T.D. 3/92
Decision rendered on march 18, 1992

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

HUMAN RIGHTS TRIBUNAL

IN THE MATTER OF the complaint filed under Section 5 of the Canadian Human Rights Act

BETWEEN:

YVONNE CHIANG

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

NATURAL SCIENCES AND ENGINEERING RESEARCH COUNCIL OF CANADA

Respondent

DECISION

TRIBUNAL:

Sidney N. Lederman, Q.C. - Chairman
Jane Banfield - Member
Aase Hueglin - Member

APPEARANCES:

Daniel Russell
Counsel for Canadian Human Rights Commission

Rhea Hoare
Counsel for the Respondent

DATES & PLACES
OF HEARING:

September 24, 25, 1991 and December 2, 1991
Toronto, Ontario

FACTS

Dr. A.J. Kresge is a professor of chemistry at the University of Toronto. His wife, Yvonne Chiang, is a research associate who often collaborates with her husband on various research projects. Of approximately 210 research papers prepared by Dr. Kresge, one-third have been coauthored by her. He attributes a great deal of his success to her supportive work.

The Natural Science and Engineering Research Council of Canada ("NSERC") is a federal corporation established under the Natural Sciences and Engineering Research Council Act R.S.C. 1985, c. N-21. Its function is to promote and assist research in the natural sciences and engineering.

Over the last 75 years, it has been the main source of funding for research work conducted at universities. Since 1974, Dr. Kresge has applied for and has received continuous NSERC funding for his research in the area of organic chemistry.

Until 1989, NSERC maintained a policy which precluded members of one's immediate family from being employed in a project which was funded by an NSERC grant. The policy was stated in the annual Awards Guide which formed the basis upon which grants were awarded and administered. Section 211 of the 1988 Awards Guide, for example, states:

"Payment of Salaries and Stipends

"211. NSERC grantees may use their research grant funds to contribute towards the payment of salaries or stipends of qualified people working in their laboratories on a part-time or full-time basis. However, grant funds

must not be used to pay any part of the salary or employee benefit plans of the grantee, members of the grantee's immediate family, other staff members of a Canadian university whose status would make them eligible to apply on their own behalf for NSERC

grants, or recipients of other direct NSERC support. Grant funds must not be used to employ secretaries, but may be used to pay for typing services for manuscripts and reports."

The evidence indicates that this policy had been in effect for a period of at least 30 years prior to its repeal in 1989. It was in effect when Dr. Kresge joined the University of Toronto in 1974.

At the same time that he became a professor at the University of Toronto, there was a verbal agreement with the university that his wife would be employed and paid by the University of Toronto as well. He was told in his first year that the university could pay only 5/6ths of Yvonne Chiang's salary. It proposed, however, that because she was his research associate, the balance of the 1/6th be paid to her out of the NSERC grant money. In view of the rule prohibiting payment to immediate members of the family, the university proposed that Ms. Chiang be paid from the NSERC funds provided to another professor and that Dr. Kresge in turn would pay that other professor's research associate. In other words, the university proposed a method of crosspayments to get around the NSERC policy. In fact that was done. Dr. Kresge was aware of the NSERC regulation when he joined the University of Toronto and he realized that the scheme proposed by the University of Toronto would be in violation of that regulation. He went along with it since it was under the advice of the University of Toronto administrators. This method of payment to Ms. Chiang for her work as a research associate continued until September 1986 when the then current administrators of the university regarded it as a contravention of the regulations and put a stop to it.

There then followed a period of time, specifically December 1, 1986 to August 1, 1989 (the latter date being when NSERC announced that its policy was rescinded) when Yvonne Chiang performed research work for Dr. Kresge but was precluded from receiving any benefit from the research grant provided to Dr. Kresge. By this time, the university was not making any contribution to Ms. Chiang's salary. Dr. Kresge attempted to find funding for his wife's work but was unsuccessful. He finally complained to the Canadian Human Rights Commission ("the Commission") and it was as a result of that complaint that NSERC agreed to rescind its regulations.

THE COMPLAINT

Ms. Chiang is the Complainant in these proceedings and claims that as a result of the discriminatory policy maintained by NSERC for the

period of time between 1986 and 1989, NSERC contravened section 5 of the Canadian Human Rights Act ("CHRA") on the grounds of family or marital status and the Commission on her behalf now seeks redress for loss of income.

NSERC'S POSITION

NSERC's position is that its policy was not discriminatory in that its policy amounted to a bona fide justification under section 15(g) of the CHRA. NSERC maintains that its restriction on the employment of relatives was imposed sincerely and for the purpose of safeguarding public funds. NSERC contends that it was necessary from the objective view point to ensure prudent and economical use of the funds.

The Council of NSERC is comprised of twenty-two

people many of whom are eminent researchers and policy advisors. There are fifty grant selection committees which review applications and make recommendations with respect to awards based on the excellence of the people and the work that is being proposed.

The Council appears to have reviewed its antinepotism policy on three occasions when complaints about it had been made. In 1981 and again in 1984, it was concerned about the balancing of individual rights versus the value of maintaining a policy against nepotism. In 1984 Dr. Brochu, the Secretary-General of NSERC wrote to the Canadian Human Rights Commission pointing out the problem and inquired whether or not the policy contravened the CHRA. On November 6, 1984 she received a response from the Commission which she thought was somewhat equivocal. It read as follows:

"On September 21 you wrote to Hanne Jensen, Director, Complaints and Compliance Branch requesting advise on paragraph 217 of the 1985-86 edition of the NSERC Awards Guide. Your letter has been forwarded to me for reply.

You asked whether in light of the "family status" provisions of the Canadian Human Rights Act, paragraph 217 might violate the Act. Quite frankly it might, were it not for the possibility of the defence of bona fide occupational justification.

It seems to me, however, that there may be situations where family members are also colleagues working in the same or complementary research areas.

Flexibility in the enforcement of paragraph 217 might be warranted in these situations.

I hope that these comments will be of help to you and the Council. Should you wish to discuss this further you can contact me at ... "

This matter was considered by the Council on

January 15 and 16, 1985 and it reviewed various options. It decided to maintain the policy i.e. " to continue to preclude grantees from using NSERC funds for payment to relatives." In October 1987, NSERC again considered the matter and the following conclusion is found in the Minutes of the meeting:

"After a somewhat lively discussion, Council agreed (split vote) to maintain the regulations precluding grantees from using grant funds to pay a salary to members of their family. It was decided, however, that exceptions to this rule might be considered by the President, in special circumstances."

However, no steps were taken to notify prospective grantees that there may be exceptions to the policy. No guidelines of any kind were established in respect of such exceptions. In fact, NSERC never permitted any exception to any individual from its policy.

That was where the matter stood until Dr. Kresge (and Yvonne Chiang) made their complaint to the Canadian Human Rights Commission in 1988. On May 18, 1989 the Commission wrote to NSERC indicating that the matter should go to conciliation. Dr. Brochu viewed that as an indication from the Commission that they felt that the NSERC policy was in contravention of the Act. At that point the Council decided to repeal the provision. on July 14, 1989, NSERC sent a memorandum to Research Grant Officers in Canadian universities informing them of the removal of the policy:

"...I draw your attention to the fact that NSERC has been advised that its regulation precluding grantees from using grant funds to remunerate members of their families contravened the Canadian Human Rights Act. Consequently, we have deleted all references to family members from the Awards Guide. As a result, university policies will apply. I remind

you of the existence of paragraph 208 on conflicts of interest; universities should ensure that hiring of family members, if permitted by their policies, be done in such a way as to avoid any real or perceived conflict of interest."

PROVISION OF SERVICES

The first issue is whether NSERC was providing services within the meaning of section 5 of the CHRA. Although not strongly contested by the Respondent, an examination of the issue of whether a government or public activity which confers a benefit is a "service", is necessary. Section 5 of the Canadian Human Rights Act provides:

"It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public,

(a) to deny, or to deny access to, any such goods, service, facility or accommodation to any individual, or,

(b) to differentiate adversely in relation to any individual, on a prohibitive ground of discrimination."

In Attorney General of Canada v. Cumming (Bailey), [1980] 2 F.C. 122 (T.D.), the Federal Court, in hearing the application made by the Attorney General of Canada to prevent the Tribunal from inquiring into the complainant's complaint of sexual discrimination, addressed the question of whether the married status deductions under paragraph 109(1)(a) of the Income Tax Act, S.C. 1970-71-72, c. 63 constituted "services". The Court held that the CHRA is "cast in wide terms and that both its subject and its stated

purpose suggest that it is not to be interpreted narrowly or restrictively". In considering the meaning of "service", regard should be had to the original Tribunal decision, Bailey et al. v. Minister of National Revenue (1980), 1 C.H.R.R. D/193. Chairman Cumming reviewed various dictionary definitions and also considered in Lodge et ai. v. Minister of Employment and Immigration, (1978) 2 F.C. 458. At page D/213, the Chairman suggested that:

"Popular sovereignty means government is to serve the people. In a modern, pluralistic country, while most goods and services are produced and provided by individuals or private groups or entities, public governments regulate economic activities and also produce and provide goods and services. The federal government provides services to the general population. Services are provided both through legislative enactment (for example, the family allowance) and in administering its responsibilities as established by the legislation enacted by Parliament (for example, providing the appropriate information and forms to citizens to be able to obtain family allowance, as well as sending out family allowance cheques, etc.).

The British North America Act itself refers to "public service" (section 106). Parliament has enacted legislation such as the Public Service Inventions Act, the Public Service Employment Act, the Public Service Staff Relations Act, and the Public Service Superannuation Act. Certain federal government functions are often referred to as being a service."

Further, at page D/214, the Chairman stated:

"...I would find that the Canadian Human Rights Act applies to practices of government officials in performing duties pursuant to statutory provisions (which do not in themselves discriminate) which provide that such officials shall exercise discretion."

In LeDeuff v. The Canada Employment and Immigration Commission (1987), 8 C.H.R.R. D/3690, at issue was a

complaint against an Immigration Officer for selecting the complainant's name because it sounded non-Canadian from a list of persons accused of criminal offences. The Tribunal questioned whether the Canada Employment and Immigration Commission was providing a "service" to the public, and if so, whether section 5 of the CHRA applied. In paragraph 29210 the Tribunal stated as follows:

"The present Tribunal is of the opinion that the Canada Employment and Immigration Commission derives its authority from an act passed by the Parliament of Canada. The scope

of this act is general and whenever the Government of Canada applies an act of general scope, it is providing a service to the public. The Canada Employment and Immigration Commission was carrying out an official duty as an agent of the Crown and thus was providing a service to the public."

The Tribunal, therefore, in this case, found that the Canada Employment and Immigration Commission was providing a service to the public and was therefore obliged to refrain from acting on the prohibitive ground of discrimination.

In Anvari v. Canadian Employment and Immigration Commission (1989), 10 C.H.R.C. D/5816, the complainant, Anvari, filed a complaint based on adverse differentiation by reason of a disability contrary to section 5(b) of the CHRA. He applied under a programme called R.A.N., initiated by the Canada Employment and Immigration Commission, for landed immigrant status. He was initially approved under this programme subject to medical examination. He was later refused landed immigration status when the doctor found him to be inadmissible as a result of his medical condition.

The second issue the Tribunal looked at was whether the officials involved in the processing of persons applying for landed status under the R.A.N. policy provided a service customarily available to the general public as is required

under section 5 of the CHRA. The Tribunal pointed out that the Immigration Act has a general scope to provide a service to the public, and under this Act officials were carrying out an official duty as agents of the Crown, and thus were providing a service to the public.

In paragraph 42273, the Tribunal further held:

"The fact that the RAN Programme applicants, who were to use the services of the immigration personnel were a specific and special group does not negate their status as members of the general public. To do so would be to suggest that all persons who fall within the ambit of special groups do so with the loss of status as members of the community at large. This suggestion could be the basis for the flourishing of discriminatory practices."

The review Tribunal upheld the original Tribunal's decision in Canada Employment and Immigration Commission v. Anvari, unreported, T.D. 2/91, April 23, 1991.

In Singh v. Department of External Affairs, [1989] 1 F.C. 430 (C.A.) one of the issues discussed was whether the Department of External Affairs and the Canada Employment and Immigration Commission were engaged in the provision of services customarily available to the general public when they determined who should be granted visitors visas to allow close relatives to sponsor family members for landing. The Federal Court of Appeal held that the Department of External Affairs and the Canada Employment and Immigration Commission were engaged in a provision of services customarily available to the general public. At page 440 of the decision the Court held:

"It is indeed arguable that the qualifying words of section 5, ... provision of ... services .... customarily

available to the general public .... can only serve a limiting role in the context of services rendered by private persons or bodies: that, by definition, services rendered by public servants at public expense are services to the public and therefore fall within the ambit of section 5."

Several points must be considered in determining whether the role NSERC plays is a "service" customarily available to public. The Supreme Court of Canada has repeatedly stated that the CHRA is to be interpreted widely. Moreover, according to Singh, it appears that by definition, "services" rendered by a public servant are "services" within the meaning of section 5 and that the limiting words of section 5 are directed at the private realm. NSERC is a federal body governed by federal legislation and members of NSERC are hired at public expense as public servants to distribute federal funds in the aim of promoting and assisting research in the natural sciences.

The Natural Sciences and Engineering Research Council Act R.S.C. 1985, C. N-21, describes the function of NSERC in section 4 as follows:

"(1) The functions of the Council are to

(a) promote and assist research in the natural sciences and engineering, other than the health sciences; and

(b) advise the Minister in respect of such matters relating to such research as the minister may refer to Council for its consideration."

The purpose of the Act and the mandate given to NSERC is broad ranging. Considering the decisions of Bailey and Le Deuff, Tribunals have held that where the language of the Act is general in scope, a service to the public is provided.

The fact that the Act is aimed at a particular group - natural scientists - does not detract from the possibility that a "service" is provided that is customarily available to the public. In the spirit of Anvari, to conclude otherwise would be to suggest that natural scientists suffer a loss of status as members of the community at large. Taking into consideration the general mandate of the Act, the fact that NSERC is a public servant of the government and that the CHRA must be interpreted broadly, it is our opinion that the activities of NSERC are 'services' within the meaning of section 5 of the CHRA.

Discriminatory Practice

Ms. Chiang has been indirectly denied the benefit of paid employment as a researcher by reason of NSERC's policy precluding the recipients of its research grants from using any part of the funds to pay salary to members of their immediate families. There is no question that the practice is a discriminatory one on the prohibited ground of family or marital status.

Defence of Bona Fide Justification

The Respondent has relied on the exception to the CHRA's framework of prohibited grounds. In section 15(g), the Act states that a practice denying service(s), pursuant to section 5, is not discriminatory if there is a bona fide justification for the denial of services. Although there is not a significant amount of jurisprudence on the bona fide justification defence with respect to services, we may make an analogy to the bona fide occupational requirement ("BFOR"), and bona fide occupational qualification ("BFOQ") defences applied in employment cases. In A.G. Can. v. Rosin, (1991] 1 F.C. 391 (C.A.), the Federal Court of Appeal

treated the BFOR defence and the bona fide justification defence with respect to services and facilities set out in section 15(g) of the CHRA as co-extensive terms.

The Supreme Court of Canada first addressed a statutory BFOQ in Ontario Human Rights Commission v. Etobicoke, [1982] 1 S.C.R. 202. At issue was a policy requiring firefighters to retire at the age of 60 years. The employer argued that this requirement was a BFOQ and therefore did not constitute discrimination under the relevant provisions of the Ontario Human Rights Code, R.S.O. 1980, c. 340.

The Court applied a two-part test to determine whether mandatory retirement at 60 years was indeed a BFOQ. The two elements of the test include a subjective and an objective element. The subjective element requires that the bona fide qualification be made in good faith and with a sincerely held belief that the limitation was imposed in the best interest of the work involved and not with the intent to defeat the purpose of the Code. The objective element requires that the limitation be related in an objective sense to the performance of the employment concerned. The Court expressed this test as follows at page 208:

"To be a bona fide occupational qualification and requirement limitation, such as a mandatory retirement at a fixed age, 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 be related 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."

The proof of the test is the ordinary standard of proof, that is, upon a balance of probabilities. In Etobicoke the Court held that the evidence was largely "impressionistic" and that something more was required

to discharge the burden of proof and therefore found in favour of the complainant.

The Etobicoke test has been widely applied in decisions following it and can be adopted in the context of provision of services. The Canadian Human Rights Tribunal briefly considered Etobicoke in the context of provision of services in the decision Druken v. Canada Emplopyment and Immigration Commission (1987), 8 C.H.R.R. D/4379 (Can. Trib.). At issue in this case was the denial of unemployment benefits to individuals married to their employer, prohibited under the Unemployment Insurance Act, R.S.C. 1985, C. U-1, section 3(2)(c). The Chairman, H. Fraser, held that the Tribunal was not satisfied that any attempts were made by the respondent to introduce administrative procedures that could reduce the number of potential abusers. Although not explicitly stated, the decision seems to indicate that the employer has a duty to accommodate by attempting administratively to reduce potential abuse, and that when this duty has not been met, an argument for bona fide justification will fail.

The Tribunal further stated at page D/4384 that:

"Where a service otherwise available to the general public is being denied, the justification for such denial must be based on the strongest possible evidence. The justification must be a question of fact in each situation and not merely a blanket application to a particular group of individuals."

In Brossard (Town) v. Quebec (Commission des Droits

de la Personnel) (1989), 10 C.H.R.R. D/5515 (S.C.C.), the Supreme Court of Canada again reviewed BFOQ as a defence to a discriminatory practice. The Court unanimously ruled that the Town of Brossard discriminated against Line Laurin when it refused to hire her because the Town's anti-nepotism policy mandated that immediate family of the existing staff not be hired. Line Laurin was applying for a lifeguard position and her mother was already employed as a secretary at the police station.

Section 10 of the Quebec Charter of Human Rights and Freedoms, R.S.Q., 1977, c. C-12 prohibits discrimination on the basis of "civil status". The Town argued that the anti-nepotism policy was necessary to avoid favouritism or any appearance thereof in the hiring practice, and was therefore a BFOQ for employment.

Beetz, J., speaking for the Court, at page D/5535, suggested two criteria for establishing the existence of an "aptitude or qualification required for employment" within the meaning of the Quebec Charter (which is similar to the bona fide justification defence under the CHRA):

"1. Is the aptitude or qualification rationally connected to the employment concerned? This allows us to determine whether the employer's purpose in establishing the requirement is appropriate in an objective sense to the job in question ...

2. Is the rule properly designed to ensure that the aptitude or qualification is met without placing an undue burden on those to whom the rule applies? This allows us to inquire as to the reasonableness of the means the employer chooses to test for the presence of the requirement for the employment in question."

Basically, this is the same test as articulated in Etobicoke. The wording, however, of the second criteria suggests that the employer must attempt to find a reasonable alternative to the rule in practice. Wilson, J., in her

concurring judgment, explicitly states that the policy in Brossard could not be a BFOQ if other alternatives exist. At page D/5558 she writes:

"It seems to me that, having regard to the nature of the right which is violated by an anti-nepotism policy, i.e. the right under s. 10 not to be discriminated against, the adoption of a total ban is not "reasonably necessary" in order to avoid a threat to the integrity of the Town's administration. The Town can avoid the threat by the less drastic means I have suggested."

The Court ultimately held that the Town's antinepotism policy was not a BFOQ because the hiring policy adopted by the Town was a blanket rule allowing for no exceptions. The Court described the policy as "unforgiving" and when applied to the case of Line Laurin, it was like "killing a fly with a sledgehammer".

The concept that the second branch of the BFOQ test must include a consideration of whether the employer, and to what extent, examined alternatives to the discriminating policy is reinforced in the Supreme Court of Canada decision, Saskatchewan (Human Rights Commision) v. Saskatoon (City), (1989) 2 S.C.R. 1297. Saskatoon involved a factual

situation similar to that in Etobicoke regarding firefighters and a policy mandating an earlier retirement age. However, unlike Etobicoke, the employer had entertained the possibility of individual testing of firefighters to determine their fitness to work. The Court held that the burden of proof required by the BFOR test had been met, and therefore, the mandatory retirement policy was not discriminatory. Sopinka, J., writing for the Court, held:

"While it is not an absolute requirement that employees be individually tested, the employer may not satisfy the burden of proof of

establishing the reasonableness of the requirement if he fails to deal satisfactorily with the question as to why it was not possible to deal with employees on an individual basis, by inter alia individual testing. If there is a practical alternative to the adoption of a discriminatory rule, this may lead to a determination that the employer did not act reasonably in not adopting it." (pp. 1313-1314).

It seems firmly established by the Supreme Court of Canada that whether the employer addressed alternatives to the discriminatory practice is a factor that must be considered when determining if a BFOR has been established. However, the recent decision of the Supreme Court of Canada in Central Alberta Dairy Pool v. Alberta (Human Rights Commission) (1990) 12 C.H.R.R. D/417 makes a distinction between situations where the employer has a duty to accommodate and where no such duty exists. In Central Alberta Dairy Pool, the Court also considered whether its earlier decision in Bhinder v. Canadian National Railway, [1985] 2 S.C.R. 561 was correct insofar as it stated that the duty to accommodate is not a component of the BFOR test. Bhinder was a case in which the respondent's hard hat policy on the work site was held to be a BFOR even though an exception could have been made for the complainant by way of accommodation for his religious beliefs. In Central Alberta Dairy Pool, the Court was divided on this issue with Wilson, J., writing the judgment and Dickson, C.J.C., L'Heureux-Dube and Cory, JJ., concurring. Concurring in the result but for different reasons, Sopinka, J., wrote a separate judgment with LaForest and McLachlin, J., concurring.

At issue in Central Alberta Dairy Pool was whether the employer had a duty to accommodate the complainant's request to have Easter Monday as a religious holiday off work as unpaid leave. The Court considered its

earlier decision of Bhinder and held that Bhinder was correct in stating that in situations where the BFOR is proven, the

employer has no duty to accommodate. Further, it held that Bhinder was incorrect where it applied the same principle to cases of adverse effect discrimination. In cases of adverse effect discrimination, the Court asserted that it must consider whether the employer could have accommodated the employee without undue hardship.

Wilson, J., explained the rationale for distinguishing direct and adverse effect discrimination when determining a response to a prima facie case of discrimination as follows at p. D/435:

"The rationale for the distinction can, I believe, be readily perceived from the majority's conclusion in Bhinder, supra, that, once a BFOR is established, the employer has no duty to accommodate. This is because the essence of a BFOR is that it be determined by references to the occupational requirement and not the individual characteristic. There is therefore no room for accommodation: the rule must stand or fall in its entirety.

Accordingly, had the majority in Bhinder concluded that the hard hat rule was not a BFOR under the Etobicoke test, as it probably should have done, the logic of the BFOR approach would have required the rule to be struck down even as it applied to those workers on whom it had no discriminatory impact. Such anomalous results would seem to be both unnecessary and counterproductive.

For these reasons, I am of the view that Bhinder, supra, is correct in so far as it states that accommodation is not a component of the BFOR test and that once a BFOR is proven the employer has no duty to accommodate. It is incorrect, however, in so far as it applied that principle to a case of adverse effect discrimination. The end result is that where a rule discriminates directly it can only be justified by a statutory equivalent of a BFOQ, i.e., a defence that considers the rule in its totality. (I note in passing that all human rights codes in Canada contain some form of BFOQ provision.) However, where a rule has an adverse discriminatory effect, the appropriate

response is to uphold the rule in its general application and consider whether the employer could have accommodated the employee adversely affected without undue hardship."

Wilson, J., stated that mandatory Monday attendance was externally a neutral policy that had an adverse discriminatory impact on the complainant. The Court concluded that the employer had a duty to accommodate up to the point of undue hardship and that the employer had failed in this respect.

Sopinka, J., although agreeing with the disposition of Wilson, J., was of the opinion that the duty to accommodate must be dealt with in the context of the BFOQ defence. He disagreed with the distinction articulated by Wilson, J., and reasoned that the statute makes no distinction between direct and indirect discrimination and that the BFOQ applies equally to all forms of discrimination. Sopinka, J., quoted extensively from Walter S. Tarnopolsky and William F. Pentney, Discrimination and The Law, 5th Cumulative Supplement (Don Mills, Ontario: DeBoo, September, 1989) to demonstrate that the distinction is not appropriate in evaluating whether a BFOQ has been established. The quotation cited by Sopinka, J., is reproduced below:

"Although it is submitted that this argument is logically defensible, it will not be elaborated upon because it marks such a radical departure from the Bhinder decision. Instead, an alternative approach which involves the incorporation of the duty to accommodate into the b.f.o.q. defence will be examined. There are two approaches to the b.f.o.q. defence which have been recognized in Canadian law thus far. The first approach requires an employer to make an individualized assessment of an employee in order to justify a b.f.o.q. The second approach allows an employer to justify a class-based b.f.o.q. where the class is defined by reference to one of the prohibited grounds of discrimination,

in situations in which it is impractical or impossible to assess employees individually. Although existing law is somewhat ambiguous on the point, there is support for the proposition that an individualized b.f.o.q. is generally to be preferred and that a classbased BFOQ will be recognized

only in cases where public safety and the 'risk of unpredictable human failure' are involved." (At p. D442/443)

Sopinka, J., stated that Bhinder was correct in holding that once the BFOR defence is made out, there is no ground for an individual assessment of each employee. However, the thrust of the issue is how the BFOQ is established. He stated unequivocally that a party must demonstrate that no reasonable alternative exists to a rule as a pre-requisite to a successful BFOQ defence. At page D/444 he writes:

"An employer who wishes to avail himself of a general rule having a discriminatory effect on the basis of religion must show that the impact on the religious practices of those subject to the rule was considered, and that there was no reasonable alternative short of causing undue hardship to the employer. What is reasonable in these terms is a question of fact. If the employer fails to provide an explanation as to why individual accommodation cannot be accomplished without undue hardship, this will ordinarily result in a finding that the duty to accommodate has not been discharged and that the BFOQ has not been established."

The law at this time does not appear to be settled on the issue of when the court must consider whether the employer addressed reasonable alternatives before it recognizes a BFOQ defence. It is our opinion that the position taken by Sopinka, J., is strong and can be seen in less explicit terms in earlier cases that have been reviewed in these Reasons. However, the reasoning of Wilson J. represents the majority of the Court in Central Alberta Dairy Pool on this issue and must be respected.

The facts of this case, if a distinction is to be drawn with the Central Alberta Dairy Pool case, indicate a situation of prima facie direct discrimination on a prohibited ground. According to the reasoning of Wilson J. the BFOR test must be applied and then "stand or fall in its entirety". There is no evidence to indicate that the antinepotism policy established by NSERC was done in anything but good faith and a sincerely held belief that the limitation was necessary and reasonable. Under the second branch of the test, however, it is our opinion that insufficiency of evidence prohibits a finding that the policy was objectively related to the service provided, and thus a bona fide justification exception must fail.

It was argued by the Respondent that the antinepotism policy was required to ensure that public monies be allocated responsibly and that the

taxpayer has the perception that the grant monies are being properly expended. It has been held, however, that an assumed perception of bias or conflict of interest cannot serve as a foundation for a BFOR: Cashin v. C.B.C. (1988) 86 N.R. 24 (Fed. C.A.) Counsel for the Respondent also argued that NSERC is a small organization and is incapable of maintaining a close audit function over the expenditure of grant funds that it has distributed. It relies on the universities to perform this function. One might ask: why is it assumed that there will be a misuse of funds if qualified family members are hired as researchers? The Respondent did not introduce any evidence that indicated a historic problem with spousal relationships and the abuse of grant monies. In any event, the safeguard we think is in the university or NSERC being satisfied that the reseacher is eminently qualified, a test which can be readily administered even by an agency with a small staff.

Even if there was some evidentiary basis for a general anti-nepotism policy, there was a total lack of evidence to demonstrate that exceptions to the anti-nepotism rule would be entertained. The Canadian Human Rights Tribunal in Lang v. Canada Employment and Immigration Commission (1990), 12 C.H.R.R. D/265 held that in situations where blanket provisions, such as an anti-nepotism rule, apply, guidelines providing information regarding exceptions to the provision must be supplied. In Lang, the Complainant was not informed that exceptions to the anti-nepotism rule existed and was not informed as how to request an exception. The Tribunal held that no bona fide justification existed for the discrimination experienced by Mrs. Lang. The Federal Court of Appeal affirmed the Lang decision at (1991) 80 D.L.R. (4th) 637, and held that blanket provisions, such as the one in Lang, were prima facie discriminatory. In Brossard supra, the Supreme Court of Canada held that a practice that has a justifiable purpose must not be disproportinately stringent to satisfy the BFOR requirement. (Also see Dunmall v. CAF, T.D. 15/91, October 25, 1991).

From the evidence at the hearing, it is apparent that Ms. Chiang was unaware of the possibility that exceptions to the anti-nepotism rule would be entertained by NSERC. Furthermore, the evidence suggested that NSERC has never created an exception to the anti-nepotism policy, or put forth possible administrative procedures that did not involve a blanket provision.

According to the reasoning of Sopinka J. in both Saskatoon and Central Alberta Dairy Pool, an employer (or provider of services) wishing to avail himself/herself of a general rule having a discriminatory effect

must show that consideration was given to the impact the rule would have on those potentially discriminated against and that there was

no reasonable alternative short of causing undue hardship to the employer (or provider of services). Given the evidence that NSERC did not have set guidelines to deal with exceptions to the anti-nepotism policy, it is our opinion that NSERC did not consider reasonable alternatives. Accordingly for these reasons as well, NSERC did not meet the prerequisite to a successful bona fide justification defence.

Damages

As a result of NSERC's discriminatory practice Yvonne Chiang lost access to research funds from December 1986 to August 1, 1989 which should otherwise have been made available to her. She performed her research duties during this time despite the fact that she was no longer being paid from NSERC funds (although in 1988 and 1989 her husband made some monies available to her from grants that he received from the American Chemical Society) and accordingly, the damages here are more in the nature of restitution. On the facts before us, Ms. Chiang should simply be paid for the work that she did. Mitigation, therefore, does not enter into the question. Even if it did, we are of the view that there is nothing in the evidence to suggest that she could have reasonably mitigated her loss since no other equivalent work was made available to her. She was also led to believe that the university would in some way make funds available to her if she continued with her work. However, this did not materialize.

We find that the Respondent should compensate the Complainant in the amount of $59,982.31 for her wage loss (after taking into account funds received from the American Chemical Society) the period December 1986 to August 1989. Further, an award of $1,000.00 is granted under s. 53(3)(b) of the CHRA for suffering for hurt feelings and loss of self

respect. Interest on both amounts shall be paid by the Respondent. The interest shall be simple interest at the Bank of Canada prime rate at the date of Complaint and to run from the date of the Complaint to the present date. There shall be no interest, however, for the period of time between May 28, 1990 and the date of the hearing, the former date being the date when the Commission decided to delay a hearing into the Complaint pending

the outcome of a judicial decision in another case.
DATED this day of January, 1992.

Sidney N. Lederman, Chairman

Jane Banfield

Aase Hueglin