HUMAN RIGHTS—STATUTORY INTERPRETATION—AFFIRMATIVE ACTION. —In *Canadian National Railway Company, Canadian Human Rights Commission and Action Travail des Femmes*[1] the majority of the Federal Court of Appeal succeeds both in demonstrating how not to read a human rights act and in planting a seed of doubt as to the wisdom of the very idea of affirmative action. Although these accomplishments merit a note for their own sake, our purpose is particularly to address the remarkable absence of any explicit theory of statutory interpretation or affirmative action in the leading majority judgment of Hugessen J.

In 1984, a Tribunal established pursuant to the Canadian Human Rights Act[2] decided that Canadian National had discriminated against women with respect to blue-collar employment in the St. Lawrence Region of Quebec. Because of this history of discrimination, women constituted a negligible seven-tenths of one per cent of Canadian National's blue-collar workforce. Amongst other measures, the Tribunal ordered Canadian National to implement a modest affirmative action program; specifically, to hire one woman for every four job openings until women comprised thirteen per cent of the work force in the targeted occupations, this being the percentage of women employed by other employers in similar jobs across Canada. Canadian National brought application under section 28 of the Federal Court Act[3] before the Federal Court of Appeal, alleging that the Tribunal had exceeded its jurisdiction by ordering the affirmative action program.

The majority of the court agreed with Canadian National. However, Hugessen J. expressed "a certain sense of frustration" in concluding that the Tribunal had gone beyond its powers, since the program did not seem unreasonable. Women can feel a far greater sense of frustration. More

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[1] (1985), 61 N.R. 354 (F.C.A.). Leave to appeal is being sought before the Supreme Court of Canada.

[2] S.C. 1976-77, c.33.

[3] S.C. 1970-71-72, c.1. Under section 2, the Federal Court of Appeal has the power to review decisions of federal tribunals on certain specified grounds.

than a decade after the Royal Commission on the Status of Women documented the inferior economic position of women, the earnings of women employed full-time are still only sixty-four per cent of the earnings of men employed full-time.[4] The frustration of women is warranted, but not the frustration of Hugessen J. His conclusion that the Tribunal exceeded its power by ordering the affirmative action program is unsupportable. He reached that result firstly by ignoring general interpretative principles for human rights statutes, and secondly by misunderstanding what affirmative action is all about.

The Canadian Human Rights Act defines affirmative action programs in section 15(1) and states that they do not constitute a discriminatory practice.[5] The power of a tribunal to order an affirmative action program is contained in section 41(2)(a), which allows a tribunal, once having found that a complaint of discrimination is substantiated against a person, to order:

> That such a person cease such discriminating practice and, in consultation with the Commission on the general purposes thereof, take measures, including adoption of a special program, plan or arrangement referred to in subsection 15(1), to prevent the same or a similar practice occurring in the future.

With this protection of affirmative action programs, and the power given to Tribunals to order them, what could be the problem with the order against Canadian National?

Hugessen J., applying "ordinary grammatical construction", focussed on the last twelve words of section 41(2)(a). A tribunal could only order a program for the purposes of preventing the same or similar practices in the future. It appears that the problem Hugessen J. then perceived with the program was a disproportionality between the twenty-five per cent hiring quota and the goal of thirteen per cent employment of women. Since the means did not have a one-to-one relationship with the goal, the quota, or more specifically the excess twelve per cent, had to be concerned with remedying the effects of past discrimination. On examining the Tribunal's judgment, he also discovered two passages in which, according to him, the tribunal discussed the need for a program in terms of

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[4] Statistics Canada, Women in Canada (1985), p. 61, Table 19. Professional women earn sixty-eight per cent of the income of their male counterparts, while at the other end of the scale, the earnings of women in product fabrication are fifty-four per cent of those of men (p. 62, Table 21). The percentages are based on 1983 statistics, the latest available.

[5] Section 15(1) states:

> It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be or are based on or related to the race, national or ethnic origin, colour, religion, age, sex, marital status or physical handicap of members of that group, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group.

catch-up. From that, he concluded, that "[t]he measure imposed is, and is stated to be, a catch-up provision whose purpose can only be to remedy the effects of past discriminatory practices".[6] But since section 41(2)(a) only permitted orders designed to prevent discrimination in the future, the Tribunal had exceeded its jurisdiction by ordering the program.

To overturn a 175-page tribunal adjudication rooted in weeks of testimony and argument, by hanging everything on twelve statutory words coupled with two brief passages in the decision at first instance, displays little of the curial deference called for in judicial review of specialized tribunals.[7] Such a surprising outcome prompts close scrutiny of the justifications advanced for the reversing opinion. And, when the ideas in the majority judgment in the *Canadian National* decision are unpacked, two major theoretical deficiencies are revealed.

How to Read a Human Rights Act

Ronald Dworkin reminds us that:[8]

> . . . the concept of legislation figures in jurisprudence as what philosophers call a "contested" concept. Theories of legislation are not themselves set out in statutes or even fixed by judicial precedent; each judge must himself apply a theory whose authority for him as for others, lies in its persuasive force.

A judge faced with the Canadian Human Rights Act might begin by asking whether there is anything about the nature of the set of legal rights and corresponding duties set down by Parliament in this piece of legislation that might distinguish it from, say, an act governing the orderly marketing of agricultural products or the tenure of real property. On the other hand, a second judge might approach the matter by arguing for a universal approach to legislative interpretation which would take no account of differences between one kind of statute and another. Hugesson J. seems to have implicitly adopted this latter approach by twice telling his reader that "ordinary grammatical construction" is all that is to be called in aid in reading the statutory provision at hand.

The task ahead of the judge who would advance this second view is no small one. In the way are the doctrines of statutory interpretation which apply to different kinds of statutes, such as penal laws.[9] In addition, there does not seem to be very much left of the so-called "ordinary grammatical construction" canon of interpretation. Driedger points out that:[10]

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[6] *Supra*, footnote 1, at p. 5.

[7] See the dissenting judgment of MacGuigan J., *supra*, footnote 1, at p. 364; and Chouinard J. in *National Banks of Canada* v. *Retail Clerks International Union and Canada Labour Relations Board* (1984), 53 N.R. 203, at p. 207.

[8] A Matter of Principle (1985), p. 320.

[9] E.A. Dreidger, The Construction of Statutes (2nd ed., 1983), pp. 207-208.

[10] *Ibid.*, p. 87.

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

But this is not to argue that our second judge might not engage in advancing a universal theory of interpretation along "ordinary grammatical construction" lines. The common law of statutory interpretation has reached such a state of confusion that no theory of construction can be said to have been definitively ruled out.[11] However, it is to say that context, the object of the act and the intention of Parliament seem to have won a rather secure place in what Driedger calls "the modern principle".

Our first judge, who would strive to make a distinction in kind between a human rights act and an orderly marketing statute, need not feel alone in the wilderness. A start might be made with reference to the special rules of strict construction in favour of the person and against the state which have evolved in dealing with penal statutes. Thus comforted, the judge could take direct guidance from the Supreme Court of Canada in *Insurance Corporation of British Coumbia* v. *Heerspink*.[12] Lamer J., carrying Estey and McIntyre JJ. with him, found the Human Rights Code of British Columbia[13] to be a fundamental law which, accordingly, took precedence over a statutory condition in a fire insurance policy. The particular sentence which leads to this conclusion is instructive.[14]

> When the subject matter of a law is said to be the comprehensive statement of the "human rights" of the people living in that jurisdiction, then there is no doubt in my mind that the people of that jurisdiction have through their legislature clearly indicated that they consider the law, and the values it endeavours to buttress and protect, are, save their constitutional laws, more important than all others.

So there would seem to be something about laws in relation to human rights which places them above other laws, without more from the lawmaker leading to this same conclusion. If this proposition is sound for the purpose of allowing the Human Rights Code of British Columbia to trump a statutory condition in a fire insurance policy, then it would seem to hold that the way in which a judge should read a human rights statute should stand apart from and on higher ground than the grab-bag of

[11] See Eric Tucker, The Gospel of Statutory Rules Requiring Liberal Interpretation According to St. Peters (1985), 35 U. of T. Law J. 113, who goes beyond this point to lament the judicial proclivity of ignoring the statutory guidance given them by both provincial and federal Interpretation Acts which assert that statutes are to be deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained. See s. 11 of the Interpretation Act, R.S.C. 1970, c.I-23, as amended.

[12] [1982] 2 S.C.R. 145, (1982), 137 D.L.R. (3d) 219. Since this note was submitted, McIntyre J., for the full Supreme Court in *Craton* v. *The Winnipeg Teachers' Assoc.* (Sept. 19, 1985, No. 17933), encorsed the opinion of Lamer J. in *Insurance Corporation of British Columbia* v. *Heerspink* giving inherent primacy to human rights legislation.

[13] R.S.B.C. 1979, c. 186.

[14] *Supra*, footnote 12, at pp. 157-158 (S.C.R.), 229 (D.L.R.).

canons, principles and rules of legislative interpretation available to the reader of a garden variety statute.

Does such a position argue only that our first judge should try to take seriously the statutory admonition to give a human rights act a fair, large and liberal interpretation or might it produce a new approach? In *Canadian Odeon Theatres Ltd.* v. *Saskatchewan Human Rights Commission and Huck*[15] the Saskatchewan Court of Appeal has recently expressed the latter view. Vancise J.A., for the majority, goes beyond "fair, large and liberal" and flatly states that the Saskatchewan Human Rights Code[16] should be given "the widest interpretation possible".[17] On the facts before the Saskatchewan Court of Appeal, a great deal turned upon the theory of interpretation to be used by the judges. What was at stake was the meaning to be given to the word "discrimination" as utilized in the public services and facilities section of the Human Rights Code. Michael Huck was a man confined to a motorized wheelchair. He purchased a ticket from the respondent theatre company only to discover that no space was made available to him where his chair might be comfortably parked for the purposes of viewing the movie screen. The respondent strenuously argued that no act of invidious discrimination was entailed in this commercial transaction for Huck was sold a ticket, just like anyone else, and was offered a seat from which to view the film, just like anyone else. He was given equal treatment, the same as offered all able-bodied patrons on the evening in question, so no discriminatory violation of the Human Rights Code could be said to have taken place. The language of the particular section of the Code was of no particular help to the court. It simply spoke of prohibiting discrimination against the physically disabled. What was meant to be conveyed by the presence of the word "discrimination" was, if one stuck to the section itself, as open to the argument of the respondent as it was to that of the complainant.

Vancise J.A justifies giving the widest possible interpretation to the provisions of the Human Rights Code by taking a number of factors into account. He points out that the purposes of the Saskatchewan Human Rights Code speak to broad social goals which have been recognized by Canada in international fora over the years since the passage of the Universal Declaration of Human Rights by the General Assembly of the United Nations. Reference is made to Driedger[18] for the proposition that a statute should be interpreted in light of the social milieu or context existing at the time and the mischief to be remedied. The following "contextual" sentences then appear in the judgment:[19]

[15] [1985] 3 W.W.R. 717 (Sask. C.A.). Leave to appeal to the Supreme Court of Canada was denied, (1985), 60 N.R. 240.

[16] S.S. 1979, c.S24-1.

[17] *Supra*, footnote 15, at p. 735.

[18] *Ibid.*, citing Dreidger, *op. cit.*, footnote 9, p. 243.

[19] *Ibid.*, at p. 736.

> The protection and enforcement of human rights has increasingly become an important national and international goal. Indeed, the province of Saskatchewan has for many years been in the forefront of the protection of human rights and dignity.

The American Federal Civil Rights Act of 1964 is looked to on the ground that it addressed the same phenonmena of discrimination to which Canadian human rights acts spoke and indeed was the forerunner of much of this legislation.[20] Vancise J.A. cites the seminal opinion of Burger C.J., of the United States Supreme Court, in *Griggs* v. *Duke Power Co.*,[21] for the proposition that facially neutral acts, such as "equal treatment", may be a violation of human rights if they have the effect of continuing adverse discriminatory practices.[22]

All of which produces the conclusion that the widest possible interpretation ought to be given to the word "discrimination". Vancise J.A. then rejects the respondent's "equal treatment amounts to no discrimination" argument in the following passage:[23]

> If that interpretation of the meaning of discrimination in s. 12(1)(b) is correct then the right not to be discriminated against for physical disability protected by the Code is meaningless. If that interpretation is correct, I can conceive of no situation in which a disabled person could be discriminated against in the use of accommodation, services or facilities which are offered to the public. If that interpretation is correct, the owner of a public facility, who offers washroom facilities of the same kind offered to the public generally to a disabled person or offers any other services notwithstanding that it cannot be used by a wheelchair reliant person, will then be found to have discharged his obligation under the Code . . . Identical treatment does not necessarily mean . . . lack of discrimination.

In summary, the theory of human rights legislative interpretation adopted by Vancise J.A. in *Huck* leads him to ask the sizable question, what is discrimination all about? And, his answer is sensible. Any other response would defeat the point of including physically disabled persons as a protected class under the Human Rights Code. Our first judge in the *Canadian National* case would reach a similar point. Section 41(2)(a), with its reference to special programs, plans or arrangements, is about affirmative action.[24] The judge would be led to ask, what is affirmative action all about? And, the answer would surely produce an opposite result to that achieved by the majority of the Federal Court of Appeal.

What Affirmative Action is All About

Our first judge could not think about affirmative action in a vacuum but would consider such measures in their context. Canadian society is

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[20] *Ibid.*, at p.738.

[21] 401 U.S. 424 (1971).

[22] *Supra*, footnote 15, at p. 740.

[23] *Ibid.*, at p. 741.

[24] As Hugessen J. recognizes at p. 357 of his judgment, *supra*, footnote 1, special programs are commonly referred to as "affirmative action programs".

split and scarred by social and economic inequalities that do not occur randomly, but correlate to characteristics shared by groups. In the sad hierarchy of our society, non-whites are worse off than whites, women worse off than men, the elderly worse off than the young and middle-aged.[25] And the list goes on.

A central goal inspiring human rights legislation is the amelioration, as a factor in societal patterns and a person's life chances, of the group characteristics such as race and sex that historically have determined social and economic status. But this goal defies easy attainment. If one concentrated only on eliminating the discrimination and resulting inequality experienced by individuals on a one-by-one basis, equality, like a horizon, would never be reached. The egalitarian society which treats its members with equal concern and respect requires for its realization concepts that go beyond the traditional, purely individualistic notions predominant in nineteenth-century thought. Such a concept is affirmative action. It is a group concept based on social theory, for it recognizes that while groups remain excluded from social and economic benefits, their exclusion fuels further inequality. In the Canadian National situation, for example, the miniscule number of women in blue-collar occupations is not only a consequence of societal divisions along the lines of sex, but it reinforces and causes those divisions to continue in the future. Affirmative action seeks to break the circle of cause and consequence. At the same time it is a strategic concept, for it asserts that the long-term goal of reducing the significance of historically detrimental group characteristics can best be achieved by taking those characteristics into account in the short-term.[26]

Our first judge would note that the concept has been embraced by legislators across the country,[27] has been given constitutional approval in the Canadian Charter of Rights and Freedoms,[28] and has been implemented in the United States for a generation.[29]

On turning to section 41(2)(a), the provision authorizing tribunals to order affirmative action programs, the judge would not be convinced by the reasoning of Hugessen J. in striking down the program. Hugessen J.'s decision turns on a dichotomy between using affirmative action programs to remedy past discrimination against a group, and using them to

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[25] Worse off in terms of all the things that count, like power, prestige and money.

[26] This synoposis draws on Dworkin, *op. cit.*, footnote 8, pp. 293-303.

[27] Only Newfoundland and the Yukon Territory do not expressly provide for affirmative action in their human rights legislation. See Russell Juriansz, Survey of Anti-Discrimination Law (1984), 16 Ottawa Law Rev. 117, at p. 162.

[28] Part I of the Constitution Act, 1982, s.15(2).

[29] United States Commission on Civil Rights, Last Hired, First Fired: Layoffs and Civil Rights (1977); Leah Cohen, A Summary of the American Experience with the Federal Contract Compliance Program (1979).

prevent future discrimination. The tenor of his judgment is that these are two separate purposes; because the tribunal's power is stated in section 41(2)(a) as being for the purpose of preventing future discrimination, it cannot order a program for the other purpose of remedying past discrimination. The problem with the reasoning is that no such dichotomy exists.

An order of a program for one purpose will necessarily be an order for the other purpose. The error is to speak in terms of two separate purposes as if a program can only be aimed at one purpose but not the other. Both purposes are what affirmative action is all about, for the concept tries to break the causal links between past inequalities suffered by a group and future perpetuation of the inequalities. It simultaneously looks to the past and to the future, with no gap between cure and prevention. Any such program will remedy past acts of discrimination against the group and prevent future acts at one and the same time. That is the very point of affirmative action.

This point demands repetition if only because more persons than Hugessen J. may misunderstand. When a program is said to be aimed at remedying past acts of discrimination, such as by bringing women into blue-collar occupations, it necessarily is preventing future acts of discrimination because the presence of women will help break down generally the notion that such work is man's work and more specifically, will help change the practices within that workplace which resulted in the past discrimination against women. From the other perspective, when a program is said to be aimed at preventing future acts of discrimination (again by bringing women into blue-collar occupations), it necessarily is also remedying past acts of discrimination because women as a group suffered from the discrimination and are now benefitting from the program.

Our first judge would not see the words of section 41(2)(a), "to prevent the same or a similar practice occurring in the future", as any obstacle to the program imposed by the Tribunal. The words encompass the Tribunal's order because programs cannot avoid being concerned with both prevention and remedy. For the Tribunal to talk twice about the program in terms of remedying past discrimination is for it simply to recognize what is involved with affirmative action. The drafters of section 41(2)(a) did not need to refer to the remedial purpose of affirmative action because it is intrinsically implicit within the concept. The fuller description of purpose in section 15(1) merely renders explicit what is implied.[30]

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[30] The interpretation of s. 15(1) also requires, however, the same approach as s. 41(2)(a) of asking what affirmative action is all about. Its words, particularly the first "or" in the phrase "prevent disadvantages that are likely to be suffered by, *or* to eliminate or reduce disadvantages that are suffered by . . . ", could produce a division between prevention and cure for a judge engaged in ordinary grammatical construction.

Hugessen J.'s concern with the lack of a direct proportionality between the goal (thirteen per cent employment) and the means (twenty-five per cent hiring) would not trouble our first judge. The twenty-five per cent quota, although it remedies past discrimination, is also a measure designed to prevent future discrimination. It cannot be anything else. Indeed, to require a direct relationship between the means and the goal would mean that the prevention of discrimination would occur at glacial speed, if at all. Such an order could not properly be called an affirmative action order. It would be neutral rather than positive in its character, amounting to little more than an admonition to Canadian National that it cease its negative discriminatory practices and not repeat them in the future. Affirmative action entails positive measures aimed at reducing gross inequalities. To require a direct relationship in the order (that is, a thirteen per cent hiring quota) would seriously weaken, if not render nonsensical, the word "prevent" in section 41(2)(a). The quota of twenty-five per cent is a very modest measure in that the most efficacious way of stopping discrimination would have been to require that all hirings be of women, unless this would be impossible, until the goal of thirteen per cent was reached.

Any interpretation of section 41(2)(a) which dichotomizes prevention and cure makes nonsense of the concept of affirmative action.[31] No explanation appears for the drafters intending such an artificial dichotomy. Moreover, what plausible motivation could the drafters have had to force tribunals to look only to the future while the Commission can look to the past as well? We cannot imagine any.[32] Additionally, for Hugessen J. to demand that the tribunal view a program and justify it solely in terms of prevention is not only a misapprehension about affirmative action but is a glorification of form over substance.

One argument Hugessen J. might raise in favour of his interpretation is hinted at in his judgment. He could point out that the merging of prevention and remedy within the concept of affirmative action depends on women as a group being portrayed as the victims of past discrimination and therefore the rightful beneficiaries of the remedial measure. He implies in his judgment that only individual victims can receive restitu-

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[31] In the same way that the "equal treatment is no discrimination" argument is said by Vancise J.A. in *Huck, supra*, footnote 15, to make nonsense of the point of using the word discrimination in a human rights statute.

[32] At best, the motivation is unclear. In Ethics and The Rule of Law (1984), p. 97, David Lyons gives an example of an affirmative action case where the statute is ambiguous. He contends that the judge ought to look to the grounds which "underlie" the legislation not as " . . . a mere matter of historical fact but a normative matter, involving justification". Thus, it is the best construction of the statute which is to be sought. With s.41(2)(a), its best construction in terms of normative justification is that no dichotomy is established between prevention and cure. Similarly, see *supra*, footnote 30, with respect to s.15(1).

tion for past wrongs.[33] But he offers no theory as to why victims are limited to identifiable individuals. The onus is on him to do so, because the logic of the complaint against Canadian National compels the opposite conclusion.

First, the complaint was initiated by Action Travail des Femmes on behalf of women as a group or class. Class actions are permitted under the Act because the problems of discrimination are more frequently group problems, not individual wrongs. It is inconsistent, when the complaint is a class action, for Hugessen J. to insist upon only individual victims.

Second, the nature of the complaint was that Canadian National had engaged in systemic discrimination, which the Tribunal found was substantiated by the evidence. This means that the employment system for blue-collar jobs resulted in the disproportionate exclusion of women *as a group*. Systemic discrimination is a wrong which is inherently group-based, in that in order to determine if it has occurred, one must study the impact of a system on the group as a whole. Sometimes, as with Canadian National, the discrimination will be intentional, but intention is not the essence of the problem. The crux of systemic discrimination is the adverse and disproportionate impact on the group. Finding an individual directly disadvantaged by the system is not necessary to prove systemic discrimination. Indeed, a system of employment discrimination that operates perfectly will never give rise to individual instances of discrimination because women will be deterred from even bothering to apply for the jobs.

The concept of systemic discrimination as one of group wrongs was developed from the same set of concerns that shape affirmative action. Inequalities are not primarily caused by one individual hurting another, but by systems that hurt groups. Systemic discrimination is the way of conceptualizing the problem; affirmative action is the way of conceptualizing the solution.

With the form and nature of the complaint grounded in groups, what theoretical explanation could be advanced for restricting victims, and thus remedies, to individuals? Again, we cannot image any. Hugessen J.'s possible objection that remedies can only be aimed at individuals does not comport with what is going on in cases like the Canadian National litigation. Women as a group are the complainants, the victims of systemic discrimination, and the recipients of redress through affirmative action.

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[33] The complainant, Action Travail des Femmes (an organization with the purpose of promoting the creation of jobs for women), argued before the court that the program could be upheld under s. 41(2)(b), which authorizes compensation for the victims of discrimination, because women as a group were the victims. Hugessen J. at p. 357 of his judgment, *supra*, footnote 1, replied by limiting victims in s. 41(2)(b) to identifiable individuals. Even if such an interpretation is cogent for s. 41(2)(b), arguments are required as to why s. 41(2)(a) should be interpreted in the same manner.

In summation, our first judge, after answering what affirmative action is all about, would give section 41(2)(a) its "widest possible interpretation" and, we submit, its only sensible interpretation. The Tribunal's order would be upheld.

There remains a deeper question with Hugessen J.'s judgment that relates to the wisdom of affirmative action. Despite his professed frustration at striking down the program, he is obviously troubled by the concept, for in discussing section 15(1) of the Canadian Human Rights Act, he states that it "allows the sins of the fathers to be visited upon the sons".[34] By this statement, he casts doubt upon the moral rectitude of affirmative action. On what grounds could Hugessen J. base his concern?

His objection is not framed in utilitarian terms, that the costs outweigh the benefits of the programs. Instead, it is couched in the moral terminology of sins, with the message that innocent sons will pay for the misdeeds of their fathers. He seems to be accepting the argument that affirmative action programs in favour of women constitute discrimination against innocent men, thereby infringing the rights of men to be free from discrimination.

If that is indeed his objection, it appears to merit close attention since rights are involved and we ought to take rights seriously.[35] But on close scrutiny, what rights of men are affected? No one has a constitutional right to demand that affirmative action programs not be implemented in favour of the disadvantaged, because affirmative action has constitutional recognition and protection. No one has the corresponding statutory right either, as affirmative action is expressly permitted by statute.[36]

So the argument cannot depend on any judicially-cognizable rights that would be infringed by affirmative action programs. Maybe the objection is simply that affirmative action is discrimination and morally wrong. This claim is formulated as an equation: Affirmative action equals discrimination. The former concept treats disadvantaged groups differently. Equating affirmative action to discrimination means accepting the view that any deviation from identical treatment constitutes discrimination.

Centuries ago, Aristotle stated that equality entails treating equals equally and unequals differently. Vancise J.A. in the Saskatchewan Court of Appeal repeated the wisdom of Aristotle in 1985. To argue otherwise,

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[34] *Supra*, footnote 1, at p. 358 of Hugessen J.'s judgment.

[35] Dworkin argues that affirmative action is best defended on utilitarian grounds rather than on arguments about the rights of those who benefit. On this footing, the crucial question is whether there exist any right-based, knockdown arguments against such a policy designed to benefit the community as a whole. See Dworkin, *op. cit.*, footnote 8, at p. 5, pp. 293-303.

[36] Except in Newfoundland and the Yukon Territory. See *supra*, footnote 23.

to mount a defence of identical treatment of everyone, will be a sizable task. One cannot assert that everyone is in fact equal, for any casual perusal of society belies such assertion. Until a sound theoretical defence is forthcoming, social policy and moral rightness can remain firmly on the side of affirmative action.

Conclusion

An absence of theoretical perspective can be uncovered in every decision-making institution. But more should be expected from our judges, particularly now that they have the awesome responsibilities of Charter enforcement and can no longer avoid thinking about human rights. Theoretical perspectives on equality must become matters of concern if judges are to be part of the solution in the quest for equality.

DONNA GRESCHNER*
KEN NORMAN*

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LABOUR LAW—LAY OFFS—MASS TERMINATION—NOTICE.—On June 13, 1985 the Supreme Court of Canada rendered the unanimous opinion of seven judges in *British Columbia Telephone Co.* v. *Telecommunication Workers Union*.[1] The court held that section 30(c) of the Canada Labour Standards Regulations[2] was validly enacted under section 60.2(d) of the Canada Labour Code.[3] The union had challenged the validity of the regulation, and the trial court found it to be *ultra vires*.[4] The British Columbia Court of Appeal reversed,[5] and its decision was affirmed by the Supreme Court.

The matter came to court after the British Columbia Telephone Company decided to reduce the total number of hours worked by its employees by fifteen per cent. The union was given the option of having working hours for all employees reduced or permitting lay-offs to occur.

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*Donna Greschner, Ken Norman, both of the College of Law, University of Saskatchewan, Saskatoon, Saskatchewan.

[1] (1985), 85 CLLC 13,034 (S.C.C.).

[2] C.R.C. 1978, c.986, as am. Subsequent to the events that gave rise to the case section 30(c) was renumbered as section 30(d): SOR/82-747, 29 July, 1982. However, it will be referred to in the comment as section 30(c).

[3] R.S.C. 1970, c.L-1.

[4] [1982] 6 W.W.R. 97, (1982), 39 B.C.L.R. 75, 83 CLLC 14,001 (B.C.S.C.).

[5] [1983] 2 W.W.R. 274, (1982), 40 B.C.L.R. 379, 84 CLLC 14,031 (B.C.S.C.).

It opted for the latter, and the employer notified affected employees, as required by the collective agreement, six weeks in advance that they would be laid off on 4 August, 1982. Six days before the lay-off commenced, the affected employees were notified that they would be recalled to work on Tuesday, 1 February, 1983.

Under section 60(1) of the Code an employer is required to give the Federal Minister of Labour sixteen weeks notice in the case of mass terminations, and section 60(4) provides that, except where otherwise prescribed by regulation, a lay-off is deemed to be a termination. The employer had not given notice pursuant to section 60(1), relying on an exemption conferred by section 30(c) of the Canada Labour Standards Regulations. Section 30(c) provides a lay-off is deemed not to be a termination where:

> The term of the lay-off is more than three months and the employer
> (i) notifies the employee in writing at or before the time of the lay-off that he will be recalled to work on a fixed date or within a fixed period from the date of the lay-off, and
> (ii) recalls the employee to his employment in accordance with subparagraph (i).

The union sought a declaration that the regulation was not authorized by the statute, and an injunction to prevent the company from proceeding with the lay-offs until it complied with the statutory requirements. It argued that a central feature of the legislative scheme was that employees should be informed of a pending termination the statutorily mandated length of time before it commenced, whereas the effect of the regulation was to create a situation whereby the employees might be off work for six months before they would know whether their employment was terminated. Although the employer would be in violation of the Act if it failed to recall workers on the date stipulated, the fundamental goal of giving advance notice would be undermined. The Supreme Court recognized the dichotomy created by statute and regulation but held that it was clear that the legislation intended to treat lay-offs differently from terminations and had delegated to the Governor in Council the task of designating the circumstances under which different treatment would be appropriate. There is little reason to argue with the Supreme Court conclusion. Given that the Governor in Council has authority to determine which lay-offs are excepted from the notice requirements, it is not reasonable to expect the court to review the exercise of such a discretion. What I wish to raise in this comment is the justification for treating lay-offs in a special manner, the wisdom of the regulations under the Canada Labour Code and under similar provincial statute and regulations, and some difficulties of enforcing the notice requirement under the Canada Labour Code.

Termination and Lay-off

The federal jurisdiction is one of several Canadian jurisdictions which require employers to give advance notice to government and affected

unions or workers when the employment of a large number of employees is terminated.[6] Labour representatives have lobbied for longer notice periods for group terminations than are required for individual terminations for a variety of reasons. They assert that giving greater notice increases the opportunity to implement measures to assist workers in finding alternate employment without an interruption in earnings. Training, mobility and transfer incentives and the implementation of early-retirement schemes can aid those workers who cannot find immediate alternative employment in the community. Those lobbying for longer notice periods also harbour the hope that if the persons affected by a mass termination have sufficient warning, they will be able to marshall a concerted and effective campaign to reverse the decision.[7]

Studies on the effectiveness of advance notice in accomplishing these goals are rather inconclusive.[8] Evidence indicates that the workers who are most likely to arrange for alternate employment before the end of the notice period are those salaried employees who are able to take time from work to engage in the job search and who also are more likely to have already developed effective job-search skills. Hourly paid production employees may not receive quite as much benefit from the advance notice.[9] The government programs that are likely to be most salutory are those which promote mobility in communities where the one major employer is cutting back or abolishing its workforce. If the workers have specialized skills in a dying industry, retraining programs may be necessary to prepare workers for other employment, and the more quickly these measures are implemented the less difficult the transition will be.[10] The series of statutory provisions requiring advance notice is nevertheless one of the major legislative initiatives for the benefit of the workers in responding to mass redundancy.

There is, however, strong criticism of the provisions. First, employers have forcefully argued that advance notice periods put them in a straight-jacket and thus conflict with the overall public interest that they

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[6] Canada Labour Code, *supra*, footnote 3, s.60; Employment Standards Act, R.S.O. 1980, c.137, s.40(2); The Labour Standards Act, S.N. 1977, c.52, s.53; The Employment Standards Act, R.S.M. 1970, c.E110, s.35.1; The Labour Standards Code, C.S.N.S., c.L-1, s.68(2); Manpower Vocational Training and Qualification Act, R.S.Q. 1977, c.F-5, s.45; Employment Standards Act, S.N.B. 1982, c.E-7.2, s.32(1) (not yet proclaimed); Employment Standards Act, S.Y.T. 1984, c.5, s.57.

[7] One successful attempt at preventing the closing of a business is described in J. Clarke, The VanPly Affair: New Directions in Worker-Management Relations, in G. Lower, H. Krahn (eds.), Working Canadians (1984), p. 200.

[8] J.P. Gordus, P. Jarley, L.A. Ferman, Plant Closings and Economic Dislocation (1981), pp. 124-126.

[9] *Ibid.*

[10] R. Saunders, Permanent Layoffs: Some Issues in The Policy Debate (Ontario Economic Council, 1981).

be able to respond quickly to changing economic conditions. They contend that the decision to terminate often cannot be made sufficiently in advance to enable compliance with the statutory requirement.[11] Secondly, they fear that employees who have received the notice will become less productive. Thirdly, given that the notice period is to facilitate job search by the employees, their success in finding other employment might deplete the employer's workforce before the end of the notice period. This decreases efficiency and greatly complicates any planning for an orderly reduction in the employer's production. Fourthly, the costs involved in giving the longer notice may cause the employer to hire fewer workers than if no notice is required.[12]

A close review of the statutory provisions and the regulations concerning notice of mass redundancy demonstrates the ambivalence of the legislators. On the one hand the legislation appears to impose an onerous duty on employers for the benefit of workers. On the other hand the extent of the duty is bounded by so many caveats that a large number of workers are exempted and a wide variety of circumstances where lay-offs occur do not necessitate the giving of notice. The implementation of the notice requirements appears designed to allow government to assure workers and unions that their concerns are being addressed while at the same time making it clear to employers that the government is not willing to interfere unduly with the making and implementation of decisions concerning the size of the workforce.

The statutory provisions commonly stipulate that they apply only if the employment of a large enough group of employees is terminated within a stipulated time frame, usually four weeks.[13] An employer who staggers the reductions in the workforce so that less than the triggering number are let go in any four week period can avoid the duty to give notice.[14] The statutes also normally exempt the employer from the notice requirement where the employees are in the construction industry[15] or work in an industry regulated by seasonal labour force requirements.[16] Another not uncommon provision limits the employer's duty to give notice where an unforeseeable or fortuitous event frustrates the contract

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[11] M.J. MacNeil, Plant Closings and Workers Rights (1982), 13 Ott. L. Rev. 1, at p. 40.

[12] Saunders, *op. cit.*, footnote 10.

[13] See, for example, Ontario's Employment Standards Act, *supra*, footnote 6, s.40(2).

[14] This is an attractive option for the employer where the number to be let go is just over the number which triggers the advance notice requirements. See Canadian Bar Association, Ontario Branch, Summary of the Labour Relations Section Meeting, May 17th, 1983.

[15] For example, Labour Standards Regulations, Nfld. Reg. 271/84, s.15(f).

[16] For example, Regulation pursuant to the Employment Standards Act, Man. Reg. 261/82, s.1(a).

or makes it impossible to perform.[17] In Nova Scotia, if the lay-off is for reasons beyond the control of the employer, such as where inability to obtain orders for the products of the employer necessitates lay-offs or discharge, and the employer has exercised due diligence to foresee and avoid the cause of the discharge or lay-off, there is no requirement to give notice.[18] This raises the difficulty of determining whether the employer could with due diligence have foreseen the need for terminations. Analysis of a similar statutory provision limiting the duty to give individual notice of termination in Newfoundland led the court to conclude that the employer was required to demonstrate that the problem was unforeseeable to the extent that reasonable notice of termination could not be given.[19] If employees are on strike or are locked out, no notice of mass termination need be given.[20] In at least one jurisdiction, the provisions do not apply if the affected workers are bound by a collective agreement.[21]

A final set of limitations on the duty to give notice which should be examined closely involves situations where the termination is only temporary or where some facet of the employment relationship is maintained. The relationship may be maintained where the employee continues to receive wages or where the employer continues to make payments into benefit plans or pays group insurance premiums on behalf of the employee.[22] Some of the most difficult problems arise, however, where the employer claims that it is not discharging the employees, but rather is laying them off. Lay-offs are differentiated from total termination of the employment contract, and in some circumstances the employer is relieved of the obligation to give advance notice of a mass lay-off.

The statutes usually indicate or assume that lay-offs are to be treated in the same fashion as terminations except in the circumstances explicitly set out.[23] The procedure is then to identify those lay-offs which are exempt from the notice requirements. In Manitoba it is lay-offs of less than eight weeks and those of more than eight weeks where employees are recalled within the time specified by the Minister of Labour.[24] In Ontario, lay-offs of less than thirteen weeks are exempt from the notice

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[17] For example, Ontario's Employment Standards Act, *supra*, footnote 6, s.40(3)(d).

[18] Labour Standards Code, *supra*, footnote 6, s.68(3)(d).

[19] *Jubber* v. *Iron Ore Company of Canada* (1984), 47 Nfld. & P.E.I.R. 335 (Nfld. S.C.).

[20] Termination of Employment Regulation, R.R.O. 1980, Reg. 286, s.2(d).

[21] Regulations Pursuant to Labour Standards Code, O.C. No. 76-1203, Reg. 2(5), as am. N.S. Reg. 17/83 (Nova Scotia). In New Brunswick on the other hand, the duty to give advance notice of mass termination applies *only* when a collective agreement is in effect: Employment Standards Act, S.N.B. 1982, c.E7.2, s.32(1) (not yet proclaimed).

[22] For example, Canada Labour Standards Regulations, *supra*, footnote 2, s.30(1)(e).

[23] Canada Labour Code, *supra*, footnote 3, s.60(4).

[24] Regulation Pursuant to the Employment Standards Act, Man. Reg. 261/82, ss.1(b),(c).

provisions as are lay-offs of longer than thirteen weeks provided the employees are recalled within the time fixed by the Director of Employment Standards.[25] Furthermore, if what would otherwise be the requisite number of employees are being laid off, but they constitute less than ten per cent of the employer's workforce, no notice of mass termination need be given unless the termination is caused by the permanent discontinuance of all or part of the business.[26] As long as the employer has the intention of recommencing operations, it would appear that no notice need be given, even if it results in a lay-off measured in terms of years rather than months.[27]

The Canada Labour Code also provides that, except as prescribed by regulation, a laid-off employee is deemed to be discharged.[28] The regulations, however, indicate that lay-offs are deemed not to be a termination where, *inter alia*, the term of the lay-off is less than three months;[29] where the term of the lay-off is more than three months and less than twelve months and the employee, throughout the term of the lay-off retains recall rights pursuant to a collective agreement;[30] and finally, the circumstances set out in section 30(1)(c), which was the subject of challenge in the *B.C. Telephone* case, *i.e.* where the lay-off is between three and six months and the employer gives notice before the beginning of lay-off of the date of recall and actually goes ahead with the recall. These regulations share with the Manitoba and Ontario provisions the possibility of employees being laid-off for long periods of time without the mass termination provisions applying. They differ, however, in trying to specify all the circumstances where longer lay-offs are deemed not to be terminated, whereas in Manitoba and Ontario, public officials have the discretion in an individual case to fix a period of time within which employees must be recalled. The Canada Labour Code also appears not to provide a remedy to the employees in the event that the employer does not recall them despite the earlier assurance of recall. This point will be addressed later.

Several matters deserve comment with respect to the legislative treatment of lay-offs in this context. The first is the dichotomy between lay-offs and terminations. Although few common law cases considered the issue, lay-offs were treated as analagous to dismissals in that reasonable notice of a lay-off was required.[31] The employer would be in breach

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[25] Termination of Employment Regulation, *supra*, footnote 20, ss.1(a)(i),(ii).

[26] Termination of Employment Relation, *ibid.*, s.5.

[27] *Re Falconbridge Nickel Mines Ltd. & Simmons* (1978), 85 D.L.R. (3d) 297, 19 O.R. (2d) 448 (Ont. Div. Ct.).

[28] *Supra*, footnote 3, s.60(4).

[29] Canada Labour Standards Regulation, *supra*, footnote 2, s.30(1)(c).

[30] *Ibid.*, s.30(1)(f).

[31] *Devonald* v. *Rosser & Sons*, [1906] 2 K.B. 728 (C.A.); *Hanley* v. *Pease & Partners*, [1915] 1 K.B. 698 (K.B.); *Earle et al.* v. *New Brunswick Liquor Control Commission* (1969), 5 D.L.R. (3d) 743 (N.B. App. Div);

of the contract of employment by laying off without reasonable notice unless a term of the contract explicitly or impliedly provided otherwise,[32] or where there was a notorious custom that the employer could lay-off without notice.[33] The legislation defers to the employers' desires by allowing lay-offs to be imposed with little or no warning. Workers are forced to bear some of the costs of the lay-off. Although they may be entitled to unemployment insurance benefits, they must abide the waiting period without any receipt of income, and the level of benefits may be below the rate of wages they had been receiving while working. The employer, on the other hand, will have greater assurance of keeping its workforce intact during the cutback, in part because the employees will have less opportunity to spend time looking for alternate employment.

One should be aware of the difficulty of determining what constitutes a lay-off. Few of the statutes, including the Canada Labour Code, define the term. The British Columbia Court of Appeal in the *B.C. Telephone* case turned to the Shorter Oxford Dictionary as an aid to interpretation.[34] This defined a lay-off as "a period during which a workman is temporarily discharged". However, it is not clear that the term necessarily has the limited temporal content suggested by the definition. For instance, lay-off is defined in the Nova Scotia statute as a temporary *or indefinite* termination of employment.[35] Furthermore, the common use of such terms as temporary lay-off,[36] permanent lay-off[37] and indefinite lay-off indicate that the term "lay-off" itself without a qualifier does not necessarily indicate a limited duration. When used in collective agreements, the term applies both where recall is contemplated and where the termination is expected to be permanent.[38] The mere fact that workers retain recall rights or have an expectation of returning to work does not relieve the employer of the duty to give notice set out in the statute[39] unless the statute or regulations otherwise provide.[40] In parallel, the accep-

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[32] *Greene* v. *Chrysler Canada Ltd.* (1982), 38 B.C.L.R. 347 (B.C.S.C.). The employee was aware that the employer offered a package of lay-off benefits and therefore the lay-off was not wrongful termination of the contract.

[33] This is preserved in Manitoba for terminations generally in the Employment Standards Act, *supra*, footnote 6, s.35(2), which stipulates that the duty to give notice does not apply where there is a general custom or practice in an industry respecting the termination that is contrary to the statutory duty.

[34] *Supra*, footnote 5, at pp. 279 (W.W.R.), 384 (B.C.L.R.), 12,127 (CLLC).

[35] Labour Standards Code, *supra*, footnote 6, s.1(i).

[36] See for example, Termination of Employment Regulations, R.R.O. 1980, Reg. 286 where it is the term "temporary lay-off" that is defined.

[37] Cf. Saunders, *op. cit.*, footnote 10.

[38] I. Christie, Employment Law in Canada (1980), p. 424.

[39] *Freightliner of Canada Ltd.* v. *CAIMAW Local 14, et al.* (1982), 83 CLLC 13,091 (B.C.S.C.).

[40] As is done in s.30(1)(f) of the Canada Labour Standards Regulations, *supra*, footnote 2.

tance of pay in lieu of notice does not constitute a waiver of an employee's recall rights.[41] Lay-offs are usually, but are not necessarily associated with employer action motivated by economic conditions.[42]

For the most part, the lack of definition in the statute does not create a problem. Although the British Columbia Court of Appeal was wrong in concluding that a lay-off necessarily implies a right of recall, the statutes make clear that it is only certain temporary lay-offs that excuse an employer from the duty of giving notice of collective termination. Such temporary lay-offs do contemplate the recall of employees. The problem is that one does not know whether the lay-off has been temporary unless one stipulates a particular time by which the employees must be recalled. Even then, one can determine with certainty whether a temporary lay-off has taken place only at the end of this period of time. This creates two difficulties. Firstly, to the extent that advance notice of lay-off or termination is a significant aid to workers in adjusting quickly to the termination and their changed circumstances, much available time will have passed and the effectiveness of the measure undermined. Secondly, one must consider the appropriate remedy for employees who are thus denied the notice which they should have received.

The first of the above concerns is considerably mitigated to the extent that the temporary lay-offs for which an employer is exempted from giving notice are kept to a minimal length of time. For example, Nova Scotia and New Brunswick legislation exempts the employer from giving notice where a person is laid off for a period not exceeding six consecutive days.[43] As already indicated, Manitoba specifies a period of eight weeks, Ontario[45] and Newfoundland[46] thirteen weeks, the federal jurisdiction three months[47] and Quebec[48] six months. In addition, as already indicated, special circumstances allow the extension of the time up to six or twelve months under the Canada Labour Code. Where the time limit is short, the failure to give advance notice as required does not deprive the

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[41] *Citation Industries Ltd.* v. *United Brotherhood of Carpenters and Joiners of America, Local 1928* (1983), 83 CLLC 16,027 (B.C.L.R.B.).

[42] VI The Oxford English Dictionary (1970), p. 130.

[43] Labour Standards Code, *supra*, footnote 6, s.68(3)(c); Employment Standards Act, *supra*, footnote 6, s.33 (not yet proclaimed).

[44] *Supra*, footnote 24.

[45] *Supra*, footnote 25.

[46] The Labour Standards Act, *supra*, footnote 6, s.46.1, as am. S.N. 1984, c.29, s.1(i). The 1984 amendment changed the length of lay-off for which no advance notice need be given from one week to thirteen weeks. This was done retroactively to 1977 to protect some employers who were facing large claims for failure to provide advance notice.

[47] *Supra*, footnote 29.

[48] Manpower Vocational Training and Qualification Act, *supra*, footnote 6, s.45(d).

employee of the benefits of notice nearly so much as when the violation of the statute is not determinable until a long time after the lay-off commenced. Hence, the extending of the length of a lay-off that an employer is permitted without having to give employees advance notice serves to deprive the legislation of its effectiveness. Although the Canada Labour Code clearly delegated authority to the Governor in Council to determine the length of temporary lay-offs excluded from the notice requirement, it is unfortunate that the exercise of discretion has created the possibility of workers being kept in a state of uncertainty for so long without being informed in advance of the situation.

Remedies

It is not clear that any remedy for employees is provided by the Canada Labour Code for the failure to give advance notice of mass termination. It is true that the employer may be subject to a fine of up to $100,000.[49] In the *B.C. Telephone* case, this would have been less than one day's payroll.[50] However, compensation payable to employees can be ordered only if the violation of the statute is in "respect of the discharge of an employee".[51] The failure to give notice may not fit within that phrase.[52] Hence, the only sanction under the Code itself may, for large employers, be a relatively minor fine that allows them to shut down operations with a minimal penalty.

Most other jurisdictions have a much more powerful incentive to ensure that the employer does not manipulate the concept of lay-off. If employees are discharged without receiving the appropriate notice, they become entitled to be paid the wages they would have received during the notice period.[53] The Ontario statute also makes it clear that it is the employees who are entitled to the notice, not merely the Minister of Labour and the union.[54] Thus, if an employer purported to engage in a temporary lay-off of five hundred employees for twelve weeks, but failed to recall them, it could be liable to pay three million, two hundred thousand dollars assuming the employees earned four hundred dollars per week, on the average.[55] This compensates and also acts as a powerful deterrent. However, it may still be to the employer's advantage not to

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[49] Canada Labour Code, *supra*, footnote 3, s.69(a).

[50] Per Spencer J. *supra*, footnote 4, at pp. 103-104 (W.W.R.), 181 (B.C.L.R.), 12,004 (CLLC).

[51] Canada Labour Code, *supra*, footnote 3, s.71(2).

[52] Per Spencer J. *supra*, footnote 4, at pp. 104 (W.W.R.), 181 (B.C.L.R.), 12,004 (CLLC).

[53] For example, Employment Standards Act, *supra*, footnote 6, s.40(7).

[54] *Ibid.*, s.40(2).

[55] The average industrial wage of December 1984, was $408.55: CCH Labour Notes, Number 799, 29 April 1985, p. 5.

give notice, since it can then delay making the payments until the end of the purported temporary lay-off.

The lack of a specific remedy in the Canada Labour Code for the failure to give notice does not necessarily mean no remedy is available. An initial objection was raised in the *B.C. Telephone* case, claiming that the court had no power to grant a remedy in a civil action for the breach of a statute. The trial judge concluded after an extended discussion that there was such a power.[56] The Court of Appeal stated without discussion that employees would have remedies enforceable by civil action,[57] and the argument was not raised in the Supreme Court of Canada. This conclusion must be carefully considered in light of the pronouncements by the Supreme Court of Canada in *The Queen in Right of Canada* v. *Saskatchewan Wheat Pool*.[58]

In that case, the Canada Wheat Board initiated an action claiming damages incurred when the defendant loaded a ship with insect-infested wheat from its grain elevator. The Board did not claim negligence, but rested its case on the defendant's breach of the Canada Grain Act,[59] which prohibits the delivery of infested grain out of a grain elevator. Dickson J., writing for the unanimous court, reviewed British, Canadian and American authorities on whether a civil action may be brought for injuries caused by breach of a statutory duty. He concluded that where there is no duty of care at common law, breach of non-industrial penal legislation should not affect civil liability unless the statute provides for it. Breach of statute where it has an effect on civil liability should be considered in the general context of negligence. One does not look to the intention of Parliament to determine whether a remedy is available. By working within the general negligence framework, one can at best use the breach of the statute as some evidence of negligence. Either an intentional or negligent failure to comply with the statutory duty may breach the standard of care required by negligence doctrine, but an unintentional, non-negligent breach of the statute does not lead to civil liability.

This does not completely preclude an action for failure to give extended advance notice under the Canada Labour Code. If it were established that the employer had no intention of recalling the employees despite informing them that the work cessation was temporary, or that it failed to take due care in determining whether a recall was likely, the failure to give notice may be actionable. Further, the *Saskatchewan Wheat Pool* decision indicates that a breach of an *industrial* safety statute may lead to

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[56] *Supra*, footnote 4, at pp. 106 (W.W.R.), 183 (B.C.L.R.), 12,005 (CLLC).

[57] *Supra*, footnote 5, at pp. 281 (W.W.R.), 385 (B.C.L.R.), 12,127 (CLLC).

[58] [1983] 1 S.C.R. 205, (1983), 143 D.L.R. (3d) 9.

[59] S.C. 1970-71-72, c.7.

liability without the need to establish fault.[60] Industrial legislation has historically enjoyed special consideration, apparently because policy and conscience dictated that employers in breach of safety legislation should be liable to their injured workers. The many cases cited by Glanville Williams in an article to which Dickson J. referred dealt with safety as opposed to other employment standards that protect security in employment.[61] Whether a duty to give notice is the type of industrial legislation that comes within the ambit of the historical anomaly is doubtful.[62]

The Supreme Court of Canada indicated in *The Board of Governors of the Senaca College of Applied Arts and Technology* v. *Bhadauria*[63] that discrimination in employment because of origin could not form the basis of a civil cause of action. The case may be distinguishable, however, because one of the major factors leading to the conclusion was that the particular statute on which the claim relied provided a comprehensive enforcement mechanism. If the statutory enforcement technique is merely use of a fine in a criminal action, then it is arguable that courts should have jurisdiction to entertain a civil action. This still leaves the question raised by Dickson J.'s statement in *Saskatchewan Wheat Pool* that one must establish a common law duty of care because the breach only goes to the question of the standard of care.[64] This is a particularly troublesome matter because of the courts' reluctance to impose liability for nonfeasance as opposed to misfeasance. Where the statute imposes a positive duty to act to provide a benefit to an employee, such benefit not being a type to which the employee was entitled at common law, there is no cause of action. The refusal to countenance liability outside the existing tort framework has been attacked "as being both arbitrary and paradoxical" since in any given situation the statute will have been enacted because of defects or gaps in existing law.[65] While the Supreme Court of Canada decision provides a major hurdle, it does acknowledge that the neighbour principle has expanded into areas previously untouched by tort law.

Another route for employees seeking compensation for not having received statutory notice is to base the action on the contract of employ-

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[60] However, Dickson J.'s purported exception must be read in light of his general conclusions. The Ontario Divisional Court in *Ryan* v. *Workmen's Compensation Board et al.* (1984), 6 O.A.C. 33 found that there was no exception for industrial legislation which would create a tort for breach of such legislation.

[61] G. Williams, The Effect of Penal Legislation in the Law of Tort (1960), 23 Mod. L. Rev. 233.

[62] See *Beal* v. *Grant* (1984), 52 N.B.R. 163 (N.B.C.A.); *Beaton* v. *Public Service Commission of Canada* (1984), 6 Admin. L.R. 119 (Fed. Ct. T.D.).

[63] [1981] 2 S.C.R. 181, (1981), 124 D.L.R. (3d) 193. See also *Tenning* v. *Government of Manitoba* (1983), 4 D.L.R. (4th) 418 (Man. C.A.).

[64] *Supra*, footnote 58, at pp. 223 (S.C.R.), 24 (D.L.R.).

[65] R.A. Buckley, Liability in Tort for Breach of Statutory Duty (1984), 100 Law Q. Rev. 204, at p. 209.

ment. This requires that the statutory standards be implied into the contract of employment. There are, however, a number of obstacles to this course which may well prevent its safe navigation. Although breach of safety legislation, as we have seen, can be characterized as a tort, it has never been treated as a breach of contract of employment.[66] However, minimum wage laws impose mandatory contractual obligations.[67] It also appears that minimum periods of individual notice become incorporated into the contract so that a dismissal without giving notice would lead to a contractual remedy for the amount of wages that would have been received during the notice period if it had been properly given. The test for determining whether a term should be implied into the contract is supposedly based on whether the parties would have agreed to the matter if they had turned their minds to the question. However, as is pointed out by Rideout,[68] courts have habitually supposed that agreement to exist when policy has suggested incorporating a particular incident into the contract. He specifically refers to the English experience where statutorily required statements of terms and conditions of employment serve as one of the sources of contractual terms.[69] Although this relies on the Contracts of Employment Act 1963,[70] which requires that employees be given a written statement of certain particulars of the terms of employment, the principle is applicable to many statutorily created employment standards.

Where the workers are unionized there is a problem in implying the right to advance notice into the employment contract. If a collective agreement is in effect, there is little scope for the individual contract of employment.[71] Greater difficulties arise when one considers the role of an arbitrator in interpreting and applying a collective agreement. There is doubt whether the arbitrator has the authority to imply terms into the collective agreement or to otherwise enforce positive statutory duties when the parties have not expressly made such duties part of their agreement.[72]

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[66] O. Kahn-Freund, Blackstone's Neglected Child: The Contract of Employment (1977), 93 Law. Q. Rev. 508, at p. 527.

[67] This may be because of the express wording of the statute: for example, the Ontario Employment Standards Act, *supra*, footnote 6, provides that every employer "shall be deemed to have agreed to pay the employee at least the minimum wage established under this Act". See also *Stewart* v. *Park Manor Motors Ltd.*, [1968] 1 O.R. 234 (Ont.C.A.), where it was held that a statute requiring the employer to pay vacation pay introduced a further contractual term into the contract of employment even though this was not expressly stated in the statute.

[68] R. Rideout, J. Dyson, Principles of Labour Law (4th ed., 1983), p. 28.

[69] *Ibid.*

[70] Now the Employment Protection (Consolidated) Act 1978, s.1 (U.K.).

[71] *McGavin Toastmaster* v. *Ainscough*, [1976] 1 S.C.R. 718, (1975), 54 D.L.R. (3d) 1.

[72] B. Langille, Labour Law is a Subset of Employment Law (1981), 31 U.T.L.J. 200, at p. 225.

The importance of access to civil remedy should not be underestimated. In the *B.C. Telephone* case, the trial judge was willing to grant an injunction to prohibit the lay-offs until the notice period had elapsed. Given the extensive consultation process that is now required under the Canada Labour Code,[73] workers and union may be able to exert a great deal of influence which will soften the impact of the decision or even delay or cancel the employer's initiative. Although the statute's treatment of lay-off is such that an injunction will not be an appropriate remedy where the employer purports to engage in a lay-off which does not require advance notice, it could be used where the employer merely ignores its statutory duties. Where the injunction is not appropriate, a large payment based on wages that would have been earned during the notice period provides compensation to the workers and acts as a powerful deterrent.

It would be most desirable to have legislation which protects the interests of workers in a more straightforward manner. Employers should not be permitted to engage in long lay-offs without having to give suitable notice. The right to a civil remedy should be explicitly set out. The rhetoric of employee protection will then be more than mere rhetoric.

MICHAEL J. MACNEIL*

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[73] *Supra*, footnote 3, ss. 60.1-60.31, as added S.C. 1980-81-82-83, c.89, ss. 32,33.

*Michael J. MacNeil, of the Department of Law, Carleton University, Ottawa, Ontario.