce, they take a 20 per cent share of the layoffs) are less burdensome to the white male group, but may not satisfy those who wish to make speedier progress towards representative workplaces. That goal would be better achieved by laying off the target groups only if their level of representation had reached that in the qualified labour pool or, more boldly, in the general population. Thus, we are drawn inevitably into the kind of discussion, fundamental to employment equity programmes, about appropriate levels of representation before we can decide how to redesign seniority systems.

financial costs on identifiable individuals.¹³¹ As Fallon and Weiler have noted in the American context, seniority is an earned entitlement that over the years becomes as important as a person's equity in his or her home. To lay off a senior male ahead of a person from a racial minority or a woman would be to deprive him unfairly of earned entitlements.¹³² Even with a promotion, where there is a less dramatic interference with rights—since no one loses a job—there is still a cost in the loss of the better position, even on a temporary basis.

Once again, it is important to note that the argument for super-seniority or proportional seniority lists often rests on the goal of an ongoing degree of group representation in the aftermath of layoffs or promotions. This is founded on a theory of substantive equality based on equality of results that goes beyond the evolving Canadian law described above and ignores the burdens on others of the accommodation sought. In advocating this result, some Canadians echo views in the American literature, where the argument against seniority and in favour of group representation ties into the affirmative action debate. Traditionally, affirmative action in the United States has been justified as a way to provide compensation for the ongoing effects of past discrimination, especially against blacks.¹³³ Layoff in accordance with seniority has been a particular concern, since it can undercut the gains achieved through affirmative action programmes.

But affirmative action based on a theory of compensation or corrective justice is a controversial concept. Most particularly, it raises concerns of intergenerational unfairness, when used to override seniority. Often, those benefited are younger women or members of a

¹³¹ In *Drager v. IAMAW* (1994), 20 C.H.R.R. D/119 (B.C.) [hereinafter *Drager*], the B.C. Human Rights Council absolved the union from liability for adverse-effects discrimination against an adherent of the Seventh Day Adventist religion resulting from shift scheduling. As in *Renaud*, *supra* note 7, the complainant did not have enough seniority to bid for work that did not conflict with his religion, but the union made various efforts to accommodate. The board of inquiry announced, at D/134, that the seniority provisions of the collective agreement should not be touched, as interference with another employee's seniority rights might well cause undue hardship to the union. See also *Ontario Allied Construction Trades Council v. Ontario Hydro* (1993), 93 C.L.L.C. ¶ 16,066 (O.L.R.B.) (the *Workers' Compensation Act* *supra* note 3, s. 54, does not create super-seniority); *Re Canada Post*, *supra* note 23 at 324; *Re Boise Cascade Canada Ltd. and UPIU Local 1330* (1994), 41 L.A.C. (4th) 291 at 299 (Palmer) [hereinafter *Boise Cascade*]; and *Greater Niagara Gen. Hosp. and SEIU Local 204* (25 April 1995) (Brent) [unreported].

¹³² Fallon & Weiler, *supra* note 9 at 57-58 and 67. I am assuming here that there has been no prior discrimination in hiring by the employer that taints the seniority system.

¹³³ See, for example, Fallon & Weiler, *ibid.*, discussing models of individual, group, and social justice; and Fiss, *supra* note 8. Fallon & Weiler defend preferential hiring for black applicants, but they argue against sacrificing the seniority of individual white employees in layoffs to compensate for past societal wrongs.

racial minority, rather than the older members who actually faced discrimination.¹³⁴ Therefore, affirmative action seems to benefit the minority group's members today for wrongs done to earlier generations, and to impose the cost of compensation on the younger generation for injury done by their parents.

Even if the argument can be made that there is some relative advantage in one group over another, one cannot escape the very real truth that preference for members of one group harms identifiable members of another—and often in the context of layoffs and promotions those individuals will not be particularly advantaged in society. A refusal to recognize the seniority of an older white male, for example, might privilege a younger woman or a recent immigrant from a racial minority group at the expense of the older Portuguese or Italian worker, himself a first-generation Canadian whose main asset is his employment.

But the American framework, and its approach to affirmative action, is not automatically transferable to Canada. While many Canadian jurisdictions have adopted employment equity policies, the conceptual foundation for them is arguably different from that underpinning American affirmative action. As with the law on adverse-effects discrimination, the goal here is not to alter standards on a *temporary* basis, because groups cannot otherwise meet job requirements due to past discrimination. As in the United States, the ultimate goal is integration of the target groups, but through providing a fairer opportunity for them to compete in a modified workplace. The emphasis is on the future and *permanent* transformation of the workplace, whether by challenging preconceptions about the abilities of targeted groups, or by making employers examine barriers to the access of those groups and reducing or eliminating them if possible—for example, by changing hiring practices or eliminating unnecessary job requirements.¹³⁵

¹³⁴ As a result, the literature and United States Supreme Court cases make frequent reference to the “victims” of reverse discrimination experiencing the burden for the “sins of their fathers.” See, for example, K. Sullivan, “Sins of Discrimination: Last Term’s Affirmative Action Cases” (1986) 100 Harv. L. Rev. 78 at 84.

¹³⁵ This seems to be the thrust of the federal and the repealed Ontario employment equity legislation, *supra* note 4, although many would quarrel with my reading of the employment equity legislation’s goals. There is no doubt that these laws contain mixed signals, since they speak of both barrier removal and progress towards better representation of target groups through the establishment of goals and timetables. However, various provisions in the Acts suggest to me that the emphasis is still on a richer concept of equality of opportunity, rather than group representation *per se*.

Therefore, Canadian solicitude for group representation has different roots than in the United States. Even where group representation is stressed, the objective is to ensure greater access, as illustrated by the Supreme Court of Canada's decision in *Action Travail*. In upholding an affirmative action programme imposed on Canadian National Railways (CN) that demanded a certain level of representation of women in blue-collar jobs, Dickson C.J. emphasized the importance of affirmative action as a remedy for systemic discrimination. A human rights tribunal had upheld a complaint of sex discrimination against CN, and the case focused on the legality of affirmative action as a remedy to counter further discrimination. Dickson C.J. concluded that such a remedy would undermine further efforts at direct discrimination and would provide a critical mass of women who could work within the institution for changes in systems and attitudes—for example, by countering stereotypes and resisting sexual harassment.¹³⁶ Thus, there is a conceptual link between *Action Travail* and other cases dealing with adverse-effects discrimination, since both types of cases are aimed at providing equal opportunity for certain groups.

Returning to the issue of seniority and accommodation, we might reformulate the argument for special seniority rules. Instead of demanding representation to ensure equal results, we might justify limited restraints on seniority rights, especially in layoff situations, in order to maintain a critical mass of target group members. As in *Action Travail*, this would be justified as promoting equal opportunity in the future by undermining attempts at direct discrimination and changing the practices that create systemic barriers.

But, even here, we cannot escape the fact that individual workers with greater seniority would be denied an opportunity to continue working or to bid for a promotion because of their gender or race. These individuals would be required to bear the cost of promoting the societal objective of employment equity, rather than having the burden spread across the larger group. This seems to be the very kind of “significant interference” with contractual rights that circumscribes the duty to accommodate. This is most obvious in the layoff situation, but it is also a factor in many promotions and transfers.

In sum, *Renaud* suggests that seniority systems will generally be protected during layoffs and with respect to promotions, because any accommodation required will significantly interfere with rights. Nevertheless, there are three circumstances where changes to seniority

¹³⁶ *Action Travail*, *supra* note 122 at 1143-45.

systems may be required, despite a general acceptance of their operation. The first two particularly affect those with disabilities.

First, if hiring is only at the entry level in positions that cannot be filled by individuals with certain disabilities, use of seniority to fill subsequent positions in the job hierarchy effectively prevents people with disabilities from ever entering the workplace. For example, if the progression to an office job in a factory first requires work lifting and moving objects on a production line, those in wheelchairs are effectively denied equality of opportunity by the seniority system. Modification of the seniority rules to allow some specified positions above the entry level to be filled by a broader search may well seem a reasonable accommodation in certain types of workplace.¹³⁷

This accommodation may also benefit existing workers who require accommodation because of an injury, yet lack the seniority to bid for it. However, these individuals will also want to press the more ambitious argument that the use of seniority for transfers should sometimes give way to allow injured workers to bid for any opening for which they are qualified. Essentially, this is the argument from *Renaud*, where it was raised in a religious context. Clearly, there is an interference with the seniority rights of another worker, who must postpone access to the desired position. But in larger workforces where there is some degree of regular turnover, this interference may be deemed not to be “significant” in some circumstances.¹³⁸

Finally, we come to the situation described in Part VIII, above, with respect to Metropolitan Toronto, where there are different bargaining units, and seniority rights are not transferable between them. From the perspective of those in the outside unit, this is a perfectly justifiable protection for members. Yet there are serious equity

¹³⁷ It is difficult to see how a successful human rights complaint could be brought to challenge these hiring practices, for the potential applicant will have difficulty identifying a particular position to which he or she is entitled, let alone showing that he or she is the one who should have had the job. Moreover, an adverse-effects discrimination case will not be easy, since the seniority system will not block all with disabilities, but only those with certain disabilities and work histories. For this reason, employment equity plans are a more useful mechanism for aiding such workers—provided they can question the operation of the seniority system, as discussed below.

¹³⁸ The interpretation in *Drager*, *supra* note 131, seems to differ, as does that in *Boise Cascade*, *supra* note 131. The view in the text, however, is implicit in *Re Better Beef Ltd. and FCW, Region 18* (1994), 42 L.A.C. (4th) 244 at 256 (Welling) (duty to accommodate does not require the employer to displace an incumbent worker, but it may prevail over seniority rights in a job competition). All of these cases involve competition over jobs. In some cases, it may be necessary to interfere with seniority rights in relation to benefits, where the stakes are not so high. For example, if the most desirable locker location goes to the person with the greatest seniority, but is the only one accessible to someone in a wheelchair, this seems an obvious case for seniority to give way.

concerns if the seniority of the inside workers is not recognized, particularly if one considers the degree to which sex discrimination has affected the design of bargaining units in Canada. Often, the practice of allocating clerical workers (primarily women) and blue-collar workers (primarily men) to separate bargaining units reflects systemic discrimination. The separate units reflect past attitudes of the union movement about the relative willingness of men and women to organize and bargain effectively, which dampened the interest of many unions in organizing women.¹³⁹ Moreover, labour relations board determinations about the appropriate bargaining unit often rested on the assumption that blue- and white-collar workers did not share a community of interest. Thus, bargaining units often reflect certain stereotypes about the needs and interests of groups of workers.¹⁴⁰ After all, the overwhelming concentration of women in clerical jobs reflects a complex set of societal factors, including not only employer expectations about female roles but also recruitment methods that directed women to some jobs and away from others, as well as channelling them away from certain educational and training programmes.¹⁴¹ Employment equity programmes seek to change those expectations and practices, but seniority systems can stand in the way if existing service with the employer is not recognized, both in the job bidding process and, especially, in the move into the new unit.

Again, the first question in a human rights complaint will be whether the application of seniority rights is discriminatory. Undoubtedly, it will be argued that hiring workers at the entry level in casual jobs and then allowing them to build up to full-time status does not exclude women; rather, it requires them to enter the workforce in the same way men do. But insistence that full-time jobs be the subject of bidding based on bargaining-unit seniority does deny a realistic opportunity to existing female employees to enter non-traditional jobs in the other bargaining unit with their employer, and results in differential treatment of men and women who entered the employer's service at the

¹³⁹ For further discussion, see White, *supra* note 81; and A. Forrest, "Bargaining Units and Bargaining Power" (1986) 41 *Rel. Ind.* 840.

¹⁴⁰ The Ontario Labour Relations Board jurisprudence on bargaining units contained some important assumptions about community of interest that led to separate bargaining units for full- and part-time workers and blue- and white-collar workers, having a significant impact on women's terms and conditions of employment. See R. Davis, *The O.L.R.B. Policy on Bargaining Units for Part-Time Workers: A Critique* (Kingston: Industrial Relations Centre, Queen's University, 1991).

¹⁴¹ For an interesting discussion of hidden gender discrimination, see V. Schultz, "Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument" (1990) 103 *Harv. L. Rev.* 1749.

same time. This compounds the effects of past systemic sex discrimination, even if women as a group are not denied entry to the bargaining unit.

Would it be a serious interference with rights under *Renaud* if employer-wide seniority were recognized as a form of accommodation in this situation? A strict reading of the case would lead to an affirmative response, for the recognition of system-wide seniority does displace some on the seniority list. But that argument ignores the fact that the seniority rights of those in the outside unit were gained through discrimination by employers and unions—and perhaps some of the members themselves—who discouraged women from entering non-traditional jobs. Recognizing employer-wide seniority places the affected women from the inside unit in the position they would have occupied in the absence of discrimination—and leaves the men where they would have been, absent a history of systemic discrimination.¹⁴²

Therefore, in this limited case, the seniority system should be seen as a form of constructive discrimination requiring accommodation. It is the kind of situation that begs attention in the bargaining process, but it is unlikely to be dealt with adequately there, since there will be a disincentive in many bargaining units to negotiate changes to the seniority system that will disadvantage members. Those hurt by the existing agreement have no direct input into the design of the system, and they must turn to the employer to press for more favourable terms. While some employers may have an incentive to act in order to meet employment equity goals under some legislation or contract compliance programmes, others will not be so motivated, with the result that barriers will continue to exist, unless there is a successful human rights complaint.

X. CONCLUSION

Seniority, like many other workplace institutions and practices, will be affected by developing principles of equality in human rights

¹⁴² The British Columbia Supreme Court expressed a similar view in a case where the employer and union settled a complaint of race discrimination: in *GVRDEU v. British Columbia (Council of Human Rights)*(1993), 93 C.L.L.C. ¶ 17,029 at 16,284, Esson C.J. considered *Renaud*, *supra* note 7, and stated that “it seems clear that Council could make an order requiring an employer to hire a person who is found had been discriminated against, even if the hiring would otherwise be a breach of the posting and seniority provisions of a collective agreement.” However, the Council had an obligation to allow the union to present arguments on the remedial issues, since seniority rights were in issue.

jurisprudence. While the decision of the Supreme Court of Canada in *Renaud* validates the importance of seniority and ensures ongoing protection for acquired rights, it also reaffirms the fact that the concepts of non-discrimination and the duty to accommodate require adjudicators to balance competing interests, often in complex fact situations. As a result, many exercises of seniority rights will remain unaffected by non-discrimination precepts. Yet there will be some circumstances in which seniority must be modified in the interests of greater equality of opportunity for members of disadvantaged groups.

Even in the absence of a legal requirement to modify seniority, the pursuit of a more equal workplace should lead unions and employers to discuss ways to reduce the detrimental impact of seniority systems on all groups. Thus, the decision reflected in the former Ontario legislation to leave seniority rights out of the employment equity planning process, without a finding that their use in promotions or hiring offends the Ontario *Human Rights Code*, was regrettable.¹⁴³ The complaint process is slow, uncertain, and turns on the facts of a particular complaint. As this article has shown, seniority can affect the pursuit of equality in many ways, and there are often good reasons to consider its impact and possible modification—even if its use is technically legal under human rights law. In a society committed to fairer opportunities for disadvantaged groups, it seems short-sighted, if not mean-spirited, to excuse unions and employers from examining seniority systems, like other employment measures, to see if adjustments are possible in the interests of greater equality.¹⁴⁴

¹⁴³ The interpretation of the Ontario seniority provision is discussed by E. Shilton & A. Pask, "The Role of Trade Unions and Employees Under the *Employment Equity Act* A Preliminary Overview" in *Employment Equity: The Lawyer's Course* (Toronto: Law Society of Upper Canada, Continuing Legal Education Dept., 1994) at 14-17.

¹⁴⁴ Therefore, the new federal legislation, *supra* note 4, s. 8(3), is an improvement in that it requires parties to discuss the possibility of reducing the adverse impact of seniority systems.