

THE CANADIAN HUMAN RIGHTS ACT
R.S.C. 1985, c. H-6 (as amended)

HUMAN RIGHTS TRIBUNAL

BETWEEN:

PEGGY (JOHNSON) VERMETTE

Complainant

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

and

CANADIAN BROADCASTING CORPORATION

Respondent

DECISION OF TRIBUNAL

TRIBUNAL: Lyman R. Robinson, Q.C.

APPEARANCES:

Geraldine Knudsen, Counsel for the
Complainant

Fiona Keith, Counsel for the Commission

Roy L. Heenan, Counsel for the Respondent

DATES AND LOCATION February 7-9, 1994
OF HEARING : April 8, 1994
Saskatoon, Saskatchewan

The complaint in this matter (Exhibit HR-1) alleges that the Respondent Canadian Broadcasting Corporation discriminated against the Complainant Peggy Johnson by terminating her employment because of a disability in violation of section 7 of the Canadian Human Rights Act (the Act). Since the date of the complaint Peggy Johnson has married and is known as Peggy Vermette. The transcript records her testimony under the name of Peggy Vermette. The disability alleged in the complaint is an "alcohol-related disability".

Pursuant to agreements with the senior levels of government that were made in 1988, the Respondent agreed to provide "on the job" training for aboriginal people in radio and television broadcasting. The training was provided by the Respondent under a Service Agreement between the Respondent and the Government of Saskatchewan that was made pursuant to the Federal-Provincial Agreements Act. Pursuant to this agreement the Respondent paid a salary to each of the trainees and the Government of Saskatchewan subsequently reimbursed the Respondent for salaries paid to the trainees. The Complainant was selected to participate as a trainee in this program. In order to receive the salary provided by the government under the training program, the Complainant was employed by the Respondent as a "temporary announcer assigned to television". The Complainant's participation in the training program commenced in late June, 1988.

The Complainant's participation in the training program continued until Monday, August 29, 1988. On that date she advised the Respondent's personnel officer in Saskatoon that she could not concentrate on her work because she was upset by personal problems that she was having with her boyfriend. She requested a referral to the Respondent's Employee Assistance Program and this was arranged. On or about August 31, 1988, the Complainant was admitted to a residential treatment program at Pine Lodge located in Indian Head, Saskatchewan. When the Respondent learned of the Complainant's admission to Pine Lodge, the Respondent's regional director for Saskatchewan, Mr. Ronald Smith sought the advice of Ms. Sandra Coates, the coordinator of the Native Career Development Office of the Province of Saskatchewan whose office had responsibility for reimbursing the Respondent with respect to salaries paid to the trainees. Mr. Smith was informed that the funds provided pursuant to the Service Agreement could only be used to pay salaries of trainees while they were being trained and the Respondent was advised to terminate the Complainant. The Respondent terminated the Complainant's employment and her enrollment in the program by a letter dated September 6, 1988 (Exhibit HR-7).

On behalf of the Complainant, it was submitted that the termination of the Complainant by the Respondent constituted "adverse effect discrimination" as defined by the Supreme Court of Canada in Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Limited, [1985] 2 S.C.R. 536.

A. PROCEDURAL RULINGS

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Prior to discussing the substance of the complaint, I shall refer to several procedural rulings that were made during the course of the proceeding.

1. Application by Commission Counsel to Call an Expert Witness Notwithstanding the lack of 30 days Notice

On February 4, 1994, three days before the hearing was scheduled to commence, an application was made by counsel for the Commission to call an expert witness. In a letter dated February 4, 1994, counsel for the Commission stated that the Commission wished to lead expert evidence as to the nature and purpose of special programs and the barriers to employment faced by aboriginal persons. A telephone conference call was convened to hear the application. Counsel for the Respondent opposed the application on the basis that four weeks notice had not been provided to the Respondent and that the definition of a "special program" within section 16 of the Act is a question of law and not one of fact.

After the conclusion of the telephone conference call, I denied the application for the following reasons. A pre-hearing conference with respect to this Complaint had been conducted by Mr. Raymond W. Kirzinger in September, 1993. Following that pre-hearing, Mr. Kirzinger prepared a Memorandum of Agreement dated September 14, 1993, with respect to matters agreed to by the parties or their counsel. Paragraph 6.1 of the Agreement provides:

"6.1 The Commission indicated that it will provide the other parties with a summary of the expert's qualifications and evidence to be adduced at least four weeks prior to the hearing."

The hearing was scheduled to begin and in fact began on February 7, 1994. Rather than providing the Respondent four weeks notice of the expert's qualifications and evidence to be adduced, counsel for the Commission sought an order permitting the Commission to call an expert on three days notice (two of which were on a weekend). The Respondent could have been significantly prejudiced by the production of an expert witness on such short notice. The Respondent would not have had a reasonable opportunity to both review the expert's proposed evidence and, if the Respondent thought that it was desirable, to seek out its own expert and have the expert available in Saskatoon all within a matter of a few days.

By a notice dated December 8, 1993, the Commission had been notified that the hearing would commence on February 7, 1994. The pre-hearing conference with respect to this matter had been held in September, 1993. Therefore, the Commission had plenty of time to identify the witnesses that it proposed to call and to give the Respondent the four weeks notice provided by Paragraph 6.1 of the Pre-Hearing Agreement.

2. Application for an Adjournment to Call Expert Evidence and Subpoena Documents from Pine Lodge

Complainant and Mr. Cardwell had been completed, Commission counsel advised the Tribunal that she did not have any further witnesses available to call at that time. Commission counsel stated (Transcript, Vol. 2, page 191) that she wished to lead further evidence relating to the issue of Ms. Vermette's alcohol dependency. She indicated that the person she had in mind was the former director of the Pine Lodge rehabilitation centre who is apparently a medical doctor. Commission counsel informed the Tribunal that the doctor was located in Regina and that she had not yet been able to confirm his availability. Commission counsel also referred to a discharge summary prepared by Pine Lodge pertaining to Ms. Vermette and stated that she wished to serve a subpoena on Pine Lodge to produce the Complainant's file and to have someone from Pine Lodge testify as to the documents but counsel had not yet identified who that individual would be. It was clear that the person was not then available and would not be available during the remaining period scheduled for the hearing of evidence during that week of February. Commission counsel requested an adjournment for the purpose of adducing the testimony of these witness. Counsel for the Respondent objected to the Commission tendering expert evidence when the Respondent had not received a summary of the expert's qualifications and evidence to be adduced at least four weeks prior to the hearing in accordance with Paragraph 6.1 of the Memorandum of Agreement following the pre-hearing.

I ruled that the proposed expert evidence of the doctor was not admissible because the Respondent had not been given the four weeks notice required by Paragraph 6.1 of the Pre-Hearing Memorandum of Agreement. Paragraph 6.1 provides:

"6.1 The Commission indicated that it will provide the other parties with a summary of the expert's qualifications and evidence to be adduced at least four weeks prior to the hearing."

I also refused to grant an adjournment to either permit the Commission to call an expert on alcohol dependency or to subpoena somebody from Pine Lodge to produce documents relating to the Complainant's attendance at Pine Lodge. The Memorandum of Agreement following the pre-hearing in September, 1993 clearly contemplated that the Commission would be calling an expert on alcohol dependency and somebody from Pine Lodge. Paragraph 4.2 of the Agreement provided, in part:

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"4.2 The Complainant expects to call the following witnesses (subject to the filing of an Agreed Statement of Facts and the extensiveness of it);

...

(c) a representative from Pine Lodge (expected duration of 30 to 45 minutes) regarding contact

made with the Respondent prior to termination;
and,

(d) an expert witness in the medical/addiction field (duration unknown at this time) to give evidence on alcohol dependency as a disability."

The Commission had been notified by a notice dated December 8, 1993 that the hearing was set to commence on February 7, 1994. Consequently, the Commission had plenty of time to identify and subpoena the witnesses that it required. Any adjournment would have meant adjourning the matter for at least two months for the purpose of completing the Commission's case before commencing the hearing of the Respondent's evidence. The Respondent had its witness, some of whom had travelled to Saskatoon from Ottawa and Alberta, ready and available to proceed with their evidence during the week of February 7, 1994. If I had granted an adjournment, those witnesses would have had to return to Saskatoon on a subsequent occasion. This would be an unwarranted expense for the Respondent and an unacceptable inconvenience to the witnesses.

3. Application by Legal Counsel for the Complainant to Recall the Complainant to Give Evidence in Chief

At the outset of the hearing, Counsel for the Commission advised the Tribunal that she was acting on behalf of the Commission but not as counsel for the Complainant. Counsel for the Commission made it clear that the Complainant, who is a party in these proceedings, was a party separate from the Commission and that she was unrepresented. Paragraph 1.1 of the Memorandum of Agreement prepared by Mr. Raymond W. Kirzinger following the pre-hearing conference with respect to this Complaint in September, 1993, reads:

"1.1 It is the Complainant's intention that the Commission will conduct her case on her behalf so long as her interests coincide with the public interest (as represented by the Commission). The Complainant understands her right to act as a separate party if her interests and the Commission's interest differ at any time."

The Complainant was called by Commission counsel as the Commission's first witness. At the conclusion of her examination in chief, the Complainant was asked by Commission counsel whether there was anything else that she wished to add on her own behalf. She replied that she could not think of anything. After the Complainant had been cross-examined and re-examined, I asked her whether, in her capacity as a separate party, whether there was anything else that she wished to give testimony about. She replied that there wasn't. Commission counsel then proceeded to call the remainder of her witnesses. The Respondent commenced its case by leading evidence with respect to the timeliness of

the complaint and the defence of laches. The Respondent called two witnesses who testified with respect to these issues. Following the examination, cross-examination and re-examination of these two witnesses, Ms. Geraldine Knudsen, Barrister and Solicitor, appeared and advised the Tribunal that she had received instructions to represent the Complainant for the remainder of the hearing.

Immediately after Ms. Knudsen made her appearance on behalf of the Complainant, Ms. Knudsen made an application to recall the Complainant to give evidence on her own behalf. I ruled against the application for the following reasons. The Complainant is clearly entitled to decide at any time during the course of the hearing that she wished to be represented by counsel of her own choice but that does not mean that when, as had happened in this case, the Respondent had commenced its case, the Complainant is entitled to in effect re-open her case and give her evidence in chief again. When a Complainant or any other party decides part way through a hearing to appoint counsel or to change legal counsel, the new counsel cannot expect the hearing to begin again. The commonly accepted rules with respect to the order in which the evidence in support of a complaint is presented, followed by presentation of evidence by the Respondent, followed by reply evidence have been developed over decades. Their object is to promote fairness in the hearing process. The Respondent is entitled to know the full case that it has to meet before it commences the presentation of its evidence. It would be unfair to the Respondent, which had commenced its defence based on the case that had been presented by the Commission and the Complainant, to provide another opportunity, in the middle of the Respondent's case, for the Complainant to recast its evidence by recalling the Complainant.

I made it clear to Ms. Knudsen that she had the full right to participate in the cross-examination of witnesses that were called by the Respondent after her appearance, and, to call evidence by way of reply if such evidence fell within the proper scope of reply evidence. Ms. Knudsen also had the opportunity and did make a closing argument on behalf of the Complainant.

4. Commission's Application to Call Reply Evidence and to Re-open the Commission's Case

After the hearing of evidence had been completed in February, 1994, the hearing was adjourned until April 7, 1994, to hear argument. By a letter dated March 11, 1994, counsel for the Commission applied for leave to present reply evidence and to re-open the Commission's case to adduce additional evidence. Counsel for the Complainant supported this application. Counsel for the Respondent opposed the application.

The proposed reply evidence included testimony by Roly Gatin, the former director of Pine Lodge Rehabilitation Centre. In her letter of March 11, 1994, Commission counsel stated:

"... it is anticipated that he will testify as to Ms. Vermette's anticipated discharge date as of September 6, 1989."

The letter from Commission counsel also referred to documentary evidence that had recently been obtained from the rehabilitation centre and stated that copies of this documentation had been sent to counsel for the Respondent. Presumably, Commission counsel intended to tender this documentation as evidence by way of reply.

Reply evidence is generally limited to evidence that contradicts or qualifies facts or issues raised in defence. Evidence that might properly be considered to form part of the Commission's case is not proper reply evidence. Sopinka and Lederman, *The Law of Evidence in Canada*, summarize the law in relation to judicial proceedings in the following manner at page 880:

"At the close of the defendant's case, the plaintiff or Crown has a right to adduce rebuttal evidence to contradict or qualify new facts or issues raised in defence. The general rule in civil cases is that matters which might properly be considered to form part of the plaintiff's case in chief are to be excluded."

Sopinka and Lederman also quote, with approval, the rationale for this rule stated in *Wigmore, Evidence* (Chadbourn rev. 1976), #1873 at 672:

"... first, the possible unfairness to an opponent who has unjustly supposed that the case in chief was the entire case which he had to meet, and, second, the interminable confusion that would be created by an unending alternation of successive fragments of each case which could have been put in at once at the beginning."

In *Allcock, Laight & Westwood Ltd. v. Patten*, [1967] 1 O.R. 18 (Ont. C.A.), Shroeder J.A. stated at page 21:

"It is well settled that where there is a single issue only to be tried, the party beginning must exhaust his evidence in the first instance and may not split his case by first relying on prima facie proof, and when this has been shaken by his adversary, adducing confirmatory evidence: *Jacobs v. Tarleton* (1848), 11 Q.B. 421, 116 E.R. 534 The rule is now so well settled that it requires no further elaboration. It is

important in the trial of actions ... that this rule should be observed. A defendant is entitled to know the case which he has to meet when he presents his

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defence and it is not open to a plaintiff under the guise of replying to reconfirm the case which he was required to make out in the first instance or take the risk of non-persuasion."

After considering the written submissions of counsel, I made an order that limited reply evidence to any conversations that Roly Gatin had with Dennice Stambuck, the Respondent's personnel officer, where Roly Gatin's evidence would contradict or qualify the evidence of Dennice Stambuck. Testimony of Roly Gatin relating to the following matters might properly be expected to have formed part of the Commission's case and could not be considered as proper reply evidence:

- a) the practices of Pine Lodge in relation to the period of time admittees remained as a resident at the rehabilitation centre;
- b) Ms. Vermette's condition when she arrived at Pine Lodge;
- c) Ms. Vermette's rehabilitation program at Pine Lodge;
- d) Ms. Vermette's anticipated discharge date from Pine Lodge unless it was testimony that this date was communicated to the Respondent; or
- e) testimony with respect to characteristics of alcoholism or alcohol dependency generally

Counsel for the Commission by a letter dated March 28, 1994, advised that Roly Gatin did not remember whether he spoke to Dennice Stambuck and counsel for the Commission did not call him as a witness by way of reply.

(b) Application to Re-open the Commission's Case
In her letter of March 11, 1994, counsel for the Commission also applied for leave to re-open the Commission's case by adducing additional evidence. The specific evidence was not stated in the letter but a reference was made to the application made by Commission counsel at the conclusion of the Commission's evidence in February to call an expert to give opinion evidence regarding Ms. Vermette's alcohol dependency.

Commission counsel's application for leave to re-open the Commission's case appeared to be an application to

adduce essentially the same evidence that the Tribunal ruled against at the conclusion of the Commission evidence in February (see paragraph 2 above). However, counsel for the Commission submitted in the March application that the four week notice requirement with respect to expert evidence, provided by the Memorandum of Agreement following the pre-hearing, had been satisfied by the delivery to the Respondent of a summary of the expert's proposed testimony.

Furthermore, copies of both Ms. Vermette's admission summary and her discharge summary had been provided to counsel for the Respondent.

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Whether or not an application to re-open is granted is a matter of discretion for the Tribunal. This has been stated in civil cases such as *B.F. Goodrich Canada Ltd. v. Mann's Garage Ltd.* (1959) 21 D.L.R. (2d) 33 (N.B.Q.B.) and *Clayton v. British American Securities Ltd.*, [1934] 3 W.W.R. 259 (B.C.C.A.) and in criminal cases such as *R. v. Scott*, [1990] 3 S.C.R. 979 per Cory J. at p. 1002-03.

Where an application to re-open is received after a decision has been rendered, the principles that should guide the exercise of this discretion are described by Sopinka and Lederman, *The Law of Evidence in Civil Cases* in the following manner at page 542:

"Except in the case of fraud or surprise, the evidence must be newly discovered evidence which reasonable diligence could not have discovered during the trial, and it must be of such a character that it would have formed a determining factor in the result."

Where the application to reopen is received prior to a decision being rendered, a broader discretion to reopen has been recognized. Sopinka and Lederman, *The Law of Evidence in Civil Cases* at page 541 suggest that a case may be reopened "where the interest of justice requires it".

Among the cases cited by Sopinka and Lederman is *Sunny Isle Farms Ltd. v. Mayhew* (1972), 27 D.L.R. (3d) 323 (P.E.I.S.C.). In that case Nicholson J. adopted the statement by Boyle J. in *Sales v. Calgary Stock Exchange*, [1931] 3 W.W.R. 392 at 394 (Alta. S.C.) where he said:

"It is in my view a serious matter to open up a trial after all the evidence has been taken, and it should never be done unless it seems imperative in the interest of justice that the case should be reopened for further evidence."

In *Sunny Isle Farms Ltd. v. Mayhew* (1972), 27 D.L.R. (3d) 323, the trial judge granted an application to reopen when

he found that plaintiff's counsel had been misled by the statement of defence in that the evidence led by defendant set up a different defence than had been pleaded. There is no suggestion in this case that counsel for the Commission was misled with respect to the defences that were raised by the Respondent in these proceedings.

Another case cited by Sopinka and Lederman is *Woodworth v. Gagne et al.*, [1935] 3 W.W.R. 49 (B.C.S.C.) where the defendant made an application to reopen for the purpose of contradicting a witness that had been called by the plaintiff. Fisher J., after adopting the above quotation from *Sales v. Calgary Stock Exchange*, dismissed an application to reopen.

Sopinka and Lederman also cite *Devins v. Hannah*, [1921] 3 W.W.R. 350 (Sask. K.B.) where an order permitting the plaintiff to reopen its case was set aside on appeal. The application to reopen was made for the purpose of hearing the evidence of a witness whom the plaintiff had

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summoned to the trial but who was not available to give evidence at the trial. While acknowledging that a judge does have a discretion to permit a party to reopen its case, the court concluded that it was not a proper case to allow reopening.

C.I.B.C. v. Hicks (1983), 42 N.B.R. (2d) 346, 110 A.P.R. 346 (N.B.Q.B.) is another example of where an application to reopen was dismissed because permitting the applicant to reopen was regarded as being unjust to the other party who had presumably based its defence on the evidence presented by the plaintiff at trial.

In *Gass v. Childs* (1958), 43 M.P.R. 87 at page 93, Ritchie J.A. set forth three criteria that should be satisfied before tribunal exercises its discretion to reopen:

"In order to justify either the reception of fresh evidence or the ordering of a new trial the three conditions set out hereunder must be fulfilled:

1. It must be shown the evidence could not have been obtained with reasonable diligence for use at the trial;
2. The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and
3. The evidence must be such as presumably to be believed, or in other words, it must be apparently credible, although it need not be

incontrovertible."

Notwithstanding that all of the above references relates to judicial proceedings, I find that the previously quoted statement of Wigmore, Evidence (Chadbourn rev. 1976), #1873 at 672, is equally applicable to both judicial and proceedings before a Human Rights Tribunal.

I have measured the application of the Commission to reopen against the above mentioned criteria of Gass v. Childs. The first question is whether the evidence could have been obtained with reasonable diligence prior to the close of the Commission's evidence in February. From the outset, the complaint has alleged discrimination related to a disability based on alcohol dependency. Alcohol dependency is one of the anticipated issues that was enumerated in paragraph 2.2 of the Pre-hearing Memorandum of Agreement. An expert witness in the medical/addiction field

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is one of the witnesses enumerated in paragraph 4.2 of the Pre-hearing Memorandum of Agreement as being a witness who the Commission intended to call to give evidence on alcohol dependency. There is nothing to indicate that this evidence or the testimony of the doctor who was the former director of the Pine Lodge rehabilitation centre or other expert could not have been obtained with reasonable diligence for tendering as part of the Commission's case. Similarly, there is nothing to indicate that the admission and discharge summaries and other documentary evidence in the possession of Pine Lodge could not have been obtained with reasonable diligence for tendering as part of the Commission's case. Therefore, I ruled that the first criterion of Gass v. Childs was not satisfied.

Having come to the conclusion that the first criterion of Gass v. Childs was not satisfied, it is not necessary to proceed to a consideration of the second and third criteria of Gass v. Childs.

The application to re-open the Commission's case was denied. Draft reasons for these decisions were forwarded to counsel prior to the hearing of argument. Counsel were advised that the final reasons with respect to these applications would be included in this decision.

B. TIMELINESS OF COMPLAINT

The Respondent made two submissions under the broad heading of the timeliness of the complaint. The Respondent submitted that complaint should be dismissed on the basis of the equitable doctrine of laches. Under this doctrine, a Respondent must establish that it has been unfairly prejudiced in its

ability to respond to the allegations by reason of the delay of the complainant in pursuing her complaint. Alternatively, the Respondent submitted that the Respondent should not be deprived of the limitation period found in section 41 of the Act and that the Tribunal should dismiss the complaint because it is based on an act that occurred more than one year before the receipt of the complaint by the Commission. Prior to discussing the legal aspects of the Respondent's submissions, it is necessary to describe the factual underpinnings on which the Respondent's submissions are based.

The act that is the subject matter of the complaint is the termination of the Complainant by the Respondent. The Respondent terminated the Complainant by a letter dated September 6, 1988 (Exhibit HR-7) addressed to the Complainant in care of Pine Lodge Treatment Centre, Indian Head, Saskatchewan. The termination was effective September 2, 1988. The Complainant testified that she received this letter while she was at Pine Lodge. The precise date on which the Complainant received this letter is unknown. The inference may be drawn that the Complainant received the letter within a week after it was sent.

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I find that she received the letter not later than September 13, 1988. This date marks the date from which the normal one year limitation period for filing a complaint began to run.

The Complainant testified that after receiving the termination letter and while she was still at Pine Lodge in Indian Head in September, 1988, she contacted the Canadian Human Rights Commission for the purpose of obtaining information. She decided not to pursue a complaint at that time. The Complainant contacted the Commission again in July, 1989. This contact is confirmed in a memorandum to the Complainant's file dated August 23, 1989 by Virginia Menzie, a Human Rights Officer in the Commission's Prairie Regional Office. That memo (Exhibit R-3) provides in part:

"When she first contacted me on July 20th, 1989 she indicated that she was aware of the September 1989 deadline in her case."

After the Complainant's contact with the Commission in July, 1989, a draft form of complaint was prepared by an officer of the Commission. The chronological summary of events prepared by the Commission (Exhibit HR-14) indicates that a draft form of Complaint was sent to the Complainant by the Commission on August 10, 1989. When the Complainant read the draft she did not believe that it accurately stated the facts and she so advised the Commission by telephone on August 14, 1989.

The Complainant testified that after making some modification to the language of the draft, she returned the draft form of complaint to the Commission in January, 1990. This was

approximately 4 months after the one year limitation period, provided by section 41 of the Act, had expired. The chronological summary of events prepared by the Commission (Exhibit HR-14) indicates that in January, 1990, the Commission received a letter from the Complainant about the complaint form. The Complainant attributed her delay in returning the draft complaint form to the Commission to the fact that she had been told that the person with whom she was working at the Commission was on a leave of absence and would not be back until January of 1990. She testified at page 96 of the transcript:

"I had some questions that I wanted to ask her and they said: 'She's not back until January.' And so I thought, 'okay, well I'll just call her in January.' Once I have my complaint in and start the process, then it's already started, I would work with her when she came back."

And further on page 97 of the transcript, she testified:

"I thought once the process started, once I wrote to them and told them that I indeed wanted to proceed with this -- it might have been a phone call. I was in contact with Virginia Menzie, I believe, over the phone, and we talked about it and they sent out a copy of the complaint form to me. So to me that meant the process had started, I had indeed started that process within the one-year time period."

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She also testified that she believed that when a Human Rights officer was assigned to a complainant by the Commission, that officer worked with the complainant throughout the complaint.

The chronological summary of events prepared by the Commission (Exhibit HR-14) indicates that a revised Complaint form was prepared by a Commission officer and sent to the Complainant on February 12, 1990. The Complaint (Exhibit HR-1) bearing the signature of the Complainant is dated February 27, 1990.

The chronological summary of events prepared by the Commission (Exhibit HR-14) indicates that the Respondent was notified of the Complaint for the first time on April 5, 1990. The notification of the Respondent occurred approximately one year and seven months after the termination that is the subject matter of the complaint.

The Respondent requested that the complaint be referred to the Commission for a decision with respect to its timeliness. By a letter dated March 7, 1991 (Exhibit HR-11), the Commission advised that Complainant that the Commission had decided to deal with this Complaint notwithstanding that the act complained of occurred more than one year before the receipt of the complaint

by the Commission. In making this decision, the Commission had before it a Report (Exhibit HR-14) signed by Nicole E. Ritchot, a Human Rights Officer and David L. Hosking, Regional Director and a letter from the Respondent's Manager of Corporate Industrial Relations Service, Mr. Claude J. Mason, dated January 8, 1991 (Exhibit HR-15).

The report of Nicole E. Ritchot and David L. Hosking (Exhibit HR-14) included, among others, the following paragraphs:

"4. The complainant initially contacted the Canadian Human Rights Commission within one year of the alleged discriminatory act.

5. The delay in filing the complaint appears to have occurred as the result of a misunderstanding between the complainant and the Canadian Human Rights Commission.

6. Prejudice to the respondent is unlikely as relevant documents and witnesses should be available, and the respondent was notified of this complaint in April 1990.

...

14. The complainant recontacted the Canadian Human Rights Commission in July, 1989 and advised she wished to proceed with the filing of a complaint. A complaint form was forwarded to the complainant for signature in August 10, 1989. August 14, 1989, the complainant advised that changes to the draft complaint form were necessary and agreed to forward her request for changes in writing. The written request for changes was not received until January 15, 1990.

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...

16. Prejudice to the respondent is unlikely as it would appear that relevant documents and witnesses are still available. Furthermore, as the complainant had expressed her desire to file a complaint within one year of the alleged discriminatory act, and in light of the Federal Court of Appeal decision *Woldemar Madisso v. Can. Human Rights Commission*, the respondent was notified of this complaint on April 5, 1990. Although the respondent was advised that based on the aforementioned court decision, this complaint was timely, the respondent disputes this opinion and has requested that the complaint be referred to the Commission for a decision."

1. Laches

The Respondent submitted that the Tribunal should dismiss the complaint on the basis of the equitable doctrine of laches because the Complainant's delay in filing her complaint

had severely prejudiced the Respondent's ability to respond to the complaint. Authority for the application of the doctrine of laches in a case such as this may be found in *Re Saanich Firefighters Union, Local 967 and District of Saanich (1971)*, 22 D.L.R. (3d) 577 (B.C.S.C.).

Counsel for the Commission acknowledged that the equitable doctrine of laches could apply but she submitted that in the context of a human rights inquiry, a Respondent must show actual prejudice that is so severe that it is impossible for the Tribunal to make a determination with respect to the issue that the complaint presents. Counsel for the Commission submitted that the evidence adduced before the Tribunal in this case did not satisfy that test. In support of her submission, counsel for the Commission cited the case of *Tweedie v. Hendrie and Company*, (October 25, 1993) Canadian Human Rights Tribunal Decision [unreported]. Prior to the hearing of any evidence with respect to the merits of the complaint in that case, a preliminary application was made by the Respondent to have the complaint dismissed by reason of delay. The actual prejudice relied upon by the Respondent included the unavailability of some documentation, the death of a potential witness, the difficulty of locating other potential witnesses and the fading memory of witnesses who were available. The Tribunal dismissed the Respondent's application before hearing evidence on the merits of the complaint.

Counsel for the Commission relied particularly on the following passage that is found on page 16 of the Tribunal's decision in the Tweedie case:

"In our view, the respondent has not demonstrated that the task of the Tribunal has been made impossible by reason of the passage of time since the filing of the complaint."

In this passage of the Decision, the Tribunal focused on the task of the Tribunal and whether its task has been made impossible by the passage of time. However, further in its decision, at page

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16, the Tribunal focused on the task of the Respondent when the Tribunal stated:

"It must be remembered that the complainant, Mr. Tweedie, did not in any manner contribute to the delay in bringing this matter before the Tribunal and as such he should not be deprived of the opportunity to present his case without strong and convincing evidence that the respondent would suffer severe prejudice if this matter proceeds."

It must also be observed that in the Tweedie case, the Tribunal reserved on the issue of whether, after hearing the evidence with respect to the merits of the complaint, the complaint should be dismissed because the respondent suffered a significant prejudice

in the presentation of its defence. At page 12 of the decision, the Tribunal made the following comment:

"The delay in this case might result in there being insufficient evidence for a determination of the case on its merits. Further, during the course of the hearing it may appear on further evidence that the complaint should be dismissed because the respondent is suffering significant prejudice in the presentation of its defence."

Other cases have focused on the prejudice to the Respondent's ability to mount a full answer and defence caused by delay rather than any difficulty of the Tribunal in determining the issues raised by the complaint. In *Kodellas v. Saskatchewan (Human Rights Commission)* (1989), 60 D.L.R. (4th) 143 (Sask. C.A.), the issue was delay caused by a backlog of cases in the Commission rather than any delay by the complainant. Nevertheless, *Vancise J.A.* focused on the effect of the delay on the respondent. He commented at page 182:

"Had these matters been proceeded with in a timely fashion, none of that additional effort or expense would have been required, nor would the potential prejudice caused by impairment or potential impairment of the opportunity to mount a full answer and defence caused by lack of memory or faded memory exist."

Similarly, in *Douglas v. Saskatchewan (Human Rights Commission)* (1989), 28 C.C.E.L. 207 (Sask. Q.B.), the delay was attributed to the Commission rather than the complainant. *Lawton J.* focussed on the effect of the delay on the respondent. At page 218, he said:

"I find, therefore, that there has been unreasonable delay which has not been satisfactorily explained by the Commission. This delay has the potential of prejudice to *Douglas* as regards mounting a full answer and defence."

Therefore, I conclude that the issue is not whether delay has made it impossible for the Tribunal to properly consider the matter but rather whether the delay has so severely prejudiced the Respondent as to make it impossible for the Respondent to present a full answer and defence to the alleged discrimination.

The definition of the equitable doctrine of laches has

been considered in many cases. In *Martin v. Donaldson Securities Ltd. et al* (1975), 61 D.L.R. (3d) 518 at 525 (B.C.S.C.), the court adopted the summary of Lord Blackburn in *Erlanger et al. v. New Sombrero Phosphate Co. et al.* (1878), 3 App. Cas. 1218 at 1279:

"In *Lindsay Petroleum Company v. Hurd* (Law Rep. 5 P.C. 239) it is said:

'The doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where, by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. ... Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.'

I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it."

Applying the standards pertaining to the equitable doctrine of laches as described in *Martin v. Donaldson Securities Ltd. et al*, the task for the Tribunal is to balance the degree of diligence that might reasonably be expected from the Complainant against the extent of the prejudice experienced by the Respondent in relation to the Respondent's ability to mount a full answer and defence to the complaint.

Counsel for the Respondent submitted that the Respondent had suffered several types of prejudice. The primary claim of prejudice related to the discarding of Ms. Stambuck's daily journal in which she kept a record of telephone calls and other events. Ms. Stambuck discarded her daily journal in January, 1990. If the complaint had been filed by the Complainant and received by the Commission within the normal one year limitation period (by September, 1989) and the Respondent had been notified within a reasonable time thereafter, the Respondent would have had notice of the complaint before Ms. Stambuck discarded her daily journal. Ms. Stambuck testified that if she had been aware that the Complainant was filing a complaint, she would not have discarded the daily journal. Ms. Stambuck's daily journal would undoubtedly have provided her with some assistance in pinpointing the precise date when certain events occurred and the precise words that were spoken. I find

that the discarding of Ms. Stambuck's daily journal caused some prejudice to the Respondent. The second claim of prejudice was the fact that memories of witnesses called by the Respondent had faded over the five and one-half years since the Respondent's termination of the Complainant. With respect to this claim, it is unlikely that the Tribunal hearing into the complaint would have occurred much more than six months earlier if the Complainant had filed her complaint within the normal one year limitation period. It is doubtful that memories of the witnesses would have been significantly better if the Tribunal hearing had occurred six months earlier. To the extent that memories have faded, it is a phenomena that applies equally to witnesses on both sides of the issue. Overall, most of the witnesses did not have difficulty recalling and testifying with respect to the material events. Some witnesses had difficulty remembering specific dates and specific words that were used in particular conversations but in my analysis of the facts, nothing turned on these occasional lapses of memory by some of the witnesses.

With respect to the issue of fading memory, the Tribunal in the Tweedie case observed at page 11:

"In regard to the fading memory of the witnesses who are available we are agreed that memory of events seven years ago will be at best imperfect. Fading memory in and of itself however is not a sufficient factor. There are certainly human beings who experience fading memory after very short periods and the fact of fading memory is a disadvantage to every party concerned."

With respect to the degree of diligence that might reasonably be expected from the Complainant, the complaint form was signed by the Complainant somewhat more than five months beyond the normal limitation of one year. The Complainant testified that she knew of the requirement that complaints must be filed within one year. She was provided with a draft form of complaint by the Commission approximately one month prior the expiration of the one year limitation period. She could easily have made the modification that she made to the draft, signed the complaint and filed it with the Commission prior to the expiration of the one year limitation. Waiting five months for the return of a Human Rights Officer who is on leave in order to discuss some unspecified questions does not constitute the degree of diligence that might reasonably be expected from the Complainant. The Complainant testified that she believed that she had started the process by notifying the Commission of her wish to file a complaint but I do not find this explanation to be consistent with the memorandum to the Complainant's file by Virginia Menzie dated August 23, 1989 (Exhibit R-3). That memorandum states, in part:

"Johnson is aware that there is a one year time limit on filing complaints under our Act. When she first contacted me on July 20th, 1989 she indicated that she was aware of the September 1989 deadline in her case."(emphasis added by bolding)

There would not have been any necessity to discuss a September

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deadline for "filing" a complaint if the Complainant believed that a telephone call to the Commission was sufficient notice to start the complaint process under the Act. With respect to this discussion between the Complainant and Virginia Menzie, the Complainant gave the following testimony in cross-examination, at page 115 of the transcript, beginning at line 10:

Q You've told us that you knew there was one year. The conversation with Ms. Menzie clearly tells us that you discussed the one year deadline in August, and yet you did nothing with the Human Rights Commission until February of 1990, is that correct?

A Yes.

The Complainant's conduct in this case is very different from the conduct of the complainant in *Tweedie v. Hendrie and Company*, (October 25, 1993) Human Rights Tribunal Decision [unreported]. In the *Tweedie* case, the complainant filed his complaint within one year from the act that was the subject matter of the complaint but he filed it with the Ontario Human Rights Commission when, from constitutional and jurisdictional perspective, the complaint should have been filed with the Canadian Human Rights Commission. The Ontario Commission eventually transferred the complaint to the Canadian Human Rights Commission but that did not occur until after more than one year had elapsed from the date of the act that was the subject matter of the complaint. There was no factual delay on the part of the complainant but only a lack of understanding of the constitutional division of responsibility. This lack of understanding appears to have been shared, at least for a period of time, by the Ontario Commission. At page 16 of the decision, the Tribunal made the following finding:

"It must be remembered that the complainant, Mr. Tweedie, did not in any manner contribute to the delay in bringing this matter before the Tribunal and as such he should not be deprived of the opportunity to present his case without strong and convincing evidence that the respondent would suffer severe prejudice if this matter proceeds."

Martin v. Donaldson Securities Ltd. et al (1975), 61 D.L.R. (3d) 518 at 525 (B.C.S.C.) and *Erlanger et al. v. New Sombrero Phosphate Co. et al.* (1878), 3 App. Cas. 1218 at 1279 requires the Tribunal to balance the degree of diligence that might reasonably be expected from the Complainant against the extent of the prejudice experienced by the Respondent in relation to the Respondent's ability to mount a full answer and defence to the complaint. The Complainant has not met the degree of diligence that might reasonably be expected. The Respondent has experienced some prejudice by the discarding of Ms. Stambuck's

daily journal but I find that this prejudice did not significantly affect the Respondent's ability to mount a full answer and defence to the complaint. Therefore, I conclude that the equitable doctrine of laches does not apply.

2. Section 41 of the Act

The Respondent's alternative submission was based on the argument that the Respondent should not be deprived of the limitation period found in section 41 of the Act and that the

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Tribunal should dismiss the complaint because it is based on an act that occurred more than one year before the receipt of the complaint by the Commission.

Section 41 of the Act provides:

"41. Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that

...

(e) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint."

The Respondent relied upon *Canadian Broadcasting Corporation v. Canadian Human Rights Commission and Leila Paul* (15 December 1993), F.C.T.D. [unreported], where the court quashed a decision of the Commission to deal with a complaint notwithstanding that the act occurred more than one year before the receipt of the complaint. The reason why the court quashed the decision of the Commission was that the Commission, by its decision, adopted a report, that was flawed.

Counsel for the Commission submitted that *Canadian Broadcasting Corporation v. Canadian Human Rights Commission and Leila Paul* has no application because a Human Rights Tribunal does not have the jurisdiction to review the decision of the Commission to exercise its discretion under section 41 of the Act. Counsel submitted that when a Human Rights Tribunal is constituted under the Act, the Tribunal is limited by section 50 of the Act to inquiring into the complaint. In support of that submission, counsel cited *Sinclair v. Peel Non-Profit Housing Corporation* (No. 1) (1990), 11 C.H.R.R. D/341 (Ont. Bd. of Inquiry), a decision under the Ontario Act, the Board of Inquiry stated at page D/341:

"The Act does not provide for an investigation by a board of inquiry into what took place before the Commission. Once a board of inquiry has been established under s. 37 the

Board's duties are set out under s. 38."

It is clear that a Human Rights Tribunal does not have the power to quash a decision of the Commission that has been made under section 41 of the Act where the Commission had decided to proceed with a complaint notwithstanding that the act occurred more than one year before the receipt of the complaint. Only the Federal Court has the power to quash decisions of the Commission.

In *Sinclair v. Peel Non-Profit Housing Corporation* (No. 1), the Board of Inquiry suggested that there could be circumstances that rendered the Commission's decision a "travesty" when it could be said that there was no decision at all. In such circumstances, Mr. Friedland, the Chair of the Board of Inquiry in *Sinclair*, commented that the Board of Inquiry (a Human Rights Tribunal in the case of the Canadian Act) would not have jurisdiction to consider the complaint. Mr. Friedland

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stated the proposition in the following manner at page D/341: "It may be that the Commission's conduct of an investigation and request to the Minister is such a 'travesty' that it can be said that in effect there was no decision by the Commission at all. No doubt, such a travesty could affect the Board's jurisdiction."

I did not understand the Respondent to argue that the decision of the Commission in the case at bar could be described as a "travesty" or that this Tribunal did not have jurisdiction because of the alleged defects in the decision of the Commission.

I also wish to make it clear, that I do not regard the role of a Human Rights Tribunal to include reviewing a decision of the Commission made under section 41 of the Act for the purpose of determining whether the Commission properly or improperly exercised its discretion under section 41 of the Act.

Any review of that nature may only be conducted by the Federal Court. However, that does not mean that a Tribunal is precluded from determining, based on the evidence before the Tribunal, whether a Respondent is to be deprived of the benefit which Parliament provided in relation to the limitation period provided in section 41 of the Act. In this respect, the observations of Muldoon J. in *Attorney General of Canada v. Canadian Human Rights Commission et al.* (1991), 36 C.C.E.L. 83 (F.C.T.D.) are instructive. Muldoon J. made the following comment about section 41 at page 105:

"Now, it is apparent that Parliament in setting the datum-line criterion of 1 year's limit in par. 41(e) did so in order seriously to confer a benefit and not just wantonly to complicate the C.H.R.A. That 1 year's limit appears to be of no direct benefit to the complainant. Whom did Parliament intend to benefit? The limit - permeable as it

is in terms of the commission's consideration of what is appropriate - appears to be of direct benefit to a respondent employer, such as S.O.S. in this case. It is just too plain for elaboration that if the employer is to be deprived of the benefit which Parliament provided, the commission must give some cogent signal or demonstration of why it considered it to be appropriate so to deprive the employer."

I have concluded that a Human Rights Tribunal has the jurisdiction to dismiss a complaint where the complaint is based on acts the last of which occurred more than one year before the receipt of the complaint by the Commission if the Tribunal concludes that there is no reasonable justification why, to use the words of Muldoon J., in *Attorney General of Canada v. Canadian Human Rights Commission et al.*, the "employer is to be deprived of the benefit which Parliament provided" in relation to the limitation period in section 41 of the Act. In making its decision on whether there is a reasonable justification for depriving a Respondent of the benefit of section 41 of the Act, a Tribunal should consider the reasons why the Commission decided to proceed with the complaint but that is only one of the factors that a Tribunal should consider. The evidence before the

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Tribunal may include matters that were not before the Commission. Among the factors that a Human Rights Tribunal should consider are:

- (i) the period of time that elapsed between the act or omission that is the subject of the complaint and the time when the complaint was filed with or received by the Commission;
- (ii) the period of time that elapsed between the act or omission that is the subject of the complaint and the time when the Respondent received notice of the complaint;
- (iii) the reasons for the delay in filing the complaint or notifying the Respondent of the complaint;
- (iv) the reasons of the Commission for deciding pursuant to section 41 of the Act to proceed with the complaint notwithstanding that the complaint is based on acts or omissions the last of which occurred more than one year before receipt of the complaint; and
- (v) the prejudice caused to the Respondent by the delay.

There is obviously some overlap between these factors and the factors that must be considered in relation to the equitable doctrine of laches but the final test is different. The doctrine of laches requires a balancing of the expectation of

reasonable diligence of the complainant and the prejudice caused by delay that may prevent a respondent from mounting a full answer and defence to the complaint. Here, the question is whether there is reasonable justification for depriving the Respondent of the benefit of the limitation period Parliament has provided by section 41 of the Act.

The first of the above mentioned factors is the time that elapsed between the act or omission which is the subject of the complaint and the time when the complaint was filed with or received by the Commission. Notwithstanding that the discussions between the Complainant and Virginia Menzie on July 20, 1989 led to the preparation of a draft form of complaint, a complaint was not signed by the Complainant until February 27, 1990 and it was not "received" by the Commission until March 2, 1990. Several facts lead me to the conclusion that the Complainant did not finally decide to file a complaint until January, 1990 at the earliest and perhaps as late as February 27, 1990. These facts include:

(a) The substantial delay between the time when the Complainant received the draft complaint in mid-August, 1989, and her next contact with the Commission in January, 1990;

(b) The fact that Virginia Menzie discussed the September, 1989 "filing" deadline with the Complainant; and

(c) The fact that the Complainant did not tell Ms. Stambuck in their chance meeting in November, 1989 that she had filed or was in the process of filing a complaint with the Commission.

The second of the above mentioned factors is the period

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of time that elapsed between the act or omission that is the subject of the complaint and the time when the Respondent received notice of the complaint. The Respondent was not notified of the complaint until April 5, 1990. This period amounted to approximately one year and seven months. If, as was suggested by the Ritchot and Hosking report, the Complainant's communications with the Commission in July and August, 1989 were sufficient to fulfil the requirement of "filing", then it was inexcusable for the Commission not to notify the Respondent of the filing of the Complaint until April, 1990.

The third of the above mentioned factors is the reasons for the delay in filing the complaint or notifying the Respondent of the complaint. I do not accept this explanation as a reasonable explanation for the delay. The Complainant's testimony that she thought that once she had called Virginia Menzie, she had started the process within the one year time

limitation, is not consistent with the memorandum of Virginia Menzie (Exhibit R-3) wherein Ms. Menzie records that the Complainant is aware of the September, 1989 deadline. If the Complainant thought by notifying the Commission in July, 1989, that she had fulfilled the filing requirement, there would not have been any need to be concerned with the September, 1989 deadline. The Complainant's reason for delaying from August, 1989 to January, 1990 was that she had some questions that she wanted to ask and that the person she had been dealing with would be away until January, 1990. No evidence was given with respect to the questions she felt she needed to ask. The complaint is the complaint of the complainant and does not require the agreement of the Commission or any of its officers. The Complainant could easily have made the modifications to the draft form of complaint sent to her by the Commission without discussing them with Virginia Menzie or another officer. When a Complainant is told that the Officer, with whom the Complainant has previously discussed the matter, is going to be away for five months, it is not reasonable to simply do nothing until that officer returns.

The fourth of the above mentioned factors are the reasons of the Commission for deciding pursuant to section 41 of the Act to proceed with the complaint notwithstanding that the complaint is based on acts or omissions the last of which occurred more than one year before receipt of the complaint. The Commission appears to have rendered its decision by simply adopting the recommendation embodied in the Ritchot and Hosking report. This form of decision making was considered by Noel J. in *Canadian Broadcasting Corporation v. Canadian Human Rights Commission and Leila Paul et al* (15 December 1993), (F.C.T.D.) [unreported]. At page 19, Noel J. makes the following comment:

"In *Syndicat des employes de production du Quebec et de l'Acadie v. Canada* (Canadian Human Rights Commission), [1989] 2 S.C.R. 879, the Supreme Court of Canada held that, where the Commission renders a decision without reasons, by simply adopting the conclusions embodied in an investigator's report, the report can be looked upon as evidencing the reasons for the decision."

The Ritchot and Hosking report (Exhibit HR-14) omits two salient facts. First, it does not contain any reference to the fact that the Complainant was aware of the one year time limit for filing a complaint. It is clear from the memorandum of Virginia Menzie (Exhibit R-3) that the Complainant was aware of the limitation period and that the limitation period would expire in September, 1989. In her testimony before the Tribunal, the Complainant testified that she knew, from the time of her first contact with the Commission in September, 1988, about the one year limitation period for filing a complaint. When she was asked about her knowledge of the limitation period she testified at page 97 of the transcript:

"I knew that because the following -- or the previous September when I called, I was informed that I had one year to file a complaint."

The Respondent's Mr. Claude J. Mason, who made the submission to the Commission with respect to the timeliness of the complaint (Exhibit HR-15), did not mention this fact. It is highly unlikely that he could have known, when he made that submission, that the Complainant was aware of the one year limitation.

Second, the Ritchot and Hosking report does not refer to the fact that the daily journal of Ms. Stambuck, the person at the Respondent's office in Saskatoon with whom the Complainant had the most contact, had been discarded by Ms. Stambuck in January, 1990, when Ms. Stambuck moved from Saskatoon to Ottawa. However, it must be observed that the submission of the Respondent's Mr. Claude J. Mason (Exhibit HR-15) by way of response to the Ritchot and Hosking report did not mention this

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fact and did not challenge the assertion by Ritchot and Hosking that prejudice to the Respondent is unlikely as relevant documents and witnesses should be available..."

A more serious flaw in the Ritchot and Hosking report is found in Paragraph 16 of the report. It provides in part:

"Furthermore, as the complainant had expressed her desire to file a complaint within one year of the alleged discriminatory act, and in light of the Federal Court of Appeal decision *Woldemar Madisso v. Can. Human Rights Commission*, the respondent was notified of this complaint on April 5, 1990. Although the respondent was advised that based on the aforementioned court decision, this complaint was timely, the respondent disputes this opinion and has requested that the complaint be referred to the Commission for a decision."

Does *Woldemar Madisso v. Can. Human Rights Commission* (1988), 10 C.H.R.R. D/5680 (F.C.A.) stand for the proposition suggested in the Ritchot and Hosking report? The complaint in *Madisso* was a complaint based on discrimination because of age relating to compulsory retirement. Prior to filing his complaint with the Canadian Human Rights Commission, Mr. Madisso had brought a civil action in the Ontario courts against his employer, Bell Canada, relating to the same matter including taking an appeal to the Ontario Court of Appeal which he lost. Immediately after the decision of the Court of Appeal, he sought permission from the Canadian Human Rights Commission to file a complaint. The Commission refused to deal with the complaint apparently because, in the opinion of the Commission, more than one year had passed since the date of the act that was the subject of the complaint. Mr. Madisso made an application to the Federal Court of Appeal to set aside the decision of the Commission. The report of the

decision of the Federal Court of Appeal is very short and I reproduce the entire judgment of the Court by Urie J. "Without expressing an opinion on or deciding any issue as between the applicant and his employer, Bell Canada, we are all of the opinion that this section 28 application must be granted. The employer in October 1985 extended the term of employment of the applicant to the date of disposition of the applicant's appeal of the judgment of the High Court of Justice of Ontario. The Court of Appeal of Ontario rendered its judgment on February 25, 1987 and on that very day, according to the record, the applicant requested the permission of the Canadian Human Rights Commission to file his complaint. Since no specific form of complaint is required we are of the view that that was the date of complaint and thus no extension of time for the filing thereof was required. The Commission was, accordingly, not called upon to exercise its discretion for the purpose of granting such an extension. That being so, the Commission's Order here under review must be set aside and the matter referred back to the Commission for disposition on the basis that the applicant's complaint was timely."

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There is a vast difference between the Madisso case and the complaint of Peggy Johnson in this case. In Madisso, the complainant's employment, by agreement with his employer, continued up until the very day on which the Mr. Madisso requested the permission of the Commission to file his complaint. Mr. Madisso sought to file his complaint on the very day that he was terminated. He could not have filed the complaint any earlier because his employment had continued until that day. Therefore, the Court of Appeal concluded that Mr. Madisso was entitled under the Act to have the Commission proceed with the investigation of his complaint. Those are very different facts compared to the facts in this case.

The Federal Court of Appeal states in Madisso that no specific form of complaint is required but surely there must still be a complaint. In Madisso, the Federal Court of Appeal treated Mr. Madisso's request for permission to file a complaint as being equivalent to filing a complaint because that was all Mr. Madisso could do in light of the Commission's refusal to proceed with his case. Those are not the circumstances that prevail in this case. Peggy Johnson did not sign a complaint until February 27, 1990. Until that date, it cannot be asserted with any degree of certainty, for the reasons expressed earlier, that she had definitely decided to proceed with the complaint against the Respondent.

The fifth of the above mentioned factors is the prejudice caused to the Respondent by the delay. Counsel for the Respondent submitted that the Respondent had suffered several types of prejudice. The Respondent's claims of prejudice were described earlier in this decision and they are only summarized

here. The primary claim of prejudice related to the discarding of Ms. Stambuck's daily journal in which she kept a record of telephone calls and other events. I found earlier that the discarding of Ms. Stambuck's daily journal caused some prejudice to the Respondent. The second claim of prejudice was the fact that memories of witnesses called by the Respondent had faded over the five and one-half years since the Respondent's termination of the Complainant. As stated earlier in this Decision, if the complaint had been filed within one year after the termination, it is unlikely that the Tribunal Hearing into the complaint would have occurred much more than six months earlier if the Complainant had filed her complaint within the normal one year limitation period. It is doubtful that memories of the witnesses would have been significantly better if the Tribunal hearing had occurred six months earlier.

After considering all of these factors, I have concluded that there is no reasonable justification for depriving the Respondent of the benefit which Parliament provided in relation to the limitation period provided in section 41 of the Act and, therefore, the complaint should be dismissed.

In the event that my analysis of section 41 of the Act and my conclusion in relation to the application of the facts to that analysis is not sustained on a review or an appeal, I shall

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proceed to consider the merits of the complaint.

C. THE FACTUAL BACKGROUND TO THE COMPLAINT

The subject matter of the complaint is the Respondent's termination of the Complainant as a trainee in a training program provided by the Respondent pursuant to a Service Agreement with the Government of Saskatchewan. Prior to discussing the substance of the complaint, it is necessary to describe the nature of the training program.

1. The Development of the Training Program

The concept of the training program was conceived by Mr. Ron Smith, who was the regional director of the Respondent in the Province of Saskatchewan from 1985 until 1990. He had observed that there were no aboriginal or metis people working in the major radio and television stations in Saskatchewan. He initiated discussions with representatives of the federal Department of Indian Affairs and the Government of Saskatchewan.

Mr. Smith also sought the advice of representatives of several native organizations including the Saskatchewan Federation of Indian Chiefs and the Indian Federated College with respect to the design of the program. He also consulted with the Public Service Commission and the RCMP which had developed a special

educational program for native and metis people.

A training program was developed with the objective of increasing the number of aboriginal people in radio and television broadcasting. Some of the people in the program would be trained as journalists and some as technicians. The program was designed to develop skills that would enable the trainees to obtain employment either with the Respondent or other major media organizations. Ms. Sandra Coates, the provincial coordinator of the Native Career Development Program in the Indian and Native Affairs Secretariat of the Province of Saskatchewan, testified that the program was a higher level program where the trainees were expected to have some experience or training in radio or television prior to entering the program.

The Respondent executed two agreements with respect to the training program, namely a "Participation Agreement" to which the Respondent and both the federal and provincial governments were parties, and a "Service Agreement" to which the Respondent and the Government of Saskatchewan were parties. The latter agreement, which was annexed to an Order in Council by the Lieutenant Governor in Council of the Province of Saskatchewan, was admitted into evidence as Exhibit R-9. Under the Service Agreement, the Government agreed to provide funds for the program for one year.

2. The Funding of the Training Program

Pursuant to the Service Agreement, the Respondent, being the "Contractor" under the Agreement, paid a salary to each of the trainees and the Respondent was reimbursed by the Government of Saskatchewan for salaries paid to the trainees. Appendix #1 of the Service Agreement contains the funding

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arrangements. Paragraph C provided:

"C. Financial

There are four (4) trainees subject to this Agreement for the training period from June 20, 1988 to June 16, 1989. Indian and Native Affairs Secretariat will provide training salaries (See Appendix #1-Page 2), initially for the period from June 20, 1988 to March 31, 1989. The Agreement may be amended if further training costs are identified for the period from April 1, 1989 to June 16, 1989."

Indian and Native Affairs Secretariat will pay directly to the Contractor upon receipt of a signed Native Career Development Program Request for Reimbursement form and a copy of the trainee's pay stub for the billing period indicated."

Pursuant to the Service Agreement, each trainee was on the Respondent's payroll and was paid a salary while the trainee was receiving training. After receiving a certification (Exhibit R-4) executed by both the Respondent and the trainee with respect to the number of training hours provided during a pay period, the Respondent was reimbursed by the Provincial Government for the salary paid to the trainee. The reimbursement included salaries paid for statutory holidays. The Respondent was responsible for payment of employer related Unemployment Insurance and Canada Pension Plan premiums, annual vacation pay and the cost of any other employee benefits associated with the trainees.

3. The Implementation of the Training Program

Before the commencement of the program, Mr. Smith had meetings with the Respondent's staff in both Regina and Saskatoon to explain the objectives of the program. The Respondent also arranged for cross-cultural training sessions to be provided to its staff by an outside consultant prior to the commencement of the program. This cross-cultural training focused on equipping the Respondent's staff to work with aboriginal people.

4. The Complainant's Enrollment in the Program

The Complainant was selected as one of the journalist trainees for the program. By a letter dated April 26, 1988 (Exhibit HR-3), the Respondent informed the Complainant that she would be employed in a position classified as a "Temporary Announcer assigned to Television". The Complainant was placed in the Saskatoon office of the Respondent. The term of the appointment was stated in the letter to be from May 30, 1988, until May 28, 1989. By mutual agreement between the parties, the starting date was postponed until June 27, 1988, because the Complainant had surgery scheduled for the second week of May, 1988. This latter agreement is reflected in an undated letter (Exhibit HR-4). Notwithstanding the provisions in the Service Agreement with respect to the period during which funding for the training program would be provided by the Government of Saskatchewan, there appears to have been some flexibility with respect to the dates on which trainees could commence and conclude the program.

A training plan was developed for the trainees. The "Training Plan" for Peggy Johnson was a two page document that described a six phase program (Exhibit HR-5). After an introductory phase, subsequent phases included technical orientation, broadcast writing, production and editing, research and interviewing skills, and concluded with on-air performance. Mr. Smith testified that the program sought to provide journalism trainees, over the course of twelve months, with the type of education that a school of journalism would provide over the course of three or four years.

5. The Termination of the Complainant

On Monday, August 29, 1988, the Complainant arrived at the Respondent's place of business. During that morning, she testified that she had difficulty concentrating on her work because she was very upset by events that had occurred on the immediately preceding weekend in relation to her boyfriend.

During that morning, the Complainant went to see Ms. Stambuck, the Respondent's Human Resources Officer in Saskatoon. The Complainant testified that she informed Ms. Stambuck that she was upset because of a "fight with her boyfriend". The Complainant inquired whether she could be referred to the Respondent's Employee Assistance Program and after some discussion Ms. Stambuck agreed. Ms. Stambuck's testimony confirmed the essential elements of the discussion that took place between her and the Complainant. Ms. Stambuck testified that the Complainant never informed her that she had consumed alcohol on the preceding weekend and that the Complainant never indicated that the Complainant was dependent on alcohol or had abused the use of alcohol. The Complainant acknowledged in cross-examination that she did not say anything to Ms. Stambuck about the Complainant's consumption of alcohol.

The Respondent's Employee Assistance Program was offered through an independent contractor named Cardwell & Associates whose services were retained by committee made up of both employees and management. The Complainant went to Cardwell & Associates. After an initial interview, she was referred to a counsellor, named Mickey Locke, whom the Complainant described as an "alcohol counsellor". After discussing her problems with the counsellor, the Complainant testified that she decided, based on the recommendation of the counsellor, to enter the residential rehabilitation centre in Indian Head, Saskatchewan. When asked why she decided to do that she testified at page 76 of the transcript:

"Because it was recommended to me. I had decided that whatever I was asked to do to deal with this alcoholism, whether it was attend an outpatient or residential rehabilitation centre, or if I should go to a hundred meetings in the next hundred days, I would do that."

The Complainant testified that she entered the rehabilitation centre on August 31, 1988.

Ms. Stambuck recalled that the Complainant did not come into work on Tuesday, August 30, 1988, which was the day

following her meeting with the Complainant when the Complainant sought a reference to Respondent's Employee Assistance Program.

Ms. Stambuck became concerned about the Complainant's absence

when she received a visit from the Complainant's daughter later in that week who inquired whether Ms. Stambuck knew the whereabouts of the Complainant. Ms. Stambuck could not recall the precise day when the Complainant's daughter came to see her.

After speaking to the Complainant's daughter, Ms. Stambuck informed Mr. Smith, that the Complainant was absent from work and that the Complainant's daughter did not know where she was.

Later in the week of August 29, 1988, Ms. Stambuck recalled receiving a telephone call from somebody at Cardwell and Associates who informed her that the Complainant was suffering from substance abuse but she could not remember when she received that call. This call was the first occasion that Ms. Stambuck had heard anything that suggested that the Complainant had a substance abuse problem. Ms. Stambuck testified that she believes she received a second call from Cardwell and Associates during which she was informed that arrangements were being made for the Complainant to attend the Pine Lodge rehabilitation centre. Ms. Stambuck subsequently spoke to somebody at Pine Lodge but she could not remember the identity of the person.

She could not be certain, but she believes that she made the call to Pine Lodge. The purpose of the call was to attempt to find out how long the Complainant would be at the Pine Lodge rehabilitation centre. Ms. Stambuck testified that the person at Pine Lodge with whom she spoke was unable to tell her how long the Complainant would be at Pine Lodge. Ms. Stambuck recalls reporting this information to Mr. Smith.

The Complainant had never informed the Respondent that she had a previous or existing dependence on alcohol or a substance abuse problem. Nothing had come to the attention of the Respondent that suggested that the Complainant might have an alcohol dependency or substance abuse problem. After her meeting with Ms. Stambuck on August 29, 1988, the Complainant never contacted the Respondent to inform the Respondent that she would be absent from the training program or that she was entering a residential treatment program. The Complainant's explanation for not communicating with the Respondent was that she assumed that either Cardwell & Associates or the counsellor, Mickey Locke, would notify the Respondent.

Mr. Smith testified that he recalled being informed of the Complainant's absence by Ms. Stambuck sometime in the week of August 29th and being informed by Ms. Stambuck that the Complainant had been referred to Cardwell and Associates. He also recalled Ms. Stambuck informing him of the inquiry by the Complainant's daughter as to the Complainant's whereabouts. Mr. Smith's recollection is that it was the following week when Ms. Stambuck informed him that she had received information that the Complainant had been admitted to the Pine Lodge rehabilitation centre. He asked Ms. Stambuck how long the Complainant would be at Pine Lodge and he was informed by Ms. Stambuck that she had been advised by Pine Lodge that they could not give a specific

length of time. Prior to receiving this information from Ms. Stambuck, Mr. Smith testified that he had not heard or seen anything that would have indicated that the Complainant had a dependency on alcohol or a substance abuse problem.

After learning that the Complainant had been admitted to Pine Lodge rehabilitation centre and that the length of her stay was uncertain, Mr. Smith called Ms. Coates, the Coordinator of the Provincial Government's Native Career Development Program whose office had responsibility for reimbursing the Respondent with respect to salaries paid to the trainees. The purpose of this call was to determine what effect the Complainant's absence from the training program would have on the funding provided by the Government for the Complainant. After describing the circumstances known to him, Mr. Smith asked Ms. Coates what should be done. He recalls her response as being:

"We pay you to train, we don't pay you to rehabilitate. No training, money."

Ms. Coates' recollection of her response to Mr. Smith was something approximating:

"We pay for training, not for rehabilitation."

Ms. Coates testified that she recalled receiving two telephone calls from Mr. Smith. The first was in late August, 1988, during which Mr. Smith informed her that the Complainant was absent from the program and he did not know her whereabouts.

In cross-examination by Ms. Knudsen, Ms. Coates testified that Mr. Smith also inquired whether the Native Career Development Program staff had heard from the Complainant. Ms. Coates responded that neither she nor the other consultants in the Native Career Development Program had heard from the Complainant notwithstanding that trainees had apparently been told that they could contact the Native Career Development Program consultants if they required any assistance.

Ms. Coates testified that she received a second call from Mr. Smith about the Complainant early in the following week. In the second call, Mr. Smith informed her that the Complainant was in a treatment centre and inquired about what he should do. She inquired why the Complainant was in a treatment centre but recalls that Mr. Smith did not seem to know the reason. In response to her question about how long the Complainant would be in the treatment centre, Mr. Smith suggested that it might be for a fairly lengthy period. Mr. Smith asked whether the program could continue to pay her salary. Ms. Coates recalled her response as being:

"The program did not provide for monies to be expended for any other reason other than training and not for time away

from work."

In response to Mr. Smith's question as to what the CBC should do, Ms. Coates testified:

"I suggested that he terminate Peggy and that he give her, with the -- offer her the opportunity to look after her health, and at such time as she was feeling well, to offer

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her also the opportunity to be in contact with the Native Career Development Program, which was ourselves at that time, or CBC, to explore any possibility or any opportunity that may exist at that time, once she was feeling better, once she was well."

Following Mr. Smith's conversation with Ms. Coates, he instructed Ms. Stambuck that it was necessary to terminate the Complainant and that Ms. Stambuck should prepare and send a letter of termination to the Complainant. He advised her that the letter should leave the door open for the Complainant to "... look at the CBC in some future opportunity". Mr. Smith testified that the Respondent could not hold out any promises to the Complainant with respect to any future participation in the program because he did not know whether there would be funding for the training program in the future.

Acting on Mr. Smith's instructions, Ms. Stambuck prepared and sent a letter addressed to the Complainant dated September 6, 1988 (Exhibit HR-7). The text of the letter is reproduced below:

"This is to advise that your temporary employment with CBC in Saskatoon is terminated effective September 2, 1988.

You will receive salary up to and including Friday September 2nd and in addition, under Article 14.3 of the Cupe O&P Collective Agreement, you will receive an additional 3 days pay in lieu of notice.

Peggy, when your treatment is over, please call me. Perhaps we can meet for coffee... I'd like to see you.

Yours sincerely,"

The letter was addressed to the Complainant at the Pine Lodge Treatment Centre in Indian Head, Saskatchewan. The Complainant testified that she received the letter while she was at Pine Lodge.

Mr. Smith testified that the termination of the Complainant was dealt with in the same manner as the termination of any probationary or temporary employee who had less than three months service with the Respondent.

Mr. Smith explained that a consequence of the trainees being on the Respondent's payroll was that the trainees came under the collective agreement between the Respondent and CUPE. The letter appointing the Complainant to the position of a Temporary Announcer (Exhibit HR-3) stated that the position fell within the CUPE O&P bargaining unit. Copies of the collective agreement between the Respondent and the Canadian Union of Public Employees (CUPE) that covered the relevant period of the Complainant's relationship with the Respondent were entered as Exhibit R-10. The collective agreement provided for a three month probationary period for all new employees joining the Respondent. Article 14.2.4 of the collective agreement provides

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that within the three month probationary period, the employer may release an employee at any time without cause and that any such release is not subject to the grievance procedure of the collective agreement unless it occurs by reason of sex, colour, creed, national origin or union activities. There has not been any suggestion that the Respondent's release of the Complainant was for any of the enumerated grounds in Article 14.2.4. Therefore, the complainant did not have access to the grievance procedure provided by the collective agreement and the Complainant never sought to file a grievance.

The Complainant remained at Pine Lodge until late September. She never attempted to contact either Ms. Stambuck or Mr. Smith with respect to the invitation contained in the last paragraph of Ms. Stambuck's letter of September 6, 1988. There were no further attempts by the Respondent to contact the Complainant. An unplanned meeting between Ms. Stambuck and the Complainant occurred in November, 1989, when both of them happened to be attending the same conference. Ms. Stambuck testified that she recalled the Complainant telling her that she was "unhappy with the whole situation" but Ms. Stambuck did not get the impression that the Complainant was going to make a complaint to the Canadian Human Rights Commission. Ms. Stambuck apparently did not make any overtures to the Complainant relating to participation in future training programs that the Respondent might be offering in conjunction with the Native Career Planning Program.

6. The Overall Success of the Training Program

Both Mr. Smith and Ms. Coates expressed the opinion that the training program had been a success. Although it was not known at the time of the Complainant's termination, the governments continued to provide funding for the training program. By the date of Mr. Smith's transfer to Alberta, the program had trained approximately 22 aboriginal or metis people.

D. BURDEN OF PROOF

Prior to discussing the issues, it is worthwhile to recall the words of McIntyre J. in Ontario Human Rights Commission and O'Malley v. Simpsons-Sears, [1985] 2 S.C.R. 536 in relation to the respective burdens of proof in cases such as this. At page 558-59, he said:

"Following the well-settled rule in civil cases, the plaintiff bears the burden. He who alleges must prove. Therefore, under the Etobicoke rule as to burden of proof, the showing of a prima facie case of discrimination, I see no reason why it should not apply in cases of adverse effect discrimination. The complainant in proceedings before human rights tribunals must show a prima facie case of discrimination. A prima facie case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer."

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E. ISSUES

1. Was the Requirement of Regular Attendance a Bona Fide Occupational Requirement?

The Respondent required trainees to attend regularly at the Respondent's place of business for the purpose of participating in the training program. Counsel for the Commission acknowledged that this requirement was a bona fide occupational requirement. The training program was an intensive program that sought, in the case of journalist trainees such as the Complainant, to provide them with training in a period of one year that would, according to Mr. Smith's testimony, be equivalent to the training normally received by a student enrolled in an academic program lasting several years. At the time when the Complainant was terminated, the Service Agreement between the Respondent and the Province only provided funds for the program until June 16, 1989. Therefore, I find that the Respondent's requirement that trainees attend regularly at the Respondent's place of business for the purpose of participating in the training program was a bona fide occupational requirement.

Notwithstanding that counsel for the Commission acknowledged that the attendance requirement was a bona fide occupational requirement, she submitted that this was a case of adverse effect discrimination and consequently the Respondent had a duty to take steps to reasonably accommodate the Complainant with respect to a disability related to a dependence on alcohol and that the Respondent failed to fulfil this duty. Adverse effect discrimination and the duty to accommodate will be considered later.

2. What was the basis of the Respondent's Termination of the Complainant?

The evidence discloses that the Respondent's decision to terminate the Complainant was the product of the following information and reasons:

(a) Ms. Stambuck had been informed that the Complainant was likely to be at the Pine Lodge residential rehabilitation centre in Indian Head for about four weeks following the Complainant's admission to Pine Lodge on August 31, 1988;

(b) The Complainant would be unable to attend the training program for the period while the Complainant was at Pine Lodge rehabilitation centre;

(c) The Complainant's training program was designed as an intensive twelve month program and the Complainant's absence from the program for four weeks would not permit her to complete the training program for a journalist prior to the deadline stipulated in the Service Agreement with the Provincial Government;

(d) When the funding provided by Service Agreement with the Provincial Government expired in June, 1989, there was no assurance that any funds would be available to continue training beyond that time;

(e) Ms. Coates, the coordinator of the Native Career Development Program for the Province of Saskatchewan whose office administered the funds provided by the Service Agreement, had informed Mr. Smith that the funds could only be used for the payment of salaries of the trainees while they were being trained and they could not be used to pay a trainee who was in a rehabilitation program; and

(f) Ms. Coates direction to terminate the Complainant.

The Complainant had never informed any of the Respondent's supervisors that she had a dependency on alcohol or a problem with alcohol abuse. Nothing had ever come to the attention of the Respondent's management in relation to the Complainant's work or behaviour that suggested that the Complainant might have a disability related to a dependence on alcohol. When the Complainant entered the residential treatment program, she never took any steps to inform the Respondent that she would be absent from work, or that she was entering a residential treatment program, or that she had any problems with alcohol dependency. The only information received by the Respondent with respect to these matters was information received by Ms. Stambuck, which was received after the Complainant had been admitted to Pine Lodge, indicating that the Complainant had

been admitted because of substance abuse.

The lack of any relationship between the grounds of termination and the complainant's alcoholism was addressed by Walsh J. in *Motorways Direct Transport Ltd. v. Canada* (Canadian Human Rights Commission) (1991), 50 Admin. L.R. 222 (F.C.T.D.) is instructive in this regard. In that case, the complaint alleged that Motorways had discriminated against the complainant by refusing to continue to employ him on the basis of his disability

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(alcoholism). Prior to reproducing a quotation from the judgment of Walsh J., I wish to stress that there is no suggestion in this case that the Complainant, Peggy Johnson, was ever intoxicated while engaged in her training at the Respondent's place of business or that her termination was based on "work-related" conduct. At page 229 of the *Motorways* case, Walsh J. said:

"If Mr. Hinrichsen is in fact dependent upon alcohol, no action was taken against him because of his dependence upon alcohol. Rather it is Mr. Hinrichsen's work-related conduct which resulted in termination. His employment conduct can only be described as abysmal. If that conduct stems from an alcohol related dependency, the Act does not provide that he is entitled to a standard treatment by his employer greater than that accorded to other employees, which is what he is attempting to obtain through this complaint. The work-related conduct engaged in by Mr. Hinrichsen would not have been tolerated with respect to an employee who did not have a dependence on alcohol, so it cannot be suggested that Mr. Hinrichsen is being discriminated against because of a dependence on alcohol. The Act does not provide an obligation upon employers to treat preferentially those with disabilities. It only requires the employer not to act or establish policies which would discriminate against individuals because of a prohibited ground to [sic] discrimination."

I find that the Respondent terminated the Complainant because of the Complainant's inability to regularly attend the training program and because she would not have been able to complete the program prior to the conclusion of the Service Agreement. I find nothing in the evidence to suggest that the Respondent's termination of the Complainant was based on any disability of the Complainant related to a dependence on alcohol.

3. Adverse Effect Discrimination

On behalf of the Complainant, counsel submitted that the complaint is based on "adverse effect discrimination". This concept was described by McIntyre J., writing the judgment of the Court in *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears*, [1985] 2 S.C.R. 536. At page 551, McIntyre J. stated:

"On the other hand, there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force."

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The prohibited grounds of discrimination are stated in section 3 of the Act. The only prohibited ground of discrimination alleged in these proceedings is discrimination on the basis of disability related to a dependence on alcohol. The term "disability" is defined in section 25 of the Act in the following manner:

"'disability' means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug."

In the context of the complaint in this case, it was submitted that the Respondent's rule which required all trainees to be in regular attendance in the training program was a rule that was on its face neutral because it applied to all employees. Nevertheless, it was submitted that the rule had a discriminatory effect on the Complainant because the Complainant was unable to regularly attend the training program because of a disability related to a dependence on alcohol. Therefore, it was submitted that there was a duty on the Respondent to accommodate the Complainant's disability in some manner.

(a) Is there Evidence to Support a Finding that the Complainant had a Previous or Existing Dependence on Alcohol?

The first question that must be answered in relation to a claim of adverse effect discrimination is whether there is evidence to support a finding that the Complainant had a disability related to a previous or existing dependence on alcohol. Merely asserting that the Complainant had a dependence on alcohol is not sufficient. Prior to considering the evidence, it is necessary to interpret section 25 of the Act which defines "disability" as meaning any "... previous or existing dependence on alcohol or a drug".

With respect to the meaning of the term "dependence" I accept and adopt the definition found in Dorland's Illustrated Medical Dictionary, 26th Edition, where the term is defined at page 359 as:

"the psychophysical state of an addict in which the

usual or increasing doses of the drug are required to prevent the onset of withdrawal symptoms."

With respect to "previous dependence" on alcohol, I interpret section 25 to mean that where a complaint is based on a "previous dependence on alcohol or a drug", there must be evidence of some continuing disability which is related to the previous dependence on alcohol or drug and that continuing disability must have manifested itself during the period extending from the commencement of the Complainant's participation in the training program until her termination that is related to the previous dependence on alcohol. A previous dependence that had no continuing disabling effect during the material time is

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irrelevant.

With respect to an "existing dependence" on alcohol, I interpret section 25 to mean that where a complaint is based on an "existing dependence on alcohol or a drug", there must be evidence of an existing dependence on alcohol and consequent disability during the period extending from the commencement of the Complainant's participation in the training program until her termination.

The evidence that may support a finding that the Complainant had a "previous dependence" on alcohol includes:

(i) The complaint (Exhibit HR -1) in which the Complainant stated:

"I have been previously dependent on alcohol. I am no longer dependent, nor do I presently have an alcohol abuse problem."

This statement does not provide any time frame as to when she was previously dependent on alcohol or the time when she ceased to be dependent on alcohol.

(ii) Testimony of the Complainant at page 45 of the transcript where she said that at the time when the training program began she regarded herself as a "recovering alcoholic". When she was asked what term "recovering alcoholic" meant, she testified:

"That means that I was not drinking, that I was in a recovery program."

(iii) Testimony of the Complainant at page 69 of the transcript where the Complainant said:

"... I never thought that my alcoholism was going to come back ..."

(iv) The testimony of Ms. Lanceley, the Complainant's daughter, at page 501 of transcript, where, in response to a question as to why she was worried when she had not heard from her mother for several days in late August, 1988, she responded, :

"Because she had been feeling depressed for a while, and I was worried that she might drink again"

This evidence constitutes at least prima facie evidence that the Complainant had a "previous dependence" on alcohol. The Complainant's evidence in this regard was not seriously challenged by the Respondent and I am prepared to find that the Complainant had dependence on alcohol prior to her selection for enrollment in the training program.

While there is evidence of "previous dependence" on alcohol, there is little, if any, evidence to support a finding that the Complainant had any continuing disability

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which was related to the previous dependence on alcohol that manifested itself during the period extending from the commencement of the Complainant's participation in the training program until her termination that is related to the previous dependence on alcohol. The Complainant testified that she did not consume any alcohol from a time prior to her surgical operation in April, 1988 until the weekend preceding July 18, 1988 and that she only consumed alcohol on one other occasion during her participation in the training program. There was no evidence that her previous dependence on alcohol affected her ability to carry out her assignments in the training program. Therefore, I find that there is not sufficient evidence to support a finding that the Complainant had, at any time which is material to this complaint, a disability related to a previous dependence on alcohol.

Is there evidence that may support a finding that the Complainant had an existing dependence on alcohol and consequent disability during the period extending from the commencement of the Complainant's participation in the training program until her termination?

The Complainant's statement in the complaint (Exhibit HR-1), that:

"I have been previously dependent on alcohol. I am no longer dependent, nor do I presently have an alcohol abuse problem."

is not very helpful because of a lack of a time frame as to when she was "previously dependent" and the time when she

ceased to be dependent.

In her testimony at the Tribunal hearing, the Complainant testified that she only consumed alcohol on two occasions during her enrollment in the training program. The first occasion was during the weekend preceding July 18, 1988. As a consequence of her consumption of alcohol on that weekend, she did not participate in the training program on July 18 and 19, 1988. She reported to the Respondent that she had been sick on those two days but did not mention anything about alcohol. In response to a question from Commission counsel as to why the Complainant did not tell the Respondent that her consumption of alcohol was the reason for her absence, the Complainant testified, at page 69 of the transcript:

"A I felt so ashamed, I never thought that my alcoholism was going to come back and be a-- I wanted this job to work so badly. I think I was just too ashamed, I thought, well, I'll just go to some meetings, I'll get the support I need and then it won't be a problem and they don't need to know about it.

Q When you say "meetings", what meetings are you referring to?

A Alcoholics Anonymous.

Q How frequently were you attending those meetings?

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A After that weekend, I believe I went two or three times that week."

The second occasion was on Saturday, August 27, 1988. It was on the following Monday, August 29, 1988, that the Complainant discussed her problems with Ms. Stambuck. She informed Ms. Stambuck that she had a "fight with her boyfriend" but she never mentioned anything to Ms. Stambuck that would suggest that she had a dependency on or a problem with alcohol.

The Complainant had never informed any of her supervisors at the CBC that she had dependency on alcohol. Ms. Stambuck, who was the Human Resources Officer for the Respondent in its Saskatoon office, testified that she saw the Complainant almost every working day during Complainant's enrollment in the training program. Ms. Stambuck did not observe anything in relation to the Complainant that indicated to her that the Complainant had a dependency on alcohol or an alcohol abuse problem. Mr. Smith testified that during the period when the Complainant was in the training program at the CBC, he never observed anything in relation to the Complainant and he never

received any information that suggested that the Complainant might have a dependency on alcohol or had any sort of problem with alcohol.

In August, 1989, a draft form of complaint (Exhibit R-6) was prepared by an officer of the Commission and sent to the Complainant for signature. The draft included the following language:

"... while I never used alcohol during work hours I was nevertheless encountering difficulties in functioning at work because of my use of alcohol."

After receiving the draft, the Complainant advised the Commission by telephone on August 14, 1989, that the draft did not accurately stated the facts. The Complainant modified that portion of the draft complaint form so that it read :

"... I was encountering difficulties in functioning at work."

The formal complaint form that was signed by the Complainant (Exhibit HR-1) used the modified language, namely:

"... I was encountering difficulties in functioning at work because of personal problems."

It is noteworthy that the modified language used by the Complainant does not allege that the Complainant was encountering any difficulties at work because of the use of alcohol.

The evidence does not support a finding that "usual or increasing doses" of alcohol were "required" by the Complainant "to prevent the onset of withdrawal

symptoms", as those words are used in the definition of "dependency" found in Dorland's Illustrated Medical Dictionary.

The definition of "dependence" in Dorland's Illustrated Medical Dictionary quoted above refers to "the psychophysical state of an addict". There is no evidence before Tribunal with respect to the psychophysical state or medical condition of the Complainant other than the Complainant's own conclusion that she was a "recovering alcoholic" and her expression of the fear that her alcoholism had returned after her consumption of alcohol on the week-end of July 16 and 17, 1988. There was no evidence with respect to the basis of the Complainant's opinion that she had been an alcoholic. Mickey Locke, the counsellor to whom the Complainant was referred by Cardwell & Associates,

and who, according to the Complainant, recommended that she enter the Pine Lodge residential rehabilitation centre was not called as a witness. Consequently, there is no evidence with respect to the counsellor's qualifications or expertise in relation to alcoholism and there is no evidence with respect to the reasons why Mickey Locke recommended to the Complainant that she enter a residential rehabilitation program. Mr. Cardwell was called as a witness but he never had any contact with the Complainant. The Complainant testified that she was never examined by a medical doctor in relation to her referral to Cardwell & Associates. There is no evidence with respect to the nature of the programs offered by the Pine Lodge Rehabilitation Centre. Perhaps the expert witness, who counsel for the Commission belatedly sought to call, may have been able to provide that evidence but for the reasons expressed above, I ruled that the expert could not be called. In the absence of such evidence, the fact that the Complainant was admitted to Pine Lodge is just as consistent with an inference that the Complainant required a residential treatment program for treatment of depression or other personal problems as it is with an inference that she was admitted for treatment of a dependency on alcohol. Indeed, the testimony of the Complainant's daughter testified at page 501 of the transcript that she was worried about her mother immediately prior to her admission to Pine Lodge because her mother "... had been feeling depressed for a while". Her daughter's concern that her mother "might drink again" was only an expression of concern and is not evidence that her mother had an existing dependency on alcohol even if her daughter was qualified to give opinion evidence on that issue.

Bearing in mind the respective burdens of proof as laid down by McIntyre J. in Ontario Human Rights Commission and O'Malley v. Simpsons-Sears, [1985] 2 S.C.R. 536 that were quoted earlier in this Decision, the Tribunal finds that there is not sufficient evidence to support a finding that the Complainant had, at any time which is material to this complaint, a disability related to a previous or existing dependence on alcohol.

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The consequence of this finding is that there has not been any adverse effect discrimination.

(b) The Effect of the Duty to Accommodate on a Bona Fide Occupational Requirement

If I had found that there was adverse effect discrimination, it would have been necessary to consider whether the Respondent had fulfilled its duty to accommodate. Nevertheless, in the event that my earlier findings are overturned on a review or on an appeal, I shall proceed to consider the duty to accommodate.

In Ontario Human Rights Commission and O'Malley v. Simpsons-Sears, [1985] 2 S.C.R. 536, McIntyre J., at page 552, stated the effect of the duty to accommodate on a bona fide occupational requirement:

"The working rule or condition is not struck down, but its effect on the complainant must be considered ... some accommodation must be required from the employer for the benefit of the complainant."

(c) The Scope of the Duty to Accommodate

Where adverse effect discrimination is found, it gives rise to a duty to accommodate notwithstanding that the otherwise neutral employment rule only adversely affects a minority of one: see Central Alberta Dairy Pool v. Alberta (Human Rights Commission), [1990] 2 S.C.R. 489 at 514. In Central Okanagan School District No. 23 v. Renaud, [1992] 2 S.C.R. 970, Sopinka J. observed at page 984:

"More than mere negligible effort is required to satisfy the duty to accommodate."

(d) The Limits on the Duty to Accommodate

There are limits on the duty of a Respondent to accommodate. The limits on a Respondent employer were considered by McIntyre J. in Ontario Human Rights Commission and O'Malley v. Simpsons-Sears, [1985] 2 S.C.R. 536 where he stated at page 555:

"Accepting the proposition that there is a duty to accommodate imposed on the employer, it becomes necessary to put some realistic limit upon it. The duty in a case of adverse effect discrimination ... is to take reasonable steps to accommodate the complainant, short of undue hardship: in other words, to take such steps as may be reasonable to accommodate without undue interference in the operation of the employer's business and without undue expense to the employer."

(e) Undue Hardship on Employer - What constitutes?

A Respondent employer has a duty to take reasonable steps to accommodate the complainant short of undue hardship. In Central Okanagan School District No. 23 v. Renaud, [1992] 2 S.C.R. 970 at 984, Sopinka J., writing

the judgment for the court, stated:

"The use of the term `undue' infers that some hardship is acceptable; it is only `undue` hardship that satisfies this test. The extent to which the

discriminator must go to accommodate is limited by the words 'reasonable' and 'short of undue hardship'."

In *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489, Wilson J. enumerated several factors that should be considered determining whether an accommodation of a complainant by a respondent employer would constitute undue hardship. At page 521, she said:

"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 to the circumstances."

Wilson J. also referred to safety as a factor to be considered but that was not a relevant factor in this case. Wilson J. also stated that the above mentioned list of factors was not intended to be exhaustive.

With respect to the impact of any proposed accommodation on other employees, Sopinka J., writing the judgment for the court in *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, stated at 984-85: "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."

And on page 988, he commented further:

"The reaction of employees may be a factor in deciding whether accommodating measures would constitute undue interference in the operation of the employer's business. In *Central Alberta Dairy Pool*, Wilson J. referred to employee morale as one of the factors to be taken into account. It is a factor that must be applied with caution. The objection of employees based on well-grounded concerns that their rights will be affected must be considered. On the other hand, objections based on attitudes inconsistent with human rights are an irrelevant consideration."

(f) The Employee's Duty to Facilitate Accommodation

While the employer has a duty to accommodate, the employee also has a duty to facilitate the implementation of an employer's proposal to accommodate. This obligation has been most clearly stated by Sopinka J. in *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 where, writing the judgment of the Court, he stated at page 974:

"The search for accommodation is a multi-party inquiry. The complainant also has a duty to assist in securing an appropriate accommodation and his or her conduct must therefore be considered in determining whether the duty to accommodate has been fulfilled. When an employer has initiated a proposal that is reasonable and would, if implemented, fulfil the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If the complainant fails to take reasonable steps and causes the proposal to founder, the complaint will be dismissed."

And further on page 994-95:

"When an employer has initiated a proposal that is reasonable and would, if implemented, fulfil the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation."

This obligation of an employee was also recognized by McIntyre J. in *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears*, [1985] 2 S.C.R. 536 where he said at page 555:

"The employer must take reasonable steps towards that end which may or may not result in full accommodation. Where such reasonable steps, however, do not fully reach the desired end, the complainant, in the absence of some accommodating steps on his own part such as an acceptance in this case of part-time work, must either sacrifice his religious principles or his employment."

However, the employee does not have an obligation to initiate a solution. Sopinka J. made this clear in *Central Okanagan School District No. 23 v. Renaud*, [1992] 2

S.C.R. 970 at p. 994 where, writing the judgment of the Court, he stated:

"This does not mean that, in addition to bringing to the attention of the employer the facts relating to discrimination, the complainant has a duty to originate a solution. While the complainant may be in a position to make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's business."

(g) What actions of the Respondent could be regarded as a fulfillment of any Duty to Accommodate?

Counsel for the Respondent argued that the Respondent had fulfilled its duty to accommodate. Counsel pointed to the fact that the Respondent had delayed the Complainant's starting date in the program to accommodate the Complainant's surgery. However, notwithstanding that the Respondent's action accommodated the Complainant, it was not an Accommodation that related to any disability the Complainant may have had related to a dependence on alcohol.

Counsel for the Respondent also pointed to the fact that the Complainant had been allowed more paid sick days than the C.U.P.E. Collective Agreement provided. This was an Accommodation of the Complainant but at the time of extending this Accommodation the Respondent was unaware of any disability the Complainant may have had related to a dependence on alcohol.

The only accommodation made by the Respondent after the Respondent became aware that the Complainant had been admitted to Pine Lodge was the invitation contained in the termination letter where Ms. Stambuck invited the Complainant to call her when her treatment was over and Ms. Stambuck's expression that she would like to see the Complainant. It may have been the intention of both Mr. Smith and Ms. Coates to encourage the Complainant to apply in the future for training in similar programs but the termination letter did not expressly convey that sentiment. The letter does not contain any explanation of the reasons why the Complainant was terminated.

Counsel for the Commission submitted several proposed courses of action that the Respondent could have undertaken in an attempt to accommodate the Complainant.

Counsel submitted that the Respondent's failure to undertake some or all of these proposals constituted a failure to fulfil the duty to accommodate. I am setting forth below each of the proposals advanced by counsel for the Commission together with the evidence and/or response that applies to each of them respectively:

Commission Counsel's Proposal (i):

The Respondent could have met with the Complainant and a representative of the C.U.P.E. union to consider ways in which the Complainant could be kept in the training program.

The Evidence & Response to Proposal (i):

The termination letter included an invitation to the Complainant to call Ms. Stambuck when the Complainant's treatment was over. The Complainant never responded to that request. It would have been futile for the Respondent to meet with the union when the Respondent had not received any expression of interest from the Complainant about returning to the training program.

Commission Counsel's Proposal (ii):

The Respondent could have advanced sick time or holiday time to the Complainant until her discharge date from Pine Lodge could be confirmed.

The Evidence & Response to Proposal (ii):

Under the terms of the Respondent's Collective Agreement with C.U.P.E., sick leave benefits accrued at the rate of 1.25 days per month and annual holiday leave also accrued at the rate of 1.25 days per month. When the Complainant left the training program on August 29th, she had already exceeded her accumulated sick time for the period that she had been in the program. The Complainant had accumulated annual holiday leave of 2.5 days when she left the program. Her total entitlement to annual holidays, if she had remained in the training program for 12 months, would have been 15 days. Her stay at Pine Lodge was expected to be four weeks or working 20 days. The coordinator of the Native Career Development Program had already advised the Respondent that program funds could not be used for anything except paying salaries to trainees for actual training.

Commission Counsel's Proposal (iii):

The Respondent could have attempted to contact the Complainant after her discharge from Pine Lodge for the purpose of exploring any opportunities for her to continue in the training program.

The Evidence with respect to Proposal (iii):

The Respondent's response to (iii) was that the Respondent did not know the Complainant's whereabouts after she was discharged from Pine Lodge. However, there is no evidence that the Respondent made an effort to locate the Complainant's whereabouts. Nevertheless,

the termination letter had explicitly invited the Complainant to contact Ms. Stambuck after the Complainant's treatment was over. The Complainant had not responded to that invitation. In the absence of a response from the Complainant to the first invitation, I find that it would not be reasonable to expect the

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Respondent to make further efforts to contact the Complainant.

Commission Counsel's Proposal (iv):

The Respondent could have made a request for further funding.

The Evidence with respect to Proposal (iv):

The Service Agreement already stipulated the maximum funds that were available for the program. Any additional funds would have required approval from the cabinet of the Government of Saskatchewan. It is highly unlikely that the cabinet would have authorized an additional grant until the initial program had been evaluated. I find that it would not be reasonable to expect the Respondent to pursue that alternative.

Commission Counsel's Proposal (v):

The Respondent could have made proposals to the Native Career Planning Program office that might have had the effect of enabling the Complainant to return to the training program after she regained her health.

The Evidence with respect to Proposal (v):

In cross-examination, Ms. Coates was asked whether Mr. Smith inquired whether the training funds for the Complainant could be put on hold for a one month period. The following questions and answers are recorded at page 382 of the transcript beginning at line 10:

"A He may have, but that was not part of what the program was -- the criteria of the program would not allow for that.

Q Do you have any recollection as to whether or not that was discussed? I'm sorry, you're shaking your head; are you --

A No, I'm trying to think if I recall that being discussed. No, I don't recall.

Q Do you have any recollection as to any other kinds of options or proposals that Mr. Smith presented to you regarding Peggy's situation?

A His question to me was, "What can we do, what will the program be prepared to do?" And the program paid for -- the criteria of the program was to pay for days that the individual was training, not for time away from the workplace, other than statutory holidays. So we didn't pay for rehabilitation or anything like that. And the program monies were set aside for particular training."

Ms. Coates could not recall whether Mr. Smith inquired about putting the funds allocated to the Complainant on

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hold, but Ms. Coates answers clearly indicate that she would not have approved such a proposal. Therefore, I cannot find that it would have been reasonable to expect the Respondent to pursue that alternative.

I do not find that any of the proposals advanced by counsel for the Commission can be regarded "reasonable steps" that the Respondent would have been under a duty to undertake in the circumstances of this case in order to fulfil the duty to accommodate.

Mr. Smith testified that the absence of a trainee from the program would not have had an impact on the delivery of the Respondent's programs and other business activities and it would not affect the progress of other trainees in the program. Nevertheless, he testified that he did have a concern that the prolonged absence of the Complainant could have an adverse impact on the overall program because it could lead to the development of antagonism toward the training program by regular staff if they perceived that different requirements of regular attendance applied to trainees. In the Alberta Dairy Pool, Wilson J. mentioned the effect on staff morale as one of the factors that may be considered as causing undue hardship when considering an employer's duty to accommodate. However, Sopinka J., writing for the court in *Central Okanagan School District 23 v. Renaud*, [1992] 2 S.C.R. 970 stated at 984-85:

"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."

And on page 988, he commented further:

"The reaction of employees may be a factor in deciding whether accommodating measures would constitute undue interference in the operation of the employer's business. In Central Alberta Dairy Pool, Wilson J. referred to employee morale as one of the factors to be taken into account. It is a factor that must be applied with caution. The objection of employees based on well-grounded concerns that their rights will be affected must be considered. On the other hand, objections based on attitudes inconsistent with human rights are an irrelevant consideration."

Mr. Smith's concern about the potential for development of antagonism by regular staff toward the training program does not meet the test laid down by Sopinka J. because no rights of the regular staff were affected. Therefore, Mr. Smith's

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concern in this regard could not relieve the Respondent of a duty to accommodate if I had found that the Respondent had a duty to accommodate.

Financial cost was another potential manifestation of undue hardship mentioned by Wilson J. in the Alberta Dairy Pool case that could be taken into account in determining whether a respondent had satisfied a duty to accommodate. It was suggested on behalf of the Complainant that the Respondent, being a large Crown corporation, had resources of its own to carry on with the Complainant's training program notwithstanding that funds would not be provided by the Government of Saskatchewan under the Service Agreement. However, the evidence of Mr. Smith was that during this period, the budget of the Respondent was being reduced and that regular full time employees were being laid off to meet the reduced budget of the Respondent. I find that it would have been an undue hardship on the Respondent and its regular employees to expect the Respondent to use funds from its regular budget in order to accommodate the Complainant in the manner suggested.

(h) Did the Complainant fulfil her duty to facilitate accommodation?

The Complainant also had a duty to assist in securing an appropriate accommodation and her conduct must therefore be considered in determining whether the Respondent's duty to accommodate has been fulfilled.

To facilitate an accommodation, there must be

communication. After leaving Ms. Stambuck's office on August 29, 1988, the Complainant never attempted to contact Mr. Smith, Ms. Stambuck or any of her supervisors at the C.B.C. to let them know where she was or to inquire whether there was any possibility of rejoining the training program.

The Complainant did not contact Ms. Coates or anyone in the office of Native Career Development to advise them of her whereabouts after August 29, 1988. The Complainant testified that she was stunned when she received the termination letter. Surely, a person who unexpectedly received a termination letter would call the employer and inquire why he or she was terminated. The termination letter specifically invited the Complainant to call Ms. Stambuck when the Complainant's period of treatment was over but the Complainant did not do so. In these circumstances, the Respondent did not know whether the Complainant was even interested in rejoining the training program.

Surely the duty of an employer to accommodate is predicated on the employee responding to invitation to meet with the employer and on the employee expressing some minimal interest in rejoining the program in accommodated circumstances.

(i) Conclusion on the Duty to Accommodate

I have already found that there was no adverse

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effect discrimination and consequently the Respondent did not owe a duty to the Complainant to take reasonable steps to accommodate the Complainant. But if I had found that there was adverse effect discrimination, would the duty to accommodate the Complainant have been fulfilled?

The onus is on a Respondent to demonstrate that the duty to accommodate has been fulfilled. The burden imposed by this onus was described by McIntyre J. in Ontario Human Rights Commission and O'Malley v. Simpsons-Sears, [1985] 2 S.C.R. 536, at pages 558-59:

"Where adverse effect discrimination ... is shown and the offending rule is rationally connected to the performance of the job, as in the case at bar, the employer is not required to justify it but rather to show that he has taken such reasonable steps toward accommodation of the employee's position as are open to him without undue hardship. It seems evident to me that in this kind of case the onus should again rest on the employer, for it is the employer who will be in possession of the necessary information to show undue hardship, and the employee will rarely, if ever, be in a position to show its absence. The onus will not be a

heavy one in all cases, in some cases it may be established without evidence: ... but once the prima facie proof of a discriminatory effect is made it will remain for the employer to show undue hardship if required to take more steps for its accommodation than he has done."

If I had found that there was adverse effect discrimination and a consequent duty to accommodate, I would have found that the Respondent had fulfilled its duty to accommodate the Complainant. The termination letter invited the Complainant to contact the Respondent when her treatment was over. The Complainant never responded to that invitation and never communicated any expression of interest to the Respondent in returning to the training program. The use of the funds provided by the Government of Saskatchewan pursuant to the Service Agreement was restricted both in terms of the purposes for which they could be used and the duration of their availability. It would have been an undue hardship on the Respondent and the Respondent's regular staff to expect the Respondent to use its regular budget to accommodate the Complainant in relation to a training program where the salaries for trainees were provided by the Government of Saskatchewan.

F. SPECIAL PROGRAMS UNDER S. 16 OF THE ACT

Section 16(1) of the Act provides that it is not a discriminatory practice for a person to adopt or carry out a special program designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by a group of individuals when those disadvantages would be or are based on or related to the race, national or

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ethnic origin, colour, religion, age, sex, marital status, family status or disability of members of that group, by improving opportunities for employment (among other things) in relation to that group.

Counsel for the Respondent submitted that the training program in which the Complainant was enrolled was a special program for aboriginal and metis people within the meaning of section 16 of the Act and that therefore it would not be a discriminatory practice if the Respondent did not provide accommodation for persons with a disability. Counsel for the Respondent asserted that the Respondent had other affirmative action programs in which persons with disabilities were favoured.

Counsel for the Commission submitted that whether or not the Respondent's training program is a special program under section 16 of the Act, persons enrolled in the program are still entitled to the protection of the Act including the right to

reasonable accommodation if adverse effect discrimination is established.

Counsel for the Commission also took the position that for a special program to enjoy the protection offered by section 16 of the Act, the program must have support measures that are relevant and appropriate for the persons who are enrolled in the program. Counsel for the Commission also asserted that in the context to the Respondent's aboriginal training program, alcohol dependency was "a disadvantage which was reasonably likely to be suffered by Ms. Vermette as an aboriginal person." Counsel submitted that absence from the training program of support measures specifically directed to persons with an alcohol dependency removed the program from any protection offered by section 16 of the Act.

Counsel for the Commission did not cite any authority to support the proposition that a special program must have appropriate support measures for persons enrolled in the program if the program is to enjoy the protection of section 16. In the absence of any authority, I reject the proposition that such support measures are a prerequisite for a special program. No evidence was tendered before the Tribunal to support the assertion by counsel for the Commission that alcohol dependency was "a disadvantage which was reasonably likely to be suffered by Ms. Vermette as an aboriginal person." Ms. Coates, the Saskatchewan Government's Coordinator of the Native Career Development Program, was asked by counsel for the Commission whether she had any knowledge of alcohol or chemical dependency among people involved with Native Career Development Program. Ms. Coates testified that she rarely encountered aboriginal or metis people who identified themselves as having a chemical or substance dependency or abuse problems.

I find that the Respondent's training program for aboriginal and metis people was an affirmative action program within the meaning of section 16 of the Act. In *Roberts v. Ontario (Ministry of Health)*, (1989), 10 C.H.R.R D/6353 (Ontario

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Board of Inquiry) aff'd 14 C.H.R.R. D/1 (Ont. Div. Ct.), the Board of Inquiry, interpreting comparable legislation, commented, at page D/6374, that such programs need not seek to "... eliminate all forms of discrimination at once ...".

G. DECISION

The complaint is dismissed.

H. REMEDIES

Notwithstanding that I have dismissed the complaint, I

will make some findings with respect to the remedies sought by the Complainant in case the dismissal of the complaint is overturned on a review or an appeal . The Complainant sought the following remedies:

- (a) Lost salary from the period of her termination by the Respondent until she commenced employment with another employer in April, 1989;
- (b) An apology that would be placed on the Complainant's personnel file at the Canadian Broadcasting Corporation; and
- (c) Compensation for hurt feelings.

In addition to these remedies, the Complainant, in her testimony, added that she wanted "changes to the interpretation of `special programs' and the lack of subsequent rights thereof to aboriginal people". However, those are matters that must await either further cases or legislative amendments.

(a) Claim for Lost Salary

With respect to the claim for loss of salary, the Complainant was terminated effective September 2, 1988. She commenced employment with Working Women on April 3, 1989, and continues to be employed by that organization.

Salary that would have been earned at C.B.C. between Sept 2, 1988 and April 3, 1989 (period of 7 months):

Annual salary per letter of appointment. \$24,900.00
Annual salary after increase 3.5% in
accordance with collective agreement
effective July 3, 1988. . \$25,771.50
Monthly salary beginning in August, 1988. \$ 2,147.63

Claim for Salary from Sept 2/88 to Apr 3/89
(7 months @ \$2,147.63 per month). \$15,033.41

A complainant is under a duty to mitigate any loss of wages by attempting to find alternative sources of income. Following her release from the Pine Lodge rehabilitation centre, she went to live in Esterhazy, Saskatchewan where she apparently had some relatives or friends. Esterhazy is a small town and she looked for employment in Esterhazy but was unsuccessful. She also sought employment in the City of Yorkton which was the closest city to Esterhazy. She was unsuccessful in her quest for employment in either of these centres and she did not receive any employment income from the date of her termination by the

Respondent until the commencement of her employment with Working Women on April 3, 1989. She applied for and received unemployment insurance. A print out of the Complainant's 1988

Income Tax Return (Exhibit HR-9) records Unemployment Insurance Benefits being reported for the 1988 taxation year of \$2,328.

The copy of the Complainant's 1989 tax return records Unemployment Insurance Benefits of \$5,936 for the 1989 taxation year. A portion of the Unemployment Insurance Benefits that were reported on the Complainant's 1989 taxation return related to her unemployment in 1988 notwithstanding that the benefits were not received until 1989. The total amount of Unemployment Insurance Benefits attributable to the period from September 1, 1988 until April 3, 1989, was \$8,264. In the circumstances, I find that the Complainant satisfied her duty to mitigate. Consequently, any claim for loss of salary must be reduced by \$8,264.

Claim for lost salary (see above). \$15,033.41
Less U.I.C. benefits(8,264.00)
Claim for Lost Salary\$ 6,769.41

I have dismissed the complaint and I do not make any order for payment to the Complainant of any sum for lost salary or interest thereon.

(b) Apology

I have dismissed the complaint and I make no order with respect to an apology.

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(c) Claim for Compensation for Hurt Feelings

I have dismissed the complaint and I make no order with respect to compensation for hurt feelings.

Dated at Victoria, British Columbia, this 9th day of July, 1994.

Lyman R. Robinson, Q.C.