T. D. 3/ 87 Decision rendered February 17, 1987

THE CANADIAN HUMAN RIGHTS ACT (S. C. 1916- 71, c.- 33, as amended)

HUMAN RIGHTS TRIBUNAL

BEFORE: Robin M. Elliot

BETWEEN:

MAUREEN STANLEY, OLWYN HOWELL, HAZEL JONES, LESLEY MAGERA
Complainants AND:

ROYAL CANADIAN MOUNTED POLICE Respondent

DECISION

APPEARANCES:

SHEILA GRECKOL and JUNE ROSS for the Complainants and the Canadian Human Rights Commission ARNOLD FRADKIN for the Respondent >

The complainants in this case, Maureen Stanley (now Reville), Olwyn Howell, Leslie Magera and Hazel Jones, allege that they are the victims of sex discrimination by the Royal Canadian Mounted Police (hereinafter "R. C. M. P."). This allegation is based on the application to them on January 16, 1981 of the R. C. M. P. 's long standing policy that prisoners held in R. C. M. P. lock- ups must be guarded by persons of the same sex. Prior to that date, and in breach of that policy, each of the complainants had been working for the R. C. M. P. at a lock- up as a guard looking after male as well as female prisoners. Maureen Reville, Olwyn Howell and Leslie Magera had been doing so at the lock- up at Grande Cache, Alberta and Hazel Jones had been doing so at the lock- up at Jasper, Alberta. After January 16, 1981, the work each of the complainants had at these lock- ups fell off dramatically because very few female prisoners are held in these lock- ups.

The hearing in this case was a lengthy one, taking up seventeen days on the evidence alone. By agreement, and due to extenuating circumstances (the sudden hospitalization of Mr. Fradkin, counsel for the R. C. M. P., on the eve of oral argument), the submissions of the parties were made in writing.

These, too, were lengthy, totalling some 550 pages. The issue in this case was clearly seen by the parties to be one of great importance.

This award is divided into three main sections. Part I deals with the evidence that was adduced and Part II with the legal framework within which I believe the evidence in a case of this nature should be analyzed. In Part III, I apply the framework outlined in Part II to the evidence described in Part I.

> PART I. THE EVIDENCE The evidence adduced in this case was directed at a wide range of matters. In order to reduce it all to manageable form, I propose to summarize it under a number of different headings. These headings are as follows: 1. The Complainants' Employment Histories; 2. R. C. M. P. Lock- ups; 3. The Fresh Arrest; 4. The Need for Tight Security; 5. The Duties of a Guard; 6. The R. C. M. P. Same- Sex Guarding Policy; 7. The Nature and Frequency of Opposite Sex Viewing; 8. The Effect of Opposite Sex Viewing; 9. Cross- sex Guarding in Canadian Correctional Institutions; 10. The Beneficial Effects of Having Females in Male Institutions; 11. Prisoner Complaints; 12. Modesty Barriers; 13. The Canadian Criminal Justice Association.

1. The Complainants' Employment Histories Maureen Reville was hired by the Grande Cache Detachment to guard both male and female prisoners. in 1978, and did so until January 16, 1981 when a directive from R. C. M. P. headquarters indicated that prisoners in R. C. M. P. lock- ups had to be guarded by persons of the same sex. After January 16, 1981, she was permitted to guard male prisoners for a short time because no male guards were available. After that work was terminated she did very limited duty guarding female prisoners. She stopped working for the R. C. M. P. in 1983.

Olwyn Howell was hired by the Grande Cache Detachment in March, 1980 to guard both male and female prisoners, and did so until January 16, 1981. Like Maureen Reville, and for the same reason, she

> - 2 was permitted to continue guarding male prisoners for a brief period thereafter. She also continued guarding female prisoners, although her hours of work were substantially reduced. In 1985, she took on a full- time position as a correctional officer in a provincial institution in Grande Cache.

Leslie Magera guarded both males and females at Grande Cache for the period January 4 to January 16, 1981. She, too, continued to guard male prisoners for a short time thereafter. She ceased working for the R. C. M. P. in April of 1981.

Hazel Jones worked at the Jasper lock- up from 1975 until 1983. Prior to June of 1980, she guarded female prisoners only and the work was infrequent. From June of 1980 until January 16, 1981 she guarded both male and female prisoners, and she worked full time. After the latter date she reverted to part- time work guarding female prisoners. She left the employ of the R. C. M. P. in 1983.

The complainants indicated that, to the best of their knowledge, they performed their duties as guards in an entirely satisfactory manner.

2. R. C. M. P. Lock- ups The R. C. M. P. has over 700 detachments across the country. Persons who have been placed under arrest by the R. C. M. P. are brought to the facility that houses one of these detachments and held in the lock- up area that forms part of it. The normal length of stay in the lock- up is several hours, although some people are held for a number of days. The function of the lock- up is to keep these people (who throughout the

> - 3 hearing were called "fresh arrests") in protective custody until their first court appearance or, in the case of many of the intoxicated persons held in the special "drunk tanks", until they are released. Sometimes persons who are remanded by the court or who are on trial will be kept in a lock- up but this is highly unusual and only happens if no other holding facility is available in the area. On occasion, convicted persons have been known to serve a weekend sentence in a lock-up, but this too is highly unusual.

In terms of layout, the lock- ups at Grande Cache and Jasper were said to be representative of those in all other detachments, the only difference being that in major urban centres there are many more cells than there are at these two (Grande Cache has four and Jasper six). There is a guard room in which the guard is based. The cell areas, which are separated from the guard room by a solid door, include the cells themselves and a walkway which contains open shower facilities. There are separate cell areas for males and females. In the case of the male cell areas, it is possible to view the cells from the guard room through a window, although the window is normally covered by venetian blinds or something similar.

Each cell is made of cement and has a grille front (steel bars from ceiling to floor and from side to side). With the exception of the "drunk tank", a special cell designed to house persons who are severely intoxicated, each cell contains a double bunk, a sink and a toilet. The "drunk tank" has nothing in it apart from a hole in the floor. The cells are completely open to view to anyone in the cell

> - 4 area, as therefore are the toilets. In fact, in some cells the toilet is just inside the grille front.

3. The Fresh Arrest Both the respondent and the complainants called experts to testify about the feelings of a typical male who has just been brought into a lock- up. The respondent's experts were Mr. Paul Williams, Mr. Josh Zambrowsky, Dr. Bruno Cormier, Dr. Stephen Hucker and Dr. Basil Orchard. The complainants' experts were Dr. Selwyn Smith and Dr. John Brooks. It is useful here to set out the qualifications and experience of each of these experts.

Mr. Williams is currently the Executive Director of the John Howard

Society in Montreal. Prior to taking up that position, he had worked for some 20 years as a psychologist in the corrections field. Mr. Williams has had extensive experience with incarcerated prisoners, largely through his work with the Canada Penitentiary Service in the 1960's and 70's. From 1964- 1969 75% of his work involved seeing prisoners on remand.

Mr. Zambrowsky has a graduate degree in criminology, and is a clinical criminologist. He is currently the Executive Director of the Canadian Criminal Justice Association. He has also been the Executive Director of the John Howard Society in Quebec and spent five years with the McGill Clinic in Forensic Psychiatry. Mr. Zambrowsky estimated that he has seen in excess of 1,000 prisoners in remand situations and stated that he has had experience counselling and doing therapy with a wide range of prisoners.

> - 5 Dr. Cormier is a psychiatrist, psychoanalyst and forensic clinical criminologist. He is currently Director of the McGill Clinic in Forensic Psychiatry and was formerly Director of

Psychiatric Services at St. Vincent de Paul Penitentiary. In the latter position Dr. Cormier saw a very large number of prisoners, including many on remand.

It should be noted that both Mr. Williams and Mr. Zambrowsky have worked with Dr. Cormier at the McGill Clinic in Forensic Psychiatry and at a New York prison being run under the auspices of that clinic. Mr. Williams has helped Dr. Cormier write articles and both Mr. Williams and Mr. Zambrowsky have contributed to Dr. Cormier's book on prisons and prison guards, The Watcher and the Watched. Dr. Cormier admitted that all three share the "same general approach to corrections".

Dr. Hucker is a forensic psychiatrist and is currently chief of the Forensic Service Group at the Clarke Institute of Psychiatry in Toronto. In his capacity as a forensic psychiatrist he has seen a large number of inmates, although only one or two dozen in the last five or six years. Some patients at the Clarke Institute are at the pre- trial and pre- sentence stage.

Dr. Orchard is a psychiatrist with the forensic clinic at the Clarke Institute of Psychiatry. He has worked with prisoners in police stations, provincial correctional centres and regional detention centres for the last 18 years.

Dr. Smith is psychiatrist- in- chief with the Royal Ottawa Hospital. In this capacity, he has liaisons with the Ottawa- Carleton Regional Detention Centre, the courts and the Parole Board, all of whom refer

> - 6 individuals to him for psychiatric assessment. He is President of the American Association of Psychiatry and the Law and is a member of an advisory group to the Federal Corrections Commission on matters of health care delivery.

Dr. Brooks is a forensic psychiatrist. He worked for three years in the Forensic Department of the Alberta Hospital where one of his functions was to assess people on remand from the courts. He would also go to the city jail and inspect fresh arrests that the police suspected were mentally unstable.

Currently, Dr. Brooks is in private practice where 65% of his files are forensic.

The evidence given by these experts in relation to the feelings of a typical male who has just been incarcerated in a lock- up was very similar: fear, anger, frustration, anxiety, helplessness, vulnerability, humiliation, shock, loss of self- esteem and despair were the descriptive terms that were commonly used. These feelings were attributed to a variety of things uncertainty as to the disposition of the charge, being cut off from family and friends, the fact of incarceration, public exposure of the fact of the arrest and the loss of privacy. Being seen in states of undress or using the toilet by anyone was said by the respondent's experts to be particularly disquieting; the complainants' experts recognized that this would be a problem to many prisoners but did not see it as being as important a problem as the respondent's experts. For example, Dr. Brooks saw public exposure of the fact of the arrest as being of greater concern to a fresh arrest.

> - 7 Dr. Smith, the complainants' other expert, emphasized that it was difficult to generalize about the feelings of fresh arrests and suggested that some fresh arrests might not suffer very much stress. I did not understand the respondent's experts to take issue with this proposition. Their point was - and this seemed to be accepted by both Dr. Smith and Dr. Brooks - that for a great many fresh arrests the time in a lock- up is a time of considerable stress.

4. The Need for Tight Security The fact that, for a great many prisoners, the time they spend in a lock- up is a time of considerable stress means that the prisoners in a lock- up must be kept under very close supervision. To emphasize the need for close supervision the R. C. M. P. adduced evidence showing that 264 suicides had been attempted in the past four years in 56 detachments, 202 of which were attempted hangings. R. C. M. P. witnesses also noted that, as a rule, when fresh arrests are brought into the lock- ups very little is known about them in terms of past history and mental state. Predicting who will and who will not be likely to attempt to commit suicide is therefore virtually impossible.

The R. C. M. P. also adduced evidence to the effect that, while attempted suicide was by far the most important security concern in the lock- ups, there were other concerns as well. The hiding of contraband, the fashioning of weapons, the planning of escapes and tatooing were all mentioned in this regard.

> - 8 5. The Duties of a Guard

The duties of a guard in an R. C. M. P. lock- up are set forth in written instructions that are prepared by a senior officer in the detachment for which the guard works. These written instructions are intended to put into effect the broad policy guidelines established by R. C. M. P. headquarters.

The written instructions applicable to the three complainants that were employed to guard male prisoners at the Grande Cache lock- up were as follows:

1. It will be the duty of the guard to see that the Detachment Cell remains securely locked at all times during his tour of duty and that no prisoners are given the opportunity to escape. The cell door is to be unlocked ONLY in the case of extreme emergency or fire. The outside door to the Detachment office is to remain locked between the hours of 6: 00 p. m. and 9: 00 a. m. Should a person come to the door and wish, to enter the office, a member of the detachment will be contacted immediately. Conversation with a visitor shall be through the locked office door.

2. No prisoner will be allowed visitors other than between 14: 00 16: 00 hours daily. No prisoner will be given any parcel or clothing by the guard. No prisoner will be allowed to keep matches in his/ her possession in the cell. No prisoner will be permitted to smoke in cells - prisoners may be given their cigarettes when being interviewed by lawyer or having visitors.

3. In the event that a prisoner or mental patient attempts to commit suicide or develops serious or unusual illness, a Member of the detachment will be contacted immediately.

4. The guard will remain awake and alert at all times and will Check the prisoners every 15 minutes and record action - sleeping, etc.

5. The guard will under no circumstances entertain company, male or female during his/ her duty hours.

6. Any unusual circumstances with regard to the prisoner or premises during the night guards tour of duty will be brought to the immediate attention of a member of the detachment. Guards will also remind detachment members on duty to sign guard/ prisoner book prior to going off duty, after checking prisoners.

> - 9 7. In the event of fire being discovered on the premises during the guard's tour of duty, he will advise the member in charge immediately and in the absence of the member in charge, a member of the detachment. Prompt action will be taken to secure the safe custody of the prisoners. In event of fire or attempted suicide the guard's primary responsibility is "Preservation of Life" and secondly security of the Prisoner(s). In these situations the guard should immediately notify a member of the detachment and obtain his assistance.

- DO NOT WAIT FOR ARRIVAL OF MEMBER IF LIFE IS ENDANGERED. - PROCEED DIRECTLY INTO CELL AND ASSIST PRISONERS TO SAFETY. - BE AWARE THAT PRISONERS MAY SOMETIMES CAUSE FIRE ETC. OR SIMULATE

MEDICAL PROBLEMS IN ORDER TO ESCAPE. - ENTRY INTO CELLS BY GUARD/ MATRON WITHOUT MEMBER PRESENT WILL ONLY

BE DONE WHEN PRISONER" S SAFETY IS ENDANGERED AS OUTLINED ABOVE. 8. Night guards will familiarize themselves with Post Order No. 6 relating to Fire Orders.

9. Guards and/ or Matrons will remain in the "Guards Station", i. e., the counter area of the cell block during their tour of duty. This will ensure that guards/ matrons are in close proximity to persons in their

care. Guards/ matrons will not sit in general detachment office during their tour of duty.

The written instructions applicable to Hazel Jones, the complainant who was employed at Jasper, contained one or two paragraphs not found in this set, and used wording that is different even in the common paragraphs, but there are no substantial differences between the two. It is clear from both that the guard's primary responsibility is to maintain security in the lock- up.

Although not mentioned in either set of written instructions, the evidence indicated that guards are also expected to supervise the prisoners when they are taking showers. However, when the prisoners they were guarding were male, the complainants were not permitted to perform this duty, which was performed by male R. C. M. P. officers. The complainants did not therefore actually handle male prisoners on their own.

> - 10 Of particular importance in this case is the obligation of the guards in R. C. M. P. lock-ups to observe the prisoners and ensure that they are safe and secure in their cells. Guards are expected to enter the cell area to make these observations and to check carefully on each prisoner. The evidence indicated that the policy relating to the frequency of such tours of observation has changed over time and that they are now made more frequently than they used to be. One change - from once every 30 minutes to once every 15 minutes - was made during the late 1970's while Ms. Reville and Ms. Jones were working at Grande Cache and Jasper respectively. The evidence also indicated that the R. C. M. P. has attempted in recent years to ensure that the tours of observation are not conducted at regular intervals. In February of 1985 R. C. M. P. headquarters stipulated that the tours had to occur "at staggered intervals so that a regular pattern of checks does not become apparent". Then, in June of 1985, as a result of growing concern about the number of suicides and attempted suicides in the lock- ups, the wording in the policy was changed to "monitor cell prisoners continually".

6. The R. C. M. P. Same- Sex Guarding Policy Evidence of the history of, and rationale for, the R. C. M. P. 's policy of requiring prisoners in lock- ups to be guarded by persons of the same sex was given by Superintendent Derek Barker, the officer in charge of administering the agreements pursuant to which the R. C. M. P. performs policing functions for provincial and municipal governments. He explained that the R. C. M. P. has always had a policy of requiring

> - 11 that the guards who work in lock- ups be of the same sex as the prisoners they are responsible for. In its current form the policy, which is contained in the R. C. M. P. Operational Manual, reads as follows:

All prisoners shall be continuously guarded by a person of the same sex. Superintendent Barker noted that the R. C. M. P. has been hiring female officers since the mid- 197O's and that those officers perform all of the same duties as male officers with respect to male prisoners with two exceptions.

One of these relates to the searching, of male prisoners and the other to escorting male prisoners from one place to another. These two duties must be performed by male officers when the prisoners are male.

According to Superintendent Barker, R. C. M. P. detachments in the province of Alberta were having difficulty in the late 1970's finding enough males who were interested in working as guards in their lock- ups. He attributed this problem to the fact that the economy of this area was booming at that time, with the result that men were able to find better jobs elsewhere. Whatever the reason for it, it led the Alberta division of the R. C. M. P. in mid- 1979 to telex R. C. M. P. headquarters in Ottawa and ask for permission to hire women to fill the vacant positions. (It will be noted that Grande Cache had already had Maureen Reville guarding male prisoners for some time when this telex was sent.) Without obtaining authority from Superintendent Barker, someone at headquarters sent back a reply indicating that the same- sex guarding policy, which was then worded as follows:

> - 12 Where a prisoner is in custody or under escort, a guard of the same sex will be on duty,

could be interpreted to allow females to guard males providing a male R. C. M. P. officer was on duty in the detachment. It was presumably on the basis of this reply that Olwyn Howell; Leslie Magera and Hazel Jones were used to guard male prisoners.

Superintendent Barker testified that he was unaware of the existence of the reply to the Alberta division until after these proceedings commenced, and that he was unaware that females had been hired to guard male prisoners until some time in 1981.

Upon receipt of the request from Alberta in mid- 1979, Superintendent Barker proceeded to study the question of whether the same- sex guarding policy should be revised in light of the problem raised by the Alberta division to allow for certain exceptions to be made. However, in November of 1980, the decision was taken by the Senior Executive Committee at R. C. M. P. headquarters to retain the policy. On the basis of that decision, instructions were sent out to all the divisions in the country to adhere to the policy. These instructions were received by the Grande Cache and Jasper detachments in January of 1981.

Superintendent Barker indicated that the reason for the same- sex guarding policy was the need to respect community standards relating to personal privacy. He said that the R. C. M. P. was concerned that if it not live up to these standards, it would be subject to complaints and criticism. He stated that he has always believed that personal privacy and human dignity must be respected to the greatest degree possible in

> - 13 the lock- ups. In his reply to a request from the investigating officer from the Canadian Human Rights Commission, he gave as additional reasons for the policy the need to treat female and male prisoners equally (the assumption being that males could definitely not be permitted to guard female prisoners) and a concern that female guards would be more vulnerable than male guards to

being physically overpowered by male prisoners. Even in that reply, however, the emphasis is on concerns about privacy and dignity and it was on those concerns that he focused in his evidence at the hearing.

During cross- examination Superintendent Barker made it clear that the study he performed after receiving the telex from Alberta was limited to determining how widespread the problem raised in that telex was - in other words, to determining how many detachments were finding it difficult to hire males to guard male prisoners. The study did not extend to investigating the extent to which the policy had been violated, to the experience in those detachments in which it had been violated (he himself did not know at the time about the Grande Cache and Jasper violations) or to the possibility of using modesty barriers in the cells to accommodate the concern about inmate privacy.

7. The Nature and Frequency of Opposite Sex Viewing A considerable body of evidence was adduced by both parties on the number of times that guards in R. C. M. P. lock- ups see male prisoners in states of undress and using the toilet. In the case of the complainants, this evidence came from them and from another female who had had experience guarding male prisoners in the Grande Cache lock- up,

> - 14 Ms. Myrna McNutt. In the case of the respondent, this evidence came from a number of male guards with experience looking after male prisoners in R. C. M. P. lock- ups.

The evidence given by the male guards indicated that prisoners are observed using the toilet with some regularity. Most of these guards spoke of seeing several prisoners using the toilet on each eight hour shift. These guards also indicated that it was common to see prisoners in various stages of undress and sometimes completely nude. Many prisoners sleep in their briefs, they said, and on court days it was customary for prisoners to change clothes.

The evidence on this point given by the complainants and by Ms. McNutt was in sharp contrast to that given by the male guards. Maureen Reville stated that she had only once seen a male prisoner using the toilet and that that was from the guard room looking through the window in the door between it and the cell area. (She said that she only actually went into the cell area on her tour of observation if she had reason to believe that something might be wrong. Otherwise she would observe the prisoners from the guard room.) When asked to explain why she would not have seen this more often she said that the prisoners seemed to know when she was coming "and so, they either went before, or they waited". (She did say, however, that she did her tours like clockwork" - i. e., precisely every 30 or 15 minutes depending on the policy then in effect.) She also noted that much of her work was done on the night shift when the prisoners were sleeping. At another point in her testimony she stated that prisoners would on occasion ask that the door between the cell area and the guard room be closed.

> - 15 Ms. Reville stated that she had only seen two male prisoners who were not

fully clothed. On one occasion she saw a prisoner asleep with his pants around his ankles and on another she saw a prisoner standing in his cell with nothing but his briefs on.

Olwyn Howell stated that, although she had seen one or two female prisoners using the toilet, she had never once come across a male prisoner using the toilet when she was in the cell area. Her explanation for this was that she could hear if a male prisoner was using the toilet and would wait until he had finished before making her observation. She, too, indicated that most of her work with male prisoners was done on the night shift. Ms. Howell said that she had only once seen a male prisoner who was not fully clothed and that that occurred at night when a prisoner’s pants slipped down around his knees.

Leslie Magera stated that she had never seen a male prisoner using the toilet and that the one prisoner she saw who was not fully clothed was simply without a shirt.

Hazel Jones testified to having "occasionally" seen male prisoners using the toilet. She noted that she could see enough of one of the cells through the window between the guard room and the cell area to know if the prisoner in that cell was using the toilet, and would check to see if he was doing so before entering. She also noted that, on occasion, male prisoners would ask to leave the door between the cell area and the guard room shut so that they could use the toilet in privacy. She stated that she had seen only one male prisoner in a state of undress and that that occurred when he was getting out of bed in the morning with his briefs on.

> - 16 Ms. McNutt was employed at Grande Cache from March, 1978 until the middle of 1980 to guard both male and female prisoners. Her evidence was that she never came across either a female or a male prisoner using the toilet during that time. She recalled that one male prisoner had asked her to leave the cell area as she was doing her tour of observation so that he could go to the bathroom. When asked why she thought she had not seen any prisoners using the toilet she surmised that the prisoners "were usually drunk and they would pass out for the night". She also said that "they knew we had the half hour to go in and look on them, most of them, so they had plenty of time to go if they had to". She stated that she had never seen a prisoner in a state of undress, even though she worked the night shift most of the time.

In addition to adducing evidence on the number of times guards in lock- ups see prisoners in states of undress or using the toilet, the parties adduced evidence on what might be called the degree of intrusiveness of the viewing that occurs when a guard does see a prisoner in such circumstances. Maureen Reville said that she simply withdrew from the window on the one occasion on which she saw a male prisoner using the toilet. Hazel Jones stated that it was her practice when this occurred to excuse herself and leave the immediate area. She did say, however, that she would ensure that the prisoner was not harming himself before excusing herself.

The evidence given by the male guards who testified on this point indicated that when they saw a prisoner using the toilet they would first ensure that the prisoner was safe and secure and not up to something devious, and then move on. One or two stated that it was

> - 17 important to see the prisoner's hands in such circumstances. A number of them indicated that, even if the prisoner was on the toilet, it was necessary to check to see that the cell itself was in proper order.

Mention should also be made at this juncture of the practice of the R. C. M. P. to strip naked prisoners who look as if they might attempt to commit suicide. According to the lock- up guards who testified about this practice, such prisoners are not issued blankets and are kept under close scrutiny (although it appears that medical help is not generally sought). It is clear that, if the guard in such circumstances were female, the prisoner would be observed with some frequency in the nude by her.

8. The Effect of Opposite Sex Viewing A good deal of expert evidence was led on the effect on male prisoners of being viewed in states of undress and using the toilet by female guards. The respondent's experts were all of the view that the effect would be a negative one. Mr. Williams described this negative effect in terms of accentuating, to a greater degree than if the prisoner were viewed in such circumstances by a male guard, the feelings of anger, frustration, lack of control and depression commonly suffered by fresh arrests. He suggested that some prisoners might react by suffering a psychological withdrawal or by aggressing, either against others or against themselves.

Mr. Zambrowsky said that male prisoners would be "extremely uncomfortable to be scrutinized with respect to the private bodily functions by members of the opposite sex", and that the degree of

> - 18 discomfort would "definitely" be higher than if the viewer was of the same sex as the prisoner. He added that, in his view, the number of times a prisoner was viewed was irrelevant. As he put it, "the reduction of the probability [of being viewed] doesn't alter the basic situation". Only if the possibility of being viewed "did in fact not exist" would the situation change, he said.

Dr. Orchard's opinion was that being viewed by a female guard rather than a male guard "increases the vulnerability tremendously and the humiliation and the feeling of degradation. It is an enormous magnification of that effect". Dr, Hucker stated that being viewed in states of undress or using the toilet by members of the opposite sex would "heighten the embarrassment" that would be suffered if the prisoner were viewed by someone of the same sex. Dr. Cormier expressed the opinion that there was a great deal of difference between being viewed in states of undress or using the toilet by a guard of the same sex and a guard of the opposite sex, at least for the great majority of people.

One of the complainants' experts, Dr. Brooks, agreed that most male prisoners would be embarrassed to be seen in states of undress and using the toilet by a female and that it would cause them some anxiety. The other, Dr. Smith, was of the view that the gender of the guard was irrelevant and that what mattered was the personality and attitude of the guard. However, in this regard he appeared to draw a distinction between being viewed on the

toilet and being viewed while showering. He seemed to accept that a male prisoner who was observed while

> - 19 showering would react differently if the guard were female rather than male. The experts who said that there was a difference between being viewed by someone of the same sex and someone of the opposite sex clearly saw as the reason for the difference the practice in our society of respecting the right of people not to be viewed in states of undress and using the toilet by strangers of the opposite sex. This practice is, they noted, reflected in separate changing and toilet facilities for males and females in schools and other buildings to which the public has access, and it is one to which everyone in our society becomes accustomed at a very early age.

Both Mr. Fradkin and Ms. Greckol raised in their questions to many of the experts the fact that men in prison are viewed in states of undress, and on occasion while using the toilet, by female nurses. The thrust of the questions was to determine if there were any differences between such viewing by nurses and such viewing by female guards. Dr. Smith's view was that there were no differences in principle and that it was simply a question of attitude. He suggested that, if females were permitted to guard male prisoners, society would come to accept them in this role just as they have come to accept them in the role of nurse. On cross- examination he did, however, accept that the nurse and the guard did perform different roles. Dr. Brooks' view was that at least in the prison setting, where female nurses have been used to care for male prisoners for several years, there was little difference between the way in which nurses are perceived and the way in which

> - 20 guards are perceived. He said that female nurses in prisons, in addition to performing their nursing functions, tend to perform some disciplinary functions, and that female guards, in addition to performing their disciplinary functions, tend to perform some helping functions,

making their roles very similar. He, too, however, accepted on cross- examination that there is nevertheless a difference in the roles.

The position taken by the respondent's experts on this point was that there was a very important difference between a male prisoner being viewed by a female guard and a male prisoner being viewed by a female nurse. That difference was said to lie in the way in which the guard and nurse would be perceived by the prisoner. The guard, they said, would be perceived as an aggressor, or at the very least as someone whose sole job it was to watch over him. The nurse, on the other hand, would be perceived as someone who was there to help him. Mention was also made of the fact that the prisoner usually consents to being viewed by a nurse. It was also noted that nurses would very rarely see a male patient using the toilet.

The respondent called an additional expert, Dr. Edward Van Dyke, to testify specifically about the effect on native male prisoners of being viewed in states of undress and using the toilet by female guards. Dr. Van Dyke is a cultural anthropologist, and was qualified as an expert witness on native culture. His view was that native persons would have a greater concern than non-native prisoners for privacy, and that this concern would be

intensified greatly if the > - 21 guard were of the opposite sex, in large part because native society is not sexually egalitarian.

Dr. Van Dyke raised a second, broader concern as well. He said that Indian religions have proscriptions against male contact with menstruating females. A male's protection against evil spirits, according to this belief, is lost when such contact is made. Contact in this context was said to include not only physical proximity but also the preparation of food and the handling of clothing or other possessions. On cross- examination, Dr. Van Dyke acknowledged that he did not have any statistical data on the percentage of native males who would feel bound by these proscriptions although he did say that it appeared to be rising at the moment. He also acknowledged that these proscriptions would be violated if a native male were in contact with female teachers, female doctors, female nurses, in fact any female who happened to be menstruating at the time she was in his presence, and that therefore the only way a native male could respect these proscriptions would be to keep the company only of women who were themselves aware of and prepared to comply with them.

Evidence from a number of witnesses indicated that native males comprise a large proportion of the inmate populations in some R. C. M. P. lock- ups. For example, they account for approximately 60 percent of the inmate population in the Grande Cache lock- up, and in one or two others almost 95 percent.

None of the experts or other witnesses called by the complainants challenged directly Dr. Van Dyke's assertions about the special problems that native males would face if females were employed to guard

> - 22 male prisoners in R. C. M. P. lock- ups. However, all of the witnesses who had had experience with male prisoners being guarded by females stated very firmly that they had never

noticed that native males reacted any differently than non- native males. This group of witnesses included several people who had had extensive experience with native male prisoners.

9. Cross- sex Guarding in Canadian Correctional Institutions In support of their case against the R. C. M. P., the complainants adduced evidence on the initiatives undertaken in recent years by the federal and several provincial correctional services to integrate female guards into male institutions. The thrust of this evidence was to show that these initiatives, which include having female guards do tours of observation of the male cell areas, have proved to be successful. By way of reply, the R. C. M. P. called representatives of two provincial correctional services that had decided not to allow females to guard male prisoners in circumstances similar to those that obtain in the R. C. M. P. lock- ups.

The correctional services that lined up on the side of the complainants were the federal Corrections Service and the correctional services of Alberta, Ontario, Manitoba and British Columbia. Those on the side of the R. C. M. P. were the correctional services of Saskatchewan and Nova Scotia.

Each jurisdiction will be dealt with in turn. The first formal step in the integration of female guards into male institutions at the federal level was a pilot project undertaken

> - 23 in the late 1970's. This pilot project, which followed on the heels of a study of then existing sex- based restrictions on certain jobs within the federal correctional service, involved females being integrated into three institutions, where, with the exception of skin searches, they performed the same duties as the male guards. This project was considered to have been a success when it was completed and in November of 1980 the decision was made to integrate females into all the medium and minimum security institutions across the country. Female guards in these institutions were expected to perform all of the same duties as male guards except, again, that they were not to perform skin searches.

In November of 1981, a report prepared by the Canadian Human Rights Commission on the results of the integration of female. guards into these institutions expressed concerns about the impact the initiative was having on inmate privacy and recommended "that a study be undertaken of the issue of inmate privacy and its dimensions, in order to reach empirically based conclusions concerning reasonable accomodation [sic] to inmates' legitimate privacy requirements, the right of woman [sic] to work in occupations involving direct contact with inmates and the need of the organization to maintain security". That study considered the possibility of introducing modesty barriers to provide prisoners with greater privacy while they were showering and using the toilet. Insofar as the use of modesty barriers in cells with grille fronts was concerned, the study stated that, "Due to the physical layout of cells, the installation of modesty screens inside

> - 24 the cell could interfere with safety and security requirements to an unacceptable degree". Nevertheless, the study suggested that "a feasibility study ... be conducted on- site to identify the type of modesty screen that will best provide inmate privacy and ensure the maintenance of security" (at p. 3). The evidence indicated that two (of a total of six) institutions with grille front cells are now involved in pilot projects using curtain modesty barriers. One of these institutions

was said to be Collins Bay in Ontario. However, according to Mr. Sylvon Labelle, Chief of Inmate Affairs for Correction Services Canada, who was called by the R. C. M. P. to testify about the complaints male prisoners have made about the integration of female guards into federal correctional institutions, the administration at Collins Bay has not yet put in the modesty barriers.

In 1983, the decision was made to extend the integration initiative into maximum security institutions. All three categories of male correctional institutions therefore now have females guarding male prisoners. Job descriptions for guard positions in these institutions state that female guards are expected to perform the same duties as male guards with the exception of skin searches, which can only be performed by the latter unless an emergency arises.

It is of interest to note that male guards have not been integrated into

the women's penitentiary at Kingston. The reason given for this was that Canada has committed itself internationally not to permit female prisoners to be guarded by males. (The precise nature of this commitment will be discussed in Part III of this award.)

Two guards, one from Prince Albert Penitentiary in Saskatchewan and the other from Edmonton Maximum Institution in Alberta, indicated

> - 25 that the integration of female guards into their respective institutions was well under way and that the program had to this point been a successful one. Mr. Bill Camche noted that at Prince Albert female guards were not assigned to a post that overlooked the auditorium because the inmates could be seen showering from there. It was clear from Mr. Ed Fisher's evidence, however, that the female guards at the "Edmonton Max" did see prisoners showering. Both acknowledged that female guards did not perform skin searches except in emergencies. Prince Albert was said to have grille- front cells with makeshift plastic modesty barriers beside the toilets. The Edmonton institution has cells with solid doors and windows. Modesty barriers are not used there. Mr. Fisher said that that was for security reasons. Both men thought that the male inmates had accepted the female guards.

Female guards are used in all male institutions under provincial jurisdiction in Alberta, including institutions holding prisoners on remand and fresh arrests. According to Mr. George Fralik, recently retired from a long career in prison management in Alberta, female guards in these institutions perform the same duties as male guards with the exception of skin searches. Two female guards working at male institutions testified that the prisoners seemed to accept their presence without noticeable difficulty.

The Ontario Ministry of Correctional Services has a formal written policy on cross- sex guarding. The policy is designed to make provision for both the interest in equality of employment opportunity and the interest in inmate privacy. It provides that male and female guards in

> - 26 the province's correctional institutions are to perform the same duties except for skin searches of prisoners of the opposite sex and "direct supervision of congregate showers where

the correctional officer has to work in full view of showering inmates [of the opposite sex]". Skin searches and shower supervision must be performed by guards of the same sex as the prisoner. The policy also stipulates that frisk searches of female prisoners must be conducted by female guards (although male prisoners can be frisk searched by either male or female guards).

Apart from direct supervision of showering, the policy allows for inmates to be subjected to "a certain amount of involuntary viewing by officers when partially or completely unclothed". It states that "Observation of inmates in such circumstances (using the toilets or showering, for example)" is permissible when it is "both infrequent and an incidental part of all correctional officers' duties".

The Ministry's policy on cross- sex guarding has been implemented in institutions containing prisoners on remand and fresh arrests as well as

facilities holding convicted prisoners. Some of these institutions have grille- front cells and some solid doors with windows. Some of the former have modesty barriers in the cells to shield the toilet from view. These generally extend from calf level to shoulder level.

Manitoba has integrated all of the institutions within its jurisdiction, including those holding prisoners on remand and fresh arrests. Some of these institutions have cells with solid doors and windows and others have cells with grille fronts. Modesty barriers are

> - 27 used in some of the institutions, although these appear to be limited to toilets in dorm facilities and showers. Female guards perform all the duties that male guards perform with respect to male prisoners except for skin and frisk searches.

British Columbia has adopted a formal policy on cross- sex guarding virtually identical to that adopted in Ontario. Hence, female guards in male institutions are expected to perform the same duties as male guards except for skin searches and "direct supervision" of prisoners in states of undress. The policy has been implemented in all but one of the institutions under the control of the Ministry of Corrections. These institutions house fresh arrests as well as prisoners on remand and convicted prisoners. Some of the facilities have cells similar to those in the R. C. M. P. lock-ups.

The Department of Corrections in Saskatchewan has been in the process of integrating female guards into male institutions and male guards into female institutions for some time, but has sought and obtained from the Saskatchewan Human Rights Commission an exemption allowing them to hire only men to fill certain jobs in male correctional institutions. The Commission has been asked to reduce the scope of this exemption on two occasions since it was first granted in 1980, and while that scope has been reduced to some extent, the Commission has not changed its view that where the job in question involves "deliberate scrutiny of an inmate in states of nudity, ... conventional standards of decency ... require" that the job be performed by someone of the same sex as the inmate. Hence, the

> - 28 exemption still extends to the position of guard in remand, secure/ semi- secure and admitting areas.

According to Richard Till, Director of the Saskatchewan Department of Corrections, the policy in his department continues to be that to allow prisoners to be viewed in states of undress or using the toilet in their cells in these areas by guards of the opposite sex is an unnecessary assault on their dignity. This was true, he said, even though it was recognized that the viewings would not occur very frequently.

The current situation in Nova Scotia is similar to that in Saskatchewan, although no formal exemption has been sought from the provincial human rights commission there. According to Mr. James Crane, Executive Director for Correctional Services for Nova Scotia, integration of females into male institutions and of males into female institutions is supported by the government. However, there were limits to the extent to which such

integration could properly go, he said, and it was not proper to have maximum security areas with open showers or toilets being supervised by guards of the opposite sex. This has not occurred in Nova Scotia to date in the correctional institutions there, nor would it, he said. He also indicated that he had recently written to the municipalities in the province, who under the current division of responsibility have control over provincial lock- up facilities, advising them that a same- sex guarding policy should be enforced in those facilities. It should be noted that this has been the traditional policy in these facilities.

> - 29 10. The Beneficial Effects of Having Females in Male Institutions Several of the witnesses who testified in this case indicated that, in their view, the presence of females in male institutions has significant beneficial effects apart from the fact that it opens up employment opportunities for females. These beneficial effects, which were attributed to both the normalizing influence that comes from having females in contact- with the prisoners and the softening influence that females can have on some male prisoners, included the improvement of decorum (i. e., speech, dress etc.), the reduction of tension and aggression and, generally, the facilitating of rehabilitation.

Most of this evidence was given by witnesses called by the complainants. However, three of the experts called by the R. C. M. P., Mr. Zambrowsky, Dr. Cormier and Dr. Orchard, agreed that it was a good idea to provide male prisoners with the opportunity to come into contact with females in the prison setting because of the normalizing effect such contact has. They were adamant, however, that such contact should not entail male prisoners being viewed in states of undress and using the toilet by female guards. Dr. Orchard focused on the positive effect on rehabilitation that the presence of females in the prison setting can have, but stressed that that was a long- term effect. Mr. Williams, another of the respondent's experts, did not seem to think that female guards were likely to have a positive effect on male prisoners because, in his view, guards were very much in a position of authority in the eyes of a prisoner and males responded less well to females in authority than to males in authority.

> - 30 Two male inmates from Kingston Penitentiary who testified agreed that the presence of females in a male prison had a beneficial effect. Again, however, they were opposed to females being in a position to view male prisoners in states of undress or using the toilet.

Evidence of the beneficial effects of having females work in male institutions tended to be directed to the prison setting, although there was some evidence dealing with remand centres. Dr. Brooks, one of the complainants' experts, appeared to be the only person who directed remarks specifically to the lock- up setting.

11. Prisoner Complaints A considerable body of evidence was adduced by both parties on the issue of how many male prisoners who have had experience with cross- sex guarding

have complained about having to be guarded by females. The complainants themselves stated that, to the best of their knowledge, no complaints had been made by the male prisoners that had been incarcerated in the Grande Cache and Jasper lock- ups while they were on guard duty. Superintendent Barker of the R. C. M. P. conceded that he had not received any complaints during this period. The prison management officials, guards and experts called by the complainants who had had experience with cross- sex guarding indicated that, at least insofar as the institutions with which they were familiar were concerned, very few, if any, complaints had been forthcoming.

The R. C. M. P. called officials from three government agencies at the federal level to give evidence about the complaints those agencies had received from male prisoners who had been, or were being, guarded

> - 31 by females. Mr. David Hosking of the Canadian Human Rights Commission stated that that body had since the 1980's received a number of complaints about the use of female guards in male institutions, and that the problem of being viewed in states of undress or using the toilet by female guards was specifically mentioned in a sizeable proportion of those complaints. To this point, he said, only one of these complaints had been processed to the stage of a formal complaint (i. e., a complaint on a form prepared by the staff at the Commission and signed by the complainant), but that was due, he acknowledged, to delays in his own office.

Mr. Edward McIsaac of the office of the Correctional Investigator, who is charged with the responsibility of investigating complaints from inmates in federal correctional institutions, testified that inmate committees at several of the institutions he had visited had expressed concern about the use of female guards.

Mr. Sylvon Labelle, Chief of Inmate Affairs at Corrections Canada, testified that, at the request of the R. C. M. P., he had sent letters to all 27 federal institutions at which female guards are currently employed to guard male prisoners asking each institution to indicate how many complaints it had received relating to this practice. By the time he gave his evidence, 19 responses had been received and out of those 19, nine indicated that complaints had been made. A total of 41 complaints had been made at these nine institutions. A close check of these complaints suggests that perhaps 10 related specifically to the problem of being viewed in states of undress or using the toilet in the prisoners' cells. It should be noted that most of these complaints

> - 32 would have been made within the preceding twelve months. In addition to the complaints generated in this fashion, Mr. Labelle indicated that his office had in the normal course received

some 24 complaints about female guards of which about a third related specifically to privacy concerns.

The R. C. M. P. also called Mr. John Hill, Director of the Correctional Law Project at Queen's University, to give evidence about complaints from male prisoners about female guards in correctional institutions. He stated that he had received a number of complaints from male prisoners at two institutions in the Kingston area. While these complaints were by no means

limited to the problem of being viewed by the female guards in the cells, a significant proportion of them did deal with this problem. Mr. Hill stated that, based on these and other complaints he had received from the inmates in these institutions, it appeared that the presence of female guards in these institutions was a very significant concern on the part of the prisoners there.

The only evidence of complaints about the presence of females in the lock- up setting came from one of the male lock- up guards called by the R. C. M. P. He stated that a fresh arrest in the Burnaby, British Columbia lock- up complained when a female R. C. M. P. officer served documents on him in his cell when he was wearing nothing but his briefs.

The R. C. M. P. also tendered in evidence a statement of claim filed by a male prisoner in a federal institution alleging that his rights under the Charter were being infringed by the use of female guards.

> - 33 One of his allegations relates specifically to being viewed in states of undress and using the toilet by female guards.

12. Modesty Barriers The possibility of using modesty barriers in the cells to protect the toilets from view was explored with a number of witnesses. The questions put to these witnesses focused on two issues: (1) the extent to which the presence of a modesty barrier would further the interest in inmate privacy and (2) the extent to which the presence of a modesty barrier would increase security risks. The assumption on which the questions were based was that the modesty barriers that would be used would permit a guard to see both the feet and the head and shoulders of a person sitting on the toilet.

The unanimous view of the respondent's witnesses was that modesty barriers of the kind being proposed would have very little if any effect on the loss of dignity that a male prisoner would suffer if he was viewed using the toilet by a female guard. Dr. Orchard said that what causes the loss of dignity is the fact that "the observer could observe what was going on and know what was going on and those observed would know that the observer observed them". Dr. Cormier stated flatly that modesty barriers would "change nothing". Dr. Hucker noted that even when people are showering behind screens they still feel "some embarrassment". Mr. Zambrowsky, while acknowledging that such barriers would seem to increase the inmate's privacy somewhat, was emphatic that they do not "change the fact that there is an invasion of privacy". Both of the inmates from Kingston Penitentiary who gave evidence stated

> - 34 that it is knowing that one is being viewed on the toilet that counts. Some of these witnesses made a point of noting that, when a man is seated on the toilet, his genitalia are not

usually visible anyway. Hence, in their view, even if there was some benefit in not having one's genitalia exposed while toileting, modesty barriers would not provide it.

The complainants' experts were more positive in their assessment of the

effect of modesty barriers on the prisoners' sense of privacy, although they too saw the effect as being a marginal one. Dr. Smith stated that a modesty barrier "enhances, just a little bit, if you will, the self- worth and dignity of the incarcerated individual". Dr. Brooks said that the "acceptance of female viewing would be better" if modesty barriers were used.

Insofar as the issue of security is concerned, the respondent's witnesses were unanimously of the view that modesty barriers would increase security risks within lock- ups. Emphasis was placed by these witnesses, who included prison management officials, on the need in high security areas for an unimpeded view of each cell. Concern was expressed about the possibility that prisoners could hide drugs or weapons or even attempt suicide behind such barriers. Several of the male lock- up guards stated that it is very important to be able to see a prisoner's hands at all times and that their ability to do so would be compromised by a modesty barrier. One of these guards indicated that if modesty barriers were used in cells that had toilets located just inside the grille front, he would feel compelled to look over or around the modesty barrier to check to see that the prisoner was safe

> - 35 and secure. One of the inmates from the Kingston Penitentiary indicated that a prisoner would be in a position to fashion a weapon behind a modesty barrier while pretending to use the toilet.

The complainants' witnesses took the position that modesty barriers would not increase security risks, or that if they did, the increase would be minimal. The view was expressed that a prisoner who was looking to do something furtive, like fashioning a weapon, would be more likely to do it on his bed since it would be easier to hide what he was doing there than behind a modesty barrier. And the guards who testified on this point seemed to think that if a prisoner were to try to commit suicide behind a modesty barrier, they would know quickly enough. There was, however, agreement from some of those who testified to this effect that it would be possible for prisoners to harm themselves behind a barrier without the guard immediately noticing that they were doing so.

Neither party was aware of any statistical evidence on the correlation between the use of modesty barriers and incidents of attempted suicide.

13. Canadian Criminal Justice Association The Canadian Criminal Justice Association (CCJA) is a national association which promotes effective criminal justice programs through research and policy analysis and development.

In 1981, the CCJA embarked on a project to develop standards for Canadian correctional facilities. Of particular relevance for the purposes of this hearing is standard 5.08.21 which reads:

> - 36 When supervision of prisoners in bathing or toilet facilities is required, it is performed by staff of the same sex as the prisoners.

This standard was referred to by Mr. Zambrowsky, who at the time he gave

evidence was Executive Director of the CCJA. He testified that although the CCJA advocated adoption of affirmative action policies by each jurisdiction in the country, this standard specifically barred females from positions in which there was a possibility of viewing males bathing or on the toilet.

A different interpretation of this standard was given by Mr. Glenn Angus, who in April 1981 became the Project Director for the CCJA's standards project. He testified firstly, that the standards were never meant to apply to police lock- ups, and that the mandate of the project was to deal with corrections only, and secondly, that standard 5.08.21 was only meant to apply to communal bathing or toilet facilities.

Mr. Angus testified that this interpretation was one shared by the entire committee that developed the standards. He said that he was party to the discussions from which the standards evolved, and was certain that there was no intent to prohibit cross- sex guarding where the toilets are in the individual cells.

> - 37 II. THE LAW The complainants in this case rely on both section 7 and section 10 of the CHRA. Those sections read as follows:

7. It is a discriminatory practice, directly or indirectly, (a) to refuse to employ or continue to employ any individual, or (b) in the course of employment, to differentiate adversely in

relation to an employee, on a prohibited ground of discrimination. 10. It is a discriminatory practice for an employer, employee

organization or organization of employers (a) to establish or pursue a policy or practice, or (b) to enter into an agreement affecting recruitment, referral,

hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

The "prohibited ground of discrimination" in this case is, of course, sex. Section 4 of the CHRA provides that "anyone found to be engaging or to have engaged in a discriminatory practice may be made subject to an order as provided in sections 41 and 42". In this case, the complainants seek orders under section 41(2)(a), (b) and (c) and 41(3).

The respondent takes the position that it is not guilty of any of the acts defined by sections 7 and 10 of the CHRA. In the alternative it relies on section 14(a) of the CHRA, which reads as follows:

14(a) It is not a discriminatory practice if (a) any refusal, exclusion, expulsion, suspension, limitation,

specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement,...

> - 38 The respondent asks that these complaints be dismissed under section 41(1). The initial burden in a case such as this rests with the complainants. They are required to show on a balance of probabilities that the respondent has been guilty of committing one or more of the acts defined by sections 7 and 10. In this case, the complainants claim that the respondent has been guilty of committing the acts defined by section 7(a) and (b) and by section 10(a).

If the complainants succeed in discharging the initial burden, the question becomes whether or not the impugned acts can be justified under section 14(a) as products of a "bona fide occupational requirement" (hereinafter "BFOR"). At this stage, the burden rests with the respondent, with the standard of proof again being on a balance of probabilities. In order for me to conclude that the complaints here are "substantiated" within the meaning of section 42(2) of the CHRA, I must be satisfied not only that the complainants have discharged the initial burden, but also that the respondent has failed to discharge this second burden.

Both parties accepted that, for the purposes of the first stage of the analysis, the complainants could discharge their burden with a showing of either "direct discrimination" or "adverse effect discrimination" (see Bhinder v. Canadian National Railway Co. (1985), 7 C. H. R. R. D/ 3093 (S. C. C.)). For the purposes of this case, those terms will carry the meanings given to them by McIntyre J. in O'Malley v. Simpson- Sears Ltd. (1985), 7 C. H. R. R. D/ 3102 (S. C. C.). In that case,

> - 39 he defined "direct discrimination" as the adoption by an employer of "a practice or rule which on its face discriminates on a prohibited ground" (at p. D/ 3106), and "adverse effect discrimination" as the adoption by an employer of "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" (at p. D/ 3106).

Both parties also agreed that the approach taken to the BFOR question in this case had to be consistent with the approach taken to that question by McIntyre J. in Ontario Human Rights Commission et al. v. The Borough of Etobicoke (1982) 3 C. H. R. R. D/ 781, a case under the Ontario Human Rights Code:

To be a bona fide occupational qualification and requirement a limitation ... must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition, it must relate in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the

efficient and economical performance of the job without endangering the employee, his fellow employees and the general public. (p. D/ 783)

This agreement was hardly surprising, since the Supreme Court considered this precise test to be applicable to the BFOR question in Bhinder (supra), a case which arose under precisely the same provisions as are at issue here (see McIntyre J. at p. D/ 3095 and Dickson C. J. at p. D/ 3095).

> - 40 The test formulated by McIntyre J. in the Etobicoke case has three important features. The first is the division of the BFOR inquiry into two distinct components, one subjective and the other objective. The second is the precise nature of the subjective component. And the third is the precise nature of the objective component.

The first of these important features requires nothing in the way of explication. I would, however, like to say a word or two about the wisdom of adding a subjective component to the BFOR test. In my respectful view, the addition of this component brings with it a serious problem, at least in cases where the employer attempts to justify the discrimination either in whole or in part on the basis of the interests of persons not parties to the dispute. This would include cases like Etobicoke, in which the employer invokes the safety of fellow employees and of the general public. It would also include cases like this one, in which the employer invokes the privacy of male prisoners. The problem is, of course, that by insisting that even in these cases the employer be required to establish subjective bona fides, there is a possibility that the interests of these third parties, which may be of compelling importance and which on the basis of the objective component of the test deserve to be vindicated, would have to be sacrificed because the particular employer in question happened to be a bigot. Surely those interests should be vindicated even if the employer is a bigot.

There are, I believe, other arguments to be made against adding a separate subjective component to the BFOR test - the fact that the term "bona fide occupational requirement" suggests that the bona fides

> - 41 relates to the occupation, not the employer; the fact that American courts have not seen fit to add a subjective component to their BFOR test; and the fact that, as McIntyre J. put it in O'Malley (supra) in speaking of the Ontario Human Rights Code, "Its main approach ... is not to punish the discriminator, but rather to provide relief for the victims of discrimination" (at p. D/ 3105) (emphasis added). But these carry less weight than the argument that proceeds from a desire to avoid. the anomalous possibility outlined above.

In spite of these concerns, I am, of course, bound to include the subjective component in the BFOR inquiry I undertake in this case. However, because, for reasons that I will explain shortly, I find the precise nature of that component of the inquiry to be somewhat ambiguous, I propose to resolve the ambiguity in favour. of a rather narrow reading of it. What that reading entails will also be explained shortly.

It is apparent, at least to anyone familiar with the facts of Etobicoke,

that the wording of the subjective and objective components of the BFOR test very much reflects the nature of the employment that was at issue there, namely firefighting. Efficiency and economy will presumably be relevant concerns in any employment context. The safety of employees will be in many employment contexts, but not all. And the safety of the public will rarely be a relevant concern. In the context of firefighting, it is clear that the safety of both the employees and the public is a very significant concern. It is to be expected, therefore, that McIntyre J. would have given safety the prominence he did in formulating his test in that case. The fact that he did so there, however, obviously does not mean that he would do so - or that

> - 42 it is appropriate to do so - in every case. Only in cases in which -safety is a relevant concern - as it clearly was in Bhinder - does it make sense to do so.

This contextual feature of the BFOR test formulated in Etobicoke has, in fact, already been recognized by the Supreme Court itself. In Caldwell v. Stuart and the Catholic Schools of Vancouver Archdiocese (1984), 6 C. H. R. R. D/ 2643, the question was whether the firing of a Catholic teacher from a Catholic school because she had married a divorced man in a civil ceremony contravened the employment discrimination provision of the B. C. Human Rights Code (since replaced by the Human Rights Act, S. B. C. 1984, c. 22). The respondents invoked the BFOR defence to the teacher's claim and the Court dealt with that defence on the basis of the Etobicoke test. It is clear, however, from the following passage that the Court recognized that that test would have to be recast to reflect the different nature of the employment at issue in the Caldwell case:

The test employed in the Etobicoke case has two branches. The first is subjective, is the questioned requirement imposed honestly, in good faith and in the sincerely held belief that it is imposed in the interest of the adequate performance of the work involved and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code? It is at once clear that it is met for at no time in these proceedings has it been suggested that the motives of the school authorities were not honest and in good faith or that the requirement of religious conformance was not imposed solely to promote the objects of the school. No ulterior motive has been shown or even suggested. In addressing the second branch of the test, however, it was argued that the requirement of religious conformance was not reasonably necessary to assure the efficient performance of the teaching function in any objective sense. Considerations of economy and safety are not involved. However, the essence of the test remains applicable and may be phrased in this way, "Is the requirement of religious conformance by Catholic teachers, objectively viewed, reasonably necessary to assure the accomplishment of the

> - 43 objectives of the Church in operating a Catholic school with its distinct characteristics for the purposes of providing a Catholic education to its students"? (p. D/ 2649, emphasis added)

In the result, the Supreme Court held that the objective component of the

test was also met and dismissed the teacher's complaint. The "essence" of the Etobicoke test, to use McIntyre J. 's term, seems to me to be as follows: in order to establish a BFOR, the employer must show both

(a) that the impugned requirement is imposed honestly, in good faith and in the sincerely held belief that it is imposed for the protection or futherance of interests which the employer can rationally seek to protect or further, given the nature of the employment in question, and not for ulterior or extraneous reasons, aimed at objectives which could defeat the purpose of the legislation, and

(b) that the impugned requirement, objectively viewed, is reasonably necessary to protect or further interests which the respondent can rationally seek to protect or further, given the nature of the employment in question.

The term "interests" is a general term designed to catch the many concerns including efficiency, economy, safety and the instilling of religious principles in children - upon the basis of which an employer might seek to justify the impugned requirement. The stipulation that these interests be interests that the employer can "rationally seek to protect or further" is designed to ensure that the interests the employer invokes in support of his BFOR defence are interests on which the employer is in fact entitled to rely. An "irrational" interest in this context would be an interest that could not rationally be said to be related to the impugned requirement. Invoking the safety of the public in a case involving sex discrimination in a retail sales context might be an example of an "irrational" interest in this sense.

> - 44 One of the submissions made by Ms. Greckol in relation to the application of the BFOR test in this case was that the employer cannot rely on what she called "customer preference" to justify the impugned requirement. In support of that submission she cited Diaz v. Pan American World Airways Inc. 442 F. 2d 385 (U. S. C. A., 5th Cir., 1971) and Imberto v. Vic and Tony Coiffure (1981), 2 C. H. R. R. D/ 392 (Ont. Trib.). I accept that submission, provided the preference is based simply and solely on prejudice or stereotyping. To allow the employer to invoke a preference on the part of his customers that is based on prejudice or stereotyping would be, as these two decisions point out, to frustrate the purpose of human rights legislation.

In my view, the best way of incorporating this principle into the BFOR inquiry is to add to the stipulation that each interest upon which the employer wishes to rely be rationally related to the impugned requirement, the further stipulation that each such interest be "legitimate". An "illegitimate" interest in this context would be an interest that is itself inimical to the purpose underlying the prohibition against discrimination in employment. This would catch customer preference based on prejudice or stereotyping as well as employee preference based on prejudice or stereotyping (see Imberto v. Vic and Tony Coiffure, supra, at p. D/ 396).

Incorporating that principle into the BFOR test results in that test taking the following form: an employer seeking to justify a discriminatory rule or policy must show:

(a) that the impugned requirement is imposed honestly, in good faith and in the sincerely held belief that it is imposed for the protection or furtherance of interests which the employer can legitimately and rationally seek to protect or further, given the nature of the employment in question, and not for

> - 45 ulterior or extraneous reasons, aimed at objectives which could defeat the purpose of the legislation, and

(b) that the impugned requirement, objectively viewed, is reasonably necessary to protect or further interests which the respondent can legitimately and rationally seek to protect or further, given the nature of the employment in question.

Applying a test of this kind is obviously not a mechanical process. It is clear enough that, as the first step, it is necessary to identify those interests that, given the nature of the employment, the employer can legitimately and rationally seek to protect or further. It will obviously be up to the employer to suggest what those interests might be. It will then be up to the tribunal to measure each of the interests suggested against the standards of legitimacy and rationality outlined above. In order to pass the test of legitimacy, an interest must be one that is not itself inimical to the purpose underlying the prohibition against discrimination in employment. To pass the test of rationality, the interest must be one that can be said to be rationally related to the impugned requirement.

Beyond that, however, the waters become somewhat muddied. What precisely is the employer required to show in order to meet the two components of the test? I begin with the subjective component. As formulated, it would appear to have two distinct branches, one positive - is the impugned requirement "imposed honestly, in good faith and in the sincerely held belief that it is imposed for the protection or furtherance of interests which the employer can legitimately and rationally seek to protect or further, given the nature of the employment" - and the other negative " and not for ulterior or extraneous reasons, aimed at objectives which could defeat the purpose of the legislation." Are these to be viewed as imposing two distinct

> - 46 obligations on the employer? Or is it the case that, if the employer satisfies the first branch, he will be presumed to have satisfied the second as well?

This may appear to be a fatuous question, but I do not believe it is. An employer may impose a discriminatory rule for a variety of different reasons. For example, an employer may discriminate against women in part because he holds a stereotypical view of the "proper" role of women and in part because experience has shown that very few women would be able to perform the work in question. If he is required to satisfy both branches, it seems to me that he would fail the subjective component because his stereotyping would be seen to be designed to limit women to their "proper" role and thereby defeat the purpose of the legislation. If, however, he is

only required to satisfy the first branch, it seems likely that he would pass the subjective component because he would honestly believe that the efficiency level in his business would fall if he hired women. (This would not, of course, mean that he would succeed on the objective component as well; in fact, on the basis of these assumed facts, he would almost certainly fail.)

The Supreme Court of Canada has not had to consider the question of what precisely it is that an employer is required to show in order to satisfy the subjective component of the BFOR test it has formulated. Neither in Etobicoke itself, nor in any of the later cases in which it has had occasion to discuss the BFOR question (Caldwell, O'Malley and Hinder), has it been obliged to examine

this component in any detail. In each of these cases the complainant appears not to have challenged the subjective bona fides of the employer.

> - 47 In my opinion, the ambiguity that seems to me to be present in the subjective component should be resolved in favour of the view that if the employer satisfies the first branch, he will be presumed to have satisfied the second as well. My reasons for selecting this course have been set forth above. In essence, it is my view that whatever can be done to minimize the possibility that third party interests will be sacrificed simply because the employer in question is a bigot should be done.

If I am wrong in this, and the correct view is that an employer must satisfy both branches, I should point out that I do not believe that the second branch can be taken to catch all stereotyping. Had it been intended to do so, it seems to me that the employer in the Etobicoke case could not have survived, as it did, the subjective part of the test. For, on the evidence adduced in that case, it seems clear that the mandatory retirement rule was based in large part, if not entirely, on a stereotypical view of older people and their ability to withstand the rigours of the job of firefighting. It would seem, therefore, that provided the stereotyping relates to the ability of the person in question to do the job, the employer will not fall afoul of the second branch. On this analysis, the only thing left for the second branch to catch is the kind of stereotyping described above - that is, a stereotypical view of the "proper" role of a particular group - and prejudice, in the strict sense of that term - that is, a judgment that members of the group in question are less worthy than others of respect.

> - 48 I turn now to the objective component of the BFOR test I have formulated. That component, it will be recalled, asks the question whether the impugned requirement is reasonably necessary to protect or further interests which the employer can legitimately and rationally seek to protect or further, given the nature of the employment. The difficulty here is knowing how it is that one is expected to answer that question. Again, the Supreme Court of Canada's judgments in Etobicoke, Caldwell, O'Malley and Bhinder do not provide a great deal of assistance. In the first, the BFOR defence failed because the evidence supporting it was held to be inadequate. In Caldwell, the defence succeeded, but it is not entirely clear from the Court's reasons for judgment what process it followed in reaching that conclusion. The latter two cases do not deal with the BFOR question in

sufficient detail to provide any real guidance at all. In my view, it is important to be as explicit as possible in describing the process by which one proceeds from question to answer in a situation such as this. That is particularly true in a complex and difficult case like this one. For that reason, I propose to set out in some detail how it is that I intend to apply the objective component of the BFOR test in this case. In the course of so doing, I will address various submissions made by the parties relating to this aspect of the case.

The first step in this process is to identify the interests the employer is entitled to rely upon, something that will presumably have already been done in the course of applying the subjective component of the BFOR test. Having identified those interests, it seems to me

> - 49 to be important next to determine both how significant those interests are and the extent to which they can be said to be protected or furthered by the impugned requirement. It seems clear that some interests will be more important than others. Hence, the safety of employees and/ or the public would be seen to be interests of greater importance than, for example, the desire to economize by not developing a mechanism to test job applicants in a way that eliminated a prohibited form of discrimination. It is also clear that the extent to which a given interest can be said to be protected or furthered can vary from case to case. Hence, the risk to the safety of employees and/ or the public that would flow from eliminating a discriminatory rule or policy in one context may be greater than the risk that would flow from eliminating such a rule or policy in another context.

It also seems clear that, the more important the interests are and the greater the extent to which they can be said to be protected or furthered by the impugned requirement, the better the employer's chances of having that requirement upheld should be. As between these two variables, it seems likely that the first will be of more significance than the second, but there will be cases in which it is the second that determines the eventual outcome. For example, a tribunal might be prepared to see an employer suffer some financial burden in order to open the doors to a group that has been discriminated against but not an oppressive one.

At this point in the process it is necessary to shift the focus away from the reasons for retaining the impugned requirement to the

> - 50 reasons for eliminating it. Those reasons are expressed in general terms in section 2 of the CHRA, which defines the CHRA's purpose:

2. The purpose of this Act is to extend the present laws in Canada to give effect, within the purview of matters coming within the legislative authority of the Parliament of Canada to the principle that every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin,

colour, religion, age, sex, marital status, family status, disability or conviction for an offence for which a pardon has been granted. (emphasis added)

This interest in ensuring that everyone has an equal opportunity "to make for himself or herself the life that he or she is able and wishes to have" is, of course, a constant in cases under the CHRA. And it is an interest of very great importance, as section 15 of the Charter makes clear and as the courts both here and in the United States have recognized in developing their respective approaches to the BFOR defence. In Bhinder (supra), McIntyre J. accepts as correct the proposition articulated by the tribunal in that case that "a liberal interpretation should be applied to the provisions prohibiting discrimination and a narrow interpretation to the exceptions" (at p. D/ 3096). And in Dothard v. Rawlinson 433 U. S. 321 (1977), Stewart J., in delivering the opinion of the United States Supreme Court, said, "We are persuaded ... that the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition

of discrimination on the basis of sex" (at P. 334). (See also Weeks v. Southern Bell Telephone and Telegraph Co. 408 F. 2d 228 (U. S. C. A., 5th Circuit, 1969).)

> - 51 While the interest in equality of opportunity will always be of great importance in such cases, I am of the view that a distinction can and should be drawn in relation to the harm done to that interest between those discriminatory job requirements that are based on stereotypical views about the ability of certain groups to perform certain tasks and those that are not. A job requirement that is based on such views not only denies the members of that group the equality of opportunity of which section 2 of the CHRA speaks, it offends in a very direct sense their dignity as human beings. It is, in effect, a statement that they are less able, and hence less worthy of respect, than other human beings. Job requirements based on stereotyping should, therefore, be especially difficult if not impossible for employers to defend.

In some cases, the complainant may seek to rely on interests other than equality of opportunity in support of the challenge to the impugned requirement. This will occur if there is reason to believe that eliminating that requirement will have a beneficial effect above and beyond opening the door to employment opportunities to the group that is being discriminated against. While such cases may be few and far between, I see no reason why the complainant should not be entitled to rely on the interests served by abolishing the impugned requirement. Each such interest will, of course, have to be given the weight it is due in the circumstances, and that weight may vary quite dramatically depending on the importance of the interest and the extent to which it would be furthered by abolishing the requirement. But, provided there

> - 52 is a rational connection between it and the abolition of the requirement, it should be entitled to some weight.

Having identified and attached the appropriate weight to the various competing interests - those upon which the employer is entitled to rely and those upon which the complainant is entitled to rely - the decision must be

made as to which set of interests prevails. This stage of the process can be described in terms of a balancing of interests, as Ms. Greckol describes it in her submissions and as it was described by LeDain J. A. in his judgment in Bhinder (1983), 48 N. R. 81 (F. C. A.) at pp. 98- 9 (see also Carson v. Air Canada (1983), 5 C. H. R. R. D/ 1857 (Can. Trib.) at p. D/ 1867, citing in turn Foreman v. VIA Canada Inc. (1980), 1 C. H. R. R. D/ 111 (Can. Trib.) at p. D/ 112 and Lamont v. Air Canada (1982), 34 O. R. (2d) 195 (H. C.)). In so describing it, one is not, of course, implying that the process is a mechanical one, or even that the competing interests can be measured in terms of a common denominator. It is simply a euphemistic way of describing the act of determining which set of interests prevails.

Given the admonition by McIntyre J. in Bhinder to give narrow scope to provisions like section 14(a) of the CHRA, it is to be expected that, in the great majority of cases in which the BFOR question is addressed, the balance of interests will be struck in favour of the complainant. In the concluding portion of his analysis of the BFOR question in Caldwell, McIntyre, J. said that, "It will only be in rare circumstances that such a factor as religious conformance can pass the test of

bona fide qualification. In the case at bar, the special nature of the school and the unique role played by the teachers

> - 53 in the attaining of the school's legitimate objects are essential to finding that religious conformance is a bona fide qualification" (p. D/ 2649). It is clear from this passage that McIntyre J. considered the interest being invoked by the employer - the instilling of religious principles in children at a denominational school - to be of inordinate importance (at the beginning of his judgment he described it in terms of the "established right ... of a religious group to carry on its activities in the operation of its denominational school according to its religious beliefs and practices" (p. D/ 2643)), and that that interest was being appreciably furthered by the impugned requirement (which would not have been the case if the complainant had been a secretary rather than a teacher (see pp. D/ 2647- 8)). It would be wrong, I think, to extract from this passage the proposition that, unless the employer can point to an interest of inordinate importance and can show that that interest is being appreciably furthered by the impugned requirement, the balance must be struck in the complainant's favour. Each case will be different and should be examined in light of its own special characteristics. But it seems to me to be right to extract from this passage the message that "only in rare circumstances" is it appropriate for a tribunal to side with the employer.

To this point, I have refrained from discussing the duty of an employer to adopt reasonable, non-discriminatory alternatives to the impugned requirement if such alternatives exist. I now wish to examine that duty and explain the role I understand it to play in applying the objective component of the BFOR test.

> - 54 Given the nature of one of the submissions Mr. Fradkin makes in connection with this duty, it is helpful to begin this examination with a discussion of what has become known as the duty to accommodate. The nature of this duty, which is imposed on the employer, is explained in the following

passage from the judgment of McIntyre J. in O'Malley, a case in which the complainant alleged adverse effect discrimination on the ground of religion:

The Code accords the right to be free from discrimination in employment. While no right can be regarded as absolute, a natural corollary to the recognition of a right must be the social acceptance of a general duty- to respect and to act within reason to protect it. In any society the rights of one will inevitably come into conflict with the rights of others. It is obvious then that all rights must be limited in the interest of preserving a social structure in which each right may receive protection without undue interference with others. This will be especially important where special relationships exist, in the case at bar, the relationship of employer and employee. In this case, consistent with the provisions and intent of the Ontario Human Rights Code, the employee's right requires reasonable steps towards an accommodation by the employer.

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 on the basis of religion or creed 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. (emphasis added)

It is clear from the above passage from McIntyre J. 's decision in O'Malley that he was discussing the duty of the employer to accommodate in the context of adverse effect discrimination. But it is also clear from a number of decisions rendered both in Canada and in the United States that a duty very similar to that described by McIntyre J. can be and has been imposed on employers in cases of direct discrimination as

> - 55 part of the BFOR analysis. A good Canadian example is Carson v. Air Canada (supra), a case under the CHRA involving age discrimination. The Review Tribunal there held that it was appropriate in applying the objective part of the Etobicoke test to consider the possibility that there was a reasonable alternative to the impugned requirement that would not be discriminatory. As the Review Tribunal put it (at p. D/ 1883), "If there is a reasonable, non- discriminatory alternative to the discriminatory practice used by the employer, it cannot be said that the objective aspect of the two- pronged test ... has been met." The reason this was so, the Review Tribunal suggested, was that if such an alternative exists, the impugned requirement could not be said to be reasonably necessary to further the interests the employer was seeking to further. The clear implication of this line of reasoning is, of course, that if such an alternative exists, the employer would be obliged to adopt it. (For examples of American cases to the same effect, see Hardin v. Stynchcomb 691 F. 2d 1364 (U. S. C. A., 11th Circuit, 1982) and Gunther v. Iowa State Men's Reformatory 612 F. 2d 1079 (U. S. C. A., 8th Circuit, 1980).)

In Bhinder, the Supreme Court of Canada held that no duty to accommodate of the kind imposed on the employer in O'Malley could be imposed on an employer to whom the CHRA applied. A distinction was drawn between the structure and language used in the Ontario Human Rights Code and the structure and language used in the CHRA and it was held that, under the CHRA, the employer need do nothing more than show that the impugned requirement was

rationally related to the nature of the employment in question. If it was, the requirement satisfied the

> - 56 BFOR test and, even though it gave rise to adverse effect discrimination, no duty to accommodate individuals within the group adversely affected could be imposed on the employer.

Mr. Fradkin takes the position that the effect of Bhinder is to rule out not only the possibility under the CHRA of imposing a duty to accommodate in cases of adverse effect discrimination, but also the possibility of imposing a duty to adopt a reasonable, non- discriminatory alternative in cases of direct and adverse effect discrimination. This argument was in fact made to the Review Tribunal in Carson, not on the basis of the Supreme Court of Canada's decision in Bhinder but on the basis of the Federal Court of Appeal's decision in that case, and it was very quickly rejected. The Review Tribunal drew a sharp distinction between a duty to accommodate, which it described as a duty "to exempt an employee from a general requirement imposed on all other employees" (p. D/ 1883), and an "obligation to seek alternatives to different treatment on a prohibited ground of discrimination" (ibid.). It then went on to say that, "in examining possible alternatives, this Tribunal is not imposing any obligation on an employer to accommodate.

Rather, it is carrying out its own obligation to assess whether or not a bona fide occupational requirement is reasonably necessary, in accordance with the objective aspect of the test approved by the Supreme Court in Etobicoke" (ibid.).

I agree with this reasoning, and in my view, there is nothing in the Supreme Court of Canada's decision in Bhinder that renders it suspect. McIntyre J. directed his remarks to a duty to accommodate in cases of adverse effect discrimination in which the impugned require>

- 57 ment had been held to satisfy the BFOR test. Nothing in his judgment suggests that he did not consider it appropriate to impose a duty on an employer to seek reasonable alternatives to the impugned requirement. On the contrary, the fact that he applied his BFOR test from Etobicoke to the impugned requirement in Bhinder suggests that the opposite was true. For, as the Review Tribunal in Carson pointed out, one cannot logically conclude that the impugned requirement is reasonably necessary without first considering (and rejecting) the possibility that a reasonable non- discriminatory alternative was available to the employer.

The fallacy in Mr. Fradkin's argument is the suggestion that the duty to accommodate is the same thing as the duty to adopt a reasonable non- discriminatory alternative. These duties are, as Carson makes clear, very different. The duty to accommodate is relevant only in cases of adverse effect discrimination and arises (if it arises at all) after the impugned requirement has been held to satisfy the BFOR test. The duty to adopt a reasonable, non- discriminatory alternative is relevant in cases of both direct and adverse effect discrimination, and arises prior to a finding that the impugned requirement satisfies the BFOR test.

I hold therefore, that, as part of its consideration of the objective

component of the BFOR test in a case arising under the CHRA, a tribunal is obliged to explore the possibility that a reasonable, non- discriminatory alternative to the impugned requirement exists. As a matter of practice, it is to be expected that the complainant will propose one or more such alternatives. It is clear, however, that

> - 58 wherever the proposal comes from, it is up to the employer to show on a balance of probabilities that each alternative that is proposed fails the test of being a reasonable, non-discriminatory alternative. In essence, this means that the employer must show that, even if the proposed alternatives were acted upon, the balance of interests would still be struck in the employer's favour.

It is to be noted that the interests relied upon by the employer might well be different with the non- discriminatory alternatives than they are with the impugned requirement. For example, the alternatives might cost the employer money or reduce efficiency. If they do, the employer is clearly entitled to rely on its interest in minimizing cost or maximizing efficiency when the new balance of interests is being struck.

Implicit in this analysis is the proposition that the search for reasonable, non- discriminatory alternatives to the impugned requirement is a separate branch of the objective component of the BFOR test. It is one thing to ask whether, with the impugned requirement in place, the balance of

interests should be struck in favour of the employer. It is quite another to ask whether, if the impugned requirement were replaced by one or more alternatives, the balance would be struck in the employer's favour. It seems to me to matter little which question is asked first. But it matters a good deal that the two be kept separate, for they are clearly different questions.

It remains for me to deal with a submission by Ms. Greckol that, in a case in which the job in question entails several different tasks, some of which pose no problem for the group discriminated against, the

> - 59 employer must show that those tasks which, according to the employer, the group discriminated against cannot or should not perform (because of the harm that would be done to the interests on which the employer relies in support of his BFOR defence it that group were permitted to do them) are tasks that are central or essential to the job. In support of this submission, she relies on Diaz v. Pan American World Airways Inc. (supra), Segrave v. Zeller's Ltd. (1975) unrep. (Ont. Trib.), Imberto v. Vic and Tony Coiffure (supra) and Caldwell v. Stuart and the Catholic Schools of Vancouver Archdiocese (supra). The Diaz case is relied upon because it is considered to be one of the leading American authorities on the BFOR question, and in it, a proposition similar to the one she advance s is articulated. Segrave and Imberto, both of which are Canadian cases, are relied upon because the Diaz case was referred to with approval in them. And Caldwell is said to reflect acceptance of, if not itself to articulate explicitly, the proposition I have formulated above.

Particular emphasis is placed on the following passage in the judgment of McIntyre J. in Caldwell:

The religious or doctrinal aspect of the school lies at its very heart and colours all its activities and programs. The role of the teacher in this respect is fundamental to the whole effort of the school, as much in its spiritual nature as in the academic. It is my opinion that objectively viewed, having in mind the special nature and objectives of the school, the requirement of religious conformance including the acceptance of observance of the church's rules regarding marriage is reasonably necessary to assure the achievement of the object of the school. It is my view that the Etobicoke test is thus met and that the requirement of conformance constitutes a bona fide qualification in respect of the occupation of the Catholic teacher employed in the Catholic school, the absence of which will deprive her of the protection of Section 8 of the Human Rights Code. It will be only in rare circumstances that such a factor as religious conformance can pass

> - 60 the test of bona fide qualification. In the case at bar, the special nature of the school and the unique role played by the teachers in the attaining of the school's legitimate objects are essential to the finding that religious conformance is a bona fide qualification. (p. D/ 2649)

I have difficulty seeing how this passage from Caldwell supports the submission Ms. Greckol makes, at least as I have formulated it. The job in question in Caldwell was not viewed by McIntyre J. as a job that was divisible into several components, the performance of some of which would cause problems if the complainant did not observe the tenets of the Catholic faith

and the performance of others of which would not. In fact, it was not viewed as a job that even had several different components.

This same difficulty seems to me to confront Ms. Greckol when she relies on Segrave v. Imberto. In neither of those cases was there a finding made that the impugned requirement would be justifiable in respect of some of the tasks to be performed but not others. In both cases the tribunal found that the impugned requirement could not be justified in respect of any of the tasks to be performed.

The proposition formulated in the Diaz case (and which was referred to with approval in Segrave v. Imberto) was that "discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively" (p. 388). It will be noted that the focus of this proposition is on the business as a whole rather than on the specific job in question. In that case the business was a passenger airline, the essence of which was defined by the court to be the "safe transportation [of people] from one place to another" (ibid.). The job

> - 61 in question was flight attendant. The gist of the court's reasoning in striking down a rule that barred men from performing this job seemed to be that, because making the flight an enjoyable experience for the passengers was tangential to the essence of the business, the fact that men would not be as successful as women at making the flight enjoyable was no reason to bar men from becoming flight attendants. (I say "seemed to be" because the court

apparently acknowledged that some men might be as successful as women at this and I would have thought that once that had been acknowledged, it was irrlevant to know whether making the flight enjoyable was of the essence of the business or not. In either case the sex discrimination would not be justifiable.)

With respect, I have a great deal of difficulty with the proposition articulated by the court in Diaz. By focusing on the business instead of the job, the court leaves, open the possibility that there may be a job that is "tangential" to the essence of the business but that can, or should, only be performed by persons of the same sex. Consider, for example, the job of picking up used towels in the locker rooms at a sports facility. Providing someone to pick up used towels would not seem to me to be of the essence of the business of operating a sports facility. And yet one would expect that the sports facility (and its clientele) would want to be able to argue that males should be performing this job in the males' locker room and females should be performing it in the females' locker room. Under the Diaz test, that expectation would be frustrated.

This brings me back to Ms. Greckol's submission as I have formulated it above. She says, in effect, that if the impugned

> - 62 requirement is said by the employer to be necessary because some only of the tasks could or should not be performed by a particular group, the employer must show that those tasks are central or essential to the performance of the job. This proposition does not suffer from the weakness inherent in the proposition articulated in Diaz. Even so, I am not prepared to accept it as a rule to be applied strictly in each and every case. Attractive as it is to decision- makers to

have at their disposal hard and fast rules that, when applied, produce quick and easy answers to what would, in their absence, often be difficult questions, the temptation to adopt them should be resisted, particularly in an area of law which is in its early stages of development.

Nevertheless, there seems to me to be much to commend this proposition, particularly insofar as the inquiry into reasonable, non- discriminatory alternatives is concerned. If the tasks that, according to the employer, could or should not be performed by a particular group are, to use the language of Diaz, tangential to the essence of the job, there is reason to believe that, by a slight adjustment in work assignments, the employer will be able to employ the group that heretofore has been barred from performing the job without sacrificing the interests that, he says, would be jeopardized if the group in question were to perform those tasks. This may not always be possible - for example, there may only be one employee - and it is for that reason that the proposition should not be applied strictly. But it will be in a great many cases, and when it is the tribunal should, in my view, be loath to find that the BFOR test has been met.

> - 63 Insofar as the other branch of the objective component of the BFOR test is concerned - that in which the balance of interests is struck with the impugned requirement in place - this proposition can also be of assistance. For if the tasks in question are peripheral to the essence of the job, the

likelihood is that little harm will be done to the interests on which the employer relies, making it more difficult for the employer to persuade the tribunal that the balance of interests should be struck in his favour. However, this will by no means always be the case. Suppose, for example, that one of a myriad of tasks assigned to guards in a particular correctional institution was to conduct skin searches of the prisoners, but that, because of the nature of the institution, that task was very seldom performed. On that basis it might be said that that task was tangential to the essence of the job of guard at that institution. Even so, it seems unlikely that, because that was the case, an argument that females should be entitled to perform the job of guard, including that particular task, would succeed. The interest in inmate privacy would likely be seen to prevail. (This would seem to be a case in which work assignments could be adjusted between male and female guards to accommodate the interest in inmate privacy. Females could therefore be employed as guards (barring other problems relating to inmate privacy), but would not perform this particular task.)

Having explained how I propose to deal with this case - and in the process, having dealt with the many submissions from the parties about how I should do so - I turn now to the task of applying the analytical framework I have developed to the evidence that was adduced in this case.

> - 64 III. APPLICATION OF THE LAW TO THE EVIDENCE Before I proceed to apply the law to the evidence in this case, I would like to deal with two points raised by Mr. Fradkin in support of his submissions that, in my view, can be quickly disposed of.

The first relates to the conduct of the Canadian Human Rights Commission in the handling of complaints from male prisoners in federal penal institutions in which female guards have been employed. Mr. Fradkin contends that the Commission has failed to deal with these complaints in

a fair and expeditious manner and suggests that the failure to do so shows that the Commission has not acted impartially on the issue of cross- sex guarding.

I fail to see how the manner in which the Commission has dealt with complaints from male inmates has any relevance to the issues in this case. The fact that the Commission received such complaints may well be relevant. But the fact that those complaints were handled in a dilatory manner (assuming, without deciding, that the evidence established that fact) no more goes to show that the R. C. M. P. 's same- sex guarding policy is not contrary to the CHRA than the fact that they were handled expeditiously would go to show that that policy is contrary to the CHRA.

The second point relates to the use of male guards to look after female prisoners. Mr. Fradkin seemed to be of the view that the issue in the case was not simply whether or not the R. C. M. P. could continue

> - 65 to prevent women from guarding men, but whether or not the R. C. M. P. could continue its policy of same- sex guarding. In other words, I was to consider both sides of the coin - women guarding men and men guarding women. Implicit in this view - and, presumably, the reason underlying it - is the assumption

that no relevant difference can be drawn between the two. I do not accept Mr. Fradkin's characterization of the issue in this case. The issue I have to decide is whether the complaints made by these four women have been substantiated. Those complaints concern the policy of the R. C. M. P. that females cannot guard male prisoners in R. C. M. P. lock- ups. They do not concern the policy of the R. C. M. P. that males cannot guard female prisoners in R. C. M. P. lock- ups. There may or may not be relevant differences between the two. I suspect there are not. But that is not a question that I need answer here (nor, I might add, was it a question to which much, if any, evidence was directed). If it is ever answered, it will be in another case.

A. Prima Facie Discrimination I turn now to the first of the two stages of analysis in employment discrimination cases, that concerned with the obligation of the complainants to show that the respondent has been guilty of one or more of the acts defined by sections 7 and 10. It will be recalled that the complainants here rely on section 7(a) and (b) and section 10(a), which for convenience, I reproduce again here:

> - 66 7. It is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ any individual, or (b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.

10. It is a discriminatory practice for an employer, employee organization or organization of employers

(a) to establish or pursue a policy or practice that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

The "prohibited ground" in this case is, of course, sex. Ms. Greckol submits that this is a clear case of direct discrimination on the basis of sex under both section 7 and section 10. In the alternative, she submits that this is a case of adverse effect discrimination on the basis of sex. This submission was based on evidence that showed clearly that far fewer females than males are incarcerated in R. C. M. P. lock- ups, and the proposition (supported by direct evidence from the complainants) that, because of this disparity, the same- sex guarding policy necessarily has a far greater impact on women who wish to work as guards than on men who wish to do so. Mr. Fradkin, on the other hand, submits that the R. C. M. P. policy under attack in this case entails no discrimination on the basis of sex. He says that both male and female guards have exactly the same rights and duties, receive the same rate of pay and are excluded from guarding prisoners of the opposite gender for exactly the same reasons.

The language of section 10 of the CHRA, in speaking of "any employment opportunities", makes it clear that the focus in cases such as this must be on the availability within a particular employment

>

- 67 context of a specific job. The employer cannot avoid a section 10 complaint by showing that he does not discriminate in respect of all the jobs performed by his employees. He has to show that he does not discriminate in respect of the specific job the complainant is seeking. It is up to the employer to define the nature and responsibilities of each job - in other words, to distinguish between one job and another - and here the R. C. M. P. has decided to distinguish between the job of guarding male prisoners and the job of guarding female prisoners. The question becomes, does the R. C. M. P. policy on cross- sex guarding on its face deprive women of the opportunity of guarding male prisoners? To ask the question is to answer it. The complainants have met the initial burden insofar as section 10 is concerned.

The same conclusion must be reached with respect to section 7. Although not apparent from the language of that provision, which speaks generally of employment with the employer, it seems to me to be clear that here, too, the focus must be on employment in a specific job. (To hold otherwise would be to frustrate the evident purpose of the CHRA, since it would mean that an employer could discriminate against existing employees looking for promotions without breaching section 7(a).) Hence the question here becomes, has the R. C. M. P. refused to continue to employ the complainants to guard male prisoners because they are women (section 7(a)), or, in the course of their employment as guards of male prisoners, differentiated adversely in relation to them because they are women (section 7(b))? Again, to ask the question is to answer it.

> - 68 I therefore agree with Ms. Greckol that this is a clear case of direct discrimination on the basis of sex under both section 7 and section 10. The R. C. M. P. policy makes it clear on its face that the job of guarding male prisoners is to be performed by males and that the job of guarding female prisoners is to be performed by females. And it is clear that the R. C. M. P. itself recognizes that these two jobs are distinct - that recognition lies at the very heart of the policy.

Before leaving this question, it is worth noting that the Supreme Court of the United States, when confronted with a very similar same- sex guarding policy in Dothard v. Rawlinson (supra), had no difficulty concluding that such a policy "explicitly discriminates against women on the basis of their sex" (at p. 332).

Having concluded that this is a case of direct discrimination, it is unnecessary for me to deal with Ms. Greckol's alternative submission that, at the very least, it is a case of adverse effect discrimination.

B. The BFOR Question The question now to be decided is whether the R. C. M. P. can justify its requirement that male prisoners in the lock- ups be guarded by males as a BFOR pursuant to the test I formulated in Part II. If the R. C. M. P. is to succeed in doing so, it must show both

(a) that the impugned requirement is imposed honestly, in good faith and in the sincerely held belief that it is imposed for the protection or furtherance of interests which the R. C. M. P. can legitimately and rationally seek to protect or further, given the

nature of the employment in question, and not for ulterior or extraneous reasons, aimed at objectives which could defeat the purpose of the CHRA; and

> - 69 (b) that the impugned requirement, objectively viewed, is reasonably

necessary to protect or further interests which the R. C. M. P. can legitimately and rationally seek to protect or further, given the nature of the employment.

The first step in the application of this test is the identification of the interests which the R. C. M. P. can, in imposing the impugned requirement, legitimately and rationally seek to protect or further, given the nature of the employment. For present purposes the nature of the employment here can be described simply as guarding male prisoners in R. C. M. P. lock- ups.

Early indications were that the R. C. M. P. was going to rely on two interests to justify its requirement that male prisoners be guarded by males - security within the lock- ups and inmate privacy. The interest in security was said to be jeopardized by female guards because they would lack the physical strength required to deal with aggressive male prisoners. It will be recalled that this was one of the justifications given for the same- sex guarding policy by Superintendent Barker to the investigating officer from the Canadian Human Rights Commission during the course of the latter's investigation into the complaints in this case. At the end of the day, however, the R. C. M. P. decided (wisely, I might say) not to pursue the argument based on security.

We are left, then with the interest in inmate privacy. The particular aspect of inmate privacy that is of concern is, of course, freedom from being viewed in a cell by strangers of the opposite sex while in states of undress and using the toilet. (It is important to note that it is this, and only this, aspect of inmate privacy that I will be referring to from now on when I speak of the interest in inmate

> - 70 privacy.) This interest is clearly one that the R. C. M. P. can legitimately seek to protect here since it is not inimical to the purposes underlying the CHRA, as customer preference based on prejudice would be. This interest is also clearly one that is rationally related to the same- sex guarding policy since it is rational to believe that it will be protected by that policy.

At this stage it is appropriate to reformulate the BFOR test as follows: (a) is the impugned requirement imposed honestly, in good faith and in

the sincerely held belief that it is imposed for the protection of inmate privacy, and not for ulterior or extraneous reasons, aimed at objections which could defeat the purpose of the CHRA; and

(b) is the impugned requirement, objectively viewed, reasonably necessary to protect inmate privacy?

Each of these components of the test will now be examined in turn.

1. The Subjective Component Ms. Greckol submits that the R. C. M. P. has failed to satisfy the subjective component of the BFOR test. She does not explicitly attribute any ulterior or extraneous motive to the R. C. M. P., but she does claim that the impugned requirement was not imposed honestly, in good faith and in the sincerely held belief that it was for the protection of inmate privacy.

She advances this claim on two separate grounds. She says first that the purported concern of the R. C. M. P. for inmate privacy is suspect given the inadequacy of the physical facilities and security practices in the lock- ups across the country and the failure of the R. C. M. P. to take steps to improve those facilities and practices. She

> - 71 referred specifically to evidence relating to the treatment of intoxicated prisoners, who are put in "drunk tanks" that lack even the most basic toilet facilities and that are often overcrowded; the absence of screening procedures to isolate prisoners who might be mentally ill or to detect potential suicide victims; the practice of stripping naked and placing in a barren cell without even a blanket of prisoners who do exhibit signs of mental instability; the failure to solicit medical assistance for those who exhibit such signs; the failure to take steps to modify the design of the cells in lock- ups to make it more difficult for prisoners to attempt suicide by hanging; and the failure to attempt to improve inmate privacy in ways other than by excluding female guards, for example, by using modesty barriers.

In support of this line of argument, she invokes a comment made by Marshall J. in his dissenting judgment in Dothard v. Rawlinson (supra), a case in which the Supreme Court- of the United States upheld on security grounds a same- sex guarding policy in a maximum security male prison in Alabama. The issue of inmate privacy was not dealt with by the majority in that case but Marshall J. indicated in his brief treatment of the issue in a footnote that it was "strange indeed to hear state officials who have for years been violating the most basic principles of human decency in the operation of their prisons suddenly become concerned about inmate

privacy" (p. 346, n. 5). It was at least partly on this basis that he rejected the BFOR argument based on inmate privacy.

The second ground upon which she advances this claim is what she describes as the absence of a satisfactory explanation of why the

> - 72 R. C. M. P. policy was initially implemented several decades ago, or why it was enforced against these four complainants in January 1981. With respect to the former, she suggests that, given that the policy has apparently been in place since the inception of the R. C. M. P., without any evidence as to the reasons why it was initially adopted, it may well have been based on what would now be considered improper sexual stereotyping. With respect to the latter, she referred to the failure Of the R. C. M. P. to investigate where, in fact, female guards had been used to guard male prisoners; whether or not concerns had been expressed by those responsible for supervising the female guards in these situations, or by the male prisoners themselves; or whether

the beneficial effects of the use of female guards to look after male prisoners outweighed the costs. The implication seems to be that, again, there is reason to believe that the policy was based on improper sexual stereotyping.

In support of this line of argument, Ms. Greckol relied on the decision in Foreman v. VIA Rail Canada Inc. (1980), 1 C. H. R. R. D/ 111 (Can. Trib.), in which the tribunal took into account in its consideration of the BFOR issue in that case the absence of satisfactory evidence as to how the impugned requirements had been "inaugurated" and whether or not they had been updated recently.

Mr. Fradkin's first response to this line of argument is to argue that, if Ms. Greckol had intended to challenge the evidence of Superintendent Barker regarding the reasons underlying the R. C. M. P. 's policy on same- sex guarding, she should have done so either by cross- examining him on the point or by introducing other evidence,

> - 73 neither of which, he says, she did. He says that to question the veracity of his evidence for the first time in argument is unfair to him (and to the R. C. M. P.) because it denies him the opportunity to respond to such an attack. The gist of this response to Ms. Greckol's submission seemed to be that, because she did not cross- examine Superintendent Barker on this point, she is not entitled to make this submission as part of her argument.

Mr. Fradkin's second response is to argue that, in any event, since Superintendent Barker's evidence was not contradicted, its validity stands. Moreover, he says, there is no reason to doubt its veracity.

Finally, Mr. Fradkin takes the position that this argument on the part of Ms. Greckol is, as he puts it, a red herring. He says that the R. C. M. P. has not held itself out to be without fault in all matters and that improvements might well be called for in some aspects of the design and operation of lock- ups. But, he says, that fact has nothing to do with the subjective bona fides of the R. C. M. P. in requiring that male prisoners be guarded by males.

In Part II of this award, I indicated that, at least in cases in which the interests invoked in support of the impugned requirement were those of persons other than the employer, tribunals should be loath to find that the subjective component of the BFOR test is not met. I also indicated that the focus of the inquiry should be on its first, or positive, branch, and not on its second, or negative, branch. Provided the respondent is able to satisfy the first branch, the tribunal is

> - 74 entitled to draw the inference that the second branch is also satisfied. The fact that Ms. Greckol does not explicitly attribute an ulterior or extraneous motive to the R. C. M. P. is not, therefore, fatal to her submission on this point. It is enough for her to argue that the R. C. M. P. 's policy was not imposed honestly, in good faith and in the sincerely held belief that it serves the interest of inmate privacy. However, I do not agree with her on

the merits of this argument. I am satisfied that the R. C. M. P. 's policy was imposed honestly, in good faith and in the sincerely held belief that it serves the interest in inmate privacy.

I base this conclusion on the evidence of Superintendent Barker. He was an honest and forthright witness and there was nothing in what he said in either direct or cross- examination that suggested that the impugned policy was not based, at least in part, on an honest and sincere belief that it was necessary to protect inmate privacy. His evidence was clear that at the root of the policy was the belief that allowing female guards to view male prisoners in states of undress and while using the toilets was contrary to existing norms of public decency and, as such, amounted to an invasion of the inmate's privacy.

Ms. Greckol's thesis that, because the R. C. M. P. has done little if anything to improve the conditions in lock- ups, its claim that its policy on same- sex guarding is based on a concern about inmate privacy should be viewed with suspicion, misses the mark, for the reason given by Mr. Fradkin. Were the evidence to show that the R. C. M. P. had consistently ignored the interest of male prisoners in not being viewed

> - 75 in states of undress and while using the toilet by females, there would be reason to be suspicious because there would be a clear contradiction between what was being done and what was being said. But I see no inconsistency of this kind between failing to improve the physical facilities and security procedures in lock- ups and saying that females should not be able to view male prisoners in states of undress and while using the toilet because it puts at risk an important aspect of the prisoners' privacy.

It is true that Marshall J. was influenced in rejecting the inmate privacy justification in Dothard v. Rawlinson by the fact that the prison officials who were making it had shown very little regard for the prisoners' other interests. But it is important to note that he was influenced even more by the fact that "these same officials allow women guards in contact positions in a number of non-maximum security institutions [while striving] to protect inmates' privacy in the prisons where personal freedom is most severely restricted" (at p. 346, n. 5). I am not sure that I follow the logic of his reasoning on this, but that is beside the point. The point is that he thought there was a contradiction between what the prison was doing and what they were saying of the kind I have found not to exist here, and was influenced by it. That case seems to me therefore to be different from this one in an important respect.

More importantly, however, I have considerable difficulty with the proposition that the very legitimate interest of a third party to the dispute between an employer and his (prospective) employees should be ignored by the tribunal adjudicating that dispute because the employer has ignored that or other interests of that party in the past. Surely

> - 76 third party interests stand on their own, and are entitled to the same weight regardless of how much weight the employer has given them. To permit the employer to dictate the weight they receive is to run the risk that the

tribunal will be adding insult to injury for those third parties who have had the misfortune to be at the mercy of a mean- spirited employer. Even if there is a contradiction between what the employer does and what the employer says, therefore, a tribunal should be loath to find that the subjective component of the BFOR test has not been met.

With respect to Ms. Greckol's other thesis, that based on what she describes as the absence of a satisfactory explanation of why the R. C. M. P. policy was initially implemented and why it was enforced against these four complainants, it seems to me that she again misses the mark. The suggestion that this policy might have been adopted initially as a result of sexual stereotyping may well have some merit to it, at least if the stereotyping Ms. Greckol has in mind relates to the "proper place" of women and their ability to do this kind of work. But even if it does have merit, it seems to me to be beside the point. The question here must surely be whether the employer now can satisfy the subjective component of the BFOR test. Superintendent Barker's evidence indicates that the impugned policy has been reviewed recently and has been retained, and he gave the reasons for retaining it. As I indicated above, I accept that those reasons stem at least in part from an honest and sincere belief in the need to protect inmate privacy.

Insofar as the enforcement of the policy against these complainants is concerned, it is important to remember that the subjective component of the BFOR test does not require the employer to show that

> - 77 Insofar as the enforcement of the policy against these complainants is concerned, it is important to remember that the subjective component of the BFOR test does not require the employer to show that his belief that the impugned requirement serves the interest in question is reasonable; it merely requires the employer to show that his belief is honest and sincere. In this regard, it is important to note that the tribunal in the Foreman case was considering the objective part of the BFOR test, not the subjective, when it made reference to the absence of satisfactory evidence as to why the impugned requirements in that case had come into existence and whether or not they had been reviewed recently. The fact that the R. C. M. P. failed to carry out investigations of the kind suggested by Ms. Greckol may tend to impugn the reasonableness of its belief in the need for its same- sex guarding policy. But it seems to me to be irrelevant to the question of whether that belief is honest and sincere.

Having rejected both of Ms. Greckol's arguments on their merits, it is unnecessary for me to deal with the procedural point raised by Mr. Fradkin.

For the reasons given, I conclude that the R. C. M. P. has satisfied the subjective component of the BFOR test.

2. The Objective Component The objective component of the BFOR test I have formulated for the purposes of this case, it will be recalled, is as follows: is the R. C. M. P. policy reasonably necessary to protect the interest in innate privacy?

I have outlined in Part II of this award the approach that I propose to take in applying this portion of the test. Having identified

>

- 78 the interest on which the R. C. M. P. seeks to rely in its attempt to justify its policy, and having satisfied myself that that interest is both legitimate and rationally related to the policy, that approach calls for a consideration of the following questions: (1) how important is the interest in inmate privacy? (2) to what extent is it furthered by the impugned policy? (3) what harm does the policy do to the interest in equality of opportunity? (4) are there any other interests on which the complainants are entitled to rely and, if so, what weight should they be given? (5) which set of interests, that relied on by the R. C. M. P. or that relied on by the complainants, prevails? (6) are there any reasonable alternatives to the policy open to the R. C. M. P.?

Each of these questions will be addressed in turn. (1) The Importance of Inmate Privacy The importance of the interest in inmate privacy invoked here is a function in part of the degree of importance we attach generally to the interest in personal privacy, in part of the degree of importance we attach to the specific interest in not being viewed in states of undress and using the toilet by strangers of the opposite sex and in part of the degree of importance we attach to this specific interest in the lock- up setting.

Insofar as the degree of importance we attach generally to the interest in personal privacy is concerned, the Supreme Court of Canada has held, in effect, that this is an interest of Constitutional dimension. In Hunter v. Southam (1984), 11 D. L. R. (4th) 641, a case involving section 8 of the Charter, Chief Justice Dickson adopted, and

> - 79 applied to that provision, the proposition articulated by Stewart J. in Katz v. United States 389 U. S. 347 (1967), at p. 351 that the Fourth Amendment's protection against unreasonable searches and seizures "protects people, not places", and quoted with approval the definition given by Stewart J. in that case to the right to privacy (at p. 350) as the "the right to be let alone by other people".

The high degree of importance we attach generally to the interest in personal privacy is also reflected in numerous statutes. For example, the provinces of British Columbia, Saskatchewan and Manitoba have enacted legislation creating a distinct tort of violating another's privacy, and the Criminal Code R. S. C. 1970, c. 34, as amended, s. 178.21 contains provisions forbidding the interception of private communications by electronic or mechanical devices unless judicial authorization to make such interceptions has first been obtained. The Parliament of Canada has also enacted legislation, now called the Privacy Act, that is designed to protect from release to

third parties personal information held by government departments and agencies. It is of interest, and I believe of importance in this case, to note that this legislation was initially enacted as part of the original Canadian Human Rights Act enacted in 1977. It would not be unreasonable to draw from that fact the inference that, at least in the view of the Parliament that enacted that act, the interest in personal privacy was of equivalent importance to the interest in equality of opportunity. At the very least, one is free to draw the inference that Parliament viewed the interest in personal privacy as a "human right".

Further support for the notion that the interest in personal privacy should be considered very important comes from the

> - 80 International Covenant on Civil and Political Rights, to which Canada became a signatory in 1976. Article 17(1) of that document provides that "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."

If the general interest in personal privacy is an important one to us, the specific interest in not being viewed while in states of undress and using the toilet by strangers of the opposite sex must be said to be of particular importance. At the core of this aspect of the interest in personal privacy is a concern about "the inherent dignity of the human person", respect for which Chief Justice Dickson says in R. v. Oakes (1986), 26 D. L. R. (4th) 200, at p. 225 is a principle "essential to a free and democratic society". The "dignity and worth of the human person" is declared in the preamble to the Canadian Bill of Rights, R. S. C. 1970, App. III to be one of the governing values of this country. And the preamble to the International Covenant on Civil and Political Rights begins with an assertion that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".

What goes into the definition of "the inherent dignity of the human person" may be a matter of dispute, and may vary somewhat front society to society and from one age to another, but no one can deny - and I do not understand Ms. Greckol to deny - that in this society at this time the definition would include the interest in not being viewed while in states of undress or using the toilet by strangers of the opposite sex. As it was put in York v. Story 324 F. 2d 450 (U. S. C. A.,

> - 81 9th Cir., 1963) in respect of the interest in not being viewed in states of undress by strangers of the opposite sex, "We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one’s unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self- respect and personal dignity" (p. 455). And in Sterling v. Cupp 607 P. 2d 206 (Ore. C. A., 1980) the court says in respect of the interest in not being viewed while using the toilet by strangers of the opposite sex, that "the final bastion of privacy is to be found in the area of human procreation and excretion" and "[if] a person is entitled to any shred of privacy, then it is to privacy in these matters" (p. 208).

This is not to suggest that no one is prepared to be viewed in these circumstances by strangers of the opposite sex. Obviously some people - for example, burlesque dancers - are prepared to be viewed at least in states of undress by strangers of the opposite sex. But that fact does not

diminish the importance that we as a society attach to this interest any more than the fact that some people are prepared to be physically assaulted - for example, hockey players - diminishes the importance that we as a society attach to the interest in freedom from physical assault.

The importance that we attach to this specific interest is not reflected widely in our laws - no doubt because there has been little need to deal with it in legislation - but legislators have, on occasion, felt compelled to ensure that it is protected. Some human rights statutes make express provision for "public decency" defences (see the Human Rights Act, S. B. C. 1984, c. 22, s. 3 (and by implication section 5(2)) and the Manitoba Human Rights Act, S. M. 1974, c. 65,

> - 82 s. 3(2)(b)). It is also to be noted that the building codes in the various jurisdictions across the country typically require separate washroom facilities for males and females (see, e. g., National Building Code of Canada, 1977, s. 3.6.4.2.(1)).

Human rights tribunals have recognized the importance of this interest in two cases, Tharp v. Lornex Mining Corporation Ltd. (B. C. Trib, 1975, unrep.) and Waplington v. Maloney Steel Ltd. (1983), 4 C. H. R. R. D/ 1262 (Alta. Trib.). In the first case, an employer was held to have contravened the prohibition against discrimination in employment in section 8 of the old B. C. Human Rights Code for requiring a female employee to share the male employees' toilet and washroom facilities. Such a requirement was held to amount to sex discrimination. The essence of the tribunal's reasoning on this point is contained in the following passage from p. 12 of its award:

... Lornex failed to offer to the Complainant toilet and washroom facilities which could be used with the same degree of privacy provided to the male residents of the other bunkhouses and, indeed, to all male residents prior to her arrival. The privacy that was missing was freedom from intrusion from the opposite sex. We have concluded that Ms. Tharp was discriminated against by virtue of the nature of the accommodation provided to her and that the basis for that discrimination was Ms. Tharp's sex. She was inserted into an exclusively male domain and denied the privacy extended by Lornex to most of the male residents on the campsite. Ms. Tharp was therefore discriminated against on the basis of her sex.

In Waplington, an employer was found to have discriminated on the basis of sex when it refused to grant a female a job as an apprentice welder because there was no washroom for women in, or easily accessible from, the employer's shop area. The award of the tribunal in that case notes that "the Individual's Rights Protection Act is to be interpreted

> - 83 in light of allowing the opposite sexes to use washroom facilities in privacy" (at p. D/ 1264). Support for this view was found in what the tribunal describes as "the general moral values of our society", the Lornex decision and the provision of the Alberta Building Code that requires separate washroom facilities for males and females.

The Lornex and Waplington cases are not, of course, on all fours with this one. In neither of them was the interest in not being viewed by strangers of the opposite sex while using the toilet set against the interest in equality of opportunity, as it is here. In a sense, these interests were

working together in these cases. But these cases do show that the interest invoked by the R. C. M. P. in this case is one which is considered by us to be of great importance.

In assessing the degree of importance that we attach to the specific interest in not being viewed in states of undress and using the toilet by strangers of the opposite sex in the lock- up setting, one must, I think, begin by recognizing that people do not lose their status as human beings simply because they are incarcerated. Prisoners, including those in R. C. M. P. lock- ups, are as entitled as everyone else in society to claim an interest in not being viewed in states of undress and using the toilet by strangers of the opposite sex, and to claim that that interest is as important to them, as ordinary human beings, as it is to everyone else.

The fact that a prisoner is entitled to claim an interest in his capacity as an ordinary human being does not, of course, mean that his claim will be vindicated. A prisoner, simply by virtue of the fact of

> - 84 his incarceration, is required to sacrifice a great many interests. One of these is the general interest in privacy. However, as a matter of principle, it is surely only those interests which, to borrow from the words of the United States Supreme Court in Hudson v. Palmer 104 S. Ct. 3194 (1984), at p. 3198, are "fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration" that a prisoner should be required to sacrifice. All other interests a prisoner should be as entitled as anyone else to expect to see vindicated. And because, as Mr. Fradkin urges in his submissions, the specific interest in not being viewed in states of undress or using the toilet by strangers of the opposite sex cannot be said to be incompatible either with imprisonment itself or with the objectives of incarceration, that must be said to be one such interest. To hold that a prisoner is not entitled to have an Interest of this importance protected when its sacrifice is not required by the objectives of incarceration is to add insult to what in effect is already a great injury.

The effect of applying the principle in Hudson v. Palmer here is, it seems to me, to make the interest in not being viewed in states of undress or using the toilet by strangers of the opposite sex even more important in the lock- up setting than it is generally. To require that it be sacrificed in this setting not only means that the interest itself is sacrificed, it also means that this extremely important principle is sacrificed.

There are other reasons to believe that this interest is more important in the lock- up setting than it is generally. It is clear

> - 85 from the evidence of all of the experts who testified in this case that most people who find themselves in a lock- up are under a great deal of stress. Anything that may tend to accentuate that stress, including embarrassment and a loss of dignity, is obviously to be avoided. One does not require expert evidence to know that being observed in states of undress or using the toilet by strangers of the opposite sex would cause embarassment and a loss of dignity to anyone, including a prisoner, who has been raised in the belief that that is something to be avoided. In this case, expert evidence was

given on this issue, and while the evidence of the experts was not consistent as to the degree to which being viewed in states of undress or using the toilet by a female guard would accentuate the stress experienced by a typical male prisoner in a lock- up, all but one agreed that there would be some accentuation.

Dr. Van Dyke's evidence regarding the special problems confronted by native males who are guarded by females serves further to enhance the importance of this interest in the lock- up setting, although, in my view, only marginally. The fact that none of the witnesses who had had experience with native males being guarded by females had noticed any difference whatsoever between the reaction of these males and the reaction of non- native males suggests that this evidence cannot be given a great deal of weight. However, the fact that none of the witnesses called by the complainants challenged this evidence directly obliges me to give it some weight.

Stronger support for the view that this specific interest is to be considered especially important in the lock- up setting comes from

> - 86 Article 10(a) of the International Covenant on Civil and Political Rights. Article 10(a) provides that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person" and would seem clearly to protect the interest of a prisoner in not being viewed in states of undress or using the toilet by strangers of the opposite sex.

Mr. Fradkin also sought support from the Standard Minimum Rules for the Treatment of Prisoners adopted in 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders and approved by the Economic and Social Council of the United Nations in resolution 663 of July 31, 1957. Canada was a member of the Economic and Social Council at the time resolution 663 was adopted and voted in favour of its adoption (as did all other nations present).

Article 1 of the Standard Minimum Rules for the Treatment of Prisoners describes the rules as embodying what is considered to be good principle and practice in the treatment of prisoners and the management of institutions. Article 4 provides that the provisions of Part I apply to all categories of prisoners, criminal and civil, convicted and untried. Article 53 is in Part I and provides as follows:

53 (1) In an institution for both men and women, the part of the institution set aside for women shall be under the authority of a responsible woman officer who shall the have the custody of the keys of all that part of the institution.

(2) No male member of the staff shall enter the part of the institution set aside for women unless accompanied by a woman officer.

(3) Women prisoners shall be attended and supervised only by women officers. This does not, however, preclude male members of

the staff, particularly doctors and teachers, from carrying out their professional duties in institutions or parts of institutions set aside for women. (emphasis added)

By its terms, Article 53 speaks only to the need to have female prisoners guarded by females. It makes no mention of the need to have male prisoners guarded by males. Mr. Fradkin attempts to circumvent this problem by pointing out that in 1955, when the provision was drafted, it would not have been expected that women would ever be in a position to guard men; such work would have been considered unsuitable for women. There was no reason, therefore, to make provision for the need to have male prisoners guarded by males. Had it been expected that women would be in a position to guard male prisoners, he suggests, Article 53 would have made provision for this as well. He says that Article 53 should be read as reflecting a concern about cross- sex guarding generally.

Implicit in this line of argument is the assumption that Article 53 is directed at the issue of privacy. Ms. Greckol takes issue with this assumption. She points out that there is nothing in the language of Article 53 to suggest that it is directed to the issue of privacy, and argues that from an historical perspective it would seem to have been directed rather to the problem of sexual exploitation by male guards of female prisoners.

Unfortunately, no evidence was given on the purpose underlying Article 53. Ms. Greckol's suggestion that it was directed to the problem of sexual exploitation is a plausible one, and it is buttressed by the fact that Article 53 has not been amended to require that male prisoners be guarded by males even though females now clearly are in a

> - 88 position to guard male prisoners and have in fact been doing so in some countries for some time. Had Article 53 been directed to the issue of privacy, one would have thought that such an amendment would by now have been made.

It may be that Article 53 was directed to the issue of privacy. On the record before me, however, I do not feel that I can conclude with any confidence that it was. I am therefore unable to accept Mr. Fradkin's submission that Article 53 serves to give added importance in the lock- up setting to the specific interest in not being viewed while in states of undress or using the toilet by strangers of the opposite sex.

Ms. Greckol attempts to diminish the importance in the lock- up setting of this specific interest by arguing that male prisoners have come to accept the presence of female nurses in prisons. The suggestion seems to be that this shows that the interest in not being viewed in states of undress and using the toilet by strangers of the opposite sex is one that male prisoners are prepared to overlook.

This same argument was considered and rejected by the Supreme Court of Oregon in Sterling v. Cupp 625 P. 2d 123 (1981), a case in which male inmates of the Oregon State Penitentiary sought to enjoin the Corrections Division of the state government from assigning female correctional personnel to certain duties within the prison. The court's reasoning on this point was as follows:

In the setting of medical and hospital care, women have long accepted

the ministrations of male physicians and men have accepted those of female nurses and, more recently, female physicians; but there the health of the patient's body itself is the object and the purpose of the contact is to help. The

> - 89 hospital is not an adversary setting of mistrustful authority on one side and compelled subjugation on the other. (emphasis added) (p. 133)

This distinction between the nurse, whose role it is to help, and the guard, whose role it is to watch over, was emphasized by the respondent's experts in this case. Although both Dr. Smith and Dr. Brooks attempted in their evidence to minimize the extent to which the roles differed, both accepted that they were different.

This difference in role, which seems to me to be clear, is not the only reason for doubting the force of Ms. Greckol's submission. The fact is that, as one of the respondent's experts pointed out, nurses are not normally expected to observe a patient using the toilet. More importantly, however, having female nurses attend to male patients inside a prison mirrors the practice outside it, it does not conflict with it. It is one thing to expect a male prisoner to accept a practice inside the prison that has come to be accepted outside it; it is quite another to expect him to accept a practice that is not accepted outside prison. I am not prepared to conclude, therefore, that the acceptance of female nurses by male prisoners has the effect of diminishing the importance of the interest in inmate privacy in the lock- up setting.

Nor am I prepared to accept Ms. Greckol's submission that the relatively low number of formal complaints from male prisoners who have been in institutions in which female guards have been employed suggests that this interest should not be given great weight. As Mr. Fradkin points out in his submissions, there is a number of reasons why prisoners who object to being guarded by females would not complain - a

> - 90 lack of faith in the complaint process, fear of retaliation, resignation, etc. But I do not rest my rejection of this submission on that basis. In my view, the number of complaints from prisoners has very little relevance in a case of this kind. I agree with Friedman J. who in In re Long 127 Cal. Rptr. 737 (C. A., 1976), a case very similar to this one, said that "the occasion does not evoke a numbers game, but rather a constitutional view founded upon undebatable expectations of privacy, which in turn reflect prevalent social norms and emotional attitudes" (p. 737). This is not a constitutional case, as that one was, but it seems to me to be no less important here than it was there to see the issue as one requiring attention to basic values and principles.

Taking into account all of the considerations I have outlined above, I conclude that the interest in inmate privacy invoked here by the R. C. M. P. is an interest of compelling importance and one to which a great deal of weight must be given in the balancing process that determines the result in this aspect of the case.

(2) The Extent to Which Inmate Privacy is Furthered by the Policy The extent to which an interest relied upon by an employer can be said to be furthered by the impugned requirement

depends on the extent to which that interest would be harmed if the requirement were removed. For obvious reasons, the latter measurement will be a difficult one to make in most cases. The tribunal will normally lack any hard evidence of what the extent of harm would actually be if the requirement were

> - 91 removed because the impugned requirement will always have been enforced. In this case there is some hard evidence on the extent to which the interest in inmate privacy would be harmed if the R. C. M. P. policy were removed because the policy has not always been enforced. That evidence comes, of course, from the four complainants and Myrna McNutt, another female who was permitted to guard male prisoners at Grande Cache during the period in question. What that evidence indicates is that very few male prisoners were viewed in states of undress or while using the toilet by these women during the relevant period, far fewer than are now viewed by male guards performing similar duties. The reasons for this difference appear to me to be: (1) that the male prisoners would conduct themselves in such a way as to minimize the possibility of being viewed in states of undress or while using the toilet by a female guard, both by being more circumspect in what they wore and by changing clothes and using the toilet at times when the female guard was unlikely, or at least less likely, to be in their presence; (2) that the female guards would accede to requests from male prisoners not to enter the cell area or otherwise observe them because they wished to use the toilet; (3) that the female guards would not enter the cell area if they had reason to believe that a male prisoner was using the toilet; and (4) that the female guards tended to work the night shift when use of the toilet would not be as common as it would be during the other shifts.

It is clear that if the R. C. M. P. policy were removed, at least to the extent of allowing male prisoners to be guarded by females, the

> - 92 prisoners would be free to conduct themselves in such a way as to minimize the possibility of being viewed in states of undress and using the toilet by female guards in the same way that the prisoners guarded by the four complainants and Ms. McNutt were. However, it is important to note that the current R. C. M. P. policy regarding the tours of observation to be conducted by lock- up guards requires that these tours not be conducted at regular intervals. The evidence of Ms. Reville was that she conducted her tours during the period in question precisely every 30 or 15 minutes depending on the number of tours she was expected to conduct every hour. Ms. McNutt's evidence suggested that she did the same. It is not absolutely clear from their evidence that this was true of the other three complainants, but given the language used in the written instructions under which they operated " check the prisoners every 15 minutes..." in the case of Grande Cache instructions - it is reasonable to assume that it was. It obviously cannot be assumed that if female guards were operating under the new policy they would see male prisoners in states of undress and using the toilet as seldom as did the complainants and Ms. McNutt. In fact there is every reason to

believe that the frequency with which this would occur would increase in a rather significant way.

Nor can it be assumed that if the policy on same- sex guarding were removed, female guards would be permitted to avoid viewing male prisoners in states of undress and while using the

toilet by acceding to requests not to enter the cell area and by resolving themselves not to enter the cell area if they had reason to believe that a male prisoner was using the toilet. The evidence suggests strongly that

> - 93 they would not be permitted to do so, and for obvious security reasons: guards cannot allow themselves to be controlled in any way by the prisoners. This is another reason to believe that more male prisoners would be viewed in states of undress and while using the toilet by female guards if the policy were removed than were viewed by the complainants and Ms. McNutt.

Finally, it would seem to be unlikely that female guards would be limited, as the complainants (except for Ms. Jones) and Ms. McNutt appeared to be, to working almost exclusively at night. Here is still another reason to believe that more male prisoners would be viewed, at least while using the toilet, by female guards if the policy were removed than were viewed by the complainants and Ms. McNutt.

Ms. Greckol takes the position in her submissions that it is not only the frequency with which male prisoners would be viewed in states of undress and using the toilet that matters, but also the degree of intrusiveness of the observations that would occur. Her contention is that a female guard would take a very quick look at a prisoner who was in a state of undress or using the toilet, and that the prisoner would therefore suffer little embarrassment even if he were viewed in such circumstances. In support of this contention, she points to the way in which Ms. Reville and Ms. Jones said they responded when they came across a male prisoner in these circumstances, which was, in effect, to leave very quickly.

I accept that the degree of intrusiveness of the viewing is a relevant consideration in a case of this nature. However, I am satisfied from the evidence of the male lock- up guards who testified in

> - 94 this case that a guard must ensure, no matter how the prisoner is dressed or what he is doing when the guard comes upon him in his cell, that the prisoner is safe and secure before moving on, and that in order for the guard to do so, it may be necessary to take a prolonged look at the prisoner. Even if this were not the case, however, the embarrassment would still be real and, for many prisoners, significant. The crucial thing, as several of the respondent's witnesses stated, is knowing that one is being viewed in circumstances in which one would rather not be viewed.

The interest in inmate privacy would obviously be furthered to a greater extent by the R. C. M. P. 's same- sex guarding policy if the guards were in the cell area - and hence in the presence of the prisoners - at all times than it would be under the existing arrangement, which has the guards based in a separate room for most of the time (albeit with the ability to see at least

some of the cells through a window if he/ she so chooses). The same would be true if television monitors were available to the guards (as the evidence shows they are in some provincial lock- up facilities in Alberta and may soon be in the provincial facilities in Nova Scotia). Nevertheless, it cannot be said that, even under the existing arrangement, the policy's effect on inmate privacy

is de minimis. A significant number of male prisoners are certain to be viewed in states of undress and while using the toilet by female guards if the policy is removed. And it must be recognized that even those who are not viewed in such circumstances by female guards are bound to suffer some anxiety and loss of personal dignity. In spite of their best efforts to avoid being so viewed, they

> - 95 will know that the guard is in a position at any time to see them in their cells, either by looking through the window or by entering the cell area.

I conclude, therefore, that the interest in inmate privacy is appreciably furthered by the R. C. M. P. same- sex guarding policy.

(3) The Extent to Which the Policy Harms Equality of Opportunity Equality of opportunity for females has been elevated by sections 15 and 28 of the Charter to an interest of special importance in Canada, and human rights tribunals must be loath to sacrifice it to other interests. Any job requirement or policy that has the effect of barring females from a particular form of employment must be said to have a clear and significant harmful effect on the interest in equality of opportunity.

It is important to note, however, that the policy impugned here is not based, as have been the great majority of hiring policies that have discriminated against females, on a stereotypical view of the roles or relative abilities of males and females. The basis upon which the R. C. M. P. is defending its policy has nothing to do with the ability of females to guard male prisoners. Absent here therefore is any assault on the dignity of a person that inevitably flows from a policy that is based on assumptions about the relative worth or abilities of members of a particular group.

> - 96 (4) Other Interests Upon Which the Complainants Can Rely Ms. Greckol submits that, in addition to relying on the interest in equality of opportunity, the complainants in this case are entitled to, rely on the beneficial effects associated with the presence of female employees in male correctional institutions. Those beneficial effects, it will be recalled, were said to include the improvement of decorum, the reduction of tension and aggressive behaviour and, generally, facilitating the rehabilitation of prisoners.

I have indicated in Part II of this award that there is no reason in principle why complainants in cases- such as this should not be able to rely in support of their. complaints on interests other than the interest in equality of opportunity. It is clear, however, that there must be a rational connection between each such additional interest invoked and the abolition of the impugned requirement. If there is not, then there is no reason to

believe that that interest will be furthered by the abolition of the requirement and the complainant should not be entitled to rely on it.

Here it is difficult to see how the abolition of the R. C. M. P. same- sex guarding policy can be said to be rationally connected to the interest in rehabilitation. The people kept in lock- ups are, with very few exceptions, not convicted prisoners, they are kept there for very short periods of

time, and it is not the function of the R. C. M. P. to rehabilitate them. Important as the interest in rehabilitation is, it is not one upon which the complainants here are entitled to rely.

The interest in improving decorum is rationally connected to the abolition of the R. C. M. P. policy but, taken by itself, must be said to be an interest of trivial importance, at least in the lock-up setting.

> - 97 While I am prepared to take it into account, therefore, I would give it trifling weight.

There is also a rational connection between the interest in reducing tension and aggression and the abolition of the same- sex guarding policy. Reducing tension and aggression would appear to serve the broader interest in security in the lock- ups, at least insofar as the prisoners themselves and the R. C. M. P. officers are concerned. (Insofar as the guards themselves are concerned, the evidence is that the complainants were not permitted to handle any of the male prisoners they guarded. On the assumption that this practice would continue to be followed if female guards were permitted to guard male prisoners, it is difficult to see how the fact that their presence would serve to reduce tension and aggression could be said to serve the interest in their security.)

The complainants are, therefore, entitled to rely on the interest in reducing tension and aggression because it may tend, at least in a limited way, to improve security in the institutions in which they work. I do not think, however, that this interest in improved security can be given great weight in this particular case. I reach this conclusion not because the interest in security is not an important one - it clearly is. I reach it because there is really no hard evidence to show that the reduction in tension and aggression that is said to flow from the presence of females in male institutions will in fact have an appreciable effect on the security of male prisoners and R. C. M. P. officers in the lock- ups. There was very little evidence at all about the frequency with which prisoners in lock- ups assault other

> - 98 prisoners or R. C. M. P. officers after they have been placed in their cells. Moreover, there was no evidence to show that there were fewer assaults on other prisoners or R. C. M. P. officers in the Jasper and Grande Cache lock- ups while the complainants and Ms. McNutt were employed to guard male prisoners there than there were at other lock- ups, or at those same lock-ups before and after they were employed there.

It is also worth noting that, by careful recruitment and proper training of male guards, the R. C. M. P. can ensure that male prisoners in its lock- ups

are looked after by people who are sensitive to the need to reduce tensions and aggression and will work to do so. The ability to reduce tensions and aggression surely does not reside solely with females.

(5) Which Set of Interests Prevails? The question now to be decided is which set of interests, that relied on by the R. C. M. P. or that relied on by the complainants, should be held to prevail? On the side of the R. C. M. P., there is the interest in inmate privacy which I have found to be not only an interest of compelling importance but also an interest that is appreciably furthered by the same- sex guarding policy. On the side of the complainants, there is the combination of the

interest in equality of opportunity for females, which I have found to be not only an interest of very great importance but also an interest that is significantly harmed by that policy, the interest in improved decorum, which I have found to be of trifling importance, and the interest in reduced tension

> - 99 and aggression which I have found to be of considerable importance but which I have concluded cannot be given a great deal of weight in this case.

Ms. Greckol suggests that a same- sex guarding policy may be justified in situations in which the duties of the person guarding the prisoner involve continual and direct observation of the prisoners while in states of undress or using the toilet (as in the case of communal showers). This suggestion is based primarily on the cross- sex guarding policies currently being applied in the Ontario and British Columbia correctional systems. Both of these policies draw a distinction between incidental and infrequent viewing as part of a guard's tour of observation of the prisoners' cells and continuous observation of prisoners in states of total or substantial nudity. Females in a male institution should be permitted to engage in the former, according to these policies, but not the latter. Reference was also made in this regard to the provision in the recent standards prepared by the CCJA that deals with the viewing of prisoners in states of undress and using the toilet by guards of the opposite sex. It will be recalled that, at least on the interpretation given to it by one of the complainants' witnesses, that provision was said to reflect a distinction of the kind suggested by Ms. Greckol.

On its face, this suggestion would appear to embody a concession on Ms. Greckol's part that at least in some circumstances - in particular, when prisoners are subject to "continual and direct" viewing by guards - the interest in inmate privacy can and should prevail over the set of interests relied upon here by the complainants.

> - 100 However, it is not clear to me that she intended to make this concession. The suggestion is framed in tentative terms only. More importantly, it is apparent that in both Ontario and British Columbia, the fact that guards are required to engage in some "continual and direct" viewing of prisoners does not mean that females are precluded from becoming guards. It simply means that they are precluded from performing those duties that entail this kind of viewing. The fact that prisoners are subject to "continual and direct"

viewing does not necessarily mean, therefore, that the interests relied upon here by the complainants must be sacrificed to the interest in inmate privacy. On the contrary, all these interests can be - and are in Ontario and British Columbia - accommodated.

The real thrust of Ms. Greckol's suggestion is, I believe, that if the prisoners are subject not to "continual and direct" viewing but only to "incidental and infrequent" viewing, the interest in inmate privacy should be sacrificed to the interests on which the complainants here rely. In effect, she is saying that a showing of "continual and direct" viewing of prisoners is necessary to a holding that the prisoners are entitled to have persons of the same sex doing the viewing. She is not saying that it is sufficient.

It is apparent that in making this argument, Ms. Greckol is focusing on the question of the extent to which the interest in inmate privacy can be said to be furthered by the R. C. M. P. 's same- sex guarding policy. Her contention is that, given the frequency and degree of intrusiveness of the viewing by female guards of male prisoners in states of undress and using the toilet that would occur if that policy

> - 101 were abolished, that interest is not sufficiently furthered by the policy to warrant upholding it.

I turn now to consider the decisions in which the interest in inmate privacy relied upon here by the R. C. M. P. has come into conflict with the interest -in equality of opportunity (and, in some instances, additional interests of the kind relied upon here by the complainants). My objectives in examining these decisions are first, to determine how other courts and tribunals have struck the balance between these competing interests and second, to determine if there is any support in them for Ms. Greckol's distinction between "continual and direct" viewing and "incidental and infrequent" viewing.

The only Canadian decision in this area is In the Matter of Certain Exemptions Sought Pursuant to the Provisions of Section 48 of the Saskatchewan Human Rights Code and Regulations Made Thereunder by Saskatchewan Social Services (Corrections Branch) (1980) 1 C. H. R. R. D/ 49). In this case the Saskatchewan Human Rights Commission agreed to grant to the Saskatchewan Corrections Branch an exemption from the Saskatchewan Human Rights Code in respect of the Branch policy of excluding women from employment in the Corrections Officer positions in all custody, recreation and admitting areas within the existing male correctional centres (e. g., Prince Albert, Regina and North Battleford) as well as from positions in the recreation, admitting, security pools (escort), secure/ semi- secure and remand units of the new adult- male correctional centres in Prince Albert, Saskatoon and Northern Saskatchewan. The reasons underlying the Branch's application, and the

> - 102 Commission's decision ta accede to it, can be gleaned from the following passages:

The primary thrust of the Applicant's submission was that the

Corrections Branch recognizes the desirability of maximizing employment opportunities for women in adult- male institutions and for men in adult- female institutions. To this end, three new facilities are now under construction in Saskatoon, Prince Albert and Northern Saskatchewan. These institutions, scheduled to come on stream in the spring of next year, embody a new physical plant, radically different from the existing institutions in Prince Albert and Regina. Rather than having undifferentiated ranges of identical cells, each with open toilet facilities, the new plants involve living units which are rather like dormitories. These units, in the case of the normal inmate who does not pose any special security risks, are designed in such a way as to avoid open toilet and showering fixtures. Hence, it is the Corrections Branch's desire ta open correctional worker positions, in these living unit areas, to women. Thus, in a year's time, women will be able ta compete for all positions in these new centres except for areas where nudity or searching of the person is unavoidable. These areas are admitting, recreation, escort, and the secure/ semi- secure and remand units. The reason for including the remand units has to

do with the wide variety of offender housed in such facilities. Many, if not most, of these people are destined for lengthy terms of incarceration, for serious crimes. They present security problems which require the opportunity to monitor their behaviour at all times, at the option of custodial staff.

The existing institutions afford no such opportunity for the employment of women in custodial positions, in the Applicant's submission. The very nature of their physical plants exposes custodial staff to continual opportunities to observe inmates in states of undress. The Corrections Branch therefore asks for a blanket exemption covering all custodial, admitting and recreational areas. The bright side of this picture is that the present facility in Prince Albert is to be shut down by July of 1981, once its successor has been brought on stream. The gloomy side, so far as equal employment opportunity is concerned, has to do with the likelihood that the existing institution in Regina will last through the 80's.

. . . . . The first question ta be determined is whether some sort of sex bar is warranted as a reasonable occupational qualification, on the ground of public decency. The Commission is of one mind in answering this question in the affirmative, so long as the matter of tight security is at stake. Where the compelling interest of this degree of security dictates surveillance, or searching, of

> - 103 the person, at any given moment, at the option of custodial workers, convential standards of public decency in this Province, at this point in time, clearly require that custodial staff be of the same sex as the inmate. In our opinion, the day of which Ms. Schockey spoke, when workers will be to inmates what nurses are to patients, on the question of decency, has yet to dawn. Where tight security is the issue, it is surely of the very essence of the function of any correctional institution, to be able to monitor inmates, at random. It follows from this assertion that an exemption order, on the ground of reasonable occupational qualification, based on conventional considerations of public decency shared by management, the workers, the inmates and this

Commission, is called for. This effectively deals with the exemption sought with regard to the three new adult- male institutions. This exemption will see a good number of custodial positions opened, for the first time in this Province, to equal competition by women. These positions, in the normal living unit facilities, it is to be hoped, will soon produce the positive modifications in inmate behaviour to which Ms. Shockey alluded. The Corrections Branch is to be applauded for its efforts in this regard.

As to existing facilities, since the Prince Albert institution is facing closure in July of next year, we are prepared to grant the blanket exemption sought until December of 1981. This allows some period of grace in the event of start- up delays concerning the new facility. It would not serve any useful purpose for the Branch to attempt any functional or structural modifications during the Prince Albert institution's final months of existence. However, the other existing institutions are not so easily dealt with. The sole footing upon which we have justified our exemption order has to do with tight security and its demands. But in existing facilities, it is the obsolete nature of the physical plants which gives rise to the concern as to the public decency, rather than urgent security interests. This is most apparent with regard to the Regina institution,

with its open ranges and unscreened toilet and showering fixtures. We understand that there is no budget in hand which would enable the Corrections Branch to even begin to modify the present structures so as to reduce the opportunity to monitor inmates in states of undress with the effect of producing situations where only security reasons compelled such observation. Given this reality, the Commission proposes to grant the requested exemptions only for a limited period, subject to review in two years' time with a view to determining what steps might, by then, be taken, either structurally or by way of functional reassignment, so as to avoid the prospect of custodial officers of the opposite sex being forever barred from employment opportunities in these facilities. (emphasis added)

> - 104 I have quoted at length from this decision in order to make it clear that it dealt with viewing by female guards of male prisoners in circumstances virtually identical to those that obtain in this case - that is, where the cells have grille fronts and their own toilet facilities and, because of security concerns, the guards must be free to enter the cell area at any time. It is to be noted that there is nothing in the decision to indicate how many prisoners in these institutions would be observed in states of undress or using the toilet, nor how intrusive the observations would be. It seems likely that, in the existing facilities, the numbers viewed would be higher than in R. C. M. P. lock- ups for the simple reason that the prisoners would spend more time there. However, that would not necessarily be true in the remand units of the new facilities. And there is no reason to believe that the viewing would be any more (or less) intrusive in any of these facilities than it would be in the lock- ups. Implicit in the Commission's holding seems to be the assumption that, provided some prisoners will be viewed by guards, the interest in inmate privacy is sufficiently furthered to warrant giving it preference over the interest in equality of opportunity.

Ms. Greckol is quite correct to point out that the scope of the

exemption granted in the 1980 decision has been narrowed on two separate occasions by the Saskatchewan Human Rights Commission. However, as noted above in Part I of this award, the Commission has not changed its opinion that in this day and age, where the job in question involves "deliberate scrutiny of an inmate in states of nudity", it must be performed by a guard of the same sex. (In the Matter of an

> - 105 Application, Pursuant to Section 48(2) of the Saskatchewan Human Rights Code and Regulations Made Thereunder, by the Saskatchewan Government Employees Union (1983) unrep. (Sask. H. R. Comm.).

This same preference for the interest in inmate privacy in these circumstances is also reflected in the great majority of American decisions that have considered the conflict between it and the interest in equality of opportunity. (In speaking here of the interest in inmate privacy, I am speaking of the precise interest relied on here by the R. C. M. P., which is the interest of male prisoners in not being viewed in their cells in states of undress or using the toilet by strangers of the opposite sex.) None of these decisions deals precisely with the resolution of this conflict in the context of a lock- up facility of the kind involved here. They deal with it instead in the correctional institution context. Some of the cases arose out of actions initiated by prisoners complaining about the use of employees of the opposite sex (often in conjunction with a number

of other complaints about conditions in the institution in question), while some arose out of actions initiated by persons seeking to guard prisoners of the opposite sex. In the majority of them, the prisoners were male and the employees (or aspiring employees) were female. But in some the roles were reversed. However, nothing appears to turn on the sex of the prisoner in these cases, and there is therefore no reason not to include those in which the prisoners are female and the employees male in this collection. The decisions to which I refer are Avery v. Perrin 473 F. Supp. 90 (U. S. D. C., 1979); Bagley v. Watson 579 F. Supp. 1099 (U. S. D. C., 1983); Bowling v. Enomoto 514 F. Supp. 201

> - 106 (U. S. D. C., 1981); Carey v. New York State Human Rights Appeal Board 402 N. Y. 2d 207 (N. Y. S. C., App. Div., 1978), aff'd. 390 N. E. 2d 301 (N. Y. C. A., 1979); City of Philadelphia v. Pennsylvania Human Rights Commission 300 A. 2d 97 (Commonwealth Ct. of Penn., 1973); Dawson v. Kendrick 527 F. Supp. 1252 (U. S. D. C., 1981); Edwards v.. Department of Corrections 615 F. Supp. 804 (U. S. D. C., 1986); Forts v. Ward 621 F. 2d 1210 (U. S. C. A., 2nd Cir., 1980); Grummett v. Rushen 779 F. 2d 421 (U. S. C. A., 9th Cir., 1985); Gunther v. Iowa State Men's Reformatory (supra); Harden v. Dayton Human Rehabilitation Centre 520 F. Supp. 769 (U. S. D. C., 1981); Hardin v. Stynchcomb (supra); Hudson v. Goodlander 494 F. Supp. 890 (U. S. D. C., 1980); Iowa Department of Social Services v. Iowa Merit Employment Department 261 N. W. 2d 161 (Iowa S. C., 1977); In re Long (supra); Long v. California State Personnel Board 116 Cal. Rptr. 562 (Calif. C. A., 1974); Mieth v. Dothard 418 F. Supp. 1169 (U. S. D. C., 1976); Miles v. Bell 621 F. Supp. 51 (U. S. D. C., 1985); Reynolds v. Wise 375 F. Supp. 145 (U. S. D. C., 1974); Wolfish v. Levi 439 F. Supp. 114 (U. S. D. C., 1977).

In saying that in the great majority of these cases, the interest in inmate privacy was preferred over the interest in equality of opportunity, I

do not mean to suggest that in all these cases it was held that persons of the opposite sex could not be employed in the institutions in question. In a number of them, the court was of the view that a reasonable, non- discriminatory alternative existed, and as a result, ordered that the employer take steps to ensure that persons of the opposite sex could be employed (see, e. g., Forts v. Ward,

> - 107 Bowling v. Enomoto, Dawson v. Kendrick, Wolfish v. Levi, all supra) and in one (Edwards v. Department of Corrections, supra), the court was satisfied that steps could and would be taken to ensure that the interest in inmate privacy was protected, and on that basis held that persons of the opposite sex could be employed. But it is implicit in virtually all of these decisions, at least as I read them, that if the clash between the interest in inmate privacy and the interest in equality of opportunity could not have been avoided, the court would have held that it was the interest in equality of opportunity that would have had to be sacrificed.

It is significant that the courts in the cases in which the interest in inmate privacy has been preferred have not considered it necessary that the viewing of. prisoners in states of undress or using the toilet occur with any particular frequency or be of a particular degree of intrusiveness. They appear to have been satisfied that, provided it was clear that some prisoners would be

viewed in such circumstances, the need to have the persons doing the viewing be of the same sex as the prisoners had been established.

This brings me to Avery v. Perrin, supra, one of the four cases relied upon by Ms. Greckol in which the prisoners were required to sacrifice their interest in privacy to the interest in equality of opportunity. This case involved a claim by a male prisoner that his right to privacy was being infringed by a female mail clerk delivering mail to the prisoners because she was in a position to see him "in various stages of undress and using toilet facilities" (p. 91). The

> - 108 court rejected his claim, and in the course of so doing it indicated that in balancing the competing interests, the right to privacy had to give way to "the lofty goals of equal job opportunity" (ibid.). However, it seems clear from the judgment that the court was not persuaded that the prisoner either had been or would be viewed by the mail clerk in states of undress or using the toilet. At the end of its judgment, the court says, at p. 92:

The facts presented by plaintiff indicate that the alleged intrusion happens daily and with precision [as to time]. Plaintiff can easily regulate his daily routine to complement the mail delivery time schedule.

In effect, then, the court found that the interest in inmate privacy was not- being harmed by the presence of this particular female employee. By implication, then, that interest would not be appreciably furthered by a policy requiring the employee to be of the same sex as the prisoner. That serves to distinguish Avery v. Perrin from this case.

Bagley v. Watson, supra, another of this group of four cases, seems to

have turned on the fact that the only evidence before the court regarding the effect on prisoners of having guards of the opposite sex looking after them was an expert's affidavit which placed great emphasis on the beneficial effects of cross- sex guarding and minimized the negative effects. This affidavit was submitted by both parties to the case (neither of whom was a prisoner) and the expert was therefore not cross- examined on it. In effect, the court would have had a difficult time not deciding in favour of the interest in equality of opportunity. It is also worth noting that none of the many of cases

> - 109 in which the opposite conclusion is reached is referred to in the judgment.

The other two decisions on which Ms. Greckol relies are Miles v. Bell, supra, and Grummett v. Rushen, supra. In both cases, the fact that the viewing by female guards of male prisoners in states of undress and using the toilet was very infrequent was crucial to the result. In the latter case, the court also relied on the fact that the viewing that did occur was not prolonged and was often restricted by distance and angle.

These cases appear to be similar to this one, except, of course, for the fact that they involved correctional institutions rather than lock- ups. I mention this because the United States Supreme Court has held that pre- trial detainees are in a preferred position to convicted prisoners in respect of the rights to which they are entitled (see Bell v. Wolfish 441 U. S. 620 (1978), at p.

545 per Rehnquist, J. and p. 568 per Marshall J.). It is not clear, therefore, that the courts in Miles v. Bell and Grummett v. Rushen would have reached the same conclusion had the prisoners in question been pre- trial detainees (as are the prisoners in this case) rather than convicted persons.

This seems to me to be a relevant consideration in determining what weight to give not only to these two decisions but to all of the American decisions. While it serves to diminish the weight given to these two, it enhances the weight given to those that have reached the opposite conclusion. For, if the courts in those cases preferred the interest in inmate privacy to the interest in equality of opportunity

> - 110 in a prison setting, they would most certainly have done so in a lock- up setting.

In my view, the decisions in this area indicate that the balance in this case should be struck in favour of the interest in inmate privacy. With few exceptions they suggest that, once it can be shown that in the performance of their regular duties, employees are bound to observe at least some prisoners in states of undress or using the toilet, the prisoners are entitled to have those duties which result in such observations performed by persons of the same sex. There is no requirement that these observations occur with any particular frequency or that they be of a particular degree of intrusiveness.

In this case it has been shown that in the performance of their regular duties, female guards in R. C. M. P. lock- ups are bound to observe at least some prisoners in states of undress and using the toilet if the R. C. M. P. 's policy

were to be abolished. On this basis, according to the rule I have extracted from these decisions, the prisoners should be entitled to have those duties which result in such observations being made performed by males.

I am reluctant, however, to base a decision in this case simply and solely on the weight of authority. The fact that there are cases that suggest a different result, either because the observations that would occur would not occur frequently enough or be of a sufficient degree of intrusiveness (Miles v. Bell and Grummett v. Rushen), or because, regardless of how often they would occur or how intrusive they might be, the interest in inmate privacy should be sacrificed (Bagley

> - 111 v. Watson), requires that I base that decision on independent grounds in effect, on my own balancing of the competing interests.

In my view, this is, as Caldwell was said to be, one of those "rare circumstances" in which the balance of interests must be struck in favour of the employer. As in that case, so in this, the impugned requirement furthers to an appreciable degree an interest of compelling importance. Why the interest in inmate privacy must be so characterized I have explained in considerable detail above and there is no need to repeat that discussion here. Suffice it to say that, at bottom, the interest reflects a concern about human dignity in a setting in which that concern must be of paramount importance. Why it can be said that this interest is here furthered to an appreciable

degree has also been examined in some detail above, and there is no need to repeat that discussion either.

There is, however, a need for me to explain why I reject Ms. Greckol's contention that this interest is not sufficiently furthered in this case to warrant preferring it to the interests relied on here by the complainants. That argument, it will be recalled, turned on her characterization of the observations that would be made by female guards of male prisoners in states of undress and using the toilet in R. C. M. P. lock- ups as "infrequent and incidental". Insofar as the question of frequency is concerned, I think it would be wrong to hold that we as a society are prepared to sacrifice the dignity of the prisoners who would be viewed simply because they may represent a relatively small proportion of all the prisoners who are held in the lock- ups. In circumstances such as this, the focus must surely be on

> - 112 the individual, not on the class of prisoners as a whole. Insofar as the degree of intrusiveness of the viewing is concerned, no one can doubt that the loss of dignity is greater when one is scrutinized for several minutes than it is when one is scrutinized for several seconds. But, as I have pointed out above, even in the latter circumstance, the loss of dignity is real and substantial. It is important to remember that it is essential for the guards in R. C. M. P. lock- ups, which everyone accepts are high risk facilities, to make a very careful check of each prisoner on each tour of observation regardless of what it is that the prisoner happens to be doing or wearing at the time.

The fact that the complainants here are entitled to rely on the interests in improved decorum and reduced tension and aggression associated

with the presence of female employers in male institutions does not, in my view, alter the balance of interests in this case sufficiently to justify a different result. For reasons I have already explained, these interests cannot be given a great deal of weight in the circumstances of this case.

In striking the balance in favour of the R. C. M. P. in this case, I have not underestimated the importance of the interest in equality of opportunity or the extent to which it is harmed by the R. C. M. P. 's same- sex guarding policy. That interest, as I have indicated above, is one that should prevail in the great majority of cases, particularly when the group being discriminated against is a group that, like women, has suffered a history of discrimination in the workplace. However, it is apparent from the very fact that the CHRA includes a provision allowing for the BFOR defence that Parliament did not intend that that interest

> - 113 should always prevail. It recognized that there would be exceptional cases in which that interest would have to be sacrificed in favour of other competing interests. In my view, this is one of those exceptional cases. The factor that contributes most to making this such a case is the importance of the competing interest here, the interest in inmate privacy. But it is also significant that, as I have indicated above, there is no suggestion here that the group discriminated against is somehow less able - and therefore less worthy of respect - than the group that is not.

I turn now to consider the question of reasonable, non- discriminatory alternatives to the R. C. M. P. 's same- sex guarding policy.

(6) The Existence of Reasonable Alternatives The question now to be addressed is whether there are steps the R. C. M. P. could be required to take that would have the effect of readjusting the balance of interests in such a way that the set of interests relied upon by the complainants would prevail. Ms. Greckol suggests four such steps, each of which is designed to lessen, if not eliminate, the harm to the interest in inmate privacy that would flow from simply abolishing the same- sex guarding policy. These four suggestions, each of which will now be examined in turn, are not mutually exclusive in the sense that they are themselves alternatives to each other. Their effect is cumulative: taken together, they form a single reasonable alternative.

> - 114 Before dealing with these proposals, it is important to note that the particular duty of guards in R. C. M. P. lock- ups that gives rise to the harm to the interest in inmate privacy - observing the prisoners in their cells to ensure that they are safe and secure - is the most important of the duties such guards perform. It is, in other words, the very essence of the job. There is therefore no possibility here of having this one duty performed by someone other than the female guard while leaving her to perform all the other duties. If this duty were to be eliminated, in effect, the job itself would be lost.

The first suggestion made by Ms. Greckol is to continue the policy adopted in the Jasper and Grande Cache lock- ups while the complainants and

Ms. McNutt were employed there to guard males of not involving female guards in the supervision of showers. The problem with this suggestion is, of course, that it does nothing to protect the particular interest in inmate privacy that is relied upon here by the R. C. M. P., which is the interest of prisoners in not being viewed in their cells in states of undress or using the toilet by strangers of the opposite sex.

Ms. Greckol's second proposal is that male prisoners in R. C. M. P. lock- ups be given advance notice of the arrival of a female guard. The problem with this proposal is the security risk it poses. The evidence was clear that the guards in lock- ups must be able to enter the cell area at the moment of their choosing. To institute a system of advance warnings would, in effect, leave the prisoners in control of the guard and that, as I have already indicated, would obviously be unacceptable.

> - 115 The third proposal is to clothe prisoners with suicidal tendencies in special outfits (asbestos baby- dolls were suggested) or to leave them in their own clothes and increase supervision, rather than to leave them naked in their cells, as the evidence indicates is the current practice of the R. C. M. P. This suggestion that special clothing suggestion that special clothing be used seems to me to be an eminently reasonable one whether or not female guards are used to look after male prisoners. It is clear, however, that it solves only a very small part of the problem insofar as protecting the interest in inmate privacy is concerned. It does nothing, for example, to ensure that that interest is protected when prisoners are using the toilet.

The final proposal made by Ms. Greckol, and the one on which she placed greatest emphasis, is to require that the R. C. M. P. install modesty barriers in the cells to shield the toilets - and hence anyone using them - from view. Ms. Greckol concedes that, because the concern about security

in R. C. M. P. lock- ups is particularly acute, these barriers would have to permit guards to observe both the head and the feet of the prisoner.

Mr. Fradkin's response to this suggestion is twofold. He says first that the installation of such barriers would pose security risks, primarily because the prisoner's hands would not be within view of the guard. Second, he says that modesty barriers of the kind proposed would do little to protect the interest in inmate privacy. He argues that such barriers would not prevent guards from viewing inmates in states of undress (e. g., while changing clothes) and that, insofar as the act of toileting is concerned, the fact that the prisoner would know - because he could see that he was being watched, and may even

> - 116 have eye contact with the guard, the loss of dignity would still be real and significant. (He also argues that modesty barriers are completely ineffectual when males are urinating. The solution to this problem is for the males in question to sit on the toilet to urinate rather than stand. That would still leave the other problem raised by Mr. Fradkin, but it would eliminate this one.)

I begin with the second of Mr. Fradkin's responses. It is clear, as he

points out, that modesty barriers would do nothing to protect the interest in inmate privacy to the extent that it relates to viewing prisoners in states of undress. More importantly, however, I am satisfied from the evidence and, quite frankly, it would have been surprising if the evidence had been otherwise - that the assault on personal dignity that occurs when one is viewed using the toilet arises not so much from the fact that one's genitalia are exposed to view by another person as from the fact that one knows that one is being viewed in the performance of an extremely private act. Even the complainants' experts seemed to agree, at least implicitly, that this was the case. The benefits that would flow to the prisoner from the use of modesty barriers of the kind proposed would therefore be minimal at best.

In my view, modesty barriers would do very little to reduce the harm to the interest in inmate privacy, and certainly not enough to readjust the balance of interests to such an extent that the set of interests relied on here by the complainants would prevail.

Having reached the conclusion I have on this point, it is unnecessary for me to rule on the other response made by Mr. Fradkin,

> - 117 that based on the alleged increase in security risks that would attend the use of modesty barriers.

My conclusion on this aspect of the case is, therefore, that no reasonable alternative to the R. C. M. P. 's same- sex guarding policy exists.

For the reasons given, I conclude that the R. C. M. P. has satisfied the objective component of the BFOR test.

IV. CONCLUSION I wish to make it clear that the decision I have reached in this case is intended to deal, and to deal solely, with the policy of the R. C. M. P. that male prisoners in R. C. M. P. lock- ups must be guarded by males. No doubt much of what I have said in this award would have application in the context of other institutions in which male prisoners are held and in which female guards are now or might some day be employed. However, as the experience in Saskatchewan shows, meaningful distinctions can be drawn between one institution and another. And as many of the American decisions make clear, reasonable, non- discriminatory alternatives can be devised in some institutions, particularly those in which the demands for tight security are not as great as they are in a lock- up facility. (In this regard, see, in particular, Forts v. Ward (supra).) A decision supporting a same- sex guarding policy in one institution does not therefore mean that a same- sex guarding policy will be justified in another. Each institution must be examined in light of its own special circumstances.

> - 118 To summarize my findings, then, I have concluded:

(1) that the complainants have made out a prima facie case of discrimination under sections 7 and 10 of the CHRA; and

(2) that the respondent has satisfied the BFOR test. I therefore dismiss the complaints.

Robin Elliot February 9, 1987 Vancouver, B. C.